

MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
From: Hon. Christopher J. Dietzen, Chair
Date: November 1, 2018
Subject: **Revised Proposal to Amend the Guidelines**

The purpose of this memorandum is to set forth a revised compromise proposal that I intend to present to the Commission at our November meeting. I will first outline the relevant background and then present the proposal.

Relevant Background

At our October meeting, Judge Schellhas and I presented our compromise proposal, which was set forth in our October 4, 2018, memorandum. Specifically, we recommended that the Commission hold a public hearing to amend the Guidelines to modify the methodology for determining the Criminal History Score (CHS) and to add a Repeat Severe Violent Offender Sentencing Enhancement to the Guidelines. After significant discussion, the Commission voted unanimously to hold a public hearing on the compromise proposal as modified during the meeting. The original and modified proposal considered by the Commission are broken down into the Custody Status Point proposal and the Violent Offender proposal.

The **Custody Status Point (CSP) proposal** had three components.

First, the current Guidelines would remain unchanged for CSP for severity levels 8 and above (Standard Grid), G and above (Sex Offender Grid), D8 and above (Drug Offender Grid), and Attempts to Commit First-Degree Murder, to include attempts, conspiracies, and out-of-state offenses. But it was also proposed that Assault–Second Degree (With a Dangerous Weapon and Substantial Bodily Harm) and Fleeing a Police Officer (Great Bodily Harm) be moved from a severity level 6 to a severity level 8. The rationale for this portion of the proposal is that severity level 8 offenses, including the above-referenced Assault–Second Degree and Fleeing a Police Officer, are more serious offenses and warrant a CSP in all cases.

Second, for the remaining severity levels, the proposal would allow the prosecutor or judge to make a motion to waive assignment of a CSP for offenses not excluded under the preceding paragraph,

provided that certain criteria are satisfied. Specifically, the judge would have the discretion, but is not required, to grant a waiver if the offender establishes that (1) waiver is consistent with public safety; (2) the offender has consistently utilized available probation services and satisfied all conditions of probation for the past three years; (3) the new offense does not represent an escalation in criminal activity; and (4) the offender has made some progress in rehabilitation and reentry into society. These conditions were the subject of some discussion between members of the Commission.

During the discussion, Commissioner Roy brought a motion to replace the waiver authorization aspect of the proposal with an aggravating factor aspect which placed the burden on the prosecutor, not the offender, to prove that there are substantial and compelling reasons to granting a custody status point in a specific case. That motion failed for lack of a second. Thereafter, the discussion focused on whether Assault–Second Degree and Fleeing a Police Officer ought to be moved to severity level 8, and whether the probationary factors were appropriate or attainable. A compromise discussed at the meeting would modify the waiver authorization criteria to provide that the judge could grant the waiver if doing so was consistent with public safety. In making that determination the judge could consider factors 2-4 above. The second factor would be modified from three to one years. The change of ranking for Assault–Second Degree and Fleeing a Police Officer, and the definition of public safety, were not specifically discussed when the motion was made and seconded.

Third, the other portions of the proposal—amending Section 2.B.2.a to reduce CSP to one-half of the CSP in certain instances, amending the assignment of the CSP to end upon discharge from probation, and eliminating the CSP for probation pursuant to Minn. Stat. § 152.18—were also approved to go forward to public hearing. Also included was the proposal to amend the felony decay factor to change the time-period upon which it is calculated, and to end upon an earlier date in certain instances.

The **Repeat Severe Violent Offender Sentencing Enhancement** proposal received much discussion. The debate turned on what crimes should be subject to the proposed sentencing enhancement. Originally, the proposal had developed a list of offenses that would be the subject of the sentencing enhancement. Subsequently, the proposal was changed to use severity levels to determine the specific offenses in order to satisfy objections to the proposal. The real question was whether Assault–Second Degree (With a Dangerous Weapon and Substantial Bodily Harm) and Fleeing a Police Office (Great Bodily Harm) should be subject to the sentencing enhancement. The makers of the motion proposed that Assault–Second Degree and Fleeing a Police Officer as described above be moved from a severity level 6 to a severity level 8. During the discussion, a compromise was offered to abandon the use of severity levels and go back to the listing of crimes that would be subject to sentencing enhancement. The maker of the motion and the second agreed to do so and suggested that we include the crimes identified in the staff memo dated May 10, 2018, and discussed June 7, 2018. It was unclear whether both crimes were included in the memo. That motion passed.

Revised Proposal

My revised **CSP proposal** would leave the original proposal in place, except to modify how we deal with Assault–Second Degree, Fleeing a Police Officer, and the criteria for the waiver authorization. Specifically, my proposed compromise would include on the list of offenses for which CSP remains

unchanged—i.e., offenses ranked at severity level 8 and above—the additional offenses of Assault–Second Degree and Fleeing a Police Officer, as described above. The benefit of doing this is to avoid changing the severity level of those two offenses. In that regard, I agree we should discuss whether a change in severity level for those two offenses is warranted, but that should be a separate discussion. For now, both offenses are serious and therefore no change in the assignment of a custody status point is warranted.

Additionally, I agree that the probationary factors need work and that the focus should be on consistency with public safety. Therefore, I would propose we change that portion of the proposal to state:

Specifically, the judge has the discretion, but is not required to grant a waiver if the offender establishes that the waiver is consistent with reasonable public safety and promotes the traditional purposes of sentencing which are retribution, incapacitation, deterrence, restitution and rehabilitation. Minn. Stat. § 244.09. In making this determination, the judge may consider whether the offender has consistently utilized available probationary services, such as drug, alcohol and psychological treatment services and otherwise satisfied the conditions of probation for the past 12 months; the new offense does not represent an escalation in criminal activity; and whether the offender has made any progress in rehabilitation and reentry into society, such as additional education and/or vocational training.

This portion is the most difficult to articulate. But it is likely the most important because it eliminates the formulaic approach for the most serious offenses and gives the court the opportunity to look at the whole person.

My proposed compromise of the **Repeat Violent Offender Sentencing Enhancement** is a product of additional work done by staff. Specifically, staff has determined that Assault–Second Degree (With a Dangerous Weapon and Substantial Bodily Harm) is on the May 10 list, but Fleeing a Police Officer (Great Bodily Harm) is not. Judge Schellhas is willing to go along with the listing in the May 10 staff memo. My thinking is that, like our approach with respect to the CSP proposal, we create an Appendix to the Guidelines that lists the crimes that are subject to the sentencing enhancement, which would include Assault–Second Degree, but not Fleeing a Police Officer. Therefore, my compromise proposal is to schedule for public hearing the proposed Repeat Violent Offender Sentencing Enhancement proposal, except that we use the specific listing of crimes—including attempts, conspiracies, and out-of-state offenses—that includes Assault–Second Degree (with substantial bodily harm) but not Fleeing a Police Officer. Additionally, I recommend that, after the first of the year, the Commission review whether Assault–Second Degree and Fleeing a Police Officer be moved higher than severity level 6.

Effective Date

The recent case of *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017), recommends that we be clear as to the effective date of proposed changes. My view is that the changes should be effective prospectively. The amendment should therefore contain language expressly stating that the changes, if permitted to take effect, would do so on August 1, 2019, and would apply to offenses committed on or after that date.

