

Minnesota Sentencing Guidelines Commission

REPORT TO THE LEGISLATURE

January, 1998

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I. BACKGROUND INFORMATION

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

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

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

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

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

A constant flow of information is gathered on sentencing practices and made available to the Commission, the legislature, and others interested in the system. The Commission modifies the guidelines, when needed, to take care of problem areas and legislative changes. This report outlines the work of the Commission in 1997.

II. GUIDELINES MODIFICATIONS - EFFECTIVE AUGUST 1, 1997

A. RANKING OF NEW OR AMENDED CRIMES

1. *The Commission adopted the proposal to rank the following crimes in Section V. OFFENSE SEVERITY REFERENCE TABLE as follows:*

Severity Level VIII

Tampering with Witness, Aggravated First Degree - 609.498, subd. 1b

Severity Level VI

Controlled Substance Crime in the Third Degree (non aggregated offenses) - 152.023

Severity Level IV

Violation of an Order for Protection - 518B.01, subd. 14 (d)

Violation of Restraining Order - 609.748, subd. 6 (d)

2. *The Commission considered the changes made by the 1997 Legislature to the following crimes and adopted the proposal to continue the existing severity level rankings in Section V. OFFENSE SEVERITY REFERENCE TABLE, unless otherwise noted above:*

Aiding an Offender to Avoid Arrest, Assault 1, Assault 4, Controlled Substance Crimes in the First, Second, Fourth, and Fifth Degree, Fleeing a Peace Officer, Harassment/Stalking, and Motor Vehicle Use Without Consent.

3. *The Commission adopted the proposal to place or continue to place the following crimes on the Unranked Offense List in Section II.A.03. of the Commentary:*

Cigarette tax and regulation violations - ~~297.12, subd 4~~ 297F.20

Controlled substance crime in the third degree (aggregated offenses) - 152.023

Interstate compact violation - 243.161

Racketeering, criminal penalties (RICO) - 609.904

Registration of predatory offenders - 243.166, subd. 5

B. ADOPTED MODIFICATIONS TO ADDRESS OTHER LEGISLATIVE CHANGES

The Commission adopted the proposal to modify Section II. C. Presumptive Sentence and Section II. F. Concurrent/Consecutive Sentences to provide for a presumptive prison sentence that is also presumptive consecutive for all felony assaults committed by an inmate serving an executed prison sentence to correspond with new statutory language that mandates executed, consecutive prison sentences for such assaults:

C. Presumptive Sentence: The offense of conviction determines . . .

In addition, the presumptive disposition for escapes from executed sentences and felony assaults committed by an inmate serving an executed prison sentence is Commitment to the Commissioner of Corrections ~~and the presumptive duration is determined by the appropriate cell of the Sentencing Guidelines grid, or the mandatory minimum, whichever is longer.~~ It is presumptive for these offenses to be sentenced consecutively to the offense for which the inmate was confined and the presumptive duration is determined by the presumptive consecutive policy (See II. F. Presumptive Consecutive Sentences).

F. Concurrent/Consecutive Sentence: . . .

Presumptive Consecutive Sentences

Consecutive sentences are presumptive in the following cases : . . .

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

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

C. ADOPTED MODIFICATIONS TO CLARIFY OR CORRECT TECHNICAL ERRORS

1. ***The Commission adopted the proposal to clarify how to determine the severity level for convictions for Crimes Committed for Benefit of a Gang by adding language to Section II.A. Offense Severity that deals with determining severity levels:***

A. **Offense Severity:** The offense severity level is determined by the offense of conviction. When an offender is convicted of two or more felonies, the severity level is determined by the most severe offense of conviction. For persons convicted under Minn. Stat. § 609.229, subd. 3 (a) - Crime Committed For Benefit of a Gang, the severity level is the same as that for the underlying crime with the highest severity level.

2. ***The Commission adopted the proposal to add language to Section II. B. Criminal History that now only appears in Section II.B.101. of the Commentary regarding how to determine the severity level of prior offenses for purposes of assigning weights for criminal history points:***

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

1. Subject to the conditions listed below, the offender is assigned a particular weight .
 - a. The weight assigned to each prior felony sentence is determined . . .

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

3. **The Commission adopted the proposal to remove the following sentence from Section II.B.102. of the Commentary that is no longer correct:**

II.B.102. *In addition, the Commission established policies to deal with several specific situations which arise under Minnesota law. The first deals with conviction under Minn. Stat. § 609.585, under which persons committing theft or another felony offense during the course of a burglary could be convicted of and sentenced for both the burglary and the other felony, or a conviction under Minn. Stat. § 609.251 under which persons who commit another felony during the course of a kidnapping can be convicted of and sentenced for both offenses. ~~In all other instances of multiple convictions arising from a single course of conduct, where there is a single victim, persons may be sentenced on only one offense.~~ For purposes . . .*

4. **The Commission adopted the proposal to modify Section II.G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers to clarify the current policy on the presumptive sentence for attempted offenses when a mandatory minimum applies to the case:**

G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers: For persons convicted of attempted offenses or conspiracies to commit an offense . . . , For persons convicted of attempted offenses or conspiracies to commit an offense with a mandatory minimum of a year and a day or more, the presumptive duration is the mandatory minimum or one-half the duration specified in the applicable Sentencing Guidelines Grid cell, whichever is greater. . . .

