

CHAPTER III

PRACTICES AND PROCEDURES

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III. PRACTICES AND PROCEDURES

In general, the procedures used to sentence an offender under the indeterminate sentencing system are retained for use in the guidelines system. Some modifications, however, have been made to the sentencing process to make it more compatible with the guidelines system.

This chapter of the manual describes these procedural aspects of sentencing under the guidelines system. It begins with a description of the statutory changes related to accusatory instruments and discovery requirements. This chapter will also describe the role of plea negotiations in the guidelines system. While plea negotiations will continue to play an important role in the disposition of criminal cases, new requirements related to those negotiations have been adopted to ensure that the purposes and principles of the guidelines system are not circumvented by plea negotiation practices.

The next topic discussed in this chapter is the process by which an offender's criminal history record will be established under the guidelines system. This discussion will include a description of the role of the presentence investigation report (PSI) under the guidelines system and its role in the determination of the presumptive sentence. Most significantly, the PSI will serve as presumptive evidence of the offender's criminal history unless challenged in court. This part will also describe proof requirements which must be met to establish an offender's criminal history.

Finally, the requirements for sentencing reports under the new guidelines system are described. Such a report is required for each case resulting in at least one felony conviction under the guidelines system.

A. ACCUSATORY INSTRUMENTS

All accusatory instruments filed for crimes to be sentenced under the guidelines system must allege facts sufficient to classify the offense on the Crime Seriousness Scale of the guidelines grid. Section 4, Chapter 790, Oregon Laws 1989. If a statutory offense is subcategorized on the scale, the accusatory instrument should include facts sufficient to establish the most serious criminal conduct for which the offender may be sentenced.

If such facts are not included in the accusatory instrument, the defendant should be allowed to argue successfully that the instrument was insufficient to establish anything but the lowest crime seriousness subclassification of the offense. Consequently, the district attorney should always include the appropriate subclassification facts in the accusatory instrument. Whether this new requirement for accusatory instruments

implicitly establishes a standard of proof for subclassification facts is an open question. Neither Section 4, Chapter 790, Oregon Laws 1989, nor the rules of the State Sentencing Guidelines Board address this particular issue. It is also unclear whether such facts must be proven at trial, by special findings of the jury or court or at the sentencing hearing.

Statutory Provision-Section 4, Chapter 790, Oregon Laws 1989:

For any felony committed on or after November 1, 1989, the accusatory instrument shall allege facts sufficient to constitute a crime or a specific subcategory of a crime in the Crime Seriousness Scale established by the rules of the State Sentencing Guidelines Board.

B. DISCOVERY REQUIREMENTS

The state's discovery responsibilities have been expanded with respect to the guidelines system. An amendment to ORS 135.815 now requires the state to provide the defendant with a description of the defendant's criminal history record. Section 6 of ORS 135.815 provides that the state's discovery shall include: "All prior convictions of the defendant known to the state that would affect the determination of the defendant's criminal history for sentencing under rules of the State Sentencing Guidelines Board."⁵

The defendant's criminal history record is a very important factor under the guidelines system. The state's preliminary assessment of the defendant's criminal history classification is critical to the defendant's ability to prepare for his or her case. It puts the defendant on notice with respect to the state's anticipated evaluation of the defendant's criminal record and provides the defendant with an opportunity to challenge the state's evaluation.

In many cases, the new discovery requirement will facilitate plea negotiations by establishing early in the process what prior convictions may be subject to dispute. When a dispute arises with respect to the existence or classification of an alleged prior conviction, the parties may resolve the dispute as part of the plea negotiation agreement. During such plea negotiations, however, the parties should remember that any plea agreement presented to the sentencing judge under the guidelines system

⁵ While this discovery requirement is not expressly limited to felony cases, such information should not be necessary for misdemeanor cases. The statutory reference to the rules of the State Sentencing Guidelines Board implicitly limits the new provisions of ORS 135.815 to felony cases. The Guidelines Board's rules only apply to felony convictions for crimes committed on or after November 1, 1989.

must include an accurate representation of the offender's criminal history record. If the existence or classification of an alleged prior conviction is part of the plea agreement, the sentencing judge must be informed as to why the offense was included or not included in the classification of the offender's criminal history record. (See the next section, C. Plea Agreements).

Statutory Provision-ORS 135.815 (as amended by Section 5, Chapter 790, Oregon Laws 1989):

Except as otherwise provided in ORS 135.855 and 135.873, the district attorney shall disclose to the defendant the following material and information within the possession or control of the district attorney:

(1) The names and addresses of persons whom the district attorney intends to call as witnesses at any state of the trial, together with their relevant written or recorded statements or memoranda of any oral statements of such persons.

(2) Any written or recorded statements or memoranda of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one.

(3) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which the district attorney intends to offer in evidence at the trial.

(4) Any books, papers, documents, photographs or tangible objects:

(a) Which the district attorney intends to offer in evidence at the trial; or

(b) Which were obtained from or belong to the defendant.

