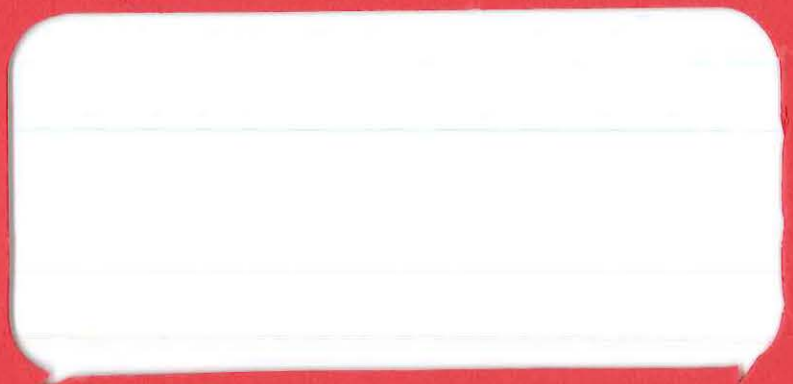
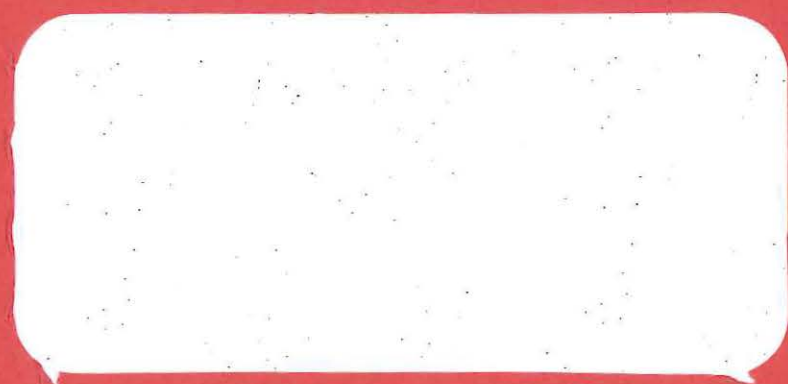


Minnesota Sentencing Guidelines Commission





Minnesota Sentencing Guidelines Commission
REPORT TO THE LEGISLATURE
January, 1989

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EXECUTIVE SUMMARY

The Sentencing Guidelines have been in operation since May 1, 1980. The purposes of these guidelines are to 1) reduce sentencing disparity for those convicted of felonies; 2) establish proportionality in sentencing by recommending harsher sanctions for serious person offenders and property offenders with lengthy criminal history records; 3) provide certainty and truth in sentencing so that it is known what period of time will be served when sentence is pronounced; and 4) coordinate sentencing practices with the correctional resources made available by the legislature. The eleven member commission continues to monitor and evaluate sentencing practices, modify the guidelines when necessary, and provide information and training to interested parties.

The 1988 Legislature passed numerous laws that were ranked by the Commission. New felonies were created for a second or subsequent fleeing of a police officer and terroristic threats with a replica firearm. Both offenses carry a statutory maximum of one year and one day and were ranked by the Commission at severity level I. Also ranked at severity level I is the new felony of unauthorized connection to a cable communications system. Two new felonies were ranked at severity level V: Check Forgery over \$35,000 and Financial Transaction Card Fraud over \$35,000. Five other new felonies were placed on the unranked offense list because the Commission believed that these offenses would occur infrequently and that circumstances would vary greatly from case to case.

The Commission has adopted a set of modifications to the guidelines that are the most substantive and far-reaching changes since the guidelines were first implemented in 1980. These modifications, that will go into effect August 1, 1989, absent any legislative action to the contrary, address the following: 1) the recent concerns of the public on the appropriate sentences for violent offenders; 2) the problem of increasing prison populations; and 3) numerous problems related to the criminal history score computation that had been identified previously but not yet addressed through guidelines modifications. The Commission recognizes that changes to the guidelines will have implications for the entire sentencing system. Thus, the Commission has chosen to present the adopted modifications as a package; one that addresses multiple problems within the context of the goals and structure of the sentencing guidelines and the mandate of the legislature. The Commission believes this systematic approach is essential for assuring that conflicting concerns are fairly assessed and balanced.

The Commission, to address the first concern above, adopted major changes to the sentencing guidelines grid. Durations at severity level VII, criminal history score of zero, were doubled from 24 months to 48 months with increases of 10 months for every additional criminal history point up to six. Durations at severity level VIII, criminal history score of zero, were doubled from 43 months to 86 months with increase of 12 months for every additional criminal history point up to six.

The Commission adopted a weighting scheme that is believed will assure a greater degree of proportionality in sentencing. Offenders who have a history of serious felonies are considered more culpable than those offenders whose prior felonies consist primarily of low severity, nonviolent offenses. The weight of the prior felony will depend on its severity level; i.e., 2 points for severity levels VIII - X, 1 1/2 points for severity levels VI - VII; 1 point for severity levels III - V, and 1/2 point for severity levels I - II. This modification addresses all three concerns noted above.

The Commission adopted a modification to restructure the misdemeanor point. The Commission has been considering the problem of unreliable and inconsistent information regarding misdemeanors and gross misdemeanors for some time. Although there have been numerous suggestions to eliminate the misdemeanor point because of wide disparity in the recording and

collection of these priors, the Commission believes that at this time, there is still merit for retaining the misdemeanor point because of the relevance it may have to felony activity. The Commission developed a Misdemeanor and Gross Misdemeanor Offense List that includes those offenses that are particularly relevant in the consideration of the appropriate guideline sentence. The weight of prior gross misdemeanors was also reduced to create a more proportional weighting scheme. This restructuring should reduce some of the disparity that results from the wide range of misdemeanor type activity that can currently be included to make up the misdemeanor point. This modification addresses the second and third concerns noted above.

One of the concerns of the Attorney General's Task Force on the Prevention of Sexual Violence Against Women (Task Force) involved the sentencing of offenders who had a juvenile history reflecting violent offenses. This concern had been raised previously by the Minnesota Police and Peace Officers Association as well as other groups and individuals. The Commission has struggled with this issue because on a philosophical basis, a young adult who has a prior violent juvenile record, consisting of offenses committed while that offender was 16 and/or 17 years of age, should be held more accountable. However, the Commission is concerned about the differences in the rights afforded offenders in juvenile court as opposed to adult court and the varying procedures used in various jurisdictions. Because of the concern over due process rights, the Commission chose to adopt a change to the juvenile history point on a somewhat modest basis. Offenders who have at least one prior serious person offense among the other prior juvenile offenses committed after their sixteenth birthday, are eligible to receive up to two points for offenses committed and prosecuted as a juvenile.

The Commission adopted a new mitigating factor for use as a dispositional departure reason. This departure factor allows for a judge to depart from the guidelines for nonviolent crime spree offenders who have not been previously sanctioned in the community at least once or twice. This policy change addresses the third concern above with respect to the problem of the increasing impact that the criminal history score continues to have on who goes to prison.

The Commission amended an aggravating factor to clarify that the sentencing judge may depart from the sentencing guidelines when the offender is a repeat sex offender.

The Commission added commentary to require that judges provide reasons for departure beyond the single reason of "amenable to probation" or "unamenable to probation." These reasons could be closely related to social and economic factors and the Commission would like the court to demonstrate that the departure is not based on any of the excluded factors.

The Commission's adopted modifications will increase prison populations substantially beyond the current level of capacity. The male prison population will begin to increase by approximately 1993, and will grow by 400 or more beds by approximately 1998. The Commission's modifications do allow for time to plan for the increases. Without the Commission's complete package, male prison populations will be beyond capacity by 1990 and the increases will go beyond 600 additional beds.

The Commission has adopted these stiff increases in durations for severity level VII and VIII out of concern that the current durations and the increased durations initially considered by the Commission, were not proportionate to the severity of these offenses. There is no evidence, however, to suggest that longer sentences reduce the rate of crime. The additional funding the state must invest to provide the prison space that is required for these increases will be to satisfy the desire of the public to have more just and proportionate sentences for violent offenders. The Legislature should certainly look to the Task Force report on Education/Prevention of Sexual Violence which offers some excellent recommendations on ways to address the problem of prevention.

I. OVERVIEW

A. Brief Description of the Sentencing Guidelines

The purposes of the guidelines are to 1) reduce sentencing disparity for those convicted of felonies; 2) establish proportionality in sentencing by recommending harsher sanctions for serious person offenders and property offenders with lengthy criminal history records; 3) provide certainty and truth in sentencing so that it is known what period of time will be served when sentence is pronounced; and 4) coordinate sentencing practices with the correctional resources made available by the legislature.

The Minnesota Sentencing Guidelines Commission was created by the Legislature in 1978 to establish sentencing guidelines which define:

1. when state imprisonment of a felon is appropriate, and
2. a fixed sentence for felons who are imprisoned in state facilities based on reasonable offense and offender characteristics.

The sentencing guidelines apply to persons convicted of felonies committed on or after May 1, 1980. Guidelines replace the old indeterminate system where judges pronounced symbolic sentences and the parole board determined actual durations. Guidelines are presumptive with respect to who should go to prison and the length of the sentence. Felons imprisoned in state prisons under the guidelines serve the sentence pronounced by the judge, reduced by good time. Judges can depart from the guidelines if there are substantial and compelling circumstances associated with the case. Either the defendant or the prosecution may appeal any sentence to the Appeals Courts.

The recommended guideline sentence is based on two factors: the primary factor is the severity of the conviction offense and the secondary factor is the criminal history score of the offender.

The Commission ranked all Minnesota felony offenses into ten levels according to the severity of the offense. These ten severity levels comprise the vertical axis of the sentencing guidelines grid. By law, First Degree Murder is excluded from the guidelines and continues to have a mandatory life sentence. The Commission continues to rank felony offenses as they are created or amended by the state legislature. (A full listing of offenses in the various severity levels is contained on pages 33 through 40 of the sentencing guidelines.)

The criminal history index measures the offender's prior record, and the score on that index comprises the horizontal axis of the sentencing guidelines grid. The index consists of four measures of prior criminal record: (1) the number of prior felony sentences; (2) a limited measure of prior misdemeanor/gross misdemeanor sentences; (3) a limited measure of the prior serious juvenile record; and (4) "custody status", which indicates if the offender was on probation or parole status when the current offense was committed.

The recommended guideline sentence is found in the cell of the sentencing guidelines grid where the offender's criminal history score and the appropriate severity level intersect. For cells above and to the left of the solid line, the guidelines recommend a stayed sentence unless the conviction offense carries a mandatory minimum sentence. For cells below and to the right of the solid line, the guidelines recommend imprisonment in a state prison. The number in the cell is the recommended length of the prison sentence in months.

For offenders given stayed sentences, the judge may set probationary conditions including fines, restitution, treatment, community work orders, or confinement in a county jail or workhouse for a period up to one year. At present, there are no guidelines for judges to use when setting conditions of a stayed sentence or the length of probation.

Those imprisoned under the guidelines will serve the prison sentence pronounced by the judge, reduced by one day for every two days of good behavior. All offenders must serve a period of supervised release equal to the amount of good time earned. Thus, on a 60 month prison sentence an offender would serve 40 months in prison, and 20 months on supervised release subject to conditions set by the Commissioner of Corrections. If the offender violates those conditions, the supervised release may be revoked and the offender returned to prison.

B. Role of the Commission

The current Commission consists of 11 members: one justice from the Supreme Court, one judge from the Court of Appeals, two district court judges, a prosecuting attorney, a defense attorney, a probation officer representative, a law enforcement representative, the Commissioner of Corrections, and two citizen representatives, one of which is a crime victim. The current Chair of the Commission is Dan Cain, one of the citizen representatives.

The current role of the Commission includes three major activities. First, the Commission monitors sentencing practices for the approximately seven thousand felony sentences imposed each year. The information is used to: 1) evaluate the sentencing guidelines; 2) identify problem areas; 3) calculate fiscal impacts of proposed bills as requested by the legislature; and 4) project prison populations.