5. **The Commission adopted the proposal to make the following modifications to Section III. F. Modifications to clarify when modifications to the Commentary are effective:**

F. Modifications: Modifications to the Minnesota Sentencing Guidelines and associated commentary will be applied to offenders whose date of offense is on or after the specified modification effective date. Modifications to the Commentary that relate to clarifications of existing policy will be applied to offenders sentenced on or after the specified effective date.

6. **The Commission adopted the proposal to make the following technical changes to Section V. OFFENSE SEVERITY REFERENCE TABLE to correct cites and omissions:**

Severity Level V

Tampering with Witness in the First Degree - 609.498, subd. 1a

Severity Level III

Depriving Another of Custodial or Parental Rights - 609.26, subd. 6 (a) (2)

Severity Level II

Check Forgery (~~\$200~~ - \$2,500) - 609.631, subd. 4 (3) (a)

Severity Level I

Check Forgery (~~less than \$200~~ \$200 or less) - 609.631, subd. 4 (3) (b)
Depriving Another of Custodial or Parental Rights - 609.26, subd. 6 (a) (1)
False Information - Certificate of Title Application - 168A.30

D. ADOPTED MODIFICATIONS REVIEWED BY THE 1997 LEGISLATURE

- 1. The Commission adopted the proposal to place the following inadvertently unranked crime on Unranked Offense List in Section II.A.03. of the Commentary:**

Refusal to assist - 6.53

- 2. The Commission adopted the proposal to modify Sections II.B.307. and II.B.407. of the Commentary to clarify that the policy for calculating adult felony criminal history points when circumstances involve a single behavioral incident with multiple victims, also applies to the juvenile and misdemeanor point calculation.**

II.B.307. In order to provide a uniform and equitable method of computing criminal history scores for cases of multiple convictions arising from a single course of conduct when single victims are involved, consideration should be given to the most severe offense for purposes of computing criminal history when there are prior multiple sentences under provisions of Minn. Stats. § 609.585 or 609.251. When there are multiple misdemeanor or gross misdemeanor sentences arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe offenses for purposes of computing criminal history. These are the same policies that apply to felony convictions and juvenile findings.

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

- 3. The Commission adopted the proposal to modify Section II. B. Criminal History and II.B.402. of the Commentary to clarify that Minnesota felony level offenses that can only be committed by juveniles should be included in calculating juvenile criminal history points.**

- 4. The offender is assigned one point for every two offenses committed and prosecuted as a juvenile that ~~would have been felonies if committed by an adult~~ are felonies under Minnesota law, provided that: . . .**

II.B.402. *First, only juvenile offenses that ~~would have been felonies if committed by an adult~~ are felonies under Minnesota law will be considered in computing the criminal history score. Status offenses, dependency and neglect proceedings, and misdemeanor or gross misdemeanor-type offenses will be excluded from consideration. . . .*

- 4. The Commission adopted the proposal to modify Section II.B.503. of the Commentary to clarify that Federal felony offenses that have no equivalent or similar offense in Minnesota should be included in the criminal history score.**

II.B.503. *It was concluded, therefore, that designation of out-of-state offenses as felonies or lesser offenses, for purposes of the computation of the criminal history index score, must properly be governed by Minnesota law. The exception to this would be Federal felony crimes for which there is no comparable Minnesota Felony offense. Sentences given for these crimes that are felony level sentences according to Minnesota law shall be given a weight of one point for purposes of calculating the criminal history score.*

- 5. The Commission adopted the proposal to place the following crime on the Misdemeanor and Gross Misdemeanor Offense List:**

Malicious Punishment of a Child
609.377

- 6. The Commission adopted the proposal to modify certain durations at severity levels III through VI in the Sentencing Guidelines Grid.**

These durational changes at severity levels III through VI were adopted to create a consistent approach to increasing durations across criminal history. Durations at severity levels VII through X already increase at even increments: 10 months for each criminal history point at severity level VII, 12 months at severity level VIII, 15 months at severity level IX, and 20 months at severity level X. The new durations effective August 1 will increase in increments of: 2 months at severity level III, three months at severity level IV, 5 months at severity level V, and 6 months at severity level VI.

The 1996 and 1997 Legislature reviewed these changes to the durations in the Sentencing Guidelines Grid and determined they should be allowed to go into effect but decided to repeal any retroactive application of these changes to persons already sentenced. The provision that provides for retroactive application of changes to the guidelines (Minn. Stat. § 244.09, subd. 11a) was **repealed effective August 1, 1997**. The specific changes to the Grid are found in the appendix.

III. 1997 ADOPTED MODIFICATIONS - EFFECTIVE AUGUST 1, 1998, AFTER REVIEW BY THE 1998 LEGISLATURE

- 1. The Commission adopted the proposal to modify Section II. F. Concurrent/Consecutive Sentences to clarify the permissive consecutive policy regarding current offenses sentenced consecutive to prior offenses:**

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

1. A current felony conviction for a crime against a person may be sentenced consecutively to a prior felony sentence for a crime against a person which has not expired or been discharged; or . . .

Consecutive sentences are permissive under the above criteria only when the presumptive disposition for the current offense(s) is commitment to the Commissioner of Corrections as determined under the procedures outlined in section II.C. In addition, consecutive sentences are permissive under 1. above, involving a current felony conviction for a crime against a person and a prior felony sentence for a crime against a person which has not expired or been discharged, only when the presumptive disposition for the prior offense(s) was commitment to the Commissioner of Corrections as determined under the procedures outlined in section II.C.

