

2020 REPORT TO THE LEGISLATURE

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Introduction

The Minnesota Sentencing Guidelines Commission submits this report to the Legislature to fulfill its two statutory reporting requirements:

- To identify and explain all modifications made during the preceding twelve months and all proposed modifications that are being submitted to the Legislature in 2020;¹ and
- To summarize and analyze reports received from county attorneys on criminal cases involving a firearm.²

The Commission also takes this opportunity to highlight other topics that may be of interest to the Legislature, including updates on Commission activities, recommendations to the Legislature, staff activities, sentencing trends, and information regarding the impact of the 2016 Drug Sentencing Reform Act.³

In 1980, Minnesota became the first state to implement a sentencing guidelines structure. The Minnesota Sentencing Guidelines Commission is a legislatively created body whose purpose is to establish and improve the Minnesota Sentencing Guidelines, evaluate outcomes of changes in sentencing policy, analyze trends, make appropriate recommendations, and provide education on sentencing law and policy.

When establishing and modifying the Guidelines, the Commission's primary consideration is **public safety**.⁴ Other considerations are current sentencing and release practices, correctional resources—including, but not limited to, the capacities of local and state correctional facilities—and the long-term negative impact of crime on the community.⁵ The Commission has stated that the purpose of the Sentencing Guidelines is to establish rational and consistent sentencing standards that reduce sentencing disparity and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender's criminal history.⁶ The Sentencing Guidelines embody principles including that sentencing should be neutral, rational, consistent, and uniform, and that departures from the presumptive sentences should be made only when substantial and compelling circumstances can be identified and articulated.⁷

¹ [Minn. Stat. § 244.09](#), subd. 11.

² [Minn. Stat. § 244.09](#), subd. 14 (referencing the reports required by [Minn. Stat. § 609.11](#), subd. 10).

³ That is, [2016 Minn. Laws ch. 160](#); see [Minn. Stat. § 244.09](#), subd. 6.

⁴ [Minn. Stat. § 244.09](#), subd. 5.

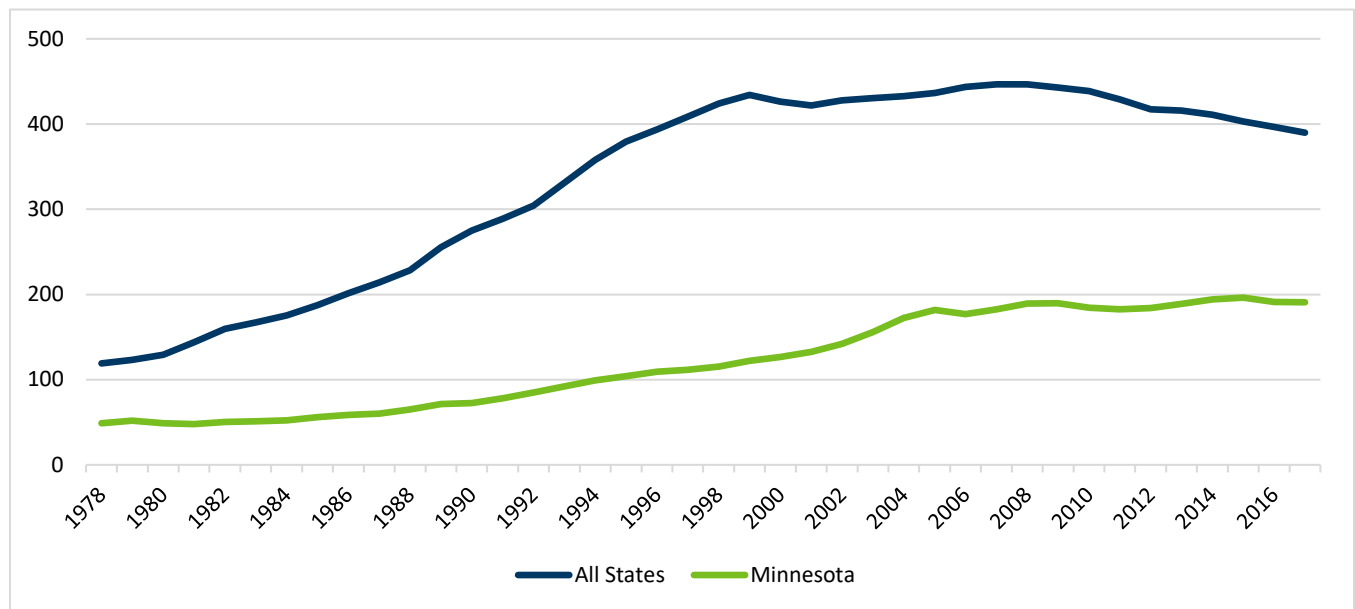
⁵ *Id.*

⁶ [Minn. Sentencing Guidelines](#) § 1.A.

⁷ *Id.*

In all but one of the first 37 years the Guidelines were in effect—from 1980 through 2016—Minnesota ranked among the states with the three lowest imprisonment rates in the nation.⁸ In 2017, Minnesota was fifth lowest.⁹ This change was not caused by an increase in Minnesota’s imprisonment rate; at 191 prisoners per 100,000 residents, Minnesota’s rate did not change from 2016 to 2017, although it did remain at its third-highest level since the Sentencing Guidelines were established (Figure 1).¹⁰ Instead, the imprisonment rate for 33 other states fell, causing the U.S. state imprisonment rate to fall by 1.9 percent from 2016 to 2017.¹¹ Despite its 2017 change in ranking, Minnesota’s imprisonment rate remained less than half the national state imprisonment rate.¹²

Figure 1. Imprisonment Rate per 100,000 Residents, 1978–2017



Source: Bureau of Justice Statistics

⁸ Minnesota had the fourth-lowest imprisonment rate in 2014, and the third-lowest in 2015 and 2016. Carson, E. Ann. Bureau of Justice Statistics. “Imprisonment Rate of Sentenced Prisoners under the Jurisdiction of State or Federal Correctional Authorities per 100,000 U.S. Residents, Dec. 31, 1978–2016” (Bureau of Justice Statistics, Oct. 19, 2017). Retrieved April 25, 2019, at http://www.bjs.gov/nps/resources/documents/QT_imprisonment%20rate_total.xlsx.

⁹ Jennifer Bronson & E. Ann Carson, “Prisoners in 2017” (NCJ 252156) (Bureau of Justice Statistics, April 2019), Table 6. Retrieved April 25, 2019, at <http://www.bjs.gov/content/pub/pdf/p17.pdf>.

¹⁰ For purposes of comparison, Minnesota’s imprisonment rate was 49 per 100,000 in 1980. See footnote 8.

¹¹ Bronson & Carson, Table 5.

¹² The imprisonment rate for all states was 390 prisoners per 100,000 U.S. residents. Neither rate includes inmates of federal prisons or local correctional facilities. See footnote 9.

Executive Summary

The Commission's Activities in 2019 (p. 5):

One of the fundamental responsibilities of the Commission is to maintain the Guidelines by annually amending them in response to legislative changes, case law, and issues raised by various parties. The Commission met ten times in 2019 to fulfill its statutory responsibilities of improving the Sentencing Guidelines and conducting ongoing research into sentencing practices and other matters relating to the improvement of the criminal justice system. In addition, the Commission held two public hearings, on July 18 and December 19.

By April 23, 2019, Governor Tim Walz had appointed four new Commission members and designated a new Chair. At its July meeting, the new Commission prioritized topics for future work. Two topics emerged with the most interest among Commissioners: A comprehensive review of child pornography sentencing guidelines, and probation guidelines, including term limits and revocations. (See “Ongoing Commission Activities,” below.)

2019 Guidelines Modifications (p. 7):

The Commission made five amendments to the Sentencing Guidelines resulting from the 2019 Minnesota Session Laws. In addition, the Commission made several amendments unrelated to legislative action—most of which were reported to the Legislature last year—and various technical amendments. These amendments took effect August 1, 2019.

Proposed 2020 Guidelines Modifications (p. 8):

In 2019, the Commission adopted proposals to rank two unranked offenses: Escape from Electronic Monitoring would be ranked at severity level 3, and Offering Counterfeit Currency would be ranked at severity level 2, 3, or 6, depending on the dollar amount involved. In 2020, the Commission adopted a proposal to place a presumptive five-year limit on the length of probation for most felonies. Absent legislative intervention, these modifications will take effect August 1, 2020.

Recommendation to the Legislature: Define Minimum Term of Imprisonment for Murder of Unborn Child in the First Degree (p. 9):

The Commission unanimously adopted a resolution to recommend that the Legislature statutorily define a minimum term of imprisonment for Murder of Unborn Child in the First Degree.

Ongoing Commission Activities (p. 9):

The 2019 Legislature directed the Commission to review and consider modifying how the Guidelines address child pornography and related crimes as compared to similar crimes, including other sex offenses and other offenses with similar maximum penalties. In July, under the leadership of its new Chair, the Commission prioritized topics for the remainder of 2019 and for 2020. In addition to the required child pornography review,

probation guidelines, including term limits and revocations, was a topic of interest. In November, the Commission moved to public hearing a proposal that would limit the length of most probation terms at five years. On January 9, 2020, after public hearing, that proposal was adopted with some modifications.

Staff Activities (p. 11):

In 2019, staff provided Sentencing Guidelines guidance to an average of 250 practitioners per month; provided the Legislature with 50 fiscal impact statements and 7 demographic impact statements for pending crime bills; compiled and reported sentencing information for over 300 individual data requests; participated in various criminal justice boards, forums and committees; processed and ensured the accuracy of over 18,000 sentencing records; worked with the Department of Corrections to generate prison bed projections and revise the Electronic Worksheet System to meet the requirements of the current Sentencing Guidelines; published the annual edition of the Minnesota Sentencing Guidelines and Commentary; and provided reports on sentencing practices to the public.

2018 Sentencing Practices Data Summary (p. 14):

Minnesota courts sentenced 18,284 felony offenders in 2018, which is the second-highest case volume on record. Because this number was slightly lower than the 2017 record-high volume of 18,288, a seven-year run of annual increases in case volume ended in 2018. None of the offense categories decreased by more than four percent nor increased by more than eight percent. In 2018, for the first time, males accounted for less than 80 percent of the felony offenders in Minnesota.

In 2018, 91 percent of felony offenders served either local confinement time as part of their stayed sentence (68%) or state prison time (23%). The average pronounced prison sentence was 47 months.

Statewide, 75 percent of felony offenders received the presumptive Guidelines sentence. The rate varied by gender, race and ethnicity, judicial district, offense type, and presumptive disposition.

Impact of the 2016 Drug Sentencing Reform Act (p. 37):

The 2016 Drug Sentencing Reform Act (DSRA) made a number of significant changes to the sentencing of Minnesota drug offenses. Those changes generally took effect August 1, 2016, and applied to over eighty percent of the drug cases sentenced in 2018. A comparison of cases sentenced before and after the DSRA's effective date discloses the act's impact in reducing prison-bed demand, even in the face of a growing volume of drug cases sentenced.

County Attorney Firearms Reports (p. 61):

County attorneys must collect and report disposition information for specified crimes for which a defendant is alleged to have possessed or used a firearm, and the Commission must summarize and analyze that information in its annual report. In fiscal year 2019, county attorneys disposed of 1,274 firearms cases.

The Commission's Activities in 2019

The Minnesota Sentencing Guidelines Commission is an eleven-member body created by the Legislature. Three members are appointed by the Chief Justice of the Supreme Court: The Chief Justice's designee; a judge of the Court of Appeals; and a district court judge. Eight members are appointed by the Governor: one public defender; one county attorney; the Commissioner of Corrections; one peace officer; one probation officer; and three public members, one of whom must be a felony crime victim. The Governor also designates the Chair.

Effective April 23, 2019, Governor Tim Walz appointed three new public members to the Commission and designated one of them, Kelly Lyn Mitchell,¹³ as the Commission's Chair.¹⁴ The other public members are Abby Honold¹⁵ and Tonja Honsey.¹⁶ Governor Walz had previously appointed Paul Schnell as Commissioner of Corrections on January 7, 2019.

Governor Walz also reappointed four Commission members: the public defender member, Cathryn Middlebrook, Chief Appellate Public Defender; the county attorney member, Peter Orput, Washington County Attorney; the peace officer member, Saint Paul Police Sgt. Salim Omari; and the probation officer member, Valerie Estrada, Corrections Unit Supervisor, Hennepin County Community Corrections & Rehabilitation.

The designee of Chief Justice Lorie S. Gildea is Associate Supreme Court Justice (Retired) Christopher Dietzen. Effective October 16, 2019, the Chief Justice appointed Judge Michelle A. Larkin as the Commission's Court of Appeals judge.¹⁷ Effective January 6, 2020, the Chief Justice appointed Judge Kevin Mark, First Judicial District, as the Commission's district court judge.¹⁸

One of the fundamental responsibilities of the Commission is to maintain the Guidelines by annually amending them in response to legislative changes, case law, and issues raised by various parties. The Commission met ten times in 2019 to fulfill its statutory responsibilities of improving the Sentencing Guidelines and conducting ongoing research into sentencing practices and other matters relating to the improvement of the criminal justice system. In addition, the Commission held two public hearings, on July 18 and December 19.

In January 2019, the Commission previewed important topics anticipated to be part of the upcoming legislative session including recommendations from Minnesota Attorney General Lori Swanson's Working Group on Sexual Assault to improve responses to sexual assault reports by adult victim-survivors; and discussed the Commission's agency oversight responsibilities. In February and March, it discussed unranked offenses, the theft offense list, and probation, including whether the Guidelines should address conditions of stayed sentences. At its March

¹³ Succeeding Judge Mark Wernick as a public member.

¹⁴ Succeeding Associate Justice (Retired) Christopher Dietzen as Chair.

¹⁵ Succeeding Angela Champagne-From.

¹⁶ Succeeding Yamy Vang.

¹⁷ Succeeding Judge Heidi Schellhas, who was the Commission's Vice-Chair until immediately before her retirement from the Court of Appeals on October 15, 2019.

¹⁸ Succeeding Judge Caroline Lennon, First Judicial District.

meeting, the Commission adopted a resolution to recommend the Legislature define a minimum term of imprisonment for first-degree murder of an unborn child (discussed on page 9).

Before the May meeting, an orientation was held for new Commission members. At its May meeting, the newly appointed Commission further discussed theft offenses, proposed clarifying amendments to its repeat severe violent offender policy (discussed on p. 7), proposed other Guidelines amendments (discussed on p. 8); and proposed ranking escape from electronic monitoring at severity level 3 (discussed on p. 8).

In June, the Commission proposed to rank offering counterfeit currency at severity level 2, 3, or 6, depending on the dollar amount involved (discussed on p. 8), and proposed Guidelines changes in response to five crimes created or amended by the Legislature in the preceding session (discussed on p. 7).

At its July meeting, the Commission took final action on proposed Guidelines modifications and, under the leadership of the new Chair, prioritized topics for the remainder of 2019 and for 2020. In addition to the legislatively mandated review of child pornography sentencing guidelines, the topic of probation guidelines, including term limits and revocations, garnered the most interest.

Additionally, at its July meeting, the Commission made appointments to groups established in 2019 Session Laws. Cathryn Middlebrook was appointed the representative to the Community Competency Restoration Task Force¹⁹ and Tonja Honsey was appointed the representative to the Criminal Sexual Conduct Statutory Reform Working Group.²⁰

At its September meeting, the Commission welcomed a 13-member delegation from the Kosovo Sentencing Commission, led by the President of the Supreme Court of Kosovo, the Hon. Enver Peci. After the meeting, President Peci presented the Commission with a plaque and a first edition of Kosovo's Sentencing Guidelines.

In the fall, the Commission began its comprehensive review of child pornography sentencing, discussion of which begins on page 9; and worked on guidelines related to probation—which included a proposal to establish a five-year probation term limitation—discussion of which begins on page 10.

¹⁹ 2019 Minn. Laws 1st Sp. Sess. [ch. 9](#), art. 6, § 77.

²⁰ 2019 Minn. Laws 1st Sp. Sess. [ch. 5](#), art. 4, § 21.

2019 Guidelines Modifications

Below is a summary of the modifications that the Minnesota Sentencing Guidelines Commission made to the August 1, 2018, edition of the Minnesota Sentencing Guidelines and Commentary. Each modification had a specified effective date of August 1, 2019.²¹

Changes Relating to Crimes Created or Amended in 2019

On July 25, 2019, after public hearing, the Commission made modifications relating to felony offenses created or amended by the 2019 Minnesota Session Laws. There were five amendments:

- New third- and fourth-degree criminal sexual conduct offenses where the actor is a peace officer;
- Higher statutory maximums for child pornography and use of minors in sexual performance when committed by repeat or predatory offenders, or when involving a child under age thirteen;
- A new surreptitious observation device offense where the victim is a minor and there is sexual intent;
- Wage theft; and
- Terminology changes to harassment and stalking statutes.

Each modification is detailed in Appendix 1.1 on page 67.

Changes to Criminal History Score Calculation & Creation of Second or Subsequent Severe Violent Offense Modifier

On December 20, 2018, after public hearing, the Minnesota Sentencing Guidelines Commission adopted and submitted to the Legislature²² several modifications changing the calculation of the criminal history score and adding a sentencing enhancement for second or subsequent severe violent offenses. As the Legislature did not intervene, these modifications took effect.

On July 25, 2019, after public hearing, the Commission made a small number of amendments and technical changes to these modifications. Among other things, these amendments clarified that stays of imposition qualify as prior severe violent offenses, but sentences within misdemeanor or gross misdemeanor limits do not.

The modifications, as amended, took effect August 1, 2019. They are detailed in Appendix 1.2 on page 80.

Changes to Clarify Effective Dates

On July 25, 2019, after submission to the Legislature and public hearing, the Commission adopted modifications to clarify that Guidelines modifications generally apply to offenses committed on or after the effective date of

²¹ See Minn. Sentencing Guidelines § 3.G for an explanation of how effective dates are implemented.

²² The Commission submitted these proposed modifications to the Legislature January 11, 2019. Minn. Sentencing Guidelines Comm'n, *Report to the Legislature* (Jan. 11, 2019). Retrieved July 26, 2019, at <https://go.usa.gov/xysku>. The Legislature took no action to provide that the changes should not take effect. See Minn. Stat. § 244.09, subd. 11.

the modification. This action was taken in light of *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017). As the Legislature did not intervene, these modifications took effect August 1, 2019. They are detailed in Appendix 1.3 on page 90.

Other Non-Legislative Amendments to the Guidelines

On July 25, 2019, after public hearing, the Commission adopted two non-legislative modifications: one reconciled policy conflicts regarding offenses committed while under sentence; and the other eliminated an ambiguity when a prior felony resulted in a non-felony sentence. Each modification is detailed in Appendix 1.4 on page 91.

Technical Amendments to the Guidelines

On July 25, 2019, after public hearing, the Commission adopted technical modifications, each of which is detailed in Appendix 1.5 on page 94.

Proposed 2020 Guidelines Modifications

Below is an explanation of the modifications that the Minnesota Sentencing Guidelines Commission proposes to be made to the August 1, 2019, edition of the Minnesota Sentencing Guidelines and Commentary. Each modification has a specified effective date of August 1, 2020.²³ These modifications are now submitted to the Legislature. Unless the Legislature by law provides otherwise, these modifications will take effect August 1, 2020, and will apply to crimes committed on or after that date.²⁴

Proposed Severity Level Rankings

On July 25, 2019, after public hearing, the Commission adopted proposals to rank Escape from Electronic Monitoring at severity level 3; and to rank Offering Counterfeit Currency under Minn. Stat. § 609.632, subd. 3, at severity level 2 (\$5,000 or Less), severity level 3 (\$5,001–\$35,000), and severity level 6 (Over \$35,000). These offenses are presently unranked.

These modifications are detailed in Appendix 2.1 and Appendix 2.2, beginning on page 98.

Proposed Probation Cap

On January 9, 2020, after public hearing, the Commission adopted a proposal to limit to five years the presumptive duration of a stay of execution or imposition of sentence for a felony offense, with exceptions for certain homicide and sex offenses.

A discussion of the Commission’s recent work on guidelines related to probation begins on page 10. The language of the proposed modification is set forth in Appendix 2.3 on page 101.

²³ See Minn. Sentencing Guidelines § 3.G for an explanation of how effective dates are implemented.

²⁴ See footnote 1.

Recommendation to the Legislature: Define Minimum Term of Imprisonment for Murder of Unborn Child in the First Degree

Pursuant to its mandate to make recommendations to the Legislature regarding changes to criminal law, criminal procedure, and sentencing,²⁵ the Minnesota Sentencing Guidelines Commission recommends that the Legislature statutorily define the minimum term of imprisonment that applies to offenders serving mandatory life sentences for Murder of Unborn Child in the First Degree.²⁶ The specific language of the Commission's recommendation, contained in a resolution unanimously adopted by the Commission on March 14, 2019, is found in Appendix 3 on page 120.

The offense in question had a statutory minimum term of imprisonment when it was established in 1986, but the offense was apparently overlooked when minimum terms of imprisonment were lengthened in 1989. There is now no minimum term of imprisonment specified in statute.²⁷ According to MSGC monitoring data, this offense is rarely committed, and, when it is committed, it is accompanied by the first-degree murder of the mother. Nevertheless, it is foreseeable that the offense may someday be committed as the primary offense, for sentencing purposes. By following the Commission's recommendation, the Legislature could clarify what minimum term of imprisonment applies before such an event occurs.

The Commission's recommendation does not include particular advice as to what minimum term of imprisonment ought to apply to this offense, although the Commission does recommend against life without the possibility of release for violations of Minn. Stat. § 609.2661, clause (3) (Murder of Unborn Child First Degree – While Committing Certain Crimes).²⁸

Ongoing Commission Activities

Comprehensive Review of Child Pornography Sentencing

On May 30, 2019, the Commission received a legislative mandate to conduct a comprehensive review of child pornography sentencing guidelines:

The Sentencing Guidelines Commission shall comprehensively review and consider modifying how the Sentencing Guidelines and the sex offender grid address the crimes described in Minnesota Statutes, sections 617.246 and 617.247, as compared to similar crimes, including other sex offenses and other offenses with similar maximum penalties.²⁹

²⁵ Minn. Stat. § [244.09, subd. 6](#).

²⁶ Minn. Stat. § [609.2661](#).

²⁷ In 2019, the Minnesota Supreme Court, without fully addressing the undefined minimum term of imprisonment, held that life without the possibility of release does not apply to this offense because it is not listed in the heinous crimes statute, [Minn. Stat. § 609.106](#). *State v. Mouelle*, 922 N.W.2d 706, 719 (Minn. 2019).

²⁸ The similar provision in the first-degree murder statute, Minn. Stat. § 609.185(a)(3) (First-Degree Murder – While Committing Certain Crimes), is not punishable by life without possible release. See Minn. Stat. § 609.106, subd. 2(1).

²⁹ [2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, § 22](#) (enacted May 30, 2019).

At its July meeting, the Commission prioritized this comprehensive review in its future work plan, and much of the Commission's work in the fall was devoted to the first steps of the review:

- At its September meeting, the Commission reviewed the mandate, its legislative history, and the history and structure of Minnesota's child pornography laws and the Sex Offender Grid. The Commission also reviewed the U.S. Sentencing Commission's 2012 child pornography study and its own sentencing data, and determined its next steps.
- In October, the Commission continued its discussion of child pornography sentencing guidelines by looking at issues related to definitions of child pornography and the production of child pornography.
- At the Commission's November meeting, experts from the U.S. Attorney's Office, the Dakota County Attorney's Office, and the Minnesota Internet Crimes Against Children Task Force—working with the Bureau of Criminal Apprehension—answered the Commission's questions about state and federal child pornography investigations and prosecutions.

The Commission intends to continue its comprehensive review in 2020.

Guidelines Related to Probation

The Commission's February meeting included a discussion of possible work plan ideas for the remainder of the year. At that meeting, the Commission reviewed the geographical differences in pronounced probation durations and discussed the possibility of returning³⁰ to the topic of changing how the Sentencing Guidelines address probation.

At its July meeting, the Commission again took up the discussion of its work plan. This discussion included review of a letter from Minnesota District Court Judge Gail Kulick to Lt. Gov. Flanagan on the subject of racial disparity in probation revocations.³¹ The Commission also heard from the Chair of the House crime committee,³² Rep. Carlos Mariani, who urged the Commission to act on the issue of probation reform. When given an opportunity to allocate a number of priority votes, Commission members present at the meeting allocated more priority to the topic of probation than to the other topics presented.³³

In October, the Commission discussed probation guidelines, term limits, and revocations. Chair Kelly Lyn Mitchell, in her capacity as Executive Director of the Robina Institute of Criminal Law and Criminal Justice, presented information on racial and regional disparities in probation and sentencing, and how they might be

³⁰ The issue had been discussed most recently at the Commission's meeting of April 12, 2018. For a historical review of the Commission's study of probation guidelines, see Nate Reitz's April 10, 2018, memorandum to Hon. Christopher J. Dietzen, Chair ("Has the MSGC ever promulgated probation guidelines or related rules?"), retrieved Dec. 3, 2019, at http://mn.gov/msgc-stat/documents/meeting%20materials/2018/April/BackgroundMemoChair_ProbationGuidelines.pdf

³¹ Kulick, Gail T. Letter to Lt. Gov. Flanagan. (April 8, 2019). Retrieved Nov. 18, 2019, at

http://mn.gov/msgc-stat/documents/meeting%20materials/2019/July25/6B_JudgeKulickLetter.pdf.

³² That is, the Public Safety and Criminal Justice Reform Finance and Policy Division of the Minnesota House of Representatives' Ways and Means Committee.

³³ The comprehensive review of child pornography, being mandatory, was not part of the priority allocation. See MSGC meeting minutes of July 25, 2019, pp. 5–6, retrieved December 3, 2019, at

<http://mn.gov/msgc-stat/documents/meeting%20materials/2019/July25/ApprovedMSGCMinutes25July2019.pdf>

reduced.³⁴ The discussion included data on Minnesota’s pronounced probation durations and probation revocations.

At its November meeting, Commissioner of Corrections Paul Schnell presented a memorandum entitled, “Proposed Guidelines Modification to Limit Probation Terms,” which contained background, observations, and conclusions regarding probation terms.³⁵ Commissioner Schnell’s memo included a proposal to set five-year limits on probation terms, with exceptions for certain homicide and sex offenses. The Commission advanced this proposal to a public hearing on a six-to-five vote.

At the public hearing on December 19, 2019, members of the public provided input to the Commission on Commissioner Schnell’s proposal. On January 9, 2020, the Commission reviewed the public hearing testimony and adopted the proposal on an eight-to-three vote, with modifications. These adopted changes to the Sentencing Guidelines are now submitted to the Legislature; they are set forth in Appendix 2.3, which begins on page 101. A minority report is set forth in Appendix 2.4, which begins on page 107. Absent legislative intervention, the adopted modifications will take effect August 1, 2020.

Staff Activities

The following provides a summary of the activities performed by Minnesota Sentencing Guidelines Commission (MSGC) staff—in addition to providing support and research for the Guidelines modifications detailed in this report—to further the goals and purposes of the Commission. In particular, staff assist the Commission in fulfilling its statutory charter³⁶ to serve as a clearinghouse and information center for the collection, preparation, analysis, and dissemination of information on sentencing practices. This includes information regarding the impact of statutory changes to the state’s criminal laws related to controlled substances, including the Drug Sentencing Reform Act.³⁷

Monitoring Sentencing Data

One of the primary functions of the MSGC staff is to monitor sentencing practices. The monitoring system is designed to maintain data on all offenders convicted of a felony and sentenced under the Guidelines.³⁸ A case is defined when a sentencing worksheet is received from the probation officer and matched with sentencing data from the District Court. As part of the agency’s core functions, MSGC staff collected and analyzed data of over

³⁴ Mitchell, K. Robina Institute of Criminal Law and Criminal Justice. University of Minnesota Law School. Presentation to the Criminal Justice Institute. *Reducing Racial & Regional Disparities in Probation and Sentencing*. (Sept. 11, 2019). Retrieved on Nov. 18, 2019 at <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CJIProbationPresentation.pdf>.

