

Mandatory Felony Sentencing Guidelines: The Oregon Model

*Laird C. Kirkpatrick**

INTRODUCTION

In 1989, Oregon joined approximately a dozen other states in adopting mandatory sentencing guidelines for felony cases. In doing so, Oregon rejected the federal sentencing guidelines as a model and developed its own approach, drawing to some extent on the general framework of the Minnesota and Washington guidelines. The Oregon scheme attempts to take felony sentencing guidelines to a new stage of evolution and responds to some of the perceived deficiencies and problems of the federal guidelines.

The Oregon guidelines are more comprehensive than their federal counterpart. Unlike the federal guidelines, the Oregon guidelines govern probationary and prison sentences. They specify both the duration of probation and the types and time periods of the various community sanctions that can be imposed. The guidelines also regulate the length of postprison supervision. Moreover, the Oregon guidelines are closely linked to the current and future capacity of state and local correctional facilities, serving as an instrument to measure and forecast the need for additional correctional resources.¹ Oregon was one of the first states to develop capacity-based sentencing guidelines in an already overcrowded corrections system.²

* Professor of Law, University of Oregon. Chair of the Governor's Task Force on Corrections, 1987-1989; Member, Oregon Criminal Justice Council, 1987-1989; Member, State Sentencing Guidelines Board, 1987-1989, which developed and promulgated the Oregon sentencing guidelines. The author expresses his appreciation to Darquise Cloutier and J. Scott Denko for their research assistance in the preparation of this Article.

¹ The enabling legislation provides that "[f]actors relevant to appropriate sentencing include . . . effective capacity of state and local corrections facilities and other sentencing sanctions available." 1987 Or. Laws ch. 619, § 2(2)(b).

² Kathleen M. Bogan, *Constructing Felony Sentencing Guidelines in an Already*

The Oregon guidelines avoid much of the federal guidelines' complexity by using a relatively straightforward sentencing grid with fewer calculable "points" than under the federal guidelines. Under the Oregon system, each criminal history category on the sentencing grid includes a range of prior convictions. This reduces the likelihood of dispute regarding the validity of a prior conviction where the conviction would not otherwise boost the defendant to a higher category. In addition, the guidelines adopt a number of innovations in the sentencing grid structure with respect to both measuring criminal history and assessing crime seriousness. For example, crimes against persons are weighted substantially greater than other types of crimes in an offender's criminal history. Finally, the guidelines take a unique approach to preventing manipulation through altered charging practices in cases where the offender is potentially liable for multiple offenses arising out of the same incident.

I. BACKGROUND OF THE GUIDELINES

Oregon has used a guidelines approach in determining the length of incarceration since 1977, when it adopted parole guidelines administered by the Oregon Board of Parole. These parole guidelines utilized a matrix based upon the seriousness of the crime and the offender's criminal history. The parole guidelines generally determined the offender's actual release date, regardless of the term of incarceration a trial court imposed.³ Thus, the guidelines essentially transferred effective control over sentencing from the trial courts to the Parole Board.

Because the parole guidelines significantly reduced unjustifiable disparities among incarcerative term lengths for similar offenders, it might have seemed unlikely that Oregon would be one of the first states to adopt sentencing guidelines. A variety of factors caused Oregon to be in the vanguard.

First, parole guidelines did not eliminate all disparities among sentenced offenders, because the guidelines applied only to offenders sentenced to prison. Disparities continued to exist as to which offenders received incarcerative sentences and as to the nature and duration of community sanctions imposed as condi-

Crowded State: Oregon Breaks New Ground, 36 CRIME & DELINQ. 467, 468 (1990).

³ Trial judges could order a minimum term to be served, but the Parole Board had authority to override minimum sentences.

tions of probation. Moreover, dramatic disparities existed between counties with respect to their utilization of state prison resources. Some counties sentenced similarly situated offenders to prison at a much higher rate than other counties.⁴

The Parole Board attempted to address these disparities by providing early release for offenders who were at the low end of the parole matrix. Such early release programs, however, created a public backlash against both the Parole Board and its matrix as offenders sentenced to prison soon reappeared in the community after serving only a fraction of their prison sentences. Thus, these early release programs gave the state corrections system the image of being a "revolving door."

Another impetus behind Oregon's adoption of guidelines was prison overcrowding. Between 1977 and 1987, Oregon's prison population more than doubled, with no proportionate increase in institutional capacity. Thus, prison overcrowding reached critical proportions.⁵ The newly elected governor, Neil Goldschmidt, had committed himself to a substantial prison expansion program. The legislature viewed sentencing guidelines as a rational mechanism to help assess the extent of immediate need for additional prison capacity as well as to forecast future demand for correctional resources.⁶ It also viewed sentencing guidelines as a comprehensive and effective management tool for the state's corrections system because the guidelines could regulate the utilization of all aspects of the system. To the extent the guidelines were keyed to available institutional capacity, proponents argued that the guidelines could reduce current prison overcrowding and prevent future overcrowding.

