

Minnesota Sentencing Guidelines Commission

Departure Reasons Listed in the Guidelines March 19, 2015

Note: This item was on the agenda February 19, 2015, at which time the Commission discussed whether it wished to amend its nonexclusive list of factors, but took no action. There was a motion to approve staff changes to the departure checklist to correct errors.

Issue: The list of departure factors in the Guidelines is shorter and different than the factors most frequently articulated by sentencing courts.

Considerations: Guidelines section 2.D.3 includes a short list of advisory, non-exclusive departure factors: six mitigating factors and fourteen aggravating factors. Guidelines section 2.D.1.d reads, “Because departures are by definition exceptions to the Guidelines, the departure factors in this section are advisory, except as otherwise established by case law.” Guidelines section 2.D.2 lists five factors that should not be used for departure: race, sex, employment factors, social factors, and the defendant’s exercise of constitutional rights during the adjudication process.

After the elimination of mandatory sentencing transcripts, Commission staff developed a list of commonly cited reasons for departure that appears on the back of the departure report as check-off boxes. The checklist was intended for the Court to use to easily check off applicable reasons for departure; however, space is also provided on the front of the departure report for the judge to write in reasons for departure. Reasons that are specified in the nonexclusive list in Guidelines are denoted with an asterisk on the checklist.

While the most common reasons for departure are listed on the checklist, not all of the reasons on the checklist are included in the Guidelines. Most notably, in 2013, “amenable to probation” was recorded as a reason for departure in 30.9 percent of all departures and in 58.4 percent of all mitigated dispositional departures; however, the reason was deliberately left out of the Guidelines because the Commission felt it strongly correlated with factors that were excluded. The Guidelines commentary warns that the use of “ ‘amenable to probation (or treatment)’ or ‘unamenable to probation’ to justify a dispositional departure, could be closely related to social and economic factors. The use of these factors, alone, to explain the reason for departure is insufficient, and the trial court should demonstrate that the departure is not based on any of the excluded factors.” 2014 Minn. Sentencing Guidelines, comment 2.D.201.

In a 2014, the Minnesota Supreme Court emphasized that mere amenability to probation does not justify a departure, but that a defendant must be *particularly* amenable to probation. *State v. Soto*, 855 N.W.2d 303 (Minn. 2014). Table 1 compares some pertinent points of the current Sentencing Guidelines (including the departure report form) and the *Soto* decision.

Table 1. Comparison of 2014 Minnesota Sentencing Guidelines and departure report form with *State v. Soto*, 855 N.W.2d 303 (Minn. 2014).

Sentencing Guidelines	<i>State v. Soto</i>
Amenability to probation (or treatment) is not enumerated in the MSG’s nonexclusive list of departure factors (MSG section 2.D.3).	Particular amenability to probation is a valid mitigated dispositional departure factor (855 N.W.2d at 308).
When used as a departure factor, amenability to probation may not be linked to social and economic factors alone (MSG Comment 2.D.201).	Facts that cannot themselves justify a departure (e.g., social or economic factors) can be relevant to determining whether a defendant is particularly amenable to probation (855 N.W.2d at 312).
Amenability to probation (or treatment) is enumerated on the departure report form’s checklist.	Merely being amenable to probation—as opposed to being <i>particularly</i> amenable to probation—has never been held to be a valid mitigated dispositional departure factor (855 N.W.2d at 308).

Questions for the Commission: 1) Does the Commission wish to amend its nonexclusive list of factors that may be used for departure?

Possible Guidelines Modifications to Section 2.D:

* * *

2. Factors that **should not** be used as Reasons for Departure. The following factors should not be used as reasons for departing from the presumptive sentences provided in the appropriate cell on the applicable Grid:
 - a. Race
 - b. Sex
 - c. Employment factors, including:
 - (1) occupation or impact of sentence on profession or occupation;
 - (2) employment history;
 - (3) employment at time of offense;
 - (4) employment at time of sentencing.
 - d. Social factors, including:

- (1) educational attainment;
- (2) living arrangements at time of offense or sentencing;
- (3) length of residence;
- (4) marital status.

e. The defendant's exercise of constitutional rights during the adjudication process.

Comment

2.D.201. *The Commission believes that sentencing should be neutral with respect to an offender's race, sex, and income level. Accordingly, the Commission has listed employment and social factors that should not be used as reasons for departure from the presumptive sentence, because these factors are highly correlated with sex, race, or income level. Employment is excluded as a reason for departure not only because of its correlation with race and income levels, but also because this factor is manipulable – e.g., offenders could lessen the severity of the sentence by obtaining employment between arrest and sentencing. While it may be desirable for offenders to obtain employment between arrest and sentencing, some groups (those with low income levels, low education levels, and racial minorities generally) find it more difficult to obtain employment than others. It is impossible to reward those employed without, in fact, penalizing those not employed at time of sentencing. ~~The use of the factors “amenable to probation (or treatment)” or “unamenable to probation” to justify a dispositional departure, could be closely related to social and economic factors. The use of these factors, alone, to explain the reason for departure is insufficient, and the trial court should demonstrate that the departure is not based on any of the excluded factors.~~*

* * *

3. Factors that may be used as Reasons for Departure. The following is a nonexclusive list of factors that may be used as reasons for departure:
 - a. Mitigating Factors.
 - (1) The victim was an aggressor in the incident.
 - (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
 - (3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.
 - (4) The offender's presumptive sentence is a commitment but not a mandatory minimum sentence, and either of the following exist:

- (a) The current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or
- (b) The current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance.