Second, the Commission modifies the guidelines each year. The major area of modification is the ranking of crimes created or amended by the legislature. Modifications are also made in response to case law, to problems identified by the monitoring system, and to problems raised by various groups, organizations, and individuals.

Third, the Commission provides information and training on sentencing guidelines to criminal justice groups, the legislature, and other interested organizations.

C. Summary of Previous Changes to the Guidelines

The Commission has made numerous changes to the sentencing guidelines since they were first implemented. These changes are described in detail in previous reports to the legislature. A brief summary of the more substantive changes is presented below.

Effective 8/1/81:

- 1) Addition of an aggravating factor to allow for departures in major controlled substance offenses.
- 2) Change in the dispositional line to presume imprisonment for offenders convicted of a severity level I offense, with a criminal history score of 6 or more.

Effective 8/1/82:

- 3) Severity level for Sale of Cocaine was increased from III to IV.

Effective 11/1/83:

- 4) Presumptive sentence to provide for three additional months for offenders who had a criminal history score of more than six and were on some form of custody status (e.g. probation) when the current offense was committed.
- 5) Allowed for the inclusion of prior DWI offenses in computing the criminal history score when the current conviction is for Criminal Vehicular Operation.
- 6) Increased durations at severity level IX, CHS 0, by 8 months and increased durations at severity level X, CHS 0, by 4 months.
- 7) Presumed imprisonment for offenders convicted of a burglary of an occupied dwelling when there was a previous adjudication of guilt for a felony burglary that was imposed before the current offense occurred. Residential Burglary increased from severity level IV to severity level V.
- 8) Reduced durations at severity level I, CHS 3 through 6+, and at severity level II and III, CHS 2 through 6+. Reductions ranged from one month to seven months.
- 9) Jail credit to include time served as a condition of a stay of execution or stay of imposition.

Effective 8/1/85:

- 10) Presumed imprisonment for offenders convicted of a second or subsequent sale of a severity level VI controlled substance or cocaine.

Effective 8/1/86:

- 11) Addition of two aggravating factors to allow for departures when 1) the offender commits, for hire, a crime against the person; and 2) when the offender is involved in an organized gang.
- 12) Clarification that it is permissible to depart from the guidelines when the current offense is a crime against a person and there was a prior crime against a person, both involving injury - even if the prior has decayed.
- 13) Severity level was increased for Sale of Cocaine from IV to VI; the severity level was increased for Possession of Cocaine from I to III.
- 14) Change in the decay factor to allow for a flat 15 year decay period for prior felony sentences and a flat 10 year decay period for misdemeanors and gross misdemeanors. Prior stays of imposition are treated the same as prior felonies as opposed to being treated the same as prior misdemeanors.

Effective 8/1/87:

- 15) Increased durations for Attempted 1st Degree Murder and severity level X offenses. Durations were nearly doubled at the zero criminal history score.

D. Summary of 1990 - 1991 Biennium Budget

The Commission is requesting the same level budget for all areas. Although the agency does have data processing needs beyond the requested level, federal monies were granted to meet these needs and further state monies will not be requested.

The Commission maintains one of the most sophisticated and complete criminal justice information systems in the state. It is also, by far, the least expensive criminal justice information system in the state. The Commission is in the process of converting its information system from the University of Minnesota mainframe system to a micro computer system. This conversion of the information system from the University of Minnesota mainframe system to a micro computer system will improve the timeliness of the data and enhance data analysis and reporting. It is anticipated that the agency will be able to produce more reports and respond more quickly and directly to requests for information. In addition, the volume of cases sentenced for felony convictions has been increasing significantly. While this will result in a definite increase in the workload of the agency, it is believed that a change level request for an increase in staff or other resources will be unnecessary, at this time, because the micro computer system will be more cost-effective. It is expected that with this conversion, the Commission's information system will be less expensive yet far more productive than a system which is dependent on the University of Minnesota mainframe system.

II. 1988 GUIDELINES MODIFICATIONS

A. Modifications that Received Legislative Review

There was only one modification that went into effect on August 1, 1988 that had required prior legislative review (presented in the 1988 Report to the Legislature). This modification involved the ranking of an inadvertently unranked offense. The Commission realized that no severity level ranking had been assigned to M.S. § 169.09, subd. 14(a)(3) - the offender has caused an accident resulting in substantial bodily harm to any person. The Commission adopted the proposal to rank this offense at severity level II. This ranking is proportional to other accident violations: a severity level III ranking for when the offender has caused an accident resulting in great bodily harm to any person, and a severity level IV ranking when death results.

B. Ranking of New or Amended Crimes

The Commission ranked numerous crimes created and amended by the legislature in the 1988 session, and these are outlined below:

- 1) The legislature created a new felony for advertising, selling, and renting devices designed to make an unauthorized connection to a cable communications system. The Commission ranked this offense at severity level I. The Commission chose not to rank this offense at the level of other Theft Related Offenses because the statutory penalty is not determined by the amount involved and the statutory maximum is less than it is for theft crimes.
- 2) A felony, with a maximum penalty of one year and one day, was created by the legislature for a second or subsequent fleeing of an officer. The offense does not involve injury to the officer and was ranked at severity level I. Other felony offenses involving the fleeing of an officer are ranked at severity level VII when the offense results in death, at severity level VI when the offense results in great bodily harm, and at severity level IV when the offense results in substantial bodily harm.
- 3) Penalties were increased by the legislature for check forgeries that involve amounts of more than \$35,000. Theft crimes are generally ranked one severity level higher than check forgery crimes of the same amount. Therefore, because the crime of Theft over \$35,000 is ranked at severity level VI, the Commission ranked check forgery over \$35,000 at severity level V.
- 4) Penalties were also increased by the legislature for financial transaction card fraud offenses that involve amounts of more than \$35,000. This offense was also ranked at severity level V (similar to the check forgeries over \$35,000).
- 5) A new Terroristic Threats provision was created by the legislature which deals with offenses involving a replica firearm. The statutory maximum is one year and one day and, therefore, the Commission did not believe it was appropriate to rank the offense any higher than severity level I. The other Terroristic Threats provisions are ranked at severity level IV when the offense involves a threat of violence or the evacuation of a building (five year statutory maximum) and at severity level II when the offense involves a bomb threat (three year statutory maximum).

C. Other Modifications not Requiring Legislative Review

The Commission adopted modifications to Section II.F. Concurrent/Consecutive Sentences and to the commentary that do not require legislative review.

- 1) The Commission clarified the policy on permissive consecutive sentencing to simply state that any escape sentence can be made consecutive to any other sentence without a departure from the guidelines.
- 2) The Commission added the following new or amended offenses to the list of Exclusions from Offense Severity Reference Table:

Cigarette Tax and Regulation Violations - 297.12, subd. 1

Gambling Regulation Violations - 349.22, subd. 3

Hazardous Wastes (water pollution) - 609.671

Obscene materials; distribution - 617.241, subd. 4

Wire Communications Violations - 626A.02, subd. 4; 626A.03, subd. 1(b)(ii); 626A.26, subd. 2(1)(ii)

The Commission believed that the above offenses occurred infrequently and that circumstances could vary greatly from case to case. The Commission believed it was appropriate to leave these offense unranked, at this time.

- 3) The Commission clarified, in commentary, how to appropriately determine whether a prior sentence of a fine only is a misdemeanor or a gross misdemeanor for the particular time frame when the offense was committed.
- 4) The Commission clarified, in commentary, that the presumptive disposition for Assault in the Second Degree is imprisonment, with the presumptive duration equal to the mandatory minimum sentence or the grid time, whichever is greater. Assault in the Second Degree, by definition, involves the use of a dangerous weapon and thus, carries a mandatory minimum prison sentence by statute; i.e., § 609.11.

III. 1989 ADOPTED MODIFICATIONS REQUIRING LEGISLATIVE REVIEW

A. Reasons for the Need to Systematically Modify the Guidelines

The Minnesota Sentencing Guidelines Commission has adopted a set of modifications to the guidelines that are the most substantive and far-reaching changes since the guidelines were first implemented in 1980. These modifications, which will go into effect August 1, 1989, absent any legislative action to the contrary, address the following: 1) the recent concerns of the public on the appropriate sentences for violent offenders; 2) the problem of increasing prison populations; and 3) numerous problems related to the criminal history score computation that had been identified previously but not yet addressed through guidelines modifications. The Commission recognizes that changes to the guidelines will have implications for the entire sentencing system. Thus, the Commission has chosen to present the adopted modifications as a package; one that addresses multiple problems within the context of the goals and structure of the sentencing guidelines and the mandate of the legislature. The Commission believes this systematic approach is essential for assuring that conflicting concerns are fairly assessed and balanced.

1. Summary of sentencing practices for offenders convicted of certain serious crimes against the person

In the spring and summer of 1988, two heinous murders, occurring in urban parking ramps, stimulated a major public concern over sexual violence perpetrated against women. The Attorney General established a Task Force on the Prevention of Sexual Violence Against Women and issued a preliminary report in mid October with recommendations for changes to the guidelines. Several of the Commission's adopted modifications are intended to address this public concern. It is useful, however, to first present some background information regarding the current sentencing patterns for violent offenders and how these patterns have changed over time. The Commission's adopted modifications should be considered relative to current and past sentencing practices.

The data presented here will focus on those Criminal Sexual Conduct cases involving force and violence. The most serious Criminal Sexual Conduct cases are ranked at severity level 8 and the remaining forcible 2nd and 3rd Degree Criminal Sexual Conduct

cases are ranked at severity level 7. Comparison data are also reviewed for offenders convicted of Aggravated Robbery, ranked at severity level 7 and Assault in the 1st Degree, ranked at severity level 8. A separate discussion on offenders convicted of child sexual abuse will follow.

In all years examined after the guidelines went into effect, the imprisonment rate was greater for these offenses than it was prior to the guidelines. This was particularly true in 1981, the first year after guidelines went into effect, and in 1987, the most recent year of monitoring data available at this time. Average pronounced sentences also indicate more harsh sentencing in 1987 for most of these offenses and pre-guidelines data indicate that 1987 sentencing is more harsh than the prior practices of the parole board. A more comprehensive description of these data, including information on charging practices, can be found in the report Summary of Sentencing Practices for Offenders Convicted of Certain Serious Person Offenses at Severity Levels VII and VIII, August 1987.

In 1987, the imprisonment rates, for all the violent crimes included in this study, had increased significantly over the 1986 figures and even more dramatically when compared to pre-guidelines sentencing practices. The table below displays the imprisonment rates for several years. Note that 1978 reflects pre-guidelines sentencing practices.

Imprisonment Rates by Offense Type
(In All Cases the Guidelines Presume a Prison Sentence)

	(pre-guidelines)									
	<u>1978</u>		<u>1981</u>		<u>1984</u>		<u>1986</u>		<u>1987</u>	
	%	#	%	#	%	#	%	#	%	#
<u>Sev. Level Seven</u>										
CSC - Force	42.4	(49)	62.8	(43)	67.2	(64)	67.4	(46)	84.2	(38)
Agg. Robbery	64.3	(150)	92.4	(185)	83.8	(117)	81.5	(124)	87.2	(109)
<u>Sev. Level Eight</u>										
CSC - Force	72.0	(24)	88.1	(42)	80.5	(41)	88.9	(36)	94.9	(39)
Assault 1st Deg.	51.9	(49)	94.1	(17)	76.2	(21)	78.3	(23)	90.0	(20)

Just as the imprisonment rates have increased over time for these types of offenders, the average pronounced sentences, for most of the included offenses, have increased over time.