STAFF MEMORANDUM

To: Minnesota Sentencing Guidelines Commission

From: Nate Reitz, Executive Director

Date: November 1, 2018

Subject: **November Consensus Items**

Based on the discussion at the October MSGC meeting, it appeared that the Commission was nearing consensus on most Guidelines modification issues discussed. Based on that discussion, as well as the Chair's memorandum to the Commission dated November 1, 2018, this memorandum attempts to capture those areas of consensus.¹

Figure 1 contains the draft language, which combines proposals that had previously been separate. New language is highlighted. If adopted, this language would bring about the following policy changes:

1. Allowing probation offenses to decay fifteen years after sentencing, thereby ensuring that prison offenses do not decay before probation offenses.

- Under existing policy, a felony offense decays—i.e., can no longer be included in criminal history—fifteen years after discharge from or expiration of sentence. Because the typical probation sentence is discharged well after the typical prison sentence prison expires, this policy, oddly, causes prison sentences generally to decay before probation sentences.
- The proposed changes (to § 2.B.1.c and Comment 2.B.113, p. 7) maintain existing policy for an executed sentence: No offense will decay until fifteen years after expiration of a prison sentence. If a probationary sentence is never executed, however, the proposal will permit the offense to decay fifteen years after the date of sentencing. In no event will an offense decay while the offender remains under supervision or custody.
- For consistency, the proposal likewise changes the misdemeanor decay policy (presently, ten years after discharge or expiration) to ten years after sentencing (§ 2.B.3.e, p. 12).

¹ In the course of preparing this memorandum, staff identified a technical correction needed to Guidelines § 2.B.3.a. This memorandum therefore also includes a new staff recommendation to make that technical correction, which may be found in the “Technical Correction” discussion on p. 5, below.

2. Avoiding cases in which a prior offense's custody status outweighs its criminal history.

- Lower-severity felony offenses (levels 1, 2, D2, & D2) contribute only one-half point to criminal history, and gross misdemeanors and targeted misdemeanors contribute only one-quarter point.² Yet, custody status for these offenses contributes a whole custody status point in the criminal history score.
- The proposed changes (chiefly to §§ 2.B.2.a, 2.B.2.a(1), & 2.B.2.a(3), p. 8; and Comment 2.B.202, p. 11; with conforming changes elsewhere) provide that custody status is reduced to one-half point, rather than one point, if the custody status is for a ranked felony offense assigned a severity level of 1, 2, D1, or D2 (including equivalent out-of-state and EJJ offenses), or for a non-traffic gross misdemeanor, gross misdemeanor DWI, or targeted misdemeanor.

3. Eliminating custody status for Minn. Stat. § 152.18 stays of adjudication.

- Under existing policy, stays of adjudication generally do not qualify for a custody status point. The lone exception is a disposition under Minn. Stat. § 152.18, the statutory stay of adjudication applicable to some drug offenses. This inconsistency may have been justified by the reference to § 152.18 dispositions in the “subsequent controlled substance conviction” definition in Minn. Stat. § 152.01, subd. 16a (2015). When that statutory reference was repealed by the 2016 Drug Sentencing Reform Act (2016 Minn. Laws ch. 160, § 1), the only obvious rationale for the distinction was eliminated.
- The proposed changes (to § 2.B.2.a(2), p. 8; and Comment 2.B.203, p. 11) eliminate the assignment of a custody status point for a § 152.18 stay of adjudication.

4. Ending eligibility for custody status point upon discharge from probation.

- Under a 2001 policy change, an offender remains eligible for a custody status point throughout the probationary period as it was originally pronounced, even if the offender is discharged from probation early. An offender without custody status, therefore, may nevertheless receive a custody status point.
- The proposed changes (deleting § 2.B.2.a(4), p. 9; and Comment 2.B.202, p. 11) will repeal the 2001 changes, restoring the requirement that, to receive a custody status point, an offender must actually be under a custody status at the time the current offense was committed.

² More precisely, they contribute one, or sometimes two, misdemeanor units. When four misdemeanor units accumulate, they collectively contribute a whole point to criminal history. See Guidelines § 2.B.3.

5. Permitting waiver of the custody status point in certain circumstances.

- The final change to custody status policy will permit the court to waive assignment of the custody status point in certain circumstances (by creating a new § 2.B.2.e, p. 10; and Comment 2.B.203, p. 11). If waived, the criminal history score and presumptive sentence will be calculated without the custody status point. Waiver, in itself, will not constitute a Guidelines departure, so long as the new processes are followed.
- Waiver is never permitted for certain excluded offenses, regardless of whether the excluded offense is the current offense, or the offense for which the custody status point is assigned. Excluded offenses—which include attempts, conspiracies, and out-of-state offenses—are those ranked at severity level 8 and above (Standard Grid), G and above (Sex Offender Grid),³ and D8 and above (Drug Offender Grid). Also excluded are Attempt or Conspiracy to Commit First-Degree Murder, Assault 2nd Degree resulting in substantial bodily harm,⁴ and Fleeing Peace Officer resulting in great bodily harm.
- In all other cases, the court or the prosecutor may make a motion to waive the custody status point.⁵ The court is never required to waive custody status, and may do so only if the offender establishes that granting such a waiver is consistent with public safety, the primary purpose of the Guidelines. Specifically, the court is directed to consider whether waiver promotes the traditional purposes of sentencing: retribution, incapacitation, deterrence, restitution and rehabilitation. In determining whether waiver is consistent with public safety, the court may consider three factors. The first factor is whether the offender has consistently utilized available probation services and satisfied all conditions of probation, parole, or conditional or supervised release, apart from the commission of the current offense, for the past twelve months. The second factor is whether the current offense constitutes an escalation of criminal activity. The third factor is whether the offender has progressed toward rehabilitation and reentry into society.
- In addition to the consideration of these three factors, Comment 2.B.203 provides further guidance to the court on the topic of public safety, which is defined as protecting the public from crime, and invites the court to employ a balanced consideration of the traditional justifications of punishment in determining whether waiver is consistent with public safety.

³ This excludes all sex offenses except Failure to Register as a Predatory Offender (severity level H).

⁴ Attempt or Conspiracy to Commit First-Degree Murder and Assault 2nd Degree are excluded by reference to the proposed Severe Violent Offense List, which is described in the next section of this memorandum.

⁵ The language, “the court, on its own motion or on the prosecutor’s motion,” is modeled after similar language found in Minn. Stat. § 609.11, subd. 8.

6. Enhancing sentences for repeat severe violent offenders.

- While enhanced punishments are available in the existing dangerous offender law (Minn. Stat. § 609.1095, subd. 2 and 3), those provisions are limited in scope and, in practice, rarely result in enhanced sentences. The Commission views an automatic sentence modifier applicable to second or subsequent severe violent offenses as being necessary to protect the public from crime and thereby to promote public safety.
- The proposed change establishes a new sentence modifier for second or subsequent severe violent offenses (by creating § 2.G.14, p. 14; and Comment 2.G.03, p. 16). It also changes the definition of “sentence modifier” (in §§ 1.B.14, p. 6; and 2.G.1, p. 14) to make it clear that such modifiers can come from statute or Guidelines policy. Finally, the proposed change establishes a new section 8, Severe Violent Offense List (p. 16)⁶ and renumbers the existing section 8, Targeted Misdemeanor List, as Appendix 4.⁷
- Under the proposed change, the Second or Subsequent Severe Violent Offense modifier automatically applies if an offender commits a listed severe violent offense (which includes attempts, conspiracies, and out-of-state offenses) after having being convicted for a prior severe violent offense, provided that the prior offense has not decayed for purposes of the criminal history score. The modifier does not apply in the case of consecutive sentencing.
- The modifier will add 12 months to the presumptive sentence (including the upper and lower ends of the range) if the offender was convicted of one prior severe violent offense before committing the current offense; 18 months for two prior severe violent offenses, and 24 months for three or more prior severe violent offenses.⁸