(5) Other substantial grounds exist that tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.

(6) The court is ordering an alternative placement under Minn. Stat. § 609.1055 for an offender with a serious and persistent mental illness.

(7) The offender is particularly amenable to probation. This factor may, but need not, be supported by one or both of the following facts:

- (a) The offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.
- (b) The offender, having met established criteria designed to assess particular amenability to probation, will have probation overseen by a problem-solving court.

2.D.303. The requirement that a defendant be “particularly” amenable to probation ensures that the defendant’s amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances necessary to justify a departure. State v. Soto, 855 N.W.2d 303, 309 (Minn. 2014). While social or economic factors cannot justify a departure, such facts may be relevant to determining whether a defendant is particularly amenable to probation. Id at 312. In determining whether a defendant is particularly suitable to individualized treatment in a probationary setting, for example, a court is permitted to consider the defendant’s age, prior record, remorse, cooperation, attitude before the court, and social support. State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982).

2.D.303304. ***

2.D.304305. ***

2.D.305306. ***

2.D.306307.

Reference: The most frequently cited reasons for departure and plea negotiation are graphed on Figure 1. Table 2 lists the reasons for departure cited in 2013, including whether the reason is generally cited as a mitigated or aggravated reason, whether the reason is listed on the Departure Report, and whether it is

listed in the Guidelines. Percentages and totals are based on responses. The most frequently cited reasons are highlighted. Up to four reasons for departure, and three reasons for the acceptance of the plea agreement, may be coded for each case.

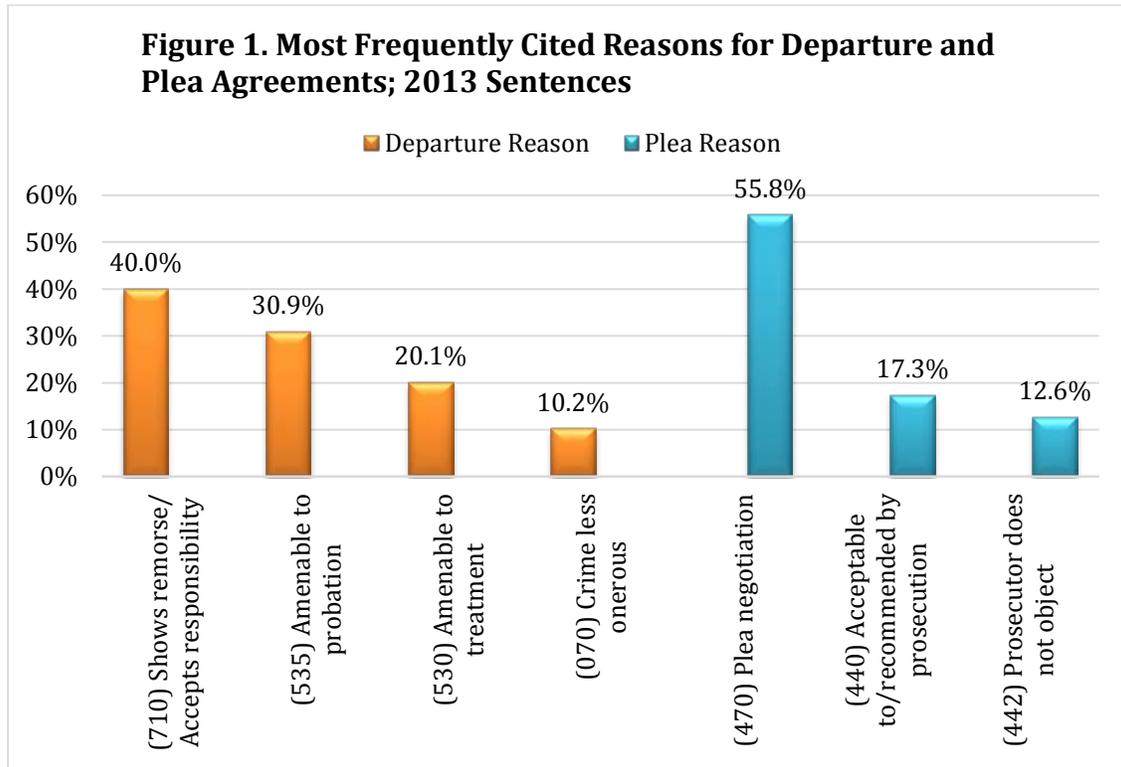


Table 2. 2013 Departure Factors, by Frequency

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
Codes 010 - 080 are generally related to offender's current offense and used as Mitigating Factors				
(070) Less onerous/weapon type less serious/gun not loaded	Mitigated	438 (10.2%)	Yes	No
(020) Offender played minor, lesser, or passive role	Mitigated	131 (3.0%)	Yes	Yes
(030) Lacked substantial capacity for judgment (non-drug)	Mitigated	102 (2.4%)	Yes	Yes
(010) Victim aggressor in incident/relationship	Mitigated	27 (.6%)	Yes	Yes
(040) Mitigated or excuse culpability, not amount to defense	Mitigated	21 (.5%)	No	Yes
(050) Use of intoxicants at time of offense		5 (.1%)	No	No
Codes 110 - 255 are generally related to offenders current offense and used as Aggravating Factors				

