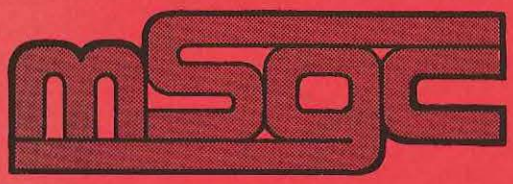
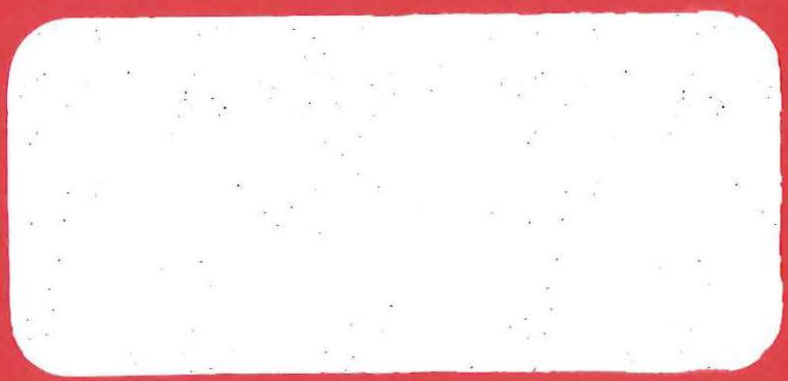
Minnesota Sentencing Guidelines Commission





Minnesota Sentencing Guidelines Commission

REPORT TO THE LEGISLATURE

January, 1994

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EXECUTIVE SUMMARY

In 1993, the Minnesota Sentencing Guidelines Commission continued to address concerns and issues related to the sentencing of convicted felons. Much of the work throughout the year was in response to previous legislative sessions. The Legislature in 1992 directed the Commission to look at several areas of the guidelines and report on these concerns by 1994. The Commission also addressed the numerous new laws and provisions passed by the Legislature in 1993.

Upon the request of the legislature, the guidelines were modified to include all prior DWIs in the calculation of the misdemeanor point when the current offense is for Criminal Vehicular Homicide or Injury. The Commission also reconsidered the severity level rankings for Criminal Vehicular Homicide. Offenses involving negligence or gross negligence are ranked at severity level VII. Those provisions only specifying the alcohol concentration are ranked at severity level VI. All provisions carry a presumptive prison sentence. The Commission heard public testimony on this matter and subsequently decided not to adopt new severity levels. They believed that the element of gross negligence or negligence is an additional factor of greater culpability that should increase the severity of the sanction. A recent appellate court decision supports this rationale.

The Commission adopted changes to help implement two new laws: 1) minimum periods of supervised release for sex offenders released from prison and 2) the new felony sentencing system that eliminates the concept of "good time" and promotes truth in sentencing. The Commission also adopted severity level rankings for new and amended crimes passed by the 1993 Legislature. A public hearing was held in July, 1993 and the Commission adopted severity level rankings that went into effect August 1, 1993. These new and amended crimes and their adopted rankings are outlined in the report.

The Commission reconsidered the original severity level rankings adopted for Stalking/Harassment Crimes. Provisions involving Aggravated Violations and Second or Subsequent Violations were ranked at severity level II and provisions involving a Pattern of Harassing Conduct were ranked at severity level III. A public hearing was held in October to hear additional testimony regarding the appropriate severity level for these crimes. Based on the new testimony, the Commission reconsidered the original rankings and increased the rankings to severity level IV for those provisions involving Aggravated Violations and Second or Subsequent Violations and increased the rankings to severity level V for provisions involving a Pattern of Harassing Conduct. The Commission also modified the guidelines to include misdemeanor level harassment crimes in the calculation of the criminal history score.

Several modifications were adopted by the Commission that require review by the 1994 Legislature. These modifications include: 1) credit for time spent in confinement under Huber Law at the rate of one day for each day served; 2) adopted severity level rankings for inadvertently unranked crimes; 3) increased severity level rankings for certain prostitution crimes involving force; and 4) the addition of several crimes to the list of misdemeanors and gross misdemeanors.

An overview of general sentencing practices and a comparison of Minnesota to other states is included in this report. Sentence lengths have increased dramatically in Minnesota in response to tougher sentencing policies adopted by the Commission and the Legislature since 1989. Incarceration rates have also increased substantially over time and more people are sentenced to jails and prisons each year. Minnesota is both more truthful and tougher in the sentencing of convicted felons when compared to other states. Offenders in Minnesota serve more time in prison for their crimes than in many other states and actually serve the term of imprisonment pronounced by the judge. Other states sentence felons to tough sounding sentences only to release them after they have served a small fraction of their time.

I. BACKGROUND INFORMATION

Minnesota adopted a sentencing guidelines system effective May 1, 1980. The guidelines were created to ensure uniform and determinate sentencing. The goals of the guidelines are: (1) To enhance public safety; (2) To promote uniformity in sentencing so that offenders who are convicted of similar types of crimes and have similar types of criminal records are similarly sentenced; (3) To establish proportionality in sentencing by emphasizing a "just deserts" philosophy. Offenders who are convicted of serious violent offenses, even with no prior record, those who have repeat violent records, and those who have more extensive nonviolent criminal records are recommended the most severe penalties under the guidelines; (4) To provide truth and certainty in sentencing; and (5) To enable the legislature to coordinate sentencing practices with correctional resources.

A sentencing guidelines system provides the legislature and the state with a structure for determining and maintaining rational sentencing policy. Through the development of the sentencing guidelines, the legislature determines the goals and purposes of the sentencing system. Guidelines represent the general goals of the criminal justice system and indicate specific appropriate sentences based on the offender's conviction offense and criminal record.

Judges may depart from the presumptive guideline sentence if the circumstances of the case are substantial and compelling. The judge must state the reasons for departure and either the prosecution or the defense may appeal the pronounced sentence. While the law provides for offenders to serve a term of imprisonment equal to two-thirds of their total sentence and a supervised release period equal to up to one-third of their total sentence if there are no disciplinary infractions, the sentence length is fixed. There is no mechanism for "early release due to crowding" that other states have been forced to accept because of disproportionate and overly lengthy sentences.

Judges pronounce sentences and are accountable for sentencing decisions. Prosecutors also play an important role in sentencing. The offense that a prosecutor charges directly affects the recommended guideline sentence if a conviction is obtained.

The Minnesota Sentencing Guidelines Commission is responsible for maintaining the sentencing guidelines. There are 11 members on the Commission who represent the criminal justice system and citizens of the State of Minnesota. The Commission meets monthly and all meetings are open to the public. Meeting minutes are available upon request.

A constant flow of information is gathered on sentencing practices and made available to the Commission, the legislature, and others interested in the system. The Commission modifies the guidelines, when needed, to take care of problem areas and legislative changes. Extensive changes were made in 1989 when the Commission and the Legislature addressed the problem of violent crime. In subsequent years, the Legislature made additional changes to law and sentencing policy to address public concerns. This report outlines the work of the Commission in 1993, much of which was in response to the 1993 legislative session.

II. GUIDELINES MODIFICATIONS - EFFECTIVE AUGUST 1, 1993

A. ADOPTED MODIFICATIONS REVIEWED BY THE 1993 LEGISLATURE

The Commission adopted the following severity level rankings for these inadvertently unranked crimes:

Severity Level III

Tax Evasion Laws - 289A.63
Damages; Illegal Molestation of Human Remains; Burials; Cemeteries - 307.08, subd.2

Severity Level II

Gambling Regulations - 349.2127, subd. 1-6
Wildfire Arson - 609.5641, subd. 1
Bribery of Participant or Official in Contest - 609.825, subd. 2

Severity Level I

Motor Vehicle Taxes - 296.25, subd. 1(b)
Excise Tax on Alcoholic Beverages - 297C.13, subd. 1
Certification for Title on Watercraft - 86B.865, subd. 1
Criminal Penalties Regarding the Activities of Corporations - 300.60

Add to Unranked Offense List

Unlawful Transfer of Sounds; Sales - 325E.20

B. ADOPTED MODIFICATIONS IN RESPONSE TO LEGISLATIVE DIRECTIVES OR CHANGES MADE IN THE 1992 LEGISLATIVE SESSION

CHANGES TO THE CRIMINAL HISTORY SCORE

The 1992 Legislature directed the Commission to modify section II.B.3 of the sentencing guidelines to provide that the criminal history score of any person convicted of violating section 609.21 shall include one-half point for each previous violation of section 169.121, 169.1211 or 169.129. This directive was effective January 1, 1993.

3. Subject to the conditions listed below, the offender is assigned one unit for each misdemeanor conviction and for each gross misdemeanor conviction included on the Misdemeanor and Gross Misdemeanor Offense List and ~~(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. All felony convictions resulting in a misdemeanor or gross misdemeanor sentence shall also be used to compute units. 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. There is the following exception to this policy when the current conviction is criminal vehicular homicide or injury: previous violations of section 169.121, 169.1211 or 169.129 are assigned two units each and there is no limit on the total number of misdemeanor points included in the criminal history score due to DWI violations.

II.B.301. *The Commission established a measurement procedure . . . 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 homicide or injury ~~operation~~. Therefore, prior misdemeanor and gross misdemeanor sentences for violations under 169.121, 169.1211 or 169.129 ~~DWI and aggravated DWI~~ shall be used in the computation of the misdemeanor/gross misdemeanor point when the current conviction offense is criminal vehicular homicide or injury ~~operation~~. These are the only prior misdemeanor and gross misdemeanor sentences that are assigned two units each.*

II.B.302. *The Commission placed a limit of one point on the consideration of misdemeanors or gross misdemeanors in the criminal history score. . . 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 believes that offenders whose current conviction is for criminal vehicular homicide or injury and who have prior violations under 169.121, 169.1211 or 169.129 are also more culpable and for these offenders there is no limit to the total number of misdemeanor points included in the criminal history score due to DWI violations.*

The Commission also adopted modifications to clarify how to calculate the Misdemeanor Point when the current conviction is for criminal vehicular homicide or injury.

II.B.302. *. . . The Commission believes that offenders whose current conviction is for criminal vehicular homicide or injury and who have prior violations under 169.121, 169.1211 or 169.129 are also more culpable and for these offenders there is no limit to the total number of misdemeanor points included in the criminal history score due to DWI violations. To determine the total number of misdemeanor points under these circumstances, first add together any non DWI misdemeanor units. If there are less than four units, add in any DWI units. Four or more units would equal one point. Only DWI units can be used in calculating additional points. Each set of four DWI units would equal an additional point. For example, if an offender had two theft units and six DWI units, the theft would be added to the two DWI units to equal one point. The remaining four DWI units would equal a second point. In a second example, if an offender had six theft units and six DWI units, the first four theft units would equal one point. Four of the DWI units would equal a second point. The remaining two theft units could not be added to the remaining two DWI units for a third point. The total misdemeanor score would be two.*

RECONSIDERATION OF CRIMINAL VEHICULAR HOMICIDE RANKINGS

The 1992 Legislature requested that the Commission consider modifying the severity level ranking for Criminal Vehicular Homicide, 609.21, subd. 1, clauses (3) & (4) and subd. 3, clauses (3) & (4). Because this directive did not go into effect until January 1, 1993, the Commission did not discuss the issue until 1993. See the **appendix** for relevant sections of the meeting minutes.

Presumptive Sentences/Legislative History

All persons convicted of Criminal Vehicular Homicide are recommended a prison sentence, effective for offenses occurring on or after August 1, 1989. The durations recommended by the guidelines depend on the offender's criminal record and the specific provisions of law under which the offender is convicted.

