Minnesota Sentencing Guidelines Commission

Adopted Modifications to the MN Sentencing Guidelines and Commentary Effective August 1, 2008

I. New and Amended Crimes Passed by the 2008 Legislature – Effective August 1, 2008

A. The Commission adopted the proposal to modify Guidelines Section V. Offense Severity Reference Table related to new crime legislation:

. . . .

III	Disarming a Peace Officer – 609.504

. . . .

B. The Commission adopted the following proposal to modify the Misdemeanor and Gross Misdemeanor Offense List:

Misdemeanor and Gross Misdemeanor Offense List

. . . .

Animal Fighting – Admission to an animal fight (gross misdemeanor)
343.31 (c)

Dangerous Dogs – Subsequent violations (gross misdemeanor)
347.55 (c)

Dangerous Dogs – Dog ownership prohibited (gross misdemeanor)
347.55 (d)(e)

Emergency Calls and Communications
609.78, subd. 1

Emergency Calls and Communications – Interference ~~with Emergency Calls and Communications~~ (gross misdemeanor)
609.78, subd. 2

Trespass on Critical Public Service Facility, Utility, or Pipeline – Without claim of right or consent (gross misdemeanor)
609.6055, subd. 2(a)

Trespass on Critical Public Service Facility, Utility, or Pipeline – Underground structure not open to the public (gross misdemeanor) 609.6055, subd. 2(b)

. . . .

C. The Commission adopted the following proposal to make the following technical modification to reflect an amended notation:

Unranked	Animal Fighting – 343.31 (a)(b)

II. Non-Legislative Modifications – Effective August 1, 2008

Custody Status Point after Discharge from Indeterminate Probation Sentence

The Commission adopted a proposal to clarify how to determine whether an offense was committed within the offender's initial term of probation, when a judge pronounces an indefinite length of probation (such as "not to exceed three years," "three to five years," or "up to the statutory maximum") and the offender is released from probation supervision prior to the end of the indefinite term. If an offender is given an initial term of probation that is definite – say, five years – and is released from probation early, it is clear that the initial term of probation was five years and that a new offense within that period will result in the addition of a custody status point to the offender's criminal history. It is the Commission's determination that, when an offender who was given an indefinite initial term of probation commits a new crime at any time prior to the end date of the pronounced range, he will be assigned a custody status point. Thus, an initial term of probation "not to exceed three years" is, for this purpose, three years; "three to five years" is five years; "up to the statutory maximum" is the statutory maximum.

Guidelines Section II.B.2.c:

. . . .

2. One point is assigned if the offender:

c. committed the current offense within the period of the initial <u>probationary sentence. If an offender is given an initial term of probation that provides a range of years (e.g. "not to exceed three years," "three to five years," "up to the statutory maximum"), rather than a specified number of years, and commits a new crime at any time prior to the end date of the pronounced range, a custody status point will be assigned.</u> ~~length of stay pronounced by the sentencing judge for a~~ <u>This policy applies to a</u> prior felony, gross misdemeanor or an extended jurisdiction juvenile conviction. This policy does not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence; or

….

Comment

II.B.201. *The basic rule assigns offenders one point if they were under some form of criminal justice custody when the offense was committed for which they are now being sentenced.* <u>*The Commission has determined that the potential for a custody status point should remain for the entire period of the probationary sentence. If an offender receives an initial term of probation that is definite, is released from probation prior to the expiration of that term and commits a new crime within the initial term, it is clear that a custody point will be assigned. For example: the*</u>

offender is put on probation for five years, is released from probation in three years, and commits a new crime in year four; a custody status point will be added to the individual's criminal history. When an offender is given an indefinite initial term of probation and commits a new crime at any time prior to the end date of the pronounced range, he will be assigned a custody status point. Thus, an initial term of probation "not to exceed three years" is, for this purpose, three years; "three to five years" is five years; "up to the statutory maximum" is the statutory maximum. ~~*The Commission believes that the potential for a custody status point should remain for the entire period of the initial length of stay pronounced by the sentencing judge. An offender who is discharged early but subsequently is convicted of a new felony within the period of the initial length of stay should still receive the consequence of a custody status point. If probation is revoked and the offender serves an executed sentence for the prior offense, eligibility for the custody status point ends with discharge from the sentence.*~~

III. Technical Modifications – Effective August 1, 2008

A. The Commission adopted a proposal to make the following technical modifications to Section II of the Minnesota Sentencing Guidelines and Commentary:

1. Move "Weighting" Language within II.B.1

Guidelines Section II.B.1:

B. Criminal History: . . . .

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

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

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

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

      Severity Level I - II = ½ point;
      Severity Level III - V = 1 point;
      Severity Level VI - VIII = 1 ½ points;
      Severity Level IX - XI = 2 points;
      Murder 1st Degree = 2 points;
      Severity Level A = 2 points;
      Severity Level B – E = 1 ½ points;

Severity Level F – G = 1 point; and
Severity Level H = ½ point for first offense
and 1 point for subsequent offenses.

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

Severity Level I - II = ½ point;
Severity Level III - V = 1 point;
Severity Level VI - VIII = 1 ½ points;
Severity Level IX - XI = 2 points;
Murder 1st Degree = 2 points;
Severity Level A = 3 points;
Severity Level B – C = 2 points;
Severity Level D – E = 1 ½ points;
Severity Level F – G = 1 point; and
Severity Level H = ½ point for first offense
and 1 point for subsequent offenses.

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

2. Remove Outdated Example, Obsolete Comment and Renumber Comment Section II.B.1

Guidelines Section II.B.1:

Comment

II.B.101. . . .

II.B.102. *The Commission determined that it was important to establish a weighting scheme for prior felony sentences to assure a greater degree of proportionality in the current sentencing. Offenders who have a history of serious felonies are considered more culpable than those offenders whose prior felonies consist primarily of low severity, nonviolent offenses.*

II.B.103. *The Commission recognized that determining the severity level of the prior felonies may be difficult in some instances. The appropriate severity level shall be based on the severity level ranking of the prior offense of conviction that is in effect at the time the offender commits the current offense. If an offense has been repealed but the elements of that offense have been incorporated into another felony statute, the appropriate severity level shall be based on the current severity level ranking for the current felony offense containing those similar elements. This policy also applies to offenses that are currently assigned a severity level ranking, but were previously unranked and excluded from the Offense Severity Reference Table. ~~For example, Unauthorized Use of a Motor Vehicle had been ranked at severity level I but was repealed in 1989. The elements of that offense were moved by the legislature to another statute and the new offense was ranked at severity level III. Therefore, the appropriate severity level that should be used to determine the weight of any prior felony sentences for Unauthorized Use of a Motor Vehicle is severity level III.~~*

II.B.104. ~~*Similarly, i*~~*If an offense has been redefined by the legislature, the appropriate severity level shall be based on how the prior felony offense would currently be ranked in consideration of any new or removed elements. For example, in 1989, the controlled substance laws were restructured and the current severity level rankings are in most situations determined on the basis of the amount and type of controlled substance involved in the conviction. For prior Minnesota controlled substance crimes committed before August 1, 1989, and all prior ~~foreign~~ out-of-state controlled substance convictions, the amount and type of the controlled substance should, therefore, be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense. In those instances where multiple severity levels are possible for a prior felony sentence but the information on the criteria that determine the severity level ranking is unavailable, the lowest possible severity level should be used. However, for prior controlled substance crimes committed on or after August 1, 1989, the current severity level ranking for the degree of the prior controlled substance conviction offense should determine the appropriate weight. This particular policy application is necessary to take into account any plea negotiations or evidentiary problems that occurred with regard to the prior offense. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

