

# **1989-2013 FELONY SENTENCING DECISIONS**

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# 1989-2013 FELONY SENTENCING DECISIONS

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## I. APPLICATION OF SENTENCING GUIDELINES

See ORS 137.010(1), (2); ORS 137.120(2); ORS 137.669.

The sentencing guidelines were enacted in 1989 and originally were codified in OAR chapter **253**. Various provisions in the original guidelines were repealed or amended in 1993, and those amendments apply only to crimes committed on or after November 1, 1993. Or Laws 1993, ch 692, § 1. Prior versions of this outline contained, as an appendix, a copy of the rules showing the 1993 amendments (*i.e.*, added material in boldface and underlined; deleted material in brackets). In 1995, the rules were amended again, this time only in minor respects, and they were recodified into OAR chapter **213**, because the rule now are administered by the Oregon Criminal Justice Commission. Although the new rules use the 213 prefix, they used the same rule numbers (*e.g.*, OAR 253-08-002 became OAR 213-08-002 and then OAR 213-008-0002). The new rules took effect on September 9, 1995, but the substantive changes apply only to crimes committed on or after November 1, 1995. See Or Laws 1995, ch 520, § 1. Attached as an appendix to prior versions of this outline was a copy of the version of the guidelines showing the 1995 amendments (*i.e.*, added material in boldface and underline; deleted material in brackets). Since then, the rules have been amended in minor respects each legislative session. Attached as an appendix to this outline is a copy of the current version of the rules. In the case summaries that follow, the rule cited is the version of the rule that the court applied.

Because of the rules have been changed over the years, it is essential to ensure that the version of the rules you are applying are the rules that were in force when the defendant committed the crime being sentenced:

(a) Original rules (OAR ch 253 (1989)) apply only to crimes committed on or after November 1, 1989, and up to November 1, 1993.

(b) Rules as amended in 1993 (OAR ch 253 (1993)) apply only to crimes committed on or after November 1, 1993, and up to November 1, 1995.

(c) The current rules (OAR ch 213) apply only to crimes committed on or after November 1, 1995. But be aware that some of the current rules were enacted or amended since 1995, and the rule that was in force when the crime was committed may govern the sentence to be imposed. The fine print after each rule notes the dates on which the rule was amended.

**State v. Davis**, 315 Or 484, 847 P2d 834 (1993): When a court imposes a dangerous-offender sentence on a conviction subject to the guidelines, the sentence is a departure under the guidelines, *see* ORS 161.737(1), and thus is subject to the rules governing the length of consecutive sentences.

**Kowalski v. Board of Parole**, 194 Or App 156, 93 P3d 831 (2004), *rev den*, 338 Or 16 (2005). Because petitioner was incarcerated both on an indeterminate pre-guidelines conviction for which the sentence has not expired and a consecutive determinate term imposed on a conviction subject to the guidelines, the board properly released him both on parole and on post-prison supervision.

**Day v. Board of Parole and Post-Prison Supervision**, 184 Or App 409, 56 P3d 495 (2002). “Under ORS 161.035(4), criminal defendants must be sentenced under the statutory scheme in force when their crimes were committed, unless the legislature has expressed an intent to the contrary. Statutes regarding parole and other forms of post-prison supervision are, in effect, incidents of criminal sentences.” For plaintiff, the post-prison supervision period provided by *former* ORS 421.120(3) applies to his sentence.

**State v. Hedgecock**, 173 Or App 216, 21 P3d 137 (2001). The sentencing court erroneously ordered defendant, who was found guilty except for insanity, to repay the costs of her court-appointed counsel and a unitary assessment. The guilty-but-insane adjudication is not a “conviction” for purpose of those statutes.

See also *State v. Gile*, 161 Or App 146, 985 P2d 199 (1999) (same).

*State ex rel. Juv. Dept. v. Offord*, 172 Or App 557, 19 P3d 377 (2001) (*per curiam*). The commitment period set by ORS 419C.501 for a juvenile may equal the maximum statutory indeterminate sentence for the crime; it is not limited by the term of imprisonment authorized by the sentencing guidelines.

See also *State ex rel. Juv. Dept. v. Johnson*, 168 Or App 81, 7 P3d 529 (2000) (same).

*State v. Bergeson*, 138 Or App 321, 908 P2d 835 (1995), *rev den*, 323 Or 690 (1996). Because defendant committed his crimes between November 1, 1989, and November 1, 1993, the convictions are subject to the original version of the guidelines.

*State v. Lyons*, 124 Or App 598, 863 P2d 1303 (1993), *aff'd on rev of other issue* 324 Or 256, 924 P2d 802 (1996). “The sentencing guidelines apply to convictions for felonies committed on or after November 1, 1989, and do not apply retroactively.”

*State v. Miller*, 114 Or App 235, 835 P2d 131 (1992). The sentencing guidelines do not apply to misdemeanor convictions.

See also *State v. Shaffer*, 121 Or App 131, 854 P2d 482 (1993) (because fourth-degree assault is not a felony, a sentence imposed on such a conviction is not governed by the guidelines).

*State v. Evans*, 113 Or App 210, 832 P2d 460 (1992). Application of the guidelines “does not depend upon whether the felony offense was classified or unclassified” under the former sentencing scheme.

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## II. CONSTITUTIONAL CONSIDERATIONS

### A. CONSTITUTIONALITY OF SENTENCING GUIDELINES

*State v. Davilla*, 234 Or App 637, 230 P3d 22 (2010). Back in 1991, when he was 16 years old, defendant attempted to rape a young woman at knifepoint, she resisted, and he murdered her. He was waived into adult court and eventually pleaded guilty to murder, first-degree burglary, and attempted first-degree rape. Pursuant to ORS 163.115(3)(a) (1989), the court imposed a life sentence. After a variety of appeals and post-conviction proceedings, the case eventually was remanded for resentencing in 2004. The state served defendant with notice per ORS 136.765 of intent to rely on several aggravating factors and requested an upward-departure sentence. The sentencing court ruled the departure rules in the sentencing guidelines are invalid as an unconstitutional delegation and struck the state’s notice. The court then ruled that the legislature would not have wanted the guidelines to remain effective without the departure rules, and struck down the guidelines *in toto*. The court then purported to apply the law in existence before 1989 and imposed an indeterminate life sentence with no restriction on parole. *Held*: Reversed and remanded. [1] “[T]he legislature’s delegation of authority to develop sentencing guidelines as an administrative rule by the [State Sentencing Guidelines Board] was constitutionally permissible.” Because “the legislature’s delegation of authority to the board to develop the guidelines was not the product of an unconstitutional delegation of legislative power to the executive branch,” the sentencing guidelines are valid. [2] Even though the rules did not impose a 200-percent maximum on an upward departure on a conviction for murder, the departure rules are not an unconstitutional delegation of legislative power to the judiciary without any constraints, because Art. I, § 16, sets a limitation on an upward departure. [3] The departure standard of “substantial and compelling” is not unconstitutionally vague. Defendant’s objection that the rules are too vague because they allow a court to rely on aggravating factors not listed in OAR 213-008-0002(1)(b), does not provide a basis for affirmance, because the state’s notice listed two aggravating factors that are in the rule.

*State v. Norris*, 188 Or App 318, 72 P3d 103, *rev den*, 336 Or 126 (2003). [1] Defendant’s constitutionally based challenge to the validity of the amendments to the sentencing guidelines since 1989 is not time-barred. [2] The bills by which the legislature approved amendments to the sentencing guidelines were not invalid on the ground that they did not comply with Art IV, § 22, which requires amendments to “acts” to be “published at full length,” because that requirement applies only to amendments to acts, and the legislature’s approval of administrative rules per ORS 137.667 is not an amendment to an “act.”

*State v. Rice*, 114 Or App 101, 836 P2d 731 (*in banc*), *rev den*, 314 Or 574 (1992). Defendant pleaded guilty to 7 class A misdemeanor charges, the court imposed 7 consecutive 90-day jail terms, and defendant challenged the cumulative sentence on the ground that it was unconstitutionally disproportionate in light of the fact that the presumptive sentence for more serious felonies would have been less. *Held*: “Here, presented with a scheme under which the imposition of any sentence on defendant’s misdemeanor offenses is discretionary, and the imposition of a sentence of probation for lesser felonies is mandatory, we hold that the existence of felony sentencing guidelines does not render disproportionate a misdemeanor’s sentence of incarceration.”

*State v. Spinney*, 109 Or App 573, 820 P2d 854 (1991), *pet rev dismissed* 313 Or 75 (1992). The sentencing guidelines do not violate Art I, §§ 15 and 16, or Art III, § 1, of the Oregon Constitution.

## **B. DEFENDANT’S CONSTITUTIONAL RIGHTS AT SENTENCING**

### **1. Right to jury, *Apprendi* issues**

See Or Const, Art I, § 11; US Const, Amend VI.

See also Part IX-H(4) (“Pleading and proof of prior convictions, repeat-offender statutes”), *below*.

To comply with *Blakely*, the 2005 legislature enacted Senate Bill 528 (2005)—which has been codified as ORS 136.760 *et seq.*—to provide a procedure for alleging and proving an “enhancement fact” to the jury.

#### **(a) Decisions by the United States Supreme Court**

*Alleyne v. United States*, 570 US \_\_\_, 133 S Ct 2151 (2013). Defendant and an accomplice, who was armed with a firearm, robbed a store manager who was transporting the day’s receipts to the bank. Defendant was charged in federal court with armed robbery under 18 USC § 1951(1) and with carrying or using a firearm in a crime of violence under § 924(c)(1)(A), which further provides that “if the firearm is brandished, [the defendant] shall be sentenced to a term of imprisonment of not less than 7 years.” The jury found defendant guilty; it also found that he carried or possessed a firearm during the crime, but it did not specifically find that he had “brandished” it. At sentencing, defendant argued that he was not subject to the seven-year minimum because the jury had not found that he “brandished” the firearm. The district court rejected that argument by relying on *Harris v. United States*, 536 US 545 (2002), in which the Court held that the right-to-jury rule announced in *Apprendi* does not apply to a fact that merely provides the basis for imposition of a mandatory minimum sentence that otherwise is within the maximum sentence allowable by law. The court then found by a preponderance of the evidence that defendant had “brandished” the firearm, and it imposed the seven-year minimum sentence. On appeal, the Fourth Circuit affirmed based on *Harris*. *Held*: Reversed and remanded. *Harris* overruled; the Sixth Amendment right to jury trial applies to a fact that provides basis for imposition of mandatory minimum sentence. [1] “The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an ‘element’ or ‘ingredient’ of the charged offense. In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*’s definition of ‘elements’ necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.” [2] It does not matter that the 7-year sentence imposed was within the court’s authority even without the “brandishing” finding: “Because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury, regardless of what sentence the defendant *might* have received if a different range had been applicable. Indeed, if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i.e.*, the range applicable without that aggravating fact).” [3] Because the district court imposed a seven-year sentence based on its erroneous assumption that the mandatory-minimum term applied given its own “brandishing” finding, that sentence was vacated and the case was remanded for resentencing.

*Notes*: [a] The majority opinion reiterated that *Apprendi*, and hence this opinion, does not apply to facts that a sentencing court may find and rely on when exercising discretion within the range prescribed by law: “Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.” In other words, if the

sentencing court on remand chooses to *exercise its discretion* to reimpose the same 7-year sentence because it finds that defendant “brandished” the firearm, that sentence evidently would be lawful. [b] The majority also cautioned that its opinion should not be construed to suggest that a mandatory-minimum term that is based solely on the defendant’s criminal record must now be based on a jury finding: “In *Almendarez-Torres v. United States*, 523 US 224 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision’s vitality, we do not revisit it for purposes of our decision today.”

***Application of this new rule in Oregon.*** There are numerous such mandatory minimum sentences in Oregon, and most do not present any problem under *Alleyne*. Some of the mandatory-minimum sentences apply based only on the nature of the conviction (e.g., ORS 137.700; ORS 163.208(2)) and so there is no *additional* fact that the jury would have to find. Some of the other mandatory-minimum sentences are based solely on the defendant’s criminal record (e.g., ORS 137.635; ORS 137.690; ORS 137.717; ORS 137.719; ORS 475.933, etc.), and so are within the *Almendarez-Torres* exception that was preserved (at least for now) in *Alleyne*. Some of the remaining mandatory-minimum sentences require additional fact-finding, but those minimum terms also require specific jury findings as a matter of state law. ORS 161.610; ORS 475.925. But there are a few statutes that mandate a minimum sentence based on an aggravating fact that is not specifically included within the elements of the underlying crime but that relates to the crime. For example, ORS 164.061 requires a court to impose a sentence of “16 months to 45 months” on a conviction for aggravated theft in the first degree if the victim was at least 65 years old. Under *Alleyne*, it will be necessary for that additional finding to be made by the jury (in the absence of a waiver or guilty plea) in order for that minimum term to apply. Similarly, ORS 163.155(1)(a) mandates a sentence of life imprisonment without the possibility of parole if the defendant is “convicted of murdering a pregnant victim ... and knew that the victim was pregnant.” Under *Alleyne*, it will be necessary those additional findings to be made by the jury in order for that minimum term to apply.

***Southern Union Co. v. United States***, 567 US \_\_, 132 S Ct \_\_, 183 L Ed 2d \_\_ (2012). Defendant was charged with a single count of unlawfully storing mercury in violation of the federal Resource Conservation and Recovery Act (RCRA), “from on or about” a specified two-year date range that spanned 762 days. Violations of RCRA are punishable by a \$50,000 maximum fine “for each day of violation.” The jury found petitioner guilty; the verdict form stated that petitioner was guilty of unlawfully storing mercury “on or about September 19, 2002 to October 19, 2004.” At sentencing, the government argued that defendant was subject to a \$50,000 fine for each of the 762 days within the date range, \$38.1 million. Defendant argued that it was subject only to a single \$50,000 fine—that the jury necessarily found only a single, one-day violation—and that a fine greater than \$50,000 would require judicial factfinding per the right-to-jury rule announced in *Apprendi*. The district court held that *Apprendi* does apply, but that the jury had found a 762-day violation. **Held:** Reversed and remanded. [1] The *Apprendi* rule applies to criminal fines. [2] The rule applies only when a defendant has a right to a jury trial, and therefore does not apply when a fine is so insubstantial as to be considered “petty” and does not trigger the right to a jury trial. [3] *Apprendi* does not bar a sentencing court from exercising sentencing discretion within a statutory range. “Nor, *a fortiori*, could there be an *Apprendi* violation where no maximum is prescribed.”

**Note:** It is not clear whether this ruling would require jury findings for imposition of a compensatory fine or restitution.

***Oregon v. Ice***, 555 US 160, 129 S Ct 711, 172 L Ed 2d 517 (2009). The right-to-jury rule announced in *Apprendi* does not apply to findings made under ORS 137.123 to support the imposition of consecutive sentences. The sentencing court did not violate the Sixth Amendment when it imposed consecutive sentences under ORS 137.123(2) based on its finding that defendant committed the crimes during separate criminal episodes. The Court emphasized that historically the common law entrusted the decision whether to impose consecutive or concurrent sentences on multiple convictions to the judge’s sole unfettered discretion.

***Rita v. United States***, 551 US 338, 127 S Ct 2456, 168 L Ed 2d 203 (2007). In *United States v. Booker*, 543 US 220 (2005), the Court held that the federal sentencing guidelines violate the right-to-jury rule in *Blakely* and, to cure that constitutional infirmity, the Court held the guidelines to be merely advisory. [1] The court of appeals may apply a presumption of reasonableness to a sentence that is within the presumptive range prescribed by the guidelines. Because the presumption is not binding and does not impose a burden on either party, that presumption does not violate *Blakely*. [2] “The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ argument and has a reasoned basis for exercising his own legal decision-making authority.” A full opinion is not necessary in every case, and “judge decides to simply apply the Guidelines to a particular case, doing so will not require a lengthy explanation.”

***James v. United States***, 550 US 192, 127 S Ct 1586, 167 L Ed 2d 532 (2007). Defendant pleaded guilty to felon

in possession of a firearm, 18 USC § 922(g), and he admitted the three prior state-court felony convictions alleged in the indictment, including one for attempted burglary. Defendant argued that he was not subject to the mandatory 15-year sentence under the Armed Career Criminal Act, 18 USC § 924(e), because his attempted-burglary conviction did not constitute a “violent felony” under the Act. The sentencing court disagreed and imposed the enhanced sentence. *Held*: Affirmed. The attempted-burglary conviction falls into the Act’s “residual provision” for crimes that “otherwise involve conduct that presents a serious potential risk of physical injury to another,” § 924(e)(2)(B)(ii). [1] Nothing in the text or legislative history of the Act bars use of a conviction for an attempt crime as a predicate. In determining which offenses constitute a “violent felony” under the Act, “we consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.” This offense does. [2] Defendant is not entitled under *Apprendi* to a jury trial on the issue whether the attempted-burglary offense is a “violent felony” because “the Court is engaging in statutory interpretation, not judicial factfinding”—“we have avoided any inquiry into the underlying facts of [his] particular offense, and have looked solely to the elements of attempted burglary as defined by Florida law.” Moreover, “we have held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.”

***Cunningham v. California***, 549 US 270, 127 S Ct 856, 166 L Ed 2d 856 (2007). California’s sentencing guidelines violate the rule in *Blakely* insofar as it allows a sentencing court to impose a sentence in the upper tier prescribed for a conviction based on a finding in aggravation that it made by a preponderance of the evidence. [1] The applicable statutory maximum for *Blakely* purposes is the middle-tier sentence, because state law provides that the court may not impose a greater sentence without an additional factual finding in aggravation. The mere fact that the scheme does not have an exclusive list of aggravating factors and hence gives sentencing courts discretion regarding the bases on which to depart does not make the scheme comparable to the discretionary post-*Booker* federal scheme. [2] The California scheme is not exempt from *Blakely* merely because (a) the prescribed determinate sentences are much shorter than those allowed under the former indeterminate-sentencing scheme, (b) the major statutory sentence enhancements must be alleged and proved, or (c) the overall process is “reasonable.”

***Washington v. Recuenco***, 548 US 212, 126 S Ct 2546, 165 L Ed 2d 466 (2006). Based on an incident in which he threatened his wife with a firearm, defendant was charged with second-degree assault “with a deadly weapon,” and the jury found him guilty. Although the jury was instructed that a firearm is a deadly weapon, it did not find specifically that he used a firearm. Nonetheless, the sentencing court imposed an enhanced sentence based on its finding that defendant used a firearm. Based on *Apprendi* and *Blakely*, which were decided in the interim, the state supreme court vacated the sentence and remanded for resentencing without that enhancement. *Held*: Reversed and remanded. “We have repeatedly recognized that the commission of constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless. If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis. Only in rare cases has this Court held that error is structural, and thus requires automatic reversal. In such cases, the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” The error here is indistinguishable from the one in *Neder v. United States*, 527 US 1 (1999), because under *Blakely* “we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.” Thus, “failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error” and is subject to harmless-error review.

*Note*: The Court did not consider whether the state’s failure, in any form, to *allege* “with a firearm” precluded imposition of an enhanced sentence.

***Shepard v. United States***, 544 US 13, 125 S Ct 1254, 161 L Ed 2d 205 (2005). In light of *Apprendi* concerns, in a prosecution under Armed Career Criminal Statute in which the government must prove that defendant’s prior state-court conviction for burglary was based in fact on a “generic burglary” within the meaning of “violent felony” element, the court is limited to determining pertinent information only from those facts necessarily resolved in the state-court proceeding. That includes the language in the charging instrument, the defendant’s admissions or factual basis for the plea in a plea case, the jury instructions given in a case tried to a jury, the court’s on-the-record factual findings in a case tried to the court, and any finding expressly made by the court.

***United States v. Booker***, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 (2005). [1] The federal sentencing guidelines violate the right-to-jury rule in *Blakely* insofar as they permit a sentencing court to impose an enhancement beyond the presumptive sentence based on post-verdict findings that it makes. [2] The proper remedy for the *Blakely* error is to sever the portion of the guidelines that make the presumptive sentence mandatory and leave it within the sentencing

court's discretion whether to impose the enhancement.

**Blakely v. Washington**, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004): Defendant pleaded guilty to second-degree kidnapping, for which the standard range under Washington's sentencing guidelines was a maximum 53-month sentence. Over defendant's objection, the sentencing court found that defendant acted with deliberate cruelty and departed to impose a 90-month exceptional sentence. *Held*: Reversed. [1] Under the state scheme, the 53-month term is the "maximum sentence" for purpose of the rule in *Apprendi v. New Jersey*, 530 US 466 (2000), because the court could not impose a longer sentence unless it first found additional aggravating facts. [2] The sentencing court's departure finding violated defendant's right to jury under the Sixth Amendment because it was not based on a fact either that defendant admitted or that was found by a jury.

**Schiro v. Summerlin**, 542 US 348, 124 S Ct 2519, 159 L Ed 2d 442 (2004): After petitioner's murder conviction and death sentence were affirmed on appeal, the U.S. Supreme Court decided *Ring v. Arizona*, 536 US 584 (2002), in which it invalidated capital-sentencing schemes that allowed judges to find the facts that are necessary to imposition of a death sentence. Relying on *Teague v. Lane*, 489 US 288 (1989), petitioner argued that *Ring* should be applied retroactively to invalidate his sentence. *Held*: The rule in *Ring* does not apply to petitioner's case. [1] The rule in *Ring* is a procedural rule, not a substantive rule, because it merely altered the method of determining the appropriate sentence. [2] *Ring* did not announce a watershed rule of criminal procedure because it cannot be said that judicial factfinding seriously diminishes the accuracy or reliability of the determination.

**Ring v. Arizona**, 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556 (2002). The rule in *Apprendi* applies to the findings of aggravating factors that are necessary, under state law, in order to render a defendant convicted of murder eligible for the death penalty. The Court, with two Justices dissenting, overruled *Walton v. Arizona*, 497 US 639 (1990), based on *Apprendi* and reversed the defendant's death sentence because the aggravating factors on which the death sentence were based were found by the sentencing court, not the jury. The Court first rejected the state's arguments that *Apprendi* did not apply because death is one of the sentences that is authorized by Arizona law for felony murder and hence that the sentence imposed is within the maximum authorized by law for that offense. The Court noted that under Arizona law there must be positive findings on the aggravating factors in order for a defendant to be eligible for a death sentence on a murder conviction. The Court then rejected, based on *Apprendi*, the state's argument that the aggravating factors at issue are not elements but merely "sentencing factors." Finally, the Court rejected the state's argument that *Apprendi* should not be extended to penalty-phase findings because "death is different."

**United States v. Cotton**, 535 US 625, 122 S Ct 1781, 152 L Ed 2d 860 (2002). The defendants were charged by an indictment with conspiracy to distribute and possess with intent to distribute a "detectable amount" of cocaine and cocaine base. The jury found them guilty of that charge. At sentencing, the court found, under the applicable provisions of the federal sentencing law, that the crime involved at least 50 grams of cocaine base, which finding permitted the court under 21 U.S.C. § 841(b)(1)(A) to impose a sentence beyond the 20-year maximum that otherwise was authorized for the underlying crime. Based on that finding, and without objection from defendants, the court imposed a 30-year sentence. While the case was on appeal, *Apprendi* was announced. *Held*: Affirmed. [1] The *Apprendi* error that the indictment failed to allege "at least 50 grams" was not a "jurisdictional" defect that precluded the district court from imposing the enhanced sentence. [2] Under the "plain error" rule, defendants' *Apprendi*-based challenge is not reviewable on appeal because the evidence was "overwhelming" and "essentially uncontroverted" that the crime involved at least 50 grams.

**Harris v. United States**, 535 US 545, 122 S Ct 2406, 153 L Ed 2d 524 (2002). The defendant unlawfully delivered narcotics while visibly possessing a firearm. Whenever a person commits such an offense while "brandishing" a firearm, the court is required to impose a minimum sentence of "not less than 7 years." 18 U.S.C. § 924(c)(1)(A)(ii). The indictment did not allege that the defendant "brandished" the firearm, and the jury found him guilty of the underlying narcotics offense without finding that he brandished the firearm. At sentencing, the court found, over the defendant's objection, that he had brandished the firearm and imposed the 7-year minimum term based on that finding. *Held*: Affirmed. [1] As a matter of statutory construction, the "brandishing" factor is not an element of the underlying offense but only a "sentencing factor" for the sentencing court. [2] The Court rejected the defendant's argument that *McMillan v. Pennsylvania*, 477 US 79 (1986), no longer is good law in light of *Apprendi*. It is constitutionally permissible to impose a *minimum* sentence that is within the statutory maximum otherwise authorized for the underlying offense based on findings made by the sentencing court.

**Apprendi v. New Jersey**, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000). Petitioner was convicted, based on his pleas of guilty, of weapons offenses for which the maximum sentence prescribed by law is 10 years. Based on a statute

that allows the sentencing court to impose an enhanced sentence after finding, by a preponderance of the evidence, that the defendant's crime was racially motivated, the court found that petitioner committed the crimes based on racial prejudice and imposed a 12-year sentence. The state supreme court affirmed, concluding the racial-bias finding was not an element of the offense, but merely a sentencing factor, and that defendant thus was not entitled to have that fact alleged in the indictment and proved to a jury. *Held*: Reversed. Under the Due Process Clause, it is permissible for a sentencing court to exercise its discretion any consider such factors when it imposes sentence within the range prescribed for the offense by statute, but "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

*Note*: By statute, the state must allege in the indictment and prove to the jury beyond a reasonable doubt a offense-subcategory factor that determines the crime-seriousness ranking of a conviction under the guidelines. ORS 132.557, 475.996(4). Moreover, the Oregon Supreme Court has interpreted Art I, § 11, to require the state to prove to a jury beyond a reasonable doubt any fact relating to the circumstances of the offense that permits or requires the imposition of a sentence beyond that authorized for the underlying offense. *State v. Quinn*, 290 Or 383 (1981) (death penalty); *State v. Wedge*, 293 Or 598 (1982) (firearm-minimum); *State v. Mitchell*, 84 Or App 452, *rev den*, 303 Or 590 (1987) (dangerous-offender).

*Jones v. United States*, 526 US 227, 119 S Ct 1265, 143 L Ed 2d 311 (1999). Defendant was charged with carjacking, in violation of 18 USC § 2119 which at the time provided that a person possessing a firearm who "takes a motor vehicle ... from the person or presence of another by force and violence or by intimidation ... shall—(1) be ... imprisoned not more than 15 years ..., (2) if serious bodily injury ... results, be ... imprisoned not more than 25 years ..., and (3) if death results, be ... imprisoned for any number of years up to life[.]" The indictment made no reference to § 2119's numbered subsections and charged none of the facts mentioned in the latter two. Defendant was told at the arraignment that he faced a maximum 15-year sentence for carjacking, and the jury instructions at his trial defined that offense by reference solely to § 2119(1). After he was found guilty, however, the sentencing court imposed a 25-year sentence on the carjacking charge because one victim suffered serious bodily injury. The court overruled defendant's objection that serious bodily injury was an element of the offense, which had been neither pleaded in the indictment nor proved before the jury. *Held*: Section 2119 establishes three separate offenses by the specification of elements, each of which must be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for its verdict.

#### **(b) Decisions by the Oregon Supreme Court**

*M.F.K. (Foster) v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012). Plaintiff filed a petition under ORS 30.866 in which she requested both a stalking protective order (SPO) against defendant and an award of compensatory damages for lost sick and annual leave, lost wages, and counseling expenses. Defendant demanded a jury trial on the claim for damages; he based that claim on Art. I, § 17, and Art. VII (Am), § 3. The trial court denied that request, and after a trial to the court, it issued a SPO and entered a judgment against defendant for \$42,000 in compensatory damages. Defendant appealed, and the Court of Appeals affirmed. *Held*: Reversed and remanded. Defendant is entitled to a jury trial on plaintiff's claim for compensatory damages. [1] ORS 30.866 allows a plaintiff to request both issuance of a SPO and compensatory damages, but it does not authorize the trial court to provide the defendant with a jury trial on the damages claim. [2] Under Art. I, § 17, and Art. VII (Am), § 3, "the relevant inquiry is not whether a newly created statutory claim existed at common law, but whether, because of its nature, it falls within the guarantee of the Constitution to a jury trial." [3] "If plaintiff had sought only money damages under ORS 30.866—that is, had she not combined her claim for money damages with a claim for [an SPO]—then her claim would have been at law and the right to jury trial would have attached." On the other hand, "if plaintiff had sought only injunctive relief [in the form of an SPO], her claim would have been equitable in nature, and the constitution would not provide a right to a jury trial. ... There is no right to jury trial on equitable claims." [4] "The right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. ... Instead, we conclude that [Art. I, § 17, and Art. VII (Am), § 3] do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'" [5] Because "plaintiff's claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog," defendant was entitled to a jury trial on that claim. [6] When a mixed petition is before the trial court in which the plaintiff is seeking both equitable relief and compensatory damages and the defendant demands a jury trial on the damages claim, the court should defer ruling on the equitable claim until the jury has rendered a verdict on the damages claim.

*State v. Ice*, 346 Or 95, 204 P3d 1290 (2009) (*per curiam*) (“*Ice II*”). [1] In light of *Oregon v. Ice*, 129 S Ct 711 (2009), the court reversed its decision in *State v. Ice*, 343 Or 248, 170 P3d 1049 (2007) (“*Ice I*”), and held: “the trial court did not violate defendant’s Sixth Amendment rights when it imposed a consecutive sentence based on the trial judge’s fact-finding. [2] “Article I, section 11, of the Oregon Constitution similarly does not require that a jury make the factual findings necessary for imposition of consecutive sentences.”

See also *State v. Viranond*, 346 Or 451, 212 P3d 1252 (2009); *State v. Loftin*, 218 Or App 160, 173 P3d 312 (2008), *mod on recons*, 228 Or App 96, 206 P3d 1208, *rev den*, 346 Or 364 (2009) (in light of *Ice II*, the sentencing court properly imposed consecutive sentences based on its own findings); *State v. Gilliland*, 223 Or App 279, 196 P3d 13 (2008), *mod on recons*, 228 Or App 358, 208 P3d 980 (2009) (*per curiam*).

*State v. Zweigart*, 344 Or 619, 188 P3d 242 (2008). [1] In light of *Ice I*, the sentencing court erred when, based on findings it made under ORS 137.123(5)(a), it ordered defendant to serve the sentence on the robbery conviction consecutively to the death sentence on the conviction for aggravated murder, which was based on the same incident, same victim. [2] The consecutive sentences the court imposed on the other convictions, however, are not error under *Ice I* because those counts named different victims and hence, by its verdicts, “the jury necessarily found beyond a reasonable doubt” that defendant committed those crimes against different victims, ORS 137.123(5)(b).

See also *State v. McCool*, 221 Or App 56, 188 P3d 453 (2008) (same as [2]).

*State v. Bray*, 342 Or 711, 160 P3d 983 (2007). Defendant was convicted on multiple counts of encouraging child sexual abuse. At sentencing, the court departed upward based on findings of three aggravating factors, including that defendant was persistently involved in similar offenses, OAR 213-008-0002(2)(b)(D), and found that any factor standing alone would support the departures. On appeal, the state argued that the “persistent involvement” finding was permissible under the “fact of a prior conviction” exception in *Blakely*. *Held*: Reversed and remanded. [1] Because the sentencing court found any factor was sufficient, the appellate court could affirm if any of the factors was legally permissible. [2] Under the rule, “[t]he trier of fact must infer from the number and frequency of those prior convictions whether the defendant’s involvement in similar offenses is sufficiently continuous or recurring to say that it is ‘persistent.’” Thus, the “persistent involvement” factor “presents a factual issue that, under *Apprendi* and *Blakely*, a defendant may insist that a jury find beyond a reasonable doubt.” [3] Although a reasonable juror could find “persistent involvement” based on defendant’s criminal record, the error was not harmless.

*State v. Hess*, 342 Or 647, 159 P3d 309 (2007). Defendant was charged with felony public indecency, ORS 163.465. Before trial, he stipulated to his prior public-indecency convictions and the court, over the state’s objection, removed the prior-convictions element from the jury’s consideration. The state appealed. *Held*: Affirmed. [1] The fact that the legislature has expressly provided a stipulation process for other crimes (*e.g.*, DUII and aggravated murder) but did not do so for this offense does not indicate a legislative intent *not* to have a similar stipulation process apply here. [2] Because defendant’s “judicial admission unconditionally resolved the prior convictions issue in the state’s favor and left only a sentencing issue for the court,” the prior conviction became irrelevant in the guilt phase and the trial court properly excluded it.

*Notes*: [a] The court did not resolve whether the prior-conviction allegation is “a sentencing factor rather than an element of the crime.” It is not clear whether this ruling applies to an element other than a prior-conviction allegation that is used to enhance the seriousness of the offense for sentencing purposes. [b] This opinion was superseded by ORS 136.433, which provides a statutory process for pleading, stipulating to, and proving a previous conviction that is used to elevate an offense.

*State v. Gornick*, 340 Or 160, 130 P3d 780 (2006). Defendant waived jury and pleaded guilty to third-degree assault. At sentencing, the court found three aggravating facts, departed upward, and imposed a 26-month sentence. For the first time on appeal, defendant contended that the sentence is error because the aggravating facts were not found by a jury. The Court of Appeals ruled that the sentence is “plain error” in light of *Blakely* and remanded for resentencing. *Held*: Reversed; trial court’s judgment affirmed. [1] Because *Blakely* recognizes that a defendant may admit or choose to waive jury on a sentence-enhancement fact, “the mere fact that a judge, rather than a jury, decides the facts relevant to sentencing does not demonstrate that any error occurred.” [2] On this record, it is possible “that defendant chose, for one of many possible reasons, not to have a jury find the aggravating facts,” in which case the trial court did not err. For that reason, “because we would be forced to choose between competing inferences respecting the trial court’s finding of the aggravating facts, the claimed error is not one appearing ‘on the face of the record’ under ORAP 5.45(1)” and the Court of Appeals erred in considering it as “plain error.”

**Miller v. Lampert**, 340 Or 1, 125 P3d 1260 (2006). In 1998, petitioner was convicted of felony sexual offenses, and the sentencing court found him to be a dangerous offender under ORS 161.725 and imposed a 30-year sentence. Petitioner did not appeal. After *Apprendi* was announced, petitioner sought post-conviction relief challenging the validity of his sentence and the adequacy of his trial counsel. The court dismissed his petition. *Held*: Affirmed. The neither the right-to-jury nor the standard-of-proof rule in *Apprendi* is a “watershed” rule of criminal procedure under *Teague v. Lane* that applies retroactively. Consequently, the court rejected petitioner’s direct challenge to the lawfulness of his sentence.

See also **Frias v. Coursey**, 229 Or App 716, 215 P3d 874, *rev den*, 347 Or 258 (2009) (*per curiam*) (post-conviction court correctly dismissed petitioner’s petition, which alleged *Blakely*-based challenges to his upward-departure sentences, as an untimely and successive petition; petitioner’s argument that *Miller* was wrongly decided in light of *Danforth* (*see below*) “is properly addressed to the Oregon Supreme Court”); **Harris v. Hill**, 227 Or App 346, 206 P3d 218 (2009) (“The principles announced by the Court in *Apprendi* and *Blakely* do not apply retroactively in a collateral proceeding such as this [post-conviction proceeding], and counsel’s failure to anticipate *Apprendi*’s holding does not constitute inadequate assistance of counsel.”); **Peralta-Basilio v. Hill**, 203 Or App 449, 126 P3d 1 (2005), *rev den*, 340 Or 359 (2006) (neither *Apprendi* nor *Blakely* applies retroactively in a collateral proceeding).

*Note*: In *Danforth v. Minnesota*, 552 US 264 (2008), the Court held that a state is not precluded from applying a new rule of federal law “retroactively” even if the U.S. Supreme Court, applying the *Teague v. Lane* rule, does not order that the new rule must be applied retroactively. In light of *Danforth*, the Court of Appeals decision in *Teague v. Palmateer*, *post*, now controls on the retroactivity issue.

**State v. Upton**, 339 Or 673, 125 P3d 713 (2005). The indictment specially alleged aggravating factors for an upward departure, defendant demurred on the ground that the court had no authority to submit those factors to the jury, and the trial court overruled the demurrer but ruled that it could not submit those factor to the jury, and the state petitioned for a writ of mandamus. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528. *Held*: Writ issued. [1] “Read together, ORS 136.030 and ORS 136.320 thus authorize the trial court to submit ‘all questions of fact’ to the jury that a criminal defendant is entitled to have the jury decide. Furthermore, ORCP 58 B(8) and 59 B authorize the trial court to instruct jurors regarding any aggravating or enhancing factor that they must resolve.” In short, under existing law, the trial court had authority “to submit sentencing enhancing factors to a jury.” [2] Under the guidelines, imposition of an upward departure is a two-step process: “First, there must be a determination of whether the state has proved the existence of the aggravating or enhancing factors. Second, there must be a determination of whether the factors so proved provide a substantial and compelling reason that justifies imposing a sentence beyond the presumptive range.” The guidelines do not identify who may make the factual findings, and even if the jury finds aggravating facts, the court is not required to depart based on that finding. Consequently, it is not inconsistent with the guidelines to allow the jury to find the alleged aggravating facts. [3] Nothing in the guidelines or the implementing statutes prohibits application of a rule that aggravating facts must be found beyond a reasonable doubt. [4] Given that *Blakely* essentially makes an aggravating fact a new “material element” of the underlying offense, it does not violate the Due Process Clause for the state to prove such a fact to the jury unless the defendant agrees to some other procedure. [5] The procedure set forth in SB 528 applies by its terms to this case even though defendant allegedly committed his crimes before its effective date. [6] The allegation of an aggravating fact in the indictment does not violate ORS 132.540(2), because such a fact, in light of *Blakely*, is a material element of the charged offense. Moreover, SB 528 now allows such facts to be alleged.

See also **State v. Sawatzky**, 339 Or 689, 125 P3d 722 (2005).

**State v. Heilman**, 339 Or 661, 125 P3d 728 (2005). Defendant waived jury without qualification and the trial court found him guilty of multiple felonies, rejecting his insanity defense. At sentencing, the state sought a dangerous-offender sentence under ORS 161.725, and defendant objected based on *Apprendi*. The court overruled that objection and, applying a standard of proof beyond a reasonable doubt, found him to be a dangerous offender and imposed a 20-year sentence. *Held*: Affirmed. [1] “[D]efendant, once having made an apparently unqualified waiver of the jury right, had the burden of objecting in some manner [at sentencing], thereby preserving his argument for appeal, if he regarded any action by the trial court as a violation of his right to trial by jury.” Although defendant raised pleading and standard-of-proof objections based on *Apprendi*, he “failed to preserve the argument that the court should have empaneled a jury to decide the requisite facts for sentencing.” Moreover, “defendant admitted facts sufficient to support the trial court’s findings ... thus foreclosing any relief under *Apprendi*.” [2] Defendant’s claim that sentencing court lacked authority to consider a dangerous-offender sentence because those facts were not alleged in the indictment fails “because *Apprendi* did not establish that the elements of each of offense and sentencing enhancement must be pleaded in the indictment.

*But see* **State v. Thomas**, 204 Or App 109, 129 P3d 212, *on recons*, 205 Or App 399, 134 P3d 1038, *rev den*, 340 Or 673 (2006) (sentencing court committed plain error in light of *Blakely* when, after defendant was convicted of the charges by jury verdict, it found that defendant is a dangerous offender and imposed an enhanced sentence pursuant to ORS

161.725 *et seq.*, distinguishing *State v. Heilman* and *State v. Gornick*).

*State v. Harris*, 339 Or 157, 118 P3d 236 (2005). [1] Unless the Supreme Court overrules *Almendarez-Torres v. United States*, the state courts must apply the prior-conviction exception to the *Blakely* rule. [2] “Although the legislature cannot define a crime in a way that relieves the state of its constitutional obligations to prove each element of the offense beyond a reasonable doubt, defining criminal conduct is still a task generally left to the legislative branch.” Thus, “a prior nonjury juvenile adjudication [may be defined] as an element that increases the seriousness of a crime or lengthens a criminal sentence, so long as the *existence* of that prior adjudication is proved to a jury or such requirement is knowingly waived.” [3] Using defendant’s prior juvenile adjudication to increase his criminal-history score falls within the scope of the *Blakely* rule. “[T]he Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must be either proved to the trier of fact or be admitted by a defendant for sentencing purposes following an informed and knowing waiver.” But the state need not reprove the crime underlying that adjudication. [4] Defendant did not waive his *Blakely* claim by pleading guilty and acknowledging his prior juvenile adjudication.

See also *State v. Moon*, 207 Or App 402, 142 P3d 105, *rev den*, 342 Or 46 (2006) (defendant’s unpreserved *Harris*-based objection is not reviewable as “plain error”); *State v. Murphy*, 205 Or App 675, 135 P3d 357 (2006) (*per curiam*); *State v. Chand*, 203 Or App 218, 125 P3d 38 (2005) (remanding for resentencing due to *Harris* error).

*State v. Dilts*, 337 Or 645, 103 P3d 95 (2004). [1] In light of *Blakely*, the pertinent “statutory maximum” under the sentencing guidelines is the presumptive sentence. Consequently, the upward-departure sentence imposed on defendant’s conviction, which was based on finding made by the sentencing court by a preponderance of the evidence, not by the jury beyond a reasonable doubt, violated his right to jury under the Sixth Amendment. [2] The court refused to reconstrue the guidelines, pursuant to ORS 174.040, to be merely advisory by severing the provisions that make the presumptive sentence mandatory. [3] The court declined to address whether it would be permissible on remand to impanel a jury to hear and decide the aggravating factors.

See also *State v. Sawatzky*, 195 Or App 159, 96 P3d 1288 (2004) (under *Blakely*, the relevant “statutory maximum” under the sentencing guidelines is the presumptive sentence; therefore, an upward-departure sentence based on facts not found by a jury violates the defendant’s Sixth Amendment right to jury).

*State v. Cox*, 337 Or 477, 98 P3d 1103 (2004), *cert den*, 126 S Ct 50 (2005). In capital case, the court refused to consider defendant’s unpreserved claim that the Fifth Amendment required the state to allege the penalty-phase factors in the indictment; the issue is not “plain error” because *Blakely* was based solely on the Sixth Amendment right to jury and the Court did not suggest that the Fifth Amendment applies in this context.

*Page v. Palmateer*, 336 Or 379, 84 P3d 133, *cert den*, 543 US 866 (2004). In this post-conviction proceeding, petitioner alleged that his dangerous-offender sentence was unlawful in light of *Apprendi v. New Jersey*. The post-conviction court denied his claim, holding that *Apprendi* does not apply retroactively. *Held*: Affirmed. [1] When interpreting the federal constitution or applying Supreme Court rulings that are based on its interpretation of the federal constitution, the state courts must comply with what the Supreme Court has ruled. Therefore, whether *Apprendi* applies retroactively is governed only by federal law. [2] Applying the standard set forth in *Teague v. Lane*, the new rule in *Apprendi* does not apply retroactively to post-conviction proceedings because it did not set out a watershed rule of criminal procedure.

*State v. Lotches*, 331 Or 455, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001). Defendant was charged with multiple counts of aggravated murder based on underlying felonies, but the indictment and the state’s evidence indicated multiple instances of each underlying felony during the criminal episode and the jury instructions “did not limit the jury’s consideration to a specified underlying felony or require jury unanimity concerning a choice among alternative felonies.” *Held*: Convictions vacated and remanded. The instructions were defective under *State v. Boots*. The clarification provided by the prosecutor during closing arguments was not a substitute for adequate jury instructions. The error was apparent on the face of the record and required reversal of each count for which the record did not establish jury unanimity regarding which acts constituted the underlying felony.

### (c) Decisions by Oregon Court of Appeals

*State v. Al-Khafagi*, 257 Or App 363, \_\_ P3d \_\_ (2013) (*per curiam*). The court imposed \$182,437 in restitution over defendant’s objection that he was entitled to a jury trial on the amount. He contended that amendments to the

restitution statutes have changed restitution's purpose from a penalty to a "quasi-civil recovery device" for victims. *Held*: Affirmed. Because defendant's obligation to pay restitution to a victim remains penal in nature despite the statutory amendments, Art. I, § 17, did not apply.

*State v. G. L. D.*, 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. The juvenile court imposed restitution in the amount of \$194,578, over youth's objection. *Held*: Affirmed. Youth's argument that he was entitled to a jury trial on restitution has no merit in light of *State v. N.R.L.*, 249 Or App 321, *rev allowed* (2012).

*State v. Ibarra-Ruiz*, 250 Or App 656, 282 P3d 934, *rev den*, 353 Or 127 (2012). Defendant was found guilty of hindering prosecution and conspiracy to commit murder, and the sentencing court ranked his conspiracy conviction as a category 11 offense, the same as completed murder, and imposed the 128-month presumptive sentence. *Held*: Affirmed. The rule in *Apprendi* does not apply to a decision by sentencing court per OAR 213-004-0004 to rank an unclassified offense: such a ranking does not increase the maximum sentence that a jury verdict authorizes but merely establishes the maximum sentence permitted (absent special jury findings) for that offense.

*State v. Lafferty*, 240 Or App 564, 247 P3d 1266 (2011). Defendant was convicted of first-degree burglary and third-degree assault in separate cases. Prior to trial, the DA sent defendant a plea offer that included a criminal-history worksheet noting a juvenile adjudication for a "person felony" and a statement that that adjudication can be included in his criminal-history score. Defendant waived jury and pleaded guilty with "open sentencing" and without stipulating to the gridblock. At sentencing, the court agreed with defendant that his juvenile adjudication could not be included in his criminal-history score. *Held*: Affirmed. [1] The DA's plea offer and criminal-history worksheet adequately advised defendant of his intention to seek an enhancement based on the adjudication and thus complied with ORS 136.775. [2] Although ORS 136.776 provides that a waiver of jury at the guilt phase "constitutes a written waiver of the right to jury on all enhancement facts," that does not necessarily resolve defendant's assertion that the constitution requires an express waiver of jury on enhancement facts. [3] When a statute is susceptible of differing constructions and one plausible construction is constitutional and the other is not, "courts will assume that the legislature intended the constitutional meaning." [4] ORS 136.776 "requires that a defendant, in order to waive his constitutional right to a jury trial on the question of guilt or innocence, must also make a knowing and intentional waiver of his right to a jury trial on sentencing enhancement facts, and must do so in writing." [5] Because neither the plea agreement nor the change-of-plea colloquy included an express waiver of jury on the adjudication issue and defendant was entitled under *State v. Harris*, 339 Or 157 (2005), to a jury trial on that factor, the sentencing court correctly excluded that adjudication from defendant's criminal-history score.

*State v. Hopson*, 220 Or App 366, 186 P3d 317 (2008), *mod on recons*, 228 Or App 91, 206 P3d 1206 (2009). [1] In light of *Ice II*, the sentencing court erred insofar as it ruled that it lacked authority to impose consecutive sentences based on its own findings. [2] The right-to-jury rule in *Blakely* applies to imposition of a lifetime term of post-prison supervision under ORS 137.765 (2005) based on a finding that the defendant is a sexually violent dangerous offender. For purposes of *Blakely*, an extended term of post-prison supervision is part of the "sentence."

*Note*: The current version of ORS 137.767(6) provides that the defendant is entitled to a jury trial on the issue of whether he is a SVDO.

*State v. LaMarsh*, 227 Or App 628, 206 P3d 1103 (2009) (*per curiam*). The sentencing court erroneously imposed Measure 11 sentences on defendant's convictions for first-degree sexual "based on its own factual finding that his offenses occurred after the effective date of Measure 11."

*State v. Nelson*, 224 Or App 193, 197 P3d 1130 (2008). The court imposed consecutive sentences based on its finding that the offenses were based on separate incidents that were "separated by time and place." The defendant did not object, but he asserted on appeal that the sentences were improper without jury findings. *Held*: Affirmed in part, reversed in part. The jury's verdict on two of the convictions showed that the jury necessarily found that the acts were not part of the same criminal episode; other sentences required reversal under *Blakely/Ice I*. The record showed that the trial court instructed the jury as to the dates on which the defendant was alleged to have committed his crimes, and that the jury necessarily found that two of the offenses occurred on separate dates. On the remaining conviction, the jury's verdict did *not* show that it found that the offenses occurred on separate dates, and the Court of Appeals exercised its discretion to correct the error because of the gravity of the error.

**State v. Stephens**, 223 Or App 644, 198 P3d 423 (2008), *rev den*, 346 Or App 10 (2009). Defendant was convicted of aggravated murder and numerous sex offenses and related crimes committed against other victims; he raised several *Blakely* and *Ice* challenges to his sentences. *Held*: Affirmed. [1] The sentencing court did not commit plain error by imposing the minimum incarceration term portions of his dangerous-offender sentences without jury findings. The jury’s findings support imposition of the 30-year indeterminate maximum dangerous-offender term (the “departure” sentences). The court then, based on its own findings, imposed required minimum incarceration terms within those constitutionally valid departure sentences. It is at least open to debate whether those minimum incarceration terms are subject to *Blakely*. [2] Although the sentencing court committed plain error under *Ice I* by imposing consecutive sentences without jury findings to support them, the appellate court declined to reach the error because, in light of other sentences that the defendant does not challenge (including a true-life sentence), the gravity of the error is minimal and a remand would serve very little practical effect.

**State v. Harding**, 222 Or App 415, 193 P3d 1055 (2008), *adh’d to on recons*, 225 Or App 386, 202 Or App 181, *app disp’d on other grounds*, 347 Or 368, 223 P3d 1029 (2009). Defendant was convicted of *inter alia* attempted murder, the sentencing court imposed an upward departure based on its own findings, and the judgment became final in 2002 when the appellate judgment issued. After defendant’s right to seek post-conviction relief had lapsed, he filed a motion in the trial court pursuant to ORS 138.083(1)(a) contending that the departure sentence was an “erroneous term in the judgment” in light of *Blakely*. The trial court corrected one error, but it declined to correct the departure, concluding that it lacked authority to correct that term. *Held*: Reversed. In light of *Blakely*, the departure may be an erroneous term that the trial court has authority to correct under ORS 138.083(1)(a). The authority to correct “errors” under ORS 138.083 is not limited to arithmetic and clerical errors that appear on the face of the judgment; rather, the authority in ORS 138.083 extends to any “erroneous term,” including errors in the procedure by which the sentence was imposed. The authority to correct errors under ORS 138.083 is *discretionary*, and the court may take into account facts and circumstances that relate to whether review is appropriate.

*Note*: Because the Supreme Court ultimately dismissed defendant’s appeal for jurisdictional reasons, this opinion is not binding precedent.

**State v. Meade**, 221 Or App 549, 191 P3d 704 (2008). Before trial, defendant waived his right to a jury trial on “guilt or innocence,” and was found guilty in a bench trial. At sentencing, he asserted that he had not waived his right to a jury trial on facts that would support enhanced sentences (*i.e.*, consecutive sentences), but the sentencing court rejected his argument and imposed consecutive sentences based on its own findings. *Held*: Reversed, remanded for resentencing. Defendant’s jury waiver did not encompass sentencing facts; he adequately preserved his challenge by objecting at the time of sentencing. Because his jury waiver expressly referred only to his “guilt or innocence,” and he objected at sentencing to the court’s authority to impose enhanced sentences without jury findings, he adequately preserved his argument for appeal.

**State v. Webster**, 220 Or App 531, 188 P3d 329, *rev den*, 345 318 (2008). “When a defendant has been convicted of failing to perform the duties of a driver when property is damaged, ORS 811.706 authorizes the court to require payment of restitution as a part of the judgment in an amount ‘equal to the amount of any damages caused by the person as a result of the incident that created the duties [of a driver].’” The right-to-jury rule in *Blakely* is “not violated by the trial court making the findings necessary to impose the full of amount of damages as restitution under ORS 811.706.”

**State v. Bowen**, 220 Or App 380, 185 P3d 1129 (2008). Over defendant’s *Blakely*-based objection, the sentencing court, relying on ORS 137.123(2), imposed consecutive sentences on multiple convictions based on defendant’s repeated sexual assaults on a child. *Held*: Affirmed. Even though, in light of *Ice I*, the court erred, the error was harmless because “the evidence at trial established eight incidents of sexual contact between defendant and the victim [over the course of 9 years, and those] incidents, as demonstrated by overwhelming evidence in the record, were so distinct from one another that we can say with complete confidence that the jury would have found that the offenses did not occur as part of a continuous and uninterrupted course of conduct if it had been asked to determine the matter. That is, on this record, no reasonable factfinder could have determined otherwise.”

*Note*: In light of *Oregon v. Ice* and *Ice II*, *above*, the rulings in this case and various others listed below that the sentencing court erred when it imposed consecutive sentences based on its own findings, are no longer correct.

**State v. Andrews**, 220 Or App 374, 185 P3d 1127, *rev den*, 345 Or 175 (2008). The sentencing court did not commit plain error under *Ice I* when it imposed consecutive sentences. The indictment alleged that defendant committed the crimes at issue “in three different date ranges,” and the parties agreed at sentencing that the jury’s verdicts of guilty necessarily had found that he committed the crimes during separate episodes.

*State v. Clark*, 220 Or App 197, 185 P3d 516 (2008). Pursuant to a plea agreement, defendant pleaded guilty, waiving jury without qualification, and the state advised him that it would be seeking departure sentences. *Blakely* was announced before sentencing, and defendant objected when the court imposed departure sentences without jury findings. Defense counsel admitted that he had not discussed the issue with defendant and had assumed that the right to jury did not extend to departure factors. *Held*: Reversed. Defendant’s jury waiver was not effective as to sentencing factors. “We will not assume that defendant waived the right to have a jury determine the sentencing factors unless the record shows that he knew that he had that right at the time he entered his plea.”

*State v. Smith*, 218 Or App 278, 179 P3d 691, *rev den*, 344 Or 671 (2008). Although, in light of *State v. Ice I*, the sentencing court committed “plain error” by imposing consecutive sentences under ORS 137.123(5)(b) (risk of loss, injury or harm to a different victim) in the absence of jury findings, the Court of Appeals declined to review it because there was no legitimate debate that the UUV involved harm to one victim, and defendant’s possession of an altered key created a risk of harm to other victims.

*State v. Cone*, 218 Or App 273, 179 P3d 688, *rev den*, 344 Or 539 (2008). Although the order imposing consecutive sentences under ORS 137.123(5)(b) was “plain error” in light of the later decision in *Ice I*, the Court of Appeals declined to exercise its discretion to correct the error because “[t]here can be no doubt” that the harm caused by the assault (physical injury to the victim’s person) was qualitatively different and greater than the harm caused by the burglary (unlawful entry onto the victim’s property).

*State v. Walch*, 218 Or App 86, 178 P3d 301 (2008), *aff’d on rev of other issue*, 346 Or 463, 213 P3d 1201 (2009). [1] Court refused to consider defendant’s unpreserved claim that the trial court failed to instruct that, to make affirmative findings on any fact allowing consecutive sentences, the jurors had to make the finding *beyond a reasonable doubt*. Because the preliminary instructions informed the jurors that the state had the “beyond a reasonable doubt” burden, the trial court did not commit plain error by failing to give a more specific instruction later. [2] Based on *State v. Sawatzky*, 339 Or 689 (2005), the court rejecting defendant’s unpreserved assertion that the state was required to allege the consecutive-sentence enhancement facts in the indictment, stating “we see no reason, in light of *Ice*, to draw any distinction between [the departure factors addressed in *Sawatzky*] and the facts supporting consecutive sentences.”

*State v. Wick*, 216 Or App 404, 173 P3d 1231 (2007), *rev den*, 344 Or 671 (2008). The trial court erred by refusing to empanel a jury to determine enhancement facts after the state gave notice of its intent to seek a jury determination on enhancement facts nine months after charging defendant with the offenses (in fact, between trial and sentencing) but only several days after the enactment of ORS 136.765. Although the statute now requires the prosecution to provide written notice of its intent to rely on enhancement facts within a “reasonable time” after filing the accusatory instrument, it would frustrate the legislature’s intent to hold that the state’s notice in this case, which was filed within 11 days after the notice requirement went into effect, was untimely.

*Note*: This case should not be interpreted to remove or loosen the “reasonable time after filing the accusatory instrument” requirement. A nine-month delay between arraignment and ORS 136.765 notice likely will be difficult to justify as “reasonable” under ordinary circumstances.

*State v. Bowen*, 215 Or App 199, 168 P3d 1208 (2007). Nothing in *Blakely* purports to overrule the decision in *Apodaca v. Oregon*, 406 US 404 (1972), in which the Court held that a less-than-unanimous jury verdict does not violate the Sixth Amendment.

*See also State v. Norman*, 216 Or App 475, 174 P3d 598 (2007) (same).

*State v. Kayfes*, 213 Or App 543, 162 P3d 308, *rev den*, 343 Or 390 (2007). Defendant, a former middle-school teacher and coach, was convicted of numerous sexual offenses involving a student. The jury specifically found that the offenses were “separate acts” in that each count “was an act that does not arise from the same continuous and uninterrupted conduct as another act.” On appeal, defendant raised a *Blakely*-based challenge to the imposition of consecutive sentences and the court’s *Miller/Bucholz* recalculation of his criminal history. *Held*: Affirmed. [1] Under *State v. Tanner*, 210 Or App 70 (2006), *below*, consecutive-sentence findings are not subject to *Blakely*. [2] The jury’s finding of separate criminal episodes defeated his merger argument and his challenge to the court’s calculation of his criminal-history score.

*State v. Mallory*, 213 Or App 392, 162 P3d 297 (2007), *rev den*, 344 Or 110 (2008). After defendant pleaded guilty to multiple offenses within the scope of ORS 137.717 (RePO), the sentencing court found that she had committed

several of the offenses during separate criminal episodes and, per under ORS 137.717(5)(a), used the first offenses as predicate convictions to impose 13-month RePO sentences on her later-committed offenses. Defendant appealed, contending that she was entitled under *Blakely* to a jury trial on that issue. *Held*: Affirmed. [1] The “separate criminal episode” finding does not categorically fall into “the fact of a prior conviction” exception to the *Blakely* rule. [2] Determining whether two offenses are based on the “same criminal episode,” as defined in ORS 131.505(4), “involves a relational examination of time, place, and circumstance” and that may not necessarily be decided by the pleas or verdicts. [3] *Shepard v. United States, above*, permits the sentencing court to make a determination that prior convictions are based on separate criminal episodes if that determination can be made based on facts in the record that necessarily were resolved by the plea or verdict. [4] In this case, when defendant pleaded guilty to counts that alleged different dates, she thereby “admitted sufficient facts to establish that those offenses involved separate criminal episodes.”

*State v. Burns*, 213 Or App 38, 159 P3d 1208 (2007), *rev dism'd*, 345 Or 302 (2008). Sentencing court erred under *Blakely* when it departed upward based on its own finding that defendant was on post-prison supervision at the time he committed the crime. Although defendant had admitted that fact, he still was entitled to a jury finding regarding “the ‘malevolent quality’ of the defendant and the failure of supervision to serve as an effective deterrent.” That is a factual determination, not a legal conclusion to be drawn from the bare fact of being on supervision.

*State v. Skanes*, 212 Or App 169, 157 P3d 303 (2007). Defendant entered a no-contest plea, and the court imposed a dispositional departure based on defendant’s persistent involvement in similar offenses, OAR 213-008-0002(1)(b)(D). Although defendant’s attorney was aware of *Blakely*, he did not object to the sentence on the ground that defendant was entitled to jury findings to support the departure. *Held*: Affirmed. Defendant waived his right to a jury trial on the substantive crime by entering a no-contest plea, and he did not request a jury for sentencing. His claim that he was entitled to jury at sentencing is not plain error.

*State v. Soto-Nunez*, 211 Or App 545, 155 P3d 96, *rev den*, 343 Or 206 (2007). In light of *State v. Clark*, 205 Or App 338 (2006), the sentencing court did not commit plain error under *Blakely* by making the findings under ORS 137.750 on which it ordered that defendant is ineligible for temporary leave and other forms of sentence modification.

*State v. Mendez*, 211 Or App 311, 155 P3d 54 (2007). The jury found defendant guilty of first-degree criminal mischief, ORS 164.365, but found that the state failed to prove the offense-subcategory allegation the damage was more than \$1,000, which would have elevated the conviction to a category 3 offense. The sentencing court imposed \$1,666 in restitution. *Held*: Affirmed. [1] Art VII (Am), § 3, applies to criminal actions. [2] The amount of restitution is to be determined by the sentencing court under a “preponderance of the evidence” standard. [3] The court’s finding of amount of loss in support of the restitution order was not an improper “reexamination” of a fact found by the jury. The court correctly ranked the conviction as only a category 2 offense based on the jury’s verdict, and its restitution finding was not inconsistent with that verdict, because the court “independently determined the amount of damage applying a different standard of proof” in assessing restitution.

*State v. Tanner*, 210 Or App 70, 150 P3d 31 (2006) (*en banc*). [1] The determination under ORS 137.123(5)(a) whether the secondary offense was “merely incidental” to the primary offense is a factual finding, not a legal conclusion. [2] *Blakely* does not entitle a defendant to a jury trial on a fact that supports a consecutive sentence under ORS 137.123(5).

See also *State v. Magana*, 212 Or App 553, 159 P3d 1163 (2007); *State v. Carson*, 211 Or App 606, 156 P3d 71 (2007) (*per curiam*) (*Tanner* “applies with equal force in the context of a challenge to consecutive sentences imposed pursuant to ORS 137.123(2)”).

*Note*: In light of *Ice II, above*, these decisions again have precedential value.

*State v. McCollister*, 210 Or App 1, 150 P3d 7 (2006). The sentencing court properly imposed the “sex-offender package” per ORS 137.540(2) as a condition of probation on defendant’s conviction for harassment. To impose that condition, it was not necessary for the court specifically to find that defendant acted with a sexual purpose. Consequently, imposition of that condition did not depend on a specific finding of fact, and defendant was not entitled to a jury finding under *Blakely*.

*State v. Gordian*, 209 Or App 600, 149 P3d 190 (2006) (*per curiam*). Defendant pleaded guilty to three crimes that “were alleged in the indictment to have occurred during separate criminal episodes,” and the court imposed consecutive sentences. Because “under ORS 137.123(2), a court is not required to make findings to support the imposition of consecutive sentences” if the defendant did not commit the crimes “in the same criminal episode,” defendant’s *Blakely*-

based objection has no merit—“the sentences in this case fall within the exception enunciated in *Blakely* for sentences based on facts admitted by a defendant.”

*State v. Buehler*, 206 Or App 167, 136 P3d 64 (2006). The right-to-jury rule in *Blakely* applies to a finding of an aggravating fact that is used as a basis for dispositional departure to a prison sentence, because a presumptive probationary sentence is the statutory maximum in the absence of such a finding. A court’s authority under OAR 213-010-0001 to revoke a probationary sentence and impose a prison sentence is “entirely contingent on the existence of facts that, by their nature, can occur only *after* the offender already has been sentenced to probation.”

*State v. Howard*, 205 Or App 408, 134 P3d 1042, *rev den*, 341 Or 198 (2006). The Court of Appeals declined to review defendant’s unpreserved claim that the sentencing court committed plain error when it found that he had a prior conviction for a firearm offense and imposed an enhanced firearm-minimum sentence under ORS 161.610(4)(b) on that basis.

*State v. Clark*, 205 Or App 338, 134 P3d 1074, *rev den*, 341 Or 245 (2006). The sentencing court’s entry of a no-release order per ORS 137.750 based on findings that it made did not violate the defendant’s right to jury under *Blakely*. “The denial of consideration for such beneficial modifications to a sentence does not increase the maximum penalty to which the defendant is exposed by the jury’s verdict,” because “[a]n order permitting consideration for sentence modifications does not mean that the defendant inevitably will receive the benefit of those programs.” “[T]he rule in *Apprendi* is not implicated by facts that merely foreclose a defendant from obtaining a lesser penalty within the range authorized by the verdict.”

*State v. Kaufman*, 205 Or App 10, 132 P3d 668, *rev den*, 340 Or 673 (2006). The Court of Appeals refused to consider as plain error defendant’s unpreserved claim that the sentencing court erred under *Blakely* by imposing a sentence subject to ORS 137.635 based on its own finding that defendant had a predicate prior conviction.

*State v. Herrera-Lopez*, 204 Or App 188, 129 P3d 238, *rev den*, 341 Or 140 (2006). Defendant’s *Blakely*-based challenge to the consecutive-sentence error has no merit because in the course of pleading guilty to the charges he admitted that consecutive sentences were appropriate and “admitted all of the facts necessary to justify consecutive sentences.” For purposes of *Blakely*, “admitted facts can be used at sentencing even when the admission was not made for that purpose.”

*State v. Causor-Mandoza*, 203 Or App 175, 124 P3d 1254 (2005). The upward-departure sentence was plain error in light of *Blakely* even though defendant admitted, when he pleaded guilty, that he was on probation at the time he committed the offense.

See also *State v. Carr*, 203 Or App 179, 124 P3d 1260 (2005).

*State v. Galloway*, 202 Or App 613, 123 P3d 352 (2005), *rev den*, 340 Or 201 (2006). In light of *Blakely*, the court committed plain error by imposing an upward-departure sentence on defendant’s conviction for second-degree arson based on its own finding that the presumptive sentence was insufficient given the risk to others from setting a fire in rural Crook County “in the middle of August in one the driest years in the history of recorded weather.”

*State v. McAhren*, 201 Or App 354, 118 P3d 859 (2005). Court refused to review defendant’s unpreserved *Blakely*-based challenge to special conditions of probation.

*State v. Anderson*, 201 Or App 340, 118 P3d 855 (2005). The court erred under *Blakely* when it imposed upward-departure sentences based on findings it had made of persistent involvement, greater harm, lack of remorse, and violation of public trust.

*State v. Price*, 200 Or App 650, 117 P3d 298 (2005). Court of Appeals refused to review as “plain error” defendant’s unpreserved *Blakely*-based claim that the sentencing court erred in determining his criminal-history score when it imposed sentence on his conviction for felony DUII.

*State v. Brown*, 200 Or App 427, 115 P3d 254, *rev den*, 339 Or 544 (2005). Defendant’s unpreserved *Blakely*-based challenge to the special conditions of probation imposed on his conviction for felony DUII are not reviewable as plain error, because “the gravity of the asserted error is slight” under the circumstances.

*State v. Vigil*, 199 Or App 525, 112 P3d 441, *rev den*, 339 Or 156 (2005). Defendant’s unpreserved *Blakely*-based challenge to the sentencing court’s no-release order under ORS 137.750 is not reviewable as plain error, because it is not obvious that *Apprendi* applies to such an order given that it “arguably does not increase the maximum penalty to which the defendant is exposed.”

*State v. Yashin*, 199 Or App 511, 112 P3d 331, *rev den*, 339 Or 407 (2005). Defendant was convicted of numerous felony sexual offenses that he committed against a single victim. The sentencing court found that he committed some of those offenses during separate criminal episodes, and it recalculated his criminal history in accordance with *Miller/Bucholz* as it imposed sentence. For the first time on appeal, defendant contended that, in light of *Blakely*, the court erred in recalculating his criminal-history score based on its own findings. *Held*: Affirmed. That claim is not reviewable as plain error, because it is not clear whether the *Miller/Bucholz* determination falls within the scope of the “prior conviction” exception in *Apprendi*.

*Makinson v. Lampert*, 199 Or App 418, 112 P3d 365, *rev den*, 339 Or 230 (2005). The post-conviction court denied all of petitioner’s claims of inadequate assistance of counsel. For the first time on appeal, petitioner asserted that, in light of *Blakely*, his counsel failed to challenge the departure sentences and the sentencing court committed plain error in imposing those sentences. *Held*: Summary affirmance granted. [1] Petitioner’s newly asserted claims are barred by ORS 138.550(3) and *Bowen v. Johnson* because he did not allege them in his petition. Such defaulted claims cannot be reviewed on appeal as plain error. [2] In any event, under *Page v. Palmateer*, the right-to-jury rule in *Apprendi* does not apply retroactively to cases on collateral review.

See also *McClanahan v. Hill*, 200 Or App 9, 112 P3d 456 (*per curiam*), *rev den*, 339 Or 450 (2005) (same).

*State v. McMillan*, 199 Or App 398, 111 P3d 1136 (2005). *Blakely* does not require that the amount of restitution be determined by the jury, because ORS 137.106(1) does prescribe a maximum amount of restitution but rather authorizes an amount “that equals the full amount of the victim’s pecuniary damages as determined by the court.”

*State v. Jenkins*, 199 Or App 384, 111 P3d 782 (2005) (*per curiam*), *rev den*, 340 Or 201 (2006). Even though defendant admitted at sentencing that he was on supervision at the time of the crime, the sentencing court committed plain error under *Blakely* when it departed based on the “on supervision” factor, because that factor requires the additional “failed to deter” finding.

*State v. Ross*, 199 Or App 1, 110 P3d 630, *mod on recons*, 200 Or App 143, 113 P3d 921 (2005), *rev den*, 340 Or 157 (2006). Defendant was convicted of dozens of sexual offenses against three children. *Held*: Defendant’s unpreserved claims that the sentencing court violated the right-to-jury rule in *Blakely* by imposing consecutive sentences and denying eligibility for early release under ORS 137.750 are not reviewable as plain error.

See also *State v. Taylor*, 198 Or App 460, 108 P3d 682, *rev den*, 339 Or 66 (2005) (unpreserved claim that *Blakely* applies to findings made under ORS 137.123(5) is not reviewable as plain error).

*State v. Howe*, 198 Or App 568, 109 P3d 391 (2005). The sentencing court committed plain error under *Blakely* when it departed upward on defendant’s conviction for second-degree arson based on the “loss or harm greater than typical” factor. That is not a finding the court may make even if the extent of the victim’s loss was uncontradicted.

*State v. Harberts*, 198 Or App 546, 108 P3d 1201 (2005), *rev den*, 341 Or 80 (2006). Defendant was convicted by jury verdict of first-degree sexual abuse based on an indictment that alleged that he committed the crime between February 1987 and July 1989, and the court imposed a suspended five-year indeterminate sentence. Based on *Blakely* and the fact that the parole board amended its rules in July 1988 to increase the permitted prison term for such a conviction, defendant contended that the indictment was insufficient on its face for failing to allege whether he committed the crime before or after the effective date of the new rule. *Held*: “The board’s action setting the prison term is simply is not part of the sentence imposed by the court. Thus the exact date of the offense ... was not a fact that would increase his punishment beyond the statutorily prescribed maximum. We therefore reject defendant’s contention that the exact date of the offense was an element of the offense that must have been pleaded and proved beyond a reasonable doubt.”

*State v. Gutierrez*, 197 Or App 496, 106 P3d 670, *on recons*, 199 Or App 521, 112 P3d 433 (2005), *rev den*, 340 Or 673 (2006). [1] Defendant’s unpreserved *Blakely*-based challenge to the restitution order is not reviewable as “plain error” because it is not clear whether *Blakely* applies to a restitution finding that does not otherwise increase the maximum incarcerative sentence. [2] The court also refused to consider his unpreserved *Blakely*-based challenge to an upward

durational departure to a 36-month term of probation on a felony conviction, because it is not clear that *Blakely* applies to probationary terms and, in any event, that term is concurrent with and on the same conditions as a 60-month probationary term, on a misdemeanor conviction, that he does not challenge.

*State v. Sullivan*, 197 Or App 26, 104 P3d 636 (2005). Defendant was convicted based on his pleas of no contest, the court found numerous aggravating factors (noting any one was sufficient) and imposed an upward departure prison term on his DCS conviction and an upward durational departure of 60 months probation on his conviction for third-degree sodomy, and he raised unpreserved *Blakely*-based challenges on appeal. *Held*: Affirmed. [1] Defendant’s challenge to the “multiple victims” factor is not plain error because his pleas to the various charges may be sufficient under the “admitted by the defendant” exception in *Blakely* to allow for the departure. [2] Defendant’s challenge to the probationary term is not plain error because it is concurrent with unchallenged 5-year probationary terms imposed on his misdemeanor convictions, and hence any error may be harmless.

*State v. Crescencio-Paz*, 196 Or App 655, 103 P3d 666 (2004), *rev den*, 339 Or 230 (2005). The sentencing court erred when it granted defendant a downward departure under ORS 137.712(2) on his conviction for second-degree robbery on the ground that the state failed to allege in the indictment and prove facts at trial that would *disentitle* defendant to a departure under that provision. Neither *Blakely* nor *State v. Quinn* requires the state to allege and prove facts apart from the elements of the offense in order negate the possibility of a downward departure.

See also *State v. White*, 217 Or App 214, 175 P3d 504 (2007), *aff’d on rev of other issue*, 346 Or 275, 211 P3d 248 (2009) (jury findings are not required for facts that render a defendant ineligible for a *downward* departure under ORS 137.712).

*State v. Ross*, 196 Or App 420, 102 P3d 755 (2004). Defendant pleaded no contest to first-degree theft, the court dispositionally departed, and defendant asserted unpreserved *Blakely*-based challenges to the sentence on appeal. *Held*: Reversed and remanded for resentencing. [1] Lack of written jury waiver does not automatically render sentence reversible error, because *Blakely* is based only on Sixth Amendment, which does not require written jury waiver, and defendant does not contend that those factors are jury issues under Art I, § 11. [2] Defendant did not waive his *Blakely* objection by pleading no contest, because he did not specifically waive jury on the potential aggravating factors. [3] Defendant’s unpreserved claim that the upward departure was error under *Blakely* was reviewable as plain error, because the aggravating factors cited by the court violate the right-to-jury rule in *Blakely*.

*State v. Warren*, 195 Or App 656, 98 P3d 1129 (2004), *rev den*, 340 Or 201 (2006). The sentencing court violated the right-to-jury rule in *Blakely* when it made findings post-verdict under ORS 161.725(1) that defendant is a dangerous offender and imposed a 30-year indeterminate sentence. That sentence is a departure under the guidelines, and the finding that he is “suffering from a severe personality disorder” falls within the scope of the *Blakely* rule even though it relates only to defendant, not to the underlying crime.

See also *State v. Thomas*, 204 Or App 109, 129 P3d 212, *on recons*, 205 Or App 399, 134 P3d 1038, *rev den*, 340 Or 673 (2006) (same); *State v. Williams*, 197 Or App 21, 104 P3d 1151 (2005) (same).

*State v. Fuerta-Coria*, 196 Or App 170, 100 P3d 773 (2004), *rev den*, 338 Or 16 (2005). Defendant’s unpreserved objection that imposing consecutive sentence based on findings made by the sentencing court, rather than the jury, violates the rule in *Blakely* is not “plain error.”

See also *State v. Goodman*, 200 Or App 137, 112 P3d 473 (*per curiam*), *rev den*, 339 Or 230 (2005) (same).

## **2. Right to notice: alleging facts relating to sentence**

*United States v. Cotton*, 535 US 625, 122 S Ct 1781, 152 L Ed 2d 860 (2002). The defendants were charged by an indictment with conspiracy to distribute and possess with intent to distribute a “detectable amount” of cocaine and cocaine base. The jury found them guilty of that charge. At sentencing, the court found, under the applicable provisions of the federal sentencing law, that the crime involved at least 50 grams of cocaine base, which finding permitted the court under 21 USC § 841(b)(1)(A) to impose a sentence beyond the 20-year maximum that otherwise was authorized for the underlying crime. Based on that finding, and without objection from defendants, the court imposed a 30-year sentence. While the case was on appeal, *Apprendi* was announced. *Held*: Affirmed. [1] The *Apprendi* error that the indictment failed to allege “at least 50 grams” was not a “jurisdictional” defect that precluded the district court from imposing the enhanced sentence. [2] Under the “plain error” rule, defendants’ *Apprendi*-based challenge is not reviewable on appeal because the evidence was “overwhelming” and “essentially uncontroverted” that the crime involved at least 50 grams.

**Jones v. United States**, 526 US 227, 119 S Ct 1265, 143 L Ed 2d 311 (1999). Defendant was charged with carjacking, in violation of 18 USC § 2119 which at the time provided that a person possessing a firearm who “takes a motor vehicle ... from the person or presence of another by force and violence or by intimidation ... shall—(1) be ... imprisoned not more than 15 years ..., (2) if serious bodily injury ... results, be ... imprisoned not more than 25 years ..., and (3) if death results, be ... imprisoned for any number of years up to life[.]” The indictment made no reference to § 2119’s numbered subsections and charged none of the facts mentioned in the latter two. Defendant was told at the arraignment that he faced a maximum 15-year sentence for carjacking, and the jury instructions at his trial defined that offense by reference solely to § 2119(1). After he was found guilty, however, the sentencing court imposed a 25-year sentence on the carjacking charge because one victim suffered serious bodily injury. The court overruled defendant’s objection that serious bodily injury was an element of the offense, which had been neither pleaded in the indictment nor proved before the jury. *Held*: Section 2119 establishes three separate offenses by the specification of elements, each of which must be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for its verdict.

**State v. Upton**, 339 Or 673, 125 P3d 713 (2005). The indictment specially alleged aggravating factors for an upward departure, defendant demurred on the ground that the court had no authority to submit those factors to the jury, and the trial court overruled the demurrer but ruled that it could not submit those factor to the jury, and the state petitioned for a writ of mandamus. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528. *Held*: Writ issued. [1] Under existing law, the trial court had authority “to submit sentencing enhancing factors to a jury.” [2] The procedure set forth in SB 528 applies by its terms to this case even though defendant allegedly committed his crimes before its effective date. [3] The allegation of an aggravating fact in the indictment does not violate ORS 132.540(2), because such a fact, in light of *Blakely*, is a material element of the charged offense. Moreover, SB 528 now allows such facts to be alleged.

**State v. Heilman**, 339 Or 661, 125 P3d 728 (2005). Defendant waived jury without qualification and the trial court found him guilty of multiple felonies, rejecting his insanity defense. At sentencing, the state sought a dangerous-offender sentence under ORS 161.725, and defendant objected based on *Apprendi*. The court overruled that objection and, applying a standard of proof beyond a reasonable doubt, found him to be a dangerous offender and imposed a 20-year sentence. *Held*: Affirmed. Defendant’s claim that sentencing court lacked authority to consider a dangerous-offender sentence because those facts were not alleged in the indictment fails “because *Apprendi* did not establish that the elements of each of offense and sentencing enhancement must be pleaded in the indictment.

**State v. Cox**, 337 Or 477, 98 P3d 1103 (2004), *cert den*, 126 S Ct 50 (2005). In capital case, the court refused to consider defendant’s unpreserved claim that the Fifth Amendment required the state to allege the penalty-phase factors in the indictment; the issue is not “plain error” because *Blakely* was based solely on the Sixth Amendment right to jury and the Court did not suggest that the Fifth Amendment applies in this context.

**State v. Compton**, 333 Or 264, 39 P3d 833, *cert den*, 537 US 841 (2002). Failure of the indictment to allege in the aggravated-murder count that defendant committed the murder “deliberately” did not deprive the trial court of authority to submit the death-penalty issue to the jury.

**State v. Terry**, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). [1] The trial court had subject-matter jurisdiction even if the indictment was defective under *Apprendi* for not alleging the penalty-phase factors. [2] Because a sentence of death is not a “penalty enhancement” within the meaning of *Apprendi* under the current statutory scheme, the state is not required to allege in the indictment that the murder was committed “deliberately.”

**State v. Calhoun**, 250 Or App 467, 280 P3d 1046 (2012) (*per curiam*). Defendant was convicted of PCS, and the court dispositionally departed and imposed a 6-month jail term based on two aggravating factors. *Held*: Reversed and remanded. The court erred “because the state failed to provide notice of the sentence-enhancement facts as required by ORS 136.765.”

<sup>^</sup> **State v. Reinke**, 245 Or App 33, 260 P3d 820 (2011), *rev allowed*, 351 Or 541 (2012). Defendant was convicted of second-degree kidnapping, and the court found him to be a dangerous offender and imposed a 180-month sentence. *Held*: Reversed and remanded for resentencing. [1] Defendant’s challenge to the dangerous-offender sentence on the ground that those facts were not specially alleged in the indictment has no merit in light of *State v. Sanchez*, 238 Or App 259 (2010). [2] But the dangerous-offender sentence is error because, under ORS 161.725(1) and 161.737 it must contain “both a determinate mandatory minimum term of incarceration and an indeterminate term, not to exceed 30 years.”

**State v. Lafferty**, 240 Or App 564, 247 P3d 1266 (2011). Defendant was convicted of first-degree burglary and third-degree assault in separate cases. Prior to trial, the DA sent defendant a plea offer that included a criminal-history worksheet noting a juvenile adjudication for a “person felony” and a statement that that adjudication can be included in his criminal-history score. Defendant waived jury and pleaded guilty with “open sentencing” and without stipulating to the gridblock. At sentencing, the court agreed with defendant that his juvenile adjudication could not be included in his criminal-history score. *Held*: Affirmed. [1] The DA’s plea offer and criminal-history worksheet adequately advised defendant of his intention to seek an enhancement based on the adjudication and thus complied with ORS 136.775. [2] Because neither the plea agreement nor the change-of-plea colloquy included an express waiver of jury on the adjudication issue and defendant was entitled under *State v. Harris*, 339 Or 157 (2005), to a jury trial on that factor, the sentencing court correctly excluded that adjudication from defendant’s criminal-history score.

**State v. Stewart**, 239 Or App 217, 244 P3d 816 (2010). Under *State v. Sanchez*, 238 Or App 259 (2010), *rev den* (2011), the Oregon Constitution does not require sentence-enhancement facts to be pleaded in the indictment.

**State v. Evans**, 238 Or App 523, 242 P3d 738 (2010). On a remand for resentencing pursuant to ORS 136.790, the state had provided defendant with written notice of sentence-enhancement facts that it intended to prove and rely on to seek an upward departure sentence. Defendant objected, asserting that they were not: (1) filed with the trial court, which he asserted was required by ORS 131.005(9); or (2) alleged in the indictment, which he claimed was required by state constitution. The trial court overruled defendant’s objections, and the jury found the alleged factors. *Held*: Affirmed. The state does not have to plead sentence-enhancement facts in the indictment or file its written notice with trial court. *State v. Sanchez*, 238 Or App 259 (2010), *rev den* (2011), establishes that the Oregon Constitution does not require that sentence-enhancement grounds be treated as “elements” of the underlying criminal offense.

**State v. Sanchez**, 238 Or App 259, 242 P3d 692 (2010), *rev den*, 349 Or 655 (2011). Defendant was convicted of first- and second-degree rape. Pursuant to ORS 136.760(2), the state had provided defendant with written notice of sentence-enhancement facts that it intended to prove and rely on to seek upward departure sentences. Defendant objected on the grounds (1) that the allegations were not found by the grand jury or pleaded in the indictment, and (2) the state had not filed its written notice with the court. The trial court overruled defendant’s objections, the jury found the sentence enhancement allegations, and the court imposed departure sentences. *Held*: Affirmed. [1] The Oregon Constitution does not require that enhancement facts be presented to the grand jury or be pleaded in the indictment. [2] Nothing required the state to file its written notice with the court.

See also **State v. Guyette**, 239 Or App 304, 243 P3d 1216 (2010) (*per curiam*), *rev den*, 350 Or 130 (2011); **State v. Stewart**, 239 Or App 217, 244 P3d 816 (2010); **State v. Bacon**, 238 Or App 575, 242 P3d 734 (2010) (*per curiam*).

**State v. Williams**, 237 Or App 377, 240 P3d 731 (2010), *rev den*, 350 Or 131 (2011). Defendant was charged with first-degree assault; the indictment did not allege any subcategory fact, which ORS 132.557 requires must be pleaded in the indictment. The prosecutor later moved to amend the indictment to allege the subcategory fact that the victim did not precipitate the assault (which elevated the offense from a category 9 to a category 10 offense). The trial court granted the motion and instructed the jury on the subcategory fact. Based on the jury’s affirmative verdict, the court sentenced defendant based on the category 10 ranking. On appeal, defendant argued that the amendment violated Art VII (Am), § 5. *Held*: Affirmed. [1] The grand jury’s jurisdictional function does not include finding facts that pertain only to sentencing. Consequently, an amendment to an indictment that adds only a subcategory fact does not impermissibly circumvent the constitutional function of the grand jury. [2] Because the grand jury is not required to find a subcategory fact, it is, for purposes of the indictment a matter of “form,” not “substance.” (Overruling *State v. Paetehr*, 169 Or App 157 (2000), on that point). [3] Although the state did not plead the subcategory fact in the indictment as required by ORS 132.557, Art. VII (Am), § 5(6), authorized the prosecutor to amend the indictment to allege the subcategory fact without resubmitting the indictment to the grand jury.

**State v. Larson**, 222 Or App 498, 193 P3d 1042, *rev den*, 345 Or 503 (2008). Under *State v. Sawatzky*, 339 Or 689 (2005), the state is not required to allege sentence-enhancement facts in the indictment, as long as the defendant has timely notice of the state’s intent to rely on those facts. Here, because the defendant did not assert that he lacked adequate notice, his claim fails.

**State v. Walch**, 218 Or App 86, 178 P3d 301 (2008), *aff’d on rev of other issue*, 346 Or 463, 213 P3d 1201 (2009). Based on *State v. Sawatzky*, 339 Or 689 (2005), the court rejecting defendant’s unpreserved assertion that the state

was required to allege the consecutive-sentence enhancement facts in the indictment, stating “we see no reason, in light of *Ice*, to draw any distinction between [the departure factors addressed in *Sawatzky*] and the facts supporting consecutive sentences.”

*State v. Wick*, 216 Or App 404, 173 P3d 1231 (2007), *rev den*, 344 Or 671 (2008). The trial court erred by refusing to empanel a jury to determine enhancement facts after the state gave notice of its intent to seek a jury determination on enhancement facts nine months after charging defendant with the offenses (in fact, between trial and sentencing) but only several days after the enactment of ORS 136.765. Although the statute now requires the prosecution to provide written notice of its intent to rely on enhancement facts within a “reasonable time” after filing the accusatory instrument, it would frustrate the legislature’s intent to hold that the state’s notice in this case, which was filed within 11 days after the notice requirement went into effect, was untimely.

*State v. Crescencio-Paz*, 196 Or App 655, 103 P3d 666 (2004), *rev den*, 339 Or 230 (2005). The sentencing court erred when it granted defendant a downward departure under ORS 137.712(2) on his conviction for second-degree robbery on the ground that the state failed to allege in the indictment and prove facts at trial that would *disentitle* defendant to a departure under that provision. Neither *Blakely* nor *State v. Quinn* requires the state to allege and prove facts apart from the elements of the offense in order to negate the possibility of a downward departure.

See also *State v. White*, 217 Or App 214, 175 P3d 504 (2007), *aff’d on rev of other issue*, 346 Or 275, 211 P3d 248 (2009) (jury findings are not required for facts that render a defendant ineligible for a *downward* departure under ORS 137.712).

*State v. Warren*, 195 Or App 656, 98 P3d 1129 (2004), *rev den*, 340 Or 201 (2006). [1] The sentencing court violated the right-to-jury rule in *Blakely* when it made findings post-verdict under ORS 161.725(1) that defendant is a dangerous offender and imposed a 30-year indeterminate sentence. [2] The indictment was not constitutionally deficient under *Blakely* for not having specially alleged the dangerous-offender factors.

*State v. Early*, 180 Or App 342, 43 P3d 439, *rev den*, 334 Or 260 (2002). [1] “Under *Apprendi v. New Jersey*, any fact, other than the fact of a prior conviction, that elevates an offense from one level to a higher level carrying a greater statutory maximum penalty must be pleaded in the charging instrument and must be proved to the trier of fact. We therefore agree with the parties that *Apprendi* requires a defendant charged with felony DWSR to be placed on notice through the charging instrument that the state intends to prove the existence of an aggravating or enhancing factor that elevates ordinary DWSR (a violation) to felony DWSR, and that the state must then present proof of that factor to a jury.” [2] The allegation in the indictment that defendant drove “feloniously” while revoked, “especially when coupled with the statutory citation in the caption, put defendant on notice that he was charged with the felony crime, as aggravated or enhanced by proof of one or more of the factors enumerated in ORS 811.182(3). . . . But *which* of the several specific circumstances listed in the statute is not itself a material element of the crime. Accordingly, the failure to allege the circumstance that gave rise to the suspension does not mean that the indictment failed to state a crime.”

*State v. Crain*, 177 Or App 627, 33 P3d 1050 (2001), *rev den*, 334 Or 400 (2002). [1] Defendant’s unpreserved claim that his dangerous-offender sentence is unlawful under *Apprendi* because the state did not allege the factors in the indictment and prove them to the jury is not reviewable on appeal. [2] Defendant’s challenge does not call into question the jurisdiction of the trial court to convict defendant on the charge of first-degree rape.

### 3. *Ex post facto* objections

See Or Const, Art I, § 21; US Const, Art I, § 10.

*Smith v. Doe*, 538 US 84, 123 S Ct 1140, 155 L Ed 2d 164 (2003). Alaska has a sex offender registration law that, like Oregon’s, requires sex offenders to register, provide information to authorities, and keep authorities updated on their whereabouts. Some of the offender’s information is kept confidential. The offender’s name, aliases, address, photograph, physical description, driver’s license number, motor vehicle identification numbers, place of employment, date of birth, crime, date and place of conviction, length and conditions of sentence, and a statement as to whether the offender is in compliance with the law’s update requirements or cannot be located are, however, published on the Internet. Both the law’s registration and notification requirements are retroactive. The sex offenders here, along with the wife of one of them, brought this action under 42 USC § 1983, seeking to declare the registration law void as to them under, *inter alia*, the *Ex Post Facto* Clause. The Ninth Circuit held that, because its effects were punitive, the law violates the *Ex Post Facto* Clause.

*Held*: Because the Alaska Sex Offender Registration Act is nonpunitive, its retroactive application does not violate the *Ex Post Facto* Clause. Analysis of the Alaska act demonstrates that the legislature intended to create a civil structure and that the statutory scheme is not sufficiently punitive to negate that intent.

*Seling v. Young*, 531 US 250, 121 S Ct 727, 148 L Ed 2d 734 (2001). Washington’s “Community Protection Act of 1990” authorizes the civil commitment of “sexually violent predators,” persons who suffer from a mental abnormality or personality disorder that makes them likely to engage in predatory acts of sexual violence. Young, confined by the Act, complained that applying the act to him violated the *Ex Post Facto* and Double Jeopardy Clauses. *Held*: The act is civil in nature and, as such, cannot be deemed punitive “as applied” to a single individual in violation of the Double Jeopardy and *Ex Post Facto* Clauses. Analysis of the civil nature of a statute requires focusing on a variety of factors. Where the legislature has denominated a statute civil, the clearest proof is required that the act nevertheless is punitive in purpose or effect. As to individual claims that the confinement does not provide the requisite adequate level of care and individualized treatment, as required either by the Act itself or the federal constitution, the state courts are available and competent to resolve these issues.

*State v. Upton*, 339 Or 673, 125 P3d 713 (2005). The indictment specially alleged aggravating factors for an upward departure, defendant demurred on the ground that the court had no authority to submit those factors to the jury, and the trial court overruled the demurrer but ruled that it could not submit those factor to the jury, and the state petitioned for a writ of mandamus. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528. *Held*: Writ issued. The procedure set forth in SB 528 applies by its terms to this case even though defendant allegedly committed his crimes before its effective date. Application of SB 528 does not violate the *ex post facto* clauses because it “changes only the method for determining the available punishment; it does not, however, increase that punishment.” Moreover, it prescribes a heightened standard of proof, which “inures to defendant’s advantage.”

*State v. McNab*, 334 Or 469, 51 P3d 1249 (2002). Based on a crime he committed in 1987, defendant was convicted of first-degree sexual abuse and was sentenced to prison. He was paroled in 1991 and his sentence expired in 1994. He subsequently was convicted of failing to register as a sexual offender in violation of ORS 181.599 (1995). *Held*: Affirmed. Requiring defendant to register as a sexual offender does not impose any significant detriment, restraint, or deprivation on defendant, in violation of the *ex post facto* provision of the Oregon Constitution, nor does it violation the *Ex Post Facto* Clause of the federal constitution.

*State v. Langley*, 331 Or 430, 16 P3d 489 (2000). A determination in defendant’s first appeal that the retroactive application of the true-life sentencing option over his objection violated the *ex post facto* clauses did not preclude, under the “law of the case” doctrine, a subsequent determination of whether he could waive the protection of those clauses during re-sentencing.

*State v. Rogers*, 330 Or 282, 4 P3d 1261 (2000). Based on murders he committed in 1987, defendant was convicted of aggravated murder and sentenced to death. His sentences were vacated and the case was remanded for a new penalty-phase hearing. In 1994 he was again sentenced to death. *Held*: Death sentences vacated and remanded. The trial court erred when it denied his request to have the jury instruction on the “true life” option, which had been enacted in the interim. Defendant validly waived any *ex post facto* objection to application of that option, and the court was required to accept that waiver. A defendant can waive an objection to the protections of the *ex post facto* clauses and this waiver does not need to be in any particular form.

*State v. McDonnell*, 329 Or 375, 987 P2d 486 (1999). The 1989 and 1991 amendments to the death-penalty statutes were intended to apply to proceedings that occurred after their enactment. A defendant is entitled to waive the protections of the *ex post facto* clause of the Oregon Constitution (Art I, § 21) and demand that the penalty-phase jury consider a true-life option even though such an option was not available when he committed his crime. A trial court’s failing to give effect to that waiver constituted reversible error.

*State v. Giles*, 254 Or App 345, 293 P3d 1086 (2012). Defendant was convicted of murder based on a crime he committed in August 1999. In 2009, the case was remanded for resentencing. On remand, defendant argued that the court could not impose on his conviction the sentence of “imprisonment of life” required by ORS 163.115(5)(a) because he committed the murder during the so-called “*McLain* window”—*i.e.*, after the date on which the Court of Appeals had invalidated that term as unconstitutionally disproportionate in *State v. McLain*, 158 Or App 419 (1999) (*viz.*, February 17, 1999), and before the legislature had fixed the statute by enacting ORS 163.115(5)(c) (*viz.*, October 23, 1999). Relying on

*State v. Haynes*, 168 Or App 565 (2000), the sentencing court overruled defendant’s objection and imposed life imprisonment with a 300-month minimum. *Held*: Reversed and remanded for entry of corrected judgment. [1] “When this court [held in *McLain*] the former version of ORS 163.115(5)(a) was unconstitutional, that statutory provision could no longer be applied. In light of the inapplicability of ORS 163.115(5), we determined ... that the proper sentence was that required by other statutes—a 25-year mandatory minimum as provided in ORS 137.700(2)(a)(A) and ORS 163.115(5)(b), followed by post-prison supervision for life in accordance with OAR 213-005-0004. [That decision] identified and was predicated on the only sentence that could lawfully have been imposed as of that time (*i.e.*, before the enactment of the 1999 amendments).” [2] “We conclude that that was the only sentence to which defendant could lawfully have been subjected as of the time he committed the murder, and because the 1999 amendments prescribe a sentence that is patently harsher than that prescribed by *McLain*, the application of the 1999-amended scheme to defendant violates *ex post facto* protections.”

*Notes*: [a] The Court of Appeals held in *Haynes* that the *ex post facto* clauses did not preclude retroactive application of the ORS 163.115(5)(a), as amended in October 1999, to a murder conviction based on a crime that was committed after re-enactment of the “imprisonment for life” sentence in April 1, 1995 and before *McLain* was issued in February 1999. The court in this decision merely distinguished *Haynes* and did not overrule it. As a result, a defendant convicted of murder based on a crime committed after April 1, 1995, must be sentenced to “imprisonment for life” pursuant to ORS 163.115(5) *unless* he or she committed the crime during the eight-month “*McLain* window”—February 17 to October 23, 1999. [b] For a murder conviction based on a crime committed during the *McLain* window, the court still must impose, and the defendant must serve, the 300-month minimum sentence per ORS 163.115(5)(b) and a life-time term of post-prison supervision per OAR 213-005-0004. But without the indeterminate “life sentence,” the parole board would not have authority under ORS 163.115(5)(c) to delay or bar the defendant’s release once he or she has completed serving the 300-month minimum. In other words, for a murder defendant in that window, he or she is legally entitled to release onto post-prison supervision immediately after completing the 300-month minimum.

*State v. Carroll*, 253 Or App 265, 290 P3d 864 (2012), *rev den*, 353 Or 428 (2013). Defendant was arrested for DUII in December 2009. At that time, a person was eligible for DUII diversion if he had not had any previous DUII diversions or convictions within the preceding 10 years. Effective January 1, 2010, however, the statute was amended to increase the “look back” period for determining diversion eligibility to 15 years. Defendant had two previous DUII convictions from 12 years before his arrest for DUII. He filed a petition to enter diversion in February 2010 and the trial court, relying on the legislative amendment, applied the current version of the statute and denied the petition because of defendant’s prior DUII convictions. The trial court also rejected defendant’s *ex post facto* challenges to the amendment. The trial court convicted defendant after a stipulated-facts trial. *Held*: Affirmed. [1] “We reject ... defendant’s contention that, by eliminating his eligibility for diversion, the amendment of ORS 813.215(1)(b) deprived him of a ‘defense’ to the offense of DUII. Diversion is not a defense.” [2] In general, “the purpose of the Oregon Vehicle Code is primarily remedial, not punitive.” The legislative history of the amendment at issue in this case reveals that, “despite incidental deterrent effects, the primary purpose of the amendment ... was a concern for public safety, rather than punishment or deterrence. We have no difficulty concluding that the primary purpose of the amendment ... was not punitive.” [3] Nor was the practical effect of the amendment punitive: “A person’s eligibility for diversion is not punishment for the offense; it provides an alternative to prosecution, conviction, and punishment.” [4] Finally, “the extension of the ‘look-back’ period for eligibility for DUII diversion does not impose such a significant detriment, restraint, or deprivation on defendant so as to constitute a form of increased punishment.”

*State v. Vasquez-Escobar*, 211 Or App 115, 153 P3d 168 (2007). Defendant pleaded guilty to a DUII that he committed in 2003, and the sentencing court permanently revoked his driving privileges per ORS 809.235(1)(b) based on his two prior DUII convictions (1996, 1997). Defendant claimed that the revocation constituted *ex post facto* punishment because he committed his current DUII offense before January 1, 2004, the date the statute took effect. *Held*: Affirmed. Because the mandated revocation is remedial or regulatory, it is not punishment with scope of either the state or federal *ex post facto* clause.

*Butler v. Board of Parole*, 194 Or App 164, 94 P3d 149, *rev den*, 337 Or 555 (2004). Change in governing statute and rule that now allows 3-member board on majority vote to deny re-release, instead of the former rule’s 4-vote majority of former 5-member board, may be applied to petitioner’s previously imposed sentence without violating constitutional *ex post facto* principles, because the change merely is procedural and was not intended as punishment, the substantive standard did not change, and the change did not create a substantial risk that his punishment would be increased.

*V.L.Y. v. Board of Parole*, 188 Or App 617, 72 P3d 993 (2003), *rev’d on other grounds* 338 Or 44, 106 P3d 145 (2005). Board applied risk-assessment scale set out in Department of Corrections rules in classifying petitioner as a

predatory sex offender. *Held*: Petitioner did not present a valid equal-privileges challenge, and his *ex post facto*, double-jeopardy, and cruel-and-unusual-punishment claims have no merit. Because ORS 181.585 applies to an open-ended class, it is not a bill of attainder. Designating petitioner as a PSO does not invade on his constitutional right to privacy.

*State v. Thomas*, 187 Or App 192, 66 P3d 570 (2003). Defendant was convicted of felony DUII, third-degree assault, and felony hit and run based on a single incident. *Held*: It does not violate the constitutional *ex post facto* clauses to include in defendant's criminal-history score, for purpose of imposing sentence on his current conviction for felony DUII, his five prior convictions for DUII, even though he committed those offenses before OAR 213-004-0009 was enacted in 1999 to require inclusion of such convictions.

*Day v. Board of Parole and Post-Prison Supervision*, 184 Or App 409, 56 P3d 495 (2002). "Under ORS 161.035(4), criminal defendants must be sentenced under the statutory scheme in force when their crimes were committed, unless the legislature has expressed an intent to the contrary. Statutes regarding parole and other forms of post-prison supervision are, in effect, incidents of criminal sentences." For plaintiff, the post-prison supervision period provided by former ORS 421.120(3) applies to his sentence.

*State v. Hurd*, 182 Or App 361, 49 P3d 107, *rev den*, 335 Or 104 (2002). When sentencing defendant for felony DUII, the court applied the *current* version of OAR 213-004-0009 (1999), which provides that every two prior DUII convictions counts as one person felony for purposes of criminal-history score. Defendant argued that this was an *ex post facto* violation, because at the time he committed his eight prior DUIIs, the rule provided that it took *three* DUII convictions to count as one person felony for criminal-history purposes. *Held*: Affirmed. Defendant's objection has no merit because "(1) he was sentenced in this case for a new crime, not for prior offenses; and (2) before he committed the new crime, defendant had notice of the penalty for reoffending."

*Meadows v. Board of Parole*, 181 Or App 565, 47 P3d 506 (2002). The "predatory sexual offender" laws do not violate the *ex post facto* constitutional provisions because they do not impose additional punishment for the underlying crimes.

*State v. Haynes*, 168 Or App 565, 7 P3d 623, *rev den*, 331 Or 203 (2000). Even though the Court of Appeals invalidated ORS 163.115(5)(a) as unconstitutionally disproportionate in *State v. McLain* because it mandated "imprisonment for life" for murder, a later grant of authority to the parole board cured the constitutional problem. Applying the later statute, enacted after the date of the crime, to defendant's conviction did not violate the *ex post facto* provisions of the constitutions.

*Giblin v. Johnson*, 165 Or App 50, 994 P2d 808 (2000). By pleading guilty, plaintiff assented to the broadest construction of his pleas, thus encompassing his agreement that the state could prove that he committed his offense on any of the dates alleged in the indictment. Because the record shows that plaintiff could have committed his crime while a 1982 administrative rule was in effect, he failed to establish that he was entitled to relief based on a 1988 administrative rule.

*State v. Grimes*, 163 Or App 340, 986 P2d 1290 (1999), *rev den*, 332 Or 656 (2001). Application of ORS 137.750 to a crime committed before its effective date but after December 5, 1996, does not violate the *ex post facto* clauses.

*State v. Bowman*, 160 Or App 8, 980 P2d 164 (1999), *rev den*, 334 Or 655 (2002). Defendant was convicted of robbery in the second degree, and the sentencing court refused to impose the 70-month minimum sentence and instead placed him on probation. The court later revoked defendant's probation and again refused to impose the minimum sentence; it imposed instead the 6-month sanction prescribed by the guidelines. *Held*: Reversed. The state's challenge to the sentence imposed on revocation is reviewable under the newly enacted ORS 138.222(4)(c). The court rejected defendant's claims that retroactive application of that provision violated the *ex post facto* and due process clauses.

See also *State v. Jackman*, 155 Or App 358, 963 P2d 170, *rev den*, 328 Or 115 (1998) (application of ORS 138.222(4)(c) to the judgment in this case, which was entered before the provision was enacted, does not violate the *ex post facto* provisions of the state or federal constitutions or the separation-of-powers provisions of Art. III, § 1).

*State v. Matthews*, 159 Or App 580, 978P2d 423 (1999). Prosecution for failing to register as a sex offender under ORS 181.599 does not violate the *ex post facto* prohibition. Defendant, who committed his sex crimes before the registration scheme was enacted, argued that making him register as a sex offender constituted "punishment" for *ex post*

*facto* purposes. Applying the two-part test of the law’s purpose and practical effect, the court held that neither the purpose nor the effect of the law was punitive.

**Haas v. Hathaway**, 144 Or App 478, 928 P2d 331 (1996). ORS 137.550(6), which was amended in 1989 to give trial court judges discretion to deny credit for time served as a condition of probation, cannot be applied to a defendant who committed his crimes before 1989.

**Hibbard v. Board of Parole**, 144 Or App 82, 925 P2d 910 (1996). When a defendant pleads no contest to an indictment alleges a time period that straddles the effective date of a new statute, he cannot successfully argue that the statute violates the guarantee against *ex post facto* legislation. An unqualified no-contest plea will support the broadest construction of the plea.

**State v. Zelinka**, 130 Or App 464, 882 P2d 624 (1994), *rev den*, 320 Or 508 (1995). Defendant convicted of murder by abuse of his 23-month-old daughter claimed that use of assaults he committed against victim before enactment of the murder-by-abuse statute violated *ex post facto* clauses even though he caused her death after enactment of the statute. *Held*: Because ORS 163.115(1)(c) requires proof of both prior assaults and abusive death of child, the crime is not complete until abuse causing death occurs and no *ex post facto* issue is presented. The statute neither aggravates nor increases the penalty for the prior assaults.

**State v. Perez**, 119 Or App 436, 851 P2d 617, *rev den*, 317 Or 272 (1993): It did not violate defendant’s rights under the *ex post facto* clauses to apply the “commercial drug offense” offense-subcategory factor defined in ORS 475.996 to his felony drug offenses, even though defendant committed his crimes prior to the effective date of the statute (and while the “scheme or network” rule was in force), because the statute “did not create a greater crime or enhance the penalty.” Although the “scheme or network” rule in force when defendant committed his crimes later was declared unconstitutionally vague, that does not preclude the later-enacted but superseding statute from applying to his crimes.

See also **State v. Bojorques-Quinonez**, 121 Or App 179, 854 P2d 498 (1993) (same).

#### 4. Double-jeopardy objections

See Or Const, Art I, § 12; US Const, Amend V; ORS 131.505 *et seq*.

**Witte v. United States**, 515 US 389, 115 S Ct 2199, 132 L Ed 2d 351 (1995). Defendant participated in two conspiracies, one to import 1000 kg. of cocaine and another to import 1000 lbs. of marijuana. He pleaded guilty to a charge based on the marijuana operation, and the judge at sentencing on that conviction took into account defendant’s participation in the other crimes, thus enhancing the conviction under the federal sentencing guidelines. Defendant later was charged with crimes based on the cocaine conspiracy, and he successfully moved to dismiss the new charges on double-jeopardy grounds. *Held*: Because the two sets of charges were based on factually distinct criminal conduct, the conviction on the marijuana offense did not bar subsequent prosecution of defendant based on the cocaine conspiracy, even though the sentencing judge in the first case took into account defendant’s participation in the second crime.

**Schiro v. Farley**, 510 US 222, 114 S Ct 783, 127 L Ed 2d 47 (1994). Petitioner brutally raped and murdered a woman, and he was charged under Indiana law with capital murder under alternative counts of knowing and felony murder. He admitted that he committed the crime but contended that he was insane. The jury returned a guilty verdict on the felony-murder count and left blank the verdict on the knowing-murder count. At the penalty phase, the jury recommended against a death sentence. The trial court, however, imposed a death sentence based on the statutory aggravating factor that the petitioner committed the murder “intentionally” during a rape. The conviction and death sentence were affirmed by the state courts, and petitioner commenced a federal *habeas corpus* proceeding in which he contended, *inter alia*, that the Double Jeopardy Clause precluded the sentencing court from finding that he had committed the murder intentionally, because the jury at the guilt phase failed to return a verdict on the knowing-murder count. *Held*: Affirmed. [1] The penalty phase of a capital case is part of the same proceeding as the guilt phase for purposes of double-jeopardy analysis. [2] The jury’s failure to return a verdict on the knowing-murder charge was not an “implied acquittal,” because neither Indiana law nor the trial court’s instructions required it to return a verdict on that charge once it had found him guilty on the felony-murder charge.

**State v. Barrett**, 350 Or 390, 255 P3d 472 (2011). Defendant was charged with stalking, a class A misdemeanor, and the victim (his estranged wife) invoked her right to be notified in advance of sentencing by completing the form

provided to her by the district attorney's office. That office received that form on February 28, 2011—the same day that a pretrial conference was scheduled. At that conference, the prosecutor engaged in plea negotiations with defendant, and he ultimately pleaded guilty to a single charge of stalking and the trial court immediately sentenced him to probation. The victim was not present at those proceedings because she had been advised by the advocate that nothing would happen at the conference, and the prosecutor did not comply with ORS 147.510(2) by advising the court whether she had been advised of the hearing and wished to participate. After learning what had happened in her absence, the victim filed a claim per ORS 147.515, alleging a violation of her state constitutional rights to be notified of, and to be present and heard at, the sentencing. The victim also moved the court to vacate defendant's sentence and hold a resentencing where she could be present and heard. The state filed a separate motion proposing the same remedy. After a hearing, the trial court found that the victim's rights had been violated but nevertheless denied relief, concluding that no source of law authorized it to order resentencing as a remedy. Pursuant to ORS 147.537, the victim appealed from the trial court's order to the Oregon Supreme Court. *Held*: Reversed, "sentence is vacated," and remanded for "resentencing." [1] The remedies clause of Art. I, § 42(3)(a)—"Every victim ... shall have remedy by due course of law for violation of a right established in this section."—authorizes the remedy of resentencing even though § 42(2) provides that "[n]othing in this section ... may ... be used to invalidate ... [a] conviction or adjudication[.]" That limitation does not preclude vacating a final judgment to conduct a resentencing because, in context, the term "'conviction' refers only to the finding of guilt" and "adjudication" refers only to a delinquency adjudication. Thus, "defendant's sentencing was neither a 'conviction' nor an 'adjudication.'" [2] Defendant's claim that the victim had waived her right to a remedy by not requesting it before attachment of jeopardy, as provided in ORS 147.533(1)(b)(C), has no merit because the victim's request falls within the exception in ORS 147.533(2)(a)—"Remedies that may be effectuated after the disposition of a criminal proceeding."—which "appears to be broad enough to include modifying the terms of a criminal judgment, including a sentence." [3] A resentencing would not violate the Double Jeopardy Clause in the Fifth Amendment. Relying on *United States v. DiFrancesco*, 449 US 117 (1980), the court explained: "The imposition of the original sentence is not comparable to an acquittal for double jeopardy purposes, and resentencing defendant with the possibility that his sentence may be increased is not inconsistent with either the history of the policies of the Double Jeopardy Clause." [4] The double-jeopardy clause in Art. I, § 12, would not bar resentencing, because Art. I, § 42(2), expressly "supersedes any conflicting section" in the state constitution.

*State v. Sawatzky*, 339 Or 689, 125 P3d 722 (2005). Based on *Blakely*, the Court of Appeals vacated defendant's upward-departure sentences and remanded for resentencing. On remand, the trial court ruled that the state could prove the aggravating facts to a newly empaneled jury, and defendant petitioned for a writ of mandamus contending that such a trial would constitute double jeopardy. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528. *Held*: Writ dismissed. [1] Because *Blakely* "requires that the adjudication of sentencing enhancement factors be fully adversarial within the context of a jury trial, the constitutional principles of former and double jeopardy ... should apply equally to a jury determination of a sentencing enhancement factor." [2] The pending trial on remand does not violate the double-jeopardy bar because it is "a continuation of a single prosecution," it was defendant who challenged the legality of her original sentences, and she has not been "acquitted" on those factors. [3] Retrial is not barred due to the fact that the indictment did not allege the aggravating facts, because the state was not required to allege those facts in the indictment. "Nothing in *Apprendi* or *Blakely* alters the definition of an 'offense' set out in ORS 161.505. In our view, so long as a defendant has timely notice that the state intends to prove certain aggravating or enhancing factors necessary for the imposition of [an upward-departure sentence], and the trial court affords a criminal defendant the opportunity to exercise his or her jury trial right in that regard, the federal constitution is satisfied."

*State v. Lhasawa*, 334 Or 543, 55 P3d 477 (2002). Issuance of 90-day exclusion order under Portland's "prostitution free zone" ordinance was not punishment or "jeopardy" under double-jeopardy provisions of the Oregon and federal constitutions, and prosecution on prostitution charge after issuance of that order is not barred by those clauses.

*State v. Selness / Miller*, 334 Or 515, 54 P3d 1025 (2002). A forfeiture proceeding was brought against defendants' house under Oregon Laws 1989, chapter 791, and they did not contest. The court dismissed the subsequent and separate prosecution of defendants based on the underlying drug offenses, concluding that the forfeiture constituted punishment and jeopardy under the double-jeopardy clauses. *Held*: Reversed. Although defendants did not entirely waive their right to argue that the forfeiture constituted "jeopardy," they failed to establish that their prosecution would violate the double-jeopardy provisions of the Oregon and federal constitutions.

*State v. Anderson*, 243 Or App 222, \_\_\_ P3d \_\_\_ (2011). In 2007, defendant pleaded guilty to third-degree rape pursuant to a plea agreement that included dismissal of other charges, a stipulation to gridblock 6-D, and a stipulated dispositional departure to probation. At that time, his criminal-history score included an assault conviction entered in 2005.

In 2008, while he was serving probation on the rape conviction, his assault conviction was reversed. In 2009, the sentencing court revoked defendant's probation and imposed the presumptive 13-month sentence, using gridblock 6-D, after rejecting defendant's argument that his criminal-history score had to be recalculated to "G" because the assault conviction had been reversed. *Held*: Affirmed. [1] OAR 213-010-0002(2) requires that, upon revocation, the sentencing court must impose a sanction based on defendant's criminal-history score as it was determined at the time of the original sentencing and that score is not to be recalculated based on intervening events. [2] The court's use of a criminal-history score that included his vacated assault conviction did not violate the Double Jeopardy Clause: "Defendant gave up his right to dispute his prior criminal history when he pleaded guilty. Defendant also knew that he would be subject to sanctions, including the term of imprisonment he ultimately received as a sanction, if he violated the terms of his probation sentence. Defendant entered into the plea agreement knowingly and voluntarily. Having entered into the stipulated agreement under these circumstances, defendant relinquished any double-jeopardy objection he may have had."

*Note*: The third holding is based on a waiver theory—*i.e.*, defendant cannot assert a double-jeopardy objection because he agreed to the gridblock as an integral part of a plea agreement by which he obtained substantial benefits. Consequently, it is unclear whether the answer would be the same in a case in which the defendant was convicted after trial and did not stipulate to a gridblock.

*State v. Forrest*, 213 Or App 151, 159 P3d 1286 (2007). ORS 813.012(2), which requires all previous DUII convictions to be counted in a defendant's criminal-history score, does not violate double-jeopardy principles on the grounds that it imposes an additional punishment for defendant's *prior* convictions or by enhancing defendant's criminal-history score based on conduct that also elevated the seriousness of the current offense (following *State v. McCoin*, 190 Or App 532 (2003)).

*State v. McCoin*, 190 Or App 532, 79 P3d 342 (2003), *rev den*, 336 Or 422 (2004). Defendant was charged with felony DUII under ORS 813.010(5) based on six previous convictions. The trial court found him guilty and sentenced him under ORS 813.012(2), which provides that, in determining the criminal-history score for a person convicted of felony DUII, every two prior misdemeanor DUII convictions are to be counted as one person felony. On appeal, defendant argued that the three prior convictions used to elevate the current charge to a felony should not also be counted in his criminal-history score. *Held*: ORS 813.012(2), which requires all previous DUII convictions to be counted in a defendant's criminal-history score, does not violate double-jeopardy principles on the grounds that it imposes an additional punishment for defendant's *prior* convictions or by enhancing defendant's criminal-history score based on conduct that also elevated the seriousness of the current offense.

*Long v. Board of Parole*, 189 Or App 56, 73 P3d 934 (2003). Petitioner challenged a parole board order designating him as a predatory sex offender contending (1) that the board's failure to notify him of the specific basis for its proposed designation violated his right to due process; (2) that the board's designation and community notification scheme violates *ex post facto* prohibitions, constitutes a bill of attainder, is cruel and unusual punishment, violates double jeopardy, and invades his right to privacy; and (3) that an unrelated condition of parole that the board imposed is not authorized by statute and is unconstitutionally vague. *Held*: Reversed and remanded. [1] The board's failure to provide petitioner with notice of the basis for its preliminary designation violated his right to due process. [2] The court's decision in *V.L.Y. v. Board of Parole*, 188 Or App 617 (2003), resolves petitioner's remaining challenges to the board's designation and notification scheme. [3] Given petitioner's history, the condition of parole that he not possess books, videotapes, or other media with children as the primary subject or actors is within the board's statutory authority. Because petitioner may ask his parole supervisor whether he can possess questionable media, he has sufficient notice of which media the condition prohibits.

*V.L.Y. v. Board of Parole*, 188 Or App 617, 72 P3d 993 (2003), *rev'd on other grounds* 338 Or 44, 106 P3d 145 (2005). Board applied risk-assessment scale set out in Department of Corrections rules in classifying petitioner as a predatory sex offender. *Held*: Petitioner did not present a valid equal-privileges challenge, and his *ex post facto*, double-jeopardy, and cruel-and-unusual-punishment claims have no merit.

*State v. Young*, 188 Or App 247, 71 P3d 119, *rev den*, 336 Or 125 (2003). Pursuant to an agreement, defendant pleaded guilty to three of six counts of aggravated murder and waived double jeopardy, and the court imposed a life sentence with the possibility of parole. After beginning to serve that sentence, defendant breached the agreement by not testifying as agree, and the state prosecuted him on the remaining counts over his objection. The jury imposed a true-life sentence. On appeal, defendant argued that the court lacked jurisdiction to convict and sentence him on the remaining convictions. *Held*: Affirmed. [1] Defendant's challenge to the true-life sentences is not barred by ORS 138.222(2)(d),

because they were not the product of a stipulated sentencing agreement within the scope of ORS 135.407 and, in any event, the parties cannot stipulate to jurisdiction. [2] The fact that defendant had commenced serving the sentence imposed on the first three convictions, which were based on the same incident, did not deprive the court of jurisdiction to impose sentence on the other three. Defendant cannot claim that the state is precluded from doing what he agreed it could do. [3] Although all the convictions would merge under *State v. Barrett*, defendant waived his right to insist on merger.

## 5. Right to counsel at sentencing

See Or Const, Art I, § 11; US Const, Amend VI.

See also Part V-A (“Constitutional Challenges to Counting Prior Conviction”), and Part IX-I(2) (“Challenge to constitutional validity of predicate conviction”), *below*.

*State v. Ferman-Velasco*, 333 Or 422, 41 P3d 404 (2001). Measure 11 does not violate the Sixth Amendment right to counsel.

*State v. Reed*, 247 Or App 155, 268 P3d 756 (2011). Defendant was convicted of contributing to the sexual delinquency of a minor in 2008, when he was 18 years old, and the court put him on probation for 18 months. Defendant was represented by counsel in that proceeding, and he was represented by counsel in some of the subsequent hearings relating to probation. In September 2009, defendant appeared another hearing related to probation, he waived counsel after a short colloquy in which he acknowledged understanding that he was entitled to one, and the court ended up extending probation until September 2011 without finding a violation. *Held*: Reversed and remanded. [1] Defendant was “entitled to representation by counsel at a probation violation hearing because it is a critical stage in a criminal prosecution.” [2] “Evidence that a defendant has had prior experience with the criminal justice system can support a finding that the defendant knowingly waived counsel. Also, a defendant’s first-hand experience of some of the basic things that an attorney could do provides evidence that a defendant understands the risks of self-representation.” [3] But this record was insufficient to establish that defendant knowingly waived counsel.

*State v. Easter*, 241 Or App 574, 249 P3d 991 (2011). Defendant was charged with second-degree theft and interfering with a police officer. He is a prolific criminal, with 27 arrests and 15 property-crime convictions since 1996. The court appointed counsel to represent him, and that attorney also represented him in two other pending cases. The case went to trial before a jury. Defendant actively participated in the case, often making his own objections, ensuring the admission of exhibits, and raising various issues with the court. After the state presented closing argument, he moved to fire his attorney and present his own closing argument. The trial court did not engage in the preferred colloquy with defendant, as described in *State v. Meyrick*, 313 Or 125, 132 (1992). The trial court did tell him that firing his attorney was “a very bad move” and warned him about some of the pitfalls he could face without an attorney. The trial court appointed the attorney to act as his advisor, and granted his request to present his own closing argument. The jury convicted him. The attorney continued to appear at numerous sentencing hearings. Sentencing was postponed three times, primarily to address defendant’s mental health issues. At the third hearing, counsel informed the court that defendant had obtained the funds to hire private counsel, as defendant had told the court he wanted to do. At the fourth sentencing hearing, counsel notified the court that defendant had told him he was no longer to appear on his behalf. More than a month later, defendant appeared *pro se* at the fifth sentencing hearing. He asked the trial court to appoint a new attorney. The court denied that request, and proceeded to impose sentence. *Held*: Affirmed. [1] Defendant knowingly waived his right to counsel under Art I, § 11, and the Sixth Amendment. Even though the trial court failed to engage in the preferred colloquy, the totality of the circumstances demonstrated that defendant knew of his right to counsel and understood the risks of self-representation. Those circumstances included (1) his experience with the criminal-justice system, (2) his opportunity to observe his attorney during the trial, (3) the trial court’s warnings about self-representation, (4) his intelligent replies to the court’s warnings, and (5) the fact that the attorney remained as his legal advisor. [2] Under the circumstances, the trial court did not abuse its discretion by failing to grant defendant another continuance.

*State v. Blanchard*, 236 Or 472, 236 P3d 845 (2010). Trial court erred in denying defendant’s request to represent himself in a probation-violation hearing. The error was “structural error” and not subject to harmless-error analysis.

*State v. Phillips*, 235 Or App 646, 234 P3d 1030 (2010). Defendant was represented by retained counsel at trial (at which he was convicted of criminal mischief) and at the original sentencing. The sentencing court ordered a subsequent restitution hearing. Defendant appeared at the restitution hearing without counsel, the court briefly verified that he chose to appear without counsel, and the court eventually imposed \$2,700 in restitution. *Held*: Reversed and remanded. [1] A

defendant has a right to counsel at a restitution hearing. [2] The on-the-record colloquy was insufficient under *State v. Meyrick*, 313 Or 125 (1992), to ensure a knowing and voluntary waiver. [3] Considering the totality of the circumstances, the Court of Appeals could not affirm, because defendant had had no previous experience in the criminal-justice system, he had not been advised of his right to appointed counsel if indigent, and the record did not show that his previous counsel had advised of his right to counsel or the pitfalls of self-representation.

*State v. Bartley*, 220 Or App 125, 184 P3d 1225 (2008) (*per curiam*). The sentencing court erred and it denied defendant's request for another setover to obtain new counsel when his counsel did not appear due to health problems and instead went ahead and imposed sentence.

*State v. Bess*, 193 Or App 294, 89 P3d 1214 (2004) (*per curiam*). The sentencing court erred when it did not make an inquiry when defendant voiced a number of complaints about his counsel and requested appointment of substitute counsel. Judgment vacated and remanded for court to make *post hoc* inquiry into defendant's complaints.

*State v. Gross*, 175 Or App 476, 28 P3d 1243 (2001) (*per curiam*). The sentencing court erred in accepting defendant's waiver of counsel at the probation-violation hearing without first advising him "of the consequences of self-representation."

*State v. Southards*, 172 Or App 634, 21 P3d 123 (2001). Sentencing court violated defendant's Art I, § 11, right to be heard himself and through counsel when the trial court imposed a sentence without allowing either him or his defense counsel to comment on new information provided to the court by the state.

*State v. Torres*, 170 Or App 150, 11 P3d 268 (2000). Sentencing court erred when it conducted a probation-revocation hearing without defendant being represented by counsel or waiving his right to counsel on the record.

*State v. Skelton*, 153 Or App 580, 957 P2d 585, *rev den*, 327 Or 448 (1998). The Court of Appeals rejected defendant's various facial constitutional challenges to Measure 11, including his claim based on the right to counsel guaranteed by the Sixth Amendment and Art I, § 11.

*State v. Parker*, 145 Or App 35, 929 P2d 327 (1996), *rev den*, 324 Or 654 (1997). Measure 11 does not violate a defendant's rights, guaranteed by Art I, § 11, of allocution or to counsel at sentencing.

*See also State v. George*, 146 Or App 449, 934 P2d 474 (1997).

## **6. Proportionality, excessive-sentence, and "cruel and unusual punishment" objections**

*See* Or Const, Art I, §§ 13, 15, 16, 20; US Const, Amend VIII, XIV.

*Note:* This section does *not* include all of the decisions in capital cases in which a court has addressed challenges to a death sentence based on the Eighth Amendment.

### **(a) Decisions by the United States Supreme Court**

*Miller v. Alabama / Jackson v. Hobbs*, 567 US \_\_, 132 S Ct \_\_, 183 L Ed 2d \_\_ (2012). Each petitioner committed a murder when he was 14 years old, he was remanded by a state juvenile court to adult court on a charge of murder, he was convicted of the offense after a trial, and the state court sentenced him to life imprisonment without the possibility of parole under a state law that made that sentence mandatory in such a case. *Held:* Reversed and remanded. [1] "The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. That right ... flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense. ... The concept of proportionality is central to the Eighth Amendment. And we view that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society." [2] Children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, ... they are less deserving of the most severe punishments. [3] A mandatory sentence of life imprisonment without the possibility of parole for a juvenile violates the Eighth Amendment because it: "precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the

conduct and the way familial and peer pressures may have affected him.” [4] That as many as 29 states may authorize a sentence of life imprisonment without parole for a juvenile convicted of murder “does not preclude our determination that mandatory life without parole for juveniles violates the Eighth Amendment.” [5] Although each petitioner was transferred from juvenile court to adult court upon the exercise of discretionary criteria, “the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.”

*Note:* [a] The majority did not consider petitioner’s *per se* challenge: “Because that holding is sufficient to decide these cases, we do not consider [petitioners’] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.” [b] Under ORS 163.150(3) the jury is given a discretionary choice between a sentence of life imprisonment with the possibility of parole and a sentence of life imprisonment without the possibility of parole (a “true life” sentence), and the broad swath of mitigating evidence that the majority opinion considers to be relevant to such a sentence is admissible under ORS 163.150(1) in order to guide that determination. Consequently, this decision does not appear to call into question the imposition of a “true life” sentence imposed in Oregon on a juvenile convicted of aggravated murder.

***Brown v. Plata***, 563 US \_\_, 131 S Ct 2020, 179 L Ed 2d 969 (2011). In an action under the federal Prison Litigation Reform Act of 1995, a three-judge panel of federal judges held a hearing, found that California prisons are severely overcrowded (*i.e.*, twice the design capacity) and grossly understaffed, and ultimately ordered California to reduce the overcrowding to only 137.5% of design capacity within two years, and to formulate a compliance plan. *Held:* Affirmed (by a 5-4 decision). If a state prison deprives prisoners of basic sustenance, including adequate medical care, the federal courts have responsibility to remedy the Eighth Amendment violation. In an extensive 54-page opinion, the majority explained why the three-judge panel was properly constituted, the findings were sufficient under the PLRA, and the remedy was appropriate and narrowly drawn.

***Graham v. Florida***, 560 US \_\_, 130 S Ct 2011, 176 L Ed 2d 825 (2010). Petitioner committed armed robbery when he was 16 years old. Under a plea agreement, the trial court placed him on probation and withheld adjudication of guilt. Less than six months later, petitioner was arrested for his involvement in a home- invasion robbery. Petitioner admitted violating the conditions of his probation, and the court sentenced him to the statutory maximum for armed robbery, life in prison. Florida has abolished its parole system, making executive clemency petitioner’s only possibility for release. The state court of appeals affirmed and the state supreme court denied review. *Held:* Reversed and remanded. The Eighth Amendment’s ban on cruel and unusual punishment precludes a state from imposing on a juvenile offender a sentence of life in prison without parole for a crime not involving homicide.

***Kennedy v. Louisiana***, 553 US \_\_, 128 S Ct 2641, 170 L Ed 2d 525 (2008). Defendant was convicted in Louisiana of a violent rape of his 8-year-old stepdaughter, and he was sentenced to death under a state statute that authorized capital punishment for the rape of a child under 12. The state supreme court affirmed the judgment after rejecting the defendant’s challenge to the statute based on his claim that his sentence constituted cruel and unusual punishment. *Held:* Death sentence vacated. The Eighth Amendment prohibits the imposition of the death penalty for the rape of a child if the crime did not result, and was not intended to result, in the victim’s death. “The difficulties in administering the death penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards [of decency that mark the progress of a maturing society] and in cases of crimes against individuals, for crimes that take the life of the victim.”

***Roper v. Simmons***, 544 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005). The Eighth Amendment precludes execution of a defendant who was a juvenile when he committed the murder.

***Ewing v. California***, 538 US 11, 123 S Ct 1179, 155 L Ed 2d 108 (2003). Under California’s three-strikes law, a defendant who is convicted of a felony and has previously been convicted of two or more serious or violent felonies must receive an indeterminate life imprisonment term. Such a defendant becomes eligible for parole on a date calculated by reference to a minimum term, which, in this case, is 25 years. While on parole, Ewing was convicted of felony grand theft for stealing three golf clubs, worth \$399 apiece. As required by the three strikes law, the prosecutor formally alleged, and the trial court found, that Ewing had been convicted previously of four serious or violent felonies. In sentencing him to 25 years to life, the court refused to exercise its discretion to reduce the conviction to a misdemeanor—under a state law that permits certain offenses to be classified as either misdemeanors or felonies—or to dismiss the allegations of some or all of his prior relevant convictions. *Held:* Ewing’s sentence is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments. The Eighth Amendment has a narrow proportionality

principle that applies to noncapital sentences. The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only extreme sentences that are “grossly disproportionate” to the crime. Though long, Ewing’s current sentence reflects a rational legislative judgment that is entitled to deference.

**Connecticut Department of Public Safety v. Doe**, 538 US 1, 123 S Ct 1160, 155 L Ed 2d 98 (2003). Among other things, Connecticut’s “Megan’s Law” requires persons convicted of sexual offenses to register with the Department of Public Safety (DPS) upon their release into the community, and requires DPS to post a sex offender registry containing registrants’ names, addresses, photographs, and descriptions on an Internet Website and to make the registry available to the public in certain state offices. Doe, a convicted sex offender who is subject to the law, filed a 42 USC § 1983 action on behalf of himself and similarly situated sex offenders, claiming that the law violates, *inter alia*, the Fourteenth Amendment’s Due Process Clause. The district court permanently enjoined the law’s public disclosure provisions. The Second Circuit affirmed, concluding that such disclosure both deprived registered sex offenders of a “liberty interest,” and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be “currently dangerous.” *Held*: Due process does not require the opportunity to prove a fact that is not material to the state’s statutory scheme. Mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. But even if, *arguendo*, that Doe was deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact (that he is not currently dangerous) that is not material under the statute. The law’s requirements turn on an offender’s conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.

**Lockyer v. Andrade**, 538 US 63, 123 S Ct 1166, 155 L Ed 144 (2003). Under California’s three strikes law, Andrade received two consecutive terms of 25 years to life after stealing \$150 worth of videotapes. In affirming, the California Court of Appeal rejected his claim that his sentence violated the constitutional prohibition against cruel and unusual punishment, concluding that Andrade’s sentence was not disproportionate. The Ninth Circuit reversed. Reviewing the case under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the latter court held that an unreasonable application of clearly established federal law under 28 USC § 2254(d)(1) occurs when there is clear error. *Held*: The Ninth Circuit erred in ruling that the California Court of Appeal’s decision was contrary to, or an unreasonable application of, the Supreme Court’s clearly established law within the meaning of § 2254(d)(1).

#### **(b) Decisions by the Oregon Supreme Court**

**State v. Rodriguez / Buck**, 347 Or 46, 217 P3d 659 (2009). In each case, the defendant, who had no previous criminal history, was convicted of first-degree sexual abuse in violation of ORS 163.427(1)(a)(A) based on sexual touching of a 13-year-old child, the sentencing court refused to impose the 75-month sentence mandated by ORS 137.700(2)(a)(P), and the state appealed. *Held*: Judgments affirmed. As applied to the convictions at issue in these cases, the mandate 75-month sentence is unconstitutionally disproportionate in violation of Article I, section 16. In considering an as-applied challenge, “a court may consider ... the specific circumstances and the facts of the defendant’s conduct that come within the statutory definition of the offense, as well as other case-specific factors, such as characteristics of the defendant and the victim, the harm to the victim, and the relationship between the defendant and the victim.” Because the touchings at issue were borderline one-time offenses and the defendants had no criminal history, the 75-month sentence was unconstitutionally excessive.

**State v. Wheeler**, 343 Or 652, 175 P3d 438 (2007). [1] ORS 137.719, which prescribes a presumptive life sentence for a third conviction for certain sexual offenses, is not facially disproportionate. Although reasonable people could argue about whether repeat sexual offenses should be treated differently from crimes of other types, the legislature’s decision to enact ORS 137.719 was not unreasonable. [2] Application of ORS 137.719 to defendant was not disproportionate based on defendant’s assertion that the offenses did not result in any permanent physical injury to the victims. Defendant’s sentences bear a sufficient relationship to the gravity of the crimes of which he was convicted and his prior felony convictions.

**State v. Ferman-Velasco**, 333 Or 422, 41 P3d 404 (2001). Imposing a Measure 11 minimum sentence on a class B felony does not violate Art I, § 16, on the ground that no minimum sentence is prescribed for some crimes that are class A felonies or have a higher crime-seriousness ranking.

**State ex rel. Caleb v. Beesley**, 326 Or 83, 949 P2d 724 (1997). Ballot Measure 11 (1994), as amended by the 1995 legislature, does not violate the prohibition against cruel and unusual punishments in Art I, § 16, or the reformation

clause of *former* Art 1, § 15.

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): Measure 11 does not violate Art I, § 15.

### (c) Decisions by the Oregon Court of Appeals

*State v. Barajas*, 254 Or App 106, 292 P3d 636 (2012), *rev den*, 353 Or 747 (2013). Defendant was convicted of, among other crimes, felony fourth-degree assault and misdemeanor fourth-degree assault, and the court imposed probationary sentences. He subsequently violated the terms of probation, and the trial court revoked his probation and sentenced him to six months in prison for the felony assault per OAR 213-010-0002(1), and 12 months in jail for the misdemeanor assault per ORS 137.545(5)(a). On appeal, he argued that the 12-month jail sentence imposed on his misdemeanor conviction is unconstitutionally disproportionate under Art. I, § 16, because it exceeds the 6-month maximum sentence that the court could impose after revoking his probation on the conviction for *felony* fourth-degree assault. *Held*: Affirmed. [1] The 12-month sentence is not unconstitutionally disproportionate. “In revoking probation for a misdemeanor and imposing a jail sentence, a trial court is belatedly imposing the sentence that it could have imposed or did impose at the original sentencing, but which it decided to hold in abeyance in favor of probation. That sentence is punishment for the original offense. Consequently, in evaluating the vertical proportionality of the sentence imposed on a lesser-included misdemeanor, we compare it to the maximum sentence that was available at the original sentencing to punish the greater-inclusive felony.” [2] “When the sentence for the greater-inclusive offense is governed by the sentencing guidelines, the proper comparator is the maximum departure sentence available for the gridblock representing the intersection of the defendant’s criminal history score and the crime’s seriousness rating.” Here, that would have been 18 months in prison for the felony assault, which exceeds the 12-month sentence that defendant actually received on the misdemeanor.

*State v. Burge*, 252 Or App 574, 288 P3d 565 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was found guilty on 12 counts of second-degree sexual abuse, and the sentencing court ranked those convictions as category 7 offenses. *Held*: Reversed and remanded. Under *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013), the category 7 ranking violated the “vertical proportionality” principle in Art I, § 16, even for the convictions based on those that involved a victim under the age of 16—the court should have ranked them as category 6 offenses. Under *Simonson*, “vertical proportionality is measured by the sentences that are available for the conduct at issue, not on what any individual defendant actually receives.”

See also *State v. Decamp*, 252 Or App 177, 285 P3d 1130 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013).

*State v. Goodenow*, 251 Or App 139, 282 P3d 8 (2012). Defendant purchased a number of lottery tickets with a stolen credit card, and ended up winning a \$1 million prize. She pleaded no-contest to first-degree aggravated theft, first-degree forgery, and cheating, in exchange for the dismissal of other charges. She waived her right to a jury trial on two counts of criminal forfeiture (for the lottery proceeds) and was tried on stipulated facts; she agreed that the proceeds could be forfeited under the Oregon forfeiture statutes, but argued that the forfeiture, which totaled more than \$960,000, would violate the Eighth Amendment’s Excessive Fines Clause; she suggested that the court should order forfeiture of only \$10,843, the amount that remained of her first lottery-winnings installment after she paid off her \$33,000 Visa bill. The court order all of it forfeited. *Held*: Affirmed. [1] “Oregon’s criminal forfeiture statutes do not limit the amount of property that may be forfeited as the proceeds of prohibited conduct. They do not require courts to determine whether a forfeiture of a defendant’s property is proportional to the defendant’s crime. ORS 131.585(1).” [2] The Excessive Fines Clause applies to *in personam* forfeitures of the proceeds of crimes “even if, historically, the type of property to be forfeited has been subject to civil *in rem* forfeiture as ‘guilty property.’ In other words, it is the nature of the forfeiture, not the type of property forfeited, that controls whether a forfeiture is subject to the Excessive Fines Clause.” [3] “In order to determine whether a forfeiture violates the Excessive Fines Clause, a court must assess the gravity of the defendant’s crime and the severity of the forfeiture and compare the two. If the forfeiture is ‘grossly disproportional’ to the gravity of the defendant’s crime, then it is unconstitutional. When assessing the gravity of a defendant’s crime, courts consider both the general characteristics of the crime and the specific characteristics of the defendant’s conduct. Regarding the general characteristics, courts consider the type of crime, that is, whether it is a crime against a person or property, as well as the classification and potential sentences for the crime, which reflect the public’s view, as expressed through legislation, of the gravity of the crime. Regarding the particular characteristics of the crime, courts consider the actual harm risked and caused by the conduct, as well as any mitigating or aggravating circumstances, such as the defendant’s motive and criminal history. When assessing the severity of a defendant’s forfeiture, courts consider the amount of the forfeiture and the effect of the forfeiture on the defendant.” Also, “whether a punishment is appropriate depends not only on the harm that the defendant

risked and caused, but also on the gain that the defendant realized.” [4] As a general matter, separating a criminal defendant from the proceeds of her crimes is an appropriate, not an excessive, punishment. It serves legitimate retributive and deterrent purposes, and it takes from the defendant only that which she should not have received in the first place.

[5] “Because defendant’s lottery winnings are the direct proceeds of her criminal conduct, the forfeiture of the winnings is simply not that severe. It deprives defendant of a net gain from her crimes but does not inflict a net loss.”

*Notes:* [a] The Court of Appeals declined to consider defendant’s argument based on the “excessive fines” clause Art. I, § 16, because she had not raised that below as an alternative to her argument under the Eighth Amendment. [b] The court noted that because neither party raised the issue, it “assumed, without deciding, that the Excessive Fines Clause ... applies to the states through the Fourteenth Amendment.”

*State v. Hoover*, 250 Or App 504, 280 P3d 1061, *rev den*, 352 Or 564 (2012). Defendant was charged with first-degree unlawful sexual penetration by digitally penetrating the vagina of a child under the age of 12. The court found defendant guilty and imposed the 300-month sentence mandated by ORS 137.700(2)(b)(F). *Held:* Affirmed. The court summarily rejected defendant’s *Rodriguez/Buck* challenge to the 300-month sentence.

*State v. Chase*, 246 Or App 389, 265 P3d 94 (2011). Defendant was sentenced to presumptive probationary terms on two felony convictions and a probationary sentence on a misdemeanor conviction for fourth-degree assault. He later violated his probation, and the trial court revoked his probation and imposed concurrent 60-day sentences on the felony convictions—the limit imposed by ORS 137.545(5)(b) (2009)—and a six-month jail term on the misdemeanor, which is permitted by ORS 137.545(5)(a). Defendant appealed, contending that the six-month sanction violated the proportionality clause, Art I, § 16. *Held:* Affirmed. Because the 60-day limit in ORS 137.545(5)(b) applies only if the probationary term was “presumptive,” defendant’s proportionality argument would have merit only if a greater, felony assault offense would have resulted in a presumptive probationary sentence. Defendant did not establish that that would have been the case, so he failed to establish that the revocation sanction the court imposed on his misdemeanor assault conviction was greater than what he could have received if that underlying conviction had been a felony.

*Note:* Because a felony conviction carries a variety of adverse consequences and limitations that a misdemeanor conviction does not, comparing an incarceration term imposed on a felony conviction versus one imposed on a lesser-included misdemeanor is like comparing apples and oranges. The Court of Appeals simply assumed for purposes of this case—but did not decide—that the “vertical proportionality” analysis under Art I, § 16, may apply to probation-revocation sanctions.

*State v. Johnson*, 244 Or App 574, 260 P3d 782 (2011). Defendant was a suspect in an unsuccessful armed robbery at a retail store in which the robber wore a ski mask. Defendant was convicted of second-degree robbery, and the court imposed the 70-month minimum sentence. On appeal, defendant also argued that his age, undiagnosed mental illness, good behavior since being diagnosed, and lack of a criminal history rendered the 70-month sentence he received for second-degree robbery was unconstitutionally cruel and unusual. *Held:* Affirmed. Applying *State v. Rodriguez/Buck*, 347 Or 46 (2009), the court found that a 70-month sentence for a person who robbed a victim at gunpoint would not shock the conscience of reasonable people.

*State v. Simonson*, 243 Or App 535, 259 P3d 962 (2011), *rev den*, 353 Or 788 (2013). Defendant, who was 23 years old, had sex with girls who were 16 and 17 years of age, and was charged with five counts of second-degree sexual abuse in violation of ORS 163.425(1)(a). The state’s theory was that the victims could not consent because they were under 18 year of age. ORS 163.315(1)(a); *State v. Stamper*, 197 Or App 413 (2005). Defendant argued that *Stamper* was wrongly decided. Defendant also argued that ranking his convictions as crime-seriousness 7 offenses violates the “vertical proportionality” principle in Art I, § 16. *Held:* Reversed and remanded. [1] The Court of Appeals reaffirmed *Stamper* and affirmed defendant’s convictions. [2] But the crime-seriousness ranking of 7 violated “vertical proportionality” principles: “Defendant’s acts in committing sexual abuse in the second degree necessarily are less severe than the same acts would have been if defendant’s victims had been younger [and he had been convicted instead of third-degree rape], but the potential penalty for defendant’s acts is greater than the potential penalty for the same acts against younger victims. Such a scheme does not comport with the standard set by Article I, section 16. Defendant’s sentences must be vacated and the case remanded for resentencing.”

*State v. Wilson*, 243 Or App 464, \_\_ P3d \_\_ (2011). Defendant was 19 years old and had lived with the family of the victim, a 4-year-old girl, for many years and was considered a member of the family. He was in a position of trust and responsibility and often was a babysitter for the victim. He was convicted of first-degree sexual abuse for touching her vaginal area with his fingers and instructing her not to tell. At sentencing, he asserted that he had a “diminished capacity”

and asked for relief from the 75-month minimum sentence per *Rodriguez/Buck*. The sentencing court imposed the minimum sentence, concluding that defendant's conduct did not warrant an exception—including the victim's age, the nature of the touching, and his position of trust—and rejecting his excuse: "I don't see that I've got any discretion here," and "this just doesn't fall under this very narrow exception so I guess I've got no choice." *Held*: Reversed and remanded. [1] Under *Rodriguez/Buck*, "the trial court can take into account a defendant's mental capacity when determining whether a Measure 11 sentence violates Article I, section 16." "Characteristics of either the defendant or the victim, or both, may be considered, and if the trial court believed otherwise, that was legal error." [2] The court's comments were too ambiguous to allow affirmance: "First, to do so would be to presume that the court's oral colloquy with defendant was intended to be a definitive and carefully reasoned explanation for its decision. In fact, it more closely resembles the thinking out loud of a judge struggling with a troubling and difficult decision that is not susceptible to (nor intended to be subjected to) the kind of analysis that we apply to statutes or written judicial opinions. Second, there is no need for us to engage in an exercise that, in the final analysis, would result only in an interpretation of ambiguous language, when we can remand the case for a more authoritative disambiguation."

*State v. Wiese*, 238 Or App 426, 241 P3d 1210 (2010), *rev den* 349 Or 655 (2011). Defendant was convicted of two counts of first-degree sodomy, two counts of first-degree sexual abuse, and one count of first-degree rape, and was sentenced to 300 months in prison under ORS 137.700. On appeal, defendant argued that his sentence was disproportionate to the offenses and constituted cruel and unusual punishment under the state and federal constitutions. *Held*: Affirmed. Defendant's sentence was not disproportionate to his offenses because (1) the severity of the penalty is congruent with the gravity of the offense—his repeated sexual abuse of his 11-year-old stepdaughter for over a year—even though she did not suffer serious physical injuries; (2) the court has previously rejected a comparison of the penalties for sexual abuse of children and intentional murder; and (3) defendant had prior convictions for robbery and assault and his punishment for those offenses did not deter him from engaging in criminal behavior.

*State v. Alwinger*, 231 Or App 11, 217 P3d 692 (2009), *on recon*, 236 Or App 240, 236 P3d 755 (2010). Under *Rodriguez/Buck*, the 300-month sentence imposed pursuant to ORS 137.700(2)(b)(F) on defendant's conviction for first-degree sexual penetration did not violate Art I, § 16, or the Eighth Amendment even though defendant was a first-time offender and the crime did not result in physical injury.

*State v. Baker*, 233 Or App 536, 226 P3d 125 (2010). Defendant was convicted of five counts of second-degree sexual abuse for having sex repeatedly with his teenaged daughter, and the court imposed sentences totaling 180 months. *Held*: Affirmed. Those sentences do not violate Art I, § 16 (distinguishing *Rodriguez/Buck*.)

*State v. Shaw*, 233 Or App 427, 225 P3d 855 (2010). Defendant was convicted of first-degree rape of an 11-year-old girl and the court imposed a sentence of 300 months and a lifetime term of post-prison supervision pursuant to ORS 137.700(2)(b)(D). *Held*: Affirmed. That sentence does not violate Art I, § 16, or the Eighth Amendment.

*State v. Pardee*, 229 Or App 598, 215 P3d 870, *rev den*, 347 Or 349 (2009). Defendant was convicted of two counts of first-degree rape, four counts of first-degree sodomy, two counts of first-degree unlawful sexual penetration, and three counts of first-degree sexual abuse. He was sentenced to a total of 400 months in prison and a lifetime PPS pursuant to ORS 137.700(2)(b)(D) to (F) and ORS 144.103(2), which require imposition of a 300-month sentence and lifetime term of PPS for such convictions when the victim is under the age of 12. Defendant appealed contending that those statutes violate Art I, § 16. *Held*: Affirmed. The only issue presented on appeal is an as-applied proportionality challenge, and defendant's sentence is "not unconstitutionally disproportionate to his crimes" under the standard set forth in *State v. Wheeler*, 343 Or 652 (2007). Defendant's primary argument is that, because the penalty for intentional murder—300 months imprisonment without mandatory lifetime PPS—is less severe than the penalty that he received for each of seven counts of which he was convicted, the latter penalties are disproportionate. "But as *Wheeler* makes clear, the text and history of Art I, § 16, establish that disproportionality is a measure of the relationship between a penalty and *the* offense, not the relationship between penalty for one offense and the penalty for another."

*State v. Dobash*, 210 Or App 145, 149 P3d 1235 (2006). Defendant contended that the 4-year probationary sentence the court imposed on his conviction for second-degree theft is disproportionate punishment in violation of Art. I, § 16, because the presumptive sentence for *first-degree* theft would have been only a 2-year probationary term. *Held*: Affirmed. There is no disproportionality because the maximum term for the greater offense is 5 years, OAR 213-005-0008(2). It is immaterial that *Blakely* may require additional jury findings in order to impose that maximum term.

**State v. Meyrovich**, 204 Or App 385, 129 P3d 729, *rev den*, 340 Or 673 (2006). Defendant, who had been convicted nine times previously of sexual offenses, was found guilty of first-degree burglary and first-degree sexual abuse for forcibly kissing the victim on her neck. The court imposed a life sentence on that conviction pursuant to ORS 137.719(1). *Held*: Affirmed. [1] “[A] sentence violates the proportionality requirement of Article I, section 16, only if it is so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper. Further, ... determining sentences is a legislative function that should be subjected to an extremely deferential level of judicial review.” [2] ORS 137.719(1) does not prescribe a life sentence based on the gravity of the offense but on “the fact that the offender is a habitual sex criminal,” and “Oregon courts have long recognized the validity of statutes that provide enhanced penalties based on the repetitive nature of the offense.” [3] The life sentence does not violate Art I, § 16, given defendant’s history of repeated sexual offenses and that “he never acknowledged culpability for his actions in the present case.”

**State v. Stickney**, 195 Or App 155, 97 P3d 1205 (2004) (*per curiam*), *rev den*, 338 Or 17 (2005). The trial court correctly overruled defendant’s various constitutional objections to the mandatory DNA sampling ordered pursuant to ORS 137.076 on his felony conviction for PCS.

**State v. Kinkel**, 184 Or App 277, 56 P3d 463, *rev den*, 335 Or 142 (2002). The sentencing court properly imposed a 112-year series of consecutive sentences on defendant’s convictions on four counts of murder and 26 counts of attempted murder. Based on the circumstances, and despite defendant’s youth and mental difficulties, that sentence did not violate either Art I, §§ 15 or 16.

**State v. Koch**, 169 Or App 223, 7 P3d 769 (2000). A 24-month departure sentence for a conviction for first-degree forgery on crime-seriousness ranking of 3 was constitutionally disproportionate when compared with the 18-month maximum departure sentence that could have been imposed the same conviction with a ranking of 4; remanded for resentencing.

**State v. Thorp**, 166 Or App 564, 2 P3d 903 (2000), *rev dism’d* 332 Or 559 (2001). Defendant, a 16-year-old male, was convicted of two counts of second-degree rape for having consensual intercourse with a girl who is more than 3 years younger than he is. The sentencing court ruled that the 75-month minimum sentence mandated by ORS 137.707(4)(a)(K) is unconstitutionally disproportionate punishment and imposed a 35-month sentence instead. *Held*: Reversed and remanded for entry of the minimum sentence. [1] A sentence violates Art I, § 16, only if it is “so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper.” [2] Whether the sentence is disproportionate under the Eighth Amendment requires consideration of “(a) the gravity of the offense and the harshness of the penalty; (b) the sentences imposed on other criminals in the same jurisdiction; and (c) the sentences imposed for commission of the same crime in other jurisdictions.” [3] In light of the historical treatment of this offense and the punishments prescribed for similar offenses, the 75-month minimum sentence is not disproportionate.

**State v. Mercado-Vasquez**, 166 Or App 15, 998 P2d 743 (2000). Defendant, who was from Mexico, was convicted of two counts of rape in the second degree, and the sentencing court ruled that the 75-month minimum sentence violated Art I, § 16, and imposed 16-month sentences instead. *Held*: None of the following factors cited by the sentencing court rendered the minimum sentence unconstitutional: (a) “cultural considerations” based on how such crimes are treated in Mexico; (b) that the victim may have been sexually active or a willing participant; (c) that defendant was “naïve”; (d) that defendant might have received a lighter sentence under prior law; (e) that he cooperated with the police after the crime was disclosed; and (f) that he will be deported as a result of these convictions.

**State v. Bowman**, 160 Or App 8, 980 P2d 164 (1999), *rev den*, 334 Or 655 (2002). Defendant, a 17-year-old juvenile, was convicted of robbery in the second degree for robbing two young men at knifepoint at night. The sentencing court refused to impose the 70-month minimum sentence and instead placed defendant on probation, and the state appealed. While that appeal was pending, the court revoked defendant’s probation and again refused to impose the minimum sentence and imposed the 6-month sanction prescribed by the guidelines. The state also appealed from that judgment, and the two appeals were consolidated on appeal. *Held*: The sentencing court erred by refusing to impose the 70-month minimum sentence; that sentence is not unconstitutionally disproportionate punishment in violation of Art I, § 16, even though he was only a juvenile, had no prior criminal record, and the victim was not injured. “The conduct that defendant engaged in was fraught with the potential for causing fear in the victims and promoting violence.”

**State v. Melillo**, 160 Or App 332, 982 P2d 12, *rev den*, 329 Or 438 (1999). Defendant was convicted of robbery

in the first degree, and the sentencing court refused to impose the 90-month minimum sentence and instead imposed the 38-month presumptive sentence. On the state's petition, the Supreme Court issued a writ of mandamus directing the sentencing court to resentence defendant under Measure 11. On remand, the court again refused to impose the minimum sentence and reimposed the same sentence, and the state appealed. *Held*: Reversed. The 90-month minimum sentence is not unconstitutionally disproportionate punishment even though defendant was only 21 years old, has only minor prior convictions, cooperated with the police, and was only the "wheelman" in the robbery. "He helped to commit a crime that involved the use of a gun and that was fraught with the potential for causing fear in the victim and promoting violence."

*State v. Silverman*, 159 Or App 524, 977 P2d 486, *rev den*, 329 Or 528 (1999), *cert den*, 531 US 876 (2000). Defendant was convicted on two counts of first-degree sexual abuse, the court refused to impose the Measure 11 minimum terms and instead placed defendant on probation, and the state appealed. *Held*: Reversed and remanded. Even though it is possible that defendant might profit from mental-health treatment, the 75-month minimum sentences are not unconstitutionally disproportionate or cruel and unusual punishment in violation of Art I, § 16, or the Eighth Amendment.

*State v. McLain*, 158 Or App 419, 974 P2d 727 (1999). On defendant's conviction for murder, the sentencing court imposed a sentence of "imprisonment for life" and a 25-year minimum term per ORS 163.115(5). The defendant appealed, contending that the "life imprisonment" term violates Art I, § 16. *Held*: The "life imprisonment" term vacated. Although ORS 163.115(5)(a) currently mandates a sentence of life imprisonment, no statute allows the parole board to parole a person convicted of murder based on a crime committed after November 1, 1989. Therefore, a "life imprisonment" term effectively is a "true life" sentence because the board lacks authority to parole. That creates a proportionality problem under Art I, § 16, because a person convicted of *aggravated* murder may be eligible for parole after serving a 30-year minimum sentence.

*State v. Davilla*, 157 Or App 639, 972 P2d 902 (1998), *rev den*, 334 Or 76 (2002). Defendant was 16 years old in August 1991, when he attempted to rape a woman and then murdered her. The sentencing court imposed a departure sentence of 1,394 months on defendant's murder conviction. *Held*: [1] The sentence violates ORS 161.620, which provides that a remanded juvenile is not be sentenced to imprisonment for the duration of his life without the possibility of release. A departure sentence of 116 years is in practical effect imprisonment for life without the possibility of release or parole. [2] Under the statutes in existence when defendant committed his crimes, a juvenile remanded to adult court cannot receive a mandatory minimum sentence or an indeterminate sentence for life. A determinate sentence under the guidelines is not a "mandatory minimum sentence" within the meaning of ORS 161.620. Therefore, the court on remand may impose a determinate sentence under the guidelines. [3] Art I, § 16, imposes a ceiling on the sentence that the court can impose on remand. Defendant cannot receive a more severe sentence for murder than he would for aggravated murder.

*State v. Ferman-Velasco*, 157 Or App 415, 971 P2d 897 (1998), *aff'd* 333 Or 422, 41 P3d 404 (2001). ORS 137.700 does not violate the proportionality clause of Art I, § 16, even though the 75-month minimum sentences for the class B felonies that defendant committed (second-degree rape and first-degree sexual abuse) are longer than the presumptive sentences prescribed for some class A felonies, "because the people rationally could believe that longer sentences are warranted from crimes against persons."

*See also State v. McGhee*, 157 Or App 598, 971 P2d 913 (1998) (same).

*State v. Gee*, 156 Or App 241, 965 P2d 462 (1998), *on recons*, 158 Or App 597, 976 P2d 80, *rev den*, 328 Or 594 (1999). Sentencing court erred in refusing to impose minimum sentence on defendant's conviction for first-degree robbery. The court's findings that defendant's criminality "has largely been the product of episodic drug abuse and resultant mental illness" and that he "will respond to mental health and drug abuse treatment" does not render mandated 90-month term unconstitutionally cruel and unusual in violation of Art I, § 16.

*State v. Shoemaker*, 155 Or App 416, 965 P2d 418, *rev den*, 328 Or 41 (1998). Defendant, age 17, robbed the victim at knifepoint, he pleaded guilty to second-degree robbery, and the court imposed the 70-month minimum term. *Held*: The sentence is not cruel and unusual punishment in violation of Art I, § 16.

*State v. Rhodes*, 149 Or App 118, 941 P2d 1072 (1997), *rev den*, 326 Or 389 (1998). Imposition of the 75-month minimum sentence mandated by ORS 137.707(2)(p) on defendant's conviction for first-degree sexual abuse does not violate Art I, §§ 15 and 16, even though defendant was only 15 years old and the victim was his younger sister, particularly in light of his admission to repeated molestations even after his mother told him to stop and evidence suggesting he committed more serious offenses.

*State v. George*, 146 Or App 449, 934 P2d 474 (1997): [1] Minimum sentence imposed per Measure 11 did not, on its face, violate Art I, § 16. [2] Measure 11 does not violate Eighth Amendment.

*State v. Lawler*, 144 Or App 456, 927 P2d 99 (1996), *rev den*, 326 Or 389 (1998): [1] With respect to a juvenile who is 15 to 17 years old and commits a Measure 11 offense, ORS 137.707 eliminates any juvenile-court discretion to waive jurisdiction—the charges must be tried in adult court and the court must impose the mandated sentence; [2] Measure 11 does not violate Art I, § 15; [3] defendant’s challenge to Measure 11 based on claim that sentence for murder violates “proportionate” clause Art I, § 16, is not reviewable, because he was not convicted of murder.

See also *State v. Spence*, 145 Or App 496, 932 P2d 63 (1996), *rev den*, 325 Or 280 (1997); *State v. Keerins*, 145 Or App 491, 932 P2d 65 (1996); *State v. Parker*, 145 Or App 35, 929 P2d 327 (1996), *rev den*, 324 Or 654 (1997); *State v. Jackson / Hoang*, 145 Or App 27, 929 P2d 323 (1996), *rev den*, 326 Or 389 (1998).

*State v. Rice*, 114 Or App 101, 836 P2d 731 (*in banc*), *rev den*, 314 Or 574 (1992). Defendant pleaded guilty to 7 class A misdemeanor charges, the court imposed 7 consecutive 90-day jail terms, and defendant challenged the cumulative sentence on the ground that it was unconstitutionally disproportionate in light of the fact that the presumptive sentence for more serious felonies would have been less. *Held*: “Here, presented with a scheme under which the imposition of any sentence on defendant’s misdemeanor offenses is discretionary, and the imposition of a sentence of probation for lesser felonies is mandatory, we hold that the existence of felony sentencing guidelines does not render disproportionate a misdemeanant’s sentence of incarceration.”

*State v. Spinney*, 109 Or App 573, 820 P2d 854 (1991), *pet rev disp’d* 313 Or 75 (1992). The sentencing guidelines do not violate Art I, §§ 15 and 16.

## **7. Right to allocution, to be present**

See Or Const, Art I, § 11; ORS 137.030.

See also Part XIII-B (“Entry of Amended or Correct Judgment”), *below*.

*V.L.Y. v. Board of Parole*, 338 Or 44, 106 P3d 145 (2005). [1] In determining that petitioner is a “predatory sexual offender” for purpose of community notification, the board erred under ORS 181.585 in applying a procedure that relied exclusively on a risk-assessment scale that is based solely on the petitioner’s past crimes and excluded consideration of his current behavior and characteristics. [2] “[A]ny party facing such a designation, whatever the reasons for the designation, must be accorded the basics of due process. Those basics, at a minimum, include notice and an opportunity to be heard as to all factual questions at a meaningful time and in a meaningful manner. Because of the nature of the factual inquiry assigned to it . . . , the board is not at liberty to substitute a purely documentary exercise for the hearing that any person faced with such a designation is entitled to receive.”

*State v. Ferman-Velasco*, 333 Or 422, 41 P3d 404 (2001). Measure 11 does not violate the Eighth Amendment, the right to allocution under the federal constitution.

*State v. Rogers*, 330 Or 282, 4 P2d 1261 (2000). The right of allocution in Art I, § 11, includes the right to make an unsworn statement to the sentencer. In a capital case, however, the sentencing court “has the authority to exercise reasonable discretion regarding allocution by a defendant to ensure that the trial is orderly and expeditious” and that the defendant’s allocution does not include “irrelevant or prejudicial statements.” The right includes “the right to make any statements relevant to existing sentencing and parole practices.” The court erred when it precluded defendant from making statements regarding the possibility of consecutive sentences.

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): Measure 11 does not violate the right to allocution in Art I, § 11.

*State v. Mayes*, 234 Or App 707, 229 P3d 628 (2010). Defendant originally was sentenced in 1996 on convictions for murder and assault; the judgment imposed a consecutive “presumptive” sentence of 34 months on the assault conviction using gridblock 8-C. In 2007, defendant filed a motion under ORS 138.083(1) to correct the judgment, asserting that the murder convictions must merge and that the 34-month sentence violated the “shift to I” rule. The court entered an amended judgment that merged the murder convictions and recited that the 34-month sentence actually was a departure based on

gridblock 8-I. *Held*: Affirmed. [1] The record supported the court’s finding that the 34-month sentence as originally imposed actually was a departure using gridblock 8-I. Thus, the amendment was proper as merely correcting a clerical error; it was not a “resentencing” to which *Blakely v. Washington* might apply. [2] Because “the trial court did not make any changes to defendant’s sentences that involved disputed facts or the exercise of judicial discretion,” defendant did not have a personal right to allocute.

*State ex rel. Juv. Dept. v. Leach*, 202 Or App 632, 123 P3d 347 (2005). Although a criminal defendant has a right under Art I, § 11, to be present at and speak at sentencing, that the right to be present and allocute “does not apply at the dispositional phase of a juvenile [delinquency] proceedings.”

*State v. Isom*, 201 Or App 687, 120 P3d 912 (2005). Defendant was convicted of, *inter alia*, attempted aggravated murder, and the court found her to be a dangerous offender and, at a resentencing hearing, imposed on that conviction, pursuant to ORS 161.725(1) and 161.737(1), a 30-year indeterminate sentence, a 220-month minimum sentence, and a 36-month term of post-prison supervision. *Held*: The court erred in refusing to allow defendant to allocute; even though the case was back before the court for resentencing to correct a clerical error, the defendant was entitled to be heard.

*State v. Jacobs*, 200 Or App 665, 118 P3d 290 (2005). [1] Defendant did not waive his right to be present at sentencing when, after the court orally imposed sentence, he requested a continuance to enable him to brief legal issues related to that sentence. [2] Because the oral sentence was not executed in the interim by delivery of defendant to the Department of Corrections, the court retained authority to modify that sentence. But the court erred when, after considering the parties’ briefs, it entered a written judgment that imposed a sentence that was more onerous than the oral sentence without reconvening a hearing in court for that purpose.

*State v. Riley*, 195 Or App 377, 97 P3d 1269 (2004), *rev den*, 340 Or 673 (2006). Pursuant to ORS 138.083(1), and based on defendant’s prior conviction for first-degree burglary, the sentencing court properly entered an amended judgment to comply with ORS 137.635(3). Although the sentencing court erred by amending the judgment without specific notice to defendant and outside his presence, the error is harmless because “the modification did not involve disputed facts or the exercise of judicial discretion.”

*State v. Massie*, 188 Or App 41, 69 P3d 1236 (2003). A defendant has a right to be personally at sentencing, including at a restitution hearing. In order for restitution to be set in the defendant’s absence, the defendant must have waived his right to be present—the defendant’s mere absence at a scheduled hearing does not establish voluntary waiver.

*State v. Parker*, 145 Or App 35, 929 P2d 327 (1996), *rev den*, 324 Or 654 (1997): Measure 11 does not violate a defendant’s rights, guaranteed by Art I, § 11, of allocution or to counsel at sentencing.

*See also State v. George*, 146 Or App 449, 934 P2d 474 (1997).

## 8. Equal-treatment objections

*See* Or Const, Art I, § 20; US Const, Amend XIV.

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): [1] Measure 11 does not violate Art I, § 20. [2] Measure 11 does not violate the Equal Protection Clause.

*State v. Abbey*, 239 Or App 306, 245 P3d 152 (2010), *rev den*, 350 Or 423 (2011). Defendant was convicted of DUII for a third time, for riding a bicycle while intoxicated. The sentencing court imposed a permanent driver’s license revocation under ORS 809.235(1)(b). *Held*: Affirmed. [1] A defendant whose DUII conviction is based on operating a bicycle while under the influence are not exempt from ORS 809.235 even though a driver’s license is not required to operate a bicycle. [2] Application of ORS 809.235 to defendant did not deny him equal privileges as an individual or as a member of a class under Art. I, § 20.

*State v. Terry*, 214 Or App 56, 162 P3d 372 (2007). ORS 809.235(1)(b) does not violate Art I, § 20, by requiring a permanent revocation of driving privileges upon a third conviction for DUII under ORS 813.010, despite defendant’s contention that it discriminates unfairly on the basis of residence (by excluding residents of other states). “The statute distinguishes on the basis of where the person committed the offense, not on the basis of where the person who committed the offense resides.” Moreover, because defendant committed the offense on which the revocation is based, he is

responsible for placing himself in the disadvantaged class.

*State v. Alvey*, 204 Or App 681, 131 P3d 765 (*per curiam*), *rev den*, 341 Or 366 (2006). The trial court dismissed an indictment charging the felony offense of second-degree encouraging child sexual abuse under ORS 163.686 on the ground that that charge is substantively indistinguishable from the misdemeanor-level *third*-degree version of the offense under ORS 163.687; the court reasoned that that violates equal-protection principles by impermissibly conferring on the district attorney unbridled discretion to charge the same conduct as either a felony or a misdemeanor. *Held*: Reversed and remanded. Such a situation does not create an equal-protection problem.

*Cunningham v. Thompson*, 186 Or App 221, 62 P3d 823 (2003), *mod on recons*, 188 Or App 289, 71 P3d 110, *rev den*, 337 Or 327 (2004). Trial counsel did not provide inadequate assistance by failing to challenge, on equal-protection grounds, the district attorney's decision to seek the death penalty, because the evidence established "that the county made its charging and sentencing decisions in petitioner's case in a manner that was consistent with a coherent, systematic policy that, moreover, was not prompted by any impermissible discriminatory motive."

*State v. Acker*, 175 Or App 145, 27 P3d 1071 (2001), *rev den*, 333 Or 260 (2002). Defendant, an adult, was convicted of first-degree sexual abuse for fondling a 13-year-old girl, and he was sentenced to 75 months. He contended on appeal that the trial court erred when it denied his motion to compel the state to allow him to plead guilty to attempted first-degree sexual abuse, asserting that the district attorney unlawfully refused to allow him to plead to the lesser offense. *Held*: Affirmed. [1] Neither ORS 135.405 nor Art I, § 20, requires the district attorney to offer adults the same opportunities for a plea bargain that are offered to juveniles charged with the same offense. [2] The district attorney did not unconstitutionally give controlling weight to the wishes of the victim in determining whether to offer a plea bargain to defendant. [3] The district attorney has a systematic, coherent policy on plea bargains for Measure 11 offenses that was consistently applied to defendant.

*State v. George*, 146 Or App 449, 934 P2d 474 (1997): Minimum sentence imposed per Measure 11 did not, on its face, violate Art I, § 20.

## 9. Victim's rights at sentencing

*See* Or Const, Art I, §§ 42-44; ORS 147.405, *et seq.*

*State v. Barrett*, 350 Or 390, 255 P3d 472 (2011). Defendant was charged with stalking, a class A misdemeanor, and the victim (his estranged wife) invoked her right to be notified in advance of sentencing by completing the form provided to her by the district attorney's office. That office received that form on February 28, 2011—the same day that a pretrial conference was scheduled. At that conference, the prosecutor engaged in plea negotiations with defendant, and he ultimately pleaded guilty to a single charge of stalking and the trial court immediately sentenced him to probation. The victim was not present at those proceedings because she had been advised by the advocate that nothing would happen at the conference, and the prosecutor did not comply with ORS 147.510(2) by advising the court whether she had been advised of the hearing and wished to participate. After learning what had happened in her absence, the victim filed a claim per ORS 147.515, alleging a violation of her state constitutional rights to be notified of, and to be present and heard at, the sentencing. The victim also moved the court to vacate defendant's sentence and hold a resentencing where she could be present and heard. The state filed a separate motion proposing the same remedy. After a hearing, the trial court found that the victim's rights had been violated but nevertheless denied relief, concluding that no source of law authorized it to order resentencing as a remedy. Pursuant to ORS 147.537, the victim appealed from the trial court's order to the Oregon Supreme Court. *Held*: Reversed, "sentence is vacated," and remanded for "resentencing." [1] Although the usual rule is that the court will not consider a constitutional issue before resolving a potentially dispositive statutory issue, the "procedural path to a statutory remedy is less clear [in this case], and we conclude that this is an appropriate occasion in which to address the victim's constitutional claims without also addressing or resolving whether the victim would be entitled to the remedy she seeks as a result of the violation of her statutory rights." [2] Defendant's argument that the victim did not establish a violation of Art. I, § 42(1)(a), because she did not make a "specific request" to participate before the sentencing hearing has no merit in light of the trial court's factual finding that she had, and that finding is supported by evidence that, before the hearing, she verbally had made that request to the advocate and had completed and sent in the form, even though it arrived later. [3] The remedies clause of Art. I, § 42(3)(a) ("Every victim ... shall have remedy by due course of law for violation of a right established in this section.") authorizes the remedy of resentencing even though § 42(2) provides that "[n]othing in this section ... may ... be used to invalidate ... [a] conviction or adjudication[.]" That limitation does not

preclude vacating a final judgment to conduct a resentencing because, in context, the term “conviction” refers only to the finding of guilt” and “adjudication” refers only to a delinquency adjudication. Thus, “defendant’s sentencing was neither a ‘conviction’ nor an ‘adjudication.’” [4] Defendant’s claim that the victim had waived her right to a remedy by not requesting it before attachment of jeopardy, as provided in ORS 147.533(1)(b)(C), has no merit because the victim’s request falls within the exception in ORS 147.533(2)(a)—“Remedies that may be effectuated after the disposition of a criminal proceeding.”—which “appears to be broad enough to include modifying the terms of a criminal judgment, including a sentence.” [5] A resentencing would not violate the Double Jeopardy Clause in the Fifth Amendment. Relying on *United States v. DiFrancesco*, 449 US 117 (1980), the court explained: “The imposition of the original sentence is not comparable to an acquittal for double jeopardy purposes, and resentencing defendant with the possibility that his sentence may be increased is not inconsistent with either the history of the policies of the Double Jeopardy Clause.” [6] The double-jeopardy clause in Art. I, § 12, would not bar resentencing, because Art. I, § 42(2), expressly “supersedes any conflicting section” in the state constitution.