(5) If actually known to the district attorney, any record of prior criminal convictions of persons whom the district attorney intends to call as witnesses at the trial; and the district attorney shall make a good faith effort to determine if such convictions have occurred.

(6) All prior convictions of the defendant known to the state that would affect the determination of the defendant's criminal history for sentencing under rules of the State Sentencing Guidelines Board.

C. PLEA AGREEMENTS

Special rules applicable to plea agreements under the sentencing guidelines system have been established both by rule (OAR 253-07-001 to 253-07-005) and by statute (Section 2, Chapter 790, Oregon

Laws 1989). The statutory law and the administrative rules are generally consistent although some discrepancies may exist. What discrepancies do exist should be resolved with due deference to the statutory provision.

The intent of the State Sentencing Guidelines Board was to adopt rules that are consistent with the new statutory requirements for plea agreements. Where both a statute and administrative rule address the same topic. The administrative rule should be viewed as a supplemental guide for the proper application of the statute.

Section 2 of Chapter 790, Oregon Laws 1989 has been reproduced below for the reader's convenience. Following the statute, the applicable administrative rules for plea agreements are included with the Guidelines Board's commentary.

Statutory Provision-Section 2, Chapter 790, Oregon Laws 1989:

In cases arising from felonies committed on or after November 1, 1989:

(1) Whenever a plea agreement is presented to the sentencing judge, the defendant's criminal history classification, as set forth in the rules of the State Sentencing Guidelines Board, shall be accurately represented to the trial judge in the plea agreement. If a controversy exists as to whether a prior conviction or juvenile adjudication should be included in the defendant's criminal history, or as to its classification under rules of the State Sentencing Guidelines Board, the district attorney and the defendant may stipulate to the inclusion, exclusion or classification of the conviction or adjudication as part of the plea agreement subject to approval of the court.

(2) The district attorney and the defendant may stipulate to the grid block classification within the sentencing guidelines grid established by the rules of the State Sentencing Guidelines Board that will provide the presumptive sentence range for the offender. The sentencing judge may accept the stipulated classification and impose the presumptive sentence provided in the rules of the State Sentencing Guidelines Board for that grid block.

(3) If the district attorney and the defendant stipulate to a grid block classification within the sentencing guidelines grid, and the sentencing judge accepts the stipulated classification but imposes a sentence other than the presumptive sentence provided by rules of the State Sentencing Guidelines Board, the sentence is a departure sentence and is subject to rules of the State Sentencing Guidelines Board related to departures.

(4) The district attorney and defendant may stipulate to a specific sentence within the presumptive range provided by rules of the State Sentencing Guidelines Board for the stipulated

offender classification. If the sentencing judge accepts the plea agreement, the judge shall impose the stipulated sentence.

(5) The district attorney and the defendant may stipulate to a sentence outside the presumptive sentence range for a stipulated grid block classification. The sentencing judge may accept an agreement for an optional probationary sentence or a departure sentence as provided in rules of the State Sentencing Guidelines Board.

Statutory Summary

Subsection (1) of this statute represents the statutory requirement that the offender's criminal record must always be accurately presented to the sentencing court. It clearly provides that the parties can stipulate to a criminal history classification only if a dispute arises as to the existence or classification of a prior conviction.

Subsection (2) is the statutory statement of OAR 253-07-003 (1). It permits the parties to stipulate to the appropriate grid block classification for an offender. In most cases, this classification process will focus on the Crime Seriousness Classification of the crime of conviction (the vertical axis of the sentencing guidelines grid). The offender's placement on the Criminal History Scale (the horizontal axis of the grid) may only be negotiated, as permitted by subsection (1), when a dispute arises with respect to the existence or classification of one or more prior convictions.

Subsection (3). The parties may stipulate to an appropriate grid-block classification for an offender without also agreeing to the actual sentence to be imposed. If this situation occurs, the sentencing judge is free to impose the presumptive sentence or to depart from the guidelines. If a departure sentence is imposed, it must be supported by substantial and compelling reasons as required by OAR 253-08-001. It is not, however, appealable as a departure sentence pursuant to Section 21, Subsection (3), Chapter 790, Oregon Laws 1989 because such appeal is precluded as a plea-agreement sentence. See, Section 21, Subsection (2), Paragraph (d), Chapter 790, Oregon Laws 1989.

Subsection (4). If the parties stipulate to an appropriate grid-block classification for an offender, they may stipulate to a specific sentence within the presumptive sentence range. If the agreement is accepted, the sentencing judge shall impose the stipulated sentence.

Subsection (5). If the parties stipulate to an appropriate grid-block classification for an offender, they may also stipulate to a specific sentence outside the presumptive sentence range. If the sentencing judge accepts the agreement, the sentence must be imposed in a manner consistent with the rules for departures or optional probationary sentences. Because the sentence results from a plea agreement, it will not be appealable. See, Section

1. Permissible Agreements

OAR 253-07-001 PERMISSIBLE PLEA AGREEMENTS. The sentencing judge shall comply with the rules of this division when accepting a negotiated plea as a plea agreement for any offense committed on or after the effective date of these rules.

