

MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
 Fr: Mark Wernick
 Re: Demographic Impact Statements
 Date: April 3, 2018

In recent weeks, staff has asked Commission members for feedback on its proposed Demographic Impact Statement (DIS) for HF3610. (The bill increases the maximum penalty for 4th degree assault of a police officer [no demonstrable bodily harm] from 1 year incarceration, a gross misdemeanor, to 2 years imprisonment, a felony). In my response, I asked staff to “normalize” the demographic data so that rate of felony convictions are presented “per 100,000” of each demographic group; e.g., whites were convicted of a felony at a rate of 261 per 100,000. Staff acknowledged the statistical validity of this kind of normalization, but declined to normalize the data in this way because it believes it is not authorized to do so by the Commission’s DIS policy. I think the normalization of data per 100,000 is authorized by the Commission’s DIS policy.

Table 1 of the proposed DIS presents 2016 gender and race/ethnicity data as follows:

		Felony Population		Prison Population		General Population		
MSGC Category		Offenders Sentenced in 2016		2016 Adult Inmate Population		U.S. Census Category	2016 Estimated Pop. Age 15 & Older	
		Number	Percent	Number	Percent		Number	Percent
Male		13,702	80.9%	9,384	92.8%	Male	2,199,515	49.5%
Female		3,225	19.1%	730	7.2%	Female	2,247,439	50.5%
Race & Ethnicity	White	9,813	58.0%	4,711	46.6%	White*	3,763,894	84.6%
	Black	4,209	24.9%	3,537	35.0%	Black or African American*	263,625	5.9%
	American Indian	1,472	8.7%	960	9.5%	American Indian*	69,224	1.6%
	Hispanic**	903	5.3%	631	6.2%	Hispanic**	193,435	4.3%
	Asian	525	3.1%	259	2.6%	Asian*	221,996	5.0%
	Other/Unknown	5	0.0%	16	0.2%	Native Hawaiian/ Other Pacific Islander*	4,781	0.1%

Looking at this data, it is not easy for the reader to determine what the actual and relative conviction rates were for the identified demographic groups. For example, with respect to American Indians and whites, the Table shows the following Minnesota data:¹

- 1,472 American Indians were convicted of a felony in 2016, which represents 8.7% of all people convicted of a felony that year; 9,813 whites were convicted of a felony in 2016, which represents 58% of all people convicted of a felony that year.
- The American Indian adult population in 2016 was 69,224, which represents 1.6% of the total adult population; the white adult population was 3,763,894, which represents 84.6% of the total adult population.

This presentation of the data does not paint a clear picture of the actual and relative felony conviction rates for the identified demographic groups.

Compare how the same 2016 data presented in Table 1 of the proposed DIS was presented in the Commission’s 2018 Report to the Legislature (Table 11, page 41):

	MSGC Category	Offenders Sentenced		U.S. Census Category	2016 Estimated Pop. Age 15 & Older		Offenders Sentenced per 100,000
		Number	Percent		Number	Percent	
	Male	13,702	80.9%	Male	2,199,515	49.5%	623
	Female	3,225	19.1%	Female	2,247,439	50.5%	143
Race & Ethnicity	White	9,813	58.0%	White*	3,763,894	84.6%	261
	Black	4,209	24.9%	Black or African American*	263,625	5.9%	1,597
	American Indian	1,472	8.7%	American Indian*	69,224	1.6%	2,126
	Hispanic**	903	5.3%	Hispanic**	193,435	4.3%	467
	Asian	525	3.1%	Asian*	221,996	5.0%	236
	Other/Unknown	5	0.0%	Native Hawaiian/Other Pacific Islander*	4,781	0.1%	***

By normalizing the data per 100,000 members of each demographic group (highlighted in red), the actual and relative conviction rates are clear. For example, in 2016, whites were convicted of a felony at a rate of 261 per 100,000, while American Indians were convicted at a rate of 2,126 per 100,000. Staff’s DIS reports to the legislature should be as clear about actual and relative felony conviction rates per demographic group as was the Commission’s 2018 report to the legislature.

¹ I am only addressing conviction rates. Staff concluded that HF3610 will have no significant impact on imprisonment rates for the identified demographic groups.

