

CHAPTER VI

DEPARTURE SENTENCES

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VI. DEPARTURE SENTENCES

As noted in Chapter IV, presumptive sentences should be imposed in all but the most unusual cases. When a case represents a truly unique set of circumstances, the sentencing judge is free to impose a appropriate sentence, other than the presumptive sentence. These departure sentences will be discussed in this chapter of the manual. The discussion will focus mainly on the factual situations for which a departure from the presumptive sentence is appropriate and the type of departure sentences which may be imposed.

A. GROUNDS FOR DEPARTURES

Consideration of aggravating and mitigating circumstances under the guidelines system is prescribed by the rules of the State Sentencing Guidelines Board. The Guidelines Board's authority to establish the grounds for departure sentences was clarified by the 1989 Legislative Assembly when it amended ORS 137.080 to add the following language:

(2) Notwithstanding any other provision of law, the consideration of aggravating and mitigating circumstances as to felonies committed on or after November 1, 1989, including the maximum sentence that may be imposed because of aggravating circumstances, shall be in accordance with rules of the State Sentencing Guidelines Board.

With this authority, the Guidelines Board developed the concept of departure sentences to permit judicial discretion where necessary to address unique factual circumstances. The sentences imposed under the guidelines system, including departure sentences should be consistent with the underlying principles and purposes of the guidelines system as described by OAR 253-02-001.

OAR 253-08-001 DEPARTURE SENTENCES. Except as provided in OAR 253-05-006, the sentencing judge shall impose the presumptive sentence provided by the guidelines unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.

Commentary

This rule reiterates the general principle that presumptive sentences should be applied in most cases. It also introduces the authority of sentencing judges to depart from the presumptive guidelines sentence in unusual cases. That authority, as noted in the commentary to OAR 253-02-001(2), was provided by Section

6(1) of the 1987 legislation: "The court may impose a sentence outside the presumptive sentence or sentence range ...for a specific offense if it finds, considering the purposes of this Act, there are substantial and compelling reasons justifying a deviation from the presumptive sentence."

The requirement that the sentencing court state the substantial and compelling reasons on the record is also based on Section 6(2) of the 1987 legislation as amended by Section 38, Chapter 790, Oregon Laws 1989. "Whenever the court imposes a sentence outside the presumptive sentence it shall set forth the reasons for its decision in the manner required by rules of the State Sentencing Guidelines Board." While this rule does not require the sentencing court to issue a formal written opinion, it does require that the reasons for departure be clearly stated on the record.

The "substantial and compelling reasons" for departures will form the basis for appellate review of sentences. See, Section 21, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 138.222). The legislature clearly established its intent that the "substantial and compelling" appellate review standard be more than the substantial evidence test currently used to review administrative decisions. During a hearing on this provision of the legislation before the Senate Judiciary Committee, the following statement was entered into the record:

It is our intent that if an appellate court is called upon to inquire into a deviation [departure sentence], then it would look at the facts stated by the sentencing judge to see whether or not there is sufficient justification for the departure. Furthermore, the reason stated on the record were adequate to justify a sentence outside the standard range and consistent with the guidelines rule. I think that is test that ought to apply. Minutes: Senate Judiciary Committee, 1989 Oregon Legislative Assembly, June 2, 1989, at 19-20 (statement of Sen. Dick Springer).

Consequently, the appellate review standard for departure sentences will have both a evidentiary standard and a legal standard:

- 1) The Evidentiary Test: Are the facts stated by the sentencing judge in justification of the departure supported by the record?
- 2) The Law Test: Are the reasons stated on the record for the departure adequate to justify a sentence outside the standard range (e.g., are they consistent with the purposes of the sentencing guidelines rules)?

Judicial discretion to depart as authorized by the 1987 legislation and this rule recognizes the important role of the

sentencing court in addressing unusual facts in individual cases. When the facts in a given case clearly indicate the need for an aggravated or mitigated sentence, the sentencing judge should state those facts which necessitate a sentence other than the presumptive sentence. When stating the reasons for a departure, the sentencing judge should remember the primary basis for proportional punishment under this guidelines system is based on two primary sentencing objectives: just deserts for the crime of conviction and public safety.

In the guidelines system, the seriousness of criminal conduct is determined by the crime of conviction. Consequently, a departure sentence is not appropriate for elements of alleged offender behavior not within the definition of the offense of conviction. If the conviction is pursuant to a plea agreement as to the crime of conviction, a departure cannot be based on facts that would, if proven, establish a higher offense subclassification for the crime or result in a more serious crime of conviction.

For example, if an offender is convicted of ORS 164.405 Robbery II, the sentence should not be aggravated beyond the upper limit of the presumptive sentence range because the offender was actually armed with a deadly weapon at the time of the robbery. This aspect of the crime was not captured in the crime of conviction since it is an element of ORS 164.415 Robbery I. Since this aspect of the crime was not captured in the conviction, it should not later be used to impose an aggravated sentence for the conviction of the lesser-included offense.