Reranked Offenses. Based on the Commission’s apparent resolve to enumerate excluded offenses (for the custody status waiver proposal) and severe violent offenses (for the repeat severe violent offender proposal), the Commission may not find it necessary, at this time, to increase, from 6 to 8, the severity levels assigned to Assault 2nd Degree (Dangerous Weapon, Substantial Bodily Harm) and Fleeing Peace Officer (Great Bodily Harm). If the language necessary to effect those changes is required, it may be

⁶ The revised list of severe violent offenses dated May 10, 2018, is used, with the following changes: First, pursuant with the Commission’s discussion at its June 7, 2018, meeting, the severity level 6 offenses of Assault 2nd Degree, Firearm (Minn. Stat. § 609.222, subd. 1), and Kidnapping (Safe Release/No Great Bodily Harm) (Minn. Stat. § 609.25, subd. 2(1)) are removed. Second, all attempts and conspiracies are included.

⁷ In general, Guidelines *sections* have been for policy, while *appendixes* have contained helpful (but not necessarily exhaustive or authoritative) lists. The existing Section 8 is merely a recitation of the statutory “targeted misdemeanor” list and is never referred to directly in the Guidelines.

⁸ The prior convictions need not occur in a particular sequence, so long as they occurred before the current offense date. This is consistent with the definition of “second or subsequent offense” found in Minn. Stat. § 609.02, subd. 11, rather than the definition of “prior conviction” found in Minn. Stat. § 609.1095, subd. 1(c).

found in pp. 22-23 of the Chair's and Vice-Chair's memorandum to the Commission dated October 4, 2018.

Technical Correction. Although not discussed at the October meeting, Staff recommends making a technical correction to Guidelines § 2.B.3.a (p. 12), which pertains to the rules for assigning a misdemeanor point. The general rule (the “one-unit rule”) is that each prior eligible misdemeanor and gross misdemeanor is worth one misdemeanor unit, and four or more units contribute one point—and no more—to the criminal history score. A special rule (the “two-unit rule”) applies only to current criminal vehicular operation (CVO)⁹ and driving while impaired (DWI) felonies. Under the two-unit rule, found in § 2.B.3.g (p. 13), a prior misdemeanor or gross misdemeanor DWI or CVO is worth two units, and there is no limit to the number of criminal history points that may result from four-unit groups.

While the two-unit rule unquestionably applies to current felony CVO and DWI offenses, a change was introduced, in the course of the 2012 Guidelines rewrite,¹⁰ that could arguably create confusion about whether the Commission intends for the one-unit rule to continue to apply to those offenses. If the one-unit rule did not apply to a current felony CVO or DWI offense, a prior misdemeanor or gross misdemeanor could never contribute to the criminal history score unless it were, itself, a DWI or CVO. A misdemeanor domestic assault, for example, would not result in a misdemeanor unit if the current offense were a felony CVO or DWI. It is clear, however, that the Commission does intend for both rules to apply to current CVO and DWI offenses.¹¹ Staff therefore recommends a technical correction (to § 2.B.3.a, p. 12) to remove any confusion and entirely clarify the Commission's intent.

Effective Date. Guidelines § 3.G.1 makes it clear that all of these policy modifications would apply to offenses committed on or after August 1, 2019. Nevertheless, in light of *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017), the Commission should make explicit its clear intent to abrogate the amelioration doctrine. Thus, in order to avoid future confusion, a preamble (p. 6) specifies that the changes are intended to apply to offenders whose date of offense is on or after August 1, 2019.

⁹ For purposes of this memo, CVO also encompasses criminal vehicular homicide.

¹⁰ For revision details, refer to Minnesota Sentencing Guidelines Commission, *Guidelines Revision Project: Adopted Modifications* (April 2012), pp. 24-25, available at <https://go.usa.gov/xPnp8> (retrieved Oct. 19, 2018).

¹¹ This is seen in two ways: First, the history of the 2012 rewrite reflects that it was intended as “ ‘primarily stylistic ... rather than substantive[] ...’ ” *State v. Kirby*, 899 N.W.2d 485, 494 (Minn. 2017) (citation omitted); *but see State v. Oreskovich*, 915 N.W.2d 920 (Minn. Ct. App. 2018) (holding that the courts will give effect to an unambiguous Guidelines change resulting from the 2012 rewrite, regardless of the Commission's stated intent to make only minor and noncontroversial changes). Second, Comment 2.B.304, the first paragraph of which is reproduced on p. 13, extensively discusses, in the context of a current felony DWI or CVO, the interplay between the two-unit rule (“DWI/CVO units”) and the one-unit rule (“non DWI/CVO misdemeanor units” and, e.g., “theft units”). This discussion would be nonsensical if the one-unit rule did not apply to current DWI and CVO offenses.

Figure 1. November consensus items—draft Guidelines changes

The Minnesota Sentencing Guidelines Commission intends to make the following modifications to the Minnesota Sentencing Guidelines and Commentary on August 1, 2019, unless the Legislature by law provides otherwise. Each modification is intended to apply to offenders whose date of offense is on or after August 1, 2019.

Minnesota Sentencing Guidelines and Commentary

1. Purpose and Definitions

* * *

B. Definitions

As used in these Sentencing Guidelines (or “Guidelines”), the following terms have the meanings given.

* * *

14. Sentence Modifier. A “sentence modifier” is a statute **or policy** that aids in defining the punishment for the underlying offense. A sentence modifier can affect either or both the duration and the disposition of the presumptive sentence. See section 2.G for policies relating to determining the presumptive sentence for offenses that include a sentence modifier.

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2. Determining Presumptive Sentences

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B. Criminal History

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1. Prior Felonies. * * *

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c. Felony Decay Factor. A prior felony sentence or stay of imposition following a felony conviction must not be used in computing the criminal history score if a period of fifteen years has elapsed since the date of discharge from or expiration of the sentence to all of the following, to the extent applicable, occurred before the date of the current offense:

(1) the prior felony sentence or stay of imposition expired or was discharged;

(2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and

(3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence.

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Comment

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2.B.113. *The Commission established a “decay factor” for the consideration of prior felony offenses in computing criminal history scores. The Commission decided it was important to consider not just the total number of felony sentences and stays of imposition, but also the age of the sentences and stays of imposition. The Commission decided that the presence of old felony sentences and stays of imposition should not be considered in computing criminal history scores after a significant period of time has elapsed. A prior felony sentence or stay of imposition will would not be counted in criminal history score computation if fifteen years has had elapsed from the prior sentencing date (or from the date the prison sentence, if executed, expired) date of discharge or expiration of that sentence or stay of imposition to the date of the current offense, provided the offender was then no longer on supervision for the prior sentence. If the offender received a stay of imposition for the prior offense, that sentencing date marks “the date of the initial sentence,” even if a stay of execution subsequently occurred as the result of, e.g., a probation violation. While this procedure does not include a measure of the offender’s subsequent*

criminality, it has the overriding advantage of accurate and simple application, while also ensuring that prison offenses do not decay before probation offenses.

