

## Staff Issue Paper

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# Escape from Custody under Minn. Stat. § 609.485

April 30, 2019

## Overview

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At its March 14, 2019, meeting, the Commission discussed ranking Escape from Electronic Home Monitoring (EHM). Staff was asked to do further research and present additional information at the April 11, 2019, meeting. Staff has updated its presentation for the May 9, 2019, meeting.

Below are two issues related to escapes: one specific to ranking Escape from EHM, and one related to escape from custody, in general.

- Ranking Escape from EHM
- Apparent Guidelines Conflict: Escape while on Supervised Release

### A. Ranking Escape from Electronic Home Monitoring (EHM)

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**Issue.** In 2017, the Commission, upon recommendation of its staff, voted to list Escape from EHM as an “Unranked” offense. At the time, staff believed the offense had been sentenced as a felony only once. Since then, staff has learned that 26 felony cases have been sentenced since 2006.

**Questions for Commission.** Does the Commission wish to rank the offense? If so, at what severity level?

**Guidelines and Statutory Considerations.** In 1994, the term “escapes while held in lawful custody” was redefined to include absconding from electronic monitoring.<sup>1</sup> In 2002, Escape from EHM was assigned a separate penalty:<sup>2</sup> Generally a gross misdemeanor, the offense now becomes a felony if the escapee was under sentence for murder; manslaughter; criminal vehicular homicide; criminal vehicular operation; criminal vehicular homicide or injury of an unborn child; assault in the first through fourth degree; criminal sexual conduct in the first through fifth degree; or civil commitment under Minn. Stat.

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<sup>1</sup> [1994 Minn. Laws ch. 636](#), art. 2, § 38, amending Minn. Stat. § [609.485, subd. 2](#).

<sup>2</sup> [2002 Minn. Laws ch. 314](#), § 8, amending Minn. Stat. § [609.485, subd. 4\(f\)](#).

chapter 253D (Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities).

Table 1, below, lists the severity-level rankings, statutory maximums, and number of Escape from Custody cases. In each of the 26 sentences for Escape from EHM, the sentencing judge assigned the offense a severity level of 3.<sup>3</sup>

*Table 1. Escape from Custody Offenses, Severity Levels, Statutory Maximums, Cases Sentence, 2006–17*

<b>Statute</b>	<b>Title</b>	<b>Severity Level</b>	<b>Stat. Max.</b>	<b>No. (Percent) Cases Sentenced</b>
609.485 subd. 4(a)(1)	Escape from Felony Offense (lawful custody)	3	5 years	768 (94.9%)
609.485 subd. 4(a)(2)	Escape, Mental Illness	1	1 year & 1 day	0 (0.0%)
609.485 subd. 4(a)(3)	Escape with Violence from Gross Misdemeanor or Misdemeanor Offense	Unranked	2 years	1 (0.1%)
609.485 subd. 4(a)(4)	Escape from Civil Commitment	1	1 year & 1 day	4 (0.5%)
609.485 subd. 4(a)(5)	Escape from Civil Commitment, Sexually Dangerous Persons	3	5 years	5 (0.6%)
609.485 subd. 4(b)	Escape with Violence from Felony Offense	8	10 years	5 (0.6%)
<i>609.485 subd. 4(f)</i>	<i>Escape from Electronic Home Monitoring</i>	<i>Unranked</i>	<i>5 years</i>	<i>26 (3.2%)</i>
<b>Total</b>	<b>Escape from Custody</b>			<b>809 (100.0%)</b>

**Staff Recommendation:** Because the actual number of Escape from EHM cases is 26, staff recommends assigning a severity level.<sup>4</sup> Because all 26 cases were ranked at Severity Level 3, because similar

<sup>3</sup> “When the court sentences an unranked offense, the court must assign an appropriate severity level for the offense and specify on the record why that particular level was assigned.” 2018 Minn. Sentencing Guidelines § 2.A.4. It is possible that judges did not consider Escape from EHM to be an unranked offense, but merely a subspecies of Escape from Felony Offense or Escape from Civil Commitment, Sexually Dangerous Persons. See footnote 1 and accompanying text.

<sup>4</sup> “An unranked offense typically has one or more of the following characteristics: (1) the offense is rarely prosecuted; (2) the offense covers a wide range of underlying conduct; or (3) the offense is new and the severity of a typical offense cannot yet be determined. If a significant number of future convictions are obtained under one or more of the unranked offenses, the Commission will reexamine the ranking of these offenses and assign

offenses with the same statutory maximum (5 years) are ranked at Severity Level 3, and to avoid ranking Escape from EHM more severely than Escape from Felony Offense, staff recommends assigning a ranking of Severity Level 3, effective August 1, 2020, and applicable to crimes committed on or after that date. Appendix 1 (p. 5) contains draft modifications to this effect.<sup>5</sup>

## **B. Apparent Guidelines Conflicts Regarding Escape while Under Sentence**

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**Issue.** There are three apparent conflicts among sections of the Guidelines that pertain to escapes while under sentence. Two of these apparent conflicts resulted from changes made in 2016 to the consecutive sentencing policy in one section of the Guidelines (§ 2.F.1, Presumptive Consecutive Sentences), without conforming changes in related sections (§§ 2.C, Presumptive Sentence, and 2.F.2, Permissive Consecutive Sentences). The third apparent conflict, found in Appendix 1 (Mandatory and Presumptive Sentences Reference Table), has existed since 2009.

