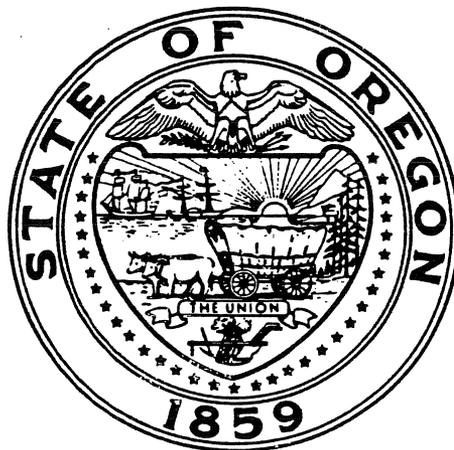


SUPPLEMENT SENTENCING GUIDELINES IMPLEMENTATION MANUAL



JANUARY, 1992

OREGON CRIMINAL JUSTICE COUNCIL

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1991
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INTRODUCTION

The Criminal Justice Council anticipated production following the 1991 legislative session of a manual to replace the 1989 Oregon Sentencing Guidelines Implementation Manual. This new manual was expected to incorporate 1991 changes to the guidelines. Legislation to approve amendments to the guidelines rules which would eliminate concepts like "single judicial proceeding", allow departures on the length of probation, and other improvements passed the Senate; however, no hearing was held on the bills in the House. Instead of a new guidelines manual, we have therefore produced a supplement to the existing manual for use between now and the end of the next legislative session, where the Council hopes to be more successful with its legislative proposals.

The supplement includes advisory crime seriousness rankings for new and modified felonies created by the 1991 Oregon Legislature, and new commentary adopted by the Sentencing Guidelines Board to clarify its intent in a number of areas in which there was some confusion during the first year of guidelines implementation. Also included are 1991 statutory amendments related to sentencing guidelines, a compilation of appellate decisions, and Council implementation advisories issued to date.

We hope you find the supplement helpful. Questions should be directed to:

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HOW TO USE THIS SUPPLEMENT

This document is organized by chapters consistent with those in the 1989 Oregon Sentencing Guidelines Implementation Manual. It is organized to be used several ways.

First, it can be used in conjunction with the 1989 manual. To determine whether there is an update to any page of the 1989 manual, practitioners should note the page number(s) being consulted in the 1989 manual, and turn to the Table of Contents for the 1992 Supplement to find the section of the supplement relevant to a particular page or pages.

An Index to the 1992 supplement by Oregon Administrative Rule number and a Topical Index to the 1992 supplement are also included at the end of the supplement.

Summaries of all appellate decisions regarding sentencing guidelines through December 31, 1991 can be found here in Chapter VIII. Appellate decisions are keyed to substantive topics within the body of the supplement.

THIS SUPPLEMENT INCLUDES THE FOLLOWING:

1. Errata for the 1989 Implementation Manual. (Does not include items in 12/89 errata previously distributed.)
2. Statutory Changes from the 1991 legislative session related to Sentencing Guidelines.
3. New Commentary for the 1989 rules adopted by the Sentencing Guidelines Board.
4. Advisories issued by the Sentencing Guidelines Board staff since 1989.
5. Appellate Decisions related to Sentencing Guidelines by the Oregon Court of Appeals and Oregon Supreme Court through December 31, 1991.

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ERRATA

This list of errata is keyed to the page numbers of the 1989 Sentencing Guidelines Implementation Manual. This list does not include items in a previous errata distributed in December 1989. Please contact the Council if you need the earlier list.

Page 4 - In the first paragraph at the top of the page, please note that modifications to the guidelines by the Guidelines Board regarding the state's "effective prison capacity" are not subject to the requirement of affirmative legislative approval as are other guidelines amendments. These capacity amendments are intended to be emergency amendments, effective immediately upon approval by the Guidelines Board. See ORS 137.665(3) and ORS 137.667(3).

Page 8 - In Section 2. a. the last line of the quoted ORS 137.010 (1) between "Board" and "otherwise", insert unless.

Page 14 - In the last sentence of the first full paragraph of the Commentary continued from the previous page replace "or" with "and", to read..."the sentencing judge should refer to comparable offenses on the Crime Seriousness Scale [or] and the ranking principles described in OAR 253-04-002."

Page 15 - In the third line of the paragraph continued from the previous page, insert "rule" to read..."This special classification rule establishes the different maximum sentences..."

Page 19 - The reference to ORS 164.877(4) Unlawful Tree Spiking-Injury should read ORS 164.877(3).

Page 21 - The reference to ORS 166.220 Carrying Dangerous Weapon, Attempted Use should read Unlawful Use of Weapon.

Page 21 - The reference to ORS 164.315 Arson I should read Arson II.

Page 21 - The note in parentheses following the citation of ORS 819.310 Trafficking in Stolen Vehicles should read "(if part of an organized operation or if [economic loss] value of the property taken from one or more victims was greater than \$50,000; otherwise CC5.)"

Page 39 - The references to ORS 161.435.01, .02, and .03 should read ORS 161.435(2)(a), (2)(b), and (2)(c) respectively.

Page 39 - The references to ORS 161.450.01, .02, and .03 should read ORS 161.450(2)(a), (2)(b), and (2)(c) respectively.

Page 40 - add ORS 164.065 Theft of Lost or Mislaid Property.

Page 40 - add ORS 163.680 Pay for Viewing Child Sexual Conduct.

Page 41 - ORS 164.877(4) Tree Spiking-Injury should be ORS 164.877(3).

Page 41 - ORS 166.365(1)(e) should be ORS 164.365(1)(f) Criminal Mischief I - Police Animal.

Page 41 - ORS 166.382 is Possession of Destructive Device, ORS 166.384 is Manufacture of Destructive Device.

Page 41 - ORS 167.062(2) should be (4).

Page 43 - The references to ORS 164.450.01, .02, and .03 should be (2)(a), (2)(b), and (2)(c) respectively.

Page 43 - ORS 166.365(1)(e) should be ORS 164.365(1)(f).

Page 44 - ORS 166.382 Manufacture of Destructive Device should be 384, and Possession of Destructive Device is ORS 166.382.

Page 45 - The references to ORS 161.435(2), (3), and (1), should be (2)(b), (2)(c), and (2)(a) respectively.

Page 46 - ORS 164.877(1) should be (2), and 164.877(4) should be (3).

Page 46 - ORS 506.911(3) should be 506.991(3).

Page 65 - The reference to ORS 166.220 should be deleted as it is a C felony, not an A misdemeanor.

Page 78 - The citation of ORS 144.790(2)(b) is a transcription error and should read, "The contents of any presentence report furnished by the Department of Corrections as required by this subsection shall be as prescribed by rules of the State Sentencing Guidelines Board under section 7, Chapter 790, Oregon Laws 1989. Note that (2)(c) was amended by the 1991 Legislative Assembly and now reads: "Except in the case of conviction of a sex offense [A] a"

Page 79 - The fourth line of the second paragraph on this page should read "...this information is made [may] available..."

Page 81 - The citation to ORS 137.079(4)(a) should be (5)(a).

Page 83 - The citation to ORS 137.010(9) should be 137.010(10).

Page 92 - The title of OAR 253-05-004 should read: Post-Prison Supervision for Murder and Aggravated Murder".

Page 93 - In the last line of the second paragraph in the commentary to Section (1) of OAR 253-05-004, on the top half of the page the words "in appropriate cases" should be deleted to read, "The offender must serve at least three years of post-prison supervision."

