

# MINNESOTA SENTENCING GUIDELINES COMMISSION

## Report to the Legislature

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January 13, 2017



## **Minnesota Sentencing Guidelines Commission**

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## Introduction

The Minnesota Sentencing Guidelines Commission submits this report to the Legislature to fulfill its two statutory reporting requirements:

- To identify and explain all modifications made during the preceding twelve months and all proposed modifications that are being submitted to the Legislature in 2017;<sup>1</sup> and
- To summarize and analyze reports received from county attorneys on criminal cases involving a firearm.<sup>2</sup>

As in past years, the Commission also takes this opportunity to highlight other topics that may be of interest to the Legislature, including sentencing trends and updates on Commission and staff activities.

In 1980, Minnesota became the first state to implement a sentencing guidelines structure. The Minnesota Sentencing Guidelines Commission is a legislatively created body whose purpose is to establish and improve the Minnesota Sentencing Guidelines, evaluate outcomes of changes in sentencing policy, analyze trends, make appropriate recommendations, and provide education on sentencing law and policy.

When establishing and modifying the Guidelines, the Commission's primary consideration is **public safety**.<sup>3</sup> Other considerations are current sentencing and release practices, correctional resources—including, but not limited to, the capacities of local and state correctional facilities—and the long-term negative impact of crime on the community.<sup>4</sup> The Commission has stated that the purpose of the Sentencing Guidelines is to establish rational and consistent sentencing standards that reduce sentencing disparity and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender's criminal history.<sup>5</sup> The Sentencing Guidelines embody principles including that sentencing should be neutral, rational, consistent, and uniform, and that departures from the presumptive sentences should be made only when substantial and compelling circumstances can be identified and articulated.<sup>6</sup>

During the first 34 years the Guidelines were in effect—from 1980 through 2013—and again in 2015, Minnesota ranked among the states with the three lowest imprisonment rates in the nation.<sup>7</sup> Compared with other states, Minnesota's imprisonment rate in 2015—196 prisoners per

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<sup>1</sup> Minn. Stat. § 244.09, subd. 11.

<sup>2</sup> Minn. Stat. § 244.09, subd. 14 (referencing the reports required by Minn. Stat. § 609.11, subd. 10).

<sup>3</sup> Minn. Stat. § 244.09, subd. 5.

<sup>4</sup> *Id.*

<sup>5</sup> Minn. Sentencing Guidelines § 1.A.

<sup>6</sup> *Id.*

<sup>7</sup> Minnesota had the fourth-lowest imprisonment rate in 2014, and the third-lowest in 2015. Carson, E. Ann. Bureau of Justice Statistics. Imprisonment Rate of Sentenced Prisoners under the Jurisdiction of State or Federal Correctional Authorities per 100,000 U.S. Residents, Dec. 31, 1978-2015. Sept. 23, 2016. Retrieved Dec. 29, 2016, at [http://www.bjs.gov/nps/resources/documents/QT\\_imprisonment%20rate\\_total.xlsx](http://www.bjs.gov/nps/resources/documents/QT_imprisonment%20rate_total.xlsx).

100,000 Minnesota residents—was less than half the national state imprisonment rate.<sup>8</sup> Minnesota's imprisonment rate rose by 0.9 percent from 2014 to 2015, and is now at its highest level since the Sentencing Guidelines were established.<sup>9</sup> From 2014 to 2015, 14 states' imprisonment rates grew by a higher percentage than Minnesota's; 3 states' imprisonment rates grew by a lower percentage; and 32 states' imprisonment rates fell. The national state imprisonment rate fell by 2.1 percent.<sup>10</sup>

This report details the work of the Minnesota Sentencing Guidelines Commission in 2016, and provides an overview of sentencing practices and trends in the criminal justice system. Sentencing practices reports with more detail, or with a focus on a specific type of crime, are available on the Commission's web site.<sup>11</sup> Data are reported from cases sentenced in calendar year 2015, the most recent full year of sentencing data.<sup>12</sup>

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<sup>8</sup> The national state imprisonment rate was 402 prisoners per 100,000 U.S. residents. Neither rate includes inmates of federal prisons or local correctional facilities. See note 10.

<sup>9</sup> Minnesota's imprisonment rate was 49 per 100,000 in 1980. See note 7.

<sup>10</sup> Carson, E. Ann. Bureau of Justice Statistics. Prisoners in 2015 (NCJ 250229) (Table 5). December 2016. Retrieved Dec. 29, 2016, at <http://www.bjs.gov/content/pub/pdf/p15.pdf>.

<sup>11</sup> More detailed reports on overall data trends in 2015 and sentencing practices for specific offenses—including assaults and violations of restraining orders, controlled substances, criminal sexual conduct, criminal vehicular homicide and injury, dangerous weapons, failure to register as a predatory offender, and felony DWI—as well as an unranked offense report and a probation revocation report, are available at <http://mn.gov/sentencing-guidelines/reports/>.

<sup>12</sup> An exception is the County Attorney Firearms Reports section, beginning on page 31, which reports fiscal year (FY) 2016 data.

## Executive Summary

### **Legislative Amendments to Controlled Substance Offenses – Adopted July, 2016 (p. 6):**

Due to the enactment of a comprehensive drug-sentencing reform act,<sup>13</sup> the Commission made several changes related to the sentencing of controlled substance offenses. Although the act permitted the Drug Offender Grid—which the Commission had proposed to the Legislature in January, 2016—to take effect, it directed changes to some of the proposed Grid’s structure and offense rankings. The act also directed the ranking of a newly created offense, Aggravated Controlled Substance Crime in the First Degree. The act made a number of other drug-related changes, to include—

- Revising drug quantity thresholds for some first- through third- degree offenses;
- Creating penalties for possession of marijuana plants;
- Revising the definition of a subsequent controlled substance conviction for purposes of mandatory-minimum sentencing;
- Abolishing those mandatory minimums for third-, fourth- and fifth-degree offenses; and
- Establishing a gross misdemeanor fifth-degree offense for first-time drug offenders who possess certain small amounts of a controlled substance.

In July, 2016, following a public hearing, the Commission modified the Guidelines as required by the act and made other modifications to conform the Guidelines to the act’s various policy changes. These modifications became effective August 1, 2016. Additionally, in November, 2016, the Commission changed a comment to the Guidelines to clarify that the criminal history points assigned to prior drug convictions are not to be recalculated using post-act drug threshold weights.

### **Legislative Amendments to Non-Controlled Substance Offenses – Adopted July, 2016**

**(p. 8):** Also in July, 2016, following a public hearing, the Commission made several changes to the Guidelines related to non-controlled substance offenses that were enacted or amended by the 2016 Legislature. These changes were all made effective August 1, 2016.

- The new felony offense of interference with a dead body or scene of death<sup>14</sup> is ranked at Severity Level 4.
- The new offense of nonconsensual dissemination of private sexual images<sup>15</sup> is ranked at Severity Level 3 and is added to the list of offenses eligible for permissive consecutive sentencing.
- When criminal vehicular homicide (death<sup>16</sup> or death to an unborn child<sup>17</sup>) is enhanced due to a qualified prior conviction, the offense is ranked at Severity Level 8 and the presumptive sentence is increased by 50 percent. No misdemeanor units are assigned to the qualified prior conviction that enhanced the current offense.

<sup>13</sup> 2016 Minn. Laws ch. 160.

<sup>14</sup> Minn. Stat. § 609.502, subd. 1(1).

<sup>15</sup> Minn. Stat. § 617.261.

<sup>16</sup> Minn. Stat. § 609.2112, subd. 1(b).

<sup>17</sup> Minn. Stat. § 609.2114, subd. 1(b).

- For the new felony assault motivated by bias,<sup>18</sup> the severity level is determined by the underlying felony assault, and the presumptive sentence is increased by 25 percent. When this sentencing enhancement is used, the use of the Guidelines' similar aggravating factor involving bias motivation<sup>19</sup> is prohibited.

**Non-Legislative Modifications – Adopted July, 2016 (p. 9):** The Commission reviewed potential non-legislative modifications. In July, 2016, as a result of the review and following a public hearing, the Commission adopted the following proposals to modify the Guidelines:

- It is clarified that both a current sex offense *and* a custody status for a prior sex offense are required for the assignment of two custody status points.<sup>20</sup>
- It is clarified that that the policy for classifying non-Minnesota prior offenses is based on offense definitions and sentencing policies in effect when the current Minnesota offense was committed.
- Both clarifications took effect August 1, 2016.
- A modification to display only whole numbers on the special grid for Attempt or Conspiracy to Commit First-Degree Murder<sup>21</sup> is proposed to take effect August 1, 2017.

**Legislative Amendments and Non-Legislative Modifications – Adopted December, 2016 (p. 9):** In December, 2016, following a public hearing, the Commission adopted two additional modifications to the Guidelines, both proposed to take effect August 1, 2017:

- The severity ranking of child neglect and endangerment is proposed to be raised from severity level 1 to severity level 5.
- The new felony offense of interference with a dead body or scene of death is proposed to be placed on the permissive consecutive list.
- The Commission also considered, but rejected, a third proposal to change how criminal history points are assigned to prior drug offenses.
- In doing so, the Commission concluded that Guideline Comment 2.B.106, as amended by the Commission on November, 17, 2016, is applicable to determine when the criminal history score for a prior drug conviction may be recalculated using post new law threshold weights.

**Staff Activities (p. 10):** The staff performed the following activities:

- Answered nearly 100 phone calls and email per month;
- Trained 400 practitioners in traditional classroom and online settings;
- Provided 36 fiscal impact statements for introduced legislation;
- Compiled sentencing information for an estimated 300 individual data requests;
- Worked with the Department of Corrections to generate prison bed projections;
- Participated in various criminal justice boards, forums and committees;
- Processed and ensured the accuracy of over 16,000 sentencing records;

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<sup>18</sup> Minn. Stat. § 609.2233.

<sup>19</sup> Minn. Sentencing Guidelines § 2.D.3.b(11).

<sup>20</sup> These terms are applied in Minn. Sentencing Guidelines §§ 2.B.2.b(1) and 2.B.2.b(2).

<sup>21</sup> Minn. Sentencing Guidelines § 2.G.13.

- Published the annual edition of the Guidelines and commentary; and
- Provided reports on sentencing practices to the public.

**Sentencing Trends (p. 14):** Minnesota courts sentenced 16,763 felony offenders in 2015, an increase of 3.8 percent. This was the highest volume on record, surpassing the previous record set in 2006. Of the total volume, person offenses accounted for 29.7 percent (4,982 offenders), drug offenses accounted for 29.3 percent (4,913 offenders), and property offenses accounted for 27.3 percent (4,575 offenders). The total volume of felony offenders sentenced increased by 17 percent from 2010 to 2015. This is largely attributable to the growth in drug offenses (48%), non-CSC sex offenses<sup>22</sup> (9%), weapon offenses (51%), and “other”<sup>23</sup> offenses (19%). The specific offense that contributed the most to that growth in the “weapon” category was possession of a firearm by a felon convicted of a crime of violence, which saw a 56-percent growth rate from 2010 to 2015. The 2012 to 2015 imprisonment rates were the highest rates observed since the Guidelines were implemented. In 2015, 91.8 percent of felony offenders served some time in a local correctional facility or prison setting: 65.6 percent served time in a local correctional facility as part of their stayed sentence, while 26.2 percent were sentenced to state prison. The average pronounced prison sentence was 45 months. Statewide, 72 percent of felony offenders received the presumptive Guidelines sentence. The rate varied by gender, race and ethnicity, judicial district, and offense type.

**County Attorney Firearms Reports (p. 31):** County attorneys collect and maintain information on crimes for which a defendant is alleged to have possessed or used a firearm. The Commission is required to include in its annual report a summary and analysis of the reports received. Since 1996, when the mandate began, county attorneys have annually reported an average 789 cases allegedly involving a firearm. The total number of reported firearms cases for fiscal year 2016 was 1,195, which is a decrease of one percent from FY 2015.

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<sup>22</sup> “Non-CSC sex offenses” are offenses on the sex offender grid other than criminal sexual conduct (chiefly failure to register as a predatory offender and possession and dissemination of child pornography).

<sup>23</sup> “Other” category: Fleeing police, escape, and other offenses of less frequency including crimes against the government such as tax offenses, failure to appear in court, and aiding an offender.

## The Commission's Activities in 2016

The Minnesota Sentencing Guidelines Commission is an eleven-member body created by the Legislature.<sup>24</sup> Three members are appointed by the Chief Justice of the Supreme Court: the Chief Justice's designee; a judge of the Court of Appeals; and a district court judge. Eight members are appointed by the Governor: one public defender; one county attorney; the Commissioner of Corrections; one peace officer; one probation officer; and three public members, one of whom must be a crime victim.

The Chief Justice's designee is Associate Supreme Court Justice (Retired)<sup>25</sup> Christopher Dietzen, who also serves as Chair by appointment of the Governor. The Court of Appeals judge is Judge Heidi Schellhas, who is also the Commission's Vice-Chair.<sup>26</sup> The district court judge is Judge Caroline Lennon, First Judicial District. Among the Commission members selected by the Governor, the public defender member is Cathryn Middlebrook, Chief Appellate Public Defender; the county attorney member<sup>27</sup> is Peter Orput, Washington County Attorney; Tom Roy is the Commissioner of Corrections; the peace officer member is Saint Paul Police Sgt. Paul Ford; the probation officer member<sup>28</sup> is Valerie Estrada, Hennepin County Community Corrections & Rehabilitation; and the public members are Angela Champagne-From, Yamy Vang, and Senior Judge Mark Wernick.

One of the fundamental responsibilities of the Commission is to maintain the Guidelines by annually amending them in response to legislative changes, case law, and issues raised by various parties. In order to meet this responsibility, the Commission met ten times during 2016 and held two public hearings, on July 20, 2016, and December 21, 2016. The Guidelines modifications adopted on July 27, 2016, are described in paragraphs A, B, and C, below, and in [Appendix 2](#) (beginning on p. 38). Further modifications were adopted on December 30, 2016, and are described below in paragraph D (beginning on p. 9) and in [Appendix 3](#) (beginning on p. 64).

### **A. Legislative Amendments to Controlled Substance Offenses – Adopted July, 2016.**

2016 Minn. Session Laws, [Chapter 160](#), revised Minnesota's drug sentencing laws and directed specific changes to the Drug Offender Grid proposed by the Commission in its January 15, 2016, Report to the Legislature. The Commission reviewed the act and modified the Minnesota Sentencing Guidelines and Commentary accordingly. Modifications were effective August 1, 2016, and are set forth in [Appendix 2.1](#). The following is a summary of

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<sup>24</sup> 1978 Minn. Laws ch. 723, art. 1, § 9 (as originally established); Minn. Stat. § 244.09, subds. 1 & 2 (2016) (current).

<sup>25</sup> The Chief Justice appointed Christopher Dietzen to the Commission, as an associate justice of the Minnesota Supreme Court, on September 12, 2012. Justice Dietzen retired from the Supreme Court effective August 31, 2016. The Chief Justice reappointed him to the Commission, as a retired associate justice of the Minnesota Supreme Court, the following day.

<sup>26</sup> The Commission unanimously elected Judge Schellhas to the then-vacant position of Vice-Chair on April 27, 2016.

<sup>27</sup> Isanti County Attorney Jeffrey Edblad was a Commission member until his resignation from the Commission effective August 1, 2016. He is now the President of the Minnesota County Attorneys Association. Peter Orput's appointment was effective October 12, 2016.

<sup>28</sup> The probation officer seat was vacant from June 23, 2015, through October 11, 2016.

the resulting policy changes in statute (as a result of the act) and in the Guidelines (as a result of the Commission's action to comply with the act's requirements, and to conform the Guidelines to the act's policy changes):

- The act permitted the Drug Offender Grid,<sup>29</sup> as it was proposed to the Legislature in January, 2016, to take effect with the following required modifications:
  - Eliminate proposed Severity Level (SL) D7.
  - Renumber proposed severity levels D10, D9, and D8 as severity levels D9, D8, and D7, respectively.
  - Change the presumptive disposition for new SL D7 from executed to stayed at criminal history scores of 0 and 1.
  - Rank aggravated first-degree controlled substance crime at new SL D9.
  - Rank first-degree possession of a controlled substance at new SL D8 (with sale).
  - Rank second-degree controlled substance crime at new SL D7.
  - Make conforming changes to the Guidelines.
- A statutory list of “aggravating factors” was established, and the offense of aggravated controlled substance crime in the first degree was created.
- A mandatory-minimum sentence was established for the aggravated first-degree offense, with no waiver provision.
- A mandatory-minimum sentence was established for first-degree offenses where the aggravated amounts are involved, but the offense is not otherwise an aggravated first-degree offense.
- The mandatory-minimum provision applicable to subsequent controlled substance convictions now applies only to first- and second-degree offenses, and only prior first- and second-degree offenses qualify a current first- or second-degree offense as a subsequent controlled substance conviction.
- A prior disposition under Minn. Stat. § 152.18 (“Discharge and Dismissal”) no longer qualifies a current conviction as a subsequent controlled substance conviction.
- Mandatory-minimum penalties under Minn. Stat. § 609.11 (relating to the involvement of weapons in the commission of certain offenses) must also be added to the mandatory-minimum penalties for aggravated first-degree controlled substance crime, but only if the crime is aggravated because of two aggravating factors, rather than because of a firearm.
- Cocaine and methamphetamine weight thresholds were increased for first- and second-degree controlled substance crime, and third-degree possession offenses. Some or all of those threshold increases are rolled back if the offense involves a firearm or multiple aggravating factors.
- Marijuana weight thresholds were reduced for first- and second-degree offenses, and the marijuana plant is introduced as a new measure of quantity and severity.
- For offenders with no prior Minn. Stat. chapter 152 convictions, fifth-degree possession of certain small amounts of a controlled substance became of a gross misdemeanor.

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<sup>29</sup> As originally proposed, the Drug Offender Grid may be found on page 80 of the Commission's January 15, 2016, Report to the Legislature. As finally adopted, the Drug Offender Grid may be found at Appendix 5.3 of this Report.

- Eligibility for disposition under Minn. Stat. § 152.18 was expanded to third-degree possession offenses.
- Disposition under Minn. Stat. § 152.18 was made mandatory for eligible fifth-degree possession cases with no prior felony record and no prior convictions for gross misdemeanor fifth-degree possession.
- The mandatory-minimum provisions of Minn. Stat. § 609.11 may not be waived for first- or second-degree sale while using or possessing, on the person or within the immediate reach of the defendant or an accomplice, a firearm.

On November 17, 2016, the Commission made a related change to Comment 2.B.106 of the Guidelines. This change clarified that prior drug convictions are not to be recalculated using post-act drug threshold weights. The change, which took immediate effect, is set forth in [Appendix 2.2](#).

**B. Legislative Amendments to Non-Controlled Substance Offenses – Adopted July, 2016.** The Commission reviewed laws related to non-controlled substance offenses newly enacted or amended by the 2016 Legislature, and adopted a proposal to modify the Minnesota Sentencing Guidelines and Commentary. Modifications were effective August 1, 2016, and are set forth in [Appendix 2.3](#).

1. The Commission adopted a proposal to increase by 50 percent the presumptive sentence duration when an offender is sentenced for a criminal vehicular homicide under [Minn. Stat. § 609.2112](#), subd. 1(b) (death, qualified prior conviction), or [609.2114](#), subd. 1(b) (death to an unborn child, qualified prior conviction).
2. The Commission adopted a proposal that, for Criminal Vehicular Homicide (Death or Death to an Unborn Child, Qualified Prior Conviction), no misdemeanor units are assigned to the qualified prior driving offense that was used to increase the statutory maximum penalty.
3. The Commission adopted a proposal to increase by 25 percent the presumptive sentence duration when the statutory maximum was increased under [Minn. Stat. § 609.2233](#) (“Felony Assault Motivated by Bias; Increased Statutory Maximum Sentence”)
4. The Commission adopted a proposal to clarify that the use of the aggravating factor involving bias motivation under Guidelines § 2.D.3.b(11) is prohibited when the statutory maximum was increased under Minn. Stat. § 609.2233.
5. The Commission adopted a proposal to assign a severity-level ranking of 4 to the new felony offense of interference with a dead body or scene of death, [Minn. Stat. § 609.502](#), subd. 1(1).

6. The Commission adopted a proposal to assign a severity-level ranking of 3 to the new offense of nonconsensual dissemination of private sexual images, Minn. Stat. § 617.261.
7. The Commission adopted a proposal to add nonconsensual dissemination of private sexual images to the list of offenses eligible for permissive consecutive sentences.
8. The Commission adopted a proposal to make technical changes.

**C. Non-Legislative Modifications – Adopted July, 2016.** Through the course of the year, the Commission reviews potential non-legislative modifications to the Guidelines. On July 27, 2016, as a result of this review and following a public hearing, the Commission adopted a proposal to modify the Minnesota Sentencing Guidelines and Commentary. Modifications were effective August 1, 2016, unless otherwise noted, and are set forth in Appendix 2.4.

1. The Commission adopted a proposal to clarify that both a current sex offense, as described in § 2.B.2.b(1), *and* a custody status for a prior sex offense, as described in § 2.B.2.b(2), are required for the assignment of two custody status points.
2. The Commission adopted a proposal to clarify that the policy for classifying non-Minnesota prior offenses is based on offense definitions and sentencing policies in effect when the current Minnesota offense was committed.
3. The Commission adopted a proposal to renumber Guidelines § 2.G.11 as § 2.G.13.
4. The Commission adopted a proposal to modify the Attempt or Conspiracy to Commit First-Degree Murder Grid in § 2.G.13, to display whole numbers in the lower ranges of the Grid at Criminal History Scores 1, 3, and 5, taking effect August 1, 2017.

**D. Legislative Amendments and Non-Legislative Modifications – Considered December, 2016.** On December 30, 2016, following a public hearing, the Commission considered three additional proposals to modify the Minnesota Sentencing Guidelines and Commentary. The Commission adopted two of the proposals and rejected the third. The successful proposals, both proposed to take effect August 1, 2017, are summarized below and are set forth in Appendix 3. The unsuccessful proposal is summarized below and set forth in Appendix 4, together with some of the reasons for the proposal's defeat.

1. The Commission, after reviewing a practitioner's request at its October 26, 2016, meeting to increase the severity-level ranking of child neglect and endangerment under Minn. Stat. § 609.378, adopted a proposal to increase the offense's severity-level ranking from Severity Level 1 to Severity Level 5, modifying Guidelines §§ 5.A and 5.B. (See Appendix 3.1, p. 64.)

2. The Commission adopted a proposal to add interference with a body or scene of death, Minn. Stat. § 609.502, subd. 1(1), to the list of offenses eligible for permissive consecutive sentencing in Guidelines § 6. (See Appendix 3.2, p. 65.)
3. The Commission rejected a proposal that, for prior Minnesota controlled substance offenses in the first, second, third, or fifth degree committed before August 1, 2016, the current felony offense of the same name would determine the offense classification in calculating the criminal history score unless it were proven that the facts would have supported a conviction of a lesser degree. The proposal would have added Guidelines § 2.B.7.c and Comment 2.B.704. (See Appendix 4, p. 66.)

## Staff Activities

The following provides a summary of the activities performed by staff, in addition to providing support and research for the Guidelines modifications detailed in this report, to further the goals and purposes of the Commission. In particular, staff assist the Commission in fulfilling its statutory charter to serve as a clearinghouse and information center for the collection, preparation, analysis, and dissemination of information on sentencing practices.<sup>30</sup>

### Monitoring Sentencing Data

One of the primary functions of the Minnesota Sentencing Guidelines Commission (MSGC) staff is to monitor sentencing practices. The monitoring system is designed to maintain data on all offenders convicted of a felony and sentenced under the Guidelines.<sup>31</sup> A case is defined when a sentencing worksheet is received from the probation officer and matched with sentencing data from the District Court. As part of the agency's core functions, MSGC staff collected and analyzed data for over 16,000 felony offenders. Additionally, staff published the annual edition of the Sentencing Guidelines and Commentary and various reports on sentencing practices and trends.<sup>32</sup>

### Training and Assistance

The staff provides assistance with the Guidelines in a variety of ways: traditional training seminars, website training materials and informational publications, and email and telephone assistance for judges, attorneys, and probation officers in determining appropriate presumptive sentences. On average, the staff fielded nearly 100 phone calls per month in 2016, the majority

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<sup>30</sup> The Commission is charged both with its research role, and its role as a clearinghouse and information center on sentencing practices, in Minn. Stat. § 244.09, subd. 6.

