

## Staff Issue Paper

---

# Prior Severe Violent Offenses Converted to Misdemeanors or Gross Misdemeanors

April 30, 2019

## Issue

---

Unless the Legislature intervenes, a new sentence modifier will apply to second or subsequent severe violent offenses committed on or after August 1, 2019. An alert practitioner has identified a potential problem: The new modifier does not specify whether a prior severe violent offense conviction qualifies even if it has been deemed a misdemeanor or gross misdemeanor by operation of law.

Should the Minnesota Sentencing Guidelines Commission take action to clarify?

## Current Treatment of Felonies Converted to Lesser Offenses

---

### Statutory Conversion of Felony to Misdemeanor or Gross Misdemeanor

Minn. Stat. § 609.13, subdivision 1, provides two ways by which a felony conviction may be deemed to be for a lesser offense: when the felony is sentenced within misdemeanor or gross misdemeanor limits, or upon successful completion of a stay of imposition. The subdivision states:

*Subdivision 1. **Felony.** Notwithstanding a conviction is for a felony:*

*(1) the conviction is deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor as defined in section 609.02; or*

*(2) the conviction is deemed to be for a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.*

## Sentencing Guidelines' Treatment of Converted Felonies

Current Guidelines policy regarding converted felonies varies, depending on whether the prior felony—

- Was deemed a misdemeanor or gross misdemeanor because it was sentenced within misdemeanor or gross misdemeanor limits, or
- Was deemed a misdemeanor upon the satisfactory completion of a stay of imposition.

**Sentences within Misdemeanor or Gross Misdemeanor Limits.** Section 2.B.1 of the Sentencing Guidelines governs the use of prior felonies in criminal history. Section 2.B.1.h states that, if a prior felony conviction was sentenced within misdemeanor or gross misdemeanor limits, it is counted as a misdemeanor or gross misdemeanor in the criminal history, as follows:

*[2.B.1.]h. Non-Felony Sentence. Except when a monetary threshold determines the offense classification of the prior offense (see section 2.B.7), when a prior felony conviction resulted in a non-felony sentence (misdemeanor or gross misdemeanor), the conviction must be counted in the criminal history score as a misdemeanor or gross misdemeanor conviction as indicated in section 2.B.3.*

See also Comment 2.B.111 (explaining rationale; reproduced in Appendix 1); section 2.B.3.a.(6) (applying this policy to prior gross misdemeanor and misdemeanor section of criminal history); section 2.D.1 (gross misdemeanor or misdemeanor sentence for a felony conviction is a departure from the Guidelines); and Comment 2.D.105 (explanation of departure policy).

**Stays of Imposition.** On the other hand, Section 2.B.1 requires each felony conviction in which a stay of imposition was given to be assigned a felony weight in the criminal history score, as follows:

*[2.B.]1. Prior Felonies. Assign a particular weight, as set forth in paragraphs a and b, to each extended jurisdiction juvenile (EJJ) conviction and each felony conviction, provided that a felony sentence was stayed or imposed before the current sentencing or a stay of imposition of sentence was given before the current sentencing.*

See also Comment 2.B.112 (explaining rationale; reproduced in Appendix 1) and section 1.B.19.a (defining “stay of imposition” consistently with section 2.B.1).

## Judicial Interpretation of Converted Felonies

**Sentencing Guidelines.** Minnesota courts give effect to the Sentencing Guidelines' existing distinctions between sentences within gross misdemeanor and misdemeanor limits and stays of imposition, as described above. See, e.g., *State v. Stewart*, 923 N.W.2d 668, 678 (Minn. Ct. App. 2019), *pet. for review*

*on other grounds filed* (Minn. Feb. 21, 2019) (articulating the difference between a stay of imposition and a gross misdemeanor sentence for purposes of the criminal history score).

**Sentences within Misdemeanor or Gross Misdemeanor Limits in Other Contexts.** Outside the context of the Sentencing Guidelines, staff has found no case published after 1980 construing Minn. Stat. § 609.13, subd. 1(1) (felony sentences within misdemeanor or gross misdemeanor limits).

**Stays of Imposition in Other Contexts.** Outside the context of the Sentencing Guidelines, judicial treatment of successfully completed stays of imposition has been nuanced. The Minnesota Supreme Court has held that a felony conviction, if deemed a misdemeanor upon successful completion of a stay of imposition, is no longer a “felony” for purposes of the career-offender statute requiring that the defendant “has five or more prior felony convictions.” *State v. Franklin*, 861 N.W.2d 67 (Minn. 2015) (present-tense emphasis added).

On the other hand, for statutes or rules using past-tense language such as “was convicted,” “having been convicted,” or “has been convicted,” the Minnesota Supreme Court has held that a prior felony is treated as a felony, notwithstanding successful completion of a stay of imposition. *State v. S.A.M.*, 891 N.W.2d 602 (2017) (“was convicted of or received a stayed sentence for” in expungement statute); *State v. Anderson*, 733 N.W.2d 128 (Minn. 2007) (“has been convicted of a crime of violence” in firearms statute); *In re Peace Officer License of Woollett*, 540 N.W.2d 829 (Minn. 1995) (“having been convicted of a felony” in POST Board administrative rules).