II.B.105. *In cases of multiple offenses occurring in a single behavioral incident in which state law prohibits the offender being sentenced on more than one offense, only the offense at the highest severity level should be considered. The phrase "before the current sentencing" means that in order for prior convictions to be used in computing criminal history score, the felony sentence for the prior offense must have been stayed or imposed before sentencing for the current offense. When multiple current offenses are sentenced on the same day before the same judge, sentencing shall occur in the order in which the offenses occurred. The dates of the offenses shall be determined according to the procedures in Section II.A.b.*

II.B.106. *When the judge determines that permissive consecutive sentences will be imposed or determines that a departure regarding consecutive sentences will be imposed, the procedure in Section II.F shall be followed in determining the appropriate sentence duration under the guidelines.*

II.B.107. ~~***II.B.102.***~~ ~~*In addition, t*~~*The Commission established policies to deal with several specific situations which arise under Minnesota law:* ~~*The first deals with*~~ *a conviction under Minn. Stat. § 152.137, under which persons convicted of methamphetamine-related crimes involving children and vulnerable adults are subject to conviction and sentence for other crimes resulting from the same criminal behavior; Minn. Stat. § 609.585, under which persons committing theft or another felony offense during the course of a burglary could be convicted of and sentenced for both the burglary and the other felony; and* ~~*or*~~ *a conviction under Minn. Stat. § 609.251 under which persons who commit another felony during the course of a kidnapping can be convicted of and sentenced for both offenses. For purposes of computing criminal history, the Commission decided that consideration should only be given to the most severe offense when there are prior multiple sentences under provisions of Minn. Stats. §§ 152.137, 609.585, or 609.251. This was done to prevent inequities due to past variability in prosecutorial and sentencing practices with respect to these statutes, to prevent systematic manipulation of these statutes in the future, and to provide a uniform and equitable method of computing criminal history scores for all cases of multiple convictions arising from a single course of conduct, when single victims are involved.*

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

II.B.108. ~~***II.B.103.***~~ *To limit the impact of past variability in prosecutorial discretion, the Commission decided that for prior multiple felony sentences arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe offenses. For example, if an offender had robbed a crowded liquor store, he could be convicted of and sentenced for the robbery, as well as one count of assault for every person in the store at the time of the offense. Past variability in prosecutorial charging and negotiating practices could create substantial variance in the number of felony sentences arising from comparable criminal behavior. To prevent this past disparity from entering into the computation of criminal histories, and to prevent manipulation of the system in the future, the Commission limited consideration to the two most severe offenses in such situations. This still allows differentiation between those getting multiple sentences in such situations from those getting single sentences, but it prevents the perpetuation of gross disparities from the past.*

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

II.B.109. ~~***II.B.104.***~~ *When an offender was convicted of a felony but was given a misdemeanor or gross misdemeanor sentence, the offense will be counted as a misdemeanor or gross misdemeanor for purposes of computing the criminal history score. The Commission recognized that the classification of criminal conduct as a felony, misdemeanor, or gross misdemeanor is determined, legally, by the sentence given rather than the conviction offense. They also recognized that where such sentences were given, it was the opinion of the judge that the offending behavior did not merit felonious punishment, or other circumstances existed which justified a limit on the severity of the sanction.*

II.B.110. ~~***II.B.105.***~~ *The decision to stay execution of sentence rather than to stay imposition of sentence as a means to a probationary term following a felony conviction is discretionary with the judge. Considerable disparity appears to exist in the use of these options. In the case of two similar offenders it is not uncommon for one to receive a stay of execution and another to receive the benefit of a stay of imposition. There is also geographical disparity with stays of imposition much less common in Ramsey County, for example, than in most other counties. As a result of the disparity that exists in the use of stays of imposition, the Commission determined that stays of execution and stays of imposition shall be treated the same with respect to criminal history point accrual. Similar treatment has the additional advantage of a simplified procedure for computing criminal history scores.*

II.B.111. ~~***II.B.106.***~~ ~~*Finally, t*~~*The Commission established a "decay factor" for the consideration of prior felony offenses in computing criminal history scores. The Commission decided it was important to consider not just the total number of felony sentences and stays of imposition, but also the age of the sentences and stays of imposition. A person who was sentenced for three felonies within a five-year period is more culpable than one sentenced for three felonies within a twenty-five year period. The Commission decided that the presence of old felony sentences and stays of imposition should not be considered in computing criminal history scores after a significant period of time has elapsed. A prior felony sentence or stay of imposition would not be counted in criminal history score computation if fifteen years had elapsed from the date of discharge or expiration of that sentence or stay of imposition to the date of the current offense. While this procedure does not include a measure of the offender's subsequent criminality, it has the overriding advantage of accurate and simple application.*

~~***II.B.107.*** *A felony sentence imposed for a criminal conviction treated pursuant to Minn. Stat. Ch. 242 (Youth Conservation Commission and later Youth Corrections Board, repealed 1977) shall be assigned its appropriate weight in computing the criminal history score according to procedures in II.B.1.*~~

II.B.112. ~~***II.B.108.***~~ *An offense upon which a judgment of guilty has not been entered before the current sentencing; ~~i.e.,~~ e.g., pursuant to Minn. Stat. § 152.18, subd. 1, shall not be assigned any weight in computing the criminal history score.*

II.B.113. ~~***II.B.109.***~~ *Under Minn. Stat. § 260B.130, a child alleged to have committed a felony offense under certain circumstances may be prosecuted as an extended jurisdiction juvenile. If the prosecution results in a guilty plea or finding of guilt and the court imposes a disposition according to Minn. Stat. § 260B.130, subd. 4 (a), the extended jurisdiction juvenile conviction shall be treated in the same manner as an adult felony sentence for purposes of calculating the prior felony record component of the criminal history score. All of the policies under ~~s~~Sections II.B.1.a – f, and corresponding commentary apply to extended jurisdiction juvenile convictions. If the extended jurisdiction juvenile conviction resulted in execution of the stayed adult prison sentence, the offense can only be counted once in the criminal history.*

3. Renumber Comment Section II.B.2

Guidelines Section II.B.2:

Comment

II.B.201. . . . .

II.B.202. *Probation given for an offense treated pursuant to Minn. Stat. § 152.18, subd. 1, will result in the assignment of a custody status point because a guilty plea has previously been entered and the offender has been on a probationary status. Commitments under Minn. R. Crim. P. 20, and juvenile parole, probation, or other forms of juvenile custody status are not included because, in those situations, there has been no conviction for a felony or gross misdemeanor which resulted in the individual being under such status. However, a custody point will be assigned if the offender committed the current offense while under some form of custody following an extended jurisdiction juvenile conviction. Probation, jail, or other custody status arising from a conviction for misdemeanor or gross misdemeanor traffic offenses are excluded. Probation, parole, and supervised release will be the custodial statuses that most frequently will result in the assignment of a point.*

II.B.203. *It should be emphasized that the custodial statuses covered by this policy are those occurring after conviction of a felony or gross misdemeanor. Thus, a person who commits a new felony while on pre-trial diversion or pre-trial release on another charge would not get a custody status point. Likewise, persons serving a misdemeanor sentence at the time the current offense was committed would not receive a custody status point, even if the misdemeanor sentence was imposed upon conviction of a gross misdemeanor or felony.*

~~***II.B.202.***~~ ***II.B.204.*** *As a general rule, the Commission excludes traffic offenses from consideration in computing the criminal history score. Given the increased penalties associated with driving while impaired offenses and serious impact on public safety, the Commission determined that these offenses should be considered for custody status points in the same manner as non-traffic offenses.*

~~***II.B.203.***~~ ***II.B.205.*** *The most problematic consequence of a criminal history score in excess of the maximum points differentiated by the Sentencing Guidelines Grids is that no additional penalty accrues for engaging in felonious behavior while under custody*

supervision. For example, if an offender has a criminal history score of seven and is released pending sentencing for a severity level three offense, and he or she commits another severity level three offense while awaiting sentencing, the presumptive sentence for the most recent offense is the same as for the prior offense. There is a presumption against consecutive sentences for property offenses, and therefore no additional penalty is provided when this type of situation occurs. The addition of three months to the cell duration provides a uniform presumptive standard for dealing with this situation.

