

Proposed Modifications to the Sentencing Guidelines and Commentary, Effective August 1, 2019

The Minnesota Sentencing Guidelines Commission will hold a public hearing on Thursday, December 13, 2018, at 1:30 p.m. in Room 1100, of the Minnesota Senate Building, 95 University Ave. W., Saint Paul, MN 55155. The public hearing is being held to consider a non-legislative proposal to modify the Minnesota Sentencing Guidelines and Commentary §§ 1.B, Definitions; 2.B, Criminal History; and 2.G, Convictions for Attempts, Conspiracies, and Other Sentence Modifiers; to renumber § 8, Targeted Misdemeanor List, as Appendix 4; and to establish a new § 8 designating a list of severe violent offenses.*

All interested persons are encouraged to attend the hearing and offer comments. Persons wishing to speak may register in advance by contacting the Commission's office at the below address or telephone number, or by e-mail at sentencing.guidelines@state.mn.us. If you need special accommodations to attend, please contact the Minnesota Sentencing Guidelines Commission as soon as possible. This notice is available in alternative formats upon request.

The Commission will hold the record open for five calendar days after the public hearing to accept written comment, after which the Commission will meet to formally adopt or reject the proposed modifications on December 20, 2018, at 1:30 p.m. in Room 1100 of the Minnesota Senate Building, 95 University Ave. W., Saint Paul, MN 55155. If adopted, modifications become effective August 1, 2019, unless the Legislature by law provides otherwise, and apply to crimes committed on or after that date.

At its November 8, 2018, meeting, the Commission adopted a motion to forward to public hearing the non-legislative modifications to the Minnesota Sentencing Guidelines and Commentary set forth on pages 3 through 14, following. The general effect of the proposed modifications may be summarized as follows:

- 1. Decay factor.** The proposed changes would 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 would permit the offense to decay fifteen years after the date of sentencing. In no event would an offense decay while the offender remains under supervision or custody. The proposal would likewise change the misdemeanor decay policy

* Notwithstanding contrary language in the Minnesota Sentencing Guidelines Commission's notice in the *Minnesota State Register*, vol. 43, no. 20 (Nov. 13, 2018), the proposed modifications do not include modifications to Minnesota Sentencing Guidelines and Commentary §§ 4.A., Sentencing Guidelines Grid; 5.A, Offense Severity Reference Table; 5.B., Severity Level by Statutory Citation; or 6, Offenses Eligible for Permissive Consecutive Sentences.

(presently, ten years after discharge or expiration) to ten years after sentencing. The proposed modifications are to §§ 2.B.1.c & 2.B.3.e and Comment 2.B.113; see pp. 4–5 and 9–10, below.

2. **One-half custody status point.** The proposed changes would 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. The proposed modifications are chiefly to §§ 2.B.2.a & 2.B.2.a(3), and Comment 2.B.202; see pp. 5–6 and 8, below, with conforming changes elsewhere.
3. **Custody status after early discharge from probation.** The proposed changes would repeal a 2001 policy change, 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. The proposed modifications are to §§ 2.B.2.a(1) & 2.B.2.a(4) and Comment 2.B.202; see pp. 5, 6 and 8, below.
4. **Custody status for Minn. Stat. § 152.18 stays of adjudication.** The proposed changes would eliminate the assignment of a custody status point for a § 152.18 stay of adjudication. The proposed modifications are to § 2.B.2.a(2) and Comment 2.B.203; see pp. 5 and 9, below.
5. **Permitting waiver of the custody status point in certain circumstances.** The proposed changes would permit the court to waive assignment of the custody status point in certain circumstances. If waived, the criminal history score and presumptive sentence will be calculated without the custody status point. Waiver would be permitted only when the offender established that waiver would be consistent with public safety, and waiver would never be permitted for offenses ranked at certain severity levels. Waiver, in itself, will not constitute a Guidelines departure, so long as the new processes are followed. The proposed modifications would create a new § 2.B.2.e and modify Comment 2.B.203; see pp. 7–9, below.
6. **Technical correction to misdemeanor units.** To remove potential confusion, the proposed change would entirely clarify the Commission’s existing intent, that the criminal history score of a current driving while impaired (DWI) or criminal vehicular operation (CVO) felony may include non-DWI/CVO misdemeanor units. The proposed modifications are to § 2.B.3.a and Comment 2.B.304; see pp. 9 & 10, below.
7. **Second or subsequent severe violent offense modifier.** The proposed change would establish a new sentence modifier for second or subsequent severe violent offenses. The modifier would add between 12 and ~~36~~²⁴* months, depending on the number of prior severe violent offense convictions, to the presumptive sentence. The proposed change would also clarify that sentence modifiers can originate in statute or Guidelines policy. Finally, the proposed change would establish a new section 8, Severe Violent Offense List, and renumber the existing section 8, Targeted Misdemeanor List, as Appendix 4. As proposed, the new or modified sections are §§ 1.B.14, 2.G.1, 2.G.14, & 8, Comment 2.G.03, and Appendix 4; see pp. 3 & 11–14, below.

* As posted on Nov. 13, 2018, this summary of the effect of the proposed modifications here erroneously read “36.” On Jan. 2, 2019, staff corrected this number to “24” to conform to the actual language of the proposed modifications, as shown on page 12 of this notice.

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

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B. Definitions

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

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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.

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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.~~

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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:

- (1) at least one-half custody status point is assigned; and
- (2) the offender's total Criminal History Score exceeds the maximum score on the applicable Grid (i.e., 7 or more).

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e. Waiver. Subject to the limitations in paragraph (4), the court, on its own motion or on the motion of a party, 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 has otherwise been in substantial compliance with the 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 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.~~

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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.

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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.

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Comment

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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. * * *

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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.

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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.

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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.

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

Comment

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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).

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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.

<u>Statute Number</u>	<u>Offense Title</u>
<u>609.185</u>	<u>Murder 1st Degree</u>
<u>609.19</u>	<u>Murder 2nd Degree</u>
<u>609.195(a)</u>	<u>Murder 3rd Degree (Depraved Mind)</u>
<u>609.221</u>	<u>Assault 1st Degree</u>
<u>609.222, subd. 2</u>	<u>Assault 2nd Degree (Dangerous Weapon, Substantial Bodily Harm)</u>
<u>609.245, subd. 1</u>	<u>Aggravated Robbery 1st Degree</u>
<u>609.25, subd. 2(2)</u>	<u>Kidnapping (Great Bodily Harm/Unsafe Release/Victim Under 16)</u>
<u>609.2661</u>	<u>Murder of an Unborn Child 1st Degree</u>
<u>609.2662</u>	<u>Murder of an Unborn Child 2nd Degree</u>
<u>609.2663</u>	<u>Murder of an Unborn Child 3rd Degree</u>
<u>609.282</u>	<u>Labor Trafficking</u>
<u>609.342, subd. 1(c)(d)(e)(f)</u>	<u>Criminal Sexual Conduct 1st Degree</u>
<u>609.343, subd. 1(c)(d)(e)(f)</u>	<u>Criminal Sexual Conduct 2nd Degree</u>
<u>609.498, subd. 1b</u>	<u>Tampering with Witness, Aggravated 1st Degree</u>
<u>609.561, subd. 1 or 2</u>	<u>Arson 1st Degree</u>
<u>609.66, subd. 1e(b)</u>	<u>Drive-By Shooting (Toward a Person or Occupied Motor Vehicle or Building)</u>

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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.