Page 137 - In the last paragraph at the bottom of the page in the Example of the Commentary to Section (3) of OAR 253-08-005, delete the sentence: "In such a case, the judge might use this finding to depart to extend the term of post-prison supervision to three years." This is an error as the operation of the rules do not provide for departure on the length of the term of post-prison supervision.

Page 138 - In the Commentary under OAR 253-05-009 the second sentence should be deleted as no rule allows for a departure with respect to the length of the period of probation.

Page 203 - In the definition of "Durational departure", OAR 253-03-001(8), the inclusion of the language: "term of post-prison supervision, term of probation" is an error as the operation of the substantive rules do not provide for departure on post-prison supervision or the term of probation.

CHAPTER I
STATEMENT OF PURPOSES AND PRINCIPLES
(1989 Manual Pages 2-8)

PURPOSES OF GUIDELINES

Constitutionality of Guidelines

▶ Appellate Decisions

State v. Spinney, 109 Or App 573, November 13, 1991. See Chapter VIII.

Date of Crime

▶ Advisory

Where an indictment is drafted so the dates of the offense are alleged to have run from June 1989 (pre-guidelines) through July 1990 (guidelines), do the guidelines control the sentencing? Staff Advice: No. See ORS 137.010(2); "If it cannot be determined whether the felony was committed on or after November 1, 1989, the defendant shall be sentenced as if the felony had been committed prior to November 1, 1989." A district attorney could avoid the problem by drafting an indictment with dates pre or post-guidelines depending on how the sentence is to be structured. (Advisory #3, September 23, 1991).

CHAPTER II
SENTENCING GUIDELINES GRID
(1989 Manual Pages 9-65)

THE CRIME SERIOUSNESS SCALE

Unranked Offenses

▶ Advisory

How is attempted aggravated murder to be ranked on the crime seriousness scale? Staff Advice: Aggravated murder is a felony to which the guidelines do not apply. OAR 253-04-003 Aggravated Murder. Attempted aggravated murder therefore should be treated as an unranked felony. The sentencing judge should proceed as set forth in OAR 253-04-004, Other Unranked Offenses, to determine the seriousness ranking according to the ranking of comparable offenses and the guidelines ranking principles. (Advisory #2, August 17, 1990).

▶ Appellate Decisions

State v. Rathbone II, 110 Or App 419, (December 26, 1991). See Chapter VIII.

▶ Note

In December 1991 the Oregon Sentencing Guidelines Board adopted advisory crime seriousness rankings for all new and modified felonies created by the 1991 Legislative Assembly. The principles of crime seriousness ranking adopted for the original 1989 crime seriousness rankings were used in developing these advisory rankings.

The 1991 rankings are advisory only. Legislation extending the Guidelines Board's authority to rank new and reclassified felonies following every legislative session failed to pass both Houses of the Legislature. However, the Criminal Justice Council received many requests for information about the rankings for the new 1991 offenses, and the Guidelines Board was convinced it would be helpful for practitioners to have the guidance of even "advisory" rankings.

Technically the new felonies are unranked offenses. OAR 253-04-004, the rule for ranking unranked offenses, and the commentary to OAR 253-04-002 regarding the principles of crime seriousness ranking, should be consulted. The rankings included here are intended simply to assist the court in determining the appropriate crime seriousness category for these new and modified offenses.

**1991 NEW AND MODIFIED FELONIES
OREGON SENTENCING GUIDELINES BOARD
CRIME SERIOUSNESS RANKINGS***

New Felonies

Ranking

ORS 181.519 F/Reg. Sex Offender	4
ORS 526.992 Export Unprocessed Timber	Unranked
ORS 163.547 Child Neglect I	4
ORS 167.262 Use Minor Drug Offense	8, 4 (if minor less than 3 yrs. younger than offender.)
ORS 163.672 Possess Child Pornography	2
ORS 167.312 Research/Animal Interference	Unranked
ORS 167.164 Possess Gray Machine	2
ORS 162.305(2)(b) Tamper Lottery Records	3
ORS 164.377 Computer Fraud (Lottery)	6-2 as other property offenses
ORS 165.074 Unlawful Credit Card Factoring	6-2 as other property offenses

Modified Felonies**

ORS 163.165(d) and (e) Assault III	6
ORS 163.411 Sexual Pen. I	10 and 9
ORS 163.408 Sexual Pen. II	8
ORS 163.427 Sex Abuse I	8
ORS 163.425 Sex Abuse II	Unranked
ORS 164.055(1)(e) Theft I Companion Animal	6-2 as other property offenses
ORS 164.325(c) Arson I	10-7
ORS 164.365(c) Criminal Mischief I	6-2 as other property offenses
ORS 166.220(b) Unlawful Use Weapon	6

* These rankings are advisory only since the 1991 Oregon Legislature failed to extend Guidelines Board authority to rank crime seriousness of offenses granted in the 1989 Legislative Session.

** The Guidelines Board elected to rank modifications to these offenses at the same level at which the underlying offense was ranked in 1989.

Drug Related Offenses

▶ Statutory Changes

The original guidelines rankings for drug offenses, found in Appendix 4 of the 1989 Sentencing Guidelines Implementation Manual were replaced by the 1991 Legislative Assembly in response to the Court of Appeals decision in State v. Moeller, 105 Or App 434, (February 6, 1991), holding the "drug scheme or network" language for classifying more serious drug offenses unconstitutional. (See Chapter VIII.) Drug related offenses are ranked by ORS 475.996 as follows:

ORS 475.996 Guideline Penalties for Controlled Substances

This bill sets quantities, and prescribes factors to be proven to obtain crime seriousness category 6 or 8 penalties, and designates crime seriousness categories 4 and 1 for other drug related offenses.

The legislation controls penalties for crimes committed on or after July 25, 1991.

CC8: A violation of 475.992 shall be classified as a crime seriousness category 8 offense if one of three tests is met:

1. delivery or manufacture of a substantial quantity of a controlled substance.
The Act defines substantial quantities of 7 controlled substances; or
2. possession, delivery, or manufacture of a controlled substance as a commercial drug offense. A commercial drug offense is defined as one accompanied by at least three of the eleven listed factors; or
3. a violation of 475.999 (manufacture or delivery within 1000' of a school).

The "substantial quantities" required for level 8 offenses are:

- (a) 5 grams or more of a mixture or substance containing a detectable amount of heroin;
- (b) 10 grams or more of a mixture or substance containing a detectable amount of cocaine;
- (c) 10 grams or more of a mixture or substance containing a detectable amount of methamphetamine;
- (d) 100 grams or more of a mixture or substance containing a detectable amount of hashish;
- (e) 150 grams or more of a substance or mixture containing a detectable amount of marijuana;
- (f) 200 or more user units of a substance or mixture containing a detectable amount of lysergic acid diethylamide; or
- (g) 60 grams or more of a mixture or substance containing a detectable amount of psilocybin or psilocin.

In order to prove a "commercial drug offense", the state shall plead and prove beyond a reasonable doubt sufficient (three or more) factors of a commercial drug offense.

