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Minnesota Sentencing Guidelines Commission

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REPORT TO THE LEGISLATURE

November 1, 1984

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Minnesota Sentencing Guidelines Commission

REPORT TO THE LEGISLATURE

November 1, 1984

The Minnesota Sentencing Guidelines Commission made only minor modifications to the sentencing guidelines in 1984. Most of the modifications were made as a result of new legislation or new case law.

No modifications to the sentencing guidelines grid nor any changes which would result in reduced sentences are proposed for the 1985 revision of the sentencing guidelines.

There is one area -- sentences for offenders convicted of first degree intrafamilial sexual abuse — that needs legislative attention. The presumptive sentence for first degree intrafamilial sexual abuse with zero criminal history is a 43 month prison sentence. In examining 1983 sentencing practices, however, the Commission found that almost 85% of those offenders were not imprisoned, although many received time in a local jail or workhouse. The high departure rate stems in part from language in the intrafamilial sexual abuse statute which states "Except when imprisonment is required by section 609.346, the court may stay imposition or execution of sentence if it finds that a stay is in the best interest of the complainant or the family unit" (Minn. Stat. § 609.3641 subd. 2). If a lower departure rate is preferred, that language either needs to be removed or modified.

In 1984 the Minnesota Legislature formalized the reporting schedule of the Sentencing Guidelines Commission to the Legislature. Minn. Stat. § 244.09, subd 11 specifies that "On or before November 1 of each year, the commission shall submit a written report to the judiciary committee of the senate and the house of representatives that identifies and explains all modifications made during the preceding 12 months and all proposed modifications that will be submitted to the legislature on January 1." Guideline modifications that became effective in 1984 are briefly described in this report. No guideline modifications requiring prior legislative review are proposed for 1985. The Commission, however, requests that the Legislature review the first degree intrafamilial sexual abuse statute in light of sentencing practices that have arisen for that offense.

1. 1984 Guideline Modifications

Modifications to the guidelines effective August 1, 1984 were of a minor nature. Most of the modifications were in response to new crimes created by the Legislature or in response to new case law from the appellate courts.

The criminal sexual conduct statutes were expanded in 1984 to include 16 and 17 year old victims when the offender is in a position of authority over the victim. The Commission ranked these offenses parallel with the intrafamilial sexual abuse of 16 and 17 year old victims. Sexual penetration of a 16 or 17 year old by someone in a position of authority over the victim (Minn. Stat. § 609.344 (e)) was ranked at severity level five and sexual contact with a 16 or 17 year old (Minn. Stat. § 609.345 (e)) was ranked at severity level four.

The crime of theft of a firearm with a value under $250 was upgraded to a felony (Minn. Stat. § 609.52, subd. 3(3)(e)). The Commission ranked this offense at severity level three parallel with theft related offenses under $2,500. A new crime, theft of telecommunication services (Minn. Stat. § 609.52, subd. 2(14)), was added to the Theft Related Offense list which means that it is ranked at severity level two if the amount involved is $250-$2,500 and is ranked at severity level three if the amount involved is over $2,500.

Two new felonies were created involving hit and run situations in accidents that were not the fault of the defendant. Hit and run accidents not the fault of the defendant that resulted in great bodily harm or substantial bodily harm are ranked at severity level one (Accidents 169.09, subd. 14 (b) (2) (3)). Hit and run accidents not the fault of the defendant that resulted in death is ranked at severity level two (Accidents 169.09, subd. 14 (b) (1)).

The guidelines grid was revised consistent with a resolution from the House Judiciary Committee so that the area above the dispositional line is shaded to indicate that local jail or workhouse time can be imposed at the discretion of the judge.

In addition to the ranking of new crimes and shading of the grid, the Commission made a number of commentary changes to clarify procedures in applying the guidelines. The commentary changes are contained in Appendix A.

2. 1985 Proposed Modifications Requiring Prior Legislative Review

The procedure for legislative review of Commission modifications was also formalized in the 1984 legislative session. Minn. Stat. § 244.05, subd. 11 reads: "Any modifications which amends the sentencing guidelines grid, including severity levels

and criminal history scores, or which would result in the reduction of any sentence or in the early release of any inmate, with the exception of a modification mandated or authorized by the legislature or relating to a crime created or amended by the legislature in the preceding session, shall be submitted to the legislature by January 1 of any year in which the commission wishes to make the change and shall be effective on August 1 of that year, unless the legislature by law provide otherwise."

No modifications to the guidelines grid nor any changes which would result in reduced sentences are proposed for the 1985 revision of the sentencing guidelines.

