

**CHAPTER IV**  
**PRESUMPTIVE SENTENCES**

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#### IV. PRESUMPTIVE SENTENCES

The Sentencing Guidelines Grid is an offender classification tool whereby each offender is classified for each crime of conviction in one of ninety-nine cells. The offender's grid block classification is used to establish a presumptive sentence for the crime of conviction. The presumptive sentence is the sentence that should be imposed in the usual case. When a case involves unusual facts which make it unique for sentencing purposes, a departure sentence may be appropriate.<sup>11</sup>

This section, however, will focus on the use of the Sentencing Guidelines Grid to identify and impose presumptive sentences. The grid itself is divided diagonally with what is called the dispositional line. This line divides the grid into two parts. The grid blocks located above the dispositional line establish presumptive prison sentences. The grid blocks below the dispositional line establish presumptive probationary sentences. This section describes the proper application of presumptive sentence for a single crime of conviction. Presumptive multiple sentences will be described in Chapter V of this manual.

##### A. PRESUMPTIVE PRISON AND POST-PRISON SUPERVISION SENTENCES

The presumptive sentence for an offender classified in a grid block above the dispositional line is prison term followed by a term of post-prison supervision. The presumptive prison term is described by OAR 253-05-001 as range of months indicated in the appropriate block on the sentencing guidelines grid.<sup>12</sup> The term of post-prison supervision for most offenses is established by OAR 253-05-002. A special rule, however, has been established for the post-prison supervision term of offender's sentenced for ORS 163.105 Aggravated Murder and ORS 163.115 Murder. OAR 253-05-004.

The rules for setting a presumptive prison sentence (including a term of post-prison supervision) are included below for the reader's convenience. The State Sentencing Guidelines Board's commentary to these rules should be consulted for more information on the proper calculation of presumptive prison sentences.

##### 1. Term of Imprisonment

OAR 253-05-001 TERM OF IMPRISONMENT. If an offense is classified in a grid block above the dispositional line, the

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<sup>11</sup> A more detailed description of departure sentences is included in Chapter VI of this manual.

<sup>12</sup> See, p. 16.

presumptive sentence shall be a term of imprisonment within the durational range of months stated in the grid block. The sentencing judge should select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure.

#### Commentary

The presumptive sentence for any offender classified in a grid block above the dispositional line is a term of imprisonment within the range of months indicated in the grid block. The sentencing judge has discretion to sentence at any place within the range. However, because one of the objectives of the guidelines system is the elimination of sentencing disparity, the sentencing judge is advised to set the prison term for most cases at the center of the presumptive sentence range.

## 2. Term of Post-Prison Supervision

OAR 253-05-002 TERM OF POST-PRISON COMMUNITY SUPERVISION. (1) A term of community supervision shall be imposed as part of the sentence for any offender who is sentenced to prison as provided by these rules or as a departure. This term of community supervision shall be described as post-prison supervision.

(2) The duration of post-prison supervision shall be determined by the crime seriousness category of the most serious current crime of conviction:

- (a) one year for Crime Categories 1-3;
- (b) two years for Crime Categories 4-6; and
- (c) three years for Crime Categories 7-11.

(3) The term of post-prison supervision shall begin upon completion of the offender's prison term.

(4) The term of post-prison supervision, when added to the prison term, shall not exceed the statutory maximum sentence for the crime of conviction. When the total duration of any sentence (prison incarceration and post-prison supervision) exceeds the statutory maximum sentence, the sentencing judge shall reduce the duration of post-prison supervision to the extent necessary to conform the total sentence length to the statutory maximum.

#### Commentary

Under the sentencing guidelines system the role of "parole" in setting the actual length of imprisonment is ended. However, given both the legislature's direction to include "the requirement and duration of parole" in the guidelines system (Section 2, 1987 legislation) and the parole provisions of Ballot Measure 10, 1986 General Election (now codified as ORS 144.305), the Guidelines Board concluded that the legislature did not intend to end the state's traditional community supervision

policies which also form part of the current "parole" system. Consequently, the Guidelines Board adopted a system of post-prison community supervision. This rule provides the basic structure by which offenders will be supervised in the community for set period of time after their release from prison.

Section (1) requires that each felony sentence of imprisonment shall include a term of post-prison supervision.

Section (2) establishes the presumptive durations of post-prison supervision: one year for Crime Categories 1-3; two years for Crime Categories 4-6; and three years for Crime Categories 7-11. The term of post-prison supervision is determined by the crime seriousness classification of the most serious crime of conviction.

Although not expressly stated, this rule does not allow departure as to the term of post-prison supervision. Aggravating or mitigating facts of the current crime of conviction should be recognized in the sentencing court's durational (incarceration term) or dispositional (prison versus probation) decision.

Section (3) provides that the term of post-prison supervision shall begin upon completion of the prison term.

