

# Minnesota Sentencing Guidelines Commission

---

## Departure Reasons Listed in the Guidelines February 19, 2015

---

**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 (see page 13). 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).

<b>Sentencing Guidelines</b>	<b><i>State v. Soto</i></b>
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? 2) Does the Commission object to suggested staff changes to the departure checklist?

**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.** \* \* \*

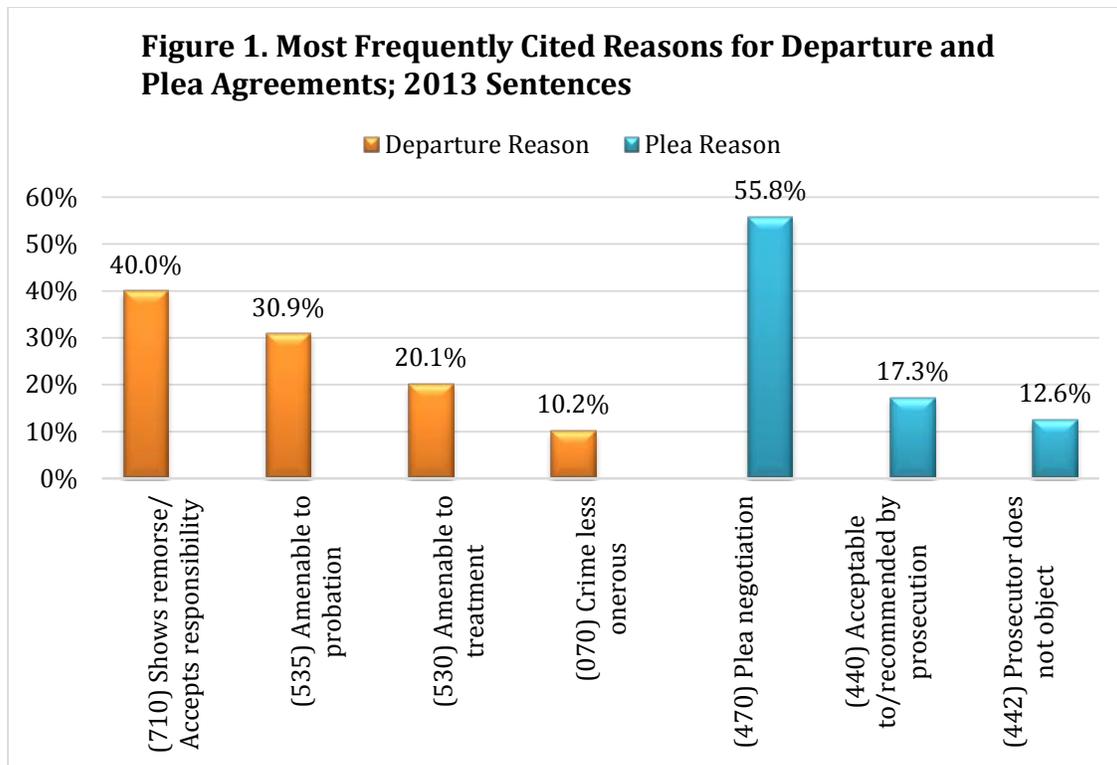
**2.D.304305.** \* \* \*

**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				

<b>(Coding Number) Reason Cited for Departure</b>	<b>Generally Cited for Mitigated/ Aggravated</b>	<b>2013 Frequency (Percent)</b>	<b>On the Departure Report?</b>	<b>In the Guidelines?</b>
(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

<b>(Coding Number) Reason Cited for Departure</b>	<b>Generally Cited for Mitigated/ Aggravated</b>	<b>2013 Frequency (Percent)</b>	<b>On the Departure Report?</b>	<b>In the Guidelines?</b>
(152) Major drug offense – Quantities substantially larger than usual	Aggravated	1 (.0%)	Yes	Yes
(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

<b>(Coding Number) Reason Cited for Departure</b>	<b>Generally Cited for Mitigated/ Aggravated</b>	<b>2013 Frequency (Percent)</b>	<b>On the Departure Report?</b>	<b>In the Guidelines?</b>
(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
(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

<b>(Coding Number) Reason Cited for Departure</b>	<b>Generally Cited for Mitigated/ Aggravated</b>	<b>2013 Frequency (Percent)</b>	<b>On the Departure Report?</b>	<b>In the Guidelines?</b>
(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
(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

<b>(Coding Number) Reason Cited for Departure</b>	<b>Generally Cited for Mitigated/ Aggravated</b>	<b>2013 Frequency (Percent)</b>	<b>On the Departure Report?</b>	<b>In the Guidelines?</b>
(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
(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
<b>Codes 750 - 780 relate to inadvertent departures</b>				
(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
<b>Codes 800 - 910 relate to excluded reasons for departure</b>				
(860) Employment at time of sentencing		1 (.0%)	No	Excluded Reason Cited in GL

(Coding Number) Reason Cited for Departure	Generally Cited for Mitigated/ Aggravated	2013 Frequency (Percent)	On the Departure Report?	In the Guidelines?
(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
(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
<b>2013 Total Departure Cases</b>		<b>4,312</b>		

## 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 \*
- Mitigated or excused culpability not amounting to defense\*
- 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
- Committed in the presence of a child\*

### Related to Individual Offender

#### Reasons Generally Used as Mitigating Factors:

- Lacked substantial capacity for judgment (not drug/alc.) \*
- Serious and persistent mental illness placement under Minn. Stat. § 609.1055\*
- Particularly amenable to probation\*
- Accepted into problem-solving court\*
- 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 Provision under (Minn. Stat. § 609.1095 s. 4)\*
- Dangerous Offender Provision under (Minn. Stat. § 609.1095 s. 2)\*
- Patterned Sex Offender Provision (Minn. Stat. § 609.108) 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 section 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

**PLEASE SEND TO:**

(Rev. 01/2015)

**Minnesota Sentencing Guidelines Commission**

**309 Administration Building,**

**50 Sherburne Avenue, St. Paul, MN 55155 Email: [sentencing.guidelines@state.mn.us](mailto:sentencing.guidelines@state.mn.us)**