10-9-1998

Ballot Measure 61: Increased Sentences for Specified Crimes and Repeat Offenders

City Club of Portland (Portland, Or.)
Oregon’s existing sentencing guidelines provide judges with a rational mechanism for ensuring fair, consistent sentences that take into consideration the relative severity of the individual crime, the criminal history of the offender, and the resource constraints of the criminal justice system. The usefulness of the guidelines, however, has been eroded by separate sentencing provisions that take little or no account of these factors. Measure 61 would be the latest of these provisions. Its proponents contend that it addresses an absence of meaningful sanctions under the guidelines for property crimes, particularly repeated property crimes. The measure, however, would increase sentences for a wide array of property and person crimes without consideration of the need for additional incarceration—from the standpoint of either justice or deterrence—and without consideration of the availability of financial and other resources to provide for it. There is little evidence that this blanket increase in the length of criminal sentences would substantially reduce the rate of crime, but even the proponents agree that the measure would impose hundreds of millions of dollars in additional prison costs on the state. Such a large commitment of state funds to prisons should not be made without evaluating its effect on other critical state programs, including other components of the criminal justice system. If the current sentencing guidelines do not provide sufficiently lengthy periods of incarceration for certain crimes, the Oregon Legislative Assembly can and should make appropriate adjustments in the guidelines for those specific crimes after due consideration of the financial effects of the adjustments on other state programs. This would allow efficient use of the state’s criminal justice resources as well as allow judges to tailor sentences to the circumstances of each individual crime and offender. Measure 61, on the other hand, would be neither efficient nor just.

Your committee unanimously recommends a “No” vote.
I. INTRODUCTION

Ballot Measure 61 will appear on the ballot as follows:

| **Caption:** | CHANGES MINIMUM SENTENCES FOR LISTED CRIMES, INCLUDING CERTAIN REPEAT OFFENSES. |
| **Result of “Yes” Vote:** | “Yes” vote changes minimum sentences for listed crimes, including certain repeat offenses. |
| **Result of “No” Vote:** | “No” vote retains present sentencing statutes and guidelines for listed crimes, including repeat offenses. |
| **Summary:** | Establishes minimum sentences for crimes listed as “major crimes.” Provides one to three year proportionally increased sentences for major crimes, aggravated murder or murder if person has one to three prior convictions for major crime within past 10 years. Prior juvenile court adjudications involving major crimes apply to increase sentences. Treats prior conviction for driving under influence of intoxicants as major crime if current conviction is for criminally negligent homicide using vehicle. Prohibits temporary leave or other reduction in additional prison time imposed under measure. |

(The language of the caption, question, and summary was prepared by the Oregon State Attorney General.)
Because of the significance of Measure 61, and because the City Club did not examine Measure 11 in 1994, the Research Board directed that a committee be formed to study Measure 61. The committee was selected from a pool of City Club members who had volunteered to participate in ballot measure studies. The committee members were screened to ensure that they had no economic interest in the outcome of the measure and had taken no public position on the measure or its subject. The committee interviewed proponents and opponents of the measure, as well as other knowledgeable people, and reviewed reports, articles, and other information, all of which are listed in the Appendices.

Measure 61 was placed on the ballot through an initiative petition sponsored by Kevin Mannix of Salem, a lawyer and former state legislator, and Steve Doell of Lake Oswego, the President of Crime Victims United. The measure is in some senses a successor to Measure 11 in 1994, which voters overwhelmingly approved and which established mandatory minimum sentences for certain violent crimes. Although Measure 61 applies to both violent and property crimes, including most Measure 11 crimes, its proponents have said that the measure’s principal objective is to ensure that felony property offenders, particularly repeat offenders, receive longer prison sentences. They contend that existing sentences are too lenient either to provide “appropriate punishment” or to serve as an effective deterrent to the commission of future crimes.

Measure 61 would create new statutory sentencing provisions for crimes defined by the measure as “major crimes.” These provisions would: (1) require repeat major crime offenders to serve an additional one to three years in prison beyond the sentence imposed for the major crime itself, and (2) establish a “presumptive” prison sentence of 14 months for all major crimes for which the law does not already establish a presumptive or mandatory sentence of 14 months or more. Neither the sentencing judge nor correctional authorities would be allowed to reduce the additional sentence for repeat offenders for any reason, but the sentencing judge could impose a sentence that was longer or shorter than the 14-month presumptive sentence for “substantial and compelling reasons,” and correctional authorities could reduce that sentence by up to 20 percent for good behavior.

II. BACKGROUND

To understand and evaluate Measure 61, one must understand Oregon’s existing, multi-layered system of sentencing laws. Some of these laws were created by the state legislature, others by citizen initiative. Because these laws are quite complex, this section begins with a relatively detailed description and
explanation of Oregon’s 1989 sentencing guidelines and the layers that have been added to them. This is followed by a brief discussion of trends in Oregon crime and incarceration rates, a summary of how Measure 61 would alter Oregon’s sentencing system, and discussion of Measure 61’s likely financial impact.

A. Overview of Existing Oregon Sentencing Laws

Oregon’s criminal statutes establish the maximum sentence for each crime, generally by categorizing the crime as a specified class of felony or misdemeanor. The maximum sentences for Class A, B, and C felonies are, respectively, 20, 10, and 5 years; the maximum sentences for misdemeanors are 1 year or less. Murder and aggravated murder are among the small number of unclassified crimes and are subject to separate sentencing provisions.