Section (4) precludes imposition of a sentence that exceeds the statutory maximum sentence for the crime of conviction. When the presumptive guidelines sentence (including both the prison term and the term of post-prison supervision) exceeds the statutory maximum sentence for the crime of conviction, the sentencing judge is directed to reduce the length of post-prison supervision to conform the total sentence length to the statutory maximum term.

Example: An offender is classified in grid block 8-B for a Sexual Abuse I conviction. The sentencing judge imposes a presumptive prison term of three years and a three-year post-prison supervision term as required by OAR 253-05-002(2). Sexual Abuse I is a Class C felony with a maximum statutory sentence of five years. The offender's total sentence of six years exceeds the statutory maximum sentence. Consequently, this rule requires the sentencing judge to shorten the term of post-prison supervision to two years.

**OAR 253-05-004 POST-PRISON SUPERVISION FOR AGGRAVATED MURDER**

(1) The term of post-prison supervision for an offender serving a life sentence pursuant to ORS 163.105 or ORS 163.115 shall be for the remainder of the offender's life, unless the Board finds a shorter term appropriate. In no case shall the term of supervision be less than three years.

(2) The limit on sanctions for post-prison supervision violations provided in OAR 253-11-004(3) shall not apply to offenders on

post-prison supervision as provided by this rule.

### Commentary

This rule is intended to avoid any conflict with current law as to the supervision of persons convicted of aggravated murder or murder/felony murder. Existing statutory law permits the imposition of a indeterminate life sentence with a mandatory minimum term. When such an indeterminate sentence is imposed as permitted by OAR 253-09-001(1), the offender may be eligible for release. If such an offender has been sentenced for a crime committed on or after November 1, 1989, the offender will be released to post-prison supervision. This rule describes how post-prison supervision shall be administered for offenders serving indeterminate life sentences.

Section (1) extends the term of post-prison supervision for an offender serving a life sentence for aggravated murder (ORS 163.095) or murder/felony murder (ORS 163.115) to life unless the Board of Parole and Post-Prison Supervision imposes a shorter period. The offender must serve at least three years of post-prison supervision in appropriate cases.

Section (2) provides that the limitations on post-prison supervision sanctions established by OAR 253-11-004(3) do not apply to offenders serving life sentences for aggravated murder or murder/felony murder. Consequently, the Board of Parole and Post-Prison Supervision may revoke community supervision repeatedly and impose prison term sanctions for any supervision violation.

### **B. PRESUMPTIVE PROBATION SENTENCES**

Amendments made to ORS 137.520 by the 1989 Legislative Assembly eliminate the use of suspended sentences to impose probationary terms on offenders sentenced under the guidelines system. Under the guidelines system, a sentence of probation is the sentence imposed by the sentencing judge. This section will illustrate how presumptive probationary sentences are established and imposed for all offenders classified in a grid block below the dispositional line (OAR 253-05-007).

The term of a presumptive probationary sentence is established by OAR 253-05-008. The guidelines system describes two general types of conditions of probation: custody conditions and non-custody conditions. The use of custody units to impose custody conditions of probation including the use of jail as a condition of probation are described in rules: OAR 253-05-011, 253-05-012 and 253-05-013. The use of non-custody conditions of probation under the guidelines system is described in rules: OAR 253-05-015 and 253-09-003.

Statutory Provision-ORS 137.520 (as amended Section 15, Chapter 790, Oregon Laws 1989):

(1) The committing magistrate, having sentenced a defendant to confinement in a county jail for a period of up to one year, or as provided by rules adopted by the State Sentencing Guidelines Board for felonies committed on or after November 1, 1989, may parole the defendant outside the county jail subject to condition and subject to being taken back into confinement upon the breach of such condition. The committing magistrate may also authorize, limit or prohibit the release of a sentenced defendant upon pass, furlough, leave, work or educational release.

(2) The committing magistrate, having placed a defendant upon probation and having confined the defendant as a condition of that probation in a county jail for a period up to one year, or having imposed a sentence of probation with confinement in the county jail in accordance with rules adopted by the State Sentencing Guidelines Board for felonies committed on or after November 1, 1989, may authorize, limit or prohibit the release of such person upon pass, furlough, leave, work or educational release.

(3) The sheriff of a county in which a defendant is confined in the county jail by sentence or as a condition of probation may allow the release of the defendant upon pass, furlough, leave, work or educational release unless otherwise ordered by the committing magistrate.

(4) A defendant confined in a county jail and placed upon educational release or upon work release shall, during the hours in which not so engaged or employed, be confined in the county jail unless the court by order otherwise directs or unless the sheriff otherwise directs in the absence of a contrary order by the court. The defendant's net earnings shall be paid to the sheriff, who shall deduct therefrom and pay such sums as may be ordered by the court for the defendant's board, restitution, fine, support of dependents and necessary personal expense. Any balance remaining shall be retained by the sheriff until the defendant's discharge from custody, whereupon the balance shall be paid to the defendant.

#### Statutory Summary

Section 15 amends ORS 137.520 to eliminate reference to suspended sentences to make this statute on probationary sentences compatible with sentencing guidelines.