^ *State v. Algeo*, S060830 (on victim’s petition for review under ORS 147.539). Did the sentencing court err when it applied comparative-negligence principles under ORS 31.600 to apportion responsibility for the victim’s injuries between the victim and defendant, and then reducing the amount it ordered defendant to pay in restitution to the percentage of the victim’s economic damages attributed to defendant’s conduct?

*State v. Brand*, 257 Or App 647, \_\_\_ P3d \_\_\_ (2013). Defendant was charged with a variety of drug and sexual offenses involving minors. He pleaded guilty to two counts of DCS/minor (each count specifically named a different child), the state dismissed all the other charges, and the court dispositionally departed from the presumptive prison sentence and imposed probationary sentences. Later, defendant was back before the court on an allegation that he violated his probation by consuming alcohol in a single incident. The court revoked his probation, imposed the presumptive 27- and 29-month prison sentences, and ordered him to serve them consecutively. Defendant objected, but the court overruled the objection, noting simply, “They’re two different minors; two different girls.” On appeal, defendant that OAR 213-012-0040(2)(b) required the court to impose concurrent sentences because the revocation was based on only a single violation, and he also cited *State v. Stokes*, 133 Or App 355 (1995), for that proposition. In response, the state argued that those authorities have been trumped by Art. I, § 44(1)(b), which provides, “No law shall limit a court’s authority to sentence a criminal defendant consecutively for crimes against different victims.” *Held*: Reversed and remanded. The court erred by imposing consecutive sentences upon revocation. Although the convictions are based on crimes defendant committed against different victims, OAR 213-012-0040(2)(b) required the court to order that the revocation sanctions are to be served concurrently, because there was only one violation.

*State v. Wagoner*, 257 Or App 607, \_\_\_ P3d \_\_\_ (2013). Defendant pleaded guilty to identity theft. Although the victim previously had submitted her restitution request for \$800, the victim’s advocate who received it failed to forward that information to the prosecutor. When the prosecutor represented at sentencing that the victim had not provided restitution information, the court did not award restitution. Several months later, the victim’s request was found, and she filed a motion under Art. I, § 42(1)(d), asserting her right to restitution. The court granted that request and imposed restitution in a supplemental judgment. On appeal, defendant asserts that, because the state did not investigate and present to the court the nature and amount of restitution prior to the time of sentencing, the court had no authority to impose restitution. *Held*: Affirmed. [1] Under Art. I, § 42(1)(d), “a victim in a criminal prosecution has the right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury,” and the legislature may provide by law for effectuation of that right. [2] In light of *State v. Thompson*, 257 Or App 336 (2013), “ORS 137.106 did not prevent the court from imposing restitution in order to provide the victim a remedy by due course of law, after it was discovered that her constitutional right to restitution was violated.”

*State v. Thompson*, 257 Or App 336, \_\_\_ P3d \_\_\_ (2013). Defendant crashed into a stop sign and street light pole owned by the City of Monmouth, and he was charged with failing to perform the duties of a driver. He pleaded guilty and agreed to pay restitution. At sentencing, the court awarded \$162 in restitution for damages to the stop sign, but denied the prosecutor’s request for \$1694.37 in restitution for the damaged light pole because “the prosecutor was late in presenting that figure to the court.” Three months later the victim, the City of Monmouth, filed a claim that the trial court violated its constitutional right “to prompt restitution” under Art. I, § 42(1)(d). Two months after that, the trial court held a hearing on the claim and granted the victim its requested relief by amending the judgment to include the restitution requested for the damaged light pole. *Held*: Affirmed. The trial court properly amended the judgment to include additional restitution as a remedy for the violation of the victim’s right to prompt restitution. [1] The victim was not limited to seeking relief only in the Supreme Court: Art. I, § 42(3)(b), does not limit a crime victim’s remedies for a rights violation to a petition for writ of

mandamus to the Supreme Court in a case that is not pending; rather, the Oregon Constitution “makes clear that the legislature is authorized to create procedures for a crime victim to pursue remedies in addition [to mandamus],” which the legislature has done by enacting ORS 147.515. [2] The victim’s failure to file its claim in the trial court within time specified in ORS 147.515 was not a jurisdictional defect: “the time window of ORS 147.515, when read in context of the victims’ rights scheme as a whole, does not operate as a restriction on the trial court’s jurisdictional authority to hear a victim’s untimely claim.” Consequently, “we decline to address the merits of defendant’s unpreserved argument that the city’s claim was untimely.” [3] The 90-day limit in ORS 137.106(1) (2011), “by its plain language, does not constrain the time in which a trial court may resentence a defendant as a means of remedying a violation of a victim’s constitutional rights.”

## 10. Other constitutional issues

*State v. Speedis*, 350 Or 424, 256 P3d 1061 (2011). Defendant was charged with first-degree burglary and second-degree assault, and the state specially alleged per ORS 136.765 four sentence-enhancement factors, none of which is listed in OAR 213-008-0002(1)(b) (*i.e.*, each is a “nonenumerated factor”): (1) defendant was on supervision when he committed the crimes, (2) previous sanctions have failed to deter him from committing crimes, (3) he committed the crimes while on release status while charges were pending, and (4) he had demonstrated a disregard of laws making successful probation unlikely. The jury found him guilty on the charges and found that the state had proved each of the factors. The sentencing court departed upward on both convictions based on each factor separately, and it imposed concurrent 72-month sentences. On appeal, defendant did not challenge the jury’s findings or the court’s ruling that those findings constituted substantial and compelling reasons; he argued only that use of nonenumerated factors violated the constitution. *Held*: Affirmed.

**Separation-of-powers challenge.** [1] Although the Criminal Justice Commission “adopted the sentencing guidelines as rules, the legislature later enacted the sentencing guidelines as statutes.” [2] Use of non-enumerated factors does not violate separation-of-powers principles in Art II, § 1. [3] “Historically, prosecutors identified and submitted the facts at a sentencing hearing that the trial courts then considered in deciding whether the seriousness of the offense and the character of the offender warranted a greater or lesser sentence within the range permitted by sentencing statutes. A prosecutor’s ability to identify the aggravating factors that may result in an enhanced sentence is consistent with that historical allocation of authority.” [4] “Under *Blakely*, a presumptive sentence is a maximum sentence for purposes of the Sixth and Fourteenth Amendment. A presumptive sentence, however, is not a maximum sentence for the purposes of state law; that is, for the purposes of analyzing defendant’s state constitutional separation-of-powers argument, a presumptive sentence does not set the outer boundary beyond which a trial court may not go.” [5] “Not only does a presumptive sentence not define the outer boundaries of a trial court’s sentencing authority, as defendant’s argument assumes, but the sentencing guidelines expressly authorize trial courts to decide whether nonenumerated aggravating and mitigating factors warrant imposing a greater or a lesser sentence than a presumptive sentence. In imposing a departure sentence based on nonenumerated aggravating factors, a trial court is not acting beyond the bounds of its sentencing authority. ... Rather, it is acting within the limits that the legislature has set.”

**Vagueness challenge.** [6] Under Art I, § 20, “‘fair notice’ is not an aspect of vagueness analysis.” So, “in deciding defendant’s state constitutional vagueness claim in this case, we consider only whether the sentencing guidelines provide an ascertainable standard that guided the prosecutor in identifying which nonenumerated factors warranted imposition of a departure sentence.” [7] “Not only is the presumptive sentence a product of the seriousness of the offense and the offender’s criminal history (one indicator of an offender’s character), but the enumerated aggravating and mitigating factors are further specifications of those two criteria. It follows, we think, that those same criteria provide guidance for prosecutors and courts in determining which nonenumerated aggravating or mitigating factors will warrant a departure sentence.” “The discretion that the sentencing guidelines give prosecutors to identify and courts to determine nonenumerated aggravating factors is neither standardless nor unfettered. That aspect of the sentencing guidelines is not vague in violation of” Art I, §§ 20 and 21. [8] Under the Due Process Clause, “a criminal statute will be unconstitutionally vague if it fails to provide ‘fair warning’ of the acts that will expose a person to criminal penalties.” But even if an ‘otherwise uncertain statute,’ standing alone, would fail to provide constitutionally adequate notice of the acts that expose a person to criminal liability, the statute will satisfy due process if a prior judicial decision has fairly disclosed the charged conduct to be within the statute’s scope.” [9] The Court of Appeals had identified each of the four nonenumerated aggravating factors at issue in this case as permissible grounds for imposing an enhanced sentence under the sentencing guidelines before defendant committed his crimes. Consequently, “[e]ven if the sentencing guidelines, standing alone, would not provide sufficient notice that those factors would justify an enhanced sentence, those appellate decisions did and, in doing so, satisfied due process. If those cases provided sufficient notice to defendants under the Due Process Clause, we think that they also provided sufficient guidance to prosecutors in identifying those aggravating factors that would support the imposition of an enhanced sentence.”

*Note:* It is not clear how the court would rule on a vagueness challenge to a nonenumerated factor that has not previously been specifically approved by an appellate court.

***State v. Partain***, 349 Or 10, 239 P3d 232 (2010). Defendant was convicted of 12 sex crimes and sentenced to 420 months in prison. On appeal, the parties stipulated to a motion vacating four of the sentences and remanding the entire case to the trial court for resentencing. On remand, the trial court restructured the remaining sentences in a way that resulted in an overall prison term of 600 months. Defendant appealed, arguing that, in imposing a harsher sentence on remand than that imposed in the original proceeding, the trial court had violated the rule of “procedural fairness” announced in *State v. Turner*, 247 Or 301 (1967). *Held:* Reversed and remanded. The Supreme Court overruled *Turner*, and ruled that a trial court lawfully may impose a harsher sentence on a criminal defendant after a retrial or remand, as long as: (1) the court makes a record on the reasons for the harsher sentence; (2) the reasons are based upon identified facts of which the original trial court was unaware; and (3) the reasons are sufficient to dispel any reason to believe the harsher sentence was imposed to punish the defendant for his or her successful appeal. Absent such facts and reasons, an unexplained or inadequately explained increased sentence will be presumed to be based on vindictive motives and will be reversed.

***State v. Sanders***, 343 Or 35, 163 P3d 607 (2007). The requirement in ORS 137.076 that a person convicted of a felony must submit to a blood or buccal sample does not violate Art I, § 9, or the Fourth Amendment.

*See also State v. Brown*, 212 Or App 164, 157 P3d 301, *rev den*, 343 Or 223 (2007). ORS 137.076, which requires a DNA sampling for persons convicted of a felony or some misdemeanors, does not violate Art I, § 9, or the Fourth Amendment.

***State v. Upton***, 339 Or 673, 125 P3d 713 (2005). The indictment specially alleged aggravating factors for an upward departure, defendant demurred on the ground that the court had no authority to submit those factors to the jury, and the trial court overruled the demurrer but ruled that it could not submit those factor to the jury, and the state petitioned for a writ of mandamus. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528 (2005). *Held:* Writ issued. [1] Given that *Blakely* essentially makes an aggravating fact a new “material element” of the underlying offense, it does not violate the Due Process Clause for the state to prove such a fact to the jury unless the defendant agrees to some other procedure. [2] SB 528 was not enacted in violation of the “single subject” clause in Art IV, § 20, or the “full text” clause of Art IV, § 22, because it did not amend any statutes that were not listed in the title. [3] SB 528 does not violate the Due Process Clause by prescribing a “one-sided” rule within the meaning of *Wardius v. Oregon*, because permitting submission of only aggravating facts to the jury does not provide any advantage to the state.

***State v. Heilman***, 339 Or 661, 125 P3d 728 (2005). Defendant waived jury without qualification and the trial court found him guilty of multiple felonies, rejecting his insanity defense. At sentencing, the state sought a dangerous-offender sentence under ORS 161.725, and defendant objected based on *Apprendi*. The court overruled that objection and, applying a standard of proof beyond a reasonable doubt, found him to be a dangerous offender and imposed a 20-year sentence. *Held:* Affirmed. “The indictment clause of the Fifth Amendment applies to only federal prosecutions, because the Fourteenth Amendment does not require that it apply to the states.” Because there is no requirement that the indictment must set forth all possible penalties for the offense, the state was not required to give notice prior to trial that it would seek a dangerous-offender sentence. “We think that this is a matter for cautious legal advice.”

***State ex rel. Caleb v. Beesley***, 326 Or 83, 949 P2d 724 (1997). Ballot Measure 11 (1994), as amended by the 1995 legislature, does not violate: (1) the one-subject provisions of Art IV, §§ 1(2)(d) and 20; (2) the prohibition against cruel and unusual punishments in Art I, § 16; (3) the separation-of-powers clause of Art III, § 1; or (4) the reformation clause of *former* Art 1, § 15.

***State ex rel. Huddleston v. Sawyer***, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): [1] Measure 11 does not violate Art I, §§ 11 (allocution), 15 (reformation), or 20 (equal privileges), or Art III, § 1 (separation of powers), of the Oregon Constitution. [2] Defendant’s claim that Measure 11 violates the Guarantee Clause (U.S. Const, Art IV, § 4) is not reviewable. [3] Measure 11 does not violate the Equal Protection Clause. [4] The sentencing court erred as a matter of law by refusing to impose the minimum sentence mandated by Measure 11.

***State v. Donahue***, 243 Or App 520, \_\_\_ P3d \_\_\_ (2011). Defendant pleaded no contest to one count of prostitution that she committed on 82<sup>nd</sup> Street in Portland. The court imposed an 18-month probationary term and required, as a special condition of probation, that she not to enter a certain “high vice” area in Portland around 82<sup>nd</sup> and Sandy unless she was passing through it in a car or public transportation. On appeal, defendant argued that the condition was not reasonably

related to the crime of conviction, was overbroad, and unconstitutionally infringed her freedom of association. *Held*: Affirmed. The condition at issue was proper because she had committed the crime in that area and it was “reasonably related to the protection of the public or her reformation, or both.” The fact that the probation condition could have been more narrowly tailored does not necessarily establish that the condition was overbroad or an unconstitutional infringement of her freedom of association. Defendant “makes no argument that she suffers any particular harm as a result of having to shop elsewhere.” Further, under ORS 137.540(2)(a), “a probation condition can include much greater intrusions upon a defendant’s freedom of association than those imposed on defendant in this case.”

*State v. Myers*, 218 Or App 635, 180 P3d 759, *rev den*, 344 Or 671 (2008). The “true life” option for aggravated murder under ORS 163.105 does not violate Art I, § 40, which provides that the sentence for aggravated murder shall be death or “life imprisonment with minimum sentence as provided by law.”

*State v. Gonzalez*, 212 Or App 1, 157 P3d 266 (2007). A probation-revocation hearing is not a “criminal prosecution” within the meaning of the Sixth Amendment. Consequently, the rule in *Crawford v. Washington* “does not preclude the admission of hearsay testimony in the absence of an opportunity to cross-examine the declarant.”

*Note*: The court did not address defendant’s alternative argument under the Due Process Clause.

*State v. Mendez*, 211 Or App 311, 155 P3d 54 (2007). The jury found defendant guilty of first-degree criminal mischief, ORS 164.365, but found that the state failed to prove the offense-subcategory allegation the damage was more than \$1,000, which would have elevated the conviction to a category 3 offense. The sentencing court imposed \$1,666 in restitution. *Held*: Affirmed. [1] Art VII (Am), § 3, applies to criminal actions. [2] The amount of restitution is to be determined by the sentencing court under a “preponderance of the evidence” standard. [3] The court’s finding was not inconsistent with the jury’s verdict because the court “independently determined the amount of damage applying a different standard of proof” (*i.e.*, only to a preponderance) in assessing restitution. “Just as a single trier of fact could, upon different standards of proof, render different findings of the same fact without any inconsistency, the same is true of different triers of fact apply different standards of proof.”

*Roy v. Palmateer*, 205 Or App 1, 132 P3d 56 (2006). Although ORS 163.105(3) (1983) authorizes the parole board to determine whether an inmate sentenced to life imprisonment on a conviction for aggravated murder is “likely to be rehabilitated within a reasonable period of time,” such a determination does not entitle to immediate release on parole. Denial of release does not violate Art I, §§ 13, 15, 16, or the 8<sup>th</sup> or 14<sup>th</sup> Amendments.

*State v. Norris*, 188 Or App 318, 72 P3d 103, *rev den*, 336 Or 126 (2003). [1] Defendant’s constitutionally based challenge to the validity of the amendments to the sentencing guidelines since 1989 is not time-barred. [2] The bills by which the legislature approved amendments to the sentencing guidelines were not invalid on the ground that they did not comply with Art IV, § 22, which requires amendments to “acts” to be “published at full length,” because that requirement applies only to amendments to acts, and the legislature’s approval of administrative rules per ORS 137.667 is not an amendment to an “act.”

*State v. Shoemaker*, 155 Or App 416, 965 P2d 418, *rev den*, 328 Or 41 (1998). Defendant, age 17, robbed the victim at knifepoint, he pleaded guilty to second-degree robbery, and the court imposed the 70-month minimum term. *Held*: The court rejected defendant’s argument that Ballot Measure 11 “violates [defendant’s] federal guarantee of due process, because it fails to provide for mitigation, and violates his voting rights, because it requires him to be sentenced as an adult without giving him the right to vote as an adult.”

*State v. Skelton*, 153 Or App 580, 957 P2d 585, *rev den*, 327 Or 448 (1998). The Court of Appeals rejected defendant’s various facial constitutional challenges to Measure 11.

*See also State v. Mills*, 153 Or App 611, 958 P2d 896 (1998), *rev den*, 328 Or 275 (1999) (rejecting various facial constitutional challenges to Measure 11); *State v. Dubois*, 152 Or App 515, 954 P2d 1264 (1998); *State v. Clanton*, 152 Or App 705, 955 P2d 312 (1998).

*State v. Jackson/Hoang*, 145 Or App 27, 929 P2d 323 (1996), *rev den*, 326 Or 389 (1998): [1] Measure 11 does not violate single-subject limitation in Art IV, § 1(2)(d); [2] Measure 11 does not violate separation-of-powers principles in Art III, § 1.

*See also State v. George*, 146 Or App 449, 934 P2d 474 (1997) (same as [2]); *State v. Spence*, 145 Or App 496, 932 P2d 63 (1996), *rev den*, 325 Or 280 (1997) (same as [2]); *State v. Keerins*, 145 Or App 491, 932 P2d 65 (1996) (same

as [2]).

*State v. Ysasaga*, 146 Or App 74, 932 P2d 1182 (1997). A defendant cannot challenge the validity of Measure 11 by way of a demurrer based on ORS 135.630(4), because the indictment states a prosecutable offense regardless whether Measure 11 is constitutional.

*State v. Lawler*, 144 Or App 456, 927 P2d 99 (1996), *rev den*, 326 Or 389 (1998). Measure 11 does not violate single-subject limitation in Art IV, § 1(2)(d).

*See also State v. Jackson / Hoang*, 145 Or App 27, 929 P2d 323 (1996), *rev den*, 326 Or 389 (1998).

*State v. Spinney*, 109 Or App 573, 820 P2d 854 (1991), *pet rev disp'd* 313 Or 75 (1992). The sentencing guidelines do not violate Art III, § 1, of the Oregon Constitution.

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### III. INTERPRETATIVE AIDS

*See* ORS 137.656; OAR 213-002-0001.

*State v. Speedis*, 350 Or 424, 256 P3d 1061 (2011). Although the Criminal Justice Commission “adopted the sentencing guidelines as rules, the legislature later enacted the sentencing guidelines as statutes.”

*State v. Dilts*, 337 Or 645, 103 P3d 95 (2005). Although the Oregon Criminal Justice Council created the sentencing guidelines as administrative rules, the legislature approved them in 1989, and they have the authority of statutory law.

*State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993). A rule interpretation issued by council staff after the rule at issue was approved by the legislature is not determinative of legislative intent.

*Kowalski v. Board of Parole*, 194 Or App 156, 93 P3d 831 (2004), *rev den*, 338 Or 16 (2005). The commentary to the sentencing guidelines is not dispositive with respect to the meaning of a particular rule.

*State v. Little*, 116 Or App 322, 842 P2d 414 (1992). The sentencing guidelines mandate imposition of a term of post-prison supervision for all prison sentences; one of the basic principles underlying the guidelines is that offenders released from prison will be under post-prison supervision for a period of time.

*State v. Seals*, 113 Or App 700, 833 P2d 1344 (1992). One of the principal policies underlying the guidelines is “to punish offenders within the limits of correctional resources.”

*See also State v. Johnson*, 125 Or App 655, 866 P2d 1245 (1993) (same).

*State v. Kennedy*, 113 Or App 134, 831 P2d 712 (1992): Although cases decided under the Washington sentencing guidelines “provide guidance in some instances,” they are not persuasive authority when the rule at issue is not similar to an Washington rule.

*State v. Guthrie*, 112 Or App 102, 828 P2d 462 (1992): One of the principal policies underlying the guidelines “is that ranking crime seriousness provides protection from personal assault for individuals.”

*State v. Moeller*, 105 Or App 434, 806 P2d 130, *pet rev disp'd* 312 Or 76 (1991) (*per curiam*): “The commentary does not have, or purport to have, authoritative status.”

*See also State v. Anderson*, 111 Or App 294, 826 P2d 66 (1992) (rejecting commentary’s interpretation of rule); *State v. Dotter*, 114 Or App 1, 833 P2d 1369 (1992) (same); *State v. Golden*, 112 Or App 302, 829 P2d 88 (1992) (“The commentary does not have authoritative status.”); *State v. Holliday*, 110 Or App 426, 824 P2d 1148, *rev den*, 313 Or 211 (1992) (“The commentary is not controlling.”)

*But see State v. Seals*, 113 Or App 700, 831 P2d 712 (1992) (“Although commentary is not authoritative, [it is persuasive where] it accurately reflects the legislative intent.”).

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## IV. CRIME-SERIOUSNESS RANKING

### A. CHALLENGES TO VALIDITY OF OFFENSE-SUBCATEGORY FACTORS

*State v. Perez*, 119 Or App 436, 851 P2d 617, *rev den*, 317 Or 272 (1993). It did not violate defendant's rights under the *ex post facto* clauses to apply the "commercial drug offense" offense-subcategory factor defined in ORS 475.900 to his felony drug offenses, even though defendant committed his crimes prior to the effective date of the statute (and while the "scheme or network" rule was in force), because the statute "did not create a greater crime or enhance the penalty." Although the "scheme or network" rule in force when defendant committed his crimes later was declared unconstitutionally vague, that does not preclude the later-enacted but superseding statute from applying to his crimes.

*See also State v. Bojorques-Quinonez*, 121 Or App 179, 854 P2d 498 (1993) (same).

*State v. Guthrie*, 112 Or App 102, 828 P2d 462 (1992). [1] Constitutional vagueness principles apply to offense-subcategory factors. [2] Rejecting constitutional vagueness challenge to the "victim did not substantially contribute" offense-subcategory factor applicable to first-degree assault.

*State v. Moeller*, 105 Or App 434, 806 P2d 130, *rev dism'd*, 312 Or 76 (1991) (*per curiam*). [1] It is permissible to challenge the facial constitutionality of an offense-subcategory factor by a pretrial demurrer. [2] The "scheme or network" factor is unconstitutionally vague and is not capable of a narrowing construction.

### B. PLEADING AND PROOF OF OFFENSE-SUBCATEGORY FACTORS

*See* Or Const., Art I, § 11, Art VII (Am), § 5; US Const., Amends V, VI; ORS 132.557; ORS 135.711; ORS 475.900(4).

*See also* Part II-B(1) ("Right to jury, *Apprendi* issues") and Part II-B(2) ("Right to notice: alleging facts related to sentence"), *above*.

*State v. Rutley*, 343 Or 368, 171 P3d 361 (2007). [1] The statute that defines the crime of DCS within 1,000 feet of a school is outside of the criminal code, and thus, under ORS 161.105(1)(b), does not require a culpable mental state because it "clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof." [2] The allegation that defendant committed the crime "knowingly" did not require the state to prove defendant's knowledge with regard to distance. At best, that allegation was ambiguous as to whether the culpable mental state was intended to apply only to the delivery or to every circumstance in the charge. "Our disposition of the issue should not be read as accepting the Court of Appeals' proposition that the state may be bound by the words of an indictment to prove a particular mental state respecting an offense, even if the legislature did not intend to require such proof."

*State v. Lark*, 316 Or 317, 851 P2d 1114 (1993): [1] "When [an offense-subcategory] factor describes conduct of the offender—such as, 'the offender caused or threatened to cause serious physical injury to the victim'—then the subcategory based on that factor applies to a defendant only if the defendant personally engaged in the described conduct. In contrast, when a factor describes a circumstance attendant on, or resulting from, the commission of the offense—such as, 'the offense was committed in an occupied dwelling'—then the subcategory based on that factor applies to a defendant whenever that circumstance attends, or results from, the commission of the offense, whether or not the defendant personally caused the circumstance." [2] Sentencing court correctly ranked defendant's burglary conviction as category 8 offense based on fact that dwelling was occupied, even though defendant did not personally enter the dwelling.

*State v. Flanigan*, 316 Or 329, 851 P2d 1120 (1993): Even though victim was assaulted during burglary, sentencing court correctly ranked burglary conviction as category 7 offense, because jury found by special verdict that defendant did not personally cause or threaten to cause physical injury to the victim (it found that he merely aided and abetted his codefendant's assault on the victim).

*State v. Ferrell*, 315 Or 213, 843 P2d 939 (1992): "The only function of the [offense-subcategory] allegation in [an] indictment is to move up the underlying [crime] on the 'crime-seriousness' scale for sentencing purposes. Although the

state is required to plead specially in the indictment any offense-subcategory fact on which it seeks to rely to enhance an offense for sentencing purposes, such an allegation is required in addition to the allegations of the elements of the underlying offense.”

*State v. Williams*, 237 Or App 377, 240 P3d 731 (2010), *rev den*, 350 Or 131 (2011). Defendant was charged with first-degree assault; the indictment did not allege any subcategory fact, which ORS 132.557 requires must be pleaded in the indictment. The prosecutor later moved to amend the indictment to allege the subcategory fact that the victim did not precipitate the assault (which elevated the offense from a category 9 to a category 10 offense). The trial court granted the motion and instructed the jury on the subcategory fact. Based on the jury’s affirmative verdict, the court sentenced defendant based on the category 10 ranking. On appeal, defendant argued that the amendment violated Art VII (Am), § 5. *Held*: Affirmed. [1] The grand jury’s jurisdictional function does not include finding facts that pertain only to sentencing. Consequently, an amendment to an indictment that adds only a subcategory fact does not impermissibly circumvent the constitutional function of the grand jury. [2] Because the grand jury is not required to find a subcategory fact, it is, for purposes of the indictment a matter of “form,” not “substance” (overruling *State v. Paeteher*, 169 Or App 157 (2000), on that point). [3] Although the state did not plead the subcategory fact in the indictment as required by ORS 132.557, Art VII (Am), § 5(6), authorized the prosecutor to amend the indictment to allege the subcategory fact without resubmitting the indictment to the grand jury.

*State v. Parker*, 231 Or App 445, 220 P3d 110 (2009), *rev den*, 348 Or 281 (2010). [1] In prosecution for first-degree burglary, defendant did not preserve his challenge to the sufficiency of the evidence to prove the offense-subcategory factor that he attempted to cause physical injury, because he did not specifically raise that issue in his motion for judgment of acquittal. [2] In any event, the evidence was sufficient to support prove that allegation.

*State v. Lupercio-Quezada*, 224 Or App 515, 198 P3d 973 (2008). Defendant was convicted by a jury of drug offenses accompanied by “commercial drug offense” subcategory factors. The charges were based on the defendant’s participation in a controlled buy of drugs by an informant. After the informant made two more buys near the apartment complex, the officers searched apartment F at the complex. Nothing in the record indicated how the officers’ attention became focused on apt. F, or how the search came about; however, the state offered evidence that drug-packaging materials were found in the apartment. The defendant moved for a judgment of acquittal on the CDO factors (which were based in part on the packaging materials), arguing that nothing tied him to the apartment. The trial court denied the motion, and defendant was convicted. *Held*: Reversed. No evidence tied the defendant to the materials found in the apartment; insufficient evidence of one of CDO factors.

*State v. Travalini*, 215 Or App 226, 168 P3d 1159 (2007), *rev den*, 344 Or 110 (2008). The state did not have to prove a mental state as to the offense-subcategory factor alleging that the arson “represented a threat of serious physical injury.” An offense subcategory fact is not an “element” of the substantive offense. Thus, ORS 161.095(2) and 161.115(1), which provide that a crime requires a culpable mental state with regard to any element “that necessarily requires a culpable mental state,” do not require proof of a culpable mental state as to offense-subcategory facts.

*State v. Conklin/Betts/Land*, 214 Or App 80, 162 P3d 364, *mod on recons*, 215 Or App 293, 168 P3d 1158 (2007). The trial court erred in denying defendant’s motion for judgment of acquittal on the “within 1000 feet of a school” element of the defendants’ DCS charges. Although the park in which defendants committed their DCS offenses is posted with signs stating that a school is within 1000 feet, an officer testified that “Sonshine School” is in a church within 1000 feet of the location of the delivery, and he testified that “I know it’s a school primarily attended by minors,” no evidence was presented from which the jurors would find that the school is “an elementary, secondary, or career school” within the scope of ORS 475.999(1) (2003).

*See also State v. Clelland*, 214 Or App 151, 162 P3d 1081 (2007) (same).

*State v. Rodriguez-Barrera*, 213 Or App 56, 159 P3d 1201, *rev den*, 343 Or 224 (2007). The police stopped defendant’s vehicle as he drove within 1000 feet of a school, and a search discovered methamphetamine packaged for sale. *Held*: Defendant correctly was found guilty of DCS within 1000 feet of a school, ORS 475.904(1). The state did not have to prove in addition that he intended an actual delivery within that school zone.

*State v. Mendez*, 211 Or App 311, 155 P3d 54 (2007). The jury found defendant guilty of first-degree criminal mischief, ORS 164.365, but found that the state failed to prove the offense-subcategory allegation the damage was more than \$1,000, which would have elevated the conviction to a category 3 offense. The sentencing court imposed \$1,666 in

restitution. *Held*: Affirmed. The court’s finding of amount of loss in support of the restitution order was not an improper “reexamination” of a fact found by the jury. The court correctly ranked the conviction as only a category 2 offense based on the jury’s verdict, and its restitution finding was not inconsistent with that verdict, because the court “independently determined the amount of damage applying a different standard of proof” in assessing restitution.

*State v. Muniz*, 204 Or App 469, 130 P3d 789 (2006). The trial court correctly rejected defendant’s claim that he could not be found guilty of first-degree criminal mischief based on the allegation in that count that “the value of the property damaged or destroyed was \$1,000 or more.” Defendant argued that that fact was alleged only as an offense-subcategory factor under OAR 213-018-0050 and hence could not also establish the “exceeding \$750” in damages element in ORS 164.365(1)(a)(A).

*State v. Nelson*, 201 Or App 715, 120 P3d 538 (2005) (*per curiam*), *rev den*, 340 Or 34 (2006). The sentencing court erred in ranking defendant’s conviction for assault in the first degree as a category 10 offense, because the indictment did not allege the offense-subcategory factor that the victim did not precipitate the assault.

*State v. Slovik*, 188 Or App 263, 71 P3d 159 (2003). Under ORS 475.996 (1997), the phrase “a mixture or substance containing a detectable amount of methamphetamine” refers only to a marketable mixture or substance. The sentencing court erred in ranking defendant’s MCS and DCS convictions as category 8 offenses pursuant to the “substantial quantity” because the jar of processing liquid containing meth was poisonous, and not marketable, in that form.

*Note*: This case was overruled by enactment of ORS 475.900(5).

*State v. Early*, 180 Or App 342, 43 P3d 439, *rev den*, 334 Or 260 (2002). [1] “Under *Apprendi v. New Jersey*, any fact, other than the fact of a prior conviction, that elevates an offense from one level to a higher level carrying a greater statutory maximum penalty must be pleaded in the charging instrument and must be proved to the trier of fact. We therefore agree with the parties that *Apprendi* requires a defendant charged with felony DWSR to be placed on notice through the charging instrument that the state intends to prove the existence of an aggravating or enhancing factor that elevates ordinary DWSR (a violation) to felony DWSR, and that the state must then present proof of that factor to a jury.” [2] The allegation in the indictment that defendant drove “feloniously” while revoked, “especially when coupled with the statutory citation in the caption, put defendant on notice that he was charged with the felony crime, as aggravated or enhanced by proof of one or more of the factors enumerated in ORS 811.182(3). ... But *which* of the several specific circumstances listed in the statute is not itself a material element of the crime. Accordingly, the failure to allege the circumstance that gave rise to the suspension does not mean that the indictment failed to state a crime.”

*State v. Moore*, 172 Or App 371, 19 P3d 911, *rev den*, 332 Or 250 (2001). Defendant argued that the sentencing court erred when it imposed enhanced sentences for his convictions as “commercial drug offenses.” *Held*: Affirmed. The state was required to present sufficient evidence that at least three subcategory factors in ORS 475.992(1)(b) (1999) were related to defendant’s drug offenses. The state presented sufficient evidence on at least three subcategory factors where (1) officers found track lighting in the growing room (possession of manufacturing paraphernalia), (2) defendant acted as a guard and used a camera with a monitor to defend the operation with deadly force, and (security measures used with the potential of injuring persons), and (3) the structural modifications directly facilitated the marijuana grow.

*State v. Paeteher*, 169 Or App 157, 7 P3d 708 (2000). Defendant was charged with manufacture of marijuana, and the indictment alleged in addition that he “knowingly possessed 150 or more grams of marijuana substance.” The instructions directed the jury to find, in the language of ORS 475.996(1)(a) (1999), whether “the manufacture involved 150 or more grams of marijuana.” The jury found defendant guilty and answered that question yes. The sentencing court, however, ranked the conviction only as a category 4 offense because the indictment failed to allege that the crime “involved” 150 grams or more. *Held*: Affirmed. [1] For an MCS (or DCS) offense to be ranked as a category 8 offense based on a “substantial quantity,” the state must allege and prove that that offense “involved” a substantial quantity; it is not enough to allege and prove that the defendant “possessed” a substantial quantity. [2] Even though the evidence established, and the jury found, that defendant’s MCS offense “involved” a substantial quantity, the conviction cannot be ranked as a category 8 offense because the indictment was insufficient in that it alleged only that defendant “possessed” a substantial quantity. That insufficiency cannot be cured by the verdict in the absence of evidence that the grand jury intended to charge “involved,” not “possessed.”

*Note*: The second holding was overruled in *State v. Williams*, 237 Or App 377 (2010), *above*.

*State v. Hurst*, 152 Or App 716, 955 P2d 338 (1998). Defendant and codefendant committed a couple of

burglaries in which they stole firearms and ammunition. The sentencing court ranked both burglary convictions as category 9 offenses based on findings that defendant “was armed with a deadly weapon.” *Held*: The “armed with a deadly weapon” offense-subcategory factor applies only if the defendant *personally* was armed. The ranking is correct for one of defendant’s conviction, because the court found that he personally stole the firearm, but it is erroneous as to the other conviction, because the court could not determine which of the two men stole the firearms.

*State v. O’Quinn*, 151 Or App 168, 947 P2d 1135 (1997). A defendant cannot be found guilty of the “armed with a deadly weapon” offense-subcategory factor to first-degree burglary based on evidence that he committed the burglary with another who stole a loaded firearm from the residence, because that factor must be based on the defendant’s personal conduct. Moreover, the factor is not proved by evidence that the defendant personally possessed a loaded firearm in the getaway car after the burglary was complete.

*State v. Wright*, 150 Or App 159, 162, 945 P2d 1083 (1997), *rev den*, 326 Or 389 (1998). Offense-subcategories factors serve only to set the appropriate ranking of the underlying conviction on the crime-seriousness scale; they are not “elements” of the underlying offense, nor do they create additional offenses. When a defendant is convicted on two separate counts that charge the same underlying offense but with alternative offense-subcategory factors (*e.g.*, “substantial quantity” and “commercial drug offense” under ORS 475.996), the convictions merge into a single conviction.

*State v. Shouse*, 148 Or App 274, 941 P2d 546, *rev den*, 326 Or 151 (1997): In prosecution for first-degree assault in which the indictment alleged the offense-subcategory factor that “the victim did not substantially contribute to the commission of the offense by precipitating the attack,” the trial court correctly instructed the jury that “you’re to confine your deliberations to the events at or near the time of the actual attack.” The term “precipitating” in the rule “connotes a sense of immediacy; in order to precipitate an attack, “the victim must take some identifiable action to which the defendant responds by attacking him or her.” Consequently, “past threats and events have no bearing on whether a confrontation suddenly erupts in violence.”

*State v. Minter*, 146 Or App 643, 934 P2d 525 (1997): [1] Because the state alleged and proved that defendant committed the burglary while “armed with a deadly weapon,” the sentencing court was required to rank the conviction as a category 9 burglary. [2] The “armed with a deadly weapon” fact required the category 9 ranking even though that same allegation served to elevate the offense from second-degree to first-degree burglary. [3] When the state intends to use a single fact both as an element to elevate the nature of the offense and as an offense-subcategory factor to elevate the crime-seriousness ranking, it is not necessary for the indictment to allege that fact twice.

*State v. Walker*, 140 Or App 472, 915 P2d 1039 (1996): In prosecution under ORS 475.999(1)(a) (1999) for unlawful delivery of a controlled substance within 1000 feet of a school, the state is not required by ORS 161.095(2) to prove that defendant knew that he was within 1000 feet of a school, because “the location of the offense in this instance is not an act, but an attendant circumstance of the underlying criminal conduct.”

*Note*: This case was overruled by *State v. Rutley*, 202 Or App 639, 123 P3d 334 (2005).

*State v. Casavan*, 139 Or App 544, 912 P2d 946, *rev den*, 323 Or 265 (1996): [1] “The subcategory factors are part of the conduct with which a defendant is charged. They must be set out in the charging instrument, ORS 135.711, and must be determined beyond a reasonable doubt by the trier of fact.” See ORS 132.557. “[S]ubcategory factors required for sentencing purposes are not themselves elements of the underlying offense, but are alleged in addition to those elements.” [2] In a prosecution for first-degree burglary, the offense-subcategory factor that defendant committed the crime in “an occupied dwelling” may be established without proving that defendant actually knew the dwelling was occupied. “Whether a dwelling is occupied is a circumstance that has nothing to do with an offender’s state of mind. The circumstance exists whether or not the offender has knowledge of the fact.”

*State v. Holloway*, 138 Or App 260, 908 P2d 324 (1995): Defendant grew marijuana in a building located on land under lease from the federal government. *Held*: Defendant properly was convicted of unlawful manufacture of a controlled substance as a “commercial drug offense” based on a finding, *inter alia*, that he used “public lands.” ORS 475.996(1)(b)(I) (1993).

*State v. Merrill*, 135 Or App 408, 899 P2d 712, *pet rev dism’d* 323 Or 73 (1996): Although ORS 132.550 and 135.630 require that each separate “offense” be charged in a separate count, it is permissible for an indictment to allege two or more offense-subcategory factors in a single count, because “the subcategory factors required for sentencing purposes are

not themselves elements of the underlying offense, but are alleged in addition to those elements.”

**State v. Hennings**, 134 Or App 131, 894 P2d 1192, *rev den*, 320 Or 502 (1995): In reviewing a claim that the evidence fails to support a “guilty” verdict on an offense-subcategory factor, the appellate court considers the “decided facts together with those facts about which there is no conflict and determines whether the inferences that may be drawn from them are sufficient to allow the jury to find defendant’s guilt beyond a reasonable doubt.”

**State v. Griffen**, 131 Or App 79, 883 P2d 1315, *rev den*, 320 Or 567 (1995): Count 1 of indictment charged DCS offense involving a “substantial quantity” of methamphetamine, and count 2 charged a companion PCS offense also involving “substantial quantity” of meth without alleging a particular amount; defendant was acquitted on count 1 and convicted on count 2. *Held*: All the facts underlying a subcategory classification must be alleged sufficiently in that count, and a defect cannot be cured by reference to a companion count. Even though the term “substantial quantity” is defined by ORS 475.996(1)(a)(C) (1993) for purpose of DCS offense to mean “ten grams or more of a mixture of substance containing a detectable amount of methamphetamine,” that definition does not apply to ORS 475.996(2)(b)(C), which elevates a PCS offense to a category 6 offense if the crime involved ten grams or more of a meth mixture. Therefore, the bare “substantial quantity” allegation in count 2 was not sufficient to elevate that offense to a category 6 offense.

**State v. Stewart**, 123 Or App 147, 859 P2d 545 (1993), *on recons*, 126 Or App 456, 868 P2d 794 (*en banc*), *aff’d on rev of diff issue* 321 Or 1, 892 P2d 1013 (1995): Trial court properly refused to give a proffered jury instruction because it stated incorrectly that the “occupied dwelling” offense-subcategory factor is an “element” of the crime.

*See* UCrJI no. 1011A.

**State v. Johnson**, 116 Or App 252, 841 P2d 643 (1992): In order for a first-degree burglary to be committed in an “occupied dwelling,” the “person must be inside the building at the time of the burglary”; although the victim was home at the time of the burglary, she was in the yard and not in the residence, and therefore the burglary was not “an occupied dwelling.”

**State v. Kreimeyer**, 115 Or App 445, 838 P2d 1102 (1992): The sentencing court ranked defendant’s arson conviction in crime-seriousness category 10 based on its finding that the fire in fact threatened human life. *Held*: Because state failed to allege that factor in indictment, conviction could not be ranked in category 10.

*See also State v. Stalder*, 117 Or App 289, 844 P2d 225 (1992) (conviction for first-degree assault; *Held*: sentencing court erred in ranking conviction based on offense-subcategory factor that was not alleged in indictment; **State v. Smith**, 116 Or App 558, 842 P2d 805 (1992) (convictions for first-degree rape and sodomy; *held*: same).

**State v. Drake**, 113 Or App 16, 832 P2d 44 (1992): In order for a conviction to be elevated on the crime-seriousness scale, the state must allege the applicable offense-subcategory factor in the count to which it is to be applied; the factor cannot be based upon facts alleged in and proved under a separate count.

**State v. Owens**, 112 Or App 462, 829 P2d 726 (1992): “The fact that the evidence at trial would support a finding that defendant’s arson did threaten human life is irrelevant [to classification of the conviction]. Evidence cannot be the basis for classifying a crime, unless the enhancing factor was alleged and proved to the trier of fact.”

**State v. Ripka**, 111 Or App 469, 827 P2d 189, *rev den*, 313 Or 300 (1992): Even though it is permissible for the accusatory instrument to plead a theft charge generally, for a theft conviction to be ranked as a category 3 offense based on the fact that it was theft by receiving, it is necessary to plead that offense-subcategory factor in the accusatory instrument.

**State v. Mack**, 108 Or App 643, 817 P2d 1321 (1991): “[A]llegations relating to the subcategory of the crime charged [are] part of the conduct with which the defendant [is] charged and that they not only had to be alleged [in the accusatory instrument] but [are] for the jury to determine beyond a reasonable doubt.”

**State v. Moeller**, 105 Or App 434, 806 P2d 130, *pet rev disp’d* 312 Or 76 (1991) (*per curiam*): The state must prove offense-subcategory factors to “the trier of fact.”

### C. CRIME-SERIOUSNESS RANKING OF CONVICTION

*See* ORS 475.900-.902, 475.910 (various drug offenses); OAR 213-004-0002 to -0005; OAR ch 213, Divs. 17, 18.

*Note:* Some statutes expressly prescribe a crime-seriousness ranking—*see, e.g.*, ORS 163.147 (prescribing rankings for second-degree manslaughter and criminally negligent homicide).

*State v. Cam*, 255 Or App 1, 296 P3d 578 (2013). The trial court correctly denied defendant’s motion to strike the “commercial drug” enhancement on drug-possession charges, ORS 475.900(1)(b), on the ground that possession of substantial quantities of one drug (methamphetamine) cannot serve as the basis for a CDO enhancement for possession of *another* drug (marijuana and MDMA). The CDO statute “plainly allows possession of any of the listed controlled substances in sufficient quantities to serve as enhancements for a possession offense. . . . The substance charged as a CDO need not be the same substance possessed in the enhancement amount,” and “[t]here is no requirement of a nexus between the underlying drug offense and the listed factors.”

*State v. Burge*, 252 Or App 574, 288 P3d 565 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was found guilty on 12 counts of second-degree sexual abuse, and the sentencing court ranked those convictions as category 7 offenses. *Held:* Reversed and remanded. Under *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013), the category 7 ranking violated the “vertical proportionality” principle in Art I, § 16, even for the convictions based on those that involved a victim under the age of 16—the court should have ranked them as category 6 offenses. Under *Simonson*, “vertical proportionality is measured by the sentences that are available for the conduct at issue, not on what any individual defendant actually receives.”

*See also State v. Decamp*, 252 Or App 177, 285 P3d 1130 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013).

*State v. Ibarra-Ruiz*, 250 Or App 656, 282 P3d 934, *rev den*, 353 Or 127 (2012). Defendant was found guilty of hindering prosecution and conspiracy to commit murder, and the sentencing court ranked his conspiracy conviction as a category 11 offense, the same as completed murder, and imposed the 128-month presumptive sentence. *Held:* Affirmed. [1] The rule in *Apprendi* does not apply to a decision by sentencing court per OAR 213-004-0004 to rank an unclassified offense: such a ranking does not increase the maximum sentence that a jury verdict authorizes but merely establishes the maximum sentence permitted (absent special jury findings) for that offense. [2] The sentencing court “has discretion to rank an unclassified offense even higher than its predicate offense.” The category 11 ranking was permissible.

*State v. Simonson*, 243 Or App 535, 259 P3d 962 (2011), *rev den*, 353 Or 788 (2013). Defendant, who was 23 years old, had sex with girls who were 16 and 17 years of age, and was charged with five counts of second-degree sexual abuse in violation of ORS 163.425(1)(a). The state’s theory was that the victims could not consent because they were under 18 year of age. ORS 163.315(1)(a); *State v. Stamper*, 197 Or App 413 (2005). Defendant argued that *Stamper* was wrongly decided. Defendant also argued that ranking his convictions as crime-seriousness 7 offenses violates the “vertical proportionality” principle in Art I, § 16. *Held:* Reversed and remanded. [1] The Court of Appeals reaffirmed *Stamper* and affirmed defendant’s convictions. [2] But the crime-seriousness ranking of 7 violated “vertical proportionality” principles: “Defendant’s acts in committing sexual abuse in the second degree necessarily are less severe than the same acts would have been if defendant’s victims had been younger [and he had been convicted instead of third-degree rape], but the potential penalty for defendant’s acts is greater than the potential penalty for the same acts against younger victims. Such a scheme does not comport with the standard set by Article I, section 16. Defendant’s sentences must be vacated and the case remanded for resentencing.”

*State v. Slovik*, 188 Or App 263, 71 P3d 159 (2003). Under ORS 475.996 (1997), the phrase “a mixture or substance containing a detectable amount of methamphetamine” refers only to a marketable mixture or substance. The sentencing court erred in ranking defendant’s MCS and DCS convictions as category 8 offenses pursuant to the “substantial quantity” because the jar of processing liquid containing meth was poisonous, and not marketable, in that form.

*Note:* This case was overruled by enactment of ORS 475.900(5).

*State v. Paeteher*, 169 Or App 157, 7 P3d 708 (2000). Defendant was charged with manufacture of marijuana, and the indictment alleged in addition that he “knowingly possessed 150 or more grams of marijuana substance.” The instructions directed the jury to find, in the language of ORS 475.996(1)(a) (1999), whether “the manufacture involved 150 or more grams of marijuana.” The jury found defendant guilty and answered that question yes. The sentencing court, however, ranked the conviction only as a category 4 offense because the indictment failed to allege that the crime “involved” 150 grams or more. *Held:* Affirmed. [1] For an MCS (or DCS) offense to be ranked as a category 8 offense based on a “substantial quantity,” the state must allege and prove that that offense “involved” a substantial quantity; it is not enough to allege and prove that the defendant “possessed” a substantial quantity. [2] Even though the evidence established, and the jury found, that defendant’s MCS offense “involved” a substantial quantity, the conviction cannot be ranked as a

category 8 offense because the indictment was insufficient in that it alleged only that defendant “possessed” a substantial quantity. That insufficiency cannot be cured by the verdict in the absence of evidence that the grand jury intended to charge “involved,” not “possessed.”

*State v. Young*, 161 Or App 507, 985 P2d 535 (1999), *rev den*, 329 Or 590 (2000). The sentencing court properly ranked as crime-seriousness category 6 offenses defendant’s multiple convictions for the unranked offense of making a false claim for health-care treatment in violation of ORS 165.692(1).

*State v. Mihm*, 157 Or App 262, 972 P2d 890 (1998), *rev den*, 328 Or 365 (1999). The indictment alleged that defendant committed first-degree burglary and that he threatened the victim with physical injury. The jury found defendant guilty and by special verdict found that he had made the threat. Defendant did not object to the verdict, but at sentencing he challenged the sufficiency of the evidence to support the “threat” finding. The court rejected that challenge and ranked the conviction as a category 9 burglary. *Held*: Affirmed. Defendant’s failure either to move for a judgment of acquittal during the trial or to object to the jury’s verdict precludes him from collaterally attacking the jury’s verdict at sentencing by challenging the sufficiency of the evidence to support the offense-subcategory factor.

*State v. Gonzalez-Alaniz*, 151 Or App 557, 950 P2d 404 (1997), *rev den*, 327 Or 83 (1998). Defendant was convicted of unlawful delivery of a controlled substance within a 1000 feet of a school in violation of ORS 475.999 (1997). *Held*: The sentencing court correctly ranked the conviction as a category 8 offense and imposed sentence accordingly.

*State v. Minter*, 146 Or App 643, 934 P2d 585 (1997): Because the state alleged and proved that defendant committed the burglary while “armed with a deadly weapon,” the sentencing court was required to rank the conviction as a category 9 burglary, even though that same allegation served to elevate the offense from second-degree to first-degree burglary.

*State v. Bergeson*, 138 Or App 321, 908 P2d 835 (1995), *rev den*, 323 Or 690 (1996): Defendant was convicted of, *inter alia*, attempted aggravated murder based on crimes he committed prior to November 1, 1993, and the sentencing court declined to rank the convictions and instead simply imposed probationary sentences. *Held*: It was error for the court to impose sentence without first ranking the convictions per OAR 253-04-004 (1991).

*State v. Dizick*, 137 Or App 486, 905 P2d 250 (1995), *rev den*, 322 Or 490 (1996): Defendant pleaded guilty, *inter alia*, to two counts of attempted aggravated murder subject to the sentencing guidelines, and the sentencing court found him to be a dangerous offender and imposed consecutive 30-year indeterminate terms per ORS 161.725. *Held*: The sentencing court erred when it failed first to determine the crime-seriousness ranking of those convictions pursuant to OAR 253-04-004 (1993).

*State v. Coleman*, 130 Or App 656, 883 P2d 266, *rev den*, 320 Or 569 (1995): Sentencing court properly ranked racketeering conviction as category 10 offense even though underlying promoting-prostitution offenses are ranked only as category 8 offenses.

*State v. Cantrell*, 125 Or App 458, 865 P2d 1323 (1993): At the time defendant committed the crime, second-degree sexual abuse was an unranked felony. The sentencing court’s ranking defendant’s conviction as a category 8 offense was a proper exercise of its discretion under OAR 253-04-004 (1991) even though the Sentencing Guidelines Board subsequently ranked that crime as a category 7 offense under the authority granted by the 1993 legislature (*see* Or Laws 1993, ch 692, § 6).

*State v. Perez*, 119 Or App 436, 851 P2d 617, *rev den*, 317 Or 272 (1993): It did not violate defendant’s rights under the *ex post facto* clauses to apply the “commercial drug offense” offense-subcategory factor defined in ORS 475.996 to his felony drug offenses, even though defendant committed his crimes prior to the effective date of the statute (and while the “scheme or network” rule was in force).

*See also State v. Bojorques-Quinonez*, 121 Or App 179, 854 P2d 498 (1993) (same).

*State v. Brandon*, 116 Or App 600, 843 P2d 457 (1992): Defendant was convicted of attempted aggravated murder, and the sentencing court ranked the conviction as a category 10 offense and imposed a 115-month sentence with 36 months of post-prison supervision. *Held*: [1] OAR 253-04-005(1), which requires attempt conviction to be ranked 2 categories below completed offense, does not apply to conviction for attempted aggravated murder, because the

completed offense is not ranked on the grid; [2] “[T]he incarceration term for attempted aggravated murder cannot exceed 20 years.” Therefore, the sentence imposed was proper.

See also *State v. Bergeson*, 138 Or App 321, 908 P2d 835 (1995), *rev den*, 323 Or 690 (1996).

Note: OAR 213-004-0005(3) now provides that convictions for attempted or soliciting aggravated murder shall be ranked as a category 10 offense.

*State v. Seaman*, 115 Or App 180, 836 P2d 1379 (1992): Defendant was convicted of both PCS and “supplying contraband” based on the same conduct and the court merged the convictions. *Held*: It was appropriate for the court to merge the PCS conviction into the supplying-contraband conviction even though the former is a class B felony and the latter is only a class C felony, because the latter is ranked higher on the crime-seriousness scale and thus is the more serious offense.

*State v. Swingle*, 114 Or App 418, 835 P2d 158 (1992) (*per curiam*): Merely because the FDWS conviction was based on defendant’s violation of a HTO order does not mean that the conviction must rank as crime-seriousness category 1 (OMVVHOO) instead of category 3 (FDWS)—the crimes have different elements and the legislature can choose to punish FDWS more severely.

*State v. Evans*, 113 Or App 210, 832 P2d 460 (1992): The sentencing court properly ranked defendant’s conviction for conspiracy to commit murder as a category 11 offense; it is permissible to rank a conspiracy conviction as the same level as the contemplated offense.

*State v. Rathbone II*, 110 Or App 419, 823 P2d 432 (1991), *rev den*, 313 Or 300 (1992): [1] “Under [OAR 253-04-004], the sentencing court has discretion to determine the seriousness of an unranked offense.” [2] The rule does not prohibit ranking a racketeering conviction higher than predicate offenses. [3] The sentencing court properly ranked the racketeering conviction, which is based on numerous category 8 drug offenses, as a category 9 offense.

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## V. CRIMINAL-HISTORY SCORE

### A. CONSTITUTIONAL CHALLENGES TO COUNTING OF A PRIOR CONVICTION

See also Part IX-H(2) (“Other ‘Prior Conviction’ and Repeat-Offender Statutes”), *below*.

Note: The 2009 Legislative Assembly enacted ORS 136.433 to 136.434, which prescribe a specific procedure for the pleading and proof of, and a collateral attack on, a previous conviction that constitutes an element of the offense (*e.g.*, for a charge of felony in possession of a firearm) or sentence-enhancement factor. The new provisions took effect on January 2, 2010.

*Iowa v. Tovar*, 541 US 77, 124 S Ct 1379, 158 L Ed 2d 209 (2004). Defendant was prosecuted as a repeat DUII offender, and he asserted a collateral challenge to a prior DUII conviction that was based his uncounseled plea of guilty. The trial court rejected that challenge but the state supreme court reversed, concluding that the prior conviction was invalid under the Sixth Amendment because the record failed to establish that, in that prior proceeding, defendant was advised that pleading guilty without counsel (1) entails the risk that a viable defense will be overlooked, and (2) deprives him of an independent opinion whether pleading guilty is wise based on the law and facts. *Held*: Reversed. [1] Less rigorous warnings are required at a change of plea than before trial. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to counsel for purpose of the plea, and the range of allowable punishments attendant upon entry of the guilty plea. Neither warning required by the state supreme court is mandated by the Sixth Amendment. [2] In a collateral attack on a prior conviction, defendant has the burden to prove that he did not completely and intelligently waive his right to counsel. Defendant failed to establish that his waiver was not knowing and voluntary.

*Nichols v. United States*, 511 US 738, 114 S Ct 1921, 128 L Ed 2d 745 (1994). Defendant was convicted of a felony drug offense subject to the federal sentencing guidelines, one of the convictions included in his criminal-history score was a prior state-court misdemeanor DUII conviction on which the court had imposed only a fine, defendant asserted a collateral challenge on that conviction by asserting that he had been denied counsel in that proceeding, and the sentencing

court refused to consider that challenge. The Supreme Court affirmed, holding that inclusion of the prior uncounseled misdemeanor conviction in defendant's criminal-history did not violate his rights under the Sixth Amendment or the Due Process Clause, because the penalty imposed on that conviction did not include any imprisonment. (The Court expressly overruled *Baldasar v. Illinois*, 446 US 222 (1980), the case on which the Oregon Supreme Court relied in deciding *State v. Grenvik*, 291 Or 99, 101 (1981).)

***State v. Probst***, 339 Or 612, 124 P3d 1237 (2005). Defendant was convicted of felony DUII under ORS 813.010(5) based on her three prior DUII convictions. She collaterally challenged one of her prior convictions, presenting evidence that she was not represented by counsel when she pleaded guilty, but the trial court overruled her challenge. *Held*: Remanded. [1] In light of *Parke v. Raley*, the decision in *State v. Grenvik* "is not correct. It is permissible, under the Sixth Amendment, to place the burden of persuasion on a defendant who collaterally attacks the validity of a prior conviction that has become final." Consequently, "the burden is on the defendant to prove by a preponderance of the evidence that it was invalid." [2] "But lack of counsel [in the prior proceeding], although relevant, is not dispositive. Defendant needed to be able to point to some evidence—from her own testimony or otherwise—tending to show that the absence of counsel *resulted in an involuntary plea*, whether because she was unaware of the possible consequences of proceeding without a lawyer, or otherwise." [3] Because "there is no such evidence in this record, either directly or by permissible inference," the trial court correctly rejected defendant's challenge. Given that defendant reasonably believed that *Grenvik* was the law, however, the case was remanded for defendant to have an opportunity to prove that her plea in that case was involuntary.

***State v. Harris***, 339 Or 157, 118 P3d 236 (2005). [1] Unless the Supreme Court overrules *Almendarez-Torres v. United States*, the state courts must apply the prior-conviction exception to the *Blakely* rule. [2] "Although the legislature cannot define a crime in a way that relieves the state of its constitutional obligations to prove each element of the offense beyond a reasonable doubt, defining criminal conduct is still a task generally left to the legislative branch." Thus, "a prior nonjury juvenile adjudication [may be defined] as an element that increases the seriousness of a crime or lengthens a criminal sentence, so long as the *existence* of that prior adjudication is proved to a jury or such requirement is knowingly waived." [3] Using defendant's prior juvenile adjudication to increase his criminal-history score falls within the scope of the *Blakely* rule. "[T]he Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must be either proved to the trier of fact or be admitted by a defendant for sentencing purposes following an informed and knowing waiver." But the state need not reprove the crime underlying that adjudication. [4] Defendant did not waive his *Blakely* claim by pleading guilty and acknowledging his prior juvenile adjudication.

See also ***State v. Murphy***, 205 Or App 675, 135 P3d 357 (2006) (*per curiam*); ***State v. Chand***, 203 Or App 218, 125 P3d 38 (2005) (remanding for resentencing due to *Harris* error).

***State v. Stewart/Billings***, 321 Or 1, 892 P2d 1013 (1995): [1] A sentencing court has authority under ORS 137.079(5)(c) to consider a defendant's claim that it is constitutionally impermissible to count his prior juvenile adjudications in his criminal-history score, and an appellate court has authority under ORS 138.222(4) to review a claim of error that the sentencing court erred in rejecting that claim. [2] An otherwise constitutionally valid prior juvenile adjudication may be counted in a defendant's criminal-history score even though he did not have a right to a jury trial in that proceeding.

*But see State v. Harris, above.*

***State v. Lafferty***, 240 Or App 564, 247 P3d 1266 (2011). Defendant was convicted of first-degree burglary and third-degree assault in separate cases. Prior to trial, the DA sent defendant a plea offer that included a criminal-history worksheet noting a juvenile adjudication for a "person felony" and a statement that that adjudication can be included in his criminal-history score. Defendant waived jury and pleaded guilty with "open sentencing" and without stipulating to the gridblock. At sentencing, the court agreed with defendant that his juvenile adjudication could not be included in his criminal-history score. *Held*: Affirmed. [1] The state's plea offer and criminal-history worksheet adequately advised defendant of the state's intention to seek an enhancement based on the adjudication and thus complied with ORS 136.775. [2] Although ORS 136.776 provides that a waiver of jury at the guilt phase "constitutes a written waiver of the right to jury on all enhancement facts," that does not necessarily resolve defendant's assertion that the constitution requires an express waiver of jury on enhancement facts. ORS 136.776 "requires that a defendant, in order to waive his constitutional right to a jury trial on the question of guilt or innocence, must also make a knowing and intentional waiver of his right to a jury trial on sentencing enhancement facts, and must do so in writing." [3] Because neither the plea agreement nor the change-of-plea colloquy included an express waiver of jury on the adjudication issue and defendant was entitled under *State v. Harris*, 339

Or 157 (2005), to a jury trial on that factor, the sentencing court correctly excluded that adjudication from defendant's criminal-history score.

**State v. Crain**, 192 Or App 328, 84 P3d 1092, *rev den*, 337 Or 556 (2004). Defendant appealed his conviction for first-degree burglary, challenging the inclusion of a prior conviction in his criminal-history score for sentencing purposes on the ground that there was no showing that he was represented by counsel or validly waived counsel before entering a guilty plea in that case. At the hearing, he testified that he could not recall whether he had waived counsel in the prior case. He argued that, because the record of the prior proceeding had been destroyed, the court could not presume that he validly waived counsel. *Held*: The burden of showing that a waiver was valid does not shift to the state until the defendant makes a *prima facie* showing that he or she was not represented. Because defendant presented no evidence showing that he was not represented in the prior proceeding, the state had no burden to produce evidence of a valid waiver.

*But see State v. Probst, above.*

**State v. McCain**, 190 Or App 532, 79 P3d 342 (2003), *rev den*, 336 Or 422 (2004). Defendant was charged with felony DUII under ORS 813.010(5) based on six previous convictions. The trial court found him guilty and sentenced him under ORS 813.012(2), which provides that, in determining the criminal-history score for a person convicted of felony DUII, every two prior misdemeanor DUII convictions are to be counted as one person felony. On appeal, defendant argued that the three prior convictions used to elevate the current charge to a felony should not also be counted in his criminal-history score. *Held*: [1] ORS 813.012(2) requires all previous DUII convictions to be counted in a defendant's criminal-history score. [2] The statute does not violate double-jeopardy principles on the grounds that it imposes an additional punishment for defendant's *prior* convictions or by enhancing defendant's criminal-history score based on conduct that also elevated the seriousness of current offense.

*See also State v. Forrest*, 213 Or App 151, 159 P3d 1286 (2007).

**State v. Thomas**, 187 Or App 192, 66 P3d 570 (2003). Defendant was convicted of felony DUII, third-degree assault, and felony hit and run based on a single incident. *Held*: It does not violate the constitutional *ex post facto* clauses to include in defendant's criminal-history score, for purpose of imposing sentence on his current conviction for felony DUII, his five prior convictions for DUII, even though he committed those offenses before OAR 213-004-0009 was enacted in 1999 to require inclusion of such convictions.

**State v. Hurd**, 182 Or App 361, *rev den*, 335 Or 104 (2002). Defendant was convicted of felony DUII based on a crime he committed in 2000, and the sentencing court overruled defendant's *ex post facto* objection applied OAR 213-004-0009, as amended in 1999, to calculate his criminal-history score as "A" based on his eight pre-1999 DUII convictions. *Held*: Affirmed. Defendant's objection has no merit because "(1) he was sentenced in this case for a new crime, not for prior offenses; and (2) before he committed the new crime, defendant had notice of the penalty for reoffending."

**State v. Riggins**, 180 Or App 525, 44 P3d 615 (2002). At sentencing, defendant challenged the validity of his prior juvenile adjudications as constitutionally defective. The court overruled that objection and including them in his criminal-history score. *Held*: Reversed. [1] "When a defendant challenges the use of a prior uncounseled conviction or adjudication to enhance a sentence, the defendant must make a *prima facie* showing that he or she was not represented at that time. If that showing is made, the burden shifts to the state to show either that defendant was, in fact, represented or that he validly waive counsel." [2] "A waiver of a youth's right to counsel [in a juvenile-delinquency proceeding] must be no less voluntary, knowing and intelligent than a waiver by an adult facing a criminal prosecution." [3] A defendant meets his burden of demonstrating that the conviction was uncounseled if the record of the adjudication either affirmatively demonstrates that [he] was not represented or the record is 'silent' on the point. If the state seeks to meet its responsive burden by showing that a youth in a juvenile case waived counsel, it must demonstrate that the youth and the youth's parents were aware of the youth's right to representation by appointed or retained counsel and that they intentionally relinquished that right and proceeded without counsel. To establish an intentional relinquishment of the right, the state must show that the youth and his parents, either through colloquy on the record with the court or perhaps through a signed written waiver, understood the risks of self-representation." [4] Defendant established that he was not represented by counsel in the juvenile proceedings, and the state failed to establish a valid waiver by either defendant or his parents. It was not sufficient to establish only that defendant did not qualify for a court-appointed counsel and his father refused to retain one for him.

*But see State v. Probst, above.*

**State v. Graves**, 150 Or App 437, 947 P2d 209 (1997), *rev den*, 326 Or 507 (1998). An otherwise constitutionally valid prior adjudication may be counted in a defendant's criminal-history score even though the defendant did not have a

right to a jury trial in that proceeding. That is true for a prior conviction based on a military courts-martial prosecution in which the defendant was not afforded a right to jury.

*State v. Harmon*, 137 Or App 428, 904 P2d 201 (1995) (*per curiam*): Defendant contended that his prior juvenile adjudications were invalid because he had been deprived of counsel in that proceeding. *Held*: The sentencing court erred when it refused to consider defendant's collateral attack on the constitutionality of adjudications.

*State v. Holliday*, 110 Or App 426, 824 P2d 1148, *rev den*, 313 Or 211 (1992): Rejecting, as unsupported by the record, defendant's claim that prior conviction was invalid as "uncounseled"; suggesting, however, that had record established that claim, the conviction could not be used in determining his criminal-history score.

## B. ESTABLISHING A PRIOR CONVICTION

See ORS 137.079(4) to (5); OAR 213-004-0013 (presentence reports); ORS 136.433.

See also Part II-B(1) ("Right to jury, *Apprendi* issues"), *above*; Part IX-H(4) ("Pleading and proof of prior convictions for repeat-offender statutes"), *below*.

*State v. Probst*, 339 Or 612, 124 P3d 1237 (2005). Defendant, charged with felony DUII, collaterally challenged one of her prior DUII convictions, presenting evidence that she was not represented by counsel when she pleaded guilty. *Held*: [1] It is permissible, under the Sixth Amendment, to place the burden of persuasion on a defendant who collaterally attacks the validity of a prior conviction that has become final. [2] "But lack of counsel [in the prior proceeding], although relevant, is not dispositive. Defendant needed to be able to point to some evidence—from her own testimony or otherwise—tending to show that the absence of counsel *resulted in an involuntary plea*, whether because she was unaware of the possible consequences of proceeding without a lawyer, or otherwise."

*State v. Harris*, 339 Or 157, 118 P3d 236 (2005). [1] Using defendant's prior juvenile adjudication to increase his criminal-history score falls within the scope of the *Blakely* rule. "[T]he Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must be either proved to the trier of fact or be admitted by a defendant for sentencing purposes following an informed and knowing waiver." But the state need not reprove the crime underlying that adjudication. [2] Defendant did not waive his *Blakely* claim by pleading guilty and acknowledging his prior juvenile adjudication.

See also *State v. Murphy*, 205 Or App 675, 135 P3d 357 (2006) (*per curiam*); *State v. Chand*, 203 Or App 218, 125 P3d 38 (2005) (remanding for resentencing due to *Harris* error).

*State v. Lafferty*, 240 Or App 564, 247 P3d 1266 (2011). Defendant was convicted of first-degree burglary and third-degree assault in separate cases. Prior to trial, the DA sent defendant a plea offer that included a criminal-history worksheet noting a juvenile adjudication for a "person felony" and a statement that that adjudication can be included in his criminal-history score. Defendant waived jury and pleaded guilty with "open sentencing" and without stipulating to the gridblock. At sentencing, the court agreed with defendant that his juvenile adjudication could not be included in his criminal-history score. *Held*: Affirmed. [1] The state's plea offer and criminal-history worksheet adequately advised defendant of the state's intention to seek an enhancement based on the adjudication and thus complied with ORS 136.775. [2] Although ORS 136.776 provides that a waiver of jury at the guilt phase "constitutes a written waiver of the right to jury on all enhancement facts," that does not necessarily resolve defendant's assertion that the constitution requires an express waiver of jury on enhancement facts. ORS 136.776 "requires that a defendant, in order to waive his constitutional right to a jury trial on the question of guilt or innocence, must also make a knowing and intentional waiver of his right to a jury trial on sentencing enhancement facts, and must do so in writing." [3] Because neither the plea agreement nor the change-of-plea colloquy included an express waiver of jury on the adjudication issue and defendant was entitled under *State v. Harris*, 339 Or 157 (2005), to a jury trial on that factor, the sentencing court correctly excluded that adjudication from defendant's criminal-history score.

*State v. Gipson*, 234 Or App 316, 227 P3d 836 (2010). The sentencing court correctly determined that defendant's criminal-history score was "A" based in part on a finding that his 1982 conviction for a federal bank-robbery conviction constituted a "person felony." Classification of that previous conviction was litigated and decided against him at a sentencing in 1999, from which defendant appealed and raised that as a claim of error on appeal, and the Court of Appeals affirmed without opinion. Consequently, the doctrine of claim preclusion binds defendant to the final determination made in that proceeding.

*State v. Pittsley*, 229 Or App 706, 215 P3d 875 (2009) (*per curiam*), *rev den*, 347 Or 43 (2009). The court erroneously sentenced defendant from gridblock 7-A, instead the correct gridblock 7-B, “because the state failed to prove that a prior out-of-state conviction constituted a ‘person’ felony for purposes of the guidelines.”

*State v. Santos*, 225 Or App 392, 201 P3d 285, *rev den*, 346 Or 116 (2009). The sentencing court properly considered, as evidence to establish defendant’s criminal history, the judgment previously entered against him in another case that included a calculation of his criminal-history score.

*State v. Torres*, 184 Or App 515, 59 P3d 156 (2002). At sentencing, defendant challenged his criminal-history score by contending that his out-of-state conviction did not correspond to an Oregon person felony. The sentencing court overruled that objection because he had not filed a prior written notice. *Held*: Reversed and remand for resentencing. “The term ‘criminal history’ in ORS 137.079(5)(c) refers to a list of a defendant’s prior contacts with the criminal justice system. Thus, the statute requires a defendant to provide notice of factual errors about his prior contact with the criminal justice system but says nothing about providing notice of intent to dispute the calculation of the criminal history score at the time of sentencing.”

*DeJac v. Baldwin*, 136 Or App 388, 902 P2d 125 (1995): Petitioner sought post-conviction relief on claim that his counsel at sentencing provided inadequate assistance by failing to object to classification prior out-of-state felony conviction on ground that it had been reduced to misdemeanor at sentencing. *Held*: Post-conviction court properly rejected that claim based on finding that when petitioner and counsel went over his criminal history in PSI, petitioner failed to alert counsel that that conviction was not correctly listed. “Determining the accuracy of the criminal history recorded in the PSI must be a joint undertaking by counsel and the defendant.”

*State v. Campbell*, 130 Or App 263, 881 P2d 829, *rev den*, 320 Or 453 (1995): The Court of Appeals held that the sentence originally imposed was error and remanded for resentencing; on remand, the sentencing court recalculated the applicable gridblock from 9-C to 9-B in light of *State v. Bucholz*, 317 Or 309 (1993), and imposed the maximum departure sentence. *Held*: Sentencing court had authority on remand to reconsider gridblock.

*State v. Golden*, 112 Or App 302, 829 P2d 88 (1992): State bears burden of proof in determination of how a prior out-of-state conviction is to be ranked.

*State v. Delgado*, 111 Or App 162, 826 P2d 1014 (1992): “If a defendant disputes any part of the criminal history in the [PSI], he must notify the district attorney and the court in writing,” and otherwise he cannot contend on appeal that the state failed to prove his criminal history with appropriate documentation.

*State v. Tapp*, 110 Or App 1, 821 P2d 1098 (1991): “[T]he state’s burden to prove criminal history for sentencing purposes is met by the [PSI], unless the defendant challenges the history. If he does, that state must prove any disputed part by a preponderance of the evidence.”

### C. STIPULATIONS REGARDING CRIMINAL HISTORY

See ORS 135.407; OAR 213-007-0002 to -0003 (plea agreements); ORS 136.433.

See also Part XIV-C (“Stipulated Sentences”), and Part IX-H(3) (“Other ‘Prior Crimes’ and Repeat-Offender Statutes”), *below*.

*State v. Adams*, 315 Or 359, 847 P2d 397 (1992): “The legislature did not intend that a sentence resulting from an agreement between a defendant and the state be reviewable on appeal.” Because the parties stipulated to the sentence as part of a plea agreement and advised the sentencing court of the correct gridblock for the conviction, and because the sentencing court approved that agreement on the record and imposed the stipulated sentence, ORS 138.222(2)(d) precludes any appellate review of a claim that the sentence imposed is error due to the fact that it effectively is a departure and the court did not make departure findings.

*State v. Bolf*, 217 Or App 606, 176 P3d 1287 (2008). Once a probationary sentence is executed, OAR 213-010-0002 limits revocation sanctions to those that are allowed by the gridblock used at the time of sentencing, even if that gridblock was determined based on an erroneous understanding of the defendant’s criminal history.

## D. CALCULATING CRIMINAL-HISTORY SCORE

### 1. Classification and counting of prior in-state conviction

See OAR 213-003-0001(14), (15); OAR 213-004-0007 to -0010.

*State v. McCain*, 190 Or App 532, 79 P3d 342 (2003), *rev den*, 336 Or 422 (2004). Defendant was charged with felony DUII under ORS 813.010(5) based on six previous convictions. The trial court found him guilty and sentenced him under ORS 813.012(2), which provides that, in determining the criminal-history score for a person convicted of felony DUII, every two prior misdemeanor DUII convictions are to be counted as one person felony. On appeal, defendant argued that the three prior convictions used to elevate the current charge to a felony should not also be counted in his criminal-history score. *Held*: [1] ORS 813.012(2) requires all previous DUII convictions to be counted in a defendant's criminal-history score. [2] The statute does not violate double-jeopardy principles on the grounds that it imposes an additional punishment for defendant's *prior* convictions or by enhancing defendant's criminal-history score based on conduct that also elevated the seriousness of the current offense.

*State v. Jaime*, 186 Or App 368, 63 P3d 53 (2003). The sentencing court erred when it counted defendant's two prior juvenile adjudications for misdemeanor person offenses as one person felony for purpose of his criminal-history score. "The 'two for one' rule does not apply to juvenile adjudications for misdemeanors." OAR 213-004-0008.

*State v. Hurd*, 182 Or App 361, 49 P3d 107, *rev den*, 335 Or 104 (2002). When sentencing defendant for felony DUII, the court applied the *current* version of OAR 213-004-0009 (1999), which provides that every two prior DUII convictions counts as one person felony for purposes of criminal-history score. He argued that was an *ex post facto* violation, because at the time he committed his eight prior DUIIs, the rule provided that it took *three* DUII convictions to count as one person felony for criminal-history purposes. *Held*: Affirmed. Because defendant committed the DUII after the 1999 amendment to the rule, he had adequate notice that his criminal history would be computed under the new rule.

*State v. Johnson*, 116 Or App 252, 841 P2d 643 (1992): In order for a first-degree burglary to be committed in an "occupied dwelling," the "person must be inside the building at the time of the burglary"; although the victim was home at the time of the burglary, she was in the yard and not in the residence, and therefore the burglary was not "an occupied dwelling."

*State v. Smith*, 116 Or App 73, 841 P2d 1 (1992): Sentencing court erred in classifying prior conviction for "tampering with a witness" as a "person felony"; definition of "person felony" in OAR 253-03-001(14) is an exclusive list.

*State v. Duncan*, 113 Or App 665, 833 P2d 1329 (1992): Where no dispute that defendant's prior first-degree burglary conviction was based on his unlawful entry of an occupied dwelling, sentencing court erred in failing to classify it as "person felony."

### 2. Classification of prior out-of-state conviction

See OAR 213-004-0011.

*Shepard v. United States*, 544 US 13, 125 S Ct 1254, 161 L Ed 2d 205 (2005). In light of *Apprendi* concerns, in a prosecution under Armed Career Criminal Statute in which the government must prove that defendant's prior state-court conviction for burglary was based in fact on a "generic burglary" within the meaning of "violent felony" element, the court is limited to determining pertinent information only from those facts necessarily resolved in the state-court proceeding. That includes the language in the charging instrument, the defendant's admissions or factual basis for the plea in a plea case, the jury instructions given in a case tried to a jury, the court's on-the-record factual findings in a case tried to the court, and any finding expressly made by the court.

*State v. Gipson*, 234 Or App 316, 227 P3d 836 (2010). The sentencing court correctly determined that defendant's criminal-history score was "A" based in part on a finding that his 1982 conviction for a federal bank-robbery conviction constituted a "person felony." Classification of that previous conviction was litigated and decided against him at a sentencing in 1999, from which defendant appealed and raised that as a claim of error on appeal, and the Court of Appeals

affirmed without opinion. Consequently, the doctrine of claim preclusion binds defendant to the final determination made in that proceeding.

*State v. Pittsley*, 229 Or App 706, 215 P3d 875 (2009) (*per curiam*), *rev den*, 347 Or 43 (2009). The court erroneously sentenced defendant from gridblock 7-A, instead the correct gridblock 7-B, “because the state failed to prove that a prior out-of-state conviction constituted a ‘person’ felony for purposes of the guidelines.

*State v. Geyer*, 194 Or App 416, 95 P3d 237 (2004). Trial court erred in convicting defendant of felony assault in the fourth degree under ORS 163.160(3)(a) based on his prior conviction in Washington for assaulting the same victim, because “assault” under that law did not require proof of actual injury.

*State v. Torres*, 184 Or App 515, 59 P3d 47 (2002). The PSI listed defendant’s prior conviction in Washington State for a felony drug offense and included that conviction in his criminal-history calculation. Defendant did not file a written objection, but raised a *Tapp/Golden* objection at sentencing to use of that conviction. *Held*: Reversed and remanded. [1] ORS 137.079(5)(c) does not require a written objection where, as here, the defendant does dispute the fact of the prior conviction but contests only the proper classification. [2] The state failed to carry its burden under OAR 213-004-0011 to establish that the prior out-of-state conviction has a counterpart in Oregon.

*State v. Provencio*, 153 Or App 90, 955 P2d 774 (1998). Defendant’s prior California conviction for “battery on an officer or emergency personnel” cannot be equated with the Oregon offense of assault on a public-safety officer, because the former is broader and more inclusive than the latter and the state failed to establish that defendant was charged and convicted on allegations that would constitute the APSO offense.

*State v. Graves*, 150 Or App 437, 947 P2d 209 (1997), *rev den*, 326 Or 507 (1998). A prior adjudication based on a military courts-martial prosecution may be counted in a defendant’s criminal-history score. OAR 213-04-011(4).

*State v. Leslie*, 134 Or App 366, 895 P2d 342, *rev den*, 321 Or 397 (1995): Although OAR 253-04-006(2) provides that an “expunged” conviction shall not be counted in the defendant’s criminal-history score, the limited set-aside remedy granted to under a California law with regard to his prior “child molestation” conviction did not constitute an “expunction,” because that law allows a sentencing court in a subsequent prosecution to consider the adjudication as a prior conviction.

*State v. Yarbor*, 133 Or App 360, 891 P2d 703, *rev den*, 321 Or 513 (1995): Sentencing court properly classified defendant’s prior Alaska conviction for “lewd and lascivious acts toward a child” as a “person felony,” even though the statutory elements do not correspond to any Oregon felony, because the additional facts alleged in the indictment, and established by the judgment, disclose that the offense would have been attempted first-degree rape in Oregon.

*State v. Golden*, 112 Or App 302, 829 P2d 88 (1992): [1] In determining ranking of prior out-of-state conviction, the proper inquiry is a comparison of the *elements* of that offense and of an analogous crime in this state (*i.e.*, not based on the *facts* of the prior crime). [2] If the foreign statute has alternative theories of proof available, the necessary comparison can be done by using the elements as pleaded in the accusatory instrument or as established in the judgment.

*State v. Lee*, 110 Or App 42, 822 P2d 138 (1991) (*per curiam*): Prior felony convictions in federal court are counted in the criminal-history score.

*State v. Tapp*, 110 Or App 1, 821 P2d 1098 (1991): “An inquiry about criminal history is not an occasion to relitigate the facts underlying an out-of-state, or any, conviction.” The only pertinent inquiry is whether the *elements* of the prior crime “correspond to the elements of an Oregon felony or Class A misdemeanor.”

See also *State v. Lee*, 110 Or App 42, 822 P2d 138 (1991) (*per curiam*).

### 3. “Single judicial proceeding” rule

See former OAR 253-03-001(18) and 253-04-006(3) (1989), which were repealed effective November 1, 1993 (Or Laws 1993, ch 692, § 1).

*State v. Perkins*, 112 Or App 604, 830 P2d 598, *rev den*, 314 Or 392 (1992): “Single judicial proceeding” rule

does not require “merger” of prior convictions entered in a single case where the court has imposed *consecutive* sentences on the convictions but suspended execution and placed defendant on concurrent terms of probation.

*State v. Schnoor*, 111 Or App 358, 826 P2d 88, *rev den*, 313 Or 211 (1992): “Single judicial proceeding” rule does not require the “merger” of prior convictions for burglary and UUV, even though the sentences were concurrent, where defendant committed the underlying crimes 3 months apart and “[t]here was no evidence that [they] were based on the same transaction or were part of a common scheme or plan.”

*State v. Munro*, 109 Or App 188, 818 P2d 971 (1991), *rev den*, 312 Or 588 (1992): Even though prior convictions were consolidated for sentencing purposes, “single judicial proceeding” rule does not require “merger” for criminal-history purposes where: (a) the court has imposed a probationary disposition on each (*i.e.*, the rule “applies to ‘sentences,’ and probation is not a sentence” under the former scheme), and (b) in any event, the record did not establish that the underlying “charges arose as part of the same act or transaction or were part of a common scheme.”

#### 4. Counting convictions previously sentenced in the same proceeding

See also Part VIII-B(2) (“Consecutive Sentences—Application of 200/400-Percent Rule”), *below*.

*State v. Martin*, 320 Or 448, 887 P2d 782 (1994): The sentencing court imposed the presumptive sentence on the conviction based on first-in-time crime, recalculated defendant’s criminal-history score based on that conviction, and then imposed consecutive presumptive sentence on second conviction using the adjusted gridblock.

See also *State v. Crockrell*, 133 Or App 196, 890 P2d 1014 (1995) (same).

*State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993): If a sentencing court, in a consolidated sentencing hearing involving convictions based on separate indictments, imposes sentences on convictions for crimes committed during separate criminal episodes, the court may include the convictions based on the first episode in the defendant’s criminal-history score for purpose of imposing sentence on the convictions based on the second episode.

See also *State v. Johnson*, 125 Or App 655, 866 P2d 1245 (1993) (same).

*State v. Miller*, 317 Or 297, 855 P2d 1093 (1993): The rule on calculating criminal history that was announced in *State v. Bucholz* applies equally to convictions based on multiple criminal episodes where the charges have been joined in a single indictment pursuant to ORS 132.560(1)(b).

*State v. Bryant*, 245 Or App 519, 263 P3d 368 (2011). Defendant and another inmate, Neal, attacked Officers Lake and Frye in variety of ways over the course of about a minute. Defendant was convicted of second-degree assault (count 1) and assaulting a public-safety officer (counts 2 and 3). At sentencing, the court, based on defendant’s convictions on counts 1 and 2, recalculated defendant’s criminal-history score per the *Miller/Bucholz* rule for the APSO conviction based on count 3 and placed that conviction into gridblock 6-C. *Held*: Reversed and remanded for resentencing. [1] For purposes of calculating a defendant’s criminal-history score under the *Miller/Bucholz* rule, “crimes arise out of the same ‘criminal episode’ where the circumstances are so interrelated that a complete account of one offense cannot be related without relating details of the other(s).” [2] The sentencing court erred in recalculating defendant’s criminal-history score for the APSO based on count 3, because he committed all of the offenses in a single criminal episode—his assault of Frye was so interrelated with his assault of Lake that a complete account of his conduct against Frye cannot be related without also relating details of his conduct directed at Lake.

*State v. Sosa*, 224 Or App 658, 199 P3d 346 (2008). Defendant was convicted of rape, sodomy, and sexual abuse. He did not object at sentencing when the trial court increased his criminal-history score without making findings to justify the increase under *State v. Bucholz*, and *State v. Miller*. On appeal, he argued that the court incorrectly used the rape conviction to increase his criminal-history score for purposes of sentencing him on the sodomy. The state conceded error but asserted that the appellate court should decline to exercise its discretion to review it. *Held*: Remanded for resentencing. Because the error increased the defendant’s sentence by four years, and because it was not “certain” that, on remand, the sentencing court would impose the same sentence, the interests weigh in favor of review.

*State v. Norman*, 216 Or App 475, 174 P3d 598 (2007). The sentencing court erroneously concluded that one attempted assault—which defendant committed in the course of trying to run several officers off the road—was a “separate criminal episode” from the first two attempted assaults, and that it therefore could be used in calculating defendant’s

criminal-history score under *Miller/Bucholz*. The offenses were simply too closely entwined to be separate criminal episodes; they occurred within a matter of seconds and within 100 yards of each other, and were motivated by defendant's single objective to avoid apprehension.

*State v. Kayfes*, 213 Or App 543, 162 P3d 308, *rev den*, 343 Or 390 (2007). Defendant, a former middle-school teacher and coach, was convicted of numerous sexual offenses involving a student. The jury specifically found that the offenses were "separate acts" in that each count "was an act that does not arise from the same continuous and uninterrupted conduct as another act." On appeal, defendant raised a *Blakely*-based challenge to the imposition of consecutive sentences and the court's *Miller/Bucholz* recalculation of his criminal history. *Held*: Affirmed. The court's calculation of defendant's criminal-history score was proper based on the jury's findings.

*State v. Moon*, 207 Or App 402, 142 P3d 105, *rev den*, 342 Or 46 (2006). Because record did not demonstrate the basis for the court's calculation of defendant's criminal-history score, defendant failed to establish that the court committed error on the face of the record under ORAP 5.45(1).

*State v. Thomas*, 187 Or App 192, 66 P3d 570 (2003). Defendant was convicted of felony DUII, third-degree assault, and felony hit and run based on a single incident. *Held*: Remanded for resentencing. The sentencing court erred under OAR 213-004-0006 in adjusting defendant's criminal-history score upward for purpose of imposing sentence on his hit-and-run conviction based on his conviction for assault, because those convictions arise from the same criminal episode.

*State v. Knight*, 160 Or App 395, 981 P2d 819 (1999). Defendant was convicted of, *inter alia*, multiple counts of first-degree burglary and violating a stalking order for repeatedly harassing his ex-wife. The prosecutor argued that the burglary conviction based on an entry at 8 a.m. should be used to elevate defendant's criminal-history score for purpose of imposing sentence on a separate burglary conviction based on a subsequent entry at 10 a.m. that same day. The sentencing court rejected that argument on the ground that the charges were consolidated for trial, and it placed both convictions in gridblock 8-I. *Held*: Reversed and remanded for resentencing. Under *State v. Bucholz*, defendant's criminal-history score should be recalculated if the second conviction is based on a crime he committed during a separate criminal episode. "The fact that the criminal charges are consolidated for trial does not necessarily mean that they arise from a single criminal episode." In this case, because evidence established that "defendant's actions constituted two discrete decisions to commit separate entries and therefore to commit separate offenses," the sentencing court erred by failing to treat them as two separate person felonies.

*State v. Allen*, 151 Or App 281, 948 P2d 745 (1997). Defendant was convicted of several offenses based on an incident in which he, while drunk, ran a red light, collided with two other cars injuring several victims, and then ran from the scene. The sentencing court increased defendant's criminal-history score during the sentencing pursuant to *Miller/Bucholz*. *Held*: [1] The 1993 amendment to OAR 253-04-006(2) did not change that part of the rule announced in *Miller/Bucholz* that convictions based separate crimes committed during a single criminal episode cannot be used to increase the defendant's criminal-history score. [2] In determining whether a conviction entered in the same proceeding may be used to increase the defendant's criminal-history score, the standard is whether it is based on a crime that the defendant committed during the same "criminal episode" as set forth in ORS 131.505(4). [3] Because all defendant's convictions "arose out of a single automobile accident, [they] clearly arose out of a single criminal episode."

*State v. Morton*, 137 Or App 568, 905 P2d 1182 (1995): Defendant pleaded guilty to multiple counts of robbery and assault based on crimes he committed against four victims during separate incidents. *Held*: Because the convictions are based on crimes arising from "separate criminal episodes," the sentencing court properly adjusted defendant's criminal history during the sentencing hearing.

*State v. Flower*, 128 Or App 83, 874 P2d 1359, *rev den*, 319 Or 572 (1994): The applicable standard is the definition of "criminal episode" set forth in ORS 131.505(4). Crimes were not part of the same "criminal episode" merely because the state joined the charges in a single indictment or moved to consolidate separate indictments pursuant to ORS 132.560(2).

*State v. Plourd*, 125 Or App 238, 864 P2d 1367 (1993): [1] Under the *Miller/Bucholz* rule, convictions sentenced at the same hearing that are based on crimes defendant committed during a single criminal episode cannot be used to enhance the defendant's criminal-history score. [2] A sentencing court cannot use a conviction sentenced at the same hearing to enhance the defendant's criminal-history score under the *Miller/Bucholz* rule unless and until it already has

imposed a complete sentence on that conviction.

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## VI. PRESUMPTIVE SENTENCE

### A. PRESUMPTIVE SENTENCE

See ORS 137.669; OAR 213-005-0001.

See also Part II-B(1) (“Right to jury, *Apprendi* issues”), *above*.

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): The term “presumptive sentence” refers to the specified number of months of incarceration for a conviction that has been placed in the proper gridblock, not the minimum sentence that otherwise may be prescribed for the conviction by a statute.

*State v. Ibarra-Ruiz*, 250 Or App 656, 282 P3d 934, *rev den*, 353 Or 127 (2012). Defendant was convicted of hindering prosecution and conspiracy to commit murder, and the sentencing court ranked his conspiracy conviction as a category 11 offense, the same as completed murder, and imposed the 128-month presumptive sentence. *Held*: Affirmed. [1] The sentencing court “has discretion to rank an unclassified offense even higher than its predicate offense.” The category 11 ranking was permissible. [2] Because the 90-month sentence prescribed by ORS 137.700 for a conviction for conspiracy to commit murder is merely a minimum sentence—not the presumptive sentence—the 128-month sentence the court imposed was not a departure.

*State v. Montazer*, 133 Or App 271, 891 P2d 662, *rev den*, 321 Or 268 (1995): Defendant’s conviction for first-degree sexual abuse falls into gridblock 8-I, the sentencing court imposed a sentence of imprisonment “not to exceed eighteen (18) months,” and defendant contended for the first time on appeal that court failed to impose a determinate sentence. *Held*: The disposition was reversible error because the sentencing court “did not identify a definite term of imprisonment as [OAR 253-05-005] requires,” which creates “difficulties in administering such an indefinite sentence.”

*State v. Shaffer*, 121 Or App 131, 854 P2d 482 (1993): Sentencing court erred in using presumptive sentence prescribed by gridblock 8-I, rather than that prescribed by the correct gridblock, 8-C, when it imposed a *concurrent* sentence on that conviction. The “shift to column I” rule in OAR 253-12-020(2) applies only to consecutive sentences.

*State v. Tremillion*, 111 Or App 375, 826 P2d 95 (*per curiam*), *rev den*, 313 Or 300 (1992): The sentencing court erred in failing to impose a definite term-of-months sentence from within the presumptive range (the court imposed a sentence of “15 to 18 months”).

*State v. Spinney*, 109 Or App 573, 820 P2d 854 (1991), *rev disp’d*, 313 Or 75 (1992): The guidelines grant the sentencing court discretion to “impose a sentence at the highest or lowest ends of the range that is provided in the sentencing grid blocks, OAR 253-05-001, or may impose a departure sentence, OAR 253-02-001(3)(d); OAR 253-08-001.”

### B. TERM OF POST-PRISON SUPERVISION

See also Part XI (“Post-Prison Supervision”), *below*.

#### 1. Term of post-prison supervision prescribed by rules

See OAR 213-005-0002 to -0005.

*State v. Morgan*, 316 Or 553, 856 P2d 612 (1993). With respect to a murder conviction subject to the sentencing guidelines, the court must impose the life-time term of post-prison supervision mandated by OAR 253-05-004(1) [now OAR 213-005-0004].

See also *State v. Bellek*, 316 Or 654, 856 P2d 616 (1993) (*per curiam*) (same).

*State v. McCallum*, 256 Or App 692, 301 P3d 965 (2013) (*per curiam*). Defendant was convicted on three counts of criminal mistreatment, a class C felony, and the court imposed a 36-month prison term and 36 months of post-prison

supervision, for a total of 72 months. *Held*: Reversed and remanded. The combined prison and PPS terms could not exceed five years.

*State v. Hall*, 256 Or App 518, 301 P3d 438 (2013) (*per curiam*). Defendant was convicted on 100 counts of first-degree encouraging child sexual abuse under ORS 163.684, a Class B felony, and the sentencing court imposed a sentence of incarceration and a “120 months post-prison supervision less time actually served” on each conviction. *Held*: Reversed and remanded for resentencing. The PPS terms were unlawfully “indeterminate” and constituted plain error in light of *State v. Mitchell*, 236 Or 16 App 248 (2010).

*Note*: The “less time served” clause that the court imposed in this case is correct if the conviction is subject to ORS 144.103(1), which provides that the defendant “shall serve a term of post-prison supervision that continues until the term of the post-prison supervision, when added to the term of imprisonment served, equals the maximum statutory indeterminate sentence for the violation.” For other felony convictions, *Mitchell* requires that the sentencing court must impose a specific PPS term. In this case, the defendant’s convictions are *not* subject to ORS 144.103(1), which applies only to a specific list of felony sexual offenses—not to all felony sexual offenses (which is a common mistake). Consequently, the sentencing court should have imposed only a 36-month term of PPS on each of the convictions.

*State v. Powell*, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). The sentencing court violated OAR 213-005-0002(4), when it imposed a 60-month sentence with a 24-month term of post-prison supervision on defendant’s PCS conviction, a class C felony. That term is error even though the court also imposed a no-release order per ORS 137.750 and judgment provided that the PPS term “is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum.”

*State v. Renner*, 250 Or App 471, 280 P3d 1043 (2012) (*per curiam*). The sentencing court revoked defendant’s probation on convictions for attempted first-degree sexual abuse and attempted first-degree sodomy, and it imposed on each conviction, per ORS 144.103(1), a 120-month term of post-prison supervision, less time served. *Held*: Reversed and remanded. The PPS terms on the sexual-abuse convictions are plain error, because the offense is a class C felony and so the terms should be only 60 months.

*State v. Young*, 249 Or App 597, \_\_\_ P3d \_\_\_ (2012). Defendant pleaded guilty to charges of second-degree burglary, UUV, and multiple counts of identity theft, all C felonies, and stipulated to crime-seriousness ranking of 8 or 9 for each. The court imposed 60-month prison terms and terms of post-prison supervision that were 60 or 36 months, “minus the period of incarceration.” *Held*: Remanded for resentencing, otherwise affirmed. [1] The five-year terms of post-prison supervision are error because the maximum term for those offenses was only three years, per OAR 213-005-0002(2). [2] The post-prison supervision terms also were erroneous because, when added to the terms of incarceration, the total exceeded the maximum statutory indefinite sentence for the crimes, in violation of OAR 213.005-0002(4). The clause making their length contingent on the length of time the defendant is incarcerated creates an unlawfully “indeterminate” sentence.

*State v. Nolasco-Lara*, 249 Or App 111, 274 P3d 880 (2012). Defendant pleaded guilty to second-degree robbery pursuant to a plea agreement providing that the state would recommend a 70-month prison sentence with 5 years of post-prison supervision; the state dismissed other and more serious charges. The court imposed that sentence, and defendant did not object. *Held*: Affirmed. The 5-year term of post-prison supervision is error both because the prescribed term is only three years, OAR 213-005-0002(2)(a), and because the total sentences exceeds the statutory maximum, OAR 213-005-0002(4). But the court declined to review the claim as “plain error,” because the term was expressly included in the plea agreement, defendant obtained “a significant benefit” by the deal, and “it is possible that defendant made a strategic choice not to object.”

*State v. Capri*, 248 Or App 391, 273 P3d 290 (2012). Pursuant to a plea agreement, defendant pleaded guilty to two counts a felony stalking, a class C felony, and the court imposed a 41-month prison sentence on each, with 28 months on the second to be served concurrently with the first, and it also imposed a 36-month term of post-prison supervision on each conviction. Defendant argued for the first time on appeal that the post-prison supervision terms violated OAR 213-005-0002(4), because the total sentence is thus 77 months. *Held*: Reversed and remanded. “Plain error” review is permissible because defendant is prejudiced because the post-prison supervision terms are 17 months too long.

*State v. Clark*, 240 Or App 813, 247 P3d 1279 (2011) (*per curiam*). On defendant’s merged convictions for first-degree rape, the court imposed a 100-month sentence and a 20-year term of PPS. *Held*: Reversed and “remanded for

resentencing.” [1] Because the PPS term appeared for the first time in the judgment, “preservation was not required.” [2] The PPS term is error because, under ORS 144.103(1), it should “be reduced by the amount of time served.”

**State v. Elk**, 240 Or App 432, 247 P3d 328 (2011) (*per curiam*). The sentencing court imposed a 36-month prison term with a 60-month term of post-prison supervision on defendant’s conviction for felony public indecency. *Held*: Reversed and remanded. [1] The PPS term is “plain error” because that conviction is not subject to the extended PPS term mandated by ORS 144.103(1), and OAR 213-005-0002(2)(a) prescribes only a 24-month term of post-prison supervision. [2] “Resentencing” is required by ORS 138.222(5).

**State v. Mitchell**, 236 Or App 248, 235 P3d 725 (2010). After revoking defendant’s probation on conviction for coercion, the court imposed a 58-month prison sentence with a 36-month term of post-prison supervision and ordered that “if the length of incarceration plus the length of [PPS] exceeds the statutory maximum indeterminate sentence, then the length of [PPS] is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum.” *Held*: Reversed and remanded for resentencing. [1] Term of PPS was plain error. [2] The PPS term is unlawful because it “is indeterminate.” [3] OAR 213-005-0002(4) requires the court “to impose a term of PPS that, when added to the incarceration term imposed (but not necessarily served), would equal 60 months.”

See also **State v. Gutierrez**, 243 Or App 285, \_\_\_ P3d \_\_\_ (2011) (court erroneously imposed on defendant’s conviction for coercion a 36-month sentence and a 36-month term of post-prison supervision, less time served; remanded for resentencing).

**State v. Donner**, 230 Or App 465, 215 P3d 928 (2009). Upon revoking defendant’s probation on his conviction for attempted second-degree kidnapping, the court orally imposed the presumptive 36-month prison sentence. But the written judgment imposed only a 6-month prison term with a 36-month term of post-prison supervision. After defendant had completed serving the prison term and had been released onto PPS, the court entered an amended judgment pursuant to ORS 138.083(1) to correct “the scrivener’s error”; the amended judgment increased the prison term to 36 months. *Held*: Affirmed in part, remanded for resentencing. Although the court had authority to correct the written judgment even though defendant already had served the original sentence, the PPS term violated OAR 213-005-0002(4) because it caused the total sentence to exceed 60 months.

See also **State v. Hyman**, 232 Or App 276, 221 P3d 832 (2009) (*per curiam*) (court violated OAR 213-005-0002(4) when it imposed a 42-month prison sentence with a 36-month term of PPS on conviction for class C felony) **State v. Flanagan**, 231 Or App 561, 219 P3d 610 (2009) (*per curiam*) (same, 55-month prison sentence and 24-month term of PPS on conviction for class C felony); **State v. Williams**, 230 Or App 488, 215 P3d 930 (2009) (*per curiam*) (same, 60-month prison sentence with a 36-month term of PPS on a conviction for a class C felony).

**State v. Johnson**, 220 Or App 504, 187 P3d 742 (2008). The sentencing court erred under OAR 213-005-0002(4) when it imposed a 36-month term of post-prison supervision on each of defendant’s three convictions for class C felonies, which caused the total sentence for each to exceed 60 months.

**State v. Hollinquest**, 212 Or App 488, 157 P3d 96 (*per curiam*), *rev den*, 343 Or 206 (2007). The court imposed on defendant’s conviction for first-degree manslaughter a 240-month sentence by upward departure with a 36-month term of post-prison supervision. *Held*: Reversed and remanded. Because the 240-month term is the statutory maximum, the court committed plain error by imposing, in addition, the 36-month term of post-prison supervision.

**State v. Johnson**, 212 Or App 135, 157 P3d 295 (2007) (*per curiam*). The sentencing court committed plain error by imposing on defendant’s conviction for first-degree sexual abuse a 20-year term of post-prison supervision per ORS 144.103 (the correct term is only 10 years).

**State v. Deloache**, 207 Or App 641, 142 P3d 74 (2006). The sentencing court committed plain error by imposing on defendant’s conviction for conspiracy to commit murder a 90-month sentence with a 20-year term of post-prison supervision less time served (the correct term is only 36 months).

**State v. Vedder**, 206 Or App 424, 136 P3d 1128 (2006), *rev den*, 342 Or 417 (2007). Defendant was convicted of attempted aggravated murder and first-degree rape and sodomy. The sentencing court designated the first as the primary offense and imposed a 120-month sentence with 36 months of post-prison supervision. The court then imposed on each of the sexual-assault convictions a consecutive 100-month sentence and, per ORS 144.103, a 20-year term of PPS, less time served. *Held*: Affirmed. Although OAR 213-012-0020(4)(a) appears to require that the PPS term for the consecutive

sentences is that term prescribed for the “primary offense,” the longer terms mandated by ORS 144.103 apply, because that is the more recent and specific statute.

*State v. Stalder*, 205 Or App 126, 133 P3d 920, *rev den*, 340 Or 673 (2006). The sentencing court erred under OAR 213-005-0002(4) and -0005 by imposing, on defendant’s conviction for a class C felony, a 40-month sentence with a 24-month term of post-prison supervision with the provision that the period of incarceration when added to the PPS term “shall not exceed 60 months.”

*State v. McClain*, 201 Or App 358, 118 P3d 854 (2005), *rev den*, 342 Or 46 (2006). The sentencing court imposed on a conviction for a class C felony a 60-month prison term with a 24-month term of post-prison supervision and ordered that the sentence “shall not exceed 60 months, in any case, including incarceration and PPS.” *Held*: That term complies with OAR 213-005-0002(4).

*State v. Angell*, 200 Or App 244, 113 P3d 998 (2005). The sentencing court erred when it imposed a 24-month prison sentence with a 120-month term of post-prison supervision on defendant’s conviction for second-degree sexual abuse, a class C felony.

*State v. Crowell*, 198 Or App 564, 109 P3d 391 (2005). The sentencing court erred when it imposed post-prison supervision terms of 10 years less time actually served on defendant’s convictions for second-degree robbery and kidnapping.

*State v. Stankewitz*, 195 Or App 411, 97 P3d 695 (2004) (*per curiam*). The sentencing court erred when it imposed a 50-month prison sentence with a 24-month term of post-prison supervision on defendant’s conviction for a class C felony.

*See also State v. Galvin*, 195 Or App 413, 97 P3d 696 (2004) (*per curiam*) (same).

*State v. McCormick*, 185 Or App 491, 60 P3d 1089 (2002), *rev den*, 335 Or 391 (2003). The Court of Appeals reviewed, as “plain error” in light of the intervening decision in *Layton v. Hall*, defendant’s unreserved claim that the sentence imposed, a 5-year firearm-minimum term with a 2-year term of post-prison supervision, violates ORS 161.605.

*See also State v. Drew*, 188 Or App 665, 72 P3d 1064 (2003) (*per curiam*)

*Day v. Board of Parole and Post-Prison Supervision*, 184 Or App 409, 56 P3d 495 (2002). “Under ORS 161.035(4), criminal defendants must be sentenced under the statutory scheme in force when their crimes were committed, unless the legislature has expressed an intent to the contrary. Statutes regarding parole and other forms of post-prison supervision are, in effect, incidents of criminal sentences.” For plaintiff, the post-prison supervision period provided by former ORS 421.120(3) applies to his sentence.

*Layton v. Hall*, 181 Or App 581, 47 P3d 898 (2002). Under OAR 213-005-0002(4), the sentencing court erred when it imposed a 36-month term of post-prison supervision on petitioner’s conviction for assault in the third degree, a class C felony, in addition to the 5-year firearm-minimum sentence. “ORS 161.610 does not establish, control, or limit post-prison supervision terms in any way. OAR 213-005-0002 both establishes and limits the length of post-prison supervision terms.”

*State v. Horsley*, 168 Or App 559, 7 P3d 646 (2000). The sentencing court imposed a 70-month sentence on defendant’s conviction for second-degree robbery per Measure 11, but it neglected to impose the mandated 24-month term of post-prison supervision. The judgment was affirmed on direct appeal. Later, the court entered an amended judgment adding the omitted term of post-prison supervision. *Held*: Affirmed. The original sentence was outside the court’s sentencing authority, and it retained jurisdiction to correct the error even though defendant had commenced service of the sentence (distinguishing *State v. Hamilton*, 158 Or App 258 (1999)).

*State v. Lewis*, 150 Or App 257, 945 P2d 661 (1997). The sentencing court must impose the term of post-prison supervision prescribed by OAR 213-05-002(2) even when it imposes the mandated minimum sentence under Measure 11 instead of the prison term prescribed by the guidelines.

*State v. Little*, 116 Or App 322, 842 P2d 414 (1992): The sentencing guidelines mandate imposition of a term of post-prison supervision for all prison sentences; one of the basic principles underlying the guidelines is that offenders

released from prison will be under post-prison supervision for a period of time.

*Note:* OAR 213-05-002(4) was amended in 1993 to limit the term of post-prison supervision by the maximum indeterminate sentence prescribed for the crime of conviction. *See Layton v. Hall*, 181 Or App 581, 47 P3d 898 (2002).

*State v. Lanig*, 116 Or App 48, 838 P2d 645 (1992) (*per curiam*): Because OAR 253-05-002(2)(b) prescribed a 24-month term of post-prison supervision for the conviction, the sentencing court committed plain error in imposing 36-month term.

*See also State v. Cherepanov*, 121 Or App 195, 853 P2d 324 (1993) (*per curiam*) (same); *State v. Graves*, 120 Or App 226, 851 P2d 635 (*per curiam*), *rev den*, 318 Or 98 (1993) (sentencing court erred in imposing 36-month term of post-prison supervision instead of prescribed 24-month term); *State v. Morgan*, 120 Or App 222, 851 P2d 636 (1993) (*per curiam*) (sentencing court erred in imposing 60-month term of post-prison supervision instead of prescribed 36-month term); *State v. Smith*, 116 Or App 73, 841 P2d 1 (1992) (same).

*But see State v. Chacon*, 127 Or App 130, 870 P2d 271 (1994) (*per curiam*) (court refused to review unpreserved claim that sentencing court erred in imposing 36-month term of post-prison supervision on a conviction for a category 6 DCS offense); *State v. Hopkins*, 127 Or App 622, 874 P2d 827, *rev den*, 319 Or 281 (1994) (court refused to review unpreserved challenge to 60-month term of post-prison supervision imposed on attempted-murder conviction).

*State v. Rund*, 115 Or App 382, 837 P2d 563 (1992) (*per curiam*): Sentencing court lacked authority to impose 5-year term of post-prison supervision where OAR 253-05-002(2)(c) prescribed 36-month term.

*State v. Pinkowsky*, 111 Or App 166, 826 P2d 10 (1992): [1] “Under the guidelines, a sentencing court does not have discretion *not* to impose post-prison supervision. OAR 253-05-002 *requires* imposition of term of post-prison supervision as part of a sentence for *any* offender who is sentenced to prison.” [2] Sentencing court had authority to enter amended judgment adding term of post-prison supervision notwithstanding that defendant had completed service of his prison term and had been released.

## 2. Extended term of post-prison supervision mandated or authorized by statute

*See* ORS 144.103 (prescribing extended post-prison supervision terms for certain sexual offenses and first-degree assault on child under six years of age); ORS 137.765 *et seq.* (lifetime term for sexually violent dangerous offenders); ORS 161.725 and 144.232 (extended term for dangerous offenders).

*Note:* The 2005 Legislative Assembly amended ORS 144.103 (effective April 24, 2006) to mandate a lifetime term of post-prison supervision for a defendant convicted of first-degree rape, sodomy, sexual penetration, or kidnapping based on a sexual assault on a child under 12 years of age. Or Laws 2006, ch 1.

*See also* Parts IX-A (“Murder Convictions”), -B (“Dangerous-Offender Sentences”), and -I (“Other ‘Prior Conviction’ Statutes”), *below*.

*State v. Sartin*, 248 Or App 748, 274 P3d 259 (2012) (*per curiam*). [1] The sentencing court committed plain error when it imposed 10-year terms of post-prison supervision on defendant’s convictions for first-degree sexual abuse without ordering, as required by ORS 144.103(1), that those terms are to be reduced by the prison terms served. [2] The proper remedy is a remand for resentencing, rather than simply for entry of a corrected judgment.

*State v. Clark*, 240 Or App 813, 247 P3d 1279 (2011) (*per curiam*). On defendant’s merged convictions for first-degree rape, the court imposed a 100-month sentence and a 20-year term of PPS. *Held:* Reversed and “remanded for resentencing.” [1] Because the PPS term appeared for the first time in the judgment, “preservation was not required.” [2] The PPS term is error because, under ORS 144.103(1), it should “be reduced by the amount of time served.”

*State v. Elk*, 240 Or App 432, 247 P3d 328 (2011) (*per curiam*). The sentencing court imposed a 36-month prison term with a 60-month term of post-prison supervision on defendant’s conviction for felony public indecency. *Held:* Reversed and remanded. [1] The PPS term is “plain error” because that conviction is not subject to the extended PPS term mandated by ORS 144.103(1), and OAR 213-005-0002(2)(a) prescribes only a 24-month term of post-prison supervision. [2] “Resentencing” is required by ORS 138.222(5).

*State v. Rickard*, 225 Or App 488, 201 P3d 927 (2009). During the course of post-conviction proceedings initiated by defendant, the state filed a motion under ORS 138.083 to amend the judgment of conviction and sentence to make them consistent with ORS 144.103, which imposes extended terms of post-prison supervision on some crimes.

Without notifying defendant, the court issued an amended judgment that: (1) added the phrase “less time actually served” to the PPS terms on certain convictions, to assure that the combined terms of incarceration and PPS did not exceed the maximum statutory sentences for those offenses, as required by ORS 144.103; (2) reduced the length of PPS on certain convictions from 20 years to 10 years, as required by ORS 144.103; and (3) increased the duration of some PPS terms from 36 months to five years. Defendant appealed arguing that the amendments were unlawful because they were done outside his presence, contrary to ORS 137.030 and Art I, § 11. *Held*: Reversed, remanded. The amendments that erroneously increased the defendant’s PPS term from 36 months to 5 years based on a version of the statute that did not apply to defendant were substantive, not mere clerical errors; thus, defendant was entitled to notice and to be present. Because the applicable statutes did not require the amendment, defendant had a right to be heard. The right to be present and to be heard protects against prejudicial actions by the sentencing court that are not required by law.

*State v. Hopson*, 220 Or App 366, 186 P3d 317 (2008), *mod on recons*, 228 Or App 91, 206 P3d 1206 (2009). The right-to-jury rule in *Blakely* applies to imposition of a lifetime term of post-prison supervision under ORS 137.765 (2005) based on a finding that the defendant is a sexually violent dangerous offender. For purposes of *Blakely*, an extended term of post-prison supervision is part of the “sentence.”

*Note*: The current version of ORS 137.767(6) provides that the defendant is entitled to a jury trial on the issue of whether he is a SVDO.

*State v. Johnson*, 212 Or App 135, 157 P3d 295 (2007) (*per curiam*). The sentencing court committed plain error by imposing on defendant’s conviction for first-degree sexual abuse a 20-year term of post-prison supervision per ORS 144.103 (the correct term is only 10 years).

*State v. Vedder*, 206 Or App 424, 136 P3d 1128 (2006), *rev den*, 342 Or 417 (2007). Defendant was convicted of attempted aggravated murder and first-degree rape and sodomy. The sentencing court designated the first as the primary offense and imposed a 120-month sentence with 36 months of post-prison supervision. The court then imposed on each of the sexual-assault convictions a consecutive 100-month sentence and, per ORS 144.103, a 20-year term of PPS, less time served. *Held*: Affirmed. Although OAR 213-012-0020(4)(a) appears to require that the PPS term for the consecutive sentences is that term prescribed for the “primary offense,” the longer terms mandated by ORS 144.103 apply, because that is the more recent and specific statute.

*State v. Pervish*, 202 Or App 442, 123 P3d 285 (2005), *rev den*, 340 Or 308 (2006). The sentencing court erred in imposing a 10-year term of post-prison supervision less time served on defendant’s convictions for compelling prostitution, because ORS 144.103 does not apply to such a conviction.

*State v. Grow*, 201 Or App 717, 120 P3d 534 (*per curiam*), *rev den*, 339 Or 544 (2005). The sentencing court erred when it imposed a 75-month prison sentence and a 10-year term of post-prison supervision on defendant’s conviction for unlawful sexual penetration in the second degree, a class C felony. Under ORS 144.103, that term of post-prison supervision must be reduced by the prison term actually served.

*State v. Linebaugh*, 149 Or App 771, 945 P2d 97 (*per curiam*), 326 Or 234 (1997). Sentencing court erred when it imposed a 10-year term of post-prison supervision pursuant to ORS 144.103 on defendant’s conviction for first-degree sexual abuse without ordering that term shall be reduced by the prison term that defendant serves.

*State v. Umtuch*, 144 Or App 366, 927 P2d 142 (1996), *rev den*, 324 Or 654 (1997): The 240-month term of post-prison supervision imposed on conviction for first-degree sodomy pursuant to ORS 144.103 was error, because the court failed to provide that that term would be reduced by time served.

*State v. McFee*, 136 Or App 160, 901 P2d 870 (1995), *pet dismissed* 323 Or 662 (1996): ORS 144.103 does not apply to a conviction for first-degree sexual abuse in violation ORS 163.427 based on a crime committed between September 29, 1991 (*i.e.*, when ORS 144.103 took effect) and November 4, 1993 (*i.e.*, when ORS 144.103 was amended to add ORS 163.427).

*See also State v. Weikert*, 145 Or App 263, 929 P2d 1070 (1996), *rev den*, 325 Or 45 (1997) (same).

*State v. Burch*, 134 Or App 569, 896 P2d 10 (1995): When sentencing court imposes an extended term of post-prison supervision per ORS 144.103, the court should not simply subtract the prison sentence imposed from maximum indeterminate sentence prescribed for conviction and then impose the remainder. ORS 144.103 requires service of a PPS

term based on “the term of imprisonment served,” not the prison term imposed, and the defendant may obtain early release on that conviction. Therefore, the court should impose full PPS term less time actually served on the prison sentence imposed.

*State v. Berkey*, 129 Or App 398, 877 P2d 1238 (*per curiam*), *rev den*, 320 Or 360 (1994): ORS 144.103 applies only to subject convictions based on crimes committed after September 29, 1991.

*See also State v. Minniear*, 124 Or App 197, 859 P2d 1205 (1993) (*per curiam*) (same).

### 3. Court-imposed conditions of post-prison supervision

*State v. Reed*, 235 Or App 470, 237 P3d 826 (2010). Defendant was convicted of first-degree burglary and sexual abuse, and the prosecutor asked the court to *recommend* as a condition of post-prison supervision that defendant be barred from contacting the victim or her family. The court’s oral sentence and the written judgment, however, purported to impose that as a condition of PPS. Defendant did not object. *Held*: Reversed and remanded. [1] The order is plain error because a sentencing court “may recommend conditions of post-prison supervision but may not order them.” [2] Defendant is prejudiced because the condition imposed in the judgment is more slightly restrictive than the condition that the board.

*State v. Hart*, 329 Or 140, 985 P2d 1260 (1999). Restitution need not be made payable during the post-prison supervision term; instead, the obligation can be extended for at least 20 years.

*Lattymayer v. Thompson*, 170 Or App 160, 12 P3d 535 (2000), *rev den*, 332 Or 56 (2001). A sentencing court does not have authority to impose conditions of post-prison supervision.

*State v. Knupp*, 140 Or App 10, 914 P2d 33 (1996): Notwithstanding general rule that sentencing court has no authority to impose conditions of post-prison supervision, “under ORS 161.675(1), the sentencing court has the authority, in fact the responsibility, as part of its imposition of sentence, if a monetary penalty is imposed, to set a payment schedule, even though it may later be modified by the Board of Parole.” Although the court should not impose the fine as a condition of post-prison supervision, the Court of Appeals will construe such an order as one “to pay a fine as part of his sentence, but to suspend payment until he is released on post-prison supervision.”

*See also State v. Larson*, 144 Or App 611, 927 P2d 1117 (1996) (same).

*State v. Dusenberry*, 130 Or App 205, 880 P2d 515 (1995): Sentencing court erred in ordering defendant, as a condition of post-prison supervision, to complete drug-treatment program; the court “lacks authority to impose conditions of parole.”

*See also State v. Weeks*, 135 Or App 493, 899 P2d 730 (1995) (sentencing court lacked authority to impose post-prison supervision terms); *State v. Wright*, 128 Or App 88, 875 P2d 1174 (1994) (sentencing court is without authority to impose conditions of incarceration and post-prison supervision); *State v. Weiss*, 113 Or App 255, 830 P2d 637 (1992) (*per curiam*) (same); *State v. Holliday*, 110 Or App 426, 824 P2d 1148, *rev den*, 313 Or 211 (1992) (same); *State v. Potter*, 108 Or App 480, 816 P2d 661 (1991) (*per curiam*) (same).

*State v. Carr*, 116 Or App 60, 840 P2d 724 (1992) (*per curiam*): A sentencing court does not have authority to impose restitution as a condition of post-prison supervision. The appellate court, however, interpreted “the judgment as sentencing defendant to pay restitution but suspending payment until he is no longer incarcerated.”

## C. PROBATIONARY DISPOSITIONS

*See* ORS 137.012 (extended terms for certain sexual offenses); OAR 213-005-0007 and -0008.

*See also* Part X (“Revocation or Modification of Probation”), *below*.

*State v. Youngs*, 256 Or App 755, 301 P3d 976 (2013) (*per curiam*). Defendant pleaded guilty to unlawful possession of methamphetamine, and the sentencing court placed him on probation and, as a condition of probation, ordered forfeiture of his cell phone, which had been seized during the investigation. *Held*: Remanded for resentencing. Under ORS 161.045(4), “the court lacked authority to order forfeiture as a condition of probation.

*State v. Gaskill*, 250 Or App 100, 279 P3d 275 (2012). Defendant chatted up a vulnerable young woman in a dollar store, followed her back to her apartment, followed her around inside her apartment for three hours despite her hints

that he leave, and kissed her on her neck and the back of her head. She eventually managed to convince him to leave. He pleaded guilty to a charge of sexual abuse in the third degree. At sentencing, the prosecutor noted that defendant had a criminal history of such offenses and “takes advantage of situations where he can find these vulnerable women, and put them in positions that they clearly do not want to be in.” None of his previous offenses involved minors, and defendant assured the court that he does not have “a problem with minors.” Nonetheless, the court imposed as a condition of probation that he not have contact with minors or frequent places where minors congregate. *Held*: Reversed and remanded for resentencing. [1] “Under ORS 137.540(2), a trial court has broad discretion to impose special conditions of probation. However, the conditions must be ‘reasonably related to the crime of conviction or the needs of the probationer for the protection of the public or reformation of the probationer, or both.’ ORS 137.540(2). Moreover, the conditions cannot be more restrictive than necessary to achieve the goals of probation. A trial court must establish a factual record to support its imposition of special conditions. That record may be established either at trial or by evidence presented at the sentencing hearing.” [2] In this record, there is no connection between defendant’s unlawful sexual conduct and his relationship to minors. The challenged special conditions of probation are not reasonably related to the protection of the public or reformation of defendant.”

*State v. Everitt*, 247 Or App 619, 269 P3d 117 (2012). Defendant was convicted of menacing, disorderly conduct in the second degree, and harassment, and the court imposed a probationary sentence and ordered him to do community service as a condition of probation. Defendant argued on appeal that the court erred in ordering him to do community service “without his consent.” *Held*: Reversed and remanded. In order to require a probationer to do community service, ORS 137.128(1) requires “the offender must consent.” The court erred when it ordered defendant to perform community service because, as far as the record showed, he “did not consent to donate labor for the welfare of the public.”

*Note*: If the court imposes a community service as a condition of probation under ORS 137.128, make sure that the record shows that the defendant expressly “consents” to that condition. If the defendant is convicted of DUII and the court imposes community service as a condition of probation under to ORS 813.020(2), it is less clear whether an on-the-record “consent” from the defendant is necessary, because that statute does not include the “the offender must consent” requirement.

*State v. Banks*, 246 Or App 109, 265 P3d 50 (2011). Defendant pleaded guilty to attempted UUV (a misdemeanor), and the court placed him on probation for two years, imposed a compensatory fine of \$3,686 and order him to pay \$50 a month on the fine. Defendant failed to make the payments, and he was arrested on the probation-violation allegation. At the show-cause hearing, the court continued defendant on probation but extended the term for a total period of six years, in order to allow defendant sufficient time to pay off the fines. Defendant did not object, but he then appealed arguing that the court committed “plain error” because it lacked authority under ORS 137.010 to extend the probationary period to six years. *Held*: Affirmed. Defendant may have had a strategic purpose in not objecting to extension of his probation into a sixth year because that gave him additional time to pay the fine and thus avoid revocation of his probation and imposition of a jail sentence.

*State v. Donahue*, 243 Or App 520, \_\_\_ P3d \_\_\_ (2011). Defendant pleaded no contest to one count of prostitution that she committed on 82<sup>nd</sup> Street in Portland. The court imposed an 18-month probationary term and required, as a special condition of probation, that she not to enter a certain “high vice” area in Portland around 82<sup>nd</sup> and Sandy unless she was passing through it in a car or public transportation. On appeal, defendant argued that the condition was (1) not reasonably related to the crime of conviction, (2) overbroad, (3) unconstitutionally infringed her freedom of association. *Held*: Affirmed. The condition at issue was proper because she had committed the crime in that area and it was “reasonably related to the protection of the public or her reformation, or both.” The fact that the probation condition could have been more narrowly tailored does not necessarily establish that the condition was overbroad or an unconstitutional infringement of her freedom of association. Defendant “makes no argument that she suffers any particular harm as a result of having to shop elsewhere.” Further, under ORS 137.540(2)(a), “a probation condition can include much greater intrusions upon a defendant’s freedom of association than those imposed on defendant in this case.”

*State v. Baker*, 235 Or App 321, 230 P3d 969 (2010). Defendant was sentenced to a one-year term of probation on her conviction for telephonic harassment. Prior to her conviction, her ex-husband had initiated a proceeding for a stalking protective order in connection with the conduct underlying the conviction. Eighteen days after defendant was sentenced, the trial court held a hearing on the requested stalking protective order and extended defendant’s term of probation to five years in exchange for the ex-husband’s agreement to dismiss his request for a stalking protective order. On appeal, defendant argued that the trial court erred by doing so. *Held*: A trial court abuses its discretion when it extends probation for reasons other than the protection of public safety and/or the rehabilitation of the defendant. The trial court’s

extension of probation “as a means of avoiding a hearing on the stalking protective order” was an abuse of discretion.

*State v. Marks*, 227 Or App 634, 206 P3d 1102 (2009) (*per curiam*). The sentencing court committed plain error when it imposed a six-year term of probation, because the maximum term is five years, ORS 137.010(4).

*State v. Fults*, 219 Or App 305, 182 P3d 267 (2008). On remand, 343 Or 515 (2007), the Court of Appeals held that the sentencing court’s imposition of a 36-month term of probation instead of the presumptive 24-month term did not constitute plain error because defense counsel expressly consented, there may have been a “strategic choice,” and the existence of a concurrent 36-month term of probation on another conviction mad gravity of the error “slight.”

*State v. McCollister*, 210 Or App 1, 150 P3d 7 (2006). The sentencing court properly imposed the “sex-offender package” per ORS 137.540(2) as a condition of probation on defendant’s conviction for harassment. To impose that condition, it was not necessary for the court specifically to find that defendant acted with a sexual purpose. Consequently, imposition of that condition did not depend on a specific finding of fact, and defendant was not entitled to a jury finding under *Blakely*.

*State v. Phillips*, 206 Or App 90, 135 P3d 461, *rev den*, 341 Or 548 (2006). [1] “We review the trial court’s imposition of probation conditions for errors of law.” [2] The sentencing court properly imposed, as a special probation condition under ORS 137.540(1)(m), that defendant complete sex-offender treatment. Even though his convictions were not for sexual offenses, the court properly found that he acted with a sexual purpose in committing them and that the conditions were reasonably related to protection of the public and reformation.

*State v. Liechti*, 202 Or App 649, 123 P3d 350 (2005), *rev den*, 340 Or 673 (2006). The sentencing ordered defendant, as a special condition of his probation on his conviction for DUII, to turn in his medical-marijuana card and to refrain from using marijuana during his probation, and defendant appealed challenging that condition. *Held*: Affirmed. ORS 137.540(1)(j) requires a probationer to obey all laws, including federal law. “Compliance with federal law requires defendant to abstain from marijuana possession and use,” even if the OMMA may permit it. Because defendant is barred from possessing marijuana by the general condition, his challenge to the special condition provides no basis for reversal.

*State v. Patton*, 201 Or App 509, 119 P3d 250, *rev den*, 339 Or 609 (2005). The sentencing court erred under ORS 137.540(2) when it ordered defendant, as a condition of probation on his sexual-abuse convictions, not to consume alcohol, because that restriction is not related to the offense.

*State v. Brown*, 200 Or App 427, 115 P3d 254, *rev den*, 339 Or 544 (2005). Defendant’s unpreserved *Blakely*-based challenge to the special conditions of probation imposed on his conviction for felony DUII are not reviewable as plain error, because “the gravity of the asserted error is slight” under the circumstances.

*State v. Gutierrez*, 197 Or App 496, 106 P3d 670, *on recons*, 199 Or App 521, 112 P3d 433 (2005), *rev den*, 340 Or 673 (2006). The Court of Appeals refused to review defendant’s unpreserved *Blakely*-based challenge to an upward durational departure to a 36-month term of probation on a felony conviction, because it is not clear that *Blakely* applies to probationary terms and, in any event, that term is concurrent with and on the same conditions as a 60-month probationary term, on a misdemeanor conviction, that he does not challenge.

*State v. Bourrie*, 190 Or App 572, 80 P3d 505 (2003). Where defendant’s conviction was not for a sexual offense, the probation condition requiring sex-offender evaluation and treatment was not reasonably related to the crime of conviction or the needs of the defendant.

*State v. Tallman*, 190 Or App 245, 78 P3d 141 (2003): The presumptive sentence for defendant’s conviction for first-degree criminal mistreatment was 20 months. With the defendant’s agreement but over the state’s objection, the court departed dispositionally and imposed a 5-year probationary sentence but ruled that, if it later revokes probation, it will impose a 36-month prison sentence without possibility of release for 21 months. The written judgment noted that the court suspended imposition of sentence and imposed the probationary term. *Held*: Reversed and remanded. [1] The state’s objection that the proposed 36-month sentence on revocation is unlawful under OAR 213-010-0002(2) “is not ripe.” [2] Given that probation is a “sentence,” the judgment is internally inconsistent because it both suspends imposition of sentence and imposes a probationary sentence. Moreover, the court lacked authority to suspend imposition of sentence on the felony conviction.

*State v. Foster*, 186 Or App 466, 63 P3d 1269 (2003). Defendant was convicted of a class A misdemeanor, and the court imposed a 360-day sentence, suspended execution of 280 days, and placed defendant on probation. *Held*: Reversed and remanded for resentencing. Under ORS 137.540(2), the period of confinement imposed a condition of probation cannot exceed half of the maximum sentence, which would be six months in this case. It does not matter that 280 of the days were suspended or that the court could have imposed the 360-month term as a straight sentence.

*State v. Flicker*, 185 Or App 666, 60 P3d 1155 (2002). The sentencing court erred in imposing the sexual-offender treatment as a condition of probation on defendant's convictions for hit and run and providing false information to a police officer, because he was not convicted of a sexual offense, ORS 137.540(1)(m), nor did he crimes involve a sexual purpose. Remanded with directs to delete that condition.

*State v. Shefler*, 118 Or App 536, 847 P2d 417 (1993) (*per curiam*): The guidelines do not permit the sentencing court to order that custody units are "to be utilized at the discretion of [defendant's] probation officer."

See also *State v. Thorfinnson*, 121 Or App 10, 853 P2d 368 (1993) (guidelines do not authorize sentencing court to impose custody units that are to be served "as directed by Department of Corrections"; "the court must determine how the custody units order are to be used, in accordance with OAR 253-05-012(3)").

But see *State v. Carr*, 125 Or App 270, 863 P2d 1316 (1993) (*per curiam*), *affd* 319 Or 408, 877 P2d 1192 (1994) (refusing to review unpreserved objection to order delegating to probation officer the authority to use reserved custody units); *State v. Williams*, 125 Or App 546, 865 P2d 1324 (1993) (*per curiam*) (same).

*State v. Dotter*, 114 Or App 1, 833 P2d 1369 (1992): The court erred in imposing 120 custody units when the gridblock prescribed only 90 and the court did not purport to depart.

*State v. Lucas*, 113 Or App 12, 830 P2d 601, *rev den*, 314 Or 176 (1992): "[T]he court was without authority to sentence defendant to prison and then suspend execution of the sentence" and place defendant on probation; "the sentencing guidelines require execution of either a prison sentence or a sentence of probation."

*State v. Anderson*, 111 Or App 294, 826 P2d 66 (1992): "[C]ustody units do not have to be imposed when the sentencing court initially passes sentence. Any units that are not imposed at the time of sentencing are reserved for use as sanctions for probation violations."

See OAR 213-05-011(1) (last sentence added by 1993 amendments).

## D. OPTIONAL PROBATION

See OAR 213-005-0006.

*State v. Schuh/Hookie*, 112 Or App 362, 829 P2d 1040, *rev den*, 314 Or 176 (1992). "A defendant's brain and society at large are not particular programs designed to forestall recidivism," and a judgment imposing optional probation based solely on that ground is reversible error.

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## VII. DEPARTURE SENTENCES

### A. PROCEEDINGS TO IMPOSE A DEPARTURE SENTENCE

See ORS 137.080 to 137.100; ORS 137.671; OAR 213-008-0001.

See also Part II-B(1) ("Right to jury, *Apprendi* issues"), Part II-B(2) ("Right to notice: alleging facts relating to sentence"), and Part II-B(4) ("Double-jeopardy objections"), *above*.

To comply with *Blakely v. Washington*, the 2005 legislature enacted ORS 136.760 *et seq.* to provide a procedure for alleging and proving an "enhancement fact" to the jury. And the 2009 legislature enacted ORS 136.433 to 136.434 to provide a procedure for pleading, stipulating to, and proving a previous conviction that is used to enhance a sentence.

*State v. Speedis*, 350 Or 424, 256 P3d 1061 (2011). Defendant was charged with first-degree burglary and second-degree assault, and the state specially alleged per ORS 136.765 four sentence-enhancement factors, none of which is listed

in OAR 213-008-0002(1)(b) (*i.e.*, each is a “nonenumerated factor”): (1) defendant was on supervision when he committed the crimes, (2) previous sanctions have failed to deter him from committing crimes, (3) he committed the crimes while on release status while charges were pending, and (4) he had demonstrated a disregard of laws making successful probation unlikely. The jury found him guilty on the charges and found that the state had proved each of the factors. The sentencing court departed upward on both convictions based on each factor separately, and it imposed concurrent 72-month sentences. On appeal, defendant did not challenge the jury’s findings or the court’s ruling that those findings constituted substantial and compelling reasons; he argued only that use of nonenumerated factors violated the constitution. *Held*: Affirmed. [1] Use of non-enumerated factors does not violate separation-of-powers principles in Art II, § 1. [2] “Under *Blakely*, a presumptive sentence is a maximum sentence for purposes of the Sixth and Fourteenth Amendment. A presumptive sentence, however, is not a maximum sentence for the purposes of state law; that is, for the purposes of analyzing defendant’s state constitutional separation-of-powers argument, a presumptive sentence does not set the outer boundary beyond which a trial court may not go.” [3] “Not only does a presumptive sentence not define the outer boundaries of a trial court’s sentencing authority, as defendant’s argument assumes, but the sentencing guidelines expressly authorize trial courts to decide whether nonenumerated aggravating and mitigating factors warrant imposing a greater or a lesser sentence than a presumptive sentence. In imposing a departure sentence based on nonenumerated aggravating factors, a trial court is not acting beyond the bounds of its sentencing authority. ... Rather, it is acting within the limits that the legislature has set.” [4] Under Art I, § 20, “‘fair notice’ is not an aspect of vagueness analysis.” So, “in deciding defendant’s state constitutional vagueness claim in this case, we consider only whether the sentencing guidelines provide an ascertainable standard that guided the prosecutor in identifying which nonenumerated factors warranted imposition of a departure sentence.” [5] “The discretion that the sentencing guidelines give prosecutors to identify and courts to determine nonenumerated aggravating factors is neither standardless nor unfettered. That aspect of the sentencing guidelines is not vague in violation of” Art I, §§ 20 and 21. [6] Under the Due Process Clause, “a criminal statute will be unconstitutionally vague if it fails to provide ‘fair warning’ of the acts that will expose a person to criminal penalties.” But even if an ‘otherwise uncertain statute,’ standing alone, would fail to provide constitutionally adequate notice of the acts that expose a person to criminal liability, the statute will satisfy due process if a prior judicial decision has fairly disclosed the charged conduct to be within the statute’s scope.” [7] The Court of Appeals had identified each of the four nonenumerated aggravating factors at issue in this case as permissible grounds for imposing an enhanced sentence under the sentencing guidelines before defendant committed his crimes. Consequently, “[e]ven if the sentencing guidelines, standing alone, would not provide sufficient notice that those factors would justify an enhanced sentence, those appellate decisions did and, in doing so, satisfied due process. If those cases provided sufficient notice to defendants under the Due Process Clause, we think that they also provided sufficient guidance to prosecutors in identifying those aggravating factors that would support the imposition of an enhanced sentence.”

*Note*: It is not clear how the court would rule on a vagueness challenge to a nonenumerated factor that has not previously been specifically approved by an appellate court.

*State v. Heisser*, 350 Or 12, 249 P3d 113 (2011). Defendant originally was charged with first-degree robbery and other charges. The parties entered a plea agreement by which defendant pleaded guilty to third-degree robbery (as a lesser-included offense) and the other charges; the agreement provided that the state was “free to seek [upward] departure sentences” within certain limits and, in turn, defendant was “free to seek presumptive sentences.” At sentencing, defendant objected the state’s request for upward departures by contending that the state’s notice of intent to seek the departures was untimely. The sentencing court concluded that the plea agreement barred defendant from making that argument, and that it was apparent that there was no “meeting of the minds” between the parties because they subjectively held different understandings about the terms of the plea agreement. Over defendant’s objection, the trial court withdrew his guilty pleas and set the case for trial. A jury found defendant guilty on the original charges and, at sentencing, the court imposed a sentence that was longer than would have been permitted by the plea agreement. The Court of Appeals reversed, concluding that the trial court lacked statutory authority under ORS 135.365 to withdraw defendant’s plea over his objection. The state petitioned for review, arguing that the court had inherent authority to rescind the plea agreement because of the lack of meeting of the minds. *Held*: Affirmed on different grounds. [1] The trial court applied an incorrect legal standard in concluding that there was no “meeting of the minds” between the parties and ordering withdrawal of the pleas. Applying contract principles, whether there was a sufficient meeting of the minds is determined by looking at the objective representations of the parties, not their subjective or unspoken intents. Here, the plea agreement was unequivocal, and the parties mutually agreed to those terms; thus, the trial court incorrectly concluded that there was no enforceable agreement. [2] The text of the plea agreement did not foreclose defendant from challenging the sufficiency of the state’s notice: “Nothing in the text of the agreement prohibited defendant from pointing out any mistakes the state might have made in laying the groundwork for upward departure sentences. Nor does anything in the agreement limit the legal or factual arguments that defendant could make in favor of presumptive sentences and against departure sentences.

Defendant's agreement to permit the state to argue for a longer sentence did not waive his opportunity to make counterarguments supporting a shorter sentence." Therefore, "the parties entered into an effective plea agreement and defendant's challenge regarding the timeliness of the state's notice to seek upward departure sentences did not violate the terms of the plea agreement."

*Note:* The court noted, "we do not need to decide whether a trial court has inherent authority to reconsider a prior decision to approve a plea agreement and accept a guilty plea as part of a plea agreement between the state and a criminal defendant. That is so because, even if the trial court had that authority, the trial court erred in this case in determining that the parties had not reached a plea agreement."

*State v. Sawatzky*, 339 Or 689, 125 P3d 722 (2005). Based on *Blakely*, the Court of Appeals vacated defendant's upward-departure sentences and remanded for resentencing. On remand, the trial court ruled that the state could prove the aggravating facts to a newly empaneled jury, and defendant petitioned for a writ of mandamus contending that such a trial would constitute double jeopardy. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528. *Held:* Writ dismissed. The pending trial on remand does not violate the double-jeopardy bar because it is "a continuation of a single prosecution," it was defendant who challenged the legality of her original sentences, and she has not been "acquitted" on those factors. Retrial is not barred due to the fact that the indictment did not allege the aggravating facts, because the state was not required to allege those facts in the indictment. "Nothing in *Apprendi* or *Blakely* alters the definition of an 'offense' set out in ORS 161.505. In our view, so long as a defendant has timely notice that the state intends to prove certain aggravating or enhancing factors necessary for the imposition of [an upward-departure sentence], and the trial court affords a criminal defendant the opportunity to exercise his or her jury trial right in that regard, the federal constitution is satisfied."

*State v. Upton*, 339 Or 673, 125 P3d 713 (2005). The indictment specially alleged aggravating factors for an upward departure, defendant demurred on the ground that the court had no authority to submit those factors to the jury, and the trial court overruled the demurrer but ruled that it could not submit those factor to the jury, and the state petitioned for a writ of mandamus. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528. *Held:* Writ issued. [1] "Read together, ORS 136.030 and ORS 136.320 thus authorize the trial court to submit 'all questions of fact' to the jury that a criminal defendant is entitled to have the jury decide. Furthermore, ORCP 58 B(8) and 59 B authorize the trial court to instruct jurors regarding any aggravating or enhancing factor that they must resolve." In short, under existing law, the trial court had authority "to submit sentencing enhancing factors to a jury." [2] Under the guidelines, imposition of an upward departure is a two-step process: "First, there must be a determination of whether the state has proved the existence of the aggravating or enhancing factors. Second, there must be a determination of whether the factors so proved provide a substantial and compelling reason that justifies imposing a sentence beyond the presumptive range." The guidelines do not identify who may make the factual findings, and even if the jury finds aggravating facts, the court is not required to depart based on that finding. Consequently, it is not inconsistent with the guidelines to allow the jury to find the alleged aggravating facts. [3] Nothing in the guidelines or the implementing statutes prohibits application of a rule that aggravating facts must be found beyond a reasonable doubt. [4] Given that *Blakely* essentially makes an aggravating fact a new "material element" of the underlying offense, it does not violate the Due Process Clause for the state to prove such a fact to the jury unless the defendant agrees to some other procedure. [5] The procedure set forth in SB 528 applies by its terms to this case even though defendant allegedly committed his crimes before its effective date. [6] SB 528 does not violate the Due Process Clause by prescribing a "one-sided" rule within the meaning of *Wardius v. Oregon*, because permitting submission of only aggravating facts to the jury does not provide any advantage to the state. [7] The allegation of an aggravating fact in the indictment does not violate ORS 132.540(2), because such a fact, in light of *Blakely*, is a material element of the charged offense. Moreover, SB 528 now allows such facts to be alleged.

*State v. Alexander*, 255 Or App 594, 298 P3d 55 (2013). Defendant was charged with second-degree burglary and two counts of theft; the indictment did not allege any sentence-enhancement factors. The prosecutor later sent defendant a written pretrial offer that included a "Blakely notice" that state would seek an upward departure; the notice included a check-the-box form listing 18 aggravating factors, including "other," but none of the boxes was checked and the "other" line was not filled in. At the change-of-plea hearing, the prosecutor advised the court that the parties' agreement included "open sentencing" and that the state would seek a departure on four factors for which it had submitted proposed jury instructions. Defendant objected that the state had not provided sufficient notice, but the trial court disagreed, and defendant pleaded no contest to the charges. At sentencing, the prosecutor orally raised a fifth possible ground for departure. The court imposed an upward-departure sentence on the burglary conviction based on the factors the state had noted. *Held:* Reversed and remanded for resentencing. [1] "A 'notice' that the state 'may' rely on any of 18 individual departure factors (including some ineffable 'other')—or any combination thereof—is the functional equivalent of 'That's for us to know and you to find

out,” and “is no notice at all.” To be adequate under ORS 136.765(2), “the state’s written notice must specify the enhancement fact, or enhancement facts, on which it intends to rely.” [2] Although the state’s proposed jury instructions specifically identified four enhancement facts, it did not satisfy the notice requirement. The record on appeal was sufficient to show that the trial court had received those proposed instructions in written form, but those instructions were not included in the record on appeal and “the record does not demonstrate that defendant, in fact, received such written notice.”

*State v. Cam*, 255 Or App 1, 296 P3d 578 (2013). Defendant was found guilty of 53 theft and drug-related charges. *Held*: Reversed and remanded for resentencing. [1] The trial court correctly submitted the “harm greater than typical” enhancement factor to the jury even though that factor was not alleged in the indictment, because sentencing enhancement factors need not be alleged in an indictment. [2] The court correctly allowed the jury to consider, in determining whether the “persistent involvement” factor applied to eight theft counts, defendant’s prior criminal conduct that did not result in conviction, and other crimes that the jury itself found defendant guilty of committing, because those crimes were unrelated to the eight counts.

*State v. Calhoun*, 250 Or App 467, 280 P3d 1046 (2012) (*per curiam*). Defendant was convicted of PCS, and the court dispositionally departed and imposed a 6-month jail term based on two aggravating factors. *Held*: Reversed and remanded. The court erred “because the state failed to provide notice of the sentence-enhancement facts as required by ORS 136.765.”

*State v. Evans*, 238 Or App 523, 242 P3d 738 (2010). On a remand for resentencing pursuant to ORS 136.790, the state had provided defendant with written notice of sentence-enhancement facts that it intended to prove and rely on to seek an upward departure sentence. Defendant objected, asserting that they were not: (1) filed with the trial court, which he asserted was required by ORS 131.005(9); or (2) alleged in the indictment, which he claimed was required by state constitution. The trial court overruled defendant’s objections, and the jury found the alleged factors. *Held*: Affirmed. The state does not have to plead sentence-enhancement facts in the indictment or file its written notice with trial court.

*State v. Sanchez*, 238 Or App 259, 242 P3d 692 (2010), *rev den*, 349 Or 655 (2011). Defendant was convicted of first- and second-degree rape. Pursuant to ORS 136.760(2), the state had provided defendant with written notice of sentence-enhancement facts that it intended to prove and rely on to seek upward departure sentences. Defendant objected on the grounds (1) that the allegations were not found by the grand jury or pleaded in the indictment, and (2) the state had not filed its written notice with the court. The trial court overruled defendant’s objections, the jury found the sentence enhancement allegations, and the court imposed departure sentences. *Held*: Affirmed. [1] The state does not have to present sentence-enhancement facts to the grand jury or allege them in the indictment. [2] Nothing required the state to file its written notice with the court.

*See also State v. Stewart*, 239 Or App 217, 244 P3d 816 (2010).

*State v. Davilla*, 234 Or App 637, 230 P3d 22 (2010). Back in 1991, when he was 16 years old, defendant attempted to rape a young woman at knifepoint, she resisted, and he murdered her. He was waived into adult court and eventually pleaded guilty to murder, first-degree burglary, and attempted first-degree rape. Pursuant to ORS 163.115(3)(a) (1989), the court imposed a life sentence. After a variety of appeals and post-conviction proceedings, the case eventually was remanded for resentencing in 2004. The state served defendant with notice per ORS 136.765 of intent to rely on several aggravating factors and requested an upward-departure sentence. The sentencing court ruled the departure rules in the sentencing guidelines are invalid as an unconstitutional delegation and struck the state’s notice. The court then ruled that the legislature would not have wanted the guidelines to remain effective without the departure rules, and struck down the guidelines *in toto*. The court then purported to apply the law in existence before 1989 and imposed an indeterminate life sentence with no restriction on parole. *Held*: Reversed and remanded. [1] “[T]he legislature’s delegation of authority to develop sentencing guidelines as an administrative rule by the [State Sentencing Guidelines Board] was constitutionally permissible.” Because “the legislature’s delegation of authority to the board to develop the guidelines was not the product of an unconstitutional delegation of legislative power to the executive branch,” the sentencing guidelines are valid. [2] Even though the rules did not impose a 200-percent maximum on an upward departure on a conviction for murder, the departure rules are not an unconstitutional delegation of legislative power to the judiciary without any constraints, because Art. I, § 16, sets a limitation on an upward departure. [3] The departure standard of “substantial and compelling” is not unconstitutionally vague. Defendant’s objection that the rules are too vague because they allow a court to rely on aggravating factors not listed in OAR 213-008-0002(1)(b), does not provide a basis for affirmance, because the state’s notice listed two aggravating factors that are in the rule.

*State v. Roberts*, 231 Or App 263, 219 P3d 41 (2009). The indictment did not allege any sentence-enhancement factors. Five months later and the day before trial, the prosecutor faxed defense counsel a notice pursuant to ORS 136.765(2) listing two sentencing-phase factors. The trial court overruled defendant's objection to the notice as untimely. Defendant was found guilty after a trial to the court, and the sentencing hearing was held two weeks later, at which the court found the factors and imposed a departure sentence. *Held*: Affirmed. [1] The Court of Appeals reviews defendant's challenge to the timeliness of the post-indictment notice "for errors of law," not for abuse of discretion. [2] ORS 136.765(2) does not prescribe a specific period of time, which suggests that "the legislature intended some measure of flexibility in assessing whether the state has provided notice within a 'reasonable period of time.'" The rule "is intended to be a time sufficient to allow the defendant to prepare a defense to those particular enhancement facts," and that may depend on whether the factors are for the guilt or sentencing phase. [3] Because the factors alleged were for the sentencing phase, were "straightforward allegations, and defendant did not argue that he was not prepared to defend, the trial court properly overruled defendant's objection to the timeliness.

*State v. Larson*, 222 Or App 498, 193 P3d 1042, *rev den*, 345 Or 503 (2008). Under *State v. Sawatzky*, 339 Or 689 (2005), the state is not required to allege sentence-enhancement facts in the indictment, as long as the defendant has timely notice of the state's intent to rely on those facts. Here, because the defendant did not assert that he lacked adequate notice, his claim fails.

*State v. Buehler*, 206 Or App 167, 136 P3d 64 (2006). The right-to-jury rule in *Blakely* applies to a finding of an aggravating fact that is used as a basis for dispositional departure to a prison sentence, because a presumptive probationary sentence is the statutory maximum in the absence of such a finding.

*State v. Balkin*, 134 Or App 240, 895 P2d 311, *rev den*, 321 Or 397 (1995): At sentencing, the court may "consider any relevant evidence that it found to be trustworthy and reliable," ORS 137.090(2), including representations by the prosecutor concerning uncharged crimes and information in the presentence investigation report.

*State v. Fennern*, 133 Or App 199, 891 P2d 2 (1995): Court properly departed based on finding that child victim of sodomy offense suffered permanent mental injury. "The guidelines do not preclude a sentencing court from drawing inferences based on the evidence before it."

*State v. Swisher*, 116 Or App 129, 840 P2d 1339 (1992), *rev den*, 315 Or 312 (1993): Nothing in ORS 137.080 or the sentencing guidelines "prohibits a court from considering aggravating or mitigating factors or deciding to impose a departure sentence without the motion of a party."

*State v. Clark*, 113 Or App 692, 833 P2d 1314 (1992): "A sentencing court is given broad discretion in determining what circumstances warrant imposition of a departure sentence."

*State v. Kennedy*, 113 Or App 134, 831 P2d 712 (1992): "In departure sentences, the legislature chose to reserve for sentencing courts the determination of what factors justify a departure. The listed aggravating and mitigating factors are neither mandatory nor exclusive, but are 'considerations' that a court may use or not in making the determination."

*State v. Wilson*, 111 Or App 147, 826 P2d 1010 (1992): [1] "[A] departure must further the purposes of the guidelines[, which] are primarily to punish offenders appropriately and to ensure the security of the public. The premise underlying the guidelines is that the grid block sentence presumptively accomplishes the purposes." [2] "If the court relies on a factor listed in OAR 253-08-002(1), its reasons for applying the rule must show that the case before it involves that sort of circumstance. The court must provide the same kind of explanation if it relies on factors not expressed in OAR 253-08-002." [3] It is not necessary for the court to cite more than one factor to justify a departure.

*State v. Mack*, 108 Or App 643, 817 P2d 1321 (1991): Aggravating and mitigating factors, as distinguished from offense-subcategory factors, are not submitted to the jury but are factors "that may be taken into account by the sentencing judge to justify departures from a presumptive sentence."

*State v. Orsi / Gauthier*, 108 Or App 176, 813 P2d 82 (1991): "Imposition of a departure sentence is a discretionary determination by the sentencing court. The sentencing court has the discretion to decide to depart on the basis of mitigating or aggravating factors other than those set out in OAR 253-08-002. That rule provides a 'nonexclusive' list of mitigating and aggravating factors."

## B. FINDINGS TO SUPPORT DEPARTURE

See ORS 137.671; OAR 213-008-0001.

See also Part II-B(1) (“Right to jury, *Apprendi* issues”), *above*.

*State v. Lennon*, 348 Or 148, 229 P3d 589 (2010). Defendant was convicted of DCS by jury verdict, and the court at sentencing found that “prior incarcerations, probations, paroles, and sanctions haven’t worked” and on that basis departed upward and imposed an 80-month sentence. Defendant did not object, but he argued on appeal that the sentence was plain error in light of *Blakely v. Washington* because the finding was not made by a jury. *Held*: Affirmed. [1] For purposes of plain-error review, “the ‘no legitimate debate’ criterion, if satisfied, places the error outside of the universe of what the Court of Appeals may consider as a discretionary matter.” [2] “A finding that [defendant’s] past criminal sanctions have not deterred [him] from committing further crimes thus requires something beyond a conclusion that [he] *has* one or more criminal convictions in his past. But a finding of a ‘separate malevolent quality’ is not necessary. If the record supports the factual inference that a defendant’s prior criminal convictions or sanctions should have, but did not, deter [him] from committing his new offense, that factual finding can, in a proper case, support a departure sentence. It is then for the sentencing court to decide, based on that predicate factual determination, whether there is ‘a substantial and compelling’ reason to impose an upward departure sentence.” [3] Because the record in this case provides “no legitimate debate” that defendant’s prior criminal sanctions have failed to deter him from further criminal activity, the Court of Appeals “should not have exercised its discretion” to review defendant’s claim as plain error.

*State v. Bray*, 342 Or 711, 160 P3d 983 (2007). Defendant was convicted on multiple counts of encouraging child sexual abuse. At sentencing, the court departed upward based on findings of three aggravating factors, including that defendant was persistently involved in similar offenses, OAR 213-008-0002(2)(b)(D), and found that any factor standing alone would support the departures. On appeal, the state argued that the “persistent involvement” finding was permissible under the “fact of a prior conviction” exception in *Blakely*. *Held*: Reversed and remanded. [1] Because the sentencing court found any factor was sufficient, the appellate court could affirm if any of the factors was legally permissible. [2] Under the rule, “[t]he trier of fact must infer from the number and frequency of those prior convictions whether the defendant’s involvement in similar offenses is sufficiently continuous or recurring to say that it is ‘persistent.’” Thus, the “persistent involvement” factor “presents a factual issue that, under *Apprendi* and *Blakely*, a defendant may insist that a jury find beyond a reasonable doubt.” [3] Although a reasonable juror could find “persistent involvement” based on defendant’s criminal record, the error was not harmless.

*State v. Klontz*, 242 Or App 372, 256 P3d 138 (2011). Defendant was charged with first-degree rape and furnishing alcohol to a minor based on an incident in which he plied the victim with alcohol at a movie theater until she was highly intoxicated, drove her back to his dorm room (instead of her room, as she had asked), then physically pinned her down and raped her after she passed out on his bed. At sentencing, the court imposed a departure sentence on the rape conviction, stating that it was finding, “by substantial and compelling level of analysis” that the victim was particularly vulnerable because of her inebriated condition. *Held*: Convictions affirmed but remanded for resentencing. The sentencing court’s use of the term “by substantial and compelling level of analysis” did not demonstrate that it applied a burden of proof of less than beyond a reasonable doubt. Rather, it clearly was referring to its finding that the victim’s vulnerability, which it had to find beyond a reasonable doubt, was a substantial and compelling reason to depart.

*State v. Skaggs*, 239 Or App 13, 244 P3d 380 (2010). Defendant was convicted in 2008 of first-degree theft. The state sought an upward departure sentence, alleging that defendant had been persistently involved in similar criminal conduct based on: (1) in 1989, defendant was convicted three times of first-degree theft, and two times of second-degree theft; (2) in 1990, he was convicted of first-degree aggravated theft; and (3) in 1994, he was convicted of attempted first-degree burglary. The jury found that defendant had been persistently involved in similar criminal conduct, and the court imposed a departure sentence. On appeal, defendant argued that the 14-year gap between the crime at issue and his most recent prior conviction defeated a finding of persistent involvement. *Held*: Affirmed. [1] Despite the gap, the jury was entitled to find that his criminal involvement had been recurring, and thus was persistent. [2] Even though the gap would not support a finding that defendant’s involvement had been “continuous,” to be persistent the conduct need be only recurring or continuous, not both.

*State v. Boitz*, 236 Or App 350, 236 P3d 766 (2010). Pursuant to ORS 136.765, the state alleged the sentence-enhancement fact that defendant committed the offense “while on release status from other pending criminal charges.” The

trial court found that the state proved that allegation by showing that defendant was on probation at the time of the offense. *Held*: Reversed and remanded. [1] The trial court erred by finding that the state proved the sentence-enhancement fact. Evidence that defendant was on probation at the time of the offense was insufficient to prove that he was on release from “pending criminal charges.” [2] Because defendant’s defense was that he did not commit the offense while criminal charges were pending, the variance between the sentence-enhancement allegation and proof at trial was prejudicial.

*State v. Gallegos*, 217 Or App 248, 174 P3d 1086 (2007), *rev den*, 344 Or 670 (2008). [1] The non-exclusive list of aggravating factors in OAR 213-008-0002(1)(b) does not violate due process. Although the scope of the potential aggravating factors under the administrative rule is “imprecise,” it nonetheless provides a “comprehensible normative standard” by listing the *types* of facts that are permissible aggravating factors. Moreover, appellate decisions sustaining the imposition of departure sentences based on non-enumerated “aggravating” factors have amplified and refined the contours of that standard. Because those cases existed when defendant committed his crime, his facial challenge to OAR 213-008-0002(1)(b) fails. [2] Defendant had notice of the potential “on supervision” aggravating factor. OAR 213-008-0002(1)(b) expressly states that the list of aggravating factors is not exclusive, and previous appellate cases had approved of the “on supervision” factor, he was on notice of that factor. An ordinary citizen is presumed to know the law, if it can be ascertained by resort to published sources.

*State v. Gibson*, 183 Or App 25, 51 P3d 619 (2002). The sentencing court erred by imposing a “double departure” on one of defendant’s convictions without expressly finding two separate aggravating factors to support both departures. The Court of Appeals would not affirm on the basis that the sentencing court had found multiple aggravating factors in support of a departure on a separate conviction. Remanded for resentencing.

*State v. Ferrell*, 146 Or App 638, 933 P2d 973 (1997): Based on four aggravating factors, the sentencing court departed both dispositionally and durationally and imposed a 12-month prison sentence on defendant’s UUV conviction. *Held*: “OAR 253-08-001 and OAR 253-08-005(3) require the sentencing court to state the substantial and compelling reasons for a dispositional departure and the *independent* substantial and compelling reasons for the further durational departure on the record.” The court erroneously failed to state which factors supported the dispositional and which supported the durational departure, so the Court of Appeals remanded for resentencing.

*State v. Reid*, 140 Or App 293, 915 P2d 453 (1996): Although a court imposing a departure sentence is not limited to the aggravating factors set forth in OAR 253-08-002(1)(b), if the court relies on one of the listed factors in circumstances in which it is not directly applicable, the court must explain its reasons for concluding that those circumstances warrant a departure. The court erred in relying on the “violation of public trust” factor, OAR 253-08-002(1)(b)(F), in father/daughter sexual-abuse case without sufficiently explaining how defendant’s actions violated *public* trust apart from that relationship.

*State v. Petrie*, 139 Or App 474, 912 P2d 913 (1996): Defendant was convicted, *inter alia*, of attempted aggravated murder, first-degree assault, first-degree burglary, and first-degree theft, and the sentencing court imposed durational and dispositional departures citing as aggravating factors defendant’s persistent involvement, greater loss than typical, permanent injury to the victim, and defendant’s lack of amenability to reformation. *Held*: Although each of the factors would support a departure on certain of the convictions, each is not a proper basis for departure on all the convictions, and the sentencing court failed either to segregate the factors or to indicate that any one would be sufficient to support the departures. Because the “persistent involvement” factor was not a proper basis to depart on the attempted-murder conviction, that departure was error and the whole case had to be remanded for resentencing.

*State v. Balkin*, 134 Or App 240, 895 P2d 311, *rev den*, 321 Or 397 (1995): At sentencing, the court may “consider any relevant evidence that it found to be trustworthy and reliable,” ORS 137.090(2), including representations by the prosecutor concerning uncharged crimes and information in the presentence investigation report.

*State v. Williams*, 131 Or App 85, 883 P2d 918 (1994), *on recons*, 133 Or App 191, 893 P2d 3, *rev den*, 321 Or 512 (1995): The sentencing court departed on the basis of five aggravating factors, it noted on the record that the factors “individually indicated that a departure is warranted,” and defendant on appeal challenged only four of the factors. *Held*: “Neither the statutes nor the sentencing guidelines limits the trial court’s discretion in imposing departure sentences to more than one aggravating factor. The record shows that the court would have imposed the departure sentence on the [unchallenged] finding alone. There is no error that requires remand.”

*State v. Woodin*, 131 Or App 171, 883 P2d 1332 (1995): Because the sentencing court imposed what effectively

was a departure sentence and the court expressly refuse to support that departure with findings, the Court of Appeals could not affirm that sentence on the ground that the sentencing court “articulated reasons for the sentence that were the functional equivalent of departure findings.”

*State v. Williams*, 119 Or App 129, 849 P2d 1155 (1993): Even though the sentencing court made comments that could be construed as finding aggravating factors, if the judgment recites that the sentences imposed are “presumptive” and the court did not expressly state that it was departing, consecutive sentences that violate the “200 percent” rule in OAR 253-12-020(2)(b) cannot be affirmed as implicit departure sentences.

*State v. Taylor*, 116 Or App 647, 842 P2d 460 (1992), *affd on recons*, 119 Or App 209, 850 P2d 1118, *rev den*, 317 Or 584 (1993): A sentence cannot be affirmed as a departure sentence if the court failed to make findings in support of a departure.

*State v. Coronado*, 115 Or App 386, 838 P2d 641 (1992) (*per curiam*): Sentencing court erred in imposing departure sentence when it failed to make findings but “simply acknowledged that it had listened to the arguments from both sides and then adopted the state’s recommendation.”

*State v. Hopkins*, 112 Or App 458, 829 P2d 97 (1992): Where the sentencing court failed to explain how “defendant’s voluntary intoxication [and] the fact that the incident arose from a domestic dispute and that it was not a common-law burglary ... were so exceptional that the imposition of the presumptive sentence would not accomplish the purposes of the guidelines,” downward-departure sentence was error.

## C. AGGRAVATING FACTORS

See ORS 137.085; OAR 213-08-00002(1)(b).

*Note:* In 2009, the Court of Appeals issued short or *per curiam* decisions in dozens of cases in which the defendants asserted unpreserved *Blakely*-based challenges to upward departures; the court affirmed in many on the ground that the sentence was not “plain error” because the evidence established the aggravating factor at issue; in others, the court remanded for resentencing. Those cases are summarized in Part XIV B(5) (“Appeal—review on appeal as plain error”), *below*, following the entry for *State v. Ramirez*, 225 Or App 382, 202 P3d 193 (2009).

### 1. “Persistent involvement” (OAR 213-008-0002(1)(b)(D))

*State v. Bray*, 342 Or 711, 160 P3d 983 (2007). Defendant was convicted on multiple counts of encouraging child sexual abuse. At sentencing, the court departed upward based on findings of three aggravating factors, including that defendant was persistently involved in similar offenses, OAR 213-008-0002(2)(b)(D), and found that any factor standing alone would support the departures. On appeal, the state argued that the “persistent involvement” finding was permissible under the “fact of a prior conviction” exception in *Blakely*. *Held:* Reversed and remanded. [1] Under the rule, “the trier of fact must infer from the number and frequency of those prior convictions whether the defendant’s involvement in similar offenses is sufficiently continuous or recurring to say that it is ‘persistent.’” Thus, the “persistent involvement” factor “presents a factual issue that, under *Apprendi* and *Blakely*, a defendant may insist that a jury find beyond a reasonable doubt.” [2] Although a reasonable juror could find “persistent involvement” based on defendant’s criminal record, the error was not harmless.

*State v. Cam*, 255 Or App 1, 296 P3d 578 (2013). Defendant was found guilty of 53 theft and drug-related charges. *Held:* Reversed and remanded for resentencing. The court correctly allowed the jury to consider, in determining whether the “persistent involvement” factor applied to eight theft counts, defendant’s prior criminal conduct that did not result in conviction, and other crimes that the jury itself found defendant guilty of committing, because those crimes were unrelated to the eight counts.

*State v. Skaggs*, 239 Or App 13, 244 P3d 380 (2010). Defendant was convicted in 2008 of first-degree theft. The state sought an upward departure sentence, alleging that defendant had been persistently involved in similar criminal conduct based on: (1) in 1989, defendant was convicted three times of first-degree theft, and two times of second-degree theft; (2) in 1990, he was convicted of first-degree aggravated theft; and (3) in 1994, he was convicted of attempted first-degree burglary. The jury found that defendant had been persistently involved in similar criminal conduct, and the court imposed a departure sentence. On appeal, defendant argued that the 14-year gap between the crime at issue and his most

recent prior conviction defeated a finding of persistent involvement. *Held*: Affirmed. [1] Despite the gap, the jury was entitled to find that his criminal involvement had been recurring, and thus was persistent. [2] Even though the gap would not support a finding that defendant's involvement had been "continuous," to be persistent the conduct need be only recurring or continuous, not both.

*State v. Pratt*, 238 Or App 1, 241 P3d 744 (2010), *rev den*, 349 Or 603 (2011). The trial court did not commit plain error by imposing a departure sentence based on facts found by the court rather than a jury, because there was no legitimate debate that a jury would have found that defendant was on probation at the time of the crime, had engaged in persistent involvement in similar offenses, had engaged in an escalating pattern of violence, and lack of amenability to treatment.

*See also State v. Williams*, 238 Or App 9, 241 P3d 1170 (2010), *rev den*, 349 Or 603 (2011) (no legitimate debate that a jury would have found that defendant had failed to be deterred by prior sanctions and persistent involvement in similar offenses).

*State v. Agee*, 223 Or App 729, 196 P3d 1060 (2008). Defendant was convicted of assault and attempted murder for intentionally driving a truck into a pedestrian, and of assaults he committed on corrections officers after his arrest. The court imposed departure sentences on the convictions for the latter crimes based on his persistent involvement in similar offenses. On appeal, defendant argued that his prior acts were not sufficiently "similar." *Held*: Affirmed. Assault is sufficiently similar to the defendant's prior convictions for resisting arrest, menacing, and animal abuse.

*State v. Schenewerk*, 217 Or App 243, 174 P3d 1117 (2007), *rev den*, 344 Or 671 (2008). [1] No separate finding of "separate malevolent factor" is required for a departure based on persistent involvement. Under *State v. Bray*, 342 Or 711 (2007), the factfinder is simply to determine, from the "number and frequency" of defendant's prior convictions for similar offenses whether the defendant's involvement in those offenses was so "continuous or recurring" as to be "persistent." The fact of "persistent involvement" can be inferred *solely* from the number of prior convictions. [2] The "persistent involvement" factor is not unconstitutionally vague. Even assuming that the scope of the term "persistent involvement" is unclear on its face, its meaning can be readily ascertained from published substantive law.

*State v. Toth*, 213 Or App 505, 162 P3d 317 (2007). At a sentencing hearing held ORS 136.760 *et seq.*, the jury found that, as alleged, defendant was persistently involved in similar offenses. Based on that finding, the court imposed an upward-departure sentence. For the first time on appeal, defendant contended that the court's instruction on that factor, which parroted the rule, OAR 213-008-0002(2)(b)(D), was insufficient for not including the "malevolent quality" consideration discussed in appellate decisions. *Held*: Affirmed. [1] Although the "persistent involvement" factor entails more than a finding of prior convictions, it does not necessarily follow that the jury must be instructed on the judicial gloss given to that factor. "The word 'persistent,' after all, is commonly understood to connote—without further elaboration—'continuing in a course of action without regard to opposition or previous failure.'" [2] The court did not commit plain error by instructing the jurors in the language of the rule.

*State v. Skanes*, 212 Or App 169, 157 P3d 303 (2007). Defendant entered a no-contest plea, and the court imposed a dispositional departure based on defendant's persistent involvement in similar offenses, OAR 213-008-0002(1)(b)(D). Although defendant's attorney was aware of *Blakely*, he did not object to the sentence on the ground that defendant was entitled to jury findings to support the departure. *Held*: Affirmed. [1] Defendant waived his right to a jury trial on the substantive crime by entering a no-contest plea, and he did not request a jury for sentencing. [2] The "persistent involvement" factor does not require an express finding of a "malevolent quality."

*State v. Gortler*, 207 Or App 321, 142 P3d 74 (2006). [1] The finding of persistent involvement in similar offenses was not supported by the evidence because defendant was being sentenced for UUV, a property crime, and his prior convictions were for traffic offenses. [2] Although the court could have found persistent involvement based on defendant's three unrelated UUV convictions for which he also was being sentenced, the prosecutor did not make that argument and the sentencing court did not rely on it at sentencing. "We will not substitute our own findings for those of the trial court."

*State v. Ceballos*, 162 Or App 477, 986 P2d 680 (1999), *rev den*, 330 Or 252 (2000). The sentencing court properly used defendant's post-offense drug-dealing conduct to support a departure finding of "persistent involvement."

*State v. Petrie*, 139 Or App 474, 912 P2d 913 (1996): Defendant was convicted, *inter alia*, of attempted aggravated murder, and the sentencing court imposed a durational departure on that conviction citing several aggravating

factors including defendant's persistent involvement; the court did not note that any one of the factors would be sufficient to support the departure. *Held*: The "persistent involvement" factor was not a proper basis to depart on the attempted-murder conviction, because defendant did not have a history of prior assaultive crimes.

