

## 1. THE SENTENCING COMMISSION

**Q.** What year was the commission established? Has the commission essentially retained its original form, or has it changed substantially or been abolished?

The entity that drafted the first version of the Oregon Sentencing Guidelines, the Oregon Criminal Justice Council, was established by statute in 1985 and was given a mandate to develop Sentencing Guidelines in 1987.<sup>1</sup> In 1995 that Commission was abolished and most of its responsibilities were assigned to the Oregon Criminal Justice Commission.<sup>2</sup>

**Q.** Membership: who appoints them, for what terms, with what required qualifications?

The Commission's seven voting members are appointed by the Governor and confirmed by the state senate; there are also two non-voting members appointed by the President of the state Senate and the Speaker of the House from their respective bodies. Members are to be appointed "with consideration of the different geographic regions of the state," and not more than four of them may belong to the same political party.<sup>3</sup>

**Q.** Is the commission an independent agency, or is it located in or hosted by some other state agency?

The Commission is an independent agency, although it was created by and reports to the Legislature.<sup>4</sup>

**Q.** How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?

The Commission currently has a dedicated staff of nine, including an executive director, executive assistant, economist, grant manager, three grant coordinators, a research analyst, and an asset forfeiture liaison.<sup>5</sup>

**Q.** What is the commission's current statutory mandate?

The Commission's overall purpose is "to improve the effectiveness and efficiency of state and local criminal justice systems by providing a centralized and impartial forum for statewide policy development and planning." Its primary duty is "to develop and maintain a state criminal justice policy and comprehensive, long-range plan for a coordinated state criminal justice system that encompasses public safety, offender accountability, crime reduction and prevention and offender treatment and rehabilitation." It may also conduct joint studies with other state agencies; provide Oregon data to federal agencies; serve as a clearinghouse and information center for Oregon state and local sentencing practices; provide technical assistance and support to local public safety coordinating councils; and receive grant applications to start or expand drug court programs.<sup>6</sup>

**Q.** Do statutes and/or guidelines identify management of prison and jail resources as a goal?

The 1987 enabling statute provided that the Criminal Justice Council, in developing the new Guidelines, should take into consideration "the effective capacity of state and local correctional facilities and other sentencing sanctions available."<sup>7</sup> The current Commission's statutory mandate specifies that

<sup>1</sup> Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. Davis L. Rev. 695, 698-99 (1992).

<sup>2</sup> David Factor, *Life Cycle of a Sentencing Commission*, 8 Fed. Sent'g Rep. 93, 97-98 (1995) (noting that when the Criminal Justice Commission was created, responsibility for prison population forecasting was transferred to the agency that develops state revenue forecasts). For further information about the Commission, visit <http://www.oregon.gov/CJC/>.

<sup>3</sup> Or. Rev. Stat. § 137.654(1) (2014).

<sup>4</sup> See Or. Rev. Stat. § 137.654 (establishing the Commission); Or. Rev. Stat. § 137.667(1) (requiring the Commission to "review all new legislation that creates new crimes or modifies existing crimes").

<sup>5</sup> Oregon Criminal Justice Commission Contact Information, [http://www.oregon.gov/CJC/pages/contact\\_us\\_directory.aspx](http://www.oregon.gov/CJC/pages/contact_us_directory.aspx) (last visited Jan. 6, 2015).

<sup>6</sup> Or. Rev. Stat. § 137.656(1)-(3) (2014).

<sup>7</sup> 1987 Or. Laws ch. 619, § 2(3), available at [http://www.oregon.gov/CJC/docs/1987\\_or\\_law\\_ch\\_619.pdf](http://www.oregon.gov/CJC/docs/1987_or_law_ch_619.pdf).

the Commission's long-range plans must include recommendations regarding: capacity, utilization, and type of state and local prison and jail facilities; alternatives to the use of prison and jail facilities; appropriate use of existing facilities and programs; and whether additional or different facilities and programs are necessary.<sup>8</sup> The Guidelines themselves emphasize the importance of setting priorities for and avoiding overcrowding in prisons and jails.<sup>9</sup>

**Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?**

Detailed information about each sentence imposed under the Guidelines must be submitted to the Commission.<sup>10</sup> The resulting data sets are used by the Commission and made available to outside researchers.<sup>11</sup>

## 2. THE GUIDELINES

**Q. When were the guidelines first implemented?**

The Oregon Sentencing Guidelines went into effect as of November 1, 1989.<sup>12</sup>

**Q. In recent years have they been modified at least once a year?**

Updating the Guidelines to account for new legislation is one of the Commission's core duties.<sup>13</sup>

**Q. Do the commission's recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?**

Although the enabling statute provided that the Criminal Justice Council's proposed Guidelines would become effective subject to legislative override, some legislators later objected to that procedure so the Legislature decided to affirmatively enact the initial Guidelines.<sup>14</sup> As for subsequent modifications, the Commission is required to review legislation creating new crimes or modifying existing crimes; it may then adopt any necessary changes to Guidelines offense severity levels, and classify new offenses as "person" felonies or misdemeanors for purposes of the Guidelines. Any such changes not affirmatively approved by the Legislature in its next regular session are repealed as of the following January 1st. Most other changes to the Guidelines do not take effect until affirmatively approved by the Legislature.<sup>15</sup>

**Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?**

The Sentencing Guidelines apply to all felonies<sup>16</sup> except Aggravated Murder,<sup>17</sup> which by statute is punishable by death, life imprisonment without parole, or life with parole eligibility. Misdemeanor crimes are not subject to the Guidelines or to any other state-wide structured sentencing rules.<sup>18</sup>

<sup>8</sup> Or. Rev. Stat. § 137.656(2) (2014).

<sup>9</sup> See Or. Admin. R. 213-002-0001(1) (2014) ("The primary objectives of sentencing are to punish each offender appropriately, and to insure the security of the people in person and property, within the limits of correctional resources provided by the Legislative Assembly, local governments and the people."); Or. Admin. R. 213-002-0001(3)(a) (2013) (one of the "basic principles" underlying the Guidelines is that responses to crime and release violations must reflect available resources because "[a] corrections system that overruns its resources is a system that cannot deliver its threatened punishment or its rehabilitative impact").

<sup>10</sup> Or. Rev. Stat. § 137.010(9) (2014); Or. Admin. R. 213.013.0001 (2013).

<sup>11</sup> Or. Rev. Stat. § 137.656(3)(b) (2014) ("To provide Oregon criminal justice analytical and statistical information to federal agencies and . . . [act as an] information center for the collection, preparation, analysis and dissemination of information on state and local sentencing practices.").

<sup>12</sup> Or. Admin. R. 213-020-0001 (2013).

<sup>13</sup> Or. Rev. Stat. § 137.667(1). For a recent example of such an update, see <http://www.oregon.gov/CJC/Documents/213-2014131Permanent.pdf>.

<sup>14</sup> Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. Davis L. Rev. 695, 699 n.11, 700 (1992).

<sup>15</sup> Or. Rev. Stat. § 137.667 (2014). Legislative advance approval is not required for changes required to implement legislation and certain Department of Corrections programs, or for non-substantive technical and clerical changes. But such changes remain subject to legislative over-ride. *Id.*

<sup>16</sup> Or. Criminal Justice Council, *Oregon Sentencing Guidelines Implementation Manual* at 1 (Sep. 1989), available at <http://www.oregon.gov/CJC/Pages/SG.aspx> ("The Guidelines establish presumptive sentences for felonies committed on or after November 1, 1989.").

<sup>17</sup> Or. Admin. R. 213-004-0003 (2013) ("Aggravated murder is not ranked in the Crime Seriousness Scale because the sentence is set by statute as death or mandatory life imprisonment . . ."); Or. Rev. Stat. § 163.105 (sentencing statute for aggravated murder).

<sup>18</sup> See *State v. Miller*, 835 P.2d 131, 132 (Or. Ct. App. 1992) (citations omitted) ("The Guidelines do not apply to misdemeanor convictions."). However, there are statutory maximums for misdemeanor sentences. Or. Rev. Stat. § 161.615 (2014).

**Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?**

The Oregon Sentencing Guidelines are primarily presented in a grid format, with a single grid that covers all ranked felony crimes. The grid contains eleven severity levels.<sup>19</sup>

**Q. How is the presumptive sentence determined?**

The vertical axis on each grid represents the severity level of the current offense; the horizontal axis represents the offender's criminal history score. The presumptive sentence is determined by locating the cell on the grid (referred to as a "grid block") where the severity level of the offense and offender's criminal history score intersect.

The Guidelines recommend a presumptive prison sentence for offenses classified in a grid block above the solid black line.<sup>20</sup> Each cell carrying a recommended executed prison sentence contains a range of prison durations, in months. A judge may pronounce a sentence within that range without departing from the Guidelines; any prison sentence outside of that range is a durational departure.<sup>21</sup>

In grid cells carrying a recommended non-prison sentence there are two numbers: the lower number in the cell is the maximum number of jail days that may be imposed as a condition of probation (30, 60, or 90 days, depending on the grid cell); the upper number in the cell is the maximum number of "sanction units" (including any jail days) that may be imposed as part of probation (90, 120, or 180 units).<sup>22</sup> One sanction unit equals 16 hours of community service, or one day in full or partial confinement, inpatient treatment, or house arrest.<sup>23</sup>

**Q. Is the choice among types of sentences regulated by a "disposition" or other prison in/out line? Are "out" sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion of prison for those cases?**

The Guidelines grid contains a disposition line (shown on the grid as a solid black line) separating the cells with recommended prison terms (above the line) from the cells with recommended probation (below the line). When a probation sentence is imposed—whether as the presumptive sentence, a downward "dispositional" departure from a recommended prison sentence, or an "optional probation" sentence in one of the border boxes—the court has no authority to also order a suspended-execution prison sentence.<sup>24</sup>

**Q. Are there border boxes or other case categories permitting multiple sentence types?**

There are three border boxes on the Oregon grid (severity level 8, columns G, H, or I — the three lowest criminal history categories) in which prison is the recommended sentence but the court may (but need not) grant probation without meeting the standards for departure. However, the court must find that a non-prison treatment program is available and is likely to be more effective in preventing recidivism than the recommended prison term. Optional probation is not allowed in certain methamphetamine cases, or where a firearm was used in committing the offense or the offender was under correctional supervision at the time.<sup>25</sup>

<sup>19</sup> See *The Oregon Sentencing Guidelines Grid*, Government of Oregon, <http://www.oregon.gov/CJC/docs/guidelinesgrid.pdf> (last visited Jan. 7, 2015). The grid is only available on-line in this separate document; unlike other provisions of the Guidelines, it is not included in the text of the Oregon Administrative Rules.

<sup>20</sup> Or. Admin. R. 213-005-0001(1) (2013); *The Oregon Sentencing Guidelines Grid*, Government of Oregon, <http://www.oregon.gov/CJC/docs/guidelinesgrid.pdf> (last visited Jan. 7, 2015).

<sup>21</sup> Or. Admin. R. 213-008-0001 (2013) ("Except as provided in . . . the sentencing judge shall impose the presumptive sentence provided by the Guidelines unless the judge finds substantial and compelling reasons to impose a departure.").

<sup>22</sup> See *The Oregon Sentencing Guidelines Grid*, Government of Oregon, <http://www.oregon.gov/CJC/docs/guidelinesgrid.pdf> (last visited Jan. 7, 2015) (explaining the numbers shown in each grid block).

<sup>23</sup> Or. Admin. R. 213-005-0012(2) (2013) (enumerating what satisfies a single sanction unit for probationary sentences).

<sup>24</sup> Or. Rev. Stat. § 137.010(3) (2014); *State v. Lucas*, 830 P.2d 601, 602 (Or. App. 1992) ("The state is correct that the court was without authority to sentence defendant to prison and then suspend execution of the sentence.").

<sup>25</sup> Or. Admin. R. 213-005-0006 (2013).