Although most crimes have specified maximum sentences, the actual sentences imposed within these maximums are determined by other legal provisions. Chief among these are the “sentencing guidelines.” The sentencing guidelines establish “presumptive sentences.” A presumptive sentence is the standard sentence a convicted offender receives based on a formal categorization of the relative severity of the crime and the offender’s criminal history. Judges may impose a sentence that deviates from the presumptive sentence only for “substantial and compelling reasons.” Guideline sentences include an additional period of post-prison supervision and may be reduced to a limited degree by correctional authorities in order to encourage good behavior and self-improvement. Sentencing guidelines must, ultimately, be based on the resources of the criminal justice system.

Overlaid on the sentencing guidelines, however, are a number of separate sentencing provisions that increase, for specified crimes and circumstances, the time that would otherwise have been served under the guidelines. The increases are effected through longer presumptive sentences, mandatory minimum sentences, or prohibitions on sentence reductions by correctional authorities. Measure 61 would employ all three of these mechanisms to increase the time served for the crimes listed in the measure as “major crimes.”

1. Sentencing Guidelines

Genesis of the Guidelines: Before the adoption of sentencing guidelines in 1989, judges sentenced offenders to “indeterminate” sentences. An indeterminate
sentence states a maximum period of confinement, which cannot exceed the statutorily authorized maximum sentence. Within the limit of the judicially imposed indeterminate sentence, however, an offender’s actual period of confinement was determined by the State Board of Parole using a matrix that considered the severity of the offense and the criminal history of the offender.

By the late 1980s, the indeterminate sentencing system had lost public credibility. Sentencing decisions varied substantially from judge to judge and from county to county because there was little or no guidance for imposing indeterminate sentences. Furthermore, the actual time served by offenders under the parole matrix was often far shorter than the indeterminate sentence. The problem was exacerbated by severe prison overcrowding, which required inmates to be released sooner than they otherwise would have been in order to make room for more dangerous inmates. For example, offenders in 1986 served an average of only 24 percent of their judicially imposed sentences. The parole matrix was an effort to establish priorities for allocating the state’s limited correctional resources, but releases were often made in a crisis atmosphere that allowed little opportunity for thoughtful decisions or meaningful policy guidance from the legislature.

To resolve these problems, the 1987 Oregon Legislature directed the Oregon Criminal Justice Council (the predecessor of the Oregon Criminal Justice Commission) to develop sentencing guidelines. The goals of the guidelines were to establish sentences that were:

1. proportional to the relative severity of the crime and criminal history of the offender;
2. applied uniformly to offenders with similar criminal histories who committed the same crime;
3. imposed by judges, subject only to limited reductions by correctional authorities for good behavior and participation in rehabilitation programs;
4. consistent with the available resources of the criminal justice system.

In short, the objective of the guidelines was to adopt a rational sentencing policy that would base sentencing decisions on a wide range of considerations instead of an ad hoc reaction to an individual crime or offender on the one hand or a lack of prison capacity on the other hand.

Oregon’s sentencing guidelines were developed from existing systems in Minnesota and Washington but included several innovative features that have
since been copied by other states. Among these features were (and are) articulated principles for ranking the seriousness of crimes and a criminal history scale that is both simpler and more sensitive to the seriousness of an offender's criminal history. The Oregon Sentencing Guidelines Board adopted the guidelines in November 1988 and forwarded them to the 1989 Oregon Legislature, which approved them with amendments, effective November 1, 1989. The Oregon Criminal Justice Commission has the authority to amend the guidelines, subject to the approval of the legislature.

Structure of the Guidelines: The guidelines employ a two-dimensional grid to specify presumptive sentences. The vertical axis is the Crime Seriousness Scale, which ranks the seriousness of crimes from 1 (least serious, e.g., bigamy) to 11 (most serious, e.g., murder). The horizontal axis is the Criminal History Scale, which ranks the seriousness of the offender's criminal history (including juvenile adjudications for acts that, if committed by an adult, would constitute a felony) from I (least serious—no prior felony convictions or adult Class A misdemeanor convictions) to A (most serious—three or more prior convictions for “person,” i.e., violent, felonies). For example, the presumptive sentence for a person convicted of negligent homicide (category 8) with a single prior conviction for burglarizing an occupied dwelling (a “person” felony—category D) would be found in grid block 8-D: 27 to 28 months in prison. (The statutory maximum sentence for negligent homicide, a Class C felony, is 5 years (60 months).)
A judge may impose a sentence that is longer or shorter than the presumptive sentence—known as a “departure”—but only if there are “substantial and compelling reasons” for doing so. The guidelines include a nonexclusive list of “aggravating” and “mitigating” factors that may justify an upward (increased sentence) or downward (decreased sentence) departure, respectively. Among the listed aggravating factors are:

- persistent involvement in similar offenses (by far the most commonly cited factor),
- the vulnerability of the victim,
- the use of a weapon,
- multiple victims,
- exceptional harm or loss, and
- crimes motivated by the race, ethnicity, religion, or sexual orientation of the victim.

An unlisted but frequently cited aggravating factor is commission of the crime while under some form of correctional supervision, such as post-prison supervision or work release.

Among the listed mitigating factors are:

- cooperation with the state (the most commonly cited),
- diminished mental capacity (excluding voluntary drug or alcohol abuse),
- acting in a minor or passive role, and
- the availability of a treatment program that is more likely to prevent continued criminal behavior than imprisonment.

The parties may also negotiate and agree to a departure. Upward departures are generally limited to double the maximum presumptive sentence, or—if the presumptive sentence is probation—1 to 3 years, depending on the crime seriousness category.

Probation, Sentence Reductions, and Post-Prison Supervision: Under the guidelines, the presumptive sentence is “probation” for all category 1 through 3 crimes and for category 4 through 7 crimes associated with the less serious criminal history categories. Probation in this context, however, means a sentence other than a “prison” sentence. Under Oregon law, sentences of 12 months or less must be served in local jails rather than state prisons. Thus, a sentence of
"probation" under the guidelines may include, and more often than not does include, a short period of confinement in the local jail or some other punitive sanction, such as work release, as a condition of probation. For presumptive probation sentences, the guidelines specify a presumptive number of "sanction units" that may be included in the sentence. Sanction units establish the maximum amount of time that must be served in various forms of custodial supervision, including jail, custodial treatment facilities, release programs, house arrest, and community service.

