

Minnesota Sentencing Guidelines Commission

Weighting Prior Controlled Substance Crimes in Criminal History October 26, 2016

Issue: On October 6, 2016, Assistant Carlton County Attorney Jeff Boucher expressed concerns to MSGC staff about training guidance that MSGC staff have been providing to practitioners regarding how to assign weights to prior drug offenses that occurred prior to August 1, 2016, for purposes of calculating criminal history scores for current offenses with offense dates on or after August 1, 2016. On October 20, the Executive Director of the Minnesota County Attorney's Association (MCAA), Bob Small, related similar concerns that his members have about the MSGC training guidance. Judge Small also said that he has heard similar concerns from the Minnesota Association of Community Corrections Act Counties (MACCAC), due to the difficulty of administering the MSGC training guidance. Judge Small requested that the MSGC consider putting the issue on its agenda.

Background.

1. Effective 8/1/16, the Legislature changed the elements of 1st, 2nd, 3rd, and 5th Degree Controlled Substance Crime. As a result of the changes—
 - a. Some cocaine and meth offenses that would have been 1st Degree offenses are now 2nd Degree offenses (10-16.9 g sale; 25-49.9 g possession).
 - b. Some cocaine and meth offenses that would have been 2nd Degree offenses are now 3rd (3-9.9 g sale; 10-24.9 g possession) or 5th (6-9.9 g possession) Degree offenses.
 - c. Some cocaine and meth offenses that would have been 3rd Degree possession offenses are now 5th Degree possession offenses (3-5.9 g).
 - d. Some marijuana offenses that would have been 2nd Degree possession offenses are now 1st Degree possession offenses (50-99.9 kg).
 - e. Some marijuana offenses that would have been 3rd Degree possession offenses are now 2nd Degree possession offenses (24-49.9 kg).
 - f. Some felony 5th Degree offenses are now gross misdemeanor 5th Degree offenses (1st-time "trace" cases).
2. When calculating the criminal history of a crime whose elements have changed, the following provisions of the Minnesota Sentencing Guidelines (MSG) apply.
 - a. MSG § 2.B.1 states, in part, "The severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense."
 - b. MSG comment 2.B.106 states, "*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.”

- c. MSG § 2.B.7.a states, in part, “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.”
3. Applying those Guidelines provisions to the elemental changes of the above-listed drug crimes, MSGC staff has been providing the following training guidance:
 - a. If an offender who is being sentenced for a current offense committed on or after 8/1/16 has, as part of his/her criminal history, one of the drug offenses whose elements have changed, the probation officer preparing the worksheet should attempt to determine whether or not the prior offense’s drug type and drug amount are such that the prior offense warrants a weight that differs from the weight assigned to the post-8/1/16 drug offense of the same name.
 - b. This is a similar process to how weights are assigned to out-of-state offenses. (See MSG § 2.B.5.b (“Find the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense.”).)
 4. MSGC considerations.
 - a. MSGC staff understands that some MCAA members (and, perhaps, some probation officers) would prefer that MSGC staff advise practitioners to disregard the elements changes, and rely on the fact that the pre-8/1/16 offenses and the post-8/1/16 offenses are identical in all respects other than the drug-weight thresholds.
 - b. Regarding monetary thresholds:
 - (1) It could be, and has been, argued that this situation is analogous to the Legislature’s decision to raise the monetary thresholds for theft offenses in [2007](#). In the case of monetary thresholds, MSGC staff provides training guidance that, on its face, is contrary to its guidance about weighting prior drug offenses: that the pre-2007 theft offenses should be weighted the same as the post-2007 offenses, disregarding the threshold changes.
 - (2) This argument would miss the point that the MSGC explicitly made an exception for changes to monetary thresholds (which are, essentially, inflationary adjustments). MSG § 2.B.7.b states, “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.” See also MSG comments 2.B.702 & 2.B.703.

- (3) The MSGC did not create a similar exception for changes in drug thresholds, which do not have similar inflationary considerations. In light of the canon of statutory interpretation that “[e]xceptions expressed in a law shall be construed to exclude all others,” Minn. Stat. § [645.19](#), MSGC staff infers that the MSGC did not intend to exclude drug offenses from the general rule that the current severity levels and offense definitions control the weight assigned to prior offenses.
- c. It is possible that the MSGC may wish to address this issue. While MSGC staff believes that the guidance it has given does accurately and faithfully apply the MSG policies, those policies, as applied here, do create a burden on practitioners, particularly probation officers preparing sentencing worksheets. On the other hand, this guidance may also be said to reflect accurately the Legislature’s current judgment about the seriousness of the prior offense.
 - d. This guidance should not be confused with retroactivity. This guidance only affects the criminal histories of offenses committed on or after 8/1/16.
 - e. This guidance is historically consistent with prior versions of the Guidelines. MSG Comment II.B.101 ([1990](#)) read, in part, *“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.”* Very similar language remained in the Guidelines until the 2012 rewrite.

Staff Recommendations.

Staff presents two alternative recommendations for the Commission’s consideration.

Option A reflects an affirmation of the current policy: that, as a general rule, the current severity levels and offense definitions control the weight assigned to prior offenses. Staff recommends that the Commission simply reinstate and update the relevant commentary that was deleted in the course of the 2012 rewrite* by changing MSG Comment 2.B.106 as

* MSG Comment 2.B.104 (2011) read, in part, “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

follows. Please note that MSG § 2.B.1 is reproduced in its entirety; the reader may wish to skip ahead to the changed language in Comment 2.B.106 on page 7.

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:

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.”

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. 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. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences. * * **

Option B would change current policy to equate pre-8/1/16 drug crimes with post-8/1/16 crimes of the same name, notwithstanding the change in elements. Staff recommends that the Commission place a new exception—MSG § 2.B.7.c—immediately after the monetary-threshold exception discussed above:

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.
- 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.

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.

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