<sup>31</sup> Beginning in 2006, first-degree murder offenses were included in the Commission's data. Previously, only attempted first-degree murder and conspiracy to commit first-degree murder had been included. First-degree murder has a mandatory life sentence; the presumptive sentence is not determined by the Sentencing Guidelines. It was decided to include first-degree murder in the Commission's data following the Legislature's creation of life sentences for certain sex offenses in 2005. The MSGC now maintains data on all life sentences pronounced.

<sup>32</sup> See note 11.

of which were questions from practitioners about the application of the Guidelines to the sentencing of a particular felony case.

In an effort to promote the accurate application of the Guidelines, staff trained over 400 practitioners in sixteen traditional classroom trainings. In addition to fulfilling training requests from probation agencies, public defenders, and prosecutors, this year's classroom trainings included a specialized training for new prosecutors conducted by the Minnesota County Attorneys Association. The increase in live trainings was due to the significant changes made to Minnesota's drug laws.

Nearly 250 additional practitioners were trained statewide via the online training service WebEx. These trainings allow MSGC staff to focus on a single topic, giving practitioners a deeper view into advanced policy topics. It also allowed Commission staff to train large groups of practitioners who may have been unable to attend a live training. Additionally, three webinars were offered throughout the year to new practitioners, allowing MSGC staff to train these practitioners immediately, rather than delaying their training until it could be scheduled in their region.

### **Website**

The Commission's website receives an average 4,213 visits each month, up 11 percent from last year (3,800 visits per month in 2015). The website includes easily accessible email signups for upcoming trainings, public hearing notices, and Commission meeting notices. One-click data requests makes getting sentencing information quick and easy.

### **Data Requests**

One of the important ways in which the Commission's staff works with fellow agencies and criminal justice practitioners across the state is researching and compiling statistical data in response to information requests. MSGC staff responded to an average 25 data requests each month for about 300 data requests in 2016. These requests are most often made by lawyers or corrections agents to show evidence of specific sentencing practices to the court. However, the requests are also made by academics, students, other state agencies, legislative staff, law enforcement, and the press for other purposes. The topics range from departure data for a single type of offense within a given county to comparative data on how an offense has been sentenced from one jurisdiction to another.

### **Collaboration with Criminal Justice Agencies**

The staff's knowledge of felony sentencing and practice makes it a valued contributor to criminal justice policy discussions. Each year, Commission staff works with the Department of Corrections to generate prison bed projections. MSGC staff also serves on the Criminal and Juvenile Justice Information Advisory Group, and on a committee assisting the Commissioner of

Corrections study and make recommendations to the Legislature on the issue of implementing an earned compliance credit policy for offenders on probation and supervised release.

### **Fiscal/Racial-Impact Statements**

During the 2016 Legislative Session, staff provided 36 fiscal impact statements for introduced legislation. These impact statements include details as to any increase or decrease in adult offender populations, the estimated net increase in state correctional facility beds, and the impact on confinement in local correctional facilities. Staff provided the requested information within the time requirements set by the Legislature.

In 2008, MSGC staff began providing the Minnesota Legislature racial-impact statement on proposed crime bills when a disparate impact was anticipated. When, in the course of preparing a required fiscal impact statement, MSGC staff identifies a bill that meets its criteria for preparing a racial-impact statement, it prepares such a statement and sends it to the chairs of the crime committees in the Senate and the House.<sup>33</sup> This is done separately from the required fiscal-impact statements.

During the 2016 Legislative Session, two legislative policy proposals met the new criteria for preparing a racial-impact statement: the Public Safety Personnel Protection Act, which was not enacted; and the drug-sentencing reform act.

The Minnesota Public Safety Personnel Protection Act (House File 2557), proposed to expand the responders covered in the offense of obstructing legal process, arrest or firefighting. It established a 24-month mandatory minimum for the existing felony offense and creates a new felony offense, with a 12-month mandatory minimum, for what are now misdemeanor and gross misdemeanor offenses. The racial-impact statement<sup>34</sup> concluded that, compared to the racial disparities now existing in Minnesota's felony populations, the racial disparity of the felony offender population for American Indian offenders and, to a lesser extent, Hispanic offenders would be worsened. The bill was not enacted.

The drug-sentencing reform act, 2016 Minn. Session Laws, Chapter 160 (Senate File 3481, 3<sup>rd</sup> Engrossment), amended the Drug Offender Grid adopted by the Commission; revised the existing thresholds for some clauses of first- through third- degree controlled substance offenses; created penalties for possession of marijuana plants; created aggravated offenses with mandatory minimum penalties; revised the definition of a subsequent controlled substance conviction under Minn. Stat. § 152.01, subd. 16a, by limiting it to prior convictions for first- and second-degree offenses and requiring actual convictions, rather than stays of adjudication; abolished mandatory minimums for third-, fourth- and fifth-degree offenses; and established a

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<sup>33</sup> In April 2015, staff formalized the criteria and process for conducting racial impact statements. The document describing the agency's criteria and process for conducting racial impact statements is available at <http://go.usa.gov/cNEPe> (retrieved Oct. 18, 2016).

<sup>34</sup> The full statement is available at <http://go.usa.gov/xkwqH> (retrieved Oct. 20, 2016).

gross misdemeanor fifth-degree offense for first-time drug offenders who possess certain small amounts of a controlled substance. The bill was enacted May 23, 2016.<sup>35</sup>

The racial-impact statement<sup>36</sup> for the Drug Reform Act made two conclusions: 1) for the adult felony population, there would be some alleviation of the existing racial disparity in the American Indian population; however, while it is expected to reduce the size of the black and Hispanic felony population in absolute terms, it is not expected to alleviate the existing racial disparities in the black and Hispanic felony populations; and 2) for the adult prison population, there will be some alleviation of the existing racial disparity in the Hispanic prison population; however, while it is expected to reduce the size of the black and American Indian prison populations in absolute terms, it is not expected to alleviate the existing racial disparities in the black and American Indian prison populations.

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<sup>35</sup> 2016 Minn. Laws ch. 160, is available at <http://go.usa.gov/xkd2d> (retrieved Oct. 18, 2016).

<sup>36</sup> The full statement is available at <http://go.usa.gov/xkd2x> (retrieved Oct. 18, 2016).

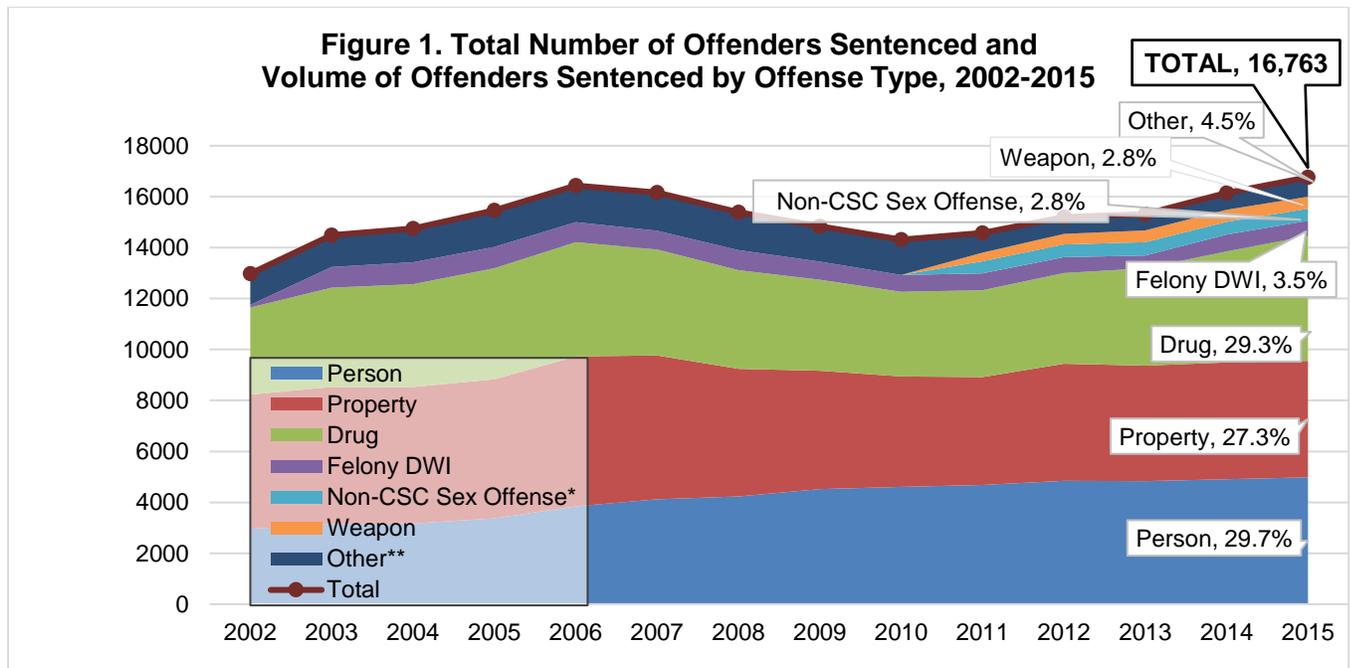
## 2015 Sentencing Practices Data Summary

The following data summarize information about sentencing practices and case volume and distribution. The recommended sentence under the Guidelines is based primarily on the severity of the offense of conviction and secondarily on the offender’s criminal record. The majority of offenders receive the recommended sentence.

In Minnesota, sentencing of felony offenders is governed by the Sentencing Guidelines. It is important, therefore, to be aware of the effect of differences in offense severity and criminal history when evaluating sentencing practices. This is particularly important when comparing groups of offenders (e.g., by gender, race and ethnicity, and judicial district). For example, if in a particular district the proportion of serious person offenders is fairly high, the imprisonment rate for that district will likely be higher than for districts with predominantly lower severity-level offenses.

### Case Volume, Distribution, and Percent Change: Overall and by Offense Type

Minnesota courts sentenced 16,763 felony offenders in 2015, an increase of 3.8 percent. This was the highest volume on record, surpassing the previous record set in 2006. Of the total volume, person offenses accounted for 29.7 percent (4,982 offenders), drug offenses accounted for 29.3 percent (4,913 offenders), and property offenses accounted for 27.3 percent (4,575 offenders) (Figure 1).

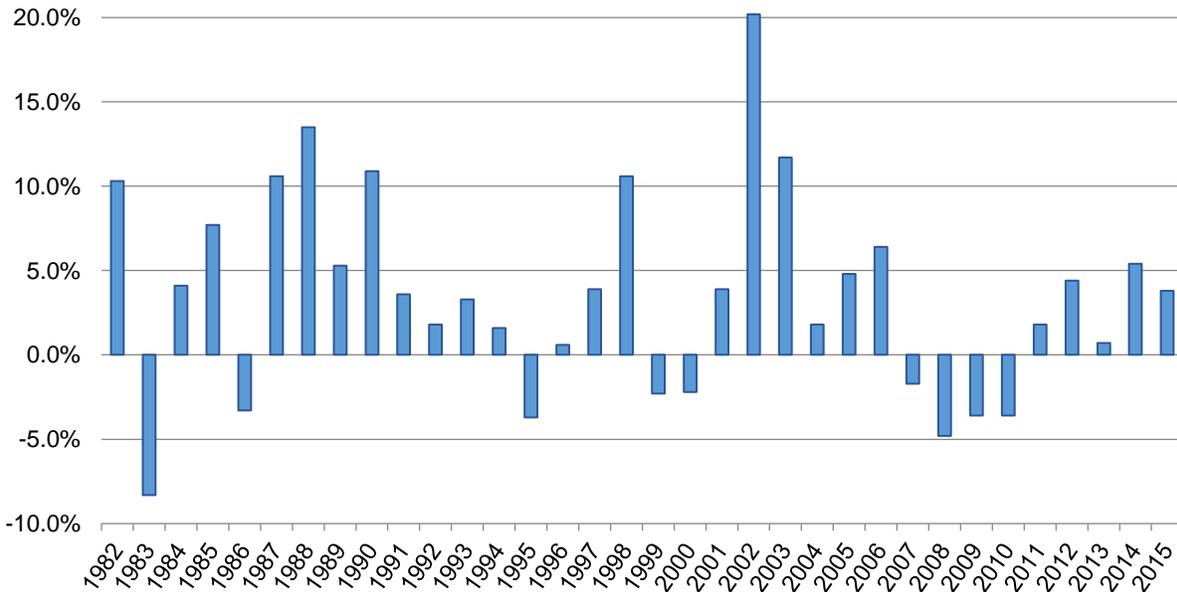


\* See note 37.  
\*\* See note 38.

The number of offenders sentenced for felony convictions grew significantly between 2001 and 2006 (Figure 2). This growth can be attributed to the implementation of the felony driving while impaired (DWI) law and increases in the number of drug crimes sentenced, particularly methamphetamine cases. Significant growth also occurred from 2010 to 2015, when the total volume of felony offenders sentenced increased by 17 percent. This is attributable to the growth in drug offenders at 48 percent, non-CSC sex offenders<sup>37</sup> at 9 percent, and “other”<sup>38</sup> offenders at 19 percent.

For this report, offenses involving a weapon were moved from the “other” category into their own “weapon”<sup>39</sup> category in order to provide more information about the category “other.” The “weapon” category grew by 51 percent from 2010 to 2015. The specific offense that contributed the most to that growth in the “weapon” category was possession of a firearm by a felon convicted of a crime of violence, which grew from 234 offenders in 2010 to 364 offenders in 2015 (56% growth rate). Person offenses grew by eight percent from 2010 to 2015, while property offenses had the smallest growth rate (6%). The only offense category that showed a decline during this time period was felony DWI, which declined by 12 percent.

**Figure 2. Percent Change in Number of Offenders Sentenced for Felony Convictions, 1982-2015**



<sup>37</sup> “Non-CSC sex offenses” are offenses on the sex offender grid other than criminal sexual conduct (chiefly failure to register as a predatory offender and possession and dissemination of child pornography).

<sup>38</sup> “Other” category: Fleeing police, escape, and other offenses of less frequency including crimes against the government such as tax offenses, failure to appear in court, and aiding an offender.

<sup>39</sup> “Weapon” offenses include: possession of a firearm by a felon convicted of a crime of violence, firearm discharge, possession of teargas and explosive devices and other weapon related offenses.

According to the Minnesota Department of Public Safety, the total number of reported “index crimes”<sup>40</sup> fell 1.2 percent from 2014 (136,989 offenses) to 2015 (135,382 offenses). The number of reported “violent crimes”<sup>41</sup> (a subset of “index crimes”), on the other hand, rose 7.6 percent over the same time period (from 12,357 in 2014 to 13,294 offenses in 2015).

Figure 3 shows the percent change, by offense type, in the number of offenders sentenced from 2001 and 2015. Person offenses increased every year from 2001 to 2012, until decreasing slightly in 2013. In 2014 and 2015, the number increased slightly. With a 13 percent increase over the previous year, drug offenses showed the second highest percent change of the offense categories. Property offenses sentenced decreased slightly by 0.3 percent. The number of felony DWI offenders sentenced decreased by 12 percent. The fluctuations in this category may be due to challenges to procedures for collecting evidence without a warrant.

**Figure 3. Year-by-Year Percent Change by Offense Type, 2001-2015**

Year Sentenced	Total	Person	Property	Drug	Felony DWI	Non-CSC Sex Offense <sup>42</sup>	Weapon <sup>43</sup>	Other <sup>44</sup> <sup>45</sup>
2001	3.9%	3.8%	4.2%	0.0%				13.3%
2002	20.2%	10.4%	17.9%	31.9%				16.3%
2003	11.7%	6.2%	2.4%	13.8%				2.2%
2004	1.8%	1.1%	-0.8%	3.6%	6.2%			6.2%
2005	4.8%	6.4%	2.0%	8.1%	-3.0%			7.6%
2006	6.4%	13.7%	7.9%	2.7%	-5.5%			1.1%
2007	-1.7%	7.3%	-4.0%	-7.1%	-6.7%			3.7%
2008	-4.8%	2.9%	-11.5%	-6.9%	6.0%			-0.1%
2009	-3.6%	6.6%	-7.0%	-7.7%	-9.6%			-7.0%
2010	-3.6%	2.0%	-6.8%	-7.0%	-5.3%	3.1%	-1.3%	-3.0%
2011	1.8%	1.7%	-2.4%	2.5%	-1.0%	9.9%	9.8%	20.3%
2012	4.4%	3.5%	8.8%	4.2%	-4.4%	4.0%	18.8%	-11.5%
2013	0.7%	-0.1%	-1.7%	7.6%	-19.2%	4.6%	13.4%	-5.2%
2014	5.4%	1.4%	1.3%	14.2%	28.6%	-2.1%	0.2%	2.6%
2015	3.8%	1.6%	-0.3%	12.6%	-10.5%	-7.1%	2.1%	15.0%

<sup>40</sup> “Index Crimes” are Murder, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny, Motor Vehicle Theft, and Arson. *1995 to 2015 Uniform Crime Reports*, State of Minnesota, Department of Public Safety, obtained September 2016, at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Pages/uniform-crime-reports.aspx>.

<sup>41</sup> “Violent Crimes” are Murder, Forcible Rape, Robbery, and Aggravated Assault. *1995 to 2015 Uniform Crime Reports*, State of Minnesota, Department of Public Safety, obtained September 2016, at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Pages/uniform-crime-reports.aspx>.

<sup>42</sup> “Non-CSC sex offenses” are offenses on the Sex Offender Grid other than criminal sexual conduct (chiefly failure to register as a predatory offender and possession and dissemination of child pornography).

<sup>43</sup> “Weapon” category includes: Possession of a firearm by a felon convicted of a crime of violence, discharge of firearm, and other weapon related offenses.

<sup>44</sup> “Other” category includes: Fleeing police, escape, voting violations, tax evasion laws, and other offenses of less frequency.

<sup>45</sup> “Other” category includes DWI before 2004 and non-CSC sex offenses and weapon offenses before 2010.

**Distribution of Offenders by Gender, Race/Ethnicity and Judicial District**

Males have always accounted for more than 80 percent of the felony offenders in Minnesota (Table 1). In 2015, 81.3 percent of the offenders sentenced were male and 18.7 percent were female. Figure 4 shows the racial and ethnic composition of the felony offender population from 1981 through 2015. The percentage of offenders who are white has decreased by roughly 25 percent since 1981. This is largely due to an increase in the percentage of black offenders, though the percentage of other non-white offenders (particularly Hispanic offenders) has also increased.

The percent of offenders who are black increased from 25.8 percent in 2014 to 26.3 percent in 2015. The percent who are white decreased slightly from 58.5 percent to 57.7 percent. The percent who are American Indians increased, while the percent who are Hispanic or Asian remained similar to that seen in 2014.

**Figure 4. Distribution of Felony Offenders by Race/Ethnicity, 1981-2015**

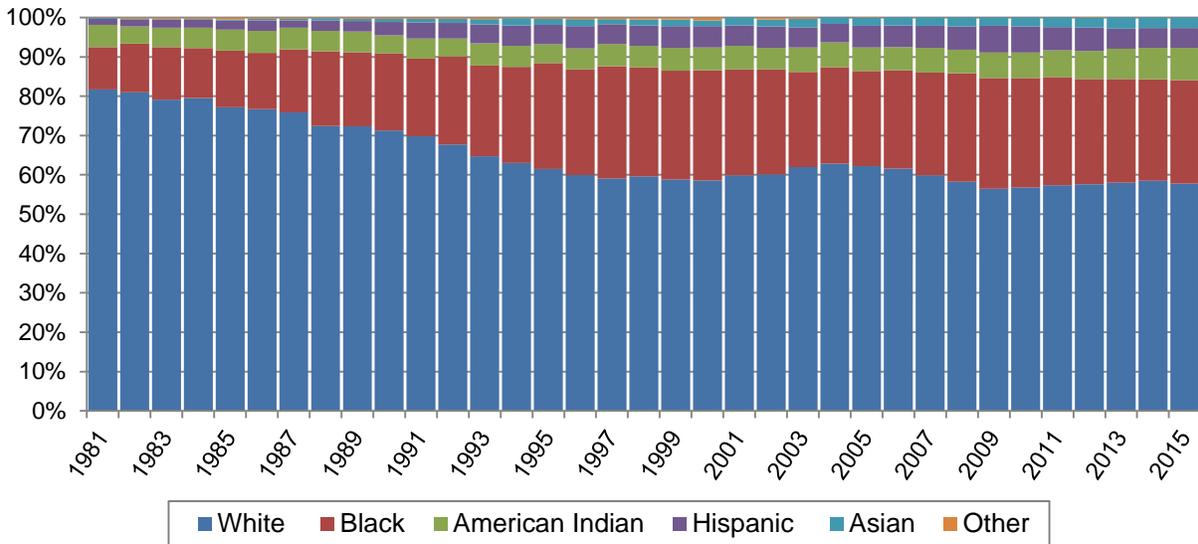
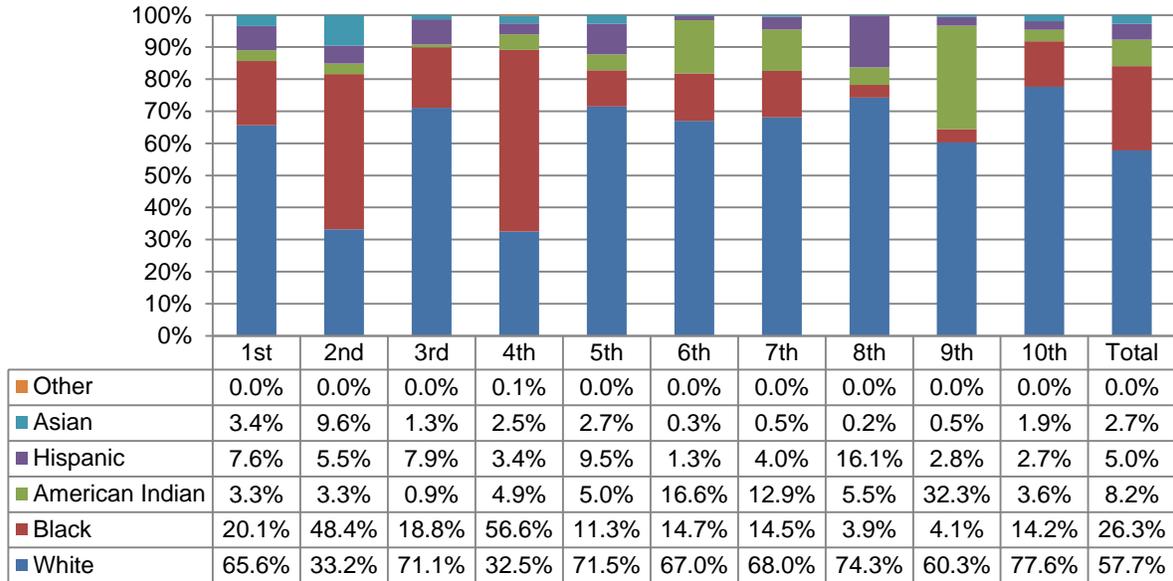


Figure 5 displays the 2015 distribution of the racial and ethnic composition of felony offenders by Minnesota judicial district. (See Appendix 1 on page 37 for a map of Minnesota’s ten judicial districts.) The largest populations of black offenders were in the Second Judicial District (Ramsey County) and the Fourth Judicial District (Hennepin County). These districts include the cities of St. Paul and Minneapolis.

