

Minnesota Sentencing Guidelines Commission

REPORT TO THE LEGISLATURE

November, 1985

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There were few legislative changes in the 1985 statutes that required action by the Sentencing Guidelines Commission. The only new felony area which the Commission ranked was sexual abuse by a psychotherapist. In addition to those rankings, the Commission increased the penalty for second or subsequent sale of drugs such as hallucinogens, heroin, and cocaine, which became effective August 1, 1985.

The Commission also adopted several revisions that will become effective August 1, 1986 absent legislative action to the contrary. The Commission proposes to rank the previously unranked Minn. Stat. § 325D.53 which includes collusive bidding and similar offenses. In addition, the Commission proposes to increase the severity levels for possession and sale of cocaine. The Commission is also proposing to revise the felony and misdemeanor decay factor. Final Commission action on collusive bidding and the decay factors will be taken prior to the January 1, 1986 submission of proposed modifications to the legislature.

Rules for modifying the guidelines pursuant to Minn. Stat. § 244.09, Subd. 5(2) were promulgated. The rules take effect January 1, 1986.

Sentencing practices in 1984 were similar to those of 1983. There was a slight increase in departure rates in 1984. The imprisonment rate for first degree sexual abuse of children in cases of zero criminal history increased somewhat in 1984.

The 1985 Sentencing Guidelines Commission Report to the Legislature includes a discussion of guideline modifications that became effective August 1, 1985 and a discussion of guideline modifications that will become effective August 1, 1986 absent legislative action to the contrary. Rules for modifying the guidelines promulgated pursuant to Minn. Stat. § 244.09, Subd. 5(2) were promulgated and are appended to this report. A brief discussion of sentencing trends in 1984 is also included.

1. 1985 Guidelines Modifications

There were only two significant modifications to the guidelines effective August 1, 1985; 1) the ranking of sexual abuse by a psychotherapist which resulted from the new crimes created by the 1985 legislature; and 2) increased penalties for second or subsequent sale of drugs such as heroin, hallucinogens, and cocaine.

a. Sexual Abuse by a Psychotherapist

In 1985 Criminal Sexual Conduct in the third and fourth degrees were expanded to include sexual contact or penetration between a psychotherapist and a client if the act occurred during a psychotherapy session, if the patient were emotionally dependent, or therapeutic deception occurred. In ranking the offenses, the primary issue was whether Criminal Sexual Conduct in the third degree, Minn. Stat. § 609.344 (h), (i), and (j), which involves sexual penetration should be a severity level seven offense which carries a presumptive prison sentence, or whether it should be ranked at severity level six with a presumptive probation sanction. It was determined that Criminal Sexual Conduct in the fourth degree, Minn. Stat. § 609.345 (h), (i), and (j) which involves sexual contact would be ranked at one level less severe than the third degree offense.

The reasoning presented in testimony to the Commission and the reasoning that emerged in Commission discussion of the issue strongly supported ranking sexual penetration of a patient by a psychotherapist at severity level seven, establishing prison as the presumptive sentence. A member and a staff person from the Task Force on Sexual Exploitation by Counselors and Therapists testified in support of a severity level seven ranking for the third degree offense. The testimony was consistent with earlier Commission discussions supporting presumptive imprisonment for the penetration offense. The relatively serious ranking was deemed appropriate for three reasons. First, it was felt that perpetrators of this crime are particularly culpable given their training and the status conferred upon them. To some extent the culpability is similar to that of perpetrators of major economic crimes who use positions of trust and authority in committing offenses, and similar to intrafamilial sexual abuse offenses in the betrayal of trust and misuse of authority. Secondly, the harm done to the victim in this kind of offense is generally substantial. The victim is by definition vulnerable and in need of healing, and the offense may prevent that healing from ever occurring. Third, it was felt that a relatively harsh penalty may deter crimes of this nature. While it is true that there is little empirical support for the deterrent effect of imprisonment generally, imprisonment may well have a deterrent effect

among middle class professionals like psychotherapists who tend to engage in more rational calculations of costs and benefits than do other offenders.

A factor was raised which suggested a less severe sanction for the offense. It was noted that loss of professional standing and public condemnation resulting from a felony conviction could be severe punishment by itself. While acknowledging the loss that would occur, such loss was not deemed sufficient to counter the factors supporting a harsher sentence.

The Commission deemed that the reasoning supporting the more serious ranking was compelling and therefore ranked the third degree penetration offense at severity level seven and the fourth degree contact offense at severity level six.

b. Increased Penalties for Sale of Drugs

In the 1985 legislative session, a bill to establish mandatory minimum sentences for sale of cocaine, heroin, and hallucinogens was introduced as H.F. 654. In addition to establishing mandatory minimum terms for sale of drugs, the bill also proposed to establish mandatory minimum terms for aggravated robbery of pharmacies, second or subsequent burglary of an occupied dwelling, and third or subsequent burglary of a residence.

While many hours of testimony on the proposal were heard in the House committees, the range of testimony was relatively narrow, coming primarily from law enforcement officials. Little testimony was provided by criminal justice groups more closely involved in sentencing policy and practices, such as prosecutors, judges, probation officers, or the Sentencing Guidelines Commission. The Minnesota Corrections Association wrote a letter opposing mandatory minimum sentences, but they did not testify on the issue. The Sentencing Guidelines Commission has generally considered mandatory minimum sentences to be within the purview of the legislature and therefore has traditionally refrained from testifying on the issue, other than to provide fiscal impact statements as requested.