The presumptive term of probation is 18 months to five years, depending on the crime category, but the sentencing judge may impose a different term of up to five years under certain circumstances or as a "departure." Probation may be revoked for a violation of its conditions or for new criminal activity. If the presumptive sentence was probation, a sentence of up to six months may be imposed upon revocation. If the presumptive sentence was prison, a sentence of up to the maximum presumptive sentence may be imposed.

Prior to the adoption of the sentencing guidelines, prison inmates could substantially reduce their sentences through good behavior (a one-third reduction), prison work, and enrollment in educational programs. Correctional authorities may reduce guideline sentences, however, by a maximum of only 20 percent for good behavior and participation in functional literacy programs. Although one of the fundamental goals of the sentencing guidelines is "truth in sentencing," i.e., to ensure that judicially imposed sentences are actually served, a modest provision for sentence reductions by correctional authorities was maintained in order to provide incentives for maintaining prison order and encouraging inmate rehabilitation.

All sentences under the guidelines, including probation revocation sentences, include a term of post-prison community supervision, which replaces the former parole system. The term is one year for crime seriousness categories 1 through 3, two years for categories 4 through 6, and three years for categories 7 through 11. (If the total length of incarceration plus post-prison supervision would exceed the statutory maximum sentence for the crime, the period of post-prison supervision must be reduced so that the statutory maximum sentence is not exceeded.) The State Board of Parole and Post-Prison Supervision may impose sanctions, including jail, for violations of post-prison supervision conditions.

**Statistical Information on Sentencing Practices Under the Guidelines:**
Statistical information, allow limited, shows that judges are much more likely to increase a presumptive sentence than to reduce it. During 1994, the most recent
year for which statewide data is available, judges departed from the guideline sentences in approximately one-fourth of all cases. Upward departures were about twice as common as downward departures. "Dispositional departures"—a prison sentence when the presumptive sentence is probation or probation when the presumptive sentence is prison—occurred in approximately 10 percent of cases, with upward dispositional departures being four times more common than downward dispositional departures. The upward dispositional departures occurred most often when the offender had a lengthy criminal record. For example, in crime history category A (three or more person felonies), the upward dispositional departure rate was as high as 74 percent, and in category E (four or more non-person felonies), the upward dispositional departure rate was as high as 40 percent.

The percentage of felony offenders sentenced to prison and to jail and the length of prison time served all increased from 1986 (three years before the adoption of the guidelines) to 1994. The percentage of felons sentenced to prison increased from 18 to 22 percent. Felons sentenced to local jails in conjunction with probation increased from 31 percent to 45 percent. Felons receiving probation without jail fell from 49 percent to 31 percent. Average prison time served increased from 16 months to 25 months, with the largest increases for person crimes.

2. Other Sentencing Provisions, Including Mandatory Minimum Sentences

Several statutory provisions substantially limit the influence of the guidelines on sentencing decisions.

Use of a Firearm. The use of a firearm during the commission of a felony may result in the imposition of minimum sentences ranging from 5 to 30 years, depending on the nature of the weapon and the number of previous convictions for the use of a firearm during the commission of a felony. For first offenses, the sentencing judge has the discretion to impose a sentence in accordance with the sentencing guidelines. Minimum sentences may be reduced by up to 20 percent for good behavior, but offenders are not eligible for other forms of early release or work release.

1988 Measure 4—Determinate Sentences for Certain Repeated Felonies. In 1988, just as the sentencing guidelines were being adopted, the voters overwhelmingly approved an initiative measure (Ballot Measure 4) that required a determinate sentence for specified felonies if the person had previously been convicted of any of the felonies. Probation, parole, and sentence
reductions for good behavior or other reasons are prohibited for these sentences. The felonies subject to Measure 4 are aggravated murder, murder, and the first degree of manslaughter, assault, kidnapping, rape, sodomy, unlawful sexual penetration, burglary, arson, and robbery. Apart from the prohibition on probation, no specific sentence is required, but the guideline sentence must be applied if it is more stringent.

1994 Measure 11—Mandatory Minimum Sentences for Certain Person Felonies. In 1994, the voters approved an initiative measure (Ballot Measure 11) that mandates lengthy prison terms for a wide variety of person felonies, including: murder and attempted murder; manslaughter, assault, kidnapping, rape, sodomy, unlawful sexual penetration, and robbery in the first and second degrees; arson and sexual abuse in the first degree; using a child in a display of sexually explicit conduct; and compelling prostitution. Except for murder (25 years), the mandatory minimum sentences range from 5 years and 10 months to 10 years. The sentencing judge has no discretion to impose a shorter sentence, and the offender is not eligible for any form of sentence reduction, such as credit for good behavior. In 1997, the Oregon Legislature modified Measure 11 to allow judges—under narrowly defined circumstances—to impose guideline sentences for assault, kidnapping, and robbery in the second degree.

1996 Presumptive Sentence Increases for Certain Property Crimes. The sentencing guidelines treat violent crimes much more seriously than property crimes. To free correctional capacity for persons who commit violent crimes, the presumptive sentences for property crimes are probation or relatively brief prison sentences, even for repeat offenders. Although, as noted above, judges frequently imposed substantial upward departure sentences on repeat offenders, the frequency with which judge choose to increase sentences was perhaps an indication that the guideline sentences for repeat property offenders were too lenient. To address this problem—and in an apparent effort to preempt an initiative similar to Measure 61—a special session of the legislature in 1996 passed substantial increases in the presumptive sentences for certain repeated property crimes.