When the guidelines were first implemented in 1980, Criminal Vehicular Homicide was ranked at severity level V and the guidelines recommended a stayed sentence for those with a criminal history score of two or less. Effective August 1, 1989, the Commission raised Criminal Vehicular Homicide to severity level VI. At that time it was also decided that the presumptive sentence should be **prison**, regardless of the offender's criminal history score.

In 1990, the legislature revised M.S. 609.21 to define Criminal Vehicular Homicide as:

> "... causes the death of a human being not constituting murder or manslaughter as a result of operating a motor vehicle,
>
> (1) in a grossly negligent manner;
> (2) in a negligent manner while under the influence of alcohol, a controlled substance, or any combination of those elements;
> (3) while having an alcohol concentration of 0.10 or more; or
> (4) while having an alcohol concentration of 0.10 or more, as measured within two hours of the time of driving."

The 1990 revisions included the addition of clause (4) and the removal of the phrase "in a negligent manner" from clause (3).

The Commission believed that clauses (1) and (2) described more serious behavior than the other two clauses because of the requirement that the offender act in a grossly negligent or negligent manner while operating the motor vehicle. The Commission, therefore, **increased** the severity level ranking for clauses (1) and (2) to severity level VII. Convictions for Criminal Vehicular Homicide under clauses (3) and (4) were left at severity level VI, but continued to carry a presumptive prison sentence.

Legislative Directive and Commission Consideration

The 1992 Legislature directed the Commission to consider whether to modify the severity level ranking for violations of sections 609.21, subd. 1, clauses (3) & (4) and subd. 3, clauses (3) & (4). The Legislature questioned whether the Commission should continue to distinguish these provisions which are ranked at severity level VI from those that are ranked at severity level VII.

The Commission discussed the issue and placed the question of severity level ranking on the agenda for the July, 1993 Public Hearing. There was support at the public hearing for ranking all clauses of section 609.21, subd. 1 & 3 at severity level VII from MADD, the Attorney General's Office, and the County Attorney's Association. In addition, Representative Swenson had previously written to the Commission and spoke at a meeting in support of a severity level VII ranking for all clauses. However, defense attorneys wrote to the Commission supporting the current severity level rankings stating that they believed that the distinctions between the clauses warranted different rankings.

The rationale given for a single severity level ranking of VII for all clauses was primarily that the differences between the behavior described in clauses (1) and (2) as compared to clauses (3) and (4) are so slight as to render them insignificant. It was argued that to not rank them similarly would potentially treat vehicular homicide that involved a sober, grossly negligent driver more seriously than someone driving with an alcohol concentration of .10 or greater. The argument was also made that clauses (3) and (4) compare closely to 2nd Degree Manslaughter which is ranked at severity level VII. The crime of 2nd Degree Manslaughter involves a person who causes the death of another "by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another."

Case examples were presented by defense attorneys to illustrate why they support separate severity level rankings. One case involved someone driving with an alcohol concentration of .10 who struck a child who darted out from between two parked cars on a rainy day. This person was convicted of clause (3), ranked at severity level VI with a presumptive prison sentence of 21 months. The second case involved a driver with an alcohol concentration of .08 who drove at the speed of 120 mph and killed two of his passengers. This person was convicted under clause (2), ranked at severity level VII with a presumptive prison sentence of 48 months. The argument presented to the Commission was that while both those drivers are culpable for making the decision to drive after drinking alcohol, the second case involved a greater level of culpability because of the high speed of driving and, therefore, that person should receive a harsher penalty.

Commission Action

The Commission did not adopt new severity level rankings for convictions under section 609.21, subd. 1, clauses (3) and (4) and subd. 3, clauses (3) and (4). The Commission believes that differences exist between the clauses that warrant a harsher penalty for clauses (1) and (2). The Commission believes the typical criminal vehicular homicide offense involves alcohol and that the distinction is not between a grossly negligent sober person and a legally drunk person. The typical case would involve a drunk person and the element of gross negligence or negligence is an additional factor of greater culpability that should increase the severity of the sanction.

A recent case decided by the Court of Appeals supports the Commission position regarding the severity level rankings of this crime. In State. v. Jaworsky, the constitutionality of the sentencing guidelines' treatment of section 609.21, subd. 1, clause (2) was challenged. The case raised the question of whether the guidelines violate the equal protection clauses of the Minnesota or United States Constitutions by recommending a 48-month sentence for convictions under Minn. Stat. 609.21, subd. 1(2) when clauses (3) and (4) are recommended a 21 month sentence under the guidelines. The Court determined that the guidelines did not violate the Minnesota Constitution and wrote:

Minn. Stat. 609.21, subd. 1(3), 1(4) require the state to prove that the defendant who caused a person's death by operating a motor vehicle had an alcohol concentration of 0.10 or more. Minn. Stat. 609.21, subd. 1(2) requires the state to prove that a defendant who caused a person's death by operating a motor vehicle was under the influence of alcohol or a controlled substance and operated the motor vehicle negligently. The sentencing guidelines simply recognize that a person who negligently operates a motor vehicle while under the influence may be deserving of a longer sentence than a person who non-negligently operates a motor vehicle while under the influence, even if the latter individual has a higher alcohol concentration than the former. The element of negligence is a substantial distinction among the offenses. . .

Furthermore, the purpose of a more severe consequence for a more serious offense is at least in part promotion of the public safety. . . Minn. Stat. 609.21, subd. 1(2), with its additional element of negligence, defines an offense that is substantially more serious than the offenses created by Minn. Stat. 609.21, subd. 1(3), 1(4). The recommendation of a longer sentence for an offense involving negligence is relevant to the promotion of public safety.

CHANGES REGARDING MINIMUM PERIODS OF SUPERVISED RELEASE

The Commission adopted the following Modifications to clarify minimum periods of supervision for sex offenders released from prison. The Legislature passed a provision in 1992 requiring all sex offenders sentenced to prison to serve a five year period of conditional release and under certain circumstances, a ten year period of conditional release. The Commission added language to the guidelines to help notify the court of this new provision.

The Commission adopted the following Commentary language:

II.E.05. M.S. § 609.346 requires that when a court sentences a person to prison for a violation of section 609.342, 609.343, 609.344, or 609.345, the court shall provide that after the person has completed the sentence imposed, the commissioner of corrections shall place the person on conditional release for five years, minus the time the person served on supervised release. If the person was convicted for a violation of one of those sections a second or subsequent time, or sentenced to a mandatory departure pursuant to section 609.346, subd. 4, the person shall be placed on conditional release for ten years, minus the time served on supervised release.

The Commission also modified the Sentencing Guidelines Grid by adding language to the description of the unshaded area of the grid:

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

CHANGES REGARDING NEW FELONY SENTENCING SYSTEM

The Commission adopted the following modifications to implement the new felony sentencing system. The 1992 legislature created a new system for sentencing offenders who are convicted of felony level offenses and who receive executed prison sentences. The new sentencing system, which eliminates good time, was passed as part of the 1992 crime bill. Under the new system, inmates will no longer earn and vest good time. Instead, the legislation authorizes the Commissioner of Corrections to impose disciplinary confinement time for violations of disciplinary rules.

Offenders who are committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993, will receive a sentence consisting of two parts: a term of imprisonment equal to two-thirds of the pronounced executed sentence; and a term of supervised release equal to the remaining one-third of the executed sentence. The court is required to explain the amount of time to be served in prison and the amount of time to be served on supervised release.

The legislature established a task force to study the new sentencing provisions and to recommend changes to legislation and to the Sentencing Guidelines to permit the effective implementation of the new system (1992 Session Laws, Ch. 571, Art. 2, Sec. 11). The criminal justice system in Minnesota operates under a variety of complex policies and rules, including

Minnesota Statutes, Minnesota Rules of Criminal Procedure, case law, and the Minnesota Sentencing Guidelines. The task force focused on how best to implement the new sentencing legislation within the context of an already complex system.[1] The Commission adopted several changes to the sentencing guidelines to implement the recommendations made by the task force.

The Commission adopted the following changes to the Sentencing Guidelines and Commentary:

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

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

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

II.E. Mandatory Sentences: . . . When an offender has been sentenced according to Minn. Stat. § 609.11, subd. 5a the presumptive duration of the prison sentence is the mandatory minimum ~~term~~ sentence for dangerous weapon involvement plus the mandatory minimum ~~term~~ sentence for the second or subsequent controlled substance offense or the duration of prison sentence provided in the appropriate cell of the Sentencing Guidelines Grid, whichever is longer.

II.F.02. . . . *The second or subsequent judge can pronounce the durations indicated in the Sentencing Guidelines Grid at the zero criminal history column for the severity level for the current offense, and can state that this sentence would be consecutive to the previous presumptive sentence. The institutional records officer will aggregate the separate durations into a single fixed presumptive sentence, as well as aggregate the terms of imprisonment and the periods of supervised release. For example, if Judge A executed a 44 month fixed presumptive sentence, and Judge B later executes a 24 month fixed presumptive sentence to be served consecutively to the first sentence, the records officer has the authority to aggregate those sentences into a single 68 month fixed presumptive sentence, with a specified minimum 45.3 month term of imprisonment and a specified maximum 22.7 month period of supervised release, ~~provided that all good time were earned~~.*

[1] This explanation of the New Felony Sentencing System and Task Force was taken from the *Report to the Legislature from the New Sentencing System Task Force*, February 15, 1993.

III.C.02. *The Commission also believes that jail credit should be awarded for time spent in custody as a condition of a stay of imposition or stay of execution when the stay is revoked and the offender is committed to the Commissioner of Corrections. The primary purpose of imprisonment is punishment, and the punishment imposed should be proportional to the severity of the conviction offense and the criminal history of the offender. If, for example, the presumptive duration in a case is 18 months, and the sentence was initially executed by means of a departure the specified minimum term of imprisonment would be 12 months ~~if all good time were earned~~.*

III.C.03. *In order to ensure that offenders are not penalized for inability to post bond, credit for time in custody shall be computed by the Commissioner of Corrections ~~after projected good time is subtracted from the sentence.~~ and subtracted from the specified minimum term of imprisonment.*

For offenders sentenced for offenses committed before August 1, 1993, credit for time in custody shall be computed by the Commissioner of Corrections after projected good time is subtracted from the executed sentence.