* * *

2. Custody Status at the Time of the Offense.

- a. One or One-Half Custody Status Point. Assign **one** custody status point when the conditions in paragraphs (1), (2), and (3)(ii) or (iii) are met. In all other cases when the conditions in paragraphs (1) through (3) are met, assign one-half custody status point:

- (1) The offender was under one of the following custody statuses at the time the current offense was committed:

- (i) probation;
- (ii) parole;
- (iii) supervised release;
- (iv) conditional release following release from an executed prison sentence (see conditional release terms listed in section 2.E.3);
- (v) release pending sentencing;
- (vi) confinement in a jail, workhouse, or prison pending or after sentencing; or
- (vii) escape from confinement following an executed sentence.

- (2) The offender was under one of the custody statuses in paragraph (1) after entry of a guilty plea, guilty verdict, or conviction. This includes a guilty plea for an offense under Minn. Stat. § 152.18, subd. 1.

- (3) The offender was under one of the custody statuses in paragraph (1) for one of the following:

- (i) a felony currently assigned a severity level ranking, on the Offense Severity Reference Table, of 1 or 2 on the Standard Grid or D1 or D2 on the Drug Offender Grid, a felony from a jurisdiction other than Minnesota equivalent to an offense currently ranked at one of those

severity levels, or an extended jurisdiction juvenile (EJJ) conviction for an offense currently ranked at one of those severity levels;

- (ii) any other felony;
- (iii) any other extended jurisdiction juvenile (EJJ) conviction;
- (iv) a non-traffic gross misdemeanor;
- (v) gross misdemeanor driving while impaired, refusal to submit to a chemical test, or reckless driving; or
- (vi) a targeted misdemeanor.

~~(4) Early Discharge from Probation. Assign a custody point if the offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court. **Do not** assign a point if probation is revoked and the offender serves an executed sentence.~~

~~(4)(5) Assigning Points to Offenses Committed Over Time. Assign a one or one-half custody status point when the offender meets the conditions in paragraphs (1) through (3) and the offender was placed under one of the custody statuses in paragraph (1) at any point in time during which the offense occurred when:~~

- ~~(i) multiple offenses are an element of the conviction offense; or~~
- ~~(ii) the conviction offense is an aggregated offense.~~

~~* * *~~

c. Additional Duration. An **additional three months** must be added to the duration of the appropriate cell time, which then becomes the presumptive duration, when:

(5) at least one-half custody status point is assigned; and

(6) the offender's total Criminal History Score exceeds the maximum score on the applicable Grid (i.e., 7 or more).

* * *

e. Waiver. Subject to the limitations in paragraph (4), the court, on its own motion or on the prosecutor's motion, may, but is not required to, waive assignment of a custody status point or half-point pursuant to section 2.B.2, provided the offender establishes that granting a waiver is consistent with the primary Guidelines purpose of public safety. Specifically, the court has the discretion, but is not required, to grant a waiver if the offender establishes that waiver is consistent with reasonable public safety and promotes the traditional purposes of sentencing which are retribution, incapacitation, deterrence, restitution, and rehabilitation. See Minn. Stat. § 244.09. In making this determination, the court may consider the following:

- (1) Whether the offender has consistently utilized available probation services, such as drug, alcohol, and psychological treatment services, and otherwise satisfied all conditions of probation, parole, or conditional or supervised release, apart from the commission of the current offense, for the past twelve months;
- (2) Whether the current offense represents an escalation of criminal activity; and
- (3) Whether the offender has made any progress toward rehabilitation and reentry into society, such as additional education and/or vocational training.
- (4) The court is not authorized to waive assignment of a custody status point if the current offense is any of the following offenses, or if the offender qualifies for a custody status point, as described in section a, above, for a custody status for any of the following offenses, including an equivalent felony offense from a jurisdiction other than Minnesota:
 - (i) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of 8, 9, 10, or 11 on the Standard Grid;
 - (ii) an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166);
 - (iii) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of D8 or D9 on the Drug Offender Grid;
 - (iv) an offense listed in Section 8, Severe Violent Offense List;

- (v) Fleeing Peace Officer (Great Bodily Harm) (Minn. Stat. § 609.487, subd. 4(b)); or
- (vi) an attempt or conspiracy to commit one of these offenses.

Comment

2.B.201. *The basic rule assigns offenders one or one-half point if they were under some form of eligible criminal justice custody status when they committed the offense for which they are now being sentenced.*

2.B.202. *The Commission wished to avoid criminal history scores in which the custody status resulting from a prior offense greatly outweighed the criminal history of the prior offense itself. Accordingly, when the criminal history weight of a prior felony is one-half point (but excluding severity level H offenses; see generally section 2.B.1) or the prior gross misdemeanor or misdemeanor contributes one or two misdemeanor units (see section 2.B.3), the custody status from that prior offense results in one-half, rather than one, custody status point. The Commission determined that the potential for a custody status point should remain for the entire period of the probationary sentence. If an offender receives an initial term of probation that is definite, is released from probation prior to the expiration of that term and commits a new crime within the initial term, it is clear that a custody point will be assigned. For example, if the offender is put on probation for five years, is released from probation in three years, and commits a new crime in year four, at least one custody status point will be added to the offender's criminal history. When the offender is given an indefinite initial term of probation and commits a new crime at any time prior to the end date of the pronounced range, the offender will be assigned a custody status point. Thus, an initial term of probation "not to exceed three years" is, for this purpose, three years; "three to five years" is five years; "up to the statutory maximum" is the statutory maximum. If probation is revoked and the offender serves an executed prison sentence for the prior offense, eligibility for the custody status point ends with discharge from the sentence.*

2.B.203. *In certain cases, the Commission believes that district courts are well equipped to assess the particular circumstances of an offender's custody, history, and current offense, and to determine whether the waiver of custody status is consistent with public safety; i.e., protecting the public from crime. All traditional justifications of punishment—retribution, incapacitation, deterrence, restitution, and rehabilitation—support the protection of the public from crime, and the court should employ their balanced consideration, together with the three factors listed, in making the determination of whether waiver meets the purpose of public safety. When custody status is waived, the presumptive sentence will be calculated without the addition of the waived*

custody status point, or half-point, in the criminal history score. Thus, provided the processes of section 2.B.2.e are followed, granting a waiver of custody status for the current offense does not, in itself, constitute a departure from the Sentencing Guidelines. Probation given for an offense under Minn. Stat. § 152.18, subd. 1, will result in the assignment of a custody status point because a guilty plea has previously been entered and the offender has been on a probationary status.

* * *

3. Prior Gross Misdemeanors and Misdemeanors. Prior gross misdemeanor and misdemeanor convictions count as units comprising criminal history points. Four units equal one criminal history point; give no partial point for fewer than four units. Determine units as specified in this section.

a. General Assignment of Units. ~~Except as provided in paragraph g, If the current conviction is for an offense other than criminal vehicular homicide or operation or felony driving while impaired (DWI),~~ assign the offender one unit for each prior conviction of the following offenses provided the offender received a stayed or imposed sentence or stay of imposition for the conviction before the current sentencing:

- (1) targeted misdemeanor, as defined in Minn. Stat. § 299C.10, subd. 1(e);
- (2) non-traffic gross misdemeanor;
- (3) gross misdemeanor driving while impaired;
- (4) gross misdemeanor refusal to submit to a chemical test;
- (5) gross misdemeanor reckless driving;
- (6) a felony conviction resulting in a misdemeanor or gross misdemeanor sentence.

