Senate Counsel, Research, and Fiscal Analysis
G-17 State Capitol
75 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-1606
(651) 296-4791
FAX: (651) 296-7747
Jo Anne Zoff Sellner
Director

Senate
State of Minnesota

S.F. 2614 - Funeral Protests (Delete everything amendment - SCS2614A-4)

Author: Senator Betzold

Prepared by: Kenneth P. Backhus, Senate Counsel (651/296-4396) KB

Date: March 9, 2006

Overview

The SCS2614A-4 amendment prohibits certain types of conduct at funerals and similar ceremonies. The amendment provides criminal penalties and a civil remedy for violations.

Section 1 makes the following acts a misdemeanor:

- publicly protesting or picketing within 300 feet of a funeral ceremony or a graveside or memorial service, during the hour before its commencement and continuing to the end of the hour following its completion, with intent to disrupt the ceremony or service;
- impeding or attempting to impede a vehicle that is part of a funeral procession with the intent to disrupt the procession;
- intentionally blocking or attempting to block access to a funeral ceremony or a graveside or memorial service; or
- knowingly engaging in targeted residential picketing at the home of a surviving member of the deceased person's immediate family on the date of the funeral ceremony or graveside or memorial service.

Enhances the penalty from a misdemeanor to a gross misdemeanor if the person has previously been convicted of violating this statute or a similar statute. Makes persons who violate this law civilly liable to immediate family members of the deceased. Also authorizes injunctive relief. Defines "funeral ceremony," "funeral procession," "graveside service," "memorial service," and "targeted residential picketing."

KPB:mvm

Senator ..... moves to amend S.F. No. 2614 as follows:

Delete everything after the enacting clause and insert:

"Section 1. **[609.501] FUNERAL OR BURIAL SERVICE; PROHIBITED ACTS.**

Subdivision 1. **Definitions.** (a) For purposes of this section, the following terms have the meanings given.

(b) "Funeral ceremony" has the meaning given in section 149A.02, subdivision 18.

(c) "Funeral procession" means two or more motor vehicles that identify themselves by using regular lights and by keeping themselves in close formation, one of which contains the body of a deceased person, enroute to or from a funeral ceremony or a graveside service.

(d) "Graveside service" has the meaning given in section 149A.02, subdivision 24.

(e) "Memorial service" has the meaning given in section 149A.02, subdivision 28, but must be conducted within 90 days of the subject's death or suspected death.

(f) "Targeted residential picketing" has the meaning given in section 609.748, subdivision 1, paragraph (c), but does not require more than one act or that acts be committed on more than one occasion.

Subd. 2. **Crime to disrupt.** (a) Whoever does any of the following is guilty of a misdemeanor:

(1) with intent to disrupt a funeral ceremony, a graveside service, or a memorial service, publicly protests or pickets within 300 feet of the location of the ceremony or service during the period in which the ceremony or service is occurring, within the hour immediately preceding its commencement, or within the hour immediately following its completion;

(2) with intent to disrupt a funeral procession, impedes or attempts to impede a vehicle that is part of the procession;

(3) intentionally physically blocks or attempts to physically block access to a funeral ceremony, graveside service, or memorial service; or

(4) knowingly engages in targeted residential picketing at the home or domicile of any surviving member of the deceased person's immediate family on the date of the funeral ceremony, graveside service, or memorial service.

(b) Whoever is convicted of a violation of paragraph (a) following a previous conviction for a violation of paragraph (a) or a similar statute from another state or the United States is guilty of a gross misdemeanor.

Subd. 3. **Civil remedy.** A person who violates subdivision 2 is liable to a surviving member of the deceased person's immediate family for damages caused by the violation. A surviving member of the deceased person's immediate family may also bring an action for injunctive relief and other appropriate remedial compensation.

EFFECTIVE DATE. This section is effective the day following final enactment, and applies to acts committed on or after that date."

Delete the title and insert:

"A bill for an act

relating to public safety; prohibiting the disruption of a funeral, burial service, or memorial service; providing a criminal penalty and a civil remedy; proposing coding for new law in Minnesota Statutes, chapter 609."

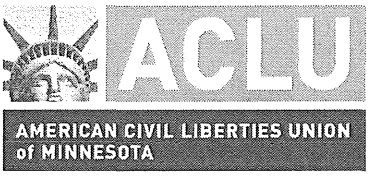
Dear Senators,

My name is Billy Bishop and I represent the group "Keep Protestors Five Hundred Yards from all Funerals". Our actions were initiated after the horrific events that occurred during the funeral of a soldier killed, while servicing his country. We believe family and friends of those grieving the loss of a loved one should be allowed to do so in peace. Our petition applies to all funerals, regardless of race, color, creed or sexual orientation. We understand that a three hundred feet proposal is already before you, but believe that is not far enough. We are requesting your consideration for a five hundred yard ban on all protestors at all funerals as a more respectful distance.

Also, earlier this week, Indiana passed a law, saying it is a a felony to disrupt any funeral.

I have presented State Representative, Ray Vandeveer, approximately twenty-five hundred signatures of people who support our petition.

Thank you for your time.



Mr. Chair, Members of the Committee, my name is Charles Samuelson and I am the Executive Director of the ACLU of Minnesota. Thank you for allowing me to speak to you today about SF2613.

SF2613 is a well-intentioned but seriously flawed proposal. In effect this bill should be called the Fred Phelps Full Funding Acts. The ACLU of Minnesota does not have any plans to challenge this law if it passes because Phelps, who has made a cottage industry out of just this type of activity, will most assuredly challenge it. He will likely be successful and be awarded attorney's fees, which will fund his organization for a long time to come.

Public opinion rejects the type of conduct that SF2613 is designed to curb. Such conduct is deliberately designed to inflame passions and to offend those who hear it. However, speech that is cruel, distasteful and upsetting is still protected by the First Amendment. Both the U.S. and Minnesota Constitutions protect the right of a citizen to speak freely on political matters. That being said, if ignored, Fred Phelps will go away.

The Supreme Court has upheld the idea that the government can enact laws that restrict the time, place and manner of protest, provided that such laws are narrowly tailored to meet significant government interests.

In determining if these provisions are constitutional, one must look to how the courts have interpreted the First Amendment. The U.S. Supreme Court has set a three-prong test for determining if a speech restriction is constitutional:

1. The restrictions must be content and viewpoint neutral.
2. The restrictions must be narrowly tailored to meet a significant government interest.
3. The restrictions must leave ample opportunity for the communication of the protestors' messages.

In order to be content and viewpoint neutral, regulations must apply to all speakers regardless of their message or viewpoint. SF 2613 may be in danger of being considered a viewpoint based restriction on speech to the extent that it singles out pure speech activities within 300 feet of funeral services and processions based on the nature of the message rather than based on whether the individual's conduct actually disrupts the funeral service. For example, an individual carrying a sign at a police officer's funeral that says "Blessed Are the Peacemakers", could not fairly be said to be willfully and knowingly disrupting the funeral; however another individual with a sign that is derogatory towards police officers would likely fall within the prohibitions of SF2613.

Instead of being narrowly tailored, this bill creates a no protest zone of 300 feet around funeral services. It is unlikely that a court would find such a broad zone to be a narrowly tailored regulation on speech. Two U.S. Supreme Court cases focused on the issue of speech-exclusion or "bubble zones" surrounding mobile activities that engendered protest. Schenck v. Pro-Choice Network of Western New York and Hill v. Colorado both involved laws that restricted protestors who approached women as they entered clinics where abortions were performed. In

1997, the Court in Schenck held that a 15-foot bubble around women entering a clinic was too restrictive of free speech rights. In 2000, the Court in Hill upheld an eight-foot bubble around those entering a clinic. In 2005, a Federal District Court in Indiana held that a 500 foot security zone for demonstrations aimed at a visit by Vice President Cheney was not narrowly tailored in violation of the right to free speech[1]. The Ninth Circuit overturned protest zones that ranged from 200 to 265 feet.[2]

The Third prong is also problematic because a court might find that the 300-foot zone does not adequately ensure that there are ample alternative means to convey the protestor's message.

The provision prohibiting targeted residential protests is also troubling. While laws prohibiting targeted residential picketing have been upheld as constitutional, they must be both content and viewpoint neutral, narrowly tailored and leave open ample alternative means of communication. This provision is also in danger of being construed as a viewpoint-based restriction on speech because it appears to only prohibit speech that is motivated by a desire to disrupt the family's grieving process, as abhorrent and unacceptable as such behavior is, while still allowing speech activities that are intended to bring comfort to the family. It is also likely that a court would find the 300-foot restriction overbroad in this context. While the Eighth Circuit Court of Appeals upheld a targeting residential picketing ban that included the targeted home plus one home on either side of the targeted home[3], it held that a ban that extended to 200 feet from a targeted residence was unconstitutional.[4]

The best answer to the behavior SF2613 seeks to proscribe is not speech restrictions, but more speech designed to counter the arguments of the protestors. It is easy to subscribe to the concept of ideas competing in an intellectual marketplace when the topic is not considered controversial. It is when we have to address highly charged issues, such as religion, abortion, homosexuality and protests outside funerals, that we seem quick to back away from the First Amendment and look to government for protection from offensive ideas. There are already laws on the books that would address much of the abhorrent activity that this bill seeks to address including laws prohibiting disorderly conduct.

As often happens in this committee, you are again asked to look at competing liberty interests and balance them. In this instance, I respectfully urge you to take a more careful look at SF2613. and work to craft a bill that is narrowly tailored to prohibit at actual disruption of funerals.

---

[1] Blair v. City of Evansville, Indiana, 361 F.Supp.2d 846 (S.D. Ind. 2005).
[2] Kuba v. 1-A Agr. Ass'n, 387 F.3d 850, 861-62 (9th Cir.2004) (200 and 265 feet zones found overbroad); Bay Area Peace Navy v. U.S., 914 F.2d 1224, 1229 (9th Cir.1990) (seventy-five yard security zone found overbroad for preventing demonstration from reaching intended audience);
[3] Douglas v. Brownell, 88 F.3d. 1511 (8th Cir. 1996).
[4] Kirkeby v. Furness, 52 F.3d 772 (8th Cir.1995).

C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On Rules of Criminal Procedure

REPORT WITH PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

March 7, 2006

Hon. Robert Lynn, Chair

Carolyn Bell Beckman, Saint Paul
Leonardo Castro, Minneapolis
James W. Donehower, Detroit Lakes
James D. Fleming, Mankato
Theodora Gaitas, Minneapolis
Candice Hojan, Minneapolis
Kathryn M. Keena, Hastings
Thomas Kelly, Minneapolis
Hon. Michael L. Kirk, Moorhead
William F. Klumpp, Saint Paul
John W. Lundquist, Minneapolis
Robin K. Magee, Saint Paul
Mark D. Nyvold, Saint Paul
Paul Scoggin, Minneapolis
Robert Stanich, Saint Paul
Hon. Heather L. Sweetland, Duluth

Hon. Paul H. Anderson
Supreme Court Liaison

Philip Marron, Minneapolis
Reporter

C. Paul Jones, Minneapolis
Counselor

Kelly Mitchell, Saint Paul
Staff Attorney

INTRODUCTION

On June 24, 2004, the United States Supreme Court held in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), that an upward departure in sentencing under the State of Washington's determinate sentencing system violated the defendant's Sixth Amendment right to a jury trial because the additional findings required to justify the departure must be made by a jury, and beyond a reasonable doubt. The Blakely decision called into question the legitimacy of upward sentencing departures under determinate sentencing systems similar to that of Washington.

The Minnesota Supreme Court considered the application of Blakely to the Minnesota Sentencing Guidelines in State v. Shattuck, 689 N.W.2d 785 (Minn. 2004). In an order issued on December 16, 2004, the Court held that upward departures under the Minnesota Sentencing Guidelines are subject to the Blakely holding, and requested further briefing from the parties on the applicable remedy. Id. On August 18, 2005, the Court issued a further opinion holding that Part II.D of the Minnesota Sentencing Guidelines, which allows for judicially determined upward departures, is unconstitutional under Blakely. The Court further held that Part II.D can be severed from the remaining guidelines provisions and that the other provisions remain in full effect. State v. Shattuck, 704 N.W.2d 131 (Minn. 2005).

The Minnesota Legislature enacted provisions relating to Blakely in the 2005 legislative session, which are set to expire February 1, 2007. See 2005 Minn. Laws ch. 136, art. 16, §§ 3-6, now codified at Minn. Stat. § 244.10, subds. 4-7. This is a procedural matter that is within the province of the court, and it is appropriate that procedural rules governing this matter be included in the Rules of Criminal Procedure.

The Supreme Court Advisory Committee on Rules of Criminal Procedure has been monitoring cases and other developments following the issuance of Blakely to determine an appropriate point at which to recommend enactment of procedures to govern the process for seeking an aggravated departure. The issuance of Shattuck and other cases has resulted in a legal landscape in which it now appears that formal procedures should be enacted as part of the Rules of Criminal Procedure. The following report sets forth proposed procedures for seeking an aggravated sentence and summarizes the issues considered by the committee in developing this proposal. The report addresses the overall procedure by topic, and the proposed amendments follow.

DEFINITION OF AGGRAVATED SENTENCE

The committee settled upon the term "aggravated sentence" to describe the type of sentence governed by Blakely, and recommends defining the term in Rule 1.04. The committee recognizes that this definition may need to be amended over time to accommodate further developments in the case law.

NOTICE

Determining the point at which notice of intent to seek an aggravated sentence should be required generated the most discussion within the committee. At the core of the controversy is a question about the fundamental nature of the factors that support an aggravated sentence. On one side, an argument can be made that the factors are functionally equivalent to elements of the offense, and therefore must be included in the complaint or indictment. Alternatively, an argument can be made that the facts in support of an aggravated sentence are merely sentencing factors, and therefore due process considerations are paramount in setting an appropriate point at which notice of intent to seek an aggravating sentence must be given. In addition, there were

practical concerns to consider. Prosecutors were concerned that the notice not be required too early in the process because in some cases, aggravating factors are not known until much later in the case. Defense attorneys were concerned that notice be provided early enough in the process to allow for a proper defense, and that it be sufficiently detailed so as to be adequate.

Putting aside the question as to whether the facts in support of an aggravated sentence are functionally equivalent to elements of the offense, committee members agreed that at a minimum, notice should be provided by the point where plea negotiations are likely to occur. The committee acknowledged that this point varies across the state, but a majority of the committee members felt the Omnibus Hearing reflects the point of commonality among the varying procedures. The proposed procedure sets a deadline at seven days prior to the Omnibus Hearing, with some allowance for later notice. A minority of the committee asserts that this notice provision comes too early in the process, especially in light of the differing practices with regard to the timing and content of the Omnibus Hearing, and has offered an alternative proposal requiring that notice be given fourteen days before trial. See alternative language below. Under either alternative, the notice procedure is proposed in new Rule 7.03 for cases initiated by complaint, and in Rule 19.04 for cases initiated by indictment.

It should be noted, however, that some members of the committee are concerned that the procedure will not be constitutionally adequate if it is determined through case law that the facts in support of an aggravated sentence are functionally equivalent to elements of the offense. If such a determination is made, the committee will prepare and submit a substitute procedure requiring notice of the factors in or with the complaint or indictment.

Because the notice deadline resulted from a compromise position as to whether the facts in support of an aggravated sentence are functionally equivalent to elements of the offense, there

was also disagreement as to the standard that should be used to permit notice to be submitted later in the process. All committee members agreed that there should be a mechanism to support the prosecution's legitimate desire to seek an aggravated sentence when facts become known after the initial notice deadline. A majority also agreed that the decision to allow a later notice should be at the discretion of the court, and should be guided by the twin standards of good cause and prejudice to the defendant. There was, however, considerable debate as to whether the rule should be written so as to require the defendant to raise an objection if a later notice appeared to prejudice the defense's case or so as to require the prosecutor to show good cause to justify every notice provided later than seven days prior to the Omnibus Hearing.

A minority of members felt strongly that the standard should be no different than that used to guide the court's discretion in considering whether to allow the prosecution to amend the complaint. The minority argues that the "good cause shown" language is impractical and unreasonable, and that if it is adopted, exceptions will outnumber the rule. The minority states that because the prejudice rule has adequately protected defendants in the context of amendments to the complaint, a simple prejudice rule should suffice for sentencing notices as well.

The language recommended in this report at Rules 7.03 and 19.04, subd. 6(3), to address the timing of the notice and the standard by which a later notice is deemed permissible is as follows:

> At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

The alternative language suggested by the minority is as follows:

> At least fourteen days prior to trial, or as soon thereafter as grounds become known to the prosecuting attorney, if the substantial rights of the defendant are not prejudiced, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

DISCLOSURE

The committee recommends adding a provision to Rule 9.01 to state that the prosecutor has a duty to disclose evidence upon which the prosecutor intends to rely in seeking an aggravated sentence. This duty is also subject to the continuing duty to disclose for the duration of the proceedings that is already included in Rule 9.03, subd. 2.

EVIDENTIARY HEARING AND DECISION TO BIFURCATE

Committee members agreed that there should be an opportunity for the defense to raise an objection to the prosecutor's intent to seek an aggravated sentence based on an argument that the proffered grounds cannot legally support an aggravated sentence, insufficiency of evidence, or both. The committee has therefore recommended adding an opportunity for a hearing on the matter in Rule 11.04.

A second order of business at the hearing is the determination as to whether the issues will be presented to the jury in a unitary or bifurcated trial. This issue generated a great deal of discussion as to whether there should be a default trial type. Under the current legislative procedure, the default trial type is unitary unless the prosecutor requests a bifurcated trial and the evidence in support of an aggravated departure would be inadmissible during the trial on the offense elements and/or prejudicial to the defendant. The committee noted that a default unitary trial type could result in litigation by the defense in almost every case for at least a bifurcated final argument, if not trial. A bifurcated default trial type could result in wasted resources because a number of cases might appropriately be tried in a unitary manner. If no default trial type is established by rule, the trial type will have to be determined in every case, but will not necessarily be a contested issue in every case. Thus, the committee decided to offer amendments that would assist the court in determining the appropriate trial type, but that would not require a particular trial type in every case.

The committee's recommendation recognizes three potential trial types: 1) a fully unitary trial; 2) a bifurcated trial; and 3) a unitary trial with a bifurcated final argument. The criteria for determining the appropriate trial type are admissibility of the evidence in support of an aggravated sentence in the guilt phase of the trial and the prejudicial impact of that evidence. A unitary trial type is appropriate when the evidence in support of an aggravated sentence would be both admissible in the guilt phase of the trial and not prejudicial to the defendant on the issue of guilt. A bifurcated trial type would be appropriate when either the evidence is not admissible in the guilt phase of the trial or is unfairly prejudicial on the issue of guilt, or both. A unitary trial type with a bifurcated final argument would be appropriate in those situations in which the evidence is such that it would be admissible and not unfairly prejudicial in the guilt phase of the

trial, but would place the defense in the position of making an awkward final argument both against guilt, and alternatively, if the defendant *is* guilty, against the factors in support of an aggravated sentence.

The committee received some comment raising concern about the hearing provided for in this rule because there is no evidentiary standard or detail as to how much process should be afforded in the hearing. The committee deliberately chose not to elaborate on these issues, and anticipates that these matters will develop through case law.

RIGHTS ADVISORY, PLEA PETITION, AND WAIVER

Corollary to the right to a jury trial on the facts in support of an aggravated sentence is the ability to waive that right. The committee is concerned that this waiver be done separately from any waivers on the issue of guilt so that the distinction between the jury trial on the issue of guilt and the jury trial on the issue of the aggravated sentence will be clear, and the waiver will be understandable to the defendant. This waiver can occur in three distinct situations: 1) the defendant admits to all facts in support of an aggravated sentence; 2) the defendant waives the right to a jury as fact finder, and allows the judge to determine whether the facts in support of an aggravated sentence have been proven; or 3) the defendant waives the right to a jury as fact finder, stipulates to certain facts, and allows the court to determine whether the stipulated facts are sufficient to support an aggravated sentence. The committee has proposed procedures: 1) in Rule 15 to allow for admission of the facts in support of an aggravated sentence and waiver of a jury trial on those facts; 2) in Rule 26.01, subd. 1, to address waiver of the jury as fact finder; and 3) in Rule 26.01, subd. 3, to address waiver in the context of a stipulated facts trial.

MOTIONS FOR INSUFFICIENCY OF EVIDENCE

The committee recommends adding a procedure in Rule 26.03, subd. 17 allowing for a motion to withdraw the issue of the aggravated sentence from jury consideration if the evidence is deemed insufficient prior to submission of the case to the jury, or to overturn the verdict if the evidence is deemed insufficient after the return and discharge of the jury.

VERDICT

The committee recommends adding language to Rule 26.03, subd. 18 stating that issues relating to an aggravated sentence shall be submitted to the court by special interrogatory. The committee did not go into detail as to the form of the verdict, noting that there is already a sample verdict form in the Criminal Jury Instruction Guide. Additionally, the committee recommends amending Rule 26.03, subd. 19 to allow the parties to request that the jury be polled as to the special interrogatory.

MOTION FOR NEW TRIAL

The committee considered the possibility that the grounds for a new trial currently in Rule 26.04, subd. 1 could potentially be applicable to a trial on the facts in support of an aggravated sentence and has therefore amended the rule to accommodate that.

MITIGATED SENTENCE PROCEEDINGS

Prior to Blakely, the court had discretion to depart upward or downward from the presumptive sentence. That discretion was reflected in Rule 27.03. subd. 1, which required the court to inform the parties that it was considering a departure for sentencing. The committee recommends amending the rule to reflect the current state of the law, which continues to allow the court to exercise this discretion without findings by a jury for mitigated departures.

Dated: 3/7/06

Respectfully Submitted,

Judge Robert Lynn
Chair, Advisory Committee on Rules of Criminal Procedure

PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

Note: Throughout these proposals, unless otherwise indicated, deletions are indicated by a line drawn through the words, and additions are underlined.

1. Rule 1.04. Definitions

Amend Rule 1.04 by adding a new paragraph (d) as follows:

(d) Aggravated Sentence. As used in these rules, the term "aggravated sentence" refers to a sentence that is an upward durational or dispositional departure from the presumptive sentence provided for in the Minnesota Sentencing Guidelines based upon aggravating circumstances or a statutory sentencing enhancement.

2. Comments – Rule 1

Amend the comments to Rule 1 by adding a new paragraph at the end of the existing comments as follows:

Rule 1.04 (d) defines "aggravated sentence" for the purpose of the provisions in these rules governing the procedure that a sentencing court must follow to impose an upward sentencing departure in compliance with Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). On June 24, 2004, the United States Supreme Court decided in Blakely that an upward departure in sentencing under the State of Washington's determinate sentencing system violated the defendant's Sixth Amendment rights where the additional findings required to justify the departure were not made beyond a reasonable doubt by a jury. The definition is in accord with existing Minnesota case law holding that Blakely applies to upward departures under the Minnesota Sentencing Guidelines and under various sentencing enhancement statutes requiring additional factual findings. See, e.g., State v. Shattuck, 704 N.W.2d 131 (Minn. 2005) (durational departures); State v. Allen, 706 N.W.2d 40 (Minn. 2005) (dispositional departures); State v. Leake, 699 N.W.2d 312 (Minn. 2005) (life sentence without release under Minn. Stat. § 609.106); State v. Barker, 705 N.W.2d 768 (Minn. 2005) (firearm sentence enhancements under Minn. Stat. § 609.11); and State v. Henderson, 706 N.W.2d 758 (Minn. 2005) (career offender sentence enhancements under Minn. Stat. § 609.1095, subd. 4). However, these Blakely-related protections and procedures do not apply retroactively to sentences that were imposed and were no longer subject to direct appeal by the time that Blakely was decided on June 24, 2004. State v. Houston, 702 N.W.2d 268 (Minn. 2005). Also, the protections and procedures do not apply to sentencing departures and enhancements that are based solely on a defendant's criminal conviction history such as the assessment of a custody status point under the Minnesota Sentencing Guidelines. State v. Allen, 706 N.W.2d 40 (Minn. 2005). For aggravated sentence procedures related to Blakely, see Rule 7.03 (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by complaint); Rule 9.01, subd. 1(7) (discovery of evidence relating to an aggravated sentence); Rule 11.04 (Omnibus Hearing decisions on

aggravated sentence issues); Rule 15.01, subd. 2 and Appendices E and F (required questioning and written petition provisions concerning defendant's admission of facts supporting an aggravated sentence and accompanying waiver of rights); Rule 19.04, subd. 6(3) (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by indictment); Rule 26.01, subd. 1(2)(b) (waiver of right to a jury trial determination of facts supporting an aggravated sentence); Rule 26.01, subd. 3 (stipulation of facts to support an aggravated sentence and accompanying waiver of rights); Rules 26.03, subd. 17(1) and (3) (motion that evidence submitted to jury was insufficient to support an aggravated sentence); Rule 26.03, subd. 18(6) (verdict forms); Rule 26.03, subd. 19(5) (polling the jury); and Rule 26.04, subd. 1 (new trial on aggravated sentence issue). The procedures provided in these rules for the determination of aggravated sentence issues supersede the procedures concerning those issues in Minn. Stat. § 244.10 (see 2005 Minn. Laws, ch. 136, art. 16, §§ 3-6) or other statutes.

3. **Rule 7. Notice by Prosecuting Attorney of Evidence and Identification Procedures; Completion of Discovery**

Create a new Rule 7.03 as follows, and renumber existing Rule 7.03 as Rule 7.04:

Rule 7.03. Notice of Prosecutor's Intent to Seek an Aggravated Sentence

At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

4. **Comments – Rule 7**

Amend the comments to Rule 7 by substituting the words "Rule 7.04" for the words "Rule 7.03" in the existing fifth and sixth paragraphs of the comments and by adding the following new paragraph after the existing fourth paragraph of the comments:

Rule 7.03 establishes the notice requirements for a prosecutor to initiate proceedings seeking an aggravated sentence in compliance with Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). See Rule 1.04 (d) as to the definition of "aggravated sentence". Also, see the comments to that rule. The written notice required by Rule 7.03 must include not only the grounds or statute relied upon, but also a summary statement of the supporting factual basis. However, there is no requirement that the factual basis be given under oath. In developing this rule, the Advisory Committee was concerned that if prosecutors were required to provide notice too early in the proceedings, they may not yet have sufficient information to make that decision and therefore may be inclined to overcharge. On the other hand it is important that defendants and defense counsel have adequate advance notice of the aggravated sentence

allegations so that they can defend against them. Further, the earlier that accurate complete aggravated sentence notices are given, the more likely it is that cases can be settled, and at an earlier point in the proceedings. The requirement of the rule that notice be given at least seven days before the Omnibus Hearing balances these important, sometimes competing, policy considerations. However, the rule recognizes that it may not always be possible to give notice by that time and the court may permit a later notice for good cause shown so long as the later notice will not unfairly prejudice the defendant. In making that decision the court can consider whether a continuance of the proceedings or other conditions would cure any unfair prejudice to the defendant. Pretrial issues concerning a requested aggravated sentence will be considered and decided under the Omnibus Hearing provisions of Rule 11.04.

5. Rule 9.01. Disclosure by Prosecution

Amend Rule 9.01, subd. 1, as follows:

Subd. 1. **Disclosure by Prosecution Without Order of Court.** Without order of court and except as provided in Rule 9.01, subd. 3, the prosecuting attorney on request of defense counsel shall, before the date set for Omnibus Hearing provided for by Rule 11, allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case and make the following disclosures:

(1) *Trial Witnesses; Grand Jury Witnesses; Other Persons.*

(a) The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons intended to be called as witnesses at the trial together with their prior record of convictions, if any, within the prosecuting attorney's actual knowledge. The prosecuting attorney shall permit defense counsel to inspect and reproduce such witnesses' relevant written or recorded statements and any written summaries within the prosecuting attorney's knowledge of the substance of relevant oral statements made by such witnesses to prosecution agents.

(b) The fact that the prosecution has supplied the name of a trial witness to defense counsel shall not be commented on in the presence of the jury.

(c) If the defendant is charged by indictment, the prosecuting attorney shall disclose to defense counsel the names and addresses of the witnesses who testified before the grand jury in the case against the defendant.

(d) The prosecuting attorney shall disclose to defense counsel the names and the addresses of persons having information relating to the case.

(2) *Statements.* The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any relevant written or recorded statements which relate to the case within the possession or control of the prosecution, the existence of which is known by the prosecuting attorney, and shall provide defense counsel with the substance of any oral statements which relate to the case.

(3) *Documents and Tangible Objects.* The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce books, grand jury minutes or transcripts, law enforcement officer reports, reports on prospective jurors, papers, documents, photographs and tangible objects which relate to the case and the prosecuting attorney shall also permit defense counsel to inspect and photograph buildings or places

which relate to the case.

(4) *Reports of Examinations and Tests.* The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case. The prosecuting attorney shall allow the defendant to have reasonable tests made. If a scientific test or experiment of any matter, except those conducted under Minnesota Statutes, chapter 169, may preclude any further tests or experiments, the prosecuting attorney shall give the defendant reasonable notice and an opportunity to have a qualified expert observe the test or experiment.

(5) *Criminal Record of Defendant and Defense Witnesses.* The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3)(a) that are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of any such records known to the defendant.

(6) *Exculpatory Information.* The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

(7) *Evidence Relating to Aggravated Sentence.* The prosecuting attorney shall disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecutor intends to rely in seeking an aggravated sentence.

(~~7~~8) *Scope of Prosecutor's Obligations.* The prosecuting attorney's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office.

6. Comments – Rule 9

Amend the comments to Rule 9 by substituting the words "Rule 9.01, subd. 1(8)" for the words "Rule 9.01, subd. 1(7)" in the existing nineteenth paragraph of the comments and by adding the following new paragraph after the existing eighteenth paragraph of the comments:

Rule 9.01, subd. 1(7) requires the prosecuting attorney to disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecuting attorney intends to rely in seeking an aggravated sentence under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). The prosecuting attorney also has a continuing duty to disclose such evidence under Rule 9.03, subd. 2. See Rule 1.04 (d) for the definition of "aggravated sentence" and also see the comments to that rule.

7. **Rule 11.04. Other Issues**

Amend Rule 11.04 as follows:

Rule 11.04. Other Issues

The Omnibus Hearing may include a pretrial dispositional conference to determine whether the case can be resolved without scheduling it for trial. The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose as permitted by Rule 11.07.

If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses.

If the prosecutor has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, a hearing shall be held to determine whether the law and proffered evidence support an aggravated sentence. If so, the court shall determine whether the issues will be presented to the jury in a unitary or bifurcated trial.

In deciding whether to bifurcate the trial, the court shall consider whether the evidence in support of an aggravated sentence is otherwise admissible in the guilt phase of the trial and whether unfair prejudice would result to the defendant in a unitary trial. A bifurcated trial shall be ordered where evidence in support of an aggravated sentence includes evidence that is inadmissible during the guilt phase of the trial or would result in unfair prejudice to the defendant. If the court orders a unitary trial the court may still order separate final arguments on the issues of guilt and the aggravated sentence.

If the defendant intends to offer evidence of a victim's previous sexual conduct in a prosecution for violation of Minn. Stat., §§ 609.342 to 609.346, a motion shall be made pursuant to the procedures prescribed by Rule 412 of the Minnesota Rules of Evidence.

8. **Comments – Rule 11**

Amend the comments to Rule 11 by substituting the words "Rule 7.04" for "Rule 7.03" in the fifth paragraph of the comments and by adding the following new paragraph after the existing thirteenth paragraph of the comments:

If the prosecuting attorney has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, Rule 11.04 requires the court to have a hearing to determine any pretrial issues that need to be resolved in connection with that request. This could include issues as to the timeliness of the notice under Rule 7.03 or 19.04, subd. 6(3). The court must determine whether the proposed grounds legally support an

aggravated sentence and whether or not the proffered evidence is sufficient to proceed to trial. The rule does not provide a standard for determining insufficiency of the evidence claims and that is left to case law development. If the aggravated sentence claim will be presented to a jury, the court must also decide whether the evidence will be presented in a unitary or a bifurcated trial and the rule provides the standards for making that determination. Even if a unitary trial is ordered for the presentation of evidence, the rule recognizes that presentation of argument on an aggravated sentence during the guilt phase of the proceedings may unduly prejudice a defendant. The rule therefore allows the court to order separate final arguments on the aggravated sentence issue, if necessary, after the jury renders its verdict on the issue of guilt.

9. **Rule 15. Procedure Upon Plea of Guilty; Plea Agreements; Plea Withdrawal; Plea to Lesser Offense**

Amend the title to Rule 15 as follows:

Rule 15. Procedure Upon Plea of Guilty; Plea Agreements; Plea Withdrawal; Plea to Lesser Offense; Aggravated Sentence

Amend Rule 15.01 as follows:

Rule 15.01. Acceptance of Plea; Questioning Defendant on Plea or Aggravated Sentence; Felony and Gross Misdemeanor Cases

Subdivision 1. Guilty Plea.

Before the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel as to the following:

1. Name, age and date and place of birth and whether the defendant is handicapped in communication and, if so, whether a qualified interpreter has been provided for the defendant.

2. Whether the defendant understands the crime charged.

3. Specifically, whether the defendant understands that the crime charged is (name of offense) committed on or about (month) (day) (year) in _____ County, Minnesota (and that the defendant is tendering a plea of guilty to the crime of (name of offense) which is a lesser degree or lesser included offense of the crime charged).

4. a. Whether the defendant has had sufficient time to discuss the case with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts of the case, and that defense counsel has represented the defendant's interests and fully advised the defendant.

5. Whether the defendant has been told by defense counsel and understands that upon a plea of not guilty, there is a right to a trial by jury and that a finding of guilty is not possible unless all jurors agree.

6. a. Whether the defendant has been told by defense counsel and understands that there will not be a trial by either a jury or by a judge without a jury if the defendant pleads guilty.

b. Whether the defendant waives the right to a trial on the issue of guilt.

7. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial by jury or by a judge, the defendant will be presumed to be innocent until guilt is proved beyond a reasonable doubt.

8. a. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and that the defendant will have the right, through defense counsel, to question these witnesses.

b. Whether the defendant waives the right to have these witnesses testify in the defendant's presence in court and be questioned by defense counsel.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to plead not guilty and have a trial, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

10. Whether defense counsel has told the defendant and the defendant understands:

a. That the maximum penalty that the court could impose for the crime charged (taking into consideration any prior conviction or convictions) is imprisonment for _____ years.

b. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for the crime charged.

c. That for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will be imposed to follow any executed prison sentence, and violating the terms of that conditional release may increase the time the defendant serves in prison.

d. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

e. That the prosecutor is seeking an aggravated sentence.

11. Whether defense counsel has told the defendant that the defendant discussed the case with one of the prosecuting attorneys, and that the respective attorneys agreed that if the defendant entered a plea of guilty the prosecutor will do the following: (state the substance of the plea agreement.)

12. Whether defense counsel has told the defendant and the defendant understands that if the court does not approve the plea agreement, the defendant has an absolute right to withdraw the plea of guilty and have a trial.

13. Whether, except for the plea agreement, any policeman, prosecutor, judge, defense counsel, or any other person, made any promises or threats to the defendant or any member of the defendant's family, or any of the defendant's friends, or other persons in order to obtain a plea of guilty.

14. Whether defense counsel has told the defendant and the defendant understands that if the plea of guilty is for any reason not accepted by the court, or is withdrawn by the defendant with the court's approval, or is withdrawn by court order on appeal or other review, that the defendant will stand trial on the original charge (charges) namely, (state the offense) (which would include any charges that were dismissed as a result of the plea agreement) and that the prosecution could proceed just as if there had never been any agreement.

15. a. Whether the defendant has been told by defense counsel and understands, that if the defendant wishes to plead not guilty and have a jury trial, the defendant can testify if the defendant wishes, but that if the defendant decided not to testify, neither the prosecutor nor the judge could comment to the jury about the failure to testify.

b. Whether the defendant waives this right, and agrees to tell the court about the facts of the crime.

16. Whether with knowledge and understanding of these rights the defendant still wishes to enter a plea of guilty or instead wishes to plead not guilty.

17. Whether the defendant makes any claim of innocence.

18. Whether the defendant is under the influence of intoxicating liquor or drugs or under mental disability or under medical or psychiatric treatment.

19. Whether the defendant has any questions to ask or anything to say before stating the facts of the crime.

20. What is the factual basis for the plea.

(NOTE: It is desirable that the defendant also be asked to acknowledge signing

the Petition to Plead Guilty, suggested form of which is contained in the appendix A to these rules; that the defendant has read the questions set forth in the petition or that they have been read to the defendant, and that the defendant understands them; that the defendant gave the answers set forth in the petition; and that they are true. If an aggravated sentence is sought, refer to subdivision 2 of this rule.)

Subd. 2. Aggravated Sentence.

Before the court accepts an admission of facts in support of an aggravated sentence, the defendant shall be sworn and questioned by the court with the assistance of counsel, in addition to and separately from the inquiry that may be required by subdivision 1, as to the following:

1. Whether the defendant understands that the prosecution is seeking a sentence greater than the presumptive sentence called for in the sentencing guidelines.

2. a. Whether the defendant understands that the presumptive sentence for the crime to which the defendant has pled guilty or otherwise has been found guilty is _____, and that the defendant could not be given an aggravated sentence greater than the presumptive sentence unless the prosecutor proves facts in support of such aggravated sentence.

b. Whether the defendant understands that the sentence in this case will be an aggravated sentence of _____,or will be left to the judge to decide.

3. a. Whether the defendant has had sufficient time to discuss this aggravated sentence with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts supporting an aggravated sentence and has represented defendant's interests and fully advised the defendant.

4. Whether the defendant has been told by defense counsel and understands that even though the defendant has pled guilty to or has otherwise been found guilty of the crime of _____, defendant may nonetheless deny the facts alleged by the prosecution which would support an aggravated sentence.

5. a. Whether the defendant has been told by defense counsel and understands that if defendant chooses to deny the facts alleged in support of an aggravated sentence, the defendant has a right to a trial by either a jury or a judge to determine whether those facts have been proven, and that a finding that the facts are proven is not possible unless all jurors agree.

b. Whether the defendant waives the right to a trial of the facts in support of an aggravated sentence to a jury or a judge.

6. Whether the defendant has been told by defense counsel and understands that at such trial before a jury or a judge, the defendant would be presumed not to be subject to an aggravated sentence and the court could not impose an aggravated sentence unless the facts in support of the aggravated sentence are proven beyond a reasonable doubt.

7. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial to a jury or a judge, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and that the defendant will have the right, through defense counsel, to question these witnesses.

b. Whether the defendant waives the right to have these witnesses testify in the defendant's presence and be questioned by defense counsel.

8. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial to a jury or a judge, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts in support of an aggravated sentence and have a trial to a jury or a judge, the defendant can testify if the defendant wishes, but that if the defendant decides not to testify, neither the prosecutor nor the judge could comment to the jury about the failure to testify.

b. Whether the defendant waives this right and agrees to tell the court about the facts in support of an aggravated sentence.

10. Whether, with knowledge and understanding of these rights, the defendant still wishes to admit the facts in support of an aggravated sentence or instead wishes to deny these facts and have a trial to a jury or a judge.