II.B.206. *While the Commission believes that the impact of the custody status provision should be maintained for all cases, incrementing the sanction for each criminal history point above that displayed by the Sentencing Guidelines Grids is deemed inappropriate. The primary determinant of the sentence is the seriousness of the current offense of conviction. Criminal history is of secondary importance and the Commission believes that proportionality in sentencing is served sufficiently with the criminal history differentiations incorporated in the Sentencing Guidelines Grids and with the special provision for maintaining the impact of the custody status provision. Further differentiation is deemed unnecessary to achieve proportionality in sentencing.*

~~***II.B.204.***~~ ***II.B.207.*** *The Commission believes that when multiple offenses are an element of the conviction offense or the conviction offense is an aggregated offense, the offender should receive a custody status point if they become subject to one of the criminal justice supervision statuses outlined in 2.a at any point during the time period in which the offenses occurred. While the Commission recognizes that its policy for determining the presumptive sentence states that for aggregated offenses, the earliest offense date determines the date of offense, it believes that eligibility for a custody status point should not be limited to the offender's status at the time of the earliest date of offense.*

~~***II.B.205.***~~ ***II.B.208.*** *When an offender who is on any custody status condition listed above for a sex offense commits another sex offense, they are assigned an additional custody status point. The Commission believes that offenders who commit a subsequent sex offense pose such a risk to public safety that their criminal history scores should be enhanced to reflect this risk. This policy does not apply to the offense of Failure to Register as a Predatory Offender (M.S. 243.166).*

4. Renumber Comment Section II.B.3

Guidelines Section II.B. 3:

Comment

II.B.301. . . .

II.B.302. *As a general rule, the Commission eliminated traffic misdemeanors and gross misdemeanors from consideration. However, driving while impaired traffic offenses have particular relevance to the offenses of criminal vehicular homicide or operation and first degree (felony) driving while impaired. Therefore, prior misdemeanor and gross misdemeanor sentences for violations under 169A.20, 169A.31, 169.121, 169.1211, 169.129, or 360.0752 shall be used in the computation of the misdemeanor/gross*

misdemeanor point when the current conviction offense is criminal vehicular homicide or operation or first degree (felony) driving while impaired.

II.B.303. *The Commission decided to reduce the weight of prior gross misdemeanors (other than DWI related offenses) in order to create a more proportional weighting scheme with respect to the weight of prior felonies at severity levels I and II which receive 1/2 point each. In addition, with the continued creation of new gross misdemeanors that are by definition nearly identical to misdemeanors, it is becoming increasingly difficult to discern whether a prior offense is a gross misdemeanor or a misdemeanor. The Commission believes that in light of these recording problems, a weighting scheme that sets the same weight for both misdemeanors and gross misdemeanors is more consistent and equitable.*

II.B.304. *The offense of fleeing a peace officer in a motor vehicle (Minn. Stat. § 609.487) is deemed a non traffic offense. Offenders given a prior misdemeanor or gross misdemeanor sentence for this offense shall be assigned one unit in computing the criminal history. Effective for crimes occurring on or after August 1, 1997, all fleeing a peace officer in a motor vehicle offenses are felonies. (Offenders with a prior felony sentence for fleeing a peace officer in a motor vehicle shall be assigned the appropriate weight for each sentence subject to the provisions in II.B.1.).*

~~II.B.302.~~II.B.305. *. . .*

II.B.306. *The Commission believes that offenders whose current conviction is for criminal vehicular homicide or operation or first degree (felony) driving while impaired, and who have prior violations under 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, or 609.21, 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 or criminal vehicular homicide or operation (CVO) violations. To determine the total number of misdemeanor points under these circumstances, first add together any non DWI/CVO misdemeanor units. If there are less than four units, add in any DWI/CVO units. Four or more units would equal one point. Only DWI/CVO units can be used in calculating additional points. Each set of four DWI/CVO units would equal an additional point. For example, if an offender had two theft units and six DWI/CVO units, the theft would be added to the two DWI/CVO units to equal one point. The remaining four DWI/CVO units would equal a second point. In a second example, if an offender had six theft units and six DWI/CVO units, the first four theft units would equal one point. Four of the DWI/CVO units would equal a second point. The remaining two theft units could not be added to the remaining two DWI/CVO units for a third point. The total misdemeanor score would be two.*

II.B.307. *The Commission has not included certain common misdemeanors in the Misdemeanor and Gross Misdemeanor Offense List because it is believed that these offenses are not particularly relevant in the consideration of the appropriate guideline sentence. This limiting was also done to prevent criminal history point accrual for misdemeanor convictions which are unique to one municipality, or for local misdemeanor offenses of a regulatory or control nature, such as swimming at a city beach with an inner tube. The Commission decided that using such regulatory misdemeanor convictions was inconsistent with the purpose of the criminal history score. In addition, several groups argued that some municipal regulatory ordinances are enforced with greater frequency against low income groups and members of racial minorities, and that*

using them to compute criminal history scores would result in economic or racial bias. For offenses defined with monetary thresholds, the threshold at the time the offense was committed determines the offense classification for criminal history purposes, not the current threshold.

~~II.B.303.~~II.B.308. . . .

~~II.B.304.~~II.B.309. . . .

~~II.B.305.~~II.B.310. . . .

~~II.B.306.~~II.B.311. . . .

~~II.B.307.~~II.B.312. . . .

5. Renumber Comment Section II.B.4

Guidelines Section II.B.4:

Comment

II.B.401. *The juvenile history item is included in the criminal history index to identify those young adult felons whose criminal careers were preceded by repeated felony-type offenses committed as a juvenile. The Commission held several public hearings devoted to the issue of using juvenile records in the criminal history index. Those hearings pointed out differences in legal procedures and safeguards between adult and juvenile courts, differing availability of juvenile records, and differing procedures among juvenile courts. As a result of these issues, the Commission originally decided to establish rigorous standards regulating the consideration of juvenile records in computing the criminal history score.*

Effective January 1, 1995, the Legislature enacted many substantive changes to the juvenile justice system. Included in these changes are the right to effective assistance of counsel in connection with a proceeding in juvenile court and the right to a jury trial on the issue of guilt for a child who is prosecuted as an extended jurisdiction juvenile. Because these rights are now afforded to juveniles, the standards regulating the consideration of juvenile records in computing the criminal history score are broadened.