Average Pronounced Prison Sentence - In Months
(In All Cases the Guidelines Presume a Prison Sentence)

	<u>1981</u>		<u>1984</u>		<u>1986</u>		<u>1987</u>	
	<u>Avg.</u>	<u>#</u>	<u>Avg.</u>	<u>#</u>	<u>Avg.</u>	<u>#</u>	<u>Avg.</u>	<u>#</u>
<u>Sev. Level Seven</u>								
CSC - Force	32.5	(27)	40.5	(43)	49.4	(31)	44.4	(32)
Agg. Robbery	42.4	(171)	48.2	(98)	47.0	(101)	50.3	(95)
<u>Sev. Level Eight</u>								
CSC - Force	71.6	(37)	73.7	(33)	78.4	(32)	82.7	(37)
Assault 1st Deg.	58.9	(16)	75.2	(16)	65.1	(18)	64.0	(18)

It is also interesting to look at the average time served for these types of offenders, prior to the guidelines. These data are based on releasing practices for fiscal year 1978 (July 1977 through June 1978). These releasing data are not considered to be a general representation of pre-guidelines releasing practices but do give some impression of what was occurring two years before sentencing guidelines were implemented. In 1978, there were 5 cases of severity level 7, Criminal Sexual Conduct, with an average time served of 19.5 months; there were 127 cases of severity level 7, Aggravated Robbery, with an average time served of 30.1 months; there were 15 cases of severity level 8, Criminal Sexual Conduct, with an average time served of 38.7 months; and there were 10 cases of severity level 8, Assault 1st Degree, with an average time served of 30.2 months. The average pronounced sentences under the guidelines are longer than the time served prior to guidelines for most of these offenses, even when the full good time credit is deducted from the guidelines sentences.

Numerous "rape" statistics have been cited over the last several months in the media which have generally pointed to a sharp increase in the rate of reported rapes and attempted rapes. The most recent cite was in the December 18, 1988, Sunday, St. Paul Pioneer Press Dispatch, in an article titled "Minnesota sex assaults rise sharply." The article indicated that, according to statistics compiled by the Bureau of Criminal Apprehension, the number of reported rapes and attempted rapes increased from 770 in 1977 to 1445 in 1987. Several reasons for this increase were discussed in the article but at least one important factor was missing. The Minnesota figures include both the violent and forcible rapes and the child sexual abuse cases. It is highly likely that a large portion of the increase in reported rapes are child sexual abuse cases, many of which are intrafamilial.

According to the sentencing guidelines monitoring data, which contain the population of all offenders sentenced in a given year, there is no indication of any increase in the violent or forcible criminal sexual conduct cases (those ranked at severity levels 7 and 8 = 73 in 1978, 85 in 1981, 105 in 1984, 82 in 1986, and 77 in 1987). There has been, however, a tremendous growth in the number of child sexual abuse cases handled in the felony sentencing courts (those ranked at severity levels 6, 7 and 8 = 71 in 1978, 81 in 1981, 351 in 1984, 301 in 1986, and 337 in 1987). These data indicate that great care must be taken when making comparisons with criminal justice data. This is particularly true when comparing Minnesota data with other states or the nation because it is often impossible to know, specifically, what differences or similarities the data are reflecting.

It is important to distinguish the child sexual abuse cases from the other sex offense cases because, although there is a fair amount of consistency with respect to the sentencing of the violent offenders studied above, there is a lack of consistency with respect to the imprisonment rate for severity level 8 criminal sexual conduct involving very young children, under the age of 13. These cases typically involve intrafamilial sexual abuse and the courts have not had much experience sentencing these offenders. As noted above, there was a dramatic increase in the number of convictions for this offense type between 1981 and 1984. The courts have attempted to deal with approximately half of these offenders (usually those offenders with no or low criminal history scores) by keeping them in the community and requiring them to serve local jail and complete treatment programs. The sentencing of these offenders does create a problem for the Commission as it raises the question of what should be the appropriate presumptive sentence; i.e., prison or community sanctions.

The mitigated dispositional departures, in the cases of child sexual abuse, are typically for reasons regarding the need for treatment or "best interest of the family". Although the appellate courts have upheld these reasons for departure as appropriate for determining the disposition of the case, these reasons are not focused on "just deserts" and would seem to be in conflict with the philosophy of the guidelines. Most of these offenders do receive a substantial amount of nonimprisonment type sanctions, including local incarceration. Perhaps standards could be developed to assure that if an offender was given a stayed sentence when the guidelines recommended prison, that the level of the nonimprisonment sanction was equivalent to the prison sanction, and assure that "just deserts" would still be administered. Clearly the area of child sexual abuse is one the Commission should continue to monitor and study.

2. Factors contributing to increasing prison populations

The Sentencing Guidelines provide the state of Minnesota with a rational and uniform sentencing policy that increases the recommended sanction according to the severity of the conviction offense and the criminal record of the offender. This structured sentencing policy allows policy makers to determine who should go to prison and for how long; and with a monitoring system in place, policy makers can also be made aware of how the sentencing policy is affecting the prison population levels. The Legislature can be given an opportunity to consider changes to the sentencing policy that will prevent a crisis situation with respect to prison resources. This is particularly important due to the fairly dramatic increases in prison populations experienced over the last two years (see Appendix C) coupled with the interest of the public in increasing sentences for offenders who are convicted of sexual assault and other violent offenses.

The analysis of the 1987 monitoring data indicates that certain sentencing trends and practices are contributing to the increases in prison populations.

1) The volume of cases sentenced increased by approximately 10% from 6,032 cases in 1986 to 6,674 in 1987. Certain areas of the state experienced this increase more than others. The northern metro area and several rural counties just north of the metro area experienced an increase in felony sentences of approximately 36% due to the growth in population and additional court personnel to process the increased case load. Hennepin county also experienced a significant increase in felony sentences that could be attributed to a higher arrest rate, more judges and prosecutors to process the cases, and efforts toward clearing a backlog of criminal cases. Preliminary review of the first half of 1988 sentences reveal that the increase in volume continued into 1988.

2) The imprisonment rate increased from 19.9% or 1,198 commitments in 1986 to 21.6% or 1,443 commitments to prison, a difference of 245 more commitments in 1987. The imprisonment rate increased at both the low end of the severity scale where most of the nonviolent offenses are ranked and the higher end of the severity scale where most of the violent offenses are ranked.

3) There was a 30% increase in the number of revocations for technical reasons for offenders who were originally given a stayed sentence, 243 cases in 1986 compared to 317 cases in 1987. The most common reasons given for revoking these sentences included: the offender received a new misdemeanor conviction, the offender absconded from treatment or failed to complete the program, the offender did not report to the probation officer, the offender was using drugs, or the offender requested to go to

prison. These figures do not include those offenders who were revoked for a new felony conviction.

4) There was an increase in the number of offenders who requested to go to prison rather than receive a nonimprisonment sentence according to the guidelines. Case law has determined that the right exists for an offender to request an executed prison sentence rather than a stayed sentence in order to comply with the guidelines presumption of concurrency in sentencing and the spirit of the guidelines with respect to proportionality. In 1987, there were 259 cases where an offender requested an executed prison sentence compared to 211 in 1986. However, most of these offenders are requesting prison because they realize that they will be receiving a prison sentence on another new felony offense or a revocation of a prior offense and they wish to serve the time concurrently. Of the 259 cases, it is estimated that 85 offenders who requested prison were not going to prison for some other felony offense. These offenders probably requested an executed prison sentence because the nonimprisonment sanctions were viewed as more onerous.

5) The criminal history score was intended to be secondary in importance to the severity of the conviction in the determination of the appropriate guideline sentence. However, over time, the criminal history score has increased in its impact on determining which offenders should receive prison sentences, resulting in some unexpected distortions of the proportionality that the guidelines strive to achieve. This has resulted in an increasing number of nonviolent, property offenders going to prison.

A more comprehensive examination of the causes and impact of the increasing prison population is presented in the Commission report, 1987 Sentencing Practices, Sentencing Trends, and Prison Populations, October, 1988.

The necessary question is whether the state wants to continue utilizing prison resources for the nonviolent offenders described above, particularly in light of current public concern over the sentence length of violent offenders. While the answer to this question is ultimately decided by the legislature, one of the principles of the guidelines is to promote the rational use of finite correctional resources by recommending the least restrictive sanction necessary to achieve the purposes of the sentence. The Legislature has also mandated that the Commission take into substantial consideration the availability of state and local resources. It would be irresponsible for the Commission to not inform the Legislature of the impact of any adopted changes to the guidelines. It would be equally irresponsible to adopt a change to guideline policy that had the immediate impact of crowding correctional facilities, with no time for the state to plan for the necessary increase in space. It is therefore essential that the Commission consider changes to the guidelines in the context of the current correctional resource situation.

3. Criminal history score impact

As was noted above, there are serious proportionality problems resulting from the increasing impact of the criminal history score. The imprisonment rate for offenders convicted of severity level I-IV offenses has been increasing steadily, over time. As these four severity levels contain mostly property and non-violent offenders, the result is an increasing proportion of non-violent offenders utilizing prison space. The key factor that is causing this increase is the criminal history score policy and its influence on the presumptive guideline sentence. Every year since the guidelines were implemented, a

smaller proportion of offenders had a criminal history score of zero (62% or 3399 cases in 1981 and 51% or 3372 cases in 1987), and a larger proportion of offenders had a criminal history score of four or more (8% or 451 cases in 1981 and 16% or 1,068 cases in 1987).

What specifically is contributing to this increase in higher criminal history scores among convicted felons? It first needs to be noted what the criminal history score is comprised of: 1) a cap of 1 point when the offender was under some form of court or correctional custody (e.g. probation or supervised release); 2) a cap of 1 point for two or more prior juvenile felony type offenses committed at age 16 or 17 and the offender was under the age of 21 when the current offense was committed; 3) a cap of 1 point for any combination of prior misdemeanor (1 unit each) or gross misdemeanor (2 units each) sentences totaling at least 4 units; and 4) generally, one point for each prior felony sentence.

The juvenile point is the only component of the criminal history score that has decreased in the percent of offenders affected, from 4.6% (252 offenders) in 1981 to 3.2% (214 offenders) in 1987. One possible reason for the decrease in this point is the aging of the offenders. In 1981, 38.4% were under the age of 21 but only 26.9% were under the age of 21 in 1987.

The percentage of offenders who received a custody status point increased from 20.8% (1145 offenders) in 1981 to 22.8% (1506 offenders) in 1987. The percentage of offenders who received a misdemeanor/gross misdemeanor point increased significantly from 6.7% (371 offenders) in 1981 to 9.6% (641 offenders) in 1987. The percentage of offenders who received at least one felony point also increased from 31.9% (1754 offenders) in 1981 to 45.4% (3033 offenders) in 1987. Three possible causes for these increases appear most likely. First, as noted above, the proportion of older offenders has increased considerably. In 1981, 16.9% (930 offenders) were over 30 years old compared to 26.1% (1739) in 1987. Older offenders would have had a longer period of time to accumulate criminal history points. Second, record keeping and methods for gathering criminal histories have probably improved.

The third reason these increases in criminal history scores may be occurring is related to prosecutorial practices where it appears that prosecutors are more aggressively prosecuting multiple current offenses. Prior to the implementation of the sentencing guidelines, an offender who had committed multiple current offenses might have received concurrent sentences or instead might have had most of the charges dropped as part of the plea negotiation. The consequences would be basically the same under either situation. Under sentencing guidelines, if a charge is dropped and no sentence is pronounced, it will not count as a criminal history point. Thus under the sentencing guidelines, the consequences of concurrent sentences are significantly greater as opposed to dropping charges.

The prosecutor has control over the criminal history score via the charging and plea negotiating practices. For example, if an offender who has no previous criminal record, commits six check forgeries and receives six convictions and sentences, the offender would have a criminal history score of five by the time he was sentenced on the sixth charge and would be recommended to go to prison under the guidelines. He would also have six felony points in the future if he were to ever reoffend. If, instead, the prosecutor aggregated all the check forgeries together into one charge, conviction and sentence or dropped all but one charge, the guidelines would be recommending a stayed

sentence and the offender would have one felony point in the future if he were to ever reoffend. The sentencing guidelines 1984 indepth data (an eight county area sample of cases) suggests that prosecutors drop charges in cases involving multiple offenses approximately 50% the time. Therefore, even though prosecutors are perhaps more aggressive in their charging practices than they were prior to guidelines, they are not necessarily consistent with respect to the number of alleged felonies they pursue convictions on.