The lack of state prison space also had a critical effect on local jails.⁷ To avoid the early release programs in effect at the state

⁴ See Bogan, *supra* note 2, at 483 (noting that Oregon's most populous county had 60% of state's violent crime but only 30% of prison commitments, whereas many rural counties had more than twice the percentage of prison commitments as their percentage of state's violent crime).

⁵ See GOVERNOR'S TASK FORCE ON CORRECTIONS PLANNING, A STRATEGIC CORRECTIONS PLAN FOR OREGON: RESTORING THE BALANCE (1989).

⁶ The enabling legislation specifically provides that if the Council finds that "state and local correctional facilities, are insufficient . . . and therefore inappropriately limit the guidelines, the council shall report such and recommend needed changes to the correctional resources" to the next Legislative Assembly. 1987 Or. Laws ch. 619, § 7(2).

⁷ Eighteen of Oregon's thirty-three county jails were under federal court

prisons, judges often sentenced felons to probation with a lengthy jail sentence as a condition of probation. Thus, local jail space intended for pretrial detainees and misdemeanants was being used for sentenced felons. As a result, city and county officials supported felony sentencing guidelines as a means of placing rational and uniform limits on the use of jails and other local correctional resources.

The Oregon Legislature recognized that the critical state prison overcrowding problems and accelerated release programs had caused the public to lose confidence in the state criminal justice system. In response, the legislature viewed sentencing guidelines as a means to help the corrections system restore its credibility. Sentencing guidelines could provide "truth-in-sentencing," whereby the time actually served would be closely in line with the length of the sentence imposed. Sentencing guidelines would thus make possible the elimination of early release programs, including parole.⁸ Moreover, they would restore actual sentencing power to the trial courts, although on a guidelines-structured basis.

II. DEVELOPMENT OF THE GUIDELINES

At the time felony sentencing guidelines were proposed, Oregon had already established a state Criminal Justice Council. Created in 1985, the Council consisted of key members from throughout the criminal justice system who represented all three branches of government.⁹ The legislature charged the Criminal Justice Council with a variety of oversight responsibilities involv-

orders, many with population caps set by the federal court. *See Bogan, supra* note 2, at 467.

⁸ A modest "earned time credit" was ultimately retained, allowing inmates to earn a maximum of a 20% credit toward their sentence for "participation in work and self-improvement programs and maintaining appropriate institution [sic] conduct." OR. ADMIN. R. 291-97-015 (1991); OR. REV. STAT. § 421.121 (1991).

⁹ 1985 Or. Laws ch. 558, § 2. The original membership of the Council included the Attorney General, the administrator of the Corrections Division, the chairperson of the State Board of Parole, the chairperson of the Psychiatric Security Review Board, the administrator of the Mental Health Division, the director of the State Council on Crime and Delinquency, one appellate judge, one trial judge, two state senators, two state representatives, one district attorney, one criminal defense attorney, one county sheriff, one county commissioner, and four public members. *Id.*

ing the state criminal justice system.¹⁰ In 1987, the legislature approved a bill authorizing the Council to develop mandatory sentencing guidelines for felony cases.¹¹

To avoid possible violation of the separation-of-powers provision of the state constitution, the legislature gave final authority to promulgate the rules to a subgroup of the Council, the Sentencing Guidelines Board. The Board consisted of members of the Council other than those who were members of the legislative or judicial branches of government. The legislature thus established the Board as an executive agency and gave its guidelines the status of administrative rules.¹²

¹⁰ 1985 Or. Laws ch. 558, § 3. This section states that the Oregon Criminal Justice Council shall:

(1) Study and make recommendations concerning the functioning of the various parts of the criminal justice system, including study and recommendations concerning implementation of community corrections programs;

(2) Study and make recommendations concerning the coordination of the various parts of the criminal justice system;

(3) Conduct research and evaluation of programs, methods and techniques employed by the several components of the criminal justice system;

(4) Study and make recommendations concerning the capacity, utilization and type of state and local prison and jail facilities; and alternatives to the same including the appropriate use of existing facilities and programs, and the desirability of additional or different facilities and programs;

(5) Study and make recommendations concerning methods of reducing risk of future criminal conduct by offenders;

(6) Collect, evaluate and coordinate information and data related to or produced by all parts of the criminal justice system;

(7) Accept gifts and grants and disburse them in the performance of its responsibilities; and

(8) Report annually to the Chief Justice of the Supreme Court, the President of the Senate, the Speaker of the House of Representatives and the Governor.

Id.

¹¹ 1987 Or. Laws ch. 619, § 4(1). The Criminal Justice Council was instructed first to submit the guidelines to the 1989 Legislature. *Id.* The guidelines would then become effective as administrative rules on September 1, 1989, without further legislative action unless the legislature voted to modify or reject them or provided a different effective date. *Id.* The 1989 Legislature did defer the effective date until November 1, 1989.

