CHAPTER VII

OTHER SENTENCES

A. Legislatively Mandated Sentences.....149

B. Dangerous Offender Statute.....151

C. Guilty Except for Insanity.....152

D. Felony Offenses Treated as Misdemeanors.....154

E. Cap on Misdemeanor Jail Terms.....155

F. Other Felony Sanctions.....157

VII. OTHER SENTENCES

The sentencing guidelines system is based on administrative rules adopted by the State Sentencing Guidelines Board. These rules were affirmatively approved by the 1989 Legislative Assembly. Section 87, Chapter 790, Oregon Laws 1989. While the guidelines have been approved by the legislature, they retain their status as administrative rules. When those rules conflict with statutes, the statutory provisions control. This chapter examines the interface between the sentencing guidelines and the sentencing requirements established by statute.

A. LEGISLATIVELY MANDATED SENTENCES

The sentencing judge retains the authority to impose a statutorily mandated sentence if it is greater than the guidelines sentence. Section 82, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 137.637). The statutory sentencing requirements for a Murder conviction (ORS 163.115) offer an excellent illustration of the interface between the statutory requirement and the rules of the State Sentencing Guidelines Board.

Assume the offender has a criminal history classification of Category H and has been convicted of Murder (Crime Category 11). The sentencing judge may properly impose the presumptive sentence of 122-128 months (Grid Block 11-H) since it exceeds the statutorily required ten year sentence (ORS 163.115(3)(b)). The statute, however, authorizes the judge to impose a mandatory sentence up to twenty-five years. Consequently, the judge may exceed the presumptive sentence as authorized by this statute. ORS 163.115(3)(c).

A sentence beyond the twenty-five years authorized by statute may also be permissible for appropriate aggravating factors. The maximum indeterminate sentence that may be imposed for a Murder conviction is a life sentence. ORS 163.115(3)(a). Consequently, the sentencing judge may impose a departure sentence up to life imprisonment since Murder was expressly excluded from the limitation place on departure sentences by OAR 253-08-004.[13] Any departure sentence beyond the twenty-five years authorized by statute must be justified as required by OAR 253-08-001.

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[13] The State Board of Parole and Post-Prison Supervision's authority to set aside minimum Murder sentences (ORS 163.115(3)(d)) has been implicitly eliminated for offenders sentenced under the guidelines system. The Board's authority to parole an inmate has been limited to those offenders sentenced for crimes committed prior to November 1, 1989. ORS 144.050 (as amended by Section 25, Chapter 790, Oregon Laws 1989).

Other examples of statutorily required or authorized mandatory sentences include the state's gun minimum statute (ORS 161.610) and Ballot Measure 4, 1988 General Election (mandatory prison terms for certain repeat Class A felony offenders). The mandatory gun minimum sentences established by ORS 161.610 are clearly indicated in the statute. These mandatory sentences must be imposed as required by the statute.

The statutory provisions related to Ballot Measure 4 do not include a specific prison terms for offenders covered by the statute. The statute only requires that such offenders be sentenced to a prison term and that the complete term be served without any form of prison term reduction. To be consistent with this statutory provision, the Guidelines Board created the Sentencing Guidelines Grid so that most offenders covered by the measure are categorized above the dispositional line (presumptive prison term).[14]

While most offenders covered by the ballot measure are required to serve a presumptive prison sentence, certain offenders convicted of a Crime Category 7 offense with a criminal history classification of Category I, H, G or F are categorized in presumptive probationary grid blocks. To comply with the requirements of the ballot measure, the Guidelines Board adopted a special rule which creates a presumptive prison term for those offenders subject to the provisions of the ballot measure. OAR 253-09-001 (2).

Statutory Provision-Section 82, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 137.637):

When a determinate sentence of imprisonment is required or authorized by statute, the sentence imposed shall be the determinate sentence or the presumptive sentence as provided by the rules of the State Sentencing Guidelines Board, whichever is longer.

OAR 253-09-001 STATUTORILY MANDATED IMPRISONMENT. (1) If a mandatory prison sentence is required or authorized by statute, the sentence imposed shall be that determinate sentence or the sentence under these rules whichever is longer.