The factors required to prove a "commercial drug offense" are:

- (a) the delivery was of heroin, cocaine, hashish, marijuana, methamphetamine,

- LSD, psilocybin or psilocin, and was for consideration;
- (b) the offender was in possession of \$300 or more in cash;
- (c) the offender was unlawfully in possession of a firearm or other weapon as described in ORS 166.270(2) or the offender used, attempted to use or threatened to use a deadly or dangerous weapon as defined in ORS 161.015, or the offender was in possession of a firearm or other deadly or dangerous weapon as defined in ORS 161.015 for the purpose of using it in connection with a controlled substance offense;
- (d) the offender was in possession of materials being used for the packaging of controlled substances such as scales, wrapping or foil, other than the material being used to contain the substance that is the subject of the offense;
- (e) the offender was in possession of drug transaction records or customer lists;
- (f) the offender was in possession of stolen property;
- (g) modification of structures by painting, wiring, plumbing or lighting to facilitate a controlled substance offense;
- (h) the offender was in possession of manufacturing paraphernalia, including recipes, precursor chemicals, laboratory equipment, lighting, ventilating or power generating equipment;
- (i) the offender was using public lands for the manufacture of a controlled substance;
- (j) the offender had constructed fortifications or had taken security measures with a potential of injuring persons;
- (k) the offender was in possession of controlled substances in an amount greater than:
 - (A) 3 grams heroin;
 - (B) 8 grams cocaine;
 - (C) 8 grams methamphetamine;
 - (D) 8 grams hashish;
 - (E) 110 grams marijuana;
 - (F) 20 user units of LSD; or
 - (G) 10 grams psilocybin or psilocin.

CC6: Violations of 475.992 shall be crime seriousness category 6 if one of two tests is met:

1. delivery of heroin, cocaine, or methamphetamine for consideration; or
2. possession of more than the described quantity of 7 listed controlled substances.

The quantities which trigger possession as a CC6 offense are:

- (a) 5 grams heroin;
- (b) 10 grams cocaine;
- (c) 10 grams methamphetamine;
- (d) 100 grams hashish;
- (e) 150 grams marijuana;
- (f) 200 user units LSD; or
- (g) 60 grams psilocybin or psilocin.

CC4 and CC1: Any felony violation of 475.992 not contained in Section 1 or 2 of this Act shall be crime category 4 if it involves delivery or manufacture; or crime category 1 if it involves possession.

ORS 475.999 Man/Del/Possess CS within 1000' School

This class A felony was amended to include manufacture along with delivery of any schedule I, II, or III controlled substance within 1000' of a school attended primarily by minors. Removes the limitation that the delivery be to a student or minor. This offense was ranked by the Legislature at crime seriousness category 8 in ORS 475.996.

Creates exception for delivery of less than 5 grams of marijuana in a public place for no consideration within 1000' school, making it a C misdemeanor. Also, makes possession of less than an ounce of marijuana within 1000' of school a C misdemeanor.

Emergency clause; effective date July 16, 1991.

▶ Appellate Decisions

State v. Moeller, 312 Or 76, (August 29, 1991); 105 Or App 434, (February 6, 1991).
See Chapter VIII.

Repealed Offenses

▶ Statutory Changes

ORS 811.185, Violation of a Habitual Traffic Offender Order, was repealed by the 1991 Legislative Assembly. (1991 c.208). This offense was ranked in crime seriousness category 1.

THE CRIMINAL HISTORY SCALE

When Conviction Occurs

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-04-006(2), Criminal History Scale, as follows: "For crimes committed on or after November 1, 1989 a conviction is considered to have occurred upon pronouncement of a sentence in open court. For crimes committed prior to November 1, 1989 a conviction is considered to have occurred upon pronouncement in open court of a sentence, or upon the pronouncement in open court of the suspended imposition of sentence."

▶ Advisory

If execution of sentence on a conviction is stayed pending appeal, does the conviction count towards the offender's criminal history? Staff advice: Yes. (Advisory #1, May 18, 1990).

Single Judicial Proceeding

▶ Appellate Decisions

State v. Munro, 109 Or App 188, (October 9, 1991). See Chapter VIII.

▶ Note

The Guidelines Board forwarded an amendment to the 1991 Legislative Assembly deleting the term "single judicial proceeding" from the guidelines rules OAR 253-04-006(3), Criminal History Scale, and OAR 253-03-001(18), Definitions, following testimony from practitioners on the difficulty in practical application of the term. The result of that amendment would have been that all prior convictions count when calculating an offender's criminal history for purposes of sentencing the current crime of conviction. That amendment was not adopted. The Council plans to introduce it in the 1993 legislative session.

Prior Burglary I Convictions

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-04-010 Burglary I as follows: "The state has the burden of proving that the prior burglary offense should be classified as a person felony. If the state fails to prove the circumstances necessary for classification as a crime seriousness category 9 or 8 person offense, then the offense shall be classified as a prior non-person offense in crime seriousness category 7. The burden of proof does not shift to the defendant."

Out of State Conviction

▶ Appellate Decisions

State v. Tapp, 110 Or App 1, (November 27, 1991). See Chapter VIII.

Person Offenses

▶ Appellate Decisions

State v. Lee, 110 Or App 42, (November 27, 1991). See Chapter VIII.

▶ Advisory

Do the definitions of "person felonies" and "person Class A misdemeanors" provide exclusive lists of the offenses which may be considered person crimes for criminal history purposes? Staff Advice: Yes. The definitions of person felonies and person Class A misdemeanors included in the definition section of the guidelines rules are exclusive lists. OAR 253-03-001(14) and (15) Definitions. (Advisory #3, September 25, 1991).

▶ Note

The Guideline Board has no authority to change the list of person offenses at this time. Since the existing list is exclusive, new or modified offenses created by the 1991 Legislative Assembly, and other offenses suggested as appropriate for "person offense" designation have not been defined as such by rule.

DUII Infractions

▶ Advisory

Do convictions for the former infraction of Driving Under the Influence in certain circumstances count in an offender's criminal history score? Staff advice: No. Infractions are not counted in an offender's criminal history score; OAR 253-04-006(2), Criminal History Scale, provides that only felonies, Class A misdemeanors and felony juvenile adjudications count. OAR 253-04-009, Prior ORS 813.010 (DUII) Convictions, the special scoring rule related to DUII convictions, refers to convictions under ORS 813.010 "or comparable statute or ordinance". Violation of ORS 813.010 is a Class A misdemeanor. (Advisory #1, May 18, 1990).

Juvenile Remand

▶ Advisory

Does a conviction for a juvenile remanded to adult court count in the offender's criminal history? Staff Advice: Yes. If convicted in adult court, the conviction counts as an adult conviction for criminal history purposes. (Advisory #3, September 25, 1991).

Currents as Priors

▶ Advisory

Upon conviction, do offenses charged in the same accusatory instrument count towards an offender's criminal history? Staff Advice: No. The legislative record on this issue from the House Judiciary Subcommittee on Crime and Corrections (June 20, 1989) is clear, as is the Council's original intent. See the commentary on pages 50-51 of the 1989 Guidelines Implementation Manual concerning OAR 253-04-006(1), Criminal History Scale. The reference to "current crime or crimes of conviction" is intended to prohibit consideration of convictions arising from the current proceeding in the calculation of an offender's criminal history. Error letters are routinely sent to courts indicating that "convictions sentenced the same day are not to be counted toward each other in the criminal history calculation". (Advisory #3, September 25, 1991).

Guilty but Insane

▶ Advisory

Do commitments to the PSRB pursuant to ORS 161.327 count as prior convictions for criminal history purposes? Staff advice: No. While the statutory language at ORS 161.319, relating to verdict and judgment on these cases, has changed over the years from "not guilty by reason of insanity" to the current "guilty except for insanity", these judgments are not considered "convictions". The guidelines criminal history scale scores "convictions". The official commentary to OAR 253-04-006, Criminal History Scale, provides that "a conviction . . . should be considered to have occurred upon the pronouncement of sentence in open court." (Page 51, 1989 Guidelines Implementation Manual) PSRB offenders are not "sentenced", but are ordered to be placed under the jurisdiction of the PSRB pursuant to ORS 161.327. (Advisory #1, May 18, 1990).