3. Sentences for Intrafamilial Sexual Abuse

The Sentencing Guidelines Commission requests that the Legislature review the first degree intrafamilial sexual abuse statute in light of sentencing practices that have arisen for that offense. The broader issue, of which intrafamilial sexual abuse is the major component, is sentences for sexual abuse of children. First degree sexual abuse of children can be charged under two statutes — Criminal Sexual Conduct 609.342 (a) or (b) or Intrafamilial Sexual Abuse 609.3641. The intrafamilial sexual abuse statute was created in 1981. The Commission ranked first degree intrafamilial sexual abuse parallel to the ranking for first degree criminal sexual conduct at severity level eight. Most such cases have a zero criminal history score which results in a presumptive sentence of 43 months in prison.

There has been a substantial increase in criminal cases of sexual abuse of children. The number of convictions for all degrees of sexual abuse of children was 126 in 1978, 160 in 1981, 293 in 1982, and 357 in 1983. The number of convictions for first degree sexual abuse of children was 23 in 1978, 13 in 1981, 55 in 1982, and 84 in 1983. The number of cases which had an initial first degree sexual abuse of children charge that resulted in some degree of felony sex offense conviction was 46 in 1978, 63 in 1981, 142 in 1982, and 181 in 1983.

In examining 1983 sentencing practices involving first degree sex offenses with child victims it was found that compliance with the presumptive sentence was very low when the offender had a criminal history score of zero (the most common circumstance). This held true both for offenders convicted of intrafamilial sexual abuse and for offenders convicted of criminal sexual conduct (a) and (b) which by

definition have child victims. The imprisonment rate for zero criminal history score offenders convicted of first degree intrafamilial sexual abuse was only 15.6% despite presumptive imprisonment for all cases. The imprisonment rate for zero criminal history score offenders convicted of first degree criminal sexual conduct (a) and (b) was 38.5%. Because of the extraordinarily high mitigated departure rate for sex offenders with child victims, a more detailed study of sanctions imposed and offender characteristics was conducted on the fifty-nine 1983 cases convicted of first degree sex offense against children with zero criminal history. Compared with offenders convicted of other serious person offenses, the offenders convicted of sexual abuse of children were more often White (95% compared to 60%), educated (60% with a high school education compared to 35% among other serious person offenders), and employed (60% compared to 36% among other serious person offenders). The results of that analysis are contained in Appendix B.

The most frequent reason given for departing from the presumptive sentence in intrafamilial sexual abuse cases was that a nonimprisonment sentence was in the best interests of the family or victim. That language finds support in the intrafamilial sexual abuse statute which states:

> "Except when imprisonment is required by section 609.346 (second or subsequent provision), the court may stay imposition or execution of sentence if it finds that a stay is in the best interest of the complainant or the family unit." Minn. Stat. § 3641, subd. 2.

Considerable disparity can occur as a result of that statutory language. Sexual abuse cases that involve family members can be prosecuted under either the criminal sexual conduct statutes or the intrafamilial sexual abuse statutes. If a prosecutor charges under the former statute, the discretion of the judge in imposing sentence is more limited and a prison sentence is more likely. Offenders charged in this manner have received sentences of up to forty years in prison. If, on the other hand, a prosecutor chooses to charge under the intrafamilial sexual abuse statute, the judge has almost total discretion to impose a non-prison sentence, and that is what usually occurs.

The Commission examined the issue of sentencing sexual abuse of children cases throughout the spring of 1984. A task force primarily composed of professionals involved in the treatment of sex offenders met with Commission members on two occasions and discussed existing programs for treating sex offenders. Most participants agreed that both punishment and treatment goals could be pursued in a

sentence and that the choice was not either to punish or to treat. Beyond that agreement, however, very little consensus was found regarding diagnostic criteria, the mixture of punishment and treatment, and the priorities between punishment and treatment goals. Summaries of the task force meetings are contained in Appendix C.

After extensive examination of the data, discussions with task force members, and a two day retreat, the Commission unanimously agreed that the ranking for first degree sex offenses against children should remain at severity level eight and should not be lowered to a level that would provide a presumptive stayed sentence. It was agreed that the serious nature of the offenses and the extensive harm done to the victims of such offenses warranted a high severity level.

The high mitigated dispositional rate, however, leaves that high ranking somewhat symbolic. The Commission discussed developing more specific criteria for departure which would apply to a small number of cases. Criteria were not developed, because the broad language in the intrafamilial sexual abuse statute would override more specific criteria in the guidelines. The Commission also believed that legislative intent is unclear. When the intrafamilial sexual abuse statutes were created in 1981, legislative authors indicated that a severity level with presumptive imprisonment was appropriate. At the same time, however, language sanctioning stayed sentences was included in the statutes. It is not known whether the sentencing practices that have emerged are consistent or inconsistent with the intended effect of the legislation. The Commission cannot resolve the ambiguity and requests that the Legislature review the matter in light of sentencing practices that have emerged for those offenses.