(2) If the provisions of Ballot Measure 4, 1988 General Election, require the imprisonment of an offender for whom the grid

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[14] The requirements of Ballot Measure 4, 1988 General Election limits the sentencing court's authority under the guidelines to impose a dispositional departure. Offenders subject to the provisions of the ballot measure must serve a prison term. Consequently, a sentencing judge may not impose a dispositional departure for an offender who must serve a prison term as required by the ballot measure.

provides presumptive probation, the offender shall be imprisoned for a duration determined as follows:

(a) 11-12 months for an offense classified in Grid Block 7-I;

(b) 12-13 months for an offense classified in Grid Block 7-H;

(c) 13-14 months for an offense classified in Grid Block 7-G; and

(d) 14-15 months for an offense classified in Grid Block 7-F.

Commentary

The Guidelines Board concluded that, absent a clear policy expression to the contrary, the legislature intended these rules to be consistent with Ballot Measure 4, 1988 General Election (codified as ORS 137.635), and all statutes requiring or authorizing mandatory prison sentences. This rule implements that interpretation of legislative intent.

Section (1) provides that a determinate statutory sentence of imprisonment will control if the statutory sentence is longer than the applicable presumptive sentence under these rules.

> EXAMPLE: ORS 161.610 permits or requires mandatory sentences for the use of handguns in the commission of a felony. When an offender is classified in grid block 9-E for a Burglary I conviction, the presumptive sentence is 46-50 months. If the offender was armed with a firearm at the time of the burglary and that fact is pled and proven at trial, the sentencing judge can exercise the judicial discretion provided by ORS 161.610 to impose a mandatory sentence of 60 months (five years).
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> In addition to the statutory minimum sentence of 60 months, the sentencing judge should also impose a term of post-prison supervision as required by OAR 253-05-002. Neither this rule nor ORS 161.610 preclude the imposition of a post-prison supervision term in addition to a mandatory prison term if it does not exceed the statutory maximum sentence for the offense.

Section (2) recognizes that these rules prescribe presumptive probation for certain crimes of conviction/criminal histories (grid blocks 7-I, 7-H, 7-G and 7-F) for which Ballot Measure 4 mandates imprisonment. To be consistent with the provisions of that ballot measure, this section provides a specific term of imprisonment for any such offender.

B. DANGEROUS OFFENDER STATUTE

The state's dangerous offender statute has been retained for use within the guidelines system. ORS 161.725-.735. To ensure that

this statute is not used in a manner inconsistent with the general purposes and principles of the guidelines system, the legislature amended the dangerous offender statutes to integrate it into the guidelines system. See, Sections 75-80, Chapter 790, Oregon Laws 1989. These statutory amendments incorporate the dangerous offender sentencing option as a departure sentence under the guidelines system. When the sentencing judge determines that the offender should be sentenced as a dangerous offender, he or she may impose an indeterminate sentence up to thirty years as a departure sentence.

A more detailed description of the dangerous offender sentencing option under the guidelines system is provided in Section E of Chapter VI.

C. GUILTY EXCEPT FOR INSANITY

The State Sentencing Guidelines Board expressly provided that the sentencing guidelines do not apply to individuals who have been found guilty except for insanity pursuant to ORS 161.295-.403. This exception to the guidelines system is recognized by OAR 253-09-002.

Furthermore, the 1989 Legislative Assembly amended ORS 161.327, 161.336 and 161.341 to clarify the jurisdiction of the Psychiatric Security Review Board (PSRB) with respect to such offenders. When an offender has been found guilty except for insanity, the jurisdiction of the PSRB shall equal the statutory maximum sentence (not the presumptive guidelines sentence) that could have been imposed if the offender had not been found insane.

OAR 253-09-002 OFFENDERS FOUND GUILTY EXCEPT FOR INSANITY. The rules of the State Sentencing Guidelines Board shall not apply to any offender found guilty except for insanity pursuant to ORS 161.295. The disposition of such an offender shall be as provided by the provisions of ORS 161.295 to 161.403.

Commentary

The Guidelines Board concluded that the 1987 legislation did not intend to place offenders found guilty except for insanity under sentencing guidelines. This rule implements that interpretation by leaving such offenders subject to the jurisdiction of the Psychiatric Security Review Board as provided by current law.