The crimes addressed by the 1996 legislation include: burglary in the first degree (for which the presumptive sentence for repeat offenses was increased to 19 months) and unauthorized use of a vehicle, possession of a stolen vehicle, trafficking in stolen vehicles, theft and aggravated theft in the first degree, burglary in the second degree, and criminal mischief in the first degree (for which the presumptive sentence for repeat offenses was increased to 13 months).
The number and type of previous convictions necessary to trigger these provisions varies for each of the listed crimes, but, for example, a single previous conviction of burglary in the first degree or unauthorized use of a vehicle is sufficient to trigger the provisions for a second conviction of the same crime. As with all presumptive sentences, the sentencing judge is authorized to impose a shorter sentence or probation as a downward departure for "substantial and compelling reasons." Your committee was told, however, that such departures have been rare to date.

B. Trends in Oregon Crime and Incarceration Rates

Crime statistics are notoriously difficult to interpret and can be easily manipulated to support one view or another. In particular, because of differences in reporting and data gathering techniques, state-to-state comparisons must be viewed with extreme caution. With those significant caveats, the following general observations can be made.

Crime rates (i.e., the number of crimes committed for a given population) for both violent and property crimes in Oregon are essentially the same now as they were 20 years ago. Although year-to-year variations have occurred, there has been no long-term upward or downward trend.

The violent crime rate, expressed as crimes per 100,000 residents, was 438.5 in 1975 and 463.1 in 1996. The rate in 1996, however, was the lowest since 1977. The proponents of Measure 61 have attributed recent decreases in violent crime to tougher sentencing provisions, particularly the approval of Measure 11 in 1994, but the violent crime rate peaked in 1985 at 551.1 and dropped significantly before the approval of Measure 11. Although Measure 11 may have had some effect on violent crime, clearly other factors were at work. It is also worth noting that Oregon's violent crime rate ranged from the 11th to 17th highest in the nation from 1975 to 1979 but since 1990 has ranked no higher than 26th and has been as low as 30th.

Similarly, the property crime rate was 6313.7 in 1975 but only 5533.6 in 1996. The rate increased during the early 1990s after a dramatic decline between 1988 and 1990, but the rate is still lower than the rates from the early and mid-1980s. Again, it is difficult to attribute these short-term trends to any change in sentencing policies. With respect to state-to-state comparisons, Oregon's property crime rate is relatively high, ranking 9th in 1996 after ranking 5th in 1994 and 1995. Oregon, however, ranked 5th in 1975 and 4th in 1985 and has never ranked lower than 16th over the past 20 years. Some have attributed the
high ranking to relatively high crime reporting rates in Oregon; others have attributed it to Oregon’s policy of reserving limited prison and jail space for violent offenders. No convincing evidence exists, however, for any one explanation.

Although by international standards Oregon’s prison incarceration rate is extremely high (twice as high or more than the rates in most industrialized countries), the rate is low by United States standards. Oregon’s incarceration rate has approximately doubled since the mid-1970s, and its prison population has increased 44.9 percent from 1992 to 1997. But its 1997 incarceration rate of 232 sentenced prisoners (i.e., persons sentenced to more than one year) per 100,000 residents was the tenth lowest in the nation and the second lowest in the West (after Utah). In 1997, Oregon’s prisons were at 105 percent of their operating capacity, but the state is rapidly increasing its prison capacity with new construction.

C. Sentencing Changes That Would Be Effected by Measure 61

Measure 61 would change existing sentencing rules in two ways. First, any person convicted of a “major crime,” as defined in the measure, would be required to serve an additional mandatory minimum sentence of 1, 2, or 3 years if the person had, respectively, 1, 2, or 3 or more “previous convictions” for a “major crime” or murder or aggravated murder within the preceding 10 years. A “previous conviction” would include juvenile adjudications (the term for a judgement in a juvenile court process) for acts that, if committed by an adult, would constitute a “major crime.” In addition, “previous convictions” would include other convictions in the same proceeding as long as they were part of a “separate criminal episode.” For example, a person convicted of four separate burglaries in the same proceeding would be subject, for the fourth burglary, to a mandatory sentence of three years based on the three “previous” burglary convictions, plus the guideline sentence for the burglary. The additional mandatory sentences could not be reduced for any reason, including good behavior, but also could not cause the total term of imprisonment to exceed the statutory maximum sentence for the crime.

Second, Measure 61 would amend the sentencing guidelines by establishing a presumptive sentence of 14 months for every “major crime” for which the presumptive or mandatory sentence was not already 14 months or more. Like other presumptive sentences, judges could impose a longer or shorter sentence for “substantial and compelling reasons,” and the sentence could be reduced by up to 20 percent for good behavior.
Measure 61 is intended to ensure not only that offenders serve longer sentences but also that they serve the sentences in state prisons instead of local jails. Because sentences of more than 12 months must be served in prison, the additional mandatory sentences for repeat offenders and the presumptive 14-month sentences would send many offenders to prison who would otherwise have been sentenced to local custody.

“Major crimes” for purposes of Measure 61 are listed below. “Major crimes” that are also Measure 11 crimes are set forth in bold. “Major crimes” for which the 1996 Legislative Assembly specified increased presumptive sentences for repeat offenders are set forth in italics.