Several policy options are available, the first of which is to do nothing. The language in the statute would remain as it is, the offenses would continue to be ranked at severity level eight, and a high departure rate would persist. A second option is to remove the statutory language regarding stayed sentences, in which case more specific criteria for departure could be developed by the Sentencing Guidelines Commission or criteria could be developed on a case by case basis through appellate review. A third option is to modify the statutory language regarding stayed sentences so that it would apply to a smaller number of cases.

Appendix A

Modifications to the Minnesota Sentencing Guidelines and Commentary
Effective August 1, 1984

Amending the Commentary language to ensure a consistent order in sentencing multiple offenses concurrently:

II.B.101. *The basic rule for computing the number of prior felony points in the criminal history score is that the offender is assigned one point for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing. In cases of multiple offenses occurring in a single behavioral incident in which state law prohibits the offender being sentenced on more than one offense, the offender would receive one point. The phrase "before the current sentencing" means that in order for prior convictions to be used in computing criminal history score, the felony sentence for the prior offense must have been stayed or imposed before sentencing for the current offense. When multiple current offenses are sentenced on the same day before the same judge, sentencing ~~should~~ shall occur in the order in which the offenses occurred.*

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

Clarifying the computation of stays of imposition in criminal history scores:

II.B.105. *However, when a prior felony conviction resulted in a stay of imposition which was successfully served, the offense will be counted as a felony for purposes of computing criminal history scores for five years from the date of discharge or expiration of the stay, and thereafter would be considered a misdemeanor. Under Minn. Stat. § 609.13, a person who successfully completes a stay of imposition is deemed to have been convicted of a misdemeanor, not a felony. The Commission thought that the primary purpose of this provision was to protect those who do not recidivate from civil disabilities that may attach to being convicted of a felony, rather than to provide a blanket immunity from having prior felonious behavior considered at future sentencing for those who do recidivate with a new felony offense.* ~~*The effect of the Commission's five-year limit on considering such sentences as felony convictions, together with the "decay factor" on misdemeanor records (Criminal History item 3e, below) is that stays of imposition following felony convictions shall be counted as a felony for five years from the date of discharge, and thereafter shall not be used in computing criminal history scores, provided the offender did not commit an offense during that five-year period which resulted in a misdemeanor, gross misdemeanor, or felony sentence. (The offense of conviction is a felony if the maximum imprisonment sentence authorized by statute is at least one year and one day.)*~~

The stay of imposition will be counted as a misdemeanor five years after the date of discharge from or expiration of the stay of imposition, even if the offender has been sentenced for crimes committed during the five year period. If the offender did not commit an offense which resulted in a misdemeanor, gross misdemeanor, or felony sentence during the five year

period after discharge from or expiration of the stay of imposition, the stay of imposition decays as a misdemeanor and shall not be used at all in computing the criminal history score.

Clarifying Commentary language regarding the decay factor:

II.B.106. *Finally, the Commission established a "decay factor" for the consideration of prior felony offenses in computing criminal history scores. The Commission decided it was important to consider not just the total number of felony sentences, but also the time interval between those sentences and subsequent offenses. A person who was sentenced for three felonies within a five-year period is more culpable than one sentenced for three felonies within a twenty-year period. The Commission decided that after a significant period of offense-free living, the presence of old felony sentences should not be considered in computing criminal history scores. A ~~P~~prior felony ~~sentences~~ sentence would not be counted in criminal history score computation if ten years had elapsed between the date of discharge from or expiration of ~~the~~ that sentence and the date of a subsequent offense for which a misdemeanor, gross misdemeanor, or felony sentence was imposed or stayed. (Traffic offenses are excluded in computing the decay factor.) It is the Commission's intent that time spent in confinement pursuant to an executed or stayed criminal sentence not be counted in the computation of the offense-free period.*

Addition of Commentary language to clarify non-traffic status of "Fleeing a Peace Officer in a Motor Vehicle.":

II.B.301. *The Commission established a measurement procedure based on units for misdemeanor and gross misdemeanor sentences which are totaled and then converted to a point value. The purpose of this procedure is to provide different weightings for convictions of felonies, gross misdemeanors, and misdemeanors. Under this procedure, misdemeanors are assigned one unit, and gross misdemeanors are assigned two units. An offender must have a total of four units to receive one point on the criminal history score. No partial points are given -- thus, a person with three units is assigned no point value. As a general rule, the Commission eliminated traffic misdemeanors and gross misdemeanors from consideration. However, the traffic offenses of driving while intoxicated and aggravated driving while intoxicated have particular relevance to the offense of criminal vehicular operation. Therefore, prior misdemeanor and gross misdemeanor sentences for DWI and aggravated DWI shall be used in the computation of the misdemeanor/gross misdemeanor point when the current conviction offense is criminal vehicular operation.*

The offense of fleeing a peace officer in a motor vehicle (Minn. Stat. § 609.487) is deemed a non traffic offense. Offenders given a prior misdemeanor or gross misdemeanor sentence for this offense shall be assigned one and two units respectively in computing the criminal history. (Offenders with a prior felony sentence for fleeing a peace officer in a motor vehicle shall be assigned one point for each sentence [illegible] to the provisions in II.B.1.).