**Question for Commission.** Does the Commission wish to reconcile the apparent conflicts existing between Guidelines sections 2.C.3, 2.F.1, 2.F.2, and Appendix 1?

### **Guidelines Considerations.**

**Section 2.F.1.** Effective August 1, 2016, the Commission made changes to Guidelines section 2.F, Consecutive Sentences. One of these changes, to section 2.F.1.a, limited the circumstances under which consecutive sentences are presumptive. After the change, the sentence for a new offense committed while on, or on escape status from, *supervised release* is no longer presumptively consecutive to the original offense; instead, the new offense must now be committed while serving, or on escape status from, an *executed term of imprisonment, disciplinary confinement, or reimprisonment* to qualify for presumptive consecutive sentencing.<sup>6</sup>

The 2016 changes apparently overlooked two apparent cross-references to presumptive consecutive sentencing policy, found in sections 2.C (Presumptive Sentence) and 2.F.2 (Permissive Consecutive Sentences).

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an appropriate severity level for a typical offense. Practitioners can contact the Commission for information on severity levels assigned to unranked offenses.” 2018 Minn. Sentencing Guidelines Comment 2.A.04.

<sup>5</sup> These draft modifications also revert to the statutory term “electronic monitoring,” omitting the word “home.”

<sup>6</sup> The Commission explained its rationale for the change as follows: “Under the current rule, when an offender commits an offense on supervised release, consecutive sentencing is presumptive unless concurrent sentencing is longer. By requiring the sentencing court to determine which sentence would be longer, this rule puts the court in the difficult (and arguably improper) position of speculating as to what disciplinary sanction the Department of Corrections will impose for committing the new offense while on supervised release. The new rule will remove this conflict by eliminating presumptive consecutive sentencing for offenders on supervised release or conditional release.” Minn. Sentencing Guidelines Comm’n, Report to the Legislature (Jan. 15, 2016), pp. 18–19 (retrieved March 29, 2019, at <https://go.usa.gov/xEhBA>).

**Section 2.C.3.e**—in an apparent reference to the pre-2016 policy found in section 2.F.1—describes qualifying circumstances for presumptive-consecutive sentencing: “It is presumptive for escape from an *executed sentence* ... to be sentenced consecutively ...” (emphasis added). But, because “executed sentence” includes of periods supervised release,<sup>7</sup> this reference is now obsolete.

**Section 2.F.2.** Likewise, section 2.F.2.a.(2)(i), in an apparent reference to the presumptive-consecutive policy, provides, “If the offender is convicted of felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – *and the offender did not escape from an executed prison sentence*, the escape may be sentenced consecutively to the sentence for which the offender was confined” (emphasis added). Again, because “executed prison sentence” includes periods of supervised release, this reference is also obsolete.

**Appendix 1**, the Mandatory and Presumptive Sentences Reference Table, contains an apparent conflict with a different part of the Guidelines. Under its entry for “Escape” under Minn. Stat. § 609.485, Appendix 1 contains a mandatory or presumptive sentence entry of “Grid Time.” For such an Escape to qualify for this mandatory or presumptive sentence, Appendix 1 has stated, since the table was introduced in 2009, the following prerequisite/condition: “Offense committed during ‘Term of Imprisonment’ portion of executed sentence.”

This appears to be a misstatement of the Guidelines policy found in section 2.C.3.e, Offenses Committed While Under State Authority, mentioned above. The pertinent provision states, “The presumptive disposition for escape from an executed sentence ... is commitment.” As noted above, “executed sentence” includes more than just “term of imprisonment.” If, for example, an offender were to commit Escape from EHM while on supervised release, the presumptive disposition would be commitment under section 2.C.3.e—but not, apparently, under Appendix 1. By limiting its rule to the escapes committed during the “term of imprisonment,” rather than during the entire “executed sentence,” Appendix 1 is construing section 2.C.3.e too narrowly.

**Staff Recommendation:** To reconcile the apparent conflicts between §§ 2.C, 2.F.1, and 2.F.2, and Appendix 1—and, specifically, to clarify the application of consecutive sentencing policy to an offense such as Escape from Electronic Monitoring committed while on supervised release—staff recommends that the Commission make conforming changes to these sections of the Guidelines and Appendix 1, effective August 1, 2019. Appendix 2 of this document (p. 6) contains staff-drafted language intended to effect this recommendation.

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<sup>7</sup> See 2018 Minn. Sentencing Guidelines § 1.B.7; [Minn. Stat. § 244.101](#).

## Appendix 1: Possible Modifications to Guidelines § 5.A & 5.B (2018)

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### 5.A. Offense Severity Reference Table

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law.

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Severity Level	Offense Title	Statute Number
<del>Unranked</del>	<del>Escape from Electronic Home Monitoring</del>	<del>609.485, subd. 4(f)</del>

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Severity Level	Offense Title	Statute Number
<u>3</u>	<u>Escape from Electronic Monitoring</u>	<u>609.485, subd. 4(f)</u>

### 5.B. Severity Level by Statutory Citation

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law.