**CHAPTER III
PRACTICES AND PROCEDURES
(1989 Manual Pages 66-88)**

PLEA AGREEMENTS

Stipulations - Accurate Representation

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-07-002(1), Criminal History, as follows: "Accordingly this section is meant to prohibit the parties from negotiating a defendant's known criminal history. For example, should the prosecutor believe an offender's criminal history to include certain convictions and the offender having no objections to that history, it would be improper for the parties to agree to present to the court a criminal history that does not include all such convictions."

▶ Advisory

May the parties stipulate to a grid block which does not accurately reflect the criminal history of the defendant, or the guidelines crime seriousness ranking for the crime of conviction? Staff Advice: No. The parties may negotiate disputed criminal history, and the defendant can plead to a less serious offense or a subcategory of the same offense. However, the grid block must reflect the crime seriousness ranking for the crime of conviction contained in the guidelines rules, and must accurately reflect the criminal history. The parties can not pick a grid block other than one provided in the guidelines rules for that offense simply because it reflects a sentence which has been negotiated. (Advisory #3, September 25, 1991).

▶ Appellate Decisions

State v. Rathbone I, 110 Or App 414, (December 26, 1991). See Chapter VIII.

▶ Note

The Guidelines Board forwarded an amendment to OAR 253-07-003, Stipulated Grid Block, to the 1991 Legislative Assembly to clarify that parties may not pick a grid block "out of the air". The agreed-upon crime seriousness, as well as the criminal history must reflect the crime of conviction and criminal history of the defendant. The stipulation of the parties to a departure sentence is not a substantial and compelling reason sufficient to support a departure.

PRE-SENTENCE INVESTIGATIONS

▶ Statutory Change

ORS 144.790 has been amended to require a PSI for all felony sex offense convictions.

▶ Advisory

May the parties waive a PSI when they stipulate to a departure sentence? Staff Advice: No. Statute requires a PSI when either party advises the court that a departure is justified. ORS 144.790(2). An amendment to the criminal code, forwarded to the 1991 Legislature, would have deleted the PSI requirement where the parties stipulate to a departure sentence. That legislation was unsuccessful. (Advisory #3, September 25, 1991).

ACCUSATORY INSTRUMENT

Proof of Subcategories

▶ Advisory

Is the standard of proof for subcategory facts "beyond a reasonable doubt? Staff Advice: Yes. See State v. Mack, below. Also see ORS 135.711, which requires the subcategory facts to be plead in the accusatory instrument. These subcategory facts are in effect elements of the offense which go to the conduct of the defendant, and as such are for the trier of fact to decide. State v. Quinn, 290 Or 383 (1981), and State v. Wedge, 293 Or 598 (1982). ORS 475.996, Chapter 690, Oregon Laws, (HB 2390), which redefines guidelines penalties for drug offenses, makes clear that the subcategory facts specific to drug offenses must be proven "beyond a reasonable doubt". (Advisory #3, September 25,1991).

▶ Appellate Decisions

State v. Mack, 108 Or App 463, (September 11, 1991). See Chapter VIII.

CRIMINAL HISTORY PREPARATION

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-04-013(3), Proof of Criminal History, as follows: "The criminal history summary is to be prepared for the court by the District Attorney. The defendant has no obligation to participate in the preparation of, or attest to the accuracy of, the record."

▶ Advisory

Does a defendant have any obligation to cooperate with the preparation of the criminal history record for the court by the District Attorney? Staff Advice: No. The obligation to prepare the record of criminal history rests with the District Attorney. OAR 253-04-013, Proof of Criminal History. It was never intended that a defendant be required to assist in the preparation, nor attest to the accuracy of the record. In fact, such a notion was discussed and rejected by the Sentencing Guidelines Board and the Legislature. On December 19, 1988, the State Sentencing Guidelines Board considered and rejected a motion to require a defendant to challenge a criminal history record by affidavit. The affidavit issue arose again before the Senate Judiciary Committee on June 2, 1989. The committee also declined to require affidavits of criminal history. The "accurate representation" language in OAR 253-07-002, Criminal History, is meant to prohibit the parties from negotiating a defendant's known criminal history. (Advisory #3, September 25, 1991).

SENTENCING HEARING

▶ Advisory

Is the same judge required for sentencing as for trial? Staff Advice: No. There is no specific requirement that the judge who imposes the sentence be the same judge as the one who presided during the trial of the offender. But there may be a preference for the same judge, particularly if the facts of the case lead to a departure sentence. (Advisory #3, September 25, 1991).

SENTENCING REPORT FORM

▶ Advisory

When a judgment of conviction for a Class A misdemeanor is entered for a felony pursuant to ORS 161.705, what should the sentencing report form indicate? Staff advice: No form is required. (Advisory #1, May 18, 1990).

▶ Note

Sentencing Report forms and instructions for completion are available from the Council office. Also available at no cost is SENCHECK, a computer program designed to calculate an offender's presumptive sentence. Call Council staff at (503)725-4130 for information or materials.

**CHAPTER IV
PRESUMPTIVE SENTENCES
(1989 Manual Pages 89-110)**

APPEAL OF PRESUMPTIVE SENTENCE

▶ Appellate Decisions

State v. Cook, 108 Or App 576, (September 4, 1991). See Chapter VIII.

State v. Fern, 110 Or App 185, (December 11, 1991). See Chapter VIII.

POST-PRISON SUPERVISION

Required in Judgment

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-05-002(1), Term of Post-Prison Supervision, as follows: "The term of post-prison supervision must be included in the judgment as an additional part of the sentence. Offenders who do not have a term of post-prison supervision imposed in a judgment of conviction are being released from prison with no supervision."

Sex Offenses

▶ Statutory Change

ORS 144.103 requires the length of post-prison supervision, for offenders convicted of certain sex offenses, to equal the maximum statutory indeterminate sentence, when added to a term of imprisonment.

Murder

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-05-002(2)(c), Term of Post-Prison Supervision, as follows: "Murder convictions classified in crime seriousness category 11 are subject to the special rule on the length of post-prison supervision set out in OAR 253-05-004, Post-Prison Supervision for Aggravated Murder or Murder. The three years established by this rule is a minimum term of post-prison supervision in murder cases."

Gun Minimum

▶ Advisory

If a defendant convicted of a Class C felony, for which the maximum penalty provided in ORS 161.605 is five years, is sentenced to a five-year gun minimum pursuant to ORS 161.610(4), what is the length of their post-prison supervision term? Staff advice: The incarcerative term plus the supervision term cannot exceed five years. (Advisory #2, August 17, 1990).

PROBATION

▶ Statutory Change

ORS 137.540(2) was amended by the 1991 Legislative Assembly to permit jail as a condition of misdemeanor probation. This corrects the drafting error made in 1989 and identified in State v. Wold, 105 Or App 158 (1991) which precluded the use of jail as a condition of misdemeanor probation.

Sex Offenses

▶ Statutory Change

ORS 137.012 requires all those convicted of certain sex offenses, when placed on probation, to serve a term of probation of at least five years and no more than the maximum statutory indeterminate sentence for the offense. Note: However, the statute is drafted using the language "if the court suspends the imposition or execution of sentence..." which may limit this probation requirement to pre-guidelines cases.

Conditions of Probation - Alcohol/Drug Treatment

▶ Statutory Change

ORS 137.540 was amended to allow the sentencing judge to have an offender evaluated to determine drug and/or alcohol dependency in all cases. If the offender is found to be dependent, the court is to include treatment as a condition of the probation sentence.

Probation Length - Departure

▶ Note

The Guidelines Board forwarded amendments to OAR 253-05-008, Duration of Probation, to the 1991 Legislative Assembly concerning the lengths of probation terms which would have allowed the sentencing judge to: impose bench probation longer than the presumptive term when necessary to complete probation conditions, depart on the length of supervised probation terms, and impose probation terms up to the statutory maximum when sentencing sex offenders. The Board acted because of its belief the current guidelines rules do not allow for departure on the length of probation terms. These amendments were not adopted. The Council plans to introduce them in the 1993 legislative session.