B. DEPARTURE FACTORS: MITIGATING AND AGGRAVATING

OAR 253-08-002 DEPARTURE FACTORS. (1) Subject to the provisions of sections (2) and (3) of this rule, the following nonexclusive list of mitigating and aggravating factors may be considered in determining whether substantial and compelling reasons for a departure exist:

(a) Mitigating factors:

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

- (E) The offender played a minor or passive role in the crime.
- (F) The offender cooperated with the state with respect to the current crime of conviction or any other criminal conduct by the offender or other person. The offender's refusal to cooperate with the state shall not be considered an aggravating factor.
- (G) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.
- (H) The offender's criminal history indicates that the offender lived conviction-free within the community for a significant period of time preceding his or her current crime of conviction.

(b) Aggravating factors:

- (A) Deliberate cruelty to victim.
- (B) The offender knew or had reason to know of the victim's particular vulnerability, such as the extreme youth, age, disability or ill health of victim, which increased the harm or threat of harm caused by the criminal conduct.
- (C) Threat of or actual violence toward a witness or victim.
- (D) Persistent involvement in similar offenses or repetitive assaults. This factor may be cited when consecutive sentences are imposed only if the persistent involvement in similar offenses or repetitive assaults is unrelated to the current offense.
- (E) Use of a weapon in the commission of the offense.
- (F) The offense involved a violation of public trust or professional responsibility.
- (G) The offense involved multiple victims or incidents. This factor may not be cited when it is captured in a consecutive sentence.
- (H) The crime was part of an organized criminal operation.
- (I) The offense resulted in a permanent injury to the victim.

- (J) The degree of harm or loss attributed to the current crime of conviction was significantly greater than typical for such an offense.
- (K) The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim.

(2) If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the Crime Seriousness Scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime.

(3) Any aspect of the current crime of conviction which serves as a necessary element of a statutory mandatory sentence may not be used as an aggravating factor if that aspect is also used to impose the mandatory sentence.

Commentary

The 1987 legislation did not define "substantial and compelling reasons" as the basis for departure sentences. Section 2 of that legislation implicitly left the initial definition to these rules by directing the Council to design the guidelines to implement both dispositional policies and terms of incarceration. Further refinements of the departure standard can be expected through future amendments to these rules, statutory definitions and decisions of Oregon's appellate courts.

To provide a starting definition of the "substantial and compelling reasons," the Guidelines Board first determined that the term embraced what are otherwise commonly described as "aggravating" or "mitigating" factors. To identify the specific facts that may constitute substantial and compelling reasons for departure, the Guidelines Board considered provisions of the Minnesota and Washington guidelines, the Oregon Parole Matrix, and the statutes of Oregon and other states.

After surveying the aggravating and mitigating factors used in these other systems, the Council recommended a list of aggravating and mitigating factors to the Guidelines Board. From this list, the Guidelines Board adopted the nonexclusive factors set forth in this rule. Sentencing judges may cite a factor not listed in this rule as grounds for a departure if that fact makes the case exceptional for sentencing purposes.

1. Mitigating Factors

Subsection (a) lists a number of factual circumstances which may be properly used as mitigating factors:

(A) The victim was aggressor or participant. (This mitigating factor is recognized by the Washington and Minnesota guidelines and the Oregon Parole Matrix.)

(B) The defendant acted under duress or compulsion under circumstances which do not constitute a complete defense. (Washington guidelines and Oregon Parole Matrix.)

EXAMPLE: Two of three partners in drug distribution operation agree to kill an individuals whom they believe is a police informant. The two accomplices threaten the third partner's wife and children if he does not participate in the murder. This form of coercion may not be sufficient to establish a defense under ORS 161.200 (Choice of Evils) or other legal defense. It may, however, be cited by the sentencing court as a mitigating factor.

(C) The defendant's mental capacity was diminished by other than drug or alcohol abuse. (Washington and Minnesota guidelines and Oregon Parole Matrix.) The Guidelines Board explicitly excluded diminished capacity due to drug or alcohol abuse as a mitigating factor when the offender makes the voluntary decision to consume the substance leading to his or her incapacitation.

(D) The offense was principally accomplished by another and the defendant exhibited extra caution or concern for the victim. (Washington guidelines.)

EXAMPLE: Two offenders plan to burglarize a home. They both agree not to carry any weapons or to use physical force on the homeowner. During the commission of the crime, however, they are surprised by the homeowner and the offender's accomplice pulls out a concealed knife and stabs the homeowner. While the accomplice flees, the offender applies the necessary first-aid to save the victim's life. Such concern for the safety of the victim may be cited as a mitigating factor when sentencing under these guidelines.

(E) The offender played a minor or passive role in the crime. (Minnesota guidelines and Oregon Parole Matrix.)

EXAMPLE: The offender was paid fifty dollars to deliver a package to a third party. The offender believes that the package contained one pound of marijuana and had never before participated in any such activity. In fact, the package contained a pound of heroin, the sentencing court may conclude that the offender's role in the drug distribution scheme was minor and therefore, a mitigated sentence might properly be imposed.

(F) The offender cooperated with the state as to current

crime of conviction or other criminal conduct by offender or other person. Because an offender cannot be required to cooperate, however, failure to do so cannot support a departure as an aggravating fact.

(G) The degree of harm or loss attributed to the current crime of conviction is significantly less than typical for the offense. (Oregon Parole Matrix.)