H.F.654 received unanimous support in the House of Representatives. The Chairman of the Senate Judiciary Committee refused to hear the Senate version of the bill, S.F.663, because he felt that mandatory minimum sentences established by the legislature distort the sentencing guidelines system and contradict the intention of the legislature to delegate specific decisions on sentencing to the Sentencing Guidelines Commission. The Senate Judiciary Chairman requested that the Sentencing Guidelines Commission consider the substantive provisions of S.F.663 and H.F.654. That request was echoed by Representative Marcus Marsh, chief author of H.F.654.

Increasing the seriousness ranking of possession and sale of cocaine was already on the Commission's modification agenda as a result of a motion by Commission member Dan Cain, a citizen representative. The Commission immediately expanded the agenda to include all substantive issues raised in H.F.654 and S.F.663.

The Commission followed its usual process for modifying the guidelines and proceeded to address the issue from April, 1985 to August 1, 1985. The modification process that the Commission has followed since inception is designed to provide the opportunity 1) for the public to raise issues; 2) to publicize Commission proposals; and 3) to provide opportunity for public comment on Commission proposals. Apparently several law enforcement officials had suggested to Senator Spear that they had had difficulty in persuading the Commission to seriously address issues raised by S.F.663 and H.F.654. The only time law enforcement representatives had approached the Commission regarding drug sale offenses was in 1981 at which time the Commission established a major drug offense aggravating factor consistent with the recommendation of the law enforcement officials. During the 1985 modification process, the Commission was unable to locate any law enforcement representative who had approached the Commission on the issue since 1981. The Commission feels that an open, responsive, and responsible modification process is essential to the guidelines system. There is no merit to the suggestion that the Commission had been unresponsive to law enforcement in considering issues brought before it.

Briefly the process followed in 1985 is as follows. Initial discussions and testimony from the public, including testimony from Representative Marcus Marsh occurred on April 18, 1985 and June 13, 1985. Commission proposals were published in the State Register June 24, 1985. A public hearing on the proposals was held on July 25, 1985. Steve Hennessy, investigator for the BCA, Jerry Kittridge, spokesman for the Minnesota Police and Peace Officers Association, Howard Laak from the Minnesota State Sheriffs Association, and Myron Johnson from Washington County Court Services office testified at that hearing. Final action on the proposals was taken on July 30, 1985. The proposals that were approved went into effect on August 1, 1985, with the exception of those which require prior legislative review, which will become effective August 1, 1986 assuming no legislative action to the contrary.

Several substantive issues regarding drug sale offenses emerged. There was no opposition to the Commission initiated proposals to raise the severity level of sale of cocaine from level four to level six and possession of cocaine from level one to level three. These modifications classify cocaine with sale of heroin, hallucinogens, and PCP rather than with marijuana and reflect the understanding that cocaine is more similar in effect to heroin, hallucinogens, and PCP than it is to marijuana. Changes in severity levels require prior legislative review before becoming effective and therefore the increased rankings for possession and sale of cocaine will become effective August 1, 1986 absent legislative action to the contrary.

A second substantive issue raised regarding sale of heroin, hallucinogens, and cocaine was the appropriate sentence upon first conviction for sale of drugs. H.F.654/S.F.663 would require a mandatory minimum prison sentence for first drug sale conviction. The Sentencing Guidelines Commission obviously cannot establish mandatory minimum sentences, but the Commission could establish presumptive imprisonment sentences for sale of drugs upon first conviction. The easiest way to accomplish this under the guidelines would be to rank sale of heroin, hallucinogens, PCP, and cocaine at severity level seven, which presumes imprisonment with a criminal history score of zero.

The Commission determined that presumptive imprisonment and, by implication, mandatory imprisonment for sale of drugs when there is a criminal history score of zero is nonproportional to the seriousness of the usual drug sale offense. This is the same conclusion the Commission came to in 1982 and reported to the legislature in the January 1, 1983 Report to the Legislature. Several reasons lead to this conclusion. First, the usual drug sale offender is the "user-seller" who sells small amounts of drugs to his or her circle of acquaintances in order to support his or her own drug use. To impose mandatory or presumptive imprisonment for this kind of offense when there is a zero criminal history score would be to equate this offense with aggravated robbery, burglary with a weapon or assault, criminal sexual conduct with force, kidnapping, and manslaughter. The Commission strongly feels that all of these offenses are significantly more serious than the usual sale of drugs offense, and that sentence proportionality requires a lesser presumptive sentence for the typical sale of drug offense.

The conclusion regarding the relative seriousness of the typical user-seller drug offender drawn by the Commission is supported by most of the law enforcement testimony both before the House committees and before the Commission. The goal of law enforcement is to obtain harsher penalties for the user-seller, not because it is a more serious offense than the Commission deems it, but because they want a "club" to encourage the offender to inform on the next level of the drug heirarchy. Those that inform would presumably not be charged with sale of drugs. Those that don't inform would get a harsher sentence than appears to be warranted by the seriousness of that offense relative to other offenses. While law enforcement's desire for tools which facilitate their work is understandable, the Commission cannot support that effort when it would result in undermining the equity, fairness, and proportionality precepts that are the foundation of our sentencing system. The guidelines system is designed to equalize sentences for similar offenses, and the policy supported by law enforcement officials would result in substantial disparity in treatment of similar offenses. Furthermore, mandatory minimum sentences merely tend to transfer judicial sentencing authority to prosecutors through their charging decisions. That transfer results in less accountable sentencing because charging and charge reduction processes are neither monitored nor are they subject to appellate review as are judicial sentencing decisions.