³⁵ Schnell, P. Memorandum to Mr. Nate Reitz, Executive Director, Minn. Sentencing Guidelines Commission. (Nov. 5, 2019). Retrieved on Dec. 26, 2019, at

<http://mn.gov/msgc-stat/documents/meeting%20materials/2019/November/ProposedModificationProbationLength.pdf>.

³⁶ [Minn. Stat. § 244.09](#), subd. 6.

³⁷ See “Impact of the 2016 Drug Sentencing Reform Act,” beginning on p. 37.

³⁸ Beginning in 2005 and 2006, MSGC began maintaining data on life sentences, even if not governed by the Guidelines.

18,000 felony offenders. Additionally, staff published the annual edition of the Sentencing Guidelines and Commentary and its annual reports on sentencing practices and trends.³⁹

Training & Assistance

The staff provides training and assistance with the Guidelines in a variety of ways: monthly webinars on individual sentencing topics, website materials, and email and telephone assistance. On average, the staff fielded over 250 calls and emails per month, the majority of which were questions from judges, attorneys, and probation officers about the application of the Guidelines to their felony cases.

MSGC staff and Department of Corrections' Information Technology staff released updates to correspond with the changes implemented by the Commission in 2019 to the criminal history score calculation. These technology changes were made to not only assist probation agents with determining eligibility under the new policies, but enhance the data collected by MSGC staff for prior offenses.

Website & Data Requests

The Commission's website received 5,266 visits each month in 2019. The majority visited to access the Sentencing Guidelines. The website includes easily accessible email signup for upcoming trainings, public hearing notices, and Commission meeting notices. One-click data requests makes getting sentencing information quick and easy.

One of the important ways in which the Commission's staff works with fellow agencies and criminal justice practitioners across the state is researching and compiling statistical data in response to information requests. MSGC staff responded to over 300 data requests in 2019. These requests are most often made by lawyers or corrections agents to show evidence of specific sentencing practices to the court. However, the requests are also made by academics, students, other state agencies, legislative staff, law enforcement, and the press for other purposes. The topics range from departure data for a single type of offense within a given county to comparative data on how an offense has been sentenced from one jurisdiction to another.

Collaboration with Criminal Justice Agencies

The staff's knowledge of felony sentencing and practice makes it a valued contributor to criminal justice policy discussions. Each year, Commission staff works with the Department of Corrections to generate prison bed projections. MSGC staff serves on the Criminal and Juvenile Justice Information Advisory Group and the newly formed Criminal Sexual Conduct Statutory Reform Working Group in addition to providing support to the Commission's representative on the Community Competency Restoration Task Force. Staff also participated in trainings that were arranged by the Minnesota County Attorneys Association and Minnesota Corrections Association.

³⁹ This information is summarized in this report ("2018 Sentencing Practices Data Summary," beginning on p. 14). The detailed reports may be found at <https://mn.gov/sentencing-guidelines/reports/>.

Fiscal Impact Statements & Demographic Impact Statements

During the 2019 Legislative Sessions, staff provided fiscal impact statements for 50 bills. These impact statements include details as to any increase or decrease in adult offender populations, the estimated net increase in state correctional facility beds, and the impact on confinement in local correctional facilities. Staff provided all requested information within the time requirements set by the Legislature.

In 2008, MSGC staff began providing the Minnesota Legislature demographic impact statements⁴⁰ on certain crime bills when such a statement was anticipated to be helpful to the Legislature. When, in the course of preparing a required fiscal impact statement, MSGC staff identifies a bill that meets its criteria for preparing a demographic impact statement, it prepares such a statement and sends it to the chairs of the crime committees in the Senate and the House. This is done separately from the required fiscal-impact statements. The full demographic impact statements are available on the MSGC web site.⁴¹

During the 2019 Legislative Sessions, seven legislative policy proposals met the criteria for preparing a demographic impact statement:

- [SF2445](#) proposed increases to the presumptive sentence for second-degree criminal sexual conduct (CSC) offenses;
- [SF 111](#) proposed amendments to CSC, surreptitious intrusion, use of minor in a sexual performance, and child pornography (CP);
- [HF 89](#) proposed increased penalties for use of minors in a sexual performance and CP offenses, creating mandatory minimum sentences, and directing the MSGC to modify the Sex Offender Grid;
- [HF 480](#) proposed amending CSC provisions;
- [HF 689](#) proposed capping probation durations at five years except for murder and CSC;
- [HF 812](#) proposed amending the definition of position of authority in Minn. Stat. § 609.341, subd. 10, to include persons in current or recent positions of authority.
- [HF 2013](#) proposed establishing new thresholds for marijuana offenses and established a new statute for marijuana offenses with penalties based on marijuana quantities.

⁴⁰ These had previously been referred to as “racial-impact statements.”

⁴¹ Full statements are available at <https://mn.gov/sentencing-guidelines/reports/#1>.

2018 Sentencing Practices Data Summary

The following data summarize information about sentencing practices and case volume and distribution. The recommended sentence under the Guidelines is based primarily on the severity of the offense of conviction and secondarily on the offender's criminal record. The majority of offenders receive the recommended sentence.

In Minnesota, sentencing of felony offenders is governed by the Sentencing Guidelines. It is important, therefore, to be aware of the effect of differences in offense severity and criminal history when evaluating sentencing practices. This is particularly important when comparing groups of offenders (e.g., by gender, race and ethnicity, and judicial district). For example, if in a particular district the proportion of serious person offenders is fairly high, the imprisonment rate for that district will likely be higher than for districts with predominantly lower severity-level offenses.

Case Volume and Distribution

In 2018, 18,284 felony offenders were sentenced, the second-highest volume of cases on record. The 2018 volume was very slightly (0.02%) lower than the 2017 record-high volume of 18,288 cases, ending a seven-year run of annual increases in case volume (from 2010–2017).

Of the seven offense categories, none decreased by more than four percent nor increased by more than eight percent.

As a category, drug offenses decreased by 2.4 percent from 2017 to 2018. By contrast, in the eight years from 2010 to 2018, the number of drug offenses grew by 66 percent, accounting for most of the 28-percent overall growth in felony offenders sentenced over that time. Only the “weapon”⁴² category surpassed the drug category in growth from 2010 to 2018 (84% increase). The specific offense that contributed the most to that growth in the “weapon” category was possession of a firearm by a felon convicted of a crime of violence, which increased from 234 offenders in 2010 to 468 offenders in 2018—a 100 percent increase.

Person offenses grew by 15.5 percent during these eight years, while property offenses had the smallest growth rate, at 13.5 percent. Non-CSC sex offenses⁴³ grew by 24.5 percent, and “other”⁴⁴ offenses grew by 33 percent. The only offense category that showed a decline from 2010 to 2018 was felony driving while impaired (DWI), which fell by 17 percent.

The total volume of felony offenders sentenced over time is illustrated in Figure 2 (p. 15), and changes in growth rates overall and by offense category are illustrated in Figure 3 (p. 16) and Figure 4 (p. 17). In addition to the growth from 2010 to 2017, discussed above, significant growth also occurred between 2001 and 2006, when the

⁴² “Weapon” offenses include: possession of a firearm by a felon convicted of a crime of violence, firearm discharge, possession of teargas and explosive devices, and other weapon related offenses.

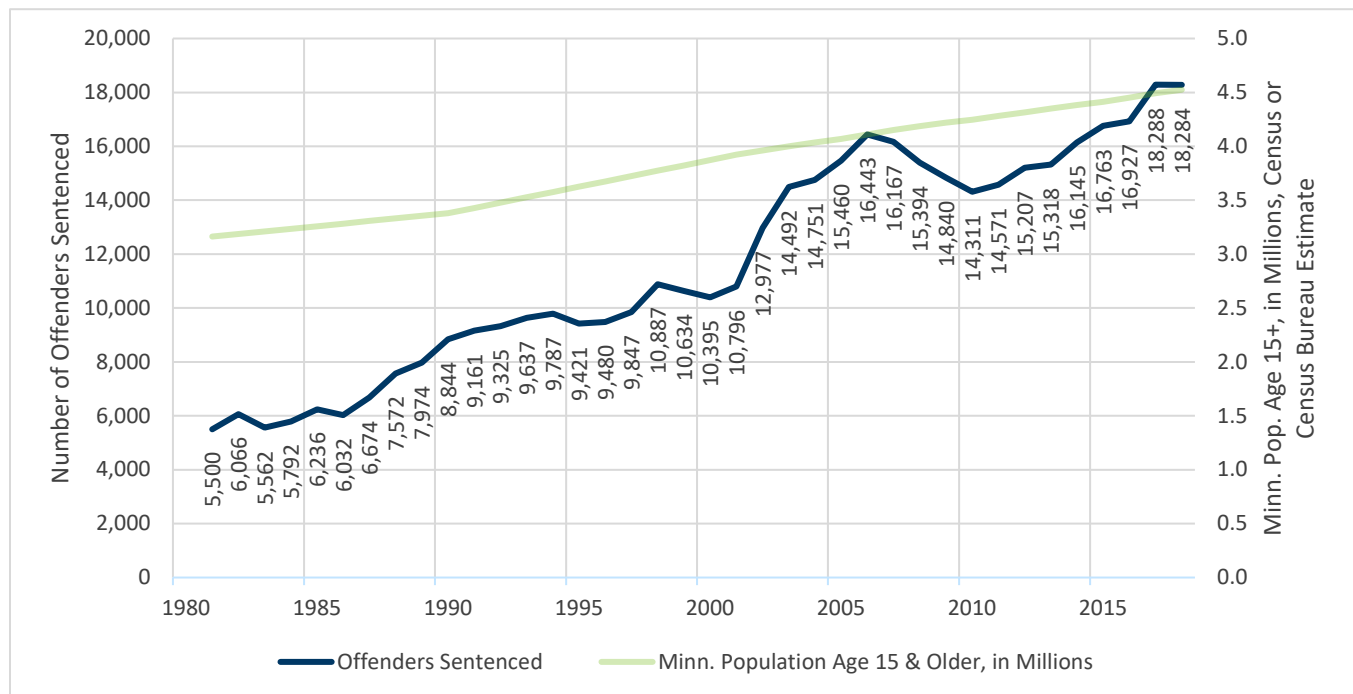
⁴³ “Non-CSC sex offenses” are offenses on the sex offender grid other than criminal sexual conduct (chiefly failure to register as a predatory offender and possession and dissemination of child pornography).

⁴⁴ “Other” category: Fleeing police, escape, and other offenses of less frequency including crimes against the government such as tax offenses, failure to appear in court, and aiding an offender.

total volume of felony offenders sentenced rose by 52 percent. That increase was largely attributable to growth in the number of drug crimes sentenced, particularly methamphetamine cases, as well as the implementation of the felony DWI law.

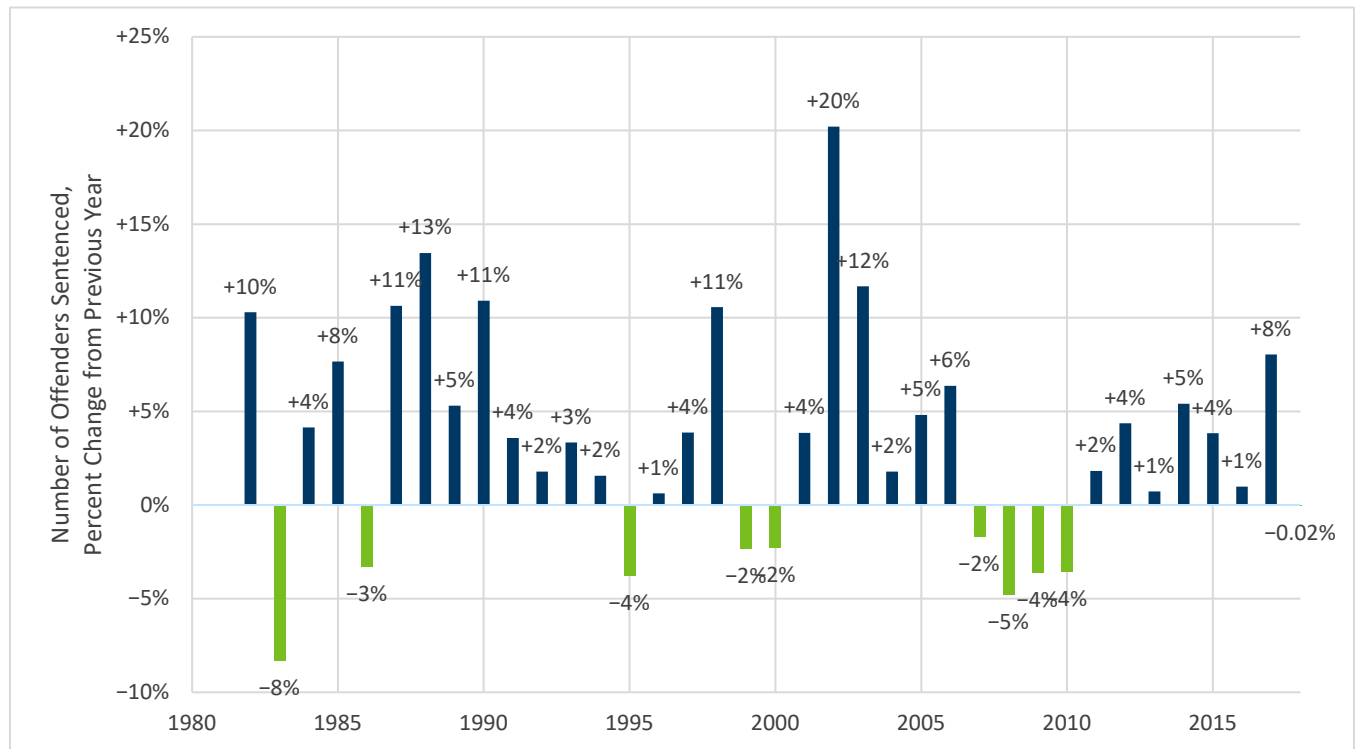
According to Department of Public Safety data, the crime rate has fluctuated over time. Over the past decade, both the number of “index crimes” and the index crime rate have fallen in every year except 2012 and 2017. From 2017 to 2018, reports of “violent crimes” fell by 6.7 percent, reports of “property crimes” fell by 8.9 percent, and the population-adjusted index crime rate fell by 9.3 percent.⁴⁵

Figure 2. Number of Offenders Sentenced for Felony Convictions, 1981–2018



⁴⁵ “Index crimes” are comprised of “violent crimes” (Murder, Forcible Rape, Robbery, Aggravated Assault, Human Trafficking – Commercial Sex Acts, and Human Trafficking – Involuntary Servitude) and “property crimes” (Burglary, Larceny, Motor Vehicle Theft, and Arson). From 2017 to 2018, violent crimes fell from 13,476 to 12,571; property crimes fell from 122,698 to 111,727; and the index crime rate fell from 2441.9 to 2215.2 per 100,000 in population. 1995 to 2018 Uniform Crime Reports, State of Minnesota, Department of Public Safety, obtained September 2019 at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Pages/uniform-crime-reports.aspx>.

Figure 3. Percent Change in Number of Offenders Sentenced for Felony Convictions, 1982–2018



Change in Case Volume by Offense Type

Figure 4 shows the year-to-year percent change, by offense type, in the number of offenders sentenced, and Figure 5 shows the number of offenders sentenced by offense type from 2003 to 2018.

Figure 4. Offenders Sentenced, Percent Change from Previous Year, by Offense Type, 2001–2018

Year Sentenced	All Offenses	Person	Property	Drug	Felony DWI	Non-CSC Sex Offense ⁴⁶	Weapon ⁴⁷	Other ⁴⁸
2001	+3.9%	+3.8%	+4.2%	0.0%				+13.3%
2002	+20.2%	+10.4%	+17.9%	+31.9%				+16.3%
2003	+11.7%	+6.2%	+2.4%	+13.8%				+2.2%
2004	+1.8%	+1.1%	-0.8%	+3.6%	+6.2%			+6.2%
2005	+4.8%	+6.4%	+2.0%	+8.1%	-3.0%			+7.6%
2006	+6.4%	+13.7%	+7.9%	+2.7%	-5.5%			+1.1%
2007	-1.7%	+7.3%	-4.0%	-7.1%	-6.7%			+3.7%
2008	-4.8%	+2.9%	-11.5%	-6.9%	+6.0%			-0.1%
2009	-3.6%	+6.6%	-7.0%	-7.7%	-9.6%			-7.0%
2010	-3.6%	+2.0%	-6.8%	-7.0%	-5.3%	+3.1%	-1.3%	-3.0%
2011	+1.8%	+1.7%	-2.4%	+2.5%	-1.0%	+9.9%	+9.8%	+20.3%
2012	+4.4%	+3.5%	+8.8%	+4.2%	-4.4%	+4.0%	+18.8%	-11.5%
2013	+0.7%	-0.1%	-1.7%	+7.6%	-19.2%	+4.6%	+13.4%	-5.2%
2014	+5.4%	+1.4%	+1.3%	+14.2%	+28.6%	-2.1%	+0.2%	+2.6%
2015	+3.8%	+1.6%	-0.3%	+12.6%	-10.5%	-7.1%	+2.1%	+15.0%
2016	+1.0%	-2.5%	-3.6%	+11.4%	-19.1%	-4.3%	+1.3%	+2.2%
2017	+8.0%	+7.8%	+10.4%	+3.6%	+20.0%	+16.9%	+11.2%	+13.2%
2018	-0.0%	+1.5%	+1.0%	-2.4%	-2.6%	+2.3%	+7.8%	-3.8%

For explanations of the “Non-CSC sex offenses,” “Weapon,” and “Other” categories, see footnotes 46–48. “Other” category also includes DWI before 2004 and non-CSC sex offenses and weapon offenses before 2010.

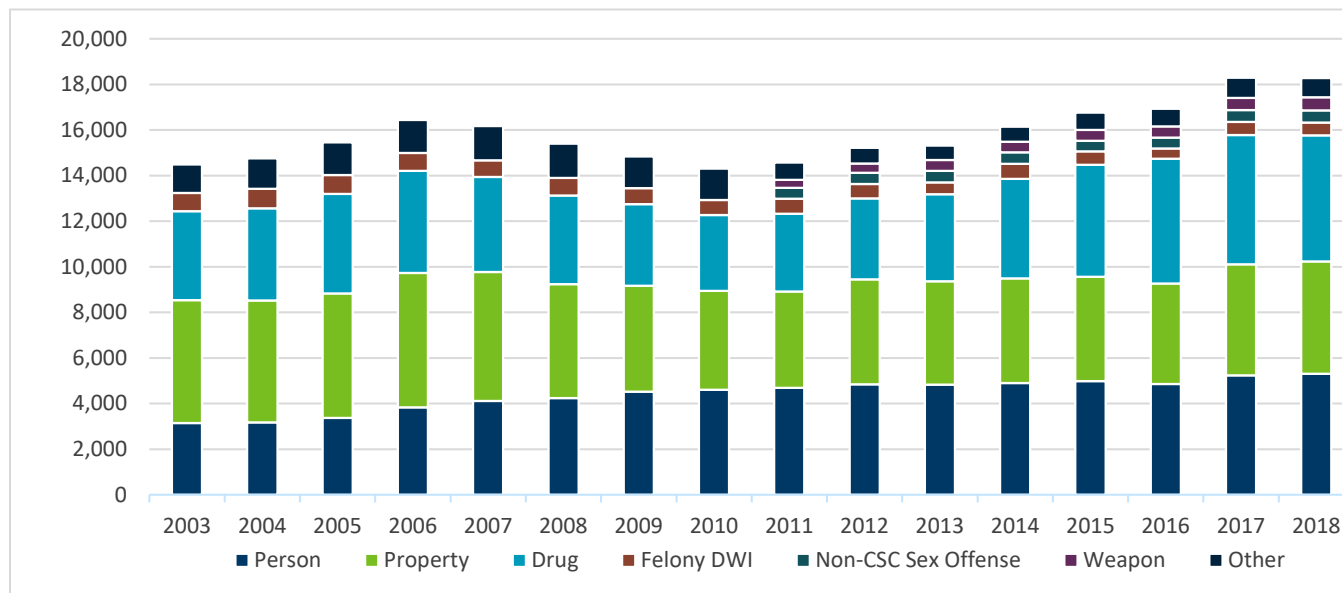
⁴⁶ “Non-CSC sex offenses” are offenses on the Sex Offender Grid other than criminal sexual conduct (chiefly failure to register as a predatory offender and possession and dissemination of child pornography).

⁴⁷ “Weapon” category includes: Possession of a firearm by a felon convicted of a crime of violence, discharge of firearm, and other weapon related offenses.

⁴⁸ “Other” category includes: Fleeing police, escape, voting violations, tax evasion laws, and other offenses of less frequency. “Other” category also includes DWI before 2004 and non-CSC sex offenses and weapon offenses before 2010.

⁴⁹ “Index crimes” are comprised of “violent crimes” (Murder, Forcible Rape, Robbery, Aggravated Assault, Human Trafficking – Commercial Sex Acts, and Human Trafficking – Involuntary Servitude) and “property crimes” (Burglary, Larceny, Motor Vehicle Theft, and Arson). From 2017 to 2018, violent crimes fell from 13,476 to 12,571; property crimes fell from 122,698 to 111,727; and the index crime rate fell from 2441.9 to 2215.2 per 100,000 in population. 1995 to 2018 Uniform Crime Reports, State of Minnesota, Department of Public Safety, obtained September 2019 at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Pages/uniform-crime-reports.aspx>.

Figure 5. Number of Offenders Sentenced by Offense Type, 2003–2018



Distribution of Offenders by Gender, Race & Ethnicity, and Judicial District

For the first time, in 2018, males accounted for less than 80 percent of the felony offenders in Minnesota. In 2018, 79.7 percent of the offenders sentenced were male and 20.3 percent were female (Table 1). Figure 6 shows the racial and ethnic composition of the felony offender population from 1981 through 2018. The percentage of offenders who were white decreased by 25 percentage points between 1981 (81.8%) and 2009 (56.5%). This was largely due to an increase in the percentage of black offenders, although the percentage of other offenders (particularly Hispanic offenders) also increased. From 2017 to 2018, the percentage of white offenders decreased from 57.3 percent to 56.6 percent.

The percent of offenders who are black increased from 25.5 percent in 2017 to 26.7 percent in 2018. The percent who are American Indians decreased, while the percent who are Hispanic and Asian remained similar to that seen in 2017.

Figure 7 displays the 2018 distribution of the racial and ethnic composition of offender populations by Minnesota judicial district. The largest populations of black offenders were in the Second Judicial District (Ramsey County) and the Fourth Judicial District (Hennepin County). These districts include the cities of St. Paul and Minneapolis, respectively. A map of the judicial districts can be found in Appendix 5 (p. 124).

Figure 6. Distribution of Felony Offenders by Race & Ethnicity, 1981–2018

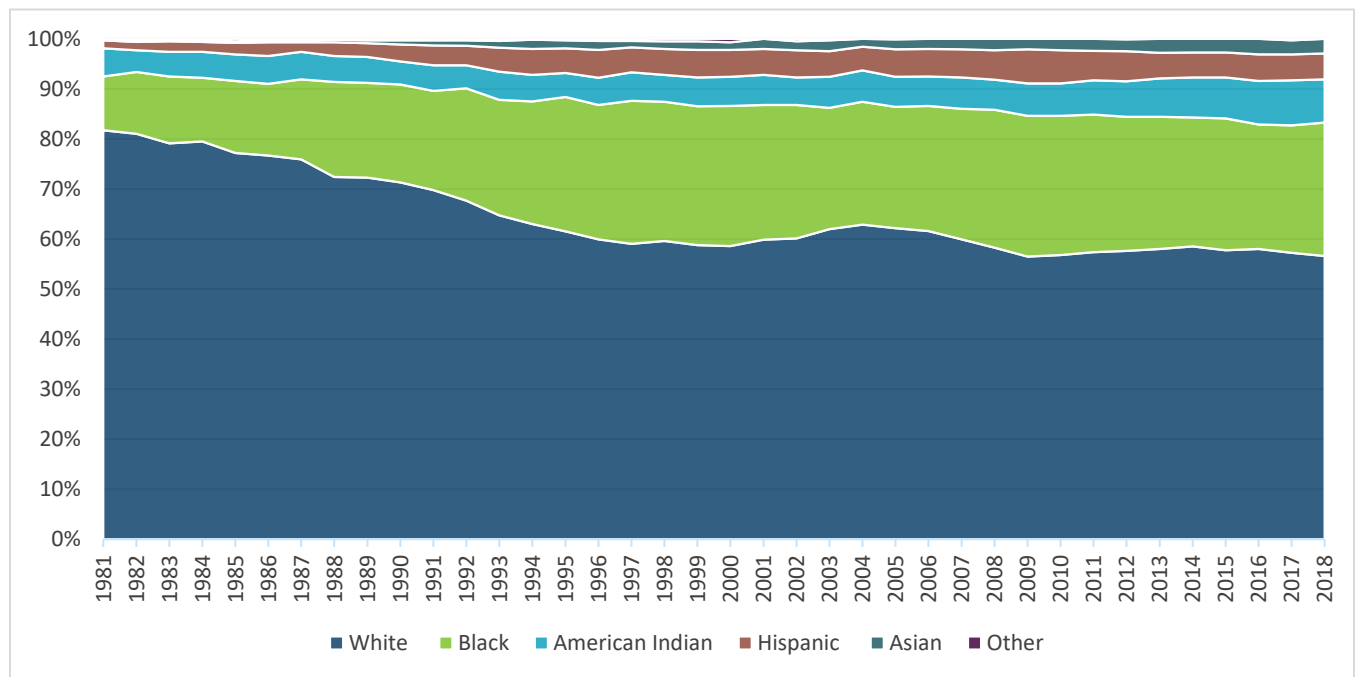


Figure 7. Distribution of Felony Offenders by Race & Ethnicity and Judicial District, 2018

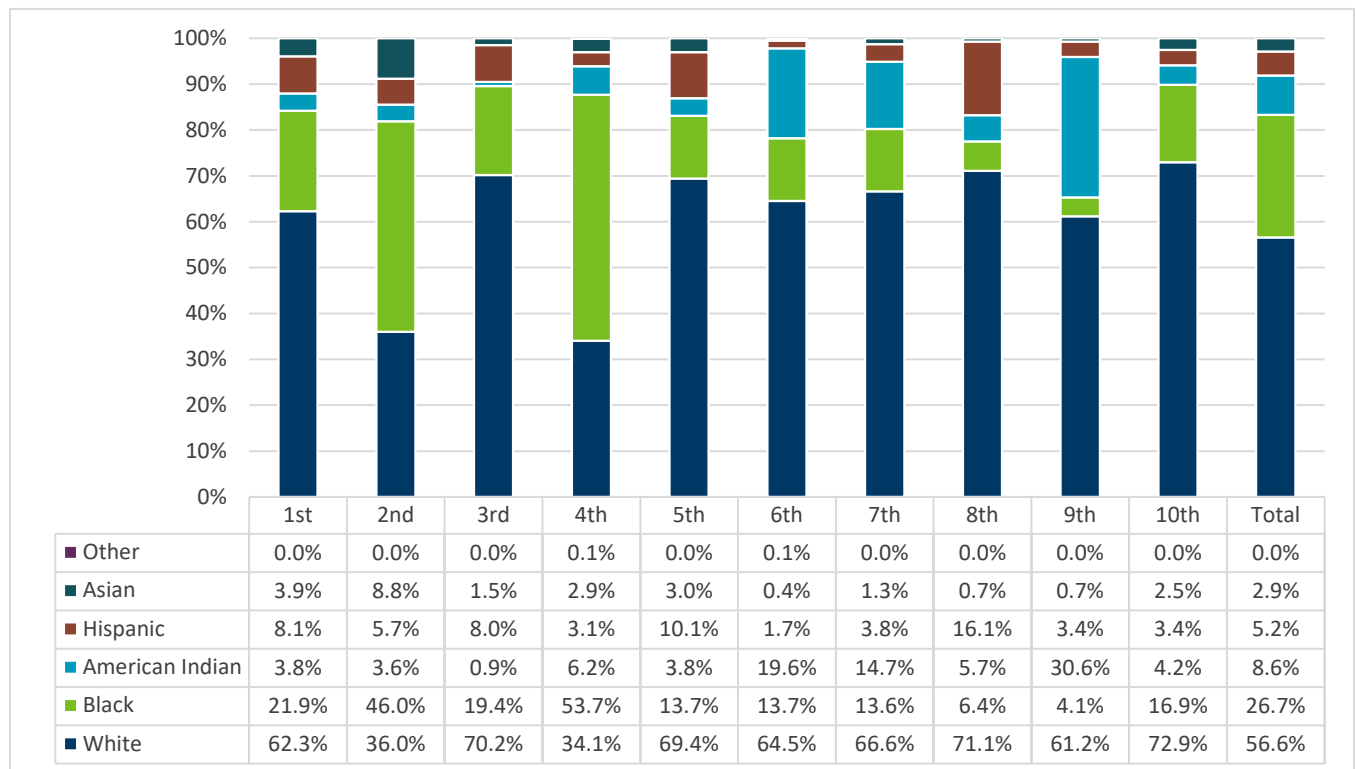


Table 1 compares, by the categories of sex, race & ethnicity, and judicial district, the population of felony offenders sentenced in 2018 with the 2018 estimated state population, age 15 and older. Within those comparison categories, Table 1 also calculates the rate of offenders sentenced in 2018 per 100,000 residents.