EXAMPLE: If an unarmed offender is convicted of Burglary I for stealing a bicycle tire from an unlocked garage which is attached to a residence, the offender will be classified in Crime Category 8 if the residence was occupied at the time of the offense. The sentencing judge may determine that the offender's conduct was significantly less serious than the usual Crime Category 8 (Burglary I) in which the offender breaks into the victim's actual living quarters to steal much more valuable property or to commit a physical assault. In such a case, the sentencing judge could properly depart from the guidelines.

EXAMPLE: An offender is convicted of Arson I for burning a yellow ribbon as a protest at a public forum. The burning material caused only minor damage to several floor tiles and the overall threat to human life and safety was minimal. The sentencing court may determine that a departure would be appropriate based on this mitigating factor.

(H) The offender has lived crime-free within the community for a significant period of time prior to the commission of the current criminal activity. The Guidelines Board added this mitigating factor after it deleted OAR 253-04-012 (Effect of Conviction-Free Period) which had provided a "decay" process by which certain prior convictions were removed from a criminal history when followed by a specified period free of further convictions. The Guidelines Board repealed this rule to ensure that an offender's criminal history classification reflected the actual criminal record.

Although the Guidelines Board rejected the automatic application of a decay rule, it also acknowledged that a significant period without criminal activity may be an appropriate mitigating factor.

EXAMPLE: The offender has a record of prior person felony convictions for offenses committed during his early twenties. At the age of 62, the offender is convicted of ORS 165.065 Negotiating Bad Checks for \$12,000 (a Crime Category 5 offense). The sentencing judge may properly cite the 40-year period of apparent law abiding conduct as a mitigating factor. If this factor is cited to support a mitigated sentence, the degree of mitigation should be limited to a reduction in the sentence enhancement which would otherwise be attributed to the offender's full criminal history.

2. Aggravating Factors

Subsection (b) lists a number of factual circumstances which may be properly used as aggravating factors:

(A) Deliberate cruelty to victim. (Washington and Minnesota guidelines and Oregon Parole Matrix.)

(B) Extreme youth, age, disability or ill health of victim, which the defendant knew or should have known. (Washington and Minnesota guidelines and Oregon Parole Matrix.) This factor should only be cited as an aggravating factor when the court determines that the offender's knowledge of or disregard for the victim's vulnerability increased the potential harm attributed to the offender's criminal conduct.

EXAMPLE: The offender embezzles \$58,000 from his employer who has been confined to a wheelchair for the last twenty years. The victim's disability should not be cited as an aggravating factor if it did not play a role in the commission of the offense.

(C) Threat of or actual violence toward a witness or victim. (Oregon Parole Matrix.) This aggravating factor applies when the offender seeks to avoid prosecution by threatening or harming a witness or the victim. This factor is properly cited as grounds for a departure when the sentencing court determines that the offender threatened or actually caused physical harm to the victim or any other witness as a means to keep the individual from testifying or to force the individual to commit perjury.

(D) Persistent involvement in similar offenses or repetitive assaults. (Oregon Parole Matrix.) This factor will not support a departure sentence for an offense which is being sentenced consecutively.

EXAMPLE: If an offender has an extensive record of fraud-related convictions and he or she has been convicted for a similar fraud scheme, the sentencing judge may impose an aggravated departure sentence. Such a departure would be most appropriate if the offender's criminal conduct demonstrated a significant level of sophistication and his or her criminal history strongly suggests that the offender will continue to engage in such illegal enterprises.

EXAMPLE: A departure sentence might also be appropriate under this paragraph for an offender convicted of ORS 163.125 Manslaughter II arising from a domestic dispute if that offender also has an extensive record of domestic violence. The prior history of domestic violence does not need to be represented in the offender's criminal history record to be cited as an aggravating factor.

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

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

EXAMPLE: A local government employee who has been appointed to serve as a trustee on behalf of a number of elderly clients embezzles funds from the trust accounts. This offender has violated not only this trust relationship with the victims, but has also abused the authority vested in him as a public servant. Consequently, an aggravated sentence would be appropriate.

(G) The offense involved multiple victims or incidents. (Oregon Parole Matrix.) This fact will not support a departure sentence for any offense for which consecutive sentences are imposed if the basis for the consecutive sentences is the fact that multiple victims were involved.

(H) The crime was part of an organized criminal operation. As used in this subsection, "organized criminal operation" means any operation in which two or more individuals cooperate in a formal or informal organization to commit illegal acts for financial benefits or as a means to further the objectives of the organization or its members.

EXAMPLE: An offender is convicted of Possession of Gambling Records I (ORS 167.137). The court determines that the offender committed the crime as a member of a major gambling organization. This factor may be properly cited as an aggravating factor for sentencing purposes under these guidelines.

(I) The offense resulted in a permanent injury to the victim. (Minnesota case law.) This aggravating factor is particularly appropriate when the victim's injury is clearly debilitating and incapacitates the victim for a considerable period of time. The victim's injury should significantly hinder the victim's efforts to pursue his or her prior lifestyle.

This aggravating factor is related to Aggravating Factor J. The fact that a murder victim has died should not be used to aggravate a sentence for a Manslaughter I conviction. The injury described in Aggravating Factor I should be significantly greater than typical for such an offense.

(J) The degree of harm attributed to the current crime of conviction was significantly greater than typical for such an offense. (Oregon Parole Matrix.) This fact also includes victim injuries which are not permanent.

