



Report to the Legislature

January 2007

Minnesota Sentencing Guidelines Commission

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Minnesota Sentencing Guidelines Commission

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Minnesota Sentencing Guidelines

In 1978, Minnesota created the nation's first sentencing guidelines commission, and we were the first state to implement a sentencing guidelines structure. Over the past 25 years, the guidelines system has proven capable of effectuating every legislative change in sentencing policy, while assuring that policy changes have been tempered by being rationally related to a rich store of data concerning crime and punishment in Minnesota.

The state's guidelines have made it possible to give citizens an honest, front-end account of sentences actually to be served. They have made it possible to see precise details about every felony punishment, so as to accurately describe sentencing trends and predict the impact of statutory changes on prison resources. They have enabled judges to "make the punishment fit the crime," by providing the most severe sentences for the most serious offenses, while taking into account important differences among offenders. Throughout the time the guidelines have existed, Minnesota has undergone significant changes in population, while both its crime rate and its rate of imprisonment per capita have remained among the lowest in the United States.

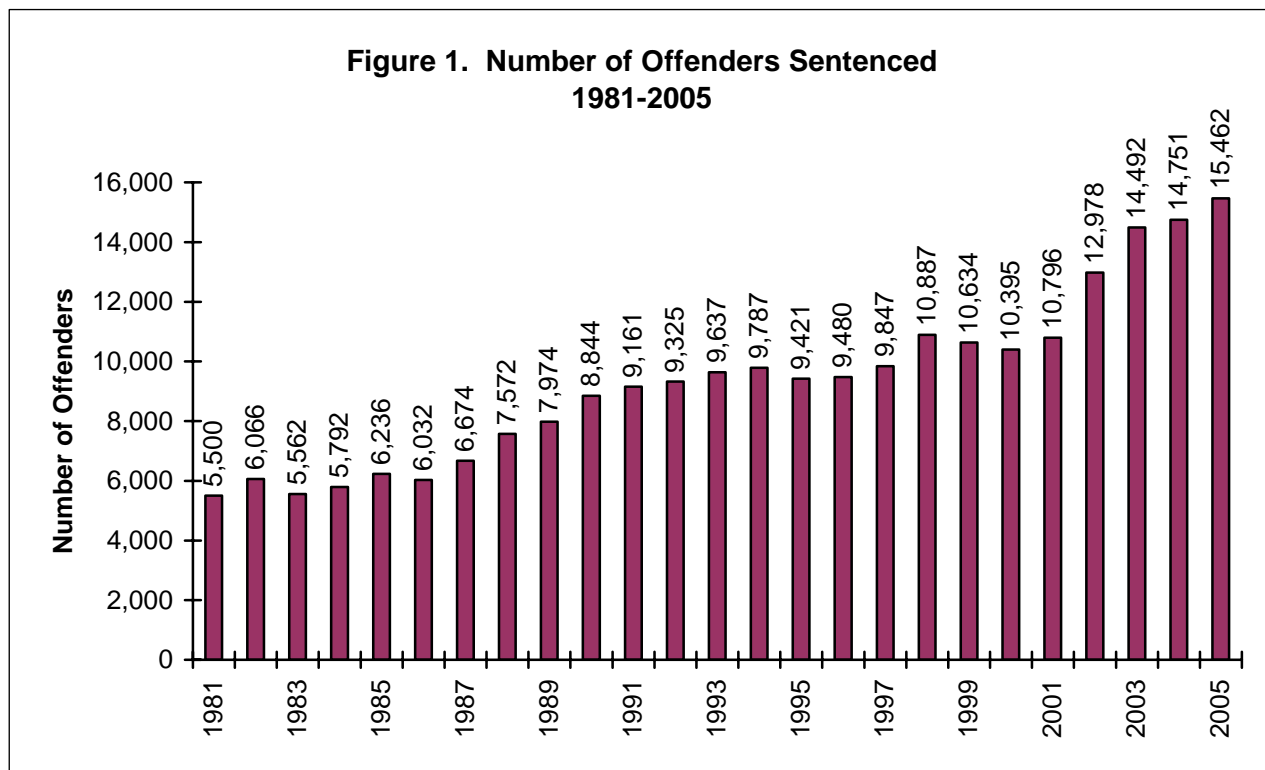
A balancing of flexibility and constraint is at the heart of our guidelines' success and enduring value. Today, other jurisdictions look to Minnesota as an example of how dysfunctional sentencing schemes might be improved. In 2006, states as different as Vermont and California sought assistance from Guidelines Commission staff. We have been consulted regarding federal sentencing possibilities since the United States' Supreme Court invalidated the federal guidelines in 2004's *Blakely v. Washington* decision and subsequent opinions. We have provided information about our guidelines system to a South African government agency working to create a fair and rational post-apartheid sanctioning scheme.

While our guidelines are far from perfect, they are an achievement of which Minnesotans can be proud.

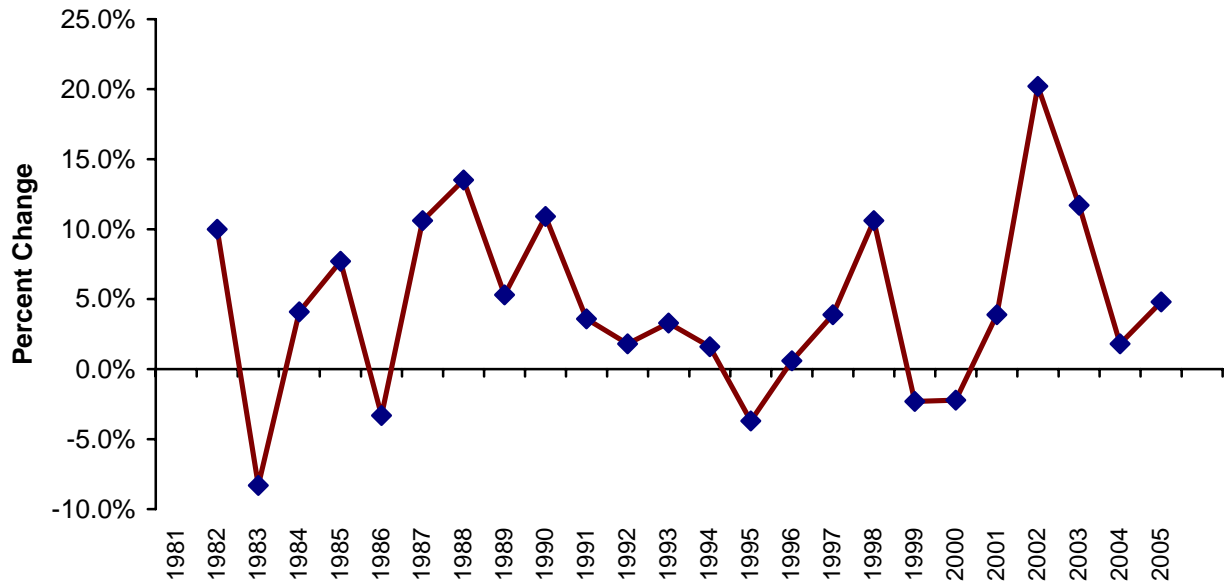
Data Summary

There were 15,462 felony offenders sentenced in Minnesota in 2005, an increase of almost five percent over 2004. In 2002, there was a twenty percent increase, largely attributable to the implementation of the felony DWI statute and to the growth in drug-crime sentences, especially in methamphetamine cases. In 2005, the number of felony DWI offenders sentenced actually declined, while the growth in the number of drug offenders was smaller than in recent years.

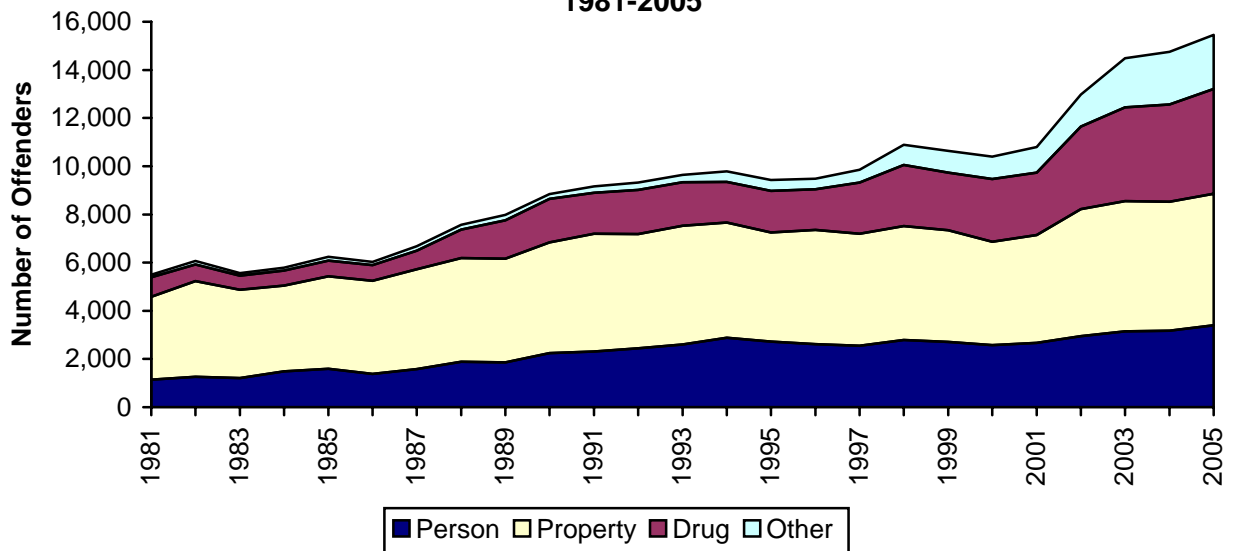
As a proportion of crimes sentenced, property crimes continued to decline, person and “other” crimes remained about the same, and drug crimes increased.