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/ Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
(220) Crime more onerous than usual offense	Aggravated	29 (.7%)	Yes	No
(240) Crime committed in victim's home or zone of privacy	Aggravated	18 (.4%)	Yes	Yes
(110) Victim is particularly vulnerable	Aggravated	17 (.4%)	Yes	Yes
(190) Multiple victim or multiple incidents per victim	Aggravated	12 (.3%)	Yes	No
(120) Particular cruelty	Aggravated	11 (.3%)	Yes	Yes
(200) Position of authority over the victim or trust	Aggravated	8 (.2%)	Yes	No
(225) Injury sustained by victim(s)/psychological impact	Aggravated	8 (.2%)	Yes	No
(251) Committed crime as part of a group of 3 or more	Aggravated	8 (.2%)	Yes	Yes
(130) Victim injury with previous felony injury conviction	Aggravated	4 (.1%)	Yes	Yes
(140) Major economic offense	Aggravated	1 (.0%)	Yes	Yes
(141) Major economic offense Multiple victims/multiple incidents per victim	Aggravated	4 (.1%)	Yes	Yes
(142) Major economic offense Monetary loss sub greater than usual offense	Aggravated	1 (.0%)	Yes	Yes
(143) Major economic offense High degree of sophistication planning/time period	Aggravated	4 (.1%)	Yes	Yes
(144) Major economic offense Used position or status to facilitate offense	Aggravated	1 (.0%)	Yes	Yes
(145) Major economic offense Previous offenses-Econ(civil or administrative) or criminal	Aggravated	1 (.0%)	Yes	Yes
(245) Crime committed in presence of children	Aggravated	4 (.1%)	No	Yes
(151) Major drug offense – At least three separate transactions	Aggravated	2 (.0%)	Yes	Yes
(152) Major drug offense – Quantities substantially larger than usual	Aggravated	1 (.0%)	Yes	Yes

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/ Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
(155) Major drug offense – High position in drug distribution	Aggravated	1 (.0%)	Yes	Yes
(157) Major drug offense – Used position or status to facilitate offense	Aggravated	1 (.0%)	Yes	Yes
(158) Community impact	Aggravated	1 (.0%)	No	No
(170) Actual offense more serious than conviction offense	Aggravated	1 (.0%)	No	No
(252) Committed for hire, a crime against the person	Aggravated	1 (.0%)	Yes	Yes
(255) Fled scene/Failed to render aid	Aggravated	1 (.0%)	No	No
Codes 310 - 390 are related to offenders – Criminal history				
(330) No prior record/no prior felonies	Mitigated	56 (1.3%)	No	No
(310) Has failed on probation before/unamenable probation	Aggravated	49 (1.1%)	Yes	No
(315) Failed Stay of Adjudication/Diversion/Violated Cond Release	Aggravated	38 (.9%)	No	No
(357) Career offender statute	Aggravated	27 (.6%)	Yes	Yes
(387) Priors occurred in short period of time/crime spree	Mitigated	13 (.3%)	Yes	Yes
(316) Revoked Extended Jurisdiction Juvenile	Aggravated	11 (.3%)	No	No
(320) Prior convictions are old	Mitigated	10 (.2%)	No	No
(365) Felon with Gun-nonviolent prior or old or juvenile	Mitigated	5 (.1%)	No	No
(358) Dangerous offender statute	Aggravated	4 (.1%)	Yes	Yes
(366) Fail to Register-Prior less serious or old or juvenile	Mitigated	3 (.1%)	No	No
(386) Priors overemphasize criminal history/same behavioral incident	Mitigated	3 (.1%)	No	No
(385) No prior violent offenses	Mitigated	2 (.0%)	No	No
(350) Repeated same type of criminal conduct	Aggravated	1 (.0%)	No	No

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/ Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
(367) Fail to Register-No new offenses	Mitigated	1 (.0%)	No	No
Codes 400 - 599 are related to sanctions or recommendations regarding sanctions				
(535) Has potential for becoming rehabilitated/amenable to probation	Mitigated	1,334 (30.9%)	Yes	No
(530) Needed treatment/supervision/amenable to treatment	Mitigated	868 (20.1%)	Yes	No
(450) Recommended by court services	Mitigated	266 (6.2%)	Yes	No
(481) Compliance with probation/extended supervision	Mitigated	265 (6.1%)	Yes	No
(410) Revocation and imprisonment/imprisonment on other	Aggravated	233 (5.4%)	Yes	No
(401) Defendant asked for execution to avoid probation/treatment/jail	Aggravated	128 (3.0%)	Yes	No
(461) Virtually all parties/victim/family agreed on sentence	Mitigated	108 (2.5%)	No	No
(420) Imposed restitution or other financial penalty/ensure paid	Mitigated	95 (2.2%)	Yes	No
(510) Prevent trauma to victim from testifying	Mitigated	92 (2.1%)	Yes	No
(400) Defendant demanded that sentence be executed	Aggravated	58 (1.3%)	Yes	No
(402) Defendant request executed sentence-already served all/most of term	Aggravated	39 (.9%)	No	No
(447) Cooperated with police and other law enforcement	Mitigated	37 (.9%)	No	No
(590) Sentence appropriate/just		26 (.6%)	No	No
(490) Accept sentence plea due to evidentiary problems	Mitigated	10 (.2%)	No	No
(480) Stayed sentence as or more severe/Time already served	Mitigated	8 (.2%)	No	No
(580) Commensurate/proportional to codefendants sentence		6 (.1%)	No	No
(520) Public protection		4 (.1%)	No	No
(591) Sentence appropriate/ disagreement with SGL policies		4 (.1%)	No	No
(595) In best interest of family and/ or victim	Mitigated	4 (.1%)	No	No