- 2. The Commission adopted the proposal to modify Section II.F.04. of the Commentary to clarify that it is permissive to give consecutive sentences where there are multiple current felony convictions for crimes involving the same person in a single course of conduct:**

II.F.04. *The Commission's policy on permissive consecutive sentencing outline . . .*

It is permissive for multiple current felony convictions against persons to be sentenced consecutively to each other when the presumptive disposition for these offenses is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C. Presumptive Sentence. Consecutive sentencing is permissive under these circumstances even when the offenses involve a single victim involving a single course of conduct. However, consecutive sentencing is not permissive under these circumstances

when the court has given an upward durational departure on any of the current offenses. The Commission believes that to give both an upward durational departure and a consecutive sentence when the circumstances involve one victim and a single course of conduct can result in disproportional sentencing unless additional aggravating factors exist to justify the consecutive sentence.

3. The Commission adopted the proposal to modify Section III.C. Jail Credit to more clearly establish the rules and principles regarding jail credit supported by case law that are in agreement with the philosophy of the sentencing guidelines:

C. Jail Credit: Pursuant to Minn. Stat. § 609.145, subd. 2, and Minn. R. Crim. P.27.03, subd. 4(b), when a convicted felon is committed to the custody of the Commissioner of Corrections, the court shall assure that the record accurately reflects all time spent in custody ~~between arrest and sentencing in connection with the offense~~, including examinations under Minn. R. Crim. P. 20 or 27.03, subd.1(A), for the offense or behavioral incident for which the person is sentenced, which time shall be deducted by the Commissioner of Corrections from the sentence imposed by subtracting the time from the specified minimum term of imprisonment and if there is any remaining time, subtracting such time from the specified maximum period of supervised release. ~~Time spent in confinement as a condition of a stayed sentence when the stay is later revoked and the offender committed to the custody of the Commissioner of Corrections shall be included in the above record, and shall be deducted from the sentence imposed. Time spent in confinement under Huber Law (Minn. Stat. § 631.425) shall be awarded at the rate of one day for each day served.~~ Jail credit shall be awarded based on the following criteria:

1. Jail credit for time spent in custody shall not turn on matters subject to manipulation by the prosecutor.
2. Jail credit shall not result in double credit when applied to consecutive sentences.
3. Jail credit shall reflect time spent in confinement as a condition of a stayed sentence when the stay is later revoked and the offender is committed to the custody of the Commissioner of Corrections. Such credit is limited to time spent in jails, workhouses, and regional correctional facilities.

4. Jail credit shall be awarded at the rate of one day for each day served for time spent in confinement under Huber Law (Minn. Stat. § 631.425).

Comment

~~III.C.01. The Commission believes that offenders should receive jail credit for time spent in custody between arrest and sentencing. During that time, the defendant is presumed innocent. There is evidence that the poor and members of racial minorities are more likely to be subject to pre-trial detention than others. Granting such jail credit for those receiving executed sentences makes the total periods of incarceration more equitable.~~

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

III.C.02. Determining the appropriate application of jail credit for an individual can be very complicated, particularly when multiple offenses are involved. While the Commission recognizes the difficulty in interpreting individual circumstances, it believes that the court should award jail credit so that it does not turn on matters that are subject to the manipulation by the prosecutor. The purpose of this criteria is to ensure that if the intent of the court is to give concurrent sentences, the withholding of jail credit does not result in de facto consecutive sentences.

III.C.03. The Commission is equally concerned that if the intent of the court is to give consecutive sentences, the awarding of jail credit should not result in de facto concurrent sentences. Therefore, when applying jail credit to consecutive sentences, credit is only applied to the first sentence in order to avoid awarding double credit. In order to avoid de facto concurrent sentences when a current offense is sentenced consecutive to a prior offense for which the offender is already serving time in a prison or jail, no jail credit shall be awarded on the current offense.

III.C.02 04. The Commission also believes that jail credit should be awarded for time spent in custody as a condition of a stay of imposition or stay of execution when the stay is revoked and the offender is committed to the Commissioner of Corrections. The primary purpose of imprisonment is punishment, and the punishment imposed should be proportional to the severity of the conviction offense and the criminal history of the offender. If, for example, the presumptive duration in a case is 18 months, and the sentence was initially executed by means of a departure the specified minimum term of imprisonment would be 12 months. If the execution of the sentence had initially been stayed and the offender had served four months in jail as a condition of the stay, and later the stay was revoked and the sentence executed, the offender would be confined for 16 months rather than 12. By awarding jail credit for time spent in custody as a condition of a stay of imposition or execution, proportionality is maintained.

~~Jail credit for time spent in confinement under the conditions of Huber Law (Minn. Stat. § 631.425) should be awarded at the rate of one day for each day served. When a condition of jail time is that it be served on week-ends, the actual time spent in jail rounded to the nearest whole day, should be credited. For example, if an offender arrives at jail at 6:00 p.m. Friday and leaves at 8:00 p.m. Sunday, 50 hours have been served and that time would be rounded to two days of jail credit if the stay were later revoked and the sentence executed.~~

Credit for time spent in custody as a condition of a stay of imposition or stay of execution is limited to time spent in jails, workhouses, and regional correctional facilities. Credit should not be extended for time spent in residential treatment facilities or on electronic monitoring as a condition of a stay of imposition or stay of execution.