CUSTODY UNITS

Reservation

▶ Advisory

For custody units to be available for use to sanction probation violations, must they be imposed by the judge at sentencing? Guidelines Board Clarification: The Board, at its February 16 1990 meeting, directed that a clarification be sent to judges advising them that no rule authorizes imposition of custody units at a time other than sentencing. The clarification statement emphasized that guidelines do not require imposition of custody units but that "if they are not imposed at the time of sentencing they cannot be imposed subsequently during the probationary period". The statement, which is available in full from Council offices, also explains how the custody units may be dispersed over the probationary term. (Advisory #1, May 18, 1990).

▶ Note

The Guidelines Board forwarded an amendment to OAR 253-05-011, Custody Units, to the 1991 Legislative Assembly which would have allowed for the automatic reservation of custody units not imposed at the time of the original sentencing. Thus all unused custody units would be available to sanction violations of probation, and the judge would not have to announce the reservation at the original sentencing. This amendment was not adopted. The Council plans to introduce it in the 1993 legislative session.

Violation Sanctions

▶ Advisories

Can a judge depart to impose additional custody units after an offender has violated the conditions of probation? Staff advice: No. Departure sentences are justified by the circumstances of the crime of conviction, not subsequent behavior, and are to be imposed at the time of sentencing. (Advisory #1, May 18, 1990).

If a judge orders an offender to serve the maximum jail term permitted under the guidelines "up front" on a probation term and the jail term is served in full, what custodial sanction can be imposed for a subsequent probation violation? Staff advice: Any other non-jail custodial sanction up to the limit of the custody units imposed. (Advisory #1, May 18, 1990).

Straight Jail

▶ Note

The Guidelines Board forwarded an amendment to OAR 253-05-007, Presumptive Probation Sentences, to the 1991 Legislative Assembly allowing the sentencing judge to exercise discretion to impose a term of straight jail as the presumptive sentence in appropriate cases rather than probation with custody units. This amendment was not adopted. The Council plans to introduce it in the 1993 legislative session.

Supervisory Authority

▶ Advisory

What authority do supervisory authorities have to move an offender from one custodial sanction to another in the expenditure of custody units? Staff advice: OAR 253-05-012, Custodial Supervision, provides that a judge sentences a felon on probation to the custody of a supervisory authority. This is in keeping with ORS 137.124. The supervisory authority may transfer an offender to any facility over which the authority has control. (See official commentary, page 102, 1989 Guidelines Implementation Manual.) The need for a judicial hearing on a transfer may occur in three situations: (1) where there is a transfer between supervisory authorities and a dispute over program availability or appropriateness, (2) where the offender will be returned to jail or confinement and (3) where the judge has ordered that any transfers are subject to judicial authorization. (Advisory #1, May 18, 1990).

Community Service

▶ Advisories

Can community service custody units be fulfilled by cash payment? Staff advice: No. OAR 253-05-012(2)(e), Custodial Supervision, requires 24 hours of work under supervision for satisfaction of each custody unit required to be served in community service. There is no provision in the rules for cash payment. (Advisory #1, May 18, 1990).

Does "more rigorous" community service entitle an offender to earn custody units faster than as is provided in OAR 253-05-012(2)(e), Custodial Supervision? Staff advice: No. (Advisory #1, May 18, 1990).

Does ORS 137.129, which limits the number of hours which can be served in community service, prohibit a felony guidelines sentence that imposes custody units of community service in excess of 500 hours? Staff advice: Yes. To avoid violating ORS 137.129, an offender can be required to serve no more than 62.5 full days or 20.8 custody units in community service. (62.5 days X 8 hours of service per unit = 500 hours, each 8-hour day is one-third of a custody unit.) (Advisory #2, August 17, 1990).

▶ Note

The Guidelines Board forwarded amendments to the 1991 Legislative Assembly amending ORS 137.129 to allow more than 500 hours of community service in the use of custody units and changing the equivalency ratio of community service hours to custody units from 24:1 to 16:1. Neither of these amendments were adopted. The Council plans to introduce them in the 1993 legislative session.

Satisfactory Compliance

▶ Advisories

For purposes of calculating custody units served pursuant to OAR 253-05-012(4) or OAR 253-05-012(2)(b), Custodial Supervision, when is a program "successfully" or "satisfactorily" completed? Staff advice: When the time period required in the program has been served. (Advisory #1, May 18, 1990).

If an offender enters but does not complete a substance abuse program, do they receive custody unit credit for the number of days served? Staff advice: No. Credit is given only if the in-custody time period required by the program has been served. (Advisory #2, August 17, 1990).

Credits - Good Time

▶ Advisory

Do time credits for good behavior in local jail (ORS 169.110) count toward the number of custody units to be served in the local jail? Staff advice: No. The credit can reduce the amount of time served, as it does under current law, but any custody units not actually served in jail could remain available for use during the probationary term. (Advisory #1, May 18, 1990).

Credits - Time Served

▶ Advisory

Does an offender receive credit under ORS 137.390 against a jail term imposed as part of a probation sentence under the guidelines for jail time served prior to sentencing? Staff advice: ORS 137.390 and the appellate case law which defines its operation continue to operate as they did previously, because under guidelines jail is still a condition of probation. ORS 137.540(2)(b). The Council did take a formal position at its October 21, 1988 meeting that the guidelines do not otherwise preclude a judge from granting credit for jail time served prior to sentencing, though the awarding of credit is not required in all cases. The court's authority to do so is doubtful, however. In Nissel v. Pearce, 307 OR 102 (November 16, 1988) a case which involved credit for presentence time served on both prison and jail terms, the Oregon Supreme Court said "The sentencing judge simply has no authority to order or compute credit for presentence time served.", citing a footnote in State v. McClure, 295 OR 732, n. 1 at 735 (1983), which was a jail confinement case. (Advisory #2, August 17, 1990).

Work Release

▶ Advisory

Does time served on work release count as custody units served in jail? Staff advice: No. See the text of OAR 253-05-012(2)(c), Custodial Supervision. (Advisory #2, August 17, 1990).

OPTIONAL PROBATION

▶ Advisories

When a defendant is classified for sentencing purposes at grid block 9H, and the judge imposes a departure sentence consistent with an offense at grid block 8H, is the defendant then eligible for optional probation? Staff Advice: No. The crime of conviction is seriousness level 9, and therefore the offender is not eligible for optional probation. A departure does not change the grid block classification of the crime of conviction, nor the offenders criminal history. (Advisory #3, September 25, 1991).

Does bench probation status on a misdemeanor prohibit the use of optional probation on the current conviction? Staff Advice: Yes. It was the Council's intent to preclude an offender from optional probation if the offender was on "correctional supervision status" at the time the new offense occurred. The defendant may still request probation as a departure sentence. See the commentary at page 110 of the 1989 Guidelines Implementation Manual. (Advisory #3, September 25, 1991).

CHAPTER V
CONCURRENT AND CONSECUTIVE SENTENCES
(1989 Manual Pages 111-121)

CONSECUTIVE SENTENCES

Limits on Length

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-12-020(2)(a) and (b), Consecutive Sentences, as follows: "When imposing consecutive sentences the reference to 'presumptive incarceration term for the primary offense' should be read to include an incarceration term imposed as a dispositional departure pursuant to OAR 253-08-005(1), Dispositional Departure Limitations." The primary offense could be one for which prison was imposed as a dispositional departure.