*State v. Westcott*, 139 Or App 374, 912 P2d 400, *rev den*, 323 Or 691 (1996): Defendant was convicted of second-degree manslaughter based on an incident in which he caused a fatal accident while DUII (*viz.*, .246 percent BAC). Pursuant to OAR 253-04-009, three of his four prior DUII convictions were used to add one "person felony" to his criminal-history score. Considering those same prior convictions, among other things, the sentencing court then departed durationally citing the "persistent involvement" aggravating factor. *Held*: The sentencing court properly departed based on that factor even though the prior DUII convictions had been used to elevate his criminal-history score.

*State v. Britt*, 136 Or App 398, 901 P2d 960, *rev den*, 322 Or 360 (1995): Defendant was convicted of unlawful possession of a controlled substance, DUII, and FDWS, and the sentencing court departed dispositionally on the PCS conviction citing on the "persistent involvement" aggravating factor, based on defendant's extensive prior record of DUII and DWS convictions. *Held*: The departure was proper even though those prior crimes did not involve drugs.

*State v. Balkin*, 134 Or App 240, 895 P2d 311, *rev den*, 321 Or 397 (1995): The sentencing court properly imposed consecutive departure sentences on defendant's two compelling-prostitution convictions—the consecutive sentences are proper under ORS 137.123, and the court's use of the "persistent involvement" factor, OAR 253-08-002(1)(b)(D), did not rely on the same findings.

*State v. Barrett*, 134 Or App 162, 894 P2d 1183, *rev den*, 321 Or 340 (1995): The sentencing court properly imposed a departure sentence on conviction for first-degree sexual abuse based on "persistent involvement" factor, where defendant admitted to PSI writer that he had engaged in "inappropriate sexual touching and contact" with at least 12 girls and young women, including family members, over the past 20 years, even though that past conduct did not result in criminal convictions.

*State v. Reeves*, 134 Or App 38, 894 P2d 1170, *rev den*, 321 Or 284 (1995): The sentencing court properly departed on robbery and kidnapping convictions based on "persistent involvement" finding, because record at sentencing established that defendant had committed several prior, albeit unadjudicated, assaults in other states and while incarcerated pretrial on these charges.

*State v. Rodriguez*, 122 Or App 117, 856 P2d 339 (1993) (*in banc*): Sentencing court properly found that defendant's prior record established "persistent involvement," even though last such conviction was entered almost 10 years previously, where defendant was incarcerated for almost 5 years during that period.

*State v. Nelson*, 119 Or App 84, 849 P2d 1147 (1993): "Persistent involvement" finding can be based on similar crimes underlying other convictions being sentenced as the same proceeding "if they are unrelated to the offense for which a sentence is being imposed."

*State v. Ambrose*, 117 Or App 298, 844 P2d 227 (1992): Defendant was convicted of first-degree sexual abuse for molesting a mentally retarded woman who was confined to a wheelchair, and the court imposed an upward-departure sentence; *held*: "[T]he court could not find persistent involvement in similar offenses or repetitive assault on the basis of one [prior] conviction for public indecency."

*State v. Alexander*, 114 Or App 220, 834 P2d 521 (1992) (*per curiam*): "Persistent involvement" finding proper even if based in part on convictions already included in criminal-history score.

*State v. Rodriguez*, 113 Or App 696, 833 P2d 1343 (1992): One prior conviction for sexual abuse of a child is insufficient to establish "persistent involvement."

*State v. Clark*, 113 Or App 692, 833 P2d 1314 (1992): "Persistent involvement" finding improperly based on a single, 13-year-old conviction—"persistent" connotes repetition."

*See also State v. Talamantes*, 134 Or App 166, 894 P2d 1182 (1995) (same).

*State v. Kennedy*, 113 Or App 134, 831 P2d 721 (1992): To depart on the ground of "persistent involvement," it

is permissible to consider prior crimes that already are included in the criminal-history score and it is not necessary that the pattern or criminal activity demonstrates either “increasing sophistication” or that defendant “poses a future danger to the public.”

*State v. Cornelius*, 112 Or App 98, 827 P2d 937, *rev den*, 314 Or 176 (1992): [1] It is not necessary in order to departure on the basis of “persistent involvement” that the prior offenses be of the “same” type, only that they be similar to the crime of conviction. [2] It is proper to depart on conviction for possession of weapon by inmate based on fact that weapon was a loaded gun (*i.e.*, it “goes beyond just the normal possession of a weapon by an inmate”).

*State v. Wilson*, 111 Or App 147, 826 P2d 1010 (1992): “Persistent involvement” factor sufficiently established by “defendant’s own admission that he had promoted prostitution by two other minor females and had long been involved in promoting prostitution in at least two states.”

## 2. Victim’s “particular vulnerability” (OAR 213-008-0002(1)(b)(B))

See Part XIV-B(5) (“Appeal—review on appeal as plain error”), *below*.

*State v. Klontz*, 242 Or App 372, 256 P3d 138 (2011). Defendant was charged with first-degree rape and furnishing alcohol to a minor based on an incident in which he plied the victim with alcohol at a movie theater until she was highly intoxicated, drove her back to his dorm room (instead of her room, as she had asked), then physically pinned her down and raped her after she passed out on his bed. At sentencing, the court imposed a departure sentence on the rape conviction, stating that it was finding, “by substantial and compelling level of analysis” that the victim was particularly vulnerable because of her inebriated condition. *Held*: Convictions affirmed but remanded for resentencing. The sentencing court’s use of the term “by substantial and compelling level of analysis” did not demonstrate that it applied a burden of proof of less than beyond a reasonable doubt. Rather, it clearly was referring to its finding that the victim’s vulnerability, which it had to find beyond a reasonable doubt, was a substantial and compelling reason to depart.

*State v. Enemisio*, 233 Or App 156, 225 P3d 115, *rev den*, 348 Or 414 (2010). Based on his assault and threats to the victim, defendant was convicted of *inter alia* coercion. The court imposed an upward departure on that conviction based on a finding that the victim was “particularly vulnerable” because defendant knew that she had been raped a year before. *Held*: Reversed and remanded. The evidence did not establish that this victim, as contrasted with rape victims in general, had a particular vulnerability or “that any such vulnerability led to increased harm or threat of harm.”

*Boxberger v. Board of Parole & Post-Prison Supervision*, 123 Or App 339, 858 P2d 1356, *rev den*, 318 Or 97 (1993): In a case involving the former matrix parole scheme, the board properly found the aggravating factor that petitioner “knew or had reason to know the victims were particularly vulnerable.” The victims are petitioner’s grandchildren and were less than 5 years old at the time. The court rejected petitioner’s contention that use of that aggravating factor was precluded because the underlying charges of first-degree sodomy were based on allegations that the children were under 12 years of age: “the victims were not simply under 12 years of age, they were substantially younger than 12.” (*Note*: The applicable board rules are substantially similar to OAR 213-008-0002(1)(b)(B) and (2).)

*State v. Ambrose*, 117 Or App 298, 844 P2d 227 (1992): Defendant was convicted of first-degree sexual abuse for molesting a mentally retarded woman who was confined to a wheelchair, and the court imposed an upward-departure sentence. *Held*: Sentencing court properly found that a departure was appropriate because defendant was aware of the victim’s “vulnerability,” and it properly considered that defendant was a “trusted friend” and that he committed the assault in the victim’s home.

*State v. Fitzgerald*, 117 Or App 152, 843 P2d 964 (1992): Sentencing court erred in imposing upward-departure sentence on conviction for first-degree burglary of an “occupied dwelling” based on finding that victim was “vulnerable” because he was asleep during the entry.

*State v. Newman*, 113 Or App 102, 832 P2d 47, *rev den*, 314 Or 176 (1992): Court properly imposed durational-departure sentence on convictions for first-degree sodomy based on finding that the victim “was particularly vulnerable because he was defendant’s adopted child and had previously been sexually abused and because defendant had physically threatened him.”

### 3. “Use of weapon” (OAR 213-008-0002(1)(b)(E))

See Part XIV-B(5) (“Appeal—review on appeal as plain error”), *below*.

*State v. Pedro*, 242 Or App 366, 256 P3d 153 (2011). Defendant forced his way into the house of his in-laws, angrily and violently confronted them and his estranged wife, and attempted to take away their young children. During the incident, defendant used pepper-spray on his wife and father-in-law and threatened the latter with a pocket knife. The police arrived at the scene and arrested him before he could take off with the children. Defendant was convicted of *inter alia* unlawful use of a weapon, ORS 166.220, based on his threatening the victim with the knife. The sentencing court imposed an upward-departure sentence on that conviction relying on the “use of a weapon” aggravating factor, OAR 213-008-0002(1)(b). *Held*: Sentence vacated, remanded for resentencing. The departure violated OAR 213-008-0002(2) because the “use of a weapon” factor merely duplicated an element of the U UW offense as that charge was proved in this case.

*Note*: ORS 166.220(1)(a) defines U UW to include both carrying a weapon with an intent to use it unlawfully against another and actually attempting to use a weapon unlawfully against another. Arguably, if the conviction is clearly based only on the first theory, additional proof that the defendant then when further and *used* the weapon would not merely duplicate the facts underlying the conviction, so a departure on the “use of a weapon” factor would be permissible.

*State v. Perez*, 186 Or App 122, 61 P3d 945, *rev den*, 335 Or 443 (2003). Defendant, a police informant, was convicted of MCS, and the court imposed an upward departure. Defendant’s use of a steak knife merely to cut the methamphetamine did not justify a departure under the “use of weapon” factor, because he did not use it to injure or threaten a person.

*State v. Torres*, 182 Or App 156, 48 P3d 170, *aff’d on recon*, 184 Or App 515, 59 P3d 47 (2002). The sentencing court erred under OAR 213-008-0002(2) and (3) by departing based on “use of a weapon” factor because defendant’s conviction for second-degree assault with a firearm included his use of a weapon as an element of that offense.

*State v. Toledo*, 175 Or App 280, 28 P3d 1194 (2001). Defendant was convicted on multiple counts of assault and DUII based on an injury accident, and the sentencing court departed upward on one assault conviction based on several aggravating factors, including a finding that defendant used a weapon, OAR 213-008-0002(1)(b)(E). *Held*: Reversed and remanded. [1] Because the sentencing court did not find that any one of the aggravating factors was sufficient to support the departure, the Court of Appeals had to reverse if any one is error. [2] The “use of a weapon” factor was error under OAR 213-008-0002(2) because that factor duplicated one of the elements of the assault charge and the court did not make a finding that that factor was significantly different from the usual criminal conduct captured by that element.

*State v. Hudson*, 115 Or App 301, 839 P2d 721 (1992), *rev den*, 315 Or 442 (1993): [1] It does not violate OAR 253-08-002(2) to cite “use of weapon” aggravating factor to depart on conviction for attempted murder, because that is not an element of the crime. [2] It does not violate OAR 253-08-002(3) to cite “use of weapon” aggravating factor to depart on conviction for attempted murder simply because the court imposed firearm-minimum sentence on companion conviction for first-degree assault.

*State v. Guthrie*, 112 Or App 102, 826 P2d 462 (1992): Sentencing court violated OAR 253-08-002(2) when it cited as an aggravating factor defendant’s use of weapon as basis for departure on conviction for first-degree assault, because that factor merely duplicated an element of the underlying offense and the court failed to “explain any significant differences” between that element and the factor.

### 4. Other aggravating factors listed in OAR 213-008-0002(1)(b)

See Part XIV-B(5) (“Appeal—review on appeal as plain error”), *below*.

*Wisconsin v. Mitchell*, 508 US 476, 113 S Ct 2194, 124 L Ed 2d 436 (1993): Pursuant to a Wisconsin statute and a jury finding that defendant committed the assault based on the victim’s race, the sentencing court imposed an enhanced sentence on the assault conviction. The state supreme court held that the statute violated the First Amendment. In a unanimous decision (per opinion of Rehnquist, CJ), the Supreme Court reversed, holding that it does not violate the First Amendment to prescribe an enhanced penalty for criminal conduct based on the defendant’s racial motive.

*Note*: OAR 253-08-002(1)(b)(K) defines as aggravating factor that crime was “motivated ... by the race, color, religion, ethnicity, national origin, or sexual orientation of the victim”.

**State v. Dilts**, 336 Or 158, 82 P3d 593 (2003), *rev'd on other grounds*, 337 Or 645, 103 P3d 95 (2004).

Defendant pleaded guilty to third-degree assault, a class C felony, and the sentencing court placed the conviction in gridblock 6-C, found that the assault was racially motivated, and on that basis departed upward and imposed a 36-month prison sentence. *Held*: The departure was lawful under the sentencing guidelines because: it was based on a finding that the assault was “racially motivated,” OAR 213-008-0002(1)(b)(K); that finding was based on evidence in the record; and, the sentence imposed is within the 200-percent limitation, OAR 213-008-0003(2).

**State v. Sullivan**, 197 Or App 26, 104 P3d 636 (2005). Defendant was convicted based on his pleas of no contest, the court found numerous aggravating factors (noting any one was sufficient) and imposed an upward departure prison term on his DCS conviction and an upward durational departure of 60 months probation on his conviction for third-degree sodomy, and he raised unpreserved *Blakely*-based challenges on appeal. *Held*: Affirmed. Defendant’s challenge to the “multiple victims” factor is not plain error because his pleas to the various charges may be sufficient under the “admitted by the defendant” exception in *Blakely* to allow for the departure.

**State v. Perez**, 186 Or App 122, 61 P3d 945, *rev den*, 335 Or 443 (2003). Defendant, a police informant, was convicted of MCS, and the court imposed an upward departure. *Held*: Affirmed. Court properly found that defendant violated a public trust as a “separate and distinct basis” for the departure. Defendant was a “trusted police agent,” that trust was of a “public” variety, and he chose to commit the crime in a motel room provided by the police.

**State v. Wolff**, 174 Or App 357, 27 P3d 145 (2001). Defendant was convicted of hindering prosecution for assisting murderers hide the victim’s body. The sentencing court departed based on three aggravating factors, including “permanent injury to the victim” under OAR 213-008-0002(1)(b)(I). *Held*: Reversed and remanded. [1] Because the sentencing court did not find that any one of the three factors is sufficient for the departure, the Court of Appeals had to reverse if any one of the three was erroneous. [2] The permanent-injury finding was error, because the victim had died as a result of the others’ conduct and defendant’s conduct of itself did not cause any permanent injury.

**State v. Allred**, 165 Or App 226, 995 P2d 1210 (2000). Defendant was convicted of hindering prosecution for helping a suspected murderer escape to Los Angeles. The sentencing court found that he had exposed the community to a risk that the person would commit another murder while a fugitive, and on that basis it departed upward relying on “factor J” (harm greater than typical). *Held*: Reversed. The harm that the offense of hindering prosecution seeks to prevent is harm to “public justice.” Therefore, to depart under factor J, the sentencing court must find that the defendant’s criminal conduct actually harmed the administration of justice, not that the defendant harmed some member of the public. The court’s finding was insufficient to depart in two respects. First, the court did not find that the defendant’s criminal conduct caused any actual harm. Second, the harm upon which the sentencing court focused was the wrong type of harm.

**State v. Watkins**, 146 Or App 338, 932 P2d 107, *rev den*, 325 Or 438 (1997): Defendant instigated a robbery that escalated into the commission of a murder by her accomplices, she was convicted of first-degree robbery but was acquitted of murder (possibly because of her affirmative defense under ORS 163.115(3)), and the sentencing court departed upward on defendant’s robbery conviction based on the victim’s death. *Held*: The departure was proper even though defendant was acquitted on the homicide charge: “OAR 253-08-002(1)(b)(J) does not condition an upward departure on a finding that a defendant was implicated in or responsible for the greater-than-typical harm that occurred.”

**State v. Reid**, 140 Or App 293, 915 P2d 453 (1996). Sentencing court cited several aggravating factors in support of departure sentences imposed on sexual-abuse convictions based on defendant’s abuse of his 12-year-old daughter. *Held*: The court erred in relying on the “violation of public trust” factor, OAR 253-08-002(1)(b)(F), without sufficiently explaining how defendant’s actions violated *public* trust apart from the father/daughter relationship, and it erred in relying on “greater degree of harm” factor, OAR 253-08-002(2)(b)(J), based on its general assessment of the emotional injuries suffered by children without making particularized findings related to this victim.

**State v. Mitchell**, 136 Or App 99, 900 P2d 1083 (1995): In the absence of a better explanation, the sentencing court’s reliance on the “greater loss than typical” aggravating factor, OAR 253-08-002(1)(b)(J), in order to impose upward-departure sentence on conviction for aggravated first-degree theft violated OAR 253-08-002(2), because it appeared to be based merely on the same facts underlying the aggravated nature of the conviction (*viz.*, the victims’ extensive financial loss).

*State v. Balkin*, 134 Or App 240, 895 P2d 311, *rev den*, 321 Or 397 (1995): The sentencing court, when imposing departure sentences on several compelling-prostitution and sodomy convictions, properly found three aggravating factors (*viz.*, persistent involvement, multiple victims, and greater degree of harm) based on evidence “that defendant had established a network of accomplices to secure young sex partners and his use of drugs and alcohol to seduce those youngsters.” The court erred, however, in relying on permanent-injury factor, OAR 253-08-002(1)(b)(I), because the finding was based on an injury to a victim different from the one named in that count, and the case thus had to be remanded for resentencing.

*State v. Fennern*, 133 Or App 199, 891 P2d 2 (1995): Sentencing court properly departed on finding that child victim of sodomy offense suffered permanent mental injury. “The guidelines do not preclude a sentencing court from drawing inferences based on the evidence before it.”

*State v. Rodriguez*, 122 Or App 117, 856 P2d 339 (1993) (*in banc*): Even though defendant committed the burglary with the cooperation of two others, the record failed to support finding of “organized criminal operation,” OAR 253-08-002(1)(b)(H), because nothing suggested that the group had an organization or purpose apart from committing this burglary.

*State v. Nelson*, 119 Or App 84, 849 P2d 1147 (1993): Although the value of the vehicle underlying the UUV charge is a fact that serves to rank the crime on the crime-seriousness scale, the extent of damage to the vehicle is not. Therefore, it is proper to depart on a UUV conviction based on an extraordinary amount of damage to the vehicle.

*State v. Ambrose*, 117 Or App 298, 844 P2d 227 (1992): Defendant was convicted of first-degree sexual abuse for molesting a mentally retarded woman who was confined to a wheelchair, and the court imposed an upward-departure sentence. *Held*: Sentencing court erred in departing on a finding that the victim’s loss “was significantly greater than typical,” because “that loss flowed from his act only incidentally.”

*State v. Fitzgerald*, 117 Or App 152, 843 P2d 964 (1992): Sentencing court erred in imposing upward-departure sentence on conviction for first-degree burglary of an “occupied dwelling” based on finding that victim suffered “permanent” injury, because that finding was not based on evidence of this victim’s injury but upon the presumed psychological effect on typical burglary victims.

*State v. Guthrie*, 112 Or App 102, 826 P2d 462 (1992): Sentencing court violated OAR 253-08-002(2) when it cited as aggravating factors defendant’s violence toward victim, his use of weapon, and permanent injury to the victim (OAR 253-08-002(1)(b)(C), (E), and (I)), as bases for departure on conviction for first-degree assault, because those factors merely duplicated the elements of the underlying offense and the court failed to “explain any significant differences” between the elements and the factors.

*State v. Wilson*, 111 Or App 147, 826 P2d 1010 (1992): [1] General statement regarding how promoting prostitution injures victims and their families is insufficient to establish “permanent injury” aggravating factor without showing that *this* victim was so injured. [2] “Threat of violence” sufficiently established by evidence that defendant threatened victim in order to induce her to return to prostitution. The factor is not limited, as suggested by the commentary, to threats made after the crime to induce the victim’s silence.

*State v. Lee*, 110 Or App 528, 823 P2d 445, *rev den*, 313 Or 211 (1992): Although a sentencing court usually is precluded from using as a departure factor a fact about the offense that is an element of the underlying crime, it nonetheless is proper to do so if the court finds that, in comparison to the usual crime of that sort, the fact is “significantly different from the usual criminal conduct that the presumptive sentence for [that crime] is intended to punish.” In this case, defendant was convicted of second-degree robbery and the sentencing court departed upward on the ground that “violence” was involved.

*See also State v. Newman*, 113 Or App 102, 832 P2d 47, *rev den*, 314 Or 176 (1992) (fact establishing element of crime generally cannot be used as an aggravating factor).

##### **5. Aggravating factors not listed in OAR 213-008-0002(1)(b)**

*See* Part XIV-B(5) (“Appeal—review on appeal as plain error”), *below*.

*United States v. Dunnigan*, 507 US 87, 113 S Ct 1111, 122 L Ed 2d 445 (1993): Defendant testified in her own

defense at trial and denied that she committed the crime or had made the inculpatory statements attributed to her. The jury found her guilty, and the district court relied on § 3C1.1 of the federal sentencing guidelines, which authorizes a departure if the defendant obstructed the administration of justice, to impose a departure sentence based on what it determined to be defendant's perjurious testimony at trial. The Fourth Circuit Court of Appeals remanded for resentencing, holding that the rule is unconstitutional to the extent it applies to a defendant's trial testimony, because it would chill a defendant's right to testify in her own defense. In a unanimous decision, the Supreme Court reversed and reinstated the judgment, holding that the rule is valid and that the sentencing court properly applied it to defendant's perjury at trial, because it does not violate a defendant's right to testify to impose an enhanced sentence based on a finding that she committed perjury at trial.

*State v. Speedis*, 350 Or 424, 256 P3d 1061 (2011). Defendant was charged with first-degree burglary and second-degree assault, and the state specially alleged per ORS 136.765 four sentence-enhancement factors, none of which is listed in OAR 213-008-0002(1)(b) (*i.e.*, each is a "nonenumerated factor"): (1) defendant was on supervision when he committed the crimes, (2) previous sanctions have failed to deter him from committing crimes, (3) he committed the crimes while on release status while charges were pending, and (4) he had demonstrated a disregard of laws making successful probation unlikely. The jury found him guilty on the charges and found that the state had proved each of the factors. The sentencing court departed upward on both convictions based on each factor separately, and it imposed concurrent 72-month sentences. On appeal, defendant did not challenge the jury's findings or the court's ruling that those findings constituted substantial and compelling reasons; he argued only that use of nonenumerated factors violated the constitution. *Held*: Affirmed.

[1] Use of non-enumerated factors does not violate separation-of-powers principles in Art II, § 1. [2] Under Art I, § 20, "fair notice" is not an aspect of vagueness analysis." So, "in deciding defendant's state constitutional vagueness claim in this case, we consider only whether the sentencing guidelines provide an ascertainable standard that guided the prosecutor in identifying which nonenumerated factors warranted imposition of a departure sentence." "The discretion that the sentencing guidelines give prosecutors to identify and courts to determine nonenumerated aggravating factors is neither standardless nor unfettered. That aspect of the sentencing guidelines is not vague in violation of" Art I, §§ 20 and 21. [3] Under the Due Process Clause, "a criminal statute will be unconstitutionally vague if it fails to provide 'fair warning' of the acts that will expose a person to criminal penalties." But even if an 'otherwise uncertain statute,' standing alone, would fail to provide constitutionally adequate notice of the acts that expose a person to criminal liability, the statute will satisfy due process if a prior judicial decision has fairly disclosed the charged conduct to be within the statute's scope." [4] The Court of Appeals had identified each of the four nonenumerated aggravating factors at issue in this case as permissible grounds for imposing an enhanced sentence under the sentencing guidelines before defendant committed his crimes. Consequently, "[e]ven if the sentencing guidelines, standing alone, would not provide sufficient notice that those factors would justify an enhanced sentence, those appellate decisions did and, in doing so, satisfied due process. If those cases provided sufficient notice to defendants under the Due Process Clause, we think that they also provided sufficient guidance to prosecutors in identifying those aggravating factors that would support the imposition of an enhanced sentence."

*Note*: It is not clear how the court would rule on a vagueness challenge to a nonenumerated factor that has not previously been specifically approved by an appellate court.

*State v. Lennon*, 348 Or 148, 229 P3d 589 (2010). Defendant was convicted of DCS by jury verdict, and the court at sentencing found that "prior incarcerations, probations, paroles, and sanctions haven't worked" and on that basis departed upward and imposed an 80-month sentence. Defendant did not object, but he argued on appeal that the sentence was plain error in light of *Blakely v. Washington* because the finding was not made by a jury. *Held*: Affirmed. [1] For purposes of plain-error review, "the 'no legitimate debate' criterion, if satisfied, places the error outside of the universe of what the Court of Appeals may consider as a discretionary matter." [2] "A finding that [defendant's] past criminal sanctions have not deterred [him] from committing further crimes thus requires something beyond a conclusion that [he] has one or more criminal convictions in his past. But a finding of a 'separate malevolent quality' is not necessary. If the record supports the factual inference that a defendant's prior criminal convictions or sanctions should have, but did not, deter [him] from committing his new offense, that factual finding can, in a proper case, support a departure sentence. It is then for the sentencing court to decide, based on that predicate factual determination, whether there is 'a substantial and compelling' reason to impose an upward departure sentence." [3] Because the record in this case provides "no legitimate debate" that defendant's prior criminal sanctions have failed to deter him from further criminal activity, the Court of Appeals "should not have exercised its discretion" to review defendant's claim as plain error.

*State v. Bennett*, 249 Or App 379, \_\_\_ P3d \_\_\_ (2012). Defendant escaped from South Fork Forest Camp and committed a burglary while he was still at large. He was caught, was charged with escape and burglary in separate cases, pleaded guilty to the burglary charge in 2008, and finally pleaded guilty to second-degree escape in 2009. At sentencing on the escape conviction, defendant argued that the court could not consider conduct that he committed *after* he had committed

the escape offense. The court durationally departed upward and imposed a 50-month sentence based on the aggravating fact that he committed the burglary while on escape. *Held*: Affirmed. A sentencing court properly “may consider a defendant’s conduct that occurred after the crime for which the defendant is being sentenced in determining whether there are substantial and compelling reasons for departure. Defendant’s argument that the collection of enumerated factors in OAR 213-008-0002(1) implies that a court is prohibited from considering post-offense conduct is not supported by the text of the rule or the relevant case law.”

*State v. Pratt*, 238 Or App 1, 241 P3d 744 (2010), *rev den*, 349 Or 603 (2011). The trial court did not commit plain error by imposing a departure sentence based on facts found by the court rather than a jury, because there was no legitimate debate that a jury would have found that defendant was on probation at the time of the crime, had engaged in persistent involvement in similar offenses, had engaged in an escalating pattern of violence, and lack of amenability to treatment.

*See also State v. Williams*, 238 Or App 9, 241 P3d 1170 (2010), *rev den*, 349 Or 603 (2011) (no legitimate debate that a jury would have found that defendant had failed to be deterred by prior sanctions and persistent involvement in similar offenses).

*State v. Boitz*, 236 Or App 350, 236 P3d 766 (2010). Pursuant to ORS 136.765, the state alleged the sentence-enhancement fact that defendant committed the offense “while on release status from other pending criminal charges.” The trial court found that the state proved that allegation by showing that defendant was on probation at the time of the offense. *Held*: Reversed and remanded. [1] The trial court erred by finding that the state proved the sentence-enhancement fact. Evidence that defendant was on probation at the time of the offense was insufficient to prove that he was on release from “pending criminal charges.” [2] Because defendant’s defense was that he did not commit the offense while criminal charges were pending, the variance between the sentence-enhancement allegation and proof at trial was prejudicial.

*State v. Gallegos*, 217 Or App 248, 174 P3d 1086 (2007), *rev den*, 344 Or 670 (2008). [1] The non-exclusive list of aggravating factors in OAR 213-008-0002(1)(b) does not violate due process. Although the scope of the potential aggravating factors under the administrative rule is “imprecise,” it nonetheless provides a “comprehensible normative standard” by listing the *types* of facts that are permissible aggravating factors. Moreover, appellate decisions sustaining the imposition of departure sentences based on non-enumerated “aggravating” factors have amplified and refined the contours of that standard. Because those cases existed when defendant committed his crime, his facial challenge to OAR 213-008-0002(1)(b) fails. [2] Defendant had notice of the potential “on supervision” aggravating factor. OAR 213-008-0002(1)(b) expressly states that the list of aggravating factors is not exclusive, and previous appellate cases had approved of the “on supervision” factor, he was on notice of that factor. An ordinary citizen is presumed to know the law, if it can be ascertained by resort to published sources.

*State v. Crocker*, 217 Or App 238, 174 P3d 1129 (2007), *rev den*, 344 Or 670 (2008). A person who clearly falls within a prohibition cannot successfully challenge it for vagueness. Even if there were some lack of precision in the aggravating factors—prior criminal sanctions have not deterred defendant, and prior institutional and disciplinary violations—defendant’s conduct (which included numerous felony convictions even while serving prison sentences, and 49 adjudicated prison disciplinary violations) indisputably fell within their “core.” Thus, he cannot plausibly assert that he lacked notice of how the departure factors apply to him.

*State v. Burns*, 213 Or App 38, 159 P3d 1208 (2007), *rev disp’d*, 345 Or 302 (2008). Sentencing court erred under *Blakely* when it departed upward based on its own finding that defendant was on post-prison supervision at the time of the crime. Although defendant admitted that fact, he was entitled to a jury finding regarding “the ‘malevolent quality’ of the defendant and the failure of supervision to serve as an effective deterrent.” That is a factual determination, not a legal conclusion to be drawn from the bare fact of being on supervision.

*State v. Allen*, 202 Or App 565, 123 P3d 331 (2005). An upward departure based on finding that defendant was on supervision at the time of the crime “is warranted only if the factfinder can draw an inference as to ‘the malevolent quality of the offender and the failure of his parole status to serve as an effective deterrent.’” Consequently, defendant’s bare admission that he was on supervision is not sufficient to waive his right to a jury on that factor.

*State v. Causor-Mandoza*, 203 Or App 175, 124 P3d 1254 (2005). The upward-departure sentence was plain error in light of *Blakely* even though defendant admitted, when he pleaded guilty, that he was on probation at the time he committed the offense.

See also *State v. Carr*, 203 Or App 179, 124 P3d 1260 (2005).

*State v. Davis/Hamilton*, 197 Or App 1, 104 P3d 602, *rev den*, 339 Or 230 (2005). The upward departure based on the sentencing court's finding that defendant committed the crime while on supervision violated *Blakely*, because that finding does not fall within the scope of the "fact of a prior conviction" exception in *Blakely*.

*State v. Morales*, 192 Or App 355, 84 P3d 1127 (2004). Imposition of departure sentences based on the fact that defendant had committed crimes in more than one state was error because the court offered no rationale as to why the commission of offenses in different states is qualitatively different than commission of multiple offenses in the same state.

*State v. Reid*, 140 Or App 293, 915 P2d 453 (1996): Sentencing court cited several aggravating factors in support of departure sentences imposed on sexual-abuse convictions based on defendant's abuse of his 12-year-old daughter. *Held*: "[A] defendant's empathy—or lack thereof—is appropriate to a court's consideration of what sentence should be imposed." It is not permissible, however, to impose a harsher sentence based on a defendant's exercise of his right to a trial. Because the Court of Appeals could not tell whether the sentencing court's "persistent denial" finding was based on defendant's lack of remorse or his insistence on a trial, the court remanded the case for reconsideration.

*State v. Brown*, 132 Or App 443, 888 P2d 1071, *rev den*, 321 Or 137 (1995): A sentencing court may base a departure sentence on factors other than those specifically set out in the guidelines.

*State v. Estes*, 131 Or App 188, 883 P2d 1335, *rev den*, 320 Or 569 (1995): Defendant was convicted of burglary and rape for entering a motel room and assaulting the victim at knifepoint, he has prior convictions for committing almost an identical crime, and he denied committing either crime. The sentencing court properly imposed a departure sentence in this case, because it did not base the departure on a "persistent involvement" finding (*cf. State v. Clark*, 113 Or App 692, 833 P2d 1341 (1993)), but departed instead based on a finding "that future efforts to rehabilitate defendant will not be successful" and the need "to ensure the security of the public."

*State v. Williams*, 133 Or App 191, 893 P2d 3, *rev den*, 321 Or 512 (1995): The sentencing court properly departed durationally based on fact that defendant was on probation when she committed the murder, because that shows "defendant's disregard for any laws and inability to be deterred from committing new criminal activity."

*State v. Morales-Aguilar*, 121 Or App 456, 855 P2d 646 (1993): Sentencing court properly imposed upward-departure sentence based on finding that defendant, by repeatedly reentering the country illegally had "demonstrated an absolute disregard for any of the laws" and that, because he faced immediate deportation, imposition of the presumptive probationary sentence would not be appropriate.

*State v. Nelson*, 119 Or App 84, 849 P2d 1147 (1993): [1] "[C]rimes committed to evade criminal sanctions [*i.e.*, FTAs] may be considered in deciding whether to impose a departure sentence." [2] It is not permissible to depart on the basis of defendant's general "criminal history" or on the severity of the crime, because those factors already serve to determine the gridblock placement of the conviction.

*State v. Zavala-Ramos*, 116 Or App 220, 840 P2d 1314 (1992): [1] "[A] defendant's current illegal immigration status cannot, *per se*, be considered to be an aggravating factor [and] consideration of a history of deportations, standing alone, would not justify a departure sentence." [2] "Circumstances that demonstrate a defendant's unwillingness to conform his conduct to legal requirements, whether or not there are criminal consequences, may be [relevant to a departure decision]." [3] A sentencing court may consider the fact that a defendant has repeatedly entered the United States illegally as a factor "in determining whether it is likely that a probationary sentence would serve the purposes of the guidelines to protect the public and punish the offender."

*State v. Berg*, 115 Or App 254, 838 P2d 73 (1992), *rev den*, 315 Or 312 (1993): [1] It was proper for sentencing court to impose 6-month dispositional-departure sentence on PCS conviction based on fact that defendant was on probation on earlier PCS conviction when he committed the crime. [2] It does not violate OAR 253-08-002(3) to impose an upward-departure sentence based on defendant's prior convictions.

*State v. Alexander*, 114 Or App 220, 834 P2d 521 (1992) (*per curiam*): Proper to depart on ground that defendant needs an extended period of incarceration in order to obtain treatment for his "substance abuse" problem.

*State v. Clark*, 113 Or App 692, 833 P2d 1314 (1992): [1] The sentencing court is not precluded, in deciding whether to depart, from considering the role of alcohol in defendant's offense. [2] "Just deserts" an insufficient basis, standing alone, for a departure.

*State v. Mitchell*, 113 Or App 632, 833 P2d 1324 (1992): [1] "The aggravating factors listed in the guidelines are not exclusive." [2] In order to rely on an aggravating fact not listed in the rule, it is not necessary that the fact be "unique" to defendant or to his crime. [3] The court properly relied on the fact that "defendant had been on community release from the penitentiary when he committed the offenses and that he previously committed crimes while he was on release status" as a basis for a durational departure.

*State v. Kennedy*, 113 Or App 134, 831 P2d 721 (1992): Finding "that defendant's alcohol problem was leading to increasingly serious crimes and that his chance for rehabilitation depends on controlling that problem" is a proper basis for a durational departure.

*State v. Hill*, 112 Or App 213, 827 P2d 951 (1992) (*per curiam*): Finding that defendant "had committed crimes during successive probationary periods and that she would not be deterred from criminal activity by being placed on probation" is an adequate basis for a dispositional departure from presumptive probation.

See also *State v. Nelson*, 119 Or App 84, 849 P2d 1147 (1993) (same).

*State v. Guthrie*, 112 Or App 102, 828 P2d 462 (1992): [1] A departure cannot be based on an aggravating factor that duplicates an element of the offense "unless the aspect is 'significantly different from the usual criminal conduct captured by the aspect of the crime'" and the court makes findings to that effect. [2] The list of aggravating factors in the rule is not exclusive. [3] A "prison discipline" record may provide a basis for a departure.

#### D. MITIGATING FACTORS

See OAR 213-008-0002(1)(a).

*State v. Rhoades*, 210 Or App 280, 149 P3d 1259 (2006). Although defendant's convictions for third-degree rape and sodomy are subject to the presumptive life sentence under ORS 137.719(1) due to his prior convictions for sexual offenses, the sentencing court departed downward pursuant to ORS 137.719(2) to impose only a 60-month sentence based on findings that the 15-year-old victim consented to the activity and that the crimes involved the same victim in the same time period and general area. *Held*: Reversed and remanded. [1] Appellate review is limited to whether the findings are supported by the evidence and the reasons given constitute substantial and compelling reasons for departure. "We review the sentencing court's explanation of why the circumstances are so exceptional that the imposition of the presumptive sentence would not accomplish the purposes of the guidelines." [2] Because the victim's consent is legally irrelevant to the charges, her consent "cannot transform her harm into one that is 'less than typical' for those offenses" under OAR 213-008-0002(2)(a)(G). Thus, the court erred in relying on that mitigating factor. [3] Although the "close in time and space" finding is not a mitigating factor set forth in the rule, those factors are nonexclusive. The "merger" rule in ORS 137.719(3) does not preclude consideration of that factor. "[T]he particular circumstances here may be considered mitigating circumstances in determining if there are substantial and compelling reasons to depart from the presumptive life sentence."

*State v. Crescencio-Paz*, 196 Or App 655, 103 P3d 666 (2004), *rev den*, 339 Or 230 (2005). The sentencing court erred when it granted defendant a downward departure under ORS 137.712(2) on his conviction for second-degree robbery on the ground that the state failed to allege in the indictment and prove facts at trial that would *disentitle* him to a departure. Neither *Blakely* nor *State v. Quinn* requires the state to allege and prove facts apart from the elements of the offense in order to negate the possibility of a downward departure.

See also *State v. White*, 217 Or App 214, 175 P3d 504 (2007), *aff'd on rev of other issue*, 346 Or 275, 211 P3d 248 (2009) (jury findings are not required for facts that render a defendant ineligible for a *downward* departure under ORS 137.712).

*State v. Waage*, 160 Or App 156, 981 P2d 333 (1999). Defendant was convicted of multiple counts of using a child in a sexually explicit display and one count of attempted second-degree rape. The court departed dispositionally and placed defendant on probation after finding that he was amenable to treatment and a suitable treatment program was available. OAR 213-008-0002(1)(a)(I). The state appealed contending that the court's findings were not supported by the

record. *Held*: Affirmed. The rule, which provides that a departure is appropriate if there is “an appropriate treatment program ... to which the offender can be admitted within a reasonable time,” does not require certainty: “The word ‘can’ in this context carries a connotation of possibility, or at the most, probability; it does not carry a connotation of certainty.” The evidence supported the sentencing court’s finding that a treatment program was available.

*State v. Hays*, 155 Or App 41, 964 P2d 1042, *rev den*, 328 Or 40 (1998): Defendant was convicted of criminally negligent homicide for failing, for religious reasons, to seek medical treatment for his child, who died of acute leukemia. The sentencing court dispositionally departed to probation based on findings that defendant cooperated with the police and had a clean criminal record (OAR 213-008-0002(1)(a)(F), (H)). *Held*: Affirmed. [1] Defendant’s full cooperation after the child’s death justified the finding even though he refused to allow the police to contact the victim before he died. “By its very nature this mitigating factor involves a defendant’s cooperation *after* the commission of the crime.” Moreover, nothing in the rules “suggests that remorse is an essential element of this mitigating factor.” [2] The fact that defendant’s criminal-history score is “T” does not preclude the court from finding that his absolutely clean criminal record and good personal character was a valid basis to depart, because a person may have a record of arrests and convictions for petty offenses and have an “T” ranking.

*State v. Parsons*, 135 Or App 188, 897 P2d 1197, *rev den*, 322 Or 168 (1995): Defendant was convicted of and first-degree sodomy and conspiracy to commit first-degree rape based on an allegation that the victim was incapable of consent by reason of mental incapacity or physical helplessness (*i.e.*, she had passed out drunk), and the convictions were ranked as category 10 offenses based on that fact. *Held*: It was improper for the sentencing court to depart downward on the grounds that the defendant did not use force, that she voluntarily became intoxicated, and that the parties previously had a consensual sexual relationship.

*State v. Lucas*, 113 Or App 12, 830 P2d 601, *rev den*, 314 Or 176 (1992): It is not *per se* impermissible to cite “defendant’s lack of any criminal history as a mitigating factor,” even though the lack of a record is captured in the low criminal-history score, but “if the court finds that fact to be a substantial and compelling reason to support a departure, it must explain why that fact is so exceptional that imposition of the presumptive sentence ... would not accomplish the guidelines’ purpose.”

*State v. Hopkins*, 112 Or App 458, 829 P2d 97 (1992): With respect to conviction for first-degree burglary, “defendant’s voluntary intoxication [and] the fact that the incident arose from a domestic dispute and that it was not a common-law burglary” are not sufficient, without more explanation, to support a downward departure.

## **E. FORM AND EXTENT OF DEPARTURE SENTENCE OF IMPRISONMENT**

See ORS 161.605 (prescribing maximum sentences); OAR 213-008-0003 to -008-0007.  
See also Part VIII B(2) (“Application of ‘200/400-Percent Rule’”), *below*.

*State v. Ramos*, 254 Or App 748, 295 P3d 176 (2013) (*per curiam*). The sentencing court committed plain error when it imposed, by upward departure, a 144-month sentence on defendant’s conviction for assault in the second degree, a class B felony.

*State v. Ricke*, 201 Or App 713, 120 P3d 539 (2005) (*per curiam*). The sentencing court erred when it imposed, by upward departure, a 96-month sentence on defendant’s conviction for stalking, which is a class C felony; that sentence exceeds the maximum allowable by law for that crime.

*State v. Munion*, 201 Or App 293, 119 P3d 278 (2005) (*per curiam*). The sentencing court erred when it imposed a 72-month upward-departure sentence on defendant’s conviction for second-degree sexual abuse, a class C felony.

*State v. Tanner*, 192 Or App 670, 87 P3d 688 (*per curiam*), *rev den*, 337 Or 160 (2004). Imposition of a 260-month sentence on a conviction for a class A felony is unlawful.

*State v. Sloan*, 186 Or App 289, 62 P3d 881 (2003) (*per curiam*). The sentencing court violated ORS 161.605 when it imposed a 62-month sentence by departure on a conviction for a class C felony.

*State v. Remme*, 173 Or App 546, 23 P3d 374 (2001). The sentencing court erred when it imposed 72-month

sentences by upward departure on defendant's convictions for first-degree criminal mistreatment, a class C felony.

*State v. Davilla*, 157 Or App 639, 972 P2d 902 (1998), *rev den*, 334 Or 76 (2002). Defendant was 16 years old in August 1991, when he attempted to rape a woman and then murdered her. The sentencing court imposed a departure sentence of 1,394 months on defendant's murder conviction. *Held*: [1] The sentence violates ORS 161.620, which provides that a remanded juvenile is not be sentenced to imprisonment for the duration of his life without the possibility of release. A departure sentence of 116 years is in practical effect imprisonment for life without the possibility of release or parole. [2] Under the statutes in existence when defendant committed his crimes, a juvenile remanded to adult court cannot receive a mandatory minimum sentence or an indeterminate sentence for life. A determinate sentence under the guidelines is not a "mandatory minimum sentence" within the meaning of ORS 161.620. Therefore, the court on remand may impose a determinate sentence under the guidelines. [3] Art I, § 16, imposes a ceiling on the sentence that the court can impose on remand. Defendant cannot receive a more severe sentence for murder than he would for aggravated murder.

*State v. Umtuch*, 144 Or App 366, 927 P2d 142 (1996), *rev den*, 324 Or 654 (1997): The sentencing court erred when it imposed a 260-month upward-departure sentence on defendant's conviction for first-degree sodomy, because it exceeded 20-year limitation set by ORS 161.605(1) and OAR 253-08-002(2).

*State v. Tracy*, 116 Or App 329, 840 P2d 1380 (1992): Sentencing court properly departed both dispositionally and durationally with respect to a conviction in gridblock 7-H; "OAR 253-08-005(3) authorizes a sentence in excess of the initial term of a dispositional departure, so long as the additional departure is supported by aggravating circumstances that are substantial and compelling and that are different from the factors used to support the initial dispositional departure." *See* OAR 213-008-0005(3) (last sentence added by 1993 amendments).

*State v. Little*, 116 Or App 322, 842 P2d 414 (1992): OAR 253-08-004(1), which requires that the combined length of the sentence imposed and the post-prison supervision term shall not exceed the statutory maximum set forth in ORS 161.605, applies only to presumptive sentences; if the court imposes an otherwise proper departure sentence, the total sentence imposed may exceed the statutory maximum.

*See also State v. Ambrose*, 117 Or App 298, 844 P2d 227 (1992).

*Note*: OAR 213-05-002(4) and OAR 213-08-003(2) were amended in 1993 to provide that a durational departure may not "exceed the statutory maximum indeterminate sentence described in ORS 161.605."

*State v. Slack*, 114 Or App 210, 832 P2d 53 (1992) (*per curiam*): Sentencing court erred in imposing a 60-month sentence on a conviction in gridblock 7-F as a dispositional and durational departure — the maximum is 36 months.

*State v. Lucas*, 113 Or App 12, 830 P2d 601, *rev den*, 314 Or 176 (1992): "[T]he court was without authority to sentence defendant to prison and then suspend execution of the sentence" and place defendant on probation; "the sentencing guidelines require execution of either a prison sentence or a sentence of probation."

*State v. Delgado*, 111 Or App 162, 826 P2d 1014 (1992): The sentencing court erred in imposing a 10-year sentence as a dispositional departure.

## F. PROBATIONARY SENTENCE AS DISPOSITIONAL DEPARTURE

*See* ORS 137.012 (prescribing extended term of probation for certain convictions for sexual offenses); OAR 213-005-0008(2); OAR 213-005-0009 to -0017.

*See also* Part VI-C ("Probationary Dispositions"), *above*.

*State v. Gutierrez*, 197 Or App 496, 106 P3d 670, *on recons*, 199 Or App 521, 112 P3d 433 (2005), *rev den*, 340 Or 673 (2006). The Court of Appeals to consider defendant's unpreserved *Blakely*-based challenge to an upward durational departure to a 36-month term of probation on a felony conviction, because it is not clear that *Blakely* applies to probationary terms and, in any event, that term is concurrent with and on the same conditions as a 60-month probationary term, on a misdemeanor conviction, that he does not challenge.

*State v. Sullivan*, 197 Or App 26, 104 P3d 636 (2005). Defendant was convicted based on his pleas of no contest, the court found numerous aggravating factors (noting any one was sufficient) and imposed an upward departure prison term on his DCS conviction and an upward durational departure of 60 months probation on his conviction for third-degree

sodomy, and he raised unpreserved *Blakely*-based challenges on appeal. *Held*: Affirmed. Defendant’s challenge to the probationary term is not plain error because it is concurrent with unchallenged 5-year probationary terms imposed on his misdemeanor convictions, and hence any error may be harmless.

*State v. Tallman*, 190 Or App 245, 78 P3d 141 (2003): The presumptive sentence for defendant’s conviction for first-degree criminal mistreatment was 20 months. With the defendant’s agreement but over the state’s objection, the court departed dispositionally and imposed a 5-year probationary sentence but ruled that, if it later revokes probation, it will impose a 36-month prison sentence without possibility of release for 21 months. The written judgment noted that the court suspended imposition of sentence and imposed the probationary term. *Held*: Reversed and remanded. [1] The state’s objection that the proposed 36-month sentence on revocation is unlawful under OAR 213-010-0002(2) “is not ripe.” [2] Because probation is a “sentence,” the judgment is internally inconsistent in that it both suspends imposition of sentence and imposes a probationary sentence. Moreover, the court lacked authority to suspend imposition of sentence on the felony conviction.

*State v. Ferguson*, 175 Or App 278, 27 P3d 176 (2001) (*per curiam*). The sentencing court imposed an 18-month sentence as a dispositional departure on defendant’s conviction for second-degree escape, but it suspended execution of that sentence and placed him on probation. *Held*: Reversed and remanded. The court had authority to impose either a dispositional departure or a probationary sentence.

*State v. Maki*, 115 Or App 367, 838 P2d 636 (1992): The sentencing court properly imposed a 60-month term of probation upon a finding of substantial and compelling reasons for a departure.

*State v. Dotter*, 114 Or App 1, 833 P2d 1369 (1992): The sentencing court cannot “extend” a probationary term under OAR 253-05-008(2)(a) at the time of original sentencing, but it may depart from the presumptive period of probation upon findings of substantial and compelling reasons to do so.

See also *State v. Vannostrand*, 111 Or App 637, 825 P2d 295 (1992) (*per curiam*) (court erred in imposing 60-month term of probation, instead of the 18-month presumptive term “that was agreed to in the plea agreement”).

See OAR 213-05-008(2), which was revised substantially in 1993.

## G. “DEPARTURE” ON MISDEMEANOR CONVICTION

See Or Laws 1989, ch 790, § 51, as amended by Or Laws 1991, ch 830, § 9, as amended by Or Laws 1993, ch 692, § 10, as amended by Or Laws 1995, ch 520, § 5 (*quoted after* ORS 161.615). The 1997 Legislative Assembly did not extend this statute for another 2-year term, so it effectively was repealed on November 1, 1997.

*State v. Bedard*, 148 Or App 231, 939 P2d 156, *rev den*, 326 Or 58 (1997): When sentencing court placed defendant on probation on prostitution conviction, it properly ordered him to serve a jail term in excess of the 3-month cap prescribed by Or Laws 1989, ch 750, § 51, based on “departure” findings of “persistent involvement” (several prior convictions for sexual offenses) and that he was on parole on a felony sexual-abuse conviction when he committed this offense.

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## VIII. CONSECUTIVE SENTENCES

See ORS 137.121; ORS 137.123; OAR 213-012-0010 *et seq*.

The 1997 Legislative Assembly directed the amendment of the rules in the sentencing guidelines that place durational limitations on consecutive sentences (*viz.*, OAR 213-008-0007 and 213-012-0020) to provide that those rules do not apply to consecutive sentences imposed on convictions “for crimes that have different victims.” Or Laws 1997, ch 313, §§ 26-28.

Art I, § 44(1)(b), enacted in 1999, provides: “No law shall limit a court’s authority to sentence a criminal defendant consecutively for crimes against different victims.”

### A. SENTENCE TO BE SERVED CONSECUTIVELY TO ONE IMPOSED IN ANOTHER CASE

See ORS 137.123(2), (3).

See also Part X-C (“Revocation of Modification of Probation—disposition upon revocation”), *below*.

*Setser v. United States*, 566 US \_\_\_, 132 S Ct \_\_\_, 182 L Ed 2d 455 (2012). Defendant was indicted in Texas state court on new drug charges, and the state also filed a motion to revoke his probation on a previous state-court conviction for drug offenses. About the same time, defendant pleaded guilty in federal court to unrelated drug charges. The federal court imposed sentence first: it imposed a 151-month sentence and ordered defendant to serve that sentence consecutively to whatever sentence would be imposed in state court on the probation revocation and concurrently with whatever sentence would be imposed in state court on the new drug charge. Thereafter, the state court imposed a revocation sanction of 5 years on the earlier conviction and a *concurrent* 10-year sentence on the new conviction. Defendant appealed from the federal-court judgment and argued that the sentencing court did not have authority to anticipatorily order the sentence on his federal-court convictions to be served consecutively to a state-court sentence that was not yet imposed and that, in any event, the consecutive-sentence order was invalid because it was impossible to implement, given the eventual nature of the state sentences. The Fifth Circuit affirmed. *Held*: Affirmed. [1] The district court’s consecutive-sentence order does not fall within the scope of 28 USC § 3584(a), which provides only that a court may order a newly imposed sentence to be served consecutively to either a previously or a simultaneously imposed sentence—*i.e.*, it does not specifically address whether a sentence can be imposed to be served consecutively to a sentence that is not yet imposed. [2] “Put to the choice, we believe it is much more natural to read § 3584(a) as not containing an implied ‘only,’ leaving room for the exercise of judicial discretion in the situations not covered, than it is to read § 3621(b) as giving the Bureau of Prisons what amounts to sentencing authority.” [3] “Because it was within the District Court’s discretion to order that [defendant’s] sentence run consecutively to his anticipated state sentence in the probation-revocation proceeding; and because the state court’s subsequent decision to make that sentence concurrent with its other sentence does not establish that the District Court abused its discretion by imposing an unreasonable sentence; we affirm the judgment of the Court of Appeals.”

*Note*: Like § 3584, ORS 137.123(1) provides only that a court may order a newly imposed sentence to be served consecutively “to any other sentence which has been previously imposed or is simultaneously imposed upon the same defendant”—*i.e.*, the statute does not expressly authorize a court to order a sentence it is imposing to be served consecutively to a sentence that has not yet been imposed. But unlike the federal statute, ORS 137.123(1) also provides: “The court may provide for consecutive sentences only in accordance with this section.” See *State v. Benedict*, 95 Or App 750 (1989). But the fact that this case affirms that a *federal* court has authority to anticipatorily order a sentence it imposes to be served consecutively to a sentence that has not yet been imposed in a parallel state-court proceeding may come in handy in global plea negotiations.

*State v. Haugen*, 349 Or 174, 243 P3d 31 (2010). Defendant, an inmate at OSP, was found guilty of killing another inmate. Defendant previously had been convicted of murder and was serving a life sentence on that conviction. On appeal, defendant argued that ORS 137.123(3) required that his death sentence must be “consecutive to” his previous life sentence. *Held*: Affirmed. ORS 137.123(3) does not require that the execution of defendant’s death sentence must be delayed until after he has served his life sentence. The statutes providing for the imposition of a death sentence are a more specific expression of legislative intent when compared with a sentence of incarceration, because a sentence of death is exceptional. Thus, that particular legislative intent controls over the general intent of the legislature, expressed in ORS 137.123(3), that sentences for crimes committed in prison must be consecutive to previously imposed sentences.

*State v. Trice*, 146 Or App 15, 933 P2d 345, *rev den*, 325 Or 280 (1997): Defendant juvenile was convicted of aggravated murder and first-degree assault in adult court and also was adjudicated in juvenile court on related charges of rape and assault: [1] ORS 137.123 did not give sentencing court authority to order the sentences imposed on the convictions to be served consecutively to the disposition imposed on adjudications, because juvenile dispositions are not “sentences” for purpose of the statute; and [2] court did not have inherent authority to order the sentences to be served consecutively to the disposition.

## **B. CONSECUTIVE SENTENCE IMPOSED ON SECONDARY CONVICTION**

See Art I, § 44(1)(b) (“No law shall limit a court’s authority to sentence a criminal defendant consecutively for crimes against different victims.”); ORS 137.121; ORS 137.123(5); OAR 213-003-0001(17); OAR 213-012-0020 *et seq.* See also Part X-C (“Revocation of Modification of Probation—disposition upon revocation”), *below*.

### **1. Authority to impose and necessity of findings**

See also Part II-B(1) (“Right to jury, *Apprendi* issues”), *above*.

**Oregon v. Ice**, 555 US 160, 129 S Ct 711, 172 L Ed 2d 517 (2009). The right-to-jury rule announced in *Apprendi* does not apply to findings made under ORS 137.123 to support the imposition of consecutive sentences. The sentencing court did not violate the Sixth Amendment when it imposed consecutive sentences under ORS 137.123(2) based on its finding that defendant committed the crimes during separate criminal episodes. The Court emphasized that historically the common law entrusted the decision whether to impose consecutive or concurrent sentences on multiple convictions to the judge’s sole unfettered discretion.

**State v. Hagberg**, 347 Or 272, 220 P3d 47 (2009). In light of *Oregon v. Ice*, sentencing court properly imposed consecutive sentences based on its own factual findings.

See also **State v. Blanscet**, 230 Or App 363, 215 P3d 924 (2009) (same); **State v. Hylton**, 230 Or App 525, 216 P3d 899 (2009) (same).

**State v. Ice**, 346 Or 95, 204 P3d 1290 (2009) (*per curiam*) (“*Ice II*”). [1] In light of *Oregon v. Ice*, 129 S Ct 711 (2009), the court reversed its decision in *State v. Ice*, 343 Or 248, 170 P3d 1049 (2007) (“*Ice I*”), and held: “the trial court did not violate defendant’s Sixth Amendment rights when it imposed a consecutive sentence based on the trial judge’s fact-finding. [2] “Article I, section 11, of the Oregon Constitution similarly does not require that a jury make the factual findings necessary for imposition of consecutive sentences.”

See also **State v. Viranond**, 346 Or 451, 212 P3d 1252 (2009) (in light of *Ice II*, the sentencing court properly imposed consecutive sentences based on its own findings); **State v. Gilliland**, 223 Or App 279, 196 P3d 13 (2008), *mod on recons*, 228 Or App 358, 208 P3d 980 (2009) (*per curiam*).

**State v. Zweigart**, 344 Or 619, 188 P3d 242 (2008). [1] In light of *Ice I*, the sentencing court erred when, based on findings it made under ORS 137.123(5)(a), it ordered defendant to serve the sentence on the robbery conviction consecutively to the death sentence on the conviction for aggravated murder, which was based on the same incident, same victim. [2] The consecutive sentences the court imposed on the other convictions, however, are not error under *Ice I* because those counts named different victims and hence, by its verdicts, “the jury necessarily found beyond a reasonable doubt” that defendant committed those crimes against different victims, ORS 137.123(5)(b).

See also **State v. McCool**, 221 Or App 56, 188 P3d 453 (2008) (same as [2]).

**State v. Running**, 336 Or 545, 87 P3d 661, *cert den*, 543 US 1005 (2004). Defendant was sentenced to death for one count of aggravated murder, and received a true-life sentence on a different count of aggravated murder of another victim. *Held*: Affirmed. The trial court did not violate ORS 163.105(1)(b) when it ordered defendant to serve the true-life sentence consecutively to his death sentence.

**Pendergrass v. Coursey**, 242 Or App 68, 253 P3d 69 (*per curiam*), *rev den*, 350 Or 530 (2011). Petitioner pleaded guilty to two counts of first-degree robbery involving different victims, and the court imposed consecutive sentences. Petitioner then filed a petition for post-conviction relief alleging, *inter alia*, that his trial counsel provided constitutionally inadequate assistance by not objecting to the consecutive-sentence order on the ground that the court had not made findings on the record as required by ORS 137.123, and the post-conviction court granted relief on that claim. *Held*: Reversed. Petitioner failed to prove that he was prejudiced given that “had petitioner’s trial counsel objected, the trial court could easily have made findings that would satisfy ORS 137.123(5)(b), because the indictment alleged separate victims for the two robbery charges. ... Trial counsel’s failure to object to the lack of express findings regarding separate victims did not prejudice petitioner; the error would have been easily remedied had it been brought to the trial court’s attention.”

**State v. Moncada**, 241 Or App 202, 250 P3d 31 (2011). Defendant ran hit two pedestrians with his motor vehicle—injuring them seriously enough that they both eventually died—and then fled without stopping to render assistance. He pleaded guilty to two counts of failure to perform the duties of a driver to injured persons in violation of ORS 811.705(1)(e) (“H&R”). Defendant argued that the H&R convictions should merge and that, in any event, the trial court could not impose consecutive sentences, but the court entered separate convictions and imposed consecutive 36-month sentences. *Held*: Affirmed. [1] “Where the statute defining a crime does not expressly identify the person who qualifies as a ‘victim,’ the court examines the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription.” When a driver fails to perform the duties required by ORS 811.705(1)(e), “the ‘victim’ is the person who does not, among other things, receive ‘reasonable assistance.’” [2] “Accordingly, merger of defendant’s two [H&R convictions] was precluded pursuant to ORS 161.067(2)

because there were ‘two or more victims.’” [3] Because defendant’s two separate H&R convictions had different victims, the court properly imposed consecutive sentences under ORS 137.123(5)(b).

*State v. Newell*, 238 Or App 385, 242 P3d 709 (2010). Defendant pleaded guilty to four counts of second-degree encouraging child sexual abuse and was placed on probation. Later, the trial court revoked defendant’s probation after he violated five of his probation conditions. At the revocation hearing, defendant argued that because the court, at the original sentencing hearing, did not make any findings under ORS 137.123 supporting the imposition of consecutive sentences, it was required to impose concurrent revocation sanctions. The court disagreed and imposed consecutive sanctions under OAR 213-012-0040(2), which authorizes imposing consecutive revocation sanctions if more than one probationary sentence is revoked for separate supervision violations. *Held*: Affirmed. ORS 137.123 applies only to the imposition of sentences and not to the imposition of sanctions upon revocation of probation.

*State v. Loftin*, 218 Or App 160, 173 P3d 312 (2008), *mod on recons*, 228 Or App 96, 206 P3d 1208, *rev den*, 346 Or 364 (2009). [1] In light of *Ice II*, the sentencing court properly imposed consecutive sentences based on its own findings. [2] The Court of Appeals nonetheless reaffirmed its previous opinion insofar as it held that ORS 137.123(5) does not permit imposition of consecutive sentences based only on the fact that the convictions are for crimes of equal seriousness.

See also *State v. Karp*, 220 Or App 299, 185 P3d 553 (2008) (*per curiam*) (same as [2]); *State v. Mills*, 219 Or App 225, 182 P3d 889 (2008) (same as [2]).

*State v. Gee*, 224 Or App 635, 198 P3d 950 (2008), *rev den*, 346 Or 157 (2009). Defendant was convicted of two counts of attempted murder based on his participation in a drive-by shooting in which he aided the shooting at a man they mistakenly thought was Taylor. The man at whom the shots were fired was White; Taylor was several blocks away and was not in range. Defendant did *not* argue that there was insufficient evidence to support both convictions for attempted murder; rather, he assigned error only to the imposition of consecutive sentences, arguing that there was insufficient evidence to support a finding that he “caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct,” under ORS 137.123(5)(b). *Held*: Affirmed. Defendant’s conduct in shooting at one victim created a risk of shooting the intended victim. Even though his conduct in shooting White did not *actually* harm Taylor, it *did* create a risk that Taylor would be harmed.

*State v. Nelson*, 224 Or App 193, 197 P3d 1130 (2008). The court imposed consecutive sentences based on its finding that the offenses were based on separate incidents that were “separated by time and place.” Defendant did not object, but he asserted on appeal that the sentences were improper without jury findings. *Held*: Affirmed in part, reversed in part. The jury’s verdict on two of the convictions showed that it necessarily found that the acts were not part of the same criminal episode; other sentences required reversal under *Blakely/Ice*. The record showed that the trial court instructed the jury as to the dates on which defendant was alleged to have committed his crimes, and that the jury necessarily found that two of the offenses occurred on separate dates. On the remaining conviction, the jury’s verdict did *not* show that it found that the offenses occurred on separate dates, and the Court of Appeals exercised its discretion to correct the error because of the gravity of the error.

*State v. Groves*, 221 Or App 371, 190 P3d 390 (2008). The court imposed consecutive sentences on defendant’s convictions for burglary and attempted rape. Defendant asserted that his convictions for burglary (based on entry with intent to commit rape) and for attempted rape based on the entry into the second victim’s apartment could not be subject to consecutive sentences under ORS 137.123(5)(a), which requires proof of a willingness to commit more than one offense, because those convictions were based on a single act. *Held*: Affirmed. The record supported the sentencing court’s finding that the defendant was willing to commit both burglary and rape. *Distinguishing State v. Warren*, 168 Or App 1 (2000) (reversing consecutive sentences on attempted murder and first-degree assault based on the defendant’s act of firing a single shot into the victim’s head).

*State v. Bowen*, 220 Or App 380, 185 P3d 1129 (2008). Over defendant’s *Blakely*-based objection, the sentencing court, relying on ORS 137.123(2), imposed consecutive sentences on multiple convictions based on defendant’s repeated sexual assaults on a child. *Held*: Affirmed. Even though, in light of *Ice I*, the court erred, the error was harmless because “the evidence at trial established eight incidents of sexual contact between defendant and the victim [over the course of 9 years, and those] incidents, as demonstrated by overwhelming evidence in the record, were so distinct from one another that we can say with complete confidence that the jury would have found that the offenses did not occur as part of a continuous

and uninterrupted course of conduct if it had been asked to determine the matter. That is, on this record, no reasonable factfinder could have determined otherwise.”

*State v. Andrews*, 220 Or App 374, 185 P3d 1127, *rev den*, 345 Or 175 (2008). The sentencing court did not commit plain error under *Ice I* when it imposed consecutive sentences. The indictment alleged that defendant committed the crimes at issue “in three different date ranges,” and the parties agreed at sentencing that the jury’s verdicts of guilty necessarily had found that he committed the crimes during separate episodes.

*State v. Smith*, 218 Or App 278, 179 P3d 691, *rev den*, 344 Or 671 (2008). In light of *Ice I*, the sentencing court committed “plain error” by imposing consecutive sentences under ORS 137.123(5)(b) (risk of loss, injury or harm to a different victim) in the absence of jury findings; nevertheless, the appellate court declined to review it because there was no legitimate debate that the UUV involved harm to one victim, and defendant’s possession of an altered key created a risk of harm to other victims.

*State v. Cone*, 218 Or App 273, 179 P3d 688, *rev den*, 344 Or 539 (2008). Although the order imposing consecutive sentences under ORS 137.123(5)(b) was “plain error” in light of the later decision in *Ice I*, the Court of Appeals declined to exercise its discretion to correct the error because “[t]here can be no doubt” that the harm caused by the assault (physical injury to the victim’s person) was qualitatively different and greater than the harm caused by the burglary (unlawful entry onto the victim’s property).

*State v. Rettman*, 218 Or App 179, 178 P3d 333 (2008). [1] Defendant’s convictions for assault (by cutting the victim’s wrist) and attempted murder (by cutting the wrist) involved precisely the same harm. Thus, consecutive sentences were not authorized by ORS 137.123(5)(b) (different harms to victim). [2] Because the sentencing court did not rely on a theory that the attempted murder included the act of *delaying treatment* for the child thus creating a greater risk of harm, the Court of Appeals could not affirm on that ground.

*State v. Walch*, 218 Or App 86, 178 P3d 301 (2008), *aff’d on rev of other issue*, 346 Or 463, 213 P3d 1201 (2009). [1] Court refused to consider defendant’s unpreserved claim that the trial court failed to instruct that, to make affirmative findings on any fact allowing consecutive sentences, the jurors had to make the finding *beyond a reasonable doubt*. Because the preliminary instructions informed the jurors that the state had the “beyond a reasonable doubt” burden, the trial court did not commit plain error by failing to give a more specific instruction later. [2] Based on *State v. Sawatzky*, 339 Or 689 (2005), the court rejecting defendant’s unpreserved assertion that the state was required to allege the consecutive-sentence enhancement facts in the indictment, stating “we see no reason, in light of *Ice*, to draw any distinction between [the departure factors addressed in *Sawatzky*] and the facts supporting consecutive sentences.”

*State v. Tanner*, 210 Or App 70, 150 P3d 31 (2006) (*en banc*). [1] The determination under ORS 137.123(5)(a) whether the secondary offense was “merely incidental” to the primary offense is a factual finding, not a legal conclusion. [2] *Blakely* does not entitle a defendant to a jury trial on a fact that supports a consecutive sentence under ORS 137.123(5).

See also *State v. Kayfes*, 213 Or App 543, 162 P3d 308, *rev den*, 343 Or 690 (2007); *State v. Magana*, 212 Or App 553, 159 P3d 1163 (2007); *State v. Carson*, 211 Or App 606, 156 P3d 71 (2007) (*per curiam*) (*Tanner* “applies with equal force in the context of a challenge to consecutive sentences imposed pursuant to ORS 137.123(2)”).

*Note:* In light of *Ice II*, these cases again have precedential value.

*State v. Gordian*, 209 Or App 600, 149 P3d 190 (2006) (*per curiam*). Defendant pleaded guilty to three crimes that “were alleged in the indictment to have occurred during separate criminal episodes,” and the court imposed consecutive sentences. Because “under ORS 137.123(2), a court is not required to make findings to support the imposition of consecutive sentences” if the defendant did not commit the crimes “in the same criminal episode,” defendant’s *Blakely*-based objection has no merit—“the sentences in this case fall within the exception enunciated in *Blakely* for sentences based on facts admitted by a defendant.”

*State v. Anderson*, 208 Or App 409, 145 P3d 245 (2006), *rev den*, 343 Or 33 (2007). The sentencing court lawfully imposed consecutive sentence on defendant’s convictions for robbery and assault of the same victim based on his act of striking the victim in the course of taking of the property. The court could have inferred that defendant was willing *both* (a) to cause physical injury to the victim (assault), and (b) to *use* the mallet, or attempt to cause *serious* physical injury with the mallet (robbery). The facts were sufficient to show his “willingness to commit more than one criminal offense” under ORS 137.123(5)(a).

**State v. Herrera-Lopez**, 204 Or App 188, 129 P3d 238, *rev den*, 341 Or 140 (2006). [1] The court properly imposed consecutive sentences under ORS 137.123(5)(b) on defendant’s convictions for first-degree kidnapping and second-degree assault based on its findings that the crimes inflicted “qualitatively different injury” to the victim. [2] Defendant’s *Blakely*-based challenge to the consecutive-sentence error has no merit because in the course of pleading guilty to the charges he admitted that consecutive sentences were appropriate and “admitted all of the facts necessary to justify consecutive sentences.” For purposes of *Blakely*, “admitted facts can be used at sentencing even when the admission was not made for that purpose.”

**State v. Fuerta-Coria**, 196 Or App 170, 100 P3d 773 (2004), *rev den*, 338 Or 16 (2005). Defendant’s unpreserved objection that the imposition of consecutive sentence based on findings made by the sentencing court, rather than the jury, violates *Blakely* is not “plain error.”

See also **State v. Goodman**, 200 Or App 137, 112 P3d 473 (*per curiam*), *rev den*, 339 Or 230 (2005) (same); **State v. Ross**, 199 Or App 1, 110 P3d 630, *mod on recons*, 200 Or App 143, 113 P3d 921 (2005), *rev den*, 340 Or 157 (2006) (same).

**State v. Brooks**, 187 Or App 388, 67 P3d 426, *rev den*, 335 Or 578 (2003). Defendant was found guilty except for insanity under ORS 161.327(1) on *inter alia* seven class C felony offenses, and the court imposed a 5-year commitment to PSRB on each and ordered defendant to serve five of those terms consecutively, without making findings under ORS 137.123(5). *Held*: Reversed and remanded for resentencing. [1] ORS 161.327(1) authorizes a sentencing court to impose consecutive PSRB commitments. [2] In order to do so, however, the court must make appropriate findings under ORS 137.123. [3] Because the court failed to make such findings, the case must be remanded for resentencing even if evidence in the record would support consecutive sentences.

See also **State v. Austin**, 187 Or App 427, 67 P3d 435 (2003) (*per curiam*) (affirming consecutive commitments to PSRB).

**State v. Hilton**, 187 Or App 666, 69 P3d 779 (2003), *rev den*, 336 Or 377 (2004). The sentencing court properly imposed consecutive sentences under ORS 137.123(5)(b) on defendant’s convictions for felon in possession and unlawful use of a weapon, because defendant completed the first offense before he committed the second and the crimes created qualitatively different risks of harm.

**State v. Warren**, 168 Or App 1, 5 P3d 1115, *rev den*, 330 Or 412 (2000). Defendant was convicted of attempted murder and first-degree assault for shooting the victim once in the head at close range, and the court imposed consecutive sentences on those convictions after making findings under ORS 137.123(5). *Held*: Reversed and remanded for resentencing. [1] The appellate court does not conduct a *de novo* review of the record to determine whether consecutive sentences are appropriate. Rather, the review is for error of law—*i.e.*, whether evidence in the record supports the court’s findings. [2] Defendant’s single act of shooting the victim once with an intent to kill cannot support a consecutive sentence on the assault conviction.

**State v. Trice**, 159 Or App 1, 976 P2d 569, *rev den*, 329 Or 61 (1999). The sentencing court ordered that 48 months of the 130-month sentence it imposed on the defendant’s assault conviction is to be served consecutively to the 256-month sentence it imposed on his murder conviction. Defendant appealed, contending that the court lacked authority to order part of a sentence to be served consecutively to another sentence imposed in the same case. *Held*: Affirmed. The sentencing court had authority under ORS 137.123 to order that a portion of a sentence is to be served consecutively to another sentence imposed in the same case. “We conclude that implicit in the authority [granted in ORS 137.123] to impose both consecutive and concurrent sentences is the authority to impose sentences that are partially consecutive and concurrent.” [Note: The authority to order that part of a sentence is to be served consecutively may be helpful particularly in cases in which the defendant is convicted of two or more Measure 11 offenses.]

See also **State v. Carlson**, 160 Or App 651, 987 P2d 523 (1999) (*per curiam*), *rev den*, 329 Or 589 (2000).

**State v. Stafford**, 157 Or App 445, 972 P2d 47 (1998), *rev den*, 329 Or 358 (1999). Defendant was convicted of three counts attempted first-degree sexual abuse for touching two young children. “[E]ach time defendant touched the first victim’s leg, he committed attempted sexual abuse because he had the opportunity to pause and reflect on his conduct. ORS 161.067. Thus, consecutive sentences were lawfully imposed because he had the time to renounce his criminal objectives before acting further.”

*State v. Rojas-Montalvo*, 153 Or App 222, 957 P2d 163, *rev den*, 327 Or 193 (1998): [1] The sentencing court properly imposed consecutive sentences on defendant’s convictions for DCS and PCS arising out of the same incident. The PCS offense was not as a matter of law merely incidental to the DCS even though defendant was convicted of DCS on a theory of “constructive” delivery. [2] The sentencing court committed plain error, however, by failing to comply with the “shift to column I” rule in OAR 213-12-020(2) when it imposed the consecutive sentence on the PCS conviction.

*State v. Gleason*, 141 Or App 485, 919 P2d 1184, *rev den*, 324 Or 323 (1996). Trial court properly imposed consecutive sentences on defendant’s racketeering and theft convictions.

*State v. Hagan*, 140 Or App 454, 916 P2d 317 (1996). The sentencing court imposed a 36-month prison term on the primary offense and 5-year probationary sentences on other convictions and then ordered the sentences to be served consecutively. *Held*: The court “lacked authority under OAR 253-12-020 to impose consecutive probation terms in addition to a term of incarceration.”

*Austin v. McGee*, 140 Or App 263, 915 P2d 1027 (1996). The sentencing court ordered the 6-month departure sentence imposed on petitioner’s conviction third-degree rape to be served consecutively to the 40-month sentence imposed on the conviction for first-degree rape; both convictions are based on his single sexual assault on a 14-year-old girl. Petitioner sought post-conviction relief based on fact that his trial counsel failed to object to the consecutive sentence. *Held*: [1] Petitioner was not entitled to relief based on claim that court failed to recite the findings in the judgment—ORS 137.123(5) requires the court to make the findings only “on the record.” [2] The sentencing court’s findings that petitioner took advantage of the victim’s young age and mental disabilities were sufficient to support the 6-month sentence both as a departure sentence and as a consecutive sentence. It was not necessary for the court to make findings under ORS 137.123(5) that are separate from the ones it made under OAR 253-08-002(1)(b).

*State v. Sumerlin*, 139 Or App 579, 913 P2d 340 (1996). Sentencing court properly imposed consecutive sentences pursuant to ORS 137.123(5)(b) on defendant’s convictions for recklessly endangering and assault based on separate victims, and it properly imposed consecutive sentences pursuant to ORS 137.123(5)(a) on defendant’s convictions for DUII and reckless driving.

## 2. Application of the “200/400-percent rule”

*See also* Part V-D(4) (“Criminal-History Score—Counting convictions previously sentenced”), *above*.

*See* ORS 137.121; OAR 213-008-0007; OAR 213-012-0020(2).

*Note*: In 1997 the rules in the sentencing guidelines that place durational limitations on consecutive sentences (*viz.*, OAR 213-008-0007 and 213-012-0020) were amended to provide that those rules do not apply to consecutive sentences imposed on convictions “for crimes that have different victims.” Or Laws 1997, ch 13, §§ 26-28. In 1999, the people enacted Art I, § 44(1)(b), which provides: “No law shall limit a court’s authority to sentence a criminal defendant consecutively for crimes against different victims.”

*State v. Langdon*, 330 Or 72, 999 P2d 1127 (2000). [1] The 400-percent rule requires the sentencing court to reduce the sentences imposed, but it does not require the court to convert a consecutive sentence to a concurrent one. [2] A sentencing court has authority to impose consecutive Measure 11 minimum sentences on convictions without regard to the 400-percent limitation in OAR 213-012-0020 and OAR 213-008-0007(3).

*State v. Miller*, 317 Or 297, 855 P2d 1093 (1993): [1] The “200 percent rule” in OAR 253-12-020(2), which limits the total length of a series of consecutive sentences, “is not applied if there were separate sentencings for separate criminal episodes,” even though the convictions are sentenced at a single sentencing hearing and are based on charges in a single indictment. The limitation applies only to consecutive sentences imposed on convictions based on crimes committed during a single criminal episode. [2] Similarly, the “shift to column I” rule in OAR 253-12-020(2) applies only to a consecutive sentence imposed on conviction based on crime committed during the same criminal episode as the “primary offense.”

*See also State v. Johnson*, 125 Or App 655, 866 P2d 1245 (1993) (same).

*State v. Davis*, 315 Or 484, 847 P2d 834 (1993): [1] When a court imposes a dangerous-offender sentence on a conviction subject to the guidelines, the sentence is a departure under the guidelines, *see* ORS 161.737(1), and thus is

subject to the rules governing the length of consecutive sentences. [2] The indeterminate portion of a dangerous-offender sentence is subject to the “400 percent rule” in OAR 253-12-020(2). “We hold that ‘incarceration term,’ as that phrase is used in OAR 253-08-007(3), refers to the entire indeterminate term of a dangerous offender sentence.” [3] “Under [the ‘200 percent rule’ in OAR 253-12-020(2)], no matter how many convictions arise out of a single case, if any of the sentences are imposed to run consecutively, the total incarceration term for all of the convictions combined may not exceed twice the maximum presumptive incarceration term for the primary offense, except by departure.” [4] The “400 percent rule” in OAR 253-08-007(3) operates as follows:

“First, the sentencing judge must calculate the presumptive incarceration term for each conviction without departure, applying OAR 253-12-020(2). These presumptive incarceration terms are limited by the 200 percent rule, *i.e.*, they cannot exceed 200 percent of the presumptive incarceration term for the primary offense. After calculating those terms, the judge may impose a departure sentence on any or all of the individual convictions. Under OAR 253-08-007(3), however, the incarceration term of each departure sentence may not exceed twice the presumptive incarceration term already determined for that offense under OAR 253-12-020(2). Because these presumptive incarceration terms will have been limited already by operation of the 200 percent rule, the maximum incarceration term that may be imposed for all the consecutive sentences together by departure cannot exceed four times the maximum presumptive incarceration term of the primary offense.”

315 Or at 493.

*Note:* In response to *Davis*, the 1993 legislature approved OAR 213-012-0020(4) and an amendment to OAR 213-008-0007(3) that provide that the limitations set forth in those rules “shall not apply to any sentence imposed on a dangerous offender under ORS 161.725 and 161.737.” Or Laws 1993, ch 692, § 1; Or Laws 1993, ch 334, § 6 (amending ORS 161.737(2)). In addition, the 1993 legislature enacted OAR 253-08-003(3), which provides that the 200-percent rule “does not apply to the indeterminate sentence imposed on a dangerous offender under ORS 161.725 and 161.737.” Or Laws 1993, ch 334, § 8.

*State v. Monro*, 256 Or App 493, 301 P3d 435 (2013). Defendant committed a series of home-invasion robberies, and was convicted of multiple counts relating to three different incidents. The trial court imposed a series of consecutive Measure 11 and departure sentences, including a consecutive 144-month departure sentence on the conviction for first-degree robbery. Defendant argued on appeal that the court erred by not applying the “shift to column I” rule, OAR 213-012-0020, when it imposed the consecutive sentence on his robbery conviction. *Held:* Reversed and remanded for resentencing. [1] Because the sentencing court chose to impose a departure sentence on the robbery conviction that was longer than the Measure 11 sentence, the court was required to follow the “shift to column I” rule. If the court had complied with that rule, “the maximum departure sentence permitted to be imposed consecutively was 72 months, rather than the 144 months that the court imposed. However, because the mandatory incarceration term for the offense under Measure 11 is greater—90 months—the court was required to impose that sentence rather than the 72-month consecutive guidelines sentence. ORS 137.700(1).” Because the court failed to comply with that rule, it imposed a consecutive sentence that is 54 months longer than the maximum permitted by law.

*State v. Powell*, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). Based on a high-speed chase during which he threw baggies of methamphetamine out the window, defendant was convicted of seven offenses including PCS, third-degree assault, and attempting to elude, and the court imposed a series of consecutive departure sentences. The Court of Appeals remanded for resentencing based on a *Blakely* error, and the court on remand reimposed the same overall sentence. *Held:* Affirmed. The sentencing court did not violate the “shift to column I” rule, OAR 213-012-0020(2) when it imposed a 60-month sentence on his PCS conviction, using gridblock 6-A rather than 6-I, after it had imposed a 6-month sentence, using gridblock 2-A, on his conviction for eluding. Application of the “shift to column I” rule does not depend on “the chronological order in which the court imposed sentences” but rather on which conviction is the “primary offense,” which means the offense of conviction with the highest crime-seriousness ranking. OAR 213-003-0001(17). Because the PCS conviction was the primary offense, the court correctly used gridblock 6-A when it imposed sentence on that conviction.

*State v. Witherspoon*, 250 Or App 316, 280 P3d 1004 (2012). Over the course of several hours, defendant and his wife, the victim, engaged in an argument that occasionally turned violent. At one point, they were in the kitchen and he threatened her with a knife. She escaped into the living room to call 911, but he pulled the cord out of the wall. She then announced that she was leaving with their son, and she went into his bedroom to get him. Defendant followed and assaulted

her there in front of the son. Defendant was convicted on stipulated facts of misdemeanor assault based on an earlier event (count 1), menacing based on the incident in the kitchen (count 2), and felony assault in the fourth degree based on the incident in the bedroom (count 4). At sentencing, the prosecutor argued, and the sentencing court agreed, that the third conviction was based on a criminal episode different from that underlying the first two convictions, and the court applied the *Miller/Bucholz* rule to increase the criminal-history score to “D” for that conviction, and it imposed the 14-month presumptive sentence based on gridblock 6-D. *Held*: Remanded for resentencing. [1] “When a court imposes sentences for multiple convictions in a single proceeding, the court may use a defendant’s convictions arising from earlier criminal episodes to calculate the defendant’s criminal history score with respect to a crime arising from a later criminal episode. However, when a defendant’s multiple convictions stem from the same criminal episode, his criminal history score remains the same with respect to all of those convictions.” [2] “The court first considers whether a complete account of one crime necessarily includes details of the other . . . . If a complete account of each crime necessarily includes details of the other, then they arise from the same criminal episode. Crimes are not cross-related, and thus do not necessarily include details of one another, where one of the crimes may be proved without evidence of the other crime.” [3] “Although the events that led to the three [convictions] would have provided useful context for proving each count, defendant’s conviction for Counts 1 and 2 in no way depended on proof of Count 4. Thus, the three counts are not cross-related, and a complete account of Counts 1 and 2 does not necessarily include details of Count 4.” [4] But the separate issue presented under ORS 131.505(4) is whether the convictions nonetheless are based on crimes defendant committed during “continuous and uninterrupted conduct that . . . is so joined in time, place and circumstance” that his conduct was “direct to the accomplishment of a single criminal objective.” Here, the entire incident was continuous and uninterrupted, and all of defendant’s conduct was based on a single criminal objective. Because all the convictions are based on a single criminal episode, the sentencing court erred in applying *Miller/Bucholz* to recalculate his criminal-history score to “D” on the assault conviction based on count 4.

*State v. Hicks*, 249 Or App 196, \_\_ P3d \_\_, *rev den*, 352 Or 341 (2012). Based on a single incident involving a single victim, defendant was convicted of second-degree burglary and first-degree criminal mischief. The sentencing court determined that each conviction is subject to the 13-month presumptive sentence in ORS 137.717(1)(b), and it departed upward to 26 months on each and ordered defendant to serve the sentences consecutively, for a total sentence of 52 months. On appeal, defendant argued that the sentences are error because the court did not comply with the “shift to column I rule,” OAR 213-012-0020(2)(a)(A), when it imposed a consecutive sentence on the criminal-mischief conviction. *Held*: Affirmed. Although the sentences prescribed by ORS 137.717(1)(b) (2009), are described as “presumptive” sentences, they nonetheless are “statutorily mandated sentences” and thus are not subject to the “shift to column I” rule. Under ORS 137.717(3) (2009), the prescribed “presumptive” sentences are “mandatory” unless the sentencing court imposes a *longer* sentence that is otherwise authorized by law.

*State v. Truong*, 249 Or App 70, 274 P3d 873 (2012). Defendant was convicted of two counts of DCS and FIP, and the court followed the state’s recommendation and imposed consecutive upward-departure sentences of 68, 36, and 36 months. For the first time on appeal, defendant complained that the total sentence of 140 months violates the 400-percent rule. *Held*: Reversed and remanded. The total sentence exceeds the 136-month limited imposed by the 400-percent limitation in OAR 213-012-0020(2) and 213-008-0007(3).

*Orchard v. Mills*, 247 Or App 355, 270 P3d 309 (2011), *rev den*, 352 Or 33 (2012). While driving intoxicated, petitioner caused an accident that injured another person and he fled the scene. Later, the police found several firearms at petitioner’s residence. He was convicted of second-degree assault, failure to perform the duties of a driver (H&R), and seven counts of felon in possession of a firearm (FIP), the court imposed consecutive sentences on those convictions, and the judgment was affirmed on appeal. Petitioner then filed a petition for post-conviction relief contending that his counsel and the sentencing court failed to apply the “shift to column I” rule, OAR 213-012-0020(1), when it imposed consecutive sentences. The post-conviction court dismissed his petition. *Held*: Affirmed. [1] “Under OAR 213-012-0020(2)(a)(B), when a trial court imposes multiple sentences consecutively, it must ‘shift to column I’ on the criminal history scale for all sentences that are imposed consecutively to the sentence on the primary offense. However, the ‘shift-to-I’ rule applies only when consecutive sentences are imposed for crimes that arise from a single criminal episode.” [2] “To determine whether convictions arise from a single criminal episode for purposes of the imposition of consecutive sentences, we apply the same definition that governs our double-jeopardy analysis: ORS 131.505(4).” [3] Petitioner’s assault and H&R convictions did not arise out of a single criminal episode, because his “assaultive conduct and his subsequent efforts to evade apprehension for that assault were not directed to the accomplishment of a single criminal objective.” [4] Similarly, his FIP convictions did not arise out of a single criminal episode even though all the guns were found and seized during a single search because “the responding officers found seven separate firearms in petitioner’s home, and there was circumstantial evidence, such as

the placement of guns in the closet and under the bed, that they were concealed by separate acts. As a result, there was sufficient evidence for the trial court to conclude that the firearms were acquired separately.”

**State v. Cervantes-Avila**, 242 Or App 122, 255 P3d 536 (2011). Defendant was convicted of, *inter alia*, first-degree rape, first-degree sodomy, and unlawful use of a weapon (ORS 166.220), all “with a firearm.” The court imposed consecutive 100-month sentences on the rape and sodomy convictions, and it then imposed a consecutive 60-month firearm-minimum sentence on the unlawful-use conviction. Defendant argued that that sentence violated the “200-percent rule,” OAR 213-012-0020(2). *Held*: Affirmed. [1] The 200-percent rule applies only to “consecutive sentences that involve presumptive or dispositional departures” and does not apply to a statutory mandatory sentence. *See State v. Langdon*, 330 Or 72 (2000). [2] Although a sentencing court has discretion under ORS 161.610(5) not to impose the 60-month firearm-minimum on a first-time offender, the court did not make that election here, which means that the 60-month term it imposed is a “mandatory minimum” for purposes of the 200-percent rule.

**State v. LePierre**, 235 Or App 391, 232 P3d 982 (2010). Defendant pleaded guilty to two counts of first-degree burglary and multiple counts of sexual offenses based on the same incident and entry. *Held*: Reversed and remanded for resentencing. The court erred when it failed to comply with the 200-percent rule (OAR 213-012-0020(2)) when it imposed a 36-month sentence on the burglary conviction to be served consecutively to the 200-month Measure 11 sentence imposed on the convictions for the sexual offenses.

**State v. Marshall**, 219 Or App 511, 183 P3d 241 (2008). The sentencing court erred when it failed to comply with “shift to column I” rule, OAR 213-012-0020(2)(a)(B), when it imposed a sentence on conviction for third-degree assault to be served consecutively to sentence on conviction for kidnapping based same incident and victim.

**State v. Stone**, 201 Or App 314, 118 P3d 830 (2005). The sentencing court erred in failing to comply with the “shift to column I rule,” OAR 213-012-0020(2)(a), when it imposed a consecutive sentence on defendant’s conviction for felon in possession of a firearm, because it was based on a crime he committed during the same criminal episode as the primary offense, MCS.

**State v. Yashin**, 199 Or App 511, 112 P3d 331, *rev den*, 339 Or 407 (2005). Defendant was convicted of numerous felony sexual offenses that he committed against a single victim. At sentencing, the court found that he committed some of those offenses during separate criminal episodes and it recalculated his criminal history in accordance with *Miller/Bucholz* as it imposed sentence. For the first time on appeal, defendant contended that, in light of *Blakely*, the sentencing court erred in recalculating his criminal-history score based on its own findings. *Held*: Affirmed. That claim is not reviewable as plain error, because it is not clear whether the *Miller/Bucholz* determination falls within the scope of the “prior conviction” exception in *Apprendi*.

**Williamson v. Schiedler**, 196 Or App 302, 101 P3d 364 (2004). Petitioner’s trial counsel provided inadequate assistance by failing to object at sentencing that the length of the total consecutive-sentence string violated the 200-percent limitation in OAR 213-012-0020(2), because all of the convictions were based on a single incident. Petitioner’s felon-in-possession offenses necessarily were part of his MCS offenses in light of the jury’s findings on the “commercial drug offense” factors that he unlawfully possessed a firearm during the offenses.

**State v. Young**, 183 Or App 400, 52 P3d 1102 (2002). The court properly imposed consecutive 13-month minimum sentences on defendant’s two convictions subject to ORS 137.717 (1997). Because those 13-month terms are mandated as minimum sentences and none of the exemptions set forth in ORS 137.717(3) apply, those consecutive sentences are not subject to the 200-percent and shift-to-column-I limitations in the guidelines.

*Note*: Under the current version of ORS 137.717, the prescribed sentences are described as a “presumptive sentence,” not a minimum sentence.

**State v. Kautz**, 179 Or App 458, 39 P3d 937, *rev den*, 334 Or 327 (2002). Because defendant committed the robbery in the course of escaping from the scene of his burglary and the same victim and property were involved in both crimes, the crimes were so related in time, place, and circumstance to constitute a single criminal episode for purpose of the “shift to column I” rule, OAR 213-012-0020.

**State v. Longnecker**, 175 Or App 33, 27 P3d 509, *rev den*, 332 Or 656 (2001). Defendant was convicted of seven felony offenses based on his kidnapping and extended torture and repeated sexual assault of the victim. The sentencing

court imposed a series of consecutive Measure 11 minimum sentences and guidelines departure sentences that total 830 months, and defendant did not object. *Held*: Reversed and remanded. The departure sentences imposed are error because they exceed the 400-percent limitation.

*State v. Bush*, 174 Or App 280, 25 P3d 368 (2001). Defendant was charged 20 separate drug and weapons offenses, and the indictment alleged that he committed all of those crimes “as part of the same act or transaction.” That allegation was not submitted to the jury. The sentencing court found that defendant committed some of the offenses during separate criminal episodes and on that basis imposed consecutive sentences that did not comply with the limitations in OAR 213-012-0020(2). *Held*: Affirmed. The “same act or transaction” allegations in the indictment were only for the purpose of joinder under ORS 132.560 and did not bar the sentencing court from finding, based on the evidence presented at trial and for purpose of OAR 213-012-0020(2), that the defendant actually committed the offenses during separate criminal episodes.

*State v. McNeil*, 170 Or App 407, 12 P3d 992 (2000). [1] The “shift to column I” rule does not apply to consecutive sentences imposed on convictions based on crimes against different victims. OAR 213-012-0020(5). [2] The sentencing court erred when it imposed a consecutive sentence on a secondary sentence without shifting to I and without finding that that crime involved a different victim. Consequently, case had to be remand for re-sentencing.

*State v. McElroy*, 161 Or App 437, 984 P2d 862, *rev den*, 329 Or 527 (1999). Defendant was convicted of first-degree burglary along with multiple counts of first-degree rape, sodomy, sexual penetration, and kidnapping. The court first imposed a 120-month upward-departure sentence on the burglary conviction and then consecutive Measure 11 sentences on each of the other convictions, for a total sentence of 585 months. *Held*: Reversed and remanded for resentencing. Because the total of the Measure 11 sentences exceeded the 460-month maximum under the 400-percent rule, the court erred in imposing a consecutive sentence on the burglary conviction.

*State v. Quintero*, 160 Or App 614, 982 P2d 543 (1999). Defendant sexually assaulted his 16-year-old daughter. Pursuant to a plea bargain, he pleaded guilty to charges of attempted rape and first-degree sexual abuse, the state dismissed the more serious charges, and the court imposed a 36-month sentence on the attempted-rape conviction and a consecutive 75-month sentence per Measure 11 on the sexual-abuse convictions. On appeal, defendant contended that the 111-month sentence violated the “400-percent rule,” OAR 213-012-0020(2). *Held*: That rule applies even though the court imposed sentence first on the attempted-rape conviction and the 75-month consecutive sentence is not subject to the rule.

*Davis v. Thompson*, 154 Or App 250, 961 P2d 911, *rev den*, 327 Or 621 (1998): Petitioner was convicted of burglary and rape based on a 1993 incident, and the sentencing court found him to be a dangerous offender and imposed a 30-year indeterminate term with a 60-month minimum on the rape conviction and a consecutive 6-month term on the burglary conviction. Petitioner’s counsel objected to the 30-year term, but he did not raise that issue on appeal. The state nonetheless conceded error on appeal in light of *State v. Davis*, 315 Or 484, 847 P2d 834 (1993). The Court of Appeals affirmed without opinion, however, and the Supreme Court denied review. Petitioner then petitioned for post-conviction relief contending that the 30-year term is unlawful in light of *Davis*, but the post-conviction court held that that claim was barred. *Held*: Affirmed. Petitioner does not assert that either his trial or appellate counsel provided inadequate assistance of counsel. Because his objection to the sentence is one that he reasonably could have asserted at sentencing and pursued on appeal, he is barred from asserting it in the post-conviction proceeding.

*State v. Skelton*, 153 Or App 580, 957 P2d 585, *rev den*, 327 Or 448 (1998): Based on convictions arising out of a single incident that occurred in 1995, the court imposed a 230-month departure sentence with a 120-month minimum on defendant’s first manslaughter conviction, consecutive 120-month minimum sentences on his other two manslaughter convictions, and a 70-month minimum on his assault conviction, for a total sentence of 540 months. *Held*: The sentencing court erred by imposing consecutive sentences that exceeded 460 months, the 400-percent limitation in OAR 213-12-020(2).

*State v. Rojas-Montalvo*, 153 Or App 222, 957 P2d 163, *rev den*, 327 Or 193 (1998): Although the sentencing court properly imposed consecutive sentences on defendant’s convictions for DCS and PCS arising out of the same incident, the court erred by failing to comply with the “shift to column I” rule in OAR 213-12-020(2) when it imposed the consecutive sentence on the PCS conviction.

*State v. Allen*, 151 Or App 281, 948 P2d 745 (1997). When a court imposes consecutive sentences on two felony convictions based on crimes the defendant committed during a single criminal episode, the court must comply with

OAR 213-12-020(2), which both requires the court to “shift to column I” on the second conviction and imposes a durational limitation on the total consecutive sentence. The applicable standard is the definition of “criminal episode” set forth in ORS 131.505(4). Multiple crimes that defendant committed during single car accident are part of same criminal episode.

*State v. Sparks*, 150 Or App 293, 946 P2d 314 (1997), *rev den*, 326 Or 389 (1998). [1] The “shift to column I” and 200-percent rule in OAR 213-12-020(2) apply only to consecutive sentences that are imposed on convictions based on crimes committed during a single criminal episode. The applicable standard is that set forth in ORS 131.505(4), which has been construed to mean: “We hold that the two charges arise out of the same act or transaction if they are so closely linked in time, place and circumstance that a complete account of one charge cannot be related without relating the details of the other charge.” [2] Defendant was convicted of three counts of first-degree burglary for entering three vacant motel rooms to commit theft and criminal mischief in each. The three entries were not a “single criminal episode,” even though he committed the crimes against the same victim on the same day, because “the circumstances of defendant’s conduct demonstrate that he had to have formed a discrete criminal objective each time he made an unlawful entry into one of the motel rooms. A complete account of any one of the unlawful entries could be proven without reference to the others.” Because the court imposed consecutive sentences on convictions based on crimes defendant committed during separate criminal episodes, OAR 213-12-020(2) did not apply.

*State v. Lundstedt*, 139 Or App 111, 911 P2d 349 (1996): The sentencing court violated OAR 253-12-020(2)(a)(B) when it imposed consecutive sentences on two convictions based on crimes committed during the same criminal episode without using the column I presumptive sentence for the second conviction.

*State v. Morton*, 137 Or App 568, 905 P2d 1182 (1995): Defendant pleaded guilty to multiple counts of robbery and assault based on crimes he committed against four victims during separate incidents. *Held*: Because the convictions are based on crimes arising from “separate criminal episodes,” the sentencing court properly [1] adjusted defendant’s criminal history during the sentencing hearing, and [2] disregarded the 200-percent limitation in OAR 253-12-020(2) when it imposed consecutive sentences on those convictions.

*State v. Ashley*, 136 Or App 393, 902 P2d 123 (1995): The sentencing court erred when it imposed consecutive “presumptive” sentences on multiple convictions based on a single incident where the total sentence exceeded the 200-percent limitation in OAR 253-12-020(2)(b), even though the total sentence was within the 400-percent limitation.

*State v. Spencer*, 134 Or App 556, 895 P2d 792, *rev den*, 321 Or 397 (1995): Defendant was convicted of 14 counts of factoring based on credit-card thefts he committed over a one-month period against separate victims, the sentencing court imposed consecutive 6-month sentences, and defendant objected on the ground that the total sentence exceeded the “400 percent” limitation in OAR 253-12-020(2). *Held*: That rule does not apply to sentences imposed on convictions that result from different “criminal episodes.” The applicable definition of that term is in ORS 131.505(4). Separate and distinct crimes committed at different times and places, with different accomplices and against different victims, “do not become part of a single criminal episode simply because the defendant committed each of the crimes with the same criminal objective.” Separate crimes do not become subject to the “400 percent rule” merely because the trial court granted the state’s motion to consolidate based its contention “that the charges were so factually interrelated that evidence of each crime would be admissible in a separate prosecution of the other crimes.”

*State v. Thomas*, 133 Or App 754, 894 P2d 496 (1995): Defendant pleaded guilty *inter alia* to two counts of third-degree assault that fell into gridblock 6-C, and the sentencing court imposed 180-day consecutive jail terms on those convictions. *Held*: The “shift to column I rule,” OAR 253-12-020(2)(a)(B), required the court to use the “maximum incarceration term” prescribed by gridblock 6-I in order to impose consecutive sentences on those convictions. Even though the convictions are “presumptive prison” convictions, OAR 253-12-020(2)(c) limited the court to imposing, without a departure, only the lower 90-day term, not the upper 180-day term, prescribed by gridblock 6-I for a probationary sentence.

*State v. Flower*, 128 Or App 83, 874 P2d 1359, *rev den*, 319 Or 572 (1994): The “200/400 percent rule” in OAR 253-12-020(2) does not apply to convictions based on crimes defendant committed during separate criminal episodes. The applicable standard is the definition of “criminal episode” set forth in ORS 131.505(4). The crimes were not part of the same criminal episode merely because the state joined the charges in a single indictment or moved to consolidate separate indictments pursuant to ORS 132.560(2).

*State v. Scott*, 126 Or App 176, 867 P2d 563, *rev den*, 318 Or 583 (1994): The sentencing court violated

OAR 253-12-020(2)(a)(B) when it used the presumptive sentence prescribed by criminal-history column “E” rather than “I” when it imposed a consecutive sentence on a secondary conviction.

**State v. Johnson**, 125 Or App 655, 866 P2d 1245 (1993): [1] A firearm-minimum sentence is not a “departure” sentence; it is a mandatory sentence. [2] When a sentencing court imposes a firearm-minimum sentence on a conviction within a consecutive-sentence string that is subject to the “400 percent rule,” OAR 253-12-020(2), the total sentence that can be imposed is the greater of the firearm minimum or the sentences derived through the rule.

**State v. Determann**, 122 Or App 480, 858 P2d 171, *rev den*, 318 Or 26 (1993): The “400 percent rule” in OAR 253-12-020 and OAR 253-08-007(3) does not automatically permit the sentencing court to impose consecutive sentences totaling 4 times the maximum presumptive sentence for the “primary offense.” The maximum available sentence under the rule is dependent upon the column-I presumptive sentences prescribed for the other convictions upon which consecutive sentences are imposed and the court’s decision whether and how far to depart on any of those convictions.

**State v. Morales-Aguilar**, 121 Or App 456, 855 P2d 646 (1993): “[T]he limitations on departures set out in OAR 253-08-007 do not apply to dispositional departure sentences,” and it is proper to order dispositional-departure prison sentences to be served consecutively.

*Note:* OAR 213-12-020(2) was amended effective November 1, 1993 (Or Laws 1993, ch 692, § 1) to clarify that the limitations apply to dispositional departures.

**State v. Shaffer**, 121 Or App 131, 854 P2d 482 (1993): Sentencing court erred in using presumptive sentence prescribed by gridblock 8-I, rather than that prescribed by the correct gridblock, 8-C, when it imposed a *concurrent* sentence on that conviction. The “shift to column I” rule in OAR 253-12-020(2) applies only to consecutive sentences.

**State v. Nelson**, 119 Or App 84, 849 P2d 1147 (1993): Consecutive sentences imposed on misdemeanor convictions in the same case “have no relevance to the maximum terms allowed under the guidelines” under OAR 253-12-020.

**State v. Nicholas**, 118 Or App 232, 846 P2d 1181 (1993): [1] If the court imposes a consecutive sentence on a secondary conviction, OAR 253-12-020(2)(a) requires the court to use the presumptive incarceration term prescribed by criminal-history column I for that offense. [2] If the court imposes a consecutive sentence on a secondary conviction that is subject to ORS 137.635, it must use the regular column I presumptive incarceration term, not the special presumptive sentence prescribed by OAR 253-09-001(2).

**State v. Freeland**, 115 Or App 388, 838 P2d 642 (1992) (*per curiam*): “The limitations on consecutive sentences [imposed in a single case] under OAR 253-12-020 and OAR 253-08-007 do not apply to consecutive [dispositional] departure sentences that have presumptive probationary sentences.”

*See also State v. Nelson*, 119 Or App 84, 849 P2d 1147 (1993) (a *dispositional* departure imposed as a consecutive sentence on a secondary conviction is not subject to the 200-percent limitation set forth in OAR 53-08-007(3) and OAR 253-08-006); **State v. Ripka**, 111 Or App 469, 827 P2d 189, *rev den*, 313 Or 300 (1992) (same).

*Note:* OAR 213-12-020(2) was amended in 1993 (Or Laws 1993, ch 692, § 1) to clarify that the limitations apply to dispositional departures.

**State v. Miller**, 114 Or App 235, 835 P2d 131 (1992): [1] The sentencing guidelines do not apply to misdemeanor convictions; a consecutive sentence imposed on a misdemeanor conviction must be served in jail, not prison. [2] Where the court imposes a probationary sentence and orders the jail term to be served consecutively to a prison term imposed in the same case, OAR 253-12-020(2)(d) requires that the consecutive term be served in prison, and thus it is reversible error for the judgment to recite that the consecutive term is to be served in “jail.”

*Note:* Former OAR 253-12-020(2)(d) (1989) was repealed in 1993 (Or Laws 1993, ch 692, § 1).

**State v. Holliday**, 110 Or App 426, 824 P2d 1148, *rev den*, 313 Or 211 (1992): OAR 253-05-013(3), which permits the court to impose all the custody units as jail if local space is available, does not apply to a jail term imposed on a secondary conviction where the sentence imposed on the primary offense is a prison term; if the court wants to impose a longer jail term on such a conviction, it must do so through a departure.

*See also State v. Brown*, 119 Or App 162, 849 P2d 547 (1993) (*per curiam*) (same).

*State v. Tracy*, 116 Or App 329, 840 P2d 1380 (1992): Sentencing court departed both dispositionally and durationally with respect to a conviction in gridblock 7-H, and it imposed a 36-month sentence that is to be served consecutively to the prison sentence imposed on the primary offense. *Held*: [1] The sentence did not violate OAR 253-12-020(2), because OAR 253-08-007(3) does not limit the length of a dispositional departure. [2] OAR 253-08-005(3) authorizes a sentence in excess of the initial term of a dispositional departure, so long as the additional departure is supported by aggravating circumstances that are substantial and compelling and that are different from the factors used to support the initial dispositional departure.

*Note*: OAR 213-08-005(3) was amended in 1993 (Or Laws 1993, ch 692, § 1) to provide that a dispositional/durational departure may not exceed 200 percent of the maximum prescribed by OAR 213-008-0005(1).

### C. TERM OF POST-PRISON SUPERVISION FOR CONSECUTIVE SENTENCES

See OAR 213-012-0020(3)(a), -0030(2)(b), and -0040(1); ORS 144.103.

*State v. Vedder*, 206 Or App 424, 136 P3d 1128 (2006), *rev den*, 342 Or 417 (2007). Defendant was convicted of attempted aggravated murder and first-degree rape and sodomy. The sentencing court designated the first as the primary offense and imposed a 120-month sentence with 36 months of post-prison supervision. The court then imposed on each of the sexual-assault convictions a consecutive 100-month sentence and, per ORS 144.103, a 20-year term of PPS, less time served. *Held*: Affirmed. Although OAR 213-012-0020(4)(a) appears to require that the PPS term for the consecutive sentences is that term prescribed for the “primary offense,” the longer terms mandated by ORS 144.103 apply, because that is the more recent and specific statute.

*State v. Burch*, 134 Or App 569, 896 P2d 10 (1995). Defendant was convicted of multiple crimes subject to ORS 144.103, and sentencing court imposed consecutive prison sentences and post-prison supervision terms of “240 months per ORS 144.103.” *Held*: The post-prison supervision terms are correct, because the statute requires that the term of post-prison supervision to be served depends on the prison term actually served, not the prison term imposed.

*State v. Minniear*, 124 Or App 197, 859 P2d 1205 (1993) (*per curiam*). ORS 144.103 applies only to subject convictions based on crimes committed after September 29, 1991 (*see* Or Laws 1991, ch 831, § 3).

See also *State v. Bullock*, 135 Or App 303, 899 P2d 709 (1995) (same).

*State v. Enos*, 114 Or App 208, 836 P2d 374 (*per curiam*), *rev den*, 314 Or 278 (1992). Where the court imposes consecutive sentences on felony convictions under the guidelines, defendant “may be required to serve only a single post-prison supervision term and that is for the primary offense”; because any post-prison supervision terms must be served concurrently and only after the combined incarceration term is completed, the imposition of multiple terms of post-prison supervision is, at worst, harmless error.

See also *State v. Markham*, 114 Or App 5, 836 P2d 1348 (1992).

### D. CONSECUTIVE PROBATIONARY SENTENCES

See OAR 213-012-0020(3)(b) and -0030(2)(a).

*State v. Stillwell*, 116 Or App 229, 840 P2d 729 (1992) (*per curiam*), *rev den*, 315 Or 443 (1993). Sentencing court imposed 13-month prison sentence, with 36 months of post-prison supervision, on primary offense and a 36-month term of probation on a companion misdemeanor conviction, to begin on defendant’s release from prison. *Held*: Affirmed. It was proper to commence probationary term on misdemeanor conviction on defendant’s release from prison, because the term “is within the maximum period for a misdemeanor after the imposition of sentence.”

*State v. Dummitt*, 115 Or App 487, 839 P2d 246 (1992). The sentencing court imposed a prison sentence on the primary offense and probationary sentences on some secondary convictions, with the jail terms to be served consecutively to the prison term. *Held*: “[T]he term of the probationary sentence is subsumed in the post-prison supervision term” (*i.e.*, the supervision part of a probationary sentence “merges” into the supervision part of the post-prison supervision term).

See also *State v. Brown*, 119 Or App 162, 849 P2d 547 (1993) (*per curiam*). “When a sentence of probation is imposed consecutively to one of incarceration, the probationary term ‘merges’ into the term of post-prison supervision”.

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## IX. SENTENCES MANDATED OR AUTHORIZED BY STATUTE

### A. MURDER CONVICTIONS (ORS 163.115(5))

See ORS 163.115(5); ORS 137.700(2)(a)(A); OAR 213-005-0004(1).

See also Part XII-A (“Merger of Convictions”), *below*.

This section does not include all the decisions that address sentencing issues that relate to a conviction for *aggravated* murder under ORS 163.095 and 163.105. In particular, this manual does not include decisions that address a sentence of death or true life. Some decisions relating to a conviction for aggravated murder are included below insofar as they address an issue that also may pertain to a sentence imposed on a conviction for murder.

#### 1. Sentence that is mandated or authorized by statute

See also Part XII-A (“Merger of Convictions”), *below*.

*State v. Bowen*, 340 Or 487, 135 P3d 272 (2006). In light of *State v. Barrett*, the sentencing court erred by entering a separate conviction and sentence of death on the two counts of aggravated murder based on defendant’s murder of the single victim. “[T]he trial court should have entered one judgment of conviction ... which enumerated separately each aggravating factor and imposed one sentence of death.”

See also *State v. Tiner*, 340 Or 551, 135 P3d 305 (2006) (sentencing court erred by entering a separate conviction and sentence of death on the two counts of aggravated murder, and a separate conviction and sentence for intentional murder, based on defendant’s murder of the single victim).

*State v. Acremant*, 338 Or 302, 108 P3d 1139, *cert den*, 126 S Ct 150 (2005). Defendant was convicted of two alternative counts of aggravated murder for each of his two victims, and defendant did not object. *Held*: The sentencing court committed plain error under *State v. Barrett* by entering two convictions for each victim. “We therefore remand the case for entry of a corrected judgment of conviction reflecting defendant’s guilt on the charge of aggravated murder for each victim, with the judgment separately enumerating the aggravating factors upon which each conviction is based.”

See also *State v. Gibson*, 338 Or 560, 113 P3d 423, *cert den*, 126 S Ct 760 (2005) (same).

*State v. Ventris*, 337 Or 283, 96 P3d 815 (2004). Although indictment charged defendant with committing aggravated felony murder personally and intentionally, and the trial court so found, that verdict does not require that the conviction on the lesser-included charge of murder necessarily must be for intentional murder rather than felony murder. On remand after vacation of the conviction for aggravated murder, the trial court properly treated that lesser conviction as one for felony murder and hence merged the separate conviction for the felony into that conviction.

*State v. Running*, 336 Or 545, 87 P3d 661, *cert den*, 543 US 1005 (2004). Defendant was sentenced to death for one count of aggravated murder, and received a true-life sentence on a different count of aggravated murder of another victim. *Held*: The trial court did not violate ORS 163.105(1)(b) when it ordered defendant to serve the true-life sentence consecutively to his death sentence.

*State v. Sparks*, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). The jury found defendant guilty of 15 counts of aggravated murder and five other offenses and sentenced him to death. *Held*: The judgment, which states that defendant “is sentenced to death on all fifteen counts” of aggravated murder, does not impermissibly impose multiple death sentences.

*State v. Hale*, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004). The jury found defendant guilty of 13 counts of aggravated murder and sentenced him to death. *Held*: The sentencing court erroneously entered multiple judgments and sentences of death for the aggravated murder of each of the three victims in the case.

*State v. Barrett*, 331 Or 27, 10 P3d 901 (2000). Defendant was convicted of three counts of aggravated murder based on three separate subsections in ORS 163.095; all the counts were based on his intentional murder of one victim. The sentencing court entered a separate conviction on each count and imposed a consecutive sentence on one of the convictions. *Held*: Reversed and remanded for resentencing. Under ORS 161.062(1), the three convictions should be merged into one

conviction (albeit one listing each subsection) and defendant should receive only a single sentence.

**State v. Morgan**, 316 Or 553, 856 P2d 612 (1993): [1] Pursuant to ORS 137.010(1) and ORS 137.637, “the criminal code can provide for mandatory sentences other than as contained in the sentencing guidelines and [i]f a mandatory prison sentence is required or authorized by statute, that sentence must be imposed if it is longer than the presumptive sentence provided by the guidelines.” [2] “Both the 10-year sentence *required* by ORS 163.115(4)(b) and the additional up to 15-year term *authorized* by (4)(c) are ‘determinate’ sentences within the meaning of ORS 137.637.” [3] ORS 163.115(4)(b) and (c) were not impliedly repealed by the sentencing guidelines, and a sentencing court may impose a determinate sentence under those provisions pursuant to ORS 137.637 in lieu of a sentence under the guidelines. [4] The indeterminate “life sentence” formerly mandated by ORS 163.115(4)(a) for a murder conviction has been superseded for convictions subject to the guidelines by OAR 253-05-004(1), which requires imposition of a life-time term of post-prison supervision.

*Note 1: Former OAR 253-08-004(2) (1989), which formerly provided that the 200-percent limitation for durational departures does not apply to murder convictions, was repealed in 1993 (Or Laws 1993, ch 692, § 1). OAR 213-008-0003(2) now provides that a departure sentence imposed on a murder conviction cannot exceed twice the maximum presumptive sentence.*

*Note 2: ORS 163.115 was amended in 1995 by Measure 11 to mandate the imposition of a 25-year minimum term in all cases (see Or Laws 1995, ch 1, § 2 and ch 421, § 3), and the provision was codified as ORS 163.115(5) and ORS 137.700(2)(a)(A). That provision applies only to convictions based on crimes committed on or after April 1, 1995. See State v. Francis, below.*

*Note 3: The 1999 legislature granted authority to the parole board to parole a defendant sentenced to life imprisonment for murder regardless of the date of the crime. Or Laws 1999, ch 782, § 2; ORS 163.115(5)(c). See State v. Haynes, below.*

**State v. Bellek**, 316 Or 654, 856 P2d 616 (1993) (*per curiam*): Sentencing court correctly imposed a 121-month determinate sentence on murder conviction pursuant to guidelines, but court erred in imposing “life sentence” pursuant to ORS 163.115(4)(a) (1993) instead of life-time term of post-prison supervision mandated by OAR 253-05-004(1).

**State v. Giles**, 254 Or App 345, 293 P3d 1086 (2012). Defendant was convicted of murder based on a murder he committed in August 1999. In 2009, the case was remanded for resentencing. On remand, defendant argued that the court could not impose on his conviction the sentence of “imprisonment for life” required by ORS 163.115(5)(a) because he committed the murder during the so-called “*McLain* window”—*i.e.*, after the date on which the Court of Appeals had invalidated that term as unconstitutionally disproportionate in *State v. McLain*, 158 Or App 419 (1999) (*viz.*, February 17, 1999), and before the legislature had fixed the statute by enacting ORS 163.115(5)(c) (*viz.*, October 23, 1999). Relying on *State v. Haynes*, 168 Or App 565 (2000), the sentencing court overruled defendant’s objection and imposed life imprisonment with a 300-month minimum. *Held: Reversed and remanded for entry of corrected judgment.* [1] “When this court [held in *McLain*] the former version of ORS 163.115(5)(a) was unconstitutional, that statutory provision could no longer be applied. In light of the inapplicability of ORS 163.115(5), we determined ... that the proper sentence was that required by other statutes—a 25-year mandatory minimum as provided in ORS 137.700(2)(a)(A) and ORS 163.115(5)(b), followed by post-prison supervision for life in accordance with OAR 213-005-0004. [That decision] identified and was predicated on the only sentence that could lawfully have been imposed as of that time (*i.e.*, before the enactment of the 1999 amendments).” [2] “We conclude that that was the only sentence to which defendant could lawfully have been subjected as of the time he committed the murder, and because the 1999 amendments prescribe a sentence that is patently harsher than that prescribed by *McLain*, the application of the 1999-amended scheme to defendant violates *ex post facto* protections.”

*Notes:* [a] The Court of Appeals held in *Haynes* that the *ex post facto* clauses did not preclude retroactive application of the ORS 163.115(5)(a), as amended in October 1999, to a murder conviction based on a crime that was committed after re-enactment of the “imprisonment for life” sentence in April 1, 1995 and before *McLain* was issued in February 1999. The court in this decision merely distinguished *Haynes* and did not overrule it. As a result, a defendant convicted of murder based on a crime committed after April 1, 1995, must be sentenced to “imprisonment for life” pursuant to ORS 163.115(5) *unless* he or she committed the crime during the eight-month “*McLain* window”—February 17 to October 23, 1999. [b] For a murder conviction based on a crime committed during the *McLain* window, the court still must impose, and the defendant must serve, the 300-month minimum sentence per ORS 163.115(5)(b) and a life-time term of post-prison supervision per OAR 213-005-0004. But without the indeterminate “life sentence,” the parole board would not have authority under ORS 163.115(5)(c) to delay or bar the defendant’s release once he or she has completed serving the 300-month minimum. In other words, for a murder defendant in that window, he or she is legally entitled to release onto post-prison supervision immediately after completing the 300-month minimum.

**State v. Davilla**, 234 Or App 637, 230 P3d 22 (2010). Back in 1991, when he was 16 years old, defendant attempted to rape a young woman at knifepoint, she resisted, and he murdered her. He was waived into adult court and eventually pleaded guilty to murder, first-degree burglary, and attempted first-degree rape. Pursuant to ORS 163.115(3)(a) (1989), the court imposed a life sentence. After a variety of appeals and post-conviction proceedings, the case eventually was remanded for resentencing in 2004. The state served defendant with notice per ORS 136.765 of intent to rely on several aggravating factors and requested an upward-departure sentence. The sentencing court ruled the departure rules in the sentencing guidelines are invalid as an unconstitutional delegation and struck the state's notice. The court then ruled that the legislature would not have wanted the guidelines to remain effective without the departure rules, and struck down the guidelines *in toto*. The court then purported to apply the law in existence before 1989 and imposed an indeterminate life sentence with no restriction on parole. *Held*: Reversed and remanded. [1] “[T]he legislature’s delegation of authority to develop sentencing guidelines as an administrative rule by the [State Sentencing Guidelines Board] was constitutionally permissible.” Because “the legislature’s delegation of authority to the board to develop the guidelines was not the product of an unconstitutional delegation of legislative power to the executive branch,” the sentencing guidelines are valid. [2] The indeterminate life sentence the sentencing court imposed is error, because the Supreme Court held in *State v. Morgan*, 316 Or 553, 560 (1993), that the guidelines superseded the indeterminate life sentence that previously was prescribed. Although *Morgan* was legislatively overruled in 1995 by enactment of ORS 163.115(5)(a), that amendment was not retroactive and does not apply to defendant’s conviction. [3] Even though the rules did not impose a 200-percent maximum on an upward departure on a conviction for murder, the departure rules are not an unconstitutional delegation of legislative power to the judiciary without any constraints, because Art. I, § 16, sets a limitation on an upward departure. [4] The departure standard of “substantial and compelling” is not unconstitutionally vague. Defendant’s objection that the rules are too vague because they allow a court to rely on aggravating factors not listed in OAR 213-008-0002(1)(b), does not provide a basis for affirmance, because the state’s notice listed two aggravating factors that are in the rule.

**State v. Myers**, 218 Or App 635, 180 P3d 759, *rev den*, 344 Or 671 (2008). The “true life” option for aggravated murder under ORS 163.105 does not violate Art I, § 40, which provides that the sentence for aggravated murder shall be death or “life imprisonment with minimum sentence as provided by law.”

**State v. Davis**, 216 Or App 456, 174 P3d 1022 (2007), *rev den*, 344 Or 401 (2008). Defendant was convicted of murder in 1996, and the sentencing court imposed a 25-year prison term with lifetime post-prison supervision. The judgment was reversed based on an evidentiary error. *State v. Davis*, 336 Or 19 (2003). On retrial, defendant again was convicted of murder, and the court reimposed the 25-year minimum but also imposed the life sentence mandated by ORS 163.115(5)(a), rejecting defendant’s objection that the court could not impose a sentence more onerous than the original sentence. *Held*: Affirmed. *State v. Turner*, 247 Or 301 (1967), did not preclude the sentencing court from imposing the life sentence after defendant’s successful appeal. The sentencing court originally had not imposed a life sentence because of *State v. McLain*, 158 Or App 419 (1999), which held that the life sentence was unconstitutionally disproportionate given the absence of a statutory provision authorizing parole after completion of the 25-year minimum. After defendant’s original sentencing and his retrial, that oversight was corrected, eliminating the constitutional flaw in the life sentence. *State v. Haynes*, 168 Or App 565, *rev den*, (2000) (application of that fix to crimes previously committed does not violate the state or federal *ex post facto* provisions).

**State v. Kennedy**, 196 Or App 681, 103 P3d 660 (2004). In 1991, defendant was waived into adult court and convicted of murder based on a crime he committed when he was 16 years old. The court imposed a 160-month sentence with a 36-month term of post-prison supervision. In 2002, and without notice and a hearing, the court entered an amended judgment that modified the PPS term to “life” per OAR 253-05-004(1) (1989). *Held*: Affirmed. ORS 161.620, which bars the imposition of a “mandatory minimum sentence” on a juvenile, does not apply to a PPS term because it is not a term of imprisonment.

**Walton v. Thompson**, 195 Or App 335, 102 P3d 687 (2004), *rev den*, 338 Or 375 (2005). Although, given the Supreme Court’s subsequent decision in *State v. Barrett*, the sentencing court should have merged petitioner’s two convictions for aggravated murder involving the same victim into a single conviction, the post-conviction court correctly denied his claim for post-conviction relief. Petitioner’s direct challenge to the sentence under ORS 138.530(1)(c) is barred by ORS 138.550(2) and *Palmer v. State of Oregon* because he could have raised that objection at sentencing and on appeal, despite a pre-*Barrett* decision by the Court of Appeals that separate convictions are proper in that circumstance.

**State v. Garner**, 194 Or App 268, 94 P3d 163, *rev den*, 337 Or 616 (2004). Although, under *State v. Barrett*,

defendant's multiple convictions for aggravated murder involving the same victim must merge into a single conviction, the judgment must separately enumerate each of the aggravating factors that the jury found proved. Consequently, it is necessary for an appellate court to address defendant's challenge to a verdict on one of those counts.

*State v. Walraven*, 187 Or App 728, 69 P3d 835, *rev den*, 335 Or 656 (2003). Under *State v. Barrett*, defendant's two convictions on alternative theories of aggravated murder for one murder must be merged into a single conviction. The Court of Appeals, however, declined to consider defendant's unpreserved claim that the sentencing court should have merged, under ORS 161.067(1), his conviction for felony murder into the conviction for aggravated murder. But the court remanded the case for resentencing at which point defendant could raise that issue before the sentencing court.

*State v. Benson*, 187 Or App 276, 66 P3d 569 (*per curiam*), *rev den*, 335 Or 655 (2003). The sentencing court erred under *State v. Barrett* in failing to merge defendant's two convictions for felony murder, which were based on the death of one victim under alternative theories.

*State v. Beason*, 170 Or App 414, 12 P3d 560 (2000), *rev den*, 331 Or 692 (2001). Defendant's separate convictions for intentional murder and murder by abuse based on his killing of one victim should have been merged into a single conviction and sentence. The case was remanded to the trial court for entry of judgment of conviction of murder, "which judgment should enumerate both theories of conviction."

*State v. Haynes*, 168 Or App 565, 7 P3d 623, *rev den*, 331 Or 283 (2000). Defendant was convicted of murder based on a crime that he committed in 1997, and the court sentenced him to imprisonment for life with a 300-month minimum pursuant to ORS 163.115(5). *Held*: Affirmed. [1] The 1999 legislature granted authority to the parole board to parole a defendant sentenced to life imprisonment for murder regardless of the date of the crime. Or Laws 1999, ch 782, § 2. [2] That parole authority cures the "proportionality" problem that the Court of Appeals identified in *State v. McLain*, 158 Or App 419 (1999). [3] The *ex post facto* clauses do not preclude application of the 1999 legislation to defendant's crime.

*State v. Davilla*, 157 Or App 639, 972 P2d 902 (1998), *rev den*, 334 Or 76 (2002). Defendant was 16 years old in August 1991, when he attempted to rape a woman and then murdered her. The sentencing court imposed a departure sentence of 1,394 months on defendant's murder conviction. *Held*: [1] The sentence violates ORS 161.620, which provides that a remanded juvenile is not be sentenced to imprisonment for the duration of his life without the possibility of release. A departure sentence of 116 years is in practical effect imprisonment for life without the possibility of release or parole. [2] Under the statutes in existence when defendant committed his crimes, a juvenile remanded to adult court cannot receive a mandatory minimum sentence or an indeterminate sentence for life. A determinate sentence under the guidelines is not a "mandatory minimum sentence" within the meaning of ORS 161.620. Therefore, the court on remand may impose a determinate sentence under the guidelines. [3] Art I, § 6, imposes a ceiling on the sentence that the court can impose on remand. Defendant cannot receive a more severe sentence for murder than he would for aggravated murder.

*State v. McLain*, 158 Or App 419, 974 P2d 727 (1999). On defendant's conviction for murder, the sentencing court imposed a sentence of "imprisonment for life" and a 25-year minimum term per ORS 163.115(5). The defendant appealed, contending that the "life imprisonment" term violates Art I, § 16. *Held*: The "life imprisonment" term vacated. Although ORS 163.115(5)(a) currently mandates a sentence of life imprisonment, no statute allows the parole board to parole a person convicted of murder based on a crime committed after November 1, 1989. Therefore, a "life imprisonment" term effectively is a "true life" sentence because the board lacks authority to parole. That creates a proportionality problem under Article I, section 16, because a person convicted of *aggravated* murder may be eligible for parole after serving a 30-year minimum sentence.

*Note: McLain* was overruled legislatively in 1999. See *State v. Haynes*, *above*.

*State v. Francis*, 154 Or App 486, 962 P2d 45, *rev den*, 327 Or 554 (1998): [1] Because defendant was convicted of murder based a crime he committed after April 1, 1995, the sentencing court correctly imposed a 25-year minimum sentence per ORS 163.115(5)(b) and ORS 137.700(2)(a)(A). [2] When the 1995 Legislative Assembly amended ORS 163.115(5) to provide that "[a] person convicted of murder, *who was at least 15 years of age at the time of committing the murder*, shall be punished by imprisonment for life" (Or Laws 1995, ch 421, § 3; italics showing addition), it thereby reinstated the "life sentence" requirement for murder convictions and implicitly overruled the prior holding in *State v. Morgan*, 316 Or 553 (1993), that the life-term of post-prison supervision prescribed by the guidelines superseded the "life imprisonment" term.

*State v. Cannon*, 135 Or App 561, 900 P2d 46 (1995): Sentencing court properly imposed, on defendant’s murder conviction, the presumptive 125-month sentence under guidelines, a 10-year minimum term pursuant to ORS 163.115(4)(b) (1993), and a life-time term of post-prison supervision, but erred when it imposed in addition a “life sentence” pursuant to ORS 163.115(4)(a) (1993).

*State v. Kim*, 132 Or App 367, 887 P2d 393 (*per curiam*), *rev den*, 320 Or 588 (1995): The sentencing court erred in imposing a 25-year minimum sentence pursuant to ORS 144.110 on a murder conviction. Because the reference to ORS 144.110 was a clerical error, the appropriate remedy is not to delete the minimum term but to remand for entry of a corrected judgment that imposes the minimum term pursuant to ORS 163.115(4)(b) and (c) (1993).

*State v. Zelinka*, 130 Or App 464, 882 P2d 624, *rev den*, 320 Or 508 (1995): Sentencing court erred in failing to merge into one conviction defendant’s three murder-by-abuse convictions based on the death of one child. Although the court properly imposed a 25-year term pursuant to ORS 163.115(4)(b) and (c) (1993) on the conviction, it erred in also imposing a “life sentence”; the Court of Appeals remanded for entry of a corrected judgment.

*State v. Gaynor*, 130 Or App 99, 880 P2d 947, *rev den*, 320 Or 508 (1995): Sentencing court had authority under ORS 163.115(4)(b) and (c) (1993) to impose a 15-year minimum sentence on murder conviction in lieu of the 121-month presumptive sentence.

*State v. Hostetter*, 125 Or App 491, 865 P2d 485 (1993), *rev den*, 318 Or 583 (1994): “Life sentence” imposed on murder conviction is reversible error under *State v. Morgan* even though sentencing court made departure findings that defendant did not challenge; *State v. Farmer* does not preclude appellate review, because the court did not purport to impose the “life sentence” as a departure sentence.

*State v. Stewart*, 123 Or App 432, 859 P2d 1200 (*per curiam*), *rev den*, 318 Or 246 (1993): [1] The sentencing court properly imposed a 20-year minimum sentence pursuant to ORS 163.115(4)(b) and (c) (1993) on defendant’s murder conviction “irrespective of which grid block applies to defendant’s criminal history.” [2] Court erred in imposing “life sentence” pursuant to ORS 163.115(4)(a) (1993) and a 20-year term of post-prison supervision.

## 2. Eligibility for release on post-prison supervision

*State ex rel. Engweiler v. Felton*, 350 Or 592, 260 P3d 448 (2011). Both relators (Engweiler and Sopher) committed a murder while under 17 years of age, and each was tried as an adult and was convicted of aggravated murder. When they committed the murders, the possible sentences for aggravated murder were death, life imprisonment without the possibility of release, and life imprisonment with a 30-year minimum term, but none of those sentences could be imposed upon a remanded juvenile, ORS 161.620. Consequently, each relator eventually received simply an indeterminate life sentence with the possibility of parole and no minimum term. At that time, the board of parole did not have rules providing for the release of a juvenile offender with such a sentence. In 1999, the board adopted rules—the “juvenile aggravated murder” rules (“JAM rules”)—to create a process whereby it could set a parole-release date for such inmates. Among other things, the JAM rules require the inmate to complete an intermediate review hearing before proceeding on to the hearing at which they would receive a parole-release date. The board set a review date for Engweiler after 480 months, and it set a review date for Sopher after 400 months. These consolidated cases involve relators’ challenges both in mandamus and a rule challenge pursuant to ORS 183.400; relators seek to compel the board to set a parole-release date for them. *Held*: “We reverse the Court of Appeals decision in *Engweiler VI*, reverse the Court of Appeals decision in *Sopher II*, and affirm in part and vacate in part the Court of Appeals decision in *Sopher III*.” [1] “ORS 144.110(2)(b) and ORS 163.105(2) to (4) do not apply to juvenile aggravated murderers. For that reason, ... the board exceeded its statutory authority when it promulgated rules requiring juvenile aggravated murderers to undergo the intermediate review process described in ORS 163.105(2) to (4) before the board makes parole release decisions regarding them.” [2] ORS 144.120(1)(a) (1991) applies “to juvenile aggravated murderers and required the board to conduct parole hearings for juvenile aggravated murderers. That is, ... the disputed phrase—‘with the exception of those sentenced for aggravated murder’—merely removes ‘those sentenced for aggravated murder’ from the requirement that a parole hearing be held within one year of the prisoners’ admission to prison, and that the legislature did not intend to eliminate the board’s authority to conduct a parole hearing for them altogether.” Thus, the board has “authority in ORS 144.120(1) (1989) and ORS 144.120(1) (1991) to determine initial release on parole for inmates like these who are serving an indeterminate sentence of life imprisonment with the possibility of parole.” [3] Engweiler is entitled to relief in mandamus because “ORS 144.120(1) (1989) imposed on the board a legal duty [either]

to conduct a parole hearing for [him] to set an initial release date for him or to explain why it chooses not to do so,” but the board has no plain legal duty to set a release date. [4] “As to Sopher, ... ORS 144.120(1) (1999) entitles him to a hearing at some point to set an initial parole-release date, but that the board has no present legal duty to conduct such a hearing and, therefore, Sopher does not have a remedy in mandamus.” (But the court suggested that the board “should consider conducting a parole hearing consistent with ORS 144.120(1)(a) (1991), and either set a release date for Sopher or explain why it has chosen not to do so.”)

**Engweiler v. Cook**, 340 Or 373, 133 P3d 904 (2006). In 1990, petitioner was convicted of aggravated murder for a crime he committed when he was 15 years old, and the court imposed an indeterminate life sentence. The parole board established a 480-month “prison term” and set a “murder review date” in 2030. Petitioner claimed that he is entitled to accumulate earned-time credits under ORS 421.121 against the 480-month term, DOC denied that request, and the Court of Appeals affirmed. *Held*: Affirmed. [1] A “term of incarceration” as used in ORS 421.121(1) means “the amount of time that an inmate must spend in prison before he is eligible to be paroled,” not the term of incarceration imposed as part of the sentence. [2] Given that petitioner is serving an indeterminate life sentence, the parole board is responsible for determining the actual duration of his imprisonment. Because the 480-month term merely determines when he might be *considered* for parole, he does not yet have a “term of incarceration” and hence is not entitled to application of earned-time credits.

**Engweiler v. Board of Parole**, 340 Or 361, 133 P3d 910 (2006). In 1990, petitioner was convicted of aggravated murder for a crime he committed when he was 15 years old, and the court imposed an indeterminate life sentence. The parole board established a 480-month “prison term” and set a “murder review date” in 2030. Petitioner petitioned for judicial review under ORS 144.335 (1999), and the Court of Appeals dismissed. *Held*: Affirmed. [1] To the extent that petitioner may have a right to have the board conduct a hearing under ORS 144.120(1)(a) (1989) to set an initial parole-release date, this judicial-review proceeding may not be used to enforce that right. He will need to prosecute a mandamus or *habeas corpus* proceeding for that purpose. [2] The board’s order is not subject to judicial review under ORS 144.335(3) (1990), because it’s an order “relating to a parole consideration hearing date.”

**Roy v. Palmateer**, 339 Or App 533, 124 P3d 603 (2005). Plaintiff was convicted of aggravated murder in 1984, and the court imposed, per ORS 163.105(2) (1983), an indeterminate life sentence with a 20-year minimum term. In 2000, the board made a finding that plaintiff is likely to be rehabilitated within a reasonable period of time, converted his sentence to one with the possibility of parole, and set a projected parole date of May 2004. Plaintiff filed a *habeas corpus* petition contending that, based on the board’s finding, he is entitled to immediate release. The trial court dismissed the petition. *Held*: Affirmed. Under ORS 163.105(4) (1983), the board’s finding that plaintiff is *capable* of rehabilitation permits the board to convert the sentence only to one with the *possibility* of parole and is not sufficient, of itself, to entitle him to immediate parole.

**Jones v. Board of Parole**, 231 Or App 256, 218 P3d 904 (2009), *rev den* 347 Or 718 (2010). Based on a crime he committed in 1992, petitioner was convicted of murder in 1993 and—in accordance with *State v. Morgan*, 316 Or 553 (1993)—the court imposed a prison sentence pursuant to the guidelines and a lifetime term of post-prison supervision. Petitioner was release, violated his PPS, and the board imposed an incarcerative sanction and established a 2015 release date. Petitioner petitioned for judicial review contending that the board was limited to only a 180-day sanction because he was not serving a “life sentence” within the meaning of *former* OAR 253-05-004(2). *Held*: Affirmed. For purposes of that rule, and consistent with *Morgan*, “a ‘life sentence’ for murder meant a determinate prison term followed by a lifetime term of PPS.”

*Note*: The “life sentence” for a murder conviction was re-enacted in April 1995. *See State v. Francis*, 154 Or App 486 (1998).

**Quinn v. Board of Parole**, 229 Or App 234, 210 P3d 944 (2009). Petitioner challenged the validity of OAR 255-035-0030, which provides that the parole board may, under certain circumstances, deny parole rather than set a parole release date. Petitioner argued that the rule violates state and federal constitutional provisions because it allows the board to deny parole to a person convicted of murder, but—due to the operation of other statutes—not to a person convicted of aggravated murder. Petitioner argued that the rule thus subjects murder offenders to disproportionate punishment and denies them the same rights, privileges, and procedural protections granted to aggravated murders in violation of Art I, §§ 16 and 20, of the Oregon Constitution and the Eighth and Fourteenth Amendments to the federal constitution. *Held*: The challenged administrative rule is valid.

**Haynes v. Board of Parole**, 229 Or App 178, 210 P3d 927 (2009). Petitioner’s Article I, section 16, challenge to

OAR 255-032-0010(3) fails. The court rejected his argument that that rule—which provides, in part, that “the minimum period of confinement for a person sentenced to life for Murder under ORS 163.115 committed on or after June 30, 1995, shall be twenty-five (25) years”—is constitutionally disproportionate because it subjects persons convicted of murder between June 30, 1995 and October 23, 1999, to the same punishment (a minimum of 25 years in prison) as a person convicted of the more serious crime of aggravated murder during that same period.

*Halladay v. Board of Parole*, 229 Or App 45, 209 P3d 854 (2009). In a rule-review petition under ORS 183.400, petitioner challenged rules prescribing procedures for a parole hearing for offenders convicted of murder and aggravated murder, contending that for some inmates sentenced for murder between 1985 and 1989 the rules may be applied unconstitutionally. The court declined to review his challenges because ORS 183.400 permits only a facial challenge, not an “as applied” challenge.

*Corgain v. Board of Parole*, 213 Or App 407, 162 P3d 990 (2007). In 1982, petitioner was convicted of aggravated murder in Klamath, and the court imposed a life sentence with a 20-year minimum; he also was convicted of first-degree robbery in Lane, and the court imposed a consecutive 20-year sentence. In 1992, the board found per ORS 163.105 (1981) that he likely would be rehabilitated within a reasonable period and set a “projected release date” of July 2002 with a consecutive 40-month term on the robbery. The board later deferred the projected release date to 2004 based on ORS 144.125 (1981). Petitioner contended that his consecutive term commenced when the board made the finding that he “likely would be rehabilitated.” *Held*: Affirmed. [1] Under *Roy v. Palmateer*, 339 Or 533 (2005), the board’s finding did not entitle petitioner to immediate parole on murder sentence—it gives him only to the possibility of parole after he completes the 20-year minimum. Consequently, his consecutive term on the robbery conviction does not commence until the board determines to “parole” him on the murder conviction. [2] The board correctly applied ORS 144.125 (1981) in making its determination whether petitioner should be released from his murder sentence to begin serving the consecutive sentence. Thus, the two-year deferral was proper.

*Roy v. Palmateer*, 205 Or App 1, 132 P3d 56 (2006). Although ORS 163.105(3) (1983) authorizes the parole board to determine whether an inmate sentenced to life imprisonment on a conviction for aggravated murder is “likely to be rehabilitated within a reasonable period of time,” such a determination does not entitle to immediate release on parole. Denial of release does not violate Article I, sections 13, 15, 16, or the 8<sup>th</sup> or 14<sup>th</sup> Amendments.

*Larsen v. Board of Parole and Post-Prison Supervision*, 191 Or App 526, 84 P3d 176, *pet withdrawn* 337 Or 84 (2004). To be eligible for a modification of the terms of confinement of a life sentence imposed under ORS 163.095(2) (1977), an inmate must prove that he or she is likely to be rehabilitated within a reasonable time. That requirement applies even if the petition is made after the inmate has served his or her minimum term of confinement.

*State v. Haynes*, 168 Or App 565, 7 P3d 623, *rev den*, 331 Or 283 (2000). Defendant was convicted of murder based on a crime that he committed in 1997, and the court sentenced him to imprisonment for life with a 300-month minimum pursuant to ORS 163.115(5). *Held*: Affirmed. The 1999 legislature granted authority to the parole board to parole a defendant sentenced to life imprisonment for murder regardless of the date of the crime. Or Laws 1999, ch 782, § 2. That parole authority cures the “proportionality” problem that the Court of Appeals identified in *State v. McLain*, 158 Or App 419 (1999).

## **B. DANGEROUS-OFFENDER SENTENCE (ORS 161.725 *et seq.*)**

See ORS 161.725 to 161.737; ORS 144.232.

To comply with *Blakely*, the 2005 legislature enacted ORS 137.760, which provides a general procedure for alleging and proving an “enhancement fact” to the jury, and amended ORS 137.735 to provide a procedure for jury findings necessary for a dangerous-offender sentence.

*Davis v. Board of Parole*, 341 Or 442, 144 P3d 931 (2006). Although the board of parole is generally required by ORS 144.120 to set an initial release date for most prisoners admitted to DOC custody, different rules apply to persons sentenced as dangerous offenders. ORS 144.228 requires the board to set a parole-consideration hearing to determine whether to set an initial release date; the board must set a release date only if it finds that the condition that “made the prisoner dangerous is absent or in remission.” Thus, as a practical matter, the burden of persuasion is on the petitioner.

*Note*: Because the burden is on the petitioner, the court did not reach his claim that the Due Process Clause requires the board must set a parole-release date unless it finds by clear-and-convincing evidence that the condition that

made the petitioner dangerous is in remission or absent standard; neither party suggests that the clear-and-convincing standard should be imposed on petitioner.

*Miller v. Lampert*, 340 Or 1, 125 P3d 1260 (2006). In 1998, petitioner was convicted of felony sexual offenses, and the sentencing court found him to be a dangerous offender under ORS 161.725 and imposed a 30-year sentence. Petitioner did not appeal. After *Apprendi* was announced, petitioner petitioned for post-conviction relief challenging the validity of his sentence and the adequacy of his trial counsel. The court dismissed his petition. *Held*: Affirmed. [1] The neither the right-to-jury nor the standard-of-proof rule in *Apprendi* is a “watershed” rule of criminal procedure under *Teague v. Lane* that applies retroactively. Consequently, the court rejected petitioner’s direct challenge to the lawfulness of his sentence. [2] In evaluating petitioner’s inadequate-assistance claim, the court must eliminate “the distorting effects of hindsight” and “look to the decisions that preceded petitioner’s sentencing hearing and ask whether, in the exercise of reasonable skill and judgment, petitioner’s counsel should have foreseen the Court’s decision in *Apprendi*.” “Measured against the law in effect at the time of petitioner’s sentencing hearing, the performance of petitioner’s trial counsel was constitutionally adequate.”

*Note*: In *Danforth v. Minnesota*, 552 US 264 (2008), the Court held that a state is not precluded from applying a new rule of federal law “retroactively” even if the U.S. Supreme Court, applying the *Teague v. Lane* rule, does not order that the new rule must be applied retroactively. In light of *Danforth*, the Court of Appeals decision in *Teague v. Palmateer*, *below*, now controls on the retroactivity issue.

*State v. Heilman*, 339 Or 661, 125 P3d 728 (2005). Defendant waived jury without qualification and the trial court found him guilty of multiple felonies, rejecting his insanity defense. At sentencing, the state sought a dangerous-offender sentence under ORS 161.725, and defendant objected based on *Apprendi*. The court overruled that objection and, applying a standard of proof beyond a reasonable doubt, found him to be a dangerous offender and imposed a 20-year sentence. *Held*: Affirmed. [1] “[D]efendant, once having made an apparently unqualified waiver of the jury right, had the burden of objecting in some manner [at sentencing], thereby preserving his argument for appeal, if he regarded any action by the trial court as a violation of his right to trial by jury.” Although defendant raised pleading and standard-of-proof objections based on *Apprendi*, he “failed to preserve the argument that the court should have empaneled a jury to decide the requisite facts for sentencing.” Moreover, “defendant admitted facts sufficient to support the trial court’s findings ... thus foreclosing any relief under *Apprendi*.” [2] Defendant’s claim that sentencing court lacked authority to consider a dangerous-offender sentence because those facts were not alleged in the indictment fails “because *Apprendi* did not establish that the elements of each of offense and sentencing enhancement must be pleaded in the indictment.” [3] “The indictment clause of the Fifth Amendment applies to only federal prosecutions, because the Fourteenth Amendment does not require that it apply to the states.” [4] Because there is no requirement that the indictment must set forth all possible penalties for the offense, the state was not required to give notice prior to trial that it would seek a dangerous-offender sentence. “We think that this is a matter for cautious legal advice.”

*Page v. Palmateer*, 336 Or 379, 84 P2d 133, *cert den*, 543 US 866 (2004). In this post-conviction proceeding, petitioner alleged that his dangerous-offender sentence was unlawful in light of *Apprendi v. New Jersey*. The post-conviction court denied his claim, holding that *Apprendi* does not apply retroactively. *Held*: Affirmed. Applying the standard set forth in *Teague v. Lane*, the new rule in *Apprendi* does not apply retroactively to post-conviction proceedings because it did not set out a watershed rule of criminal procedure.

*Note*: See note following *Miller v. Lampert*, *above*.

*State v. Davis*, 315 Or 484, 847 P2d 834 (1993). [1] When a court imposes a dangerous-offender sentence on a conviction subject to the guidelines, the court shall indicate the presumptive sentence for the conviction. See ORS 161.737(2). “The presumptive sentence under the guidelines is the determinate part of the dangerous offender sentence, *viz.*, the part that the offender *must* serve. The remainder of the dangerous offender sentence is the indeterminate part of the sentence, *i.e.*, the part that the offender *may* serve, but from which the offender may be released to post-prison supervision.” [2] When a court imposes a dangerous-offender sentence on a conviction subject to the guidelines, the sentence is a departure under the guidelines, see ORS 161.737(1), and thus is subject to the rules governing the length of consecutive sentences. [3] The indeterminate portion of a dangerous-offender sentence is subject to the “400 percent rule” in OAR 253-12-020(2). “We hold that ‘incarceration term,’ as that phrase is used in OAR 253-08-007(3), refers to the entire indeterminate term of a dangerous offender sentence.”

*Note*: In response to *Davis*, the 1993 legislature approved OAR 213-12-020(4) and an amendment to OAR 213-08-007(3) that provide that the limitations set forth in those rules “shall not apply to any sentence imposed on a dangerous offender under ORS 161.725 and 161.737.” Or Laws 1993, ch 692, § 1; Or Laws 1993, ch 334, § 6 (amending

ORS 161.737(2)). In addition, the 1993 legislature enacted OAR 213-08-003(3), which provides that the 200-percent rule “does not apply to the indeterminate sentence imposed on a dangerous offender under ORS 161.725 and 161.737.” Or Laws 1993, ch 334, § 8.

^ **State v. Reinke**, 245 Or App 33, 260 P3d 820 (2011), *rev allowed*, 351 Or 541 (2012). Defendant was convicted of second-degree kidnapping, and the court found him to be a dangerous offender and imposed a 180-month sentence. *Held*: Reversed and remanded for resentencing. [1] Defendant’s challenge to the dangerous-offender sentence on the ground that those facts were not specially alleged in the indictment has no merit in light of *State v. Sanchez*, 238 Or App 259 (2010). [2] But the dangerous-offender sentence is error because, under ORS 161.725(1) and 161.737 it must contain “both a determinate mandatory minimum term of incarceration and an indeterminate term, not to exceed 30 years.”

**State v. Shelters**, 225 Or App 76, 200 P3d 598 (2009). On remand from the Oregon Supreme Court in light of *State v. Ramirez*, 343 Or 505 (2007), *adh’d to as modified on recons*, 344 Or 195 (2008), and *State v. Fults*, 343 Or 515 (2007), defendant argued that the Court of Appeals should consider his *Blakely* challenge to the imposition of two 30-year indeterminate “dangerous offender” sentences based on facts not found by the jury beyond a reasonable doubt. *Held*: Remanded for resentencing. Because there remains “legitimate debate” about whether a jury would have found defendant to be a dangerous offender, remand is required. Dangerous-offender facts – whether the defendant suffers from a severe personality disorder indicating a propensity toward crimes that seriously endanger the safety of others and whether, as a result, an extended period of incarceration is warranted – are qualitatively different from other departure factors, such as a victim’s permanent injury or the presence of multiple victims, that are capable of “conclusive establishment by facts adduced at trial.” Instead, because a dangerous-offender sentence rests on the “factfinder’s synthesis of the characteristics of the offender and the determination that those characteristics warrant an extended period of incarceration,” it was not obvious that the jury necessarily would have made the dangerous-offender findings in this case.

**State v. Stephens**, 223 Or App 644, 198 P3d 423 (2008), *rev den*, 346 Or App 10 (2009). Defendant was convicted of aggravated murder and numerous sex offenses and related crimes committed against other victims; he raised several *Blakely* and *Ice* challenges to his sentences. *Held*: Affirmed. The sentencing court did not commit plain error by imposing the minimum incarceration term portions of his dangerous-offender sentences without jury findings. The jury’s findings support imposition of the 30-year indeterminate maximum dangerous-offender term (the “departure” sentences). The court then, based on its own findings, imposed required minimum incarceration terms within those constitutionally valid departure sentences. It is at least open to debate whether those minimum incarceration terms are subject to *Blakely*.

**State v. Thomas**, 204 Or App 109, 129 P3d 212, *on recons*, 205 Or App 399, 134 P3d 1038, *rev den*, 340 Or 673 (2006). The sentencing court committed plain error in light of *Blakely* when, after defendant was convicted of the charges by jury verdict, it found that defendant is a dangerous offender and imposed an enhanced sentences pursuant to ORS 161.725 *et seq.* (distinguishing *State v. Heilman*, *above*).

**Gill v. Lampert**, 205 Or App 90, 132 P3d 674 (2006). Petitioner was convicted in 1998 by jury verdict of two counts of attempted first-degree assault for shooting at two police officers. The sentencing court found him to be a dangerous offender based *inter alia* on its finding that he “seriously endangered the life or safety of another.” Petitioner later petitioned for post-conviction relief contending that his trial counsel provided inadequate assistance by failing to object to the court’s dangerous-offender finding based on *State v. Mitchell*, 84 Or App 452 (1987). The court denied his claim. *Held*: Reversed and remanded. [1] A counsel provides inadequate assistance if he fails to object based on *Mitchell* when the court, rather than the jury, makes the seriously-endangered finding. [2] The jury’s verdict was not sufficient of itself to constitute the required finding, because “an attempted assault can occur without the offender seriously endangering the life or safety of any person.” [3] Petitioner was prejudiced by his counsel’s failure to object, because a reasonable jury could have acquitted him on that fact.

**State v. Isom**, 201 Or App 687, 120 P3d 912 (2005). Defendant was convicted of, *inter alia*, attempted aggravated murder, and the court found her to be a dangerous offender and, at a resentencing hearing, imposed on that conviction, pursuant to ORS 161.725(1) and 161.737(1), a 30-year indeterminate sentence, a 220-month minimum sentence, and a 36-month term of post-prison supervision. *Held*: [1] The PPS term is “plain error,” because the post-prison supervision term for a dangerous offender upon her release is the remainder of the 30-year indeterminate term. The nature of the error required a remand for resentencing pursuant to ORS 138.222(5) instead of simply a remand for entry of a corrected judgment.

**State v. Warren**, 195 Or App 656, 98 P3d 1129 (2004), *rev den*, 340 Or 201 (2006). [1] The sentencing court violated the right-to-jury rule in *Blakely* when it made findings post-verdict under ORS 161.725(1) that defendant is a dangerous offender and imposed a 30-year indeterminate sentence. That sentence is a departure under the guidelines, and the finding that he is “suffering from a severe personality disorder” falls within the scope of the *Blakely* rule even though it relates only to defendant, not to the underlying crime. [2] The indictment was not constitutionally deficient under *Blakely* for not having specially alleged the dangerous-offender factors.

See also **State v. Williams**, 197 Or App 21, 104 P3d 1151 (2005) (same as 1).

**Teague v. Palmateer**, 184 Or App 577, 57 P3d 176 (2002) (*en banc*), *rev den*, 335 Or 181 (2003). [1] A state is not precluded from applying a new rule of federal law “retroactively” even if the U.S. Supreme Court, applying the *Teague v. Lane* rule, does not order that the new rule must be applied retroactively. [2] Under Oregon law, the decision in *Apprendi v. New Jersey* does not apply “retroactively” to invalidate sentences that became final before that decision was announced.

*Note:* Although this decision was superseded by *Page v. Palmateer* and *Miller v. Lampert*, *above*, the Court’s subsequent decision in *Danforth v. Minnesota*, 552 US 264 (2008), in which the Court agreed with point [1], means that point [2] now controls.

**State v. Crain**, 177 Or App 627, 33 P3d 1050 (2001), *rev den*, 334 Or 400 (2002). [1] Defendant’s unpreserved claim that his dangerous-offender sentence is unlawful under *Apprendi* because the state did not allege the ORS 161.725(1) factors in the indictment and prove them to the jury is not reviewable on appeal. [2] Defendant’s challenge does not call into question the jurisdiction of the trial court to convict defendant on the charge of first-degree rape.

**State v. Wilson**, 161 Or App 314, 985 P2d 840 (1999), *rev den*, 330 Or 71 (2000). The sentencing court imposed a 30-year dangerous-offender sentence with a 140-month minimum on defendant’s conviction for first-degree kidnapping, which crime eventually resulted in the victim’s death (defendant’s aggravated-murder conviction was reversed and remanded for retrial). *Held:* That sentence is not unconstitutionally disproportionate in violation of Article I, section 16, based on the fact that his codefendants received much shorter sentences after pleading guilty. “Article I, section 16, has never been interpreted to require that individuals who commit different crimes during the same criminal episode receive comparable sentences, regardless of the crimes involved, the nature of their participation in those crimes, and other relevant factors such as their criminal histories, their cooperation with authorities, and their violent propensities.”

**Lovelace v. Zenon**, 159 Or App 158, 976 P2d 575 (1999), *rev den*, 329 Or 589 (2000). Petitioner was convicted of assault in the second degree in 1987 by jury verdict. The sentencing court found, pursuant to ORS 161.725(1)(b) (1987), that petitioner’s crime seriously endangered the life and safety of the victim and imposed a dangerous-offender sentence. *Held:* In light of *State v. Mitchell*, 84 Or App 452 (1987), petitioner was entitled to post-conviction relief on his claim that his trial counsel provided inadequate assistance by failing to object on the ground that the indictment did not specifically allege, and the *jury* had not made the specific finding, that his crime seriously endangered the victim. Although *Mitchell* was issued shortly after petitioner was sentenced, his counsel should have foreseen that that decision.

**Davis v. Thompson**, 154 Or App 250, 961 P2d 911, *rev den*, 327 Or 621 (1998): Petitioner was convicted of burglary and rape based on a 1993 incident, and the sentencing court found him to be a dangerous offender and imposed a 30-year indeterminate term with a 60-month minimum on the rape conviction and a consecutive 6-month term on the burglary conviction. Petitioner’s counsel objected to the 30-year term, but he did not raise that issue on appeal. The state nonetheless conceded error on appeal in light of *State v. Davis*, 315 Or 484, 847 P2d 834 (1993). The Court of Appeals affirmed without opinion, however, and the Supreme Court denied review. Petitioner then petitioned for post-conviction relief contending that the 30-year term is unlawful in light of *Davis*, but the post-conviction court held that that claim was barred. *Held:* Affirmed. Petitioner does not assert that either his trial or appellate counsel provided inadequate assistance of counsel. Because his objection to the sentence is one that he reasonably could have asserted at sentencing and pursued on appeal, he is barred from asserting it in the post-conviction proceeding.

**Johnson v. Zenon**, 151 Or App 349, 948 P2d 767 (1997), *rev den*, 326 Or 530 (1998). Based on two burglaries that petitioner committed in 1991 (*i.e.*, before *State v. Davis*), the sentencing court imposed an 80-month departure sentence on one and imposed on the other a *concurrent* dangerous-offender sentence with a 30-year indeterminate term and a 40-month minimum. The judgment was affirmed on appeal. Petitioner petitioned for post-conviction relief contending that his trial counsel provided inadequate assistance by failing to object to the 30-year term on the ground that, in light of *Davis*, that term violated the 200-percent limitation in *former* OAR 253-08-004(1). *Held:* Without addressing the unresolved issue of whether (and how) *Davis* applies to a *concurrent* dangerous-offender sentence, the post-conviction court correctly

rejected petitioner's claim, because counsel had objected adequately on that ground, even though his argument was not as articulate as petitioner's current argument.

*State v. Trice*, 146 Or App 15, 933 P2d 345, *rev den*, 325 Or 280 (1997): Sentencing court properly found defendant to be a dangerous offender and sentenced him per ORS 161.725 even though the state's experts declined to diagnose him as having a "severe personality disorder," because he is a juvenile.

*State v. Dizick*, 137 Or App 486, 905 P2d 250 (1995), *rev den*, 322 Or 490 (1996): Defendant pleaded guilty, *inter alia*, to two counts of attempted aggravated murder subject to the sentencing guidelines, and the sentencing court found him to be a dangerous offender, imposed consecutive 30-year indeterminate terms per ORS 161.725, and ordered that "parole shall extend for the entire term of the defendant's sentence." *Held*: The sentencing court erred when it [1] failed to determine the crime-seriousness ranking of those convictions pursuant to OAR 253-04-004 and then to indicate the presumptive sentences per ORS 161.737 (1991), and [2] imposed "parole" instead of post-prison supervision pursuant to ORS 144.232.

*State v. O'Hara*, 136 Or App 15, 900 P2d 536, *rev den*, 322 Or 362 (1995): In a case governed by ORS 161.737 (1991), the sentencing court erred when it imposed a 90-month departure sentence (gridblock 8-A) as the minimum term of a dangerous-offender sentence.

*State v. Wolflick*, 130 Or App 333, 880 P2d 974 (1995) (*per curiam*): The sentencing court erred when it imposed a lifetime term of post-prison supervision as part of a dangerous-offender sentence, but the court refused to grant relief based on a separate unpreserved claim that sentencing court erroneously imposed minimum term pursuant to ORS 144.110.

*State v. Reese*, 128 Or App 323, 876 P2d 317 (1994): The sentencing court erred when it imposed a departure sentence as the minimum term of a dangerous-offender sentence imposed under *former* ORS 161.737 (1989).

*State v. Warren*, 122 Or App 334, 857 P2d 876, *rev den*, 318 Or 27 (1993): The requirement in ORS 161.737(2) that the sentencing court "indicate on the record ... the presumptive sentence that would have been imposed had the court not imposed [a dangerous-offender sentence]" is satisfied by the court's oral ruling; it is not essential that that term be recited in the final judgment, although that is the preferable practice.

*State v. Andrews*, 118 Or App 107, 844 P2d 947 (1993) (*per curiam*): Sentencing court imposed a 20-year dangerous-offender sentence under ORS 161.725 with a 6-year minimum under ORS 137.635; *Held*: "the court had authority to sentence defendant under ORS 137.635 or under the dangerous offender statute, but not both."

*State v. Cordova-Lopez*, 115 Or App 754, 838 P2d 644 (1992) (*per curiam*): Sentencing court erred in imposing departure sentence as minimum term of dangerous-offender sentence; the presumptive sentence is the minimum term.

*See also State v. Bell*, 121 Or App 659, 855 P2d 669 (1993) (*per curiam*) (sentencing court erred in imposing a minimum sentence pursuant to ORS 144.110 as part of dangerous-offender sentence instead of the presumptive sentence, as prescribed by ORS 161.737(2)); *State v. Johnson*, 119 Or App 494, 849 P2d 1160 (1993) (*per curiam*) (same); *State v. Serheinko*, 111 Or App 604, 826 P2d 114 (1992) (same).

*Note*: ORS 161.737(2) and related statutes and rules were amended in 1993 to provide that the sentencing court may impose a minimum sentence on a dangerous offender that "shall be no less than the presumptive incarceration term and no more than twice the maximum incarceration term." *See* Or Laws 1993, ch 334, § 6.

*State v. Reese*, 114 Or App 557, 836 P2d 737 (1992): If the court imposes a dangerous-offender sentence on a conviction otherwise subject to ORS 137.635(1), that statute does not authorize the court to order that the 30-year term imposed pursuant to ORS 161.725 is a determinate sentence.

*State v. Serheinko*, 111 Or App 604, 826 P2d 114 (1992): "[U]nder ORS 161.737(2), a sentencing court must indicate the presumptive sentence [that] a defendant would have served had a dangerous offender sentence not been imposed. When the presumptive sentence has been served, a defendant automatically becomes eligible for consideration on parole."

### C. ORS 137.635 (BALLOT MEASURE 4 (1988))

See ORS 137.635; OAR 213-009-0001(2).

*Note:* Measure 11, which took effect in April 1995, precludes any form of early release on the mandated minimum terms, ORS 137.700(1), and all the crimes listed in ORS 137.635(2) are covered by Measure 11 *except* first-degree burglary. Consequently, the no-release clause in ORS 137.635(1) largely has been rendered superfluous by the no-release clause in ORS 137.700(1) with two exceptions: (1) for a conviction for first-degree burglary, and (2) the clause in ORS 137.700(1) precludes release only during the minimum-term portion of the sentence but the clause in ORS 137.635(1) applies to the entire sentence that is imposed.

***Burdge v. Palmateer***, 338 Or 490, 112 P3d 320 (2005). Based on three separate incidents, petitioner was convicted in 1994 of three counts of first-degree burglary and some felony sexual assaults. At a consolidated sentencing hearing, the court imposed sentence on the first burglary conviction and then used that conviction as a predicate for imposing no-release sentences under ORS 137.635 on the other convictions. After *State v. Allison*, 143 Or App 241, *rev den*, (1996), petitioner filed a petition for post-conviction relief complaining that his counsel failed to assert a similar argument that the statute cannot be applied to his convictions. The post-conviction court denied his claim, but the Court of Appeals reversed. *Held:* Reversed, affirming the post-conviction court's judgment. "Assuming that ORS 137.635 is ambiguous, it is not so obviously ambiguous that any lawyer exercising reasonable professional skill and judgment [before *Allison*] necessarily would have seen it." And "even if the meaning of a [sentencing] statute remains unsettled, the statute may so obviously offer possible benefits to a defendant that any lawyer exercising reasonable professional skill and judgment would raise it."

***State v. Casiano***, 214 Or App 509, 166 P3d 599 (2007). The sentencing court committed "plain error" by applying ORS 137.635 based on a prior conviction that was entered *after* defendant's commission of the offense in this case, contrary to *State v. Allison*, 143 Or App 241, *rev den*, 324 Or 487 (1996).

***Estes v. Dept. of Corrections***, 210 Or App 399, 150 P3d 1088, *rev den*, 342 Or 523 (2007). Court of Appeals upheld the validity of *former* OAR 291-100-110 (1993), which provides procedure for DOC to determine whether a sentence is subject to release restrictions in ORS 137.635. Because the rule does not preclude a hearing if the inmate requests one, petitioner's due-process challenge must await an application of the rule in a specific case. The rule does not impermissibly vest DOC with a judicial function.

***State v. Kaufman***, 205 Or App 10, 132 P3d 668, *rev den*, 340 Or 673 (2006). The Court of Appeals refused to consider as plain error defendant's unpreserved claim that the sentencing court erred under *Blakely* by imposing a sentence subject to ORS 137.635 based on its own finding that defendant had a predicate prior conviction.

***State v. Riley***, 195 Or App 377, 97 P3d 1269 (2004), *rev den*, 340 Or 673 (2006). [1] Pursuant to ORS 138.083(1), and based on defendant's prior conviction for first-degree burglary, the sentencing court properly entered an amended judgment to comply with ORS 137.635(3). The original judgment contained an "erroneous term" in that it authorized early release and ORS 137.635(1) bars it. [2] Although the sentencing court erred by amending the judgment without specific notice to defendant and outside his presence, the error is harmless because "the modification did not involve disputed facts or the exercise of judicial discretion."

***State v. Whitlock***, 187 Or App 265, 65 P3d 1114, *rev den*, 336 Or 17 (2003). Defendant was convicted, based on no-contest pleas, of first-degree burglary and kidnapping, and the court imposed consecutive sentences of 40 and 90 months on those convictions. Several days later, the court, *sua sponte* and without notice to defendant, entered an amended judgment reciting that those sentences are subject to ORS 137.635 based on defendant's prior conviction for first-degree burglary. *Held:* Remanded for resentencing. [1] The amendment was not proper under ORS 138.083(1), because the court failed to provide written notice to the parties and an opportunity for defendant to object. [2] The appropriate remedy is to vacate the amended judgment and remand "for determination of whether to reinstate original judgment and, if not, for resentencing." *Note:* The court declined to address whether it would be permissible, in these circumstances, for the court to enter the amended judgment after a hearing.

***State v. Redmond***, 155 Or App 297, 963 P2d 743 (*per curiam*), *rev den*, 327 Or 554 (1998). In light of *State v. Allison*, sentencing court erred in imposing sentence on defendant's convictions pursuant to ORS 137.635.

See also ***State v. Johnson***, 156 Or App 100, 964 P2d 1133 (1998) (*per curiam*), *rev den*, 328 Or 298 (1999).

*State v. Clark*, 146 Or App 590, 933 P2d 984 (1997): Sentencing court erred by refusing to indicate in the judgment that the sentences imposed on defendant's robbery and burglary convictions are subject to ORS 137.635: "The sentencing court was required to apply the statute and erred as a matter of law in failing to do so."

*State v. Rosson*, 145 Or App 574, 931 P2d 807 (1997), *rev den*, 325 Or 369 (1997): Defendant's prior Tennessee conviction for aggravated robbery was a predicate offense for purpose of ORS 137.635, because that offense that is substantively comparable to first-degree robbery, an offense that is listed in ORS 137.635(2).

*State v. Allison*, 143 Or App 241, 923 P2d 1224, *rev den*, 324 Or 487 (1996): ORS 137.635 does not apply to a conviction unless the defendant has a prior conviction for a subject offense and that prior conviction was sentenced before he committed the crime underlying the conviction being sentenced.

See also *State v. Hegstrom*, 147 Or App 344, 936 P2d 371 (*per curiam*), *rev den*, 325 Or 446 (1997) (same); *State v. Moss*, 147 Or App 658, 938 P2d 215, *rev den*, 325 Or 491 (1997) (same); *State v. Weikert*, 145 Or App 263, 929 P2d 1070 (1996), *rev den*, 325 Or 45 (1997) (same); *State v. Larson*, 144 Or App 611, 927 P2d 1117 (1996) (same); *State v. Brown*, 143 Or App 263, 923 P2d 1236 (1996) (same).

*State v. Andre*, 142 Or App 285, 920 P2d 1145, *rev den*, 324 Or 229 (1996): Sentencing court correctly ruled that defendant's 1971 conviction for burglary in a dwelling in violation of former ORS 164.230 (1971) was a predicate conviction for purpose of ORS 137.635(2)(h), because the elements as alleged and proved in the prior case would constitute first-degree burglary under ORS 164.225; "the fact that the statute numbers have changed is not controlling."

*State v. Thompson*, 142 Or App 222, 920 P2d 566 (1996) (*per curiam*): Sentencing court erred in imposing sentence per ORS 137.635 on convictions for first-degree sexual abuse and theft.

*State v. Daugaard*, 142 Or App 278, 921 P2d 975 (1996): Sentencing court erred in imposing sentence per ORS 137.635 on convictions for first-degree sexual abuse, second-degree sodomy, and compelling prostitution.

*State v. Deck*, 135 Or App 538, 898 P2d 1370 (1995) (*per curiam*): Because defendant, who was convicted of first-degree burglary, previously had not been convicted of a crime listed in ORS 137.635(2), the sentencing court erred in providing in the judgment that the sentence imposed is "subject to ORS 137.635."

*State v. Woodin*, 131 Or App 171, 883 P2d 1332 (1995): The phrase "maximum sentence otherwise provided by law in such cases" in ORS 137.635(1) means the presumptive sentence prescribed by the guidelines unless the sentencing court makes findings to impose a longer sentence by departure; ORS 137.635 does not permit a sentencing court to impose the maximum upward-departure sentence without first making findings to support a departure.

*State v. Rickerd*, 124 Or App 552, 862 P2d 1324 (1993): ORS 137.635 does not apply to conviction based on crime committed prior to January 1, 1990.

See also *State v. Gouveia*, 116 Or App 86, 840 P2d 753 (1992).

*Curry v. Grill*, 125 Or App 507, 866 P2d 1237 (1993): A defendant sentenced for a conviction subject to ORS 137.635 is not entitled to any credits against his sentence authorized by ORS 421.121, even though ORS 137.635 references only ORS 421.120, not ORS 421.121.

*State v. Nicholas*, 118 Or App 232, 846 P2d 1181 (1993): If the court imposes a consecutive sentence on a secondary conviction that is subject to ORS 137.635, it must use the regular column I presumptive incarceration term, not the special presumptive sentence prescribed by OAR 253-09-001(2).

*State v. Andrews*, 118 Or App 107, 844 P2d 947 (1993) (*per curiam*): Sentencing court imposed a 20-year dangerous-offender sentence under ORS 161.725 with a 6-year minimum under ORS 137.635; *Held*: "the court had authority to sentence defendant under ORS 137.635 or under the dangerous offender statute, but not both."

*State v. Shafer*, 116 Or App 667, 843 P2d 462 (1992) (*per curiam*), *rev den*, 315 Or 644 (1993). Because the conviction was subject to both sentencing guidelines and ORS 137.635, it was proper for court to impose a guidelines sentence and to order that defendant would be subject to the release restrictions in ORS 137.635(1) with respect to that

sentence.