EXAMPLE: If part of a rapist's sadistic conduct involves the intentional mutilation of his victim, a departure sentence would be appropriate. If the mutilation leads to permanent injuries, the sentencing court could properly cite Aggravating Factor I (Permanent Injury), as well as Aggravating Factor J, to impose a departure sentence.

EXAMPLE: If an offender uses psychological torture on a victim as part of a kidnapping scheme, the sentencing judge may cite Aggravating Factor J to impose a departure sentence. A departure would only be appropriate if the psychological torture represented an exceptional harm to the victim as compared to the harm associated with the usual kidnapping case. A harm caused by the psychological torture needs not result in a physical injury to serve as a aggravating factor.

EXAMPLE: Aggravating Factor J may also be cited in property offenses. For example, this aggravating factor may be cited in any "white-collar" property crime for which the amount of property stolen or misappropriated was exceptionally great or led to severe economic misfortune for the victim. This situation may often arise in cases of computer fraud or Blue Sky offenses.

(K) The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim. This factor was added by the Guidelines Board to allow departure sentences as a matter of public policy when an offenses arises from various forms of bigotry.

EXAMPLE: An offender is convicted of an Assault II (ORS 163.175) for an attack on a victim who belongs to a racial minority. The sentencing court determines that the attack was related to the offender's membership in a white supremacist gang. This fact may be cited as an aggravating factor if the attack was motivated by the offender's desire to further the gang's objective of racial bigotry. This factual situation may also support a departure under Aggravating Factor H as a crime committed as part of a organized criminal operation.

3. Restrictions on the Use of Departure Factors

Section (2) restricts consideration of "aggravating" or "mitigating" facts as grounds for departure when that consideration would have a duplicating effect on a sentence imposed under these rules. If a given fact is a statutory element of the crime, or if it is used under OAR 253-04-002(2) to subclassify the crime on the Crime Seriousness Scale, that fact generally may not be used as an aggravating or mitigating fact for departure purposes. Such a fact may be used to support a departure only if it makes the crime of conviction significantly different from the usual criminal conduct which the presumptive sentence is intended to punish.

EXAMPLE: The defendant is convicted of Burglary I ranked at Crime Category 8 because the dwelling was occupied at the time of the burglary. Because the fact

of occupancy elevates Burglary I from Crime Category 7 to Crime Category 8, the fact of occupancy may not be relied on as an aggravating factor to support a departure sentence.

EXAMPLE: Defendant is convicted of Burglary I ranked at Crime Category 7 because the dwelling was unoccupied. The fact that the dwelling was unoccupied is already recognized in ranking the crime as a Crime Category 7 instead of Crime Category 9 offense, that fact cannot also be used as a mitigating factor to support a departure sentence.

In very rare cases, facts that constitute an element of the crime, or a basis for subclassifying the offense on the Crime Seriousness Scale, can be used if the actual conduct represented by that aspect of the current crime of conviction is significantly different from the usual criminal conduct represented by that aspect of the crime.

EXAMPLE: An offender is convicted of Assault I ORS 163.185 for the torture and permanent disfigurement of a victim. While serious physical injury is an element of the offense, the degree of harm actually inflicted in this case far exceeds the usual damage caused by such an offense. The sentencing judge may cite the deliberate nature of the defendant's act (Aggravating Factor J) and the permanent nature of the victim's injury (Aggravating Factor I) to impose a departure sentence.

Section (3) prohibits the use of a given fact which is a premise of a statutorily mandated sentence to impose a departure sentence in excess of the mandated sentence.

EXAMPLE: Defendant is convicted of robbery with use of a firearm. The court imposes the minimum mandatory sentence specified by ORS 161.610 for a crime based on use of a firearm. The weapon use may not be cited as an aggravating factor to impose a departure sentence which exceeds the mandatory sentence.

Statutory Provision-ORS 137.080 (amended by Section 9, Chapter 790, Oregon Laws 1989):

(1) After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, in a case where discretion is conferred upon the court as to the extent of the punishment to be inflicted, the court, upon the suggestion of either party that there are circumstances which may be properly considered in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily at a specified time and upon such notice to the adverse party as it may direct.

(2) Notwithstanding any other provision of law, the consideration

of aggravating and mitigating circumstances as to felonies committed on or after November 1, 1989, including the maximum sentence that may be imposed because of aggravating circumstances, shall be in accordance with rules of the State Sentencing Guidelines Board.

Statutory Summary

The legislature amended ORS 137.080 to provide that the consideration of aggravating and mitigating factors for felonies committed on or after November 1, 1989 shall be in accordance with sentencing guidelines.

Statutory Provision-ORS 137.090 (as amended by Section 10, Chapter 790, Oregon Laws 1989):

- (1) In determining aggravation or mitigation, the court shall consider:
- (a) Any evidence received during the proceeding;
 - (b) The presentence report, where one is available; and
 - (c) Any other evidence relevant to aggravation or mitigation that the court finds trustworthy and reliable.

(2) When a witness is so sick or infirm as to be unable to attend, the deposition of the witness may be taken out of court at such time and place, and upon such notice to the adverse party, and before such person authorized to take depositions, as the court directs.

Statutory Summary

The legislature amended ORS 137.090 to allow the sentencing court to consider any trustworthy or reliable evidence when assessing aggravation and mitigation. Such evidence may include evidence received during any portion of the current prosecution (excluding information heard only by the grand jury) or any information included in the presentence report.