II.B.402. *~~First, o~~Only juvenile offenses that are felonies under Minnesota law will be considered in computing the criminal history score. Status offenses, dependency and neglect proceedings, and misdemeanor or gross misdemeanor-type offenses will be excluded from consideration.*

II.B.403. *Consistent with Minn. Stat. § 609.035, which provides for a single sentence for adult offenders when multiple convictions arise from a single course of conduct, only juvenile offenses arising from separate courses of conduct contribute to the juvenile point(s), unless multiple victims were involved.*

~~II.B.403.~~ II.B.404. *~~Second, t~~The juvenile offenses must have been committed after the offender's fourteenth birthday. The Commission chose the date of the offense rather than the date the findings were made by the court to eliminate variability in application based on differing juvenile court practices.*

~~II.B.404.~~ II.B.405. *~~Third, j~~Juvenile offenses will be considered in computing the criminal history score only for adult offenders who had not attained the age of 25 at the time the felony was committed for which they are now being sentenced. Again, the Commission chose to examine the age of the offender at the time of the offense rather than at time of sentencing to prevent disparities resulting from system processing variations.*

~~II.B.405.~~ II.B.406. *~~Fourth, t~~The Commission decided that, provided the above conditions are met, it would take two juvenile offenses to equal one point on the criminal history score, and generally, an offender may not receive more than one point on the basis of prior juvenile offenses. This point limit does not apply to offenses committed and prosecuted as a juvenile for which the guidelines would presume imprisonment. The presumptive disposition for a prior juvenile offense is considered to be imprisonment if the presumptive disposition for that offense under the sentencing guidelines is imprisonment regardless of criminal history. Included in this determination are any mandatory minimum laws that apply to the offense or any other applicable policies under ~~s~~Section II.C., Presumptive Sentence. The criminal history record is not used to determine whether the juvenile offense carries a presumptive imprisonment sentence because of the difficulty in applying criminal history score computations to prior juvenile offenses. Two juvenile offenses are required for each additional point. Again, no partial points are allowed, so an offender with only one juvenile offense meeting the above criteria would receive no point on the criminal history score.*

~~II.B.406.~~ II.B.407. *Only those juvenile offenses where findings were made after August 1, 1989, can contribute to a juvenile history score of more than one. The Commission was concerned with possible past disparities in the procedures used in the various juvenile courts. This effective date for the prior findings corresponds to the Commission's previous policy which allowed for more than one juvenile point when there were certain prior serious violent offenses on the juvenile record. Retaining this effective date for the new policy continues to give proper notice that in the future, the juvenile history can result in more than one criminal history point.*

~~II.B.407.~~ II.B.408. *In order to provide a uniform and equitable method of computing criminal history scores for cases of multiple felony offenses with findings arising from a single course of conduct when single victims are involved and when the findings involved provisions of Minn. Stats. § 609.585 or 609.251, consideration should be given to the most severe offense with a finding for purposes of computing criminal history. When there are multiple felony offenses with findings arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe felony offenses with findings for purposes of computing criminal history. These are the same policies that apply to felony, gross misdemeanor and misdemeanor convictions for adults.*

6. Make "Out-of-State" Language Consistent in Section II.B

Guidelines Section II.B.5:

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

   The determination as to whether a prior out-of-state conviction for a felony offense committed by an offender who was less than 18 years old should be included in the juvenile section or adult section of the criminal history score is governed by Minnesota law. The conviction should be included in the juvenile history section if it meets the requirements outlined in II.B.4. The prior can be included in the adult history section only if the factfinder determines that it is an offense for which the offender would have been certified to adult court if it occurred in Minnesota. See *State v. Marquetti, 322 N.W.2d 316 (Minn. 1982)*.

Comment

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

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

II.B.503. *For prior out-of-state controlled substance convictions, the amount and type of the controlled substance should be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense.*

. . . .

Guidelines Section II.B.1:

. . . .

II.B.104. ~~*Similarly, i*~~*If an offense has been redefined by the legislature, the appropriate severity level shall be based on how the prior felony offense would currently be ranked in consideration of any new or removed elements. For example, in 1989, the controlled substance laws were restructured and the current severity level rankings are in most situations determined on the basis of the amount and type of controlled substance involved in the conviction. For prior Minnesota controlled substance crimes committed before August 1, 1989, and all prior* ~~*foreign*~~ *out-of-state controlled substance convictions, the amount and type of the controlled substance should, therefore, be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense. In those instances where multiple severity levels are possible for a prior felony sentence but the information on the criteria that determine the severity level ranking is unavailable, the lowest possible severity level should be used. However, for prior controlled substance crimes committed on or after August 1, 1989, the current severity level ranking for the degree of the prior controlled substance conviction offense should determine the appropriate weight. This particular policy application is necessary to take into account any plea negotiations or evidentiary problems that occurred with regard to the prior offense. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

7. Renumber Comment Section II.B.6

Guidelines Section II.B.6:

Comment

II.B.601. . . .

II.B.602. *A first-time first degree (felony) driving while impaired (DWI) offense involves a DWI violation within ten years of the first of three or more prior impaired driving incidents. Because the DWI priors elevated this offense to the felony level, they should be excluded from the criminal history score. Those predicate misdemeanor and gross misdemeanor offenses should also be excluded for a subsequent felony DWI, but any prior felony DWI would be counted as part of the felony criminal history score.*

8. Remove Obsolete Comment and Renumber Comment Section II.C

Guidelines Section II.C:

Comment

II.C.01. . . .

II.C.02. . . .

II.C.03. *The presumptive duration listed on the grids, when executed, includes both the term of imprisonment and the period of supervised release. According to M.S. § 244.101, when the court sentences an offender to an executed sentence for an offense occurring on or after August 1, 1993, the sentence consists of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence; and a specified maximum supervised release term equal to one-third of the total executed sentence. A separate table following the Sentencing Guidelines Grids illustrate how executed sentences are broken down into their two components.*

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

~~II.C.03.~~II.C.04. *When a stay of execution is given, the presumptive sentence length shown in the appropriate cell should be pronounced, but its execution stayed. If the sentence length pronounced, but stayed, differs from that shown in the appropriate cell, that is a departure from the guidelines.*

~~II.C.04.~~II.C.05. *When a stay of imposition is given, no sentence length is pronounced, and the imposition of the sentence is stayed to some future date. If that sentence is ever imposed, the presumptive sentence length shown in the appropriate cell should be pronounced, and a decision should be made on whether to execute the presumptive sentence length given. If the sentence length pronounced at the imposition of the sentence differs from that shown in the appropriate cell of the Sentencing Guidelines Grids, that is a departure from the guidelines.*

~~II.C.05.~~II.C.06. *If an offender is convicted of a felony, and no stayed sentence is given under Minn. Stat. § 609.13, through 609.14, and the judge imposes or stays a misdemeanor or gross misdemeanor sentence, that is a departure from the guidelines.*

~~II.C.06.~~II.C.07. *When an offender is convicted of two or more offenses, and the most severe offense is a conviction for attempt or conspiracy under Minn. Stat. § 609.17, or 609.175, the presumptive sentence duration shall be the longer of (1) the duration for the attempt or conspiracy conviction, or (2) the duration for the next most severe offense of conviction.*

~~II.C.07.~~ *~~The term "sale" as it relates to presumptive imprisonment for second or subsequent sale of a severity level VI drug or sale of cocaine encompasses all elements of Minn. Stat. § 152.09 subd. 1 (1) which reads "Manufacture, sell, give away, barter, deliver, exchange or distribute; or possess with intent to manufacture, sell, give away,~~*

~~*barter, deliver, exchange or distribute, a controlled substance" or Minn Stat. § 152.01, subd. 15a which reads " 'Sell' means to sell, give away, barter, deliver, exchange, distribute or dispose of to another; or to offer or agree to do the same; or to manufacture", if the offense was committed after August 1, 1989.*~~

II.C.08. . . .

