

Minnesota Sentencing Guidelines Commission

Assigning a Second Custody Status Point

April 27, 2016

Issue: Guidelines § 2.B.2.a describes the Guidelines policy for assigning one custody status point to an offender on custody status at the time of the offense. Guidelines § 2.B.2.b explains the policy for assigning a second custody status point to an offender if: (1) the current offense is found on the Sex Offender Grid (except for failure to register as a predatory offender under Minn. Stat. § 243.166); [and] (2) the offender qualifies for one custody status point for an offense found on the Sex Offender Grid as described in Guidelines § 2.B.2.a.

Recently, a practitioner contacted MSGC staff and suggested that, in his particular case, two custody status points should be assigned. The particular offender's current offense was one found on the Sex Offender Grid; however, the offender was on probation for a prior burglary offense (not an offense on the Sex Offender Grid). The practitioner suggested that because there was no "and" connecting clause (1) and clause (2), the policy could be interpreted to mean that a second custody status point must be assigned if: (1) the current offense is found on the Sex Offender Grid (except for failure to register as a predatory offender under Minn. Stat. § 243.166); *or* (2) the offender qualifies for one custody status point for an offense found on the Sex Offender Grid as described in Guidelines § 2.B.2.a.

Guidelines Considerations:

The word "and," which previously conjoined the two requirements for a second custody status point, was deleted during the 2012 Guidelines rewrite (see [2011 Guidelines § 2.B.2.d](#)). The deletion appears to be inadvertent, as the commentary, both before and after the rewrite, clearly stated the dual requirement of a current sex offense *and* a custody status for a prior sex offense. Compare Comment 2.B.210 (2015) with Comment 2.B.208 (2011), both of which state:

When [offenders] on any custody status condition listed [in section 2.B.2.b] for a sex offense commit[] another sex offense, they are assigned an additional custody status point. The Commission believes that offenders who commit a subsequent sex offense pose [so significant] a risk to public safety that their criminal history scores should be enhanced to reflect this risk. This policy does

not apply to the offense of Failure to Register as a Predatory Offender ([Minn. Stat. §] 243.166).

Analysis of Alternatives:

- To **take no action** may lead to inconsistent application of the Guidelines and perpetuate a perception of disharmony between the Guidelines § 2.B.2.b and Comment 2.B.210.
- To **insert “and”** would clarify that when offenders on any custody status condition listed in section 2.B.2.b for a sex offense commit another sex offense, they are assigned an additional custody status point, consistent with the history of the Guidelines and the existing Comment 2.B.210.

Question for the Commission: Does the Commission wish to clarify its policy?

Staff Recommendation: Clarify that when offenders on any custody status condition listed in section 2.B.2.b for a sex offense commit another sex offense, they are assigned an additional custody status point, with that clarification to take effect August 1, 2016, as outlined below (recommended change at arrow).

[Section 2.]B. Criminal History

2. Custody Status at the Time of the Offense.

- a. One Custody Status Point. Assign **one** custody status point when the conditions in paragraphs (1) through (3) are met:

(1) The offender was under one of the following custody statuses:

- (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;
 - (ii) extended jurisdiction juvenile (EJJ) conviction;
 - (iii) non-traffic gross misdemeanor;
 - (iv) gross misdemeanor driving while impaired, refusal to submit to a chemical test, or reckless driving; or
 - (v) 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.
- (5) Assigning Points to Offenses Committed Over Time. Assign a 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.

b. Two Custody Status Points. Assign **two** custody status points if:

- (1) the current conviction offense is an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166); **and**
- (2) the offender qualifies for one custody status point, as described in section a, above, for an offense currently found on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166).