Table 1. Offenders Sentenced, 2018, by Gender, Race & Ethnicity, and Judicial District, Compared to 2018 Estimated Population Age 15 Years and Older

	MSGC Category	Offenders Sentenced		U.S. Census Category	2018 Estimated Pop. Age 15 & Older		Offenders Sentenced per 100,000
		Number	Percent		Number	Percent	
	Male	14,566	79.7%	Male	2,240,025	49.5%	650
	Female	3,717	20.3%	Female	2,284,777	50.5%	163
Race & Ethnicity	White	10,343	56.6%	White*	3,785,189	83.7%	273
	Black	4,880	26.7%	Black or African American*	291,296	6.4%	1,675
	American Indian	1,574	8.6%	American Indian*	71,013	1.6%	2,216
	Hispanic**	948	5.2%	Hispanic**	210,101	4.6%	451
	Asian	533	2.9%	Asian*	238,780	5.3%	223
	Other/Unknown	6	0.0%	Native Hawaiian/Other Pacific Islander*	5,163	0.1%	***
Judicial District****	First	2,484	13.6%	First	636,267	14.1%	390
	Second	1,813	9.9%	Second	441,619	9.8%	411
	Third	1,361	7.4%	Third	388,888	8.6%	350
	Fourth	4,070	22.3%	Fourth	1,025,940	22.7%	397
	Fifth	1,016	5.6%	Fifth	232,992	5.1%	436
	Sixth	831	4.5%	Sixth	211,161	4.7%	394
	Seventh	1,874	10.2%	Seventh	395,773	8.7%	474
	Eighth	453	2.5%	Eighth	128,902	2.8%	351
	Ninth	1,755	9.6%	Ninth	276,169	6.1%	635
	Tenth	2,627	14.4%	Tenth	787,091	17.4%	334
	Total	18,283	100.0%	Total	4,524,802	100.0%	404

Source of July 1, 2018, population estimate: U.S. Census Bureau (August 2019).

*Not Hispanic, alone or in combination with one or more other races. The sum of percentages of residents in each racial or ethnic category exceeds 100 percent (101.7%) because residents of more than one race are counted in more than one category.

**Table 1 lists all Hispanic offenders and residents as Hispanic, regardless of race.

***The MSGC category of "Other/Unknown" is not a valid comparison group to the U.S. Census category of "Native Hawaiian/Other Pacific Islander."

****See Appendix 5 (p. 124) for a map of Minnesota's ten judicial districts.

Incarceration Rates

Under Minn. Stat. § [609.02](#), a felony sentence must be at least 366 days long. Sentences of one year or less are gross misdemeanors or misdemeanors and are served in local correctional facilities (i.e., county jail or workhouse).

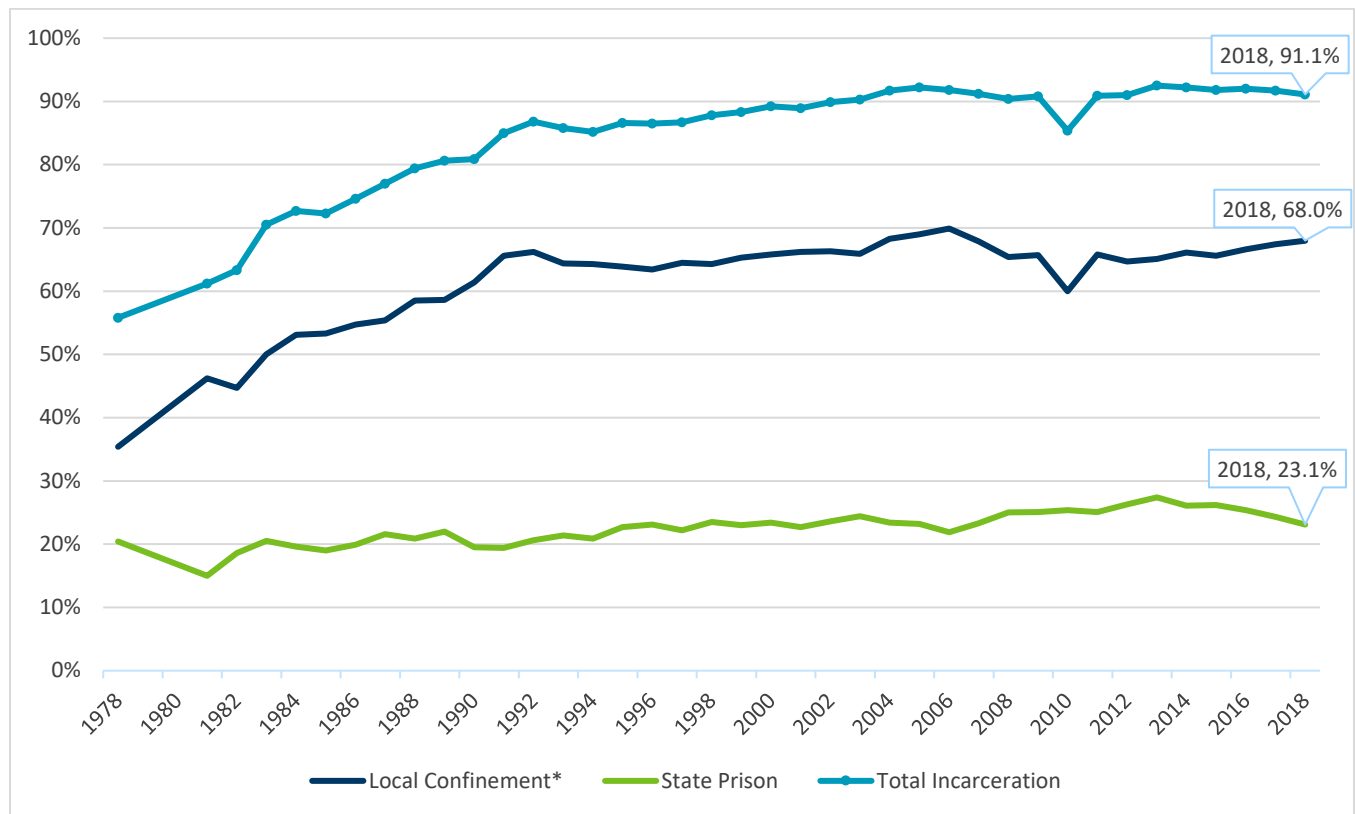
The Guidelines presume who should go to state prison and for how long. Imprisonment rates are related to the Guidelines recommendations and are based on the seriousness of the offense and the offender's criminal history score. In cases in which prison sentences are stayed, the court usually places the offender on probation. As a condition of probation, the court may impose up to one year of local confinement. Probationers usually serve time in a local facility (i.e., county jail or workhouse) and are often given intermediate sanctions such as treatment (residential or nonresidential), restitution, and fines.

Total Incarceration

The total incarceration rate describes the percentage of offenders who received a sentence that included incarceration in a state prison or local confinement (i.e., county jail, local correctional facility, or workhouse), following conviction. The 2012–15 imprisonment rates were the highest rates observed since the Guidelines were implemented. In 2016 and 2017, the imprisonment rate declined to 25.4 percent and 24.3 percent, respectively. In 2018, the imprisonment rate declined again: 91.1 percent of felony offenders served either local confinement time or state prison time (Total Incarceration, Figure 8): 68.0 percent served local confinement time⁵⁰ as part of their stayed sentence (Local Confinement, Figure 8); and 23.1 percent were sentenced to state prison (State Prison, Figure 8).

⁵⁰ When a felony sentence is “stayed,” the court may impose up to one year of confinement in a local correctional facility such as a county jail or workhouse.

Figure 8. Total Incarceration Rates: 1978, 1981–2018



*Offenders who receive “stayed” sentences that include up to one year incarceration in a local correctional facility are subject to possible future revocation to state prison.

Table 2 (p. 23) provides total incarceration information for offenders sentenced in 2018. “Total Incarceration” includes all offenders receiving prison sentences or receiving local confinement time as a condition of a stayed sentence. When comparing imprisonment rates (state prison) across various groups (sex, race and ethnicity, or judicial district) it is important to note that much of the variation is directly related to the proportion of offenders in any particular group who are recommended a prison sentence by the Guidelines based on the severity of the offense and the offender’s criminal history.

Race & Ethnicity

The total incarceration rate varies somewhat across racial groups (ranging from 90.1% for white offenders to 93.4% for Asian offenders) (Figure 9, p. 24). Greater variation by race exists in the separate imprisonment rates (State Prison) and local confinement. Among five racial groups, white offenders had the lowest actual (19.5%), whereas black offenders had the highest actual (30.0%) imprisonment rates (Table 2).

Judicial District

Variation was also observed in incarceration rates by judicial district (Figure 10, p. 24). The Second Judicial District (Ramsey County) had the highest total incarceration rate (96.9%) and the Ninth Judicial District

(northwest Minnesota) had the lowest total incarceration rate (78.6%). Variation was also seen with respect to the separate rates for prison and local confinement. The Seventh Judicial District (west-central counties) had the highest imprisonment rate (27.7%), and the First Judicial District (southern metro counties) had the lowest imprisonment rate (18.2%). With regard to use of local confinement, the First and Tenth Judicial Districts had the highest rates (74.7% and 74.6%), and the Ninth Judicial District had the lowest rate (55.3%).

Table 2. Total Incarceration Rates by Gender, Race & Ethnicity, and Judicial District, 2018 and 2014–18 Rate

	MSGC Category	Total Number	Total Incarceration		Local Confinement		State Prison		
			Number	Rate (%)	Number	Rate (%)	Number	2018 Rate (%)	2014–18 5-Yr. Rate
	Male	14,566	13,398	92.0	9,566	65.7	3,833	26.3	28.1
	Female	3,717	3,262	87.8	2,869	77.2	393	10.6	12.0
Race & Ethnicity	White	10,343	9,318	90.1	7,301	70.6	2,017	19.5	21.8
	Black	4,880	4,538	93.0	3,075	63.0	1,463	30.0	31.0
	American Indian	1,574	1,422	90.3	1,049	66.6	373	23.7	26.9
	Hispanic	948	882	93.0	624	65.8	258	27.2	28.8
	Asian	533	498	93.4	383	71.9	115	21.6	23.3
	Other/Unknown	6	2	33.3	2	33.3	0	0.0	13.0
Judicial District	First	2,484	2,309	93.0	1,856	74.7	453	18.2	20.0
	Second	1,813	1,756	96.9	1,311	72.3	445	24.5	26.3
	Third	1,361	1,170	86.0	844	62.0	326	24.0	24.9
	Fourth	4,070	3,678	90.4	2,600	63.9	1,078	26.5	28.6
	Fifth	1,016	924	90.9	728	71.7	196	19.3	20.9
	Sixth	831	711	85.6	551	66.3	160	19.3	21.9
	Seventh	1,874	1,808	96.5	1,289	68.8	519	27.7	28.9
	Eighth	453	427	94.3	326	72.0	101	22.3	27.3
	Ninth	1,755	1,379	78.6	971	55.3	408	23.2	25.6
	Tenth	2,627	2,498	95.1	1,958	74.5	540	20.6	22.4
	Total	18,284	16,660	91.1	12,434	68.0	4,226	23.1	25.0

**See Appendix 5 (p. 124) for a map of Minnesota's ten judicial districts.*

Figure 9. Total Incarceration Rates by Gender & Race/Ethnicity, 2018

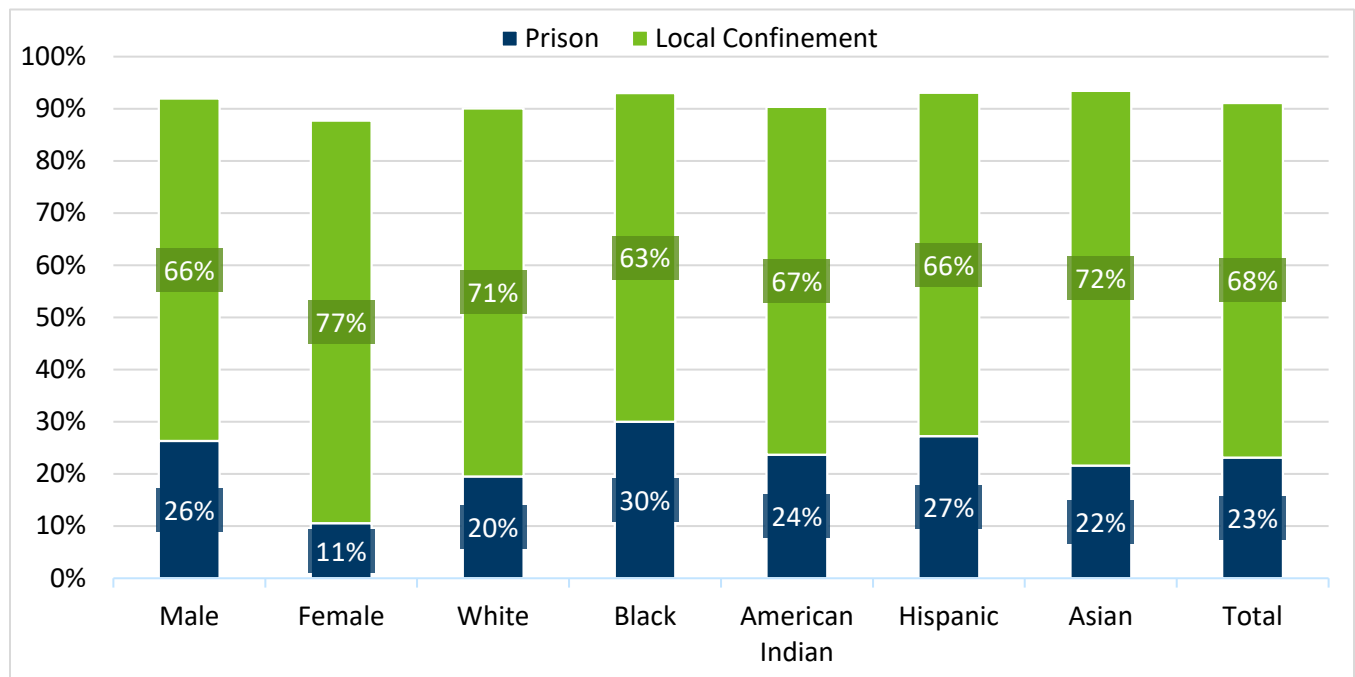
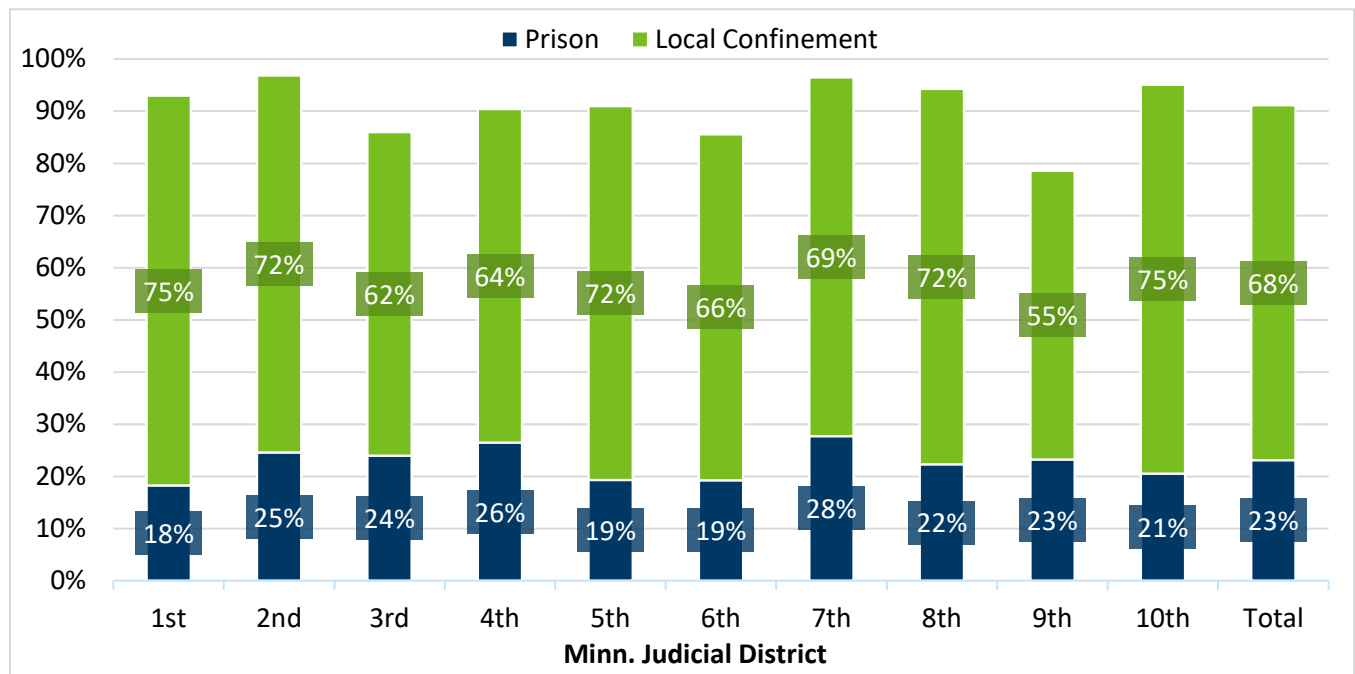


Figure 10. Total Incarceration Rates by Judicial District, 2018



Average Pronounced Prison Sentence and Local Confinement

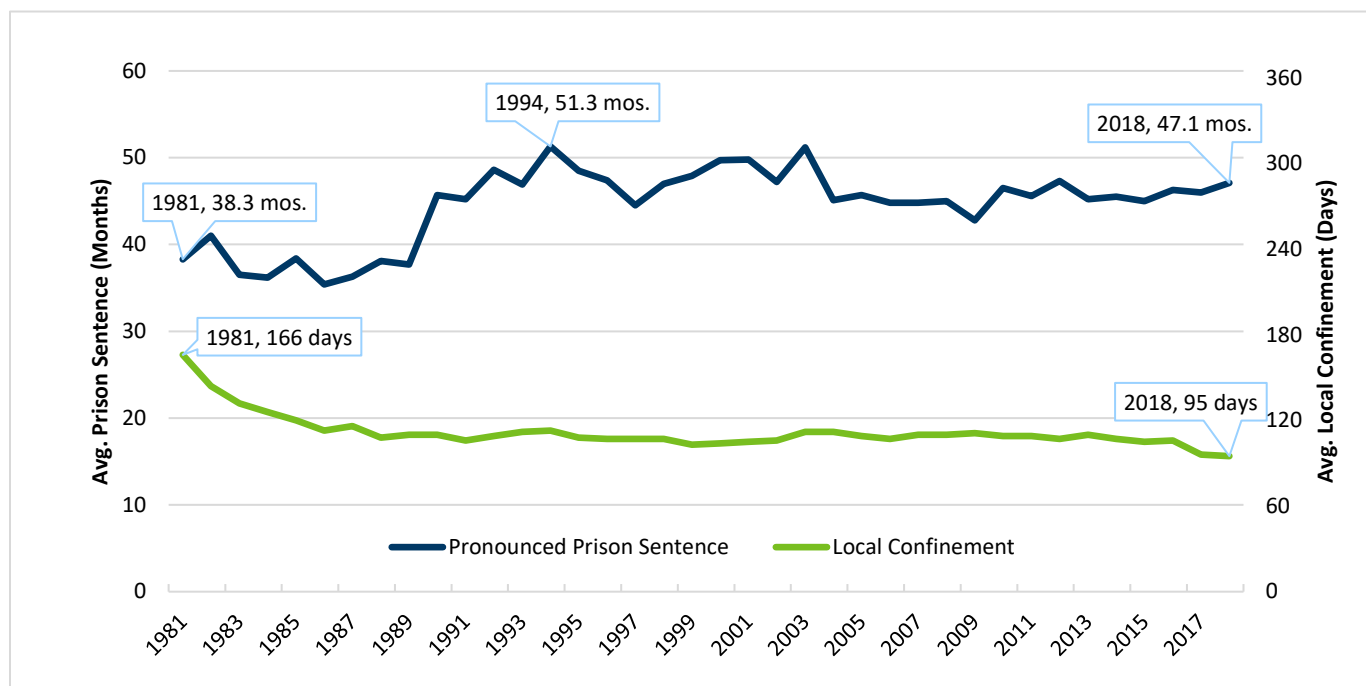
In 2018, the average pronounced prison sentence was 47 months, a slight increase from 2017 (Figure 11). The average varied by applicable Grid: 43 months for offenders with presumptive sentences on the Standard Grid, and 75 months for offenders with presumptive sentences on the Sex Offender Grid.⁵¹ The Drug Offender Grid, which became effective August 1, 2016, had an average pronounced prison sentence of 46 months.

Life Sentences

Sixteen offenders received life sentences (an increase from seven offenders in 2017), all of which were for first-degree murder. Seven of those life sentences were with no release possible, six of which resulted from convictions of premeditated first-degree murder.⁵² Offenders with life sentences are excluded from the average pronounced prison sentences reported here.

The average amount of local confinement pronounced was 95 days in 2018, the lowest average on record (Figure 11). The average amount of local confinement was 96 days in 2017, 106 days in 2016, and had remained in a fairly narrow range—between 103 and 113 days—from 1988 through 2016.

Figure 11. Average Pronounced Prison Sentences and Local Confinement, 1981–2018



⁵¹ In 2018, 10 offenders (0.05%) were sentenced for offenses committed before August 1, 2005, some of which were sex offenses. The applicable pre-2005 Standard Grid was therefore used to determine the presumptive sentence. The average pronounced sentence for these offenses was 95.5 months.

⁵² Life imprisonment without possibility of release has been the mandatory sentence for premeditated murder since 2005. [2005 Minn. Laws ch. 136](#), art. 2, § 5, & art. 17, § 9.

Departures from the Sentencing Guidelines

A “departure” is a pronounced sentence other than that recommended in the appropriate cell of the applicable Guidelines Grid. There are two types of departures – dispositional and durational – as further explained below. Since the presumptive sentence is based on “the typical case,” the appropriate use of departures by the courts when substantial and compelling circumstances exist can actually enhance proportionality by varying the sanction in an atypical case.

While the court ultimately makes the sentencing decision, most sentences pronounced by the court are based on judicial acceptance of plea agreements between prosecutors and defendants after victim input. Probation officers make recommendations to the courts regarding whether a departure from the presumptive sentence is appropriate, and prosecutors and defense attorneys commonly arrive at agreements regarding acceptable sentences for which an appeal will not be pursued. Prosecutors did not object to at least 57 percent of mitigated dispositional departures, nor to at least 72 percent of mitigated durational departures.⁵³

When there is a departure from the presumptive sentence, the court is required to submit reasons for the departure to the Commission.⁵⁴ Along with reasons for departure, the court may supply information about the position of the prosecutor regarding the departure. In 2018, the Commission received departure reasons, information about the position of the prosecutor, or both, in 99 percent of departure cases, and 97 percent of felony convictions were settled without a trial. The Commission recognizes the need to balance the importance of plea agreements with the goals of the Guidelines. In the case of a plea agreement, the Commission asks courts to explain the underlying reasons for the plea agreement or for the court’s acceptance of it.⁵⁵

Total Departures

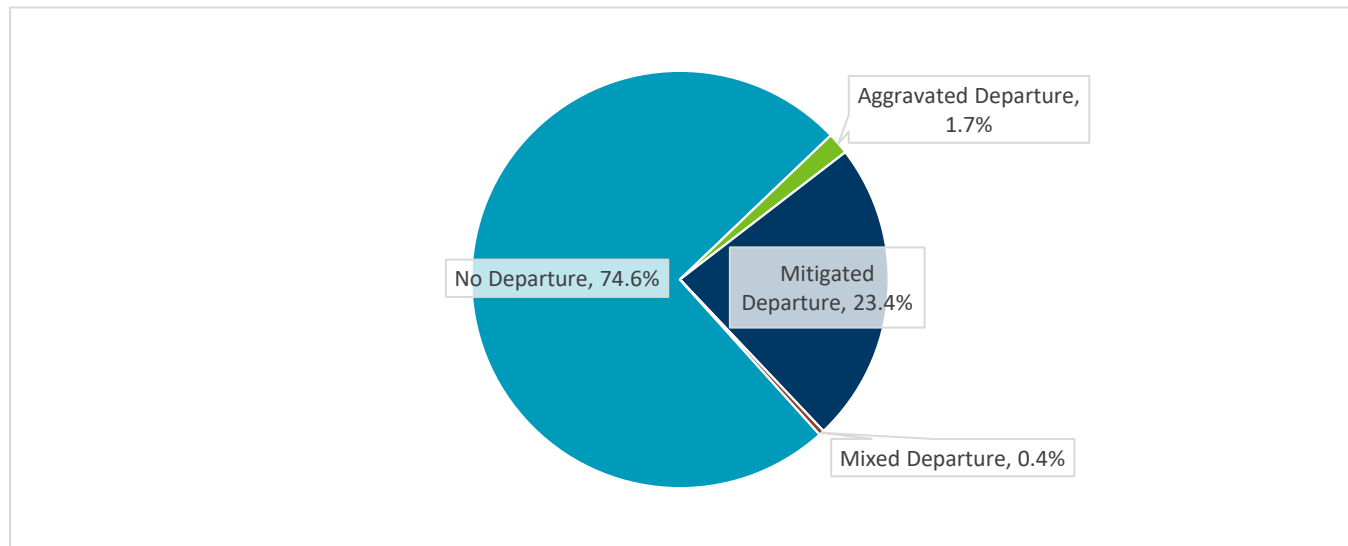
In 2018, 74.6 percent of the total number of felony offenders (18,284) sentenced received the presumptive Guidelines sentence. The remaining 25.4 percent received some type of departure; i.e., aggravated, mitigated, or “mixed,” which includes both dispositional and durational departures (Figure 12).

⁵³ See Figure 15 and Figure 17.

⁵⁴ Minn. R. Crim. P. [27.03](#), subd. 4(C).