**Figure 2. Offenders Sentenced - Percent Change
1981-2005**



**Figure 3. Number of Offenders Sentenced by Offense Type
1981-2005**



The Commission's Activities in 2006

The Minnesota Sentencing Guidelines Commission consists of eleven members, of whom three are judges appointed by Minnesota's Chief Justice and eight are citizens appointed by the Governor. Currently, the Governor's appointees are: Commission Chair Steve Borchardt, Olmsted County Sheriff; Commissioner of Corrections Joan Fabian; Isanti County Attorney Jeffrey Edblad; Fifth Judicial District Assistant Public Defender Darci Bentz; Washington County Community Corrections Supervisor Tracy Jenson; Rev. Robert Battle, Saint Paul; and Connie Larson, Waseca. The judicial representatives are Supreme Court Justice Alan Page; Court of Appeals Judge Gordon Shumaker; and Second Judicial District Judge Edward Cleary.

The Commission makes policy decisions concerning felony sentencing. These are implemented by a staff supervised by an executive director.

Legislation

In 2006, staff carried the Commission's proposed sex-offender sentencing grid to the Legislature, where it was ratified. The new sex-offender sentencing provisions took effect on August 1, 2006, and were incorporated into the latest edition of the *Minnesota Sentencing Guidelines and Commentary*. See Appendix at p. 30.

Research

In the spring of 2006, the Commission voted to authorize the executive director to move forward on the design of research to answer long-standing questions about racial disparity in Minnesota sentencing. For at least 30 years, policy-makers have expressed concern about the fact that minority citizens constitute a much larger share of those admitted to prison, and of the total prison population, than their share of the state's population as a whole. The Commission is interested in doing research that will at least explain what parts of the disparity are rational (based on criminal record and the seriousness of crimes committed) and what parts are irrational (not based on history and nature of convictions). The executive director and staff; researcher/guidelines expert Kay Knapp; University law professors Richard Frase, Kevin Reitz and Myron Orfield; Supreme Court research manager/guidelines expert Debra Dailey; and Hennepin County Court and Corrections researchers worked together to design the study. In November of 2006, the Commission gave permission to the executive director to seek non-tax private funding for this work.

Maintaining Guidelines

As it does after each session of the Legislature, the Commission made numerous decisions concerning changes that should be made to the guidelines, based on changes in statutes. It also incorporated relevant Supreme Court decisions into the guidelines. All modifications, including those associated with the new sex offender grid, are set forth in the Appendix, beginning on p. 30. They were published in the annual revision of the guidelines, which took effect on August 1.

Staff Activity

Commission staff processed data on more than 15,000 felony sentences, adding valuable data on each case to its database, which is recognized as one of the most useful and extensive ever developed. The database is a rich source of information that is used, along with Minnesota Department of Corrections statistics, to produce prison-bed projections each year. The data is also a foundation for research – such as the racial disparity study described above – that can be used to create fair and rational sentencing policy. Using MSGC data, staff produced fiscal notes predicting the impact of every proposed change in criminal statutes considered by the 2006 Legislature.

In addition to doing statistical analysis, staff answered hundreds of telephone calls from practitioners seeking assistance on particular cases. The Commission expanded its training of probation officers, lawyers and judges from eight classes last year to sixteen in 2006; about 500 people attended these day-long sessions, which were held throughout Minnesota.

Sentencing Guidelines Modifications

Changes to the sentencing guidelines related to new and amended crimes passed by the Legislature during the 2006 Session became effective August 1, 2006. The exact language of all changes is included in the Appendix.

A. Modifications Requiring Legislative Review in 2007

Bringing Stolen Goods into the State (M.S. §609.525) was apparently overlooked when the Commission re-ranked theft offenses in 1989. The present Commission has ranked it to conform with the relevant penalty provision (M.S. §609.52, subd. 3) and with all other theft-related crimes covered by that provision. Since the new ranking will result in lower sentences than the guidelines presently indicate, it will become law only if the 2007 Legislature does not pass a bill striking the updated ranking. Only 37 people have been sentenced under this statute since 1989. See, Appendix, p. 29.

B. Changes in Sentencing Sex Offenders

The guidelines now differentiate the sentencing of sex offenses from other offenses. A separate sex offender grid increases penalties for repeat offenders by weighing prior sex offenses more heavily when computing criminal history scores and by providing that offenders reach maximum sentences with a lower criminal history than previously. See, Appendix, p. 30.

C. Ranking of Offenses

Based on new and amended crime legislation in the 2006 Legislative Session, the Commission considered the following severity level rankings:

1. Severity Level VII – Felony DWI: The Commission considered a Legislative change that expands the reach of the statute, and adopted a proposal to retain the current ranking.
2. Severity Level IV – Domestic Assault: The severity level was retained after the Legislature extended the look-back time to ten years and provided that repeated domestic assaults against different victims, as well as against the same victim, may trigger felony charges.
3. Severity Level III – Escape from Civil Commitment, Sexually Dangerous Persons: This was moved up from Severity Level I in view of changes made to the statutory maximum.
4. Severity Level II – Failure to Control a Regulated Animal, resulting in great bodily harm or death: This was ranked in relation to existing offenses.

5. Unranked – Labor Trafficking and Unlawful Conduct with Respect to Documents in the Furtherance of Labor or Sex Trafficking: The Legislature increased the statutory maximum when the victim of this offense is under the age of eighteen; the Commission maintained its unranked status, due to a lack of sentencing history on the offense.

D. Misdemeanor and Gross Misdemeanor Offense List

The Commission considered new and amended misdemeanors and gross misdemeanors and added the following offenses to the list of offenses that augment criminal history scores: counterfeiting of currency; fraudulent or improper financing statements; computer encryption; gross misdemeanor facilitating access to a computer security system; disruption of funeral services; gross misdemeanor interference with 911 calls; and gross misdemeanor fourth-degree assault of an animal control officer.

E. Other Modifications

The Commission responded to appellate case law by making changes to guidelines language. It clarified the impact of *State v. Barker*, 705 NW 2d 768, Minn. 2005 (Guidelines II.C) and *Blakely v. Washington*, 542 U.S. 296, 2004 (Guidelines II.D). Based on *State v. Rouland*, 685 NW 2d 706, 2004, it moved language concerning offense severity and criminal history from the commentary to the guidelines in order to give it binding legal effect (Guidelines II.A, II.B).

The Commission changed the felony DWI section to conform to new statutory consecutive sentencing provisions (Guidelines II.F). Conditional release language was modified to conform to statutory provisions regarding sex offenders (Guidelines II.E).

Felony Driving While Impaired

Cases Sentenced in 2005

Sentencing Policy

Felony Driving While Impaired (DWI) 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 imposes a probationary sentence.

The sentencing guidelines provide 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.

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 five-year term of conditional release (Minn. Stat. § 169A.276, subd. 1(d); Guidelines II.E).

The guidelines presume a minimum 36-month sentence for all felony DWI cases (Guidelines II.E). For a person with a criminal history score of 2 or less, the guidelines presume a stayed (probationary) sentence. However, if a person has a prior felony DWI conviction, the presumption is imprisonment, regardless of criminal history (Guidelines II.C).

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

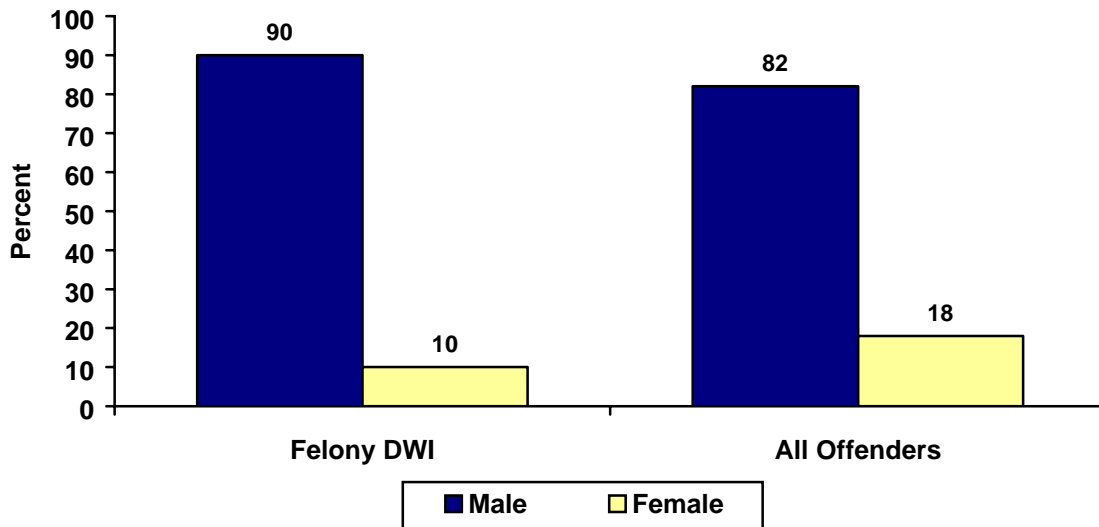
Volume of Cases and Offender Characteristics

There were 834 offenders sentenced for felony DWI in 2005. Since the felony DWI law went into effect on August 1, 2002, 2,606 offenders have been sentenced: 102 in 2002; 810 in 2003; 860 in 2004; and 834 in 2005. 404 of those offenders were committed directly to state prison, while 2,202 received probationary sentences, almost all of which included incarceration in local jails.