Commentary

Judicially approved plea agreements constitute a proper and effective means to dispose of criminal cases without trial. In Oregon under current law, 85 to 95 percent of all criminal charges are disposed of by plea agreement. This rule reflects the Guidelines Board's judgment that plea agreements must continue to play an important role under sentencing guidelines in Oregon, subject to conditions and controls applied by the sentencing judge. The Minnesota and Washington guidelines systems have successfully integrated this approach to plea agreements without a significant increase in trial rates.

2. Criminal History

OAR 253-07-002 CRIMINAL HISTORY. (1) An offender's criminal history classification shall be accurately represented to the sentencing judge in the plea agreement.

(2) If a controversy exists as to the inclusion of a prior conviction or juvenile adjudication in an offender's criminal history or as to the classification of a prior conviction or juvenile adjudication, the district attorney and defense may stipulate to the inclusion, exclusion or classification of the conviction or juvenile adjudication as part of a plea agreement subject to the approval of the sentencing judge.

Commentary

Section (1). Under sentencing guidelines an offender's criminal history assumes a far more carefully defined and formal role in sentencing than under the prior indeterminate sentencing system. Accordingly, this section prohibits any misrepresentation of the criminal history to the sentencing judge in the context of a plea agreement. This prohibition includes the intentional non-disclosure of a prior conviction or juvenile adjudication by the state.

The offender may admit or stipulate to the existence of prior convictions or juvenile adjudications for purposes of the current sentencing proceeding only. Such admissions or stipulations may not be used as evidence of prior convictions in any other proceeding unrelated to the current sentencing matter. If, however, the existence or nonexistence of a prior conviction or

juvenile adjudication is established pursuant to a contested hearing before the sentencing judge, that court's findings may be used as prima facie evidence of the existence or non-existence of an alleged prior conviction or juvenile adjudication in a subsequent proceeding against the offender. It is the Guidelines Board's intent that the finding in the contested hearing creates a rebuttable presumption in any subsequent proceeding either for or against the offender.

Section (2) recognizes that disagreements may occur between the state and an offender as to the inclusion or treatment of a prior conviction or juvenile adjudication in an offender's criminal history. This section authorizes the state and defendant to resolve such disagreements by stipulation subject to the sentencing judge's approval. Parties are also permitted under this rule to stipulate to the treatment of out-of-state convictions and juvenile adjudications under OAR 253-04-011, and the classification of Burglary I convictions or juvenile adjudications under OAR 253-04-010. All such stipulations must be approved by the court.

Criminal history disagreements not resolved by court-approved stipulations should be decided by the sentencing judge as provided by OAR 253-04-013.

3. Stipulated Grid Block

OAR 253-07-003 STIPULATED GRID BLOCK. (1) Subject to the provisions of OAR 253-07-002 and the approval of the sentencing judge, the district attorney and defense may stipulate to the grid block classification within the Sentencing Guidelines Grid which will provide the presumptive sentence for the offender.

(2) If the sentencing judge accepts the stipulated grid block classification and imposes a sentence other than the presumptive sentence for the stipulated grid block, the sentence is a departure.

Commentary

Section (1). Every plea agreement within the guidelines system will include a stipulation as to the placement of the crime of conviction on the Crime Seriousness Scale of the Sentencing Guidelines Grid (Appendix 1). Many agreements will also include stipulated Criminal History Classifications. This section authorizes the parties to stipulate to an appropriate grid block classification. While such agreements are appropriate, the parties must accurately present the offender's criminal history to the sentencing judge in all cases as required by OAR 253-07-002.

Example: A defendant is being charged with Rape I. The parties agree that the defendant has two prior Burglary I convictions. They further agree that one prior conviction

involved the burglary of an occupied dwelling which is properly classified as a prior person felony conviction. The parties, however, dispute whether the second prior burglary conviction was in an occupied dwelling. Consequently, the parties agree to a guilty plea to a Crime Category 10 Rape I in Criminal History Category C (one prior person conviction and one or more non-person conviction). This is an appropriate plea agreement if the sentencing judge determines that an issue exists as to the disputed classification of the second prior burglary conviction.

Section (2) requires that any stipulated grid block classification for the crime of conviction and criminal history be approved by the sentencing court. If the court approves the grid placement, the court must sentence within the presumptive range of the stipulated grid block or depart from the guidelines. If the sentencing judge imposes a departure sentence, he or she must state the substantial and compelling reasons for the departure.

4. Stipulated Presumptive Sentence

OAR 253-07-004 STIPULATED PRESUMPTIVE SENTENCE. (1) The district attorney and the defense may stipulate to a specific sentence within the presumptive sentence range for the stipulated grid block classification.

(2) If the sentencing judge accepts the plea agreement, the judge shall impose the stipulated sentence.

Commentary

Section (1). In addition to an agreed grid block classification, some plea agreements under sentencing guidelines can be expected to include an agreed sentence within the presumptive sentence range for the grid block classification. This section authorizes such agreements.

Section (2) requires the court to impose the stipulated sentence if the court approves an agreement with such a stipulation. If the court imposes any other sentence, the state or defendant may withdraw the plea agreement.