¹² In *State v. Spinney*, the court held that this administrative approach to the development of the sentencing guidelines did not violate the separation-of-powers provision of the Oregon Constitution. 820 P.2d 854 (Or. Ct.

When the Council presented the guidelines to the 1989 Legislature, some members, particularly those new legislators who had not previously had a chance to vote on the sentencing guidelines, objected to the "automatic enactment" provision. Some members also felt that the guidelines should not become law without explicit legislative action. Responding to these concerns, the 1989 Oregon Legislative Assembly took action, officially approving the guidelines as promulgated by the State Sentencing Guidelines Board.¹³

A. *The Sentencing Grid*

The authorizing legislation instructed the Council to take into consideration a variety of factors in developing the guidelines.¹⁴ The legislation pronounced that the primary function of sentencing is "to punish each criminal offender appropriately and insure the security of the public in person and property."¹⁵ Based on

App. 1991). By way of contrast, the Federal Sentencing Commission was established as an independent agency in the judicial branch rather than the executive branch. The federal approach also survived constitutional challenge. *See* *Mistretta v. United States*, 488 U.S. 361 (1989).

¹³ *See* *Bogan*, *supra* note 2, at 479.

¹⁴ 1987 Or. Laws ch. 619, § 2(3). This section states:

In developing the sentencing guidelines the council shall take into consideration factors relevant to establishment of appropriate sentences, including severity of the offense, criminal history of the offender, aggravating and mitigating circumstances, performance under probationary supervision, prevention of recidivism, possibility of reformation or deterrence and the effective capacity of state and local correctional facilities and other sentencing sanctions available.

Id.

¹⁵ 1987 Or. Laws ch. 619, § 2(2)(a). In *Spinney*, the defendant challenged the sentencing guidelines, asserting that the sentencing policy violated art. I, § 15 of the Oregon Constitution, which requires that "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." 820 P.2d at 854-55. The court upheld the guidelines, stating:

[T]he guidelines are an attempt both to protect society and to deter individuals from engaging in dangerous and repeated criminal conduct. They also seek to apply corrections system resources for the rehabilitation and reformation of offenders, the prevention of recidivism and the promotion of more consistent sentences among like individuals. The guidelines expressly acknowledge that one of the primary purposes for imposing sentences is to provide punishment that is appropriate to the

this sentencing policy, the Council concluded that the two primary determinants of an appropriate sentence should be the seriousness of the crime and the offender's criminal history. Obviously, the more serious the crime, the more appropriate a severe punishment. Likewise, even greater severity is justified when the offender has been convicted previously but has continued to engage in criminal conduct. Because authorities generally consider criminal history one of the best predictors of an offender's likelihood to engage in future criminal conduct, consideration of criminal history is relevant to both appropriate punishment and protection of public safety.

Taking this policy into consideration, the Council developed a sentencing grid, with crime seriousness and criminal history factors serving as the two axes.¹⁶ It established eleven categories of crime seriousness as the vertical axis and nine categories of criminal history as the horizontal axis. The intersection of these axes creates a total of ninety-nine grid boxes or cells, each containing a presumptive sentencing range. The sentencing range in each grid cell is relatively narrow although the trial judge retains discretion to order any sentence within that range.¹⁷ Any sentence more severe or lenient than the presumptive sentence specified by the grid cell requires a formal departure from the guidelines.¹⁸

A dispositional line runs through the grid, with cells above the line containing presumptive prison sentences and cells below the line involving presumptive probation. Of the ninety-nine cells,

offense. That does not render them "vindictive" and violative of the constitution.

Id. at 856 (citations omitted). The court also rejected an argument that the guidelines violated art. I, § 16 of the Oregon Constitution, which requires that "all penalties shall be proportioned to the offense." *Id.* The court rejected this challenge despite conceding that under the guidelines, a defendant convicted of a less serious crime may sometimes receive a longer sentence than a person convicted of a more serious crime if the first offender has a longer criminal history. *Id.*

¹⁶ The grid is set forth as Appendix A.

¹⁷ See OR. ADMIN. R. 253-05-001 (1989), which states:

If an offense is classified in a grid block above the dispositional line, the presumptive sentence shall be a term of imprisonment within the durational range of months stated in the grid block. The sentencing judge should select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure.

Id.

¹⁸ OR. ADMIN. R. 253-08-001 (1991).

fifty-three are above the line and forty-six are below the line. Three grid cells have a probation option whereby offenders with relatively minor criminal records can be sentenced to community sanctions instead of the presumptive prison term without requiring a formal departure from the guidelines. The judge, however, can exercise this option only if she makes the appropriate findings.¹⁹

B. *The Crime Seriousness Scale*

To assist the Council in ranking crime seriousness levels, a subcommittee of the Council proposed a set of guiding principles.²⁰

¹⁹ These appropriate findings include the following:

(a) An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism;

(b) The recommended treatment program is available and the offender can be admitted to it within a reasonable period of time; and

(c) The probationary sentence will serve community safety interests by promoting offender reformation.

