

Minnesota Sentencing Guidelines Commission

Weighting Prior Controlled Substance Crimes in Criminal History Part A: Evaluation of Options November 17, 2016

Issue: Effective August 1, 2016, the definitions of several drug offenses changed. Following those changes, MSGC staff have been advising practitioners to weight prior drug offenses according to current offense definitions, in accordance with staff's interpretation of Minnesota Sentencing Guidelines §§ 2.B.1 & 2.B.7.a and Comment 2.B.106. This interpretation, however, has been the subject of some controversy. The Commission began discussion of this issue at its October 26, 2016, meeting, and it presently has the issue under review. The Commission may choose to adopt a different interpretation of the Guidelines through commentary, to change the Guidelines themselves, to do both, or to do neither.

Background: Please refer to the materials provided at the October 26, 2016, meeting.

Options. There appear to be three options for the Commission's consideration. Two options have modified versions ("Modified Option B" and "Modified Option C"), which incorporate all features of the base option with additional features. These options are summarized and evaluated in this document ("Part A"); draft implementation language for each option is detailed in a separate document ("Part B").

Option A. Weight prior Minnesota drug offenses under present-day offense definitions. Conduct a factual inquiry into the drug type and amount of the prior conviction offense; determine under what present-day offense definition the prior offense would have fallen; and weight the prior offense accordingly.

Example: An offender with a 2015 prior first-time felony 5th Degree conviction for possessing meth "residue" would, for an August 2016 current offense, receive a misdemeanor unit in his criminal history score, because the drug amount was apparently less than 0.25 grams. (Additional examples are in Table 2.)

Option B. Weight prior Minnesota drug offenses as if they were equivalent to the present-day offense of the same name. Disregard threshold changes that made some offenses less or more severe, and made some fifth degree offenses gross misdemeanors.

Example: An offender with a 2015 prior first-time felony 5th Degree conviction for possessing meth "residue" would, for an August 2016 current offense, receive ½

felony point in his criminal history score, because the prior offense was felony controlled substance crime in the 5th Degree. (Additional examples are in Table 2.)

[Modified Option B. As an exception to the above, weight a prior Minnesota drug offense under present-day offense definitions (see Option A) if the sentencing court finds, by a preponderance of evidence, that the facts underlying the prior conviction would constitute a lesser controlled substance crime if the offense had been committed on or after August 1, 2016.]

[Example: Same as Option B example—unless the defense attorney could prove by a preponderance of evidence that the prior offense involved less than 0.25 grams of methamphetamine. In this “residue” case, such proof is likely available, so the prior offense would receive a misdemeanor unit in the criminal history score.]

Option C. Correspond prior Minnesota drug offenses to present-day offenses according to a strict comparison of the elements of the prior drug law that was violated with the elements of present-day drug statutes. Disregarding the underlying facts and looking only at the elements, determine the most severe present-day offense that would necessarily be established by proof of any violation of the statute previously violated.

Example: An offender with a 2015 prior 1st Degree conviction for sale of 14 grams of heroin would, for an August 2016 current offense, receive 1½ felony points in his criminal history score, rather than 2 felony points, because the elements of the prior crime (sale of 10 grams of cocaine, heroin, or meth) encompass some behavior (sale of 10 grams of cocaine or meth) that is covered, in the present-day statute, by a drug offense no more serious than 2nd Degree. (Additional examples are in Table 2; for further explanation, refer also to footnote 3.)

[Modified Option C. As an exception to the above, if the prosecutor wishes the facts of a prior offense to be evaluated under present-day offense definitions (see Option A), that party may be permitted to prove up the prior offense’s conformity to the present-day threshold at a *Blakely* trial, provided that such proof is limited to the threshold range of the prior offense.]

[Example: Same as Option C example—unless the prosecutor could prove to a jury beyond a reasonable doubt that the prior sale offense involved heroin, rather than cocaine or meth. In the event of such proof, the offender would receive 2 felony points in his criminal history score.]

Application: Table 1 lists all prior controlled substance crimes which, if committed before August 1, 2016, would be treated differently¹ under Options A, B, and C, for purposes of calculating the criminal history applicable to a current offense committed on or after August 1, 2016. For reference purposes, the weight of the prior offense that would historically have been assigned to a current offense committed before August 1, 2016, is also shown (although that column is always the same as Option B). The frequency of each crime, as a percentage of all drug cases sentenced in 2014, is also displayed.²

Table 1: Application of Options A, B, and C to various prior drug offenses.

Prior drug offense, committed before 8/1/16, no special charging provisions (zones, children, etc.)		Criminal history weight in points (& degree), current offense committed before 8/1/16	% of 2014 felony drug sentences	Criminal history weight in points (& degree), current offense committed on or after 8/1/16		
				Option A	Option B	Option C
SALE	≥10 g heroin	2 (1 st)	0.3%	2 (1 st)	2 (1 st)	1½ (2 nd)
	3 to 9.9 g heroin	1½ (2 nd)	0.4%	1½ (2 nd)	1½ (2 nd)	1½ (3 rd)
	≥17 g cocaine or meth	2 (1 st)	1.9%	2 (1 st)	2 (1 st)	1½ (2 nd)
	10 to 16.9 g cocaine or meth	2 (1 st)	0.7%	1½ (2 nd)	2 (1 st)	1½ (2 nd)
	3 to 9.9 g cocaine or meth	1½ (2 nd)	2.7%	1½ (3 rd)	1½ (2 nd)	1½ (3 rd)
	25 to 49.9 kg marijuana	1½ (2 nd)	0.1%	2 (1 st)	1½ (2 nd)	2 (1 st)
	10 to 24.9 kg marijuana	1½ (3 rd)	0.0%	1½ (2 nd)	1½ (3 rd)	1½ (2 nd)
POSSN	≥25 g heroin	2 (1 st)	0.1%	2 (1 st)	2 (1 st)	1½ (2 nd)
	6 to 24.9 g heroin	1½ (2 nd)	0.3%	1½ (2 nd)	1½ (2 nd)	½ (5 th) ³