II.C.09. Post-Blakely Sentencing Issues

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

II.C.09.a. Statutory Maximum Sentence

***Apprendi v. New Jersey**, 530 U.S. 466 (2000). . . .*

II.C.09.b. Presumptive Sentence

***Blakely v. Washington**, 1264 S.Ct. 2531 (2004). . . .*
***State v. Shattuck**, 704 N.W. 2d 131 (Minn. 2005). . . .*
***State v. Allen,** 706 N.W.2d 40 (Minn. 2005). . . .*
***State v. Conger**, 687 N.W.2d 639 (Minn. App. 2004). . . .*
***State v. Mitchell**, 687 N.W.2d 393 (Minn. App. 2004). . . .*
***State v. Fairbanks,** 688 N.W. 2d 333 (Minn. App. 2004). . . .*

II.C.09.c. Mandatory Minimum – Minn. Stat. § 609.11

. . . .

II.C.09.d. Custody Status Point

***State v. Brooks,** 690 N.W. 2d 160 (Minn. App. 2004). . . .*

II.C.09.e. Retroactivity

***State v. Petschl,** 692 N.W.2d 463 (Minn. App. 2004). . . .*
***State v. Houston,** 702 N.W.2d 268, 273 (Minn. 2005). . . .*
***State v. Beaty,** 696 N.W.2d. 406 (Minn. App. 2005). . . .*

II.C.09.f. Blakely Waiver Issues

State v. Hagen, *690 N.W.2d 155 (Minn. App. 2004). . . .*
State v. Senske, *692 N.W. 2d 743 (Minn. App. 2005). . . .*

9. Remove Unnecessary Language in Comment Section II.D

Guidelines Section II.D:

Comment

II.D.102. *~~In addition, t~~The Commission determined that the severity of offenders' sanctions should not vary depending on whether or not they exercise constitutional rights during the adjudication process.*

. . . .

II.D.206. *The aggravating factor involving bias motivation under ~~s~~Section II.D.2.b.(11) cannot be used when a person has been convicted under a statute that elevated the crime to a felony offense because of bias motivation, e.g., Minn. Stat. §§ 609.2231, subd. 4 (fourth-degree assault), 609.595, subd. 1a(a) (criminal damage to property); 609.749, subd. 3(1) (harassment/stalking). The Commission intends that a penalty for a bias-motivated offense be subject to enhancement only once.*

~~Additionally, i~~In determining when domestic violence, sexual assault and sexual abuse cases are motivated by a victim's sex and may be appropriately enhanced, proof must be shown of at least one factor, such as: Offender makes abusive or derogatory references based on gender; offender states hatred for a gender as a class; crime involves excessive violence, including mutilation; or victims are multiple and all of the same gender.

10. Renumber Comment Section II.E

Guidelines Section II.E:

Comment

II.E.01. . . .

II.E.02. . . .

II.E.03. *When the mandatory minimum sentence is for less than one year and one day, the Commission interprets the minimum to mean any incarceration including time spent in local confinement as a condition of a stayed sentence. The presumptive disposition would not be commitment to the Commissioner unless the case falls above the dispositional line on the Sentencing Guidelines Grids. An example would be a conviction for simple possession of cocaine, a Fifth Degree Controlled Substance Crime.*

If the person has previously been convicted of a controlled substance crime, the mandatory minimum law would require at least six months incarceration which could be served in a local jail or workhouse.

~~II.E.03.~~II.E.04. . . .

II.E.05. *There are some offenses that by statutory definition involve a dangerous weapon and, therefore, the mandatory minimum provision dealing with dangerous weapons always applies; for example, Assault in the Second Degree, Drive-By Shootings, and Certain Persons Not to Have Firearms. The presumptive disposition for these types of offenses is imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is greater.*

11. Reorganize Guidelines Section II.F

Guidelines Section II.F:

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

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

For persons who, while on probation, parole, or incarcerated, pursuant to an offense committed on or before April 30, 1980, commit a new offense for which a consecutive sentence is imposed, service of the consecutive sentence for the current conviction shall commence upon the completion of any incarceration arising from the prior sentence.

Comment

II.F.01. *Consecutive sentences are a more severe sanction because the intent of using them is to confine the offender for a longer period than under concurrent sentences. If the severity of the sanction is to be proportional to the severity of the offense, consecutive sentences should be limited to more severe offenses. Generally, the Commission has*

established criteria which permits, but does not require, the use of consecutive sentences in the instances listed in the guidelines.

For felony convictions committed while an offender is serving an executed prison sentence, or by an offender on supervised release, on conditional release, or on escape status from an executed prison sentence, it is presumptive to impose the sentence for the current offense consecutive to the sentence the offender was serving at the time the new offense was committed. As defined in Minn. Stat. § 244.101, "executed prison sentence" includes both the term of imprisonment and period of supervised release. The guidelines create a presumption against the use of consecutive sentences in all other cases not meeting the guideline criteria. If consecutive sentences are used in such cases, their use constitutes a departure from the guidelines and written reasons are required.

In all cases the Commission suggests that judges consider carefully whether the purposes of the sentencing guidelines (in terms of punishment proportional to the severity of the offense and the criminal history) would be served best by concurrent rather than consecutive sentences.

II.F.02. *The order of sentencing when consecutive sentences are imposed by the same judge is to sentence in the order in which the offenses occurred.*

II.F.03. *For persons sentenced under Minn. Stat. § 609.229, subd. 3, where there is a sentence for an offense committed for the benefit of a gang, the presumptive duration for the underlying crime with the highest severity level if sentenced consecutively would include additional months as outlined under Section II.G, and using the respective criminal history score appropriate for consecutive sentencing.*

II.F.04. *The service of the consecutive sentence begins at the end of any incarceration arising from the first sentence. The institutional records officer will aggregate the separate durations into a single fixed sentence, as well as aggregate the terms of imprisonment and the periods of supervised release. For example, if the judge executed a 44-month fixed sentence, and a 24-month fixed sentence to be served consecutively to the first sentence, the records officer has the authority to aggregate the sentences into a single 68-month fixed sentence, with a specified minimum 45.3-month term of imprisonment and a specified maximum 22.7-month period of supervised release.*

II.F.05. *The Commissioner of Corrections has the authority to establish policies regarding durations of confinement for persons sentenced for crimes committed before May 1, 1980, and will continue to establish policies for the durations of confinement for persons revoked and re-imprisoned while on parole or supervised release, who were imprisoned for crimes committed on or after May 1, 1980.*

If an offender is under the custody of the Commissioner of Corrections pursuant to a sentence for an offense committed on or before April 30, 1980, and if the offender is convicted of a new felony committed on or after May 1, 1980, and is given a presumptive sentence to run consecutively to the previous indeterminate sentence, the phrase "completion of any incarceration arising from the prior sentence" means the target release date which the Commissioner of Corrections assigned to the inmate for the offense committed on or before April 30, 1980, or the date on which the inmate completes any incarceration assigned as a result of a revocation of parole connected with the pre-guidelines offense.