⁵⁵ See Minn. Sentencing Guidelines comment 2.D.104 (“Plea agreements are important to our criminal justice system because it is not possible to support a system where all cases go to trial. However, it is important to have balance in the criminal justice system where plea agreements are recognized as legitimate and necessary and the goals of the Guidelines are supported. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to make informed policy decisions or to ensure consistency, proportionality, and rationality in sentencing. Departures and their reasons highlight both the success and problems of the existing Guidelines. When a plea agreement involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain its reasons for accepting the negotiation.”).

Figure 12. Total Departure Rates, All Cases, 2018



Dispositional Departures

While Figure 12, above, reports both the dispositional and durational departure rates among all cases, this section examines only dispositional departures.

A “dispositional departure” occurs when the court orders a disposition other than that recommended in the Guidelines. There are two types of dispositional departures: aggravated dispositional departures and mitigated dispositional departures. An aggravated dispositional departure occurs when the Guidelines recommend a stayed sentence but the court pronounces an executed prison sentence. A mitigated dispositional departure occurs when the Guidelines recommend a prison sentence but the court pronounces a stayed sentence.

In 2018, 2,386 offenders (13%) received a dispositional departure from the Guidelines. In 2,284 cases (12.5%), the offenders received probation when the Guidelines recommended prison (“mitigated dispositional departure”), and, in 102 cases (0.6%), the offenders received prison when the Guidelines recommended probation (“aggravated dispositional departure”) (Figure 13).

Most aggravated dispositional departures (54% in 2018) occur when an offender with a presumptive stayed sentence requests an executed prison sentence or agrees to the departure as part of a plea agreement. This request is usually made in order for the offender to serve the sentence concurrently with another prison sentence. The Commission historically included these cases in the departure figures because, for the given offense, the sentence is not the presumptive Guidelines sentence. If requests for prison are not included in the analysis, the aggravated dispositional departure rate—as a measure of judicial compliance—is 0.3 percent (Figure 13, inset).

Effective with the August 1, 2015, amendments to Minnesota Sentencing Guidelines § 2.D.1, a sentence that is executed pursuant to an offender’s right to demand execution is no longer considered an aggravated dispositional departure. This change has resulted in a decrease in the aggravated dispositional departure rate

from previous years. In 2015, the overall aggravated dispositional departure rate was 4.2 percent and the rate for presumptive stayed sentences was 6.2 percent. The decrease in aggravated dispositional departure rates is apparent in the 2018 sentencing data.⁵⁶

Figure 13. Dispositional Departure Rates with and without Requests for Prison from Defendant, 2018

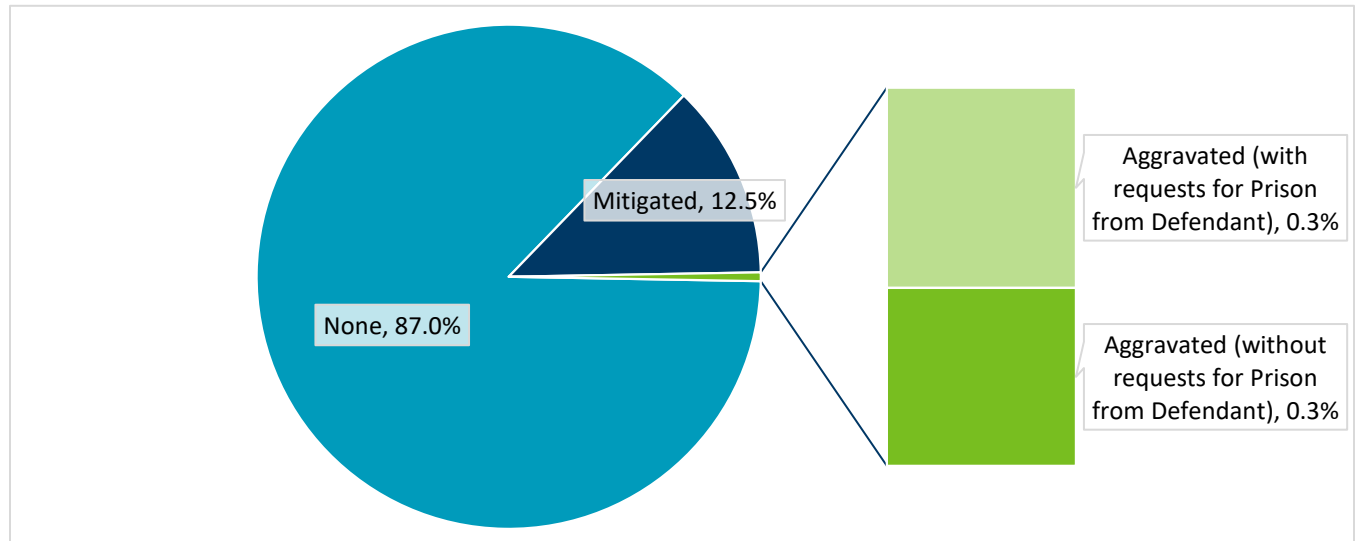


Table 3 lists dispositional departure rates by gender, race and ethnicity, and judicial district for presumptive commitment offenses. The aggravated dispositional departure rate for offenders recommended a stayed sentence (“Presumptive Stays”) was 0.8 percent. The mitigated dispositional departure rate for offenders who were recommended prison (“Presumptive Commitments”) was 38.3 percent.

The mitigated dispositional departure rate is higher for women (53.6%) than men (36.6%). When examined by racial and ethnic composition, the mitigated dispositional departure rate ranged from a low of 33.2 percent for Hispanic offenders and 33.3 percent for American Indian offenders to a high of 42.5 percent for Asians offenders. There was also variation in the rate by judicial district, ranging from a low of 32.3 percent in the Seventh Judicial District (includes the City of St. Cloud) to a high of 48.3 percent in the Sixth Judicial District (includes the City of Duluth).

When reviewing Table 3, note the observed variations may be partly explained by regional differences in case volume, charging practices, and plea agreement practices, as well as differences in the types of offenses sentenced, criminal history scores of offenders across racial groups or across regions, and available local correctional resources. (See Appendix 5 on page 124 for a map of Minnesota’s ten judicial districts.)

⁵⁶ For cases sentenced in 2018, 94.1% of the presumptive stayed cases had an offense date within the scope of the 2015 change. The aggravated dispositional departure rate for those cases was 0.5%, compared to 6.3% for 2018 cases with offense dates prior to August 1, 2015. There were 448 post-August 1, 2015, presumptive stayed cases where the offender received a prison sentence that was not counted as a dispositional departure because the sentence was executed pursuant to the offender’s right to demand execution.

Table 3. Dispositional Departures by Presumptive Disposition, by Gender, Race and Ethnicity, and Judicial District, 2018 and 2013–17 Rate

		Total Number	Presumptive Stays			Presumptive Commitments			
			Total	Aggravated Dispositional Departure		Total	Mitigated Dispositional Departure		
				Number	Rate (%)		Number	2018 Rate (%)	2013–17 5-Yr. Rate
	Male	14,566	9,191	4	0.8	5,375	1,969	36.6	33.8
	Female	3,717	3,131	28	0.9	586	314	53.6	54.2
Race & Ethnicity	White	10,343	7,442	54	0.7	2,901	1,207	41.6	38.8
	Black	4,880	2,793	20	0.7	2,087	737	35.3	33.3
	American Indian	1,574	1,120	22	2.0	454	151	33.3	29.3
	Hispanic	948	602	3	0.5	346	115	33.2	31.8
	Asian	533	359	3	0.8	174	74	42.5	35.9
	Other/Unknown	6	6	0	---	0	---	---	66.7
Judicial District	First	2,484	1,830	18	1.0	654	276	42.2	40.1
	Second	1,813	1,057	7	0.7	756	345	45.6	37.9
	Third	1,361	880	3	0.3	481	197	41.0	37.9
	Fourth	4,070	2,586	11	0.4	1,484	492	33.2	33.9
	Fifth	1,016	724	4	0.6	292	117	40.1	42.7
	Sixth	831	535	1	0.2	296	143	48.3	43.8
	Seventh	1,874	1,257	20	1.6	617	199	32.3	28.3
	Eighth	453	327	1	0.3	126	43	34.1	28.6
	Ninth	1,755	1,286	29	2.3	469	161	34.3	32.6
	Tenth	2,627	1,840	8	0.4	764	311	39.5	35.9
	Total	18,284	12,322	102	0.8	5,962	2,284	38.3	35.8

See Appendix 5 (p. 124) for a map of Minnesota’s ten judicial districts.

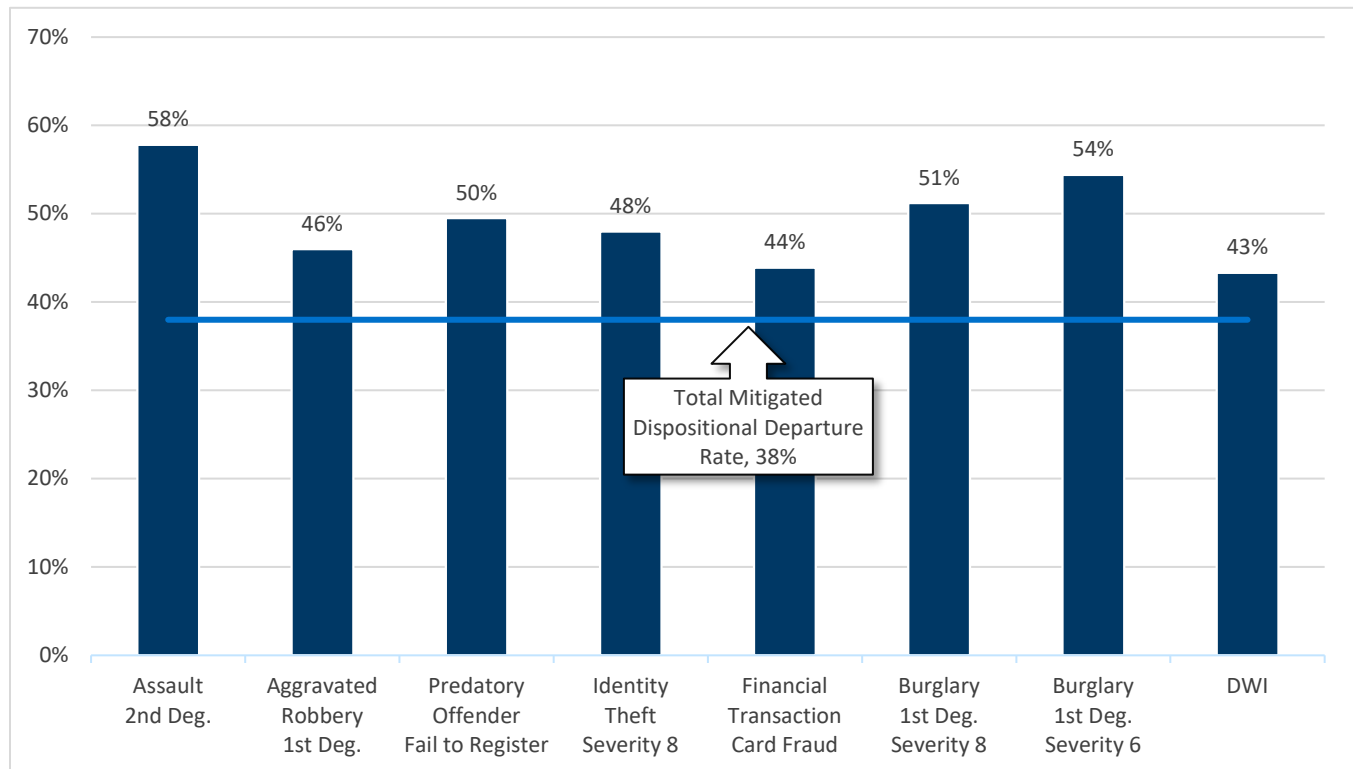
Dispositional departure rates vary for the type of offense. Figure 14 displays the offenses with the highest rates of mitigated dispositional departure compared to the total rate of 38 percent, and Figure 15 displays the position of the prosecutor as cited by the court.⁵⁷

In 57 percent of mitigated dispositional departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In 19.5 percent of these cases, the court stated that the prosecutor objected to the departure (Figure 15, “Total”). The court did not supply

⁵⁷ The offenses were selected based on criteria that there were 50 or more “presumptive commitment” cases and the mitigated dispositional departure rate of 43% or more.

information on the prosecutor's position in 24 percent of these departures. In all offense categories, amenability to probation and amenability to treatment were the most frequently cited substantial and compelling reasons for departure recorded.

Figure 14. Mitigated Dispositional Departure Rates for Selected Offenses Compared to Total Rate, 2018*



**Selected based on criteria that there were 50 or more presumptive commitment cases and the mitigated dispositional departure rate was 43% or more. "Total" includes all presumptive commitment cases.*

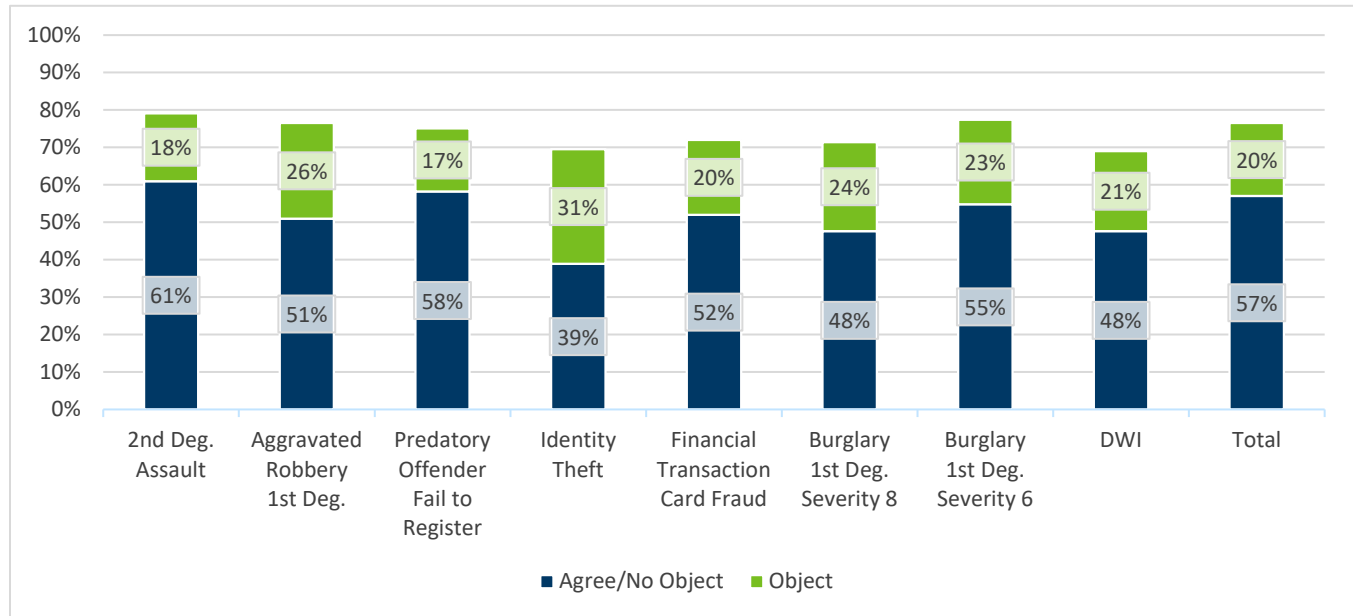
Two of the selected⁵⁸ offenses in Figure 14 and Figure 15, assault in the second degree and failure to register as a predatory offender, have mandatory minimum sentences specified in statute, with provisions allowing for departure from those mandatory minimums.

Assault in the second degree, by definition, involves the use of a dangerous weapon and therefore carries a mandatory minimum prison sentence ([Minn. Stat. § 609.11](#), subds. 4, 5 & 9). The second-degree assault statute proscribes a broad range of misbehavior: Injury to the victim may or may not occur, and the type of dangerous weapon involved can vary widely, from a pool cue to a knife to a firearm. Circumstances surrounding the offense can also vary significantly, from barroom brawls to unprovoked confrontations. The mandatory minimum statute specifically permits the court to sentence without regard to the mandatory minimum, provided that substantial and compelling reasons are present ([Minn. Stat. § 609.11](#), subd. 8). It is perhaps unsurprising to find many departures in the sentencing of a crime that can be committed in many different ways.

⁵⁸ See footnote 57 for selection criteria.

Failure to register as a predatory offender also has a statutory mandatory minimum sentence, accompanied by a statutory provision that allows for sentencing without regard to the mandatory minimum ([Minn. Stat. § 243.166](#), subd. 5(d)).

Figure 15. Court-Cited Position of Prosecutor for Mitigated Dispositional Departures, Selected* Offenses, 2018



Because departure reports do not always include information on the prosecutor's position, columns do not add up to 100%.

*Offenses were selected based on criteria that there were 50 or more presumptive commitment cases and the mitigated dispositional departure rate was 43 percent or more.

Durational Departures

A “durational departure” occurs when the court orders a sentence with a duration that is other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid. There are two types of durational departures: aggravated durational departures and mitigated durational departures. An aggravated durational departure occurs when the court pronounces a duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid. A mitigated durational departure occurs when the court pronounces a sentence that is more than 15 percent lower than the fixed duration displayed in the appropriate cell on the applicable Grid.

From 2016 to 2017, the mitigated durational departure rate fell from 23.7 percent to 21.9 percent; and it rose slightly in 2018 to 22.8 percent. The aggravated durational departure rate fell from 2.8 percent to 2.6 percent from 2016 to 2017; and rose slightly in 2018 to 2.7 percent. The general trend in lower aggravated durational departure rates since the mid-2000s likely reflects the impact of increased presumptive sentences over the past years and issues related to the U.S. Supreme Court ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), which

required a jury to find all facts—other than the fact of a prior conviction or those facts agreed to by the defendant—used to enhance a sentence under mandatory sentencing guidelines.⁵⁹

In response to the *Blakely* decision, the 2005 Legislature widened the ranges on the Standard Grid to 15 percent below and 20 percent above the presumptive fixed sentence, within which the court may sentence without departure. In 2006, a Sex Offender Grid was adopted. The Sex Offender Grid introduced higher presumptive sentences for repeat offenders and offenders with prior criminal history records.⁶⁰

Table 4 illustrates durational departure rates for executed prison sentences by gender, race and ethnicity, and judicial district. The mitigated durational departure rate was higher for males than females (22.9% vs. 21.9%). When the departure rate is examined by racial and ethnic composition, the rate varies from a low of 17.8 percent for white offenders to a high of 30.6 percent for black offenders. There is also considerable variation in the rate by judicial district, ranging from a low of 2.0 percent in the Eighth Judicial District (includes the City of Willmar) to a high of 40.7 percent in the Second Judicial District (includes the City of St. Paul).

When reviewing the information in Table 4, it is important to note that the observed variations may be partly explained by regional differences in case volume, charging practices, and plea agreement practices, as well as differences in the types of offenses sentenced and criminal history scores of offenders across racial groups or across regions. A map of Minnesota’s ten judicial districts can be found in Appendix 5 (p. 124).

Table 4. Durational Departure Rates by Gender, Race and Ethnicity, and Judicial District, Executed Prison Sentences Only, 2018 and 2013–17 Rate

		Number Executed Prison	Total Durational Departure Rate (%)	Durational Departures, Executed Prison Sentences Only						
				No Departure		Aggravated		Mitigated		
				Number	Rate	Number	Rate	Number	2018 Rate	2013–17 5-Yr. Rate
	Male	3,833	25.7	2,848	74.3	107	2.8	878	22.9	25.1
	Female	393	23.4	301	76.6	6	1.5	86	21.9	21.0
Race & Ethnicity	White	2,017	20.0	1,614	80.0	43	2.1	360	17.8	19.8
	Black	1,463	34.0	965	66.0	51	3.5	447	30.6	34.8
	American Indian	373	23.9	284	76.1	9	2.4	80	21.4	16.7
	Hispanic	258	20.9	204	79.1	7	2.7	47	18.2	21.3
	Asian	115	28.7	82	71.3	3	2.6	30	26.1	32.7
	Other/Unknown	0	---	---	---	---	---	---	---	11.1

⁵⁹ The Minnesota Supreme Court determined that *Blakely*’s jury requirements applied to aggravated departures under the Minnesota Sentencing Guidelines. *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005).

⁶⁰ For a deeper examination of the effect of the *Blakely* decision on sentencing practices, see the MSGC special report: *Impact of Blakely and Expanded Ranges on Sentencing Grid*, at: <http://mn.gov/sentencing-guidelines/reports/>.

		Number Executed Prison	Total Durational Departure Rate (%)	Durational Departures, Executed Prison Sentences Only						
				No Departure		Aggravated		Mitigated		
				Number	Rate	Number	Rate	Number	2018 Rate	2013–17 5-Yr. Rate
Judicial District	First	453	21.6	355	78.4	13	2.9	85	18.8	18.7
	Second	445	42.0	258	58.0	6	1.3	181	40.7	36.5
	Third	326	8.6	298	91.4	5	1.5	23	7.1	9.0
	Fourth	1,078	42.3	622	57.7	40	3.7	416	38.6	47.9
	Fifth	196	15.8	165	84.2	6	3.1	25	12.8	21.4
	Sixth	160	15.0	136	85.0	1	0.6	23	14.4	15.7
	Seventh	519	19.8	416	80.2	14	2.7	89	17.1	18.2
	Eighth	101	4.0	97	96.0	2	2.0	2	2.0	6.4
	Ninth	408	17.2	338	82.8	10	2.5	60	14.7	10.0
	Tenth	540	14.1	464	85.9	16	3.0	60	11.1	12.5
	Total	4,226	25.5	3,149	74.5	113	2.7	964	22.8	24.7

See Appendix 5 (p. 124) for a map of Minnesota's ten judicial districts.

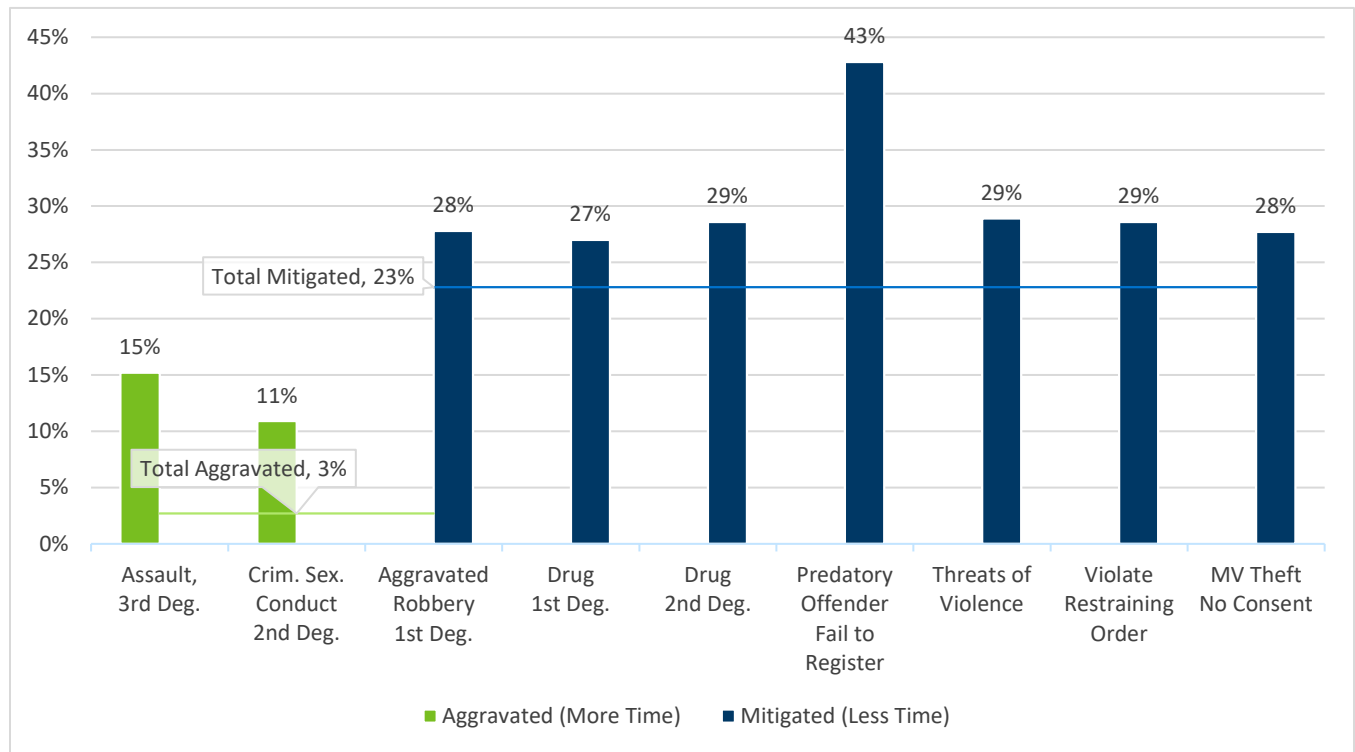
As with dispositional departures, it may be helpful to look at offenses with higher than average durational departure rates. Figure 16 displays offenses with high durational departure rates compared to the total durational departure rate and Figure 17 displays the position of the prosecutor as cited by the court.⁶¹

Aggravated durational departure rates were highest for assault in the third degree and criminal sexual conduct in the second degree. Mitigated durational departure rates were highest for aggravated robbery in the first degree; controlled substance crimes in the first and second degrees; predatory offender, failure to register; threats of violence; violate restraining order; and motor vehicle (MV) theft, no consent (Figure 16).

For both mitigated and aggravated durational departures, plea agreement or recommendation of the prosecutor were the most frequently cited reasons for departure for all offense types.

⁶¹ Selected based on criteria that there were 40 or more executed prison cases, and the aggravated durational departure rate was 8% or more or the mitigated durational departure rate was 26% or more.

Figure 16. Durational Departure Rates for Selected* Offenses Compared to the Total Rate, Executed Prison Sentences Only, 2018



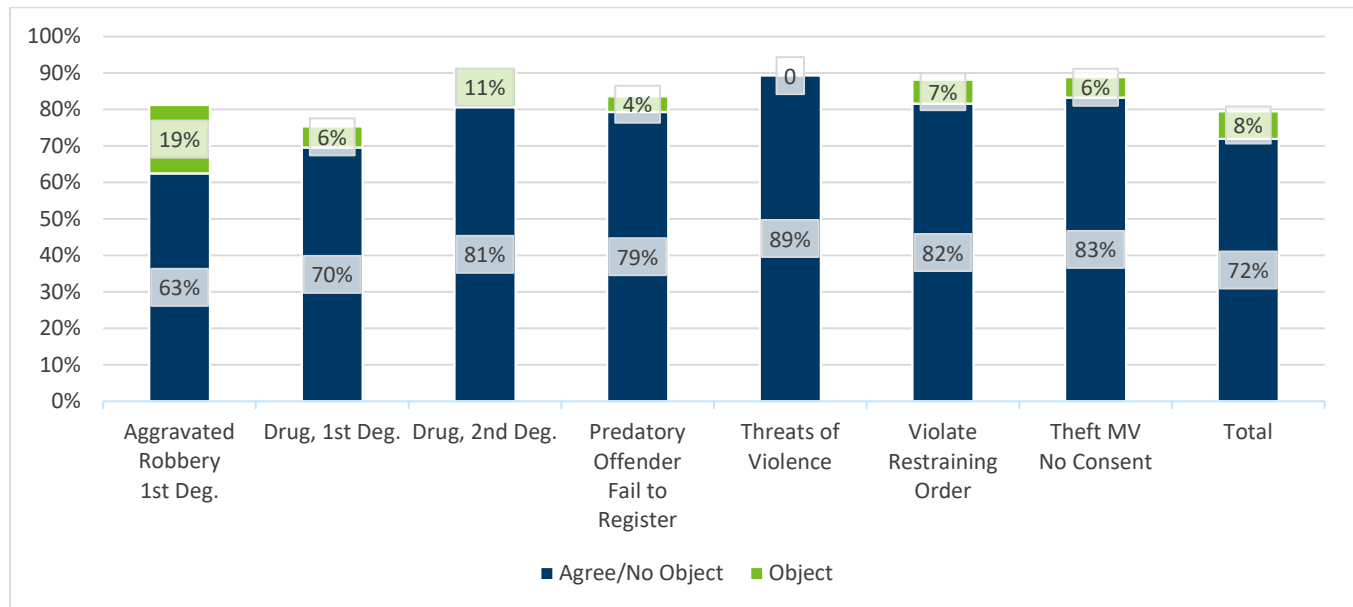
*Selected based on criteria that there were 40 or more executed prison cases, and the aggravated durational departure rate was 8 percent or more or the mitigated durational departure rate was 26 percent or more. “Total” includes all executed prison sentences.