While the Commission does not deem state imprisonment to be a proportional presumptive or mandatory sentence for the usual sale of drugs offense with a zero criminal history score, the Commission does deem state imprisonment to be appropriate for a second or subsequent sale of drug offense. In the 1983 Report to the Legislature, the Commission recommended that the ambiguous language in the second or subsequent mandatory minimum law for sale of drugs (Minn. Stat. § 152.15, Subd. 1(1) & (2)) be clarified to address the repetitive drug offender. The legislature has not clarified that statute and therefore the Commission modified the guidelines to presume imprisonment for second or subsequent sale of heroin, hallucinogens, PCP, and cocaine. That modification became effective August 1, 1985.

Although proportionality dictates a presumptive or mandatory sentence less than state imprisonment for the typical sale of drug offense, the Commission believes that a significant period in jail as a condition of probation would be appropriate for the offense when the presumptive disposition is nonimprisonment. The Commission did a special study of jail time served by offenders convicted of sale of heroin, hallucinogens, PCP, and cocaine. Of 78 offenders convicted of sale of heroin, hallucinogens, PCP, and cocaine in 1984 in Minnesota, 15% (12 offenders) were sentenced to state prison, 72% (56 offenders) received jail time as a condition of probation, and 13% (10 offenders) received neither jail nor prison time. The average jail time served by the 56 offenders who received jail time was 93 days. For the 36 offenders with zero criminal history who received jail time, the average time served was 73 days. The number of days served in jail ranged from 10 to 365 days. If the average amount of jail time being served is deemed to be insufficient, the legislature could establish a minimum jail term as a condition of probation. Presumptive jail time is an area that the legislature appears to be moving into, with jail terms recently included statutorily for burglary and intrafamilial sexual abuse. The Commission has discussed presumptive jail time with respect to sale of drugs and collusive bidding.

The final issue discussed was the non-typical or major drug sale offense in which a harsher sentence would be appropriate given the seriousness of the

offense. As noted above, the Commission adopted a major drug aggravating factor in 1981 to cover the relatively few major drug offenses prosecuted in state courts and was told at that time by law enforcement officials that the aggravating factor would sufficiently differentiate the user-seller from the major dealer. It has been suggested that judges may not always use their discretion to aggravate sentences when dealing with a case that meets the criteria of the major drug aggravating factor. Determining whether that is in fact the case would require a special research study. If it could be demonstrated that major drug dealers were being treated like user-sellers in a significant number of cases, one solution might be to require aggravation of sentence when circumstances warrant it rather than to merely permit aggravation. Another approach might be to redefine the crimes so that the statutes differentiate major drug dealers from user-sellers so that they could be ranked proportionally.

The Commission also discussed the non drug provisions of H.F.654/S.F.663. One provision proposed mandatory minimum terms for aggravated robbery of a pharmacy. The presumptive sentence under the guidelines is imprisonment for aggravated robbery. If a weapon is used imprisonment is already mandatory under Minn. Stat. § 609.11. There appear to be no problems arising from the current sentencing policies regarding aggravated robbery of pharmacies. Mitigated departures for aggravated robbery of a pharmacy are so rare as to be almost nonexistent. The Guidelines Commission cannot establish a stronger policy than already exists in the guidelines, and no need for a stronger policy is indicated by data on sentencing practices.

Similarly, the provision to establish mandatory minimum sentences for second or subsequent burglary of an occupied dwelling would add little if anything to the existing sentencing policy in the area. In 1983 the Guidelines Commission established presumptive imprisonment for burglary of an occupied dwelling if there were a prior felony sentence for a burglary of any kind in the offender's criminal history. The guidelines policy is more inclusive than that in the legislative proposal and therefore, the guidelines policy does not appear to need strengthening, nor do the data indicate that there is a problem with current adherence to the more inclusive guidelines policy.

The legislative proposal also establishes a mandatory minimum sentence for third burglary of a residence. The criminal history score in the guidelines is based on several factors in addition to the number of prior felony sentences in an offender's record. As a result of the computation factors, there are very few offenders convicted of a severity level five offense (e.g., residential burglary) with two prior felonies of any kind who do not already receive presumptive imprisonment sentences under the guidelines. Fewer cases still have two prior burglaries in their backgrounds without receiving a presumptive imprisonment sentence under the guidelines. Analysis of sentencing data revealed that only five offenders in 1983 were convicted of residential burglary and had two prior burglaries of any kind without having presumptive imprisonment sentences under the guidelines. If the priors were restricted to residential burglaries, less than five cases would probably have qualified. Again, the data do not reveal the existence of a problem in this particular area.

The guidelines modifications effective August 1, 1985 are included in Appendix A.

2. 1986 Proposed Modifications Requiring Prior Legislative Review

In addition to higher severity rankings for possession and sale of cocaine, the Commission has proposed to rank three offenses which had been inadvertently excluded from the Offense Severity Reference Table. All of the rankings require legislative review before becoming effective August 1, 1986, assuming the legislature does not act to the contrary.

