

CHAPTER V

CONCURRENT AND CONSECUTIVE SENTENCES

A. Concurrent and Consecutive Sentences.....112

B. Consecutive Sentences.....112

C. Sentences Imposed Consecutively to a.....116
Prior Remaining Sentence

D. Multiple Supervision Terms.....118

E. Departure Limitations in Consecutive Sentences.....119

V. CONCURRENT AND CONSECUTIVE SENTENCES

Nothing in the rules of the State Sentencing Guidelines Board should be read to limit the court's discretion to impose concurrent or consecutive sentences. This discretionary authority is granted to the judiciary by statute. ORS 137.122 and 137.123. However, notwithstanding the free exercise of this form of judicial discretion, the sentencing guidelines prescribe the manner in which multiple sentences are to be computed.

Under the guidelines system, all multiple sentences whether imposed concurrently or consecutively include an incarceration term and a supervision term. The following rules describe how multiple sentences are to be calculated and how they are to be executed.

A. CONCURRENT AND CONSECUTIVE SENTENCES

OAR 253-12-010 CONCURRENT AND CONSECUTIVE SENTENCES. When multiple convictions have been entered against a single defendant, the sentencing judge may impose consecutive or concurrent sentences as provided by ORS 137.122, 137.123 and 137.370.

Commentary

This rule confirms that existing statutory law controls the sentencing judge's threshold choice of consecutive or concurrent sentences for multiple convictions.

If a sentencing judge sentences multiple convictions consecutively in a single case, OAR 253-12-020 must be consulted for the proper calculation on the consecutive sentences. If the sentencing judge imposes the sentence in the current case consecutively to a remaining sentence from a prior proceeding, OAR 253-12-030 must be consulted for the proper execution of the consecutive sentences.

These rules do not include provisions for the computation of concurrent sentences. The execution of concurrent sentences will remain unchanged under the guidelines system although special provisions for the revocation of concurrent probationary sentences are described in ORS 253-12-040.

B. CONSECUTIVE SENTENCES

OAR 253-12-020 CONSECUTIVE SENTENCES. (1) When the sentencing judge imposes multiple sentences consecutively, the consecutive sentences shall consist of an incarceration term and a supervision term.

(2) (a) Subject to the provisions of subsection (b) of this section, the presumptive incarceration term of the consecutive sentences is the sum of:

(A) the presumptive incarceration term for the primary offense, as defined in OAR 253-03-001(17); and

(B) up to the maximum incarceration term indicated in the Criminal History I Column for each additional offense imposed consecutively.

(b) The total incarceration term of the consecutive sentences, including the incarceration term for the primary offense, shall not exceed twice the maximum presumptive incarceration term of the primary sentence except by departure as provided by OAR 253-08-007.

(c) The incarceration term of any probationary sentence is the maximum jail sentence that could be imposed as provided by these rules as part of the presumptive probationary sentence for that offense.

(d) If any sentence includes a prison term, the entire incarceration term of the consecutive sentences shall be served in prison.

(3) The supervision term of the consecutive sentences shall be:

(a) The presumptive post-prison supervision term imposed for the primary offense if the sentence for any offense includes a prison term; or

(b) The presumptive probation term of each offense if no sentence includes a prison term. All presumptive probation terms imposed as provided by this subsection shall run concurrently.

Commentary

This rule prescribes the calculation of presumptive sentences imposed consecutively in a single case.

Section (1). Consecutive sentences in a single case will include two components: an incarceration term and a supervision term.

Section (2), subsection (a), requires the sentencing judge to calculate the incarceration term of the consecutive sentences by adding the presumptive incarceration term of the "primary offense" (most serious crime of conviction) and the "base sentence" (calculated in the Criminal History I column of the grid) for each additional offense to be imposed consecutively.

Paragraph (A). The "primary offense" is the offense with the highest crime seriousness ranking. OAR 253-03-001(17). If more than one crime of conviction is classified in the same crime category, the sentencing judge must designate which offense will

serve as the primary offense. Id. The incarceration term imposed for the primary offense will be the presumptive sentence for the offense and the offender's criminal history classification.

Paragraph (B). The incarceration term for every other offense being sentenced consecutively is determined from the I Column on the Criminal History Scale. Sentences for these additional offenses may be described as "base sentences" because the offender's criminal history is not used to determine them.

This process for calculating incarceration terms permits an appropriate consideration of the offender's criminal history record without distorting the just desserts orientation of the guidelines. The offender's criminal history record is properly reflected in the incarceration term associated with the primary offense. The significance of the offender's criminal history, however, is not multiplied for each additional offense because it is already reflected in the presumptive sentence for the primary offense.