As was discussed above, the criminal history score directly affects whether the offender will be recommended a prison sentence according to the guidelines. This is particularly true for property or nonviolent offenders because violent offenders are generally recommended to receive a prison sentence under the guidelines, regardless of the criminal history score. As the proportion of offenders with higher criminal history scores increases, the proportion of property offenders with presumptive prison sentences under the guidelines increases. In 1981, 7.0% or 242 cases involving property offenses were recommended a prison sentence under the guidelines compared to 15.7% or 651 cases in 1987.

There are two other related problems regarding the criminal history score policy that the Commission has focused on for some time. The first is the problem of inconsistent and unreliable information regarding an offender's prior misdemeanor record. Misdemeanors are not maintained in any statewide information system and probation officers must depend primarily on the offender to self-report prior misdemeanors. Verifying the existence of misdemeanors is extremely time consuming, particularly when the misdemeanor occurred outside the county where the offender is currently being processed. When the offense could either be a misdemeanor or gross misdemeanor, it is sometimes difficult to determine the level of the offense by the disposition which is not always available. Numerous probation officers have expressed their desire to have the Commission eliminate the misdemeanor point. Others, however, believe that it is important to keep the misdemeanor point because they believe misdemeanor offenses hold some importance in representing the overall picture of the individual's criminality, particularly when the misdemeanors reflect some tendency for violent behavior.

The second problem related to the criminal history score is that prior felonies are not weighted according to their seriousness. Prior felony sentences that were weighted by severity would have the effect of punishing more harshly those offenders whose prior records demonstrate repeated violent offenses as opposed to those offenders whose prior record reflects nonviolent offenses. A weighting scheme for prior felony sentences would fit well with the guidelines philosophy of just deserts but the Commission has been concerned with the complexity that a weighting scheme would introduce to the system. Yet, support has been expressed by various judges, prosecutors, probation officers, citizens, and others indicating that such a change in the guidelines would be worth the added complexity.

B. Explanation of the Commission's Adopted Modifications

The adopted language for the following adopted modifications, subject to legislative review, is found in Appendix B.

1. Weighting prior felony sentences

The Commission adopted a proposal to weight each prior felony sentence according to its severity level. The weights are assigned as follows:

Severity levels I - II = 1/2 point;
Severity levels III - V = 1 point;
Severity levels VI - VII = 1 1/2 points;
Severity levels VIII - X = 2 points; and
Murder 1st Degree = 2 points.

The felony point total would be the sum of the weights (any partial points would not result in a point). It is the intent of the Commission that prior attempted felonies carry the same weight as the completed offense.

The Commission believes that this weighting scheme will assure a greater degree of proportionality in sentencing. As noted above, the general idea of weighting the prior felony record has been supported by a variety of criminal justice professionals and citizens. Offenders who have a history of serious felonies are considered more culpable than those offenders whose prior felonies consist primarily of low severity, nonviolent offenses. The significance of higher severity level prior felonies is greatly enhanced. Under the Commission's weighting scheme, offenders who have histories of violent felony behavior such as murder, criminal sexual conduct, and aggravated robbery, will consequently serve a substantially longer sentence than they would under the current guidelines.

This weighting scheme also addresses the problems outlined in the section above, regarding the impact of the criminal history score on the presumptive sentence for nonviolent offenders. The increasing use of finite prison resources for nonviolent offenders has resulted in reduced prison resources for person offenders. Under the adopted weighting scheme, the significance of low severity level prior felonies is lessened. This should result in a lower imprisonment rate for offenders with nonviolent criminal histories and assure more space to provide for the increased prison sentences for serious and repeat person offenders.

The Commission considered the concerns, expressed in letters and testimony, with the 1/2 point weight for severity level I and II prior felony sentences. However, there are three additional factors, beyond the explanation given above, that render this weighting scheme a sound one. First, an offender who continues to commit more felony offenses while on probation for a prior offense is subject to revocation of sentence. It is extremely unlikely that an offender could continue to commit severity level I and II offenses and not serve time in prison.

Second, offenders do receive significant and meaningful consequences for their felony behavior when a non prison sentence is given. Local jail, community work service, fines, restitution, treatment, and probation are available to the sentencing judge. Some of these nonincarcerative sanctions, such as restitution and community work service, will benefit the victim or the community in a more direct way than incarceration, particularly when sentencing a nonviolent offender.

Third, although Unauthorized Use of a Motor Vehicle (UUMV) is ranked at severity level one and would receive a weight of 1/2 for future offenses, auto theft is ranked at severity level four and will continue to receive a weight of 1 for future offenses. Currently, it is relatively common for an auto theft offense to be reduced to a UUMV (joy-riding) conviction. Prosecutors will be held more accountable for this type of plea negotiation under the Commission's weighting scheme because there is a more meaningful difference between the two offenses. Perhaps this policy will reduce the frequency of pleas from auto theft to UUMV.

Regarding the complexity that this change will introduce into the system, the Commission has stated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences. Commission staff also plans to begin work on developing ways to improve the monitoring system to provide criminal history information to probation officers.

2) Restructuring the misdemeanor point

As noted above, the Commission has been considering the problem of unreliable and inconsistent information regarding misdemeanors and gross misdemeanors for some time. There have been suggestions to eliminate the misdemeanor point because of wide disparity in the recording and collection of these priors. The Commission believes, however, that at this time, there is still merit in retaining the misdemeanor point because of the relevance it may have to felony activity. The Commission has adopted a restructuring of the misdemeanor point to reduce some of the disparity that results from the wide range of misdemeanor type activity that can currently be included to make up the misdemeanor point. The Commission developed a Misdemeanor and Gross Misdemeanor Offense List that includes those offenses that are particularly relevant in the consideration of the appropriate guideline sentence. All felony convictions that result in a misdemeanor or gross misdemeanor sentence will also be included.

The Commission has also reduced the weight of prior gross misdemeanors from two units to one unit (other than DWI related offenses) in order to create a more proportional weighting scheme with respect to the weight of prior felonies at severity levels I and II which will receive 1/2 point each under the Commission's weighting proposal. The weight for prior aggravated DWI's remains at two units and the weight of prior misdemeanor level DWI's has been increased to two units when the current conviction is for Criminal Vehicular Operation. The Commission believes that prior DWI's are particularly significant and should be emphasized under these circumstances. Four units are required to equal one point and the misdemeanor point is capped at one.

3. Expanding juvenile history

One of the concerns of the Attorney General's Task Force on the Prevention of Sexual Violence Against Women involved the sentencing of offenders who had a juvenile history reflecting violent offenses. This concern had been raised previously by the Minnesota Police and Peace Officers Association as well as other groups and individuals. The Commission has struggled with this issue because on a philosophical basis, a young adult who has a prior violent juvenile record, consisting of offenses committed while that offender was 16 and/or 17 years of age, should be held more accountable. However, the

Commission is concerned about the differences in the rights afforded offenders in juvenile court as opposed to adult court and the varying procedures used in various jurisdictions.

Because of the concern over due process rights, the Commission chose to adopt a change to the juvenile history point on a somewhat modest basis. Offenders who have at least one prior serious person offense among the other prior juvenile offenses committed after their sixteenth birthday, are eligible to receive up to two points for offenses committed and prosecuted as a juvenile. The Commission also established that only those juvenile offenses where findings were made after August 1, 1989 can contribute to a juvenile history score of two. This effective date gives proper notice that in the future, the juvenile history can result in two criminal history points, if at least one of four or more offenses is a Murder, Assault in the 1st or 2nd Degree, Criminal Sexual Conduct in the 1st, 2nd, or 3rd Degree, or Aggravated Robbery involving a dangerous weapon.

4. New mitigating factor

In the 1988 Report to the Legislature, the Commission reported that consideration was being given to a criminal history score intervention policy that would address the problem of the increasing impact that the criminal history score continues to have on who goes to prison. As was noted above (and in previous reports to the legislature), criminal history scores can be highly dependent on the charging and plea negotiating practices of the prosecuting attorney and these practices can vary by jurisdiction. This discretion has impacted most heavily on property offenders where the percentage who received presumptive imprisonment under the guidelines in 1987 is more than double that of 1981: 15.7% and 7.0% respectively. While some of this increase is due to a larger proportion of older offenders who have built their criminal history scores by repeated interventions of the criminal justice system, there are a substantial number of property offenders who have built up their criminal history score by having committed one or two crime sprees. 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 property offenders. Rational sentencing policy requires such trade-offs, to ensure the availability of correctional resources for the most serious offenders.

The intervention policy, proposed last year, would require that an offender receive a certain number of prior interventions by the criminal justice system before an executed sentence would be deemed appropriate. Last December, 1987, the Commission held a public hearing on this proposal. The majority of those who testified believed the policy would introduce unnecessary complication into the system. The Commission did not adopt the proposal last December but decided to examine the policy further. Upon further consideration, the Commission has decided to incorporate this policy as a reason for a dispositional departure. The Commission believes that the nonviolent crime spree offender should perhaps be sanctioned in the community at least once or twice before a prison sentence is appropriate. At this time, the Commission believes that the judge is best able to distinguish these offenders and can depart from the guidelines accordingly. Application of the policy as a reason for departure should eliminate much of the complexity that probation officers and attorneys were concerned with. Also, the use of this reason to depart from the guidelines can be monitored and evaluated. The departure reason only applies to offenders with a current conviction at severity levels 1 - 4 and who had no, one, or two prior court interventions.

5. Changes to the aggravating factors

The Commission adopted the following change to one of the aggravating factors:

- (3) The current conviction is for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured.

This change will clarify that the sentencing judge may depart from the sentencing guidelines when the offender is a repeat sex offender.

6. Changes to the grid - increased durations at severity levels VII and VIII

The Commission adopted major changes to the sentencing guidelines grid. These changes include doubling the current duration at severity level VII, criminal history score of zero, from 24 months to 48 months and increasing this number by 10 months for every additional criminal history point up to six. The changes also include doubling the current duration at severity level VIII, criminal history score of zero, from 43 months to 86 months and increasing this number by 12 months for every additional criminal history point up to six. These changes will also have the effect of extending supervised release.

The Commission proposed changes to the durations for the more violent offenders, found at severity levels VII and VIII, in response to the public concern over the length of the recommended sentences for violent offenders. The changes are also in direct response to the Attorney General's Task Force on the Prevention of Sexual Violence Against Women. The Commission chose to address all violent crimes at severity levels VII and VIII rather than separate out the violent sex offenses because they believe the other offenses ranked at these severity levels are generally as serious. The Commission believes that the current durations at severity levels VII and VIII are not long enough and had initially considered much more modest increases of approximately 8 to 12 months. Public testimony indicated that there was a strong desire for even harsher sentences. Upon further examination, it became apparent that the entire Commission proposal, adopted as a "package", could provide for these much more extensive increases. The Commission's package presents a responsible and rational approach to addressing a set of conflicting concerns, particularly when compared to some of the proposals suggested by others.

However, the Commission's package will increase prison populations substantially beyond the current level of capacity. A more detailed assessment of the impact will be presented in a later section. The Commission has adopted these stiff increases in durations for severity levels VII and VIII out of concern that the current durations and the increased durations initially considered by the Commission, were not proportionate to the severity of the offenses. The Commission realizes, however, that these changes will not necessarily deter or prevent future crimes, and that these changes will not necessarily enhance public safety. There is no evidence to suggest that longer sentences reduce the rate of crime. The additional funding the state must invest to provide the prison space that is needed for these increases will be to satisfy the desire of the public to have more just and proportionate sentences for violent offenders. The Legislature should certainly look to the Attorney General's Task Force on the Prevention of Sexual

Violence Against Women report on Education/Prevention of Sexual Violence which offers some excellent recommendations on ways to address the problem of prevention.

7. Changes to the Commentary regarding dispositional departure for reasons related to the excluded factors

In the 1988 legislative session, the Legislature passed a bill directing the Commission to study three issues. One of those issues regarded the use of social and economic factors to justify a departure from the guidelines. The Commission will report in greater detail on this issue as well as the other two issues in a report that will be presented to the Legislature in February. One of the changes in the adopted package addresses this issue by clarifying that a judge must demonstrate that the departure is not based on any of the excluded factors. The following language was added to the commentary:

The use of the factors "amenable to probation (or treatment)" or "unamenable to probation" to justify a dispositional departure, could be closely related to social and economic factors. The use of these factors, alone, to explain the reason for departure is insufficient and the trial court shall demonstrate that the departure is not based on any of the excluded factors.