The Commission proposes to rank Minn. Stat. § 609.53, Subd. 1(4) Receiving Stolen Property (firearm) and Minn. Stat. § 609.75, Subd. 7 Sports Bookmaking at severity level four. Both of these offenses seemed similar in culpability to the kinds of theft crimes and other property crimes classified in severity level four.

The Commission also proposes to rank Minn. Stat. § 325D.53, Price Fixing/-Collusive Bidding, which had been inadvertently excluded from the guidelines. The Commission initially proposed to rank that offense at severity level five consistent with the request of the Attorney General's office and published that proposal in June,

1985 along with other proposed modifications. The reasons for the severity level five proposal were 1) the offense had elements of a major economic offense and therefore deserved a higher severity ranking than theft or theft related offenses; and 2) it undermined a public process in the same way that perjury undermines a public process. At the public hearing following publication, testimony was offered by attorneys involved in both the Minnesota Bar Association anti-trust section and in the defense of contractors charged with collusive bidding in southern Minnesota. The Commission was urged to rank collusive bidding at severity level three or four similar to theft or theft related offenses. The Commission was asked to delay action until further testimony could be obtained from the Minnesota Bar Association's anti-trust section. The Commission agreed to delay action on the matter.

Two further meetings were held in which the issue was discussed by the Commission with further analysis provided by the Attorney General's office outlining the various sections of the statute and providing information on sentences imposed for bid rigging cases. Little additional information was received from the anti-trust section nor were the members polled as had been indicated would be done given a delay in Commission proceedings. In subsequent discussions on the issue, Commission members increasingly perceived the offense to be very serious. Not only does it have elements similar to a major economic offense, but the actual losses to the public can be very extensive. The offenders are deemed to be culpable due to their standing in the community and positions of trust. The fact that an entire public process is undermined as a result of this offense is also deemed significant. Particularly when compared with the sentences of relatively minor repetitive property offenders whose culpability is probably less and whose potential gain is substantially less, the initial Commission proposal seemed too lenient. As a result, the Commission currently proposes to rank Price Fixing/Collusive Bidding at severity level seven which would make it a presumptive imprisonment offense. As with sexual abuse by a psychotherapist, it was felt that the deterrent value of an imprisonment sentence for this kind of offender could be significant. A public hearing will be held following public notice and final Commission action will be taken several days after the public hearing. The final Commission action will be submitted to the legislature by January 1, 1986.

The Commission also proposes to modify the procedure in the guidelines for calculating the "decay" factor. The decay factor refers to the computation of criminal history scores and involves the "decay" of old felonies and misdemeanors such

that they are not included in the calculations. The current procedure, which has essentially been in effect since the guidelines were adopted is very complicated, and has come to be applied erroneously as often as it is applied accurately. The Commission member who is a probation officer has long urged the Commission to simplify the procedure so that it will be applied consistently and accurately. The Commission proposal significantly simplifies the decay factor for felony computation. The proposal will on balance probably result in slightly longer sentences over time, but some sentences could be shorter than under the current procedure and therefore prior legislative review is required.

The proposal does not significantly affect the decay of misdemeanors. In 1983 the Commission adopted an absolute limit in use of prior misdemeanor offenses of ten years from the date of conviction. That was adopted at the request of the State Court Administrator's office because that office wanted to implement a ten year uniform record retention schedule for misdemeanors due to the cost of retaining the records indefinitely. That procedure for misdemeanors will remain intact, and a similar procedure for felonies is proposed. An absolute 15 year limit from date of discharge from a prior felony to the date of the current offense is proposed. The current procedure is a ten year crime free period before decay. Another proposed revision is to treat prior stays of imposition and stays of execution the same for criminal history purposes. Currently stays of imposition revert to misdemeanor status five years from the date of discharge from the stay. The differentiation currently made is confusing and cumbersome and also perpetuates disparity that exists statewide in the use of stays of imposition. Overall, the modifications will have little effect on sentencing practices but will significantly facilitate application of the guidelines procedures by probation officers. Final Commission action on the decay factor will be taken by the Commission and submitted to the legislature by January 1, 1986.

Guideline modifications effective August 1, 1986 absent legislative action to the contrary are included in Appendix B.

3. Rule for Modifying Sentencing Guidelines

In 1984 the legislature instructed the Commission to promulgate rules according to the Administrative Procedures Act establishing the process that the Commission will follow in modifying the sentencing guidelines. The rules adopted incorporate the

process that the Commission has followed since the inception of the guidelines and are included in Appendix C.

4. Sentencing Trends in 1984

In September, 1984, the Commission published an evaluation of the impact of sentencing guidelines from 1981 through 1983. There were no major changes in sentencing practices in 1984.

The rise in dispositional departures that was noted in 1983 continued in 1984. The rate was 6.2% in 1981, 7.0% in 1982, 8.9% in 1983, and 9.7% in 1984. Less than half (4%) of the 9.7% dispositional departures cases were aggravated with 5.7% mitigated.

The durational departure rate for all sentences (stayed and executed) was 7.6% about the same as in 1983 (7.7%). Only 2.5% of the sentences were aggravated in 1984 and 5.1% were mitigated.

The durational departure rate for executed sentences was 21%, down slightly from the 1983 figure of 23%. About a third of the departures (7%) were aggravated in 1984 with 14% mitigated.

