

## Staff Issue Paper

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# Potential Actions in Conformity with the Presumptive Cap on Length of Probation

January 31, 2020

On January 9, 2020, the Commission adopted changes to the Sentencing Guidelines—chiefly in section 3.A—establishing a presumptive cap of five years’ probation for all felonies except listed sex and homicide offenses. In the absence of enacted legislation to the contrary, these changes will take effect August 1, 2020, and will apply to crimes committed on or after that date.

The Commission may wish to consider whether and to what extent other actions in conformity to this Guidelines modification may be prudent. This paper discusses four such areas for the Commission’s consideration: recommendations to the Legislature in light of the new presumptive probation cap; conforming changes to the Sentencing Guidelines themselves; conforming changes to the commentary to the Sentencing Guidelines; and changes to the content of the sentencing worksheets.

## Recommendations to the Legislature in Light of the Change

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Although similar to a bill passed by the Minnesota House in 2019,<sup>1</sup> the Commission’s action to cap probation lengths was criticized by at least one public-hearing participant for lacking certain elements of that bill.<sup>2</sup> For example, the bill—unlike the Commission’s action—would have authorized extensions of probation for violent-crime probationers who remain a threat to public safety. Also, the bill would have addressed the anomaly that six-year probation lengths are permitted for certain gross misdemeanors,<sup>3</sup> which is longer than the five-year cap to be permitted for most felonies. Obviously, the Commission cannot make statutory changes such as these when modifying the Sentencing Guidelines.

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<sup>1</sup> See [S.F. 802, 1st Unofficial Engrossment](#), art. 9, §§ 18–19 (passed by the House on April 29, 2019).

<sup>2</sup> See pp 6–7 of the written testimony of Robert Small, Executive Director, Minn. County Attorneys Ass’n, included in the record of the MSGC public hearing of December 19, 2019.

<sup>3</sup> These gross misdemeanors are Driving While Impaired, Criminal Vehicular Operation, and Criminal Sexual Conduct offenses; see Minn. Stat. § [609.135, subd. 2\(b\)](#).

On the other hand, the Commission is both empowered and required to make recommendations to the Legislature, from time to time, regarding changes in criminal law, criminal procedure, and other aspects of sentencing.<sup>4</sup>

Does the Commission wish to make legislative recommendations regarding appropriate changes to the law in light of the forthcoming cap on presumptive probation lengths?

## Amendments Within the Sentencing Guidelines

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### Refining & Clarifying Amendments

During the debate leading up to the adoption of these changes to the Guidelines, some suggested that the proposal was incomplete or lacking in various ways. Some suggested, for example, that the Guidelines ought to guide the district court on what aggravating factors might supply adequate grounds to exceed the five-year presumptive probation cap.<sup>5</sup> Additionally, staff notes that the adopted changes are silent as to whether multiple probationary terms within the presumptive cap may be “stacked,” or run consecutively to each other, resulting in a net probationary term greater than five years.<sup>6</sup> The Commission may find that these—or other—areas not explicitly addressed in the adopted changes ought to be refined or clarified.

If it were the will of the Commission to do so, it could likely make such changes effective August 1, 2020, to coincide with the effective date of the presumptive probation cap itself. Provided the changes did not “amend[] the Sentencing Guidelines grid, including severity levels and criminal history scores,” and would not “result in the reduction of any sentence or in the early release of any inmate,”<sup>7</sup> and provided the Commission complied with its public hearing requirements,<sup>8</sup> the Commission would not be required to submit the changes to the Legislature in advance.<sup>9</sup>

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<sup>4</sup> Minn. Stat. § [244.09, subd. 6](#) (“The commission shall from time to time make recommendations to the legislature regarding changes in the Criminal Code, criminal procedures, and other aspects of sentencing.”).

<sup>5</sup> This was the fourth concern raised in the minority report to the Commission’s adoption of the presumptive probation cap; the minority report raised other concerns as well. See MSGC’s 2020 [Report to the Legislature](#), January 15, 2020, Appendix 2.4.

<sup>6</sup> While “Minnesota statutes do not explicitly authorize stacked probationary periods,” the court of appeals has “sanctioned the stacking of consecutive probationary periods.” *Pageau v. State*, 820 N.W.2d 271, 275-76 (Minn. Ct. App. 2012) (Larkin, J.) (further quotation marks and citations omitted).

<sup>7</sup> [Minn. Stat. § 244.09, subd. 11](#).

<sup>8</sup> [Minn. R. ch. 3000](#).

<sup>9</sup> The Commission must report such changes to the Legislature in its next annual report. [Minn. Stat. § 244.09, subd. 11](#).