The Commission adopted the following table be added to the backside of the Sentencing Guidelines Grid:

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

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

Executed Sentence	Term of Imprisonment	Supervised Release Term	Executed Sentence	Term of Imprisonment	Supervised Release Term
12 and 1 day	8 and 1 day	4	88	58 ⅔	29 ⅓
13	8 ⅔	4 ⅓	98	65 ⅓	32 ⅔
15	10	5	108	72	36
17	11 ⅓	5 ⅔	110	73 ⅓	36 ⅔
18	12	6	122	81 ⅓	40 ⅔
19	12 ⅔	6 ⅓	134	89 ⅓	44 ⅔
21	14	7	146	97 ⅓	48 ⅔
22	14 ⅔	7 ⅓	150	100	50
23	15 ⅓	7 ⅔	158	105 ⅔	52 ⅔
25	16 ⅔	8 ⅓	165	110	55
26	17 ⅓	8 ⅔	180	120	60
27	18	9	190	126 ⅔	63 ⅓
30	20	10	195	130	65
32	21 ⅓	10 ⅔	200	133 ⅓	66 ⅔
34	22 ⅔	11 ⅓	210	140	70
38	25 ⅓	12 ⅔	220	146 ⅔	73 ⅓
41	27 ⅓	13 ⅔	225	150	75
44	29 ⅓	14 ⅔	230	153 ⅓	76 ⅔
46	30 ⅔	15 ⅓	240	160	80
48	32	16	306	204	102
54	36	18	326	217 ⅓	108 ⅔
58	38 ⅔	19 ⅓	346	230 ⅔	115 ⅓
65	43 ⅓	21 ⅔	366	244	122
68	45 ⅓	22 ⅔	386	257 ⅓	128 ⅔
78	52	26	406	270 ⅔	135 ⅓
86	57 ⅓	28 ⅔	426	284	142

C. RANKING OF NEW OR AMENDED CRIMES

The Commission adopted the following severity level rankings for crimes amended or created by the 1993 Legislature:

Severity Level VII

Controlled Substance Crimes in the Second Degree - 152.022
(to include new provision of selling LSD in a "zone.")
Criminal Sexual Conduct 3 - 609.344, subd. 1 (h), (i), (j), (k), & (l)

Severity Level VI

Controlled Substance Crimes in the Third Degree - 152.023
(to include new provision of possessing LSD in a "zone.")
Criminal Sexual Conduct 4 - 609.345, subd. 1 (h), (i), (j), (k), & (l)
Drive-By Shooting (toward a person or occupied motor vehicle or building) - 609.66, subd. 1e (a)

Severity Level V

Arson Second Degree - 609.562
Possession of Explosive or Incendiary Device - 299F.811
Possession of Molotov Cocktail - 299F.815
Riot First Degree - 609.71, subd. 1

Severity Level III

Arson Third Degree - 609.563
Drive-By Shooting (unoccupied motor vehicle or building) - 609.66, subd. 1e (a)
Dangerous Weapons - 609.67, subd. 2; 624.713, subd. 1 (b)
(To include additional weapons added by the 1993 Legislature)
Harassment/Stalking (pattern of harassing conduct) - 609.749, subd. 5
Tampering with Fire Alarm System (results in bodily harm) - 609.686, subd. 2

Severity Level II

Harassment/Stalking (aggravated violations) - 609.749, subd. 3
Harassment/Stalking (2nd or subsequent violation) - 609.749, subd. 4
Negligent Fires (damage greater than $2,500) - 609.576, subd. 1 (b) (3)
Riot Second Degree - 609.71, subd. 2

Severity Level I

Child Neglect/Endangerment - 609.378
Dangerous Weapons on School Property - 609.66 1d
Fifth Degree Assault (3rd or subsequent violation) - 609.224, sub. 4
Prize Notices and Solicitations - 325F.755, subd. 7
Reckless Discharge of a Firearm - 609.66 1a (a) (3)
Tampering with a Fire Alarm (potential for bodily harm) - 609.686, subd. 2
Violation of Pistol without a Permit (2nd or subsequent violation) - 624.714, subd. 1 (a)

The Commission adopted the following language to address the new crime of Solicitation of Mentally Impaired Persons:

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

D. ADOPTED MODIFICATIONS TO CORRECT TECHNICAL ERRORS

The Commission adopted the following corrections to the Offense Severity Reference Table:

Discharge of Firearm - 609.66, subd. 1a (a)(2)
Discharge of Firearm (public housing, school, or park zone) - 609.66, subd. 1a~~(2)~~ (b)(1)
Firearm Silencer - 609.66, subd. 1a (a)(1)
Theft of a Firearm - 609.52, subd. 3 (1)~~, (2)~~

The Commission adopted the following corrections to section II.A.02.b. of the Commentary:

b. If multiple offenses are an element of the conviction offense, such as in Subd. 1 (h) ~~(v)~~ (iii) of first degree criminal sexual conduct, the date of the earliest offense should be used as the date of the conviction offense.

III. STALKING/HARASSMENT MODIFICATIONS - EFFECTIVE JANUARY 1, 1994

A. ORIGINAL SEVERITY LEVEL RANKINGS FOR STALKING/ HARASSMENT CRIMES

The 1993 Legislature created new felony level Stalking/Harassment Laws that went into effect June 1, 1993. Usually new crimes do not become law until August 1 and because the Commission could not act to adopt severity level rankings for this crime before it went into effect, the crime is considered "unranked" for crimes committed between June 1, 1993 and August 1, 1993. The following new felony stalking and harassment provisions were created:

Aggravated Violation includes harassment and stalking offenses if:

(1) the acts are committed because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age or national origin;
(2) the acts are committed by falsely impersonating another;
(3) the person possesses a dangerous weapon at the time of the offense;
(4) the acts are committed with the intent to influence or otherwise tamper with a juror or a judicial proceeding or with the intent to retaliate against a judicial officer; or
(5) the victim is under the age of 18 and the actor is more than 36 months older than the victim.

Maximum Penalty: 5 years/$10,000

Second or Subsequent Violations: A harassment violation within 10 years after being discharged from a previous conviction for harassment/stalking, violation of a restraining order or assault/terroristic threats.

Maximum Penalty: 5 years/$10,000

Pattern of Harassing Conduct: Two or more acts against a single victim or members of a single household that would cause a reasonable person to feel terrorized or fear bodily harm.

Maximum Penalty: 10 years/$20,000.

The Commission ranked the Aggravated Violations and the Second or Subsequent Violations at severity level II and the Pattern of Harassing Conduct at severity level III. The July 15, 1993, public hearing provided testimony from several victims and organizations on the new stalking and harassment crimes. The testimony focused on the terror and the loss of liberty felt by victims of these crimes and the past inability of the criminal justice system to respond adequately. While the Commission recognized the serious nature of the crimes described by these stalking victims, they believed that this testimony did not represent the typical case. They were concerned that because of the broad language of the statute, the typical case would more likely involve the minimum behavior necessary to achieve a conviction under the statute. The Commission believed that many of the more egregious cases could be charged under other laws such as Terroristic Threats, Burglary, or Assault 1st, 2nd, or 3rd which are ranked at higher severity levels. The Commission also believed that in the more egregious cases judges could depart from the presumptive sentence.

B. RECONSIDERATION OF ORIGINAL SEVERITY LEVEL RANKINGS AND ADOPTED NEW RANKINGS

The Commission decided to hold a second public hearing on October 14, 1993 on the issue of the severity level rankings for the new felony stalking/harassment crimes. This second public hearing was in response to a great deal of public concern regarding the Commission's original severity level rankings. The public testimony focused once again on the egregious nature of stalking/harassment crimes. Many of those who testified recommended that the Commission place these crimes on the list of unranked crimes to give judges the discretion to assign an appropriate ranking on a case by case basis. Others called for specific severity level rankings of IV, V, or VI.

Based on the new testimony, the Commission reconsidered the severity level rankings for the stalking/harassment crimes and adopted new rankings. They agreed that the typical case would likely be more serious than the minimum behavior necessary to obtain a conviction under the law. The Commission increased the severity level for the **Aggravated Violations and the Second or Subsequent Violations** from level II to **level IV**. The Commission increased the severity level for the **Pattern of Harassing Conduct** from level III to **level V**. These new rankings are comparable to the severity level rankings for the crimes of Assault 3, Terroristic Threats, Simple Robbery, Residential Burglary, and other person crimes. The Commission rejected placing these new stalking/harassment crimes on the unranked list because of concern that it would result in disparities in sentencing.

C. ADDING CRIMES TO THE LIST OF MISDEMEANORS AND GROSS MISDEMEANORS

The Commission also decided to add certain crimes to the *Misdemeanor and Gross Misdemeanor Offense List*. This list includes those misdemeanors and gross misdemeanors that can be used to compute units in the criminal history score. Some of these crimes cannot be added until after legislative review; see section IV. D. below. The crime below was added to the list effective for crimes committed on or after January 1, 1994.

Harassment/Stalking - 609.749, subd. 2

See the **appendix** for relevant sections of the meeting minutes that detail discussions on the issue of where to rank stalking/harassment crimes.

IV. 1993 ADOPTED MODIFICATIONS REQUIRING LEGISLATIVE REVIEW

A. ADOPTED MODIFICATIONS TO JAIL CREDIT UNDER HUBER LAW

The 1993 Legislature passed language directing the Commission to consider modifying the guidelines so that credit for time spent in confinement under Huber Law would be given at the rate of one day for each day served. The Commission adopted the following language with an effective date of August 1, 1994, as specified by the legislation:

C. **Jail Credit:** . . . Time spent in confinement under Huber Law (Minn. Stat. § 631.425) shall be awarded at the rate of ~~twelve hours for each 24 hour period~~ one day for each day served. ~~See State v. Deschampe, 332 N.W.2d. 18 (Minn. 1983).~~

Comment

III.C.02. . . . *Jail credit for time spent in confinement under the conditions of Huber Law (Minn. Stat. § 631.425) should be awarded at the rate of ~~12 hours for each 24 hour period~~ one day for each day served.*

B. ADOPTED SEVERITY LEVEL RANKINGS FOR INADVERTENTLY UNRANKED CRIMES

Several felony offenses were recently discovered that had not been considered for ranking by the Commission. These crimes are technically unranked at this time. The Commission adopted the following severity level rankings for these crimes. After review by the 1994 Legislature, these modifications will go into effect August 1, 1994:

Severity Level IV

Theft of Incendiary Device - 609.52, subd. 3 (2)

Severity Level III

Dangerous Weapons - 609.67, subd. 2; 624.713, subd. 1 (a) & (b)
(The added provision deals with persons under 18 years who possess a pistol.)
Theft of Trade Secret - 609.52, subd. 2(8)

Severity Level II

Gambling Regulations - 349.22, subd. 4

Severity Level I

Insurance Regulations - 62A.41
Tax-Related Criminal Penalties (gambling section of law) - 349.2171
Voting Violations - Chapters 201, 203B, & 204C

C. ADOPTED INCREASED SEVERITY LEVEL RANKINGS OF CERTAIN PROSTITUTION CRIMES INVOLVING FORCE

A private citizen wrote to the Commission expressing concern over the severity level ranking for certain prostitution crimes involving force. The citizen believed that the severity level for these crimes should be the same as the severity level for criminal sexual conduct involving force; i.e., severity level VII. Upon review of these crimes, the Commission agreed that it is more appropriate to treat these prostitution crimes similar to criminal sexual conduct in the third degree with force and adopted an increased severity level ranking of VII.

Severity Level VII

Solicitation of Prostitution (force) - 609.322, subd. 1a (2) & (4)(b)

D. ADDING CRIMES TO THE LIST OF MISDEMEANORS AND GROSS MISDEMEANORS

Violation of Harassment Restraining Order - 609.748
Obscene or Harassing Telephone Calls - 609.79
Letter, Telegram, or Package; Opening; Harassment - 609.795

V. GENERAL OVERVIEW OF 1992 SENTENCING PRACTICES AND COMPARISON TO OTHER STATES

Dramatic changes have occurred in sentencing practices in Minnesota over the last several years. Prison sentences have increased substantially, reflecting the tougher sentencing policies adopted by the Commission and the Legislature since 1989. Minnesota delivers some of the harshest penalties in the country with respect to serious crimes against persons and controlled substance offenses. Sentence lengths for property crimes are also comparable to the rest of the nation.