**Q. Are the guidelines purely advisory, or are they legally binding?**

The Guidelines are legally binding; judges must pronounce a sentence within the recommended range unless a departure is ordered, stating legally-valid reasons.<sup>26</sup>

**3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY- RECOMMENDED SENTENCES**

**Q. What is the overall/general standard for departure?**

The court may depart from the presumptive sentence when there are substantial and compelling reasons supporting that decision.<sup>27</sup>

**Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?**

The Guidelines contain lists of permissible aggravating and mitigating circumstances permitting departure, and both of these lists are explicitly stated to be non-exclusive, allowing courts to recognize additional factors. Most of the listed factors reflect retributive (harm and culpability) factors, rendering the offender more or less blameworthy or the offense more or less harmful than is typical for cases of this type. Among the non-retributive factors, one permits downward dispositional departure based on offender amenability to treatment in an available non-prison program; other non-retributive factors permit departure based on persistence of criminal conduct, or a significant period of law-abiding conduct.<sup>28</sup> Case law also recognizes unamenability to probation as a basis for an upward dispositional departure imposing prison rather than probation and jail.<sup>29</sup> The Guidelines do not contain a separate list of prohibited departure factors, but the lists

of mitigating and aggravating factors contain several prohibitions: refusal to cooperate cannot be deemed an aggravating factor; a fact used to trigger a mandatory sentence also cannot be used as an aggravating factor; and crime facts that are elements of the conviction offense or were used to determine its offense severity level can only be used as an aggravating or mitigating factor if the facts make the case significantly different from typical cases of that type.<sup>30</sup>

**Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?**

A listed mitigating factor includes that “[t]he offender cooperated with the state with respect to the current crime of conviction or any other criminal conduct by the offender or other person.” This provision also explicitly states that refusal to cooperate shall not be considered as an aggravating factor.<sup>31</sup>

**Q. Are there limits on the degree of durational (length-of-custody) departure?**

The Guidelines provide that when the court imposes a longer prison sentence than recommended in the Guidelines (upward durational departure) the prison term may not exceed twice the maximum duration for that cell in the grid.<sup>32</sup>

For offenders who receive an prison, in lieu of the recommended probation sentence (upward dispositional departure), the Guidelines also specify a presumptive duration of 6, 12, or 18 months, depending on the crime seriousness category of the conviction offense (these are the terms shown in the “max depart” column of the grid). The Guidelines further provide that departures from these durations require separate justification, and are subject to a “doubling” limit similar to the one noted above (i.e., they cannot exceed 12, 24, or 36 months, respectively).<sup>33</sup>

<sup>26</sup> Or. Rev. Stat. § 137.669 (2014); Or. Admin. R. 213-008-0001 (2013).

<sup>27</sup> Or. Admin. R. 213-008-0001 (2013).

<sup>28</sup> Or. Admin. R. 213-008-0002 (2013).

<sup>29</sup> *State v. Fanning*, 208 P.3d 530, 531–32 (Or. Ct. App. 2009).

<sup>30</sup> Or. Admin. R. 213-008-0002 (2013).

<sup>31</sup> Or. Admin. R. 213-008-0002(1)(a)(F) (2013).

<sup>32</sup> Or. Admin. R. 213-008-0003(2) (2013). See *The Oregon Sentencing Guidelines Grid, Government of Oregon*, <http://www.oregon.gov/CJC/docs/guidelinesgrid.pdf> (last visited Jan. 7, 2015), for a representation of the sentencing grid.

<sup>33</sup> Or. Admin. R. 213-008-0005(1), (3) (2013).