In 72 percent of the mitigated durational departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In 7.5 percent of these cases, the court stated that the prosecutor objected to the departure (Figure 17, “Total”). In 21 percent of the mitigated durational departures, the court did not provide information on the position of the prosecutor. These rates varied somewhat by offense.

In 57.5 percent of the aggravated durational departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In 42.5 percent of the aggravated durational departures, the court did not provide information on the position of the prosecutor. There were no cases in which the court stated that the prosecutor objected to the aggravated durational departure.

The discussion on page 31 regarding mandatory minimums applies here: The mandatory minimum provisions applicable to one of the high-durational-departure crimes—failure to register as a predatory offender—allow for sentencing without regard to the mandatory minimum prison term (Minn. Stat. § [243.166](#), subd. 5(d)). This fact, together with the wide variety of ways in which the crime can be committed, may lend this offense to the application of discretion in prosecutorial or judicial sentencing practice.

Figure 17. Court-Cited Position of Prosecutor for Mitigated Durational Departures for Offenders Receiving an Executed Prison Sentence, Selected* Offenses, 2018



Departure reports do not always include information on the prosecutor's position, which is why the columns do not add up to 100 percent.

*Offenses were selected based on criteria that there were 40 or more executed prison cases and the mitigated durational departure rate was 26 percent or more.

Mitigated Departures: Gender, Race/Ethnicity, & Judicial Districts

Previous sections of this report discussed variations—by gender, race/ethnicity, and judicial district—in mitigated *dispositional* departure rates for presumptive commitment offenses (p. 29) and in mitigated *durational* departure rates for executed prison sentences (p. 32). Figure 18 and Figure 19 present a combined illustration of these variations. Among racial and ethnic groups (Figure 18)—

- Sentences for white offenders had a higher mitigated dispositional departure rate than the total rate, but a lower durational departure rate;
- Sentences for black offenders had a higher mitigated durational departure rate than the total rate, but a lower dispositional departure rate;
- Sentences for American Indian and Hispanic offenders had lower mitigated durational and dispositional departure rates than the total rate; and
- Sentences for Asian offenders had higher mitigated and dispositional departure rates than the total rate.

Recall from Figure 7 (p. 19) that the racial and ethnic composition of offender populations varies by judicial district. When reviewing Figure 18, note that the observed variations may be partly explained by regional differences in charging, plea agreement, and sentencing practices, as well as by regional differences in case

volume, the types of offenses sentenced, criminal history scores of offenders across racial groups, and available local correctional resources. (See p. 124 for a map of Minnesota’s ten judicial districts.)

Figure 18. Mitigated Departure Rates by Gender & Race/Ethnicity, 2018

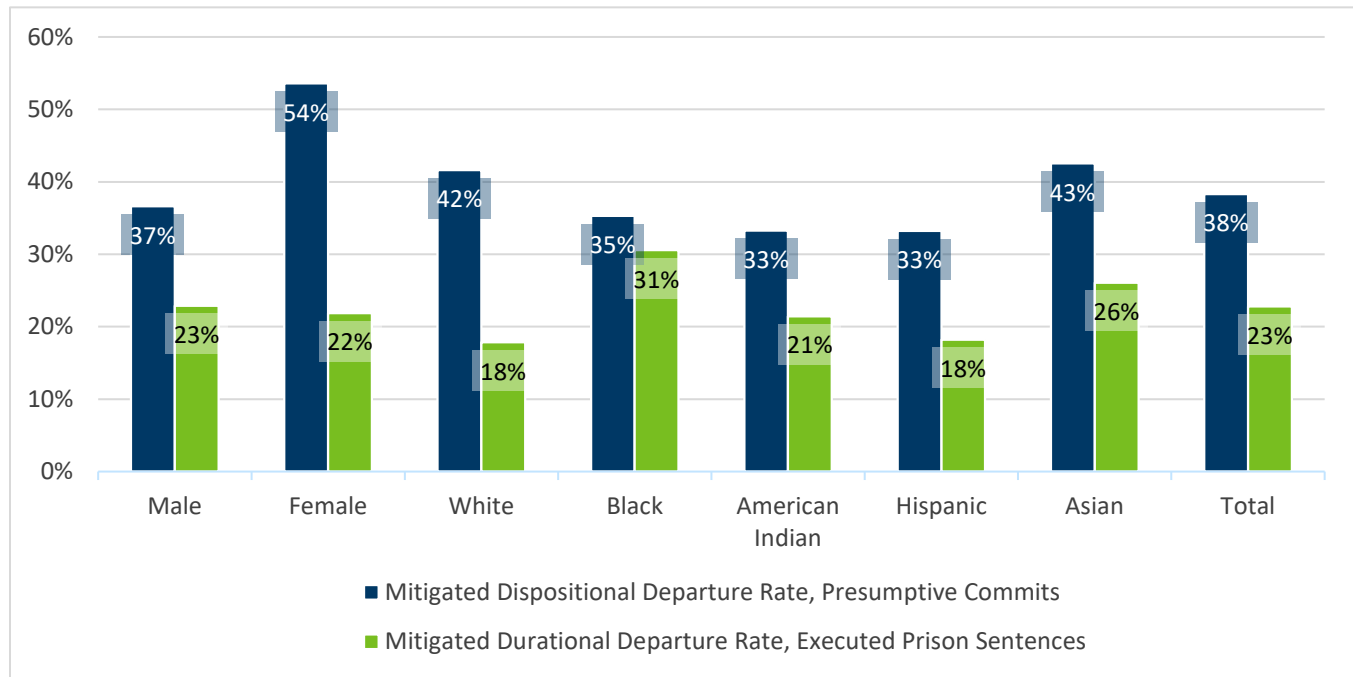
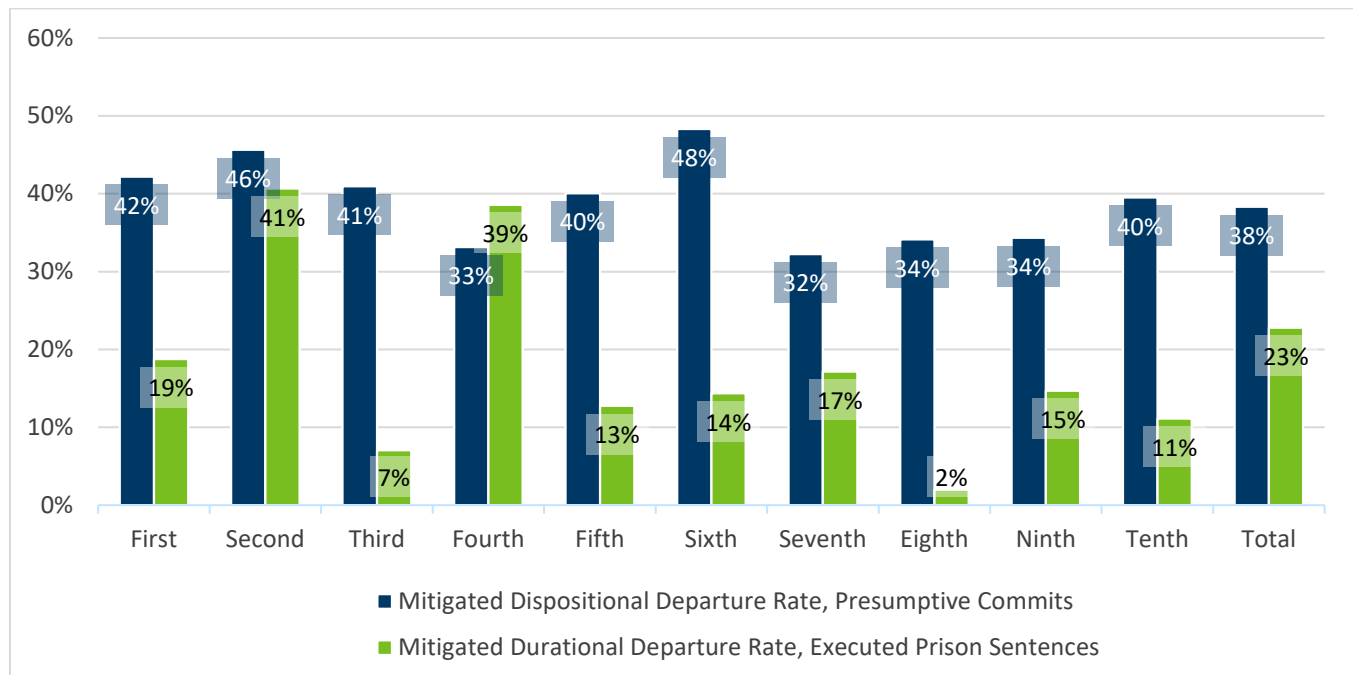


Figure 19. Mitigated Departure Rates by Minnesota Judicial District, 2018

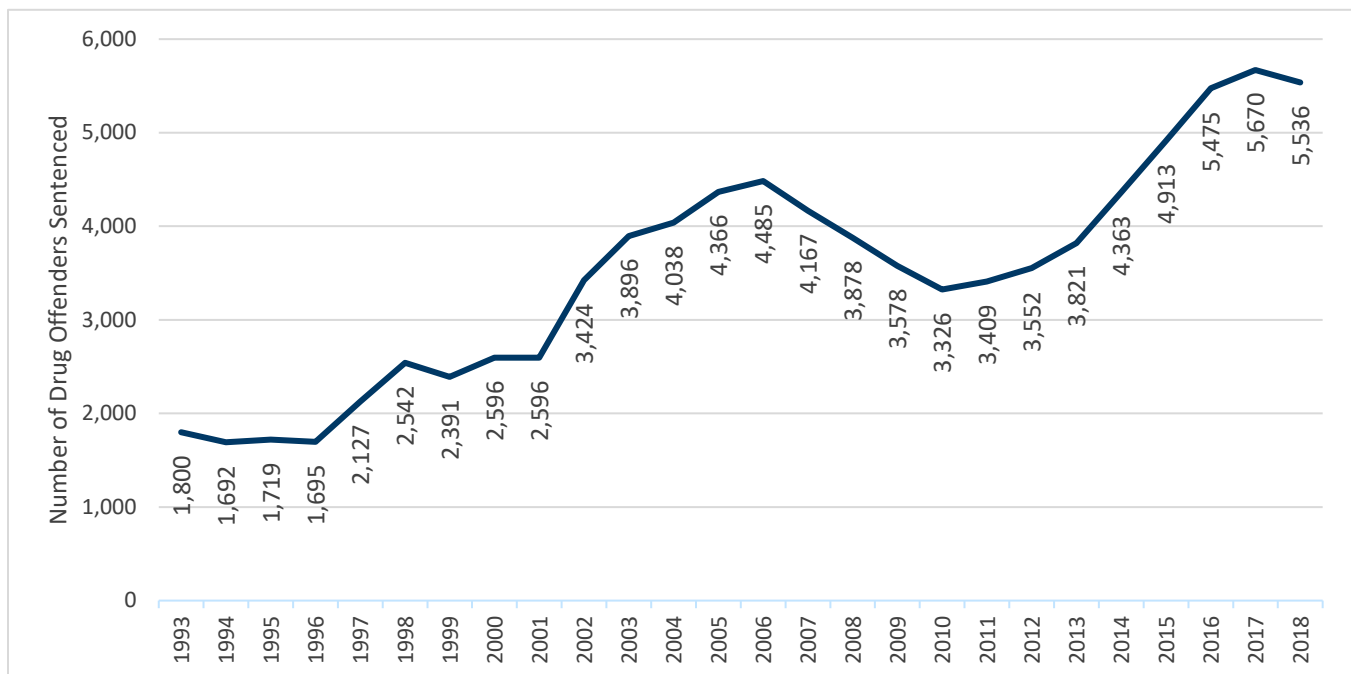


Impact of the 2016 Drug Sentencing Reform Act

The 2016 Drug Sentencing Reform Act (DSRA)⁶² made a number of significant changes to the sentencing of Minnesota drug offenses. Those changes generally took effect August 1, 2016, and applied to crimes committed on and after that date. Over eighty percent of the drug cases sentenced in 2018 were subject to the DSRA.⁶³

In 2018, 5,536 offenders (pre- and post-DSRA) were sentenced for drug offenses (Figure 20), a decline of 2.4 percent from 2017. Because the number of offenders sentenced for drug offenses grew each year from 2011 through 2017, the volume of drug cases sentenced in 2018 was 66.4 percent greater than the 2010 volume. This seven-year rise followed a four-year decline in drug case volume, by seven or eight percent each year, from 2006 to 2010.

Figure 20. Number of Offenders Sentenced for Felony Drug Convictions, 1993–2018



Post-DSRA Offense Volume

The DSRA's provisions were effective for all offenses committed after July 31, 2016. Through the end of 2018, the new provisions have been applicable to 7,327 felony offenders with a first- through fifth-degree drug offense as the most serious offense sentenced.⁶⁴ The next sections focus on these offenses.

⁶² [2016 Minn. Laws ch. 160](#).

⁶³ Of the 5,536 drug cases sentenced in 2018, 81 percent were committed after the DSRA took effect.

⁶⁴ The DSRA applied to 203 cases sentenced in 2016, 2,717 cases sentenced in 2017, and 4,407 cases sentenced in 2018.

Pre- and Post-DSRA Comparison Groups

To measure the impact of the DSRA, this report compares the post-DSRA cases to comparable pre-DSRA group. Table 5 displays felony post-DSRA cases committed on or after August 1, 2016, and sentenced through December 2018, by controlled substance degree, as well as comparable offenses sentenced under the DSRA's new gross misdemeanor fifth-degree provision. For comparison to this post-DSRA group, Table 5 also displays the number of cases, by degree, committed and sentenced in a comparable earlier time frame (committed on or after August 1, 2013 and sentenced through December 2015).

Table 5. Cases with a Drug Offense as the Most Serious Offense Sentenced, Pre- & Post-DSRA Comparison Groups

Comparison Group	Offense Date Range	Sentencing Date Range	1 st Deg. No. & Percent	2 nd Deg. No. & Percent	3 rd Deg. No. & Percent	4 th Deg. No. & Percent	Felony 5 th Deg. No. & Percent	Gross Misd. 5 th Deg. No. & Percent	Total
Pre-DSRA 2013–15	Aug '13 – Dec '15	Aug '13 – Dec '15	391 6.1%	531 8.3%	854 13.4%	144 2.3%	4,443 69.8%	N/A	6,363 100%
Post-DSRA 2016–18	Aug '16 – Dec '18	Aug '16 – Dec '18	499* 5.6%	444 5.0%	844 9.5%	128 1.4%	5,412 60.7%	1,594** 17.9%	8,921 100%

**Includes the DSRA offense of Aggravated Controlled Substance Crime 1st Degree.*

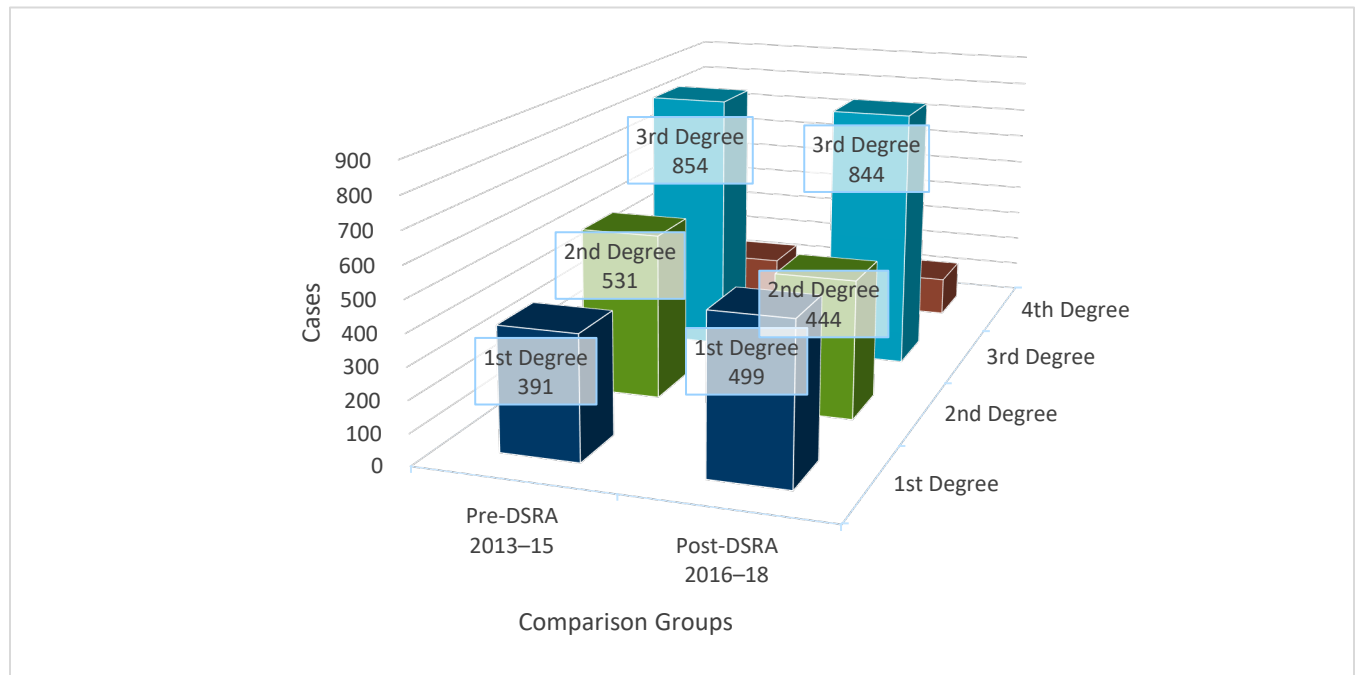
***Source of post-DSRA gross misdemeanor case data: Minnesota Judicial Branch. (Obtained 9/19/2019.) Gross misdemeanor cases may not necessarily be the most serious offenses sentenced.*

Volume of Offenses

First- Through Fourth-Degree Offenses

The provisions of the DSRA raised the thresholds (amounts of drugs necessary for conviction) for some first-through third-degree offenses. Therefore, it might be expected that the percentage of cases that are first-through third-degree would decline while the percent that are fourth- and fifth-degree would increase. The evidence available to date shows an increase in the number of offenses that are first-degree, and a decline in the number and percentage of offenses that are second-degree offenses (shown by comparison group in Figure 21).

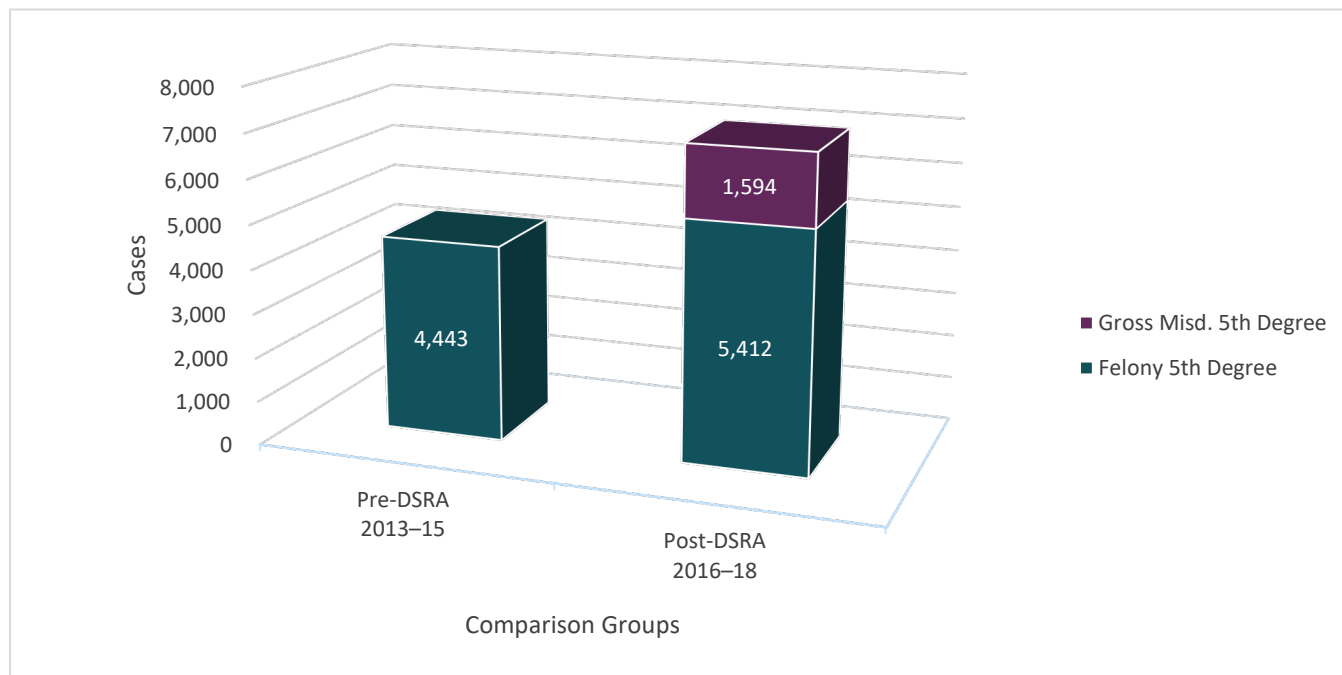
Figure 21. Case Volume, 1st–4th Degree Drug Offenses, Pre- and Post-DSRA Comparison Groups



Fifth-Degree Offenses

For felony fifth-degree offenses, the number and percentage of offenses compared to the 2013–15 group increased. When gross misdemeanor fifth-degree offenses are included (for first-time possession of a trace amount of a controlled substance, a DSRA-created offense discussed in more detail on p. 42), the number of post-DSRA fifth-degree cases increased from 4,443 cases (69.8% of pre-DSRA cases) to 7,006 (78.5% of post-DSRA cases) which is a 57.7 percent increase. Likewise, when gross misdemeanor fifth-degree offenses are included, the total number of drug cases in the post-DSRA group was 40.2 percent greater than the 2013–15 comparison group. (Even if the 1,594 gross misdemeanor cases were excluded from the group, the post-DSRA total—7,327 cases—would have been larger than the 2015–16 comparison group.) This is illustrated in Figure 22.

Figure 22. Case Volume, 5th Degree Drug Offenses, Pre- and Post-DSRA Comparison Groups



Post-DSRA Offense Characteristics

Post-DSRA Aggravated First-Degree Offenses

The DSRA created an aggravated first-degree offense for the most serious offenses. These offenses are ranked at a severity level of D9 on the Drug Offender Grid (p. 123), and therefore have longer presumptive sentences than the standard first-degree offenses. In addition, the statutory sentencing minimum is either 86 months or the presumptive fixed sentence, whichever is longer, which makes the offenders ineligible for a sentence at the low end of the presumptive range on the Drug Offender Grid. This offense requires the sale or possession of 100 or more grams, as well as either a firearm or two aggravating factors. Through 2018, eight offenders had been sentenced for First-Degree Aggravated Controlled Substance Crime under the firearm provision, and another 10 offenders had been sentenced under the provision requiring two aggravating factors. All of the aggravated offenses received prison sentences. The average pronounced sentence was 115 months.

In addition, the DSRA contains a provision that specifies a minimum sentence of either 65 months or the presumptive fixed sentence, whichever is longer, for offenses involving the sale or possession of 100 or more grams without a firearm or aggravating factors, referred to in this report as “100+ gram offenses.” Like other non-aggravated first-degree offenses, these offenses are ranked at severity level D8 on the Drug Offender Grid (p. 123), but the statutory sentencing minimum makes the offenders ineligible for a sentence at the low-ends of the presumptive ranges. Through 2018, 76 first-degree offenders were sentenced for 100+ gram offenses not

qualifying as aggravated-first degree offenses. The imprisonment rate was 75 percent. The average pronounced sentence for the offenders receiving prison sentences was 81 months.

Post-DSRA Drug Types

Table 6 provides more detailed information—drawn from an examination of individual complaints—about the drug types⁶⁵ involved in offenses committed on and after the DSRA’s effective date (August 1, 2016), and sentenced through 2018. Methamphetamine (“meth”) continues to be the most frequently cited drug type.

Table 6. Distribution of Felony Cases by Drug Class & Drug Type, Post-DSRA Group

Drug Class	Drug Type	Drug Type		Drug Class	
		Total	Percent	Total	Percent
Stimulants	Cocaine	604	8.2%		
	Meth	4,727	64.5%		
	Other	88	1.2%		
Stimulants Total				5,419	74%
Narcotics*	Heroin	562	7.7%		
	Other	278	3.8%		
Narcotics* Total				840	11.5%
Depressants				257	3.5%
Hallucinogens				61	0.8%
Marijuana/Cannabis	Marijuana	526	7.2%		
	Other	87	1.2%		
Marijuana/Cannabis Total				613	8.4%
Other/Multiple	Other	39	0.5%		
	Multiple	98	1.3%		
Other/Multiple Total				137	1.9%
Total of Drug Classes				7,327	100%

*See footnote 65.

⁶⁵ Drug types were grouped into drug classes based on the United States Drug Enforcement Administration’s classifications at https://www.dea.gov/pr/multimedia-library/publications/drug_of_abuse.pdf (retrieved Nov. 22, 2017). Consistent with those classifications, the term “narcotics,” as used here, is synonymous with “opioids,” rather than with the statutory term “narcotic drug” (Minn. Stat. § [152.01](#), subd. 10), which includes the non-opioids cocaine and methamphetamine. Fentanyl is included within “narcotics,” as used here; 20 post-DSRA cases involving fentanyl were observed.

Post-DSRA Fifth-Degree Offenses with Trace Drug Amounts

Unless the offender has a prior conviction for a drug offense, Minn. Stat. § [152.025](#), subd. 4(a) establishes post-DSRA fifth-degree offenses as gross misdemeanors if the person had less than a specified quantity of drugs (“trace” amounts). There were 5,412 post-DSRA felony fifth-degree offenders. Table 7 displays the number of those cases with a trace amount. It is assumed that these offenders had prior convictions that disqualified them from gross misdemeanor convictions. On some criminal complaints, the drug amount was not specified but was described as residue or a trace amount. There were 965 fifth-degree cases (almost 18%) where either the drug quantity specified fit within gross misdemeanor limits or the criminal complaint alleged there was residue or a trace amount. Fourteen percent of those 965 cases received executed prison sentences. There were 790 fifth-degree cases where the quantity of drugs was not specified on the criminal complaint. Some percentage of those cases could have been a trace amount.

