

MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
Fr: Mark Wernick
Re: Weighing Prior Controlled Substance Convictions
Date: November 14, 2016

I am writing to offer my comments on the Staff's Options A, B, and C, and the modifications to Options B and C.

To begin, I believe the Commission must eliminate Option A from consideration. Under this Option, in every case involving a prior controlled substance crime conviction, the sentencing judge would have to make a factual finding as to the weight and type of drug involved in the prior case. To the extent that inquiry would increase the criminal history score beyond what it would have been if only the facts necessarily proved by the conviction had been considered, a *Blakely* proceeding would be required. Because Option A does not recognize *Blakely* principles, it must be rejected.

Options B and C are straightforward. Under Option B, the sentencing judge need only look to the name of the controlled substance crime on the prior judgment of conviction and weigh that crime the same as a current controlled substance crime with the same name. In my opinion, this option unfairly denigrates the significance of the 2016 drug reform legislation; and, it is contrary to the history (established in 1989) of measuring the severity of prior controlled substance criminal conduct under the most current standards.

Under Option C, the sentencing judge need only look to the elements necessarily proved by the prior controlled substance crime conviction and weigh that conviction the same as the current controlled substance crime containing those elements. This is the option I prefer, but as modified to allow the state to increase the criminal history points by consideration of the defendant's prior offense conduct under current standards.¹

The following chart shows the differences between options B and C as applied to cocaine and methamphetamine offenses:

¹ If a prior judgment of conviction involving cocaine, methamphetamine or heroin does not specify which drug was involved, the sentencing court would treat the conviction as involving cocaine or methamphetamine, unless, under a modified Option C, the state proved, in a *Blakely* proceeding, that the substance was heroin. As a practical matter, there should rarely, if ever, be a factual dispute about whether the prior conviction involved heroin or the other drugs.

Prior Conviction	Option B	Option C
1 st degree (sale of 10 grams, possession of 25 grams)	Weigh as 1 st degree – 2 felony points	Weigh as 2 nd degree – 1 ½ felony points
2 nd degree (sale of 3 grams, possession of 6 grams)	Weigh as 2 nd degree – 1 ½ felony points	Weigh sale as 3 rd degree – 1 ½ felony points, weigh possession as 5 th degree – ½ felony point
3 rd degree (sale of any amount, possession of 3 grams)	Weigh as 3 rd degree – 1 ½ felony points	Weigh sale as 3 rd degree – 1 ½ felony points, weigh possession as 5 th degree – ½ felony point
5 th degree possession (any amount)	Weigh as 5 th degree – ½ felony point	If prior was first drug conviction, weigh as gross misdemeanor unit; if prior was not first drug conviction, weigh ½ felony point

Both of these options should allow for modifications based on the facts underlying the prior drug convictions. Under Option B Modified, the burden would be on the defendant to prove (by a preponderance of the evidence) that the prior conviction overstates the severity of the prior conduct, using current offense elements as the severity standard. Under Option C Modified, the burden would be on the state to prove (beyond a reasonable doubt) that the prior conviction understates the severity of the prior conduct, using current offense elements as the severity standard.

In deciding whether trial judges should assess the severity of prior drug convictions based on current offense elements, let us not forget Minnesota’s history of unfairly severe sentences for low level drug offenses resulting from the legislature’s response to *State v. Russell*. I recounted this history with respect to cocaine, methamphetamine, and heroin in my October 2015 Memorandum to the Commission. Here are some highlights:

- In 1989, the Minnesota legislature enacted a statutory scheme dividing drug dealers into three categories; namely, major wholesalers (1st degree), mid-level wholesalers (2nd degree), and retail dealers (3rd degree).
 - The weight of the drugs involved in the crime served as a proxy for the defendants’ place in the drug distribution hierarchy.
 - Possession with intent to sell was eliminated from the definition of “sale.”
 - A major wholesaler (1st degree – 86 month commit for first offender) was defined as someone who possessed 500 grams (intent to sell presumed) or distributed 50 grams (25/10 grams for crack). This was Minnesota’s “kingpin” statute. A mid-level wholesaler (2nd degree – 48 month commit for first offender) was defined as someone who possessed 50 grams (intent to sell

presumed) or distributed 10 grams (6/3 grams for crack). A retail dealer (3rd degree – probation for first offender) was someone who possessed 10 grams (intent to sell presumed) (3 grams for crack) or distributed any amount.

- In *State v. Russell* (1991), a 3rd degree controlled substance crime case, the Minnesota Supreme Court held that the disparate penalties for crack and powder cocaine offenses violated the state's equal protection clause. The record in that case demonstrated that in 1988, 96.6% of the people charged with possession of crack cocaine were black while 79.6% of the people charged with possession of powder cocaine were white. The Court also questioned (but did not decide) whether the presumption of intent to sell based on possession of 10 grams is constitutional.
- In 1992, in response to *Russell*, the Minnesota legislature reduced the powder cocaine quantity thresholds to the crack cocaine levels. (In 1997, the legislature did the same for methamphetamine and heroin.) In addition, the legislature added possession with intent to sell to the definition of "sale." As a result, possession of 10 grams of powder cocaine (with intent to sell presumed) went from a presumptive probationary offense for a first offender to a presumptive 86 month commit offense, where intent to sell is proved. The retail dealer was turned into a kingpin.
- The legislative response to *Russell* was not based on new data about drug markets. The response was a reflection of legislators' political animus towards the Minnesota Supreme Court. This animus created a windfall for police and prosecution authorities. The applicable guidelines rendered Minnesota an outlier among sentencing guidelines jurisdictions in the severity of sentences imposed for low level drug dealers.
- MSGC data shows that from 2011-2013, 27 out of 100,000 white adults were imprisoned for drug offenses in Minnesota while 356 out of 100,000 black adults were so imprisoned. This is a 13 to 1 disparity rate. No responsible academic or researcher has suggested that this kind of disparity in imprisonment rates reflects actual offense rates in Minnesota. The racial disparity was based largely on how law enforcement resources were (and still are) allocated.
- In 2016 (after over 20 years of back and forth between the legislature and the MSGC), the Minnesota legislature raised the quantity thresholds for cocaine and methamphetamine offenses so that less severe sentences would be imposed for low level dealers.

In light of this history, trial judges should be able assess the severity of prior drug convictions based on current (and more enlightened) severity standards.

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