11. What is the factual basis for an aggravated sentence.

(Note: Where a represented defendant is pleading guilty without an aggravated sentence, use the plea petition form in Appendix A to these rules. Where a represented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix A and Appendix E.

Where an unrepresented defendant is pleading guilty without an aggravated sentence, use Appendix C to these rules. Where an unrepresented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix C and Appendix F.)

10. Appendices - Rule 15

Amend paragraphs 15 and 19 of Appendix A to Rule 15 as follows:

15. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty I am entitled to a trial by a jury on the issue of guilt, and all jurors would have to agree I was guilty before the jury could find me guilty.

b. That if I plead guilty I will not have a trial by either a jury or by a judge without a jury.

c. That with knowledge of my right to a trial on the issue of guilt, I now waive my right to a trial.

19. I have been told by my attorney and I understand:

a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.

b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for _____ years. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for this crime.

c. That for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will follow any executed prison sentence that is imposed. Violating the terms of this conditional release may increase the time I serve in prison. In this case, the period of conditional release is ___ years.

d. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.

e. That my present probation or parole could be revoked because of the plea of guilty to this crime.

f. That the prosecutor is seeking an aggravated sentence of _____.

Amend paragraphs 15 and 19 of Appendix C to Rule 15 as follows:

15. I understand:

a. That if I wish to plead not guilty I am entitled to a trial by a jury on the issue of guilt, and all jurors would have to agree I was guilty before the jury could find me guilty.

b. That if I plead guilty I will not have a trial by either a jury or by a judge without a jury.

c. That with knowledge of my right to a trial on the issue of guilt, I now waive my right to a trial.

19. I understand:

a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.

b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for _____ years. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for this crime.

c. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.

d. That my present probation or parole could be revoked because of the plea of guilty to this crime.

e. That if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

f. That the prosecutor is seeking an aggravated sentence of _____.

Add a new Appendix E to Rule 15 as follows:

APPENDIX E TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
_____ JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

PETITION REGARDING
AGGRAVATED SENTENCE

vs.

_____
Defendant.

TO: THE ABOVE NAMED COURT

I, _____, defendant in the above entitled action do respectfully represent and state as follows:

1. I have pled guilty to or have otherwise been found guilty of the crime of _____.

2. I understand the presumptive guideline sentence for this offense is _____, and I could not be given an aggravated sentence greater than the presumptive sentence unless the prosecution proves facts in support of such an aggravated sentence.

3. I understand the prosecution is seeking a sentence greater than that called for in the sentencing guidelines. Specifically, I understand the sentence in this case will be _____ or will be left to the judge to decide.

4. I am represented by attorney _____ and:

a) I feel I have had sufficient time to discuss the issue of an aggravated sentence with my attorney.

b) I am satisfied my attorney is fully informed as to the facts related to an aggravated sentence, and that my attorney has discussed possible defenses I have to an aggravated sentence.

c) I am satisfied that my attorney has represented my interests and has fully advised me about an aggravated sentence.

5. My attorney has told me and I understand that even though I have pled guilty to or been otherwise found guilty of the crime of _____, I have the right to deny the facts alleged by the prosecution in support of an aggravated sentence.

6. My attorney has told me and I understand that I am entitled to a trial to either a jury or a judge to determine whether an aggravated sentence may be imposed upon me.

7. My attorney has told me and I understand that at such trial I have the following rights:

a) I am presumed not to be subject to an aggravated sentence.

b) The prosecution must prove facts supporting an aggravated sentence to either a jury or a judge beyond a reasonable doubt.

c) That before a jury could find facts supporting an aggravated sentence, all jurors would have to agree. That means the jury's decision must be unanimous.

d) That at a trial before either a jury or a judge, the prosecution will be required to call witnesses in open court and in my presence, and I, through my attorney, will have the right to question the witnesses.

e) That I may require any witnesses I think are favorable to me to appear and testify on my behalf.

f) That I may testify at such a trial if I wish to, but that if I choose not to testify, neither the prosecution nor the judge could comment to the jury about the failure to testify.

g) That if I admit the facts in support of an aggravated sentence, I will not have a trial to either a jury or a judge.

8. That with knowledge of my right to a trial on the facts in support of an aggravated sentence, I now waive my right to a trial.

9. I now waive my right not to testify and I will tell the judge about the facts which support an aggravated sentence.

Dated: _____

_____
Signature of Defendant

Add a new Appendix F to Rule 15 as follows:

APPENDIX F TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
_____ JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

_____
Defendant.

PETITION REGARDING
AGGRAVATED SENTENCE
BY PRO SE DEFENDANT

TO: THE ABOVE NAMED COURT

I, _____, defendant in the above entitled action do respectfully represent and state as follows:

1. I have pled guilty to or have otherwise been found guilty of the crime of _____.

2. I understand the presumptive guideline sentence for this offense is _____, and I could not be given an aggravated sentence greater than the presumptive sentence unless the prosecution proves facts in support of such an aggravated sentence.

3. I understand the prosecution is seeking a sentence greater than that called for in the sentencing guidelines. Specifically, I understand the sentence in this case will be _____ or will be left to the judge to decide.

4. I understand that although I have pled guilty to or have otherwise been found guilty of the crime of _____, I have the right to deny the facts alleged by the prosecution in support of an aggravated sentence.

5. I understand that I am entitled to a trial by either a jury or a judge to determine whether an aggravated sentence may be imposed upon me.

6. I understand that I have an absolute right to have an attorney represent me at such trial and knowing the consequences of giving up my right to counsel, I waive my right to be represented by an attorney.

7. I understand that at a trial to a jury or a judge to determine if an aggravated sentence may be imposed upon me, I have the following rights:

a) I am presumed not to be subject to an aggravated sentence.

b) The prosecution must prove facts supporting an aggravated sentence to either a jury or a judge beyond a reasonable doubt.

c) That before a jury could find facts supporting an aggravated sentence, all jurors would have to agree. That means the jury's decision would have to be unanimous.

d) That at a trial before either a jury or a judge, the prosecution will be required to call witnesses in open court and in my presence, and that I would have the right to question the witnesses.

e) That I may require any witnesses I think are favorable to me to appear and testify on my behalf.

f) That I may testify at such a trial if I wish to, but that if I choose not to testify, neither the prosecution nor the judge could comment to the jury about the failure to testify.

g) That if I admit the facts in support of an aggravated sentence, I will not have a trial to either a jury or a judge.

8. That with knowledge of my right to a trial on the facts in support of an aggravated sentence, I now waive my right to a trial.

9. I now waive my right not to testify and I will tell the judge about the facts which support an aggravated sentence.

Dated: _____

_____

Signature of Defendant

11. Rule 19.04. Appearance of Defendant Before Court

Amend Rule 19.04, subd. 6 as follows:

Subd. 6. Notice by Prosecuting Attorney.

(1) *Notice of Evidence and Identification Procedures.* When the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping, (2) any confessions, admissions or statements in the nature of confessions made by the defendant, (3) any evidence against the defendant discovered as the result of confessions, admissions or statements in the nature of confessions made by the defendant, or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to lineups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney, on or before the date set for defendant's arraignment, shall notify the defendant or defense counsel in writing of such evidence and identification procedures.

(2) *Notice of Additional Offenses.* The prosecuting attorneys shall notify the defendant or defense counsel in writing of any additional offenses the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. The notice shall be given at the Omnibus Hearing under Rule 11 or as soon thereafter as the offense becomes known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The notice need not include offenses for which the defendant has been previously prosecuted, or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged in the indictment arose.

(3) *Notice of Intent to Seek Aggravated Sentence.* At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

12. Comments – Rule 19

Amend the comments to Rule 19 by adding a new paragraph after the existing twelfth paragraph of those comments as follows:

Rule 19.04, subd. 6(3), which establishes the notice requirements for a prosecuting attorney seeking an aggravated sentence in proceedings prosecuted by indictment, parallels Rule 7.03 which establishes those requirements for proceedings prosecuted by complaint. See the comments to that other rule. Also see Rule 1.04 (d) which defines "aggravated sentence" and the comments to that rule.

13. Rule 26. Trial

Amend Rule 26.01, subd. 1 as follows:

Subd. 1. Trial by Jury.

(1) *Right to Jury Trial.*

(a) Offenses Punishable by Incarceration. A defendant shall be entitled to a jury trial in any prosecution for an offense punishable by incarceration. All trials shall be in the district court.

(b) Misdemeanors Not Punishable by Incarceration. In any prosecution for the violation of a misdemeanor not punishable by incarceration, trial shall be to the court.

(2) *Waiver of Trial by Jury.*

(a) Waiver ~~Generally~~ on the Issue of Guilt. The defendant, with the approval of the court may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

(~~b~~c) Waiver When Prejudicial Publicity. The defendant shall be permitted to waive jury trial whenever it is determined that (a) the waiver has been knowingly and voluntarily made, and (b) there is reason to believe that, as the result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial.

(3) *Withdrawal of Waiver of Jury Trial.* Waiver of jury trial may be withdrawn by the defendant at any time before the commencement of trial.

(4) *Waiver of Number of Jurors Required by Law.* At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of a lesser number than that provided by law. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to trial by a jury consisting of the number of jurors provided by law, personally in writing or orally on the record in open court agrees to trial by such reduced jury.

(5) *Number Required for Verdict.* A unanimous verdict shall be required in all cases.

(6) *Waiver of Unanimous Verdict.* At any time before verdict, the parties, with the approval of the court, may stipulate that the jury may render a verdict on the concurrence of a specified number of jurors less than that required by law or these rules. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to a verdict on the concurrence of the number of jurors specified

by law, personally in writing or orally on the record waives the right to such a verdict.

Amend Rule 26.01, subd. 3 as follows:

Subd. 3. Trial on Stipulated Facts. By agreement of the defendant and the prosecuting attorney, a ~~case~~determination of defendant's guilt, or the existence of facts to support an aggravated sentence, or both, may be submitted to and tried by the court based on stipulated facts. Before proceeding in this manner, the defendant shall acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court. The agreement and the waiver shall be in writing or orally on the record. If this procedure is utilized for determination of defendant's guilt and the existence of facts to support an aggravated sentence, there shall be a separate waiver as to each issue. Upon submission of the case on stipulated facts, the court shall proceed as on any other trial to the court. If the defendant is found guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court.

Amend Rule 26.03, subd. 17 as follows:

Subd. 17. Motion for Judgment of Acquittal or Insufficiency of Evidence to Support an Aggravated Sentence.

(1) Motions Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. After the evidence on either side is closed, the court on motion of a defendant or on its initiative shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses. The court shall also, on motion of the defendant or on its initiative, order that any grounds for an aggravated sentence be withdrawn from consideration by the jury if the evidence is insufficient.

(2) Reservation of Decision on Motion. If the defendant's motion is made at the close of the evidence offered by the prosecution, the court may not reserve decision of the motion. If the defendant's motion is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict or is discharged without having returned a verdict. If the defendant's motion is granted after the jury returns a verdict of guilty, the court shall make written findings specifying its reasons for entering a judgment of acquittal.

(3) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal or insufficiency of evidence to support an aggravated sentence may be made or renewed within 15 days after the jury is discharged or within such further time as the court may fix during the 15-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal, in which case the court shall make written findings specifying its reasons for entering a judgment of acquittal. If no verdict

is returned, the court may enter judgment of acquittal. Such a motion is not barred by defendant's failure to make a similar motion prior to the submission of the case to the jury.

Amend Rule 26.03, subd. 18 as follows:

Subd. 18. Instructions.

(1) *Requests for Instructions.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to the arguments to the jury, and such action shall be made a part of the record.

(2) *Proposed Instructions.* The court may, and upon request of any party shall, before the arguments to the jury, inform counsel what instructions will be given and all such instructions may be stated to the jury by either party as a part of the party's argument.

(3) *Objections to Instructions.* No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict. The matter to which objection is made and the grounds of the objection shall be specifically stated. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. All objections to instructions and the rulings thereon shall be included in the record. All instructions, whether given or refused, shall be made a part of the record. An error in the instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial though it was not otherwise called to the attention of the court.

(4) *Giving of Instructions.* The court in its discretion shall instruct the jury either before or after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. The instructions may be in writing and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.

(5) *Contents of Instructions.* In charging the jury the court shall state all matters of law which are necessary for the jury's information in rendering a verdict and shall inform the jury that it is the exclusive judge of all questions of fact. The court shall not comment on the evidence or the credibility of the witnesses, but may state the respective claims of the parties.

(6) *Verdict Forms.* The court shall submit appropriate forms of verdict to the jury for its consideration. Where an aggravated sentence is sought, the court shall submit the issue(s) to the jury by special interrogatory.

Amend Rule 26.03, subd. 19 as follows:

Subd. 19. Jury Deliberations and Verdict.

(1) *Materials to Jury Room.* The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room.

(2) *Jury Requests to Review Evidence.*

1. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.

2. The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(3) *Additional Instructions After Jury Retires.*

1. If the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors, after notice to the prosecutor and defense counsel, shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless:

(a) the jury may be adequately informed by directing their attention to some portion of the original instructions;

(b) the request concerns matters not in evidence or questions which do not pertain to the law of the case;

or (c) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

2. The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.

3. The court after notice to the prosecutor and defense counsel may recall the jury after it has retired and give any additional instructions as the court deems appropriate.

(4) *Deadlocked Jury.* The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

(5) *Polling the Jury.* When a verdict on the issue of guilt is rendered and before the jury has been discharged, the jury shall be polled at the request of any party or upon the court's initiative. When the jury has answered special interrogatories relating to an aggravated sentence, the jury shall be polled at the request of any party or upon the court's initiative as to their answers. The poll(s) shall be conducted by the court or clerk of court who shall ask each juror individually whether the verdict announced is the juror's verdict. If ~~the~~either poll does not conform to the verdict, the jury may be directed to retire for further deliberation or may be discharged.

(6) *Impeachment of Verdict.* Affidavits of jurors shall not be received in evidence to impeach their verdict. A defendant who has reason to believe that the verdict

is subject to impeachment, shall move the court for a summary hearing. If the motion is granted the jurors shall be interrogated under oath and their testimony recorded. The admissibility of evidence at the hearing shall be governed by Rule 606(b) of the Minnesota Rules of Evidence.

(7) *Partial Verdict.* The court may accept a partial verdict when the jury has agreed on a verdict on less than all of the charges submitted, but is unable to agree on the remainder.

Amend Rule 26.04, subd. 1 as follows:

Subd. 1. New Trial.

(1) *Grounds.* The court on written motion of the defendant may grant a new trial on the issue of guilt or the existence of facts to support an aggravated sentence, or both, on any of the following grounds:

1. If required in the interests of justice;

2. Irregularity in the proceedings of the court, jury, or on the part of the prosecution, or any order or abuse of discretion, whereby the defendant was deprived of a fair trial;

3. Misconduct of the jury or prosecution;

4. Accident or surprise which could not have been prevented by ordinary prudence;

5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;

6. Errors of law occurring at the trial, and objected to at the time or, if no objection is required by these rules, assigned in the motion;

7. The verdict or finding of guilty is not justified by the evidence, or is contrary to law.

(2) *Basis of Motion.* A motion for new trial shall be made and heard on the files, exhibits and minutes of the court. Pertinent facts that would not be a part of the minutes may be shown by affidavit except as otherwise provided by these rules. A full or partial transcript of the court reporter's notes of the testimony taken at the trial or other verbatim recording thereof may be used on the hearing of the motion.

(3) *Time for Motion.* Notice of a motion for a new trial shall be served within 15 days after verdict or finding of guilty. The motion shall be heard within 30 days after the verdict or finding of guilty, unless the time for hearing be extended by the court within the 30-day period for good cause shown.

(4) *Time for Serving Affidavits.* When a motion for new trial is based on affidavits, they shall be served with the notice of motion. The opposing party shall have 10 days after such service in which to serve opposing affidavits, which period may be extended by the court upon an order extending the time for hearing under this rule. The court may permit reply affidavits.

14. Comments – Rule 26

Amend the ninth, tenth, and eleventh paragraphs of the comments to Rule 26 as follows:

Rule 26.01, subd. 1(2)(a) (Waiver of Trial by Jury ~~Generally~~ on the Issue of Guilt) is based upon F.R.Crim.P. 23(a), ABA Standards, Trial by Jury, 1.2(b) (Approved Draft, 1968) and continues substantially present Minnesota law (Minn. Stat. § 631.01 (1971)) except that waiver of jury trial by the defendant requires the approval of the court. Rule 26.01, subd. 1(2)(b) establishes the procedure for waiver of a jury on the issue of an aggravated sentence. See Blakely v. Washington, 542 U.S. 196, 124 S.Ct. 2531 (2004) and State v. Shattuck, 704 N.W.2d 131 (Minn. 2005) as to the constitutional limitations on imposing aggravated sentences based on findings of fact beyond the elements of the offense and the conviction history. Also, see Rules 1.04 (d), 7.03, and 11.04 and the comments to those rules. Whether a defendant has waived or demanded a jury on the issue of guilt, that defendant is still entitled to a jury trial on the issue of an aggravated sentence and a valid waiver under Rule 26.01, subd. 1(2)(b) is necessary before an aggravated sentence may be imposed based on findings not made by jury trial.

Rule 26.01, subd. 1(2)(~~b~~c) (Waiver When Prejudicial Publicity)

Under Rule 26.01, subd. 2(2)(~~b~~c), the defendant shall be permitted to waive jury trial if required to assure the likelihood of a fair trial when there has been a dissemination of potentially prejudicial material. (See ABA Standards, Fair Trial and Free Press, 3.3 (Approved Draft, 1968).)

Amend the sixty-eighth paragraph of the comments to Rule 26 as follows:

Rule 26.03, subd. 17 (Motion for Judgment of Acquittal or Insufficiency of Evidence to Support an Aggravated Sentence) abolishing motions for directed verdict, and providing for motions for judgment of acquittal is taken from F.R.Crim.P. 29(a)(b)(c) and ABA Standards, Trial by Jury, 4.5(a)(b)(c) (Approved Draft, 1968). Such a motion by the defendant, if not granted, should not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence. (See F.R.Crim.P. 29(a), ABA Standards, Trial by Jury, 4.5(a) (Approved Draft, 1968).) A defendant is also entitled to a jury determination of any facts beyond the elements of the offense or conviction history that might be used to aggravate the sentence. Blakely v. Washington, 542 U.S. 196, 124 S.Ct. 2531 (2004); State v. Shattuck, 704 N.W.2d 131 (Minn. 2005). If such a trial is held, the rule also provides that the defendant may challenge the sufficiency of the evidence presented.

Amend the comments to Rule 26 by adding a new paragraph after the existing seventy-third paragraph of the comments (referring to Rule 26.03, subd. 18 (5)) as follows:

Rule 26.03, subd. 18(6) (Verdict Forms) requires that where aggravated sentence issues are presented to a jury, the court shall submit the issues to the jury by special

interrogatory. For a sample form for that purpose see CRIMJIG 8.01 of the Minnesota Criminal Jury Instruction Guide. When that is done, Rule 26.03, subd. 19(5) permits any of the parties to request that the jury be polled as to their answers.

15. Rule 27.03. Sentencing Proceedings

Amend Rule 27.03, subd. 1(A) as follows:

(A) At the time of, or within three days after a plea, finding or verdict of guilty of a felony, the court may order a presentence investigation and shall order that a sentencing worksheet be completed. As part of any presentence investigation and report, the court may order a mental or physical examination of the defendant. The court shall also then:

(1) Set a date for the return of the report of the presentence investigation.

(2) Set a date, time and place for the sentencing.

(3) Order the defendant to return at such date, time and place.

(4) If the facts ascertained at the time of a plea or through trial cause the judge to consider a mitigated departure from the sentencing guidelines appropriate, the court shall advise counsel of such consideration.

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

Bureau of Criminal Apprehension

CriMNet Program Office
1430 Maryland Avenue East • Saint Paul, Minnesota 55106
Phone: 651.793.1000 • Fax: 651.793.1001 • TTY: 651.282.6555
www.crimnet.state.mn.us

Alcohol and Gambling Enforcement

ARMER/911 Program

Bureau of Criminal Apprehension

Driver and Vehicle Services

Homeland Security and Emergency Management

Minnesota State Patrol

Office of Communications

Office of Justice Programs

Office of Traffic Safety

State Fire Marshal and Pipeline Safety

March 8, 2006

Senator Leo Foley
Chairman, Senate Crime Prevention and Public Safety Committee
G-24 Capitol
75 Dr. Martin Luther King Jr. Blvd.
St Paul, MN 55155

Dear Senator Foley:

In July 2005, in response to increasing legislative and public interest regarding expungement and background check issues, the CriMNet Program Office and the Bureau of Criminal Apprehension's (BCA) Criminal Justice Information Systems (CJIS) section initiated a comprehensive study to examine expungement and background check processes in Minnesota.

A 2004 court ruling by the Minnesota Court of Appeals generated additional uncertainty about the status of expunged records in both the executive and judicial branches. Some argue that this ruling is having an unfair impact on offenders trying to reintegrate into society and gain employment or housing. Public safety officials believe that these expungement issues have an effect on the completeness of criminal records. Compounding these issues is the fact that there is wide disparity and inconsistency in the policies and practices for statutorily authorized background checks.

The Management Analysis & Development division (MAD), within the Department of Administration, has been contracted by the CriMNet Program Office and CJIS to complete the analysis and background information for the study.

MAD has completed its initial phase of key stakeholder interviews as part of its study. Those interviews have included legislative members, legislative staff, cabinet agency heads, state court leadership and staff, law enforcement leadership, legal aid and assistance groups, subject matter experts, and other interest groups. MAD is proceeding with a second round of interviews and focus groups (people and organizations who were recommended from the first round of interviews) and should be completed by April 2006. A delivery team (working group) of the Criminal and Juvenile Justice Information Task Force (Task Force) has begun meeting to discuss and analyze the information compiled by MAD.

Before the 2007 legislative session, MAD will outline possible findings, options, and related consequences of options for potential statutory policy changes, as determined by the delivery team. The possible options and findings will be presented to the full Task Force and the Criminal and Juvenile Justice Information Policy Group (Policy Group). The Policy Group will adopt a final report which will be distributed and presented to the legislature in January 2007.

Please feel free to contact me if you have any questions or need additional information.

Respectfully,

Dale W Good

Dale Good
Executive Director, CriMNet

cc: Senate Crime Prevention and Public Safety Committee Members

Report to the Legislature
January 2006

Minnesota Sentencing Guidelines Commission

Members

Steven Borchardt, Chair and Olmsted County Sheriff
Jeffrey Edblad, Vice-Chair and Isanti County Attorney
Alan Page, Justice, Minnesota Supreme Court
Gordon Shumaker, Judge, Court of Appeals
Isabel Gomez, District Court Judge, Fourth Judicial District
Joan Fabian, Commissioner of Corrections
Tracy D. Jenson, Probation Officer, Washington County
Darci Bentz, Public Defender Representative
Robert Battle, Citizen Representative
Connie Larson, Citizen Representative
Michael Williams, Citizen Representative

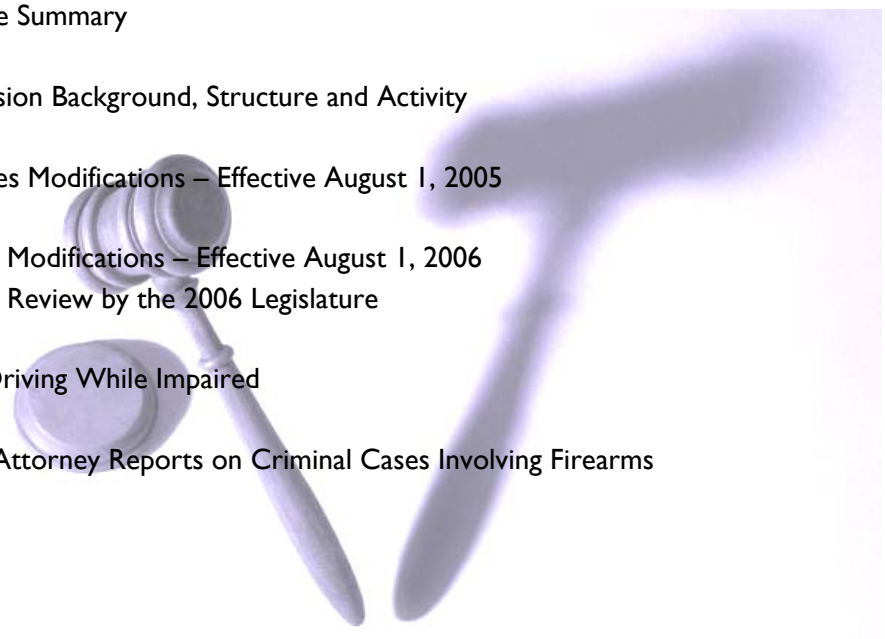
Staff

Barbara Tombs, Executive Director
Anne Wall, Research Analysis Specialist, Senior
Linda McBrayer, Management Analyst 3
Lee Meadows, Research Analyst Specialist
Khanh Nguyen, Research Analyst Intermediate
Jacqueline Kraus, Research Analyst

Minnesota Sentencing Guidelines Commission

This information will be made available in an alternative format upon request. The total cost of development and preparation for this report was $8,228.09 (reported as required by Minn. Stat. § 3.197).

Table of Contents



Executive Summary

Since the implementation of Sentencing Guidelines in Minnesota 25 years ago, the Commission has developed one of the most extensive and detailed sentencing databases in the United States.

In 1978, the Minnesota Sentencing Guidelines Commission was established and has been responsible for developing, overseeing and monitoring the state's sentencing guidelines for all felony offenders. With the overriding goal of assuring public safety, the guidelines were also created to promote proportionality and uniformity in sentencing, reduce disparity in sentencing, and to coordinate sentencing practices with correctional resources. Since the development and implementation of the guidelines, the Commission has spent the vast majority of its time compiling data used to monitor and analyze sentencing practices throughout the state and providing sentencing information to the Legislature and state criminal justice agencies. Since the implementation of the sentencing guidelines in Minnesota 25 years ago, the Commission has developed one of the most extensive and detailed sentencing databases in the United States.

Each January, the Sentencing Guidelines Commission submits its Annual Report to the Legislature. The report contains a variety of sentencing information including: recent legislative modifications to the guidelines, analysis of felony DWI sentences, county attorney reports on cases involving firearms and other sentencing issues of importance to the Legislature. This year's 2006 Report to the Legislature includes two additional sections relating to the sentencing guidelines. The first section provides an overview of the impact to date of the U.S. Supreme Court decision *Blakely v. Washington* on criminal sentencing in Minnesota. Legislation was enacted during the 2005 session to address many of the constitutional issues identified in the *Blakely* decision. However, as *Blakely*-related cases work themselves through the Minnesota Appellate and Supreme Courts, additional issues have been identified that may require subsequent legislative action. The second section includes a set of modifications to the sentencing guidelines focusing on changes in sentencing policies for sex offenders in response to the legislative directive to the Commission contained in HF 1 of the 2005 session. These modifications become effective for crimes committed on or after August 1, 2006, pending legislative review.

The U.S. Supreme Court's decision in *Blakely v. Washington* has impacted criminal sentencing nationwide, with Minnesota being no exception. The *Blakely* decision did not rule sentencing guidelines or determinate sentencing unconstitutional, nor did it rule aggravated departures unconstitutional. What the Court's ruling did indicate was that Minnesota's current procedure for imposing aggravated departures and statutorily enhanced sentences is unconstitutional. Throughout 2005, various Minnesota Appellate and Supreme Court decisions have been released clarifying, to some extent, the impact of *Blakely* on specific sentencing provisions.

Three of the more recent Minnesota Supreme Court decisions are particularly significant *State v. Shattuck*, 704 N.W. 2d 131 (Minn. 2005) which ruled that the Minnesota Sentencing Guidelines are not advisory and that the imposition of the presumptive sentence is mandatory absent additional findings. In addition, the Court determined that Section 11.D of the Guidelines, pertaining to aggravated departures, is "facially unconstitutional" and must be severed from the remainder of the guidelines, since it does not provide a procedure for jury determination of aggravating circumstances can occur. The remainder of the Sentencing Guidelines remain constitutional and in effect. In *State v. Barker,* released November 17, 2005, the Court stated that the application of mandatory minimum sentencing under Minn. Stat.§ 609.11, when a weapon is not an element of the offense, cannot be based on facts determined by the court. Imposition of the mandatory minimum without the aid of a jury, or in the absence of an admission by the defendant, is unconstitutional under *Blakely*. Finally, *State v. Allen,* decided on November 23, 2005, ruled that an upward dispositional departure executing a presumptive stayed sentence based on judicially found aggravating facts is unconstitutional under *Blakely.* This ruling now adds aggravated dispositional departures to aggravated durational departures as sentencing procedures that are subject to the constitutional provisions identified in *Blakely*.

Although legislation has been enacted to address many of the procedural issues surrounding *Blakely,* the Commission is recommending that additional legislative action be taken to address these recent court decisions and preserve the court's ability to impose aggravated departures when appropriate and necessary to protect public safety. In addition, the Commission has amended the Guideline Commentary to provide practitioners an overview of the case law and impact of *Blakely* in Minnesota to date.

Modifications to the guidelines are included that involve changes in the sentencing structure and procedures for sex offenders, which is in response to the directive to the Sentencing Commission contained in HF1 of the 2005 Legislative session. The Commission is proposing a separate determinate sentencing grid for sex offenses that enhances sentences for the serious sex offenders who are not subject to the mandatory or indeterminate life sentences established by the 2005 Legislature. The new grid calculates criminal history in a different manner, weighting prior sex offense convictions more heavily. The new sentencing grid for sex offenses strongly focuses on enhanced sentences for repeat sex offenses and attempts to address the public safety concerns surrounding recidivism among sex offenders.

In 2004, the Sentencing Guidelines Commission's data demonstrates some slight changes from previous years. The number of felony sentences imposed continued to increase, but the increase was significantly smaller than that experienced by the state in previous years. The number of offenders sentenced for felony offenses increased from 14,492 in 2003, to 14,751 in 2004 representing only a 1.8% yearly increase. It should be noted however, that this increase follows a 20.0% increase between 2001 and 2002 and an 11.7% increase from 2002 to 2003. When the source of this growth is analyzed by offense types, person offenses increased by 0.9 %; property offenses *decreased* by 0.9%; drug offenses increased by 3.5% (compared to 31.0% in 2002 and 13.8% in 2003) and the "other offense" category increased by 6.6% between 2003 and 2004 (compared to the 53.6% increase between 2002 and 2003). The data indicates that in 2004, the "other offense" category accounted for the largest growth in felony sentences

imposed with or without the inclusion of felony DWI.

The total number of felony offenders sentenced to prison actually decreased from 3,536 in 2003 to 3,443 in 2004. While the imprisonment rate increased from 23.6% in 2002 to 24.4% in 2003, it showed a decline in 2004 to 23.4%. It should be noted that the jail rate in 2004 was 68.3%, an increase from 65.9% in 2003, representing the highest level ever since the implementation of the sentencing guidelines.

The average pronounced prison sentenced also showed a decrease from 51.2 months in 2003 to 45.1 months in 2004. This represents the lowest average pronounced sentence since 1997. The slight decrease in the number of felony offenders sentenced to prison, combined with the decrease in the average pronounced sentence, may be an indication that the notable growth in felony convictions the state has experienced in the past few years is leveling off and stabilizing. However, this trend will need to be monitored in the upcoming years to determine any long term impact on the criminal justice system or the prison population.

Analysis of felony DWI data indicates that 860 cases have been sentenced in 2004, which represents a slight increase over the 810 cases sentenced in 2003. Approximately 33% (287) of the offenders had a criminal history of one and 26% (219) of offenders had a criminal history of zero. The vast majority of offenders sentenced for felony DWI (77%) had a criminal history score of two or less. Fifteen percent of the 860 cases (131) were sentenced to prison with an average pronounced sentence of 52 months; whereas 82% (707) of the total number of felony DWI cases received local jail time as a condition of probation for an average stay of 229 days. The total incarceration rate for DWI, including both prison and jail sentences was 97%. Of the 222 cases that were presumptive prison sentences under the guidelines, 126 cases received the presumptive prison sentence and 96 cases received a mitigated dispositional departure and were placed on probation. Analysis of DWI data indicates that since the DWI law became effective in 2002, 1,772 offenders have been sentenced, with 1,518 of those offenders placed on probation. By the end of 2004, the probation revocation rate for felony DWI was 5.7% or 87 probation revocations.

The County Attorney Reports regarding firearm offenses show that 731 cases from July 1, 2004, through June 30, 2005, involved an offender allegedly committing an offense listed in subdivision 9 of Minn. Stat. § 609.11 while possessing or using a firearm. This represents a 4.3% increase over the previous year's total 701cases. Prosecutors secured convictions in 70% of the cases charged, the same conviction rate as indicated in 2003. In approximately 63.1% of the cases where a firearm was established in the conviction, a mandatory minimum sentence was imposed and executed, an increase over 61% from the previous year.

The Sentencing Guidelines Commission hopes the information contained in this report will be both useful and informative. The Commission is available to address any questions or to provide any additional information requested. Additional data reports on overall data trends in 2004 and sentencing practices for specific offenses including Criminal Sexual Conduct Offenses, Failure to Register, Drug Offenses, Criminal Vehicular Operation, Weapons Offenses, and Unranked Offenses are available on the Guidelines Commission's web site at: http://www.msgc.state.mn.us/

Commission Background, Structure and Activity

Commission Background

Under the Sentencing Guidelines, offenders with similar offense characteristics and similar criminal history characteristics receive similar criminal sentences throughout the state of Minnesota, thus reducing disparity in sentencing.

Minnesota was the first state to adopt a sentencing guidelines system over 25 years ago and has been viewed as the model for felony sentencing reform throughout the United States. The sentencing guidelines provided several major improvements over the old indeterminate sentencing system.

1. Truth In Sentencing/Predictability. All of the participants in the criminal justice system – courts, prosecutors, offenders, and victims – now know, at the time of sentencing, how much time an offender will serve in prison. For example, if an offender is sentenced to 60 months in prison, that offender will serve 40 months in prison and will then be placed on supervised release for the remaining 20 months.

A highly desirable side effect of determinate sentencing is the ability to fairly accurately predict future prison bed needs. Thus, if the sentence for a particular offense is increased by 12 months, the Guidelines Commission staff can, within a certain amount of statistical confidence, project the long-term prison bed impact of that change. In conjunction with other agencies, the potential fiscal impact of any sentencing change can also be measured and quantified, thus providing the Legislature with data based information for policy decisions.

2. Clear Proportionality/Uniformity. Under this "Just Deserts" model of sentencing, an offender who commits a more serious crime receives a longer sentence than one who commits a less serious crime. An offender with a criminal history receives a longer sentence than an offender who commits the same crime but does not have a criminal history. Offenders with similar offense and criminal history characteristics are treated the same, thus reducing disparity in sentencing.

3. Accurate Data Collection. The sentencing guidelines system also allows the Commission to collect accurate and detailed data on the specific determinate sentences actually imposed across the state. Data collected by the Commission allows analysis of sentencing trends with respect to particular offenses, specific types of offenders, and geographic variations.

The primary goal of the Sentencing Guidelines has always been, and remains, that of protecting public safety while enabling the efficient use of limited state resources for incarceration of felony offenders.

Commission Structure

The Minnesota Sentencing Guidelines Commission is responsible for maintaining and monitoring the sentencing guidelines. The eleven member commission is composed of a cross section of representatives of the Minnesota criminal justice system.

The Governor is responsible for eight appointments to the Commission, including the Chairman. Those appointments currently include Sheriff Steve Borchardt from Olmstead County, representing law enforcement and currently serving as Chairman of the Commission. Additional Governor appointees include: Joan Fabian, Commissioner of Corrections; Jeffrey Edblad from Isanti County, the County Attorney Representative; Darci Bentz of Fairmont, MN, the Public Defender Representative; and Tracy Jenson of Washington County, the Probation Representative. Rev. Robert Battle of St. Paul, Michael Williams of Minneapolis, and Connie Larson of Waseca, serve as Citizen Members on the Commission.

The Chief Justice of the Minnesota Supreme Court is responsible for three appointments to the Commission. Those appointments currently include: Justice Alan C. Page, Minnesota Supreme Court; Judge Gordon Shumaker, Minnesota Court of Appeals; and Judge Isabel Gomez, District Court Judge from the Fourth Judicial District.

The Commission is comprised of six full-time employees. Barbara Tombs serves as the Executive Director of the Minnesota Sentencing Guidelines Commission. The agency's other staff positions include a research director, three full-time research analysts and one administrative staff.

Commission Activity

I. Assessing the Impact of *Blakely v. Washington* on Sentencing in Minnesota

Although it has been over 18 months since the United States Supreme Court released its *Blakely v. Washington,* 1264 S. Ct. 2531 (2004) decision, the impact of that ruling on criminal sentencing in Minnesota continues to be addressed through a series of Minnesota Appellate and Supreme Court decisions.

The Court ruled in *Blakely v. Washington* that all facts other than prior convictions that increase a defendant's sentence beyond the presumptive sentence must be presented to a jury and proven beyond a reasonable doubt.

In *Blakely*, the U. S. Supreme Court reaffirmed and clarified its prior holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) which stated that under the Sixth Amendment of the United States Constitution, any facts other than prior criminal convictions that enhance a defendant's sentence beyond the statutory maximum must be presented to a

jury and proven beyond a reasonable doubt. In *Blakely,* the Supreme Court held that a defendant's Sixth Amendment right to a jury trial could be violated even when the sentence imposed is below the stated statutory maximum sentence.

In *Blakely*, a Washington State defendant pled guilty to a 2nd degree kidnapping offense involving a firearm. Under Washington's sentencing statute, the defendant would have received a sentence of between 49 and 53 months for this offense. However, the sentencing judge sentenced the defendant to 90 months, citing a Washington statute that allows a sentence of up to ten years if the judge finds justification for the imposition of an "exceptional sentence." The judge stated that justification for the sentence imposed was that the defendant committed the offense with deliberate cruelty. The defendant appealed his sentence and the Court ruled that the sentence was a Sixth Amendment violation.

Under the Sixth Amendment, the Court held that all facts, other than prior criminal convictions, that increase a criminal defendant's sentence beyond what it would have been absent those facts, must be presented to a jury and proven beyond a reasonable doubt. Thus, it treated the presumptive sentence, rather than the statutory maximum sentence, as the punishment that can not be increased without a jury's input or the defendant's admission of the aggravating factors and waiver of the right to have a jury determine the factors exist beyond a reasonable doubt.

In the Court's view, the right to a jury trial right does not only mean that a person has the right to present a case to the jury; it also means that a person has a right to have a jury, not a judge, make all the factual findings required to impose a sentence longer than recommended by the guidelines, unless the defendant formally admits to some or all of the aggravating facts.