## Corrective Amendments

In addition to issues brought up during the debate, staff has discovered<sup>10</sup> a potential problem with the language of proposed section 3.A.2: It appears to assume that the “floor” for probation periods is the length of the statutory maximum penalty, when, in fact, the floor is *four years* or the statutory maximum, whichever is longer.<sup>11</sup>

Take the example of Assault 4th Degree (Peace Officer), a felony carrying a three-year statutory maximum.<sup>12</sup> Statutorily, probation for that offense may be up to four years, but the proposed Guidelines modifications appear not to permit a probation duration longer than three years.<sup>13</sup> Did the Commission intend for the presumptive probation-length cap for this offense to be three years, or four? If four years, it should consider amending proposed section 3.A.2.a to establish the presumptive cap at four years for such offenses.<sup>14</sup> Alternatively, if three years was intended, the Commission should consider amending proposed section 3.A.2.c to clarify that a court wishing to depart from the three-year presumptive cap could depart to the statutorily allowed four-year period of probation.<sup>15</sup>

Does the Commission wish further to explore the advisability of making amendments such as these to the Guidelines in 2020?

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<sup>10</sup> This issue was brought to our attention by nonpartisan legislative legal staff.

<sup>11</sup> When a felony’s statutory maximum penalty is four years or less, the court may establish a probationary period of up to four years per [Minn. Stat. § 609.135, subd. 2\(a\)](#) (“If the conviction is for a felony [other than certain criminal vehicular operation offenses], the stay shall be for not more than four years or the maximum period for which the sentence of imprisonment might have been imposed, whichever is longer.”).

<sup>12</sup> Minn. Stat. § [609.2231, subd. 1\(c\)](#).

<sup>13</sup> In cases where the statutory maximum punishment is less than five years, the proposed section 3.A.2.a establishes the presumptive length of stay at the statutory maximum punishment. Then, even in cases of departure from the presumptive length of stay, the proposed section 3.A.2.c forbids the court from pronouncing a length of stay longer than the statutory maximum punishment.

<sup>14</sup> Section 3.A.2.a might be changed, for example, to say, “When the court stays execution or imposition of sentence for a felony offense, including an attempt or conspiracy, the pronounced length of stay must not exceed five years, or four years if the length of the statutory maximum punishment, whichever is less than five years, unless the court identifies and articulates substantial and compelling reasons to support a departure from this rule.” Alternatively, the phrase “or the length of the statutory maximum punishment, whichever is less” could be deleted from section 3.A.2.a, and section 3.A.2.c could be amended to read, “~~If the court by departure exceeds the limitation in section 3.A.2.a,~~ Pursuant to [Minn. Stat. § 609.135, subd. 2\(a\) & \(b\)](#), the length of stay must generally not exceed four years or the statutory maximum punishment for the offense, whichever is longer.”

<sup>15</sup> Section 3.A.2.c might be changed, for example, to say, “If the court by departure exceeds the limitation in section 3.A.2.a, the length of stay must not exceed the limitations in Minn. Stat. § 609.135, subd. 2(a) & (b) (generally four years or the statutory maximum punishment for the offense, whichever is longer).”

## Conforming Amendments Within the Commentary

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While comments to the Sentencing Guidelines are advisory and are not binding on the courts,<sup>16</sup> practitioners and staff may rely on the commentary for guidance. It is therefore advisable to keep the commentary as error-free as is reasonably possible.

The commentary to Sentencing Guidelines section 3.A contains four comments:

**3.A.101.** *The use of either a stay of imposition or stay of execution is at the discretion of the court. The Commission has provided a non-presumptive recommendation regarding which categories of offenders should receive stays of imposition, and has recommended that convicted felons generally should receive only one stay of imposition. The Commission believes that stays of imposition are a less severe sanction, and should be used for those convicted of less serious offenses and those with short criminal histories. Under current sentencing practices, courts use stays of imposition most frequently for these types of offenders.*

**3.A.102.** *When a court grants a stayed sentence, the duration of the stayed sentence may exceed the presumptive sentence length indicated in the appropriate cell on the applicable Grid, and may be as long as the statutory maximum for the conviction offense. See Minn. Stat. § 609.135, subd. 2. Thus, for an offender convicted of Theft over \$5,000 (Severity Level 3), with a Criminal History Score of 1, the duration of the stay could be up to ten years. The 13-month sentence shown in the Guidelines is the presumptive sentence length and, if imposed, would be executed if: (a) the court departs from the dispositional recommendation and decides to execute the sentence; or (b) the stay is later revoked and the court decides to imprison the offender.*

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**3.A.[3]01.**<sup>17</sup> *The court may attach any conditions to a stayed sentence that are permitted by law and that the court deems appropriate. The Guidelines neither enlarge nor restrict the conditions that courts may attach to a stayed sentence. Minn. Stat. § 244.09, subd. 5 permits, but does not require, the Commission to establish guidelines covering conditions of stayed sentences. The Commission chose not to develop guidelines during its initial guideline development effort. The Commission has provided some language in the above section of the Guidelines that provides general direction in the use of conditions of stayed sentences.*

**3.A.[3]02.**<sup>17</sup> *While the Commission has resolved not to develop guidelines for nonimprisonment sanctions at this time, the Commission believes it is important for the*

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<sup>16</sup> *State v. Jones*, 848 N.W.2d 528, 537 (Minn. 2014) (citing *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003)).