#### 1. Duration of Probation

The following rules describe how the duration of supervision is determined for a presumptive probationary sentence.

OAR 253-05-008 DURATION OF PROBATION. (1) The presumptive duration of probation shall be determined by the crime seriousness category of the most serious current crime of conviction:

- (a) eighteen months for Crime Categories 1-2;
- (b) two years for Crime Categories 3-5;
- (c) three years for Crime Categories 6-8; and
- (d) five years for Crime Categories 9-11.

(2) (a) Subject to subsection (b) of this section, the sentencing judge may extend the length of probation by increments of up to one year upon finding a violation or violations of the conditions of probation or when necessary to ensure that the conditions of probation are completely satisfied.

(b) A probationary term shall not exceed five years.

(3) The time during which the offender has absconded from supervision and a bench warrant has been issued for the offender's arrest shall not be counted in determining the time served on a sentence of probation.

(4) Nothing in this rule shall preclude the sentencing judge from imposing a period of bench probation as the probationary sentence required or permitted by the sentencing guidelines.

#### Commentary

Section (1) prescribes the presumptive duration of probation according to the crime seriousness category of the most serious current crime of conviction. The duration of the presumptive probationary term increases with the seriousness of the crime category: 18 months (Crime Categories 1-2), two years (Crime Categories 3-5), three years (Crime Categories 6-8), and five years (Crime Categories 9-11). This scale represents a judgment by the Guidelines Board that the most relevant factor in setting the length of probation is the crime seriousness ranking of the crime of conviction.

Section (2) allows the sentencing judge after a hearing to extend without departure the duration of probation by one-year increments, up to a maximum of five years, for violation of probation conditions or to insure probation conditions are met. The Guidelines Board decided that incremental increases of probation duration beyond the presumptive probationary term would permit the maximum effective use of limited supervisory resources.

The presumptive probationary term should only be extended after the court has determined that the offender has violated the conditions of probation or that the offender's performance on supervision indicates a need to extend the probationary term. The Guidelines Board makes no determination as to whether a hearing should be held to establish the grounds for an extension.

In no case should the term of probation be extended by an increment of more than a one year.

Section (3) provides that the calculation of time served on probation should exclude any time during which an offender has absconded from supervision and a bench warrant has been issued for the arrest of the offender. This provision is consistent with current Oregon law (ORS 137.010(3)).

Section (4) preserves the authority of a sentencing judge to use bench probation (as defined in OAR 253-03-001(1)) as the form of probation imposed pursuant to these rules. When the sentencing judge determines that the restitution or other financial requirements of probation require a payment schedule beyond the presumptive term of probation, the judge may impose active supervision up to the presumptive probationary term and an additional term of bench probation for the entire payment schedule.

## 2. Custody Units

OAR 253-05-007 PRESUMPTIVE PROBATION SENTENCES. (1) Except as provided by OAR 253-09-001, if the offense is classified in a grid block below the dispositional line, the presumptive sentence shall be a term of probation which may include custody and conditions of supervision.

(2) Each grid block below the dispositional line of the grid includes two components of a presumptive probationary sentence. The top number in each grid block is the number of custody units that may be imposed as part of a presumptive probationary sentence. The bottom number in each grid block is the maximum number of custody units that may be imposed as a jail term.

### Commentary

Section (1) establishes the presumptive sentence for current crimes of conviction/criminal histories classified in grid blocks below the dispositional line. The presumptive sentence for those classifications is a probationary term which may include custody and other conditions of supervision. The duration of probation is determined as required by OAR 253-05-008.

The application of this rule is subject to OAR 253-09-001. That rule requires the imposition of statutorily mandated sentences. When the presumptive sentence is inconsistent with a statutorily mandated sentence, the statutory sentence must be imposed. For example, certain offenders convicted of Crime Category 7 Burglary I are classified in grid blocks below the dispositional line. Some of these offenders have criminal histories for which a sentence of imprisonment is mandated by statute (Ballot Measure 4, 1988 General Election codified as ORS 137.635). The application of OAR 253-09-001 will ensure these offenders serve the required prison term.

Section (2) explains the numbers in each grid block below the dispositional line as illustrated in Appendix 1. The first number is the maximum number of "custody units" a sentencing judge may impose as part of a sentence of probation. The specific application of custody units is prescribed by OAR 253-05-011 and OAR 253-05-012.

The second number in each grid block below the dispositional line is the maximum number of custody units a judge may use to impose a jail term as part of probation. The Council recommended and the Guidelines Board adopted this limitation to control the total demand for limited jail space created by felony probation sentences. OAR 253-05-013 provides exceptions to this limitation on the use of jail as part of a probationary sentence when adequate jail space is available.