EXAMPLE: The defendant agrees to plead guilty to a Crime Category 4 Theft I in Criminal History Category F. The agreement also includes a stipulated sentence whereby the offender will receive no more than 30 days of jail and that a specific drug abuse program is imposed as part of the presumptive probationary sentence. If the sentencing judge accepts the plea, he or she shall impose the stipulated sentence. (The specific nature of this stipulation, however, would not preclude the use of custody to impose other custodial conditions of probation.)

5. Stipulated Non-Presumptive Sentence

OAR 253-07-005 STIPULATED NON-PRESUMPTIVE SENTENCE. (1) The district attorney and defense may stipulate to a sentence outside the presumptive sentence range for a stipulated grid block classification.

(2) If the parties stipulate to an optional probationary sentence, the sentencing judge may accept the plea agreement after making the findings as required by OAR 253-05-006.

(3) If the parties stipulate to a departure sentence, the sentencing judge may accept the plea agreement if the judge finds on the record substantial and compelling reasons for the departure.

Commentary

Section (1). A third form of plea agreement under sentencing guidelines will combine a stipulated grid-block classification with a stipulated departure sentence. This section authorizes such agreements.

Sections (2) and (3), however, provide that such agreements may be accepted only if the sentencing judge finds substantial and compelling reasons on the record for the departure. This restriction represents a judgment by the Guidelines Board that the public policy represented by presumptive sentences should control disposition of all cases unless facts exist to support a departure.

D. PRESENTENCE INVESTIGATIONS

Presentence Investigation Reports (PSI reports) will continue to play an important role in the sentencing of felony offenders under the guidelines system.

1. Minimum PSI Requirements

Section 7, Chapter 790, Oregon Laws 1989 directs the Guidelines Board to adopt by rule minimum standards for PSI reports to be used when sentencing offenders under the guidelines system. Such rules may indicate what minimum information is required and what additional information may be required only if requested by the court or either party.

Statutory Provision-Section 7, Chapter 790, Oregon Laws 1989:

(1) By November 1, 1989, the State Sentencing Guidelines Board shall provide by rule for: (a) The minimum information to be included in the presentence report to be prepared for the sentencing of defendants convicted of felonies committed on or after November 1, 1989; and (b) The sentencing report form to be

filed with the Oregon Criminal Justice Council.

(2) Subject to the provisions of ORS 137.530 (2) and 144.790 (2), the rules relating to presentence reports may provide that certain information is to be reported in all cases and that other information is to be provided only upon request made by the court, the district attorney or the defendant under ORS 144.790 (1) or in any additional circumstances set forth in the rules.

(3) In adopting the rules, the Board shall consider any recommendations of the Oregon Criminal Justice Council and shall assure that notice of the proposed rules and opportunity to comment are provided to the Department of Corrections, the State Board of Parole and Post-Prison Supervision and the State Court Administrator.

(4) Any form adopted under paragraph (b) of subsection (1) of this section must be approved by the Supreme Court before it is distributed for use to the trial courts.

a. Minimum Contents

OAR 253-13-010 MINIMUM CONTENTS OF PRESENTENCE REPORTS. Except as provided by section (7), each presentence report prepared for an offender to be sentenced for one or more felonies committed on or after November 1, 1989, shall at a minimum include the following information:

(1) A summary of the factual circumstances of the crime or crimes of conviction and an appropriate classification of each crime of conviction on the Crime Seriousness Scale (Appendix 2). If the crime of conviction is subclassified in Appendix 3 or 4, the presentence report shall state the factual circumstances that justify the proposed subclassification.

(2) A listing of all prior adult felony and Class A misdemeanor convictions and all prior juvenile adjudications and an assessment of the appropriate classification of the criminal history on the Criminal History Scale pursuant to OAR 253-04-006 to 253-04-013.

(3) A proposed grid block classification for each crime of conviction and the presumptive sentence for each crime of conviction.

(a) If the proposed grid block classification is a grid block above the dispositional line, the presentence report shall state the presumptive prison term range and the presumptive duration of post-prison supervision.

(b) If the proposed grid block classification is Grid Block 8-G, 8-H or 8-I, the presentence report shall state whether the offender is eligible for an optional probationary sentence. If the offender is eligible, the presentence report may include a

recommendation that an optional probationary sentence be imposed with a further recommendation for the appropriate conditions of probation.

(c) If the proposed grid block classification is a grid block below the dispositional line, the presentence report shall provide the following information:

(A) the presumptive term of probation;

(B) the maximum number of custody units that may be imposed and the number of custody units that may be used to impose jail time as part of the probationary sentence;

(C) a recommendation for the appropriate conditions of probation including both custody and non-custody conditions; and

(D) any other information relevant to the imposition of a presumptive sentence as provided by these rules.

(4) A victim statement as required by ORS 137.530(3) and 144.790(2).

(5) A recommendation as to whether a departure from the guidelines is appropriate. If a recommendation is made, the presentence report shall indicate the aggravating or mitigating factors upon which the departure recommendation is made. Such recommendations shall be consistent with the requirements for departures as defined by OAR 253-08-001 to 253-08-007.