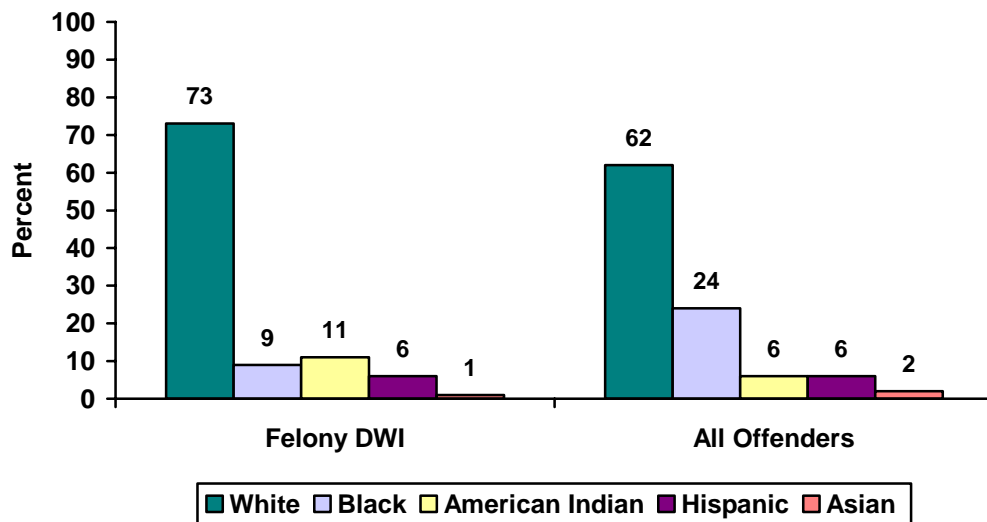
Demographic Characteristics

Felony DWI offenders are more likely to be male and white or American Indian than the overall offender population. The average age at time of offense was 37, as compared to 30 for offenders overall.

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

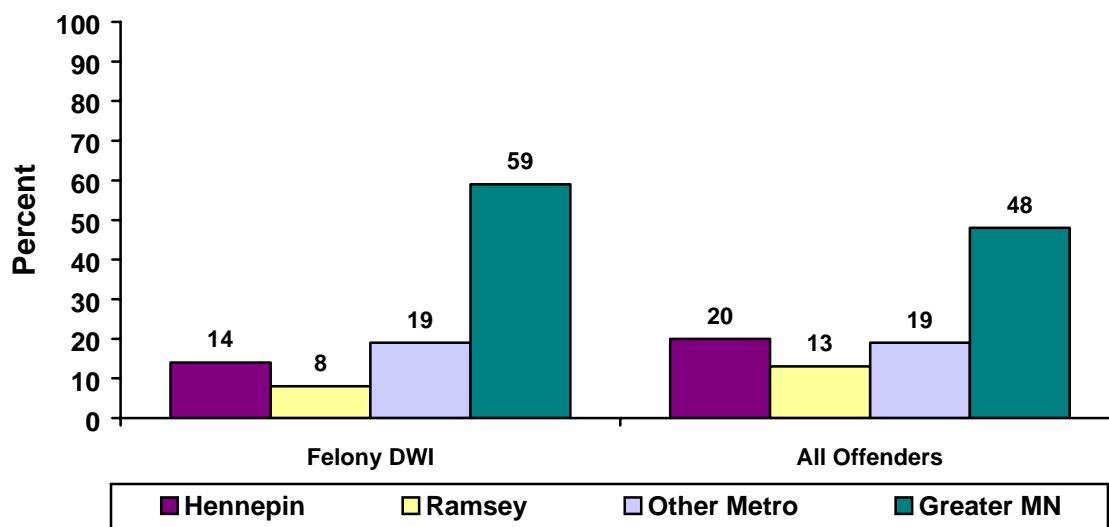


**Figure 2: Distribution of Offenders by Race:
Felony DWI Offenders Compared to All Offenders**



Hennepin County sentenced fourteen percent of the felony DWI cases in the state, compared to 20 percent of all felony cases sentenced. Ramsey County sentenced eight percent of the felony DWI cases, compared to thirteen percent of all felony cases. The other metro counties had the same percentages in each category (19%). Greater Minnesota sentenced a larger proportion of felony DWIs (59%) than its share of all felonies sentenced (48%).

**Figure 3: Distribution of Offenders by Region:
Felony DWI Offenders Compared to All Offenders**

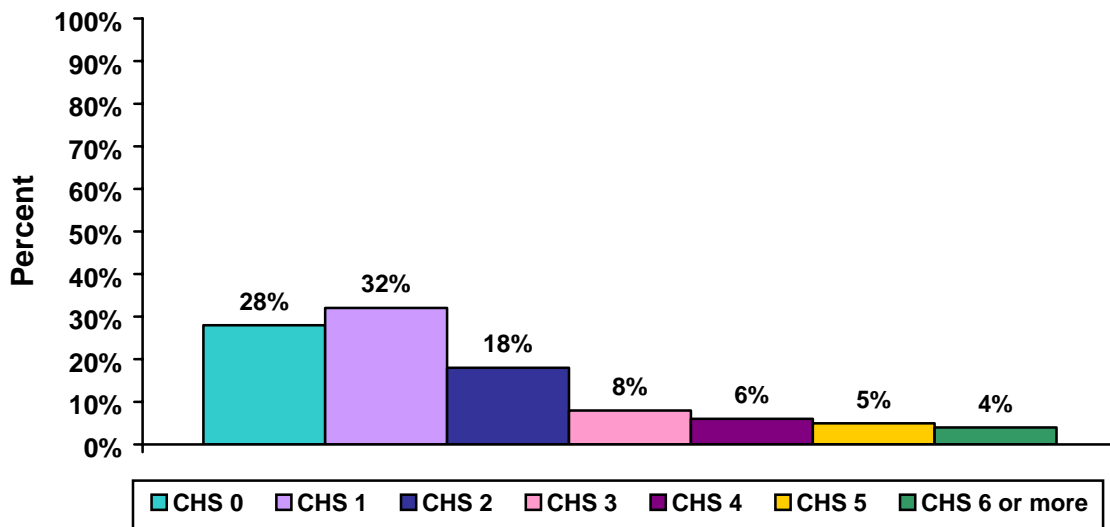


Criminal History

All felony DWI offenders have, at a minimum, three prior alcohol-related driving offenses on their records. According to case law and the sentencing guidelines, the same offenses used to reach the felony level are not used in calculating an offender's criminal history score (Guidelines II.B.6). Thus, a first-time felony DWI offender may be sentenced at a criminal history score of zero.

In 2005, most DWI offenders were sentenced at a criminal history score of one or zero. The vast majority (78%) were sentenced at a score of two or less, so most had presumptive probationary sentences. However, 30 of the offenders with only one or two criminal history points had presumptive prison sentences because of a prior felony DWI. When all 834 DWI offenders, regardless of criminal history, are considered, 69 (8%) were sentenced for a subsequent felony DWI. More than half of felony DWI offenders (59%) 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 (43%) had non-DWI felonies on their records that contributed to their total criminal history score.

Figure 4: Distribution of Offenders by Criminal History Score



Sentencing Practices

Incarceration Rates

At the time of sentencing, the court can impose several different types of sentences, the most restrictive being a sentence of imprisonment in a state facility for a period exceeding a year. The court may instead 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.

Eighteen percent (150 offenders) were sentenced to imprisonment in a state facility; the average pronounced sentence was 52 months. Eighty percent (669 offenders) were sentenced to local incarceration, for an average of 215 days, as a condition of probation. The total incarceration rate (both offenders sentenced to prison and local incarceration) was 98 percent. The remaining two percent (15 offenders) received other sanctions imposed by the court at sentencing. Eighty-two percent (684 offenders) were placed on probation. All offenders were placed on probation for at least 24 months. Most (72%) received a probation period equal to the statutory maximum of seven years (84 months); the average length of probation was 77 months.