Statutory Provision-ORS 137.540 (2)(a) and (b) (as amended by Section 16, Chapter 790, Oregon Laws 1989):

(2) In addition to the general conditions, the court may impose special conditions of probation for the protection of the public or reformation of the offender, or both, including, but not limited to, that the probationer shall:

(a) For crimes committed prior to November 1, 1989, be confined to the county jail or be restricted to the probationer's own residence or to the premises thereof, or be subject to any combination of such confinement and restriction, such confinement or restriction or combination thereof to be for a period not to exceed one year or one-half of the maximum period of confinement that could be imposed for the offense for which the defendant is convicted, whichever is the lesser. However, the court shall not order restriction to residence or premises thereof in the case of a defendant convicted of a crime in the course of which the defendant used or threatened to use any weapon or in the course of which the defendant caused, attempted to cause or threatened to cause, physical injury to another.

(b) For felonies committed on or after November 1, 1989, be confined in the county jail, or be subject to other custodial sanctions under community supervision, or both, as provided by rules of the State Sentencing Guidelines Board. The court shall not order restriction to residence or premises thereof in the case of a defendant convicted of a crime in the course of which the defendant used or threatened to use any weapon or in the course of which the defendant caused, attempted to cause or threatened to cause physical injury to another.

#### Statutory Summary

The Guidelines Board's authority to require the use of custody units is inherent in the guidelines enabling legislation. That legislation directs the Guidelines Board to develop guidelines which "control ... the imposition and duration of probation

subject to condition." Section 2, Chapter 619, Oregon Laws 1987. The legislature has also affirmatively approved the actual concept of custody units in its general approval of the sentencing guidelines. Section 85, Chapter 790, Oregon Laws 1989. More specifically, the legislature expressly provided that custodial sanctions may imposed as part of probationary sentence only as permitted by the rules of the Guidelines Board. Id. at Section 16 (amending ORS 137.540). The pertinent part of the statutory provision has been included above for the reader's convenience.

#### a. Custodial Conditions of Probation

The guidelines enabling legislation directed the development of sentencing guidelines which were consistent with the "effective capacity of state and local correctional facilities and other sentencing sanctions available." Section 2, Chapter 619, Oregon Laws 1987. In order to achieve this objective, the State Sentencing Guidelines Board adopted several rules which structure the court's discretionary authority to impose various conditions of probation. The Guidelines Board focused primarily on the custodial conditions of probation. Consequently, it adopted rules which direct courts to use "custody units" to impose custodial conditions of probation.

The concept of "custody units" is new to Oregon law. "Custody units" structure the use of custodial programs as probationary conditions in a manner consistent with the "modified just deserts" objectives of these guidelines. The number of custody units associated with a presumptive probationary sentence are primarily based on the seriousness of the crime of conviction. The following rules and commentary describe how custody units are imposed to create the custodial conditions of a presumptive sentence of probation.

OAR 253-05-011 CUSTODY UNITS. (1) When imposing a probationary sentence, the sentencing judge may require that the offender serve a term of custody supervision in a correctional facility or as part of a custody program. The term of custody supervision shall be imposed as a number of custody units.

(2) The number of custody units that may be imposed as part of a presumptive probationary sentence shall be determined by the grid block classification of the offense:

(a) up to 90 custody units for offenses classified in Crime Categories 1 and 2 and grid blocks 3-G, 3-H and 3-I;

(b) up to 120 custody units 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 180 custody units for offenses classified in grid

blocks 5-F, 6-F through 6-I, and 7-F through 7-I.

(3) If the sentencing judge imposes a probationary sentence as a dispositional departure or as an optional probationary sentence, the sentencing judge may impose up to 180 custody units as a part of the sentence. Imposition of more than 180 custody units is a departure.

#### Commentary

This rule establishes the concept of "custody units" as part of a probationary sentence and prescribes the limitation of their use. The concept of custody units (a) recognizes that forms of custody, other than jail, are appropriate as probation sanctions; (b) allows and encourages use of such alternatives to control demands on limited jail space; and (c) describes the presumptive maximum use of all custody sanctions.

Section (1) authorizes a sentencing judge to impose a term of custody supervision in a correctional facility or custody program. When a term of custody supervision is imposed, it must be stated in terms of custody units. A more detailed description of the imposition and execution of custody units is presented in the commentary to OAR 253-05-012.

Section (2) sets the maximum number of custody units which may be imposed as part of a presumptive probationary sentence. The custody units described in this subsection also appear as the first number in each grid block below the dispositional line as illustrated in Appendix 1.

Section (3) specifies that a maximum of 180 custody units may be imposed when the sentence of probation is a dispositional departure or an optional probationary sentence. Imposition of more than 180 custody units for either type of sentence is a departure and must therefore meet the conditions prescribed by these rules for departure sentences.

#### b. Custodial Supervision

OAR 253-05-012 CUSTODIAL SUPERVISION. (1) The custody units imposed as part of a probationary sentence shall be used to set a term of custodial supervision in a correctional facility or as part of a custody program.

(2) When custody units are imposed as part of a probationary sentence, the offender shall receive credit for having served those custody units as follows:

(a) JAIL: Each day of jail incarceration equals one (1) custody unit.