III.C.05. In computing jail time credit, each day or portion of a day in jail should be counted as one full day of credit. For example, a defendant who spends part of a day in confinement on the day of arrest and part of a day in confinement on the day of release should receive a full day of credit for each day. Jail credit for time spent in confinement under the conditions of Huber Law (Minn. Stat. § 631.425) should be awarded at the rate of one day for each day served.

III.C.03 06. In order to ensure that offenders are not penalized for inability to post bond, credit for time in custody shall be computed by the Commissioner of Corrections and subtracted from the specified minimum term of imprisonment. If there is any remaining jail credit left over, it should be subtracted from the specified maximum period of supervised release. For offenders sentenced for offenses committed before August 1, 1993, credit for time in custody shall be computed by the Commissioner of Corrections after projected good time is subtracted from the executed sentence.

Commission policy is that sentencing should be neutral with respect to the economic status of felons. When credit for time spent in custody is immediately deducted from the total sentence, the incongruous result is that individuals who cannot post bond are confined longer than those who post bond. ~~In order to correct this incongruity, computation of projected good time shall be made by the Commissioner of Corrections at time of admission to prison and shall be subtracted from the sentence prior to crediting an offender for time spent in custody.~~

IV. SPECIAL SECTION TO REPORT ON THE USE OF "PLEA AGREEMENT" AS A REASON FOR DEPARTURE

A. BACKGROUND INFORMATION

1. State v. Givens

A recent (March, 1996) Minnesota Supreme Court decision, *State v. Givens*, 544 N.W.2d 774, raised serious concerns for the Minnesota Sentencing Guidelines Commission. The decision stated that a defendant may waive his right to be sentenced under the Minnesota Sentencing Guidelines in the case of a negotiated plea. The Supreme Court may have intended a narrow interpretation of its decision and its application only to those cases similar to *Givens*, where there were valid reasons for departure from the presumptive sentence as well as an agreement to the sentence on the part of the defendant. However, the Commission was concerned with possible broader interpretations of the decision.

Under a broader interpretation, the result could have been an entire discarding of the policies and procedures of the sentencing guidelines system. A system of fair and proportional sentencing throughout the state along with a vehicle for collecting data on sentencing practices and a tool for managing correctional resources might have been lost.

The Commission decided it was necessary to clarify, statutorily, that sentencing guidelines are not a right that accrues to a person convicted of a felony. The 1997 Legislature passed such language which became effective following the date of final enactment, May 7, 1997. This language clarifies the need for the court to continue ordering sentencing worksheets for all convicted felons and to indicate on the record the reasons for departure when the pronounced sentence differs from the presumptive sentence.

2. Appellate Review of Plea Negotiated Sentences

While the Commission did not suggest any changes in the area of appellate review of sentences, the Legislature decided to address the issue of appeals in those situations where a defendant agrees to a plea agreement and is given a dispositional departure from the presumptive sentence. The Legislature decided that they did not want there to exist an indefinite period of time to appeal the sentence. In particular, they believed that in situations involving a plea agreement for a dispositional departure, the defendant should not have the option to wait until after a revocation of sentence before appealing the sentence. The language passed by the Legislature requires defendants to appeal their sentence within 90 days (the same amount of time given to the prosecution under Rule 28.05, subd. 1 (1)) or before the date of any act committed by the defendant resulting in revocation of the stay of sentence. This provision became effective August 1, 1997.

3. Use of Plea Agreements as a Reason for Departure

The Commission was concerned with another aspect of the *State v. Givens* decision that appeared to recognize the use of "plea agreement" alone as a legitimate reason for departure. These concerns were similar to their concerns regarding the waiving of

sentencing guidelines and are explained further in the next section. The Commission adopted a proposal to add "plea agreement" to the list of reasons that cannot be used for departure and presented this change to the 1997 Legislature for its review. The Legislature did not want to see this change take effect in 1997 and directed the Commission to study the advisability of allowing a plea agreement to be used as a reason for departure from a presumptive sentence and report its findings by December 15, 1997. The Commission has studied this issue by discussing it with a wide range of criminal justice professionals. An all day meeting took place on October 23, 1997, where the Commission received extensive information from practitioners.

B. PLEA AGREEMENTS AND DEPARTURES

1. Summary of the Problem

Plea agreements are important to our criminal justice system because it is not possible to support a system where all cases go to trial. While plea agreements can involve the charge, the sentence, or both, the primary issue for the Commission is the question of how do plea agreements fit into a sentencing guidelines system, particularly plea agreements that involve a departure from the presumptive sentence.

The sentencing guidelines strive to achieve more uniform and proportional sentences statewide by recommending a "presumptive" sentence based on the combination of the severity of the conviction offense and the extent of the criminal history of the offender. The presumptive sentence is appropriate for the typical case but when there are substantial and compelling circumstances, a departure is more appropriate. The sentencing judge is required by law to provide written reasons to confirm the substantial and compelling nature of the case that justify the departure.

Information regarding felony sentencing are routinely monitored and analyzed by the Commission. Departures and their reasons highlight both the success and problems of the existing sentencing guidelines. With this information, the public can be assured that accurate information on sentencing practices is collected and available to the Commission and others concerned with sentencing policy. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to provide for informed policy making or to ensure the public that the guidelines achieve their goals of uniformity, proportionality, and rationality in sentencing.