OR. ADMIN. R. 253-05-006(1) (1989). The optional probationary sentence is not available, however, if the offender used a firearm in committing the offense or if, at the time of the offense, the offender was on probation or parole for a prior conviction. *Id.* 253-05-006(2).

²⁰ See Bogan, *supra* note 2, at 472. In describing the Council's ranking process, Bogan states:

The principles developed by the committee were based on the premise that the primary determinant of crime severity is the harm posed by the criminal conduct. "Harm" was defined as the damage or threat to the societal interest protected by the statute. Societal interests were then ranked in a hierarchy; the greatest interest to be protected was defined by the committee as individual personal safety. Property rights were ranked next highest, and the integrity of government institutions third.

Within each of the three overall interest categories—person, property, and governmental interests—offenses were ranked as to their severity according to internal principles as well. *Person* offenses were grouped in order of severity as to whether the harm threatened was death, serious physical injury, physical injury, or emotional harm. The property category ranked threats to private property higher than public property rights. *Governmental interests* offenses ranked highest were those threatening obstruction of justice; next were offenses that constituted a violation of the public trust; last, those violating social norms.

Id. (emphasis in original).

These principles established a hierarchy of societal interests to be protected from criminal conduct, ranking protection of person first, property protection second, and preservation of governmental interests third.²¹

Although this general framework proved useful to the Council, it could not resolve all hard issues in the ranking process. The Council found that a serious crime affecting an interest lower in the hierarchy often deserved a more severe sanction than a relatively minor crime involving a higher interest. Thus, in the final grid, some crimes involving the integrity of governmental institutions, such as hindering prosecution or bribery, were ranked higher than minor property or person crimes. Overall, however, the final sentencing grid was weighted heavily toward protection of personal safety, with crimes against persons, particularly those involving violence, receiving the most severe sanctions.

Unlike many other jurisdictions' codes, the Oregon Criminal Code does not subcategorize criminal conduct precisely enough for it to be incorporated without modification into a sentencing guidelines system. The Oregon Code establishes three classifications of felonies—Classes A, B, and C—and provides statutory maximum sentences of twenty, ten, and five years respectively, but no minimum sentences.²²

The Council concluded that because many crimes within a particular felony classification cover a broad range of conduct, it should differentiate the crimes for purposes of sentencing. Therefore, in ranking crime seriousness levels, the Council developed its own subcategories for use as part of the sentencing grid. For example, Rape I was ranked higher if the offender used or threatened to use a weapon, if the offender caused or threatened to cause serious physical injury, or if the victim was under the age of twelve. Similarly, Arson I was ranked in crime category 10 if the offense represented a serious threat to life, and otherwise in crime categories 9, 8, or 7, depending on the amount of economic loss caused. Finally, Burglary I was ranked in crime category 9 if the offender was armed with a deadly weapon or caused or threatened physical injury, in category 8 if the dwelling was occupied at the time of the offense, and otherwise in category 7.

The Council generally ranked property crimes according to the

²¹ *Id.*

²² See OR. REV. STAT. § 161.605 (1991), which sets forth maximum prison terms for felonies.

amount of loss involved. It drew distinctions depending on whether the loss that resulted from theft, embezzlement, arson, or other property crime was over \$50,000, ranged from \$10,000-\$50,000, \$5000-10,000, \$1000-\$5000, or was less than \$1000. The Council considered the argument that using property value as the measure of crime seriousness sometimes ignores the actual harm to the victim.²³ However, because the degree of economic loss has traditionally been a measure of crime seriousness, the utility of this criterion as a ranking device prevailed over the philosophical argument.

The Council also engaged in considerable debate regarding the appropriate ranking of drug offenses. In determining crime seriousness, the Council chose to focus on the nature of the offense and whether it was part of a criminal enterprise. The Council identified more serious drug offenses as those committed as “part of a drug cultivation, manufacture or delivery scheme or network.”²⁴ Aggravated drug offenses, such as distribution to minors, were ranked in category 8, major drug offenses in category 6, other drug offenses in category 4, and possession for personal use in category 1.²⁵

Distinctions among drug offenses incorporated in the guidelines proved unworkable, and the Oregon Court of Appeals ultimately held that the “scheme or network” language was unconstitutionally vague.²⁶ In its place, the 1991 Legislature adopted legislation that classified crime severity of drug offenses by the nature of the drug, the amounts involved, and the type of prohibited conduct in which the actor engaged—delivery, manufacture, or possession.²⁷

²³ For instance, the theft of a \$1000 vehicle from a low-income family can potentially cause more harm to the victims than the theft of a \$30,000 vehicle from an affluent owner.

²⁴ OR. ADMIN. R. 253-04-002(3) app. 4 (1989).