<sup>17</sup> To conform to the renumbering of section 3.A.2 as section 3.A.3, staff intends to renumber comments 3.A.201 and 3.A.202 as comments 3.A.301 and 3.A.302, respectively, in the August 1, 2020, edition of the Minnesota Sentencing Guidelines and Commentary. This intended change is reflected in brackets.

*sentencing courts to consider proportionality when pronouncing a period of local confinement as a condition of probation. This is particularly important given Minn. Stat. § 609.135, subd. 7, which states when an offender may not demand execution of sentence. The period of local confinement should be proportional to the severity of the conviction offense and the criminal history score of the offender. Therefore, the period of local confinement should not exceed the term of imprisonment that would be served if the offender were to have received an executed prison sentence according to the presumptive Guidelines duration.*

Staff notes the following issues that the Commission may wish to address:

- **Comment 3.A.102** deals with the length of probation. The Commission may wish to renumber this comment as 3.A.201—as the new section 3.A.2 deals with length of probation—and update the wording to mention the new presumptive cap and to conform to its language. For example, the given hypothetical—involving a ten-year probation period for theft—seems like a poor choice to use as an example going forward.
- **Comments 3.A.[3]01 and 3.A.[3]02** refer to the Commission’s historical choice not to develop guidelines for nonimprisonment sanctions, despite its authority to do so. The authority in question is found in the paragraph following Minn. Stat. § 244.09, subd. 5(2), which authorizes the Commission to “establish appropriate sanctions for offenders for whom imprisonment is not proper” within the sentencing guidelines it promulgates. As this same paragraph is also the source of the Commission’s authority to establish a presumptive probation cap,<sup>18</sup> the Commission has now partially exercised that authority. The Commission may therefore wish to qualify the commentary’s statements of the Commission’s historical resolve not to develop guidelines for nonimprisonment sanctions.

Does the Commission wish to explore addressing these issues in the commentary in future meetings?

## Changes to Sentencing Worksheets

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The sentencing worksheet—the form relied on at sentencing that “reflects ... the presumptive sentence as reflected in the appropriate cell of the applicable Grid”<sup>19</sup>—is not necessarily required to reflect the presumptive sentence within the meaning of the five-year probation cap. Still, the worksheet could be changed<sup>20</sup> to refer to the applicable statutory or presumptive cap.<sup>21</sup> On the other

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<sup>18</sup> See Jan. 8, 2020, letter from Deputy Attorney General David Voigt to MSGC Executive Director (in MSGC meeting materials of Jan. 9, 2020).

<sup>19</sup> Minn. Sentencing Guidelines § 1.B.16 (definition of “sentencing worksheet”).

<sup>20</sup> This would require the Department of Corrections to change its software used to generate sentencing worksheets (the “Electronic Worksheet System”).

<sup>21</sup> For example, the worksheet’s comments section might include language such as this: “If the court grants a mitigated dispositional departure and stays imposition or execution of sentence, it may not pronounce a length

hand, it is possible that, by referring to a statutory or presumptive probation cap of four<sup>22</sup> or five years, the worksheet could be seen as suggesting an official endorsement of that duration to the sentencing court, possibly having the unintended consequence of driving *up* probation lengths toward these periods—four or five years—in jurisdictions where probation lengths have heretofore typically been shorter.

Does the Commission wish to offer guidance to staff in this regard?

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of stay longer than *x* years unless it identifies and articulates substantial and compelling reasons to depart from this rule.” The phrase “grants a mitigated departure and” would only apply in cases of a presumptive commit, and the phrase “unless it identifies and articulates substantial and compelling reasons to depart from this rule” would only apply where the presumptive five-year cap, rather than the statutory maximum, controls the length of stay. The phrase “*x* years” would be replaced with the statutory maximum imprisonment term when the current offense is a listed homicide or sex offense; with “4 years” when the statutory maximum is less than or equal to four years (*see* footnote 11, above; *but see* discussion beginning on page 2, above, regarding the Commission’s intent on whether the statutory maximum penalty, rather than the statutory four-year period, should control the length of stay for offenses with a statutory maximum penalty shorter than five years); and with “5 years” in all other cases.

<sup>22</sup> *See* footnotes 11 and 21, above.