

Reitz, Nate (MSGC)

From: Kara M. Haro <[REDACTED]>
Sent: Tuesday, September 4, 2018 12:33 PM
To: Guidelines, Sentencing (MSGC)
Cc: Kelly Mitchell; Max Keller; Robin Wolpert; Joe Van Thomme
Subject: RE: Request for Input – Possible Criminal History Score Policy Modifications
Attachments: MSBA Comment in Response to MSGC Request for Input.docx

Hello,

We have received your request and attached is input from the Minnesota State Bar Association's Criminal Law Section.

Please let me know if you have any questions.

Best,

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From: Guidelines, Sentencing (MSGC) [mailto:sentencing.guidelines@state.mn.us]
Sent: Friday, August 3, 2018 3:26 PM
To: Guidelines, Sentencing (MSGC)
Subject: Request for Input – Possible Criminal History Score Policy Modifications

Dear Criminal Justice Stakeholders, Meeting Notice Subscribers, and Commission Members:

The Chair of the Minnesota Sentencing Guidelines Commission is requesting input from various criminal justice stakeholders regarding the pros and cons of adopting one or more possible modifications to the Sentencing Guidelines' criminal history score policy. For further explanation and details, please refer to the memo to stakeholders [here](#).

The next MSGC meeting will take place in St. Paul on September 13, 2018 at 1:30 p.m. If you have input, please provide it to us at the meeting. (If you wish to speak at the meeting, Staff requests that you send us advance notice by e-mail at sentencing.guidelines@state.mn.us.) If you have written comment for the Commission, please submit it to MSGC staff by e-mail or U.S. mail by September 5, 2018.

Minnesota Sentencing Guidelines Commission
658 Cedar Street, Suite G-58, St. Paul, MN 55155
Main: 651-296-0144 | mn.gov/sentencing-guidelines



This email is intended to be read only by the intended recipient. If you received this email in error, please notify the sender immediately and delete this email and any attachments. Thank you.

To: Minnesota Sentencing Guidelines Commission

From: MSBA Criminal Law Section

Re: Response to Request for Input – Possible Criminal History Score Modifications

The Minnesota Sentencing Guidelines has requested input on a number of proposals to modify the manner in which an offender's criminal history score is calculated, including proposed changes to custody status, the manner in which misdemeanors are counted, and the decay policy, as well as a proposal to increase the weight for repeat severe violent offenses. This memo sets forth the input of the Criminal Law Section of the Minnesota State Bar Association. The Criminal Law Section is not in a position to provide comment about all of the proposals or to weigh the relative merits of one proposal against another. However, the Section has done extensive work with regard to the length of probation and can provide input where this issue intersects with the proposals.