¹ Only those prior offenses whose treatment varies among the three options are listed in Table 1. For example, because a prior sale of up to 2.9 g of cocaine, heroin, or meth would be treated identically by all three options (as a 3rd Degree offense with a weight of 1½), that offense, although comprising 7.5% of all drug cases sentenced in 2014, is excluded from Table 1. On the other hand, because 2nd and 3rd Degree offenses are each assigned a weight of 1½, some prior offenses, although weighted equally under all options, are nevertheless shown on Table 1 because they would equate to different degrees under the different options (e.g., sale of 3 to 9.9 g heroin).

² Because not all drug offenses are displayed (*see* note 1), the percentages will not total 100 percent.

³ The fact that Option C, using a strict elements test, would weight a prior 2nd Degree possession of 24 g of heroin as equivalent to a present-day 5th Degree possession begs the following explanation. The prior conviction was under Minn. Stat. § 152.022, subd. 2(a)(1) (2011), which prohibited the possession of “six grams or more of cocaine, heroin, or methamphetamine.” Because Option C looks only at the elements of the

	Prior drug offense, committed before 8/1/16, no special charging provisions (zones, children, etc.)	Criminal history weight in points (& degree), current offense committed before 8/1/16	% of 2014 felony drug sentences	Criminal history weight in points (& degree), current offense committed on or after 8/1/16		
				Option A	Option B	Option C
POSSESSION	3 to 5.9 g heroin	1½ (3 rd)	0.5%	1½ (3 rd)	1½ (3 rd)	½ (5 th)
	≥50 g cocaine or meth	2 (1 st)	1.8%	2 (1 st)	2 (1 st)	1½ (2 nd)
	25 to 49.9 g cocaine or meth	2 (1 st)	1.5%	1½ (2 nd)	2 (1 st)	1½ (2 nd)
	10 to 24.9 g cocaine or meth	1½ (2 nd)	2.7%	1½ (3 rd)	1½ (2 nd)	½ (5 th)
	6 to 9.9 g cocaine or meth	1½ (2 nd)	1.0%	½ (5 th)	1½ (2 nd)	½ (5 th)
	3 to 5.9 g cocaine or meth	1½ (3 rd)	5.4%	½ (5 th)	1½ (3 rd)	½ (5 th)
	50 to 99.9 kg marijuana	1½ (2 nd)	0.0%	2 (1 st)	1½ (2 nd)	2 (1 st)
	25 to 49.9 kg marijuana	1½ (3 rd)	0.1%	1½ (2 nd)	1½ (3 rd)	1½ (2 nd)
	5 th Degree, more than trace ⁴ amt. of controlled substance, no prior ch. 152 convictions	½ felony point (felony 5 th)	27.5%	½ felony point (felony 5 th)	½ felony point (felony 5 th)	1 misdemeanor unit (gross misd. 5 th)
	Trace ⁴ amount of controlled substance, no prior ch. 152 convictions	½ felony point (felony 5 th)	7.7%	1 misdemeanor unit (gross misd. 5 th)	½ felony point (felony 5 th)	1 misdemeanor unit (gross misd. 5 th)

crime, and because the element included any of the three drugs, Option C requires the practitioner to find the most severe offense whose elements now necessarily prohibit the possession of 6 g of cocaine, of 6 g of heroin, and of 6 g of meth. The present-day 2nd Degree statute prohibits the possession of 6 g of heroin, but smaller amounts of cocaine or meth. Even the present-day 3rd Degree statute, with its 10 g threshold for cocaine and meth, does not necessarily prohibit all drugs prohibited by the prior 2nd Degree possession statute. Accordingly, Option C requires weighting the prior 2nd Degree as a 5th Degree.

⁴ This document uses the term “trace” amounts to describe those quantities specified in Minn. Stat. § 152.025, subd. 4(a) (2016) (<0.05 g heroin; or <0.25 g or ≤1 dosage unit of all Schedule I-IV controlled substances other than heroin and marijuana).

Of the 16,763 felony offenders sentenced in 2015, 29 percent (4,891) had at least one⁵ prior drug offense in their criminal history. Not all of those 4,891 offenders, however, had prior drug offenses that would be affected by one of the above policy choices. (See notes 1 and 2.)

Example: Table 2 calculates the criminal history for a hypothetical offender with four prior drug offenses with offense dates prior to August 1, 2016, being sentenced for a current offense committed on or after August 1, 2016, under each of the three options. The prior offenses were selected to illustrate variance among the options, not to reflect a typical offender’s criminal history.

Table 2: Example of Options A, B, and C applied to a hypothetical offender being sentenced for a current offense on or after August 1, 2016, with four prior drug offenses committed before August 1, 2016.