See also *State v. Walker*, 117 Or App 527, 842 P2d 817 (1992) (*per curiam*), *rev den*, 315 Or 644 (1993).

*State v. Haydon*, 116 Or App 347, 842 P2d 410 (1992): [1] ORS 137.635 applies to any subject felony conviction based on a crime committed on or after January 1, 1990, even if the conviction otherwise is subject to the sentencing guidelines. [2] Any sentence imposed pursuant to ORS 137.635(1) is subject to the departure rules and durational limitations set forth in the guidelines applicable to that conviction. [3] ORS 137.635(1) “requires a determinate incarceration term and thus eliminates any option under the guidelines for imposition of a probationary term.”

See also *State v. Graham*, 125 Or App 516, 865 P2d 490 (1993) (“sentencing court did not have authority under ORS 137.635 to impose a sentence that is longer than that authorized by the guidelines”).

*State v. Reese*, 114 Or App 557, 836 P2d 737 (1992): If the court imposes a dangerous-offender sentence on a conviction otherwise subject to ORS 137.635(1), that statute does not authorize the court to order that the 30-year term imposed pursuant to ORS 161.725 is a determinate sentence.

#### **D. FIREARM-MINIMUM SENTENCE (ORS 161.610)**

See ORS 161.610; OAR 213-009-0001(1) and (3).

*Dean v. United States*, 556 US \_\_\_, 129 S Ct 1849, 173 L Ed 2d 785 (2009). Defendant committed an armed robbery of a bank and, while doing so, accidentally discharged his gun, which did not cause any injury. The court imposed the 10-year mandatory minimum under 18 USC § 924(c)(1)(A)(iii) because the gun was “discharged” during the crime. *Held*: Affirmed. Because the statute does not expressly require a culpable mental state, the accidental “discharge” was sufficient to trigger the minimum term. The Court rejected defendant’s attempt to rely on the “rule of lenity.”

*Harris v. United States*, 536 US 545, 122 S Ct 2406, 153 L Ed 2d 524 (2002). The defendant unlawfully delivered narcotics while visibly possessing a firearm. Whenever a person commits such an offense while “brandishing” a firearm, the court is required to impose a minimum sentence of “not less than 7 years.” 18 USC § 924(c)(1)(A)(ii). The indictment did not allege that the defendant “brandished” the firearm, and the jury found him guilty of the underlying narcotics offense without finding that he brandished the firearm. At sentencing, the court found, over the defendant’s objection, that he had brandished the firearm and imposed the 7-year minimum term based on that finding. *Held*: Affirmed. [1] As a matter of statutory construction, the “brandishing” factor is not an element of the underlying offense but only a “sentencing factor” for the sentencing court. [2] The Court rejected the defendant’s argument that *McMillan v. Pennsylvania*, 477 US 79 (1986), no longer is good law in light of *Apprendi v. New Jersey*. It is constitutionally permissible to impose a *minimum* sentence that is within the statutory maximum otherwise authorized for the underlying offense based on findings made by the sentencing court.

But see *State v. Wedge*, 293 Or 598, 652 P2d 883 (1982) (defendant entitled to jury finding under Art I, § 11, on “use of a firearm” allegation).

*State v. Jacob*, 344 Or 181, 180 P3d 6 (2008). The sentencing court refused to impose the 30-year minimum sentence mandated by ORS 161.610(4)(c) on defendant’s third conviction for a firearm offense, ruling that defendant’s first firearm sentence was invalid under *State v. Wedge* even though he had not previously challenged that sentence on appeal, in a post-conviction proceeding, or at his second sentencing for a firearm offense. *Held*: Reversed with directions to impose sentence. [1] Prior “punishment” under ORS 161.610 authorizes the greater sentence based on a new firearm offense. [2] Defendant cannot collaterally attack the validity of the earlier punishment at his sentencing based on the new firearm conviction.

*State v. Hirsch / Friend*, 338 Or 622, 114 P3d 1104 (2005). Statute barring felon from possessing firearms, ORS 166.270(1), does not violate defendant’s right to bear arms under Art I, § 27.

*State v. Saechao*, 256 Or App 369, 300 P3d 287 (2013). Defendant was convicted of several firearm offenses arising from an incident which he used of a gun to rob a store. The sentencing court imposed six separate 60-month mandatory minimum firearm sentences per ORS 161.610(4)(a); each sentence was subsumed in other, longer sentences imposed in the case, and the total sentence was 210 months—120 months on a conviction for attempted aggravated murder and a consecutive 90 months on a conviction for first-degree robbery. *Held*: Reversed and remanded. Under *State v. Hardesty*, 298 Or 616, (1985), the multiple firearm-minimum sentences were not authorized under ORS 161.610(4)(a).

**State v. Claggett**, 245 Or App 491, 263 P3d 1109 (2011). Defendant pleaded guilty to coercion with a firearm and unlawful use of a weapon with a firearm, and the court imposed on each a 60-month firearm-minimum sentence pursuant to ORS 161.610(4) and ordered him to serve 24 months of the second sentence consecutively to the first. *Held*: Reversed and remanded for resentencing. The sentencing court committed plain error under *State v. Hardesty*, 298 Or 616 (1985), by imposing two firearm-minimum sentences in the same case, and that error requires resentencing because the second sentences is partially consecutive to the first.

**State v. Cervantes-Avila**, 242 Or App 122, 255 P3d 536 (2011). Defendant was convicted of, *inter alia*, first-degree rape, first-degree sodomy, and unlawful use of a weapon (ORS 166.220), all “with a firearm.” The court imposed consecutive 100-month sentences on the rape and sodomy convictions, and it then imposed a consecutive 60-month firearm-minimum sentence on the unlawful-use conviction. Defendant argued that that sentence violated the “200-percent rule,” OAR 213-012-0020(2). *Held*: Affirmed. [1] The 200-percent rule applies only to “consecutive sentences that involve presumptive or dispositional departures” and does not apply to a statutory mandatory sentence. *See State v. Langdon*, 330 Or 72 (2000). [2] Although a sentencing court has discretion under ORS 161.610(5) not to impose the 60-month firearm-minimum on a first-time offender, the court did not make that election here, which means that the 60-month term it imposed is a “mandatory minimum” for purposes of the 200-percent rule.

**State v. Medina**, 234 Or App 684, 228 P3d 723 (2010). [1] The sentencing court committed plain error under *State v. Hardesty*, 298 Or 616 (1985), when it imposed three firearm-minimum sentences on separate convictions based on a single incident. [2] In deciding whether to exercise discretion to grant relief on an unpreserved claim of sentencing error, “we consider whether the defendant encouraged the trial court’s imposition of the erroneous sentence, the possibility that the defendant made a strategic choice not to object, the role of other sentences in the case, and the interests of the justice system in avoiding unnecessary, repetitive sentencing proceedings.” [3] Although the sentencing court on remand, after correcting the error, possibly can restructure the sentences to reimpose the same overall sentence, it is not clear from the record that it necessarily would. Consequently, the court remanded for resentencing.

**State v. Moore-Zuniga**, 228 Or App 291, 208 P3d 507 (2009). Defendant was charged with several assault offenses that specifically alleged that he committed “with a firearm,” witnesses at trial testified that defendant “shot” at them, and the jury found him guilty. The court imposed a five-year firearm-minimum sentence per ORS 161.610 despite defendant’s objection that the jury’s verdicts did not necessarily find that he used a firearm, because the instructions mentioned only “a dangerous or deadly weapon.” *Held*: Affirmed. “Although the jury was never instructed that it was required to find that defendant used or threatened to use a firearm in order to convict him of the offenses charged, the *only* (and uncontroverted) evidence adduced at trial pertaining to use of a dangerous or deadly weapon referred to his use of a .22-caliber gun—a ‘firearm.’ Thus, ... the jury, in convicting defendant ... *necessarily* found that he used or threatened to use a firearm in committing those offenses.”

*Note*: The court cautioned that it was immaterial that the caption of the verdict forms included “with a firearm” because jurors are instructed to disregard captions.

**State v. Quintero-Martinez**, 220 Or App 497, 188 P3d 350, *rev den*, 345 Or 318 (2008). [1] The sentencing court erred when it imposed a 60-month firearm-minimum term on each of defendant’s convictions for first-degree burglary and first-degree kidnapping. [2] The error, however, does not warrant relief on appeal as “plain error.” Because the court imposed, per Measure 11, a 90-month sentence on the kidnapping conviction, the minimum on that conviction has “no practical effect.” Moreover, because the court made clear that it intended to impose an overall sentence of 120 months, and made the sentences partially consecutive for that purpose, “we are certain” that if the case was remanded, the court would reimpose the same 120-month sentence.

**State v. Howard**, 205 Or App 408, 134 P3d 1042, *rev den*, 341 Or 198 (2006). The Court of Appeals declined to review defendant’s unpreserved claim that the sentencing court committed plain error when it found that he had a prior conviction for a firearm offense and imposed an enhanced firearm-minimum sentence under ORS 161.610(4)(b) on that basis.

**State v. Torres**, 195 Or App 236, 97 P3d 691, *rev den*, 337 Or 616 (2004). Sentencing court erred in imposing firearm-minimum sentence on defendant’s robbery conviction because there was no evidence that he personally used or threatened use of a firearm.

*See also State v. Hernandez*, 194 Or App 490, 95 P3d 732 (2004) (*per curiam*), *rev den*, 338 Or 57 (2005).

*State v. Von Melker*, 193 Or App 765, 91 P3d 833 (*per curiam*), *rev den*, 337 Or 282 (2004). The sentencing court erred when it imposed more than one firearm-minimum sentence on convictions arising from the same criminal episode.

*State v. Hilton*, 187 Or App 666, 69 P3d 779 (2003), *rev den*, 336 Or 377 (2004). The sentencing court erred in imposing a 10-year firearm minimum based on ORS 161.610(4)(b), because defendant's prior firearm conviction was entered in Virginia and hence was not punishment under ORS 161.610(4)(a).

*State v. McCormick*, 185 Or App 491, 60 P3d 1089 (2002), *rev den*, 335 Or 391 (2003). The Court of Appeals reviewed, as "plain error" in light of the intervening decision in *Layton v. Hall*, defendant's unpreserved claim that the sentence imposed, a 5-year firearm-minimum term with a 2-year term of post-prison supervision, violates ORS 161.605. See also *State v. Drew*, 188 Or App 665, 72 P3d 1064 (2003) (*per curiam*).

*Layton v. Hall*, 181 Or App 581, 47 P3d 898 (2002). Under OAR 213-005-0002(4), the sentencing court erred when it imposed a 36-month term of post-prison supervision on petitioner's conviction for assault in the third degree, a class C felony, in addition to the 5-year firearm-minimum sentence. "ORS 161.610 does not establish, control, or limit post-prison supervision terms in any way. OAR 213-005-0002 both establishes and limits the length of post-prison supervision terms."

*Dugger v. Schiedler*, 174 Or App 585, 27 P3d 498 (2001). Plaintiff was convicted on charges of second-degree robbery and kidnapping with a firearm. Although those offenses were subject to Measure 11, the sentencing court orally declared Measure 11 to be unconstitutional and imposed instead a 60-month firearm-minimum sentence. Plaintiff later sought *habeas corpus* relief on a claim that the Department of Corrections was denying him earned-time credit per the no-release clause in ORS 137.707(2), and the trial court dismissed his petition. *Held*: Reversed. Because the sentencing court declared all of Measure 11 unconstitutional and the state did not appeal, the department could not deny plaintiff earned-time credits based on the no-release clause in ORS 137.707(2). Under the 60-month firearm-minimum sentence, plaintiff was eligible for earned-time credits, ORS 161.610(3).

*State v. Harris*, 174 Or App 105, 25 P3d 404 (2001). During a burglary/robbery, defendant found a rifle that was inoperable (because the bolt was missing), and he threatened to beat the victim with it. The indictment alleged, and the jury found, that defendant "used or threatened to use" the rifle during the burglary, and the sentencing court imposed a 5-year firearm-minimum per ORS 161.610. *Held*: Reversed and remanded. "[T]he legislature intended 'use or threatened use' of a firearm within the meaning of ORS 161.610 to refer to discharge or threatened discharge." Defendant's threat to use of the rifle only as club was not a sufficient factual basis for imposing the firearm-minimum sentence.

*State v. Thiehoff*, 169 Or App 630, 10 P3d 322 (2000), *rev den*, 332 Or 137 (2001). The minimum sentence prescribed by ORS 161.610 cannot be imposed on a conviction for a firearm offense if the jury returned a general verdict in which it could have found the defendant guilty only on an aiding-and-abetting theory. The statute requires the state to prove and the jury to find that defendant "personally" used or threatened to use the firearm.

*State v. Polin*, 167 Or App 255, 3 P3d 171, *rev den*, 330 Or 553 (2000). The sentencing court erred when it imposed firearm-minimum sentences on each of several convictions that were based on crimes defendant committed during a single incident.

*State v. Black*, 161 Or App 662, 987 P2d 530 (1999) (*per curiam*). The sentencing court erred when it imposed two concurrent minimum sentences per ORS 161.610 on defendant's two convictions for firearms offenses; the statute "contemplates only one ... minimum sentence for the 'first conviction' involving a firearm even when the defendant is simultaneously convicted of two or more felony charges."

*State v. Wimberly*, 152 Or App 154, 952 P2d 1042 (1998). Defendant was convicted of unlawful use of a firearm in violation of ORS 166.220; that count alleged, and the jury found, that he did "intentionally discharge" the firearm in the course of committing that crime. Although the sentencing court found no mitigating circumstances that would justify not imposing the firearm-minimum sentence, it refused to impose that minimum sentence because the caption of that count did not include "with a firearm." *Held*: The court erred by not imposing the minimum sentence, because "ORS 161.610(2) does not require that an indictment include that phrase in the caption." Moreover, the minimum term was required by ORS 161.610(3), because use of a firearm was an element of the offense of which defendant was convicted.

*State v. Cleveland*, 148 Or App 97, 939 P2d 94, *rev den*, 325 Or 621 (1997). Because the sentencing guidelines have not changed the rule that a court may impose only one firearm-minimum sentence in a case, the sentencing court erred when it imposed firearm-minimum sentences on defendant's convictions for manslaughter, burglary, and robbery.

*State v. Mooney*, 143 Or App 624, 924 P2d 827 (1996) (*per curiam*): The sentencing court, on a conviction for a "firearm" offense, departed dispositionally and imposed a probationary sentence. The court later revoked probation and imposed a prison sentence with a firearm minimum. *Held*: The court lacked authority to impose the firearm-minimum sentence when it revoked probation and imposed a prison sentence.

*State v. Bergeson*, 138 Or App 321, 908 P2d 835 (1995): Defendant was convicted of a felony with a firearm, and the sentencing court imposed a probationary sentence on that conviction without making any findings under ORS 161.610(5) to support waiver of the 5-year firearm minimum. *Held*: The 5-year term is mandatory under ORS 161.610(4) unless the court makes appropriate findings. Because ORS 137.637 requires the defendant to serve a statutory minimum term that is longer than the sentence prescribed by the guidelines, the court erred when it imposed a probationary sentence in lieu of the 5-year minimum without first making findings to justify waiver of the minimum term.

*State v. Johnson*, 125 Or App 655, 866 P2d 1245 (1993): [1] A firearm-minimum sentence is not a "departure" sentence; it is a mandatory sentence. [2] When a sentencing court imposes a firearm-minimum sentence on a conviction within a consecutive-sentence string that is subject to the "400 percent rule," OAR 253-12-020(2), the total sentence is the greater of the firearm minimum or the sentences derived through the rule.

*State v. Walker*, 117 Or App 527, 842 P2d 817 (1992) (*per curiam*), *rev den*, 315 Or 644 (1993): Although the sentencing court erred in imposing on a single conviction both a 120-month minimum sentence pursuant to ORS 161.610(4) and a 65-presumptive sentence, the error does not warrant relief on appeal, because ORS 137.637 requires defendant to serve the 120-month sentence.

*State v. Stalder*, 117 Or App 289, 844 P2d 225 (1992): If the sentencing court imposes a sentence under the guidelines that is longer than the firearm-minimum sentence mandated by ORS 161.610(4), ORS 137.637 requires the court to impose the guidelines sentence as the incarceration term of the sentence, but the court nonetheless should impose the restrictions on release set forth in ORS 161.610(3). "The mandatory limitations of OAR 253-09-001(1) and ORS 137.637 apply only to the incarceration term. They do not apply in any way to limit the application of the other provisions of ORS 161.610."

*State v. Hudson*, 115 Or App 301, 839 P2d 721 (1992), *rev den*, 315 Or 442 (1993): It does not violate OAR 253-08-002(3) to cite "use of weapon" aggravating factor to depart on conviction for attempted murder simply because the court imposed firearm-minimum sentence on companion conviction for first-degree assault.

## **E. BALLOT MEASURE 11 (1994) (ORS 137.700 *et seq.*)**

The 1997 Legislative Assembly approved numerous amendments to Measure 11 with an effective date of October 4, 1997. Or Laws 1997, ch 852. Those amendments: [1] add three crimes to Measure 11 (*viz.*, some forms of first-degree arson, using a child in a sexually explicit display, and compelling prostitution); [2] clarify that a defendant is eligible for earned-time credit with respect to any portion of the sentence imposed that exceeds the minimum term; [3] bar the filing of a petition in juvenile court that alleges an offense subject to Measure 11; [4] bar a jury from considering the sentence that may be imposed if the defendant is found guilty (ORS 136.325); and [5] allow, under some circumstances, a sentencing court to impose a sentence less than the minimum term on a conviction for second-degree robbery, assault, or kidnapping (ORS 137.712). *See note* under subsection (3), *below*.

The Legislative Assembly in its 2006 Special Session amended Measure 11 (effective April 24, 2006), to enact "Jessica's Law" to mandate imposition of a 300-month minimum sentence on a conviction for first-degree rape, sodomy, sexual penetration, or kidnapping based on a sexual assault on a child under 12 years of age. ORS 137.700(2)(b)(D) to (G).

### **1. Prison sentence mandated by ORS 137.700**

*State v. Rodriguez / Buck*, 347 Or 46, 217 P3d 659 (2009). In each case, the defendant, who had no previous criminal history, was convicted of first-degree sexual abuse in violation of ORS 163.427(1)(a)(A) based on sexual touching

of a 13-year-old child, the sentencing court refused to impose the 75-month sentence mandated by ORS 137.700(2)(a)(P), and the state appealed. *Held*: Judgments affirmed. As applied to the convictions at issue in these cases, the mandate 75-month sentence is unconstitutionally disproportionate in violation of Article I, section 16. In considering an as-applied challenge, “a court may consider ... the specific circumstances and the facts of the defendant’s conduct that come within the statutory definition of the offense, as well as other case-specific factors, such as characteristics of the defendant and the victim, the harm to the victim, and the relationship between the defendant and the victim.” Because the touchings at issue were borderline one-time offenses and the defendants had no criminal history, the 75-month sentence was unconstitutionally excessive.

*State v. Ferman-Velasco*, 333 Or 422, 41 P3d 404 (2001). [1] Imposing a Measure 11 minimum sentence on a class B felony does not violate Art. I, § 6, on the ground that no minimum sentence is prescribed for some crimes that are class A felonies or have a higher crime-seriousness ranking. [2] Measure 11 does not violate the Eighth Amendment, the right to allocution under the federal constitution, or the Sixth Amendment right to counsel.

*State v. Langdon*, 330 Or 72, 999 P2d 1127 (2000). [1] Measure 11 prohibits the reduction of a minimum sentence for any reason. [2] The 400-percent rule requires the sentencing court to reduce the sentences imposed, but it does not require the court to convert a consecutive sentence to a concurrent one. [3] A sentencing court has authority to impose consecutive Measure 11 minimum sentences on convictions without regard to the 400-percent limitation in OAR 213-012-0020 and OAR 213-008-0007(3).

*State ex rel. Caleb v. Beesley*, 326 Or 83, 949 P2d 724 (1997). Ballot Measure 11 (1994), amended by the 1995 legislature, does not violate: (1) the one-subject provisions of Art IV, §§ 1(2)(d) and 20, of the Oregon Constitution; (2) the prohibition against cruel and unusual punishments in Art I, § 16, of the Oregon Constitution; (3) the separation-of-powers clause of Art III, § 1, of the Oregon Constitution; or (4) the reformation clause of *former* Art 1, § 15, of the Oregon Constitution.

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): [1] Measure 11 did not impliedly repeal the sentencing guidelines. [2] Measure 11 does not violate Art I, §§ 11 (allocution), 15 (reformation), or 20 (equal privileges), or Art III, § 1 (separation of powers), of the Oregon Constitution. [3] Defendant’s claim that Measure 11 violates the Guarantee Clause (U.S. Const, Art IV, § 4) is not reviewable. [4] Measure 11 does not violate the Equal Protection Clause. [5] The sentencing court erred as a matter of law by refusing to impose the minimum sentence mandated by Measure 11.

*State v. Wiese*, 238 Or App 426, 241 P3d 1210 (2010), *rev den* 349 Or 655 (2011). Defendant was convicted of two counts of first-degree sodomy, two counts of first-degree sexual abuse, and one count of first-degree rape, and was sentenced to 300 months in prison under ORS 137.700. On appeal, defendant argued that his sentence was disproportionate to the offenses and constituted cruel and unusual punishment under the state and federal constitutions. *Held*: Affirmed. Defendant’s sentence was not disproportionate to his offenses because (1) the severity of the penalty is congruent with the gravity of the offense—his repeated sexual abuse of his 11-year-old stepdaughter for over a year—even though she did not suffer serious physical injuries; (2) the court has previously rejected a comparison of the penalties for sexual abuse of children and intentional murder; and (3) defendant had prior convictions for robbery and assault and his punishment for those offenses did not deter him from engaging in criminal behavior.

*State v. Navarrete-Pech*, 230 Or App 157, 213 P3d 1262 (2009), *rev den*, 348 Or 13 (2010). Measure 11 minimum sentences apply to convictions based on aiding-and-abetting liability. *State v. Cobb*, 224 Or App 594 (2009).

*State v. Smith*, 229 Or App 243, 211 P3d 961 (2009). The trial court correctly imposed a 70-month minimum sentence under Measure 11 on defendant’s second-degree robbery conviction, despite defendant’s objection that Measure 11 does not apply to accomplices.

*State v. LaMarsh*, 227 Or App 628, 206 P3d 1103 (2009) (*per curiam*). The sentencing court erroneously imposed Measure 11 sentences on defendant’s convictions for first-degree sexual “based on its own factual finding that his offenses occurred after the effective date of Measure 11.”

*State v. Brown*, 227 Or App 99, 204 P3d 825 (2009). Defendant was charged with twelve felony and misdemeanor sexual offenses that he committed against three victims, and the parties negotiated a deal by which he pleaded

guilty to five charges and admitted that each of the felony convictions was subject to a minimum sentence of 75 or 100 months under Measure 11. The court imposed a series of consecutive sentences that totaled 220 months. Defendant argued on appeal that the court committed plain error by imposing a 75-month sentence on a conviction for first-degree sexual abuse because it was undisputed that he committed the crime before April 1, 1995. *Held*: Affirmed. [1] The court committed plain error, because ORS 137.700 applies only to convictions based on crimes committed on or after April 1, 1995, and the no-release order cannot be justified based on ORS 137.750, which did not take effect until December 5, 1996. [2] But the court declined to exercise its discretion to reverse and remand because it is clear that the court could and would impose essentially the same sentence on remand by restructuring the consecutive sentences.

*State v. Miller*, 226 Or App 52, 202 P3d 921, *rev den*, 346 Or 184 (2009). Defendant was convicted of nine counts of first-degree sodomy and first-degree sexual abuse. The indictment alleged that defendant committed the crimes “on or after April 1, 1995” (the effective date of Measure 11), and the verdict form for each count included a special instruction that stated that, for each count that the jury found defendant guilty, the jury had to answer the following question: “Did the crime occur on or after April 1, 1995?” The jury found defendant guilty on all counts and affirmatively answered the special question. On appeal, defendant argued that there was insufficient evidence from which a jury could find that he committed the crimes after the effective date for Measure 11. *Held*: Affirmed. Although dates generally are not material elements of a crime, the dates can be material in the sense that they control the sentencing scheme that applies to the convictions. Defendant was subject to Measure 11 sentences only if the jury found that he committed the crimes after the effective date of those mandatory minimum sentences. The victim testified only that the offenses occurred in “spring 1995,” the parties stipulated at trial that the first day of spring was March 21, 1995, the victim also testified that the offenses occurred while she was playing Little League baseball, and the evidence showed that her team’s first game was April 22, 1995. Reviewing the evidence in the light most favorable to the state, there was sufficient evidence from which the jury could find that defendant committed the crimes after April 1, 1995.

*State v. Cobb*, 224 Or App 594, 198 P3d 978 (2008). The minimum sentences mandated by ORS 137.700 are not limited only to those convicted based on “principal” liability—they apply also to a conviction based on an aiding-and-abetting theory.

*State v. Acker*, 175 Or App 145, 27 P3d 1071 (2001), *rev den*, 333 Or 260 (2002). Defendant, an adult, was convicted of first-degree sexual abuse for fondling a 13-year-old girl, and he was sentenced to 75 months. He contended on appeal that the trial court erred when it denied his motion to compel the state to allow him to plead guilty to attempted first-degree sexual abuse, asserting that the district attorney unlawfully refused to allow him to plead to the lesser offense. *Held*: Affirmed. [1] Neither ORS 135.405 nor Art I, § 20, requires the district attorney to offer adults the same opportunities for a plea bargain that are offered to juveniles charged with the same offense. [2] The district attorney did not unconstitutionally give controlling weight to the wishes of the victim in determining whether to offer a plea bargain to defendant. [3] The district attorney has a systematic, coherent policy on plea bargains for Measure 11 offenses that was consistently applied to defendant.

*State v. Longnecker*, 175 Or App 33, 27 P3d 509, *rev den*, 332 Or 656 (2001). Defendant was convicted of seven felony offenses based on his kidnapping and extended torture and repeated sexual assault of the victim. The sentencing court imposed a series of consecutive Measure 11 minimum sentences and guidelines departure sentences that total 830 months, and defendant did not object. *Held*: Reversed and remanded. [1] Defendant’s claim that the total sentence is excessive in light of *State v. Langdon* is reviewable as “plain error.” [2] Defendant’s failure to file a motion under ORS 138.083(1) to correct the judgment does not bar plain-error review on appeal. [3] The departure sentences imposed are error because they exceed the 400-percent limitation.

*Dugger v. Schiedler*, 174 Or App 585, 27 P3d 498 (2001). Plaintiff was convicted on charges of second-degree robbery and kidnapping with a firearm. Although those offenses were subject to Measure 11, the sentencing court orally declared Measure 11 to be unconstitutional and imposed instead a 60-month firearm-minimum sentence. Plaintiff later sought *habeas corpus* relief on a claim that the Department of Corrections was denying him earned-time credit per the no-release clause in ORS 137.707(2), and the trial court dismissed his petition. *Held*: Reversed. Because the sentencing court declared all of Measure 11 unconstitutional and the state did not appeal, the department could not deny plaintiff earned-time credits based on the no-release clause in ORS 137.707(2). Under the 60-month firearm-minimum sentence, plaintiff was eligible for earned-time credits, ORS 161.610(3).

*State v. Alvarez*, 168 Or App 393, 7 P3d 616, *rev den*, 331 Or 244 (2000). Defendant was convicted of

first-degree robbery, and the court declared Measure 11 unconstitutional on its face and imposed the 55-month presumptive sentence instead. Both parties appealed, but the state dismissed its appeal in light of *State ex rel. Huddleston v. Sawyer*. The parties then stipulated to a remand to consider an unresolved motion to suppress; the Court of Appeals “vacated” the judgment and remanded. The trial court denied the motion to suppress, reentered the conviction, and imposed the 90-month minimum sentence. *Held*: Affirmed. The remand order allowed the trial court to correct the erroneous sentence, and the rule in *State v. Turner*, 247 Or 301 (1967), that a defendant cannot receive a more onerous sentence on remand after prevailing on appeal does not apply where, as here, the original sentence was unlawful.

*State v. Mercado-Vasquez*, 166 Or App 15, 998 P2d 743 (2000). Defendant, who was from Mexico, was convicted of two counts of rape in the second degree, and the sentencing court ruled that the 75-month minimum sentence violated Article I, section 16, and imposed 16-month sentences instead. *Held*: None of the following factors cited by the sentencing court rendered the minimum sentence unconstitutional: (a) “cultural considerations” based on how such crimes are treated in Mexico; (b) that the victim may have been sexually active or a willing participant; (c) that defendant was “naïve”; (d) that defendant might have received a lighter sentence under prior law; (e) that he cooperated with the police after the crime was disclosed; and (f) that he will be deported as a result of these convictions.

*State v. McElroy*, 161 Or App 437, 984 P2d 862, *rev den*, 329 Or 527 (1999). Defendant was convicted of first-degree burglary along with multiple counts of first-degree rape, sodomy, sexual penetration, and kidnapping. The court first imposed a 120-month upward-departure sentence on the burglary conviction and then consecutive Measure 11 sentences on each of the other convictions, for a total sentence of 585 months. *Held*: Reversed and remanded for resentencing. Because the total of the Measure 11 sentences exceeded the 460-month maximum under the 400-percent rule, the court erred in imposing a consecutive sentence on the burglary conviction.

*State v. Melillo*, 160 Or App 332, 982 P2d 12, *rev den*, 329 Or 438 (1999). Defendant was convicted of robbery in the first degree, and the sentencing court refused to impose the 90-month minimum sentence and instead imposed the 38-month presumptive sentence. On the state’s petition, the Supreme Court issued a writ of mandamus directing the sentencing court to resentence defendant under Measure 11. On remand, the court again refused to impose the minimum sentence and reimposed the same sentence, and the state appealed. *Held*: Reversed. The 90-month minimum sentence is not unconstitutionally disproportionate punishment even though defendant was only 21 years old, has only minor prior convictions, cooperated with the police, and was only the “wheelman” in the robbery. “He helped to commit a crime that involved the use of a gun and that was fraught with the potential for causing fear in the victim and promoting violence.”

*State v. Silverman*, 159 Or App 524, 977 P2d 486, *rev den*, 329 Or 528 (1999), *cert den*, 531 US 876 (2000). Defendant was convicted on two counts of first-degree sexual abuse, the court refused to impose the Measure 11 minimum terms and instead placed defendant on probation, and the state appealed. *Held*: Reversed and remanded. Even though it is possible that defendant might profit from further mental-health treatment, the 75-month minimum sentences are not unconstitutionally disproportionate or cruel and unusual punishment in violation of either Article I, section 16, or the Eighth Amendment.

*State v. Ferman-Velasco*, 157 Or App 415, 971 P2d 897 (1998), *aff’d* 333 Or 422, 41 P3d 404 (2001). ORS 137.700 does not violate the proportionality clause of Article I, section 16, even though the 75-month minimum sentences for the class B felonies that defendant committed (second-degree rape and first-degree sexual abuse) are longer than the presumptive sentences prescribed for some class A felonies, “because the people rationally could believe that longer sentences are warranted from crimes against persons.”

*See also State v. McGhee*, 157 Or App 598, 971 P2d 913 (1998) (same).

*State v. Albrich*, 157 Or App 64, 969 P2d 1033 (1998), *rev den*, 328 Or 293 (1999). Sentencing court erred in refusing to impose minimum sentence on defendant’s conviction for second-degree robbery.

*State v. Gee*, 156 Or App 241, 965 P2d 462 (1998), *on recons*, 158 Or App 597, 976 P2d 80, *rev den*, 328 Or 594 (1999). Sentencing court erred in refusing to impose minimum sentence on defendant’s conviction for first-degree robbery. The court’s findings that defendant’s criminality “has largely been the product of episodic drug abuse and resultant mental illness” and that he “will respond to mental health and drug abuse treatment” does not render mandated 90-month term unconstitutionally cruel and unusual in violation of Article I, section 16.

*State v. Jackman*, 155 Or App 358, 963 P2d 170, *rev den*, 328 Or 115 (1998). Ballot Measure 11 is

constitutional.

*State v. Skelton*, 153 Or App 580, 957 P2d 585, *rev den*, 327 Or 448 (1998): Based on convictions arising out of a single incident that occurred in 1995, the court imposed a 230-month departure sentence with a 120-month minimum on defendant's first manslaughter conviction, consecutive 120-month minimum sentences on his other two manslaughter convictions, and a 70-month minimum on his assault conviction, for a total sentence of 540 months. *Held*: [1] The Court of Appeals rejected defendant's various facial constitutional challenges to Measure 11 (specifically including his claim based on the right to counsel guaranteed by the Sixth Amendment and Art I, § 11). [2] The sentencing court erred by imposing consecutive sentences that exceeded 460 months, the 400-percent limitation in OAR 213-12-020(2).

*State v. Mills*, 153 Or App 611, 958 P2d 896 (1998), *rev den*, 328 Or 275 (1999) (rejecting various facial constitutional challenges to Measure 11).

*State v. Dubois*, 152 Or App 515, 954 P2d 1264 (1998). The sentencing court declared Measure 11 unconstitutional on its face and imposed a probationary sentence on defendant's conviction for second-degree assault. The state appealed contending that the court erred in not imposing the 70-month minimum sentence mandated by Measure 11. *Held*: The sentencing court erred in failing to impose the required minimum sentence.

*See also State v. Clanton*, 152 Or App 705, 955 P2d 312 (1998).

*State v. Lewis*, 150 Or App 257, 945 P2d 661 (1997). The court must impose the term of post-prison supervision prescribed by OAR 213-05-002(2) even when it imposes the mandated minimum sentence under Measure 11 instead of the prison term prescribed by the guidelines.

*State v. George*, 146 Or App 449, 934 P2d 474 (1997): [1] Minimum sentence imposed per Measure 11 did not, on its face, violate Art I, § 16. [2] Measure 11 does not violate Art I, § 20. [3] Measure 11 does not violate Eighth Amendment.

*State v. Ysasaga*, 146 Or App 74, 932 P2d 1182 (1997): A defendant cannot challenge the validity of Measure 11 by way of a demurrer based on ORS 135.630(4), because the indictment states a prosecutable offense regardless whether Measure 11 is constitutional.

*State v. Parker*, 145 Or App 35, 929 P2d 327 (1996), *rev den*, 324 Or 654 (1997): Measure 11 does not violate a defendant's rights, guaranteed by Art I, § 11, of allocution or to counsel at sentencing.

*See also State v. George*, 146 Or App 449, 934 P2d 474 (1997).

*State v. Jackson/Hoang*, 145 Or App 27, 929 P2d 323 (1996), *rev den*, 326 Or 389 (1998): [1] Measure 11 does not violate single-subject limitation in Art IV, § 1(2)(d); [2] Measure 11 does not violate separation-of-powers principles in Art III, § 1.

*See also State v. George*, 146 Or App 449, 934 P2d 474 (1997) (same as [2]); *State v. Spence*, 145 Or App 496, 932 P2d 63 (1996), *rev den*, 325 Or 280 (1997) (same as [2]); *State v. Keerins*, 145 Or App 491, 932 P2d 65 (1996) (same as [2]).

## **2. Application to juveniles under ORS 137.707**

*Alvarado v. Hill*, 252 F3d 1066 (9<sup>th</sup> Cir. 2001). Petitioner was not entitled to *habeas corpus* relief under 28 USC § 2254 on his claim that "automatic remand" provision in ORS 137.707(1) violates his due-process rights as a juvenile under the federal constitution, or on his claim that the mandatory minimum sentence unconstitutionally precludes consideration of mitigating evidence.

*State v. Godines*, 236 Or App 404, 236 P3d 824, *rev den*, 349 Or 480 (2010). Defendant sexually abused his younger sister when he was 14 years old, but she did not disclose the abuse until after he had turned 18 years old. Defendant was charged and convicted in adult court. At sentencing, defendant did not object to the imposition of Measure 11 sentences, but he argued on appeal that the sentences were "plain error" because he was only 14 when he committed the offenses. *Held*: Affirmed. Because defendant's argument was based on a "complex issue of first impression" that was reasonably in dispute, it was not plain error.

*Coley v Morrow*, 183 Or App 426, 52 P3d 1090, *rev den*, 335 Or 104 (2002). The court in the underlying criminal

proceeding had jurisdiction to convict petitioner of robbery under ORS 137.707, because he had committed that offense on his 15<sup>th</sup> birthday, even though he committed it before the time of day on which he was born.

*State v. Pike*, 177 Or App 151, 33 P3d 374 (2001), *rev den*, 333 Or 568 (2002). [1] Because juvenile courts have jurisdiction over defendants who are under the age of 18 when proceedings are initiated, ORS 137.707 is not applicable to a defendant who is 18 years old when he is indicted. [2] The sentencing court correctly denied defendant's motion to remand him to juvenile court for disposition upon being convicted on charges of third-degree sexual abuse as lesser-included offenses to the charges of first-degree sexual abuse. Although he committed the crimes when he was 17 years old, he was not charged until he was 18 and hence there is no basis to remand him to juvenile court on those convictions.

*State v. Thorp*, 166 Or App 564, 2 P3d 903 (2000), *rev dism'd* 332 Or 559 (2001). Defendant, a 16-year-old male, was convicted of two counts of second-degree rape for having consensual intercourse with a girl who is more than 3 years younger than he is. The sentencing court ruled that the 75-month minimum sentence mandated by ORS 137.707(4)(a)(K) is unconstitutionally disproportionate punishment and imposed a 35-month sentence instead. *Held*: Reversed and remanded for entry of the minimum sentence. [1] A sentence violates Art I, § 16, only if it is "so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper." [2] Whether the sentence is disproportionate under the Eighth Amendment requires consideration of "(a) the gravity of the offense and the harshness of the penalty; (b) the sentences imposed on other criminals in the same jurisdiction; and (c) the sentences imposed for commission of the same crime in other jurisdictions." [3] In light of the historical treatment of this offense and the punishments prescribed for similar offenses, the 75-month minimum sentence is not disproportionate.

*State v. Bowman*, 160 Or App 8, 980 P2d 164 (1999), *rev den*, 334 Or 655 (2002). Defendant, a 17-year-old juvenile, was convicted of robbery in the second degree for robbing two young men at knifepoint at night. The sentencing court refused to impose the 70-month minimum sentence and instead placed defendant on probation, and the state appealed. While that appeal was pending, the court revoked defendant's probation and again refused to impose the minimum sentence and imposed the 6-month sanction prescribed by the guidelines. The state also appealed from that judgment, and the two appeals were consolidated on appeal. *Held*: The sentencing court erred by refusing to impose the 70-month minimum sentence; that sentence is not unconstitutionally disproportionate punishment in violation of Art I, § 16, even though he was only a juvenile, had no prior criminal record, and the victim was not injured. "The conduct that defendant engaged in was fraught with the potential for causing fear in the victims and promoting violence."

*State v. Shoemaker*, 155 Or App 416, 965 P2d 418, *rev den*, 328 Or 41 (1998). Defendant, age 17, robbed the victim at knifepoint, he pleaded guilty to second-degree robbery, and the court imposed the 70-month minimum term. *Held*: The sentence is not cruel and unusual punishment in violation of Art I, § 16. The court also rejected defendant's argument that Ballot Measure 11 "violates [defendant's] federal guarantee of due process, because it fails to provide for mitigation, and violates his voting rights, because it requires him to be sentenced as an adult without giving him the right to vote as an adult."

*State v. Rhodes*, 149 Or App 118, 941 P2d 1072 (1997), *rev den*, 326 Or 389 (1998). [1] ORS 137.707 is facially constitutional. [2] Imposition of the 75-month minimum sentence mandated by ORS 137.707(2)(p) on defendant's conviction for first-degree sexual abuse does not violate Art I, §§ 15 and 16, even though defendant was only 15 years old and the victim was his younger sister, particularly in light of his admission to repeated molestations even after his mother told him to stop and evidence suggesting he committed more serious offenses.

*State v. Lawler*, 144 Or App 456, 927 P2d 99 (1996), *rev den*, 326 Or 389 (1998): [1] With respect to a juvenile who is 15 to 17 years old and commits a Measure 11 offense, ORS 137.707 eliminates any juvenile-court discretion to waive jurisdiction—the charges must be tried in adult court and the court must impose the mandated sentence; [2] Measure 11 does not violate single-subject limitation in Art IV, § 1(2)(d); [3] Measure 11 does not violate Art I, § 15; [4] defendant's challenge to Measure 11 based on claim that sentence for murder violates "proportionate" clause Art I, § 16, is not reviewable, because he was not convicted of murder.

See also *State v. Spence*, 145 Or App 496, 932 P2d 63 (1996), *rev den*, 325 Or 280 (1997) (same as [3]); *State v. Keerins*, 145 Or App 491, 932 P2d 65 (1996) (same as [3]); *State v. Parker*, 145 Or App 35, 929 P2d 327 (1996), *rev den*, 324 Or 654 (1997) (same as [3]); *State v. Jackson/Hoang*, 145 Or App 27, 929 P2d 323 (1996), *rev den*, 326 Or 389 (1998) (same as [1], [2], and [3]).

### 3. Possibility of departure under ORS 137.712

*Note:* ORS 137.712 was enacted in 1997 (Or Laws 1997, ch 852) to allow, under some circumstances, a sentencing court to impose a sentence less than the minimum term on a conviction for second-degree robbery, assault, or kidnapping. That list was expanded in 1999 to include second-degree manslaughter (Or Laws 1999, ch 954, § 2), and was further expanded in 2001 to include second-degree rape, sodomy, and sexual penetration, and first-degree sexual abuse (Or Laws 2001, ch 851, § 5).

*State v. Brooks*, 256 Or App 348, 300 P3d 256 (2013). Defendant was convicted of two counts of second-degree robbery, and the sentencing court denied his request for a departure under ORS 137.712 and imposed a 70-month sentence. *Held:* Reversed and remanded. In light of *State v. Arnold*, 214 Or App 201 (2007), the court erred in ruling that defendant was disqualified under ORS 137.712(2)(d)(C) from obtaining a departure. “We remand for resentencing, at which time the trial court can consider whether defendant is otherwise eligible for a lesser sentence under ORS 137.712 and, if so, whether to exercise its discretion to impose such a sentence.”

*State v. Bowden*, 217 Or App 133, 174 P3d 1073 (2007). Under ORS 137.712(5), if a person sentenced to a probationary term violates a term of probation “by committing a new crime,” the court “shall” revoke the probation and impose the presumptive sentence under the sentencing guidelines. A juvenile “commits a new crime” under ORS 137.712(5) by engaging in conduct that would constitute a crime if committed by an adult. Although a juvenile adjudication is not a criminal conviction, the focus of the phrase “committed a new crime” in ORS 137.712(5) is on the *conduct*, rather than the legal consequences available for that conduct.

*State v. Arnold*, 214 Or App 201, 164 P3d 334 (2007). Defendant was convicted at trial of second-degree robbery based on his aiding and abetting a robbery by driving and waiting in the getaway car while two other men robbed the victim at gunpoint. The sentencing court imposed the mandatory Measure 11 sentence, rejecting defendant’s argument that the court should impose a downward departure under ORS 137.712. The sentencing court concluded that defendant was ineligible for a departure because of ORS 137.712(2)(d)(C), which permits a departure only where, “if the defendant represented by words or conduct that the defendant was armed with a deadly weapon, the representation did not reasonably put the victim in fear of imminent physical injury”; the court rejected defendant’s argument that that factor did not apply to him because he *personally* did not make any representation that he was armed. *Held:* Sentence vacated and reversed. The factor in ORS 137.712(2)(d)(C) precludes a downward departure “if the defendant represented by words or conduct that the defendant was armed with a deadly weapon, [and] the representation did not reasonably put the victim in fear of imminent physical injury.” Under that provision, the sentencing court must consider whether the representation reasonably put the victim in fear of imminent injury *only if* the defendant *personally* represented by words or conduct that he was armed with a deadly weapon. The sentencing court erroneously concluded that defendant was ineligible for a downward departure on the ground that defendant’s accomplice had represented that he had a weapon and thereby put the victim in reasonable fear of imminent injury.

*State v. Ivie*, 213 Or App 198, 159 P3d 1257 (2007). Defendant pleaded guilty to second-degree assault and the parties stipulated to a departure pursuant to ORS 137.712 to a probationary sentence but further agreed that if defendant violated the probation, the court on revocation would impose a 70-month term as the “presumptive” sentence. The court imposed that sentence without making findings under ORS 137.712 or 137.750. Later, upon revocation, defendant argued that ORS 137.712(5) barred a sentence longer than 38 months. The court disagreed and imposed the 70-month sentence and denied any eligibility for early release based on ORS 137.700(1). *Held:* Reversed and remanded. [1] In interpreting the parties’ plea agreement, “commercial contract principles apply”—“the construction of a contract is a question of law, but when the contract is ambiguous, extrinsic evidence may be used to resolve the ambiguity, and determination of a the parties’ intent is a question of fact.” The record supported the sentencing court’s finding that defendant had stipulated to a 70-month term on revocation. [2] Because 70-month term was imposed pursuant to stipulation, ORS 137.222(2)(d) barred appellate review. But because the record does not show that defendant stipulated to the no-release order, his challenge to that term is reviewable. [3] The sentencing court erred in denying eligibility for release, because defendant was not sentenced pursuant to ORS 137.700(1) and the court did not make findings under ORS 137.750 to support that order.

*State v. Anderson*, 197 Or App 193, 104 P3d 1175, *rev den*, 338 Or 583 (2005). Defendant was convicted of second-degree robbery based on her plea of guilty, and the sentencing court rejected her request for a departure under ORS 137.712 and imposed the mandatory 70-month sentence. She appealed contending that the sentencing court erred in ruling that she was disqualified from a departure. *Held:* Appeal dismissed. Defendant was not entitled to a lesser sentence

even under her argument. If the court erred, “that error deprived defendant only of an opportunity to be considered for a sub-minimum sentence; it did not expose her to a sentence that exceeded the legal maximum.” Consequently, her claim of error is not reviewable under ORS 138.050(3) and “we lack jurisdiction to consider it.”

*State v. Crescencio-Paz*, 196 Or App 655, 103 P3d 666 (2004), *rev den*, 339 Or 230 (2005). The sentencing court erred when it granted defendant a downward departure under ORS 137.712(2) on his conviction for second-degree robbery on the ground that the state failed to allege in the indictment and prove facts at trial that would *disentitle* him to a departure. Neither *Blakely* nor *State v. Quinn* requires the state to allege and prove facts apart from the elements of the offense in order negate the possibility of a downward departure.

See also *State v. White*, 217 Or App 214, 175 P3d 504 (2007), *aff’d on rev of other issue*, 346 Or 275, 211 P3d 248 (2009) (jury findings are not required for facts that render a defendant ineligible for a *downward* departure under ORS 137.712).

*State v. Isbell*, 178 Or App 523, 38 P3d 272 (2001). For purpose of ORS 137.712, which allows a sentencing court depart from a Measure 11 minimum sentence under some circumstances, “previous conviction” means “a finding of guilt that is entered in the register any time before sentence is imposed on the current crime.” Consequently, although defendant was eligible for departure on his first of three convictions for second-degree robbery, he was ineligible under ORS 137.712(2)(d)(D) based on that conviction when the court imposed sentence on the second and third convictions for second-degree robbery.

#### 4. “Jessica’s Law” (ORS 137.700(2)(b)(D) to (G))

*State v. Hoover*, 250 Or App 504, 280 P3d 1061, *rev den*, 352 Or 564 (2012). Defendant was charged with first-degree unlawful sexual penetration by digitally penetrating the vagina of a child under the age of 12. The court found defendant guilty and imposed the 300-month sentence mandated by ORS 137.700(2)(b)(F). *Held*: Affirmed. The court summarily rejected defendant’s *Rodriguez/Buck* challenge to the 300-month sentence.

*State v. Wiese*, 238 Or App 426, 241 P3d 1210 (2010), *rev den* 349 Or 655 (2011). Defendant was convicted of two counts of first-degree sodomy, two counts of first-degree sexual abuse, and one count of first-degree rape for sexually assaulting his 11-year-old step-daughter, and was sentenced to 300 months in prison under ORS 137.700(2)(b). On appeal, defendant argued that his sentence was disproportionate to the offenses and constituted cruel and unusual punishment under the state and federal constitutions. *Held*: Affirmed. Defendant’s sentence was not disproportionate to his offenses because (1) the severity of the penalty is congruent with the gravity of the offense—his repeated sexual abuse of his 11-year-old stepdaughter for over a year—even though she did not suffer serious physical injuries; (2) the court has previously rejected a comparison of the penalties for sexual abuse of children and intentional murder; and (3) defendant had prior convictions for robbery and assault and his punishment for those offenses did not deter him from engaging in criminal behavior.

*State v. Alwinger*, 231 Or App 11, 217 P3d 692 (2009), *on recon*, 236 Or App 240, 236 P3d 240 (2010). Under *Rodriguez/Buck*, the 300-month sentence imposed pursuant to ORS 137.700(2)(b)(F) on defendant’s conviction for first-degree sexual penetration did not violate Art I, § 16, or the Eighth Amendment even though defendant was a first-time offender and the crime did not result in physical injury.

*State v. Shaw*, 233 Or App 427, 225 P3d 855 (2010). Defendant was convicted of first-degree rape of an 11-year-old girl and the court imposed a sentence of 300 months and a lifetime term of post-prison supervision pursuant to ORS 137.700(2)(b)(D). *Held*: Affirmed. That sentence does not violate Art I, § 16, or the Eighth Amendment.

*State v. Pardee*, 229 Or App 598, 215 P3d 870, *rev den*, 347 Or 349 (2009). Defendant was convicted of two counts of first-degree rape, four counts of first-degree sodomy, two counts of first-degree unlawful sexual penetration, and three counts of first-degree sexual abuse. He was sentenced to a total of 400 months in prison and a lifetime PPS pursuant to ORS 137.700(2)(b)(D) to (F) and ORS 144.103(2), which require imposition of a 300-month sentence and lifetime term of PPS for such convictions when the victim is under the age of 12. Defendant appealed contending that those statutes violate Art I, § 16. *Held*: Affirmed. The only issue presented on appeal is an as-applied proportionality challenge, and defendant’s sentence is “not unconstitutionally disproportionate to his crimes” under the standard set forth in *State v. Wheeler*, 343 Or 652 (2007). Defendant’s primary argument is that, because the penalty for intentional murder—300 months imprisonment without mandatory lifetime PPS—is less severe than the penalty that he received for each of seven counts of which he was convicted, the latter penalties are disproportionate. “But as *Wheeler* makes clear, the text and history of Art. I, § 16,

establish that disproportionality is a measure of the relationship between a penalty and *the* offense, not the relationship between penalty for one offense and the penalty for another.”

## F. REPEAT PROPERTY OFFENDERS (ORS 137.717)

*Note:* When ORS 137.717 was enacted in 1996, the prescribed terms were “minimum sentences.” Or Laws 1996, ch 1. In 1999, the statute was amended to provide that the prescribed terms instead are “presumptive sentences.”

*State v. Williams*, 254 Or App 746, 295 P3d 693 (2013) (*per curiam*). The sentencing court erred when it imposed a sentence under ORS 137.717 based defendant’s prior conviction for theft of services under ORS 164.125, because such a conviction does not count as a predicate offense for purposes of the statute.

*State v. Hicks*, 249 Or App 196, \_\_\_ P3d \_\_\_, *rev den*, 352 Or 341 (2012). Based on a single incident involving a single victim, defendant was convicted of second-degree burglary and first-degree criminal mischief. The sentencing court determined that each conviction is subject to the 13-month presumptive sentence in ORS 137.717(1)(b), and it departed upward to 26 months on each and ordered defendant to serve the sentences consecutively, for a total sentence of 52 months. On appeal, defendant argued that the sentences are error because the court did not comply with the “shift to column I rule,” OAR 213-012-0020(2)(a)(A), when it imposed a consecutive sentence on the criminal-mischief conviction. *Held:* Affirmed. Although the sentences prescribed by ORS 137.717(1)(b) (2009), are described as “presumptive” sentences, they nonetheless are “statutorily mandated sentences” and thus are not subject to the “shift to column I” rule. Under ORS 137.717(3) (2009), the prescribed “presumptive” sentences are “mandatory” unless the sentencing court imposes a *longer* sentence that is otherwise authorized by law.

*State v. Earls*, 246 Or App 578, 267 P3d 171 (2011). Based on his pleas of guilty, defendant was convicted on multiple counts of negotiating a bad check and other theft offenses. The sentencing court considered defendant’s four previous court-martial convictions for theft offenses, ruled that these convictions consequently are subject to ORS 137.717, and imposed 13-month presumptive sentences. *Held:* Reversed and remanded. “In light of those structural distinctions between courts vested with authority under Article III, and courts-martial, authorized by Congress pursuant to its Article I powers, we conclude that a ‘federal court’ under ORS 137.717 is a criminal court that derives its authority from Article III. A court-martial does not fit that bill. Therefore, court-martial convictions are not ‘previous conviction[s]’ under ORS 137.717(4).”

*State v. Sumpter*, 227 Or App 513, 206 P3d 1088 (2009). Defendant was convicted of first-degree assault, first-degree theft, and UUV, and the court imposed a 13-month sentence on the theft and UUV convictions pursuant to ORS 137.717 (RePO) based on his previous Nevada conviction for robbery. *Held:* Convictions affirmed; remanded for resentencing. Defendant’s convictions for theft and UUV are not subject to RePO because “the state failed to prove that the Nevada conviction was a ‘comparable offense’ for purposes of ORS 137.717(4)(b).”

*State v. Escalera*, 223 Or App 26, 194 P3d 883 (2008), *rev den*, 345 Or 690 (2009). Defendant was convicted of *inter alia* UUV. Based on his previous conviction in Washington for residential burglary, the state requested a sentence of 13 month under ORS 137.717(1)(b) on the UUV conviction. Defendant argued that Washington’s burglary statute was not comparable to ORS 164.225 because Washington law defines “dwelling” more broadly than does Oregon law; he argued that, the term “comparable offense” for purposes of ORS 137.717 is equivalent to the definition in ORS 213-004-0011(3), which includes out-of-state convictions only if the elements of the offense are identical to those of the corresponding Oregon offense. *Held:* Affirmed. A “comparable [out-of-state] offense” under ORS 137.717 does not require absolute identity of elements. Although the Washington statute has a broader definition of “dwelling” than does the Oregon burglary statute—specifically, it includes fenced areas and all train cars and cargo containers—the offenses were still “comparable” for purposes of ORS 137.717. Despite minor differences in scope, the offenses share enough “like circumstances” as to make the comparison appropriate.

*State v. Mallory*, 213 Or App 392, 162 P3d 297 (2007), *rev den*, 344 Or 110 (2008). After defendant pleaded guilty to multiple offenses within the scope of ORS 137.717 (RePO), the sentencing court found that she had committed several of the offenses during separate criminal episodes and, per under ORS 137.717(5)(a), used the first offenses as predicate convictions to impose 13-month RePO sentences on her later-committed offenses. Defendant appealed, contending that she was entitled under *Blakely* to a jury trial on that issue. *Held:* Affirmed. [1] The “separate criminal episode” finding does not categorically fall into “the fact of a prior conviction” exception to the *Blakely* rule.

[2] Determining whether two offenses are based on the “same criminal episode,” as defined in ORS 131.505(4), “involves a relational examination of time, place, and circumstance” and that may not necessarily be decided by the pleas or verdicts. [3] *Shepard v. United States* permits the sentencing court to make a determination that prior convictions are based on separate criminal episodes if that determination can be made based on facts in the record that necessarily were resolved by the plea or verdict. [4] In this case, when defendant pleaded guilty to counts that alleged different dates, she thereby “admitted sufficient facts to establish that those offenses involved separate criminal episodes.”

*State v. Sauer*, 205 Or App 428, 134 P3d 1050, *rev den*, 341 Or 141 (2006). Defendant was convicted of five counts of identity theft based on separate crimes he committed in October 2002. The court rejected defendant’s claim that it should apply the current version of ORS 137.717(1)(d), which requires four predicate identity-theft convictions in order to impose the enhanced 13-month sentence, and it applied instead the former version of the statute, ORS 137.717(1)(d)(A) (2001), which required only one predicate identity-theft conviction. The court imposed consecutive 13-month sentences on second through fifth convictions. *Held*: Affirmed. Nothing in the 2003 amendment to the statute suggests that the legislature intended it to apply retroactively, and the opening phrase in ORS 137.717(1)—“When the court sentences a person ...”—cannot be construed to require the court to apply the version of the statute in force on the date of sentencing.

*State v. Jenniches*, 187 Or App 658, 69 P3d 771, *rev den*, 335 Or 578 (2003). Defendant was convicted on ten counts of theft by receiving subject to ORS 137.717 (1997), and the court departed upward on three of the convictions and imposed 26-month sentences, using the 13-month minimum sentence as a base. Defendant did not object. *Held*: Affirmed. [1] The departure sentences are “plain error” under *State v. Bagley*, because the court had authority to impose the minimum sentence under ORS 137.717 (1997) or a departure sentence under the guidelines, but not both. [2] Despite the error, the Court of Appeals declined to grant relief, because “the state has articulated and developed an alternative theory for affirming defendant’s sentences,” it is clear that, on remand for resentencing under ORS 138.222(5), “the court lawfully could, and would, impose the same total term of imprisonment” by restructuring the sentences, and the sentencing court denied defendant’s motion for entry of a corrected judgment under ORS 138.083(1).

*State v. Young*, 183 Or App 400, 52 P3d 1102 (2002). Defendant was convicted of two offenses subject to ORS 137.717 (1997), and the court imposed consecutive 13-month minimum sentences on those convictions. *Held*: Because those 13-month terms are mandated as minimum sentences and none of the exemptions set forth in ORS 137.717(3) apply, those consecutive sentences are not subject to the 200-percent and shift-to-column-I limitations in the guidelines.

*Note*: Under the current version of ORS 137.717, the prescribed sentence is described as a “presumptive sentence,” not a minimum sentence.

*State v. Keefer*, 169 Or App 338, 8 P3d 1002 (2000). A sentencing court imposed the 13-month prison term mandated by ORS 137.717 but suspended execution and placed defendant on probation. *Held*: Reversed. A sentencing court lacks authority to suspend the execution of a prison term imposed under ORS 137.717.

*State v. Bagley*, 158 Or App 589, 976 P2d 75 (1999). Defendant was convicted of a UUV offense subject to ORS 137.717, the “repeat property offenders” statute. The conviction was a presumptive-probation offense, but the statute mandates a 13-month minimum term. The sentencing court made a finding of an aggravating factor, and imposed an 18-month sentence as a durational departure using the 13-month minimum as the base. *Held*: Reversed and remanded for entry of a corrected judgment reducing the sentence to 13 months. The 13-month minimum is not the new “presumptive sentence” for such an offense and, consequently, if the court wants to impose a longer sentence by departure it must comply with the guidelines using the presumptive sentence otherwise prescribed for the conviction. That means, in the case of a presumptive-probation conviction, that the court must do a “double departure” with two separate aggravating factors in order to impose a sentence longer than the minimum term.

*See also State v. Ware*, 161 Or App 110, 986 P2d 28 (1999) (*per curiam*).

*Note*: These decisions are no longer good law in light of the 1999 amendment. *See note, above*.

## G. “THREE STRIKES” LAW (ORS 137.719)

*State v. Wheeler*, 343 Or 652, 175 P3d 438 (2007). [1] ORS 137.719, which prescribes a presumptive life sentence for a third conviction for certain sexual offenses, is not facially disproportionate. Although reasonable people could argue about whether repeat sexual offenses should be treated differently from crimes of other types, the legislature’s decision to enact ORS 137.719 was not unreasonable. [2] Application of ORS 137.719 to defendant was not

disproportionate based on defendant's assertion that the offenses did not result in any permanent physical injury to the victims. Defendant's sentences bear a sufficient relationship to the gravity of the crimes of which he was convicted and his prior felony convictions.

*State v. Molette*, 255 Or App 29, 296 P3d 594, *rev den*, 353 Or 788 (2013). Defendant was convicted of second-degree sexual abuse, and the jury also found: that he had convictions for prior felony sex crimes in Texas; that prior criminal sanctions had not deterred him; that he had been persistently involved in similar criminal activity; and his incarceration was necessary for public safety. The state asked the sentencing court to impose the presumptive life sentence under ORS 137.719, defendant asked for a lesser sentence, and the court imposed the life sentence. On appeal, defendant relied on *Gordon v. Hall*, 232 Or App 174 (2009), to argue that the court erred when it imposed the life sentence, because the state failed to prove that he had received two prior "sentences" for felony sex crimes—he asserted that he received only probation for his two previous sex offenses. He also argued that the court erred because it imposed the life sentence based on an incorrect assumption that a downward departure sentence under ORS 137.719 may not exceed the authorized statutory maximum for the offense. *Held*: Affirmed. Neither argument was preserved, and neither qualifies as "plain error," because it is not obvious that the sentencing court erred in either respect.

*Gordon v. Hall*, 232 Or App 174, 221 P3d 763 (2009). Petitioner was convicted of first-degree sexual abuse and the court imposed a life sentence pursuant to ORS 137.719(1) based on petitioner's previous convictions for sexual offenses in California. The conviction and sentence were affirmed on appeal. Petitioner filed a petition for post-conviction relief contending his trial counsel did not provide constitutionally adequate assistance when he did not argue that one of his previous convictions, on which the court imposed only probation, could not be counted under ORS 137.719(3). The court denied the claim. *Held*: Reversed. [1] Because ORS 137.719(1) uses the phrase "sentenced for sex crimes" rather than "convicted of sex crimes," the question is whether he was *sentenced* on the previous conviction. [2] Under both Oregon and California law at that time, probation was not a "sentence." Because the California court deferred imposition of a prison sentence on that conviction and instead put him on probation, and petitioner successfully completed probation, he was not "sentenced" within the meaning of ORS 137.719(1). It is immaterial that Oregon law now views probation as a "sentence." [3] Because petitioner's trial counsel had a valid objection he could have interposed and he did not, he did not provide constitutionally adequate assistance and petitioner suffered prejudice that warrants relief.

*State v. Rhoades*, 210 Or App 280, 149 P3d 1259 (2006). Although defendant's convictions for third-degree rape and sodomy are subject to the presumptive life sentence under ORS 137.719(1) due to his prior convictions for sexual offenses, the sentencing court departed downward pursuant to ORS 137.719(2) to impose only a 60-month sentence based on findings that the 15-year-old victim consented to the activity and that the crimes involved the same victim in the same time period and general area. *Held*: Reversed and remanded. [1] Appellate review is limited to whether the findings are supported by the evidence and the reasons given constitute substantial and compelling reasons for departure. "We review the sentencing court's explanation of why the circumstances are so exceptional that the imposition of the presumptive sentence would not accomplish the purposes of the guidelines." [2] Because the victim's consent is legally irrelevant to the charges, her consent "cannot transform her harm into one that is 'less than typical' for those offenses" under OAR 213-008-0002(2)(a)(G). Thus, the court erred in relying on that mitigating factor. [3] Although the "close in time and space" finding is not a mitigating factor set forth in the rule, those factors are nonexclusive. The "merger" rule in ORS 137.719(3) does not preclude consideration of that factor. "[T]he particular circumstances here may be considered mitigating circumstances in determining if there are substantial and compelling reasons to depart from the presumptive life sentence." [4] Because the court erred in relying on the "less than typical" factor and did not find that it would have so departed based only on the "close in time and space" factor, the proper remedy is to remand for resentencing.

*State v. Meyrovich*, 204 Or App 385, 129 P3d 729, *rev den*, 340 Or 673 (2006). Defendant, who had been convicted nine times previously of sexual offenses, was found guilty of first-degree burglary and first-degree sexual abuse for forcibly kissing the victim on her neck. The court imposed a life sentence on that conviction pursuant to ORS 137.719(1). *Held*: Affirmed. [1] "[A] sentence violates the proportionality requirement of [Art I, § 16] only if it is so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper. Further, ... determining sentences is a legislative function that should be subjected to an extremely deferential level of judicial review." [2] ORS 137.719(1) does not prescribe a life sentence based on the gravity of the offense but on "the fact that the offender is a habitual sex criminal," and "Oregon courts have long recognized the validity of statutes that provide enhanced penalties based on the repetitive nature of the offense." [3] The life sentence does not violate Art I, § 16, given defendant's history of repeated sexual offenses and that "he never acknowledged culpability for his actions in the present case."

## H. NO-RELEASE ORDER (ART. I, § 44(1)(A); ORS 137.750)

ORS 137.750 to 137.754 were enacted in 1997 as part of Senate Bill 936 to implement Ballot Measure 40 (1996). Or Laws 1997, ch 313, §§ 14-16.

In 1999, the people approved Art I, § 44, which 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; and (B) Judicial authority to grant appellate or post-conviction relief.”

*Note:* Many other statutes, including those that are addressed above in this section, contain provisions that either preclude or restrict the availability of release during the sentence imposed.

*State v. Baskette*, 254 Or App 751, 295 P3d 177 (2013) (*per curiam*). Defendant was convicted, based on guilty pleas, of various drug- and firearm-related offenses in two consolidated cases. In orally imposing sentence, the trial court stated that defendant would be eligible for “earned time” credits but not AIP; the court did not make findings to support that decision. The subsequent written judgments denied defendant consideration for “any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing.” On appeal, defendant argued that the trial court erred in denying him eligibility for sentence reductions under ORS 137.750 without making the requisite findings. He argued that, because the error did not become apparent until the court’s written judgments were issued, he was not required to preserve the claim of error for appeal. *Held:* Remanded for resentencing. The sentencing court committed plain error by not making the findings required under ORS 137.750 to deny defendant eligibility for early release, sentence reduction, or other program.

*State v. Baker*, 240 Or App 320, 246 P3d 81 (2010) (*per curiam*). The sentencing court properly denied defendant eligibility for early release per ORS 137.750 on her various convictions for theft-related offenses. Defendant incorrectly asserted that the court based its ruling only on her criminal history, which was taken into account in calculating her sentence—the court also found, and defendant does not challenge, she “is a drug dependent person, that prior attempts at rehabilitation had not been effective for her, and that she presents a high risk of engaging in future criminal activity.”

*State v. Hammond*, 218 Or App 574, 180 P3d 137 (2008). Defendant’s act of filing of an ORS 137.754 motion *after* the execution of sentence in an attempt to convince the sentencing court to make the required findings of “substantial and compelling reasons” to support its order denying eligibility for alternative sentencing programs did not “retroactively” preserve his claim for appeal.

*State v. Casiano*, 214 Or App 509, 166 P3d 599 (2007). The sentencing court committed “plain error” by applying ORS 137.635 based on a prior conviction that was entered *after* defendant’s commission of the offense in this case. The order denying defendant eligibility for leave cannot be affirmed on the ground that the sentencing court could have exercised its discretion to deny eligibility for leave pursuant to ORS 137.750 because the record did not show that, had the sentencing court realized its error regarding ORS 137.635, it would have exercised its discretion under ORS 137.750.

*State v. Ivie*, 213 Or App 198, 159 P3d 1257 (2007). Defendant pleaded guilty to second-degree assault and the parties stipulated to a departure pursuant to ORS 137.712 to a probationary sentence but further agreed that if defendant violated the probation, the court on revocation would impose a 70-month term as the “presumptive” sentence. The court imposed that sentence without making findings under ORS 137.712 or 137.750. Later, upon revocation, defendant argued that ORS 137.712(5) barred a sentence longer than 38 months. The court disagreed and imposed the 70-month sentence and denied any eligibility for early release based on ORS 137.700(1). *Held:* Reversed and remanded. [1] In interpreting the parties’ plea agreement, “commercial contract principles apply”—“the construction of a contract is a question of law, but when the contract is ambiguous, extrinsic evidence may be used to resolve the ambiguity, and determination of a the parties’ intent is a question of fact.” The record supported the sentencing court’s finding that defendant had stipulated to a 70-month term on revocation. [2] But the court erred in denying eligibility for release, because defendant did not stipulate to that term, he was not sentenced pursuant to ORS 137.700(1), and the court did not make findings under ORS 137.750 to support that order.

*State v. Soto-Nunez*, 211 Or App 545, 155 P3d 96, *rev den*, 343 Or 206 (2007). [1] The Court of Appeals refused to review defendant’s unpreserved claim that the sentencing court erred when it entered a no-release order without making findings on the record per ORS 137.750 to support that order: “had defendant called that shortcoming to the court’s attention, it might easily have been remedied.” [2] In light of *State v. Clark*, 205 Or App 338 (2006), the sentencing court

did not commit plain error under *Blakely* by making the findings on which it ordered that defendant is ineligible for temporary leave and other forms of sentence modification under ORS 137.750.

See also *State v. Eades*, 208 Or App 173, 144 P3d 1003 (2006) (same as [2]).

*State v. Clark*, 205 Or App 338, 134 P3d 1074, *rev den*, 341 Or 245 (2006). The sentencing court's entry of a no-release order per ORS 137.750 based on findings that it made did not violate the defendant's right to jury under *Blakely*. "The denial of consideration for such beneficial modifications to a sentence does not increase the maximum penalty to which the defendant is exposed by the jury's verdict," because "[a]n order permitting consideration for sentence modifications does not mean that the defendant inevitably will receive the benefit of those programs." "[T]he rule in *Apprendi* is not implicated by facts that merely foreclose a defendant from obtaining a lesser penalty within the range authorized by the verdict."

*State v. Harvey*, 203 Or App 343, 125 P3d 792 (2005), *rev den*, 340 Or 308 (2006). Because defendant committed the crimes before December 5, 1996, the sentencing court committed plain error when it imposed a no-release order under ORS 137.750, which took effect on that date.

*State v. Vigil*, 197 Or App 407, 106 P3d 656, *on recons*, 199 Or App 525, 112 P3d 441, *rev den*, 339 Or 156 (2005). Court of Appeals refused to consider defendant's unpreserved *Blakely*-based challenge to sentencing court's findings in support of its no-release order under ORS 137.750; it is not "plain error" because it is not clear whether *Blakely* applies to an order that merely precludes early release but does not otherwise increase the maximum sentence.

See also *State v. Ross*, 199 Or App 1, 110 P3d 630, *mod on recons*, 200 Or App 143, 113 P3d 921 (2005), *rev den*, 340 Or 157 (2006) (same).

*State v. Pettigrew*, 185 Or App 313, 59 P3d 594 (2002), *rev den*, 335 Or 504 (2003). The sentencing court erred in denying defendant eligibility for early release under ORS 137.750, because defendant committed those crimes before December 5, 1996, the effective date of that statute.

*State v. Mercado-Cervantes*, 170 Or App 152, 11 P3d 268 (2000). Defendant was convicted of two counts of first-degree sexual abuse along with other crimes, and the sentencing court declared that defendant is ineligible for early release on those convictions pursuant to ORS 137.750. The state conceded that ORS 137.750 applies only to crimes committed *on or after* December 5, 1996, and that defendant committed his crimes *before* that date. Remanded for entry of a corrected judgment.

*State v. Woods*, 165 Or App 551, 997 P2d 275 (2000). ORS 137.750, which allows the sentencing court for substantial and compelling reasons to deny a defendant any form of early release, applies only to convictions based on crimes committed after December 6, 1996.

*State v. Grimes*, 163 Or App 340, 986 P2d 1290 (1999), *rev den*, 332 Or 656 (2001). Application of ORS 137.750 to a crime committed before its effective date but after December 6, 1996, does not violate the *ex post facto* clauses.

## I. OTHER PRIOR-CONVICTION OR REPEAT-OFFENDER STATUTES

See ORS 137.690 (repeat "major felony sex crimes"); ORS 137.765 (sexually violent dangerous offender); ORS 163.095(1)(c) (aggravated murder); ORS 163.118(1)(d) (first-degree manslaughter); ORS 163.149 (aggravated vehicular manslaughter); ORS 163.160(3)(a), (b) (assault); ORS 163.465(2)(b) (public indecency); ORS 163.732(2) (stalking); ORS 163.750(2) (violating stalking protective order); ORS 165.065(3) (negotiating bad check); ORS 166.023(2) (disorderly conduct); ORS 166.270 (felon in possession); ORS 166.438(5) (unlawful transfer of firearm); ORS 475.925 to ORS 475.935 (drug offenses); ORS 813.010(5) and ORS 811.011 (DUII).

*Note:* The 2009 Legislative Assembly enacted ORS 136.433 to 136.434, which prescribe a specific procedure for the pleading and proof of, and a collateral attack on, a previous conviction that constitutes an element of the offense (*e.g.*, for a charge of felony in possession of a firearm) or sentence-enhancement factor. The new provisions took effect on January 2, 2010.

## 1. Constitutional challenge to validity, scope, or application of statute

See also Part II-B (“Defendant’s Constitutional Rights at Sentencing”), *above*.

*State v. Hirsch/Friend*, 338 Or 622, 114 P3d 1104 (2005). [1] The right to bear arms guaranteed by Art I, § 27, does not deprive the legislature of authority to regulate the possession and use of arms to protect public safety. That regulatory power allows the legislature to restrict possession and use of weapons by a class of persons that poses an identifiable threat to the public due to their previous commission of serious criminal conduct. [2] ORS 166.270(1), which prohibits felons from possessing firearms, is a valid exercise of legislative authority and does not violate Art I, § 27.

*State v. Hopson*, 220 Or App 366, 186 P3d 317 (2008), *mod on recons*, 228 Or App 91, 206 P3d 1206 (2009). The right-to-jury rule in *Blakely* applies to imposition of a lifetime term of post-prison supervision under ORS 137.765 (2005) based on a finding that the defendant is a sexually violent dangerous offender. For purposes of *Blakely*, an extended term of post-prison supervision is part of the “sentence.”

*Note*: The current version of ORS 137.767(6) provides that the defendant is entitled to a jury trial on the issue of whether he is a SVDO.

*State v. Meyrovich*, 204 Or App 385, 129 P3d 729, *rev den*, 340 Or 673 (2006). Defendant, who had been convicted nine times previously of sexual offenses, was found guilty of first-degree burglary and first-degree sexual abuse for forcibly kissing the victim on her neck. The court imposed a life sentence on that conviction pursuant to ORS 137.719(1). *Held*: Affirmed. [1] “[A] sentence violates the proportionality requirement of Article I, section 16, only if it is so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper. Further, ... determining sentences is a legislative function that should be subjected to an extremely deferential level of judicial review.” [2] ORS 137.719(1) does not prescribe a life sentence based on the gravity of the offense but on “the fact that the offender is a habitual sex criminal,” and “Oregon courts have long recognized the validity of statutes that provide enhanced penalties based on the repetitive nature of the offense.” [3] The life sentence does not violate Art. I, § 16, given defendant’s history of repeated sexual offenses and that “he never acknowledged culpability for his actions in the present case.”

## 2. Challenge to constitutional validity of a predicate conviction

See also Part V-A (“Constitutional Challenges to Counting of a Prior Conviction”), *above*.

*Iowa v. Tovar*, 541 US 77, 124 S Ct 1379, 158 L Ed 2d 209 (2004). Defendant was prosecuted as a repeat DUII offender, and he asserted a collateral challenge to a prior DUII conviction that was based his uncounseled plea of guilty. The trial court rejected that challenge but the state supreme court reversed, concluding that the prior conviction was invalid under the Sixth Amendment because the record failed to establish that, in that prior proceeding, defendant was advised that pleading guilty without counsel (1) entails the risk that a viable defense will be overlooked, and (2) deprives him of an independent opinion whether pleading guilty is wise based on the law and facts. *Held*: Reversed. [1] Less rigorous warnings are required at a change of plea than before trial. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to counsel for purpose of the plea, and the range of allowable punishments attendant upon entry of the guilty plea. Neither warning required by the state supreme court is mandated by the Sixth Amendment. [2] In a collateral attack on a prior conviction, defendant has the burden to prove that he did not completely and intelligently waive his right to counsel. Defendant failed to establish that his waiver was not knowing and voluntary.

*Custis v. United States*, 511 US 485, 114 S Ct 1732, 128 L Ed 2d 517 (1994). Defendant was convicted of a federal firearms offense, the government then relied on defendant’s prior state-court armed-felony convictions to seek an enhanced sentence under the federal Armed Career Criminal Act, and defendant asserted a collateral attack on those prior convictions by contending that he had been denied effective assistance of counsel during those proceedings. The sentencing court refused to consider that challenge, and it imposed the enhanced sentence based on those convictions. The Supreme Court affirmed, holding [1] that the ACCA statute did not permit collateral attacks on predicate convictions, and [2] that use of those convictions to impose an enhanced sentence did not violate defendant’s rights under the Due Process Clause. On the latter point, the Court held that the collateral-attack exception applied in *Burgett v. Texas*, 389 US 109 (1967), and progeny is limited to collateral attacks based on a complete deprivation of the right to counsel, as opposed to claims of mere ineffective assistance.

*Note:* The Court left open the possibility that defendant thereafter could obtain post-conviction relief from the challenged convictions in state court and then seek modification of the ACCA sentence imposed in this case.

**Parke v. Raley**, 506 US 20, 113 S Ct 517, 121 L Ed 2d 391 (1992) (federal *habeas corpus* proceeding). Kentucky recidivism statute places burden of proof on defendant to assert and establish claim that prior convictions are invalid; the prosecution needs to prove only that the prior convictions were entered. In this case, the prosecution produced the records of conviction showing that petitioner was convicted upon guilty pleas, no transcript of the change-of-plea hearing was available, petitioner testified that his pleas were not knowing and voluntary, and the district court held that petitioner failed to establish that the convictions are invalid. *Held:* Affirmed. The Kentucky statute is constitutional—*i.e.*, that it does not violate the Due Process Clause to place the burden of proof on the petitioner in this context to establish the invalidity of a prior conviction.

**State v. Jacob**, 344 Or 181, 180 P3d 6 (2008). The sentencing court refused to impose the 30-year minimum sentence mandated by ORS 161.610(4)(c) on defendant's third conviction for a firearm offense, ruling that defendant's first firearm sentence was invalid under *State v. Wedge* even though he had not previously challenged that sentence on appeal, in a post-conviction proceeding, or at his second sentencing for a firearm offense. *Held:* Reversed with directions to impose sentence. Defendant cannot collaterally attack the validity of the earlier punishment at his sentencing based on the new firearm conviction.

**Bailey v. Lampert**, 342 Or 321, 153 P3d 95 (2007). Petitioner was convicted of felony offenses in 1995 and unsuccessfully challenged those convictions on appeal and in a post-conviction proceeding. Meanwhile, and based on those convictions, he was convicted in 2000 of felon in possession of a firearm (FIP). In 2003, the Ninth Circuit vacated his felony convictions based on a *Brady* violation, and the state elected not to re prosecute him. He then filed a post-conviction proceeding contending that the vacation of his felony convictions renders his FIP conviction void. *Held:* Relief denied. [1] The plain language of ORS 166.270 supports petitioner's FIP conviction—the only issue is whether, at time defendant possessed the firearm, he previously was convicted of a felony. [2] By enacting ORS 161.025(2), “the legislature has eliminated the availability of any ‘rule of lenity.’” [3] For purposes of ORS 166.270, a person's status as a felon “continues unless and until the conviction is validated or the person brings himself within one of the statutory exceptions.” [4] Petitioner's constitutionally based challenges have no merit: (a) in *City of Pendleton v. Standerfer*, 297 Or 725 (1984), the defendant asserted his collateral challenge to the validity of the predicate conviction within the same case; (b) the prior conviction in *Standerfer* was invalid based on denial of counsel; and (c) petitioner's due-process challenge has no merit in light of *Lewis v. United States*, 445 US 55 (1980).

**State v. Probst**, 339 Or 612, 124 P3d 1237 (2005). Defendant was convicted of felony DUII under ORS 813.010(5) based on her three prior DUII convictions. She collaterally challenged one of her prior convictions, presenting evidence that she was not represented by counsel when she pleaded guilty, but the trial court overruled her challenge. *Held:* Remanded. [1] In a prosecution for felony DUII, “the existence of the predicate convictions is an element of the felony charge that the state must prove beyond a reasonable doubt, but the *validity* of the predicate convictions is not an element” that the state must prove. A judgment of conviction that has become final is “entitled to a presumption of validity.” [2] In light of *Parke v. Raley*, the decision in *State v. Grenvik* “is not correct. It is permissible, under the Sixth Amendment, to place the burden of persuasion on a defendant who collaterally attacks the validity of a prior conviction that has become final.” Consequently, “the burden is on the defendant to prove by a preponderance of the evidence that it was invalid.” [3] “But lack of counsel [in the prior proceeding], although relevant, is not dispositive. Defendant needed to be able to point to some evidence — from her own testimony or otherwise — tending to show that the absence of counsel *resulted in an involuntary plea*, whether because she was unaware of the possible consequences of proceeding without a lawyer, or otherwise.” [4] Because “there is no such evidence in this record, either directly or by permissible inference,” the trial court correctly rejected defendant's challenge. Given that defendant reasonably believed that *Grenvik* was the law, however, the case was remanded for defendant to have an opportunity to prove that her plea in that case was involuntary.

*See also State v. Kaneshige*, 205 Or App 48, 132 P3d 670 (2006) (*per curiam*).

**State v. Cervantes-Oropeza**, 215 Or App 518, 170 P3d 1114 (2007). Defendant appealed from a judgment imposing sentence on his conviction for felony DUII, arguing that the sentencing court had erroneously considered his prior DUII convictions (which were based on guilty pleas) in determining his criminal-history score. He asserted that the prior convictions were invalid on the ground that the state had failed to prove that he had executed written jury waivers in those cases. *Held:* Affirmed. Although Art I, § 11, requires a written waiver in the event that the defendant elects to waive trial by jury “and consent to be tried by the judge of the court alone,” the constitutional text, the pertinent case law, and the

historical circumstances of the constitutional provision demonstrate that that provision does not require a written waiver of jury trial if the defendant seeks to plead guilty.

*State v. Forrest*, 213 Or App 151, 159 P3d 1286 (2007). In prosecution for felony DUII, the trial court properly denied defendant's motion to exclude evidence of his prior DUII conviction as uncounseled. Although the court in the prior proceeding accepted defendant's waiver of counsel and guilty plea without an express "pitfalls" colloquy, the written plea petition that defendant had executed "sufficed to inform defendant of the risks of self-representation," and from that the trial court properly found that "defendant appreciated the risks of proceeding without advice of counsel and knowingly waived his right to counsel."

*State v. Eades*, 208 Or App 173, 144 P3d 1003 (2006). Under *State v. McCoin*, 190 Or App 532 (2003), the sentencing court correctly counted defendant's prior DUIIs when calculating his criminal-history score, even though those prior convictions were the basis of his conviction for felony DUII.

*State v. McKenzie*, 195 Or App 318, 97 P3d 1242 (2004). Defendant was charged with felony DUII, and he filed a pretrial motion to suppress his prior conviction for DUII in Nevada on the ground that it was based on an uncounseled no-contest plea that was constitutionally infirm. The trial court suppressed the conviction on the ground that the plea form and change-of-plea colloquy do not sufficiently establish that defendant was warned of the relative dangers of disadvantages of proceeding without counsel, and the state appealed. *Held*: Affirmed. Under the law of both Nevada and Oregon, a defendant who waives counsel and pleads guilty must be advised on the record of the dangers of proceeding without counsel, and this record failed to establish that fact.

*State v. McCoin*, 190 Or App 532, 79 P3d 342 (2003), *rev den*, 336 Or 422 (2004). Defendant was charged with felony DUII under ORS 813.010(5) based on six previous convictions. The trial court found him guilty and sentenced him under ORS 813.012(2), which provides that, in determining the criminal-history score for a person convicted of felony DUII, every two prior misdemeanor DUII convictions are to be counted as one person felony. On appeal, defendant argued that the three prior convictions used to elevate the current charge to a felony should not also be counted in his criminal-history score. *Held*: [1] ORS 813.012(2) requires all previous DUII convictions to be counted in a defendant's criminal-history score. [2] The statute does not violate double-jeopardy principles on the grounds that it imposes an additional punishment for defendant's *prior* convictions or by enhancing defendant's criminal-history score based on conduct that also elevated the seriousness of the current offense.

*State v. Thomas*, 187 Or App 192, 66 P3d 570 (2003). Defendant was convicted of felony DUII, third-degree assault, and felony hit and run based on a single incident. *Held*: It does not violate the constitutional *ex post facto* clauses to include in defendant's criminal-history score, for purpose of imposing sentence on his current conviction for felony DUII, his five prior convictions for DUII, even though he committed those offenses before OAR 213-004-0009 was enacted in 1999 to require inclusion of such convictions.

*State v. Hurd*, 182 Or App 361, *rev den*, 335 Or 104 (2002). Defendant was convicted of felony DUII based on a crime he committed in 2000, and the sentencing court overruled defendant's *ex post facto* objection applied OAR 213-004-0009, as amended in 1999, to calculate his criminal-history score as "A" based on his eight pre-1999 DUII convictions. *Held*: Affirmed. Defendant's objection has no merit because "(1) he was sentenced in this case for a new crime, not for prior offenses; and (2) before he committed the new crime, defendant had notice of the penalty for reoffending."

### **3. Determining whether a prior conviction counts as a predicate conviction**

*Descamps v. United States*, 569 US \_\_\_, 133 S Ct 2276 (2013). Defendant was convicted in federal court on a charge of felon in possession of a firearm, and the government sought an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 USC § 924, which requires proof of three previous convictions for, *inter alia*, "a violent felony," which is defined to include "burglary." Among defendant's previous convictions was one entered in California state court, based on his plea of guilty, for the offense of "burglary," which is defined by state law to include entering certain locations with an intent to commit larceny or "any felony." Because the state statute does not include as an element either "breaking" or an unlawful entry, the burglary offense is defined broadly enough to include shoplifting. Defendant argued that his conviction for burglary could not be counted as a predicate under the ACCA because the California statute defines the offense too broadly, but the district court overruled that objection after reviewing the record of that case to determine that his offense, in fact, involved "breaking and entering" a business. As a result, the court imposed a significantly longer

sentence under the ACCA. The Ninth Circuit, in a split *en banc* decision, affirmed. *Held*: Reversed and remanded. Defendant's conviction cannot count as a predicate under the ACCA. [1] For a prior conviction to count as one for a "violent felony" under the ACCA, it must have been for the "generic" version of one of the listed offenses. "So, for example, we held that a defendant can receive an ACCA enhancement for burglary only if he was convicted of a crime having the basic elements of generic burglary—*i.e.*, 'unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" [2] Under *Taylor v. United States*, 495 US 575 (1990), the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses (*e.g.*, burglary) requires a "categorical approach": "Sentencing courts may look only to the statutory definitions—*i.e.*, the elements—of a defendant's prior offenses, and *not* to the particular facts underlying those convictions. If the relevant statute has the same elements as the 'generic' ACCA crime, then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is necessarily guilty of all the generic crime's elements. But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." [3] When the statute defines the offense in alternative language, the court may use the "modified categorical approach": "it may look beyond the statutory elements to the charging paper and jury instructions used in a case" to determine whether the defendant was convicted of an alternative that would constitute the "generic version" of the listed offense. "For example, if the burglary statute prohibits 'entry of a vehicle or a building,' one of those alternatives (a building) corresponds to an element in generic burglary although the other (a vehicle) does not," in which case resort to the statute alone does not resolve the question. "Because the statute is 'divisible'—*i.e.*, comprises multiple, alternative versions of the crime—a later sentencing court cannot tell, without reviewing something more, if the defendant's conviction was for the generic (building) or non-generic (vehicle) form of burglary. Hence *Taylor* permitted sentencing courts, as a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction." *See also Shepard v. United States*, 544 US 13 (2005). [4] The "generic version" of burglary that applies to the ACCA "requires an unlawful entry along the lines of breaking and entering." But California's version "does not, and indeed covers simple shoplifting." Because California "defines burglary more broadly than the generic offense," defendant's burglary conviction "cannot serve as an ACCA predicate. Whether [he] *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not." [5] "The Ninth Circuit erred in invoking the modified categorical approach to look behind [defendant's burglary] conviction in search of record evidence that he actually committed the generic offense. The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction."

*Note*: A conviction in Oregon for first- or second-degree burglary presents a problem under this decision. To be sure, ORS 164.215 and ORS 164.225 generally define the offense as a "generic" burglary—*i.e.*, they require an allegation and proof that the defendant "enters or remains unlawfully in a building." But the definition of "building" in ORS 164.205(1) is far broader than the common-law conception of that term—it also includes "any booth, vehicle, boat, aircraft, or other structure adapted for overnight accommodation of persons or for carrying on business therein." Consequently, the Ninth Circuit held in *United States v. Mayer*, 560 F3d 948, 958-59 (9<sup>th</sup> Cir 2009), that an unadorned conviction for first-degree burglary under ORS 164.225(1) does not count as a predicate under the "burglary" term in 18 USC § 924(e)(2)(B)(ii). (But the court then went on to hold that the defendant's prior burglary conviction at issue in that case otherwise met the catch-all definition of "violent felony." 560 F3d at 960-63.) It appears from the Court's discussion in *Deschamps* of "divisible" statutes that an Oregon prosecutor can avoid the problem that tripped up the Ninth Circuit in *Mayer* by specifically alleging that the defendant committed the crime in a *real* building. Because the problem identified in *Mayer* is that "building" is defined in overbroad terms for purposes of the "generic" analysis, and because the definition of "dwelling" in ORS 164.205(2) incorporates the term "building," it may be necessary to allege something more specific than just "building" or "dwelling."

*Shepard v. United States*, 544 US 13, 125 S Ct 1254, 161 L Ed 2d 205 (2005). In light of *Apprendi* concerns, in a prosecution under Armed Career Criminal Statute in which the government must prove that defendant's prior state-court conviction for burglary was based in fact on a "generic burglary" within the meaning of "violent felony" element, the court is limited to determining pertinent information only from those facts necessarily resolved in the state-court proceeding. That includes the language in the charging instrument, the defendant's admissions or factual basis for the plea in a plea case, the jury instructions given in a case tried to a jury, the court's on-the-record factual findings in a case tried to the court, and any finding expressly made by the court.

**Bailey v. Lampert**, 342 Or 321, 153 P3d 95 (2007). Petitioner was convicted of felony offenses in 1995 and unsuccessfully challenged those convictions on appeal and in a post-conviction proceeding. Meanwhile, and based on those convictions, he was convicted in 2000 of felon in possession of a firearm (FIP). In 2003, the Ninth Circuit vacated his felony convictions based on a *Brady* violation, and the state elected not to reprosecute him. He then filed a post-conviction proceeding contending that the vacation of his felony convictions renders his FIP conviction void. *Held*: Relief denied. [1] The plain language of ORS 166.270 supports petitioner’s FIP conviction—the only issue is whether, at time defendant possessed the firearm, he previously was convicted of a felony. [2] By enacting ORS 161.025(2), “the legislature has eliminated the availability of any ‘rule of lenity.’” [3] For purposes of ORS 166.270, a person’s status as a felon “continues unless and until the conviction is validated or the person brings himself within one of the statutory exceptions.” [4] Petitioner’s constitutionally based challenges have no merit: (a) in *City of Pendleton v. Standerfer*, 297 Or 725 (1984), the defendant asserted his collateral challenge to the validity of the predicate conviction within the same case; (b) the prior conviction in *Standerfer* was invalid based on denial of counsel; and (c) petitioner’s due-process challenge has no merit in light of *Lewis v. United States*, 445 US 55 (1980).

^ **State v. Stark**, 248 Or App 573, 273 P3d 941, *rev allowed*, 352 Or 564 (2012). Defendant was convicted of a felony offense in 2004, and the judgment in that case allowed him to apply for “misdemeanor treatment” upon his completion of probation. In 2006, defendant obtained an order reducing his felony conviction to a misdemeanor. *See* ORS 161.705(1)(d). In May 2008, defendant was charged with being a felon in possession of a firearm. Defendant then obtained a *nunc pro tunc* judgment memorializing that his felony conviction had been reduced to a misdemeanor. At the trial, defendant moved for acquittal, arguing that the reduction of his conviction to a misdemeanor meant that he was not a felon at the time he possessed the firearm. The trial court denied his motion, and he was found guilty. *Held*: Affirmed. Under ORS 166.270(3)(a), a person “has been convicted of a felony” for purposes of the FIP offense “if, at the time of conviction for an offense, that offense was a felony under the law of the jurisdiction in which it was committed” but that such a conviction is not a felony if “[t]he court declared the conviction to be a misdemeanor at the time of judgment.” The phrase “at the time of judgment” in that provision “refers to the time when an original felony judgment of conviction was entered, not to a later time when a judgment reducing such conviction to misdemeanor status might be entered.”

**State v. Rutherford**, 244 Or App 113, 260 P3d 542 (2011). Defendant pleaded guilty to DUII, and the state asked the sentencing court to permanently revoke his driving privileges per ORS 809.235(1)(b)(A) on the ground that he had been convicted of DUII “for a third or subsequent time” under a “statutory counterpart” clause. The state offered evidence that defendant had two previous convictions for DUII in Nevada. Defendant argued that the Nevada DUII statute is not a “statutory counterpart” of Oregon’s DUII statute. The trial court imposed the permanent revocation. *Held*: Affirmed. [1] A DUII statute in another state can be a statutory counterpart of Oregon’s DUII statute so long as it has the “same use, role, or characteristics”—“even if it does not have the same elements as ORS 813.010.” A foreign DUII statute that criminalizes a broader range of conduct may still be a “statutory counterpart.” [2] Even though the Nevada statute may be broader “because it includes more intoxicants than ORS 813.010” and “applies to defendants who have a blood alcohol level of up to 0.08 [percent] or more up to two hours after driving,” it nonetheless “qualifies as a statutory counterpart to ORS 813.010.” [3] Defendant’s claim that a first DUII in Nevada should be considered equivalent to a diversion under Oregon law—and hence not a DUII conviction—has no merit. A first DUII conviction in Nevada is not akin to diversion under Oregon law because such a conviction is entered as a conviction and only the sentence is suspended while the defendant completes treatment, and the conviction later can be used to enhance subsequent DUII conviction.

*See also State v. Donovan*, 243 Or App 187, \_\_\_ P3d \_\_\_ (2011) (court correctly denied defendant’s request for diversion on DUII charge because her 2004 conviction in New York on the infraction traffic offense of DUII by “driving while ability impaired” rendered her ineligible—the New York DUII statute is a “statutory counterpart” to Oregon’s DUII for purposes of ORS 813.215(1)(a)(A) because it is part of New York’s general DUII statute and “the two statutes prohibit substantially the same conduct”).

**State v. Mersman**, 216 Or App 194, 172 P3d 654 (2007), *rev den*, 344 Or 390 (2008). For felony DUII, a “statutory counterpart” need not have precisely the same elements or scope. It is sufficient that the statutes either are “remarkably similar” or “have the same use, role, or characteristics.” Defendant was convicted under an Alaska statute that is broader than Oregon’s DUII statute in that it requires only that the defendant had “physical control” over the vehicle, even without proof of driving. The court did not decide whether the statutes are “remarkably similar.” Rather, the court concluded that the statutes have “the same use, role, or characteristics.”

**State v. Ortiz**, 202 Or App 695, 124 P3d 611 (2005). Defendant was convicted of felony DUII under ORS 813.010(5) based in part on his prior conviction in Idaho for DUII under a statute that prescribes a reduced .02-percent

BAC standard for juveniles. *Held*: Reversed and remanded for entry of conviction for misdemeanor DUII. The phrase “or its statutory counterpart in another jurisdiction” that appears in ORS 813.010(5) refers only to the standard .08-percent standard in that section and does not include the lower standards that appear in other statutes for particular classes of drivers. Therefore, defendant’s prior DUII conviction under Idaho’s “zero tolerance” statute was not one under a “statutory counterpart” for purposes of ORS 813.010(5).

*Koennecke v. Lampert*, 198 Or App 444, 108 P3d 653, *rev den*, 339 Or 66 (2005). Petitioner was convicted of felony DWS in 1986, and the court imposed only a fine; the court, however, did not expressly declare the conviction to be only a misdemeanor under ORS 161.705. Based on that DWS conviction, petitioner later was convicted of being felon in possession under ORS 166.270 (1995). He then petitioned for post-conviction relief contending that his counsel in the FIP prosecution should have argued that his conviction for DWS was not a felony but only a misdemeanor by operation of ORS 161.585(2)(b) (1985) due to the sentence imposed. The post-conviction court rejected that claim. *Held*: Affirmed. The exception in ORS 166.270(3)(a), which provides that a prior conviction for a felony offense is not one for a felony for the purpose of the FIP statute if “the court declared the conviction to be a misdemeanor at the time of judgment,” is a reference only to ORS 161.705 and does not apply to a felony conviction on which the court imposed only a minimal sentence.

*State v. Saunders*, 195 Or App 357, 97 P3d 1261 (2004), *rev den*, 338 Or 124 (2005). In a prosecution for felony public indecency under ORS 163.465(2)(b), defendant’s prior adjudications for that offense as guilty except for insanity under ORS 161.295 cannot be considered as predicate “prior convictions.”

*State v. Geyer*, 194 Or App 416, 95 P3d 237 (2004). Trial court erred in convicting defendant of felony assault in the fourth degree under ORS 163.160(3)(a) based on his prior conviction in Washington for assaulting the same victim, because “assault” under that law did not require proof of actual injury.

#### **4. Pleading and proof of predicate conviction for repeat-offender statutes**

*See also* Part II-B(1) (“Right to jury, *Apprendi* issues”), *above*.

*Note*: The 2009 Legislative Assembly enacted ORS 136.433 to 136.434, which prescribe a specific procedure for the pleading and proof of, and a collateral attack on, a previous conviction that constitutes an element of the offense (*e.g.*, for a charge of felony in possession of a firearm) or sentence-enhancement factor. The new provisions took effect on January 2, 2010.

*State v. Hess*, 342 Or 647, 159 P3d 309 (2007). Defendant was charged with felony public indecency, ORS 163.465. Prior to trial, he stipulated to his prior public-indecency convictions and the court, over the state’s objection, removed the prior-convictions element from jury. The state appealed. *Held*: Affirmed. [1] The fact that the legislature has expressly provided a stipulation process for other crimes (*e.g.*, DUII and aggravated murder) but did not do so for this offense does not indicate a legislative intent *not* to have such a process apply here. [2] Because defendant’s “judicial admission unconditionally resolved the prior convictions issue in the state’s favor and left only a sentencing issue for the court,” the prior conviction became irrelevant in the guilt phase and the trial court properly excluded it.

*Note*: The court did not resolve with the prior-conviction allegation is “a sentencing factor rather than an element of the crime.” It is not clear whether this ruling applies to any element other than a prior-conviction allegation that is used to enhance the seriousness of the offense for sentencing purposes.

*State v. Molver*, 233 Or App 239, 225 P3d 136, *rev den*, 348 Or 291 (2010). In a prosecution for felony DUII based on allegations that the defendant was convicted of DUII three times previously, ORS 813.326 does not require the state to plead the specific dates and locations of the prior convictions, because such information is readily available by means of pretrial discovery.

*State v. Hopson*, 220 Or App 366, 186 P3d 317 (2008), *mod on recons*, 228 Or App 91, 206 P3d 1206 (2009). The right-to-jury rule in *Blakely* applies to imposition of a lifetime term of post-prison supervision under ORS 137.765 (2005) based on a finding that the defendant is a sexually violent dangerous offender. For purposes of *Blakely*, an extended term of post-prison supervision is part of the “sentence.”

*Note*: The current version of ORS 137.767(6) provides that the defendant is entitled to a jury trial on the issue of whether he is a SVDO.

*State v. Clayton*, 210 Or App 442, 150 P3d 1078 (2007). Given the prosecutor's failure, during the state's case in chief, to introduce defendant's prior stalking conviction, the trial court erred in denying his motion for judgment of acquittal on the charge of felony violation of a stalking protective order.

*Note:* The Court of Appeals refused to consider state's cross-assignment of error challenging the trial court's refusal to allow the prosecutor to reopen the state's case to introduce the prior conviction.

*State v. Hambrick*, 189 Or App 310, 75 P3d 462 (2003). Defendant was charged with felony fourth-degree assault based on his prior conviction for assaulting the same victim. ORS 163.160(3)(a). Defendant made a written judicial admission to that element, and filed a motion to exclude all evidence of the prior conviction, conceding that, if the jury returned a guilty verdict on the elements of "ordinary" fourth-degree assault, then the trial court would enter the conviction as a felony. Over the state's objection, the trial court accepted defendant's admission and granted his motion to exclude the evidence. The state appealed. *Held:* The state is not required to accept a defendant's offer to stipulate to a prior conviction, and the court should not have accepted the stipulation. Because the state was required to prove the prior conviction, the court erred in taking that element from the jury.

*Note:* This decision was been limited by *State v. Hess*, *above*.

*State v. Garrett*, 187 Or App 201, 66 P3d 554 (2003). In a prosecution for felony fourth-degree assault under ORS 163.160(3)(a) based on defendant's prior assault conviction, the state was not required to accept his offer to stipulate to the conviction and keep that conviction from the jury. Because the state was required to prove the prior conviction as an element of the crime, the trial court correctly admitted it.

*State v. Reynolds*, 183 Or App 245, 51 P3d 684, *rev den*, 335 Or 90 (2002). It is permissible under ORS 132.540(2) for an indictment charging felony fourth-degree assault under ORS 163.160(3)(a) to allege that a defendant previously assaulted the same victim, because that is an element of the crime.

## **J. OTHER MINIMUM SENTENCES MANDATED OR AUTHORIZED BY STATUTE**

*See* ORS 137.010(1); ORS 137.637; OAR 213-009-0001 to -0003.

*See* ORS 163.165(2) (third-degree assault, requires term of imprisonment); ORS 163.208(2) (assaulting public-safety officer, requires minimum jail term of 7 or 14 days); ORS 164.061 (aggravated first-degree theft, 16-month minimum); ORS 475.925 (minimum terms for certain drug offenses); ORS 813.020(2) (DUII, requires minimum jail term of 2 days).

*See* Part XIII-F ("Other Disabilities and Consequences From Conviction"), *below*.

*State v. Sanders*, 343 Or 35, 163 P3d 607 (2007). The requirement in ORS 137.076 that a person convicted of a felony must submit to a blood or buccal sample does not violate Art I, § 9, or the Fourth Amendment.

*See also State v. Brown*, 212 Or App 164, 157 P3d 301, *rev den*, 343 Or 223 (2007). ORS 137.076, which requires a DNA sampling for persons convicted of a felony or some misdemeanors, does not violate Art I, § 9, or the Fourth Amendment.

*V.L.Y. v. Board of Parole*, 338 Or 44, 106 P3d 145 (2005). [1] In determining that petitioner is a "predatory sexual offender" for purpose of community notification, the board erred under ORS 181.585 in applying a procedure that relied exclusively on a risk-assessment scale that is based solely on the petitioner's past crimes and excluded consideration of his current behavior and characteristics. [2] "[A]ny party facing such a designation, whatever the reasons for the designation, must be accorded the basics of due process. Those basics, at a minimum, include notice and an opportunity to be heard as to all factual questions at a meaningful time and in a meaningful manner. Because of the nature of the factual inquiry assigned to it . . . , the board is not at liberty to substitute a purely documentary exercise for the hearing that any person faced with such a designation is entitled to receive."

*State v. McNab*, 334 Or 469, 51 P3d 1249 (2002). Based on a crime he committed in 1987, defendant was convicted of first-degree sexual abuse and was sentenced to prison. He was paroled in 1991 and his sentence expired in 1994. He subsequently was convicted of failing to register as a sexual offender in violation of ORS 181.599 (1995). *Held:* Affirmed. Requiring defendant to register as a sexual offender does not impose any significant detriment, restraint, or deprivation on defendant, in violation of the *ex post facto* provision of the Oregon Constitution, nor does it violation the Ex Post Facto Clause of the federal constitution.

*State v. Pemberton*, 226 Or App 285, 203 P3d 326 (2009). Defendant challenged the 13-month prison sentences imposed on two counts of third-degree assault under ORS 163.165(1)(i) (propelling a dangerous substance at a staff member), arguing that the trial court imposed those sentences based only on its mistaken belief that it was required to impose sentences that exceeded 12 months in order for the court to sentence defendant to the custody of the Department of Corrections. *Held*: Reversed, remanded for resentencing. [1] ORS 163.165(2) *requires* that the sentence imposed on a conviction based on ORS 163.165(1)(i) be served in a state correction facility. [2] Because the sentencing court based its discretionary sentencing decision on a mistake of law, remanded to allow the sentencing court to reconsider in light of the requirement in ORS 163.165(2).

*State v. Stickney*, 195 Or App 155, 97 P3d 1205 (2004) (*per curiam*), *rev den*, 338 Or 17 (2005). The trial court correctly overruled defendant's constitutional objections to the mandatory DNA sampling ordered pursuant to ORS 137.076 on his felony conviction for PCS.

*V.L.Y. v. Board of Parole*, 188 Or App 617, 72 P3d 993 (2003), *rev'd on other grounds*, 338 Or 44, 106 P3d 145 (2005) (*see above*). Board applied risk-assessment scale set out in Department of Corrections rules in classifying petitioner as a predatory sex offender. *Held*: Petitioner did not present a valid equal-privileges challenge, and his *ex post facto*, double-jeopardy, and cruel-and-unusual-punishment claims have no merit. Because ORS 181.585 applies to an open-ended class, it is not a bill of attainder. Designating petitioner as a PSO does not invade on his constitutional right to privacy.

*Meadows v. Board of Parole*, 181 Or App 565, 47 P3d 506 (2002). [1] The "predatory sexual offender" laws do not violate the *ex post facto* constitutional provisions because they do not impose additional punishment for the underlying crimes. [2] Similarly, petitioner's challenges under the double-jeopardy and cruel-and-unusual-punishment clauses have no merit. [3] Although a parolee has a due-process right to a hearing before being designated a "predatory sexual offender," *Noble v. Board of Parole*, 327 Or 485 (1998), any error in failing to accord petitioner such a hearing is harmless because he was afforded an opportunity to challenge the ruling but failed to do so.

*State v. Engweiler*, 118 Or App 132, 846 P2d 1163, *rev den*, 317 Or 486 (1993): "A mandatory sentence for aggravated murder cannot be imposed on a remanded juvenile who was under the age of 17 at the time of the offense." *See* ORS 161.620.

*State v. Serheinko*, 111 Or App 604, 826 P2d 114 (1992): ORS 144.110 does not apply to any conviction for a felony committed on or after November 1, 1989.

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## X. REVOCATION OR MODIFICATION OF PROBATION

### A. PROCEEDINGS TO REVOKE OR MODIFY PROBATION

*See* ORS 137.545 to 137.547; OAR 213-010-0001.

*See* Part II-B ("Defendant's Constitutional Rights at Sentencing"), *above*.

*State v. Erives*, 252 Or App 93, 284 P3d 1276 (2012), *rev den*, 353 Or 203 (2013). Defendant, who speaks Spanish and some English, appeared before the court on allegations that he had violated his probation. Neither he nor his counsel requested an interpreter, and the trial court did not appoint an interpreter. During defendant's testimony, the court *sua sponte* brought in an interpreter. The court found him in violation. On appeal, defendant argued for the first time that the trial court erred by not appointing an interpreter for the entirety of the proceedings. *Held*: Affirmed. [1] On this record, defendant was entitled to the services of an interpreter. ORS 47.275(1). [2] Under the circumstances of the case, however, it was not obvious that an interpreter was required: (a) at the outset of the hearing, defendant engaged in a colloquy with the court that suggested that he understood English; (b) defendant was represented by counsel who had previously conferred with defendant and informed the court at the outset of the hearing that defendant was ready to proceed; and (c) neither defendant nor his attorney ever requested the appointment of an interpreter.

*State v. Vanlieu*, 251 Or App 361, 283 P3d 429 (2012). Defendant was convicted of felony offenses and the court imposed a probationary sentence. The probation was set to expire on January 8, 2003, and the court issued a show-cause order on December 27, 2002, alleging that he had not paid certain court-ordered financial obligations. Defendant appeared

on the order on December 30, and the court appointed counsel and set a hearing date of February 7, 2003. Defendant failed to appear at that time and the court issued a bench warrant. Defendant was arrested on the warrant in March 2003, and the show-cause hearing was rescheduled. Defendant failed to appear again, and another warrant was issued. In April 2010—seven years later—defendant was arrested on the warrant. The court then issued an amended show-cause order alleging that he had violated probation while on the lam. Defendant moved to dismiss, alleging that the court did not have jurisdiction because the court had not issued an arrest warrant before the probationary period had expired and that, in any event, it could not revoke probation based on conduct that occurred after the probationary period had expired. The court denied his motion, found him in violation, and revoked his probation. *Held*: Reversed and remanded. [1] “If a probation violation proceeding is commenced before the probationary period is set to expire, the trial court retains authority to hold a hearing on the charged violation after the date on which the probationary term would have expired.” [2] If the trial court commences a revocation proceeding during a defendant’s term of probation through either “a show cause order *or* a bench warrant, the court retains jurisdiction over the defendant even after the probation ends.” Although ORS 137.545(2) and (8) authorize a trial court to issue an arrest warrant based on allegations that the defendant has violated his probation, “nothing in the statutory scheme either requires a court to issue a warrant or provides that a probation violation hearing cannot be held unless and until a warrant issued.” [3] “Accordingly, . . . the probation-violation proceeding in this case was properly commenced by the trial court’s issuance of the order to show-cause on December 27, 2002, before the probationary period was scheduled to expire on January 8, 2003.” [4] But the timely commencement of a probation-violation proceeding does not automatically extend a defendant’s probationary period beyond its scheduled expiration date, except for the limited purposes of adjudicating a violation that occurred before the period probationary expired. “Instead, the legislature conferred authority on trial courts to deliberately extend probation. The trial court did not exercise its discretion to do so in this case, nor did it find that defendant violated the terms of his probation before it was set to expire. In those circumstances, the court lacked authority to revoke defendant’s probation based on misconduct that occurred after his probationary period had expired.”

*Notes*: [a] Because the show-cause hearing in this case was scheduled for a date *after* the probationary period was set to expire, the defendant’s failure to appear at that hearing could not provide a basis of itself to revoke his probation. To avoid that problem, if the court issues a show-cause order and the probationary period is set to expire before the hearing, it may be appropriate to ask the court to extend the probationary period, pursuant to ORS 137.545(1)(a), to a date after the hearing. [b] ORS 137.010(4) provides that if “the probationer has absconded from supervision and a bench warrant has issued,” then the probationary period is automatically tolled. Because the defendant did not abscond until after the probationary period already had expired, this statute did not automatically toll the expiration of the probationary period.

*State v. Shirk*, 248 Or App 278, 273 P3d 254 (2012). Sheriff Deputy Read learned that defendant and her boyfriend, Martinez, were staying at a motel and determined that a warrant was outstanding for Martinez’s arrest. The deputies arrested Martinez in the motel room and discovered a methamphetamine pipe in his pants pocket. Defendant was in the room during the arrest and the deputies observed a baby asleep on the bed where Martinez had been laying. When the officers spoke to defendant in the hall, she tried to shut the motel room door to prevent the officers’ reentry. The deputies handcuffed her to prevent her from shutting the door. Without providing defendant with *Miranda* warnings, the officers questioned her while she remained handcuffed. She consented to a search of the room—signing a written consent form—and the deputies searched the room and found evidence that she had violated her terms of probation. At the subsequent probation-violation hearing, defendant moved to suppress the evidence, arguing that she was illegally seized and that her statements and consent to search were products of that illegal seizure. She also argued that her statements and consent were the result of the custodial interrogation in violation of *Miranda*. The trial court suppressed her statements, denied her motion with respect to the evidence found in the motel room, and ruled that the deputies’ entry into and search of the room was permissible under the emergency-aid doctrine. The court then found her in violation of her probation. *Held*: Reversed and remanded. [1] Placing defendant in handcuffs was an unlawful seizure. [2] Defendant’s consent to search the room was tainted by both the unlawful seizure that “was ongoing” when she consented and by the deputy’s questioning of her without *Miranda* warnings. [3] The state did not establish that there was a tenuous factual link between the between the unlawful seizure and the disputed evidence. [4] The emergency-aid doctrine did not apply, because there was no “true emergency” requiring “immediate” aid to the baby.

*State v. Reed*, 247 Or App 155, 268 P3d 756 (2011). Defendant was convicted of contributing to the sexual delinquency of a minor in 2008, when he was 18 years old, and the court put him on probation for 18 months. Defendant was represented by counsel in that proceeding, and he was represented by counsel in some of the subsequent hearings relating to probation. In September 2009, defendant appeared another hearing related to probation, he waived counsel after a short colloquy in which he acknowledged understanding that he was entitled to one, and the court ended up extending probation until September 2011 without finding a violation. *Held*: Reversed and remanded. [1] Defendant was “entitled to

representation by counsel at a probation violation hearing because it is a critical stage in a criminal prosecution.” [2] “Evidence that a defendant has had prior experience with the criminal justice system can support a finding that the defendant knowingly waived counsel. Also, a defendant’s first-hand experience of some of the basic things that an attorney could do provides evidence that a defendant understands the risks of self-representation.” [3] But this record was insufficient to establish that defendant knowingly waived counsel.

*State v. Monk*, 244 Or App 152, 260 P3d 607 (2011). At a show-cause hearing, the court found defendant in violation of his probation, on a conviction for menacing, based on testimony from his probation officer that another police officer, who was “at training” on the day of the hearing, had filed a report stating that he had found defendant in possession of marijuana; the court extended defendant’s term of probation. *Held*: Reversed and remanded. [1] Although neither the rules of evidence nor the state or federal constitutions provide a *pro se* bar to admission of hearsay in a probation-revocation hearing, the defendant does have a general right under the Due Process Clause to confront and cross-examine witnesses based on consideration of four factors: “(1) the importance of the evidence to the court’s finding; (2) the probationer’s opportunity to refute the evidence; (3) the difficulty and expense of obtaining witnesses; and (4) traditional indicia of reliability borne by the evidence.” [2] In light of *State v. Wibbens*, 238 Or App 737 (2010), and *State v. Terry*, 240 Or App 330 (2011), the court erred because the hearsay at issue was the only evidence of the alleged violation, the testimony as to the circumstances of the of the alleged violation was vague, the state did not offer much of an explanation why the officer who found the drugs was unavailable, and the report on which the probation officer relied was not offered as evidence.

*State v. Terry*, 240 Or App 330, 252 P3d 332 (2011). Defendant appealed from a judgment revoking his probation, arguing that the trial court erred in denying his motion to exclude hearsay evidence offered through his probation officer on the ground that the admission of that evidence violated his due process right to confront witnesses. *Held*: [1] Under *State v. Wibbens*, 238 Or App 737 (2010), admission of the hearsay violated defendant’s due process right to confront witnesses against him. [2] That error required reversal because the state failed to show why the hearsay declarants could not have been called to testify, and without the ability to cross-examine those witnesses defendant’s ability to refute the evidence against him was severely impaired.

*State v. Wibbens*, 238 Or App 737, 243 P3d 790 (2010). Defendant appealed from a judgment revoking his probation and claimed that the trial court erred by admitting hearsay evidence over his objection that it violated his right of confrontation under the Due Process Clause. *Held*: Reversed and remanded. [1] To determine whether admission of hearsay evidence at a probation-revocation proceeding violates a probationer’s due-process right to confrontation, his confrontation interest must be weighed against the state’s reason for denying it. [2] The hearsay was indispensable to the state’s case; the state made no showing why the hearsay declarant could not be produced at the hearing; the hearsay statement was an unsworn oral allegation that bore no characteristics of reliability; the facts to be proved by the hearsay were based on sensory perception and thus were subject to errors of judgment; and the evidence was not corroborated. Consequently, defendant’s interest in confrontation outweighed the state’s reason for not producing the witness, and admission of the hearsay evidence violated his confrontation right. [3] Because the hearsay statement was the sole evidence of a probation violation, its admission was not harmless.

*State v. Blanchard*, 236 Or 472, 236 P3d 845 (2010). [1] The trial court erred in refusing to allow defendant to represent himself at a probation-revocation hearing, because there was no evidence that his waiver was not an intelligent and understanding one or that his self-representation would have disrupted the proceedings. [2] The error was “structural” and not subject to a harmless-error analysis.

*State v. Hammond*, 218 Or App 574, 180 P3d 137 (2008). Because the Oregon Evidence Code does not apply to probation-violation proceedings, and because no other provision precludes consideration of polygraph results in a probation-violation proceeding, the circuit court properly considered defendant’s deceptive polygraph result in revoking probation based on its conclusion that defendant had lied to his probation officer.

*State v. Gonzalez*, 212 Or App 1, 157 P3d 266 (2007). A probation-revocation hearing is not a “criminal prosecution” within the meaning of the Sixth Amendment. Consequently, the rule in *Crawford v. Washington* “does not preclude the admission of hearsay testimony in the absence of an opportunity to cross-examine the declarant.”

*Note*: The court did not address defendant’s alternative argument under the Due Process Clause.

*State v. Lindquist*, 192 Or App 498, 86 P3d 103 (2004). Defendant argued that his probation-violation proceeding was not timely commenced on the ground that the warrant for his arrest was not executed “without unreasonable delay”

within the meaning of ORS 131.135, which provides that a “prosecution is commenced when a warrant or other process is issued.” *Held*: A probation violation proceeding is not a “prosecution,” and ORS 131.135 does not impose a temporal limit on the court’s authority to adjudicate a probation violation by requiring the execution without unreasonable delay of an arrest warrant issued in connection with such a proceeding.

*State ex rel. Juv. Dept. v. Rial*, 181 Or App 249, 46 P3d 217 (2002). [1] Because youth failed at the proper time to challenge the court’s imposition of a sex-offender treatment as a condition of his probation, he cannot challenge that condition in an appeal from the revocation. [2] Youth was “entitled to the protection of the Due Process Clause in his probation revocation hearing, including adequate notice of the ‘charges’ against him.” In this case, youth received adequate notice.

*State v. Gross*, 175 Or App 476, 28 P3d 1243 (2001) (*per curiam*). The sentencing court erred in accepting defendant’s waiver of counsel at the probation-violation hearing without first advising him “of the consequences of self-representation.”

*State v. Torres*, 170 Or App 150, 11 P3d 268 (2000). Sentencing court erred when it conducted a probation-revocation hearing without defendant being represented by counsel or waiving his right to counsel on the record.

## **B. FINDING THAT DEFENDANT VIOLATED PROBATION**

*State v. Milnes*, 256 Or App 701, 301 P3d 966 (2013). Defendant was charged with felon in possession of a firearm and violating her probation (by failing to comply with special conditions that she remain law-abiding and abstain from use of intoxicants). At trial, defendant admitted that she and her boyfriend had been arguing and that she was drunk (in violation of her probation). But she denied trying to stall police entry into her room to allow her boyfriend to escape and denied seeing a rifle or ammunition in her room. Based on the discrepancy between defendant’s statements at the scene to police and her testimony at trial, the prosecutor requested the uniform “witness false in part” instruction. *See* UCrJI 1026; ORS 10.095(3). The circuit court gave the instruction over defendant’s objection, and the jury found her guilty. The court then found her in violation of her probation based on that conviction and on her admitted use of alcohol. *Held*: Reversed. The trial court committed reversible error by giving “witness false in part” instruction. The circuit court’s finding that defendant violated her probation also must be reversed and remanded because the stated basis for its decision included both her conviction and her admitted probation violation by being intoxicated—it did not indicate that it would have reached the same finding based only on defendant’s admitted intoxication, so the case should be remanded to allow the court to make that decision.

*State v. Vanlieu*, 251 Or App 361, 283 P3d 429 (2012). Defendant was convicted of felony offenses and the court imposed a probationary sentence. The probation was set to expire on January 8, 2003, and the court issued a show-cause order on December 27, 2002, alleging that he had not paid certain court-ordered financial obligations. Defendant appeared on the order on December 30, and the court appointed counsel and set a hearing date of February 7, 2003. Defendant failed to appear at that time and the court issued a bench warrant. Defendant was arrested on the warrant in March 2003, and the show-cause hearing was rescheduled. Defendant failed to appear again, and another warrant was issued. In April 2010—seven years later—defendant was arrested on the warrant. The court then issued an amended show-cause order alleging that he had violated probation while on the lam. Defendant moved to dismiss, alleging that the court did not have jurisdiction because the court had not issued an arrest warrant before the probationary period had expired and that, in any event, it could not revoke probation based on conduct that occurred after the probationary period had expired. The court denied his motion, found him in violation, and revoked his probation. *Held*: Reversed and remanded. [1] “If a probation violation proceeding is commenced before the probationary period is set to expire, the trial court retains authority to hold a hearing on the charged violation after the date on which the probationary term would have expired.” The probation-violation proceeding in this case was properly commenced by the trial court’s issuance of the order to show-cause on December 27, 2002, before the probationary period was scheduled to expire on January 8, 2003.” [2] But the timely commencement of a probation-violation proceeding does not automatically extend a defendant’s probationary period beyond its scheduled expiration date, except for the limited purposes of adjudicating a violation that occurred before the period probationary expired. “Instead, the legislature conferred authority on trial courts to deliberately extend probation. The trial court did not exercise its discretion to do so in this case, nor did it find that defendant violated the terms of his probation before it was set to expire. In those circumstances, the court lacked authority to revoke defendant’s probation based on misconduct that occurred after his probationary period had expired.”

**State v. Laizure**, 246 Or App 747, 268 P3d 680 (2011), *rev den*, 352 Or 33 (2012). Defendant was convicted of first-degree theft, and the court imposed a two-year probationary sentence with conditions that he maintain gainful employment and not change his address without permission from his probation officer. Based on a report from his probation officer that defendant had violated both conditions, the court held a hearing, found him in violation, continued his probation, and extended the term to five years. Defendant appealed and argued that the court erred in finding him in violation, and the state responded in part that whether he had violated his probation did not matter because the court had authority under ORS 137.540(8) to “at any time modify the conditions of probation” without finding a violation. *Held*: Affirmed. [1] ORS 137.540(8) is inapposite because “the trial court did not merely modify the conditions of defendant’s probation. Rather, it extended the period of defendant’s probation. The court may extend the period of defendant’s probation only where it properly exercises its limited discretion to do so. Under ORS 137.545(1)(a), “a court may extend probation without finding a violation of a condition of probation if, in its discretion, it determines that the purposes of probation are not being served.” [2] But “we need not determine whether defendant violated a condition of his probation because we conclude that the record reflects a permissible exercise of the trial court’s limited discretion. The trial court stated that its decision to extend defendant’s probation was based on his failure to keep his probation officer informed of both his mailing address and his employment status, and that this failure was ‘a deceiving thing.’ Defendant does not dispute that he failed to inform his probation officer of his mailing address and employment status. Defendant only complains that his conduct did not violate the terms of his probation. ... The trial court did not abuse its discretion and made a sufficient record to extend defendant’s probation.”

**State v. Kacin**, 237 Or App 66, 240 P3d 1099 (2010). Defendant was convicted of aggravated first-degree theft and was sentenced to five years’ probation and ordered to pay restitution of more than \$125,000 by making a \$50 payment each month. Over the next four years, defendant missed six monthly payments, but made them up later. The state moved to revoke her probation for failure to pay restitution. Defendant argued that did not allow revocation, relying on ORS 137.540(9), which prohibits revocation “as a result of the probationer’s failure to pay restitution unless the court determines from the totality of circumstances that the purposes of probation are not being served.” The trial court revoked probation, finding: “The purposes of probation are not being served.” *Held*: Reversed and remanded. The statement in the order is insufficient to establish that revocation had been based on a reason other than failure to pay restitution, because the only information in the record was that defendant was late with several restitution payments.

**State v. Martin**, 221 Or App 78, 188 P3d 432, *rev den*, 345 Or 418 (2008). The sentencing court did not commit “plain error” by revoking defendant’s probation on a felony conviction based solely on a finding that he was “not benefiting from his probation.” It is not obvious that OAR 213-010-0001—which provides that court may revoke probation “upon a finding that the offender has violated one or more conditions of probation, or that the offender has participated in new criminal activity”—prescribes the exclusive bases for revocation and hence overrules *Barker v. Ireland*, 238 Or 1 (1964), and precludes a revocation on that basis.

*Notes*: (a) The concurring opinion argues that the rule precludes a revocation based on a “not benefiting” finding. (b) The rule applies only to probationary sentences imposed on felony convictions.

**State v. Bowden**, 217 Or App 133, 174 P3d 1073 (2007). Under ORS 137.712(5), if a person sentenced to a probationary term violates a term of probation “by committing a new crime,” the court “shall” revoke the probation and impose the presumptive sentence under the sentencing guidelines. A juvenile “commits a new crime” under ORS 137.712(5) by engaging in conduct that would constitute a crime if committed by an adult. Although a juvenile adjudication is not a criminal conviction, the focus of the phrase “committed a new crime” in ORS 137.712(5) is on the *conduct*, rather than the legal consequences available for that conduct.

**State v. Melton**, 189 Or App 411, 76 P3d 156 (2003). Defendant, who was put on probation pursuant to ORS 137.712(1) on his conviction for second-degree assault, was found in violation for consuming alcohol and failing to submit to supervision, based on his consumption of alcohol before being arrested for DUII. Pursuant to ORS 137.597, he agreed to a structured, intermediate sanction for those violations. After he was charged with DUII arising from the same incident, the state sought to revoke his probation for violating the condition that he “obey all laws.” Defendant moved to dismiss the revocation proceeding on the ground that his completion of the sanction for consumption of alcohol precluded the state from revoking his probation for committing DUII; the court denied that motion and revoked his probation. *Held*: The court properly found defendant in violation of several conditions based on the single incident. Moreover, ORS 137.712(5) provides that, where a person sentenced to probation ... violates a condition of probation by committing a new crime, the court *shall* revoke the probation” and impose the presumptive guidelines sentence.

*State v. Paez-Lopez*, 155 Or App 617, 964 P2d 1083 (1998). Defendant, an alien, was convicted of DCS and the court placed him on probation and ordered him, as a condition, not to reenter this country illegally. He later was arrested in this country and was charged in federal court with illegal entry. The sentencing court revoked defendant's probation, concluding that he had failed to establish that he had reentered legally. *Held*: Reversed. [1] In order to revoke a defendant's probation, "the state had to prove by a preponderance of the evidence that he had violated the terms of probation." [2] The court could not assume that defendant was barred from reentry and then shift the burden to him to establish that he was entitled to reenter under some exception. [3] The court could not affirm on the basis that the purposes of probation were not being served, because the sentencing court did not attempt to justify the revocation on that basis. [4] The proper remedy was to remand for reconsideration.

### C. DISPOSITION IMPOSED ON FINDING A VIOLATION OF PROBATION

See ORS 137.545(5), 137.551; OAR 213-005-0010 to -0012; OAR 213-010-0002; OAR 213-012-0040(2).

*State v. Lewis*, 257 Or App 641, \_\_ P3d \_\_ (2013). Defendant was charged by a six-count indictment with a variety of drug crimes that he committed on December 29 and 30, 2009. He pleaded guilty to four counts, he stipulated that the crimes "are all separate acts that ... warrant consecutive sentences," the state dismissed the other charges, and the parties stipulated to dispositional departures to probationary sentences on three of the convictions. Later, he was back before the court on allegations that he violated his probation by possessing and using marijuana. He admitted that allegation, and the court revoked his probation and imposed the presumptive sentences in the range of 23 to 26 months. Defense counsel asked the court to run them concurrent, noting "with one admission, there is only one sanction to be imposed." The sentencing court ordered him to serve those sentences consecutively, because that was contemplated in the parties' plea agreement. On appeal, defendant argued for the first time that OAR 213-012-0040(2)(b) *required* the court to impose concurrent sentences because the revocation was based on only a single violation, and he also cited *State v. Stokes*, 133 Or App 355 (1995), for that proposition. In response, the state argued that the parties had effectively stipulated to the imposition of consecutive sentences upon revocation as part of their plea deal and that, in any event, the rule does not apply where, as here, the underlying convictions are based on crimes the defendant committed during separate criminal episodes, relying on *Miller/Buchholz* which adopted essentially the same rule for purpose of imposing consecutive sentences under OAR 213-012-0020(2). *Held*: Reversed and remanded. [1] The parties had not stipulated to imposition of consecutive sentence upon revocation—rather, the parties' plea agreement merely allowed that the state could *request* consecutive sentences. [2] Although the convictions are based on crimes defendant committed during separate criminal episodes, OAR 213-012-0040(2)(b) required the court to order that the revocation sanctions are to be served concurrently, because there was only one violation.

*Notes*: [a] OAR 213-012-0040(2)(a) requires the court to impose *concurrent* sentences if it revokes probation on multiple *felony* convictions based only a single violation. To provide a basis for consecutive sentences, the defendant must admit to, or the court must find, more than one violation. Whether the court can impose consecutive sentences depends entirely on whether there are multiple violations and not on whether consecutive sentences otherwise may be proper under ORS 137.123. See *State v. Newell*, 238 Or App 385 (2010). [b] In order to have "zero tolerance" probation, the plea agreement must expressly provide that the parties stipulate that upon revocation for any violation the court will or may impose consecutive sentences despite any limitation in OAR 213-012-0040(2)(a). See *State v. Ivie*, 213 Or App 198 (2007) (enforcing a similar agreement). [c] The rule, and hence this opinion, does *not* apply to a revocation on probation on a conviction for a misdemeanor.

*State v. Brand*, 257 Or App 647, \_\_ P3d \_\_ (2013). Defendant was charged with a variety of drug and sexual offenses involving minors. He pleaded guilty to two counts of DCS/minor (each count specifically named a different child), the state dismissed all the other charges, and the court dispositionally departed from the presumptive prison sentence and imposed probationary sentences. Later, defendant was back before the court on an allegation that he violated his probation by consuming alcohol in a single incident. The court revoked his probation, imposed the presumptive 27- and 29-month prison sentences, and ordered him to serve them consecutively. Defendant objected, but the court overruled the objection, noting simply, "They're two different minors; two different girls." On appeal, defendant that OAR 213-012-0040(2)(b) *required* the court to impose concurrent sentences because the revocation was based on only a single violation, and he also cited *State v. Stokes*, 133 Or App 355 (1995), for that proposition. The state argued that those authorities have been trumped by Art. I, § 44(1)(b), which provides, "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims." *Held*: Reversed and remanded. The court erred by imposing consecutive sentences upon revocation. Although the convictions are based on crimes defendant committed against

different victims, OAR 213-012-0040(2)(b) required the court to order that the revocation sanctions are to be served concurrently, because there was only one violation.

*State v. Barajas*, 254 Or App 106, 292 P3d 636 (2012), *rev den*, 353 Or 747 (2013). Defendant was convicted of felony fourth-degree assault and misdemeanor fourth-degree assault, and the court imposed probationary sentences. He subsequently violated the terms of probation, and the trial court revoked his probation and sentenced him to six months in prison on the felony conviction pursuant to OAR 213-010-0002(1), and 12 months in jail for the misdemeanor conviction pursuant to ORS 137.545(5)(a). On appeal, defendant argued that the 12-month jail sentence imposed on his misdemeanor conviction is unconstitutionally disproportionate under Art. I, § 16, because it exceeds the 6-month maximum sentence that the court could impose after revoking his probation on the conviction for *felony* fourth-degree assault. *Held*: Affirmed. [1] “In revoking probation for a misdemeanor and imposing a jail sentence, a trial court is belatedly imposing the sentence that it could have imposed or did impose at the original sentencing, but which it decided to hold in abeyance in favor of probation. That sentence is punishment for the original offense. Consequently, in evaluating the vertical proportionality of the sentence imposed on a lesser-included misdemeanor, we compare it to the maximum sentence that was available at the original sentencing to punish the greater-inclusive felony.” [2] “When the sentence for the greater-inclusive offense is governed by the sentencing guidelines, the proper comparator is the maximum departure sentence available for the gridblock representing the intersection of the defendant’s criminal history score and the crime’s seriousness rating.” Here, that would have been 18 months in prison for the felony assault, which exceeds the 12-month sentence that defendant actually received on the misdemeanor. Therefore, the 12-month sentence is not unconstitutionally disproportionate.

*State v. Chase*, 246 Or App 389, 265 P3d 94 (2011). Defendant was sentenced to presumptive probationary terms on two felony convictions and a probationary sentence on a misdemeanor assault conviction. He later violated his probation, and the trial court revoked his probation and imposed concurrent 60-day sentences on the felony convictions—the limit imposed by ORS 137.545(5)(b) (2009)—and a six-month jail term on the misdemeanor, which is permitted by ORS 137.545(5)(a). Defendant appealed, contending that the six-month sanction violated the proportionality clause, Art I, § 16. *Held*: Affirmed. Because the 60-day limit in ORS 137.545(5)(b) applies only if the probationary term was “presumptive,” defendant’s proportionality argument would have merit only if a greater, felony assault offense would have resulted in a presumptive probationary sentence. Defendant did not establish that that would have been the case, so he failed to establish that the revocation sanction the court imposed on his misdemeanor assault conviction was greater than what he could have received if that underlying conviction had been a felony.

*State v. Anderson*, 243 Or App 222, \_\_\_ P3d \_\_\_ (2011). In 2007, defendant pleaded guilty to third-degree rape pursuant to a plea agreement that included dismissal of other charges, a stipulation to gridblock 6-D, and a stipulated dispositional departure to probation. At that time, his criminal-history score included an assault conviction entered in 2005. In 2008, while he was serving probation on the rape conviction, his assault conviction was reversed. In 2009, the sentencing court revoked defendant’s probation and imposed the presumptive 13-month sentence, using gridblock 6-D, after rejecting defendant’s argument that his criminal-history score had to be recalculated to “G” because the assault conviction had been reversed. *Held*: Affirmed. [1] OAR 213-010-0002(2) requires that, upon revocation, the sentencing court must impose a sanction based on defendant’s criminal-history score as it was determined at the time of the original sentencing. [2] Because imposition of a sanction upon revocation is not a new sentencing, *see State v. Newell*, 238 Or App 385, 392 (2010), that score is not to be recalculated based on intervening events. [3] The court’s use of a criminal-history score that included his vacated assault conviction did not violate the Double Jeopardy Clause: “Defendant gave up his right to dispute his prior criminal history when he pleaded guilty. Defendant also knew that he would be subject to sanctions, including the term of imprisonment he ultimately received as a sanction, if he violated the terms of his probation sentence. Defendant entered into the plea agreement knowingly and voluntarily. Having entered into the stipulated agreement under these circumstances, defendant relinquished any double-jeopardy objection he may have had.”

*Note*: The third holding is based on a waiver theory—*i.e.*, defendant cannot assert a double-jeopardy objection because he agreed to the gridblock as an integral part of a plea agreement by which he obtained substantial benefits. Consequently, it is unclear whether the answer would be the same in a case in which the defendant was convicted after trial and did not stipulate to a gridblock.

*State v. Newell*, 238 Or App 385, 242 P3d 709 (2010). Defendant pleaded guilty to four counts of second-degree encouraging child sexual abuse and was placed on probation. Later, the trial court revoked defendant’s probation after he violated five of his probation conditions. At the revocation hearing, defendant argued that because the court, at the original sentencing hearing, did not make any findings under ORS 137.123 supporting the imposition of consecutive sentences, it was required to impose concurrent revocation sanctions. The court disagreed and imposed consecutive sanctions under

OAR 213-012-0040(2), which authorizes imposing consecutive revocation sanctions if more than one probationary sentence is revoked for separate supervision violations. *Held*: Affirmed. ORS 137.123 applies only to the imposition of sentences and not to the imposition of sanctions upon revocation of probation.

*State v. Ferguson*, 228 Or App 1, 206 P3d 1145 (2009). Defendant was convicted of DCS, and the court imposed an “optional probation” sentence. Later, the court revoked his probation and, using gridblock 8-G, imposed the 21-month presumptive sentence pursuant to ORS 137.545(5)(b) and OAR 213-010-0002(2). On appeal, defendant argued that, despite those provisions, the maximum sentence upon revocation was only 180 days per ORS 137.593(2)(d). *Held*: Affirmed. [1] “[W]hen an offender serving a probationary sentence for a felony violates probation, the offender may receive structured intermediate sanctions from the agency supervising his or her probation. ORS 137.593(1). *Alternatively*, an offender who violates his probation may have his or her probation revoked by the sentencing judge, ORS 137.593(2)(a), but only if no structured intermediate sanctions have already been completed for the violation. ORS 137.593(2)(c), (3). Moreover, the court retains authority to revoke probation and impose a sentence of incarceration ‘*notwithstanding* ORS 137.124 and 423.478 and any other provision of law.’” [2] Consequently, “ORS 137.593(2)(d) does not irreconcilably conflict with (and therefore repeal) OAR 213-010-0002(2), which authorizes the court to impose up to the maximum presumptive sentence that could have been imposed initially upon revocation of optional probation.” [3] Under ORS 137.593(2)(d), “when a court revokes probation for a person who is the responsibility of the county supervisory authority, the court retains authority to *require* up to 180 days of incarceration, thus overriding the authority that the county otherwise may have under ORS 423.478 to execute the sentence by means of sanctions other than incarceration.”

*State v. Ramirez*, 226 Or App 471, 204 P3d 119 (2009) (*per curiam*). The sentencing court erred when imposed a 60-month sentence after revoking defendant’s probation on his conviction for attempted first-degree sexual abuse. Because the conviction falls into gridblock 6-I, the maximum sentence upon revocation is only 6 months.

*Note*: *But see State v. Ivie*, *below*.

*State v. Miller*, 224 Or App 642, 199 P3d 329 (2008). Defendant appealed from a judgment revoking his probation and imposing a sentence of incarceration. He asserted that the court lacked jurisdiction to revoke probation because the revocation proceeding was not commenced until after the probationary period had ended. The court had issued several orders extending probation based on violations by the defendant. The most recent order established that the period of probation was to expire on November 8, 2005. The probation officer submitted an affidavit to the court, reporting a new violation, on that date; however, the court did not issue a warrant for the defendant’s arrest until November 15. The state asserted that, although the most recent court order had provided that the probation term would end on November 8, 2005, the probation term did not in fact expire until later because of periods of time that it claimed were automatically added to the probation term based on the fact that the defendant absconded from supervision for periods of time prior to the expiration of the probation period. The state based its argument on OAR 213-005-0008(3), which provides that, “[t]he time during which the offender has absconded from supervision and a bench warrant has been issued for the offender’s arrest shall not be counted in determining the time served on a sentence of probation.” *Held*: Reversed. Although OAR 213-005-0008(3) permits a court in imposing sanctions for a probation violation to refuse to “count” the days during which a defendant absconded from supervision, the judge in this case imposed a different sanction and did not extend the period of probation. Even if the court *could* have extended the period of probation based on the number of days during which the defendant had absconded, it did not; the period of probation was established by the terms of the court’s order, not by operation of OAR 213-005-0008(3).

*State v. Bolf*, 217 Or App 606, 176 P3d 1287 (2008). Once a probationary sentence is executed, OAR 213-010-0002 limits revocation sanctions to those that are authorized by the gridblock used at the time of sentencing, even if that gridblock was determined based on an erroneous understanding of the defendant’s criminal history.

*State v. Ivie*, 213 Or App 198, 159 P3d 1257 (2007). Defendant pleaded guilty to second-degree assault and the parties stipulated to a departure pursuant to ORS 137.712 to a probationary sentence but further agreed that if defendant violated the probation, the court on revocation would impose a 70-month term as the “presumptive” sentence. The court imposed that sentence without making findings under ORS 137.712 or 137.750. Later, upon revocation, defendant argued that ORS 137.712(5) barred a sentence longer than 38 months. The court disagreed and imposed the 70-month sentence and denied any eligibility for early release based on ORS 137.700(1). *Held*: Reversed and remanded. [1] In interpreting the parties’ plea agreement, “commercial contract principles apply”—“the construction of a contract is a question of law, but when the contract is ambiguous, extrinsic evidence may be used to resolve the ambiguity, and determination of a the parties’ intent is a question of fact.” The record supported the sentencing court’s finding that defendant had stipulated to a 70-

month term on revocation. [2] But the sentencing court erred in denying eligibility for release, because defendant did not stipulate to that term, he was not sentenced pursuant to ORS 137.700(1), and the court did not make findings under ORS 137.750 to support that order.

**State v. Tallman**, 190 Or App 245, 78 P3d 141 (2003): The presumptive sentence for defendant's conviction for first-degree criminal mistreatment was 20 months. With the defendant's agreement but over the state's objection, the court departed dispositionally and imposed a 5-year probationary sentence but ruled that, if it later revokes probation, it will impose a 36-month prison sentence without possibility of release for 21 months. The written judgment noted that the court suspended imposition of sentence and imposed the probationary term. *Held*: Reversed and remanded. [1] The state's objection that the proposed 36-month sentence on revocation is unlawful under OAR 213-010-0002(2) "is not ripe." [2] Given that probation is a "sentence," the judgment is internally inconsistent because it both suspends imposition of sentence and imposes a probationary sentence. Moreover, the court lacked authority to suspend imposition of sentence on the felony conviction.

**State v. Hoffmeister**, 164 Or App 192, 990 P2d 910 (1999). The sentencing court originally sentenced defendant incorrectly under gridblock 7-I. When the court later revoked defendant's probation, it corrected that error by placing the conviction in gridblock 7-C, and it imposed the presumptive 21-month sentence. *Held*: Reversed. Defendant should have received only a 6-month sentence upon revocation. When a court makes an incorrect criminal-history finding and imposes a probationary sentence based upon the incorrect gridblock, that finding is binding upon the court in a later probation-revocation proceeding.

**State v. Anderson**, 149 Or App 506, 945 P2d 594 (1997). The sentencing court imposed 5-year sentences on defendant pre-guidelines felony convictions, suspended execution of sentence, and placed him probation. Later, it revoked probation, modified the sentences by imposing minimum terms and ordering them to be served consecutively, and then executed the sentences. *Held*: The court erred by modifying the previously imposed sentences following revocation of probation. *See* ORS 137.550(4).

**State v. Daves**, 145 Or App 443, 930 P2d 265 (1996): Court had authority under ORS 137.540(4) to modify the conditions of defendant's probation and to continue probation without finding that he had violated a condition of his probation.

**State v. Mooney**, 143 Or App 624, 924 P2d 827 (1996) (*per curiam*): The sentencing court, on a conviction for a "firearm" offense, departed dispositionally and imposed a probationary sentence. The court later revoked probation and imposed a prison sentence with a firearm minimum. *Held*: The court lacked authority to impose the firearm-minimum sentence when it revoked probation and imposed a prison sentence.

**State v. Curtiss**, 137 Or App 376, 904 P2d 198 (1995): The sentencing court violated OAR 253-05-002(2)(a) and OAR 253-10-002(3) when, after revoking probation, it imposed an 18-month term of post-prison supervision on a conviction in gridblock 3-G.

**State v. Jerue**, 134 Or App 668, 896 P2d 613 (1995) (*per curiam*): Defendant was convicted of third-degree rape, the conviction was placed in gridblock 6-G, the sentencing court imposed the presumptive-probation sentence, and the court later revoked probation and imposed an 18-month "dispositional departure" sentence. *Held*: The sentence is error, because OAR 253-10-002(1) and (4) precluded the court from imposing a "revocation sanction" of more than 6 months.

**State v. Stokes**, 133 Or App 355, 891 P2d 13 (1995): Defendant was convicted on two counts of attempted first-degree sexual abuse that fall into gridblock 6-B, the sentencing court departed dispositionally and placed defendant on probation after making findings under ORS 137.123 to support imposition of consecutive sentences, the court later revoked probation based on a single violation and imposed consecutive 24-month sentences, and defendant appealed contending that OAR 253-12-040(2) barred consecutive sentences. *Held*: Because the court revoked probation on both convictions based on a single violation, OAR 253-12-040(2) limited the court to imposing concurrent sentences even though consecutive sentences otherwise were authorized by ORS 137.123.

*Note*: With the enactment in 1999 of Art I, § 44(1)(b), the limit in OAR 213-012-0040(2) on imposing consecutive sentences upon revocation should not apply if the underlying convictions are based on crimes against different victims.

**State v. Guyton**, 126 Or App 143, 868 P2d 1335, *rev den*, 319 Or 36 (1994): When a sentencing court revokes a

dispositional-departure probationary sentence, the court is not bound to impose sentence using the gridblock contemplated by the parties' original plea agreement if that gridblock was incorrect because of a miscalculation of the defendant's criminal-history score. "Neither ORS 135.407 nor the guidelines gives the sentencing court discretion to accept or reject agreements as to what sanction will be imposed if probation is revoked."

*Note: But see State v. Bolf and State v. Hoffmeister, above.*

***Houck v. Board of Parole & Post-Prison Supervision***, 125 Or App 461, 865 P2d 476 (1993), *rev den*, 318 Or 461 (1994): When a sentencing court revokes probation on a pre-guidelines conviction based on new convictions under the guidelines, the court is not limited by OAR 253-10-002 when it imposes sentence on the pre-guidelines conviction; rather, it has authority under ORS 137.550(4)(a)(B) to "impose any sentence which originally could have been imposed," including a minimum sentence pursuant to ORS 144.110.

***State v. Bullock***, 122 Or App 472, 858 P2d 70 (1993): Although a sentencing court generally does not have authority to deny a defendant credit for time served, under ORS 137.545(7) "a sentencing court does have limited discretion to grant or deny credit for time served as a condition of probation" when it revokes probation and imposes a prison sentence. (*Note: Although this case involved misdemeanor convictions, ORS 137.372 and 137.545(7) expressly provides that it is discretionary with the sentencing court to grant credit upon revocation in a guidelines case.*)

***State v. Lewis***, 119 Or App 362, 850 P2d 409, *rev den*, 317 Or 163 (1993): [1] When a court revokes probation on convictions that are subject to presumptive probation terms, "OAR 253-10-002(1) and (3) require imposition of a prison term on each count and also post-prison supervision." Sentencing court erred when, after revoking probation, it imposed an 84-day jail sentence with 84 days credit for time served. [2] Although a sentencing court upon revocation of probation has authority under ORS 137.550(6) to grant credit for jail time served as a condition of probation, it does not have authority to grant credit for time defendant served on a separate charge.

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## XI. PAROLE OR POST-PRISON SUPERVISION

See OAR 213-011-0001 to -0004.

See Part VI-B ("Term of Post-Prison Supervision"), *above*.

*Note:* This section does *not* include cases that address only: (1) procedural issues in the parole and release administrative process, or (2) parole and release of an inmate convicted as a juvenile.

***State ex rel. Engweiler v. Felton***, 350 Or 592, 260 P3d 448 (2011). Both relators committed a murder while under 17 years of age, and each was tried as an adult and was convicted of aggravated murder. When they committed the murders, the possible sentences for aggravated murder were death, life imprisonment without the possibility of release, and life imprisonment with a 30-year minimum term, but none of those sentences could be imposed upon a remanded juvenile, ORS 161.620. Consequently, each relator eventually received simply an indeterminate life sentence with the possibility of parole and no minimum term. At that time, the board of parole did not have rules providing for the release of a juvenile offender with such a sentence. In 1999, the board adopted rules—the "juvenile aggravated murder" rules ("JAM rules")—to create a process whereby it could set a parole-release date for such inmates. Among other things, the JAM rules require the inmate to complete an intermediate review hearing before proceeding on to the hearing at which they would receive a parole-release date. The board set a review date for Engweiler after 480 months, and it set a review date for Sopher after 400 months. These consolidated cases involve relators' challenges both in mandamus and a rule challenge pursuant to ORS 183.400; relators seek to compel the board to set a parole-release date for them. *Held:* "We reverse the Court of Appeals decision in *Engweiler VI*, reverse the Court of Appeals decision in *Sopher II*, and affirm in part and vacate in part the Court of Appeals decision in *Sopher III*." [1] "ORS 144.110(2)(b) and ORS 163.105(2) to (4) do not apply to juvenile aggravated murderers. For that reason, ... the board exceeded its statutory authority when it promulgated rules requiring juvenile aggravated murderers to undergo the intermediate review process described in ORS 163.105(2) to (4) before the board makes parole release decisions regarding them." [2] ORS 144.120(1)(a) (1991) applies "to juvenile aggravated murderers and required the board to conduct parole hearings for juvenile aggravated murderers. That is, ... the disputed phrase—'with the exception of those sentenced for aggravated murder'—merely removes 'those sentenced for aggravated murder' from the requirement that a parole hearing be held within one year of the prisoners' admission to prison, and that the legislature did not intend to eliminate the board's authority to conduct a parole hearing for them altogether." Thus, the board has "authority in ORS 144.120(1) (1989) and ORS 144.120(1) (1991) to determine initial release on parole for inmates like

these who are serving an indeterminate sentence of life imprisonment with the possibility of parole.” [3] Engweiler is entitled to relief in mandamus because “ORS 144.120(1) (1989) imposed on the board a legal duty [either] to conduct a parole hearing for [him] to set an initial release date for him or to explain why it chooses not to do so,” but the board has no plain legal duty to set a release date. [4] “As to Sopher, ... ORS 144.120(1) (1999) entitles him to a hearing at some point to set an initial parole-release date, but that the board has no present legal duty to conduct such a hearing and, therefore, Sopher does not have a remedy in mandamus.” (But the court suggested that the board “should consider conducting a parole hearing consistent with ORS 144.120(1)(a) (1991), and either set a release date for Sopher or explain why it has chosen not to do so.”)

**Severey / Wilson v. Board of Parole**, 349 Or 461, 245 P3d 119 (2010). In each case, the petitioner committed two aggravated murders in the mid-1980s, and the court imposed consecutive sentences of life imprisonment with a 30-year minimum. After each petitioner had served 20 years of that sentence, the parole board found, under ORS 163.105(2) (1985), that he was capable of rehabilitation and converted the term of confinement on the first sentence to life imprisonment with the possibility of parole, but further ruled that he had to wait another 20 years to petition for such relief on the second sentence. *Held*: Reversed and remanded. [1] Each petitioner was entitled under ORS 163.105(2) (1985) to a “rehabilitation” on both of his two life sentences after having served 20 years. [2] Under ORS 163.105(2) (1985), if the board makes the “capable of rehabilitation” finding, it has authority to override the 30-year minimum and grant parole. [3] Determination of eligibility on parole on the combined consecutive sentences under the board’s rules.

*Note*: These two decisions apply only to a defendant who committed aggravated murder before June 1995 and was sentenced to life imprisonment with a 30-year minimum. The 1995 legislature amended ORS 163.105(2) (effective June 30, 1995) to change the introductory to “At any time after 25 years ...” Or Laws 1995, ch 421, §§ 2, 5. In 1999, ORS 163.105(2) was amended again (effective October 23, 1999) to eliminate that 25-year minimum and to change that subsection to its current, “At any time after *completion* of the minimum term of confinement.” Or Laws 1999, ch 59, § 31. As a result, someone who committed aggravated murder after October 23, 1999, and was sentenced to life imprisonment with a 30-year minimum can be considered for parole only after he has completely served the 30-year minimum.

**Janowski / Fleming v. Board of Parole**, 349 Or 432, 245 P3d 1270 (2010). In each case, the petitioner was convicted of aggravated murder in 1985 and the court imposed a sentence of life imprisonment with a 30-year minimum. After each petitioner had served 20 years of that sentence, the parole board found, under ORS 163.105(2) (1985), that he was capable of rehabilitation and converted the term of confinement to life imprisonment with the possibility of parole, but further ruled that he could not be released until expiration of the 30-year minimum. *Held*: Reversed and remanded. Under ORS 163.105(2) (1985), if the board makes the “capable of rehabilitation” finding, it has authority to override the 30-year minimum and grant parole.

**Weems / Roberts v. Board of Parole**, 347 Or 586, 227 P3d 671 (2010). Petitioners were incarcerated on various drug, assault, and weapons convictions. Although neither petitioner was incarcerated as the result of a sexual offense, both petitioners had been charged with various sexual offenses. One petitioner (Roberts) had been convicted of “sexual misconduct.” After being released to post-prison supervision, the Board of Parole and Post-Prison Supervision (board) imposed “special conditions” requiring petitioners to participate in sex-offender surveillance and sex-offender treatment as part of their supervision. Both petitioners challenged those conditions. *Held*: In determining what post-prison supervision special conditions are appropriate to impose for a particular offender, ORS 144.102(3)(a) authorizes the board to consider the individual circumstances and nature of the offender, and not just the offender’s current crime or crimes of conviction. The board’s imposition of the sex-offender special conditions was supported by substantial evidence: based on their criminal histories, a reasonable person could conclude that the sex-offender special conditions were necessary to further the public’s safety and each petitioner’s reintegration into the community.

**Stogsdill v. Board of Parole**, 342 Or 332, 154 P3d 91 (2007). The Due Process Clause does not require the parole board to apply a clear-and-convincing standard of proof in determining a fact that supports postponement of a parole-release date. A finding by a preponderance of the evidence is sufficient.

**Davis v. Board of Parole**, 341 Or 442, 144 P3d 931 (2006). Although the parole board is generally required by ORS 144.120 to set an initial release date for most prisoners admitted to DOC custody, different rules apply to an inmate sentenced as a dangerous offender. ORS 144.228 requires the board to set a parole-consideration hearing to determine whether to set an initial release date; the board must set a release date only if it finds that the condition that “made the prisoner dangerous is absent or in remission.” Thus, as a practical matter, the burden of persuasion is on the petitioner.

*Note:* Because the burden is on the petitioner, the court did not reach his claim that the Due Process Clause requires the board must set a parole-release date unless it finds by clear-and-convincing evidence that the condition that made the petitioner dangerous is in remission or absent standard; neither party suggests that the clear-and-convincing standard should be imposed on petitioner.

*Atkinson v. Board of Parole*, 341 Or 382, 143 P3d 538 (2006). ORS 144.335 provides that, to support a motion for leave to proceed and obtain judicial review of an order of the parole board, a petitioner must present a “substantial question of law.” Petitioner’s one-sentence allegation of legal violations, made without factual support or legal analysis, did not present a substantial question of law.

*V.L.Y. v. Board of Parole*, 338 Or 44, 106 P3d 145 (2005). [1] In determining that petitioner is a “predatory sexual offender” for purpose of community notification, the board erred under ORS 181.585 in applying a procedure that relied exclusively on a risk-assessment scale that is based solely on the petitioner’s past crimes and excluded consideration of his current behavior and characteristics. [2] “[A]ny party facing such a designation, whatever the reasons for the designation, must be accorded the basics of due process. Those basics, at a minimum, include notice and an opportunity to be heard as to all factual questions at a meaningful time and in a meaningful manner. Because of the nature of the factual inquiry assigned to it . . . , the board is not at liberty to substitute a purely documentary exercise for the hearing that any person faced with such a designation is entitled to receive.”

*State v. Hart*, 329 Or 140, 985 P2d 1260 (1999). Restitution does not need to be made payable during the post-prison supervision term; instead, the obligation can be extended for at least 20 years.

*Martin v. Board of Parole*, 327 Or App 147, 957 P2d 147 (1998): Parole board properly ordered petitioner, as a condition of his post-prison supervision, to stay out of most of Lane County, where his rape victim resided.

*Dixon v. Board of Parole*, 257 Or App 273, \_\_ P3d \_\_ (2013). In 1987, while on parole for on a robbery conviction, petitioner got into a fight with a bartender in Multnomah County, stabbed him in the heart, and stole money from the till. He pleaded guilty to aggravated murder and the court imposed a life sentence with a 30-year minimum. In 2009, after he had served 20 years, he requested a murder-review hearing under ORS 163.105(2), asking the board to find that he was likely to be rehabilitated within a reasonable period of time and, upon that finding, change the terms of his 30-year confinement. The board considered petitioner’s lengthy criminal record and numerous incidents of misconduct while imprisoned and, after a hearing at which he and his wife and family testified, denied his request, finding that he had not met his burden to so prove. On appeal, petitioner contended that he had provided sufficient evidence that he was likely to be rehabilitation and, thus, the board’s decision was not supported by substantial evidence; he also argued that the board’s order did not contain substantial reasons for its conclusions. *Held:* Affirmed. The board properly denied petitioner’s request. [1] “On substantial evidence review, we must determine whether a reasonable person could make the findings that the board made, ORS 183.482(8)(c), and we do not substitute our own view of the evidence for the board’s view of the evidence. Under ORS 163.105(2)(a), petitioner has the burden to prove that he was capable of rehabilitation. Thus, we examine the record to determine if there was substantial evidence for a reasonable person to conclude that petitioner did not meet his burden.” [2] Petitioner’s argument that he presented “unrebuttable” evidence in his favor is wrong standard to review the evidence: substantial evidence exists when the record would permit a reasonable person to make the finding, and the board “has the authority to deny petitioner’s requested relief if he fails to meet his burden of proof, regardless of whether some of his evidence is unrebuttable.” [3] “OAR 255-032-0020(4) does not preclude the board from considering petitioner’s past conduct, including his criminal history, along with other evidence, to infer that he is presently immature or irresponsible.” [4] Petitioner adequately preserved his claim that the board’s order was not supported by “substantial reason” because he contended in his administrative-review request “that the board’s conclusions were not supported by the record.” [5] The board’s order was contained substantial reasons when it “identified the particular facts and the particular criteria on which it relied” in support of its conclusion that petitioner did not meet his burden.

*Gordon v. Board of Parole*, 246 Or App 600, 267 P3d 188 (2011). Petitioner sought judicial review of an order by Board of Parole and Post-Prison Supervision that deferred his parole release date under ORS 144.125(3). The issue was what standard for parole-deferral applies—the 1984 standard or the rule that was in effect in 1988. In 1984, the board’s practice was to review the entire record to determine whether an inmate had a present severe emotional disturbance resulting in dangerousness under ORS 144.125(3). Under the 1988 rule, the board could rely only on the psychiatric or psychological report in the record to make that determination. The Supreme Court previously had held that the board had inconsistently applied the 1984 standard to defer petitioner’s rule, when it had previously applied the 1988 rule, and so it

remanded the case to the board to provide a rationale for the inconsistency. On remand, the board explained its decision to apply the 1984 standard instead of the 1988 rule. But the board also applied the 1988 rule and concluded that it could defer his release under either the 1984 standard or the 1988 rule. *Held*: Affirmed. The Court of Appeals did not reach the first issue, but affirmed the board's order on the second issue. Relying solely on the psychological report, the court determined that substantial evidence supported the board's finding that petitioner suffered from a present severe emotional disturbance that rendered him dangerous, and so the board did not err in deferring his parole release.

***Shelby v. Board of Parole***, 244 Or App 348, 260 P3d 682 (2011), *rev den*, 351 Or 507 (2012). Petitioner was convicted of crimes in 1984, 1985, 1991, and 1998, and the courts imposed a series of consecutive sentences on those convictions. Although petitioner was "paroled" on the 1985 sentences in 2005, he remained in prison serving his consecutive sentences on the later-committed crimes. In 2007, petitioner was released from prison on all those convictions subject to conditions of parole and post-prison supervision. His PPS terms expired in 2009, but his parole on the 1985 conviction did not expire until August 2010. He petitioned for judicial review of a board order that imposed conditions of parole; he contended that his 1985 sentences expired in 2005 and so he was not lawfully on parole after his release in 2007. *Held*: Affirmed. [1] Petitioner's appeal is not moot even though he has been discharged from parole, because during his time on parole "the state charged petitioner monthly supervision fees and [he] still owes supervision fees to the state." [2] The board had parole authority even though petitioner remained in prison after his "good time" date on the 1985 sentences because the board paroled him before the "good time" date and petitioner remained incarcerated to serve the other consecutive sentences. "The board correctly reasoned that petitioner's 1985 indeterminate sentences had not expired simply because [he] was paroled on those sentences. Rather, [he] was not incarcerated on his 1985 convictions after he was released on parole on the 1985 convictions and began serving the prison term of the consecutive sentence for his 1991 conviction."

***Murphy v. Board of Parole***, 243 Or App 242, \_\_\_ P3d \_\_\_ (2011). Petitioner was convicted of aggravated murder and was sentenced to life imprisonment with the possibility of parole. He eventually was paroled, but the board revoked his parole in 2008, denied his request for re-release, and set a new re-release date for November 2012. *Held*: Affirmed. "OAR 225-75-096 afforded the board discretion to set petitioner's rerelease date for November 2012. That the agency's rule did not expressly address parolees, like petitioner, who are serving life sentences and are ineligible for 'good time,' is immaterial; the board was not required to 'adopt rules establishing [its] policy in regard to every possible factual circumstance that may arise.' In situations where a parolee had no good-time date, we conclude that OAR 255-75-096 authorized a duration of incarceration up to the remainder of the parolee's sentence. The board's action was proper."

***Baize v. Board of Parole***, 242 Or App 217, 256 P3d 123 (2011). Petitioner was convicted of aggravated murder in 1993, and the court imposed a life sentence with a 20-year minimum. After the minimum term expired, he sought a "murder review hearing" before the board. At the hearing, the district attorney who had prosecuted petitioner spoke without being sworn as a witness; he summarized his view of the crime and petitioner's history, and opined that he had not shown that he could be rehabilitated within a reasonable period of time. The board denied petitioner's request to cross-examine the DA and ultimately found that petitioner was not likely to be rehabilitated within a reasonable period of time and, therefore, declined to provide a parole release date. *Held*: Affirmed. [1] Petitioner had "waived" his objection that the DA was not sworn, because the board specifically had asked him whether he wanted the DA sworn and he did not request it. [2] Because ORS 183.450(3) does not apply to contested-case orders concerning inmates, petitioner did not have a statutory right to cross-examine the DA. [3] "We interpret administrative rules under the same framework we apply when construing statutes." [4] Under ORS 144.120(7), a victim or the district attorney may appear at a parole hearing and provide "a statement" and "may present information or evidence." Although OAR 255-032-0030(5) permits an inmate to cross-examine a "witness" who gives "testimony" at the hearing, a district attorney who makes a "statement" that provides "information" under ORS 144.120(7) and OAR 255-032-0025(5) is not a witness. In the context of the rules that govern such a hearing, an inmate does not have a right to cross-examine a district attorney or victim who merely provides such a statement that contains "information, in form of opinions and recommendations," and does not testify. [5] The court also dismissed petitioner's undeveloped claim that he had a due-process right to cross-examine the DA.

***Murphy v. Board of Parole***, 241 Or App 177, 250 P3d 13 (2011). Petitioner was convicted of murder in 1976 based on an incident in which he "brutally raped and murdered the victim while he was intoxicated." He was paroled in 2007 subject to a condition that he "shall not possess or use intoxicating beverages." Shortly thereafter, a Sponsors staff member contacted petitioner when he appeared to be intoxicated, and he submitted to a breath test that disclosed a .13% BAC. Petitioner claimed that he had not had a drink but merely had recently "gargled Listerine." He submitted to a urine test the next day, which disclosed recent alcohol use and noted that the Listerine excuse was "extremely unlikely." After a

hearing at which petitioner appeared without counsel, the board revoked his parole. *Held*: Affirmed. [1] The record contains sufficient evidence to support the board's finding that petitioner consumed alcohol. [2] Petitioner's claim that the condition was unconstitutionally vague because it would prohibit the "incidental use of household medicinal products" has no merit because the board permissibly found that he had consumed an alcohol beverage. [3] The board's admitted failure to comply with a rule that required providing three-days notice of evidence that would be presented does not require reversal because petitioner did not establish any prejudice. [4] The board properly denied petitioner's request to call certain witnesses because he failed to establish that they would have had relevant testimony to present. [5] Petitioner's complaint that he was denied an opportunity to cross-examine the authors of reports offered at the hearing does not warrant reversal, because he did not object to admission of the reports. *Distinguishing State v. Wibbens*, 238 Or App 737 (2010). [6] The board properly denied petitioner's request for appointment of counsel. The Court of Appeals declined to consider new reasons for the appointment that petitioner had not raised before the board.

***Reed v. Board of Parole***, 240 Or App 353, 245 P3d 1287, *rev den*, 350 Or 230 (2011). Based on a rape that petitioner committed in 1985, he was sentenced in 1991 to 20 years, including a 10-year minimum period of confinement under ORS 144.110 (1985). At the time of sentencing, petitioner was being held at a federal penitentiary on unrelated federal criminal charges. In 1992, the board established a tentative parole release date of December 12, 2001, and a tentative "good-time release date" of June 13, 2004. Petitioner remained in federal custody until October 2006. Shortly thereafter, the board ordered parole supervision conditions pertaining to the rape conviction. Petitioner requested board review of that order, contending that under the 1985 sentencing statutes, the board did not have "legal standing" or authority to order parole; that the board erroneously applied the 1989 sentencing guidelines; and that he had "served more th[an] enough time for a full discharge on the 20 year sentence [he] received." The board responded to petitioner's request for review, stating that it had applied sentencing statutes that were in effect in 1985; that under ORS 144.050 (1983) and ORS 144.270(2) (1983), the board was authorized to place an inmate on parole and to set the terms and conditions of parole; and that because petitioner had served "little more than 16 years" of his 20-year sentence his argument that he had served more than enough time was without merit. Petitioner then sought judicial review of the board's order, arguing that because he was confined in federal prison through the date of his "good-time release date," the board did not have authority to impose parole and, instead, he was entitled to a complete discharge. *Held*: Affirmed. Petitioner's original argument below was simply too general to alert the board to the argument that he subsequently raised on review; therefore, it was unpreserved, and the court would not consider it.

***Simpson v. Board of Parole***, 237 Or App 661, 241 P3d 347 (2010). Petitioner challenged the board's order imposing special sex-offender conditions of PPS following his prison term for drug-related offenses. He argued that the record did not support the board's finding that the special conditions were necessary for his reformation or to protect the public and that the evidence was insufficient because he was not on supervision for a sexual offense, his sole conviction for a sexual offense was 22 years before, and he had not reoffended in that 22-year period. *Held*: Affirmed. ORS 144.102(3)(a) allows the board to consider the offender's criminal history in addition to his current crimes of conviction, in determining the conditions of supervision. Petitioner's previous conviction for two counts of sexual abuse—based on acts committed against a child over a four-year period—constituted substantial evidence to support the board's conclusion that the conditions were necessary.

***Fisher / Gordon v. Board of Parole***, 239 Or App 603, 245 P3d 671 (2010). In consolidated cases, petitioners appealed the decisions of the denial or deferral of their parole-release dates. Each petitioner filed a motion seeking permission for appellate counsel to view the confidential sealed information on which the board relied in making its decision. The board had determined that the information should not be disclosed because disclosure would interfere with the board's functions to rehabilitate offenders and protect the public. *Held*: Limited disclosure to appellate counsel alone did not interfere with the board's functions and, under ORS 1.160 and ORAP 3.07, the court had authority to impose a protective order prohibiting disclosure to the petitioners, requiring filing of redacted or confidential briefs, and prohibiting further disclosure of the confidential materials.

***Walton v. Board of Parole***, 238 Or App 664, 243 P3d 811 (2010), *vacated and remanded*, 349 Or 654 (2011). Petitioner was convicted of aggravated murder in 1987 and sentenced to life imprisonment with a 30-year minimum. Twenty years later, the board held a rehabilitation hearing and determined that petitioner was capable of rehabilitation within a reasonable period of time. The board set a projected release date following the mandatory 30 years' imprisonment, scheduled a hearing for six months prior to that date, and ordered that a psychological evaluation be done at that time. Petitioner argued that the board had to set a firm release date and that the provisions of ORS 144.125, on which the board relied to set a projected release date, do not apply. *Held*: Affirmed. The board is not required to set a firm release date.

ORS 163.105 does not provide how an actual parole-release date is set—it merely authorizes the board to convert a life sentence with a 30-year minimum to a sentence with the possibility of parole. Thus, it does not conflict with ORS 144.125, which establishes the criteria for whether an eligible offender is prepared for release. The board properly applied ORS 144.125 to set a projected parole-release date.

**Norris v. Board of Parole**, 237 Or App 1, 238 P3d 994 (2010), *rev den*, 350 Or 230 (2011). When a term of post-prison supervision is based on ORS 144.103(1), the term that the offender will serve is calculated by subtracting the maximum indeterminate sentence for that conviction from the amount of time he or she was actually incarcerated on the prison sentence imposed on that conviction.

**Rondeau v. Board of Parole**, 232 Or App 488, 222 P3d 753 (2009). After concluding that petitioner had violated the terms of his post-prison supervision, the board imposed 60 months' imprisonment. Petitioner filed an appeal from that sanction. While the appeal was pending, petitioner's sanction expired and he was re-released. The board moved to dismiss as moot. *Held*: Petitioner's appeal is moot. Because petitioner had challenged only the duration of his sanction, a decision from the appellate court could have no practical effect after the sanction's expiration.

**Jones v. Board of Parole**, 231 Or App 256, 218 P3d 904 (2009), *rev den* 347 Or 718 (2010). Petitioner was convicted of murder in 1992 and sentenced to a determinate prison term followed by lifetime PPS. When petitioner violated the terms of his supervision, the board ordered his reincarceration until 2015. Petitioner sought judicial review, arguing that, under OAR 253-05-004 (Sept 1, 1989), the board could impose no more than a 180-day sanction in his case. *Held*: Affirmed. The limitation in OAR 253-05-004 (1989) is subject to an exception for offenders serving a "life sentence." Because PPS is part of an offender's "sentence," and because petitioner's sentence includes "lifetime" PPS, he is serving a "life sentence" under the relevant rules.

