IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	Jackson County Circuit Court
	)	No. 13CR09373
Plaintiff-Respondent,	)	
Respondent on Review	)	Court of Appeals
	)	No. A158880
vs.	)	
	)	Supreme Court
JASON ALLEN MCFERRIN,	)	No. S065711
	)	
Defendant-Appellant,	)	
Petitioner on Review.	)	

BRIEF OF *AMICI CURIAE*

Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Jackson County, the Hon. Patricia Crain, Judge

Opinion filed: November 29, 2017
Author of opinion: Tookey, Judge
Concurring: Ortega, Presiding Judge; and Landau, Judge Pro Tempore

ERNEST G. LANNET #013248
Chief Defender
ANNE FUJITA MUNSEY #994080
Senior Deputy Public Defender
1175 Court Street N.E.
Salem, OR 97301
Phone: (503) 378-3349
Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
TIMOTHY SYLWESTER #813914
Assistant Attorney General
1162 Court Street N.E.
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

JESSE WM. BARTON #881556
Attorney at Law
P.O. Box 5545
Salem, Oregon 97304
Phone: (503) 391-6283
On behalf of *Amici Curiae* Oregon Justice Resource Center & Pacific Sentencing Initiative, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes & Felony Sentencing Guidelines

Other Authorities

BRIEF OF *AMICI CURIAE*

SUPPLEMENTAL STATEMENT OF THE CASE

Undersigned counsel files this brief on behalf of the Oregon Justice Resource Center, and of Pacific Sentencing Initiative, LLC. As explained in their motion to appear, *amici* are aligned with the interests of defendants Jason Allen McFerrin and Patrick Allen Sparks.

ARGUMENT OF AMICUS CURIAE

In *State v. McFerrin*, 289 Or App 96, 408 P3d 263 (2017), *rev allowed*, 362 Or 794 (2018), on the basis of the defendant's **two** probation violations, the trial court revoked four probationary sentences and ran **three** of the defendant's four 20-month probation-revocation sanctions consecutively. The defense objected. Consistent with the criminal-defense community's understanding of OAR 213-012-0040(2)'s limitations on trial court authority to impose consecutive revocation sanctions, the defense argued that the provision "prescribe[s] [a] one-for-one rule[.]" *McFerrin*, 289 Or App at 100. That is, the defense argued the court could impose only as many consecutive sanctions as

there were violations. Because there were only two violations, the court could impose only two consecutive sanctions.[1]

The Court of Appeals rejected the defense argument. It held OAR 213-012-0040(2) "does not limit the sentencing court to imposing only as many consecutive sentences as there are separate supervision violations[.]" *McFerrin*, 289 Or App at 101. Instead, if there are "multiple supervision violations" (so two or more violations), and if they "are **truly 'separate,'** under [OAR 213-012-0040(2)(b)], the sentencing court may impose consecutive sentences for each term of probationary supervision that is revoked." *Id*. (emphasis added).

In *State v. Sparks*, 289 Or App 642, 412 P3d 1218 (2017), *rev allowed*, 362 Or 794 (2018), the trial court revoked three probationary sentences based on **two** probation violations, and ran all **three** of the defendant's 36-month

---

[1] *State v. Stokes*, 133 Or App 355, 891 P2d 13 (1995) is the basis for the criminal-defense community's understanding of OAR 213-012-0020(2), which provides:

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

probation-revocation sanctions consecutively. Presumably relying on its prior decision in *McFerrin*, the Court of Appeals affirmed without opinion.

This court allowed review to determine decide whether OAR 213-012-0040(2) prescribes the "one-for-one rule" defendants advocate. *Amici curiae*'s motivation for entering this case is to inform the court that:

1. The Court of Appeals' construction of OAR 213-012-0040(2) establishes the provision as a "collective incapacitation" scheme, which will facilitate "mass incarceration."

2. The application of criminomics (a combination of the social science disciplines of criminology and economics) shows that mass incarceration is economically inefficient; therefore, policies that facilitate mass incarceration violate pertinent context in the construction of Felony Sentencing Guidelines provisions: (a) the guidelines' "economy principle," and (b) the state's "evidence-based program" requirements.

3. Analyses of demographic data show that mass incarceration, which the Court of Appeals' construction of OAR 213-012-0040(2) facilitates, disproportionately impacts African American populations. The construction risks increasing Oregon's black-to-Caucasian imprisonment-rate disparity, which would reverse recent years' downward trend in that disparity.[2]

---

[2] *Amici* recognize that mass incarceration also disproportionately impacts other racial and ethnic groups, *e.g.*, Hispanic and Native-American. But by most metrics, mass incarceration's disproportionate impact on African American Oregonians is by far the most shocking. *See, e.g.*, Brief of *Amicus Curiae* at 4 n 5, *State v. Speedis*, 350 Or 424, 432-33, 256 P3d 1061 (2011) (SC No. S058310). For that reason, *amici* focus on mass incarceration's disproportionate impact on African Americans.

A. <u>Mass Incarceration, Generally</u>.

Mass incarceration is a consequence; specifically, it is a consequence of criminal justice system policies and practices. These **policies** predominantly include the application of "**collective** incapacitation" sentencing schemes, as opposed to "**selective** incapacitation" schemes.

"Incapacitation" is perhaps the primary rationale for incarcerating criminal defendants. *See, e.g.*, Arthur W. Campbell, *Law of Sentencing*, § 2:3 (3d ed 2004). The rationale is thought to serve the "protection of society," which in Oregon is a foundational principle "for the punishment of crime[.]" Or Const, Art I, § 15. That principle also is found in the guidelines, whose "primary objectives of sentencing" include "insur[ing] the security of the people." OAR 213-002-0001(1).

The incapacitation rationale is grounded on the theory that "society need not fear offenders who are rendered physically incapable of committing crime." Campbell, *Law of Sentencing*, § 2:3 at 42. "Few prisoners escape; there are few offenses which they can commit inside; and their victims are usually their fellow prisoners or custodians." Nigel Walker, *Sentencing in a Rational Society* 164 (1972), *quoted in* Campbell, § 2:3 at 42. But owing to the "criminogenic effect of prison" (discussed later), in the long run, **extended** incapacitation may be as likely to fail, as it is to achieve, its desired goal of societal protection.

As mentioned, there are two, polar-opposite types of incapacitation: selective and collective. **Selective** incapacitation puts incarceration to "the most efficient use," by "restrict[ing the incapacitation] rationale to justifying imprisonment for only the most dangerous offenders, and recogniz[ing] the need for more accurate presentence studies to diagnose those types." Campbell, § 2:3 at 43. "'Selective incapacitation strategies offer the possibility of achieving greater reductions in crime at considerably smaller costs in prison resources[.]'" Campbell, § 2:3 at 44 n 13 (quoting Jacqueline Cohen, *Incapacitating Criminals: Recent Research Findings*, National Institute of Justice (Dec. 1983)). *See also* Ben Vollaard, *Preventing Crime Through Selective Incapacitation*, 123 The Economic Journal 262 (2013).

For example, consider that an estimated "70 percent of all serious criminal offenses are committed by roughly 7 percent of offenders, a group commonly referred to as career criminals." David W. Neubauer & Henry F. Fradella, *America's Courts & the Criminal Justice System* 223 (11th ed 2014) (citing Matthew G. Vaughn & Matt DeLisi, *Were Wolfgang's Chronic Offenders Psychopaths: On the Convergent Validity Between Psychopathy & Career Criminality*, 36 Journal of Criminal Justice 33-42 (2008) and Matt DeLisi, *Career Criminals in Society* (2005)). Theoretically, a selective-incapacitation system that unerringly targets the 7% could reduce the serious crime rate by 70%. The cost of incapacitating only that 7% would be low, but

its crime-rate reductions would be massive. Such a system would be so efficient that its inventor should be worthy of a Nobel Prize in economics.

Collective incapacitation is the polar opposite of selective incapacitation. It applies indiscriminately, and to far more defendants than does selective incapacitation. It is insouciant to defendants' personal characteristics and the characteristics of their individual crimes. By imposing incarceration sentences indiscriminately, collective-incapacitation schemes lump together those who are unlikely to recidivate with the 7% who offend so frequently they account for 70% of all serious crimes.[3]

"[C]ollective incapacitation policies have only modest impacts on crime but can cause enormous increases in prison populations." Campbell, § 2:3 at 44 n 13 (quoting Cohen, *Incapacitating Criminals*). Such policies are problematic in other ways:

> "[O]ffenders are incapacitated only as long as their confinement lasts. Thus advocates of incapacitating prison sentences must logically endorse extremely long terms at enormous taxpayer expense. This, in turn, exposes another flaw: extended

---

[3] In Oregon, the only **comprehensive** effort to differentiate defendants least likely to recidivate from those most likely to recidivate is made in the prison system, where inmates are subjected to risk-assessment testing. These tests yield Automated Criminal Risk Scores (ACRS). *See* www.oregon.gov/doc/OC/docs/pdf/IB_56_ACRS.pdf (accessed June 18, 2018), But such a score is not used to transform an inmate's sentence into one consistent with what he would have incurred through selective-incapacitation, *i.e.*, by changing the length of his sentence to better reflect his likelihood of recidivating. Instead, the score only is used to determine where to house the inmate, and his program eligibility. *Id*.

> incarceration causes prolonged **harm to prison inmates**,[4] especially non-dangerous ones, as it continues to drain public funds."

Campbell, § 2:3 at 43 (footnote omitted; emphasis added).

Literature from the criminology discipline is sharply critical of collective incapacitation. The theory "cannot provide any standards about how long a sentence should be." Neubauer & Fradella, *America's Courts & the Criminal Justice System* at 374. "[C]ritics argue that the costs of imprisonment typically exceed the benefits gained from preventing certain criminals from recidivating by keeping them incapacitated." *Id*. at 375 (citing Argan A.J. Blockland & Paul Nieubeerta, *Selectively Incapacitating Frequent Offenders: Costs & Benefits of Various Penal Scenarios*, 23 Journal of Quantitative Criminology 327 (2007)). *See also* Avinash Singh Bhati, *Estimating the Number of Crimes Averted by Incapacitation: An Information Theoretic Approach*, 23 Journal of Quantitative Criminology 255 (2007). "Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate **or extremely dangerous offenders**,[5] are an inefficient approach to preventing

---

[4] This "harm to prison inmates" comes from what is called the "criminogenic effect of prison," which is discussed later.

[5] Oregon's dangerous offender law is an example of the state's few selective-incapacitation schemes. This law "specifically target[s] very high-rate of extremely dangerous offenders[.]" *Id*. It does so by requiring an accurate presentence study to determine whether a "defendant is suffering from a severe personality disorder indicating a propensity toward crimes[.]" ORS 161.725(1)(a), (b), and (c).

crime by incapacitation." National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* at 5 (2014) (emphasis added).

As mentioned, *amici*'s motivation for entering this case is to address the fact that the Court of Appeals' construction established OAR 213-012-0040(2) as a mass incarceration-oriented collective-incapacitation scheme, so will contribute to the grave societal problems that mass incarceration produces.

Mass incarceration is part of a social movement that began in the United States in the 1980s, in response to significant but transitory crime-rate increases. Oregon fully joined the movement in 1989, when the legislature replaced its **in**determinate, **rehabilitation**-based parole matrix system with its **de**terminate, **retribution**-based ("just desserts") Felony Sentencing Guidelines.[6] *See Sentencing Guidelines Implementation Manual* 7 (1989). Subsequent to that adoption, the state adopted a series of additional mass-incarceration schemes (most significantly, Ballot Measure 11 (1994) (enrolled as Or Laws 1995, ch 1; codified at ORS 137.700 and ORS 137.707)).

---

[6] "**In**determinate" sentencing schemes allow for parole, whereas "**de**terminate" schemes do not. *See* Campbell, § 4:2, p 105 & § 4:3, pp 110-11. For guidelines era defendants, the only "**in**determinate" sentences are mandatory life sentences under ORS 163.115(5)(a), *see* ORS 163.115(5)(c); Or Laws 1999, ch 782, § 2, and 30-year dangerous offender sentences under ORS 161.725(1). *See* ORS 144.228. But even these sentences come with minimum terms, *see* ORS 163.115(5)(b); ORS 161.737(2), which are **de**terminate. Thus, these statutes provide hybrid, determinate-indeterminate sentences schemes

Paragraph 1 on Appendix 1 (Demographic Calculations) explains that since the guidelines' effective date through January 1, 2018, Oregon's **prison** population grew by 167.0%. Meanwhile, the state's **general** population grew by only 46.6%. App 1, ¶ 2. Therefore, from November 1, 1989 to January 1, 2018, the state's prison population grew at a mass-incarceration rate of **3.58 times faster** than did its general population. *Id*.

On January 1, 2018, the prison population stood at 14,733. App 1, ¶ 1. But if the prison population had grown only as fast as the state's general population, on January 1, 2018, the system would have housed only 8,088 inmates, so 6,645 fewer inmates than the system actually housed on that date. App 1, ¶ 2. It now costs on average $47,377 per year to imprison one inmate. *See* App 9-10 (Per-Inmate Average Annual Cost of Imprisonment). Therefore, if growth in the state's prison population had only matched general population growth, the state now would be saving more than $300 million per year on its prison system. App 1, ¶ 2.[7]

Applying the Court of Appeals' construction of OAR 213-012-0040(2) to a hypothetical demonstrates that, as opposed to the defendants' proposed

---

[7] When Oregon began developing the guidelines, its "prison system was operating at 125% of capacity[.]" Kathleen M. Bogan, *Constructing Felony Sentencing Guidelines in an Already Crowded State: Oregon Breaks New Ground*, 36 Crime & Delinquency 467, 470 (1990). If the 1989 Legislature first had addressed this overcapacity, by increasing the prison population by 25%, and from there had matched general population growth, annual savings still would be more than $200 million. *Id*.

construction, the Court of Appeals' construction sets a collective-incapacitation policy. As such, it is conducive to propagating mass incarceration.