▶ Note

The new commentary to OAR 253-12-020 cited above also applies to 253-08-007(3), Departure Limitations in Consecutive Sentences. The language of that rule also uses "the presumptive incarceration term for the primary offense", though the primary offense could be one for which prison was imposed as a dispositional departure. The limit on consecutive sentences then is twice the maximum incarceration term that could be imposed as part of the presumptive sentence or as a dispositional departure. The proposed rule amendment to correct the language in these rule sections was not passed.

Entire Sentence in Prison

▶ Advisories

May a judge order the incarceration term of a presumptive probation sentence under the guidelines to be served concurrently or consecutively to a pre-guidelines prison term? Staff advice: Nothing in the guidelines rules authorizes the guidelines jail term to be served in prison in this situation. However, public policy may favor the use of a concurrent sentence for the guidelines incarceration in these cases. See OAR 253-12-030, Sentences Imposed Consecutively to a Prior Remaining Sentence. (Advisory #1, May 18, 1990).

If a misdemeanor is sentenced consecutively to a felony with time served in prison, are the custody requirements of the misdemeanor sentence served in prison? Staff Advice: No. The guidelines rules apply to felonies only. There is no authority for a misdemeanor sentence to be served in prison. The language of OAR 253-12-020(2)(d), Consecutive Sentences, is intended to apply only to consecutive felonies. The "entire sentence in prison" language in OAR 253-12-020 and 030 is intended to mean that the incarceration term of the consecutive felonies is done in prison, not that there is no earned credit time granted. (Advisory #3, September 25, 1991).

Unsumming

▶ Advisory

Does the Parole Board have the authority to "unsum" consecutive sentences where one offense is pre-guidelines and the other is guidelines? Staff Advice: No. The Attorney General's office has advised the State Board of Parole and Post-Prison Supervision that if any sentence is imposed under the guidelines, the Board has no authority to unsum the consecutive sentences. (Advisory #3, September 25, 1991).

Consecutive Probations

▶ Advisory

May a sentencing judge impose guidelines probation sentences consecutively? Staff Advice: No. The operation of the current rules does not allow for consecutive probation terms. See OAR 253-12-020(3)(b), Consecutive Sentences. An amendment to the guidelines, forwarded to the 1991 Legislature, would have specifically allowed for consecutive probation terms. That legislation was unsuccessful. (Advisory #3, September 25, 1991).

Consecutive Revocation Terms

▶ Advisory

Where multiple probation terms are violated, may the revocation sanctions be imposed consecutively? Staff Advice: Yes. If a separate and distinct violation is alleged and proven for each of the separate probation terms revocation sanctions may be imposed consecutively. Otherwise the violation sanctions are to be served concurrently. See OAR 253-12-040(2), Multiple Supervision Terms. (Advisory #3, September 25, 1991).

Post-Prison Supervision of Consecutive Cases

▶ Advisory

When an offender is sentenced to prison on a guidelines and a pre-guidelines case served consecutively, in what order are the sentences served and what is the supervision status on release? Staff advice: The sentences are served in the order in which the crimes were committed, therefore, the guidelines sentence is served last and the offender is released on post-prison supervision. This is the official commentary to OAR 253-12-020, Consecutive Sentences (Advisory #2, August 17, 1990).

**CHAPTER VI
DEPARTURE SENTENCES
(1989 Manual Pages 122-147)**

DEPARTURE SENTENCES

Discretion to Impose

▶ Appellate Decisions

State v. Orsi/Gauthier, 108 Or App 176, (July 3, 1991). See Chapter VIII.

State v. Cook, 108 Or App 576, (September 4, 1991). See Chapter VIII.

State v. Hays, 109 Or App 491, (October 30, 1991). See Chapter VIII.

State v. Fern, 110 Or App 185, (December 11, 1991). See Chapter VIII.

Findings for Court

▶ Advisory

Is the finding of factors in aggravation or mitigation, for the purpose of supporting a departure sentence, a question for the sentencing judge? Staff Advice: Yes. The court, not the jury, is responsible for finding the "substantial and compelling" reasons necessary to support a departure sentence. (Advisory #3, September 25, 1991).

Duration - Limits

▶ New Commentary

The Guidelines Board adopted new commentary to OAR 253-08-004(1), Durational Departure Limitations, as follows: "The doubling limit created in section 1 of this rule also applies to prison terms imposed as a result of a dispositional departure sentence."

The Guidelines Board has adopted new commentary to OAR 253-08-005(3), Dispositional Departure Limitations, as follows: "The limit on this additional departure is two times the maximum set forth in section (1). This limitation is consistent with departure limitations throughout the rules."

Notice

▶ Advisory

Is there any notice requirement when either party seeks a departure sentence? Staff Advice: No. There are no specific notice requirements. However, the statutory requirement of a PSI in all departures (ORS 144.790) should provide sufficient notice and opportunity to prepare arguments for or against a departure sentence. (Advisory #3, September 25, 1991).

Probation/Post-Prison Supervision

▶ Advisory

May a judge depart on the length of the term of probation or post prison supervision provided by the guidelines rules? Staff Advice: No. Currently the rules do not allow for departure on the lengths of the terms of probation or post-prison supervision. The only apparent authority supporting such a departure appears in the definition of durational departures. However, the operation of the substantive rules of departure do not provide for such departures. The Council and the Sentencing Guidelines Board adopted amendments to the guidelines allowing for extended lengths of probation with and without formal departure. None of these amendments were approved by the 1991 Legislature. (Advisory #3, September 25, 1991).

Custody Units

▶ Advisory

Does the 400% limitation rule in OAR 253-08-007, Departure Limitations in Consecutive Sentences, apply to limit the number of custody units which can be imposed as a departure for probationary sentences imposed consecutively? Staff advice: No. OAR 253-08-006, Departure Limitations on the Use of Custody Units, provides the rule for departure limitations on the use of custody units. (Advisory #2, August 17, 1990).

**CHAPTER VII
OTHER SENTENCES
(1989 Manual Pages 148-157)**

OTHER SENTENCES

Misdemeanor Jail Cap

▶ Statutory Change

Chapter 830, Section 9, Oregon Laws 1991 extended the six-month cap on the use of jail in misdemeanor convictions for an additional two years through November 1, 1993. See the note in the criminal code following ORS 161.615.

Ballot Measure 4 (ORS 137.635)

▶ Advisories

Do the felony sentencing guidelines establish the durations of imprisonment for offenders defined in ORS 137.635, Determinate Sentences for Certain Felony Convictions (Ballot Measure 4, November 1988)? Staff advice: Yes. The guidelines sentences are the determinate sentences required by the statute. (Advisory #1, May 18, 1990).

Can a judge dispositionally depart from a prison sentence to probation for a defendant defined in ORS 137.635 (Ballot Measure 4 enacted by the voters November, 1988)? Staff Advice: No. (Advisory #2, August 17, 1990).

Murder

▶ Advisory

Are sentences for murders committed on or after November 1, 1989 controlled by the guidelines or by ORS 163.115? Staff advice: The existence of guidelines sentences for murder in addition to the statutory sentences at ORS 163.115(3), which preceded the guidelines, presents judges with three options for sentencing in a murder case. For murders committed on or after November 1, 1989, a judge may sentence an offender as provided in the guidelines, and based upon the offender's criminal history, enter a sentence of from 120 months (10 years) to 269 months (22.4 years). Guidelines sentences for murder were constructed so that all exceed the ten-year mandatory minimum required by ORS 163.115(3)(b). Sentences for murder are found at Crime Category 11 on the guidelines grid.