Prior Offense	Option A	Option B	Option C
1st Degree sale, 20 g cocaine	Weight as 1st Degree sale: 2 felony pts.	Weight as 1st Degree sale: 2 felony pts.	Weight as 2nd Degree sale: 1½ felony pt.
2nd Degree possession, 7 g heroin	Weight as 2nd Degree possession: 1½ felony pt.	Weight as 2nd Degree possession: 1½ felony pt.	Weight as 5th Degree possession: ½ felony pt.
2nd Degree possession, 7 g cocaine	Weight as 5th Degree possession: ½ felony pt.	Weight as 2nd Degree possession: 1½ felony pt.	Weight as 5th Degree possession: ½ felony pt.
5th Degree trace possession, no priors	Weight as gross misdemeanor: 1 misdemeanor unit	Weight as felony: ½ felony pt.	Weight as gross misdemeanor: 1 misdemeanor unit
Total points	4 felony points & 1 misdemeanor unit	5½ felony points*	2½ felony points & 1 misdemeanor unit*

*Under the “Modified” versions of Option B and Option C, a party could change the criminal history score to that of Option A (4 felony points and 1 misdemeanor unit) if the party were able to provide the requisite proof regarding the conformity of the prior offenses to the current offense definitions.

⁵ Those 4,891 offenders had a total of 8,818 prior drug offenses.

Evaluation: The following is staff’s assessment of the pros and cons of each option. Table 3, which follows the assessment, is a tabular summary of this evaluation of options.

Option A: Pros. Because it assigns weight to a prior offense according to the present-day statutory elements, Option A defers to the Legislature’s current understanding of the prior offense’s present-day severity, and may therefore be said to conform to the Legislature’s current concept of justice. Option A most closely conforms to staff’s understanding of the Commission’s historical understanding of the language of the Sentencing Guidelines⁶ and may therefore arguably express a greater degree of historical continuity.

Option A: Cons. Because it changes how prior offenses are viewed today, Option A may be confused with, or viewed as, retroactivity. Option A is the most difficult option for staff to explain (in terms of complexity) and for probation officers to implement (both in terms of complexity and time). Because it requires the probation officer to reassess the facts of a prior case, Option A creates the highest risk of error and non-uniform treatment. Also due to that fact-finding requirement, Option A is the most vulnerable to a constitutional challenge under *Blakely*⁷ and requires the most fact-checking by prosecutors and defense attorneys.

Option B: Pros. Because it assigns weight to a prior offense based on the severity of that offense as it was understood to be at the time of the offense was committed, Option B may be the most respectful to the judge’s and the parties’ historical understanding of the offense’s severity. Option B should be safe from a *Blakely* challenge, as it would employ only the fact of the prior conviction in assessing criminal history. Option B is the simplest for all practitioners to administer, as the name of the prior offense will govern how the offense is weighted today; it is not necessary to make a pre- and post-August 1, 2016 distinction. **Modified Option B** would, on the other hand, increase complexity for judges and parties on a case-by-case basis, and would particularly increase the burden on defense counsel to be alert for cases in which criminal history scores should be adjusted downward to conform to the Legislature’s present-day definition of a prior offense. Modified Option B should

⁶ On the other hand, the Guidelines history in question includes a time period that predated *Blakely*, which may call into question the validity of this historical approach. See note 7 and accompanying text.

⁷ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), as applied by *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005), held that a defendant has a right to a jury finding, beyond a reasonable doubt, the existence of any fact, other than the fact of a prior conviction, that provides grounds for an aggravated departure from the Minnesota Sentencing Guidelines’ presumptive sentence. To the extent that a rule permits an offender’s sentence to be increased by a criminal history score that is, in turn, increased by the fact of a drug type or amount that was not necessarily explicitly proven—e.g., alleged in a prior complaint—that rule may arguably be exposed to a *Blakely* challenge.

also be safe from a *Blakely* challenge, as no increases in sentence or aggravated departures would result from counsel seeking application of the more lenient, present-day offense definitions.

Option B: Cons. Because it would generally result in the highest criminal history scores of the three options, Option B would result in the greatest burden on prison resources. Moreover, given the recent legislative determination that the behavior underlying some of those prior offenses is no longer deemed to be as serious, this resource cost is arguably unnecessary. **Modified Option B** would, on the other hand, allow a safety valve—which defense counsel would likely invoke only in those cases in which it would make a meaningful difference—so that the criminal history could be adjusted to reflect the present-day concept of the prior offense’s severity.

Option C: Pros. Because Option C would result in the lowest criminal history scores, it would result in the least burden on prison resources. As a strict-elements test, Option C would be encounter no *Blakely* challenge; it is, rather, the most straightforward application of *Blakely*. Option C should be fairly straightforward to administer, as a conversion chart could be developed to show how pre-2016 offense elements translate to post-2016 offense elements. **Modified Option C** would, on the other hand, increase the burden on prosecutors to prove to a jury beyond a reasonable doubt the conformity of a prior offense to the Legislature’s present-day offense definition. (It is possible that such proof might be negotiated in the plea-bargaining process.) Modified Option C should also be safe from a *Blakely* challenge, as any increases in sentence would result from facts proven to a jury beyond a reasonable doubt.

Option C: Cons. Because of some of the changes in the structure of controlled substance crimes—particularly, the manner in which heroin is now distinguished from cocaine and methamphetamine—Option C, which strictly construes the elements without looking at the facts, would cause the greatest deviations from what one might expect the prior offense’s weight to be,⁸ and the greatest deviation from what the parties were expecting at the time the prior offense went through the court system. **Modified Option C** would, on the other hand, allow a safety valve—which a prosecutor would likely invoke only in those cases in which it would make a meaningful difference—so that the criminal history could be adjusted to reflect the present-day concept of the prior offense’s severity.

⁸ See, e.g., note 3.

Table 3: Summary of each option’s pros and cons.