Figure 5: Type of Incarceration



Incarceration Rates and Distribution of Cases by County

By far the highest number of cases sentenced was in Hennepin County, followed by Ramsey County, Dakota County, St. Louis County, and Anoka County. These counties accounted for 39 percent of all felony DWI cases sentenced. Other counties with more than twenty felony DWI cases included Becker, Cass, Clay, Olmsted, and Washington. These five counties accounted for an additional fourteen percent of all felony DWIs.

Table 1: Incarceration Rates by County

County	Number and Percentage of Offenders			Total
	State Prison	Jail	Other Sanctions	
Aitkin	1 16.7%	5 83.3%	0 .0%	6 100.0%
Anoka	3 6.8%	40 90.9%	1 2.3%	44 100.0%
Becker	7 33.3%	14 66.7%	0 .0%	21 100.0%
Beltrami	2 40.0%	2 40.0%	1 20.0%	5 100.0%
Benton	3 27.3%	8 72.7%	0 .0%	11 100.0%
Big Stone	0 .0%	0 .0%	0 .0%	0 100.0%
Blue Earth	0 .0%	17 100.0%	0 .0%	17 100.0%
Brown	0 .0%	6 100.0%	0 .0%	6 100.0%

County	Number and Percentage of Offenders			Total
	State Prison	Jail	Other Sanctions	
Carlton	3 18.8%	13 81.3%	0 .0%	16 100.0%
Carver	1 20.0%	4 80.0%	0 .0%	5 100.0%
Cass	5 21.7%	17 73.9%	1 4.3%	23 100.0%
Chippewa	0 .0%	2 100.0%	0 .0%	2 100.0%
Chisago	2 20.0%	7 70.0%	1 10.0%	10 100.0%
Clay	3 13.6%	19 86.4%	0 .0%	22 100.0%
Clearwater	2 100.0%	0 .0%	0 .0%	2 100.0%
Cook	1 100.0%	0 .0%	0 .0%	1 100.0%
Cottonwood	0 .0%	2 100.0%	0 .0%	2 100.0%
Crow Wing	0 .0%	11 100.0%	0 .0%	11 100.0%
Dakota	8 13.1%	53 86.9%	0 .0%	61 100.0%
Dodge	1 25.0%	3 75.0%	0 .0%	4 100.0%
Douglas	0 .0%	7 100.0%	0 .0%	7 100.0%
Faribault	2 100.0%	0 .0%	0 .0%	2 100.0%
Fillmore	1 50.0%	1 50.0%	0 .0%	2 100.0%
Freeborn	0 .0%	3 100.0%	0 .0%	3 100.0%
Goodhue	0 .0%	8 100.0%	0 .0%	8 100.0%
Grant	0 .0%	0 .0%	0 .0%	0 .0%
Hennepin	22 19.1%	90 78.3%	3 2.6%	115 100.0%
Houston	1 50.0%	1 50.0%	0 .0%	2 100.0%
Hubbard	1 100.0%	0 .0%	0 .0%	1 100.0%
Isanti	1 10.0%	8 80.0%	1 10.0%	10 100.0%
Itasca	4 40.0%	5 50.0%	1 10.0%	10 100.0%
Jackson	0 .0%	2 100.0%	0 .0%	2 100.0%

County	Number and Percentage of Offenders			Total
	State Prison	Jail	Other Sanctions	
Kanabec	0 .0%	4 100.0%	0 .0%	4 100.0%
Kandiyohi	3 60.0%	2 40.0%	0 .0%	5 100.0%
Kittson	0 .0%	0 .0%	0 .0%	0 .0%
Koochiching	0 .0%	1 100.0%	0 .0%	1 100.0%
Lac Qui Parle	0 .0%	0 .0%	0 .0%	0 .0%
Lake	0 .0%	1 100.0%	0 .0%	1 100.0%
Lake of the Woods	0 .0%	0 .0%	0 .0%	0 .0%
LeSueur	0 .0%	5 100.0%	0 .0%	5 100.0%
Lincoln	0 .0%	0 .0%	0 .0%	0 .0%
Lyon	0 .0%	4 100.0%	0 .0%	4 100.0%
McLeod	0 .0%	5 100.0%	0 .0%	5 100.0%
Mahnomen	3 30.0%	7 70.0%	0 .0%	10 100.0%
Marshall	0 .0%	2 100.0%	0 .0%	2 100.0%
Martin	1 20.0%	4 80.0%	0 .0%	5 100.0%
Meeker	0 .0%	0 .0%	0 .0%	0 .0%
Mille Lacs	3 27.3%	8 72.7%	0 .0%	11 100.0%
Morrison	0 .0%	5 100.0%	0 .0%	5 100.0%
Mower	2 40.0%	2 40.0%	1 20.0%	5 100.0%
Murray	0 .0%	1 100.0%	0 .0%	1 100.0%
Nicollet	1 33.3%	2 66.7%	0 .0%	3 100.0%
Nobles	0 .0%	6 100.0%	0 .0%	6 100.0%
Norman	0 .0%	2 100.0%	0 .0%	2 100.0%
Olmsted	3 14.3%	18 85.7%	0 .0%	21 100.0%
Otter Tail	2 11.8%	15 88.2%	0 .0%	17 100.0%
Pennington	1 14.3%	6 85.7%	0 .0%	7 100.0%

County	Number and Percentage of Offenders			Total
	State Prison	Jail	Other Sanctions	
Pine	3 23.1%	9 69.2%	1 7.7%	13 100.0%
Pipestone	1 50.0%	1 50.0%	0 .0%	2 100.0%
Polk	7 53.8%	6 46.2%	0 .0%	13 100.0%
Pope	1 100.0%	0 .0%	0 .0%	1 100.0%
Ramsey	10 15.9%	53 84.1%	0 .0%	63 100.0%
Red Lake	0 .0%	1 100.0%	0 .0%	1 100.0%
Redwood	3 42.9%	4 57.1%	0 .0%	7 100.0%
Renville	0 .0%	3 100.0%	0 .0%	3 100.0%
Rice	0 .0%	11 91.7%	1 8.3%	12 100.0%
Rock	0 .0%	1 100.0%	0 .0%	1 100.0%
Roseau	1 33.3%	2 66.7%	0 .0%	3 100.0%
St. Louis	7 16.3%	36 83.7%	0 .0%	43 100.0%
Scott	3 17.6%	14 82.4%	0 .0%	17 100.0%
Sherburne	3 25.0%	8 66.7%	1 8.3%	12 100.0%
Sibley	2 40.0%	3 60.0%	0 .0%	5 100.0%
Stearns	3 17.6%	14 82.4%	0 .0%	17 100.0%
Steele	2 33.3%	4 66.7%	0 .0%	6 100.0%
Stevens	0 .0%	0 .0%	0 .0%	0 .0%
Swift	0 .0%	0 .0%	0 .0%	0 .0%
Todd	1 50.0%	1 50.0%	0 .0%	2 100.0%
Traverse	0 .0%	0 .0%	0 .0%	0 .0%
Wabasha	0 .0%	2 66.7%	1 33.3%	3 100.0%
Wadena	1 33.3%	2 66.7%	0 .0%	3 100.0%
Waseca	0 .0%	5 100.0%	0 .0%	5 100.0%
Washington	6 18.2%	27 81.8%	0 .0%	33 100.0%

County	Number and Percentage of Offenders			Total
	State Prison	Jail	Other Sanctions	
Watowwan	0 .0%	1 100.0%	0 .0%	1 100.0%
Wilkin	0 .0%	2 100.0%	0 .0%	2 100.0%
Winona	0 .0%	3 100.0%	0 .0%	3 100.0%
Wright	2 18.2%	8 72.7%	1 9.1%	11 100.0%
Yellow Medicine	1 100.0%	0 .0%	0 .0%	1 100.0%
Total	150 18.0%	669 80.2%	15 1.8%	834 100.0%

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 dispositional (i.e., whether the prison sentence is stayed or imposed) or durational (i.e., concerning the length of sentence). An “aggravated” departure involves either imposing a prison sentence when a stayed sentence is presumed by the guidelines, or imposing a greater amount of time than that presumed. A “mitigated” departure means either imposing a stayed probationary sentence when prison is presumed, or imposing less time than the time presumed.

Dispositional Departures

Of the 834 cases sentenced in 2005, 219 (26%) were presumptive prison sentences under the sentencing guidelines. Of those cases, 143 (65%) were given the presumptive sentence and committed to prison. The remaining 76 cases (35%) were given mitigated dispositional departures and placed on probation. The mitigated dispositional departure rate for first-time offenders was 40 percent; for second or subsequent violators, 23 percent. There were fewer mitigated departures than in 2004, when the dispositional departure rate was 43 percent.

Of the 615 cases where the sentencing guidelines presumed a stayed sentence, seven cases (1%) were given aggravated dispositional departures and committed to prison. The remaining 608 cases received the presumptive stayed sentence and were placed on probation. As noted above, a stayed sentence, in which the offender is placed on probation, might include up to one year of incarceration in a local facility.