The judge is also authorized by ORS 163.115(3)(c) to impose, for any murder conviction, a minimum mandatory sentence of up to 25 years. A minimum imposed under ORS 163.115(3)(b) or (c) may be set aside by the Parole Board.

In the exceptional case the judge also has the option to impose a determinate sentence exceeding the presumptive guidelines sentence, by departure. OAR 253-08-004(2)

Durational Departure Limitations, provides that general departure limitations for guidelines cases do not apply to sentences for murder. Therefore, if a judge finds substantial and compelling reasons to aggravate a guidelines sentence, the sentence imposed may be up to life. The Parole Board has no authority to reduce a guidelines sentence. (Advisory #2, August 17, 1990).

▶ Note

There are still unresolved questions around murder sentences. One in particular is the Parole Board's authority to overturn the minimum imposed by a judge sentencing under the statute for an offense committed on or after November 1, 1989. See ORS 144.050 and 163.115(3)(d).

Gun Minimum

▶ Note

The Guidelines Board forwarded an amendment to ORS 161.610(5) to the 1991 Legislative Assembly making clear that when the sentencing judge elects to suspend the execution of a gun minimum for an offense covered by the guidelines, the sentence to be imposed will be in accordance with the rules of the Guidelines Board. This amendment was not adopted. The Council plans to introduce it in the 1993 legislative session.

CHAPTER VIII
APPELLATE REVIEW
(1989 Manual Pages 158-164)

This Chapter contains brief summaries of the appellate decisions dealing with sentencing guidelines issues through December 31, 1991. Every opinion addresses the scope of review and the jurisdiction of the court before any substantive guidelines rules issues which may be presented. The cases are arranged alphabetically by the court of decision.

SUPREME COURT DECISIONS

State v. Moeller, 312 Or 76, August 29, 1991, Per Curiam.

The Supreme Court dismisses its previous order granting review of the Court of Appeals decision in these consolidated cases, which involved demurrers challenging as unconstitutionally vague the "scheme or network" standard for enhancing penalties in drug related offenses under the guidelines.

COURT OF APPEALS DECISIONS

State v. Cook, et. al., 108 Or App 576, September 4, 1991.

The Court of Appeals consolidated four cases in which defendants appealed a sentence within the presumptive range of the guidelines.

The Court found jurisdiction in ORS 138.222(7), but found in three of the appeals, there was nothing which could be reviewed, as ORS 138.222(2)(a) precludes review of a sentence within the presumptive range. While ORS 138.222(4)(a) permits review of a claim of error that the sentencing court failed to comply with the requirements of law, a sentence within the presumptive range complies with the requirements of law, and does not show on its face a legal error.

The Court in the first case cites Orsi/Gauthier, see below, for the proposition that the claim of error must be preserved in the record below. In the next two cases, the Court again cites Orsi/Gauthier, see below, holding that the decision to impose a departure sentence is within the discretion of the sentencing court and is not a failure to follow a requirement of law. In the fourth case, for which no opinion has yet been published, the defendant challenges the ability of the sentencing court to make findings under OAR 253-05-006, Optional Probation, independent of the jury's verdict.

State v. Fern, 110 Or App 185, December 11, 1991.

Although ORS 138.222(4)(a) allows review of a claim that a sentencing court failed to follow constitutional standards in imposing a sentence, a defendant must preserve the claim of error. When the record does not show defendant wanted to exercise the right of allocution or was prevented from doing so, there is no error to review.

State v. Hays, 109 Or App 491, October 30, 1991, Per Curiam.

Defendant signed a plea agreement, the prosecutor explained the agreement to the sentencing court and the sentencing court accepted it, making findings to support the downward departure. On appeal, defendant claimed the sentence was cruel and unusual. Appellate review of the sentence is precluded by ORS 138.222(2)(d), which provides that there is no review of any sentence resulting from an agreement between the state and the defendant, which the sentencing court approves on the record.

State v. Lee, 110 Or App 42, November 27, 1991, Per Curiam.

Classification of a prior federal conviction, for criminal history purposes, is limited to whether the elements of the offense would have constituted a felony under current Oregon law. OAR 253-04-011, Out-of-State Convictions. The sentencing court erred in conducting an evidentiary hearing and determining that defendant's testimony was not credible and that the facts of conviction suggested threat of immediate force so that conviction would be classified as a "person felony" for purposes of the criminal history scale.

State v. Mack, 108 Or App 643, September 11, 1991.

Allegations relating to the subcategory of a crime are part of the conduct with which a defendant is charged and are for the jury to determine beyond a reasonable doubt. State v. Moeller. The court did not err in submitting the allegations to the jury with a special verdict form and requiring it to make findings with respect to each of the subcategory facts alleged.

State v. Moeller, et. al., 105 Or App 434, February 6, 1991.

Demurrer to indictment was proper method to test constitutionality of provision that could affect penalty, although indictment stated a crime without the challenged language. Allegation that defendant engaged in a "drug cultivation, manufacture, or delivery scheme or network", as well as committing charged offense, and was therefore subject to enhanced penalty under sentencing guidelines, was an element of the charged conduct rather than a sentencing factor, and must be submitted to the fact finder. State v. Wedge, 293 Or 598 (1982). The phrase is vague and violates Or Const, Art I, Secs 20 and 21.

State v. Munro, 109 Or App 188, October 9, 1991.

Defendant appealed from sentences imposed after pleading guilty to burglary. Under ORS 138.222(4)(b), the appellate court may review a claim of error that the number of concurrent sentences has been miscounted. It is a claim relating to the classification of a prior conviction for criminal history purposes. OAR 253-04-006(3). Defendant's prior convictions are not multiple sentences imposed concurrently, because two dispositions were probations and a probation is not a sentence. State v. Carmickle, 307 Or 1 (1988). In classifying pre-guidelines dispositions, the guidelines did not change the definition of sentence to include an order of probation. While defendant could be in the anomalous position of having the favorable pre-guidelines disposition of probation it now prevents the receiving of the lower criminal history classification. On the merits defendant would have fared no better, as the crimes do not meet the requirements of a single judicial proceeding. OAR 253-03-001(18). Thus the convictions do not come within the provisions of OAR 253-04-006(3), which requires multiple sentences in a prior single judicial proceeding which are imposed concurrently to be considered as one conviction for criminal history purposes.

State v. Orsi/Gauthier, 108 Or App 176, July 3, 1991.

Although passage of the sentencing guidelines changed the scope of review on appeal, it did not change the fundamental requirement that a defendant must preserve a claim of error. Imposition of a departure sentence is a discretionary determination by the sentencing court. If the defendant does not agree that the court's reasons are substantial and compelling, it is incumbent on the defendant to indicate the basis of the objection. Without an objection, there is no error to review.

State v. Rathbone (I), 110 Or App 414, December 26, 1991.

Defendant pled guilty pursuant to a plea agreement to drug charges alleged to be part of a scheme or network. After his plea, the scheme or network language was held to violate the Oregon Constitution. State v. Moeller. Defendant then challenged his sentence on appeal, arguing that the sentencing court erred by ranking his crime at 8 on the crime seriousness scale instead of at 4. Under ORS 138.222(2)(d), there is no review of a sentence resulting from an agreement between the state and the defendant that the sentencing court approves on the record. Reading that section together with the specific provisions governing plea agreements in ORS 135.407 and ORS 138.222(4)(a), review on direct appeal is limited solely to the question of whether the sentencing court failed to comply with the requirements of ORS 135.407. There is no review of defendant's claim.

State v. Rathbone (II), 110 Or App 419, December 26, 1991.

