Staff Information Paper

Amendments to Guidelines Section 3.A Commentary in Light of Proposed 2020 Modifications

March 26, 2020

On January 9, 2020, the Commission adopted changes to the Sentencing Guidelines—chiefly in section 3.A—establishing a presumptive cap of five years’ probation for all felonies except listed sex and homicide offenses. In the absence of enacted legislation to the contrary, these changes will take effect August 1, 2020, and will apply to crimes committed on or after that date.

This paper assumes that the Legislature permits the changes to take effect, unchanged. In that event, what, if any, conforming changes should the Commission consider making to the commentary to section 3.A? While comments to the Sentencing Guidelines are advisory and are not binding on the courts, practitioners and staff may rely on the commentary for guidance. It is therefore advisable to keep the commentary as error-free as is reasonably possible.

There are presently four comments to Sentencing Guidelines section 3.A. Staff suggests five types of potential amendments for the Commission’s consideration, shown in the appendix. The appendix contains section 3.A—as it will appear on August 1, 2020, absent legislative intervention—with the addition of some sample changes along the lines suggested below:


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1 State v. Jones, 848 N.W.2d 528, 537 (Minn. 2014) (citing Asfaha v. State, 665 N.W.2d 523, 526 (Minn. 2003)).
2 Staff has already indicated its intent to renumber comments 3.A.201 and 3.A.202 as comments 3.A.301 and 3.A.302, respectively, in a staff note on page 106 of the MSGC’s 2020 Report to the Legislature.
• Second, staff suggests updating the language in the renumbered section 3.A.201 to reflect the **new probation-length guideline.** As a starting point for the Commission’s work, staff has included in the appendix some sample language for renumbered comment 3.A.201. The broad exclusion language, “unless the current offense is a homicide or criminal sexual conduct offense, including an attempt or conspiracy,” is intended to signal the Commission’s intent that attempted first-degree murder, and attempted first-degree murder of an unborn child, not be subject to the five-year cap (in the unlikely event of a probationary sentence), even though those offenses are not on the exclusion list in 3.A.2.d.

• Third, based on the Commission’s guidance at its March 12 meeting, staff suggests adding a **new comment 3.A.202** clarifying that, even though pronouncing a length of stay longer than five years is defined as an aggravated durational departure, individual offender characteristics may be relevant. This is important to point out because current case law does not allow the consideration of individual offender characteristics in (prison) durational departures.

• Fourth, based on the Commission’s guidance at its March 12 meeting, staff has drafted a **new comment 3.A.203** clarifying that the Commission, by referring to “statutory maximum punishment” as the absolute cap on the length of probation, did not intend to override longer four- and six-year maximum probation lengths statutorily provided for some offenses.

• Fifth, staff suggests **qualifying language** in the commentary indicating that the Commission has **chosen not to develop nonimprisonment guidelines** pursuant to its statutory authority to do so, as the Commission has now partially exercised that statutory authority in establishing the new probation-length guidelines. As a starting point for the Commission’s work, staff has included in the appendix some sample language for renumbered comments 3.A.301 and 3.A.302.

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3 See Jan. 8, 2020, [letter](#) from Deputy Attorney General David Voigt to MSGC Executive Director.
Appendix: Guidelines section 3.A, as proposed to take effect August 1, 2020, with sample changes to the commentary shown in legal blackline

3. Related Policies

A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the court orders a stayed sentence, the court may pronounce a stay of execution or a stay of imposition. The court must pronounce the length of the stay as provided in section 3.A.2 and may establish appropriate conditions subject to the considerations in section 3.A.3.

a. Stay of Execution. When ordering a stay of execution, the court must pronounce the prison sentence duration, but its execution is stayed. The presumptive duration is shown in the appropriate cell.

b. Stay of Imposition. When ordering a stay of imposition, the court must not pronounce a prison sentence duration, and the imposition of the sentence is stayed.

The Commission recommends that stays of imposition be used for offenders who are convicted of lower severity offenses and who have low criminal history scores. The Commission further recommends that convicted felons be given one stay of imposition, although for very low severity offenses, a second stay of imposition may be appropriate.

Comment

3.A.101. The use of either a stay of imposition or stay of execution is at the discretion of the court. The Commission has provided a non-presumptive recommendation regarding which categories of offenders should receive stays of imposition, and has recommended that convicted felons generally
should receive only one stay of imposition. The Commission believes that stays of imposition are a less severe sanction, and should be used for those convicted of less serious offenses and those with short criminal histories. Under current sentencing practices, courts use stays of imposition most frequently for these types of offenders.

***[Comment 3.A.102. is moved below]***

2. **Length of Stay.**

   a. When the court stays execution or imposition of sentence for a felony offense, including an attempt or conspiracy, the pronounced length of stay must not exceed five years or the length of the statutory maximum punishment, whichever is less, unless the court identifies and articulates substantial and compelling reasons to support a departure from this rule.

   b. Subject to the limitation in section 3.A.2.a, the pronounced length of stay may exceed the presumptive prison sentence duration provided in the applicable Grid.

   c. If the court by departure exceeds the limitation in section 3.A.2.a, the length of stay must not exceed the statutory maximum punishment for the offense.

   d. The limitation in section 3.A.2.a does not apply to a sentence for a violation of Minn. Stat. § 609.19 (Murder 2nd Degree), 609.195 (Murder 3rd Degree), 609.20 (Manslaughter 1st Degree), 609.2112 (Criminal Vehicular Homicide), 609.2662 (Murder of an Unborn Child 2nd Degree), 609.2663 (Murder of an Unborn Child 3rd Degree), 609.2664 (Manslaughter of an Unborn Child 1st Degree), 609.268 (Death or Injury of an Unborn Child in Comm. of Crime), 609.342 (Criminal Sexual Conduct 1st Degree), 609.343 (Criminal Sexual Conduct 2nd Degree), 609.344 (Criminal Sexual Conduct 3rd Degree), 609.345 (Criminal Sexual Conduct 4th Degree), or 609.3451 (Criminal Sexual Conduct 5th Degree).

   e. Extensions of probation are governed by statute (see Minn. Stat. § 609.135, subd. 2(g)–(h)).