Implications for Sentencing in Minnesota

State v. Shattuck

In its 2005 Report to the Legislature, the Commission reported that the Minnesota Sentencing Guidelines remain intact and constitutional after the *Blakely* decision. Only sentences that are aggravated beyond the presumptive guidelines sentence are affected by the Supreme Court's ruling. That position was affirmed on August 18, 2005, when the Minnesota Supreme Court ruled in *State v. Shattuck*, 704 N.W.2d 131(Minn. 2005). This case focused on the constitutionality of Minn. Stat. § 609.109, the Repeat Sex Offender Statute. However, the court's ruling also addressed the application of *Blakely* to the Minnesota Sentencing Guidelines.

In *Shattuck*, the defendant was convicted of two counts of kidnapping, two counts of 1st degree criminal sexual conduct and one count of aggravated robbery. The presumptive sentence under the guidelines for the 1st degree criminal sexual conduct and kidnapping with great bodily harm charges would have been 161 months, based on a severity level ranking of VIII offense and a criminal history score of 9, which included a custody status point. Under the Repeat Sex Offender statute, for certain types of 1st and 2nd degree criminal sexual conduct offenses, the court *shall* commit the defendant to not less than 30 years if the court finds (1) an aggravating factor which justifies an upward departure, and (2) the offender has previous convictions for 1st, 2nd or 3rd degree criminal sexual conduct. The court imposed

a 161 month sentence for the kidnapping conviction and a 360 month sentence for the first degree criminal sexual conduct conviction, utilizing the Repeat Sex Offense statute. The court found the aggravating factors of particular vulnerability, particular cruelty, great emotional harm and that the assault was planned.

The Minnesota Supreme Court stated in its decision that a jury, not the court, must make the determination that aggravating factors are present to impose an upward durational departure under the sentencing guidelines, citing the *Blakely* ruling. The decision held that Minn. Stat. § 609.109 is unconstitutional since it authorizes the court to impose an upward durational departure without the aid of a jury.

The ruling also stated that Minnesota Sentencing Guidelines are not advisory and that the imposition of the presumptive sentence is mandatory absent additional findings. This holding specifically rejects the idea that the guidelines be considered advisory, as the United States Supreme Court found the Federal Guidelines would in *United States v. Booker* 125 S. Ct. 738 (2005). The Court's reason for rejecting the *Booker* remedy was that the federal guidelines are based upon laws, legislative intent and principles that differ from those of the state of Minnesota.

In addition, the decision stated that Minnesota Sentencing Guidelines Section II.D, which pertains to the manner in which aggravated departures are imposed, is "facially unconstitutional" and must be severed from the remainder of the guidelines. However, the remainder of the guidelines remain in effect and mandatory upon the courts. The majority of the Court concluded that to invalidate the guidelines would be contrary to the expressed sentencing policy of the state in maintaining uniformity, proportionality and predictability in sentencing. Although this specific section of the Court's decision finds that the current procedure for imposing aggravated departures is in violation of the Sixth Amendment, it also validates the constitutionality of the guidelines and determinate sentencing.

The Court also noted in *Shattuck* that Minnesota Courts have the inherent authority to authorize the use of sentencing juries and bifurcated proceedings to comply with *Blakely*. While the Supreme Court was deciding the *Shattuck* case, the Legislature amended Minn. Stat. § 609.109 to comply with the constitutional issues raised in *Blakely*. However, the Court took no position on the constitutionality of the legislative action. Acknowledging the Court's inherent authority to create rules and procedures, the decision stated that it was the belief of the Court that the Legislature should decide the manner in which the sentencing guidelines should be amended to comply with the constitutional requirements of *Blakely*.

The Supreme Court remanded the *Shattuck* case to the district court for imposition of a sentence within the presumptive range of the sentencing guidelines. The Court's ruling in this case created a level of confusion as to whether cases remanded for re-sentencing due to a *Blakely* issue were limited only to the imposition of a sentence within the presumptive range of the guidelines or whether the district court could conduct a sentencing hearing that utilizes a jury for determination of aggravating factors.

On October 6, 2005, the Minnesota Supreme Court issued an Order amending the *Shattuck* opinion clarifying that the Legislature has enacted significant new requirements for sentencing aggravated

departures which includes sentencing juries and bifurcated trials. It further clarified that these changes apply both prospectively and to re-sentencing hearings. This clarification enables re-sentencing hearings to include jury determination of aggravating factors and the imposition of aggravated departure sentences.

The *Shattuck* decision clarifies that aggravated departures resulting in enhanced sentences above the presumptive range on the sentencing grid are not deemed unconstitutional by *Blakely,* as long as the aggravating factor(s) that may result in a departure are determined beyond a reasonable doubt by a jury or the defendant knowingly and willingly stipulates to the aggravating factors. Thus, it is the procedure that the Court calls into question, not the enhanced sentence itself. Aggravated departures are still an available sentencing option for the most serious cases that pose the greatest threat to public safety.

The structure of Sentencing Guidelines in Minnesota remains constitutional, as do aggravated departures.

State v. Barker

Another significant Minnesota Supreme Court decision relating to the impact of *Blakely* is *State v. Barker*,--N.W.2d—(Minn.2005) released on November 17, 2005. In this case, the Court addressed the application of *Blakely* rights to the imposition of the mandatory sentencing provision contained in Minn. Stat. § 609.11. In this case the defendant was convicted of possession of a 5th degree controlled substance offense and sentenced under Minn. Stat. § 609.11 to a 36 months mandatory minimum sentence in prison based on a judicial finding that the defendant possessed a firearm during the predicate offense. The defendant had no criminal history points and the presumptive sentence under the sentencing guidelines was a year and a day stayed.

At sentencing, the defendant stipulated to the possession of a firearm, claiming he had the gun on the front passenger seat for protection. The defendant claimed he had pulled the firearm out from under the back seat so he could grab it in a second's notice to protect himself and that the possession of the weapon did not increase the risk of violence since it was solely for self protection. The court denied the defendant's request for a jury determination of sentencing factors and imposed the mandatory minimum sentence of 36 months in prison. The defendant appealed his sentence claiming it violated his constitutional rights under *Blakely.*

The Minnesota Supreme Court ruled that Minn. Stat. § 609.11 is unconstitutional to the extent that it authorizes the district court to impose an aggravated durational departure upon a finding of sentencing factors, other than prior convictions, without the aid of a jury or an admission by the defendant. Unlike most mandatory minimum sentences which are triggered solely by prior convictions, the Minn. Stat. § 609.11 mandatory minimum may only be applied when the court finds that a weapon present during the commission of a crime created an increased risk of violence. However when the weapon is an element of the offense, this finding is not required. Even though Barker admitted to the possession of the weapon during the sentencing hearing, when the court denied his prior request for a jury determination as to whether the weapon increased the risk of violence, any statements made by the defendant after that denial could not be held to satisfy the *Blakely* admission exception.

In its decision, the Court noted that the Legislature did not amend Minn. Stat. § 609.11 in the same manner as the other special sentencing enhancement statutes such as Minn. Stat. § 609.108, the Patterned and Predatory Sex Offender; Minn. Stat. § 609.1095, the Dangerous and Repeat Felony Offender, or Minn. Stat. § 609.109, Repeat Sex Offenders. The Court appears to interpret that inaction as a lack of legislative intent to authorize sentencing juries for Minn. Stat. § 609.11. The Court remanded the case to the lower court for re-sentencing within the presumptive guideline range.

In its initial analysis of the impact of *Blakely* on sentencing in Minnesota, the Commission indicated that most mandatory minimum sentences would not be impacted by *Blakely* since in many cases the imposition of the mandatory minimum sentence is triggered by prior convictions. However, Minn. Stat. § 609.11 was identified as a potential problem due to the requirement that the court determine the presence of a weapon in situations where the weapon was not an element of the crime. In reviewing 2004 sentencing data pertaining to offenders sentenced under Minn. Stat. § 609.11, 884 offenders were sentenced under that specific statute. Of the 884 offenders, 505 offenders received a mandatory sentence that was greater than the applicable guideline sentence based on the sentencing grid. Of those 505 cases, 461 involved offenses in which possession of the weapon was an element of the crime, leaving 44 cases in which possession of a weapon that had not been charged was cited as a sentencing factor in the imposition of the mandatory minimum prison sentence. Although the number of cases identified may be limited, these cases have the potential to represent significant threats to public safety. The option to sentence to the mandatory minimum when a weapon increases the risk of harm should be available.

RECOMMENDATION TO THE LEGISLATURE

The Sentencing Commission recommends that the Legislature amend 609.11 as soon as possible in a similar manner similar to its previous amendments to Minn. Stat. § 609.108, the Patterned and Predatory Sex Offender; Minn. Stat. § 609.1095, the Dangerous and Repeat Felony Offender, or Minn. Stat. § 609.109, Repeat Sex Offenders, (contained in H.F.1). The Legislature should consider authorizing the use of a jury to determine the enhancement factors required to impose the mandatory minimum sentences under Minn. Stat. § 609.11 and provide for appropriate *Blakely* waivers by defendants. It is the intention of the Commission to modify the language of the Guidelines to be consistent with legislative action at its next public hearing.

State v. Allen

The latest notable *Blakely* related decision was released on November 23, 2005 in *State v. Allen*,--N.W.2d--(Minn.2005). The Minnesota Supreme Court addressed the application of *Blakely* to aggravated dispositional departures. In a previous Minnesota Court of Appeals decision, *State v. Hanf*, 687 N.W. 2d 659 (Minn. App. 2004), the Appellate Court ruled that aggravated dispositional departures are not subject to *Blakely* provisions, due to the fact that dispositional departures are based on offender characteristics, not offense characteristics, making them similar to the sentencing judgments made under indeterminate sentencing models. The Court stated that a "*Blakely* Right" must arise from a jury verdict, and noted that the traditional role of a jury has never extended to which offenders do or do not go to prison. The Court of Appeals further stated that the Sixth Amendment does not require juries to

determine amenability to probation, since amenability to probation is not a fact necessary to constitute a criminal offense. Thus, the Court concluded in *Hanf* that aggravated dispositional departures based on offender-related characteristics, such as amenability or unamenability to probation, do not violate *Blakely* provisions.

In *State v. Allen,* the Minnesota Supreme Court over ruled the lower court's decision in *Hanf.* In *Allen*, the defendant pled guilty to 1st Degree Test Refusal as part of a negotiated plea agreement in exchange for the dismissal of other charges. His specific sentence was to be determined by the court. The defendant's criminal history included a custody point, since the defendant was on probation for a prior offense at the time of the current offense. The presumptive guideline sentence was a 42 month stayed sentence. However, based on the defendant's numerous prior alcohol-related convictions and history of absconding from probation, the court determined the defendant was not amenable to probation and sentenced the defendant to a 42 month executed prison sentence, an aggravated dispositional departure under the sentencing guidelines. The case was on appeal when *Blakely v. Washington* was decided.

In its ruling, our Supreme Court stated that a stayed sentence is not merely an alternative mode of serving a prison sentence, in that the additional loss of liberty encountered with an executed sentence exceeds the maximum penalty allowed by a plea of guilty or jury verdict. Thus the Court found a violation of the defendant's Sixth Amendment Constitutional rights. The Court held a sentence disposition to be as much an element of the presumptive sentence as the sentence duration. Offender characteristics authorizing upward dispositional departures must be found by or admitted by the defendant. When the district court imposed an upward dispositional departure based on its own finding of unamenability to probation, the defendant's constitutional rights were violated under *Blakely.* Unamenability to probation may be used as an aggravating factor to impose an upward dispositional departure, only if it is found by a jury beyond a reasonable doubt or admitted as part of a voluntary waiver of the right to a jury determination.

The *State v. Allen* ruling will impact the procedure by which upward dispositional departures are imposed under Minnesota's Sentencing Guidelines. An analysis of dispositional departure data indicates that 523 aggravated dispositional departures were imposed in 2004. However in 76% (397) of the cases, the departure was the result of a plea negotiation or a request by the defendant for an executed sentence. In addition, the *Allen* case has led to much speculation as to whether probation revocations resulting in an executed prison sentence are also subject to *Blakely* provisions. Although the *Allen* case focuses on imposition of an executed prison sentence as the result of an aggravated dispositional departure, the Court's reasoning could be interpreted to be applicable to probation revocations in which a presumptive stayed sentence is executed due to an offender's conduct on probation. The Commission awaits further action by the Minnesota courts addressing this specific issue.

RECOMMENDATURE TO THE LEGISLATURE

The Sentencing Commission recommends that the Legislature enact the same provisions related dispositional departures as were enacted during the last legislative session (contained in H.F.1) relating to aggravated durational departures, including bifurcated proceedings and appropriate *Blakely* waiver provisions. It is the intent of the Commission to amend the guideline language to reflect legislative changes at the next public hearing

Departure Trends in Minnesota – *Post Blakely*

The *Blakely v. Washington* and the subsequent *State v. Shattuck* decisions directly impacted the procedure for imposing aggravated departures under the sentencing guidelines. Although the total number of departures (including both aggravated and mitigated) represented only 26% (3,835) of the 14,751 total felony sentences imposed in 2004, they are important since they represent the atypical cases for which the presumptive guidelines sentence may not be appropriate.

Of the total 14,751 sentences imposed during 2004, only 6.6% (968) of the cases involved aggravated departures. Aggravated dispositional departures accounted for 3.6% (523) of the total cases; aggravated durational departures accounted for 2.7% (403) and aggravated departures representing a combination of both aggravated dispositional and durational departures accounted for 0.3% (42) percent of the total.

When aggravated departure data is compared among years there appears to be only a slight decrease since the *Blakely* ruling in 2004. Presented below is a summary of the types and frequencies of aggravated departures, both dispositional and durational, from 2002 to 2004.

Total Aggravated Departures
Number of Cases and Percent of Overall Cases Sentenced

Type of Departure	2002		2003		2004	
	#	%	#	%	#	%
Aggravated Disposition Only	481	3.7%	521	3.6%	523	3.6%
Aggravated Disposition and Duration	50	0.4%	60	0.4%	42	0.3%
Aggravated Duration Only – Prison	224	1.7%	247	1.7%	191	1.3%
Aggravated Duration Only – Probation	247	1.9%	235	1.6%	212	1.4%
Total	1,002	7.7%	1,063	7.3%	968	6.6%

The data would indicate that *post-Blakely* procedural adjustments have been utilized to continue imposing aggravated departures when appropriate.

The Supreme Court's ruling in *Blakely v. Washington* at the end of its 2003-2004 term created an enormous amount of confusion and uncertainty in sentencing practices and policies at both the state and federal level. Academics, courts, legal experts and sentencing professionals have struggled to decipher what the Court's decision really means and to determine to what extent current sentencing polices and practices are affected in various jurisdictions, as well as what procedural modifications are necessary to comply with the constitutional issues identified in *Blakely*. Minnesota courts have addressed numerous

Blakely-related issues over the past year, including retroactivity, custody status points, and dispositional departures. Although not every issue or question related to *Blakely* has been addressed at this time, there is certainly more clarity than a year ago. Timely criminal sentencing has continued, as has the imposition of aggravated departure sentences. The statutory modifications passed by the 2005 Legislature combined with clarification from recent Minnesota court decisions, have resulted in maintaining enhanced sentences as an option for consideration when warranted and necessary.

II. Modifications to Sex Offender Sentencing Policies

The 2005 Minnesota Legislature passed HF 1, which contained a directive to the Minnesota Sentencing Guidelines Commission to develop a separate sex offense sentencing grid for sex offenders who would not be subject to the mandatory or indeterminate life sentencing provisions for sex offenders enacted in the last legislative session. After a preliminary review of the issues relating to the sentencing of sex offenders, a subcommittee was designated to explore options that would more appropriately address the difficult public safety issues surrounding sex offenders, particularly recidivism. The Commission felt it was imperative to preserve the current determinate sentencing model in Minnesota to ensure proportionality, uniformity and certainty in sentencing, while addressing the availability of longer sentences for cases involving serious or repeat sex offenses.

The subcommittee began by examining which sex offenders would be subject to the new mandatory or indeterminate life sentences and removing those offenders from the pool of defendants who would be sentenced on the new sex offense grid. The subcommittee reviewed current sex offense sentences and their placement on the sentencing grid. Several issues relating to the severity level rankings of sex offenses, repeat sex offenders, and mandatory minimums sentences were identified. The subcommittee determined that recidivism by sex offenders presents different public safety concerns than does recidivism by other felony offenders and concluded that prior convictions for sex offenses should weigh more heavily in determining an appropriate sentence. To address the multiple issues surrounding sentencing of sex offenders, the subcommittee developed a separate sentencing grid for sex crimes, including Failure to Register as a Predatory Offender. The proposed grid encompasses the current statutory maximums and mandatory minimum sentences for sex offenders. Criminal history calculations for the sex offender will weigh prior sex offense convictions more heavily than priors are weighted in the current. Sex offenses committed on supervision will also result in enhanced custody status points.

For the most serious sex offenses, an offender would receive at least one-half the statutory maximum sentence for a criminal history score of three. Thus, one prior Criminal Sexual Conduct 1st Degree conviction would result in a presumptive guidelines sentence equal to one half the statutory maximum sentence. At other offense levels, second time offenders who commit their offenses while on probation or supervised release will also have a presumptive guideline sentence equal to one half the statutory maximum. It should be noted that current sentencing policy provides for lengthy periods of supervision for serious offenders. Aggravated durational departures remain a sentencing option with the new Sex Offense Grid, but it is likely that departures will be less frequent because of the longer sentences provided within the presumptive range. Finally, the Commission ranked all currently unranked sex

offenses with the exception of incest, which is almost never charged since the behavior involved is fully chargeable under more modern statutes.

The modifications to current sex offender sentencing policies were designed to focus on the danger posed by the recidivist sex offenders. Sex offenders have a lower overall recidivism rate than other types of felony offenders. However, when sex offenders do recidivate, they pose a greater threat to public safety. The proposed sex offense grid is designed to impose significantly longer sentences for repeat offenders, as well as for the more serious sex offenses. An analysis of aggravated durational departure data for sex offenders indicates that the enhanced sentences provided by the new grid are reflective of sentences that sex offenders are currently receiving through departures. The Commission prepared a projected prison bed impact, indicating that the proposed sex offense grid would require 380 beds per year after a 20 year phase-in period. When the prison bed impact of 380 is combined with the projected impact of the mandatory and indeterminate life sentence provision for sex offenders passed in the 2005 legislative session, the total prison bed impact of changes to sentencing provision for sex offenders in Minnesota is 598 prison beds after a 20 year phase-in period.

A Public Hearing was held on December 8, 2005, to gather input on the proposed modifications. The Commission subsequently met on December 15, 2005, to adopt the proposed modifications to the guidelines that are contained in this report. The Commission believes the proposed modifications to the sentencing guidelines promote public safety, while providing determinate sentencing options responsive to the constitutional issues identified in *Blakely* and allowing full consideration of the complex factors involved in appropriate sentencing of sex offenders.

Guidelines Modifications

Effective 8/1/2005

Changes to the sentencing guidelines related to new and amended crimes passed by the Legislature during the 2005 session became effective August 1, 2005. The language of the specific changes to the sentencing guidelines is included in the Appendix. A summary of the most significant guidelines changes follows. Other changes not summarized here are included in the Appendix.

Adopted Modifications Related to New and Amended Crimes

The Commission considered new and amended crime legislation from the 2005 Legislative Session and adopted the following severity level rankings:

A. Possession of Substances with Intent to Manufacture Methamphetamine: The Commission considered changes made to the statutory maximum and ranked this offense at severity level V. This offense had previously been ranked at severity level III.

B. Domestic Assault By Strangulation: severity level IV.

C. Methamphetamine Crimes Involving Children and Vulnerable Adults and Anhydrous Ammonia offenses: severity level III.

D. Obstructing Legal Process: The Commission considered changes made to add ambulance service personnel to this offense and adopted a proposal to maintain the current severity level III ranking for the crime.

E. Electronic Use of False Pretense to Obtain Identity: severity level II.

F. Assault in the Fourth Degree: The Commission considered changes made to assault in the fourth degree and adopted a proposal to maintain the current severity level I ranking for the crime.

G. Criminal Use of Real Property, Escape from Civil Commitment, and Interference with Privacy: severity level I.

H. Misdemeanor and Gross Misdemeanor Offense List: The Commission considered new and amended misdemeanors and gross misdemeanors and added the offense of Predatory Offender Carrying a Weapon to the Misdemeanor and Gross Misdemeanor Offense List.

Other Adopted Modifications

- **Life Sentences for Certain Sex Offenders Point:** The Commission adopted modifications to accommodate legislatively mandated life sentences for certain sex offenders.

- **Criminal Sexual Predatory Conduct Offenses:** The Commission added language to specify that the presumptive sentence for this offense is 25% greater than the presumptive sentence for the underlying offense. If the person has previously been convicted of a sex offense, the presumptive sentence is increased by 50%.

- **Multiple Sentences:** The Commission added language to address the legislative provision allowing multiple offenses arising out of the same course of conduct for the new methamphetamine related crimes involving children and vulnerable adults.

- **Crime for the Benefit of a Gang-Child Victims:** The Commission modified its policy to specify that the presumptive sentence for a crime committed for the benefit of a gang is increased by 24 months when the victim is a child.

- **New Grid adopted with Expanded Ranges:** A new grid was adopted to provide sentence ranges of 15% below and 20% above the presumptive sentence.

Adopted Modifications

To Be Effective 8/1/2006 Following Legislative Review

SEX OFFENSE GRID EXPLANATION

Grid Design Principles:

1. The Commission acknowledges that certain types of sex offenses require a different sentencing structure than that contained on the current sentencing guidelines grid, due to a combination of the serious nature of the offense, components of the underlying criminal behavior involved and the threat sex offenses pose to public safety.

2. The new sex offense grid is developed to reflect a combination of sentence lengths based on presumptive sentences and mandatory minimums enacted by the Legislature with relation to sex offenses, thus preserving the "truth in sentencing" principle set forth in the Sentencing Guidelines and retaining the guideline's determinate sentencing structure.

3. The severity ranking of sex offenses on the new grid is based primarily on the statutory maximum sentences for individual sex offenses. Severity levels generally attempt to place sex offenses with similar statutory maximum sentences on the same severity level, which allows for greater proportionality in sentences than is currently provided.

4. The new grid contains significantly enhanced sentence lengths that address issues raised in *Blakely v. Washington* relating to aggravated durational departures, as well as recognizing actual sentencing practices in serious sex offense cases.

5. Criminal history scores totaling six or more indicate a presumptive prison sentence that reflect the statutory maximum penalty designated for most sex offenses. Although the sex offense grid, like the general sentencing guidelines grid, provides ranges of 20% above and 15% below the presumptive sentence, ranges for criminal history scores of six or more do not extend above the statutory maximum sentence. Similarly, the range for first degree criminal sexual conduct does not extend below the statutorily required 144 month presumptive sentence for zero criminal history scores.

6. The underlying prison sentence for the presumptive non-prison portion of the sex offense grid (the shaded areas) enhances current sentence lengths to demonstrate the seriousness assigned to violations and subsequent revocation of a presumptive non-prison sentence.

7. The Commission decided to include Failure to Register as a Sex Offender in the new sex offense sentencing policy. Although this offense is not itself a sex offense, the Commission believes predatory sex offenders that fail to register pose a serious threat to public safety. Inclusion of this offense on the new sex offender grid also permits the Commission to tailor appropriate punishment for these offenders consistent with the statutory minimum and maximum sentences without the constraints of the existing gird.

8. The new sex offense grid would apply only to sex offenders who do not qualify for the indeterminate life sentences passed by the 2005 Legislature.

9. Current unranked sex offenses, including Use of Minors in Sexual Performance and Possession/Dissemination of Child Pornography, are ranked on the new grid. Given the infrequency in prosecution of Incest, it was the Commission's decision not to rank that offense at this time.

Structure of the Sex Offense Grid:

1. Severity levels are indicated by the letters A through H, with A representing the most serious sex offenses and H the least serious. Letters were chosen to designate the severity levels to avoid the confusion between the current sentencing grid and the new sex offense grid.

2. Failure to Register as a Predatory Offender is the only offense listed on the H severity level. Although severity level H is the lowest severity level, all criminal history categories reflect a presumptive term of imprisonment to reflect the current statutory requirement as well as the seriousness of the offender's prior sex offense conviction.

3. CSC 2nd, 3rd and 4th degree offenses retain the previous multi severity level designation which treats sexual offenses committed with force, violence or weapons more seriously with longer presumptive sentences.

4. Criminal history scores are calculated in the same manner as under the current sentencing grid, however, the weights assigned for prior sex offense convictions are modified. Weights were increased for more serious sex offenses, with the less serious sex offenses remaining at their current weight. The prior conviction weight is not reduced for **any** sex offense under the new grid. The modified weights are assigned whenever the offense being sentenced is any offense ranked on the Sex Offender Grid (including Failure to Register). When an offender is sentenced for an offense not included on the Sex Offender Grid, prior sex offenses will not receive the modified weights.

5. Criminal history scores totaling six or more points indicate a presumptive prison sentence that reflects the statutory maximum penalty designated for most sex offenses.

6. Criminal history scores were designed so that a score of 3 generally designates a presumptive sentence of one half of the statutory maximum sentence. Thus, one prior CSC 1st degree sex offense conviction alone will result in a criminal history score of 3 and a presumptive sentence of one half of the maximum sentence set forth in statute for a specific severity level. At other offense levels, second time offenders who commit their offenses while on probation or supervised release will also be recommended a sentence that is one half the statutory maximum.

7. The presumptive non-prison portion of the new grid is structured similar to the current grid with lower level sex offenses with limited criminal history scores designated as a non-prison sentence. However, the new sex offense grid contains fewer presumptive non-prison cells and the underlying prison term is notably longer on the new grid, even for zero criminal history scores, than on the current sentencing grid.

8. Although new crimes were attempted to be ranked by severity levels that coincided with statutory maximum sentences, child pornography was an exception to this practice due to the nature and amount of harm associated with the offense. When ranking the offense of Child Pornography, a multi-severity level ranking was chosen to distinguish between penalty ranges for a first conviction and second or subsequent convictions. Possession of Child Pornography is ranked at a severity level G for a first conviction and a severity level F for a second/subsequent conviction. Dissemination of Child Pornography is ranked at a severity level E for the first conviction and a severity level D for a second/subsequent conviction.

9. Use of Minors in Sexual Performance has a designated statutory maximum sentence of 10 years and was ranked with similar sex offenses carrying a 10 year statutory maximum sentence at severity level E.

Custody Status Points:

1. If an offender is on supervision (probation, supervised release or conditional release) for a sex offense and commits another sex offense, the offender would receive two custody status points, instead of the current one custody status point.

2. If an offender is on supervision (probation, supervised release or conditional release) for a sex offense and commits a non-sex offense, the offender would receive the current one custody status point.

3. If an offender is on supervision for a sex offense and is convicted of Failure to Register, the offender would continue to receive the current one custody status point.

Consecutive Sentences and Departures:

1. The new sentencing grid and sentencing structure would still permit consecutive sentencing by the court when the facts or circumstances surrounding a specific offender/conviction warrant an enhanced sentence. Consecutive sentencing can result in periods of incarceration that exceed the statutory maximum for any single conviction.

2. Departures, both aggravated and mitigated, would be available with the new sex offense grid. Although the sentences have been significantly enhanced on the new grid, mitigated durational and dispositional departures are available for the atypical cases that may warrant a lesser sentence. Aggravated departures are still available as long as *Blakely* issues are addressed in the sentencing process. However, with the enhanced sentence lengths contained on the new grid and the indeterminate life sentencing provision for certain sex offenders, the need for aggravated departures may be lessened.

Ranking of Sex Offenses and Weights to be Assigned to Prior Offenses

Offense	Statutory Provisions	Severity Level	Stat. Max.	Weight of Prior	Current Weight
CSC 1	609.342, all clauses: Penetration	A	30	3	2
CSC 1	609.341 subd.11: Contact, victim(s) under 13	A	30	3	1.5
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	25	2	1.5
CSC 3	609.344 subd.1 c, d, g, h-n: Penetration, force or prohibited occupation	C	15	2	1.5
CSC 2	609.343 subd.1 a, b, g: Contact with young minors	D	25	1.5	1.5
CSC 3	609.344 subd,1 a, b, e, f: Penetration, minors	D	15	1.5	1
Dissemination Child Pornography	617.247 subd.3: Subsequent or Predatory Offender	D	15	1.5	Unranked
CSC 4	609.345 subd.1 c, d, g, h-n: Contact, force or prohibited occupation	E	10	1.5	1.5
Use Minors Sexual Perform.	617.246 subd.2, 3, 4	E	10	1.5	Unranked
Dissemination Child Pornography	617.247 subd.3	E	7	1.5	Unranked
CSC 4	609.345 subd.1 a, b, e, f: Contact, minors	F	10	1	1
Possession Child Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	10	1	Unranked
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	5	1	1
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	5	1	1
Possession Child Pornography	617.247 subd.4	G	5	1	Unranked
Incest	609.365	Unranked	10	Unranked	Unranked
Solicit Children for Sexual Conduct	609.352 subd.2	G	3	1	1
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	5	0.5 1	0.5 1

2005 Legislatively Created Life Sentences for Certain Sex Offenders

The Commission recommended that the Legislature create an Off Grid Sex Offense Category designating offenses for which a sentence of life in prison with the possibility of release is appropriate. The Legislature responded by creating two types of life sentences for some sex offenders.

A. Life Without the Possibility of Release – 609.3455 subd. 2

The omnibus public safety bill mandates life sentences without the possibility of release for some sex offenders. This sentence applies only to 1st and 2nd degree criminal sexual conduct offenses under the following paragraphs of subdivision 1:

(c)–fear of great bodily harm;
(d)–use of dangerous weapon;
(e)–personal injury with force or coercion or against an impaired victim;
(f)–accomplice and use of force or coercion or use of a dangerous weapon; or
(h)–victim under 16, significant relationship, and force or coercion, personal injury, or multiple acts.

This sentence also requires:

(1) two or more heinous elements (torture, great bodily harm, mutilation, extreme inhumane conditions, dangerous weapon, multiple victims, multiple perpetrators, and kidnapping) exist; or
(2) the person has a previous sex offense conviction (convicted of the prior offense before committing the current offense) and one heinous element exists.

B. Life With the Possibility of Release – 609.3455 subd. 3 and 4

This legislation also provides for mandatory life sentences with the possibility of release for other sex offenses. A first-time sex offender is subject to a life sentence if the offense is 1st or 2nd degree criminal sexual conduct under subdivision1, paragraph (c), (d), (e), (f), or (h) and one heinous element exists. Repeat sex offenders may also receive this sentence under any of the following circumstances:

(1) the offender has two previous sex offense convictions (the offender was convicted and sentenced for a sex offense committed after the offender was earlier convicted and sentenced for a sex offense and both convictions preceded the commission of the present offense);
(2) the person has one previous sex offense conviction (convicted of the prior offense before committing the current offense) and (i) the present offense involved an aggravating factor, other than repeat sex convictions, that would provide grounds for an upward departure; or (ii) the person received an upward durational departure for the previous sex offense conviction; or (iii) the person was sentenced under section 609.108 for the previous sex offense conviction;
(3) the person has two prior sex offense convictions, the prior and present offenses involved at least three separate victims, and (i) the present offense involved an aggravating factor, other than repeat sex convictions, that would provide grounds for an upward departure; or (ii) the person received an upward durational departure for the previous sex offense conviction; or (iii) the person was sentenced under section 609.108 for the previous sex offense conviction.

These provisions do not apply if the current offense is fourth-degree criminal sexual conduct and the

previous or prior offenses were also fourth-degree criminal sexual conduct offenses. When an offender receives a life sentence with the possibility of release, the court is required to specify a minimum term of imprisonment, based on the sentencing guidelines or any applicable mandatory minimum sentence that must be served before the offender is eligible for release.

When analyzing the impact of the bill, staff estimated that 37 offenders sentenced in 2003 would qualify for the life sentences. Based on offenders sentenced in 2004, staff estimates that 23 offenders would qualify for the life sentences.

Offenders Estimated to be Eligible for Life Sentences: Offenders Sentenced in 2003

Group	Life Sentence Type	Number	Degree of Conviction
First-degree offenders, clauses c, d, e, f, or h with two severe aggravating factors	No Release	6	6 First
First-degree offenders, clauses c, d, e, f, or h with one severe aggravating factor	Release Possible	6	6 First
Offenders with two previous sex offenses (convicted on prior offense before committing the current offense)	Release Possible	8	4 First, 1 Second, 2 Third, 1 Fourth
Aggravated departure with a previous offense	Release Possible	5	4 First, 1 Second
Offenders who committed multiple offenses against different victims, prison with no mitigated durations	Release Possible	12	9 First, 3 Second
Total	Release Possible	**37**	25 First, 5 Second, 2 Third, 1 Fourth

Offenders Estimated to be Eligible for Life Sentences: Offenders Sentenced in 2004

Group	Life Sentence Type	Number	Degree of Conviction
First or Second degree offenders, clauses c, d, e, f, or h with two severe aggravating factors	No Release	5	5 First
First or Second degree offenders, clauses c, d, e, f, or h with one severe aggravating factor	Release Possible	6	4 First, 2 Second
Offenders with two previous sex offenses (convicted on prior offense before committing the current offense)	Release Possible	2	1 Second, 1 Fourth
Aggravated departure with a previous offense.	Release Possible	6	2 First, 2 Second, 2 Third
Offenders who committed multiple offenses against different victims, prison with no mitigated durations	Release Possible	4	2 First, 1 Second 1 Third
Total	Release Possible	**23**	13 First, 6 Second, 3 Third, 1 Fourth

The table below displays the number of sex offenders sentenced in 2004 by offense and new severity level on the proposed Sex Offender Grid. It also displays the number of offenders assumed to be mandated Life sentences and the number who would be subject to the proposed Sex Offender Grid.

Estimated Number of Offenders Subject to Sex Offender Grid

Offense	Statutory Provisions	New Severity Level	Number of Offenders	Number Qualify for Life	Number Remaining
CSC 1	609.342, all clauses: Penetration	A	137	13	124
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	36	3	33
CSC 3	609.344 subd.1 c, d, g, h-n: Penetration, force or prohibited occupation	C	62	1	61
CSC 2	609.343 subd.1 a, b, g: Contact with young minors	D	110	3	107
CSC 3	609.344 subd.1 a, b, e, f: Penetration, minors	D	146	2	144
Dissemination Pornography	617.248 subd.3: Subsequent or Predatory Offender	D	0	0	0
CSC 4	609.345 subd.1 c, d, g, h-n: Contact, force or prohibited occupation	E	50	1	49
Use Minors Sexual Perform.	617.246 subd.2, 3, 4	E	2	0	2
Dissemination Pornography	617.247 subd.3	E	1	0	1
CSC 4	609.345 subd.1 a, b, e, f: Contact, minors	F	50	0	50
Possession Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	1	0	1
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	0	0	0
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	3	0	3
Possession Pornography	617.247 subd.4	G	33	0	33
Solicit Children Sexual Conduct	609.352 subd.2	G	8	0	8
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	231	0	231
Total			**870**	**23**	**847**

Offenders Subject to Sex Offender Grid: Number with a "True" Prior Criminal Sexual Conduct Offense

Offense	Statutory Provisions	New Severity Level	Number of Offenders	Number One True Prior Sex Offense	Number 2 Or More True Prior Sex Offense
CSC 1	609.342, all clauses: Penetration	A	124	2	2
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	33	1	1
CSC 3	609.344 subd.1 c, d, g, h-n: Penetration, force or prohibited occupation	C	61	3	1
CSC 2	609.343 subd.1 a, b, g: Contact with young minors	D	107	5	2
CSC 3	609.344 subd.1 a, b, e, f: Penetration, minors	D	144	5	1
Dissemination Pornography	617.248 subd.3: Subsequent or Predatory Offender	D	0	0	0
CSC 4	609.345 subd.1 c, d, g, h-n: Contact, force or prohibited occupation	E	49	0	1
Use Minors Sexual Perform.	617.246 subd.2, 3, 4	E	2	0	0
Dissemination Pornography	617.247 subd.3	E	1	0	0
CSC 4	609.345 subd.1 a, b, e, f: Contact, minors	F	50	4	1
Possession Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	1	1	0
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	0	0	0
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	3	0	0
Possession Pornography	617.247 subd.4	G	33	0	0
Solicit Children Sexual Conduct	609.352 subd.2	G	8	0	0
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	231	127	17
Total			**847**	**148 (17%)**	**26 (3%)**

Estimated Prison Bed Impact of Changes for Sentencing Sex Offenses

Impact of Life Sentences

Number of Sex Offenders Sentenced in 2004: 870
Number Assumed to Qualify for Life Sentence: 23
Estimated Prison Bed Impact of Life Sentences: 138-663

Assumptions:

1. Offenders serving life sentences with no release serve until they die. Estimated life span based on age at sentence and Social Security actuarial tables.
2. Four scenarios presented for how long offenders with release possible sentences will serve with minimum time to serve based on new Sex Offender Grid.

Estimated Impact by Type of Life Sentence and Scenario for Time Served

Type of Sentence	Number of Offenders	Prison Bed Impact			
		Serve Minimum	Serve Minimum +5 years	Serve Minimum +10 years	Serve Till Death
Life: No Release	5	128	128	128	128
Life: Release Possible	18	10	98	183	535
Total	23	138	226	311	663

Impact of Sex Offender Grid

Number Assumed to Qualify for Sex Offender Grid: 847
Number of Prison Sentences Expected to Change: 179 (21%)
Eventual Prison Bed Impact: 372 additional beds needed per year

Assumptions:

1. The number and type of offenders sentenced remains the same as in 2004.
3. Offenders currently receiving mitigated dispositional and durational departures would continue to receive an identical sentence.
3. Offenders currently receiving aggravated departures would receive sentences at least as long as they are currently receiving.

Estimated Impact by Type of Change to Presumptive Sentence

Type of Change	Number of Offenders	Prison Bed Impact
New Prison Sentences	30	93
Serve More Time	149	279
Total	178	372

Timing of Prison Bed Impact

Assumptions:

1. No impact until 2007 because will take time for offenders to commit crimes and be processed through the system and number of trials may increase.
2. Impact for life sentences based on offenders who are eligible for release serving 5 years beyond their minimum terms.