A conviction for racketeering is an unranked crime, and a claim that the sentencing court erred in ranking the conviction for racketeering for sentencing purposes is reviewable under ORS 138.222(4)(b). Under OAR 253-04-004, the sentencing court has the discretion to determine the seriousness of an unranked offense, and review of that decision is limited to whether the court's reasons are stated on the record and whether those reasons reflect a proper exercise of the court's discretion.

State v. Spinney, 109 Or App 573, November 13, 1991.

Oregon's sentencing guidelines do not violate Article I, section 15, of the Oregon Constitution, which provides that criminal laws must be "founded on the principles of reformation, and not of vindictive justice." The fact that the guidelines expressly acknowledge that one of the primary purposes for imposing sentences is to provide punishment that is appropriate to the offense, OAR 253-02-001(1), does not render them "vindictive" and violative of the constitution. The guidelines also do not violate Article I, section 16, which provides, in part, that "all penalties shall be proportioned to the offense." The guidelines provide for progressively longer periods of incarceration for the more serious crimes and the most recidivist offenders, and such considerations as criminal history and crime seriousness are precisely what Article I, section 16 requires. In enacting the guidelines, the legislature did not unduly burden or interfere with the exercise of judicial functions in violation of Article III, section 1, of the Oregon Constitution, because it is within the legislature's power to establish criminal penalties. The guidelines provide for the exercise of judicial discretion in considering the mitigating and aggravating factors of each case to determine whether to impose a sentence within the presumptive range or to impose a departure sentence.

State v. Tapp, 110 Or App 1, November 27, 1991.

For purposes of the criminal history scale under sentencing guidelines, the only issue is whether the elements of an out-of-state adult conviction correspond to the elements of an Oregon felony or Class A misdemeanor. OAR 253-04-011. An inquiry about criminal history is not an occasion to relitigate the facts underlying an out-of-state, or any, conviction. Elements of defendant's Washington conviction for assault in the second degree did not involve all of the elements of an Oregon assault felony and it was error to classify defendant's Washington conviction as an attempted felonious assault under Oregon law. Remanded for resentencing.

**CHAPTER IX
PROBATION
(1989 Manual Pages 165-170)**

PROBATION

Transfer to Bench

▶ Advisory

May a probation officer recommend a transfer to bench probation for the remainder of the probation term, if there have been no problems and the conditions of probation have been satisfied? Staff Advice: Yes. The rules provide for this contingency. OAR 253-05-010, Modification of Probationary Terms. (Advisory #3, September 25, 1991).

Revocations

▶ Statutory Change

ORS 137.550(4) was amended by the 1991 Legislative Assembly changing "shall" to "may" clarifying that the decision to revoke a probation sentence for guidelines offenses is discretionary, not mandatory.

▶ Advisory

Is 180 days the minimum time required for probation revocations where the offender's presumptive sentence was probation? Staff Advice: No. The language of the rule says the sentence upon revocation shall be a prison term "up to six months". OAR 253-10-002(1), Revocation Sanctions. (Advisory #3, September 25, 1991).

CHAPTER X
PRISON CREDIT AND LEAVE PROGRAMS
(1989 Manual Pages 171-179)

Work Release

▶ Statutory Change

ORS 144.420 was amended to authorize the Department of Corrections to release inmates as part of a work release program to participate in alcohol or drug treatment, mental health programs, and specific treatment to develop independent living skills.

Literacy

▶ Statutory Change

ORS 421.121 provides for the reduction of a prison sentence for participation in functional literacy program, subject to no more than 20% of the total term in combination with other earned time credits.

**CHAPTER XI
PRISON RELEASE AND POST-PRISON SUPERVISION
(1989 Manual Pages 180-197)**

PRISON RELEASE

Severe Medical Condition - Terminal Illness

▶ Statutory Change

ORS 144.122 and 144.126 were amended to allow the State Board of Parole and Post-Prison Supervision to advance the release date of prisoners suffering from severe medical conditions, including a terminal illness. Also, expands the coverage of ORS 144.122 and 144.126 to allow this early release to prisoners sentenced under the 5 yr. gun minimum. ORS 161.610, the gun minimum, was amended accordingly.

POST-PRISON SUPERVISION

Conditions - Victim Impact Session

▶ Statutory Change

ORS 144.102 was amended to allow the State Board of Parole and Post-Prison Supervision to require attendance at a victim impact session as a condition of post-prison supervision.

Sanctions

▶ Statutory Change

ORS 144.106, 144.334, 144.343, and 144.345 were added or amended to allow the State Board of Parole and Post-Prison Supervision to delegate the authority to impose graduated sanctions in lieu of return to prison for minor violations. Permits imposition of the sanction without a hearing unless the sanction requires confinement for more than 15 days. Deletes the requirement of a hearing in those cases where a revocation is based on a conviction for a new crime for which the offender has been convicted and sent to prison. Allows the use of citations to direct appearance at a violation hearing.

▶ Note

The Guidelines Board forwarded an amendment to OAR 253-11-004(3), Post-Prison Supervision Sanctions, to the 1991 Legislative Assembly which would have allowed graduated post-prison supervision violation sanctions of up to one year of prison dependent on the length of the term of post-prison supervision. This amendment was not adopted. The Council plans to introduce it in the 1993 legislative session.

GUIDELINES STATUTORY CITATIONS

Listed below are the statutory citations of Chapter 790 Oregon Laws 1989 (HB2250) Felony Sentencing Guidelines. When the 1989 Sentencing Guidelines Implementation Manual went to print permanent ORS citation numbers had not yet been assigned.*

Ch. 790 Section	ORS	Ch. 790 Section	ORS	Ch. 790 Section	ORS
1.	Add	30	Add	59	Add
2.	135.407	31 . . . . .	.Temp (144.096)	60,61.	421.121
3.	Add			62	421.166
4.	135.711	32	144.096	63	421.168
5.	135.815	32a.	144.102	64	423.100
6.	137.010	32b.	144.098	65	423.525
7. . . . .	.Temp	33,34.	144.104	66	423.530
7a	135.980	35	144.106	67	423.570
8.	137.079	36	144.108	68	144.125
8a	144.790	37	144.622	69	144.420
8b	144.800	38	137.663	71 . . . . .	.Eff
9.	137.080	39	137.671	72	161.610
10	137.090	40	144.317	73	137.673
11	137.120	41	144.335	74 . . . . .	.Rplg
14	137.121	42	144.340	75	161.725
15	137.520	42a.	144.343	76 . . . . .	.Add
16	137.540	43	144.349	77	161.737
17	137.550	44	144.350	78	144.226
18	137.523	45	144.374	79Add
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18b.	144.346	47	144.380	81	137.372
19	137.074	47a.Rplg	82	137.637
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20	138.083	47c.Eff	85Add
21	138.222	48	161.327	86Rplg
21a.	138.060	49	161.336	87Temp
22	144.005	50	161.341	88 . . . . .	.Add
23 . . . . .	.Temp	51 . . . . .	.Temp (161.615)	89	137.665
24	144.040			90 . . . . .	.Temp
25	144.050	52	161.585	91	137.657
26	144.060	53	162.135	91a. . . . .	.Temp
27	144.075	54	162.175	94 . . . . .	.Add
27a.	144.126	55	421.005	94a.	137.667
27b.	144.140	56	421.120	95	137.669
28 . . . . .	.Temp (144.110)	57	421.165	96-101 . . . . .	.Temp
29	144.260	57a. . . . .	.Eff	135,135a . . . . .	.Temp
		58 . . . . .	.Rplg	135b.	163.150
				136 . . . . .	.Emer

* Abbreviations used are as follows:
 Add...Adds new section to existing chapter or title
 Eff...Effective date provision
 Emer...Emergency clause
 Rplg...Repealing provision
 Temp...Temporary provision

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