- Promoting Prostitution
- Theft by Extortion
- Criminal Mistreatment in the First Degree
- Felon in Possession of a Firearm (if the felony is a Class A or B Felony)
- Criminally Negligent Homicide (in a conviction for Criminally Negligent Homicide that involves the use of a vehicle, a prior conviction for Driving under the Influence of Intoxicants counts as a previous “major crime”)
- Conspiracy, Attempt, or Solicitation to Commit a Class A or B Felony
- Escape in the First Degree
- Bribe Giving or Receiving or Bribing a Witness
- Perjury
- Robbery in the First, Second, or Third Degree
- Assault in the First, Second, or Third Degree
- Arson in the First Degree
- Compelling Prostitution
- Conspiracy, Attempt, or Solicitation to Commit Aggravated Murder or Murder
- Manslaughter in the First or Second Degree
- Rape in the First, Second, or Third Degree
- Sodomy in the First, Second, or Third Degree
- Unlawful Sexual Penetration in the First or Second Degree
- Sexual Abuse in the First or Second Degree
Burglary in the First or Second Degree

Aggravated Theft

Unauthorized Use of a Motor Vehicle (if committed by taking, operating, or exercising control over the vehicle)

Criminal Mischief in the First Degree (if the aggregate value of the damage or destruction of property exceeds $10,000)

The "major crimes" that are also Measure 11 crimes already require mandatory minimum sentences of 70 months or more. This is well in excess of the 14-month presumptive sentence specified by Measure 61. (For substantial and compelling reasons, a court may choose not to apply Measure 11's mandatory minimum sentence to Robbery and Assault in the Second Degree; Measure 61's presumptive sentence of 14 months, however, is likely to have little bearing on these downward "departures.") For Measure 11 crimes, Measure 61's only effect would be to add, in the event of previous major crime convictions, an additional one to three years to the mandatory sentence.

For the "major crimes" that are subject to the increased presumptive sentences for repeat offenders specified by the legislature in 1996, the principal effects of Measure 61 would be: (1) to establish a presumptive sentence of 14 months in prison for first-time and other offenders who do not have the required criminal history to trigger the increased presumptive sentences under the 1996 legislation (and for whom the current presumptive sentence is generally probation), and (2) to require additional incarceration of from 1 to 3 years for repeat offenders.

B. Financial Effects of Measure 61

The state's official Estimate of Financial Impact (EFI) forecasts that Measure 61 would require 4,300 new prison beds by 2006 at a construction and start-up cost of $470 million. Direct state expenditures for prison operating costs and debt service would increase from $21 million in 1999-2000 to $125 million in 2005-2006. State payments to counties for probation and post-prison supervision would be reduced by $800,000 to $1.9 million per year because fewer offenders would receive probation. Direct state expenditures for court operations and indigent defense would increase by approximately $1 million per year by 2001-2002. In sum, if the EFI is accurate, Measure 61 would cost the state approximately $168 million by the end of the next biennial budget cycle in 2001 and more than $1 billion over the next 10 years.
To place these numbers in perspective, state general fund and lottery spending in the 1997-99 biennium is $9.4 billion, of which $1.3 billion is budgeted for public safety programs, including $836 million for adult and youth corrections. The budget for adult and youth corrections is an increase of nearly 40 percent from the 1995-97 biennium. Expressed as percentages of state general fund and lottery spending in the 1997-99 biennium, Measure 61's estimated increase in state expenditures of $168 million during the 1999-2001 biennium is approximately 1.8 percent of total expenditures, but approximately 20 percent of adult and youth corrections expenditures, which are increasing rapidly even without Measure 61.

The EFI is necessarily based on a number of predictions concerning the reactions of the criminal justice system to Measure 61. These include the plea bargaining practices of prosecutors, the sentencing practices of judges with respect to presumptive sentences, the number of arrests for “major crimes,” prior criminal histories of offenders, and the degree to which additional prison beds will need to be minimum or medium security beds. Because these factors are difficult to predict with any great degree of accuracy, the actual financial effects of the measure on the state may be quite different from those stated in the EFI.

Proponents of Measure 61 have strenuously argued that the EFI substantially overstates the measure's financial effects. They note that the EFI for Measure 11 significantly overstated the financial effects of that measure, which they attribute to a reduction in violent crime caused by the deterrent effects of the measure. Others have suggested that the overstatement was due (1) to a general, nationwide drop in the rate of violent crime that had nothing to do with Measure 11, and (2) to Measure 11 crimes being plea bargained down to non-Measure 11 crimes in order to avoid the measure’s mandatory minimum sentences. The proponents, however, do not dispute that Measure 61 would likely require the construction of a new prison of 2,200 to 2,800 beds. This would require direct state expenditures for construction and operating costs of at least several hundred million dollars over the next 10 years.
III. ARGUMENTS PRO AND CON

A. Arguments Advanced in Favor of the Measure

- The measure will lengthen sentences, particularly for property crimes and repeat offenders. The sentencing guidelines and other laws do not impose sentences that sufficiently reflect the seriousness of the crimes listed in the measure.

- The increased sentences required by the measure will reduce crime, particularly property crime, by keeping criminals incarcerated longer and by deterring others from committing crimes.

- By requiring longer sentences that must be served in state prisons rather than local jails, the measure will shift some of the costs and problems of dealing with inmates from local governments to the state, which is better able to pay the costs and solve the problems.

B. Arguments Advanced Against the Measure

- The measure will have little or no effect on crime rates and may encourage some young offenders to become career criminals by requiring long-term incarceration without incentives for rehabilitation.

- The measure’s mandatory and presumptive sentences will further limit the ability of judges to tailor sentences to fit the crime and the criminal history of the offender. Instead, the measure will give prosecutors an inappropriate degree of discretion to dictate sentences through their charging decisions, and the criminal justice system will be distorted by plea bargaining crimes down to offenses outside the measure in order to avoid its mandatory sentencing provisions.

- The measure will impose substantial financial burdens on the state without identifying a new source of funding or specifying what existing spending should be reduced.
The mandatory sentences required by the measure will create prison disciplinary problems by eliminating incentives for proper behavior and rehabilitation.