(6) Any additional information as provided upon request of the sentencing judge.

(7) The sentencing judge may waive the requirement for any information necessary to establish the presumptive sentence if that information has been made part of an accepted plea agreement.

Commentary

The 1989 Legislative Assembly directed the State Sentencing Guidelines Board to establish by rule the minimum contents of presentence reports for offenders sentenced for any felony committed on or after November 1, 1989. Sections 7 and 8a, Chapter 790, Oregon Laws 1989.

When a presentence report (PSI) is requested, the PSI writer should provide the necessary information as accurately as possible. Certain plea agreements may include stipulated facts related to the crime of conviction or the offender's criminal history classification. In such a case, the sentencing judge should generally waive the need to collect such information in the PSI. When such information is not waived, the PSI writer should make a good-faith effort to provide the information.

b. Format

OAR 253-13-011 FORMAT FOR PRESENTENCE REPORTS. The format for all presentence reports for offenders convicted of a felony committed on or after November 1, 1989, shall be as provided by the Department.

Commentary

The specific format for presentence reports will continue to be established by the Department of Corrections. The State Sentencing Guidelines Board adopted rule OAR 253-13-011 to ensure that no other rule of the Guidelines Board is construed to restrict or modify the Department's authority in this area.

2. When is a PSI Required under Guidelines?

Section 8a, Chapter 790, Oregon Laws 1989, establishes the circumstances under which the a presentence report will be required with respect to sentences under the guidelines system. A presentence report will be required if requested by the sentencing court or if either party indicates that a departure may be appropriate. While the new statutory provision authorizes the Guidelines Board to establish a PSI requirement rule, the Guidelines Board declined to exercise this authority. The Guidelines Board agreed to monitor the use of PSI reports under guidelines system and to take further action on this issue when appropriate.

Statutory Provision-ORS 144.790 (2) (as amended by Section 8a, Chapter 790, Oregon Laws 1989):

(2)(a) Notwithstanding the provisions of subsection (1) of this section, when a person is convicted of a felony committed on or after November 1, 1989, the Department of Corrections shall only furnish a presentence report to the sentencing court if:

- (A) Required by the rules of the State Sentencing Guidelines Board under section 7 of this 1989 Act;
- (B) Ordered by the sentencing judge; or
- (C) Either party advises the court that the party believes a departure is justified.

(b) The contents of any presentence report furnished by the Department of Corrections as required by rules of the State Sentencing Guidelines Board under section 7 of this 1989 Act.

(c) A presentence report need not be prepared if the parties do not dispute the appropriate grid block classification and no departure is requested or imposed.

E. PROOF OF CRIMINAL HISTORY

The importance of the offender's criminal history record will greatly increase under the guidelines system. Consequently, several new provisions relating to the proof of criminal history have been established by statute or by rules of the State Sentencing Guidelines Board. As noted earlier in this chapter, the discovery requirements in criminal cases have been expanded to include a criminal history evaluation.⁶

The new discovery requirement serves as the first step in the process used to establish an offender's classification on the Criminal History Scale of the Sentencing Guidelines Grid. Once this information is made available, the parties can begin the plea agreement process. If they can reach a proper plea agreement as described in Section C of this chapter, the parties shall describe the offender's criminal history record as accurately as possible to the sentencing court and the issue is resolved. If, however, a plea agreement cannot be negotiated or if the plea agreement is rejected by the sentencing judge, further proof of the offender's criminal history must be established.

The offender's criminal history record must be established by a preponderance of the evidence⁷ or by the offender's admission. ORS 137.079(4)(c) and OAR 253-04-013. Except to the extent disputed by the defendant, the defendant's criminal history record can be established by a preliminary report to the court. This report may be prepared by the district attorney or be made as part of the PSI report in the case. ORS 137.079(4)(a) and OAR 253-04-013(2).

When such a report is filed with the court and the defendant, the defendant must notify the court immediately if he or she disputes any portion of the criminal history summary. When the criminal history summary is challenged, the state must be given reasonable time to produce the evidence needed to prove the defendant's record. Most often a certified copy of the conviction judgment is adequate proof of a prior conviction. Other forms of evidence, however, may also satisfy the state's burden of proof as determined by the sentencing judge.⁸

⁶ See, Section B. Discovery Requirements.

⁷ When the sentencing judge reviews a plea agreement, he or she should use the preponderance of the evidence standard to determine whether the offender's criminal history record has been accurately represented to the court as required by Section 2, Subsection (1), Chapter 790, Oregon Laws 1989 and the rules of the State Sentencing Guidelines Board.

⁸ The proof of prior in-state convictions will be easier to establish once the state's Oregon Judicial Information Network (OJIN) is fully on line and a central repository has been established for judgment orders. The state will be aided by a

The proof requirements related to criminal history are described both by rule (OAR 253-04-013) and by statute (ORS 137.079(4)). The applicable administrative rules with the Guidelines Board's commentary are included below with the pertinent statutory provisions on this topic.