Clarifying Commentary language regarding decay factor:

II.B.304. The Commission also adopted a "decay" factor for prior misdemeanor and gross misdemeanor offenses for the same reasons articulated above for felony offenses. If five years have elapsed between the expiration of or discharge from a misdemeanor or gross misdemeanor sentence and the date of a subsequent offense for which a misdemeanor, gross misdemeanor, or felony sentence was stayed or imposed, ~~the~~ that misdemeanor or gross misdemeanor ~~sentences~~ sentence will not be used in computing the criminal history score. (Traffic offenses are excluded in computing the decay factor.) It is the Commission's intent that time spent in confinement pursuant to an executed or stayed criminal sentence not be counted in the computation of the offense-free period.

Improving the language by removing the phrase "that was imposed.":

Section II.C. (Presumptive Sentence) is modified as follows:

The offense of conviction determines the appropriate severity level on the vertical axis. The offender's criminal history score, computed according to section B above, determines the appropriate location on the horizontal axis. The presumptive fixed sentence for a felony conviction is found in the Sentencing Guidelines Grid cell at the intersection of the column defined by the criminal history score and the row defined by the offense severity level. The offenses within the Sentencing Guidelines Grid are presumptive with respect to the duration of the sentence and whether imposition or execution of the felony sentence should be stayed.
(Rev. Eff. 8/1/82)

The line on the Sentencing Guidelines Grid demarcates those cases for whom the presumptive sentence is stayed. For cases contained in cells below and to the right of the line, the sentence should be executed. For cases contained in cells above and to the left of the line, the sentence should be stayed, unless the conviction offense carries a mandatory minimum sentence.

When the current conviction offense is burglary of an occupied dwelling (Minn. Stat. § 609.582, subd.1(a)) and there was a previous adjudication of guilt for a felony burglary ~~that was imposed~~ before the current offense occurred, the presumptive disposition is Commitment to the Commissioner of Corrections. The presumptive duration of sentence is the fixed duration indicated in the appropriate cell of the Sentencing Guidelines Grid.

Every cell in the Sentencing Guidelines Grid provides a fixed duration of sentence. For cells below the solid line, the guidelines provide both a presumptive prison sentence and a range of time for that sentence. Any prison sentence duration pronounced by the sentencing judge which is outside the range of the presumptive duration is a departure from the guidelines, regardless of whether the sentence is executed or stayed, and requires written reasons from the judge pursuant to Minn. Stat. § 244.10, subd. 2, and Section E of these guidelines.

(Rev. Eff. 11/1/83)

Addition of Commentary language to clarify the presumptive sentence in second or subsequent sex offenses:

II.E.03. *In State v. Feinstein, 338 N.W.2d 244 (Minn. 1983), the Supreme Court held that judges had the authority to stay execution of mandatory three year prison sentences for second or subsequent sex offenses established by Minn. Stat. § 609.346. Although the Supreme Court decision authorized stays of execution for second or subsequent sex offenses, the presumptive disposition for second or subsequent sex offenses is still imprisonment. A stay of execution for such a case constitutes a dispositional departure and written reasons which specify the substantial and compelling nature of the circumstances and which demonstrate why the disposition selected is more appropriate, reasonable, or equitable than the presumptive disposition are required.*

Updating Commentary language regarding consecutive sentences:

II.F.02. *The guidelines provide that when one judge gives consecutive sentences in cases involving multiple current convictions, sentence durations shall be aggregated into a single fixed presumptive sentence. Moreover, the Commission recommends that when an offender is charged with multiple offenses within the same judicial district the trials or sentencings be consolidated before one judge, whenever possible. This will allow the judge to perform the aggregation process described in the guidelines if consecutive sentences are given.*

The order of sentencing when consecutive sentences are imposed by the same judge is to sentence the most severe conviction offense first. The presumptive duration for the conviction is determined by the severity level appropriate to the conviction offense and criminal history score of the offender, or the mandatory minimum, whichever is greater. When there are multiple offenses at the highest severity level, the earliest occurring offense among those at the highest severity level shall be sentenced first. After sentencing the most severe offense or the earliest occurring offense among those at the highest severity level, subsequent sentences shall be imposed in the order in which the offenses occurred. A zero criminal history score shall be used in determining the presumptive duration for each subsequent offense sentenced consecutively.