**Quinn v. Board of Parole**, 229 Or App 234, 210 P3d 944 (2009). Petitioner challenged the validity of OAR 255-035-0030, which provides that the parole board may, under certain circumstances, deny parole rather than set a parole release date. Petitioner argued that the rule violates state and federal constitutional provisions because it allows the board to deny parole to a person convicted of murder, but—due to the operation of other statutes—not to a person convicted of aggravated murder. Petitioner argued that the rule thus subjects murder offenders to disproportionate punishment and denies them the same rights, privileges, and procedural protections granted to aggravated murders in violation of Article I, sections 16 and 20, of the Oregon Constitution and the Eighth and Fourteenth Amendments to the federal constitution. *Held*: The challenged administrative rule is valid.

**Haynes v. Board of Parole**, 229 Or App 178, 210 P3d 927 (2009). Petitioner's Article I, section 16, challenge to OAR 255-032-0010(3) fails. The court rejected his argument that that rule—which provides, in part, that "[t]he minimum period of confinement for a person sentenced to life for Murder under ORS 163.115 committed on or after June 30, 1995, shall be twenty-five (25) years"—is constitutionally disproportionate because it subjects persons convicted of murder between June 30, 1995 and October 23, 1999, to the same punishment (a minimum of 25 years in prison) as a person convicted of the more serious crime of aggravated murder during that same period.

**Blacknall v. Board of Parole**, 221 Or App 200, 189 P3d 1234, *on mo for costs*, 223 Or App 294, 196 P3d 20 (2008), *aff'd on costs issue*, 348 Or 131 (2010). Petitioner's claim that the board, when it revoked his parole and denied his request for re-release on parole on his 58-month sentence, violated the Due Process Clause and Article I, section 16, became moot when he was released on parole.

**Delavega v. Board of Parole**, 222 Or App 161, 194 P3d 159 (2008). The board correctly calculated petitioner's term of post-prison supervision based on ORS 144.103 for his four convictions for attempted first-degree sexual abuse. The term is calculated separately for each conviction subject to the statute, and the terms are to be served concurrently upon his release. Consequently, the longest term of post-prison supervision, and the term he must serve, is based on the conviction for which he received the shortest prison term, not the longest prison term.

**Roberts v. Board of Parole**, 221 Or App 278, 190 P3d 397 (2008). Petitioner sought judicial review of board order imposing special conditions of post-prison supervision; he challenged the conditions requiring sex-offender treatment. While review was pending, he completed his term of post-prison supervision and was discharged. *Held*: Review is not moot because the state is seeking recovery against him for costs of administering the conditions.

**Houston v. Brown, et al.**, 221 Or App 208, 190 P3d 427 (2008). Plaintiff, who was serving a term of post-prison supervision, appealed from a judgment dismissing his petition for *habeas corpus* relief in which he challenged a 90-day jail sanction imposed for his refusal to comply with a condition post-prison supervision. While his appeal was pending, he completed serving the sanction and was released. He argued that his appeal should not be dismissed as moot because of “collateral consequences” in that he continued to refuse to comply with the condition and asserted that the board would sanction him again. *Held*: Appeal dismissed as moot. The *habeas corpus* statutes do not authorize a court to order the board to desist from imposing sanctions in the future.

**Demeyer v. Board of Parole**, 206 Or App 740, 139 P3d 969 (2006), *adh’d to on recons*, 208 Or App 267, 144 P3d 981 (2006). The mere fact that a psychological evaluation of petitioner was filed after lapse of the 60-day statutory time limitation in ORS 144.223(2) does not bar the board from considering it in making a release decision, unless the petitioner suffers some cognizable prejudice due to the delay. To establish the requisite prejudice, an inmate must satisfactorily show that the report is unreliable due to the delay in filing it; the bare allegation that the report was “possibly stale” is insufficient.

**Kowalski v. Board of Parole**, 194 Or App 156, 93 P3d 831 (2004), *rev den*, 338 Or 16 (2005). Because petitioner was incarcerated both on an indeterminate pre-guidelines conviction for which the sentence has not expired and a consecutive determinate term imposed on a conviction subject to the guidelines, the board properly released him both on parole and on post-prison supervision.

**V.L.Y. v. Board of Parole**, 188 Or App 617, 72 P3d 993 (2003), *rev’d on other grounds*, 338 Or 44, 106 P3d 145 (2005) (*see above*). Board applied risk-assessment scale set out in Department of Corrections rules in classifying petitioner as a predatory sex offender. *Held*: Petitioner did not present a valid equal-privileges challenge, and his *ex post facto*, double-jeopardy, and cruel-and-unusual-punishment claims have no merit. Because ORS 181.585 applies to an open-ended class, it is not a bill of attainder. Designating petitioner as a PSO does not invade on his constitutional right to privacy.

**State v. Hamilton**, 186 Or App 729, 64 P3d 1215 (2003). Because defendant was placed at the corrections center as “transitional lodger” a condition of post-prison supervision and was heavily supervised and could not leave the center without an escort, he was “committed” within the meaning of ORS 166.275, which prohibits possession of a weapon by an inmate.

**Thomas v. Board of Parole and Post-Prison Supervision**, 186 Or App 170, 63 P3d 29, *rev den*, 335 Or 510 (2003). If the sentencing court did not impose restitution as part of the judgment, the parole board was without authority to require plaintiff, as a condition of parole, to pay restitution based on a separate conviction. *Note*: ORS 144.102(4)(b) now provides broader authority.

**Gaynor v. Board of Parole and Post-Prison Supervision**, 165 Or App 609, 996 P2d 1020 (2000). The parole board does not have the authority to extend a post-prison supervision term beyond the term that the sentencing court imposed, even if the court imposed the wrong term.

**Frey v. Board of Parole**, 152 Or App 462, 950 P2d 418 (1998). The board designated petitioner a “predatory sex offender” and ordered him to obtain sexual-offender treatment during post-prison supervision. *Held*: The PSO designation is not “punishment” that infringes upon petitioner’s constitutional rights.

**Rund v. Board of Parole**, 152 Or App 231, 953 P2d 766 (1998). Petitioner was imprisoned on a kidnapping conviction, and the board ordered him to obtain sex-offender treatment during post-prison supervision, because his history suggested that he was a sexual offender. Petitioner refused to comply, and the board imposed a series of sanctions, including a 90-day “local sanction” in county jail. *Held*: [1] Board had authority under ORS 144.102(3) to impose condition even though petitioner’s conviction was not a sexual offense. [2] When the board imposes a local sanction of a jail term pursuant to ORS 144.106(3) for failure to comply with post-prison supervision conditions, that time is not subject to the time limit for incarceration in state prison set by ORS 144.108.

**Lee v. Board of Parole**, 144 Or App 489, 927 P2d 1097 (1996): The parole board *sua sponte* increased petitioner’s term of post-prison supervision on his conviction for first-degree sexual abuse from 36 months to 105 months per ORS 144.103. *Held*: That was error, because petitioner’s conviction is not subject to the statute in light of *State v. McFee*.

*Coleman v. Board of Parole*, 144 Or App 487, 927 P2d 622 (1996): Board had authority to designate petitioner as a “high risk offender”—that is not the same as a dangerous-offender designation pursuant to ORS 161.725.

*Hibbard v. Board of Parole*, 144 Or App 82, 925 P2d 910 (1996): Predatory-sexual-offender designation is not “punishment” within meaning of constitutional clauses prohibiting *ex post facto* legislation, cruel and unusual punishment, double jeopardy, or bills of attainder.

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## XII. MERGER OF CONVICTIONS

See ORS 161.067; ORS 161.485.

*Note:* This section includes only decisions issued since 1995.

### A. MERGER OF CONVICTIONS FOR AGGRAVATED MURDER, MURDER, AND UNDERLYING FELONY

*State v. Bowen*, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). In light of *State v. Barrett*, the sentencing court erred when it entered a separate conviction and sentence of death on the two counts of aggravated murder based on defendant’s murder of the single victim. “[T]he trial court should have entered one judgment of conviction ... which enumerated separately each aggravating factor and imposed one sentence of death.”

*State v. Tiner*, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007). The sentencing court erred when it entered a separate conviction and sentence of death on the two counts of aggravated murder, and a separate conviction and sentence for intentional murder, based on defendant’s murder of the single victim.

*State v. Acremant*, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005). Defendant was convicted of two alternative counts of aggravated murder for each of his two victims, and defendant did not object. *Held:* The sentencing court committed plain error under *State v. Barrett* by entering two convictions for each victim. “We therefore remand the case for entry of a corrected judgment of conviction reflecting defendant’s guilt on the charge of aggravated murder for each victim, with the judgment separately enumerating the aggravating factors upon which each conviction is based.”

See also *State v. Gibson*, 338 Or 560, 113 P3d 423, *cert den*, 546 US 1044 (2005) (same).

*State v. Ventris*, 337 Or 283, 96 P3d 815 (2004). Although indictment charged defendant with committing aggravated felony murder personally and intentionally, and the trial court so found, that verdict does not require that the conviction on the lesser-included charge of murder necessarily must be for intentional murder rather than felony murder. On remand after vacation of conviction for aggravated murder, he trial court properly treated that lesser conviction as one for felony murder and hence merged the separate conviction for the felony into that conviction.

*State v. Sparks*, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). The jury found defendant guilty of 15 counts of aggravated murder and five other offenses and sentenced him to death. *Held:* The judgment, which states that defendant “is sentenced to death on all fifteen counts” of aggravated murder, does not impermissibly impose multiple death sentences.

*State v. Hale*, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004). The jury found defendant guilty of 13 counts of aggravated murder and sentenced him to death. *Held:* The sentencing court erroneously entered multiple judgments and sentences of death for the aggravated murder of each of the three victims in the case.

*State v. Barrett*, 331 Or 27, 10 P3d 901 (2000). Defendant was convicted of three counts of aggravated murder based on three separate subsections in ORS 163.095; all the counts were based on his intentional murder of one victim. The sentencing court entered a separate conviction on each count and imposed a consecutive sentence on one of the convictions. *Held:* Reversed and remanded for resentencing. Under ORS 161.062(1), the three convictions should be merged into one conviction (albeit one listing each subsection) and defendant should receive only a single sentence.

See also *State v. Benson*, 187 Or App 276, 66 P3d 569 (*per curiam*), *rev den*, 335 Or 655 (2003) (sentencing court erred under *Barrett* in failing to merge defendant’s two convictions for felony murder, which were based on the death of one victim under alternative theories).

*State v. Thomas*, 238 Or App 360, 242 P3d 721 (2010). Based on a single murder, defendant was convicted on two counts of aggravated murder and two counts of conspiracy to commit aggravated murder, and the court imposed concurrent true-life sentences on those convictions. Defendant appealed, contending that the court committed plain error by not merging the convictions. The Court of Appeals agreed and remanded with directions to enter a single conviction for aggravated murder. On remand, the court entered an amended judgment that merged the four counts into a single conviction, but also imposed separate concurrent sentences. Defendant appealed again, raising the unpreserved claim that the trial court committed plain error by not imposing a single sentence. *Held*: Reversed and remanded. [1] The error is “plain” because it is apparent on the face of the judgment and does not require resolution of competing inferences. [2] The court exercised its discretion to correct the error even though defendant is serving a true-life sentence and the correction will not affect his sentence, and even though defendant did not ask the trial court to correct the judgment per ORS 138.083(1), because “judicial efficiency weighs in favor of correcting the error in this proceeding.” [3] The court remanded “for resentencing on a single conviction of aggravated murder.”

See also *State v. Weivoda*, 237 Or App 571, 241 P3d 307 (2010) (*per curiam*) (similar).

*State v. Delcurto*, 231 Or App 275, 218 P3d 172 (2009), *rev den*, 348 Or 114 (2010). The sentencing court committed plain error when it did not merge defendant’s two convictions for criminally negligent homicide into his two convictions for second-degree manslaughter based on the same incident and victims.

*State v. Lopez-Delgado*, 223 Or App 752, 196 P3d 104 (2008). Defendant was convicted of two counts of aggravated murder, two counts of murder, and one count of first-degree burglary based on a single episode in which he and another person committed burglary. During the burglary, the other person intentionally shot and killed two victims. Defendant asserted that his burglary conviction merged into his murder convictions and that his murder convictions merge into his conviction for aggravated-murder. *Held*: Remanded for entry of corrected judgment. [1] Because murder is a lesser-included offense of aggravated murder, the convictions that were based on the death of a single victim should have merged into the aggravated-murder convictions based on the same acts. [2] Defendant’s burglary conviction merges into his conviction for felony murder based on the burglary.

*State v. Gonzales-Gutierrez*, 216 Or App 97, 171 P3d 384 (2007), *rev den*, 344 Or 194 (2008). Defendant was convicted of several counts of attempt, conspiracy, and solicitation to commit aggravated murder and simple murder of each of two victims, and the trial court entered separate convictions. Defendant did not object, but argued on appeal that all of the convictions based on the offenses involving each victim should have merged into a single conviction for each victim. *Held*: Reversed. [1] Under ORS 161.067(1), each of the convictions for attempted aggravated murder based on different theories (murder for hire and murder of a witness) should have merged into a single conviction. [2] The convictions based on different theories of conspiracy to commit aggravated murder also should have merged. [3] Because ORS 161.485(2) provides that a court may enter convictions for only one inchoate offense based on the same conduct against the same victim, all of defendant’s convictions for attempt, solicitation, and conspiracy of the same offense against the same victim, merge into single convictions of attempted murder and attempted aggravated murder. [4] Finally, the convictions for attempted murder must merge into the convictions for attempted aggravated murder.

*State v. Wilson*, 216 Or App 226, 173 P3d 150 (2007), *rev den*, 344 Or 391 (2008). In defendant’s retrial for aggravated murder and murder, the trial court was not required to “re-merge” the previously entered predicate felonies (which had been affirmed by the appellate courts) into the new convictions for attempted aggravated murder, even though the original sentencing court had merged the predicates into his aggravated-murder conviction. The Court of Appeals did not decide whether a procedural mechanism exists to “merge” convictions entered in separate proceedings because it held that merger was not required in any event. First, it held that each crime has an element that the other does not. Second, it held that, under *State v. Barrett*, 331 Or 27, 37 n 4, (2000), separate offenses that also constitute aggravating circumstances for purposes of proving various theories of aggravated murder do *not* merge into the convictions for aggravated murder.

*State v. Walraven*, 214 Or App 645, 167 P3d 1003 (2007), *rev den*, 344 Or 280 (2008). The sentencing court erroneously failed to merge defendant’s conviction for felony murder under ORS 163.115(1)(b) into his single merged conviction for aggravated murder. Under ORS 161.067(1), the provisions do not each “require[] proof of an element that the others do not.” Because the aggravated-murder statute defines aggravated murder as “murder *as defined in ORS 163.115* [and an aggravating circumstance],” then any conviction for murder is subsumed in any conviction for aggravated murder. Thus, a felony-murder conviction merges into a conviction for intentional aggravated murder.

*State v. Link*, 214 Or App 100, 162 P3d 1038 (2007), *aff'd*, 346 Or 187, 208 P3d 936 (2009). The sentencing court erred in not merging defendant's multiple alternative convictions for aggravated murder, and his related convictions for conspiracy and attempt to commit murder, based on a single homicide. It was not sufficient for the judgment to recite that the convictions "merge for sentencing."

*State v. Hamilton*, 203 Or App 706, 127 P3d 654, *rev den*, 340 Or 359 (2006). The sentencing court erred in failing to merge into a single conviction for murder defendant's separate convictions on two counts of murder by abuse and two counts of felony murder that were based on his killing of a single child. Remanded for resentencing per ORS 138.222(5).

*State v. Randant*, 196 Or App 601, 103 P3d 1134 (2004), *aff'd on rev of other issue*, 341 Or 64, 136 P3d 1113 (2006). The sentencing court erred in failing to merge defendant's separate conviction for aggravated felony murder and the underlying felonies into his other conviction for aggravated felony murder based on the same victim and incident.

*State v. Young*, 188 Or App 247, 71 P3d 119, *rev den*, 336 Or 125 (2003). Pursuant to an agreement, defendant pleaded guilty to three of six counts of aggravated murder and waived double jeopardy, and the court imposed a life sentence with the possibility of parole. After beginning to serve that sentence, defendant breached the agreement by not testifying as agree, and the state prosecuted him on the remaining counts over his objection. The jury imposed a true-life sentence. On appeal, defendant argued that the court lacked jurisdiction to convict and sentence him on the remaining convictions. *Held*: Affirmed. The fact that defendant had commenced serving the sentence imposed on the first three convictions, which were based on the same incident, did not deprive the court of jurisdiction to impose sentence on the other three. Defendant cannot claim that the state is precluded from doing what he agreed it could do. Although all the convictions would merge under *State v. Barrett*, defendant waived his right to insist on merger.

*State v. Rios*, 186 Or App 639, 64 P3d 184 (2003). The sentencing court erred under *State v. Barrett* by failing to merge defendant's separate convictions for alternative theories of attempted aggravated murder and attempted murder into a single conviction.

*State v. Cook*, 183 Or App 237, 51 P2d 673 (2002) (*per curiam*), *rev den*, 335 Or 142 (2003). Under *State v. Barrett*, the sentencing court erred in entering three convictions and aggravated murder and in imposing consecutive true-life sentences, because all the charges were based on defendant's murder of a single victim.

*State v. Avritt*, 175 Or App 137, 28 P3d 642 (2001), *rev den*, 333 Or 400 (2002). Defendant's convictions for attempted aggravated murder and first-degree burglary must merge because the jurors were instructed that they had to find that he committed a *completed* burglary in order to find him guilty on the charge of attempted aggravated murder.

*State v. Beason*, 170 Or App 414, 12 P3d 560 (2000), *rev den*, 331 Or 692 (2001). Defendant's separate convictions for intentional murder and murder by abuse based on his killing of one victim should have been merged into a single conviction and sentence. The case was remanded to the trial court for entry of judgment of conviction of murder, "which judgment should enumerate both theories of conviction."

*State v. Merideth*, 149 Or App 164, 942 P2d 803, *rev den*, 326 Or 58 (1997). Defendant was convicted of three counts each of aggravated murder in violation of ORS 163.095(1)(d) (more than one murder victim), felony murder, arson, and first-degree manslaughter all based on an incident in which he started a fire that burned down a duplex, killing a woman and her two children. The court merged the felony-murder and arson convictions into the respective aggravated-murder convictions and imposed consecutive life sentences and the murder convictions and a concurrent 48-year sentence on the manslaughter convictions. *Held*: The sentencing court correctly refused to merge the manslaughter convictions into the aggravated-murder convictions, because the manslaughter charges contained an element (*viz.*, "conduct manifesting extreme indifference") that was not included in the aggravated-murder counts.

*But see State v. Bowen*, 340 Or 487, 516, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007) (first-degree manslaughter is lesser-included offense of murder for purposes of ORS 136.465).

*State v. Walton*, 134 Or App 66, 894 P2d 1212, *rev den*, 321 Or 429 (1995): Defendant originally was convicted of aggravated felony murder, aggravated murder (concealment), felony murder, and first-degree robbery, and the sentencing court originally sentenced defendant to death, but it did not impose sentences on the felony-murder or robbery convictions. The Supreme Court vacated defendant's death sentence and remanded "the case." On remand, the sentencing court imposed

consecutive life sentences on the aggravated-murder convictions, merged the felony-murder conviction, and sentenced defendant to 30 years on the robbery conviction. *Held*: The sentencing court erred in failing to merge the robbery conviction into the convictions for felony murder and aggravated felony murder; a predicate felony conviction merges into a conviction for felony murder or aggravated felony murder based on commission of that felony.

*State v. Zelinka*, 130 Or App 464, 882 P2d 624 (1994), *rev den*, 320 Or 508 (1995): Because defendant's three convictions for murder by abuse were based on only one murder victim and only one statutory violation, sentencing court erred in failing to merge them into a single conviction.

## **B. MERGER OF CONVICTIONS FOR ATTEMPT, CONSPIRACY, OR SOLICITATION**

*See* ORS 161.485.

*State v. Dasa*, 234 Or App 219, 227 P3d 228 (2010). Based on his unlawful entry into the victim's residence with an intent to murder and his subsequent intentional murder of that victim, defendant correctly was convicted of aggravated felony murder under ORS 163.115(2)(d). But the sentencing court erred when it did not merge defendant's three related convictions for attempted aggravated murder under alternative theories based on his attempt to murder another person in the residence.

*State v. Nelson*, 218 Or App 563, 180 P3d 133 (2008). The trial court committed plain error by not merging defendant's convictions for prostitution in violation of ORS 161.405 and for unlawful prostitution procurement activities under Portland City Code § 14A.040.050. Unlawful prostitution procurement activities encompasses acts that would constitute attempted prostitution; thus, the failure to merge the inchoate crime into the completed crime was error under ORS 161.485(3) ("[a] person shall not be convicted on the basis of the same course of conduct of both an actual commission of an offense and an attempt to commit that offense.")

*State v. Gonzales-Gutierrez*, 216 Or App 97, 171 P3d 384 (2007), *rev den*, 344 Or 194 (2008). Defendant was convicted of several counts of attempt, conspiracy, and solicitation to commit aggravated murder and simple murder of each of two victims, and the trial court entered separate convictions. Defendant did not object, but argued on appeal that all of the convictions based on the offenses involving each victim should have merged into a single conviction for each victim. *Held*: Reversed. The convictions based on different theories of conspiracy to commit aggravated murder also should have merged. Because ORS 161.485(2) provides that a court may enter convictions for only one inchoate offense based on the same conduct against the same victim, all of defendant's convictions for attempt, solicitation, and conspiracy of the same offense against the same victim, merge into single convictions of attempted murder and attempted aggravated murder.

*State v. Link*, 214 Or App 100, 162 P3d 1038 (2007), *aff'd*, 346 Or 187, 208 P3d 936 (2009). The sentencing court erred in not merging defendant's multiple alternative convictions for aggravated murder, and his related convictions for conspiracy and attempt to commit murder, based on a single homicide. It was not sufficient for the judgment to recite that the convictions "merge for sentencing."

*State v. Wood*, 208 Or App 329, 144 P3d 1005 (2006) (*per curiam*). Separate convictions for conspiracy to commit theft and the completed theft that was the object of the conspiracy merge under ORS 161.485(3). Conspiracy conviction vacated; remand for resentencing.

*See also State v. Thomas*, 208 Or App 492, 144 P3d 942 (2006) (convictions for aggravated murder and conspiracy to commit aggravated murder merge into conviction for aggravated murder).

*State v. Hathaway*, 207 Or App 716, 143 P3d 545, *rev den*, 342 Or 254 (2006). [1] The sentencing court committed plain error by failing to merge *sua sponte* pursuant to ORS 161.485(3) defendant's convictions for first-degree burglary and conspiracy to commit first-degree burglary based on the same course of conduct. [2] The court reviewed defendant's claim even though the error had no effect on the length of defendant's imprisonment, and that it would cause pain to the victims and would give defendant an opportunity to escape.

*State v. O'Dell*, 191 Or App 331, 82 P3d 183 (2003), *rev den*, 336 Or 509 (2004). Defendant's convictions for conspiracy and the completed offense merge pursuant to ORS 161.485(3).

*State v. Russell*, 185 Or App 488, 60 P3d 575 (2002), *rev den*, 335 Or 402 (2003). The sentencing court erred

under ORS 161.485(3) when it entered convictions on defendant's completed offenses and on separate conspiracy charges based on the same offenses.

*State v. Watson*, 180 Or App 320, 43 P3d 444, *rev den*, 334 Or 289(2002). The sentencing court erred in failing to merge under ORS 161.485(3) defendant's separate convictions for escape in the second degree and conspiracy to commit escape because they were based on the same escape, even though the court found under ORS 161.067(3) that defendant committed the two crimes in separate criminal episodes.

*State v. Green*, 145 Or App 175, 929 P2d 1057 (1996): Sentencing court erred by failing to merge, per ORS 161.485(2), defendant's separate convictions for conspiracy to commit rape and sodomy and his convictions for attempt to commit rape and sodomy.

*State v. Culley*, 135 Or App 536, 899 P2d 732 (*per curiam*), *rev den*, 322 Or 168 (1995): Sentencing court erred under ORS 161.485(2) in entering separate convictions for both conspiracy and solicitation to commit murder; remanded for vacation of conspiracy conviction and for resentencing.

*State v. Scott*, 135 Or App 319, 899 P2d 697, *rev den*, 321 Or 560 (1995): Sentencing court erred under ORS 161.485(3) when it failed to merge convictions for conspiracy to commit tampering with a witness and the completed crime of tampering with a witness.

*State v. Rickards*, 133 Or App 592, 891 P2d 1383 (1995) (*per curiam*): Sentencing court erred under ORS 161.485(2) when it failed to merge defendant's convictions for attempted first-degree assault and conspiracy to commit first-degree assault; the appropriate remedy is to remand for a determination of which conviction should merge and for resentencing.

*State v. Garratt*, 131 Or App 755, 885 P2d 757 (1994) (*per curiam*): Because ORS 161.485(2) precludes conviction of more than one inchoate crime for conduct aimed at the culmination of the same crime, sentencing court erred when it failed to merge defendant's convictions for solicitation to commit perjury and conspiracy to commit perjury.

## C. MERGER OF CONVICTIONS FOR OTHER OFFENSES

See ORS 161.067.

### 1. Merger under ORS 161.067(1)—lesser or necessarily included offenses

*Note*: This section does not include those decisions that address only the closely related topic of whether a secondary offense is a lesser-included offense for purposes of charging and jury instruction (*see* ORS 136.460, 136.65). *See* Or Crim Rptr § J-6150.

*State v. Foster*, 257 Or App 757, \_\_\_ P3d \_\_\_ (2013) (*per curiam*). Defendant threw a beer glass into the victim's face causing serious physical injury. She was convicted on two counts of **second-degree assault**, in violation of ORS 163.175(1)(a) ("causes serious physical injury to another") and (1)(b) ("causes physical injury to another by means of a deadly or dangerous weapon"). The sentencing court entered separate convictions. *Held*: Reversed and remanded. The court should have merged the convictions under ORS 161.067(1), because ORS 163.175(1)(a) and (b) are not separate "statutory provisions" for purposes of that subsection.

*State v. Dahl*, 256 Or App 848, 302 P3d 480 (2013) (*per curiam*). Defendant was convicted of assault in the fourth degree and two counts of **attempted assault in the second degree** based on an incident in which he slammed a door on the victim and then kicked her in the face. On appeal, defendant claimed that the sentencing court committed plain error by not merging the attempted-assault convictions. *Held*: Reversed and remanded. Because ORS 161.485(2) precludes a person from being "convicted of more than one offense ... for conduct designed to commit or to culminate commission of the same crime," and because there was not a sufficient pause between the attempted assaults, the trial court committed plain error by failing to merge the guilty verdicts into a single conviction for attempted assault.

*State v. Van Newton*, 256 Or App 474, 300 P3d 286 (2013) (*per curiam*). Based on multiple incidents, defendant was found guilty of 26 crimes including one count of second-degree assault and one of **fourth-degree assault**, both of

which involved the same victim and incident. At sentencing, the state conceded that the latter was a lesser-included of the former and that the verdicts have to merge, and the sentencing court agreed, but the judgment stated that the second count “merges” with the first, “for the purpose of imposing sentence.” *Held*: Reversed and remanded for resentencing. The judgment constitutes plain error that requires a remand: “We have previously held that the precise language that the trial court used in its judgment fails to merge a defendant’s guilty verdicts.”

*State v. Arbogast*, 256 Or App 482, 300 P3d 309 (2013) (*per curiam*). The sentencing court “committed plain error in failing to merge the guilty verdict for **unlawful use of a weapon** with the guilty verdict for second-degree assault,” because those crimes were based on the same incident and involved the same victim.

*State v. Brooks*, 256 Or App 348, 300 P3d 256 (2013). Defendant was convicted of first-degree burglary and two counts of **second-degree robbery**, and the sentencing court entered separate robbery convictions, and imposed concurrent 70-month sentences. *Held*: Reversed and remanded for resentencing. In light of *State v. White*, 346 Or 275 (2009), the court erred in entering separate convictions on the two robbery counts.

*State v. Wytcherley*, 256 Or App 128, 299 P3d 606 (2013) (*per curiam*). Based on a single incident in which defendant shot his brother in the leg, he was convicted of second-degree assault and **unlawful use of a weapon**. The sentencing court entered separate convictions. *Held*: Reversed and remanded. Because all of the elements of UUW are contained within second-degree assault committed with a weapon, and because the offenses did not involve a pause sufficient to preclude merger, the court erred by failing to merge the two counts.

*State v. Valenzuela*, 255 Or App 738, 298 P3d 640 (2013) (*per curiam*). The sentencing court erred when it did not merge defendant’s conviction for **unlawful use of a weapon**, ORS 166.220, into his conviction for second-degree assault, ORS 163.175, where both offenses were based on his single act of stabbing the victim with a knife.

*State v. Pinard*, 255 Or App 417, 300 P3d 177, *rev den*, 353 Or 787 (2013). Defendant shot his neighbor’s dog. The dog’s injuries were so severe that her owners euthanized her at home. Defendant was convicted of one count of aggravated **first-degree animal abuse**, ORS 167.322, and two counts of first-degree animal abuse, ORS 167.320. On appeal, he argued that the trial court committed plain error by not merging the aggravated first-degree animal abuse with the first-degree animal abuse count, and by not merging the two first-degree animal abuse counts with each other. The state conceded that the two first-degree animal abuse counts should be merged, but argued that aggravated first-degree animal abuse and first-degree animal abuse do not merge, because each crime requires proof of a different mental state—aggravated abuse requires proof of a “malicious” killing (killing with malicious intent), whereas abuse requires proof of a “cruel” killing (killing in a manner calculated to cause pain). *Held*: Reversed and remanded for entry of a single count of first-degree animal abuse. [1] The court did not commit plain error in entering separate convictions for first-degree animal abuse and aggravated first-degree animal abuse: “we need not conclusively resolve whether the two statutes require proof of different elements; the question is at least reasonably in dispute, and defendant’s challenge therefore does not establish plain error.” [2] The court did commit plain error in entering two convictions for first-degree abuse based on the single incident.

*State v. Epps*, 255 Or App 290, 296 P3d 663 (2013) (*per curiam*). Defendant was found guilty on two counts each of **possession of a stolen vehicle**, ORS 819.300 (PSV), and unauthorized use of a vehicle, ORS 164.135 (UUV), and the court entered a separate conviction on each. *Held*: Reversed and remanded for merger and resentencing. Each UUV conviction must merge with the companion PSV conviction.

*State v. Cam*, 255 Or App 1, 296 P3d 578 (2013). Defendant was at the center of a massive property-theft ring based in Woodburn. Thieves would bring him stolen goods in exchange for cash or drugs. The jury found defendant guilty of 53 theft and drug-related charges. *Held*: Reversed and remanded for resentencing. [1] The two convictions for “commercial drug offense” **PCS** do not merge even though the counts dealt with the same substances. “In determining whether convictions merge under ORS 161.067(1), the court considers the statutory elements of each offense, not the underlying factual circumstances recited in the indictment,” and offense subcategories such as CDO “are not statutory elements of the offense.” [2] The counts of **theft** against the same victim should have merged.

*State v. Joynt*, 254 Or App 415, 294 P3d 534 (2012) (*per curiam*), *rev den*, 353 Or 788 (2013). Defendant was found guilty of two counts of **first-degree theft** for stealing a truck and parts from that truck, and was found guilty on three pairs of counts charging unlawful use of a vehicle, ORS 164.135 (UUV), and **unlawful possession of a stolen vehicle**,

ORS 819.300 (PSV), for illegally towing three cars. The court entered separate convictions on those verdicts. *Held*: Reversed and remanded to merge various verdicts and for resentencing. [1] The two theft verdicts merge. *State v. Noe*, 242 Or App 530, 532 (2011). [2] Also based on *Noe*, all of the elements of the PSV offense are subsumed into the companion UUV offense, “in a case like this one,” and so those verdicts merge.

*Bumgarner v. Nooth*, 254 Or App 86, 295 P3d 52 (2012). In 2004, petitioner was convicted of two counts of **first-degree rape**, two counts of first-degree unlawful sexual penetration, two counts of first-degree sexual abuse, two counts of **first-degree kidnapping**, and one count of third-degree assault. The judgment was affirmed on appeal. At the time of trial, there was case law that the convictions on the sex crimes and kidnapping did not merge, but there were also cases suggesting that convictions for the same offense merge when the charges had been based on different statutory subsections. It was not until after the trial that the appellate courts definitely announced that such verdicts should merge. *State v. Parkins*, 346 Or 333 (2009). Petitioner sought post-conviction relief, arguing that his trial counsel was constitutionally inadequate for not requesting merger. The post-conviction court agreed and granted post-conviction relief, and the state appealed. *Held*: Affirmed. [1] Reasonable trial counsel would have discerned, from existing case law holding that different theories of aggravated murder merged, that the structure of the aggravated-murder statute and the statutes involved in this case was similar, and that the convictions at issue in this case should merge. [2] “Uncertainty in the law regarding when convictions would merge ... did not relieve trial counsel of the obligation to assert that the sentences at issue were subject to merger.” Despite any ambiguity in the law, the benefits of raising merger as an issue were so obvious that any reasonable lawyer would have done so. [3] Given the “obvious possible benefits” of arguing that the verdicts should merge, trial counsel’s failure to argue for merger constituted inadequate assistance.

*State v. Kinsley*, 253 Or App 251, 289 P3d 367 (2012) (*per curiam*). Defendant was found guilty on charges of **delivery of methamphetamine** within 1,000 feet of a school, delivery of methamphetamine, first-degree child neglect, and **endangering the welfare of a minor**, and the court entered separate convictions. *Held*: Remanded for resentencing. [1] Under *State v. Rodriguez-Gomez*, 242 Or App 567 (2011), convictions for delivery of methamphetamine within 1,000 feet of a school and delivery of methamphetamine merge. [2] Under *State v. Reiland*, 153 Or App 601 (1998), and based on the manner in which the offenses were charged, the convictions for endangering the welfare of a minor and first-degree child neglect merge.

*State v. Ledford*, 252 Or App 572, 287 P3d 1278 (2012) (*per curiam*), *rev den*, 353 Or 209 (2013). Based on a single incident, defendant was convicted of **first-degree rape**, first-degree sexual abuse, and **second-degree sexual abuse** by jury verdicts, and the court entered separate convictions on those verdicts. *Held*: Reversed and remanded. The sentencing court erred by not merging the verdicts on the charge of second-degree sexual abuse into the conviction for first-degree rape.

*State v. Hamilton*, 348 Or 371, 233 P3d 432 (2010). Defendant and a companion committed an armed **robbery** at a bar during which seven people, barkeepers and customers, were threatened. Defendant was convicted on seven counts each of first-degree robbery, and the sentencing denied defendant’s motion to merge all the convictions. *Held*: Affirmed. [1] “A ‘victim’ of robbery includes a person against whom a defendant uses or threatens violence in the course of committing or attempting to commit theft, which can, but does not have to, be the owner or possessor of the property” he is attempting to steal. “Each of the seven people subjected to threats of violence in the course of the robbery was a victim for purposes of the robbery statutes.” [2] Consequently, “the trial court properly denied defendant’s motion to merge his robbery convictions under ORS 161.067(2).”

*State v. Blake*, 348 Or 95, 228 P3d 560 (2010). Based on his single act of attempting to purchase groceries with a counterfeit \$100 bill, defendant was convicted of first-degree **forgery**, ORS 165.013(1)(a), and first-degree criminal possession of a forged instrument, ORS 165.022(1). The sentencing court denied defendant’s motion to merge the convictions. *Held*: Reversed and remanded. The convictions merge under ORS 162.067(1) because all of the elements of that latter offense are included within those of the former offense. Although the elements are textually different because the possession offense requires proof of possession and the forgery offense requires proof of uttering, it is not possible, given the definitions of those terms, to utter a forged instrument without also possessing it. “Proof of the act necessary to establish the crime of forgery also proves the act necessary to establish the crime of criminal possession of a forged instrument.” Likewise, “a person cannot utter a forged bill to another with an intent to injure or defraud that person without also having an intent to present that bill to the person to be injured or defrauded.”

*State v. Parkins*, 346 Or 333, 211 P3d 262 (2009). Defendant was convicted of six counts of first-degree **sexual**

**abuse** based on one incident in which he molested an 11-year-old girl by touching her breasts, vagina, buttocks; three counts alleged forcible compulsion and the other three alleged that she was under 14 years old. *Held*: Reversed and remanded. [1] ORS 163.427(1)(a) defines three alternative ways to commit the crime of first-degree sexual abuse—*viz.*, if the victim is under 14, is subjected to forcible compulsion, is incapable of consent—and those alternatives “are not separate statutory provisions within the meaning of” ORS 161.067(1). *Distinguishing State v. Crotsley*, 308 Or 272 (1989). Thus, the convictions for alternative forms of sexual abuse merge into a single conviction. [2] But, three separate convictions for first-degree sexual abuse are proper based on each of the different body parts defendant touched.

*State v. White*, 346 Or 275, 211 P3d 248 (2009). Defendant was convicted of two counts of second-degree **robbery** based on counts alleging that he robbed the victim while purporting to be armed and while aided by the presence of another person. ORS 164.405(1)(a), (b). He appealed arguing that the convictions merge into a single conviction under ORS 161.067(1). The Court of Appeals affirmed, concluding that the two theories of robbery were based on separate statutory provisions because each addressed a “separate and distinct legislative concern” (*i.e.*, the increased risk of psychological harm to the victim who believes that the robber is armed, and the increased risk of physical harm to the victim when the robber is aided by another person who is actually present at the scene). *Held*: Reversed and remanded. Guilty verdicts based on these two counts of second-degree robbery that are based on the same criminal episode and victim cannot be entered as separate convictions, but instead merge into one conviction for second-degree robbery. The mere fact that a statute “addresses two legislative concerns” may be a useful guide when analyzing the legislature’s intent, but it is not dispositive. Rather, “the fundamental question is whether the text, context, and legislative history show that the legislature intended to define a single or two separate crimes.” Here, ORS 164.405(1)(a) and (b) both address the same coercive effect on the victim, even though they do so in different ways. Consequently, they are not separate statutory provisions for purposes of ORS 161.067(1).

*State v. White*, 341 Or 624, 147 P3d 313 (2006). Defendant’s two convictions for first-degree **burglary** based on separately alleged intents to commit assault and menacing merge because both were based on a single entry and the same incident. The alternative theories of “entering” and “remaining” are not separate statutory provisions under ORS 161.067(1). Because there was no evidence of repeated violations of the burglary statute, ORS 161.067(3) did not authorize separate convictions.

*Note*: The court affirmed without discussion the previous decision of the Court of Appeals in this case on two other merger issues—202 Or App 1, 121 P3d 3 (2005): [1] Defendant’s two convictions for first-degree kidnapping under ORS 163.235(1)(c) and (d) based on one continuing incident and one victim merge under the analysis in *State v. Barrett*, because those are alternative means to prove a single crime, not separate crimes, and the evidence did not establish that defendant committed that offense twice, separated by a sufficient pause, within the meaning of ORS 161.067(3). [2] Defendant’s three convictions for second- and fourth-degree assault merge under the analysis in *State v. Sanders*, because they were based on a single assault against a single victim and the trial court treated them all as lesser-included offenses of the principal assault charge.

*State v. Edwards*, 251 Or App 18, 281 P3d 675, *rev den*, 352 Or 665 (2012). Defendant was convicted of **robbery** offenses that he committed against multiple victims; for each of two victims, one count of first-degree robbery alleged “armed with a deadly weapon” and the other alleged “caused serious physical injury.” ORS 164.415(1)(a), (c). The court entered separate convictions on all the counts of first-degree robbery. *Held*: Reversed and remanded for resentencing. Because “the state concedes that a single robbery occurred with respect to each victim and that the legislature intended subsections (1)(a) and (1)(c) to constitute alternative theories of a single crime rather than multiple crimes,” the alternative counts of first-degree robbery as to each victim were a single crime and so the conviction must merge.

*State v. Powell*, 250 Or App 480, 281 P3d 631, *rev den*, 352 Or 665 (2012). Defendant and others tricked their way into the victim’s house in order to steal marijuana, and defendant threatened the three victims with a firearm. When the intruders discovered that the marijuana they sought actually was next door, they released the victims and left. Defendant was convicted of, *inter alia*, three counts of first-degree **robbery** and six counts of second-degree robbery, two for each victim. *Held*: Reversed and remanded. [1] The sentencing court committed plain error by not merging the two convictions for second-degree robbery for each victim into a single conviction. [2] But the court correctly did not merge those convictions into the respective conviction for first-degree robbery.

*State v. Calhoun*, 250 Or App 474, 280 P3d 1045, *rev den*, 352 Or 377 (2012) (*per curiam*). Defendant was convicted of first-degree rape and **second-degree sexual abuse**. *Held*: Reversed and remanded. The court erred by “failing to merge, per ORS 161.067(1), the guilty verdict for second-degree sexual abuse with the guilty verdict for first-degree

rape.”

*Note:* Although the opinion does not expressly discuss the point, the charge of first-degree rape was based on an allegation of “forcible compulsion” and the charge of second-degree sexual abuse was based on an allegation of sexual intercourse and the “does not consent” clause in ORS 163.425(1)(a). In only that particular circumstance is second-degree sexual abuse a lesser-included offense of first-degree rape.

*State v. Zolotoff*, 250 Or App 376, 280 P3d 396 (*per curiam*), *rev den*, 352 Or 666 (2012). Defendant attacked his father with a fireplace poker. He was convicted of, *inter alia*, attempted assault in the first degree constituting domestic violence and **unlawful use of a weapon**, in violation of ORS 166.220, based on an allegation that he attempted to use a dangerous weapon unlawfully against the victim. *Held:* Remanded for resentencing. Based on the way to two offenses were charged, the sentencing court erred by not merging, per ORS 161.067(1), the UUW conviction into the conviction for attempted assault.

*State v. Williams*, 249 Or App 514, \_\_\_ P3d \_\_\_ (2012) (*per curiam*). Defendant sexually molested a 14-year-old girl and was convicted on multiple counts of first-degree sexual penetration and **sexual abuse**. *Held:* Convictions affirmed; remanded for resentencing. In light of *State v. Parkins*, 346 Or 333 (2009), the convictions on alternative counts of first-degree sexual abuse must merge.

*State v. Mills*, 248 Or App 35, 273 P3d 162 (2012). Defendant was annoyed at Weeks, his former girlfriend, and Jacobs, her new boyfriend, and so he and a friend drove by and threw gasoline on Jacobs’s car and lit it on fire. The fire damaged the residence, too. The indictment charged three alternative counts of first-degree **arson** based on ORS 164.325(1)(a)(B)—naming the car, Weeks, and Jacobs as the victims— and one count of second-degree arson based on ORS 164.315(1)(a)(B) (damages exceed \$750). Defendant was convicted on all counts. At sentencing, defendant argued, based on *State v. Luers*, 211 Or App 389 (2007), that the three guilty verdicts on the counts of first-degree arson should merge into a single conviction. The court disagreed and entered a conviction on each count. *Held:* Remanded for resentencing. [1] Multiple convictions based on alternative theories of first-degree arson arising from a single criminal episode merge into a single conviction under ORS 161.067(1). The “victim” of the crime of arson is the property owner, not the persons or properties who were endangered by the fire. [2] Defendant failed to preserve his claim that the separate conviction for second-degree arson should be merged into the conviction for first-degree arson, and so his claim of error is not reviewable.

*State v. Bramel*, 247 Or App 764, 270 P3d 413 (2012) (*per curiam*). The trial court erred when it entered separate convictions on guilty verdicts on two counts of **strangulation**, in violation of ORS 163.187, that were based on alternative theories. Remanded for entry of a judgment reflecting a single conviction “and enumerating alternative theories, and for resentencing.”

*State v. Earls*, 246 Or App 578, 267 P3d 171 (2011). Based on his pleas of guilty, defendant was convicted on multiple counts of **negotiating a bad check** and other theft offenses. The sentencing court ruled that these convictions are subject to ORS 137.717, and imposed 13-month presumptive sentences. The court merged “for the purpose of imposing sentence” defendant’s convictions for negotiating a bad check into his theft convictions. *Held:* Reversed and remanded. The sentencing court committed plain error by not merging the guilty verdicts on the charges of negotiating a bad check into defendant’s theft convictions.

*Note:* The Court of Appeals pointed out that “merging for purposes of sentencing” is not sufficient—the merger has to be for purposes of *conviction*.

*State v. Bettles*, 245 Or App 496, 261 P3d 99 (2011) (*per curiam*). The trial court erred by failing to merge the guilty verdicts on charges of first- and second-degree **assault**.

*State v. Colmenares-Chavez*, 244 Or App 339, 260 P3d 667, *rev den*, 351 Or 216 (2011). Defendant stopped at a gas station with his friends and coerced the attendant, whom he knew, into giving him \$10 worth of gas. Defendant and his friends came back later a few hours later, and he threatened the attendant and demanded \$40. He then pulled a gun on the victim while his accomplice collected \$900 from the till. Defendant was found guilty of first-degree **robbery**, ORS 164.415(1)(a) (armed with firearm) and two counts of second-degree robbery, ORS 164.405(1)(a) and (b) (represents he is armed and is aided by another actually present). The sentencing court did not merge those convictions. *Held:* Reversed and remanded for resentencing. [1] In light of *State v. White*, 346 Or 275 (2009), the verdicts on the two counts of second-degree robbery merge. [2] Although state argued that the verdicts on the two counts of second-degree robbery

should not merge because one was based on the first incident and the second was based on the second incident—and so separate convictions would be lawful under ORS 161.067(3)—the Court of Appeals noted that the prosecutor appears to have conceded at sentencing that all the convictions were based only on the second incident, and so “the state cannot raise this new theory for the first time on appeal.” [3] The resulting conviction for second-degree robbery does not merge under ORS 161.067(1) into the conviction for first-degree robbery, because first-degree robbery and second-degree robbery are in separate statutory sections as different degrees of incrementally graded offenses, and they have differing elements and different punishments.

*Note:* The Court of Appeals noted the proper nomenclature: “There has been some confusion in our opinions about whether a defendant’s ‘verdicts’ merge or a defendant’s ‘convictions’ merge. The Supreme Court addressed this in *White*, 346 Or at 279 n 4, saying, ‘[A] trial court applies [ORS 161.067] to guilty verdicts on particular counts, rather than to convictions.’ However, sentences never merge; sentences are either concurrent or consecutive.” Ensure that the judgment does not use the phrase “merged for sentencing,” because that phrase likely will result in a reversal, even if the sentencing court has not used the phrase in its oral pronouncement.

*State v. Lassiter*, 244 Or App 327, 267 P3d 854 (2011). [1] Defendant’s separate convictions for attempted first-degree **theft** and second-degree theft for taking property from victim’s store and attempting to return the same for a refund should be merged into a single conviction. [2] “Reversed and remanded with instructions to enter a judgment of conviction for one count of second-degree theft reflecting that defendant was found guilty on both theories.”

*State v. Noe*, 242 Or App 530, 256 P3d 14 (2011). Defendant was convicted on two counts of aggravated first-degree theft (ORS 164.057) and one count each of unauthorized use of a vehicle (ORS 164.135), and **possession of a stolen vehicle** (ORS 819.300), and the court entered a separate conviction on each. *Held:* Reversed and remanded to merge some convictions and for resentencing. [1] The separate convictions on the convictions for aggravated first-degree theft must be merged, because those were based simply on different theories of theft involving the same truck. [2] The separate convictions for UUV and PSV merge under ORS 161.067(1), because operating or possessing a vehicle “without consent of the owner” for purposes of UUV is the same as operating or possessing a “stolen” vehicle for purposes of PSV. [3] ORS 161.067(1) does not require merger of the convictions for PSV and UUV with the conviction for first-degree theft because “both require the involvement of a vehicle, which is not required for first-degree aggravated theft, and first-degree theft requires proof that the value of the property at issue is \$10,000 or more.”

*State v. Rodriguez-Gomez*, 242 Or App 567, 256 P3d 169 (2011) (*per curiam*). Defendant was convicted of multiple **DCS** offenses based on two incidents in which he sold methamphetamine to an informant near a school. For each incident, defendant was convicted of two counts: DCS in violation of ORS 475.890 and DCS within 1000 feet of a school in violation of ORS 475.892. *Held:* Reversed and remanded for resentencing. The offense of DCS within 1000 feet of a school is simply an enhanced version of DCS. Consequently, ORS 161.067(1) requires merger of those convictions.

*State v. Johansen*, 242 Or App 515, 256 P3d 159 (2011) (*per curiam*). Sentencing court committed plain error when it entered separate convictions on defendant’s two convictions for first-degree **burglary** that were based on a single unlawful entry and involved alternative theories. “Reversed and remanded for entry of a judgment reflecting a single conviction for first-degree burglary; otherwise affirmed.”

*State v. Gray*, 240 Or App 599, 249 P3d 544 (2011). Defendant shot his sister, and he was convicted on two counts of **unlawful use of a weapon** in violation of ORS 166.220(1)(a) and (b). Based on *State v. Crawford*, 215 Or App 544 (2007), the sentencing court did not merge those two convictions. *Held:* Affirmed. [1] “Although defendant’s argument could have been more robust,” he adequately preserved his claim of error by arguing that the second UUW charge was based on an “alternative theory.” [2] The decision in *State v. White*, 346 Or 275 (2009), does not require overruling *Crawford*. [3] The “carrying” UUW offense based on ORS 166.220(1)(a) is not a lesser-included offense of the “discharging” UUW offense based on subsection (1)(b). [4] In determining under ORS 161.067(1) whether one offense is included within another, “only the statutory elements of the offenses are compared; if different, the facts as alleged in the indictment or as found by the factfinder are not relevant.”

*State v. Logan*, 240 Or App 554, 248 P3d 431 (2011) (*per curiam*). [1] Defendant’s conviction for third-degree theft should merge into his conviction for attempted first-degree **theft** by receiving involving the same incident and property. [2] But defendant’s theft conviction does not merge into his related conviction for computer crime in violation of ORS 164.377(2)(c).

*State v. Ko*, 240 Or App 318, 246 P3d 82 (2010) (*per curiam*). Trial court erred in not merging for purposes of conviction defendant separate convictions on two counts of **violating a court's stalking protective order**, which were based on a single incident and “represented separate theories of violating” ORS 163.750. Remanded with directions to enter a corrected judgment and “for resentencing.”

*State v. Alvarez*, 240 Or App 167, 246 P3d 26 (2010), *rev den*, 350 Or 408 (2011). Defendant's convictions for assault (*viz.*, causing serious physical injury by means of a dangerous weapon) and for **unlawful use of a weapon** (*viz.*, “carry[ing] or possess[ing] a dangerous weapon” with the intent to use it) do not merge, because each of the statutory provisions, as charged, required proof of an element that the other did not.

*State v. Tyler*, 239 Or App 401, 245 P3d 168 (2010). The sentencing court correctly did not merge defendant's convictions for attempted second-degree **assault** and fourth-degree assault, because attempted second-degree assault requires proof of an attempt to cause serious physical injury (but no requirement that any injury be caused), and fourth-degree assault requires proof of actual physical injury.

*State v. Bankston*, 239 Or App 301, 243 P3d 1217 (2010) (*per curiam*), *mod on recon*, 241 Or App 644 (2011). The sentencing court erred when it merged defendant's separate convictions for first-degree unlawful penetration and third-degree **sexual abuse**.

*State v. Cufau*, 239 Or App 188, 244 P3d 382 (2010), *rev den*, 350 Or 130 (2011). Defendant was convicted of first-degree assault (ORS 163.185—intentionally causing serious physical injury with a dangerous or deadly weapon) and **unlawful use of a weapon** (ORS 166.220—possession with the intent to use unlawfully a dangerous or deadly weapon). On appeal, defendant argued that the court's failure to merge those convictions was plain error, relying on *State v. Ryder*, 230 Or App 432 (2009). *Held*: Affirmed. Because the elements of defendant's UUW offense are not necessarily co-extensive with those of his assault offense, it was not obvious that *Ryder* was controlling and the alleged error was not apparent on the face of the record.

*State v. Roberts*, 239 Or App 37, 243 P3d 155 (2010). Because defendant's four **kidnapping** convictions were based on different theories of a single incident involving a single victim, the trial court erred when it failed to merge those convictions.

*State v. Medley*, 239 Or App 25, 243 P3d 147 (2010). The sentencing court correctly did not merge defendant's convictions for attempted first-degree theft (attempting to deprive another of property) and **unlawful entry into a motor vehicle** (entry into a motor vehicle with intent to commit a crime), because each has an element that the other does not.

*State v. True*, 237 Or App 234, 239 P3d 271 (2010) (*per curiam*). The sentencing court erred when it entered separate convictions on defendant's two convictions for third-degree **sexual abuse** that involved a single victim and “were based on a single act that violated separate subparagraphs of ORS 163.415(1)(a).” Reversed and remanded for entry of a corrected judgment and “for resentencing.”

*State v. Saucedo*, 236 Or App 358, 239 P3d 996 (2010). Defendant broke into his ex-girlfriend's house, then followed her into the camper trailer where she had fled, grabbed their infant, threatened to take the child if the mother did not come with him, drove to a store and shoplifted items, went to a motel, and checked them in under false names. After his guilty pleas to numerous offenses, defendant appealed and challenged as plain error the entry of three **burglary** convictions based on the single entry into the camper trailer. He also challenged two separate kidnapping convictions involving the ex-girlfriend, arguing that they were based on a continuing act of kidnapping. *Held*: Reversed and remanded. [1] Entry of separate burglary convictions was plain error and was reviewable on appeal because it “exceeded the maximum allowed by law.” [2] At re-sentencing, the parties can address whether separate kidnapping convictions were proper.

See also *State v. Vineyard*, 240 Or App 458, 246 P3d 1178 (*per curiam*), *rev den*, 350 Or 297 (2011) (court committed plain error when it entered separate convictions for first-degree burglary based on different intents upon unlawful entry).

*State v. Eilers*, 235 Or App 566, 232 P3d 997 (2010) (*per curiam*). The sentencing court committed plain error when it failed to merge defendant's two convictions for first-degree **theft** based his stealing and selling the same item.

*State v. LePierre*, 235 Or App 391, 232 P3d 982 (2010). Defendant pleaded guilty to two counts of first-degree **burglary** and multiple counts of sexual offenses based on the same incident and entry. The burglary counts alleged different intended crimes, the court stated that those convictions merge “for sentencing purposes,” and the judgment recited that defendant was “convicted” on both burglary counts but that they merge “for sentencing purposes.” Defendant did not object. *Held*: Reversed and remanded for resentencing. In light of *State v. White*, 341 Or 624 (2006), the two burglary convictions should be merged for purpose of conviction. Merger “for sentencing” is not sufficient.

*Ross v. Hill*, 235 Or App 340, 231 P3d 1185, *rev den*, 349 Or 56 (2010). Petitioner pleaded guilty to several crimes, including two alternative counts of first-degree **kidnapping**, based on a single incident. The court entered separate kidnapping convictions but imposed concurrent sentences; petitioner’s counsel did not ask the court to merge the conviction. The post-conviction court denied his petition. *Held*: Reversed and remanded with directs to merge kidnapping convictions and for resentencing. [1] In light of current case law, the two kidnapping convictions should be merged. [2] Because the unsettled case law at the time of the sentencing hearing should have alerted petitioner’s counsel to move for merger, he failed to provide constitutionally adequate assistance.

*State v. Cortes*, 235 Or App 181, 230 P3d 102 (2010) (*per curiam*). The sentencing court committed plain error by not merging defendant’s two convictions for second-degree **robbery**. Remanded for sentencing.

See also *State v. Paniagua-Miguel*, 235 Or App 378, 231 P3d 801 (*per curiam*), *rev den*, 349 Or 57 (2010) (same).

*State v. Bergman*, 234 Or App 212, 227 P3d 817 (2010) (*per curiam*). The sentencing court committed plain error by not merging defendant’s two convictions for first-degree **theft** based on his stealing and then selling the same item.

*State v. Sullivan*, 234 Or App 38, 227 P3d 1186, *on recon*, 234 Or App 177, 230 P3d 100 (2010). Based on fight outside a bar in which he pummeled and kicked the victim, defendant was convicted of first- and second-degree **assault**. The trial court entered separate convictions and imposed consecutive sentences. *Held*: Reversed and remanded to merge convictions and for resentencing. Because, as pleaded, the charge of second-degree assault did not require proof of an element that the other charge did not, separate convictions are not permissible under ORS 161.067(1).

*State v. McMurren*, 232 Or App 272, 221 P3d 830 (2009) (*per curiam*). The sentencing court erred by not merging defendant’s two convictions for first-degree **burglary**, which were based on a single entry against a single victim and for not merging defendant’s three convictions for coercion “based on the compulsion of a single act against a single victim.”

*State v. Tenorio-Guzman*, 231 Or App 252, 217 P3d 696 (2009) (*per curiam*). The sentencing court committed plain error when it did not merge defendant’s two convictions for **DCS** “where were based on separate theories of guilt for the same criminal act.”

*State v. Ryder*, 230 Or App 432, 216 P3d 895 (2009). The sentencing court committed plain error when it did not merge defendant’s conviction for **unlawful use of a weapon** based on ORS 161.220(1)(a) into his separate convictions for second-degree assault based on the same conduct.

*State v. Behen*, 230 Or App 31, 213 P3d 857 (2009). Defendant was the get-away driver at a robbery of a gas station in which two victims were robbed, and she was convicted of two counts of second-degree **robbery** under ORS 164.405(1) for each victim—one based on subsection (1)(a) (purports to be armed) and one based on subsection (1)(b) (aided by another person). *Held*: Reversed and remanded. Each such pair of convictions merges into a single conviction for second-degree robbery.

*State v. Smith*, 229 Or App 518, 214 P3d 824 (2009). Defendant was convicted of fourth-degree assault and first-degree **criminal mistreatment** for assaulting the 5-year-old victim, girlfriend’s son, by striking him several times on the face with a closed hand on April 24, 2006. *Held*: Convictions affirmed, remanded for resentencing. The sentencing court erred by not merging defendant’s convictions fourth-degree assault and first-degree criminal mistreatment into a single conviction.

*State v. Leyva*, 229 Or App 479, 211 P3d 968 (2009). Defendant’s two convictions for **DCS**, one based on the “substantial quantity” offense-subcategory factor and one based on the “commercial drug offense” factor, should have

merged.

*State v. Yong*, 227 Or App 211, 205 P3d 63 (2009). Defendant's two convictions for felony **assault** in the fourth degree under ORS 163.(3)(a) and (c) based on a single assault on one victim during one incident merge for purposes of conviction. It is not sufficient for the judgment to recite that the convictions "merge for purposes of sentencing."

*State v. Merrick*, 224 Or App 471, 197 P3d 624 (2008) (*per curiam*). Defendant's three convictions for first-degree **possession of a forged instrument** that are based on his simultaneous possession "of several counterfeit bills" should be merged.

*State v. Campbell*, 226 Or App 467, 204 P3d 118 (2009) (*per curiam*). Defendant's two convictions for **unlawful possession of a firearm** based on ORS 166.250(1)(a) and (b), which were based on his possessing one firearm during one incident, merge into a single conviction.

*State v. Odnorozhenko*, 224 Or App 288, 197 P3d 562 (2008). Convictions based on alternative theories of first-degree **kidnapping** merge. Although the defendants did not object at trial, failure to merge was plain error because alternative theories of first-degree kidnapping involve the same "statutory provision" under ORS 161.067. Likewise, one of the defendants, who was convicted of both kidnapping with a firearm and first-degree kidnapping, was entitled to merger of those convictions because the elements of the lesser offense are subsumed in those of the greater offense.

*State v. Oliver*, 221 Or App 233, 189 P3d 1240 (2008). Defendant was convicted of second- and third-degree **robbery** and fourth-degree assault based on an incident in which he put his hand underneath his sweatshirt, pretending that he had a gun, and demanded money from the victim. *Held*: Convictions affirmed; robbery convictions should have merged. The trial court committed plain error in failing to merge the convictions for second- and third-degree robbery.

*State v. Acencio-Galindo*, 220 Or App 600, 188 P3d 392, *rev den*, 345 Or 175 (2008). The sentencing court erred when it failed to merge defendant's separate **DCS** convictions that were based on a single delivery and merely alleged alternative "substantial quantity" and "commercial drug offense" theories.

*State v. Orobio-Juan*, 220 Or App 446, 186 P3d 326 (2008) (*per curiam*). The sentencing court committed plain error by failing to merge two convictions for felony **assault** in the fourth degree based ORS 163.160(3)(a) and (c), because they were based on his same single assault on same victim.

*State v. Ureno-Alvarez*, 220 Or App 301, 185 P3d 556 (2008) (*per curiam*). The trial court erred by failing to merge defendant's several convictions for first-degree **failure to appear**, which were based on his failure to appear at a single hearing involving several charges.

*State v. Valladares-Juarez*, 219 Or App 561, 184 P3d 1131 (2008). Sentencing court erred by entering separate conviction for alternative theories of first-degree **kidnapping** based on same incident and victim.

*State v. Crawford*, 215 Or App 544, 171 P3d 974 (2007), *rev den*, 344 Or 280 (2008). Defendant was charged with and tried to a court on two counts of **unlawful use of a weapon** (Uuw) under ORS 166.220(1)(a) & (b) and another charge of being a felon in possession of a firearm. The trial court entered separate convictions on all counts over defendant's objection that the Uuw convictions must merge. *Held*: Affirmed. The prohibitions on carrying and discharging firearms are directed at separate and distinct legislative concerns; thus, they are "separate statutory provisions" under ORS 161.067(1). And because carrying and discharging are different elements, each provision includes an element that the other does not.

*State v. Brostrom*, 212 Or App 486, 157 P3d 1237, *mod on recons*, 214 Or 604, 167 P3d 460 (2007) (*per curiam*), *rev den*, 344 Or 109 (2008). [1] The sentencing court erred in not merging defendant's multiple convictions for first-degree **criminal mistreatment** based on a single victim. [2] The court also erred in not merging her multiple convictions for alternative theories of felony fourth-degree assault based on single victim.

*State v. Luers*, 211 Or App 34, 153 P3d 688, *aff'd on recons*, 213 Or App 389, 160 P3d 1013 (2007). [1] The sentencing court erred in not merging defendant's three convictions for first-degree **arson** on alternative legal theories under

ORS 164.325(1)(b) based on a single incident. Similarly, the court erred by not merging defendant's two convictions for attempted first-degree arson based on a second incident. The fact that the alternative theories involved threats to different individuals does not preclude merger, because "the victim of the crime of first-degree arson as provided in ORS 164.325(1)(b) is the owner of the property," not the individual who may have been personally endangered. [2] The sentencing court correctly did not merge defendant's separate convictions for **unlawful possession of a destructive device** (ORS 166.382) into his two convictions for unlawful manufacture of a destructive device (ORS 166.384), because "each offense requires proof of an element that the other does not." To prove the latter offense, "the state need not prove that, after assembling the device, the person had possession of it in its completed form."

*State v. Turner*, 211 Or App 96, 153 P3d 134 (2007) (*per curiam*). [1] In light of *State v. Cox*, the sentencing court erred in failing to merge defendant's separate convictions for first-degree **theft** for stealing the property and then selling it to another. [2] "[T]he proper remedy under the circumstances is to remand the case for entry of a judgment reflecting the single conviction and enumerating the two alternative theories of conviction."

*State v. Hylton*, 210 Or App 104, 150 P3d 47 (2006) (*per curiam*), *rev den*, 342 Or 473 (2007). In light of *State v. White*, the sentencing court committed plain error when it failed to merge *sua sponte* defendant's two convictions for first-degree **kidnapping** based on alternative theories, ORS 163.235(1)(c) and (d).

*State v. Owen*, 209 Or App 662, 149 P3d 299 (2006). [1] The sentencing court committed plain error when it failed to merge *sua sponte* defendant's separate convictions for second-degree **robbery** based on ORS 164.405(1)(a) (representing he was armed) that he committed against a single victim. [2] But defendant's unpreserved claim that the sentencing court erred in failing to merge *sua sponte* his separate convictions for second-degree robbery based on ORS 164.405(1)(a) and (b) (aided by another) is not reviewable as plain error.

*State v. Barnes*, 209 Or App 332, 147 P3d 936 (2006), *rev den*, 342 Or 256 (2007). [1] Defendant's convictions for first-degree **sexual abuse**, based on the victim's lack of capacity to consent, and third-degree sexual abuse, based on the victim's lack of consent, must merge. The offenses arose out of the same criminal episode and, because proof that a victim was incapable of consent establishes lack of consent, each offense does not contain an element that the other does not. [2] Defendant's conviction for **harassment** does not merge with the sexual-abuse conviction because harassment requires proof of an intent to harass or annoy, and sexual abuse requires sexual contact; hence, each crime has an element that the other does not.

*State v. Lazaro-Martinez*, 207 Or App 526, 142 P3d 120 (2006) (*per curiam*). In light of *State v. Glaspey*, defendant's convictions for felony fourth-degree **assault** must merge.

See also *State v. Schweiter*, 208 Or App 337, 144 P3d 1006 (2006) (*per curiam*) (same)

*State v. Camarena-Velasco*, 207 Or App 19, 139 P3d 979 (2006). Defendant signed a single release agreement promising to appear at all court proceedings in two cases. His two convictions for **failure to appear** at a single court appearance set on both cases merge because the offenses did not violate separate statutory provisions under ORS 161.067(1). Following *State v. Eastman*, 112 Or App 256 (1992) (gravamen of crime of failure to appear is the violation of a release agreement).

*State v. Yong*, 206 Or App 522, 138 P3d 37, *rev den*, 342 Or 117 (2006). Based on his single assault on the victim, defendant was convicted of two counts of felony fourth-degree **assault** under ORS 163.160(3)(a) and (c) (previously convicted of assaulting the same victim; committed in presence of child). *Held*: Under *State v. Barrett*, the court erred by not merging those convictions—by enacting those provisions, "the legislature did not intend to create additional crimes but, instead, to more severely punish the same conduct, if committed in a domestic situation, by making it a felony."

*State v. White*, 202 Or App 1, 121 P3d 3 (2005), *aff'd on review limited to separate issue*, 341 Or 624, 147 P3d 313 (2006) (*see above*). [1] Defendant's two convictions for first-degree **kidnapping** under ORS 163.235(1)(c) and (d) based on one continuing incident and one victim merge under the analysis in *State v. Barrett*, because those are alternative means to prove a single crime, not separate crimes, and the evidence did not establish that defendant committed that offense twice, separated by a sufficient pause, within the meaning of ORS 161.067(3). [2] Defendant's three convictions for second- and fourth-degree **assault** merge under the analysis in *State v. Sanders*, because they were based on a single assault against a single victim and the trial court treated them all as lesser-included offenses of the principal assault charge.

*State v. Sanders*, 189 Or App 107, 74 P3d 1105 (2003), *rev den*, 336 Or 657 (2004). Defendant appealed from convictions for various degrees of assault, arguing that the sentencing court should have merged his second-degree **assault** convictions with his first-degree assault conviction. *Held*: Because the second-degree assault was a lesser-included offense of the first-degree assault, convictions for the offenses necessarily merged despite ORS 161.067(1), which precludes merger of offenses each of which requires proof of an element that the other does not.

*State v. Rodvelt*, 187 Or App 128, 66 P3d 577, *rev den*, 336 Or 17 (2003). The sentencing court erred in failing to merge defendant's convictions for fourth-degree **assault** into his convictions for first-degree criminal mistreatment based on the same acts.

*State v. Bell*, 181 Or App 456, 46 P3d 216 (*per curiam*), *rev den*, 334 Or 491 (2002). The sentencing court erred when it refused to merge defendant's two convictions for first-degree **arson** based on a single fire in motel room.

*State v. Lee*, 174 Or App 119, 23 P3d 999, *rev den*, 332 Or 559 (2001). **Menacing** is not a lesser-included offense of the charges of first- or second-degree robbery.

*State v. Johnson*, 174 Or App 27, 25 P3d 353 (2001). Defendant's two convictions for **robbery** in the first degree under ORS 164.415(1)(a) and (b) do not merge even though they are based on a single incident in which he robbed one victim. Each paragraph is a separate statutory provision that requires proof of an element that the other does not.

*Note*: The court followed *State v. Nevarez* and distinguished *State v. Babb*, 91 Or App 676 (1988).

*State v. Spring*, 172 Or App 508, 21 P3d 657 (2001). Defendant's convictions for **sexual abuse** and rape based on the same incident do not merge under ORS 161.067(1) because the convictions are based on separate statutory provisions and each requires proof of an element that the other does not.

*State v. Wehage*, 170 Or App 535, 13 P3d 165 (2000). **Harassment** is not a lesser-included offense of attempted second-degree sodomy.

*State v. Zimmerman*, 170 Or App 329, 12 P3d 996 (2000). The elements of second-degree **robbery** under ORS 164.405(1)(a) (represents by word or conduct) are not necessarily included within the charge of first-degree robbery (armed with or attempts to use a weapon). Consequently, second-degree robbery is not a lesser-included offense of first-degree robbery and the trial court erred in finding defendant guilty of second-degree robbery under the indictment that charged only first-degree robbery.

*State v. Nevarez*, 168 Or App 325, 5 P3d 1200 (2000). Even though both of defendant's convictions for first-degree **robbery** are based on her robbery of one victim during a single incident, the convictions do not merge, because each required proof that the other did not: one count was based on her use of a dangerous weapon (ORS 164.415(1)(b)), and the other was based on her attempt to cause serious physical injury (ORS 164.415(1)(c)).

*State v. Reiland*, 153 Or App 601, 958 P2d 900 (1998): Defendant was convicted on four counts of misdemeanor **endangering the welfare of a minor** in violation of ORS 163.575(1)(b) and four counts of felony first-degree child neglect in violation of ORS 163.547(1). Both sets of convictions are based on her allowing her children to remain in her residence while drugs were delivered. *Held*: [1] In determining whether the sentencing court erred in refusing to merge convictions, the court looks only to statutory elements of each offense under which the defendant was convicted in order to determine whether they contain different elements. [2] Defendant's endangering convictions merge into her child-neglect convictions—the phrase “permits [a child] to remain” in the former statute is synonymous with the phrase “allows the child to stay” in the latter statute and thus covers the same conduct.

*State v. O'Hara*, 152 Or App 765, 955 P2d 313, *rev den*, 327 Or 305 (1998). Defendant's separate convictions for second-degree **assault** and attempted first-degree assault based on the same incident do not merge. Each has an element the other does not (*viz.*, intent to cause *serious* physical injury, and *actual* physical injury, respectively). Merger is not required by ORS 161.485(3), because the attempt conviction is not for the same offense.

*State v. Sparks*, 150 Or App 293, 946 P2d 314 (1997), *rev den*, 326 Or 389 (1998). Defendant was convicted of multiple paired counts of first-degree **burglary**, with one count alleging that he intended to commit theft in the dwelling and the second alleging he intended to commit criminal mischief. *Held*: The statutory element is that the defendant entered

“with intent to commit a crime therein.” Entry with intent to commit several different crimes is but a single burglary. Therefore, the sentencing court erred when it failed to merge each pair of convictions into a single conviction.

*State v. Wright*, 150 Or App 159, 162, 945 P2d 1083 (1997), *rev den*, 326 Or 389 (1998). Offense-subcategories factors serve only to determine the appropriate ranking of the underlying conviction on the crime-seriousness scale; they are not “elements” of the underlying offense, nor do they create additional offenses. When a defendant is convicted on two separate counts that charge the same underlying offense but with alternative **offense-subcategory factors** (e.g., “substantial quantity” and “commercial drug offense” under ORS 475.996), the convictions merge into a single conviction.

*State v. Gleason*, 141 Or App 485, 919 P2d 1184, *rev den*, 324 Or 323 (1996). Convictions for RICO and the underlying **theft** convictions do not merge.

*State v. Guzman*, 140 Or App 347, 914 P2d 1120 (1996). Separate convictions for unlawful manufacture and **possession of a controlled substance** that are based on the same act do not merge.

*State v. Petrie*, 139 Or App 474, 912 P2d 913 (1996): Sentencing court correctly refused to merge defendant’s separate convictions for attempted aggravated murder and first-degree **assault**, even though the crimes involved a single victim and uninterrupted conduct, because each crime required proof of an element that the other did not.

## 2. Merger under ORS 161.067(2)—different victims

*State v. Glaspey*, 337 Or 558, 100 P3d 730 (2004). Based on his single assault on his wife in front of their two children, defendant was convicted of two counts of felony assault in the fourth degree under ORS 163.160(3)(c). *Held*: Although ORS 161.067(2) provides that conduct violating a single statute may result in multiple convictions if it caused injury to multiple victims, the only “victim” for purpose of those statutes is the person defendant assaulted, not the children who observed the assault. Therefore, defendant is subject to only a single conviction for assault.

*See also State v. Cook*, 210 Or App 353, 149 P3d 1288 (2006) (*per curiam*) (the sentencing court erred when it entered separate convictions for felony assault in the fourth degree that were based on one assault but three child witnesses); *State v. Nilsen*, 205 Or App 50, 132 P3d 669 (2006) (*per curiam*) (court erred under *Glaspey* in entering two convictions for fourth-degree assault based on defendant’s single assault of victim in front of two children); *State v. Lopez-Aguirre*, 203 Or App 535, 124 P3d 1290 (2005) (*per curiam*) (court should have merged defendant’s three convictions for felony assault in the fourth degree into a single conviction).

*State v. Haney*, 256 Or App 506, 301 P3d 445 (2013). Defendant stole a car in Washington, where police arrested him and towed the vehicle to an impound lot; later that night, defendant broke into the impound lot, took the car, and drove to Oregon, where he was arrested and charged with two counts of **unauthorized use of a vehicle**, ORS 164.135(1)(a) (one count naming the victim as the car owner; the other count naming the victim as the tow company) and two counts of possession of a stolen vehicle (each listing the same victims individually). Before trial, the prosecutor agreed to drop the two PSV counts and to recommend no more than 13 months incarceration in exchange for defendant’s guilty plea to the UUV counts. Later, at sentencing after his guilty plea, defendant argued that the two UUV counts should merge under ORS 161.067(2) because owners must be considered a “single victim for purposes of determining the number of separately punishable offenses.” The sentencing court ruled that there were separate victims because the nature of their ownership interests (lienhold vs. ownership) differed, and it entered two UUV convictions (with concurrent sentences). *Held*: Reversed and remanded. The owner and the tow company were UUV victims under ORS 161.067(2) because they both had a right of possession superior to the taker of the car (ORS 164.005(4)). But even though “the property interests held by the owner and the lienholder are distinct, the interest that a defendant infringes on in committing UUV is their possessory interest and, thus, the defendant causes the same infringement of the right to possess the vehicle that both parties have, despite their differing interests.”

<sup>^</sup> *State v. Nix*, 251 Or App 449, 283 P3d 442 (2012), *rev allowed*, 353 Or 410 (2013). Defendant was charged with 93 counts of **first- and second-degree animal neglect** for neglecting horses and goats that he owned. The jury found him on 20 counts of second-degree animal neglect. At sentencing, defendant argued that all the verdicts should merge into a single conviction for second-degree animal neglect. The sentencing court agreed, holding that the animals were not separate “victims” under ORS 161.067(2); rather, the sole victim was the public generally. *Held*: Remanded for entry of separate convictions for each guilty verdict and for resentencing; otherwise affirmed. [1] Because ORS 167.325 does not expressly state who the “victim” is of an animal-neglect offense, “we examine the statute to identify the gravamen of the crime and

determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription.” [2] Although an animal is not a “person,” no provision “expressly or implicitly provides that the victim of a violation of the animal neglect statutes is a person,” and neither 131.007(2) (which defines “victim” for much of the criminal code) nor Art. I, § 44(3), by their terms, applies to the animal-neglect statutes or ORS 161.067. [3] “The legislature has the power to designate, either expressly or by implication, a different meaning of victim than person. In fact, we have concluded, not infrequently, that the legislature has intended for the public, not a person or persons, to be the victim of a criminal offense. . . Thus, ever mindful of the ordinary meaning of victim, our objective remains to ascertain whether the legislature intended that meaning or a different meaning with respect to ORS 167.325.” [4] The gravamen of the offense of second-degree animal neglect is the defendant’s failure to provide minimum care for an animal in his custody or control. Thus, the fact that ORS 167.325 proscribes the failure to act with regard to ‘an animal’ indicates that the legislature intended to protect animals by creating the crime of second-degree animal abuse,” as does the statutory definition of “minimum care.” [5] “For there to be a human victim in this case, it would be necessary to conclude that the legislature intended to treat neglected animals as property of their owners who, in turn, would qualify as victims of the offense. . . Here, there is no textual indication that the legislature intended ORS 167.325 to protect the property interest of an animal’s owner by criminalizing acts of neglect that would adversely affect that interest. . . In light of the statute’s focus on the harm to individual animals, that outcome likewise would make little sense. Thus, we conclude that the victim under ORS 167.325 is not a person.” [6] “Based on the text and context of ORS 167.325, it appears that the legislature’s primary concern was to protect individual animals as sentient beings, rather than to vindicate a more generalized public interest in their welfare. . . The legislative history confirms that tentative conclusion.” [8] “We conclude that the individual animal identified in each count of second degree animal neglect for which defendant was found guilty qualified as a separate victim under ORS 167.325 for purposes of the application of ORS 161.067(2). It follows that the trial court erred in merging those guilty verdicts into a single conviction.”

*State v. Harper*, 251 Or App 239, 283 P3d 408, *rev den*, 352 Or 666 (2012). Defendant was charged with *inter alia* multiple counts of first-degree theft against a single victim; one alleged theft by taking property valued at \$750 or more, and the other alleged theft by receiving, that he sold the copper “knowing that the property was the subject of theft.” ORS 164.055(1)(a), (c). Defendant was convicted, and the trial court entered separate convictions on the theft counts. *Held*: Reversed and remanded for resentencing. “Because the two first-degree theft counts brought against defendant for taking the copper and selling it constituted two theories of theft of the same property from a single victim . . . the trial court erred in failing to merge those counts into a single conviction.”

*State v. Birchard*, 251 Or App 223, 284 P3d 1153 (2012). A jury found defendant guilty on two counts of resisting arrest, one count for each police officer whom he resisted. The court entered two convictions, and defendant did not object. *Held*: Reversed and remanded for resentencing. Under *State v. Owens*, 159 Or App 80 (1999), resisting arrest is a crime “against public order”; “a defendant commits only one act of resisting arrest when he or she resists multiple officers acting in concert to take him into custody”; to convict a person of more than one count of resisting arrest, state must prove that “multiple instances of qualifying conduct are separated by a sufficient intervening lapse of time.”

*State v. Reeves*, 250 Or App 294, 280 P3d 994, *rev den*, 352 Or 565 (2012). The police seized and searched defendant’s computer and determined that he had used file-sharing software to download hundreds of files of child porn. Based on selected files, defendant was charged with 15 counts of encouraging child sexual abuse, ORS 163.684. After a trial to the court, the judge found him guilty. At sentencing, the court denied defendant’s motion to merge the convictions, ruling that ORS 161.067(3) applied because there was a “pause” between each download. *Held*: Remanded for resentencing. [1] The sentencing court erred when it entered 15 separate convictions based on ORS 161.067(3), because “the only testimony pertaining to the practical potential for a ‘pause’ demonstrated that all of the 15 files *could* have been downloaded concurrently, and the state offered no evidence supporting a reasonable inference that there was, in fact, a pause between the downloads of one or more of the files.” [2] But entry of separate convictions may be permissible under ORS 161.067(2) based on a finding that the 15 images involved different victims: “Although the legislature did not use the term ‘victim’ [in ORS 163.684] to describe the child depicted, the repeated use of ‘involving a child’ indicates that the purpose of the statute is to protect the child involved in the visual recording. . . Each duplication of the visual recording constitutes a revictimization of the child depicted. The specific harm addressed by ORS 163.684 is the proliferation of such depictions of child abuse.” Therefore, under ORS 161.067(2), “the ‘victim’ for the purpose ORS 163.684 is the child—or children—depicted in the downloaded images that are the basis of the 15 counts on which the court rendered guilty verdicts.” [3] “Although the identity of the victim of a crime is often either obvious or ascertainable, the state is not required to prove the identity of the victim.” [4] Because the sentencing court erroneously relied on ORS 161.067(3) to enter separate convictions, and did not rule on ORS 161.067(2), which may be a permissible basis for entry of separate convictions, a remand for reconsideration is necessary.

*State v. Urbina*, 249 Or App 267, \_\_\_ P3d \_\_\_ (2012). Defendant was charged multiple crimes involving sexual acts with an adult and children, including first-degree encouraging child sexual abuse and compelling prostitution. The two counts of first-degree encouraging child sexual abuse concerned child pornography found on defendant’s home computer, and he was charged with “duplicating” child pornography under the former version of ORS 163.684(1)(a)(A). He was convicted of charges. *Held*: Affirmed in part, reversed in part. The sentencing court did not commit plain error by entering two separate convictions for encouraging child sexual abuse. It is not obvious that the state is the sole “victim” of such charges; it is possible that the depicted child is the victim, and there was no argument here that the two charges involved depictions of the same child.

*State v. Mills*, 248 Or App 35, 273 P3d 162 (2012). Defendant was annoyed at Weeks, his former girlfriend, and Jacobs, her new boyfriend, and so he and a friend drove by and threw gasoline on Jacobs’s car and lit it on fire. The fire damaged the residence, too. The indictment charged three alternative counts of first-degree arson based on ORS 164.325(1)(a)(B)—naming the car, Weeks, and Jacobs as the victims— and one count of second-degree arson based on ORS 164.315(1)(a)(B) (damages exceed \$750). Defendant was convicted on all counts. At sentencing, defendant argued, based on *State v. Luers*, 211 Or App 389 (2007), that the three guilty verdicts on the counts of first-degree arson should merge into a single conviction. The court disagreed and entered a conviction on each count. *Held*: Remanded for resentencing. Multiple convictions based on alternative theories of first-degree arson arising from a single criminal episode merge into a single conviction under ORS 161.067(1). The “victim” of the crime of arson is the property owner, not the persons or properties who were endangered by the fire.

*Jones v. State of Oregon*, 246 Or App 253, 265 P3d 75, *rev den*, 351 Or 403 (2011). Petitioner, while drunk, drove down Interstate 5 in the wrong direction. Based on a police videotape that showed five identifiable cars that were most put at risk, defendant was tried and convicted on five counts of reckless endangering. The court entered five separate convictions and imposed consecutive 12-month sentences on those convictions. Petitioner’s counsel did not object to the separate convictions or consecutive sentences. Petitioner appealed, and his counsel relied on *State v. Harbert*, 155 Or App 137 (1998), to argue that the separate convictions were plain error. The state argued in response that the convictions do not merge and that, in any event, the claim was not reviewable as plain error. The Court of Appeals affirmed without opinion. Petitioner then filed a petition for post-conviction relief in which he alleged that his trial counsel was inadequate for not arguing that there should have been only one conviction and sentence. His theory was that reckless endangering does not require the state to prove an actual victim and, therefore, no matter how many people were endangered, he committed only one crime. The post-conviction court dismissed his petition. *Held*: Affirmed. Separate convictions were proper under *State v. Sumerlin*, 139 Or App 579 (1996). “*Harbert*, in contrast to *Sumerlin*, addressed the applicability of ORS 163.195(1) to circumstances in which a person engaged in conduct likely to expose another person to harm, even if that conduct did not actually expose another person to harm. *Sumerlin*, in contrast, addressed the applicability of the statute—and the availability of multiple convictions—where the defendant engaged in conduct that actually exposed (multiple) persons (in *Sumerlin*, the defendant’s two nephews) to harm. That is, ORS 163.195(1) properly applies to both circumstances—and, when it applies to the latter and multiple persons have actually been exposed to harm, multiple convictions, pertaining to each of the victims, can be imposed.”

*State v. Mullen*, 245 Or App 671, 263 P3d 1146 (2011), *rev den*, 352 Or 25 (2012). When defendant was arrested for passing a bad check, he was in possession of identification or identifying information of three different people and, based on that evidence, he was convicted of three counts of identity theft in violation of ORS 165.800(1). Over defendant’s objection, the court entered separate convictions, concluding that the underlying crimes had different victims for purpose of ORS 161.067(2). *Held*: Affirmed. [1] “In determining whether defendant’s conduct involved ‘two or more victims’ under ORS 161.067(2), we look to the substantive statute that defines the crime.” “Where the statute defining a crime does not expressly identify the person who qualifies as a ‘victim,’ the court examines the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription.” [2] “We need not determine which parties actually suffer economic harm that results from a completed act of deception or fraud under various scenarios of identity theft because we conclude that the victims of identity theft include persons who suffer a risk of loss from the exposure of their identification to misuse.” [3] ORS 165.800 is designed to protect persons whose identity has been stolen, thereby making them “victims” for purposes of ORS 161.067(2).

*Note*: The court noted that it did not need to determine whether other parties—such as someone who actually was defrauded by the defendant’s use of the stolen identification—might *also* be a victim of the identity-theft offense.

*State v. Moncada*, 241 Or App 202, 250 P3d 31 (2011). Defendant hit two pedestrians with his motor vehicle—

injuring them seriously enough that they both eventually died—and then fled without stopping to render assistance. He pleaded guilty to two counts of failure to perform the duties of a driver to injured persons in violation of ORS 811.705(1)(e) (“H&R”). Defendant argued that the convictions should merge and that, in any event, the trial court could not impose consecutive sentences, but the court entered separate convictions and imposed consecutive 36-month sentences. *Held*: Affirmed. [1] “Where the statute defining a crime does not expressly identify the person who qualifies as a ‘victim,’ the court examines the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription.” When a driver fails to perform the duties required by ORS 811.705(1)(e), “the ‘victim’ is the person who does not, among other things, receive ‘reasonable assistance.’” [2] “Accordingly, merger of defendant’s two [H&R convictions] was precluded pursuant to ORS 161.067(2) because there were ‘two or more victims.’” [3] Because defendant’s two separate H&R convictions had different victims, the court properly imposed consecutive sentences under ORS 137.123(5)(b).

*State v. Bowers*, 234 Or App 301, 227 P3d 822, *rev den*, 348 Or 621 (2010). The sentencing court erred when it did not merge defendant’s three convictions for abuse of a memorial based on his destruction of three separate items in a cemetery, because the evidence did not establish that the crimes had different victims or that a “sufficient pause” occurred between the offenses for purposes of ORS 161.067(3).

*State v. Hathaway*, 231 Or App 556, 219 P3d 605 (2009) (*per curiam*). The sentencing court erred by not merging defendant’s two convictions for first-degree burglary, which were based on a single entry but involved both homeowners. *See* ORS 161.067(2)(e).

*State v. Williams*, 229 Or App 79, 209 P3d 842, *rev den*, 347 Or 44 (2009). The sentencing court correctly refused to merge defendant’s two robbery convictions based on his use of force against two individuals during a robbery on the ground that the convictions involved two separate victims under ORS 161.067(2). Because the gravamen of robbery is the use or threatened use of force against another person, robbery is a person crime and not a property crime. Thus, although there was only a single taking of property, both the clerk and the customer were separate victims of the robbery, and merger was not appropriate.

*State v. Sanchez-Alfonso*, 224 Or App 556, 198 P3d 946 (2008), *rev den*, 346 Or 258 (2009). Defendant was convicted of two counts of first-degree burglary based his entry into dwelling in which he threatened two occupants with a knife. Defendant argued that the court could enter only one conviction for his entry into the dwelling, because the two persons present were not separate “victims” of the burglary under ORS 161.067(2). *Held*: Reversed to merge the burglary convictions. When a burglar enters a building, he violates the property owner’s right to occupy, invite, and exclude others from the premises. The victim of a burglary for purposes of ORS 161.067(2) is the person who possesses the privacy interest that was violated, not whomever he may assault while inside.

*State v. Luers*, 211 Or App 34, 153 P3d 688, *aff’d on recons*, 213 Or App 389, 160 P3d 1013 (2007). The sentencing court erred in not merging defendant’s three convictions for first-degree arson on alternative legal theories under ORS 164.325(1)(b) based on a single incident. Similarly, the court erred by not merging defendant’s two convictions for attempted first-degree arson based on a second incident. The fact that the alternative theories involved threats to different individuals does not preclude merger, because “the victim of the crime of first-degree arson as provided in ORS 164.325(1)(b) is the owner of the property,” not the individual who may have been personally endangered.

### 3. Merger under ORS 161.067(3)—repeated commission of the same offense

*State v. White*, 341 Or 624, 147 P3d 313 (2006). Defendant’s two convictions for first-degree **burglary** based on separately alleged intents to commit assault and menacing merge because both were based on a single entry and the same incident. The alternative theories of “entering” and “remaining” are not separate statutory provisions under ORS 161.067(1). Because there was no evidence of repeated violations of the burglary statute, ORS 161.067(3) did not authorize separate convictions.

*Note*: The court affirmed without discussion the previous decision of the Court of Appeals in this case on another merger issue—202 Or App 1, 121 P3d 3 (2005): Defendant’s two convictions for first-degree kidnapping under ORS 163.235(1)(c) and (d) based on one continuing incident and one victim merge under the analysis in *State v. Barrett*, because those are alternative means to prove a single crime, not separate crimes, and the evidence did not establish that defendant committed that offense twice, separated by a sufficient pause, within the meaning of ORS 161.067(3).

*State v. Barnum*, 333 Or 297, 39 P3d 178 (2002). Although defendant was properly convicted on two counts of first-degree **burglary** based on theft and arson, the record did not provide sufficient grounds for separately punishing defendant on both counts. The fact that a theft occurred at a distance from the source of the fire did not establish that a “sufficient pause” had occurred under ORS 161.067(3). To be separately punishable, “one crime must end before the other begins.”

*State v. Ostrom*, 257 Or App 520 \_\_ P3d \_\_ (2013) (*per curiam*). Defendant was charged with multiple counts of **theft**, each of which alleged that he had committed the theft “on or between November 01, 2010 and August 05, 2011.” Defendant pleaded guilty to three counts of second-degree theft without qualification, and the state dismissed two other counts. After the court accepted his guilty pleas, defendant argued that the three counts should merge into a single conviction because “they’re alleged exactly the same.” The state argued that the counts should not merge because the three thefts were “discrete incidents.” The court declined to merge the counts. *Held*: Affirmed. “We conclude that, because defendant pleaded guilty to committing each theft within a date range, the trial court could conclude that defendant committed each theft on different dates—separated by, for example, months—within that range.” See *Hibbard v. Board of Parole*, 144 Or App 82, 88 (1996), *vac’d on other grounds*, 327 Or 594 (1998) (when a defendant pleads guilty to committing a crime within a date range and thereby fails to limit his plea temporally, the defendant “assent[s] to the broadest construction of his pleas, *i.e.*, that the state could prove that he committed the offenses on any of the dates alleged in the indictment”). “From there, the trial court could conclude that the thefts were separated by sufficient pauses and, therefore, were separately punishable offenses.”

*State v. Chappell*, 256 Or App 123, 299 P3d 604 (2013) (*per curiam*). Defendant was found guilty of five counts of being a **felon in possession of a firearm**. He argued that those conviction should merge into a single conviction because he stole them in a single burglary from a single victim. The sentencing court refused to merge the convictions. On appeal, the state conceded that the court erred under *State v. Torres*, 249 Or App 571 (2012). *Held*: Reversed and remanded. “We adhere to our holding in *Torres* and conclude that, because the record in this case contains no evidence of a sufficient pause in defendant’s criminal conduct, the trial court erred in failing to merge defendant’s guilty verdicts for being a felon in possession of a firearm stemming from the single burglary.”

*State v. Reed*, 256 Or App 61, \_\_ P3d \_\_ (2013). Defendant led several police officers on a chase that spanned an hour and a half. He managed to get away for various periods, only to be found again and resume the chase. He was charged with, among other things, four counts of **attempting to elude** a police officer, which each count corresponding to a particular officer that defendant attempted to elude. He was convicted on all counts, and argued that the counts should merge into a single conviction. The court declined to merge the counts, entering convictions on all four counts. *Held*: Affirmed. [1] “In order to support multiple attempts to elude, (a) the defendant must have completed each attempt to elude—that is, he must have stopped running or hiding—before beginning the next attempt to elude, and (b) each attempt to elude must have been separated from the others by a pause in the defendant’s conduct sufficient to afford him an opportunity to renounce his criminal intent.” [2] “Whether a defendant stopped running or hiding from the police at a particular point in time is a question of historical fact” for the trial court, and that finding binds the appellate court when it is supported by “constitutionally sufficient evidence in the record.” [3] The record supported the trial court’s implicit factual findings that defendant ceased running or hiding between his attempts to elude, as well as its legal conclusion that “there was a sufficient pause between each of the attempts to elude to afford him the opportunity to renounce his criminal intent.” Thus, the four counts do not merge under ORS 161.067(3) because defendant committed four crimes, and those crimes were separated by sufficient pauses

*State v. Gerlach*, 255 Or App 614, 300 P3d 193, *rev den*, 353 Or 787 (2013). Defendant kidnaped a 10-year-old girl, forced her into his car, drove her to a remote area, parked, and sexually assaulted her. He then got back into the driver’s seat and drove off, with the victim still in the car, heading toward a forested, mountainous area, possibly with an intent to murder her and dump her body. Fortunately, the police caught up with him and forced his car off the road, and the victim was rescued. Defendant was charged with two counts of **first-degree kidnapping**, among other crimes. The state’s theory was that his act of forcing the victim into his car and driving to the location of the sexual assault constituted one kidnapping, and his act of driving the victim from that location toward the mountainous area constituted the second kidnapping. Defendant stipulated that he committed all of the acts alleged in the indictment. At sentencing, he argued that the two kidnapping counts should merge. The sentencing court rejected that argument holding that the two counts did not merge under ORS 161.067(3), because they were separated by a “sufficient pause.” *Held*: Reversed and remanded. [1] Defendant’s stipulation to the facts alleged in the indictment does not preclude review of his claim: “the scope and application of ORS 161.067 is a question of law that we review for errors of law.” [2] “Because kidnapping is the seizure of

a person for the purpose of substantially interfering with the person's liberty, it is a continuing crime. It continues for as long as the seizure continues. Therefore, if defendant commits the crime of kidnapping by taking a person from one place to a second place, the defendant does not commit an additional kidnapping by moving the person from a second place to a third place." [3] Because a single deprivation of the victim's personal liberty is a single violation of ORS 163.225, and, consequently, a single violation of ORS 163.235, merger of defendant's kidnapping counts is not prevented by ORS 161.067(3)."

*State v. Aitken*, 255 Or App 17, 296 P3d 587 (2013). Defendant committed a knife attack on two victims (Walker and Torres) in an apartment. A jury found defendant guilty on one count of first-degree assault and three counts of **second-degree assault** against Walker, and two counts of second-degree assault against Torres. The sentencing court merged several of the convictions, but refused to merge two counts in which Walker was the victim, finding that defendant had a "substantial opportunity to stop" and "renounce [his] criminal intent" between the assaults underlying those counts. *Held*: Remanded for resentencing. In determining whether to merge counts committed against the same victim in a single criminal episode under ORS 161.067(3), the issue is whether there was a "sufficient pause in defendant's criminal conduct to permit the two offenses to be separately punishable," which means that "one offense ended before the other began." The sentencing court found that there was such a pause in defendant's attack on Walker, a finding that is binding on appeal.

*State v. G. L. D.*, 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of **second-degree burglary**, and first-degree criminal mischief. *Held*: Affirmed. The juvenile court correctly did not merge the two burglary adjudications because the evidence allowed the court to find that youth made two separate entries—first to take the computers, then 15 minutes later to the school to set the fire—which provided him a sufficient opportunity to renounce his criminal intent, for purposes of ORS 161.067(3).

*State v. Glazier*, 253 Or App 109, 288 P3d 1007 (2012), *rev den*, 353 Or 280 (2013). Defendant assaulted the victim by dragging her out of bed by her ankle, causing her to hit her head and hip on the floor, dragging her out of the room, repeatedly striking her head against a hardwood floor, and kicking her in the torso. Defendant was found guilty on charges of **second-degree assault** and two counts of fourth-degree assault. At sentencing, he argued that his guilty verdicts on the three assault counts should merge into a single conviction for second-degree assault because his actions were part of a single criminal episode and were not separated by sufficient pauses. The court disagreed and entered separate convictions. *Held*: Reversed and remanded with instructions to merge the guilty verdicts into a single conviction for second-degree assault and for resentencing; otherwise affirmed. Defendant's actions were not "separately punishable" assaults under ORS 161.067(3) because "there was no evidence of a temporal break such that a trier of fact could find that one assault had ended before another began. Defendant's conduct was continuous and uninterrupted; there was no evidence that he paused his aggression from the time he pulled the victim off the bed to final charged act of kicking her in the torso."

*State v. Jay*, 251 Or App 752, 284 P3d 597 (2012) (*per curiam*), *rev den*, 353 Or 209 (2013). As a result of a single burglary/robbery incident after which defendant and his co-perpetrators divided up the loot, defendant was convicted on two counts of **first-degree theft** by receiving based on a laptop and knives that were stolen. *Held*: Reversed and remanded. The sentencing court erred by entering separate convictions on those counts, because both items were stolen "during the court of one criminal episode and without evidence of a sufficient pause between the thefts."

*State v. Reeves*, 250 Or App 294, 280 P3d 994, *rev den*, 352 Or 565 (2012). The police seized and searched defendant's computer and determined that he had used file-sharing software to download hundreds of files of child porn. Based on selected files, defendant was charged with 15 counts of **encouraging child sexual abuse**, ORS 163.684. After a trial to the court, the judge found him guilty. At sentencing, the court denied defendant's motion to merge the convictions, ruling that ORS 161.067(3) applied because there was a "pause" between each download. *Held*: Remanded for resentencing. [1] The sentencing court erred when it entered 15 separate convictions based on ORS 161.067(3), because "the only testimony pertaining to the practical potential for a 'pause' demonstrated that all of the 15 files *could* have been downloaded concurrently, and the state offered no evidence supporting a reasonable inference that there was, in fact, a pause between the downloads of one or more of the files." [2] But entry of separate convictions may be permissible under ORS 161.067(2) based on a finding that the 15 images involved different victims.

*State v. Torres*, 249 Or App 571, \_\_\_ P3d \_\_\_, *rev den*, 352 Or 378 (2012). Defendant was found guilty on 21 counts of **felon in possession of a firearm**, in violation of ORS 166.270 ("FIP"), based on 21 firearms that were stored in a

gun safe in his residence. The sentencing court merged the convictions under ORS 161.067(3) on the ground that he committed all the crimes at the same time and place. The state appealed and argued that *State v. Ott* 96 Or App 511 (1989), and *State v. Collins*, 100 Or App 311 (1990), held that ORS 161.067(3) does not apply to FIP convictions because it does not have a “personal victim.” *Held*: Affirmed. [1] For purposes of ORS 161.067, “the meaning of ‘victim’ is not fixed; rather, it is context specific. Depending on the legislature’s intent, it can refer, among other variations, to persons, the state, or the public at large. Thus, determining the identity of the pertinent victim, for purposes of merger under ORS 161.067, requires an examination of the specific substantive statute defining the relevant offense—here, ORS 166.270.” [2] “Where a statute does not expressly identify the person who qualifies as a victim, we examine the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription.” [3] “The gravamen of the crime of felon in possession of a firearm is the possession of a firearm by ‘any person who has been convicted of a felony.’ Thus, it is the person’s status as a felon that renders their possession of the firearm unlawful.” So, “the public is a single collective ‘victim’ of a violation of ORS 166.270 for purposes of merger under ORS 161.067(3).” [4] “[I]f the other requirements of ORS 161.067(3) were satisfied, defendant’s convictions must be merged. Because ... those requirements were satisfied ... , we conclude that the trial court properly merged defendant’s convictions.”

See also *State v. Curnutte*, 250 Or App 379, 280 P3d 398 (*per curiam*), *rev den*, 352 Or 564 (2012) (defendant, a felon, attempted to sell two firearms to a police informant, and he was convicted on two counts of **felon in possession of a firearm**; in light of *State v. Torres*, 249 Or App 571, *rev den* (2012), the sentencing court erred by not merging the two convictions per ORS 161.067(3)).

*State v. Bell*, 246 Or App 12, 264 P3d 182 (2011), *rev den*, 351 Or 678 (2012). During a search of defendant’s residence, the police found three firearms stashed in separate places. The evidence showed that he obtained each firearm from a different person at a different time and stored each in a different location. He was convicted on three counts of **felon in possession of a firearm**, and he argued at sentencing that the convictions must merge under ORS 161.067(3). The court denied his motion and entered separate convictions. *Held*: Affirmed. Under *State v. Collins*, 100 Or App 311 (1990), “ORS 161.067(3) authorized separate convictions for the possession of each firearm,” because “the record establishes that defendant’s acts of possession of the firearms were separate acts.”

*State v. Bryan*, 244 Or App 160, 260 P3d 617 (2011). Defendant was convicted of two counts of attempted first-degree **assault** and two counts of menacing based on a single, brief incident in which he threatened the victim with a knife and tried to slash him with it twice, missing both times. *Held*: [1] Because “the evidence showed that defendant’s second slash toward the victim immediately followed his first slash ... we conclude that there was not a sufficient pause between defendant’s acts and, thus, the trial court plainly erred in failing to merge defendant’s convictions” under ORS 161.067(3). [2] “Reversed and remanded for entry of a single conviction of attempted first-degree assault and a single conviction of menacing and for resentencing; otherwise affirmed.”

*State v. McConville*, 243 Or App 275, \_\_ P3d \_\_ (2011). Defendant pleaded guilty to burglary and two counts of **theft** alleging an aggregate value over \$750—one count specifying a laptop computer and the other specifying jewelry and other items. At sentencing, the victim testified that she awoke to find defendant in her bedroom; he asked her where she kept her money and valuables, said that he had already looked in the home’s first floor, and began rifling through her dresser. He then took a bracelet and two rings off the victim and, at some point, took a laptop from the bed-stand before going back downstairs to look for more items to steal. The state presented several pieces of jewelry recovered from defendant, including a ring the victim had hidden in her kitchen, one of the rings taken off her person, and some costume jewelry taken from the basement. The sentencing court entered convictions on both theft counts, rejecting defendant’s claim that the thefts were not separated by a sufficient pause under ORS 161.067(3). *Held*: Reversed and remanded to merged theft convictions and for resentencing. [1] “For purposes of ORS 161.067(3), the state has the burden of adducing legally sufficient evidence of the requisite ‘sufficient pause’” between the two offenses. In order for there to be “a sufficient pause in the defendant’s criminal conduct, ... one crime must end before another begins.” [2] The record was insufficient to establish a sufficient pause between the two charged thefts because the items used to aggregate the alleged value of the stolen property could have been stolen both partly before and partly after the theft of the laptop, which would show that one theft had not ended before the other theft began.

*Notes*: [a] This case illustrates why it is important, if a defendant pleads guilty to two counts that charge the same offense against the same victim based on different acts, to ensure that the record shows that the defendant also *stipulates* that the court will enter separate convictions on those counts. [b] If the defendant will not so stipulate, ensure the record at sentencing establishes either that the defendant committed the two offenses during separate criminal episodes or that “a sufficient pause” occurred between them. The court’s statement that “one crime must end before another begins” is from

*State v. Barnum*, 333 Or 297, 303 (2002), and related to alternative counts of first-degree burglary based on a single entry, and so arguably should not apply in this context. The fact that *separately committed* offenses of the same type may be overlapping in time should not necessarily preclude a “sufficient pause” finding.

*State v. Mason*, 241 Or App 714, 250 P3d 976 (2011). Defendant was found guilty of two counts of felony fourth-degree assault and two counts of **contempt**. The trial court found that both assaults were based on a single uninterrupted assault on a single victim that had to merge, but the court entered a judgment with two assault convictions that were “merged for purposes of sentencing.” The two contempt convictions were based on the violation of two separate provisions of a single release agreement during a single course of conduct. *Held*: Reversed and remanded. [1] The trial court erred in failing to properly merge the assault convictions and the contempt convictions. Because the court had determined that both assaults involved a single uninterrupted assault on a single individual, the guilty verdicts must be merged under ORS 161.067(3) into a single *conviction*. [2] Multiple violations of a single release agreement merge into a single conviction because the essence of the charge is that the court’s order was violated.

*Note*: The Court of Appeals once again expressly cautioned trial courts against using the disapproved “merged for sentencing” language noting, “it is a misnomer and should never be used because it improperly conflicts two distinct parts of the criminal process.”

*State v. Salvador*, 237 Or App 424, 241 P3d 324 (2010). Because of defendant’s three convictions for **possession of a forged instrument** were based on his single act of possessing three blank resident alien cards, the sentencing court erred by not merging those convictions.

*State v. Watkins*, 236 Or App 339, 236 P3d 770, *rev den*, 349 Or 480 (2010). Defendant attacked a prison guard and stabbed him several times with a shank; the guard managed to push defendant away and, while defendant watched, activated his waistband alarm to summon help. Within seconds, defendant reinitiated his attack. Defendant was convicted of seven counts of second-degree **assault**, and the sentencing court imposed separate convictions on each conviction but purported to “merge them for sentencing purposes” by imposing concurrent sentences. In doing so, the court noted that it did not believe a showing of sufficient pause between the charged counts had been made. On appeal, defendant argued that the trial court should have merged the convictions into two assault convictions (one for his conduct before the guard pushed him away, and one for his subsequent conduct). *Held*: Reversed and remanded. [1] Mere passage of time is insufficient to establish a sufficient pause for purposes of ORS 161.067(3); assaults occurring in one criminal episode will merge absent showing of such pause. [2] Defendant’s concession that two assault convictions would be appropriate is not binding; the circuit court’s “determination” of “no showing of sufficient pause” required the appellate court to merge each of the assault convictions into a single conviction.

*State v. LePierre*, 235 Or App 391, 232 P3d 982 (2010). Defendant pleaded guilty to two counts of first-degree **burglary** and multiple counts of sexual offenses based on the same incident and entry. The burglary counts alleged different intended crimes, the court stated that those convictions merge “for sentencing purposes,” and the judgment recited that defendant was “convicted” on both burglary counts but that they merge “for sentencing purposes.” Defendant did not object. *Held*: Reversed and remanded for resentencing. In light of *State v. White*, 341 Or 624 (2006), the two burglary convictions should be merged for purpose of conviction. Merger “for sentencing” is not sufficient.

*State v. Bowers*, 234 Or App 301, 227 P3d 822, *rev den*, 348 Or 621 (2010). The sentencing court erred when it did not merge defendant’s three convictions for **abuse of a memorial** based on his destruction of three separate items in a cemetery, because the evidence did not establish that the crimes had different victims or that a “sufficient pause” occurred between the offenses for purposes of ORS 161.067(3).

*Note*: The Court of Appeals refused to consider, to establish “sufficient pause,” evidence proffered by the prosecutor at sentencing that the items were a significant distance apart, because the sentencing court excluded that evidence and the state did not cross-assign error to that ruling on appeal.

*State v. Huffman*, 234 Or App 177, 227 P3d 1206 (2010). Defendant was convicted on four counts of first-degree **theft** based on his theft of four cameras from a Costco. An employee later saw defendant with four boxed cameras, which he then separately removed from the boxes and hid in his clothes. The sentencing court when it entered four separate convictions for first-degree theft. *Held*: Reversed and remanded for merger and resentencing. ORS 161.067(3) permits entry of separate convictions based on repeated commissions of the same crime against the same victim only if there was a “sufficient pause” between the offenses. Because defendant’s theft was complete when he removed the boxed cameras from

the shelf with the intent to steal them, and “the record is completely devoid of evidence as to how defendant acquired the cameras,” there is no basis for a sufficient-pause finding.

*State v. Sullivan*, 234 Or App 38, 227 P3d 1186, *on recon*, 234 Or App 177, 230 P3d 100 (2010). Based on fight outside a bar in which he pummeled and kicked the victim, defendant was convicted of first- and second-degree **assault**. The trial court entered separate convictions and imposed consecutive sentences. *Held*: Reversed and remanded to merge convictions and for resentencing. Even though defendant variously struck and kicked the victim, causing different injuries, separate convictions were not permissible under ORS 161.067(3) because no eyewitness “described any pause whatsoever” in defendant’s assault on the victim.

*State v. MacDonald*, 232 Or App 431, 222 P3d 718 (2009) (*per curiam*). The sentencing court erred by not merging defendant’s five convictions for **identity theft** based on his possession of a single victim’s wallet that contained various items of identification.

*State v. McMurren*, 232 Or App 272, 221 P3d 830 (2009) (*per curiam*). The sentencing court erred by not merging defendant’s two convictions for first-degree **burglary**, which were based on a single entry against a single victim and for not merging defendant’s three convictions for coercion “based on the compulsion of a single act against a single victim.”

*State v. Merrick*, 224 Or App 471, 197 P3d 624 (2008) (*per curiam*). Defendant’s three convictions for first-degree **possession of a forged instrument** that are based on his simultaneous possession “of several counterfeit bills” should be merged.

*State v. Kayfes*, 213 Or App 543, 162 P3d 308, *rev den*, 343 Or 390 (2007). Defendant, a former middle-school teacher and coach, was convicted of numerous **sexual offenses** involving a student. The jury specifically found that the offenses were “separate acts” in that each count “was an act that does not arise from the same continuous and uninterrupted conduct as another act.” See ORS 131.505(4). *Held*: Affirmed. The jury’s finding that defendant committed the crimes during separate criminal episodes provided a basis for the court to enter separate convictions under ORS 161.067(3) for the separate crimes against the victim.

*State v. Lucio-Camargo*, 186 Or App 144, 62 P3d 811 (2003). Defendant unlawfully entered an apartment and separately threatened two people with a weapon. He was convicted on two counts of first-degree **burglary**, and the court entered two convictions but imposed concurrent sentences. *Held*: Reversed and remanded with directions to merge the convictions. Defendant’s entry into the apartment was a single burglary for purpose of ORS 161.067(1). Because defendant’s initial unlawful entry never ended, there was not a sufficient pause between the burglaries to permit entry of separate convictions under ORS 161.067(3).

*State v. McCloud*, 177 Or App 511, 34 P3d 699 (2001), *mod on remand* 184 Or App 659, 56 P3d 962 (2002) (*per curiam*). Defendant was convicted on two counts of third-degree **sexual abuse** for the separate acts of touching the minor victim’s breast and vaginal area during a single incident. The sentencing court found, under ORS 161.067(3), that there was not “a sufficient pause” in time between the touchings, and it entered separate convictions but imposed only a single sentence. On appeal, defendant contended that the court erred in failing to merge the convictions based on its finding. *Held*: Affirmed. ORS 161.067(3) did not require merger of the two convictions.

*State v. Schwartz*, 173 Or App 301, 21 P3d 1128, *rev den*, 333 Or 162 (2001). Defendant was convicted of two counts of **computer crime** for accessing the victim’s computer system without authorization and copying password files. The sentencing court correctly denied defendant’s motion to merge those convictions “because the acts that formed the basis for each violation were separated by a ‘sufficient pause’ in defendant’s criminal to afford him the opportunity to renounce his criminal intent” within the meaning of ORS 161.067(3).

*State v. Wise*, 150 Or App 449, 946 P2d 363 (1997): The taking of two firearms constitutes two violations of ORS 164.055 (defining first-degree **theft**), although the two violations occurred in the course of a single incident and were committed against a single victim. As a result, the two thefts do not merge under ORS 161.062(3), because that statute applies only to a single statutory violation that involves multiple victims.

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### XIII. FINES, RESTITUTION, COSTS, FEES, AND FORFEITURE

See Or Const, Art I, § 42(1)(d) (victim’s right to “prompt restitution”); ORS 137.101 *et seq.*

*Note:* This section includes only decisions issued since 2001.

#### A. COMPENSATORY FINE (ORS 137.101)

*M.F.K. (Foster) v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012). Plaintiff filed a petition under ORS 30.866 in which she requested both a stalking protective order (SPO) against defendant and an award of compensatory damages for lost sick and annual leave, lost wages, and counseling expenses. Defendant demanded a jury trial on the claim for damages; he based that claim on Art. I, § 17, and Art. VII (Am), § 3. The trial court denied that request, and after a trial to the court, it issued a SPO and entered a judgment against defendant for \$42,000 in compensatory damages. Defendant appealed, and the Court of Appeals affirmed. *Held:* Reversed and remanded—defendant is entitled to a jury trial on plaintiff’s claim for compensatory damages. [1] ORS 30.866 allows a plaintiff to request both issuance of a SPO and compensatory damages, but it does not authorize the trial court to provide the defendant with a jury trial on the damages claim. [2] Under Art. I, § 17, and Art. VII (Am), § 3, “the relevant inquiry is not whether a newly created statutory claim existed at common law, but whether, because of its nature, it falls within the guarantee of the Constitution to a jury trial.” [3] “If plaintiff had sought only money damages under ORS 30.866—that is, had she not combined her claim for money damages with a claim for [an SPO]—then her claim would have been at law and the right to jury trial would have attached.” On the other hand, “if plaintiff had sought only injunctive relief [in the form of an SPO], her claim would have been equitable in nature, and the constitution would not provide a right to a jury trial. ... There is no right to jury trial on equitable claims.” [4] “The right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. ... Instead, we conclude that [Art. I, § 17, and Art. VII (Am), § 3] do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as ‘civil’ or ‘at law.’” [5] Because “plaintiff’s claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog,” defendant was entitled to a jury trial on that claim. [6] When a mixed petition is before the trial court in which the plaintiff is seeking both equitable relief and compensatory damages and the defendant demands a jury trial on the damages claim, the court should defer ruling on the equitable claim until the jury has rendered a verdict on the damages claim.

*State v. Choat*, 251 Or App 669, 284 P3d 578, *rev den*, 352 Or 666 (2012). Defendant was the driver of a car involved in an accident in which two of his passengers died and another was injured. A jury found him guilty of two counts of second-degree manslaughter, three counts of recklessly endangering another person, and one count each of assault, reckless driving, and driving under the influence of intoxicants. The court imposed a 156-month sentence and a compensatory fine of \$1,590.02, which was designated to repay a witness—the sister of one of the killed passengers—for her airfare and hotel expenses incurred in order to attend the trial. Defendant had objected to imposition of that sum as *restitution*, but he did not object when the court imposed it as a compensatory fine instead. *Held:* Affirmed. [1] ORS 137.101(1) limits a compensatory fine only to expenses that may be recovered in a civil action, and costs associated with an injured person’s family attending trial are not recoverable by civil action. [2] Defendant’s objection is not preserved because “this record indicates that defendant objected to restitution, arguing that it was not authorized because the expense was a normal cost of prosecution; the court, alerted to defendant’s objection to restitution, ordered a compensatory fine instead, to which defendant did not object. Moreover, even if defendant’s objection to restitution were broad enough to encompass an objection to the compensatory fine, the fact remains that his argument—whether against restitution, compensatory fine, or both—was not developed in enough detail to permit the state to respond to it or the court to evaluate it.” [3] Even though the error in this case is an error of law and is not reasonably in dispute, the Court of Appeals declined to review it as “plain error” because “an inference that might be drawn from the record is that defendant’s decision not to object to the imposition of a compensatory fine in the amount of \$1,590.02 was a strategic choice, because doing so would have provided the trial court with the opportunity to reconsider its decision not to impose a fine of \$50,000 for the benefit of Allstate.”

*State v. Onischenko*, 249 Or App 470, \_\_\_ P3d \_\_\_, *rev den*, 352 Or 378 (2012). Savoy had a retail business in

which he sold new shoes, but the business failed and he put his inventory of 1,500 pairs of new shoes into storage. He authorized defendant to sell a small quantity of the shoes on an internet site, but he meanwhile attempted to interest another retailer in buying his inventory. When Savoy brought the other retailer by to look at the shoes, he discovered that defendant had taken all the shoes and sold them at second-hand stores. Defendant eventually pleaded guilty to aggravated first-degree theft. At sentencing, Savoy testified that the wholesale value of the stolen shoes was \$106,000 and the retail value was \$175,200. The court imposed a compensatory fine based on the wholesale value. *Held*: Affirmed. [1] “To properly calculate Savoy’s economic damages, the trial court had to first determine the market value of the shoes at the time that defendant stole them. The market value of an item can be established through an owner’s testimony, unless it is shown that he has no knowledge of the market value of his property in spite of his ownership. It can also be established through evidence of the asking price of the item. Evidence regarding the market value of property need not be exact.” [2] “The market value of property is ultimately a factual matter, and we review a trial court’s factual findings to determine whether ... whether the finding is supported by any evidence in the record.” [3] Because “Savoy planned to sell the shoes to another shoe retailer, ... the trial court could reasonably infer that the shoes were in the wholesale market and that the price Savoy had paid for the shoes when he bought them in that market continued to represent their value in that market. Indeed, Savoy ... testified that the price he had paid for the shoes represented their value. On the record in this case, that testimony alone was sufficient to support the trial court’s determination of Savoy’s economic damages.” [4] “Savoy’s general testimony that shoes decline in value over time did not preclude the trial court from relying on Savoy’s specific testimony that the price he had paid for the shoes represented their value at the time they were stolen.”

*Note*: The state argued that because the sentencing court imposed the sum as a *compensatory fine*—rather than as restitution—and the amount imposed was within the maximum fine authorized by ORS 161.625, it was not necessary to determine whether that amount exceeded the victim’s actual economic damages. But the court noted it was not necessary to address that issue because it determined that the amount imposed actually did match the victim’s economic loss.

*State v. Debuiser*, 249 Or App 203, \_\_\_ P3d \_\_\_ (2012). For shoplifting and engaging in a fight with a loss-prevention officer, defendant was convicted of theft of the shoplifted items and harassment of the officer. At sentencing, the court asked the prosecutor if the officer needed any medical attention, and the prosecutor responded that “everything was covered by Worker’s Comp” and that he “has been made whole.” Nonetheless, the court imposed a \$200 compensatory fine under ORS 137.101. Defendant argued on appeal that the court committed plain error by imposing a compensatory fine without any proof that the victim had suffered pecuniary loss. *Held*: Affirmed. The claimed error is not reviewable as “plain error” because it is not apparent on the face of the record. Multiple competing plausible inferences existed, including that defendant chose not to object to the fine for tactical reasons. The court could have imposed a greater fine under ORS 161.635, and, particularly knowing that he faced a \$3,000 fine in an unrelated case, defendant may have chosen not to object because he feared the court would impose the same or a greater fine under ORS 161.635.

*State ex rel Juv Dept. v. S. J. P.*, 247 Or App 698, 271 P3d 124 (2012). In this juvenile-delinquency case, youth was charged with committing what would be assault in the fourth degree against his stepsister. After the assault but before the hearing, she moved to North Carolina. The victim was not subpoenaed for the hearing, but she flew back to Oregon at her own expense to testify. The juvenile court found youth within its jurisdiction and ordered him to pay a compensatory fine to the victim, to compensate her for the cost of airplane fare. *Held*: Compensatory fine vacated and remanded. [1] “A juvenile court may impose a fine on a youth in a delinquency proceeding under the same circumstances as a court may impose a fine on a criminal defendant. ORS 419C.459 (2009).” [2] “[P]roof that a person has suffered economic damages as a result of a crime requires more than evidence of a ‘but for’ connection between an objectively verifiable monetary loss and the crime; it requires evidence that the loss could be recovered against the defendant in a civil action.” [3] The victim’s travel expenses are not recoverable as damages under ORCP 68 B because even if they “were incurred in connection with (and therefore recoverable in) a future civil action against youth, ... costs are not considered damages when sought in the same action in which they are incurred.” [4] Unlike in *State v. Mahoney*, 115 Or App 440, 443, *mod on recon*, 118 Or App 1 (1993), the victim did not incur the travel expenses to stop or mitigate the damages from an on-going tort. In fact, because the state did not subpoena the victim, she was not required to incur the expenses.

*Note*: Under ORS 137.106(1), the amount the court may impose as *restitution* is limited by the extent of the victim’s actual compensable loss but ORS 137.101 does not expressly impose such a limitation on the amount the court may impose as a *compensatory fine*. The Court of Appeals has not yet resolved whether the amount of a compensatory fine is limited by the amount of the victim’s compensable loss. See *State v. Williams*, 239 Or App 56 (2010) (noting that the issue is unresolved).

*State v. Martino*, 245 Or App 594, 263 P3d 1111 (2011). Defendant was convicted of several felony and misdemeanor offenses for committing violent physical and sexual crimes against his wife and stepson. At sentencing, the

court imposed a \$10,000 compensatory fine to cover psychological treatment for defendant's wife. Defendant did not object, but he argued on appeal that the fine was plain error because there was no evidence that his wife actually had incurred any therapy costs or other economic damages. The state responded that the fine is not "plain error" because defendant may have chosen not to object to the fine for strategic reasons: "he may have concluded that the court would perceive an objection to the fine as evidence that [he] had no remorse or was unwilling to accept responsibility for his acts." *Held*: Reversed and remanded for resentencing. [1] "The parties agree that there was no evidence that wife had incurred, or would incur, any mental health expenses or other pecuniary loss. They also agree that imposing a fine without evidence of pecuniary loss is error." [2] It was plain error for the trial court to impose a compensatory fine in absence of evidence of economic damages. Defendant's possible desire to avoid a harsh sentence is not a "a plausible strategic reason" for his failure to object to the fine so as to require the court to choose between possible inferences for purposes of precluding plain-error review.

*Note*: If the court imposes either a compensatory fine or restitution, it is imperative that the record contains *either* (1) some evidence that the victim suffered a pecuniary loss, *or* (2) an express acknowledgment by the defendant that he or she accepts the fine or restitution despite the absence of such evidence. If imposition of a compensatory fine or restitution is part of some sentencing agreement, that should be stated that on the record.

*State v. Klontz*, 242 Or App 372, 256 P3d 138 (2011). Defendant was charged with first-degree rape and furnishing alcohol to a minor based on an incident in which he plied the victim with alcohol at a movie theater until she was highly intoxicated, drove her back to his dorm room (instead of her room, as she had asked), then physically pinned her down and raped her after she passed out on his bed. At sentencing, the court imposed a compensatory fine of \$3,000 to be paid to the victim, without receiving evidence that the victim suffered any pecuniary damages. *Held*: Remanded for resentencing. The court erroneously imposed a compensatory fine in absence of any evidence that the victim suffered pecuniary damage.

*State v. Williams*, 239 Or App 56, 243 P3d 885 (2010). Defendant was convicted of theft for stealing copper railroad wire and selling it for \$26.32. The sentencing court imposed a sentence that included a \$150 compensatory fine. For the first time on appeal, defendant argued that, because the verdict had not established that the victim suffered a loss of at least \$150, the court erred by imposing a compensatory fine in that amount. *Held*: Affirmed. The court did not commit plain error, because reasonable minds could differ about whether the amount of a compensatory fine imposed under ORS 137.101 necessarily is limited to the amount of the victim's pecuniary damages.

*State v. Moore*, 239 Or App 30, 243 P3d 151 (2010). Defendant was convicted of first-degree theft and UUV. At sentencing, the court imposed a fine of \$100 under ORS 161.625, and a compensatory fine of \$1,455.36 under ORS 137.101. ORS 137.101(1) allows a "portion of the fine" imposed under ORS 161.625(1) to be designated as a compensatory fine to be paid to the victim. Defendant argued that it was plain error for the court order both a fine of \$100 and then \$1,455.35 as "a portion" of the \$100 fine. *Held*: Reversed and remanded. [1] It was plain error for the court to order the \$1,455.35 compensatory fine in addition to the fine already imposed under ORS 161.625(1). [2] The appellate court exercised its discretion to review the error, because it was not clear whether the trial court would have imposed the same fine if it had applied the correct analysis.

*State v. Haines*, 238 Or App 431, 242 P3d 705 (2010). Defendant was convicted of attempted sexual abuse. There was evidence that the victim had received counseling, and the court ordered him to pay a compensatory fine of \$1000 to the victim. For the first time on appeal, defendant argued that the fine was error because there was no evidence that the victim had suffered any economic damages—*i.e.*, because the counseling expenses were paid by an insurer, the victim had no damages. *Held*: Affirmed. The trial court did not commit plain error when it ordered a compensatory fine, because there was some evidence that the victim had incurred economic damages.

*State v. Shepherd*, 236 Or App 157, 236 P3d 738 (2010). Defendant got drunk, stole a car, and wrecked it. She pleaded guilty to UUV, attempting to elude a police officer, and driving under the influence of intoxicants. She was ordered to pay \$18,145.30 in restitution to the victim's insurance company (representing the value of the car), and \$1,200 to the victim as a compensatory fine (representing the remaining balance on the loan). On appeal, defendant argued that the trial court erred in ordering the compensatory fine because such fines are authorized only for objectively verifiable monetary losses and the state did not adduce any evidence that the \$1,200 met that criterion. *Held*: Because defendant's argument on appeal differed from the argument made to the trial court and, as a consequence, the state never had the opportunity to respond to it, the Court of Appeals determined that it was not adequately preserved and declined to reach its merits.

**State v. Ivory**, 231 Or App 381, 220 P3d 56 (2009). Defendant was convicted for theft by receiving after being found in possession of a stolen armoire. The sentencing court imposed a compensatory fine of \$2,000 based on jewelry missing from the armoire when it was recovered. *Held*: Vacated and remanded. “The mere fact that defendant was shown to be the last person in possession of the stolen armoire before it was returned to the victim does not support an inference that the victim’s missing jewelry was in the armoire when he received it.” Because he was convicted only of theft by receiving based on the armoire, the evidence was not sufficient to support a compensatory fine based on the missing jewelry.

**State v. Drinkwater**, 231 Or App 6, 217 P3d 1090 (2009), *rev den*, 348 Or 13 (2010). The sentencing court committed plain error when it imposed a \$1,000 compensatory fine on defendant’s conviction for first-degree rape, because the record does not contain evidence that the victim suffered any economic damage or pecuniary loss as a result of defendant’s offense. The Court of Appeals could not identify any “plausible strategic reason for defendant to have failed to object to the imposition of the fine.”

**State v. Neese**, 229 Or App 182, 210 P3d 933 (2009). On convictions for sexual offenses involving his four-year-old daughter, defendant was ordered to pay \$75,000 in compensatory fines to the victim. Although he did not object at sentencing, he argued on appeal that the fine was plain error. *Held*: Reversed. Because the state failed to show any pecuniary loss by the victim, imposition of the compensatory fine was plain error. The appellate court exercised its discretion to correct the error because the amount was substantial, and because the record did not show that the victim suffered \$75,000 in damages.

**State v. Anderson**, 228 Or App 237, 206 P3d 1217 (2009) (*per curiam*). The sentencing court erred when it imposed a compensatory fine on defendant’s convictions for first-degree sexual abuse because “there was no evidence that the victim suffered any pecuniary loss.”

**State v. Kennedy**, 227 Or App 281, 205 P3d 65 (2009) (*per curiam*). The sentencing court committed plain error when, after imposing a 300-month sentence on defendant’s convictions for first-degree sodomy, it ordered him to pay \$2,000 as a compensatory fine to pay for the victim’s future counseling costs, because the record does not establish that the victim suffered some pecuniary loss: “In this case, there was no evidence even of future appointments.”

**State v. Villines**, 226 Or App 469, 204 P3d 119 (2009) (*per curiam*). The sentencing court erred when it imposed a compensatory fine of \$2,000 on defendant’s conviction for second-degree sexual abuse because “the record does not support findings that the victim suffered economic damages as required by ORS 137.010 and 137.103.”

**State v. Snyder**, 220 Or App 440, 186 P3d 324 (2008) (*per curiam*). Defendant pleaded guilty to burglary and theft, the parties agreed that all of the stolen property had been recovered and returned, and the court imposed a compensatory fine based on a finding that the victims had suffered “psychological damage.” *Held*: Reversed and remanded. “Although we agree that such damage may have resulted from the crime committed in this case, [ORS 137.101 and 137.103] require that economic damages be suffered before compensatory fines may be imposed.”

**State v. Morris**, 217 Or App 271, 174 P3d 1129 (2007), *rev den*, 344 Or 671 (2008). The sentencing court committed plain error by imposing a \$5,000 compensatory fine without proof that the victim suffered a “pecuniary loss,” as required under ORS 137.101. The court rejected the state’s argument that, if defendant had objected at sentencing, it may have been able to provide a factual basis for the compensatory-fine award; rather, it concluded that, because defendant did not “invite” the error, and the amount was significant, the interests of justice supported its decision to correct the error.

**State v. Reed**, 214 Or App 164, 162 P3d 379, *rev den*, 343 Or 224 (2007) (*per curiam*). The sentencing court erred when it imposed, on defendant’s convictions for first-degree sodomy and attempted rape, a compensatory fine of \$20,000 to pay for future psychological treatment for the victim, because the record does not establish that the victim actually suffered a pecuniary loss.

**State v. Ross**, 199 Or App 1, 110 P3d 630, *mod on recons*, 200 Or App 143, 113 P3d 921 (2005), *rev den*, 340 Or 157 (2006). Defendant was convicted of dozens of sexual offenses against three children, and the court imposed what effectively is a life sentence and \$30,000 in compensatory fines, CAA fees, and assessments. *Held*: [1] The compensatory fines and assessments were proper, as the court adequately considered defendant’s ability to pay. [2] The CAA-fee order is error, though, because the court did not comply with ORS 161.663(3) by failing to find that he has a present ability to pay.

*State v. Fiez*, 181 Or App 656, 47 P3d 529 (2002) (*per curiam*). The sentencing court erred when it imposed a \$3,000 compensatory fine on defendant's convictions for first-degree sexual abuse and attempted first-degree rape, because the court failed to find that the victims had suffered a pecuniary loss. Remanded "for resentencing."

## **B. RESTITUTION (ORS 137.103 *et seq.*)**

^ *State v. Algeo*, S060830 (on victim's petition for review under ORS 147.539). Issue on review: Did the sentencing court err when it applied comparative-negligence principles under ORS 31.600 to apportion responsibility for the victim's injuries between the victim and defendant, and then reducing the amount it ordered defendant to pay in restitution to the percentage of the victim's economic damages attributed to defendant's conduct?

*State v. Wagoner*, 2257 Or App 607, \_\_ P3d \_\_ (2013). Defendant pleaded guilty to identity theft. Although the victim previously had submitted her restitution request for \$800, the victim's advocate who received it failed to forward that information to the prosecutor. When the prosecutor represented at sentencing that the victim had not provided restitution information, the court did not award restitution. Several months later, the victim's request was found, and she filed a motion under Art. I, § 42(1)(d), asserting her right to restitution. The court granted that request and imposed restitution in a supplemental judgment. On appeal, defendant argued that, because the state did not investigate and present to the court the nature and amount of restitution prior to the time of sentencing, the court had no authority to impose restitution. *Held*: Affirmed. [1] Under Art. I, § 42(1)(d), "a victim in a criminal prosecution has the right to receive prompt restitution from the convicted criminal who caused the victim's loss or injury," and the legislature may provide by law for effectuation of that right. [2] In light of *State v. Thompson*, 257 Or App 336 (2013), "ORS 137.106 did not prevent the court from imposing restitution in order to provide the victim a remedy by due course of law, after it was discovered that her constitutional right to restitution was violated."

*State v. Thompson*, 257 Or App 336, \_\_ P3d \_\_ (2013). Defendant crashed into a stop sign and street light pole owned by the City of Monmouth, and he was charged with failing to perform the duties of a driver. He pleaded guilty and agreed to pay restitution. At sentencing, the court awarded \$162 in restitution for damages to the stop sign, but denied the prosecutor's request for \$1694.37 in restitution for the damaged light pole because "the prosecutor was late in presenting that figure to the court." Three months later the victim, the City of Monmouth, filed a claim that the trial court violated its constitutional right "to prompt restitution" under Art. I, § 42(1)(d). Two months after that, the trial court held a hearing on the claim and granted the victim its requested relief by amending the judgment to include the restitution requested for the damaged light pole. *Held*: Affirmed. The trial court properly amended the judgment to include additional restitution as a remedy for the violation of the victim's right to prompt restitution. [1] The victim was not limited to seeking relief only in the Supreme Court: Art. I, § 42(3)(b), does not limit a crime victim's remedies for a rights violation to a petition for writ of mandamus to the Supreme Court in a case that is not pending; rather, the Oregon Constitution "makes clear that the legislature is authorized to create procedures for a crime victim to pursue remedies in addition [to mandamus]," which the legislature has done by enacting ORS 147.515. [2] The victim's failure to file its claim in the trial court within time specified in ORS 147.515 was not a jurisdictional defect: "the time window of ORS 147.515, when read in context of the victims' rights scheme as a whole, does not operate as a restriction on the trial court's jurisdictional authority to hear a victim's untimely claim." Consequently, "we decline to address the merits of defendant's unpreserved argument that the city's claim was untimely." [3] The 90-day limit in ORS 137.106(1) (2011), "by its plain language, does not constrain the time in which a trial court may resentence a defendant as a means of remedying a violation of a victim's constitutional rights."

*State v. Al-Khafagi*, 257 Or App 363, \_\_ P3d \_\_ (2013) (*per curiam*). The sentencing court imposed \$182,437 as restitution over defendant's objection that he was entitled to a jury trial on the amount. He contended that amendments to the restitution statutes have changed restitution's purpose from a penalty to a "quasi-civil recovery device" for victims. *Held*: Affirmed. Because defendant's obligation to pay restitution to a victim remains penal in nature despite the statutory amendments, Art. I, § 17, did not apply.

*State v. Coronado*, 256 Or App 780, 302 P3d 477 (2013). Defendant was convicted on two counts of second-degree assault and one count of third-degree assault. At the first sentencing hearing, the state asked the court to impose restitution of \$5,932 to the victim and \$38,677 to the victim's insurer. Defense counsel stated, "No objection." At the second sentencing hearing, the trial court ordered that the parole board would determine the amount of restitution. Defendant did not object, and the judgment reflected the trial court's order for the board to set the amount of restitution.

*Held*: Affirmed. [1] Although ORS 137.106(4)(a) allows a trial court to have the board set a payment schedule for restitution, only the trial court has the authority to determine the *amount* of restitution. [2] But even though the trial court committed plain error, the Court of Appeals refused to exercise its discretion to reach the error: (a) defendant could have brought the error to the trial court’s attention; (b) it would have been an easy error for the trial court to fix; and (c) striking the award of restitution, as defendant had asked the appellate court to do, could have resulted in a windfall for defendant.

*State v. Nelson*, 256 Or App 480, 300 P3d 307 (2013) (*per curiam*). The sentencing court erred when it imposed restitution in the amount of \$250 upon defendant’s convictions for coercion and fourth-degree assault, because there was an “absence of a causal relationship between his criminal conduct and the victim’s economic loss.” Remanded for resentencing.

*State v. White*, 255 Or App 560, 298 P3d 50 (2013). Defendant was convicted of assault in the fourth degree and the court imposed, by supplemental judgment, restitution in the amount of \$1,337.27. On appeal, he challenged the restitution on grounds that the amount and nature of the victim’s economic damages had not been proved prior to the time of sentencing. *Held*: Reversed and remanded. Because the evidence to support the restitution order was not presented “prior to or at sentencing,” the order imposing restitution is plain error under *State v. McLaughlin*, 247 Or App 334 (2011), *rev allowed* (2012), and the Court of Appeals exercised its discretion to correct the error.

*State v. Griffin*, 255 Or App 509, 296 P3d 1288 (2013) (*per curiam*). After defendant’s sentencing, the trial court issued a judgment that ordered the state to submit “restitution figures” within 60 days. Then, 91 days later, and without holding a hearing, the court signed a supplemental judgment imposing \$640 in restitution. The judgment was entered the following week. Defendant appealed, arguing that the supplemental judgment was signed more than 90 days after the initial judgment, in violation of ORS 137.106. *Held*: Remanded for resentencing. Before extending the 90-day statutory deadline for signing a supplemental judgment of restitution, the court was required to make a “good cause” determination under ORS 137.106(1)(b).

*State v. Oidor*, 254 Or App 12, 292 P3d 629 (2012). Based on evidence that defendant sold music CDs that contained unauthorized reproductions of the original recordings, he was found guilty of unlawful sound recording, ORS 164.865(1)(b), and unlawful labeling of a sound recording, ORS 164.868. The sentencing court imposed restitution of \$500 to the Recording Industry Association of America (RIAA). *Held*: The trial court erred by imposing restitution to the RIAA, because the record contained no evidence “that defendant’s criminal conduct caused any economic damages to a victim.”

*State v. Beckham*, 253 Or App 609, 292 P3d 611 (2012). Defendant was convicted of fourth-degree assault constituting domestic violence. The trial court entered a supplemental judgment imposing restitution 104 days after the original judgment had issued. Defendant appealed, contending that the trial court erred by imposing restitution because the supplemental judgment was entered after the 90-day period allowed under ORS 137.106(1)(b), and the court did not find good cause for extending that time, and the record lacked evidence to support the amount of restitution imposed. The state conceded error in both respects but argued that the proper remedy is to vacate the supplemental judgment and remand for a hearing for the trial court to now determine whether good cause existed to extend the restitution determination and, if so, the amount of economic damages. *Held*: Supplemental judgment vacated and remanded; otherwise affirmed. Because the good-cause determination does not have to be made within the 90-day period, and because the legislative intent behind the restitution statute is to ensure that crime victims receive restitution, the proper remedy is to vacate the supplemental judgment and remand for the trial court to determine: (a) whether the failure to include a requirement of restitution in the original judgment precludes the court from now awarding restitution; (b) if not, whether, at the time the court entered the supplemental judgment, there was good cause to extend the restitution determination; and (c) if so, the amount of the victim’s economic damages.

*State v. G. L. D.*, 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of second-degree burglary, and first-degree criminal mischief. The court imposed restitution in the amount of \$194,578. On appeal, youth contended the juvenile court erred when it awarded restitution to insurance companies and denied his request for a jury to determine the amount of restitution. *Held*: Affirmed. [1] Under *State v. E.V.*, 240 Or App 298 (2010), the juvenile court properly ordered youth to pay restitution to insurance companies. [2] Youth’s argument that he was entitled to a jury trial on restitution has no merit in light of *State v. N.R.L.*, 249 Or App 321, *rev allowed* (2012).

*State v. Barker*, 252 Or App 357, 287 P3d 1179 (2012) (*per curiam*). The sentencing court erred when it awarded restitution on defendant’s conviction for telephonic harassment for damages the victim suffered as a result of conduct defendant engaged in before he committed the crime of conviction—conduct for which he “had not been convicted and did not admit having committed.”

^ *State v. N. R. L.*, 249 Or App 321, 277 P3d 564, *rev allowed*, 352 Or 378 (2012). Youth who was found within the jurisdiction of the juvenile court on charges of burglary and criminal mischief, and the juvenile court ordered him to pay restitution to the victims in the amount of \$114,071.13. On appeal, youth argued that the court erred when it denied his motion to empanel a jury; he argued that Art. I, § 17, entitled him to a jury trial on the issue of restitution because the amendments to the restitution statute, ORS 419C.450, had changed the statute’s purpose from penal to “quasi-civil.” *Held*: Affirmed. [1] “A jury trial is guaranteed only in those classes of cases in which the right was customary at the time the constitution was adopted or in cases of like nature. To determine whether cases are of like nature, courts must look at the particular issue in the proceeding rather than the controversy.” [2] “Because juvenile delinquency proceedings are *sui generis* and did not exist when Article I, section 17, was adopted in 1857, youths generally are not entitled to a trial by jury in such proceedings.” [3] “The juvenile court thus imposes restitution as a sanction, an aspect of the youth’s disposition, not as a form of civil recovery for the victim.” Moreover, “the restitution available to victims does not fully compensate the victim and the judgment for restitution also serves rehabilitative and deterrent purposes.” A youth is not entitled to a jury trial on the amount of restitution because “juvenile court’s order of restitution in a juvenile proceeding is penal, not civil, in nature.”

^ *State v. McLaughlin*, 247 Or App 334, 269 P3d 104 (2011), *rev allowed*, 352 Or 107 (2012). Defendant ripped a bronze plaque off the wall at PPB Central Precinct and dumped it in the street; it was recovered unharmed and was re-installed. He was charged with “knowingly” committing first-degree theft in violation of ORS 164.055(1), and the state presented evidence at trial that the plaque was worth \$2,000 (replacement value). A jury found him guilty. At sentencing, the state asked for a set-over to present evidence to establish the amount restitution, and the court granted that motion, overruling defendant’s objection. At a later hearing within the 90-day period allowed by ORS 137.106(1)(b), the court imposed \$495 in restitution based on the cost of the re-installation. The Court of Appeals held that the state had failed to meet its “procedural deadline” under ORS 137.106(1) to present “evidence of the nature and amount of damages prior to the time of sentencing.” The court ordered that the “judgment awarding restitution [be] vacated and [the case] remanded for resentencing,” and otherwise affirmed. Defendant petitioned for reconsideration that, given the state’s failure to meet its obligations under ORS 137.106(1), the trial court now lacked authority to impose any restitution and that the proper disposition is to vacate and reverse the supplemental judgment awarding restitution, rather than to vacate the judgment and remand for resentencing. *Held*: Conviction affirmed; restitution order vacated, remanded for resentencing. [1] The sentencing court erred when it imposed restitution because the state did not present evidence to the court *before the sentencing hearing* about the “nature and amount” of damages the victim suffered as required by ORS 137.106(1). The evidence presented at trial regarding the “replacement value” was not sufficient to comply with the statute, because restitution later was sought based on cost of re-installation. [2] “The trial court’s original sentence indicated its desire to have defendant compensate the victim, although the court was mistaken that it could award restitution at the time of sentencing. In light of the possible compensatory fine and ORS 138.222(5)(a), we must permit the court to reconsider its sentence.”

*Notes*: [a] When evidence of the “nature and amount” of the victim’s loss is presented at trial, that generally should be sufficient to comply with ORS 137.106(1) if that same loss will be relied upon at sentencing for restitution. The problem in this case arose because of the discrepancy between the loss proved at trial and the separate loss on which the restitution order is based. [b] The court’s opinion assumes that the “prior to the time of sentencing” clause in ORS 137.106(1) refers only to the original sentencing hearing and does not include a subsequent restitution hearing that may be allowed by subsection (1)(b) of that statute. In other words, the court implicitly held that the state must present a sufficient statement of “nature and amount” before the original sentencing hearing and cannot defer doing that until a later restitution hearing.

*State v. Martinez*, 250 Or App 342, 280 P3d 399 (2012). Defendant was convicted of unlawful use of a weapon, first-degree criminal mischief, and menacing. The sentencing court imposed a probationary sentence and ordered him to pay \$3,209 in restitution, including an unexplained \$273 to “Care Oregon,” and he did not object. *Held*: Reversed and remanded. [1] The sentencing court committed plain error by imposing restitution to Care Oregon without any supporting evidence in the record. [2] Because the amount of restitution “was not insubstantial given defendant’s circumstances” and the interests of justice militated against requiring a defendant to pay an obligation that is unsubstantiated by the record, the

Court of Appeals exercised its discretion to consider the error, and remanded for resentencing.

*State v. Kephart*, 249 Or App 360, \_\_\_ P3d \_\_\_ (2012). Based on conduct that he committed in 1991, defendant was charged with causing the death of his daughter, who eventually died many years later from her injuries. Pursuant to a plea agreement, defendant pleaded guilty to one count of aggravated murder by abuse. As part of the agreement, the parties stipulated that the 1989 version of ORS 163.105 (which was in effect in 1991) would apply and that application of the statute would result in him receiving a life sentence with a 30-year minimum and eligibility for parole after 20 years. The parties also agreed that defendant would pay restitution for the victim's burial and that the state would request restitution for the state's costs in providing years of care and treatment for the victim before she died. Although defendant could object to the request for restitution for the victim's care and treatment, he agreed not to request an evidentiary hearing. And under the plea agreement, the sentencing court was to be bound by the parties' negotiations and to impose the agreed-upon sentence. After the sentencing hearing, the state submitted a restitution schedule that sought \$3,500 for crime victim compensation and \$1,168,495 payable to the Department of Human Services (DHS), which had paid for the victim's care and treatment. Defendant objected, asserting that (1) the 1991 restitution statutes applied and that restitution could not be awarded to DHS under those statutes, and (2) that he did not have the ability to pay. The court awarded the requested restitution. *Held*: Vacated and remanded. "Defendant does not dispute the state's assertion that the restitution award was permissible under the current version of the restitution statutes. The state, for its part, does not present any cogent argument that the award was proper under the 1991 version of the restitution statutes. Instead, their entire dispute centers around what their stipulation was and what statute the trial court applied in awarding restitution. Thus, whether the award of restitution was proper depends on whether or not the parties stipulated to the application of the 1991 version of the restitution statutes as part of the plea negotiations. The parties dispute what their stipulation was in that regard. The trial court's opinion regarding restitution does not address that issue, nor does it explicitly state what version of the restitution statutes the court applied. The trial court is in the best position to resolve both of those predicate issues and should have the opportunity to address them in the first instance. For that reason, we vacate the judgment and remand the case for the trial court to consider and address both of those questions."

*State v. N. R. L.*, 249 Or App 321, \_\_\_ P3d \_\_\_ (2012). Youth who was found within the jurisdiction of the juvenile court on charges of burglary and criminal mischief, and the juvenile court ordered him to pay restitution to the victims in the amount of \$114,071.13. On appeal, youth argued that the court erred when it denied his motion to empanel a jury; he argued that Art. I, § 17, entitled him to a jury trial on the issue of restitution because the amendments to the restitution statute, ORS 419C.450, had changed the statute's purpose from penal to "quasi-civil." *Held*: Affirmed. [1] "A jury trial is guaranteed only in those classes of cases in which the right was customary at the time the constitution was adopted or in cases of like nature. To determine whether cases are of like nature, courts must look at the particular issue in the proceeding rather than the controversy." [2] Because juvenile-delinquency proceedings are *sui generis* and did not exist when Art. I, § 17, was adopted in 1857, "youths generally are not entitled to a trial by jury in such proceedings." [3] "The juvenile court thus imposes restitution as a sanction, an aspect of the youth's disposition, not as a form of civil recovery for the victim." Moreover, "the restitution available to victims does not fully compensate the victim and the judgment for restitution also serves rehabilitative and deterrent purposes." A youth is not entitled to a jury trial on the amount of restitution because "juvenile court's order of restitution in a juvenile proceeding is penal, not civil, in nature."

*State v. Jordan*, 249 Or App 93, 274 P3d 289 (2012). Defendant drove drunk and hit the victim, who suffered serious physical injury, including brain trauma, and spent six months in the hospital and underwent multiple surgeries. Defendant pleaded guilty to DUII and second-degree assault, and the court imposed restitution in the amount of \$887,793, including \$670,000 to Providence for medical expenses and over \$100,000 for lost income. *Held*: Affirmed. [1] The court did not commit "plain error" by relying on Providence's medical-lien ledger. Although "medical bills do not establish reasonable charges necessarily incurred," the ledger contains the amounts that Providence actually paid to medical-service providers. Because the appellate courts "have never addressed whether an award of restitution may be based on an insurer's statutory lien amount," and the issue is "reasonably in dispute," defendant's claim "does not qualify as an error of law apparent on the face of the record." [2] Defendant failed to adequately preserve specific objections to a list of anticipated future treatment expenses—which may be recovered as restitution—including naturopathic medical and food expenses, which the victim's wife testified were helping his condition. [3] The court properly ordered restitution for various professional services (including a conservatorship), because they "were reasonable charges necessarily incurred as a result of the victim's injuries." [4] The court properly ordered restitution for the victim's lost income based on his average income over the preceding four years, despite fluctuations. [5] "The date of the determination by the trial court is the date as of which the loss is determined. Thus, the victim's loss of income as of the date of the trial court's determination of restitution is a current loss and not a future impairment of earning capacity. For that reason, we conclude that a victim is entitled to

restitution for loss of income up to the date that the trial court determines the full amount of the victim's economic damages and awards restitution.”

*State v. White*, 249 Or App 166, 274 P3d 313 (2012) (*per curiam*). Defendant was convicted of first-degree theft for having obtained unemployment benefits while he was employed. The sentencing court imposed restitution in the amount of the unlawfully obtained benefits plus 12 percent interest, based on ORS 657.310, which entitles the Employment Department to recover interest at one percent a month on a civil judgment obtained to recover such benefits. *Held*: Reversed and remanded. “The damages that can be awarded to a victim in a civil action and the economic damages recoverable as restitution are not necessarily coextensive.” “The economic damages that can be awarded as restitution are limited to ‘objectively verifiable monetary losses’ resulting from defendant’s actions,” and “the interest that the department would be entitled to receive under ORS 657.310(4) and (5) on a judgment against defendant is not such a loss.”

*State v. Yocum*, 247 Or App 507, 269 P3d 113 (2011), *rev den*, 352 Or 25 (2012). Defendant burglarized the victim’s house and stole many items, including a set of antique diamond earrings that were never recovered. Defendant was convicted, and the state requested restitution in the amount of \$20,000 for the stolen earring based on an estimate provided by a professional jeweler who based his estimate on the victim’s description of the earrings. The earrings had belonged to the victim’s mother and she did not know the original purchase price or have a picture of them. Over defendant’s objection that the evidence of value was insufficient, the sentencing court set restitution at \$20,000. *Held*: Affirmed. [1] Under ORS 137.106, “the state had the burden of producing ‘evidence of the nature and amount’ of the victim’s economic damages ... [and] the state had the burden to prove those damages by a preponderance of the evidence.” [2] “To the extent that defendant argues that the replacement cost of the victim’s diamond earrings was not objectively verifiable and, therefore, that the victim’s damages were not economic in nature, we reject that argument. Damages representing the cost of replacing stolen jewelry, including diamond earrings, are ‘capable of verification through objective facts’ and, accordingly, are economic in nature.” [3] “On this record, the trial court was entitled to infer that the jeweler felt that the victim’s description was sufficiently adequate such that he could make an appropriate estimate as to the replacement cost of the earrings. Additionally, the state presented evidence that supported the estimate: namely, the victim’s testimony regarding her father’s wealth, her mother’s habit of wearing good quality jewelry, and her drawing and description of the earrings. ... The trial court, as factfinder, was entitled to weigh the evidence presented and to reach that conclusion.”

^ *State v. McLaughlin*, 247 Or App 334, 269 P3d 104 (2011), *rev allowed*, 352 Or 107 (2012). In *State v. McLaughlin*, 243 Or App 214 (2011), the court held that the state had failed to meet its “procedural deadline” under ORS 137.106(1) to present “evidence of the nature and amount of damages prior to the time of sentencing.” The court ordered that the “judgment awarding restitution [be] vacated and [the case] remanded for resentencing,” and otherwise affirmed. Defendant petitioned for reconsideration that, given the state’s failure to meet its obligations under ORS 137.106(1), the trial court now lacked authority to impose any restitution and that the proper disposition is to vacate and reverse the supplemental judgment awarding restitution, rather than to vacate the judgment and remand for resentencing. *Held*: Remanded for resentencing. “The trial court’s original sentence indicated its desire to have defendant compensate the victim, although the court was mistaken that it could award restitution at the time of sentencing. In light of the possible compensatory fine and ORS 138.222(5)(a), we must permit the court to reconsider its sentence.”

*State v. Gruver*, 247 Or App 8, 268 P3d 760 (2011). While stealing jewelry from a department store, defendant damaged some of the jewelry and the store’s plumbing when she removed the packaging and tried to flush it down a toilet in the store’s bathroom. She was convicted of first-degree theft, and the prosecutor submitted a restitution schedule that identified the department store’s losses as follows: “Loss: Damaged Jewelry \$3,809.99” and “Loss: Plumbing Bill \$369.00.” Without objection from defendant, the court imposed the restitution in that amount. Defendant appealed, claiming that the trial court’s imposition of the restitution was plain error because “there was no evidence that the victim was entitled to restitution in any amount.” *Held*: Affirmed. [1] ORS 137.106(5), which gives a defendant the right to be heard on any objection to restitution, does not preclude appellate review if defendant fails to exercise her statutory right to object. [2] But an unreserved restitution challenge is reviewable as plain error only if there is a “total absence of evidence to support the restitution award in a particular amount” (reaffirming *State v. Harrington*, 229 Or App 473 (2009)). [3] The sentencing court did not commit plain error because the state submitted a restitution schedule describing the victim’s damages, which was supported by testimony at trial from department store personnel as to the amount of the damaged jewelry and the fact that the store toilet had to be unclogged: “Whatever the state’s purported deficiencies in failing to make a more detailed showing of the ‘loss of value’ that defendant caused, there is no question that the state’s proof established loss triggering an entitlement to restitution. Thus, the record here does not disclose the plain error that we identified in *Harrington*, which involved a total absence of evidence to support the restitution award in a particular amount.”

*Note:* Although the court affirmed the restitution order, it stressed that the error was not plain because the restitution request was supported by evidence presented at trial, which leaves open the possibility of a plain-error challenge where the restitution schedule is the *only evidence* supporting restitution.

*State v. Condon*, 246 Or App 403, 264 P3d 1288 (2011), *rev den*, 351 Or 649 (2012). Defendant was convicted of attempted first-degree assault with a firearm, the judgment was entered on April 9, 2009, and the court entered a supplemental judgment on September 21 that imposed \$333,149 in restitution. Defendant objected on the ground that the restitution determination was not made within 90 days after judgment. The sentencing court found that there was good cause to enter the restitution beyond the 90-day limit because the delay was caused by difficulty the victim's family had in assembling all of the victim's medical bills. *Held:* Affirmed. The reasons given by the victim's family were sufficient to allow the trial court to find "good cause" to enter the order of restitution beyond the 90-day timeline established by ORS 137.106(1)(b).

*Note:* The Court of Appeals held that "good cause" was shown even though it noted that "the prosecutor's office entirely ignored the restitution matter for the entire 90 days after the judgment of conviction was entered."

*State v. Unis*, 246 Or App 397, 425 P3d 528 (2011). Defendant was convicted of first-degree theft and attempted first-degree theft. The sentencing court initially imposed a restitution amount of \$851.15. Defendant requested a restitution hearing, which was set past the 90-day timeline under ORS 137.106(1)(b). The prosecutor discovered that the restitution specialist was terminally ill with a brain tumor and did not understand the victim's explanations that the initial restitution amount was incorrect. After several delays that were either requested or consented to by defendant, the court imposed restitution of \$2,570. *Held:* Affirmed. The restitution specialist's illness constituted "good cause" to extend the timeline for determining the restitution amount. "Given those circumstances, we agree with the trial court that the delay in determining the proper amount of restitution in this case was for 'good cause.' Finally, we note that the vast majority of the delay that occurred after April was either requested by or consented to by defendant (*e.g.*, the prosecutor's unopposed request for a continuance while the parties attempted to reach an agreement as to the restitution amount)."

*State v. Landreth*, 246 Or App 376, 265 P3d 89 (2011). Defendant was convicted of UUV, which caused the victim economic damages. Because the prosecutor had not yet done a restitution investigation, the sentencing court noted in the judgment that restitution was to be determined within 90 days. ORS 137.106(1)(b). About two months before the 90 days had expired, the state moved for an amended judgment, and informed the court that the victim would testify at the restitution hearing regarding the amount of damages. The court held a hearing on the 98th day. Defendant argued that the court had no authority to order restitution after the 90th day; in response, the state argued that the court should exercise its authority to find "good cause" to extend the 90-day period because the victim had recently been diagnosed with a serious illness, was receiving treatment, and had been hospitalized. After hearing that, the court found good cause to extend the deadline due to "scheduling with the court." *Held:* Affirmed. [1] The trial court properly extended the time beyond 90 days after finding good cause. ORS 137.106 does not limit the sentencing court's authority to find good cause past the 90-day deadline, and it does not require the state to seek such a finding within the 90-day window. [2] The record established good cause; although the court stated that its finding was based on "scheduling with the court," the context of that finding—which came right after the state explained the victim's illness and hospitalization—indicated that the court based its determination on the victim's needs and circumstances. [3] The record did not suggest prosecutorial neglect of the case; the state had difficulty concluding the restitution investigation because of the victim's poor health, and in all events completed the investigation within the 90-day window. The court also noted that the state had not filed its motion at the last minute, and the time from the motion to the hearing—only eight days—was "not unusually long."

*State v. White*, 246 Or App 329, 264 P3d 1291 (2011). The court entered a judgment on December 10, 2009, that stated, pursuant to ORS 137.106, that defendant would be required to pay restitution in an amount "to be determined." Defendant appealed from that judgment. On February 24, 2010, the court entered a supplemental judgment imposing restitution. On July 14, 2010, defendant filed an amended notice of appeal citing the February 23 supplemental judgment. Defendant's appellate counsel asserted that the amended notice was timely under ORS 137.071(4) because he had just become aware of it. *Held:* Appeal from supplemental judgment dismissed. [1] Under *State v. Fowler*, 350 Or 133 (2011), defendant's failure to timely file notice of appeal from the supplemental judgment imposing restitution deprived the appellate court of jurisdiction over that judgment. [2] Defendant's timely appeal from the original judgment did not allow the court to review his claim with respect to the supplemental judgment. *See* ORS 138.240. [3] The fact that defense counsel may not be served promptly with a signed copy of a supplemental judgment and so "must check with the court or access the court's computerized database" is not a valid excuse for a default in failing to file a timely notice of appeal.

*State v. Martinez*, 246 Or App 383, 265 P3d 92 (2011), *rev den*, 351 Or 507 (2012). Defendant was convicted of second-degree assault, and the court imposed judgment on February 9, 2009, with leave to submit a request for restitution within 90 days. On May 5, the 85<sup>th</sup> day, the state filed a motion requesting restitution in the amount of \$2,914. The court held a hearing on August 17, and the prosecutor explained that the delay was caused in part by the victim not being cooperative. The defendant objected on the ground that state had all of the victim’s medical bills since February, but the court found “good cause” and imposed restitution. *Held*: Affirmed. “Awaiting information that is highly pertinent to the request for restitution is not, as defendant suggests, the equivalent of ‘prosecutorial inadvertence or neglect.’” Thus, although the restitution was sought toward the end of the 90-day period, the reason for that was a legitimate one. Moreover, the delay after the state had filed its motion was due to appointing new counsel for defendant and ensuring defendant’s availability for the hearing. Thus, the record establishes that there were valid reasons—the need to appoint counsel and difficulties in arranging the presence of defendant, who was being moved around within the state prison system—for the subsequent delay in holding the hearing.” Thus, the delay was not actually the result of the victim’s failure to cooperate.

*State v. Bassett*, 243 Or App 289, \_\_\_ P3d \_\_\_ (2011). While driving drunk, defendant collided with an unmarked police cruiser and then fled the scene; the officer suffered personal injuries as a result of the accident. Defendant pleaded guilty to DUII and to failure to perform the duties of a driver where *property* is damaged, ORS 811.700 (H&R). The court ordered the defendant to pay \$11,000 in restitution for injuries to the officer, rejecting defendant’s argument that because she was convicted only under ORS 811.700 she can be held liable only for *property* damage. *Held*: Affirmed. ORS 811.706, the restitution statute for H&R, does not condition restitution on whether the defendant was convicted under ORS 811.700 (property damaged) or ORS 811.705 (personal injury)—it allows restitution for “any” damages resulting from the underlying incident.

*State v. Moore*, 243 Or App 199, \_\_\_ P3d \_\_\_ (2011). Defendant drove a truck without the consent of the owner and wrecked it. He was convicted of failure to perform the duties of a driver (H&R) and was ordered to pay restitution for the amount paid by the owner “to clear the title of the wrecked truck” (\$3,889) and for “the finance charge on the replacement truck” (\$5,277). Defendant objected to the latter portion of the restitution award on the ground that that sum was not “economic damages” that are recoverable as restitution under ORS 137.106 and ORS 31.710. *Held*: Affirmed. Restitution orders for damages resulting from a defendant’s H&R offense are specifically governed by ORS 811.706, and not by ORS 137.106. Because defendant has not argued that the restitution was not lawful under ORS 811.706, the Court of Appeals affirmed.

*State v. Murrell*, 242 Or App 178, 255 P3d 574 (2011). At a restitution hearing held 150 days after sentencing, the court overruled defendant’s objection that no “good cause” justified extending the time for imposing restitution beyond the 90-day period specified in ORS 137.106(1)(b), and it entered an amended judgment that imposed \$2,025 restitution based on his DUII conviction. *Held*: Amended judgment vacated. [1] Whether particular circumstances satisfy the “good cause” standard in ORS 137.106(1)(b) “is a question of law”—the ruling is not reviewed for abuse of discretion. [2] The sentencing court erred by imposing restitution outside the 90-day period. ORS 137.106(1)(b) requires that restitution be determined within 90 days after entry of the original judgment unless there is “good cause” to extend the time to complete the restitution determination. No action was taken on this case until it was too late for the trial court to act on the restitution request within the 90-day period, and the reason for the delay was the prosecutor’s “inadvertent mislaying of the file,” which was not good cause.

*State v. Umphery*, 241 Or App 36, 248 P3d 449 (2011). Based on a vehicle accident, defendant was convicted of second-degree assault, among other crimes. At the sentencing hearing, the prosecutor disclosed that it would be seeking \$383,668 in restitution, defense counsel asked for a hearing, and so the court continued sentencing. But the court later entered a final judgment imposing that amount of restitution without first holding a hearing. *Held*: Reversed and remanded. Defendant adequately objected and requested a restitution hearing, and he was not afforded a hearing.

*State v. E.V.*, 240 Or App 298, 246 P3d 78 (2010), *rev den*, 350 Or 130 (2011). Youth was found within the juvenile court’s jurisdiction for committing acts that, if committed by an adult, would constitute third-degree sexual abuse. Youth argued that the court could not impose restitution payable to the Criminal Injuries Compensation Account or to the victim’s insurance carrier because neither is a “victim” for the purpose of restitution in juvenile-delinquency cases. The juvenile court entered a supplemental judgment imposing restitution. *Held*: Affirmed. The juvenile code expressly incorporates the criminal code’s definition of “restitution,” which, in turn, includes a special definition of “victim.” That definition of victim, ORS 137.103(4), includes the account and insurance carriers, and thus, those entities are “victims” for restitution purposes in juvenile delinquency cases.

*State ex rel Juv. Dept. v. N.L.D.*, 240 Or App 132, 246 P3d 54 (2010). Youth appealed from a supplemental judgment ordering him to pay restitution to the Criminal Injuries Compensation Account. He argued that the court erred in imposing restitution because (1) the account is not a “victim” within the meaning of ORS 419C.450; and (2) the juvenile code does not provide restitution to be ordered to the account because ORS chapter 147, which describes the procedure for paying restitution to the account, is not among the statutes that are incorporated into the Juvenile Code under ORS 419C.270. *Held*: Affirmed. [1] The account is a “victim” for purposes of restitution in a juvenile delinquency case. [2] Youth did not preserve his argument that ORS chapter 147 is not incorporated into the Juvenile Code, and it is not plain error.

*State v. Tippets*, 239 Or App 429, 244 P3d 891 (2010). Defendant was convicted of several sexual offenses and, on appeal, challenged the imposition of restitution to two victims pursuant to ORS 137.106(1). *Held*: Reversed and remanded. [1] The trial court committed plain error by imposing a restitution requirement in the absence of evidence that the victims suffered a pecuniary loss. [2] The proper remedy under ORS 138.222(5)(a) is to remand to the trial court to consider whether restitution should be imposed.

*State ex rel. Juv. Dept. v. Z.D.B.*, 238 Or App 377, 242 P3d 714 (2010). Youth admitted two counts that, if committed by an adult, would constitute harassment, and the court imposed restitution for the victim’s medical expenses. A group of people were involved in a fight with the victim, who suffered a broken eye socket as a result of the attack. Youth admitted kicking the victim in the ribs during the fight, but not in the face. The juvenile court found that youth had initiated the group’s attack and that the victim’s damages would not have occurred but for that action. Youth challenged the restitution order arguing that his adjudicated criminal activity—kicking the victim in the ribs—was not the cause of the victim’s pecuniary loss. *Held*: Affirmed. Under ORS 419C.450, a juvenile court is authorized to order restitution if it finds that, but for the youth’s conduct, the victim would not have suffered the injury. The court found—and the evidence supported—that, but for youth’s instigation of the fight, the victim would not have been injured. For the court to impose restitution, it is not necessary for the actual adjudicated criminal activity to be the specific cause of the injury.

*State v. Carson*, 238 Or App 188, 243 P3d 73 (2010). Defendant embezzled from her employer over a period of years, and she was charged with 12 offenses that covered two separate date ranges with a gap between them. Defendant pleaded guilty to five of the offenses. The plea agreement specified that the state could present evidence at a restitution hearing “that is relevant to the charging instrument,” and that “the state is not limited to the counts that defendant pleads guilty on.” At the hearing, the prosecutor stated that he believed that the agreement allowed him to present evidence of losses from the “entire time span” in the indictment. The state then presented evidence of economic damages that occurred within the overall time span of the charges in the indictment, with some of the damages occurring during the time between the two date ranges covered by the indictment. On appeal, defendant argued that the damages that occurred during the gap were not traceable to criminal conduct that she had admitted. *Held*: Affirmed. [1] The parties may alter the statutory restitution framework by agreement or waiver. [2] The written plea agreement here was ambiguous concerning the amount of damages that occurred during the disputed time period. Plea agreements are construed according to contract principles, and when a contract term is ambiguous, extrinsic evidence may be considered in resolving the ambiguity to determine the parties’ intent. [3] The parties’ intent is a question of fact, and a trial court’s finding regarding the parties’ intent, thus, is binding on appeal if there is evidence in the record to support it. Here, the prosecutor’s statement at the change of plea hearing—and the fact that defendant did not object to it—was “strong evidence” of the parties’ understanding of the agreement. Thus, the trial court’s implicit finding that the plea agreement permitted proof of damages during the disputed time period was supported by evidence.

*State v. C.A.S.*, 237 Or App 271, 239 P3d 283 (2010) (*per curiam*), *rev den*, 349 Or 602 (2011). Youth drove a car without the owner’s permission and crashed it. He adjudicated on an offense, and the juvenile court ordered him to pay restitution to the car’s owner in the amount of \$250, her insurance deductible, and an additional \$4,315.26 to her for repair costs paid by her insurer. *Held*: Affirmed. [1] Youth’s claim that the insurer is not a “victim” for purposes of ORS 419C.450 is beside the point, because the court did not order him to repay the insurer. [2] The court declined to address whether the “victim’s injury, loss or damage” in this case, for purposes of ORS 417C.450(1)(a)(A) is only \$250, because that’s all that she had to pay, because Youth did not specifically address that issue in his argument on appeal.

*State v. Kacin*, 237 Or App 66, 240 P3d 1099 (2010). Defendant was convicted of aggravated first-degree theft and was sentenced to five years’ probation and ordered to pay restitution of more than \$125,000 by making a \$50 payment each month. Over the next four years, defendant missed six monthly payments, but made them up later. The state moved to

revoke her probation for failure to pay restitution. Defendant argued that did not allow revocation, relying on ORS 137.540(9), which prohibits revocation “as a result of the probationer’s failure to pay restitution unless the court determines from the totality of circumstances that the purposes of probation are not being served.” The trial court revoked probation, finding: “The purposes of probation are not being served.” *Held*: Reversed and remanded. The statement in the order is insufficient to establish that revocation had been based on a reason other than failure to pay restitution, because the only information in the record was that defendant was late with several restitution payments.

*State v. Patton*, 237 Or App 46, 238 P3d 439 (2010), *rev den*, 350 Or 131 (2011). Based on her plea of no contest, defendant was convicted of one count of theft in the first degree for having stolen a large sum of money from her elderly grandfather. As a part the agreement, she agreed to pay restitution in an amount to be determined by the court at a later hearing. Before the restitution hearing, the victim died, and so the trial court ordered defendant to pay restitution to his estate, over defendant’s objection that the estate is not a “victim” for purposes of ORS 137.106. *Held*: Reversed and remanded. ORS 137.106 authorizes restitution to a “victim,” but a “victim” must be a “person” who has suffered pecuniary damage as a result of a defendant’s criminal activities. A “person” is defined in ORS 161.015(5) to include only one of four entities: (1) a human being; (2) a corporation; (3) an unincorporated association; and (4) a government or government instrumentality. An estate of a decedent does not qualify as any of those four.

*State v. Phillips*, 235 Or App 646, 234 P3d 1030 (2010). Defendant was represented by retained counsel at trial (at which he was convicted of criminal mischief) and at the original sentencing. The sentencing court ordered a subsequent restitution hearing. Defendant appeared at the restitution hearing without counsel, the court briefly verified that he chose to appear without counsel, and the court eventually imposed \$2,700 in restitution. *Held*: Reversed and remanded. [1] A defendant has a right to counsel at a restitution hearing. [2] The on-the-record colloquy was insufficient under *State v. Meyrick*, 313 Or 125 (1992), to ensure a knowing and voluntary waiver. [3] Considering the totality of the circumstances, the Court of Appeals could not affirm, because defendant had had no previous experience in the criminal-justice system, he had not been advised of his right to appointed counsel if indigent, and the record did not show that his previous counsel had advised of his right to counsel or the pitfalls of self-representation.

*State v. Ceballos*, 235 Or App 208, 230 P3d 954 (2010). Defendant was convicted of criminally homicide, and the state asked to court to order restitution to the victim’s brother for the cost of the funeral, which had been paid by the insurer out of life-insurance proceeds payable to the brother. The sentencing court denied that request, and the state appealed. *Held*: Reversed and remanded. “The funeral expenses were economic damages under ORS 31.710,” which expressly includes “burial and memorial expenses,” because the brother incurred them as a result of the death, even though he did so voluntarily and was not legally obligated to do so.