C. Summary of Public Response to Commission Proposals

Public response to the Commission's initial proposals was extensive and varied. The proposal under consideration at the time of the public hearing encompassed relatively modest increases at severity levels VII and VIII of approximately 8 to 12 months. The Commission received letters and heard testimony from prosecutors, the Attorney General's Office and Task Force on the Prevention of Sexual Violence Against Women, probation officers, law enforcement officials, the State Public Defender's Office, individual legislators, law professors, and private citizens. The contribution of public comment is essential to the process of guidelines modification. A brief summary of the letters and testimony is presented below. A complete record of the public testimony is available upon request.

Private citizens - The Commission received approximately 40 letters from private citizens and nearly all were supportive of stiffer penalties for violent and repeat violent offenders. While most letters did not offer any comment regarding nonviolent offenders, one letter stated opposition to lessening sentences for some of the nonviolent offenders with six letters stating that it was reasonable to lessen sentences for nonviolent offenders to assure prison space for the violent offenders.

Prosecutors - Hennepin, Ramsey, and Dakota County Attorneys favored the concept of weighting but were against the 1/2 weight for prior severity levels I and II felonies. These prosecutors also did not favor the change to the misdemeanor point or the addition of a mitigating factor for crime spree offenders. The Hennepin County Attorney did not believe the Commission's initial proposal to increase durations at severity levels VII and VIII was enough. Tom Johnson offered the Commission a specific proposal that he supported. (This proposal is reviewed in more detail in the upcoming section on Impact.) The Attorney General had a similar position to the Hennepin County Attorney. The Ramsey County Attorney and a Minneapolis City Attorney were concerned with the impact of the Commission's proposal on local resources.

State Public Defender's Office - This office supported the weighting scheme, including the 1/2 weight at severity levels I and II. The office also supported the restructuring of the misdemeanor point and the additional mitigating factor for crime spree offenders. No comment was made regarding the increased durations at severity levels VII and VIII.

Attorney General's Task Force on the Prevention of Sexual Violence Against Women - The task force was dissatisfied with the Commission's initial proposal and did not believe that their recommendations had been fully considered. The task force opposed the half point weighting for severity level I and II priors.

Law enforcement officials - The Commission received comment from four law enforcement groups or officials. They were generally against the 1/2 weight for prior severity levels I and II felonies, primarily because of the impact this change could have on local resources. They were also concerned with "nothing" happening to offenders who had prior severity I and II offenses. Some wanted the Commission to further increase durations at severity level VII and VIII.

Probation officers - One agent supported the entire Commission package except the lowering of weight for gross misdemeanors. Other agents were concerned with the impact of the changes on local resources. Some agents also expressed concern over the complication that a weighting scheme will introduce, particularly one that weights according to the severity level of the prior felony.

Law professors - The Commission received letters from two law professors. A University of Minnesota law professor, Richard Frase, was against any additional increases in durations at severity levels VII and VIII beyond the Commission's initial proposal because the costs of building and maintaining prisons are enormous and there is no deterrent or prevention value for the increase in sentences. Andrew von Hirsch, Rutgers University, has written several works on the concept of "just deserts". He expressed support for the weighting scheme and stated that the 1/2 weight was essential in order to balance the weights at the high end of the severity scale. He also supported the mitigating factor and the comment regarding the use of "amenable" or "unamenable" to probation. His statements regarding the durational increases were similar to Professor Frase's comments and he did not believe that a just deserts philosophy supported making any drastic changes to the durations.

Minnesota Citizens Council on Crime and Justice - This is a non-profit organization that has an interest and concern for criminal justice issues. The organization is responsible for operating the Crime Victim Center in the Twin Cities. This group supports the Commission's complete weighting proposal but they are, however, strongly against any increases in durations. They are concerned that Minnesota will ignore the experiences of other states, where 36 states are under court order to resolve their crowded prison conditions. They cited from an article titled "Who's punishing whom?", FORBES, March 21, 1988, where other states are pouring larger and larger portions of their state's budgets into prisons and there is no indication that these states are experiencing any increase in public safety. In Louisiana, the average prison sentence for armed robbery is 16.7 years, nearly double the national average, yet Louisiana has the tenth- highest rate of armed robbery in the country. This organization believes the state is better off spending money to increase public safety through prevention programs, treatment programs, and apprehension resources.

D. Impact of Proposals on State and Local Resources

State Prisons

The Commission adopted several modifications to the guidelines that will have the effect of increasing the presumptive durations for offenders convicted of severity level 7 and 8 offenses and additional increases for offenders who have criminal records reflecting convictions at severity levels 6 through 10. The modifications will also have the effect of reducing the impact of criminal history scores that reflect severity level 1 and 2 convictions and/or misdemeanor convictions. In addition, a modification was adopted that will increase the number of criminal history points allowable for juvenile offenses when there is at least one prior offense involving a serious crime against a person. Commission staff has calculated an estimate of the impact of these adopted modifications on prison populations. An explanation of the estimated impact of these modifications on prison populations is presented below.

The Commission also adopted an aggravating factor and a mitigating factor to the nonexclusive list of reasons for departure. The estimate below does not include any speculation on the possible impact of adding these factors to the list of departure reasons. The estimate is expected to be conservative because it does not take into account the possible impact of consecutive sentences.

Also demonstrated below is an estimate of what the impact of the Commission's adopted modifications would be without the 1/2 point included as part of the weighting scheme. An impact analysis of the initial Commission proposal and the Hennepin County Attorney's (Tom Johnson) proposal is also displayed.

The Sentencing Guidelines Commission and the Department of Corrections work together to prepare prison populations projections. The projections that are currently being used are based on the institutional population as of 6/1/88 (source: Department of Corrections) and 1987 sentencing data (source: Sentencing Guidelines Commission). The projections for males include an estimated 45 interstate cases. Current capacity for males is approximately 2832 beds (see Appendix C). The projections include the following assumptions:

- 1) Court volume, which increased 10% from 1986 to 1987, will increase 10% in 1988 and then level off. Should volume increase after 1988, populations would increase more than has been projected.
- 2) Probation revocations, which increased from 1986 to 1987, will remain at the 1987 level. If the revocation rate increases, population could increase by 40 beyond these projections within a year.
- 3) The trend toward higher criminal history scores will not continue. If it should, as it has each year, population could increase by 35 beyond these projections within a year.
- 4) These base projections do not include the impact of any potential new policies, other than those specified, that might be adopted during the 1989 legislative session.

The following figures demonstrate the impact of the Commission's adopted modifications which include substantial increases in durations at severity levels 7 and 8, the weighting scheme change, and the change to the misdemeanor point. The third column displays the impact without the 1/2 point included in the weighting scheme. At severity level 7, CHS of 0, the durations were doubled to 48 months and increased by 10 months for every additional criminal history point up to six. The durations at severity level 8, CHS of 0, were doubled to 86 months and increased by 12 months for every additional criminal history point up to six.

<u>Males</u>	<u>Current Projections</u>	<u>Projections for Adopted Commission Modifications</u>	<u>Projections w/out 1/2 point Change</u>
End of:			
August 1989	2704	2704	2704
August 1990	2822	2863	2955
August 1991	2926	2880	3081
August 1992	2936	2804	3051
August 1993	2934	2919	3174
August 1994	2949	3035	3285
August 1995	2966	3080	3330
August 1996	2985	3115	3391
August 1997	3004	3172	3432
August 1998	3037	3206	3471

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The earliest possible effective date for these modifications would be August 1, 1989, therefore, the impact of the modifications will not be recognized until sometime between August of 1989 and August of 1990. Note that for the male population, even with the full weighting scheme proposed by the Commission, additional bed space will be needed, as many as 400 more beds over the next decade. In addition, the population will continue to increase after 1998. However, the proposal does appear to provide some time to plan for that space as bed space need will fluctuate until 1993 when it will go beyond capacity. These adopted modifications without the 1/2 point value for prior severity level 1 and 2 convictions will result in an immediate and far reaching need for additional bed space.

Females will only be slightly affected by the durational increases. The weighting scheme and the misdemeanor point change will result in a reduction of the female prison population level by approximately 25 to 30 beds.

The following figures compare the prison population levels according to the current projection with the prison population levels projected for the Commission's initial proposal which differed from the adopted modifications in that the increases at severity levels 7 and 8 were more modest:

<u>Males</u>	<u>Current Projections</u>	<u>Projections w/ Initial Commission Proposals</u>	<u>Projections w/out 1/2 point Change</u>
End of:			
August 1989	2704	2704	2704
August 1990	2822	2861	2955
August 1991	2926	2872	3072
August 1992	2936	2739	2986
August 1993	2934	2791	3041
August 1994	2949	2788	3049
August 1995	2966	2779	3048
August 1996	2985	2804	3091
August 1997	3004	2839	3109
August 1998	3037	2832	3098

These modifications would have the effect of leveling off the increasing population. Projections indicate that the population for males would fluctuate somewhat around the 2832 bed capacity, barring any other changes in sentencing practices or sentencing policy. It appears that there would not be any need for increased prison space.

However, if the weighting scheme did not incorporate the 1/2 point weight for severity level 1 and 2 prior offenses, the impact would be significantly greater, moving prison populations well beyond capacity as early as 1990 and crossing the 3000 level by 1991.

Tom Johnson, Hennepin County Attorney, presented the Commission with a proposal for consideration. The following is an estimate of the impact of this proposal, although not all of the components could be included in the analysis. The projections below include the increased durations, adding a severity level, and weighting all prior person offenses at 2 points each.

<u>Males</u>	<u>Current Projections</u>	<u>Projections for Tom Johnson's Proposal</u>
End of:		
August 1989	2704	2704
August 1990	2822	3221
August 1991	2926	3727
August 1992	2936	3887
August 1993	2934	4030
August 1994	2949	4159
August 1995	2966	4258
August 1996	2985	4353
August 1997	3004	4400
August 1998	3037	4460

The impact is immediate and extraordinary, requiring a new facility by 1990, with a continuing need for 100 or more additional prison beds each subsequent year. Staff also estimated the impact of increasing the minimum time served on a life sentence to 25 years: about 35 beds. The impact of the "rounding the corner" and moving down one severity level for every criminal history point past six (up to the statutory maximum) is approximately 400 beds.

These projection figures do not necessarily indicate the precise level of the prison population for the specified month and year. It is unlikely that the future can be predicted with such accuracy. Rather, the value of these projections lies with the ability to determine, for each proposal, whether a trend exists toward an increasing, a decreasing, or a stabilized prison population and the degree of any identified trend.

Local Resources

The Commission's adopted modifications will also have an impact on local correctional resources but it is difficult to estimate in what way local resources will be affected. Approximately 200 offenders who would be recommended a prison sentence under current guidelines would be recommended community sanctions under the adopted modifications. The cases would probably be distributed throughout the state but it does appear that Ramsey county may experience a disproportionately larger share: approximately 45 offenders would be from Ramsey county. Hennepin county may experience a disproportionately smaller share, approximately 35 offenders. The remaining offenders would likely be distributed among 50 other counties, ranging from 1 to 10 offenders per county. Approximately 35 counties would not likely be experiencing any affect on local resources due to the Commission's adopted modifications.

Because these offenders are currently recommended prison terms, it appears likely that these offenders, under the new policy, will serve some time in jail. However, as there are no standards for nonimprisonment sanctions, it is uncertain whether all, some, or none of these offenders will receive local jail time or how much jail time they may receive. None the less, the Commission believes it is important to realize that changes to the guidelines affect both state and local resources and that even this limited information on the impact should be reported to the legislature. This information is essential to the legislature in their determination for state correctional funding as well as community correctional funding.