**Figure 5. Distribution of Felony Offenders by Race and Judicial District, 2015**



**Incarceration Rates**

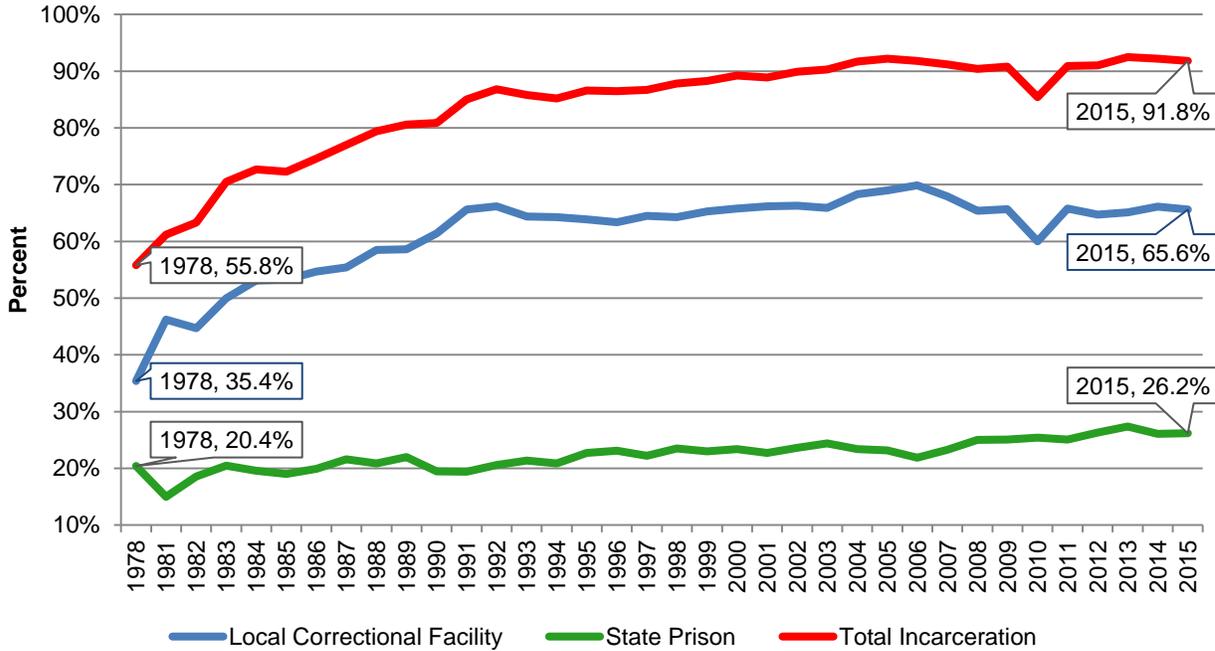
Under Minn. Stat. § 609.02, a felony sentence must be at least 366 days long.

The Guidelines presume who should go to state correctional institutions (prison) and for how long. Imprisonment rates are related to the Guideline recommendations and are based on the seriousness of the offense and the offender’s criminal history score. In cases in which prison sentences are stayed, the court usually places the offender on probation. As a condition of probation, the court may impose up to one year of incarceration in a local correctional facility. Probationers usually serve time in a local correctional facility and are often given intermediate sanctions such as treatment (residential or nonresidential), restitution, and fines. There are no specific Guidelines to the court regarding the imposition of these intermediate sanctions.<sup>46</sup>

The 2012-15 imprisonment rates were the highest rates observed since the Guidelines were implemented. In 2015, 91.8 percent of felony offenders served some time in a local correctional facility or prison setting (*Total Incarceration*, Figure 6): 66.6 percent served time in a local correctional facility as part of their stayed sentence (*Local Correctional Facility*, Figure 6); and 26.2 percent were sentenced to a Minnesota Department of Corrections (DOC) prison facility (*State Prison*, Figure 6).

<sup>46</sup> While the Commission is authorized to establish, within the Sentencing Guidelines, sanctions for offenders for whom imprisonment is not proper (Minn. Stat. § 244.09, subd. 5), it has chosen not to develop specific Guidelines for the sanctions and other conditions of stayed sentences. The determination of such sanctions and conditions is left to district courts, with general guidance provided in Minnesota Sentencing Guidelines § 3.A.2.

Figure 6. Total Incarceration Rates: 1978, 1981-2015



When comparing imprisonment rates across various groups (sex, race or judicial district) it is important to note that much of the variation is directly related to the proportion of offenders in any particular group who are recommended a prison sentence by the Guidelines based on the severity of the offense and the offender’s criminal history.

Table 1, below, provides total incarceration information for offenders sentenced in 2015. The total incarceration rate describes the percentage of offenders who received a sentence that included incarceration in a state prison or local correctional facility, following conviction.

*Race/Ethnicity*

The total incarceration rate varies somewhat across racial groups (ranging from 90.9% for white offenders to 93.4% for black offenders). Greater variation by race exists in the separate rates for prison and local confinement. White offenders were imprisoned at the lowest rate (23.2%) whereas black offenders were imprisoned at the highest rate (32.6%).

*Judicial District*

Variation was also observed in incarceration rates by Judicial District. The Second Judicial District (Ramsey County) had the highest total incarceration rate (98.1%) and the Third Judicial District (southeast Minnesota) had the lowest total incarceration rate (82.1%). This variation continues with respect to the separate rates for prison and local confinement. The Eighth Judicial District (west-central counties) had the highest imprisonment rate (32%), and the Fifth Judicial District (southwestern counties) had the lowest imprisonment rate (20%). With regard to

use of local confinement, the Second Judicial District had the highest rate (71.7%), and the Third Judicial District had the lowest rate (57.6%). See, Appendix 1 on p. 37, for a map of Minnesota’s ten judicial districts.

**Table 1. Total Incarceration Rates by Gender, Race / Ethnicity, and Judicial District, 2015**

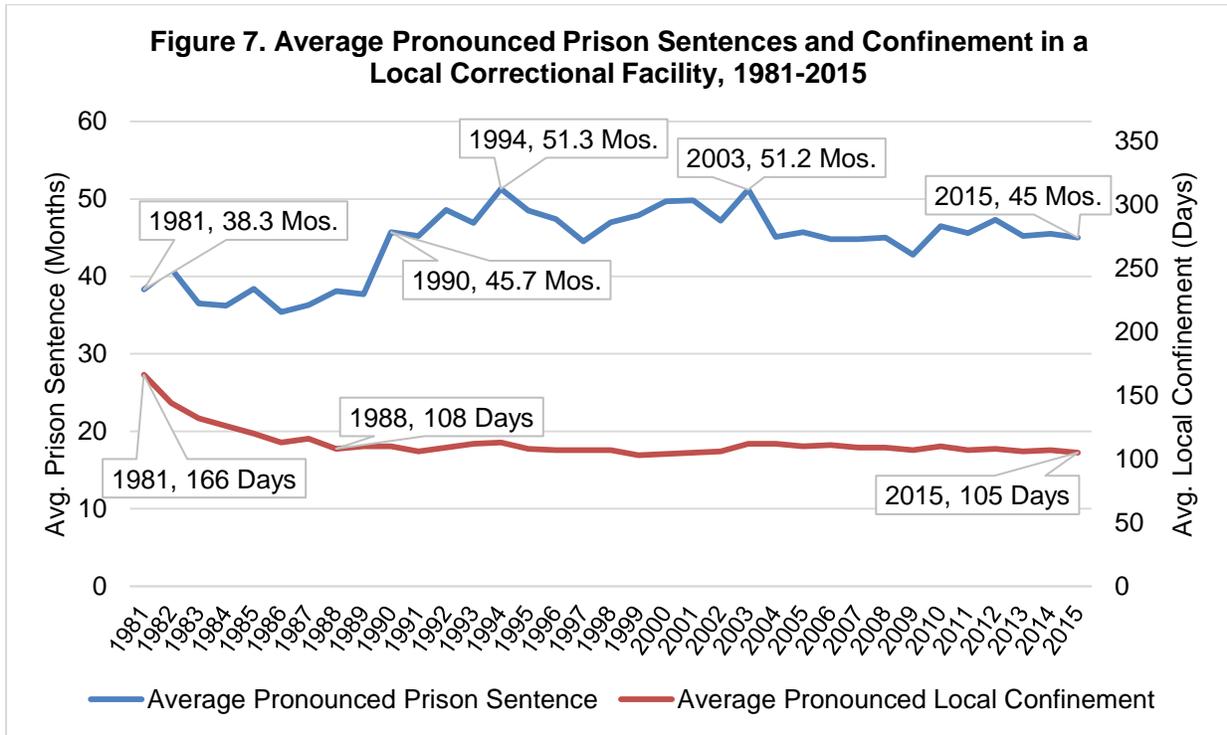
		Total	Total Incarceration		State Prison		Conditional Confinement	
		Cases	Number	Percent	Number	Percent	Number	Percent
<b>Gender</b>	Male	13,621	12,627	92.7	3,995	29.3	8,632	63.4
	Female	3,142	2,761	87.9	397	12.6	2,364	75.2
<b>Race/ Ethnicity</b>	White	9,677	8,792	90.9	2,241	23.2	6,551	67.7
	Black	4,409	4,119	93.4	1,437	32.6	2,682	60.8
	American Indian	1,382	1,277	92.4	364	26.3	913	66.1
	Hispanic	836	773	92.5	236	28.2	537	64.2
	Asian	458	426	93.0	114	24.9	312	68.1
	Other/Unknown	1	1	100.0	0	0.0	1	100.0
	<b>Judicial District</b>	First	2,049	1,831	89.4	430	21.0	1,401
	Second	2,055	2,016	98.1	542	26.4	1,474	71.7
	Third	1,381	1,134	82.1	339	24.5	795	57.6
	Fourth	3,240	2,972	91.7	1,030	31.8	1,942	59.9
	Fifth	918	834	90.8	184	20.0	650	70.8
	Sixth	919	803	87.4	185	20.1	618	67.2
	Seventh	1,691	1,654	97.8	520	30.8	1,134	67.1
	Eighth	435	414	95.2	139	32.0	275	63.2
	Ninth	1,696	1,476	87.0	440	25.9	1,036	61.1
	Tenth	2,379	2,254	94.7	583	24.5	1,671	70.2
<b>Total</b>		16,763	15,388	91.8	4,392	26.2	10,996	65.6

**Average Pronounced Prison Sentences and Confinement in a Local Correctional Facility**

The average pronounced prison sentence in 2015 was 45.0 months, a slight decrease over 2014 (Figure 7). Numerous changes in sentencing practices and policies, as well as changes in the distribution of cases, can affect the average. The average prison sentence increased after 1989, when the Commission increased—in some cases, doubled—recommended prison sentences for higher severity-level offenses. The average amount of local confinement pronounced as an interim sanction was 105 days in 2015, compared to 107 days in 2014 (Figure 7). The average has remained largely constant since 1988.

*Life Sentences*

In 2015, five offenders received life sentences, all for first-degree murder. All of those life sentences were with no release possible. Those offenders are excluded from the averaged pronounced prison sentence reported here. No offenders sentenced for criminal sexual conduct offenses received a life sentence.



**Departures from the Guidelines**

A “departure” is a pronounced sentence other than that recommended in the appropriate cell of the applicable Guidelines Grid. There are two types of departures – dispositional and durational – as further explained below. Since the presumptive sentence is based on “the typical case,” the appropriate use of departures by the courts when substantial and compelling circumstances exist can actually enhance proportionality by varying the sanction in an atypical case.

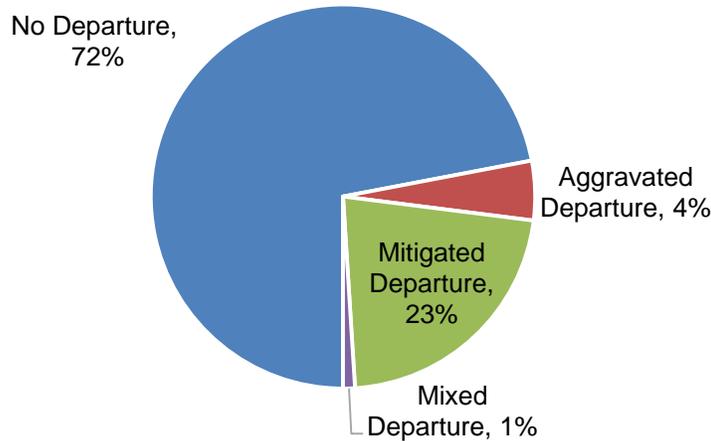
While the court ultimately makes the sentencing decision, most sentences pronounced by the court are based on judicial acceptance of plea agreements between prosecutors and defendants after victim input. Probation officers make recommendations to the courts regarding whether a departure from the presumptive sentence is appropriate, and prosecutors and defense attorneys commonly arrive at agreements regarding acceptable sentences for which an appeal will not be pursued. In 2015, prosecutors did not object to at least 62 percent of

mitigated dispositional departures, nor to at least 73 percent of mitigated durational departures.<sup>47</sup> Victims are provided an opportunity to comment regarding the appropriate sentence as well. Therefore, these departure statistics should be reviewed with an understanding that, when the court pronounces a particular sentence, there may be agreement or acceptance among the other actors that the sentence is appropriate. Only a small percent of cases (1% to 2%) result in an appeal of the sentence pronounced by the court.

When there is departure from the presumptive sentence, the court is required to submit reasons for the departure to the Commission.<sup>48</sup> Along with reasons for departure, the court may supply information about the position of the prosecutor regarding the departure. In 2015, the Commission received departure reasons or information about the position of the prosecutor 95 percent of the time. In 2015, 97 percent of felony convictions were settled without a trial. The Commission recognizes the need to balance the importance of plea agreements with the goals of the Guidelines. In the case of a plea agreement, the Commission asks courts to explain the underlying reasons for the plea agreement or for the court’s acceptance of it.<sup>49</sup>

In 2015, 72 percent of all felony offenders sentenced received the presumptive Guidelines sentence. The remaining 28 percent received some type of departure (Figure 8).

**Figure 8. Combined Dispositional and Durational Departure Rates, 2015**



<sup>47</sup> See figures 11 and 13 on pages 27 and 30.

<sup>48</sup> Minn. R. Crim. P. 27.03, subd. 4(C).

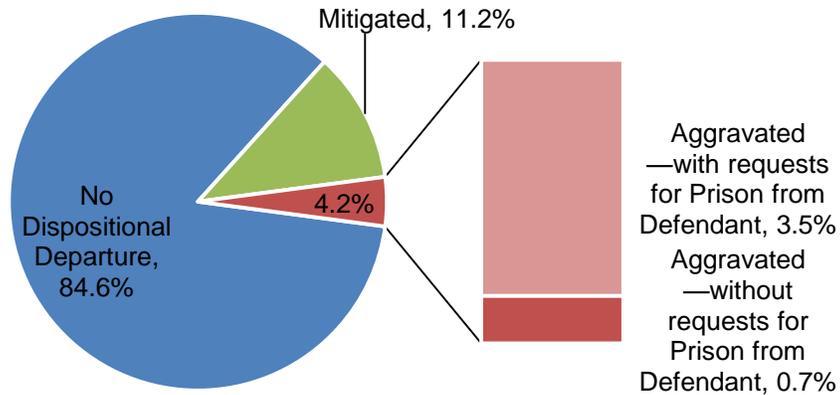
<sup>49</sup> See Minn. Sentencing Guidelines comment 2.D.104 (“Plea agreements are important to our criminal justice system because it is not possible to support a system where all cases go to trial. However, it is important to have balance in the criminal justice system where plea agreements are recognized as legitimate and necessary and the goals of the Guidelines are supported. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to make informed policy decisions or to ensure consistency, proportionality, and rationality in sentencing. Departures and their reasons highlight both the success and problems of the existing Guidelines. When a plea agreement involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain its reasons for accepting the negotiation.”).

*Dispositional Departures*

A “dispositional departure” occurs when the court orders a disposition other than that recommended in the Guidelines. There are two types of dispositional departures: aggravated dispositional departures and mitigated dispositional departures. An aggravated dispositional departure occurs when the Guidelines recommend a stayed sentence but the court pronounces an executed prison sentence. A mitigated dispositional departure occurs when the Guidelines recommend a prison sentence but the court pronounces a stayed sentence.

In 2015, the combined mitigated and aggravated dispositional departure rate was 15.4 percent: 11.2 percent mitigated and 4.2 percent aggravated (Figure 9). Most aggravated dispositional departures (84% in 2015) occur when an offender with a presumptive stayed sentence requests an executed prison sentence or agrees to the departure as part of a plea agreement. This request is usually made in order for the offender to serve the sentence concurrently with another prison sentence. The Commission has historically included these cases in the departure figures because, for the given offense, the sentence is not the presumptive Guidelines sentence.<sup>50</sup> If requests for prison are not included in the analysis, the aggravated dispositional departure rate—as a measure of judicial compliance—is less than one percent (Figure 9, Inset). Because aggravated dispositional departures represent such a small percentage of cases, the remainder of this analysis will focus on mitigated dispositional departures.

**Figure 9. Dispositional Departure Rates with and without Requests for Prison from Defendant, 2015**



<sup>50</sup> Effective with the 2015 modifications to Minnesota Sentencing Guidelines § 2.D.1, a sentence that is executed pursuant to an offender’s right to demand execution will no longer be considered an aggravated dispositional departure. Four of the cases in this report fell within the scope of the amended rule.

Table 2 illustrates dispositional departure rates based on presumptive disposition by gender, race, and judicial district. The aggravated dispositional departure rate for offenders recommended a stayed sentence (“Presumptive Stays”) was 6.2 percent. The mitigated dispositional departure rate for offenders who were recommended prison (“Presumptive Commits”) was 33.7 percent.

The mitigated dispositional departure rate is higher for women (52.4%) than men (31.8%). When examined by racial and ethnic composition, the mitigated dispositional departure rate ranged from a low of 26.2 percent for Asian offenders to a high of 37.0 percent for white offenders. There was also variation in the rate by Minnesota Judicial District, ranging from lows of 24.6 percent in the Seventh District (includes the cities of Moorhead and St. Cloud) and 27.8 percent in the Eight District (includes the City of Willmar) to a high of 47.4 percent in the Fifth Judicial District (includes the City of Mankato). When reviewing Table 2, note that the observed variations may be partly explained by regional differences in case volume, charging practices, and plea agreement practices, as well as differences in the types of offenses sentenced and criminal history scores of offenders across racial groups or across regions. (See Appendix 1 on page 37 for a map of Minnesota’s ten judicial districts.)

**Table 2. Dispositional Departure Rates by Gender, Race/Ethnicity, and Judicial District, 2015**

		Total Cases	Presumptive Stays			Presumptive Commits		
			Total	Aggravated Dispositional Departure		Total	Mitigated Dispositional Departure	
				No.	Rate		No.	Rate
<b>Gender</b>	Male	13,621	8,579	552	6.4%	5,042	1,602	31.8%
	Female	3,142	2,623	148	5.6%	519	272	52.4%
<b>Race/ Ethnicity</b>	White	9,677	6,826	443	6.5%	2,851	1,054	37.0%
	Black	4,409	2,528	132	5.2%	1,881	578	30.7%
	American Indian	1,382	983	72	7.3%	399	107	26.8%
	Hispanic	836	532	33	6.2%	304	102	33.6%
	Asian	458	332	20	6.0%	126	33	26.2%
	Other/ Unknown	1	1	0	0.0%	0	---	---
	<b>Judicial District</b>	First	2,049	1,489	85	5.7%	560	216
Second		2,055	1,342	57	4.2%	713	228	32.0%
Third		1,381	922	61	6.6%	459	182	39.7%
Fourth		3,240	1,904	118	6.2%	1,336	425	31.8%
Fifth		918	667	52	7.8%	251	119	47.4%
Sixth		919	625	19	3.0%	294	128	43.5%
Seventh		1,691	1,097	70	6.4%	594	146	24.6%
Eighth		435	277	26	9.4%	158	44	27.8%
Ninth		1,696	1,220	119	9.8%	476	156	32.8%
Tenth		2,379	1,659	93	5.6%	720	230	31.9%
<b>Total</b>		<b>16,763</b>	<b>11,202</b>	<b>700</b>	<b>6.2%</b>	<b>5,561</b>	<b>1,874</b>	<b>33.7%</b>

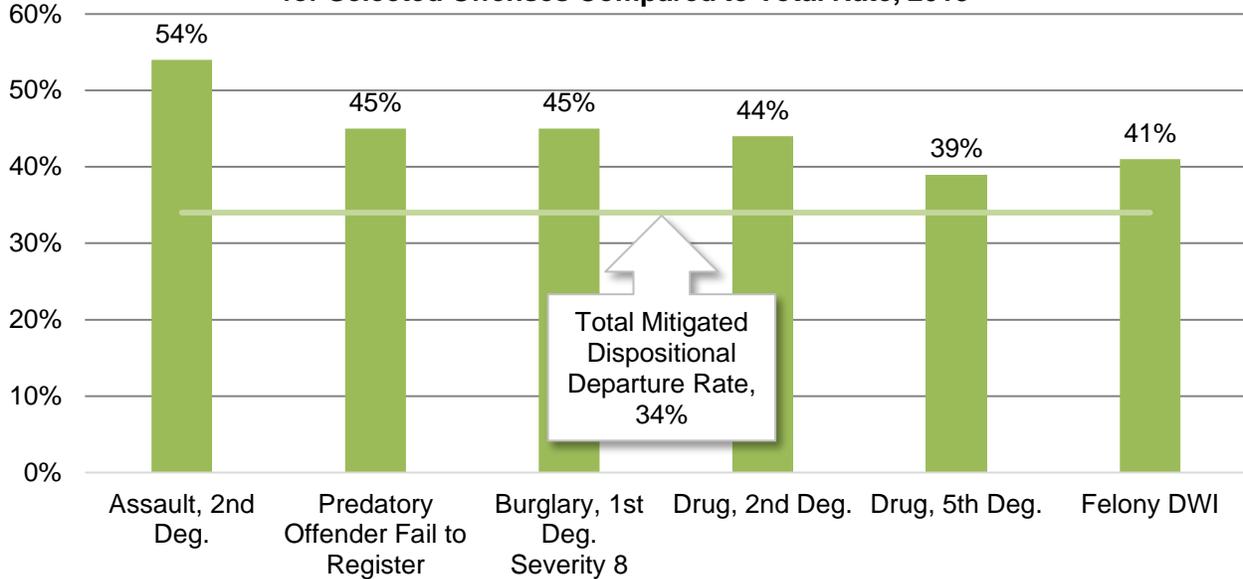
Dispositional departure rates vary for the type of offense. Figure 10 displays the offenses with the highest rates of mitigated dispositional departure compared to the total rate of 34 percent, and Figure 11 displays the position of the prosecutor as cited by the court.<sup>51</sup>

In 62 percent of all mitigated dispositional departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In 15 percent of these cases, the court stated that the prosecutor objected to the departure (Figure 11, "Total"). The court did not supply information on the prosecutor's position in 23 percent of these departures. In all offense categories, amenability to probation and amenability to

<sup>51</sup> The offenses were selected based on criteria that there were 50 or more "presumptive commitment" cases and the mitigated dispositional departure rate of 39 percent or more.

treatment were the most frequently cited substantial and compelling reasons for departure recorded.