C. DEPARTURE OPTIONS

When a departure sentence is appropriate, the sentencing judge may depart from the guidelines in several different respects. This section will examine the type of departures which are permitted under the guidelines and what limitations, if any, are placed on these departure options.

1. Durational Departures: Prison Sentences

The sentencing judge will have the authority to depart from the presumptive duration of a presumptive prison sentence. This type of departure will naturally have a significant impact on prison populations. Consequently, the sentencing judge is required by

the rules of the State Sentencing Guidelines Board to consider the principles and purposes of the guidelines sentence when deciding the appropriate magnitude the aggravated or mitigated prison term. OAR 253-08-003.

With this requirement, the durational departure should be generally proportional to the significance of the aggravating or mitigating factors. Aggravated durational departures which are disproportionate to the aggravating factors will produce departure sentences which are inconsistent with the general structure of the guidelines system. Aggravated durational departures which are excessive will limit the correctional resources available to punish more serious offenders. To help avoid this result, the Guidelines Board has established a general rule that no durational departure should more than double the presumptive sentence for a given offense. OAR 253-08-004.

OAR 253-08-003 DURATION OF DEPARTURES. When a sentencing judge departs in setting the duration of an incarceration term, the judge shall consider the purposes and principles of these guidelines as described in OAR 253-02-001 to impose a sentence which is proportionate to the seriousness of the crime of conviction and the offender's criminal history.

Commentary

Any departure from a presumptive sentence should accord with the sentencing purposes and principles that underlie these rules (OAR 253-02-001). Accordingly, this rule requires the magnitude of the durational departure be commensurate with the seriousness of the crime of conviction and the offender's criminal history.

OAR 253-08-004 DURATIONAL DEPARTURE LIMITATIONS. (1) A durational departure from a presumptive incarceration term shall not total more than double the maximum duration of the presumptive incarceration term.

(2) The limit on durational departures established by section (1) of this rule does not apply to any sentence imposed for a conviction of ORS 163.115 Murder.

Commentary

Section (1) states the basic limit on upward durational departures from a presumptive incarceration term: double the maximum duration of the presumptive term. The Guidelines Board decided that a limitation on upward durational departures from presumptive prison sentences was required (a) to reduce the potential for significant disparity in departure sentences and (b) to prevent departure sentences from preempting available corrections system capacity which is needed to provide presumptive sentences for other offenders.

EXAMPLE: A defendant's presumptive incarceration term is 81-90 months. The maximum durational departure allowed under this section is 90 months, or a total departure sentence of 180 months.

Section (2) exempts Murder (ORS 163.115(a)) from the limitations of Section (1). The Guidelines Board decided that the extreme seriousness of Murder justified giving sentencing judges greater flexibility in recognizing aggravating facts associated with Murder convictions.

2. Dispositional Departures

The sentencing judge may impose a dispositional departure. Such departures permit the sentencing judge to impose a prison term when the presumptive sentence is probation and conversely, to impose a probation term when the presumptive sentence is prison. The types of dispositional departures are discussed below.

a. Probation to Prison

When the sentencing judge finds appropriate grounds for departure, he or she may impose a prison term as a dispositional departure. OAR 253-08-005. Such dispositional departures implicitly involve durational departures since the incarceration term of the sentence is transformed from the custody units of the presumptive probationary sentence to a prison term. The following administrative rule establishes parameters of a dispositional prison-term sentence. It not only includes limitations on the prison term duration but also the term of post-prison supervision.

OAR 253-08-005 DISPOSITIONAL DEPARTURE LIMITATIONS. (1) When a sentencing judge imposes a prison term as a dispositional departure, the term of incarceration shall be:

(a) up to six months for offenses classified in Crime Categories 1 and 2, or grid blocks 3-G, 3-H and 3-I;

(b) up to twelve months for offenses classified in grid blocks 3-A through 3-F, 4-C through 4-I, and 5-G through 5-I; and

(c) up to eighteen months for offenses classified in grid blocks 5-F, 6-F through 6-I, and 7-F through 7-I.

(2) When a sentencing judge imposes a prison term as a dispositional departure, the term of post-prison supervision shall be determined by the crime seriousness category of the most serious current crime of conviction as required by OAR 253-05-002.

(3) Any sentence inconsistent with the provisions of this rule shall constitute an additional departure and shall require substantial and compelling reasons independent of the reasons given for the dispositional departure.

Commentary

Section (1) states the prison terms that apply when imprisonment is imposed as a dispositional departure from a presumptive sentence of probation. These limitations, in accordance with the overall structure of the guidelines, vary depending on the grid block classification of the current crime of conviction and criminal history.

Section (2) states the rule for determining the period of post-prison supervision as part of a sentence of imprisonment which is a dispositional departure. The presumptive length of post-prison supervision is determined by the crime seriousness category of the most serious current crime of conviction as provided by OAR 253-05-002.

Section (3) provides that a dispositional departure sentence of imprisonment which imposes a term of incarceration longer than provided by Section (1), or a term of post-prison supervision in excess of the duration provided by Section (2), must be justified by substantial and compelling reasons not only in terms of the initial dispositional departure, but also in terms of those aspects of the departure which conflict with the provisions of Section (1) or Section (2).