* * *

- e. Decay Factor. A prior misdemeanor or gross misdemeanor sentence or stay of imposition following a misdemeanor or gross misdemeanor conviction must **not** be used in computing the criminal history score if ten years has elapsed between ~~the date of discharge from or expiration of~~ the initial sentence following the prior conviction and the date of the current offense. However, misdemeanor sentences that result from the successful completion of a stay of imposition for a felony conviction are subject to the felony decay factor in section 2.B.1.c.

- f. Maximum Assignment of Points. Except as provided in paragraph g, an offender cannot receive more than one point for prior misdemeanor or gross misdemeanor convictions.

- g. Assignment of Units for Criminal Vehicular Homicide or Operation or Felony Driving While Impaired (DWI). If the current conviction is for criminal vehicular homicide or operation or felony DWI, assign previous violations of Minn. Stat. §§ 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, 609.2112, 609.2113, or 609.2114 two units each. There is no limit to the total number of misdemeanor points that can be included in the offender's criminal history score due to criminal vehicular homicide or operation or DWI offenses. For DWI offenses, see section 2.B.6 for exceptions to this policy relating to predicate offenses used for enhancement purposes. For Criminal Vehicular Homicide (Death or Death to an Unborn Child, and Qualified Prior Conviction), assign no misdemeanor units to the qualified prior driving offense that was used to increase the statutory maximum penalty.

* * *

Comment

* * *

2.B.304. *The Commission believes that offenders whose current conviction is for criminal vehicular homicide or operation or first-degree (felony) driving while impaired, and who have prior violations under Minn. Stat. Stats. §§ 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, 609.2112, 609.2113, or 609.2114 are also more culpable, and for these offenders there is no limit to the total number of misdemeanor points included in the criminal history score due to DWI or criminal vehicular homicide or operation (CVO) violations. To determine the total number of*

*misdemeanor points under these circumstances, first add together any non DWI/CVO misdemeanor units. If there are less than four units, add in any DWI/CVO units. Four or more units would equal one point. Only DWI/CVO units can be used in calculating additional points. Each set of four DWI/CVO units would equal an additional point. For example, if an offender had two theft units and six DWI/CVO units, the theft would be added to the two DWI/CVO units to equal one point. The remaining four DWI/CVO units would equal a second point. In a second example, if an offender had six theft units and six DWI/CVO units, the first four theft units would equal one point. Four of the DWI/CVO units would equal a second point. The remaining two theft units could not be added to the remaining two DWI/CVO units for a third point. The total misdemeanor score would be two. * * **

* * *

2.B.306. *The Commission also adopted a “decay” factor for prior misdemeanor and gross misdemeanor offenses for the same reasons articulated for felony offenses; however, given that these offenses are less serious, the decay period is 10 years rather than 15.*

* * *

G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers

1. In General. Sentence modifiers are statutes or policies that aid in defining the punishment for the underlying offense. Modifiers can affect either or both the duration and the disposition of the presumptive sentence. Any change to the presumptive fixed sentence under this section must also be applied to the upper and lower ends of the range found in the appropriate cell on the applicable Grid, except that the presumptive sentence cannot be less than one year and one day, nor can it be less than any applicable mandatory minimum.

* * *

14. Second or Subsequent Severe Violent Offense.

- a. The following definitions apply to this section:

(1) A “severe violent offense” is an offense listed in Section 8, Severe Violent Offense List. “Severe violent offense” includes attempt or conspiracy, and

includes an equivalent felony from a jurisdiction other than Minnesota. A current offense is not a "severe violent offense" if section 2.E.4 (Mandatory Life Sentences) applies.

(2) "Second or subsequent severe violent offense" means that prior to the commission of current severe violent offense, the offender has been adjudicated guilty of one or more severe violent offenses.

(3) A "prior severe violent offense conviction" is an adjudication that qualifies the current offense as a second or subsequent severe violent offense. A conviction for an offense excluded from criminal history score computation under section 2.B.1.c (Felony Decay Factor) does not qualify as a "prior severe violent offense conviction."

b. If the current offense is a second or subsequent severe violent offense, the presumptive fixed sentence for the current offense, as determined in section 2.C, shall increase by the number of months corresponding, in the following table, to the number of prior severe violent offense convictions, provided that:

(1) If the current severe violent offense is an attempt under Minn. Stat. § 609.17 or conspiracy under Minn. Stat. § 609.175, the increase shall be one-half the number of months stated; and

(2) This section shall not apply to a presumptive or permissive consecutive sentence pursuant to section 2.F.

NUMBER OF PRIOR SEVERE VIOLENT OFFENSE CONVICTIONS	MONTHS
<u>1</u>	<u>12</u>
<u>2</u>	<u>18</u>
<u>3 or more</u>	<u>24</u>

Comment

* * *

2.G.03. While the Commission recognizes the enhanced punishments available in the existing dangerous offender law (Minn. Stat. § 609.1095, subd. 2 and 3), it is also aware of the limited scope of those provisions, which, in practice, rarely result in enhanced sentences. It views the establishment of an automatic sentence modifier applicable to second or subsequent severe violent offenses as being necessary to protect the public from crime and thereby to promote public safety. The term "second or subsequent severe violent offense" incorporates the statutory term "second or subsequent offense" (Minn. Stat. § 609.02, subd. 11).

* * *

8. Severe Violent Offense List

Each of the following is a "severe violent offense" within the meaning of sections 2.B.2.e and 2.G.14. Attempt or conspiracy is included, as is an equivalent felony from a jurisdiction other than Minnesota.

Statute Number	Offense Title
609.185	Murder 1st Degree
609.19	Murder 2nd Degree
609.195(a)	Murder 3rd Degree (Depraved Mind)
609.221	Assault 1st Degree
609.222, subd. 2	Assault 2nd Degree (Dangerous Weapon, Substantial Bodily Harm)
609.245, subd. 1	Aggravated Robbery 1st Degree
609.25, subd. 2(2)	Kidnapping (Great Bodily Harm/Unsafe Release/Victim Under 16)
609.2661	Murder of an Unborn Child 1st Degree
609.2662	Murder of an Unborn Child 2nd Degree
609.2663	Murder of an Unborn Child 3rd Degree
609.282	Labor Trafficking
609.342, subd. 1(c)(d)(e)(f)	Criminal Sexual Conduct 1st Degree
609.343, subd. 1(c)(d)(e)(f)	Criminal Sexual Conduct 2nd Degree

609.498, subd. 1b	Tampering with Witness, Aggravated 1st Degree
609.561, subd. 1 or 2	Arson 1st Degree
609.66, subd. 1e(b)	Drive-By Shooting (Toward a Person or Occupied Motor Vehicle or Building)

* * *

Appendix 4. 8. Targeted Misdemeanor List

Directive to MSGC staff: The existing Section 8, Targeted Misdemeanor List, shall be restyled as Appendix 4, Targeted Misdemeanor List, and moved to the end of the Minnesota Sentencing Guidelines and Commentary.

STAFF MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
From: Nate Reitz, Executive Director
Date: November 1, 2018
Subject: November Consensus Items – Estimated Impact

This memorandum provides a staff estimate of the cumulative impact of the adoption of all policy changes reflected in a separate staff memorandum (“November Consensus Items,” dated November 1, 2018), which was an attempt to capture those policy areas upon which it appeared the Commission was nearing consensus.