Sentences for minority offenders, particularly black offenders, were aggravated somewhat more frequently dispositionally than for white offenders in 1984. Sentences for black offenders, in 1984, were also aggravated more frequently durationally.

The imprisonment rate remains at approximately 20% with the rate of jail as a condition of probation at 53% for a total incarceration rate for felony offenders of 73%.

Defendants continue to request prison instead of a stayed sentence even though they were not being sent to prison on any other sentence (86 offenders in 1984; 111 offenders in 1983). The most frequent reason for departure in 1984 (100 offenders) was "plea negotiation" in spite of the clear statement from the Supreme Court that plea negotiation by itself is an inadequate reason for departure.

More prison sentences were given in sexual abuse of children cases in 1984 than in 1983. For offenders convicted of first degree intrafamilial sexual abuse with zero criminal history in 1984 (51 offenders), 33% went to prison compared to 15% in 1983. The imprisonment rate in 1984 for those convicted of first degree criminal sexual conduct sections a or b with zero criminal history (13 offenders) was 62% compared to an imprisonment rate of 38% for 26 offenders in 1983. For offenders convicted of other sections of first degree criminal sexual conduct with zero criminal history in 1984 (19 offenders) the imprisonment rate was 74% compared to 69% for 16 offenders in 1983. Prosecutions for sexual abuse of children continue to be primarily of white offenders. Among first degree offenders with zero criminal history 92% are white offenders. For offenders convicted of first degree criminal sexual conduct other than sections a or b with zero criminal history scores, only 53% were white offenders.

**Guidelines Modifications
Effective August 1, 1985**

- C. Presumptive Sentence: 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.

The line on the Sentencing Guidelines Grid demarcates those cases for whom the presumptive sentence is executed from those 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 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. Similarly, when the current conviction offense is sale of a severity level VI drug or sale of cocaine and there was a previous adjudication of guilt for a sale of a severity level VI drug or sale of cocaine 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.

Modifications to Offense Severity Reference Table

VIII	Intrafamilial Sexual Abuse 1 - 609.3641
VII	Criminal Sexual Conduct 2 - 609.343 (c), (d), & (f), & (h) Criminal Sexual Conduct 3 - 609.344 (c), & (d), & (g) Criminal Sexual Conduct 3 - 609.344 (h), (i), & (j) Intrafamilial Sexual Abuse 2 - 609.3642, subd. 1(2) Intrafamilial Sexual Abuse 3 - 609.3643, subd. 1(2)
VI	Criminal Sexual Conduct 2 - 609.343 (a), & (b), & (g) Criminal Sexual Conduct 4 - 609.345 (c), & (d), & (g) Criminal Sexual Conduct 4 - 609.345 (h), (i) & (j) Intrafamilial Sexual Abuse 2 - 609.3642, subd. 1(1) Intrafamilial Sexual Abuse 4 - 609.3644, subd. 1(2)
V	Criminal Sexual Conduct 3 - 609.344 (b), & (e), & (f) Intrafamilial Sexual Abuse 3 - 609.3643, subd. 1(1)
IV	Criminal Sexual Conduct 4 - 609.345 (b), & (e), & (f) Intrafamilial Sexual Abuse 4 - 609.3644, subd. 1(1)
II	Negligent Fires (damage greater than \$10,000) - 609.576 (b) (4) (3)

Commentary Modifications
Effective August 1, 1985

II.A.02. The date of the offense is important because the offender's age at the time of the offense will determine whether or not the juvenile record is considered, and the date of the offense might determine whether a custody status point should be given, and the date of offense determines the order of sentencing with multiple convictions. For those convicted of a single offense, there is generally no problem in determining the date of the offense. For those convicted of multiple offenses when theft and damage to property aggregation procedures are used for sentencing purposes or when multiple offenses are an element of the conviction offense, the following rules apply: the following rules should apply in determining the date of the offense:

- a. The date of the most severe offense should be used. If there are two or more convictions of equal severity, and none of a higher severity, the earliest of the offenses should be used to establish the date of the offense.
- a. If offenses have been aggregated under Minn. Stat. § 609.52, subd. 3(5), or § 609.595, the date of the earliest offense should be used as the date of the conviction offense.
- b. If multiple offenses are an element of the conviction offense, such as in Subd. 1 (h) (v) of first degree criminal sexual conduct, the date of the earliest offense should be used as the date of the conviction offense.

If the date of the offense is not specified in the complaint and cannot be ascertained with certainty, the judge shall establish the relative order of events, based on the information available, to determine whether or not the juvenile record is to be considered, whether or not a custody status point is to be assigned, and the order of sentencing.

If the date of offense established by the above rules is on or before April 30, 1980, the sentencing guidelines should not be used to sentence the case.

II.A.04. Incest was excluded because since 1975, the great majority of incest cases are prosecuted under the criminal sexual conduct statutes, ~~and more recently, under the intrafamilial sexual abuse statutes.~~ If an offender is convicted of incest under Minn. Stat. § 609.365, and when the offense would have been a violation of one of the criminal sexual conduct statutes ~~or intrafamilial sexual abuse statutes,~~ the severity level of the applicable criminal sexual conduct ~~or intrafamilial sexual abuse~~ statute should be used. For example, if a father is convicted of incest for the sexual penetration of his ten year old daughter, the appropriate severity level would be the same as criminal sexual conduct in the first degree ~~or intrafamilial sexual abuse in the first degree.~~ On the other hand, when the incest consists of behavior not included in the criminal sexual conduct ~~or intrafamilial sexual abuse~~ statutes (for example, consenting sexual penetration involving individuals over age 18) that offense behavior is excluded from the Offense Severity Reference Table.