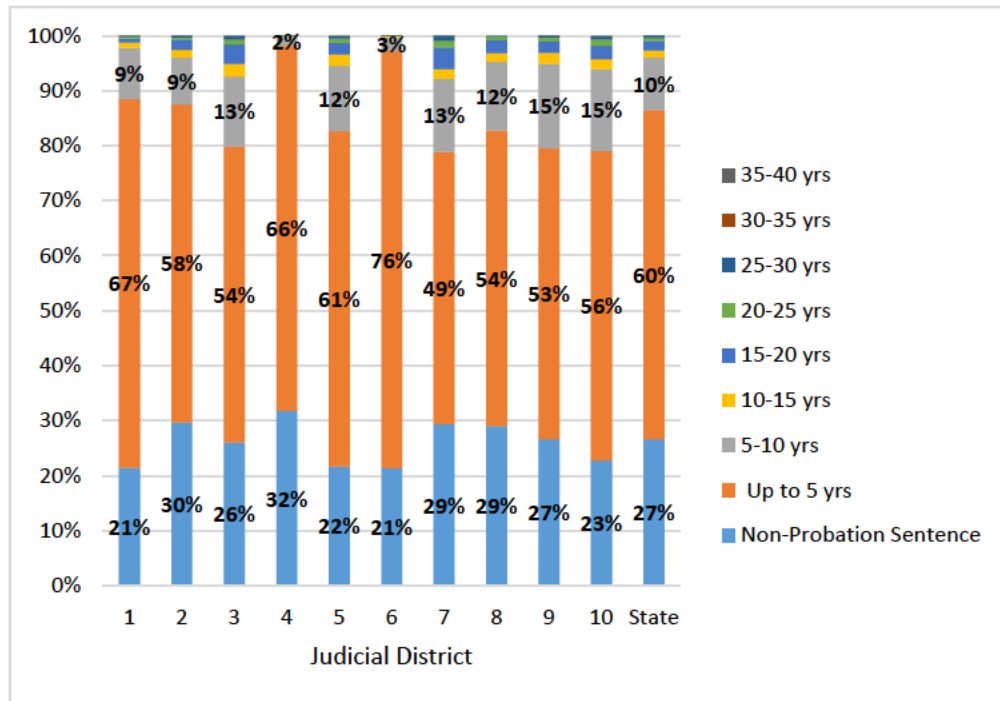
Length of Probation

As the first state in the nation to enact sentencing guidelines, Minnesota has a long history of truth in sentencing. Currently, prison sentences are predictable, fairly uniform (except for a few offenses), and proportional to the offense severity and criminal history of the offender. However, probationary sentences do not follow this model. Though the sentencing guidelines recommend when probation is the presumptive sentence, there is no guidance regarding the length of the probationer term. Minnesota law permits the court to set the probation term anywhere between 4 years and the statutory maximum sentence, and as a result, probation terms vary and can be as long as 40 years. In contrast, many states limit probation to 5 to 10 years, or less.

Minnesota places a high value on holding offenders accountable for their crimes through service of community supervision sentences (i.e., "probationary sentences"). From 2010 to 2015, statewide, nearly three quarters of felony convictions were sentenced to probation. By far, the most common probation term was up to 5 years, with 60% of cases receiving a probation sentence within this range. A further 13% of cases were sentenced to probation terms between 5 and 40 years, and as shown in Figure 1, there was variation across the state with regard to the use of lengthy probation terms. Honing in on those cases sentenced to probation terms of greater than 5 years that were not sex offenses and that were not presumptive commitments, drug cases garnered the longest probation terms with an average of 155 months, higher than the average probation terms for person and DWI offenses (121 and 84 months, respectively), which arguably pose an equal or greater threat to public safety. Because of this variation in sentencing, in 2017 the MSBA Criminal Law Section proposed legislation for MSBA consideration that would

impose a 5-year cap on felony probation terms for non-sex offense and non-presumptive commitment cases, and an 8-year cap on non-sex offense presumptive commitment cases.¹

Figure 1. Mix Between Probation and Non-Probation Cases and Probation Terms from 2010-2015



(Source: Robina Institute of Criminal Law and Criminal Justice)

Several of the Commission’s proposals acknowledge the perverse results that can arise from the variation and length of probation sentences. For example, the proposal to end the custody status point at discharge from probation (pg. 3) acknowledges that some districts within the state routinely impose lengthy probation terms and utilize early discharge as an incentive for compliance with probation. Appendix 1.2 of the Commission’s memo indicates that the policy of continuing to count the original probation term for custody status purposes was enacted because some counties were reluctant to utilize early discharge because they wanted offenders to maintain exposure for the custody status point if they subsequently committed a new crime. The end result is that the current sentencing guidelines policy was used as an incentive to encourage counties to utilize early discharge while serving as a disincentive for probationers to perform well on probation because they would not ultimately receive the benefit of that performance.

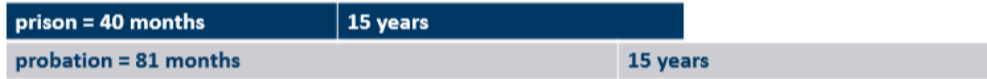
The Commission has also proposed that the decay period for offenses sentenced to probation commence at the start of probation rather than the discharge from sentence (pg. 10). At the Commission’s July meeting in 2017, Commission staff demonstrated that, because probation terms are so long in Minnesota, and because the decay period does not start until the offender is

¹ The proposed legislation would not have changed the permissible range for probation terms in sex offense cases; they would have continued to be punishable with probation terms up to the statutory maximum sentence.

discharged from the sentence, offenders placed on probation may actually wait longer for their prior offense to decay than offenders who go to prison (Figure 2). This results violates the principles of the sentencing guidelines as well as common sense.

Figure 2. Decay Period Comparison

- Example 2: Second-Degree Burglary of Dwelling – 10 yr. Stat. Max.



(Source: Sentencing Guidelines Commission, Staff Presentation, July 27, 2017)

As noted above, the Criminal Law Section cannot provide feedback as to the relative merits of each of the proposals in the Commission’s memo. However, where the proposals intersect with the lack of uniformity and proportionality in probation sentences, the Section urges the Commission to seriously consider the impact of current probationary sentencing practices and to enact policy that will even out those impacts and bring the sentencing guidelines back in alignment with its principles.

The MSBA Criminal Law Section thanks the Commission for allowing this opportunity to provide feedback and input as the Commission continues to review and revise the criminal history score.