*State v. Powell*, 234 Or App 589, 228 P3d 719 (2010) (*per curiam*). Sentencing court committed plain error when it imposed restitution “not to exceed \$40,000” on defendant’s conviction for second-degree assault for anticipated medical treatment. Although a restitution award may include “reasonably predictable and easily measurable future treatment expenses,” the award was error because “the record lacks evidence that the victim has incurred or will incur such expenses.”

*State v. Cufaude*, 232 Or App 280, 221 P3d 834 (2009) (*per curiam*), *rev den*, 348 Or 13 (2010). The sentencing court erred when it imposed \$7,500 in restitution on defendant’s convictions for sexual offenses against a child based on lost wages suffered by the victim’s mother and for future counseling expenses for the victim—“there was no evidence presented that they would incur those expenses.”

*State v. Carlton*, 231 Or App 376, 218 P3d 178 (2009). The sentencing court erred when it imposed \$76,000 in restitution on defendant’s conviction for aggravated first-degree theft without affording him a hearing when he objected, as required by ORS 137.106(5).

*State v. Thompson*, 231 Or App 193, 217 P3d 697(2009). At the original sentencing, the court imposed a compensatory of \$1,000 on each of defendant’s convictions for sexual abuse. The Court of Appeals reversed and remanded because the record did not support the compensatory fines. On remand, the state presented evidence that the victim actually had incurred \$4,500 in counseling expenses and so the court imposed that sum as restitution, rather than as a compensatory fine. *Held*: Affirmed. Defendant’s claim that the rule in *State v. Turner*, 247 Or 301 (1967), precludes imposition of a greater amount on remand has no merit because that rule “does not apply: (1) when the imposition of the sentence on remand does not involve the exercise of judicial discretion, and (2) when the sentence originally imposed was unlawful.”

Here, when the state established that the victim had incurred economic damages of \$4,500, the court was required by ORS 137.106(1)(a) to impose restitution in that amount.

*State v. Noble*, 231 Or App 185, 217 P3d 1130 (2009), *rev den*, 348 Or 281 (2010). At defendant's trial on two charges of first-degree theft, a security officer testified that the items stolen were worth \$1,500 each. The jury found her guilty, necessarily finding that the items were worth at least \$1,000 each. At sentencing, the court imposed restitution in the amount of \$3,000 based solely on the security officer's trial testimony. *Held*: Affirmed. [1] ORS 137.106(1) "does not impose an obligation on the state to prove that it conducted a *separate* investigation on the nature and amount of the damages [for purpose of restitution] apart from the investigation of the crime itself *after* defendant was convicted." [2] The court complied with ORS 137.106(5) by affording defendant an opportunity to be heard before imposing that amount.

*State v. Harrington*, 229 Or App 473, 211 P3d 972, *rev den*, 347 Or 365 (2009). [1] Defendant failed to preserve challenge to lack of evidence of pecuniary damages by objecting to restitution "in general terms." [2] Absence of evidentiary support for pecuniary damages is reviewable as plain error. [3] Court exercised its discretion to review the issue as plain error because of the significant amount of restitution imposed, and thus, "defendant's interest in correcting the error was high."

*State v. Kammeyer*, 226 Or App 210, 203 P3d 274 (2009). Defendant challenged an order of restitution imposed on his conviction for first-degree burglary, raising an unpreserved argument that the trial court lacked authority to order restitution based on two counts of burglary with which he had been charged, but that were dismissed as part of a plea agreement. At sentencing, defendant raised what his attorney characterized as "concerns" about any imposition of restitution based on those acts; however, defendant had volunteered to the trial court that he did not "want to take [his] plea back," and acknowledged that he was getting a "good deal," and told the sentencing court that he was "okay" with paying the proposed restitution. *Held*: Affirmed. Because defendant's statements to the sentencing court invited the asserted error, the Court of Appeals declined to consider the merits of his argument.

*State v. Romero-Navarro*, 224 Or App 25, 197 P3d 30 (2008). Defendant was convicted of fatally stabbing the 17-year-old victim. At sentencing, defendant argued that he was not required to pay for the amounts expended by the Criminal Injuries Compensation Account to reimburse the victim's family for a portion of the burial expenses. He also argued that the victim's family was not entitled to restitution for the remaining burial expenses, because those expenses were in fact paid by the victim's father's employer. The trial court rejected the defendant's arguments and imposed restitution. *Held*: Affirmed. [1] "Economic damages" include all expenses to which a victim incurred, or was "subjected," even if a third party ultimately pays or writes off a portion thereof. [2] The Criminal Injuries Compensation Account is a "victim" under ORS 137.103(4)(c) if it "has expended moneys on behalf of a victim."

*State ex rel Juv. Dept. v. S.R.R.*, 223 Or App 253, 195 P3d 411 (2008). ORS 419C.450(1)(a)(B) authorizes a juvenile court to order restitution as part of the judgment, with the specific amount of restitution to be established by a supplemental judgment based on a determination by the court within 90 days of the entry of the original judgment. The court may extend the time for that determination based on a finding of "good cause." In this case, the restitution hearing was held almost a year after the entry of the initial judgment, and the state was unable to offer a reason for the delay other than that there were a lot of "personnel changes" in the office at the time. The juvenile court rejected youth's argument that the state failed to establish "good cause" for the delay. *Held*: Supplemental judgment vacated. "Good cause" does not include prosecutorial inadvertence or neglect. Under *State v. Biscotti*, 219 Or App 296 (2008), interpreting a similar statute, losing track of a file or other neglect is not "good cause" for extension of the time for determining restitution.

*State v. Cave*, 223 Or App 60, 195 P3d 446 (2008), *rev den*, 345 Or 690 (2009). Defendant appealed from a judgment on convictions assault and other crimes, asserting that the sentencing court erred when it ordered restitution based on damage to the assault victim's tires. The victim had discovered the damage to his tires after the assault, and apparently there was no solid evidence that defendant was responsible for slashing the tires, because he was not charged with criminal mischief or any other crime based on the tire slashing. *Held*: Restitution order reversed. Because defendant was not convicted of criminal mischief, and did not admit that he caused the damage to the tires, the record failed to draw the connections necessary to establish that he caused the damage to the tires.

*State v. DuBois*, 221 Or App 644, 191 P3d 670 (2008). Defendant's *Blakely*-based challenge to the restitution order is not reviewable as plain error. *State v. Travalini*, 215 Or App 226 (2008).

*State v. Casper*, 221 Or App 198, 190 P3d 385 (2008) (*per curiam*). The sentencing court erred by imposing a compensatory fine by entering an amended judgment after defendant commenced serving his sentence.

*State v. Romero*, 220 Or App 536, 188 P3d 310 (2008). After sentencing, during which the amount of restitution was left open, the prosecutor submitted an amount and the court entered “stipulated order” imposing restitution in that amount. Defense counsel then objected to the amount, but the court entered an amount judgment with the amount requested by the prosecutor. *Held*: Reversed and remanded. When it became apparent that there was a factual dispute regarding the amount of restitution, “under ORS 137.106(5), it was incumbent on the trial court to conduct a hearing and afford defendant an opportunity to present evidence as to the correct amount of restitution.”

*State v. Webster*, 220 Or App 531, 188 P3d 329, *rev den*, 345 Or 318 (2008). “When a defendant has been convicted of failing to perform the duties of a driver when property is damaged, ORS 811.706 authorizes the court to require payment of restitution as a part of the judgment in an amount ‘equal to the amount of any damages caused by the person as a result of the incident that created the duties [of a driver].’” The right-to-jury rule in *Blakely* is “not violated by the trial court making the findings necessary to impose the full of amount of damages as restitution under ORS 811.706.”

*State v. Zaragoza*, 220 Or App 526, 188 3d 308 (2008). The sentencing court violated ORS 137.106(5) when it denied defendant’s request for a hearing on the amount of restitution.

*State v. Biscotti*, 219 Or App 296, 182 P3d 269 (2008). At sentencing, the state asked for 30 day to provide statement of amount for restitution, and the court imposed restitution in an amount to be determined within 30 days. Four months later, the prosecutor asked for leave under ORS 137.106(1) to submit the amount, explaining that the file had been misplaced due to an internal “miscommunication.” The court found good cause, and imposed the amount. *Held*: Reversed. [1] The 90-day limitation added to ORS 137.106(1) in 2003 is not merely “hortatory.” [2] In construing “good cause” clause, “[w]e ordinarily assume that the legislature is aware of other statutes *in pari materia* and case law interpreting them existing at the time of enactment.” [3] The prosecutor’s “carelessness” in handling the file—even without any fault of the victim—does not constitute “good cause” to excuse an untimely request for restitution.

*Note*: The enactment of Art I, § 42(3) in 2008, which now entitles victims enforce their right to “prompt restitution” under subsection (1)(d), may affect the holding in this case.

*State v. Ferrara*, 218 Or App 57, 178 P3d 250 (2008). The \$20,000 restitution award to the victim’s son was erroneous in the absence of evidence of damages from the mother’s murder. Although the record shows that the victim’s sole source of income was from Social Security benefits, there was no evidence of the amount of support that the child received, as required under ORS 137.103 (2003).

*Note*: In 2005, the legislature replaced the term “pecuniary damages” with “economic damages,” which is a broader term. That legislative change would not affect the outcome of this case because the 2005 amendment did not eliminate the state’s obligation to offer some evidence of the *amount* of damages.

*State v. Thorpe*, 217 Or App 301, 175 P3d 993 (2007). Although, at sentencing, defendant did state that he had delivered a check (one that was not part of the guilty plea) to another person, he did not admit to acts that would constitute *criminal* possession of a forged instrument because he did not admit that he knew it was forged. ORS 137.103(1) requires that the record *clearly reflect* that defendant admitted engaging in criminal activities. Because defendant’s admission did not meet that standard, the restitution order was error.

*State v. Pleasant*, 212 Or App 697, 159 P3d 337 (2007) (*per curiam*). The sentencing court erred in assessing restitution based on losses that occurred outside the dates in the counts to which defendant pleaded guilty. The court remanded with directions “to recalculate the restitution to include only damages arising out of criminal activity for which defendant pleaded guilty or admitted.”

*State v. Mendez*, 211 Or App 311, 155 P3d 54 (2007). The jury found defendant guilty of first-degree criminal mischief, ORS 164.365, but found that the state failed to prove the offense-subcategory allegation the damage was more than \$1,000, which would have elevated the conviction to a category 3 offense. The sentencing court imposed \$1,666 in restitution. *Held*: Affirmed. [1] Art VII (Am), § 3, applies to criminal actions. [2] The amount of restitution is to be determined by the sentencing court under a “preponderance of the evidence” standard. [3] The court’s finding of amount of loss in support of the restitution order was not an improper “reexamination” of a fact found by the jury. The court correctly ranked the conviction as only a category 2 offense based on the jury’s verdict, and its restitution finding was not inconsistent

with that verdict, because the court “independently determined the amount of damage applying a different standard of proof” in assessing restitution.

*State v. Denham*, 211 Or App 98, 153 P3d 133 (2007) (*per curiam*). The sentencing court erred in imposing restitution, on defendant’s conviction for unlawful entry into a motor vehicle, for damage done to the vehicle’s steering column, because defendant denied causing that damage and his plea did not admit causing damage.

*State v. Styron*, 210 Or App 458, 150 P3d 1071 (2007) (*per curiam*). The sentencing court erred in imposing, on defendant’s conviction for second-degree burglary, restitution of \$500 for “down time of business,” because the evidence does not establish that “victim suffered any pecuniary damages ... as a result of defendant’s criminal activities.”

*State v. Renner*, 207 Or App 528, 142 P3d 1078 (2006) (*per curiam*). Sentencing court erroneously imposed portion of restitution for damages that did not result from the crime of conviction.

*State v. McBee*, 204 Or App 687, 131 P3d 819 (2006) (*per curiam*). Based on defendant’s UUV conviction, the court imposed \$1,673 in restitution. *Held*: Reversed and remanded. [1] The state failed to establish a causal connection between defendant’s conduct and the loss suffered, because the evidence suggested another person caused the damage before defendant came into possession. [2] The court properly could impose restitution for towing and storage fees.

*State v. McMillan*, 199 Or App 398, 111 P3d 1136 (2005). Because ORS 137.106(1) does prescribe a maximum amount of restitution but rather authorizes an amount “that equals the full amount of the victim’s pecuniary damages as determined by the court,” *Blakely* does not require that the amount of restitution be determined by the jury.

*State v. Gutierrez*, 197 Or App 496, 106 P3d 670, *on recons*, 199 Or App 521, 112 P3d 433 (2005), *rev den*, 340 Or 673 (2006). [1] “[A]bility to pay is not a factor that courts are required to consider when deciding *whether* to impose restitution.” [2] Even though defendant was unemployed and may be deported, the sentencing court adequately considered his ability to pay when it imposed \$7,864 in restitution on his convictions arising from a car chase that ended in an accident. [3] The Court of Appeals refused to consider his *Blakely*-based challenge to the restitution order because it is not “plain error”; it is not clear whether *Blakely* applies to a restitution finding that does not otherwise increase the maximum incarcerative sentence

*State v. Wilson*, 193 Or App 506, 92 P3d 729 (2004). [1] Restitution is a sentence, and the Court of Appeals reviews to determine whether the sentencing court complied with the requirements of law in imposing restitution. [2] The sentencing court erred in imposing \$5,000 in restitution to the Fugitive Apprehension Unit for costs incurred in apprehending him after his escape, because those costs were incurred regardless of defendant’s crime. [3] Because there remain sentencing options that the sentencing court rejected in favor of imposing restitution but permissibly could adopt on resentencing, the case requires a remand for resentencing under ORS 138.222(5).

*State v. Plumb*, 192 Or App 623, 87 P3d 676 (2004). Defendant pleaded guilty to 12 counts of aggravated theft based on \$1 million that she embezzled from her employer. As part of the restitution order, defendant was ordered to convey her Individual Retirement Account (IRA) and her 401(k) pension account to the victim. Defendant also had personal property stored at five storage facilities. The court appointed a receiver to sell the contents of the storage facilities. On appeal, defendant argued that (1) her 401(k) pension account and her IRA are exempt from collection, (2) restitution is limited to proceeds directly related to her underlying crime, and (3) the court erred in appointing a receiver. *Held*: [1] Funds in defendant’s 401(k) pension account, which are subject to the Employee Retirement Income Security Act, are exempt from the court’s order that defendant use her retirement funds to pay the restitution judgment. [2] ORS 137.540(2)(c) permits a court to order a probationer to pay restitution; nothing requires that defendant must return the specific embezzled funds. [3] The court properly exercised its statutory and inherent authority when it appointed a receiver to administer the sale of the items in the storage facility.

*State v. Massie*, 188 Or App 41, 69 P3d 1236 (2003). A defendant has a right to be personally at sentencing, including at a restitution hearing. In order for restitution to be set in the defendant’s absence, the defendant must have waived his right to be present—the defendant’s mere absence at a scheduled hearing does not establish voluntary waiver.

*State v. Thomas*, 187 Or App 762, 69 P3d 814 (2003) (*per curiam*). The sentencing court erred in imposing restitution on defendant's conviction, except for insanity, for assault in the second degree. Restitution may not be imposed pursuant to ORS 137.106 on a defendant found guilty except for insanity.

*State v. Bigelo*, 187 Or App 715, 69 P3d 786 (2003) (*per curiam*). In prosecution for theft by receiving, the sentencing "erred by imposing restitution for items that defendant returned to the victim."

*State v. Marsh*, 187 Or App 47, 66 P3d 541 (2003). Defendant was convicted of 10 counts of second-degree animal abuse, and the sentencing court imposed \$43,000 as the cost incurred in caring for the 69 animals that had been seized. *Held*: Reversed and remanded. [1] The court had authority under ORS 167.350(1) (1999), to impose restitution only for the cost of caring for the 10 animals underlying his convictions. [2] The record is not sufficient to affirm the restitution order under either ORS 167.350(3) or ORS 137.103.

*Thomas v. Board of Parole*, 186 Or App 170, 63 P3d 29, *rev den*, 335 Or 510 (2003). If the sentencing court did not impose restitution as part of the judgment, the parole board was without authority to require plaintiff, as a condition of parole, to pay restitution based on a separate conviction. *Note*: ORS 144.102(4)(b) now provides broader authority.

*State v. Llanos-Martinez*, 185 Or App 597, 60 P3d 1099 (2002). Defendant was convicted of hit and run, and the court imposed \$5000 in restitution under ORS 811.706 to another driver who ran into his unoccupied car. *Held*: Reversed and remanded for resentencing. [1] Because defendant had fled the scene, and was not driving, when the other driver hit his car, ORS 811.700 did not authority the restitution award. [2] The Court of Appeals refused to affirm the award under ORS 137.106, because that issue was not raised below and the record is not adequately developed on that issue.

*State v. Howett*, 184 Or App 352, 56 P3d 459 (2002). Because defendant was charged with, and pleaded guilty to, committing theft from her employer during a specific 5-day period and the evidence at the sentencing hearing established that she stole only \$843 during that period, the court erred by imposing \$3,250 in restitution based on losses that occurred during other periods.

*State v. Stephens*, 183 Or App 392, 52 P3d 1086 (2002). The sentencing court properly ordered defendant, based on his convictions for UUV and possession of a stolen vehicle, to pay \$4,000 in restitution for loss of the vehicles wheels, which occurred after defendant parked the vehicle. Defendant's acts of possession and his exercise of control over the car, and leaving it parked unprotected, facilitated the theft of the wheels.

*State v. Pacheco*, 180 Or App 81, 42 P3d 351 (2002). Sentencing court cannot impose restitution based on an ability-to-pay finding justified only by defendant's prior employment history when that history consisted only of her working illegally in this country and an undocumented alien.

### C. FINES, COSTS, AND FEES

*Southern Union Co. v. United States*, 567 US \_\_, 132 S Ct \_\_, 182 L Ed 2d \_\_ (2012). Defendant was charged with a single count of unlawfully storing mercury in violation of the federal Resource Conservation and Recovery Act (RCRA), "from on or about" a specified two-year date range that spanned 762 days. Violations of RCRA are punishable by a \$50,000 maximum fine "for each day of violation." The jury found petitioner guilty; the verdict form stated that petitioner was guilty of unlawfully storing mercury "on or about September 19, 2002 to October 19, 2004." At sentencing, the government argued that defendant was subject to a \$50,000 fine for each of the 762 days within the date range, \$38.1 million. Defendant argued that it was subject only to a single \$50,000 fine—that the jury necessarily found only a single, one-day violation—and that a fine greater than \$50,000 would require judicial factfinding per the right-to-jury rule announced in *Apprendi*. The district court held that *Apprendi* does apply, but that the jury had found a 762-day violation. *Held*: Reversed and remanded. [1] The *Apprendi* rule applies to criminal fines. [2] The rule applies only when a defendant has a right to a jury trial, and therefore does not apply when a fine is so insubstantial as to be considered "petty" and does not trigger the right to a jury trial. [3] *Apprendi* does not bar a sentencing court from exercising sentencing discretion within a statutory range. "Nor, *a fortiori*, could there be an *Apprendi* violation where no maximum is prescribed."

*Note*: It is not clear whether this ruling would require jury findings for imposition of a compensatory fine or restitution.

*State v. Ferman-Velasco*, 333 Or 422, 41 P3d 404 (2001). The sentencing court properly ordered defendant to

pay the prosecution's witness fees under ORS 161.665(1).

*State v. Naylor*, 256 Or App 478, 300 P3d 307 (2013) (*per curiam*). Defendant was convicted of second-degree theft, and the sentencing court ordered defendant to repay \$390 for his court-appointed attorney. *Held*: Attorney fee assessment reversed; otherwise affirmed. The court erred when it imposed that assessment because “the record does not support defendant’s ability to pay those fees.”

*State v. Akim*, 256 Or App 352, 300 P3d 261 (2013) (*per curiam*). Based on a crime he committed before January 1, 2012, defendant was convicted of fourth-degree assault and harassment. The sentencing court imposed a \$500 unitary assessment on each conviction. *Held*: Reversed and remanded. The sentencing court erred “because the statute that provided for those assessments was repealed effective January 1, 2012.” *Former* ORS 137.290(2)(b) (2009), *repealed by* Or Laws 2011, ch 597, § 118; Or Laws 2012, ch 89, § 1.

*State v. Eshaia*, 253 Or App 676, 291 P3d 805 (2012). Defendant pleaded guilty to a charge of menacing. At sentencing, defense counsel asked the court to waive fees because defendant was unable to pay them; counsel asserted that defendant “doesn’t work” and is disabled, but defendant admitted that he receives both “SSI and SSD.” The trial court ordered him to repay \$400 in fees for his court-appointed attorney pursuant to ORS 151.505 and ORS 161.665 (“CAA fees”). *Held*: Affirmed. [1] ORS 151.505 and ORS 161.665 provide that a court may not impose attorney fees “unless the defendant ‘is or may be able’ to pay them. A court’s determination of that issue must be supported by the record.” [2] Here, “the record is not silent regarding defendant’s ability to pay attorney fees—the record establishes that defendant was receiving disability income. Although the record provides nothing further regarding defendant’s ability to pay, ...defendant’s indication that he was receiving some income is sufficient.” (Distinguishing *State v. Pendergraph*, 251 Or App 630 (2012).)

*State v. Kuehner*, 252 Or App 628, 288 P3d 578 (2012). Defendant was arrested and indicted on charges of kidnapping, rape, sexual abuse, and resisting arrest. He was released pending trial. He then armed himself with a knife and broke into the victim’s apartment again, sexually and physically attacked her, and threatened to commit suicide. During a standoff with the police, he stabbed himself in the neck. He was taken to a hospital, where he was held for a week with round-the-clock police security. Based on the second incident, defendant pleaded guilty, to charges of first-degree rape, kidnapping, and burglary. The state requested recovery as “costs” under ORS 161.665(1) of \$7,808.34 the City of Medford paid in overtime to the officers guarding defendant at the hospital. The sentencing court agreed, ruling that “the expenses were not excluded from recovery because the specific overtime payments were the direct result of defendant’s conduct and would not otherwise have been incurred.” *Held*: Reversed and remanded. [1] As a general rule, costs that may be recovered under ORS 161.665(1) “excludes regular and overtime salary payments alike.” [2] The statute does not permit recovery of salary expenditures to its employees as costs of prosecution, even overtime pay that is unforeseen and unbudgeted: “Even if extraordinary, unforeseeable, and unbudgeted, the salary payments to the officers in guarding defendant were required to maintain the operations of the Medford Police Department.”

*State v. Battles*, 252 Or App 569, 287 P3d 1277 (2012) (*per curiam*), *rev den*, 353 Or 533 (2013). Defendant was convicted of attempted murder, second-degree assault, and unlawful use of a weapon. The sentencing court imposed a unitary assessment on the conviction for attempted murder. *Held*: Reversed and remanded. The sentencing court erred because the unitary assessment cannot be imposed on a conviction for an attempt crime. *State v. Becker*, 171 Or App 721, 722 (2000).

*State v. Pendergraph*, 251 Or App 630, 284 P3d 573 (2012). Defendant pleaded guilty to two counts of failure to appear. At sentencing, defense counsel asked the court not to require defendant to repay the fees for his court-appointed counsel, explaining that he has medical issues and “doesn’t have any money. He’s unable to pay, he doesn’t work. He’s unable to pay court-appointed attorney’s fees. We’d ask that the court not impose them under ORS 151.505(4) because he is unable to pay.” The court imposed a 60-day sentence and, without explanation, ordered him to repay \$400 in CAA fees. *Held*: Reversed and remanded. [1] Under ORS 151.505, “only a person who presently is able, or who may be able in the future, to pay costs may be ordered to do so.” In addition, when an objection is raised, “a court’s determination that a defendant is or may be able to pay fees must be supported by the record.” [2] “Thus, a court cannot impose attorney fees based on a record that is silent regarding the defendant’s ability to pay those fees. There must be some information from which the court can find the statutorily required factual predicate to imposition of the fees: that the defendant ‘is or may be able to pay’ them. A court cannot impose fees based on pure speculation that a defendant has funds to pay the fees or may acquire them in the future.” [3] “Whether a defendant is or may be able to pay fees depends on the defendant’s particular

circumstances, and the record in this case says nothing about defendant's particular circumstances from which the trial court could find, as required, that he 'is or may be able' to pay the fees."

*State v. Lewis*, 236 Or App 49, \_\_\_ P3d \_\_\_, *rev den*, 349 Or 172 (2010). Defendant was convicted of third-degree assault in two separate cases. At sentencing, the trial court ordered him to pay a unitary assessment of \$607 in each case. The court did not specify the time within which the assessments had to be paid, or the source from which they were to be paid. The money award in each judgment ordered that defendant was to pay all financial obligations in full "before release from incarceration and before supervision ends." The judgments also either permitted or mandated that the funds could be withdrawn from defendant's "DOC account while incarcerated." On appeal, defendant assigned error to the orders requiring him to satisfy the assessments before release from incarceration. *Held*: [1] Defendant was not required to preserve the claimed errors. The aspects of defendant's sentence claimed as error on appeal first appeared in the written judgments. Under those circumstances, defendant had no practical ability to preserve the claimed error. [2] On the merits, the court erred in ordering defendant to fulfill all monetary obligations before his release from incarceration, without finding—as required by ORS 161.675(1)—that defendant had "assets to pay all or part of the amounts ordered."

*State v. Curtis*, 234 Or App 287, 228 P3d 1216 (2010) (*per curiam*). Because a sentencing court has authority under ORS 423.570(6)(b) to waive the \$15/month fee for bench probation supervision, the court erred when it denied defendant's waiver request on the ground that it did not have such authority. Remanded for reconsideration.

*State v. Kanuch*, 231 Or App 20, 217 P3d 1082 (2009). The sentencing court erred when it ordered defendant, who had been convicted of aggravated murder and was sentenced to a life sentence with a 30-year minimum, to repay \$15,000 in attorney fees because "the record says nothing about whether defendant is or may be able to pay" that sum, as is required by ORS 161.655(4). The burden was not on defendant to show that he could not pay that sum.

*State v. Larson*, 222 Or App 498, 193 P3d 1042, *rev den*, 345 Or 503 (2008). Under *State v. Giger*, 115 Or App 559 (1992), a defendant may not, for the first time on appeal, raise an objection to a failure to find ability to pay costs. The alleged error was not plain: although the state did not offer at sentencing any evidence of defendant's ability to pay, the evidence at trial showed that he owned valuable real property, had "vested" benefits from a former job, and was receiving Social Security income and rental income from his real property. And defendant admitted that, after his arrest on the charges, he had transferred real property to his son for no consideration.

*State v. Eades*, 208 Or App 173, 144 P3d 1003 (2006). It was not plain error for the court to impose both a prison sentence and a \$2,000 fine on defendant's conviction for felony DUII, notwithstanding that ORS 813.010(6)(c) establishes a minimum \$2,000 fine "if the person is not sentenced to a term of imprisonment." That is a *minimum* fine that must be imposed "[i]n addition to any other sentence that may be imposed," and ORS 161.625 permits the imposition of a fine up to \$100,000.

*State v. Shank*, 206 Or App 280, 136 P3d 101 (2006). A limited judgment entered in criminal action requiring defendant, per ORS 151.487 to contribute \$127 toward the cost of her court-appointed counsel is appealable under ORS 19.205(5) as an order entered in a special statutory proceeding, and the appeal is not subject to the \$250 limit in ORS 19.205(4).

*State v. Flajole*, 204 Or App 295, 129 P3d 770 (2006). Defendant was sentenced to probation, he absconded from supervision, he was arrested in Washington State and extradited to Oregon, and the court found him in violation, continued probation, and ordered him under ORS 161.655(1) to reimburse the state \$236 for the cost of extraditing him. *Held*: Reversed and remanded for entry of a corrected judgment. [1] Because the statute uses the present tense ("enters a judgment"), "we take that phrasing to be significant." [2] The term "prosecuting," in the statutes and "in ordinary parlance," means "the portion of a criminal action that leads to a determination of guilt or innocence of the crime charged." [3] Because "ORS 161.665, in referring to costs incurred 'in prosecuting the defendant,' means the proceedings by which the defendant was determined to be guilty of the crime of conviction," the sentencing court "erred in ordering defendant to pay the costs of extraditing him for the purpose of conducting a probation violation hearing."

*Stirton v. Trump*, 202 Or App 252, 121 P3d 714 (2005). Petitioner was charged in justice court with 31 counts of second-degree animal neglect, the animals were impounded under ORS 166.345(2), and the justice of the peace ordered the animals forfeited under ORS 167.347(1). Petitioner filed a writ of review in circuit court challenging that order, and the court dismissed the petition and awarded the county \$11,000 in costs for boarding the animals. *Held*: Affirmed but costs

vacated. [1] Under ORS 156.705, the justice court had jurisdiction over the animal-abuse charges. Consequently, it also had jurisdiction under ORS 167.347 to order forfeiture of the subject animals. [2] Because the county was not a party to the writ-of-review proceeding, the circuit court lacked authority to order petitioner to pay those costs.

*State v. Johnston*, 176 Or App 418, 31 P3d 1011 (2001). The sentencing court properly ordered defendant to repay the costs of confinement as a general condition of probation. The term “other fees” in ORS 137.540(1)(a) includes amounts incurred by county in incarcerating offender in local jail. Court’s order was justified based on defendant’s failure to comply with prior court dates and probation requirements, and his history of failing to meet financial obligations.

#### D. FORFEITURE

*State v. Youngs*, 256 Or App 755, 301 P3d 976 (2013) (*per curiam*). Defendant pleaded guilty to unlawful possession of methamphetamine, and the sentencing court placed him on probation and, as a condition of probation, ordered forfeiture of his cell phone, which had been seized during the investigation. *Held*: Remanded for resentencing. Under ORS 161.045(4), “the court lacked authority to order forfeiture as a condition of probation.”

*State v. Goodenow*, 251 Or App 139, 282 P3d 8 (2012). Defendant purchased a number of lottery tickets with a stolen credit card, and ended up winning a \$1 million prize. She pleaded no-contest to first-degree aggravated theft, first-degree forgery, and cheating, in exchange for the dismissal of other charges. She waived her right to a jury trial on two counts of criminal forfeiture (for the lottery proceeds) and was tried on stipulated facts; she agreed that the proceeds could be forfeited under the Oregon forfeiture statutes, but argued that the forfeiture, which totaled more than \$960,000, would violate the Eighth Amendment’s Excessive Fines Clause; she suggested that the court should order forfeiture of only \$10,843, the amount that remained of her first lottery-winnings installment after she paid off her \$33,000 Visa bill. The court order all of it forfeited. *Held*: Affirmed. [1] “Oregon’s criminal forfeiture statutes do not limit the amount of property that may be forfeited as the proceeds of prohibited conduct. They do not require courts to determine whether a forfeiture of a defendant’s property is proportional to the defendant’s crime. ORS 131.585(1).” [2] The Excessive Fines Clause applies to *in personam* forfeitures of the proceeds of crimes “even if, historically, the type of property to be forfeited has been subject to civil *in rem* forfeiture as ‘guilty property.’ In other words, it is the nature of the forfeiture, not the type of property forfeited, that controls whether a forfeiture is subject to the Excessive Fines Clause.” [3] “In order to determine whether a forfeiture violates the Excessive Fines Clause, a court must assess the gravity of the defendant’s crime and the severity of the forfeiture and compare the two. If the forfeiture is ‘grossly disproportional’ to the gravity of the defendant’s crime, then it is unconstitutional. When assessing the gravity of a defendant’s crime, courts consider both the general characteristics of the crime and the specific characteristics of the defendant’s conduct. Regarding the general characteristics, courts consider the type of crime, that is, whether it is a crime against a person or property, as well as the classification and potential sentences for the crime, which reflect the public’s view, as expressed through legislation, of the gravity of the crime. Regarding the particular characteristics of the crime, courts consider the actual harm risked and caused by the conduct, as well as any mitigating or aggravating circumstances, such as the defendant’s motive and criminal history. When assessing the severity of a defendant’s forfeiture, courts consider the amount of the forfeiture and the effect of the forfeiture on the defendant.” Also, “whether a punishment is appropriate depends not only on the harm that the defendant risked and caused, but also on the gain that the defendant realized.” [4] As a general matter, separating a criminal defendant from the proceeds of her crimes is an appropriate, not an excessive, punishment. It serves legitimate retributive and deterrent purposes, and it takes from the defendant only that which she should not have received in the first place. [5] “Because defendant’s lottery winnings are the direct proceeds of her criminal conduct, the forfeiture of the winnings is simply not that severe. It deprives defendant of a net gain from her crimes but does not inflict a net loss.”

*Notes*: [a] The Court of Appeals declined to consider defendant’s argument based on the “excessive fines” clause Art. I, § 16, because she had not raised that below as an alternative to her argument under the Eighth Amendment. [b] The court noted that because neither party raised the issue, it “assumed, without deciding, that the Excessive Fines Clause ... applies to the states through the Fourteenth Amendment.”

*State v. Olson*, 246 Or App 785, 268 P3d 679 (2011). The circuit court issued a stalking protective order (SPO) that prohibited defendant from contacting B, a high-school student, or any member of B’s immediate family. Defendant violated the SPO by going to B’s high school and taking pictures of B’s sister. The court found him in violation of SPO, found him guilty of criminal trespass, imposed a probationary sentence, and ordered, as a condition of probation, that he forfeit the camera. *Held*: Reversed and remanded for resentencing. [1] ORS 161.045(4) generally provides that a criminal conviction does not allow “forfeiture of property ... except where a forfeiture is expressly authorized by law.” No statute

authorizes forfeiture of a camera in these circumstances. [2] ORS 137.540(2), which authorizes conditions of probation, does not permit forfeiture of property as a condition of probation.

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## XIV. MISCELLANEOUS SENTENCING ISSUES

### A. CREDIT FOR TIME SERVED

See ORS 137.320; ORS 137.372; ORS 137.550(6).

*Holcomb v. Sunderland*, 321 Or 99, 893 P2d 1049 (1995). Under ORS 137.320(4), 137.370(2)(a), and 137.390, a defendant sentenced to a jail term as a condition of probation is entitled to credit against that jail term for time previously served in jail awaiting trial.

*Note:* The 1995 Legislature responded to *Holcomb* by enacting ORS 137.372(2), which applies only to felony convictions based on crimes committed on or after July 18, 1995, and authorizes a sentencing court to deny credit for time served against a jail term imposed as part of a probationary sentence.

*State v. Phaneuf*, 219 Or App 640, 184 P3d 1136 (2008). [1] Because “a trial court lacks authority to deny credit for time served to which a defendant is entitled by statute,” the court erred by entering a judgment that purports to deny credit for time served. [2] But the error is harmless for purposes of “plain error” review, because DOC must compute credit under ORS 137.370 “no matter what the language of the sentencing judgment might be.”

*Mecham v. Hill*, 217 Or App 144, 174 P3d 1051 (2007). Plaintiff was not entitled to *habeas corpus* relief on his claim, based on statements made by the sentencing judge after revoking his probation, that he was entitled to credit for time served on probation violations in other cases. The sentencing court has no authority to calculate the amount of credit for time served. *Nissel v. Pearce*, 307 Or 102, 105 (1988). Rather, under ORS 137.320, it is the responsibility of the DOC to calculate the amount of credit to which the prisoner is entitled.

*Curtiss v. Dept. of Corrections*, 212 Or App 42, 157 P3d 279 (2007). DOC rule that precludes credit for time served during house arrest, OAR 291-100-0080(3)(g), is valid. The term “confined” in ORS 137.370(2)(a) “equates with ‘imprisoned’ and does not encompass a situation in which a person voluntarily agrees to restrict his or her location.”

*Wallett v. Thompson*, 165 Or App 365, 998 P2d 1273 (2000). Because plaintiff was in federal prison as a consequence of his own unlawful conduct, he was “voluntarily absent” from Oregon custody within the meaning of ORS 137.370(3)(1977), and he was not entitled to credit for time served in federal prison.

*Stokes v. State of Oregon*, 157 Or App 114, 969 P2d 1038 (1998), *rev den*, 328 Or 418 (1999). Plaintiff commenced a civil suit for false imprisonment and negligence in which she contended that she was falsely imprisoned by the Department of Corrections because it failed to give her credit for 63 days she spent in the Marion County Jail before she was transported to prison. The court dismissed her suit and she appealed. *Held:* Affirmed. The Marion County Sheriff did not deliver a statement to DOC of the number of days plaintiff was imprisoned in the jail. “The delivery of that statement by the sheriff is a prerequisite to DOC’s decision to credit the time served.” ORS 137.320 “requires plaintiff to seek compliance from the Marion County sheriff, because DOC has no obligation to act until the sheriff delivers the statement of time served. As a matter of law, plaintiff cannot now maintain an action against the state, or its agency, DOC.”

*State ex rel. Curry v. Thompson*, 156 Or App 537, 967 P2d 522 (1998), *rev den*, 328 Or 365 (1999). Before he was extradited to Oregon, plaintiff was incarcerated in the State of Washington on both the Oregon charges and on separate Washington charges. *Held:* Under ORS 137.370(4), plaintiff was not entitled to credit for the time he was incarcerated in Washington while being held also on the Washington charges, but he was entitled to credit for the time during which he was held solely as a result of the Oregon charges.

*Haas v. Hathaway*, 144 Or App 478, 928 P2d 331 (1996): [1] *Habeas corpus* plaintiff was not entitled under ORS 137.370 to credit for time he spent in the Oregon State Hospital as a condition of probation; [2] plaintiff was entitled under former ORS 137.550(6) (1987) to credit for time served in jail as a condition of probation—it violates the *ex post facto* clause to deny the credit based on the current version of the statute.

See also *Reeves v. Johnson*, 145 Or App 162, 928 P2d 356 (1996) (*per curiam*), *rev den*, 325 Or 367 (1997) (same).

*Randolph v. ODOC*, 139 Or App 79, 910 P2d 1171, *rev den*, 323 Or 114 (1996): Plaintiff served time in local jail while awaiting trial both on pending federal charges and unrelated pending state charges. When he was sentenced on the federal charges, the court granted him credit for the time served in jail. The state court later imposed sentences to be served consecutively to the federal sentences, and the sheriff, pursuant to ORS 137.320(1), certified the same days to the Department of Corrections as time defendant served prior to trial. *Held*: [1] The department had authority under ORS 137.320(3) to deny credit for time certified by the sheriff. [2] Plaintiff is not entitled to credit against his consecutive state sentences (a) for time he spent in jail while serving the federal sentence or (b) for the days for which he already received credit against his federal sentence.

*State v. Bullock*, 122 Or App 472, 858 P2d 70 (1993): Although a sentencing court generally does not have authority to deny a defendant credit for time served, under ORS 137.550(6) “a sentencing court does have limited discretion to grant or deny credit for time served as a condition of probation” when it revokes probation and imposes a prison sentence. (*Note*: Although this case involved misdemeanor convictions, ORS 137.372 and 137.550(6) expressly provide that it is discretionary with the sentencing court to grant credit upon revocation in a guidelines case.)

*State v. Barber*, 113 Or App 603, 832 P2d 51 (1992): Sentencing court imposing prison sentence under guidelines does not have discretion to deny defendant credit for time served to which he otherwise is entitled under ORS 137.370.

See also *State v. McEahern*, 126 Or App 201, 867 P2d 568 (1994) (same); *State v. Jones*, 113 Or App 228, 832 P2d 459 (1992) (*per curiam*) (“The guidelines did not change ORS 137.320 [and,] by negative implication, sentencing courts have no authority to deny credit for time served to which a defendant is statutorily entitled. Insofar as the judgment purports to do so, it is invalid.”).

## **B. ENTRY OF AMENDED OR CORRECTED JUDGMENT**

See ORS 138.083(1); ORS 138.227.

See also Part XIV-D(3) (“Proceedings on remand”), *below*.

*State v. Gilbert*, 248 Or App 657, 274 P3d 223 (2012). Defendant pleaded guilty in this case to several charges of second-degree burglary and theft and the court, pursuant to the parties’ agreement, imposed a probationary sentence on one conviction and deferred sentencing on the rest to allow him to participate in drug court. A year later, defendant was convicted in an unrelated case of burglary and theft offenses and the court imposed consecutive sentences totaling 78 months. Defendant then failed to complete drug court in this case, and so the court revoked his deferred sentencing and imposed a series of consecutive sentences totaling 65; the judgment did not provide that defendant would have to serve the sentences consecutively to the 78-month sentence. When defendant was scheduled for release, the state filed a motion under ORS 138.083(1) to amend the judgment to provide that the sentences in this case are to be served consecutively to the 78-month sentence. The court granted the motion, finding that “my intention was for the sentences to be consecutive.” *Held*: Reversed and remanded. [1] “Oregon subscribes to the common-law rule that once a valid sentence is executed—that is, once a defendant begins serving—the trial court loses jurisdiction over the case and, thus, power to modify the sentence.” [2] “A sentence is, as a matter of law, concurrent unless the judgment expressly provides that it is to be consecutive.” A court may amend a judgment when the trial court orally provides that sentences be served consecutively at the time the court imposes the sentence but does not include consecutive sentences in the written judgment. “But that is not the case here. We conclude that, because the trial court did not expressly provide that the sentences in [this case] be served consecutively to the sentences [previously] imposed in [the other case], either orally at the July 24, 2007, hearing or in the July 2007 judgment, the court may not later amend the judgment to reflect its unexpressed intention to make the sentences consecutive, and ORS 138.083(1)(a) does not authorize the trial court to amend the sentence.”

*State v. Estey*, 247 Or App 25, 268 P3d 772 (2011), *rev den*, 352 Or 25 (2012). In 1997, defendant was convicted on 20 counts of first-degree sexual abuse, the court imposed a 75-month sentence on each and structured consecutive sentences to arrive at a total sentence of 225 months. But the language used in the written judgment imposed a total sentence of only 150 months. In August 2009, the prosecutor learned that defendant was scheduled for release and asked the court, pursuant to ORS 138.083(1), to correct the judgment. After a hearing, the court granted the motion and entered an amended judgment to impose 225 months. *Held*: Affirmed. ORS 138.083(1) applies here because “the original written judgment did contain a ‘factual error’: it failed to reflect the sentencing court’s oral imposition of the sentence on one of the

counts consecutively to the sentences on two others, resulting in a total of 225 months' incarceration.” *Distinguishing State v. Johnson*, 242 Or App 279 (2011) (sentencing court erred when it entered an amended judgment to impose the sentence that it had *intended* to impose but had not actually imposed orally).

*State v. Johnson*, 242 Or App 279, 255 P3d 547 (2011). In 2001, defendant was convicted on three charges, including murder and MCS, and the court sentenced him to a series of prison terms to be served consecutively to a 12-month sentence previously imposed on separate conviction for fourth-degree assault. Defendant appealed, and the Court of Appeals reversed and remanded the case for a new trial. On remand, the parties entered into a settlement by which defendant agreed to plead guilty to manslaughter and MCS, the state dismissed the other charge, and the court imposed new sentences. Neither the court's oral sentence nor the new judgment ordered defendant to serve those sentences consecutively to the sentence on the assault conviction. A month later, the prosecutor filed a motion pursuant to ORS 138.083(1) to “correct” the judgment to add a provision that the sentences would be served consecutively to the sentence on the assault conviction. Defendant did not respond to the motion. Three months later, without having held a hearing on the motion, the trial court entered an amended judgment that made the change requested by the state. *Held*: Amended judgment vacated. ORS 138.083(1)(a) did not authorize the sentencing court to amend the original judgment, because it did not contain a mathematical or clerical error or an erroneous legal or factual term. “Oregon subscribes to the common-law rule that, once a valid sentence is executed—that is, once a defendant begins serving it—the trial court loses jurisdiction over the case and, thus, power to modify the sentence. The common-law rule includes an exception: If the sentence is invalid because it is contrary to law in some respect, the court is deemed to have failed to pronounce any sentence and, thus, it has not yet exhausted its jurisdiction and can substitute a valid sentence for the one that is void. That appears to be the only exception recognized in the common law. ... [Because there is no authority for the proposition] that a trial court has inherent authority to modify the judgment to reflect sentences to which a defendant agreed, ... the trial court lacked authority to modify the judgment.”

*Note*: It is well established that a circuit court has inherent authority to amend a judgment at any time, even after the judgment is final and the sentence has been executed, in order to add a term that was orally imposed but then inadvertently omitted from the written judgment—*i.e.*, to conform the written judgment to the sentence that the court actually had imposed orally. *See, e.g., Mullinax and Mullinax*, 292 Or 416, 424 (1982); *Daugharty v. Gladden*, 217 Or 567, 576-77 (1959); *State v. French*, 208 Or App 652, 654-55 (2006); *Peterson v. Maass*, 130 Or App 520 (1995); *State v. Bryant*, 93 Or App 313, 315 (1988). The problem in this case was that the consecutive-sentence term the court added had not been imposed *orally* as part of the original sentence.

*State v. Herring*, 239 Or App 416, 244 P3d 899 (2010). Defendant appealed an amended judgment on his two counts of attempted murder with a firearm, contending that the trial court erred in entering the amended judgment—which extended the length of PPS on one count and imposed a \$605 fine it had previously waived—without giving him notice or an opportunity to be present and to be heard. *Held*: Reversed and remanded. The trial court violated ORS 137.030(1) and the state constitution by entering the amended judgment to make those corrections without a hearing.

*State v. Mayes*, 234 Or App 707, 229 P3d 628 (2010). Defendant originally was sentenced in 1996 on convictions for murder and assault; the judgment imposed a consecutive “presumptive” sentence of 34 months on the assault conviction using gridblock 8-C. In 2007, defendant filed a motion under ORS 138.083(1) to correct the judgment, asserting that the murder convictions must merge and that the 34-month sentence violated the “shift to I” rule. The court entered an amended judgment that merged the murder convictions and recited that the 34-month sentence actually was a departure based on gridblock 8-I. *Held*: Affirmed. [1] The record supported the court's finding that the 34-month sentence as originally imposed actually was a departure using gridblock 8-I. Thus, the amendment was proper as merely correcting a clerical error; it was not a “resentencing” to which *Blakely v. Washington* might apply. [2] Because “the trial court did not make any changes to defendant's sentences that involved disputed facts or the exercise of judicial discretion,” defendant did not have a personal right to allocute.

*State v. Donner*, 230 Or App 465, 215 P3d 928 (2009). Upon revoking defendant's probation on his conviction for attempted second-degree kidnapping, the court orally imposed a 36-month prison sentence. But the written judgment imposed only a 6-month prison term with a 36-month term of post-prison supervision, and defendant completed serving the prison term and was released onto PPS. The court later entered an amended judgment pursuant to ORS 138.083(1) to correct “the scrivener's error”; the amended judgment increased the prison term to 36 months. *Held*: Affirmed in part, remanded for resentencing. [1] The court had authority to correct the written judgment even though defendant already had served the original sentence. [2] But the PPS term violated OAR 213-005-0002(4) because it caused the total sentence to exceed 60 months.

**State v. Rickard**, 225 Or App 488, 201 P3d 927 (2009). During the course of post-conviction proceedings initiated by defendant, the state filed a motion under ORS 138.083 to amend the judgment of conviction and sentence to make them consistent with ORS 144.103, which imposes extended terms of post-prison supervision on some crimes. Without notifying defendant, the court issued an amended judgment that: (1) added the phrase “less time actually served” to the PPS terms on certain convictions, to assure that the combined terms of incarceration and PPS did not exceed the maximum statutory sentences for those offenses, as required by ORS 144.103; (2) reduced the length of PPS on certain convictions from 20 years to 10 years, as required by ORS 144.103; and (3) increased the duration of some PPS terms from 36 months to five years. Defendant appealed arguing that the amendments were unlawful because they were done outside his presence, contrary to ORS 137.030 and Art I, § 11. *Held*: Reversed, remanded. [1] Amendments that conformed the judgment to comport with mandatory sentencing provisions were merely “administrative,” not substantive; defendant had no right to be present. Because the first sets of amendments merely made the judgment comport with mandatory provisions of the applicable statute, they were merely administrative. Defendant did not have a right of allocution with respect to those administrative acts, which made the otherwise legally incorrect sentence comply with a mandatory sentencing law, because the amendments were merely “nondiscretionary administrative change[s] to which the defendant cannot object, that is, one required by law.” [2] The amendments that erroneously increased the defendant’s PPS term from 36 months to 5 years based on a version of the statute that did not apply to defendant were substantive, not mere clerical errors; thus, defendant was entitled to notice and to be present. Because the applicable statutes did not require the amendment, defendant had a right to be heard. The right to be present and to be heard protects against prejudicial actions by the sentencing court that are not required by law.

**State v. Harding**, 222 Or App 415, 193 P3d 1055 (2008), *adh’d to on recons*, 225 Or App 386, 202 P3d 181, *app’dism’d on other grounds*, 347 Or 368, 223 P3d 1029 (2009). Defendant was convicted of *inter alia* attempted murder, the sentencing court imposed an upward departure based on its own findings, and the judgment became final in 2002 when the appellate judgment issued. After defendant’s right to seek post-conviction relief had lapsed, he filed a motion in the trial court pursuant to ORS 138.083(1)(a) contending that the departure sentence was an “erroneous term in the judgment” in light of *Blakely*. The trial court corrected one error, but it declined to correct the departure, concluding that it lacked authority to correct that term. *Held*: Reversed and remanded. [1] Although the *denial* of a motion filed under ORS 138.083 is not appealable by defendant, defendant’s motion resulted in an amended judgment, which is appealable. [2] In light of *Blakely*, the departure may be an erroneous term that the trial court has authority to correct under ORS 138.083(1)(a). The authority to correct “errors” under ORS 138.083 is not limited to arithmetic and clerical errors that appear on the face of the judgment; rather, the authority in ORS 138.083 extends to any “erroneous term,” including errors in the procedure by which the sentence was imposed. [3] The authority to correct errors under ORS 138.083 is *discretionary*, and the court may take into account facts and circumstances that relate to whether review is appropriate.

*Note*: Because the Supreme Court ultimately dismissed defendant’s appeal for jurisdictional reasons, this opinion is not binding precedent.

**State v. Xocua-Xicalhua**, 213 Or App 581, 162 P3d 336 (2007) (*per curiam*). Although the sentencing court announced that it would impose consecutive sentences totaling 98 months, it did not impose an 18-month sentence on one conviction. Weeks later, the court entered an amended judgment to add the omitted 18-month term. *Held*: Reversed and remanded. [1] The court had authority under ORS 138.083(1) to amend the judgment “even after defendant had commenced serving his sentences.” [2] But the court erred in amending judgment without first providing him the notice required by the statute.

**State v. French**, 208 Or App 652, 145 P3d 305 (2006). Based on a finding that defendant committed a new offense, the sentencing court revoked his probation, imposed a 6-month sentence, and orally ordered him to serve that consecutively to the sentence he was serving on the new conviction. But the written judgment omitted the consecutive-sentence order, so the court *sua sponte* entered an amended judgment six months later correcting the error. *Held*: Reversed and remanded. [1] The Court of Appeals rejected defendant’s reliance on the rules that (a) the written judgment controls over a court’s oral comments, and (b) the sentencing court generally lacks authority to amend the judgment once it has been executed. ORS 138.083(1)(a) overrides those common-law rules. [2] By amending the judgment *sua sponte* without providing notice to defendant, the sentencing court failed to comply with ORS 138.083(1)(a). [3] The error was potentially prejudicial to defendant despite the state’s argument that defendant has no valid objection to the amendment.

**State v. Easton**, 204 Or App 1, 126 P3d 1256, *rev den*, 340 Or 673 (2006). Pursuant to parties’ stipulation, the court orally imposed consecutive sentences on convictions entered in two cases, but the written judgments failed to include

the consecutive-sentence order. Later, the court entered an amended judgment in one case, pursuant to ORS 138.083(1), to add the consecutive-sentence order, and defendant appealed. *Held*: [1] Because defendant contends that the sentencing court lacked jurisdiction to amend the judgment, ORS 138.222(2)(d), which bars review of a stipulated sentence, does not preclude review of his claim. [2] The amended judgment is appealable and reviewable under ORS 138.050(1) to determine whether it includes a disposition that was not imposed consistently with statutory requirements. [3] Defendant's complaint that the amendment did not correct a "clerical" error is unavailing because ORS 138.083(1) authorizes the court to correct "any erroneous term in the judgment." The "common-law rule" that a court generally lacks authority to modify a sentence that has been "executed" does not preclude a court from correcting a sentence pursuant to the specific authority granted by ORS 138.083(1).

*State v. Jacobs*, 200 Or App 665, 118 P3d 290 (2005). [1] Defendant did not waive his right to be present at sentencing when, after the court orally imposed sentence, he requested a continuance to enable him to brief legal issues related to that sentence. [2] Because the oral sentence was not executed in the interim by delivery of defendant to the Department of Corrections, the court retained authority to modify that sentence. [3] The court erred when, after considering the parties' briefs, it entered a written judgment that imposed a sentence that was more onerous than the oral sentence without reconvening a hearing in court for that purpose.

*State v. Kennedy*, 196 Or App 681, 103 P3d 660 (2004). In 1991, defendant was waived into adult court and convicted of murder based on a crime he committed when he was 16 years old. The court imposed a 160-month sentence with a 36-month term of post-prison supervision. In 2002, and without notice and a hearing, the court entered an amended judgment that modified the PPS term to "life" per OAR 253-05-004(1) (1989). *Held*: [1] ORS 161.620, which bars the imposition of a "mandatory minimum sentence" on a juvenile, does not apply to a PPS term because it is not a term of imprisonment. [2] The court erred in modifying the term without providing defendant an opportunity to be heard because although the life-time term is mandated by statute and hence defendant had no cognizable interest in making a statement at sentencing regarding that term, the possibility of a reduction in the term by the board under the rule meant that "defendant was entitled to an opportunity to make statements relevant to the board's existing practices concerning the shortening" of the term.

*State v. Riley*, 195 Or App 377, 97 P3d 1269 (2004), *rev den*, 340 Or 673 (2006). [1] Pursuant to ORS 138.083(1), and based on defendant's prior conviction for first-degree burglary, the sentencing court properly entered an amended judgment to comply with ORS 137.635(3). The original judgment contained an "erroneous term" in that it authorized early release and ORS 137.635(1) bars it. [2] Although the sentencing court erred by amending the judgment without specific notice to defendant and outside his presence, the error is harmless because "the modification did not involve disputed facts or the exercise of judicial discretion."

*State v. Whitlock*, 187 Or App 265, 65 P3d 1114, *rev den*, 336 Or 17 (2003). Defendant was convicted, based on no-contest pleas, of first-degree burglary and kidnapping, and the court imposed consecutive sentences of 40 and 90 months on those convictions. Several days later, the court, *sua sponte* and without notice to defendant, entered an amended judgment reciting that those sentences are subject to ORS 137.635 based on defendant's prior conviction for first-degree burglary. *Held*: Remanded for resentencing. [1] The amendment was not proper under ORS 138.083(1), because the court failed to provide written notice to the parties and an opportunity for defendant to object. [2] The appropriate remedy is to vacate the amended judgment and remand "for determination of whether to reinstate original judgment and, if not, for resentencing." *Note*: The court declined to address whether it would be permissible, in these circumstances, for the court to enter the amended judgment after a hearing.

*State v. Nason*, 184 Or App 114, 55 P3d 525 (2002) (*per curiam*). The sentencing court erred when it entered an amended judgment, after defendant had commenced serving his sentences, to modify the two consecutive 12-month prison terms to consecutive terms of 13 and 11 months in order to comply with ORS 137.124(2). "The amended judgment does not merely correct a clerical or arithmetic error." Remanded "with instructions to reenter the original judgment."

*State v. Gibson*, 183 Or App 25, 51 P3d 619 (2002). After defendant had appealed from the judgment of conviction, the sentencing court entered an amended judgment to correct errors in the nature of the convictions entered and charges dismissed. *Held*: [1] Regardless of whether such an error may be corrected by way of ORS 138.083(1), "that change was substantive, not administrative," and hence the court violated defendant's right to be present for the resentencing under Art I, § 11, and ORS 137.030. [2] The error is reviewable on appeal even though defendant failed to object. [3] The proper remedy is to vacate the amended judgment and remand for entry of a corrected judgment and

resentencing.

**State v. Lebeck**, 171 Or App 581, 17 P3d 504 (2000). The sentencing court stayed defendant's prison sentence pending appeal. Defendant's appeal did not raise any sentencing issues, and the judgment was affirmed without opinion. Defendant then filed a motion in the sentencing court to modify the prison sentences; he argued that because the prison sentences had been stayed pending appeal the trial court had authority to modify the sentences. The court agreed and amended the judgment to replace the four prison sentences with four sentences of probation. *Held*: Defendant's prison sentences were not executed because they were stayed pending appeal. For that reason, the sentencing court had the authority to modify the sentences.

**State v. Lavitsky**, 171 Or App 506, 17 P3d 495 (2000), *rev den*, 332 Or 430 (2001). Defendant was convicted of attempted murder and was sentenced to 38 months. When the victim later died, the state charged defendant with intentional murder. The trial court convicted him of first-degree manslaughter. The sentencing court wanted defendant to serve a total of 65 months on both convictions, so it amended the judgment on the manslaughter conviction to read "*nunc pro tunc*" to the date he was sentenced on the conviction for attempted murder. *Held*: Reversed. The sentencing court "was attempting impermissibly to have its ruling take effect before it made that ruling, rather than to have the record reflect the truth of any ruling made on the *nunc pro tunc* date."

**State v. Horsley**, 168 Or App 559, 7 P3d 646 (2000). The sentencing court imposed a 70-month sentence on defendant's conviction for second-degree robbery per Measure 11, but it neglected to impose the mandated 24-month term of post-prison supervision. The judgment was affirmed on direct appeal. Later, the court entered an amended judgment adding the omitted term of post-prison supervision. *Held*: Affirmed. [1] Because the original sentence was outside the court's sentencing authority, it retained jurisdiction to correct the error even though defendant had commenced service of the sentence (*distinguishing State v. Hamilton*, 158 Or App 258 (1999)). [2] The court's authority to enter a corrected judgment under ORS 138.083 is not dependent upon the pendency of an appeal.

**State v. Alvarez**, 168 Or App 393, 7 P3d 616, *rev den*, 331 Or 244 (2000). Defendant was convicted of first-degree robbery, and the court declared Measure 11 unconstitutional on its face and imposed the 55-month presumptive sentence instead. Both parties appealed, but the state dismissed its appeal in light of *State ex rel. Huddleston v. Sawyer*. The parties then stipulated to a remand to consider an unresolved motion to suppress; the Court of Appeals "vacated" the judgment and remanded. The trial court denied the motion to suppress, reentered the conviction, and imposed the 90-month minimum sentence. *Held*: Affirmed. [1] The remand order allowed the trial court to correct the erroneous sentence. [2] The rule in *State v. Turner*, 247 Or 301 (1967), that a defendant cannot receive a more onerous sentence on remand after prevailing on appeal does not apply where, as here, the original sentence was unlawful.

**State v. Zimmerman**, 166 Or App 635, 999 P2d 547 (2000). The sentencing court imposed a \$5,000 fine as a sentence and as a condition of probation, but suspended payment of that fine. Later, the court executed \$2,000 of the fine. *Held*: Affirmed. Although a sentencing court does not have authority to modify a sentence once it has been executed, a court retains authority to modify the conditions of probation at any time, and the enactment of the sentencing guidelines did not change that. The sentencing court properly executed part of the fine in light of the fact that it had vacated the compensatory fine after an insurance settlement. That was not an improper modification of the sentence, and the pendency of defendant's appeal from the original judgment did not divest the court of authority to make that change.

**State v. Layton**, 163 Or App 37, 986 P2d 1221 (1999), *rev den*, 330 Or 252 (2000). A motion pursuant to ORS 138.083 during pendency of appeal to correct a mistake in a sentence is inadequate to preserve a claim of an improper post-prison supervision term.

**State v. Christopherson**, 159 Or App 428, 978 P2d 1039, *rev den*, 329 Or 126 (1999). The sentencing court imposed sentence and entered judgment on April 4. On April 8, the court entered an amended judgment to correct an arithmetic error in the costs portion of the judgment. Defendant filed his notice of appeal on May 6. *Held*: The Court of Appeals *sua sponte* dismissed the appeal. [1] The 30-day time limitation in ORS 138.071(1) is jurisdictional. [2] The entry of an amended judgment to correct a "clerical error" does not extend the time within which a party must file a notice of appeal from the original judgment unless the modification either (a) materially alters the party's rights or obligations or (b) creates a right of appeal that the party did not have under the original judgment. [3] The amended judgment in this case merely corrected an arithmetic error; it did not materially affect defendant's rights or create a right of appeal.

*State v. Hamilton*, 158 Or App 258, 974 P2d 245, *rev den*, 329 Or 318 (1999). The court imposed a 70-month sentence pursuant to Measure 11, defendant began to serve that sentence, and he appealed. Later, while that appeal was pending, the court ruled that Measure 11 is unconstitutional, vacated defendant's sentence, and resented him to 12 months under the guidelines. The state appealed from the amended judgment. *Held*: Reversed and remanded with directions to reinstate the original judgment. Once defendant began serving the original sentence, the sentencing court lacked authority to modify it. In addition, the sentencing court lost jurisdiction when defendant appealed, except for purposes of ORS 138.083 (which allows the court to correct clerical errors and to modify any erroneous term).

*State v. DeCamp*, 158 Or App 238, 973 P2d 922 (1999). The court sentenced defendant to 21 months on his conviction for first-degree burglary and one month on his conviction for first-degree failure to appear, the sentences to run consecutively. Three weeks later, the court, without holding a hearing, *sua sponte* entered an order lengthening defendant's sentence on the FTA conviction to six months. *Held*: "[T]he trial court erred in entering the modification order without a hearing and without having defendant present." A defendant has the right to be present when he is sentenced for a felony and that right extends to the substantive modification of his sentence. [2] Whether the sentencing court had authority to modify defendant's sentence depended on whether the judgment had been executed, *i.e.*, whether defendant had been physically delivered to ODOC. The case was remanded to determine when defendant was delivered to DOC's custody. *See also State v. Gray*, 155 Or App 162, 963 P2d 730 (1998) (same as [1]).

*State v. Hamlin*, 151 Or App 481, 950 P2d 336 (1997), *rev den*, 327 Or 173 (1998). The court imposed prison sentences on defendant's MCS and DCS convictions and a concurrent probationary sentence on her PCS conviction; the court stayed execution of the prison sentences for 30 days. Meanwhile, defendant both appealed from and moved for reconsideration of the judgment. She then dismissed her appeal to allow the court to rule on her motion for reconsideration. The court denied that motion but reconsidered the sentence, vacated the prison sentences, and imposed probationary sentences instead. The state appealed. *Held*: [1] The intervening appeal and dismissal did not "affirm" the judgment so as to deprive the sentencing court of authority to modify the sentences. [2] A sentencing court retains authority modify the sentence so long as it has not yet been executed. [3] The court here lacked authority to modify the prison sentences even though defendant had not yet commenced service of those sentences, because she already had begun to serve the probationary sentence imposed on the other conviction in the case. Under sentencing guidelines, probation is a sentence. Defendant's sentence was "put into effect" when she began her probationary sentence and the sentencing court was without authority to modify the sentencing judgment.

*State v. Perry*, 140 Or App 18, 914 P2d 29 (1996). The sentencing court orally imposed 18-month prison sentence on burglary conviction and 45-day jail sentence on misdemeanor conviction without expressly ordering them to be served consecutively, defendant immediately commenced service of the jail term, and the court subsequently imposed a written judgment that ordered the sentences to be served consecutively. *Held*: Because a sentencing court "lacks the authority to modify a sentence once the defendant has started serving the sentence which is later modified," the court erred in entering written judgments that ordered the sentences to be served consecutively, even though defendant had not yet been delivered to the Department of Corrections on execution of the prison sentence.

*Peterson v. Maass*, 130 Or App 520, 882 P2d 1140 (1995): Sentencing court had authority to enter an amended judgment more than 60 days after entry of the original judgment (*see* ORS 138.083) in order to conform written judgment to the sentence orally imposed.

*State v. Pinkowsky*, 111 Or App 166, 826 P2d 10 (1992): [1] "Under the guidelines, a sentencing court does not have discretion *not* to impose post-prison supervision. OAR 253-05-002 *requires* imposition of term of post-prison supervision as part of a sentence for *any* offender who is sentenced to prison." Consequently, sentencing court had authority to enter amended judgment to correct the "clerical error" by adding term of post-prison supervision notwithstanding that defendant had completed service of his prison term and had been released. [2] Because no appeal was taken, "ORS 138.083 does not apply to defendant's case." Moreover, "nothing in the statute provides that it is the exclusive authority for corrections to be made"; the statute "is not a limitation, but is an expansion of trial courts' authority to correct clerical errors."

### C. STIPULATED SENTENCES

*State v. Adams*, 315 Or 359, 847 P2d 397 (1992): "The legislature did not intend that a sentence resulting from an agreement between a defendant and the state be reviewable on appeal." Because the parties stipulated to the sentence as

part of a plea agreement and advised the sentencing court of the correct gridblock for the conviction, and because the sentencing court approved that agreement on the record and imposed the stipulated sentence, ORS 138.222(2)(d) precludes any appellate review of a claim that the sentence imposed is error due to the fact that it effectively is a departure and the court did not make departure findings.

*State v. Lewis*, 257 Or App 641, \_\_ P3d \_\_ (2013). Defendant was charged by a six-count indictment with a variety of drug crimes that he committed on December 29 and 30, 2009. He pleaded guilty to four counts, he stipulated that the crimes “are all separate acts that ... warrant consecutive sentences,” the state dismissed the other charges, and the parties stipulated to dispositional departures to probationary sentences on three of the convictions. Later, he was back before the court on allegations that he violated his probation by possessing and using marijuana. He admitted that allegation, and the court revoked his probation and imposed the presumptive sentences in the range of 23 to 26 months. Defense counsel asked the court to run them concurrent, noting “with one admission, there is only one sanction to be imposed.” The sentencing court ordered him to serve those sentences consecutively, because that was contemplated in the parties’ plea agreement. On appeal, defendant argued for the first time that OAR 213-012-0040(2)(b) *required* the court to impose concurrent sentences because the revocation was based on only a single violation, and he also cited *State v. Stokes*, 133 Or App 355 (1995), for that proposition. In response, the state argued that the parties had effectively stipulated to the imposition of consecutive sentences upon revocation as part of their plea deal and that, in any event, the rule does not apply where, as here, the underlying convictions are based on crimes the defendant committed during separate criminal episodes. *Held*: Reversed and remanded. The parties had not stipulated to imposition of consecutive sentence upon revocation—rather, the parties’ plea agreement merely allowed that the state could *request* consecutive sentences.

*State v. Ivie*, 213 Or App 198, 159 P3d 1257 (2007). Defendant pleaded guilty to second-degree assault and the parties stipulated to a departure pursuant to ORS 137.712 to a probationary sentence but further agreed that if defendant violated the probation, the court on revocation would impose a 70-month term as the “presumptive” sentence. The court imposed that sentence without making findings under ORS 137.712 or 137.750. Later, upon revocation, defendant argued that ORS 137.712(5) barred a sentence longer than 38 months. The court disagreed and imposed the 70-month sentence and denied any eligibility for early release based on ORS 137.700(1). *Held*: Reversed and remanded. [1] In interpreting the parties’ plea agreement, “commercial contract principles apply”—“the construction of a contract is a question of law, but when the contract is ambiguous, extrinsic evidence may be used to resolve the ambiguity, and determination of a the parties’ intent is a question of fact.” The record supported the sentencing court’s finding that defendant had stipulated to a 70-month term on revocation. [2] Because 70-month term was imposed pursuant to stipulation, ORS 137.222(2)(d) barred appellate review. But because the record does not show that defendant stipulated to the no-release order, his challenge to that term is reviewable.

*State v. Boggs*, 211 Or App 384, 154 P3d 172 (2007) (*per curiam*). The parties entered into plea agreement that included a stipulation to a 180-month sentence, and the trial court “agreed to be bound by the terms of the agreement” but actually imposed a 206-month sentence. The state conceded that the sentence was error, and the court remanded for resentencing.

*Note*: Under ORS 135.432(3), if the court does not impose the stipulated sentence, the remedy is to allow the defendant to withdraw his plea.

*State v. Easton*, 204 Or App 1, 126 P3d 1256, *rev den*, 340 Or 673 (2006). Pursuant to parties’ stipulation, the court orally imposed consecutive sentences on convictions entered in two cases, but the written judgments failed to include the consecutive-sentence order. Later, the court entered an amended judgment in one case, pursuant to ORS 138.083(1), to add the consecutive-sentence order, and defendant appealed. *Held*: [1] Because defendant contends that the sentencing court lacked jurisdiction to amend the judgment, ORS 138.222(2)(d), which bars review of a stipulated sentence, does not preclude review of his claim. [2] Defendant’s complaint that the amendment did not correct a “clerical” error is unavailing because ORS 138.083(1) authorizes the court to correct “any erroneous term in the judgment.” The “common-law rule” that a court generally lacks authority to modify a sentence that has been “executed” does not preclude a court from correcting a sentence pursuant to the specific authority granted by ORS 138.083(1).

*Haney v. Schiedler*, 202 Or App 51, 120 P3d 1225 (2005). Pursuant to a plea agreement, petitioner pleaded guilty to two class C felony offenses, the state dismissed Measure 11 charges, and the parties stipulated to probationary sentence with concurrent 65-month sentences if probation was revoked. Petitioner violated probation, and the court imposed the stipulated sentences, and petitioner did not appeal. Petitioner then filed a post-conviction petition challenging his sentence as excessive under ORS 138.530(1)(c), the state argued that that claim was barred by ORS 138.550, the post-conviction

court granted relief, and the state appealed. *Held*: Reversed. In light of the intervening decision in *Stroup v. Hill*, 196 Or App 565 (2005), the post-conviction court's ruling was plain error and warranted reversal.

*Stroup v. Hill*, 196 Or App 565, 103 P3d 1157 (2004), *rev den*, 338 Or 432 (2005). Facing 59 years in prison on a variety of charges, petitioner entered into a plea agreement in which he pleaded guilty to several charges, the state dismissed the Measure 11 charges, and the court imposed *inter alia* a 60-month sentence with a 36-month term of post-prison supervision on his felon-in-possession conviction. Petitioner did not appeal, but he then filed a petition for post-conviction relief contending that, in light of *Layton v. Hall*, the PPS term on the FIP conviction exceeds the maximum allowable by law and that his trial counsel provided inadequate assistance. *Held*: [1] Petitioner's challenges to the sentence under ORS 138.530(1)(a), (b), and (c) are barred. The erroneous sentence did not deprive the sentencing court of "jurisdiction"; his direct challenge to the sentence is barred by ORS 138.550 and *Palmer v. State of Oregon* because he could have raised that objection at sentencing and on appeal; and, his "due process" challenge fails for the same reason. [2] His claim of inadequate assistance fails based on the post-conviction court's findings that he knew that the court would impose that sentence when he pleaded guilty and failed to show that he would not have pleaded guilty had he known that that sentence exceeds the maximum.

*Blackledge v. Morrow*, 174 Or App 566, 26 P3d 851, *rev den*, 332 Or 588 (2001). Petitioner was charged with a count of first-degree sexual abuse subject to Measure 11, and he entered into a plea agreement by which he pleaded guilty to attempted first-degree sexual abuse as a lesser-included offense and stipulated to a 65-month sentence. The post-conviction court ruled that petitioner's appellate counsel failed to provide constitutionally adequate assistance by not challenging the sentence on appeal as "plain error." *Held*: Reversed and remanded. [1] Because petitioner was convicted only of a class C felony, the 65-month sentence exceeds the maximum allowable by law under ORS 161.605(3). [2] To obtain post-conviction relief based on a claim of inadequate assistance of appellate counsel, petitioner had to "establish that competent appellate counsel would have asserted the claim, and 'that had the claim of error been raised, it is more probable than not that the result would have been different.'" [3] Had appellate counsel attempted to challenge the sentence, the Court of Appeals would have been barred by ORS 138.222(2)(d) from reviewing that claim on direct appeal, because it was entered per petitioner's stipulation. "If this court lacks authority to review a sentence under ORS 138.222, then the court may not review the sentence regardless of whether an error is apparent on the face of the record." [4] "Given that the erroneous sentence was not reviewable on direct appeal, petitioner's appellate counsel did not provide constitutionally inadequate assistance in failing to assert the error on direct appeal." [5] Because the post-conviction court granted relief only on petitioner's claim of inadequate assistance of appellate counsel and that ruling was error, the appropriate remedy is to remand for reconsideration based on petitioner's alternative claim that he is entitled to relief under ORS 138.530(1)(c) because the sentence is excessive.

*Washington v. Johnson*, 165 Or App 578, 997 P2d 263, *rev den*, 330 Or 553 (2000). After being found guilty of aggravated murder, petitioner entered into a stipulated sentencing agreement, by which the petitioner avoided a death sentence but waived his right to appeal or seek post-conviction relief. Petitioner claimed that his lawyer inadequately informed him of the consequences of entering into the stipulated sentencing agreement. *Held*: [1] Because petitioner failed to claim that had he been better informed he would not have accepted the offer, he failed to establish that he was prejudiced by his counsel's alleged inadequacy. [2] Because the right to appeal and to seek post-conviction relief are not of constitutional dimension, the waiver of the statutory rights was not inherently prejudicial, even if petitioner was unaware of the full ramifications of the rights waived.

#### **D. ADJUDICATION FOR GUILTY BUT INSANE**

See ORS 161.295 *et seq.*

*Note*: This section includes only decisions issued since 2001.

*Tharp v. PSRB*, 338 Or 413, 110 P3d 103 (2005). [1] The phrase "mental disease or defect" as used in ORS 161.341(4) has the same meaning as that phrase is used in ORS 161.295. [2] The term "mental disease or defect" does not include an abnormality that constitutes solely a "personality disorder." [3] "[S]ubstance dependency is a 'personality disorder' and thus is not a 'mental disease or defect' within the meaning of ORS 161.295(1)."

See also *Ashcroft v. PSRB*, 338 Or 448, 111 P3d 1117 (2005) ("alcohol dependence is a personality disorder as that term is used in ORS 161.295(2) and that, therefore, it is not a mental disease or defect").

*Erschine v. P.S.R.B.*, 257 Or App 71, \_\_\_ P3d \_\_\_ (2013). In 2010, petitioner was found guilty except for insanity on

a charge of first-degree burglary, was placed within the jurisdiction of the PSRB, and was committed to OSH. In 2011, the hospital applied to the board, pursuant to ORS 161.341(1) to have petitioner conditionally released to DOC. Petitioner opposed the request, but after a hearing the board found that he has a mental disease and still presents a danger but that he “could be adequately controlled and treated in the community if he were conditionally released to the DOC,” recommending that he reside in “secure custody” and participates in treatment. Petitioner appealed. *Held*: Reversed and remanded. Under the circumstances of this case, ORS 161.341(1) required the hospital to submit a “verified conditional release plan” to the board before petitioner’s conditional-release hearing, and that was not done.

*State v. Saunders*, 195 Or App 357, 97 P3d 1261 (2004), *rev den*, 338 Or 124 (2005). In a prosecution for felony public indecency under ORS 163.465(2)(b), defendant’s prior adjudication for that offense as guilty except for insanity under ORS 161.295 cannot be considered as predicate “prior convictions.”

*State v. Peverieri*, 192 Or App 229, 84 P3d 1125, *rev den*, 337 Or 248 (2004). Defendant was charged with attempted aggravated murder. At the time he committed the crime, the combination of cognitive impairments caused by a chronic liver condition and voluntary consumption of alcohol made him agitated and paranoid. Defendant raised an insanity defense, but the trial court rejected his defense. *Held*: The defense is not available if the claimed lack of capacity is the result of a combination of mental disease or defect and another factor. Thus, even if defendant’s liver condition produced a mental disease or defect, ORS 161.295 did not apply.

*Laing v. PSRB*, 192 Or App 462, 86 P3d 100 (2004). Alcohol dependence is not a mental disease or defect within the meaning of ORS 161.346(1)(c). The court declined to address the state’s alternative argument that petitioner took a contrary position in entering his guilty plea and thus was judicially estopped from making that argument, because the record is inadequate to establish that petitioner asserted to the contrary in a previous proceeding.

*See also Ashcroft v. PSRB*, 192 Or App 467, 86 P3d 102 (2004).

*Beiswenger v. PSRB*, 192 Or App 38, 84 P3d 180, *rev allowed* 337 Or 247 (2004). In 1988, based on schizophrenia-related diagnoses, petitioner was found guilty except for insanity of various crimes and was placed in the jurisdiction of the PSRB pursuant to ORS 161.295 and 161.327. In 2002, petitioner applied for conditional release on the ground that he no longer suffered from a mental disorder. The term “mental disease or defect” does not include an abnormality constituting solely a “personality disorder.” ORS 161.295(2). At that time, his diagnoses included paraphilia, substance abuse; and personality disorder with obsessive-compulsive features. The board found that petitioner was affected by a mental disease or defect and denied release. Petitioner sought judicial review, arguing that was entitled to release on the ground that he did not currently suffer from a mental disease or defect. *Held*: Although petitioner’s current diagnoses of paraphilia and alcohol and drug abuse are not classified as personality disorders in the DSM, those diagnoses are personality disorders within the meaning of ORS 161.295 and are not mental diseases or defects for the purpose of that statute.

*State v. Nelson*, 191 Or App 133, 80 P3d 543 (2003) (*per curiam*). The length of Psychiatric Security Review Board jurisdiction is to be measured by the statutory indeterminate maximum sentence rather than the guidelines presumptive sentence.

*State v. Thomas*, 187 Or App 762, 69 P3d 814 (2003) (*per curiam*). The sentencing court erred in imposing restitution on defendant’s conviction, except for insanity, for assault in the second degree. Restitution may not be imposed pursuant to ORS 137.106 on a defendant found guilty except for insanity.

*State v. Brooks*, 187 Or App 388, 67 P3d 426, *rev den*, 335 Or 578 (2003). Defendant was found guilty except for insanity under ORS 161.327(1) on *inter alia* seven class C felony offenses, and the court imposed a 5-year commitment to PSRB on each and ordered defendant to serve five of those terms consecutively, without making findings under ORS 137.123(5). *Held*: Reversed and remanded for resentencing. [1] ORS 161.327(1) authorizes a sentencing court to impose consecutive PSRB commitments. [2] In order to do so, however, the court must make appropriate findings under ORS 137.123. [3] Because the court failed to make such findings, the case must be remanded for resentencing even if evidence in the record would support consecutive sentences.

*See also State v. Austin*, 187 Or App 427, 67 P3d 435 (2003) (*per curiam*) (affirming consecutive commitments to PSRB).

*Romanov v. P.S.R.B.*, 179 Or App 127, 38 P2d. 965 (2002). Pursuant to a plea agreement, petitioner was found guilty but insane on a charge of first-degree arson, a class A felony, and the court ordered that he be placed within PSRB

jurisdiction for 10 years. The board determined under ORS 161.327(1) that its jurisdiction was 20 years. *Held*: “Board did not have authority to rewrite the trial court’s order and hold petitioner in its jurisdiction for an additional ten years.”

*State v. Hedgecock*, 173 Or App 216, 21 P3d 137 (2001). The sentencing court erred when it ordered defendant, who was found guilty except for insanity, to repay the costs of her court-appointed counsel and a unitary assessment. The GBI verdict is not a “conviction” for purpose of those statutes.

*See also State v. Gile*, 161 Or App 146, 985 P2d 199 (1999) (same).

#### **E. SETTING ASIDE CONVICTION / EXPUNCTION (ORS 137.225)**

*See* ORS 137.225.

*Note*: This section includes only decisions issued since 2001.

*State v. Roberts*, 255 Or App 132, 296 P3d 603 (2013). In 2007, defendant pleaded guilty to unlawful delivery of marijuana, which was reduced under a plea agreement to a misdemeanor. In 2010, he pleaded “no contest” to public urination, a municipal-code violation. Later that year, he moved to set aside his drug conviction under ORS 137.225, which allows a defendant to move to set aside certain convictions if three or more years have passed, provided that he was not convicted of any other offense (excluding traffic violations) within the ten years before the motion is filed. The state argued that defendant’s conviction for public urination made him ineligible. The trial court rejected that argument and granted defendant’s motion to set aside his DCS conviction. *Held*: Reversed. The trial court erred in setting aside defendant’s DCS conviction. For purposes of ORS 137.225, a municipal code violation is an “offense,” a term that includes “violations.” Defendant’s no-contest plea resulted in a “conviction.” Accordingly, “defendant’s no contest plea to the violation of public urination resulted in a ‘conviction’ of an offense within the 10 years preceding defendant’s motion to expunge his marijuana conviction.”

*State v. Beck*, 254 Or App 609, 295 P3d 169 (2013). In 1961, defendant was convicted of negligent homicide under *former* ORS 163.091 (1957). That offense was defined as causing the death of another person by driving a motor vehicle in a grossly negligent manner, and it was punishable as either a misdemeanor or a felony. In 2010, defendant moved under ORS 137.225 to set aside his conviction. The state opposed the motion, contending that the conviction is not eligible to be set either because of the exclusion for traffic offenses, set out at ORS 137.225(6)(a), or because of the specific exclusion for a conviction for criminally negligent homicide under ORS 163.145, set out at ORS 137.225(7). The trial court denied defendant’s motion. *Held*: Affirmed. The trial court correctly denied defendant’s motion to set aside his conviction. [1] ORS 137.225(7) precludes the setting aside of defendant’s conviction. Although ORS 137.225(7) specifically refers just to ORS 163.145 (the current statute defining the offense of criminally negligent homicide) and to Class C felonies (a classification that did not exist when defendant committed his crime), defendant’s conviction is one the legislature intended to preclude from being set aside under ORS 137.225(7). The legislative history of ORS 163.145 establishes that the legislature intended the crime of criminally negligent homicide to encompass the previous crime of negligent homicide. Moreover, the legislature has clearly demonstrated its intent to prevent convictions for criminally negligent homicide from being set aside. [2] The reference in ORS 137.225(7) to a conviction under the current statute number, ORS 163.145, does not preclude its application to a conviction under *former* ORS 163.091.

*State v. Branam*, 220 Or App 255, 185 P3d 557, *rev den*, 345 Or 301 (2008). Defendant was convicted of PCS and was put on probation. Later, the court revoked his probation and imposed a 6-month jail term, which he completely served. Defendant then moved to set aside his conviction, but the court denied the motion on the ground that his violation of probation meant that he had not “fully complied with and performed the sentence of the court,” ORS 137.225(1)(a). *Held*: Reversed and remanded. [1] “The fact that the legislature used the definitive article ‘the’ and the singular form of the noun ‘sentence’ suggests that it intended the requirements of ORS 137.225(1)(a) to apply only to one particular sentence.” [2] Because the legislative history is inconclusive, two maxims of construction are relevant: (a) “we are to construe the language of a statute in a manner that is consistent with its purpose,” and (b) “we attempt to discern what the legislature would have intended had it considered the particular problem presented.” [3] Applying those maxims, if a defendant was sentenced to probation but probation is revoked and a sentence of incarceration is imposed, “the relevant ‘sentence of the court’ for the purpose of ORS 137.225(1)(a) is the incarceration term.” [4] Because the court denied defendant’s motion based only on its ruling that he was disqualified due to revocation, the Court of Appeals remanded for the court to exercise its discretion under ORS 137.225(3).

*State v. Hartford*, 213 Or App 331, 161 P3d 331 (2007). ORS 137.225(6)(b) barred the court from setting aside

the record of defendant's arrest for burglary, because he was convicted of theft within the preceding 10 years, even though the court properly had set aside that theft conviction pursuant to ORS 137.225(1). The bar in ORS 137.225(6) applies to a record of an arrest as well as of a conviction.

*State v. Soreng*, 208 Or App 259, 145 P3d 195 (2006). The trial court erroneously refused to set aside defendant's conviction for criminally negligent homicide, which was a class C felony at the time of the conviction, on the ground that the legislature since had amended ORS 163.145 to provide that criminally negligent homicide is now a Class B felony and thus is not subject to expunction under ORS 137.225(5)(a). Although the legislature changed the classification of that offense for purposes of future prosecutions, it did not provide that previously entered convictions for the class C felony of criminally negligent homicide are not longer ineligible for expunction.

*State v. Johnson*, 207 Or App 694, 143 P3d 249 (2006). The trial court erred in setting aside defendant's conviction for DCS (cocaine) based on ORS 137.225(5)(c), which permits a court to set aside convictions for crimes that were "punishable as either a felony or a misdemeanor, in the discretion of the court." Although ORS 161.705 permits a court to treat certain DCS (marijuana) convictions as misdemeanors, a convictions for DCS (cocaine) cannot be treated as a misdemeanor.

*State v. Trujillo*, 207 Or App 344, 142 P3d 85 (2006). The trial court erroneously set aside defendant's convictions for assaulting a public safety officer and resisting arrest, both of which arose from the same incident. Under ORS 137.225(6)(b), a person convicted of any other offense within the 10-year period preceding the motion to set aside the conviction is ineligible for expunction, even if the multiple convictions arose from the same criminal episode.

*State v. Blas-Fernandez*, 205 Or App 563, 135 P3d 330 (2006) (*per curiam*). The trial court erred when it granted defendant's motions under ORS 137.225(1)(b) to set aside her records of arrest, because she was arrested in two separate incidents within three years preceding her motion and ORS 137.225(7) precludes a set-aside order in that circumstance.

*State v. Jansen*, 197 Or App 251, 105 P3d 928 (2005). The trial court set aside defendant's prior single-incident convictions for forgery and theft after purporting to merge them into a single conviction. *Held*: Reversed. Under ORS 137.225(6)(b), as construed in *State v. Adams*, defendant was ineligible for expunction because she had more than one conviction with ten years immediately preceding her motion. "The trial court's purported post-conviction 'merger' of the convictions was without effect."

*State v. Schoenborn*, 188 Or App 486, 71 P3d 587 (2003). In 1995, defendant was arrested and convicted of contributing to the sexual delinquency of a minor in violation of ORS 163.435(2). Later, defendant moved to set aside his conviction pursuant to ORS 137.225. The trial court denied the motion because it concluded that ORS 181.594(2) prohibited the setting aside of defendant's conviction. On appeal, defendant argued that at the time he committed his offense, ORS 181.594(2) did not prohibit the setting aside of a conviction of violation of ORS 163.435(2). Defendant further argues that the 1999 amendments to ORS 181.594(2), which now expressly prohibits setting aside a conviction under ORS 163.435(2), do not apply to individuals convicted before the effective date of the 1999 legislation. Or Laws 1999, ch 626, § 23(1). *Held*: The 1999 amendments to ORS 181.594(2) do not apply to defendant's conviction, which was entered in 1995. Remanded to allow trial court to decide defendant's motion to have conviction and related records set aside.

*State ex rel. Juv. Dept. v. Tyree*, 177 Or App 187, 33 P3d 729 (2001). [1] ORS 419C.610 allows a juvenile court to set aside an order finding a youth within the jurisdiction of the court, even if that order is incorrectly labeled a judgment. [2] Such an order does not have the effect of expunging the youth's adjudication records under ORS 419C.260 *et seq.* [3] An order under ORS 419C.610 setting aside an earlier adjudication cannot apply retroactively. [3] Such an order does not conflict with the sexual-offender registration requirements of ORS 181.595 *et seq.* because the exceptions provide that they do not apply to offenders whose adjudications have been vacated. ORS 181.595(3).

## **F. OTHER DISABILITIES OR CONSEQUENCES BASED ON FELONY CONVICTION**

*See* ORS 131.550 *et seq.* (criminal forfeiture); ORS 166.270 (felons prohibited from possessing firearms); ORS 166.279 (forfeiture of weapons); ORS 809.235 *et seq.* (suspension or revocation of driver license based on criminal conviction).

*Note*: This section includes only those decisions issued since 2001.

## 1. Collateral consequences under federal law

*Descamps v. United States*, 569 US \_\_\_, 133 S Ct 2276 (2013). Defendant was convicted in federal court on a charge of felon in possession of a firearm, and the government sought an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 USC § 924, which requires proof of three previous convictions for, *inter alia*, “a violent felony,” which is defined to include “burglary.” Among defendant’s previous convictions was one entered in California state court, based on his plea of guilty, for the offense of “burglary,” which is defined by state law to include entering certain locations with an intent to commit larceny or “any felony.” Because the state statute does not include as an element either “breaking” or an unlawful entry, the burglary offense is defined broadly enough to include shoplifting. Defendant argued that his conviction for burglary could not be counted as a predicate under the ACCA because the California statute defines the offense too broadly, but the district court overruled that objection after reviewing the record of that case to determine that his offense, in fact, involved “breaking and entering” a business. As a result, the court imposed a significantly longer sentence under the ACCA. The Ninth Circuit, in a split *en banc* decision, affirmed. *Held*: Reversed and remanded. Defendant’s conviction cannot count as a predicate under the ACCA. [1] For a prior conviction to count as one for a “violent felony” under the ACCA, it must have been for the “generic” version of one of the listed offenses. “So, for example, we held that a defendant can receive an ACCA enhancement for burglary only if he was convicted of a crime having the basic elements of generic burglary— *i.e.*, ‘unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.’” [2] Under *Taylor v. United States*, 495 US 575 (1990), the rule for determining when a defendant’s prior conviction counts as one of ACCA’s enumerated predicate offenses (*e.g.*, burglary) requires a “categorical approach”: “Sentencing courts may look only to the statutory definitions—*i.e.*, the elements—of a defendant’s prior offenses, and *not* to the particular facts underlying those convictions. If the relevant statute has the same elements as the ‘generic’ ACCA crime, then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is necessarily guilty of all the generic crime’s elements. But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form.” [3] When the statute defines the offense in alternative language, the court may use the “modified categorical approach”: “it may look beyond the statutory elements to the charging paper and jury instructions used in a case” to determine whether the defendant was convicted of an alternative that would constitute the “generic version” of the listed offense. “For example, if the burglary statute prohibits ‘entry of a vehicle or a building,’ one of those alternatives (a building) corresponds to an element in generic burglary although the other (a vehicle) does not,” in which case resort to the statute alone does not resolve the question. “Because the statute is ‘divisible’—*i.e.*, comprises multiple, alternative versions of the crime—a later sentencing court cannot tell, without reviewing something more, if the defendant’s conviction was for the generic (building) or non-generic (vehicle) form of burglary. Hence *Taylor* permitted sentencing courts, as a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute’s alternative elements formed the basis of the defendant’s prior conviction.” *See also Shephard v. United States*, 544 US 13 (2005). [4] The “generic version” of burglary that applies to the ACCA “requires an unlawful entry along the lines of breaking and entering.” But California’s version “does not, and indeed covers simple shoplifting.” Because California “defines burglary more broadly than the generic offense,” defendant’s burglary conviction “cannot serve as an ACCA predicate. Whether [he] *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not.” [5] “The Ninth Circuit erred in invoking the modified categorical approach to look behind [defendant’s burglary] conviction in search of record evidence that he actually committed the generic offense. The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant’s conviction.”

*Note*: A conviction in Oregon for first- or second-degree burglary presents a problem under this decision. To be sure, ORS 164.215 and ORS 164.225 generally define the offense as a “generic” burglary—*i.e.*, they require an allegation and proof that the defendant “enters or remains unlawfully in a building.” But the definition of “building” in ORS 164.205(1) is far broader than the common-law conception of that term—it also includes “any booth, vehicle, boat, aircraft, or other structure adapted for overnight accommodation of persons or for carrying on business therein.” Consequently, the Ninth Circuit held in *United States v. Mayer*, 560 F3d 948, 958-59 (9<sup>th</sup> Cir 2009), that an unadorned conviction for first-degree burglary under ORS 164.225(1) does not count as a predicate under the “burglary” term in 18 USC § 924(e)(2)(B)(ii). (But the court then went on to hold that the defendant’s prior burglary conviction at issue in that case otherwise met the catch-all definition of “violent felony.” 560 F3d at 960-63.) It appears from the Court’s discussion in *Descamps* of “divisible” statutes that an Oregon prosecutor can avoid the problem that tripped up the Ninth Circuit in

*Mayer* by specifically alleging that the defendant committed the crime in a *real* building. Because the problem identified in *Mayer* is that “building” is defined in overbroad terms for purposes of the “generic” analysis, and because the definition of “dwelling” in ORS 164.205(2) incorporates the term “building,” it may be necessary to allege something more specific than just “building” or “dwelling.”

*Sykes v. United States*, 563 US \_\_, 131 S Ct 2667, 180 L Ed 2d 60 (2011). Defendant pleaded guilty in federal court to a count of felon in possession of a firearm in violation of 8 USC § 922(g)(1), and the court imposed a 15-year mandatory minimum sentence under the Armed Career Criminal Act, 8 USC § 924(e) (“ACCA”) based on finding that he had three previous convictions for a “violent felony,” including a felony conviction in Indiana for vehicular eluding. *Held*: Affirmed. [1] Under the “residual clause” in § 924(e)(2)(B), a conviction for a felony offense defined by state law is a “violent felony” on a “categorical approach” if, as the offense is defined, it “involves conduct that presents a serious potential risk of physical injury to another” and that risk is akin to that presented by one of the enumerated offenses (which include arson and burglary). [2] Because vehicular eluding after being signaled by a police officer to pull over presents a risk that is akin to arson and burglary, it is a “violent felony” (*i.e.*, without examination of the actual facts of the crime). [3] It is not necessary that the offense be “purposeful, violent, or aggressive” in nature to fall within the residual clause—it is enough that it is not a strict-liability offense (such as felony DUII) and requires a culpable mental state more than reckless. [4] Although the state eluding statute also contains an enhanced version of the offense that includes the additional element of creating “a substantial risk of bodily injury to another” that does not mean that the base offense is not sufficient to meet the criteria of a “violent felony.”

*Note*: Under this decision, attempting to elude in violation of ORS 811.540(1)(b)(A) appears to constitute a “violent felony” for purpose of the ACCA.

*McNeill v. United States*, 563 US \_\_, 131 S Ct 2218, 180 L Ed 2d 35 (2011). Defendant pleaded guilty in federal court to a count of felon in possession of a firearm in violation of 8 USC § 922(g)(1), and the court imposed a 15-year mandatory minimum sentence under the ACCA based on finding that he had at least three previous convictions for “a violent felony or a serious drug offense,” including felony convictions in North Carolina between 1991 and 1994 for “drug trafficking,” on which the court had imposed 10-year sentences. *Held*: Affirmed. [1] A state drug offense is a “serious drug offense,” as defined in § 924(e)(2)(A)(ii), if “a maximum term of imprisonment of ten years or more is prescribed by law.” That standard requires examination of state law at the time defendant *committed* the offense, not the sentence prescribed by the current version of the statute. [2] Even though North Carolina reduced the maximum sentence for the “drug trafficking” offense in 1994 to be less than 10 years, that change was prospective only and did not retroactively reduce defendant’s sentences. Consequently, his previous convictions meet the criteria of “serious drug offense.”

*Johnson v. United States*, 559 US \_\_, 130 S Ct 1265, 176 L Ed 2d 1 (2010). Defendant pleaded guilty in federal court to felon in possession of ammunition, and the court imposed an enhanced sentence under § 924(e)(1) of the ACCA (“has three previous convictions” for “a violent felony”) based in part on defendant’s previous conviction in Florida for the offense of simple battery (which was elevated to a felony because of a previous battery conviction). *Held*: Reversed and remanded. [1] The state battery offense is committed if the person intentionally either “causes bodily harm to another” or “touches or strikes another person against [his] will,” and the latter can be committed by any intentional physical contact, no matter how slight. The term “violent felony” in the ACCA includes an offense that “has an element the use ... of physical force against the person of another.” In this context, “physical force” does not have its common-law meaning but rather means *violent* force—*i.e.*, “force capable of causing physical pain or injury to another person.” [2] If the state-court battery conviction is ambiguous because the statute contains an alternative that would not be a “violent felony,” that can be resolved by the “modified categorical approach” allowed by *Shepard v. United States*, 544 US 13 (2005). [3] Because the record of the state conviction does not establish whether defendant was convicted under the “bodily harm” alternative, the sentence is reversed and remanded.

*United States v. Hayes*, 555 US 415, 129 S Ct 1079, 172 L Ed 2d 816 (2009). Under 18 USC § 922(g)(9), it is a federal crime for any person to possess a firearm if he has been convicted of a “misdemeanor crime of domestic violence.” The Fourth Circuit held that a crime constitutes one of “domestic violence” only if the domestic relationship was an essential element of the offense. *Held*: Reversed. Although the “domestic relationship ... must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution,” that relationship “need not be a defining element of the predicate offense.” *Note*: The dissent would have applied the “late antecedent” rule of statutory construction to reach the contrary conclusion.

*Chambers v. United States*, 555 US 122, 129 S Ct 687, 172 L Ed 2d 484 (2009). The Armed Career Criminal Act

mandates a 15-year minimum sentence for a felon who unlawfully possesses a firearm and has three or more previous convictions for a “violent felony,” which is defined to include any crime that “involves conduct that presents a serious potential risk of physical injury to another.” 18 USC § 924(e)(1). The district court held that defendant’s previous state-court conviction for failure to report for weekend jail incarceration imposed on his robbery and battery convictions was akin to escape and hence constituted a “violent felony.” *Held*: Reversed. The standard under § 924(e)(1) is a categorical, rather than case-specific, inquiry whether the felony at issue is one that constitutes a “violent felony.” A failure to report by definition is a crime of “inaction” and hence is not one within the intended scope of “violent felony.”

***Burgess v. United States***, 553 US 124, 128 S Ct 1572, 170 L Ed 2d 480 (2008). In this federal prosecution, the federal district court imposed an enhanced sentence on the defendant’s conviction for conspiracy to possess with the intent to distribute cocaine, under the Controlled Substances Act (CSA), 21 USC § 841(b)(1)(A), which enhances the mandatory minimum sentence for certain drug crimes if the drug offender has a “prior conviction for a felony drug offense.” The petitioner challenged the imposition of that sentence, asserting that, although his prior South Carolina conviction for cocaine possession was punishable by more than one year’s imprisonment, South Carolina classified that offense as a misdemeanor. *Held*: The CSA expressly defines “felony drug offense” in 21 USC § 802(44), to mean any offense “punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country.” That definition does not depend on the particular state’s definition of the term “felony.”

***Begay v. United States***, 553 US 137, 128 S Ct 1581, 170 L Ed 2d 490 (2008). A conviction under New Mexico’s DUII statute is not a “violent felony” for purposes of a mandatory minimum sentence for offenders who unlawfully possess a firearm and have three or more prior convictions for drug crimes or “violent felonies,” under 18 USC § 924(e)(1), the Armed Career Criminal Act (ACCA). A “violent felony” includes any crime punishable by more than one year of imprisonment that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” Although felony DUII convictions may present a serious potential risk of serious physical injury, felony DUII is nonetheless outside the scope of the statute because it is simply “too unlike the provision’s listed examples for us to believe that Congress intended to cover it.” Rather, DUII differs from the listed crimes in at least one key respect: it does not involve purposeful, violent, and aggressive conduct, which “matters considerably” when viewed in the context of the ACCA’s basic purpose, which is to impose a greater sentence on offenders who present a special danger by possessing a gun.

***United States v. Rodriguez***, 553 US 377, 128 S Ct 1783, 170 L Ed 2d 719 (2008). The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence upon felons who unlawfully possess a firearm and have three or more prior convictions for a violent felony or “serious drug offense.” 18 USC § 924(e)(1). Under the statute, a state drug-trafficking conviction qualifies as a “serious drug offense” if “a maximum term of imprisonment of ten years or more is prescribed by law.” In this case, the defendant previously had been convicted of two violent felonies. He also had been convicted three times of state drug offenses that, for first offenses, carried five-year maximum terms, but for “second or subsequent” offenses, carried sentences up to ten years. The district court and the Ninth Circuit concluded that the defendant’s second and third drug offenses were not “serious drug offenses” within the meaning of that term. *Held*: Under a straightforward application of the ACCA, the relevant state “law” prescribes a “maximum term” of 10 years; the increased sentence authorized by the recidivism provision must be considered in determining the maximum term.

***James v. United States***, 550 US 192, 127 S Ct 1586, 167 L Ed 2d 532 (2007). Defendant pleaded guilty to felon in possession of a firearm, 18 USC § 922(g), and he admitted the three prior state-court felony convictions alleged in the indictment, including one for attempted burglary. Defendant argued that he was not subject to the mandatory 15-year sentence under the Armed Career Criminal Act, 18 USC § 924(e), because his attempted-burglary conviction did not constitute a “violent felony” under the Act. The sentencing court disagreed and imposed the enhanced sentence. *Held*: Affirmed. The attempted-burglary conviction falls into the Act’s “residual provision” for crimes that “otherwise involve conduct that presents a serious potential risk of physical injury to another,” § 924(e)(2)(B)(ii). [1] Nothing in the text or legislative history of the Act bars use of a conviction for an attempt crime as a predicate. [2] In determining which offenses constitute a “violent felony” under the Act, “we consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.” [3] As the offense is defined by state law, which requires an overt act directed toward entry of the structure, “attempted burglary presents a risk that is comparable to the risk posed by the completed offense.” And “the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” The risk does not need to be presented in all cases. [4] Defendant is not entitled under *Apprendi* to a jury trial on the issue whether the attempted-burglary offense is a “violent felony” because “the Court is engaging in statutory

interpretation, not judicial factfinding”—“we have avoided any inquiry into the underlying facts of [his] particular offense, and have looked solely to the elements of attempted burglary as defined by Florida law.” Moreover, “we have held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.”

*Gonzalez v. Duenas-Alvarez*, 549 US 183, 127 S Ct 815, 166 L Ed 2d 683 (2007). Petitioner, a resident alien, was convicted in California of aiding and abetting UUV, a felony offense under state law. INS then sought his removal under 8 USC § 1101(a)(43)(G), which provides as a removable offense a “theft offense ... for which the term of imprisonment is at least one year.” The Ninth Circuit barred removal, holding that aiding and abetting a theft is not within the “generic” form of theft for purposes of *Taylor v. United States*, 495 US 575. *Held*: [1] Because state and federal law uniformly treats one who aids and abets a crime to be as guilty as the principal, such conduct falls within the “generic” definition of theft. [2] The fact that California applies a “natural and probable consequences” doctrine for aiding-and-abetting liability does not change the result. That rule is applied in some form in many states and in federal court, and petitioner has not shown that the California version is relatively overbroad in its application. “To find that state law creates a crime outside the generic definition of a listed crime in a federal statute requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct falling outside the generic definition.”

*Lopez v. Gonzalez*, 549 US 47, 127 S Ct 625, 166 L Ed 2d 462 (2006). Petitioner, a resident alien, was convicted in South Dakota for aiding another’s possession of cocaine, a felony offense under state law. INS then sought his removal under 8 USC § 1101(a)(43)(B), which provides as a removable offense an “aggravated felony” such as “illicit trafficking in a controlled substance ... including a drug trafficking crime.” The latter term is defined to include “any felony punishable under the Controlled Substance Act.” *Held*: Even though the offense for which petitioner was convicted is a felony under state law, it does not constitute an “aggravated felony” for purposes of § 1101 because simple PCS is only a misdemeanor under the CSA.

*Gonzalez v. State of Oregon*, 340 Or 452, 134 P3d 955 (2006). Petitioner, a Mexican national, pleaded guilty to PCS and DCS. His counsel advised him that the convictions “may cause” his deportation and exclusion; petitioner did not ask for advice regarding the specific likelihood of deportation, and counsel did not offer such advice. When INS commenced deportation proceeding, petitioner sought post-conviction relief to vacate his convictions. *Held*: Counsel did not provide constitutionally inadequate assistance by not advising petitioner regarding the specific likelihood of deportation. The Oregon Constitution does not require counsel “to attempt to specify the likelihood that the trial court might impose the maximum sentence or the minimum sentence. If the constitution does not require that level of specificity concerning the *direct* consequences of a criminal conviction, we see no constitutional warrant for requiring that level of specificity concerning a *collateral* consequence of a conviction.”

*Guzman v. State of Oregon*, 227 Or App 361, 206 P3d 210 (2009) (*per curiam*). In light of *Gonzalez v. State of Oregon*, 340 Or 452 (2006), the post-conviction court correctly denied the claim by petitioner, an undocumented alien, that his trial counsel provided inadequate assistance by failing to advise him more fully about the possibility of removal when he pleaded guilty to PCS. “Taken as a whole, the advice given petitioner alerted him that he could be deported and did not mislead him as to the probability of that outcome. The evidence showed that petitioner was certain to be deported once he was seized by the Department of Homeland Security, but that there was a possibility that he would be undetected by federal authorities.”

See also *Ramirez v. State of Oregon*, 212 Or App 446, 157 P3d 1290 (2007) (petitioner was adequately advised by his trial counsel, and by his plea petition, that he “may be deported” as a result of the conviction. Given petitioner’s express acknowledgement in his petition, ORS 135.385(2)(d) did not require the trial court to address petitioner specifically concerning that term); *Senda v. Thompson*, 211 Or App 390, 155 P3d 53 (*per curiam*), *on recons*, 212 Or App 706, 159 P3d 355 (2007) (*per curiam*) (same, rejecting claim under Sixth Amendment).

## 2. Collateral consequences under state law

*State v. Sanders*, 343 Or 35, 163 P3d 607 (2007). The requirement in ORS 137.076 that a person convicted of a felony must submit to a blood or buccal sample does not violate Art I, § 9, or the Fourth Amendment.

See also *State v. Brown*, 212 Or App 164, 157 P3d 301 (2007). ORS 137.076, which requires a DNA sampling for persons convicted of a felony or some misdemeanors, does not violate Art I, § 9, or the Fourth Amendment.

*State v. Hirsch / Friend*, 338 Or 622, 114 P3d 1104 (2005). [1] The right to bear arms guaranteed by Art I, § 27, does not deprive the legislature of authority to regulate the possession and use of arms to protect public safety. That

regulatory power allows the legislature to restrict possession and use of weapons by a class of persons that poses an identifiable threat to the public due to their previous commission of serious criminal conduct. [2] ORS 166.270(1), which prohibits felons from possessing firearms, is a valid exercise of legislative authority and does not violate section 27.

**V.L.Y. v. Board of Parole**, 338 Or 44, 106 P3d 145 (2005). In determining that petitioner is a “predatory sexual offender” for purpose of community notification, the board erred under ORS 181.585 in applying a procedure that relied exclusively on a risk-assessment scale that is based solely on the petitioner’s past crimes and excluded consideration of his current behavior and characteristics.

**State v. McNab**, 334 Or 469, 51 P3d 1249 (2002). Based on a crime he committed in 1987, defendant was convicted of first-degree sexual abuse and was sentenced to prison. He was paroled in 1991 and his sentence expired in 1994. He subsequently was convicted of failing to register as a sexual offender in violation of ORS 181.599 (1995). *Held*: Affirmed. Requiring defendant to register as a sexual offender does not impose any significant detriment, restraint, or deprivation on defendant, in violation of the *ex post facto* provision of the Oregon Constitution, nor does it violation the Ex Post Facto Clause of the federal constitution.

**State v. Lhasawa**, 334 Or 543, 55 P3d 477 (2002). Issuance of 90-day exclusion order under Portland’s “prostitution free zone” ordinance was not punishment or “jeopardy” under double-jeopardy provisions of the Oregon and federal constitutions, and prosecution on prostitution charge after issuance of that order is not barred by those clauses.

**State v. Selness/Miller**, 334 Or 515, 54 P3d 1025 (2002). A forfeiture proceeding was brought against defendants’ house under Oregon Laws 1989, chapter 791, and they did not contest. The court dismissed the subsequent and separate prosecution of defendants based on the underlying drug offenses, concluding that the forfeiture constituted punishment and jeopardy under the double-jeopardy clauses. *Held*: Reversed. Although defendants did not entirely waive their right to argue that the forfeiture constituted “jeopardy,” they failed to establish that their prosecution would violate the double-jeopardy provisions of the Oregon and federal constitutions.

**Koenecke v. Lampert**, 198 Or App 444, 108 P3d 653, *rev den*, 339 Or 66 (2005). Petitioner was convicted of felony DWS in 1986, and the court imposed only a fine; the court, however, did not expressly declare the conviction to be only a misdemeanor under ORS 161.705. Based on that DWS conviction, petitioner later was convicted of being felon in possession under ORS 166.270 (1995). He then petitioned for post-conviction relief contending that his counsel in the FIP prosecution should have argued that his conviction for DWS was not a felony but only a misdemeanor by operation of ORS 161.585(2)(b) (1985) due to the sentence imposed. The post-conviction court rejected that claim. *Held*: Affirmed. The exception in ORS 166.270(3)(a), which provides that a prior conviction for a felony offense is not one for a felony for the purpose of the FIP statute if “the court declared the conviction to be a misdemeanor at the time of judgment,” is a reference only to ORS 161.705 and does not apply to a felony conviction on which the court imposed only a minimal sentence.

**State v. Stickney**, 195 Or App 155, 97 P3d 1205 (2004) (*per curiam*), *rev den*, 338 Or 17 (2005). The trial court correctly overruled defendant’s constitutional objections to the mandatory DNA sampling ordered pursuant to ORS 137.076 on his felony conviction for PCS.

**V.L.Y. v. Board of Parole**, 188 Or App 617, 72 P3d 993 (2003), *rev’d on other grounds* 338 Or 44, 106 P3d 145 (2005) (*see above*). Board applied risk-assessment scale set out in Department of Corrections rules in classifying petitioner as a predatory sex offender. *Held*: Petitioner did not present a valid equal-privileges challenge, and his *ex post facto*, double-jeopardy, and cruel-and-unusual-punishment claims have no merit. Because ORS 181.585 applies to an open-ended class, it is not a bill of attainder. Designating petitioner as a PSO does not invade on his constitutional right to privacy.

**State v. Fries**, 186 Or App 564, 63 P3d 1269 (2003) (*per curiam*). Defendant was convicted of MCS within a 1000 feet of a school, and the sentencing court “ordered the forfeiture of 16 firearms that the police found during a search of his residence.” *Held*: Forfeiture order vacated and remanded for resentencing. [1] The record is insufficient to support the forfeiture. [2] Because defendant had agreed as part of the plea agreement that he would pay a \$2,500 fine “if the trial court did not order forfeiture of the firearms,” the proper remedy was to remand for resentencing “so that the court may consider whether to modify the sentence in accordance with that agreement.”

**Meadows v. Board of Parole**, 181 Or App 565, 47 P3d 506 (2002). [1] The “predatory sexual offender” laws do

not violate the *ex post facto* constitutional provisions because they do not impose additional punishment for the underlying crimes. [2] Similarly, petitioner's challenges under the double-jeopardy and cruel-and-unusual-punishment clauses have no merit. [3] Although a parolee has a due-process right to a hearing before being designated a "predatory sexual offender," *Noble v. Board of Parole*, 327 Or 485 (1998), any error in failing to accord petitioner such a hearing is harmless because he was afforded an opportunity to challenge the ruling but failed to do so.

*State v. Branstetter*, 181 Or App 57, 45 P3d 137 (2002). In an animal-neglect prosecution, the trial court entered a pretrial order under ORS 167.347 forfeiting defendant's animals upon his failure to post a bond. Defendant subsequently was acquitted, and he appealed challenging the forfeiture order. *Held*: Affirmed. [1] Defendant's "due process and remedies clause arguments" have no merit. [2] Defendant's claim under the excessive-fines clauses, that his acquittal rendered the forfeiture *per se* unlawful, also has no support.

### 3. Revocation or suspension of driving privileges

*State v. Donovan*, 243 Or App 187, \_\_\_ P3d \_\_\_ (2011). Defendant was charged with DUII in 2008 and applied for diversion. The trial court denied her petition, ruling that her 2004 conviction in New York on the infraction traffic offense of DUII by "driving while ability impaired" rendered her ineligible under ORS 813.215(1)(a)—which disqualifies a DUII defendant from diversion if he or she has been convicted within the previous 10 years of, *inter alia*, an offense in another jurisdiction that: (A) is a "statutory counterpart to ORS 813.010"; (B) a DUII offense "that involved impaired driving of a vehicle due to use of intoxicating liquor"; or (C) "a driving offense ... that involved operating motor vehicle while having a blood alcohol content above that jurisdiction's permissible blood alcohol content." Defendant was convicted and appealed. *Held*: Affirmed. [1] The New York DUII statute is a "statutory counterpart" to Oregon's DUII for purposes of ORS 813.215(1)(a)(A) because it is part of New York's general DUII statute and "the two statutes prohibit substantially the same conduct." [2] "[S]tatutes need not be identical in order to be construed as statutory counterparts; it is sufficient that they have the same use, role, or characteristics." [3] Because ORS 813.010 does not require the statutory counterpart to be a "crime," but only an "offense," defendant's conviction in New York for a "traffic infraction" version of DUII rendered her ineligible for diversion. [4] ORS 813.215(1)(a) (B) and (C) were not intended to narrow the meaning of "statutory counterpart" in subparagraph (A) but were added to expand the disqualification by making variants of impaired-driving offenses in other jurisdictions that are not part of their general DUII statute a ground for denying diversion in Oregon.

*State v. Abbey*, 239 Or App 306, 245 P3d 152 (2010), *rev den*, 350 Or 423 (2011). Defendant was convicted of DUII for a third time, for riding a bicycle while intoxicated. The sentencing court imposed a permanent driver's license revocation under ORS 809.235(1)(b). *Held*: Affirmed. [1] A defendant whose DUII conviction is based on operating a bicycle while under the influence are not exempt from ORS 809.235 even though a driver's license is not required to operate a bicycle. [2] Application of ORS 809.235 to defendant did not deny him equal privileges as an individual or as a member of a class under Art. I, § 20.

*State v. McGuire*, 221 Or App 103, 188 P3d 425 (2008). [1] The permanent revocation mandated by ORS 809.235(1)(b) based on defendant's third conviction for DUII does not violate her rights under the Due Process Clause on a theory that it does not apply equally to drivers with comparable convictions entered in other states. Even though the "right to travel" may, in some situations, be "fundamental," that does not extend to a "right" to have a driver's license. [2] Likewise, the revocation does not violate the Equal Protection Clause or Art I, § 20, because those thrice-convicted for DUII are not a suspect class and it bears a rational relationship to a legitimate state interest.

*State v. Rodriguez*, 217 Or 24, 175 P3d 471 (2007). ORS 809.235(1)(b) (2003), which required permanent revocation "if the person is convicted [of DUII] ... for a third time," applies to the *third or any subsequent* DUII.

*Note*: The 2005 legislature fixed the "third time" problem by expressly requiring permanent revocation upon conviction for the "third or subsequent time."

*State v. Roberts*, 216 Or App 238, 172 P3d 651(2007). Defendant appealed the judgment imposed on her conviction for DUII, challenging the trial court's order suspending her driving privileges for three years. She argued that the court erroneously considered her prior Idaho conviction in calculating the suspension period under ORS 809.428(2), which prescribes suspension periods based on the number of "offense[s]." Defendant asserted that the term "offense" refers only to *Oregon* offenses, and thus argued that the court should have imposed only a one-year suspension, rather than a three-year suspension. *Held*: Affirmed. The term "offense" includes out-of-state offenses. As long as the conduct underlying the out-of-state conviction is "substantially similar" to what would constitute an Oregon DUII, it is a DUII

“offense” within the meaning of ORS 809.428(2).

*State v. Terry*, 214 Or App 56, 162 P3d 372 (2007). ORS 809.235(1)(b) does not violate Art I, § 20, by requiring a permanent revocation of driving privileges upon a third conviction for DUII under ORS 813.010, despite defendant’s contention that it discriminates unfairly on the basis of residence (by excluding residents of other states). “The statute distinguishes on the basis of where the person committed the offense, not on the basis of where the person who committed the offense resides.” Moreover, because defendant committed the offense on which the revocation is based, he is responsible for placing himself in the disadvantaged class.

*State v. Vasquez-Escobar*, 211 Or App 115, 153 P3d 168 (2007). Defendant pleaded guilty to a DUII that he committed in 2003, and the sentencing court permanently revoked his driving privileges per ORS 809.235(1)(b) based on his two prior DUII convictions (1996, 1997). Defendant claimed that the revocation constituted *ex post facto* punishment because he committed his current DUII offense before January 1, 2004, the date the statute took effect. *Held*: Affirmed. Because the mandated revocation is remedial or regulatory, it is not punishment with scope of either the state or federal *ex post facto* clause.

## G. CAP ON SENTENCE IMPOSED ON MISDEMEANOR CONVICTION

*See* Or Laws 1989, ch 790, § 51, *as amended by* Or Laws 1991, ch 830, § 9, *as amended by* Or Laws 1993, ch 692, § 10, *as amended by* Or Laws 1995, ch 520, § 5 (*quoted after* ORS 161.615). The 1997 Legislative Assembly did not extend this statute for another 2-year term, so it was repealed on November 1, 1997.

*State v. Galvin*, 152 Or App 275, 954 P2d 800 (1998). [1] The sentencing court erred in imposing a 12-month jail term as a condition of probation on defendant’s conviction for the class A misdemeanor hit-and-run offense. The maximum term of imprisonment for such an offense was one year if the court made findings of substantial and compelling reasons; otherwise, it was only six months. Or Laws 1989, ch 790, § 51 (reenacted in 1991, 1993, and 1995). Because the maximum jail term that may be imposed as a condition of probation is one-half of the maximum jail term that may be imposed as a straight sentence, ORS 137.540(2), the maximum jail term that the court may impose as a condition of probation for this offense would be only 6 months if the court made findings of substantial and compelling reasons, or three months if the court did not. [2] The 6-month jail term imposed as a condition of probation on defendant’s DUII conviction was lawful, because section 51 does not apply to DUII convictions.

*Note*: As of November 1, 1997, there is no longer a 6-month presumptive limitation on sentences for class A misdemeanors, because the limitation, originally enacted by the 1989 legislature, contained a sunset clause, which was not extended by the 1997 legislature.

*State v. Plourd*, 121 Or App 557, 855 P2d 1138 (1993): The 6-month jail cap for class A misdemeanor convictions imposed by Or Laws 1989, ch 790, § 51, *as amended by* Or Laws 1991, ch 830, § 9, does not apply to misdemeanor convictions for attempted second-degree sodomy or second-degree sexual abuse (under former statute).

*State v. Christman*, 115 Or App 364, 838 P2d 1087 (1992): Because defendant failed to preserve the objection, appellate court would not review claim that 1-year sentence imposed on misdemeanor conviction was error under Or Laws 1989, ch 790, § 51, *as amended by* Or Laws 1991, ch 830, § 9, due to fact that the sentencing court failed to make findings of “substantial and compelling reasons.”

*State v. Sellberg*, 113 Or App 378, 832 P2d 1269 (1992) (*per curiam*): Under Or Laws 1989, ch 790, § 51, *as amended by* Or Laws 1991, ch 830, § 9, the maximum sentence for most class A misdemeanors is capped at 6 months unless the “judge finds substantial and compelling reasons to impose a longer term.” Consequently, if the court suspends imposition of sentence on a conviction for a class A misdemeanor subject to the cap, and it places the defendant on probation, the most jail time that the court can order as a condition of probation pursuant to ORS 137.540(2)(a) is 3 months, unless the court makes the required findings at that time.

## H. CONTEMPT PROCEEDINGS

*Note*: This section contains only those decisions relating to the disposition on a contempt finding.

*State v. Quade*, 252 Or App 577, 287 P3d 1278 (2012) (*per curiam*). For several years, defendant failed to pay \$17,000 in restitution and related costs, failed to appear in court, and disobeyed court orders. He pleaded guilty to four counts of contempt of court based on that misconduct. The court entered misdemeanor convictions and imposed unitary assessments and misdemeanor surcharges on each conviction. *Held*: Reversed and remanded. The sentencing court erred, because contempt of court is not a criminal conviction, and the court lacked the authority to impose assessments and surcharges associated with criminal convictions.

*State v. Spainhower*, 251 Or App 25, 283 P3d 361 (2012). In May 2009, a jury returned a verdict finding defendant guilty on a harassment charge. When defendant vehemently objected that the verdict was an “injustice” despite the trial court’s direction to him to be quiet, the court found him in direct contempt. But the court did not impose a sanction immediately because it granted him a new trial on the charge. When the case was retried in February 2010, defendant was acquitted. The court then imposed a sanction on the contempt finding pursuant to ORS 33.096. *Held*: Reversed.

[1] “Although the direct-contempt power is inherent, ORS 33.096 governs the exercise of that power by Oregon courts. ORS 33.025(1). ORS 33.096 maintains intact the decades-old rule that the authority of the court to punish a contempt summarily—that is, by court order without presentation of an accusatory instrument or affidavit—exists only if the offender commits the contempt in the immediate view and presence of the court.” [2] “Because the justification for the summary imposition of a direct contempt sanction depends on the need to preserve order in the court or protect the authority and dignity of the court, the court’s inherent power is, necessarily, both functionally and constitutionally, subject to a temporal constraint. Consequently, although some delay is circumstantially permissible—*e.g.*, when the court believes that the exigencies of a trial require it—the court is obligated to act at the first reasonable opportunity. That is, ultimately, the limiting temporal principle: The court must impose any sanction at the first reasonable opportunity, usually at or before the end of trial.” [3] Although it “may have been convenient for the court to sanction defendant for the contempt and to sentence him on the underlying harassment charge at the same time,” waiting so long to impose the sanction violated ORS 33.096. “In view of the temporal limitations on a court’s inherent power . . . to resort to summary contempt proceedings, that is not a sufficient reason for such a long delay.”

*State v. Hauskins*, 251 Or App 34, 281 P3d 669 (2012). Defendant was on probation for drug offenses. When his urine tested positive for a controlled substance, he “confessed” to his probation officer: “Yes, I used.” In addition to alleging a probation violation, the state charged him with punitive contempt. When the state did not offer the urinalysis test result as substantive evidence, defendant argued that the state had not submitted sufficient evidence to corroborate his confession in accordance with the *corpus delicti* rule in ORS 136.425(1). The court found him in violation and in contempt. While the case was on appeal, defendant completed serving the jail sentence imposed on his contempt adjudication. *Held*: Reversed. Even though defendant had completed serving the sentence, the case was not moot. A punitive contempt, like a criminal conviction, results in a stigma, which constitutes a collateral consequence that prevents the case from being moot. *Distinguishing SER State of Oregon v. Hawash*, 230 Or App 427 (2009).

*State v. Campbell*, 246 Or App 683, 267 P3d 205 (2011) (*per curiam*). Defendant was found in contempt for violating a pretrial-release order. He appealed arguing that because contempt is not a crime, the trial court erred in denying his motion to dismiss the charging instrument and in convicting him of a misdemeanor. *Held*: “Reversed and with instructions to enter a judgment finding defendant in contempt of court.” Although contempt is not a crime, “the appropriate remedy was not dismissal of the indictment but rather ‘entry of a judgment that does not characterize contempt of court as a criminal conviction.’”

*State v. Reynolds*, 239 Or App 313, 243 P3d 496 (2010). After making a finding of punitive contempt, the trial court overruled defendant’s objection to the use of the standard form judgment, which reflected entry of a judgment of a “misdemeanor” conviction. *Held*: Reversed and remanded. Contempt is not a crime, and the judgment should not reflect a conviction for a crime or that a “sentence” was imposed thereon.

See also *State v. Lewis*, 240 Or App 430, 247 P3d 328 (2011) (*per curiam*) (court erred when it entered a “judgment of conviction” on defendant’s adjudication for contempt of court with a corresponding entry of a “firearm notification”).

## I. IMPOSITION OF CONDITIONS OF CONFINEMENT

*State v. Rubio/Galligan*, 248 Or App 130, 273 P3d 238, *rev den*, 352 Or 107 (2012). Defendants knew that the victim had \$2,600 in cash on him, so they armed themselves with a hammer and a loaded pistol, went to the victim’s motel room, pushed their way into the room, and unsuccessfully attempted to rob him. Defendants were found guilty of first-

degree burglary, first-degree robbery, and third-degree assault. *Held*: Convictions affirmed, remanded with directions to enter a corrected judgment. [1] The trial court committed plain error when it imposing a condition in the judgment that the defendants not contact the victim during their prison term. Because defendants were sentenced to prison, only the Corrections Division and the parole board have authority to impose such a condition during incarceration or post-prison supervision. [2] But the court denied defendants' request for "a full resentencing": "Because the only error was the inclusion of terms in the judgments that the trial court had no authority to impose, the appropriate remedy is to remand with instructions to delete the erroneous terms from the judgments."

*State v. Langmayer*, 239 Or App 600, 244 P3d 894 (2010) (*per curiam*). Defendant was convicted of assault in the second degree, and the sentencing court advised him that it intended not to impose a "Measure 11 sentence" on the condition that he not have any contact with the victim, his wife. But the written judgment imposed a minimum sentence per Measure 11 and ordered that defendant "shall have no contact with victim during period of incarceration." *Held*: Reversed and remanded. [1] The "no contact" order exceeded the scope of the court's authority because "only the Department of Corrections may impose a condition of incarceration." [2] The court rejected the state's argument that the "no contact" order was merely a proposed recommendation. "In determining a trial court's intention, we look to the signed judgment and no to in-court statements," and the judgment unambiguously imposes "an imperative."

## J. CONTINUANCE OF SENTENCING PROCEEDING

*State v. Dawson*, 252 Or App 85, 284 P3d 1272 (2012). Defendant was found guilty of DUII and reckless driving, and he requested a two-day delay before sentencing. The trial court denied that request, ruling that there was no authority that required it, and immediately proceeded to sentencing. On appeal, the state conceded that ORS 137.020(2) entitled defendant to the requested delay, but argued that the error was harmless because he did not challenge the sentence imposed or argue that he was prejudiced by the trial court's refusal to grant his request for the delay. *Held*: Remanded for resentencing. [1] "A trial court has a duty to pass sentence in accordance with the pertinent sentencing statutes, ORS 137.010(1), and a sentence's validity is determined solely by how well it comports with those statutes." But "the court's failure to comply with the sentencing statutes does not require reversal and remand for resentencing unless the error 'prejudiced the defendant in respect to a substantial right.' See ORS 131.035." [2] To determine whether the trial court's failure to allow a sentencing delay, the court examined "the record in light of the nature and purposes of the statutory right." Although the record does not indicate that the trial court would have imposed a different sentence if defendant had more time to prepare for sentencing, there is "another, more subtle, purpose" behind the two-day waiting period: "to create a measure of distance between the sentencing proceeding and the momentum to pronounce final judgment that often exists in the wake of a criminal trial." [3] "That concern is manifest in this case. The trial judge here acknowledged that the case had an emotional impact on him, and the lack of waiting period denied defendant the substantial right of having a "deliberate and carefully considered pronouncement of judgment."

*State v. Easter*, 241 Or App 574, 249 P3d 991 (2011). Defendant was charged with second-degree theft and interfering with a police officer. He is a prolific criminal, with 27 arrests and 15 property-crime convictions since 1996. The court appointed counsel to represent him, and that attorney also represented him in two other pending cases. The case went to trial before a jury. Defendant actively participated in the case, often making his own objections, ensuring the admission of exhibits, and raising various issues with the court. After the state presented closing argument, he moved to fire his attorney and present his own closing argument. The trial court did not engage in the preferred colloquy with defendant, as described in *State v. Meyrick*, 313 Or 125, 132 (1992). The trial court did tell him that firing his attorney was "a very bad move" and warned him about some of the pitfalls he could face without an attorney. The trial court appointed the attorney to act as his advisor, and granted his request to present his own closing argument. The jury convicted him. The attorney continued to appear at numerous sentencing hearings. Sentencing was postponed three times, primarily to address defendant's mental health issues. At the third hearing, counsel informed the court that defendant had obtained the funds to hire private counsel, as defendant had told the court he wanted to do. At the fourth sentencing hearing, counsel notified the court that defendant had told him he was no longer to appear on his behalf. More than a month later, defendant appeared *pro se* at the fifth sentencing hearing. He asked the trial court to appoint a new attorney. The court denied that request, and proceeded to impose sentence. *Held*: Affirmed. [1] Defendant knowingly waived his right to counsel under Art I, § 11, and the Sixth Amendment. [2] The issue raised at sentencing concerned whether the trial court abused its discretion by refusing to allow another continuance, not whether the trial court abused its discretion by denying defendant counsel. The court noted that defendant had caused his own problem by firing his attorney and by failing to hire private counsel even though he had the funds to do so. It also noted that nearly four months had passed since defendant's trial and that sentencing had been rescheduled five times at defendant's request. Under the circumstances, the trial court did not abuse its discretion by failing

to grant defendant another continuance.

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## XV. APPEAL AND COLLATERAL CHALLENGES

### A. APPEALABILITY

*See* ORS 138.020 *et seq.*

*State v. Cloutier*, 351 Or 68, 261 P3d 1234 (2011). Defendant pleaded no contest to DUII and the court imposed a \$1,100 fine, which exceeds the \$1,000 minimum fine, ORS 813.010(6)(a), but is within the statutory maximum for DUII. The court explained that the increase was based on the fact that defendant had pleaded no-contest, rather than pleading guilty, when he entered diversion. Defendant appealed, arguing that the court violated his Due Process rights by considering his no-contest plea at sentencing. The state moved to dismiss, arguing that ORS 138.050 bars such a challenge. The Court of Appeals denied that motion, and the state petitioned for review. *Held*: Appeal dismissed. Under ORS 138.050(1), a defendant who pleads guilty or no contest may appeal only if the sentence “exceeds the maximum allowable by law” or “is unconstitutionally cruel and unusual.” Because defendant did not argue that the fine is “cruel and unusual,” the only issue was whether it “exceeds the maximum allowable by law.” The court held that that clause does not allow review of a claim that the sentencing court committed a constitutional violation—the legislature intended that clause to allow an appeal only when the defendant asserts that the sentence imposed exceeds the *statutory* maximum. Because defendant did not contend that his \$1,100 fine exceeded the maximum fine allowed by statute, the appellate courts lack jurisdiction to consider his claim based on the Due Process Clause.

*State v. Harding*, 347 Or 368, 223 P3d 1029 (2009). The circuit court, pursuant to ORS 138.083, entered a corrected judgment on June 28. Defendant, who was incarcerated in OSCI, attempted to appeal from that judgment by sending a notice of appeal to the Court of Appeals by first-class mail. He delivered the notice to prison authorities on July 28 (the 30th day after the judgment was entered) for mailing to the court, but the notice did not actually arrive at the court for filing until August 2 (the 35th day). *Held*: Appeal dismissed because defendant’s notice of appeal was untimely. [1] With a few exceptions not applicable in this case, ORS 138.071(4) requires a party to file a notice of appeal within 30 days after entry of a corrected judgment, and that requirement is jurisdictional. Although ORS 19.260(1) provides that a notice of appeal is timely if the party mails it by the 30th day, that exception applies only if the notice “is mailed by registered or certified mail” with proof of the date of mailing, and defendant did not comply with that requirement. [2] To the extent that ORAP 1.35(4) (which provides that a document is “deemed filed in the appellate court” on the day an incarcerated party delivers it to prison authorities to be mailed to the court for filing) permits an incarcerated party to file a document *pro se* by giving it to prison authorities for mailing by the due date, that rule cannot be applied to render timely a notice of appeal that was sent by first-class mail, because the statutes expressly provide that such a notice must be mailed by registered or certified mail by the due date in order to be timely. “[W]here there is an inconsistency between a statute and a rule ... the statute must govern.”

*State v. Hess*, 342 Or 647, 159 P3d 309 (2007). Defendant was charged with felony public indecency, ORS 163.465. Prior to trial, he stipulated to his prior public-indecency convictions and the court, over the state’s objection, removed the prior-convictions element from the jury’s consideration. The state appealed. *Held*: The order is appealable under ORS 138.060(1)(c) because it effectively excluded evidence from the jury. The state is prejudiced, because unless the ruling is correct, it is being deprived of its right to a jury trial under ORS 136.001.

*State v. Branstetter*, 332 Or 389, 29 P3d 1121 (2001). Defendant was charged with first-degree animal neglect. Before trial, the Humane Society filed a petition pursuant to ORS 167.347(1) seeking to forfeit defendant’s animals. The court found that there was probable cause to forfeit the animals and ordered the defendant to post a \$2,700 bond. When the defendant failed to post the bond, the animals were forfeited. The defendant was acquitted of all criminal charges, and he then appealed the forfeiture order. The Court of Appeals dismissed defendant’s appeal holding that the forfeiture order was not appealable. *Held*: Reversed and remanded. Although the criminal case and the forfeiture case shared the same case number, the forfeiture proceeding was separate and distinct from the criminal action. Pursuant to ORS 19.205(4), the forfeiture proceeding is a “special statutory proceeding,” and may be appealed.

*State v. Mullins*, 352 Or 343, 284 P3d 1139 (2012). In February 2009, defendant was convicted on assault

charges, and the court entered a judgment that included a statement that he will pay restitution “in an amount to be determined as ordered and pursuant to ORS 137.106(1)(b).” Defendant filed a notice of appeal. In July, the state moved for an “amended” judgment and requested \$2,604 in restitution. Without a hearing, the court entered a supplemental judgment that included that amount of restitution. Neither defendant, his trial counsel, or his appellate counsel received notice of the amended judgment. In November 2009, defendant’s trial counsel received notice of the supplemental judgment. In March 2010, defendant’s appellate counsel found out about the supplemental judgment and filed an amended notice of appeal, and then filed an appellate brief assigning error to the supplemental judgment. The state moved to dismiss the amended notice of appeal because defendant’s amended notice of appeal was not timely under ORS 138.071(4). The Court of Appeals affirmed original judgment and, relying on *State v. Fowler*, 350 Or 133 (2011), dismissed defendant’s attempted appeal from the supplemental judgment. *Held*: Affirmed. [1] Because ORS 138.071(4) states that the 30-day appeal period commences when the defendant “receives notice” of entry of the supplemental judgment, “the legislature intended that a defendant receive actual rather than constructive notice of entry of the supplemental judgment. In other words, the legislature contemplated that (a) some person or entity would provide the defendant with the notice in question (that is, that entry of a qualifying judgment had occurred); and (b) the defendant need not act to preserve the time for appeal until receiving that notice. Entry of the supplemental judgment in the register would not alone be sufficient to trigger the 30-day appeal period... It follows that a defendant is not deemed to receive that notice by virtue of its entry and is not independently obligated to determine the date or fact of entry of a supplemental judgment under ORS 138.083 to preserve the time for appeal.” [2] “It follows as a textual and contextual matter that, in referring to notice received by ‘the defendant,’ ORS 138.071(4) includes notice received by the defendant’s counsel in the case.” [3] The term “notice received by ‘the defendant’” included notice received by defendant’s trial counsel and, therefore, that trial counsel’s receipt of notice of entry of the supplemental judgment sufficed to trigger the 30-day appeal period. [4] “Defendant’s trial counsel received notice of the entry of the supplemental judgment in November 2009, at a time when that counsel continued to serve as attorney of record for defendant in the trial court proceeding. Therefore, trial counsel was serving as defendant’s agent on that date. Given the wording [in] ORS 138.071(4), ... trial counsel’s receipt of notice of entry of the supplemental judgment amounted to notice received by ‘the defendant’ under ORS 138.071(4) that that judgment had been entered and, therefore, that the 30-day appeal period began to run as of the date of trial counsel’s receipt of that notice. The amended notice of appeal that incorporated the supplemental judgment, filed in March 2010, therefore was not timely filed.”

*State v. White*, 255 Or App 560, 298 P3d 50 (2013). Defendant was convicted of assault in the fourth degree and the court imposed, by supplemental judgment, restitution in the amount of \$1,337.27. On appeal, he challenged the restitution on grounds that the amount and nature of the victim’s economic damages had not been proved prior to the time of sentencing. The Court of Appeals dismissed his appeal, ruling that failed to timely file notice of appeal from supplemental judgment. After the Supreme Court decided *State v. Mullins*, 352 Or 343 (2012), it remanded this case to the Court of Appeals for reconsideration. 352 Or 665 (2012). *Held*: Reversed and remanded. In light of *Mullins*, defendant’s notice of appeal was timely even though the supplemental judgment was entered on February 24, 2010, and defendant did not file an amended notice of appeal from that judgment until July 14, 2010. The notice was timely under ORS 138.071(4) because defendant and his trial and appellate counsel did not become aware of entry of the supplement judgment until June 30, 2010.

*State v. Landahl*, 254 Or App 46, 292 P3d 646 (2012), *rev den*, 353 Or 787 (2013). Defendant was charged with DUII and pleaded no contest in order to enter into diversion. The diversion agreement provided that the charge would be dismissed if he completed diversion and that, if he failed to complete diversion, a conviction would be entered based on his plea. Later, defendant moved to terminate diversion and dismiss the charge, asserting that he had completed diversion, and the court granted the motion. Shortly thereafter, the district attorney discovered that defendant had another DUII charge pending and moved to set aside the dismissal. The trial court granted the motion to set aside, terminated diversion, entered a DUII conviction, and imposed a probationary sentence. Defendant appealed and asserted only a claim that the trial court erred when it set aside the dismissal and entered a judgment of conviction; he did not challenge the sentence. *Held*: Appeal dismissed. [1] A defendant who has pleaded guilty or no contest may appeal under ORS 138.050 only when he “makes a colorable showing that the disposition” exceeds the maximum allowable by law or is unconstitutionally cruel and unusual. For purposes of ORS 138.050, “disposition” refers to the types of dispositions listed in ORS 138.053(1). [2] Under that statute, and in light of *State v. Cloutier*, 351 Or 68 (2011), entry of a conviction is not a “disposition.” [3] The Court of Appeals does not have jurisdiction over defendant’s appeal pursuant to ORS 138.050 because he challenges only the entry of the conviction itself and does not challenge the sentence imposed on his conviction.

*State v. Sager*, 249 Or 252, 274 P3d 890 (2012) (*per curiam*). In 2001, defendant was convicted on several charges of assault, and those convictions were affirmed in 2005. In 2009, he filed motions under ORS 137.754 to correct the judgments, but the trial courts denied his motions. He appealed. *Held*: Appeals dismissed. For the reasons discussed in

*State v. Hart*, 188 Or App 650, *rev den* (2003)—in which the court held that an order denying a motion to amend the judgment under ORS 138.083(1) is not appealable—the courts’ denial of a defendant’s motions to correct the judgments are not appealable because they left the original conviction and sentence “untouched.”

*State v. White*, 246 Or App 329, 264 P3d 1291 (2011). The court entered a judgment on December 10, 2009, that stated, pursuant to ORS 137.106, that defendant would be required to pay restitution in an amount “to be determined.” Defendant appealed from that judgment. On February 24, 2010, the court entered a supplemental judgment imposing restitution. On July 14, 2010, defendant filed an amended notice of appeal citing the February 23 supplemental judgment. Defendant’s appellate counsel asserted that the amended notice was timely under ORS 137.071(4) because he had just become aware of it. *Held*: Appeal from supplemental judgment dismissed. [1] Under *State v. Fowler*, 350 Or 133 (2011), defendant’s failure to timely file notice of appeal from the supplemental judgment imposing restitution deprived the appellate court of jurisdiction over that judgment. [2] The fact that defense counsel may not be served promptly with a signed copy of a supplemental judgment and so “must check with the court or access the court’s computerized database” is not a valid excuse for a default in failing to file a timely notice of appeal.

*State v. Coleman*, 246 Or App 84, 265 P3d 39 (2011), *rev den*, 352 Or 25 (2012). In June 2007, defendant pleaded guilty to identity theft. In October 2007, the court entered an amended judgment per ORS 138.083 based on defendant’s motion. In January 2009, the state and the defense counsel stipulated to entry of a second amended judgment to correct another clerical error, which resulted in a longer prison term. Defendant already had been released from prison and objected to having to serve more time, so she hired new counsel and filed a motion in March 2009 asking the court to vacate the second amended judgment on the ground that she had not been informed of its entry and hence did not have an opportunity to object. The court concluded that the second amended judgment was correct, and so it denied defendant’s motion, but it entered an order in June 2009 purporting to re-impose the same judgment in order to allow defendant to challenge that ruling on appeal. Defendant appealed from the June 2009 order, and the state moved to dismiss relying on *State v. Hart*, 188 Or App 650 (2003). *Held*: Appeal dismissed. [1] The June 2009 order did not modify or set aside the January 2009 in any respect, and “a trial court lacks the authority to simply re-enter an earlier, appealable judgment in order to artificially extend a party’s time to appeal.” [2] Because defendant’s counsel stipulated to entry of the January 2009 judgment, her complaint that she “was not personally notified of the amended judgment” does not provide her an exemption from that rule. *Distinguishing State v. Ainsworth*, 346 Or 524 (2009). [3] An order denying a motion under ORS 138.083(1) to amend a judgment is not appealable. Because defendant’s notice of appeal was not timely as to the January 2009 amended judgment, her attempt to appeal from the June 2009 order does not provide the Court of Appeals with jurisdiction.

*State v. Bowers*, 234 Or App 301, 227 P3d 822, *rev den*, 348 Or 621 (2010). Defendant pleaded guilty to three counts of abuse of a memorial based on his destruction of three separate items in a cemetery, the court entered separate convictions, and defendant appealed. *Held*: [1] Defendant’s challenge to the entry of separate convictions was reviewable on appeal under ORS 138.050(3) because if the convictions should be merged then the disposition exceeds the maximum allowable by law. [2] The Court of Appeals refused to consider—to establish “sufficient pause” under ORS 161.067(3)—evidence that was proffered by the prosecutor at sentencing that the items were a significant distance apart, because the sentencing court excluded that evidence and the state did not cross-assign error to that ruling on appeal.

*State v. Portis*, 233 Or App 256, 225 P3d 841, *rev dism’d as moot*, 348 Or 559, 236 P3d 718 (2010). Defendant cannot appeal from a supplemental judgment denying her request for eligibility for additional earned-time credits pursuant to HB 3508 (2009).

*State v. Harding*, 222 Or App 415, 193 P3d 1055 (2008), *adh’d to on recons*, 225 Or App 386, 202 P3d 181, *app dism’d on other grounds*, 347 Or 368, 223 P3d 1029 (2009) (*see above*). Although the *denial* of a motion filed under ORS 138.083 is not an appealable order, defendant’s ORS 138.083 motion resulted in an amended judgment, which is appealable.

*State v. Shank*, 206 Or App 280, 136 P3d 101 (2006). [1] A limited judgment entered in criminal action requiring defendant, per ORS 151.487 to contribute \$127 toward the cost of her court-appointed counsel is appealable under ORS 19.205(5) as an order entered in a special statutory proceeding. [2] The appeal is not subject to the \$250 limit in ORS 19.205(4). [3] But the public defender does not have authority to represent the defendant in such an appeal.

*State v. Ristick*, 204 Or App 626, 131 P3d 762 (2006). Defendant pleaded no contest to two counts of aggravated theft in 1995 for defrauding an elderly victim. He failed to appear for sentencing and was not recaptured and returned for

sentencing until 2004. He appealed asserting *Blakely*-based challenges to his sentence. *Held*: Appeal dismissed under the “former fugitive” rule, because the state’s ability to prove the aggravating facts under SB 528 has been compromised by the 8-year delay, and hence a resentencing would reward him for his flight.

*State v. Easton*, 204 Or App 1, 126 P3d 1256, *rev den*, 340 Or 673 (2006). Pursuant to parties’ stipulation, the court orally imposed consecutive sentences on convictions entered in two cases, but the written judgments failed to include the consecutive-sentence order. Later, the court entered an amended judgment in one case, pursuant to ORS 138.083(1), to add the consecutive-sentence order, and defendant appealed. *Held*: The amended judgment is appealable and reviewable under ORS 138.050(1) to determine whether it includes a disposition that was not imposed consistently with statutory requirements. Because defendant contends that the sentencing court lacked jurisdiction to amend the judgment, ORS 138.222(2)(d), which bars review of a stipulated sentence, does not preclude review of his claim.

*State v. Roy*, 198 Or App 209, 108 P3d 88 (2005). Pursuant to a plea agreement, defendant pleaded guilty and the court placed him on probation with the caveat that any violation would trigger an automatic revocation and a 16-month prison sentence. When defendant later violated a condition, however, the court nonetheless continued his probation, and the state appealed from that order. *Held*: Appeal dismissed. [1] ORS 138.060(1)(e) does not permit a state’s appeal from a post-judgment order that continues probation. [2] ORS 138.222(7) does not itself confer jurisdiction but only defines the scope of appellate review.

*State v. Anderson*, 197 Or App 193, 104 P3d 1175, *rev den*, 338 Or 583 (2005). Defendant was convicted of second-degree robbery based on her plea of guilty, and the sentencing court rejected her request for a departure under ORS 137.712 and imposed the mandatory 70-month sentence. She appealed contending that the sentencing court erred in ruling that she was disqualified from a departure. *Held*: Appeal dismissed. Because defendant was not entitled to a lesser sentence even under her argument, if the court erred, “that error deprived defendant only of an opportunity to be considered for a sub-minimum sentence; it did not expose her to a sentence that exceeded the legal maximum.” Consequently, her claim of error is not reviewable under ORS 138.050(3) and “we lack jurisdiction to consider it.”

*State v. Stubbs*, 193 Or App 595, 91 P3d 774, *rev den*, 337 Or 669 (2004). [1] In construing a statute, “context includes related statutes, as well as prior versions of the statutes.” [2] When the defendant is convicted on a plea of guilty or no contest, ORS 138.050(1) limits his right to appeal and requires that his appeal be dismissed if he does not assert a challenge that is within the scope of that provision. [3] To be appealable under ORS 138.050(1), defendant must show that the “disposition” either is unconstitutionally cruel and unusual or exceeds the maximum allowable by law because it was not “imposed consistently with statutory requirements.” [4] Defendant’s claim that the sentencing court lacked authority under ORS 138.083 to vacate the original sentence and impose a longer “corrected” sentence is within the ambit of ORS 138.050(1). The court denied the state’s motion to dismiss his appeal.

*State v. Hart*, 188 Or App 650, 72 P3d 671, *rev den*, 336 Or 126 (2003). An order denying a motion under ORS 138.083(1) to enter a corrected judgment is not an appealable order.

*Pruett and Pruett*, 185 Or App 669, 60 P3d 1094 (2002), *rev den*, 335 Or 443 (2003). The Court of Appeals dismissed defendant’s appeal from judgment of contempt because he consistently failed to report to serve the jail term imposed in the judgment, even though he did disappear and his default otherwise did not come within the scope of ORAP 8.05(3). “An appellant’s failure voluntarily to surrender to custody or report to supervision as required by a judgment under appeal or a conditional release agreement is a sufficient ground for this court to exercise its discretion to dismiss the appeal.”

*State v. Christopherson*, 159 Or App 428, 978 P2d 1039, *rev den*, 329 Or 126 (1999). The sentencing court imposed sentence and entered judgment on April 4. On April 8, the court entered an amended judgment to correct an arithmetic error in the costs portion of the judgment. Defendant filed his notice of appeal on May 6. *Held*: The Court of Appeals *sua sponte* dismissed the appeal. [1] The 30-day time limitation in ORS 138.071(1) is jurisdictional. [2] The entry of an amended judgment to correct a “clerical error” does not extend the time within which a party must file a notice of appeal from the original judgment unless the modification either (a) materially alters the party’s rights or obligations or (b) creates a right of appeal that the party did not have under the original judgment. [3] The amended judgment in this case merely corrected an arithmetic error; it did not materially affect defendant’s rights or create a right of appeal.

*State v. Balukovic*, 153 Or App 253, 956 P2d 250 (1998): Defendant pleaded guilty and entered into a

probationary “deferred sentencing program” (DSP). The sentencing court later found him in violation of the DSP conditions, revoked his probation, and imposed sentence, and defendant appealed contending only that the court erred when it revoked his probation. *Held*: Appeal dismissed. This appeal is governed by ORS 138.050(3), which limits appellate review only to whether the disposition imposed exceeds the maximum allowable. Defendant’s claim of error is not reviewable under ORS 138.053(1)(e), because that provision is limited to post-judgment orders revoking probation. (*Note*: Although this case involved only misdemeanor convictions, the same result should apply to a felony conviction.)

*State v. Hopkins*, 112 Or App 458, 829 P2d 97 (1992): Appellate court has jurisdiction under ORS 138.222(7) to review state’s appeal challenging downward departure.

*State v. Schuh/Hookie*, 112 Or App 362, 829 P2d 1040, *rev den*, 314 Or 176 (1992): ORS 138.222(7) grants the appellate court jurisdiction over a state’s appeal from a judgment imposing “optional probation” under the guidelines.

*State v. Cook*, 108 Or App 576, 816 P2d 697 (1991), *rev den*, 312 Or 588 (1992): Defendant may appeal pursuant to ORS 138.222(7) from a judgment that imposes a presumptive sentence, even though the challenge asserted to the sentence is not reviewable.

## **B. REVIEWABILITY ON APPEAL**

### **1. Appellate review of presumptive sentence under ORS 138.222(2)(a) to (c)**

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): The state was entitled to mandamus relief based on claim that sentencing court erroneously refused to impose Measure 11 sentence and imposed shorter presumptive sentence instead, because ORS 138.222(2)(a) barred the state from obtaining review of that claim on direct appeal.

*Note*: The 1997 Legislative Assembly effectively overruled *Sawyer* on that point by amending ORS 138.222 to provide that, in any appeal, the appellate court may review a claim that “[t]he sentencing court erred in failing to impose a minimum sentence that is prescribed by ORS 137.700 or 137.707.” Or Laws 1997, ch 852, § 9.

*State v. Martin*, 320 Or 448, 887 P2d 782 (1994). ORS 138.222(2)(a) precludes appellate review of a presumptive sentence, provided the sentencing court used the correct gridblock. The sentencing court imposed the presumptive sentence on the conviction based on first-in-time crime, properly recalculated defendant’s criminal-history score based on that conviction, and then imposed consecutive presumptive sentence on second conviction using the adjusted gridblock. Because the sentences at issue on appeal are presumptive sentences, and hence unreviewable under ORS 138.222(2)(a), the Court of Appeals properly affirmed the judgment of conviction summarily.

*State v. Keefer*, 169 Or App 338, 8 P3d 1002 (2000). A sentencing court imposed the 13-month prison term mandated by the repeat-property-offenders statute, ORS 137.717, but it suspended execution and placed defendant on probation. *Held*: The state’s claim that the court erred by suspending execution of the sentence is reviewable under ORS 138.222(4); ORS 138.222(2)(a) does not bar review.

*State v. Dubois*, 152 Or App 515, 954 P2d 1264 (1998). The sentencing court declared Measure 11 unconstitutional on its face and imposed a probationary sentence on defendant’s conviction for second-degree assault. The state appealed contending that the court erred in not imposing the 70-month minimum sentence mandated by Measure 11. *Held*: The state’s claim of error is reviewable in light of the 1997 amendment to ORS 138.222 to provide that an appellate court may review a claim that a sentencing court erred in failing to impose a minimum sentence that is prescribed by ORS 137.700.

*See also State v. Clanton*, 152 Or App 705, 955 P2d 312 (1998).

*State v. Brown*, 143 Or App 263, 923 P2d 1236 (1996): Even though the sentencing court imposed the presumptive prison sentences on defendant’s convictions for first-degree burglary, ORS 138.222(2)(a) did not preclude review of defendant’s claim that the sentencing court erroneously ordered that those sentences are subject to ORS 137.635, because the ORS 137.635 designation is part of the “sentence” imposed, but is not part of the “presumptive sentence.”

*Note*: It is questionable whether this decision is still good law in light of *State ex rel. Huddleston v. Sawyer*, *supra*.

*State v. Owen*, 142 Or App 314, 921 P2d 424 (1996): Even though sentencing court imposed presumptive prison

sentence on defendant's DCS conviction, ORS 138.222(2)(a) does not preclude appellate review of claim that court imposed erroneous term of post-prison supervision.

*State v. Jackson*, 141 Or App 123, 917 P2d 34 (1996). ORS 138.222(2)(a) does not preclude appellate review of defendant's claim that one of the probation conditions the sentencing court imposed unconstitutionally interferes with her free-speech rights; that claim is reviewable under ORS 138.222(4)(a).

*State v. Marquez*, 139 Or App 379, 912 P2d 390, *rev den*, 323 Or 483 (1996): Defendant pleaded guilty to 6 counts of "computer crime," and the sentencing court imposed the presumptive sentence and \$14,000 in restitution. *Held*: ORS 138.222(2)(a) does not preclude appellate review of defendant's challenge to restitution order (distinguishing *State v. Nelson*, 127 Or App 741, 874 P2d 108 (1994)).

*See also State v. Thompson*, 138 Or App 247, 908 P2d 329 (1995).

*State v. McFee*, 136 Or App 160, 901 P2d 870 (1995), *rev dism'd*, 323 Or 662 (1996): Defendant pleaded no contest to a charge of first-degree sexual abuse, the sentencing court imposed the presumptive prison sentence and an 86-month term of post-prison supervision pursuant to ORS 144.103 (1993), and defendant contended on appeal that the PPS term was error. *Held*: ORS 138.222(2)(a) does not preclude appellate review of that claim, because the PPS term is not part of the "presumptive sentence."

*State v. Stokes*, 133 Or App 355, 891 P2d 13 (1995): Defendant was convicted on two counts of attempted first-degree sexual abuse that fall into gridblock 6-B, the sentencing court departed dispositionally and placed defendant on probation after making findings under ORS 137.123 to support imposition of consecutive sentences, the court later revoked probation based on a single violation and imposed consecutive 24-month sentences, and defendant appealed contending that OAR 253-12-040(2) barred consecutive sentences. *Held*: ORS 138.222(2)(a) does not bar appellate review, because defendant challenges the consecutive-sentence order, not the sentences; review is governed instead by ORS 138.222(4)(a).

*State v. Montazer*, 133 Or App 271, 891 P2d 662, *rev den*, 321 Or 268 (1995): Defendant's conviction for first-degree sexual abuse falls into gridblock 8-I, the sentencing court imposed a sentence of imprisonment "not to exceed eighteen (18) months," and defendant contended for the first time on appeal that court failed to impose a determinate sentence. *Held*: ORS 138.222(2)(a) does not preclude review of the sentence, because the sentence imposed was merely a range and "technically was not a presumptive sentence."

*State v. Guyton*, 126 Or App 143, 868 P2d 1335, *rev den*, 319 Or 36 (1994): Where court revoked dispositional-departure probationary sentence and imposed the presumptive sentence prescribed by OAR 253-10-002(2), ORS 138.222(2)(a) precluded any appellate review of sentence imposed.

*State v. Swisher*, 116 Or App 129, 840 P2d 1339 (1992), *rev den*, 315 Or 312 (1993): ORS 138.222(2)(c) precludes appellate court from reviewing a claim that sentencing court erred in failing to grant optional probation.

## **2. Appellate review of stipulated sentence under ORS 138.222(2)(d)**

*See also* Part XIV-C ("Stipulated Sentences"), *above*.

*State v. Kephart*, 320 Or 433, 887 P2d 774 (1994): The 1993 amendment to ORS 138.222(2)(d), which narrows the class of unreviewable sentences to "[a]ny sentence resulting from a stipulated sentencing agreement," applies to any cases still on appeal when the amendment took effect (*viz.*, on November 4, 1993). The amendment was intended to preserve the rule in *State v. Adams*, 315 Or 359, 847 P2d 397 (1993), and to overrule the series of Court of Appeals decisions commencing with *State v. Johnston*, 120 Or App 165, 851 P2d 1156 (1993). The current version of ORS 138.222(2)(d) allows review of sentences resulting from plea bargains "unless they are 'stipulated sentences' as illustrated in ORS 135.407." (*Note*: Decision effectively overruled *State v. George*, 127 Or App 581, 873 P2d 468, *rev den*, 319 Or 274 (1994).)

*See also State v. Martin*, 320 Or 448, 887 P2d 782 (1994); *State v. Cannon*, 135 Or App 561, 900 P2d 46 (1995); *State v. Burch*, 134 Or App 569, 896 P2d 10 (1995).

*State v. Adams*, 315 Or 359, 847 P2d 397 (1992): The appellate court may review a claim of error under ORS 138.222(3) and (4) only if the alleged error falls within ORS 138.222(2)(e); if the sentence is declared nonreviewable by

ORS 138.222(2)(a) to (d), it cannot be reviewed under subsections (3) and (4).

*State v. Nolasco-Lara*, 249 Or App 111, 274 P3d 880 (2012). Defendant pleaded guilty to second-degree robbery pursuant to a plea agreement providing that the state would recommend a 70-month prison sentence with 5 years of post-prison supervision; the state dismissed other, more serious charges. The court imposed that sentence, and defendant did not object. *Held*: Affirmed. ORS 137.222(2)(d) does not bar appellate review of the term of post-prison supervision because defendant did not expressly “stipulate” to that term.

*State v. Capri*, 248 Or App 391, 273 P3d 290 (2012). Pursuant to a plea agreement, defendant pleaded guilty to two counts a felony stalking, a class C felony, and the court imposed a 41-month prison sentence on each, with 28 months on the second to be served concurrently with the first, and it also imposed a 36-month term of post-prison supervision on each conviction. Defendant did not object to the sentence, but he argued for the first time on appeal that the post-prison supervision terms violated OAR 213-005-0002(4), because the total sentence is thus 77 months. *Held*: Reversed and remanded. ORS 138.222(2)(d) does not bar review of defendant’s claim of error, because he did not specifically stipulate to the terms of post-prison supervision.

*State v. Ivie*, 213 Or App 198, 159 P3d 1257 (2007). Defendant pleaded guilty to second-degree assault and the parties stipulated to a departure pursuant to ORS 137.712 to a probationary sentence but further agreed that if defendant violated the probation, the court on revocation would impose a 70-month term as the “presumptive” sentence. The court imposed that sentence without making findings under ORS 137.712 or 137.750. Later, upon revocation, defendant argued that ORS 137.712(5) barred a sentence longer than 38 months. The court disagreed and imposed the 70-month sentence and denied any eligibility for early release based on ORS 137.700(1). *Held*: Reversed and remanded. [1] In interpreting the parties’ plea agreement, “commercial contract principles apply”—“the construction of a contract is a question of law, but when the contract is ambiguous, extrinsic evidence may be used to resolve the ambiguity, and determination of a the parties’ intent is a question of fact.” The record supported the sentencing court’s finding that defendant had stipulated to a 70-month term on revocation. [2] Because 70-month term was imposed pursuant to stipulation, ORS 137.222(2)(d) barred appellate review. But because the record does not show that defendant stipulated to the no-release order, his challenge to that term is reviewable.

*State v. Easton*, 204 Or App 1, 126 P3d 1256, *rev den*, 340 Or 673 (2006). Pursuant to parties’ stipulation, the court orally imposed consecutive sentences on convictions entered in two cases, but the written judgments failed to include the consecutive-sentence order. Later, the court entered an amended judgment in one case, pursuant to ORS 138.083(1), to add the consecutive-sentence order, and defendant appealed. *Held*: The amended judgment is appealable and reviewable under ORS 138.050(1) to determine whether it includes a disposition that was not imposed consistently with statutory requirements. Because defendant contends that the sentencing court lacked jurisdiction to amend the judgment, ORS 138.222(2)(d), which bars review of a stipulated sentence, does not preclude review of his claim.

*State v. Young*, 188 Or App 247, 71 P3d 119, *rev den*, 336 Or 125 (2003). Pursuant to an agreement, defendant pleaded guilty to three of six counts of aggravated murder and waived double jeopardy, and the court imposed a life sentence with the possibility of parole. After beginning to serve that sentence, defendant breached the agreement by not testifying as agree, and the state prosecuted him on the remaining counts over his objection. The jury imposed a true-life sentence. On appeal, defendant argued that the court lacked jurisdiction to convict and sentence him on the remaining convictions. *Held*: Affirmed. Defendant’s challenge to the true-life sentences is not barred by ORS 138.222(2)(d), because they were not the product of a stipulated sentencing agreement within the scope of ORS 135.407 and, in any event, the parties cannot stipulate to jurisdiction.

*Blackledge v. Morrow*, 174 Or App 566, 26 P3d 851, *rev den*, 332 Or 588 (2001). Petitioner was charged with a count of first-degree sexual abuse subject to Measure 11, and he entered into a plea agreement by which he pleaded guilty to attempted first-degree sexual abuse as a lesser-included offense and stipulated to a 65-month sentence. The post-conviction court ruled that petitioner’s appellate counsel failed to provide constitutionally adequate assistance by not challenging the sentence on appeal as “plain error.” *Held*: Reversed and remanded. To obtain post-conviction relief based on a claim of inadequate assistance of appellate counsel, petitioner had to “establish that competent appellate counsel would have asserted the claim, and ‘that had the claim of error been raised, it is more probable than not that the result would have been different.’” Had appellate counsel attempted to challenge the sentence, the Court of Appeals would have been barred by ORS 138.222(2)(d) from reviewing that claim on direct appeal, because it was entered per petitioner’s stipulation. “If this court lacks authority to review a sentence under ORS 138.222, then the court may not review the sentence regardless of

whether an error is apparent on the face of the record.” Because the erroneous sentence was not reviewable on direct appeal, “petitioner’s appellate counsel did not provide constitutionally inadequate assistance in failing to assert the error on direct appeal.”

*State v. Quintero*, 160 Or App 614, 982 P2d 543 (1999). Defendant sexually assaulted his 16-year-old daughter. Pursuant to a plea bargain, he pleaded guilty to charges of attempted rape and first-degree sexual abuse, the state dismissed the more serious charges, and the court imposed a 36-month sentence on the attempted-rape conviction and a consecutive 75-month sentence on the sexual-abuse convictions. On appeal, defendant contended that the 111-month sentence violated the “400-percent rule,” OAR 213-012-0020(2). *Held*: ORS 138.222(2)(d), which precludes review of a stipulated sentence, does not bar review of defendant’s claim. Although he agreed that the state would make that recommendation, he did not stipulate to it.

*State v. Albrich*, 157 Or App 64, 969 P2d 1033 (1998), *rev den*, 328 Or 293 (1999). Under ORS 138.222(4)(c), which was enacted after the state filed its notice of appeal, the Court of Appeals can review the state’s claim that the sentencing court erred in refusing to impose the Measure 11 minimum even though the state stipulated to a 30-month sentence as an alternative sentence. *Cf.* ORS 138.222(2)(d).

*State v. Dizick*, 137 Or App 486, 905 P2d 250 (1995), *rev den*, 322 Or 490 (1996). ORS 138.222(2)(d) does not preclude review of defendant’s challenge to dangerous-offender sentences; although he pleaded guilty, he did not stipulate to those sentences.

*State v. McFee*, 136 Or App 160, 901 P2d 870 (1995), *rev disp’d*, 323 Or 662 (1996): Defendant pleaded no contest to a charge of first-degree sexual abuse, the sentencing court imposed the presumptive prison sentence and an 86-month term of post-prison supervision pursuant to ORS 144.103 (1993), and defendant contended on appeal that the PPS term was error. *Held*: ORS 138.222(2)(d) does not preclude appellate review of that claim, because the parties’ plea agreement did not stipulate to that term.

*State v. Davis*, 134 Or App 310, 895 P2d 1374 (1995): Pursuant to a plea bargain, defendant pleaded guilty to first-degree theft, another charge was dismissed, the parties stipulated to a probationary sentence, and the sentencing court imposed that sentence and, over defendant’s objection, ordered him to repay \$225 in costs. *Held*: Because the costs order was not entered pursuant to the parties’ stipulation, ORS 138.222(2)(d) does not preclude appellate review of defendant’s challenge to that order—“the statute was not intended to preclude review of a portion of a sentence that was not agreed to between the state and the defendant in the ‘stipulated sentencing agreement.’”

*State v. Barrett*, 134 Or App 162, 894 P2d 1183, *rev den*, 321 Or 340 (1995): Pursuant to a plea bargain, defendant pleaded guilty to first-degree sexual abuse and the state agreed not to recommend a departure; the sentencing court *sua sponte* imposed a departure sentence. *Held*: ORS 138.222(2)(d) does not bar appellate review of defendant’s challenge to departure sentence.

*State v. Hennings*, 134 Or App 131, 894 P2d 1192, *rev den*, 320 Or 502 (1995): Pursuant to a plea bargain, defendant pleaded guilty to DCS, the state dismissed other charges, and the parties reserved for trial only the “commercial drug offense” offense-subcategory factor. *Held*: ORS 138.222(2)(d) does not preclude defendant’s challenge to the sufficiency of the evidence to support the trial court’s finding that the state proved that factor.

*State v. Reeves*, 134 Or App 38, 894 P2d 1170, *rev den*, 321 Or 284 (1995): Defendant pleaded guilty to several felony offenses, the state dismissed other charges, the parties stipulated to the applicable gridblocks for the convictions, and the sentencing court imposed consecutive departure sentences. *Held*: Because defendant did not stipulate to the sentences imposed, ORS 138.222(2)(d) does not bar appellate review of his claims on appeal that the court erred in departing and in ordering the sentences to be served consecutively.

*State v. Thomas*, 133 Or App 754, 894 P2d 496 (1995): Pursuant to a plea bargain, defendant pleaded guilty *inter alia* to two counts of third-degree assault, the state dismissed other charges, the parties agreed that the “shift to column I rule,” OAR 253-12-020(2)(a)(B), required the court to use gridblock 6-I to impose consecutive sentences on those convictions, and the court imposed 180-day consecutive jail terms. *Held*: ORS 138.222(2)(d) does not bar review of defendant’s claim that the rule prescribes a maximum 90-day jail term.

**State v. Upton**, 132 Or App 579, 889 P2d 376, *rev den*, 320 Or 749 (1995): Pursuant to a plea bargain, defendant pleaded guilty to aggravated murder and stipulated to a “true life” sentence; she purported to reserve, however, the right to contend on appeal that that sentence violates Article I, section 40. *Held*: Appellate review of the sentence is governed by ORS 138.222, not by ORS 138.050. The challenged sentence results from a “stipulated sentencing agreement” within the meaning of ORS 138.222(2)(d), even though the plea bargain was not an agreement described in ORS 137.407 (because aggravated murder is not included in the sentencing guidelines grid). Appellate review is barred notwithstanding defendant’s intention to “reserve” the constitutional challenge.

**State v. Eickoff**, 130 Or App 516, 883 P2d 240, *rev den*, 320 Or 453 (1995): ORS 138.222(2)(d) (1989) does not preclude appellate review of claim that sentencing court erred when, in response to a letter from the Department of Corrections, it entered an amended judgment that added a term of post-prison supervision; such a claim is reviewable under ORS 138.222(4)(a).

**State v. Nelson**, 127 Or App 741, 874 P2d 108 (1994) (*per curiam*): ORS 138.222(2)(d) precludes appellate review of the restitution order, because it is part of the “sentence” imposed.

**State v. Hallinan**, 125 Or App 316, 865 P2d 449 (1993): Where defendant pleaded guilty pursuant to plea agreement in which the state agreed to recommend only the presumptive sentence, ORS 138.222(2)(d) (1989) precludes appellate review of state’s claim on appeal that the sentencing court erred in imposing a downward-departure sentence without making any departure findings: “By agreeing to recommend only the presumptive sentence, the state gave up its right to seek an upward departure sentence or to argue against a downward departure.”

*Caveat*: This case and most of the cases cited below are of questionable authority in light of the 1993 amendment to ORS 138.222(2)(d) and *State v. Kephart, supra*.

**State v. Owen**, 121 Or App 665, 855 P2d 1141 (*per curiam*), *rev den*, 318 Or 98 (1993): Where, pursuant to a plea agreement, defendant pleaded guilty to several charges, other charges were dismissed, and the parties made certain sentencing recommendations, ORS 138.222(2)(d) (1989) precludes appellate review of the term of post-prison supervision imposed, even though the state concedes that the term imposed is error.

*See also State v. Woods*, 121 Or App 661, 856 P2d 321 (1993) (*per curiam*) (same); *State v. Smith*, 121 Or App 677, 856 P2d 321 (1993) (*per curiam*) (same); *State v. Cavota*, 121 Or App 598, 856 P2d 322 (1993) (even though challenged “life sentence” is error under *State v. Morgan*, 316 Or 553 (1993), ORS 138.222(2)(d) precludes appellate review, because sentence resulted from plea agreement); *State v. Davilla*, 121 Or App 583, 855 P2d 1160, *affd on recons*, 124 Or App 87, 860 P2d 894 (1993), *rev den*, 318 Or 351 (1994) (same).

**State v. Tanner**, 121 Or App 104, 854 P2d 941, *rev den*, 318 Or 98 (1993): Where the parties entered into an agreement by which defendant was tried on stipulated facts, the state agreed not to prosecute defendant for other crimes, and defendant admitted liability for other crimes for purposes of restitution, appellate review of the resulting sentences is barred by ORS 138.222(2)(d) (1989), even though defendant did not plead guilty and the parties’ agreement did not address the sentences to be imposed.

*See also State v. Garcia*, 122 Or App 226, 957 P2d 207 (1993) (similar, state’s appeal); *State v. Contreras*, 121 Or App 201, 854 P2d 942 (1993) (*per curiam*) (appellate court cannot review defendant’s challenge to consecutive departure sentences where, pursuant to agreement between parties, he was convicted on stipulated facts of some of the charges, the state dismissed the other charges, the parties stipulated to the gridblock, and the state agreed to remain silent as to the sentence).