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/ Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
(524) Low Risk Assessment Score		2 (.0%)	No	No
(525) Not a danger to public/unlikely to reoccur	Mitigated	2 (.0%)	No	No
(538) So can participate in prison treatment program		2 (.0%)	No	No
(455) Cooperated with court services		1 (.0%)	No	No
(529) Not amenable to juvenile treatment/amenable adult probation		1 (.0%)	No	No
(545) Concurrent time with another		1 (.0%)	No	No
Codes 600 – 743 cover other miscellaneous reasons for departure				
(710) Shows remorse/accepts responsibility	Mitigated	1,724 40.0%	Yes	No
(650) Save taxpayers cost of a trial/judicial efficiency	Mitigated	227 (5.3%)	No	No
(600) Psych-Emotional problems/impaired capacity for judgment	Mitigated	30 (.7%)	No	Yes
(635) Defendants health problems	Mitigated	23 (.5%)	No	No
(640) Age of offender	Mitigated	22 (.5%)	No	No
(603) Persistent Mental Illness per 609.1055	Mitigated	9 (.2%)	No	Yes
(680) Substantial risk of victimization if committed	Mitigated	4 (.1%)	No	No
(605) Education/culturally deprived/Mental impairment	Mitigated	3 (.1%)	No	No
(670) Serving time in another state/lives in another state	Mitigated	3 (.1%)	No	No
(610) Chemical dependency problem	Mitigated	2 (.0%)	No	No
(675) Offender being deported/returning to native country		2 (.0%)	No	No
(700) Disregard for law/disregard for others	Aggravated	2 .0%	No	No
(620) Defendant acted out of jealousy or passion	Mitigated	1 (.0%)	No	No
(630) Defendant pregnant	Mitigated	1 (.0%)	No	No

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/ Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
(677) Avoid Deportation		1 (.0%)	No	No
(715) No remorse	Aggravated	1 (.0%)	No	No
(740) Offender absconded prior to sentencing/Failed to appear	Aggravated	1 (.0%)	No	No
Codes 750 - 780 relate to inadvertent departures				
(780) Unknown		198 (4.6%)	No	No
(750) Inadvertent/worksheet error		110 (2.6%)	No	No
(768) No available transcript/Departure info not available/Retired Judge		21 (.5%)	No	No
(765) Report/Transcript Received-Reasons Unclear/Case on Appeal		3 (.1%)	No	No
(779) Reasons not requested--no worksheet completed		2 (.0%)	No	No
(767) Drug Court-No reasons in transcript		1 (.0%)	No	No
Codes 800 - 910 relate to excluded reasons for departure				
(860) Employment at time of sentencing		1 (.0%)	No	Excluded Reason Cited in GL
(880) Living arrangement/stability or support of family		3 (.1%)	No	Excluded Reason Cited in GL
(885) Solid community record/ support		1 (.0%)	No	Excluded Reason Cited in GL
Information about plea agreements and prosecutor recommendations				
(470) Plea negotiation (on sentence)		2,404 (55.8%)	Yes	No
(440) Acceptable to/recommendation of prosecution		748 (17.3%)	Yes	No
(442) Prosecutor does not object to the departure		543 (12.6%)	Yes	No
(441) Prosecutor <u>objects</u> to the departure		403 (9.3%)	Yes	No
(477) Waived Jury Determination of Aggravating Factors		104 (2.4%)	Yes	No
(599) Minn. Stat. 609.11 motion by prosecutor		41 (1.0%)	Yes	No

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/ Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
(445) Recommendation by prosecution for testimony/cooperation		8 (.2%)	No	No
(478) Jury Determination of Aggravating Factors		5 (.1%)	Yes	No
(597) Motion to sentence without regard to mandatory minimum other than Minn. Stat. 609.11		3 (.1%)	No	No
(592) Straight plea between court and defense		1 (.0%)	No	No
(596) Minn. Stat. 609.11 motion by judge		1 (.0%)	No	No
2013 Total Departure Cases		4,312		

- Established in Statute
- Established in Guidelines
- Published Court Ruling
- In Interest of Data
- Discussed in Criminal Law and Procedure

FREQUENTLY CITED DEPARTURE REASONS
(CHECK ALL THAT APPLY)
Additional Reasons May be Recorded on Page 1.

Related to Nature of Current Offense ■

Reasons Generally Used as Mitigating Factors:

- Offender played minor or passive role * ■
- Victim was aggressor in incident * ■
- Crime less onerous than usual ■

Reasons Generally Used as Aggravating Factors: ■

- Victim treated with particular cruelty * ■ ■ ■
- Victim was particularly vulnerable * ■ ■ ■
- Victim injury/psychological impact on victim ■
- Current conviction is offense w/ victim injury (including Crim. Sex. Conduct) and there is a similar prior * ■ ■
- Major economic offense--involves 2 or more of following: * ■ ■
 - multiple victims/multiple incidents per victim ● ●
 - use of position/status ● ●
 - high degree planning/soph./lengthy period of time ● ●
 - actual/attempted loss greater than usual/than min.
 - similar prior conduct ● ●

Reasons Generally Used as Aggravating Factors (cont.):