Consider two defendants, each having four probationary sentences revoked, one for committing two "truly separate" probation violations, the other for committing those same two violations, plus two more violations, for a total of four, with the lengths of all individual sanctions for both defendants being equal. "Truly separate" violations are the sole basis for imposing consecutive probation-revocation sanctions. Selective-incapacitation theory holds that the defendant who violated four such conditions is the more recalcitrant of the two, so is the more logical recipient of four consecutive sanctions. Conversely, selective-incapacitation theory holds that the defendant who violated only two such conditions is the least recalcitrant of the two defendants, so is an illogical recipient of four consecutive sanctions.

The defendants' proposed construction would work in this logical, selective-incapacitation manner, by authorizing four consecutive sanctions **only for** the more recalcitrant defendant who committed four violations. This selective incapacitation would minimize OAR 213-012-0040(2)'s propagation of mass incarceration.

Conversely, the Court of Appeals' construction would allow the trial court—with nothing more to go on—to lump the two defendants together and impose four consecutive sanctions **on both** defendants. This is a collective-

incapacitation construction, for it will allows maximal consecutive sanctions for both defendants, insouciant to their individual characteristics. As a collective-incapacitation construction, the Court of Appeals' construction will propagate mass incarceration and its economically inefficient and racially insidious externalities. *Amici* now address those externalities.

B. <u>Criminomics & Mass Incarceration</u>.

As mentioned, cost-benefit analyses demonstrate that the Court of Appeals' mass incarceration-oriented construction of OAR 213-012-0040(2) is economically inefficient. The construction's inefficiency violates applicable context in the construction of Felony Sentencing Guidelines provisions.

1. The Costs of the Court of Appeals' Construction.

The Court of Appeals' construction will carry surprisingly high financial costs. For the companion cases of *McFerrin* and *Sparks* alone, the Court of Appeals' construction will cost the state in excess of $200,000. App 8 (Criminomics Calculations), ¶ 1. The construction's costs will increase dramatically, as trial courts increasingly rely on it to impose consecutive sanctions, and do so in perpetuity.

But the construction's costs will not be limited to the costs of incarceration. The construction also will carry "opportunity costs," *i.e.*, the opportunity to invest in other, more productive state programs and services. *See, e.g.*, App 8, ¶ 2.

Spelman explains the irrationality of mass-incarceration policies, when considered against opportunity costs: "Whether more prisons reduce crime matters less than how much. Crime is not the only problem the American taxpayer is grappling with. * * * It is not enough to have a small effect on the crime problem if that means forgoing a big effect on an equally thorny problem." William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment & Crime*, 27 Crime & Justice 419, 420 (2000). Spelman concludes: "Thus it is no longer sufficient, if it ever was, to demonstrate that prisons are better than nothing. Instead, they must be better than the next-best use of the money." *Id*. *See also United States v. Craig*, 703 F3d 1001, 1003 (7th Cir 2012) (Posner, J., concurring) ("[t]he social [including economic] costs of imprisonment should in principle be compared with the benefits of imprisonment to the society, consisting mainly of deterrence and incapacitation").

Consider that on a micro level, there is no basis to conclude that McFerrin's and Sparks' combined total additional time of up to 56 months in prison will generate any societal-protection benefits whose value approaches, let alone exceeds, the additional costs of the additional months. Conversely, by defendants' proposed selective-incapacitation construction would limit trial court consecutive-sanction authority, thereby decreasing OAR 213-012-0040(2)'s mass-incarceration effect. This decrease would save resources so they

may be put to more productive uses elsewhere, while still authorizing sufficient incarceration to meet public-safety values.

Likewise, and as will be explained, at a macro level there is no basis to conclude that the Court of Appeals' policy will generate societal protection benefits of such significant value to exceed the policy's direct and opportunity costs, as it is used on a statewide basis in perpetuity. Conversely, there is every reason to believe that the policy's costs will greatly exceed the value of its societal-protection benefits. Consequently, the policy violates laws that are context in the construction of guidelines provisions.

2. *The Court of Appeals' Construction Conflicts With Context.*

Pertinent context starts with the Felony Sentencing Guidelines' foundational principles. *See, e.g., State v. Carr*, 319 Or 408, 411-12, 877 P2d 1192 (1994) (context includes other statutes on the same general subject[8]). Appendix 10-11 contains OAR 213-002-0001, whose subsection (3) sets out

---

[8] The 1989 Legislature formally approved the guidelines. *See* Or Laws 1989, ch 790, § 87 (the legislature "approves the sentencing guidelines as developed by the State Sentencing Guidelines Board"). Section 2 of the 2003 Legislature's House Bill (HB) 2174 set out the then-extant guidelines **in their complete text**, and the legislature passed HB 2174. Or Laws 2003, ch 453. This established the then extant-guidelines as a legislative act. If the guidelines did not have that status before, they certainly have it consequent to passage of HB 2174. *Accord State v. Dilts II*, 337 Or 645, 651 n 6, 103 P3d 95 (2004) ("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").

those principles. They are summarized as economy, veracity, vindication, public safety, and consistency.

The first of these—the economy principle, OAR 213-002-0001(3)(a)—is grounded on the policy that "the guidelines must conform corrections practices to available resources." *Implementation Manual* at 6. The principle's origin is Oregon Laws 1987, chapter 619.[9] By that session law, the 1987 Legislature charged the Criminal Justice Council with creating sentencing guidelines for submission to the Sentencing Guidelines Board for consideration and approval.[10] *Implementation Manual* at 1. Chapter 619's Preamble provides in relevant part:

> "[T]he decision to imprison offenders and decisions as to the period of such imprisonment must be made on a systematic basis that will maintain institutional populations **within a level for**

---

[9] Page 1 of the *Implementation Manual* erroneously cites to chapter 619 as a 198**9** session law.

[10] The 1985 Legislature created the Criminal Justice Council, Or Laws 1985, ch 558, § 2, which served as the original agency charged with administering the guidelines. *Former* ORS 137.659(2) (1994), *repealed by* Or Laws 1995, ch 420, § 14. The 1987 Legislature created the Sentencing Guidelines Board. Or Laws 1987, ch 619, § 3. "The State Sentencing Guidelines Board [was] composed of the executive branch representatives included as members of the Oregon Criminal Justice Council." *Implementation Manual* at 3 n 2. *See also Id*. at ii. The 1995 Legislature abolished both the council and the board. Or Laws 1995, ch 420, §§ 1 and 14. In the same act, that legislature created the Criminal Justice Commission and charged it with administering the guidelines. *See, e.g.*, ORS 137.667(1) and (2). Consequent to this change in administering agencies, the guidelines were moved from OAR chapter 253 to OAR chapter 213.

> **which the Legislative Assembly and the people of the state are prepared to provide**, while, at the same time allowing for the judicial discretion necessary for appropriate sentencing in individual cases[.]"

(Emphasis added.)

OAR 213-002-0001(1) essentially reiterates the session law's Preamble: "The primary objectives of sentencing are to punish each offender appropriately, and to insure the security of the people in person and property, **within the limits of correctional resources** provided by the Legislative Assembly, local governments and the people." (Emphasis added.) Similarly, the relevant part of OAR 213-002-0001(3)(a) states: "The response of the corrections system to crime * * * **must reflect the resources available for that response**." (Emphasis added.)

Moreover, the legislature intended regular modifications of the guidelines as a means of controlling the prison system's population. The legislature directed the Sentencing Guidelines Board to meet on a "quarterly" basis to address "the effect of the guidelines on state and local correctional resources." *Former* ORS 137.665(2) (1994), *repealed by* Or Laws 1995, ch 420, § 14. Further, the legislature decreed that if the board determined "the projected prison population will exceed or underutilize the effective capacity of state correctional resources, the board shall adopt by rule modifications to assure that

[the] prison population is consistent the capacity." *Former* ORS 137.665(3) (1994), *repealed by* Or Laws 1995, ch 420, § 14.[11]

This policy of linking felony sentences to prison capacity arose from the fact that "[b]etween 1977 and 1987, Oregon's prison population more than doubled, with no proportionate increase in institutional capacity. Thus, prison overcrowding reached critical proportions." Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 UC Davis L Rev 695, 697 (1992). As noted, when Oregon began development of the guidelines, its "prison system was operating at 125% of capacity[.]" Bogan, 36 Crime & Delinquency at 470. This contributed to the parole board's creation of "early release programs," which "gave the state corrections system the image of being a 'revolving door.'" Kirkpatrick, 25 UC Davis L Rev at 697.

Under *former* ORS 137.665(3) (1994), the guidelines board could determine the impacts of new legislation and judicial decisions that unexpectedly expanded trial court sentencing authority, thereby increasing the prison system's population. To accommodate those population increases, the guidelines board could adopt "rule modifications to assure that prison population [remains] consistent the capacity." *Former* ORS 137.665(3) (1994).

---

[11] The 1995 Legislature's repeal of the guidelines board's authority to "adopt by rule modifications to assure that [the] prison population is consistent the capacity" was total, in that the legislature did not transfer that authority to the Criminal Justice Commission.

But the guidelines board never exercised that particular authority.[12] For that matter, no one else **ever** has taken successful steps to modify the guidelines to accommodate increases in the prison system's population wrought by new legislation and judicial decisions. Instead, the consistent response has been obedience to mass incarceration, by funding expansions of the prison system.

On the other hand, during the early days of the guideline's era, various Court of Appeals decisions, effectively treating the economy principle as context, construed the pertinent provisions in the defendants' favor. The court did so, for those constructions "conform[ed] corrections practices to available resources." *Implementation Manual* at 6.

These cases started with *State v. Davis*, 113 Or App 118, 830 P2d 620 (1992), *aff'd*, 315 Or 484, 847 P2d 834 (1993). It construed *former* OAR 253-12-020, *renumbered as* OAR 213-012-0020, which limited the length of consecutive-sentence "strings." Recognizing that the provision "comports with

---

[12] *State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993)—which fairly recently, this court nearly overruled, *see State v. Cuevas*, 358 Or 147, 361 P3d 581 (2015) (Walters, J., dissenting)—is an excellent example of judicial decisions that unexpectedly enlarged the prison population. *Bucholz* construed the guidelines' criminal-history scoring scheme to authorize trial courts, during a single sentencing hearings, to reconstitute ("ratchet up") defendants' criminal-history scores. In doing so, the *Bucholz* court rejected "Advisory # 3," issued by Criminal Justice Council staff, which said criminal-history reconstitution was prohibited. *See* 317 Or at 318-19. Under *former* ORS 137.665(3) (1994), the guidelines board could have "overturned" *Bucholz* by modifying the criminal-history scheme to reiterate the staff advisory. But the board declined to take such action.

the policy underlying the guidelines to allocate punishment 'within the limits of correctional resources,'" the court construed the provision favorably to the defendant. *Davis*, 113 Or App at 121 (quoting *former* OAR 253-02-001(1), *renumbered as* OAR 213-002-0001(1) and citing *former* OAR 253-02-001(3)(a), *renumbered as* OAR 213-002-0001(3)(a)).[13]

Subsequent cases consistent with *Davis* include *State v. Johnson*, 125 Or App 655, 866 P2d 1245 (1994). The *Johnson* court construed the same guidelines provision that was at issue in *Davis*, and, as in *Davis*, did so favorably to the defendant. The court explained that it "endeavors[s] to" construe the guidelines "within a framework that attempts to meet the objective of punishing offenders appropriately, while recognizing the **limited correctional resources** provided by the legislature." *Johnson*, 125 Or App at 659 (emphasis added; citing *Davis*). *See also State v. Haydon*, 116 Or App 347, 354-55, 842 P2d 410 (1992) (construing guidelines provision in manner favorably to defendant; citing *Davis*); and *State v. Seals*, 113 Or App 700, 704, 833 P2d 1344 (1992) (same).

Like the provision at issue in *Davis*, OAR 213-012-0040(2) limits consecutive "strings," so it too "comports with the **policy** underlying the guidelines to allocate punishment within the limits of correctional resources[.]"

---

[13] Consequent to the 1995 replacement of the Criminal Justice Council with the Criminal Justice Commission, and to the Secretary of State's 1997 (or thereabouts) decision to add additional zeroes to OAR enumerations, the rules at issue in *Davis* were renumbered.

Davis, 113 Or App at 121 (emphasis added; internal quotations omitted). Complying with that "policy"—the economy principle—demands a selective-incapacitation construction, because that construction maximizes the provision's limitations on the lengths of consecutive "strings." But the Court of Appeals' construction established OAR 213-012-0040(2) as a collective-incapacitation scheme, which instead maximizes the lengths of consecutive "strings." Thus, the court construed the provision in the way **least** likely "to allocate punishment within the limits of correctional resources[.]" The construction violates the economy principle.

The 2003 Legislature's adoption of the state's evidence-based program requirements, Or Laws 2003, ch 669, amplifies the economy principle. Those requirements are codified as ORS 182.515 and ORS 182.525. They apply to four state agencies, including the Department of Corrections (DOC). *See* ORS 182.515(1)(a). The requirements mandate that each agency "spend at least 75 percent of state moneys that the agency receives for programs on evidence-based programs." ORS 182.525(1).

"Evidence-based programs" are those that are "cost-effective"—*i.e.*, their "cost savings realized over a reasonable period of time are greater than [their] costs." ORS 182.515(2). Moreover, an evidence-based "program" is one that, through "scientifically based research," ORS 182.515(3)(a), has been proven to "[r]educe the propensity of a person to commit crimes[.]" ORS

182.515(3)(a)(A). Thus, "cost savings realized over a reasonable period of time," ORS 182.515(2), are achieved by "[r]educ[ing] the propensity of a person to commit crimes[.]" ORS 182.515(3)(a)(A).