**Figure 10. Mitigated Dispositional Departure Rates for Selected Offenses Compared to Total Rate, 2015**



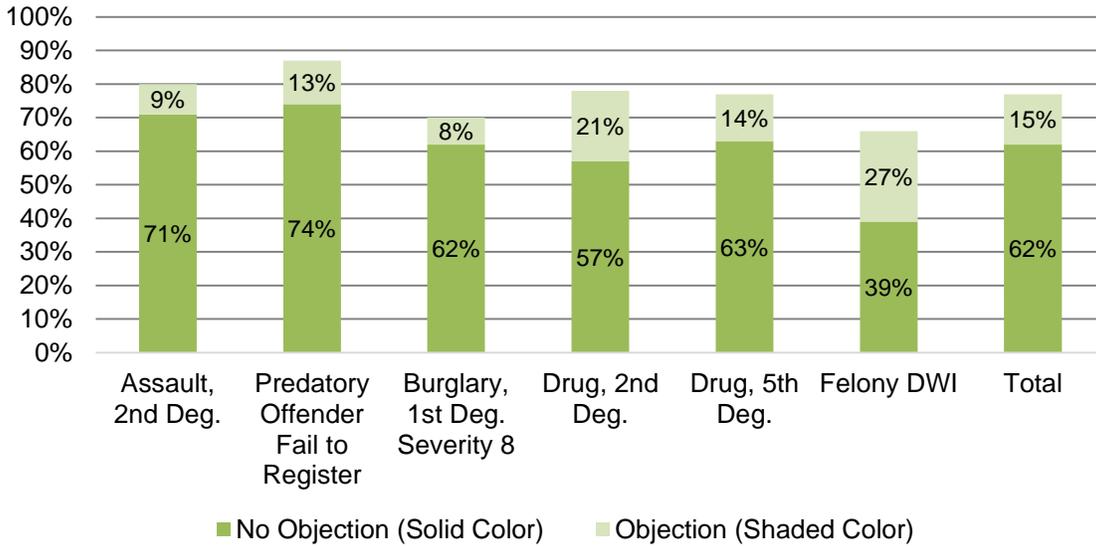
Two of the selected<sup>52</sup> offenses in Figures 10 and 11, assault in the second degree and failure to register as a predatory offender, have mandatory minimum sentences specified in statute, with provisions allowing for departure from those mandatory minimums.

Assault in the second degree, by definition, involves the use of a dangerous weapon and therefore carries a mandatory minimum prison sentence (Minn. Stat. § 609.11, subds. 4, 5 & 9). The second-degree assault statute proscribes a broad range of misbehavior: Injury to the victim may or may not occur, and the type of dangerous weapon involved can vary widely, from a pool cue to a knife to a firearm. Circumstances surrounding the offense can also vary significantly, from barroom brawls to unprovoked confrontations. The mandatory minimum statute specifically permits the court to sentence without regard to the mandatory minimum, provided that substantial and compelling reasons are present (Minn. Stat. § 609.11, subd. 8). It is perhaps unsurprising to find many departures in the sentencing of a crime that can be committed in many different ways.

Failure to register as a predatory sex offender also has a statutory mandatory minimum sentence, accompanied by a statutory provision that allows for sentencing without regard to the mandatory minimum (Minn. Stat. § 243.166, subd. 5(d)).

<sup>52</sup> See note 51 for selection criteria.

**Figure 11. Mitigated Dispositional Departure Rates, Court-Cited Position of Prosecutor Compared to Total Rate, 2015**



Note: Departure reports do not always include information on the prosecutor’s position, which is why the colored segments do not add up to 100% for each offense.

*Durational Departures*

A “durational departure” occurs when the court orders a sentence with a duration that is other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid. There are two types of durational departures: aggravated durational departures and mitigated durational departures. An aggravated durational departure occurs when the court pronounces a duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid. A mitigated durational departure occurs when the court pronounces a sentence that is more than 15 percent lower than the fixed duration displayed in the appropriate cell on the applicable Grid.

In 2015, the mitigated durational departure rate for offenders receiving executed prison sentences was lower than observed in 2014, at approximately 25 percent (24.8% compared to 26.1%). The aggravated durational departure rate increased slightly, from 2.8 percent in 2014 to 3.3 percent. The trend in lower aggravated durational departure rates since the mid-2000s likely reflects the impact of increased presumptive sentences over the past years and issues related to the U.S. Supreme Court ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), which required a jury to find all facts—other than the fact of a prior conviction or those facts agreed to by the defendant—used to enhance a sentence under mandatory sentencing guidelines.<sup>53</sup>

<sup>53</sup> The Minnesota Supreme Court determined that *Blakely’s* jury requirements applied to aggravated departures under the Minnesota Sentencing Guidelines. *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005).

In response to the *Blakely* decision, the 2005 Legislature widened the ranges on the Standard Grid to 15 percent below and 20 percent above the presumptive fixed sentenced, within which the court may sentence without departure. In 2006, a Sex Offender Grid was adopted. The Sex Offender Grid introduced higher presumptive sentences for repeat offenders and offenders with prior criminal history records.<sup>54</sup>

Table 3 illustrates durational departure rates for executed prison sentences by gender, race and ethnicity, and Minnesota Judicial District. The mitigated durational departure rate for males sentenced in 2015 was higher than for females (25.3% vs. 19.9%). When the departure rate is examined by racial and ethnic composition, the rate varies from a low of 14.8 percent for American Indian offenders to a high of 38.6 percent for Asian offenders. There is also considerable variation in mitigated durational departure rates by Minnesota Judicial District, ranging from a low of 2.2 percent in the Eighth Judicial District to a high of 48.6 percent in the Fourth Judicial District.

When reviewing the information in Table 3, it is important to note that the observed variations may be partly explained by regional differences in case volume, charging practices, and plea agreement practices, as well as differences in the types of offenses sentenced and criminal history scores of offenders across racial groups or across regions.

**Table 3. Durational Departures by Gender, Race, and Judicial District, Executed Prison Sentences Only, 2015**

		Total		Executed Prison Sentences Only					
		Executed Prison	Durational Dep. Rate	No Departure		Aggravated Durations		Mitigated Durations	
<b>Gender</b>	Male	3,995	28.6%	2,851	71.4%	135	3.4%	1,009	25.3%
	Female	397	22.4%	308	77.6%	10	2.5%	79	19.9%
<b>Race/ Ethnicity</b>	White	2,241	22.5%	1,731	77.2%	78	3.5%	432	19.3%
	Black	1,437	38.3%	887	61.7%	40	2.8%	510	35.5%
	American Indian	364	18.7%	296	81.3%	14	3.8%	54	14.8%
	Hispanic	236	24.6%	178	75.4%	10	4.2%	48	20.3%
	Asian	114	41.2%	67	58.8%	3	2.6%	44	38.6%
	Other/Unk.	0	---	---	---	---	---	---	---
<b>Judicial District</b>	First	430	22.8%	332	77.2%	16	3.7%	82	19.1%
	Second	542	39.7%	327	60.3%	14	2.6%	201	37.1%
	Third	339	9.7%	306	90.3%	9	2.7%	24	7.1%
	Fourth	1,030	53.5%	479	46.5%	50	4.9%	501	48.6%
	Fifth	184	25.5%	137	74.5%	5	2.7%	42	22.8%
	Sixth	185	14.6%	158	85.4%	2	1.1%	25	13.5%
	Seventh	520	20.0%	416	80.0%	11	2.1%	93	17.9%
	Eighth	139	6.5%	130	93.5%	6	4.3%	3	2.2%
	Ninth	440	14.4%	375	85.2%	18	4.1%	47	10.7%
	Tenth	583	14.4%	499	85.6%	14	2.4%	70	12.0%
<b>Total</b>		<b>4,392</b>	<b>28.1%</b>	<b>3,159</b>	<b>71.9%</b>	<b>145</b>	<b>3.3%</b>	<b>1,088</b>	<b>24.8%</b>

<sup>54</sup> For a deeper examination of the effect of the *Blakely* decision on sentencing practices, see the MSGC special report: *Impact of Blakely and Expanded Ranges on Sentencing Grid*, at: <http://mn.gov/sentencing-guidelines/reports/>.

As with dispositional departures, it can be helpful to look at offenses with higher than average durational departure rates. Figure 12 displays offenses with high durational departure rates compared to the total durational departure rate and Figure 13 displays the position of the prosecutor as cited by the court.<sup>55</sup>

Aggravated durational departure rates were highest for assaults in the first and third degree. Mitigated durational departure rates were highest for controlled substance crime in the first degree, domestic assault, failure to register as a predatory offender, aggravated robbery in the first degree, and burglary in the first degree in which there was no assault nor dangerous weapon involved (ranked at Severity Level 6). For both mitigated and aggravated durational departures, plea agreement or recommendation of the prosecutor were the most frequently cited reasons for departure for all offense types.

In 73 percent of all mitigated durational departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure (Figure 13, "Total"). In five percent of these cases, the court stated that the prosecutor objected to the departure. In 22 percent of the mitigated durational departures, the court did not provide information on the position of the prosecutor.

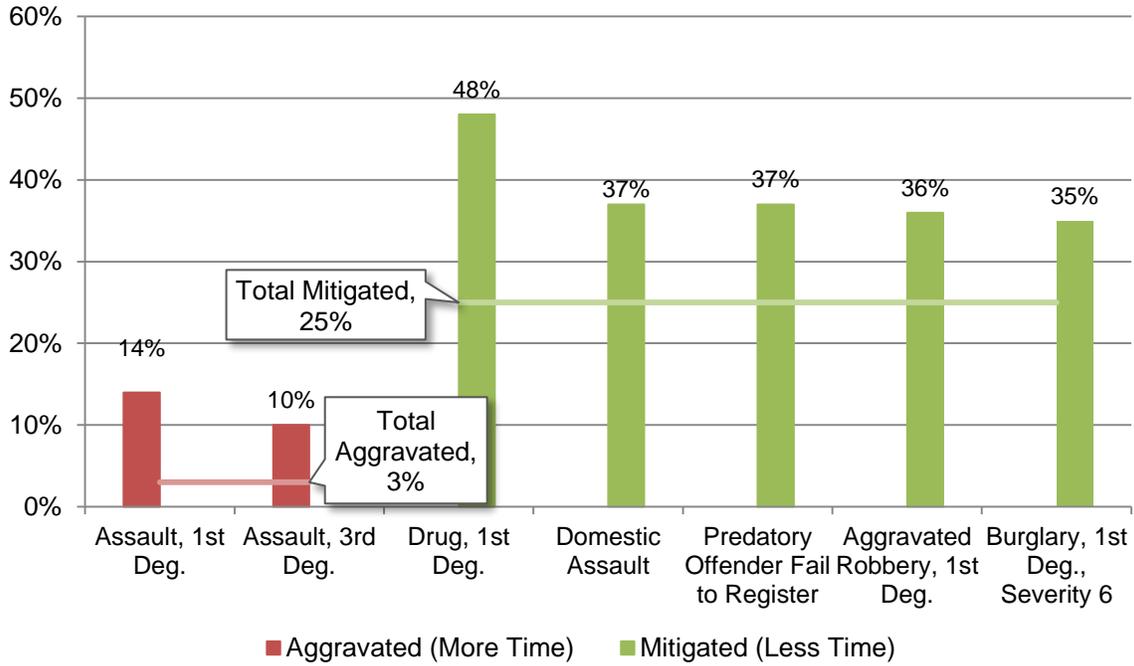
In half (50%) of the aggravated durational departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In the other half of the aggravated durational departures, the court did not provide information on the position of the prosecutor. There were no cases in which the court stated that the prosecutor objected to the aggravated durational departure.

The discussion on page [26](#) regarding mandatory minimums applies here: The mandatory minimum provisions applicable to one of the high-durational-departure crimes—failure to register as a predatory offender—allow for sentencing without regard to the mandatory minimum prison term (Minn. Stat. § [243.166](#), subd. 5(d)), and the wide variety of ways in which the crime can be committed may lend itself to the application of discretion in prosecutorial or judicial sentencing practice.

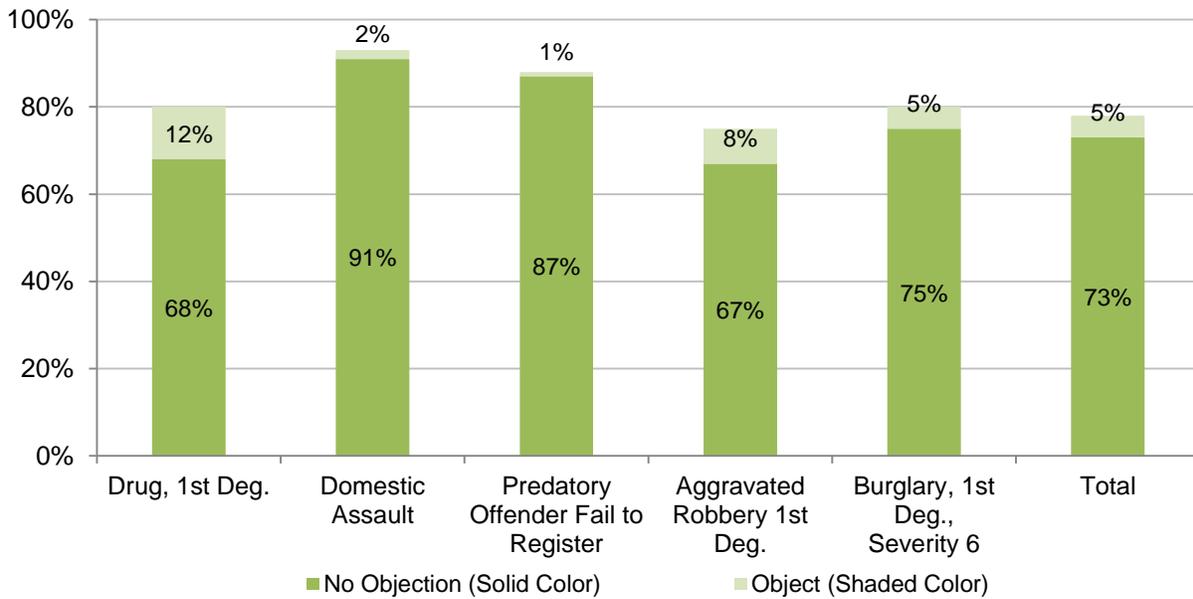
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<sup>55</sup> Selected based on criteria that there were 40 or more executed prison sentences and the aggravated durational departure rate was 10 percent or more, or the mitigated durational departure rate was above 30 percent.

**Figure 12. Durational Departure Rates for Selected Offenses Compared to the Total Rate, 2015 (Executed Prison Sentences Only)**



**Figure 13. Mitigated Durational Departure Rates for Selected Offenses Compared to the Total Rate, Court-Cited Position of Prosecutor, 2015 (Executed Prison Sentences Only)**



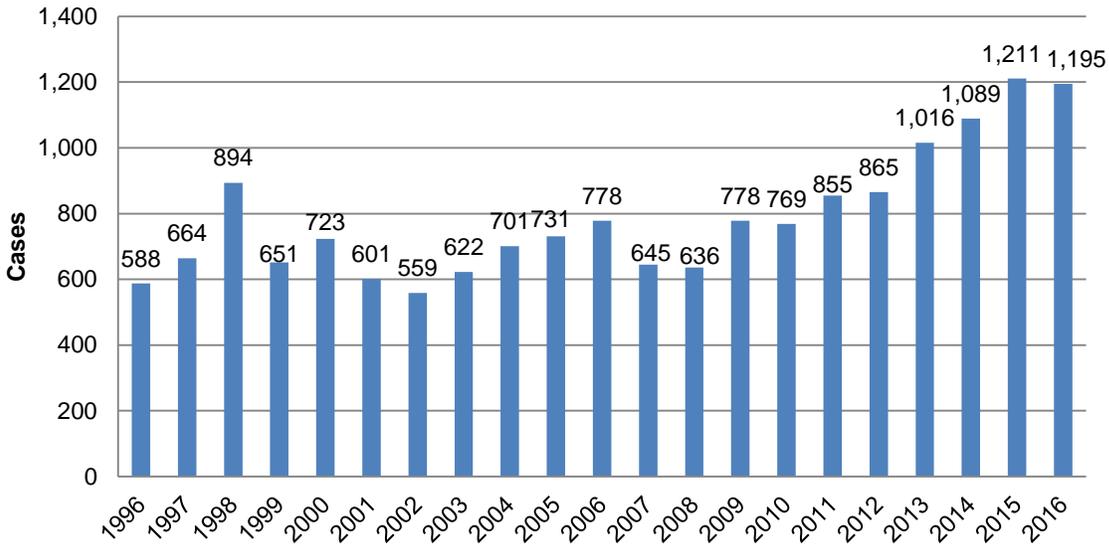
Note: Departure reports do not always include information on the prosecutor's position, which is why the colored segments do not add up to 100% for each offense.

## County Attorney Firearms Reports

Current law requires all county attorneys in Minnesota, by July 1 of each year, to submit to the Commission its data regarding felony cases in which defendants allegedly possessed or used a firearm and committed offenses listed in Minn. Stat. § 609.11, subdivision 9.<sup>56</sup> The Commission is required to include in its annual Report to the Legislature a summary and analysis of the reports received. Memoranda describing the mandate, along with forms on which to report, are distributed by MSGC staff to County attorneys. Although MSGC staff clarifies inconsistencies in the summary data, the information received from the county attorneys is reported directly as provided.

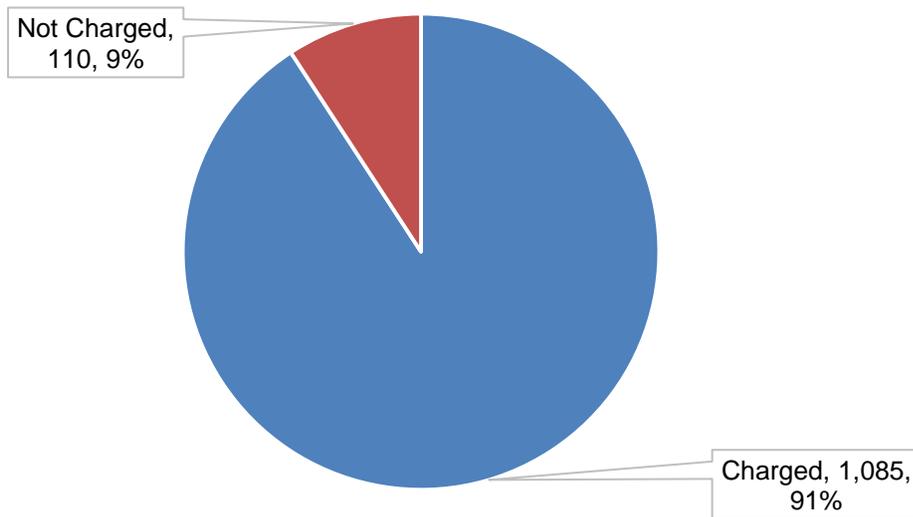
Since the mandate began in 1996, the average number of annual cases involving firearms statewide has been 789. Between July 1, 2015 and June 30, 2016 (FY 2016), there were 1,195 cases allegedly involving a firearm (Figure 14). This was a one percent decrease (down 16 cases for FY 2015) from the peak number of 1,211 cases reported in FY 2015. As shown in Figure 15, of those 1,195 cases, prosecutors charged 1,085 cases (91%) while 110 cases (9%) were not charged.

**Figure 14. Cases Allegedly Involving a Firearm, 1996 to 2016**



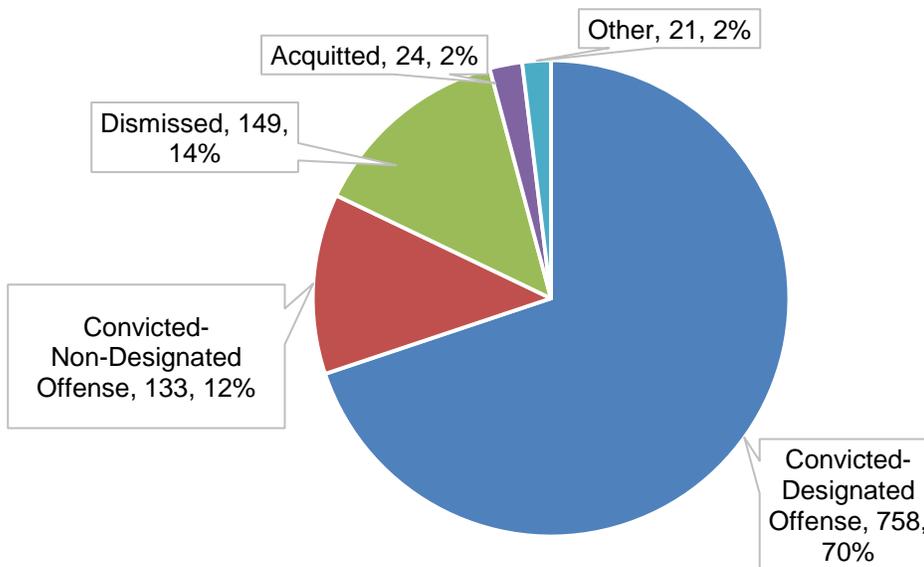
<sup>56</sup> The statute provides a mandatory minimum sentence of 36 months for the first conviction of specified offenses, and 60 months for a second. Offenses include murder in the first, second, or third degree; assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; first-degree or aggravated first-degree witness tampering; some criminal sexual conduct offenses; escape from custody; arson in the first, second, or third degree; felony drive-by shooting; aggravated harassment and stalking; felon in possession of a firearm; and felony controlled substance offenses.

**Figure 15. Cases Charged, 2016**



Of the 1,085 cases charged, 758 (70%) were convicted of offenses designated in Minn. Stat. § 609.11; 133 (12%) were convicted of offenses not covered by the mandatory minimum (e.g., threats of violence under Minn. Stat. § 609.713); 149 (14%) had all charges dismissed; 24 (2%) were acquitted on all charges; and 21 (2%) were “other” cases including federal prosecutions and stays of adjudication (Figure 16).

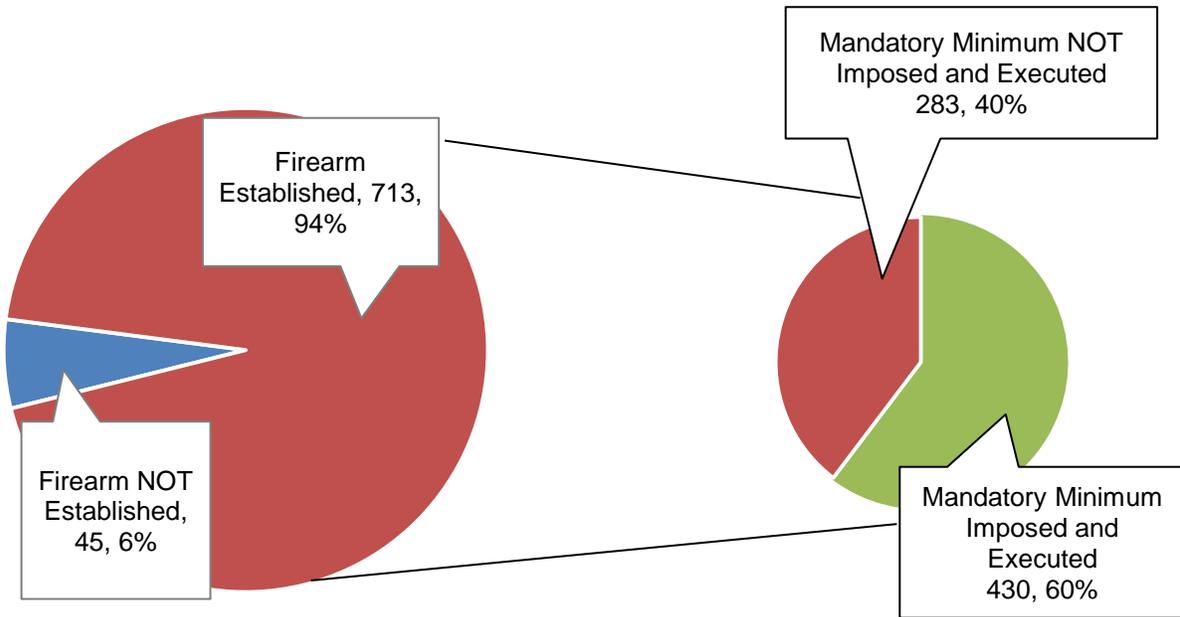
**Figure 16. Case Outcomes, 2016**



In 713 (94%) of the 758 cases in which there was a conviction for a designated offense, use or possession of a firearm was established on the record (Figure 17). The fact-finder, *i.e.*, the judge or jury, must establish whether the defendant or an accomplice used or possessed a firearm in the commission of the offense at the time of conviction. Minn. Stat. § 609.11, subdivision 7.