II.F.06. *Minn. Stat. § 624.74 provides for a maximum sentence of three years or payment of a fine of $5,000 or both, for possession or use of metal-penetrating bullets during the commission of a crime. Any executed felony sentence imposed under Minn. Stat. § 624.74, shall run consecutively to any felony sentence imposed for the crime committed with the weapon, thus providing an enhancement to the sentence imposed for the other offense. The extent of enhancement, up to the three year statutory maximum, is left to the discretion of the Court. If, for example, an offender were convicted of Aggravated Robbery in the First Degree with use of a gun and had a zero criminal history score, the presumptive sentence for the offense would be 48 months; if the offender were also convicted of Minn. Stat. § 624.74, Metal-Penetrating Bullets, the Court could, at its discretion, add a maximum of 36 months, without departing from the guidelines.*

1. Presumptive Consecutive Sentences

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

Consecutive sentences are presumptive under the above criteria only when the presumptive disposition for the current offense(s) is commitment to the Commissioner of Corrections as determined under the procedures outlined in ~~s~~Section II.C. The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an executed term of imprisonment, however, is always commitment to the Commissioner of Corrections.

Under the circumstances above, it is presumptive for the sentence(s) to be consecutive to the sentence being served by the offender at the time the escape or other new offense was committed. A concurrent sentence under these circumstances constitutes a departure from the presumptive sentence except if the total time to serve in prison would be longer if a concurrent sentence is imposed in which case a concurrent sentence is presumptive. A special, nonexclusive, mitigating departure factor may be used by the judge to depart from the consecutive presumption and impose a concurrent sentence: there is evidence that the defendant has provided substantial and material assistance in the detection or prosecution of crime.

For each presumptive consecutive offense sentenced consecutive to another offense(s), a criminal history score of one, or the mandatory minimum for the offense,

whichever is greater, shall be used in determining the presumptive duration. For persons sentenced under Minn. Stat. § 609.229, subd. 3, where there is a sentence for an offense committed for the benefit of a gang, the presumptive duration for the underlying crime with the highest severity level if sentenced consecutively, would include additional months as outlined in Section II.G, and using the respective criminal history score appropriate for consecutive sentencing.

When an offender is sentenced for a felony DWI, a consecutive sentence is presumptive if the offender has a prior unexpired misdemeanor, gross misdemeanor or felony DWI sentence. The presumptive disposition for the felony DWI is based on the offender's location on the grid. If the disposition is probation, the presumptive sentence for the felony DWI is a consecutive stayed sentence with a duration based on a criminal history score of one. Any pronounced probationary jail time should be served consecutively to any remaining time to be served on the prior DWI offense. If the disposition is commitment to prison, the requirement for consecutive sentencing does not apply (M.S. § 169A.28 subd. 1(b)).

Comment

II.F.101. *For each presumptive consecutive offense sentenced consecutive to another offense(s), the presumptive duration is determined by a criminal history score of one, or the mandatory minimum, whichever is greater.*

II.F.102. *The presumptive disposition for an escape from an executed sentence or a felony assault committed by an inmate serving an executed term of imprisonment is commitment to the Commissioner of Corrections. It is presumptive for sentences for these offenses to be consecutive to the sentence the inmate was serving at the time the new offense was committed.*

II.F.103. *Consecutive sentences are presumptive for a crime committed by an inmate serving, or on escape status from, an executed prison sentence if the presumptive disposition for the crime is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C.*

II.F.104. *Sentences for offenses committed while on escape status from an executed sentence which have presumptive dispositions of commitment to the Commissioner of Corrections are presumptive consecutive to the sentence being served by the offender at the time of the escape.*

II.F.105. *In certain situations a concurrent sentence would result in an offender serving longer in prison than a consecutive sentence and in such situations a concurrent sentence*

is presumptive. For example, an inmate has four months left to serve before release on the first offense. The new offense is a severity level IV crime and the inmate's criminal history score is five. If sentenced concurrently, the presumptive duration would be 27 months, the term of imprisonment would be 18 months and because the sentence runs concurrently with the first offense, the total time to be served would be 18 months. If the new offense were sentenced consecutively, the presumptive duration would be 15 months, the term of imprisonment would be 10 months and adding the 10 months to the four months left to serve on the first offense would equal 14 months or 4 months less than the time to be served under concurrent sentencing. In a situation like this example, concurrent sentencing would be presumptive.

2. Permissive Consecutive Sentences

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

~~1~~ a. A current felony conviction for a crime on the list of offenses eligible for permissive consecutive sentences found in Section VI may be sentenced consecutively to a prior felony sentence for a crime listed in Section VI which has not expired or been discharged; or

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

~~3~~ c. A current felony conviction for escape from lawful custody, as defined in Minn. Stat. § 609.485, when the offender did not escape from an executed prison sentence, may be sentenced consecutively to the sentence for the offense for which the offender was confined; or

~~4~~ d. A current felony conviction for a crime committed while on felony escape from lawful custody, as defined in Minn. Stat. § 609.485, from a non-executed felony sentence may be sentenced consecutively to the sentence for the escape or for the offense for which the offender was confined; or

~~5~~ e. A current felony conviction for a crime committed while on felony escape from lawful custody, as defined in Minn. Stat. § 609.485, from an executed felony sentence may be sentenced consecutively to the sentence for the escape; or

~~6~~ f. A current felony conviction for Fleeing a Peace Officer in a Motor Vehicle as defined in Minn. Stat. § 609.487, or Criminal Sexual Conduct in the First through Fourth Degrees with force or violence as defined in Minn. Stat. § 609.342 through 609.345; or

~~7~~ g. A current conviction for a felony assault committed while in a local jail or workhouse may be sentenced consecutively to any other executed prison sentence if the presumptive disposition for the other offense was commitment to the Commissioner of Corrections.

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

Consecutive sentences are always permissive under the above criteria ~~numbers 3, 5, 6, or 7~~ letters c, e, f, or g. There is no dispositional departure if the sentences are executed when consecutive sentences are pronounced under criteria ~~numbers 3, 5, 6, or 7~~ letters c, e, f, or g.

For each offense sentenced consecutive to another offense(s), other than those that are presumptive, a zero criminal history score, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration. The purpose of this procedure is to count an individual's criminal history score only one time in the computation of consecutive sentence durations. For persons sentenced under Minn. Stat. § 609.229, subd. 3, where there is a

sentence for an offense committed for the benefit of a gang, the presumptive duration for the underlying crime with the highest severity level if sentenced consecutively, would include additional months as outlined in Section II.G, and using the respective criminal history score appropriate for consecutive sentencing. The presumptive duration for each offense sentenced concurrently shall be based on the offender's criminal history as calculated by following the procedures outlined in Section II.B.

Comment

II.F.201. *For persons given permissive consecutive sentences, the presumptive duration for each offense sentenced consecutive to another offense(s) is determined by the severity level appropriate to the conviction offense at the zero criminal history column, or the mandatory minimum, whichever is greater.*

II.F.202. *The Commission's policy on permissive consecutive sentencing outline the criteria that are necessary to permit consecutive sentencing without the requirement to cite reasons for departure. Judges may pronounce consecutive sentences in any other situation by citing reasons for departure. Judges may also pronounce durational and dispositional departures both upward and downward in cases involving consecutive sentencing if reasons for departure are cited. The reasons for each type of departure should be specifically cited. The procedures for departures are outlined in Section II.D, of the guidelines.*

II.F.203. *It is permissive for multiple current felony convictions for offenses on the eligible list to be sentenced consecutively to each other when the presumptive disposition for these offenses is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C, of the guidelines. Consecutive sentencing is permissive under these circumstances even when the offenses involve a single victim involving a single course of conduct. However, consecutive sentencing is not permissive under these circumstances when the court has given an upward durational departure on any of the current offenses. The Commission believes that to give both an upward durational departure and a consecutive sentence when the circumstances involve one victim and a single course of conduct can result in disproportional sentencing unless additional aggravating factors exist to justify the consecutive sentence.*

II.F.204. *If the presumptive disposition for an escape conviction from a non-executed prison sentence is commitment to the Commissioner of Corrections, it is permissive for the sentence to be consecutive to the offense for which the offender was confined. The presumptive duration for the escape is found at the zero criminal history score and the appropriate severity level. In addition to making the sentence for the escape offense consecutive to the sentence for which the offender was confined, it is also permissive to pronounce a sentence for any offense committed while on escape status that carries a presumptive disposition of commitment to the Commissioner of Corrections, consecutive to the sentence for the escape conviction or consecutive to the sentence for which the offender was confined.*

Additionally, it is permissive to sentence any offense committed while on escape status from an executed sentence consecutive to the escape.