This overview will summarize general trends in sentencing through 1992 and compare Minnesota's sentences to those in other states. Minnesota stands out as a state that is both more **truthful** and **tougher** in the sentencing of felony offenders. Unlike other states that sentence felons to long, tough sounding prison sentences only to release them after serving a small fraction of their time, Minnesota offenders are sentenced to a fixed term of imprisonment and a fixed period of supervised release. Inmates who violate institution rules or conditions of their release can also spend all or part of their supervised release period in prison. When the actual time served in prison is taken into account, Minnesota's offenders spend more time in prison for their crimes than in many other states.

Volume of Cases

The number of offenders sentenced for felony convictions has grown dramatically since 1987. The volume increased by 55% from 1986 to 1992; from just over 6,000 in 1986 to over 9,300 cases in 1992. While crime rates have fluctuated over the last 10 years, adult arrest rates have generally been increasing. Thus, the increase in sentenced felons is more directly related to arrests than to crime rates. Figure 1 below displays the volume of sentenced felons over time.

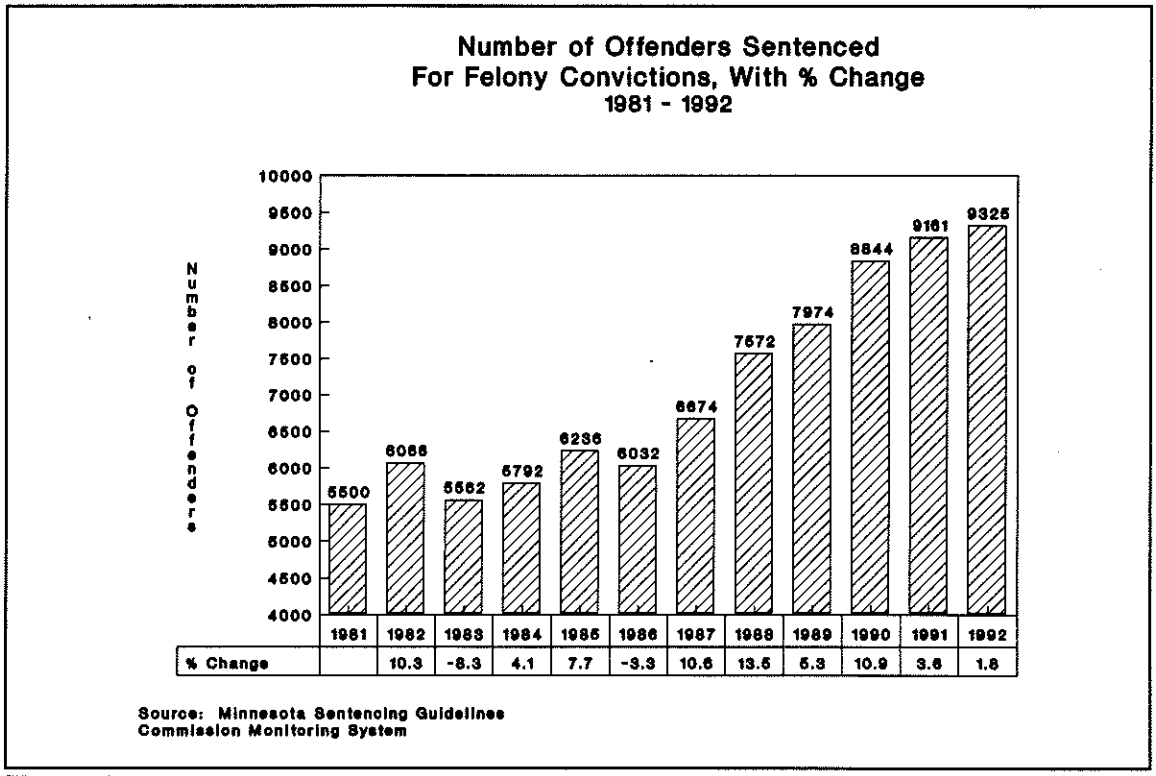
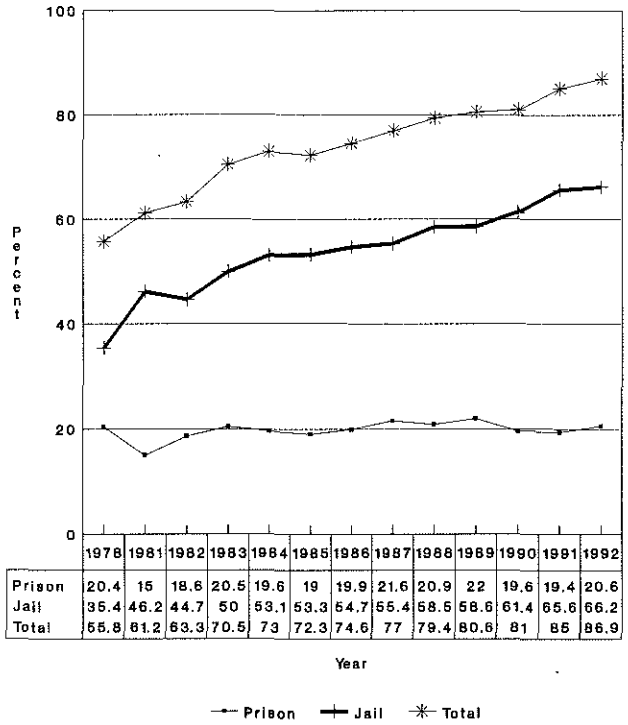


Figure 1

Incarceration Rates

The vast majority of convicted felons serve some time in prison or jail. Among all convicted felons sentenced in 1992, 87% were incarcerated as all or part of their sentence compared to only 61% in 1981. Figure 2 displays the incarceration rates in state and local institutions over time.



	1978	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
Prison	20.4	15	18.6	20.5	19.6	19	19.9	21.6	20.9	22	19.6	19.4	20.6
Jail	35.4	46.2	44.7	50	53.1	53.3	54.7	55.4	58.5	58.6	61.4	65.6	66.2
Total	55.8	61.2	63.3	70.5	73	72.3	74.6	77	79.4	80.6	81	85	86.9

Figure 2

State Prisons

The rate at which felons are incarcerated in state institutions has fluctuated around 20% over time. In 1992, 20.6% of convicted felons were sentenced to prison compared to 19.4% in 1991. The actual number of offenders sentenced to prison, however, has grown dramatically due to the growth in the volume of cases. In 1981, 825 offenders were sentenced to prison compared 1,925 in 1992.

Local Jails

The use of incarceration as a condition of probation has increased profoundly. Among all sentenced felons, 66% were required to serve time in jail in 1992 compared to only 46% in 1981. The increasing rate coupled with the increasing volume of cases has resulted in nearly 2 1/2 times as many offenders going to jail in 1992 as compared to 1981. However, the average length of time pronounced by the judge decreased significantly from 164 days in 1981 to 109 days in 1992.

Figures 3 and 4 below summarize the prison and jail rates and the actual number of offenders given prison or jail over time.