EXAMPLE: An offender (Criminal History Category E) is convicted of ORS 164.085 Theft by Deception for a scheme which defrauded an elderly couple of \$4,500 (a Crime Category 3 offense). The sentencing judge may properly impose a dispositional departure after finding that the fraud scheme was part of an ongoing scheme designed exclusively for senior-citizen victims (Aggravating Factor B). The judge would then determine the appropriate dispositional departure sentence up to a twelve-month prison term with a one-year post-prison supervision term. This determination would be based on the offender's classification of grid block 3-E. The incarceration term is established by OAR 253-08-005(1)(b) and the post-prison supervision term is established by OAR 253-08-005(2).

The judge might also find, however, that the offender has an extensive record of persistent involvement in similar fraud schemes (Aggravating Factor D). In such a case, the judge might use this finding to depart to extend the term of post-prison supervision to three years. Aggravating Factor D might be properly cited in this case to justify the departure sentence on public safety or just deserts grounds.

b. Prison to Probation

Dispositional departures may also involve probationary sentences. If the sentencing judge imposes a probationary sentence as a dispositional departure from the guidelines, the appropriate duration of probation should be established pursuant to OAR 253-05-008.

OAR 253-05-009 NON-PRESUMPTIVE PROBATIONARY SENTENCES. If the sentencing judge imposes a probationary sentence as a dispositional departure or as an optional probationary sentence, the duration of community supervision shall be as provided by OAR 253-05-008.

Commentary

This rule provides that OAR 253-05-008 also controls length and extension of probation imposed as an optional probationary sentence under OAR 253-05-006 or as a departure probationary sentence. A longer term of probation in either context is a separate departure and must therefore be justified as required by these rules for departures.

3. Custodial Conditions of Probation

The final departure sentence to be discussed in this section of the manual relates to the custodial conditions of probation. As noted earlier (See Section B of Chapter IV), presumptive probationary sentences under the guidelines include very clear limitations on certain types of custodial conditions that may be imposed as part of the sentence. The administrative rules discussed below describe the degree to which the sentencing judge may depart in setting custodial conditions beyond the limits of the presumptive sentence.

Proper compliance with these rules is crucial to the balanced apportionment of state and local responsibilities for sentenced felons. Whenever the sentencing judge finds substantial and compelling reasons to exceed the limitation custodial conditions of a presumptive probation sentence, he or she should comply with departure limitations described below or impose a dispositional departure (prison term).

OAR 253-05-016 DEPARTURE PROBATIONARY SENTENCES. A probationary sentence which exceeds the applicable limitation on the use of custodial supervision as part of a probationary sentence is a departure.

Commentary

A probationary sentence that includes custodial requirements in excess of the applicable number of custody units for the

presumptive sentence is a departure. This rule applies if the sentence exceeds the total limits on custody units, the limits on use of jail as part of the total custody unit limitation, or both. This rule does not apply when either OAR 253-05-012(5) (custody unit exception for certain treatment programs), or OAR 253-05-013(3) (judicial finding that adequate jail space is available to exceed custody unit limitations) is applicable.

The limit on the use of custody units as part of a probationary sentence impose as a dispositional departure is 180 units. OAR 253-05-011(3). This limitation may be exceeded only as part of an additional departure from the guidelines.

OAR 253-08-006 DEPARTURE LIMITATIONS ON THE USE OF CUSTODY UNITS. (1) A departure on the number of custody units imposed as part of a presumptive probationary sentence shall not total more than double the maximum number of custody units permitted as part of the presumptive sentence.

(2) Notwithstanding the provisions of section (1) of this rule, the maximum number of custody units that may be used to impose a jail term as part of the probationary sentence shall be limited to the maximum number of custody units included in the presumptive sentence as provided by OAR 253-05-011(2).

Commentary

Section (1) sets a departure limitation on the imposition of custody units comparable to the limitations on durational departures described in OAR 253-08-004. The basis for both limitations is the same: to reduce the potential for sentence disparity and to maintain effective control over the use of available correctional resources.

EXAMPLE: The maximum number of custody units allowed for an offender classified in Grid Block 6-G is 180 units. The maximum use of custody units for a departure under this rule is a total of 360 custody units.

Section (2) limits the use of jail as part of a departure sentence. The number of custody units which may used to impose a jail term for the departure sentence may not exceed the total number of custody units which could be imposed as part of the presumptive sentence.

EXAMPLE: An offender is classified in grid block 2-D for violations of wildlife laws. The number of custody units that may be imposed as part of the presumptive sentence is 90. Thirty of these units may be used to impose a jail term. If the sentencing judge finds grounds for departure to increase the jail term imposed, the maximum departure permitted by this rule would be a jail term of no more than 90 days.

The limit on the use of jail as part of a probationary sentence impose as a dispositional departure is 90 days. OAR 253-05-013(2). This limit is imposed to ensure that local correctional facilities are not used as a substitute to state prison and may not be exceeded for any reason. If additional incarceration is appropriate, the departure from a presumptive prison term would be inappropriate and the offender should be sentenced to a state correctional facility.