**Q.** Are there limits on the availability of dispositional departure (re: executed-prison vs stayed sentence)?

Other than mandatory-minimum statutes that forbid the grant of probation, there are no limits on the availability of dispositional departures.<sup>34</sup>

## 4. PRISON RELEASE DISCRETION

**Q.** Does this jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?

Determinate prison terms apply and parole release discretion is abolished for all felony crimes except aggravated murder, which by statute remains punishable by death, life without parole, or life with parole eligibility.<sup>35</sup>

**Q.** Does the state have a “truth in sentencing” law, limiting the extent of early release?

Under Oregon’s determinate sentencing system the offender serves a specified duration that cannot be changed by a parole board or equivalent agency, and can only be shortened by the award of good-conduct credits. The maximum credit any offender can earn is 20 percent, so offenders will serve most of the prison time imposed by the sentencing court, thus promoting truth in sentencing.<sup>36</sup>

**Q.** Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?

Since there is no parole release discretion, and the amount of good-conduct credit is limited, the Guidelines effectively specify both the minimum and the maximum time the offender will serve in prison.<sup>37</sup>

**Q.** Is the period of post-prison supervision independent of any unserved prison term?

A term of post-prison supervision is part of any prison sentence for a felony offender. The length of post-prison supervision (generally one, two, or three years) depends on the severity of the offender’s crime, not the amount of good-time earned. The prison term plus the post-release supervision term cannot exceed the statutory maximum punishment for the offense.<sup>38</sup>

**Q.** What good-time credits do prisoners earn? Is program participation considered?

Most inmates can reduce their prison terms by up to 20 percent for good conduct and program participation.<sup>39</sup>

<sup>34</sup> See Or. Admin. R. 213-008-0005 (2013) (this section is titled “Dispositional Departure Limitations” and only proscribes limits on the duration of the dispositional departure—no limitations on when it is permissible to depart).

<sup>35</sup> Or. Admin. R. 213-002-0001(3)(b) (2013); Or. Rev. Stat. § 163.105 (2014) (sentencing statute for aggravated murder); Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. Davis L. Rev. 695, 696–98, 710 (1992).

<sup>36</sup> Or. Admin. R. 213-002-0001(3)(b) (2013); Or. Rev. Stat. § 421.121 (2014) (eligibility for reduction in term of incarceration); Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. Davis L. Rev. 695, 696–98 (1992) (describing how the Oregon guidelines play a role similar to “truth-in-sentencing” laws).

<sup>37</sup> Or. Rev. Stat. § 421.121 (2014) (describing the limits on good-conduct credit); Or. Admin. R. 213-002-0001(3)(b) (2013) (explaining that the sentencing matrix “controls [the] actual length of stay”).

<sup>38</sup> Or. Admin. R. 213-005-0002 (2013).

<sup>39</sup> Or. Rev. Stat. § 421.121 (2014).

**Q. Are prison terms subject to exceptional, “second-look” releasing mechanisms?**

Inmates sent to prison under the Guidelines are eligible for various furlough programs, or for pardon and clemency, but prison terms are not otherwise subject to exceptional, “second-look” releasing mechanisms other than in cases of serious medical infirmity.<sup>40</sup>

**Q. Are some “mandatory” minima subject to case-specific “departure” or other exception?**

The statute imposing mandatory minimum prison terms for using a firearm to commit a felony permits the court to impose a less severe, Guidelines-based sentence on offenders who have not previously been subject to that statute.<sup>43</sup>

## 5. RELATIONSHIP TO CRIMINAL LAWS

**Q. Did the guidelines replace some or all previous statutory maxima?**

The Guidelines did not replace any previous statutory maximum sentences, but rather were designed to operate within those maxima. Subject to the requirements for upward departure and for sentencing to more than double the recommended prison duration, a judge can impose a sentence all the way up to the statutory maximum.<sup>41</sup>

**Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-riden whenever a mandatory applies?**

The Guidelines were set independently of mandatory-minimum statutes, and are over-riden whenever such a statute applies and requires a more severe sentence. If statute requires imprisonment for an offender for whom the Guidelines recommend probation, the Guidelines establish prison durations based upon offense severity.<sup>42</sup>

## 6. CRIMINAL HISTORY SCORING

**Q. What are the major components of the criminal history score?**

Oregon utilizes a criminal history scale, which uses nine mutually exclusive categories, A through I (with A being the most serious), to classify the offender’s prior record according to the nature and extent of those crimes. In making this classification the following elements are included:

1. Prior adult felony convictions;
2. Prior adult class A misdemeanor convictions; and
3. Prior juvenile adjudications for conduct that would be a felony if committed by an adult.