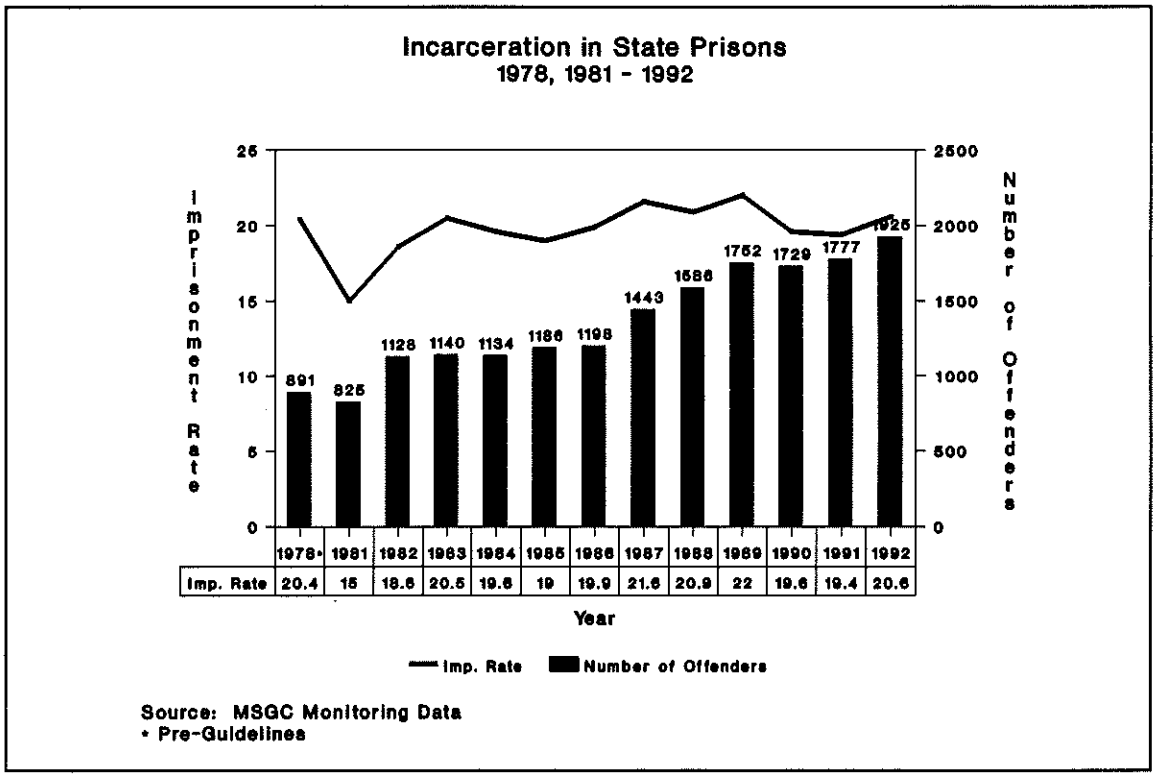


Figure 3

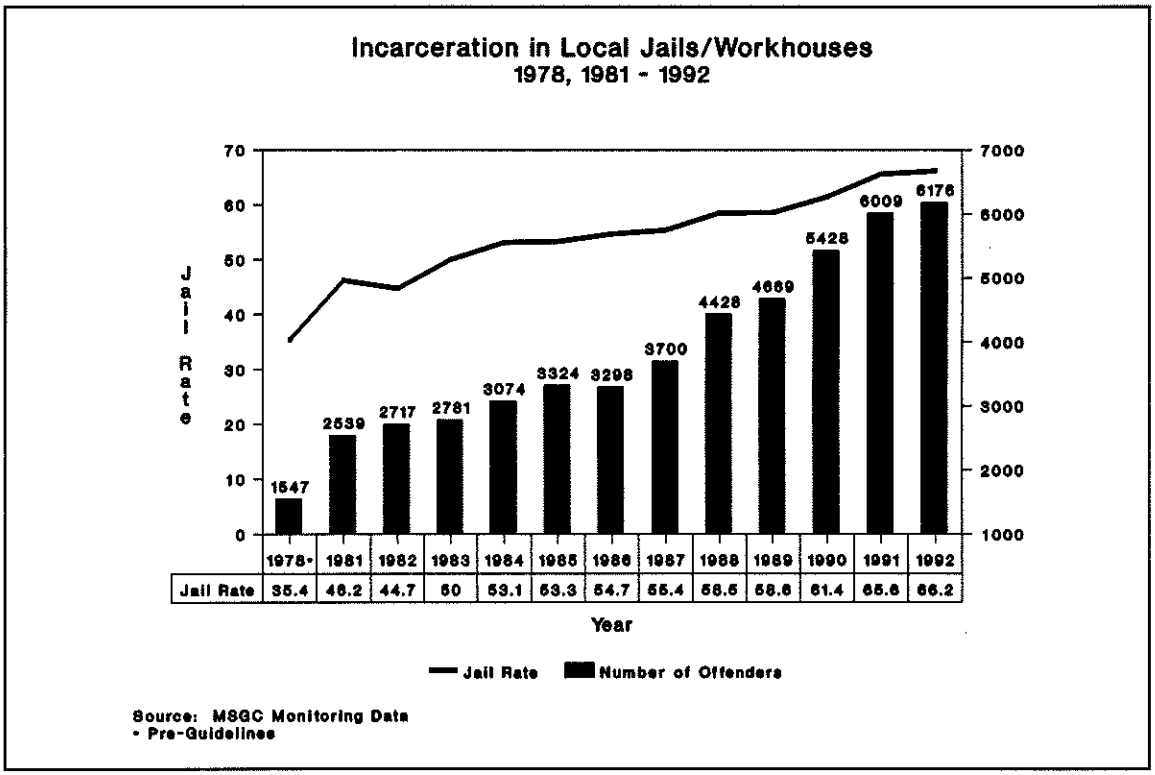


Figure 4

Average Prison Sentences

In addition to sending more people to prison each year, the average sentence length has increased substantially in recent years. The overall average pronounced prison sentence did not vary much over most of the 1980s until after 1989 when major policy changes were made for the sentencing of violent offenders. The average pronounced sentence was 38.3 months in 1981, 37.7 months in 1989 and climbed to 48.6 months in 1992. The increases are more profound when examining serious person crimes. Sentence lengths increased from 1981 to 1992 by over 70% for Assault in the First Degree, 60% for Aggravated Robbery, and by 100% for Criminal Sexual Conduct in the Third Degree involving force. Figure 5 below compares average prison sentences in 1981 and 1992 for certain serious person crimes and displays the percent increase.

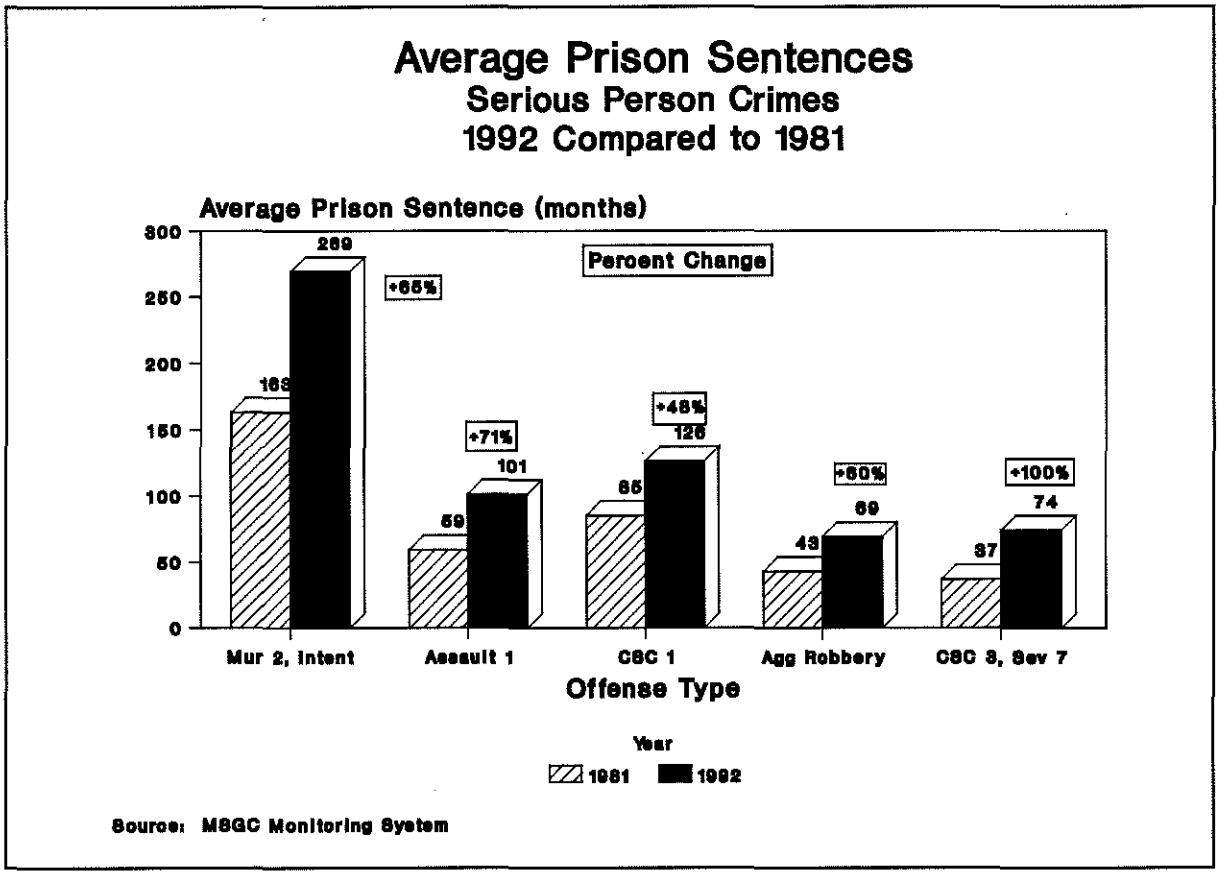


Figure 5

Because policy changes have not been as dramatic for property offenders, average prison sentences typically increased or remained the same for most property offense types. For example, average prison sentences remained at 3 years for residential burglary, increased somewhat for non-residential burglary (from 25 months in 1981 to 29 months in 1992), and increased slightly for most theft crimes (theft over $2,500 increased from 28 months in 1981 to 31 months in 1992 and motor vehicle use without consent increased from 17 months in 1981 to 20 months in 1992). These increases are primarily due to shifts in the distribution of offenders toward higher criminal history scores that call for greater sentences under the guidelines.

Comparing Minnesota to Other States

In Minnesota, the prison sentence pronounced by the judge is close to the actual time the offender will serve in prison. Sentences are fixed and generally, offenders will serve a minimum of two thirds of their sentence in prison and the remaining one third on supervised release. In states with indeterminate sentencing systems there is little relationship between the pronounced sentence and the actual time served. The judge pronounces a broad sentence range (eg. zero to 10 years) and a releasing authority decides when the offender will actually be released. In these systems, the actual time served is typically only a small fraction of the pronounced sentence. Other states have determinate sentencing systems that appear to be truthful but employ early release mechanisms to ease crowded conditions in the prisons. For example, Florida with an average daily prison population of over 47,000, released over 26,000 inmates in 1992 through an emergency early release program. Therefore, in order to compare Minnesota prison sentences to other states, it is essential to compare time served in prison rather than the sentences pronounced.

It is interesting to look at sentencing practices in the state of Texas because we generally think of Texas as a "tough on crime" state. Sentence lengths in Texas increased through the 1980s, but the actual percentage of the sentence served has decreased. Information found in a report issued by the Criminal Justice Policy Council, 1992, An Overview of Prison Sentences and Time Served in Texas, indicates that a typical offender in Texas serves 13% of the pronounced sentence. Figure 6 below shows that offenders sentenced in 1991 in Minnesota are estimated to serve more time in prison than offenders in Texas in each major crime group.

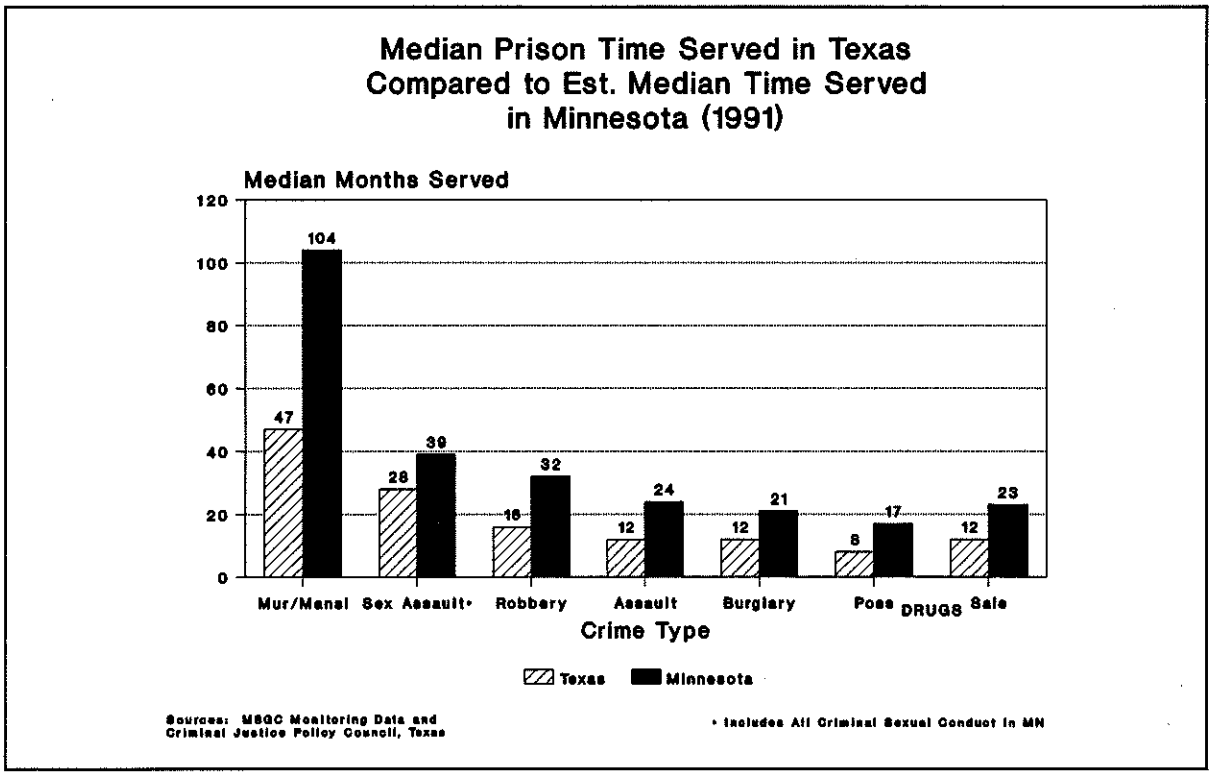


Figure 6

Comparing Minnesota to other states in the country shows similar results. A survey was conducted by the Bureau of Justice Statistics (See Sourcebook of Criminal Justice Statistics, 1992). Thirty-four states responded to the national survey and provided information on the median time served by offenders released in 1990 for several crime groups. Figure 7 below shows that offenders sentenced in Minnesota in 1991 are estimated to serve more time in prison than the median time served across all 34 states in the survey and across all the crime groups studied.