Year	# Extra Beds Needed			Year	# Extra Beds Needed		
	Life (min. +5)	Grid	Total		Life (min. +5)	Grid	Total
FY 2007	0	39	39	FY 2037	176	372	548
FY 2008	0	95	95	FY 2038	180	372	552
FY 2009	0	145	145	FY 2039	185	372	557
FY 2010	2	186	188	FY 2040	189	372	561
FY 2011	5	215	220	FY 2041	193	372	565
FY 2012	10	238	248	FY 2042	197	372	569
FY 2013	15	259	273	FY 2043	201	372	573
FY 2014	21	276	297	FY 2039	185	372	557
FY 2015	29	295	324	FY 2040	189	372	561
FY 2016	34	307	341	FY 2041	193	372	565
FY 2017	41	316	357	FY 2042	197	372	569
FY 2018	50	324	374	FY 2043	201	372	573
FY 2019	59	333	392	FY 2044	205	372	577
FY 2020	68	342	410	FY 2045	207	372	579
FY 2021	78	349	427	FY 2046	209	372	581
FY 2022	85	356	441	FY 2047	211	372	583
FY 2023	93	363	456	FY 2048	213	372	585
FY 2024	101	366	467	FY 2049	215	372	587
FY 2025	109	369	478	FY 2050	216	372	588
FY 2026	116	369	485	FY 2051	217	372	589
FY 2027	123	371	494	FY 2052	218	372	590
FY 2028	133	372	505	FY 2053	219	372	591
FY 2029	140	372	512	FY 2054	220	372	592
FY 2030	146	372	518	FY 2055	221	372	593
FY 2031	152	372	524	FY 2056	222	372	594
FY 2032	156	372	528	FY 2057	223	372	595
FY 2033	160	372	532	FY 2058	224	372	596
FY 2034	164	372	536	FY 2059	225	372	597
FY 2035	168	372	540	FY 2060	226	372	598
FY 2036	172	372	544	FY 2061	226	372	598

Estimated Impact by Offense and New Severity Level

Offense	Statutory Provisions	Severity Level	Number of Offenders	Number Prison Cases with Increased Sentences	Prison Bed Impact
CSC 1	609.342, all clauses: Penetration	A	124	28	99
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	33	9	45
CSC 3	609.344 subd.1 c, d, g, j, k, m, n: Penetration, force or prohibited occupation	C	61	14	13
CSC 2	609.343 subd.1 a, b, g: Contact with minors	D	107	21	59
CSC 3	609.344 subd.1 b, e, f, h, i, l: Penetration, minors or some occupations	D	144	31	95
Dissemination Pornography	617.247 subd.3: Subsequent or Predatory Offender	D	0	0	0
CSC 4	609.345 subd.1 c, d, g, j, k, m, n: Contact, force or prohibited occupation	E	49	8	12
Use Minors Sexual Perform.	617.247 subd.2, 3, 4	E	2	0	0
Dissemination Pornography	617.247 subd.3	E	1	0	0
CSC 4	609.345 subd.1 b, e, f, h, i, l: Contact, minors or some occupations	F	50	8	18
Possession Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	1	1	2
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	0	0	0
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	3	0	0
Possession Pornography	617.247 subd.4	G	33	3	3
Solicit Children Sexual Conduct	609.352 subd.2	G	8	0	0
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	231	54	26
Total			**847**	**178**	**372**

Offenders Subject to Sex Offender Grid: Aggravated Durational Departures Number Eliminated by New Presumptive Sentences By Offense

Offense	Total Number Sentenced	Prison Sentences			Probation Sentences		
		#	# Aggravated Durations	# Eliminated	#	# Aggravated Durations	# Eliminated
CSC 1	124	82	9	3	42	3	2
CSC 2: Force	33	21	1	1	12	0	---
CSC 3: Force	61	30	4	3	31	1	0
CSC 2: Minors	107	15	4	1	92	3	1
CSC 3: Minors	144	20	4	4	124	8	5
CSC 4: Force	49	8	0	---	41	3	0
CSC 4: Minors	50	5	1	1	45	0	---
Use Minors Sexual Perform.	2	0	0	---	2	0	---
Dissemination Pornography	1	0	0	---	1	0	---
Indecent Exposure	3	0	0	---	3	0	---
Possession Pornography	34	2	0	---	32	0	---
Solicit Children Sexual Conduct	8	0	0	---	8	1	1
Failure to Register	231	100	2	2	131	2	---
Total	847	283	25	15 (60%)	564	22	9 (41%)

There were a total of 47 aggravated durational departures pronounced for offenders sentenced in 2004 who would be subject to the proposed sex offender grid. Under the proposed policies for calculating criminal history scores for sex offenders and the proposed sex offender grid, 24 (51%) of those departures would be eliminated because the offender's new presumptive sentence would be equal to or longer than the sentence pronounced.

I. 2006 Proposed Modifications Related to Sex Offenses

A. The Commission proposes the following changes to the *Minnesota Sentencing Guidelines and Commentary* to implement a new Grid with presumptive sentences for sex offenders.

II. Determining Presumptive Sentences

The presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by locating the appropriate cell of the Sentencing Guidelines Grid. The grid represents the two dimensions most important in current sentencing and releasing decisions--offense severity and criminal history.

A. Offense Severity: The offense severity level is determined by the offense of conviction. When an offender is convicted of two or more felonies, the severity level is determined by the most severe offense of conviction. For persons convicted under Minn. Stat. § 609.229, subd. 3(a) - Crime Committed for Benefit of a Gang, the severity level is the same as that for the underlying crime with the highest severity level.

Felony offenses, other than specified sex offenses, are arrayed into eleven levels of severity, ranging from low (Severity Level I) to high (Severity Level XI). Specified sex offenses are arrayed on a separate grid into eight severity levels labeled A through H. First-degree murder is excluded from the sentencing guidelines, because by law the sentence is mandatory imprisonment for life. Offenses listed within each level of severity are deemed to be generally equivalent in severity.

…

II.A.03. *The following offenses were excluded from the Offense Severity Reference Table:*

1. *Abortion - 617.20; 617.22; 145.412*
2. *Accomplice after the fact - 609.495, subd. 3*
3. *Adulteration - 609.687, subd. 3 (3)*
4. *Aiding suicide - 609.215*
5. *Altering engrossed bill - 3.191*
6. *Animal fighting - 343.31*
7. *Assaulting or harming a police horse - 609.597, subd. 3 (1) & (2)*
8. *Bigamy - 609.355*
9. *Cigarette tax and regulation violations - 297F.20*

10. *Collusive bidding/price fixing - 325D.53, subds.1(3), 2 & 3*
11. *Concealing criminal proceeds; engaging in business - 609.496; 609.497*
12. *Corrupting legislator - 609.425*
13. *Criminal sexual conduct, third degree - 609.344, subd. 1(a)*
    (By definition the perpetrator must be a juvenile.)
14. *Criminal sexual conduct, fourth degree - 609.345, subd. 1(a)*
    (By definition the perpetrator must be a juvenile.)
15. *Damage to Property of Critical Public Service Facilities, Utilities, and Pipelines – 609.594*
16. *Escape with violence from gross misdemeanor or misdemeanor offense – 609.485, subd. 4(a)(3)*
17. *Failure to Report - 626.556, subd. 6*
18. *Falsely impersonating another - 609.83*
19. *Female genital mutilation - 609.2245*
20. *Forced execution of a declaration - 145B.105*
21. *Gambling acts (cheating, certain devices prohibited; counterfeit chips; manufacture, sale, modification of devices; instruction) - 609.76, subd. 3,4,5,6, & 7*
22. *Hazardous wastes - 609.671*
23. *Horse racing-prohibited act - 240.25*
24. *Incest - 609.365*
25. *Insurance Fraud – Employment of Runners – 609.612*
26. *Interstate compact violation - 243.161*
27. *Issuing a receipt for goods one does not have – 227.50*
28. *Issuing a second receipt without "duplicate" on it – 227.52*
29. *Killing or harming a public safety dog - 609.596, subd. 1*
30. *Labor Trafficking – 609.282*
31. *Lawful gambling fraud - 609.763*
32. *Metal penetrating bullets - 624.74*
33. *Misprision of treason - 609.39*
34. *Motor vehicle excise tax - 297B.10*
35. *Obscene materials; distribution - 617.241, subd. 4*
36. *Obstructing military forces - 609.395*
37. *Pipeline safety - 299J.07, subd. 2*
38. *Police radios during commission of crime - 609.856*
39. ~~*Possession of Pictorial Representations of Minors – 617.247*~~
40. *Racketeering, criminal penalties (RICO) - 609.904*
41. *Real and Simulated Weapons of Mass Destruction – 609.712*
42. *Refusal to assist - 6.53*
43. *Sale of membership camping contracts – 82A.03; 82A.13; 82A.25*
44. *Service animal providing service – 343.21, subd. 9(e)(g)*
45. *State lottery fraud - 609.651, subd. 1 with 4(b) and subd. 2 & 3*
46. *Subdivided land fraud - 83.43*
47. *Torture or cruelty to pet or companion animal – 343.21, subd. 9(c)(d)(f)(h)*
48. *Treason - 609.385*
49. *Unauthorized computer access - 609.891*

50. Unlawful Conduct with Documents in Furtherance of Labor or Sex Trafficking – 609.283
51. Unlawful Transfer of Sounds; Sales - 325E.201
~~*52. Use of Minors in Sexual Performance Prohibited - 617.246*~~
53. Warning subject of investigation - 609.4971
54. Warning subject of surveillance or search - 609.4975
55. Wire communications violations - 626A.02, subd. 4; 626A.03, subd. 1(b)(ii); 626A.26, subd. 2(1)(ii)

…

B. Criminal History: A criminal history index constitutes the horizontal axis of the Sentencing Guidelines Grids. The criminal history index is comprised of the following items: (1) prior felony record; (2) custody status at the time of the offense; (3) prior misdemeanor and gross misdemeanor record; and (4) prior juvenile record for young adult felons.

…

The offender's criminal history index score is computed in the following manner:

1. Subject to the conditions listed below, the offender is assigned a particular weight for every extended jurisdiction juvenile conviction and for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing. Multiple offenses are sentenced in the order in which they occurred. For purposes of this section, prior extended jurisdiction juvenile convictions are treated the same as prior felony sentences.

    a. If the current offense is not a specified sex offense, the weight assigned to each prior felony sentence is determined according to its severity level, as follows:

        Severity Level I - II = ½ point;

        Severity Level III - V = 1 point;

        Severity Level VI - VIII = 1 ½ points;

        Severity Level IX - XI = 2 points; ~~and~~

        Murder 1st Degree = 2 points;

        Severity Level A = 2 points;

        Severity Level B – E = 1 ½ points;

        Severity Level F – G = 1 point; and

        Severity Level H = ½ point for first offense and 1 point for subsequent offenses

    b. If the current offense is a specified sex offense, the weight assigned to each prior felony sentence is determined according to its severity level, as follows:

Severity Level I - II = ½ point;

Severity Level III - V = 1 point;

Severity Level VI - VIII = 1 ½ points;

Severity Level IX - XI = 2 points; ~~and~~

Murder 1st Degree = 2 points;

Severity Level A = 3 points;

Severity Level B – C = 2 points;

Severity Level D – E = 1 ½ points;

Severity Level F – G = 1 point; and

Severity Level H = ½ point for first offense and 1 point for subsequent offenses

The severity level to be used in assigning weights to prior offenses shall be based on the severity level ranking of the prior offense of conviction that is in effect at the time the offender commits the current offense.

2. One point is assigned if the offender:

   a. was on probation, parole, supervised release, conditional release, or confined in a jail, workhouse, or prison pending sentencing, following a guilty plea or verdict in a felony, gross misdemeanor or an extended jurisdiction juvenile case, or following a felony, gross misdemeanor or an extended jurisdiction juvenile conviction; or
   b. was released pending sentencing at the time the felony was committed for which he or she is being sentenced; or
   b. committed the current offense within the period of the initial length of stay pronounced by the sentencing judge for a prior felony, gross misdemeanor or an extended jurisdiction juvenile conviction. This policy does not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence; or
   c. became subject to one of the criminal justice supervision statuses listed in 2.a above at any point in time during which the offense occurred when multiple offenses are an element of the conviction offense or the conviction offense is an aggregated offense.
   d. An additional custody status point shall be assigned if the offender was on probation, supervised release, or conditional release for a specified sex offense, other than Failure to Register as a Predatory Offenders (M.S. 243.166) and the current offense

of conviction is a specified sex offense, other than Failure to Register as a Predatory Offenders (243.166).

The offender will not be assigned a point under this item when:

a. the person was committed for treatment or examination pursuant to Minn. R. Crim. P. 20; or

b. the person was on juvenile probation or parole status at the time the felony was committed for which he or she is being sentenced and was not on probation or supervised release status for an extended jurisdiction juvenile conviction.

An additional three months shall be added to the duration of the appropriate cell time which then becomes the presumptive duration when:

a. a custody status point is assigned; and
b. the criminal history points that accrue to the offender without the addition of the custody status point places the offender in the far right hand column of the Sentencing Guidelines Grid.

Comment

II.B.201. *The basic rule assigns offenders one point if they were under some form of criminal justice custody when the offense was committed for which they are now being sentenced. The Commission believes that the potential for a custody status point should remain for the entire period of the initial length of stay pronounced by the sentencing judge. An offender who is discharged early but subsequently is convicted of a new felony within the period of the initial length of stay should still receive the consequence of a custody status point. If probation is revoked and the offender serves an executed sentence for the prior offense, eligibility for the custody status point ends with discharge from the sentence. Probation given for an offense treated pursuant to Minn. Stat. § 152.18, subd. 1, will result in the assignment of a custody status point because a guilty plea has previously been entered and the offender has been on a probationary status. Commitments under Minn. R. Crim. P. 20, and juvenile parole, probation, or other forms of juvenile custody status are not included because, in those situations, there has been no conviction for a felony or gross misdemeanor which resulted in the individual being under such status. However, a custody point will be assigned if the offender committed the current offense while under some form of custody following an extended jurisdiction juvenile conviction. Probation, jail, or other custody status arising from a conviction for misdemeanor or gross misdemeanor traffic offenses are excluded. Probation, parole, and supervised release will be the custodial statuses that most frequently will result in the assignment of a point. It should be emphasized that the custodial statuses covered by this policy are those occurring after conviction of a felony or gross misdemeanor. Thus, a person who commits a new felony while on pre-trial diversion or pre-trial release on another charge would not get a custody status point. Likewise, persons serving a misdemeanor sentence at the time the current offense was committed would not receive a custody status point, even if the misdemeanor sentence was imposed upon conviction of a gross misdemeanor or felony.*

II.B.207. *When an offender who is on probation, conditional release or supervised release for a sex offense commits another sex offense, they are assigned an additional custody status point. The commission believes that offenders who commit a subsequent sex offense pose such a risk to public safety that their criminal history scores should be enhanced to reflect this risk. This policy does not apply to the offense of Failure to Register as a Predatory Offender (M.S. 243.166).*

C. Presumptive Sentence: The offense of conviction determines the appropriate severity level on the vertical axis of the appropriate Grid. The offender's criminal history score, computed according to section B above, determines the appropriate location on the horizontal axis of the appropriate Grid. The presumptive fixed sentence for a felony conviction is found in the Sentencing Guidelines Grid cell at the intersection of the column defined by the criminal history score and the row defined by the offense severity level. The offenses within the Sentencing Guidelines Grids are presumptive with respect to the duration of the sentence and whether imposition or execution of the felony sentence should be stayed.

The ~~line~~ shaded areas on the Sentencing Guidelines Grids demarcate~~s~~ those cases for whom the presumptive sentence is stayed ~~executed~~ from those for whom the presumptive sentence is ~~stayed~~ executed. For cases contained in cells ~~above and to the right of the line~~ outside of the shaded areas, the sentence should be executed. For cases contained in cells ~~below and to the left of the line~~ within the shaded areas, the sentence should be stayed, unless the conviction offense carries a mandatory minimum sentence.

~~Pursuant to M.S. § 609.342, subdivision 2, the presumptive sentence for a conviction of Criminal Sexual Conduct in the First Degree is an executed sentence of at least 144 months. Sentencing a person in a manner other than that described in M.S. § 609.342, subdivision 2 is a departure. The presumptive duration for an attempt or conspiracy to commit Criminal Sexual Conduct in the First Degree is one-half of the time listed in the appropriate cell of the Sentencing Guidelines Grid, or any mandatory minimum, whichever is longer.~~

~~Pursuant to M.S. § 609.343, subdivision 2, the presumptive sentence for a conviction of Criminal Sexual Conduct in the Second Degree, 609.343 subd. 1 clauses (c), (d), (e), (f), and (h), is an executed sentence of at least 90 months. Sentencing a person in a manner other than that described in M.S. § 609.343, subdivision 2 is a departure. The presumptive duration for an attempt or conspiracy to commit Criminal Sexual Conduct in the Second Degree is one-half of the time listed in the appropriate cell of the Sentencing Guidelines Grid, or any mandatory minimum, whichever is longer.~~

…

Comment

II.C.01. *The guidelines provide sentences which are presumptive with respect to (a) disposition--whether or not the sentence should be executed, and (b) duration--the length of the sentence. For cases ~~above and to the right of the dispositional line~~ outside the shaded area, the guidelines create a presumption in favor of execution of the sentence. For cases in cells ~~below and to the left of the dispositional line~~ within the shaded area, the guidelines create a presumption against execution of the sentence, unless the conviction offense carries a mandatory minimum sentence.*

The dispositional policy adopted by the Commission was designed so that scarce prison resources would primarily be used for serious person offenders and community resources would be used for most property offenders. The Commission believes that a rational sentencing policy requires such trade-offs, to ensure the availability of correctional resources for the most serious offenders. For the first year of guidelines operation, that policy was reflected in sentencing practices. However, by the third year of guideline operation, the percentage of offenders with criminal history scores of four or more had increased greatly, resulting in a significant increase in imprisonment for property offenses. Given finite resources, increased use of imprisonment for property offenses results in reduced prison resources for person offenses. The allocation of scarce resources has been monitored and evaluated on an ongoing basis by the Commission. The Commission has determined that assigning particular weights to prior felony sentences in computing the criminal history score will address this problem. The significance of low severity level prior felonies is reduced, which should result in a lower imprisonment rate for property offenders. The significance of more serious prior felonies is increased, which should result in increased prison sentences for repeat serious person offenders.

II.C.02. *In the cells ~~above and to the right of the dispositional line~~ outside of the shaded areas of the grids, the guidelines provide a fixed presumptive sentence length, and a range of time around that length. Presumptive sentence lengths are shown in months, and it is the Commission's intent that months shall be computed by reference to calendar months. Any sentence length given that is within the range of sentence length shown in the appropriate cell of the Sentencing Guidelines Grids is not a departure from the guidelines, and any sentence length given which is outside that range is a departure from the guidelines. In the cells ~~below and to the left of the dispositional line~~ in the shaded areas of the grids, the guidelines provide a single fixed presumptive sentence length.*

The presumptive duration listed on the grid, when executed, includes both the term of imprisonment and the period of supervised release. According to M.S. § 244.101, when the court sentences an offender to an executed sentence for an offense occurring on or after August 1, 1993, the sentence consists of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence; and a specified maximum supervised release term equal to one-third of the total executed sentence. A separate table following the Sentencing Guidelines Grids illustrates how executed sentences are broken down into their two components.

The Commissioner of Corrections may extend the amount of time an offender actually serves in prison if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison.

...

~~II.C.08. When an offender has been convicted of M.S. § 609.342, the presumptive duration is that found in the appropriate cell of the Sentencing Guidelines Grid, any applicable mandatory minimum sentence, or the minimum presumptive sentence pursuant to M.S. § 609.342, subdivision 2, whichever is longer. According to M.S. § 609.342, subd. 2, the presumptive sentence for a conviction of Criminal Sexual Conduct in the First Degree is an executed sentence of at least 144 months. The presumptive duration for an attempt or conspiracy to commit Criminal Sexual Conduct in the First Degree is one half of the time listed in the appropriate cell of the Sentencing Guidelines Grid, or any mandatory minimum, whichever is longer.~~

~~*II.C.09. When an offender has been convicted of M.S. § 609.343 subd. 1 clauses (c), (d), (e), (f), or (h), the presumptive duration is that found in the appropriate cell of the Sentencing Guidelines Grid, any applicable mandatory minimum sentence, or the minimum presumptive sentence pursuant to M.S. § 609.343, subdivision 2, whichever is longer. According to M.S. § 609.343, subd. 2, the presumptive sentence for a conviction of these clauses of Criminal Sexual Conduct in the Second Degree is an executed sentence of at least 90 months. The presumptive duration for an attempt or conspiracy to commit Criminal Sexual Conduct in the Second Degree is one half of the time listed in the appropriate cell of the Sentencing Guidelines Grid, or any mandatory minimum, whichever is longer.*~~

E. Mandatory Sentences: When an offender has been convicted of an offense with a mandatory minimum sentence of one year and one day or more, the presumptive disposition is commitment to the Commissioner of Corrections. The presumptive duration of the prison sentence should be the mandatory minimum sentence according to statute or the duration of the prison sentence provided in the appropriate cell of the Sentencing Guidelines Grids, whichever is longer.

Comment

II.E.02. *The Commission attempted to draw the dispositional line so that the great majority of offenses that might involve a mandatory sentence would fall* ~~*above the dispositional line*~~ *outside the shaded areas of the Grids. However, some cases carry a mandatory prison sentence under state law but fall* ~~*below the dispositional line*~~ *within the shaded areas on the Sentencing Guidelines Grids; e.g., Assault in the Second Degree. When that occurs, imprisonment of the offender is the presumptive disposition. The presumptive duration is the mandatory minimum sentence or the duration provided in the appropriate cell of the Sentencing Guidelines Grid, whichever is longer. These crimes are ranked below the dispositional line because the Commission believes the durations at these levels are more proportional to the crime than the durations found at the higher severity levels where prison is recommended regardless of the criminal history score of the offender. For example, according to Minn. Stat. § 609.11, the mandatory minimum prison sentence for Assault in the Second Degree involving a knife is one year and one day. However, according to the guidelines, the presumptive duration is the mandatory minimum or the duration provided in the appropriate cell of the grid, whichever is longer. Therefore, for someone convicted of Assault in the Second Degree with no criminal history score, the guidelines presume 21-month prison duration based on the appropriate cell of the grid found at severity level VI. The Commission believes this duration is more appropriate than the 48-month prison duration that would be recommended if this crime were ranked at severity level VIII, which is the first severity level ranked completely above the dispositional line.*

When the mandatory minimum sentence is for less than one year and one day, the Commission interprets the minimum to mean any incarceration including time spent in local confinement as a condition of a stayed sentence. The presumptive disposition would not be commitment to the Commissioner unless the case falls above the dispositional line on the Sentencing Guidelines Grids. An example would be a conviction for simple possession of cocaine, a Fifth Degree Controlled Substance Crime. If the person has previously been convicted of a controlled substance crime, the mandatory minimum law would require at least six months incarceration, which could be served in a local jail or workhouse.

...

Proposed Sex Offender Grid

Severity Level of Conviction Offense		I. Criminal History Score						
		0	1	2	3	4	5	6 or more
CSC 1st Degree	A	144 144-173	156 133-187	168 143-202	180 153-216	234 199-281	306 260-360	360 326-360
CSC 2nd Degree: Contact with force	B	90 90-108	110 94-132	130 111-156	150 128-180	195 166-234	255 217-300	300 255-300
CSC 3rd Degree: Penetration with force or by prohibited occupations	C	48 41-58	62 54-76	76 65-91	90 77-108	117 99-140	153 130-180	180 153-180
CSC 2nd Degree: Contact with minors *CSC 3rd Degree: Penetration of minor* *Dissemination of Child Pornography: Subsequent or by Predatory Offender*	D	36	48	60 51-72	70 60-84	91 77-109	119 101-143	140 119-168
CSC 4th Degree: Contact with force or by prohibited occupations *Use Minors in Sexual Performance* *Dissemination of Child Pornography*	E	24	36	48	60 51-72	78 66-94	102 87-120	120 102-120
CSC 4th Degree: Contact with minors *Possession of Child Pornography: Subsequent or by Predatory Offender*	F	18	27	36	45 51-69	59 60-80	77 68-92	84 72-101
CSC 5th Degree *Indecent Exposure* *Possession of Child Pornography* *Solicit Children for Sexual Conduct*	G	15	20	25	30	39 33-47	51 43-60	60 51-60
Registration Of Predatory Offenders	H	12[1] 12[1]-14	14 12[1]-17	16 14-19	18 15-22	24 20-28	30 26-37	36 31-43

Presumptive commitment to state imprisonment. See section II.E. Mandatory Sentences for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. These offenses include second and subsequent Criminal Sexual Conduct offenses. See sections II.C. Presumptive Sentence and II.E. Mandatory Sentences.

[1] One year and one day

Effective August 1, 2006

Examples of Executed Sentences (Length in Months) Broken Down by:
Specified Minimum Term of Imprisonment and Specified Maximum Supervised Release Term

Offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 will no longer earn good time. In accordance with Minn. Stat. § 244.101, offenders will receive an executed sentence pronounced by the court consisting of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence and a supervised release term equal to the remaining one-third. This provision requires that the court pronounce the total executed sentence and explain the amount of time the offender will serve in prison and the amount of time the offender will serve on supervised release, assuming the offender commits no disciplinary offense in prison that results in the imposition of a disciplinary confinement period. The court shall also explain that the amount of time the offender actually serves in prison may be extended by the Commissioner if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison. The court's explanation is to be included in a written summary of the sentence.

Executed Sentence	Term of Imprisonment	Supervised Release Term	Executed Sentence	Term of Imprisonment	Supervised Release Term
12 and 1 day	8 and 1 day	4	78	52	26
14	9 1/3	4 2/3	84	56	28
15	10	5	90	60	30
16	10 2/3	5 1/3	91	60 2/3	30 1/3
18	12	6	102	68	34
20	13 1/3	6 2/3	110	73 1/3	36 2/3
24	16	8	117	78	39
25	16 2/3	8 1/3	119	79 1/3	39 2/3
27	18	9	120	80	40
30	20	10	130	86 2/3	43 1/3
36	24	12	140	93 1/3	46 2/3
39	26	13	144	96	48
40	26 2/3	13 1/3	150	100	50
45	30	15	153	102	51
48	32	16	156	104	52
51	34	17	168	112	56
59	39 1/3	19 2/3	180	120	60
60	40	20	195	130	65
62	41 1/3	20 2/3	234	156	78
70	46 2/3	23 1/3	255	170	85
76	50 2/3	25 1/3	300	200	100
77	50 2/3	25 2/3	306	204	102
			360	240	120

V. OFFENSE SEVERITY REFERENCE TABLE

IX	~~Criminal Sexual Conduct 1 (sexual penetration) - 609.342~~ ~~(See II.C. Presumptive Sentence and II. G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers.)~~
VIII	~~Criminal Sexual Conduct 1 (sexual contact - victim under 13) - 609.342~~ ~~(See II.C. Presumptive Sentence and II. G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers.)~~ ~~Criminal Sexual Conduct 2 - 609.343, 1(c), (d), (e), (f), & (h)~~ ~~(See II.C. Presumptive Sentence and II. G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers.)~~ ~~Criminal Sexual Conduct 3 - 609.344, subd. 1(c), (d), (g), (h), (i), (j), (k), (l), (m), & (n)~~
VI	~~Criminal Sexual Conduct 2 - 609.343, subd. 1(a), (b), & (g)~~ ~~Criminal Sexual Conduct 4 - 609.345, 1(c), (d), (g), (h), (i), (j), (k), (l), (m), & (n)~~
V	~~Criminal Sexual Conduct 3 - 609.344, subd. 1(b), (e), & (f)~~
IV	~~Criminal Sexual Conduct 4 - 609.345, subd. 1(b), (e), & (f)~~ ~~Criminal Sexual Conduct 5 - 609.3451, subd. 3~~ ~~Indecent Exposure - 617.23, subd. 3(a), (b)~~
III	~~Registration of Predatory Offenders (2nd or subsequent violation) – 243.166 subd. 5(c~~ ~~Solicitation of Children to Engage in Sexual Conduct - 609.352, subd. 2~~
I	~~Registration of Predatory Offenders – 243.166 subd. 5(b)~~

A

Criminal Sexual Conduct 1 - 609.342

B

Criminal Sexual Conduct 2 - 609.343 subd. 1 (c), (d), (e), (f), (h)

C

Criminal Sexual Conduct 3 - 609.344 subd. 1 (c), (d), (g), (j), (k). (m), (n)

D

Criminal Sexual Conduct 2 - 609.343 subd. 1 (a), (b), (g)
Criminal Sexual Conduct 3 - 609.344 subd. 1 (b), (e), (f), (h), (i), (l)
Dissemination Child Pornography: Subsequent or by Predatory Offender – 617.247 subd. 3

E

Criminal Sexual Conduct 4 - 609.345 subd. 1 (c), (d), (g), (j), (k). (m), (n)
Use Minors in Sexual Performance - 617.246 subd. 2, 3, 4
Dissemination Child Pornography - 617.247 sub. 3

F

Criminal Sexual Conduct 4 - 609.345 subd. 1 (b), (e), (f), (h), (i). (l)
Possession of Child Pornography: Subsequent or by Predatory Offender - 617.247 sub. 4

G

Criminal Sexual Conduct 5- 609.3451 subd. 3
Indecent Exposure - 617.23 subd. 3
Possession of Child Pornography – 617.247 subd. 4

H

Failure to Register as a Predatory Offender – 243.166 subd. 5(b), (c)

NUMERICAL REFERENCE OF FELONY STATUTES

This statutory felony offense listing is for convenience in cross-referencing to the Offense Severity Table; it is not official nor is it intended to be used in place of the Offense Severity Reference Table.

STATUTE	OFFENSE	SEVERITY LEVEL
243.166 subd. 5(b)	Registration of Predatory Offenders	~~1~~ H
243.166 subd. 5(c)	Registration of Predatory Offenders (2nd or subsequent violations)	~~3~~ H
609.342	Criminal Sexual Conduct 1 ~~(Sexual Penetration)~~	~~9~~ * A
~~609.342~~	~~Criminal Sexual Conduct 1 (Sexual Contact victim under 13)~~	~~8~~ *
609.343 subd. 1(a)(b)(g)	Criminal Sexual Conduct 2	~~6~~ D
609.343 subd. 1(c)(d)(e)(f)(h)	Criminal Sexual Conduct 2	~~8~~ * B
609.344 subd. 1(b)(e)(f)(h)(i)(l)	Criminal Sexual Conduct 3	~~5~~ D
609.344 subd. 1(c)(d)(g) ~~(h)(i)~~(j)(k)~~(l)~~(m)(n)	Criminal Sexual Conduct 3	~~8~~ C
609.345 subd. 1(b)(e)(f)(h)(i)(l)	Criminal Sexual Conduct 4	4 F
609.345 subd. 1(c)(d)(g) ~~(h)(i)~~(j)(k)~~(l)~~(m)(n)	Criminal Sexual Conduct 4	~~6~~ E
609.3451 subd. 3	Criminal Sexual Conduct 5	4 G
609.352 subd. 2	Solicitation of Children to Engage in Sexual Conduct	~~3~~ G

~~* See II.C. Presumptive Sentence and II.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers~~.

617.23 subd. 3	Indecent Exposure	4 G
617.246	Use of Minors in Sexual Performance Prohibited	~~unranked~~ E
617.247 subd. 3	Dissemination of Pictorial Representation of Minors	E
617.247 subd. 3	Dissemination of Pictorial Representation of Minors: Subsequent or by Predatory Offender	D
617.247 subd. 4	Possession of Pictorial Representation of Minors	~~unranked~~ G
617.247 subd. 4	Possession of Pictorial Representation of Minors Subsequent or by Predatory Offender	F

B. The Commission proposes the following corrections to Section II.E. of the *Minnesota Sentencing Guidelines and Commentary* to make the language conform with statutory provisions regarding conditional release.

E. Mandatory Sentences

…

Several Minnesota statutes provide for mandatory conditional release terms that must be served by certain offenders once they are released from prison. When a court commits a person subject to one of these statutes to the custody of the commissioner of corrections, it shall provide that after the person has been released from prison, the commissioner shall place the person on conditional release for the designated term. A person committed to prison for a sex offense or criminal sexual predatory conduct is subject to a ten-year conditional release term, unless the offense is a violation of M.S. § 609.3451 (fifth degree criminal sexual conduct). If the person was committed to prison ~~sex offense before conviction for the current sex offense and either the present or prior sex offense was~~ for a violation of M.S. §§ 609.342 (first degree criminal sexual conduct), 609.343 (second degree criminal sexual conduct), 609.344 (third degree criminal sexual conduct), 609.345 (fourth degree criminal sexual conduct), or 609.3453 (criminal sexual predatory conduct), and there is a previous or prior sex offense conviction, the person shall be placed on conditional release for the remainder of the person's life, unless the current offense and prior conviction were both for violations of M.S. § 609.345 (fourth degree criminal sexual conduct). If both the current and prior convictions are for M.S. § 609.345 (fourth degree criminal sexual conduct) the conditional release period shall be for ten years. If a person, who is subject to a life with the possibility of release sentence, is released, that offender is subject to conditional release for the remainder of his or her life. If a person is sentenced for failure to register as a predatory offender and the person was assigned a risk level III under M.S. § 244.052, the person shall be placed on conditional release for ten years. A person convicted of fourth degree assault against secure treatment facility personnel under M.S. § 609.2231, subdivision 3a is subject to a five-year

conditional release term. Finally, a person sentenced to imprisonment for first degree (felony) driving while impaired is subject to five years of conditional release.

C. The Commission proposes the following corrections to Section II.G. of the *Minnesota Sentencing Guidelines and Commentary* to clarify the Commission's policy regarding the presumptive sentence for attempted criminal sexual conduct offenses.

G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers: For persons convicted of attempted offenses or conspiracies to commit an offense, Solicitation of Juveniles under Minn. Stat. § 609.494, subd. 2(b), Solicitation of Mentally Impaired Persons under Minn. Stat. § 609.493, or Aiding an Offender – Taking Responsibility for Criminal Acts under Minn. Stat. § 609.495, subd. 4, the presumptive sentence is determined by locating the Sentencing Guidelines Grid cell defined by the offender's criminal history score and the severity level of the completed or intended offense or the offense committed by the principal offender, and dividing the duration contained therein by two, but such sentence shall not be less than one year and one day except that for Conspiracy to Commit a Controlled Substance offense as per Minn. Stat. § 152.096, in which event the presumptive sentence shall be that for the completed offense.

For persons convicted of attempted offenses or conspiracies to commit an offense with a mandatory minimum of a year and a day or more, the presumptive duration is the mandatory minimum or one-half the duration specified in the applicable Sentencing Guidelines Grid cell, whichever is greater. For persons convicted of an attempt or conspiracy to commit Criminal Sexual Conduct in the First Degree (M.S. § 609.342) or Criminal Sexual Conduct in the Second Degree (M.S. § 609.343, subd. 1(c), (d), (e), (f), and (h)), the presumptive duration is one-half of that found in the appropriate cell of the Sentencing Guidelines Grid or any mandatory minimum, whichever is longer. <u>The Commission regards the provisions of M.S. 609.342 subd. 2(b) and 609.343 subd. 2(b) as statutorily created presumptive sentences, and not mandatory minimums.</u>

II. Modifications to Describe Post *Blakely* Sentencing Issues

The Commission proposes the following modifications to the Guideline Commentary to provide clarification regarding the presumptive guidelines sentence and the impact of the U.S. Supreme Court ruling in *Blakely v. Washington*.

II.C.11. Post Blakely Sentencing Issues

United States Supreme Court and the Minnesota Supreme and Appellate Courts have ruled that any fact other than a prior conviction that increases the penalty for the crime beyond the prescribed statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. Sentencing procedures that fail to provide this process are unconstitutional and violate a defendant's Sixth Amendment right under the United States Constitution. Although the ruling by the court appears clear, there are multiple issues surrounding what constitutes an enhancement, as well as what constitutes a statutory maximum sentence, that are being addressed by the courts. The Sentencing Guidelines Commission, in an effort to assist practitioners involved in sentencing procedures, is providing a summary of court decisions to date involving Blakely sentencing issues. The information provided is not intended to be considered as an exhaustive list of relative cases, but rather intended to serve as a guide to assist in sentencing.

Statutory Maximum Sentence

***Apprendi v. New Jersey**, 530 U.S. 466 (2000) Case involved a defendant that pled guilty to 2nd Degree Possession of a Firearm for Unlawful Purposes that carried a prison sentence of between 5 and 10 years. The state requests the court to make the factual finding necessary to impose the state's Hate Crime Law sentencing enhancement provision increasing the sentence to between 10 and 20 years. The judge held the requested hearing, listens to the evidence and determined by a preponderance of the evidence standard that crime met the Hate Crime Law criteria. The court's imposition of an enhanced prison sentence based on the hate crime statute exceeded the statutory maximum sentence for the underlying offense. Court ruled that any factor other than a prior conviction that increases the penalty for the crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.*

Presumptive Sentence

***Blakely v. Washington**, 1264 S.Ct. 2531 (2004) Case involves the court's imposition of an exceptional sentence under the state's sentencing guidelines, for which justifiable factors were provided, which exceeded the presumptive guidelines sentence but was less than the statutory maximum sentence for the offense. Court reaffirmed and clarified its earlier ruling in Apprendi stating, that under the Sixth Amendment, all factors other than prior criminal convictions that increase a criminal defendant's sentence beyond what it would have been absent those facts, must be presented to a jury and proven beyond a reasonable doubt. The jury trial right does not just mean that a defendant has the right to present a case to the jury; it also means that a defendant has a right to have a jury, not the court, make all the factual findings required to impose a sentence in excess of the presumptive guideline sentence, unless the defendant formally admits some or all of the factors or formally waives that right.*

State v. Shattuck, *704 N.W. 2d 131 (Minn. 2005) Case involves a defendant that is convicted 2 counts of Kidnapping, 2 counts of 1st Degree Sexual Conduct, and 1 count of Aggravated Robbery. The presumptive guideline sentence for these offenses would have been 161 months given the severity level VII ranking with a criminal history score of 9, including a custody status point. Under the Repeat Sex Offender statute, for certain types of 1st and 2nd degree sexual conduct offenses, the court* ***shall*** *commit the defendant to not less than 30 years if the court finds (1) an aggravating factor exists which provides for an upward departure, and (2) the offender has previous convictions for 1st, 2nd or 3rd degree criminal sexual conduct. The court imposed a 161 month sentence for the kidnapping conviction and 360 months for the 1st degree criminal sexual conduct, using the Repeat Sex Offender statute. The court found that a jury, not the court, must make the determination that aggravating factors are present to impose an upward durational departure under the sentencing guidelines, citing the Blakely ruling. The decision also held that Minn. Stat. § 609.109 is unconstitutional since it authorizes the court to impose an upward durational departure without the aid of a jury.*

The Court also ruled that the Minnesota Sentencing Guidelines are not advisory and that the imposition of the presumptive sentence is mandatory absent additional findings. This finding specifically rejects the remedy that the guidelines are advisory as set forth in the United States Supreme Court in United States v. Booker 125 S. Ct. 738 (2005). In addition, the decision stated that Minnesota Sentencing Guidelines Section II.D, which pertains to the manner in which aggravated departures are imposed, is "facially unconstitutional" and must be severed from the remainder of the guidelines. However, the remainder of the guidelines shall remain in effect and mandatory upon the courts. The Court also noted in Shattuck that Minnesota Courts have the inherent authority to authorize the use of sentencing juries and bifurcated proceedings to comply with Blakely. While the Supreme Court was deciding the Shattuck case, the Legislature amended Minn. Stat. § 609.109 to comply with the constitutional issues raised in Blakely. However, the Court took no position on the constitutionality of legislative action. Acknowledging the Court's inherent authority to create rules and procedures, the decision stated that it was the belief of the Court that the legislature should decide the manner in which the sentencing guidelines should be amended to comply with the constitutional requirements of Blakely. On October 6, 2005, the Minnesota Supreme Court issued an Order amending the Shattuck opinion clarifying that the legislature has enacted significant new requirements for sentencing aggravated departures which included sentencing juries and bifurcated trials. It further clarified that these changes apply both prospectively and to re-sentencing hearings. This clarification enables re-sentencing hearings to include jury determination of aggravating factors and the imposition of aggravated departure sentences.