²⁵ *Id.*

²⁶ *State v. Moeller*, 806 P.2d 130, 133 (Or. Ct. App. 1991) (noting that “[t]he phrase is vague, and we can conceive of no narrowing construction that would not be legislative in character”). The classification of drug offenses under the federal guidelines has also presented uncertainties. *See Chapman v. United States*, 111 S. Ct. 1919 (1991) (addressing whether weight specified in federal guidelines for classifying possession of LSD included “carrier” for drug, such as a sugar cube).

²⁷ *See* 1991 Or. Laws ch. 690. This statute provides that drug offenses are classified as crime category 8 if “(1) The violation constitutes delivery or manufacture of a controlled substance and involves substantial quantities of

The Council also faced the traditional philosophical debate in ranking attempt crimes: Should the focus be on the culpable mental state of the offender, in which case an attempt would be ranked as highly as a completed crime? Or should the focus be on the harm actually caused, in which case an attempt would rank below a completed crime? Ultimately, the Council decided to rank an attempted crime two levels below the ranking of a completed crime.²⁸

C. The Criminal History Scale

The criminal history axis of the sentencing guidelines grid has nine categories of criminal history ranging from Category A (the highest) to Category I (no criminal history).²⁹ In developing these categories, the Council made a number of fundamental pol-

a controlled substance (2) The violation constitutes possession, delivery or manufacture of a controlled substance and the possession, delivery or manufacture is a commercial drug offense." *Id.* § 1. The statute defines "substantial quantities" and "commercial drug offense"; lesser offenses are classified as crime categories 6, 4, or 1. *Id.* §§ 2-3.

²⁸ OR. ADMIN. R. 253-04-005(1) (1989). Under the Oregon Criminal Code, an attempt is ranked one category below a completed offense. Thus, an attempted Class A felony is a Class B felony. OR. REV. STAT. § 161.405 (1991).

²⁹ OR. ADMIN. R. 253-04-007 (1989). The criminal history categories are defined as follows:

CRIMINAL HISTORY CATEGORY A: The offender's criminal history includes three or more person felonies in any combination of adult convictions or juvenile adjudications.

CRIMINAL HISTORY CATEGORY B: The offender's criminal history includes two person felonies in any combination of adult convictions or juvenile adjudications.

CRIMINAL HISTORY CATEGORY C: The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony; and one or more adult conviction or juvenile adjudication for a non-person felony.

CRIMINAL HISTORY CATEGORY D: The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony; but no adult conviction or juvenile adjudication for a non-person felony.

CRIMINAL HISTORY CATEGORY E: The offender's criminal history includes four or more adult convictions for non-person felonies but no adult conviction or juvenile adjudication for a person felony.

CRIMINAL HISTORY CATEGORY F: The offender's criminal history includes two or three adult convictions for non-person

icy decisions. First, the Council decided to consider only prior felonies and Class A misdemeanors, thereby excluding Class B and C misdemeanors from an offender's criminal history. The Council also chose to include prior juvenile adjudications, but only if they involved conduct that would be a felony if committed by an adult. Finally, the Council included out-of-state convictions only where the elements of the offense would constitute a felony or Class A misdemeanor under current Oregon law.³⁰

Perhaps the Council's most significant policy choice, however, was to distinguish between person and nonperson crimes for purposes of criminal history. Such an approach was a manifestation of the Council's overall philosophy of using the guidelines to target those offenders who present the greatest danger to personal safety. Thus, a prior person crime ranks an offender considerably higher on the criminal history scale than a prior nonperson crime. For example, prior conviction of three or more person felonies puts the offender in Category A, the highest criminal history category, whereas conviction of four or more nonperson felonies puts the offender in Category E. Similarly, conviction of even one felony against a person ranks the offender in Category D, ahead of an offender who has committed multiple nonperson felonies.

The prosecutor must prove an offender's criminal history unless it is admitted.³¹ The criminal history set forth in the presentence report sufficiently satisfies the state's burden on this issue unless a defendant files a notice contesting the history

felonies but no adult conviction or juvenile adjudication for a person felony.

CRIMINAL HISTORY CATEGORY G: The offender's criminal history includes four or more adult convictions for Class A misdemeanors; one adult conviction for a non-person felony; or three or more juvenile adjudications for non-person felonies, but no adult conviction or juvenile adjudication for a person felony.

CRIMINAL HISTORY CATEGORY H: The offender's criminal history includes no adult felony conviction or juvenile adjudication for a person felony; no more than two juvenile adjudications for non-person felonies; and no more than three adult convictions for Class A misdemeanors.

CRIMINAL HISTORY CATEGORY I: The offender's criminal history does not include any juvenile adjudication for a felony or any adult conviction for a felony or Class A misdemeanor.

Id.

³⁰ OR. ADMIN. R. 253-04-011 (1989).