Comment

II.F.01. *Consecutive sentences are a more severe sanction because the intent of using them is to confine the offender for a longer period than under concurrent sentences. If the severity of the sanction is to be proportional to the severity of the offense, consecutive sentences should be limited to more severe offenses. Generally, the Commission has established criteria which permits, but does not require, the use of consecutive sentences in the instances listed in the guidelines.*

For felony convictions committed while an offender is serving, or on escape status from, an executed prison sentence, it is presumptive to impose the sentence for the current offense consecutive to the sentence the offender was serving at the time the new offense was committed. As defined in Minn. Stat. § 244.101, "executed prison sentence" includes both the term of imprisonment and period of supervised release. The guidelines create a presumption against the use of consecutive sentences in all other cases not meeting the guideline criteria. If consecutive sentences are used in such cases, their use constitutes a departure from the guidelines and written reasons are required.

In all cases the Commission suggests that judges consider carefully whether the purposes of the sentencing guidelines (in terms of punishment proportional to the severity of the offense and the criminal history) would be served best by concurrent rather than consecutive sentences.

II.F.02. *The order of sentencing when consecutive sentences are imposed by the same judge is to sentence in the order in which the offenses occurred. For persons given permissive consecutive sentences, the presumptive duration for each offense sentenced consecutive to another offense(s) is determined by the severity level appropriate to the conviction offense at the zero criminal history column, or the mandatory minimum, whichever is greater.*

For each presumptive consecutive offense sentenced consecutive to another offense(s), the presumptive duration is determined by a criminal history score of one rather than at the zero criminal history column of the grids, or the mandatory minimum, whichever is greater. For persons sentenced under Minn. Stat. § 609.229, subd. 3 where there is a sentence for an offense committed for the benefit of a gang, the presumptive duration for the underlying crime with the highest severity level if sentenced consecutively would include additional months as outlined under Section II.G. and using the respective criminal history score appropriate for consecutive sentencing.

The service of the consecutive sentence begins at the end of any incarceration arising from the first sentence. The institutional records officer will aggregate the separate durations into a single fixed sentence, as well as aggregate the terms of imprisonment and the periods of supervised release. For example, if the judge executed a 44 month fixed sentence, and a 24 month fixed sentence to be served consecutively to the first sentence, the records officer has the authority to aggregate the sentences into a single 68 month

~~*fixed sentence, with a specified minimum 45.3 month term of imprisonment and a specified maximum 22.7 month period of supervised release.*~~

~~***II.F.03.** The presumptive disposition for an escape from an executed sentence or a felony assault committed by an inmate serving an executed term of imprisonment is commitment to the Commissioner of Corrections. It is presumptive for sentences for these offenses to be consecutive to the sentence the inmate was serving at the time the new offense was committed. Consecutive sentences are also presumptive for a crime committed by an inmate serving, or on escape status from, an executed prison sentence if the presumptive disposition for the crime is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C.*~~

~~*In certain situations a concurrent sentence would result in an offender serving longer in prison than a consecutive sentence and in such situations a concurrent sentence is presumptive. For example, an inmate has four months left to serve before release on the first offense. The new offense is a severity level IV crime and the inmate's criminal history score is five. If sentenced concurrently, the presumptive duration would be 27 months, the term of imprisonment would be 18 months and because the sentence runs concurrently with the first offense, the total time to be served would be 18 months. If the new offense were sentenced consecutively, the presumptive duration would be 15 months, the term of imprisonment would be 10 months and adding the 10 months to the four months left to serve on the first offense would equal 14 months or 4 months less than the time to be served under concurrent sentencing. In a situation like this example, concurrent sentencing would be presumptive.*~~

~~*For persons given presumptive consecutive sentences, the presumptive duration is determined by a criminal history score of one, or the mandatory minimum, whichever is greater.*~~

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

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

~~*If the presumptive disposition for an escape conviction from a nonexecuted prison sentence is commitment to the Commissioner of Corrections, it is permissive for the sentence to be consecutive to the offense for which the offender was confined regardless of whether the other sentence is for a crime against the person. The presumptive duration for the escape is found at the zero criminal history column and the appropriate severity level. In addition to making the sentence for the escape offense consecutive to the sentence for which the offender was confined, it is also permissive to pronounce a sentence for any offense committed while on escape status that carries a presumptive disposition of commitment to the Commissioner of Corrections, consecutive to the sentence for the escape conviction or consecutive to the sentence for which the offender was confined.*~~

~~*Sentences for offenses committed while on escape status from an executed sentence which have presumptive dispositions of commitment to the Commissioner of Corrections are presumptive consecutive to the sentence being served by the offender at the time of the escape. In addition, it is permissive to sentence any offense committed while on escape status from an executed sentence consecutive to the escape.*~~

~~***II.F.05.** The Commissioner of Corrections has the authority to establish policies regarding durations of confinement for persons sentenced for crimes committed before May 1, 1980, and will continue to establish policies for the durations of confinement for persons revoked and re-imprisoned while on parole or supervised release, who were imprisoned for crimes committed on or after May 1, 1980.*~~

~~*If an offender is under the custody of the Commissioner of Corrections pursuant to a sentence for an offense committed on or before April 30, 1980, and if the offender is convicted of a new felony committed on or after May 1, 1980, and is given a presumptive sentence to run consecutively to the previous indeterminate sentence, the phrase "completion of any incarceration arising from the prior sentence" means the target release date which the Commissioner of Corrections assigned to the inmate for the offense committed on or before April 30, 1980 or the date on which the inmate completes any incarceration assigned as a result of a revocation of parole connected with the pre-guidelines offense.*~~

~~***II.F.06.** Minn. Stat. § 624.74 provides for a maximum sentence of three years or payment of a fine of $5,000 or both, for possession or use of metal-penetrating bullets during the commission of a crime. Any executed felony sentence imposed under Minn. Stat. § 624.74 shall run consecutively to any felony sentence imposed for the crime committed with the weapon, thus providing an enhancement to the sentence imposed for the other offense. The extent of enhancement, up to the three year statutory maximum, is left to the discretion of the Court. If, for example, an offender were convicted of Aggravated Robbery in the First Degree with use of a gun and had a zero criminal history score, the presumptive sentence for the offense would be 48 months; if the offender were also convicted of Minn. Stat. § 624.74, Metal-Penetrating Bullets, the Court could, at its discretion, add a maximum of 36 months, without departing from the guidelines.*~~

B. The Commission adopted a proposal to make the following technical modifications in Section III of the Minnesota Sentencing Guidelines and Commentary:

1. Rewrite and Reorder Comment Section III.C.06

Guidelines Section III.C:

III.C.01. *In order to promote the goals of the sentencing guidelines, it is important to ensure that jail credit is consistently applied to reflect all time spent in custody in connection with the offense. Granting jail credit to the time served in custody in connection with an offense ensures that a defendant who cannot post bail because of indigency will serve the same amount of time that a person in identical circumstances who is able to post bail would serve. Also, the total amount of time a defendant is incarcerated should not turn on irrelevant concerns such as whether the defendant pleads guilty or insists on his right to trial. The Commission believes that greater uniformity in the application of jail credit can be achieved by following the general criteria noted above in Ssection III.C., Jail Credit.*