IV. 1987 BRIEF DATA SUMMARY

The volume of cases sentenced increased dramatically from 6,032 in 1986 to 6,674 in 1987, an approximate 10% increase. The 10th judicial district experienced the largest increase in volume at 36%. Judicial districts 1, 3, and 4 also experienced significant increases in the number of cases sentenced in 1987 at 24%, 15%, and 17% respectively. Judicial districts 2, 5, 6, and 8 experienced a decrease in the number of cases sentenced in 1987 as compared with 1986.

The imprisonment rate increased from 19.9% in 1986 to 21.6% in 1987 or from 1,198 cases to 1,443 cases. This is a substantial increase and represents the highest imprisonment rate to

date (data are available only for 1978, 1981-1987). The imprisonment rate for severity levels I-IV increased from 14.0% in 1986 to 16.1% in 1987. The imprisonment rate for severity levels VII-X also increased from 74.8% in 1986 to 77.4% in 1987. Imprisonment rates remained about the same at severity levels V and VI.

The overall dispositional departure rate increased from 10.4% in 1986 to 10.7% in 1987 which is about the same rate that occurred in 1985. The increase, however, was due to an increase in aggravated dispositional departures from 4.1% in 1986 to 4.5% in 1987. The mitigated dispositional departure rate remained the same at 6.3%. Although the aggravated dispositional departure rate increased in 1987, the large majority of these departures are actually "requests for prison." In both 1986 and 1987, approximately 82% of all aggravated dispositional departures were a result of an offender "requesting prison."

The overall durational departure rate for executed sentences increased from 19.1% in 1986 to 20.8% in 1987. The durational departure rate has tended to fluctuate over time with 1981 having the highest durational departure rate of 23.6%. The aggravated durational departure rate increased from 5.2% in 1986 to 7.1% in 1987 while the mitigated durational departure rate decreased slightly from 14.0% in 1986 to 13.7% in 1987. Aggravated durational departures increased for both genders and for all racial groups except American Indians. The mitigated durational departure rate increased for females from 12.1% in 1986 to 15.1% in 1987 and decreased slightly for males from 14.0% in 1986 to 13.5% in 1987. The mitigated dispositional departure rate increased for all racial groups except whites.

The overall rate of jail as a condition of a stayed sentence increased from 54.7% in 1986 to 55.4% in 1987. The increase was basically an increase in the jail rate for females from 39.5% in 1986 to 44.4% in 1987.

While the distribution of cases leveled off in 1986 with respect to criminal history, the trend toward higher criminal history scores continued in 1987. The percentage of cases that had a criminal history score of zero decreased from 52.2% in 1986 to 50.5% in 1987, the lowest percentage to date (61.8% in 1981). Conversely, the percentage of cases that had a criminal history score of 4 or greater increased from 14.2% in 1986 to 16.0% in 1987, the highest percentage to date (8.2% in 1981). This continued shift in the distribution of cases toward higher criminal history scores has a profound effect on the proportion of commitments to prison that are property offenders v. the proportion of commitments to prison that are person offenders. The proportion of commitments that were property offenders continued to increase from 53% in 1986 to 54% in 1987, the highest proportion to date. Conversely, the proportion of commitments that were person offenders continued to decrease from 40% in 1986 to 37% in 1987, the lowest proportion to date. (In 1981, the proportion of prison commitments that were property offenders was 37% and the proportion of commitments that were person offenders was 57%.)

Commission staff is currently preparing 1988 sentencing data. These data should be available, at least on a preliminary basis, by April of 1989. If there are any specific questions regarding 1988 sentencing practices, please contact staff offices at 296-0144.

V. UPCOMING FEBRUARY REPORT

The 1988 Legislature passed a bill which directed the Minnesota Sentencing Guidelines Commission to study three issues and report back to the Legislature by February 1, 1989. The issues are as follows:

- 1) Should criteria and procedures be developed to limit the length of aggravated durational departures from presumptive sentences.
- 2) Whether improved criteria and procedures can be developed to minimize or eliminate the use of social and economic factors as the basis for dispositional departures from presumptive sentences.
- 3) Whether and to what extent guidelines should be developed to govern the type and severity of nonimprisonment sanctions imposed by sentencing judges as conditions of stayed sentences.

These three issues will be discussed in detail in the February report. In general, the Commission has not adopted any changes to the guidelines that would address issues #1 or #3. The Commission has adopted a change to the Commentary, II.D.101., that addresses issue #2, which has been explained above. If there is a need to obtain information on these issues prior to the February report, please contact the staff offices at 296-0144.

APPENDIX A

Minnesota Sentencing Guidelines Commission

MODIFICATIONS TO THE SENTENCING GUIDELINES EFFECTIVE AUGUST 1, 1988

Modifications to Section II. F. Concurrent/Consecutive Sentences are as follows:

3. When the conviction is for escape from lawful custody, as defined in Minn. Stat. § 609.485 ~~and there are unexpired or current executed sentences for any offense for which the person was in custody at time of the escape and/or current executed sentences for offenses committed while on escape status.~~

When a current conviction ~~for a crime against a person~~ is sentenced consecutive to a prior indeterminate or presumptive sentence ~~for a crime against a person~~, the presumptive duration for the current conviction is determined by locating the severity level appropriate to the current conviction offense and the zero criminal history column or the mandatory minimum, whichever is greater.

Modifications to Section V. Offense Severity Reference Table are as follows:

V Check Forgery over \$35,000 - 609.631, subd. 4(1)
Financial Transaction Card Fraud over \$35,000 - 609.821, subd. 3(1)(i)

III Check Forgery (over \$2,500) - 609.631, subd. 4(1) (2)

II Accidents - 169.09, subd. 14 (a)(3) & (b)(1)
Check Forgery (\$200 - \$2,500) - 609.631, subd. 4(2) (3) (a)

Cable Communication Systems Interference - 609.80, subd. 2
Check Forgery (less than \$200) - 609.631, subd. 4(2) (3) (b)
Fleeing a Police Officer - 609.487, subd. 3
Terroristic Threats - 609.713, subd. 3(a)

MODIFICATIONS TO THE COMMENTARY, EFFECTIVE AUGUST 1, 1988

Modifications to Comment II.A.03.(Exclusions from Offense Severity Reference Table):

- | | |
|------------|--|
| <u>6.</u> | <u>Cigarette Tax and Regulation Violations - 297.12, subd. 1</u> |
| <u>7.</u> | <u>6.- Collusive bidding/price fixing - 325D.53, subds. 1(3), 2 & 3</u> |
| <u>8.</u> | <u>7.- Corrupting legislator - 609.425</u> |
| <u>9.</u> | <u>8.- Criminal sexual conduct, third degree - 609.344, subd. 1(a)</u>
(By definition the perpetrator must be a juvenile.) |
| <u>10.</u> | <u>9.- Criminal sexual conduct, fourth degree - 609.345, subd. 1(a)</u>
(By definition the perpetrator must be a juvenile.) |
| <u>11.</u> | <u>10.- Falsely impersonating another - 609.83</u> |
| <u>12.</u> | <u>Gambling Regulation Violations - 349.22, subd. 3</u> |
| <u>13.</u> | <u>11.- Hazardous wastes - 609.671; 115.071, subd. 2(2)</u> |
| <u>14.</u> | <u>12.- Horse racing-prohibited act - 299J.29</u> |
| <u>15.</u> | <u>13.- Killing a police dog - 609.596, subd. 1</u> |
| <u>16.</u> | <u>14.- Incest - 609.365</u> |
| <u>17.</u> | <u>15.- Metal penetrating bullets - 624.74</u> |
| <u>18.</u> | <u>16.- Misprision of treason - 609.39</u> |
| <u>19.</u> | <u>17.- Motor vehicle excise tax - 297B.10</u> |
| <u>20.</u> | <u>18.- Obscene materials; distribution - 617.241, subd. 4</u> |
| <u>21.</u> | <u>19.- Obstructing military forces - 609.395</u> |
| <u>22.</u> | <u>20.- Penalties (sales tax violations) - 297A.39</u> |
| <u>23.</u> | <u>21.- Pipeline safety - 299J.07, subd. 2</u> |
| <u>24.</u> | <u>22.- Police radios during commission of crime - 609.856</u> |
| <u>25.</u> | <u>23.- Possession of pictorial representations of minors-617.247</u> |
| <u>26.</u> | <u>24.- Prohibiting promotion of minors to engage in obscene works - 617.246</u> |
| <u>27.</u> | <u>25.- Sales tax without permit, violations - 297A.08</u> |
| <u>28.</u> | <u>26.- Treason - 609.385</u> |
| <u>29.</u> | <u>Wire Communications Violations - 626A.02, subd. 4; 626A.03, subd. 1(b)(ii); 626A.26, subd. 2(1)(ii)</u> |

Modifications to Comment II.B.107. (Non-felony sentences where a fine is the only sanction given)

If the offender's prior record involves convictions of offenses that were committed on or after August 1, 1987, for which fines of \$201 - \$700 were the only sanction given, the conviction would count as a misdemeanor for purposes of computing criminal history scores.

If a fine is the only penalty provided by statute for the offense of conviction, and the fine imposed is was in excess of \$500 or in excess of \$700 if the offense occurred on or after August 1, 1983, then the offense would be counted as a gross misdemeanor. (An-example-of this-situation-is-Distribution-of-Obscene-Materials; Minn.-Stat.-617.241-(1982)).

If a fine is-\$200-or was given that was less than the misdemeanor level of fine as classified above, and that is 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.

Modifications to Comment II.F.03. (Concurrent/Consecutive Sentences)

II.F.03. *For cases with a prior felony sentence ~~for a crime against a person~~, which has neither expired nor been discharged, and a single current conviction ~~for a crime against a person~~, and when the current conviction is sentenced consecutive to the prior, the presumptive duration for the current conviction is found at the zero criminal history column and the appropriate severity level.*

Modifications to Comments II.E.01 and II.E.02. (Mandatory Minimum Sentences)

II.E.01. *The Commission attempted to draw the dispositional line so that the great majority of offenses that might involve a mandatory sentence would fall below the dispositional line. However, some cases carry a mandatory prison sentence under state law but fall above the dispositional line on the Sentencing Guidelines Grid: 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.*

II.E.02. *In 1981 the mandatory minimum provision dealing with the use of dangerous weapons in the commission of certain felonies (Minn. Stat. § 609.11) was amended to provide that the court shall determine the firearm or other dangerous weapon use or firearm possession based upon the record of the trial or plea of guilty and does not require the citing of this provision. If the court makes a finding that a dangerous weapon was involved, the mandatory minimum applies pursuant to Minn. Stat. § 609.11. This provision also provides prosecutors with the authority to make a motion to sentence apart from the mandatory minimum sentence. In State v. Olson, 325 N.W.2d 13 (Minn. 1982), the Supreme Court extended that authority to judges as well. When a motion to sentence apart from the mandatory minimum is made by the prosecutor or the judge, it becomes legal to stay imposition or execution of sentence or to impose a lesser sentence than the mandatory minimum. When such a motion is made, the presumptive disposition for the case is still imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is greater. A stay of imposition or execution for the case constitutes a mitigated dispositional departure. The imposition of a duration less than the mandatory minimum or cell time, if the latter is greater, constitutes a mitigated durational departure. Written reasons which specify the substantial and compelling nature of the circumstances and which demonstrate why the sentence selected is more appropriate, reasonable or equitable than the presumptive sentence are required.*

Assault in the Second Degree by statutory definition involves the use of a dangerous weapon and, therefore, the mandatory minimum provision dealing with dangerous weapons always applies when someone has been convicted of Assault in the Second Degree. The presumptive disposition is imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is greater.

APPENDIX B**MODIFICATIONS ADOPTED BY THE MINNESOTA SENTENCING GUIDELINES****Effective August 1, 1989, Absent Any Legislative Action to the Contrary****Adopted Modifications for Weighting of Prior Felonies**

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

1. Subject to the conditions listed below, the offender is assigned ~~one point~~ a particular weight 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.

a. The weight assigned to each prior felony sentence is determined according to its severity level, as follows:

Severity Level I - II = 1/2 point;

Severity Level III - V = 1 point;

Severity Level VI - VII = 1 1/2 point;

Severity Level VIII - X = 2 points; and

Murder 1st Degree = 2 points.