The DOC's appropriations bill for the 2017-19 biennium, HB 5004 (enrolled as Or Laws 2017, ch 556, §§ 1-2), shows that the state prison system is the DOC's single biggest program. One of imprisonment's foundational principles "for the punishment of crime" is "reformation" (also called "rehabilitation"). Or Const, Art I, § 15. Reformation "is designed to eliminate or substantially reduce [a defendant's] criminal propensities." Campbell, *Law of Sentencing*, § 2:4 at 44. That is, reformation is intended to "[r]educe the propensity of a person to commit crimes." ORS 182.515(4)(a)(A). Therefore, imprisonment is a "program" under ORS 182.515(4)(a)'s definition of the term.

But the Court of Appeals' mass incarceration-oriented sentencing policy has no grounding in "scientifically based research," as is required for evidence-based programs. Owing to the "criminogenic effect of prison" (explained later), the Court of Appeals' sentencing policy will force the DOC to house defendants for lengthy terms that could be as likely to **increase,** as to decrease, their "propensity * * * to commit crimes[.]" ORS 182.515(4)(a)(A). The Court of Appeals' sentencing policy therefore would force the DOC to administer sentences in violation of its evidence-based program requirements.

In sum, the Court of Appeals' construction of OAR 213-012-0040(2) violates the guidelines' economy principle and the state's evidence-based program requirements—policies that are context in the construction of guidelines provisions. Conversely, defendants' proposed construction, consistent with the *Davis* line of cases, comports with those contextual policies. This court should adopt defendants' proposed alternative.

3. Other Foundations, Policies & Principles of Sentencing Change Nothing.

Amici recognize that the economy principle and the evidence-based program requirements are not the sole foundations, policies, and principles of sentencing. For example, Article I, section 15, of the Oregon Constitution fully states:

> "Laws for the punishment of crime shall be founded on these principles: **protection of society, personal responsibility, accountability for one's actions** and reformation."

(Emphasis added.)

The guidelines' other four principles—veracity, vindication, public safety, and consistency, *see* OAR 213-012-0040(3)(b) to (e)—are mostly consistent with Article I, section 15's foundational principles.[14] Moreover, these other four principles are intended to meet two of the "primary objectives of sentencing"—"to punish each offender appropriately, **and** to insure the security of the people[.]" OAR 213-002-0001(1) (emphasis added). But for the

[14] These principles are only **mostly** consistent, because, in conflict with section 15, they exclude reformation as a principle of punishment.

following reasons, these other foundations, policies, and principles should have no bearing on the construction of OAR 213-012-0040(2).

OAR 213-002-0001(3)(b)'s veracity principle, or "truth in sentencing," *see Implementation Manual* at 7, is a response to a "public backlash against both the Parole Board and its matrix as defendants sentenced to prison soon reappeared in the community after serving only a fraction of their prison sentences." Kirkpatrick, 25 UC Davis L Rev at 697. The veracity principle establishes that with the two exceptions previously noted, guidelines era sentences are **de**terminate, so disallow parole. This principle can meet the "personal responsibility" and "accountability" foundational principles. Or Const, Art I, § 15. It also can meet the "primary objective[] of sentencing," "to punish each offender appropriately[.]" OAR 213-002-0001(1).

But the veracity principle also can conflict with those foundational principles and the sentencing objective, and it cause violations of Article I, section 15's reformation requirement. Owing to these potential conflicts and violations, the veracity principle should not guide the construction of OAR 213-012-0040(2).

Consider, for example, defendant Sparks. He incurred a 108-month total consecutive sentence. Under his constructional theory, the court was limited to imposing a 72-month total. Assume that by not later than the time Sparks completes the first 72 months, he is truly reformed. In that case, making him

serve the remaining 36 months would violate at least the spirit of section 15's reformation principle. *See Tuel v. Gladden*, 234 Or 1, 6, 379 P2d 553 (1963) ("an implied essential corollary of reformation [is] that permanent reformation should be followed by release from confinement"). Moreover, making him serve the remaining 36 months would advance none of section 15's other principles, nor the objective of "punish[ing] each offender appropriately[.]" OAR 213-002-0001(1). But owing to guidelines' sentences determinate character, they would require a truly reformed defendant Sparks to pointlessly serve the remaining 36 months.

Next, OAR 213-002-0001(3)(c)'s vindication principle parallels the guidelines' retribution policy, *i.e.*, its "just desserts" policy. *See Implementation Manual* at 7. Presumably, this principle too is intended to meet the "primary objective[] of sentencing," "to punish each offender appropriately[.]" OAR 213-002-0001(1).

But when the 1989 Legislature approved the guidelines, Article I, section 15 stated in relevant part: "Laws for the punishment of crime shall be founded on the principles of reformation, **and not of vindictive justice**." (Emphasis added.) About seven years later, the voters approved Ballot Measure 26 (1996), which came by way of legislative referral. SJR 32 (1995). The measure amended section 15 to read as previously set out in full (above). The history of the 1996 amendment shows that it was intended to **retain the prohibition** on

vindictive justice. *See, e.g.*, Official Voters' Pamphlet, General Election, Nov 5, 1996, 6-7 (statements of measure's originator, Crime Victims United). *See also Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 871 P2d 106 (1994). So at its root, the "vindication" principle would seem to conflict with section 15's implied prohibition on vindictive punishment.[15]

OAR 213-002-0001(3)(d)'s public safety principle is intended to meet the foundational principle "protection of society," Or Const, Art I, § 15, and the objective of "insur[ing] the security of the people[.]" OAR 213-002-0001(1). But as explained, guidelines era defendants who are truly reformed mid-sentence must pointlessly complete their determinate sentences. That does not serve public safety. Indeed, under the "criminogenic effect of prison" (explained later), requiring truly reformed defendants to pointlessly complete lengthy sentences can prove **detrimental** to public safety.

---

[15] *Ecumenical Ministries* states: "In considering the history of a constitutional provision," "this court examines * * * arguments for and against the measure included in the voters' pamphlet." 318 Or at 559 n 8. The original version of section 15 characterized vindictive punishment and reformation as diametrically opposed. The fact that the 1996 amendment expressly retained the reformation requirement suggests that, and at least creates ambiguity as to whether, the voters intended to retain the prohibition on vindictive punishment. The statements from members of Crime Victims United, which organization principally supported the measure, are relevant to settling the matter and support the conclusion that the voters intended to retain the prohibition. *E.g.*, Official Voters' Pamphlet, Nov 5, 1996, at 7 (Crime Victims United's Statement in Favor, quoting Representative Naito explaining that after the amendment, the criminal-justice system still "should not be vindictive. It should not be mean-spirited."). At minimum the statements establish that the voters did not intend to impose vindictive justice as a principle of punishment.

Finally, there is OAR 213-002-0001(3)(e)'s consistency principle. It too is intended to meet the foundational principle of "personal responsibility" and "accountability," Or Const, Art I, § 15, and the objective of "punish[ing] each offender appropriately[.]" OAR 213-002-0001(1). In theory, through application of the guidelines' crime-seriousness ranking and criminal-history scoring schemes, on a statewide basis, defendants with like criminal records convicted of like crimes would incur like sentences. But under the Court of Appeals' construction of OAR 213-012-0040(2), trial courts will have unfettered discretion in imposing however many sanctions are available on a consecutive basis, so long as defendants committed at least two "truly separate" conditions of probation.

For example, consider a hypothetical defendant who, like defendant McFerrin, had four probationary sentences revoked and faced 20-month sanctions on each revocation. But further assume the two defendants' circumstances differ only in terms of their probationary records: defendant McFerrin committed **two** probation violations, whereas the hypothetical defendant committed **four or more** violations. Unlike the defendants' construction of OAR 213-012-0040(2), the Court of Appeals' construction—insouciant to the distinctions between the two defendants—would authorize the trial court to impose the exact same number of consecutive sanctions, up to and including four, on each defendant. For that matter, it would authorize the court

to give the hypothetical defendant **fewer** consecutive sanctions than McFerrin. Thus, the consistency principle actually militates **against** the Court of Appeals' construction, for the construction sets the stage for violations of the guidelines' consistency principle.

In sum, none of these other foundations, policies, and principles of sentencing should bear on the construction of OAR 213-012-0040(2).

4. *Criminomics Supports Application of the Economy Principle & Evidence-Based Program Requirements.*

Criminomics analyses show that for some time, the state's various mass incarceration-oriented, collective-incapacitation schemes have failed to secure the "protection of society," Or Const, Art I, § 15, by "insur[ing] the security of the people in person and property[.]" OAR 213-002-0001(1). Moreover, the analyses confirm that the Court of Appeals' mass collective-incapacitation construction of OAR 213-012-0040(2) conflicts with the guidelines' economy principle and the state's evidence-based program requirements.

Consider Appendix 13 (Incarceration and Crime Rate Changes 1995-2010)—a reproduction of the bar graph found on page 7 of *Commission on Public Safety: Report to the Governor* (Dec. 30, 2011).[16] The graph shows that from 1995 to 2010, Oregon increased its imprisonment rate by nearly 80%, thus confirming Oregon as a mass-incarceration state. Meanwhile, New York **cut** its

16 https://www.oregon.gov/cjc/justicereinvestment/Documents/CPS_report_to_Governor_12_30_11.pdf (accessed June 19, 2018).

imprisonment rate by just over 20%, and California increased its rate by about 5%.

Most significantly, the graph also shows that over the 15-year period, and despite their widely varying changes in prison populations, all three states enjoyed about 50% **decreases** in their violent and property crime rates. The graph thus demonstrates a lack of correlation between imprisonment rates and crime rates. The lack of correlation indicates the crime-rate reductions represent nothing more than regressions to the mean. The graph serves to rebut claims that Oregon's mass-incarceration policies produced the crime-rate reductions, and undermines the merit—and even the rationality—of mass-incarceration policies.

Furthermore, recognize that by beginning date of the graph, January 1, 1995, the state's prison population was 127.9% of what it was on the guidelines' November 1, 1989 effective date. App 1, ¶ 1. That marked a 5.4% annual growth rate over that 62-month period—a rate more than three times faster than the state's 1.7% annual average general population growth rate from the guidelines effective date, to July 1, 2017. App 1, ¶ 2. Criminomic analyses explain why Oregon's continued obedience to mass incarceration, from 1995 on, was not correlated to the state's crime-rate reductions (and may even have restricted those reductions).

For example, in his meta-analysis Roodman determined that "even though the 59% per-capita rise in incarceration between 1990 and 2010 accompanied a 42% drop in FBI-tracked 'index crimes,' researchers agree that putting more people behind bars added modestly, at most, to the fall in crime[.]" David Roodman, *The Impacts of Incarceration on Crime* at 5, Open Philanthropy Project, Sept 2017.[17] He continues:

> "[T]he question of the net impact of incarceration on crime must be brought to the data. Having reviewed and revisited published analyses in unprecedented depth, my best estimate is **that the best estimate of the impact of additional incarceration on crime in the United States today is zero. And, while that estimate is not certain, there is <u>as much reason overall to believe that incarceration increases crime as decreases it</u>**."

Id. at 7 (boldface in original; underscore added).

Finally, Roodman asserts, "Incapacitation looks lower at margins where incarceration is higher, which suggests **diminishing returns** to incarceration." Roodman, *The Impacts of Incarceration on Crime* at 77 (emphasis added).

Similarly, "[a] 2014 report from the Brookings Institution's Hamilton Project explained that incarceration has 'diminishing marginal returns.' In other words, incarceration becomes less effective the more it is used." Dr. Oliver Roeder, *et al.*, *What Caused the Crime Decline*? at 7, Brennan Center for

---

[17] https://blog.givewell.org/wp-content/uploads/2017/09/The-impacts-of-incarceration-on-crime-10.pdf (accessed June 19, 2018).

Justice (2015)[18] (footnote omitted; quoting Steven Raphael & Michael Stoll, *A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime* 9, The Hamilton Project (2004)).[19]

In fact, the use of collective-incapacitation policies to impose lengthy sentences to achieve mass incarceration seems as likely to fail as it is to succeed in reducing crime rates. Roeder, *et al.* explain:

> "In 2006, sociologist Bruce Western examined how incarceration influenced crime through rehabilitation, incapacitation, and deterrence. Using data through 2000, Western estimated that about 10 percent of the 1990s crime drop could be attributed to increased incarceration. To isolate the effects of incarceration, he controlled for other variables, including: spending on police, various indicators of unemployment, income inequality, racial demographics, sentencing guidelines and practices, and political parties in power. Western also made adjustments for the effect of prison on crime, which includes how prison can actually increase crime (i.e. upon release from prison, research shows, many individuals become more likely to commit more crime). (This effect is often referred to as the **"criminogenic" effect of prison**. The phenomenon of two variables that simultaneously affect one another is called a 'simultaneity effect' in economic analysis. * * *)"

What Caused the Crime Decline? at 20 (footnotes omitted; emphasis added).

> "This [criminogenic] effect is particularly powerful on low-level offenders. Once an individual enters prison, they are surrounded by other prisoners who have often committed more serious and violent offenses. Upon release, they often have trouble finding

---

[18] www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf (accessed June 19, 2018).

[19] http://brook.gs/1E6xzGl (accessed June 19, 2018).

> employment and reintegrating into society due to both legal barriers and social stigma."

Id. at 25 (footnotes omitted).