Criterion	Option A	Option B	Modified Option B	Option C	Modified Option C
Consistent with MSG history	+				
Effects current legislative vision	+	-	+	-	+
Respects parties’ prior understanding		+		-	
Safe from <i>Blakely</i> challenge	-	+	+	+	+
Error, non-uniformity risk	-	+			
Burden on prisons		-		+	
Burden on probation officers	-	+		+	
Burden on defense attorneys	-		-		
Burden on prosecutors	-				-
Other					
Unweighted total score	-3	+2	+1	+1	+1

Minnesota Sentencing Guidelines Commission

Weighting Prior Controlled Substance Crimes in Criminal History Part B: Implementation of Preferred Option November 17, 2016

Issue: The previous document (Part A) presented and evaluated various policy options regarding assigning criminal-history weights to prior controlled substance crimes. Once the Commission has decided on its preferred policy option, it must decide how it wishes to implement that policy. This decision involves considerations of whether the Commission wishes to change the Commentary, the Guidelines themselves, or both. These choices have timing implications. This document (Part B) will describe these options and implications.

Approaches and Timing: The Commission may wish to change the Commentary, or the Guidelines themselves, or both. Some of the advantages and disadvantages of these approaches—as well as timing considerations—follow.

Changes to the Commentary. Changes to the Commentary can take effect immediately, without public hearing or presentation to the Legislature.¹ Thus, through immediate Commentary changes, the Commission can act quickly to bring clarity to Guidelines practitioners and MSGC staff. On the other hand, the Commentary—and changes to it—are not binding, but rather are advisory.² The Commentary cannot be relied upon to create an exception to what otherwise would be a clear and unambiguous Guidelines provision.³

Changes to the Guidelines. Changes to the Guidelines—unlike changes to the Commentary alone—can substantively alter Guidelines policy. Compared with changes to the Commentary, however, Guidelines changes take effect more slowly. Unless mandated or authorized by the Legislature, any change to the calculation of a criminal history score must—in addition to going through the public hearing

¹ Neither the terms of Minn. Stat. § 244.09, subd. 11, nor the terms of Minn. Rules chapter 3000—both of which govern changes to the Minnesota Sentencing Guidelines—similarly govern changes to the Commentary. Historically, the Commission has not always submitted commentary changes for legislative review; for example, when the Commission first promulgated the Commentary in 1980, it did so several months after submitting the Guidelines to the Legislature, and shortly before the Guidelines were to take effect. *Cf.* Meeting Minutes of the Minn. Sentencing Guidelines Comm’n Meeting (April 3, 1980) (approving the Commentary on that date) *with* 1978 Minn. Laws ch. 723, art. 1, § 9 (requiring the Commission to submit Guidelines to the Legislature by January 1, 1980, with an effective date of May 1, 1980).

² *State v. Rouland*, 685 N.W.2d 706, 708 (Minn. Ct. App. 2004), *review denied* (Minn. Nov. 23, 2004); *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003).

³ *Rouland*, 685 N.W.2d at 708; *State v. Notch*, 446 N.W.2d 383, 386 (Minn. 1989).

process⁴—be submitted to the Legislature by January 15. In the absence of legislative intervention, such a change will take effect on August 1.⁵

An exception exists, however: The Commission may accelerate this process in the case of “a modification ... relating to a crime created or amended by the legislature in the preceding session.”⁶ Under the “preceding session” exception, such changes take effect, following public hearing, on the date ordered by the Commission.⁷ Because the next regular session of the Legislature begins on January 3, 2017, a Guidelines modification relating to a change made in the 2016 legislative session would arguably need to take effect no later than January 2, 2017, in order to take advantage of the “preceding session” exception.⁸

Anticipating that the Commission may propose, at today’s meeting, to make a Guidelines change effective before January 3, 2017, MSGC staff have made the necessary arrangements for a public hearing to take place on December 21, 2016, followed by a Commission meeting on December 28, 2016.⁹

Changes to both the Guidelines and Commentary. The Commission may also wish to change both the Guidelines and the Commentary. Historically, the Commentary provides explanation, clarification, examples, or the rationale of the Guidelines provisions, and the Commission may adopt changes to both the Guidelines and Commentary for one of those purposes. On the other hand, the Commission may wish to communicate an immediate, interim explanation of policy through a Commentary change, followed by a companion Guidelines change taking effect on January 1, 2017.

Draft Implementation Language. The following are staff-drafted options for implementation language. For brevity, they are shown out of context; their context within the existing 2016 Minnesota Sentencing Guidelines and Commentary is provided in Appendix A. For historical reference, two prior versions of comment 2.B.104 through 2.B.106 are provided in Appendix B: The version immediately after the various degrees of controlled substance crime were created (1990); and the version immediately before the 2012 rewrite of the Sentencing Guidelines (2011).

⁴ Minn. R. 3000.0100 *et seq.*

⁵ Minn. Stat. § 244.09, subd. 11.

⁶ *Id.*

⁷ Minn. R. 3000.0600, subp. 3.

⁸ Under this scenario, MSGC staff suggests January 1, 2017, as an effective date.

⁹ MSGC staff suggests that, if the Commission wishes to meet on December 28 or shortly thereafter, that such a meeting replace both MSGC meetings currently scheduled for December 15, 2016, and January 12, 2017.

Option A—Changes to Commentary Only.