Subsection (b) prescribes the limits on the total incarceration term for consecutive sentences imposed in a single case. The incarceration term in such a case may not exceed twice the maximum presumptive incarceration term of the primary sentence for the primary offense.

EXAMPLE: An offender classified in Criminal History Category F is convicted of three separate Burglary I convictions for burglaries of occupied dwellings (Crime Category 8). The sentencing judge selects one of the Burglary I convictions to serve as the most serious crime of conviction. For that primary offense, the sentencing judge imposes the maximum presumptive incarceration term of twenty-four months for grid block 8-F. The base sentence for the other two offenses is sixteen to eighteen months.

The sentencing judge, however, is limited by OAR 253-12-020(2)(b) to a total incarceration term of no more than forty-eight months (twice the maximum term of the primary sentence of twenty-four months). Consequently, the sentencing judge may only impose a portion of the incarceration term of the base sentence.

The sentencing judge may comply with the limitation of OAR 253-12-020(2)(b) in two ways. The judge may impose the maximum incarceration term of the full base sentence for one of the remaining Burglary I convictions (18 months) and a reduced base sentence (six months for the remaining conviction). Alternatively, the sentencing judge may impose a reduced base sentence for both remaining Burglary I convictions (12 months + 12 months).

This limitation on the incarceration term of consecutive sentences may be exceeded pursuant to the special departure rule

applicable to consecutive sentences. OAR 253-08-007.

Subsection (c). The incarceration term for any presumptive probationary sentence is the maximum jail sentence that could be imposed as part of the presumptive probationary sentence. If the incarceration term for the primary offense is a prison term, the entire incarceration term of the consecutive sentences will be served in prison. Subsection (d).

Section (3) of this rule establishes the supervision term for consecutive sentences.

Under subsection (a), if the incarceration term for the consecutive sentences is a prison term, the supervision term is a term of post-prison supervision as established for the primary offense.

EXAMPLE: In the case discussed above, the primary offense was a Crime Category 8 Burglary I conviction. The offender's criminal history classification was Category F. The presumptive sentence for the primary offense is a prison term; therefore, the supervision part of the consecutive sentences is a single term of post-prison supervision. The post-prison supervision term for the primary offense is three years. OAR 253-05-002.

Under subsection (b), if the sentence for the primary offense is a probationary sentence, the consecutive sentences shall be served as multiple probationary terms. In this situation, a probationary term will be imposed for each crime conviction. All probationary terms associated with consecutive sentences will be served concurrently. A special rule for the revocation of probationary sentences imposed consecutively has been established as OAR 253-12-040.

Special Note: Whenever an offender has been convicted of multiple offenses some of which were committed prior to November 1, 1989 and others were committed on or after that date, two types of sentences must be imposed. For the crimes committed prior to November 1, 1989, the sentencing judge will impose an indeterminate sentence. For all other offenses, the sentencing judge will impose a guidelines sentence.

If the sentences are imposed concurrently, the term of incarceration will be the guidelines sentence or the parole set for the pre-guidelines conviction whichever is longer. If the parole set is longer, the offender should be paroled. If the guidelines sentence is longer, the offender should be released to post-prison supervision.

If the sentences are imposed consecutively, the incarceration terms should be served in the order in which the corresponding crimes of conviction were committed. Consequently, the offender will always serve the guidelines

sentence last and therefore, he or she will always be released to post-prison supervision.

C. SENTENCES IMPOSED CONSECUTIVELY TO A PRIOR REMAINING SENTENCE

OAR 253-12-030 SENTENCES IMPOSED CONSECUTIVELY TO A PRIOR REMAINING SENTENCE. (1) When a sentence is imposed consecutively to a sentence imposed in a prior proceeding, the incarceration term of the new sentence is added to the remaining incarceration term of the prior sentence. If any sentence includes a prison term, the entire incarceration term of all sentences shall be served in prison.

(2) When a sentence is imposed consecutively to a sentence imposed in a prior proceeding, the supervision term or terms of the new sentence shall be served concurrently with the prior sentence as follows:

(a) If the supervision term of the new sentence is a term of probationary supervision, the supervision shall begin at the date of sentencing.

(b) If the supervision term of the new sentence is a term of post-prison supervision, the supervision term shall begin upon the completion of the incarceration term of the combined sentences.

Commentary

Section (1). Whenever a sentence is imposed consecutively to a prior sentence from an earlier case, the incarceration term of the new sentence is added to the remaining incarceration term of the prior sentence. If any of the sentences include a prison term, all incarceration terms will be served in prison. In such a case the incarceration term associated with a probationary sentence will be served in prison, rather than jail.