(b) RESIDENTIAL CUSTODIAL TREATMENT FACILITY: Each day of actual confinement in a 24-hour residential custodial

treatment facility equals one (1) custody unit when the program is satisfactorily completed.

(c) RESTITUTION, PROBATION, WORK RELEASE OR COMMUNITY SERVICE CENTERS: Each day served in a community service release, work release or similar release program, in which the offender is confined in a custodial facility when not on release, equals one (1) custody unit for each day of partial incarceration.

(d) HOUSE ARREST: Each day of satisfactory compliance with the requirements of house arrest equals one (1) custody unit if the offender satisfactorily completes the house arrest.

(e) COMMUNITY SERVICE: Eight hours of community service under the direct supervision of a supervisor designated by the supervisory authority equals one-third (1/3) custody unit.

(3)(a) When the sentencing judge orders jail time as part of a probationary sentence, the judge shall sentence the offender directly to the custody of the supervisory authority with jurisdiction over the county jail.

(b) When the sentencing judge recommends a custodial facility or program other than jail, the judge shall sentence the offender directly to the custody of the supervisory authority with jurisdiction over that facility or program. To impose such a sentence, the judge must determine that space is available in that facility or program and that the offender meets the eligibility criteria established for that facility or program by the supervisory authority.

(4) The supervisory authority shall keep a record of all custody units served by the offender during the course of the probationary term. When custody units are served only upon the successful completion of a custodial program, the supervisory authority, when appropriate, shall certify that the offender has successfully completed a custodial program and the number of custody units served by the offender as part of the program.

(5) Where the sentencing judge finds that a custodial rehabilitation program designed to deal with drug or alcohol abuse or sexual behavior is essential to minimize the offender's likelihood of engaging in future criminal conduct, the requirement that the offender successfully enter and complete such a program shall not be limited by the custodial units set forth in OAR 253-05-011 or the provisions of this rule.

#### Commentary

Section (1) provides that custody supervision in a correctional facility or custody program imposed by a sentence of probation is to be stated in custody units.

Section (2) specifies the various forms of custody that provide offender credit against imposed custody units. This section also describes what conditions must be met by the offender before he or she can receive custody-unit credits. The custody unit value of each form of custody is also indicated in this section.

When adopting this rule, the Guidelines Board reviewed all custody programs, other than jail, which might be appropriate for custody unit credit. This section reflects the following judgments made by the Guidelines Board:

(a) To qualify for custody-unit credit, a given custody program must include continuous or intermittent restriction of an offender's freedom of movement, or the performance of required service under the restrictions of direct correctional supervision.

(b) Custody-unit credit for some forms of custodial treatment should depend on the satisfactory completion of a required program.

(c) The credit given for non-jail custody should depend on the extent of the restrictions on the defendant's liberty compared to jail incarceration, and the desirability of providing incentives for willing and satisfactory participation in custodial programs other than jail.

Paragraph A. This paragraph establishes the benchmark value of one day's jail time as one custody unit. To earn a custody unit credit, the offender must actually serve the required time in custody. If an offender is released early for good behavior or is "matrix released" from a facility with a population limitation, he or she will only receive custody-unit credit for the days served in custody. This limitation applies to all forms of custody included in this rule.

Paragraph B. This paragraph provides one custody-unit credit for each day in a residential treatment facility if the program is a 24-hour custodial program. The offender can earn custody-unit credit only by satisfactory completion of the entire program.

Paragraph C. This paragraph provides one custody-unit credit for each day's participation in a work-release program if the offender is confined in a custodial facility when not on release. The Guidelines Board concluded that the combination of confinement and the controlled nature of activity when not confined justified custody-unit credit equal to jail.

Paragraph D. This paragraph provides one custody-unit credit for each day's compliance with house arrest requirements, subject to satisfactory completion of the entire period of house arrest. Although the Guidelines Board was inclined to establish a more restricted credit policy for house arrest, various law enforcement officials testified that many offenders view house

arrest as more onerous and restrictive than jail. These witnesses also noted that the custody-unit credit formula should provide maximum incentive for participation in house arrest programs.

Paragraph E. This paragraph provides one-third (1/3) custody-unit credit for each eight-hour period of community service under the direct supervision of a supervisor designated by the supervisory authority. Because this program does not involve actual physical confinement on either a continuous or intermittent basis, the Guidelines Board decided it was not equivalent to the other custody sanctions included in this rule. The Council and Guidelines Board also decided, however, that restrictions imposed by this form of supervision, and the objective of encouraging satisfactory participation in such programs, required some custody-unit credit.

An offender should never receive more than one custody-unit credit for any single twenty-four hour period. For example, an offender released from a restitution center to participate in an eight-hour community service project should only receive one custody-unit credit for the restitution center incarceration and not an additional one-third credit for the community service.