- Committed, for hire, a crime against the person * ■ ■
- Committed crime as part of a group of three or more persons who all actively participated in the crime * ■ ■
- Major controlled substance crime involving 2 or more of the following: * ■ ■
 - 3 or more separate transactions ● ●
 - sale quantities substantially larger than personal use ● ●
 - involved manufacture for use by others ● ●
 - possession of firearm during offense ● ●
 - high position in drug distribution hierarchy ● ●
 - high degree of sophistication/lengthy period of time ● ●
 - use of position/status ● ●
- Multiple victims or multiple incidents per victim ■
- Crime committed in victim's home or zone of privacy ■ ■ ■
- Position of authority, superiority, confidence or trust ■
- Crime more onerous than usual offense ■

Related to Individual Offender ■ ■

Reasons Generally Used as Mitigating Factors:

- Lacked substantial capacity for judgment (not drug/alc.) * ■ ■
- Particularly amenable to probation ■ ■
- Particularly amenable to treatment: ■
 - Chem. dependency
 - Sex offender
 - Other
- Impose restitution/ensure financial penalties paid ■
- Ensure compliance w/ probation or allow longer supervision
- Shows remorse/accepts responsibility ■

Reasons Generally Used as Aggravating Factors: ■

- Has failed on probation/unamenable to probation ■
- Career Offender under Minn. Stat. § 609.1095, s. 4 ■ ■
- Dangerous Offender under Minn. Stat. § 609.1095, s. 2 ■ ■ ■
- Engrained Offender under Minn. Stat. § 609.3455, s. 3a ■ ■

Related to Requests for Executed Sentence ■ ■

- Request prison to avoid probation and/or jail ■
- Request prison as part of a plea agreement ■
- Request prison--revocation/prison on another offense ■
- Request prison--other reasons___ ■

Related to Recommendations Regarding Sentence

- Recommended by court services ■
- Recommended by treatment professional ■
- Recommendation or agreement of victim/victim's family

Other Reasons

- Current Severity Level 1-4 offense and priors resulted from crime spree * ■
- Prevent trauma to witness from testifying
- Witness is unlikely, unable or unwilling to testify

* Indicates reasons specified in the nonexclusive list in 2.D.3 of the MN Sentencing Guidelines and Commentary

ADDITIONAL INFORMATION REGARDING PLEA AGREEMENTS AND PROSECUTORIAL RECOMMENDATIONS

- Prosecutor objects to the departure ■
- Departure recommended by prosecutor ■
- Prosecutor does not object to the departure ■
- Plea agreement on sentence ■ ■
- Motion by prosecutor to sentence without regard to Minn. Stat. § 609.11 ■ ■ ■ ■

Annotated Bibliography: Departure Reasons

RELATED TO NATURE OF OFFENSE

State v. Garcia, 302 N.W.2d 643 (Minn.1981); *State v. Rott*, 313 N.W.2d 574 (Minn.1981); *State v. McClay*, 310 N.W.2d 683 (Minn.1981).

It is proper for the sentencing court to consider the conduct underlying the charge of which the defendant was convicted.

State v. Womack, 319 N.W.2d 17 (Minn.1982).

It is proper for the court to look at the conduct underlying the offense to which the defendant pled guilty if the defendant admits that the underlying conduct occurred, but it is improper when the defendant denies that such conduct occurred.

General Mitigated Factors

Offender played minor or passive role *

MSG 2.D.3.a.(2): Factors that may be used as Reason for Departure-Mitigated Factors

“The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.”

Victim was aggressor in incident *

MSG 2.D.3.a.(1): Factors that may be used as Reason for Departure-Mitigated Factors

“The victim was an aggressor in the incident.”

Crime less onerous than usual.

State v. Peter, 825 N.W.2d 126, 130 (Minn.App.2012).

Requests for durational departures require the court to consider whether the conduct involved in the offense of conviction was significantly more or less serious than the typical conduct for that crime.

General Aggravating Factors

M.S.A. § 244.10, subd. 4: Deviation from the Guidelines-Aggravated Departures

The state is not limited to factors specified in the Guidelines provided the state provides reasonable notice to the defendant and the court prior to sentencing of the factors on which the state intends to rely.

Victim treated with particular cruelty *

MSG 2.D.3.b.(2): Factors that may be used as Reason for Departure-Aggravated Factors

“The victim was treated with particular cruelty for which the individual offender should be held responsible.”

M.S.A. § 244.10, subd. 5a(2): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “the victim was treated with particular cruelty for which the offender should be held responsible.”

State v. Garcia, 302 N.W.2d 643 (Minn.1981).

State v. Schantzen, 308 N.W.2d 484, 487 (Minn.1981); *State v. Norton*, 328 N.W.2d 142 (Minn.1982).

Cruelty of a kind not usually associated with the commission of the offense in question.

State v. Shiue, 326 N.W.2d 648 (Minn.1982); *State v. Profit*, 323 N.W.2d 34, 36 (Minn.1982).

It is proper to look at the impact of a crime on people other than the victim in determining whether the crime was committed in a particularly cruel way.

Victim was particularly vulnerable *

MSG 2.D.3.b.(1): Factors that may be used as Reason for Departure-Aggravated Factors

“The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability.”

M.S.A. § 244.10, subd. 5a(1): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “the victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.”

State v. Norton, 328 N.W.2d 142 (Minn.1982).

Victim particularly vulnerable due to age.

Victim injury/psychological impact on victim.

State v. Van Garden, 326 N.W.2d 633, 634 (Minn.1982); *State v. Felix*, 410 N.W.2d 398 (Minn.App.,1987).

Even if the infliction of great bodily harm is an element of the offense, “the injury nonetheless can be considered as an aggravating factor in this case because of its serious and permanent nature.”