2.B.106. *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements, except as provided in section 2.B.7.b. For example, in 1989 and 2016, the controlled substance laws were restructured on the basis of the amount and type of controlled substance involved in the conviction. For prior Minnesota controlled substance crimes committed before the effective date of the applicable change, and all prior non-Minnesota controlled substance convictions, therefore, consider the amount and type of the controlled substance when determining the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense. To illustrate, assume an offender was convicted in 2015 of Third-Degree Controlled Substance Crime for possessing 4 grams of methamphetamine. Because, under current offense definitions, the possession of 4 grams of methamphetamine now meets the definition of felony Fifth-Degree Controlled Substance Crime, the prior offense should be assigned a weight of ½ felony point when sentencing a current offense. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

* * *

2.B.701. *The Commission recognized that the classification of criminal conduct as a felony, gross misdemeanor, misdemeanor, or petty misdemeanor is determined legally by the sentence given rather than the conviction offense. If a felony offense has been redefined by the Legislature as a non-felony offense, base the appropriate classification on how the prior offense would currently be classified in consideration of any new or removed elements, except as provided in section 2.B.7.b. For example, in 2016, some offenses that were previously felony Fifth-Degree Controlled Substance Crime became gross misdemeanors. For prior Minnesota controlled substance crimes committed before August 1, 2016, and all prior non-Minnesota controlled substance convictions, therefore, consider the amount and type of the controlled substance when determining the appropriate classification to be assigned to a prior felony Fifth-Degree Controlled Substance Crime. To illustrate, assume an offender was convicted in 2015 of Fifth-Degree Controlled Substance Crime for possessing a residual amount of methamphetamine weighing less than 0.25 grams, and that the offender had not been previously convicted of a chapter 152 offense (or similar crime from another jurisdiction). Because, under current offense definitions, the prior offense now meets the definition of gross misdemeanor Fifth-Degree Controlled Substance Crime, the prior offense should be assigned a weight of one misdemeanor unit when sentencing a current offense.*

Option B—First Approach—Changes to Commentary Only.

2.B.106. *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense ~~would~~ is currently ~~be~~ ranked ~~in consideration of any new or removed elements~~. For example, in 2016, the Legislature redefined various controlled substance crimes. A prior offense of Third-Degree Controlled Substance Crime, committed in 2015, will continue to be assigned a weight of 1½ felony points, even though, under current offense definitions, the prior offense might meet the definition of Fifth-Degree Controlled Substance Crime. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

* * *

2.B.701. *The Commission recognized that the classification of criminal conduct as a felony, gross misdemeanor, misdemeanor, or petty misdemeanor is determined legally by the sentence given rather than the conviction offense. If a felony offense has been redefined by the Legislature as a non-felony offense, base the appropriate classification on how the prior offense was formerly classified. For example, in 2016, the Legislature redefined various controlled substance crimes. A prior Fifth-Degree Controlled Substance Crime, committed in 2015, will continue to be assigned a weight of ½ felony point, even though, under current offense definitions, the prior offense may meet the definition of gross misdemeanor Fifth-Degree Controlled Substance Crime.*

Option B—Second Approach—Changes to Guidelines and Commentary.

2.B.106. *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements, except as provided in sections 2.B.7.b and 2.B.7.c. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

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[2.B.]7. Determining Offense Levels for Prior Offenses.

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- c. Drug Threshold. When an offender's criminal history contains a Minnesota felony conviction for controlled substance crime in the first, second, third, or fifth degree with an offense date prior to August 1, 2016, the current felony offense of the same name determines the offense classification in calculating the criminal history score, notwithstanding the redefinition of the offense.

* * *

2.B.704. On August 1, 2016, drug-quantity thresholds changed for various degrees of controlled substance crime, and a gross misdemeanor version of Fifth-Degree Controlled Substance Crime was created. Despite these elemental changes and the creation of the Drug Offender Grid, the essential severity of the various degrees of controlled substance crime remained unaltered by the Legislature and the Commission. The Commission decided that prior Minnesota felony drug offenses committed before August 1, 2016, should receive the same weight as offenses of the same degree committed on or after that date. To illustrate, assume an offender was convicted in 2015 of Fifth-Degree Controlled Substance Crime for possessing a residual amount of methamphetamine weighing less than 0.25 grams, and that the offender had not been previously convicted of a chapter 152 offense (or similar crime from another jurisdiction). Because the prior offense was a felony Fifth-Degree Controlled Substance Crime, it will be eligible to contribute ½ felony point to the offender's criminal history score, even though, under current offense definitions, the prior offense might meet the definition of gross misdemeanor Fifth-Degree Controlled Substance Crime.

Modified Option B—Changes to Guidelines and Commentary.

2.B.106. *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements, except as provided in sections 2.B.7.b and 2.B.7.c. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

* * *

[2.B.]7. Determining Offense Levels for Prior Offenses.

* * *

c. Drug Threshold. When an offender's criminal history contains a Minnesota felony conviction for controlled substance crime in the first, second, third, or fifth degree with an offense date prior to August 1, 2016, the current felony offense of the same name determines the offense classification in calculating the criminal history score, notwithstanding the redefinition of the offense, unless the court finds, by a preponderance of evidence, that the facts underlying the prior 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. If the court makes such a finding, then the controlled substance crime of the lesser degree, or the gross misdemeanor controlled substance crime, determines the offense classification in calculating the criminal history score.

* * *

2.B.704. On August 1, 2016, drug-quantity thresholds changed for various degrees of controlled substance crime, and a gross misdemeanor version of Fifth-Degree Controlled Substance Crime was created. Despite these elemental changes and the creation of the Drug Offender Grid, the essential severity of the various degrees of controlled substance crime remained unaltered by the Legislature and the Commission. The Commission decided that prior Minnesota felony drug offenses committed before August 1, 2016, should receive the same weight as offenses of the same degree committed on or after that date. On the other hand, the Commission decided that it was appropriate to permit a reduced weight when it could be

proven that the facts underlying the prior offense comported with an offense that the Legislature now considered to be less serious. To illustrate, assume an offender was convicted in 2015 of Fifth-Degree Controlled Substance Crime for possessing a residual amount of methamphetamine weighing less than 0.25 grams, and that the offender had not been previously convicted of a chapter 152 offense (or similar crime from another jurisdiction). Because the prior offense was a felony Fifth-Degree Controlled Substance Crime, it will be eligible to contribute ½ felony point to the offender's criminal history score, unless it is proven by a preponderance of evidence that, under current offense definitions, the prior offense meets the definition of gross misdemeanor Fifth-Degree Controlled Substance Crime. In the latter case, the prior offense will be eligible to contribute one gross misdemeanor unit to the offender's criminal history score.

