

MEMORANDUM

To: Minnesota Sentencing Guidelines Commission (MSGC)
Fr: Commissioner Mark Wernick
Re: Motions for November 18, 2015, MSGC Meeting
Date: November 5, 2015

At the November 18, 2015, meeting, I will ask that the MSGC consider the following amendments to the Minnesota Sentencing Guidelines:

1. Reduce the severity level for 1st degree controlled substance crimes from 9 to 8.
2. Reduce the severity level for 2nd degree controlled substance crimes from 8 to 7.
3. If the severity levels for 1st and 2nd degree controlled substance crimes are reduced, add the following circumstances as grounds for an aggravated departure in controlled substance crime cases (language below taken from pending bills):
 - a. the defendant or an accomplice knowingly possessed a firearm or other dangerous weapon, as defined in section 609.02, subd. 6, during the commission of the offense;
 - b. the offense involved separate acts of sale or possession of a controlled substance in three or more counties;
 - c. the offense involved the transfer of controlled substances across a state or international border and into Minnesota;
 - d. the circumstances of the offense reveal the defendant to have occupied a high position in the drug distribution hierarchy;
 - e. the defendant used a position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships;
 - f. the offense involved the sale of a controlled substance to a minor or vulnerable adult, or aiding or conspiring with a minor to commit the offense; and,
 - g. the defendant or an accomplice possessed equipment, drug paraphernalia, documents, or monies evidencing that the offense involved cultivation, manufacture, distribution or possession of controlled substances in quantities substantially larger than the ~~minimum threshold~~ amount involved in for the underlying offense.

4. Establish “border boxes” for controlled substance offenses that would otherwise be presumptive prison boxes for offenders having a criminal history score of 0 or 1.

In addition, at the November 18 meeting, I will ask that the MSGC consider the following recommendations to the legislature:

1. Repeal the mandatory minimum sentencing provisions in chapter 152 and enact no other mandatory minimum sentencing provisions with respect to controlled substance crimes.
2. Revise quantity thresholds for controlled substance crimes so that different degrees of crimes fairly distinguish between major drug wholesalers, mid-level drug wholesalers, and low level drug wholesalers or retail distributors.
3. Repeal Minn. Stat. § 244.10, subd. 5a (defining aggravated factors warranting an aggravated sentencing departure) so that the MSGC can resume its pre-*Blakely* authority in this area.

Discussion

Reducing Severity Levels for 1st and 2nd Degree Controlled Substance Crimes

In my October 20, 2015, Memorandum to the MSGC, I described two changes that the legislature made to the controlled substance crime statutes in response to the *Russell* decision: 1) the quantity thresholds for cocaine were substantially reduced (followed by the same quantity threshold reductions for methamphetamine and heroin); and, 2) the word “sell” was redefined to include possession with intent to sell. With respect to cocaine, methamphetamine, and heroin, the effect of the changes are summarized in the graph below, together with the guidelines changes I am proposing:

Cocaine, Methamphetamine and Heroin¹

	<i>Pre-Russell</i>	<i>Post-Russell</i>	Current Guidelines at CHS 0	Proposed Guidelines Change
1st Degree	Offense described someone who possesses a 500 gram inventory, presumably or actually selling 50 gram quantities.	Offense includes someone who possesses a 10 gram inventory, intending to sell smaller quantities.	Level 9, 86 months commit	Level 8, 48 months commit
2nd Degree	Offense described someone who possesses a 50 gram inventory, presumably or actually selling 10 gram quantities.	Offense includes someone who possesses a 3 gram inventory, intending to sell smaller quantities.	Level 8, 48 months commit	Level 7, 36 months stayed
3rd Degree	Offense described someone who possesses a 10 gram inventory, presumably or actually selling smaller amounts.	Offense includes someone who possesses any amount with the intent to sell.	Level 6, 21 months stayed	No change

I have highlighted the fact that the post-*Russell* 1st degree crime includes conduct that had been a 3rd degree crime.

Because cocaine, methamphetamine and heroin have a separate legislative classification, it is well within the MSGC's power to limit severity level reductions to the statutes governing those substances. But, limiting severity level reductions to those statutes raises the issue of whether it would be fair to keep the other 1st and 2nd degree controlled substance crime statutes at severity levels 9 and 8, respectively. I suggest that the severity level for all 1st and 2nd degree controlled substance crimes be reduced by one level.