2. Highlights of October 23 Meeting on Plea Agreements and Departures

The Commission invited practitioners (judges, prosecutors, and defense attorneys) to a meeting to share their experiences with the Commission regarding the issue of plea agreements and departures. The practitioners were asked to address the following questions:

- As a judge, are you willing to accept a negotiated plea that includes a sentence departure? If so, do you require the parties provide you with the reason(s) they agreed to a departure? Do you use these reasons to explain your decision to depart? Or do you simply say that the reason is "plea agreement?"

- As a prosecutor, are you willing to negotiate a plea that includes a sentence departure? If so, are there usually particular "reasons" why you would agree to a sentence that is outside the presumptive sentence? Do you provide the sentencing judge with these reason(s) and does the judge use these reasons to explain the departure?

- Are there any constraints or boundaries that guide your negotiations (such as the sentencing guidelines, statutory requirements or other internal policies)? If so, under what type of circumstances are you willing to override the policies?

- As a defense attorney, are there any constraints or boundaries that guide your negotiations (such as the sentencing guidelines, statutory requirements, or other internal policies)? If so, under what type of circumstances are you willing to set aside the policies?

- Specifically, under what circumstances would you advise your client to negotiate a plea for a sentence departure, up or down? In these situations, do you provide the sentencing judge with the reasons for departure?

- Do you believe that certain factors increase the need to plea negotiate for a sentence departure such as:
 - Notable increases in case loads
 - Increases in the presumptive sentence lengths
 - General disagreement among practitioners with certain sentencing policies
 - Mandatory minimum sentencing requirements
 - Other factors?

- The Commission is also concerned that case law development regarding departures took place for the most part in the first several years under the sentencing guidelines system. In those earlier years the presumptive sentences for many of the more serious crimes were considerably lower than they are now. To double the presumptive sentence for a severity level VIII offender with no criminal history back in 1988 meant an 86 month sentence (7.2 years) rather than a 43 month sentence (3.6 years). Since 1989, such doubling results in a 172 month sentence (14.3 years) rather than a 86 month sentence (7.2 years). Clearly, to double the sentence is much more meaningful in 1997 compared to 10 years ago. Should the Commission provide some guidance to the court to help determine what types of cases, given that there are reasons for departure, would call for a departure as high as or greater than double the presumptive sentence?

Highlights of the meeting are listed below:

Prosecutors

- Guidelines are a set point for plea agreements.
- "Plea agreement" should not be the only reason for departure as this would undermine the set point. One of the prosecutors, however, believed that in the case of a downward departure, plea agreement was a sufficient reason by itself.
- Most of the thought goes into settling the case and not on determining the departure grounds or whether the reasons fit into the goals and philosophy of the guidelines. However, the requirement for additional reasons beyond "plea agreement" is important or the set point would be destroyed.
- Usually reasons do exist that could explain the departure beyond the plea agreement itself.
- Increasing caseloads as well as tougher sentencing policies do put pressure on the system to settle cases. Priorities can be set such as for gun and other violent offenses.
- Do not want limits placed on aggravated departures.

Defense Attorneys

- Plea agreement should be allowed as the sole reason for departure because the underlying reasons may not be acceptable or considered "substantial and compelling." For example, it was believed that victim agreement with the plea negotiation should be a valid reason for the departure. However, the appellate lawyer perspective was that there should be substantial and compelling reasons for any aggravated departure even if it is part of a plea agreement.
- The culture has changed since guidelines were first implemented and there is greater willingness to negotiate for sentences rather than charges and to, in most cases, push for less time than the presumptive.
- General belief that the standards for departure have been weakened.
- Tougher sentencing policies create a greater need to negotiate for a downward departure.

Judges

- It is the judge's responsibility to make the final decision even when there is a plea agreement.
- Departure reasons that support the plea agreement can usually be found in the sentencing transcripts, even if they are not among those listed in the guidelines or recognized by current case law.
- Plea agreement should be accepted as a basis for departure, but the reasons the negotiation was accepted by the judge should be explained.
- Increased caseloads as well as tougher sentencing policies have increased the willingness to accept plea agreements involving departures.
- Do not support further limiting of the judge's discretion to depart.

It is important to note that representatives from all groups of practitioners expressed concern that changes in sentencing policy toward harsher penalties has impacted the frequency with which departures are negotiated. The Commission believes these higher departure rates suggest a more thorough review of the data and the sentencing guidelines themselves is necessary.

3. Data Highlights

The Commission also reviewed information on departures to understand the frequency with which "plea agreement" is used as a reason for departure. The following chart displays information over the last ten years summarizing the total number of offenders sentenced each year, the total number and percent of any type of departure, the number and percent of departures where "plea agreement" was cited as at least one of the reasons for departure, and the number and percent of departures where "plea agreement" was the only reason cited to explain the departure.

Plea Agreements and Departures 1987-1996

Year	Number of Cases Sentenced	Departure	Plea Agreement Indicated	Plea Agreement Only Reason Cited
1996	9,480	23.3% (2,212)	43.9% (971)	16.0% (353)
1995	9,421	21.5% (2,021)	40.6% (821)	11.6% (235)
1994	9,787	20.9% (2,043)	41.5% (848)	10.4% (213)
1993	9,637	20.8% (2,009)	42.5% (853)	10.2% (204)
1992	9,325	19.6% (1,828)	39.9% (729)	12.4% (227)
1991	9,161	19.6% (1,791)	35.6% (638)	11.3% (202)
1990	8,844	18.8% (1,660)	34.3% (570)	13.2% (219)
1989	7,974	17.2% (1,375)	32.7% (449)	11.4% (157)
1988	7,572	16.2% (1,224)	31.1% (381)	12.9% (158)
1987	6,674	16.8% (1,121)	26.6% (298)	10.5% (118)

4. Recommendation

The data above suggest that over time, judges are increasingly citing "plea agreement" as a reason for departure. It is helpful to know that the case involved a plea agreement and in most of these cases, the judge provides other reasons to explain the rationale for the departure. However, the Commission is particularly concerned about number of cases where "plea agreement" is the only reason cited to explain the departure and the fact that the percent of these cases increased significantly in 1996. This increase may be a result of *State v. Givens*, published in March, 1996, because this decision appears to acknowledge "plea agreement" as an acceptable reason for departure. As noted above, if a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to provide for informed policy making, ensure consistency, proportionality, and rationality in sentencing.