II.A.06. When felony offenses are inadvertently omitted from the sentencing guidelines, judges should exercise their discretion by assigning an offense a severity level which they believe to be appropriate. A felony offense is inadvertently omitted when the offense appears neither in the Offense Severity Reference Table nor in the list of offenses in II.A.03. which are excluded from the Offense Severity Reference Table.

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 shall occur in the order in which the offenses occurred. The dates of the offenses shall be determined according to the procedures in II.A.02.

II.B.108. A felony sentence imposed for a criminal conviction treated pursuant to Minn. Stat. Ch. 242 (Youth Conservation Commission and later Youth Corrections Board, repealed 1977) shall be assigned one felony point in computing the criminal history score according to procedures in II.B.1.

II.B.204. When three months is added to the cell duration as a result of the custody status provision, the lower and upper durations of the sentence range in the appropriate cell are also increased by three months.

II.B.205. When the conviction offense is an attempt or conspiracy under Minn. Stats. § 609.17 or 609.175 and three months is added to the cell duration as a result of the custody status provision, the following procedure shall be used in determining the presumptive duration for the offense. First, three months is added to the appropriate cell duration for the completed offense, which becomes the presumptive duration for the completed offense. The presumptive duration for the completed offense is then divided by two which is the presumptive duration for those convicted of attempted offenses or conspiracies. No such presumptive sentence, however, shall be less than one year and one day.

II.B.302. The Commission placed a limit of one point on the consideration of misdemeanors or gross misdemeanors in the criminal history score. This was done because with no limit on point accrual, persons with lengthy, but relatively minor, misdemeanor records could accrue high criminal history scores and, thus, be subject to inappropriately severe sentences upon their first felony conviction. With the exception of offenses with monetary thresholds the Commission limited consideration of misdemeanors to those which are misdemeanors under existing state statute, or ordinance misdemeanors which substantially conform to existing state statutory misdemeanors. This was done to prevent criminal history point accrual for misdemeanor convictions which are unique to one municipality, or for local misdemeanor offenses of a regulatory or control nature, such as swimming at a city beach with an inner tube. The Commission decided that using such regulatory misdemeanor convictions was inconsistent with the purpose of the criminal history score. In addition, several groups argued that some municipal regulatory ordinances are enforced with greater frequency against low income groups and members of racial minorities, and that using them to compute criminal history scores would result in economic or racial bias. For offenses defined with monetary thresholds, the threshold at the time the offense was committed determines the offense classification for criminal history purposes, not the current threshold.

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

II.F.05. Minn. Stat. § 624.74 provides for a maximum sentence of three years or payment of a fine of \$3000 or both, for possession or use of metal-penetrating bullets during the commission of a crime. Any executed felony sentence imposed under Minn. Stat. § 624.74 shall run consecutively to any felony sentence imposed for the crime committed with the weapon, thus providing an enhancement to the sentence imposed for the other offense. The extent of enhancement, up to the three year statutory maximum, is left to the discretion of the Court. If, for example, an offender were convicted of Aggravated Robbery with use of a gun and had a zero criminal history score, the mandatory minimum sentence and the presumptive sentence for the offense would be 36 months; ~~with a presumptive sentence of 54 months~~; if the offender were also convicted of Minn. Stat. § 624.74, Metal-Penetrating Bullets, the Court could, at its discretion, add a maximum of 36 months, without departing from the guidelines.

II.F.06. *The criterion that crimes must be against different persons for permissive consecutive sentencing is designed to exclude consecutive sentences in two types of situations. One type involves multiple offenses against a victim in a single behavioral incident such as burglary with a dangerous weapon and aggravated robbery with bodily harm. The requirement of different victims is also intended to exclude consecutive sentences in domestic abuse and child abuse situations when there are multiple incidents perpetrated against a victim over time. Assault, criminal sexual conduct, ~~intrafamilial sexual abuse~~, and incest are the conviction offenses most frequently found in domestic abuse and child abuse cases. Multiple incidents against a victim typifies these types of situations. In fact, ~~the intrafamilial sexual abuse~~ one criminal sexual conduct provisions delineates multiple incidents as an element of the offense. The high severity rankings assigned to offenses that tend to involve very young victims reflect the understanding that multiple incidents generally occur in these kinds of situations. The Commission believes that a uniform policy reflected in high severity rankings provides the best approach in sentencing these cases. Permissive consecutive sentences would result in enormous disparity based on varying charging practices of prosecutors and discretionary judicial decisions.*

APPENDIX B

**Proposed Modifications to the Sentencing Guidelines
Effective August 1, 1986**

Section B (Criminal History) is modified as follows:

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

1. Subject to the conditions listed below, the offender is assigned one point for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing.

a. When multiple sentences for a single course of conduct were imposed pursuant to Minn. Stats. § § 609.585 or 609.251, the offender is assigned one point;

b. An offender shall not be assigned more than two points for prior multiple sentences arising out of a single course of conduct in which there were multiple victims;

c. When a prior felony conviction resulted in a misdemeanor or gross misdemeanor sentence, that conviction shall be counted as a misdemeanor or gross misdemeanor conviction for purposes of computing the criminal history score, and shall be governed by item 3 below;