As seen, the expansion of prison populations, through application of collective-incapacitation schemes, initially does reduce crime rates. This is because initially, the schemes incapacitate a some number of the 7% who commit 70% of serious crimes. But before too long the schemes run their course in terms of incapacitating the 7%, leaving them to incapacitate instead the 93% who are far less dangerous so far less worthy of extended imprisonment. But owing to the collective-incapacitation schemes' insouciance to the distinctions between the 7% and the 93%, the 93% incur the same extended prison terms as do the 7%.

Thus, continual prison expansion yields diminishing returns until eventually, the expansion yields little or no—or even is detrimental to—the "protection of society[.]" Or Const, Art I, § 15. This is particularly true of **collective**-incapacitation policies, such as the one the Court of Appeals created through its construction of OAR 213-012-0040(2). This is because, in their insouciant way, those policies imprison low-level offenders as though they are no different from career criminals.

The other penological theory primarily driving mass incarceration is the "deterrence rationale," which "is utilized in either of two forms: general or special." Campbell, *Law of Sentencing*, § 2:2 at 38. "General deterrence

justifies sentences in the name of discouraging the general public from recourse to crime." *Id*. "Special deterrence defends criminal penalties as a way to dissuade individual offenders from repeating the same or other criminal acts." *Id*. at 39.

But in whatever form, the deterrence rationale's validity is as subject to criticism as is the incapacitation rationale. Campbell explains, "Although there abides a visceral public commitment to the notion that criminal sanctions deter criminal activity, supporting evidence remains inconclusive." *Id*. at 41 (footnote omitted). Neubauer and Fradella concur, "[B]ecause deterrence rests on the assumption of rational calculating behavior, and this precondition is absent in many crimes * * * , many observers question whether court sentences—particularly severe ones—do indeed deter." *America's Courts & the Criminal Justice System* at 373.

In turn, Roodman states: "We are left with little convincing evidence that at today's margins in the US, increasing the frequency or length of sentences deters aggregate crime." Roodman, *The Impacts of Incarceration on Crime* at 48.

Roeder, *et al*. agree:

> "Empirical studies have shown that longer sentences have minimal or no benefit on whether offenders or potential offenders commit crimes. The National Academy of Sciences (NAS) concluded that insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects. NAS pointed out that all leading surveys of the

> deterrence research have reached the same conclusion: that potential offenders may not accurately perceive, and may vastly underestimate, those risks and punishments associated with committing a crime."

Roeder, *et al., What Caused the Crime Decline*? at 26 (internal quotations and footnote omitted).

In sum, criminomics analyses confirm that the Court of Appeals' construction of OAR 213-012-0040(2) conflicts with the guidelines' economy principle and the state's evidence-based program requirements. Moreover, the analyses show that for some time, the state's various mass incarceration-oriented, collective-incapacitation schemes have failed to secure the "protection of society," Or Const, Art I, § 15, by "insure[ing] the security of the people in person and property[.]" OAR 213-002-0001(1). But as a selective-incapacitation construct, defendants' proposed construction complies with all foundations, purposes, and principles of sentencing, so is the preferred alternative.

5. *Conclusion.*

Even when accounting for (i) Oregon's "objectives of sentencing" "to punish each offender appropriately, and to insure the security of the people"; (ii) the guidelines' veracity, vindication, public safety, and consistency principles; and (iii) the incapacitation and deterrence rationales, the crime-control value (if any) of the Court of Appeals' collective incapacitation-based construction of OAR 213-012-0040(2) will not outweigh the policy's costs.

Consequently, the construction will propagate violations of the guidelines' economy principle and the DOC's evidence-based program requirements.

Conversely, defendants' construction of OAR 213-012-0040(2) reflects selective-incapacitation principles. It stands a far greater chance of complying with the economy principle, and of ensuring DOC compliance with its evidence-based program requirements, while still meeting the other "primary objectives of sentencing" and guidelines principles. Consistent with the Court of Appeals' decisions from early days of the guidelines era—the *Davis* lines of cases—this court should reject the Court of Appeals' construction in favor of defendants' proposed construction.

C. <u>Racial Disparities & Mass Incarceration</u>.

The second problem with the Court of Appeals' mass incarceration-oriented policy, embedded in its collective incapacitation-based construction of OAR 213-012-0040(2), is that demographic analyses show that mass incarceration policies impact African Americans at orders of magnitude greater than they impact Caucasians. These demographic analyses support Prof. Alexander's frightening observation:

> "[W]hile it is generally believed that the backlash against the Civil Rights Movement is defined primarily by the rollback of affirmative action and the undermining of federal civil rights legislation by a hostile judiciary, the seeds of the new system of control—mass incarceration—were planted during the Civil Rights Movement itself, when it became clear that the old caste system was crumbling and a new one would have to take its place."

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindedness* 22 (2010).

The *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, & Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System*, Mar 2018 explains, on a national basis, that mass incarceration-oriented policies' impact African Americans at orders of magnitude greater than they impact on Caucasians[20]:

> "The United States criminal justice system is the largest in the world. At year end 2015, over 6.7 million individuals were under some form of correctional control in the United States, including 2.2 million incarcerated in federal, state, or local prisons and jails. The U.S. is a world leader in its rate of incarceration, dwarfing the rate of nearly every other nation.
>
> "Such broad statistics mask the racial disparity that pervades the U.S. criminal justice system, and for African Americans in particular. African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. **African American adults are 5.9 times as likely to be incarcerated than whites**[.]"

Id. at 1 (emphasis added).

The Report continues:

> "By creating and perpetuating policies that allow such racial disparities to exist in its criminal justice system, **the United States is in violation of its obligations under Article 2 and Article 26**

[20] www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf (accessed June 12, 2018).

> **of the International Covenant on Civil and Political Rights**[21] to ensure that all its residents—regardless of race—are treated equally under the law."

Id. at 2 (emphasis added).

It would be comforting if the foundation of The Sentencing Project's *Report to the Special Rapporteur* did not exist in Oregon. But statewide and local demographic analyses show that to the extent the nation's criminal justice system violates the covenant, Oregon is an accomplice. For that reason, Articles 2 and 26 of the covenant should be treated as context in passing on the Court of Appeals' construction of OAR 213-012-0040(2).

But the covenant's articles should not stand alone as context. In 2013 (on its fourth try), the legislature adopted racial/ethnic-impact statement legislation. SB 463 (enrolled as Or Laws 2013, ch 600). As relevant to defendants' case, the law stated:

> "Upon receipt of [a bipartisan] written request, the Oregon Criminal Justice Commission shall prepare a racial and ethnic impact statement that describes the effects of proposed legislation on the racial and ethnic composition of:
>
> > "(a) The criminal offender population[.]"

Or Laws 2013, ch 600, § 1(2).

The bill's co-sponsor on the House side, state Rep. Joseph Gallegos, explained the bill's intent:

---

[21] Appendix 18 provides both the texts of Article 2, paragraph 1 and Article 26 of the International Covenant on Civil and Political Rights, and historical information about the covenant.

> "[T]here is a need for tools at the legislative level to ensure that legislators can predict the impact legislation will have on minorities before a bill is passed.
>
> "I urge you to support the use of Racial Impact Statements as another tool to begin to reduce those disparities in agency systems."

Testimony, Senate Committee on Judiciary, SB 463, Mar 14, 2018 (statement of Rep Joseph Gallegos).[22]

Key provisions of SB 463 were scheduled to "sunset" on January 2, 2018. Or Laws 2013, ch 600, § 10. The 2017 Legislature made the law permanent, and made certain amendments to the law. HB 2238 (Or Laws 2017, ch 614). It now is primarily codified as ORS 137.683 and ORS 137.685.

Thus, ORS 137.683 and ORS 137.685 establish that during legislative deliberations over proposed criminal justice system policies, racial/ethnic-impact statements should be prepared to "predict the impact [the] legislation will have on minorities before a bill is passed," as a means of "reduc[ing racial/ethnic impact] disparities in agency systems." Testimony, Mar 14, 2018 (statement of Rep Joseph Gallegos)." This expressly stated policy should serve as context in the construction of such criminal justice policies as sentencing laws, for unquestionably, those laws affect "[t]he criminal offender population." ORS 137.683(2)(b).

---

[22] https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/8191 (accessed June 26, 2018).

In analyzing racial disparities in Oregon's "criminal offender population," the best starting point is an Urban Institute report addressing probation revocations in Multnomah County. That report is best, because (i) defendants' case is all about probation revocations, and (ii) the majority (51.4%) of African American Oregonians lives in Multnomah County. *See* App 3, ¶ 6.

The Urban Institute conducted a "multisite study of racial and ethnic disparities in probation revocations. * * * [It found] evidence of disparity between white and black probationers, which persist after controlling for available legal and demographic factors." *Responding to Racial Disparities in Multnomah County's Probation Revocation Outcomes* at 1, Urban Institute, Apr 2014.[23] The study found that "3.9 percent of black probationers were revoked, a rate that was over twice as high as white (1.6 percent) * * * probationers." *Id*. at 2. These percentages reflect a black-to-Caucasian probation revocation-rate disparity of 143.8%. App 4, ¶ 6.

Data provided in Appendix 14-17 (Data Request Briefing) tend to reflect this disparity on a statewide basis. Table 1's "Prison" column, under "Corrected Race," includes probation-revocation data from all 36 counties. The data show

---

[23] www.urban.org/sites/default/files/publication/33836/413175-Responding-to-Racial-Disparities-in-the-Multnomah-Countys-Probation-Revocation-Outcomes.PDF (accessed June 13, 2018).

that African Americans were revoked and sent to prison at a rate 1.82 times more often than Caucasians. App 3, ¶ 7.[24]

The probation-revocation disparities—the 143.8% disparity in particular—support Prof. Alexander's frightening observation. Furthermore, the disparities are too large to be attributed to "happenstance." *See Miller-El v. Cockrell*, 537 US 322, 342, 123 S Ct 1029, 154 L Ed 2d 931 (2003) (where prosecution used **71%** of its peremptory strikes to dismiss African Americans from jury, "[h]appenstance [was] unlikely to produce this disparity").

Instead, the disparities should be attributed to bias. This is because the "disparities in revocation rates persisted between black and white probationers after controlling for other variables in the logistic regression model." Urban Institute at 4. The study explains:

> "The statistically significant relationship between race and revocation suggests that bias could have contributed to the disparity, **likely from multiple decision points**. Discretion is present at every decision point in the criminal justice system: Where do officers patrol? Who do officers provide a verbal warning versus an arrest? Which arrests result in charges filed? On which cases do district attorneys seek more stringent probation conditions? Which offenders do probation officers seek to bring

---

[24] This disparity rate becomes more significant in consideration of the fact that African Americans are more likely to be sentenced to prison than to probation, whereas Caucasians are more likely to be sentenced to probation than to prison (an inverse correlation to the black-to-Caucasian imprisonment disparity, discussed below). For example, in January 2018, 56.3% of all African Americans who were in prison or on probation were **in prison**, whereas 55.4% of all Caucasians who were in prison or on probation were **on probation**. App 3, ¶ 7.

> before a judge versus those to whom they offer a second chance? Which cases do judges choose to revoke?"

Id. at 5 (emphasis added).

But these probation-revocation disparities are modest compared to **imprisonment** disparities—which disparities most emphatically support Prof. Alexander's frightening observation.

Of Oregon's 14,733 prison inmates as of January 2018, 1,318 were African American. App 2, ¶ 3. Also as of January 2018, Oregon's total population included an estimated 91,688 African Americans. *Id*. So as of January 1, 2018, 1.44% of the state's African American population was living in prison. *Id*.

Of Oregon's 14,733 prison inmates as of January 2018, 10,966 were Caucasian. App 2, ¶ 4. Also as of January 2018, approximately 3,630,088 Oregonians were Caucasian. *Id*. So as of January 1, 2018, 0.03% of the state's Caucasian population was living in prison. *Id*.

Comparing these African American and Caucasian imprisonment rates shows that as of January 1, 2018, African American Oregonians were **4.8 times** more likely to be prison inmates than were Caucasian Oregonians.[25] *Id*. Put

---

[25] Visually consider 10,000 African American and Caucasian Oregonians randomly selected from both inside and outside prison walls, taken to Autzen stadium where they are racially segregated in the two ends zones and told to stand, and then everyone taken from outside prison walls is told to sit. That would leave 144 African Americans standing, as opposed to 30 Caucasians.

another way, African American Oregonians were **380%** more likely to be imprisoned than were Caucasians. *Id*. This is yet another disparity so large it must be attributed to something other than "happenstance," *Miller-El*, 537 US at 342, with that something other being bias.

Oregon's imprisonment rate for African Americans, of 4.8 times greater than the rate for Caucasians, is less than The Sentencing Project's report that nationally, "African American adults are 5.9 times as likely to be **incarcerated** than whites[.]" *Report to the Special Rapporteur* at 1 (emphasis added). But the term "incarcerated" includes both state prison and county jail inmates (and also city jail inmates, to the extent such jails still exist).

Including statewide **jail** inmate data could increase Oregon's black-to-Caucasian disparity. Although statewide demographics of Oregon's jail inmates are not readily available, demographic data for Multnomah County are. The data are derived from a "snapshot for June 30, 2014, [of] the rate of adults in jail per 1,000 adults in the Multnomah County population[.]" *Racial and Ethnic Disparities and the Relative Rate Index (RRI): Summary of Data in Multnomah County*, Safety & Justice Challenge.[26] The report's summary explains:

> "• For every 1,000 White adults in Multnomah County, there are 1.5 White adults in jail.

---

26 http://media.oregonlive.com/portland_impact/other/RRI%20Report%20Final-1.pdf (accessed June 12, 2018).

> "• For every 1,000 Black adults in Multnomah County, there are 9.2 Black adults in jail."

Id. at 3.