Statutory Provision-ORS 161.327 (as amended by Section 48, Chapter 790, Oregon Laws 1989):

(1) Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person would have been guilty of a felony, or of a

misdemeanor during a criminal episode in the course of which the person caused physical injury or risk of physical injury to another, and if the court finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to a state mental hospital designated by the Mental Health Division or conditional release, the court shall order the person placed under the jurisdiction of the Psychiatric Security Review Board for care and treatment. The period of jurisdiction of the Board shall be equal to the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity.

(2) The court shall determine whether the person should be committed to a state hospital designated by the Mental Health Division or conditionally released pending any hearing before the Board as follows:
(a) If the court finds that the person presents a substantial danger to others and is not a proper subject for conditional release, the court shall order the person committed to a state hospital designated by the Mental Health Division for custody, care and treatment pending hearing before the Board in accordance with ORS 161.341 to 161.351.
(b) If the court finds that the person presents a substantial danger to others but that the person can be adequately controlled with supervision and treatment if conditionally released and that necessary supervision and treatment are available, the court may order the person conditionally released, subject to those supervisory orders of the court as are in the best interests of justice, the protection of society and the welfare of the person. The court shall designate a person or state, county or local agency to supervise the person upon release, subject to those conditions as the court directs in the order for conditional release. Prior to the designation, the court shall notify the person or agency to whom conditional release is contemplated and provide the person or agency an opportunity to be heard before the court. After receiving an order entered under this paragraph, the person or agency designated shall assume supervision of the person pursuant to the direction of the Psychiatric Security Review Board. The person or agency designated as supervisor shall be required to report in writing no less than once per month to the Board concerning the supervised person's compliance with the conditions of release.

(3) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect requiring supervision when the disease may, with reasonable medical probability, occasionally become active and, when active, render the person a danger to others.

(4) In determining whether a person should be conditionally released, the court may order evaluations, examinations and compliance as provided in ORS 161.336 (4) and 161.346 (2).

(5) In determining whether a person should be committed to a

state hospital or conditionally released, the court shall have as its primary concern the protection of society.

(6) Upon placing a person on conditional release, the court shall notify the Board in writing of the court's conditional release order, the supervisor appointed, and all other conditions of release, and the person shall be on conditional release pending hearing before the Board in accordance with ORS 161.336 to 161.351. Upon compliance with this subsection and subsections (1) and (2) of this section, the court's jurisdiction over the person is terminated and the Board assumes jurisdiction over the person.

(7) An order of the court under this section is a final order appealable by the person found guilty except for insanity in accordance with ORS 19.010 (4). The person shall be entitled on appeal to suitable counsel possessing skills and experience commensurate with the nature and complexity of the case. If the person is indigent, suitable counsel shall be appointed in the manner provided in ORS 138.500 (1), and the compensation for counsel and costs and expenses of the person necessary to the appeal shall be determined, allowed and paid as provided in ORS 138.500.

(8) Upon placing a person under the jurisdiction of the Board, the court shall notify the person of the right to appeal and the right to a hearing before the Board in accordance with ORS 161.336 (7) and 161.341 (4).

D. FELONY OFFENSES TREATED AS MISDEMEANORS

ORS 161.585 permits certain felony offenses to be classified as a misdemeanor depending on the sentence imposed and under certain specified conditions. The application of ORS 161.585, however, has been limited to offenders sentenced for an offense committed prior to November 1, 1989. Consequently, offenders convicted of a felony on or after November 1, 1989 will no longer be eligible for misdemeanor treatment under this statutory provision and therefore, will be subject to the sentencing guidelines system.[15]

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[15] The sentencing judge does retain the authority to treat certain felony offenses as misdemeanors. The sentencing judge may enter judgment of a Class A misdemeanor conviction for Class C felonies and certain Class B drug felonies upon successful completion of probation, or if the judge determines that a felony conviction would be "unduly harsh." ORS 161.705.

The Oregon Criminal Justice Council did not recommend that this statute be limited to pre-guidelines cases, because it recognized the importance of this form of judicial discretion. The Council does, however, recommend that this sentencing option be used sparingly.

Statutory Provision-ORS 161.585 (as amended by Section 52, Chapter 790, Oregon Laws 1989):

(1) When a crime punishable as a felony is also punishable by imprisonment for a maximum term of one year or by a fine, the crime shall be classed as a misdemeanor if the court imposes a punishment other than imprisonment under ORS 137.124 (1).