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Statute Number	Offense Title	Severity Level
609.485 subd. 4(f)	Escape from Electronic <del>Home</del> Monitoring	<del>Unranked</del> <u>3</u>

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## Appendix 2: Possible Modifications to the Guidelines § 2.C and Guidelines Appendix 1

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### [2]C. Presumptive Sentence \* \* \*

#### 3. Finding the Presumptive Sentence for Certain Offenses. \* \* \*

- e. Offenses Committed While Under State Authority. The presumptive disposition for escape from an executed sentence, felony assault committed by an inmate serving an executed term of imprisonment, or assault on secure treatment facility personnel is commitment. ~~It~~ Pursuant to section 2.F.1, it is presumptive for escape from an executed ~~sentence~~ term of imprisonment and for felony assault committed by an inmate serving an executed term of imprisonment to be sentenced consecutively to the offense for which the inmate was confined. The presumptive duration is determined by the presumptive sentencing consecutive policy (see section 2.F.1, Presumptive Consecutive Sentences).

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### [2]F. Concurrent/Consecutive Sentences \* \* \*

#### 1. Presumptive Consecutive Sentences.

- a. Criteria for Imposing a Presumptive Consecutive Sentence. Consecutive sentences are presumptive (required under the Guidelines) when:

(1) the offender was, at the time of the current offense:

- (i) serving an executed term of imprisonment, disciplinary confinement, or reimprisonment; or
- (ii) on escape status from an executed term of imprisonment, disciplinary confinement, or reimprisonment; and

(2) the presumptive disposition for the current offense(s) is commitment.

- b. Finding the Presumptive Disposition. ~~The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an executed term of imprisonment is always commitment. In all other cases, the~~ The presumptive disposition is determined using the criteria in section 2.C. The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an executed term of imprisonment is always commitment.

\* \* \*

**2.F.102.** *When the court pronounces presumptive consecutive sentences for multiple offenses, each new offense will be sentenced at a Criminal History Score of 1. The new offenses will run concurrently to each other, but consecutive to the prior offense.*

*For example, an offender is convicted of Escape from Custody and First-Degree Burglary of an Occupied Dwelling following escape from an executed ~~sentence~~ term of imprisonment. The term of imprisonment remaining on the original offense from which the offender escaped is 18 months. Each of the new offenses will have a presumptive consecutive sentence duration found at a Criminal History Score of 1: Escape from Custody (Severity Level 3), 13 months; Burglary (Severity Level 6), 27 months. The two sentences will run concurrently to each other, and the longer of the two durations will be added to the time remaining on the original term of imprisonment (here, 27 months will be added to the time remaining on the original 18-month sentence). Aggregated, the new presumptive consecutive sentence duration is 45 months.*

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## 2. Permissive Consecutive Sentences.

- a. Criteria for Imposing a Permissive Consecutive Sentence. Consecutive sentences are permissive (may be given without departure) only in the situations specified in this section. \* \* \*

(1) Specific Offenses; Presumptive Commitment. \* \* \*

- (iii) Felony Conviction After Escape (Non-Executed Sentence). If the offender commits and is convicted for a new felony crime while on felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – from a non-executed felony sentence, the new felony conviction may be sentenced consecutively

to the sentence for the escape or the offense for which the offender was confined.

(2) Other Offenses. Consecutive sentences for the following offenses are always permissive and there is no dispositional departure if the sentences are executed.

- (i) Felony Escape. If the offender is convicted of felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – and the offender did not escape from an executed ~~prison-sentence~~ term of imprisonment, disciplinary confinement, or reimprisonment (see section 2.F.1.a.(1)(ii)), the escape may be sentenced consecutively to the sentence for which the offender was confined.
- (ii) Felony Conviction After Escape (Executed Sentence). If the offender committed and is convicted for a new felony crime committed while on felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – from an executed felony sentence, the new felony may be sentenced consecutively to the sentence for the escape.

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## **Appendix 1. Mandatory and Presumptive Sentences Reference Table**

This table is for convenience when applying mandatory sentences (section 2.E) and presumptive sentences (section 2.C). It is not exhaustive.

Presumptive disposition. Commitment.

Presumptive duration. Mandatory minimum or the duration in the appropriate cell on the applicable Grid, whichever is longer.

Attempts and Conspiracies. Mandatory sentences generally apply to attempted offenses under Minn. Stat. § 609.17 and conspiracies under Minn. Stat. § 609.175. Mandatory minimums are not divided in half. The presumptive duration is the mandatory minimum duration found in statute or one-half of the duration in the appropriate cell on the applicable Grid, whichever is longer.



(See section 2.G for more information on convictions for attempts, conspiracies and offenses with other sentence modifiers.)

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<b>Statute</b>	<b>Offense</b>	<b>Prerequisite or Conditions</b>	<b>Minimum Duration</b>
609.485	Escape	<del>Offense committed during "Term of Imprisonment"</del> <u>portion of Escape from</u> executed sentence	Grid Time

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