In the cases in which the firearm was established on the record, 430 offenders (60%)<sup>57</sup> were sentenced to the mandatory minimum prison term (Figure 17, inset). The statute specifically allows the prosecutor to file a motion to have the defendant sentenced without regard to the mandatory minimum. The prosecutor must provide a statement as to the reasons for the motion. If the court finds substantial mitigating factors, with or without a motion by the prosecutor, the defendant may be sentenced without regard to the mandatory minimum. Minn. Stat. § 609.11, subdivision 8.

**Figure 17. Cases Convicted of Designated Offense, Firearm Established on the Record (Inset), 2016**



<sup>57</sup> County attorneys' data for fiscal year 2016 (ending June 30, 2016). According to MSGC monitoring data from calendar year 2015, of those offenders whose sentencing worksheets reflected the use or possession of a firearm or prohibited persons from possessing a firearm or ammunition requiring a mandatory prison sentence under Minn. Stat. § 609.11, 52.1 percent (348 offenders) received both the mandatory prison disposition and the mandatory minimum duration. In addition, 14.4 percent (96 offenders) received the mandatory prison disposition, but less than the mandatory minimum duration.

**Table 4. County Attorney Firearms Reports on Criminal Cases Allegedly, Involving a Firearm by MN County, Cases Disposed from July 1, 2015 to June 30, 2016**

County	Cases Allegedly Involving a Firearm	Cases Charged	Cases Convicted – Designated Offense	Cases in which a Firearm was Established on the Record	Mandatory Minimum Sentence Imposed and Executed
Aitkin	17	12	5	3	3
Anoka	49	49	32	32	18
Becker	7	6	4	4	1
Beltrami	7	2	2	2	0
Benton	14	13	8	7	7
Big Stone	0	0	0	0	0
Blue Earth	14	14	11	8	4
Brown	4	3	2	0	0
Carlton	2	2	2	2	2
Carver	0	0	0	0	0
Cass	9	9	4	3	3
Chippewa	6	6	1	0	0
Chisago	3	3	2	2	1
Clay*	---	---	---	---	---
Clearwater	7	7	4	4	2
Cook	0	0	0	0	0
Cottonwood	2	2	2	1	1
Crow Wing	5	5	2	0	0
Dakota	45	45	30	30	15
Dodge	3	3	0	0	0
Douglas	10	9	2	2	0
Faribault	0	0	0	0	0
Fillmore	0	0	0	0	0
Freeborn	2	2	1	1	0
Goodhue	9	9	6	5	0
Grant	0	0	0	0	0
Hennepin	454	454	360	360	222
Houston	2	2	1	1	0
Hubbard	0	0	0	0	0
Isanti	2	2	2	2	1
Itasca	13	13	11	11	3
Jackson	0	0	0	0	0
Kanabec	12	8	0	0	0
Kandiyohi	5	4	4	4	3
Kittson	1	1	1	1	0
Koochiching	2	1	0	0	0
Lac Qui Parle	1	1	0	0	0

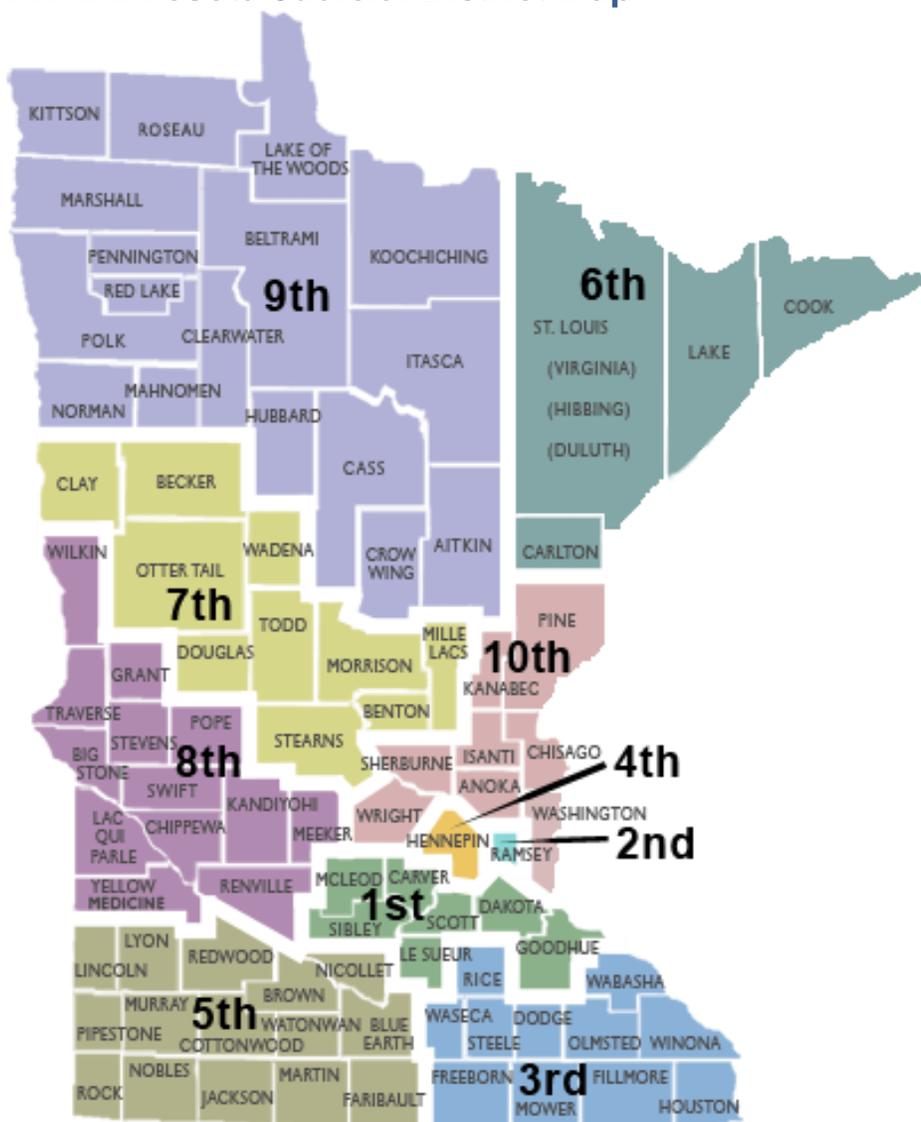
\* Not reported as of January 9, 2017.

County	Cases Allegedly Involving a Firearm	Cases Charged	Cases Convicted – Designated Offense	Cases in which a Firearm was Established on the Record	Mandatory Minimum Sentence Imposed and Executed
Lake	3	3	3	2	0
Lake of the Woods	2	2	1	1	0
Le Sueur	4	4	3	1	1
Lincoln*	---	---	---	---	---
Lyon	11	11	7	7	6
McLeod	1	1	1	1	0
Mahnomen	0	0	0	0	0
Marshall*	---	---	---	---	---
Martin	3	3	3	2	2
Meeker	1	1	1	1	1
Mille Lacs	27	24	8	6	5
Morrison	6	6	3	3	2
Mower	8	7	2	2	2
Murray	1	1	0	0	0
Nicollet	4	4	2	2	1
Nobles	6	6	3	2	1
Norman	0	0	0	0	0
Olmsted	15	12	10	8	6
Otter Tail	1	0	0	0	0
Pennington	3	3	2	2	2
Pine	1	1	1	1	0
Pipestone	2	2	1	1	1
Polk	9	8	2	2	1
Pope	16	0	0	0	0
Ramsey	125	125	94	91	53
Red Lake	1	1	0	0	0
Redwood	4	4	3	2	2
Renville	5	4	2	1	1
Rice	26	15	9	7	5
Rock	0	0	0	0	0
Roseau	2	2	0	0	0
Scott	7	7	6	6	3
Sherburne	11	11	6	3	3
Sibley	0	0	0	0	0
St. Louis	44	40	30	28	19
Stearns	27	27	22	19	13
Steele	6	5	2	2	2
Stevens	1	1	0	0	0
Swift	0	0	0	0	0
Todd	0	0	0	0	0
Traverse	1	1	1	1	1

\* Not reported as of January 9, 2017.

County	Cases Allegedly Involving a Firearm	Cases Charged	Cases Convicted – Designated Offense	Cases in which a Firearm was Established on the Record	Mandatory Minimum Sentence Imposed and Executed
Wabasha	7	7	5	3	0
Wadena	42	2	1	1	0
Waseca	2	2	1	1	0
Washington	16	16	11	11	6
Watsonwan	5	5	3	2	1
Wilkin	0	0	0	0	0
Winona	20	17	7	3	1
Wright	7	7	3	3	3
Yellow Medicine	5	0	0	0	0
<b>Total</b>	<b>1,195</b>	<b>1,085</b>	<b>758</b>	<b>713</b>	<b>430</b>

## Appendix 1. Minnesota Judicial District Map



<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>	<u>Sixth</u>	<u>Seventh</u>	<u>Eighth</u>	<u>Ninth</u>	<u>Tenth</u>
Carver	Ramsey	Dodge	Hennepin	Blue Earth	Carlton	Becker	Big Stone	Aitkin	Anoka
Dakota	Fillmore	Freeborn		Brown	Cook	Benton	Chippewa	Beltrami	Chisago
Goodhue	Houston	Houston		Cottonwood	Lake	Clay	Grant	Cass	Isanti
LeSueur	Mower	Mower		Faribault	St. Louis	Douglas	Kandiyohi	Clearwater	Kanabec
McLeod	Murray	Murray		Jackson		Mille Lacs	LacQuiParle	Crow Wing	Pine
Scott	Rice	Rice		Lincoln		Morrison	Meeker	Hubbard	Sherburne
Sibley	Steele	Steele		Lyon		Otter Tail	Pope	Itasca	Washington
	Wabasha	Wabasha		Martin		Stearns	Renville	Kittson	Wright
	Waseca	Waseca		Murray		Todd	Stevens	Koochiching	
	Winona	Winona		Nicollet		Wadena	Swift	Lake-Woods	
				Nobles			Traverse	Mahnomen	
				Pipestone			Wilkin	Marshall	
				Redwood			Yellow Medicine	Norman	
				Rock				Pennington	
				Watowan				Polk	
								Red Lake	
								Roseau	

Source: Minnesota Judicial Branch at <http://mncourts.gov/?page=238>

## Appendix 2. Modifications to the Sentencing Guidelines and Commentary – Adopted July and November, 2016

On July 27, 2016, and on November 17, 2016, the Minnesota Sentencing Guidelines Commission adopted the following modifications to the Sentencing Guidelines and Commentary resulting from new and amended legislation and other policy considerations. The modifications adopted in July followed a public hearing on July 20, 2016. The modifications adopted in November were to commentary only.

### Appendix 2.1. Legislative Amendments to Controlled Substance Offenses – Adopted July, 2016

The Commission reviewed laws related to controlled substance offenses newly enacted or amended by the 2016 Legislature, and adopted a proposal to modify the Minnesota Sentencing Guidelines to add § 4.C (Drug Offender Grid) and comments 2.C.11 and 2.E.05; and to make modifications in §§ 1.B.13, 1.B.17, 2.B.1.a, 2.B.1.b, 2.C.1, 2.C.3.c, 2.E.2.c, 5.A, 5.B, and 6; comments 2.C.10 and 2.E.06 (currently numbered 2.E.05); and Guidelines Appendix 1.

#### 1. Modification to Guidelines § 1.B.

The Commission adopted a proposal to modify § 1.B, as a result of legislative amendments to controlled substance offenses, to take effect August 1, 2016, as follows.

#### Section 1.B. Definitions

As used in these Sentencing Guidelines (or “Guidelines”), the following terms have the meanings given.

\* \* \*

#### 13. Presumptive Sentence. \* \* \*

- a. Presumptive Disposition. \* \* \*
- b. Presumptive Duration. The “presumptive duration” is the recommended fixed sentence length in months found in the appropriate cell on the applicable Grid.
- c. Presumptive Range. The “presumptive range” is provided for a sentence that is a presumptive commitment. Pursuant to Minn. Stat. § 244.09, subd. 5(2), the range is 15 percent lower and 20 percent higher than the fixed duration displayed in each cell on the Grids.
- d. Lower Range. The “lower range” is that portion of the presumptive range that is shorter than the fixed presumptive duration. \* \* \*

17. Severity Level. The “severity level” is a ranking assigned to each felony offense by the Sentencing Guidelines Commission to indicate the seriousness of the offense. The vertical axis on the applicable grid represents the severity of the conviction offense. Felony offenses, other than sex and drug offenses, are arranged on the Standard Grid into eleven levels of severity, ranging from high (Severity Level 11) to low (Severity Level 1). Sex offenses are arranged on the Sex Offender Grid into eight severity levels, ranging from high (Severity Level A) to low (Severity Level H). Drug offenses are arranged on the Drug Offender Grid into nine levels of severity, ranging from high (Severity Level D9) to low (Severity Level D1). Offenses listed within each severity level are deemed equally serious. \* \* \*

2. Modifications to Guidelines § 2.B.1.

The Commission adopted a proposal to modify § 2.B.1, as a result of legislative amendments to controlled substance offenses and legislative amendments that would mandate modifications to the Guidelines, to take effect August 1, 2016, as follows.

**Section 2.B. Criminal History**

\* \* \*

1. Prior Felonies. Assign a particular weight, as set forth in paragraphs a and b, to each extended jurisdiction juvenile (EJJ) conviction and each felony conviction, provided that a felony sentence was stayed or imposed before the current sentencing or a stay of imposition of sentence was given before the current sentencing. \* \* \*
  - a. Current Offense on Standard Grid or Drug Offender Grid. If the current offense is **not** on the Sex Offender Grid, determine the weight assigned to each prior felony sentence according to its severity level, as follows:

<b>Current Offense on Standard Grid or Drug Offender Grid</b>	<b>SEVERITY LEVEL</b>	<b>POINTS</b>
	1 – 2, <u>D1 – D2</u>	½
	3 – 5, <u>D3 – D5</u>	1
	6 – 8, <u>D6 – D7</u>	1 ½
	9 – 11, <u>D8 – D9</u>	2
	Murder 1 <sup>st</sup> Degree	2
	A	2
	B – E	1 ½
	F – G	1
	H	½ (for first offense); 1 (for subsequent offenses)

- b. Current Offense on Sex Offender Grid. If the current offense is on the Sex Offender Grid, determine the weight assigned to each prior felony sentence according to its severity level, as follows:

<b>Current Offense on Sex Offender Grid</b>	<b>SEVERITY LEVEL</b>	<b>POINTS</b>
	1 – 2, <u>D1 – D2</u>	½
	3 – 5, <u>D3 – D5</u>	1
	6 – 8, <u>D6 – D7</u>	1 ½
	9 – 11, <u>D8 – D9</u>	2
	Murder 1 <sup>st</sup> Degree	2
	A	3
	B – C	2
	D – E	1 ½
	F – G	1
H	½ (for first offense); 1 (for subsequent offenses)	

\* \* \*

### 3. Modifications to Guidelines § 2.C.

The Commission adopted a proposal to modify § 2.C, as a result of legislative amendments to controlled substance offenses, to take effect August 1, 2016, as follows.

#### **Section 2.C. Presumptive Sentence**

\* \* \*

1. Finding the Presumptive Sentence. The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable Grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis). \* \* \*

Each cell on the ~~Standard Grid and Sex Offender Grids~~ provides a fixed sentence duration. Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitments. For cells above the solid line, the Guidelines provide both a fixed presumptive duration and a range of time for that sentence except as provided in section 2.C.3.c(1). The shaded areas of the grids do not display ranges. If the duration for a sentence that is a presumptive commitment is found in a shaded area, the standard range – 15 percent lower and 20 percent higher than the fixed duration displayed – is permissible without departure, provided that the minimum sentence is not less than one year and one day, and the maximum sentence is not more than the statutory maximum. \* \* \*

3. Finding the Presumptive Sentence for Certain Offenses. \* \* \*

- c. Controlled Substance Offenses.

- (1) Certain First-Degree Offenses. If the current conviction is for controlled substance crime in the first degree and the penalty statute is Minn. Stat. § 152.021, subd. 3(c) (related to sale or possession of at least 100 grams or 500 dosage units of certain controlled substances), or if the current conviction is for aggravated controlled substance crime in the first degree, then the lower range, although displayed on the Drug Offender Grid, is excluded from what would otherwise be the presumptive range for that offense.

- (2) Subsequent Controlled Substance Convictions. If the current conviction offense is for a controlled substance crime in the first, ~~or second, or third~~ degree and is a “subsequent controlled substance conviction” as defined in Minn. Stat. § 152.01, subd. 16a, the presumptive disposition is commitment. A ~~stay of adjudication under Minn. Stat. § 152.18 that occurred before August 1,~~

~~1999 is not a prior disposition under Minn. Stat. § 152.01, subd. 16a. The prior dispositions listed in Minn. Stat. § 152.01, subd. 16a, trigger~~ Such a conviction triggers the presumptive commitment unless more than ten years have elapsed since discharge from sentence ~~or stay of adjudication~~. The presumptive duration for a controlled substance conviction falling under this section is the ~~fixed~~ duration indicated in the appropriate cell on the Drug Offender Grid, or the mandatory minimum, whichever is longer. \* \* \*

*Comment \* \* \**

***2.C.10.*** *Because a stay of adjudication is not a felony conviction, the Guidelines do not apply unless and until the stay is vacated and conviction is entered. Minn. Stat. § 152.021, subdivisions 3(c) and 3(d), exclude the lower range, as defined in section 1.B.13.d, from what would otherwise be the presumptive range. While the mandatory-minimum provision of subd. 3(c) may be waived for an offender sentenced for a first-degree possession crime who had not previously been convicted of controlled substance crime in the first, second, or third degree, a sentence duration that is shorter than the fixed presumptive sentence, even if within the lower range, is nevertheless a mitigated durational departure if subd. 3(c) applies. Under either subdivision, the presumptive disposition is commitment.*

***2.C.11.*** *The special penalty provisions for subsequent controlled substance convictions do not apply to current offenses of aggravated controlled substance crime in the first degree.* \* \* \*

#### 4. Modifications to Guidelines § 2.E.

The Commission adopted a proposal to modify § 2.E, as a result of legislative amendments to controlled substance offenses, to take effect August 1, 2016, as follows.

#### **Section 2.E. Mandatory Sentences**

\* \* \*

#### 2. Specific Statutory Provisions. \* \* \*

- c. Subsequent Drug Controlled Substance Offenses Involving a Dangerous Weapon. Pursuant to Minn. Stat. § 609.11, subd. 5a, some drug offenses committed with a dangerous weapon may be subject to one of the following two provisions.

- (1) Certain Aggravated First-Degree Offenses. If an offender is sentenced for aggravated controlled substance crime in the first degree under Minn. Stat. § 152.021, subd. 2b(2), and is also subject to Minn. Stat. § 609.11, subd. 5a, the presumptive duration is the mandatory minimum sentence described in section 2.C.3.c(1) added to the mandatory minimum sentence for the dangerous weapon involvement found in Minn. Stat. § 609.11, subd. 4 or 5.
- (2) Subsequent Controlled Substance Offenses. If an offender is sentenced for a ~~second or~~ subsequent drug controlled substance offense and is subject to Minn. Stat. § 609.11, subd. 5a, the presumptive duration is the longer of either:
- (1) (i) the mandatory minimum sentence for the subsequent drug controlled substance offense added to the mandatory minimum sentence for the dangerous weapon involvement; or
- (2) (ii) the presumptive duration for the subsequent drug controlled substance offense provided in the appropriate cell on the Standard Drug Offender Grid and limited, if applicable, by section 2.C.3.c(1).

\* \* \*

***2.E.05.*** Minn. Stat. § 609.11, subd. 5a, applies to aggravated controlled substance crime in the first degree only if the offender is convicted under Minn. Stat. § 152.021, subd. 2b(2), and the crime was committed with a firearm or other dangerous weapon. Example: An offender with a Criminal History Score of 3 possessed 100 grams of cocaine. Because two of the aggravating factors listed in Minn. Stat. § 152.01, subd. 24, were present, the offender is convicted of aggravated controlled substance crime in the first degree under Minn. Stat. § 152.021, subd. 2b(2). It is also proven that the offender was in possession of a firearm, although the firearm possession was not an element of the crime. The mandatory minimum sentence would be 158 months, calculated as follows:

122 months Mand. Min. (section 2.C.3.c(1); Severity Level D9, Criminal History Score of 3)  
+ 36 months Mand. Min. for weapon (Minn. Stat. § 609.11, subd. 5(a))  
=158 months

Minn. Stat. § 609.11, subd. 5a, does not apply to Minn. Stat. § 152.021, subd. 2b(1), which, by definition, involves the use or possession of a firearm.

**2.E.05 2.E.06.** *Minn. Stat. § 609.11, subd. 5a, states that for a subsequent ~~drug~~ controlled substance offense involving a weapon, the mandatory minimum duration for the drug offense and the mandatory minimum duration for the weapon offense are added together. The Guidelines presumptive duration is determined by comparing the total sum of the combined mandatory minimums and the duration found in the appropriate cell on the ~~Standard~~ Drug Offender Grid for the subsequent ~~drug~~ controlled substance offense; the presumptive duration is the longer of the two. For example: A ~~third~~ second-degree drug offender with a Criminal History Score of ~~3~~ 2 is convicted of a subsequent controlled substance offense and was in possession of a firearm.*

*Mandatory Minimums: ~~24~~36 months Mand. Min. (Minn. Stat. § 152.02~~32~~2, subd. 3(b))*  
*+ 36 months Mand. Min (Minn. Stat. § 609.11, subd. 5(a))*  
*=~~60~~72 months*

*vs.*

*Grid Cell: =~~39~~68 months (Severity Level ~~6D7~~; Criminal History Score of ~~3~~ 2)*

*\* \* \**

#### 5. Addition of Guidelines § 4.C.

The Commission adopted a proposal to add § 4.C, as a result of legislative amendments that would mandate modifications to the Guidelines,<sup>58</sup> to take effect August 1, 2016, as follows.

<sup>58</sup> 2016 Minn. Laws ch. 160, § 18, rejected specific provisions of the Drug Offender Grid as it had been proposed to the Legislature by the Minnesota Sentencing Guidelines Commission on January 15, 2016; directed specific changes to the proposed Drug Offender Grid; and otherwise permitted the proposed Drug Offender Grid to take effect. The Drug Offender Grid shown in this report incorporates all changes directed by the Act.

### 4.C. Drug Offender Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denotes range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subjected to local confinement.

<b>SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)</b>		<b>CRIMINAL HISTORY SCORE</b>						
		<b>0</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6 or more</b>
<i>Aggravated Controlled Substance Crime, 1st Degree Manufacture of Any Amt. Meth</i>	<b>D9</b>	86 <i>74*-103</i>	98 <i>84*-117</i>	110 <i>94*-132</i>	122 <i>104*-146</i>	134 <i>114*-160</i>	146 <i>125*-175</i>	158 <i>135*-189</i>
<i>Controlled Substance Crime, 1st Degree</i>	<b>D8</b>	65 <i>56*-78</i>	75 <i>64*-90</i>	85 <i>73*-102</i>	95 <i>81*-114</i>	105 <i>90*-126</i>	115 <i>98*-138</i>	125 <i>107*-150</i>
<i>Controlled Substance Crime, 2nd Degree</i>	<b>D7</b>	48	58	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Controlled Substance Crime, 3rd Degree Failure to Affix Stamp</i>	<b>D6</b>	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Possess Substances with Intent to Manufacture Meth</i>	<b>D5</b>	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Controlled Substance Crime, 4th Degree</i>	<b>D4</b>	12 <sup>1</sup>	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Meth Crimes Involving Children and Vulnerable Adults</i>	<b>D3</b>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Controlled Substance Crime, 5th Degree</i>	<b>D2</b>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21 <i>18-25</i>
<i>Sale of Simulated Controlled Substance</i>	<b>D1</b>	12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>

\* Lower range may not apply. See section 2.C.3.c(1) and Minn. Stat. § 152.021, subdivisions 3(c) & 3(d).