Option C—Changes to Commentary Only.

2.B.106. *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements, except as provided in section 2.B.7.b. This rule is limited by the constitutional principles discussed in State v. Shattuck, 704 N.W.2d 131 (Minn. 2005), which held that a defendant generally has the right to a jury finding, beyond a reasonable doubt, the existence of any fact, other than the fact of a prior conviction, that provides grounds for an aggravated departure from the Minnesota Sentencing Guidelines. To illustrate the application of these principles, assume that, in 2015, an offender committed a prior offense of Second-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2015), which prohibited the possession of “six grams or more of cocaine, heroin, or methamphetamine.” In 2016, the Legislature redefined various controlled substance crimes. Because the behavior prohibited by the prior offense encompasses behavior that may now be prohibited by Second-, Third-, or Fifth-Degree Controlled Substance Crime, the prior offense must, consistent with the principles of Shattuck, be assigned a weight consistent with the most severe present-day offense whose elements were necessarily established by proof of any violation of the statute previously violated. In this example, that present-day offense is felony Fifth-Degree Controlled Substance Crime. Any Second-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2015), will therefore be assigned a weight of ½ felony point when sentencing a current offense. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

* * *

2.B.701. *The Commission recognized that the classification of criminal conduct as a felony, gross misdemeanor, misdemeanor, or petty misdemeanor is determined legally by the sentence given rather than the conviction offense. If a felony offense has been redefined by the Legislature as a non-felony offense, base the appropriate classification on how the prior offense would currently be classified in consideration of any new or removed elements, except as provided in section 2.B.7.b. This rule is limited by the constitutional principles discussed in State v. Shattuck, 704 N.W.2d 131 (Minn. 2005), which held that a defendant generally has the right to a jury finding, beyond a reasonable doubt, the existence of any fact, other than the fact of a prior conviction, that provides grounds for an aggravated departure from the Minnesota Sentencing Guidelines. To illustrate application of these principles, assume that, in 2015, an offender who then had no prior convictions for chapter 152 offenses (or similar crimes from*

other jurisdictions) committed an offense of Fifth-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2015), which prohibited the possession of any amount of any schedule I through IV controlled substance other than marijuana. In 2016, the Legislature redefined various controlled substance crimes. Because the behavior prohibited by the prior felony offense encompasses behavior that may now be prohibited by the new gross misdemeanor Fifth-Degree Controlled Substance Crime, the prior Fifth-Degree offense must, consistent with the principles of Shattuck, be assigned a weight consistent with the most severe present-day offense whose elements were necessarily established by proof of any violation of the statute previously violated. In this example, that present-day offense is gross misdemeanor Fifth-Degree Controlled Substance Crime. Any Fifth-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2015), will therefore be assigned a weight of 1 misdemeanor unit when sentencing a current offense.

Modified Option C—Changes to Commentary Only.

2.B.106. *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements, except as provided in section 2.B.7.b. This rule is limited by the constitutional principles discussed in State v. Shattuck, 704 N.W.2d 131 (Minn. 2005), which held that a defendant generally has the right to a jury finding, beyond a reasonable doubt, the existence of any fact, other than the fact of a prior conviction, that provides grounds for an aggravated departure from the Minnesota Sentencing Guidelines. To illustrate the application of these principles, assume that, in 2015, an offender committed a prior offense of Second-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2015), which prohibited the possession of “six grams or more of cocaine, heroin, or methamphetamine.” In 2016, the Legislature redefined various controlled substance crimes. Because the behavior prohibited by the prior offense encompasses behavior that may now be prohibited by Second-, Third-, or Fifth-Degree Controlled Substance Crime, the prior offense must, consistent with the principles of Shattuck, be assigned a weight consistent with the most severe present-day offense whose elements were necessarily established by proof of any violation of the statute previously violated. In this example, that present-day offense is felony Fifth-Degree Controlled Substance Crime. Any Second-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2015), will therefore be assigned a weight of ½ felony point when sentencing a current offense. On the other hand, also consistent with the principles of Shattuck, the prosecutor may seek to prove, in compliance with the Rules of Criminal Procedure pertaining to aggravated sentences, the prior offense’s conformity to the present-day threshold of a more serious offense. Such proof is limited to the threshold range of the prior offense. For example, the prosecutor in the previous example could not seek to prove that the offender possessed 25 grams of heroin, as that weight would exceed the Second-Degree threshold range that applied at the time of conviction. If the prosecutor could prove that the prior offense involved possession of 12 grams of methamphetamine, however, such proof would establish conformity to the present-day definition of Third-Degree Controlled Substance Crime and would fall within the prior Second-Degree range. The prior offense would therefore be assigned a weight of 1½ felony points when sentencing a current offense. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