Although the post-*Russell* quantity threshold changes were limited to cocaine, methamphetamine and heroin, all 1st and 2nd degree controlled substance crimes were

¹ Minn. Stat. §§ 152.021, subd. 1(1), 152.021, subd. 2(1), 152.022, subd. 1(1), 152.022, subd. 2(2).

impacted by the change to the definition of “sell.” That impact is reflected in the graphs below, together with the guidelines changes I am proposing:

Other Narcotic Drugs and Amphetamine/Phencyclidine or Hallucinogen²

	<i>Pre-Russell</i>	<i>Post-Russell</i>	Current Guidelines at CHS 0	Proposed Guidelines Change
1st Degree	Offense described someone who possesses a 500 gram (or 500 dosage unit) inventory, presumably or actually selling 50 gram (or 200 dosage unit) quantities.	Offense includes someone who possesses a 50 gram (or 200 dosage unit) inventory, intending to sell smaller quantities.	Level 9, 86 months commit	Level 8, 48 months commit
2nd Degree	Offense described someone who possesses a 50 gram (or 100 dosage unit) inventory, presumably or actually selling 10 gram (or 50 dosage unit) quantities.	Offense includes someone who possesses a 10 gram (or 50 dosage unit) inventory, intending to sell smaller quantities.	Level 8, 48 months commit	Level 7, 36 months stayed

² Minn. Stat. §§ 152.021, subd. 1(2) and (3), 152.021, subd. 2(2) and (3), 152.022, subd. 1(2) and (3), 152.022, subd. 2(2) and (3).

Marijuana³

	<i>Pre-Russell</i>	<i>Post-Russell</i>	Current Guidelines at CHS 0	Proposed Guidelines Change
1st Degree	Offense described someone who possesses a 100 kilogram inventory, presumably or actually selling 50 kilogram quantities (25 kilos in protected zone).	Offense includes someone who possesses a 50 kilogram inventory (25 kilos in a protected zone), intending to sell smaller quantities.	Level 9, 86 months commit	Level 8, 48 months commit
2nd Degree	Offense described someone who possesses a 50 kilogram inventory , presumably or actually selling 25 kilogram quantities.	Offense includes someone who possesses a 25 kilogram inventory, intending to sell smaller quantities.	Level 8, 48 months commit	Level 7, 36 months stayed

In both of the graphs above, I have highlighted the fact that the post-*Russell* 1st degree crimes include virtually the same conduct that had been 2nd degree crimes. The post-*Russell* change to the definition of “sell” justifies a one severity level reduction for all 1st and 2nd degree controlled substance crimes referred to in these graphs.⁴

³ Minn. Stat. §§ 152.021, subd. 1(4), 152.021, subd. 2(4), 152.022, subd. 1(4), 152.022, subd. 2(4).

⁴ Under my proposal, 1st degree manufacturing methamphetamine in violation of Minn. Stat. § 152.021, subd. 2a would become a level 8 crime. Also, under my proposal, 2nd degree crimes involving sales to minors (or conspiring with minors to sell) or sales in protected zones in violation of Minn. Stat. § 152.022, subd. 1(5) would become level 7 crimes. The MSGC could decide to keep these crimes at severity levels 9 and 8, respectively, because these crimes were not significantly affected by the post-*Russell* statutory changes. But because these crimes involve amounts smaller than the minimum thresholds, and because the legislature put them in the same degree as the crimes having minimum thresholds, I am suggesting a reduction to the severity levels for these crimes to the same extent as the other 1st and 2nd degree crimes.

Some MSGC members are understandably reluctant to reduce the severity level for 1st degree crimes because a severity level 8 sentence may not be sufficient for a major wholesaler, as defined before *Russell*. This issue is really about a fair allocation of the burden to prove grounds for departure.

A properly crafted criminal statute will define a typical offense, to which the MSGC can assign a severity level. Because a severity level designation should result in fair punishment for an offender committing the typical offense, it is not unfair to put the burden on the offender to prove grounds for a mitigated departure.