The Commission believes it is important to communicate quickly to practitioners the importance of providing a more comprehensive explanation for a sentence departure. They are concerned that *State v. Givens* may continue to impact the departure information and more and more departures may simply be explained by "plea agreement." The Commission proposes adding the language, found below, as commentary to the *Minnesota Sentencing Guidelines and Commentary*. It appears, given the directive of the 1997 Legislature, that this language would need to pass out of the 1998 Legislature as a bill in order for it to take effect August 1, 1998.

II.D.04. 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 sentencing guidelines are supported. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to provide for informed policy making or to ensure consistency, proportionality, and rationality in sentencing. Departures and their reasons highlight both the success and problems of the existing sentencing guidelines. When a plea agreement is made that involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted.

V. COUNTY ATTORNEY REPORTS ON CRIMINAL CASES INVOLVING FIREARMS

The 1994 Legislature passed a law (M.S. § 609.11, subd. 10) directing county attorneys to report information to the sentencing guidelines commission on criminal cases involving a firearm. This law reads as follows:

Subd. 10. [Report on Criminal Cases Involving a Firearm]

Beginning on July 1, 1994, every county attorney shall collect and maintain the following information on criminal complaints and prosecutions within the county attorney's office in which the defendant is alleged to have committed an offense listed in subdivision 9 while possessing or using a firearm:

- (1) whether the case was charged or dismissed;*
- (2) whether the defendant was convicted of the offense or a lesser offense;*
- (3) whether the mandatory minimum sentence required under this section was imposed and executed or was waived by the prosecutor or court.*

No later than July 1 of each year, beginning on July 1, 1995, the county attorney shall forward this information to the sentencing guidelines commission upon forms prescribed by the commission.

Pursuant to M.S. § 244.09, subd. 14, the sentencing guidelines commission is required to include in its annual report to the legislature a summary and analysis of the reports received from county attorneys.

Commission staff revised the firearms report for 1997 to further clarify the form. Each county attorney was provided with a copy of the form, an illustration of how to complete the form, and a memorandum describing the ongoing mandate by the legislature. Eighty-three of the 87 county attorneys (95%) responded to the Commission's data request. There appear to be difficulties setting up reliable tracking systems in those counties that did not respond.

The following sets of tables summarize statewide information. Tables providing FY 1997 information by individual county are included in the appendix. The data indicate that prosecutors charged offenders in almost all of the cases disposed of in FY 1997 that involved a firearm (98%). Among those cases charged, a majority (66%) of the offenders were convicted of an applicable offense pursuant to § 609.11, subd. 9, and a firearm was established on the record. This was an increase from FY 1996 when this figure was 58 percent. Of those cases where the mandatory minimum applied, a prison sentence was pronounced 66 percent of the time. This figure remained the same as for FY 1996.

The data in FY 1997 show an increase in volume from FY 1996. The total number of cases where reporting was required under the statute increased from 588 cases in FY 1996 to 664 cases in FY 1997, a 13 percent increase. The volume increased in FY 1997 28 percent for cases where the mandatory minimum was required. The volume increased 27 percent from last year for cases receiving the mandatory minimum sentence when it was required.

**County Attorney Report on Criminal Cases Involving Firearms
Statewide Summary (Excluding Counties with Missing Information)
Cases Disposed from July 1, 1996 to July 1, 1997**

**Cases Where Reporting Is Required
by M.S. § 609.11, Subd. 10 - Cases Charged and Not Charged**

	Total Number of Cases Where Reporting Is Required	Cases Charged	Cases Not Charged
Percent of Cases	100%	98%	2%
Number of Cases	(664)	(654)	(10)

Outcome of Cases Charged

	Total Number of Cases Charged	Convicted of Offense w/ a Mandatory Minimum		Conviction Offense Not Covered by M.S. § 609.11	Acquitted on all Charges	All Charges Dismissed	Other
		Firearm Established	Firearm Not Established				
Percent of Cases	100%	66%	4%	18%	2%	10%	0%
Number of Cases	(654)	(429)	(24)	(119)	(12)	(67)	(3)

Convictions for Offenses Covered by M.S. § 609.11 - Establishment of Firearm on the Record

	Total Number of Cases	Firearm Established	Firearm Not Established
Percent of Cases	100%	95%	5%
Number of Cases	(453)	(429)	(24)

Sentences for Cases Where a Mandatory Minimum for a Firearm was Required

	Number of Cases Where Mandatory Minimum Required	Mandatory Minimum Sentence Imposed	Mandatory Minimum Sentence Not Imposed
Percent of Cases	100%	66%	34%
Number of Cases	(429)	(282)	(147)