* * *

2.B.701. *The Commission recognized that the classification of criminal conduct as a felony, gross misdemeanor, misdemeanor, or petty misdemeanor is determined legally by the sentence given rather than the conviction offense. If a felony offense has been redefined by the Legislature as a non-felony offense, base the appropriate classification on how the prior offense would currently be classified in consideration of any new or removed elements, except as provided in section 2.B.7.b. This rule is limited by the constitutional principles discussed in State v. Shattuck, 704 N.W.2d 131 (Minn. 2005), which held that a defendant generally has the right to a jury finding, beyond a reasonable doubt, the existence of any fact, other than the fact of a prior conviction, that provides grounds for an aggravated departure from the Minnesota Sentencing Guidelines. To illustrate application of these principles, assume that, in 2015, an offender who then had no prior convictions for chapter 152 offenses (or similar crimes from other jurisdictions) committed an offense of Fifth-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2015), which prohibited the possession of any amount of any schedule I through IV controlled substance other than marijuana. In 2016, the Legislature redefined various controlled substance crimes. Because the behavior prohibited by the prior felony offense encompasses behavior that may now be prohibited by the new gross misdemeanor Fifth-Degree Controlled Substance Crime, the prior Fifth-Degree offense must, consistent with the principles of Shattuck, be assigned a weight consistent with the most severe present-day offense whose elements were necessarily established by proof of any violation of the statute previously violated. In this example, that present-day offense is gross misdemeanor Fifth-Degree Controlled Substance Crime. Any Fifth-Degree Controlled Substance Crime in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2015), will therefore be assigned a weight of 1 misdemeanor unit when sentencing a current offense. On the other hand, also consistent with the principles of Shattuck, the prosecutor may seek to prove, in compliance with the Rules of Criminal Procedure pertaining to aggravated sentences, the prior offense's conformity to the present-day threshold of a more serious offense. Such proof is limited to the threshold range of the prior offense. For example, if the prosecutor could prove that the prior offense involved possession of 1 gram of methamphetamine, such proof would establish conformity to the present-day felony definition of Fifth-Degree Controlled Substance Crime. The prior offense would therefore be assigned a weight of ½ felony points when sentencing a current offense.*

APPENDIX A – Sections 2.B.1 (less comments 2.B.107 through 2.B.116) and 2.B.7, Minnesota Sentencing Guidelines and Commentary (Aug. 1, 2016)

2. Determining Presumptive Sentences

* * *

B. Criminal History

* * *

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.

The severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense.

- a. Current Offense on Standard Grid or Drug Offender Grid. If the current offense is **not** on the Sex Offender Grid, determine the weight assigned to each prior felony sentence according to its severity level, as follows:

Current Offense on Standard Grid or Drug Offender Grid	SEVERITY LEVEL	POINTS
	1 – 2, D1 – D2	½
	3 – 5, D3 – D5	1
	6 – 8, D6 – D7	1 ½
	9 – 11, D8 – D9	2
	Murder 1 st Degree	2
	A	2
	B – E	1 ½
	F – G	1
	H	½ (for first offense); 1 (for subsequent offenses)

- b. Current Offense on Sex Offender Grid. If the current offense is on the Sex Offender Grid, determine the weight assigned to each prior felony sentence according to its severity level, as follows:

Current Offense on Sex Offender Grid	SEVERITY LEVEL	POINTS
	1 – 2, D1 – D2	½
	3 – 5, D3 – D5	1
	6 – 8, D6 – D7	1 ½
	9 – 11, D8 – D9	2
	Murder 1 st Degree	2
	A	3
	B – C	2
	D – E	1 ½
	F – G	1
	H	½ (for first offense); 1 (for subsequent offenses)

- c. Felony Decay Factor. A prior felony sentence or stay of imposition following a felony conviction must not be used in computing the criminal history score if a period of fifteen years has elapsed since the date of discharge from or expiration of the sentence to the date of the current offense.
- d. Assigning Felony Weights – Previous Court Appearances Resulting in Multiple Sentences. Following are exceptions to including prior felonies in criminal history when multiple felony sentences were imposed in a previous court appearance:
- (1) Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minn. Stats. §§ 152.137, 609.585 or 609.251, include in criminal history only the weight from the offense at the highest severity level.
 - (2) Single Course of Conduct / Multiple Victims. When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, include in criminal history only the weights from the two offenses at the highest severity levels.
- e. Assigning Felony Weights – Current Multiple Sentences. Multiple offenses sentenced at the same time before the same court must be sentenced in the

order in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced (also known as "*Hernandizing*") except as follows:

- (1) Single Course of Conduct / Multiple Sentences. When multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day under Minn. Stats. §§ 152.137, 609.585, or 609.251, the conviction and sentence for the "earlier" offense does not increase the criminal history score for the "later" offense.
 - (2) Single Course of Conduct / Multiple Victims. When multiple current convictions arise out of a single course of conduct in which there were multiple victims, weights are given only to the two offenses at the highest severity levels.
- f. Prior Offense with Attempt, Conspiracy, or Other Sentence Modifier. When a prior offense included a sentence modifier, such as attempt, conspiracy, or other sentence modifier as described in section 2.G, the prior conviction must be given the same felony weight as a completed offense.
 - g. Prior Offenses with No Conviction. Assign no weight to an offense for which a judgment of guilty has not been entered before the current sentencing, such as a stay of adjudication or continuance for dismissal.
 - 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.
 - i. Total Felony Points. The felony point total is the sum of the felony weights. If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number.