Table 2 of the proposed DIS presents data to describe how HF3610 may have impacted the felony conviction rates of the identified demographic groups in 2017:

Existing Annual Felony Population			Estimated Change in Felony Offenders Sentenced*		Estimated Resulting Annual Felony Population*			
MSGC Category	Offenders Sentenced in 2016		No.	%	No.	%	% change from existing felony pop.	% -point change relative to other categories**
	No.	%						
Male	13,702	80.9%	+59	60%	13,761	80.8%	+0.4%	-0.1%
Female	3,225	19.1%	+40	40%	3,265	19.2%	+1.2%	+0.1%
White	9,813	58.0%	+56	57%	9,869	58.0%	+0.6%	
Black	4,209	24.9%	+7	7%	4,216	24.8%	+0.2%	-0.1%
American Indian	1,472	8.7%	+23	23%	1,495	8.8%	+1.6%	+0.1%
Hispanic***	903	5.3%	+4	4%	907	5.3%	+0.4%	
Asian	525	3.1%			525	3.1%		
Other/Unk.	5	0.0%	+9	9%	14	0.1%	****	****

With respect to American Indians and whites, this graph shows:

- The number of American Indians convicted of a felony would have increased from 1,472 to 1,495, a 1.6% increase; the number of whites convicted of a felony would have increased from 9,813 to 9,869, a 0.6% increase.
- The percentage of American Indians convicted of a felony would have increased from 8.7% of the all people convicted to 8.8% of all people convicted; the percentage of whites convicted of a felony would have remained at 58% of all people convicted.

According to my math, if the above data was presented in a normalized fashion, a table would look something like this:

MSGC Category	Offenders Sentenced		U.S. Census Category	2016 Estimated Pop. Age 15 & Older		Offenders Sentenced per 100,000 (2016)	Offenders Sentenced per 100,000 (2017) ²
	Number	Percent		Number	Percent		
Male	13,702	80.9%	Male	2,199,515	49.5%	623	626
Female	3,225	19.1%	Female	2,247,439	50.5%	143	145
White	9,813	58.0%	White*	3,763,894	84.6%	261	262
Black	4,209	24.9%	Black or African American*	263,625	5.9%	1,597	1,599
American Indian	1,472	8.7%	American Indian*	69,224	1.6%	2,126	2,160
Hispanic**	903	5.3%	Hispanic**	193,435	4.3%	467	469
Asian	525	3.1%	Asian*	221,996	5.0%	236	236
Other/Unknown	5	0.0%	Native Hawaiian/Other Pacific Islander*	4,781	0.1%	***	

By normalizing the data, the reader can easily see the extent of the disparity between American Indians and whites and how HF3610 may impact the disparity. The DIS report could still avoid using language such as “racially disparate impact” or “exacerbating racial disparities;” language that is concerning to some Commission members.

As I said earlier, staff declined to normalize the data as I suggested because it believes such normalization is not authorized by the “Scope” section of the Commission’s DIS policy. That section provides as follows:

Scope. When a demographic impact statement regarding a proposed crime bill is either requested by the Legislature in accordance with Minn. Stat. § 3.98, or satisfies the significance threshold described in the prior paragraph, then MSGC staff shall prepare a demographic impact statement as follows: (1) the statement shall present in a table the percentage breakdown by demographic group over the past 3 to 5 years the state general population, the state felony population, and the state prison population. Additionally, (2) the statement may express a limited opinion that estimates the number of offenders and prisoners by demographic group that may be convicted and imprisoned under the new crime bill if enacted and percentage change when compared to the prior years in the table, provided that the opinion has foundational reliability and the underlying

² Because of my limited ability to put tables into documents, I did not include the actual numerical increases per demographic group. Those numbers are in Table 2 (“Estimated Change in Felony Offenders Sentenced”), and would be included in this kind of proposed table as well.

scientific evidence is generally accepted in the relevant scientific community within the meaning of Minnesota Rule of Evidence 702.

Put differently, the before-and-after demographic group comparison will compare the numbers and percentage by demographic group, as used herein, of the prior felony and prison populations on the one hand, and the new felony and prison population estimates on the other hand, provided that such estimates can be calculated in a manner that satisfies Rule 702. Any opinion shall set forth the facts and data upon which the opinion is based. Minn. Rule of Evidence 703. *The demographic impact statement shall not express any opinions unless the criteria of Rules 702 and 703 are satisfied;* and shall not express an opinion “concerning the merits of the proposal.” Minn. Stat. § 3.98, subd. 2(b). Likewise, the demographic impact statement shall not express an opinion about the cause of any potential disparate demographic impact that may be identified within the statement, and each statement shall disclaim any intent, on the part of either the MSGC or its staff, to express such an opinion. (Italics added).

The italicized language above reveals that staff is authorized to express an opinion about the data, so long as the opinion has a reliable foundation and will assist the reader in understanding the data. Rule 702. The only opinions prohibited by the policy are opinions about the merits of the legislation or the cause of any potential disparate impact. Accordingly, the policy allows staff to express its own opinion about how the data should be presented so that the reader can readily understand the extent of any potential disparate impact.

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