~~a-~~ b. When multiple sentences for a single course of conduct were imposed pursuant to Minn. Stats. § 609.585 or 609.251, the offender is assigned one point only the offense at the highest severity level is considered;

~~b-~~ c. An offender shall not be assigned more than two points. 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;

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

~~d-~~ 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.

Comment

II.B.101. *The basic rule for computing the number of prior felony points in the criminal history score is that the offender is assigned ~~one point~~ a particular weight 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. The felony point total is the sum of these weights. No partial points are given -- thus, a person with less than a full point is not given that point. For example, an offender with a total weight of 2 1/2 would have 2 felony points. The Commission determined that it was important to establish a weighting scheme for prior felony sentences to assure a greater degree of proportionality in the current sentencing. Offenders who have a history of serious felonies are considered more culpable than those offenders whose prior felonies consist primarily of low severity, nonviolent offenses. The Commission recognized that determining the severity level of the prior felonies may be difficult in some instances. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

In cases of multiple offenses occurring in a single behavioral incident in which state law prohibits the offender being sentenced on more than one offense, ~~the offender would receive one point~~ only the offense at the highest severity level should be considered. The phrase "before the current sentencing" means that in order for prior convictions to be used in computing criminal history score, the felony sentence for the prior offense must have been stayed or imposed before sentencing for the current offense. When multiple current offenses are sentenced on the same day before the same judge, sentencing shall occur in the order in which the offenses occurred. The dates of the offenses shall be determined according to the procedures in II.A.02.

When the judge determines that permissive consecutive sentences will be imposed or determines that a departure regarding consecutive sentences will be imposed, the procedure in section II.F. shall be followed in determining the appropriate sentence duration under the guidelines.

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

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

II.B.103. To limit the impact of past variability in prosecutorial discretion, the Commission ~~placed a limit of two points on computing~~ decided that for prior multiple felony sentences arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe offenses. For example, if an offender had robbed a crowded liquor store, he could be convicted of and sentenced for the robbery, as well as one count of assault for every person in the store at the time of the offense. Past variability in prosecutorial charging and negotiating practices could create substantial variance in the number of felony sentences arising from comparable criminal behavior. To prevent this past disparity from entering into the computation of criminal histories, ~~and to prevent manipulation of the system in the future,~~ the Commission ~~placed a limit of two points~~ limited consideration to the two most severe offenses in such situations. This still allows differentiation between those getting multiple sentences in such situations from those getting single sentences, but it prevents the perpetuation of ~~gross disparities from the past practice~~ resulting in disparity.

~~The two-point~~ This limit in calculating criminal history when there are multiple felony sentences arising out of a single course of conduct with multiple victims also applies when such sentences are imposed on the same day.

II.B.108. A felony sentence imposed for a criminal conviction treated pursuant to Minn. Stat. Ch. 242 (Youth Conservation Commission and later Youth Corrections Board, repealed 1977) shall be assigned ~~one felony point~~ its appropriate weight in computing the criminal history score according to procedures in II.B.1.

II.B.109. An offense upon which a judgment of guilty has not been entered before the current sentencing; i.e., pursuant to Minn. Stat. § 152.18, subd. 1, shall not be assigned ~~a felony point~~ any weight in computing the criminal history score.

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 below and to the right of the dispositional line, the guidelines create a presumption in favor of execution of the sentence. For cases in cells above and to the left of the dispositional line, 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 ~~will be~~ 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.

Adopted Modifications to the Misdemeanor Point
Effective August 1, 1989, Absent Any Legislative Action to the Contrary

3. Subject to the conditions listed below, the offender is assigned one unit for each misdemeanor conviction and ~~two units~~ for each gross misdemeanor conviction (excluding traffic offenses with the exception of DWI and aggravated DWI offenses, which are assigned two units each, when the current conviction offense is criminal vehicular operation) for which a sentence was stayed or imposed before the current sentencing. Four such units shall equal one point on the criminal history score, and no offender shall receive more than one point for prior misdemeanor or gross misdemeanor convictions.
 - a. Only convictions of statutory misdemeanors and gross misdemeanors listed in the Misdemeanor and Gross Misdemeanor Offense List ~~or ordinance misdemeanors that conform substantially to a statutory misdemeanor~~ shall be used to compute units. All felony convictions resulting in a misdemeanor or gross misdemeanor sentence shall also be used to compute units.
 - b. When multiple sentences for a single course of conduct are given pursuant to Minn. Stat. § 609.585, ~~and the most serious conviction is for a gross misdemeanor~~, no offender shall be assigned more than ~~two~~ one units.
 - c. A prior misdemeanor or gross misdemeanor sentence shall not be used in computing the criminal history score if a period of ten years has elapsed since the offender was adjudicated guilty for that offense. However, this does not apply to misdemeanor sentences that result from successful completion of a stay of imposition for a felony conviction.

Comment

II.B.301. *The Commission established a measurement procedure based on units for misdemeanor and gross misdemeanor sentences which are totaled and then converted to a point value. The purpose of this procedure is to provide different weightings for convictions of felonies, gross misdemeanors, and misdemeanors. Under this procedure, misdemeanors are ~~assigned one unit~~, and gross misdemeanors are assigned ~~two~~ one units. An offender must have a total of four units to receive one point on the criminal history score. No partial points are given--thus, a person with three units is assigned no point value. As a general rule, the Commission eliminated traffic misdemeanors and gross misdemeanors from consideration. However, the traffic offenses of driving while intoxicated and aggravated driving while intoxicated have particular relevance to the offense of criminal vehicular operation. Therefore, prior misdemeanor and gross misdemeanor sentences for DWI and aggravated DWI shall be used in the computation of the misdemeanor/gross misdemeanor point when the current conviction*

offense is criminal vehicular operation. These are the only prior misdemeanor and gross misdemeanor sentences that are assigned two units each. The Commission decided to reduce the weight of prior gross misdemeanors (other than DWI related offenses) in order to create a more proportional weighting scheme with respect to the weight of prior felonies at severity levels I and II which receive 1/2 point each. In addition, with the continued creation of new gross misdemeanors that are by definition nearly identical to misdemeanors, it is becoming increasingly difficult to discern whether a prior offense is a gross misdemeanor or a misdemeanor. The Commission believes that in light of these recording problems, a weighting scheme that sets the same weight for both misdemeanors and gross misdemeanors is more consistent and equitable.

The offense of fleeing a peace officer in a motor vehicle (Minn. Stat. § 609.487) is deemed a non traffic offense. Offenders given a prior misdemeanor or gross misdemeanor sentence for this offense shall be assigned one ~~and two units respectively~~ in computing the criminal history. (Offenders with a prior felony sentence for fleeing a peace officer in a motor vehicle shall be assigned ~~one point~~ the appropriate weight for each sentence subject to the provisions in II.B.1.).

II.B.302. The Commission placed a limit of one point on the consideration of misdemeanors or gross misdemeanors in the criminal history score. This was done because with no limit on point accrual, persons with lengthy, but relatively minor, misdemeanor records could accrue high criminal history scores and, thus, be subject to inappropriately severe sentences upon their first felony conviction. ~~With the exception of offenses with monetary thresholds, the Commission limited consideration of misdemeanors to those which are particularly relevant misdemeanors under existing state statute, or ordinance misdemeanors which substantially conform to existing state statutory misdemeanors. This was done to prevent criminal history point accrual for misdemeanor convictions which are~~ The Commission believes that only certain misdemeanors and gross misdemeanors are particularly relevant in determining the appropriate sentence for the offender's current felony conviction(s). Offenders whose criminal record includes at least four prior sentences for misdemeanors and gross misdemeanors contained in the Misdemeanor and Gross Misdemeanor Offense List, are considered more culpable and are given an additional criminal history point under the guidelines. The Commission has not included certain common misdemeanors in the Misdemeanor and Gross Misdemeanor Offense List because it is believed that these offenses are not particularly relevant in the consideration of the appropriate guideline sentence. This limiting was also done to prevent criminal history point accrual for misdemeanor convictions which are unique to one municipality, or for local misdemeanor offenses of a regulatory or control nature, such as swimming at a city beach with an inner tube. The Commission decided that using such regulatory misdemeanor convictions was inconsistent with the purpose of the criminal history score. In addition, several groups argued that some municipal regulatory ordinances are enforced with greater frequency against low income groups and members of racial minorities, and that using them to compute criminal history scores would result in economic or racial bias. For offenses defined with monetary thresholds, the threshold at the time the offense was committed determines the offense classification for criminal history purposes, not the current threshold.

II.B.303. The Commission adopted a policy regarding multiple misdemeanor or gross misdemeanor sentences arising from a single course of conduct under Minn. Stat. § 609.585, that parallels their policy regarding multiple felony sentences under that statute. It is possible for a person who commits a misdemeanor in the course of a burglary to be convicted of and sentenced for a gross misdemeanor (the burglary) and the misdemeanor. If that situation exists in an offender's criminal history, the policy places a ~~two~~ one-unit limit in computing the misdemeanor/gross misdemeanor portion of the criminal history score.

~~II.B.305. If an offender was convicted of a gross misdemeanor, but given a misdemeanor sentence, that is counted as a misdemeanor in computing the criminal history score.~~

II.B.3065. Convictions which are petty misdemeanors by statutory definition, or which have been certified as petty misdemeanors under Minn. R. Crim. P. 23.04, or which are deemed to be petty misdemeanors under Minn. R. Crim. P. 23.02, will not be used to compute the criminal history score.

II.B.3076. Misdemeanor convictions under Minn. Stat. § 340A.503, with the exception of subd. 2 (1), will not be used to compute the criminal history score. Because it is not the nature of the act but the age of the offender that determines the crime and because the record of violation cannot be disclosed absent an order by the court, the Commission believes it is inappropriate to include these convictions in the criminal history score.

Misdemeanor and Gross Misdemeanor Offense List

The following misdemeanors and gross misdemeanors will be used to compute units in the criminal history score. All felony convictions resulting in a misdemeanor or gross misdemeanor sentence shall also be used to compute units.

Arson 3rd Degree
609.563; subd. 2

Assault
609.224

Burglary 4th Degree
609.582

Carrying Pistol
624.714

Check Forgery
609.631

Contributing to Delinquency of Minor
260.315

Criminal Sexual Conduct 5th Degree
609.3451

Damage to Property
609.595

Dangerous Weapons
609.66

Fleeing a Police Officer
609.487

Furnishing Liquor to Persons Under 21
340A.503

Indecent Exposure
617.23

Interference with Privacy
609.746

Possession of Small Amount of Marijuana in Motor Vehicle
152.15

Possession of Stolen Property
609.53

Theft
609.52, subd. 2(1)

Trespass (gross misdemeanor)
609.605

Violating an Order for Protection
518B.01; subd. 14

Adopted Modifications to the Juvenile Point
Effective August 1, 1989, Absent Any Legislative Action to the Contrary

4. The offender is assigned one point for every two offenses committed and prosecuted as a juvenile that would have been felonies if committed by an adult, provided that:
 - a. Findings were made by the juvenile court pursuant to an admission in court or after trial;
 - b. Each offense represented a separate behavioral incident or involved separate victims in a single behavioral incident;
 - c. The juvenile offenses occurred after the offender's sixteenth birthday;
 - d. The offender had not attained the age of twenty-one at the time the felony was committed for which he or she is being currently sentenced; and
 - e. No offender may receive more than one point for offenses committed and prosecuted as a juvenile unless at least one of the offenses is Murder, Assault in the 1st or 2nd Degree, Criminal Sexual Conduct in the First, Second, or Third Degree or Aggravated Robbery involving a dangerous weapon. No offender may receive more than two points for offenses committed and prosecuted as a juvenile.