Comment

2.B.101. *The basic rule for computing the number of prior felony points in the criminal history score is that the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given for a felony level offense, no matter what period of probation is pronounced, before the current sentencing.*

2.B.102. *No partial points are given – thus, an offender with less than a full point is not given that point. For example, an offender with a total weight of 2 ½ would have 2 felony points.*

2.B.103. *The Commission determined that it was important to establish a weighting scheme for prior felony sentences to assure a greater degree of proportionality in the current sentencing. Offenders who have a history of serious felonies are considered more culpable than those offenders whose prior felonies consist primarily of low severity, nonviolent offenses.*

2.B.104. *The Commission recognized that determining the severity level of the prior felonies may be difficult in some instances. For that reason, the severity level of the prior offense is based on the severity level in effect when the offender commits the current offense.*

2.B.105. *If an offense has been repealed, but the elements of that offense have been incorporated into another felony statute, determine the appropriate severity level based on the severity level ranking for the current felony offense containing those similar elements. For example, in 2010, the Legislature recodified violations of domestic abuse no contact orders from Minn. Stat. § 518B.01, subd. 22(d) into Minn. Stat. § 629.75, subd. 2(d). This policy also applies to offenses that are currently assigned a severity level ranking, but were previously unranked and excluded from the Offense Severity Reference Table. For example, possession of pornographic work involving minors under Minn. Stat. § 617.247, subd. 3(a) was unranked until August 1, 2006. It is currently ranked at Severity Level E, and receives a weight of 1 ½ points.*

2.B.106. *If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

* * *

7. Determining Offense Levels for Prior Offenses.

- a. Classification of Prior Offense. The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies. Offenses that are petty misdemeanors by statute, or that are certified as or deemed to be petty misdemeanors under Minn. R. Crim. P. 23,

must not be used to compute the criminal history score.

- b. Monetary Threshold. When a monetary threshold determines the offense classification, the monetary threshold in effect when the prior offense was committed, not the current threshold, determines the offense classification in calculating the criminal history score.

Comment

2.B.701. *The Commission recognized that the classification of criminal conduct as a felony, gross misdemeanor, misdemeanor, or petty misdemeanor is determined legally by the sentence given rather than the conviction offense.*

2.B.702. *A monetary threshold determines the offense classification when the value of property or services is an element of the offense. Punishment for the offense typically increases as the dollar amount increases.*

2.B.703. *When the offense severity level is determined by a monetary threshold, the threshold in effect when the prior offense was committed determines the offense classification in criminal history. For example, beginning August 1, 2007, the monetary threshold for a felony level Theft of Moveable Property offense under Minn. Stat. § 609.52.2(a)(1) was divided between Severity Level 2 and Severity Level 3 by the dollar amount of \$5,000. Prior to that, this offense would have been assigned a severity level based on a dollar amount of \$2,500. Because this was a change by the Legislature for inflation and no change was made by the Commission to the severity levels, a Theft of Moveable Property offense over \$2,500 which previously received a Severity Level of 3 and a weight of 1 point in criminal history would continue to receive that same weight.*

* * *

APPENDIX B – Historical antecedents to Comments 2.B.104 through 2.B.106

1. Excerpt of Minnesota Sentencing Guidelines Comment II.B.101 (1990):

II.B.101. * * * *The Commission recognized that determining the severity level of the prior felonies may be difficult in some instances. The appropriate severity level shall be based on the severity level ranking of the prior offense of conviction that is in effect at the time the offender commits the current offense. If an offense has been repealed but the elements of that offense have been incorporated into another felony statute, the appropriate severity level shall be based on the current severity level ranking for the current felony offense containing those similar elements. For example, Unauthorized Use of a Motor Vehicle had been ranked at severity level I but was repealed in 1989. The elements of that offense were moved by the legislature to another statute and the new offense was ranked at severity level III. Therefore, the appropriate severity level that should be used to determine the weight of any prior felony sentences for Unauthorized Use of a Motor Vehicle is severity level III. Similarly, if an offense has been redefined by the legislature, the appropriate severity level shall be based on how the prior felony offense would currently be ranked in consideration of any new or removed elements. For example, the controlled substance laws were restructured and the current severity level rankings are in most situations determined on the basis of the amount and type of controlled substance involved in the conviction. The amount and type of the controlled substance should, therefore, be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense. In those instances where multiple severity levels are possible for a prior felony sentence but the information on the criteria that determine the severity level ranking is unavailable, the lowest possible severity level should be used. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

2. Minnesota Sentencing Guidelines comments 2.B.103 & 2.B.104 (2011):

2.B.103. *The Commission recognized that determining the severity level of the prior felonies may be difficult in some instances. The appropriate severity level shall be based on the severity level ranking of the prior offense of conviction that is in effect at the time the offender commits the current offense. If an offense has been repealed but the elements of that offense have been incorporated into another felony statute, the appropriate severity level shall be based on the current severity level ranking for the current felony offense containing those similar elements. This policy also applies to offenses that are currently assigned a severity level ranking, but were previously unranked and excluded from the Offense Severity Reference Table.*

2.B.104. *If an offense has been redefined by the legislature, the appropriate severity level shall be based on how the prior felony offense would currently be ranked in consideration of any new or removed elements. For example, in 1989, the controlled substance laws were restructured and the current severity level rankings are in most situations determined on the basis of the amount and type of controlled substance involved in the conviction. For prior Minnesota controlled substance crimes committed before August 1, 1989, and all prior out-of-state controlled substance convictions, the amount and type of the controlled substance should, therefore, be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense. In those instances where multiple severity levels are possible for a prior felony sentence but the information on the criteria that determine the severity level ranking is unavailable, the lowest possible severity level should be used. However, for prior controlled substance crimes committed on or after August 1, 1989, the current severity level ranking for the degree of the prior controlled substance conviction offense should determine the appropriate weight. This particular policy application is necessary to take into account any plea negotiations or evidentiary problems that occurred with regard to the prior offense. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*