The relevant provisions of ORS 137.079 are consistent with the provisions of OAR 253-04-013. The statute, however, includes some important additional provisions. First, the sentencing judge is directed to correct any errors in the PSI report's summary of the offender's criminal history record. Because of the increased significance given prior convictions under the guidelines, the accurate reporting of the offender's criminal record is crucial to the proper application of the guidelines system.

The amendments to ORS 137.079 also provide that the court's determination of the offender's criminal history record is not subject to appeal except as provided by the appellate review provisions of Section 21, Chapter 790, Oregon Laws 1989. This provision of the statute limits appellate review of the court's criminal history determination to an appeal based on a claim that the court "erred ... in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes." Section 21, Subsection (4), Paragraph (b), Chapter 790, Oregon Laws 1989.

This limitation on appellate review precludes a challenge to the court's determination as to what prior convictions and juvenile adjudications are included in the offender's criminal history. It does not, however, prohibit either party from challenging the court's classification of a prior conviction. For example, the sentencing court may conclude that the offender's criminal history record includes two prior non-person felony convictions and one juvenile adjudication of a person felony. The state may not argue on appeal that the court failed to include an additional prior adult conviction. It may, however, claim that one of prior non-person convictions should have been classified as a person felony conviction.

Statutory Provision-ORS 137.079 (4) (as amended by Section 8, Chapter 790, Oregon Laws 1989):

(4) A defendant who is being sentenced for felonies committed prior to November 1, 1989, may file a written motion to correct

new statutory requirement that any offender convicted of a felony or a Class A misdemeanor must be fingerprinted. Section 19, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 137.074). This new statute directs the sentencing court to insure that fingerprints for all offenders convicted of a Class A misdemeanor or felony have been collected at the time of conviction.

the criminal history contained in the presentence report prior to the date of sentencing. At sentencing, the court shall consider defendant's motion to correct the presentence report and shall correct any factual errors in the criminal history contained in that report. An order allowing or denying a motion made pursuant to this subsection shall not be reviewable on appeal. If corrections are made by the court, only corrected copies of the report shall be provided to individuals or agencies pursuant to ORS 137.077.

(4)(a) The provisions of this subsection apply only to a defendant being sentenced for a felony committed on or after November 1, 1989.

(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.

(d) The court shall correct any error in the criminal history as reflected in the presentence report.

(e) If corrections to the presentence report are made by the court, only corrected copies of the report shall be provided to individuals or agencies pursuant to ORS 137.077.

(f) Except as provided in section 21 of this 1989 Act, the court's decision on issues relating to a defendant's criminal history shall not be reviewable on appeal.

OAR 253-04-013 PROOF OF CRIMINAL HISTORY. (1) The offender's criminal history shall be admitted in open court by the offender or determined by a preponderance of the evidence at the sentencing hearing by the sentencing judge.

(2) Except to the extent disputed in accordance with section (3), the summary of the offender's criminal history prepared for the court by the state shall satisfy the state's burden of proof as to an offender's criminal history.

(3) Upon receipt of the criminal history summary prepared for the court, the offender shall immediately notify the district attorney and the court with written notice of any error in the proposed criminal history summary. Except to the extent any disputed part is thereafter changed by agreement of the district attorney and the defendant with the approval of the sentencing judge, the state shall have the burden of producing further evidence to satisfy its burden of proof as to any disputed part or parts of the criminal history and the sentencing judge shall

allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence.

Commentary

This rule prescribes the process to prove an offender's criminal history.

Section (1) provides that criminal history is to be established either by the offender's admission in open court or by the sentencing judge's determination at the sentencing hearing. The standard of proof that applies to the state is a preponderance of the evidence. This standard of proof is also established by Section 8(4)(c), Chapter 790, Oregon Laws 1989 when the defendant challenges the criminal history summary of the presentence investigation report.

Section (2) provides that the formal criminal history prepared for the court by the state is prima facie evidence of an offender's criminal history. The state is not required to produce any further evidence of criminal history unless the offender challenges the summary pursuant to Section (3) of this rule.

Section (3) describes how the offender may challenge the state's criminal history summary. The offender must give both the state and judge written notice of his or her challenge to the state's criminal history summary. This notice must be given immediately. If the dispute is not then corrected by agreement of the district attorney and defendant, the state must prove the existence or classification of the prior conviction by a preponderance of the evidence. The state is to be given reasonable time to produce such evidence.

F. JUDGMENT OF CONVICTION

1. Judgment of Conviction: Prison Sentences

The adoption of sentencing guidelines has necessitated changes to the content of the judgment of conviction. Most importantly, every prison sentence imposed under the guidelines system will include a term of post-prison supervision. Both ORS 137.010 and OAR 253-05-005 require that this aspect of the sentence be reflected in the judgment of conviction.

With the elimination of parole,⁹ the Board of Parole and Post-Prison Supervision will not have the authority to release an offender sentenced under the guidelines system. Consequently,

⁹ ORS 144.050 (as amended by Section 25, Chapter 790, Oregon Laws 1989), limits the parole function to offenders sentenced for crimes committed prior to November 1, 1989.

the Board has no statutory authority to require that such offenders submit to supervision after their release from prison.