³¹ OR. REV. STAT. § 137.079(5) (1991); OR. ADMIN. R. 253-04-013 (1989).

stated therein, in which case the prosecutor must prove the defendant's criminal history by a preponderance of the evidence.³² However, criminal history categories that include a range of prior convictions will likely lessen the incentive a defendant at a sentencing hearing might otherwise have to dispute the exact numbers and validity of prior convictions.

D. Departures

Oregon's sentencing guidelines are mandatory. The trial judge must impose a sentence within the range specified in the grid block unless that judge finds "substantial and compelling reasons" for a departure.³³ The guidelines set forth a nonexclusive list of eight mitigating factors³⁴ and eleven aggravating factors³⁵ that support such departures. A trial judge, however, generally

³² See OR. REV. STAT. § 137.079(5)(b)-(c) (1991), which states:

- (b) Except as otherwise provided in paragraph (c) of this subsection, the defendant's criminal history as set forth in the presentence report shall satisfy the state's burden of proof as to the defendant's criminal history.
- (c) Prior to the date of sentencing, the defendant shall notify the district attorney and the court in writing of any error in the criminal history as set forth in the presentence report. Except to the extent that any disputed portion is later changed by agreement of the district attorney and defendant with the approval of the court, the state shall have the burden of proving by a preponderance of evidence any disputed part of the defendant's criminal history. The court shall allow the state reasonable time to produce evidence to meet its burden.

Id.

³³ OR. ADMIN. R. 253-08-001 (1991). A judge must state the reasons for any departure on the record. *Id.*

³⁴ *Id.* 253-08-002(1)(a). These mitigating factors include:

- (A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.
- (B) The defendant acted under duress or compulsion (not sufficient as a complete defense).
- (C) The defendant's mental capacity was diminished (excluding diminished capacity due to voluntary drug or alcohol abuse).
- (D) The offense was principally accomplished by another and the defendant exhibited extreme caution or concern for the victim.
- (E) The offender played a minor or passive role in the crime.
- (F) The offender cooperated with the state with respect to the current crime of conviction or any other criminal conduct by the

cannot use a factor as an aggravation if it is already an element of the crime of conviction.³⁶ When a judge departs from the presumptive sentence, she must consider the purposes and policies of the guidelines and impose a sentence that is proportionate to the seriousness of the crime and the offender's criminal history.³⁷ To prevent departures from causing undue disparities in sentencing and from preempting available corrections capacity, departures are limited to no more than double the maximum duration of the presumptive incarceration term of the underlying

offender or other person. The offender's refusal to cooperate with the state shall not be considered an aggravating factor.

(G) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

(H) The offender's criminal history indicates that the offender lived conviction-free within the community for a significant period of time preceding his or her current crime of conviction.

Id.

³⁵ *Id.* 253-08-002(1)(b). These aggravating factors include:

(A) Deliberate cruelty to victim.

(B) The offender knew or had reason to know of the victim's particular vulnerability, such as the extreme youth, age, disability or ill health of victim, which increased the harm or threat of harm caused by the criminal conduct.

(C) Threat of or actual violence toward a witness or victim.

(D) Persistent involvement in similar offenses or repetitive assaults. This factor may be cited when consecutive sentences are imposed only if the persistent involvement in similar offenses or repetitive assaults is unrelated to the current offense.

(E) Use of a weapon in the commission of the offense.

(F) The offense involved a violation of public trust or professional responsibility.

(G) The offense involved multiple victims or incidents. This factor may not be cited when it is captured in a consecutive sentence.

(H) The crime was part of an organized criminal operation.

(I) The offense resulted in a permanent injury to the victim.

(J) The degree of harm or loss attributed to the current crime of conviction was significantly greater than typical for such an offense.

(K) The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim.

Id.

³⁶ *Id.* 253-08-002(2).

³⁷ *Id.* 253-08-003.

conviction.³⁸

Although sentences within the presumptive range are not subject to appellate review,³⁹ both the state and the defendant can appeal a departure sentence.⁴⁰ The appellate court must determine whether evidence in the record supports the sentencing court's findings that substantial and compelling reasons justified ordering a departure.⁴¹

E. Consecutive Sentences

The guidelines attempt to check the possibility of introducing undue disparities into the sentencing system through the use of consecutive sentences. For example, it is possible for a defendant to be convicted of numerous separate crimes arising out of the same course of conduct.⁴² If there were no limit on consecutive sentences, the aggregate sentence imposed could easily exceed sentences for crimes far higher on the crime seriousness scale.

The Council addressed this issue by providing that the presumptive incarceration term for consecutively imposed sentences equals the presumptive incarceration term for the most serious offense plus up to the maximum incarceration term for each additional offense allowed under the category I grid blocks (the grid blocks that assume no criminal history on the part of the offender).⁴³ However, the total incarceration term for the aggre-

³⁸ *Id.* 253-08-004(1).