But the 1st degree controlled substance crime statute (post-*Russell*) is not a properly crafted statute. Instead of defining a typical offense, the statute defines multiple levels of culpability, from major wholesaler to street level dealer. Severity level 9 may be appropriate for the highest level of culpability but it is wholly inappropriate for the lowest level (severity level 6, pre-*Russell*). In the face of a poorly crafted statute, the MSGC must aim its severity level designation to the lower or mid-levels of culpability, not to the high levels, as is currently the case. A severity level 8 designation helps achieve this purpose. To be sure, for the most culpable offenders, this change would add a burden on the state to prove grounds for an aggravated departure. But, the state should properly bear the burden of a poorly crafted statute.

Aggravating Factors

If the MSGC reduces the severity levels for 1st and 2nd degree controlled substance crimes, then it would be fair to adopt new aggravating factors that the state could prove more readily than the current aggravating factors (requiring proof of two factors to show a major controlled substance offense). The list I propose is derived from SF 1382 and HF 2107 (with modifications noted by strikethroughs and underlines), except for those factors that I identified in my October 20 Memorandum (prior conviction for crime of violence, benefit of a gang, three or more separate acts, protected zone).

Also, I suggest that the MSGC recommend to the legislature that it repeal Minn. Stat. § 152.10, subd. 5a (defining aggravated factors warranting an aggravated sentencing departure). This statute was enacted in 2005 in order to implement the *Blakely* decision. The statute is no longer necessary and its existence unnecessarily complicates the MSGC's efforts to adjust aggravating factors in the Minnesota Sentencing Guidelines. For example, if the MSGC now adds aggravating factors for controlled substance offenses, it should also modify (or eliminate) the two-factor definition of a major controlled substance offense. The statute likely prevents the MSGC from making this modification.

Border Boxes

As several MSGC members have noted, border boxes are appropriate for controlled substance crimes for offenders having a CHS of 0 or 1. There is a heightened need for judicial discretion in this area. The MSGC's authority to establish border boxes may be found in Minn. Stat. § 244.09, subd. 5(1) ("The guidelines ... shall establish [t]he circumstances under which imprisonment of an offender is proper..."). If the MSGC decides that it is without authority to establish border boxes, it should seek such authority from the legislature.

Other Motions

My other motions; recommending that the legislature repeal mandatory minimums and revise drug quantity thresholds, have been adequately addressed elsewhere.

I will conclude with another graph, this one showing a summary of MSGC proposals to modify drug offenses. See MSGC, *Drug Sentencing in Minnesota, August 26, 2015*, slides 8-9.

Summary of MSGC Proposals to Modify Drug Offenses

	Activity	Detail	Result
1995	Insert new severity level 7 at 36 mos. commit	Part of reform package with many components; adjust 1 st and 2 nd deg.	Options presented to Legislature; no modifications adopted by MSGC; Legislature did not adopt.
2000-01	Drug subcommittee with outside members	Developed drug Grid with border boxes; reshape how drug offenses were ranked.	Commission continuation; no new developments.
2002	New drug subcommittee with new Chair	Developed proposal for mandatory diversion for possession.	No modifications adopted by MSGC.

2003-04	Legislature directive to report on drug offenses	List of options given to Legislature in 2004 Legislative Report.	Options presented to Legislature; no modifications adopted by MSGC; Legislature did not adopt.
2007	2007 Report to the Legislature	Options given to Legislature. Updated results from 2004 Legislative Report.	Options presented to Legislature; no modifications adopted by MSGC; Legislature did not adopt.
2008	Legislative directive to make changes to Grid for controlled substance offenses	Notwithstanding multiple proposals, MSGC proposed no changes. Recommended LWGCS.	Options presented to Legislature; Commission continuation, no new developments; no modifications adopted by MSGC.
2009	Report from Legislative Working Group on Controlled Substances	Report recommended "modest" changes to thresholds.	Options presented to Legislature; Legislature did not adopt.
2012-13	Special outcome study of 1 st and 2 nd Degree drug offenses	Gathered data on drug amounts. Presented findings to Round Table forum. Multiple proposals failed to win MSGC majority.	No modifications adopted by MSGC.
2014	1 st & 2 nd Degree mitigated departures: regression analysis	Significant: Criminal history; double quantity threshold; being Hispanic; geography.	Commission continuation; no new developments.