State v. Allen --N.W.2d—(Minn. 2005) Case *involves a defendant who pled guilty to 1st Degree Test Refusal as part of a negotiated plea agreement in exchange for the dismissal of other charges and the specific sentence to be determined by the court. The district court determined the defendant had a custody point assigned to their criminal history, since the defendant was on probation for a prior offense at the time of the current offense. The presumptive guideline sentence was a 42 month stayed sentence. However, based on the defendant's numerous prior alcohol-related convictions and history of absconding from probation, the court determined the defendant was not amenable to probation and sentenced the defendant to a 42 month executed prison sentence, representing an aggravated dispositional departure under the sentencing guidelines. The case was on appeal when Blakely v. Washington was decided. The Court ruled that a stayed sentence is not merely an alternative mode of serving a prison sentence, in that the additional loss of liberty encountered with an*

executed sentence exceeds the maximum penalty allowed by a plea of guilty or jury verdict, thus violating the defendant's Sixth Amendment Constitutional right. The Court viewed a sentence disposition as much an element of the presumptive sentence as the sentence duration. Dispositional departures that are based on offender characteristics are similar to indeterminate sentencing model judgments and must be part of a jury verdict in that "amenability to probation" is not a fact necessary to constitute a crime. When the district court imposed an aggravated dispositional departure based on the aggravating factor of unamenability to probation without the aid of a jury, the defendant's constitutional rights were violated under Blakely. Unamenability to probation may be used as an aggravating factor to impose an upward dispositional departure, but it must be determined by a jury and not the court. The Allen case also raises the issue and much speculation whether probation revocations resulting in an executed prison sentence are also subject to Blakely provisions. Although the Allen case focuses on imposition of an executed prison sentence as the result of an aggravated dispositional departure sentence based on the defendant's unamenability to probation, the court's stated reasons in its ruling could be interpreted as to be applicable to probation revocations that result in the imposition of an executed sentence due to an offender's lack of progress or success on probation. The Commission awaits further action by the Minnesota courts addressing this specific issue.

***State v. Conger**, 687 N.W.2d 639 (Minn. App. 2004) Case involves a defendant who pled guilty to aiding and abetting in a 2nd degree intentional and unintentional murder. At sentencing, the judge determines that multiple aggravating factors are present and imposes an upward durational departure. The Court ruled that the presumptive sentence designated by the guidelines is the maximum sentence a judge may impose without finding facts to support a departure. Any fact other than prior conviction used to impose a departure sentence must be found by a jury or admitted by the defendant. The Court also ruled that when a defendant pleads guilty, any upward departure that is not entirely based on the facts admitted in the guilty plea is a violation of the defendant's Sixth Amendment rights and unconstitutional.*

***State v. Mitchell**, 687 N.W.2d 393 (Minn. App. 2004) Case involves a defendant who is arrested for theft with a presumptive guidelines sentence of 21 months. The judge determines the defendant is a career criminal under Minn. Stat. §1095 subd. 4 (2002) after determining the defendant had 5 or more prior felony convictions and the current conviction was part of a "pattern of criminal conduct." The judge imposes an upward departure of 42 months. The Court ruled that a pattern of criminal conduct may be shown by criminal conduct that is similar but not identical to the charged offense in such factors as motive, results, participants, victims or shared characteristics. This determination goes beyond the mere fact of prior convictions since prior convictions do not address motive, results, participants, victims etc. A jury, not a judge, must determine if the defendant's prior convictions constitutes a "pattern of criminal conduct" making him a career criminal.*

***State v. Fairbanks** 688 N.W. 2d 333 (Minn. App. 2004) Case involves a defendant who is convicted of 1st degree assault of a correctional employee and kidnapping. The judge sentences the defendant under the Dangerous Offender Statute which provides for a durational departure from the presumptive guideline sentence. Criteria necessary for sentencing under this statute include (1) two or more convictions for violent crimes and (2) offender is a danger to public safety. Defendant stipulates to the past criminal behavior during trial but that admission by the defendant alone does not permit a finding that the defendant is a danger to public safety. That*

finding must be determined by a jury. A judge can only depart upward based solely on prior convictions. The court also ruled that a defendant's waiver of Blakely rights must be knowing, intelligent and voluntary.

Mandatory Minimum – Minn. Stat. § 609.11

State v. Barker *—N.W.2d— (Minn. 2005) Case involves a defendant convicted of a 5th degree controlled substance offense and sentenced under Minn. Stat. § 609.11 to a mandatory prison sentence of 36 months based on a judicial finding that the defendant possessed a firearm during the predicate offense. The defendant has a criminal history score of 0, thus the presumptive guideline sentence for the 5th degree controlled substance offense would have been a stayed sentence of a year and a day. At sentencing the defendant stipulates to the possession of the firearm but claims it was for self protection and did not increase the risk of violence associated with the drug offense. The court denies the defendant's request for a jury trial and imposes the mandatory minimum 36 month prison sentence. Defendant appeals on Blakely issues. The Court ruled that Minn. Stat. § 609.11 is unconstitutional to the extent that it authorizes the district court to impose an aggravated departure upon a finding other than prior criminal convictions, without the aid of a jury. Unlike most mandatory minimum sentences which are triggered by prior criminal convictions, Minn. Stat.§ 609.11 requires a finding of the possession of a weapon when the weapon is not an element of the offense to impose the 36 month prison sentence. Even though the defendant admitted to the possession of a weapon, he did not admit to the increased risk of violence the court determined was associated with the possession of the weapon. The court also indicated that the Legislature did not amend 609.11 as it did with other sentencing enhancement statutes allowing for jury determination of aggravated factors. In cases where the weapon is an element of the offense there is no Blakely issue.*

Custody Status Point

State v. Brooks *690 N.W. 2d 160 (Minn.App.2004) Case involves a defendant convicted of a 5th degree assault and tampering with a witness. The defendant has a criminal history score of 6 or more prior to the sentencing for this conviction. The guidelines provide for a three month enhancement for the custody status point. Defendant argues the three month enhancement is in violation of Blakely. Court rules that determination of the custody status point is analogous to the Blakely exception for "fact of prior conviction." Like a prior conviction, a custody status point is established by court record based on the fact of prior convictions and not by a jury. Presumptive sentencing is meaningless without a criminal history score, which includes the determination of custody status points.*

Retroactivity

State v. Petschl 692 N. W.2d 463 (Minn. App, 2004) Blakely provisions apply to all cases sentenced or with direct appeals pending on or after June 24, 2004.

State v. Houston *689 N.W.2d 556 (Minn. App. 2004). The Minnesota Supreme Court determined that Blakely could be applied retroactively to cases on direct review but not collateral review. Teague v. Lane stated that in order for an issue to be retroactive for collateral review, the case needs to state a rule of law that is either:*

(1) new or not dictated by precedent or (2) a "Watershed" rule meaning it requires an observance of those criminal procedures that are implicit in the concept of liberty. The Court ruled that Blakely is not a rule of "watershed" magnitude since the accuracy of the conviction is not diminished. A Blakely violation results only in a remand for sentencing rather than a new trial to determine the validity of the conviction, thus Blakely does not apply to appeals on collateral review.

State v. Beaty *696 N.W.2d. 406 (Minn. App. 2005) Case involves a defendant who pled guilty to a charge with a violation of an order for protection (OFP) and terroristic threats. At sentencing the court imposes the presumptive guideline sentence of 18 months stay of execution. The defendant subsequently violates probation and admits to the violations. The court revokes the defendant's probation, executes the 18 months sentence for the terrotistic threats and vacates the stay of imposition for the violation of the OFP, imposing a 36 month concurrent executed sentence, which is an upward departure from the presumptive guideline sentence. Departure is based on the aggravating factors that the victim suffered extreme adverse effect from the violation of the OFP and probation did not appear to deter the defendant. Blakely is issued the day after the defendant is sentenced. Defendant challenges his probation revocation and the imposition of the departure under the retroactive provisions of Blakely. United States v. Martin addressed retroactivity of a standard of review for sentencing procedures and compels courts to apply procedural changes to all sentences that are not final. The defendant's sentence is not final for retroactivity purposes and still subject to appeal. The Court held that when a district court imposes a stay of imposition of a sentence, thereby precluding challenge to the sentence on direct review and subsequently vacates the stay of imposition and imposes an upward departure, Blakely will apply retroactively.*

Blakely Waiver Issues

State v. Hagen *690 N.W.2d 155 (Minn. App. 2004) Case involves a defendant who pled guilty to Minn. Stat. § 609.342 subd. 1(g) sexual penetration of a victim under the age of 16 involving a significant relationship. Defendant lives in the same house as the 13 year old victim and there are numerous aggravating factors associated with the offense such as zone of privacy, particular vulnerability and great psychological harm, which the defendant does not deny. Defendant admits the sexual penetration and states his attorney discussed the "significant relationship" element with him. District court states this is one of the worst child sex abuse cases it has seen and imposed an aggravated durational departure from the 144 month presumptive guideline sentence to 216 months. Defendant appeals his sentence on Blakely issues. Court ruled that Blakely has blurred the distinction between offense elements and sentencing factors. When the defendant stipulates to an element of an offense, it must be supported by an oral or written waiver of the defendant's right to a jury trial on that aggravating element. In Hagen, the admissions were made at the sentencing hearing rather than at the guilty/not guilty plea hearing where he could waive his right to a jury trial. The record must clearly indicate the aggravating factor was present in the underlying offense. Admissions must be effective and more than just not objecting to the aggravating factors.*

State v. Senske *692 N.W. 2d 743 (Minn. App. 2005) Case involves a defendant who pled guilty to two counts of 1st degree criminal sexual conduct with no agreement on the sentence as part of the plea. Defendant admits to multiple acts of penetration with stepdaughter and son, including blindfolding the son. District Court*

determines the defendant's actions warrant an upward durational departure due to the psychological harm to the victims, vulnerability due to age, the planning and manipulation involved in the act and death threats made to the victims. The court imposes 216 month consecutive sentences, representing a 50 percent increase over the presumptive guideline sentence. Defendant appeals his sentence on a Blakely issue and the imposition of consecutive sentences. The Court ruled that even though the sentence to be imposed was not part of the plea agreement, the defendant nonetheless was not advised that the aggravating factors he admitted to could be used to impose an aggravated departure. Even though the defendant admitted to the aggravating factors, those admissions were not accompanied by a waiver of the right to a jury determination of the aggravating factors. The Court further stated that the imposition of consecutive sentences did not violate Blakely principles since the consecutive sentences were based on the fact the offenses involved were "crimes against a person" and involved separate sentences for separate offenses.

III. Modifications to Consecutive Sentencing Policy for Felony DWIs

The Commission proposes to adopt a policy regarding presumptive consecutive sentences for Felony DWI offenses to conform with the consecutive sentencing provisions in M.S. 169A.28.

F. Concurrent/Consecutive Sentences: Generally, when an offender is convicted of multiple current offenses, or when there is a prior felony sentence which has not expired or been discharged, concurrent sentencing is presumptive. In certain situations consecutive sentences are presumptive; there are other situations in which consecutive sentences are permissive. These situations are outlined below. The use of consecutive sentences in any other case constitutes a departure from the guidelines and requires written reasons pursuant to Minn. Stat. § 244.10, subd. 2 and section D of these guidelines.

When consecutive sentences are imposed, offenses are sentenced in the order in which they occurred.

Presumptive Consecutive Sentences

Consecutive sentences are presumptive when the conviction is for a crime committed by an offender serving, or on supervised release, conditional release, or on escape status from an executed prison sentence.

…

When an offender is sentenced for a felony DWI, a consecutive sentence is presumptive if the offender has a prior unexpired misdemeanor, gross misdemeanor or felony DWI sentence. The presumptive disposition for the felony DWI is based on the offender's location on the Grid. If the presumptive disposition is probation, the presumptive sentence for the felony DWI is a consecutive stayed sentence with a duration based on the appropriate Grid time. Any pronounced probationary jail time should be

served consecutively to any remaining time to be served on the prior DWI offense. If the presumptive disposition is commitment to prison, the presumptive sentence is a consecutive sentence of 42 months duration, except if the total time to serve in prison would be longer if a concurrent sentence is imposed in which case a concurrent sentence is presumptive.

IV. Technical Modifications to move commentary language into the Guidelines to conform with the Minnesota Court of Appeals opinion in State v. Rouland. In that decision, the court held that policy in the Commentary did not apply because it conflicted with policy in the Guidelines. The proposed changes below ensure that Commission policies are stated in the Guidelines, not just the Commentary.

A. Unranked Offense Policy

A. Offense Severity: The offense severity level is determined by the offense of conviction. When an offender is convicted of two or more felonies for which only one sentence may be pronounced by statute, the severity level is determined by the most severe offense of conviction. For persons convicted under Minn. Stat. §§ 609.2241 – Knowing Transfer of Communicable Disease, 609.229, subd. 3 (a) – Crime Committed for Benefit of a Gang, 609.3453 – Criminal Sexual Predatory Conduct, or 609.714 – Offense in Furtherance of Terrorism, the severity level is the same as that for the underlying crime with the highest severity level.

Felony offenses are arrayed into eleven levels of severity, ranging from low (Severity Level I) to high (Severity Level XI). First degree murder is excluded from the sentencing guidelines, because by law the sentence is mandatory imprisonment for life. Offenses listed within each level of severity are deemed to be generally equivalent in severity. ~~The most frequently occurring offenses within each severity level are listed on the vertical axis of the Sentencing Guidelines Grid. The severity level for infrequently occurring offenses can be determined by consulting Section V, entitled "Offense Severity Reference Table."~~ The severity level for each felony offense is governed by Section V: Offense Severity Reference Table. Some offenses are designated as unranked offenses in the Offense Severity Reference Table. When unranked offenses are being sentenced, the sentencing judges shall exercise their discretion by assigning an appropriate severity level for that offense and specify on the record the reasons a particular level was assigned. If an offense is inadvertently omitted from the Offense Severity Reference Table, the offense shall be considered unranked and the above procedures followed.

Comment

II.A.01. *Offense severity is determined by the offense of conviction. The Commission thought that serious legal and ethical questions would be raised if punishment were to be determined on the basis of alleged, but unproven, behavior, and prosecutors and defenders would be less accountable in plea negotiation. It follows that if the offense of conviction is the standard from which to determine severity, departures from the guidelines should not be permitted for elements of offender behavior not within the statutory definition of the offense of conviction. Thus, if an offender is convicted of simple robbery, a departure from the guidelines to increase the severity of the sentence should not be permitted because the offender possessed a firearm or used another dangerous weapon.*

II.A.02. *The date of the offense is important because the offender's age at the time of the offense will determine whether or not the juvenile record is considered, the date of the offense might determine whether a custody status point should be given, and the date of offense determines the order of sentencing with multiple convictions. For those convicted of a single offense, there is generally no problem in determining the date of offense. For those convicted of multiple offenses when theft and damage to property aggregation procedures are used for sentencing purposes or when multiple offenses are an element of the conviction offense, the following rules apply:*

a. *If offenses have been aggregated under Minn. Stat. § 609.52, subd. 3 (5) or § 609.595, the date of the earliest offense should be used as the date of the conviction offense.*

b. *If multiple offenses are an element of the conviction offense, such as in subd. 1 (h) (iii) of first degree criminal sexual conduct, the date of the conviction offense must be determined. If there is a reasonable likelihood that all of the offender's multiple acts occurred before a date on which the presumptive sentence changed, the earlier presumptive sentence should be used. If there is no reasonable likelihood that all of the offender's multiple acts occurred before that date, the later presumptive sentence should be used. See State v. Murray, 495 N.W.2d 412, 415 (Minn. 1993) (articulating rule).*

~~***II.A.03.*** *The following offenses were excluded from the Offense Severity Reference Table:*~~

~~*1. Abortion – 617.20; 617.22; 145.412*~~
~~*2. Accomplice after the fact – 609.495, subd. 3*~~
~~*3. Adulteration – 609.687, subd. 3 (3)*~~
~~*4. Aiding suicide – 609.215*~~
~~*5. Altering engrossed bill – 3.191*~~
~~*6. Animal fighting – 343.31*~~
~~*7. Assaulting or harming a police horse – 609.597, subd. 3 (1) & (2)*~~
~~*8. Bigamy – 609.355*~~
~~*9. Cigarette tax and regulation violations – 297F.20*~~
~~*10. Collusive bidding/price fixing – 325D.53, subds. 1 (3), 2 & 3*~~
~~*11. Concealing criminal proceeds; engaging in business – 609.496; 609.497*~~

~~12. Corrupting legislator – 609.425~~
~~13. Criminal sexual conduct, third degree – 609.344, subd. 1 (a) (By definition the perpetrator must be a juvenile)~~
~~14. Criminal sexual conduct, fourth degree – 609.345, subd. 1 (a) (By definition the perpetrator must be a juvenile)~~
~~15. Damage to Property of Critical Public Service Facilities, Utilities, and Pipelines – 609.594~~
~~16. Escape with violence from gross misdemeanor or misdemeanor offense – 609.485, subd. 4 (a) (3)~~
~~17. Failure to Report – 626.556, subd. 6~~
~~18. Falsely impersonating another – 609.83~~
~~19. Female genital mutilation – 609.2245~~
~~20. Forced execution of a declaration – 145B.105~~
~~21. Gambling acts (cheating, certain devices prohibited; counterfeit chips; manufacture, sale, modification of devices; instruction) – 609.76, subd. 3, 4, 5, 6, & 7~~
~~22. Hazardous wastes – 609.671~~
~~23. Horse racing – prohibited act – 240.25~~
~~24. Incest – 609.365~~
~~25. Insurance Fraud – Employment of Runners – 609.612~~
~~26. Interstate compact violation – 243.161~~
~~27. Issuing a receipt for goods one does not have – 227.50~~
~~28. Issuing a second receipt without "duplicate" on it – 227.52~~
~~29. Killing or harming a public safety dog – 609.596, subd. 1~~
~~30. Labor Trafficking – 609.282~~
~~31. Lawful gambling fraud – 609.763~~
~~32. Metal penetrating bullets – 624.74~~
~~33. Misprison of treason – 609.39~~
~~34. Motor vehicle excise tax – 297B.10~~
~~35. Obscene materials; distribution – 617.241, subd. 4~~
~~36. Obstructing military forces – 609.395~~
~~37. Pipeline safety – 299J.07, subd. 2~~
~~38. Police radios during commission of crime – 609.856~~
~~39. Possession of Pictorial Representations of Minors – 617.247~~
~~40. Racketeering, criminal penalties (RICO) – 609.904~~
~~41. Real and Simulated Weapons of Mass Destruction – 609.712~~
~~42. Refusal to assist – 6.53~~
~~43. Sale of membership camping contracts – 82A.03; 82A.13; 82A.25~~
~~44. Service animal providing service – 343.21, subd. 9 (c) (g)~~
~~45. State lottery fraud – 609.651, subd. 1 with 4 (b) and subd. 2 & 3~~
~~46. Subdivided land fraud – 83.43~~
~~47. Torture or cruelty to pet or companion animal – 343.21, subd. 9 (c) (d) (f) (h)~~
~~48. Treason – 609.385~~
~~49. Unauthorized computer access – 609.891~~

~~50. Unlawful Conduct with Documents in Furtherance of Labor or Sex Trafficking – 609.283~~
~~51. Unlawful Transfer of Sounds; Sales – 325E.201~~
~~52. Use of Minors in Sexual Performance Prohibited – 617.246~~
~~53. Warning subject of investigation – 609.4971~~
~~54. Warning subject of surveillance or search – 609.4975~~
~~55. Wire communications violations – 626A.02, subd. 4; 626A.03, subd. 1 (b) (ii); 626A.26, subd. 2 (1) (ii)~~

~~***II.A.04.*** *Incest was excluded because since 1975, the great majority of incest cases are prosecuted under the criminal sexual conduct statutes. If an offender is convicted of incest under Minn. Stat. § 609.365, and when the offense would have been a violation of one of the criminal sexual conduct statutes, the severity level of the applicable criminal sexual conduct statute should be used. For example, if a father is convicted of incest for the sexual penetration of his ten year old daughter, the appropriate severity level would be the same as criminal sexual conduct in the first degree. On the other hand, when the incest consists of behavior not included in the criminal sexual conduct statutes (for example, consenting sexual penetration involving individuals over age 18) that offense behavior is excluded from the Offense Severity Reference Table.*~~

~~***II.A.05.*** *The other offenses were excluded because prosecutions are rarely, if ever, initiated under them or because the underlying conduct included in the offense covers such a wide range of severity. When persons are convicted of offenses excluded from the Offense Severity Reference Table, judges should exercise their discretion by assigning an offense a severity level which they believe to be appropriate. Judges should specify on the record the reasons a particular severity level was assigned. Factors which a judge may consider when assigning a severity level to an unranked offense include but are not limited to: 1) the gravity of the specific conduct underlying the unranked offense; 2) the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense; 3) the conduct of and severity level assigned to other offenders for the same unranked offense; and 4) the severity level assigned to other offenders engaged in similar conduct. If a significant number of future convictions are obtained under one or more of the excluded offenses, the Commission will determine an appropriate severity level, and will add the offense to the Offense Severity Reference Table.*~~

~~***II.A.06.*** *When felony offenses are inadvertently omitted from the sentencing guidelines, judges should exercise their discretion by assigning an offense a severity level which they believe to be appropriate. A felony offense is inadvertently omitted when the offense appears neither in the Offense Severity Reference Table nor in the list of offenses in II.A.03. which are excluded from the Offense Severity Reference Table.*~~

II.A.03. *Some offenses, including Minn. Stat. §§ 609.2241 – Knowing Transfer of Communicable Disease, 609.229, subd. 3 (a) – Crime Committed for Benefit of a Gang, 609.3453 – Criminal Sexual Predatory Conduct, and 609.714 – Offense in Furtherance of Terrorism, involve other offenses committed under specific circumstances. The severity level for these offenses is the same as that of the underlying offense. The presumptive sentence for some of these offenses, however, is increased from that of the underlying offense as described in II.G: Convictions for Attempts, Conspiracies, and Other Sentence Modifiers.*

II.A.04. *Offenses are generally left unranked because prosecutions for these offenses are rarely initiated, because the offense covers a wide range of underlying conduct, or because the offense is new and the severity of a typical offense cannot yet be determined. When exercising their discretion by assigning an appropriate severity level, sentencing judges may consider, but are not limited to, the following factors: 1) the gravity of the specific conduct underlying the unranked offense; 2) the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense; 3) the conduct of and severity level assigned to other offenders for the same unranked offense; and 4) the severity level assigned to other offenders engaged in similar conduct.*

Incest was left unranked because, since 1975, the great majority of incest cases are prosecuted under the criminal sexual conduct statutes. If an offender is convicted of incest and the offense would have been a violation of one of the criminal sexual conduct statutes, the severity level of the applicable criminal sexual conduct statute should be used. For example, if a father is convicted of incest for the sexual penetration of his ten year old daughter, the appropriate severity level would be the same as criminal sexual conduct in the first degree. Conversely, when incest consists of behavior not included in the criminal sexual conduct statutes (for example, consenting sexual penetration involving individuals over age 18), sentencing judges should exercise their discretion to assign an appropriate severity level as described above.

If a significant number of future convictions are obtained under one or more of the unranked offenses, the Commission will reexamine the ranking of these offenses and assign an appropriate severity level for a typical offense.

~~***II.A.07.***~~ ***II.A.05.*** *There are two theft offenses involving a motor vehicle that are ranked individually on the Offense Severity Reference Table. For Theft of a Motor Vehicle, ranked at severity level IV, the offender must be convicted under the general theft statute, Minn. Stat. § 609.52, subd. 2 (1), and the offense must involve theft of a motor vehicle, in order for severity level IV to be the appropriate severity level ranking. It is the Commission's intent that any conviction involving the permanent theft of a motor vehicle be ranked at severity level IV, regardless of the value of the motor vehicle. If an offender is convicted of Motor Vehicle Use Without Consent under Minn. Stat. § 609.52, subd. 2 (17), the appropriate severity level is III, regardless of whether the sentencing provision that is cited is Minn. Stat. § 609.52, subd. 3 (3) (d) (v).*

~~***II.A.08.*** *Knowing Transfer of Communicable Disease, Minn. Stat. § 609.2241, is prosecuted under section 609.17, 609.185, 609.19, 609.221, 609.222, 609.223, 609.2231, or 609.224. The severity level ranking for this crime would be the same as the severity level ranking of the crime for which the offender is prosecuted. For example, if the offender commits this crime and is convicted under Assault in the 1st Degree, Minn. Stat. § 609.221, the appropriate severity level ranking would be severity level IX.~~****

V. OFFENSE SEVERITY REFERENCE TABLE

****

Abortion – 617.20; 617.22; 145.412
Accomplice After the Fact – 609.495, subd. 3
Adulteration – 609.687, subd. 3 (3)
Aiding Suicide – 609.215
Altering Engrossed Bill – 3.191
Animal Fighting – 343.31
Assaulting or Harming a Police Horse – 609.597, subd. 3 (1) & (2)
Bigamy – 609.355
Cigarette Tax and Regulation Violations – 297F.20
Collusive Bidding/Price Fixing – 325D.53, subds. 1 (3), 2 & 3
Concealing Criminal Proceeds; Engaging in Business – 609.496; 609.497
Corrupting Legislator – 609.425
Criminal Sexual Conduct, Third Degree – 609.344, subd. 1 (a)
(By definition the perpetrator must be a juvenile.)
Criminal Sexual Conduct, Fourth Degree – 609.345, subd. 1 (a)
(By definition the perpetrator must be a juvenile.)
Damage to Property of Critical Public Service Facilities, Utilities, and Pipelines – 609.594
Escape with Violence from Gross Misdemeanor or Misdemeanor Offense – 609.485, subd. 4 (a) (3)
Failure to Report – 626.556, subd. 6
Falsely Impersonating Another – 609.83
Female Genital Mutilation – 609.2245
Forced Execution of a Declaration – 145B.105
Gambling Acts (Cheating, Certain Devices Prohibited; Counterfeit Chips; Manufacture, Sale, Modification of Devices; Instruction) – 609.76, subd. 3, 4, 5, 6, & 7

U Hazardous Wastes – 609.671
N Horse Racing – Prohibited Act – 240.25
R Incest – 609.365
A Insurance Fraud – Employment of Runners – 609.612
N Interstate Compact Violation – 243.161
K Issuing a Receipt for Goods One Does Not Have – 227.50
E Issuing a Second Receipt Without "Duplicate" On It – 227.52
D Killing or Harming a Public Safety Dog – 609.596, subd. 1

Labor Trafficking – 609.282
Lawful Gambling Fraud – 609.763

Metal Penetrating Bullets – 624.74
Misprison of Treason – 609.39

Motor Vehicle Excise Tax – 297B.10

Obscene Materials; Distribution – 617.241, subd. 4
Obstructing Military Forces – 609.395
Pipeline Safety – 299J.07, subd. 2
Police Radios During Commission of Crime – 609.856
Possession of Pictorial Representations of Minors – 617.247*
Racketeering, Criminal Penalties (RICO) – 609.904
Real and Simulated Weapons of Mass Destruction – 609.712
Refusal to Assist – 6.53
Sale of Membership Camping Contracts – 82A.03; 82A.13; 82A.25
Service Animal Providing Service – 343.21, subd. 9 (e) (g)
State Lottery Fraud – 609.651, subd. 1 with 4 (b) and subd. 2 & 3
Subdivided Land Fraud – 83.43
Torture or Cruelty to Pet or Companion Animal – 343.21, subd. 9 (c) (d) (f) (h)
Treason – 609.385
Unauthorized Computer Access – 609.891
Unlawful Conduct with Documents in Furtherance of Labor or Sex Trafficking – 609.283
Use of Minors in Sexual Performance Prohibited – 617.246*
Warning Subject of Investigation – 609.4971
Warning Subject of Surveillance or Search – 609.4975
Wire Communications Violations – 626A.02, subd. 4; 626A.03, subd. 1 (b) (iii); 626A.26, subd. 2 (1) (ii)

* These offenses will have assigned severity levels if the Commission's proposed Sex Offender Grid is adopted.

B. Criminal History

B. A criminal history index constitutes the horizontal axis of the Sentencing Guidelines Grid. The criminal history index is comprised of the following items: (1) prior felony record; (2) custody status at the time of the offense; (3) prior misdemeanor and gross misdemeanor record; and (4) prior juvenile record for young adult felons.

The classification of prior offenses as petty misdemeanors, misdemeanors, gross misdemeanors, or felonies is determined on the basis of current Minnesota offense definitions and sentencing policies, except that when a monetary threshold determines the offense classification, the monetary classification

in effect at the time the prior offense was committed, not the current threshold, determines the offense classification in calculating the criminal history index. Offenses which are petty misdemeanors by statute, or which are deemed petty misdemeanors by Minn. R. Crim. P. 23.02 (the only sanction is a fine less than the misdemeanor fine level defined in statute) and 23.04, are not used to compute the criminal history index.

The offender's criminal history index score is computed in the following manner:

Comment

II.B.01. *The sentencing guidelines reduce the emphasis given to criminal history in sentencing decisions. Under past judicial practice, criminal history was the primary factor in dispositional decisions. Under sentencing guidelines, the offense of conviction is the primary factor, and criminal history is a secondary factor in dispositional decisions. In the past there were no uniform standards regarding what should be included in an offender's criminal history, no weighting format for different types of offenses, and no systematic process to check the accuracy of the information on criminal history.*

II.B.02. *The guidelines provide uniform standards for the inclusion and weighting of criminal history information. The sentencing hearing provides a process to assure the accuracy of the information in individual cases. These improvements will increase fairness and equity in the consideration of criminal history.*

II.B.03. *No system of criminal history record keeping ever will be totally accurate and complete, and any sentencing system will have to rely on the best available criminal history information.*

~~***II.B.04.*** *Generally, the classification of prior offenses as petty misdemeanors, misdemeanors, gross misdemeanors, or felonies should be determined on the basis of current Minnesota offense definitions and sentencing policies. Exceptions to this are offenses in which a monetary threshold determines the offense classification. In these situations, the monetary threshold in effect at the time the offense was committed determines the offense classification for criminal history purposes, not the current threshold.*~~

~~*If a fine was given that was less than the misdemeanor level of fine classified by the laws in effect at the time the offense was committed, and that was the only sanction imposed, the conviction would be deemed a petty misdemeanor under Minn. R. Crim. P. 23.02, and would not be used to compute the criminal history score. Convictions which are petty misdemeanors by statutory definition, or which have been certified as petty misdemeanors under Minn. R. Crim. P. 23.04, will not be used to compute the criminal history score.*~~

~~The offender's criminal history index score is computed in the following manner:~~

1. Subject to the conditions listed below, the offender is assigned a particular weight for every extended jurisdiction juvenile conviction and for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing. Multiple sentences are sentenced in the order in which they occurred. For purposes of this section, prior extended jurisdiction juvenile convictions are treated the same as prior felony sentences.

   a. The weight assigned to each prior felony sentence is determined according to its severity level, as follows:
      Severity Level I – II = ½ point;
      Severity Level III – V = 1 point;
      Severity Level VI – VIII = 1 ½ points;
      Severity Level IX – XI = 2 points; and
      Murder 1st Degree = 2 points.

      The severity level to be used in assigning weights to prior offenses shall be based on the severity level ranking of the prior offense of conviction that is in effect at the time the offender commits the current offense.

   b. When multiple sentences for a single course of conduct were imposed pursuant to Minn. Stats. §§ 152.137, 609.585 or 609.251, only the offense at the highest severity level is considered; when multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day pursuant to Minn. Stats. §§ 152.137, 609.585, or 609.251, the conviction and sentence for the "earlier" offense should not increase the criminal history score for the "later" offense.

   c. Only the two offenses at the highest severity levels are considered for prior multiple sentences arising out of a single course of conduct in which there were multiple victims;

   d. When a prior felony conviction resulted in a misdemeanor or gross misdemeanor sentence, that conviction shall be counted as a misdemeanor or gross misdemeanor conviction for purposes of computing the criminal history score, and shall be governed by ~~item 3~~ section II.B.3 below;

   e. Prior felony sentences or stays of imposition following felony convictions will not be used in computing the criminal history score if a period of

fifteen years has elapsed since the date of discharge from or expiration of the sentence, to the date of the current offense.

The felony point total is the sum of these weights; no partial points are given.

****

2. One point is assigned if the offender:

****

An additional three months shall be added to the duration of the appropriate cell time which then becomes the presumptive duration when:

a. a custody status point is assigned; and

b. the criminal history points that accrue to the offender without the addition of the custody status point places the offender in the far right hand column of the Sentencing Guidelines Grid.

Three months shall also be added to the lower and upper end of the range provided in the appropriate cell. If the current conviction is an attempt or conspiracy under Minn. Stats. §§ 609.17 or 609.175 and three months is added to the cell duration under this section, the three months shall be added to the cell duration before that duration is halved pursuant to section II.G: Convictions for Attempts, Conspiracies, and Other Sentence Modifiers when determining the presumptive sentence duration. No presumptive duration, however, shall be less than one year and one day.

Comment

~~***II.B.204.*** *When three months is added to the cell duration as a result of the custody status provision, the lower and upper durations of the sentence range in the appropriate cell are also increased by three months.*~~

~~***II.B.205.*** *When the conviction offense is an attempt or conspiracy under Minn. Stats. § 609.17 or 609.175 and three months is added to the cell duration as a result of the custody status provision, the following procedure shall be used in determining the presumptive duration for the offense. First, three months is added to the appropriate cell duration for the completed offense, which becomes the presumptive duration for the completed offense. The presumptive duration for the completed offense is then divided by two which is the presumptive duration for those convicted of attempted offenses or conspiracies. No such presumptive sentence, however, shall be less than one year and one day.*~~

****

5. The designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in

Minnesota law. The weighting of prior out-of-state felonies is governed by section II.B.1 (above) and shall be based on the severity level of the equivalent Minnesota felony offense; Federal felony offenses for which there is no comparable Minnesota offense shall receive a weight of one in computing the criminal history index score. The determination of the equivalent Minnesota felony for an out-of-state felony is an exercise of the sentencing court's discretion and is based on the definition of the foreign offense and the sentence received by the offender.

Comment

II.B.501. *Out-of-state convictions include convictions under the laws of any other state, or the federal government, including convictions under the Uniform Code of Military Justice, or convictions under the law of other nations.*

II.B.502. *The Commission concluded that convictions from other jurisdictions must, in fairness, be considered in the computation of an offender's criminal history index score. It was recognized, however, that criminal conduct may be characterized differently by the various state and federal criminal jurisdictions. There is no uniform nationwide characterization of the terms "felony," "gross misdemeanor," and "misdemeanor." Generally, the classification of prior offenses as petty misdemeanors, misdemeanors, gross misdemeanors, or felonies should be determined on the basis of current Minnesota offense definitions and sentencing policies. Exceptions to this are offenses in which a monetary threshold determines the offense classification. In these situations, the monetary threshold in effect at the time the offense was committed determines the offense classification for criminal history purposes, not the current threshold.*

~~***II.B.503.*** *It was concluded, therefore, that designation of out of state offenses as felonies or lesser offenses, for purposes of the computation of the criminal history index score, must properly be governed by Minnesota law. The exception to this would be Federal felony crimes for which there is no comparable Minnesota felony offense. Sentences given for these crimes that are felony level sentences according to Minnesota law shall be given a weight of one point for purposes of calculating the criminal history score.~~

~~***II.B.504.*** *It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded foreign convictions. In so doing, sentencing courts should consider the nature and definition of the foreign offense, as well as the sentence received by the offender.~~

6. When determining the criminal history score for a current offense that is a felony solely because the offender has previous convictions for similar or related misdemeanor and gross misdemeanor offenses, the prior gross misdemeanor conviction(s) upon which the enhancement is based may be used in determining custody status, but the prior misdemeanor and gross misdemeanor conviction(s) cannot be used in calculating the remaining components of the offender's criminal history score. If the current offense is a first degree (felony) driving while impaired (DWI) offense and the offender has a prior felony

DWI offense, the prior felony DWI shall be used in computing the criminal history score, but the prior misdemeanor and gross misdemeanor offenses used to enhance the prior felony DWI cannot be used in the offender's criminal history.

Comment

II.B.601. *There are a number of instances in Minnesota law in which misdemeanor or gross misdemeanor behavior carries a felony penalty as a result of the offender's prior record. The Commission decided that in the interest of fairness, a prior offense that elevated the misdemeanor or gross misdemeanor behavior to a felony should not also be used in criminal history points other than custody status. Only one prior offense should be excluded from the criminal history score calculation, unless more than one prior was required for the offense to be elevated to a felony. For example, Assault in the Fifth Degree is a felony if the offender has two or more convictions for assaultive behavior. In those cases the two related priors at the lowest level should be excluded. Similarly, theft crimes of more than $200 but less than $500 are felonies if the offender has at least one previous conviction for an offense specified in that statute. In those cases, the prior related offense at the lowest level should be excluded.*

A first-time first degree (felony) driving while impaired (DWI) offense involves a DWI violation within ten years of the first of three or more prior impaired driving incidents. Because the DWI priors elevated this offense to the felony level, they should be excluded from the criminal history score. Those predicate offenses should also be excluded for a current felony DWI that is a felony because the offender has a prior felony DWI, but the prior Felony DWI would be counted as part of the felony criminal history score.

NUMERICAL REFERENCE OF FELONY STATUTES

This statutory felony offense listing is for convenience in cross-referencing to the Offense Severity Table; it is not official nor is it intended to be used in place of the Offense Severity Reference Table.

STATUTE	OFFENSE	SEVERITY LEVEL
243.166 subd. 5(b)	Registration of Predatory Offenders	~~1~~ H
243.166 subd. 5(c)	Registration of Predatory Offenders (2nd or subsequent violations)	~~3~~ H
609.342	Criminal Sexual Conduct 1 ~~(Sexual Penetration)~~	~~9 *~~ A
~~609.342~~	~~Criminal Sexual Conduct 1 (Sexual Contact- victim under 13)~~	~~8 *~~
609.343 subd.1(a)(b)(g)	Criminal Sexual Conduct 2	~~6~~ D
609.343 subd.1(c)(d)(e) (f)(h)	Criminal Sexual Conduct 2	~~8 *~~ B
609.344 subd. 1(b)(e)(f)	Criminal Sexual Conduct 3	~~5~~ D
609.344 subd. 1(c)(d)(g) (h)(i)(j)(k)(l)(m)(n)	Criminal Sexual Conduct 3	~~8~~ C
609.345 subd. 1(b)(e)(f)	Criminal Sexual Conduct 4	4 F
609.345 subd. 1(c)(d)(g) (h)(i)(j)(k)(l)(m)(n)	Criminal Sexual Conduct 4	~~6~~ E
609.3451 subd. 3	Criminal Sexual Conduct 5	4 G
609.352 subd. 2	Solicitation of Children to Engage in Sexual Conduct	~~3~~ G
617.23 subd. 3	Indecent Exposure	4 G

~~* See II.C. Presumptive Sentence and II.C. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers~~.