³⁹ OR. REV. STAT. § 138.222(2)(a) (1991). An appellate court may, however, review a claim that "[t]he sentencing court erred in ranking the crime seriousness classification of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes." *Id.* § 138.222(4)(b); *see also* State v. Munro, 818 P.2d 971, 973 (Or. Ct. App. 1991) (finding claim of error that number of concurrent sentences had been miscounted for purposes of determining criminal history is reviewable).

⁴⁰ OR. REV. STAT. § 138.222(3) (1991). *But see* State v. Orsi/Gauthier, 813 P.2d 82 (Or. Ct. App. 1991) (defendant must object to departure sentence to obtain review on appeal).

⁴¹ OR. REV. STAT. § 138.222(3) (1991).

⁴² This could occur, for example, when there are multiple victims of a single robbery or multiple instances of embezzlement from the same victim.

⁴³ OR. ADMIN. R. 253-12-020(2)(a) (1989). An important issue for further study is whether the Oregon approach to the problem of consecutive sentences is more or less satisfactory than the approach taken by the federal guidelines. For a description of the federal approach, *see* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 25-28 (1988).

gate of the consecutive sentences cannot exceed twice the maximum presumptive incarceration term for the most serious offense.⁴⁴ Any longer sentence requires a departure.⁴⁵

F. *Postprison Supervision*

Although the guidelines abolished the traditional concept of early release on parole, they retained the policy of postprison supervision. The Council concluded that it is critically important to assist and monitor offenders as they make the transition from prison back into the community. Thus, in addition to a specified period of incarceration, each offender who is sentenced to prison is also sentenced to a term of postprison supervision. The period of this supervision ranges from one to three years, depending on the crime of conviction's seriousness ranking.⁴⁶ Violations of postprison supervision conditions can result in a return to prison for up to six months.

The Parole Board was not abolished by the legislature. Instead, it was renamed the Board of Parole and Post-Prison Supervision. This Board continues to set parole release dates for offenders sentenced prior to the implementation of guidelines. Its role regarding offenders sentenced pursuant to the guidelines, however, is different. For these offenders, the Board's primary responsibility is to set conditions of postprison supervision, to adjudicate alleged violations of those conditions, and to impose necessary sanctions.

G. *Community Sanctions*

One of the most innovative aspects of the Oregon guidelines is their regulation of both the nature of community sanctions and the length of probation. Grid cells below the dispositional line provide for a period of probation extending from eighteen months to five years, depending on crime severity.⁴⁷ An offender's failure to comply with conditions of probation can result in a revocation and imposition of a prison term for up to six

⁴⁴ OR. ADMIN. R. 253-12-020(2)(b) (1989).

⁴⁵ *Id.* A departure is permitted "only if the judge finds substantial and compelling reasons to impose a departure sentence for any individual offense being sentenced consecutively." *Id.* 253-08-007(1) (1991).

⁴⁶ *Id.* 253-05-002(2) (1989) (1 year for crime categories 1-3, 2 years for crime categories 4-6, and 3 years for crime categories 7-11).

⁴⁷ *Id.* 253-05-008(1).

months except in cases where the probationary sentence was a departure. In departure cases, the prison term imposed upon revocation can equal the maximum presumptive term that could have originally been imposed.⁴⁸

In addition to specifying the length of probation, each grid cell below the dispositional line specifies the maximum number of "custody units" that may be imposed as part of the presumptive probationary sentence. A custody unit represents one day of confinement in a jail, residential custodial treatment facility, restitution center, or work release center.⁴⁹ Each day of satisfactory compliance with the conditions of house arrest also counts as one custody unit.⁵⁰ Community service of an eight-hour day counts as one-third of a custody unit.⁵¹

The maximum custody units that may be imposed ranges from 90 to 180 depending on the grid block offense classification.⁵² Sentences above this range require a departure. To protect county jail space, the number of custody units that may be used for jail confinement is limited to between 30 and 90, again depending on the grid block classification of the offense.⁵³

To facilitate sentencing judges' greater use of community sanctions, the legislature directed the Department of Corrections to compile a statewide directory of community programs for probationers and to make this directory available to judges and probation officers.⁵⁴ The information provided is intended to more fully inform those involved in the sentencing process of the community resources available, thereby expanding sentencing options and potentially contributing to the development of additional community programs.⁵⁵

CONCLUSION

The Oregon Criminal Justice Council and Sentencing Guidelines Board continue in operation and have ongoing responsibility for implementing the guidelines and for researching and

⁴⁸ *Id.* 253-10-002(2).

⁴⁹ *Id.* 253-05-012(2)(a)-(c).

⁵⁰ *Id.* 253-05-012(2)(d).

⁵¹ *Id.* 253-05-012(2)(e).

⁵² *Id.* 253-05-011(2).

⁵³ *Id.* 253-05-013(1).

⁵⁴ *See* Bogan, *supra* note 2, at 476.