In order to ensure that offenders sentenced under the guidelines serve a term of post-prison supervision, the sentencing judge must make it a part of the judgment. ORS 137.010. The judgment of conviction shall also inform the defendant that he or she may receive additional sanctions for violations of post-prison supervision. Id. With this information in the judgment of conviction, the offender is notified that he or she has been sentenced to a term of prison, a term of post-prison supervision and may be subject to additional prison incarceration for supervision violations.

The rules of the Guidelines Board also include a special rule for probationary sentences. OAR 253-05-015 directs the sentencing judge to state the non-custody conditions which require participation in a specific non-custody program. This reporting requirement will help establish a database on the use of probationary programs throughout the state.

Statutory Provision-ORS 137.010 (9)¹⁰ (as amended by Section 6, Chapter 790, Oregon Laws 1989):

(9) A judgment of conviction that includes a term of imprisonment for a felony committed on or after November 1, 1989, shall state the length of incarceration and the length of post-prison supervision. The judgment of conviction shall also provide that if the defendant violates the conditions of post-prison supervision, the defendant shall be subject to sanctions including the possibility of additional imprisonment in accordance with rules of the State Sentencing Guidelines Board.

OAR 253-05-005 JUDGMENT OF CONVICTION. Each judgment of conviction which includes a prison term for an offense committed on or after the effective date of these rules shall state the length of incarceration and the length of post-prison supervision. The judgment of conviction shall also expressly provide that if the offender violates the conditions of post-prison supervision, the offender shall be subject to sanctions imposed by the supervisory agent or additional imprisonment imposed by the Board in accordance with these rules.

¹⁰ The reader should note that ORS 137.010 was also amended by Section 1, Chapter 849, Oregon Laws 1989. This act provides that an offender may not refuse probation. This provision should apply to both offenders sentenced under the indeterminate sentencing system and those subject to the new guidelines system. When codified the subsections of ORS 137.010 may not correspond numerically to the subsection citations noted in this training manual.

Commentary

Each judgment must (1) state the length of incarceration; (2) state the length of post-prison supervision; and (3) expressly provide that if the offender violates conditions of post-prison supervision, the offender is subject to sanctions imposed by the supervisory authority or additional imprisonment imposed by the Board of Parole and Post-Prison Supervision as provided by these rules. These requirements assure that each judgment of conviction will clearly state the total potential sanction imposed as part of the sentence.

2. Judgment of Conviction: Probation Sentence

OAR 253-05-015 NON-CUSTODY CONDITIONS OF PROBATION.

(3) Each judgment of conviction which includes a probationary term for an offense committed on or after the effective date of these rules shall include a description of all programmatic conditions imposed as part of the probationary sentence.

Commentary

Section (3) of this rule requires that all of programmatic conditions imposed under this rule be described in the judgment of conviction. The Council is directed to "serve as a clearinghouse and information center for the collection, preparation, analysis and dissemination of information on state and local sentencing practices...." Section 9(1), 1987 legislation. The Guidelines Board adopted this rule to assist the Council's efforts to collect data on the use of local correctional programs by sentenced offenders.

G. SENTENCING REPORTS

OAR 253-13-001 SENTENCING REPORT. (1) A sentencing report shall be submitted forthwith to the Oregon Criminal Justice Council by the sentencing court for each sentence imposed for felonies committed on or after November 1, 1989.

(2) The sentencing report shall provide the following offense and offender information:

(a) Offender identification information;

(b) Court processing information;

(c) Offense conviction information for each crime of conviction;

(d) All prior convictions for felonies or Class A misdemeanors and all juvenile adjudications as described in OAR 253-04-006(2);

(e) Whether the offender is eligible for an optional probationary sentence as provided by OAR 253-05-006;

(f) The presumptive sentence for each crime of conviction;
and

(g) Any other information needed to identify the presumptive sentence in accordance with these rules.

(3) The sentencing report shall provide the following information about the sentence imposed for each crime of conviction:

(a) a description of the sentence imposed, including:

(A) the prison term of incarceration and the term of post-prison supervision; or

(B) the duration of probation, number of custody units, any term of jail incarceration and whether treatment or evaluation was ordered as part of probation;

(b) the total amount of financial obligations associated with the sentences;

(c) if multiple sentences are imposed, whether the sentences are to be served concurrently or consecutively;

(d) whether a statutorily mandatory minimum sentence has been imposed; and

(e) If a departure sentence is imposed, the type of departure (durational or dispositional) and each aggravating or mitigating factor relied upon to impose the departure sentence.

(4) If the offender has been revoked from probation pursuant to OAR 253-10-001, the sentencing report shall provide the following information:

(a) the reasons for revocation;

(b) the revocation sanction imposed; and

(c) whether the incarceration term is to be served concurrently or consecutively with any other sentence.

(5) The staff of the State Sentencing Guidelines Board shall develop the sentencing report form in accordance with the provisions of this rule and shall submit it to the Supreme Court of Oregon for approval prior to distribution for use by trial courts. The form shall display the following statement on its face: The completed form shall be submitted to the Oregon Criminal Justice Council forthwith. ORS 137.010(8).