Thus, at the time of the Multnomah County jail "snapshot," African Americans were 6.13 times as likely to be incarcerated as Caucasians, reflecting a 513% disparity. App 2, ¶ 5. That disparity is worse than the nationwide **incarceration** disparity provided in The Sentencing Project's *Report to the Special Rapporteur*, and is 35% worse than the state's **imprisonment** disparity. App 2, ¶ 5. The majority of African American Oregonians living in Multnomah County, and its county jail population reflecting a black-to-Caucasian incarceration disparity 35% worse than the state prison system's disparity, suggests that adding jail inmate data to the state's prison inmate data could increase Oregon's black-to-Caucasian **incarceration** disparity to something greater than the state's 380% **imprisonment** disparity.

Various studies explain that these sorts of disparities—measured in orders of magnitude—are products of the combined effects of criminal justice system **policies** and **practices**. These are discussed below, in turn.

1. *Criminal Justice System Policies & Racial Disparities.*

Criminal justice system policies, in the form of sentencing laws, are a primary source of racial disparities in incarceration rates. These policies include, for example, "[d]rug-free school zone laws [that] mandate sentencing

enhancements for people caught selling drugs in designated school zones." *Report to the Special Rapporteur* at 8.

For a pair of reasons, *amici* provide an extended discussion of drug-free zone school laws. First, Oregon has such laws and has had them at least since the guidelines effective year of 1989.[27] Second, like the Court of Appeals' construction of OAR 213-012-0040(2), the drug-free zone school laws are a collective incapacitation-based sentencing scheme. This is because they apply on a strict liability basis, *State v. Rutley*, 343 Or 368, 171 P3d 361 (2007), to drug crimes committed within 1,000 feet of a school. *E.g.*, ORS 475.904.

For example, consider two drug dealers, one who was oblivious to a high school being 990 feet away when he sold drugs to a middle-aged high-school dropout; the other who went onto high school property, ostensibly to attend that evening's basketball game, but actually to sell drugs to a high school student. The drug-free zone school laws, in their collective-incapacitation manner, insouciant to the two distinctions between the two defendants, would apply to both defendants equally.

The Sentencing Project's *Report to the Special Rapporteur* explains, "The expansive geographic range of [school] zones coupled with high urban density has disproportionately affected residents of urban areas, and particularly those in high-poverty areas—who are largely people of color." *Id*. at 8. *See also*

---

[27] *See* Or Laws 1989, ch 806, § 2 (codified as *former* ORS 475.999, *renumbered as* ORS 475.904 (2005))

Marc Mauer, *The Race to Incarcerate* 169-70 (2d ed 2006). Thus, the likelihood of Oregon's drug-free school zone laws disproportionately affecting African American Oregonians is pretty much guaranteed, because the majority of African American Oregonians live in densely populated urban areas, such as neighborhoods in Multnomah County, where schools are far more numerous than they are in rural areas.

The guidelines' crime-seriousness ranking scheme demonstrates the punitive effects of Oregon's drug-free school zone laws. In the absence of crime-seriousness enhancers, the manufacture or delivery of a controlled substance is ranked at seriousness level 4. OAR 213-019-0012(1). The presumptive sentences for defendants with criminal-history scores of A or B range from eight months to 11 months of incarceration. OAR 213-004-0001 & App 1 (sentencing guidelines grid). The presumptive sentence for defendants with criminal-history scores of C to I always is two years of probation. OAR 213-004-0001 & App 1; OAR 213-005-0008(1)(b).

But if the manufacture or delivery is committed within 1,000 feet of a school, the drug-free school zone law doubles the crime's seriousness ranking to level 8. OAR 213-019-0008(1). This makes enormous differences in presumptive sentences. Regardless of their criminal-history scores, the

presumptive sentence for level 8 defendants always is imprisonment, ranging from 16 months to 45 months. OAR 213-004-0001 & App 1.[28]

The enormous differences in presumptive sentences that drug-free school zone laws create very well could explain the drug-crime imprisonment disparity found in the "Corrected Race" column of Table 3 on Appendix 14. It shows that as of July 1, 2016, 5.23% of persons then in prison for drug crimes were African American. But if African Americans then comprised 2.2% of the state's total population (as they did one year later, *see* App 2, ¶ 3), they were **over**represented as drug-crime inmates by a factor of **2.38**. App 4, ¶ 11. By comparison, the same column of Table 3 shows that Caucasians comprised 67.74% of persons then in prison for drug crimes. If Caucasians then comprised 87.1% of the state's total population (as they did one year later, *see* App 2, ¶ 4), they were **under**represented as drug-crime inmates by a factor of **0.78**. *Id*.

These figures must be compared with the fact that

> "**African Americans are not significantly more likely to use or sell prohibited drugs than whites**, but they are *made* criminal at drastically higher rates for precisely the same conduct. In fact, studies suggest that white professionals may be the most likely of any group to have engaged in illegal drug activity in the lifetime, yet they are the least likely to be made criminals. * * * Black people have been made criminals by the War on Drugs to a degree

---

[28] In rare situations, defendants convicted of level 8 crimes, and whose criminal-history scores are G to I, are eligible for "optional probation." OAR 213-005-0006. The standard length of optional probationary terms is three years. OAR 213-005-0008(1)(c).

> that dwarfs its effect on other racial and ethnic groups, especially whites."

The New Jim Crow at 197 (boldface added; italics in original).

Or as The Sentencing Project's *Report to the Special Rapporteur* states: "The rise of mass incarceration begins with disproportionate levels of police contact with African Americans. This is striking in particular for drug offenses, **which are committed at roughly equal rates across races**." *Id*. at 3 (emphasis added).

Despite African Americans' and Caucasians' roughly equivalent drug-crime commission rate, Oregon sends African Americans to prison for drug crimes at a rate 2.38 times greater rate than it does Caucasians.[29] Owing to their strict-liability construct, Oregon's drug-free school zone laws apply on a collective-incapacitation basis. Because of that, and because the laws far more frequently apply in urban areas where the majority of African American Oregonians live, the odds are excellent that these laws contributed to the black-

---

[29] For a particularly shocking drug-crime imprisonment disparity, see *Incarcerated America, Human Rights Watch Backgrounder* at 4 (Apr. 2003) (Figure 4) http://pantheon.hrw.org/legacy/backgrounder/usa/incarceration/us042903.pdf (accessed June 13, 2018). Figure 4 on page 4 reports that over a measurement period, Oregon imprisoned 20 Caucasian males for drug crimes, versus 301 African American males for drug crimes. This means that over the measurement period, Oregon imprisoned **1,405% more** African American males for drug crimes than it did Caucasian males [(301 – 20) ÷ 20 = 14.05].

to-Caucasian disparities in drug-crime imprisonment, so contributed to the state's 380% black-to-Caucasian prison-rate disparity.[30]

Likewise, in light of the findings of the Urban Institute study, it stands to reason that the Court of Appeals' collective-incapacitation construction of OAR 213-012-0040(2), once it is applied on a statewide basis in perpetuity, will exacerbate to the state's black-to-Caucasian prison-rate disparity. That alone should be reason enough for this court to reject the Court of Appeals' construction in favor of defendants' selective incapacitation-based construction.

2. Criminal Justice System Practices & Racial Disparities.

The Sentencing Project's *Report to the Special Rapporteur* explains that criminal justice system policies, such as the Court of Appeals' construction of OAR 213-012-0040(2) and drug-free school zone laws, do not by themselves explain black-to-Caucasian imprisonment rate disparities. Various criminal justice system **practices** also contribute to the disparities. These practices include:

- "[D]isproportionate levels of police contact with African Americans." *Report to the Special Rapporteur* at 3. "In recent years, black drivers have been somewhat more likely to be stopped than whites but have

[30] Advocates of drug-free school zone laws argue that such law's racially disparate impacts may be avoided simply by saying no to drugs. This argument has a visceral appeal. But its logic depends on ignoring the injustice of the laws' imposition of substantially greater criminal punishment on African American urban defendants, and substantially lesser punishment on Caucasian rural defendants, based solely on the happenstance of there being, or not being, a school within a 1,000 foot radius.

> been far more likely to be searched and arrested. Once pulled over, black and Hispanic drivers were three times as likely as whites to be searched (6% and 7% versus 2%) and blacks were twice as likely as whites to be arrested. These patterns hold even though police officers generally have a lower 'contraband hit rate' when they search black versus white drivers." *Id*. at 5 (footnote omitted).

- "Pretrial detention has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, to be sentenced to prison, and to receive longer sentences. Blacks and Latinos are more likely than whites to be denied bail, to have a higher money bond set, and to be detained because they cannot pay their bond." *Id*. at 6.

- "Biased use of discretion: Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites. * * * State prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws." *Id*. at 7-8 (underscore in original).

These disparity-producing practices should be compared with the findings of the *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System* (May 1994).[31] This report, issued about a generation ago, confirms that the practices The Sentencing Project itemized in its *Report to the Special Rapporteur* exist in Oregon. Likewise, it echoes the Urban Institute report's explanation of Multnomah County's

---

31 https://mbabar.org/assets/documents/diversity/ethinicityinorjudicialsys.pdf (accessed June 15, 2018).

probation-revocation disparity. Conclusion 9 of the *Report of the Oregon Supreme Court Task Force* states:

> "In the criminal justice area, the evidence suggests that, as compared to similarly situated nonminorities:
>
> "• minorities are more likely to be arrested,
>
> "• minorities are more likely to be charged,
>
> "• minorities are less likely to be released on bail,
>
> "• minorities are more likely to be convicted,
>
> "• minorities are less likely to be put on probation,
>
> "• minorities are more likely to be incarcerated."

Id. at 3.

With respect to these multi-stage instances of bias, the Urban Institute study makes an extremely important observation. "If small biases are present at the individual level, these biases may have **a cumulative effect** as offenders are processed through the criminal justice system." Urban Institute at 5 (emphasis added).

Thus, no singular stage within the series of events in the criminal justice process creates the racial disparities discussed here. Instead, it is the "cumulative effect" of biases at each individual stage, combined with collective-incapacitation policies such as drug-free school zone laws and the Court of Appeals' construction of OAR 213-012-0040(2), that make the disparities possible, and perhaps even inevitable.

3. Criminal Justice System Policies & Practices As Racial Proxies.

The Urban Institute study makes yet another significant observation: "[S]ome of the effects of bias could then be **represented** as objective factors for decisionmaking, such as criminal history indicators." Urban Institute at 5 (emphasis added).

With respect to this observation, consider that two defendants on probation for the same crime might be treated differently in a probation-violation hearing, because one probationer has a more extensive criminal record than the other. If that probationer is African American, his revocation "could then be **represented**" as based on his more extensive criminal record, rather than on anyone's bias. But the probationer's criminal record itself could be the product of bias, in the form of what is called a "racial proxy."[32]

The *Report of the Oregon Supreme Court Task Force* addressed this. It states:

> "[A] substantial amount of the racial disparity may be explained by the fact that minority offenders tend to have more serious criminal histories than white offenders, [but] that explanation fails to take into account the possibility that **racism may, in some measure, account for those more serious criminal histories**. To the extent

[32] For information about "racial proxies," see Anupam Datta, *et al.*, *Proxy Discrimination in Data-Driven Systems Theory & Experiments with Machine Learnt Programs*, arXiv.org, July 25, 2017, https://arxiv.org/pdf/1707.08120.pdf (accessed June 14, 2018).

> that is so, implementation of the guidelines simply has perpetuated the effects of that racism in subsequent cases."

Id. at 41 (emphasis added).[33]

Thus, probing examinations of factors that appear to be non-biased grounds for racial disparities may prove that those factors are racial proxies. If so, those factors too are products of bias.[34]

4. Summation.

The Urban Institute's report shows that during the time of its study, Multnomah County—where the majority of African American Oregonians

---

[33] In an effort to reduce the possible use of racial proxies in sentencing, Recommendation Number 4-11 of the *Report of the Task Force* urged amending the guidelines criminal-history scoring scheme to include what the Sentencing Guidelines Board previously removed, *see Implementation Manual* at 129, *i.e.*, a provision by which a defendant's record of prior convictions no longer would be counted (would "decay" or "wash out") after living a number of conviction-free years in the community. *See Report of the Oregon Supreme Court Task Force* 4-11 at 41, 43. No such steps were taken. *See Progress Report of the Oregon Supreme Court Implementation Committee: A Commitment to Fairness* at 52 (Jan. 1996), https://www.courts.oregon.gov/programs/inclusion/resources/Documents/RacialEthnicTaskForceProgReport_1996.pdf (accessed June 27, 2018).

[34] Criminal records may serve as insidious racial proxies in other ways. For example, felon disenfranchisement laws have been challenged on racial-proxy grounds. *See generally Issues: Felony Disenfranchisement*, The Sentencing Project, www.sentencingproject.org/issues/felony-disenfranchisement (accessed June 24, 2018).

Oregon long ago repealed its felon disenfranchisement law. But the state does have ORS 10.030(3)(a)(E), which excludes from serving on grand and petit juries anyone who "[h]as been convicted of a felony or served a felony sentence within the prior 15 years[.]" To the extent this basis for exclusion acts as a racial proxy, it violates at least the spirit of *Batson v. Kentucky*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986).

live—revoked African American probationers at a rate 143.8% greater than the rate at which the county revokes Caucasian probationers. DOC and Census Bureau data show that as of January 1, 2018, Oregon imprisoned its African American citizens at a rate 380% greater than its Caucasian citizens. These shocking disparities are attributable to the state's criminal justice system policies and practices that are part and parcel of the state's obedient participation in the mass-incarceration movement that swept the nation in response to a transitory surge in crime rates.