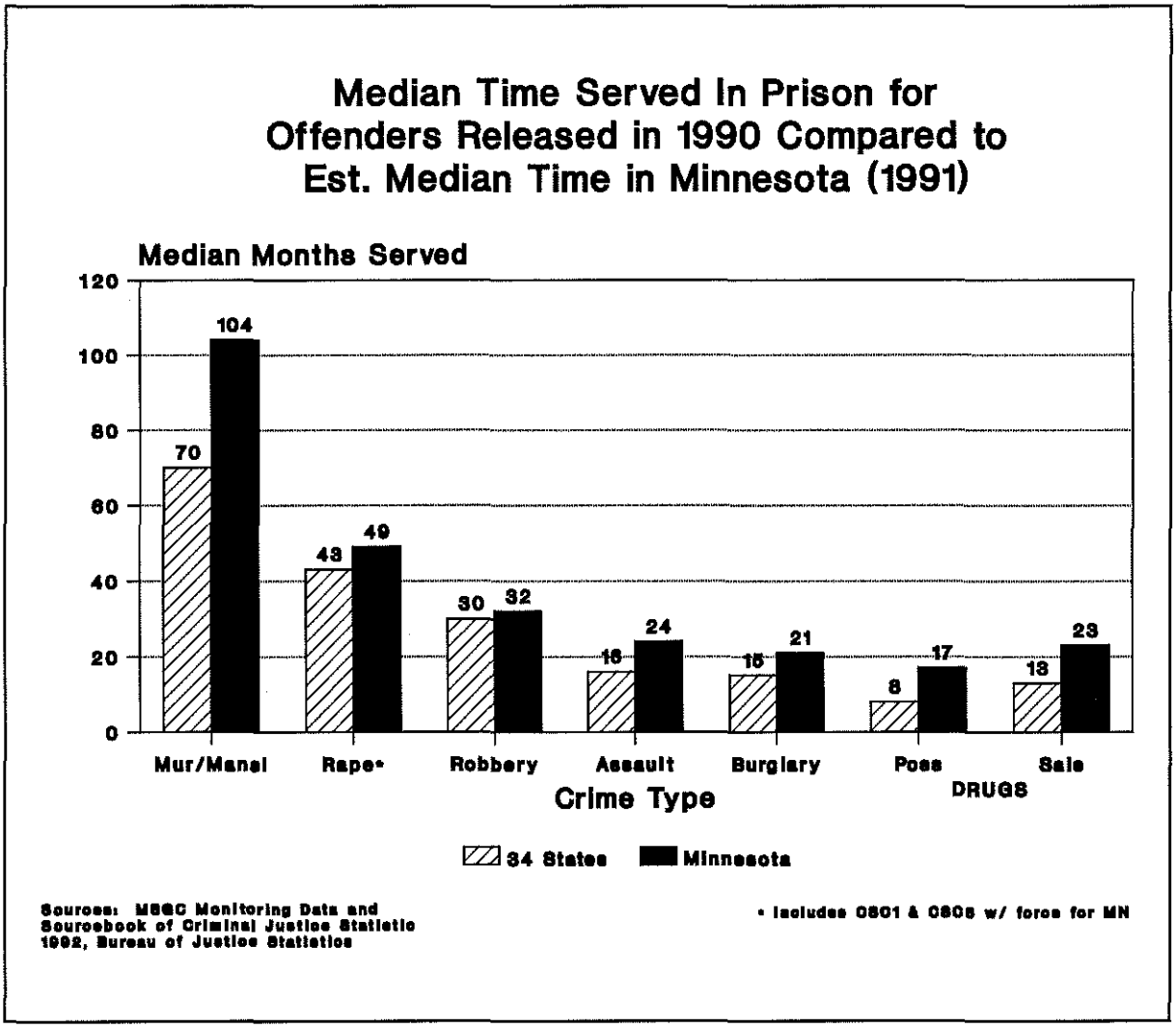


Figure 7

VI. UPCOMING REPORTS AND OTHER AVAILABLE REPORTS

The 1992 sentencing data are now complete and a report summarizing additional information on 1992 sentencing practices should be available shortly.

In 1991, the Commission conducted a special study on controlled substance offenses. The Commission focused the report on the differences between crack and powdered cocaine as this issue was raised by the Supreme Court in State v. Russell. The report was completed in February, 1992 and presented to the Legislature. The report also provides indepth information collected by staff through a survey of probation officers. This information on drug offenders sentenced in 1990 is more complete than information collected in our routine monitoring system. Information collected and summarized includes the specific type and actual amount of drug involved, specific conditions of probation, and chemical dependency related information.

The Commission is currently working on a follow up study on drug offenders sentenced in Hennepin and Ramsey counties in 1991 and 1992. This new study will also look at offenders who were given a stay of adjudication under Minn. Stat. § 152.18. This new indepth information will allow the Commission to look at the impact of the new drug laws on both sentencing and charging practices. A report should be available in the early spring.

Below is a list of recent reports that are available upon request.

Report to the Legislature on Controlled Substance Offenses, February, 1992.

Report to the Legislature, January, 1993.

Sentencing Practices for Offenders Convicted of Criminal Vehicular Homicide and Injury, November, 1993.

Report to the Legislature on the Mandatory Minimum Sentences for Weapons Offenses, November, 1991.

Report to the Legislature on Intermediate Sanctions, February, 1991.

Summary of 1991 Sentencing Practices for Convicted Felons, May, 1993.

A P P E N D I X

Excerpts from Commission Meeting Minutes Regarding Criminal Vehicular Homicide

Commission Meeting May 6, 1993

The next item discussed was the severity level rankings for criminal vehicular homicide. Chairman Gernes noted this subject was previously discussed in May of 1992, and at that time it was decided not to change the ranking. Currently, § 609.21, subd. 1 (1) and (2) and subd. 3 (1) and (2) are severity level VII; and
§ 609.21, subd. 1 (3) and (4) and subd. 3 (3) and (4) are severity level VI. The statutes describe different ways in which the crime is committed. The 1992 Legislature asked the Commission to consider again whether or not it is appropriate to make this distinction.

Representative Doug Swenson addressed the Commission. He supports placing all the clauses at severity level VII. He reviewed the letter the County Attorney's Association sent to the Commission. That letter indicated that the differences in culpability between clauses (1) and (2) and clauses (3) and (4) are so slight, it renders them insignificant. He compared it with 2nd Degree Manslaughter which is placed at severity level VII. Representative Swenson noted that when the Legislature took out the term "negligence" from clauses (3) and (4), they did not intend to make those clauses a less severe crime than the other portion of the statute. He noted that currently when someone commits the crime of criminal vehicular homicide at a time when they are under the influence of alcohol, it is a less serious crime than if committed when sober. He does not believe this is the correct message to send to society. He said if people choose to drink and drive and then kill someone, this is a logical consequence of their behavior. The law should not be saying that because this was done while under the influence of alcohol, it is less serious than if committed under different circumstances. He believes the Legislature intended to strongly encourage the Commission to rank this offenses at severity level VII.

Judge Randall noted it is not true that people who are under the influence are treated less seriously than people who are negligent. To reach subdivision 1, clauses (1) and (2) (severity level VII), a .10 or more blood alcohol level can be used in connection with driving conduct to show gross negligence or to show driving in a negligent manner while under the influence. Someone can be found to be under the influence of alcohol at far less than .10 level. If an individual is at .10 or more, and is driving in an appropriate manner but a death results, they will be charged with a severity level VI offense if the state can prove nothing else. To receive a severity level VII, the state with or without using .10, must show driving in a negligent manner. He noted that to drive negligently is a crime in and of itself. Driving negligently and being under the influence is more serious because not only are you driving negligently, but you have contributed toward your own negligence. He said the mere fact of getting to .10 in and of itself does not mean that you could have prevented the accident. Judge Randall offered a scenario of a person who gets to .10 but is driving perfectly under control, obeying all lights and signs, and doing nothing he would not do if he was sober and someone pulls in front of him resulting in an accident and a death. One can say that the person should not have reached .10, but that person is just not as immoral as the person whose driving is at fault.

Representative Swenson stated all four of these clauses are the same crime, and there is no reason to make distinctions as to the penalties. He believed people in the state know that a person should not drink to exceed .10. He feels that the difference in severity levels means that if an individual is drinking, they are partially excused and are not treated as severely as an individual not drinking.

Jenny Walker referred to the letters submitted by Fred T. Friedman, Chief Public Defender of the Sixth Judicial District, and Bruce H. Hanley, P.A., president of the Minnesota Criminal Defense Lawyers Association. She provided examples as to why there are differences between clauses (1) and (2) and clauses (3) and (4). One case involved an individual who was driving at .10;

it was raining out and a child darted out from between two cars. Under that scenario, he was guilty of criminal vehicular operation resulting in death because he killed the child and had an alcohol concentration of .10 or more. However, there was nothing he could have done in this situation. He was punished for a felony offense because of his blood alcohol content. The other situation involved an individual who was at .08 and was driving 120 miles per hour and killed two of his passengers. This individual received a more severe sentence than did the person at .10 who exhibited no negligence and killed the child. There are deaths in both cases. There is clearly more culpability in somebody driving down a road at 120 miles per hour who is under the influence than the individual who was simply at .10. There was no indication that the person at .10 was acting negligently; it was strictly an accident except that person made the decision to drive when they were over .10. It is for that reason that that person was convicted of a felony. This person is different from one who drinks, makes a decision to drive, and fails to execute due care in operating a motor vehicle. She feels there are good and important distinctions to be made. She noted that (1) both are presumptive commit and (2) in 50 percent of the cases, judges are departing and not sending people to prison.

James Dege stated that he felt the offenses should be ranked the same, because to get to .10 and opt to get into a vehicle and drive is negligent.

Stan Suchta noted that Minnesota has a strong stand against drinking and driving and does a lot to deter drunk drivers. He believes it is more effective to deter drunk drivers up front, not at the end after people are killed. He said he did not know what purpose would be served by making this offense a severity level VII. James Dege said he agreed that, hopefully, education would work; however, this law is for people who do not follow the law or do not believe they will get caught or could care less about what they have heard about drinking and driving.

Chairman Gernes stated that he supported increasing clauses (3) and (4) to severity level VII. He does not view getting to .10 as a non-culpable act; getting to .10 or .20 means intentionally sitting down and drinking and compares to negligence, together with an intentional act of driving a car resulting in death. He takes the position that intentionally getting to .10 and then driving is more serious than negligence or gross negligence. He stated that in prior Commission discussions these offenses were compared to 2nd Degree Manslaughter. He stated that he felt clauses (3) and (4) are more culpable. Chairman Gernes noted that if the ranking principles are applied to these offenses for all four clauses, the type of harm is "death" and the level of harm is "completed." In terms of the level of culpability, he stated that he believed the culpability was "intentional" rather than "strict liability" and that there is no reason to distinguish between the two sets of clauses.

Chairman Gernes noted that this topic should be put on the July's public hearing notice regardless of whether the Commission decided to change the rankings because the Legislature has indicated that they want the Commission to increase clauses (3) and (4) to the same severity level as (1) and (2) which is VII. Deb Dailey noted that typically the Commission makes a proposal to change something in the guidelines and then it is put on the public hearing agenda, but that the Commission could choose to put something on the agenda even if no preliminary modification is adopted. Justice Gardebring requested that the Commission not take a vote on this issue at this time, but put it on the agenda so that further testimony could be heard on this issue.

> **MOTION** was made to place for consideration on the July public hearing agenda the question of changing the severity level for M.S. 609.21, subd. 1 (3) and (4) and subd. 3 (3) and (4) so the Commission may hear testimony regarding this issue before taking a position. **Motion** carried.

The Commission thanked Representative Doug Swenson for attending the meeting and sharing his viewpoints with them.

Commission Meeting
July 20, 1993

The 1992 legislature requested that the Commission consider ranking all clauses of Criminal Vehicular Homicide at severity level VII. Clauses (3) and (4) are currently ranked at severity level VI and carry a presumptive prison sentence of 21 months for offenders with no criminal history score. It was noted that the Commission had discussed this issue, in detail, at a number of meetings prior to the public hearing.