~~d. When a prior felony conviction results in a stay of imposition, and when that stay of imposition was successfully served, it shall be counted as a felony conviction for purposes of computing the criminal history score for five years from the date of discharge, and thereafter shall be counted as a misdemeanor under the provisions of item 3 below;~~

~~e~~ d. Prior felony sentences or stays of imposition following felony convictions will not be used in computing the criminal history score if a period of ~~ten~~ fifteen years has elapsed since the date of discharge from or expiration of the sentence, to the date of the current offense. ~~of any subsequent misdemeanor, gross misdemeanor or felony, provided that during the period the individual had not received a felony, gross misdemeanor, or misdemeanor sentence whether stayed or imposed.~~

Section B.3. (Criminal History) is modified as follows:

3. Subject to the conditions listed below, the offender is assigned one unit for each misdemeanor conviction and two units for each gross misdemeanor conviction (excluding traffic offenses with the exception of DWI and aggravated DWI offenses when the current conviction offense is criminal vehicular operation) for which a sentence was stayed or imposed before the current sentencing. Four such units shall equal one point on the criminal history score, and no offender shall receive more than one point for prior misdemeanor or gross misdemeanor convictions.
 - a. Only convictions of statutory misdemeanors or ordinance misdemeanors that conform substantially to a statutory misdemeanor shall be used to compute units.
 - b. When multiple sentences for a single course of conduct are given pursuant to Minn. Stat. § 609.585, and the most serious conviction is for a gross misdemeanor, no offender shall be assigned more than two units.
 - ~~e. Prior misdemeanor and gross misdemeanor sentences will not be used in computing the criminal history score if a period of five years has elapsed since the date of discharge from or expiration of the sentence to the date of offense of any subsequent misdemeanor, gross misdemeanor, or felony, provided that during the period the individual had not received a felony, gross misdemeanor, or misdemeanor sentence, whether stayed or imposed.~~
 - ~~d~~ c. A prior misdemeanor or gross misdemeanor sentence shall not be used in computing the criminal history score if a period of ten years has elapsed since the offender was adjudicated guilty for that offense. However, this does not apply to misdemeanor sentences that result from successful completion of a stay of imposition for a felony conviction.

Proposed Changes to Section V. Offense Severity Reference Table, effective August 1, 1986, are as follows:

VII. Price Fixing/Collusive Bidding - 325D.53

VI. Sale of Cocaine - 152.15, subd. 1(1)

IV. ~~Sale of Cocaine - 152.15, subd. 1(1)~~
Receiving Stolen Property (firearm) - 609.53, subd. 1(4)
Sports Bookmaking - 60.75, subd. 7

III. Possession of Cocaine - 152.15, subd. 2(1)

I. ~~Possession of Cocaine - 152.15, subd. 2(1)~~

Proposed Commentary Modifications to the Decay Factor

Comment

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 or for which a stay of imposition of sentence was given 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 shall occur in the order in which the offenses occurred. The dates of the offenses shall be determined according to the procedures in II.A.02.

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 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.~~

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

II.B.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 and stays of imposition, but also the time interval between those sentences and subsequent offenses age of the sentences and stays of imposition. A person who was sentenced for three

felonies within a five-year period is more culpable than one sentenced for three felonies within a twenty-five year period. The Commission decided that ~~after a significant period of offense-free living, the presence of old felony sentences and stays of imposition should not be considered in computing criminal history scores after a significant period of time has elapsed. A prior felony sentence or stay of imposition would not be counted in criminal history score computation if ten fifteen years had elapsed between from the date of discharge from or expiration of that sentence or stay of imposition to and the date of the current offense. 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. While this procedure does not include a measure of the offender's subsequent criminality, it has the overriding advantage of accurate and simple application.~~

II.B.304. The Commission also adopted a "decay" factor for prior misdemeanor and gross misdemeanor offenses for the same reasons articulated above for felony offenses. Instead of calculating the decay period from the date of discharge as with felonies, the decay period for misdemeanor and gross misdemeanor sentences begins at the date of conviction. The range of sentence length for misdemeanor and gross misdemeanor sentences is much less than for felony sentences and therefore basing the decay period on date of conviction is less problematic than it would be with prior felonies. A conviction based decay period rather than a discharge based decay period for misdemeanor and gross misdemeanors facilitates a uniform retention schedule for misdemeanor and gross misdemeanor records. The decay period for misdemeanor and gross misdemeanor sentences also differs from the felony decay procedure in that the ten year misdemeanor decay period is absolute and not dependent on the date of the current offense. If, for example, the ten year period elapses between date of offense for a new felony and sentencing for that offense, the prior misdemeanor offense is not included in the criminal history score computation. This procedure also facilitates a uniform retention schedule for misdemeanor and gross misdemeanor records. 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, that misdemeanor or gross misdemeanor 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.

~~A ten year limit for considering misdemeanor sentences was adopted for two reasons. First, the retention of misdemeanor records for extended periods is prohibitively expensive for many counties and therefore retention schedules have varied among the counties. A ten year limit provides a uniform standard for considering misdemeanor sentences and allows for the establishment of a uniform retention schedule. Secondly, the Commission feels that the relevance of a prior misdemeanor offense for current felony sentencing is significantly reduced over time.~~

II.D.202. An aggravated sentence would be appropriate when the current conviction is for an offense in which the victim was injured and there is a prior felony conviction for an offense in which the victim was injured even if the prior felony offense had decayed in accordance with section II.B.1.d.