D. DEPARTURE LIMITATIONS IN CONSECUTIVE SENTENCES

Special rules have been established for the computation of consecutive sentences under the guidelines system. Clear limitations have been established for the incarcerative part of consecutive sentences by OAR 253-12-020. A detailed discussion of this rule is included in Chapter V of this manual. As that rule indicates, the limitations on the incarcerative part may only be exceed as provided by OAR 253-08-007.

This departure rule permits durational departures for each offense being sentenced consecutively. To impose a departure sentence for any individual conviction requires a finding of substantial and compelling reasons. The departure reasons must be unique to the crime of conviction for which a departure sentence is to be imposed.

This rule also sets clear limitations on durational departures. No durational departure may exceed more than double the incarceration term that would have been required if a departure had not been exercised: double the presumptive sentence for the primary offense and double the base sentence of any other offense being sentenced consecutively. To fully understand the application of this rule, the reader should consult Chapter V: Concurrent and 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 a 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 presumptive 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 proper 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	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:

	<u>Presumptive Sentence</u>
Primary Offense: Robbery A	55 months
	<u>Base Sentence</u>
Other Offenses: Robbery B	36 months
Robbery C	10 months
Robbery D	9 months
<hr/>	
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 terms that could have been imposed. OAR 253-008-007(3). Consequently, 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%.

E. DANGEROUS OFFENDER DEPARTURES

The 1987 legislation was silent as to the intended effect of sentencing guidelines on the state's dangerous offender statutes. ORS 161.725-.735. These statutes allowed the sentencing court to impose a mandatory minimum sentence of up to 30 years for certain "dangerous" offenders. Because this sentencing option could be used to undermine the modified just deserts policies embodied in the guidelines system, the Oregon Criminal Justice Council recommended and the legislature agreed to integrate the dangerous offender statutes into the guidelines system.

To make the dangerous offender statutes a part of the guidelines system, the legislature designated dangerous offender sentences as departures from the guidelines. Section 77, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 161.737). This means the reasons for the dangerous offender sentence must be stated on the record and the sentence may be appealed by the defendant as a departure sentence. Furthermore, to make the dangerous offender sentence more compatible with the modified "just deserts" orientation of the guidelines, the dangerous offender criteria were changed.

Under the old system, an offender qualified as a dangerous offender if he or she suffered from "a severe personality disorder indicating a propensity toward criminal activity." The new criteria are more focused on the violent nature of the offender. Therefore, the offender qualifies as a dangerous offender if he or she suffers from "a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another." ORS 161.725.

The maximum sentence for a dangerous offender remains an indeterminate sentence of up to thirty years. The offender will be eligible for release only if the personality disorder disappears or is in remission. The general process used to review a dangerous offender's eligibility for parole will be used for offenders sentenced under the guidelines system.

The Board of Parole and Post-Prison Supervision will make the release decision for offenders sentenced under the guidelines system as dangerous offenders. The release procedure will be comparable to the parole procedures used to evaluate the offender's parole eligibility under the indeterminate sentencing system. The only significant difference in the release process is that the offender becomes eligible for release consideration after having served the presumptive sentence for crime of conviction. If released to post-prison supervision, the term of supervision is for the remainder of the original sentence. The dangerous offender may be returned to prison by the Board at any time if the dangerous condition returns during the term of post-prison supervision.

Statutory Provision-ORS 161.725 (as amended by Section 75, Chapter 790, Oregon Laws 1989):

Subject to the provisions of section 77 of this 1989 Act, the maximum term of an indeterminate sentence of imprisonment for a dangerous offender is 30 years, if the court finds that because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public and if it further finds, as provided in ORS 161.735, that one or more of the following grounds exist:

(1) The defendant is being sentenced for a Class A felony, and the court finds that the defendant is suffering from a severe

personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another.

(2) The defendant is being sentenced for a felony that seriously endangered the life or safety of another, has been previously convicted of a felony not related to the instant crime as a single criminal episode, and the court finds that the defendant is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another.

(3) As used in this section, "previously convicted of a felony" means:

- (a) Previous conviction of a felony in a court of this state;
- (b) Previous conviction in a court of the United States, other than a court-martial, of an offense which at the time of conviction of the offense was and at the time of conviction of the instant crime is punishable under the laws of the United States by death or by imprisonment in a penitentiary, prison or similar institution for a term of one year or more; or
- (c) Previous conviction by a general court-martial of the United States or in a court of any other state or territory of the United States, or of the Commonwealth of Puerto Rico, of an offense which at the time of conviction of the offense was punishable by death or by imprisonment in a penitentiary, prison or similar institution for a term of one year or more and which offense also at the time of conviction of the instant crime would have been a felony if committed in this state.

(4) As used in this section, "previous conviction of a felony" does not include:

- (a) An offense committed when the defendant was less than 16 years of age;
- (b) A conviction rendered after the commission of the instant crime;
- (c) A conviction that is the defendant's most recent conviction described in subsection (3) of this section, and the defendant was finally and unconditionally discharged from all resulting imprisonment, probation or parole more than seven years before the commission of the instant crime; or
- (d) A conviction that was by court-martial of an offense denounced only by military law and triable only by court-martial.