Section (3) describes how custody units are to be imposed as part of a probationary sentence. If the sentence includes jail, the judge must sentence the offender to the custody of the supervisory authority with jurisdiction over the county jail. If the sentence of custody units includes a recommendation for placement in a custodial facility or program other than jail, the judge must sentence the offender directly to the custody of the supervisory authority with jurisdiction over that facility or program. Imposition of such a sentence also requires the sentencing judge to determine that the facility or program has space for the offender and that the offender is eligible for the program.

The use of the term "jurisdiction" is not intended to mean legal jurisdiction. The term recognizes that different corrections officials within a county will have control over different correctional programs and facilities. In one county, the Community Corrections Manager may manage both the jail and the work release center. In another county, the sheriff may control both of those facilities. And in a third county, the sheriff may manage the jail and the Community Corrections Manager may operate the work release center.

The supervisory authority may move an offender from one type or level of custody program to another if the supervisory authority considers the movement warranted by the risk classification or behavior of the offender or by the capacity of the program or facility.

The sentencing judge should work with the corrections official in control of the custodial facility or program to which the

offender is sentenced. Local correctional resources are limited with respect to both capacity limitations and eligibility requirements. The effective use of probationary sentences will require an informed judiciary. Corrections officials and judges must work together to ensure that local correctional programs are used effectively as sentencing options.

Section (4) requires the supervisory authority to maintain a record of the number of custody unit credits earned by the offender. When these rules require the successful completion of a residential custodial treatment program or a term of house arrest, the supervisory authority must certify successful program completion and the number of custody unit credits earned by the offender.

Section (5) removes the custody unit limitation of OAR 253-05-011 when the sentencing judge finds a custodial rehabilitation program related to drug or alcohol abuse or sexual behavior is essential to minimize the offender's likelihood of engaging in future criminal conduct. Consequently, the sentencing judge may require the offender to participate in a six-month in-custody treatment program even when the maximum number of units provided for the presumptive sentence is 120. While the offender will "earn" one custody unit for each day of custody, the offender will be required to complete the full six-month program in order to serve the 120 custody units imposed as part of probation.

#### c. Jail as Part of Probation Sentence

OAR 253-05-013 JAIL AS PART OF PROBATION. (1) Subject to the provisions of section (3) of this rule, the maximum number of custody units that may be used to impose a jail term as part of a probationary sentence shall be as follows:

(a) Up to 30 custody units for offenses classified in Crime Categories 1 and 2 and grid blocks 3-G, 3-H and 3-I;

(b) Up to 60 custody units 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 90 custody units for offenses classified in grid blocks 5-F, 6-F through 6-I, and 7-F through 7-I.

(2) If the sentencing judge imposes a probationary sentence as a dispositional departure from a presumptive prison term or as an optional probationary sentence, the judge may use up to 90 custody units to impose a jail term as part of the probationary sentence.

(3) The limitations established by this rule on the use of jail as part of a probationary sentence may be exceeded if the sentencing judge, after consulting with the appropriate supervisory authority, finds on the record that local jail space

provided by the county is available for a longer term. Upon making such a finding, the sentencing judge may, without departure, use up to the maximum number of custody units included in the presumptive sentence to impose a jail term as part of a probationary sentence.

(4) Within the limitations established by this rule on the use of jail as part of a probationary sentence, the sentencing judge may impose:

(a) a jail term as part of a probationary sentence to be served immediately upon sentencing;

(b) one or more jail terms as a sanction for probation violations over the term of probation; or

(c) both (a) and (b) of this section so long as the total length of jail incarceration does not exceed the limits established by this rule on the use of jail as part of a probationary sentence.

#### Commentary

This rule sets forth the limits on the use of jail as a part of a probationary sentence. These limitations respond to the directive of the 1987 legislation to develop sentencing guidelines which "take into consideration factors relevant to establishment of appropriate sentences, including . . . the effective capacity of . . . local correctional facilities . . . ." Section 2, 1987 legislation.

The 1987 legislation recognized the severe capacity limitations of local facilities (with over half of Oregon's jails under federal court orders controlling maximum populations); the extensive use of jail space for sentenced felons; and the need to coordinate that use of jail for felony sentences with the many other important demands for jail space (including pretrial detention, detention after conviction and awaiting sentencing, imprisonment for misdemeanors, detention on holds from other jurisdictions in or out of Oregon, and detention awaiting extradition).

Section (1) provides the maximum number of custody units that may be used to impose a jail term as a condition of probation. These limits are represented as the lower number appearing in each grid block below the dispositional line as illustrated in the Sentencing Guidelines Grid (Appendix 1).

Section (2) specifies that a maximum of 90 custody units may be imposed as a term of jail incarceration for an offender sentenced to a dispositional departure sentence of probation or an optional probationary sentence.

Section (3). Recognizing that some counties in Oregon have recently increased jail capacity by voter-approved levies, this

section allows a sentencing judge to exceed the otherwise applicable limits on jail use if the court finds on the record that adequate jail space is available. Such a finding may be made only after consultation with the supervisory authority with jurisdiction over the jail.