<sup>1</sup> 12<sup>1</sup>=One year and one day



Presumptive commitment to state imprisonment.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

Effective August 1, 2016

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

*Under Minn. Stat. § 244.101, offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 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. The court is required to 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 must 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.*

<b>Executed Sentence</b>	<b>Term of Imprisonment</b>	<b>Supervised Release Term</b>	<b>Executed Sentence</b>	<b>Term of Imprisonment</b>	<b>Supervised Release Term</b>
12 and 1 day	8 and 1 day	4	58	38 2/3	19 1/3
13	8 2/3	4 1/3	65	43 1/3	21 2/3
15	10	5	68	45 1/3	22 2/3
17	11 1/3	5 2/3	75	50	25
18	12	6	78	52	26
19	12 2/3	6 1/3	85	56 2/3	28 1/3
21	14	7	86	57 1/3	28 2/3
23	15 1/3	7 2/3	88	58 2/3	29 1/3
24	16	8	95	63 1/3	31 2/3
27	18	9	98	65 1/3	32 2/3
28	18 2/3	9 1/3	105	70	35
30	20	10	108	72	36
33	22	11	110	73 1/3	36 2/3
38	25 1/3	12 2/3	115	76 2/3	38 1/3
39	26	13	122	81 1/3	40 2/3
43	28 2/3	14 1/3	125	83 1/3	41 2/3
45	30	15	134	89 1/3	44 2/3
48	32	16	146	97 1/3	48 2/3
51	34	17	158	105 1/3	52 2/3
57	38	19			

## 6. Modifications to Guidelines §§ 5.A and 5.B.

The Commission adopted a proposal to modify §§ 5.A and 5.B, as a result of legislative amendments that would mandate modifications to the Guidelines, to take effect August 1, 2016, as follows.

**Section 5.A. Offense Severity Reference Table**

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law. \* \* \*

<b>Severity Level</b>	<b>Offense Title</b>	<b>Statute Number</b>
9	Controlled Substance Crime 1st Degree	152.021
9	Manufacture Any Amount of Methamphetamine	152.021, subd. 2a(a)
9	Importing Controlled Substances Across State Borders	152.0261
8	Controlled Substance Crime 2nd Degree	152.022
6	Controlled Substance Crime 3rd Degree	152.023
6	Failure to Affix Stamp on Cocaine	297D.09, subd. 1
6	Failure to Affix Stamp on Hallucinogens or PCP	297D.09, subd. 1
6	Failure to Affix Stamp on Heroin	297D.09, subd. 1
6	Failure to Affix Stamp on Remaining Schedule I & II Narcotics	297D.09, subd. 1
5	Possession of Substances with Intent to Manufacture Methamphetamine	152.0262
4	Controlled Substance Crime 4th Degree	152.024
3	Anhydrous Ammonia (Tamper/Theft/Transport)	152.136
3	Methamphetamine Crimes Involving Children and Vulnerable Adults	152.137
2	Controlled Substance in the 5th Degree	152.025

2	Failure to Affix Stamp on Remaining Schedule I, II, & III Non-Narcotics	297D.09, subd. 1
2	Medical Cannabis Violations (Submission of False Records)	152.33, subd. 4
2	Sale of Synthetic Cannabinoids	152.027, subd. 6(c)
1	Failure to Affix Stamp on Marijuana/Hashish/Tetrahydrocannabinols	297D.09, subd. 1
1	Failure to Affix Stamp on Schedule IV Substances	297D.09, subd. 1
1	Medical Cannabis Violations (Intentional Diversion)	152.33, subd. 1
1	Medical Cannabis Violations (Diversion by patient, registered Designated Caregiver, or Parent)	152.33, subd. 2
1	Sale of Simulated Controlled Substance	152.097

<b><u>Severity Level</u></b>	<b><u>Offense Title</u></b>	<b><u>Statute Number</u></b>
<u>D9</u>	<u>Aggravated Controlled Substance Crime 1st Degree</u>	<u>152.021, subd. 2b</u>
	<u>Importing Controlled Substances Across State Borders</u>	<u>152.0261</u>
	<u>Manufacture Any Amount of Methamphetamine</u>	<u>152.021, subd. 2a(a)</u>
<u>D8</u>	<u>Controlled Substance Crime 1st Degree</u>	<u>152.021, subd. 1 or 2</u>
<u>D7</u>	<u>Controlled Substance Crime 2nd Degree</u>	<u>152.022</u>
<u>D6</u>	<u>Controlled Substance Crime 3rd Degree</u>	<u>152.023</u>
	<u>Failure to Affix Stamp on Cocaine</u>	<u>297D.09, subd. 1</u>
	<u>Failure to Affix Stamp on Hallucinogens or PCP</u>	<u>297D.09, subd. 1</u>
	<u>Failure to Affix Stamp on Heroin</u>	<u>297D.09, subd. 1</u>
	<u>Failure to Affix Stamp on Remaining Schedule I &amp; II Narcotics</u>	<u>297D.09, subd. 1</u>
<u>D5</u>	<u>Possession of Substances with Intent to Manufacture Methamphetamine</u>	<u>152.0262</u>
<u>D4</u>	<u>Controlled Substance Crime 4th Degree</u>	<u>152.024</u>
<u>D3</u>	<u>Anhydrous Ammonia (Tamper/Theft/Transport)</u>	<u>152.136</u>
	<u>Methamphetamine Crimes Involving Children and Vulnerable Adults</u>	<u>152.137</u>

<b>Severity Level</b>	<b>Offense Title</b>	<b>Statute Number</b>
<u>D2</u>	<u>Controlled Substance Crime 5th Degree</u>	<u>152.025, subd. 4(b)</u>
	<u>Failure to Affix Stamp on Remaining Schedule I, II, &amp; III Non-Narcotics</u>	<u>297D.09, subd. 1</u>
	<u>Medical Cannabis Violations (Submission of False Records)</u>	<u>152.33, subd. 4</u>
	<u>Sale of Synthetic Cannabinoids</u>	<u>152.027, subd. 6(c)</u>
<u>D1</u>	<u>Failure to Affix Stamp on Marijuana/Hashish/Tetrahydrocannabinols</u>	<u>297D.09, subd. 1</u>
	<u>Failure to Affix Stamp on Schedule IV Substances</u>	<u>297D.09, subd. 1</u>
	<u>Medical Cannabis Violations (Intentional Diversion)</u>	<u>152.33, subd. 1</u>
	<u>Medical Cannabis Violations (Diversion by patient, registered Designated Caregiver, or Parent)</u>	<u>152.33, subd. 2</u>
	<u>Sale of Simulated Controlled Substance</u>	<u>152.097</u>

\* \* \*

### 5.B. Severity Level by Statutory Citation

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law.

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
<u>152.021, subd. 1 or 2</u>	Controlled Substance Crime 1st Degree	<u>9D8</u>
152.021, subd. 2a(a)	Manufacture Any Amount of Methamphetamine	<u>D9</u>
<u>152.021, subd. 2b</u>	<u>Aggravated Controlled Substance Crime 1st Degree</u>	<u>D9</u>
152.022	Controlled Substance Crime 2nd Degree	<u>8D7*</u>
152.023	Controlled Substance Crime 3rd Degree	<u>D6*</u>
152.024	Controlled Substance Crime 4th Degree	<u>D4</u>

\* See section 2.C and Appendix 1 to determine the presumptive disposition.

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
152.025, subd. 4(b)	Controlled Substance Crime 5th Degree	<u>D</u> 2
152.0261	Importing Controlled Substances Across State Borders	<u>D</u> 9
152.0262	Possession of Substances with Intent to Manufacture Methamphetamine	<u>D</u> 5
152.027, subd. 6(c)	Sale of Synthetic Cannabinoids	<u>D</u> 2
152.097	Sale of Simulated Controlled Substance	<u>D</u> 1
152.136	Anhydrous Ammonia (Tamper/Theft/Transport)	<u>D</u> 3
152.137	Methamphetamine Crimes Involving Children and Vulnerable Adults	<u>D</u> 3
152.33, subd. 1	Medical Cannabis Violations (Intentional Diversion)	<u>D</u> 1
152.33, subd. 2	Medical Cannabis Violations (Diversion by patient, registered Designated Caregiver, or Parent)	<u>D</u> 1
152.33, subd. 4	Medical Cannabis Violations (Submission of False Records)	<u>D</u> 2
297D.09, subd. 1	Failure to Affix Stamp on Cocaine	<u>D</u> 6
297D.09, subd. 1	Failure to Affix Stamp on Hallucinogens or PCP	<u>D</u> 6
297D.09, subd. 1	Failure to Affix Stamp on Heroin	<u>D</u> 6
297D.09, subd. 1	Failure to Affix Stamp on Remaining Schedule I & II Narcotics	<u>D</u> 6
297D.09, subd. 1	Failure to Affix Stamp on Remaining Schedule I, II, & III Non-Narcotics	<u>D</u> 2
297D.09, subd. 1	Failure to Affix Stamp on Marijuana/Hashish/Tetrahydrocannabinols	<u>D</u> 1
297D.09, subd. 1	Failure to Affix Stamp on Schedule IV Substances	<u>D</u> 1

\* \* \*

## 7. Modifications to Guidelines § 6.

The Commission adopted a proposal to modify § 6, as a result of legislative amendments to controlled substance offenses, to take effect August 1, 2016, as follows.

### Section 6. Offenses Eligible for Permissive Consecutive Sentences

- A.** Convictions for attempted offenses or conspiracies to commit offenses listed below are eligible for permissive consecutive sentences as well as convictions for completed offenses.
- B.** Under section 2.F.2(a)(1)(i), it is permissive for a current felony conviction to run consecutively to a prior felony sentence from a jurisdiction other than Minnesota if the non-Minnesota conviction is for a crime that is equivalent to a crime listed below.

Statute Number	Offense Title
152.021, subd. 2a(a)	Manufacture any Amount of Methamphetamine
<u>152.021, subd. 2b(2) with ref. to 152.01, subd. 24(8)</u>	<u>Aggravated Controlled Substance Crime 1st Degree, Sale to a Minor or Vulnerable Adult</u>
152.022, subd. 1 <del>(5)</del> (6)	Sells Cocaine/Narcotic to Minor/Employs Minor
152.023, subd. 1(3)	Sells Sch. I,II,III to Minor (not Narcotic)
152.023, subd. 1(4)	Sells Sch. I,II,III Employs Minor (not Narcotic)
152.024, subd. 1(2)	Schedule IV or V to Minor
152.024, subd. 1(3)	Employs Minor to Sell Schedule IV or V
152.0261, subd. 1a	Employing a Minor to Import Controlled Substances
152.137	Methamphetamine Crimes Involving Children or Vulnerable Adults

\* \* \*

## 8. Modifications to Guidelines Appendix 1.

The Commission adopted a proposal to modify Appendix 1 as a result of legislative amendments to controlled substance offenses, to take effect August 1, 2016, as follows.

### Appendix 1. Mandatory and Presumptive Sentences Reference Table

\* \* \*

Statute	Offense	Prerequisite or Conditions	Minimum Duration
152.021	Controlled Substance Crime 1st Degree	<del>Prior felony conviction per chapter under Minn. Stat. § 152.021 or 022, or similar non-Minnesota offense. finding under Minn. Stat. § 152.18</del>	48 Months
152.022	Controlled Substance Crime 2nd Degree	<del>Prior felony conviction per chapter under Minn. Stat. § 152.021 or 022, or similar non-Minnesota offense. finding under Minn. Stat. § 152.18</del>	36 Months
152.023, subd. 3(a)	Controlled Substance Crime 3rd Degree	<del>Prior felony conviction under Minn. Stat. § 152 or finding under Minn. Stat. § 152.18</del>	Grid Time <sup>‡</sup>
152.023, subd. 3(b)	Controlled Substance Crime 3rd Degree	<del>Prior felony conviction under Minn. Stat. § 152 or finding under Minn. Stat. § 152.18</del>	24 months

<sup>‡</sup> -Presumptive commitment per Guidelines section 2.C.

### Appendix 2.2. Modification to Guidelines Commentary – Adopted November, 2016

On November 17, 2016, the Commission decided that, in calculating a Defendant's criminal history score, prior drug convictions are not to be recalculated using post-August 1, 2016 drug threshold weights. The rationale was that Guidelines Comment 2.B.106 applies only to added or removed elements of the offense and does not apply to modifications of an element. Because the changes to the controlled substance laws modified an element, recalculation is not necessary. Modifications to Comment 2.B.106, as follows, took effect immediately.

***2.B.106.*** *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements. If the prior offense has been removed from the current Severity Offense Reference Table in response to a legislative action that repealed the prior offense and created separate offenses with new or removed elements, use the current severity level for the newly created offense that has been added to Severity Offense Reference Table and encompasses the behavior necessarily proven by the prior conviction. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

## Appendix 2.3. Legislative Amendments to Non-Controlled Substance Offenses – Adopted July, 2016

The Commission reviewed laws related to non-controlled substance offenses newly enacted or amended by the 2016 Legislature, and adopted a proposal to modify Minnesota Sentencing Guidelines to add new §§ 2.G.11 and 2.G.12; and to make modifications in §§ 2.B.3.g, 5.A, 5.B, and 6; comments 2.B.304 and 2.D.308; and Guidelines Appendix 1.

### 1. Modification to Guidelines § 2.B.

The Commission adopted a proposal that, for Criminal Vehicular Homicide (Death or Death to an Unborn Child, Qualified Prior Conviction), assign no misdemeanor units to the qualified prior driving offense that was used to increase the statutory maximum penalty, by modifying § 2.B.3, to take effect August 1, 2016, as follows.

#### Section 2.B. Criminal History

\* \* \*

#### 3. Prior Gross Misdemeanors and Misdemeanors. \* \* \*

- g. Assignment of Units for Criminal Vehicular Homicide or Operation or Felony Driving While Impaired (DWI). If the current conviction is for criminal vehicular homicide or operation or felony DWI, assign previous violations of Minn. Stat. §§ 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, 609.2112, 609.2113, or 609.2114 two units each. There is no limit to the total number of misdemeanor points that can be included in the offender's criminal history score due to criminal vehicular homicide or operation or DWI offenses. For DWI offenses, see section 2.B.6 for exceptions to this policy relating to predicate offenses used for enhancement purposes. For Criminal Vehicular Homicide (Death or Death to an Unborn Child, and Qualified Prior Conviction), assign no misdemeanor units to the qualified prior driving offense that was used to increase the statutory maximum penalty. \* \* \*

#### *Comment*

\* \* \*

**2.B.304.** *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 Minn. Stats. §§ 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, 609.2112, 609.2113, or 609.2114 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. \* \* \**

*When the current offense is a conviction under Minn. Stat. § 609.2112, subd. 1(b) (Death, and Qualified Prior Conviction), or § 609.2114, subd. 1(b) (Death to an Unborn Child, and Qualified Prior Conviction), the Commission excluded consideration of the qualified prior driving offense, if a misdemeanor or gross misdemeanor, from the criminal history score because, by virtue of the conviction offense, the qualified prior conviction has been accounted for in the enhanced penalty. \* \* \**

2. Modification to Guidelines § 2.D.

The Commission adopted a proposal to clarify that the use of the aggravating factor involving bias motivation under Guidelines § 2.D.3.b(11) is prohibited when the statutory maximum was increased under Minn. Stat. § 609.2233 by modifying Comment 2.D.308, to take effect August 1, 2016, as follows.

**Section 2.D. Departures from the Guidelines**

\* \* \*

**2.D.308.** *The aggravating factor involving bias motivation under section 2.D.3.b(11) cannot be used when ~~an offender has been convicted under a statute that~~ sentencing an offender for a crime with an increased statutory maximum penalty under Minn. Stat. § 609.2233 (felony assault motivated by bias), or for a crime that was 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(a)(1) (stalking)). The Commission intends that a penalty for a bias-motivated offense be subject to enhancement only once. \* \* \**

3. Modification to Guidelines § 2.G.

The Commission adopted a proposal to increase by 25 percent the presumptive sentence duration when the statutory maximum was increased under Minn. Stat. § 609.2233; and to increase by 50 percent the presumptive sentence duration when an offender is sentenced for a criminal vehicular homicide under Minn. Stat. § 609.2112, subd. 1(b) (death, qualified prior conviction), or 609.2114, subd. 1(b) (death to an unborn child, qualified prior conviction), by inserting new §§ 2.G.11 & 2.G.12, to take effect August 1, 2016, as follows.

**Section 2.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers**

\* \* \*

11. Felony Assault Motivated by Bias. When an offender is sentenced for a crime for which the maximum penalty has been increased under Minn. Stat. § 609.2233, the presumptive duration found in the appropriate cell on the applicable Grid for the underlying offense must be increased by twenty-five percent.

12. Criminal Vehicular Homicide (Death or Death to an Unborn Child, and Qualified Prior Conviction). When an offender is sentenced for a criminal vehicular homicide under Minn. Stat. § 609.2112, subd. 1(b) (death, qualified prior conviction), or 609.2114, subd. 1(b) (death to an unborn child, qualified prior conviction), the presumptive duration found in the appropriate cell on the Standard Grid for the offense must be increased by fifty percent. \* \* \*

4. Modification to Guidelines §§ 5.A and 5.B.

The Commission adopted a proposal to assign severity-level rankings as a result of new laws and conforming modifications as a result of amended laws, by modifying §§ 5A & 5B, to take effect August 1, 2016, as follows.

**Section 5.A. Offense Severity Reference Table**

\* \* \*

Severity Level	Offense Title	Statute Number
8	Criminal Vehicular Homicide (Death)	609.2112, subd. 1(a)
	<u>Criminal Vehicular Homicide (Death, and Qualified Prior Conviction)</u>	609.2112, subd. 1(b)
	Criminal Vehicular Operation (Death to an Unborn Child)	609.2114, subd. 1(a)
	<u>Criminal Vehicular Operation (Death to an Unborn Child, and Qualified Prior Conviction)</u>	609.2114, subd. 1(b)

\* \* \*

\* \* \*

Severity Level	Offense Title	Statute Number
4	<u>Interference with a Dead Body or Scene of Death</u>	<u>609.502 subd. 1(1)</u>

\* \* \*

Severity Level	Offense Title	Statute Number
3	Coercion ( <u>Prop. Value \$2,500 or More</u> )	609.27, subd. 1(2),(3), (4), & (5), & (6)

\* \* \*

Severity Level	Offense Title	Statute Number
3	<u>Nonconsensual Dissemination of Private Sexual Images</u>	<u>617.261, subd. 2(b)</u>

\* \* \*

Severity Level	Offense Title	Statute Number
2	Coercion ( <u>Prop. Value \$301 - \$2,499,500</u> )	609.27, subd. 1(2),(3), (4), & (5), & (6)

\* \* \*

Severity Level	Offense Title	Statute Number
1	Assaults <u>4th Degree</u> Motivated by Bias	609.2231, subd. 4(b)

\* \* \*

## Section 5.B. Severity Level by Statutory Citation

\* \* \*

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
609.2112, subd. 1(a)	Criminal Vehicular Homicide (Death)	8
<u>609.2112, subd. 1(b)</u>	<u>Criminal Vehicular Homicide (Death, and Qualified Prior Conviction)</u>	<u>8*</u>
609.2113, subd. 1	Criminal Vehicular Operation (Great Bodily Harm)	5
609.2113, subd. 2	Criminal Vehicular Operation (Substantial Bodily Harm)	3
609.2114, subd. 1(a)	Criminal Vehicular Operation (Death to an Unborn Child)	8
<u>609.2114, subd. 1(b)</u>	<u>Criminal Vehicular Operation (Death to an Unborn Child, and Qualified Prior Conviction)</u>	<u>8*</u>
609.2114, subd. 2	Criminal Vehicular Operation (Injury to an Unborn Child)	5

\* See section 2.G.12 to determine the presumptive sentence.

\* \* \*

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
609.2231, subd. 4(b)	Assaults <u>4th Degree</u> Motivated by Bias	1 **
<u>609.2233</u>	<u>Felony Assault Motivated by Bias</u>	<u>See Note*</u>

\*\* See section 2.C.2 and Appendix 3 to determine the presumptive duration. Depending on the offender’s criminal history score, the presumptive duration may exceed the statutory maximum.

\* See section 2.G.11 to determine the presumptive sentence.

\* \* \*

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
609.27, subd. 1(2),(3), (4), & (5), & (6)	Coercion (Prop. Value <del>over</del> <u>\$2,500 or More</u> )	3
609.27, subd. 1(2),(3), (4), & (5), & (6)	Coercion (Prop. Value \$301 - \$2,500)	2

\* \* \*

Statute Number	Offense Title	Severity Level
<u>609.502 subd. 1(1)</u>	<u>Interference with a Dead Body or Scene of Death</u>	<u>4</u>

\* \* \*

Statute Number	Offense Title	Severity Level
<u>617.261, subd. 2(b)</u>	<u>Nonconsensual Dissemination of Private Sexual Images</u>	<u>3</u>

\* \* \*

5. Modification to Guidelines § 6.

The Commission adopted a proposal to add nonconsensual dissemination of private sexual images to the list of offenses eligible for permissive consecutive sentences, by modifying § 6, with the modification to take effect August 1, 2016, as follows.

**Section 6. Offenses Eligible for Permissive Consecutive Sentences**

\* \* \*

Statute Number	Offense Title
<u>617.261, subd. 2(b)</u>	<u>Nonconsensual Dissemination of Private Sexual Images</u>

6. Modification to Guidelines Appendix 1.

The Commission adopted a proposal to make technical changes to Appendix 1, to take effect August 1, 2016, as follows.

**Appendix 1. Mandatory and Presumptive Sentences Reference Table**

\* \* \*

Statute	Offense	Prerequisite or Conditions	Minimum Duration
169A.24, subd. 1(2)	Driving while Intoxicated	Prior Felony DWI	Grid Time
169A.24, subd. 1(3)	Driving while Intoxicated	Prior Criminal Vehicular Homicide or Operation under Minn. Stat. § 609.2112.1(2) thru (6); § 609.2113.1(2) thru (6); § 609.2113.2(2) thru (6); <u>§ 609.2114.1(2) thru (6);</u> <u>§ 609.2114.2(2) thru (6)</u>	Grid Time

\* \* \*

## Appendix 2.4. Non-Legislative Modifications – Adopted July, 2016

Through the course of the previous year, the Commission reviews potential non-legislative modifications. As a result of these reviews, the Commission adopted a proposal to modify Minnesota Sentencing Guidelines to make modifications in §§ 2.B.2.b, 2.B.5.b, 5.A, 5.B, and 8; and Appendix 2; to renumber Minnesota Sentencing Guidelines § 2.G.11 as § 2.G.13, effective August 1, 2016; and to make modifications in Minnesota Sentencing Guidelines § 2.G.13 (currently numbered § 2.G.11), effective August 1, 2017, unless the Legislature by law provides otherwise.

### 1. Modification to Guidelines § 2.B.2.

The Commission adopted a proposal to clarify that both a current sex offense, as described in § 2.B.2.b(1), *and* a custody status for a prior sex offense, as described in § 2.B.2.b(2), are required for the assignment of two custody status points, with the clarification to take effect August 1, 2016, as follows.

#### Section 2.B. Criminal History

\* \* \*

### 2. Custody Status at the Time of the Offense.

\* \* \*

#### b. Two Custody Status Points. Assign **two** custody status points if:

- (1) the current conviction offense is an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166); and

- (2) the offender qualifies for one custody status point, as described in section a, above, for an offense currently found on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166).

\* \* \*

2. Modification to Guidelines § 2.B.5.

The Commission adopted a proposal to clarify that the policy for classifying non-Minnesota prior offenses is based on offense definitions and sentencing polices in effect when the current Minnesota offense was committed, with the modification taking effect August 1, 2016, as follows.

**Section 2.B. Criminal History**

\* \* \*

5. Convictions from Jurisdictions other than Minnesota.

\* \* \*

- b. How to Count. Find the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense. The section in which to count the non-Minnesota offense in criminal history depends on:

- whether the offense is defined as a felony, gross misdemeanor, or targeted misdemeanor in Minnesota; **and**
- the sentence imposed.