Section (2). Whenever a sentence is imposed consecutively to a prior sentence from an earlier case, the supervision term of the new sentence is served concurrently. Under subsection (a), if the new sentence includes a probationary term, the supervisory period begins upon the date of sentencing. Under subsection (b), if the new sentence includes a term of post-prison supervision, the supervisory period begins upon the completion of the offender's new prison term being served consecutively.

EXAMPLE: An offender classified in Criminal History Category F is convicted of a Crime Category 8 Burglary I in Deschutes County and sentenced on December 12, 1989. The offender is sentenced to a twenty-four month prison term with a three-year term of post-prison supervision.

On February 4, 1990, the same offender is convicted of a Forgery I (Crime Category 4) in Lane County. The offender's

new criminal history classification is Category C. The presumptive sentence for this conviction is a probation term of two years and a maximum jail term of sixty days.

If the sentencing judge imposes the maximum jail term consecutively to the prior conviction, the sixty-day term will be added to the offender's prison term. The period of probationary supervision will begin immediately upon sentencing. In this case, the offender will most likely serve the entire probationary term in prison.

This rule creates the possibility that an offender will be subject to both probation supervision and post-prison supervision during the course of the consecutive sentences. If an offender is serving a prison term when he or she is later sentenced to a probationary term in a subsequent case, the probationary term will begin on the date of sentencing. OAR 253-12-030(2)(a).

After the offender has served the initial prison term, he or she will be released to post-prison supervision which will continue to run concurrently with the remainder of the probationary sentence. If the offender violates the conditions of post-prison supervision or probation, the sentencing judge may revoke probation and the Board of Parole and Post-Prison Supervision may revoke post-prison supervision. If both the sentencing judge and the Board revoke the offender, the revocation sanctions will be served consecutively or concurrently as provided by OAR 253-12-040.

Special Note: If, after November 1, 1989, an offender is on parole when the current crime of conviction is committed, the Board of Parole and Post-Prison Supervision may revoke parole and the new offense may be prosecuted. Upon conviction, the incarceration term for the new offense may be imposed consecutively or concurrently to the prison term associated with the parole revocation. When the incarceration term is completed, the offender will be released to the term of post-prison supervision as is required for the latest crime of conviction.

If a guidelines sentence is imposed concurrently to a previously imposed indeterminate sentence, the term of incarceration will be the guidelines sentence or the remaining term of the parole set for the pre-guidelines conviction, whichever is longer. If the parole set is longer, the offender should be paroled. If the guidelines sentence is longer, the offender should be released to post-prison supervision.

If a guidelines sentence is imposed consecutively to a previously imposed indeterminate sentence, the incarceration term of the guidelines sentence will begin after the offender has served the parole set and the offender will be released to post-prison supervision.

D. MULTIPLE SUPERVISION TERMS

OAR 253-12-040 MULTIPLE SUPERVISION TERMS. (1) If the offender has been sentenced to multiple terms of post-prison supervision, the terms of post-prison supervision shall be served as a single term. The maximum sanction for a post-prison supervision violation in such a case shall be limited as provided by OAR 253-11-004 for a single term of post-prison supervision.

(2) When an offender is serving multiple terms of probationary supervision, the sentencing judge may impose revocation sanctions for supervision violations as provided by OAR 253-10-002 for the violation of each separate term of probationary supervision.

(a) If more than one term of probationary supervision is revoked for a single supervision violation, the sentencing judge shall impose the prison term sanctions concurrently.

(b) If more than one term of probationary supervision is revoked for separate supervision violations, the sentencing judge may impose the prison term sanctions concurrently or consecutively.

Commentary

This rule prescribes the calculation of the period of supervision, and of imprisonment upon revocation, in cases of multiple supervision terms.

Section (1). Whenever an offender is serving more than one term of post-prison supervision at a single time, the terms shall be treated as a single term of supervision. Consequently, the maximum sanction for supervision violations is limited by OAR 253-11-004. This limitation on the maximum revocation sanction applies regardless of how many terms of post-prison supervision are being served by the offender. This limitation even applies when the separate terms of post-prison supervision have been imposed in separate cases.

Section (2). A different rule applies to revocation sanctions associated with multiple terms of probation which may result in revocation sanctions for each term of probation. The prison term associated with the revocation sanction will be served concurrently or consecutively depending on the nature of the supervision violation. Under subsection (a), if the basis for multiple revocations is a single supervision violation, the incarceration-term sanctions must be served concurrently. Under subsection (b), if multiple probationary terms are revoked for separate and distinct supervision violation, the incarceration-term sanctions may be imposed consecutively.