As shown below, classification into a particular category depends on both the number and type of prior crimes. Prior felony and Class A misdemeanors are sub-classified into “person” (violent) and “non-person” crimes. All crimes within each type (e.g., all person felonies) are weighted equally, regardless of their authorized maximum penalties.<sup>44</sup> Every two prior adult person class A misdemeanors is converted into and counted as one adult person felony.<sup>45</sup> Using these rules, the nine categories in Oregon’s Criminal History Scale are defined as follows:

- A. Three or more person felonies (whether adult convictions or juvenile adjudications);
- B. Two person felonies (whether adult convictions or juvenile adjudications);

<sup>40</sup> Or. Rev. Stat. § 144.126 (2014) (release for serious medical condition); Or. Rev. Stat § 144.650 (pardon applications); see Or. Admin. R. 213-005-0012(2)(b) (2013) (explaining sanction unit credits for participation in a residential custodial treatment facility).

<sup>41</sup> Or. Admin. R. 213-008-0003(2) (2013) (“In no case may the sentence exceed the statutory maximum indeterminate sentence described in ORS 161.605.”); Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. Davis L. Rev. 695, 703 (1992) (discussing statutory maximum sentences for each class of felony).

<sup>42</sup> Or. Admin. R. 213-009-0001(1) (2013) (“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.”).

<sup>43</sup> Or. Rev. Stat. § 161.610(5) (2014); Or. Admin. R. 213-009-0001(3) (2013).

<sup>44</sup> Or. Admin. R. 213-004-0006(1) (2013) (explaining the “order of seriousness” for the nine criminal history categories); Or. Admin. R. 213-004-0007 (2013) (listing all the criminal history categories and what comprises each one); Or Admin R. 213-003-0001 (2013) (defining, in part, “Juvenile adjudication” as “an act, which, if committed by an adult, would be punishable as a felony.”).

- C. One adult conviction or juvenile adjudication for a person felony, and at least one adult conviction or juvenile adjudication for a non-person felony;
- D. One adult conviction or juvenile adjudication for a person felony, and no other felonies;
- E. Four or more adult non-person felonies, and no person felonies;
- F. Two or three adult non-person felonies, and no person felonies;
- G. Four or more adult Class A misdemeanors; or one adult non-person felony; or three or more juvenile non-person felonies with no adult or juvenile person felonies;
- H. No adult or juvenile person felonies, no more than two juvenile non-person felonies, and no more than three adult Class A misdemeanors;
- I. No juvenile felonies, no adult felonies, and no adult Class A misdemeanors.<sup>46</sup>

**Q.** Does the jurisdiction utilize “decay”/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

The Oregon Guidelines do not mention any decay rule, look-back limit, or other limitation on the counting of older convictions, so it appears there is none.<sup>47</sup>

**Q.** Do the guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

The highest criminal history scale category (category A) requires at least three prior person (violent) felonies, the next highest (category B) requires at least two such felonies, and the third and fourth highest (categories C and D) require at least one person felony.<sup>48</sup>

## 7. MULTIPLE CURRENT OFFENSES

**Q.** Are consecutive sentences limited? If so, how (e.g., prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

Crimes committed by sentenced inmates must be sentenced consecutively to the sentence the inmate was already serving. In other cases, where two or more crimes are separate (not committed in a continuous and uninterrupted course of conduct), or the offender is already serving a sentence previously imposed by another court (anywhere in the U.S.), the new sentence may be sentenced either concurrently or consecutively, in the court’s discretion. When a defendant is being sentenced for multiple crimes committed in a continuous and uninterrupted course of conduct, consecutive sentencing is permitted (but not required) if the court finds at least one of the following circumstances to exist: 1) a lesser offense “was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime,” but rather indicated defendant’s “willingness to commit more than one criminal offense;” 2) each crime involved a different victim; or 3) the additional crime(s) caused or risked “greater or qualitatively different loss, injury, or harm” to the same victim.<sup>49</sup> Except by departure, the combined duration of consecutive custody sentences may not exceed twice the length of the maximum custody term permitted for the most serious of those crimes.<sup>50</sup>

**Q.** In consecutive sentencing, how is the offender’s criminal history taken into account?

When crimes are sentenced consecutively, the offender’s criminal history is only fully counted for the “primary” (most serious) offense. For all other crimes sentenced consecutively, the judge must use (or depart from) the sentence that would be recommended for that crime if the offender were in the lowest criminal history category (category I).<sup>51</sup>

<sup>46</sup> Or. Admin. R. 213-004-0008 (2013).