An offense may be counted as a felony only if it would **both** be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence, which includes the equivalent of a stay of imposition. The offense definitions in effect when the current Minnesota offense was committed govern the designation of non-Minnesota convictions as felonies, gross misdemeanors, or misdemeanors.

\* \* \*

3. Modification to Guidelines § 2.G.

The Commission adopted a proposal to renumber Guidelines § 2.G.11 as § 2.G.13 and modify the Grid in that section, as shown below, to display whole numbers in the lower ranges of the Grid at Criminal History Scores 1, 3, and 5, with the renumbering taking effect

August 1, 2016, and the remaining modifications taking effect August 1, 2017, unless the Legislature by law provides otherwise, as follows.

**Section 2.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers**

\* \* \*

11.13. Attempt or Conspiracy to Commit First-Degree Murder. When an offender is sentenced for attempt or conspiracy to commit murder in the first degree under Minn. Stat. § 609.185 or murder of an unborn child in the first degree under Minn. Stat. § 609.2661, the presumptive disposition is commitment. The presumptive durations are as follows:

SEVERITY LEVEL OF CONVICTION OFFENSE	CRIMINAL HISTORY SCORE						
	0	1	2	3	4	5	6 or More
<i>Conspiracy / Attempted Murder, 1<sup>st</sup> Degree</i>	<b>180</b> <i>153-216</i>	<b>190</b> <del><i>161.5</i></del> <i>162-228</i>	<b>200</b> <i>170-240</i>	<b>210</b> <del><i>178.5</i></del> <i>179-240<sup>1</sup></i>	<b>220</b> <i>187-240<sup>1</sup></i>	<b>230</b> <del><i>195.5</i></del> <i>196-240<sup>1</sup></i>	<b>240</b> <i>204-240<sup>1</sup></i>

<sup>1</sup> Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2. \* \* \*

4. Modification to Guidelines §§ 5.A. and 5.B.

The Commission adopted a proposal to designate a violation of the corporate political contributions law under Minn. Stat. § 211B.15, as “unranked” in Guidelines § 5, with the modification to take effect August 1, 2016, as follows.

**Section 5.A. Offense Severity Reference Table**

\* \* \*

Severity Level	Offense Title	Statute Number
UNRANKED	<u>Corporate Political Contribution Violations</u>	<u>211B.15</u>

\* \* \*

### Section 5.B. Severity Level by Statutory Citation

\* \* \*

Statute Number	Offense Title	Severity Level
<u>211B.15</u>	<u>Corporate Political Contribution Violations</u>	<u>Unranked</u>

\* \* \*

#### 5. Modification to Guidelines § 8.

The Commission adopted a proposal to modify the targeted misdemeanor list by putting violation of a domestic abuse no contact order under Minn. Stat. § 629.75, in numerical order, with the correction to take effect August 1, 2016, as follows.

#### Section 8. Targeted Misdemeanor List

*(As provided for in Minn. Stat. § 299C.10, subd. 1(e))*

Under Minn. Stat. § 299C.10, subd. 1(e), a targeted misdemeanor is a misdemeanor violation of:

Statute Number	Offense Title
169A.20	Driving While Impaired
518B.01; <del>629.75</del>	Order for Protection Violation
609.224	Assault 5th Degree
609.2242	Domestic Assault
609.746	Interference with Privacy
609.748	Harassment or Restraining Order Violation
617.23	Indecent Exposure
<u>629.75</u>	<u>Domestic Abuse No Contact Order Violation</u>

## 6. Modification to Guidelines Appendix 2.

The Commission adopted a proposal to modify Appendix 2 to correctly list the condition that must be met for the mandatory minimum to apply under Minn. Stat. § 609.11, to take effect August 1, 2016, as follows.

**Appendix 2. Dangerous Weapons Offense Reference Table**

\* \* \*

<b>Dangerous Weapons – Minn. Stat. § <a href="#">609.11</a></b>			
<b>Statute</b>	<b>Offense</b>	<b>Prerequisite or Conditions</b>	<b>Minimum Duration</b>
<a href="#">609.11, subd. 4</a>	Dangerous Weapon (Other than Firearm)	Weapon is an element of crime <u>or otherwise established</u>	1 Year and 1 Day
<a href="#">609.11, subd. 4</a>	Dangerous Weapon (Other than Firearm) – Subsequent <del>o</del> Offense	Current dangerous weapon (other than firearm) offense <del>(other than firearm)</del> with prior dangerous weapon (other than firearm) offense  Weapon is an element of crime <u>or otherwise established</u>	36 Months
<a href="#">609.11, subd. 5(a)</a>	Firearm	<del>Weapon</del> Firearm is an element of crime <u>or otherwise established</u>	36 Months
<a href="#">609.11, subd. 5(a)</a>	Firearm – Subsequent Offense	Current firearm offense with prior firearm <del>or dangerous weapon</del> offense  <del>Weapon</del> Firearm is an element of crime <u>or otherwise established</u>	60 Months
<a href="#">609.11, subd. 5(b)</a>	Certain Persons not to have Firearms or Ammunition	Current conviction under Minn. Stat. § 609.165 or Minn. Stat. § 624.713 subd. 1(2)	60 Months

\* \* \*

## Appendix 3. Modifications to the Sentencing Guidelines and Commentary – Adopted December, 2016

On December 30, 2016, following a public hearing on December 21, 2016, the Minnesota Sentencing Guidelines Commission adopted the following modifications to the Sentencing Guidelines and Commentary resulting from new and amended legislation and other policy considerations.

### Appendix 3.1. Re-Ranking Severity Level of Child Neglect and Endangerment

The Commission adopted a proposal to modify Guidelines §§ 5.A and 5.B, with a proposed effective date of August 1, 2017, as follows.

#### 5.A. Offense Severity Reference Table

\* \* \*

Severity Level	Offense Title	Statute Number
<u>5</u>	<u>Child Neglect/Endangerment</u>	<u>609.378</u>
<u>1</u>	<u>Child Neglect/Endangerment</u>	<u>609.378</u>

\* \* \*

#### 5.B. Severity Level by Statutory Citation

\* \* \*

Statute Number	Offense Title	Severity Level
609.378	Child Neglect/Endangerment	<u>5</u> <u>1</u>

\* \* \*

### Appendix 3.2. Modifying the Permissive Consecutive Sentencing List

The Commission adopted a proposal to modify Guidelines § 6, with a proposed effective date of August 1, 2017, as follows.

#### Section 6. Offenses Eligible for Permissive Consecutive Sentences

- A. Convictions for attempted offenses or conspiracies to commit offenses listed below are eligible for permissive consecutive sentences as well as convictions for completed offenses.
- B. Under section 2.F.2(a)(1)(i), it is permissive for a current felony conviction to run consecutively to a prior felony sentence from a jurisdiction other than Minnesota if the non-Minnesota conviction is for a crime that is equivalent to a crime listed below.

\* \* \*

Statute Number	Offense Title
609.502, subd. 1(1)	Interference with a Dead Body or Scene of Death

\* \* \*

## Appendix 4. Proposed Modifications to the Sentencing Guidelines and Commentary – Submitted to Public Hearing but Not Adopted – December, 2016

On November 17, 2016, the Commission proposed, on a vote of 6 to 5, to modify the Guidelines by adding § 2.B.7.c and Comment 2.B.704. This proposal was given a public hearing on December 21, 2016. After receiving oral and written public comments, the Commission debated the motion to adopt the proposed modification on December 30, 2016. The motion failed on a vote of 5 to 6. The modification that was not adopted is shown in Appendix 4.1. Three documents or comments that members of the majority found persuasive are reproduced in Appendixes 4.2, 4.3, and 4.4.

### Appendix 4.1. Proposed Modification Regarding Prior Controlled Substance Offenses in Criminal History – Submitted to Public Hearing but Not Adopted

The following is the text of the proposed modification to the Minnesota Sentencing Guidelines and Commentary that was submitted to public hearing on December 21, 2016, and was rejected on December 30, 2016:

[2.B.]7. Determining Offense Levels for Prior Offenses.

- a. Classification of Prior Offense. The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies. Offenses that are petty misdemeanors by statute, or that are certified as or deemed to be petty misdemeanors under Minn. R. Crim. P. 23, must not be used to compute the criminal history score.
- b. Monetary Threshold. When a monetary threshold determines the offense classification, the monetary threshold in effect when the prior offense was committed, not the current threshold, determines the offense classification in calculating the criminal history score.
- c. Drug Threshold. When an offender's criminal history contains a Minnesota felony conviction for controlled substance crime in the first, second, third, or fifth degree with an offense date prior to August 1, 2016, the current felony offense of the same name determines the offense classification in calculating the criminal history score, notwithstanding the redefinition of the offense, unless the court finds, by a preponderance of evidence, that the facts

underlying the prior conviction would have constituted a controlled substance crime of a lesser degree, or a gross misdemeanor controlled substance crime, if the offense had been committed on or after August 1, 2016. If the court makes such a finding, then the controlled substance crime of the lesser degree, or the gross misdemeanor controlled substance crime, determines the offense classification in calculating the criminal history score.

*Comment*

\* \* \*

**2.B.704.** *On August 1, 2016, drug-quantity thresholds changed for various degrees of controlled substance crime, and a gross misdemeanor version of Fifth-Degree Controlled Substance Crime was created. Despite these elemental changes and the creation of the Drug Offender Grid, the essential severity of the various degrees of controlled substance crime remained unaltered by the Legislature and the Commission. The Commission decided that prior Minnesota felony drug offenses committed before August 1, 2016, should receive the same weight as offenses of the same degree committed on or after that date. On the other hand, the Commission decided that it was appropriate to permit a reduced weight when it could be proven that the facts underlying the prior offense comported with an offense that the Legislature now considered to be less serious. To illustrate, assume an offender was convicted in 2015 of Fifth-Degree Controlled Substance Crime for possessing a residual amount of methamphetamine weighing less than 0.25 grams, and that the offender had not been previously convicted of a chapter 152 offense (or similar crime from another jurisdiction). Because the prior offense was a felony Fifth-Degree Controlled Substance Crime, it will be eligible to contribute ½ felony point to the offender's criminal history score, unless it is proven by a preponderance of evidence that, under current offense definitions, the prior offense meets the definition of gross misdemeanor Fifth-Degree Controlled Substance Crime. In the latter case, the prior offense will be eligible to contribute one gross misdemeanor unit to the offender's criminal history score.*

**Appendix 4.2. Memorandum of Associate Justice (Retired) Christopher J. Dietzen**

The Commission's Chair's memorandum in opposition to the motion is reproduced below.

December 28, 2016

MEMORANDUM

TO: MEMBERS OF THE MINNESOTA SENTENCING GUIDELINES COMMISSION, EXECUTIVE DIRECTOR NATE REITZ, AND STAFF

FROM: CHAIRMAN CHRISTOPHER J. DIETZEN

RE: Proposed Amendment to Minn. Sent. Guidelines 2.B.7

On December 30, 2016, the Commission will vote on a proposed amendment to Minn. Sent. Guidelines 2.B.7, which would add the following underlined language:

**7. Determining Offense Levels for Prior Offenses.**

- a. *Classification of Prior Offense.* The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subs. 2-4a) and sentencing policies. Offenses that are petty misdemeanors by statute, or that are certified as or deemed to be petty misdemeanors under Minn. R. Crim. P. 23, must not be used to compute the criminal history score.
- b. *Monetary Threshold.* When a monetary threshold determines the offense classification, the monetary threshold in effect when the prior offense was committed, not the current threshold, determines the offense classification in calculating the criminal history score.
- c. *Drug Threshold.* When an offender's criminal history contains a Minnesota felony conviction for controlled substance crime in the first, second, third, or fifth degree with an offense date prior to August 1, 2016, the current felony offense of the same name determines the offense classification in calculating the criminal history score, notwithstanding the redefinition of the offense, unless the court finds, by a preponderance of evidence, that the facts underlying the prior conviction would have constituted a controlled substance crime of a lesser degree, or a gross misdemeanor controlled substance crime, if the offense had been committed on or after August 1, 2016. If the court makes such a finding, then the controlled substance crime of the lesser degree, or the gross misdemeanor controlled substance crime, determines the offense classification in calculating the criminal history score.

The proponents of the modification of Minn. Sent. Guidelines 2.B.7 argue that the “proposed guideline is not retroactive,” and therefore it is lawful. It is true that Minn. Sent. Guidelines 3.G would limit the proposed modification to offenders who commit a new offense on or after the effective date of the modification. But this does not fully address the retroactivity problem. Specifically, the problem is that the substance of the proposed modification allows application of the new thresholds to an offender’s prior convictions. This is the epitome of retroactivity. Because the substance of the proposed modification is in direct conflict with the express intent of the Legislature that the 2016 drug thresholds not be applied retroactively, the proposed modification must be rejected.

To fully appreciate the retroactivity concerns it is important to understand the process for calculating a defendant’s criminal history score, which involves three steps—identify the defendant’s prior conviction, check the offense severity chart, and assign criminal history points based upon those determinations. Under the current methodology, a defendant’s prior conviction is defined by the law that existed at the time the prior offense was committed. Based on the severity level of each prior conviction, the probation officer calculates the defendant’s criminal history score. A defendant’s prior conviction is not altered by subsequent changes in the law. This well-established procedure will be significantly altered if the Commission adopts the proposed modification. More specifically, under the proposed modification a defendant’s prior conviction of *first-degree* sale of a controlled substance would be treated as a prior conviction of *second-degree* sale of a controlled substance for purposes of calculating the defendant’s current criminal history score, if the defendant proves that application of the *new drug thresholds* to his *old*

*conduct* would have resulted in a second-degree conviction. It is therefore clear that the proponents seek to redefine a defendant's pre-amendment conduct using the new 2016 threshold, which in my view is the epitome of retroactivity.

Allowing a court to rewrite a defendant's criminal history if the defendant shows that application of the 2016 amendments to his or her pre-amendment convictions would result in a lesser degree of conviction is not only unprecedented, it is contrary to well-established law. Let me explain.

The general principle is that changes in criminal laws operate prospectively, not retroactively. Minn. Stat. § 645.21 (2016) (providing that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature"); *Krause v. Merickel*, 344 N.W.2d 398, 402 (Minn. 1984) (explaining that "[o]ur examination of the 1975 amendment and its legislative history fails to indicate any legislative intent to apply the repeal retroactively"). Thus, a new law may not be applied retroactively to prior conduct unless expressly provided for by the Legislature.

Here, the Legislature clearly stated that the law was prospective in its application and not retroactive. In enacting the statutory amendments to the drug thresholds, the Legislature expressly stated that the effective date of the amendments was August 1, 2016, and that the amendments applied "to crimes committed on or after that date." Thus, the statutory amendments apply to crimes committed after the effective date of the law and the sentences imposed for those crimes. Notably, the Senate tried to make the new drug thresholds retroactive, but was unsuccessful in doing so.

The proponents of the modification appear to concede that the new drug thresholds apply prospectively to new offenses that occur after August 1, 2016, but then allege that the new drug thresholds may be applied retroactively to calculate the criminal history score. The problem with this argument is that a portion of the sentence—the criminal history score, which measures the seriousness of an offender’s *past* convictions—is recalculated using the *new* drug thresholds. Specifically, the proposed modification applies the new drug thresholds to criminal conduct that occurred before August 1, 2016. Thus, the proposed modification attempts to alter the rights of the defendant for conduct that occurred before August 1, 2016. Because the substance of the proposed modification to Minn. Sent. Guidelines 2.B.7 retroactively applies the new law to prior conduct in direct conflict with legislative intent that the new law only apply to criminal conduct that occurred after August 1, 2016 and sentence imposed for those crimes, the proposed modification must be rejected.

Additionally, the proposed modification is directly contrary to recent amendments to the guidelines. On November 17, 2016 the Commission considered whether the severity level of a prior conviction should be modified every time the Legislature redefines an offense. There were conflicting arguments of when and under what circumstances an alteration of the severity level was appropriate. The Commission decided that if an offense has been redefined by the Legislature the severity level for the prior conviction should not be recalculated unless the Legislature either added or removed an element of the prior offense and the Commission in response to the legislative action removed the prior offense from the Offense Severity Reference Table and added the newly created offense to the Offense Severity Reference Table. The purpose of the proposed modification to Minn.

Sent. Guidelines 2.B.7 is to create a specific exception to the general rule that the severity level of a prior conviction should not be recalculated every time the Legislature amends an offense. An objective reason for why prior controlled substance convictions should be treated differently than all other offenses has not yet been articulated.

## II

The proponents of the modification also argue that the legislative intent of the 2016 drug laws was to overturn the “injustice” of lower drug thresholds, and that additional relief in the form of lower sentences is necessary to relieve the alleged injustice against prior drug offenders. This argument not only mischaracterizes the legislative intent, it is contrary to the past practices of the Commission and will adversely affect the criminal justice system.

The proponent’s characterization of the legislative intent is inconsistent with Legislature’s express statement that the 2016 amendments are to be applied prospectively. Although some of the people who lobbied in favor of the 2016 amendments argued there was a need to correct perceived injustices, others supported the amendments for different reasons. The fact that the Legislature rejected a request that the 2016 amendments be given retroactive effect, and instead expressly stated that the amendments applied prospectively, significantly undermines the proponent’s claim that the 2016 amendments were enacted to remedy 25-years of injustice.

Moreover, the past practice has been to apply changes to drug threshold prospectively. For example, when the Legislature lowered the thresholds for the sale of heroin 20 years ago, *see* Act of May 30, 1997, ch. 239 § 6-7, 1997 Minn. Laws 2742, 2789-2790 (lowering the threshold for first-degree sale of heroin from 50 grams to 10 grams and the threshold for second-degree sale of heroin from 10 grams to 3 grams), there is no evidence that the Commission directed probation officers or courts to reexamine prior convictions of second-degree sale of heroin to determine whether they constituted first-degree sale of heroin under the newly enacted thresholds for purposes of determining the offender's criminal history score. Moreover, it is my understanding that prosecutors in the metro never requested that criminal history be recalculated based on the new heroin thresholds. Rather, those changes to drug thresholds were applied prospectively. It would be inconsistent to change that approach to drug sentencing laws. There is no rational basis to treat reductions in thresholds one way and increases to thresholds differently.

Not only is the proposed modification inconsistent with past practices, it will also adversely affect public safety and substantially benefit repeat drug dealers. The actual purpose of the drug sentencing reform was to reduce sentences for drug users and give those who were addicted the opportunity for treatment, and to give the prosecutors the tools they needed to go after drug dealers. It was believed that the new law would improve public safety by allowing a judge to send an offender who was chemically dependent and wanted to get better to receive treatment and become a productive citizen; and to give the prosecutors the tools go to after drug dealers. The proposed modification does not further any of these goals.

The drug sentencing reform already gives the drug user a substantial reduction in the sentence, and does not change the ability of a judge to send the person to treatment if a mitigating factor is found. This proposal simply benefits repeat offenders who have a prior drug conviction. A substantial number of those offenders are drug dealers who pleaded to a lesser offense as part of a negotiated plea. The early release of those drug dealers does not promote public safety; instead it adversely affects public safety. Further, there is no evidence that such proposal will improve the geographic disparity in drug sentences between metro and out-state counties. In fact, it is more likely that the proposed modification will exacerbate the problem. Specifically, it is more likely that a repeat drug offender in Hennepin County will receive a reduced criminal history score for a prior drug offense than his/her repeat offender counterpart in Olmsted county.

The following hypothetical provides an example of how a repeat drug dealer would benefit under the proposed amendment to Minn. Sent. Guidelines 2.B.7. The defendant has a prior 2015 conviction of first-degree sale of 16 grams of cocaine. As part of his factual basis he admits selling 16 grams of cocaine. His current conviction also involves the sale of 16 grams of cocaine. Again, the defendant admits as part of his factual basis that he sold 16 grams of cocaine. Under the existing guidelines, the defendant's 2015 conviction of first-degree sale of 16 grams of cocaine would be a severity level D-8, *see* Minn. Sent. Guidelines 5.A (2016), and result in a criminal history score of 2, *see* Minn. Sent. Guidelines 2.B.1.a. (2016). The guidelines "presumptive range" for his current conviction of second-degree sale of cocaine would be an *executed* prison sentence of 58 to 81 months with a "presumptive duration" of 68 months in prison (offense severity of D-7 for the

second-degree sale conviction and a criminal history score of 2). Before the 2016 amendments, the guidelines “presumptive range” for the defendant’s current offense (which would have been a first-degree sale of cocaine) would have been an executed prison sentence of 94 to 132 months with a “presumptive duration” of 110 months in prison. Put differently, even when the existing guidelines are used, the 2016 amendments result in a *42-month decrease* in the guideline presumptive duration.

Under the proposed amendment to Minn. Sent. Guidelines 2.B.7, the defendant’s 2015 conviction of first-degree sale of 16 grams of cocaine would be reduced to a severity level D-7 (if the defendant proved by a preponderance of the evidence that his prior sale of 16 grams of cocaine now falls within the definition of second-degree sale of cocaine), *see* Minn. Sent. Guidelines 5.A (2016), and would result in a criminal history score of 1½, which would be rounded down to 1 in accordance with Minn. Sent. Guidelines 2.B.1.i (2016) (“The felony point total is the sum of the felony weights. If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number”). The guidelines presumptive range for his current conviction of second-degree sale of 16 grams of cocaine would be a *stayed* prison sentence of 58 (offense severity of D-7 for the second-degree sale conviction and a criminal history score of 1). Put differently, the proposed amendment to Minn. Sent. Guidelines 2.B.7 results in a non-prison commit for a drug dealer who has repeatedly sold 16 grams of cocaine.

Perhaps more troubling is the hypothetical in which a defendant, who has two prior convictions for *possession of shoplifting gear* (which gives the defendant a criminal history score of 2 because possession of shoplifting gear is a severity level 3 and he would receive

1 criminal history point for each of the prior convictions), and who is convicted of selling of 16 grams of cocaine for the first-time. Because the proposed amendment to Minn. Sent. Guidelines 2.B.7 is limited to prior controlled substance convictions, the defendant's criminal history score would remain a 2 and the "presumptive duration" would be an *executed* 68 month prison sentence. Put differently, under the proposed amendment to Minn. Sent. Guidelines 2.B.7, the 2016 amendments result in a *68-month executed prison sentence* for a first time drug dealer who sells 16 grams of cocaine and who has two prior convictions for possession of shoplifting gear, while a person who has repeatedly sold 16 grams of cocaine would receive a *58-month stayed sentence*.

Not only does the proposed modification benefit repeat drug offenders, it precludes a court from applying the new thresholds to an offender's pre-amendment convictions if such an application would result in a greater degree of conviction. Under the proposed modification, a court is authorized to rewrite a defendant's criminal history if the defendant shows that application of the 2016 amendments to his or her pre-amendment convictions would result in a lesser degree of conviction. But if application of the 2016 amendments to the offender's pre-amendment convictions would result in a greater degree of conviction (as would be the case in most sale of marijuana cases), the district court is not allowed to rewrite a defendant's criminal history.

### III.

Moreover, pursuant to Minn. R. Crim. P. 27.03, subd. 9, an unauthorized sentence may be challenged at any time. If the Commission adopts the proposed modification, the

finality of sentences will be undermined across the state. For example, whenever an offender, who has a prior controlled substance, is sentenced for *any* felony offense following the effective date of the proposed modification, the sentence would be subject to a motion to correct at any time as long as the defendant is able to show that application of the 2016 amendments to his or her pre-amendment controlled-substance conviction would result in a lesser degree of conviction.

Not only will the proposed modification adversely affect the criminal justice system, the proposed modification is also premature. The 2016 amendments have only been effective for 4 months. In that short time frame, it is impossible to know how many addicts, if any, are being denied access to treatment based on their existing criminal history scores. Further, the Minnesota Supreme Court has granted review on the issue of whether, notwithstanding the effective date of the 2016 amendments, certain defendants are entitled to the benefit of the 2016 amendments. *See State v. Otto*, No. A15-1454, 2016 WL 3884412 (Minn. App. July 18, 2016), *rev. granted in part* (Minn. Sept. 18, 2016); *State v. Kirby*, No. A15-0117, 2016 WL 3884245 (Minn. App. July 18, 2016), *rev. granted in part* (Minn. Sept. 18, 2016). In my view, it makes sense to wait for the guidance of the Minnesota Supreme Court before moving ahead with the proposed modification to Minn. Sent Guidelines 2.B.7.

