

MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
Fr: Mark Wernick
Re: Proposed Guideline 2.B.7.c. and Comment 2.B.704 (Criminal History Points for Controlled Substance Crimes)
Date: December 20, 2016

I am writing in response to Judge Robert Small's written testimony opposing proposed Guideline 2.B.7.c. and Comment 2.B.704.

For nearly 25 years, the Minnesota Sentencing Guidelines overstated the seriousness of the criminal conduct underlying countless controlled substance crime prosecutions, especially for 1st and 2nd degree offenses. During that time, sentencing guidelines originally designed for major or mid-level wholesale offenders were applied to low level, retail offenders. The 2016 statutory and guidelines changes recognize this history of injustice. Accordingly, the proposed Guideline 2.B.7.c. allows current offenders to show that their criminal history scores, because of prior controlled substance crime convictions, overstate the seriousness of their prior controlled substance crime conduct.

The proposed Guideline is not retroactive. It would apply only to "offenders whose *date of offense* is on or after the [Guideline's] effective date." Minn. Sentencing Guideline 3.G.1. (Italics added). Contrary to what is suggested by Judge Small's case examples, the proposed Guideline creates no right to a "recalculation" of a criminal history score.¹

The proposed Guideline would apply only if the "court finds, by a preponderance of the evidence, that the facts underlying the prior [pre-August 1, 2016] conviction would have constituted a controlled substance crime of a lesser degree, or a gross misdemeanor controlled substance crime, if the offense had been committed on or after August 1, 2016."

Under the proposed Guideline, the state meets its burden to prove a criminal history score by establishing the fact of a prior controlled substance crime conviction. It would then be up to the defendant to show that the points attributable to that conviction overstate the seriousness of the underlying criminal conduct, as measured by the current controlled substance crime

¹ A sentencing law that reduces punishment may apply "retroactively" to cases pending final judgment on or after the law's effective date. See *State v. Coolidge*, 282 N.W.2d 511, 514-515 (Minn. 1979). But such retroactivity to pending cases does not apply in the face of contrary legislative intent. See *Edstrom v. State*, 326 N.W.2d 10 (Minn. 1982). If Judge Small's argument is that the proposed Guideline, together with 3.G.1., is ambiguous with respect to retroactivity, I would respectfully ask him to point out the ambiguity so that the Commission can clarify the matter.

statutory scheme. There is nothing remarkable about putting the burden of proof on a defendant to obtain a benefit under the guidelines; e.g., the benefit of a mitigated departure.²

Because the defendant would be moving to lower his or her criminal history score to reduce an otherwise presumptive guidelines sentence, *Blakely* procedures are not required. Like other ordinary sentencing issues, the rules of evidence would not apply. Minn. Rule Evidence 1101(b)(3). In most cases, judges would decide the defendants' motions by reviewing complaints and police reports in connection with the prior controlled substance crime convictions. Both parties would argue whether or not the facts underlying the prior controlled substance crime convictions would constitute a lesser controlled substance crime under the current statutory framework. A tie goes to the state.

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² “As a general rule, the party seeking to benefit from a claim or defense has the burden of persuasion.” 11 Minn. Prac., *Evidence* § 301.01 (4th Ed. 2016).