As a practical matter, judicial rulings might have little more success in eliminating bias from criminal justice system **practice** stages than "all the perfumes of Arabia would [have in] sweeten[ing] the little hand of Lady Macbeth." *State v. Barber*, 118 Wash 2d 335, 351, 823 P2d 1068 (1992) (Dolliver, J., dissenting). [35] But where judicial rulings **can** succeed is with criminal justice system **policies**. Specifically, they can succeed by construing sentencing laws to avoid collective incapacitation and its resultant mass

---

[35] In *Barber*, the defendant was an African American man with two other African American men in the predominantly Caucasian city of Bellevue, Washington. This racial incongruity prompted police interest in the three men, leading to an investigatory stop. *See* 118 Wash 2d at 351 (Dolliver, J., dissenting) ("[r]acial incongruity overhangs this entire case like a noxious pall"). The majority held that "[r]ace or color alone is not a sufficient basis for making an investigatory stop," *id*. at 347, but stopped short of affirming the Court of Appeals' reversal of the defendant's convictions. *Id*. at 348-49. Instead, the majority "reversed and * * * remanded to the trial court with instructions." *Id*. at 349. This half-measure motivated Justice Dolliver's dissent.

incarceration, which impacts African Americans orders of magnitude greater than it impacts Caucasians.

The Court of Appeals' construction of OAR 213-012-0040(2) authorizes trial courts to sentence revoked probationers to lengthy prison terms on a collective incapacitation-basis, so will contribute to mass incarceration. That authority, when coupled with the racial disparities in probation revocations seen in the Urban Institute's study and Data Request Briefing (App 14-17), portends a racially disparate impact similar to that of drug-free school zone laws. The newly announced consecutive-sanction authority thereby risks exacerbating the 380% black-to-Caucasian imprisonment-rate disparity.

Any such exacerbation would be a step backwards. This is because, at least since July 1, 2009, Oregon's black-to-Caucasian imprisonment-rate disparity has been shrinking.

Of Oregon's 13,925 prison inmates as of July 1, 2009, 1,350 inmates were African American. App 3, ¶ 8. Also as of July 1, 2009, there were 76,513 African American Oregonians. App 3-4, ¶ 9; App 19. So as of July 1, 2009, 1.76% of the state's African American population was living in prison. App 3-4, ¶ 9. The reduction from 1.76%, to 1.44% as of January 1, 2018, marked an **18.2% reduction** over that 8½-year period. *Id*.

Of Oregon's 13,925 prison inmates as of July 1, 2009, 10,294 were Caucasian. App 3, ¶ 8. Also as of July 1, 2009, Oregon's total population

included 3,435,440 Caucasians. App 4, ¶ 10; App 19. So as of July 1, 2009, approximately 0.03% of Caucasian Oregonians were living in prison. App 4, ¶ 10.

When measured on a per capita basis in Oregon as of July 1, 2009, for each **one** Caucasian prison inmate, there were nearly **six** African American prison inmates, for a black-to-Caucasian imprisonment rate disparity of **486%**. App 4, ¶ 10. The reduction from 486%, to 380% as of January 1, 2018, marked a **21.8% reduction** over that 8½-year period. *Id*.

Notwithstanding these reductions, the prevailing 380% rate is still shameful and shockingly high. It reflects the intractability of eliminating racial bias from American society,[36] and is a stain on a state seeking to overcome its racist history.[37]

This court should recognize that the Court of Appeals' collective incapacitation-based construction of OAR 213-012-0040(2), after all the mass incarceration before it, will do little if anything to improve public safety—and may even be a detriment to public safety. But the policy stands an excellent

---

[36] This intractability is beyond dispute. *See, e.g.*, Beverly Daniel Tatum, *Segregation Worse In Schools 60 Years After Brown v. Board of Education*, Seattle Times, Sept 14, 2017 (guest opinion), https://www.seattletimes.com/opinion/segregation-worse-in-schools-60-years-after-brown-v-board-of-education (accessed June 15, 2018).

[37] *See, e.g.*, Matt Novak, *Oregon Was Founded As a Racist Utopia*, Gizmodo, Jan. 21, 2015, https://gizmodo.com/oregon-was-founded-as-a-racist-utopia-1539567040 (accessed June 14, 2018).

chance, and even creates a certainty, of increasing the state's black-to-Caucasian prison-rate disparity, thus negating some part of the disparity reductions made since July 1, 2009.

Conversely, defendants' proposed construction of OAR 213-012-0040(2) poses no risk to public safety. After all, under their construction, McFerrin still would spend at least 32 months in prison, and Sparks still would spend 72 months in prison—which should be sufficient to meet the foundational principles of "protection of society, personal responsibility, accountability[.]" Or Const, Art I, § 15. And by restricting trial court consecutive revocation-sanction authority to a selective-incapacitation basis, defendant's construction would minimize mass incarceration and its risk of increasing the state's black-to-Caucasian prison-rate disparity.

Amici urge the court to avoid negating any part of the reductions made in the state's black-to-Caucasian prison-rate disparity since July 1, 2009. Toward that end, *amici* urge the court to construe OAR 213-012-0040(2) in context with Articles 2 and 26 of the International Covenant on Civil and Political Rights, and with the state's racial/ethnic-impact statement law, and to adopt defendant's construction.

CONCLUSION

Amici urge this court (i) to reject the Court of Appeals' construction of OAR 213-012-0040(2), (ii) to adopt defendants' proposed construction of the provision, and (iii) to reverse and remand defendants' cases for resentencing.

Respectfully submitted,

s/*Jesse Wm. Barton*
JESSE WM. BARTON #881556
Attorney at Law
Attorney for *Amici Curiae*
Oregon Justice Resource Center &
Pacific Sentencing Initiative, LLC

APPENDIX

Demographic Calculations

The following paragraphs provide the calculations that provide certain data stated in the brief:

1. On November 1, 1989, the state prison system housed 5,517 inmates. App 6. On January 1, 2018, the system housed 14,733 inmates. Issue Brief: Oregon Dept. of Corrections—Quick Facts, www.oregon.gov/doc/OC/docs/pdf/IB-53-Quick%20Facts.pdf (accessed June 12, 2018). That reflects a growth rate of 167.0% [(14,733 - 5,517) ÷ 5,517 = 1.670]. By January 1, 1995, the prison system housed 7,057 inmates. App 7. That was 127.9% of the prison population as of the guidelines effective date [7,057 ÷ 5,517 ≈ 1.279], for an annual average growth rate over the 62-month period of 5.4% [(7,057 - 5,517) ÷ 5,517 ÷ 62 x 12 ≈ 0.054].

2. On January 1, 1990 (the closest date available to the Felony Sentencing Guidelines effective date), there were 2,842,281 Oregon residents. *1990 Census of Population: General Population: Characteristics Oregon* at Table 1, www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-39.pdf (accessed June 13, 2018). On July 1, 2017, there were 4,142,776 Oregon residents. U.S. Census Bureau QuickFacts: Oregon, www.census.gov/quickfacts/OR (accessed June 12, 2018). That marked a 1.7% annual average growth rate over the 26½-year period from January 1, 1990 [(4,142,775 – 2,842,281) ÷ 2,842,281 ÷ 26.5 ≈ 0.017]. From July 1, 2016 to July 1, 2017, the state's general population grew at a rate of 1.2% [(4,142,776 – 4,093,465) ÷ 4,093,465 ≈ 0.012]. *See Id*. Assuming the state had the same growth rate for the last half of 2017, from July 1, 2017 to January 1, 2017, the state's population grew by 0.6%, and, as of January 1, 2018, was 4,167,633 [4,142,776 x 1.006 ≈ 4,167,633]. That figure reflects a 46.6% growth rate from January 1, 1990 [(4,167,633 - 2,842,281) ÷ 2,842,281 ≈ 0.466]. The state's prison population growth rate of 167.0% was 3.58 greater than its general population growth rate of 46.6% [1.67 ÷ 0.466 ≈ 3.58]. If prison population growth had matched general population growth, the January 1, 2018 prison population would have been 8,088 [5,517 x 1.466 ≈ 8,088], so 6,645 fewer inmates that were actually housed on that date [14,733 – 8,088 = 6,645]. With the $47,377 per year annual cost, *see* App 9-10, that many fewer inmates would save $314,820,165 annually [$47,377 x

6,645 = $314,820,165]. If the legislature increased the prison population by 25% before matching general population growth, annual savings would be $219,023,871 [14,733 – (5,517 x 1.25 x 1.466) x $47,377 ≈ $219,023,871].

3. Issue Brief: Oregon Dept. of Corrections—Quick Facts, *see* ¶ 1 (above), states that as of January 2018, of the state's prison inmates, 1,318 were African American. U.S. Census Bureau QuickFacts: Oregon, *see* ¶ 2 (above), states that as of July 1, 2017, African-Americans comprised 2.2% of the state's total population. As explained in ¶ 2 (above), *amici* estimate that on January 1, 2018, Oregon's population was 4,167,633. Assuming that as of January 1, 2018, African-Americans still comprised 2.2% of the state's population, they numbered 91,688 [4,167,633 x 0.022 ≈ 91,688]. Therefore, 1.44% of the state's African American population then was living in prison [1,318 ÷ 91,688 ≈ 0.0144].

4. Issue Brief: Oregon Dept. of Corrections—Quick Facts, *see* ¶ 1 (above), states that as of January 2018, of the state's prison inmates, 10,966 were Caucasian. U.S. Census Bureau QuickFacts: Oregon, *see* ¶ 2 (above), states that as of July 1, 2017, 87.1% of Oregon's population was Caucasian. Again assuming that on January 1, 2018, Oregon's population was 4,167,633, *see* ¶ 2 (above), and further assuming that as of January 1, 2018, Caucasians still comprised 87.1% of the state's population, they numbered 3,630,008: 4,167,633 x 0.871 ≈ 3,630,008. Therefore, 0.03% of the state's Caucasian population then was living in prison [10,966 ÷ 3,630,088 ≈ 0.003]. Comparing this percentage to the percentage of African Americans then living in prison, *see* ¶ 3 (above), African American Oregonians were 4.8 times more likely to be prison inmates than were Caucasian Oregonians [0.0144 ÷ 0.003 ≈ 4.8], so were were 380% more likely to be imprisoned than were Caucasians [(4.8 - 1) ÷ 1 = 3.8].

5. The "snapshot" of *Racial and Ethnic Disparities and the Relative Rate Index (RRI): Summary of Data in Multnomah County*, Safety & Justice Challenge, stating that in the Multnomah County jail there were 1.5 Caucasians for every 1,000 Caucasian residents of the county and 9.2 African Americans for every 1,000 African Americans residents of the county, reflects that African Americans were 6.13 times more likely than Caucasians to be jail inmates [9.2 ÷ 1.5 ≈ 6.13], for a 513% disparity [(9.2 – 1.5) ÷ 1.5 ≈ 5.13].

The county jail disparity is 35% greater than 380% state prison disparity [(5.13 – 3.8) ÷ 3.8 = 0.35].

6. [Note: For this percentage, *amici* rely on July 1, 2017 Census Bureau data, *see* ¶ 2 (above), without adjusting them to obtain a January 1, 2018 estimate.] As of July 1, 2017, Multnomah County had 807,566 residents, 5.8% of whom were African-American. U.S. Census Bureau QuickFacts: Multnomah County, Oregon, www.census.gov/quickfacts/fact/table/multnomahcountyoregon/PST045216 (accessed June 12, 2018). Therefore, the county then had 46,838 African-American residents [807,566 x 0.058 ≈ 46,838]. As of July 1, 2017, 2.2% of Oregon's 4,142,776 residents were African-American, *see* ¶ 3 (above), so the state then had 91,141 African-American residents [4,142,0.022 ≈ 91,141]. Multnomah County's African-American residents then comprised 51.4% of the state's total African-American population [46,838 ÷ 91,141 ≈ 0.514]. The 3.9% probation-revocation rate for African Americans in Multnomah County is 143.8% greater than the rate for Caucasians [(3.9 - 1.6) ÷ 1.6) ≈ 1.438].

7. The "Corrected Race" and "Prison" columns of Table 1, *see* App 14, state that in 2017, a total of 2,990 revoked probationers were sentenced to prison. Of them, 304 were African American [2,990 x 0.1018 ≈ 304], for a revocation rate of 29.7% [304 ÷ 1,024 ≈ 0.297]. Caucasians comprised 2,229 of revoked probationers [2,990 x 0.7455 ≈ 2,229], for a revocation rate of 16.3% [2,229 ÷ 13,636 ≈ 0.163]. The African American revocation rate is 1.82 times greater than the Caucasian rate [0.297 ÷ 0.163 ≈ 1.82]. Issue Brief: Oregon Dept. of Corrections—Quick Facts, *see* App 1, ¶ 1, show that in January 2018, of all African Americans in prison or on probation, 56.3% were in prison [1,318 ÷ (1,318 + 1,024) ≈ 0.563], whereas of all Caucasians then in prison or on probation, 55.4% were on probation [13,636 ÷ (13,636 + 10,966) ≈ 0.0554].

8. Oregon Department of Corrections: Inmate Population Profile for 07/01/2009, www.oregon.gov/doc/RESRCH/docs/inmate_profile_200907.pdf (accessed June 14, 2018).

9. Appendix 20 is a copy of Oregon QuickFacts from the US Census Bureau, for the 2009, which no longer is available on line. But it explains that as of

July 1, 2009, Oregon's total population was 3,825,657, and that African-Americans comprised 2.0% of the total: 3,825,657 x 0.02 ≈ 76,513. The 1,350 African Americans then living in prison, *see* ¶ 8 (above), comprised 1.76% of the state's African American population [1,350 ÷ 76,513 ≈ 0.0176]. That percentage, compared to the January 1, 2018 percentage, *see* ¶ 3 (above), marks an 18.2% reduction [(0.176 – 0.144) ÷ 0.176 ≈ 0.182].