Table 2: Dispositional Departures

Presumptive Disposition	Sentence Received		Departure Rate
	Prison	Probation	
Prison – 219	143 (65%)	76 (35%)	Mitigated – 35%
Probation – 615	7 (1%)	608 (99%)	Aggravated – 1%
Total – 834	150 (18%)	684 (82%)	Total Dispositional -10%

The most frequently cited reasons for mitigated dispositional departure included amenability to probation (59%) and treatment (53%). In 24 percent of mitigated departures, judges cited the defendant's showing of remorse or acceptance of responsibility. In fifteen percent of the cases, the court chose to increase the length of time an offender would be supervised by imposing a probationary sentence. In 47 percent of the departures, the court noted that there was a plea negotiation, that the prosecutor recommended the sentence, or that the prosecutor did not object. The court stated that the prosecutor objected to the mitigated disposition in twelve percent of the cases. Of the seven cases where a prison sentence was imposed even though the presumptive disposition was probation, five (71%) were the result of a defendant's request for prison.

Durational Departures on Prison Cases

Of the 150 cases sentenced to prison, 109 (73%) received the recommended duration; forty-one cases (27%) received a sentence that was shorter than recommended. No cases received sentences longer than recommended. In 68 percent of the mitigated durational departures, the court cited plea agreement or lack of objection by the prosecutor. No prosecutorial objection to any of the mitigated durations was noted. Judges frequently cited the offender's show of remorse or acceptance of responsibility (34%), the fact that the crime was less onerous than typical (15%), and the fact that, by pleading guilty, the offender saved the taxpayers the cost of a trial (10%).

Table 3: Durational Departures: Executed Sentences

Number of Executed Sentences	No Departure	Aggravated Departures	Mitigated Departures	Total Departure Rate
150	109 (73%)	0	41 (27%)	27%

Revocations to Prison

A revocation occurs when an offender who is on probation violates 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. Information from the Department of Corrections indicates that, in 2005, 93 felony DWI offenders served their sentences in prison after being revoked from

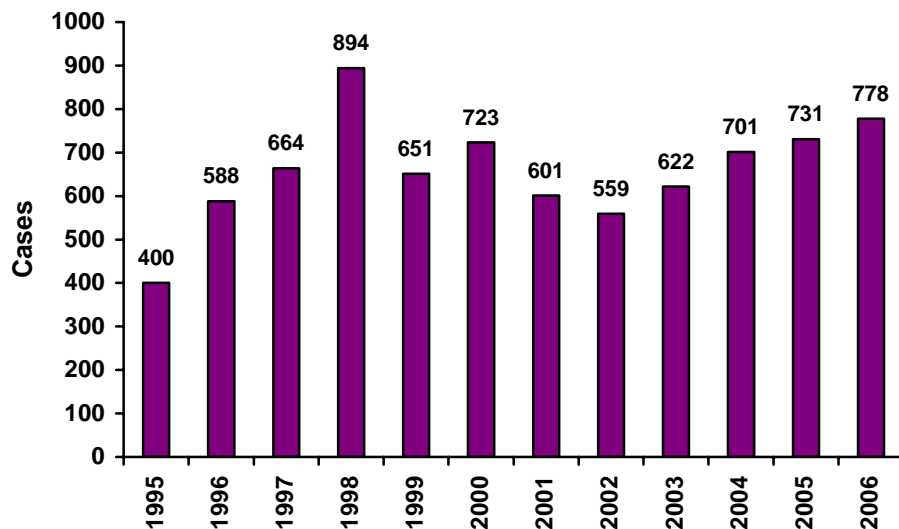
probation. There were 63 probation revocations in 2004 and 24 in 2003 for a total of 180 revocations. The revocation rate through the end of 2005 was eight percent.

County Attorney Firearms Reports

Current law directs County Attorneys to collect and maintain information on criminal complaints and prosecutions in which a defendant is alleged to have committed an offense while possessing or using a firearm, as described in M.S. § 609.11, subdivision 9*. This information is supposed to be forwarded to the Sentencing Guidelines Commission no later than July 1 of each year. Pursuant to M.S. § 244.09, subdivision 14, the Commission is required to include in its annual Report to the Legislature a summary and analysis of the reports received. Memoranda describing the mandate, along with forms on which to report, are distributed by the Commission to County Attorneys. Although the Commission's staff clarifies inconsistencies in the summary data, the information received from the County Attorneys is reported directly as provided.

Since the mandate began in 1995, the average number of annual cases involving firearms statewide has been 659. Between July 1, 2005 and July 1, 2006, there were a total of 778 cases allegedly involving a firearm. Prosecutors charged 750 cases (96%).

**Figure 1: Cases Allegedly Involving a Firearm –
1995 to 2005**



* The statute provides a mandatory minimum sentence of 36 months for the first conviction of specified offenses, and 60 months for a second. Offenses include 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; some criminal sexual conduct offenses; escape from custody; arson in the first, second, or third degree; felony drive-by shooting; aggravated harassment and stalking; felon in possession of a firearm; and felony controlled substance offenses.

Of the individuals charged, 525 (70%) were convicted of offenses designated in M.S. § 609.11. One hundred thirty-three individuals (18%) were convicted of offenses not covered by the mandatory minimum (e.g., terroristic threats); 11 (1%) were acquitted on all charges; 70 (9%) had all charges dismissed; and 11 (1%) were “other” cases, such as federal prosecutions and civil commitment. In 485 (92%) of the 525 cases in which there was a conviction for a designated offense, use or possession of a firearm was established on the record. In the cases in which the firearm was established on the record, 310 offenders (64%) were sentenced to the mandatory minimum prison term.

Figure 2: Cases Allegedly Involving a Firearm – Charged?

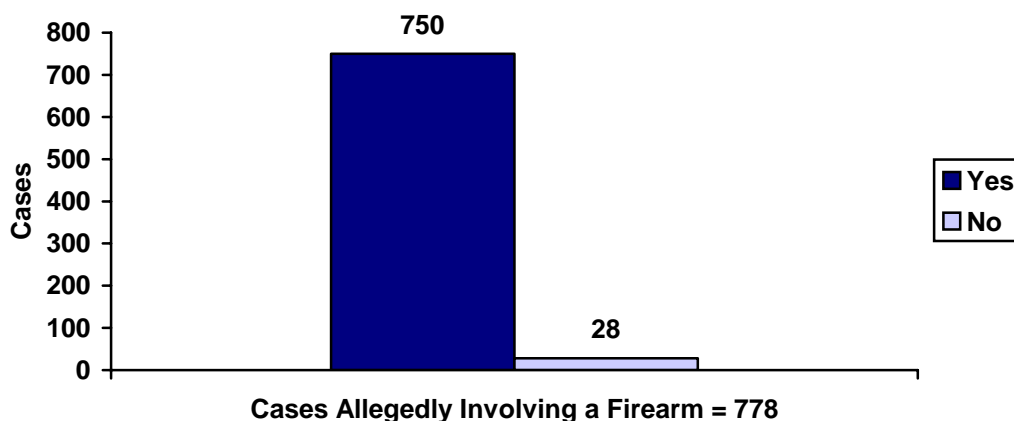
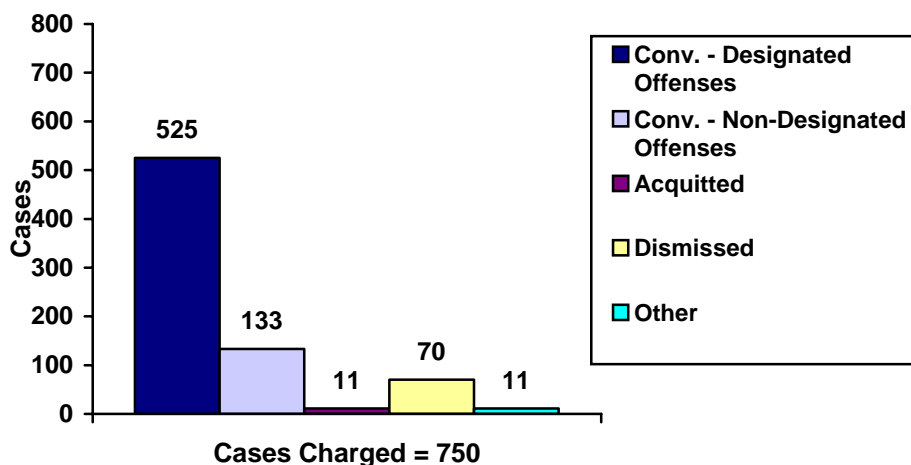
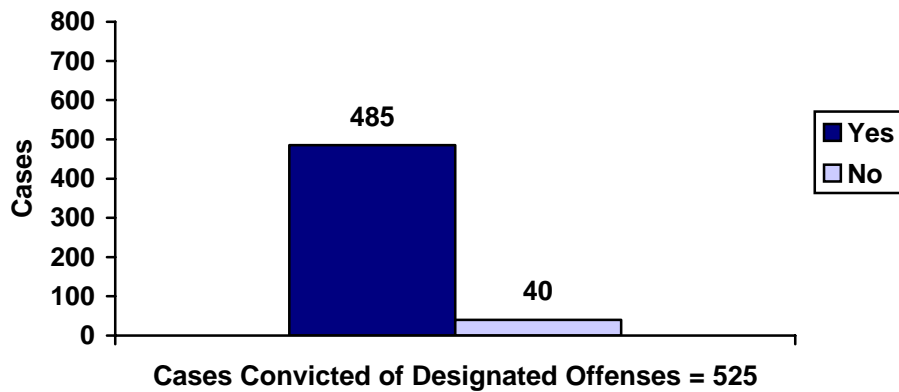