617.246	Use of Minors in Sexual Performance Prohibited	~~unranked~~ E
617.247 subd. 3	Dissemination of Pictorial Representation of Minors	~~unranked~~ E
617.247 subd. 3	Dissemination of Pictorial Representation of Minors Subsequent or by Predatory Offender	~~unranked~~ D
617.247 subd. 4	Possession of Pictorial Representation of Minors	~~unranked~~ G
617.247 subd. 4	Possession of Pictorial Representation of Minors Subsequent or by Predatory Offender	~~unranked~~ F

Felony DWI

Cases Sentenced in 2004

Sentencing Policy

Felony Driving While Impaired went into effect August 1, 2002. Minn. Stat. § 169A.276, subdivision 1(a) created a minimum 36-month felony sentence of imprisonment for this offense, while subdivision 1(b) allows for a stay of execution of that sentence but specifically forbids a stay of imposition or stay of adjudication. This means that the court is required to pronounce a period of incarceration even if the court intends on pronouncing a probationary sentence.

The guidelines recommend sentences for the typical case based on the severity of the offense of conviction and the offender's criminal record. Judges may depart from the recommended sentence if the circumstances of a case are substantial and compelling. The court must provide reasons for the departure. Both the prosecution and the defense may appeal the pronounced sentence.

Regardless of whether the judge follows the guidelines, the sentence is fixed. An offender who is sentenced to prison will serve a term of imprisonment equal to at least two-thirds of the pronounced executed sentence. The actual time the offender is incarcerated may be increased (up to the total sentence) if the offender violates disciplinary rules. An offender receiving a prison sentence for a felony DWI is also subject to a 5-year term of conditional release (Minn. Stat. § 169A.276, subd. 1(d); MSGC II.E).

For felony DWI, the Minnesota Sentencing Guidelines and Commentary (MSGC) presume a minimum 36-month sentence be imposed by the court for this offense (MSGC II.E.). For a person convicted of a felony DWI who has a criminal history score of less than 3, the sentencing guidelines presume a stayed sentence; however, if a person has a prior felony DWI conviction, the sentence is presumed to be an executed sentence of imprisonment, regardless of the criminal history score (MSGC II.C.).

Offenders receiving stayed sentences can receive up to one year of local jail time as a condition of their probation and are subject to the mandatory penalty provisions specified in Minn. Stat. § 169A.275. This statute provides that 4th time DWI offenders must be incarcerated for 180 days and 5th or more time offenders for one year, unless they are placed in an intensive supervision program. This statute also allows that a portion of this mandatory jail time may be served on electronic monitoring.

Volume of Cases and Offender Characteristics

There were 860 offenders sentenced for felony DWI in 2004. This was an increase of 6% over the 810 offenders sentenced in 2003.

Demographic Characteristics

Felony DWI offenders are more likely to be White or Native American males than the overall offender population and a larger proportion were sentenced in Greater Minnesota (see figures 1-3). The average age at time of offense was 36 for DWI offenders as compared to 30 for all offenders. The distribution of Felony DWI cases by county can be found in the Appendix.

Figure 1: Distribution of Offenders by Sex:
Felony DWI Offenders Compared to All Offenders

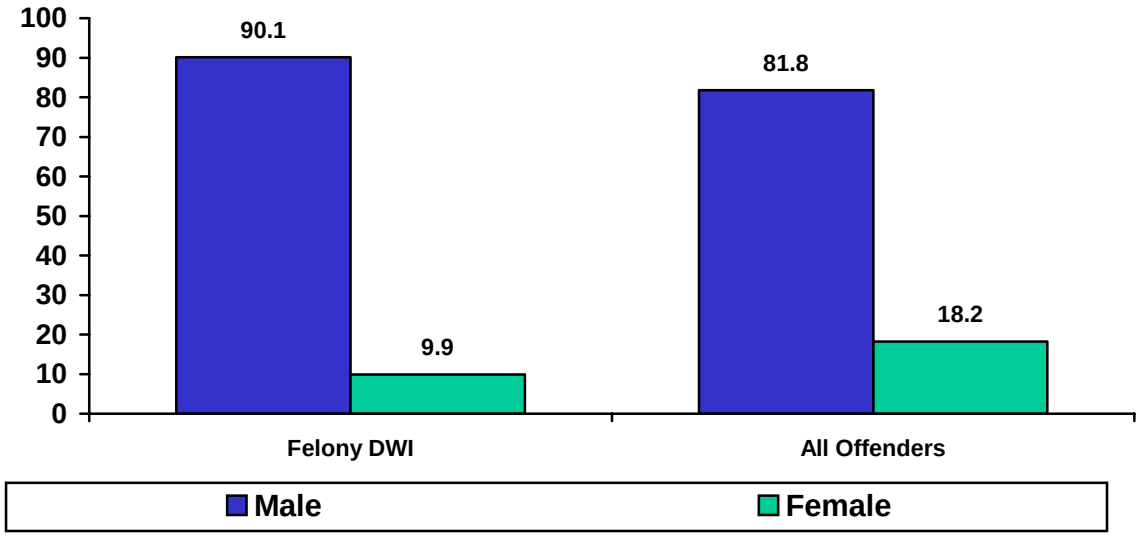


Figure 2: Distribution of Offenders by Race
Felony DWI Offenders Compared to All Offenders

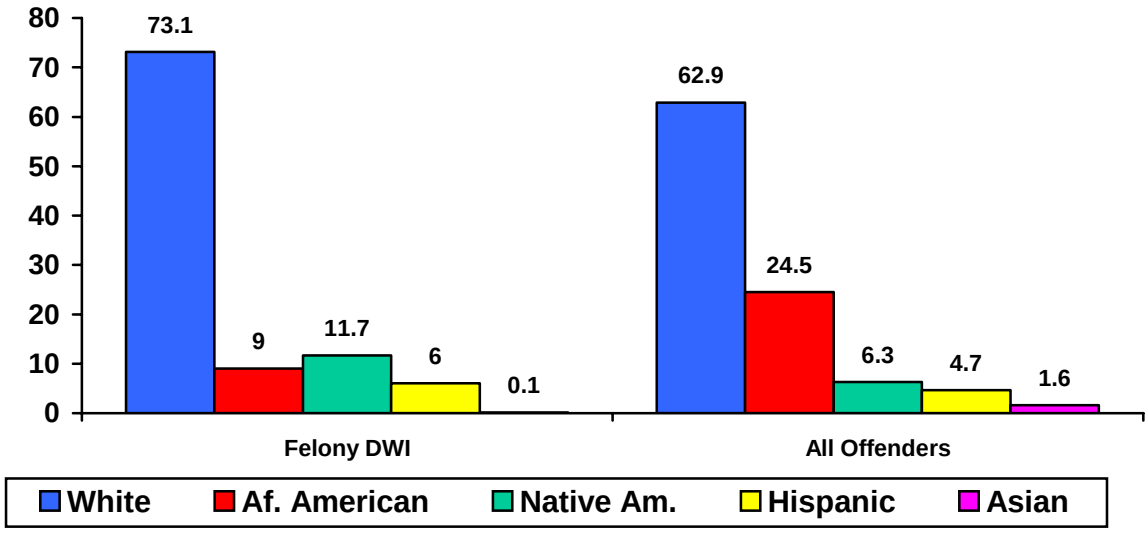
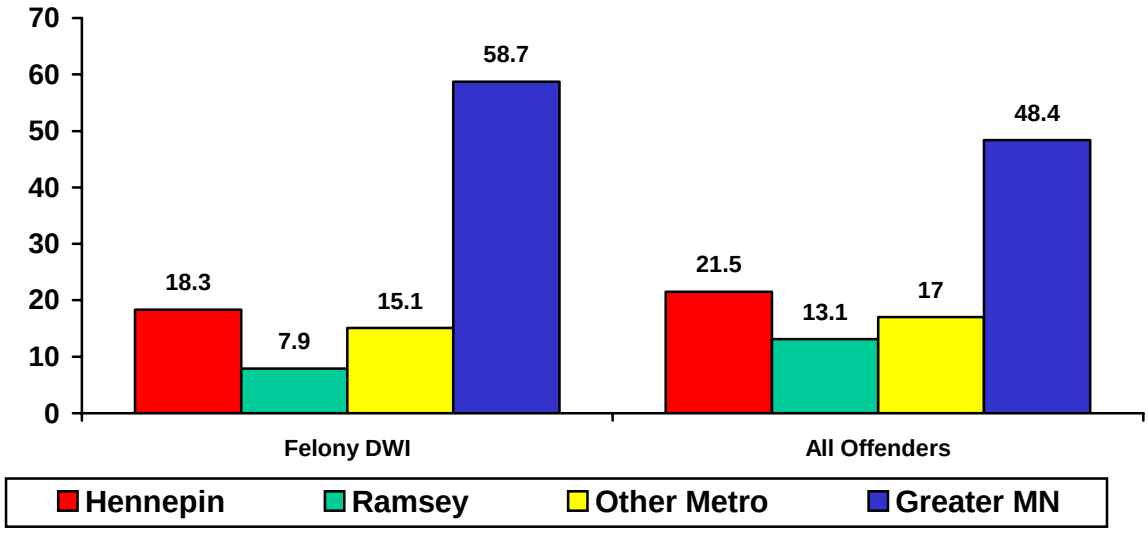


Figure 3: Distribution of Offenders by Region



Felony DWI Offenders Compared to All Offenders

Criminal History

All felony DWI offenders have at a minimum of three prior alcohol-related driving offenses on their record that serve as the predicate offenses upon which a felony DWI charge is based. Per the sentencing guidelines, the predicate offenses upon which a felony offense is based are not used in calculating an offender's criminal history score (MSGC II.B.6). Thus, a first time felony DWI offender may be sentenced at a criminal history score of zero.

Of the 860 cases sentenced in 2004, the greatest number of offenders (387 or 33%) was sentenced at a criminal history score of one, followed by 219 offenders (26%) sentenced at a criminal history score of zero and 151 offenders (18%) sentenced at a criminal history score of two. All totaled, the vast majority (77%) of offenders sentenced for felony DWI were sentenced at a criminal history score of two or less. A criminal history score of 2 or less is a presumed stayed sentence unless the offender's criminal history score includes a prior felony DWI. Nineteen offenders sentenced at a criminal history score of two or less had a presumptive prison sentence because they had a prior felony DWI in their criminal history.

Just over half of all offenders (57%) were under some kind of supervision (e.g., probation, release pending sentence, supervised release from prison) at the time they committed the current offense. Almost half (44%) of these offenders had other felony offenses (i.e., non-DWI felonies) on their record that contributed to their total criminal history score. Altogether, 72 offenders (8%) had a prior felony

DWI in their criminal history. Twenty-five of those 72 were sentenced for multiple felony DWIs at the same time and 47 offenders (5%) were sentenced for a subsequent felony DWI offense.

Distribution of Cases by Criminal History Score

Criminal History Score	Number	Percent
0	219	26%
1	287	33%
2	151	18%
3	99	12%
4	49	6%
5	26	3%
6 or more	29	3%

Sentencing Practices

Incarceration Rates

At the time of sentencing, the court can impose one or more of several different sentences, the most restrictive being a sentence of imprisonment in a state facility for a period exceeding a year. The court may also impose a sentence of local incarceration for a period of up to one year as a condition of probation, as well as other sanctions including community work service, court ordered treatment, and fines.

Of the 860 offenders sentenced for felony DWI, 131 (15%) were sentenced to imprisonment in a state facility. The average pronounced sentence for these 131 offenders was 52 months. An additional 707 offenders (82%) were sentenced to local incarceration as a condition of probation for an average period of 229 days. The total incarceration rate (i.e., both offenders sentenced to prison and local incarceration) was 97%. The remaining 22 offenders (3%) received other sanctions imposed by the court at sentencing. For the 728 offenders placed on probation, the average pronounced length of probation was 76 months. One offender received probation for one year, all other offenders were placed on probation for two years or longer. Most (72%) of the offenders placed on probation received a probation period equal to the statutory maximum of seven years (84 months).

Incarceration Type and Durations Felony DWI Offenders

Type	Number	Percent	Average Pronounced Durations
Prison	131	15.2%	52 months
Local Jail Time	707	82.2%	229 days
Other Sanctions	22	2.6%	
Total	860	100%	

Departure Rates

A departure occurs when the court imposes a sentence that is different from that presumed under the sentencing guidelines. A departure can be to the presumed disposition of the sentence (i.e., whether the guidelines calls for a stayed probationary sentence or a commitment to prison) or to the presumed duration or the sentence measured in months. A departure can be "aggravated" meaning either imposing a prison sentence on a presumptive stayed probationary sentence, or imposing a greater amount of time than that presumed by the sentencing guidelines. A departure can be "mitigated" meaning either imposing a stayed probationary sentence on a presumed prison sentence, or by imposing a shorter duration than that presumed under the sentencing guidelines.

Dispositional Departures

Of the 860 cases sentenced in 2004, 222 (75%) were presumptive prison sentences under the sentencing guidelines. Of those 222 cases, 126 (57%) were given the presumptive sentence and committed to prison. The remaining 96 cases (43%) were given a mitigated dispositional departure and placed on probation. The mitigated dispositional departure rate for Felony DWI cases sentenced through the end of 2003 was 37%.

Of the 638 cases where the sentencing guidelines presumed a stayed sentence, 5 (1%) were given an aggravated dispositional departure and committed to prison. The remaining 633 cases received the presumptive stayed sentence and were placed on probation. As noted above, a stayed sentence where the offender is placed on probation might include up to a year of incarceration in a local facility as a condition of the probation.

Dispositional Departures

Presumptive Disposition	Sentence Received		Departure Rate
	Prison	Probation	
Prison – 222	126 (57%)	96 (43%)	Mitigated – 43%
Probation – 638	5 (1%)	633 (99%)	Aggravated – 1%
Total – 860	131(15%)	729 (85%)	Total Dispositional -12%

The most frequently cited reasons for the mitigated dispositional departures included amenability to probation (60%) and treatment (53%). In 25% of these departures, the court cited the defendant's show of remorse or acceptance of responsibility as a reason for departure and in 18% placing the offender on long term supervision was cited as a reason for departure. In 40% of the mitigated dispositional departures, the court cited a plea negotiation, recommendation by the prosecutor, or failure by the prosecutor to object as a reason for departure. In 15% of these cases, the court stated that the prosecutor objected to the mitigated disposition. Of the five cases where a prison sentence was imposed even though the presumptive disposition was probation, 3 (60%) were the result of the defendant's request for a prison sentence.

Durational Departures on Prison Cases

Of the 131 cases sentenced to prison, 85 (65%) received the sentence duration recommended under the sentencing guidelines. Five cases received a duration greater than that recommended by the sentencing guidelines and the remaining 41 cases (31%) received a sentence duration shorter than that recommended by the sentencing guidelines. This is a decrease from the 44% mitigated durational departure rate observed for felony DWI cases sentenced through the end of 2003. In 61% of the mitigated durational departures sentenced in 2004, the court cited plea agreement or recommendation or lack of objection by the prosecutor as a reason for departure. The court stated that the prosecutor objected to only 2 (5%) of the mitigated durations. Other most frequently cited reasons for mitigated durations included: the offenders showed remorse or accepted responsibility (29%), the crime was less onerous than typical (17%), and that by pleading guilty the offender saved the taxpayers the cost of a trial (10%). Of the five aggravated durational departures, one was the result of a plea negotiation, three resulted from errors in calculating the presumptive sentence, and in one case the court stated that the crime was more onerous than typical.

Durational Departures-Executed Sentences

Number of Executed Sentences	No Departure	Aggravated Departures	Mitigated Departures	Total Departure Rate
131	85 (65%)	5 (4%)	41 (31%)	35%

Revocations to Prison

A revocation occurs when an offender placed on probation violates the conditions of that probation. A revocation can add additional sanctions to an offender's sentence or can result in the offender being sent to prison to serve their sentence. Information from the Department of Corrections indicates that 63 felony DWI offenders were admitted in 2004 as probation revocations. There were 24 probation revocations in 2003 for a total of 87. Since the felony DWI law went into effect, (August 1, 2002) 1,772 offenders have been sentenced (102 in 2002, 810 in 2003, and 860 in 2004) and 1,518 offenders have been placed on probation. With 87 probation revocations, the revocation rate through the end of 2004 is 5.7%.

County Attorney Reports

A mandatory minimum sentence was imposed and executed in 63 % of the cases where it was required.

Current law directs county attorneys to collect and maintain information on criminal complaints and prosecutions within the county attorney's office in which a defendant is alleged to have committed an offense while possessing or using a firearm. This information is then forwarded to the Sentencing Guidelines Commission no later than July 1 of each year. Pursuant to M.S. § 244.09, subdivision 14, the Sentencing Guidelines Commission is required to include in its annual Report to the Legislature a summary and analysis of the reports received from county attorneys. Memoranda describing the ongoing mandate by the Legislature along with forms (See Appendix) on which to report their county's cases are distributed to Minnesota's county attorneys. Although commission staff clarifies inconsistencies in the summary data, the information received from the county attorneys is reported directly as provided.

This year the Commission received information from all 87 Minnesota counties. Figure 1 below displays a historical summary of cases since the mandate began. In FY 2005 there were a total of 731 cases in which a defendant allegedly committed an offense listed in subdivision 9 of M.S. § 609.11 while possessing or using a firearm. Case volume was up 4.3 percent from last year.

Figures 2 through 5 summarize this year's statewide information. Tables providing information for individual counties are included in the Appendix.

FIGURE 1. Historical Case Summary

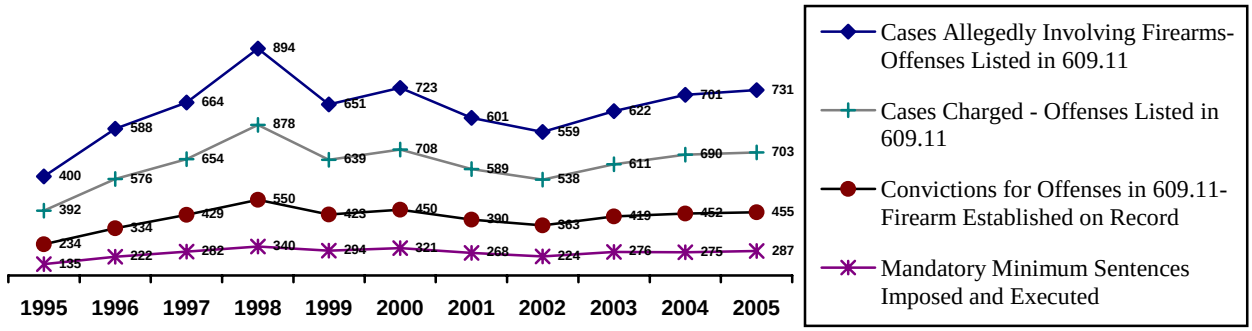


FIGURE 2. Total Number Cases Allegedly Involving Firearms Offenses Listed in M.S. § 609.11, subdivision 9

- *Prosecutors charged offenders in 96 percent of the cases allegedly involving firearms. This figure remains the same as reported last year.*

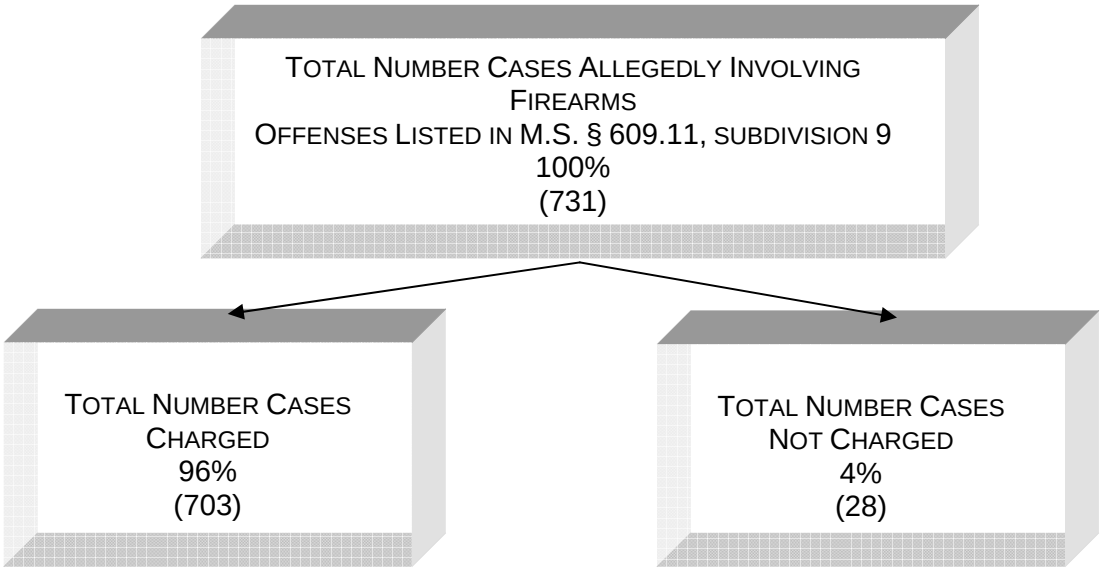


FIGURE 3. Offenses Charged – Case Outcomes

- *Among those cases charged, 70 percent were convicted of an offense listed in M.S. § 609.11, subdivision 9. This figure is was the same percent recorded in FY 2004.*

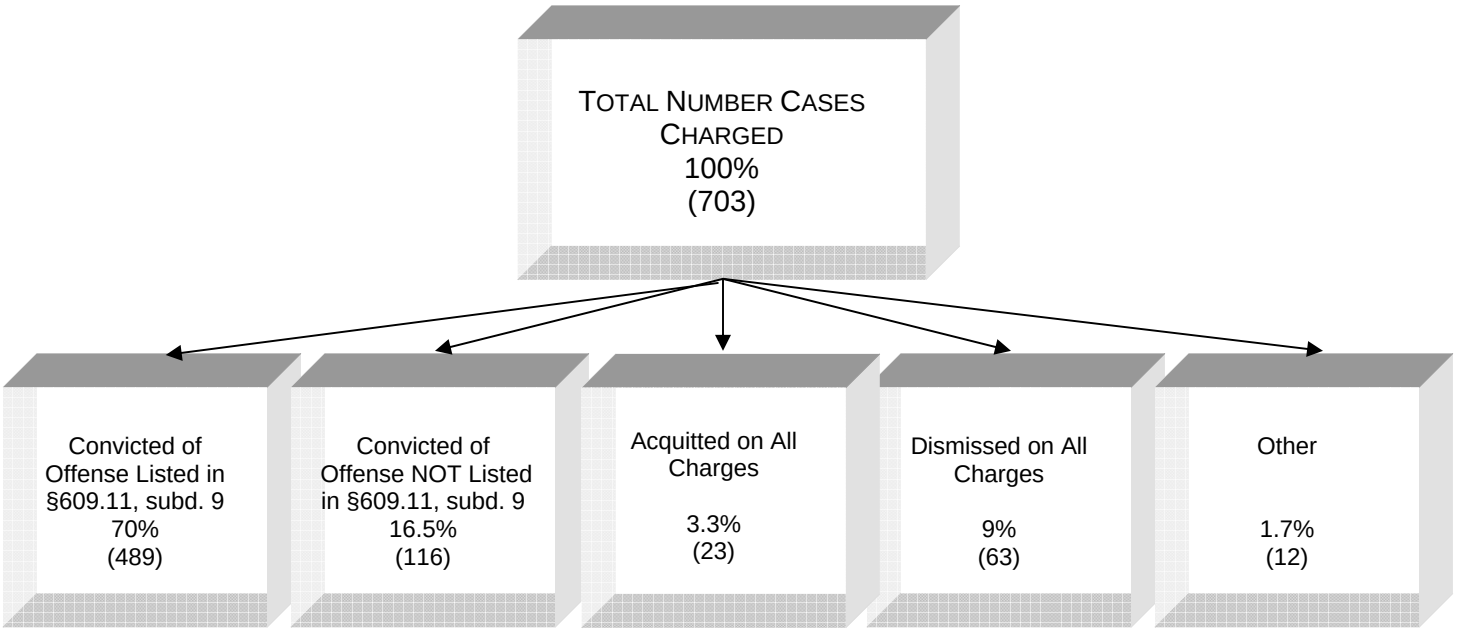


FIGURE 4. Convictions for Offenses Listed in M.S. § 609.11, subdivision 9 - Firearm Established on the Record

- *There were 489 convictions for offenses listed in M.S. § 609.11, subdivision 9. In 93 percent of the cases, a firearm was established on the record. This is slightly lower from 94 percent as reported in FY 2004.*

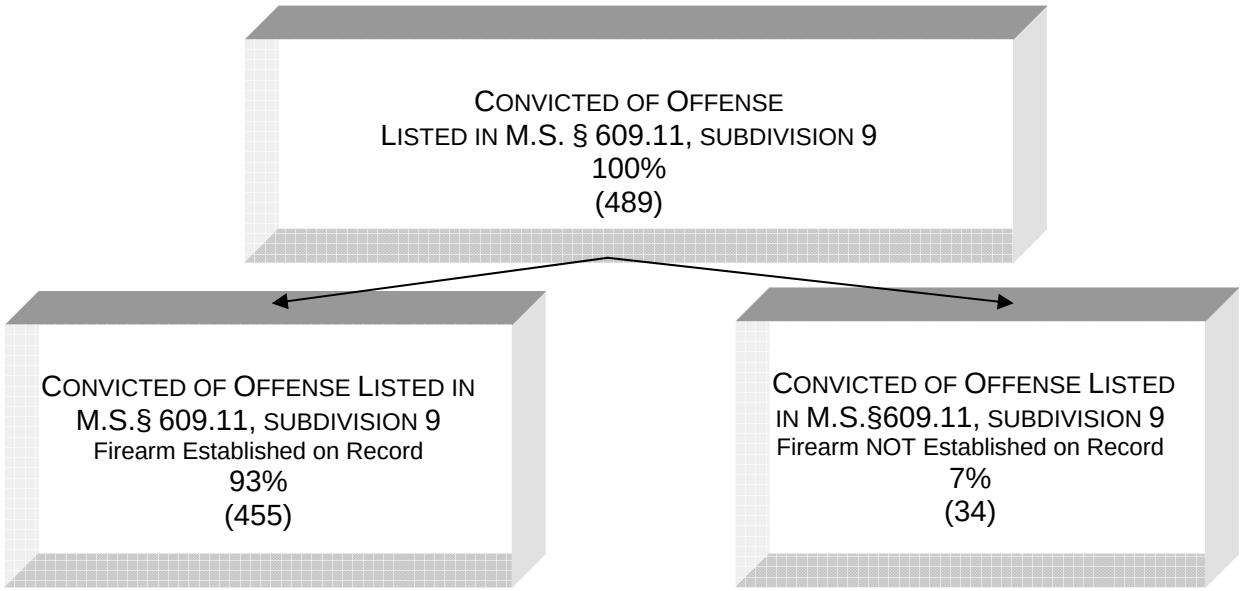
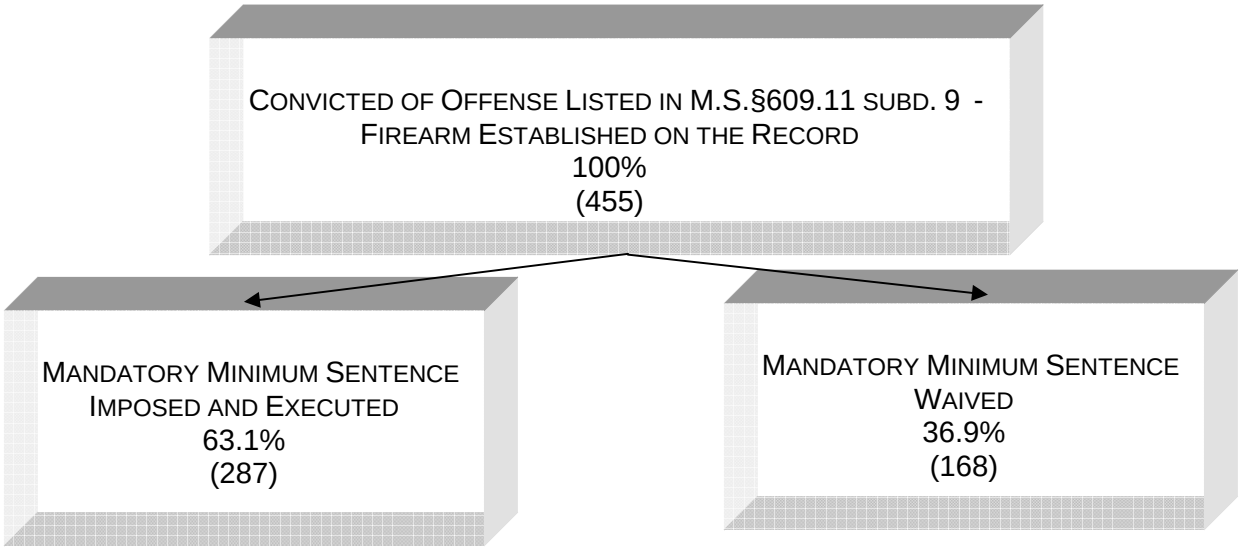


FIGURE 5. Mandatory Minimum Sentences Imposed and Executed

- *A mandatory minimum sentence was imposed and executed in 63.1 percent of the cases where it was required. This figure was 61 percent in FY 2004 and 66 percent in FY 2003.*



Appendix

SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	**1**	**2**	**3**	**4**	**5**	**6 or more**
Murder, 2nd Degree (intentional murder; drive-by shootings)	**XI**	306 *261-367*	326 *278-391*	346 *295-415*	366 *312-439*	386 *329-463*	406 346-480[3]	426 *363-480*[3]
Murder, 3rd Degree Murder, 2nd Degree (unintentional murder)	**X**	150 *128-180*	165 *141-198*	180 *153-216*	195 *166-234*	210 *179-252*	225 *192-270*	240 *204-288*
Criminal Sexual Conduct, 1st Degree [2] *Assault, 1st Degree*	**IX**	86 *74-103*	98 *84-117*	110 *94-132*	122 *104-146*	134 *114-160*	146 *125-175*	158 *135-189*
Aggravated Robbery 1st Degree Criminal Sexual Conduct, 2nd Degree (c),(d),(e),(f),(h) [2]	**VIII**	48 *41-57*	58 *50-69*	68 *58-81*	78 *67-93*	88 *75-105*	98 *84-117*	108 *92-129*
Felony DWI	**VII**	36	42	48	54 *46-64*	60 *51-72*	66 *57-79*	72 *62-86*
Criminal Sexual Conduct, 2nd Degree (a) & (b)	**VI**	21	27	33	39 *34-46*	45 *39-54*	51 *44-61*	57 *49-68*
Residential Burglary Simple Robbery	**V**	18	23	28	33 *29-39*	38 *33-45*	43 *37-51*	48 *41-57*
Nonresidential Burglary	**IV**	12[1]	15	18	21	24 *21-28*	27 *23-32*	30 *26-36*
Theft Crimes (Over $2,500)	**III**	12[1]	13	15	17	19 *17-22*	21 *18-25*	23 *20-27*
Theft Crimes ($2,500 or less) Check Forgery ($200-$2,500)	**II**	12[1]	12[1]	13	15	17	19	21 *18-25*
Sale of Simulated Controlled Substance	**I**	12[1]	12[1]	12[1]	13	15	17	19 *17-22*

Presumptive commitment to state imprisonment. First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence. See section II.E. Mandatory Sentences for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. See sections II.C. Presumptive Sentence and II.E. Mandatory Sentences.

[1] One year and one day

[2] Pursuant to M.S. § 609.342, subd. 2 and 609.343, subd. 2, the presumptive sentence for Criminal Sexual Conduct in the First Degree is a minimum of 144 months and the presumptive sentence for Criminal Sexual Conduct in the Second Degree – clauses c, d, e, f, and h is a minimum of 90 months (see II.C. Presumptive Sentence and II.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers). Pursuant to M.S. § 609.3455, certain sex offenders are subject to life sentences. Some of these life sentences are life without release, while others are indeterminate life sentences with the minimum term of imprisonment specified by the court and based upon the sentencing guidelines and any applicable mandatory minimums. See II.C. Presumptive Sentence.

[3] M.S. § 244.09 requires the Sentencing Guidelines to provide a range of 15% downward and 20% upward from the presumptive sentence. However, because the statutory maximum sentence for these offenses is no more than 40 years, the range is capped at that number.

Effective August 1, 2005

SPECIFIC GUIDELINES MODIFICATIONS
Effective August 1, 2005

I. Modifications Adopted by the Commission in December 2004 and Approved During the 2005 Legislative Session

A. The Commission adopted the following modifications related to the *Blakely* decision:

1. Departure Language

D. Departures from the Guidelines: The sentence~~s~~ ranges provided in the Sentencing Guidelines Grid are presumed to be appropriate for ~~every case~~ the crimes to which they apply. Thus, the judge shall ~~utilize the presumptive sentence provided in the sentencing guidelines~~ pronounce a sentence within the applicable range unless ~~the individual case involves~~ there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grid. A sentence outside the applicable range on the grid is a departure from the sentencing guidelines and is not controlled by the guidelines, but rather, is an exercise of judicial discretion constrained by case law and appellate review. However, in exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular ~~When such circumstances are present, the judge may depart from the presumptive sentence and stay or impose any sentence authorized by law. When departing from the presumptive sentence, the court should pronounce a sentence which is proportional to the severity of the offense of conviction and the extent of the offender's prior criminal history, and should take into substantial consideration the statement of purpose and principles in Section I, above. When departing from the presumptive sentence, a judge must provide written reasons which specify the~~ substantial and compelling ~~nature of the~~ circumstances that~~, and which demonstrate why the sentence selected in the departure is~~ make the departure more appropriate~~, reasonable, or equitable~~ than the presumptive sentence.

Furthermore, if an aggravated durational departure is to be considered, the judge must afford the accused an opportunity to have a jury trial on the additional facts that support the departure and to have the facts proved beyond a reasonable doubt. If the departure facts are proved beyond a reasonable doubt, the judge may exercise the discretion to depart from the presumptive sentence. In exercising that discretion, it is recommended that the judge pronounce a sentence that is proportional to the severity of the crime for which the sentence is imposed and the offender's criminal history, and take into consideration the purposes and underlying principles of the sentencing guidelines. Because departures are by definition exceptions to the sentencing guidelines, the departure factors set forth in II.D are advisory only, except as otherwise established by settled case law. When the conviction is for a criminal sexual conduct offense or offense in which the victim was otherwise injured, and victim injury is established in proving the elements of the crime, an aggravated durational departure is possible without a jury determination of additional facts if the departure is based on the offender's prior history of a conviction for a prior criminal sexual conduct offense or an offense in which victim injury was established as an element of the

offense.

Comment

II.D.01. *The guideline sentences are presumed to be appropriate for every case. However, there will be a small number of cases where substantial and compelling aggravating or mitigating factors are present. When such factors are present, the judge may depart from the presumptive disposition or duration provided in the guidelines, and stay or impose a sentence that is deemed to be more appropriate~~, reasonable, or equitable~~ than the presumptive sentence. A defendant has the right to a jury trial to determine whether or not aggravating factors are proved beyond a reasonable doubt.*

II.D.02. *Decisions with respect to disposition and duration are logically separate. Departures with respect to disposition and duration also are logically separate decisions. A judge may depart from the presumptive disposition without departing from the presumptive duration, and vice-versa. A judge who departs from the presumptive disposition as well as the presumptive duration has made two separate departure decisions, each requiring written reasons.*

II.D.03. *The aggravating or mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favor of the guideline sentence. The purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be reduced if judges depart from the guidelines frequently. Certainty in sentencing cannot be attained if departure rates are high. Prison populations will exceed capacity if departures increase imprisonment rates significantly above past practice.*

II.D.04. *Plea agreements are important to our criminal justice system because it is not possible to support a system where all cases go to trial. However, it is important to have balance in the criminal justice system where plea agreements are recognized as legitimate and necessary and the goals of the sentencing guidelines are supported. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to provide for informed policy making or to ensure consistency, proportionality, and rationality in sentencing.*

Departures and their reasons highlight both the success and problems of the existing sentencing guidelines. When a plea agreement is made that involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted.

2. Permissive Consecutive Sentences

II.F. Concurrent/Consecutive Sentences: ****

Permissive Consecutive Sentences

Except when consecutive sentences are presumptive, consecutive sentences are permissive (may be given without departure) only in the following cases:

1. A current felony conviction for a crime ~~against a person~~ on the list of offenses eligible for permissive consecutive sentences found in Section VI may be sentenced consecutively to a

prior felony sentence for a crime ~~against a person~~ listed in Section VI which has not expired or been discharged; or

2. Multiple current felony convictions for crimes ~~against persons~~ on the list of offenses eligible for permissive consecutive sentences found in Section VI may be sentenced consecutively to each other; or

…

Consecutive sentences are permissive under the above criteria numbers 1, 2, and 4 only when the presumptive disposition for the current offense(s) is commitment to the Commissioner of Corrections as determined under the procedures outlined in section II.C. In addition, consecutive sentences are permissive under number 1 above, ~~involving a current felony conviction for a crime against a person and a prior felony sentence for a crime against a person which has not expired or been discharged,~~ only when the presumptive disposition for the prior offense(s) was commitment to the Commissioner of Corrections as determined under the procedures outlined in section II.C. If the judge pronounces a consecutive stayed sentence in these circumstances, the stayed sentence is a mitigated dispositional departure, but the consecutive nature of the sentence is not a departure if the offense meets one of the above criteria. The consecutive stayed sentence begins when the offender completes the term of imprisonment and is placed on supervised release.

Comment

****

II.F.04. The Commission's policy on permissive consecutive sentencing outline the criteria that are necessary to permit consecutive sentencing without the requirement to cite reasons for departure. Judges may pronounce consecutive sentences in any other situation by citing reasons for departure. Judges may also pronounce durational and dispositional departures both upward and downward in cases involving consecutive sentencing if reasons for departure are cited. The reasons for each type of departure should be specifically cited. The procedures for departures are outlined in Section II.D. of the guidelines.

It is permissive for multiple current felony convictions ~~against persons~~ for offenses on the eligible list to be sentenced consecutively to each other when the presumptive disposition for these offenses is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C. Presumptive Sentence. Consecutive sentencing is permissive under these circumstances even when the offenses involve a single victim involving a single course of conduct. However, consecutive sentencing is not permissive under these circumstances when the court has given an upward durational departure on any of the current offenses. The Commission believes that to give both an upward durational departure and a consecutive sentence when the circumstances involve one victim and a single course of conduct can result in disproportional sentencing unless additional aggravating factors exist to justify the consecutive sentence.