When concurrent and consecutive sentences are imposed for different offenses, the most severe offense involving consecutive sentencing shall be sentenced first. When there are multiple offenses at the highest severity level, the earliest occurring offense among those at the highest severity level shall be sentenced first. After sentencing the most severe offense or the earliest occurring offense among those at the highest severity level, subsequent sentences shall be imposed in the order in which the offenses occurred. The presumptive duration for each offense sentenced consecutively shall be based on a zero criminal history score. The presumptive duration for each offense sentenced concurrently shall be based on the offender's criminal history as calculated by following the procedures outlined in II.B.

~~*However,*~~*If multiple trials or sentencings cannot be consolidated before one judge, and if two or more judges give presumptive sentences some of which are given consecutively to others, the* ~~*Commission believes there are two options available.*~~*following method can be used.*

~~*The first option would be for the judge choosing to impose a sentence consecutive to a presumptive sentence given by another judge to pronounce the duration indicated at the zero criminal history column and the appropriate severity level for the current offense, and to specify that the sentence shall commence at the end of the term of imprisonment for the previous guideline sentence. Provided that the sentence for the most severe current offense is pronounced first, the total terms of imprisonment resulting from a second (or subsequent) consecutive sentence will be the same as if one judge were sentencing all convictions. However, under this option, the period of supervised release will be somewhat shorter because the offender technically will be serving the period of supervised release on the first offense at the same time he or she is serving the term of imprisonment on the second offense.*~~

~~*The second option would be for*~~ *The second or subsequent judge* ~~*to*~~ *can pronounce the durations indicated in the Sentencing Guidelines Grid at the zero criminal history column for the severity level for the current offense, and* ~~*to*~~ *can state that this sentence would be consecutive to the previous presumptive sentence.* ~~*The Commission believes that it would be appropriate for*~~ *The institutional records officer* ~~*to*~~ *will aggregate the separate durations into a single fixed presumptive sentence, as well as* ~~*to*~~ *aggregate the terms of imprisonment and the periods of supervised release. For example, if Judge A executed a 44 month fixed presumptive sentence, and Judge B later executes a 24 month fixed presumptive sentence to be served consecutively to the first sentence,* ~~*the Commission feels*~~ *the records officer has the authority to aggregate those sentences into a single 68 month fixed presumptive sentence, with a 45.3 month term of imprisonment and a 22.7 month period of supervised release, provided that all good time were earned.* ~~*The Commission believes that nothing in statutory or case law prevents the records officer from performing this aggregation, and that such aggregation provides an orderly, rational, and equitable method for handling consecutive sentences.*~~

Under this ~~*second option*~~ *method, if the most severe current offense is sentenced first, the resulting aggregated sentence lengths would be the same as if one judge had sentenced the offenses consecutively.*

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

Additions to the Offense Severity Reference Table:

V Criminal Sexual Conduct 3 - 609.344(e)

IV Criminal Sexual Conduct 4 - 609.345 (e)

III Theft of a Firearm - 609.52, subd. 3(3) (e)

II Accidents - 169.09, subd. 14 (b) (1)

I Accidents -169.09, subd. 14 (b) (2) (3)
~~Obtaining or Retaining a Child~~ Depriving Another of Custodial or Parental Rights - 609.26

Deletions from the Offense Severity Reference Table:

IV ~~Neglect of Child - 609.378~~

Additions to the *Theft Related Offense List:*

Theft of Telecommunications Services - 609.52, subd. 2 (14)

IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle *Possession of Marijuana*	I	12*	12*	12*	13	15	17	19 *18-20*
Theft Related Crimes ($250-$2500) *Aggravated Forgery ($250-$2500)*	II	12*	12*	13	15	17	19	21 *20-22*
Theft Crimes ($250-$2500)	III	12*	13	15	17	19 *18-20*	22 *21-23*	25 *24-26*
Nonresidential Burglary *Theft Crimes (over $2500)*	IV	12*	15	18	21	25 *24-26*	32 *30-34*	41 *37-45*
Residential Burglary *Simple Robbery*	V	18	23	27	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Criminal Sexual Conduct, 2nd Degree (a) & (b) *Intrafamilial Sexual Abuse, 2nd Degree subd. 1(1)*	VI	21	26	30	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated Robbery	VII	24 *23-25*	32 *30-34*	41 *38-44*	49 *45-53*	65 *60-70*	81 *75-87*	97 *90-104*
Criminal Sexual Conduct 1st Degree *Assault, 1st Degree*	VIII	43 *41-45*	54 *50-58*	65 *60-70*	76 *71-81*	95 *89-101*	113 *106-120*	132 *124-140*
Murder, 3rd Degree *Murder, 2nd Degree (felony murder)*	IX	105 *102-108*	119 *116-122*	127 *124-130*	149 *143-155*	176 *168-184*	205 *195-215*	230 *218-242*
Murder, 2nd Degree (with intent)	X	120 *116-124*	140 *133-147*	162 *153-171*	203 *192-214*	243 *231-255*	284 *270-298*	324 *309-339*

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

At the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation.