(5) As used in this section, "conviction" means an adjudication of guilt upon a plea, verdict or finding in a criminal proceeding in a court of competent jurisdiction, but does not include an adjudication which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

Statutory Summary

ORS 161.725 is amended to reference a new statutory provision for sentencing dangerous offenders under the sentencing guidelines system. ORS 161.725 is also amended to change the "dangerous offender" criteria from a "propensity toward criminal activity"

to a "propensity toward crimes that seriously endanger the life or safety of another". The change was recommended to make the dangerous offender statute more compatible with the just deserts orientation of the guidelines system.

Statutory Provision-Section 77, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 161.737):

(1) A sentence imposed under ORS 161.725 and 161.735 for felonies committed on or after November 1, 1989, shall constitute a departure from the sentencing guidelines created by rules of the State Sentencing Guidelines Board. The findings made to classify the defendant as a dangerous offender under ORS 161.725 and 161.735 shall constitute substantial and compelling reasons to depart from the presumptive sentence as provided by rules of the State Sentencing Guidelines Board.

(2) When the sentence is imposed, the sentencing judge shall indicate on the record the reasons for the departure and the presumptive sentence that would have been imposed if the court had not imposed the sentence under ORS 161.725 and 161.735 as a departure.

Statutory Summary

This provision provides that a dangerous offender sentence shall be considered a departure from the guidelines. The findings required to impose a dangerous offender sentence shall constitute the substantial and compelling reasons needed to justify departure. Such findings will be subject to appeal as may be permitted for departure sentences pursuant to Section 21, Subsection (1), Chapter 790, Oregon Laws 1989.

The provision requires the sentencing judge to note the presumptive sentence which would have been imposed if the offender had not been designated as a dangerous offender pursuant to ORS 161.725 and 161.735. Subsection (2).

Statutory Provision-ORS 144.226 (as amended by Section 78, Chapter 790, Oregon Laws 1989):

(1) Any person sentenced under ORS 161.725 and 161.735 as a dangerous offender shall within 60 days prior to the parole consideration hearing under ORS 144.228 or the last day of the presumptive sentence established under section 77 of this 1989 Act and at least every two years thereafter be given a complete physical, mental and psychiatric examination by a psychiatrist appointed by the Superintendent of the Oregon State Hospital. Within 60 days after the examination, the examining psychiatrist shall file a written report of findings and conclusions relative to the examination with the Director of the Department of Corrections and chairperson of the State Board of Parole and Post-Prison Supervision.

(2) The examining psychiatrist shall include in the report a statement as to whether or not in the psychiatrist's opinion the convicted person has any mental or emotional disturbance or deficiency or condition predisposing the person to the commission of any crime to a degree rendering the examined person a menace to the health or safety of others. The report shall also contain any other information which the examining psychiatrist believes will aid the State Board of Parole and Post-Prison Supervision in determining whether the examined person is eligible for parole or release. The report shall also state the progress or changes in the condition of the examined person as well as any recommendations for treatment. A certified copy of the report shall be sent to the convicted person, to the convicted person's attorney and to the executive officer of the Department of Corrections institution in which the convicted person is confined.

Statutory Summary

ORS 144.226 is amended to require periodic physical, mental and psychiatric examinations for offenders convicted as dangerous offenders under the guidelines system as is now required for such offenders sentenced under the current sentencing system.

Statutory Provision-Section 80, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 144.232):

(1) A person sentenced under ORS 161.725 and 161.735 as a dangerous offender for felonies committed on or after November 1, 1989, shall be considered for release to post-prison supervision. The offender is eligible for release to post-prison supervision after having served the presumptive sentence established under section 77 of this 1989 Act.

(2) The State Board of Parole and Post-Prison Supervision shall hold a release hearing no later than 10 days prior to the date on which the offender becomes eligible for release on post-prison supervision as provided in subsection (1) of this section.

(3) The dangerous offender's eligibility for and release to post-prison supervision shall be determined in a manner consistent with the procedures and criteria required by ORS 144.228 for the parole determination process applicable to dangerous offenders sentenced for crimes committed prior to November 1, 1989.

(4) An offender released under this section shall serve the remainder of the sentence term imposed under ORS 161.725 and 161.735 on post-prison supervision, however:

(a) Notwithstanding ORS 137.010 or the rules of the State Sentencing Guidelines Board, the State Board of Parole and Post-Prison Supervision may return an offender to prison for a maximum period of 180 days as a sanction for any supervision

violation. The sanction may be imposed repeatedly during the term of post-prison supervision for subsequent supervision violations.

(b) The Board may at any time require the offender to submit to a psychiatric examination as provided for in ORS 144.226. If the Board determines, as a result of the examination, that the condition that made the prisoner dangerous is no longer in remission or has otherwise returned, the Board shall return the offender to prison for an indefinite period of time. An offender returned to prison under this paragraph is entitled to periodic reviews once every two years for possible release to post-prison supervision as provided by subsection (3) of this section.

Statutory Summary

This provision provides that offenders sentenced pursuant to the guidelines as dangerous offenders under ORS 161.725 and 161.735 become eligible for release to post-prison supervision after serving a term equal to the presumptive sentence which would have been imposed if the offender was not sentenced as a dangerous offender. Subsections (1) & (2). Dangerous offenders shall be considered for release to post-prison supervision based on the same procedures and criteria currently used to consider parole for dangerous offenders. Subsection (3).

All offenders released as dangerous offenders will be subject to incarcerative sanctions up to six months for supervision violations and recommitment if the dangerous condition returns. Subsection (4).