Although not expressly addressed in these rules, an offender serving a term of post-prison supervision simultaneously with a probationary term is serving two separate supervisory periods. If the offender violates the conditions of post-prison supervision and the conditions of probation, separate sanctions

may be imposed for both violations. The Board of Parole and Post-Prison Supervision has the authority to sanction the post-prison supervision violation, and the sentencing judge has the authority to sanction the probation violation. If the basis for the revocation for both the post-prison supervision term and the probationary term stem from the same conduct, the separate sanctions shall be served concurrently. If, however, the supervision violations are based on separate incidents, the revocation sanctions may be imposed consecutively.

E. DEPARTURE LIMITATIONS IN CONSECUTIVE SENTENCES

OAR 253-08-007 DEPARTURE LIMITATIONS IN CONSECUTIVE SENTENCES.

(1) The court may depart from the presumptive limits established by OAR 253-12-020 for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any individual offense being sentenced consecutively.

(2) Except as provided by section (3) of this rule, the sentencing judge shall comply with the provisions of OAR 253-08-001 to 253-08-006 when a departure sentence is imposed for an offense sentenced consecutively.

(3) When a departure sentence is imposed for any individual offense sentenced consecutively, the incarceration term of that departure sentence shall not exceed twice the maximum presumptive incarceration term that may be imposed for that offense as provided in OAR 253-12-020(2)(a).

Commentary

Section (1) provides that a departure sentence may be imposed for any individual offense being sentenced consecutively.

Section (2) subjects a departure sentence imposed for any offense being sentenced consecutively to OAR 253-08-001 to 253-08-006.

Section (3) limits the durational departure for an offense sentenced consecutively to double the incarceration term which could have been imposed as part of the consecutive sentence.

The provisions of this special departure rule must be applied in the context of Section (2) of OAR 253-12-020 which provides the calculus for setting the incarceration term of consecutive sentences. Subsection (b) of OAR 253-12-020 (2) reads as follows:

The total incarceration term of the consecutive sentences, including the incarceration term for the primary offense, shall not exceed twice the maximum presumptive incarceration term of the primary sentence except by departure as provided by OAR 253-08-007.

The application of this rule will require the sentencing judge to calculate the incarceration term of the consecutive sentences as if no departure would be imposed. Once an incarceration term has been set for each of the crimes of conviction, the sentencing judge may establish a departure sentence for any one or more of the offenses. The grounds for departure should specifically apply to the offense for which a departure sentence is to be imposed. The following example will illustrate the proper application of this rule:

EXAMPLE:

Fact Pattern. An offender is convicted of three Robbery I offenses. The offender's criminal history classification is Criminal History D.

	<u>Presumptive Sentence</u>
Primary Offense: Robbery A	55 months
	<u>Base Sentence</u>
Other Offenses: Robbery B and C	36 months

If the sentences on all three offenses are imposed consecutively and the judge does not identify grounds for any departure, the maximum incarceration term for the consecutive sentences is 110 months. OAR 253-12-020(2)(b). After imposing the presumptive 55 month sentence for the primary offense, the sentencing judge may comply with this rule by imposing 36 months for the Robbery B conviction sentenced consecutively to the primary offense and no more than 19 months for the Robbery C conviction imposed consecutively. Conversely, the judge may impose 27 1/2 months for each of the additional offenses being imposed consecutively.

If the offender was convicted of a fourth Robbery I, the incarceration term of each add-on sentence would need to be further reduced to comply with OAR 253-12-020(2)(b) or no incarceration term at all could be imposed for the Robbery D conviction.

Sample Consecutive Sentences. The maximum incarceration term that may be imposed as permitted by OAR 253-12-020(2)(a) is:

Presumptive Sentence

Primary Offense: Robbery A 55 months

Base Sentence

Other Offenses: Robbery B 36 months

Robbery C 10 months

Robbery D 9 months

Total Incarceration Term 110 months

Departure Options. The sentencing judge may impose a departure sentence for any offense for which facts specific to the commission of that offense constitute "substantial and compelling" reasons to impose a greater sentence. When an aggravated departure is appropriate, the total incarceration term for the offense may not exceed twice the term that would have been imposed without a departure. OAR 253-008-007(3). Consequently, in the example above the maximum departure sentence for the primary offense (Robbery A) is 110 months; for Robbery B--72 months; for Robbery C--20 months and for Robbery D--18 months. Thus, the maximum sentence which could be imposed for a series of consecutive sentences in which a maximum durational departure is justified for each of the sentences could be up to 400% of the primary sentence, but could never exceed 400%.