Presumptive commitment to state imprisonment.

*one year and one day

(Rev. Eff. 8/1/81; 11/1/83; 8/1/84)

Appendix B

First Degree Sex Offenses Against Children: Sentence and Offender Characteristics

Sanctions

Of the 59 offenders sentenced in 1983 for first degree sexual abuse against children (both Criminal Sexual Conduct and Intrafamilial Sexual Abuse cases) with zero criminal history score, 15 (25%) were imprisoned. This means that the mitigated dispositional departure rate for these cases was 75% since the presumption is imprisonment for all cases. Offenders who were not imprisoned generally received some incarceration in a local jail or workhouse. Thirty-six of the 59 offenders (61%) received jail or workhouse time as a condition of a stayed sentence. The average pronounced jail time for the offenders was 9.1 months. The average amount of jail time actually served by the offenders was 5.5 months, approximately 60% of the pronounced time. Eight of the 59 offenders (14%) received no incarceration in prison or jail.

Offenders with jail as a condition of probation were frequently given treatment as an additional condition of the stayed sentence. Nine of the 36 offenders with jail time also had residential treatment as an additional condition of probation. Twenty-three of the 36 offenders had nonresidential treatment as an additional condition of probation. Four offenders were given jail time with no treatment ordered. In all, 15 of the 59 offenders had residential treatment (25%), and 24 of the 59 offenders were given nonresidential treatment (41%).

The most frequently used residential facility was the sex offender program at St. Peter State Hospital where nine of the 15 residential treatment offenders were placed. Other residential facilities used were Nexus, Alpha House, Eden House, and Passage Way. Almost all of the offenders were still in residence as of July, 1984. A variety of nonresidential programs were used. Most of the offenders with nonresidential treatment were also still participating in the program.

Offenders convicted of Criminal Sexual Conduct were more likely to be imprisoned than offenders convicted of Intrafamilial Sexual Abuse, even though both offenses are ranked at severity level eight. The victims in Criminal Sexual Conduct

cases were likely to be acquaintances of the offender, but not a family member. Of the 59 offenders, 26 were convicted of Criminal Sexual Conduct and 33 were convicted of Intrafamilial Sexual Abuse. Ten of the 26 offenders convicted of Criminal Sexual Conduct were imprisoned (39%) and five of the 33 offenders convicted of Intrafamilial Sexual Abuse (15%) were imprisoned. Offenders of each conviction type were equally likely to get residential treatment as a condition of a stayed sentence (approximately 25%). Offenders convicted of Intrafamilial Sexual Abuse were somewhat more likely to get jail time (67% compared to 42%) and nonresidential treatment (49% compared to 31%).

The vast majority of offenders pled guilty (52) rather than go to trial (7). Four of the seven offenders who went to trial (57%) were sent to prison, compared to 21% imprisoned among those who pled guilty. None of those who went to trial received residential treatment. Jail was the major nonimprisonment sanction for those who went to trial and received stayed sentences.

The age of the victim was correlated with the use of imprisonment. The imprisonment rate for cases with victims under age 11 was 39%, and the rate for cases with victims 11 or older was 17%. The combined rate of nonresidential and residential treatment for cases with victims under age 11 was 56%, and for cases with victims aged 11 or older was 72%.

Offender Characteristics

It had been frequently hypothesized that sex offenders against children had different characteristics than offenders convicted of other serious person crimes. It was suggested that sex offenders against children were more middle class in their social attributes than other serious person offenders.

The characteristics of sex abusers of children were compared with other serious person offenders convicted of severity levels seven and eight offenses with zero criminal history scores. The results of the analysis confirmed the expectations of observers. The sex offenders tended to be older than other serious person offenders with an average age of 37 years compared to 24 years for other serious person offenders. The sex offenders were more likely to be White with 95% of the sex offenders White compared to 60% White among other serious offenders. The offenders in each of the two groups were equally likely (91%) to be male.

The sexual abusers of children were more likely than other serious person offenders to be married or cohabiting (71% compared to 22%). Sex offenders had attained a higher educational status, with 60% having a high school education or more compared to 35% among other serious person offenders. The sex offenders also had a higher rate of employment. At the time of offense, 60% of the sex offenders were employed compared to 36% among other serious person offenders. At the time of sentencing, 45% of sex offenders were employed compared with 18% among other serious person offenders. There was no difference in types of occupations. Approximately 20% among each of the two offender groups were trained for white collar/professional/other skilled work.