Some of the policy changes affect the impact of other policy changes. Although the following tables¹ separately display the estimated impact of various policy changes, each table considers the effect of the other policy changes.

It is estimated that three of the changes to custody status policy—not including the custody status waiver proposal—would, combined, eventually avoid the need for 155 estimated prison beds (Table 1). It is estimated that the proposed changes to decay policy would eventually avoid the need for 236 estimated prison beds (Table 2). Table 3 contains the sum of Table 1 and Table 2.

The impact of the custody status waiver proposal will depend on the rate at which judges grant waivers, which is unknown. If staff assumptions about waiver rates are correct, this proposal would eventually avoid the need for between 168 and 298 estimated prison beds (Table 4 and Table 5).

With respect to the repeat severe violent offender proposal, Table 7 displays the incidence, in 2017, of repeat severe violent offenders by offense. It is estimated that the proposal would eventually require the need for an additional 24 estimated prison beds (Table 8 and Table 9).

¹ Each table assumes that future cases sentenced will resemble 2017 cases sentenced with regard to number, severity levels, criminal history scores, departure rates, and offender demographic characteristics. Estimates were made only for cases receiving prison sentences. Estimated prison beds are two-thirds of the sum, in years, of executed prison sentences, disregarding case-specific reductions or increases in the actual prison time served. Prison bed costs/savings take many years to be fully realized. Rate per 100,000 residents age 15 and older (2017 U.S. Census Bureau Estimate) counts all Hispanic offenders and residents as Hispanic, regardless of race, and otherwise counts multiracial residents in multiple categories. Comparison between offender and resident data in the “other/unknown” category are not reliable and are omitted.

Three Custody Status Policy Changes: Table 1 estimates the combined impact of implementing consensus items 2, 3, and 4, which are intended, respectively, to avoid cases in which a prior offense’s custody status outweighs its criminal history; to eliminate custody status for Minn. Stat. § 152.18 stays of adjudication; and to end eligibility for custody status point upon discharge from probation.

Table 1. Items 2, 3, 4 – Demographic Impact of “Custody Status” Consensus Items

		Estimated Prison Bed Impact									
		Shift to Probation			Serve Less Time			Total Beds (-)	Estimated Resulting Beds	Percent Change	Est. per 100K
		Number	Percent	Beds (-)	Number	Percent	Beds (-)				
	Male	63	0.4	78	178	1.2	54	132	10,484	-1.2	471
	Female	15	0.4	16	34	0.9	7	22	768	-2.8	34
Race & Ethnicity	White	41	0.4	49	115	1.1	32	81	5,272	-1.5	140
	Black	20	0.4	26	55	1.2	19	45	4,037	-1.1	1,443
	American Indian	9	0.5	11	25	1.5	4	15	948	-1.6	1,350
	Hispanic	5	0.5	6	11	1.2	3	9	700	-1.3	344
	Asian	3	0.6	3	5	1.0	2	5	265	-1.9	113
	Other/unknown	0	---	---	1	1.8	0.2	0.2	27	-0.7	---
	Judicial District	First	5	0.2	5	29	1.2	6	11	1,049	-1.0
	Second	7	0.4	7	17	0.9	5	12	1,389	-0.9	316
	Third	8	0.6	12	20	1.4	8	20	881	-2.2	228
	Fourth	14	0.4	15	39	1.0	13	27	2,945	-0.9	289
	Fifth	3	0.3	3	6	0.6	2	5	461	-1.1	198
	Sixth	5	0.5	8	5	0.5	2	10	719	-1.4	341
	Seventh	15	0.8	18	26	1.3	8	26	1,187	-2.1	302
	Eighth	2	0.4	2	6	1.2	1	4	319	-1.2	248
	Ninth	7	0.4	12	33	1.8	9	21	1,079	-1.9	392
	Tenth	12	0.5	13	31	1.2	7	20	1,221	-1.6	157
	Total	78	0.4	94	212	1.2	61	155	11,251	-1.4	250

Notes: For general notes, see footnote 1, above. Cases with CSP and received prison sentences: 2,693. Cases that lose CSP: 75 (2.8%). Cases that lose CSP due to orig. probation period status: 64. Cases that lose CSP due to stay of adjudication status: 11. Cases with CSP change to ½ point: 656 (24.4%) (i.e., due to custody for M/GM or severity levels 1 or 2). No changes were made to CSP of 111 cases for which the severity level of the prior could not be determined; therefore, the impact may be underestimated.

Decay: Table 2 estimates the impact of implementing consensus item 1, which would allow probation offenses to decay fifteen years after sentencing, thereby ensuring that prison offenses do not decay before probation offenses.

Table 2. Item 1 – Demographic Impact of “Decay” Consensus Items

		Estimated Prison Bed Impact									
		Shift to Probation			Serve Less Time			Total Beds (-)	Estimated Resulting Beds	Percent Change	Est. per 100K
		Number	Percent	Beds (-)	Number	Percent	Beds (-)				
	Male	125	0.9	134	246	1.7	93	228	10,388	-2.1	467
	Female	6	0.2	6	9	0.3	3	8	782	-1.0	34
Race & Ethnicity	White	69	0.7	70	124	1.2	42	111	5,242	-2.1	140
	Black	36	0.8	40	86	1.8	40	80	4,002	-2.0	1,430
	American Indian	20	1.2	21	25	1.5	8	29	934	-3.0	1,330
	Hispanic	5	0.5	8	13	1.4	5	13	696	-1.8	342
	Asian	1	0.2	1	6	1.2	2	2	268	-0.7	114
	Other/unknown	0	---	---	1	1.8	0.3	0.3	27	-1.1	---
Judicial District	First	14	0.6	14	35	1.5	10	24	1,036	-2.3	165
	Second	8	0.4	7	23	1.3	8	15	1,386	-1.1	315
	Third	7	0.5	9	27	1.9	14	22	879	-2.4	227
	Fourth	24	0.6	23	61	1.6	29	51	2,921	-1.7	286
	Fifth	4	0.4	4	9	0.9	4	8	458	-1.7	196
	Sixth	4	0.4	7	5	0.5	1	8	721	-1.1	342
	Seventh	21	1.1	21	34	1.7	10	31	1,182	-2.6	301
	Eighth	0	---	---	8	1.6	3	3	320	-0.9	248
	Ninth	23	1.3	28	29	1.6	11	40	1,060	-3.6	385
	Tenth	26	1.0	28	24	0.9	7	34	1,207	-2.7	155
	Total	131	0.7	140	255	1.4	96	236	11,170	-2.1	249

Notes: For general notes, see footnote 1, above. Staff set felony priors to decay at 15 years from date of sentence to date of current offense for priors with weights of 1.5 or less; and set Misd./GM priors to decay at 10 years from date of sentence to date of current offense. It was assumed that felony priors with a weight of 2.0 or 3.0 would have received prison sentences; therefore, were not subject to the revised decay policy.

No. of decayed priors=6% of felonies; and 7% of Misd./GM.

No. of cases with CSP reduction due to new decay policy=10%; 7% of stayed cases, 17% of prison.

Because 18% with weights of 1.5 or less received prison sentences (excluding Mand. Mins.), bed impact was further reduced by 18%.

Result of changes to decay policy for prison cases on sentences: 4,362 (91%)-no change; 131 (3%) shift to no prison, 255 (5.8%) serve less time.