MOTION was made and seconded to rank M.S. § 609.21, subdivision 1, clauses (3) and (4) and subdivision 3 clauses (3) and (4) at severity level VII. Commissioner Pung noted that these offenses are currently presumptive prison, but that raising the severity level would increase the presumptive duration from 21 months to 48 months for those with a zero criminal history score. It was noted that MADD, the Attorney General Office and the County Attorney's Association had provided written comments supporting increasing the severity level from VI to VII. Representative Swenson had previously written and spoken to the Commission recommending that all Criminal Vehicular Homicide offenses be ranked at severity level VII. It was also noted that defense attorneys had also previously written the Commission stating the distinctions between the clauses warranted different severity levels.

MOTION failed. Chairman Gernes, Jim Dege and Susan Lange requested that the record reflect that they were among those who had voted in favor of the motion. Jenny Walker requested that the record reflect that she had voted against the motion.

Commission Meeting
May 27, 1993

STALKING/HARASSMENT - M.S. 609.749

These provisions create new gross misdemeanor and felony harassment and stalking offenses and increases penalties for violations of a harassment restraining order or an order for protection.

The following new felony stalking and harassment provisions were created:

Aggravated Violations involves gross misdemeanor or misdemeanor-level behavior that is raised to the felony level if:

(1) the acts are committed because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age or national origin;
(2) the acts are committed by falsely impersonating another;
(3) the person possesses a dangerous weapon at the time of the offense;
(4) the acts are committed with the intent to influence or otherwise tamper with a juror or a judicial proceeding or with the intent to retaliate against a judicial officer; or
(5) the victim is under the age of 18 and the actor is more than 36 months older than the victim.

The statutory maximum for this offense is five years.

Second or Subsequent Violations: A harassment violation within ten years after being discharged from a previous conviction for harassment/stalking, violation of a restraining order or assault/terroristic threats. The maximum penalty is five years/$10,000.

Pattern of Harassing Conduct: Two or more acts against a single victim or members of a single household that would cause a reasonable person to feel terrorized or fear bodily harm. The maximum penalty is ten years/$20,000.

Ms. Dailey noted these new crimes are similar to Terroristic Threats which is ranked at severity level IV. She noted at the legislative hearings these crimes, particularly the Pattern of Harassing Conduct, were viewed as more serious than Terroristic Threats because the offender is viewed as more culpable. Stalking crimes more typically involve a high degree of planning and premeditation than other intentional acts. She suggested that the Pattern of Harassing Conduct might be viewed more seriously than the other two provisions. Judge Randall believed that a severity level IV was high enough because harassing conduct can include simply dialing a telephone number.

Chairman Gernes noted that in Terroristic Threats cases the phrase "in reckless disregard to risk of causing such terror" is used by prosecutors often in closing arguments and that it doesn't require a lot of directed intent. Terroristic threats does cover a very broad class of acts. He noted that harassment requires a repetitive activity and thus argues for a higher severity level.

Stan Suchta believed this crime deserved some response but he felt that keeping an offender in prison for a few months would not change the behavior greatly. However, he noted that it might send a message to other stalkers/harassers that prison is a possibility. He believed it should be ranked at severity level I or II.

Chairman Gernes asked what was the Legislature's argument to justify the passage of this law. Deb Dailey noted that during the legislative hearings victims who had been terrorized by people testified. The Legislature heard a lot of detail about the specific activities that put these victims in constant fear for their lives. The Legislature also focused on abortion protestors.

MOTION was made and seconded to propose ranking M.S. 609.749, aggravated violation, at severity level II.

MOTION carried.

Deb Dailey noted the second or subsequent situation involves behavior at the misdemeanor or gross misdemeanor level. Deb Dailey also noted that the phrase "ten years after being discharged" may have been incorrectly drafted and would likely be changed to "after conviction." Judge Randall noted this provision does not require that the offense be directed to the same victim. Chairman Gernes asked whether there would be any reason to rank the second or subsequent violation lower than the aggravated. Deb Dailey noted that aggravated violation focuses on the current violation whereas the second or subsequent violation focuses on past behavior.

MOTION was made and seconded to propose ranking M.S. 609.749, second or subsequent violations at severity level II.

MOTION carried.

The Commission next discussed the "Pattern of Harassing Conduct" offense. This provision requires two or more acts against a single victim or household. Chairman Gernes noted that in addition to a pattern of behavior, the provision requires that a reasonable person would feel terrorized or fear bodily harm under the circumstances. Jenny Walker indicated that this language appears to also cover domestic abuse situations. Judge Randall said the Commission should consider ranking this offense low but allow the trial court to depart upward for the most egregious conduct. Jenny Walker said that a gross misdemeanor assault which involves an Assault 5th degree against the same victim would meet the statutory definition for this offense. Judge Wilson noted that to rank this offense at severity level IV would put it in the same category as Assault 3rd degree, Malicious Punishment of a Child, Criminal Sexual Conduct 4th degree, etc.

MOTION was made and seconded to propose ranking M.S. 609.749, Pattern of Harassing Conduct, at severity level III.

Jenny Walker asked if there was a way the Commission could do something to allow for an aggravation for the most outrageous, egregious situations. Judge Randall stated that if a threat to kill is proven, it becomes terroristic threats. Chairman Gernes stated that he will vote against the motion because this is perceived by the Legislature and society as a serious problem. He stated that this offense is as serious as terroristic threats and should be ranked as severity level IV.

MOTION carried.

Deb Dailey noted that Stalking/Harassment becomes effective June 1, 1993, so it will be unranked for two months.

The Commission then discussed M.S. § 609.749, subd. 5, Pattern of Harassing Conduct.

MOTION was made and seconded to rank M.S. § 609.749, subd. 5, Pattern of Harassing Conduct at severity level III.

Commissioner Pung spoke against the motion, noting that the offense does not involve generalized behavior, it is directed at an individual. He stated that given the seriousness and uniqueness of this offense a ranking at severity level III is too low. James Dege agreed.

Chairman Gernes also spoke against the motion. He stated that he was particularly impressed by the testimony at the public hearing regarding how the victims of these offenses are virtual prisoners 24 hours a day. Chairman Gernes stated that although it is important for the Commission to exercise independent judgment, it is also important for the Commission to consider the intent of the legislature. He stated that this crime had been one of the most important matters discussed by the legislature.

Judge Randall stated that the crime is in some ways redundant and superfluous. When offenders commit this offense, and in particular offenses like the highly publicized case in Ramsey County, there are a number of other felony, and non-felony, offenses that they can be charged with.

Judge Randall stated that he was not persuaded by the argument raised at the public hearing that criminal justice professionals are apprehensive about prosecuting, defending and arresting individuals who direct these types of offenses against people they have contact with in the criminal justice profession. He stated that he did not believe that the judges, police, etc. were afraid to prosecute and deal with those individuals, but to the extent that it might be true, those people would be equally, if not more, apprehensive about dealing with an offender charged with an even higher severity level offense.

Judge Randall stated that part of the impetus for the harassment and stalking provisions was apprehension over the activities of Operation Rescue. He noted that there had been arrests on both sides of that issue, generally involving following people. He stated that even if the law is held to be constitutional, those cases are likely to result in suspended sentences of some sort, with community service, fines, etc. He added that if the offenders refuse to pay the fine they may serve some time in jail. He stated that when there is an egregious stalking or harassment case, there are plenty of laws that can be used.

It was noted that the offense being ranked involves a pattern of behavior, 2 acts within a five year period against a single victim. The types of acts covered include: Assault Fifth, Violation of an Order for Protection or Harassment Order, Terroristic Threats, repeated letters, telephone calls, etc.

Chairman Gernes noted that the Assistant Police Chief in Winona had told him that there were already three cases that they were investigating, and that none of them were minor in nature.

Commissioner Pung also spoke against the motion, citing the similarity to Terroristic Threats.

MOTION carried. Chairman Gernes, Jim Dege and Susan Lange requested that the record reflect that they were among those voting against the motion.

MOTION was made and seconded to rank M.S. § 609.749, subd. 3, Harassment/Stalking-Aggravated Violations, at severity level II. **MOTION** carried. Chairman Gernes, Jim Dege and Susan Lange requested that the record reflect that they were among those voting against the motion.

MOTION was made and seconded to rank M.S. § 609.749, subd. 4, Harassment/Stalking-Second or Subsequent Violation, at severity level II. **MOTION** carried. Chairman Gernes, Jim Dege and Susan Lange requested that the record reflect that they were among those voting against the motion.

Commission Meeting
August 24, 1993

Justice Gardebring suggested that the Commission hold another public hearing regarding the stalking provisions adopted by the Legislature. She noted that because of the level of response to this issue, the Commission should review it. Justice Gardebring stated that the issue has attracted a high degree of attention and the Commission would be making a mistake if this issue was not reviewed and additional public testimony heard. She noted that this crime is not like other crimes the Commission has considered. The nature of the impact on its victims is extreme in a way that other kinds of non-physical assault crimes rarely are. She suggested the Commission schedule another public hearing specifically for the purpose of hearing public testimony and considering a change in the ranking of the stalking laws. She referenced a memo from Steve Alpert of the Attorney General's office that expressed the view that the Commission cannot legally and properly make any change in the ranking without a public hearing.

MOTION was made and seconded that the Commission schedule a public hearing on the question of the ranking of the three felony-level stalking provisions as passed this last Legislative session.

Judge Randall suggested the Commission place this issue on the July 1994 public hearing agenda, thus allowing for 11 months of review. He stated that currently there is no data that suggests the Commission's original ranking is incorrect. Judge Randall believed that if the ranking is changed, the Commission will set a precedent; every time someone does not like a Commission's ranking decision, another public hearing will be scheduled allowing for reconsideration.

Judge Wilson stated that he will vote in support of this motion for another public hearing, not because he believes his vote was incorrect, but because it was a very close vote, some members were absent, and it is an important issue.

Chairman Gernes stated there is also the matter of the gross misdemeanors and misdemeanors created by the 1993 Legislature including gross misdemeanors relating to stalking. The Commission did not decide whether these should be included in the Misdemeanor and Gross Misdemeanor Offense List. Deb Dailey noted that it is very difficult to track all the misdemeanor or gross misdemeanor offenses created by the Legislature. She stated there were some new gross misdemeanor harassment/stalking laws that the Commission may want to add to the Misdemeanor and Gross Misdemeanor Offense List. This list specifies only the misdemeanor and gross misdemeanor crimes that may be included in the offender's criminal history score. She stated that if the Commission decides to hold another public hearing, it would provide an opportunity to address this issue.

Justice Gardebring responded to Judge Randall's comments. She stated that the Commission does not usually receive much public response. The Commission has made a decision which does not conform, at least to the views of the public who have chosen to address the Commission about their concerns. She did not believe this action could

wait 11 months for review. She stated that this position is based on commitment to the principle of proportionality and the Commission's ability and need to respond to the public.

Chairman Gernes believed that revisiting this issue provides another opportunity for discussion which will assist in ensuring the correct decision. He believed it takes more courage on the Commission's part to review and make a decision after having additional input rather than just walking away from the issue.

T. Williams stated that he was not inclined to support another public hearing. He agreed that it is an important issue that concerns many people. He believed that many of the people who challenge the Commission's decision believe that it should be on a level of presumptive commit. He believed that by holding another public hearing on a matter that has already been decided is an unusual step and one that ought to be taken only as a last resort.

Commissioner Pung stated that he will support the motion primarily because it is a public education opportunity. He believes there are a lot of misconceptions regarding the differences between severity levels. He also suggested that the Commission develop a procedure, as recommended by counsel, to address this type of issue in the future.