State v. Ford, 539 N.W.2d 214, 230 (Minn.1995).

Determining that psychological trauma to bystander was appropriate ground for departure.

State v. Olson, 436 N.W.2d 817, 821 (Minn.App.1989); *State v. Morrison*, 437 N.W.2d 422, 429 (Minn.App.1989).

The court did not abuse its discretion by relying, in part, on fact that victim was abused in front of sister who suffered resulting psychological trauma).

State v. Glaraton, 425 N.W.2d 831, 833–35 (Minn.1988).

Reinstated sentence of greater-than-quadruple upward departure based on numerous aggravating factors, including “the infliction of psychological trauma” to victim).

State v. Patterson, 511 N.W.2d 476, 478 (Minn.App.1994).

The victim's need for “future counseling for her psychological injury” was one of multiple “substantial and compelling” factors to support double-durational departure.

State v. Allen, 482 N.W.2d 228, 233 (Minn.App.1992).

Psychological and emotional injury may justify upward departure.

Current conviction is offense w/ victim injury (including Crim. Sex. Conduct) and there is a similar prior *

MSG 2.D.3.b.(3): Factors that may be used as Reason for Departure-Aggravated Factors

“Current conviction is for a criminal sexual conduct offense, or an offense in which the victim was otherwise injured, and is the offender has a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured.”

M.S.A. § 244.10, subd. 5a(3): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “the current conviction is for a criminal sexual conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured.”

Major economic offense--involves 2 or more of following: *

MSG 2.D.3.b.(4): Factors that may be used as Reason for Departure-Aggravated Factors

“The offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:

- (a) the offense involved multiple victims or multiple incidents per victim;
- (b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
- (c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;
- (d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or (e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.”

M.S.A. § 244.10, subd. 5a(4): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “the offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense.”

- Subd. 5a(4)(i) **multiple victims/multiple incidents per victim.**
 - “The offense involved multiple victims or multiple incidents per victim.”
- Subd. 5a(4)(ii) **actual/attempted loss greater than usual/than min.**
 - “The offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes.”
- Subd. 5a(4)(iii) **high degree planning/soph./lengthy period of time.**
 - “the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time.”
- Subd. 5a(4)(iv) **use of position/status.**
 - “The offender used the offender's position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships.”
- Subd. 5a(4)(v) **similar prior conduct.**
 - “The offender had been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.”

Committed, for hire, a crime against the person *

MSG 2.D.3.b.(6): Factors that may be used as Reason for Departure-Aggravated Factors

“The offender committed, for hire, a crime against the person.”

M.S.A. § 244.10, subd. 5a(6): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “The offender committed, for hire, a crime against the person.”

Committed crime as part of a group of three or more persons who all actively participated in the crime *

MSG 2.D.3.b.(10): Factors that may be used as Reason for Departure-Aggravated Factors

“Offender committed the crime as part of a group of three or more offenders who all actively participated in the crime.”

M.S.A. § 244.10, subd. 5a(10): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “The offender committed the crime as part of a group of three or more persons who all actively participated in the crime.”

Major controlled substance crime involving 2 or more of the following: *

MSG 2.D.3.b.(5): Factors that may be used as Reason for Departure-Aggravated Factors

“The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:

- (a) the offense involved at least three separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so;
- (b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
- (c) the offense involved the manufacture of controlled substances for use by other parties;
- (d) the offender knowingly possessed a firearm during the commission of the offense;
- (e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
- (f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or
- (g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional).”

M.S.A. § 244.10, subd. 5a(5): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense.”

- **Subd. 5a(5)(i) 3 or more separate transactions.**
 - “The offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so.”
- **Subd. 5a(5)(ii) sale quantities substantially larger than personal use.**
 - “The offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use”.
- **Subd. 5a(5)(iii) involved manufacture for use by others.**
 - “The offense involved the manufacture of controlled substances for use by other parties.”
- **Subd. 5a(5)(iv) possession of firearm during offense.**
 - “The offender knowingly possessed a firearm during the commission of the offense.”
- **Subd. 5a(5)(v) high position in drug distribution hierarchy.**
 - “The circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy.”
- **Subd. 5a(5)(vi) high degree of sophistication/lengthy period of time.**
 - “The offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement.”
- **Subd. 5a(5)(vii) use of position/status.**
 - “The offender used the offender's position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships.”

Multiple victims or multiple incidents per victim.

State v. Murphy, 545 N.W.2d 909 (Minn.,1996).

Defendant's conduct took place over a ten-year period and involved multiple victims, which amongst other factors, justified a double aggravated durational departure.

State v. Ali, 855 N.W.2d 235 (Minn.,2014).

In cases with multiple victims, consecutive sentences are rarely, if ever, disproportionate to the offense.

Crime committed in victim's home or zone of privacy.

MSG 2.D.3.b.(14): Factors that may be used as Reason for Departure-Aggravated Factors

“The offense was committed in a location in which the victim had an expectation of privacy.”

M.S.A. § 244.10, subd. 5a(14): Deviation from the Guidelines-Aggravating Factors

Aggravating factors include, but are not limited to... “The offense was committed in a location in which the victim had an expectation of privacy.”

State v. Van Gorden, 326 N.W.2d 633 (Minn.1982); *State v. Morales*, 324 N.W.2d 374 (1982).

Invasion of the zone of privacy surrounding and including the victim's home is a factor which may be considered.

Position of authority, superiority, confidence or trust.