There was a slightly lower incidence of drug and alcohol abuse among sex offenders. Approximately 30% of the sex offenders were heavy or addicted users of alcohol or drugs compared to 40% among other serious person offenders.

The expectation that offenders convicted of sexual abuse of children are different socially and economically from other serious person offenders was verified. It cannot be inferred, however, that the high rate of mitigated departures is a result of their higher level of economic and social status. The legislative language that supports stayed sentences is a more direct source that sanctions departures from presumptive imprisonment.

Minnesota Sentencing Guidelines Commission

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TO: Members of the Sex Offense Study Group

FROM: Kay A. Knapp KK
Director

DATE: March 19, 1984

SUBJECT: Observations and Perspectives Shared at March 15 Meeting

The first meeting of the Sex Offense Study Group began at approximately 6:45 p.m. in the Metropolitan Council Chambers. All members of the Commission subcommittee were in attendance as follows: Stephen Rathke, Justice Kelley, Bill Falvey, Barbara Andrus, and Dan Cain. Commission member Tom Foster also attended the meeting. Study Group members in attendance were: Marv Rosow, Honorable Lee Greenfield, Fern Sepler-king, Mary Bogut, Dick Seely, Jerry Kaplan, Honorable Eric Petty, Bryce Fier, and Peggy Specktor. Holly Sprangers-Larson and Stephen M. Larson were present at the meeting.

Chairman Stephen Rathke outlined the Commission's concerns regarding sentencing practices for sex offenses involving children. One major concern is that the presumptive imprisonment sentence for such first degree sex offenders with zero criminal history scores is not being followed. A second major concern is the disparity that exists between similar sex offense cases as a result of variable prosecutorial charging practices and judicial sentencing discretion. Chairman Rathke outlined three options for resolving the problem:

1). Maintain the current Guideline policy; recommend legislative changes to IFSA statutes; disseminate information to courts.

2). Change the guidelines to reflect sentencing practices, e.g. rerank first degree intrafamilial sexual abuse and criminal sexual conduct (a) and (b) from severity level eight to severity level six.

3). Maintain the current Grid policy for sex offenses, but draft more specific criteria for departure outlining substantial and compelling circumstances that would apply to a small number of cases.

After having outlined the problem and some obvious options, the Chair solicited observations and perspectives from Commission and study group members. The following represent some of those observations and perspectives.

- It is often in the best interest of the victim and family to have the offender participate in community treatment programs rather than sending the offender to prison. (The opposite perspective was also articulated, i.e. that it was not in the best interest of the victim to refrain from imprisoning the offender).

- Prison is a sobering experience and provides time for reflection and thought. Often an offender will be more receptive to treatment when finally imprisoned because attempts at court manipulation have ended.

- Treatment in the community is more effective than treatment in prison because it allows for reality testing.

- The average period of residential treatment at Alpha House for those who complete the program is 20 months. Approximately 50% who begin, complete the program. The average period of residential treatment at ITPSA, St. Peter, is approximately two years, with three to five years nonresidential treatment and supervision. Four months of community treatment and program supervision is provided by the Lino Lakes Sex Offender program following release from the institution.

- The major cause for disparity and lack of guideline compliance is the existence of the intrafamilial sexual abuse statute. Prosecutors have total discretion to charge under criminal sexual conduct or intrafamilial sexual abuse, and under the latter judges have almost total discretion in determining the appropriate disposition.

- There is probably little correlation between severity of conviction offense and amenability to treatment. To the extent that they are correlated, those convicted of more serious offenses are probably more amenable to treatment. That occurs because remorseful offenders are more likely to engage in straight pleas to the charged offense. Offenders who deny the offense and/or lack remorse are more likely to bargain for and get a reduced charge.

- There is probably a positive correlation between culpability for the offense and amenability to treatment. The executive convicted of child abuse is arguably more culpable for child abuse because of his intelligence, education, and other advantages (i.e., he should know better); he is also more amenable to treatment because he probably does not suffer from psychopathy, chemical dependency, or other mental illness. The chemically dependent, psychopathic offender is arguably less culpable due to mental impairment; but he is also probably less amenable to treatment because of the mental impairment.

- Periods of supervised release are not long enough to provide community treatment at the end of the sentence.

- The reliability of amenability assessments is probably not very high as evidenced by the variation that exists among program assessment criteria.

- Treatment becomes less effective when courts are willing to revise conditions of the stay at the request of the defendant, e.g., by allowing jail/workhouse time to be served in lieu of program completion.

- The sentencing practices for intrafamilial sexual abuse raise serious questions about the role of excluded factors in sentencing. Offenders convicted of intrafamilial sexual abuse more often tend to be white and of higher economic status than other offense types. There is also a higher rate of mitigated dispositional departures.