APPENDIX

A. ADOPTED DURATIONAL ADJUSTMENTS, EFFECTIVE AUGUST 1, 1997

SEVERITY LEVEL OF CONVICTION OFFENSE (Common 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)	X	306 299-313	326 319-333	346 339-353	366 359-373	386 379-393	406 399-413	426 419-433
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (unintentional murder)	IX	150 144-156	165 159-171	180 174-186	195 189-201	210 204-216	225 219-231	240 234-246
<i>Criminal Sexual Conduct, 1st Degree</i> <i>Assault, 1st Degree</i>	VIII	86 81-91	98 93-103	110 105-115	122 117-127	134 129-139	146 141-151	158 153-163
<i>Aggravated Robbery 1st Degree</i>	VII	48 44-52	58 54-62	68 64-72	78 74-82	88 84-92	98 94-102	108 104-112
<i>Criminal Sexual Conduct, 2nd Degree (a) & (b)</i>	VI	21	26 27	30 33	34 33-35 39 37-41	44 42-46 45 43-47	54 50-58 51 49-53	65 60-70 57 55-59
<i>Residential Burglary</i> <i>Simple Robbery</i>	V	18	23	27 28	30 29-34 33 31-35	38 36-40	46 43-49 43 41-45	54 50-58 48 46-50
<i>Nonresidential Burglary</i>	IV	12 ¹	15	18	21	25 24-26 24 23-25	32 30-34 27 26-28	44 37-45 30 29-31
<i>Theft Crimes (Over \$2,500)</i>	III	12 ¹	13	15	17	19 18-20	22 21-23 21 20-22	25 24-26 23 22-24
<i>Theft Crimes (\$2,500 or less)</i> <i>Check Forgery (\$200-\$2,500)</i>	II	12 ¹	12 ¹	13	15	17	19	21 20-22
<i>Sale of Simulated Controlled Substance</i>	I	12 ¹	12 ¹	12 ¹	13	15	17	19 18-20

B. COUNTY ATTORNEY REPORTS ON CRIMINAL CASES INVOLVING FIREARMS BY COUNTY

County Attorney Report on Criminal Cases Involving Firearms

**Cases Where Reporting Is Required
by M.S. § 609.11, Subd. 10
Cases Disposed from July 1, 1996 to July 1, 1997**

County	Total Number of Cases Where Reporting Is Required	Cases Not Charged	Cases Charged
Aitkin	4	0	4
Anoka	17	0	17
Becker	2	0	2
Beltrami	1	0	1
Benton	0	0	0
Big Stone	0	0	0
Blue Earth	7	0	7
Brown	1	0	1
Carlton	4	0	4
Carver	3	1	2
Cass	6	0	6
Chippewa	1	0	1
Chisago	5	0	5
Clay	6	0	6
Clearwater	1	0	1
Cook	0	0	0
Cottonwood	0	0	0
Crow Wing	16	0	16
Dakota	14	0	14
Douglas	3	0	3
Faribault	2	0	2
Fillmore	3	0	3
Freeborn	0	0	0
Goodhue	4	0	4
Grant	0	0	0
Hennepin	244	0	244
Houston	0	0	0

County	Total Number of Cases Where Reporting Is Required	Cases Not Charged	Cases Charged
Hubbard	6	2	4
Isanti	6	0	6
Itasca	13	0	13
Jackson	0	0	0
Kanabec	3	0	3
Kandiyohi	4	0	4
Kittson	0	0	0
Koochiching	4	0	4
Lac Qui Parle	0	0	0
Lake of the Woods	0	0	0
Lesueur	1	0	1
Lincoln	2	0	2
Lyon	1	0	1
Mcleod	5	0	5
Mahnomen	4	0	4
Marshall	0	0	0
Martin	3	0	3
Mille Lacs	1	0	1
Morrison	2	0	2
Mower	4	0	4
Murray	1	0	1
Nicollet	3	0	3
Nobles	3	0	3
Norman	0	0	0
Olmsted	10	0	10
Otter Tail	1	0	1
Pennington	5	0	5
Pipestone	0	0	0
Polk	9	0	9
Pope	0	0	0
Ramsey	142	0	142
Red Lake	0	0	0
Redwood	2	0	2
Renville	0	0	0
Rice	9	0	9

County	Total Number of Cases Where Reporting Is Required	Cases Not Charged	Cases Charged
Rock	1	0	1
Roseau	5	0	5
St. Louis	30	7	23
Scott	4	0	4
Sherburne	4	0	4
Sibley	0	0	0
Stearns	4	0	4
Steele	4	0	4
Stevens	1	0	1
Swift	0	0	0
Todd	2	0	2
Traverse	0	0	0
Wabasha	6	0	6
Wadena	2	0	2
Waseca	0	0	0
Washington	4	0	4
Watonwan	1	0	1
Wilkin	2	0	2
Winona	1	0	1
Wright	4	0	4
Yellow Medicine	1	0	1
Total	664	10	654