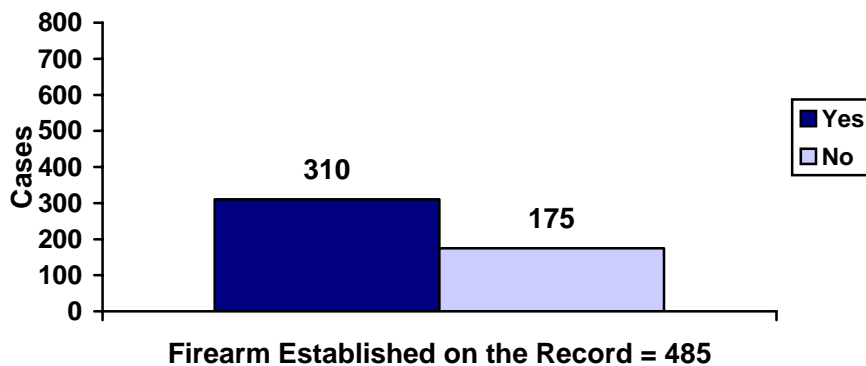
Figure 3: Cases Charged – Case Outcome



**Figure 4: Cases Convicted of Designated Offenses
– Firearm Established on the Record?**



**Figure 5: Firearm Established on the Record –
Mandatory Minimum Sentence Imposed and
Executed?**



County Attorney Reports on Criminal Cases Involving Firearms by County
Cases Disposed from July 1, 2005 to July 1, 2006

County	Cases Allegedly Involving a Firearm	Cases Charged	Cases Convicted – Designated Offense	Cases in which a Firearm was Established on the Record	Mandatory Minimum Sentence Imposed and Executed
Aitkin	7	6	4	0	0
Anoka	64	58	39	39	16
Becker	9	9	5	5	3
Beltrami	7	6	1	3	2
Benton	3	2	0	0	0
Big Stone	0	0	0	0	0
Blue Earth	9	9	4	4	4
Brown	0	0	0	0	0
Carlton	5	5	2	2	0
Carver	3	2	0	0	0
Cass	18	18	7	5	2
Chippewa	1	1	1	0	0
Chisago	6	6	6	6	6
Clay	1	1	0	0	0
Clearwater	2	2	0	0	0
Cook	0	0	0	0	0
Cottonwood	2	2	1	1	0
Crow Wing	17	17	10	2	1
Dakota	34	34	29	29	19
Dodge	2	2	0	0	0
Douglas	1	1	1	1	1
Faribault	0	0	0	0	0
Fillmore	1	1	0	0	0
Freeborn	3	3	3	3	2
Goodhue	8	8	5	4	1
Grant	0	0	0	0	0
Hennepin	172	172	143	143	107
Houston	4	4	2	2	2
Hubbard	3	3	1	1	1
Isanti	2	2	2	2	1
Itasca	11	11	7	6	1
Jackson	3	3	3	3	0
Kanabec	3	3	2	2	1
Kandiyohi	7	7	5	5	3
Kittson	1	1	1	1	0
Koochiching	1	1	0	0	0
Lac Qui Parle	0	0	0	0	0
Lake	1	1	1	1	1

County	Cases Allegedly Involving a Firearm	Cases Charged	Cases Convicted – Designated Offense	Cases in which a Firearm was Established on the Record	Mandatory Minimum Sentence Imposed and Executed
Lake of the Woods	0	0	0	0	0
Le Sueur	2	2	1	1	1
Lincoln	0	0	0	0	0
Lyon	2	2	1	1	0
McLeod	1	1	0	0	0
Mahnomen	2	2	2	1	1
Marshall	0	0	0	0	0
Martin	1	1	0	0	0
Meeker	5	5	3	3	3
Mille Lacs	14	13	8	4	3
Morrison	6	6	4	3	2
Mower	2	2	0	0	0
Murray	1	1	1	1	1
Nicollet	0	0	0	0	0
Nobles	2	2	2	2	2
Norman	4	4	3	3	3
Olmsted	7	7	5	5	3
Otter Tail	6	5	0	0	0
Pennington	1	1	1	0	0
Pine	7	7	2	2	1
Pipestone	8	6	3	3	1
Polk	8	8	6	6	2
Pope	0	0	0	0	0
Ramsey	107	107	85	85	48
Red Lake	2	2	0	0	0
Redwood	8	8	4	2	1
Renville	6	6	3	3	0
Rice	7	7	1	1	0
Rock	0	0	0	0	0
Roseau	9	8	5	2	2
Scott	7	7	7	6	3
Sherburne	11	11	7	7	2
Sibley	2	2	2	2	0
St. Louis	52	45	33	26	20
Stearns	26	22	17	17	13
Steele	8	8	7	6	6
Stevens	2	2	2	2	2
Swift	1	1	1	1	1
Todd	5	5	5	5	5
Traverse	0	0	0	0	0
Wabasha	3	1	1	1	1
Wadena	3	3	3	3	2

County	Cases Allegedly Involving a Firearm	Cases Charged	Cases Convicted – Designated Offense	Cases in which a Firearm was Established on the Record	Mandatory Minimum Sentence Imposed and Executed
Waseca	0	0	0	0	0
Washington	13	13	1	1	1
Watonwan	0	0	0	0	0
Wilkin	0	0	0	0	0
Winona	6	6	5	3	2
Wright	9	9	6	6	3
Yellow Medicine	1	1	1	1	1
Total	778	750	525	485	310

Appendix

How the Sentencing Guidelines Work

Minnesota's sentencing guidelines are contained in two grids and a set of sentencing rules updated and published annually by the Guidelines Commission. The Sex Offender Grid is used for sentencing felony sex offenses and sex-related crimes, such as possession of child pornography and failure to register as a predatory offender. Sex offenders convicted under M.S. § 609.3455 were taken out of the guidelines scheme by the 2005 Legislature. These "worst of the worst" individuals receive either life without possibility of release or "life sentences" whose actual duration is determined by the Department of Corrections. The original Sentencing Guidelines Grid is applied to all other felony sentences, except murder in the first degree. First-degree murderers, like the sex offenders not covered by the guidelines, are sentenced to life with or without possibility of release.

On the left side of each grid is a vertical scale on which each felony is ranked according to its seriousness. A few felonies are unranked, because they are new offenses or are seldom charged. These crimes are given a ranking when there are enough convictions to make it possible to see some agreement among practitioners as to how they should be sentenced. In the meantime, judges may rank these crimes at the degree of seriousness they deem appropriate.

Across the top of each grid is a horizontal scale of criminal history scores starting at zero. When a felon is sentenced, a criminal history is calculated according to the rules printed in *Sentencing Guidelines and Commentary*, and the crime being sentenced is located on the ranking scale. The box at the intersection of criminal history and felony rank contains a presumptive sentence that is either a specific number of months, or a range within which a sentencing judge may choose a specific number of months. Some of the boxes are shaded; sentences that appear in those areas are stayed, or probationary, sentences. In these cases, it is presumed that the offender will be required to meet certain conditions, which may include up to 365 days in a local jail; if the offender does not comply with the conditions of probation, he may be sent to prison. Sentences in the unshaded area of each grid are presumed commitments, in which the offender is sent to a state prison. There are, however, a number of offenses that carry a presumptive prison sentence regardless of where the offender is located on the Sentencing Guidelines Grid, e.g. some crimes involving dangerous weapons and certain second-time drug and burglary cases.

Judges must impose the presumptive sentence, unless there are substantial and compelling reasons to give a more or less severe punishment. Judges are able to consider characteristics of an offender, or of a particular crime, that they believe make a case different from the typical offense of its kind when they determine sentences. They are required to explain their reasons for upward or downward departures, which are governed by legal principles and may be appealed by either the defendant or the prosecutor. Over the years, decisions of the Supreme Court and the Court of Appeals have defined what characteristics are fair for a judge to consider and have provided guidance as to what kinds of departures are legally appropriate.

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



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 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, 2006

SEX OFFENDER 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		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
CSC 1 st Degree	A	144 144-173	156 144-187	168 144-202	180 153-216	234 199-281	306 260-360	360 306-360
CSC 2 nd Degree – (c),(d), (e), (f), (h)	B	90 90-108	110 94-132	130 111-156	150 128-180	195 166-234	255 217-300	300 255-300
CSC 3 rd Degree – (c),(d), (g), (h), (i), (j), (k), (l), (m), & (n)	C	48 41-58	62 53-74	76 65-91	90 77-108	117 99-140	153 130-180	180 153-180
CSC 2 nd Degree – (a), (b), (g) CSC 3 rd Degree – (a), (b), (e), (f) 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 4 th Degree – (c),(d), (g), (h), (i), (j), (k), (l), (m), & (n) 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 4 th Degree – (a), (b), (e), (f) Possession of Child Pornography: Subsequent or by Predatory Offender	F	18	27	36	45 38-54	59 50-71	77 65-92	84 71-101
CSC 5 th 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 20-29	30 26-36	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

Sentencing Guidelines Modifications

A. Modifications Requiring Legislative Review in 2007

Theft Offense List

It is recommended that the following property crimes be treated similarly. This is the list cited for the two THEFT CRIMES (\$2,500 or less and over \$2,500) in the Offense Severity Reference Table.