10. Appendix 20 explains that as of July 1, 2009, Oregon's total population was 3,825,657, and that Caucasians comprised 89.8% of the state's total population: 3,825,657 x .898 ≈ 3,435,440. The 10,294 Caucasians then living in prison, *see* ¶ 8 (above), comprised 0.03% of the state's Caucasian population [10,294 ÷ 3,435,440 ≈ 0.00299]. Comparing this percentage to the percentage of African Americans then living in prison, *see* ¶ 9 (above), African American Oregonians were 5.86 times more likely to be prison inmates than were Caucasian Oregonians [0.0176 ÷ 0.003 ≈ 5.86], so were 486% more likely to be imprisoned than were Caucasians [(5.86 - 1) ÷ 1 = 4.86]. That percentage, compared to the January 1, 2018 percentage, *see* ¶ 4 (above), marks a 21.8% reduction [(0.486 - 0.380) ÷ 0.486 ≈ 0.218].

11. From the "Corrected Race" column of Table 3, App 14: 5.23 ÷ 2.2% ≈ 2.38 **and** 67.74% ÷ 87.1% ≈ .777.

jessbarton@msn.com

From: SANCHAGRIN Ken * CJC [Ken.SANCHAGRIN@oregon.gov]
Sent: Friday, June 22, 2018 3:50 PM
To: Jess Barton
Subject: Data for Commission on Public Safety Report

Dear Jess,

I'd like to respond to your question regarding the data used to construct the graphs found in the CPS report.

Monthly prison population totals, beginning on 1/1/80, are maintained in an Excel table by the Criminal Justice Commission. The table's data were used to construct the line graph headed "Oregon's Historical Prison Population," which appears on page 9 of *Commission on Public Safety: Report to the Governor* (Dec. 30, 2011). The page of the table, which covers dates from 10/1/87 to 8/1/91, shows that on 11/1/89, the prison population stood at 5,517.

I hope this addresses your question. Please let me know if you require anything further.

Best,

Ken

Ken Sanchagrin, JD PhD
Research Director
Criminal Justice Commission
p: (503) 373-7449
ken.sanchagrin@oregon.gov
oregon.gov/cjc
okb.oregon.gov

10/1/1987	4,231
11/1/1987	4,247
12/1/1987	4,334
1/1/1988	4,309
2/1/1988	4,412
3/1/1988	4,498
4/1/1988	4,538
5/1/1988	4,549
6/1/1988	4,610
7/1/1988	4,629
8/1/1988	4,592
9/1/1988	4,668
10/1/1988	4,635
11/1/1988	4,761
12/1/1988	4,886
1/1/1989	4,860
2/1/1989	5,044
3/1/1989	5,081
4/1/1989	5,025
5/1/1989	5,202
6/1/1989	5,254
7/1/1989	5,305
8/1/1989	5,427
9/1/1989	5,510
10/1/1989	5,558
11/1/1989	5,517
12/1/1989	5,769
1/1/1990	5,841
2/1/1990	6,067
3/1/1990	6,102
4/1/1990	6,139
5/1/1990	6,164
6/1/1990	6,141
7/1/1990	6,216
8/1/1990	6,252
9/1/1990	6,311
10/1/1990	6,310
11/1/1990	6,282
12/1/1990	6,380
1/1/1991	6,297
2/1/1991	6,306
3/1/1991	6,317
4/1/1991	6,331
5/1/1991	6,383
6/1/1991	6,381
7/1/1991	6,362
8/1/1991	6,439

9/1/1991	6,516
10/1/1991	6,532
11/1/1991	6,624
12/1/1991	6,596
1/1/1992	6,603
2/1/1992	6,595
3/1/1992	6,677
4/1/1992	6,693
5/1/1992	6,688
6/1/1992	6,615
7/1/1992	6,582
8/1/1992	6,529
9/1/1992	6,504
10/1/1992	6,480
11/1/1992	6,477
12/1/1992	6,506
1/1/1993	6,487
2/1/1993	6,485
3/1/1993	6,516
4/1/1993	6,535
5/1/1993	6,498
6/1/1993	6,536
7/1/1993	6,496
8/1/1993	6,538
9/1/1993	6,556
10/1/1993	6,555
11/1/1993	6,545
12/1/1993	6,553
1/1/1994	6,657
2/1/1994	6,687
3/1/1994	6,695
4/1/1994	6,728
5/1/1994	6,752
6/1/1994	6,807
7/1/1994	6,832
8/1/1994	6,857
9/1/1994	6,821
10/1/1994	6,868
11/1/1994	6,904
12/1/1994	6,997
1/1/1995	7,057
2/1/1995	7,228
3/1/1995	7,303
4/1/1995	7,347
5/1/1995	7,409
6/1/1995	7,458
7/1/1995	7,532

Criminomics Calculations

The following paragraphs provide the calculations that provide certain data stated in the brief:

1. Based on its finding of violations of two conditions of probation, the trial court ran three of defendant McFerrin's four 20-month probation-revocation sanctions (although, under the Court of Appeals construction of OAR 213-012-0040(2), the trial court could have made all four sanctions consecutive). Under McFerrin's construction, the trial court could have made only two sanctions consecutive. The cost of the Court of Appeals construction then is the cost of the additional, 20-month consecutive sanction. Because it costs an average of $47,377 per year to imprison one inmate, *see* App 6-7, depending on how much "good time" McFerrin earns of the 20% maximum, *see* ORS 421.121(2), and ignoring transitional leave, the additional 20 months the Court of Appeals construction allows will cost anywhere from **$63,169** [$47,377 x 20 ÷ 12 x. 0.8 ≈ $63,169] to **$78,962** [$47,377 x 20 ÷ 12 ≈ $78,962].

   Based on its finding of (arguably) violations of two conditions of probation, the trial court ran consecutively all three of defendant Sparks' 36-month probation-revocation sanctions, with no "good time" eligibility. Under Sparks' construction, the trial court could have made only two sanctions consecutive. The cost of the Court of Appeals construction then is the cost of the additional, 36-month consecutive sanction, which, under the Court of Appeals construction, allows will cost **$142,131** [$47,377 x 36 ÷ 12 = $142,131].

   Under the Court of Appeals construction, the combined cost of these two cases, compared to the defendants' construction, will range from **$205,200** [$142,131 + 63,169 = $205,200] to **$221,093** [$142,131 + 78,962 = $221,093].

2. The 2015 Legislature's Senate Bill 780 would have established a "pilot program" requiring the state Department of Corrections to provide counseling services to a selected group of veteran inmates afflicted with post-traumatic stress disorder. On April 21, 2015, the Senate Committee on Veterans & Emergency Preparedness approved the bill unanimously. *See* https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/SB780 (Measure History) (accessed June 16, 2018). The bill had a two-biennium fiscal impact of $175,612. *See* https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureAnalysisDocument/29029 (accessed June 16, 2018). Consequently, the bill was subsequently referred to the Joint Committee on Ways & Means, where it died. But the minimum cost of $205,200, of the Court of Appeals construction of OAR 213-012-0020(2) compared to the defendants' construction, would be more than enough to fund SB 780's pilot program.

Per-Inmate Average Annual Cost of Imprisonment

Felony Sentencing in Oregon: Guidelines, Statutes, Cases, Ch 1 Update at 1-2 (OCDLA 3d ed 2012) states:

> "House Bill 5004 (2017) (enrolled as Oregon Laws 2017, ch 556) is the 2017 Legislature's primary measure appropriating funds to the Department of Corrections (DOC) for the 2017-19 biennium. The bill's Section 1 appropriates from the general fund $1,703,283,755. Of that amount, $152,543,451 is for administrative-type functions. The Community Corrections Division's portion of the total is $294,290,629, which is about 17.3% of the total general fund appropriation. Assuming 17.3% of the administrative-type functions are for the Community Corrections portion, the total cost for Community Corrections is $294,290,629 + ($152,543,451 x 17.3%) = $320,680,646. That leaves a total of $1,382,603,109 of the DOC's general fund appropriation for other than Community Corrections, so for imprisonment.
>
> "Section 2 of HB 5004 specifies a non-general fund appropriation of $42,471,917. Of that amount, $9,578,016 is for administrative-type functions. The Community Corrections Division's portion of the total is $7,009,979, which is about 16.5% of the total non-general fund appropriation. Assuming 16.5% of the administrative-type functions are for the Community Corrections portion, the total cost for Community Corrections is $7,009,979 + ($9,578,016 x 16.5%) = $8,590,352. That leaves a total of $33,881,565 of the DOC's non-general fund appropriation for other than Community Corrections, so for imprisonment.
>
> "The combined general and non-general fund appropriations for other than Community Corrections, for the 2017-19 biennium, is $1,382,603,109 + 33,881,565 = $1,416,484,674. The state Office of Economic Analysis currently projects that as of July 1, 2018, the DOC will have 14,949 prison inmates.[1] Because July 1, 2018, is the midpoint of the biennium, on average the DOC should have 14,949 prison inmates throughout the biennium. This means that during the current biennium, the annual average per-inmate cost of

imprisonment will be $47,377 [$1,416,484,674 ÷ 14,949 inmates ÷ 2 yrs. = $47,377].[2]

"[1] Go to this link: http://www.oregon.gov/das/OEA/Pages/forecastcorrections.aspx. Once there, under Most Recent Forecast, select "October 2017 Monthly Detail Tables)," which will open an Excel spreadsheet. From that spreadsheet, select the "Final SA" tab. ("Final SA" means "Final – Seasonally Adjusted," which is the most reliable statistic.) That tab will show the projected inmate population for, among numerous other dates, July 1, 2018.

[2] Other sources estimate a lower cost, usually in the $30,000 range. The reason for the difference between those estimates and the estimate provided here is that the other sources exclude the costs of capital construction, i.e., the costs of prison buildings themselves. Because excluding those costs is illogical, this estimate includes them.

OAR 213-002-0001

(1) The primary objectives of sentencing are to punish each offender appropriately, and to insure the security of the people in person and property, within the limits of correctional resources provided by the Legislative Assembly, local governments and the people.

(2) Sentencing guidelines are intended to forward the objectives described in section (1) by defining presumptive punishments for felony convictions, subject to judicial discretion to deviate for substantial and compelling reasons; and presumptive punishments for post-prison or probation supervision violations, again subject to deviation.

(3) The basic principles which underlie these guidelines are:

(a) The response of the corrections system to crime, and to violation of post-prison and probation supervision, must reflect the resources available for that response. A corrections system that overruns its resources is a system that cannot deliver its threatened punishment or its rehabilitative impact. This undermines the system's credibility with the public and the offender, and vitiates the objectives of prevention of recidivism and reformation of the offender. A corrections system that overruns its resources can produce costly litigation and the threat of loss of system control to the federal judiciary. A corrections system that overruns its resources can increase the risk to life and property within the system and to the public.

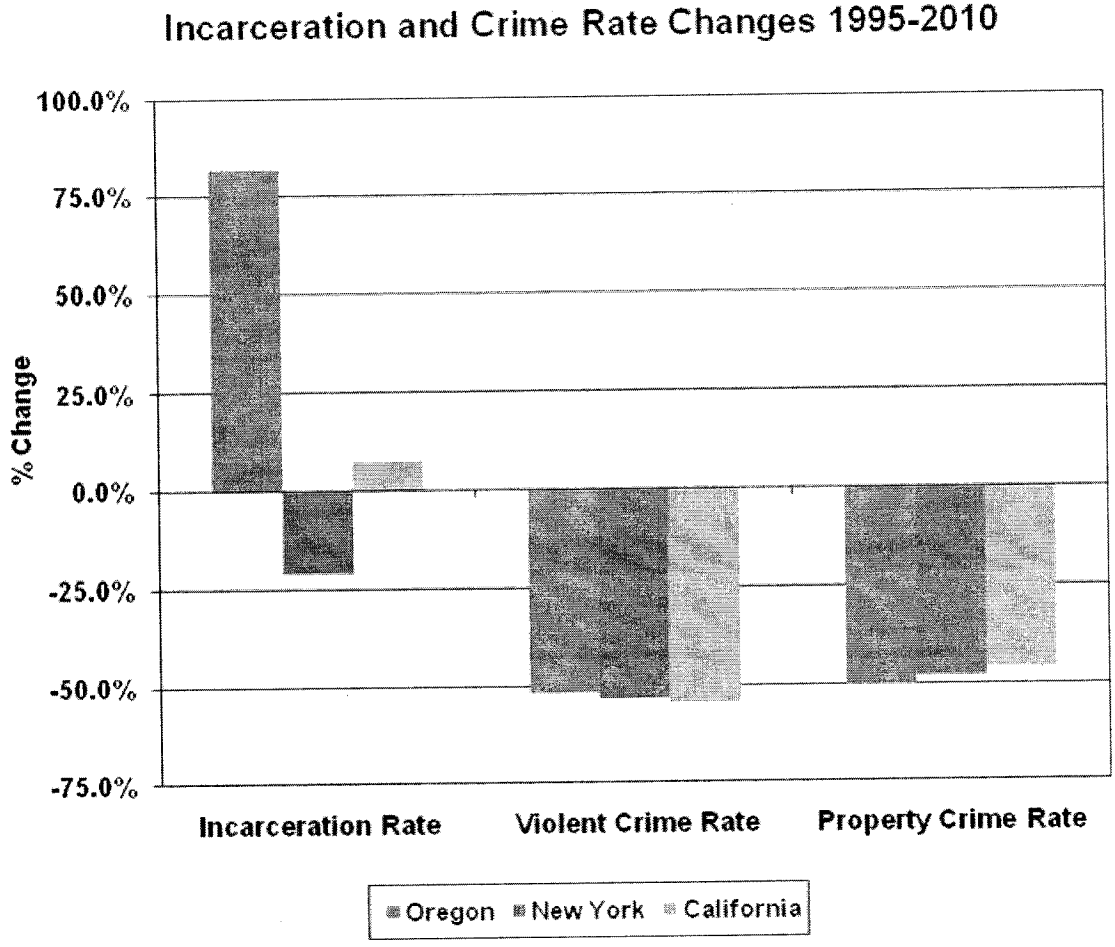
(b) Oregon's current sentencing system combines indeterminate sentences with a parole matrix. Although many citizens believe the indeterminate sentence sets the length of imprisonment, that sentence only sets an offender's maximum period of incarceration and the matrix controls actual length of stay. The frequent disparity between the indeterminate sentence length and time served under the matrix confuses and angers the public and damages the corrections system's credibility with the public. Sentences of imprisonment should represent the time an offender will actually serve, subject only to any reduction authorized by law.