****

VI. OFFENSES ELIGIBLE FOR PERMISSIVE CONSECUTIVE SENTENCES

Statute Number	Offense
152.021 subd. 2a(a)	Manufacture any amount of Methamphetamine
152.022 subd. 1 (5)	Sells Cocaine/Narcotic to Minor/Employs Minor
152.023 subd. 1 (3)	Sells Sch. I,II,III to Minor (not Narcotic)
152.023 subd. 1 (4)	Sells Sch I,II,III Employs Minor (not Narcotic)
152.024 subd. 1 (2)	Schedule IV or V to Minor
152.024 subd. 1 (3)	Employs Minor to sell Schedule IV or V
152.0261 subd. 1a	Employing a Minor to Import Controlled Substances
152.137	Methamphetamine Crimes Involving Children or Vulnerable Adults
169.09 subd. 14(a)(1)	Accidents- Resulting in Death
169.09 subd. 14(a)(2)	Accidents- Great Bodily Harm
169A.24 subd. 1 (1)	First Degree DWI – 4 or more w/in 10 years
169A.24 subd. 1 (2)	First Degree DWI – 2nd or subsequent
243.166 subd. 5 (b)	Registration of Predatory Offenders
243.166 subd. 5 (c)	Registration of Predatory Offenders - 2nd or subsequent
518B.01 subd. 14(d)	Violation of an Order for Protection
609.185	Conspiracy/Attempted Murder in the First Degree
609.19	Murder in the Second Degree
609.195	Murder in the Third Degree
609.20	Manslaughter in the First Degree
609.205	Manslaughter Second Degree
609.21 subd. 1 & 3	Criminal Vehicular Homicide
609.21 subd. 2 & 4	Criminal Vehicular Injury - Great Bodily Harm
609.21 subd. 2a	Criminal Vehicular Injury - Substantial Bodily Harm
609.215	Aiding Suicide
609.221	Assault 1
609.222	Assault 2 - Dangerous Weapon
609.223	Assault 3
609.2231	Assault 4
609.224 subd. 4	Assault 5 - 3rd or subsequent violation
609.2241	Knowing Transfer of Communicable Disease
609.2242 subd. 4	Domestic Assault
609.2245	Female Genital Mutilation
609.2247	Domestic Assault by Strangulation
609.228	Great Bodily Harm - Distribution of Drugs
609.229 subd. 3	Crime Committed for Benefit of Gang
609.2325 subd. 3(1)	Criminal Abuse of Vulnerable Adult (Death)
609.2325 subd. 3(2)	Criminal Abuse of Vulnerable Adult (Great Bodily Harm)
609.2325 subd. 3(3)	Criminal Abuse of Vulnerable Adult (Substantial Bodily Harm)
609.235	Use of Drugs to Injure or Facilitate Crime
609.24	Simple Robbery
609.245 subd. 1	Aggravated Robbery 1

Statute Number	Offense
609.245 subd. 2	Aggravated Robbery 2
609.25	Kidnapping
609.255	False Imprisonment
609.2661	Consp./At. Murder I of Unborn Child
609.2662	Murder 2 of an Unborn Child
609.2663	Murder 3 of an Unborn Child
609.2664	Manslaughter 1 of an Unborn Child
609.2665	Manslaughter 2 of an Unborn Child
609.267	Assault 1 of an Unborn Child
609.2671	Assault 2 of an Unborn Child
609.268	Death or Injury of an Unborn Child in Comm. of Crime
609.282	Labor Trafficking
609.322 subd. 1	Solicit, Promote, or Profit from Prost. Under 18
609.322 subd. 1a	Solicit, Promote, or Profit from Prost. (No Age Limit)
609.324 subd. 1(a)	Engage or Hire a Minor to Engage in Prostitution
609.324 subd. 1(b)	Engage or Hire a Minor to Engage in Prostitution
609.324 subd. 1(c)	Engage or Hire a Minor to Engage in Prostitution
609.342 subd. 1	Criminal Sexual Conduct 1
609.343 subd. 1	Criminal Sexual Conduct 2
609.344 subd. 1	Criminal Sexual Conduct 3
609.345 subd. 1	Criminal Sexual Conduct 4
609.3451 subd. 3	Criminal Sexual Conduct 5
609.3453	Criminal Sexual Predatory Conduct
609.352 subd. 2	Solicitation of Children to Engage in Sexual Conduct
609.365	Incest
609.377	Malicious Punish. of Child
609.378	Child Neglect/Endangerment
609.485 subd. 4(a)(3)	Escape with Violence from GM or Misd. Offense
609.485 subd. 4(b)	Escape with Violence from Felony offense
609.487 subd. 4(a)	Fleeing Peace Officer (Resulting in Death)
609.487 subd. 4(b)	Fleeing Peace Officer (Great Bodily Harm)
609.487 subd. 4(c)	Fleeing Peace Officer (Substantial Bodily Harm)
609.498 subd. 1a	Tampering with a Witness in the First Degree
609.498 subd. 1b	Tampering with a Witness, Aggravated First Degree
609.527	Identity Theft
609.561	Arson in the First Degree
609.582 subd. 1(a)	Burglary First Degree - of Occupied Dwelling
609.582 subd. 1(b)	Burglary First Degree with Dangerous Weapon
609.582 subd. 1(c)	Burglary First Degree with Assault
609.582 subd. 2(a)	Burglary Second Degree – Dwelling
609.582 subd. 2(b)	Burglary Second Degree – Bank
609.591 subd. 3 (1)	Hinder Logging (Great Bodily Harm)
609.594 subd. 2	Damage to Property – Critical Public Service Facilities

Statute Number	Offense
609.66 subd. 1e	Drive-By Shooting
609.662 subd. 2 (b)(1)	Duty to Render Aid (Death or Great Bodily Harm)
609.662 subd. 2 (b)(2)	Duty to Render Aid (substantial bodily harm)
609.671	Hazardous Wastes
609.687 subd. 3(1)	Adulteration Resulting in Death
609.687 subd. 3(2)	Adulteration Resulting in Bodily Harm
609.71 subd. 1	Riot 1
609.712	Real/Simulated Weapons of Mass Destruction
609.713 subd. 1	Terroristic Threats-Violence Threat/Evacuation
609.713 subd. 2	Terroristic Threats-Bomb Threat
609.713 subd. 3(a)	Terroristic Threats-Replica Firearm
609.714 subd. 2	Crimes Committed in Furtherance of Terrorism
609.748 subd. 6(d)	Violation of Restraining Order
609.749 subd. 3	Harassment/Stalking (Aggravated Violations)
609.749 subd. 4	Harassment/Stalking (Subsequent Violations)
609.749 subd. 5	Harassment/Stalking (Pattern of Conduct)
609.855 subd. 2(c)(1)	Interference with Transit Operator
609.855 subd. 5	Discharge Firearm at Occup. Tran. Vehicle/Facility
617.23 subd. 3	Indecent Exposure
617.246, subd. 2 617.246, subd. 3 617.246, subd. 4	Use of Minors in Sexual Performance Prohibited Operation/Owner-Use of Minors in Sexual Perform. Dissemination-Use of Minors in Sexual Performance
617.247, subd. 3(a) 617.247, subd. 3(b)	Dissemination of Pictorial Representations of Minors Dissemination by Predatory Offender
617.247, subd. 4(a) 617.247, subd. 4(b)	Possession of Pictorial Representations of Minors Possession by Predatory Offender
624.732 subd. 2	Intentional Release of Harmful Substance
624.74	Metal Penetrating Bullets

B. The Commission adopted a proposal to rank the following crime in Section V. OFFENSE SEVERITY REFERENCE TABLE and to remove this crime from the list of unranked offenses in Comment II.A.03:

III Anhydrous Ammonia (tamper/theft/transport) – 18D.331 subd. 5

II. Adopted Modifications Associated With New and Amended Crimes Passed by the Legislature During the 2005 Legislative Session

A. The Commission adopted a proposal to rank the following crimes in Section V. OFFENSE SEVERITY REFERENCE TABLE:

V

Possession of Substances with Intent to Manufacture Methamphetamine – 152.0262

IV

Domestic Assault by Strangulation – 609.2247

III

~~Attempted Manufacture of Methamphetamine – 152.021, subd. 2a(b)~~
Anhydrous Ammonia (tampter/theft/transport) – ~~18D.331, subd. 5~~ 152.136
Methamphetamine Crimes Involving Children and Vulnerable Adults – 152.137
Obstructing Legal Process, Arrest, ~~or~~ Firefighting, or Ambulance Service Personnel Crew – 609.50, subd. 2

II

Electronic Use of False Pretense to Obtain Identity – 609.527, subd. 5a

I

Assault 4 – 609.2231, subd. 1, 2, ~~&~~ 3, & 3a
Criminal Use of Real Property (Movie Pirating) – 609.896
Escape from Civil Commitment – 609.485, subd. 4 (a) (4)
Interference with Privacy (subsequent violations & minor victim) – 609.746, subd. 1(e)

B. The Commission adopted a proposal to add the following offenses to the unranked offense list in Comment II.A.03:

Labor Trafficking – 609.282
Unlawful Conduct with Documents in Furtherance of Labor or Sex Trafficking – 609.283

C. The Commission adopted a proposal to add the following crime to the *Misdemeanor and Gross Misdemeanor Offense List*:

Predatory Offender Carrying a Weapon
624.714, subd. 24

D. The Commission adopted a proposal to add the following crimes to Section VI. OFFENSES ELIGIBLE FOR PERMISSIVE CONSECUTIVE SENTENCING:

152.137	Methamphetamine Crimes Involving Children and Vulnerable Adults
609.2247	Domestic Assault by Strangulation
609.282	Labor Trafficking
609.3453	Criminal Sexual Predatory Conduct

E. The Commission adopted a proposal to add the following language to Sections II.C. and II.E of the *Minnesota Sentencing Guidelines and Commentary* to address the new mandatory life sentences for certain sex offenders:

C. Presumptive Sentence: ****

The line on the Sentencing Guidelines Grid demarcates those cases for whom the presumptive sentence is executed from those for whom the presumptive sentence is stayed. For cases contained in cells above and to the right of the line, the sentence should be executed. For cases contained in cells below and to the left of the line, the sentence should be stayed, unless the conviction offense carries a mandatory minimum sentence.

Pursuant to M.S. § 609.3455, certain sex offenders are subject to mandatory life sentences. The sentencing guidelines presumptive sentence does not apply to offenders subject to mandatory life without the possibility of release sentences under subdivision 2 of that statute. For offenders subject to life with the possibility of release sentences under subdivisions 3 and 4 of that statute, the court shall specify a minimum term of imprisonment, based on the sentencing guidelines or any applicable mandatory minimum sentence, that must be served before the offender may be considered for release.

The sentencing guidelines do not apply to offenders sentenced under M.S. § 609.109, subdivision 3, which mandates a life sentence for certain repeat sex offenders. The minimum term of imprisonment for offenders sentenced under this statute is 30 years.

Pursuant to M.S. § 609.342, subdivision 2, the presumptive sentence for a conviction of Criminal Sexual Conduct in the First Degree is an executed sentence of at least 144 months. Sentencing a person in a manner other than that described in M.S. § 609.342, subdivision 2 is a departure. The presumptive duration for an attempt or conspiracy to commit Criminal Sexual Conduct in the First Degree is one-half of the time listed in the appropriate cell of the Sentencing Guidelines Grid, or any mandatory minimum, whichever is longer.

Pursuant to M.S. § 609.343, subdivision 2, the presumptive sentence for a conviction of Criminal Sexual Conduct in the Second Degree, 609.343 subd. 1 clauses (c), (d), (e), (f), and (h), is an executed sentence of at least 90 months. Sentencing a person in a manner other than that described in M.S. § 609.343, subdivision 2 is a departure. The presumptive duration for an attempt or conspiracy to commit Criminal

Sexual Conduct in the Second Degree is one-half of the time listed in the appropriate cell of the Sentencing Guidelines Grid, or any mandatory minimum, whichever is longer.

****

Comment

****

II.C.10. *The 2005 Legislature enacted statutory changes allowing life sentences with the possibility of release for certain sex offenders. The statute requires the sentencing judge to pronounce a minimum term of imprisonment, based on the sentencing guidelines and any applicable mandatory minimum, that the offender must serve before being considered for release. All applicable sentencing guidelines provisions, including the procedures for departing from the presumptive sentence, are applicable in the determination of the minimum term of imprisonment for these sex offense sentences.*

****

E. Mandatory Sentences: ****

First degree murder~~,~~ and ~~certain~~ sex offenders ~~convicted under~~ subject to Minn. Stat. § 609.109, subd. 3 and § 609.3455, subdivision 2, which have ~~a~~ mandatory life imprisonment sentences, are excluded from offenses covered by the sentencing guidelines.

****

F. The Commission adopted a proposal to add the following language to Section II.G. of the *Minnesota Sentencing Guidelines and Commentary* to address the new Criminal Sexual Predatory Conduct offense:

II.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers: For persons convicted of attempted offenses or conspiracies to commit an offense, Solicitation of Juveniles under Minn. Stat. § 609.494, subd. 2(b), Solicitation of Mentally Impaired Persons under Minn. Stat. § 609.493, or Aiding an Offender – Taking Responsibility for Criminal Acts under Minn. Stat. § 609.495, subd. 4, the presumptive sentence is determined by locating the Sentencing Guidelines Grid cell defined by the offender's criminal history score and the severity level of the completed or intended offense or the offense committed by the principal offender, and dividing the duration contained therein by two, but such sentence shall not be less than one year and one day except that for Conspiracy to Commit a Controlled Substance offense as per Minn. Stat. § 152.096, in which event the presumptive sentence shall be that for the completed offense.

For persons convicted of attempted offenses or conspiracies to commit an offense with a mandatory minimum of a year and a day or more, the presumptive duration is the mandatory minimum or one-half the duration specified in the applicable Sentencing Guidelines Grid cell, whichever is greater. For persons convicted of an attempt or conspiracy to commit Criminal Sexual Conduct in the First Degree (M.S. § 609.342) or Criminal Sexual Conduct in the Second Degree (M.S. § 609.343, subd. 1(c), (d), (e), (f), and (h)), the presumptive duration is one-half of that found in the appropriate cell of the Sentencing Guidelines Grid or any mandatory minimum, whichever is longer.

For persons sentenced under Minn. Stat. § 609.714 (an offense committed in furtherance of terrorism),

the presumptive sentence duration for the underlying offense is increased 50%. The presumptive sentence is determined by locating the Sentencing Guidelines Grid cell defined by the offender's criminal history score and the severity level of the underlying crime.

For persons sentenced under Minn. Stat. § 609.3453 (criminal sexual predatory conduct), the presumptive sentence duration for the underlying offense, located in the Sentencing Guidelines Grid Cell defined by the offender's criminal history score and the severity level of the underlying crime, is increased by 25%. If the person was convicted and sentenced for a sex offense before the commission of the present offense, the presumptive sentence duration for the underlying offense is increased by 50%. Any partial months resulting from this calculation should be rounded down to the nearest half month.

****

For persons sentenced under Minn. Stat. § 609.229, subd. 3(a) where there is a sentence for an offense committed for the benefit of a gang, the presumptive disposition is always commitment to the Commissioner of Corrections due to the mandatory minimum under Minn. Stat. § 609.229, subd. 4. The presumptive duration is determined by the duration contained in the Sentencing Guidelines Grid cell defined by the offender's criminal history score and the severity level of the underlying crime with the highest severity level, or the mandatory minimum, whichever is greater, plus an additional 12 months. If the underlying crime is an attempt, the presumptive duration includes an additional 6 months rather than 12.

Any changes to presumptive sentences under this section are also applied to the upper and lower numbers of the sentencing range provided on the Sentencing Guidelines Grid.

G. The Commission adopted the following modifications to Section II.E. of the *Minnesota Sentencing Guidelines and Commentary* to address the increased conditional release terms for sex offenders and the expanded application of conditional release to Failure of Predatory Offenders to Register (risk level III sex offenders) and to Fourth Degree Assault against secure treatment facility personnel.

E. Mandatory Sentences: ****

When an offender is sentenced for first degree (felony) driving while impaired, the court must impose a sentence of at least 36 months. The presumptive disposition is determined by the dispositional line on the Sentencing Guidelines Grid. For cases contained in cells above and to the right of the line, the sentence should be executed. For cases contained in cells below and to the left of the line, the sentence should be stayed unless the offender has a prior conviction for a felony DWI, in which case the presumptive disposition is Commitment to the Commissioner of Corrections. ~~In addition, when the court commits a person convicted of first degree (felony) driving while impaired to the custody of the commissioner of corrections, it shall provide that after the person has been released from prison the commissioner shall place the person on conditional release for five years.~~

Several Minnesota statutes provide for mandatory conditional release terms that must be served by certain offenders once they are released from prison. When a court commits a person subject to one of these statutes to the custody of the commissioner of corrections, it shall provide that after the person has been released from prison, the commissioner shall place the person on conditional release for the designated term. A person committed to prison for a sex offense is subject to a ten-year conditional release term. If the person was convicted of a sex offense before conviction for the current sex offense and either the present or prior sex offense was for a violation of M.S. §§ 609.342 (first degree criminal sexual conduct), 609.343 (second degree criminal sexual conduct), 609.344 (third degree criminal sexual conduct), or 609.3453 (criminal sexual predatory conduct), the person shall be placed on conditional release for the remainder of the person's life; a person subject to a life with the possibility of release sentence, if they are released, is also subject to conditional release for the remainder of their life. If a person is sentenced for failure to register as a predatory offender and the person was assigned a risk level III under M.S. § 244.052, the person shall be placed on conditional release for ten years. A person convicted of fourth degree assault against secure treatment facility personnel under M.S. § 609.2231, subdivision 3a is subject to a five-year conditional release term. Finally, a person sentenced to imprisonment for first degree (felony) driving while impaired is subject to five years of conditional release.

Comment

****

~~***II.E.05.*** *M.S. § 609.109 requires that when a court sentences a person to prison for a violation of section 609.342, 609.343, 609.344, or 609.345, the court shall provide that after the person has completed the sentence imposed, the commissioner of corrections shall place the person on conditional release for five years, minus the time the person served on supervised release. If the person was convicted for a violation of one of those sections a second or subsequent time, or sentenced to a mandatory departure pursuant to section 609.109, subd. 6, the person shall be placed on conditional release for ten years, minus the time served on supervised release. M.S. § 169A.276, subd. 1(d) requires that when the court commits a person to the custody of the commissioner of corrections for first degree (felony) driving while impaired, it shall provide that after the person has been released from prison the commissioner shall place the person on conditional release for five years.~~

H. The Commission adopted the following modifications to Section II.B. of the *Minnesota Sentencing Guidelines and Commentary* to address the new provision allowing multiple sentences arising out of the same course of conduct involving the new methamphetamine-related crimes involving children and vulnerable adults offense:

II.B. Criminal History.

****

1. Subject to the conditions listed below, the offender is assigned a particular weight for every extended jurisdiction juvenile conviction and for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing. Multiple offenses are sentenced in the order in which they occurred. For purposes of this section, prior extended jurisdiction juvenile convictions are treated the same as prior felony sentences.

****

b. When multiple sentences for a single course of conduct were imposed pursuant to Minn. Stats. §§ 152.137, 609.585 or 609.251, only the offense at the highest severity level is considered; when multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day pursuant to Minn. Stat. § 152.137, the conviction and sentence for the "earlier" offense should not increase the criminal history score for the "later" offense.

****

Comment

****

II.B.102. *In addition, the Commission established policies to deal with several specific situations which arise under Minnesota law. The first deals with conviction under Minn. Stat. § 152.137, under which persons convicted of methamphetamine-related crimes involving children and vulnerable adults are subject to conviction and sentence for other crimes resulting from the same criminal behavior, Minn. Stat. § 609.585, under which persons committing theft or another felony offense during the course of a burglary could be convicted of and sentenced for both the burglary and the other felony, or a conviction under Minn. Stat. § 609.251, under which persons who commit another felony during the course of a kidnapping can be convicted of and sentenced for both offenses. For purposes of computing criminal history, the Commission decided that consideration should only be given to the most severe offense when there are prior multiple sentences under provisions of Minn. Stats. §§ 152.137, 609.585 or 609.251. This was done to prevent inequities due to past variability in prosecutorial and sentencing practices with respect to ~~that statute~~ these statutes, to prevent systematic manipulation of ~~Minn. Stats. § 609.585 or 609.251~~ these statutes in the future, and to provide a uniform and equitable method of computing criminal history scores for all cases of multiple convictions arising from a single course of conduct, when single victims are involved.*

When multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day pursuant to Minn. Stats. §§ 152.137, 609.585 or 609.251, the conviction and sentence for the "earlier" offense should not increase the criminal history score for the "later" offense.

****

I. The Commission adopted the following modifications to Section II.G. of the *Minnesota Sentencing Guidelines and Commentary* to address the increased statutory maximum sentence for a crime committed for the benefit of a gang when the victim of the crime is a minor:

II.G. Attempts, Conspiracies, and Other Sentence Modifiers.

****

For persons sentenced under Minn. Stat. § 609.229, subd. 3(a) where there is a sentence for an offense committed for the benefit of a gang, the presumptive disposition is always commitment to the Commissioner of Corrections due to the mandatory minimum under Minn. Stat. § 609.229, subd. 4. The presumptive duration is determined by the duration contained in the Sentencing Guidelines Grid cell defined by the offender's criminal history score and the severity level of the underlying crime with the highest severity level, or the mandatory minimum, whichever is greater, plus an additional 12 months or an additional 24 months if the victim of the crime was under the age of eighteen years. If the underlying crime is an attempt, the presumptive duration includes an additional 6 months ~~rather than 12~~ or an additional 12 months if the victim of the crime was under the age of eighteen years.

III. Other Proposed Modifications Related to Legislation Passed During the 2005 Legislative Session

A. The Commission adopted the following modifications to Section II.G. and to the Sentencing Guidelines Grid to address the legislative mandate to provide sentence ranges of 15% downward and 20% upward:

II.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers:

****

Further, the presumptive disposition for Conspiracy to Commit or Attempted First Degree Murder, Minn. Stat. § 609.185, or Conspiracy to Commit or Attempted First Degree Murder of an Unborn Child, Minn. Stat. § 609.2661, with 609.17 or 609.175 cited, shall be imprisonment for all cases. The presumptive durations shall be as follows:

SEVERITY LEVELS OF CONVICTION OFFENSE	CRIMINAL HISTORY SCORE						
	0	**1**	**2**	**3**	**4**	**5**	**6 or More**
Conspiracy/ Attempted Murder, 1st Degree	180 ~~176-184~~ 153-216	190 ~~186-194~~ 161.5-228	200 ~~196-204~~ 170-240	210 ~~206-214~~ 178.5-240[1]	220 ~~216-224~~ 187-240[1]	230 ~~226-234~~ 195.5-240[1]	240 ~~236-240~~ 204-240[1]

[1] M.S. § 244.09 requires the Sentencing Guidelines to provide a range of 15% downward and 20% upward from the presumptive sentence. However, because the statutory maximum sentence for these offenses is no more than 20 years, the range is capped at that number.

****

IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Offenders with non-imprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Murder, 2nd Degree (intentional murder; drive-by-shootings)	XI	306 ~~*299-313*~~ *261-367*	326 ~~*319-333*~~ *278-391*	346 ~~*339-353*~~ *295-415*	366 ~~*359-373*~~ *312-439*	386 ~~*379-393*~~ *329-463*	406 ~~*399-413*~~ *346-480*[3]	426 ~~*419-433*~~ *363-480*[3]
Murder, 3rd Degree *Murder, 2nd Degree (unintentional murder)*	X	150 ~~*144-156*~~ *128-180*	165 ~~*159-171*~~ *141-198*	180 ~~*174-186*~~ *153-216*	195 ~~*189-201*~~ *166-234*	210 ~~*204-216*~~ *179-252*	225 ~~*219-231*~~ *192-270*	240 ~~*234-246*~~ *204-288*
Criminal Sexual Conduct, 1st Degree [2] *Assault, 1st Degree*	IX	86 ~~*81-91*~~ *74-103*	98 ~~*93-103*~~ *84-117*	110 ~~*105-115*~~ *94-132*	122 ~~*117-127*~~ *104-146*	134 ~~*129-139*~~ *114-160*	146 ~~*141-151*~~ *125-175*	158 ~~*153-163*~~ *135-189*
Aggravated Robbery 1st Degree *Criminal Sexual Conduct, 2nd Degree (c),(d),(e),(f),(h)* [2]	VIII	48 ~~*44-52*~~ *41-57*	58 ~~*54-62*~~ *50-69*	68 ~~*64-72*~~ *58-81*	78 ~~*74-82*~~ *67-93*	88 ~~*84-92*~~ *75-105*	98 ~~*94-102*~~ *84-117*	108 ~~*104-112*~~ *92-129*
Felony DWI	VII	36	42	48	54 ~~*51-57*~~ *46-64*	60 ~~*57-63*~~ *51-72*	66 ~~*63-69*~~ *57-79*	72 ~~*69-75*~~ *62-86*
Criminal Sexual Conduct, 2nd Degree (a) & (b)	VI	21	27	33	39 ~~*37-41*~~ *34-46*	45 ~~*43-47*~~ *39-54*	51 ~~*49-53*~~ *44-61*	57 ~~*55-59*~~ *49-68*
Residential Burglary *Simple Robbery*	V	18	23	28	33 ~~*31-35*~~ *29-39*	38 ~~*36-40*~~ *33-45*	43 ~~*41-45*~~ *37-51*	48 ~~*46-50*~~ *41-57*
Nonresidential Burglary	IV	12[1]	15	18	21	24 ~~*23-25*~~ *21-28*	27 ~~*26-28*~~ *23-32*	30 ~~*29-31*~~ *26-36*
Theft Crimes (Over $2,500)	III	12[1]	13	15	17	19 ~~*18-20*~~ *17-22*	21 ~~*20-22*~~ *18-25*	23 ~~*22-24*~~ *20-27*
Theft Crimes ($2,500 or less) *Check Forgery ($200-$2,500)*	II	12[1]	12[1]	13	15	17	19	21 ~~*20-22*~~ *18-25*
Sale of Simulated Controlled Substance	I	12[1]	12[1]	12[1]	13	15	17	19 ~~*18-20*~~ *17-22*

Presumptive commitment to state imprisonment. First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence. See section II.E. Mandatory Sentences for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. ~~These offenses include Third Degree Controlled Substance Crimes when the offender has a prior felony drug conviction, Burglary of an Occupied Dwelling when the offender has a prior felony burglary conviction, second and subsequent Criminal Sexual Conduct offenses and offenses carrying a mandatory minimum prison term due to the use of a dangerous weapon (e.g., Second Degree Assault).~~ See sections II.C. Presumptive Sentence and II.E. Mandatory Sentences.

[1] One year and one day

[2] Pursuant to M.S. § 609.342, subd. 2 and 609.343, subd. 2, the presumptive sentence for Criminal Sexual Conduct in the First Degree is a minimum of 144 months and the presumptive sentence for Criminal Sexual Conduct in the Second Degree – clauses c, d, e, f, and h is a minimum of 90 months (see II.C. Presumptive Sentence and II.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers). Pursuant to M.S. § 609.3455, certain sex offenders are subject to life sentences. Some of these life sentences are life without release, while others are indeterminate life sentences with the minimum term of imprisonment specified by the court and based upon the sentencing guidelines and any applicable mandatory minimums. See II.C. Presumptive Sentence.

[3] M.S. § 244.09 requires the Sentencing Guidelines to provide a range of 15% downward and 20% upward from the presumptive sentence. However, because the statutory maximum sentence for these offenses is no more than 40 years, the range is capped at that number.

~~Effective August 1, 2004~~
Effective August 1, 2005

Felony DWI Cases By County

Incarceration Rates by County

County	# of Cases Sentenced	Number and Percentage of Offenders		
		State Prison	Local Jail	Other Sanctions
Aitkin	4	1 (25%)	3 (75%)	0
Anoka	38	2 (5%)	33 (87%)	3 (8%)
Becker	15	4 (27%)	11 (73%)	0
Beltrami	19	2 (11%)	17 (89%)	0
Benton	10	3 (30%)	7 (70%)	0
Blue Earth	11	3 (27%)	8 (73%)	0
Brown	4	0	4 (100%)	0
Carlton	7	1 (14%)	6 (86%)	0
Carver	1	0	1 (100%)	0
Cass	12	1 (8%)	11 (92%)	0
Chippewa	4	1 (25%)	3 (75%)	0
Chisago	16	0	16 (100%)	0
Clay	28	6 (21%)	22 (79%)	0
Clearwater	5	0	5 (100%)	0
Cottonwood	1	0	1 (100%)	0
Crow Wing	13	3 (23%)	10 (77%)	0
Dakota	49	3 (6%)	46 (94%)	0
Dodge	5	0	5 (100%)	0
Douglas	3	0	3 (100%)	0
Fillmore	4	0	4 (100%)	0
Freeborn	11	1 (9%)	9 (82%)	1 (9%)
Goodhue	5	1 (20%)	4 (80%)	0
Hennepin	157	26 (17%)	119 (76%)	12 (8%)
Houston	3	0	3 (100%)	0
Hubbard	1	0	1 (100%)	0
Isanti	6	0	6 (100%)	.0

County	# of Cases Sentenced	Number and Percentage of Offenders		
		State Prison	Local Jail	Other Sanctions
Itasca	10	3 (30%)	7 (70%)	0
Jackson	1	1 (100%)	0	0
Kanabec	3	0	3 (100%)	0
Kandiyohi	4	0	4 (100%)	0
Koochiching	2	0	2 (100%)	0
Lake of the Woods	3	0	3 (100%)	0
Le Sueur	2	1 (50%)	1 (50%)	0
Lyon	4	0	4 (100%)	0
McLeod	8	3 (38%)	5 (62%)	0
Mahnomen	12	5 (42%)	7 (58%)	0
Martin	4	0	4 (100%)	0
Meeker	4	2 (50%)	2 (50%)	0
Mille Lacs	10	0	10 (100%)	0
Morrison	6	0	6 (100%)	0
Mower	8	2 (25%)	6 (75%)	0
Nicollet	8	1 (13%)	7 (87%)	0
Nobles	5	0	5 (100%)	0
Olmsted	26	8 (31%)	18 (69%)	0
Otter Tail	14	1 (7%)	12 (86%)	1 (7%)
Pennington	5	0	5 (100%)	0
Pine	12	2 (17%)	10 (83%)	0
Pipestone	1	0	1 (100%)	0
Polk	15	6 (40%)	8 (53%)	1 (7%)
Pope	1	0	1 (100%)	0
Ramsey	68	8 (12%)	60 (88%)	0
Redwood	3	1 (33%)	2 (67%)	0
Renville	2	0	2 (100%)	0
Rice	7	2 (29%)	5 (71%)	0
Rock	2	0	2 (100%)	0
Roseau	3	0	3 (100%)	0
St Louis	46	7 (15%)	38 (83%)	1 (6%)

County	# of Cases Sentenced	Number and Percentage of Offenders		
		State Prison	Local Jail	Other Sanctions
Scott	17	0	16 (94%)	1 (6%)
Sherburne	7	0	7 (100%)	1 (8%)
Sibley	7	1 (14%)	6 (86%)	0
Stearns	25	6 (24%)	18 (72%)	1 (4%)
Steele	8	2 (25%)	6 (75%)	0
Todd	4	2 (50%)	2 (50%)	0
Traverse	4	1 (25%)	3 (75%)	0
Wabasha	2	0	2 (100%)	0
Wadena	2	1 (50%)	1 (50%)	0
Waseca	2	0	2 (100%)	0
Washington	25	1 (4%)	24 (96%)	0
Winona	11	2 (18%)	9 (82%)	0
Wright	13	2 (15%)	10(77%)	1 (8%)
Yellow Medicine	2	2 (100%)	0	0
Total	860	131 (15%)	707 (82%)	22 (3%)

County Attorney Reports on Criminal Cases Involving Firearms
By County

Cases Allegedly Involving Firearms - Offenses Listed in M.S. § 609.11, subd. 9

Cases Disposed from July 1, 2003 to July 1, 2004

County	Cases Allegedly Involving Firearms - Offenses Listed in M.S § 609.11	Cases Not Charged	Cases Charged
Aitkin	4	0	4
Anoka	48	4	44
Becker	6	0	6
Beltrami	4	0	4
Brown	1	0	1
Carver	1	0	1
Cass	20	0	20
Chisago	3	2	1
Clay	6	0	6
Crow Wing	21	0	21
Dakota	28	0	28
Dodge	4	0	4
Freeborn	1	0	1
Goodhue	4	0	4
Grant	1	0	1
Hennepin	150	0	150
Hubbard	10	1	9
Isanti	2	0	2
Itasca	26	0	26
Jackson	2	1	1
Kanabec	7	5	2
Kandiyohi	5	1	4
Lake	5	0	5
LeSueur	2	0	2
Lyon	4	0	4
McLeod	5	0	5
Mahnomen	39	0	39
Mille Lacs	7	0	7

County	Cases Allegedly Involving Firearms - Offenses Listed in M.S § 609.11	Cases Not Charged	Cases Charged
Morrison	5	0	5
Mower	12	5	7
Murray	1	0	1
Nicollet	4	1	3
Nobles	5	0	5
Norman	3	0	3
Olmsted	11	0	11
Pine	10	0	10
Pipestone	7	1	6
Polk	13	0	13
Ramsey	97	0	97
Redwood	4	0	4
Renville	5	0	5
Rice	5	0	5
St. Louis	46	3	43
Scott	7	0	7
Sherburne	12	0	12
Stearns	27	3	24
Steele	5	0	5
Stevens	2	0	2
Todd	5	0	5
Washington	10	0	10
Watonwan	2	0	2
Winona	8	1	7
Wright	8	0	8
Yellow Medicine	1	0	1
Total	**731**	**28**	**703**

County Attorney Report on Criminal Cases Involving Firearms
By County

Offenses Charged - Case Outcome
Cases Disposed from July 1, 2003 to July 1, 2004

County	Total Number of Cases Charged	Convicted of Offense Listed in M.S. § 609.11, subd. 9 Firearm Established	Convicted of Offense Listed in M.S § 609.11, subd. 9 Firearm Not Established	Conviction Offense Not Listed in M.S. §609.11	Acquitted on all Charges	Dismissed on all Charges	Other
Aitkin	4	1	0	0	0	2	1
Anoka	44	27	1	9	0	7	0
Becker	6	5	0	0	0	1	0
Beltrami	4	3	0	0	0	1	0
Brown	1	1	0	0	0	0	0
Carver	1	1	0	0	0	0	0
Cass	20	1	3	9	0	7	0
Chisago	1	1	0	0	0	0	0
Clay	6	6	0	0	0	0	0
Crow Wing	21	9	0	9	1	1	1
Dakota	28	19	0	2	4	3	0
Dodge	4	3	0	0	0	0	1
Freeborn	1	1	0	0	0	0	0
Goodhue	4	1	0	1	0	1	1
Grant	1	1	0	0	0	0	0
Hennepin	150	127	0	12	5	6	0
Hubbard	9	4	4	0	0	1	0
Isanti	2	1	0	1	0	0	0
Itasca	26	22	1	3	0	0	0
Jackson	1	1	0	0	0	0	0
Kanabec	2	1	0	0	0	1	0
Kandiyohi	4	2	0	1	0	0	1
Lake	5	4	0	0	0	1	0
LeSueur	2	1	0	1	0	0	0
Lyon	4	3	1	0	0	0	0
McLeod	5	3	0	2	0	0	0
Mahnomen	39	17	0	22	0	0	0
Mille Lacs	7	2	5	0	0	0	0

County	Total Number of Cases Charged	Convicted of Offense Listed in M.S. § 609.11, subd. 9 Firearm Established	Convicted of Offense Listed in M.S § 609.11, subd. 9 Firearm Not Established	Conviction Offense Not Listed in M.S. §609.11	Acquitted on all Charges	Dismissed on all Charges	Other
Morrison	5	2	0	1	0	1	1
Mower	7	2	0	3	0	1	1
Murray	1	1	0	0	0	0	0
Nicollet	3	1	0	2	0	0	0
Nobles	5	4	1	0	0	0	0
Norman	3	2	0	1	0	0	0
Olmsted	11	8	0	3	0	0	0
Pine	10	4	2	2	0	1	1
Pipestone	6	3	2	0	0	1	0
Polk	13	7	3	2	1	0	0
Ramsey	97	67	0	1	9	20	0
Redwood	4	1	2	1	0	0	0
Renville	5	2	1	1	0	0	1
Rice	5	3	0	2	0	0	0
St. Louis	43	30	2	9	0	2	0
Scott	7	4	1	2	0	0	0
Sherburne	12	6	0	5	0	1	0
Stearns	24	20	0	2	1	1	0
Steele	5	3	1	0	0	1	0
Stevens	2	1	0	0	1	0	0
Todd	5	5	0	0	0	0	0
Washington	10	3	4	0	1	2	0
Watonwan	2	1	0	1	0	0	0
Winona	7	4	0	3	0	0	0
Wright	8	2	0	3	0	0	3
Yellow Medicine	1	1	0	0	0	0	0
Total	**703**	**455**	**34**	**116**	**23**	**63**	**12**

County Attorney Report on Criminal Cases Involving Firearms By County

Mandatory Minimum Sentences Imposed and Executed

Cases Disposed from July 1, 2003 to July 1, 2004

County	Convicted of Offense Listed in M.S. § 609.11, subd. 9 Firearm Established on Record	Mandatory Minimum Sentence Imposed	Mandatory Minimum Sentence Waived
Aitkin	1	1	0
Anoka	27	10	17
Becker	5	4	1
Beltrami	3	2	1
Brown	1	1	0
Carver	1	0	1
Cass	1	1	0
Chisago	1	0	1
Clay	6	4	2
Crow Wing	9	5	4
Dakota	19	7	12
Dodge	3	0	3
Freeborn	1	0	1
Goodhue	1	1	0
Grant	1	1	0
Hennepin	127	96	31
Hubbard	4	2	2
Isanti	1	1	0
Itasca	22	7	15
Jackson	1	1	0
Kanabec	1	1	0
Kandiyohi	2	0	2
Lake	4	2	2
LeSueur	1	1	0
Lyon	3	1	2
McLeod	3	3	0
Mahnomen	17	17	0

County	Convicted of Offense Listed in M.S. § 609.11, subd. 9 Firearm Established on Record	Mandatory Minimum Sentence Imposed	Mandatory Minimum Sentence Waived
Mille Lacs	2	1	1
Morrison	2	0	2
Mower	2	2	0
Murray	1	1	0
Nicollet	1	0	1
Nobles	4	4	0
Norman	2	1	1
Olmsted	8	4	4
Pine	4	3	1
Pipestone	3	0	3
Polk	7	3	4
Ramsey	67	48	19
Redwood	1	0	1
Renville	2	1	1
Rice	3	3	0
St. Louis	30	15	15
Scott	4	0	4
Sherburne	6	3	3
Stearns	20	13	7
Steele	3	3	0
Stevens	1	1	0
Todd	5	5	0
Washington	3	2	1
Watonwan	1	0	1
Winona	4	3	1
Wright	2	2	0
Yellow Medicine	1	0	1
Total	455	287	168

609.11 MINIMUM SENTENCES OF IMPRISONMENT

Subdivision 1. Commitments without minimums. All commitments to the commissioner of corrections for imprisonment of the defendant are without minimum terms except when the sentence is to life imprisonment as required by law and except as otherwise provided in this chapter.