Commentary

1. Contents and Development of the Sentencing Report

This rule establishes the contents of the sentencing report as required by section 7, Chapter 790, Oregon Laws 1989. The sentencing court is responsible for ensuring that a sentencing report consistent with the requirements of this rule is completed and submitted forthwith to the Council for sentences imposed for felonies committed on or after November 1, 1989. ORS 137.010(8).

The primary purpose of the sentencing report is to provide the Council with the necessary information to fulfill its obligations to monitor guidelines. The database generated from these reports will provide the means to assess the impact of the guidelines on both local and state correctional resources and the impact of proposed revisions to the guidelines.

Council staff will review completed sentencing reports to identify computational errors. Staff will promptly notify the sentencing court in writing when such errors are identified. Because any sentence modification must be made within 60 days of sentencing, Section 20, Chapter 790, Oregon Laws 1989, it is essential that report forms be submitted to the Council and returned to the sentencing court as expeditiously as possible.

The format of the sentencing report will be established by the Guidelines Board's staff and presented to the Oregon Criminal Justice Council, the Department of Corrections, the State Board of Parole and Post-Prison Supervision, and the State Court Administrator for comments as required by Section 7(3), Chapter 790, Oregon Laws 1989. Before distribution for use to the trial courts, the report form must be approved by the Supreme Court of Oregon.

The Guidelines Board intends that the following items necessary to enable the Council to fulfill its duties under Sections 89 and 91, Chapter 790, Oregon Laws 1989 and Section 9, Chapter 619, Oregon Laws 1987, may be included on the report form developed by Guidelines Board staff pursuant to the requirements of subsections (a), (b), (c) and (d) of section 2 of this rule.

(a) Offender identification information: Offender's name, State Police Identification (SID) number, birth date, sex, race, and supervision status at the time of the offense.

(b) Court processing information: Court case number, county of sentence imposition; whether conviction was based on plea, trial to judge, or jury verdict; date of plea, court finding of guilt or jury verdict; whether plea was to original charge or lesser and included offense and whether any charges were dismissed; date of sentence; description of plea agreement if one is accepted; and whether a presentence report was ordered.

(c) Offense conviction information for each crime of

conviction: Offense title, Oregon Revised Statutes (ORS) citation, date of offense, use of firearm finding, and crime seriousness ranking on Crime Seriousness Scale (Appendix 2).

(d) All prior convictions for felonies or Class A misdemeanors and all juvenile adjudications as described in OAR 253-04-006(2): offense title, date of prior conviction or juvenile adjudication, classification as a person or non-person offense, sentencing court, and case number if available. The report form shall differentiate those prior convictions relied upon to determine the offender's sentence in the current proceeding from additional convictions reported to the sentencing judge.

2. Completion of the Sentencing Report

Although the sentencing court, as noted above, has ultimate responsibility to submit forthwith a completed sentencing report, it is understood by both the Guidelines Board and Oregon's judiciary that the sentencing court will direct other parties to complete the Sentencing Report or portions of it.

a. Information Establishing Presumptive Sentence

The first part of the sentencing report provides all the information necessary to establish the presumptive sentence for each crime of conviction. When a plea negotiation includes an agreement upon criminal history, the prosecutor and defense attorney will be directed to complete and submit the first part of the sentencing report at the time of entry of plea. When the parties disagree as to the appropriate criminal history, each party will be directed to complete and submit to the sentencing judge this first part of the sentencing report. When the judge orders a presentence report (PSI), the PSI writer may be directed to complete and submit this first part of the sentencing report with the PSI.

In jurisdictions where caseloads are not prohibitive, and the sentencing judge desires to do so, the judge may choose to complete this portion of the form or delegate the task to a member of the court's staff.

Regardless of the means chosen to complete this part of the sentencing report, the information ultimately submitted to the Council should reflect the legal basis for the sentence. It is recognized that on occasion the legal basis for computations of a defendant's criminal history for sentencing purposes will not coincide with the criminal record summaries submitted by other agencies. However, the State Sentencing Guidelines Board expects that the offender's criminal history classification will reflect the offender's complete criminal history as accurately as is reasonably possible. If the court for purpose of sentencing modifies any criminal history information submitted to it based

on the resolution of disputes as to the correct criminal history, the court should assure that this part of the sentencing report as submitted to the Council reflects all such decisions.

b. Information about the Sentence Imposed, including Departure Sentences; Probation Revocations

A second part of the sentencing report will provide information about the sentence imposed for each crime of conviction. Delegation of responsibility for completing this part of the sentencing report, including information required for a departure sentence or probation revocation, may occur at the discretion of each sentencing judge.

NOTICE TO READER: Unfortunately, Sentencing Report forms and instructions were not available when this Implementation Manual was printed. Preliminary forms will be available in early October from the offices of the Oregon Criminal Justice Council. Forms will be finalized and distributed for use by trial courts after approval is obtained from the Supreme Court of Oregon