**State v. Johnston**, 120 Or App 165, 851 P2d 1156, *rev den*, 317 Or 272 (1993): [1] Under ORS 138.222(2)(d) (1989), as construed in *State v. Adams, supra*, “any claim that a sentence was imposed without compliance with the requirements of law or is a departure sentence not supported by substantial and compelling reasons may not be reviewed if the sentence ‘resulted from’ a plea agreement.” ORS 138.222(2)(d) (1989) “does not preclude review only of ‘stipulated sentences,’ but rather applies to any sentence resulting from the parties’ agreement. [2] Where defendant pleaded guilty to several charges, the state agreed to dismiss the other charges and not to file additional charges, the parties stipulated to the applicable gridblock, and the state agreed to recommend a sentence of no more than 108 months, ORS 138.222(2)(d) (1989) precludes appellate review of defendant’s claim that the resulting sentences are error on the ground that the departures were improper, even though the parties did not stipulate to the sentences.

*See also State v. Becker*, 120 Or App 230, 851 P2d 1150 (1993) (*per curiam*) (defendant pleaded guilty, the state dismissed other charges, and the parties to a range of permissible sentences; *held*: ORS 138.222(2)(d) (1989) precludes

appellate review of defendant's claims that the sentencing court misranked one conviction and that the consecutive sentences violate OAR 253-12-020(2)); *State v. Kilborn*, 120 Or App 462, 852 P2d 935 (1993) (defendant pleaded guilty and the state agreed not to recommend any sentence; *Held*: ORS 138.222(2)(d) precludes appellate review of state's claim of error on appeal that sentencing court misranked conviction); *State v. Gordineer*, 121 Or App 91, 854 P2d 473 (*per curiam*), *rev den*, 318 Or 98 (1993) (defendant pleaded guilty and the state dismissed other charges; *held*: appellate court cannot review defendant's claims that departures were improper or that consecutive sentences violate OAR 253-12-020(2)); *State v. Kelly*, 121 Or App 99, 853 P2d 1328 (*per curiam*), *rev den*, 318 Or 98 (1993) (no appellate review of sentences where defendant pleaded guilty and other charges were dismissed); *State v. Reardon*, 121 Or App 423, 853 P2d 1372 (1993) (*per curiam*) (same); *State v. Hughes*, 121 Or App 675, 855 P2d 667 (*per curiam*), *rev den*, 318 Or 98 (1993) (ORS 138.222(2)(d) precludes review of defendant's claim that no evidence in the record supports the sentencing court's finding under ORS 137.123(4) in support of consecutive sentences); *State v. Haskins*, 121 Or App 671, 855 P2d 667 (*per curiam*), *rev den*, 318 Or 98 (1993) (ORS 138.222(2)(d) precludes appellate review of departure sentence)

*But see State v. Bell*, 121 Or App 659, 855 P2d 669 (1993) (*per curiam*) (even though defendant was convicted on guilty plea, ORS 138.222(2)(d) does not preclude appellate review of defendant's challenge to dangerous-offender sentence, "[b]ecause defendant's plea was not the result of a plea agreement with the state"); *State v. Rice*, 121 Or App 657, 855 P2d 670 (1993) (*per curiam*) (same, claim that consecutive sentence violated "shift to column I" rule); *State v. Graham*, 125 Or App 516, 865 P2d 490 (1993) (same).

### 3. Appellate review under ORS 138.050

*State v. Cloutier*, 351 Or 68, 261 P3d 1234 (2011). Defendant pleaded no contest to DUII and the court imposed a \$1,100 fine, which exceeds the \$1,000 minimum fine, ORS 813.010(6)(a), but is within the statutory maximum for DUII. The court explained that the increase was based on the fact that defendant had pleaded no-contest, rather than pleading guilty, when he entered diversion. Defendant appealed, arguing that the court violated his Due Process rights by considering his no-contest plea at sentencing. The state moved to dismiss, arguing that ORS 138.050 bars such a challenge. The Court of Appeals denied that motion, and the state petitioned for review. *Held*: Appeal dismissed. Under ORS 138.050(1), a defendant who pleads guilty or no contest may appeal only if the sentence "exceeds the maximum allowable by law" or "is unconstitutionally cruel and unusual." Because defendant did not argue that the fine is "cruel and unusual," the only issue was whether it "exceeds the maximum allowable by law." The court held that that clause does not allow review of a claim that the sentencing court committed a constitutional violation—the legislature intended that clause to allow an appeal only when the defendant asserts that the sentence imposed exceeds the *statutory* maximum. Because defendant did not contend that his \$1,100 fine exceeded the maximum fine allowed by statute, the appellate courts lack jurisdiction to consider his claim based on the Due Process Clause.

*State v. Baker*, 346 Or 1, 202 P3d 174 (2009). A proportionality challenge to a sentence is reviewable in appeal from a judgment based on a guilty plea as a claim that the sentence is "unconstitutionally cruel and unusual," under ORS 138.050.

*State v. Donahue*, 243 Or App 520, \_\_\_ P3d \_\_\_ (2011). Defendant pleaded no contest to one count of prostitution that she committed on 82<sup>nd</sup> Street in Portland. The court imposed an 18-month probationary term and required, as a special condition of probation, that she not to enter a certain "high vice" area in Portland around 82<sup>nd</sup> and Sandy unless she was passing through it in a car or public transportation. On appeal, defendant argued that the condition was not reasonably related to the crime of conviction, was overbroad, and unconstitutionally infringed her freedom of association. *Held*: Affirmed. Despite the limitation in ORS 138.050(3), defendant's claim of error is reviewable under ORS 138.053(3).

*State v. McConville*, 243 Or App 275, \_\_\_ P3d \_\_\_ (2011). Defendant pleaded guilty to burglary and two counts of theft alleging an aggregate value over \$750—one count specifying a laptop computer and the other specifying jewelry and other items. The sentencing court entered convictions on both theft counts, rejecting defendant's claim that the thefts were not separated by a sufficient pause under ORS 161.067(3). *Held*: Reversed and remanded to merged theft convictions and for resentencing. Entry of separate convictions is an appealable disposition under ORS 138.050(1) even when a defendant has pleaded guilty to separate counts.

*State v. Stubbs*, 193 Or App 595, 91 P3d 774, *rev den*, 337 Or 669 (2004). [1] When the defendant is convicted on a plea of guilty or no contest, ORS 138.050(1) limits his right to appeal and requires that his appeal be dismissed if he does not assert a challenge that is within the scope of that provision. [2] To be appealable under ORS 138.050(1), defendant must show that the "disposition" either is unconstitutionally cruel and unusual or exceeds the maximum allowable

by law because it was not “imposed consistently with statutory requirements.” [3] Defendant’s claim that the sentencing court lacked authority under ORS 138.083 to vacate the original sentence and impose a longer “corrected” sentence is within the ambit of ORS 138.050(1). The court denied the state’s motion to dismiss his appeal.

*State v. Anderson*, 197 Or App 193, 104 P3d 1175, *rev den*, 338 Or 583 (2005). Defendant was convicted of second-degree robbery based on her plea of guilty, and the sentencing court rejected her request for a departure under ORS 137.712 and imposed the mandatory 70-month sentence. She appealed contending that the sentencing court erred in ruling that she was disqualified from a departure. *Held*: Appeal dismissed. Because defendant was not entitled to a lesser sentence even under her argument, if the court erred, “that error deprived defendant only of an opportunity to be considered for a sub-minimum sentence; it did not expose her to a sentence that exceeded the legal maximum.” Consequently, her claim of error is not reviewable under ORS 138.050(3) and “we lack jurisdiction to consider it.”

*State v. Sanchez*, 160 Or App 182, 981 P2d 361, *rev den*, 329 Or 318 (1999). Defendant, aided by an interpreter, pleaded no contest to possession of a weapon by an inmate. He appealed contending that the court committed plain error by failing to have the interpreter to place her credentials on the record as required by ORS 45.275(7). *Held*: That claim of error is not reviewable under either ORS 138.050(3) or ORS 138.222(4). “[T]he courts of this have construed ORS 138.222 to apply only to the lawfulness of the sentence itself, not the procedures by which it was imposed.”

#### 4. Issues reviewable on appeal

See ORS 138.222(3) and (4).

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997). [1] The state was entitled to mandamus relief based on claim that sentencing court erroneously refused to impose Measure 11 sentence and imposed shorter presumptive sentence instead, because ORS 138.222(2)(a) barred the state from obtaining review of that claim on direct appeal. [2] Defendant’s claim that Measure 11 violates the Guarantee Clause (US Const, Art IV, § 4) is not reviewable.

*State v. Stewart/Billings*, 321 Or 1, 892 P2d 1013 (1995). A sentencing court has authority under ORS 137.079(5)(c) to consider a defendant’s claim that it is constitutionally impermissible to count his prior juvenile adjudications in his criminal-history score, and an appellate court has authority under ORS 138.222(4) to review a claim of error that the sentencing court erred in rejecting that claim.

*State v. White*, 246 Or App 329, 264 P3d 1291 (2011). The court entered a judgment on December 10, 2009, that stated, pursuant to ORS 137.106, that defendant would be required to pay restitution in an amount “to be determined.” Defendant appealed from that judgment. On February 24, 2010, the court entered a supplemental judgment imposing restitution. On July 14, 2010, defendant filed an amended notice of appeal citing the February 23 supplemental judgment. Defendant’s appellate counsel asserted that the amended notice was timely under ORS 137.071(4) because he had just become aware of it. *Held*: Appeal from supplemental judgment dismissed. [1] Defendant’s failure to timely file notice of appeal from the supplemental judgment imposing restitution deprived the appellate court of jurisdiction over that judgment. [2] Defendant’s timely appeal from the original judgment did not allow the court to review his claim with respect to the supplemental judgment. See ORS 138.240.

*State v. Delgado*, 239 Or App 435, 245 P3d 170 (2010), *rev den*, 350 Or 423 (2011). Defendant appealed his convictions on several felony convictions and challenged the terms of post-prison supervision. The state conceded that the terms were erroneous but argued that the proper remedy is for defendant to file a motion to correct the judgment under ORS 138.083, not plain-error review on appeal. *Held*: Reversed and remanded. The availability of a remedy under ORS 138.083 is a permissible factor in the court’s exercise of discretion to correct a plainly erroneous term of PPS, but it is not the only factor.

*State v. Arnold*, 214 Or App 201, 164 P3d 334 (2007). Defendant was convicted at trial of second-degree robbery based on his aiding and abetting a robbery by driving and waiting in the getaway car while two other men robbed the victim at gunpoint. The sentencing court imposed the mandatory Measure 11 sentence, rejecting defendant’s argument that it should downwardly depart under ORS 137.712. The court rule that he was not eligible for a departure because of ORS 137.712(2)(d)(C), which permits a departure only where, “if the defendant represented by words or conduct that the defendant was armed with a deadly weapon, the representation did not reasonably put the victim in fear of imminent

physical injury”; the court rejected his argument that that factor did not apply to him because he *personally* did not make any representation that he was armed. *Held*: Sentence vacated and reversed. Even though the sentence imposed is lawful, defendant’s claim of error is reviewable under ORS 138.222(4)(a): “That provision permits this court to review a sentencing issue when the sentence that was imposed was an authorized sentence, but the trial court is asserted to have erroneously determined that the defendant was not eligible for a different, also authorized, sentence.” [2] The sentencing court erroneously concluded that defendant was ineligible for a downward departure.

*State v. Gornick*, 196 Or App 397, 102 P3d 734 (2004), *rev’d on other grounds*, 340 Or 160, 130 P3d 780 (2006). Defendant pleaded guilty to assault in the third degree, the sentencing court found several aggravating factors and departed upward, and defendant asserted unpreserved *Blakely*-based challenges to the sentence on appeal. *Held*: Reversed and remanded for resentencing. Defendant’s claim of error is reviewable under ORS 138.222(4)(a) as exceeding the maximum allowed by law.

*State v. Keefer*, 169 Or App 338, 8 P3d 1002 (2000). A sentencing court imposed the 13-month prison term mandated by the repeat-property-offenders statute, ORS 137.717, but it suspended execution and placed defendant on probation. *Held*: The state’s claim that the court erred by suspending execution of the sentence is reviewable under ORS 138.222(4); ORS 138.222(2)(a) does not bar review.

*State v. Lavert*, 164 Or App 280, 991 P2d 1067 (1999). The sentencing court refused to impose the Ballot Measure 11 minimum based on its ruling that that sentence as applied to this defendant would be constitutionally cruel and unusual, and the state appealed. *Held*: Affirmed. The appellate court must have access to sufficient information to allow the court to “step into the shoes” of the sentencing judge. The appellate court in this case was not provided with transcripts from the trial and two post-verdict hearings in which sentencing was discussed. Therefore, it had no basis upon which to reverse the trial court’s ruling that Ballot Measure 11 was unconstitutional as applied to this defendant.

*State v. Bowman*, 160 Or App 8, 980 P2d 164 (1999), *rev den*, 334 Or 655 (2002). Defendant, a 17-year-old juvenile, was convicted of robbery in the second degree, the sentencing court refused to impose the 70-month minimum sentence and instead placed defendant on probation, and the state appealed. While that appeal was pending, the court revoked defendant’s probation and again refused to impose the minimum sentence and imposed the 6-month sanction prescribed by the guidelines. The state also appealed from that judgment, and the two appeals were consolidated on appeal. *Held*: Although the state’s appeal from the original judgment was moot, its challenge to the sentence imposed on revocation is reviewable under ORS 138.222(4)(c). The court rejected defendant’s claims that retroactive application of that provision violated the *ex post facto* and due process clauses.

*State v. Silverman*, 159 Or App 524, 977 P2d 486, *rev den*, 329 Or 528 (1999), *cert den*, 531 US 876 (2000). Defendant was convicted on two counts of first-degree sexual abuse, the court refused to impose the Measure 11 minimum terms and instead placed defendant on probation, and the state appealed. *Held*: The state’s claim of error is reviewable under ORS 138.222(4)(c). The court rejected defendant’s *ex post facto* challenge to application of the statute.

*State v. Albrich*, 157 Or App 64, 969 P2d 1033 (1998), *rev den*, 328 Or 293 (1999). In light of ORS 138.222(4)(c), which was enacted after the state filed its notice of appeal, the Court of Appeals can review the state’s claim that the sentencing court erred in refusing to impose the Measure 11 minimum.

*State v. Gee*, 156 Or App 241, 965 P2d 462 (1998), *on recons*, 158 Or App 597, 976 P2d 80, *rev den*, 328 Or 594 (1999). Defendant’s procedural due-process rights were not violated by the retroactive application of amended ORS 138.222(4)(c), which now allows the Court of Appeals to review claims that the sentencing court erred in refusing to impose a Ballot Measure 11 sentence.

*State v. Jackman*, 155 Or App 358, 963 P2d 170, *rev den*, 328 Or 115 (1998). Application of ORS 138.222(4)(c), which allows the state to obtain review on appeal of the sentencing court’s failure to impose a Measure 11 sentence, to the judgment in this case, which was entered before the provision was enacted, does not violate the *ex post facto* provisions of the state or federal constitutions or the separation-of-powers provisions of Article III, section 1, of the Oregon Constitution.

*State v. Ysasaga*, 146 Or App 74, 932 P2d 1182 (1997): Defendant unsuccessfully challenged the validity of Measure 11 by a demurrer based on ORS 135.630(4) and assigned as error on appeal only the order overruling his demurrer. *Held*: Court of Appeals could not review the merits of defendant’s claim, because the indictment stated a

prosecutable offense regardless whether Measure 11 is constitutional and defendant did not assign error to the sentence imposed.

*State v. Lawler*, 144 Or App 456, 927 P2d 99 (1996), *rev den*, 326 Or 389 (1998): Defendant's challenge to Measure 11 based on claim that sentence for murder violates "proportionate" clause Article I, section 16, is not reviewable, because he was not convicted of murder.

*State v. Franks*, 143 Or App 384, 923 P2d 1302, *rev den*, 324 Or 488 (1996): Where the sentencing court erred when it inadvertently imposed the presumptive sentence prescribed for gridblock 7-A after placing the conviction in gridblock 7-B, the Court of Appeals refused to consider the state's argument on appeal that the sentence imposed actually is the presumptive sentence because the conviction in fact falls into gridblock 7-A, because the state failed to cross-assign error.

*State v. Perry*, 140 Or App 18, 914 P2d 29 (1996). A claim that the sentencing court erred when it entered a written judgment that varied from the oral sentence imposed is reviewable under ORS 138.222(4)(a) as a question of law.

*State v. Sumerlin*, 139 Or App 579, 913 P2d 340 (1996). ORS 138.050(3) and ORS 138.222(4)(a) permit appellate review of a claim that the sentencing court erred in ruling whether two convictions merge. (Overruling *State v. Anderson*, 119 Or App 23, 849 P2d 548 (1993).)

*State v. Leslie*, 134 Or App 366, 895 P2d 342, *rev den*, 321 Or 397 (1995): Notwithstanding ORS 137.079(5)(f), ORS 138.222(4)(a) permits appellate review of defendant's claim that sentencing court erred when it included in his criminal-history score a prior conviction that he contended had been "expunged."

*State v. Talamantes*, 134 Or App 166, 894 P2d 1182 (1995): In reviewing claim that sentencing court erroneously relied on a particular aggravating factor to support departure, the written judgment, which listed that factor, controls over the court's oral comments, which were ambiguous.

*State v. Davilla*, 121 Or App 583, 855 P2d 1160, *affd on recons*, 124 Or App 87, 860 P2d 894 (1993), *rev den*, 318 Or 351 (1994): Where defendant, a remanded juvenile, was convicted upon his pleas of guilty, appellate court has no authority under ORS 138.050 or ORS 138.222 to review a claim that sentencing court erred in refusing to vacate remand order.

*State v. Woodard*, 121 Or App 483, 855 P2d 1139, *rev den*, 318 Or 26 (1993): Where, pursuant to a plea agreement, defendant pleaded no contest to several charges, including first-degree sodomy, other charges were dismissed, and the state agreed to stand silent as to sentence, appellate court cannot review under ORS 138.050(1)(a) defendant's claim that, as a matter of law, the sodomy conviction should be reduced to an incest conviction. "Defendant may not, on direct appeal, take issue with a conviction to which he agreed to plead no contest."

*State v. Plourd*, 121 Or App 557, 855 P2d 1138 (1993): Appellate court cannot review under ORS 138.040 defendant's claim that 1-year sentences imposed on convictions for class A misdemeanors violate Or Laws 1989, ch 790, § 51, *as amended by* Or Laws 1991, ch 830, § 9, are error because the sentencing court allegedly failed to make appropriate departure findings. The sentences imposed are within the maximum allowable by law and ORS 138.040, unlike ORS 138.222(3), does not authorize review of departure findings.

*State v. Lewis*, 119 Or App 362, 850 P2d 409, *rev den*, 317 Or 163 (1993): In a state's appeal from a judgment imposed upon revocation of probation, the appellate court has authority under ORS 137.222(4)(a) to review a claim that the sentencing court erred in imposing a jail term instead of the prison term mandated by OAR 253-10-002.

*State v. Anderson*, 119 Or App 23, 849 P2d 548 (1993): ORS 138.222 permits review only of the sentence imposed; in an appeal by the state from a judgment imposing sentence under the guidelines, the appellate court cannot review a claim that the sentencing court erred in merging 2 convictions. (Overruled on this issue in *State v. Sumerlin*, 139 Or App 579, 913 P2d 340 (1996), discussed *above*.)

*State v. Thomas*, 117 Or App 533, 844 P2d 936 (1992) (*per curiam*), *rev den*, 317 Or 272 (1993): Although ORS 138.222(4)(a) would permit review if the sentencing court erroneously had concluded that it lacked authority to depart,

it does not permit review of a claim that the court erroneously concluded that defendant had failed to establish mitigating circumstances sufficient to warrant a departure.

*State v. Henderson*, 116 Or App 604, 843 P2d 459 (1992): ORS 138.222(4)(a) does not permit appellate review of a claim that the sentencing court erred in vacating the original sentence and in imposing an amended sentence; “that subsection is subject to the general provision that a *sentence* may be reviewed under the provisions of ORS 138.222,” and defendant’s claim of error did not challenge the sentence imposed.

*State v. Barber*, 113 Or App 603, 832 P2d 51 (1992): If the sentencing court made findings sufficient to impose a departure sentence, the appellate court has “no authority to review the length of a departure sentence, if it is within the guidelines.”

*State v. Hopkins*, 112 Or App 458, 829 P2d 97 (1992): Appellate court has authority under ORS 138.222(7) to review state’s appeal challenging downward departure.

*State v. Schuh/Hookie*, 112 Or App 362, 829 P2d 1040, *rev den*, 314 Or 176 (1992): Appellate court has authority under ORS 138.222(4) to review state’s claim that the sentencing court erred in imposing “optional probation.”

*State v. Guthrie*, 112 Or App 102, 828 P2d 462 (1992): In appeal challenging departure sentence, appellate court does “not review the court’s decision whether to consider particular mitigating or aggravating factors [but only] whether the reasons that the court provided for the departure sentence constitute substantial and compelling reasons.”

*State v. Delgado*, 111 Or App 162, 826 P2d 1014 (1992): A claim that the state failed to prove defendant’s criminal history in the proper manner generally is reviewable under ORS 138.222(4)(a) notwithstanding ORS 137.079(4)(f).

*State v. Holliday*, 110 Or App 426, 824 P2d 1148, *rev den*, 313 Or 211 (1992): Claim that prior conviction included in criminal-history calculation was invalid as “uncounseled” is reviewable under ORS 138.222(4)(a), as is claim that sentencing court improperly imposed all the available custody units as jail time without making the findings as required by OAR 253-05-013(3).

*State v. Rathbone II*, 110 Or App 419, 823 P2d 432 (1991), *rev den*, 313 Or 300 (1992): Appellate court has authority under ORS 138.222(4)(b) to review claim that sentencing court erred in its ranking of racketeering conviction (which is unranked offense).

*State v. Tapp*, 110 Or App 1, 821 P2d 1098 (1991): Appellate court has authority under ORS 138.222(4)(b) to review defendant’s claim that the sentencing court erred in its classification of a prior out-of-state conviction for criminal-history purposes.

*State v. Munro*, 109 Or App 188, 818 P2d 971 (1991), *rev den*, 312 Or 588 (1992): Appellate court has authority under ORS 138.222(4)(b) to review defendant’s claim that sentencing court misapplied “single judicial proceeding” rule in calculating his criminal-history score.

*State v. Cook*, 108 Or App 576, 816 P2d 697 (1991), *rev den*, 312 Or 588 (1992): If the sentencing court imposed the presumptive sentence and defendant did not preserve a constitutional challenge to the guidelines or the sentence imposed, no appellate review: [1] of sentence imposed on ground that it is excessive, is “disproportionate,” or is cruel and unusual punishment, or [2] of claim that court erred in declining to depart downward.

See also *State v. Bates*, 113 Or App 597, 832 P2d 49 (1992) (*per curiam*) (if presumptive sentence imposed, no review of claim that sentence unconstitutionally cruel and unusual punishment); *State v. Green*, 113 Or App 373, 833 P2d 311, *rev den*, 314 Or 391 (1992) (where court imposed consecutive presumptive sentences and made appropriate *Racicot* findings, no appellate review of challenge to sentences on ground they are “excessive”); *State v. Fern*, 110 Or App 185, 822 P2d 1210 (1991) (“We have no authority to review the court’s decision not to impose a departure sentence.”); *State v. Hays*, 109 Or App 491, 820 P2d 39 (1991) (*per curiam*), *rev den*, 312 Or 588 (1992) (no appellate review of defendant’s claim that downward-departure sentence “excessive”).

## 5. Preservation of error, review of unpreserved claim as plain error

See ORAP 5.45(4).

*United States v. Cotton*, 535 US 625, 122 S Ct 1781, 152 L Ed 2d 860 (2002). The defendants were charged by an indictment with conspiracy to distribute and possess with intent to distribute a “detectable amount” of cocaine and cocaine base. The jury found them guilty of that charge. At sentencing, the court found, under the applicable provisions of the federal sentencing law, that the crime involved at least 50 grams of cocaine base, which finding permitted the court under 21 U.S.C. § 841(b)(1)(A) to impose a sentence beyond the 20-year maximum that otherwise was authorized for the underlying crime. Based on that finding, and without objection from defendants, the court imposed a 30-year sentence. While the case was on appeal, *Apprendi* was announced. *Held*: Affirmed. [1] The *Apprendi* error that the indictment failed to allege “at least 50 grams” was not a “jurisdictional” defect that precluded the district court from imposing the enhanced sentence. [2] Under the “plain error” rule, defendants’ *Apprendi*-based challenge is not reviewable on appeal because the evidence was “overwhelming” and “essentially uncontroverted” that the crime involved at least 50 grams.

*State v. Lennon*, 348 Or 148, 229 P3d 589 (2010). Defendant was convicted of DCS by jury verdict, and the court at sentencing found that “prior incarcerations, probations, paroles, and sanctions haven’t worked” and on that basis departed upward and imposed an 80-month sentence. Defendant did not object, but he argued on appeal that the sentence was plain error in light of *Blakely v. Washington* because the finding was not made by a jury. *Held*: Affirmed. [1] For purposes of plain-error review, “the ‘no legitimate debate’ criterion, if satisfied, places the error outside of the universe of what the Court of Appeals may consider as a discretionary matter.” [2] “A finding that [defendant’s] past criminal sanctions have not deterred [him] from committing further crimes thus requires something beyond a conclusion that [he] has one or more criminal convictions in his past. But a finding of a ‘separate malevolent quality’ is not necessary. If the record supports the factual inference that a defendant’s prior criminal convictions or sanctions should have, but did not, deter [him] from committing his new offense, that factual finding can, in a proper case, support a departure sentence. It is then for the sentencing court to decide, based on that predicate factual determination, whether there is ‘a substantial and compelling’ reason to impose an upward departure sentence.” [3] Because the record in this case provides “no legitimate debate” that defendant’s prior criminal sanctions have failed to deter him from further criminal activity, the Court of Appeals “should not have exercised its discretion” to review defendant’s claim as plain error.

*Note*: The court declined to review defendant’s unpreserved challenge to the validity of the “failure to deter” aggravating factor.

*State v. Fults*, 343 Or 515, 173 P3d 822 (2007). Defendant was convicted in this case of MCS, the court placed the conviction in gridblock 4-F and imposed a probationary sentence with a 36-month term (instead of the presumptive 24-month term), because that matched the probationary terms it had imposed on defendant’s other convictions in a different case. Defense counsel said, “We have no objection to that, whatsoever.” But defendant then appealed contending that the 36-month term was “plain error” because the court did not properly depart. The Court of Appeals agreed and reversed, noting that “‘there [is no] indication that defendant’s failure to object constituted a strategic choice for which defendant now seeks to shift the blame” and that “the state has no valid interest in requiring defendant to serve an unlawful sentence.” *Held*: Reversed and remanded for reconsideration. [1] “Under those circumstances, defense counsel easily could have feared that a technical objection to the extra 12 months of probation on the MCS conviction would ‘break the deal,’ and that the best tactic for his client was to remain silent. In other words, ... there is a significant possibility that defendant’s failure to object *was in fact* a strategic choice.” [2] “Among the factors that may apply in this case [when determining whether to review a ‘plain error’ are: (1) defendant’s apparent encouragement of the judge’s choice; (2) the role of the concurrent, permissible 36-month probationary sentence; (3) the possibility that defendant made a strategic choice not to object to the sentence; and (4) the interest of the judicial system in avoiding unnecessary repetitive sentencing proceedings, as well as its interest in requiring preservation of error. Finally, respecting the ‘no valid interest’ statement itself, ... (1) the statement is a truism, which, if it were dispositive, would require consideration of and reversal based on any sentencing error, even those that have no readily identifiable significance, and (2) sentences in criminal cases, such as those imposed to run concurrently with sentences that the prisoner already is (or will be) serving, often have no real, practical effect on the prisoner. In such cases, among others, an appellate court’s ‘no valid interest’ statement contributes little or nothing to its analysis under ORAP 5.45(1) whether to exercise its discretion to consider ‘an error of law apparent on the face of the record.’ This is one of those cases.”

*Note*: On remand, the Court of Appeals affirmed: *State v. Fults*, 219 Or App 305, 182 P3d 267 (2008) (sentencing court’s imposition of a 36-month term of probation instead of the presumptive 24-month term did not constitute plain error because defense counsel expressly consented, there may have been a “strategic choice,” and the existence of a concurrent

36-month term of probation on another conviction mad gravity of the error “slight”).

*State v. Bowen*, 340 Or 487, 135 P3d 272 (2006). In light of *State v. Barrett*, the sentencing court committed plain error when it entered a separate conviction and sentence of death on the two counts of aggravated murder based on defendant’s murder of the single victim. “[T]he trial court should have entered one judgment of conviction ... which enumerated separately each aggravating factor and imposed one sentence of death.”

See also *State v. Tiner*, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007) (sentencing court committed plain error when it entered a separate conviction and sentence of death on the two counts of aggravated murder, and a separate conviction and sentence for intentional murder, based on defendant’s murder of the single victim); *State v. Acremant*, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005) (defendant was convicted of two alternative counts of aggravated murder for each of his two victims, *Held*: sentencing court committed plain error under *State v. Barrett* by entering two convictions for each victim); *State v. Gibson*, 338 Or 560, 113 P3d 423, *cert den*, 546 S Ct 1044 (2005) (same).

*State v. Gornick*, 340 Or 160, 130 P3d 780 (2006). Defendant waived jury and pleaded guilty to third-degree assault. At sentencing, the court found three aggravating facts, departed upward, and imposed a 26-month sentence. For the first time on appeal, defendant contended that the sentence is error because the aggravating facts were not found by a jury. The Court of Appeals ruled that the sentence is “plain error” in light of *Blakely* and remanded for resentencing. *Held*: Reversed; trial court’s judgment affirmed. [1] “Determining whether a trial court committed plain error involves a two-step analysis. The first step incorporates three requirements: (1) the claimed error is an error of law, (2) the claimed error is obvious, not reasonably in dispute, and (3) it appears on the face of the record ... . If all the requirements of the first step are satisfied, then the court proceeds to the second step, where it must decide whether to exercise its discretion to consider or not to consider the error.” [2] “This court employs two different standards of review to ascertain whether the Court of Appeals properly concluded that a trial court committed plain error. First, this court considers whether the Court of Appeals committed an error of law in determining that the three elements under the first state of the plain-error analysis had been satisfied. Next, this court inquires whether the Court of Appeals abused its discretion in deciding to consider the error under the second step of the plain-error analysis.” [3] Because *Blakely* recognizes that a defendant may admit or choose to waive jury on a sentence-enhancement fact, “the mere fact that a judge, rather than a jury, decides the facts relevant to sentencing does not demonstrate that any error occurred.” [4] On this record, it is possible “that defendant chose, for one of many possible reasons, not to have a jury find the aggravating facts,” in which case the trial court did not err. For that reason, “because we would be forced to choose between competing inferences respecting the trial court’s finding of the aggravating facts, the claimed error is not one appearing ‘on the face of the record’ under ORAP 5.45(1)” and the Court of Appeals erred in considering it as “plain error.”

*State v. Heilman*, 339 Or 661, 125 P3d 728 (2005). Defendant waived jury without qualification and the trial court found him guilty of multiple felonies, rejecting his insanity defense. At sentencing, the state sought a dangerous-offender sentence under ORS 161.725, and defendant objected based on *Apprendi*. The court overruled that objection and, applying a standard of proof beyond a reasonable doubt, found him to be a dangerous offender and imposed a 20-year sentence. *Held*: Affirmed. “[D]efendant, once having made an apparently unqualified waiver of the jury right, had the burden of objecting in some manner [at sentencing], thereby preserving his argument for appeal, if he regarded any action by the trial court as a violation of his right to trial by jury.” Although defendant raised pleading and standard-of-proof objections based on *Apprendi*, he “failed to preserve the argument that the court should have empaneled a jury to decide the requisite facts for sentencing.” Moreover, “defendant admitted facts sufficient to support the trial court’s findings ... thus foreclosing any relief under *Apprendi*.”

*State v. Cox*, 337 Or 477, 98 P3d 1103 (2004), *cert den*, 126 S Ct 50 (2005). In capital case, the court refused to consider defendant’s unpreserved claim that the Fifth Amendment required the state to allege the penalty-phase factors in the indictment; the issue is not “plain error” because *Blakely* was based solely on the Sixth Amendment right to jury and the Court did not suggest that the Fifth Amendment applies in this context.

*State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993): Supreme Court refused to review unpreserved claim that sentencing court failed to comply with ORS 137.123(4) when it imposed consecutive sentences.

*State v. Miller*, 317 Or 297, 855 P2d 1093 (1993): Supreme Court refused to review unpreserved claim that sentencing court failed to comply with OAR 253-12-020(2) when it imposed consecutive sentences.

**State v. Farmer**, 317 Or 220, 856 P2d 623 (1993): Because under current law it was uncertain whether “life sentence” could be imposed as a departure sentence on murder conviction subject to the sentencing guidelines, an unpreserved objection to a “life sentence” supported by departure findings is not reviewable as “plain error” under ORAP 5.45(2), notwithstanding *State v. Morgan*, 316 Or 553, 856 P2d 612 (1993). An alleged error is not “plain error” merely because it relates to the sentence imposed and presents only an issue of law, to be plain error “the error of law must be ‘apparent,’ meaning ‘obvious, not reasonably in dispute.’”

*Caveat*: Many of the “plain error” rulings by the Court of Appeals that predate the *Farmer* decision are now of questionable authority. *See, e.g., State v. Rodriguez*, 127 Or App 89, 91, 870 P2d 270 (1994).

**State v. Adams**, 315 Or 359, 847 P2d 397 (1992): Because the parties stipulated to the sentence as part of a plea agreement and advised the sentencing court of the correct gridblock for the conviction, and because the sentencing court approved that agreement on the record and imposed the stipulated sentence, ORS 138.222(2)(d) precludes any appellate review of defendant’s claim of error on appeal that the sentence imposed is error due to the fact that it effectively is a departure and the court did not make departure findings.

**State v. Monro**, 256 Or App 493, 301 P3d 435 (2013). Defendant committed a series of home-invasion robberies, and was convicted of multiple counts relating to three different incidents. The trial court imposed a series of consecutive Measure 11 and departure sentences, including a consecutive 144-month departure sentence on the conviction for first-degree robbery. Defendant argued for the first time on appeal that the court erred by not applying the “shift to column I” rule, OAR 213-012-0020, when it imposed the consecutive sentence on his robbery conviction. *Held*: Reversed and remanded for resentencing. The trial court erred by not complying with the “shift to column I” rule. [1] Because the sentencing court chose to impose a departure sentence on the robbery conviction that was longer than the Measure 11 minimum sentence, the court was required to comply with the “shift to column I” rule if it imposed a consecutive sentence. If the court followed that rule, the maximum departure sentence that could be imposed consecutively was only 72 months. But because the mandatory incarceration term for the offense under Measure 11 is greater—90 months—the court was required to impose that sentence rather than the 72-month consecutive guidelines sentence. Because the court failed to comply with that rule, the court imposed a sentence that is 54 months longer than the maximum permitted by law. [2] The Court of Appeals exercised its discretion to review the claim as plain error because it was not “certain” on the record that, if defendant had objected below, the sentencing court would have imposed the same aggregate incarceration term by structuring the sentence differently.

**State v. Saechao**, 256 Or App 369, 300 P3d 287 (2013). Defendant was convicted of several firearm offenses based on a single incident which he used of a gun to rob a store. The sentencing court imposed six separate 60-month mandatory minimum firearm sentences pursuant to ORS 161.610(4)(a), despite defendant’s objection. Each of those sentences was subsumed in other, longer sentences imposed in the case, and the total sentence was 210 months—120 months on a conviction for attempted aggravated murder and a consecutive 90 months on a conviction for first-degree robbery. *Held*: Reversed and remanded for resentencing. [1] Under *State v. Hardesty*, 298 Or 616, (1985), the multiple firearm-minimum sentences were not authorized under ORS 161.610(4)(a). [2] Although review of a claim of plain error is discretionary, and even though the sentencing court may impose the same total amount of incarceration on remand, the Court of Appeals exercised its discretion to review the error in this case because the record did not clearly establish that the sentencing court would do so. Because it was not certain that a remand would provide no benefit to defendant, the court remanded for resentencing.

**State v. Engerseth**, 255 Or App 765, 299 P3d 567 (2013). After a jury trial, defendant was convicted of unlawful use of a weapon, menacing, and tampering with a witness. At sentencing, defendant stipulated that he was “on supervision” and, on that basis, the sentencing court imposed a 60-month sentence by upward departure. Defendant did not object. Later, he filed a motion under ORS 138.083(1) to “correct” the judgment by deleting the departure term contending that the departure was unlawful because, despite the stipulation, the court did not obtain a *written* waiver of his right to a jury trial on the enhancement fact, as is required by ORS 136.773(1). The court denied that motion. *Held*: Affirmed. [1] Defendant failed to preserve the argument that he makes on appeal, because his motion to correct the judgment under ORS 138.083(1)(a) “preserved only the limited issue of whether the court abused its discretion in refusing to correct the judgment, not the issue of whether the sentence is erroneous.” “Filing a post-judgment motion does not retroactively preserve predicate sentencing error.” [2] The Court of Appeals declined to decide whether the sentencing court committed plain error under ORS 136.773(1). “Because he stipulated to the enhancement fact, defendant was not prejudiced by any error. On this record, no reasonable factfinder could conclude anything other than that defendant was on supervision when he committed the relevant crime. Under those circumstances, any error is not grave, the state has a significant interest in

avoiding a second, unnecessary sentencing hearing, and remanding to the trial court would not advance the ends of justice.”

**State v. Rice**, 255 Or App 181, 296 P3d 622 (2013) (*per curiam*). Defendant was convicted on two misdemeanor counts. The sentencing court suspended imposition of sentence and put defendant on probation. For the first time on appeal, defendant cited ORS 137.010(4) and argued that the sentencing court erred by suspending his entire sentence, instead of just “a part of” the sentence. *Held*: Affirmed. “During the sentencing hearing, defendant argued that the court was limited to imposing and suspending a jail sentence that did not exceed 180 days or that the court was required to impose a jail sentence and to specify the number of days of jail time that the court was suspending so that the sentence would be clear. Defendant did not cite ORS 137.010 or assert below what he argues now—that the trial court could not suspend *all* of his sentence, only ‘a part of’ his sentence, before it could impose probation. Accordingly, defendant’s assignments of error were not preserved below; nor does defendant contend that they amount to plain error.”

**State v. Molette**, 255 Or App 29, 296 P3d 594, *rev den*, 353 Or 788 (2013). Defendant was convicted of second-degree sexual abuse, and the jury also found: that he had convictions for prior felony sex crimes in Texas; that prior criminal sanctions had not deterred him; that he had been persistently involved in similar criminal activity; and his incarceration was necessary for public safety. The state asked the sentencing court to impose the presumptive life sentence under ORS 137.719, defendant asked for a lesser sentence, and the court imposed the life sentence. On appeal, defendant relied on *Gordon v. Hall*, 232 Or App 174 (2009), to argue that the court erred when it imposed the life sentence, because the state failed to prove that he had received two prior “sentences” for felony sex crimes—he asserted that he received only probation for his two previous sex offenses. He also argued that the court erred because it imposed the life sentence based on an incorrect assumption that a downward departure sentence under ORS 137.719 may not exceed the authorized statutory maximum for the offense. *Held*: Affirmed. Neither argument was preserved, and neither qualifies as “plain error,” because it is not obvious that the sentencing court erred in either respect.

**State v. Aitken**, 255 Or App 17, 296 P3d 587 (2013). Defendant committed a knife attack on two victims (Walker and Torres) in an apartment. A jury found him guilty on one count of first-degree assault and three counts of second-degree assault against Walker, and two counts of second-degree assault against Torres. The sentencing court imposed 144-month sentences on two of the convictions for second-degree assault. *Held*: Remanded for resentencing; otherwise affirmed. The court committed plain error by imposing 144-month sentences on those two convictions, because the statutory maximum sentence for second-degree assault is 120 months.

**State v. Baskette**, 254 Or App 751, 295 P3d 177 (2013) (*per curiam*). Defendant was convicted, based on guilty pleas, of various drug- and firearm-related offenses in two consolidated cases. In orally imposing sentence, the trial court stated that defendant would be eligible for “earned time” credits but not AIP; the court did not make findings to support that decision. The subsequent written judgments denied defendant consideration for “any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing.” On appeal, defendant argued that the trial court erred in denying him eligibility for sentence reductions under ORS 137.750 without making the requisite findings. He admitted that he had not raised that issue below, but argued that, because the error did not become apparent until the court’s written judgments were issued, he was not required to preserve the claim of error for appeal. *Held*: Remanded for resentencing. [1] The sentencing court erred by not making the findings required under ORS 137.750 to deny defendant eligibility for early release, sentence reduction, or other program. [2] Because “the error as to the denial of earned time did not become apparent until after the court had entered its written judgments, which contradicted the statement that the court had made at sentencing in open court that defendant would be eligible for earned time, ... preservation as to that error is not required.”

**State v. Battles**, 252 Or App 569, 287 P3d 1277 (2012) (*per curiam*), *rev den*, 353 Or 533 (2013). Defendant was convicted of attempted murder, second-degree assault, and unlawful use of a weapon, and the sentencing court imposed a unitary assessment on the attempted-murder conviction and a 144-month upward-departure sentence on the assault conviction. *Held*: Reversed and remanded. [1] The sentencing court committed plain error because the unitary assessment cannot be imposed on a conviction for an attempt crime. *See State v. Becker*, 171 Or App 721, 722 (2000). [2] The court committed plain error by imposing a 144-month sentence on the conviction for second-degree assault, because it is a class B felony and the maximum sentence is only 120 months. (Although that sentence is to be served concurrently with a longer sentence, the Court of Appeals reviewed it as “plain error” because it had remanded for resentencing based on the first error.)

**State v. Burge**, 252 Or App 574, 288 P3d 565 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was found guilty on 12 counts of second-degree sexual abuse. For the first time on appeal, he contended that, in light *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013), the sentencing court committed “plain error,” when it ranked those convictions as category 7 offenses. *Held*: Reversed and remanded for resentencing. Under *Simonson*, the category 7 ranking violated the “vertical proportionality” principle in Art I, § 16, even for the convictions based on those that involved a victim under the age of 16—the court should have ranked them as category 6 offenses. Under *Simonson*, “vertical proportionality is measured by the sentences that are available for the conduct at issue, not on what any individual defendant actually receives.”

**State v. Decamp**, 252 Or App 177, 285 P3d 1130 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was convicted of six counts of second-degree sexual abuse, and the court sentenced him to three consecutive 24-month sentences, with the other three sentences concurrent. On appeal, defendant claimed that his sentences are disproportionate in light of *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013). *Held*: Reversed and remanded for resentencing. [1] In light of *Simonson*, the sentencing court erred by ranking his convictions for second-degree sexual abuse as a “7” on the crime-seriousness scale. [2] The error warranted plain-error review: “Application of a crime-seriousness score of 6 rather than 7 yields a lower presumptive sentence for each of defendant’s six second-degree sexual-abuse convictions; thus, it is possible that defendant could receive a substantially shorter prison term on remand. Moreover, the state has no interest in sustaining a constitutionally infirm sentence.”

**State v. Dimmick**, 252 Or App 359, 287 P3d 1180 (2012) (*per curiam*). The sentencing court orally imposed an 18-month probationary sentence on defendant’s conviction for attempting to elude, but the written judgment imposed a 24-month term. *Held*: Reversed and remanded. [1] Ordinary preservation-of-error principles “are inapposite, because defendant had no opportunity to object to the sentencing error.” [2] The 24-month term is plain error because, “in the absence of findings justifying an upward departure, the correct probationary term was 18 months.”

**State v. Choat**, 251 Or App 669, 284 P3d 578, *rev den*, 352 Or 666 (2012). Defendant was the driver of a car involved in an accident in which two of his passengers died and another was injured. A jury found him guilty of two counts of second-degree manslaughter, three counts of recklessly endangering another person, and one count each of assault, reckless driving, and driving under the influence of intoxicants. The court imposed a 156-month sentence and a compensatory fine of \$1,590.02, which was designated to repay a witness—the sister of one of the killed passengers—for her airfare and hotel expenses incurred in order to attend the trial. Defendant had objected to imposition of that sum as *restitution*, but he did not object when the court imposed it as a compensatory fine instead. *Held*: Affirmed. [1] ORS 137.101(1) limits a compensatory fine only to expenses that may be recovered in a civil action, and costs associated with an injured person’s family attending trial are not recoverable by civil action. [2] Defendant’s objection is not preserved because “this record indicates that defendant objected to restitution, arguing that it was not authorized because the expense was a normal cost of prosecution; the court, alerted to defendant’s objection to restitution, ordered a compensatory fine instead, to which defendant did not object. Moreover, even if defendant’s objection to restitution were broad enough to encompass an objection to the compensatory fine, the fact remains that his argument—whether against restitution, compensatory fine, or both—was not developed in enough detail to permit the state to respond to it or the court to evaluate it.” [3] Even though the error in this case is an error of law and is not reasonably in dispute, the Court of Appeals declined to review it as “plain error” because “an inference that might be drawn from the record is that defendant’s decision not to object to the imposition of a compensatory fine in the amount of \$1,590.02 was a strategic choice, because doing so would have provided the trial court with the opportunity to reconsider its decision not to impose a fine of \$50,000 for the benefit of Allstate.”

**State v. Powell**, 250 Or App 480, 281 P3d 631, *rev den*, 352 Or 665 (2012). Defendant and others tricked their way into the victim’s house in order to steal marijuana, and defendant threatened the three victims with a firearm. When the intruders discovered that the marijuana they sought actually was next door, they released the victims and left. Defendant was convicted of, *inter alia*, three counts of first-degree robbery and six counts of second-degree robbery, two for each victim. *Held*: Reversed and remanded for merger and resentencing. [1] The sentencing court committed plain error by not merging the two convictions for second-degree robbery for each victim into a single conviction. [2] The court declined to consider defendant’s unpreserved argument that the sentencing court erred by imposing the firearm-minimum sentence on a secondary conviction rather than the conviction for first-degree burglary.

**State v. Martinez**, 250 Or App 342, 280 P3d 399 (2012). Defendant was convicted of unlawful use of a weapon, first-degree criminal mischief, and menacing. The sentencing court imposed a probationary sentence and ordered him to

pay \$3,209 in restitution, including an unexplained \$273 to “Care Oregon,” and he did not object. *Held*: Reversed and remanded. [1] The sentencing court committed plain error by imposing restitution to Care Oregon without any supporting evidence in the record: “the record is devoid of any evidence from which the court could find that defendant’s criminal conduct resulted in economic damages of \$273 to Care Oregon.” [2] Because the amount of restitution “was not insubstantial given defendant’s circumstances” and the interests of justice militated against requiring a defendant to pay an obligation that is unsubstantiated by the record, the Court of Appeals exercised its discretion to consider the error, and remanded for resentencing.

*State v. Moore*, 249 Or App 684, \_\_ P3d \_\_ (2012). Defendant, while intoxicated, crashed her car head-on into the victim’s car. She pleaded guilty to DUII and fourth-degree assault, and she argued at the restitution hearing that she should not be responsible for over \$50,000 in expenses that the victim’s insurers’ incurred paying for the victim’s medical bills. She argued that because the victim’s insurers were still negotiating with her insurers, their dispute should be resolved “through the civil system.” The sentencing court ordered restitution to the insurers. On appeal, defendant argued: (1) the evidence was insufficient to establish that the victim’s insurers sustained the losses that the state claimed, and (2) the court erred by not continuing the restitution hearing until the time when the exact amount of the insurers’ losses were determined. *Held*: Affirmed. Defendant’s argument that the trial court should “let the civil system” handle the insurers’ losses, instead of imposing restitution, was not sufficient to preserve her argument on appeal that the state failed to properly prove the losses. Similarly, she failed to preserve her claim that the court erred by not continuing the restitution hearing because she never asked the trial court to do so.

*State v. Young*, 249 Or App 597, \_\_ P3d \_\_ (2012). Defendant pleaded guilty to charges of second-degree burglary, UUV, and multiple counts of identity theft, all C felonies, and stipulated to crime-seriousness ranking of 8 or 9 for each. The court imposed 60-month prison terms and terms of post-prison supervision that were 60 or 36 months, “minus the period of incarceration.” *Held*: Remanded for resentencing. [1] The five-year terms of post-prison supervision are plain error because the maximum term for those offenses was only three years, per OAR 213-005-0002(2). [2] The post-prison supervision terms also were erroneous because, when added to the terms of incarceration, the total exceeded the maximum statutory indefinite sentence for the crimes, in violation of OAR 213.005-0002(4). The clause making their length contingent on the length of time the defendant is incarcerated creates an unlawfully “indeterminate” sentence. *State v. Mitchell*, 236 Or App 248 (2010).

*State v. Debuiser*, 249 Or App 203, \_\_ P3d \_\_ (2012). For shoplifting and engaging in a fight with a loss-prevention officer, defendant was convicted of theft of the shoplifted items and harassment of the officer. At sentencing, the court asked the prosecutor if the officer needed any medical attention, and the prosecutor responded that “everything was covered by Worker’s Comp” and that he “has been made whole.” Nonetheless, the court imposed a \$200 compensatory fine under ORS 137.101. Although defendant did not object, he argued on appeal that the court committed plain error by imposing a compensatory fine without any proof that the victim had suffered pecuniary loss. *Held*: Affirmed. The claimed error is not reviewable as “plain error” because it is not apparent on the face of the record. Multiple competing plausible inferences existed, including that defendant chose not to object to the fine for tactical reasons. The court could have imposed a greater fine under ORS 161.635, and, particularly knowing that he faced a \$3,000 fine in an unrelated case, defendant may have chosen not to object because he feared the court would impose the same or a greater fine under ORS 161.635.

*State v. West*, 249 Or App 257, \_\_ P3d \_\_ (2012) (*per curiam*). Defendant’s unpreserved claim that the sentencing court erred by imposing a particular amount of restitution is not reviewable on appeal as “plain error,” because “there was some evidence presented of the nature and amount of the damages” suffered by the victim.

*State v. Wilcox*, 249 Or App 248, \_\_ P3d \_\_ (2012) (*per curiam*). The sentencing court committed plain error when it imposed separate concurrent sentences on each of defendant’s three convictions for first-degree burglary after it had merged those convictions into a single conviction.

*State v. Truong*, 249 Or App 70, 274 P3d 873 (2012). Defendant was convicted of two counts of DCS and FIP, and the court followed the state’s recommendation and imposed consecutive upward-departure sentences of 68, 36, and 36 months. For the first time on appeal, defendant complained that the total sentence of 140 months violates the 400-percent rule. *Held*: Reversed and remanded. [1] The total sentence exceeds the 136-month limited imposed by the 400-percent limitation in OAR 213-012-0020(2) and 213-008-0007(3). [2] The court reviewed defendant’s claim as plain error. It is not certain that the sentencing court would have restructured the sentences if defendant had objected, it is merely

“speculative” that defendant made a tactical decision not to object, and defendant’s failure to seek a modification under ORS 138.083 does not bar plain-error review.

*State v. Nolasco-Lara*, 249 Or App 111, 274 P3d 262 (2012). Defendant pleaded guilty to second-degree robbery pursuant to a plea agreement providing that the state would recommend a 70-month prison sentence with 5 years of post-prison supervision. The state dismissed other and more serious charges. The court imposed that sentence, and defendant did not object. *Held*: Affirmed. [1] The 5-year term of post-prison supervision is plain error both because the prescribed term is only three years, OAR 213-005-0002(2)(a), and because the total sentences exceeds the statutory maximum, OAR 213-005-0002(4). [2] But the court declined to review the claim as “plain error,” because the term was expressly included in the plea agreement, defendant obtained “a significant benefit” by the deal, and “it is possible that defendant made a strategic choice not to object.”

*State v. Jordan*, 249 Or App 93, 274 P3d 289 (2012). Defendant drove drunk and hit the victim, who suffered serious physical injury, including brain trauma, and spent six months in the hospital and underwent multiple surgeries. Defendant pleaded guilty to DUII and second-degree assault, and the court imposed restitution in the amount of \$887,793, including \$670,000 to Providence for medical expenses and over \$100,000 for lost income. *Held*: Affirmed. [1] The court did not commit “plain error” by relying on Providence’s medical-lien ledger. Although “medical bills do not establish reasonable charges necessarily incurred,” the ledger contains the amounts that Providence actually paid to medical-service providers. Because the appellate courts “have never addressed whether an award of restitution may be based on an insurer’s statutory lien amount,” and the issue is “reasonably in dispute,” defendant’s claim “does not qualify as an error of law apparent on the face of the record.” [2] Defendant failed to adequately preserve specific objections to a list of anticipated future treatment expenses—which may be recovered as restitution—including naturopathic medical and food expenses, which the victim’s wife testified were helping his condition.

*State v. Capri*, 248 Or App 391, 273 P3d 290 (2012). Pursuant to a plea agreement, defendant pleaded guilty to two counts a felony stalking, a class C felony, and the court imposed a 41-month prison sentence on each, with 28 months on the second to be served concurrently with the first, and it also imposed a 36-month term of post-prison supervision on each conviction. Defendant did not object to the sentence, but he argued for the first time on appeal that the post-prison supervision terms violated OAR 213-005-0002(4), because the total sentence is thus 77 months. *Held*: Reversed and remanded. “Plain error” review is permissible because defendant is prejudiced because the post-prison supervision terms are 17 months too long. Even though the state contends that the sentencing court easily could have fixed the problem by reducing the second prison sentence to be only 24 months, “it is not certain that the trial court will impose a sentence on remand that is identical in practical effect to the original sentence.”

*State v. Rubio/Galligan*, 248 Or App 130, 273 P3d 238, *rev den*, 352 Or 170 (2012). Defendants knew that the victim had \$2,600 in cash on him, so they armed themselves with a hammer and a loaded pistol, went to the victim’s motel room, pushed their way into the room, and unsuccessfully attempted to rob him. Defendants were found guilty of first-degree burglary, first-degree robbery, and third-degree assault. *Held*: Remanded with directions to enter a corrected judgment. The trial court committed plain error when it imposing a condition in the judgment that the defendants not contact the victim during their prison term. Because defendants were sentenced to prison, only the Corrections Division and the parole board have authority to impose such a condition during incarceration or post-prison supervision.

*State v. Gruver*, 247 Or App 8, 268 P3d 760 (2011). While stealing jewelry from a department store, defendant damaged some of the jewelry and the store’s plumbing when she removed the packaging and tried to flush it down a toilet in the store’s bathroom. She was convicted of first-degree theft, and the prosecutor at sentencing submitted a restitution schedule that identified the department store’s losses as follows: “Loss: Damaged Jewelry \$3,809.99” and “Loss: Plumbing Bill \$369.00.” The court imposed the restitution amount that the state requested. *Held*: Affirmed. [1] ORS 137.106(5), which gives a defendant the right to be heard on any objection to restitution, does not preclude appellate review if defendant fails to exercise her statutory right to object. [2] But an unpreserved restitution challenge is reviewable as plain error only if there is a “total absence of evidence to support the restitution award in a particular amount” (reaffirming *State v. Harrington*, 229 Or App 473 (2009)). [3] The sentencing court did not commit plain error because the state submitted a restitution schedule describing the victim’s damages, which was supported by testimony at trial from department store personnel as to the amount of the damaged jewelry and the fact that the store toilet had to be unclogged: “Whatever the state’s purported deficiencies in failing to make a more detailed showing of the ‘loss of value’ that defendant caused, there is no question that the state’s proof established loss triggering an *entitlement* to restitution. Thus, the record here does not disclose the plain error that we identified in *Harrington*, which involved a total absence of evidence to support the

restitution award in a particular amount.”

*Note:* Although the court affirmed the restitution order, it stressed that the error was not plain because the restitution request was supported by evidence presented at trial, which leaves open the possibility of a plain-error challenge where the restitution schedule is the *only evidence* supporting restitution.

*State v. Banks*, 246 Or App 109, 265 P3d 50 (2011). Defendant pleaded guilty to attempted UUV (a misdemeanor), and the court placed him on probation for two years, imposed a compensatory fine of \$3,686 and order him to pay \$50 a month on the fine. Defendant failed to make the payments, and he was arrested on the probation-violation allegation. At the show-cause hearing, the court continued defendant on probation but extended the term for a total period of six years, in order to allow defendant sufficient time to pay off the fines. Defendant did not object, but he then appealed arguing that the court committed “plain error” because it lacked authority under ORS 137.010 to extend the probationary period to six years. *Held:* Affirmed. [1] In considering whether to review an unpreserved claim as “plain error,” the court may “take into consideration any strategic purpose that the defendant may have had in not objecting to the trial court’s course of action and the interests of the judicial system in avoiding unnecessary repetitive sentencing proceedings, as well as its intent in requiring preservation of error.” [2] Defendant may have had a strategic purpose in not objecting to extension of his probation into a sixth year because that gave him additional time to pay the fine and thus avoid revocation of his probation and imposition of a jail sentence.

*State v. Claggett*, 245 Or App 491, 263 P3d 1109 (2011) (*per curiam*). Defendant pleaded guilty to coercion with a firearm and unlawful use of a weapon with a firearm, and the court imposed on each a 60-month firearm-minimum sentence pursuant to ORS 161.610(4) and ordered him to serve 24 months of the second sentence consecutively to the first. *Held:* Reversed and remanded for resentencing. The sentencing court committed plain error under *State v. Hardesty*, 298 Or 616 (1985), by imposing two firearm-minimum sentences in the same case, and that error requires resentencing because the second sentences is partially consecutive to the first.

*State v. Wilson*, 245 Or App 365, 263 P3d 1107 (2011). Defendant was found guilty of DUII based on stipulated facts, and the sentencing court, by checking a preprinted judgment form, imposed a DUII conviction fee of \$230, which exceeds the statutory maximum fee of \$130 set by ORS 813.030 (2009). *Held:* Reversed and remanded for resentencing. [1] Because “there is no indication that defendant had an opportunity to object to imposition of the \$230 fee in the preprinted judgment until it was entered, . . . preservation is not required.” [2] The fact that defendant did not seek relief under ORS 138.083(1) does not preclude plain-error review. [3] The \$230 fee was erroneous under ORS 813.030 (2009) (the current fee is \$255).

*State v. Diaz-Guillen*, 245 Or App 110, 261 P3d 80 (2011). Defendant was convicted of two counts of attempted aggravated murder, two counts of first-degree assault, two counts of unlawful use of a weapon, one count of first-degree burglary, one count of felon in possession of a firearm, and two counts of tampering with a witness. At sentencing, the trial court imposed 60-month terms of imprisonment, plus 24-month terms of post-prison supervision, on each of the Class C felonies (the statutory maximum sentence is 60 months total). The trial court also imposed three 60-month “firearm minimum” terms on three of the felony counts. Defendant did not object. The total sentence on all the convictions was 357 months. *Held:* Affirmed. Although the trial court imposed erroneous sentences—the PPS terms on the Class C felonies exceeded the statutory maximum, and there can be only one “firearm minimum” in a single case—the Court of Appeals refused to exercise its discretion to review defendant’s unpreserved sentencing arguments. Because the erroneous sentences are to be served concurrently with other longer, lawful sentences, the errors have no practical effect. In addition, the trial judge had made comments to the effect that defendant deserved his sentence, that rehabilitation had not worked, and that he would be an old man before his release. It was unlikely that a remand would result in an overall sentence more favorable to defendant, and a remand would have resulted in unnecessary and repetitive sentencing proceedings.

*State v. Gutierrez*, 243 Or App 285, \_\_\_ P3d \_\_\_ (2011). On defendant’s conviction for coercion, the court imposed a 36-month sentence and a 36-month term of post-prison supervision, less time served. *Held:* Remanded for resentencing. The PPS term is “plain error” in light of *State v. Mitchell*, 236 Or App 248 (2010), notwithstanding the “less time served” qualifying clause.

*State v. Donahue*, 243 Or App 520, \_\_\_ P3d \_\_\_ (2011). Defendant pleaded no contest to one count of prostitution that she committed on 82<sup>nd</sup> Street in Portland. The court imposed an 18-month probationary term and required, as a special condition of probation, that she not to enter a certain “high vice” area in Portland around 82<sup>nd</sup> and Sandy unless she was passing through it in a car or public transportation. On appeal, defendant argued that the condition was not reasonably

related to the crime of conviction, was overbroad, and unconstitutionally infringed her freedom of association. *Held*: Affirmed. Defendant failed to preserve her first objection, and the court declined to consider it.

*State v. Johnson*, 242 Or App 279, 255 P3d 547 (2011). In 2001, defendant was convicted on three charges, including murder and MCS, and the court sentenced him to a series of prison terms to be served consecutively to a 12-month sentence previously imposed on separate conviction for fourth-degree assault. Defendant appealed, and the Court of Appeals reversed and remanded the case for a new trial. On remand, the parties entered into a settlement by which defendant agreed to plead guilty to manslaughter and MCS, the state dismissed the other charge, and the court imposed new sentences. Neither the court's oral sentence nor the new judgment ordered defendant to serve those sentences consecutively to the sentence on the assault conviction. A month later, the prosecutor filed a motion pursuant to ORS 138.083(1) to "correct" the judgment to add a provision that the sentences would be served consecutively to the sentence on the assault conviction. Defendant did not respond to the motion. Three months later, without having held a hearing on the motion, the trial court entered an amended judgment that made the change requested by the state. *Held*: Amended judgment vacated. [1] Under the particular circumstances in this case, "preservation was not required"—defendant's failure to respond to the state's motion did not preclude review of his claim on appeal. [2] ORS 138.083(1)(a) did not authorize the sentencing court to amend the original judgment, because it did not contain a mathematical or clerical error or an erroneous legal or factual term.

*State v. Clark*, 240 Or App 813, 247 P3d 1279 (2011) (*per curiam*). On defendant's merged convictions for first-degree rape, the court imposed a 100-month sentence and a 20-year term of PPS. *Held*: Reversed and "remanded for resentencing." [1] Because the PPS term appeared for the first time in the judgment, "preservation was not required." [2] The PPS term is error because ORS 144.103(1) requires that it should "be reduced by the amount of time served."

*State v. Ashley*, 240 Or App 795, 249 P3d 125, *rev den*, 350 Or 297 (2011). Defendant pleaded guilty to attempted aggravated murder and various other offenses, and the court ordered him to pay \$2,976 in court-appointed attorney fees, noting "not that he'll ever pay them, but I'm not going to waive them." Defendant did not object, but he argued on appeal that the order was "plain error" because the court did not make a finding under ORS 161.665(4) that he had an ability to pay. *Held*: Affirmed. "Because defendant did not request special findings, we conclude that he has not preserved his challenge to the trial court's failure to make them."

*State v. Delgado*, 239 Or App 435, 245 P3d 170 (2010), *rev den*, 350 Or 423 (2011). Defendant appealed his convictions on several felony convictions and challenged the terms of post-prison supervision. The state conceded that the terms were erroneous but argued that the proper remedy is for defendant to file a motion to correct the judgment under ORS 138.083, not plain-error review on appeal. *Held*: Reversed and remanded. [1] The availability of a remedy under ORS 138.083 is a permissible factor in the court's exercise of discretion to correct a plainly erroneous term of PPS, but it is not the only factor. [2] In light of the gravity of the error, and the fact that the erroneous term appeared for the first time when the judgment issued, the Court of Appeals exercised its discretion to review the erroneous sentences.

*State v. Moore*, 239 Or App 30, 243 P3d 151 (2010). Defendant was convicted of first-degree theft and UUV. At sentencing, the court imposed a fine of \$100 under ORS 161.625, and a compensatory fine of \$1,455.36 under ORS 137.101. ORS 137.101(1) allows a "portion of the fine" imposed under ORS 161.625(1) to be designated as a compensatory fine to be paid to the victim. Defendant argued that it was plain error for the court order both a fine of \$100 and then \$1,455.35 as "a portion" of the \$100 fine. *Held*: Reversed and remanded. [1] It was plain error for the court to order the \$1,455.35 compensatory fine in addition to the fine already imposed under ORS 161.625(1). [2] The appellate court exercised its discretion to review the error, because it was not clear whether the trial court would have imposed the same fine if it had applied the correct analysis.

*State v. Hiatt*, 238 Or App 535, 242 P3d 735 (2010). Although defendant initially objected at the sentencing hearing to the trial court's calculation of the victim's economic damages for purposes of restitution for the coin collection he stole, he withdrew that objection after the court explained how it made its decision. Therefore, defendant's claim of error on appeal was unreviewable as unpreserved.

*State v. Thomas*, 238 Or App 360, 242 P3d 721 (2010). Based on a single murder, defendant was convicted on two counts of aggravated murder and two counts of conspiracy to commit aggravated murder, and the court imposed concurrent true-life sentences on those convictions. Defendant appealed, contending that the court committed plain error by not merging the convictions. The Court of Appeals agreed and remanded with directions to enter a single conviction for

aggravated murder. On remand, the court entered an amended judgment that merged the four counts into a single conviction, but also imposed separate concurrent sentences. Defendant appealed again, raising the unpreserved claim that the trial court committed plain error by not imposing a single sentence. *Held*: Reversed and remanded. [1] The error is “plain” because it is apparent on the face of the judgment and does not require resolution of competing inferences. [2] The court exercised its discretion to correct the error even though defendant is serving a true-life sentence and the correction will not affect his sentence, and even though defendant did not ask the trial court to correct the judgment per ORS 138.083(1), because “judicial efficiency weighs in favor of correcting the error in this proceeding.” [3] The court remanded “for resentencing on a single conviction of aggravated murder.”

*State v. True*, 237 Or App 234, 239 P3d 271 (2010) (*per curiam*). The sentencing court committed plain error when it entered separate convictions on defendant’s two convictions for third-degree sexual abuse that involved a single victim and “were based on a single act that violated separate subparagraphs of ORS 163.415(1)(a).” Reversed and remanded for entry of a corrected judgment and “for resentencing.”

*State v. Godines*, 236 Or App 404, 236 P3d 824, *rev den*, 349 Or 480 (2010). Defendant sexually abused his younger sister when he was 14 years old, but she did not disclose the abuse until after he had turned 18 years old. Defendant was charged and convicted in adult court. At sentencing, defendant did not object to the imposition of Measure 11 sentences, but he argued on appeal that the sentences were “plain error” because he was only 14 when he committed the offenses. *Held*: Affirmed. Because defendant’s argument was based on a “complex issue of first impression” that was reasonably in dispute, it was not plain error.

*State v. Shepherd*, 236 Or App 157, 236 P3d 738 (2010). Defendant got drunk, stole a car, and wrecked it. She pleaded guilty to UUV, attempting to elude a police officer, and driving under the influence of intoxicants. She was ordered to pay \$18,145.30 in restitution to the victim’s insurance company (representing the value of the car), and \$1,200 to the victim as a compensatory fine (representing the remaining balance on the loan). On appeal, defendant argued that the trial court erred in ordering the compensatory fine because such fines are authorized only for objectively verifiable monetary losses and the state did not adduce any evidence that the \$1,200 met that criterion. *Held*: Because defendant’s argument on appeal differed from the argument made to the trial court and, as a consequence, the state never had the opportunity to respond to it, the Court of Appeals determined that it was not adequately preserved and declined to reach its merits.

*State v. Phillips*, 234 Or App 676, 229 P3d 631, *mod on recons*, 236 Or App 461, 240 P3d 1099, *rev den*, 349 Or 370 (2010). The Court of Appeals declined to review as plain error defendant’s claim that the trial court erred in not merging his two convictions for contempt. Because defendant has already completed the 60-day sentence and also was incarcerated on another sentence during that time, “the asserted error was not grave and the ends of justice, although no perfectly served, were not seriously damaged.”

*State v. Lewis*, 236 Or App 49, 234 P3d 152, *rev den*, 349 Or 172 (2010). Defendant was convicted of third-degree assault in two separate cases. At sentencing, the trial court ordered him to pay a unitary assessment of \$607 in each case. The court did not specify the time within which the assessments had to be paid, or the source from which they were to be paid. The money award in each judgment ordered that defendant was to pay all financial obligations in full “before release from incarceration and before supervision ends.” The judgments also either permitted or mandated that the funds could be withdrawn from defendant’s “DOC account while incarcerated.” On appeal, defendant assigned error to the orders requiring him to satisfy the assessments before release from incarceration. *Held*: [1] Defendant was not required to preserve the claimed errors. The aspects of defendant’s sentence claimed as error on appeal first appeared in the written judgments. Under those circumstances, defendant had no practical ability to preserve the claimed error. [2] On the merits, the court erred in ordering defendant to fulfill all monetary obligations before his release from incarceration, without finding—as required by ORS 161.675(1)—that defendant had “assets to pay all or part of the amounts ordered.”

*State v. Reed*, 235 Or App 470, 237 P3d 826 (2010). Defendant was convicted of first-degree burglary and sexual abuse, and the prosecutor asked the court to *recommend* as a condition of post-prison supervision that defendant be barred from contacting the victim or her family. The court’s oral sentence and the written judgment, however, purported to impose that as a condition of PPS. Defendant did not object. *Held*: Reversed and remanded. [1] The order is plain error because a sentencing court “may recommend conditions of post-prison supervision but may not order them.” [2] Defendant is prejudiced because the condition imposed in the judgment is more slightly restrictive than the condition that the board.

**State v. Medina**, 234 Or App 684, 228 P3d 723 (2010). [1] The sentencing court committed plain error under *State v. Hardesty*, 298 Or 616 (1985), when it imposed three firearm-minimum sentences on separate convictions based on a single incident. [2] In deciding whether to exercise discretion to grant relief on an unpreserved claim of sentencing error, “we consider whether the defendant encouraged the trial court’s imposition of the erroneous sentence, the possibility that the defendant made a strategic choice not to object, the role of other sentences in the case, and the interests of the justice system in avoiding unnecessary, repetitive sentencing proceedings.” [3] Although the sentencing court on remand, after correcting the error, possibly can restructure the sentences to reimpose the same overall sentence, it is not clear from the record that it necessarily would. Consequently, the court remanded for resentencing.

**State v. Phillips**, 234 Or App 676, 229 P3d 631, *mod on recon*, 236 Or App 461, 240 P3d 1099, *rev den*, 349 Or 370 (2010). The Court of Appeals declined to review as plain error defendant’s claim that the trial court erred in not merging his two convictions for contempt. Because defendant has already completed the 60-day sentence and also was incarcerated on another sentence during that time, “the asserted error was not grave and the ends of justice, although no perfectly served, were not seriously damaged.”

**State v. Selmer**, 231 Or App 31, 217 P3d 1092 (2009), *rev den* 347 Or 608 (2010). Defendant’s claim that the sentencing court erred in entering a judgment stating that his PCS conviction is for possession of methamphetamine instead of heroin, which is what was charged, is reviewable on appeal even though he did not object, because the error show up for the first time in the final judgment and “he had no practical ability to object” before the judgment was entered. Reversed and remanded for entry of a corrected judgment.

**State v. Harrington**, 229 Or App 473, 211 P3d 972, *rev den*, 347 Or 365 (2009). [1] Defendant failed to preserve challenge to lack of evidence of pecuniary damages by objecting to restitution “in general terms.” [2] Absence of evidentiary support for pecuniary damages is reviewable as plain error. [3] Court exercised its discretion to review the issue as plain error because of the significant amount of restitution imposed, and thus, “defendant’s interest in correcting the error was high.”

**State v. Neese**, 229 Or App 182, 210 P3d 933 (2009). On convictions for sexual offenses involving his four-year-old daughter, defendant was ordered to pay \$75,000 in compensatory fines to the victim. Although he did not object at sentencing, he argued on appeal that the fine was plain error. *Held*: Reversed. Because the state failed to show any pecuniary loss by the victim, imposition of the compensatory fine was plain error. The appellate court exercised its discretion to correct the error because the amount was substantial, and because the record did not show that the victim suffered \$75,000 in damages.

**State v. Toquero**, 228 Or App 547, 208 P3d 1026 (2009). The Court of Appeals declined to review defendant’s unpreserved challenge to the sentencing court’s mistaken imposition of 75-month, rather than 70-month, Measure 11 sentences for using a child in a sexually explicit display. Defendant originally could have received 500 months in prison on all of the charges, and the court instead imposed a total prison term of 325 months with some sentences consecutive to others. Given the number and structure of defendant’s sentences, and the court’s expressed intent to impose a “long sentence,” defendant likely would receive the same sentence on remand; thus the state’s interest in avoiding repetitive sentencing proceedings weighed against an exercise of discretion.

**State v. Marks**, 227 Or App 634, 206 P3d 1102 (2009) (*per curiam*). The sentencing court committed plain error when it imposed a six-year term of probation, because the maximum term is five years, ORS 137.010(4).

**State v. Kennedy**, 227 Or App 281, 205 P3d 65 (2009) (*per curiam*). The sentencing court committed plain error when, after imposing a 300-month sentence on defendant’s convictions for first-degree sodomy, it ordered him to pay \$2,000 as a compensatory fine to pay for the victim’s future counseling costs, because the record does not establish that the victim suffered some pecuniary loss: “In this case, there was no evidence even of future appointments.”

**State v. Brown**, 227 Or App 99, 204 P3d 825 (2009). Defendant was charged with twelve felony and misdemeanor sexual offenses that he committed against three victims, and the parties negotiated a deal by which he pleaded guilty to five charges and admitted that each of the felony convictions was subject to a minimum sentence of 75 or 100 months under Measure 11. The court imposed a series of consecutive sentences that totaled 220 months. Defendant argued on appeal that the court committed plain error by imposing a 75-month sentence on a conviction for first-degree sexual abuse because it was undisputed that he committed the crime before April 1, 1995. *Held*: Affirmed. [1] The court

committed plain error, because ORS 137.700 applies only to convictions based on crimes committed on or after April 1, 1995, and the no-release order cannot be justified based on ORS 137.750, which did not take effect until December 5, 1996. [2] The error is not harmless, because 75-month sentence far exceeds the permissible sentence for that conviction. [3] But the court declined to exercise its discretion to reverse and remand because it is clear that the court could and would impose essentially the same sentence on remand by restructuring the consecutive sentences.

*State v. Santos*, 225 Or App 392, 201 P3d 285, *rev den*, 346 Or 116 (2009). Although defendant objected to the sentencing court's order that he serve his misdemeanor sentences consecutively to that imposed on his firearm conviction, his objection was based on his argument that the convictions should "merge." That objection did not preserve his current argument that consecutive sentences were not justified under ORS 137.123(5)(b) (different victims) based on his claim that the crime of being a felon in possession of a firearm is a "victimless" crime.

*State v. Ramirez*, 225 Or App 382, 202 P3d 193 (2009). On remand for reconsideration in light of *State v. Ramirez*, 343 Or 505 (2007), *adh'd to as modified on recons*, 344 Or 195 (2008), and *State v. Fults*, 343 Or 515 (2007), defendant argued that the Court of Appeals should consider his unpreserved *Blakely* challenge to departure sentences on his convictions for sexual offenses. *Held*: Affirmed. The court declined to reach the unpreserved claim of error because there was no legitimate debate that the jury would have found that the victim was *particularly vulnerable* because she was the defendant's niece and was younger than 8 years old at the time of the crimes.

*Note*: The Supreme Court remanded dozens of similar cases for reconsideration in light of *Ramirez* and *Fults* to consider whether the defendant's *Blakely*-based claim constituted "plain error" and warranted relief. In some cases, the court denied relief on the ground of "no legitimate debate"—*i.e.*, there was no legitimate debate that the jury would have found the departure factors relied on by the trial court because the evidence was overwhelming, and a jury almost undoubtedly would make affirmative findings on those factors regarding factor on which the departure was based—and in the others the court granted relief:

(a) **Relief denied:** *State v. Williams*, 225 Or App 512, 202 P3d 899 (2009) (*in custody*—at time he committed current offenses of escape and criminal mischief); *State v. Price*, 225 Or App 556, 202 P3d 905 (2009) (*disrespect for the court*—defendant had fled from the courtroom after the court had instructed him to remain to be taken into custody); *State v. Niko*, 225 Or App 560, 202 P3d 908 (2009) (*abuse of trust*—defendant unlawfully entered the apartment of an elderly woman at the assisted-living center at which he worked); *State v. Norton*, 225 Or App 507, 202 P3d 916 (2009) (*persistent involvement* in drug offenses—defendant had four prior convictions within eight years of the current case, which involved several drug offenses); *State v. Steinhoff*, 225 Or App 522, 202 P3d 901 (2009) (*persistent involvement* in theft offenses—even though defendant had a nine-year break between some of his convictions; a jury "readily" would have drawn the inference that five prior convictions for theft demonstrated persistent involvement); *State v. Nord*, 225 Or App 533, 202 P3d 910 (2009) (*persistent involvement* in domestic assaults—defendant had two prior convictions for domestic assault committed against two different women within two years of the current case); *State v. Mitchell*, 225 Or App 538, 202 P3d 235 (2009) (*persistent involvement*—burglary was based on defendant's intent to commit assault and defendant had 23 prior convictions, five of which were for assaultive offenses); *State v. Knoke*, 225 Or App 377, 202 P3d 194 (2009) (*victim's permanent injuries*—defendant's acts of punching the victim in the face, the victim lapsed into a coma and, at the time of trial, was confined to a wheelchair and had only a limited ability to speak); *State v. Scott*, 225 Or App 312 (2009) (*victim's particular vulnerability*—the 14-year-old victim previously had been victimized by sexual abuse, defendant was aware of the abuse, and he had developed a relationship of trust with the victim); *State v. Vega*, 225 Or App 307, 201 P3d 254 (2009) (*victim suffered permanent scarring* from burn injuries); *State v. Vandervort*, 225 Or App 343, 201 P3d 260 (2009) (*harm suffered by the victim*—loss of her home and almost all of her possessions was greater-than-typical harm); *State v. Howell*, 225 Or App 146, 200 P3d 610 (2009) (*threats of violence*—defendant set fire to his ex-girlfriend's trailer after threatening to do so, and later confessed that he did it because he was angry and that he could "become a lot more violent toward her" if she did not return some property to him); *State v. Strasser*, 225 Or App 333, 201 P3d 271, *rev den*, 346 Or 213 (2009) (*persistent involvement*—defendant had prior convictions for manslaughter, hit and run (injured person), and two separate resisting-arrest convictions; *lack of amenability to probation*—his probation officer characterized defendant's past probation performance as "absolute total noncompliance and just the constant challenge of every piece of authority."); *State v. Fanning*, 228 Or App 259, 208 P3d 530 (2009) (defendant *on probation* and that he *avoided opportunities to rehabilitate* himself); *State v. Martina*, 227 Or App 13, 205 P3d 87 (2009) (*persistent involvement* in assault crimes, that he was *on supervision* when he committed his current crime, and *efforts to rehabilitate* him had failed); *State v. Robertson*, 227 Or App 270, 205 P3d 78 (2009) (*on supervision*—including defendant's "repeated harassment of the victim, culminating in his violent intrusion into her home"); *State v. Phillips*, 227 Or App 310, 206 P3d 215 (2009) (*on supervision*—including defendant shot the victim during a dispute about his plan to commit a new robbery; *victim suffered permanent injury*—he was paralyzed from the neck down and appeared at sentencing in a wheel chair); *State v. Wilson*, 227 Or App 508, 206 P3d 1060 (2009) (*on supervision* and *harm inflicted* was aggravated—defendant kidnapped a 17-month old child strapped in a car seat, led police on a chase through downtown Salem at 90 mph, took off on foot when officers rammed the car, broke into a residence and had to be subdued by several officers and a police dog); *State v. Sanders*, 227 Or App 495, 206 P3d 274, *adh'd to on recons*, 229 Or App 238, 212 P3d 512, *rev den*, 347 Or 43 (2009) (defendant failed to designate an adequate record for the court to determine whether the departure factors were subject to "legitimate debate"); *State v. Wise*, 227 Or App 350, 206 P3d 216 (2009) (*on supervision*—

defendant has 38 convictions over 30 years, including “numerous property crimes, drug offenses, rape, and manslaughter”); *State v. Erickson*, 227 Or App 299, 206 P3d 221, *rev den*, 346 Or 361 (2009) (*victim particularly vulnerable*—she was his daughter and he sexually abused her over a six-year period when she was under 12 years old; *violation of trust*—he committed crimes when mother left child in his care; *harm significantly greater; significantly cruel conduct* and he posed a significant risk to the community); *State v. Villanueva*, 227 Or App 18, 204 P3d 849 (2009) (*persistent involvement*—defendant has “numerous prior convictions” for similar assaultive offenses, including a conviction for assaulting the same victim in the current case); *State v. Soto-Nunez*, 227 Or App 22, 204 P3d 850 (2009) (*persistent involvement*—defendant had eight prior DUIs within eight years, and three prior convictions for giving false information to a police officer); *State v. Morris*, 227 Or App 27, 204 P3d 865 (2009) (*persistent involvement*—defendant had “extensive” criminal history dating back to 1975 and included convictions for burglary, DWS, fourth-degree assault, menacing, and attempting to elude); *State v. Ruiz*, 227 Or App 157, 205 P3d 81 (2009) (defendant was *on abscond status* and had been so for more than three years); *State v. Tatarinov*, 227 Or App 161, 205 P3d 79 (2009) (*persistent involvement*—defendant had “extensive, ongoing involvement in activities related to identity theft and forgery” as well as a forgery conviction and two convictions for identity theft); *State v. Dream*, 227 Or App 267, 205 P3d 83, *rev den*, 346 Or 361 (2009) (*persistent involvement*—defendant had three prior assault convictions, including one for assault against the same victim, his domestic partner); *State v. Grittman*, 227 Or App 273, 205 P3d 97, *rev den*, 346 Or 361 (2009) (*persistent involvement*—defendant had two prior convictions for the same offense, MCS); *State v. Holquin*, 227 Or App 276, 205 P3d 76, *rev den*, 346 Or 362 (2009) (*was incarcerated* at the time of his offense—defendant assaulted a supervisor while at EOCD); *State v. Jackson*, 227 Or App 33, 205 P3d 98 (2009) (*persistent involvement*—defendant had convictions for robbery and burglary dating back to 1971); *State v. Pulcifer*, 227 Or App 9, 204 P3d 852, *adh’d to as modified on recons*, 228 Or App 738, 209 P3d 380 (2009) (*used a weapon* and there was *threat of actual violence*—defendant used a chain and a bat and threatened the victims); *State v. Bruce*, 228 Or App 219, 206 P3d 1123 (2009) (*persistent involvement*—defendant had three previous felony sex offense convictions, have absconded from supervision and failed to register as a sex offender); *State v. Williams*, 227 Or App 314, 206 P3d 213, *rev den*, 346 Or 258 (2009) (*on probation*—defendant had 12 parole or probation violations); *State v. Rambo*, 227 Or App 356, 206 P3d 212 (2009) (*persistent involvement*—FIP conviction was the fourth conviction in 13 years for the same crime); *State v. Bohannon*, 227 Or App 356, 206 P3d 213, *rev den*, 348 Or 258 (2009) (*victim was particularly vulnerable*—she was 11 years old and defendant babysat her while her mother was ill; circumstances were *particularly egregious*—defendant’s abuse included ejaculation, he carried hepatitis B and C viruses at the time he molested the victim, and he molested the victim while his daughter slept in the same bed and she witnessed the crimes); *State v. McDaniel*, 227 Or App 501, 206 P3d 276 (2009) (*not amenable to probation*—defendant has more than a dozen prior convictions since 1993, including providing false information to police officer and attempting to elude, and defendant also testified that he had successfully eluded police at least five times); *State v. Rodriguez*, 227 Or App 283, 205 P3d 89 (2009) (*victim was particularly vulnerable*—victim had a mental disability); *State v. Winn*, 228 Or App 250, 208 P3d 524 (2009) (*persistent involvement*—two prior convictions for assault in 1999; *on supervision* at the time of the offense—defendant told the victim that he would kill her even if he had to spend the rest of his life in prison).

(b) **Relief granted:** *State v. Lopez-Daniel*, 225 Or App 564, 202 P3d 247 (2009) (*harm to victim* due to assault was greater than typical—although the victim testified that her leg was “smashed” but there was no medical evidence, and the record showed that the victim had declined medical assistance at the scene of the crash; *failure to accept responsibility*—was not beyond dispute); *State v. Albondante*, 225 Or App 502, 202 P3d 914 (2009) (*persistent involvement*—based on only two prior convictions in 1975 and 1985); *State v. Powell*, 225 Or App 517, 202 P3d 903 (2009) (*persistent involvement*—defendant’s three prior drug convictions occurred more than 11 years prior to the convictions in this case); *State v. Shellabarger*, 225 Or App 527, 202 P3d 897 (2009) (*persistent involvement*—there was a 15-year gap between current crime and prior assault conviction); *State v. Lennon*, 225 Or App 318, 201 P3d 264 (2009) (*defendant was undeterred* by prior sentences—although the record showed that he had prior probations and prior incarcerations, the record was not sufficiently “overwhelming”); *State v. Williams*, 225 Or App 325, 201 P3d 267 (2009) (*persistent involvement*—defendant had single prior conviction); *State v. Lee*, 225 Or App 339, 201 P3d 258 (2009) (*defendant was undeterred* by prior sentences—legitimate question remained as to whether a jury would so find); *State v. Brown*, 224 Or App 580, 198 P3d 953 (2008), *rev den*, 346 Or 116 (2009) (*not amenable to rehabilitation* and *victim was particularly vulnerable*—there was little possibility that the defendant made a strategic choice not to object to departure sentences, jury’s verdict did not demonstrate that it necessarily found that the facts supporting departures existed, error is grave because it increased the defendant’s sentence by 120 months); *State v. Williams (Williams III)*, 228 Or App 254, 208 P3d 496 (2009) (*persistent involvement*—whenever the state alleges prior uncharged misconduct, rather than prior convictions, there will “generally” be legitimate doubt about whether the misconduct constitutes persistent involvement); *State v. Pratt*, 227 Or App 364, 206 P3d 273 (2009) (*on probation*—defendant on probation for two prior attempted robberies, supported himself by selling marijuana in downtown Portland, and committed his two current violent robberies while on probation, but that was not “compelling” enough to show that a jury would find that defendant had a “malevolent quality”); *State v. Flores*, 227 Or App 369, 206 P3d 279 (2009) (*persistent involvement*—based on convictions for offenses committed after the crime being sentenced); *State v. Dean*, 227 Or App 498, 206 P3d 281 (2009) (*persistent involvement*—defendant did not have a previous conviction for FIP); *State v. Loe*, 227 Or App 373, 206 P3d 277 (2009) (*security of the public*—legitimate debate about the factor); *State v. Gallino*, 227 Or App 304, 206 P3d 204 (2009) (*persistent involvement*—defendant had only one undisputed prior conviction); *State v. Day*, 227 Or App 1, 204 P3d 870 (2009) (*deliberate cruelty*—defendant and victim argued over efforts to obtain meth, defendant swung a motorcycle helmet at victim, victim picked up an axe and advanced toward defendant, and defendant shot victim in the face, but victim was released from hospital later the same day); *State v. Giles*, 227 Or App 5, 204 P3d 868 (2009) (*persistent involvement*—single conviction for FIP).

*State v. Shelters*, 225 Or App 76, 200 P3d 598 (2009). On remand for reconsideration in light of *State v. Ramirez*, 343 Or 505 (2007), *adh'd to as modified on recons*, 344 Or 195 (2008), and *State v. Fults*, 343 Or 515 (2007), defendant argued that the Court of Appeals should consider his *Blakely* challenge to the imposition of two 30-year indeterminate “dangerous offender” sentences based on facts not found by the jury beyond a reasonable doubt. *Held*: Remanded for resentencing. Because there remains “legitimate debate” about whether a jury would have found defendant to be a dangerous offender, remand is required. Dangerous-offender facts—whether the defendant suffers from a severe personality disorder indicating a propensity toward crimes that seriously endanger the safety of others and whether, as a result, an extended period of incarceration is warranted—are qualitatively different from other departure factors, such as a victim’s permanent injury or the presence of multiple victims, that are capable of “conclusive establishment by facts adduced at trial.” Instead, because a dangerous-offender sentence rests on the “factfinder’s synthesis of the characteristics of the offender and the determination that those characteristics warrant an extended period of incarceration,” it was not obvious that the jury necessarily would have made the dangerous-offender findings in this case.

*State v. Sosa*, 224 Or App 658, 199 P3d 346 (2008). Defendant was convicted of rape, sodomy, and sexual abuse. He did not object at sentencing when the trial court increased his criminal-history score without making findings to justify the increase under *State v. Bucholz*, 317 Or 309 (1993), and *State v. Miller*, 317 Or 297 (1993). On appeal, he argued that the court incorrectly used the rape conviction to increase his criminal-history score for purposes of sentencing him on the sodomy. The state conceded error but asserted that the appellate court should decline to exercise its discretion to review it. *Held*: Remanded for resentencing. Because the error increased the defendant’s sentence by four years, and because it was not “certain” that, on remand, the sentencing court would impose the same sentence, the interests weigh in favor of review.

*State v. Agee*, 223 Or App 729, 196 P3d 1060 (2008). Defendant was convicted of assault and attempted murder for intentionally driving a truck into a pedestrian, and of assaults he committed on corrections officers after his arrest. The court imposed consecutive sentences on the crimes committed against the pedestrian based on a finding that the defendant demonstrated a willingness to commit more than one offense under ORS 137.123(5)(a); defendant did not challenge the sufficiency of the evidence at that time. *Held*: Affirmed. Defendant’s unpreserved challenge to the evidence supporting the court’s finding was not one of plain error, because the sentencing court made statements demonstrating that it believed that the defendant had demonstrated an intent to commit more than one offense.

*State v. McCrorey*, 223 Or App 655, 196 P3d 106, *rev den*, 346 Or 66 (2008). Defendant’s claim that the consecutive sentences are plain error has no merit in light of *State v. Perez*, 340 Or 310 (2006), because the record is susceptible to the inference that defendant made a tactical decision not to insist on jury findings to support consecutive sentences.

*State v. Bighouse*, 223 Or App 261, 196 P3d 538 (2008) (*en banc*), *rev den*, 346 Or App 10 (2009). The Court of Appeals allowed reconsideration of its prior decision affirming without opinion based on the defendant’s argument that he adequately preserved his challenge to the imposition of consecutive sentences in the absence of jury findings to support the consecutive sentences under ORS 137.123. The defendant asserted that his references throughout a sentencing memorandum to the necessity of jury findings to support consecutive sentences sufficiently raised the issue before the trial court. *Held*: Remanded for resentencing. The defendant’s sentencing memorandum adequately raised his current challenge, even though the focus of his argument at sentencing was based on his assertion that the indictment failed to allege consecutive-sentence facts. Defendant adequately preserved his current argument in the memorandum by referring to the necessity of jury findings to impose consecutive sentences under ORS 137.123, even though those references were made in a “background” section and even though defendant focused largely on the pleading issue, rather than the jury-findings issue. [The dissent would have concluded that the sentencing memorandum did not put the trial court on notice of the argument that the defendant made on appeal.]

*State v. Larson*, 222 Or App 498, 193 P3d 1042, *rev den*, 345 Or 503 (2008). Under *State v. Giger*, 115 Or App 559 (1992), a defendant may not, for the first time on appeal, raise an objection to a failure to find ability to pay costs. Here, there was no plain error: although the state did not, at sentencing, offer evidence of defendant’s ability to pay, the evidence at trial showed that he owned valuable real property, had “vested” benefits from a former job, and was receiving Social Security income and rental income from his real property. Also, at sentencing, he admitted that, after his arrest on the charges, he had transferred real property to his son for no consideration.

*State v. Meade*, 221 Or App 549, 191 P3d 704 (2008). Defendant challenged the imposition of sentences based on enhancement facts based on his claim that he was entitled to jury findings to support them. Before trial, defendant entered a

waiver of his right to a jury trial on “guilt or innocence,” and was found guilty in a bench trial. At sentencing, he asserted that he had not waived his right to a jury trial on facts that would support enhanced sentences (in this case, consecutive sentences), but the sentencing court rejected his argument and imposed the sentences based on its own findings. *Held:* Reversed, remanded for resentencing. Defendant’s jury waiver did not encompass sentencing facts; he adequately preserved his challenge by objecting at the time of sentencing. Because defendant’s jury waiver expressly referred only to his “guilt or innocence,” and he objected at sentencing to the court’s authority to impose enhanced sentences without jury findings, he adequately preserved his argument for appeal.

*State v. Martin*, 221 Or App 78, 188 P3d 418, *rev den*, 345 or 418 (2008). The sentencing court did not commit “plain error” by revoking defendant’s probation on a felony conviction based solely on a finding that he was “not benefiting from his probation.” It is not obvious that OAR 213-010-0001—which provides that court may revoke probation “upon a finding that the offender has violated one or more conditions of probation, or that the offender has participated in new criminal activity”—prescribes the exclusive bases for revocation and hence overrules *Barker v. Ireland*, 238 Or 1 (1964), and precludes a revocation on that basis.

*Notes:* (a) The concurring opinion argues that the rule precludes a revocation based on a “not benefiting” finding. (b) The rule applies only to probationary sentences imposed on felony convictions.

*State v. Acencio-Galindo*, 220 Or App 600, 188 P3d 392, *rev den*, 345175 (2008). [1] The sentencing court erred when it failed to merge defendant’s separate DCS convictions that were based on a single delivery and merely alleged alternative “substantial quantity” and “commercial drug offense” theories. [2] The error is “plain error” that warrants relief on appeal because entry of an erroneous conviction prejudices defendant and defense counsel had no apparent “strategic reason” for not objecting.

*State v. Johnson*, 220 Or App 504, 187 P3d 742 (2008). The sentencing court committed “plain error” under OAR 213-005-0002(4) when it imposed a 36-month term of post-prison supervision on each of defendant’s three convictions for class C felonies, which caused the total sentence for each to exceed 60 months. The error warrants relief on appeal because there was no apparent tactical reason not to object and gravity of the error “is significant” (even though the excess term is, at most, only 6 months for two of the convictions).

*State v. Quintero-Martinez*, 220 Or App 497, 188 P3d 350, *rev den*, 345 Or 318 (2008). Although the sentencing court erred when it imposed a 60-month firearm-minimum term on each of defendant’s convictions for first-degree burglary and first-degree kidnapping, the error does not warrant relief on appeal as “plain error.” Because the court imposed, per Measure 11, a 90-month sentence on the kidnapping conviction, the minimum on that conviction has “no practical effect.” Moreover, because the court made clear that it intended to impose an overall sentence of 120 months, and made the sentences partially consecutive for that purpose, “we are certain” that if the case was remanded, the court would reimpose the same 120-month sentence.

*State v. Ramirez*, 220 Or App 470, 188 P3d 305 (2008). On remand from the Supreme Court, 343 Or 505 (2007), the Court of Appeals held that the sentencing court committed “plain error” under *Ice* when it made a finding under ORS 137.123(2) and ordered defendant to serve the 60-month sentence on his conviction for unlawful use of a firearm consecutively to the sentences on his convictions for first-degree assault and attempted murder.

*State v. Orobio-Juan*, 220 Or App 446, 186 P3d 326 (2008) (*per curiam*). The sentencing court committed plain error by failing to merge two convictions for felony assault in the fourth degree based ORS 163.160(3)(a) and (c), because they were based on his same single assault on same victim.

*State v. Andrews*, 220 Or App 374, 185 P3d 1127, *rev den*, 345 Or 175 (2008). The sentencing court did not commit plain error under *Ice* when it imposed consecutive sentences. The indictment alleged that defendant committed the crimes at issue “in three different date ranges,” and the parties agreed at sentencing that the jury’s verdicts of guilty necessarily had found that he committed the crimes during separate episodes.

*State v. Valladares-Juarez*, 219 Or App 561, 184 P3d 1131 (2008). Sentencing court committed “plain error” by entering separate conviction for alternative theories of first-degree kidnapping based on same incident and victim. Error warrants relief on appeal because erroneous conviction prejudices defendant and defense counsel had no apparent “strategic reason” for not objecting.

*State v. Fults*, 219 Or App 305, 182 P3d 267 (2008). On remand from the Supreme Court, 343 Or 515 (2007), the court held that the sentencing court’s imposition of a 36-month term of probation instead of the presumptive 24-month term did not constitute plain error because defense counsel expressly consent, there may have been a “strategic choice,” and the existence of a concurrent 36-month probation on another conviction made gravity of the error “slight.”

*State v. Banks*, 218 Or App 593, 180 P3d 726 (2008). Defendant’s unpreserved challenge to the imposition of consecutive sentences based on *State v. Ice*, 343 Or 248 (2007), was reviewable as a claim of “plain error.” Because of the gravity of the error, and because it was highly unlikely that defendant made a strategic choice to forgo an objection (and because the trial court likely would have rejected it based on the law at the time), the court exercised its discretion to review the claim on appeal.

*State v. Hammond*, 218 Or App 574, 180 P3d 137 (2008). Defendant’s act of filing of an ORS 137.754 motion after the execution of sentence in an attempt to convince the sentencing court to make the required findings of “substantial and compelling reasons” to support its order denying eligibility for alternative sentencing programs did not “retroactively” preserve his claim for appeal.

*State v. Gallegos*, 217 Or App 248, 174 P3d 1086 (2007), *rev den*, 344 Or 670 (2008). Defendant’s challenges to the use of unenumerated aggravating factors are reviewable, even in an appeal from a judgment entered on a conviction based on guilty plea, under ORS 138.050 and ORS 138.222(4). The court rejected the state’s argument that defendant’s claim is barred by ORS 138.050 (limiting appeals based on a guilty plea) and ORS 138.222(4) (court can review claim that the sentencing court “failed to comply with the requirements of law in imposing or failing to impose a sentence”), citing *State v. Stubbs*, 193 Or App 595, *rev den*, 337 Or 669 (2004), and *State v. Arnold*, 214 Or App 201 (2007).

See also *State v. Schenewerk*, 217 Or App 243, 174 P3d 1117 (2007), *rev den*, 344 Or 671 (2008) (rejecting state’s similar reviewability arguments); *State v. Crocker*, 217 Or App 238, 174 P3d 1129 (2007), *rev den*, 344 Or 670 (2008) (same).

*State v. Steen*, 215 Or App 635, 170 P3d 1126 (2007). Defendant waived any challenge to the lack of findings to support consecutive sentences. In a situation in which the record supports findings that support consecutive sentences, the appellate court lacks authority to consider an unpreserved challenge to the court’s failure to state its findings.

*State v. Carr*, 215 Or App 306, 170 P3d 563 (2007), *rev den*, 344 Or 109 (2008). Court declined to review unpreserved challenges to probation conditions prohibiting defendant from using the sidewalk outside the school, because defendant did not address why the court should exercise its discretion to review his arguments on appeal. Thus, even if the claim were one of plain error, the court would decline to review it.

*State v. Dominguez-Coronado*, 215 Or App 7, 168 P3d 291 (2007), *recons den*, 219 Or App 315, 182 P3d 322, *rev den*, 345 Or 396 (2008). Defendant failed to preserve his claim that his two DCS convictions were based on the same act of delivery and different only in their offense-subcategory factors. His claim is not one of plain error because it was possible that the charges were based on two separate deliveries—the first being an attempted sale to an informant, and the second based on evidence found in an apartment—in which case, the convictions would not have merged.

*State v. Johnson*, 215 Or App 1, 168 P3d 312, *rev den*, 343 Or 366 (2007). The court declined to review defendant’s challenge to the use of juvenile adjudications to enhance his criminal-history score on a “plain error” basis because defendant already had served his sentences.

*State v. Casiano*, 214 Or App 509, 166 P3d 599 (2007). [1] Appellate review of the sentencing court’s erroneous application of ORS 137.635 to deny eligibility for leave and other programs during the service of the sentence is not foreclosed by ORS 138.222(2)(a), even though the prison sentence imposed by the court was within the presumptive range. Although ORS 138.222(2)(a) precludes appellate review of the *length* of a sentence that is within the presumptive guidelines range for the offense, it does not preclude the appellate courts from reviewing *other aspects* of the sentence, such as the defendant’s eligibility for subsequent modifications of the sentence by the Department of Corrections or other supervisory authority. [2] The sentencing court committed “plain error” by applying ORS 137.635 based on a prior conviction that was entered after defendant’s commission of the offense in this case, contrary to *State v. Allison*, 143 Or App 241, *rev den*, 324 Or 487 (1996) (holding that ORS 137.635 refers only to a person who, at the time of the *commission* of the second offense, had already been convicted of a prior listed offense). [3] The order denying defendant eligibility for leave cannot be affirmed on the ground that the sentencing court could have denied him eligibility for leave under ORS

137.750 because the record did not show that, had the sentencing court realized its error regarding ORS 137.635, it would have denied eligibility under ORS 137.750.

*State v. Nave*, 214 Or App 324, 164 P3d 1219, *rev den*, 343 Or 690 (2008). A revocation of driving privileges is part of the “disposition” that is reviewable in an appeal based on a guilty plea.

See also *State v. Roberts*, 216 Or App 238, 172 P3d 651 (2007) (same).

*State v. Arnold*, 214 Or App 201, 164 P3d 334 (2007). Defendant was convicted at trial of second-degree robbery based on his aiding and abetting a robbery by driving and waiting in the getaway car while two other men robbed the victim at gunpoint. The sentencing court imposed the mandatory Measure 11 sentence, rejecting defendant’s argument that the court should impose a downward departure under ORS 137.712. *Held*: Sentence vacated and reversed. The sentence was reviewable on appeal under ORS 138.222(4)(a), notwithstanding that the Measure 11 sentence was not an *unlawful* sentence.

*State v. Toth*, 213 Or App 505, 162 P3d 317 (2007). At a sentencing hearing held per SB 528, the jury found that, as alleged, defendant was persistently involved in similar offenses. Based on that finding, the court imposed an upward-departure sentence. For the first time on appeal, defendant contended that the court’s instruction on that factor, which parroted the rule, OAR 213-008-0002(2)(b)(D), was insufficient for not including the “malevolent quality” consideration discussed in appellate decisions. *Held*: Affirmed. [1] ORCP 59 H does not preclude review of a defendant’s unpreserved claim that the trial court erred in failing “to deliver an instruction that was not requested but that the law nevertheless requires.” [2] Although the “persistent involvement” factor entails more than a finding of prior convictions, it does not necessarily follow that the jury must be instructed on the judicial gloss given to that factor. “The word ‘persistent,’ ... is commonly understood to connote—without further elaboration—‘continuing in a course of action without regard to opposition or previous failure.’” Thus, the trial court did not commit plain error by instructing the jurors in the language of the rule.

*State v. Mallory*, 213 Or App 392, 162 P3d 297 (2007), *rev den*, 344 Or 110 (2008). After defendant pleaded guilty to multiple offenses within the scope of ORS 137.717 (RePO), the sentencing court found that she had committed several of the offenses during separate criminal episodes and, per under ORS 137.717(5)(a), used the first offenses as predicate convictions to impose 13-month RePO sentences on her later-committed offenses. Defendant appealed, contending that she was entitled under *Blakely* to a jury trial on that issue. *Held*: Affirmed. [1] Defendant’s objection is adequately preserved; even if counsel did not articulate the objection on the record, the sentencing court acknowledged understanding the objection and overruled it. [2] When defendant pleaded guilty to counts that alleged different dates, she thereby “admitted sufficient facts to establish that those offenses involved separate criminal episodes.”

*State v. Johnson*, 212 Or App 135, 157 P3d 295 (2007) (*per curiam*). The sentencing court committed plain error by imposing a 20-year term of post-prison supervision per ORS 144.103 on defendant’s conviction for first-degree sexual abuse (the correct term is 10 years).

*State v. Soto-Nunez*, 211 Or App 545, 155 P3d 96, *rev den*, 343 Or 206 (2007). The Court of Appeals refused to review defendant’s unpreserved claim that the sentencing court erred when it entered a no-release order without making findings on the record per ORS 137.750 to support that order: “had defendant called that shortcoming to the court’s attention, it might easily have been remedied.”

*State v. Owen*, 209 Or App 662, 149 P3d 299 (2006). [1] The sentencing court committed plain error when it failed to merge *sua sponte* defendant’s separate convictions for second-degree robbery based on ORS 164.405(1)(a) (representing he was armed) that he committed against a single victim. [2] But defendant’s unpreserved claim that the sentencing court erred in failing to merge *sua sponte* his separate convictions for second-degree robbery based on ORS 164.405(1)(a) and (b) (aided by another) is not reviewable as plain error.

*State v. Eades*, 208 Or App 173, 144 P3d 1003 (2006). [1] It was not plain error for the court to impose both a prison sentence and a \$2,000 fine, notwithstanding that ORS 813.010(6)(c) establishes a minimum \$2,000 fine “if the person is not sentenced to a term of imprisonment.” That statute refers to a *minimum* fine that must be imposed “[i]n addition to any other sentence that may be imposed,” and ORS 161.625 permits the imposition of a fine up to \$100,000. [2] The sentencing court did not commit plain error by finding defendant to be ineligible for temporary leave and other forms of sentence modification under ORS 137.750; following *State v. Clark*, 205 Or App 338 (2006) (denial of

ORS 137.750 eligibility is not subject to *Blakely*).

*State v. Hathaway*, 207 Or App 716, 143 P3d 545, *rev den*, 342 Or 254 (2006). The sentencing court committed plain error by failing to merge *sua sponte* defendant's convictions for first-degree burglary and conspiracy to commit first-degree burglary based on the same course of conduct, as required by ORS 161.485(3). The court reviewed defendant's claim even though the error had no effect on the length of defendant's imprisonment, and that it would cause pain to the victims and would give defendant an opportunity to escape.

*State v. Deloache*, 207 Or App 641, 142 P3d 74 (2006). The sentencing court committed plain error by imposing on defendant's conviction for conspiracy to commit murder a 90-month sentence with a 20-year term of post-prison supervision less time served (the correct term is only 36 months).

*State v. Moon*, 207 Or App 402, 142 P3d 105, *rev den*, 342 Or 46 (2006). [1] In light of *State v. Gornick*, imposition of departure sentence based on facts not found by a jury was not plain error. [2] Because record did not demonstrate the basis for the court's calculation of defendant's criminal-history score, defendant's unpreserved *Harris*-based objection also is not reviewable as "plain error." Also, defendant's unpreserved *Blakely*-based objection to the upward-departure sentence on his kidnapping conviction is not reviewable as "plain error." and his;

*State v. Phillips*, 206 Or App 90, 135 P3d 461, *rev den*, 341 Or 548 (2006). The Court of Appeals declined to review as plain error defendant's unpreserved *Blakely*-based challenge to a dispositional departure on his conviction for DCS to a minor based on the court's finding of "multiple incidents," because defendant had admitted in his own trial testimony that he had committed the offense at issue "probably ten times" with the victim.

*State v. Steele*, 205 Or App 469, 134 P3d 1054 (2006). The sentencing court committed plain error when, after defendant was convicted of first-degree burglary by jury verdict, it found the "persistent involvement" and "on supervision" aggravating facts and imposed an upward-departure sentence (distinguishing *State v. Gornick*). Defendant's admission during trial of his prior convictions and that he had been on supervision "his entire life" did not obviate the need for a jury verdict on those facts.

*State v. Howard*, 205 Or App 408, 134 P3d 1042, *rev den*, 341 Or 198 (2006). The Court of Appeals declined to review defendant's unpreserved claim that the sentencing court committed plain error when it found that he had a prior conviction for a firearm offense and imposed an enhanced firearm-minimum sentence under ORS 161.610(4)(b) on that basis.

*State v. Thomas*, 204 Or App 109, 129 P3d 212, *on recons*, 205 Or App 399, 134 P3d 1038, *rev den*, 340 Or 673 (2006). The sentencing court committed plain error in light of *Blakely* when, after defendant was convicted of the charges by jury verdict, it found that defendant is a dangerous offender and imposed an enhanced sentences pursuant to ORS 161.725 *et seq.* (distinguishing *State v. Heilman* and *State v. Gornick*).

*State v. Kaufman*, 205 Or App 10, 132 P3d 668, *rev den*, 340 Or 673 (2006). The Court of Appeals refused to consider as plain error defendant's unpreserved claim that the sentencing court erred under *Blakely* by imposing a sentence subject to ORS 137.635 based on its own finding that defendant had a predicate prior conviction.

*State v. De Paz-Cerna*, 204 Or App 582, 131 P3d 792 (2006). [1] Defendant's unpreserved *Blakely*-based challenge to one sentence does not provide any basis for relief on appeal because that sentence is to be served concurrently with a sentence that defendant does not challenge. [2] Defendant's unpreserved challenge to the court's *Miller/Bucholz* recalculation is not "plain error."

*State v. Fredley*, 204 Or App 464, 130 P3d 790, *rev den*, 341 Or 245 (2006). The Court of Appeals refused to review defendant's unpreserved *Blakely*-based challenges to three rulings by the sentencing court, on the ground that none constitutes "plain error": (1) the determination that one of his prior convictions was for a "person felony"; (2) the recalculation of his criminal-history score pursuant to *Miller/Bucholz*; and (3) imposing consecutive sentences.

*State v. Williams*, 204 Or App 473, 131 P3d 767, *rev den*, 341 Or 198 (2006). Defendant's *Blakely*-based "plain error" challenge to a 12-month prison sentence imposed as a dispositional departure on his felony conviction warrants relief even though that sentence is concurrent with a 12-month jail sentence that the court imposed on a companion misdemeanor

convictions: “although [the sentences] are identical in length and were ordered to be served concurrently, they nevertheless are qualitatively different from each other by reason of the respective modifications to which each is subject.”

*State v. Herrera-Lopez*, 204 Or App 188, 129 P3d 238, *rev den*, 341 Or 140 (2006). Defendant’s *Blakely*-based challenge to the consecutive-sentence error has no merit because in the course of pleading guilty to the charges he admitted that consecutive sentences were appropriate and “admitted all of the facts necessary to justify consecutive sentences.” For purposes of *Blakely*, “admitted facts can be used at sentencing even when the admission was not made for that purpose.”

*State v. Easton*, 204 Or App 1, 126 P3d 1256, *rev den*, 340 Or 673 (2006). Pursuant to parties’ stipulation, the court orally imposed consecutive sentences on convictions entered in two cases, but the written judgments failed to include the consecutive-sentence order. Later, the court entered an amended judgment in one case, pursuant to ORS 138.083(1), to add the consecutive-sentence order, and defendant appealed. *Held*: The amended judgment is reviewable under ORS 138.050(1) to determine whether it includes a disposition that was not imposed consistently with statutory requirements. Because defendant contends that the sentencing court lacked jurisdiction to amend the judgment, ORS 138.222(2)(d), which bars review of a stipulated sentence, does not preclude review of his claim.

*State v. Harvey*, 203 Or App 343, 125 P3d 792 (2005), *rev den*, 340 Or 308 (2006). Because defendant committed the crimes before December 5, 1996, the sentencing court committed plain error when it imposed a no-release order under ORS 137.750, which took effect on that date.

*State v. Causor-Mandoza*, 203 Or App 175, 124 P3d 1254 (2005). The upward-departure sentence was plain error in light of *Blakely* even though defendant admitted, when he pleaded guilty, that he was on probation at the time he committed the offense.

*See also State v. Carr*, 203 Or App 179, 124 P3d 1260 (2005).

*State v. Galloway*, 202 Or App 613, 123 P3d 352 (2005), *rev den*, 340 Or 201 (2006). In light of *Blakely*, the court committed plain error by imposing an upward-departure sentence on defendant’s conviction for second-degree arson based on its own finding that the presumptive sentence was insufficient given the risk to others from setting a fire in rural Crook County “in the middle of August in one the driest years in the history of recorded weather.”

*State v. Ricke*, 201 Or App 713, 120 P3d 539 (2005) (*per curiam*). The sentencing court committed plain error when it imposed, by upward departure, a 96-month sentence on defendant’s conviction for stalking, which is a class C felony; that sentence exceeds the maximum allowable by lawful for that crime.

*State v. Isom*, 201 Or App 687, 120 P3d 912 (2005). Defendant was convicted of, *inter alia*, attempted aggravated murder, and the court found her to be a dangerous offender and, at a resentencing hearing, imposed on that conviction, pursuant to ORS 161.725(1) and 161.737(1), a 30-year indeterminate sentence, a 220-month minimum sentence, and a 36-month term of post-prison supervision. *Held*: The PPS term is “plain error,” because the post-prison supervision term for a dangerous offender upon her release is the remainder of the 30-year indeterminate term.

*State v. Patton*, 201 Or App 509, 119 P3d 250, *rev den*, 339 Or 609 (2005). The sentencing court committed plain error under ORS 137.540(2) when it ordered defendant, as a condition of probation on his sexual-abuse convictions, not to consume alcohol, because that restriction is not related to the offense. The Court of Appeals remanded for resentencing under ORS 138.222(5).

*State v. McAhren*, 201 Or App 354, 118 P3d 859 (2005). Court refused to review defendant’s unreserved *Blakely*-based challenge to special conditions of probation.

*State v. Anderson*, 201 Or App 340, 118 P3d 855 (2005). Defendant’s objections to the sentence are reviewable on appeal even though she did not first assert them until after the court already had imposed sentence.

*State v. Munion*, 201 Or App 293, 119 P3d 278 (2005) (*per curiam*). The sentencing court committed plain error when it imposed a 72-month upward-departure sentence on defendant’s conviction for second-degree sexual abuse, a class C felony.



*State v. Crowell*, 198 Or App 564, 109 P3d 391 (2005). The sentencing court committed plain error when it imposed post-prison supervision terms of 10 years less time actually served on defendant's convictions for second-degree robbery and kidnapping.

*State v. Taylor*, 198 Or App 460, 108 P3d 682, *rev den*, 339 Or 66 (2005). [1] Defendant's general objection to consecutive sentences at sentencing failed to preserve the *Blakely*-based challenge that he asserted on appeal. [2] Defendant's unpreserved claim that the right-to-jury rule in *Blakely* applies to findings made under ORS 137.123(5) is not reviewable as plain error.

*State v. Gutierrez*, 197 Or App 496, 106 P3d 670, *on recons*, 199 Or App 521, 112 P3d 433 (2005), *rev den*, 340 Or 673 (2006). [1] The Court of Appeals refused to consider defendant's *Blakely*-based challenge to the restitution order because it is not "plain error"; it is not clear whether *Blakely* applies a restitution finding that does not otherwise increase the maximum incarcerative sentence. [2] The court also refused to consider his *Blakely*-based challenge to an upward durational departure to a 36-month term of probation on a felony conviction because it is not clear that *Blakely* applies to probationary terms and, in any event, that term is concurrent with and on the same conditions as a 60-month probationary term on a misdemeanor conviction, which he does not challenge.

*State v. Vigil*, 197 Or App 407, 106 P3d 656, *on recons*, 199 Or App 525, 112 P3d 441, *rev den*, 339 Or 156 (2005). Court of Appeals refused to consider defendant's unpreserved *Blakely*-based challenge to sentencing court's findings in support of its no-release order under ORS 137.750 because it is not "plain error"; it is not clear whether *Blakely* applies when order merely precludes early release but does not otherwise increase the maximum sentence.

*State v. Sullivan*, 197 Or App 26, 104 P3d 636 (2005). Defendant was convicted based on his pleas of no contest, the court found numerous aggravating factors (noting any one was sufficient) and imposed an upward departure prison term on his DCS conviction and an upward durational departure of 60 months probation on his conviction for third-degree sodomy, and he raised unpreserved *Blakely*-based challenges on appeal. *Held*: Affirmed. [1] Defendant's challenge to the "multiple victims" factor is not plain error because his pleas to the various charges may be sufficient under the "admitted by the defendant" exception in *Blakely* to allow for the departure. [2] Defendant's challenge to the probationary term is not plain error because it is concurrent with unchallenged 5-year probationary terms imposed on his misdemeanor convictions, and hence any error may be harmless.

*State v. Fuerta-Coria*, 196 Or App 170, 100 P3d 773 (2004), *rev den*, 338 Or 16 (2005). Defendant's unpreserved objection that the imposition of consecutive sentence based on findings made by the sentencing court, rather than the jury, violates *Blakely* is not "plain error."

*See also State v. Goodman*, 200 Or App 137, 112 P3d 473 (*per curiam*), *rev den*, 339 Or 230 (2005) (same).

*State v. Riley*, 195 Or App 377, 97 P3d 1269 (2004), *rev den*, 340 Or 673 (2006). The Court of Appeals refused to consider defendant's unpreserved *Blakely*-based objection to the sentencing court's use of his prior juvenile adjudication in calculating his criminal-history score. Because *State v. Stewart/Billings* is on point and it is not clear whether such an adjudication is within the scope of the "prior conviction" exception in *Blakely*, the alleged error is not "plain."

*State v. Stankewitz*, 195 Or App 411, 97 P3d 695 (2004) (*per curiam*). The sentencing court committed plain error when it imposed a 50-month prison sentence with a 24-month term of post-prison supervision on defendant's conviction for a class C felony.

*See also State v. Galvin*, 195 Or App 413, 97 P3d 696 (2004) (*per curiam*) (same).

*State v. Johnston*, 188 Or App 80, 69 P3d 1279 (2003). Court of Appeals refused to consider state's challenge to sentencing court's refusal to impose presumptive sentence on conviction for felony DUII, because prosecutor failed to object with sufficient clarity to the court's justification.

*State v. Whitlock*, 187 Or App 265, 65 P3d 114, *rev den*, 336 Or 17 (2003). Defendant was convicted, based on no-contest pleas, of first-degree burglary and kidnapping, and the court imposed consecutive sentences of 40 and 90 months on those convictions. Several days later, the court, *sua sponte* and without notice to defendant, entered an amended judgment reciting that those sentences are subject to ORS 137.635 based on defendant's prior conviction for first-degree burglary. *Held*: Remanded for resentencing. The claim of error is reviewable despite defendant's failure to object, because he did not have prior notice of entry of the amended judgment.

**State v. Jaime**, 186 Or App 368, 63 P3d 53 (2003). The sentencing court committed plain error when it counted defendant's two prior juvenile adjudications for misdemeanor person offenses as one person felony for purpose of his criminal-history score. "The 'two for one' rule does not apply to juvenile adjudications for misdemeanors." OAR 213-004-0008.

**State v. Sloan**, 186 Or App 289, 62 P3d 881 (2003) (*per curiam*). The sentencing court committed plain error under ORS 161.605 when it imposed a 62-month sentence on a conviction for a class C felony.

**State v. McCormick**, 185 Or App 491, 60 P3d 1089 (2002), *rev den*, 335 Or 391 (2003). The Court of Appeals reviewed, as "plain error" in light of the intervening decision in *Layton v. Hall*, defendant's unpreserved claim that the sentence imposed, a 5-year firearm-minimum term with a 2-year term of post-prison supervision, violates ORS 161.605.

**State v. Russell**, 185 Or App 488, 60 P3d 575 (2002), *rev den*, 335 Or 402 (2003). The sentencing court committed "plain error" under ORS 161.485(3) when it entered convictions on defendant's completed offenses and on separate conspiracy charges based on the same offenses.

**State v. Branstetter**, 181 Or App 57, 45 P3d 137 (2002). In animal-neglect prosecution, the Court of Appeals declined to consider whether the pretrial forfeiture of the animals constituted an "excessive fine" because he did not raise that objection below and did not expressly make that argument on appeal.

**State v. Crain**, 177 Or App 627, 33 P3d 1050 (2001), *rev den*, 334 Or 400 (2002). [1] Defendant's claim that his dangerous-offender sentence is unlawful under *Apprendi* because the state did not allege the factors in the indictment and prove them to the jury is not reviewable on appeal in the absence of a timely objection at sentencing. [2] Defendant's challenge does not call into question the jurisdiction of the trial court to convict defendant on the charge of first-degree rape.

**State v. Longnecker**, 175 Or App 33, 27 P3d 509, *rev den*, 332 Or 656 (2001). Defendant was convicted of seven felony offenses based on his kidnapping and extended torture and repeated sexual assault of the victim. The sentencing court imposed a series of consecutive Measure 11 minimum sentences and guidelines departure sentences that total 830 months, and defendant did not object. *Held*: Reversed and remanded. [1] Defendant's claim that the total sentence is excessive in light of *State v. Langdon* is reviewable as "plain error." [2] Defendant's failure to file a motion under ORS 138.083(1) to correct the judgment does not bar plain-error review on appeal. [3] The departure sentences imposed are error because they exceed the 400-percent limitation.

**State v. Remme**, 173 Or App 546, 23 P3d 374 (2001). Defendant's unpreserved claim that the sentencing court erred when it imposed 72-month sentences by upward departure on his convictions for first-degree criminal mistreatment, a class C felony, was error was apparent on the face of the record and hence reviewable under ORAP 5.42(2).

**State v. Sullivan**, 172 Or App 688, 19 P3d 1001 (2001). Defendant appealed contending that the sentencing court erred when it calculated the length of his consecutive sentences and that the error is apparent in the face of the record, and the state conceded error. *Held*: Remanded for resentencing. "The legal error is obvious and is not in dispute in this case. In light of the state's concession for error, we conclude that it is proper for us to exercise our discretion to correct it."

**Reynolds v. Lampert**, 170 Or App 780, 13 P3d 1038 (2000). Post-conviction court found that petitioner's trial counsel failed to provide constitutionally adequate assistance of counsel by failing to object to sentencing court's calculation of his criminal-history score, and it remanded for resentencing. *Held*: Affirmed. The Court of Appeals declined to consider the state's claim that the sentencing court actually was correct in calculating petitioner's score, because it failed to make that argument before the post-conviction court. Petitioner had raised that issue adequately in his petition, and the state thus was on notice that it needed to address that issue.

**State v. Layton**, 163 Or App 37, 986 P2d 1221 (1999), *rev den*, 330 Or 252 (2000). A motion pursuant to ORS 138.083 during pendency of appeal to correct a mistake in a sentence is inadequate to preserve a claim of an improper post-prison supervision term.

**State v. Black**, 161 Or App 662, 987 P2d 530 (1999) (*per curiam*). The Court of Appeals reviewed as "plain error" defendant's unpreserved claim that the sentencing court erred when it imposed two concurrent minimum sentences

per ORS 161.610 on defendant's two firearms offenses, even though "[d]efendant has shown no collateral consequences from the two concurrent sentences."

*State v. Quintero*, 160 Or App 614, 982 P2d 543 (1999). Defendant sexually assaulted his 16-year-old daughter. Pursuant to a plea bargain, he pleaded guilty to charges of attempted rape and first-degree sexual abuse, the state dismissed the more serious charges, and the court imposed a 36-month sentence on the attempted-rape conviction and a consecutive 75-month sentence on the sexual-abuse convictions. For the first time on appeal, defendant contended that the 111-month sentence violated the "400-percent rule," OAR 213-012-0020(2). *Held*: The Court of Appeals refused to review his claim on the ground that it was not preserved. As part of the plea bargain, the state dismissed more serious Measure 11 charges, agreed to recommend concurrent sentences on the sexual-abuse convictions, and "defendant agreed that the trial court had discretion to impose a consecutive departure sentence up to 36 months on the [attempted-rape] conviction in consideration of the other benefits he obtained. Moreover, on remand pursuant to ORS 138.222(5), the court could reimpose the same overall sentence by restructuring it.

*State v. Melillo*, 160 Or App 332, 982 P2d 12, *rev den*, 329 Or 438 (1999). Defendant was convicted of robbery in the first degree, and the sentencing court refused to impose the 90-month minimum sentence and instead imposed the 38-month presumptive sentence. On the state's petition, the Supreme Court issued a writ of mandamus directing the sentencing court to resentence defendant under Measure 11. On remand, the court again refused to impose the minimum sentence and reimposed the same sentence, and the state appealed. *Held*: The Court of Appeals refused to review the state's claim that the sentencing court erred by failing to comply with the writ of mandamus, because claim was not preserved.

*State v. Trice*, 159 Or App 1, 976 P2d 569, *rev den*, 329 Or 61 (1999). Court of Appeals declined to consider defendant's unpreserved objection that sentencing court, on remand for resentencing, erred by modifying sentences that already had been "executed."

*State v. Skelton*, 153 Or App 580, 957 P2d 585, *rev den*, 327 Or 448 (1998): In light of *State v. Langdon*, 151 Or App 640, 950 P2d 410 (1997), *aff'd* 330 Or 72, 999 P2d 1127 (2000), the sentencing court committed plain error by imposing a series of consecutive Measure 11 and guidelines sentences, on convictions arising out of a single incident, that exceed the 400-percent limitation in OAR 213-12-020(2).

*State v. Rojas-Montalvo*, 153 Or App 222, 957 P2d 163, *rev den*, 327 Or 193 (1998): Although the sentencing court properly imposed consecutive sentences on defendant's convictions for DCS and PCS arising out of the same incident, the court committed plain error by failing to comply with the "shift to column I" rule in OAR 213-12-020(2) when it imposed the consecutive sentence on the PCS conviction.

*State v. Dixon*, 152 Or App 395, 952 P2d 571 (*per curiam*), *rev den*, 327 Or 173 (1998). The Court of Appeals refused to review defendant's unpreserved challenge to the sentences imposed on his convictions for first-degree assault and first-degree robbery with a firearm (*viz.*, dangerous-offender sentences subject to ORS 137.635), because that issue has not been resolved and the lawfulness of such a sentence "is debatable."

*State v. McCoy*, 152 Or App 393, 952 P2d 572 (*per curiam*), *rev den*, 327 Or 83 (1998). The Court of Appeals refused to review defendant's unpreserved claim that the sentence imposed on his conviction for third-degree assault with a firearm (*viz.*, a 5-year firearm minimum with a 2-year term of post-prison supervision) violated OAR 213-05-002(4), because that issue has not been resolved and the lawfulness of that sentence "is reasonably in dispute."

*State v. Galvin*, 152 Or App 275, 954 P2d 800 (1998). The Court of Appeals reviewed defendant's unpreserved claim that the sentencing court erred when it imposing a 12-month jail term as a condition of probation on defendant's conviction for a class A misdemeanor—the court noted that the sentence exceeded the maximum term as a matter of law and that the state conceded error. The court refused to review, however, defendant's unpreserved challenge to the 6-month jail terms imposed on the other misdemeanor convictions.

*State v. Gonzalez-Alaniz*, 151 Or App 557, 950 P2d 404 (1997), *rev den*, 327 Or 83 (1998). Defendant was convicted of unlawful delivery of a controlled substance within a 1000 feet of a school in violation of ORS 475.999, and the sentencing court ranked the conviction as a category 8 offense and imposed sentence accordingly. The Court of Appeals refused to review defendant's claim that the state was required to prove an *actual* delivery within 1000 feet of a school, because defendant assigned error only to the sentencing court's ranking of the conviction, not the sufficiency of the

evidence to support the conviction.

*State v. Anderson*, 149 Or App 506, 945 P2d 594 (1997). The sentencing court imposed 5-year sentences on defendant pre-guidelines felony convictions, suspended execution of sentence, and placed him probation. Later, it revoked probation, modified the sentences by imposing minimum terms and ordering them to be served consecutively, and then executed the sentences. *Held*: The court committed plain error on the face of the record when it modified the previously imposed sentences following revocation of probation.

*State v. Arellano*, 149 Or App 86, 941 P2d 1089 (1997), *pet dismiss'd* 327 Or 555 (1998). Defendant contended for the first time on appeal that the sentencing court erroneously ranked his convictions for rape and sodomy as category 10 offenses, because the indictment failed to allege the offense-subcategory factor. The state responded that the court could have imposed the same sentence had defendant objected in a timely manner. *Held*: Because ORS 138.083, as amended in 1995, permits a sentencing court, notwithstanding that an appeal from the judgment is pending, to enter an amended judgment “to correct any arithmetic or clerical errors or to delete or modify any erroneous term in the judgment,” the Court of Appeals will refuse to review an unpreserved claim that a term in the judgment is plain error—the appellant must seek relief first by asking the sentencing court to correct the judgment.

*State v. Cleveland*, 148 Or App 97, 939 P2d 94, *rev den*, 325 Or 621 (1997): [1] Sentencing court committed plain error when it imposed more than one firearm-minimum sentence on defendant’s convictions for manslaughter, burglary, and robbery. [2] Even though defendant was not prejudiced by error and sentencing court easily can correct error without affecting overall sentence imposed, Court of Appeals reviewed claim and remanded for resentencing, because the court believed defendant would be entitled to post-conviction relief and that short-circuiting that process was “in the interests of judicial economy.”

*State v. Newsom*, 148 Or App 84, 939 P2d 90 (1997): [1] Sentencing court committed plain error when it imposed 120-month term of post-prison supervision on defendant’s conviction for first-degree sexual abuse, because it was based on a crime he committed prior to the November 4, 1993, amendment to ORS 144.103. [2] Court of Appeals reviewed claim and remanded for entry of a corrected judgment, because judgment was entered prior to the September 8, 1995, amendment to ORS 138.083 that expanded sentencing court’s authority to correct judgment.

*State v. Weikert*, 145 Or App 263, 929 P2d 1070 (1996), *rev den*, 325 Or 45 (1997): Sentencing court committed plain error when it imposed extended term of post-prison supervision per ORS 144.103 on conviction that was not subject to the statute and imposed ORS 137.635 restrictions on convictions not subject to the statute.

*State v. Umtuch*, 144 Or App 366, 927 P2d 142 (1996), *rev den*, 324 Or 654 (1997): Sentencing court committed plain error when it imposed a 260-month sentence with a 240-month term of post-prison supervision on conviction for first-degree sodomy.

*State v. Franks*, 143 Or App 384, 923 P2d 1302, *rev den*, 324 Or 488 (1996): The sentencing court committed plain error when it inadvertently imposed the presumptive sentence prescribed for gridblock 7-A after placing the conviction in gridblock 7-B.

*State v. Brock*, 143 Or App 100, 923 P2d 666 (1996): [1] Court of Appeals refused to review unpreserved claim that sentencing court erred when it imposed an extended term of post-prison supervision per ORS 144.103 on defendant’s conviction for first-degree sexual abuse, because it was unclear from the record whether defendant committed the crime before or after the statute took effect. [2] The sentencing court committed plain error when it imposed, evidently per ORS 144.103, a 214-year term of post-prison supervision.

*State v. Graham*, 143 Or App 85, 923 P2d 664 (1996): Given that ORS 138.083, as amended in 1995 (*see* Or Laws 1995, ch 109, § 1), now allows a sentencing court notwithstanding an appeal to enter an amended judgment to correct “any erroneous term in the judgment,” the Court of Appeals will not review as “plain error” a claim that the sentencing court imposed an incorrect term of post-prison supervision—defendant must apply to the sentencing court to correct the error.

*State v. Owen*, 142 Or App 314, 921 P2d 424 (1996): Sentencing court committed plain error when it imposed 36-month term of post-prison supervision instead of 24-month term prescribed by OAR 253-05-002(2)(b).

*State v. Scott*, 142 Or App 306, 920 P2d 1147 (*per curiam*), *rev den*, 324 Or 323 (1996): Sentencing court committed plain error when it imposed 60-month term of post-prison supervision on defendant's conviction for first-degree robbery instead of 36-month term prescribed by OAR 253-05-002(2)(c).

*State v. Daugaard*, 142 Or App 278, 921 P2d 975 (1996): Sentencing court committed plain error when it imposed sentence per ORS 137.635 on convictions for first-degree sexual abuse, second-degree sodomy, and compelling prostitution.

*State v. Loewen*, 141 Or App 144, 917 P2d 532, *rev den*, 324 Or 229 (1996). The sentencing court committed plain error when it imposed an extended term of post-prison supervision per ORS 144.103 (1991) on defendant's conviction for first-degree sexual abuse based on a crime he committed in December 1991; the Court of Appeals "remanded for resentencing."

*State v. Todd*, 140 Or App 640, 915 P2d 1042 (1996) (*per curiam*). The sentencing court committed plain error when it imposed an extended term of post-prison supervision per ORS 144.103 on defendant's conviction for first-degree sodomy, which was based on a crime he committed prior to September 29, 1991. The court "remanded for entry of a corrected judgment imposing a 36-month period of post-prison supervision."

*State v. Sumerlin*, 139 Or App 579, 913 P2d 340 (1996). Court of Appeals refused to review unpreserved claim that sentencing court failed to make the findings required by ORS 137.123(5) when it imposed consecutive sentences.

*State v. Lundstedt*, 139 Or App 111, 911 P2d 349 (1996): Notwithstanding that claim of error was unpreserved, the Court of Appeals reviewed defendant's claim that the sentencing court violated OAR 253-12-020(2)(a)(B) when it imposed consecutive sentences on two convictions based on crimes committed during the same criminal episode without using the column I presumptive sentence for the second conviction.

*State v. Macon*, 138 Or App 515, 909 P2d 901 (*per curiam*), *rev den*, 323 Or 74 (1996): Sentencing court committed "plain error" when it imposed 36-month term of post-prison supervision defendant's category-6 conviction for second-degree robbery. (*Note*: State conceded error.)

*State v. Curtiss*, 137 Or App 376, 904 P2d 198 (1995): The Court of Appeals reviewed as "plain error" defendant's unpreserved claim that the sentencing court erred when, after revoking probation, it imposed an 18-month term of post-prison supervision on a conviction in gridblock 3-G. (*Note*: State conceded error.)

*State v. Kephart*, 137 Or App 277, 904 P2d 176 (1995) (*per curiam*): Defendant claimed on appeal that the sentencing court erred by disregarding the limitations in OAR 253-12-020(2) when it imposed consecutive sentences on certain convictions; he contended that the rule applied because those convictions were based on crimes he committed during a single criminal episode. *Held*: The Court of Appeals refused to review that claim, because it was unpreserved "and the alleged error is not one that can be characterized as apparent on the face of the record."

*State v. Biswell*, 137 Or App 142, 903 P2d 416 (1995) (*per curiam*): Notwithstanding defendant's failure to preserve the claim of error, the Court of Appeals reviewed and agreed with defendant's claim that the sentencing court imposed an incorrect term of post-prison supervision. (*Note*: State conceded error.)

*State v. Ashley*, 136 Or App 393, 902 P2d 123 (1995): [1] Notwithstanding that defendant failed to preserve the claim of error, the Court of Appeals reviewed his claim that the sentencing court erred when it imposed consecutive "presumptive" sentences on multiple convictions based on a single incident that exceeded the 200-percent limitation in OAR 253-12-020(2)(b). [2] The Court of Appeals refused to review, however, an unpreserved claim that the sentencing court erred in failing to merge defendant's multiple convictions for first-degree burglary, which were based on separate offense-subcategory factors.

*State v. Burch*, 134 Or App 569, 896 P2d 10 (1995): Court of Appeals refused to review defendant's unpreserved challenges to terms of post-prison supervision even though the state conceded some of the terms were error, because state disputed that those alleged errors warranted any relief on appeal. The court did review and reject, however, defendant's challenge to calculation of PPS terms under ORS 144.103.

**State v. Montazer**, 133 Or App 271, 891 P2d 662, *rev den*, 321 Or 268 (1995): Defendant's conviction for first-degree sexual abuse falls into gridblock 8-I, the sentencing court imposed a sentence of imprisonment "not to exceed eighteen (18) months," and defendant contended for the first time on appeal that court failed to impose a determinate sentence. *Held*: The claim of error is reviewable as "plain error," because the sentencing court "did not identify a definite term of imprisonment as [OAR 253-05-005] requires," which creates "difficulties in administering such an indefinite sentence," and "because the correction of this error may be accomplished with a minimum of judicial time."

**State v. Brown**, 132 Or App 443, 888 P2d 1071, *rev den*, 321 Or 137 (1995): "[I]f a defendant believes that the sentencing court's reasons are not substantial and compelling and, therefore, do not justify departure, the defendant must indicate the basis of the objection with specificity so as to put the sentencing court on notice that its explanation or analysis may be flawed." A general argument that a departure is not justified is not sufficient to preserve an objection to the factors found and relied upon by the court for the departure.

**State v. Kim**, 132 Or App 367, 887 P2d 393 (*per curiam*), *rev den*, 320 Or 588 (1995): The Court of Appeals reviewed as "plain error" an unpreserved objection to imposition of a 25-year minimum sentence pursuant to ORS 144.110 on a murder conviction, because the state conceded error and it was apparent that the reference to ORS 144.110 was a clerical error.

**State v. Garratt**, 131 Or App 755, 885 P2d 757 (1995): Sentencing court committed "plain error" under ORS 161.485(2) when it entered separate convictions and imposed separate sentences for solicitation to commit perjury and conspiracy to commit perjury.

**State v. Hendershott**, 131 Or App 531, 887 P2d 351, *rev den*, 320 Or 587 (1995): Court of Appeals refused to review unpreserved claims that sentencing court erred in failing to merge convictions, in imposing consecutive and departure sentences, and in imposing two firearm-minimum sentences.

**State v. Eickoff**, 130 Or App 516, 883 P2d 240, *rev den*, 320 Or 453 (1995): The Court of Appeals refused to review defendant's unpreserved objection that the term of post-prison supervision imposed violated OAR 253-05-002(4) (1989) because it resulted in total sentence that exceeds the maximum statutory indeterminate sentence.

**State v. Wolflick**, 130 Or App 333, 880 P2d 974 (1995) (*per curiam*): The Court of Appeals reviewed as "plain error" an unpreserved objection to the sentencing court's imposition of a lifetime term of post-prison supervision as part of a dangerous-offender sentence, but the court refused to grant relief based on a separate unpreserved claim that sentencing court erroneously imposed minimum term pursuant to ORS 144.110.

**State v. Gaynor**, 130 Or App 99, 880 P2d 947, *rev den*, 320 Or 508 (1995): The imposition of a 36-month term of post-prison supervision on the murder conviction was not reviewable as "plain error" in the state's cross-appeal, because the prosecutor at sentencing affirmatively requested a 36-month term.

**State v. Rood**, 129 Or App 422, 879 P2d 886 (1994): Sentencing court orally imposed consecutive 60-day presumptive sentence but written judgment imposed 18-month consecutive sentence. *Held*: Defendant's challenge to that term on appeal was reviewable as "plain error" notwithstanding his failure to seek a correction of the error under ORS 138.083, because the state conceded error and "the gravity of the error."

**State v. Berkey**, 129 Or App 398, 877 P2d 1238 (*per curiam*), *rev den*, 320 Or 360 (1994): Imposition of extended term of post-prison supervision pursuant to ORS 144.103 on conviction for crime committed prior to effective date of statute (*viz.*, September 29, 1991) was reviewable as "plain error" notwithstanding defendant's failure to object, because state conceded error, the term imposed exceeds maximum allowable by law, "and justice would be served by correcting error."

See also **State v. Noble**, 135 Or App 381, 896 P2d 617, *rev den*, 322 Or 361 (1995) (*per curiam*) (same) (erroneous imposition of 60-month PPS term reviewable as "plain error"); **State v. Bullock**, 135 Or App 303, 899 P2d 709 (1995) (application of ORS 144.103 to conviction based on crime committed before effective date reviewable as "plain error"); **State v. Jones**, 129 Or App 413, 879 P2d 881 (1994) (imposition of 60-month term of post-prison supervision on conviction for first-degree rape committed prior to effective date of ORS 144.103 was reviewable as "plain error").

**State v. Wright**, 128 Or App 88, 875 P2d 1174 (1994): Court of Appeals reviewed unpreserved claim that sentencing court erroneously imposed conditions of post-prison supervision, because court stated at sentencing that it merely would recommend the conditions but final judgment contained imposed conditions.

**State v. Chacon**, 127 Or App 130, 870 P2d 271 (1994) (*per curiam*): Court of Appeals refused to review unpreserved claim that sentencing court erred in imposing 36-month term of post-prison supervision on a conviction for a category 6 DCS offense; court noted that defense counsel at sentencing expressly concurred in term.

See also **State v. Hopkins**, 127 Or App 622, 874 P2d 827, *rev den*, 319 Or 281 (1994) (court refused to review unpreserved challenge to 60-month term of post-prison supervision imposed on attempted-murder conviction).

**State v. Doty**, 127 Or App 86, 870 P2d 868 (1994): The sentencing court imposed an extended term of post-prison supervision pursuant to former ORS 144.103 on defendant's conviction for first-degree sexual abuse, and defendant contended for the first time on appeal that statute did not apply to such a conviction; *Held*: Court of Appeals refused to review claim as "plain error."

See also **State v. Dallabona**, 127 Or App 236, 872 P2d 444 (1994) (*per curiam*) (same).

**State v. Rodriguez**, 127 Or App 89, 870 P2d 270 (1994): Court of Appeals refused to review unpreserved claim that sentencing court erred in failing to reduce burglary conviction from category 9 to category 8 offense per the parties' plea agreement; court noted that sentence imposed was within range authorized for category 8 offense. (*Note*: Court suggested that *State v. Owens*, *infra*, no longer is good law on this point.)

See also **State v. Dallabona**, 127 Or App 236, 872 P2d 444 (1994) (*per curiam*) (same, ranked rape conviction as category 10 instead of category 9 offense per parties' plea agreement).

**State v. Stewart**, 123 Or App 147, 859 P2d 545 (1993), *on recons*, 126 Or App 456, 868 P2d 794 (1994) (*en banc*), *aff'd* 321 Or 1, 892 P2d 1013 (1995): Court of Appeals refused to review various unpreserved challenges to the sentences imposed under the guidelines.

**State v. McEahern**, 126 Or App 201, 867 P2d 568 (1994): Court of Appeals refused to review challenge to order denying credit for time served, because defense counsel invited the error by contending that sentencing court had discretion to grant or deny credit.

**State v. Graham**, 125 Or App 516, 865 P2d 490 (1993): Court of Appeals reviewed as "plain error" defendant's claim that sentencing court erroneously imposed a sentence pursuant to ORS 137.635 that is longer than that authorized by guidelines, because it was an error of law apparent on the face of the record and "defendant was substantially prejudiced."

**State v. Hostetter**, 125 Or App 491, 865 P2d 485 (1993), *rev den*, 318 Or 583 (1994): "Life sentence" imposed on murder conviction is reversible error under *State v. Morgan* even though sentencing court made departure findings that defendant did not challenge; *State v. Farmer* does not preclude appellate review, because the court did not purport to impose the "life sentence" as a departure sentence.

See also **State v. Dashed**, 126 Or App 252, 868 P2d 15 (1994) (same).

**State v. Petty**, 124 Or App 574, 863 P2d 503 (1993): Court of Appeals reviewed as "plain error" an unpreserved claim that sentencing court erroneously imposed a "life sentence" pursuant to ORS 163.115(4)(a) on a murder conviction where the court did not purport to impose that term as a departure.

**State v. Rickerd**, 124 Or App 552, 862 P2d 1324 (1993): Court of Appeals reviewed as "plain error" an unpreserved claim that sentencing court erroneously relied on ORS 137.635 when it imposed a "determinate" dangerous-offender sentence on a conviction based on a crime committed prior to the effective date of the statute (*viz.*, January 1, 1990).

**State v. Kelsey**, 124 Or App 446, 863 P2d 475 (1993): Court of Appeals refused to review unpreserved challenges to probation conditions imposed on felony convictions, even though state conceded that conditions were error.

**State v. Morgan**, 124 Or App 229, 862 P2d 539 (1993), *rev den*, 319 Or 150 (1994): Court of Appeals reviewed as "plain error" an unpreserved claim that sentencing court erroneously imposed a series of consecutive sentences that "greatly exceeds" the maximum sentence permissible under the "400 percent rule." The court found that the error is one of

law on the face of the record and that “the error is egregious.”

*State v. Minniear*, 124 Or App 197, 859 P2d 1205 (1993) (*per curiam*): Court of Appeals refused to review an unpreserved challenge to the imposition of multiple post-prison supervision terms on consecutive sentences.

*State v. Slawson*, 123 Or App 573, 860 P2d 876 (1993): Court of Appeals refused to review as “plain error” defendant’s unpreserved objections to 60-month term of post-prison supervision and to portions of judgment imposing conditions of post-prison supervision.

*State v. Guzman*, 121 Or App 673, 855 P2d 1140 (1993): Where defendant’s only objection at sentencing was that assertion in the PSI that he previously had been deported was “not the most credible evidence,” appellate court would not review claim on appeal that sentencing court erred in departing based in part on his immigration status. “[Defendant’s] objection did not alert the sentencing court that defendant objected to consideration of his immigration status as a basis of departure [and] did not alert the court to defendant’s argument that the evidence in the PSI will not support the conclusion that he was illegally in the United States.”

*State v. Bojorques-Quinonez*, 121 Or App 179, 854 P2d 498 (1993): Appellate court refused to review defendant’s claim that trial court erroneously amended the indictment by striking allegation of offense-subcategory factor, because defendant concurred in the amendment.

*State v. Smith*, 118 Or App 97, 845 P2d 1304 (1993) (*per curiam*): Because defendant “stipulated to the dispositional departure as part of a negotiated plea of no contest,” appellate court refused to review claim that sentencing court failed to make findings to support the departure.

*State v. Shafer*, 116 Or App 667, 843 P2d 462 (1992) (*per curiam*) *rev den*, 315 Or 644 (1993): Appellate court would not review unpreserved challenge to departure sentence.

*State v. Taylor*, 116 Or App 647, 842 P2d 460 (1992): [1] A sentence cannot be affirmed as a departure sentence if the court failed to make findings in support of a departure. [2] “[W]hen the trial court’s authority to impose a sentence is limited by statute, it may not exceed the limitations of the statute, regardless of a defendant’s consent to the sentence. Therefore, if the court imposes a sentence that effectively is a departure and it does not make findings to support a departure, the sentence may be reviewed as plain error notwithstanding that defendant acquiesced in the sentence.”

*State v. Tracy*, 116 Or App 329, 840 P2d 1380 (1992): Appellate court can review unpreserved claim that sentencing court lacked authority to impose both a dispositional and a durational departure on a single conviction.

*State v. Little*, 116 Or App 322, 842 P2d 414 (1992): Appellate court can review unpreserved claim that departure sentence imposed “exceeded [the sentencing court’s] authority” because the sentence was longer than the maximum set forth in ORS 161.605.

*State v. Gouveia*, 116 Or App 86, 840 P2d 753 (1992): Appellate court can review unpreserved claim that sentencing court imposed sentence based on ORS 137.635 on conviction for felony committed before the effective date of the statute (*viz.*, January 1, 1990).

*State v. Carr*, 116 Or App 60, 840 P2d 724 (1992) (*per curiam*): Appellate court can review unpreserved claim that sentencing court erred in imposing a condition of post-prison supervision.

*State v. Lanig*, 116 Or App 48, 838 P2d 645 (1992) (*per curiam*): Because OAR 253-05-002(2)(b) prescribed a 24-month term of post-prison supervision for the conviction, the sentencing court committed plain error in imposing 36-month term.

See also *State v. Smith*, 116 Or App 73, 841 P2d 1 (1992) (same).

*State v. Evans*, 115 Or App 392, 838 P2d 1086 (1992) (*per curiam*): Sentencing court’s refusal to impose sentence in compliance with guidelines was plain error that warrants relief on appeal even though defendant failed to object.

*State v. Maki*, 115 Or App 367, 838 P2d 636 (1992): Appellate court would not review claim that sentencing

court's reasons for departing and imposing 60-month term of probation were inadequate, because defendant failed to preserve objection.

*State v. Christman*, 115 Or App 364, 838 P2d 1087 (1992): Because defendant failed to preserve the objection, appellate court would not review claim that 1-year sentence imposed on misdemeanor conviction was error under Or Laws 1989, ch 790, § 51, *as amended by* Or Laws 1991, ch 830, § 9, due to fact that the sentencing court failed to make findings of “substantial and compelling reasons.”

*See also State v. Berg*, 122 Or App 573, 857 P2d 909 (1993) (same).

*State v. Seaman*, 115 Or App 180, 836 P2d 1379 (1992): Defendant was convicted of both PCS and “supplying contraband” based on the same conduct and the court merged the PCS conviction into the supplying-contraband conviction even though the former is a class B felony and the latter is only a class C felony, because the latter is ranked higher on the crime-seriousness scale and thus is the more serious offense. The Court of Appeals refused to review defendant's unpreserved claim that merging the statutorily greater crime into the lesser crime violated Article I, section 16.

*State v. Clark*, 114 Or App 631, 836 P2d 183 (1992) (*per curiam*): The sentencing court's failure to comply with OAR 253-12-020(2)(a) when imposing a consecutive sentence was plain error that warrants relief on appeal.

*State v. Dotter*, 114 Or App 1, 833 P2d 1369 (1992): Unpreserved claims that the sentencing court imposed and reserved too many custody units and that it imposed a term of probation longer than the presumptive term nonetheless are reviewable on appeal.

*State v. Perkins*, 112 Or App 604, 830 P2d 598, *rev den*, 314 Or 392 (1992): Appellate court would not review unpreserved constitutional challenge to “single judicial proceeding” rule.

*State v. Owens*, 112 Or App 462, 829 P2d 726 (1992): Even though defendant did not object at sentencing, the appellate court could review as “plain error” a claim that the court erred in ranking the conviction on the crime-seriousness scale.

*State v. Delgado*, 111 Or App 162, 826 P2d 1014 (1992): Where defendant failed to challenge criminal history set forth in PSI, appellate court would not consider unpreserved claim that state needed to prove history with copies of judgments.

*State v. Rathbone I*, 110 Or App 414, 823 P2d 430 (1991), *rev den*, 313 Or 300 (1992): Where defendant pleaded guilty to charges, including the “scheme or network” factor, appellate court would not review his challenge (which he had abandoned at trial) to the validity of that factor.

*See also State v. Ledonne*, 111 Or App 114, 823 P2d 454 (1992) (*per curiam*) (where defendant pleaded guilty to “scheme or network” offense, no appellate review under ORS 138.222(4)(b) of challenge to sentence on ground that court erred in ranking conviction based on that factor); *State v. Sebastian*, 111 Or App 386, 826 P2d 96 (1992) (*per curiam*) (same, no appellate review under ORS 138.222(3), because “sentence imposed was not a departure from the guidelines as they existed when defendant pleaded guilty.”); *State v. Stevens*, 111 Or App 258, 826 P2d 12 (1992).

*State v. Cook*, 108 Or App 576, 816 P2d 697 (1991), *rev den*, 312 Or 588 (1992): Where defendant was convicted upon no-contest plea, the court imposed the presumptive sentence, and defendant did not object, appellate court would not review as “error apparent on the face of the record” defendant's unpreserved claim that the sentence imposed is unconstitutionally cruel and unusual punishment.

*State v. Potter*, 108 Or App 480, 816 P2d 661 (1991) (*per curiam*): Appellate court review as “plain error” an unpreserved claim that sentencing court erroneously imposed conditions of post-prison supervision.

*State v. Orsi/Gauthier*, 108 Or App 176, 813 P2d 82 (1991): “Whatever change ORS 138.222 makes in the scope of review in guidelines cases, it did not change the fundamental requirement that a defendant must preserve a claim of error. The argument that the court's reasons for departure are not ‘substantial and compelling’ is not an error of law that may be reviewed as ‘apparent on the face of the record.’” Unless defendant objects to a departure at the time of sentencing, “no error is preserved” and the objection will not be reviewed on appeal.

*See also State v. Clark*, 113 Or App 692, 833 P2d 1314 (1992) (refusing to consider unpreserved constitutional

challenge to departure sentence); *State v. Newman*, 113 Or App 102, 832 P2d 47, *rev den*, 314 Or 176 (1992) (same); *State v. Drake*, 113 Or App 16, 832 P2d 44 (1992) (failure to object to departure precludes appellate review); *State v. Hubbard*, 111 Or App 402, 826 P2d 642 (*per curiam*), *rev den*, 313 Or 627 (1992) (failure to object to departure precludes appellate review of claim that “the evidence was insufficient to support the factors that the court used to justify the departure”).

## 6. Claims of error that may have become moot

*United States v. Juvenile Male*, 564 US \_\_\_, 130 S Ct 2518, 177 L Ed 2d 64 (2011) (*per curiam*). In 2005, respondent was 15 years old when he was adjudicated delinquent in federal court for committing conduct on the Fort Belknap Indian Reservation that would be a felony sexual offense if he was an adult. He was ordered to serve time in juvenile detention and then to remain on supervision until he was 21 years old. In 2006, Congress enacted the Sex Offender Registration and Notification Act (SONAR), which requires adult and juveniles to register if they have been adjudged to have committed certain sexual offenses. Thereafter, the district court imposed, as a condition of respondent’s supervision, that he register in compliance with the Act. Respondent appealed and challenged the condition. After respondent turned 21 and his supervision was terminated, the Ninth Circuit issued an opinion invalidating the condition on the ground that “retroactive” application of SONAR to respondent violated the Ex Post Facto Clause because he committed his offense before the enactment of the Act. On review, the United States Supreme Court certified a question to the Montana Supreme Court asking whether respondent’s continuing obligation to register as a sex offender under state law was contingent on whether his since-lapsed federal-supervision condition was valid, and that court relied that it did not. *Held*: Reversed and remanded to dismiss appeal. [1] “In criminal cases, this requirement means that a defendant wishing to continue his appeals after the expiration of his sentence must suffer some ‘continuing injury’ or ‘collateral consequence’ sufficient to satisfy Article III. When the defendant challenges his underlying *conviction*, this Court’s cases have long presumed the existence of collateral consequences. But when a defendant challenges only an expired *sentence*, no such presumption applies, and the defendant must bear the burden of identifying some ongoing ‘collateral consequence’ that is traceable to the challenged portion of the sentence and likely to be redressed by a favorable judicial decision.” [2] Because respondent’s supervision had terminated by the time of the Ninth Circuit’s decision, his challenge was moot unless he can establish a collateral consequence. [3] Although “a favorable decision in this case might serve as a useful precedent for respondent in a hypothetical lawsuit challenging Montana’s registration requirement on *ex post facto* grounds,” that “possible, indirect benefit in a future lawsuit cannot save *this* case from mootness.” [4] Respondent’s argument that his claim is not moot “because, under current law, [he] may have an independent duty to register as a sex offender under SORNA itself” has no merit because “the duty to register under SORNA is not a *consequence*—collateral or otherwise—of the District Court’s special conditions of supervision.” Rather, that duty is an obligation that exists independently of the validity of the condition at issue. “That continuing obligation might provide grounds for a pre-enforcement challenge to SORNA’s registration requirements. It does not, however, render the current controversy regarding the validity of respondent’s sentence any less moot.” [5] Finally, because respondent is over 21 and his supervision has been terminated, “he will never again be subject to an order imposing special conditions of juvenile supervision” and so the “capable-of-repetition exception to mootness thus does not apply, and the Ninth Circuit lacked the authority under Article III to decide this case on the merits.”

*State v. Portis*, 348 Or 559, 236 P3d 718 (2010). Defendant appealed from the trial court’s supplemental judgment denying her additional earned-time credit under Or Laws 2009, ch 660, §§ 17, 18 (HB 3508). The Court of Appeals dismissed the case on the basis that it lacked jurisdiction under ORS 138.053(1). *Held*: Appeal dismissed. After the passage of Or Laws 2010, ch 2, § 5(5) (SB 1007), only those inmates who had already been determined eligible by a court would be allowed to retain the benefit of the additional earned-time credit under HB 3508. Because defendant had not been found to be eligible for additional earned-time credits at the time SB 1007 became effective, her case was moot.

*State v. Link*, 346 Or 187, 208 P3d 936 (2009). Defendant, Thomas, Koch, and a couple of other juveniles concocted a plan to murder Thomas’s mother, steal her car, and escape to Canada. They broke into the victim’s home and planned various ways to kill her. When she arrived, they attempted to kill her without success. Defendant, who was outside the house, called Koch on his cell phone and urged him to shoot her. Koch then got a rifle and shot the victim to death. Defendant was charged with aggravated felony murder and aggravated murder to conceal the robbery and burglary, ORS 163.095(2)(d), (e). The court found him guilty on all those charges, and defendant appealed and challenged the denial of his motion for judgment of acquittal on the charges of aggravated felony murder. The Court of Appeals affirmed, ruling that because all the convictions for aggravated murder merged into a single conviction and he did not challenge his convictions for aggravated murder to conceal, he challenge to the convictions for aggravated felony murder was moot. *Held*: Reversed and remanded. Because defendant challenges the validity of the guilty *verdicts* on the charges of aggravated

felony murder and those verdicts are and must be included in the judgment, his challenge is not moot or harmless: “the ruling that defendant seeks would affect his substantial right.” *Distinguishing State v. Pratt*, 316 Or 561, 575 (1993).

*State v. Macy*, 320 Or 408, 886 P2d 1010 (1994): When parole board “unsummed” defendant’s consecutive life sentences, his challenge to imposition of the consecutive terms became moot and the court was required to dismiss the appeal, even though some theoretical possibility exists that the board could undo that action. (*Note*: The underlying convictions were not subject to sentencing guidelines.)

*State v. Powell*, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). Defendant was convicted of seven offenses including PCS, third-degree assault, and attempting to elude. The sentencing court imposed a series of consecutive departure sentences, including a 60-month sentence with a 24-month term of post-prison supervision on defendant’s PCS conviction, a class C felony. *Held*: Affirmed. [1] The court violated OAR 213-005-0002(4) when it imposed a 24-month term of post-prison supervision on the PCS conviction, even though the court also imposed a no-release order per ORS 137.750 and judgment provided that the PPS term “is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum.” [2] But that error is harmless, because defendant must serve a PPS term on another conviction and a remand to enter a corrected judgment “would not have the potential to improve defendant’s position.”

*State v. Dawson*, 252 Or App 85, 284 P3d 1272 (2012). Defendant was found guilty of DUII and reckless driving, and he requested a two-day delay before sentencing. The trial court denied that request, ruling that there was no authority that required it, and immediately proceeded to sentencing. On appeal, the state conceded that ORS 137.020(2) entitled defendant to the requested delay, but argued that the error was harmless because he did not challenge the sentence imposed or argue that he was prejudiced by the trial court’s refusal to grant his request for the delay. *Held*: Remanded for resentencing; otherwise affirmed. [1] “A trial court has a duty to pass sentence in accordance with the pertinent sentencing statutes, ORS 137.010(1), and a sentence’s validity is determined solely by how well it comports with those statutes.” But “the court’s failure to comply with the sentencing statutes does not require reversal and remand for resentencing unless the error ‘prejudiced the defendant in respect to a substantial right.’ See ORS 131.035.” [2] To determine whether the trial court’s failure to allow a sentencing delay, the court examined “the record in light of the nature and purposes of the statutory right.” Although the record does not indicate that the trial court would have imposed a different sentence if defendant had more time to prepare for sentencing, there is “another, more subtle, purpose” behind the two-day waiting period: “to create a measure of distance between the sentencing proceeding and the momentum to pronounce final judgment that often exists in the wake of a criminal trial.” [3] “That concern is manifest in this case. The trial judge here acknowledged that the case had an emotional impact on him, and the lack of waiting period denied defendant the substantial right of having a “deliberate and carefully considered pronouncement of judgment.”

*State v. Hauskins*, 251 Or App 34, 281 P3d 669 (2012). Defendant was on probation for drug offenses. When his urine tested positive for a controlled substance, he “confessed” to his probation officer. In addition to alleging a probation violation, the state charged him with punitive contempt. The court found him in violation and in contempt. While the case was on appeal, defendant completed serving the jail sentence imposed on his contempt adjudication. *Held*: Reversed. Even though defendant had completed serving the sentence, the case was not moot. A punitive contempt, like a criminal conviction, results in a stigma, which constitutes a collateral consequence that prevents the case from being moot. *Distinguishing SER State of Oregon v. Hawash*, 230 Or App 427 (2009).

*State v. Donahue*, 243 Or App 520, \_\_\_ P3d \_\_\_ (2011). Defendant pleaded no contest to one count of prostitution that she committed on 82<sup>nd</sup> Street in Portland. The court imposed an 18-month probationary term and required, as a special condition of probation, that she not to enter a certain “high vice” area in Portland around 82<sup>nd</sup> and Sandy unless she was passing through it in a car or public transportation. On appeal, defendant argued that the condition was not reasonably related to the crime of conviction, was overbroad, and unconstitutionally infringed her freedom of association. *Held*: Affirmed. Defendant’s claim of error is not moot because although the original term had expired the court had extended the term subject to the same condition.

*State v. Fulleylove*, 240 Or App 611, 251 P3d 201 (2011). Defendant was convicted in 1998 of first-degree sodomy, and the court imposed a 120-month sentence with a 20-year term of PPS per ORS 144.103(1) and denied eligibility for early release under ORS 137.750. The court also imposed a consecutive 18-month sentence on his conviction for attempted sodomy. The court later entered an amended judgment clarifying that the no-release order applied to both sentences, and defendant appealed. *Held*: Appeal dismissed as moot. Because defendant fully served his prison sentences

and has been released onto PPS terms per ORS 144.103(1), “that release does moot any appeal that concerns the date on which he should have been released from prison, because that released date does not govern the length of the inmate’s term of post-prison supervision.” *Distinguishing Baty v. Slater*, 161 Or App 653 (2000).

**Rondeau v. Board of Parole**, 232 Or App 488, 222 P3d 753 (2009). Petitioner was convicted of murder and the court imposed a 120-month sentence a lifetime term of post-prison supervision. He was released, he violated his PPS, and the board imposed a 60-month sanction. He petitioned for judicial review contending that the board was limited to imposing only 90 days as a sanction. *Held*: Review dismissed as moot because petitioner was re-released onto supervision, the length of the sanction did not affect his lifetime term of PPS, and petitioner did not identify any potential collateral effect.

**State ex rel. State of Oregon v. Hawash**, 230 Or App 427, 215 P3d 124 (2009) (*per curiam*). The court found defendant in contempt of court for failing to pay child support and imposed a two-year term of bench probation. Defendant appealed, claiming that the court erred in failing to consider her inability to pay. *Held*: Appeal dismissed. “The two-year period of bench probation has expired [and defendant] has not identified any collateral consequences that flow from the judgment of contempt.”

**State v. Jessup**, 228 Or App 222, 206 P3d 1122 (2009) (*per curiam*). Defendant appealed challenging her sentence as unlawful in light of *Blakely*. While the appeal was pending, she completed serving her sentence and was released. She filed a motion to allow her appeal to proceed arguing that “she intends to file a civil suit challenging the constitutionality of her confinement,” that “recovery in her civil suit would be predicated on a finding that her confinement was illegal,” and that a determination by an appellate court that the sentence was unlawful thus will have a “practical effect” that precludes the issue from being moot. *Held*: Appeal dismissed. The appeal is moot because the only issue is the length of the sentence and defendant already has served it. “What defendant requests amounts to a declaratory judgment that, she argues, will have a meaningful effect in a *separate*, subsequent civil case that she intends to file. This we cannot do.”

**Roberts v. Board of Parole**, 221 Or App 278, 190 P3d 397 (2008). Petitioner sought judicial review of board order imposing special conditions of post-prison supervision; he challenged the conditions requiring sex-offender treatment. While review was pending, he completed his term of post-prison supervision and was discharged. *Held*: Review is not moot because the state is seeking recovery against him for costs of administering the conditions.

**Houston v. Brown, et al.**, 221 Or App 208, 190 P3d 427 (2008). Plaintiff, who was serving a term of post-prison supervision, appealed from a judgment dismissing his petition for *habeas corpus* relief in which he challenged a 90-day jail sanction imposed for his refusal to comply with a condition post-prison supervision. While his appeal was pending, he completed serving the sanction and was released. He argued that his appeal should not be dismissed as moot because of “collateral consequences” in that he continued to refuse to comply with the condition and asserted that the board would sanction him again. *Held*: Appeal dismissed as moot. The *habeas corpus* statutes do not authorize a court to order the board to desist from imposing sanctions in the future.

**State v. Carroll**, 212 Or App 317, 157 P3d 1193 (2007) (*per curiam*). Defendant’s unpreserved *Blakely*-based challenges to multiple departure sentences do not warrant review because he served those sentences and was released onto a single post-prison supervision term.

**State v. Retasket**, 211 Or App 432, 156 P3d 71 (2007) (*per curiam*). Defendant’s challenge to the post-prison supervision term became moot when sentencing court entered an amended judgment per ORS 138.083(1) correcting the error.

See also **State v. Balogh**, 209 Or App 162, 146 P3d 335 (2006) (sentencing court’s entry of an amended judgment to correct error rendered moot defendant’s appeal from the original judgment).

**Green v. Baldwin**, 204 Or App 351, 129 P3d 734 (2006). Inmate’s claim for *habeas corpus* relief, in which he contended that parole board violated *ex post facto* principles by applying new amendment to deny release on parole, became moot upon his parole. The fact that he was still on active parole supervision did not keep his claim justiciable. (*Distinguishing Baty v. Slater*, 164 Or App 779, *rev den*, (2000)).

See also **Odle v. Thompson**, 174 Or App 506, 26 P3d 177 (2001) (same; noting that plaintiff had no entitlement to be moved to inactive supervision).

**State v. Jackson**, 201 Or App 407, 118 P3d 849 (2005) (*per curiam*). Defendant's *Blakely*-based challenge to the court's no-release order under ORS 137.750 is moot because he completed service of the underlying 12-month sentence. See also **State v. Schaefer**, 201 Or App 409, 118 P3d 849 (2005) (*per curiam*) (same).

**State v. Muyingo**, 197 Or App 320, 105 P3d 899 (2005), *rev den*, 340 Or 359 (2006). Defendant is entitled to a remand for resentencing due to the *Blakely* error in imposing a departure sentence—that claim is not moot in light of his completion of that sentence and release on post-prison supervision, because a reduction in the prison term will terminate his post-prison supervision term earlier.

**Williamson v. Schiedler**, 196 Or App 302, 101 P3d 364 (2004). Petitioner's challenge to the length of his prison sentence is not moot in light of his release onto a 36-month term of post-prison supervision, because a determination that his prison sentence should have been shorter will result in an earlier termination of his PPS term.

**State v. Garner**, 194 Or App 268, 94 P3d 163, *rev den*, 337 Or 616 (2004). Although, under *State v. Barrett*, defendant's multiple convictions for aggravated murder involving the same victim must merge into a single conviction, the judgment must separately enumerate each of the aggravating factors that the jury found proved. Consequently, it is necessary for an appellate court to address defendant's challenge to a verdict on one of those counts.

**Durham v. Palmateer**, 193 Or App 763, 91 P3d 834 (2004) (*per curiam*). Petitioner's *habeas corpus* claim that the board violated the *ex post facto* provisions when it set his parole-release date is moot in light of the board's recalculation of that date using the original rules.

**State v. Baldez**, 189 Or App 528, 76 P3d 685 (2003) (*per curiam*). Defendant's challenge to his prison sentence became moot when he completed serving that sentence and was released onto post-prison supervision. Dismissal, rather than summary affirmance, is the appropriate disposition when appeal becomes moot.

**Dugger v. Schiedler**, 174 Or App 585, 27 P3d 498 (2001). Plaintiff was convicted on charges of second-degree robbery and kidnapping with a firearm. Although those offenses were subject to Measure 11, the sentencing court orally declared Measure 11 to be unconstitutional and imposed instead a 60-month firearm-minimum sentence. Plaintiff later sought *habeas corpus* relief on a claim that the Department of Corrections was denying him earned-time credit per the no-release clause in ORS 137.707(2), and the trial court dismissed his petition. *Held*: Reversed. Plaintiff's claim is not moot even though he has been released, "because the termination date of his term of post-prison supervision depends on the proper determination of the date on which his incarceration term expired."

**State v. Dick**, 169 Or App 649, 10 P3d 315 (2000) (*per curiam*). The sentencing court revoked defendant's probation without providing notice, a hearing, or a waiver of counsel. The state conceded that the court erred but argued the appeal was moot because defendant already had completed his sentence. Defendant argued that his prior violation history might be used against him if he had legal problems in the future. *Held*: Appeal dismissed. "The mere possibility of future adverse consequences does not render a case justiciable."

**State v. Bowman**, 160 Or App 8, 980 P2d 164 (1999), *rev den*, 334 Or 655 (2002). Defendant, a 17-year-old juvenile, was convicted of robbery in the second degree, the sentencing court refused to impose the 70-month minimum sentence and instead placed defendant on probation, and the state appealed. While that appeal was pending, the court revoked defendant's probation and again refused to impose the minimum sentence and imposed the 6-month sanction prescribed by the guidelines. The state also appealed from that judgment, and the two appeals were consolidated on appeal. *Held*: The state's appeal from the original judgment was moot, but its challenge to the sentence imposed on revocation is reviewable under ORS 138.222(4)(c).

**Barnes v. Thompson**, 159 Or App 383, 977 P2d 431, *rev den*, 329 Or 447 (1999). Plaintiff, who was convicted on preguidelines offenses, petitioned for *habeas corpus* relief on a claim that the board's extension of his parole-release date for two years was unlawful. The trial court dismissed the petition, plaintiff appeal, and while his appeal was pending he was released on parole. *Held*: Appeal dismissed. Because plaintiff is serving indeterminate sentences and will be on parole for the remainder of those terms, his complaint that he should have been released two years earlier, even if true, would not provide any basis for relief now. The mere possibility that the board might release him from "active supervision" earlier does not preclude his current claim from being moot.

*State v. Lavitsky*, 158 Or App 660, 976 P2d 82 (1999). The state appealed seeking a remand for imposition of a longer sentence. While the appeal was pending, defendant completed the sentence that was imposed and was released to an INS hold for deportation. *Held*: The imminent deportation does not render the state’s appeal moot. “Defendant’s impending or actual deportation may, as a practical matter, render enforcement of our decision problematic should we conclude that the trial court erred in sentencing defendant—*viz.*, defendant may no longer be in the country or might never reenter the country. However, we will not base a decision about mootness on speculation that a decision on the merits may not have a practical effect.”