Minnesota Sentencing Guidelines Commission

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TO: Members of the Sex Offense Study Group

FROM: Kay A. Knapp KK
Director

DATE: April 17, 1984

SUBJECT: Observations and Perspectives Shared at April 12 Meeting

The second meeting of the Sex Offense Study Group began at approximately 6:45p.m. in the Metropolitan Council Chambers. Commission subcommittee members present were Stephen Rathke, Dan Cain, and Barbara Andrus. Commission member Judge O. Russell Olson also attended the meeting. Study Group members in attendance were: Dick Seely, Bryce Fier, Mike O'Brien, Mary Ellison, Jerry Kaplan, Mary Bogut, and Peggy Specktor. Others in attendance included: Dan Hollihan, Ramsey County Attorney's office; John Lynch, MAO Network Crime Committee; Del Gorecki, Ramsey County Attorney's office; Dave Gair, Hennepin County Court Services; Jeff Benson, Hennepin County Court Services; Peter Halbach, Attorney General's office; Mary Ann Jurney, Ramsey County Mental Health.

Chairman Stephen Rathke reiterated the Commission's concerns regarding sentencing for sex offenses involving children. He outlined several options for resolving the problem which include maintaining the current Guideline policy with legislative changes to IFSA statutes; change the Guidelines to reflect sentencing practices; and maintain the current policy for sex offenses, but draft more specific departure criteria. The Chair solicited suggestions from the study group regarding various sentencing options. Most of the discussion centered around the following topics.

- Desirability of treatment: Several study group members expressed their interest that treatment be structured into sanctions. Some equated treatment with stayed sentences but it was observed that sex offender treatment programs are available in prison also and that treatment programs in and out of prison have advantages and disadvantages. It was reiterated that it probably isn't too useful to dichotomize treatment versus punishment.

- Possible legislative changes: Several study group members expressed a desire to have language regarding the best interests of victim and family unit removed from the IFSA statutes. That language can be used to justify any departure whether warranted or not. It was suggested that IFSA statutes might be repealed entirely, if language that would criminalize sexual acts against 16 and 17 year olds were included in the criminal sexual conduct statutes. Concern was expressed that victim reporting might decrease if prison were probable for sex offenses against children. Another possibility would be an increase in plea negotiation to sex offenses that carried a presumptively stayed sentence.

It was suggested that a longer period of supervised release could be established for sex offenders, such as a minimum of two years. Another possibility in keeping with the conceptualization of punishment and treatment would be to statutorily mandate treatment for sex offenders in prison. Concern was expressed that such exceptions not be extended beyond the area of sex offenses.

Another possibility would be to have all sex offenders below the line sent to prison where an evaluation would be done accompanied by three to six months of imprisonment followed by treatment for those amenable in prison or a residential treatment center. An advantage of this approach would be some uniformity in punishment for offenders.

- Possible Guidelines changes: There was a consensus that severity level seven and eight sex offenses should not be moved above the dispositional line. However, there was not a consensus that any other changes were necessary. Some members suggested that an 85% departure rate for severity level eight, zero criminal history score might be acceptable.

  The racial implications of doing nothing were reiterated at this meeting. It is the only area of criminal convictions for serious person offenses in which white offenders are represented out of proportion to their numbers. It is also the area of highest mitigated departures. Black offenders convicted of criminal sexual conduct (a) and (b) do not receive mitigated dispositional departures at as high a rate as white offenders.

  The offense circumstances contained in the Hennepin County Attorney's Child Sex Abuse Disposition Policy were briefly reviewed. The criteria were structured as "aggravating factors," that is they stressed "unamenability to a stayed sentence." If the severity levels of the offenses are to remain at the current level, any criteria that would be drafted for the Guidelines would have to be mitigated departures -- i.e., particularly amenable to a stayed sentence.

  It was suggested that the criteria for departures in the sexual abuse area need not be limited to rare and unusual cases, and that perhaps more flexibility was needed. However, it was noted that the Commission's mandate is to establish presumptive sentences that would apply to most cases.

Note from the Director: The study group did not address the effectiveness of treatment programs. Comments were made regarding the wide range of programs available, and the apparent implication was that they are not all equally effective (apart from the obvious understanding that some programs are more effective for certain offenders than others). If, however, treatment is to receive official policy level sanction as part of sentences for sex offenders, it should be done with the understanding that the effectiveness evaluation of treatment programs probably would not demonstrate significant success.

The Commission subcommittee will share the thoughts, perspectives, and information of the study group with the full Commission at a retreat on May 11 and 12. If there is a consensus on the Commission regarding the appropriate Guideline policy in the area of sexual abuse of children, the Commission will focus on articulating that policy and discussing ways in which dissemination and training on the policy can occur. If a consensus does not emerge, the Commission will make plans for continuing to study the issue. Regardless of outcome, the Commission response will be communicated following the May meeting.