Table 7. Felony Fifth-Degree Cases by Alleged Drug Amounts, Post-DSRA Group

Drug Type	Amount Alleged on Criminal Complaint	Number of Cases	Percent of Felony Fifth-Degree Cases	Percent of All Felony Drug Cases
Cocaine and Methamphetamine	Less than .25 grams	303	5.6%	4.1%
Heroin	Less than .05 grams	9	0.2%	0.1%
Dosage Units	1 dosage unit or less	58	1.1%	0.8%
Trace or Residue	As stated on complaint	595	11%	8.1%
Total Trace Cases		965	17.8%	13.1%
Quantity of Drug – Not Specified	No amount alleged on criminal complaint	790	14.6%	10.8%
Fifth-Degree – Not a Possible Trace Level	Greater than trace amount alleged	3,657	67.6%	49.9%
Total Post-DSRA Felony Fifth-Degree		5,412	100.0%	73.8%

Post-DSRA Zone Offenses

The drug statutes provide harsher penalties for offenses committed in specified zones – school, park, public housing and drug treatment facilities as defined in Minn. Stat. § [152.01](#). The school, park and public housing zones include the property as well as the area surrounding the property to a distance of 300 feet or one city block. Offenses committed in zones are elevated to a more severe degree than other offenses. What would be third-degree sale offenses are elevated to second-degree offenses and fifth-degree sale of marijuana offenses are elevated to fourth-degree offenses. Fifth-degree possession offenses are elevated to third-degree offenses.

Zone offenses existed before passage of the DSRA, but the frequency of the use of the zone enhancement has increased post-DSRA, from 74 cases (4.8% of the 2nd–4th degree offenses in the pre-DSRA group) to 163 cases

(11.5% of the 2nd–4th degree offenses in the post-DSRA group). This may be attributable to the creation of gross misdemeanor penalty level for trace amounts. Unless there is a prior conviction, post-DSRA trace-level cases cannot be prosecuted as felony fifth-degree offenses, but can, if committed in a zone, be prosecuted as felony third-degree offenses. In 26 percent of the post-DSRA zone cases, trace or residue was the stated drug quantity. In 17 percent of the zone cases, no amount of drug was specified. None of the post-DSRA zone cases with unknown or trace amounts had a prior conviction.

Table 8 displays the frequency of zone use for second-, third-, and fourth-degree offenses by judicial district. Post-DSRA, zone enhancements were used in a higher percentage of cases in all districts except the Second Judicial District and the Seventh Judicial District. This was particularly noticeable in the Fifth Judicial District and the Ninth Judicial District. Post-DSRA, 53 percent of all zone cases were found in the Ninth Judicial District; compared to 45 percent of the pre-DSRA zone cases. In Polk County (the site of 63 of the Ninth Judicial District’s 87 post-DSRA zone offenses), zone enhancements were used in 70 percent of the second- through fourth-degree post-DSRA cases compared to 42 percent of the pre-DSRA cases.

Table 8. Use of Zone Provisions, Second- Through Fourth-Degree Offenses by Judicial District; Pre- & Post-DSRA Comparison Groups

District	Pre-DSRA 2013–15 Comparison Group		Post-DSRA 2016–18 Comparison Group	
	Number of Zone Offenses	Percent of Cases	Number of Zone Offenses	Percent of Cases
First	0	0%	7	6.3%
Second	0	0%	0	0%
Third	6	2.7%	17	11.5%
Fourth	4	1.5%	11	4.0%
Fifth	13	11.5%	23	17.8%
Sixth	3	2.3%	6	5.8%
Seventh	13	8.8%	6	3.9%
Eighth	1	1.6%	2	5.3%
Ninth	33	16.5%	87	33.2%
Tenth	1	.6%	4	3.1%
Total	74	4.8%	163	11.5%

Post-DSRA Sentence Uniformity

Presumptive Sentences and Prison Rates

The DSRA restricted mandatory minimums for subsequent offenses to first- and second-degree offenses and limited the definition of subsequent drug offenses to prior first- and second-degree offenses. This change eliminated automatic presumptive prison dispositions for third-degree offenders with prior drug convictions. In addition, before the implementation of the Drug Offender Grid (p. 123), all first- and second-degree offenses

had presumptive prison sentences regardless of offenders' criminal history scores (CHS).⁶⁶ On the Drug Offender Grid, however, second-degree offenses with CHS of 0 or 1 have presumptive stayed sentences. It was anticipated that those two changes would result in a decrease in the percent of drug offenders with presumptive prison dispositions, and, therefore, prison sentences.

Overall, the presumptive and actual imprisonment rates are lower than those for the comparison group. Table 9 displays the presumptive prison rate and actual prison rate by degree for the post-DSRA group and the comparison group. The post-DSRA imprisonment rate for first-degree offenders is similar to, but slightly higher than, the rate for the comparison group, perhaps because of the increase in the threshold amounts and the creation of the aggravated first-degree offenses. The prison rate for the non-aggravated first-degree offenses was 61 percent, while the rates were 100 percent for aggravated offenses and 75 percent for 100+ gram offenses.

Table 9. Presumptive and Actual Prison Rates, Pre- and Post-DSRA Comparison Groups

Degree	Pre-DSRA 2013–15 Comparison Group			Post-DSRA 2016–18 Comparison Group		
	Number	Presumptive Prison Rate	Prison Rate	Number	Presumptive Prison Rate	Prison Rate
First	391	100%	63%	499	100%	65%
Second	531	100%	62%	444	50%	36%
Third	854	49%	37%	844	38%	26%
Fourth	144	25%	22%	128	26%	29%
Fifth*	4,443	9%	15%	5,412	11%	13%
Total	6,363	28%	25%	7,327	23%	20%

**Felony only.*

The DSRA provisions reduced the percentage of second- and third-degree offenses that have presumptive prison dispositions; the actual imprisonment rates for those offenders fell accordingly. The presumptive prison rate for second-degree offenders fell from 100 percent to 50 percent, while the actual imprisonment rate fell from 62 percent to 36 percent. The presumptive prison rate for third-degree offenders fell from 49 percent to 38 percent, while the actual imprisonment rate fell from 37 percent to 26 percent. Fourth-degree offenders still represented a small fraction of drug offenders; post-DSRA fourth-degree offenses had similar presumptive prison rates, but a higher actual imprisonment rate.

There was a slight increase in the presumptive imprisonment rates for fifth-degree offenses, but a slight decrease in the actual rate. The increase in the presumptive rate may be due, in part, to the creation of a gross

⁶⁶ Prior to the implementation of the Drug Offender Grid, first-degree was ranked at a severity level of 9 on the Standard Grid (p. 121) and second-degree was ranked at a severity level of 8 on the Standard Grid.

misdemeanor possession of trace amount offense (discussed in more detail on p. 42), which removed some first-time drug offenders, with potentially lower criminal history scores, from the pool of felony fifth-degree offenders.

Departure Rates

A “departure” is a pronounced sentence other than that recommended in the appropriate cell of the applicable Guidelines Grid. There are two types of departures—dispositional and durational—as further explained on page 26.

It was anticipated that the DSRA would result in more uniformity by lowering departure rates for drug cases, for several reasons. By raising the thresholds for first- through third-degree offenses, the cases with lower drug quantities in each degree would drop to a lesser degree and those cases were more likely to receive departures than the cases with larger drug quantities. The shift of trace cases to gross misdemeanors could also affect departure rates.⁶⁷

Limiting the definition of a subsequent drug offense to first- and second-degree offenses and eliminating mandatory minimums for all but first- and second-degree offenses could also potentially increase uniformity by decreasing both mitigated dispositional departures and mitigated durational departures.

Table 10 and Figure 23 display mitigated dispositional departure rates for cases with presumptive prison dispositions for the post-DSRA group and comparison group. For all offense degrees, the total mitigated dispositional departure rate was 35 percent for both the pre- and post-DSRA groups.

Mitigated dispositional departure rates fell for first-degree offenders (35.5% post-DSRA) compared to the 37 percent rate in the pre-DSRA group. The mitigated dispositional departure rate for second-degree offenders fell from 38 percent in the pre-DSRA group to 30 percent for the post-DSRA group. This reduction is due to the implementation of the Drug Offender Grid, which, as proposed by the Commission and adopted by the DSRA, reduced the percent of second-degree offenders with presumptive prison sentences.

However, the mitigated dispositional departure rates increased for third and fifth-degree offenses. The rate for third-degree offenses rose from 27 percent to 35 percent post-DSRA. This may be due to the DSRA’s removal, for subsequent third-degree offenses, of the mandatory minimum sentence provision, from which mitigated dispositional departures were not lawful.⁶⁸ To a lesser degree, the mitigated dispositional departure rate also appears to have increased for fifth-degree offenses (from 34.5% to 37.5% post-DSRA).

⁶⁷ A discussion of gross misdemeanor possession of trace amount offenses begins on page 42.

⁶⁸ See *State v. Turck*, 728 N.W.2d 544 (Minn. App. 2007), review denied (Minn. May 30, 2007).

Table 10. Mitigated Dispositional Departure Rates, Presumptive Commitments Only, Pre- & Post-DSRA Comparison Groups

Degree	Pre-DSRA 2013–15 Comparison Group			Post-DSRA 2016–18 Comparison Group		
	Presumptive Commits	Mitigated Disposition		Presumptive Commits	Mitigated Disposition	
	Number	Number	Rate	Number	Number	Rate
First	391	146	37%	499	177	35.5%
Second	531	203	38%	220	66	30%
Third	417	113	27%	318	112	35%
Fourth	36	14	39%	33	6	18%
Fifth	386	133	34.5%	605	227	37.5%
Total	1,761	609	35%	1,675	588	35%

Figure 23. Mitigated Dispositional Departure Rates, Presumptive Commitments Only, Pre- & Post-DSRA Comparison Groups

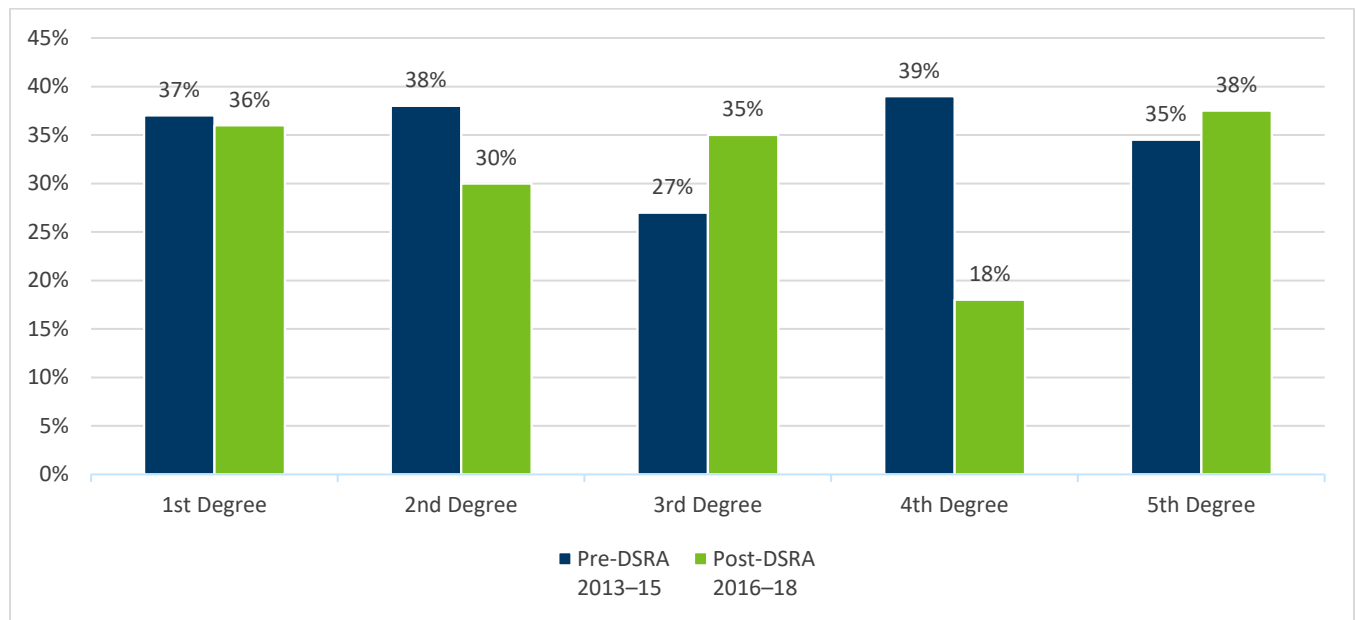


Table 11 and Figure 24 display mitigated durational departure rates for cases that received a prison sentence for the pre- and post-DSRA comparison groups. Mitigated durational departure rates declined for first- through third-degree offenses; thus, the overall rate declined. The rate for first-degree offenses declined from 46 percent pre-DSRA, to 26 percent in the post-DSRA group. The rate for second-degree offenses declined from 29 percent pre-DSRA, to 23 percent post-DSRA. The rate for third-degree offenses declined from 30 percent pre-

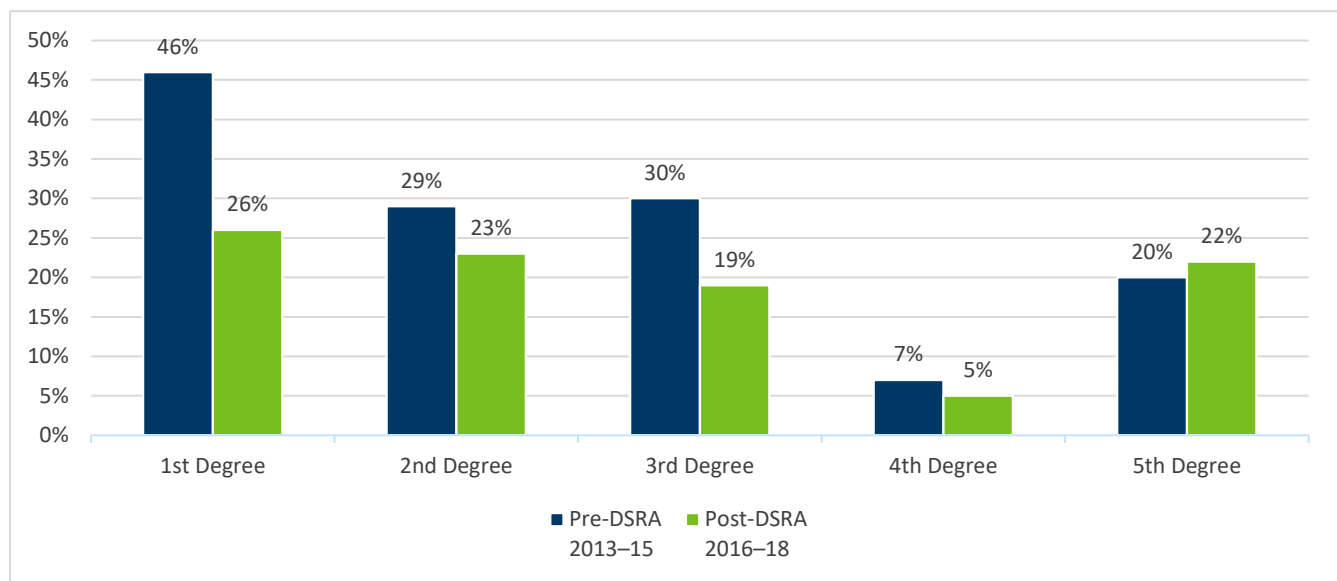
DSRA group to 19 percent in the post-DSRA group. The rate for fifth-degree offenders rose slightly from 20 percent to 22 percent. The overall rate declined from 28 percent pre-DSRA to 22 percent post-DSRA.

Among the first-degree post-DSRA offenders who received prison sentences, the mitigated durational departure rates were 25 percent for the non-aggravated offenses, 22 percent for the aggravated offenses, and 30 percent for the 100+ gram offenses.

Table 11. Mitigated Durational Departure Rates, Executed Prison Sentences Only, Pre- & Post-DSRA Comparison Groups

Degree	Pre-DSRA 2013–15 Comparison Group			Post-DSRA 2016–18 Comparison Group		
	Received Prison	Mitigated Duration		Received Prison	Mitigated Duration	
	Number	Number	Rate	Number	Number	Rate
First	245	112	46%	322	82	26%
Second	328	96	29%	159	37	23%
Third	317	96	30%	216	42	19%
Fourth	31	2	7%	37	2	5%
Fifth	661	134	20%	722	159	22%
Total	1,582	440	28%	1,456	322	22%

Figure 24. Mitigated Durational Departures, Executed Prison Sentences Only, Pre- & Post-DSRA Comparison Groups



Estimated Prison Beds Needed Post-DSRA

Because the DSRA adjusted some drug offenses to lesser degrees and moved some to gross misdemeanors, it was anticipated that the act would result in prison bed savings. That savings has begun; however, it is not as large as anticipated. The primary reason the anticipated prison bed savings has not been fully realized appears to be the continuing increases in the number of drug offenses that are sentenced. The DSRA's originally estimated bed savings was based on 2014 sentencing data, but the number of felony drug offenses sentenced in 2018 was 27 percent greater than the 2014 case volume (Figure 20).

This section discusses the number of *estimated prison beds* needed for the pre-DSRA and post-DSRA comparison groups. "Estimated prison beds" are computed by calculating two-thirds of the sum, in years, of all executed prison sentences imposed for the relevant category. Because these estimates assume that offenders will serve two-thirds of the pronounced sentences,⁶⁹ they do not account for case-specific possibilities that may reduce⁷⁰ or increase⁷¹ the actual prison time to be served. All estimated prison beds are not needed the first year; the need is, instead, apportioned over time.⁷²

Despite the increase in the number of drug cases sentenced in recent years, indications of prison bed savings are appearing (Table 12). While the number of felony offenders in the 2016–18 post DSRA comparison group (7,327) was 15 percent greater than the number of offenders in the 2013–15 pre-DSRA comparison group (6,363), the number receiving a prison sentence (1,582 pre-DSRA and 1,456 post-DSRA) was eight percent lower, and the number of estimated beds (3,780 pre-DSRA and 3,520 post-DSRA) was seven percent lower.

For first-degree offenders, the estimated prison beds needed rose by 22 percent (from 1,275 beds pre-DSRA to 1,556 beds post-DSRA), despite a post-DSRA decrease in the prison sentence for the average first-degree offender of six months. Instead, this increase in the need for estimated prison beds was caused by a 31-percent increase in the number of first-degree offenders receiving prison sentences (from 245 pre-DSRA to 322 in the post-DSRA group).

On the other hand, the number of estimated prison beds needed for second-degree offenders decreased markedly (by 43%, from 1,202 pre-DSRA to 691 post-DSRA). The number of estimated prison beds needed for third-degree offenders also decreased (by 19%, from 657 beds pre-DSRA to 532 post-DSRA). The number of post-DSRA second-degree offenders receiving prison sentences declined, as anticipated, as did the number of post-DSRA third-degree offenders. The average pronounced sentences at both degrees increased. These

⁶⁹ See Minn. Stat. § [244.101](#), subd. 1 (defining an executed sentence as consisting of two parts: a minimum term of imprisonment, equal to two-thirds of the executed sentence; and a maximum supervised release term, equal to one-third of the executed sentence).

⁷⁰ Prison time might be reduced, for example, because of jail credit ([Minn. Sentencing Guidelines](#) § 3.C.; [Minn. R. Crim. P. 27.03](#), subd. 4(B)) or early release programs (see, e.g., [Minn. Stat. § 244.17](#) (Challenge Incarceration Program)).

⁷¹ Prison time might be increased because of additional time served by supervised release violators (Minn. Stat. § [244.05](#), subd. 3(2)) or subsequently revoked sentences of offenders who were originally sentenced to probation, rather than to an executed prison sentence (Minn. Stat. § [609.14](#), subd. 3).

⁷² All beds are not needed in the first year. The total need for the estimated prison beds is, instead, apportioned over a period of approximately nine years, with each year requiring a smaller share of the total estimated prison beds than the year before.

increases in average sentences were due to the elimination of low-duration presumptive prison sentences for offenders with low criminal history scores. This was accomplished by the Drug Offender Grid's elimination of presumptive prison sentences for second-degree offenders at criminal history scores of zero and one, and by the elimination of mandatory minimums for subsequent third-degree drug offenders, thus reducing the prison rate at criminal history scores below three.

The estimated prison beds needed for fifth-degree offenders increased by 15 percent (from 604 beds pre-DSRA to 696 post-DSRA). This is because the number of post-DSRA fifth-degree offenders receiving prison sentences increased, a reflection of recent years' increases in the number of offenders sentenced for fifth-degree offenses. The number of offenders sentenced for fifth-degree offenses increased by 22 percent (from 4,443 in the pre-DSRA group to 5,412 in the post-DSRA group) while the number receiving prison sentences increased by nine percent (from 661 to 722).

Table 12. Estimated Prison Beds Needed, Pre- & Post-DSRA Comparison Groups

Degree	Pre-DSRA 2013–15 Comparison Group			Post-DSRA 2016–18 Comparison Group			Change in Post-DSRA Estimated Bed Need
	Number Receiving Prison	Average Duration (months)	Est. Beds Needed	Number Receiving Prison	Average Duration (months)	Est. Beds Needed	
First	245	93	1,275	322	87	1,556	+22%
Second	328	66	1,202	159	77	681	–43%
Third	317	37	657	216	44	532	–19%
Fourth	31	25	43	37	26	54	+26%
Fifth	661	16	604	722	17	696	+15%
Total	1,582	43	3,780	1,456	43	3,520	–7%

Because “estimated prison beds” in this table represent more than one year of sentencing data, these numbers should be used for relative comparison only between the pre-DSRA and post-DSRA groups. In addition, all estimated prison beds are not needed the first year; the need is, instead, apportioned over time. See footnote 72, above.

Estimated Prison-Bed Demand Avoided Due to DSRA

Like the previous section, this section analyzes the sentences for “post-DSRA” offenses; that is, offenses committed after July 31, 2016, and sentenced through 2018. Unlike the previous section, however, this section does not compare the post-DSRA sentences to sentences actually imposed in previous years. Instead, this section seeks to compare the post-DSRA sentences to the estimated sentences those same cases would have received if they had been sentenced in 2015, before the DSRA took effect.

The first part of this analysis focuses on possession and sale of two of the three drugs for which the thresholds and presumptive punishments may have changed at the higher offense degrees: namely, cocaine and

methamphetamine. Heroin is also included in this analysis. A total of 5,880 post-DSRA cases—all involving the sale or possession of cocaine, heroin, or methamphetamine sold or possessed on or after August 1, 2016, are the subject of this part of the analysis.

The thresholds also changed for marijuana; weight thresholds were lowered and plants were added as a unit of measure for first- and second-degree offenses. Very few cases in the post-DSRA group were above these thresholds. Beds for these cases were calculated separately.

With respect to drugs other than cocaine, methamphetamine, heroin, and first or second-degree marijuana offenses, the methodology for calculating prison beds pre- and post-DSRA does not consider drug type and quantity. Because the DSRA did not change the quantity thresholds for these offenses, it is assumed that the prison-bed need for these cases would be based on reduced durations for first-degree offenders on the Drug Offender Grid; stayed dispositions for some second-degree offenders on the Drug Offender Grid; and eliminated mandatory minimum penalties for third-degree offenders. Instead, the 2015 bed estimate is based on the average sentence pronounced in 2015 for cases at the same severity levels and criminal history scores.

First, Table 13 (“Estimated Prison Beds Needed Based on Actual Sentences”) displays the estimated prison beds that will be needed for those post-DSRA offenses based on the executed sentences actually imposed in those cases. “Estimated prison beds” are calculated in the manner described on page 48, above.

Next, Table 13 (“Estimated Prison Beds Needed if Sentenced in 2015”) displays the estimated prison beds that would have been needed for the same set of post-DSRA offenses, if those offenses had been sentenced as similar offenses were sentenced in 2015. These estimates are calculated as follows:

- The first six rows display the estimated prison beds needed and avoided for sale or possession of cocaine, methamphetamine, heroin, or—in first- and second-degree cases—marijuana. The calculations are made by replacing the actual penalty received for each post-DSRA offense with the average penalty given in 2015 to offenders with the same criminal history score for the same act (sale or possession) involving a similar amount⁷³ of the drug in question.
- For the “All other felony cases” row—involving lower-frequency drugs whose thresholds did not change post-DSRA—this calculation is made by changing the dispositions and durations to reflect applicable pre-DSRA presumptive penalties; *i.e.*, by applying to those cases the sentencing grid, the mandatory minimums for repeat offenders, and the sentencing practices as they existed in 2015.

Finally, Table 13 (“Difference”) shows the difference in prison beds needed, over time. A negative number reflects an estimate that fewer beds were actually needed, post-DSRA, then would have been needed if those cases had been sentenced in 2015.

⁷³ For purposes of this analysis, the following drug quantities were considered similar. Sale: under 3 grams; 3 to under 10 grams; 10 to under 100 grams; and 100 grams or more. Possession: under 3 grams; 3 to under 6 grams; 6 to under 25 grams; 25 to under 100 grams; and 100 grams or more. Drug quantities were determined by a review of 95 percent of criminal complaints of cases sentenced in 2015 and all complaints of cases in the post-DSRA group.

Because the post-DSRA cases were sentenced over a span of years, they represent more than one year of sentencing data. As a result, the number of estimated prison beds may be misleading. To resolve this, the last row of Table 13 (“Annualized Total”) reduces the number of post-DSRA cases to a number that more closely resembles a typical year’s felony drug caseload.

It will be seen that the estimated prison-bed need for the offenses sentenced in the post-DSRA group (2,671 beds, annualized) is 33 percent smaller than the estimated prison-bed need for those same offenses would have been (4,015 beds, annualized) if each case had been sentenced as a similar case was typically sentenced in 2015.⁷⁴

Table 13. Estimated Prison-Bed Demand Avoided for Post-DSRA Felony Drug Cases

Degree (Post-DSRA)	Post-DSRA (2016–18) Felony Drug Cases			Difference
	Number of Cases	Estimated Prison Beds Needed Based on Actual Sentences	Estimated Prison Beds Needed if Sentenced in 2015	
First – Heroin, Cocaine, Meth	463	1,461	1,420	+41
Second – Heroin, Cocaine, Meth	387	668	963	–295
Third – Heroin, Cocaine, Meth	748	492	1,000	–508
Fourth – Heroin, Cocaine, Meth	90	50	125	–75
Fifth* – Heroin, Cocaine, Meth	4,192	574	1,464	–890
First & Second – Marijuana	38	23	20	+3
All other felony cases	1,409	252	299	–47
Post-DSRA (2016–18) Total	7,327	3,520	5,291	–1,771
Annualized Total**	5,560	2,671	4,015	–1,344

All estimated prison beds are not needed the first year; the need is, instead, apportioned over time. See footnote 72, above.

**Felony only⁷⁵*

***“Annualized Total” is the Post-DSRA Total multiplied by 75.8%, which is the ratio of the average annual number of felony drug cases from 2016–18 (5,560) to the number of felony cases in the Post-DSRA Comparison Group (7,327).*

⁷⁴ All estimated prison beds would not have been needed the first year; the need would, instead, have been apportioned over time. See footnote 72, above.