Subd. 2. Repealed, 1978 c 723 art 2 s 5

Subd. 3. Repealed, 1981 c 227 s 13

Subd. 4. Dangerous weapon. Any defendant convicted of an offense listed in subdivision 9 in which the defendant or an accomplice, at the time of the offense, used, whether by brandishing, displaying, threatening with, or otherwise employing, a dangerous weapon other than a firearm, shall be committed to the commissioner of corrections for not less than one year plus one day, nor more than the maximum sentence provided by law. Any defendant convicted of a second or subsequent offense in which the defendant or an accomplice, at the time of the offense, used a dangerous weapon other than a firearm, shall be committed to the commissioner of corrections for not less than three years nor more than the maximum sentence provided by law.

Subd. 5. Firearm. (a) Except as otherwise provided in paragraph (b), any defendant convicted of an offense listed in subdivision 9 in which the defendant or an accomplice, at the time of the offense, had in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm, shall be committed to the commissioner of corrections for not less than three years, nor more than the maximum sentence provided by law. Any defendant convicted of a second or subsequent offense in which the defendant or an accomplice, at the time of the offense, had in possession or used a firearm shall be committed to the commissioner of corrections for not less than five years, nor more than the maximum sentence provided by law.

(b) Any defendant convicted of violating section 609.165 or 624.713, subdivision 1, clause (b), shall be committed to the commissioner of corrections for not less than five years, nor more than the maximum sentence provided by law.

Subd. 5a. Drug offenses. Notwithstanding section 609.035, whenever a defendant is subject to a mandatory minimum sentence for a felony violation of chapter 152 and is also subject to this section, the minimum sentence imposed under this section shall be consecutive to that imposed under chapter 152.

Subd. 6. No early release. Any defendant convicted and sentenced as required by this section is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law, notwithstanding the provisions of sections 242.19, 243.05, 244.04, 609.12 and 609.135.

Subd. 7. Prosecutor shall establish. Whenever reasonable grounds exist to believe that the defendant or an accomplice used a firearm or other dangerous weapon or had in possession a firearm, at the time of commission of an offense listed in subdivision 9, the prosecutor shall, at the time of trial or at the plea of guilty, present on the record all evidence tending to establish that fact unless it is otherwise admitted on the record. The question of whether the defendant or an accomplice, at the time of commission of an offense listed in subdivision 9, used a firearm or other dangerous weapon or had in possession a firearm shall be determined by the court on the record at the time of a verdict or finding of guilt at trial or the entry of a plea of guilty based upon the record of the trial or the plea of guilty. The court shall determine on the record at the time of sentencing whether the defendant has been convicted of a second or subsequent offense in which the defendant or an accomplice, at the time

of commission of an offense listed in subdivision 9, used a firearm or other dangerous weapon or had in possession a firearm.

Subd. 8. Motion by prosecutor. (a) Except as otherwise provided in paragraph (b), prior to the time of sentencing, the prosecutor may file a motion to have the defendant sentenced without regard to the mandatory minimum sentences established by this section. The motion shall be accompanied by a statement on the record of the reasons for it. When presented with the motion, or on its own motion, the court may sentence the defendant without regard to the mandatory minimum sentences established by this section if the court finds substantial and compelling reasons to do so. A sentence imposed under this subdivision is a departure from the sentencing guidelines.

(b) The court may not, on its own motion or the prosecutor's motion, sentence a defendant without regard to the mandatory minimum sentences established by this section if the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon.

Subd. 9. Applicable offenses. The crimes for which mandatory minimum sentences shall be served as provided in this section are: murder in the first, second, or third degree; assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; first-degree or aggravated first-degree witness tampering; criminal sexual conduct under the circumstances described in sections 609.342, subdivision 1, clauses (a) to (f); 609.343, subdivision 1, clauses (a) to (f); and 609.344, subdivision 1, clauses (a) to (e) and (h) to (j); escape from custody; arson in the first, second, or third degree; drive-by shooting under section 609.66, subdivision 1e; harassment and stalking under section 609.749, subdivision 3, clause (3); possession or other unlawful use of a firearm in violation of section 609.165, subdivision 1b, or 624.713, subdivision 1, clause (b), a felony violation of chapter 152; or any attempt to commit any of these offenses.

Subd. 10. Report on criminal cases involving a firearm. Beginning on July 1, 1994, every county attorney shall collect and maintain the following information on criminal complaints and prosecutions within the county attorney's office in which the defendant is alleged to have committed an offense listed in subdivision 9 while possessing or using a firearm:

(1) whether the case was charged or dismissed;

(2) whether the defendant was convicted of the offense or a lesser offense; and

(3) whether the mandatory minimum sentence required under this section was imposed and executed or was waived by the prosecutor or court.

No later than July 1 of each year, beginning on July 1, 1995, the county attorney shall forward this information to the sentencing guidelines commission upon forms prescribed by the commission.

2004-05 Firearms Report Form:
County Attorney Report on Criminal Cases Involving Firearms

M.S. § 609.11, subdivision 10 requires that no later than July 1 of each year, every county attorney shall forward to the sentencing guidelines commission information on cases in which the defendant is alleged to have committed an offense listed in M.S. § 609.11, subdivision 9. Please report on adult cases disposed of between July 1, 2004 and July 1, 2005. Please do not include cases that were pending during this time period. Consult page 2 for an illustration.

Criminal Complaints Disposed of from July 1, 2004 to July 1, 2005.

County:

Completed by: **Telephone:**

I. CHARGING

Cases Charged Where Reporting is Required	Cases **NOT** Charged Where Reporting is Required
# of cases =	# of cases =

Only cases in this box should be carried down to Table II.

II. CASE OUTCOME: *Sum of Table II = total of "Cases Charged Where Reporting is Required" box above*

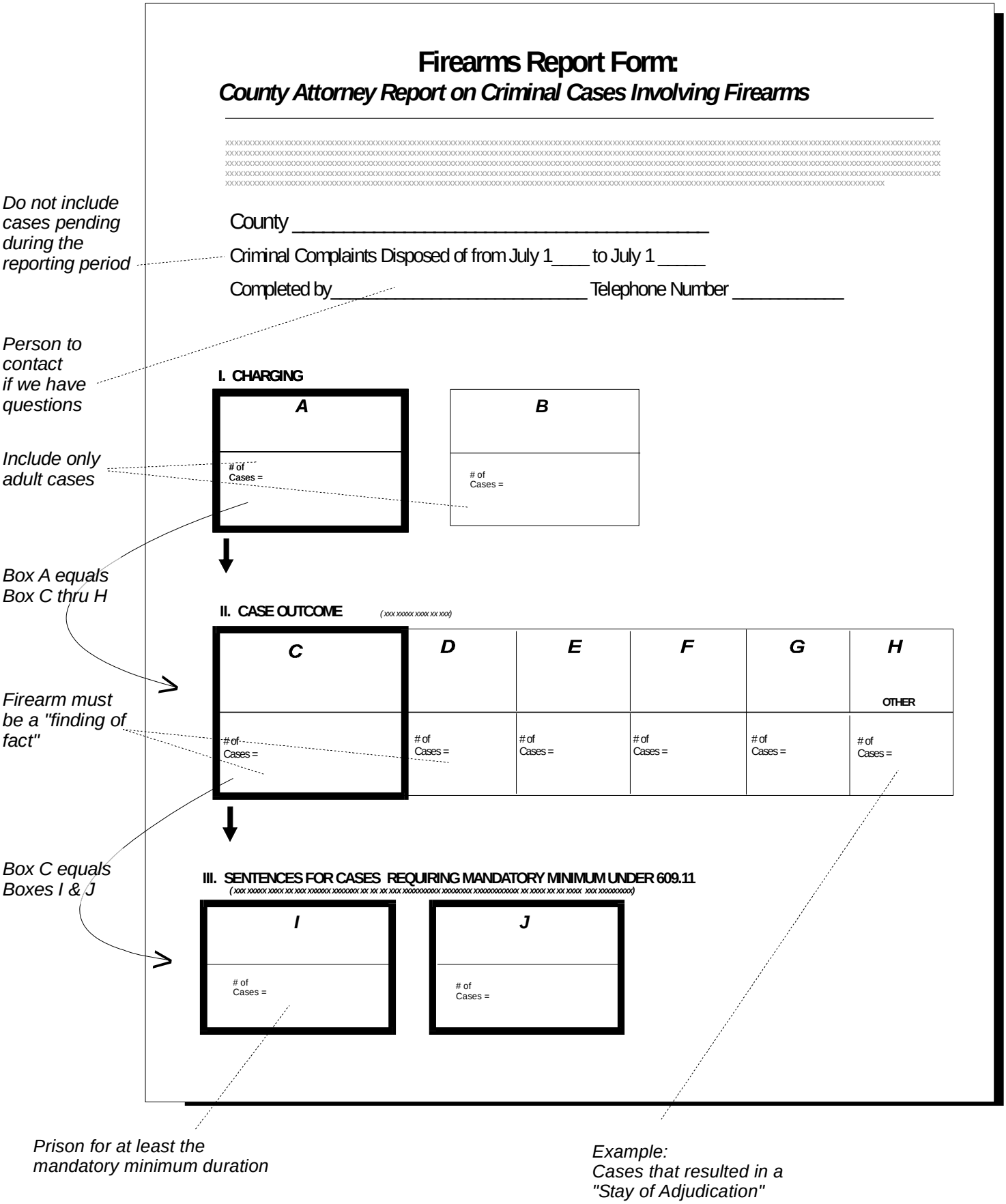
Convicted of Offense Listed in Subd. 9; Firearm Established on the Record	Convicted of Offense Listed in Subd. 9; Firearm **Not** Established on the Record	Convicted of Offense Not Listed in Subd. 9	Acquitted on all Charges	All Charges Dismissed	Other
# of cases =	# of cases =	# of cases =	# of cases =	# of cases =	# of cases=

Only cases in this box should be carried down to Table III.

III. SENTENCES FOR CASES REQUIRING MANDATORY MINIMUM UNDER M.S. § 609.11:
Sum of Table III = Total in "Firearm Established on Record" box above

Mandatory Minimum Sentence (or greater) Imposed and Executed		Mandatory Minimum Sentence Waived
# of cases =	# of cases =	

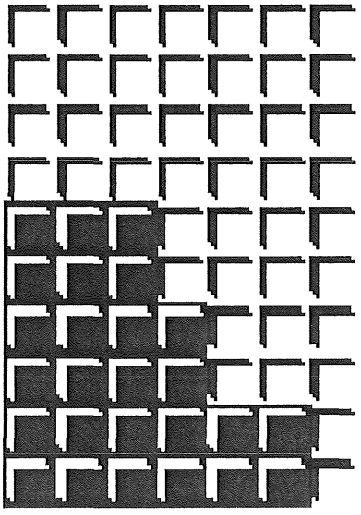
Please send form to ***Minnesota Sentencing Guidelines Commission***, *525 Park Street, Suite 220, Saint Paul, MN 55103*
Email: Sentencing.guidelines@state.mn.us (651) 296-0144 Fax: (651) 297-5757 TTY: 1-800-627-3529 (ask for (651) 296-0144)



FIREARMS REPORT FORM ILLUSTRATION

Minnesota Sentencing Guidelines Commission

Proposed Sex Offender Sentencing Guidelines Grid



Presented To:

Minnesota State Senate
Crime Prevention and Public Safety Committee
Thursday, March 9th, 2006

Executive Summary

Why create a separate sex offender grid?

It is the responsibility of the Minnesota Sentencing Guidelines Commission to make certain that the guidelines fully encompass sentencing statutes and that, to the extent possible while maintaining guidelines goals, they harmonize with actual sentencing practice. The new grid does a better job of both, concerning sex offenses.

The existing grid did not adequately address the clear need for greater incapacitation of the most destructive sex offenders. The Legislature dealt with the "worst of the worst" in its off-the-grid life sentences. In order to meet the primary guidelines goals of protecting public safety while maintaining proportionate sentencing, transparency in sentencing, and a rational use of existing resources, it is necessary to put the remaining sex offenses on a separate grid.

Structure of the new grid

The new grid is specifically designed to deal with the fact that recidivism in sex offenders has a significance that it does not usually have with other types of criminals. In general, sex offenders are less likely to re-offend than other offenders; the large majority of them are never charged more than once. At any point in the continuum of harm, repeat offenders should be recognized as posing a greater-than-typical risk of harming others and should receive swift, clear, and significant sanctions.

- When the new grid is used, the criminal history weight of prior sex offenses is increased if an individual is subsequently convicted of a sex offense. See page 10.

- The longer presumptive sentences on the new grid more quickly move repeat offenders toward the statutory maximum, especially when they are under supervision (probation, conditional release, or supervised released) when they are charged again.

- There are fewer non-prison boxes on the grid. At a criminal history score of three, all but level G offenses are presumptive commits, even without any revocation of probation.

Impact of the new grid

- Based on 2004 data, 21 percent of sex offenders will receive longer sentences under the new grid. See page 16.

- While projected bed impact is substantial – 93 prison beds – it is much less than the impact of the off-the-grid life sentences, both in the total bed impact and in terms of the relationship between the total bed impact and the number of individuals affected. That is, there is a 93-bed impact because of the grid's effect on 179 offenders (21% of all sex offenders) and a 138-663 bed impact because of the new life sentences' effect on 23 offenders (2.5% of all sex offenders). See pages 15 and 16.

The Commission believes that the bed impact is acceptable under the guidelines goals. The new grid directs additional prison resources to particularly problematic offenders, while not disproportionately impacting all sex offenders.

Blakely impact

The Commission estimates that the new grid will reduce the need for upward durational departures by 60 percent, and the need for upward dispositional departures by 41 percent. See page 19.

Proposed Sex Offender Grid

Severity Level of Conviction Offense		Criminal History Score						
		0	1	2	3	4	5	6 or more
CSC 1st Degree	A	144 144-173	156 133-187	168 143-202	180 153-216	234 199-281	306 260-360	360 326-360
CSC 2nd Degree: Contact with force	B	90 90-108	110 94-132	130 111-156	150 128-180	195 166-234	255 217-300	300 255-300
CSC 3rd Degree: Penetration with force or by prohibited occupations	C	48 41-58	62 54-76	76 65-91	90 77-108	117 99-140	153 130-180	180 153-180
CSC 2nd Degree: Contact with minors *CSC 3rd Degree: Penetration of minor* *Dissemination of Child Pornography: Subsequent or by Predatory Offender*	D	36	48	60 51-72	70 60-84	91 77-109	119 101-143	140 119-168
CSC 4th Degree: Contact with force or by prohibited occupations *Use Minors in Sexual Performance* *Dissemination of Child Pornography*	E	24	36	48	60 51-72	78 66-94	102 87-120	120 102-120
CSC 4th Degree: Contact with minors *Possession of Child Pornography: Subsequent or by Predatory Offender*	F	18	27	36	45 51-69	59 60-80	77 68-92	84 72-101
CSC 5th Degree *Indecent Exposure* *Possession of Child Pornography* *Solicit Children for Sexual Conduct*	G	15	20	25	30	39 33-47	51 43-60	60 51-60
Registration Of Predatory Offenders	H	12[1] 12[1]-14	14 12[1]-17	16 14-19	18 15-22	24 20-28	30 26-37	36 31-43

Presumptive commitment to state imprisonment. See section II.E. Mandatory Sentences for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. These offenses include second and subsequent Criminal Sexual Conduct offenses. See sections II.C. Presumptive Sentence and II.E. Mandatory Sentences.

[1] One year and one day

Effective August 1, 2006

Examples of Executed Sentences (Length in Months) Broken Down by: Specified Minimum Term of Imprisonment and Specified Maximum Supervised Release Term

Offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 will no longer earn good time. In accordance with Minn. Stat. § 244.101, offenders will receive an executed sentence pronounced by the court consisting of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence and a supervised release term equal to the remaining one-third. This provision requires that the court pronounce the total executed sentence and explain the amount of time the offender will serve in prison and the amount of time the offender will serve on supervised release, assuming the offender commits no disciplinary offense in prison that results in the imposition of a disciplinary confinement period. The court shall also explain that the amount of time the offender actually serves in prison may be extended by the Commissioner if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison. The court's explanation is to be included in a written summary of the sentence.

Executed Sentence	Term of Imprisonment	Supervised Release Term	Executed Sentence	Term of Imprisonment	Supervised Release Term
12 and 1 day	8 and 1 day	4	78	52	26
14	9 1/3	4 2/3	84	56	28
15	10	5	90	60	30
16	10 2/3	5 1/3	91	60 2/3	30 1/3
18	12	6	102	68	34
20	13 1/3	6 2/3	110	73 1/3	36 2/3
24	16	8	117	78	39
25	16 2/3	8 1/3	119	79 1/3	39 2/3
27	18	9	120	80	40
30	20	10	130	86 2/3	43 1/3
36	24	12	140	93 1/3	46 2/3
39	26	13	144	96	48
40	26 2/3	13 1/3	150	100	50
45	30	15	153	102	51
48	32	16	156	104	52
51	34	17	168	112	56
59	39 1/3	19 2/3	180	120	60
60	40	20	195	130	65
62	41 1/3	20 2/3	234	156	78
70	46 2/3	23 1/3	255	170	85
76	50 2/3	25 1/3	300	200	100
77	50 2/3	25 2/3	306	204	102
			360	240	120

Adopted Modifications

To Be Effective 8/1/2006 Following Legislative Review

SEX OFFENSE GRID EXPLANATION

Grid Design Principles:

1. The Commission acknowledges that certain types of sex offenses require a different sentencing structure than that contained on the current sentencing guidelines grid, due to a combination of the serious nature of the offense, components of the underlying criminal behavior involved and the threat sex offenses pose to public safety.

2. The new sex offense grid is developed to reflect a combination of sentence lengths based on presumptive sentences and mandatory minimums enacted by the Legislature with relation to sex offenses, thus preserving the "truth in sentencing" principle set forth in the Sentencing Guidelines and retaining the guideline's determinate sentencing structure.

3. The severity ranking of sex offenses on the new grid is based primarily on the statutory maximum sentences for individual sex offenses. Severity levels generally attempt to place sex offenses with similar statutory maximum sentences on the same severity level, which allows for greater proportionality in sentences than is currently provided.

4. The new grid contains significantly enhanced sentence lengths that address issues raised in *Blakely v. Washington* relating to aggravated durational departures, as well as recognizing actual sentencing practices in serious sex offense cases.

5. Criminal history scores totaling six or more indicate a presumptive prison sentence that reflect the statutory maximum penalty designated for most sex offenses. Although the sex offense grid, like the general sentencing guidelines grid, provides ranges of 20% above and 15% below the presumptive sentence, ranges for criminal history scores of six or more do not extend above the statutory maximum sentence. Similarly, the range for first degree criminal sexual conduct does not extend below the statutorily required 144 month presumptive sentence for zero criminal history scores.

6. The underlying prison sentence for the presumptive non-prison portion of the sex offense grid (the shaded areas) enhances current sentence lengths to demonstrate the

seriousness assigned to violations and subsequent revocation of a presumptive non-prison sentence.

7. The Commission decided to include Failure to Register as a Sex Offender in the new sex offense sentencing policy. Although this offense is not itself a sex offense, the Commission believes predatory sex offenders that fail to register pose a serious threat to public safety. Inclusion of this offense on the new sex offender grid also permits the Commission to tailor appropriate punishment for these offenders consistent with the statutory minimum and maximum sentences without the constraints of the existing gird.

8. The new sex offense grid would apply only to sex offenders who do not qualify for the indeterminate life sentences passed by the 2005 Legislature.

9. Current unranked sex offenses, including Use of Minors in Sexual Performance and Possession/Dissemination of Child Pornography, are ranked on the new grid. Given the infrequency in prosecution of Incest, it was the Commission's decision not to rank that offense at this time.

Structure of the Sex Offense Grid:

1. Severity levels are indicated by the letters A through H, with A representing the most serious sex offenses and H the least serious. Letters were chosen to designate the severity levels to avoid the confusion between the current sentencing grid and the new sex offense grid.

2. Failure to Register as a Predatory Offender is the only offense listed on the H severity level. Although severity level H is the lowest severity level, all criminal history categories reflect a presumptive term of imprisonment to reflect the current statutory requirement as well as the seriousness of the offender's prior sex offense conviction.

3. CSC 2nd, 3rd and 4th degree offenses retain the previous multi severity level designation which treats sexual offenses committed with force, violence or weapons more seriously with longer presumptive sentences.

4. Criminal history scores are calculated in the same manner as under the current sentencing grid, however, the weights assigned for prior sex offense convictions are modified. Weights were increased for more serious sex offenses, with the less serious sex offenses remaining at their current weight. The prior conviction weight is not reduced for **any** sex offense under the new grid. The modified weights are assigned whenever the offense being sentenced is any offense ranked on the Sex Offender Grid (including Failure to Register). When an offender is sentenced for an offense not included on the Sex Offender Grid, prior sex offenses will not receive the modified weights.

5. Criminal history scores totaling six or more points indicate a presumptive prison sentence that reflects the statutory maximum penalty designated for most sex offenses.

6. Criminal history scores were designed so that a score of 3 generally designates a presumptive sentence of one half of the statutory maximum sentence. Thus, one prior CSC 1st degree sex offense conviction alone will result in a criminal history score of 3 and a presumptive sentence of one half of the maximum sentence set forth in statute for a specific severity level. At other offense levels, second time offenders who commit their offenses while on probation or supervised release will also be recommended a sentence that is one half the statutory maximum.

7. The presumptive non-prison portion of the new grid is structured similar to the current grid with lower level sex offenses with limited criminal history scores designated as a non-prison sentence. However, the new sex offense grid contains fewer presumptive non-prison cells and the underlying prison term is notably longer on the new grid, even for zero criminal history scores, than on the current sentencing grid.

8. Although new crimes were attempted to be ranked by severity levels that coincided with statutory maximum sentences, child pornography was an exception to this practice due to the nature and amount of harm associated with the offense. When ranking the offense of Child Pornography, a multi-severity level ranking was chosen to distinguish between penalty ranges for a first conviction and second or subsequent convictions. Possession of Child Pornography is ranked at a severity level G for a first conviction and a severity level F for a second/subsequent conviction. Dissemination of Child Pornography is ranked at a severity level E for the first conviction and a severity level D for a second/subsequent conviction.

9. Use of Minors in Sexual Performance has a designated statutory maximum sentence of 10 years and was ranked with similar sex offenses carrying a 10 year statutory maximum sentence at severity level E.

Custody Status Points:

1. If an offender is on supervision (probation, supervised release or conditional release) for a sex offense and commits another sex offense, the offender would receive two custody status points, instead of the current one custody status point.

2. If an offender is on supervision (probation, supervised release or conditional release) for a sex offense and commits a non-sex offense, the offender would receive the current one custody status point.

3. If an offender is on supervision for a sex offense and is convicted of Failure to Register, the offender would continue to receive the current one custody status point.

Consecutive Sentences and Departures:

1. The new sentencing grid and sentencing structure would still permit consecutive sentencing by the court when the facts or circumstances surrounding a specific offender/conviction warrant an enhanced sentence. Consecutive sentencing can result in periods of incarceration that exceed the statutory maximum for any single conviction.

2. Departures, both aggravated and mitigated, would be available with the new sex offense grid. Although the sentences have been significantly enhanced on the new grid, mitigated durational and dispositional departures are available for the atypical cases that may warrant a lesser sentence. Aggravated departures are still available as long as *Blakely* issues are addressed in the sentencing process. However, with the enhanced sentence lengths contained on the new grid and the indeterminate life sentencing provision for certain sex offenders, the need for aggravated departures may be lessened.

Ranking of Sex Offenses and Weights to be Assigned to Prior Offenses

Offense	Statutory Provisions	Severity Level	Stat. Max.	Weight of Prior	Current Weight
CSC 1	609.342, all clauses: Penetration	A	30	3	2
CSC 1	609.341 subd.11: Contact, victim(s) under 13	A	30	3	1.5
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	25	2	1.5
CSC 3	609.344 subd.1 c, d, g, h-n: Penetration, force or prohibited occupation	C	15	2	1.5
CSC 2	609.343 subd.1 a, b, g: Contact with young minors	D	25	1.5	1.5
CSC 3	609.344 subd,1 a, b, e, f: Penetration, minors	D	15	1.5	1
Dissemination Child Pornography	617.247 subd.3: Subsequent or Predatory Offender	D	15	1.5	Unranked
CSC 4	609.345 subd.1 c, d, g, h-n: Contact, force or prohibited occupation	E	10	1.5	1.5
Use Minors Sexual Perform.	617.246 subd.2, 3, 4	E	10	1.5	Unranked
Dissemination Child Pornography	617.247 subd.3	E	7	1.5	Unranked
CSC 4	609.345 subd.1 a, b, e, f: Contact, minors	F	10	1	1
Possession Child Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	10	1	Unranked
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	5	1	1
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	5	1	1
Possession Child Pornography	617.247 subd.4	G	5	1	Unranked
Incest	609.365	Unranked	10	Unranked	Unranked
Solicit Children for Sexual Conduct	609.352 subd.2	G	3	1	1
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	5	0.5 1	0.5 1

2005 Legislatively Created Life Sentences for Certain Sex Offenders

The Commission recommended that the Legislature create an Off Grid Sex Offense Category designating offenses for which a sentence of life in prison with the possibility of release is appropriate. The Legislature responded by creating two types of life sentences for some sex offenders.

A. Life Without the Possibility of Release – 609.3455 subd. 2

The omnibus public safety bill mandates life sentences without the possibility of release for some sex offenders. This sentence applies only to 1st and 2nd degree criminal sexual conduct offenses under the following paragraphs of subdivision 1:

(c)–fear of great bodily harm;
(d)–use of dangerous weapon;
(e)–personal injury with force or coercion or against an impaired victim;
(f)–accomplice and use of force or coercion or use of a dangerous weapon; or
(h)–victim under 16, significant relationship, and force or coercion, personal injury, or multiple acts.

This sentence also requires:

(1) two or more heinous elements (torture, great bodily harm, mutilation, extreme inhumane conditions, dangerous weapon, multiple victims, multiple perpetrators, and kidnapping) exist; or
(2) the person has a previous sex offense conviction (convicted of the prior offense before committing the current offense) and one heinous element exists.

B. Life With the Possibility of Release – 609.3455 subd. 3 and 4

This legislation also provides for mandatory life sentences with the possibility of release for other sex offenses. A first-time sex offender is subject to a life sentence if the offense is 1st or 2nd degree criminal sexual conduct under subdivision1, paragraph (c), (d), (e), (f), or (h) and one heinous element exists. Repeat sex offenders may also receive this sentence under any of the following circumstances:

(1) the offender has two previous sex offense convictions (the offender was convicted and sentenced for a sex offense committed after the offender was earlier convicted and sentenced for a sex offense and both convictions preceded the commission of the present offense);
(2) the person has one previous sex offense conviction (convicted of the prior offense before committing the current offense) and (i) the present offense involved an aggravating factor, other than repeat sex convictions, that would provide grounds for an upward departure; or (ii) the person received an upward durational departure for the previous sex offense conviction; or (iii) the person was sentenced under section 609.108 for the previous sex offense conviction;
(3) the person has two prior sex offense convictions, the prior and present offenses involved at least three separate victims, and (i) the present offense involved an aggravating factor, other than repeat sex convictions, that would provide grounds for an upward departure; or (ii) the person received an upward durational departure for the previous sex offense conviction; or (iii) the person was sentenced under section 609.108 for the previous sex offense conviction.

These provisions do not apply if the current offense is fourth-degree criminal sexual conduct and the previous or prior offenses were also fourth-degree criminal sexual conduct offenses. When an offender receives a life sentence with the possibility of release, the court is required to specify a minimum term of imprisonment, based on the sentencing guidelines or any applicable mandatory minimum sentence that must be served before the offender is eligible for release.

When analyzing the impact of the bill, staff estimated that 37 offenders sentenced in 2003 would qualify for the life sentences. Based on offenders sentenced in 2004, staff estimates that 23 offenders would qualify for the life sentences.

Offenders Estimated to be Eligible for Life Sentences: Offenders Sentenced in 2003

Group	Life Sentence Type	Number	Degree of Conviction
First-degree offenders, clauses c, d, e, f, or h with two severe aggravating factors	No Release	6	6 First
First-degree offenders, clauses c, d, e, f, or h with one severe aggravating factor	Release Possible	6	6 First
Offenders with two previous sex offenses (convicted on prior offense before committing the current offense)	Release Possible	8	4 First, 1 Second, 2 Third, 1 Fourth
Aggravated departure with a previous offense	Release Possible	5	4 First, 1 Second
Offenders who committed multiple offenses against different victims, prison with no mitigated durations	Release Possible	12	9 First, 3 Second
Total	Release Possible	**37**	25 First, 5 Second, 2 Third, 1 Fourth

Offenders Estimated to be Eligible for Life Sentences: Offenders Sentenced in 2004

Group	Life Sentence Type	Number	Degree of Conviction
First or Second degree offenders, clauses c, d, e, f, or h with two severe aggravating factors	No Release	5	5 First
First or Second degree offenders, clauses c, d, e, f, or h with one severe aggravating factor	Release Possible	6	4 First, 2 Second
Offenders with two previous sex offenses (convicted on prior offense before committing the current offense)	Release Possible	2	1 Second, 1 Fourth
Aggravated departure with a previous offense.	Release Possible	6	2 First, 2 Second, 2 Third
Offenders who committed multiple offenses against different victims, prison with no mitigated durations	Release Possible	4	2 First, 1 Second 1 Third
Total	Release Possible	**23**	13 First, 6 Second, 3 Third, 1 Fourth

The table below displays the number of sex offenders sentenced in 2004 by offense and new severity level on the proposed Sex Offender Grid. It also displays the number of offenders assumed to be mandated Life sentences and the number who would be subject to the proposed Sex Offender Grid.

Estimated Number of Offenders Subject to Sex Offender Grid

Offense	Statutory Provisions	New Severity Level	Number of Offenders	Number Qualify for Life	Number Remaining
CSC 1	609.342, all clauses: Penetration	A	137	13	124
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	36	3	33
CSC 3	609.344 subd.1 c, d, g, h-n: Penetration, force or prohibited occupation	C	62	1	61
CSC 2	609.343 subd.1 a, b, g: Contact with young minors	D	110	3	107
CSC 3	609.344 subd.1 a, b, e, f: Penetration, minors	D	146	2	144
Dissemination Pornography	617.248 subd.3: Subsequent or Predatory Offender	D	0	0	0
CSC 4	609.345 subd.1 c, d, g, h-n: Contact, force or prohibited occupation	E	50	1	49
Use Minors Sexual Perform.	617.246 subd.2, 3, 4	E	2	0	2
Dissemination Pornography	617.247 subd.3	E	1	0	1
CSC 4	609.345 subd.1 a, b, e, f: Contact, minors	F	50	0	50
Possession Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	1	0	1
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	0	0	0
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	3	0	3
Possession Pornography	617.247 subd.4	G	33	0	33
Solicit Children Sexual Conduct	609.352 subd.2	G	8	0	8
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	231	0	231
Total			**870**	**23**	**847**

Offenders Subject to Sex Offender Grid: Number with a "True" Prior Criminal Sexual Conduct Offense

Offense	Statutory Provisions	New Severity Level	Number of Offenders	Number One True Prior Sex Offense	Number 2 Or More True Prior Sex Offense
CSC 1	609.342, all clauses: Penetration	A	124	2	2
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	33	1	1
CSC 3	609.344 subd.1 c, d, g, h-n: Penetration, force or prohibited occupation	C	61	3	1
CSC 2	609.343 subd.1 a, b, g: Contact with young minors	D	107	5	2
CSC 3	609.344 subd.1 a, b, e, f: Penetration, minors	D	144	5	1
Dissemination Pornography	617.248 subd.3: Subsequent or Predatory Offender	D	0	0	0
CSC 4	609.345 subd.1 c, d, g, h-n: Contact, force or prohibited occupation	E	49	0	1
Use Minors Sexual Perform.	617.246 subd.2, 3, 4	E	2	0	0
Dissemination Pornography	617.247 subd.3	E	1	0	0
CSC 4	609.345 subd.1 a, b, e, f: Contact, minors	F	50	4	1
Possession Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	1	1	0
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	0	0	0
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	3	0	0
Possession Pornography	617.247 subd.4	G	33	0	0
Solicit Children Sexual Conduct	609.352 subd.2	G	8	0	0
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	231	127	17
Total			**847**	**148 (17%)**	**26 (3%)**

Estimated Prison Bed Impact of Changes for Sentencing Sex Offenses

Impact of Life Sentences

Number of Sex Offenders Sentenced in 2004: 870
Number Assumed to Qualify for Life Sentence: 23
Estimated Prison Bed Impact of Life Sentences: 138-663

Assumptions:

1. Offenders serving life sentences with no release serve until they die. Estimated life span based on age at sentence and Social Security actuarial tables.
2. Four scenarios presented for how long offenders with release possible sentences will serve with minimum time to serve based on new Sex Offender Grid.

Estimated Impact by Type of Life Sentence and Scenario for Time Served

Type of Sentence	*Number of Offenders*	Prison Bed Impact			
		Serve Minimum	**Serve Minimum +5 years**	**Serve Minimum +10 years**	**Serve Till Death**
Life: No Release	5	128	128	128	128
Life: Release Possible	18	10	98	183	535
Total	23	138	226	311	663

Impact of Sex Offender Grid

Number Assumed to Qualify for Sex Offender Grid: 847
Number of Prison Sentences Expected to Change: 179 (21%)
Eventual Prison Bed Impact: 372 additional beds needed per year

Assumptions:

1. The number and type of offenders sentenced remains the same as in 2004.
3. Offenders currently receiving mitigated dispositional and durational departures would continue to receive an identical sentence.
3. Offenders currently receiving aggravated departures would receive sentences at least as long as they are currently receiving.

Estimated Impact by Type of Change to Presumptive Sentence

Type of Change	Number of Offenders	Prison Bed Impact
New Prison Sentences	30	93
Serve More Time	149	279
Total	178	372

Timing of Prison Bed Impact

Assumptions:

1. No impact until 2007 because will take time for offenders to commit crimes and be processed through the system and number of trials may increase.
2. Impact for life sentences based on offenders who are eligible for release serving 5 years beyond their minimum terms.

Year	# Extra Beds Needed			Year	# Extra Beds Needed		
	Life (min.+5)	Grid	Total		Life (min.+5)	Grid	Total
FY 2007	0	39	39	FY 2037	176	372	548
FY 2008	0	95	95	FY 2038	180	372	552
FY 2009	0	145	145	FY 2039	185	372	557
FY 2010	2	186	188	FY 2040	189	372	561
FY 2011	5	215	220	FY 2041	193	372	565
FY 2012	10	238	248	FY 2042	197	372	569
FY 2013	15	259	273	FY 2043	201	372	573
FY 2014	21	276	297	FY 2039	185	372	557
FY 2015	29	295	324	FY 2040	189	372	561
FY 2016	34	307	341	FY 2041	193	372	565
FY 2017	41	316	357	FY 2042	197	372	569
FY 2018	50	324	374	FY 2043	201	372	573
FY 2019	59	333	392	FY 2044	205	372	577
FY 2020	68	342	410	FY 2045	207	372	579
FY 2021	78	349	427	FY 2046	209	372	581
FY 2022	85	356	441	FY 2047	211	372	583
FY 2023	93	363	456	FY 2048	213	372	585
FY 2024	101	366	467	FY 2049	215	372	587
FY 2025	109	369	478	FY 2050	216	372	588
FY 2026	116	369	485	FY 2051	217	372	589
FY 2027	123	371	494	FY 2052	218	372	590
FY 2028	133	372	505	FY 2053	219	372	591
FY 2029	140	372	512	FY 2054	220	372	592
FY 2030	146	372	518	FY 2055	221	372	593
FY 2031	152	372	524	FY 2056	222	372	594
FY 2032	156	372	528	FY 2057	223	372	595
FY 2033	160	372	532	FY 2058	224	372	596
FY 2034	164	372	536	FY 2059	225	372	597
FY 2035	168	372	540	FY 2060	226	372	598
FY 2036	172	372	544	FY 2061	226	372	598

Estimated Impact by Offense and New Severity Level

Offense	Statutory Provisions	Severity Level	Number of Offenders	Number Prison Cases with Increased Sentences	Prison Bed Impact
CSC 1	609.342, all clauses: Penetration	A	124	28	99
CSC 2	609.343 subd.1 c, d, e, f, h: Contact with force	B	33	9	45
CSC 3	609.344 subd.1 c, d, g, j, k, m, n: Penetration, force or prohibited occupation	C	61	14	13
CSC 2	609.343 subd.1 a, b, g: Contact with minors	D	107	21	59
CSC 3	609.344 subd.1 b, e, f, h, i, l: Penetration, minors or some occupations	D	144	31	95
Dissemination Pornography	617.247 subd.3: Subsequent or Predatory Offender	D	0	0	0
CSC 4	609.345 subd.1 c, d, g, j, k, m, n: Contact, force or prohibited occupation	E	49	8	12
Use Minors Sexual Perform.	617.247 subd.2, 3, 4	E	2	0	0
Dissemination Pornography	617.247 subd.3	E	1	0	0
CSC 4	609.345 subd.1 b, e, f, h, i, l: Contact, minors or some occupations	F	50	8	18
Possession Pornography	617.247 subd.4: Subsequent or Predatory Offender	F	1	1	2
CSC 5	609.3451 subd.3: Repeat G.Misd offenses involving minors	G	0	0	0
Indecent Exposure	617.23 subd.3: Repeat G.Misd offenses	G	3	0	0
Possession Pornography	617.247 subd.4	G	33	3	3
Solicit Children Sexual Conduct	609.352 subd.2	G	8	0	0
Failure to Register	243.166 subd.5b 243.166 subd.5c: Subsequent offense	H	231	54	26
Total			**847**	**178**	**372**

Offenders Subject to Sex Offender Grid: Aggravated Durational Departures Number Eliminated by New Presumptive Sentences By Offense

Offense	Total Number Sentenced	Prison Sentences			Probation Sentences		
		#	# Aggravated Durations	# Eliminated	#	# Aggravated Durations	# Eliminated
CSC 1	124	82	9	3	42	3	2
CSC 2: Force	33	21	1	1	12	0	---
CSC 3: Force	61	30	4	3	31	1	0
CSC 2: Minors	107	15	4	1	92	3	1
CSC 3: Minors	144	20	4	4	124	8	5
CSC 4: Force	49	8	0	---	41	3	0
CSC 4: Minors	50	5	1	1	45	0	---
Use Minors Sexual Perform.	2	0	0	---	2	0	---
Dissemination Pornography	1	0	0	---	1	0	---
Indecent Exposure	3	0	0	---	3	0	---
Possession Pornography	34	2	0	---	32	0	---
Solicit Children Sexual Conduct	8	0	0	---	8	1	1
Failure to Register	231	100	2	2	131	2	---
Total	847	283	25	15 (60%)	564	22	9 (41%)

There were a total of 47 aggravated durational departures pronounced for offenders sentenced in 2004 who would be subject to the proposed sex offender grid. Under the proposed policies for calculating criminal history scores for sex offenders and the proposed sex offender grid, 24 (51%) of those departures would be eliminated because the offender's new presumptive sentence would be equal to or longer than the sentence pronounced.