IV. DISCUSSION

Two principal arguments have been advanced for Measure 61. The first is that it will provide more appropriate punishment for serious crimes that are now treated too leniently. The second is that it will reduce crime, particularly property crime, by removing career criminals from the streets and deterring future crimes by others. These arguments and arguments against the measure are discussed below.

A. Punishment

Although the proponents of Measure 61 are sincere in their belief that the measure will substantially reduce crime, the first section of the measure makes plain another purpose that is perhaps more significant to the proponents: "The purpose of this Act is to protect the public by imposing tougher sentences on criminals who repeatedly violate major criminal laws and to ensure that all criminals are held accountable and punished for major crimes...." (Emphasis added.) Moreover, in his interview with the committee, proponent Steve Doell stated that the "first goal" of Measure 61 "is to provide appropriate punishment for serious felony property offenders" and the "second goal is to provide an effective deterrent to repeated criminal conduct involving property crimes."

Your committee is not unsympathetic to the view that the criminal justice system should do more than endeavor to protect the public from future crimes. For most crime victims, it is the completed crime against them or their family and friends that is of concern, not potential future crimes. Even relatively minor property crimes that cause little physical or financial harm can deeply offend our senses of justice and well-being. A sentence that appears to treat a crime too lightly may only compound the offense, no matter how appropriate the sentence may be for protecting the public from future crimes.

Measure 61, however, offers little comfort to our senses of justice and well-being. First, it has no element of proportionality. It would apply the same mandatory
and presumptive sentences to a wide range of crimes and offenders. A second conviction for unauthorized use of a motor vehicle would merit the same sentence enhancement as a second conviction of first degree manslaughter or rape. A first degree robbery conviction would merit the same sentence enhancement as a third degree robbery conviction. A first degree criminal mischief conviction would merit a sentence enhancement under the measure but kidnapping would not. Indeed, little thought appears to have been given to the specific crimes included in the measure.

Second, packing off an offender for a lengthy stay in a state prison, where the offender is simply serving his or her time, is not always the best means of doing justice to the crime or the victims. Especially for property offenses, a sentence that includes a limited period of local confinement combined with restitution to the victims, service to the community, and treatment for drug or alcohol abuse would seem to offer greater opportunities for ensuring that justice is done and for restoring the victims' and the community's sense of well-being.

This is not to say that the sentences imposed for some crimes should not be increased. The high percentage of upward departures in sentences for repeated property offenses, discussed above, suggests that judges may have believed that the sentencing guidelines were too lenient in these circumstances. The legislature's 1996 enactment of longer presumptive sentences for certain repeated property crimes was a response to this. But Measure 61 paints with a brush that is too broad. If criminal sentences need to be increased for reasons of justice, the increases should be justified with some particularity. Measure 61's proponents have not done that. The measure's wholesale increases in prison sentences appear to be motivated by no principle of justice higher than incarcerating as many offenders as possible, as far away as possible, for as long as possible.

B. Deterrence

The other principal argument for Measure 61 is that it will reduce crime, particularly the property and other "major crimes" defined in the measure that are not already subject to Measure 11. Its proponents contend that it will do this both by incarcerating criminals for longer periods, thereby preventing them from committing further crimes, and by deterring others.

Obviously, incarceration will drastically limit the opportunities for an offender to commit additional crimes against the public while the offender is incarcerated. It is also reasonable to believe that the prospect of longer
incarceration would have some deterrent effect on others. But your committee found little evidence that the additional incarceration required by Measure 61 would substantially reduce crime.

As discussed above, the rates for both violent and property crimes in Oregon are essentially the same now as they were 20 years ago. The incarceration rate over that period, however, has approximately doubled. One cannot conclude from this that the rate of incarceration has no effect on crime—the crime rate, after all, might have been higher in the absence of the higher incarceration rate. But it is difficult to discern from the data any relationship between the crime rate and the rate of incarceration. In particular, the evidence does not support the proponents' contention that Measure 11 is responsible for reducing the violent crime rate. The rate of violent crime in Oregon has fluctuated from year to year, but the overall trend has been downward since 1985, well before the adoption of Measure 11 in 1994. Moreover, violent crime rates have fallen nationally throughout the 1990s, both in states that have required longer terms of incarceration and in those that have not.

The proponents contend that deterrence is more effective for property crimes than violent crimes because the decision to commit a property crime is more likely to involve a weighing of risks and potential benefits. Again, however, there is no strong association in the available data between incarceration rates and property crime rates. Oregon property crime rates fell in the 1980s, rose again in the early 1990s, and now appear to be falling again. Although sentencing practices for property crimes may have had some effect on the property crime rate, none of these shifts in the rate can be clearly attributed to shifts in sentencing practices.

There are many reasons why increases in sentences for property crimes might not be expected to have a substantial effect on property crime rates. One reason is that an arrest is made for only a small percentage of property crimes. It is a commonplace that punishment is an effective deterrent only when it is certain and swiftly applied. The prospect of a longer term of incarceration is likely to be a weak deterrent when the chances of being apprehended are slim and the extra term of incarceration will not be served until many months or years in the future. Another reason for a lack of deterrence is that many persons who commit property crimes are drug addicts. The slim prospect of additional incarceration at some indefinite time in the future is unlikely to weigh heavily against the immediate need to satisfy the addiction.

With respect to the violent crimes that are addressed by both Measure 11 and Measure 61, it is difficult to believe that a prison term of from one to three years
in addition to a mandatory minimum term of from 5 years and 10 months to 10 years would have a significant deterrent effect. The additional term would ensure that the public is protected from the offender that much longer, but the effect on the overall crime rate is likely to be minuscule. Moreover, if more prison time were appropriate for some Measure 11 offenders, it would be better to address that issue directly rather than as a byproduct of Measure 61.