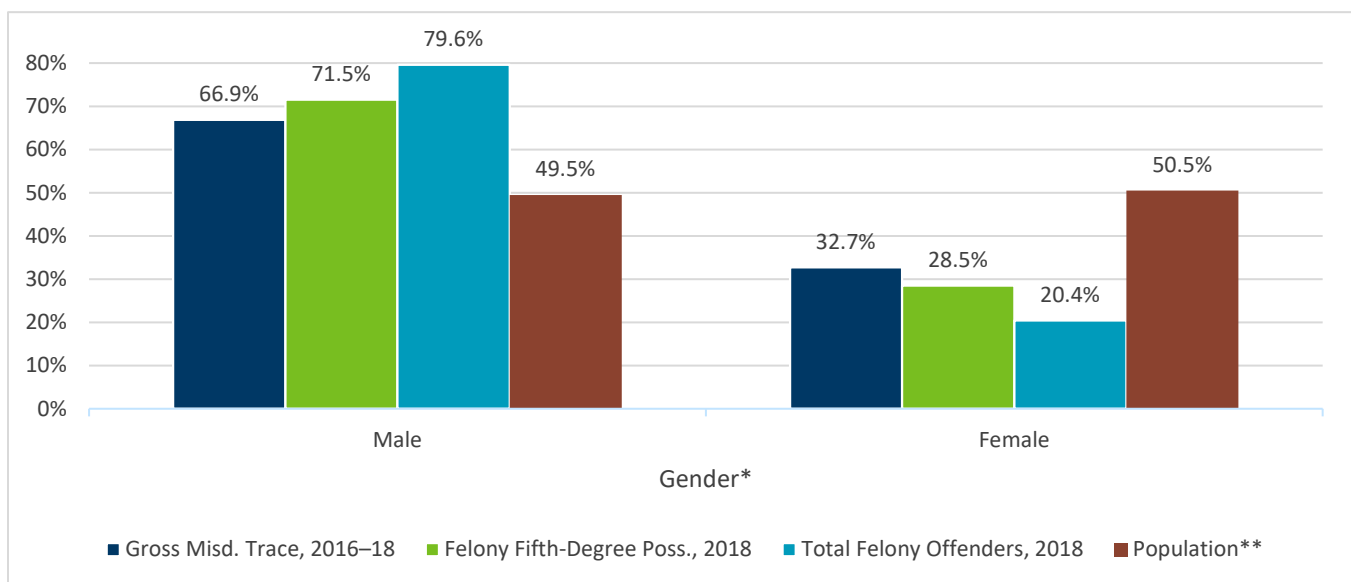
⁷⁵ This analysis does not include gross misdemeanor fifth-degree cases (the subject of the next section). If those cases were included in Table 13, they would not increase the estimated prison beds needed based on actual post-DSRA sentences because gross misdemeanor offenses are not sentenced to prison. On the other hand, due to the gross misdemeanor statute’s eligibility requirements—of no prior drug offenses and low drug quantities—it is assumed that this offense category’s contribution to the 2015 estimated prison-bed need would not have been large.

Use of DSRA Gross Misdemeanor Offense

The DSRA created a gross misdemeanor fifth-degree offense for possessing a trace amount of a controlled substance, effective for offenses committed after July 31, 2016. Before the effective date, this offense would have been a felony.⁷⁶ Only offenders with no prior conviction for sale or possession of a controlled substance offense are eligible for the gross misdemeanor penalty. A “trace” amount is defined as less than 0.25 grams or one dosage unit for controlled substances that are not heroin; and 0.05 grams for heroin.⁷⁷

From August 1, 2016 through December 31, 2018, 1,594 people were convicted of gross misdemeanor possession of a trace amount of a controlled substance.⁷⁸ Of those, 66.9 percent were male and 32.7 percent were female. Compared with the rates of females sentenced for felony fifth-degree possession in 2018 (28.5%) and females in the total 2018 felony population (20.4%), females were sentenced for gross misdemeanor possession of a trace amount at a higher rate (32.7%) (Figure 25).

Figure 25. Distribution by Gender of Gross Misdemeanor Possession of Trace Amount Cases Sentenced 8/1/2016 to 12/31/2018; Felony Fifth Degree Possession Sentenced 2018; Total Felony Offenders Sentenced 2018; and Population Age 15 and Older



Source of Gross Misd. Trace Cases, 2016–18: Minnesota Judicial Branch. (Obtained 9/19/2019.)

* One corporation omitted from “Total Felony Offenders, 2018.” Six “Gross Misd. Trace, 2016–18” cases (0.4%) not displayed where the gender was blank; i.e., not reported, “Null.”

**2018 estimated population, age 15 and over, U.S. Census Bureau (August 2019).

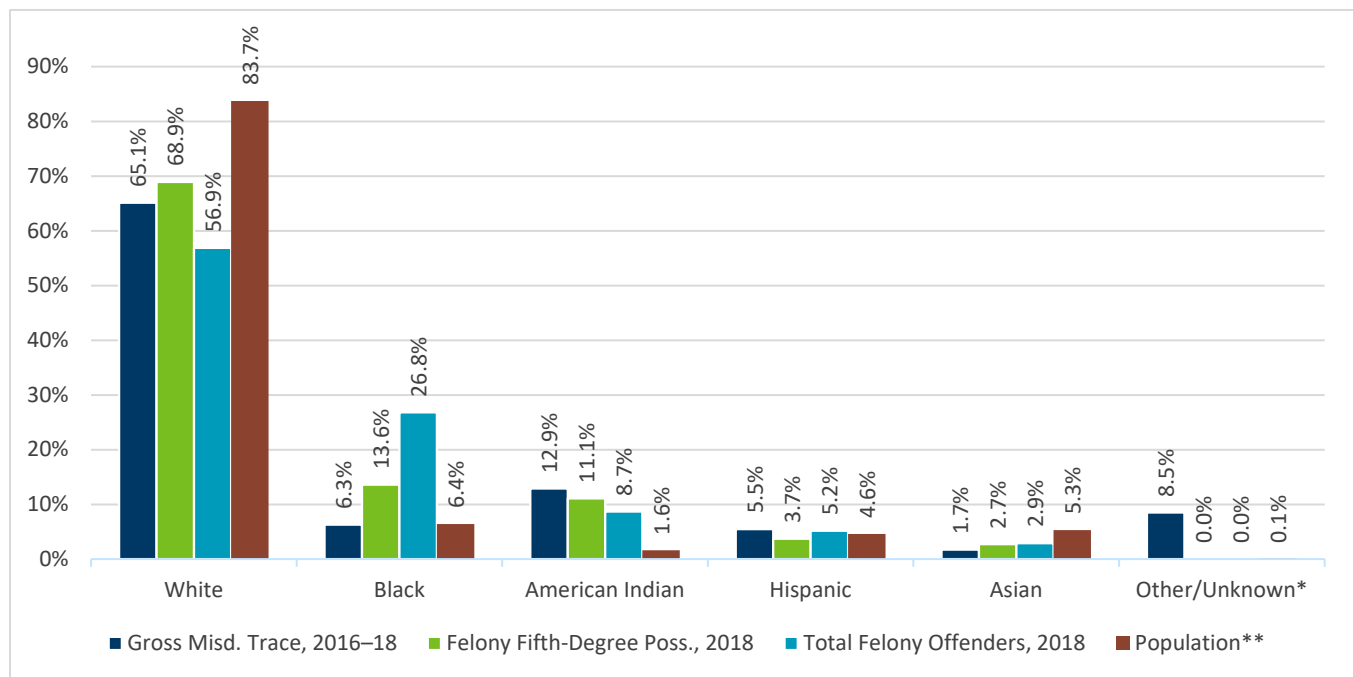
⁷⁶ Unlike a felony sentence, a gross misdemeanor sentence may never include state prison time—even if probation is revoked and the entire sentence is executed. Cf. Minn. Stat. §§ 609.02, subds. 2 & 4, & 609.03(2) (maximum imprisonment for gross misdemeanor is one year) with Minn. Stat. § 609.105, subd. 3 (sentence of one year or less to be served locally).

⁷⁷ The status of possession of a small amount of marijuana as a petty misdemeanor was not altered by the DSRA. Minn. Stat. § 152.027, subd. 4.

⁷⁸ Sentenced under Minn. Stat. § 152.025, subd. 4(a), 8/1/2016 to 12/31/2018, according to Judicial Branch data.

Of those convicted of gross misdemeanor possession of a trace amount of a controlled substance from August 1, 2016 through December 31, 2018, 65.1 percent were white, 6.3 percent were black, 12.9 percent were American Indian, 5.5 percent were Hispanic, 1.7 percent were Asian, and in 8.5 percent of the cases, the person's race or ethnicity was "other" or "unknown."⁷⁹ Figure 26 also displays rates by race and ethnicity for felony fifth-degree possession offenders sentenced in 2018, total felony offenders sentenced in 2018, and the state's estimated 2018 population, age 15 and older.

Figure 26. Distribution by Race & Ethnicity of Gross Misdemeanor Possession of Trace Amount Cases Sentenced 8/1/2016 to 12/31/2018; Felony Fifth Degree Possession Sentenced 2018; Total Felony Offenders Sentenced 2018; and Population Age 15 and Older



Source: Minnesota Judicial Branch. (Obtained 9/19/2019.)

*Other/Unknown: 3.6% multiracial; 5% Hawaiian/Pacific Islander; 1.4% "Null;" .5% "other;" .5% refused 1.9% unavailable.

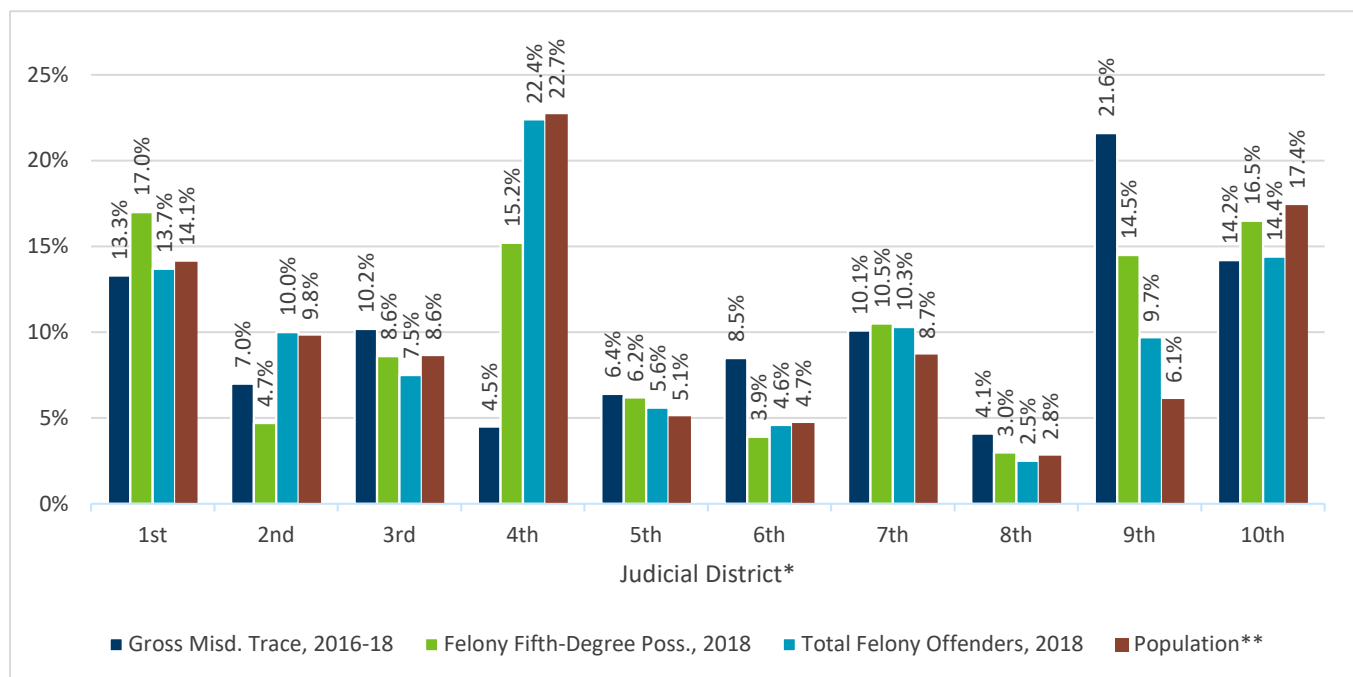
**2018 estimated population, age 15 and over, U.S. Census Bureau (August 2019).

The Minnesota judicial district with the most convictions for gross misdemeanor possession of a trace amount of a controlled substance from August 1, 2016 through December 31, 2018, was the Ninth Judicial District with 21.6 percent. By comparison, the Ninth Judicial District has about six percent of Minnesota's population age 15 and older. The judicial districts with the fewest convictions were the Eighth Judicial District (4.1% of gross misdemeanor trace cases and 2.8% of population) and the Fourth Judicial District (Hennepin County) (4.5% of gross misdemeanor trace cases and 22.7% of population). Figure 27 displays the geographical distribution of these trace cases together with the geographical distribution of felony fifth-degree possessions sentenced in

⁷⁹ Other/Unknown: 3.6% multiracial; 5% Hawaiian/Pacific Islander; 1.4% "Null;" .5% "other;" .5% refused 1.9% unavailable.

2018, total felony offenders sentenced in 2018, and the state’s estimated 2018 population, age 15 and older. A map of the judicial districts, including counties, can be found in Appendix 1 (p. 67).

Figure 27. Distribution by Judicial District of Gross Misdemeanor Possession of Trace Amount Cases Sentenced 8/1/2016 to 12/31/2018; Felony Fifth Degree Possession Sentenced 2018; Total Felony Offenders Sentenced 2018; and Population Age 15 and Older



Source of Gross Misd. Trace Cases, 2016–18: Minnesota Judicial Branch. (Obtained 9/19/2019.)

*See Appendix 5 (p. 124) for a map of Minnesota’s ten judicial districts.

**2018 estimated population, age 15 and over, U.S. Census Bureau (August 2019).

Unlike other judicial districts, post-DSRA gross misdemeanor trace offenses committed in the Second Judicial District (Ramsey County) and Fourth Judicial District (Hennepin County) are prosecuted by the appropriate city attorney, rather than the county attorney.⁸⁰ This jurisdictional change, which applies only to those two judicial districts, may account for some of the variation in the data shown in Figure 27.

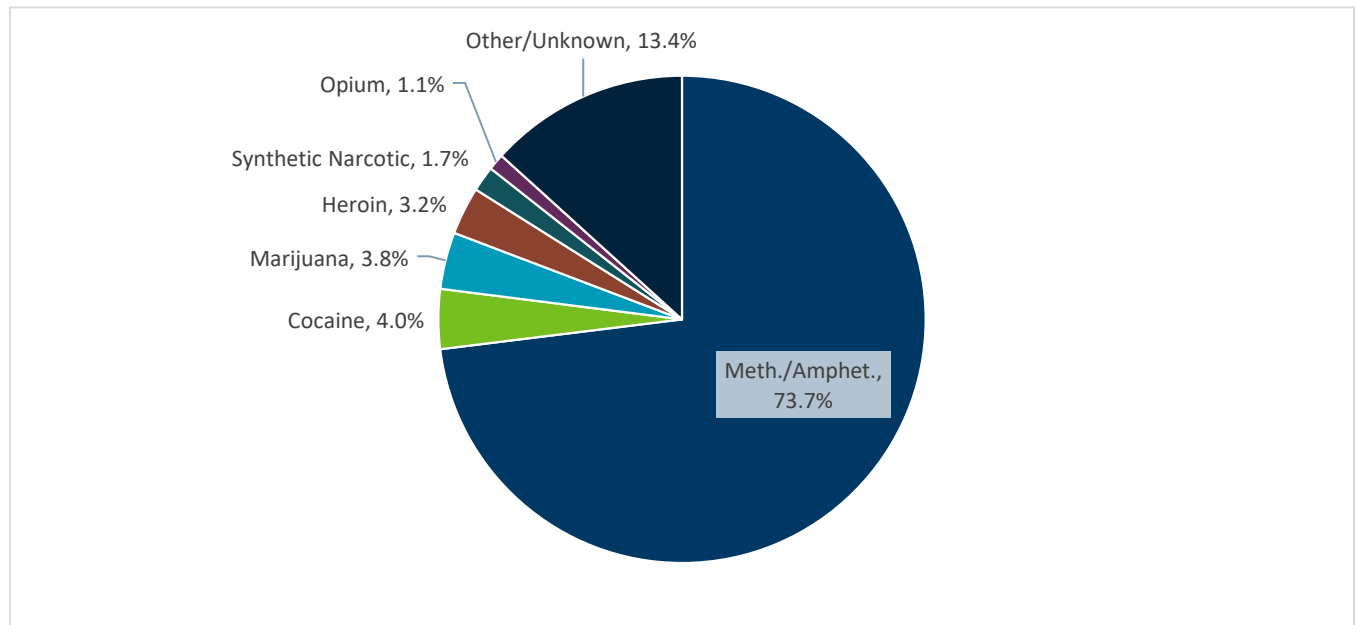
Table 14 and Table 15 display the number and percentage of gross misdemeanor trace-amount cases by gender, race, judicial district, and county. These tables begin on page 55.

Most of the gross misdemeanor trace-amount cases involved possession of methamphetamine or amphetamines (“Meth./Amphet.”) at 73.7 percent (Figure 28). This is consistent with the trend for felony cases

⁸⁰ There are some exceptions to this rule (e.g., in some municipalities whose population is less than 2,500). [Minn. Stat. § 484.87](#), subd. 2. In all other counties, the county attorney must prosecute. [Minn. Stat. § 388.051](#), subd. 2(d).

depicted in Table 6. The other drugs were: cocaine at 4.0 percent; marijuana at 3.8 percent; heroin at 3.2 percent; synthetic narcotics at 1.7 percent; Opium at 1.1 percent; and “other” or “unknown” at 13.4 percent.⁸¹

Figure 28. Gross Misdemeanor Possession of Trace Amounts by Drug Type, Sentenced 8/1/2016 to 12/31/2018



Source: Minnesota Judicial Branch. (Obtained 9/19/2019.)
Drug type information is based on Minnesota Offense Codes (MOCs).

Table 14. Gross Misdemeanor Possession of Trace Amount Convictions by Gender and Judicial District, Sentenced 8/1/2016 to 12/31/2018

		Number	Percent
Gender	Male	1,067	66.9
	Female	521	32.7
	Unknown	6	.4
	Total	1,594	100.0
Judicial District⁸²	First	212	13.3
	Second	112	7.0
	Third	162	10.2
	Fourth	72	4.5

		Number	Percent
Judicial District (cont'd)	Fifth	102	6.4
	Sixth	136	8.5
	Seventh	161	10.1
	Eighth	65	4.1
	Ninth	345	21.6
	Tenth	227	14.2
	Total	1,594	100.0

Source: Minnesota Judicial Branch. (Obtained 9/19/2019.)

⁸¹ Drug type information is based on Minnesota Offense Codes (MOCs) obtained from the court record.

⁸² See Appendix 5 (p. 124) for a map of Minnesota’s ten judicial districts.

Table 15. Number and Percent of Gross Misdemeanor Possession of Trace Amounts by County, * Sentenced 8/1/2016 to 12/31/2018

County	Number	Percent
1 Aitkin	21	1.3
2 Anoka	45	2.8
3 Becker	23	1.4
4 Beltrami	39	2.4
5 Benton	10	.6
7 Blue Earth	34	2.1
8 Brown	11	.7
9 Carlton	17	1.1
10 Carver	12	.8
11 Cass	58	3.6
12 Chippewa	8	.5
13 Chisago	21	1.3
14 Clay	14	.9
15 Clearwater	3	.2
16 Cook	1	.1
17 Cottonwood	1	.1
18 Crow Wing	81	5.1
19 Dakota	76	4.8
20 Dodge	7	.4
21 Douglas	3	.2
22 Faribault	22	1.4
23 Fillmore	1	.1
24 Freeborn	18	1.1
25 Goodhue	36	2.3
26 Grant	1	.1
27 Hennepin	72	4.5
28 Houston	21	1.3
29 Hubbard	9	.6
30 Isanti	22	1.4
31 Itasca	20	1.3
33 Kanabec	17	1.1
34 Kandiyohi	18	1.1
36 Koochiching	5	.3
38 Lake	7	.4
39 Lake of the Woods	2	.1
40 Le Sueur	6	.4
42 Lyon	6	.4
43 McLeod	8	.5
44 Mahanomen	48	3.0
46 Martin	5	.3

County	Number	Percent
47 Meeker	7	.4
48 Mille Lacs	29	1.8
49 Morrison	16	1.0
50 Mower	8	.5
51 Murray	3	.2
52 Nicollet	4	.3
53 Nobles	8	.5
54 Norman	3	.2
55 Olmsted	18	1.1
56 Otter Tail	27	1.7
57 Pennington	19	1.2
58 Pine	59	3.7
59 Pipestone	1	.1
60 Polk	30	1.9
61 Pope	9	.6
62 Ramsey	112	7.0
63 Red Lake	1	.1
64 Redwood	4	.3
65 Renville	12	.8
66 Rice	25	1.6
68 Roseau	6	.4
69 St. Louis	111	7.0
70 Scott	65	4.1
71 Sherburne	11	.7
72 Sibley	9	.6
73 Stearns	32	2.0
74 Steele	13	.8
75 Stevens	2	.1
76 Swift	3	.2
77 Todd	2	.1
78 Traverse	1	.1
79 Wabasha	11	.7
80 Wadena	5	.3
82 Washington	6	.4
83 Watonwan	30	1.9
84 Wilkin	3	.2
85 Winona	34	2.1
86 Wright	22	1.4
87 Yellow Medicine	3	.2
Total	1,594	100.0

*Counties with zero cases omitted. Source: Minnesota Judicial Branch. (Obtained 9/19/2019.)

Pre- and Post-DSRA Stays of Adjudication

A stay of adjudication under [Minn. Stat. § 152.18](#) (“Discharge and Dismissal”) is a type of deferred prosecution that allows certain first-time drug defendants to be placed on probation and receive conditions of probation (e.g., drug treatment, educational programming) without judgment of guilt. If the conditions are successfully met, the defendant is discharged from probation and proceedings are dismissed. Effective for offenses committed on or after August 1, 2016 (when the DSRA took effect), such a stay of adjudication became mandatory for first-time fifth-degree controlled substance possession offenders with no felony record and no previous participation in diversion.⁸³ Additionally, such stays of adjudication were expanded to permit their use for third-degree controlled substance possessions. To measure the impact of the DSRA, this section compares post-DSRA cases to a comparable pre-DSRA group. This comparison is not limited to felony cases; this section includes post-DSRA gross misdemeanor cases among fifth-degree case data.

Stays of Adjudication Before and After the DSRA

Table 16 displays two groups: “Pre-DSRA”⁸⁴; and “Post-DSRA”.⁸⁵ There were 4,267 pre-DSRA cases and 7,530 post-DSRA cases. Comparing Pre-DSRA and Post-DSRA, the number of stays of adjudications increased by 76.5 percent (from 4,267 to 7,530); this varied by degree (Figure 29).

Table 16. Stay of Adjudication Dispositions under Chapter 152, Pre- & Post-DSRA Comparison Groups

Degree	Pre-DSRA 2013–15 Comparison Group	Post-DSRA 2016–18 Comparison Group	Pre-DSRA to Post-DSRA Percent Change
First	2	1	-50.0%
Second	6	7	+16.7%
Third	42	163	+288.1%
Fourth	46	42	-8.7%
Fifth	4,171	7,317	+75.4%
Total	4,267	7,530	+76.5%

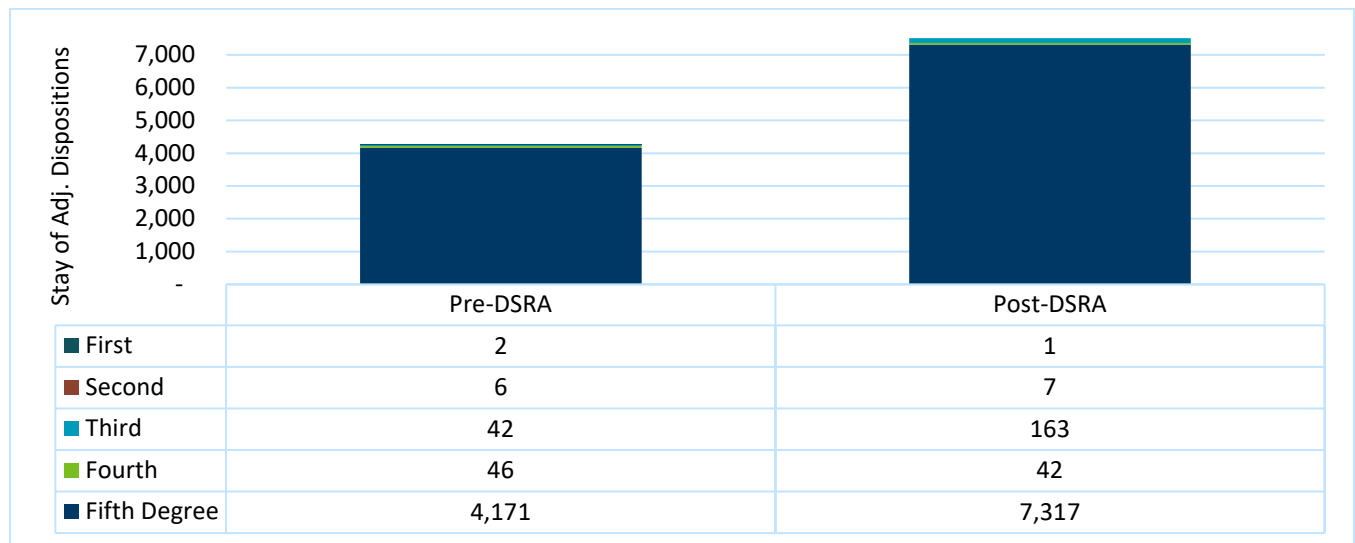
Source: Minnesota Judicial Branch. (Obtained 9/19/2019 and 12/11/2019.)

⁸³ See Minn. Stat. § 152.18, subd. 1(b), for a complete description of the criteria.

⁸⁴ Stay of adjudication dispositions, first- through fifth-degree offenses with offense dates and disposition dates between 8/1/2013 and 12/31/2015. Source: Minnesota Judicial Branch. (Obtained 12/11/2019.)

⁸⁵ Stay of adjudication dispositions, first- through fifth-degree offenses with offense dates and disposition dates between 8/1/2016 and 12/31/2018. Source: Minnesota Judicial Branch. (Obtained 9/19/2019.)

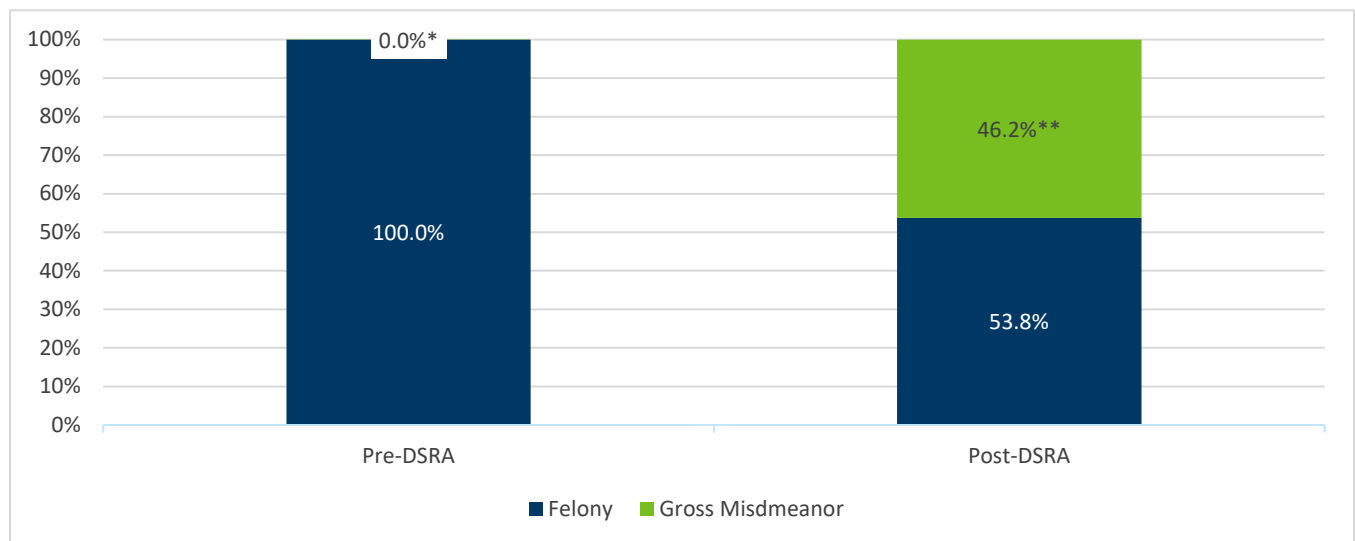
Figure 29. Stay of Adjudication Dispositions under Chapter 152 by Degree, Pre- & Post-DSRA Comparison Groups



Source: Minnesota Judicial Branch. (Obtained 9/19/2019 and 12/11/2019.)