Comment

II.B.405. *Fourth, the Commission decided that, provided the above conditions are met, it would take two juvenile offenses to equal one point on the criminal history score, and that no offender may receive more than one point on the basis of prior juvenile offenses, unless at least one of the prior offenses was a serious violent offense, subject to provision II.B.4.e., upon which the offender may receive no more than two points. Again, no partial points are allowed, so an offender with only one juvenile offense meeting the above criteria would receive no point on the criminal history score. The ~~one~~ two point limit was deemed consistent with the purpose of including the juvenile record in the criminal history--to distinguish the young adult felon with no juvenile record of felony-type behavior from the young adult offender who has a prior juvenile record of repeated felony-type behavior. The ~~one~~ two point limit also was deemed advisable to limit the impact of findings obtained under a juvenile court procedure that does not afford the full procedural rights available in adult courts. The former one point limit was expanded to two points to differentiate the youthful violent offender.*

II.B.406. *Only those juvenile offenses where findings were made after August 1, 1989 can contribute to a juvenile history score of two. The Commission was concerned with the disparities in the procedures used in the various juvenile courts. This effective date gives proper notice that in the future, the juvenile history can result in two criminal history points, if at least one of the offenses is an offense listed in section 4.e.*

**Adopted Modifications to Commentary to Address
Dispositional Departures for Reasons Related to the Excluded Factors**

Effective August 1, 1989, Absent Any Legislative Action to the Contrary

Comment

II.D.101. The Commission believes that sentencing should be neutral with respect to offenders' race, sex, and income levels. Accordingly, the Commission has listed several factors which should not be used as reasons for departure from the presumptive sentence, because these factors are highly correlated with sex, race, or income levels. ~~The Commission's study of Minnesota sentencing decisions indicated that, unlike many other states, these factors generally were not important in dispositional decisions. Therefore, their exclusion as reasons for departure should not result in a change from current judicial sentencing practices. The only excluded factor which was associated with judicial dispositional decisions was employment at time of sentencing. In addition to Employment is excluded as a reason for departure not only because of its correlation with race and income levels, but also because this factor was excluded because it is manipulable--offenders could lessen the severity of the sentence by obtaining employment between arrest and sentencing. While it may be desirable for offenders to obtain employment between arrest and sentencing, some groups (those with low income levels, low education levels, and racial minorities generally) find it more difficult to obtain employment than others. It is impossible to reward those employed without, in fact, penalizing those not employed at time of sentencing. The use of the factors "amenable to probation (or treatment)" or "unamenable to probation" to justify a dispositional departure, could be closely related to social and economic factors. The use of these factors, alone, to explain the reason for departure is insufficient and the trial court shall demonstrate that the departure is not based on any of the excluded factors.~~

**Adopted Modifications to Add Mitigated Factor
Regarding Crime Spree Offenders**

Effective August 1, 1989, Absent Any Legislative Action to the Contrary

2. Factors that may be used as reasons for departure: The following is a nonexclusive list of factors which may be used as reasons for departure:

a. Mitigating Factors:

- (1) The victim was an aggressor in the incident.
- (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
- (3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.

(4) The offender's presumptive sentence is a commitment to the commissioner but not a mandatory minimum sentence, and either of the following exist:

(a) The current conviction offense is at severity level I or II and the offender received all of his or her prior felony sentences during less than three separate court appearances; or

(b) The current conviction offense is at severity level III or IV and the offender received all of his or her prior felony sentences during one court appearance.

- (4)(5) Other substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

Adopted Modifications to Aggravating Factors

Effective August 1, 1989,

Absent Any Legislative Action to the Contrary

b. Aggravating Factors:

- (3) The current conviction is for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured.

Adopted Modifications to Commentary Regarding Departures

Effective August 1, 1989, Absent Any Legislative Action to the Contrary

Comment

II.D.202. *The Commission recognizes that the criminal history score does not differentiate between the crime spree offender who has been convicted of several offenses but has not been previously sanctioned by the criminal justice system and the repeat offender who continues to commit new crimes despite receiving previous consequences from the criminal justice system. The Commission believes the nonviolent crime spree offender should perhaps be sanctioned in the community at least once or twice before a prison sentence is appropriate. At this time, the Commission believes that the judge is best able to distinguish these offenders and can depart from the guidelines accordingly.*

II.D.2023. *An aggravated sentence would be appropriate when the current conviction is for a Criminal Sexual Conduct offense or for an offense in which the victim was injured and there is a prior felony conviction for a Criminal Sexual Conduct offense or for an offense in which the victim was injured even if the prior felony offense had decayed in accordance with section II.B.1.d.*

CRIMINAL HISTORY SCORE

SEVERITY LEVELS OF CONVICTION OFFENSE	0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana I							
Theft Related Crimes (\$250-\$2500) Aggravated Forgery (\$250-\$2500) II							
Theft Crimes (\$250-\$2500) III							
Nonresidential Burglary Theft Crimes (over \$2500) IV							
Residential Burglary Simple Robbery V							
Assault, 2nd Degree VI							
Aggravated Robbery VII	48 24 23-25 44-52	58 32 30-34 54-62	68 41 38-44 64-72	78 40 45-53 74-82	88 66 60-70 84-92	98 81 75-87 94-102	108 57 96-104 104-112
Criminal Sexual Conduct, 1st Degree Assault, 1st Degree VIII	86 43 41-45 81-91	98 54 50-58 93-103	110 65 60-70 105-115	122 76 71-81 117-127	134 95 89-101 129-139	146 113 106-120 141-151	158 132 124-140 153-163
Murder, 3rd Degree Murder, 2nd Degree (felony murder) IX							
Murder, 2nd Degree (with intent) X							

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

*one year and one day

Background

Adult Male Prison Populations

Substantial Increases

The number of Minnesota adult male inmates incarcerated in state prisons has been increasing since the mid-1970s. The total number dipped to about 1,200 in 1974 and has increased to more than 2,600 currently.

Just within the last two years increases have been substantial, amounting to approximately 200 more inmates annually. On October 1, 1986, there were 2,211 male inmates incarcerated. Two years later as of November 14, 1988, there were 2,605 Minnesota male inmates--an increase of 394. Projections show that these increases will continue.

The number of women inmates has also been on the increase with 117 Minnesota inmates currently incarcerated at the Shakopee facility.

Record High Commitments

The increasing number of commitments of offenders from the courts to the corrections department is the primary reason for these upward changes.

In 1980 average monthly commitments totaled 70. Thus far this year the monthly average is more than double that figure at 150.

For October, 1988, the number of court commitments hit a record high at 171 inmates.

Contract Inmates

Although current population projections clearly indicate that the program will be phased out, the department has housed inmates from jurisdictions outside Minnesota on a per diem basis since 1981. Beginning with a contract

with Wisconsin to generate funds for opening the Oak Park Heights facility, these contracts will have generated \$36.5 million by the end of FY 1989. In addition to institutional operations these funds have been used to pay for bed expansion, programs for battered women, a training center for new officers, and other programs.

The Wisconsin agreement was phased out in FY 1986 and an agreement with Alaska ended in June, 1988. The department currently has contracts with the U.S. government to house federal inmates in Minnesota. Due to increasing Minnesota populations, plans call for the phaseout of federal inmates at the end of the current fiscal year.

Over time there has been some misinformed criticism of the contract program indicating that somehow more Minnesota inmates would be incarcerated if these contract inmates were not in the system. This simply is not true. A commitment from the court to the Commissioner of Corrections has never been refused admission to prison based on a need to make room for contract inmates. Inmate population projections and court commitments have never included these contract inmates nor would it make sense to do so. It should also be noted that these contract inmates have been and are housed at the Stillwater and St. Cloud institutions with a relatively small number at Oak Park Heights.

Current Situation

Receipts from housing contract inmates are currently being used to fund inmate bed expansions which will be needed for Minnesota inmates. Receipts are also used to fund other institution operations and correctional programs.

Approximately \$4 million of the contract funds used in FY 1989 provided for 487 additional beds at the St. Cloud, Willow River/Moose Lake, Red Wing, Lino Lakes, and Stillwater facilities. Funds were also used to expand work release programming. These expansions increased capacity to 2,832 male beds.

Future Problems

Population projections indicate that the number of Minnesota inmates will go beyond the department's existing capacity (2,832) during the next biennium. All existing beds including the 487 beds currently funded with contract funds will be needed for Minnesota inmates.

Therefore, contract inmates will be phased out and the department is seeking funds to replace the outside revenue sources with appropriated dollars during the next legislative session.

Potential Bed Shortages

However, in order to accommodate Minnesota inmates throughout the next biennium (totaling over 2,900 inmates by summer, 1990) expansion beyond the current capacity will be required.

Population projections are based on a simulation which includes factors that may vary over time. Bed shortages could grow to more than 300 when factors such as a continuing increase in court volume and continuing trends in higher criminal history scores are estimated.

These potential shortages do not take into consideration any increases that would result from any legislative changes to increase penalties.

Also, it is considered good correctional practice to operate facilities at 95 percent of capacity to allow for inmate movement, special programs, etc. This factor would result in the need for approximately 142 additional beds.

Expansion Proposals

The department is not seeking a major capital budget change nor is there a request for construction of a new prison in the 1990-91 budget.

The department has attempted to develop budget proposals which provide the most cost-effective ways to deal with the prison population problem. They include:

Work Release Expansion. The department is seeking funds to increase total work release capacity to approximately 120 beds. This request is for approximately \$1 million each year of the biennium.

Reduction of Short-Term Commitments. Many offenders are being committed to state prisons with less than 12 months to serve, many with less than six months, and some less than three. It is the department's position that many of these offenders need not be sent to prison and more appropriately should be placed in a community correctional sanction. This will be accomplished by:

- **Community Corrections Act (CCA) expansion**--The department is proposing a 33 percent increase (\$5.1 million each year) for the CCA to provide adequate funding to deal with the increased level of correctional activity. A chargeback mechanism is also proposed whereby CCA counties would be charged for offenders with 12 months or less to serve who are committed as a result of a probation violation. Chargebacks would also be used for cases in which the court departed from the recommended guidelines sentence and committed the offender to prison.

- **Non-CCA counties**--Through implementation of internal policies the department will limit the number of short-term commitments from non-CCA areas where the department provides probation services.

- **Legislative change**--The department is proposing legislation which would prohibit the current practice of allowing offenders to demand a prison sentence of relatively short duration rather than face community-based sanctions.

Contingency Fund. The department is also requesting the establishment of a contingency fund of \$2.5 million the first year and \$2 million thereafter to provide 150 beds at a location to be determined. Expansion at an existing building located at one of the state regional treatment centers is the most probable option.

Impact. The impact of work release expansion would result in the reduced need for 40 beds, the short-term commitment reductions would result in the reduced need for 154 beds, and the contingency fund would add 150 beds for a total of 344 beds. These proposals may be adequate to address the potential bed shortage.

Other Options

Sentencing Guidelines. Minnesota Sentencing Guidelines Commission staff have developed options for reducing the number of nonviolent offenders going to prison in order to make room for violent offenders.

Options include development of non-imprisonment guidelines; development of guidelines for probation revocations; weighing of prior felonies in determining criminal history scores; elimination of the use of misdemeanors in calculating criminal histories; and development of a criminal history score intervention policy.

Prison Construction. Many states that have attempted to solve their prison population problems by building more institutions now have construction programs and operational costs that are the fastest growing users of state revenues.

Nationally, annual prison operational costs are reaching \$10 billion. State correctional spending levels are reaching one-half billion in some areas and over a billion in states with larger prison

populations. Construction is underway costing more than \$2.5 billion. There is no evidence that this increased use of incarceration relates to crime rates.

If the legislature were to mandate building a new institution, the department would most likely propose a 400 to 500 bed medium security facility which would have a construction cost of \$40 to \$50 million. Annual operational costs are estimated at \$15 to \$20 million.

The most recently constructed maximum security facility in Minnesota was the Oak Park Heights institution in 1982 at a cost of \$31.8 million. Replacement costs are currently estimated at more than \$65 million.

It is the department's position that current population projections can be dealt with by implementing less costly proposals. As noted earlier, these projections do not reflect any legislative changes which would increase sanctions.

Future Planning

The department is forming a strategic planning group for the 1990s which will analyze and recommend correctional needs for the next decade. They will begin work in July, 1989, and develop recommendations by January, 1990.

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November 18, 1988

Minnesota
Department of
Corrections 