Combined Custody Status and Decay: Table 3 is the sum of Table 1 and Table 2. It estimates the combined impact of implementing consensus items 1, 2, 3, and 4, which are intended, respectively, to allow probation offenses to decay fifteen years after sentencing, thereby ensuring that prison offenses do not decay before probation offenses; to avoid cases in which a prior offense’s custody status outweighs its criminal history; to eliminate custody status for Minn. Stat. § 152.18 stays of adjudication; and to end eligibility for custody status point upon discharge from probation.

Table 3. Items 1, 2, 3, 4 – Demographic Impact of “Custody Status” and “Decay” Consensus Items

		Estimated Prison Bed Impact									
		Shift to Probation			Serve Less Time			Total Beds (-)	Estimated Resulting Beds	Percent Change	Est. per 100K
		Number	Percent	Beds (-)	Number	Percent	Beds (-)				
	Male	188	1.3	212	424	2.9	147	360	10,256	-3.4	461
	Female	21	0.6	22	43	1.2	10	30	760	-3.8	33
Race & Ethnicity	White	110	1.0	119	239	2.3	74	192	5,161	-3.6	137
	Black	56	1.2	66	141	3.0	59	125	3,957	-3.1	1,414
	American Indian	29	1.8	32	50	3.0	12	44	919	-4.6	1,308
	Hispanic	10	1.1	14	24	2.5	8	22	687	-3.1	338
	Asian	4	0.8	4	11	2.1	4	7	263	-2.6	112
	Other/unknown	0	0.0	0	2	3.6	0.5	0.5	27	-1.9	---
Judicial District	First	19	0.8	19	64	2.7	16	35	1,025	-3.3	163
	Second	15	0.8	14	40	2.2	13	27	1,374	-1.9	312
	Third	15	1.1	21	47	3.3	22	42	859	-4.7	222
	Fourth	38	1.0	38	100	2.6	42	78	2,894	-2.6	284
	Fifth	7	0.7	7	15	1.5	6	13	453	-2.8	194
	Sixth	9	1.0	15	10	1.1	3	18	711	-2.5	337
	Seventh	36	1.8	39	60	3.0	18	57	1,156	-4.7	294
	Eighth	2	0.4	2	14	2.8	4	7	316	-2.2	245
	Ninth	30	1.7	40	62	3.4	20	61	1,039	-5.5	377
	Tenth	38	1.4	41	55	2.1	14	54	1,187	-4.4	153
	Total	209	1.1	234	467	2.6	157	391	11,015	-3.4	245

Notes: For general notes, see footnote 1, above. Table 3 combines the impact of Table 1 and Table 2 to display the estimated total impact of the proposed changes to custody and decay policy (without the waiver provision).

Waiver: Consensus item 5 would permit waiver of the custody status point in certain circumstances.

When the nature of current offense permits it, the proposal would grant sentencing judges a great deal of discretion to waive the offender's custody status at the time of the offense. Without data, staff were required to make assumptions about the frequency at which sentencing courts will opt to waive custody status when permitted to do so. Staff assumed—

1. No waivers will be given if the current offense is on the list of excluded offenses, or if the offender has a custody status point for an offense on the list of excluded offenses, as found in § 2.B.2.e(4) of the proposal.
2. No waivers will be given if the custody status is escape or released pending sentencing.
3. The rate at which waivers are granted will vary by escalation (measured as the difference between the severity levels of the current offense and the custody offense) and the recidivism interval (measured as the elapsed time between the sentencing date for the custody offense and the date the current offense was committed). The assumed waiver rates are set forth in Table 6 (p. 7); due to the uncertainty involved, a broad range of waiver rates is assumed.

After applying the first two assumptions, as well as the other proposed changes to custody status and decay policies, 1,241 remaining cases, sentenced in 2017, both received a prison sentence and had a custody status point. After applying the assumed waiver rates to those cases, it was estimated that between 41 percent and 74 percent of those offenders would receive a waiver. Based on these assumptions, the range of prison bed savings is estimated to be between 168 and 298 beds.

Caution: These estimates are based on assumed waiver rates that, while plausible to staff, are not founded in data. The true impact of this proposal will be determined by the actual waiver rates, not the assumptions stated above.

Table 4 displays the demographic distribution for the upper end of the estimated impact, based on waiver rates occurring at the high end of the range of staff assumptions. Table 5 displays the demographic distribution for the lower end of the estimated impact, based on waiver rates occurring at the low end of the range of staff assumptions. The actual impact might be expected to fall somewhere between that shown on the two tables.

Table 4. Item 5 – Demographic Impact of “Waiver” Consensus Item – Upper End of Estimated Impact

		Estimated Prison Bed Impact – Upper End									
		Shift to Probation			Serve Less Time			Total Beds (-)	Estimated Resulting Beds	Percent Change	Est. per 100K
		Number	Percent	Beds (-)	Number	Percent	Beds (-)				
	Male	148	1.0	177	358	2.4	93	270	10,346	-2.5	465
	Female	17	0.5	19	27	0.8	9	28	762	-3.5	34
Race & Ethnicity	White	73	0.7	85	213	2.0	58	142	5,211	-2.7	139
	Black	60	1.3	71	103	2.2	27	97	3,985	-2.4	1,424
	American Indian	18	1.1	22	36	2.2	12	34	929	-3.5	1,322
	Hispanic	10	1.1	14	19	2.0	3	17	692	-2.4	340
	Asian	4	0.8	5	14	2.7	3	7	263	-2.6	112
	Other/unknown	0	0.0	---	0	0.0	---	0	27	0.0	540
Judicial District	First	18	0.7	21	53	2.2	12	33	1,027	-3.1	163
	Second	24	1.3	28	36	2.0	6	34	1,367	-2.4	311
	Third	10	0.7	14	27	1.9	9	23	878	-2.6	227
	Fourth	40	1.0	45	59	1.5	16	62	2,910	-2.1	285
	Fifth	7	0.7	7	18	1.8	6	14	452	-3.0	194
	Sixth	5	0.5	7	19	2.1	7	14	715	-1.9	339
	Seventh	16	0.8	17	61	3.1	13	31	1,182	-2.6	301
	Eighth	2	0.4	3	15	3.0	3	5	318	-1.5	247
	Ninth	19	1.0	25	48	2.6	15	41	1,059	-3.7	385
	Tenth	24	0.9	28	49	1.9	16	43	1,198	-3.5	154
	Total	165	0.9	196	385	2.1	102	298	10,346	-2.6	230

Notes: For general notes, see footnote 1, above.

Table 5. Item 5 – Demographic Impact of “Waiver” Consensus Item – Lower End of Estimated Impact

		Estimated Prison Bed Impact – Lower End									
		Shift to Probation			Serve Less Time			Total Beds (-)	Estimated Resulting Beds	Percent Change	Est. per 100K
		Number	Percent	Beds (-)	Number	Percent	Beds (-)				
	Male	83	0.6	99	197	1.3	54	153	10,463	-1.4	471
	Female	11	0.3	13	13	0.4	3	16	774	-2.0	34
Race & Ethnicity	White	42	0.4	49	128	1.2	32	81	5,272	-1.5	140
	Black	32	0.7	38	49	1.1	14	53	4,029	-1.3	1,440
	American Indian	12	0.7	15	16	1.0	7	22	941	-2.3	1,340
	Hispanic	5	0.5	6	9	1.0	1	7	702	-1.0	345
	Asian	3	0.6	4	8	1.6	2	5	265	-1.9	113
	Other/unknown	0	---	---	0	---	---	0	27	0.0	540
Judicial District	First	10	0.4	12	27	1.1	7	19	1,041	-1.8	166
	Second	12	0.7	13	25	1.4	3	17	1,384	-1.2	315
	Third	5	0.4	6	14	1.0	6	12	889	-1.3	230
	Fourth	22	0.6	27	35	0.9	9	36	2,936	-1.2	288
	Fifth	5	0.5	5	8	0.8	4	9	457	-1.9	196
	Sixth	3	0.3	4	12	1.3	4	8	721	-1.1	342
	Seventh	10	0.5	11	35	1.8	8	19	1,194	-1.6	304
	Eighth	2	0.4	3	7	1.4	2	4	319	-1.2	248
	Ninth	11	0.6	15	27	1.5	7	22	1,078	-2.0	391
	Tenth	14	0.5	16	20	0.8	6	22	1,219	-1.8	157
	Total	94	0.5	112	210	1.1	57	168	11,238	-1.5	250

Notes: For general notes, see footnote 1, above.