⁵⁵ *Id.*

monitoring their effectiveness.⁵⁶ The Council makes its research data and reports available to policy makers in other states. As this data becomes available and problems and disparities are identified, further refinement of the guidelines will undoubtedly become necessary.

In any guidelines system, there must be continual review and refinement of the crime seriousness levels and criminal history categories to ensure that all important distinctions are drawn. For example, should certain person crimes, particularly those involving extreme violence or injury, be weighted more heavily as part of the offender's criminal history? Are the guidelines properly structured to target those offenders who present the greatest future danger to society? Should an adult conviction be weighted more heavily than a juvenile adjudication for the same offense? Should five convictions for criminal conduct involving different victims be weighted more heavily than five convictions for the same conduct involving a single victim? Should multiple offenses committed against a single victim over an extended period of time be treated more severely than when they occur as part of a single criminal episode? How can a guidelines system ensure uniformity and avoid disparities in the face of differential charging practices?

Jurisdictions adopting sentencing guidelines must face these and many other questions. There remains much to be said for individualized sentencing outside a guidelines system. Those jurisdictions adopting sentencing guidelines have a continuing obligation to demonstrate that sentencing under their guidelines is not only more efficient, but is more fair. It is not enough that

⁵⁶ The Oregon Criminal Justice Council has found the following: (1) The average length of prison stay for all offenders has increased from 34 months for those sentenced prior to guidelines to 48 months for those sentenced under the guidelines; (2) The average length of stay for those offenders convicted of forcible sex crimes and homicide has almost doubled since the guidelines went into effect; (3) Under the guidelines, the rate of imprisonment for offenders convicted of person crimes has increased from 34% to 48%, for forcible sex crimes from 40% to 60%, for drug delivery and manufacture from 9% to 22%, while the rate of imprisonment has been reduced for property crimes from 19% to 9% and for driving offenses from 7% to 3%; (4) Judges imposed departure sentences in only 6% of the cases, with approximately an even split between upward and downward departures; (5) Guidelines have not affected the rate of plea bargaining, and 92% of felony cases continue to be disposed of by plea. OR. CRIMINAL JUSTICE COUNCIL, FIRST YEAR REPORT ON IMPLEMENTATION OF SENTENCING GUIDELINES, at vii-ix (Mar. 1991).

like offenders are treated alike. Unlike offenders must be treated differently if the interests of furthering justice and protecting society are to be properly served.

- APPENDIX A -

		▼ CRIMINAL HISTORY SCALE ▼									
		Multiple (2+) Felony Offender	Repeat (2+) Felony Person Offender	Single (1) Felony Non-Person Offender	Single (1) Felony Person Offender	Multiple (4+) Felony Non-Person Offender	Repeat (2-3) Felony Non-Person Offender	Significant Minor Criminal Record	Minor Criminal Record	Minor Misdemeanor or No Criminal Record	
		A	B	C	D	E	F	G	H	I	
▼	Murder	11	225-269	196-224	178-194	149-177	149-177	135-148	129-134	122-128	120-121
▼	Manslaughter I, Assault I, Rape I, Arson I	10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60
▼	Rape I, Assault I, Kidnapping I, Arson I, Burglary I, Robbery I	9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36
▼	Manslaughter II, Sexual abuse I, Assault II, Rape II, Using child in display of sexual conduct, Drugs-minors, Cult/manuf/del, Comp. prostitution, Neg. homicide	8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18
▼	Extortion, Coercion, Supplying contraband, Escape I	7	31-36	25-30	21-24	19-20	16-18	180-90	180-90	180-90	180-90
▼	Robbery II, Assault III, Rape III, Bribe Receiving, Intimidation, Property crimes (more than \$50,000), Drug possession	6	25-30	19-24	15-18	13-14	10-12	180-90	180-90	180-90	180-90
▼	Robbery III, Theft by receiving, Trafficking stolen vehicles, Property crimes (\$10,000-\$49,999)	5	15-16	13-14	11-12	9-10	6-8	180-90	120-60	120-60	120-60
▼	FTA I, Custodial interference II, Property crimes (\$5,000-\$9,999), Drugs-Cult/manuf/del	4	10-10	8-9	120-60	120-60	120-60	120-60	120-60	120-60	120-60
▼	Abandon child, Abuse of corpse, Criminal nonsupport, Property crimes (\$1,000-\$4,999)	3	120-60	120-60	120-60	120-60	120-60	120-60	90-30	90-30	90-30
▼	Dealing child pornography, Violation of wildlife laws, Welfare fraud, Property crimes (less than \$1,000)	2	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30
▼	Altering firearm ID, Habitual offender, Violation, Bigamy, Paramilitary activity, Drugs-possession	1	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30

• In *white blocks*, numbers are presumptive prison sentences expressed as a range of months.

• In *gray blocks*, upper number is the maximum number of custody units which may be imposed; lower number is the maximum number of jail days which may be imposed.