State v. Campbell, 367 N.W.2d 454 (Minn. 1985).

Affirmed upward departure in part because defendant "violated a position of trust".

State v. Lee, 494 N.W.2d at 482 (Minn. 1992).

Defendant clearly abused his position of authority and his position as a leader to maneuver the complainants into situations where he could sexually assault them.

State v. Carpenter, 459 N.W.2d 121, 128 (Minn.1990).

Defendant abused his position of trust and authority in persuading a teenager not of the age of consent to have sexual intercourse with him.

Crime more onerous than usual offense.

State v. Cox, 343 N.W.2d 641, (Minn. 1984).

Found factor that distinguishes this case more serious than the "typical" case in that the victim was put in a particularly humiliating position.

State v. Schantzen, 308 N.W.2d 484 (Minn.1981).

Conduct was a form of gratuitous cruelty which was unjustified within the context of the crime and warranted a departure.

RELATED TO INDIVIDUAL OFFENDER

9 Minn. Prac., Criminal Law & Procedure § 36:42 (4th ed.): Classification/Use of Particular use of Departure Factors
Because certain factors, such as the "offender-related" factor of amenability to probation, or of danger to the public, apply only to dispositional and not durational departures, whereas "offender" related factors may apply to both, the classifications may have significance. These categories, however, are not identified as such in the guidelines themselves and the courts have not analyzed them comprehensively. These labels may serve no useful purpose and may lead to failure to apply factors properly. The better practice is to identify the factor and consider whether it reasonably and logically supports either a durational or a dispositional departure or both. If it does, it should weigh in favor of departure, if not, it should not, regardless of nomenclature.

State v. Peter, 825 N.W.2d at 130 (Minn. App. 2012).

A court must consider only offense-related factors, rather than offender-related factors, when deciding a request for a durational departure.

General Mitigated Factors

State v. Kindem, 313 N.W.2d 6, (Minn. 1981).

Court did not err in refusing to depart from the Guidelines in order to impose a sentence more lenient than the presumptive sentence, in that the reasons for downward departure were not substantial and compelling.

Lacked substantial capacity for judgment (not drug/alc.) *

MSG 2.D.3.a.(3): Factors that may be used as Reason for Departure-Mitigated Factors

"The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor."

State v. McLaughlin, 725 N.W.2d 703, 716 (Minn.2007).

MN Supreme Court has stated that "in order to constitute a mitigating factor in sentencing, a defendant's impairment must be 'extreme' to the point that it deprives the defendant of control over his actions."

Particularly amenable to probation.

State v. Soto, 855 N.W.2d 303 (Minn. 2014).

Mere amenability to probation does not justify a departure, but that a defendant must be particularly amenable to probation. Facts that cannot themselves justify a departure (e.g., social or economic factors) can be relevant to determining whether a defendant is particularly amenable to probation (855 N.W.2d at 312).

MSG Comment 2.D.

When used as a departure factor, amenability to probation may not be linked to social and economic factors alone.

Particularly amenable to treatment:

- **Chem. Dependency.**
- **Sex offender.**
- **Other.**

State v. Hennessy, 328 N.W.2d 442, 443 (Minn.1983); *State v. Trog*, 323 N.W.2d 28, 31 (Minn.1982); *State v. Wright*, 310 N.W.2d 461, 462 (Minn.1981).

Courts have justified downward departures from Guidelines where an adult is particularly amenable to treatment in a probationary setting.

Impose restitution/ensure financial penalties paid.

State v. Dillener, 336 N.W.2d 268, 269 (Minn. 1983).

Ensuring payment of restitution can justify a dispositional, but not a durational, departure.

Ensure compliance w/ probation or allow longer supervision.

Shows remorse/accepts responsibility.

State v. Trog, 323 N.W.2d 28 (Minn.1982).

A defendant's remorse and attitude in court are relevant factors in deciding whether to depart dispositionally.

State v. Schmit, 329 N.W.2d 56, 58, n. 1 (Minn.1983).

A defendant's lack of remorse is not a factor justifying a durational departure or one with respect to consecutive service.

General Aggravating Factors

M.S.A. § 244.10, subd. 4: Deviation from the Guidelines-Aggravated Departures

The state is not limited to factors specified in the Guidelines provided the state provides reasonable notice to the defendant and the court prior to sentencing of the factors on which the state intends to rely.

Has failed on probation/unamenable to probation.

State v. Garcia, 302 N.W.2d 643 (Minn.1981).

The court was justified in considering the fact that a defendant has a chemical dependency problem and that a defendant had not taken advantage of treatment programs while on probation in the past.

Career Offender under Minn. Stat. § 609.1095, s. 4.

MSG 2.D.3.b.(9): Factors that may be used as Reason for Departure-Aggravated Factors

"The offender is being sentenced as a "career offender" under Minn. Stat. § 609.1095, subd. 4."

Special sentencing provision established by the legislature that constitutes a departure (Sent. Guidelines 2.D.2).

M.S.A. § 244.10, subd. 5a(9): Deviation from the Guidelines-Aggravating Factors

"Aggravating factors include, but are not limited to...The offender is a career offender as described in section 609.1095, subdivision 4."

Dangerous Offender under Minn. Stat. § 609.1095, s. 2.

MSG 2.D.3.b.(8): Factors that may be used as Reason for Departure-Aggravated Factors

"The offender is being sentenced as a "dangerous offender who commits a third violent crime" under Minn. Stat. § 609.1095, subd. 2."