Incarceration and the threat of incarceration are essential components of any modern criminal justice system. There is little evidence, however, that the additional incarceration required by Measure 61 is likely to have a substantial effect on Oregon crime rates.

C. Cost

The official EFI forecasts that Measure 61 will result in prison construction and operating costs of more than $1 billion over the next decade. This forecast, which the proponents of Measure 61 strongly dispute, is based on a number of assumptions that may or may not prove to be accurate. But even the proponents agree that the measure is likely to require 2,200 to 2,800 new prison beds, which would cost at least half of the EFI, or several hundred million dollars.

Measure 61's problematic effects on the community’s sense of justice and its doubtful reductions in the crime rate cannot be justified by its enormous cost. Indeed, your committee was told that cost was the reason that Oregon's relatively conservative legislature declined during the last session to approve a bill very similar to Measure 61.

The measure's proponents argue that government's highest priority must be the protection of the life and property of its citizens because everything else, whether it be commerce, education, culture, or the environment, depends on a secure and ordered society. Your committee does not disagree. The committee also does not disagree that prisons are a necessary element of the government's ability to protect life and property. But the question posed by Measure 61 is whether the additional prison time that it proposes would promote justice and increase public safety to a degree justified by its costs. It is not simply a matter of taking money that could be used for schools and transportation—which desperately need money and which also enhance security by eliminating ignorance, teaching social skills, and creating economic well-being—but also a matter of taking money that could be used for other elements of the criminal justice system, such as local jails, the police, the courts, and prevention, rehabilitation, and restitution programs. Providing additional funds to these
other elements might do more to promote justice and reduce crime than building additional prison space for offenders who would be subject to Measure 61. For example, there is some evidence to suggest that spending money for increased police enforcement combined with placing more offenders in jail but for shorter periods of time would do more to reduce crime than spending the same amount of money to build more prison space.

In the absence of clearer evidence that Measure 61 is likely to achieve its objectives of promoting justice and substantially reducing crime, the certainty of its enormous costs is a compelling argument against it.

D. Sentencing Policy

The fundamental attribute of Oregon's sentencing guidelines is rationality. There may be disagreement about whether the presumptive sentences specified by individual grid blocks are too long or too short, or, as is the case with Measure 61's proponents, there may be disagreement about whether the presumptive sentences are in general too long or too short. But the processes by which presumptive sentences are established and sentences are imposed under the guidelines are, or are supposed to be, rational. The relative lengths of presumptive sentences are established on the basis of the relative severity of the crime and the criminal history of the offender. Actual sentences may be adjusted in individual cases for compelling reasons. The overall lengths of presumptive sentences may be adjusted to reflect the resources that the legislature and, ultimately, the voters are willing to allocate to prisons. These are the types of considerations that a reasonable person would take into account in determining an appropriate sentence.

Measure 61, like Measure 11, is fundamentally irrational. That is not to say that a rational person could not, in any given case, decide to impose the same sentence that Measure 61 would require. Rather, it is the process of establishing and imposing sentences under the measure that is irrational.

Under Measure 61's mandatory sentencing provisions, all offenders who have been convicted of one, two, or three or more "major crimes" must serve, respectively, one, two, or three additional years of prison. From the standpoint of sentencing policy, this is objectionable on its face for several reasons.

First, there has been no budget process for the prison space needed to accommodate these additional sentences. Would this substantial amount of
money be better spent on schools? Would it be better spent on additional police officers, local jail space, or other elements of the criminal justice system? Would it be better left in the pockets of taxpayers? Under the sentencing guidelines, the legislature can address these issues through the state budgeting process and adjust the presumptive sentences accordingly. The voters cannot consider, and may not even be aware of, these alternatives in voting on Measure 61.

Second, the additional mandatory sentences required by Measure 61 appear to be wholly arbitrary. For example, it is unclear why the measure requires two additional years for two previous convictions of a "major crime." Would three years or 18 months better serve the purposes of the measure? So far as the committee could ascertain, the lengths of the additional terms were not selected with the expectation that they would achieve any particular result.

Third, the additional mandatory sentences are not proportional to the seriousness of the crimes for which the sentences are imposed or the seriousness of the crimes previously committed. A person who has been convicted of unauthorized use of a motor vehicle with three previous convictions of unauthorized use of a motor vehicle (which may have been imposed in the same proceeding for three separate thefts) would be required to serve an additional three years just as would a person who has been convicted of first degree manslaughter with three or more previous convictions of any combination of "major crimes" such as first degree manslaughter, first degree robbery, or first degree burglary of an occupied dwelling. Under Measure 61, a judge has no discretion to treat these two offenders differently.

Fourth, the lack of sentencing discretion is likely to lead to a serious distortion in the criminal justice system that is similar to the distortion that has been created by Measure 11. Because of the injustice of imposing the mandatory minimum sentence in a particular case, the prosecutor, through plea bargaining, will charge the defendant with a lesser offense that is not subject to the mandatory minimum sentence. This distorts the criminal justice system in two ways. Persons are convicted of crimes that are less serious than the crimes that they actually committed. In addition, the function of tailoring sentences to fit the crime is transferred from neutral judges, where it properly lies, to prosecutors, who can impose a longer or shorter sentence by choosing which crime to prosecute.

Finally, Measure 61's mandatory sentences for repeat offenders could not be reduced for good behavior or participation in certain prison programs, as ordinary prison sentences (but not Measure 11 sentences) may be. This would preclude an important incentive for good behavior in prison and for
preclude an important incentive for good behavior in prison and for rehabilitation. If the concern is that offenders should serve an absolute minimum period in prison, the length of the sentence could be increased to ensure that the minimum is served even with reductions. That would largely preserve the incentives for good behavior and rehabilitation without reducing the desired minimum sentence length. Because some of Measure 61's mandatory sentences would be additions to base sentences that are subject to reductions for good behavior and participation in certain prison programs, its effects with respect to this issue would be ameliorated somewhat. Still, there is no good reason to prohibit such reductions.