Table 6. Assumed Custody Status Waiver Rates (for explanation, see Assumption 3, p. 5)

		Escalation (severity levels)		
		2 or more	1	0 or less
Recidivism Interval (years)	3 or more	50% to 80%	65% to 90%	80% to 100%
	2 or more, but less than 3	35% to 70%	50% to 80%	65% to 90%
	1 or more, but less than 2	20% to 60%	35% to 70%	50% to 80%
	Less than 1	5% to 50%	20% to 60%	35% to 70%

Enhancing sentences for repeat severe violent offenders: Consensus item 6 would provide an automatic sentence modifier applicable to second or subsequent severe violent offenses.

Of the 18,288 offenders sentenced in 2017, 463 (2.5%) were sentenced for one of the crimes designated as a Severe Violent Offense in Table 7. Of those 463 offenses sentenced, 46 qualified as “second or subsequent offenses” because the offenders were convicted of one of the offenses on the list before committing the instant offense.

Table 7. Proposed Repeat Severe Violent Offenders; Sentenced 2017

Statute	Offense Description	2017 Cases	
		Number	Number Subsequent offenses
609.185	Murder 1 (all sections-attempts /conspiracies only)	3	0
609.2661	Murder 1-Unborn Child (attempts /conspiracies only)	0	0
609.19, subd. 1	Murder 2-Intentional or by a drive-by	45	7
6609.19, subd. 2	Murder 2-Unintentional	26	6
609.2662	Murder 2-Unborn Child	0	0
609.195(a)	Murder 3-eminently dangerous act and evincing depraved mind	2	0
609.2663	Murder 3-Unborn Child	0	0
609.221	Assault 1-great bodily harm/peace officer	65	5
609.222, subd. 2	Assault 2-dangerous weapon and substantial bodily harm	34	2
609.245, subd. 1	First-Degree Aggravated Robbery -weapon/fake weapon/bodily harm	216	20
609.25 subd. 2(2)	Kidnapping-unsafe release/under16/GBH	5	0
609.282	Labor Trafficking	1	0
609.342 subd. 1(c),(d),(e),(f)	First-Degree Criminal Sexual Conduct (force, weapon, injury, accomplice)	37	4
609.343 subd. 1(c),(d),(e),(f)	Second-Degree Criminal Sexual Conduct (force, weapon, injury, accomplice)	6	0
609.498 subd. 1b	Aggravated First-Degree Witness Tampering	1	0
609.561 subd. 1,2	First-Degree Arson	8	0
609.66, subd. 1e(b)	Drive-By Shooting- at person, occupied building/motor vehicle	14	2
Total		463	46

Notes: Of the 46 offenders sentenced for a subsequent severe violent offense, 43 received prison sentences. Of the 43 offenders with prison sentences, 30 (70%) would serve longer sentences under the proposal. Thirteen offenders would receive no enhancement; 9 because they received a consecutive sentence and 4 because they already received a statutory maximum sentence.

Table 8 displays the impact for the offenders whose sentences would change and the projected prison-bed impact by offense. The total estimated impact is an eventual 24 beds over time.

Table 8. Projected Prison Bed Impact of Repeat Severe Violent Offender Proposal by Offense

Statute	Offense Description	2017 Prison Cases		
		Number w/ Prior SVC	Number Serve More Time	Est. Prison Beds (+)
609.19, subd. 1	Murder 2-Intentional/drive-by	7	5	3
609.19, subd. 2	Murder 2-Unintentional	6	1	1
609.221	Assault 1	5	4	3
609.222, subd. 2	Assault 2- SBH	2	1	1
609.245, subd. 1	First-Degree Aggravated Robbery	17	17	14
609.342	First-Degree Criminal Sexual Conduct	4	0	0
609.66, subd. 1e	Drive-By Shooting- person/occupied entity	2	2	2
Total		43	30	24

Table 9 displays the demographic distribution of the projected prison bed impact. The projected bed increase for offenders who would qualify for increased sentences is compared to the prison beds required under the current criminal history policy.

Table 9. Item 6 – Demographic Impact of Repeat Severe Violent Offender Proposal

		Estimated Prison Bed Impact					
		Serve More Time			Estimated Resulting Beds	Percent Change	Estimated Resulting Beds per 100K
		Number	Percent	Beds (+)			
	Male	28	0.2	23	10,639	0.2	478
	Female	2	0.1	1	791	0.1	35
Race & Ethnicity	White	5	0.0	4	5,357	0.1	143
	Black	21	0.5	17	4,099	0.4	1,465
	American Indian	3	0.2	2	965	0.2	1,374
	Hispanic	1	0.1	1	710	0.1	349
	Asian	0	---	0	270	0.0	115
	Other/unknown	0	---	0	27	0.0	---
		Total	30	0.2	24	11,430	0.2
Judicial District	First	3	0.1	3	1,063	0.3	169
	Second	1	0.1	1	1,402	0.1	319
	Third	1	0.1	1	902	0.1	233
	Fourth	16	0.4	13	2,985	0.4	293
	Fifth	0	---	0	466	0.0	200
	Sixth	2	0.2	2	731	0.3	347
	Seventh	3	0.2	3	1,216	0.2	310
	Eighth	1	0.2	1	324	0.3	252
	Ninth	2	0.1	1	1,101	0.1	400
	Tenth	1	0.0	1	1,242	0.1	160

Notes: For general notes, see footnote 1, above.

STAFF MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
From: Nate Reitz, Executive Director
Date: November 8, 2018
Subject: **Comment 2.B.203**

The Chair proposes the following alternative language to Comment 2.B.203. New language, with respect to the November 1, 2018, staff memorandum, is highlighted:

2.B.203. *In determining whether to grant a waiver in a particular case, the primary consideration is public safety. In this context, public safety means protecting the public from crime. The court should consider the values of retribution, incapacitation, deterrence, restitution and rehabilitation. In doing so, the court should apply a balanced approach in which all five values are examined and applied. For rehabilitation, the court may also consider the three factors listed in section 2.B.2.e in order to examine the whole person. When custody status is waived, the presumptive sentence will be calculated without the addition of the waived custody status point, or half-point, in the criminal history score. Thus, provided the processes of section 2.B.2.e are followed, granting a waiver of custody status for the current offense does not, in itself, constitute a departure from the Sentencing Guidelines. Probation given for an offense under Minn. Stat. § 152.18, subd. 1, will result in the assignment of a custody status point because a guilty plea has previously been entered and the offender has been on a probationary status.*