...

Bringing Stolen Goods Into State
609.525

...

Guidelines Section V. OFFENSE SEVERITY REFERENCE TABLE

...

VI ~~Bringing Stolen Goods Into State — over \$2,500~~

V ~~Bringing Stolen Goods Into State — \$1,000-\$2,500~~

IV ~~Bringing Stolen Goods Into State — \$301-\$999~~

...

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
...		
609.525 all sections	Bringing Stolen Goods into State-over \$2,500	6 <u>3</u>
609.525 all sections	Bringing Stolen Goods into State- \$1,000-\$2,500 \$501-\$2,500	5 <u>2</u>
609.525 all sections	Bringing Stolen Goods into State- \$301-\$999 \$251-\$500 with previous conviction	4 <u>2</u>
...		

B. New Sex Offender Grid and Related Changes to Text

Guidelines Section 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 on the applicable sentencing grid. The grids 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 thru 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
 - c. 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
 - d. 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.
 - e. 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 Offender (M.S. 243.166) and the current offense of conviction is a specified sex offense, other than Failure to Register as a Predatory Offender (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 demarcates 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 areas of the grids, 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 areas, 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

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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.

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Guidelines Section IV. SEX OFFENDER 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.

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE		0	1	2	3	4	5	6 or more
CSC 1 st Degree	A	144 144-173	156 144-187	168 144-202	180 153-216	234 199-281	306 260-360	360 306-360
CSC 2 nd Degree – (c),(d), (e), (f), (h)	B	90 90-108	110 94-132	130 111-156	150 128-180	195 166-234	255 217-300	300 255-300
CSC 3 rd Degree – (c),(d), (g), (h), (i), (j), (k), (l), (m), & (n)	C	48 41-58	62 53-74	76 65-91	90 77-108	117 99-140	153 130-180	180 153-180
CSC 2 nd Degree – (a), (b), (g) CSC 3 rd Degree – (a), (b), (e), (f) 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 4 th Degree – (c),(d), (g), (h), (i), (j), (k), (l), (m), & (n) 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 4 th Degree – (a), (b), (e), (f) Possession of Child Pornography: Subsequent or by Predatory Offender	F	18	27	36	45 38-54	59 50-71	77 65-92	84 71-101
CSC 5 th 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 20-29	30 26-36	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	84	56	28
14	9 1/3	4 2/3	90	60	30
15	10	5	91	60 2/3	30 1/3
16	10 2/3	5 1/3	102	68	34
18	12	6	110	73 1/3	36 2/3
20	13 1/3	6 2/3	117	78	39
24	16	8	119	79 1/3	39 2/3
25	16 2/3	8 1/3	120	80	40
27	18	9	130	86 2/3	43 1/3
30	20	10	140	93 1/3	46 2/3
36	24	12	144	96	48
39	26	13	150	100	50
40	26 2/3	13 1/3	153	102	51
45	30	15	156	104	52
48	32	16	168	112	56
51	34	17	180	120	60
59	39 1/3	19 2/3	195	130	65
60	40	20	234	156	78
62	41 1/3	20 2/3	255	170	85
70	46 2/3	23 1/3	300	200	100
76	50 2/3	25 1/3	306	204	102
77	50 2/3	25 2/3	360	240	120
78	52	26			

Guidelines Section 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.)
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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)
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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)
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V	Criminal Sexual Conduct 3 — 609.344, subd. 1(b), (e), & (f)
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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)
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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
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I	Registration of Predatory Offenders — 243.166 subd. 5(b)
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...

- 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), (h), (i), (j), (k), (l), (m), (n)
- D** Criminal Sexual Conduct 2 - 609.343 subd. 1 (a), (b), (g)
Criminal Sexual Conduct 3 - 609.344 subd. 1 (a), (b), (e), (f)
Dissemination of Child Pornography: subsequent or by predatory offender -
617.247 subd 3
- E** Criminal Sexual Conduct 4 - 609.345 subd. 1 (c), (d), (g), (h), (i), (j), (k), (l), (m), (n)
Use Minors in Sexual Performance - 617.246 subd. 2, 3, 4
Dissemination of Child Pornography - 617.247 sub. 3
- F** Criminal Sexual Conduct 4 - 609.345 subd. 1 (a), (b), (e), (f),
Possession of Child Pornography: subsequent or by predatory offender -
617.247 subd. 4
- G** Criminal Sexual Conduct 5- 609.3451 subd. 3
Solicitation of Children to Engage in Sexual Conduct - 609.352, subd. 2
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	4 <u>H</u>
243.166 subd. 5(c)	Registration of Predatory Offenders (2 nd or subsequent violations)	3 <u>H</u>
609.342	Criminal Sexual Conduct 1 (Sexual Penetration)	9 * <u>A</u>
609.342	Criminal Sexual Conduct 1 (Sexual Contact- victim under 13)	8 *
609.343 subd.1(a)(b)(g)	Criminal Sexual Conduct 2	6 <u>D</u>
609.343 subd.1(c)(d)(e)(f)(h)	Criminal Sexual Conduct 2	8 ⁺ <u>B</u>
609.344 subd. 1(a)(b)(e)(f)	Criminal Sexual Conduct 3	5 <u>D</u>
609.344 subd. 1(c)(d)(g) (h)(i)(j)(k)(l)(m)(n)	Criminal Sexual Conduct 3	8 <u>C</u>
609.345 subd. 1(a)(b)(e)(f)	Criminal Sexual Conduct 4	4 <u>F</u>
609.345 subd. 1(c)(d)(g) (h)(i)(j)(k)(l)(m)(n)	Criminal Sexual Conduct 4	6 <u>E</u>
609.3451 subd. 3	Criminal Sexual Conduct 5	4 <u>G</u>
609.352 subd. 2	Solicitation of Children to Engage in Sexual Conduct	3 <u>G</u>
617.23 subd. 3	Indecent Exposure	4 <u>G</u>
617.246	Use of Minors in Sexual Performance Prohibited	unranked <u>E</u>
<u>617.247 subd. 3</u>	<u>Dissemination of Pictorial Representation of Minors</u> (subsequent or by predatory offenders)	<u>D</u>
<u>617.247 subd. 3</u>	<u>Dissemination of Pictorial Representation of Minors</u>	<u>E</u>
617.247 subd. 4	Possession of Pictorial Representation of Minors (subsequent or by predatory offenders)	unranked <u>F</u>
617.247 subd. 4	Possession of Pictorial Representation of Minors	unranked <u>G</u>

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

C. Ranking of Offenses

Guidelines Section V. OFFENSE SEVERITY REFERENCE TABLE

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III	<u>Escape from Civil Commitment – 609.485, subd. 4 (a) (5)</u>
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II	<u>Failure to Control a Regulated Animal, resulting in great bodily harm or death – 346.155, subd. 10(e)</u>
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Unranked	<u>Counterfeiting of Currency – 609.632</u> <u>Fraudulent or Improper Financing Statements – 609.7475</u> <u>Computer Encryption – 609.8912</u>
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...

D. Misdemeanor and Gross Misdemeanor Offense List

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Counterfeiting of Currency – 609.632
Fraudulent or Improper Financing Statements – 609.7475
Computer Encryption – 609.8912
G.M. Facilitating Access to a Computer Security System – 609.8913
Disruption of Funeral Services – 609.501
G.M. Interference with 911 Calls – 609.78 subd.2
G.M. 4th Degree Assault of Animal Control Officer – 609.2231 subd.6

...

E. Other Modifications

1. Conditional Release Language in Guidelines Section II.E

E. Mandatory Sentences

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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, use of minors in a sexual performance under M.S. § 617.246, or a child pornography offense under M.S. § 617.247 is subject to a five-year conditional release term. If the person was committed to prison for a violation of M.S. §§ 617.246 (use of minors in a sexual performance) or 617.247 (possession or dissemination of child pornography), and there is a previous or prior conviction for either of these offenses or for a criminal sexual conduct offense, the person shall be placed on conditional release for ten years. Finally, a person sentenced to imprisonment for first degree (felony) driving while impaired is subject to five years of conditional release.

2. Presumptive Sentence for Attempted Criminal Sexual Conduct in Guidelines Section II.G

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. 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.

....

3. Description of Post-*Blakely* Sentencing Issues

Guidelines Section II.C. Presumptive Sentence:

Comment

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II.C.09. Post *Blakely* Sentencing Issues

The 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 requested 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, listened 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 involved 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 involved a defendant that was convicted of 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 –706 N.W.2d 40—(Minn. 2005) Case involved 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 guidelines 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 Sentencing Guidelines Commission awaits further action by the Minnesota Courts addressing this specific issue.