Measure 61's 14-month minimum presumptive sentence for all "major crimes" is somewhat less objectionable on policy grounds than the mandatory additional sentences. One could reasonably reach the conclusion that all "major crimes" are sufficiently serious that they merit at least a presumptive prison sentence of 14 months, whether or not the increase in presumptive sentence lengths would substantially reduce crime. As a presumptive sentence, judges would have the discretion, subject to certain limits, to impose a shorter sentence if the circumstances of the crime or the individual offender merited it. Nonetheless, the 14-month presumptive sentence, like the mandatory additional sentences, would substantially increase the need for prison space without an opportunity to consider budgetary alternatives.

Your committee strongly believes that the sentencing guidelines provide a rational mechanism for setting sentences. The guidelines allow appropriate consideration of budgetary alternatives, the relative seriousness of crimes and the criminal history of the offender, and effects on other portions of the criminal justice system. If the presumptive sentences under the guidelines appear to be too low, either in general or for specific crimes, the appropriate course would be for the Oregon Criminal Justice Commission or the Oregon Legislature to consider increases in the presumptive sentences after evaluating budgetary alternatives and the effects that the increases would have on the criminal justice system. Mandating minimum sentences and increasing presumptive sentences outside this process, as Measure 61 would do, is the very sort of uncoordinated, unreflective sentencing policy that the sentencing guidelines were intended to avoid.

VI. CONCLUSIONS

Measure 61 is addressed to the public's continuing frustration with crime and the perceived leniency of presumptive sentences under the current sentencing
and reduce crime by imposing additional mandatory sentences for repeated "major crimes" and by establishing a minimum presumptive prison sentence of 14 months for all "major crimes."

The committee was not persuaded that the measure would substantially further either of its principal goals. Although increased prison sentences may to some degree amuse the sense of justice of crime victims and of the community at large, this is counterbalanced by the injustice that is likely to result from the measure's failure to make any distinction in the seriousness of the broad range of crimes that it lists as "major crimes." Moreover, justice, particularly for property crimes, is not always promoted by longer prison sentences. In appropriate cases, justice for the victims, the community, and the offender may be better served by short-term jail sentences combined with restitution to the victims or service to the community.

Your committee found little evidence to support the claims that Measure 61 would substantially reduce crime. The trends in Oregon crime rates over the past 20 years do not indicate any significant relationship between the period of incarceration and the crime rate. Demographic and economic factors appear to have much more influence. Longer sentences would prevent offenders from committing further crimes against the public while they were incarcerated, but the number of crimes, particularly property crimes, resolved by an arrest and conviction is only a small fraction of all crimes. For persons who have not been arrested, Measure 61 works only through the fear of arrest, conviction, and incarceration for an extended period of time, but this fear may not be sufficient for the many property offenders who are satisfying drug addictions or who believe, correctly or incorrectly, that they are unlikely to be caught.

Your committee's concerns about the ability of Measure 61 to achieve its purposes would be less significant were it not for the immense cost of the measure and the existence of an alternative mechanism for achieving those purposes. The several hundred million to a billion dollars that Measure 61 is projected to cost over the next decade is far too much money in the absence of more substantial evidence that the additional incarceration required by the measure will significantly reduce crime and promote greater justice. Other state programs, including other criminal justice programs, desperately need the funds that Measure 61 would require for the construction and operation of new prisons.

If, as Measure 61's proponents contend, more offenders should be sentenced to prison and for longer terms, that can be accomplished in a far more rational manner through the existing sentencing guidelines. The process of amending
the guidelines through the Oregon Criminal Justice Commission and the Oregon Legislature would allow the efficacy and need for the additional prison terms to be assessed in light of their cost and in light of competing claims for public funds. The increased periods of incarceration could also be allocated to the specific types of crimes and criminal histories for which additional incarceration would most benefit the public. Furthermore, the sentencing guidelines' aggravating and mitigating factors could be used by judges to adjust the higher presumptive sentences upward or downward in individual cases for "substantial and compelling reasons."

The Oregon Legislature used this process in 1996 to increase the presumptive sentences for certain repeated property crimes after concerns were raised that the existing presumptive sentences were too lenient. This action demonstrates that the existing sentencing guidelines can be amended as needed and after due consideration of the issues described above. Rather than resorting to the initiative process, which does not allow effective consideration of these complicated issues, the proponents of Measure 61 should seek to persuade the legislature that additional incarceration is warranted and that the necessary funds should be allocated to provide the needed prison space. The merits of the issues posed by Measure 61 cannot be considered adequately, and should not be decided, in the context of an initiative campaign.

VI. RECOMMENDATION

Your committee unanimously recommends a "No" vote on Measure 61.

Respectfully submitted,

Tami Chartraw
Greg Dennis
Erika George
Trish Holden
Michael Campbell, Chair

Jim Westwood, research advisor
Paul Leistner, research director
VII. APPENDICES

A. Witness List

Patrick Callahan, Multnomah County District Attorney's Office
Steve Doell, co-chief petitioner and president, Crime Victims United
Hon. James Ellis, presiding judge, Multnomah County Circuit Court
Sen. Jeannette Hamby, Oregon State Senator
Prof. James Heuser, Portland State University
Phillip Lemman, executive director, Oregon Criminal Justice Commission
Paul Levy, Metropolitan Public Defender Services, Inc.

B. Resource Materials


Oregon Revised Statutes (1997).