<sup>46</sup> Or. Admin. R. 213-004-0007 (2013).

<sup>47</sup> See Or. Admin. R. 213-004-0006 to -0013 (2013) (the guideline rules relating to criminal history). Look-back limits are also not mentioned in the Commission commentary accompanying the first edition of the Guidelines. See Or. Criminal Justice Council, *Oregon Sentencing Guidelines Implementation Manual* at 47–57 (Sep. 1989), available at <http://www.oregon.gov/CJC/Pages/SG.aspx>.

<sup>48</sup> Or. Admin. R. 213-004-0007 (2013).

<sup>49</sup> Or. Rev. Stat. § 137.123 (2014).

<sup>50</sup> Or. Admin. R. 213-012-0020(2)(b) (2013).

<sup>51</sup> Or. Admin. R. 213-012-0020(2)(a) (2013).

## 8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

### Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

Departures from recommended sentences may be appealed by the prosecution and the defense; appeal may not be taken against sentences consistent with Guidelines recommendations, against trial court decisions to impose or refuse to impose optional probation in the three “border boxes,” or against sentences resulting from a court-approved prosecution and defense stipulated sentence agreement.<sup>52</sup> Trial court findings on issues of sentencing law and policy are reviewed de novo, whereas substantial deference is given to the lower court’s factual findings and application of legal rules to those facts.<sup>53</sup> The de novo review standard has resulted in a substantial body of interpretive case law, clarifying and further developing many important issues of Guidelines interpretation and policy.<sup>54</sup>

### Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

Other than sentence appeals, and the requirement that all departure sentences be accompanied by a statement of reasons on the record, there are no other specific enforcement methods. However, in grid cells with recommended custody sentences, the allowed range without departure is fairly narrow, having widths as small as one month and with the top of the range rarely exceeding 110 percent of the bottom.<sup>55</sup>

### Q. Are some deviations from the guidelines not deemed departures?

All deviations from the Guidelines are deemed departures, except for decisions to grant optional probation in cases falling into one of the three border boxes.<sup>56</sup>

### Q. Do some deviations require especially strong justification? Or minimal justification?

All decisions to depart from the Guidelines are subject to the same standards. Regarding degree of departure, however, durational departures that more than double the recommended duration, and consecutive sentences that total more than double the maximum term for the most serious of the crimes, require additional justification beyond that otherwise needed for upward durational departure, or for consecutive sentencing.<sup>57</sup>

<sup>52</sup> Or. Rev. Stat. § 138.222(2), (7) (2014).

<sup>53</sup> Or. Rev. Stat. § 138.222(3), (4) (2014).

<sup>54</sup> See Oregon case law summary, in this Repository.

<sup>55</sup> See Or. Rev. Stat. § 138.222 (2014) (scope of review for sentence appeals); Or. Admin. R. 213-008-0001 (2013) (requirement of stated reasons on the record); *The Oregon Sentencing Guidelines Grid*, Government of Oregon, <http://www.oregon.gov/CJC/docs/guidelinesgrid.pdf> (last visited Jan. 7, 2015).

<sup>56</sup> Or. Admin. R. 213-008-0001 (2013) (departure sentences); Or. Admin. R. 213-005-0006 (2013) (optional probationary sentences).

<sup>57</sup> Or. Admin. R. 2013-008-0001 (2013) (standard for departures); Or. Admin. R. 213-008-0003(3) (2013) (an exception to the limitation on durational departures); Or. Admin. R. 213-008-0007(3) (2013) (an exception to the limitation on duration of consecutive sentences); Or. Admin. R. 213-012-0020(2)(b) (2013) (limitation on duration of consecutive sentences).