(2) Notwithstanding the provisions of ORS 161.525, upon conviction of a crime punishable as described in subsection (1) of this section, the crime is a felony for all purposes until one of the following events occurs, after which occurrence the crime is a misdemeanor for all purposes:
(a) Without granting probation, the court imposes a sentence of imprisonment other than to the legal and physical custody of the Department of Corrections.
(b) Without granting probation, the court imposes a fine.
(c) Upon revocation of probation, the court imposes a sentence of imprisonment other than to the legal and physical custody of the Department of Corrections.
(d) Upon revocation of probation, the court imposes a fine.
(e) The court declares the offense to be a misdemeanor, either at the time of granting probation, upon suspension of imposition of sentence, or on application of defendant or the probation officer of the defendant thereafter.
(f) The court grants probation to the defendant without imposition of sentence upon conviction and defendant is thereafter discharged without sentence.
(g) Without granting probation and without imposing sentence, the court declares the offense to be a misdemeanor and discharges the defendant.

(3) The provisions of this section shall apply only to persons convicted of a felony committed prior to November 1, 1989.

E. CAP ON MISDEMEANOR JAIL TERMS

Pending implementation of misdemeanor guidelines in 1991, the legislature has set a temporary six-month limitation on the maximum jail term that may be imposed for certain Class A misdemeanors. Section 51, Chapter 790, Oregon Laws 1989. This limitation, however, may be exceeded if the judge finds on the record substantial and compelling reasons for a longer sentence. In this context the term "substantial and compelling reasons" is intended to have the same meaning given by law and appellate decisions to that term as used in the rules of the State Sentencing Guidelines Board for guidelines departure sentences.

The following offenses are not subject to the six-month limitation and may be sentenced up to the maximum provided by ORS 161.615 without a finding of substantial and compelling reasons for a departure:

(1) Driving Under the Influence of Intoxicants, Contributing

to the Sexual Delinquency of a Minor, Sexual Abuse II, Endangering the Welfare of a Minor, and Public Indecency;

(2) Attempted Incest, Attempted Sodomy III, Attempted Rape III, and Attempted Sexual Abuse I; or

(3) any other sex offense that can be sentenced as a misdemeanor.

This new statutory provision does not expand the scope of appellate review for misdemeanor judgments as allowed by ORS 138.040 and 138.050. Only two issues related to misdemeanor sentences may be raised on appeal: 1) Is the sentence unconstitutionally cruel and unusual; and 2) Does the sentence exceed the maximum sentence allowable by law?

A sentence that exceeds the six-month limitation may only be challenged as exceeding "the maximum sentence allowable by law" if the sentencing judge failed to make the required findings on the record. If such findings have been made, they may not be challenged on the grounds that they are not supported by the evidence in the record or do not constitute substantial and compelling reasons for the longer sentence.

Statutory Provision-Section 51, Chapter 790, Oregon Laws 1989:

(1) Notwithstanding the provisions of ORS 161.615, the maximum term of jail incarceration for a Class A misdemeanor committed on or after November 1, 1989, shall not exceed six months unless the sentencing judge finds on the record substantial and compelling reasons to impose a longer term.

(2) The provisions of subsection (1) do not apply to sentences imposed for:
(a) Violations of ORS 163.415, 163.435, 163.465, 163.575 or 813.010;
(b) An attempt to commit a crime described in ORS 163.355, 163.385, 163.425 or 163.525; or
(c) Any other sex crime that can be treated as a misdemeanor on sentencing.

(3) This section does not expand the scope of review in any appeal from a judgment of conviction as provided in ORS 138.040 or 138.050.

(4) Section 21 of this Act does not apply in any appeal of a judgment of conviction that is subject to this section.

(5) This section is repealed November 1, 1991.

F. OTHER FELONY SANCTIONS

OAR 253-09-003 OTHER SANCTIONS. In addition to the presumptive or departure sentence, the sentencing judge may impose any restitution, fine, fee or other monetary payment authorized or required by law.

Commentary

This rule confirms that sentencing guidelines do not supercede the provisions of current law (e.g., ORS 137.540, 161.625, 137.101-.109) as to restitution, fines, fees, or other monetary payments imposed as part of a sentence.