State v. Conger, 687 N.W.2d 639 (Minn. App. 2004) Case involved a defendant who pled guilty to aiding and abetting in a 2nd degree intentional and unintentional murder. At sentencing, the judge determined that multiple aggravating factors were present and imposed 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 involved a defendant who was arrested for theft with a presumptive guidelines sentence of 21 months. The judge determined the defendant is a career criminal under Minn. Stat. §609.1095 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 imposed 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 constitute a “pattern of criminal conduct” making him a career criminal.

State v. Fairbanks 688 N.W. 2d 333 (Minn. App. 2004) Case involved a defendant who was convicted of 1st degree assault of a correctional employee and kidnapping. The judge sentenced 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 stipulated 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

Effective August 1, 2006, Minn. Stat. § 609.11 provides for a mandatory minimum prison sentence when the factfinder determines that the defendant possessed a deadly weapon while committing the predicate offense. If an offense that occurred before August 1, 2006, is charged under § 609.11, the defendant cannot be sentenced to the mandatory minimum when the resulting sentence is higher than the presumptive sentence for the predicate offense, unless the same Blakely-based procedure is followed. State v. Barker, 705 NW2d 768 (Minn. 2005). 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 involved a defendant convicted of a 5th degree assault and tampering with a witness. The defendant had 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 argued 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 702 N.W.2d 268, 273 (Minn. 2005). 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 involved a defendant who pled guilty to a charge with a violation of an order for protection (OFP) and terroristic threats. At sentencing the court imposed the presumptive guideline sentence of 18 months stay of execution. The defendant subsequently violated probation and admitted to the violations. The court revoked the defendant’s probation, executed the 18 months sentence for the terroristic threats and vacated 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 was 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 was issued the day after the defendant is sentenced. Defendant challenged 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 involved 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 lived in the same house as the 13 year old victim and there were 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 admitted the sexual penetration and stated his attorney discussed the “significant relationship” element with him. District court stated this is one of the worst child sex abuse cases it had seen and imposed an aggravated durational departure from the 144 month presumptive guideline sentence to 216 months. Defendant appealed 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 involved 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 admitted to multiple acts of penetration with stepdaughter and son, including blindfolding the son. District Court determined 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 imposed 216 month consecutive sentences, representing a 50 percent increase over the presumptive guideline sentence. Defendant appealed 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.

4. Felony DWIs

a. Consecutive Sentencing

Guidelines Section II.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 II.D of these guidelines.

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Presumptive Consecutive Sentences

Consecutive sentences are presumptive when the conviction is for a crime committed by an offender serving an executed prison sentence, or by an offender on supervised release, on 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 disposition is commitment to prison, the requirement for consecutive sentencing does not apply (M.S. § 169A.28 subd. 1(b)).

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b. Previous DWI Convictions

Guidelines Section II.C. Presumptive Sentence:

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When the current conviction is for felony DWI, and the offender ~~has a prior conviction for a felony DWI~~ had a previous conviction, as defined by Minn. Stat. § 609.02 subd. 5, for a felony DWI prior to commission of the current offense, the presumptive disposition is Commitment to the Commissioner of Corrections.

....

E. Mandatory Sentences:

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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 outside the shaded areas of the grid, the sentence should be executed. For cases contained in cells within the shaded areas of the grid, the sentence should be stayed unless the offender ~~has a prior conviction for a felony DWI~~ had a previous conviction, as defined by Minn. Stat. § 609.02 subd. 5, for a felony DWI prior to commission of the current offense, in which case the presumptive disposition is Commitment to the Commissioner of Corrections.

....

B. Criminal History:

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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 guilty verdict~~ or extended jurisdiction juvenile conviction in a felony, non-traffic gross misdemeanor or gross misdemeanor driving while impaired or refusal to submit to a chemical test case, ~~an extended jurisdiction juvenile case, or following a felony, gross misdemeanor or an extended jurisdiction juvenile conviction; or~~

...

Comment

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II.B.202. As a general rule, the Commission excludes traffic offenses from consideration in computing the criminal history score. Given the increased penalties associated with driving while impaired offenses and serious impact on public safety, the Commission determined that these offenses should be considered for custody status points in the same manner as non-traffic offenses. ~~However, one gross misdemeanor offense--driving while impaired--is particularly relevant in sentencing cases of criminal vehicular homicide or injury and first degree (felony) driving while impaired. Because of its particular relevance in cases of this nature, a custody status point shall be assigned if the offender is under probation, jail, or other custody supervision following a gross misdemeanor conviction under section 169A.20, 169A.31, 169.121, 169.1211, 169.129, or 360.0752, when the felony for which the offender is being sentenced is criminal vehicular homicide or injury or first degree (felony) driving while impaired, and the offense occurred while under that supervision.~~

5. Moving Language from Commentary to Guidelines (*State v. Rouland* Impact)

a. Unranked Offenses

Guidelines Section II.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.~~

~~**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~~
- ~~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~~
- ~~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~~
- ~~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.~~

Guidelines Section V. OFFENSE SEVERITY REFERENCE TABLE

...

U N R A N K E D	<u>Abortion – 617.20; 617.22; 145.412</u>
	<u>Accomplice After the Fact – 609.495, subd. 3</u>
	<u>Adulteration – 609.687, subd. 3 (3)</u>
	<u>Aiding Suicide – 609.215</u>
	<u>Altering Engrossed Bill – 3.191</u>
	<u>Animal Fighting – 343.31</u>
	<u>Assaulting or Harming a Police Horse – 609.597, subd. 3 (1) & (2)</u>
	<u>Bigamy – 609.355</u>
	<u>Cigarette Tax and Regulation Violations – 297F.20</u>
	<u>Collusive Bidding/Price Fixing – 325D.53, subds. 1 (3), 2 & 3</u>
	<u>Computer Encryption – 609.8912</u>
	<u>Concealing Criminal Proceeds; Engaging in Business – 609.496; 609.497</u>
	<u>Corrupting Legislator – 609.425</u>
	<u>Counterfeiting of Currency – 609.632</u>
	<u>Damage to Property of Critical Public Service Facilities, Utilities, and Pipelines – 609.594</u>
	<u>Escape with Violence from Gross Misdemeanor or Misdemeanor Offense – 609.485, subd. 4 (a) (3)</u>
	<u>Failure to Report – 626.556, subd. 6</u>
	<u>Falsely Impersonating Another – 609.83</u>
	<u>Female Genital Mutilation – 609.2245</u>
	<u>Forced Execution of a Declaration – 145B.105</u>
	<u>Fraudulent or Improper Financing Statements – 609.7475</u>
	<u>Gambling Acts (Cheating, Certain Devices Prohibited; Counterfeit Chips; Manufacture, Sale, Modification of Devices; Instruction) – 609.76, subd. 3, 4, 5, 6, & 7</u>
	<u>Hazardous Wastes – 609.671</u>
	<u>Horse Racing – Prohibited Act – 240.25</u>
	<u>Incest – 609.365</u>
	<u>Insurance Fraud – Employment of Runners – 609.612</u>
	<u>Interstate Compact Violation – 243.161</u>
	<u>Issuing a Receipt for Goods One Does Not Have – 227.50</u>
	<u>Issuing a Second Receipt Without “Duplicate” On It – 227.52</u>
	<u>Killing or Harming a Public Safety Dog – 609.596, subd. 1</u>
	<u>Labor Trafficking – 609.282</u>
	<u>Lawful Gambling Fraud – 609.763</u>
	<u>Metal Penetrating Bullets – 624.74</u>
	<u>Misprision of Treason – 609.39</u>
	 <u>Motor Vehicle Excise Tax – 297B.10</u>
	 <u>Obscene Materials; Distribution – 617.241, subd. 4</u>
	<u>Obstructing Military Forces – 609.395</u>
	<u>Pipeline Safety – 299J.07, subd. 2</u>
	<u>Police Radios During Commission of Crime – 609.856</u>
	<u>Racketeering, Criminal Penalties (RICO) – 609.904</u>
	<u>Real and Simulated Weapons of Mass Destruction – 609.712</u>
	<u>Refusal to Assist – 6.53</u>

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
Unlawful Transfer of Sounds; Sales – 325E.201
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)

...

b. Criminal History

Guidelines Section II.B. Criminal History: 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.

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~~ 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.

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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

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~~**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.~~

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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.

6. New Offense Eligible for Permissive Consecutive Sentencing

Guidelines Section VI. OFFENSES ELIGIBLE FOR PERMISSIVE CONSECUTIVE SENTENCES

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609.185 Murder in the First Degree

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7. Departures from the Presumptive Guidelines Sentence (*Blakely v. Washington* Impact)

Guidelines Section II.D. Departures from the Guidelines: The sentence ranges provided in the Sentencing Guidelines Grids are presumed to be appropriate for the crimes to which they apply. Thus, the judge shall pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids. A sentence outside the applicable range on the grids 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 substantial and compelling circumstances that make the departure more appropriate 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.