Special sentencing provision established by the legislature that constitutes a departure (Sent. Guidelines 2.D.2).

M.S.A. § 244.10, subd. 5a(8): Deviation from the Guidelines-Aggravating Factors

"Aggravating factors include, but are not limited to...The offender is a dangerous offender who committed a third violent crime, as described in section 609.1095, subdivision 2."

Neal v. State, 658 N.W.2d 536, 545 (Minn.2003).

The dangerous-offender statute permits the court to impose a durational departure not otherwise authorized by the Guidelines, even when the state does not prove severe aggravating factors.

Engrained Offender under Minn. Stat. § 609.3455, s. 3a.

MSG 2.D.3.b.(7): Factors that may be used as Reason for Departure-Aggravated Factors

"The offender is being sentenced as an "engrained offender" under Minn. Stat. § 609.3455, subd. 3a."

Special sentencing provision established by the legislature that constitutes a departure (Sent. Guidelines 2.D.2).

M.S.A. § 244.10, subd. 5a(7): Deviation from the Guidelines-Aggravating Factors

"Aggravating factors include, but are not limited to...The offender is sentenced according to section 609.3455, subdivision 3a."

RELATED TO REQUESTS FOR EXECUTION OF SENTENCE

9 Minn. Prac., Criminal Law & Procedure § 36:50 (4th ed.): Defendant's Right to Execute Sentence; Refusal of Probation

Because the terms and conditions of probation may in some cases be more onerous than an executed sentence of imprisonment, a defendant generally has the right to demand execution of a sentence rather than submit to probation.

Request prison to avoid probation and/or jail.

State v. Randolph, 316 N.W.2d 508, (Minn.1982).

If it cannot be demonstrated that society's interests suffer by vacating probation sentence, defendant should be allowed to refuse probation and demand execution of sentence.

State v. Ott, 341 N.W.2d 883, (Minn.1984).

Defendant was going to be incarcerated for other offenses, defendant had right to refuse probation so that when he was released from prison he would not have to serve five years of probation.

State v. Rasinski, 472 N.W.2d 645 (Minn.1991).

Defendant has right to demand execution of presumptive sentence when probationary sentence is more onerous, even if society's interest appears to be better served by the probationary sentence.

Request prison as part of a plea agreement.

Request prison--revocation/prison on another offense.

State v. Ott, 341 N.W.2d 883, (Minn.1984).

Defendant was going to be incarcerated for other offenses, defendant had right to refuse probation so that when he was released from prison he would not have to serve five years of probation.

Request prison--other reasons.

State v. Randolph, 316 N.W.2d 508, (Minn.1982).

If it cannot be demonstrated that society's interests suffer by vacating probation sentence, defendant should be allowed to refuse probation and demand execution of sentence.

State v. Rasinski, 472 N.W.2d 645 (Minn.1991).

Defendant has right to demand execution of presumptive sentence when probationary sentence is more onerous, even if society's interest appears to be better served by the probationary sentence.

RELATED TO RECOMMENDATIONS REGARDING SENTENCE

Recommended by court services.

State v. Donnay, 600 N.W.2d 471, (Minn. App.1999).

The court did not err by staying execution of the sentence based, in part, on the recommendation of court services.

Recommended by treatment professional.

State v. Cameron, 369 N.W.2d 20 (Minn.App.1985).

A psychological report was submitted which described Cameron as a hypochondriac. It recommended the court not discard the possibility of jail time. A psychological report also indicated Cameron was not amenable to treatment.

Recommendation or agreement of victim/victim's family.

OTHER REASONS

Current severity level 1-4 offense and priors resulted from crime spree *.

MSG 2.D.3.a.(4): Factors that may be used as Reason for Departure-Mitigated Factors

"Offender's presumptive sentence is a commitment but not a mandatory minimum sentence, and either of the following exist:

(a) The current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or

(b) The current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance.

Prevent trauma to witness from testifying.

Witness is unlikely, unable or unwilling to testify.

PLEA AGREEMENT AND PROSECUTORIAL RECOMMENDATION

Prosecutor objects to the departure.

Additional information obtained for the interest of data.

Departure recommended by prosecutor.

Additional information obtained for the interest of data.

Prosecutor does not object to the departure.

Additional information obtained for the interest of data.

Plea agreement on sentence.

State v. Garcia, 302 N.W.2d 643 (Minn.1981); *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn.2002).

The court properly did not rely on the term of the negotiated plea as a factor in its decision to depart. An attempt such as this by the parties to limit sentence duration does not create a "substantial and compelling circumstance" which may be relied upon as

justifying a departure from the Guidelines. Only the court, acting in accordance with the Guidelines, and not the parties, has the authority to determine the appropriate sentence.

Additional information obtained for the interest of data.

Motion by prosecutor to sentence without regard to Minn. Stat. § 609.11.

Established in Minn. Stat. §609.11, subd. 8 that constitutes a departure.

MSG 2.E.2.d.(2): Mandatory Sentences; Specific Statutory Provisions-Departure

“Minn. Stat. § 609.11, subd. 8 provides that the court, on its own motion or on the prosecutor’s motion, may sentence without regard to the mandatory minimum sentence if the court finds substantial and compelling reasons to do so”.

State v. Larson, 473 N.W.2d 907, (Minn.App.1991).

The trial court may sentence without regard to a mandatory minimum term if it finds that substantial mitigating factors exist to justify the departure.

*** Indicates reasons specified in the nonexclusive list in II.D.2 of the MN Sentencing Guidelines and Commentary**