*Comment*

***[The following comment is moved from above]***
3.A.102–3.A.201. When a court grants a stayed sentence, the duration of the stayed sentence may exceed the presumptive sentence length indicated in the appropriate cell on the applicable Grid, and may be as long as the statutory maximum punishment for the conviction offense. See Minn. Stat. § 609.135, subd. 2. Absent substantial and compelling reasons to depart, however, the length of the stay may not exceed five years, unless the current offense is a homicide or criminal sexual conduct offense, including an attempt or conspiracy. Thus, for an offender convicted of Theft over $5,000 (Severity Level 3), with a Criminal History Score of 1, the duration of the stay could be up to five years—or, upon a finding of substantial and compelling reasons to depart, up to ten years. Regardless of the length of stay, the 13-month sentence shown in the Guidelines is the presumptive sentence length and, if imposed, would be executed if: (a) the court departs from the dispositional recommendation and decides to execute the sentence; or (b) the stay is later revoked and the court decides to imprison the offender.

3.A.202. Before section 3.A.2.a took effect, case law required durational departures to be based on the nature of the offense rather than on the individual characteristics of the offender. See State v. Solberg, 882 N.W.2d 618, 625 (Minn. 2016). Although a pronounced length of stay longer than provided in section 3.A.2 is defined as an aggravated durational departure, the Commission recognizes that judicial considerations for pronouncing a longer-than-recommended length of stay may differ substantially from considerations for imposing a longer-than-recommended prison duration. As a result of these differences, the individual characteristics of the offender may be relevant to the district court’s finding of substantial and compelling reasons justifying a longer-than-recommended length of stay.

3.A.203. Within section 3.A.2, “statutory maximum punishment” refers to the applicable maximum period for a stay of sentence established in statute. For most felonies, this is the maximum period for which the sentence of imprisonment might have been imposed, but, for some felonies, this is four or six years. Minn. Stat § 609.135, subd. 2(a)–(b).

3. Other Conditions of Stayed Sentences. While the Commission has otherwise chosen not to develop specific guidelines for the conditions of stayed sentences, it recognizes that there are several penal objectives to be considered in establishing conditions of stayed sentences, including:

- deterrence;
- public condemnation of criminal conduct;
- public safety;
- rehabilitation;
- restitution;
• retribution; and
• risk reduction.

The Commission also recognizes that the relative importance of these objectives may vary with both offense and offender characteristics and that multiple objectives may be present in any given sentence. The Commission urges courts to utilize the least restrictive conditions of stayed sentences that are consistent with the objectives of the sanction. The Commission further urges courts to consider the following principles in establishing the conditions of stayed sentences:

(1) **Retribution.** If retribution is an important objective of the stayed sentence, the severity of the retributive sanction should be proportional to the severity of the offense and the prior criminal record of the offender. A period of confinement in a local jail or correctional facility may be appropriate.

(2) **Rehabilitation.** If rehabilitation is an important objective of the stayed sentence, the court should make full use of available local programs and resources. The absence of a rehabilitative resource, in general, should not be a basis for enhancing the retributive objective in sentencing and, in particular, should not be the basis for more extensive use of incarceration than is justified on other grounds.

(3) **Restitution.** The Commission urges courts to make expanded use of restitution and community work orders as conditions of a stayed sentence, especially for offenders with short criminal histories who are convicted of property crimes, although the use of these conditions in other cases may be appropriate.

(4) **Supervision.** Supervised probation should be a primary condition of stayed sentences.

(5) **Fines.** If fines are imposed, the Commission urges the expanded use of day fines, which standardizes the financial impact of the sanction among offenders with different income levels.
(6) **Work Release and Community Based Programs.** The Commission has chosen not to establish specific guidelines relating to work release programs in local facilities or community-based residential and nonresidential programs.

**Comment**

**3.A.201. 3.A.301.** The court may attach any conditions to a stayed sentence that are permitted by law and that the court deems appropriate. The Guidelines neither enlarge nor restrict the conditions that courts may attach to a stayed sentence. Minn. Stat. § 244.09, subd. 5 permits, but does not require, the Commission to establish guidelines covering conditions of stayed sentences. The Commission chose not to develop guidelines during its initial guideline development effort. The Commission has provided some language in the above section of the Guidelines that provides with respect to the pronounced length of stay in section 3.A.2, and has provided additional, general direction in the use of conditions of stayed sentences in the above section.

**3.A.202. 3.A.302.** While the Commission has resolved not to develop guidelines for nonimprisonment sanctions at this time, the Commission believes it is important for the sentencing courts to consider proportionality when pronouncing a period of local confinement as a condition of probation. This is particularly important given Minn. Stat. § 609.135, subd. 7, which states when an offender may not demand execution of sentence. The period of local confinement should be proportional to the severity of the conviction offense and the criminal history score of the offender. Therefore, the period of local confinement should not exceed the term of imprisonment that would be served if the offender were to have received an executed prison sentence according to the presumptive Guidelines duration.