## **Can Converted Felonies be Prior Severe Violent Offense Convictions?**

---

On January 11, 2019, the Commission submitted to the Legislature proposed Guidelines modifications, among which was a new sentencing modifier, “Second or Subsequent Severe Violent Offense.” (Appendix 2 contains the relevant excerpt.) The proposed modifications will take effect on, and apply to crimes committed on and after, August 1, 2019, in the absence of legislative intervention.

By operation of the new modifier, the presumptive sentence of an offender convicted of a severe violent offense (i.e., an offense listed on the Severe Violent Offense List) and who has one or more prior severe violent offense convictions—including attempts, conspiracies, and equivalent out-of-state felonies—will automatically be increased by 6 to 24 months, depending on the number of prior severe violent offense convictions and whether or not the current offense is an attempt or conspiracy.

Although each offense on the Severe Violent Offense List is a felony, the modifier does not explicitly state that the prior severe violent offense must be a felony (unless it is an out-of-state offense), nor does it specify the treatment to be given to prior severe violent offenses that are deemed to be gross misdemeanors or misdemeanors by operation of Minn. Stat. § 609.13.

According to MSGC monitoring data, less than one percent (0.3%) of severe violent offenses sentenced in the past decade (2008–17) were sentenced within gross misdemeanor or misdemeanor limits.

## Commission Options

---

1. The Commission may **take no action** to clarify whether or not converted felonies may qualify as prior severe violent offense convictions. *Rationale:* Clarification of this question should be left to the courts.
2. The Commission may clarify that **all severe violent offense convictions qualify as priors**, including felonies deemed to be gross misdemeanors and misdemeanors.\* *Rationale:* By listing these as severe violent offenses, the Commission has, in effect, overruled the prior judicial determination “that the offending behavior did not merit felonious punishment, or other circumstances existed that justified a limit on the severity of the sanction” (Comment 2.B.111).
3. The Commission may clarify that **converted felonies do not qualify as prior severe violent offenses**. *Rationale:* Notwithstanding the “[c]onsiderable disparity [that] appears to exist in the use of” stays of imposition (Comment 2.B.112), the Commission defers to the legislative determination that, upon successful completion of probation, such offenses become misdemeanors.
4. The Commission may clarify that **stays of imposition qualify** as prior severe violent offenses, but **sentences within misdemeanor or gross misdemeanor limits do not qualify**. *Rationale:* This action would be consistent with existing Guidelines policy regarding treatment of a prior offense as a felony or gross misdemeanor, would reduce practitioner confusion, and would balance the disparity concerns expressed in Comment 2.B.112 with the judicial-respect concerns expressed in Comment 2.B.111.

If the Commission wishes to implement Option 4, staff-drafted language to that effect is in Appendix 3.

Regardless of the particular course of action chosen, the Commission must, if it chooses to take action, resolve the question of **timing**:

- If the Commission believes that the action would “amend[] the Sentencing Guidelines grid, including severity levels and criminal history scores, or ... would result in the reduction of any sentence or in the early release of any inmate” (Minn. Stat. § 244.09, subd. 11), then it must submit the change to the Legislature by January 15, 2020, to take effect August 1, 2020.
- On the other hand, if the Commission believes that the action would not constitute such a change, it may, following public notice and hearing, make the modifications effective on a date of its choosing (e.g., August 1, 2019, to coincide with the effective date of the modifier itself).

---

\* Under this option, the applicable decay period for gross misdemeanors and misdemeanors should be clarified.

## Appendix 1: Sentencing Guidelines Comments 2.B.111 & 2.B.112 (2018)

---

**2.B.111.** *When an offender was convicted of a felony but was given a misdemeanor or gross misdemeanor sentence, the offense will be counted as a misdemeanor or gross misdemeanor for purposes of computing the criminal history score. The Commission also recognized that where such sentences were given, it was the opinion of the court that the offending behavior did not merit felonious punishment, or other circumstances existed that justified a limit on the severity of the sanction.*

**2.B.112.** *The decision to stay execution of sentence rather than to stay imposition of sentence as a means to a probationary term following a felony conviction is discretionary with the court. Considerable disparity appears to exist in the use of these options. In the case of two similar offenders it is not uncommon for one to receive a stay of execution and another to receive the benefit of a stay of imposition. There may also be geographical disparities. As a result of the disparity that exists in the use of stays of imposition, the Commission determined to treat stays of execution and stays of imposition the same with respect to criminal history point accrual. Similar treatment has the additional advantage of a simplified procedure for computing criminal history scores.*

## Appendix 2: Proposed Sentencing Guidelines §§ 2.G.14 & 8 (2019)

---

### 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.

| <b><u>NUMBER OF PRIOR SEVERE<br/>VIOLENT OFFENSE<br/>CONVICTIONS</u></b> | <b><u>MONTHS</u></b> |
|--|----------------------|
| <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.

| <b><u>Statute Number</u></b>        | <b><u>Offense Title</u></b>  |
|-------------------------------------|--|
| <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> |

## **Appendix 3: Staff-Drafted Change to Proposed Guidelines § 2.G.14.a (2019)**

---

### 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, as outlined in Section 2.B.5 (Convictions from Jurisdictions 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.” A conviction that resulted in a non-felony sentence (see section 2.B.1.h) does not qualify as a “prior severe violent offense conviction” if the non-felony sentence was imposed before the current offense date.