(c) Under sentencing guidelines the response to many crimes will be state imprisonment. Other crimes will be punished by local penalties and restrictions imposed as part of probation. All offenders released from prison will be under post-prison supervision for a period of time. The ability of the corrections

system to enforce swiftly and sternly the conditions of both probation and post-prison supervision, including by imprisonment, is crucial. Use of state institutions as the initial punishment for crime must, therefore, leave enough institutional capacity to permit imprisonment, when appropriate, for violation of probation and post-prison supervision conditions.

(d) Subject to the discretion of the sentencing judge to deviate and impose a different sentence in recognition of aggravating and mitigating circumstances, the appropriate punishment for a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender's criminal history.

(e) Subject to the sentencing judge's discretion to deviate in recognition of aggravating and mitigating circumstances, the corrections system should seek to respond in a consistent way to like crimes combined with like criminal histories; and in a consistent way to like violations of probation and post-prison supervision conditions.



Commission on Public Safety: Report to the Governor at 7 (Dec. 30, 2011).

Data Request Briefing

Oregon Criminal Justice Commission

23 June 2018

1. NATURE OF THE REQUEST

Jesse Barton, Attorney at Law, submitted a data request to the Criminal Justice Commission (CJC) on 15 June 2018. In his request, Mr. Barton asked for data regarding: (1) the racial demographics for all probation revocatees broken down by revocation disposition (jail versus prison) in 2017; (2) the racial demographics of all persons sentenced to prison versus local jails for felony crimes in 2017; (3) the racial demographics for all individuals currently serving prison sentences for drug crimes in 2016; and (4) the yearly prison population from 1980 until present day.

2. Data Request Results

a. Racial Demographics of Probation Revocations in 2017 by Local Control versus Prison

Table 1. Racial Demographics of Probation Revocations in 2017

	DOC Race		Corrected Race[1]	
Race/Ethnicity	**LC**	**Prison**	**LC**	**Prison**
White	85.99%	78.44%	81.27%	74.55%
African American	4.65%	10.55%	4.62%	10.18%
Hispanic	6.35%	6.44%	11.20%	10.70%
Asian	0.94%	1.35%	0.97%	1.20%
Native American	1.91%	3.22%	1.94%	3.37%
Unknown	0.17%	0.00%	--	--
N	1,336	2,990	1,336	2,990

b. Racial Demographics of Individuals Sentenced to Prison versus Local Control in 2017

Table 2. Racial Demographics of Prison versus Local Control Sentences

	DOC Race		Corrected Race	
Race/Ethnicity	**LC**	**Prison**	**LC**	**Prison**
White	85.69%	77.14%	80.91%	72.04%
African American	4.61%	8.96%	4.55%	8.73%
Hispanic	6.40%	9.22%	11.32%	14.57%
Asian	0.92%	1.61%	0.94%	1.45%
Native American	2.26%	3.02%	2.28%	3.20%
Unknown	0.12%	0.04%	--	--
N	4,878	4,900	4,878	4,900

[1] Please see the Technical Appendix

c. Racial Demographics of Individuals in Prison for Drug Crimes as of July 1, 2016

Table 3. Racial Demographics of Individuals in Prison for Drug Crimes, July 1, 2016 (N=1,147)

Race/Ethnicity	DOC Race	Corrected Race
White	74.63%	67.74%
African American	5.23%	5.23%
Hispanic	17.18%	24.06%
Asian	1.13%	0.78%
Native American	1.83%	2.18%

d. Yearly Prison Population from 1980 to 2017

Table 4. Total Prison Population by Year (1980-2017)

Year	Prison Pop	Year	Prison Pop
1980	2,784	1999	9,473
1981	2,858	2000	10,118
1982	3,384	2001	10,943
1983	3,321	2002	11,699
1984	3,474	2003	12,220
1985	3,714	2004	12,728
1986	3,937	2005	12,954
1987	4,334	2006	13,378
1988	4,886	2007	13,488
1989	5,769	2008	13,651
1990	6,380	2009	13,825
1991	6,596	2010	13,929
1992	6,506	2011	13,944
1993	6,553	2012	14,241
1994	6,971	2013	14,700
1995	7,924	2014	14,588
1996	8,498	2015	14,667
1997	7,644	2016	14,699
1998	8,776	2017	14,739

Technical Appendix

Research in a variety of disciplines has identified numerous challenges faced by researchers when using data based on third party administrative designations. Chief among these challenges is the possibility of racial misidentification when subjects do not present according to the stereotypical characteristics often associated with individuals of different racial or ethnic groups. A secondary concern related to administrative racial designation is that administrative constraints regarding the available racial categories can result in skewed racial data. Both concerns appear to be relevant when it comes to criminal justice data in Oregon.

One means for addressing the potential misclassification associated with the use of administrative racial identification data is to correct for race using publically available demographic information associated with surnames and the geographic areas in which individuals live. Elliott et al. (2009) first proposed this method, which is referred to as Bayesian Improved Surname Geocoding (BISG). Since its introduction, the BISG approach has been applied to the study of administrative health care data, in studies and litigation evaluating mortgage and non-mortgage lending patterns, in academic research, and by financial institutions.

The Bayesian Improved Surname Geocoding (BISG) approach utilizes two data sources for matching with the names of individuals found within the Oregon Department of Corrections (DOC) data and the Oregon Law Enforcement Data Systems data.

US Census 2010 Surname Database. Following both the 2000 and 2010 Decennial Censuses, the US Census Bureau compiled a database of surnames broken down by racial identity. Based on data derived from the Census more generally, this database reports the share of individuals identifying with a given racial category for all surnames with at least 100 enumerated individuals. This accounts for over 294,979,229 individuals across the United States, or nearly 96 percent of the US population. The possible racial/ethnicity categories include non-Hispanic White, Hispanic, non-Hispanic African American, non-Hispanic Asian or Pacific Islander, non-Hispanic American Indian/Alaska Native, and non-Hispanic multirace. For technical documentation regarding the construction of this database, please refer to Comenetz (2016).

Geographic Data. Geographic data regarding the racial and ethnic composition of the U.S. population by race originates in the Census Summary File 1 (SF1). The SF1 file can be used to calculate the racial distribution of a variety of geographic areas, including blocks, block groups, tracts, counties, states, regions, and the nation. While utilizing data from the highest level of disaggregation is preferred, data limitations required the CJC utilize racial distribution data aggregated at the county level.

The Bayesian Improved Surname Geocoding (BISG) approach utilized in this briefing was applied using the following steps:

1. **Surnames Standardization**. Special characters, suffixes, titles, and hyphens were removed, and compound names were parsed.
2. **Surname Matching**. Utilizing the 2010 US Census Surname database, researchers matched the records from Oregon DOC. For compound names, both names were matched where possible.

3. **Surname Race Proportions**. Where a match occurred, the probability of belonging to a given racial group was constructed. This probability was merely the proportion of individuals across the United States with the last name in question who identified as members of a given race. In the event a last name is not matched to the Census Surname list, no probabilities are assigned.
4. **Geographic Race Proportions and Matching**. Using the Census SF1 file, racial distributions were created for each of the 36 counties in Oregon.
5. **Construction of BISG Probabilities**. Bayes theorem was used to update the surname-based probabilities created in Step 3 using the geographic information used to create the probabilities in Step 4. This technique took the following form:

$$\Pr(r|g,s) = \frac{p(r|s)q(g|r)}{\sum_{r\in R} p \times q}$$

where $p(r|s)$ represents the probability of belonging to a given race/ethnicity for a given surname, $q(g|r)$ represents the proportion of individuals of a given race or ethnicity at the county level, and R represents the set of six race/ethnicity categories. The result is a probability based on both surname and geographic concentrations of assignment into each of the six race and ethnicity categories.

6. **Updating DOC Data**. Most often, applications utilizing the BISG approach apply the steps above to a dataset with no information regarding race. Data collected by the Oregon DOC, however, provides information regarding the third-party identification of individual inmates' race, which means that the BISG approach can be used to augment the DOC data rather than as the primary method for assigning racial identity. As such, the following steps were taken:
    a. All individuals whose race was recorded as "unknown" were updated using their BISG probabilities. This means that an individual previously marked as unknown with regards to race was assigned to the racial category with highest probability obtained during the BISG process.
    b. Individuals who would be identified as African American based on their BISG probability were assigned as such.
    c. Individuals who would be identified as Hispanic based on their BISG probability were assigned as such unless their DOC racial category was Asian or American Indian.
    d. Individuals who would be identified as Asian based on their BISG probability were assigned as such unless their DOC racial category was American Indian.
    e. Individuals who would be identified as American Indian based on their BISG probability were assigned as such.

International Covenant on Civil and Political Rights

Article 2, paragraph 1 states:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 26 states:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The United States Senate consented to the Covenant on April 2, 1992, when it approved Treaty Document 95-20 (which Senate President George H.W. Bush signed on June 8, 1992). But the Senate subjected its consent

> "to the following understandings, which shall apply to the obligations of the United States under this Covenant:
>
> "(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective."

Resolution of Ratification: Senate Consideration of Treaty Document 95-20, https://www.congress.gov/treaty-document/95th-congress/20/resolution-text (accessed June 14, 2018).

State & County QuickFacts

Oregon

People QuickFacts	Oregon	USA
Population, 2009 estimate	3,825,657	307,006,550
Population, percent change, April 1, 2000 to July 1, 2009	11.8%	9.1%
Population estimates base (April 1) 2000	3,421,437	281,424,602
Persons under 5 years old, percent, 2009	6.5%	6.9%
Persons under 18 years old, percent, 2009	22.8%	24.3%
Persons 65 years old and over, percent, 2009	13.5%	12.9%
Female persons, percent, 2009	50.4%	50.7%
White persons, percent, 2009 (a)	89.8%	79.6%
Black persons, percent, 2009 (a)	2.0%	12.9%
American Indian and Alaska Native persons, percent, 2009 (a)	1.6%	1.0%
Asian persons, percent, 2009 (a)	3.7%	4.6%
Native Hawaiian and Other Pacific Islander, percent, 2009 (a)	0.3%	0.2%
Persons reporting two or more races, percent, 2009	2.6%	1.7%
Persons of Hispanic or Latino origin, percent, 2009 (b)	11.2%	15.8%
White persons not Hispanic, percent, 2009	79.6%	65.1%
Living in same house in 1995 and 2000, pct 5 yrs old & over	46.8%	54.1%
Foreign born persons, percent, 2000	8.5%	11.1%
Language other than English spoken at home, pct age 5+, 2000	12.1%	17.9%
High school graduates, percent of persons age 25+, 2000	85.1%	80.4%
Bachelor's degree or higher, pct of persons age 25+, 2000	25.1%	24.4%
Persons with a disability, age 5+, 2000	593,301	49,746,248
Mean travel time to work (minutes), workers age 16+, 2000	22.2	25.5
Housing units, 2009	1,638,583	129,925,421
Homeownership rate, 2000	64.3%	66.2%
Housing units in multi-unit structures, percent, 2000	23.1%	26.4%
Median value of owner-occupied housing units, 2000	$152,100	$119,600
Households, 2000	1,333,723	105,480,101
Persons per household, 2000	2.51	2.59
Median household income, 2008	$50,165	$52,029
Per capita money income, 1999	$20,940	$21,587
Persons below poverty level, percent, 2008	13.5%	13.2%

Business QuickFacts	Oregon	USA
Private nonfarm establishments, 2007	113,389[1]	7,705,018
Private nonfarm employment, 2007	1,477,553[1]	120,604,265
Private nonfarm employment, percent change 2000-2007	9.0%[1]	5.7%
Nonemployer establishments, 2007	261,731	21,708,021
Total number of firms, 2002	299,505	22,974,655
Black-owned firms, percent, 2002	0.7%	5.2%
American Indian and Alaska Native owned firms, percent, 2002	1.0%	0.9%
Asian-owned firms, percent, 2002	3.0%	4.8%

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 5, 2018, I filed this Brief of *Amici Curiae* with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system.

I further certify that on July 5, 2018, I served copies of this Brief of *Amici Curiae* on Timothy Sylwester, attorney for respondent, and on Anne Fujita Munsey, attorney for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation of ORAP 8.15(3) and ORAP 5.05(1)(b)(i)(A), and that, as described in ORAP 5.05(1)(a), the word count of this brief is 12,442 words.

I further certify that the text of this brief, including its footnotes, is Times New Roman and is not smaller than 14-point, as required by ORAP 8.15(3) and ORAP 5.05(3)(b)(ii).

s/*Jesse Wm. Barton*
JESSE WM. BARTON #881556
Attorney at Law
P.O. Box 5545
Salem, OR 97304
Phone: (503) 391-6283
jessewmbarton@gmail.com