III.C.06. *The Commission's policy is that sentencing should be neutral with respect to the economic status of felons. 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 and subtracted from the specified minimum term of imprisonment. If there is any remaining jail credit left over, it should be subtracted from the specified maximum period of supervised release. If credit for time spent in custody were immediately deducted from the sentence instead, the incongruous result is that individuals who cannot post bond are confined longer than those who post bond. 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.*

~~*Commission policy is that sentencing should be neutral with respect to the economic status of felons. When credit for time spent in custody is immediately deducted from the sentence, the incongruous result is that individuals who cannot post bond are confined longer than those who post bond.*~~

C. The Commission adopted a proposal to make the following technical modifications in Section V and to the Forgery Related Offense List:

1. Inadvertently Unranked Offense – Low-Level Radioactive Waste Compact; Enforcement of Compact and Laws

Guidelines Section V:

V. OFFENSE SEVERITY REFERENCE TABLE

Unranked	Midwest Interstate Low-Level Radioactive Waste Compact; Enforcement of Compact and Laws – 116C.835

2. Amend Statutory References on the Offense Severity Reference Table

Guidelines Section V:

V. OFFENSE SEVERITY REFERENCE TABLE

III	Damages; Illegal Molestation of Human Remains; Burials; Cemeteries – 307.08, subd. 2(a)

3. Remove References to Repealed Statutes

Forgery Related Offense List

~~Altering Packing House Certificate~~
~~226.05~~
[Repealed, 1990 c 426 art 1 s 26]

V. OFFENSE SEVERITY REFERENCE TABLE

IV	~~False Statement by Corporate Officer (Perjury) – 300.61~~

[Repealed, 2005 c 69 art 4 s 1]

I ~~Criminal Penalties Regarding the Activities of Corporations – 300.60~~

[Repealed, 2005 c 69 art 4 s 1]

4. Remove Reference to Repealed Statute on the Unofficial Numerical Reference of Felony Statutes Table

~~300.60 Activities of Corporations 1~~

[Repealed, 2005 c 69 art 4 s 1]

~~300.61 False Statement by Corporate Officer (perjury) 4~~

[Repealed, 2005 c 69 art 4 s 1]

IV. Amendment to Section II, Non-Legislative Modifications – Effective August 1, 2008

Commentary was inadvertently stricken from II.B.201, in Section II, above. Below is the intended version.

Comment

II.B.201. . . *If probation is revoked and the offender serves an executed sentence for the prior offense, eligibility for the custody status point ends with discharge from the sentence.*

V. Non-Legislative Modifications – Effective August 1, 2009

A. Calculation of Juvenile Point

The Commission adopted a proposal to amend Guidelines Section II.B.4, providing that only juvenile adjudications rather than juvenile adjudications and continuances without adjudication be used in the calculation of a juvenile point.

Guidelines Section II.B.4:

4. The offender is assigned one point for every two adjudications ~~offenses~~ committed and prosecuted as a juvenile that are felonies under Minnesota law, provided that:

   ~~a. Findings were made by the juvenile court pursuant to an admission in court or after trial;~~

   a ~~b~~. Each adjudication ~~offense~~ represented a separate behavioral incident or involved separate victims in a single behavioral incident;

   b ~~c~~. The juvenile adjudications were pursuant to offenses occurring~~ed~~ after the offender's fourteenth birthday;

   c ~~d~~. The offender had not attained the age of twenty-five at the time the felony was committed for which he or she is being currently sentenced; and

   d ~~e~~. Generally, an offender may receive only one point for adjudications ~~offenses~~ committed and prosecuted as a juvenile that are felonies under Minnesota law. This point limit does not apply to offenses committed and prosecuted as a juvenile for which the sentencing guidelines would presume imprisonment. The presumptive disposition of the juvenile

offense is considered to be imprisonment if the presumptive disposition for that offense under the sentencing guidelines is imprisonment. This determination is made regardless of the criminal history score and includes those offenses that carry a mandatory minimum prison sentence and other presumptive imprisonment offenses described in Ssection II.C., Presumptive Sentence.

Comment

. . . .

II.B.402. *First, only juvenile adjudications for offenses that are felonies under Minnesota law will be considered in computing the criminal history score. Status offenses, dependency and neglect proceedings, and misdemeanor or gross misdemeanor-type offenses will be excluded from consideration. Consistent with Minn. Stat. § 609.035 which provides for a single sentence for adult offenders when multiple convictions arise from a single course of conduct, only juvenile adjudications for offenses arising from separate courses of conduct contribute to the juvenile point(s), unless multiple victims were involved.*

II.B.403. *Second, the juvenile adjudications must result from offenses ~~must have been~~ committed after the offender's fourteenth birthday. The Commission chose the date of the offense rather than the date of adjudication ~~the findings were made by the court~~ to eliminate variability in application based on differing juvenile court practices.*

II.B.404. *Third, juvenile adjudications ~~offenses~~ will be considered in computing the criminal history score only for adult offenders who had not attained the age of 25 at the time the felony was committed for which they are now being sentenced. Again, the Commission chose to examine the age of the offender at the time of the offense rather than at time of sentencing to prevent disparities resulting from system processing variations.*

II.B.405. *Fourth, the Commission decided that, provided the above conditions are met, it would take two juvenile adjudications ~~offenses~~ to equal one point on the criminal history score, and generally, an offender may not receive more than one point on the basis of prior juvenile adjudications ~~offenses~~. This point limit does not apply to offenses committed and prosecuted as a juvenile for which the guidelines would presume imprisonment. The presumptive disposition for a prior juvenile offense is considered to be imprisonment if the presumptive disposition for that offense under the sentencing guidelines is imprisonment regardless of criminal history. Included in this determination are any mandatory minimum laws that apply to the offense or any other applicable policies under Ssection II.C., Presumptive Sentence. The criminal history record is not used to determine whether the juvenile offense carries a presumptive imprisonment sentence because of the difficulty in applying criminal history score computations to prior juvenile offenses. Two juvenile adjudications ~~offenses~~ are required for each additional point. Again, no partial points are allowed, so an offender with only one juvenile adjudication ~~offense~~ meeting the above criteria would receive no point on the criminal history score.*

~~II.B.406.~~ *~~Only those juvenile offenses where findings were made after August 1, 1989 can contribute to a juvenile history score of more than one. The Commission was concerned with possible past disparities in the procedures used in the various juvenile courts. This effective date for the prior findings corresponds to the Commission's previous policy which allowed for~~*

~~*more than one juvenile point when there were certain prior serious violent offenses on the juvenile record. Retaining this effective date for the new policy continues to give proper notice that in the future, the juvenile history can result in more than one criminal history point.*~~

II.B.407. *In order to provide a uniform and equitable method of computing criminal history scores for cases of multiple felony offenses with adjudications ~~findings~~ arising from a single course of conduct when single victims are involved and when the adjudications ~~findings~~ involved provisions of Minn. Stats. § 609.585 or 609.251, consideration should be given to the most severe offense with an adjudication ~~finding~~ for purposes of computing criminal history. When there are multiple felony offenses with adjudications ~~findings~~ arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe felony offenses with adjudications ~~findings~~ for purposes of computing criminal history. These are the same policies that apply to felony, gross misdemeanor and misdemeanor convictions for adults.*