James Dege supported the motion for the public hearing. He stated that the outcome may not change, but it will show that the Commission listens to the public.

Stan Suchta supported Judge Randall's suggestion to review this issue over the next 11 months. This would provide the Commission with statistics and an opportunity to review data.

Chairman Gernes was concerned about waiting 11 months to review this issue. He felt the Commission's image and authority was eroding. He stated there are more and more mandatory sentences imposed by the Legislature because of a perception the Commission is not reflecting the "felt necessities of the time." Stan Suchta stated that there are so many unknowns about this crime and that more information needs to be gathered before this issue is revisited.

Jenny Walker stated that the Commission is in a no-win situation. The Commission is supposed to be an independent body. If the Commission schedules a public hearing, the Commission will be placed in a political position responding to pressure. She believed the Commission's independence is called into question. She also stated that if the Commission chooses not to conduct another public hearing, the Legislature will respond by directing the Commission to evaluate the rankings. She stated that if another public hearing is held, her position will not change. She added that the types of stalking cases she is currently seeing do not lead her to believe the ranking should be changed.

Susan Lange stated that the Commission owes it to the citizens of the state to review this issue.

MOTION to have a public hearing to reconsider the three felony stalking crimes passed by the 1993 Legislature carried.

Chairman Gernes noted that there needs to be a 30-day notice for the public hearing. Ms. Dailey suggested setting the public hearing on Thursday, October 14, 1993, and then having the regularly scheduled Commission meeting on Thursday, October 21, 1993.

Steve Alpert stated that the public notice should include the effective date of the changes. Jenny Walker suggested that if there is a change to the ranking it become effective January 1, 1994.

Deb Dailey noted that in a similar situation, the Commission voted to have the changes go into effect the date of the meeting.

MOTION was made and seconded to schedule the public hearing for October 14, 1993. **MOTION** carried.

Deb Dailey clarified that the public hearing notice will state that the date of the meeting to vote on changes, if any, will be October 21, 1993; and that the effective date of the changes, if any, will be January 1, 1994.

Commission Meeting
October 21, 1993

The Commission next reviewed the ranking considerations for stalking/harassment crimes.

Justice Gardebring stated that she was concerned about the severity level ranking of M.S. § 609.749, subdivisions 3, 4, and 5. She stated that the testimony she heard at the second public hearing has reinforced her concern. She is persuaded by the testimony and also by the information Deb Dailey provided to Commission members at a previous meeting in a handout entitled "Application of Ranking Principles to Stalking/Harassment Crimes." Using the same principles and based on the comparisons that Ms. Dailey made with other crimes that represented the same type and level of harm and same degree of culpability, she feels that this offense is ranked too low. Justice Gardebring believes this Commission faces a dilemma because the stalking statute is written to include a broad variety of behaviors, and it is difficult to make comparisons between this felony and others the Commission has already ranked. Her preference is to rank M.S. § 609.749, subdivisions 3, 4, and 5 at severity level V or VI; however, given the statute's broad language and the extent to which it applies to a variety of behaviors, a more sensible position for the Commission to take would be to make it an unranked crime. She stated that the best way to get additional information is to allow trial court judges to look at the case's particular facts and make a judgment about the appropriate severity level. Justice Gardebring believes that this crime covers behavior not covered by other statutes and the Commission will see charges under this crime that are not currently anticipated. She suggested making this an unranked crime; leaving it open for reconsideration as early as next summer if experience and data have been obtained. The Commission will then have charging data on individual cases and can examine the extent of behavior that the charges cover. Also, information will be available at that time about sentencing decisions made by trial court judges.

MOTION was made and seconded that M.S. § 609.749, subdivisions 3, 4, and 5 be added to the list of unranked offenses.

T. Williams spoke against the motion. He stated that the Commission was created, in part, to eliminate disparities in sentencing with the goal that people who commit similar crimes receive similar sentences. He stated that if the Commission believes this is a serious offense it should be ranked appropriately; however, he noted that regardless of level the Commission chooses, someone will express concern. Mr. Williams suggested that not ranking this offense would be a cowardly way out. He stated that the Commission should consider how the Commission's actions are perceived by the public. The Commission not only has to be fair; it also has to appear to be fair. He believed the response to stalking's current ranking is the public's reaction to perception, not necessarily reality.

Jenny Walker agreed with Mr. Williams that M.S. § 609.749, subdivisions 3, 4, and 5 should be ranked. Ms. Walker agreed that the Commission has an affirmative obligation to find out what the typical stalking or harassment case is and to rank accordingly. She stated that every stalking situation is different in much the same way as every aggravated robbery or every assault is different. She stated that the judge has the authority to deviate upwards or downward, and the prosecution can seek a departure in the most egregious cases.

Motion to have M.S. § 609.749, subdivisions 3, 4, and 5 unranked was withdrawn.

MOTION was made and seconded to rank M.S. § 609.749, subdivisions 3, 4, and 5 at severity level V.

Justice Gardebring stated that the public needs to understand that what the Commission has done is fair and is perceived as fair. She believed that the perception is that the current severity level rankings for these offenses is too low. She stated her preference is to have them unranked, as she believed they cover a variety of behaviors some of which are much more egregious, and more terrifying than others. She agreed that while judges can depart upward or downward, the Commission does not have the experience to determine what is the typical stalking/harassment offense. She believed that it is better to leave the offenses unranked; however, if the Commission does not support that, she believed that the Commission must then take this offense seriously and rank appropriately. She believed it should be ranked in the same range as terroristic threats. She suggested a severity level V because it is commensurate with a typical crime in this area based on the testimony heard.

Judge Randall agreed with Ms. Walker and Mr. Williams. He stated that if it is left unranked, people who are less accountable than this Commission will be ranking this offense. He stated that the testimony at the second public hearing was virtually identical to that at the first public hearing; the only difference was that at the second public hearing there was some sort of informal strategy to not rank, a strategy which was not made known to Commission members beforehand. He stated that the Commission does not know what these crimes exactly look like because there have not been any. Judge Randall stated that it is difficult to state that the present levels are not correct as they were arrived at after much debate. He stated that the Commission is an independent body and is supposed to use their knowledge to rank offenses. He is against placing the offense on the list of unranked crimes and against changing the severity level to V.

James Dege agreed with T. Williams and Jenny Walker. The people at the public hearing said they wanted something done. He stated that the current severity level for this offense is too low. If the Commission does not wish to rank it higher, it should be left up to the courts to decide. He stated he believed there would not be consistency in sentencing if left the offenses is left unranked; if it is ranked at severity level V, there is room for upward and downward departures.

Judge Wilson spoke against the motion to rank M.S. § 609.749, subdivisions 3, 4, and 5 at severity level V. He stated that these are three different classes of offenses; two are five year felonies, and one is a ten year felony. He stated that this, in itself, gives direction from the Legislature that the offenses should be treated differently. He stated that the Sentencing Guidelines' purpose is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history. He did not believe that the testimony at the public hearing necessarily described the typical offenses. He stated that causing the telephone to ring on two separate occasions is not equal to a simple robbery. Judge Wilson stated that he did not wish to minimize the offender's behavior in this case, but he believed that they must be punished proportionately. He stated that in his judgment the types of behavior described, sentenced, and which would be charged as stalking, would not be anything like the behavior that was heard in the testimony at the public hearing. He suggested ranking the five year felonies at severity level III and the ten year felony at severity level IV. He believed that if the severity levels were increased to levels III and IV, this would show the public that the Commission has considered this issue and given it a great deal of thought.

Stan Suchta stated that he has changed his thinking on this issue after having talked to

his colleagues in probation and parole over the last several weeks. He stated that his colleagues have said that this type of behavior stems from dangerous individuals and there should be severe sanctions. He stated that when the original argument was made to rank this lower, it still allowed the court upward departure if the situation merited this action; however, he stated that it appears in his experience that judges find it more difficult to depart upward than downward and that raising the severity levels would aid the prosecutor in coming to a plea agreement. Mr. Suchta stated that he supported increasing the severity rankings for these offenses, but he was uncomfortable ranking them all at severity level V.

James Dege stated that he agreed to rank all three offenses at severity level V because courts can depart upward or downward.

Dr. Mary T. Howard stated that stalking/harassment is much more common than comes to the public's attention. She believed that it is essential that once a case gets to court that it receive attention, and she believes it would receive attention if ranked at a higher severity level.

Jenny Walker stated that cases that either she or her office have been appointed to handle are matters that prior to the stalking statute being enacted, would not have even constituted a gross misdemeanor; however, she stated she is not down playing the situation these victims have been through. Ms. Walker provided two examples of men who were charged with stalking based on the pattern of stalking behavior. They had three incidents of violating an Order for Protection. Prior to the enactment of the stalking statute, these individuals could not even be charged with a gross misdemeanor because they had not been convicted of the first violation of Order for Protection when they were charged with the second. She did not believe that these individuals should be treated the same as those individuals convicted of with simple robbery.

Chairman Gernes clarified that if M.S. § 609.749, subdivisions 3, 4, and 5 are ranked at severity level V, it is not a commitment to prison if it is their first offense, but the offender will go to prison when they have a criminal history score of three. He stated that this offense causes a significant loss of privacy and liberty to the victim; it is a person crime not a property crime. Chairman Gernes stated that he preferred making this an unranked offense because the statute covers such a wide range of activities, and it is difficult to define a typical case.

Commissioner Wood stated that he was against the motion but suggested delaying any ranking until the Commission has more information and some experience in addressing the problem. Mr. Wood stated that if this Commission would fail to rank this offense after gathering such information, that would be cowardly; but for now, given the lack of information, making the offenses unranked would be the enlightened approach. Mr. Wood stated that currently there are 32 offenses that are on the unranked offense list. He equated this offense to racketeering and the state lottery fraud because there is a wide range of behavior and little experience with the law. He suggested that the Commission should not rank the law, gain some experience, and then evaluate the issue when more information is available. He stated that he believed most people wanted a presumptive commit. He stated that increasing the offense to severity level V would not change the public's perception.

Judge Randall stated that no one has been able to answer what is the typical stalking/harassment offense. Chairman Gernes stated that because the statute covers a very large number of activities, it is difficult to define what is the "typical" offense. Chairman Gernes noted that the only thing he could see that was typical was the repeated refusal to obey the law; and looking at the victim, there is a repeated intrusion upon their lifestyle.

Motion to rank M.S. § 609.749, subdivisions 3, 4, and 5 at severity level V was withdrawn.

MOTION was made and seconded to not rank M.S. § 609.749, subdivisions 3, 4, and 5.

Judge Wilson spoke against the motion. He stated the guidelines list 37 offenses that are unranked. He stated that many offenses are unranked because prosecutions are rarely initiated under them. He believed that it is out of line with this Commission's history to not rank these offenses; and it is out of line with the theory behind the guidelines, which is certainty in sentencing.

Deb Dailey noted that state lottery fraud was placed on the unranked list mainly because, at the time the crime was created, it was uncertain what the typical state lottery fraud would be and also uncertain about how frequently this offense would be prosecuted.
MOTION failed.

MOTION was made and seconded to rank M.S. § 609.749, subdivision 3 and 4 (five-year felony) at severity level III and subdivision 5 (ten-year felony) at severity level IV.

MOTION failed.

MOTION was made and seconded to rank M.S. § 609.749, subdivision 3 and 4 (five-year felony) at severity level IV and subdivision 5 (ten-year felony) at severity V.

MOTION carried.