The time has come for the MSGC to alleviate the injustices caused by the post-*Russell* amendments to the 1st and 2nd degree controlled substance crime statutes. I urge the MSGC to 1) reduce the severity levels for 1st and 2nd degree controlled substance crimes so that the presumed punishment better fits the more typical crimes; and, 2) revise the aggravating factors list so that prosecutors can more readily prove appropriate grounds for an aggravated departure. In addition, I urge the MSGC to establish “border boxes” for controlled substance offenses that would otherwise be presumptive prison boxes for offenders having a criminal history score of 0 or 1.

MW

SUPPLEMENTAL MEMORANDUM

To: Minnesota Sentencing Guidelines Commission (MSGC)
Fr: Commissioner Mark Wernick
Re: Motions for November 18, 2015, MSGC Meeting
Date: November 9, 2015

At our last meeting, Judge Lennon asked me a question about the federal sentencing guidelines. I recall saying something to the effect that when Minnesota enacted its 5-degree controlled substance crime structure, the Minnesota controlled substance guidelines became much more severe than the federal guidelines for the same quantity thresholds. I have since looked at the 1990 federal sentencing guidelines. I need to correct what I said.

With respect to cocaine, heroin and methamphetamine, it appears that the 1990 federal guidelines were roughly comparable to the 1990 Minnesota guidelines relating to the same quantity thresholds. The Minnesota guidelines became out of cinque with the federal guidelines applicable to similar quantities when the Minnesota controlled substance crime statutes were amended (lowering thresholds, redefining “sell”) without any change being made to the Minnesota sentencing guidelines. The graph on the next page illustrates this point.

Two distinctions with federal guidelines should be noted. First, Minnesota prisoners are entitled to a 33% discount for good time, compared to 15% for federal prisoners. Second, federal guidelines become much more severe than Minnesota’s severity level 9 guidelines in cases involving drug quantities far above those prosecuted in state court. Still, to get an 86 month presumptive prison sentence in federal court at CHS 0-1, the government must prove sale or possession with intent to sell 3.5 kilograms of cocaine, 700 grams of heroin, or 350 grams of methamphetamine. To get a 48 month presumptive prison sentence in federal court at CHS 0-1, the government must prove sale or possession with intent to sell 400 grams of cocaine, 80 grams of heroin, or 40 grams of methamphetamine. In 2014, the United States Sentencing Guidelines Commission lowered its severity levels for drug offenses by 2 levels (out of 43).

**First, Second, and Third Degree Controlled Substance Crimes – Cocaine,
Methamphetamine, Heroin**

	<i>Pre-Russell</i>	Minnesota Guidelines CHS 0 (1990)	Federal Guidelines CHS 0-1 (1990)	<i>Post-Russell</i>	Minnesota Guidelines CHS 0 (2015)	Federal Guidelines CHS 0-1 (2015)
<u>1st Degree</u>	Offense described someone w/ 500 gram inventory, presumably or actually selling 50 gram quantities.	81-91 months	[500 grams] <u>Cocaine:</u> 63-78 months <u>Heroin:</u> 78-97 months <u>Meth:</u> 78-97 months	Offense includes someone w/ 10 gram inventory, intending to sell smaller quantities.	74-103 months	[10 grams] <u>Cocaine:</u> 10-16 months ¹ <u>Heroin:</u> 15-21 months <u>Meth:</u> 21-27 months
<u>2nd Degree</u>	Offense described someone w/ 50 gram inventory, presumably or actually selling 10 gram quantities.	44-52 months	[50 grams] <u>Cocaine:</u> 21-27 months <u>Heroin:</u> 33-41 months <u>Meth:</u> 33-41 months	Offense includes someone w/ 3 gram inventory, intending to sell smaller quantities.	41-57 months	[3 grams] <u>Cocaine:</u> 10-16 months <u>Heroin:</u> 10-16 months <u>Meth:</u> 10-16 months
<u>3rd Degree</u>	Offense described someone w/ 10 gram inventory, presumably or actually selling smaller quantities.	21 months stay	[10 grams] <u>Cocaine:</u> 10-16 months <u>Heroin:</u> 21-27 months <u>Meth:</u> 21-27 months	Offense includes someone w/ any amount intending to sell.	21 months stay	Same as above

¹ At 10-16 months, a federal offender is eligible for local confinement for ½ of the sentence. A guilty plea would allow for a 6-12 month sentence, all of which could be served on local confinement.