Section (4) confirms the sentencing judge's authority to use custody units to set the initial custodial conditions of probation, to impose a sanction for subsequent probation violations, or both. Such uses, separately or in combination, are subject to the maximum number of custody units established by this rule. This section represents a judgment by the Guidelines Board that some use of local correctional facilities for probation violations is a proper claim on those resources, but that such use must be limited because of resource limitations. If an offender's probation violations warrant incarceration beyond the limits of this section, a prison revocation sanction should be imposed pursuant to OAR 253-10-002. As stated in OAR 253-02-001(3)(b), a basic principle of these rules is to maintain enough state institutional capacity for probation violation sanctions. Consequently, the guidelines were designed to ensure that state prison space is available for probation sanctions.

### 3. Non-Custody Conditions

The rules of the State Sentencing Guidelines Board make very little change to the court's traditionally broad discretion to impose appropriate non-custody conditions of probation. The sentencing judge may impose any non-custody condition of probation necessary "to meet the unique circumstance of the offender and to minimize the offender's opportunity to participate in criminal conduct." OAR 253-05-015. The limitation on the court's discretion in this area is procedural. Whenever the sentencing judge imposes a programmatic condition of probation, it must be indicated on the judgment of conviction.

**OAR 253-05-015 NON-CUSTODY CONDITIONS OF PROBATION. (1) The sentencing judge may impose any additional non-custodial supervisory conditions of probation as permitted by law.**

**(2) The sentencing judge may impose programmatic conditions of probation to meet the unique circumstances of the offender and to minimize the offender's opportunity to participate in criminal conduct.**

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

#### Commentary

Section (1) confirms the continued authority of sentencing judges

to impose any non-custodial supervisory conditions permitted by law. See, ORS 137.540.

Section (2) confirms the sentencing judge's authority to impose programmatic conditions of probation to meet the offender's unique circumstances and to minimize the opportunities to participate in new criminal conduct. In the context of this rule, "programmatic conditions" means any specific requirement that the offender participate in one or more structured programs or activities while under supervision. The programs may be designed to achieve offender rehabilitation by addressing his or her educational, vocational or mental health needs. They may also be designed to restrict the offender's behavior in the community including polygraph examinations, antabuse programs or urinalysis testing. "Programmatic conditions", however, do not include any custody programs subject to the provisions of OAR 253-05-011, 253-05-012 or 253-05-013.

While the sentencing judge is free to impose as part of a probationary term any programmatic condition permitted by law, he or she should attempt to keep the severity of the conditions consistent with the seriousness of the crime of conviction.

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

#### 4. Supervisory Authority and Record of Custody Units

Statutory Provision-Section 18, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 137.523):

For felonies committed on or after November 1, 1989:

(1) When the judge sentences the defendant to confinement in a county jail as a condition of probation, the judge shall sentence the defendant directly to the custody of the sheriff or the supervisory authority, as defined in rules of the State Sentencing Guidelines Board, with jurisdiction over the county jail.

(2) When the judge recommends a custodial facility or program other than jail as a condition of probation, the judge shall sentence the defendant directly to the custody of the supervisory authority, as defined in rules of the State Sentencing Guidelines Board, with jurisdiction over the facility or program. Before imposing such a sentence, the judge must determine from the supervisory authority that space is available in the facility or

program and that the defendant meets the eligibility criteria established for the facility or program.

(3) A record of the time served by the defendant in custody under community supervision during probation shall be maintained as provided by rules adopted by the State Sentencing Guidelines Board.

#### Statutory Summary

When the court sets a custodial condition of probation other than a jail term, the court must make certain findings. Section 18, Chapter 790, Oregon Laws 1989. First, the judge must determine that the offender is eligible for the program and second, that space is available for that offender at the time of sentencing or at some specific future date. These findings should be made in cooperation with the person who has jurisdiction over the custody program.

When such findings are made, the sentencing judge sentences the offender to the custody of the supervisory authority. *Id.* The "supervisory authority" is the person designated by the county governing body to "operate corrections supervision services, custodial facilities or both." OAR 253-03-001(19). This designation may be formal or implicit in the responsibilities of the corrections official. A county may have more than one supervisory authority although in such a situation the county governing body should clearly designate the jurisdiction of each supervisory authority.

This section also requires that a record of the custody units served by the offender be maintained in accordance with rules adopted by the State Sentencing Guidelines Board. Subsection (3).

OAR 253-05-017 RECORD OF CUSTODY UNITS. The supervisory authority or the supervisory authority's designee shall keep a record of all custody units served by the offender while under the jurisdiction of the supervisory authority. The record shall be maintained in a form that will enable the sentencing judge to determine whether the custody units imposed as part of a probationary sentence have been served.

#### Commentary

The 1989 Legislative Assembly directed the supervisory authority to keep a record of the custody units served by an offender as part of a probationary sentence imposed for any felony committed on or after November 1, 1989. Section 18, Chapter 790, Oregon Laws 1989. This rule describes the supervisory authority's general record keeping responsibilities to record custody units. The specific form of record keeping is left to the supervisory authority, but the form must enable the sentencing judge to determine whether an offender has served the custody units

imposed as part of probation.