Finally, Minn. Sent. Guidelines 2.B.7 is not the appropriate location for the proposed modification and will add confusion to the guidelines. The modification uses the phrase “offense classification” in an inaccurate manner. As the opening paragraph of section 2.B.7 makes clear, the section in question addresses “[t]he classification of a prior

offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony.” Minn. Sent. Guidelines 2.B.7.a.

The only “classification” of a prior offense that changed as a result of the Legislature’s 2016 amendments to Minn. Stat. ch. 152 is that possession of a trace amount of a controlled substance was reduced from a felony to a gross misdemeanor. See Act of May 22, 2016, ch. 160, § 7, 2016 Minn. Laws 576, 585 (providing that “A person convicted under the provisions of subdivision 2, clause (1), who has not been previously convicted of a violation of this chapter or a similar offense in another jurisdiction, is guilty of a gross misdemeanor if: (1) the amount of the controlled substance possessed, other than heroin, is less than 0.25 grams or one dosage unit or less if the controlled substance was possessed in dosage units; or (2) the controlled substance possessed is heroin and the amount possessed is less than 0.05 grams”). But, even without the proposed amendment to section 2.B.7, a defendant’s prior conviction of fifth-degree possession of a trace amount will be treated as a gross misdemeanor under *the current* paragraph a of section 2.B.7, which states that “[t]he classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subs. 2-4a) and sentencing policies.”<sup>1</sup>

The classifications of all other controlled substance offenses remained felonies. In the context these offenses, the proposed modification’s use the phrase “offense

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<sup>1</sup> Admittedly, this reclassification of the defendant’s prior conviction as a gross misdemeanor will impact his or her criminal history score because unlike a prior felony conviction, a prior gross misdemeanor conviction is assigned a 1/4 of a criminal history point under Minn. Sent. Guidelines 2.B.3.

classification” is inaccurate. The proposed modification actually focuses on “the degree” assigned to the prior felony controlled substance conviction. Nothing in section 2.B.7, however, addresses manner in which a probation officer calculates “the degree” of a prior felony offense that is still *classified* as a felony following a statutory amendment. If the Commission amends section 2.B.7 to include a provision that does not address the “classification” of prior offenses, it is likely to introduce confusion into Minnesota’s sentencing law. Thus, in my view, Minn. Sent. Guidelines 2.B.7 is not the appropriate location for the proposed modification.

In sum, the proposed modification of Minn. Sent. Guidelines 2.B.7 violates Minn. Stat. § 645.21, when it allows application of the new thresholds to an offender’s prior convictions, in spite of the Legislature’s expressed intent that the new thresholds only apply to criminal conduct that occurred after August 1, 2016. Moreover, the proposed modification adversely affect the criminal justice system. Finally, the proposed modification is both premature and poorly located in the guidelines.

### Appendix 4.3. Comments of Judge Heidi Schellhas

The Commission's Vice-Chair made a statement at the December 30, 2016, meeting, to the following effect:

*My appointment to this commission is dependent on my position as a Judge on the Minnesota Court of Appeals. My contribution to the commission is directly informed by my judicial understanding of and adherence to the rule of law. Mindful of that, I enthusiastically supported amendments to the Sentencing Guidelines that preceded the legislature's passage of the 2016 Drug Reform Act. But I oppose the current proposed Guidelines amendment. I agree with the written and oral reasons stated by Chair Justice Dietzen in opposition to the proposed Guidelines amendment, including consideration of public safety.*

*I offer the following comments in opposition to the proposed amendments:*

*First, I mean no disrespect to the author of the proposed Guidelines amendment, but I find the language confusing and incomplete particularly in the comment as to who carries the burden of proof and what procedure will be followed. I do not think that the amendment, if passed, will be easily understood or employed by judges, lawyers, or probation officers.*

*Judge Wernick states in his December 20 written submission to the Commission—and again today—that the proposed Guidelines amendment is “not intended to be retroactive” and creates “no **right** to a ‘recalculation’ of a criminal history score.” I don't disagree with that, but the Guidelines amendment clearly contemplates that a defendant who commits any felony on or after August 1, 2016, will have his or her prior drug convictions reweighted under the 2016 Drug Reform Act. In my view, application of the new law to the reweighting of final judgments of prior convictions is a retroactive application of the law.*

*We know that the Minnesota Supreme Court has four cases pending before it. I am familiar with those cases. I have read the briefs in connection with the lead case, State v. Otto. I understand that the supreme court is not being asked to directly address the question we are now grappling with here—whether or not final judgments of prior convictions be reweighted—but I do believe that whatever the supreme court decides with respect to State v. Otto, and the other cases that it has accepted for review and stayed, will be greatly illuminating with respect to the issue of retroactivity.*

*The Minnesota Sentencing Guidelines Commission has a long history of suspending action on matters that are pending before the supreme court. Waiting for the supreme court's disposition of the issue of retroactivity and application to offenses that have*

*occurred prior to August 1, 2016, would be the customary, deferential, and most efficient approach for this Commission.*

*As to the question of retroactivity, if the Commission will not suspend its action on this motion, I will say that I have heard no commissioner explain what in the 2016 Drug Reform Act “clearly and manifestly” reflects the Legislature’s intent that the law be applied to judgments of final conviction occurring before the effective day of the act. There being no compelling rationale to support application of the new Drug Reform Law to judgments of final conviction prior to August 1, 2016, I think that supporting the current proposed amendment seems disrespectful to the Legislature and perhaps foolhardy, given the Commission’s status as a creature of the legislature.*

*Last but not least, one purpose of the Guidelines, as noted in comment 2.B.02, is to “provide uniform standards for the inclusion and weighting of criminal history information.” If the proposed amendments are adopted, uniformity in the weighting of prior drug convictions will likely decrease uniformity and increase geographic disparity in sentencing.*

*For all of these reasons, I urge my fellow commissioners to vote against the proposed Guidelines amendments.*

**Appendix 4.4. Letter from the Dakota Co. Attorney and the Ramsey Co. Attorney**

Dakota County Attorney James Backstrom and Ramsey County Attorney John Choi submitted the following public comment:



**JAMES C. BACKSTROM**  
DAKOTA COUNTY ATTORNEY



**JOHN J. CHOI**  
RAMSEY COUNTY ATTORNEY

December 23, 2016

Dear Members of the Minnesota Sentencing Guideline Commission:

We have been advised that at the December 21, 2016 public hearing on a proposed modification to the Minnesota Sentencing Guidelines related to the calculation of criminal history for controlled substance offenses, the State Public Defender when testifying in support of the proposed modification mentioned our names and referenced previous public comments that we made regarding the 2016 Drug Reform Act. We are concerned that the context in which these comments were made could mislead the Commission and those in attendance as to our position on the proposed modification. Therefore, we believe it is necessary to clearly explain our position on the proposed modification and our support of the Minnesota County Attorneys Association and law enforcement in opposition thereto.

The Commission is currently considering a modification to the Guidelines that would allow the sentencing court to calculate criminal history of a defendant by determining whether or not the prior offense would have constituted a controlled substance crime of the lesser degree under the 2016 Drug Reform Act (Act). Under the proposed modification any defendant who is able to demonstrate by a preponderance of the evidence to a sentencing court that their prior controlled substance offense would have constituted an offense of a lesser degree under the Act would be entitled to have their criminal history calculated as if the prior drug offense had occurred after August 1, 2016. As a result, any defendant, irrespective of the seriousness of the offense for which they are currently being sentenced, who is able to demonstrate by a preponderance of the evidence that their prior controlled substance offense would have constituted an offense of a lesser degree after August 1, 2016, would be entitled to a reduction in their criminal history score and corresponding reduction in their presumptive fixed sentence for the current offense. Depending upon the number of prior controlled substances convictions, the reduction in sentence for the current offense could range from months to years.

The number of controlled substance cases to which the proposed modification would apply is unknown, but it is clearly a large number of cases. Between 2005 and 2014 over 38,000 felony level drug offenses were sentenced in Minnesota.<sup>1</sup> Some insight as to the number of these cases that may be impacted by the proposed modification may also be garnered from the legislative fiscal note prepared for the Drug Reform Act by the Minnesota Department of Management and Budget.<sup>2</sup> The fiscal note

<sup>1</sup> Minnesota Sentencing Guidelines Recap Report, "Felony Controlled Substance Crimes 2014," published January 2016

<sup>2</sup> See, Reg. Fiscal Note prepared for SF3481-3E available at <http://mn.gov/fnsearch/>

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contains information of an analysis performed by Commission staff of the impact of the Drug Reform Act if it had been applied to controlled substance cases sentenced in 2014. This analysis estimated that of the 267 first degree controlled substance cases sentenced in 2014, 82 (30%) would move to a second degree controlled substance offense. Of the 427 second degree controlled substance cases sentenced, 43 (10%) would move to fifth degree controlled substance offenses. Of the 603 third degree controlled substance cases sentenced, 134 (22%) would move to a fifth degree offense. It was further estimated that of the 2,591 fifth degree controlled substance cases sentenced, approximately 337 (13%) would move from a felony offense to a gross misdemeanor offense. Based upon this analysis it is estimated that 596 defendants convicted of a felony level drug offense in 2014 could potentially qualify for recalculation of the criminal history under this proposed modification.

We acknowledge that application of the proposed modification is dependent upon the defendant reoffending and that in some cases defendants who reoffend may not be able to meet their burden of proof. However, given that over 38,000 felony level drug offenses were sentenced between 2005 and 2014 and the low burden of proof in the proposed modification, the change now under consideration will potentially impact hundreds if not thousands of felons being sentenced after August 1, 2016.

The large number of prior convictions to which the proposed modification would likely apply raises significant public safety concerns. As prosecutors who see on a daily basis the tragic and lasting impact of crime on victims and our communities, we cannot support any proposed modifications that would potentially reduce the sentences for our most serious and dangerous offenders. Many violent offenses such as murder, criminal sexual conduct, robbery, domestic violence, child abuse and assault are committed by defendants with prior controlled substance offenses. The physical and emotional impact of such offenses on the victims, family members and our communities are significant and often irreparable. Likewise, many other offenses such as burglary, forgery and identity theft, which also have significant and long term adverse impacts on victims and our communities, are committed by defendants with prior controlled substance offenses. This proposed modification will potentially reduce the presumptive fixed sentenced under Sentencing Guidelines for many of these offenders and therefore must be rejected.

Minnesota law requires that “in establishing and modifying the Sentencing Guidelines, the primary consideration of the Commission shall be public safety.”<sup>3</sup> To our knowledge there has been no study or analysis by the Commission or its staff as to the potential impact the proposed modification would have on the sentences of our most serious and dangerous offenders. To support a proposal that will have a substantial negative impact on the overall public safety of our communities without significant consideration or analysis will potentially undermine the overall confidence our citizens have in Minnesota’s criminal justice system and the confidence that many criminal justice professionals and legislators have in the decision making process of the Commission.

The Commission should also be aware of the potential retroactive impact the proposed modification will have on crimes that occurred prior to August 1, 2016. Proponents of the proposed modification have indicated that it will only apply to crimes committed on or after August 1, 2016. The proponents cite to

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<sup>3</sup> Minn. Stat. 244.09, Subd. 5.

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language in the Guidelines indicating that modifications to the Guidelines and associated commentary applies to offenders “whose date of offense is on or after the specified modification effective date.”<sup>4</sup> This language is similar to that used in several provisions in the 2016 Drug Reform Act which limits its application to “crimes committed on or after” August 1, 2016.<sup>5</sup> However, despite what appears to be **clear language** as to the effective date of the 2016 Drug Reform Act and Guidelines provisions, the Minnesota Supreme Court has granted review in two cases in which the State Public Defender, with the support of the Minnesota Association of Criminal Defense Lawyers, argues that under common law the provisions in the Act and modifications to the Guidelines resulting from the Act that reduce a defendant’s sentence not only apply to controlled substance crimes committed on or after August 1, 2016, but also to any controlled substance case which was “pending” on August 1, 2016.<sup>6</sup> Because “pending cases” include those on direct appeal, those in which the defendant has fled and arrest warrants have been issued, or cases otherwise unresolved in district court as of August 1, 2016, the provisions of the Act, modifications to the Guidelines and the proposed modification currently under consideration by the Commission may result in a reduction of sentences for thousands of criminal offenders whose offense occurred **prior to** August 1, 2016.

A Minnesota Supreme Court decision on the retroactivity of the Act and resulting modifications to the Guidelines will provide significant clarity to the Commission on the potential impact the proposed modification will have to criminal offenses that occurred prior to August 1, 2016. For the Commission to support a proposed modification that potentially impacts thousands of criminal offenses without waiting for further clarification that would be provided by the Supreme Court decision in *Otto* and *Kirby* as to the Act’s potential retroactive effect would be irresponsible and again would undermine the overall confidence of many criminal justice professionals, legislators and citizens in the Commission’s decision making process.

Finally, as individuals who were intimately involved in the negotiating, drafting and legislative process we take issue with statements by supporters of the proposed modification who assert that the 2016 Drug Reform Act was a clear statement of the Legislature’s belief that existing sentencing of drug offenders was too harsh and that the proposed modification is a furtherance of this legislative intent. The Drug Reform Act was the product of lengthy discussions and compromises between various criminal justice professionals, professional associations and public interest groups.<sup>7</sup> The legislation was not presented to the Legislature merely as a means to reduce sentences for all controlled substance offenders out of belief that the sentences were too harsh. Instead, the legislation was presented as means to:

- (1) bring existing minimum crime thresholds in closer alignment with minimum thresholds of other jurisdictions who use weight-based classifications for controlled substance offenses;
- (2) distinguish less serious drug offenders primarily motivated by chemical addiction from the more serious, dangerous and entrepreneurial drug offenders;

<sup>4</sup> Minn. Sentencing Guidelines 3.G.1.

<sup>5</sup> See, 2016 Minn. Laws. Ch. 290

<sup>6</sup> See, *State v. Otto*, Case No. A15-1454 and *State v. Kirby*, Case No. A15-0117

<sup>7</sup> See, S. Floor Deb. On S.F. No. 3481 (May 16, 2016)

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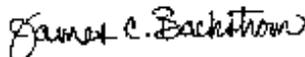
- (3) provide opportunities for the less serious drug offenders facing presumptive and mandated prison sentences to more effectively address their underlying chemical addiction in a non-prison setting;
- (4) assure that more serious dangerous and entrepreneurial drug offenders receive severe prison sentences;
- (5) reject modifications to the Minnesota Sentencing Guidelines proposed by the Minnesota Sentencing Guidelines Commission that would have substantially reduced presumptive sentences for all controlled substance offenses, and
- (6) obtain funding for drug courts and other community based treatment and counseling programs out of prison bed savings resulting from the overall impact as the Drug Reform Act.

Any interpretation that the Drug Reform Act manifested a legislative belief that previous sentencing practice related to controlled substance offenses was unduly harsh is an oversimplification and is inconsistent with the legislative history of the legislation. The legislative history of this legislation and the agreed upon compromise by all parties involved in negotiating this compromise legislation, including the State Public Defender and private criminal defense bar, was that the Drug Reform Act would have no retroactivity impacts. So we find it extremely disappointing that the State Public Defender and private defense bar are now advocating for this proposed modification that will have retroactive impacts. A proposed modification that would allow for the reduction of criminal history scores for serious and dangerous offenders, including those who commit such serious crimes as murder, robbery, domestic violence, and child abuse is well beyond what was intended by the Legislature in enacting the 2016 Drug Reform Act. Needless to say, if we believed that the potential consequence of the legislation would have resulted in a reduction in sentences for such offenders we would not have supported this compromise legislation.

The 2016 Drug Reform Act was the product of difficult and tenuous negotiations. The process was historic in that it not only resulted in comprehensive drug legislative reform, but also brought together criminal justice professionals, law enforcement and involved criminal justice reform entities for meaningful discussions on criminal justice policy. The full impact of the legislation on the sentencing of drug offenses is unknown at this time. Until such impact can be ascertained we would strongly caution the Commission to refrain from engaging in changes to the Guidelines under the guise of such changes being "consistent with" the 2016 Drug Reform Act.

It is for the above reasons and those previously provided to the Commission by the Minnesota County Attorneys Association that we join our fellow County Attorneys and the Minnesota Law Enforcement Coalition in its opposing the proposed modification.

Very truly yours,



JAMES C. BACKSTROM  
DAKOTA COUNTY ATTORNEY



JOHN J. CHOI  
RAMSEY COUNTY ATTORNEY

JCB/kd

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## Appendix 5.1. Section 4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)	CRIMINAL HISTORY SCORE							
	0	1	2	3	4	5	6 or more	
<i>Murder, 2nd Degree</i> (intentional murder; drive-by-shootings)	<b>11</b>	306 <i>261-367</i>	326 <i>278-391</i>	346 <i>295-415</i>	366 <i>312-439</i>	386 <i>329-463</i>	406 <i>346-480<sup>2</sup></i>	426 <i>363-480<sup>2</sup></i>
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (unintentional murder)	<b>10</b>	150 <i>128-180</i>	165 <i>141-198</i>	180 <i>153-216</i>	195 <i>166-234</i>	210 <i>179-252</i>	225 <i>192-270</i>	240 <i>204-288</i>
<i>Assault, 1st Degree</i>	<b>9</b>	86 <i>74-103</i>	98 <i>84-117</i>	110 <i>94-132</i>	122 <i>104-146</i>	134 <i>114-160</i>	146 <i>125-175</i>	158 <i>135-189</i>
<i>Agg. Robbery, 1st Degree;</i> <i>Burglary, 1st Degree (w/</i> <i>Weapon or Assault)</i>	<b>8</b>	48 <i>41-57</i>	58 <i>50-69</i>	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Felony DWI;</i> <i>Financial Exploitation of a</i> <i>Vulnerable Adult</i>	<b>7</b>	36	42	48	54 <i>46-64</i>	60 <i>51-72</i>	66 <i>57-79</i>	72 <i>62-84<sup>2,3</sup></i>
<i>Assault, 2nd Degree</i> <i>Burglary, 1st Degree (Occupied</i> <i>Dwelling)</i>	<b>6</b>	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Residential Burglary;</i> <i>Simple Robbery</i>	<b>5</b>	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Nonresidential Burglary</i>	<b>4</b>	12 <sup>1</sup>	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Theft Crimes (Over \$5,000)</i>	<b>3</b>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Theft Crimes (\$5,000 or less)</i> <i>Check Forgery (\$251-\$2,500)</i>	<b>2</b>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21 <i>18-25</i>
<i>Assault, 4th Degree</i> <i>Fleeing a Peace Officer</i>	<b>1</b>	12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>

<sup>1</sup> 12<sup>1</sup>=One year and one day



Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

<sup>2</sup> Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

<sup>3</sup> The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

## Appendix 5.2. Section 4.B. Sex Offender Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or More
<i>CSC 1<sup>st</sup> Degree</i>	<b>A</b>	144 <i>144-172</i>	156 <i>144-187</i>	168 <i>144-201</i>	180 <i>153-216</i>	234 <i>199-280</i>	306 <i>261-360</i>	360 <i>306-360<sup>2</sup></i>
<i>CSC 2<sup>nd</sup> Degree—(c)(d)(e)(f)(h) Prostitution; Sex Trafficking<sup>3</sup> 1<sup>st</sup> Degree—1(a)</i>	<b>B</b>	90 <i>90<sup>3</sup>-108</i>	110 <i>94-132</i>	130 <i>111-156</i>	150 <i>128-180</i>	195 <i>166-234</i>	255 <i>217-300</i>	300 <i>255-300<sup>2</sup></i>
<i>CSC 3<sup>rd</sup> Degree—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Prostitution; Sex Trafficking 2<sup>nd</sup> Degree—1a</i>	<b>C</b>	48 <i>41-57</i>	62 <i>53-74</i>	76 <i>65-91</i>	90 <i>77-108</i>	117 <i>100-140</i>	153 <i>131-180</i>	180 <i>153-180<sup>2</sup></i>
<i>CSC 2<sup>nd</sup> Degree—(a)(b)(g) CSC 3<sup>rd</sup> Degree—(a)(e)(f) or(b)with ref. to subd. 2(1) Dissemination of Child Pornography (Subsequent or by Predatory Offender)</i>	<b>D</b>	36	48	60 <i>51-72</i>	70 <i>60-84</i>	91 <i>78-109</i>	119 <i>102-142</i>	140 <i>119-168</i>
<i>CSC 4<sup>th</sup> Degree—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Use Minors in Sexual Performance Dissemination of Child Pornography<sup>2</sup></i>	<b>E</b>	24	36	48	60 <i>51-72</i>	78 <i>67-93</i>	102 <i>87-120</i>	120 <i>102-120<sup>2</sup></i>
<i>CSC 4<sup>th</sup> Degree— (a)(b)(e)(f); CSC 5<sup>th</sup> Degree; Possession of Child Pornography (Subsequent or by Predatory Offender)</i>	<b>F</b>	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>66-92</i>	84 <i>72-100</i>
<i>CSC 3<sup>rd</sup> Degree—(b) with subd. 2(2); Indecent Exposure Possession of Child Pornography; Solicit Child for Sexual Conduct<sup>2</sup></i>	<b>G</b>	15	20	25	30	39 <i>34-46</i>	51 <i>44-60</i>	60 <i>51-60<sup>2</sup></i>
<i>Registration Of Predatory Offenders</i>	<b>H</b>	12 <sup>1</sup> <i>12<sup>1</sup>-14</i>	14 <i>12<sup>1</sup>-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

<sup>1</sup> 12<sup>1</sup>=One year and one day.



Presumptive commitment to state imprisonment. Sex offenses under Minn. Stat. § 609.3455, subd. 2, have mandatory life sentences and are excluded from the Guidelines. See section 2.E, for policies regarding those sentences controlled by law, including conditional release terms for sex offenders.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenders in the shaded area of the Grid may qualify for a mandatory life sentence under Minn. Stat. § 609.3455, subd. 4. See sections 2.C and 2.E.

<sup>2</sup> Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

<sup>3</sup> Prostitution; Sex Trafficking is not subject to a 90-month minimum statutory presumptive sentence so the standard range of 15% lower and 20% higher than the fixed duration applies. (The range is 77-108.)

## Appendix 5.3. Section 4.C. Drug Offender Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denotes range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subjected to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Aggravated Controlled Substance Crime, 1st Degree Manufacture of Any Amt. Meth</i>	<b>D9</b>	86 <i>74*-103</i>	98 <i>84*-117</i>	110 <i>94*-132</i>	122 <i>104*-146</i>	134 <i>114*-160</i>	146 <i>125*-175</i>	158 <i>135*-189</i>
<i>Controlled Substance Crime, 1st Degree</i>	<b>D8</b>	65 <i>56*-78</i>	75 <i>64*-90</i>	85 <i>73*-102</i>	95 <i>81*-114</i>	105 <i>90*-126</i>	115 <i>98*-138</i>	125 <i>107*-150</i>
<i>Controlled Substance Crime, 2nd Degree</i>	<b>D7</b>	48	58	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Controlled Substance Crime, 3rd Degree Failure to Affix Stamp</i>	<b>D6</b>	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Possess Substances with Intent to Manufacture Meth</i>	<b>D5</b>	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Controlled Substance Crime, 4th Degree</i>	<b>D4</b>	12 <sup>1</sup>	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Meth Crimes Involving Children and Vulnerable Adults</i>	<b>D3</b>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Controlled Substance Crime, 5th Degree</i>	<b>D2</b>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21 <i>18-25</i>
<i>Sale of Simulated Controlled Substance</i>	<b>D1</b>	12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>

\* Lower range may not apply. See section 2.C.3.c(1) and Minn. Stat. § 152.021, subdivisions 3(c) & 3(d).

<sup>1</sup> 12<sup>1</sup>=One year and one day



Presumptive commitment to state imprisonment.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.