7/9/85

[REVISOR] RPK/JA AR0763

1 Sentencing Guidelines Commission

2

3 Adopted Rules Governing Promulgation of the Sentencing
4 Guidelines

5

6 Rules as Adopted

7 3000.0100 PURPOSE AND SCOPE.

8 The procedures contained in parts 3000.0100 to 3000.0600
9 govern the promulgation of the sentencing guidelines, including
10 any modifications of severity levels and criminal history scores.

11 3000.0200 NOTICE OF HEARING.

12 The Sentencing Guidelines Commission shall maintain a list
13 of all persons who have registered with the commission for the
14 purpose of receiving notice on proposed amendments to the
15 sentencing guidelines. The commission may inquire as to whether
16 those persons on the list wish to maintain their names on the
17 list and may remove names for which there is a negative reply or
18 no reply within 60 days. The commission shall, at least 30 days
19 before the date set for the hearing, give notice of its
20 intention to amend the sentencing guidelines by United States
21 mail to all persons on its list, and by publication in the State
22 Register. The mailed notice and the notice in the State
23 Register must include a copy of the proposed amendments or a
24 brief description of the nature and effect of the proposed
25 changes.

26 3000.0300 CONDUCT OF HEARINGS.

27 Subpart 1. Proposed amendment proceedings. A hearing on
28 proposed amendments to the sentencing guidelines, including any
29 modifications of severity levels and criminal history scores,
30 must proceed substantially in the manner specified in this part.

31 Subp. 2. Registration of participants. A person intending
32 to testify regarding proposed amendments to the sentencing
33 guidelines shall register with the commission before testifying
34 by writing his or her name, address, telephone number, and the
35 names of any individuals or associations that the person

1 represents in connection with the hearing on a register to be
2 provided by the commission. Persons may indicate to the
3 commission in writing their desire to be informed of the date on
4 which the proposed amendments will be considered for adoption at
5 a public hearing under part 3000.0600.

6 Subp. 3. Notice of procedures at hearing. The chairperson
7 of the Sentencing Guidelines Commission shall convene the
8 hearing at the proper time and shall explain to all persons
9 present the purpose of the hearing and the procedure to be
10 followed at the hearing. The chairperson of the commission
11 shall notify all persons present that the record will remain
12 open for five calendar days following the hearing for receipt of
13 written comments concerning the proposed amendments. The
14 commission shall give due consideration to all comments received
15 within the five-day comment period.

16 Subp. 4. Proposed amendments. The commission shall make
17 copies of the proposed amendments available at the hearing.

18 Subp. 5. Opportunity for questions. Interested persons
19 must be given an opportunity to address questions to the
20 commission, its staff, or witnesses. The commission or its
21 staff may question interested persons making oral statements.
22 The questioning may extend to an explanation of the purpose of
23 intended operation of a proposed amendment to the sentencing
24 guidelines, or may be conducted for other purposes if material
25 to evaluation or formulation of the proposed amendments.

26 Subp. 6. Opportunity for presenting statements.
27 Interested persons must be given an opportunity to present oral
28 and written statements regarding the proposed amendments to the
29 sentencing guidelines.

30 Subp. 7. Record of hearing. The commission shall make an
31 audio recording of the hearing.

32 3000.0400 RECEIPT OF WRITTEN MATERIALS.

33 The Sentencing Guidelines Commission shall allow written
34 materials to be submitted and recorded in the hearing record for
35 a period of five calendar days after the public hearing under
36 part 3000.0500 ends, or for a longer period if the commission so

1 orders.

2 3000.0500 HEARING RECORD.

3 The record must be closed upon the last date for receipt of
4 written materials under part 3000.0400. The record includes:

5 A. the notice of hearing as mailed;

6 B. a copy of the State Register containing the notice
7 of hearing;

8 C. the names of persons who testify with respect to
9 the proposed amendments to the sentencing guidelines;

10 D. copies of all publications in the State Register
11 pertaining to the proposed amendments to the sentencing
12 guidelines;

13 E. all written statements, comments, and materials
14 received by the commission relating to the proposed amendments
15 to the sentencing guidelines;

16 F. the audio recording of the hearing under part
17 3000.0300; and

18 G. a copy of the proposed amendments to the
19 sentencing guidelines as heard at the hearing under part
20 3000.0300.

21 3000.0600 AMENDMENT ADOPTION.

22 Subpart 1. Adoption. After holding the hearing required
23 under part 3000.0300 and expiration of the written comment
24 period under part 3000.0400, the sentencing guidelines
25 commission may, by a majority vote of a quorum of the commission
26 present, adopt proposed amendments to the sentencing
27 guidelines. A quorum means a majority of the members of the
28 commission.

29 Subp. 2. Notice. The commission shall provide all persons
30 listed with the commission under part 3000.0200 and all persons
31 requesting notification under part 3000.0300, subpart 2 with
32 notice of the adoption hearing by United States mail.

33 Subp. 3. Effective date. All proposed amendments to the
34 sentencing guidelines that do not have to be submitted to the
35 legislature are effective on the date ordered by the commission.