### C. OPTIONAL PROBATIONARY SENTENCES

As has been described in this chapter, the Sentencing Guidelines Grid is divided into two parts by the dispositional line. The presumptive sentences associated with grid blocks above the dispositional line are prison terms with periods of post-prison supervision. These presumptive prison sentences are described in Section A of this chapter. The presumptive sentences for grid blocks below the dispositional line are probationary sentences and those sentences are described in Section B of this chapter.

This final rule for presumptive sentences is an exception to the dichotomy created by the dispositional line. This special rule applies only to grid blocks 8-G, 8-H and 8-I. While these grid blocks are located above the dispositional line, the sentencing judge is given the discretionary authority by OAR 253-05-006 to impose a probationary sentence. If the sentencing judge makes the necessary findings required by the rule, a probationary sentence may be imposed without departing from the guidelines.

OAR 253-05-006 OPTIONAL PROBATIONARY SENTENCES. (1) If an offense is classified in grid blocks 8-G, 8-H or 8-I, the sentencing judge may impose an optional probationary sentence upon making the following specific findings on the record:

- (a) An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism;
- (b) The recommended treatment program is available and the offender can be admitted to it within a reasonable period of time; and
- (c) The probationary sentence will serve community safety interests by promoting offender reformation.

(2) The sentencing judge shall not impose an optional probationary sentence if:

- a. A firearm was used in the commission of the offense; or
- b. At the time of the offense, the offender was under correctional supervision status for a prior conviction.

(3) A probationary sentence imposed for an offense classified in grid blocks 8-G, 8-H and 8-I when not authorized by this rule is a departure.

### Commentary

The Guidelines Board considered several proposals to allow imposition of a sentence of probation, instead of a presumptive sentence of imprisonment, without meeting the requirements for a departure (OAR 253-08-001 et. seq.):

- a. the "first offender option" of the Washington sentencing guidelines which allows a judge to impose probation instead of imprisonment for certain first-time offenders whose presumptive sentence is imprisonment;
- b. the "sex offender option" of the Washington sentencing guidelines which allows a judge to impose probation instead of imprisonment for certain sex offenders; and
- c. the "bridge-block option" of the proposed Washington, D.C. sentencing guidelines which creates a number of "bridge blocks" for which the sentencing judge may impose either probation or imprisonment depending on certain factors.

Although these options were rejected, the Guidelines Board decided that, subject to specified conditions, probation instead of presumptive imprisonment should be available without departure for offenders in grid blocks 8-G, 8-H, and 8-I. These "optional probation" blocks were created for the following reasons:

- a. the 1986 sentencing data considered by the Guidelines Board in adopting these rules revealed that approximately 85 percent of the offenders who would be classified in grid blocks 8-G, 8-H, and 8-I were placed on probation; and
- b. the offenders in those grid blocks have no criminal history or a limited criminal history with no prior person felony convictions.

For these offenders, the Guidelines Board concluded that the sentencing judge is best suited to establish an appropriate sentence and that this expansion of judicial discretion would not produce significant disparity in the treatment of similarly situated offenders.

Section (1) establishes the probationary option for grid blocks 8-G, 8-H and 8-I. It requires the sentencing judge to make certain findings of fact on the record before imposing an optional probationary sentence. The Guidelines Board decided that the probationary option should only be used if an effective treatment program is available to reduce the likelihood of recidivism. The sentencing court must determine that probationary term will better serve public safety interests than the presumptive prison term. If that finding is made and an appropriate treatment program is available to the offender, the sentencing judge should impose the probationary sentence.

Section (2) states two situations that preclude the imposition of

a optional probationary term: (a) use of a firearm in the commission of the current crime of conviction; or (b) commission of the offense when the offender was under correctional supervision status for a prior conviction. This restriction applies even if the offender is otherwise eligible for an optional probationary sentence.

"Correctional supervision status" is defined by OAR 253-03-001(3) as "any form of incarcerative or non-incarcerative supervision which is served by an offender as part of a sentence for a criminal conviction." Correctional supervision status includes, but is not limited to, parole, post-prison supervision, felony or misdemeanor probation, terminal leave, temporary leave and jail or prison incarceration as a part of a sentence. It does not apply to a person who commits a crime while on pretrial release.

OAR 253-05-009 provides that the duration of probation of optional probationary sentences shall be established as required by OAR 253-05-008. Accordingly, the duration of an optional probationary sentence in grid blocks 8-G, 8-H and 8-I shall be three years. That term of probation may also be extended by one-year increments up to a maximum five term as is permitted by OAR 253-05-008(2).

Section (3). If a probationary term is imposed for an offender classified in grid blocks 8-G, 8-H, and 8-I contrary to the requirements of this rule, the sentence is a departure from the guidelines. The reasons for such a sentence must be stated on the record as required by these rules for departure sentences.