County Attorney Report on Criminal Cases Involving Firearms

Cases Where Reporting Is Required by M.S. § 609.11, Subd. 10

Outcome of Cases Charged

Cases Disposed from July 1, 1996 to July 1, 1997

County	Total Number of Cases Charged	Convicted of Offense w/ a Mandatory Minimum		Conviction Offense Not Covered by M.S. § 609.11	Acquitted on all Charges	All Charges Dismissed	Other
		Firearm Established	Firearm Not Established				
Aitkin	4	1	0	2	0	1	0
Anoka	17	8	0	8	0	1	0
Becker	2	0	0	2	0	0	0
Beltrami	1	0	0	1	0	0	0
Benton	0	0	0	0	0	0	0
Big Stone	0	0	0	0	0	0	0
Blue Earth	7	3	0	4	0	0	0
Brown	1	1	0	0	0	0	0
Carlton	4	4	0	0	0	0	0
Carver	2	2	0	0	0	0	0
Cass	6	2	1	3	0	0	0
Chippewa	1	0	0	1	0	0	0
Chisago	5	1	0	4	0	0	0
Clay	6	5	0	1	0	0	0
Clearwater	1	0	0	1	0	0	0
Cook	0	0	0	0	0	0	0
Cottonwood	0	0	0	0	0	0	0
Crow Wing	16	13	0	3	0	0	0
Dakota	14	11	0	1	0	2	0
Douglas	3	1	1	0	0	1	0
Faribault	2	0	0	2	0	0	0
Fillmore	3	0	2	1	0	0	0
Freeborn	0	0	0	0	0	0	0
Goodhue	4	0	0	3	0	1	0
Grant	0	0	0	0	0	0	0
Hennepin	244	180	3	10	8	42	1
Houston	0	0	0	0	0	0	0
Hubbard	4	2	0	1	0	0	1
Isanti	6	4	0	0	1	1	0

County	Total Number of Cases Charged	Convicted of Offense w/ a Mandatory Minimum		Conviction Offense Not Covered by M.S. § 609.11	Acquitted on all Charges	All Charges Dismissed	Other
		Firearm Established	Firearm Not Established				
Itasca	13	5	4	3	1	0	0
Jackson	0	0	0	0	0	0	0
Kanabec	3	3	0	0	0	0	0
Kandiyohi	4	2	0	2	0	0	0
Kittson	0	0	0	0	0	0	0
Koochiching	4	0	0	4	0	0	0
Lac Qui Parle	0	0	0	0	0	0	0
Lake of the Woods	0	0	0	0	0	0	0
Lesueur	1	0	0	1	0	0	0
Lincoln	2	2	0	0	0	0	0
Lyon	1	1	0	0	0	0	0
Mcleod	5	2	1	2	0	0	0
Mahnomen	4	1	1	2	0	0	0
Marshall	0	0	0	0	0	0	0
Martin	3	0	0	1	0	2	0
Mille Lacs	1	1	0	0	0	0	0
Morrison	2	1	0	1	0	0	0
Mower	4	1	3	0	0	0	0
Murray	1	0	0	1	0	0	0
Nicollet	3	3	0	0	0	0	0
Nobles	3	1	0	2	0	0	0
Norman	0	0	0	0	0	0	0
Olmsted	10	6	0	4	0	0	0
Otter Tail	1	0	0	1	0	0	0
Pennington	5	4	0	1	0	0	0
Pipestone	0	0	0	0	0	0	0
Polk	9	7	1	1	0	0	0
Pope	0	0	0	0	0	0	0
Ramsey	142	116	0	13	2	11	0

County	Total Number of Cases Charged	Convicted of Offense w/ a Mandatory Minimum		Conviction Offense Not Covered by M.S. § 609.11	Acquitted on all Charges	All Charges Dismissed	Other
		Firearm Established	Firearm Not Established				
Red Lake	0	0	0	0	0	0	0
Redwood	2	0	0	1	0	1	0
Renville	0	0	0	0	0	0	0
Rice	9	4	0	3	0	2	0
Rock	1	0	0	0	0	1	0
Roseau	5	1	0	4	0	0	0
St. Louis	23	15	4	4	0	0	0
Scott	4	1	0	3	0	0	0
Sherburne	4	2	0	2	0	0	0
Sibley	0	0	0	0	0	0	0
Stearns	4	2	0	1	0	1	0
Steele	4	2	0	2	0	0	0
Stevens	1	1	0	0	0	0	0
Swift	0	0	0	0	0	0	0
Todd	2	2	0	0	0	0	0
Traverse	0	0	0	0	0	0	0
Wabasha	6	0	0	6	0	0	0
Wadena	2	1	0	0	0	0	1
Waseca	0	0	0	0	0	0	0
Washington	4	1	3	0	0	0	0
Watsonwan	1	0	0	1	0	0	0
Wilkin	2	2	0	0	0	0	0
Winona	1	1	0	0	0	0	0
Wright	4	0	0	4	0	0	0
Yellow Medicine	1	0	0	1	0	0	0
Total	654	429	24	119	12	67	3

(Pages 30-31 from the original report are missing.)

County	Number of Cases Where Mandatory Minimum Required	Mandatory Minimum Sentence Imposed	Mandatory Minimum Sentence Not Imposed
Redwood	0	0	0
Renville	0	0	0
Rice	4	4	0
Rock	0	0	0
Roseau	1	1	0
St. Louis	15	6	9
Scott	1	0	1
Sherburne	2	2	0
Sibley	0	0	0
Stearns	2	1	1
Steele	2	2	0
Stevens	1	0	1
Swift	0	0	0
Todd	2	0	2
Traverse	0	0	0
Wabasha	0	0	0
Wadena	1	0	1
Waseca	0	0	0
Washington	1	0	1
Watonwan	0	0	0
Wilkin	2	2	0
Winona	1	1	0
Wright	0	0	0
Yellow Medicine	0	0	0
Total	429	282	147