*State v. Barnum*, 154 Or App 24, 959 P2d 1007 (1998): Defendant was resentenced by order of a post-conviction court, and he appealed contending that the court failed to comply with the remand order. *Held*: Appeal dismissed. Defendant’s claim of error is moot, because he already had completely served the prison term imposed, the prison term imposed is the same as he claims should have been imposed, and his claim that the court erred by imposing a term of post-prison supervision provides no basis for reversal, because he is serving a consecutive prison term with the identical term of post-prison supervision.

*State ex rel. Eames v. Baldwin*, 146 Or App 503, 934 P2d 454 (1997): Plaintiff petitioned for mandamus based on claim that defendant superintendent was erroneously denying him credit for time he spent on electronic monitoring and work release. *Held*: Plaintiff’s claim is moot, because he had been transferred to another institution and was no longer in defendant’s custody on those convictions.

*State v. Stewart*, 123 Or App 432, 859 P2d 1200 (*per curiam*), *rev den*, 318 Or 246 (1993): Dispute over defendant’s criminal-history score for purpose of imposing sentence on his murder conviction is moot given that sentencing court properly imposed a 20-year minimum sentence pursuant to ORS 163.115(4)(b) and (c).

*State v. Lewis*, 121 Or App 494, 854 P2d 1009, *rev den*, 318 Or 26 (1993): Where the sentencing court revoked probation and imposed sentence while appeal was pending from original judgment, defendant’s challenge to condition of probation is moot.

*State v. Miller*, 114 Or App 235, 835 P2d 131 (1992): Sentencing court entered amended judgment while case was on appeal in order to correct erroneous term of post-prison supervision; *held*: that claim of error is moot.

## **7. Affirmance despite error—error is harmless or waived**

See Article VII (amended), section 3; ORS 138.230.

*Washington v. Recuenco*, 548 US 212, 126 S Ct 2546, 165 L Ed 2d 466 (2006). Based on an incident in which he threatened his wife with a firearm, defendant was charged with second-degree assault “with a deadly weapon,” and the jury found him guilty. Although the jury was instructed that a firearm is a deadly weapon, it did not find specifically that he used a firearm. Nonetheless, the sentencing court imposed an enhanced sentence based on its finding that defendant used a firearm. Based on *Apprendi* and *Blakely*, which were decided in the interim, the state supreme court vacated the sentence and remanded for resentencing without that enhancement. *Held*: Reversed and remanded. “We have repeatedly recognized that the commission of constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless. If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis. Only in rare cases has this Court held that error is structural, and thus requires automatic reversal. In such cases, the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” The error here is indistinguishable from the one in *Neder v. United States*, 527 US 1 (1999), because under *Blakely* “we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.” Consequently, “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error” and is subject to harmless-error review.

*Note*: The Court did not consider whether the state’s failure, in any form, to *allege* “with a firearm” precluded imposition of an enhanced sentence.

*State v. Link*, 346 Or 187, 208 P3d 936 (2009). Defendant, Thomas, Koch, and a couple of other juveniles concocted a plan to murder Thomas’s mother, steal her car, and escape to Canada. They broke into the victim’s home and planned various ways to kill her. When she arrived, they attempted to kill her without success. Defendant, who was outside

the house, called Koch on his cell phone and urged him to shoot her. Koch then got a rifle and shot the victim to death. Defendant was charged with aggravated felony murder and aggravated murder to conceal the robbery and burglary, ORS 163.095(2)(d), (e). The court found him guilty on all those charges, and defendant appealed and challenged the denial of his motion for judgment of acquittal on the charges of aggravated felony murder. The Court of Appeals affirmed, ruling that because all the convictions for aggravated murder merged into a single conviction and he did not challenge his convictions for aggravated murder to conceal, he challenge to the convictions for aggravated felony murder was moot. *Held*: Reversed and remanded. Because defendant challenges the validity of the guilty *verdicts* on the charges of aggravated felony murder and those verdicts are and must be included in the judgment, his challenge is not moot or harmless: “the ruling that defendant seeks would affect his substantial right.” *Distinguishing State v. Pratt*, 316 Or 561, 575 (1993).

*State v. Fults*, 343 Or 515, 173 P3d 822 (2007). Defendant was convicted in this case of MCS, the court placed the conviction in gridblock 4-F and imposed a probationary sentence with a 36-month term (instead of the presumptive 24-month term), because that matched the probationary terms it had imposed on defendant’s other convictions in a different case. Defense counsel said, “We have no objection to that, whatsoever.” But defendant then appealed contending that the 36-month term was “plain error” because the court did not properly depart. The Court of Appeals agreed and reversed, noting that “there [is no] indication that defendant’s failure to object constituted a strategic choice for which defendant now seeks to shift the blame” and that “the state has no valid interest in requiring defendant to serve an unlawful sentence.” *Held*: Reversed and remanded for reconsideration. [1] “Under those circumstances, defense counsel easily could have feared that a technical objection to the extra 12 months of probation on the MCS conviction would ‘break the deal,’ and that the best tactic for his client was to remain silent. In other words, ... there is a significant possibility that defendant’s failure to object was *in fact* a strategic choice.” [2] “Among the factors that may apply in this case [when determining whether to review a ‘plain error’ are: (1) defendant’s apparent encouragement of the judge’s choice; (2) the role of the concurrent, permissible 36-month probationary sentence; (3) the possibility that defendant made a strategic choice not to object to the sentence; and (4) the interest of the judicial system in avoiding unnecessary repetitive sentencing proceedings, as well as its interest in requiring preservation of error. Finally, respecting the ‘no valid interest’ statement itself, ... (1) the statement is a truism, which, if it were dispositive, would require consideration of and reversal based on any sentencing error, even those that have no readily identifiable significance, and (2) sentences in criminal cases, such as those imposed to run concurrently with sentences that the prisoner already is (or will be) serving, often have no real, practical effect on the prisoner. In such cases, among others, an appellate court’s ‘no valid interest’ statement contributes little or nothing to its analysis under ORAP 5.45(1) whether to exercise its discretion to consider ‘an error of law apparent on the face of the record.’ This is one of those cases.”

*Note*: On remand, the Court of Appeals affirmed: *State v. Fults*, 219 Or App 305, 182 P3d 267 (2008) (sentencing court’s imposition of a 36-month term of probation instead of the presumptive 24-month term did not constitute plain error because defense counsel expressly consented, there may have been a “strategic choice,” and the existence of a concurrent 36-month term of probation on another conviction mad gravity of the error “slight”).

*State v. Bray*, 342 Or 711, 160 P3d 983 (2007). Defendant was convicted on multiple counts of encouraging child sexual abuse. At sentencing, the court departed upward based on findings of three aggravating factors, including that defendant was persistently involved in similar offenses, OAR 213-008-0002(2)(b)(D), and found that any factor standing alone would support the departures. On appeal, the state argued that the “persistent involvement” finding was permissible under the “fact of a prior conviction” exception in *Blakely*. *Held*: Reversed and remanded. [1] Because the sentencing court found any factor was sufficient, the appellate court could affirm if any of the factors was legally permissible. [2] The “persistent involvement” factor raises a “factual issue that, under *Apprendi* and *Blakely*, a defendant may insist that a jury find beyond a reasonable doubt.” [3] Although a rational juror could find “persistent involvement” based on defendant’s criminal record, the error was not harmless.

*State v. Powell*, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). Defendant was convicted of seven offenses including PCS, third-degree assault, and attempting to elude. The sentencing court imposed a series of consecutive departure sentences, including a 60-month sentence with a 24-month term of post-prison supervision on defendant’s PCS conviction, a class C felony. *Held*: Affirmed. [1] The court violated OAR 213-005-0002(4) when it imposed a 24-month term of post-prison supervision on the PCS conviction, even though the court also imposed a no-release order per ORS 137.750 and judgment provided that the PPS term “is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum.” [2] But that error is harmless, because defendant must serve a PPS term on another conviction and a remand to enter a corrected judgment “would not have the potential to improve defendant’s position.”

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*State v. Diaz-Guillen*, 245 Or App 110, 261 P3d 80 (2011). Defendant was convicted of two counts of attempted aggravated murder, two counts of first-degree assault, two counts of unlawful use of a weapon, one count of first-degree burglary, one count of felon in possession of a firearm, and two counts of tampering with a witness. At sentencing, the trial court imposed 60-month terms of imprisonment, plus 24-month terms of post-prison supervision, on each of the Class C felonies (the statutory maximum sentence is 60 months total). The trial court also imposed three 60-month "firearm minimum" terms on three of the felony counts. Defendant did not object. The total sentence on all the convictions was 357 months. *Held*: Affirmed. Although the trial court imposed erroneous sentences—the PPS terms on the Class C felonies exceeded the statutory maximum, and there can be only one "firearm minimum" in a single case—the Court of Appeals refused to exercise its discretion to review defendant's unreserved claims of error, because the erroneous sentences are to be served concurrently with other longer, lawful sentences, the errors have no practical effect.

*State v. Medina*, 234 Or App 684, 228 P3d 723 (2010). [1] The sentencing court committed plain error under *State v. Hardesty*, 298 Or 616 (1985), when it imposed three firearm-minimum sentences on separate convictions based on a single incident. [2] Although the sentencing court on remand, after correcting the error, possibly can restructure the sentences to reimpose the same overall sentence, it is not clear from the record that it necessarily would. Consequently, the court remanded for resentencing.

*State v. Phillips*, 234 Or App 676, 229 P3d 631, *mod on recon*, 236 Or App 461, 240 P3d 1099, *rev den*, 349 Or 370 (2010). The Court of Appeals declined to review as plain error defendant's claim that the trial court erred in not merging his two convictions for contempt. Because defendant has already completed the 60-day sentence and also was incarcerated on another sentence during that time, "the asserted error was not grave and the ends of justice, although no perfectly served, were not seriously damaged."

*State v. Henry*, 225 Or App 245, 201 P3d 217 (2009). Defendant was convicted of coercion arising out of a card game at the Tillamook County Jail. On appeal, he asserted that the court's order that he serve the sentence consecutively to the sentences he already was serving violated his Sixth Amendment right to a jury trial. *Held*: Affirmed. Any error in ordering the sentence to be served consecutively was harmless because it was undisputed that the defendant was serving other sentences. [This case was decided before *Oregon v. Ice*; otherwise, its harmless-error analysis would have been unnecessary.]

*State v. Calderon-Ortiz*, 222 Or App 1, 191 P3d 808 (2008), *rev den*, 345 Or App 618 (2009). Although the record did not show that the jurors had found as fact that the defendant's rape and sodomy convictions arose from separate criminal episodes, the record demonstrated that various *other* convictions were based on separate criminal episodes. Because the sentencing court clearly stated its intention to impose a total 180-month prison sentence, and because it could have done so under ORS 137.123(2) by imposing the sentences on the other convictions consecutively to one another, the court's error in imposing a partially consecutive sentence on the sodomy conviction was harmless.

*State v. Bowen*, 220 Or App 380, 185 P3d 1129 (2008). Over defendant's *Blakely*-based objection, the sentencing court, relying on ORS 137.123(2), imposed consecutive sentences on multiple convictions based on defendant's repeated

sexual assaults on a child. *Held*: Affirmed. Even though, in light of *Ice*, the court erred, the error was harmless because “the evidence at trial established eight incidents of sexual contact between defendant and the victim [over the course of 9 years, and those] incidents, as demonstrated by overwhelming evidence in the record, were so distinct from one another that we can say with complete confidence that the jury would have found that the offenses did not occur as part of a continuous and uninterrupted course of conduct if it had been asked to determine the matter. That is, on this record, no reasonable factfinder could have determined otherwise.”

*State v. Phaneuf*, 219 Or App 640, 184 P3d 1136 (2008). Because “a trial court lacks authority to deny credit for time served to which a defendant is entitled by statute,” the court erred by entering a judgment that purports to deny credit for time served. But the error is harmless for purposes of “plain error” review, because DOC must compute credit under ORS 137.370 “no matter what the language of the sentencing judgment might be.”

*State v. Marshall*, 219 Or App 511, 183 P3d 241 (2008). [1] The sentencing court erred when it failed to comply with “shift to column I” rule, OAR 213-012-0020(2)(a)(B), when it imposed a sentence on conviction for third-degree assault to be served consecutively to sentence on conviction for kidnapping based same incident and victim. [2] Error was not harmless on ground that sentencing court can reimpose same overall by readjusting a partially consecutive sentence on a different conviction, because on this record “it is not certain that the court would do so.” *Distinguishing State v. Jenniches*.

*State v. Boone*, 213 Or App 242, 160 P3d 944, *on recon*, 215 Or App 428, 169 P3d 1274 (2007). Because the Court of Appeals reversed several of defendant’s convictions and, as a result, remanded the case pursuant to ORS 138.222(5) for resentencing, the court concluded that “it need not address” defendant’s challenges to the sentences imposed on his other convictions.

*State v. Hollinquest*, 212 Or App 488, 157 P3d 96 (*per curiam*), *rev den*, 343 Or 206 (2007). The court imposed on defendant’s conviction for first-degree manslaughter a 240-month sentence (by upward departure) with a 36-month term of post-prison supervision. *Held*: Reversed and remanded. [1] Because the 240-month term is the statutory maximum, the court committed plain error by imposing, in addition, the 36-month term of post-prison supervision. [2] The fact that the court imposed a 24-month term of post-prison supervision on defendant’s FIP conviction, which he does not challenge, does not make the error harmless, even though the post-prison supervision terms will be served as a single unit under OAR 213-012-0040, because the erroneous term is longer.

*State v. Gallegos*, 208 Or App 488, 145 P3d 255 (2006). Remand based on *Barrett*; resentencing is required under ORS 138.222(5) even though the court would have the authority to impose the same sentence on remand.

*State v. Gortler*, 207 Or App 321, 142 P3d 74 (2006). Even though defendant stipulated to a 13-month sentence on a UUV conviction in one case, his *Blakely*-based challenge to a concurrent 12-month departure sentence imposed on a UUV conviction in a second case is not harmless because the court imposed sentences in the second case that defendant must serve consecutively to the 12-month sentence.

*State v. Williams*, 204 Or App 473, 131 P3d 767, *rev den*, 341 Or 198 (2006). Defendant’s *Blakely*-based “plain error” challenge to a 12-month prison sentence imposed as a dispositional departure on his felony conviction warrants relief even though that sentence is concurrent with a 12-month jail sentence that the court imposed on a companion misdemeanor convictions: “although [the sentences] are identical in length and were ordered to be served concurrently, they nevertheless are qualitatively different from each other by reason of the respective modifications to which each is subject.”

*State v. Jackson*, 201 Or App 407, 118 P3d 849 (2005) (*per curiam*). Defendant’s *Blakely*-based challenge to the court’s no-release order under ORS 137.750 is moot because he completed service of the underlying 12-month sentence. *See also State v. Schaefer*, 201 Or App 409, 118 P3d 849 (2005) (*per curiam*) (same).

*State v. Jacobs*, 200 Or App 665, 118 P3d 290 (2005). [1] Defendant did not waive his right to be present at sentencing when, after the court orally imposed sentence, he requested a continuance to enable him to brief legal issues related to that sentence. [2] The court erred when, after considering the parties’ briefs, it entered a written judgment that imposed a sentence that was more onerous than the oral sentence without reconvening a hearing in court for that purpose. Because, under those circumstances, defendant had no opportunity either to object or to argue for leniency in person before entry of judgment, his claim of error is not unreviewable as unreviewable.

*State v. Gutierrez*, 199 Or App 521, 112 P3d 433 (2005), *rev den*, 340 Or 673 (2006). Defendant's *Blakely*-based challenge to the extended 36-month term of his probation on a felony is moot because he is serving a 60-month concurrent term that he does not challenge on a misdemeanor conviction. Defendant's claim of potential prejudice is merely speculative and remote, and it depends on whether he chooses to comply with the conditions of his probation.

*State v. Sullivan*, 197 Or App 26, 104 P3d 636 (2005). Defendant's unpreserved *Blakely*-based challenges to a 36-month probationary term on his felony conviction is not reviewable because it is concurrent with unchallenged 5-year probationary terms imposed on his misdemeanor convictions, and hence any error may be harmless.

*State v. Jenniches*, 187 Or App 658, 69 P3d 771, *rev den*, 335 Or 578 (2003). Defendant was convicted on ten counts of theft by receiving subject to ORS 137.717 (1997), and the court departed upward on three of the convictions and imposed 26-month sentences, using the 13-month minimum sentence as a base. Defendant did not object. *Held*: Affirmed. Although the departure sentences are "plain error" under *State v. Bagley*, the Court of Appeals declined to grant relief, because "the state has articulated and developed an alternative theory for affirming defendant's sentences," it is clear that, on remand for resentencing under ORS 138.222(5), "the court lawfully could, and would, impose the same total term of imprisonment" by restructuring the sentences, and the sentencing court denied defendant's motion for entry of a corrected judgment under ORS 138.083(1).

*State v. Gibson*, 183 Or App 25, 51 P3d 619 (2002). The sentencing court erred by imposing a "double departure" on one of defendant's convictions without expressly finding two separate aggravating factors to support both departures. The Court of Appeals would not affirm on the basis that the sentencing court had found multiple aggravating factors in support of a departure on a separate conviction. Remanded for resentencing.

*State v. Toledo*, 175 Or App 280, 28 P3d 1194 (2001). Defendant was convicted on multiple counts of assault and DUII based on an injury accident, and the sentencing court departed upward on one assault conviction based on several aggravating factors, including a finding that defendant used a weapon, OAR 213-008-0002(1)(b)(E). *Held*: Reversed and remanded. [1] Because the sentencing court did not find that any one of the aggravating factors was sufficient to support the departure, the Court of Appeals had to reverse if any one was error. [2] The "use of a weapon" factor was error under OAR 213-008-0002(2) because that factor duplicated one of the elements of the assault charge and the court did not make a finding that that factor was significantly different from the usual criminal conduct captured by that element.

*State v. Wolff*, 174 Or App 357, 27 P3d 145 (2001). Defendant was convicted of hindering prosecution for assisting murderers hide the victim's body. The sentencing court departed based on three aggravating factors, including "permanent injury to the victim" under OAR 213-008-0002(1)(b)(I). *Held*: Reversed and remanded. [1] Because the sentencing court did not find that any one of the three factors is sufficient for the departure, the Court of Appeals had to reverse if any one of the three was erroneous. [2] The permanent-injury finding was error, because the victim had died as a result of the others' conduct and defendant's conduct of itself did not cause any permanent injury.

*State v. Black*, 161 Or App 662, 987 P2d 530 (1999). The sentencing court erred when it imposed firearm-minimum sentences on two convictions based on crimes defendant committed during a single incident. That error warrants relief on appeal even though those sentences are concurrent.

*State v. Paez-Lopez*, 155 Or App 617, 964 P2d 1083 (1998). Defendant, an alien, was convicted of DCS and the court placed him on probation and ordered him, as a condition, not to reenter this country illegally. He later was arrested in this country and was charged in federal court with illegal entry. The sentencing court revoked defendant's probation, concluding that he had failed to establish that he had reentered legally. *Held*: Reversed. In order to revoke a defendant's probation, "the state had to prove by a preponderance of the evidence that he had violated the terms of probation." The court could not assume that defendant was barred from reentry and then shift the burden to him to establish that he was entitled to reenter under some exception. The Court of Appeals could not affirm on the basis that the purposes of probation were not being served, because the sentencing court did not attempt to justify the revocation on that basis. Therefore, the proper remedy was to remand for reconsideration.

*State v. Daves*, 145 Or App 443, 930 P2d 265 (1996): Even if court erred by finding defendant in violation of probation, that error did not require a remedy, because the court had authority under ORS 137.540(4) (now ORS 137.540(7)) to modify the conditions of defendant's probation and to continue probation without finding that he had violated a condition of his probation.

*State v. Weikert*, 145 Or App 263, 929 P2d 1070 (1996), *rev den*, 325 Or 45 (1997): Although sentencing court committed plain error when it imposed extended term of post-prison supervision per ORS 144.103 on conviction that was not subject to the statute, that error was harmless, because the court imposed a longer term of post-prison supervision on the primary offense.

*State v. Franks*, 143 Or App 384, 923 P2d 1302, *rev den*, 324 Or 488 (1996): The sentencing court inadvertently imposed the presumptive sentence prescribed for gridblock 7-A after placing the conviction in gridblock 7-B, and the state contended on appeal that the sentence imposed actually is the presumptive sentence (and hence lawful) because the conviction in fact falls into gridblock 7-A. *Held*: The Court of Appeals refused to consider that argument because the state failed to cross-assign error.

*State v. Yarbor*, 133 Or App 360, 891 P2d 703, *rev den*, 321 Or 513 (1995): Any error in classifying defendant's prior convictions does not warrant relief on appeal, because on remand the sentencing court would be able to recalculate defendant's criminal-history score in accordance with *State v. Bucholz*, 317 Or 309 (1993), achieve the same gridblock, and thus impose the same sentence.

*State v. Williams*, 131 Or App 85, 883 P2d 918 (1994), *on recons*, 133 Or App 191, 891 P2d 3, *rev den*, 321 Or 512 (1995): The sentencing court departed on the basis of five aggravating factors, it noted on the record that the factors "individually indicated that a departure is warranted," and defendant on appeal challenged only four of the factors. The Court of Appeals affirmed without considering defendant's claims of error: "Neither the statutes nor the sentencing guidelines limits the trial court's discretion in imposing departure sentences to more than one aggravating factor. The record shows that the court would have imposed the departure sentence on the [unchallenged] finding alone. There is no error that requires remand."

*See also State v. Barrett*, 134 Or App 162, 894 P2d 1183, *rev den*, 321 Or 340 (1995) (same); *State v. Fennern*, 133 Or App 199, 891 P2d 2 (1995) (because sentencing court "specifically held that either factor would support the departure sentence it imposed," the Court of Appeals declined to review defendant's challenge to second factor after determining that sentencing court properly relied on first factor).

*State v. Dusenberry*, 130 Or App 205, 880 P2d 515 (1995): Sentencing court erred in ordering defendant, as a condition of post-prison supervision, to complete drug-treatment program, because the court "lacks authority to impose conditions of parole." The judgment could not be affirmed notwithstanding the error on the ground that the clause is nonprejudicial "surplusage," because the judgment does not contain a correct provision and the parole board is not otherwise required to impose such a condition.

*State v. Dashed*, 126 Or App 252, 868 P2d 15 (1994): Although sentencing court erroneously imposed "life sentence" pursuant to ORS 163.115(4)(a) on murder convictions (*see State v. Morgan*), that portion of the judgment "is surplusage" and does not require a remand for resentencing, because court properly imposed a 22-year determinate sentence pursuant to ORS 163.115(4)(b) and (c) and a life-time term of post-prison supervision pursuant to OAR 253-05-004(1).

*State v. Baker*, 119 Or App 144, 848 P2d 661 (1993) (*per curiam*): Although the sentencing court erred in determining defendant's criminal-history score, that error does not warrant relief on appeal because "[t]he challenged sentence is concurrent [with] a 24-month term of imprisonment in a separate case."

*State v. Walker*, 117 Or App 527, 842 P2d 817 (1992) (*per curiam*), first-degree 315 Or 644 (1993): Although the sentencing court erred in imposing both a 120-month minimum sentence pursuant to ORS 161.610(4) and a 65-month presumptive sentence, the error does not warrant relief on appeal, because ORS 137.637 requires defendant to serve the 120-month sentence.

*State v. Dummitt*, 115 Or App 487, 839 P2d 246 (1992): Sentencing court's failure to "merge" probationary sentence into term of post-prison supervision not reversible error, because OAR 253-12-020(3)(a) mandates a single term of supervision, effectively making probationary term "surplusage."

*State v. Enos*, 114 Or App 208, 836 P2d 1347 (*per curiam*), *rev den*, 314 Or 728 (1992): Any error in imposing separate terms of post-prison supervision on each conviction in case does not warrant relief on appeal, because OAR 253-05-002(3) requires all the PPS terms to commence upon defendant's release from prison and OAR 253-12-040(1) requires

the terms to be served concurrently.

See also *State v. Markham*, 114 Or App 5, 836 P2d 1348 (1992) (same).

*State v. Bottrell*, 111 Or App 652, 826 P2d 126 (1992) (*per curiam*): Even if the sentencing court erred in determining defendant's criminal-history score, that is not a basis for any relief on appeal, because the presumptive sentence is the same for either gridblock and the court imposed the presumptive sentence.

See also *State v. Nelson*, 119 Or App 84, 849 P2d 1147 (1993) (even though sentencing court incorrectly used column "H" rather than "I" sentence in imposing consecutive sentence, "the error did not prejudice defendant, and, therefore, he is not entitled to relief"); *State v. Ripka*, 111 Or App 469, 827 P2d 189, *rev den*, 313 Or 300 (1992) (error in ranking offense does not require relief on appeal if court imposed a departure sentence that would have been permissible under either gridblock).

*State v. Tremillion*, 111 Or App 375, 826 P2d 95 (*per curiam*), *rev den*, 313 Or 300 (1992): Even though the sentencing court erred in failing to impose a definite sentence on a secondary conviction, the error does not require relief on appeal, because the sentence is less than and concurrent with an unchallenged prison sentence imposed on another conviction.

But see *State v. Dotter*, 114 Or App 1, 833 P2d 1369 (1992) (imposing too many custody units is reversible error even though the court "reserved" all the units).

*State v. Cook*, 108 Or App 576, 816 P2d 697 (1991), *rev den*, 312 Or 588 (1992): Because the appellate court cannot review a presumptive sentence, if defendant's sole challenge on appeal is a claim that the presumptive sentence imposed is "excessive," the appellate court can affirm summarily.

### C. SCOPE OF REVIEW ON APPEAL

See ORS 138.222(3) and (4).

*State v. Baker*, 346 Or 1, 202 P3d 174 (2009). A proportionality challenge to a sentence is reviewable in appeal from a judgment based on a guilty plea as a claim that the sentence is "unconstitutionally cruel and unusual," under ORS 138.050.

*State v. Eshaia*, 253 Or App 676, 291 P3d 805 (2012). Defendant pleaded guilty to a charge of menacing. At sentencing, defense counsel asked the court to waive fees because defendant was unable to pay them; counsel asserted that defendant "doesn't work" and is disabled, but defendant admitted that he receives both "SSI and SSD." The trial court ordered him to repay \$400 in fees for his court-appointed attorney pursuant to ORS 151.505 and ORS 161.665. *Held*: Affirmed. [1] Defendant's claim that the order requiring him to pay \$400 is reviewable under ORS 138.050. [2] ORS 151.505 and ORS 161.665 provide that a court may not impose attorney fees "unless the defendant 'is or may be able' to pay them. A court's determination of that issue must be supported by the record."

*State v. Beckham*, 253 Or App 609, 292 P3d 611 (2012). Defendant was convicted of fourth-degree assault constituting domestic violence. The trial court entered a supplemental judgment imposing restitution 104 days after the original judgment had issued. Defendant appealed, contending that the trial court erred by imposing restitution because: (1) the supplemental judgment was entered after the 90-day period allowed under ORS 137.106(1)(b), and the court did not find good cause for extending that time; and (2) the record lacked evidence to support the amount of restitution imposed. The state conceded error in both respects but argued that the proper remedy is to vacate the supplemental judgment and remand for a hearing for the trial court to now determine whether good cause existed to extend the restitution determination and, if so, the amount of economic damages. *Held*: Supplemental judgment vacated and remanded; otherwise affirmed. Because defendant was convicted of a misdemeanor after a trial, ORS 138.040, rather than ORS 138.222(5) (which applies only to felony sentences), governs appellate review and disposition options.

*State v. Ivie*, 213 Or App 198, 159 P3d 1257 (2007). Defendant pleaded guilty to second-degree assault and the parties stipulated to a departure pursuant to ORS 137.712 to a probationary sentence but further agreed that if defendant violated the probation, the court on revocation would impose a 70-month term as the "presumptive" sentence. The court imposed that sentence without making findings under ORS 137.712 or 137.750. Later, upon revocation, defendant argued that ORS 137.712(5) barred a sentence longer than 38 months. The court disagreed and imposed the 70-month sentence and denied any eligibility for early release based on ORS 137.700(1). *Held*: Reversed and remanded. [1] In interpreting the

parties' plea agreement, "commercial contract principles apply"—"the construction of a contract is a question of law, but when the contract is ambiguous, extrinsic evidence may be used to resolve the ambiguity, and determination of a the parties' intent is a question of fact." The record supported the sentencing court's finding that defendant had stipulated to a 70-month term on revocation. [2] Because 70-month term was imposed pursuant to stipulation, ORS 137.222(2)(d) barred appellate review. But because the record does not show that defendant stipulated to the no-release order, his challenge to that term is reviewable. [3] The sentencing court erred in denying eligibility for release, because defendant was not sentenced pursuant to ORS 137.700(1) and the court did not make findings under ORS 137.750 to support that order.

*State v. Rhoades*, 210 Or App 280, 149 P3d 1259 (2006). Although defendant's convictions for third-degree rape and sodomy are subject to the presumptive life sentence per ORS 137.719 due to his prior convictions for similar sexual offenses, the sentencing court departed downward pursuant to ORS 137.719(2) to impose only a 60-month sentence based on findings that the 15-year-old victim consented to the activity and that the crimes involved the same victim in the same time period and general area. *Held*: Reversed and remanded. Appellate review is limited to whether the findings are supported by the evidence and the reasons given constitute substantial and compelling reasons for departure. "We review the sentencing court's explanation of why the circumstances are so exceptional that the imposition of the presumptive sentence would not accomplish the purposes of the guidelines."

*State v. Anderson*, 197 Or App 193, 104 P3d 1175, *rev den*, 338 Or 583 (2005). Defendant was convicted of second-degree robbery based on her plea of guilty, and the sentencing court rejected her request for a departure under ORS 137.712 and imposed the mandatory 70-month sentence. She appealed contending that the sentencing court erred in ruling that she was disqualified from a departure. *Held*: Appeal dismissed. Because defendant was not entitled to a lesser sentence even under her argument, if the court erred, "that error deprived defendant only of an opportunity to be considered for a sub-minimum sentence; it did not expose her to a sentence that exceeded the legal maximum." Consequently, her claim of error is not reviewable under ORS 138.050(3) and "we lack jurisdiction to consider it."

*State v. Wilson*, 193 Or App 506, 92 P3d 729 (2004). Restitution is a sentence, and the Court of Appeals reviews to determine whether the sentencing court complied with the requirements of law in imposing restitution.

*State v. Paeteher*, 169 Or App 157, 7 P3d 708 (2000). The appellate court reviews "to determine whether the sentencing court committed an error of law when it ranked defendant's conviction."

*State v. Warren*, 168 Or App 1, 5 P3d 1115, *rev den*, 330 Or 412 (2000). The appellate court does not conduct a *de novo* review of the record to determine whether consecutive sentences are appropriate. Rather, the review is for error of law—*i.e.*, whether evidence in the record supports the court's findings.

*State v. Young*, 161 Or App 507, 985 P2d 535 (1999), *rev den*, 329 Or 590 (2000). In an appeal in which the defendant challenges the sentencing court's ranking of an unranked offense pursuant to OAR 213-004-0004, the Court of Appeals reviews only to determine "whether the court's reasons are stated on the record and whether those reasons reflect a proper exercise of the court's discretion. ... On review, the issue is not whether we would have chosen a different crime category but rather whether the sentencing court's reasons for choosing the category reflect a proper exercise of discretion."

*State v. Waage*, 160 Or App 156, 981 P2d 333 (1999). Defendant was convicted of multiple counts of using a child in a sexually explicit display and one count of attempted second-degree rape. The court departed dispositionally and placed defendant on probation after finding that he was amenable to treatment and a suitable treatment program was available. OAR 213-008-0002(1)(a)(I). The state appealed contending that the court's findings were not supported by the record. *Held*: "Our review is of the sentencing court's factual basis for departing, not of the decision whether to depart. ... We review the trial court's finding that treatment was available to determine if it is 'supported by the evidence in the record.' ORS 138.222(3)(a)."

*State v. Reiland*, 153 Or App 601, 958 P2d 900 (1998): In determining whether the sentencing court erred in refusing to merge convictions, the Court of Appeals reviews for error of law. The court looks only to statutory elements of each offense under which the defendant was convicted in order to determine whether they contain different elements.

*State v. Rojas-Montalvo*, 153 Or App 222, 957 P2d 163, *rev den*, 327 Or 193 (1998): The Court of Appeals reviews challenges to consecutive sentences for errors of law and to determine whether the sentence imposed exceeds the maximum allowable by law.

*State v. Provencio*, 153 Or App 90, 955 P2d 774 (1998). The Court of Appeals reviews a sentencing court's classification of a prior convictions for criminal-history purposes for errors of law, ORS 138.222(4)(b).

*State v. Hurst*, 152 Or App 716, 955 P2d 338 (1998). Defendant and codefendant committed burglaries in which they stole firearms and ammunition. The sentencing court ranked the convictions as category 9 offenses based on findings that defendant was armed with a deadly weapon. *Held*: In reviewing whether the court's findings support the ranking, the Court of Appeals reviews for error of law under ORS 138.222(4)(b).

*State v. Minter*, 146 Or App 643, 934 P2d 585 (1997): Per ORS 138.222(4)(b), the Court of Appeals "reviews a claim that the sentencing court erred in ranking the crime seriousness classification of the current crime as a question of law."

*State v. Ferrell*, 146 Or App 638, 933 P2d 973 (1997): Per ORS 138.222(3), the Court of Appeals reviews a challenge to a departure sentence to determine whether the factual findings and reasons cited by the sentencing court are supported by evidence in the record and constitute substantial and compelling reasons to depart as a matter of law; "our review is of the sentencing court's factual basis and reasons for departing, not the decision whether to depart."

See also *State v. Watkins*, 146 Or App 338, 932 P2d 107, *rev den*, 325 Or 438 (1997).

*State v. Rosson*, 145 Or App 574, 931 P2d 807, *rev den*, 325 Or 369 (1997): Whether the sentencing court erred in using defendant's prior Tennessee conviction for aggravated robbery as a predicate offense for purpose of ORS 137.635 is reviewed under ORS 138.222(4)(a) as a question of law.

*State v. Jackson/Hoang*, 145 Or App 27, 929 P2d 323 (1996), *rev den*, 326 Or 389 (1998): In reviewing claims that Measure 11 is unconstitutional on its face, the Court of Appeals reviews for errors of law, not "de novo."

*State v. Perry*, 140 Or App 18, 914 P2d 29 (1996). A claim that the sentencing court erred when it entered a written judgment that varied from the oral sentence imposed is reviewable under ORS 138.222(4)(a) as a question of law.

*State v. Casavan*, 139 Or App 544, 912 P2d 946, *rev den*, 323 Or 265 (1996). A claim that the sentencing court erred in determining the crime-seriousness classification of a conviction is reviewed under ORS 138.222(4)(b) as a question of law.

*State v. Parsons*, 135 Or App 188, 897 P2d 1197, *rev den*, 322 Or 168 (1995): The appellate court reviews "departure sentences to determine whether the sentencing court's findings of fact and reasons justifying the departure are supported by evidence in the record and constitute substantial and compelling reasons for departure. Those reasons must be exceptional circumstances to overcome the presumption that the gridblock sentence accomplishes the purposes of the guidelines."

*State v. Hennings*, 134 Or App 131, 894 P2d 1192, *rev den*, 320 Or 502 (1995): In reviewing a claim that the evidence fails to support a "guilty" verdict on an offense-subcategory factor, the appellate court considers the "decided facts together with those facts about which there is no conflict and determines whether the inferences that may be drawn from them are sufficient to allow the jury to find defendant's guilt beyond a reasonable doubt."

*State v. Guyton*, 126 Or App 143, 868 P2d 1335, *rev den*, 319 Or 36 (1994): Where sentencing court revoked probationary sentence and imposed prison term sanction, any appellate review of sentence is governed by ORS 138.222, not by ORS 138.053(3); the latter provision authorizes appellate review only of the decision to revoke probation.

*State v. Akin*, 125 Or App 351, 865 P2d 461 (1993), *rev den*, 318 Or 478 (1994): A claim of error that the sentencing court erred in imposing a firearm-minimum sentence under ORS 161.610 is reviewed for an error of law pursuant ORS 138.222(4)(a), not for abuse of discretion under ORS 138.222(3), because such a sentence is not a "departure" sentence.

*State v. Zavala-Ramos*, 116 Or App 220, 840 P2d 1314 (1992): Where the appellate court could not determine whether the sentencing court considered defendant's illegal immigration status in the proper manner before imposing a departure sentence, the case must be remanded for sentencing.

*State v. Duncan*, 113 Or App 665, 833 P2d 1329 (1992): Sentencing court’s decision whether to classify a prior conviction as a person felony “is reviewable as a matter of law.”

*State v. Schuh / Hookie* 112 Or App 362, 829 P2d 1040, *rev den*, 314 Or 176 (1992): In a state’s appeal challenging a judgment imposing optional probation, appellate court “must determine if there is evidence to support the required findings and whether the reasons advanced are sufficient to justify optional probation. There is nothing in the rule requiring the trial court to give substantial and compelling reasons for non-departure sentence. If the court makes the required findings, we cannot examine its reasons for selecting probation rather than the presumptive prison term or its reasons for selecting a particular, appropriate treatment program.”

*State v. Guthrie*, 112 Or App 102, 828 P2d 462 (1992): In appeal challenging departure sentence, appellate court does “not review the court’s decision whether to consider particular mitigating or aggravating factors [but only] whether the reasons that the court provided for the departure sentence constitute substantial and compelling reasons.”

*State v. Wilson*, 111 Or App 147, 826 P2d 1010 (1992): Under ORS 138.222(3), appellate review of a departure sentence “is of the sentencing court’s factual basis and reasons for departure, not the decision *whether* to depart.”

*State v. Rathbone II*, 110 Or App 419, 823 P2d 432 (1991), *rev den*, 313 Or 300 (1992): “[T]he sentencing court has discretion to determine the seriousness of an unranked offense. Our review under ORS 138.222(4)(b) is limited to whether the court’s reasons are stated on the record and whether those reasons reflect a proper exercise of the court’s discretion.”

*See also State v. Evans*, 113 Or App 210, 832 P2d 460 (1992) (same).

*State v. Tapp*, 110 Or App 1, 821 P2d 1098 (1991): With respect to issue whether sentencing court correctly classified prior out-of-state conviction for criminal-history purposes, appellate review is limited to whether the court “properly made that legal determination.”

## D. APPROPRIATE REMEDY

*See* ORS 138.222(5); ORS 138.040(2); ORS 138.050(3).

### 1. Remand for entry of corrected judgment

*State v. Bowen*, 352 Or 109, \_\_\_ P3d \_\_\_ (2012). Defendant was convicted of on a couple of alternative counts of aggravated murder and was sentenced to death. On direct review, the Supreme Court rejected all of defendant’s claims of error—including a challenge to the use of a stun belt as a security device—and affirmed his convictions and death sentence. But the court held that the sentencing court erred by not merging the convictions for aggravated murder; the court remanded for entry of a corrected judgment. *State v. Bowen*, 340 Or 487 (2006). Defendant immediately filed a petition for post-conviction relief, and the trial court did not enter a corrected judgment. After a few years, the parties to the post-conviction proceeding realized that the corrected judgment had not yet been entered, and the district attorney in 2010 filed a motion to enter a corrected judgment. In response, defendant filed a motion contending that the court had to conduct a new sentencing hearing per ORS 138.012 and a motion for new trial based on the use of the stun belt at trial. The trial court denied those motions, ruling that the remand order required it simply to enter a corrected judgment, and that is all it did. *Held*: Remanded for entry of corrected judgment. “It follows that the error identified in *Bowen I* was remedied by entry of a corrected judgment for a single conviction of aggravated murder and a single sentence of death, which, in turn, ensured that defendant’s record accurately reflected the crimes for which he was convicted. That narrow result is consistent with our statutory and constitutional obligations to affirm the verdict and judgment of the trial court unless an error affects a substantial right of a party. In summary, in denying defendant’s motion to follow ORS 138.012, the trial court on remand correctly reasoned that, consistently with *Bowen I*, ORS 138.012(2)(a) did not apply to the remand proceedings. Instead, this court’s remand direction in *Bowen I* was limited to entry of a corrected judgment, which the trial court entered on remand.”

*State v. Acremant*, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005). Defendant was convicted of two alternative counts of aggravated murder for each of his two victims, and defendant did not object. *Held*: The sentencing court committed plain error under *State v. Barrett* by entering two convictions for each victim. “We therefore remand the

case for entry of a corrected judgment of conviction reflecting defendant's guilt on the charge of aggravated murder for each victim, with the judgment separately enumerating the aggravating factors upon which each conviction is based."

See also *State v. Gibson*, 338 Or 560, 113 P3d 423, *cert den*, 546 US 1044 (2005) (same).

*State v. Leistiko*, 254 Or App 413, 292 P3d 670 (2012) (*per curiam*). The sentencing court entered a supplemental judgment under HB 3408 (2009) that denied defendant eligibility for additional earned-time credits. Defendant appealed arguing that the court had no authority to enter such a judgment, and the state agreed. *State v. Portis*, 233 Or App 256, *dism'd as moot*, 348 Or 559 (2010). *Held*: Appeal dismissed. "The appropriate remedy ... is thus exceedingly narrow: dismiss the appeal and remand the case to the trial court with instructions to vacate the supplemental judgment concerning HB 3508 earned-time credits."

*State v. Sartin*, 248 Or App 748, 274 P3d 259 (2012) (*per curiam*). [1] The sentencing court committed plain error when it imposed 10-year terms of post-prison supervision on defendant's convictions for first-degree sexual abuse without ordering, as required by ORS 144.103(1), that those terms are to be reduced by the prison terms served. [2] The proper remedy is a remand for resentencing, rather than simply for entry of a corrected judgment.

*State v. Rubio/Galligan*, 248 Or App 130, 273 P3d 238, *rev den*, 352 Or 170 (2012). [1] The trial court committed plain error when it imposing a condition in the judgment that the defendants not contact the victim during their prison term. Because defendants were sentenced to prison, only the Corrections Division and the parole board have authority to impose such a condition during incarceration or post-prison supervision. [2] But the court denied defendants' request for "a full resentencing": "Because the only error was the inclusion of terms in the judgments that the trial court had no authority to impose, the appropriate remedy is to remand with instructions to delete the erroneous terms from the judgments."

*State v. Lassiter*, 244 Or App 327, 267 P3d 854 (2011). [1] Defendant's separate convictions for attempted first-degree theft and second-degree theft for taking property from victim's store and attempting to return the same for a refund should be merged into a single conviction. [2] "Reversed and remanded with instructions to enter a judgment of conviction for one count of second-degree theft reflecting that defendant was found guilty on both theories."

See also *State v. Johansen*, 242 Or App 515, 256 P3d 159 (2011) (*per curiam*) (court committed plain error when it entered separate convictions on defendant's two convictions for first-degree burglary that were based on a single unlawful entry and involved alternative theories; "Reversed and remanded for entry of a judgment reflecting a single conviction for first-degree burglary; otherwise affirmed.>").

*State v. Turner*, 211 Or App 96, 153 P3d 134 (2007) (*per curiam*). The sentencing court erred in failing to merge defendant's separate convictions for first-degree theft for stealing the property and then selling it to another. "The proper remedy under the circumstances is to remand the case for entry of a judgment reflecting the single conviction and enumerating the two alternative theories of conviction."

*State v. Flicker*, 185 Or App 666, 60 P3d 1155 (2002). The sentencing court erred in imposing the sexual-offender treatment as a condition of probation on defendant's convictions for hit and run and providing false information to a police officer, because he was not convicted of a sexual offense, ORS 137.540(1)(m), nor did he crimes involve a sexual purpose. Remanded with directs to delete that condition.

*State v. Anderson*, 149 Or App 506, 945 P2d 594 (1997). The sentencing court imposed 5-year sentences on defendant pre-guidelines felony convictions, suspended execution of sentence, and placed him probation. Later, it revoked probation, modified the sentences by imposing minimum terms and ordering them to be served consecutively, and then executed the sentences. *Held*: The court erred by modifying the previously imposed sentences following revocation of probation, and the appropriate remedy is to remand with directions to enter an amended judgment that deletes the minimum terms and the consecutive-sentence order.

*State v. Clark*, 146 Or App 590, 933 P2d 984 (1997): Where sentencing court erred by refusing to indicate in the judgment that the sentences imposed on defendant's robbery and burglary convictions are subject to ORS 137.635, the Court of Appeals remanded for entry of a corrected judgment.

*State v. Weikert*, 145 Or App 263, 929 P2d 1070 (1996), *rev den*, 325 Or 45 (1997): Because the sentencing court erred by imposing restrictions on release per ORS 137.635 on conviction that is not subject to the statute, the Court of

Appeals remanded for entry of a corrected judgment.

*State v. Todd*, 140 Or App 640, 915 P2d 1042 (1996) (*per curiam*). The sentencing court committed plain error when it imposed an extended term of post-prison supervision per ORS 144.103 on defendant's conviction for first-degree sodomy, which was based on a crime he committed prior to September 29, 1991. The court "remanded for entry of a corrected judgment imposing a 36-month period of post-prison supervision."

*State v. Jerue*, 134 Or App 668, 896 P2d 613 (1995) (*per curiam*): Because the sentencing court erroneously imposed 18-month departure sentence on revocation of probation and defendant already had served the maximum 6-month term prescribed by OAR 253-10-002(1), the appropriate remedy is not to remand for resentencing but to remand for entry of a corrected judgment.

*State v. Kim*, 132 Or App 367, 887 P2d 393 (*per curiam*), *rev den*, 320 Or 588 (1995): The sentencing court erred when it imposed a 25-year minimum sentence pursuant to ORS 144.110 on a murder conviction. Because the reference to ORS 144.110 was a clerical error, the appropriate remedy is not to delete the minimum term but to remand for entry of a corrected judgment that imposes the minimum term pursuant to ORS 163.115(4)(b) and (c).

*State v. Rood*, 129 Or App 422, 879 P2d 886 (1994): Sentencing court orally imposed consecutive 60-day presumptive sentence but written judgment erroneously imposed 18-month consecutive sentence. Because it was clear from the record that the sentencing court intended to impose only a 60-day sentence on that conviction, the appropriate remedy is to remand for entry of corrected judgment.

*State v. Berkey*, 129 Or App 398, 877 P2d 1238 (*per curiam*), *rev den*, 320 Or 360 (1994): Imposition of extended term of post-prison supervision pursuant to ORS 144.103 on conviction for crime committed prior to effective date of statute was error that required remand. Appropriate remedy is to remand for entry of corrected judgment, and "defendant need not be present for entry of the amended judgment."

See also *State v. Jones*, 129 Or App 413, 879 P2d 881 (1994) (same).

*State v. Bivens*, 127 Or App 83, 871 P2d 486, *rev den*, 319 Or 149 (1994): Where the sentencing court erred in imposing a "life sentence" pursuant to ORS 163.115(4)(a) instead of a life-time term of post-prison supervision, all that is needed to correct the error is to enter an amended judgment; "resentencing" is not required, and defendant need not be present for entry of the corrected judgment.

See also *State v. Butterfield*, 128 Or App 1, 874 P2d 1339, *rev den*, 319 Or 625 (1994); *State v. Harris*, 127 Or App 613, 872 P2d 445, *rev den*, 319 Or 281 (1994).

*State v. Petty*, 124 Or App 574, 863 P2d 503 (1993): Where sentencing court erroneously imposed a "life sentence" pursuant to ORS 163.115(4)(a) but minimum term imposed is proper, the appropriate remedy is to remand "for resentencing with instructions to delete the sentence of life imprisonment and to impose a judgment for post-prison supervision for the remainder of defendant's life under OAR 253-05-004."

See also *State v. Trihn*, 126 Or App 324, 868 P2d 779, *rev den*, 318 Or 661 (1994); *State v. Hostetter*, 125 Or App 491, 865 P2d 485 (1993), *rev den*, 318 Or 583 (1994).

*State v. Cherepanov*, 121 Or App 195, 853 P2d 324 (1993) (*per curiam*): Where sentencing court imposed incorrect term of post-prison supervision, "sentence modified to reduce post-prison supervision to three years."

## 2. Remand for resentencing

See ORS 138.222(5).

*State v. Sierra*, 349 Or 604, 247 P3d 759 (2011). The court affirmed defendant's conviction for first-degree kidnapping but vacated his convictions for second-degree kidnapping and remanded the case "for further proceedings." The state moved for reconsideration on the disposition. *Held*: Disposition modified to remand "for resentencing on the remaining counts and for further proceedings." Although "further proceedings" in the original mandate did not exclude resentencing, "because we agree that ORS 138.222(5)(b) requires this court to remand for resentencing in this case, we will make our instructions more explicit."

*State v. Edson*, 329 Or 127, 985 P2d 1253 (1999). Under ORS 138.222(5), an appellate court is obligated to remand the entire case to the trial court for resentencing. An appellate court does not have the authority to vacate or delete portions of a sentence.

*State v. Ferrell*, 315 Or 213, 843 P2d 939 (1992): If an offense-subcategory factor pleaded in an indictment is constitutionally infirm, in the absence of any showing that the presence of the factor affected the validity of the conviction on the underlying crime, the appropriate relief on appeal is to affirm the conviction on the underlying crime and to remand for resentencing with the factor disregarded.

*State v. Beckham*, 253 Or App 609, 292 P3d 611 (2012). Defendant was convicted of fourth-degree assault constituting domestic violence. The trial court entered a supplemental judgment imposing restitution 104 days after the original judgment had issued. Defendant appealed, contending that the trial court erred by imposing restitution because: (1) the supplemental judgment was entered after the 90-day period allowed under ORS 137.106(1)(b), and the court did not find good cause for extending that time; and (2) the record lacked evidence to support the amount of restitution imposed. The state conceded error in both respects but argued that the proper remedy is to vacate the supplemental judgment and remand for a hearing for the trial court to now determine whether good cause existed to extend the restitution determination and, if so, the amount of economic damages. *Held*: Supplemental judgment vacated and remanded. [1] Because defendant was convicted of a misdemeanor after a trial, ORS 138.040, rather than ORS 138.222(5) (which applies only to felony sentences), governs appellate review and disposition options. [2] Because the good-cause determination does not have to be made within the 90-day period, and because the legislative intent behind the restitution statute is to ensure that crime victims receive restitution, the proper remedy is to vacate the supplemental judgment and remand for the trial court to determine: (a) whether the failure to include a requirement of restitution in the original judgment precludes the court from now awarding restitution; (b) if not, whether, at the time the court entered the supplemental judgment, there was good cause to extend the restitution determination; and (c) if so, the amount of the victim’s economic damages.

<sup>^</sup> *State v. McLaughlin*, 247 Or App 334, 269 P3d 104 (2011), *rev allowed*, 352 Or 107 (2012). In *State v. McLaughlin*, 243 Or App 214 (2011), the court held that the state had failed to meet its “procedural deadline” under ORS 137.106(1) to present “evidence of the nature and amount of damages prior to the time of sentencing.” The court ordered that the “judgment awarding restitution [be] vacated and [the case] remanded for resentencing,” and otherwise affirmed. Defendant petitioned for reconsideration that, given the state’s failure to meet its obligations under ORS 137.106(1), the trial court now lacked authority to impose any restitution and that the proper disposition is to vacate and reverse the supplemental judgment awarding restitution, rather than to vacate the judgment and remand for resentencing. *Held*: Remanded for resentencing. “The trial court’s original sentence indicated its desire to have defendant compensate the victim, although the court was mistaken that it could award restitution at the time of sentencing. In light of the possible compensatory fine and ORS 138.222(5)(a), we must permit the court to reconsider its sentence.”

*State v. Reeves*, 250 Or App 294, 280 P3d 994, *rev den*, 352 Or 565 (2012). The police seized and searched defendant’s computer and determined that he had used file-sharing software to download hundreds of files of child porn. Based on selected files, defendant was charged with 15 counts of encouraging child sexual abuse, ORS 163.684. After a trial to the court, the judge found him guilty. At sentencing, the court denied defendant’s motion to merge the convictions, ruling that ORS 161.067(3) applied because there was a “pause” between each download. *Held*: Remanded for resentencing. [1] The sentencing court erred when it entered 15 separate convictions based on ORS 161.067(3), because no evidence supported a reasonable inference that there was, in fact, a pause between the downloads of one or more of the files. [2] But entry of separate convictions may be permissible under ORS 161.067(2) based on a finding that the 15 images involved different victims. [3] Because the sentencing court erroneously relied on ORS 161.067(3) to enter separate convictions, and did not rule on ORS 161.067(2), which may be a permissible basis for entry of separate convictions, a remand for reconsideration is necessary: “given the potential applicability of ORS 161.067(2), depending on the extent to which different child victims are depicted in the images that are the subject of each of the 15 counts—a determination that is necessarily within the trial court’s factfinding competence—the proper number of convictions to be entered in this case remains to be determined.”

*State v. Sartin*, 248 Or App 748, 274 P3d 259 (2012) (*per curiam*). [1] The sentencing court committed plain error when it imposed 10-year terms of post-prison supervision on defendant’s convictions for first-degree sexual abuse without ordering, as required by ORS 144.103(1), that those terms are to be reduced by the prison terms served. [2] The proper remedy is a remand for resentencing, rather than simply for entry of a corrected judgment.

<sup>^</sup> *State v. McLaughlin*, 247 Or App 334, 269 P3d 104 (2011), *rev allowed*, 352 Or 107 (2012). In *State v. McLaughlin*, 243 Or App 214 (2011), the court held that the state had failed to meet its “procedural deadline” under ORS 137.106(1) to present “evidence of the nature and amount of damages prior to the time of sentencing.” The court ordered that the “judgment awarding restitution [be] vacated and [the case] remanded for resentencing,” and otherwise affirmed. Defendant petitioned for reconsideration that, given the state’s failure to meet its obligations under ORS 137.106(1), the trial court now lacked authority to impose any restitution and that the proper disposition is to vacate and reverse the supplemental judgment awarding restitution, rather than to vacate the judgment and remand for resentencing. *Held*: Remanded for resentencing. “The trial court’s original sentence indicated its desire to have defendant compensate the victim, although the court was mistaken that it could award restitution at the time of sentencing. In light of the possible compensatory fine and ORS 138.222(5)(a), we must permit the court to reconsider its sentence.”

*State v. Bryan*, 244 Or App 160, 260 P3d 617 (2011). Defendant was convicted of two counts of attempted first-degree assault and two counts of menacing based on a single, brief incident in which he threatened the victim with a knife and tried to slash him with it twice, missing both times. *Held*: [1] Because “the evidence showed that defendant’s second slash toward the victim immediately followed his first slash ... we conclude that there was not a sufficient pause between defendant’s acts and, thus, the trial court plainly erred in failing to merge defendant’s convictions” under ORS 161.067(3). [2] “Reversed and remanded for entry of a single conviction of attempted first-degree assault and a single conviction of menacing and for resentencing; otherwise affirmed.”

See also *State v. Noe*, 242 Or App 530, 256 P3d 14 (2011) (defendant was convicted on two counts of aggravated first-degree theft and one count each of unauthorized use of a vehicle, and possession of a stolen vehicle, and the court entered a separate conviction on each; *held*: reversed and remanded to merge some convictions and for resentencing); *State v. Rodriguez-Gomez*, 242 Or App 567, 256 P3d 169 (2011) (*per curiam*) (defendant was convicted of multiple DCS offenses based on two incidents in which he sold methamphetamine to an informant near a school; *held*: reversed and remanded for resentencing).

*State v. Wilson*, 243 Or App 464, \_\_\_ P3d \_\_\_ (2011). Defendant was 19 years old and had lived with the family of the victim, a 4-year-old girl, for many years and was considered a member of the family. He was convicted of first-degree sexual abuse for touching her vaginal area with his fingers and instructing her not to tell. At sentencing, he asserted that he had a “diminished capacity” and asked for relief from the 75-month minimum sentence per *Rodriguez/Buck*. The sentencing court imposed the minimum sentence, concluding that defendant’s conduct did not warrant an exception and rejecting his excuse: “I don’t see that I’ve got any discretion here,” and “this just doesn’t fall under this very narrow exception so I guess I’ve got no choice.” *Held*: Reversed and remanded. [1] Under *Rodriguez/Buck*, “the trial court can take into account a defendant’s mental capacity when determining whether a Measure 11 sentence violates Article I, section 16.” “Characteristics of either the defendant or the victim, or both, may be considered, and if the trial court believed otherwise, that was legal error.” [2] The court’s comments were too ambiguous to allow affirmance: “First, to do so would be to presume that the court’s oral colloquy with defendant was intended to be a definitive and carefully reasoned explanation for its decision. In fact, it more closely resembles the thinking out loud of a judge struggling with a troubling and difficult decision that is not susceptible to (nor intended to be subjected to) the kind of analysis that we apply to statutes or written judicial opinions. Second, there is no need for us to engage in an exercise that, in the final analysis, would result only in an interpretation of ambiguous language, when we can remand the case for a more authoritative disambiguation.”

*State v. Elk*, 240 Or App 432, 247 P3d 328 (2011) (*per curiam*). The sentencing court imposed a 36-month prison term with a 60-month term of post-prison supervision on defendant’s conviction for felony public indecency. *Held*: Reversed and remanded. [1] The PPS term is “plain error” because that conviction is not subject to the extended PPS term mandated by ORS 144.103(1), and OAR 213-005-0002(2)(a) prescribes only a 24-month term of post-prison supervision. [2] “Resentencing” is required by ORS 138.222(5).

*State v. Pemberton*, 226 Or App 285, 203 P3d 326 (2009). Defendant challenged the 13-month prison sentences imposed on two counts of third-degree assault under ORS 163.165(1)(i) (propelling a dangerous substance at a staff member), arguing that the trial court imposed those sentences based only on its mistaken belief that it was required to impose sentences that exceeded 12 months in order for the court to sentence defendant to the custody of the Department of Corrections. *Held*: Reversed, remanded for resentencing. [1] ORS 163.165(2) *requires* that the sentence imposed on a conviction based on ORS 163.165(1)(i) be served in a state correction facility. [2] Because the sentencing court based its discretionary sentencing decision on a mistake of law, remanded to allow the sentencing court to reconsider in light of the requirement in ORS 163.165(2).

**State v. Branam**, 220 Or App 255, 185 P3d 557, *rev den*, 345 Or 301 (2008). Defendant was convicted of PCS and was put on probation. Later, the court revoked his probation and imposed a 6-month jail term, which he completely served. Defendant then moved to set aside his conviction, but the court denied the motion on the ground that his violation of probation meant that he had not “fully complied with and performed the sentence of the court,” ORS 137.225(1)(a). *Held*: Reversed and remanded. If a defendant was sentenced to probation but probation is revoked and a sentence of incarceration is imposed, “the relevant ‘sentence of the court’ for the purpose of ORS 137.225(1)(a) is the incarceration term.” Because the court denied defendant’s motion based only on its ruling that he was disqualified due to revocation, the Court of Appeals remanded for the court to exercise its discretion under ORS 137.225(3).

**State v. Luers**, 211 Or App 34, 153 P3d 688, *aff’d on recons*, 213 Or App 389, 160 P3d 1013 (2007). The Court of Appeals remanded for resentencing on the ground that the sentencing court erred in not merging defendant’s three convictions for first-degree arson. The court declined to consider defendant’s various challenges to departure sentences and his *Blakely* and proportionality objections, because those issues may be resolved on remand.

**State v. Rhoades**, 210 Or App 280, 149 P3d 1259 (2006). Although defendant’s convictions for third-degree rape and sodomy are subject to the presumptive life sentence under ORS 137.719 due to his prior convictions for similar sexual offenses, the sentencing court departed downward pursuant to ORS 137.719(2) to impose only a 60-month sentence based on findings that the 15-year-old victim consented to the activity and that the crimes involved the same victim in the same time period and general area. *Held*: Reversed and remanded. Because the court erred in relying on the “less than typical” factor and did not find that it would have so departed based only on the proper “close in time and space” factor, the proper remedy is to remand for resentencing.

**State v. Hamilton**, 203 Or App 706, 127 P3d 654, *rev den*, 340 Or 359 (2006). The sentencing court erred in failing to merge into a single conviction for murder defendant’s separate convictions on two counts of murder by abuse and two counts of felony murder that were based on his killing of a single child. Remanded for resentencing per ORS 138.222(5).

**State v. Ortiz**, 202 Or App 695, 124 P3d 611 (2005). Defendant was convicted of felony DUII under ORS 813.010(5) based in part on his prior conviction in Idaho for DUII under a statute that prescribes a reduced .02-percent BAC standard for juveniles. *Held*: Defendant’s prior DUII conviction under Idaho’s “zero tolerance” statute was not one under a “statutory counterpart” for purposes of ORS 813.010(5). Reversed and remanded for entry of conviction for misdemeanor DUII.

**State v. Isom**, 201 Or App 687, 120 P3d 912 (2005). Defendant was convicted of, *inter alia*, attempted aggravated murder, and the court found her to be a dangerous offender and, at a resentencing hearing, imposed on that conviction, pursuant to ORS 161.725(1) and 161.737(1), a 30-year indeterminate sentence, a 220-month minimum sentence, and a 36-month term of post-prison supervision. *Held*: [1] The PPS term is “plain error,” because the post-prison supervision term for a dangerous offender upon her release is the remainder of the 30-year indeterminate term. [2] The nature of the error required a remand for resentencing pursuant to ORS 138.222(5) instead of simply a remand for entry of a corrected judgment.

**State v. Patton**, 201 Or App 509, 119 P3d 250, *rev den*, 339 Or 609 (2005). The sentencing court committed plain error under ORS 137.540(2) when it ordered defendant, as a condition of probation on his sexual-abuse convictions, not to consume alcohol, because that restriction is not related to the offense. The Court of Appeals remanded for resentencing under ORS 138.222(5).

**State v. Bogle**, 200 Or App 391, 114 P3d 541 (2005) (*per curiam*), *rev den*, 340 Or 34 (2006). The sentencing court erred under *Blakely* when it departed based on “on supervision at the time,” and that error requires remand for resentencing.

**State v. Angell**, 200 Or App 244, 113 P3d 998 (2005). [1] The sentencing court erred when it imposed a 24-month prison sentence with a 120-month term of post-prison supervision on defendant’s conviction for second-degree sexual abuse, a class C felony, and the proper remedy is to remand for resentencing per ORS 138.222(5). [2] Because the case is being remanded for resentencing, the appellate court does not need to address defendant’s other unpreserved challenges to the sentence.

**State v. Ross**, 200 Or App 143, 113 P3d 921 (2005), *rev den*, 340 Or 157 (2006). Because sentencing court erred in failing to determine defendant's ability to pay before ordering him to repay his CAA costs, the case must be remanded for resentencing per ORS 138.222(5).

**State v. Crowell**, 198 Or App 564, 109 P3d 391 (2005). The sentencing court erred when it imposed post-prison supervision terms of 10 years less time actually served on defendant's convictions for second-degree robbery and kidnapping. Because those sentences are vacated and the case is remanded for resentencing under ORS 138.222(5), it is unnecessary to consider defendant's unpreserved *Blakely*-based objection to the consecutive sentences.

**State v. Randant**, 196 Or App 601, 103 P3d 1134 (2004), *aff'd on other issue* 341 Or 64, 136 P3d 1113 (2006). Because the sentencing court erred in failing to merge defendant's separate conviction for aggravated felony murder and the underlying felonies into his other conviction for aggravated felony murder based on the same victim and incident, ORS 138.222(5) requires that the case must be remanded for resentencing.

**State v. Von Melker**, 193 Or App 765, 91 P3d 833 (*per curiam*), *rev den*, 337 Or 282 (2004). The sentencing court erred when it imposed more than one firearm-minimum sentence on convictions arising from the same criminal episode. It is not necessary to address defendant's *Layton* challenge to the term of post-prison supervision because case must be remanded for resentencing.

**State v. Wilson**, 193 Or App 506, 92 P3d 729 (2004). The sentencing court erred in imposing \$5,000 in restitution to the Fugitive Apprehension Unit for costs incurred in apprehending him after his escape, because those costs were incurred regardless of defendant's crime. Because there remain sentencing options that the sentencing court rejected in favor of imposing restitution but permissibly could adopt on resentencing, the case requires a remand for resentencing under ORS 138.222(5).

**State v. Whitlock**, 187 Or App 265, 65 P3d 114, *rev den*, 336 Or 17 (2003). Defendant was convicted, based on no-contest pleas, of first-degree burglary and kidnapping, and the court imposed consecutive sentences of 40 and 90 months on those convictions. Several days later, the court, *sua sponte* and without notice to defendant, entered an amended judgment reciting that those sentences are subject to ORS 137.635 based on defendant's prior conviction for first-degree burglary. *Held*: Remanded for resentencing. The amendment was not proper under ORS 138.083(1), because the court failed to provide written notice to the parties and an opportunity for defendant to object. The appropriate remedy is to vacate the amended judgment and remand "for determination of whether to reinstate original judgment and, if not, for resentencing."

**State v. Becker**, 187 Or App 274, 66 P3d 584 (*per curiam*), *rev den*, 335 Or 655 (2003). The Court of Appeals reversed one of defendant's two felony convictions and "remanded for resentencing."

**State v. Rodvelt**, 187 Or App 128, 66 P3d 577, *rev den*, 336 Or 17 (2003). Where the sentencing court erred in failing to merge defendant's convictions for fourth-degree assault into his convictions for first-degree criminal mistreatment, the proper remedy is to vacate those convictions and remand for resentencing pursuant to ORS 138.222(5).

**State v. Fries**, 186 Or App 564, 63 P3d 1269 (2003) (*per curiam*). Defendant was convicted of MCS within a 1000 feet of a school, and the sentencing court "ordered the forfeiture of 16 firearms that the police found during a search of his residence." *Held*: The record is insufficient to support the forfeiture. Because defendant had agreed as part of the plea agreement that he would pay a \$2,500 fine "if the trial court did not order forfeiture of the firearms," the proper remedy was to remand for resentencing "so that the court may consider whether to modify the sentence in accordance with that agreement."

**State v. Foster**, 186 Or App 466, 63 P3d 1269 (2003). Defendant was convicted of a class A misdemeanor, and the court imposed a 360-day sentence, suspended execution of 280 days, and placed defendant on probation. *Held*: The jail term is error under ORS 137.540(2), because the period of confinement imposed a condition of probation cannot exceed half of the maximum sentence. Reversed and remanded for resentencing.

**State v. Llanos-Martinez**, 185 Or App 597, 60 P3d 1099 (2002). Defendant was convicted of hit and run, and the court imposed \$5000 in restitution under ORS 811.706 to another driver who ran into his unoccupied car. *Held*: [1] Because defendant had fled the scene, and was not driving, when the other driver hit his car, ORS 811.700 did not

authority the restitution award. [2] The Court of Appeals refused to affirm the award under ORS 137.106, because that issue was not raised below and the record is not adequately developed on that issue. Reversed and remanded for resentencing.

*State v. Moore*, 185 Or App 229, 58 P3d 847 (2002) (*per curiam*). The Court of Appeals reversed defendant's convictions for first-degree sexual abuse which, under *State v. Spring*, were submitted to the jury improperly as lesser-included offenses under charges of first-degree sodomy. Remanded for resentencing on the remaining convictions.

*State v. Ramsey*, 184 Or App 468, 56 P3d 484 (2002), *rev den*, 335 Or 479 (2003). Defendant was convicted on several alternative counts of aggravated murder and jury imposed a true-life sentence. The Court of Appeals, based on an instruction error, reversed all but one of the convictions. *Held*: "Because the jury's consideration of those additional convictions [at the penalty phase] could have affected the sentence it imposed, that sentence must be vacated and remanded."

*State v. Gibson*, 183 Or App 25, 51 P3d 619 (2002). After defendant had appealed from the judgment of conviction, the sentencing court entered an amended judgment to correct errors in the nature of the convictions entered and charges dismissed. *Held*: Regardless of whether such an error may be corrected by way of ORS 138.083(1), "that change was substantive, not administrative," and hence the court violated defendant's right to be present for the resentencing. The proper remedy is to vacate the amended judgment and remand for entry of a corrected judgment and resentencing.

*State v. McNeil*, 170 Or App 407, 12 P3d 992 (2000). Although the "shift to column I" rule does not apply to consecutive sentences imposed on convictions that are based on crimes against different victims, OAR 213-012-0020(5), the sentencing court erred when it imposed a consecutive sentence on a secondary sentence without shifting to I and without finding that that crime involved a different victim. Consequently, case had to be remand for re-sentencing.

*State v. Paez-Lopez*, 155 Or App 617, 964 P2d 1083 (1998). Defendant, an alien, was convicted of DCS and the court placed him on probation and ordered him, as a condition, not to reenter this country illegally. He later was arrested in this country and was charged in federal court with illegal entry. The sentencing court revoked defendant's probation, concluding that he had failed to establish that he had reentered legally. *Held*: Reversed. In order to revoke a defendant's probation, "the state had to prove by a preponderance of the evidence that he had violated the terms of probation." The court could not assume that defendant was barred from reentry and then shift the burden to him to establish that he was entitled to reenter under some exception. The Court of Appeals could not affirm on the basis that the purposes of probation were not being served, because the sentencing court did not attempt to justify the revocation on that basis. Therefore, the proper remedy was to remand for reconsideration.

*State v. Green*, 145 Or App 175, 929 P2d 1057 (1996): Where sentencing court erred by failing to merge, per ORS 161.485(2), defendant's separate convictions for conspiracy to commit rape and sodomy and his convictions for attempt to commit rape and sodomy, the case must be remanded for the court to merge those convictions and for resentencing.

*State v. Umtuch*, 144 Or App 366, 927 P2d 142 (1996), *rev den*, 324 Or 654 (1997): Because the Court of Appeals set aside one of the sentences, ORS 138.222(5) required it to remand the entire case for resentencing; consequently, it declined to review defendant's challenges to other sentences.

*State v. Bailey*, 143 Or App 285, 924 P2d 833 (1996): Because the Court of Appeals set aside one of defendant's convictions, ORS 138.222(5) required a remand for the sentencing court to resentence the other conviction.

*State v. Brock*, 143 Or App 100, 923 P2d 666 (1996): Where sentencing court erroneously imposed a 214-year term of post-prison supervision and it is not clear whether the court intended to impose the term pursuant to ORS 144.103 or whether that statute applies to defendant's conviction, the appropriate remedy is to remand for resentencing, not just for entry of a corrected judgment.

*State v. Daugaard*, 142 Or App 278, 921 P2d 975 (1996): Sentencing court's errors in imposing sentence on invalid convictions and per ORS 137.635 on other convictions that are not subject to the statute requires a remand for resentencing per ORS 138.222(5).

**State v. Loewen**, 141 Or App 144, 917 P2d 532, *rev den*, 324 Or 229 (1996). The sentencing court committed plain error when it imposed an extended term of post-prison supervision per ORS 144.103 (1991) on defendant's conviction for first-degree sexual abuse based on a crime he committed in December 1991; the Court of Appeals "remanded for resentencing."

**State v. Hagan**, 140 Or App 454, 916 P2d 317 (1996). The sentencing court erroneously ordered the 5-year probationary sentences on the secondary convictions to be served consecutively to the 36-month prison term on the primary offense. *Held*: ORS 138.222(5) required the Court of Appeals to remand the case for resentencing, rather than merely striking the consecutive-sentence order, because "[t]he consecutive nature of the probationary sentences was essential to the trial court's sentencing scheme."

**State v. Reid**, 140 Or App 293, 915 P2d 453 (1996). Sentencing court cited four aggravating factors in support of the departure without finding that any one would be sufficient, defendant did not challenge one of the factors, and the Court of Appeals held that the court erred in relying on the other three factors. *Held*: Case must be remanded for resentencing.

**State v. Petrie**, 139 Or App 474, 912 P2d 913 (1996): Defendant was convicted, *inter alia*, of attempted aggravated murder, first-degree assault, first-degree burglary, and first-degree theft, and the sentencing court imposed durational and dispositional departures citing as aggravating factors defendant's persistent involvement, greater loss than typical, permanent injury to the victim, and defendant's lack of amenability to reformation. *Held*: Although each of the factors would support a departure on certain of the convictions, each is not a proper basis for departure on all the convictions, and the sentencing court failed either to segregate the factors or to indicate that any one would be sufficient to support the departures. Because the "persistent involvement" factor was not a proper basis to depart on the attempted-murder conviction, that departure was error and the whole case had to be remanded for resentencing.

**State v. Wisley**, 138 Or App 344, 909 P2d 877 (1995): Because the Court of Appeals reversed one of defendant's convictions, ORS 138.222(5) required the court to remand the entire case for resentencing.

**State v. Mitchell**, 136 Or App 99, 900 P2d 1083 (1995): The sentencing court cited two aggravating factors in support of the departure and did not indicate whether either one would be sufficient alone. *Held*: Because one of the factors (*viz.*, greater loss than typical) was not a proper basis for a departure without a further explanation from the court, the sentence was error and the case had to be remanded for reconsideration. On remand, the court can clarify its reliance on that factor or indicate whether the departure would be justified based only on the other factor.

**State v. Hennings**, 134 Or App 131, 894 P2d 1192, *rev den*, 320 Or 502 (1995): Because the Court of Appeals held that the evidence did not support the finding of one of the three factors used by the sentencing court to classify the DCS conviction as a "commercial drug offense" under ORS 475.996(1)(b), the court erred in ranking the conviction as a category 8 offense and the case had to be remanded for resentencing.

**State v. Taylor**, 133 Or App 503, 892 P2d 697 (1995): Because Court of Appeals reversed one conviction in the case and remanded for retrial, the other conviction must be remanded for resentencing pursuant to ORS 138.222(5).

**State v. Garratt**, 131 Or App 755, 885 P2d 757 (1995): Sentencing court erred under ORS 161.485(2) when it entered separate convictions and imposed separate sentences for solicitation to commit perjury and conspiracy to commit perjury. The Court of Appeals remanded "for entry of a corrected judgment imposing only one conviction and for resentencing."

**State v. Dvorak**, 124 Or App 578, 863 P2d 1314 (1993), *rev den*, 318 Or 351 (1994): ORS 138.222(5), *as amended by* Or Laws 1993, ch 692, § 2, applies to cases pending on appeal on its effective date (*viz.*, August 23, 1993), and requires the appellate court to remand "the entire case" for resentencing if it finds any sentence imposed in the case is erroneous.

*See also* **State v. St. John**, 125 Or App 266, 863 P2d 1317 (1993) (*per curiam*) (same); **State v. Johnson**, 125 Or App 268, 863 P2d 1316 (1993) (*per curiam*) (same).

*Note*: The 1993 amendment to ORS 138.222(5) effectively overrules contrary prior decisions. *See* **State v. Dvorak**, 121 Or App 626, 855 P2d 1148 (1993); **State v. Smith**, 116 Or App 558, 842 P2d 805 (1992); and **State v. Brown**, 119 Or App 162, 849 P2d 547 (1993) (*per curiam*), *on recons*, 126 Or App 631, 869 P2d 904 (1994) (*per curiam*).

*State v. Rickerd*, 124 Or App 552, 862 P2d 1324 (1993): Where the sentencing court erroneously relied upon ORS 137.635 to impose a “determinate” dangerous-offender sentence, the appropriate remedy is not simply to delete the word “determinate” from the sentence but to remand for resentencing.

*State v. Shaffer*, 121 Or App 131, 854 P2d 482 (1993): Where conviction that was designated as the primary offense is modified on appeal to a lesser crime and is remanded for resentencing, the secondary conviction must be resentenced too, because the original sentence on that conviction was based on the “shift to column I” rule and now should be resentenced according to its correct gridblock.

*State v. Williams*, 119 Or App 129, 849 P2d 1155 (1993): If the consecutive sentences imposed exceed the “200 percent” limitation in OAR 253-12-020(2) and they cannot be affirmed as a proper departure, the appropriate remedy is to remand the case for resentencing.

*State v. Nelson*, 119 Or App 84, 849 P2d 1147 (1993): If the sentencing court relied on both proper and improper grounds when it imposed a departure sentence and the record does not establish that the court would have departed as it did based only on the proper factors, the appropriate remedy on appeal is to remand for resentencing.

*State v. Ambrose*, 117 Or App 298, 844 P2d 227 (1992): “If a sentence has been imposed in error, a court is not precluded from relying on alternative authority when imposing sentence on remand.”

*State v. Reese*, 114 Or App 557, 836 P2d 737 (1992): If a portion of a sentence imposed under the guidelines is erroneous, ORS 138.222(5) does not authorize the appellate court to modify the sentence; it must remand for resentencing.

*State v. Serheinko*, 111 Or App 604, 826 P2d 114 (1992): If the sentencing court elected to forgo imposing a departure sentence and imposed instead an erroneous sentence under a statutory provision, “on resentencing, the [sentencing] court can impose no greater punishment than it did initially.”

*State v. Wilson*, 111 Or App 147, 826 P2d 1010 (1992): The appellate court held that the sentencing court improperly relied on 3 of the 6 cited aggravating factors; *Held*: “because we cannot tell what sentence the court would have imposed had it found fewer than the 6 factors, we remand for resentencing.”

See also *State v. Rodriguez*, 113 Or App 696, 833 P2d 1343 (1992) (“Because we cannot tell if the court would have imposed the same sentence on the basis of only [the valid aggravating factor], we remand for resentencing.”); *State v. Guthrie*, 112 Or App 102, 828 P2d 462 (1992) (Where the sentencing court relied upon some improper aggravating factors in imposing departure sentence, sentence is vacated and case remanded for resentencing).

*State v. Lee*, 110 Or App 42, 821 P2d 1100 (1991) (*per curiam*): Where sentencing court erred in relitigating facts of defendant’s prior out-of-state conviction for purpose of determining its criminal-history ranking, the appropriate remedy is to remand for a redetermination of that issue.

### 3. Proceedings on remand

See also Part XII-B (“Entry of an Amended or Corrected Judgment”), *above*.

*Pepper v. United States*, 562 US \_\_\_, 131 S Ct 1229, 179 L Ed 2d 196 (2011). Defendant was convicted of felony drug offenses, and the sentencing court departed downward and imposed a 24-month sentence based on his cooperation with prosecutors. On the government’s appeal, the Eighth Circuit reversed and remanded generally for resentencing. On remand, defendant proffered evidence that he had completed drug treatment, had married, attended college and obtained straight A’s, and was gainfully employed and supporting his family. The sentencing court disregarded that evidence, departed downward and imposed a 65-month sentence. The Eighth Circuit affirmed, ruling that defendant’s evidence of his post-sentencing rehabilitation was irrelevant. *Held*: Reversed and remanded for reconsideration. [1] “[W]hen a defendant’s sentence has been set aside on appeal and his case is remanded for resentencing, a district court may consider evidence of a defendant’s rehabilitation since his prior sentencing and such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.” Because the proffered evidence was relevant to several of the mitigating factors set forth in the guidelines, the sentencing court properly may consider it. [2] A rule in the guidelines that purports to limit sentences that may be imposed on remand is invalid in light of *United States v. Booker*, 543 US 220 (2005), and nothing else in the guidelines precludes a sentencing court on remand from considering only information that was available

at the time of the original sentencing—in fact, the Court has recognized that a court on remand may consider post-sentencing aggravating evidence that may warrant a longer sentence. [3] Law-of-the-case principles did not bind the sentencing court on remand to adhere to the original 40-percent reduction for his cooperation, even though that ruling was not directly reversed on appeal. “Because a district court’s original sentencing intent may be undermined by altering one portion of the calculus, and appellate court in reversing one part of a defendant’s sentence may vacate the entire sentence so that, on remand, the trial court may reconfigure the sentencing plan to satisfy the sentencing factors” in the guidelines.

*State v. Bowen*, 352 Or 109, \_\_ P3d \_\_ (2012). Defendant was convicted of on a couple of alternative counts of aggravated murder and was sentenced to death. On direct review, the Supreme Court rejected all of defendant’s claims of error—including a challenge to the use of a stun belt as a security device—and affirmed his convictions and death sentence. But the court held that the sentencing court erred by not merging the convictions for aggravated murder; the court remanded for entry of a corrected judgment. *State v. Bowen*, 340 Or 487 (2006). Defendant immediately filed a petition for post-conviction relief, and the trial court did not enter a corrected judgment. After a few years, the parties to the post-conviction proceeding realized that the corrected judgment had not yet been entered, and the district attorney in 2010 filed a motion to enter a corrected judgment. In response, defendant filed a motion contending that the court had to conduct a new sentencing hearing per ORS 138.012 and a motion for new trial based on the use of the stun belt at trial. The trial court denied those motions, ruling that the remand order required it simply to enter a corrected judgment, and that is all it did. *Held*: Affirmed. [1] “Because this court’s intended disposition in *Bowen I* was to remand solely for entry of a corrected judgment, the corollary result is that the court did not intend that the remand proceed pursuant to the resentencing provisions set out in ORS 138.012(2)(a).” [2] “It follows that the error identified in *Bowen I* was remedied by entry of a corrected judgment for a single conviction of aggravated murder and a single sentence of death, which, in turn, ensured that defendant’s record accurately reflected the crimes for which he was convicted. That narrow result is consistent with our statutory and constitutional obligations to affirm the verdict and judgment of the trial court unless an error affects a substantial right of a party. In summary, in denying defendant’s motion to follow ORS 138.012, the trial court on remand correctly reasoned that, consistently with *Bowen I*, ORS 138.012(2)(a) did not apply to the remand proceedings. Instead, this court’s remand direction in *Bowen I* was limited to entry of a corrected judgment, which the trial court entered on remand.” [3] The trial court correctly denied defendant’s motion for new trial as untimely and not properly before the court: “We agree with the trial court that defendant was not permitted to relitigate the stun device issue on remand.”

*State v. Partain*, 349 Or 10, 239 P3d 232 (2010). Defendant was convicted of 12 sex crimes and sentenced to 420 months in prison. On appeal, the parties stipulated to a motion vacating four of the sentences and remanding the entire case to the trial court for resentencing. On remand, the trial court restructured the remaining sentences in a way that resulted in an overall prison term of 600 months. Defendant appealed, arguing that, in imposing a harsher sentence on remand than that imposed in the original proceeding, the trial court had violated the rule of “procedural fairness” announced in *State v. Turner*, 247 Or 301 (1967). *Held*: Reversed and remanded. The Supreme Court overruled *Turner*, and ruled that a trial court lawfully may impose a harsher sentence on a criminal defendant after a retrial or remand, as long as: (1) the court makes a record on the reasons for the harsher sentence; (2) the reasons are based upon identified facts of which the original trial court was unaware; and (3) the reasons are sufficient to dispel any reason to believe the harsher sentence was imposed to punish the defendant for his or her successful appeal. Absent such facts and reasons, an unexplained or inadequately explained increased sentence will be presumed to be based on vindictive motives and will be reversed.

*State v. Sawatzky*, 339 Or 689, 125 P3d 722 (2005). Based on *Blakely*, the Court of Appeals vacated defendant’s upward-departure sentences and remanded for resentencing. On remand, the trial court ruled that the state could prove the aggravating facts to a newly empaneled jury, and defendant petitioned for a writ of mandamus contending that such a trial would constitute double jeopardy. While the case was pending before the Supreme Court, the legislature enacted Senate Bill 528. *Held*: Writ dismissed. The pending trial on remand does not violate the double-jeopardy bar because it is “a continuation of a single prosecution,” it was defendant who challenged the legality of her original sentences, and she has not been “acquitted” on those factors. Retrial is not barred due to the fact that the indictment did not allege the aggravating facts, because the state was not required to allege those facts in the indictment. “Nothing in *Apprendi* or *Blakely* alters the definition of an ‘offense’ set out in ORS 161.505. In our view, so long as a defendant has timely notice that the state intends to prove certain aggravating or enhancing factors necessary for the imposition of [an upward-departure sentence], and the trial court affords a criminal defendant the opportunity to exercise his or her jury trial right in that regard, the federal constitution is satisfied.”

*State v. Ventris*, 337 Or 283, 96 P3d 815 (2004). Although indictment charged defendant with committing aggravated felony murder personally and intentionally, and the trial court so found, that verdict does not require that the

conviction on the lesser-included charge of murder necessarily must be for intentional murder rather than felony murder. On remand after vacation of the conviction for aggravated murder, the trial court properly treated that lesser conviction as one for felony murder and hence merged the separate conviction for the felony into that conviction.

*State v. Simonsen*, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). A defendant may not withdraw a guilty plea if his case is remanded from an appeals court for re-sentencing.

*State v. Smith*, 323 Or 450, 918 P2d 824 (1996): Because of erroneous sentences imposed on some convictions, the Court of Appeals on defendant's appeal reversed the judgments remanded all the cases for resentencing. The sentencing court on remand, among other things, modified the valid sentences previously imposed on some of the misdemeanor convictions by making the consecutive instead of concurrent. *Held*: "[T]he sentencing court lacked authority on remand for resentencing to modify the original misdemeanor sentences once those sentences already had been served in their entirety.

*State v. Young*, 246 Or App 469, 266 P3d 135 (2011). Defendant was convicted of various theft-related offenses, and the court imposed a series of 26-month sentences. Defendant eventually obtained post-conviction relief on the ground that those sentences were unlawful; the court remanded the case to the sentencing court "for resentencing and entry of an amended judgment" that reduced each sentence to 24 months, "with all other terms and conditions of the original Judgment to remain the same." The court on remand made that correction, left the rest of the judgment as it was, but then ordered defendant to repay \$375, the costs of his court-appointed counsel incurred at the resentencing. *Held*: Affirmed. [1] "A remand for correction of a sentencing error after post-conviction relief does not allow the court to fashion a completely new sentence. ... Rather, if the petitioner satisfies the burden of proof in the post-conviction court under ORS 138.530(1)(c) to establish that a sentence is in excess of that authorized by law, the post-conviction court is limited under ORS 138.520 to ordering correction of the established error, and a remand to the trial court for correction of the error does not give the trial court *carte blanche* to formulate a new sentence." [2] ORS 151.505(1) "provides the authority to order a defendant to pay court-appointed attorney fees that are incurred at resentencing after appeal or post-conviction relief." [3] "The criminal trial court had authority under ORS 151.505 to impose costs for defendant's court-appointed representation at resentencing" even though "the post-conviction court's remand required that, apart from the duration of the period of incarceration, the terms and conditions of the original judgment were to 'remain the same.'" [4] In light of *State v. Partain*, 349 Or 10 (2010), it was permissible for the court on remand to add the fees to the disposition.

*State v. Hollingquest*, 241 Or App 1, 250 P3d 366 (2011). Defendant was convicted of first-degree manslaughter and felon in possession of a firearm, and the court imposed, by upward departure based on its own finding of "persistent involvement," a 240-month sentence with a 36-month term of PPS on the manslaughter conviction, and it imposed a shorter concurrent sentence on the FIP conviction. Defendant appealed and challenged the sentence. The Court of Appeals affirmed the 240-month term but held that the PPS term was "plain error" because it violated OAR 213-005-0002(4); the court remanded for "resentencing." On remand, the court deleted the PPS term and refused to consider defendant's new *Blakely*-based challenge to the 240-month term. *Held*: Reversed and remanded. [1] "After this court remanded for resentencing pursuant to ORS 138.222(5)(a), the entire case was before the trial court for resentencing—that is, for imposition of new sentences—and the trial court had the authority to consider any and all arguments that defendant might choose to make concerning the constitutionality of the sentence that the court was being asked to impose." [2] "It is true that the rule of law announced in *Blakely* does not apply retroactively to cases *on collateral review*" but "a remand for resentencing is not equivalent to collateral review; it is something that occurs in the course of a *direct review* of a criminal case." So, "when a criminal case is before a court for resentencing pursuant to ORS 138.222(5), the court must impose a sentence that is constitutional at the time of the resentencing—the law as of the date on which the defendant was initially sentenced is irrelevant." [3] It is immaterial that the earlier opinion did not remand for consideration of defendant's *Blakely*-based claim, because "it is up to the parties to identify the pertinent issues that they want the sentencing court to address after a case is remanded for resentencing." [4] Although "the trial court had *authority* to consider defendant's constitutional arguments on remand," the question remains "whether the court had *discretion to refuse* to consider them." Here, the court was required to consider defendant's *Blakely*-based challenge because "defendant's initial departure sentence was based on judicial factfinding, not on facts found by a jury beyond a reasonable doubt, as required by *Blakely*." Consequently, when a case is remanded for resentencing, ORS 136.792 comes into play, and if a sentence is to be based on sentence enhancement facts, a sentencing jury must be empanelled unless the facts in question have previously been found by a jury beyond a reasonable doubt," or the defendant waives his right to jury trial.

*State v. Claborn*, 237 Or App 488, 240 P3d 66 (2010). Defendant was convicted of kidnapping and other related charges, and his kidnapping conviction was reversed on appeal and the case was remanded for resentencing. On remand,

the trial court declined to consider defendant's new arguments that he was improperly convicted by a non-unanimous jury verdict and that the Measure 11 sentence was disproportionate, concluding it had authority only to delete the kidnapping conviction from the prior judgment. *Held*: Reversed and remanded. [1] The sentencing court correctly refused to consider defendant's belated challenge to the non-unanimous verdict because it was outside the scope of the resentencing remand. [2] But the court erred by refusing to consider defendant's proportionality challenge to the sentence, because ORS 138.222(5)(a) required a full resentencing.

*State v. Hylton*, 230 Or App 525, 216 P3d 899 (2009). Based on findings made by the jury, the sentencing court imposed a series of consecutive sentences, including departure sentences, that totaled 438 months. On appeal, the Court of Appeals held that two of the convictions must be merged, and it remanded for "resentencing" pursuant to ORS 138.222(5)(b). On remand, the court denied defendant's request for a new jury trial on the aggravating factors; it merged the convictions and restructured the sentences to achieve the same 438-month sentence. *Held*: Affirmed. Neither ORS 138.222(5)(b) nor ORS 136.792(1) required the trial court to impanel a new jury: "where a defendant previously has been afforded that right [to a jury trial] and the case is remanded for resentencing, a trial court has discretion under ORS 136.792 in that circumstance as well not to impanel a new jury, but instead to rely on findings made by the original jury in the case."

*State v. Gildersleeve*, 230 Or App 348, 215 P3d 117, *rev den*, 347 Or 290 (2009). Defendant was sentenced in state court on multiple convictions to 300 months in prison. Thereafter, he was sentenced in federal court to 235 months in prison, 60 of which was consecutive to his state sentences. In his appeal from the state-court judgment, the Court of Appeals agreed that a dangerous-offender sentence was error in light of *Blakely* and remanded for resentencing. On remand, the sentencing court reduced the total sentence to only 130 months but that sentence became consecutive to the federal-court sentence. The court rejected defendant's claim that his total sentence thus violated the rule in *State v. Turner*, 247 Or 301 (1967). *Held*: Affirmed. Because the sentence imposed on remand is less than the original sentence, *Turner* did not apply. "We see no reason that the *Turner* doctrine should be extended to require sentencing courts to take into account sentences imposed in a different case in a different jurisdiction."

*State v. Muyingo*, 225 Or App 156, 200 P3d 601, *adh'd to on recons*, 226 Or App 327, 203 P3d 365 (2009). Defendant argued that the sentencing court, on remand after his successful appeal, erroneously imposed new sentences on convictions that the Court of Appeals had affirmed. *Held*: Affirmed. Under ORS 138.222(5), a sentencing court may impose a new sentence for any conviction in the remanded case. The term "case," for purposes of that statute, includes all charges that are tried together.

*State v. Davis*, 216 Or App 456, 174 P3d 1022 (2007), *rev den*, 344 Or 401 (2008). Defendant was convicted of murder in 1996, and the sentencing court imposed a 25-year prison term with lifetime post-prison supervision. The judgment was reversed based on an evidentiary error. *State v. Davis*, 336 Or 19 (2003). On retrial, defendant again was convicted of murder, and the court reimposed the 25-year minimum but also imposed the life sentence mandated by ORS 163.115(5)(a), rejecting defendant's objection that the court could not impose a sentence more onerous than the original sentence. *Held*: Affirmed. [1] *State v. Turner*, 247 Or 301 (1967), did not preclude the sentencing court from imposing the life sentence after defendant's successful appeal. The sentencing court originally had not imposed a life sentence because of *State v. McLain*, 158 Or App 419 (1999), which held that the life sentence was unconstitutionally disproportionate given the absence of a statutory provision authorizing parole after completion of the 25-year minimum. After defendant's original sentencing and his retrial, that oversight was corrected, eliminating the constitutional flaw in the life sentence. *State v. Haynes*, 168 Or App 565, *rev den*, (2000) (application of that fix to crimes previously committed does not violate the state or federal *ex post facto* provisions). [2] The sentencing court erred in ruling that it lacked authority to consider defendant's *Blakely* claim after a remand for resentencing on convictions for murder and felon in possession, even though the sentence on the latter conviction was not at issue in the previous appeal. Under ORS 138.222(5), when a case requires resentencing on *any* part of the judgment, the sentencing court has authority to resentence on all convictions.

*State v. Bisby*, 212 Or App 86, 157 P3d 262, *rev den*, 343 Or 160 (2007). Pursuant to a plea agreement, the parties stipulated to a 72-month sentence. At defendant's request, the court imposed that term by upward departure on his coercion conviction and imposed a concurrent 25-month sentence on his conviction for tampering with a witness. Later, a post-conviction court vacated all the sentences and remanded for resentencing. At resentencing, more than 25 months after the original sentencing, the court modified the sentences to consecutive presumptive terms of 36 and 30 months. *Held*: Reversed and remanded. [1] ORS 138.222(5) "applies only to courts imposing new sentences on remand from 'the

appellate court,' and not to cases like this one on remand from a post-conviction court." [2] Because *State v. Smith*, 323 Or 450 (1996), precludes modification of a sentence that the defendant already has served, the post-conviction court did not have authority under ORS 138.520 to allow a resentencing of defendant's tampering conviction.

*State v. Curry*, 209 Or App 31, 146 Or App 348 (2006). After a remand for resentencing to correct a particular error based on the defendant's successful collateral challenge to the sentence, the sentencing court has authority to correct only the error that required the resentencing. Thus, because the federal district court granted *habeas corpus* relief requiring resentencing based on a corrected criminal-history score, the sentencing court correctly refused to consider new mitigating evidence that defendant offered for the purpose of attempting to convince the court not to reimpose the departure sentences that it originally imposed.

*State v. Gallegos*, 208 Or App 488, 145 P3d 255 (2006). Remand based on *Barrett*; resentencing is required under ORS 138.222(5) even though the court would have the authority to impose the same sentence on remand.

*State v. Young*, 188 Or App 247, 71 P3d 119, *rev den*, 336 Or 125 (2003). Pursuant to an agreement, defendant pleaded guilty to three of six counts of aggravated murder and waived double jeopardy, and the court imposed a life sentence with the possibility of parole. After beginning to serve that sentence, defendant breached the agreement by not testifying as agree, and the state prosecuted him on the remaining counts over his objection. The jury imposed a true-life sentence. On appeal, defendant argued that the court lacked jurisdiction to convict and sentence him on the remaining convictions. *Held*: Affirmed. The fact that defendant had commenced serving the sentence imposed on the first three convictions, which were based on the same incident, did not deprive the court of jurisdiction to impose sentence on the other three. Defendant cannot claim that the state is precluded from doing what he agreed it could do. Although all the convictions would merge under *State v. Barrett*, defendant waived his right to insist on merger.

*Bogle v. Armenakis*, 184 Or App 326, 56 P3d 420 (2002), *rev den*, 335 Or 180 (2003). The Court of Appeals granted petitioner post-conviction relief based on claims of inadequate assistance of counsel that affected some but not all of petitioner's convictions, and it remanded the case to the post-conviction court for appropriate relief. *See Bogle v. Armenakis*, 172 Or App 55 (2001). The post-conviction court on remand vacated the affected convictions and the sentences imposed on the other convictions, and it remanded the case to the trial court for further proceedings. *Held*: Affirmed. The remedy the court ordered was within the scope of the remand order. Vacating all of the sentences was proper under *Brock v. Baldwin*, 171 Or App 188 (2000).

*State v. Gibson*, 183 Or App 25, 51 P3d 619 (2002). After defendant had appealed from the judgment of conviction, the sentencing court entered an amended judgment to correct errors in the nature of the convictions entered and charges dismissed. *Held*: [1] Regardless of whether such an error may be corrected by way of ORS 138.083(1), "that change was substantive, not administrative," and hence the court violated defendant's right to be present for the resentencing under Article I, section 11, and ORS 137.030. [2] The error is reviewable on appeal even though defendant failed to object. [3] The proper remedy is to vacate the amended judgment and remand for entry of a corrected judgment and resentencing.

*State v. Alvarez*, 168 Or App 393, 7 P3d 616, *rev den*, 331 Or 244 (2000). Defendant was convicted of first-degree robbery, and the court declared Measure 11 unconstitutional on its face and imposed the 55-month presumptive sentence instead. Both parties appealed, but the state dismissed its appeal in light of *State ex rel. Huddleston v. Sawyer*. The parties then stipulated to a remand to consider an unresolved motion to suppress; the Court of Appeals "vacated" the judgment and remanded. The trial court denied the motion to suppress, reentered the conviction, and imposed the 90-month minimum sentence. *Held*: Affirmed. [1] The remand order allowed the trial court to correct the erroneous sentence. [2] The rule in *State v. Turner*, 247 Or 301 (1967), that a defendant cannot receive a more onerous sentence on remand after prevailing on appeal does not apply where, as here, the original sentence was unlawful.

*State v. Wilson*, 161 Or App 314, 985 P2d 840 (1999), *rev den*, 330 Or 71 (2000). The Supreme Court reversed defendant's convictions for aggravated murder and murder, otherwise affirmed, and remanded "for further proceedings." On remand, the sentencing court imposed sentences on defendant's underlying convictions for kidnapping and assault, which had been merged into the aggravated-murder convictions. *Held*: [1] The sentencing court "did not exceed the scope of the Supreme Court's remand in sentencing defendant on those convictions that had been affirmed." [2] Defendant's concerns regarding whether those convictions will have to be "remerged" if he is again convicted of aggravated murder upon retrial are not yet "ripe." [3] Defendant was not unlawfully subjected to a harsher sentence on remand when the court

imposed a dangerous-offender sentence on his kidnapping conviction, because that conviction had been merged into the aggravated-murder conviction during the original sentencing and hence did not receive a separate sentence.

*State v. Coburn*, 146 Or App 653, 934 P2d 579 (1997): Where post-conviction court ruled that indeterminate portion of dangerous-offender sentence violated *State v. Davis* rule and remanded the court to the sentencing court for “resentencing,” sentencing court was required to correct dangerous-offender sentence and could not resentence the convictions as departures.

*State v. Henderson*, 146 Or App 81, 932 P2d 577 (1997): Although the parties may raise new arguments at resentencing when the Court of Appeals remands a case for “resentencing” pursuant to ORS 138.222(5), the court at the resentencing hearing properly refused to consider defendant’s new challenges to the sentence imposed, because the case was back before that court based on a remand order from a post-conviction court and the remand order directed the sentencing court only to enter an amended judgment to correct a different term.

*State v. Walton*, 134 Or App 66, 894 P2d 1212, *rev den*, 321 Or 429 (1995): Supreme Court vacated the death sentences originally imposed on defendant’s aggravated-murder convictions and remanded “the case” for resentencing. The sentencing court on remand imposed consecutive life sentences on those convictions and a consecutive dangerous-offender sentence on the robbery conviction. *Held*: The sentencing court had authority to resentence all the convictions, even though [1] the court originally had not imposed a sentence on the robbery conviction, and [2] the Supreme Court found only the death sentences to be error. The court also had authority to order the new sentences to be served consecutively.

*State v. Campbell*, 130 Or App 263, 881 P2d 829, *rev den*, 320 Or 453 (1995): The Court of Appeals held that the sentence originally imposed was error and remanded for resentencing; on remand, the sentencing court recalculated the applicable gridblock from 9-C to 9-B in light of *State v. Bucholz*, 317 Or 309 (1993), and imposed the maximum departure sentence. *Held*: Sentencing court had authority on remand to reconsider gridblock.

## **E. CHALLENGES TO SENTENCE IN COLLATERAL PROCEEDING**

*Note*: This section does *not* include all the decisions in which a defendant sentenced to death has collaterally challenged his death sentence.

### **1. Federal habeas corpus proceeding (28 USC § 2254)**

*Roper v. Simmons*, 544 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005). The Eighth Amendment precludes execution of a defendant who was a juvenile when he committed the murder.

*Schriro v. Summerlin*, 542 US 348, 124 S Ct 2519, 159 L Ed 2d 442 (2004). After petitioner’s murder conviction and death sentence were affirmed on appeal, the U.S. Supreme Court decided *Ring v. Arizona*, 536 US 584 (2002), in which it invalidated capital-sentencing schemes that allowed judges to find the facts that are necessary to imposition of a death sentence. Relying on *Teague v. Lane*, 489 US 288 (1989), petitioner argued that *Ring* should be applied retroactively to invalidate his sentence. *Held*: The rule in *Ring* does not apply to petitioner’s case. [1] The rule in *Ring* is a procedural rule, not a substantive rule, because it merely altered the method of determining the appropriate sentence. [2] *Ring* did not announce a watershed rule of criminal procedure because it cannot be said that judicial factfinding seriously diminishes the accuracy or reliability of the determination.

*Ewing v. California*, 538 US 11, 123 S Ct 1179, 155 L Ed 2d 108 (2003). Under California’s three-strikes law, a defendant who is convicted of a felony and has previously been convicted of two or more serious or violent felonies must receive an indeterminate life imprisonment term. Such a defendant becomes eligible for parole on a date calculated by reference to a minimum term, which, in this case, is 25 years. While on parole, Ewing was convicted of felony grand theft for stealing three golf clubs, worth \$399 apiece. As required by the three strikes law, the prosecutor formally alleged, and the trial court found, that Ewing had been convicted previously of four serious or violent felonies. In sentencing him to 25 years to life, the court refused to exercise its discretion to reduce the conviction to a misdemeanor—under a state law that permits certain offenses to be classified as either misdemeanors or felonies—or to dismiss the allegations of some or all of his prior relevant convictions. *Held*: Ewing’s sentence is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments. The Eighth Amendment has a narrow proportionality principle that applies to noncapital sentences. The Eighth Amendment does not require strict proportionality between crime

and sentence, but forbids only extreme sentences that are “grossly disproportionate” to the crime. Though long, Ewing’s current sentence reflects a rational legislative judgment that is entitled to deference.

*Lockyer v. Andrade*, 538 US 63, 123 S Ct 1166, 155 L Ed 144 (2003). Under California’s three strikes law, Andrade received two consecutive terms of 25 years to life after stealing \$150 worth of videotapes. In affirming, the California Court of Appeal rejected his claim that his sentence violated the constitutional prohibition against cruel and unusual punishment, concluding that Andrade’s sentence was not disproportionate. The Ninth Circuit reversed. Reviewing the case under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the latter court held that an unreasonable application of clearly established federal law under 28 USC §2254(d)(1) occurs when there is clear error. *Held*: The Ninth Circuit erred in ruling that the California Court of Appeal’s decision was contrary to, or an unreasonable application of, the Supreme Court’s clearly established law within the meaning of § 2254(d)(1).

*Lackawana County v. Coss*, 532 US 394, 121 S Ct 1567, 149 L Ed 2d 608 (2001). Petitioner was convicted of vandalism and criminal mischief in 1986 and of aggravated assault in 1990. He sought to have his sentence on the assault conviction set aside because the court relied on his 1986 conviction in setting the sentence, and he maintained that the 1986 conviction was invalid due to ineffective assistance of counsel. The Third Circuit agreed. *Held*: Petitioner satisfied the “in custody” requirement of section 2254, even though no longer in custody for the 1986 conviction, because he is contending that that sentence unconstitutionally was used to enhance a later sentence for which he was in custody. However, petitioner could not challenge the prior, expired conviction because he failed to pursue available remedies to challenge that conviction. Just as the Court had held in *Daniels v. United States*, finality of convictions and ease of administration are considerations that counsel against allowing such challenges. In *Daniels*, the Court ruled that (with rare exception) a federal prisoner may not use 28 U.S.C. § 2255 to challenge the constitutionality of prior state convictions used to enhance his federal sentence under the Armed Career Criminal Act of 1994. The exception is when defendant makes a *Gideon* claim (failure to appoint counsel).

*Glover v. United States*, 531 US 198, 121 S Ct 696, 148 L Ed 2d 629 (2001). In his trial on federal labor racketeering charges, Glover received an increased sentence of between 6 and 21 months because the charges were grouped under federal sentencing guidelines criteria. Glover’s counsel did not press the grouping issue in the trial court or raise it on appeal to the Seventh Circuit. Glover filed a pro se motion to correct the sentence, arguing that his counsel’s failure to pursue the issue was ineffective assistance of counsel. The district court denied the motion and the Seventh Circuit affirmed, concluding that the 6 to 21 month increase was not significant enough to amount to prejudice for purposes of *Strickland*. *Held*: The Seventh Circuit erred in engrafting onto the prejudice branch of the *Strickland* test the requirement that any increase in sentence must meet a standard of significance. Under the Sixth Amendment, any amount of actual jail time has significance. Although the amount by which a defendant’s sentence is increased by a particular decision may be a factor in determining whether counsel’s performance in failing to argue the point constitutes ineffective assistance, it cannot serve as a bar to a showing of prejudice.

*Alvarado v. Hill*, 252 F3d 1066 (9<sup>th</sup> Cir. 2001). Petitioner was not entitled to *habeas corpus* relief under 28 U.S.C. § 2254 on his claim that “automatic remand” provision in ORS 137.707(1) violates his due-process rights as a juvenile under the federal constitution, or on his claim that the mandatory minimum sentence unconstitutionally precludes consideration of mitigating evidence.

## **2. Post-conviction proceedings (ORS 138.510 et seq.)**

*Chaidez v. United States*, 568 US \_\_\_, 133 S Ct 1103 (2013). Petitioner is from Mexico but is a lawful permanent resident of the US. She was convicted in federal court of mail fraud after pleading guilty, and the district court sentenced her to four years of probation. That judgment became final in 2004. In 2009, immigration authorities commenced removal proceedings on the ground that her conviction is for an “aggravated felony.” She then filed the federal equivalent of a post-conviction petition, contending that her lawyer failed to provide constitutionally adequate assistance because he did not warn her that her convictions could result in removal. While her petition was pending, the Court decided *Padilla v. Kentucky*, holding that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas. The government argued that *Padilla* did not help petitioner, because it is a “new rule” that does not apply retroactively under *Teague v. Lane*, 489 US 288 (1989). The district court disagreed, applied *Padilla* to petitioner’s claim, found that her lawyer provided ineffective assistance, and set aside her conviction. The Seventh Circuit reversed, holding that *Padilla* does not apply retroactively. *Held*: Affirmed. The ruling in *Padilla* is a “new rule” that does not apply retroactively to convictions that are already final. [1] Under *Teague*, when the Court “announces “a ‘new rule,’ a person

whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. Only when we apply a settled rule may a person avail herself of the decision on collateral review.” Under *Teague*, “a case announces a new rule ... when it breaks new ground or imposes a new obligation on the government. To put it differently, ... a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final. And a holding is not so dictated ... unless it would have been apparent to all reasonable jurists.” On the other hand, “when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes. Because that is so, garden-variety applications of the test in *Strickland v. Washington*, 466 US 668 (1984), for assessing claims of ineffective assistance of counsel do not produce new rules.” [2] “*Padilla*’s holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been—in fact, was not—apparent to all reasonable jurists prior to our decision. *Padilla* thus announced a ‘new rule.’” [3] “Under *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.” Consequently, petitioner cannot rely on *Padilla* in support of her ineffective-assistance claim.

*Note:* The Court noted that petitioner did not contend that even if *Padilla* is a “new rule” it should be applied retroactively to her case: “*Teague* stated two exceptions: ‘watershed rules of criminal procedure’ and rules placing ‘conduct beyond the power of the [government] to proscribe’ apply on collateral review, even if novel. 489 US at 311. [Petitioner] does not argue that either of those exceptions is relevant here.”

***Padilla v. Kentucky***, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010). Petitioner, a long-time lawful permanent resident in the U.S., was charged with transporting marijuana, a removable offense under 8 USC § 1227(a)(2)(B)(i). His counsel incorrectly assured him that a conviction on that offense would not adversely affect his immigration status because he had been a resident so long. Petitioner pleaded guilty based on that misadvice. Petitioner later petitioned for post-conviction relief contending that his counsel provided him with constitutionally inadequate advice. The state court rejected that claim, holding that a potential adverse effect on immigration status is a mere collateral consequence that cannot provide a basis under the Sixth Amendment to set aside a guilty plea. *Held:* Reversed and remanded. [1] As a matter of federal law, deportation is an integral part of the penalty that may be imposed on a noncitizen defendant who pleads guilty to a removable offense. For that reason, it is not a mere “collateral consequence” that is outside the ambit of the Sixth Amendment right to counsel. [2] In the particular circumstances of this case, counsel’s misadvice was clear because it could be “easily determined” from examining the INS statute that removal was “presumptively mandatory” for such a conviction. [3] The case must be remanded for a determination by the state court whether petitioner can establish prejudice to warrant relief under the *Strickland* standard.

*Note:* In *dicta*, the majority rejected the Solicitor General’s suggestion to limit the holding just to affirmative-misadvice claims such as this. But the majority also cautioned that there may be many circumstances in which the potential immigration consequences may not be clear, in which case a counsel’s advice that such a consequence “may” result will be constitutionally sufficient.

***Gable v. State of Oregon***, 353 Or 750, \_\_ P3d \_\_ (2013). In January 1989, petitioner murdered Oregon Department of Corrections director Michael Francke, and he was charged with aggravated murder. At that time, Oregon law provided only two sentencing options on a conviction for aggravated murder: death and life with the possibility of parole. Later in 1989, the legislature amended ORS 163.105(1) and ORS 163.150 to give jurors a third option—life without the possibility of parole (“true life”)—and it provided that that new option applies to all pending cases. During his trial in 1990 in Marion County, petitioner’s trial counsel did not advise him that he could object on *ex post facto* grounds to submission of the true-life option to the jury, and the trial court instructed the jury on all three sentencing options without any objection from petitioner. The jury found petitioner guilty of aggravated murder and imposed a true-life sentence. On appeal, petitioner argued for the first time that imposition of the true-life sentence violated the *ex post facto* clauses, but the Court of Appeals refused to consider that claim because it was unpreserved. *State v. Gable*, 127 Or App 320, 332, *rev den* (1994). Meanwhile, the Oregon Supreme Court held that imposition of a true-life sentence over the defendant’s objection on an aggravated-murder conviction based on a murder committed before the amendment violated the state’s *ex post facto* clause. *State v. Wille*, 317 Or 487 (1993). Petitioner then sought post-conviction relief asserting (among dozens of claims) that his trial counsel failed to provide constitutionally adequate assistance because he did not advise him that he could choose to object on *ex post facto* grounds to submission of the true-life sentencing option. In 2000, the post-conviction court denied relief on all of his claims. He appealed, and the Court of Appeals reversed and remanded on that claim, ruling that his attorney had provided inadequate assistance on that point and the court needed to decide whether petitioner was prejudiced by that error. *Gable v. State of Oregon*, 203 Or App 710 (2006). On remand, petitioner testified that if his counsel had advised him of the possible *ex post facto* objection he would have chosen to object to the jury considering the true-life option. But the post-conviction court again denied his claim, finding that his testimony on that point was not credible because it did not “make sense,” and that, as a result, he did not prove he suffered prejudice. The Court of Appeals

affirmed. 243 Or App 389 (2011). *Held*: Affirmed. The post-conviction court correctly rejected petitioner’s *Wille-based* claim on its finding that he was not credible. [1] “In establishing a right to post-conviction relief, the burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence. ORS 138.620(2). That burden of proof applies to facts related to both prongs of the test for inadequacy of counsel. The legal standard that applies to the prejudice prong entails demonstrating that, based on the facts that the petitioner has established by a preponderance of the evidence, the acts or omissions of counsel had a tendency to affect the result of the trial. A petitioner must make a similar showing under the Sixth Amendment. In reviewing the decision of the post-conviction court, we are bound by its findings of fact if they are supported by evidence in the record.” [2] The post-conviction court applied the correct burden of proof under *Strickland v. Washington*, 466 US 668 (1984). “Under the circumstances, ... there is no reason for us to assume that the court applied the statutory burden of proof in a manner that conflicted with the *Strickland* standard.” [3] Under *Moen v. Peterson*, 312 Or 503 (1991), “the controlling question in this post-conviction proceeding, ... is whether the receipt of correct advice about a possible *ex post facto* objection would have made a difference to petitioner in this case. The only evidence on that point is petitioner’s assertion that he would have insisted on exercising his *ex post facto* rights and have the jury instructed on only two sentencing options. As we have noted, the post-conviction court did not believe petitioner. There is no suggestion that the post-conviction court lacked a basis in the record for making that finding as to petitioner’s credibility. To the contrary, throughout the course of the post-conviction proceeding, the court detailed inconsistencies in petitioner’s testimony that led it to conclude—repeatedly—that petitioner simply was not credible. That ends the matter.”

***Bailey v. Lampert***, 342 Or 321, 153 P3d 95 (2007). Petitioner was convicted of felony offenses in 1995 and unsuccessfully challenged those convictions on appeal and in a post-conviction proceeding. Meanwhile, and based on those convictions, he was convicted in 2000 of felon in possession of a firearm (FIP). In 2003, the Ninth Circuit vacated his felony convictions based on a *Brady* violation, and the state elected not to reprosecute him. He then filed a post-conviction proceeding contending that the vacation of his felony convictions renders his FIP conviction void. *Held*: Relief denied. [1] The plain language of ORS 166.270 supports petitioner’s FIP conviction—the only issue is whether, at time defendant possessed the firearm, he previously was convicted of a felony. [2] By enacting ORS 161.025(2), “the legislature has eliminated the availability of any ‘rule of lenity.’” [3] For purposes of ORS 166.270, a person’s status as a felon “continues unless and until the conviction is validated or the person brings himself within one of the statutory exceptions.” [4] Petitioner’s constitutionally based challenges have no merit: (a) in *City of Pendleton v. Standerfer*, 297 Or 725 (1984), the defendant asserted his collateral challenge to the validity of the predicate conviction within the same case; (b) the prior conviction in *Standerfer* was invalid based on denial of counsel; and (c) petitioner’s due-process challenge has no merit in light of *Lewis v. United States*, 445 US 55 (1980).

***Hinton v. Hill***, 342 Or 222, 149 P3d 1205 (2006). Petitioner was advised incorrectly that the maximum possible sentence was only 226 months, and she pleaded guilty on that basis. The court then imposed a 366-month sentence. The post-conviction court vacated the judgment and remanded either for resentencing within a 226-month maximum or to vacate petitioner’s guilty pleas. *Held*: Affirmed. The post-conviction court was not required to vacate the convictions; rather, the court had authority under ORS 138.520 to allow resentencing within the range of which petitioner had been advised, because that disposition is sufficient to remedy the actual prejudice that petitioner suffered as a result of the misadvice.

***Gonzalez v. State of Oregon***, 340 Or 452, 134 P3d 955 (2006). Petitioner, a Mexican national, pleaded guilty to PCS and DCS. His counsel advised him that the convictions “may cause” his deportation and exclusion; petitioner did not ask for advice regarding the specific likelihood of deportation, and counsel did not offer such advice. When INS commenced deportation proceeding, petitioner sought post-conviction relief to vacate his convictions. *Held*: Counsel did not provide constitutionally inadequate assistance by not advising petitioner regarding the specific likelihood of deportation. The Oregon Constitution does not require counsel “to attempt to specify the likelihood that the trial court might impose the maximum sentence or the minimum sentence. If the constitution does not require that level of specificity concerning the *direct* consequences of a criminal conviction, we see no constitutional warrant for requiring that level of specificity concerning a *collateral* consequence of a conviction.”

See also ***Guzman v. State of Oregon***, 227 Or App 361, 206 P3d 210 (2009) (*per curiam*) (trial counsel provided inadequate assistance by failing to advise him more fully about the possibility of removal when he pleaded guilty to PCS: “Taken as a whole, the advice given petitioner alerted him that he could be deported and did not mislead him as to the probability of that outcome. The evidence showed that petitioner was certain to be deported once he was seized by the Department of Homeland Security, but that there was a possibility that he would be undetected by federal authorities.”); ***Ramirez v. State of Oregon***, 212 Or App 446, 157 P3d 1290 (2007) (petitioner was adequately advised by his trial counsel, and by his plea petition, that he “may be deported” as a result of the conviction. Given petitioner’s express

acknowledgement in his petition, ORS 135.385(2)(d) did not require the trial court to address petitioner specifically concerning that term); *Senda v. Thompson*, 211 Or App 390, 155 P3d 53 (*per curiam*), *on recons*, 212 Or App 706, 159 P3d 355 (2007) (*per curiam*) (same, rejecting claim under Sixth Amendment).

*Miller v. Lampert*, 340 Or 1, 125 P3d 1260 (2006). In 1998, petitioner was convicted of felony sexual offenses, and the sentencing court found him to be a dangerous offender under ORS 161.725 and imposed a 30-year sentence. Petitioner did not appeal. After *Apprendi* was announced, petitioner petitioned for post-conviction relief challenging the validity of his sentence and the adequacy of his trial counsel. The court dismissed his petition. *Held*: Affirmed. [1] The neither the right-to-jury nor the standard-of-proof rule in *Apprendi* is a “watershed” rule of criminal procedure under *Teague v. Lane* that applies retroactively. Consequently, the court rejected petitioner’s direct challenge to the lawfulness of his sentence. [2] In evaluating petitioner’s inadequate-assistance claim, the court must eliminate “the distorting effects of hindsight” and “look to the decisions that preceded petitioner’s sentencing hearing and ask whether, in the exercise of reasonable skill and judgment, petitioner’s counsel should have foreseen the Court’s decision in *Apprendi*.” “Measured against the law in effect at the time of petitioner’s sentencing hearing, the performance of petitioner’s trial counsel was constitutionally adequate.”

See also *Frias v. Coursey*, 229 Or App 716, 716, 215 P3d 874, *rev den*, 347 Or 258 (2009) (*per curiam*) (post-conviction court correctly dismissed petitioner’s petition, which alleged *Blakely*-based challenges to his upward-departure sentences, as an untimely and successive petition, because the *Miller v. Lampert*, 340 Or 1 (2006), held that *Blakely* does not apply retroactively; petitioner’s argument that *Miller* was wrongly decided in light of *Danforth v. Minnesota* “is properly addressed to the Oregon Supreme Court.”); *Harris v. Hill*, 227 Or App 346, 206 P3d 218 (2009) (“The principles announced by the Court in *Apprendi* and *Blakely* do not apply retroactively in a collateral proceeding such as this [post-conviction proceeding], and counsel’s failure to anticipate *Apprendi*’s holding does not constitute inadequate assistance of counsel.”); *Lutz v. Hill*, 205 Or App 252, 134 P3d 1003, *rev den*, 341 Or 140 (2006) (“Counsel’s failure to anticipate *Apprendi* or *Blakely* by objecting to the imposition of enhanced dangerous offender sentences or upward departure sentences does not constitute constitutionally inadequate assistance of counsel.”); *Peralta-Basilio v. Hill*, 203 Or App 449, 126 P3d 1 (2005), *rev den*, 340 Or 359 (2006) (neither *Apprendi* nor *Blakely* applies retroactively in a collateral proceeding).

*Note*: In *Danforth v. Minnesota*, , 552 US 264 (2008), the Court held that a state is not precluded from applying a new rule of federal law “retroactively” even if the U.S. Supreme Court, applying the *Teague v. Lane* rule, does not order that the new rule must be applied retroactively. In light of *Danforth*, the Court of Appeals decision in *Teague v. Palmateer, below*, now controls on the retroactivity issue.

*Burdge v. Palmateer*, 338 Or 490, 112 P3d 320 (2005). Based on three separate incidents, petitioner was convicted in 1994 of three counts of first-degree burglary and some felony sexual assaults. At a consolidated sentencing hearing, the court imposed sentence on the first burglary conviction and then used that conviction as a predicate for imposing no-release sentences under ORS 137.635 on the other convictions. After *State v. Allison*, 143 Or App 241, *rev den*, (1996), petitioner filed a petition for post-conviction relief complaining that his counsel failed to assert a similar argument that the statute cannot be applied to his convictions. The post-conviction court denied his claim, but the Court of Appeals reversed. *Held*: Reversed, affirming the post-conviction court’s judgment. [1] “Assuming that ORS 137.635 is ambiguous, it is not so obviously ambiguous that any lawyer exercising reasonable professional skill and judgment [before *Allison*] necessarily would have seen it.” [2] “Even if the meaning of a [sentencing] statute remains unsettled, the statute may so obviously offer possible benefits to a defendant that any lawyer exercising reasonable professional skill and judgment would raise it.”

*Page v. Palmateer*, 336 Or 379, 84 P2d 133, *cert den*, 543 US 866 (2004). In this post-conviction proceeding, petitioner alleged that his dangerous-offender sentence was unlawful in light of *Apprendi v. New Jersey*. The post-conviction court denied his claim, holding that *Apprendi* does not apply retroactively. *Held*: Affirmed. [1] When interpreting the federal constitution or applying Supreme Court rulings that are based on its interpretation of the federal constitution, the state courts must comply with what the Supreme Court has ruled. Therefore, whether *Apprendi* applies retroactively is governed only by federal law. [2] Applying the standard set forth in *Teague v. Lane*, the new rule in *Apprendi* does not apply retroactively to post-conviction proceedings because it did not set out a watershed rule of criminal procedure.

*Saldana-Ramirez v. State of Oregon*, 255 Or App 602, 298 P3d 59 (2013). Petitioner, who is not a US citizen, pleaded guilty in 2008 to one count of felony failure to appear; a charge of felony assault was dismissed. In 2009, he filed a petition for post-conviction relief in which he claimed that his attorney provided constitutionally ineffective assistance

because she did not sufficiently advise him regarding the possible adverse immigration consequences of his conviction. In 2010, while his post-conviction case was pending, the Court held in *Padilla v. Kentucky*, 559 US 356 (2010), that a claim of effective assistance of counsel applies to a defense counsel's erroneous or inadequate advice, in conjunction with a plea, regarding possible adverse immigration consequences; the Court held that the defense attorney in that case was constitutionally ineffective for not adequately advising the petitioner about the "clear" consequences of his guilty plea. The post-conviction court found that petitioner's counsel adequately advised him as set forth in *Padilla* and dismissed his petition. Petitioner appealed and reiterated his claim that he is entitled to relief under *Padilla*. While his appeal was pending, the Court decided *Chaidez v. United States*, in which it held that the rule it adopted in *Padilla* does not apply retroactively in collateral proceedings. *Held: Affirmed.* "Petitioner's conviction became final before *Padilla* issued. Thus, under federal retroactivity principles as elucidated in *Chaidez*, *Padilla* does not apply to petitioner's collateral challenge. Federal retroactivity principles govern whether a new federal rule applies retroactively in an Oregon court. *Miller v. Lampert*, 340 Or 1, 7 (2006)."

***Byers v. Premo***, 255 Or App 208, 296 P3d 659, *rev den*, 353 Or 787 (2013). Petitioner was charged with first-degree burglary, second-degree assault, and multiple felony sexual offenses based on an incident in which he broke into the victim's house and repeatedly assaulted her. On the day of trial, petitioner's trial counsel advised him that it was unlikely he would be acquitted of the charges against him if he proceeded to trial. His counsel also told him that one of his options was to agree to a trial on stipulated facts and explained that, by agreeing to do that, he would almost certainly be found guilty of the charged crimes, but the court might impose a shorter sentence than it would if he insisted on a full trial. Counsel further advised petitioner that, in any event, he would likely receive a long prison sentence and explained to him that the court could order him to serve the sentences for each of the charged crimes consecutively. The trial court explained to petitioner that if he agreed to a stipulated-facts trial, the prosecutor would recite the facts and those would be the facts upon which petitioner would agree to try the case. Petitioner confirmed to the court that he understood that. The prosecutor then recited the facts underlying each of the counts, stating that, except for the burglary count, the acts that provided the basis for each count were separate and distinct from the acts that provided the basis for each of the other counts—which would provide a basis for imposition of consecutive sentences under ORS 137.123(2). Petitioner agreed, and the court found him guilty of all counts. Before sentencing, petitioner moved to withdraw his stipulation, but the court denied the motion, concluding that petitioner had knowingly and voluntarily agreed to a stipulated-facts trial. Relying on ORS 137.123(5), the court then sentenced him to consecutive sentences on each of the convictions (except the burglary conviction), for a total sentence of 1,070 months (90 years). Petitioner then filed a petition for post-conviction relief, alleging that his trial counsel provided constitutionally inadequate assistance because, among other things, he failed to inform him that the trial court would be able to sentence him consecutively based on the stipulated facts. He testified that if his counsel had adequately advised him, he would not have agreed to the stipulated-facts trial. The post-conviction court denied relief, finding that petitioner was not credible, that his counsel had adequately advised him of the maximum sentences and that the court could impose consecutive sentences, that his agreement to a stipulated-facts trial was knowing, intelligent, and voluntary. *Held: Affirmed.* The post-conviction court properly rejected petitioner's claims. [1] Even if petitioner's trial counsel may have failed to adequately advise petitioner that he was stipulating to facts on which the sentencing court could rely to impose consecutive sentences under ORS 137.123(2), he failed to prove that he was prejudiced. The sentencing court imposed consecutive sentences based on ORS 137.123(5), rather than subsection (2). [2] Moreover, given the post-conviction court's finding that petitioner was not credible, he failed to prove that if his counsel had properly advised him, he would not have agreed to be tried on the facts to which he stipulated.

***Bumgarner v. Nooth***, 254 Or App 86, 295 P3d 52 (2012). In 2004, petitioner was convicted of two counts of first-degree rape, two counts of first-degree unlawful sexual penetration, two counts of first-degree sexual abuse, two counts of first-degree kidnapping, and one count of third-degree assault. The judgment was affirmed on appeal. At the time of trial, there was case law that the convictions on the sex crimes and kidnapping did not merge, but there were also cases suggesting that convictions for the same offense merge when the charges had been based on different statutory subsections. It was not until after the trial that the appellate courts definitely announced that such verdicts should merge. *State v. Parkins*, 346 Or 333 (2009). Petitioner sought post-conviction relief, arguing that his trial counsel was constitutionally inadequate for not requesting merger. The post-conviction court agreed and granted post-conviction relief, and the state appealed. *Held: Affirmed.* [1] Reasonable trial counsel would have discerned, from existing case law holding that different theories of aggravated murder merged, that the structure of the aggravated-murder statute and the statutes involved in this case was similar, and that the convictions at issue in this case should merge. [2] "Uncertainty in the law regarding when convictions would merge ... did not relieve trial counsel of the obligation to assert that the sentences at issue were subject to merger." Despite any ambiguity in the law, the benefits of raising merger as an issue were so obvious that any reasonable lawyer would have done so. [3] Given the "obvious possible benefits" of arguing that the verdicts should merge, trial

counsel's failure to argue for merger constituted inadequate assistance.

**Jones v. State of Oregon**, 246 Or App 253, 265 P3d 75, *rev den*, 351 Or 403 (2011). Petitioner, while drunk, drove down Interstate 5 in the wrong direction. Reviewing a police videotape of the chase, the state picked five identifiable cars that were most put at risk of being hit, and defendant was tried and convicted on five counts of reckless endangering. The court entered five separate convictions and imposed consecutive 12-month sentences on those convictions. Petitioner's counsel did not object to the separate convictions or consecutive sentences. Petitioner appealed, and his counsel relied on *State v. Harbert*, 155 Or App 137 (1998), to argue that the separate convictions were plain error. The state argued in response that the convictions do not merge and that, in any event, the claim was not reviewable as plain error. The Court of Appeals affirmed without opinion. Petitioner then filed a petition for post-conviction relief in which he alleged that his trial counsel was inadequate for not arguing that there should have been only one conviction and sentence. His theory was that reckless endangering does not require the state to prove an actual victim and, therefore, no matter how many people were endangered, he committed only one crime. The post-conviction court dismissed his petition. *Held*: Affirmed. [1] Separate convictions were proper under *State v. Sumerlin*, 139 Or App 579 (1996). "*Harbert*, in contrast to *Sumerlin*, addressed the applicability of ORS 163.195(1) to circumstances in which a person engaged in conduct likely to expose another person to harm, even if that conduct did not actually expose another person to harm. *Sumerlin*, in contrast, addressed the applicability of the statute—and the availability of multiple convictions—where the defendant engaged in conduct that actually exposed (multiple) persons (in *Sumerlin*, the defendant's two nephews) to harm. That is, ORS 163.195(1) properly applies to both circumstances—and, when it applies to the latter and multiple persons have actually been exposed to harm, multiple convictions, pertaining to each of the victims, can be imposed." [2] "To the extent that petitioner now suggests that *Harbert*, not *Sumerlin*, is controlling, the post-conviction court could properly have determined that petitioner failed to adduce persuasive evidence essential to that distinction, *viz.*, that petitioner's conduct in speeding the wrong way on Interstate 5 had not 'actually exposed' other persons (the persons to whom the five reckless endangerment counts pertained) 'to harm.'" [3] Because petitioner's argument has no legal merit in light of *Sumerlin*, trial counsel was not constitutionally inadequate.

**Orchard v. Mills**, 247 Or App 355, 270 P3d 309 (2011), *rev den*, 352 Or 33 (2012). While driving intoxicated, petitioner caused an accident that injured another person and he fled the scene. Later, the police found several firearms at petitioner's residence. He was convicted of second-degree assault, failure to perform the duties of a driver (H&R), and seven counts of felon in possession of a firearm (FIP), the court imposed consecutive sentences on those convictions, and the judgment was affirmed on appeal. Petitioner then filed a petition for post-conviction relief contending that his counsel and the sentencing court failed to apply the "shift to column I" rule, OAR 213-012-0020(1), when it imposed consecutive sentences. The post-conviction court dismissed his petition. *Held*: Affirmed. [1] "Under OAR 213-012-0020(2)(a)(B), when a trial court imposes multiple sentences consecutively, it must 'shift to column I' on the criminal history scale for all sentences that are imposed consecutively to the sentence on the primary offense. However, the 'shift-to-I' rule applies only when consecutive sentences are imposed for crimes that arise from a single criminal episode." [2] "To determine whether convictions arise from a single criminal episode for purposes of the imposition of consecutive sentences, we apply the same definition that governs our double-jeopardy analysis: ORS 131.505(4)." [3] Petitioner's assault and H&R convictions did not arise out of a single criminal episode, because his "assaultive conduct and his subsequent efforts to evade apprehension for that assault were not directed to the accomplishment of a single criminal objective." [4] Similarly, his FIP convictions did not arise out of a single criminal episode even though all the guns were found and seized during a single search because "the responding officers found seven separate firearms in petitioner's home, and there was circumstantial evidence, such as the placement of guns in the closet and under the bed, that they were concealed by separate acts. As a result, there was sufficient evidence for the trial court to conclude that the firearms were acquired separately."

**Pendergrass v. Coursey**, 242 Or App 68, 253 P3d 69 (*per curiam*), *rev den*, 350 Or 530 (2011). Petitioner pleaded guilty to two counts of first-degree robbery involving different victims, and the court imposed consecutive sentences. Petitioner then filed a petition for post-conviction relief alleging, *inter alia*, that his trial counsel provided constitutionally inadequate assistance by not objecting to the consecutive-sentence order on the ground that the court had not made findings on the record as required by ORS 137.123, and the post-conviction court granted relief on that claim. *Held*: Reversed. Petitioner failed to prove that he was prejudiced given that "had petitioner's trial counsel objected, the trial court could easily have made findings that would satisfy ORS 137.123(5)(b), because the indictment alleged separate victims for the two robbery charges. ... Trial counsel's failure to object to the lack of express findings regarding separate victims did not prejudice petitioner; the error would have been easily remedied had it been brought to the trial court's attention."

**Ross v. Hill**, 235 Or App 340, 231 P3d 1185, *rev den*, 349 Or 56 (2010). Petitioner pleaded guilty to several crimes, including two alternative counts of first-degree kidnapping, based on a single incident. The court entered separate kidnapping convictions but imposed concurrent sentences; petitioner’s counsel did not ask the court to merge the conviction. The post-conviction court denied his petition. *Held*: Reversed and remanded with directs to merge kidnapping convictions and for resentencing. [1] In light of current case law, the two kidnapping convictions should be merged. [2] Because the unsettled case law at the time of the sentencing hearing should have alerted petitioner’s counsel to move for merger, he failed to provide constitutionally adequate assistance.

*Note*: The court did not discuss how petitioner may have suffered prejudice, nor did the court discuss why “resentencing”—as opposed to entry of a corrected judgment—was the appropriate remedy.

**Gordon v. Hall**, 232 Or App 174, 221 P3d 763 (2009). Petitioner was convicted of first-degree sexual abuse and the court imposed a life sentence pursuant to ORS 137.719(1) based on petitioner’s previous convictions for sexual offenses in California. The conviction and sentence were affirmed on appeal. Petitioner filed a petition for post-conviction relief contending his trial counsel did not provide constitutionally adequate assistance when he did not argue that one of his previous convictions, on which the court imposed only probation, could not be counted under ORS 137.719(3). The court denied the claim. *Held*: Reversed. [1] Because ORS 137.719(1) uses the phrase “sentenced for sex crimes” rather than “convicted of sex crimes,” the question is whether he was *sentenced* on the previous conviction. [2] Under both Oregon and California law at that time, probation was not a “sentence.” Because the California court deferred imposition of a prison sentence on that conviction and instead put him on probation, and petitioner successfully completed probation, he was not “sentenced” within the meaning of ORS 137.719(1). It is immaterial that Oregon law now views probation as a “sentence.” [3] Because petitioner’s trial counsel had a valid objection he could have interposed and he did not, he did not provide constitutionally adequate assistance and petitioner suffered prejudice that warrants relief.

**Compton v. Lampert**, 226 Or App 420, 203 P3d 924 (2009). Petitioner appealed from an order denying his ORCP 71 motion to correct a post-conviction judgment that had been entered as a result of an agreement by which petitioner and defendant had settled petitioner’s claims for post-conviction relief. Under the terms of the settlement agreement, petitioner’s sentence in an underlying criminal case was reduced from 3,000 months to 200 months of imprisonment. The agreement made no mention of a 120-month term of post-prison supervision that also had been imposed as part of petitioner’s sentence in the criminal case, and the post-conviction judgment kept that term in place. Petitioner’s ORCP 71 motion sought to correct the post-conviction judgment to state that he was not subject to the 120-month PPS term. *Held*: Affirmed. The settlement agreement was unambiguous and used the term “sentence” to refer to and to modify only the period of incarceration. The agreement left all other terms of petitioner’s sentence, including the 120-month PPS term, in place.

**Holloway v. Gower**, 225 Or App 176, 200 P3d 584 (2009). Petitioner pleaded guilty in 2003 to a Class C felony. Based on its own findings, the sentencing court imposed an upward departure sentence of 60 months in prison and 24 months of PPS. Pursuant to ORS 138.083, petitioner’s appellate counsel later obtained a corrected judgment in which petitioner’s PPS term was deleted in conformance with OAR 213-005-0002(4), which provides that the sum of prison and PPS terms cannot exceed the statutory maximum indeterminate sentence. Petitioner did not appear in the ORS 138.083 proceeding. Petitioner later filed a petition for post-conviction relief, alleging various claims of inadequate assistance of counsel: (1) that his original trial attorney unreasonably had failed to make an *Apprendi* objection to the departure sentence imposed based on the court’s findings; (2) that trial counsel unreasonably failed to object based on OAR 213-005-0002(4) to the original sentence; and (3) that appellate counsel unreasonably failed to assign error to the fact that the petitioner was not present at the ORS 138.083 proceeding. The petitioner also claimed that counsel should have objected to the corrected sentence based on the assertion that the circuit court had to impose a 12-month term of PPS and that the correct sentence was a 48-month prison term to be followed by a 12-month PPS term. The post-conviction denied relief. *Held*: Affirmed. [1] Although trial counsel should have objected based on OAR 213-005-0002(4), the petitioner was not prejudiced because that error was later corrected in the ORS 138.083 proceeding. [2] Because it was unclear whether the ORS 138.083 modification was substantive and not merely administrative, petitioner could not prove that he was prejudiced by appellate counsel’s failure to assign error to the fact that he was not present. Because the issue was not preserved, it would have been reviewable only if it were a claim of plain error. Thus, appellate counsel reasonably did not raise the issue on appeal. Likewise, appellate counsel reasonably elected to file the ORS 138.083 motion because, if he had waited and raised the issue on direct appeal, the appellate court could have exercised its discretion not to review it. [3] Trial counsel did not provide inadequate assistance by failing to foresee *Blakely*’s application of *Apprendi* to departure sentences. *Peralta-Basilio v. Hill*, 203 Or App 449, *rev den*, 340 Or 359 (2006).

**Chase v. Blackletter**, 221 Or App 92, 188 P3d 427, *rev den*, 345 Or 381 (2008). Petitioner waived jury and pleaded guilty, he was sentenced after *Blakely* but before *Ice*, the court imposed consecutive sentences based on findings it made, and defense counsel did not object. Petitioner petitioned for post-conviction relief contending that his counsel provided inadequate assistance by failing to object to the consecutive sentences on the ground that he was entitled to jury findings. *Held*: Claim rejected. In light of the state of the law at the time of sentencing, “we cannot assume that because trial counsel in *Ice* accurately anticipated the Supreme Court’s extension of *Apprendi* and *Blakely* to consecutive sentencing, any lawyer exercising reasonable professional skill and judgment would have done the same.”

See also **Krieg v. Belleque**, 221 Or App 36, 188 P3d 413, *rev den*, 345 Or 317 (2008) (same; *Blakely* issued while petitioner’s direct appeal was pending).

**Buffa v. Belleque**, 214 Or App 39, 162 P3d 376, *rev den*, 343 Or 690 (2007). Petitioner was convicted of several burglaries in 2000, and the sentencing court departed upward on a finding of “persistent involvement.” The judgment was entered a month after *Apprendi* was decided and before the Court of Appeals issued its opinion in *State v. Dilts*. Petitioner alleged in this post-conviction petition that his counsel provided inadequate assistance by failing to raise an *Apprendi*-based objection to the departure. *Held*: “Given the common understanding of *Apprendi* before the decision in *Blakely*, counsel, exercising reasonable skill and judgment, could well conclude, even before *Dilts*, that there was no merit in raising an *Apprendi* argument against a guidelines departure sentence.”

**State v. Bisby**, 212 Or App 86, 157 P3d 262, *rev den*, 343 Or 160 (2007). Pursuant to a plea agreement, the parties stipulated to a 72-month sentence. At defendant’s request, the court imposed that term by upward departure on his coercion conviction and imposed a concurrent 25-month sentence on his conviction for tampering with a witness. Later, a post-conviction court vacated all the sentences and remanded for resentencing. At resentencing, more than 25 months after the original sentencing, the court modified the sentences to consecutive presumptive terms of 36 and 30 months. *Held*: Reversed and remanded. [1] ORS 138.222(5) “applies only to courts imposing new sentences on remand from ‘the appellate court,’ and not to cases like this one on remand from a post-conviction court.” [2] Because *State v. Smith*, 323 Or 450 (1996), precludes modification of a sentence that the defendant already has served, the post-conviction court did not have authority under ORS 138.520 to allow a resentencing of defendant’s tampering conviction.

**Snodgrass v. Lampert**, 210 Or App 390, 150 P3d 1109, *rev den*, 342 Or 633 (2007). The post-conviction court correctly denied petitioner’s claim that his trial counsel provided inadequate assistance by failing to object to the consecutive sentences on the ground that he had committed all the offenses during a single criminal episode. When counsel requested concurrent sentences, the sentencing court, to justify the consecutive terms, made extensive comments that “objectively fall within the scope of ORS 137.123(5)(b).” Hence, counsel “could have reasonably concluded that it would be futile to raise an objection.” Moreover, petitioner failed to prove prejudice because “it is more probable that the trial court would have re-couched its findings in terms of ORS 137.123(5)(b), had such an objection been made.”

**Gill v. Lampert**, 205 Or App 90, 132 P3d 674 (2006). Petitioner was convicted in 1998 by jury verdict of two counts of attempted first-degree assault for shooting at two police officers. The sentencing court found him to be a dangerous offender based *inter alia* on its finding that he “seriously endangered the life or safety of another.” Petitioner later petitioned for post-conviction relief contending that his trial counsel provided inadequate assistance by failing to object to the court’s dangerous-offender finding based on *State v. Mitchell*. The court denied his claim. *Held*: Reversed and remanded. [1] A counsel provides inadequate assistance if he fails to object based on *Mitchell* when the court, rather than the jury, makes the seriously-endangered finding. [2] The jury’s verdict was not sufficient of itself to constitute the required finding, because “an attempted assault can occur without the offender seriously endangering the life or safety of any person.” [3] Petitioner was prejudiced by his counsel’s failure to object, because a reasonable jury could have acquitted him on that fact.

**Peralta-Basilio v. Hill**, 203 Or App 449, 126 P3d 1 (2005), *rev den*, 340 Or 359 (2006). [1] Petitioner’s argument on appeal that his upward-departure sentence is unlawful in light of *Blakely* provides no basis for post-conviction relief because he did not assert that claim in his petition. [2] In any event, neither *Apprendi* nor *Blakely* applies retroactively in a collateral proceeding. [3] Petitioner’s related claim against his counsel provides no basis for relief because “given the state of the law in the fall of 2002, when petitioner was sentenced, counsel did not fail to exercise reasonable skill and judgment in failing to object to” the departure sentence.

**Haney v. Schiedler**, 202 Or App 51, 120 P3d 1225 (2005). Pursuant to a plea agreement, petitioner pleaded guilty to two class C felony offenses, the state dismissed Measure 11 charges, and the parties stipulated to probationary sentence

with concurrent 65-month sentences if probation was revoked. Petitioner violated probation, and the court imposed the stipulated sentences, and petitioner did not appeal. Petitioner then filed a post-conviction petition challenging his sentence as excessive under ORS 138.530(1)(c), the state argued that that claim was barred by ORS 138.550, the post-conviction court granted relief, and the state appealed. *Held: Reversed.* [1] The state’s failure to rely specifically on *Palmer v. State of Oregon* before the post-conviction court did not preclude it from relying on that principle on appeal. [2] In light of the intervening decision in *Stroup v. Hill*, 196 Or App 565 (2005), the post-conviction court’s ruling was plain error and warranted reversal.

***Makinson v. Lampert***, 199 Or App 418, 112 P3d 365, *rev den*, 339 Ore. 230 (2005). The post-conviction court denied all of petitioner’s claims of inadequate assistance of counsel. For the first time on appeal, petitioner asserted that, in light of *Blakely*, his counsel failed to challenge the departure sentences and the sentencing court committed plain error in imposing those sentences. *Held: Summary affirmance granted.* [1] Petitioner’s newly asserted claims are barred by ORS 138.550(3) and *Bowen v. Johnson* because he did not allege them in his petition. Such barred claims cannot be reviewed on appeal as “plain error.” [2] In any event, under *Page v. Palmateer*, the right-to-jury rule in *Apprendi* does not apply retroactively to cases on collateral review.

See also ***McClanahan v. Hill***, 200 Or App 9, 112 P3d 456 (*per curiam*), *rev den*, 339 Or 450 (2005) (same).

***Koenecke v. Lampert***, 198 Or App 444, 108 P3d 653, *rev den*, 339 Or 66 (2005). Petitioner was convicted of felony DWS in 1986, and the court imposed only a fine; the court, however, did not expressly declare the conviction to be only a misdemeanor under ORS 161.705. Based on that DWS conviction, petitioner later was convicted of being felon in possession under ORS 166.270 (1995). He then petitioned for post-conviction relief contending that his counsel in the FIP prosecution should have argued that his conviction for DWS was not a felony but only a misdemeanor by operation of ORS 161.585(2)(b) (1985) due to the sentence imposed. The post-conviction court rejected that claim. *Held: Affirmed.* The exception in ORS 166.270(3)(a), which provides that a prior conviction for a felony offense is not one for a felony for the purpose of the FIP statute if “the court declared the conviction to be a misdemeanor at the time of judgment,” is a reference only to ORS 161.705 and does not apply to a felony conviction on which the court imposed only a minimal sentence.

***Stroup v. Hill***, 196 Or App 565, 103 P3d 1157 (2004), *rev den*, 338 Or 432 (2005). Facing 59 years in prison on a variety of charges, petitioner entered into a plea agreement in which he pleaded guilty to several charges, the state dismissed the Measure 11 charges, and the court imposed *inter alia* a 60-month sentence with a 36-month term of post-prison supervision on his felon-in-possession conviction. Petitioner did not appeal, but he then filed a petition for post-conviction relief contending that, in light of *Layton v. Hall*, the PPS term on the FIP conviction exceeds the maximum allowable by law and that his trial counsel provided inadequate assistance. *Held: [1]* Petitioner’s challenges to the sentence under ORS 138.530(1)(a), (b), and (c) are barred. The erroneous sentence did not deprive the sentencing court of “jurisdiction”; his direct challenge to the sentence is barred by ORS 138.550 and *Palmer v. State of Oregon* because he could have raised that objection at sentencing and on appeal; and, his “due process” challenge fails for the same reason. [2] His claim of inadequate assistance fails based on the post-conviction court’s findings that he knew that the court would impose that sentence when he pleaded guilty and failed to show that he would not have pleaded guilty had he known that that sentence exceeds the maximum.

***Walton v. Thompson***, 195 Or App 335, 102 P3d 687 (2004), *rev den*, 338 Or 375 (2005). Although, given the Supreme Court’s subsequent decision in *State v. Barrett*, the sentencing court should have merged petitioner’s two convictions for aggravated murder involving the same victim into a single conviction, the post-conviction court correctly denied his claim for post-conviction relief. Petitioner’s direct challenge to the sentence under ORS 138.530(1)(c) is barred by ORS 138.550(2) and *Palmer v. State of Oregon* because he could have raised that objection at sentencing and on appeal, despite a pre-*Barrett* decision by the Court of Appeals that separate convictions are proper in that circumstance.

***Williamson v. Schiedler***, 196 Or App 302, 101 P3d 364 (2004). [1] Petitioner’s challenge to the length of his prison sentence is not moot in light of his release onto a 36-month term of post-prison supervision, because a determination that his prison sentence should have been shorter will result in an earlier termination of his PPS term. [2] Petitioner’s trial counsel provided inadequate assistance by failing to object at sentencing that the length of the total consecutive-sentence string violated the 200-percent limitation in OAR 213-012-0020(2), because all of the convictions were based on a single incident. Petitioner’s felon-in-possession offenses necessarily were part of his MCS offenses in light of the jury’s findings on the “commercial drug offense” factors that he unlawfully possessed a firearm during the offenses.

**Teague v. Palmateer**, 184 Or App 577, 57 P3d 176 (2002) (*en banc*), *rev den*, 335 Or 181 (2003). Because the decision in *Apprendi v. New Jersey* does not apply “retroactively” to invalidate sentences that became final before that decision was announced, the post-conviction court correctly dismissed his petition challenging his dangerous-offender sentence on that basis.

*Note:* Although this decision was superseded by *Page v. Palmateer* and *Miller v. Lampert*, *above*, the Court’s subsequent decision in *Danforth v. Minnesota*, 552 US 264 (2008), in which the Court agreed with point [1], means that point [2] now controls.

**Coley v. Morrow**, 183 Or App 426, 52 P3d 1090, *rev den*, 335 Or 104 (2002). The court in the underlying criminal proceeding had jurisdiction to convict petitioner of robbery under ORS 137.707, because he had committed that offense on his 15<sup>th</sup> birthday, even though he committed it before the time of day on which he was born.

**Grimes v. Palmateer**, 181 Or App 649, 47 P3d 57 (2002). Petitioner’s probationary sentences were revoked and the court imposed, pursuant to the parties’ stipulation, a series of consecutive sentences. Petitioner claimed that his counsel failed to provide constitutionally adequate assistance by not objecting to the consecutive sentences based on OAR 213-012-00040(2)(a). *Held:* [1] The question is not whether the sentences violated the rules but only “whether, under the circumstances, petitioner’s trial counsel made a reasonable tactical choice in negotiating the combined plea and sentencing agreement.” [2] Counsel’s choice, under the circumstances, was reasonable even if the consecutive sentences technically violated the rule. [3] Counsel could not have objected to the sentences because of the stipulation. [3] The post-conviction court’s implicit finding that petitioner understood and voluntarily entered into the plea agreement is supported by evidence in the record. [4] Petitioner’s appellate counsel did not fail to provide constitutionally adequate assistance by not challenging the sentence, because it was imposed pursuant to the parties’ stipulation.

**Layton v. Hall**, 181 Or App 581, 47 P3d 898 (2002). Petitioner’s trial counsel failed to provide constitutionally adequate assistance at sentencing by not challenging, based on OAR 213-005-0002(4) the 36-month term of post-prison supervision that was imposed on his conviction for assault in the third degree, a class C felony, in addition to the 5-year firearm-minimum sentence, even though such an objection had no merit under the prior version of the rule and the courts had not yet determined whether an amendment to the rule had changed that result. “Regardless of whether an objection to the sentence would ultimately have succeeded, competent counsel would have raised such an objection. A competent decision to raise, or to forgo, an objection may involve a variety of considerations, including the likelihood of success, the benefit to the client if successful, and any countervailing detriment if unsuccessful. . . . Given that cost-benefit calculus, competent counsel would have objected to the seven-year sentence.”

**Mastne v. Schiedler**, 180 Or App 552, 44 P3d 621 (2002). Petitioner filed a petition for post-conviction relief challenging the dangerous-offender sentence imposed in 1986 on his conviction for robbery, contending that that sentence is unlawful under *Apprendi v. New Jersey*, and the post-conviction court dismissed his petition. *Held:* State’s motion for summary affirmance granted. Petitioner’s petition is time-barred by ORS 138.510(4) regardless of whether *Apprendi* would apply.

**Blackledge v. Morrow**, 174 Or App 566, 26 P3d 851, *rev den*, 332 Or 588 (2001). Petitioner was charged with a count of first-degree sexual abuse subject to Measure 11, and he entered into a plea agreement by which he pleaded guilty to attempted first-degree sexual abuse as a lesser-included offense and stipulated to a 65-month sentence. The post-conviction court ruled that petitioner’s appellate counsel failed to provide constitutionally adequate assistance by not challenging the sentence on appeal as “plain error.” *Held:* Reversed and remanded. [1] Because petitioner was convicted only of a class C felony, the 65-month sentence exceeds the maximum allowable by law under ORS 161.605(3). [2] To obtain post-conviction relief based on a claim of inadequate assistance of appellate counsel, petitioner had to “establish that competent appellate counsel would have asserted the claim, and ‘that had the claim of error been raised, it is more probable than not that the result would have been different.’” [3] Had appellate counsel attempted to challenge the sentence, the Court of Appeals would have been barred by ORS 138.222(2)(d) from reviewing that claim on direct appeal, because it was entered per petitioner’s stipulation. “If this court lacks authority to review a sentence under ORS 138.222, then the court may not review the sentence regardless of whether an error is apparent on the face of the record.” [4] “Given that the erroneous sentence was not reviewable on direct appeal, petitioner’s appellate counsel did not provide constitutionally inadequate assistance in failing to assert the error on direct appeal.” [5] Because the post-conviction court granted relief only on petitioner’s claim of inadequate assistance of appellate counsel and that ruling was error, the appropriate remedy is to remand for reconsideration based on petitioner’s alternative claim that he is entitled to relief under ORS 138.530(1)(c) because the sentence is excessive.

**Brock v. Baldwin**, 171 Or App 188, 14 P3d 651 (2000), *rev den*, 332 Or 56 (2001). ORS 138.520 authorizes a post-conviction court to grant such relief “as may be proper and just.” Because the inadequate assistance of counsel resulted in unlawful sentences, the court had authority to remand the entire case for resentencing per ORS 138.222(5), including those sentences that are not error and that petitioner did not challenge.

**Reynolds v. Lampert**, 170 Or App 780, 13 P3d 1038 (2000): Post-conviction court found that petitioner’s trial counsel failed to provide constitutionally adequate assistance of counsel by failing to object to sentencing court’s calculation of his criminal-history score, and it remanded for resentencing. *Held*: Affirmed. The Court of Appeals declined to consider the state’s claim that the sentencing court actually was correct in calculating petitioner’s score, because it failed to make that argument before the post-conviction court. Petitioner had raised that issue adequately in his petition, and the state thus was on notice that it needed to address that issue.

**Lattymayer v. Thompson**, 170 Or App 160, 12 P3d 535 (2000), *rev den*, 332 Or 56 (2001). Because a sentencing court does not have authority to impose conditions of post-prison supervision, trial counsel failed to provide adequate assistance when he did not object to the conditions imposed by the court.

**Washington v. Johnson**, 165 Or App 578, 997 P2d 263, *rev den*, 330 Or 553 (2000). After being found guilty of aggravated murder, petitioner entered into a stipulated sentencing agreement, by which the petitioner avoided a death sentence but waived his right to appeal or seek post-conviction relief. Petitioner claimed that his lawyer inadequately informed him of the consequences of entering into the stipulated sentencing agreement. *Held*: [1] Because petitioner failed to claim that had he been better informed he would not have accepted the offer, he failed to establish that he was prejudiced by his counsel’s alleged inadequacy. [2] Because the right to appeal and to seek post-conviction relief are not of constitutional dimension, the waiver of the statutory rights was not inherently prejudicial, even if petitioner was unaware of the full ramifications of the rights waived.

**Britton v. Slater**, 165 Or App 46, 994 P2d 1203 (2000). Petitioner’s trial counsel did not object when the trial judge imposed an erroneous term of post-prison supervision term. *Held*: Even though petitioner could have challenged that term on direct appeal as “plain error,” he can challenge that term in a post-conviction proceeding within a claim for inadequate assistance of counsel.

**Johnson v. Zenon**, 151 Or App 349, 948 P2d 767 (1997). Petitioner’s trial counsel at his resentencing was not constitutionally inadequate because he in fact raised the same objection to the sentence as raise by petitioner in the post-conviction proceeding. Trial counsel was not constitutionally inadequate merely because he did not articulate the objection “in the same way with the same clarity and sophistication as in th[e] post-conviction proceeding.”

**State v. Coburn**, 146 Or App 653, 934 P2d 579 (1997). In a post-conviction proceeding defendant successfully challenged the length of his dangerous-offender sentence on the ground that, in light of *State v. Davis*, it exceeded the maximum allowed by law; he did not challenge the court’s dangerous-offender determination. The post-conviction court remanded for resentencing, and the sentencing court forwent reimposition of a dangerous-offender sentence and imposed departure sentences instead. *Held*: Reversed and remanded for resentencing. [1] ORS 138.222(5) does not apply to a remand ordered pursuant to a post-conviction judgment. [2] The sentencing court was required on remand to resentence defendant under the dangerous-offender scheme— it was not free to impose any other sentence it originally could have imposed.

**Austin v. McGee**, 140 Or App 263, 915 P2d 1027 (1996). The post-conviction court correctly rejected petitioner’s claim that his counsel at sentencing failed to provide constitutionally adequate assistance by failing to object to the consecutive sentences, because the court’s oral findings were sufficient. The findings need not be included in the judgment, and the court may use the same factors to support a departure and to support consecutive sentences.

**Thompson v. Prinslow**, 138 Or App 183, 906 P2d 310 (1995). Petitioner claimed that his counsel at the probation-revocation hearing provided inadequate assistance, resulting in revocation and a prison sentence. *Held*: Appeal dismissed as moot because petitioner already had completed service of sentence imposed.

**DeJac v. Baldwin**, 136 Or App 388, 902 P2d 125 (1995). Post-conviction court correctly rejected petitioner’s claim that his trial counsel provided inadequate assistance at sentencing by failing to investigate his criminal history.

Petitioner failed to alert his counsel that he had been convicted only of battery, not of the robbery listed in the PSI.

*State v. Stevens*, 134 Or App 1, 894 P2d 1217 (1995). Defendant pleaded guilty to a “scheme or network” drug offense, the sentencing court imposed an enhanced sentence, and defendant appealed. While that appeal was pending, defendant challenged the sentence in a collateral *habeas corpus* petition; the court converted that petition into a post-conviction petition, vacated the sentence, and remanded the case to the sentencing court for resentencing. The sentencing court then resentenced defendant, and he appealed from that judgment, too. *Held*: The post-conviction court lacked jurisdiction to review the challenge to the sentence, because a direct appeal was pending from the original judgment. ORS 138.550(1). Moreover, the sentencing court lacked authority to resentence defendant, because an appeal was pending from the original judgment. The Court of Appeals vacated the judgment imposed on resentencing and reinstated the original judgment.

*Peterson v. Maass*, 130 Or App 520, 882 P2d 1140 (1994), *rev den*, 321 Or 47 (1995). The post-conviction court correctly rejected inadequate-assistance claim based on fact that defense counsel did not object to entry of amended judgments correcting clerical error in sentence imposed. Because sentencing court had authority to enter amended judgments notwithstanding pendency of appeal from original judgment, “petitioner was not prejudiced by the failure of his trial counsel to object.”

### 3. State *habeas corpus* proceedings (ORS 34.310 *et seq.*)

*Roy v. Palmateer*, 339 Or App 533, 124 P3d 603 (2005). Plaintiff was convicted of aggravated murder in 1984, and the court imposed, per ORS 163.105(2) (1983), an indeterminate life sentence with a 20-year minimum term. In 2000, the board made a finding that plaintiff is likely to be rehabilitated within a reasonable period of time, converted his sentence to one with the possibility of parole, and set a projected parole date of May 2004. Plaintiff filed a *habeas corpus* petition contending that, based on the board’s finding, he is entitled to immediate release. The trial court dismissed the petition. *Held*: Affirmed. Under ORS 163.105(4) (1983), the board’s finding that plaintiff is *capable* of rehabilitation permits the board to convert the sentence only to one with the *possibility* of parole and is not sufficient, of itself, to entitle him to immediate parole.

*Dugger v. Schiedler*, 174 Or App 585, 27 P3d 498 (2001). Plaintiff was convicted on charges of second-degree robbery and kidnapping with a firearm. Although those offenses were subject to Measure 11, the sentencing court orally declared Measure 11 to be unconstitutional and imposed instead a 60-month firearm-minimum sentence. Plaintiff later sought *habeas corpus* relief on a claim that the Department of Corrections was denying him earned-time credit per the no-release clause in ORS 137.707(2), and the trial court dismissed his petition. *Held*: Reversed. [1] Plaintiff’s claim is not moot even though he has been released, “because the termination date of his term of post-prison supervision depends on the proper determination of the date on which his incarceration term expired.” [2] Because the sentencing court declared all of Measure 11 unconstitutional and the state did not appeal, the department could not deny plaintiff earned-time credits based on the no-release clause in ORS 137.707(2). [3] Under the 60-month firearm-minimum sentence, plaintiff was eligible for earned-time credits, ORS 161.610(3).

### 4. Mandamus proceedings (ORS 34.105 *et seq.*)

*Engweiler v. Cook*, 340 Or 373, 133 P3d 904 (2006). In 1990, petitioner was convicted of aggravated murder for a crime he committed when he was 15 years old, and the court imposed an indeterminate life sentence. The parole board established a 480-month “prison term” and set a “murder review date” in 2030. Petitioner claimed that he is entitled to accumulate earned-time credits under ORS 421.121 against the 480-month term, DOC denied that request, and the Court of Appeals affirmed. *Held*: Affirmed. [1] A “term of incarceration” as used in ORS 421.121(1) means “the amount of time that an inmate must spend in prison before he is eligible to be paroled,” not the term of incarceration imposed as part of the sentence. [2] Given that petitioner is serving an indeterminate life sentence, the parole board is responsible for determining the actual duration of his imprisonment. Because the 480-month term merely determines when he might be *considered* for parole, he does not yet have a “term of incarceration” and hence is not entitled to application of earned-time credits.

*State v. Sawatzky*, 339 Or 689, 125 P3d 722 (2005). Based on *Blakely*, the Court of Appeals vacated defendant’s upward-departure sentences and remanded for resentencing. On remand, the trial court ruled that the state could prove the aggravating facts to a newly empaneled jury, and defendant petitioned for a writ of mandamus contending that such a trial would constitute double jeopardy. While the case was pending before the Supreme Court, the legislature enacted Senate

Bill 528. *Held*: Writ dismissed. [1] “[M]andamus is an appropriate remedy in a double or former-jeopardy matter, because a defendant’s ordinary right to appeal after conviction does not vindicate his or her statutory right to be from a second prosecution for the same offense.” [2] Because *Blakely* “requires that the adjudication of sentencing enhancement factors be fully adversarial within the context of a jury trial, the constitutional principles of former and double jeopardy ... should apply equally to a jury determination of a sentencing enhancement factor.” [3] The pending trial on remand does not violate the double-jeopardy bar because it is “a continuation of a single prosecution,” it was defendant who challenged the legality of her original sentences, and she has not been “acquitted” on those factors. [4] Retrial is not barred due to the fact that the indictment did not allege the aggravating facts, because the state was not required to allege those facts in the indictment. “Nothing in *Apprendi* or *Blakely* alters the definition of an ‘offense’ set out in ORS 161.505. In our view, so long as a defendant has timely notice that the state intends to prove certain aggravating or enhancing factors necessary for the imposition of [an upward-departure sentence], and the trial court affords a criminal defendant the opportunity to exercise his or her jury trial right in that regard, the federal constitution is satisfied.”

*State ex rel. Caleb v. Beesley*, 326 Or 83, 949 P2d 724 (1997). Ballot Measure 11 (1994), as amended by the 1995 legislature, does not violate: (1) the one-subject provisions of Art IV, §§ 1(2)(d) and 20; (2) the prohibition against cruel and unusual punishments in Art I, § 16; (3) the separation-of-powers clause of Art III, § 1; or (4) the reformation clause of *former* Art 1, § 15.

*State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145, *cert den*, 522 US 994 (1997): [1] The state was entitled to mandamus relief based on claim that sentencing court erroneously refused to impose Measure 11 sentence and imposed shorter presumptive sentence instead, because ORS 138.222(2)(a) barred the state from obtaining review of that claim on direct appeal. [2] Measure 11 does not violate Art I, §§ 11 (allocution), 15 (reformation), or 20 (equal privileges), or Art III, § 1 (separation of powers), of the Oregon Constitution. [3] Defendant’s claim that Measure 11 violates the Guarantee Clause (US Const, Art IV, § 4) is not reviewable. [4] Measure 11 does not violate the Equal Protection Clause. [5] The sentencing court erred as a matter of law by refusing to impose the minimum sentence mandated by Measure 11.

*Note*: The 1997 Legislative Assembly effectively overruled *Sawyer* on point [1] by amending ORS 138.222 to provide that, in any appeal, the appellate court may review a claim that “[t]he sentencing court erred in failing to impose a minimum sentence that is prescribed by ORS 137.700 or 137.707.” Or Laws 1997, ch 852, § 9.

*Cullop v. Offender Information and Sentence Computation Center*, 226 Or App 167, 203 P3d 276 (2009). The circuit court erred in *sua sponte* dismissing petitioner’s petition for an alternative writ of mandamus on the ground that he had a “plain, speedy, and adequate alternative remedy” by means of an appeal from an order issued by the Board of Parole and Post-Prison Supervision. [1] No other adequate remedy exists. The gravamen of petitioner’s claim is not that the board committed an error, but, rather, that the Department of Corrections, in executing the board’s order, miscalculated the maximum sentence expiration dates for his sentences. In addition, his claim is not cognizable in a *habeas corpus* proceeding under ORS 34.610(2). Thus, mandamus is an appropriate remedy for such a claim. [2] To the extent that the circuit court’s dismissal was based, in part, on its assessment that DOC’s calculation of petitioner’s sentences was correct, it impermissibly did so *sua sponte*, before the return of the writ by defendant. Rather, the statutes permit a circuit court to dismiss *sua sponte* only based on circumstances listed in ORS 34.110 and 34.130 (jurisdiction and service problems).

*Romanov v. P.S.R.B.*, 179 Or App 127, 38 P2d. 965 (2002). Pursuant to a plea agreement, petitioner was found guilty but insane on a charge of first-degree arson, a class A felony, and the court ordered that he be placed within PSRB jurisdiction for 10 years. The board determined under ORS 161.327(1) that its jurisdiction was 20 years. Petitioner sought judicial review. *Held*: Reversed. “Board did not have authority to rewrite the trial court’s order and hold petitioner in its jurisdiction for an additional ten years.”

## 5. Proceedings before the parole board

*See also* Part IX-A(2) (“Murder Convictions—Eligibility for release”) and Part XI (“Parole or Post-Prison Supervision”), *above*.

*Note*: This section includes only cases involving a sentence imposed under the guidelines.

*Weems / Roberts v. Board of Parole*, 347 Or 586, 227 P3d 671 (2010). Petitioners were incarcerated on various drug, assault, and weapons convictions. Although neither petitioner was incarcerated as the result of a sexual offense, both petitioners had been charged with various sexual offenses. One petitioner (Roberts) had been convicted of “sexual

misconduct.” After being released to post-prison supervision, the Board of Parole and Post-Prison Supervision (board) imposed “special conditions” requiring petitioners to participate in sex-offender surveillance and sex-offender treatment as part of their supervision. Both petitioners challenged those conditions. *Held*: In determining what post-prison supervision special conditions are appropriate to impose for a particular offender, ORS 144.102(3)(a) authorizes the board to consider the individual circumstances and nature of the offender, and not just the offender’s current crime or crimes of conviction. The board’s imposition of the sex-offender special conditions was supported by substantial evidence: based on their criminal histories, a reasonable person could conclude that the sex-offender special conditions were necessary to further the public’s safety and each petitioner’s reintegration into the community.

*Norris v. Board of Parole*, 237 Or App 1, 238 P3d 994 (2010), *rev den*, 350 Or 230 (2011). When a term of post-prison supervision is based on ORS 144.103(1), the term that the offender will serve is calculated by subtracting the maximum indeterminate sentence for that conviction from the amount of time he or she was actually incarcerated on the prison sentence imposed on that conviction.

*Delavega v. Board of Parole*, 222 Or App 161, 194 P3d 159 (2008). The board correctly calculated petitioner’s term of post-prison supervision based on ORS 144.103 for his four convictions for attempted first-degree sexual abuse. The term is calculated separately for each conviction subject to the statute, and the terms are to be served concurrently upon his release. Consequently, the longest term of post-prison supervision, and the term he must serve, is based on the conviction for which he received the shortest prison term, not the longest prison term.

*Gaynor v. Board of Parole*, 165 Or App 609, 996 P2d 1020 (2000). Petitioner was convicted of murder, and the court imposed a 15-year sentence pursuant to ORS 163.115(5) (1989) and a 3-year term of post-prison supervision. That judgment was affirmed on appeal; the Court of Appeals declined to review, on the basis of “invited error,” the state’s claim that the court erred by not imposing a lifetime term of post-prison supervision. The court later denied the state’s motion to correct the judgment pursuant to ORS 138.083. Nonetheless, the parole board *sua sponte* set a lifetime term of post-prison supervision on the ground that that term is mandated by the guidelines and it has a statutory duty to comply. *Held*: Reversed and remanded. [1] The board “did not possess the authority to lengthen petitioner’s term of post-prison supervision beyond that ordered by the court.” [2] ORS 137.010 “authorizes only the sentencing court, not the board, to impose the term of post-prison supervision. [3] If there is an error in the sentence imposed, “then only the sentencing court and the appellate courts have the authority to correct it.”

## 6. Other civil actions

<sup>^</sup> *Westfall v. Oregon Department of Corrections*, 247 Or App 384, 271 P3d 116 (2011), *rev allowed*, 352 Or 564 (2012). Plaintiff was convicted of various felony offenses in Jackson County in January 2000, and the court imposed a series of consecutive sentences. Plaintiff escaped from a work crew, and he was convicted of escape in Marion County in July 2001, and the court imposed a consecutive prison sentence. Petitioner then was convicted in Douglas County of various felony offenses in July 2002, and the court imposed more consecutive sentences. Finally, plaintiff was convicted of various felony offenses in Douglas County in September 2002, and the court imposed more consecutive sentences. In 2005, plaintiff obtained post-conviction relief on his Marion County escape conviction, and that sentence was vacated. As a result, DOC employees applied an established policy to readjust all of his various consecutive sentences based on the “consecutive to all previously imposed sentences” clause in the Josephine County judgment, and calculated a new release date. After his release, plaintiff filed a civil action for negligence and false imprisonment contending that his sentences should have been readjusted in a manner that would have resulted in his release 13 months previously. The state moved for summary judgment on the ground that the restructuring of plaintiff’s sentences were actions for which, under ORS 30.265(3)(c), the state is immune from tort liability. The trial court granted the motion. *Held*: Reversed and remanded for trial. [1] ORS 30.265(3)(c) “insulates public bodies from tort liability for acts or decisions that constitute a choice among alternative public policies by persons to whom responsibility for such policies has been delegated, yet the immunity does not come to bear on the merely routine decisions that a public employee makes in the course of everyday governmental activities.” [2] “Although, as the state argues, the adoption of the DOC policy may reflect a choice among competing policy objectives by individuals within the agency to whom the responsibility to make such a choice has been delegated, the DOC employees implementing that policy were *not* delegated similar responsibility; the policy choice had been made for them through the instructions in the DOC policy that required them to make certain decisions when confronted with particular language in a judgment. Put differently, even if the employees’ sentence-restructuring decisions in this case were made in perfect conformity with the DOC sentencing policy, those decisions were not the product of policy choices by the employees.”

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