As described on page 52, the DSRA created a gross misdemeanor fifth-degree offense for possessing a trace amount of a controlled substance. Figure 30 shows that gross misdemeanants were receiving almost half of the post-DSRA stay of adjudication dispositions.

Figure 30. Distribution by Offense Level of Stay of Adjudication Dispositions under Chapter 152, Pre- & Post-DSRA Comparison Groups



Source: Minnesota Judicial Branch. (Obtained 9/19/2019 and 12/11/2019.)

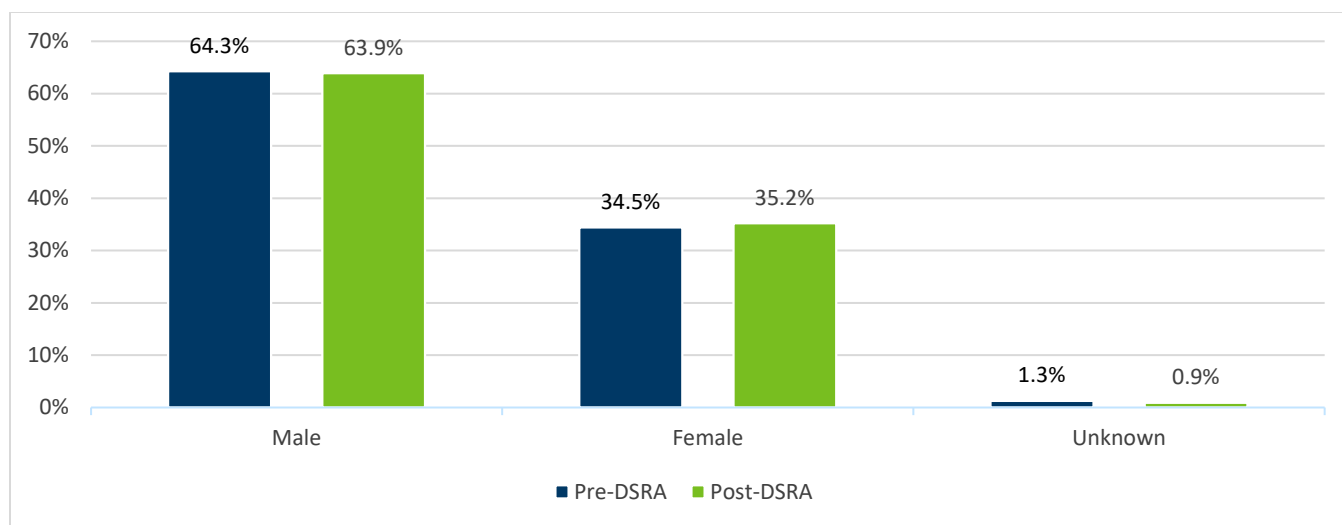
*Two cases were coded as misdemeanor offenses pre-DSRA. It is assumed that these were data errors, as the law had not yet taken effect.

**Three cases were coded as misdemeanor offenses post-DSRA. It is assumed that these were data errors.

Pre-DSRA & Post-DSRA Comparisons

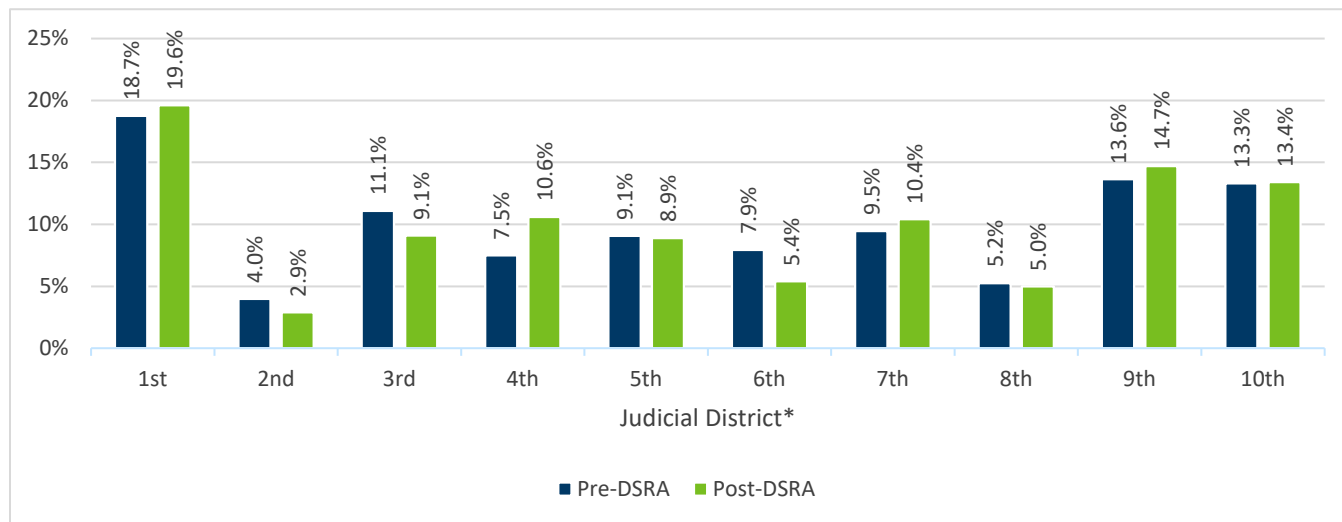
As Figure 31 shows, the distribution by gender of stay of adjudication dispositions was largely the same for the pre-DSRA and post-DSRA groups. This was generally true of the distribution by judicial district (Figure 32), although there was some variation in the fourth and sixth districts. Distribution by race and ethnicity was largely the same for pre-DSRA and post-DSRA groups (Figure 33).

Figure 31. Distribution by Gender of Stay of Adjudication Dispositions under Chapter 152, Pre- & Post-DSRA Comparison Groups



Source: Minnesota Judicial Branch. (Obtained 9/19/2019 and 12/11/2019.)

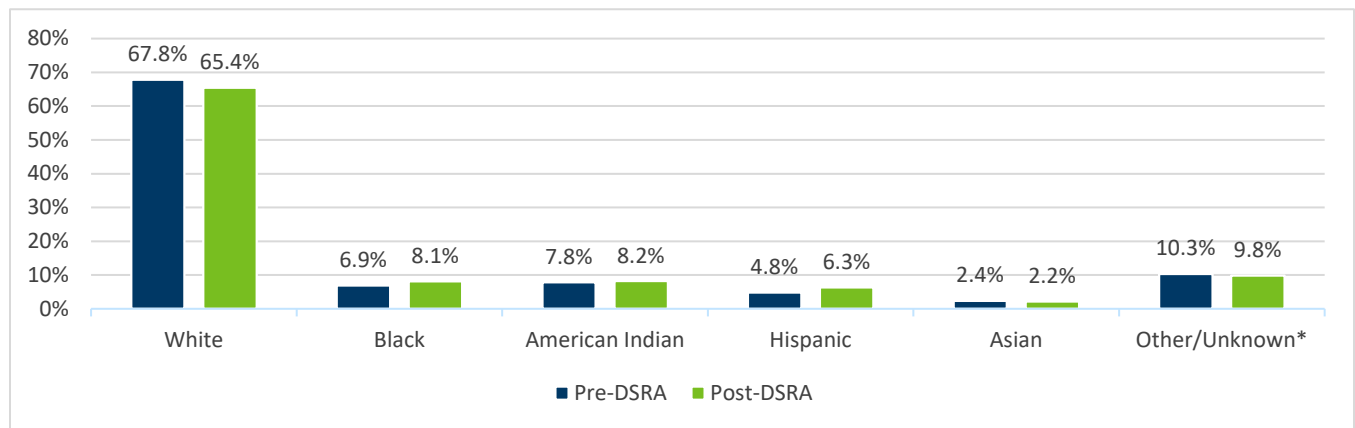
Figure 32. Distribution by Judicial District of Stay of Adjudication Dispositions under Chapter 152, Pre- & Post-DSRA Comparison Groups



Source: Minnesota Judicial Branch. (Obtained 9/19/2019 and 12/11/2019.)

*See Appendix 5 (p. 124 for a map of Minnesota's ten judicial districts.

Figure 33. Distribution by Race & Ethnicity of Stay of Adjudication Dispositions under Chapter 152, Pre- & Post-DSRA Comparison Groups

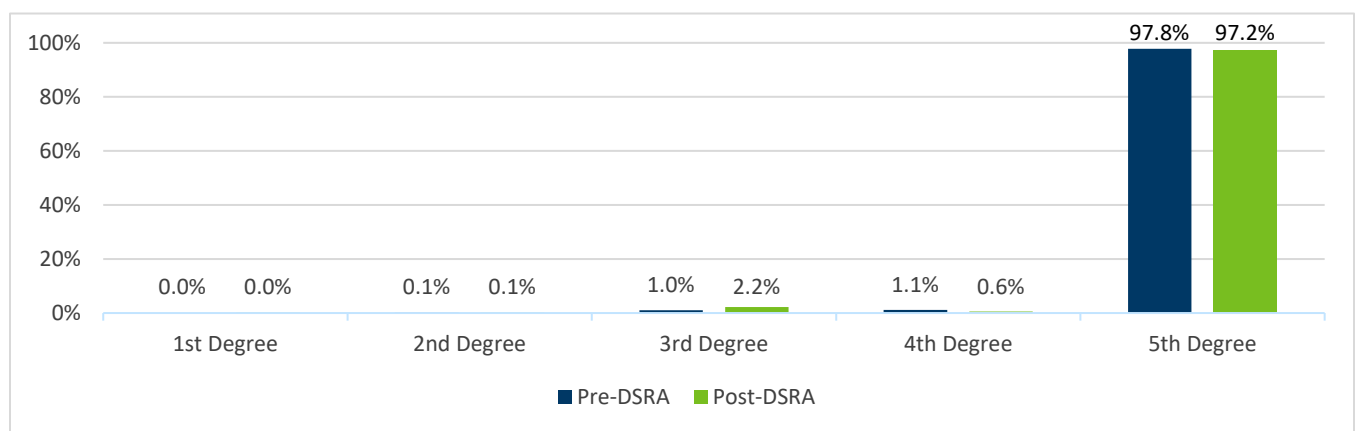


Source: Minnesota Judicial Branch. (Obtained 9/19/2019 and 12/11/2019.)

*Other/Unknown: 10.3% Pre-DSRA & 9.8% Post-DSRA unknown; 2.7% Pre-DSRA & 1.5% Post-DSRA unavailable; 0.7% Pre-DSRA & 0.8% Post-DSRA “other;” 2.5 Pre-DSRA & 3.1% Post-DSRA multiracial; 0.5% Pre-DSRA & 0.8% Post-DSRA refused; and 0.2% Pre-DSRA & 0.3% Post-DSRA Hawaiian/Pacific Islander.

As stated, the DSRA required statutory stays of adjudication for certain first-time fifth-degree possession defendants, and permitted the use of such stays of adjudication in third-degree possession cases. Figure 34 shows that the use of stays of adjudication for third-degree cases has gone up slightly post-DSRA, but their use remains most common in fifth-degree cases.⁸⁶

Figure 34. Distribution by Controlled Substance Degree of Stay of Adjudication Dispositions under Chapter 152, Pre- & Post-DSRA Comparison Groups



Source: Minnesota Judicial Branch. (Obtained 9/19/2019 and 12/11/2019.)

⁸⁶ First- and second-degree possession cases, and sale cases at every degree, are ineligible for disposition under [Minn. Stat. § 152.18](#). Nothing in that section, however, explicitly curtails the general authority of the district court to stay adjudication for such an offense, although the circumstances in which the district court is authorized to “stay[] adjudication of guilt over the prosecutor’s objection and in the absence of statutory authority” have been described as “unusual,” *State v. Foss*, 556 N.W.2d 540, 540-41 (Minn. 1996); see also *State v. Lee*, 706 N.W.2d 491 (Minn. 2005).

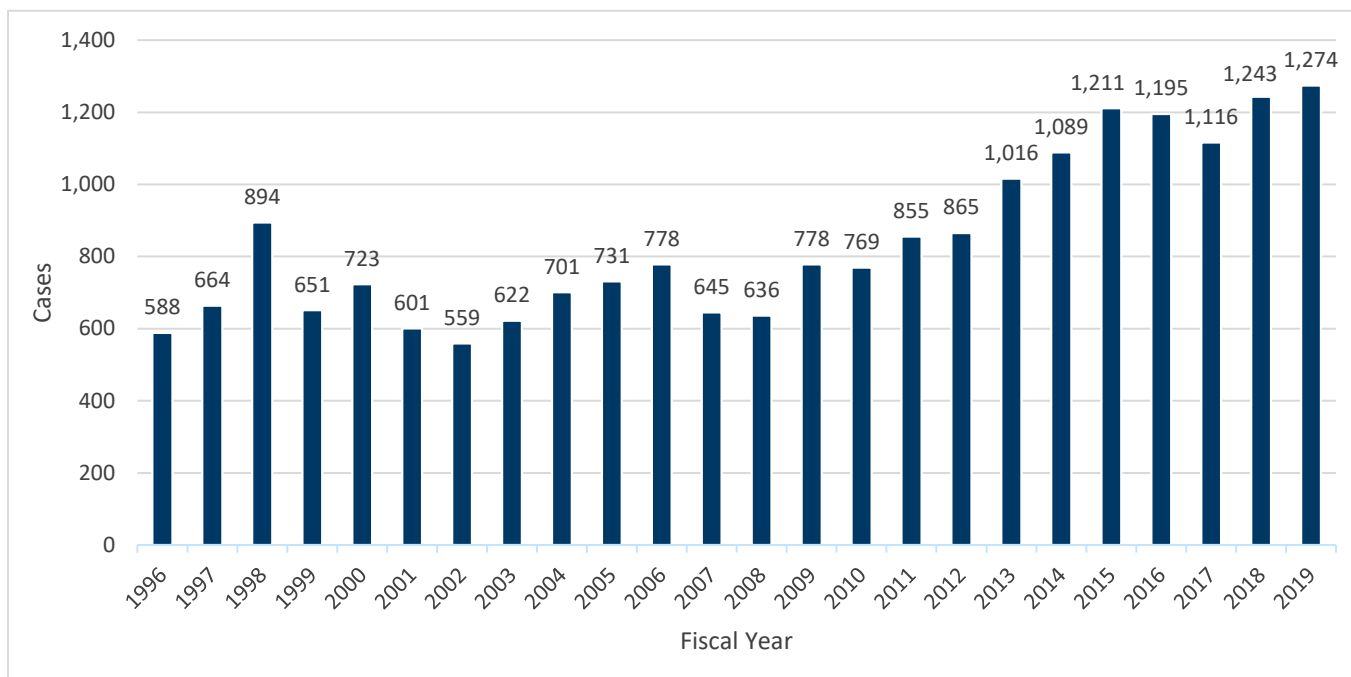
County Attorney Firearms Reports

Current law requires all county attorneys in Minnesota, by July 1 of each year, to submit to the Commission their data regarding felony cases in which defendants allegedly possessed or used a firearm and committed offenses listed in [Minn. Stat. § 609.11](#), subdivision 9.⁸⁷ The Commission is required to include in its annual Report to the Legislature a summary and analysis of the reports received. Memoranda describing the mandate, along with report forms, are distributed by MSGC staff to county attorneys. Although MSGC staff clarifies inconsistencies in the summary data, the information received from the county attorneys is reported directly as provided.

Cases Allegedly Involving a Firearm, 1996 to 2019

Since the mandate began in 1996, the average number of annual cases allegedly involving firearms statewide has been 842. Between July 1, 2018 and June 30, 2019 (FY 2019), county attorneys report disposing of 1,274 cases allegedly involving a firearm (Figure 35). This was a 2.5 percent increase (up 31 cases) from FY 2018, and the largest number of such cases on record.

Figure 35. Cases Allegedly Involving a Firearm, FY 1996 to FY 2019



⁸⁷ The statute provides a mandatory minimum sentence of 36 months for the first conviction of specified offenses, and 60 months for a second. Designated offenses include murder in the first, second, or third degree; assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; first-degree or aggravated first-degree witness tampering; some criminal sexual conduct offenses; escape from custody; arson in the first, second, or third degree; felony drive-by shooting; aggravated harassment and stalking; felon in possession of a firearm; and felony controlled substance offenses.

Cases Charged, 2019

Of the 1,274 cases in which defendants allegedly possessed or used firearms, prosecutors charged 1,166 cases (91.5%), while 108 cases (8.5%) were not charged (Figure 36, “Charged” and “Not Charged”).

Case Outcomes, 2019

Of the 1,166 cases charged, 851 (73%) were convicted of offenses designated in [Minn. Stat. § 609.11](#); 111 (9.5%) were convicted of non-designated offenses (not covered by the mandatory minimum (e.g., threats of violence under [Minn. Stat. § 609.713](#)); 144 (12%) had all charges dismissed; 26 (2%) were acquitted on all charges; and 34 (3%) were “other” cases, including federal prosecutions and stays of adjudication (Figure 36).

Cases Convicted of Designated Offense & Firearm Established on the Record, 2019

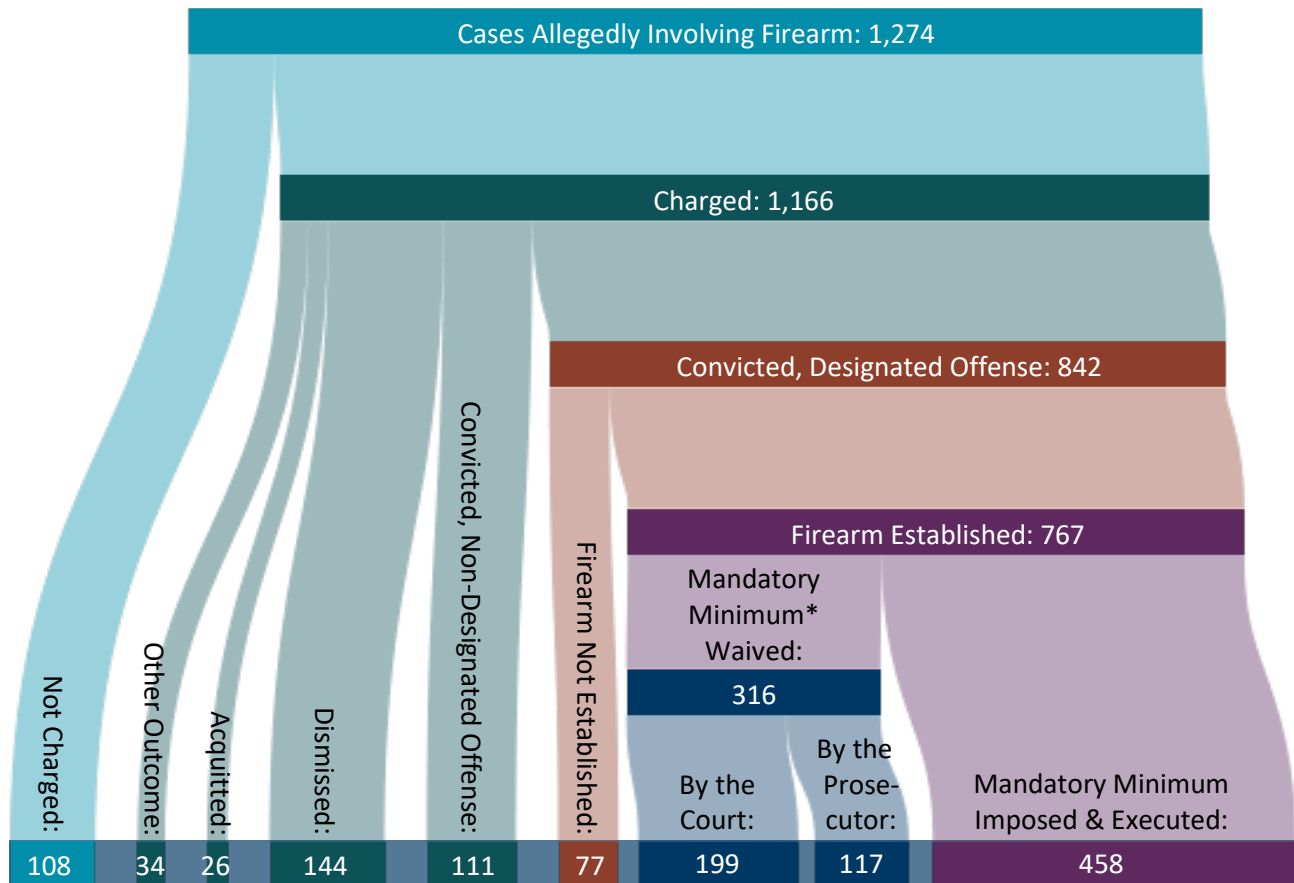
In 774 (91%) of the 851 cases in which there was a conviction for a designated offense, use or possession of a firearm was established on the record (Figure 36, “Firearm Established”). The fact-finder, i.e., the judge or jury, must establish whether the defendant or an accomplice used or possessed a firearm in the commission of the offense at the time of conviction. Minn. Stat. § 609.11, subdivision 7.

In the cases in which the firearm was established on the record, 458 offenders (59%)⁸⁸ were sentenced to the mandatory minimum prison term (Figure 36, “Mandatory Minimum Imposed & Executed”). The statute specifically allows the prosecutor to file a motion to have the defendant sentenced without regard to the mandatory minimum. The prosecutor must provide a statement as to the reasons for the motion. If the court finds substantial mitigating factors, with or without a motion by the prosecutor, the defendant may be sentenced without regard to the mandatory minimum. Minn. Stat. § 609.11, subdivision 8.⁸⁹

⁸⁸ County attorneys’ data for fiscal year 2019 (ending June 30, 2019). According to MSGC monitoring data from calendar year 2018, of those offenders whose sentencing worksheets reflected the use or possession of a firearm or prohibited persons from possessing a firearm (excluding ammunition-only cases) requiring a mandatory prison sentence under Minn. Stat. § 609.11, 51 percent (378 offenders) received both the mandatory prison disposition and the mandatory minimum duration or longer. In addition, 11 percent (80 offenders) received the mandatory prison disposition, but less than the mandatory minimum duration.

⁸⁹ Although [Minn. Stat. § 609.11](#) uses the term “mandatory minimum” to describe the sentences it prescribes, the term includes cases in which the court, on the motion of the prosecutor or on its own motion, is statutorily permitted, when substantial and compelling reasons are present, to sentence a defendant without regard to those prescribed sentences. Minn. Stat. § 609.11, subd. 8(a); but see subd. 8(b) & 8(c) (the court is not permitted to sentence a defendant without regard to the mandatory minimum if the defendant was previously convicted of a designated offense in which the defendant used or possessed a firearm or other dangerous weapon, nor if the defendant or an accomplice used or personally possessed a firearm in the commission of a first- or second-degree sale of a controlled substance).

Figure 36. Disposition of Cases, Alleged Designated Offenses Involving Firearms, as Reported by County Attorneys, Cases Disposed of Between July 1, 2018, and June 30, 2019



*For an explanation of the term “mandatory minimum,” see footnote 89, above.

Table 17. County Attorney Firearms Reports on Criminal Cases Allegedly Involving a Firearm, by Minn. County, Cases Disposed of Between July 1, 2018, and June 30, 2019

County	Cases Allegedly Involving Firearm	Charged	Dismissed	Convicted, Non-Designated Offense	Convicted, Designated Offense	Firearm Established	Mandatory Minimum Imposed and Executed
Aitkin	7	3	-	2	1	-	-
Anoka	40	40	4	13	19	19	9
Becker	30	9	-	-	9	9	4
Beltrami	10	8	1	-	7	7	7
Benton	15	12	2	2	8	5	3
Big Stone	1	1	-	1	-	-	-
Blue Earth	17	17	2	-	15	12	12
Brown	6	6	1	1	4	3	2
Carlton	3	3	-	-	3	3	2
Carver	0	-	-	-	-	-	-
Cass	23	14	1	4	9	8	3
Chippewa	7	6	-	-	6	1	1
Chisago	5	5	-	1	1	1	-
Clay*							
Clearwater	0	-	-	-	-	-	-
Cook	2	2	-	1	-	-	-
Cottonwood	1	1	-	-	-	-	-
Crow Wing	0	-	-	-	-	-	-
Dakota	63	63	9	3	50	41	27
Dodge	0	-	-	-	-	-	-
Douglas	0	-	-	-	-	-	-
Faribault	1	1	-	1	-	-	-
Fillmore	6	6	-	-	5	-	-
Freeborn	7	7	-	3	3	-	-
Goodhue	15	15	-	3	6	3	2
Grant	3	3	-	-	2	-	-
Hennepin	454	454	61	7	374	374	225
Houston	2	2	-	-	1	-	-
Hubbard	9	2	-	1	-	-	-

*Not reported as of 1/14/2020.

County	Cases Allegedly Involving Firearm	Charged	Dismissed	Convicted, Non-Designated Offense	Convicted, Designated Offense	Firearm Established	Mandatory Minimum Imposed and Executed
Isanti	4	4	4	-	-	-	-
Itasca	16	9	-	3	6	6	1
Jackson	0	-	-	-	-	-	-
Kanabec	11	3	-	-	3	2	2
Kandiyohi	9	3	1	-	2	-	-
Kittson	0	-	-	-	-	-	-
Koochiching	1	1	-	-	-	-	-
Lac qui Parle	0	-	-	-	-	-	-
Lake	6	6	3	-	3	3	3
Lake of the Woods	0	-	-	-	-	-	-
Le Sueur	3	3	-	1	2	2	1
Lincoln	0	-	-	-	-	-	-
Lyon	2	2	1	-	1	1	-
McLeod	3	3	-	1	1	1	-
Mahnomen	3	3	-	-	3	-	-
Marshall	0	-	-	-	-	-	-
Martin	0	-	-	-	-	-	-
Meeker	5	5	2	1	1	1	1
Mille Lacs	22	21	4	2	12	10	6
Morrison	7	7	2	-	4	4	2
Mower	24	14	2	4	8	6	5
Murray	0	-	-	-	-	-	-
Nicollet	5	3	1	2	-	-	-
Nobles	10	10	1	-	9	6	4
Norman	0	-	-	-	-	-	-
Olmsted	38	34	5	6	23	21	11
Otter Tail	11	11	1	4	6	6	2
Pennington	3	3	2	-	1	1	-
Pine	23	17	3	4	10	7	6

County	Cases Allegedly Involving Firearm	Charged	Dismissed	Convicted, Non-Designated Offense	Convicted, Designated Offense	Firearm Established	Mandatory Minimum Imposed and Executed
Pipestone	3	3	-	1	2	-	-
Polk	8	8	1	1	6	4	2
Pope	4	-	-	-	-	-	-
Ramsey	139	134	4	7	113	106	60
Red Lake	0	-	-	-	-	-	-
Redwood	9	9	1	-	8	5	3
Renville	7	7	2	2	3	2	1
Rice	6	6	-	1	5	5	3
Rock	0	-	-	-	-	-	-
Roseau	3	3	1	1	-	-	-
Scott	8	7	-	2	5	4	4
Sherburne	19	17	-	2	15	15	7
Sibley	2	2	2	-	-	-	-
St. Louis	38	35	4	3	26	26	13
Stearns	21	21	2	2	16	16	11
Steele	3	3	1	-	2	2	2
Stevens	0	-	-	-	-	-	-
Swift	0	-	-	-	-	-	-
Todd	4	4	-	2	2	2	2
Traverse	0	-	-	-	-	-	-
Wabasha	5	5	-	1	4	1	1
Wadena	3	3	2	1	-	-	-
Waseca	2	2	-	1	1	1	-
Washington	17	17	2	-	15	15	8
Watonwan	4	4	1	1	2	2	-
Wilkin	5	5	-	-	2	1	-
Winona	18	16	6	4	4	2	-
Wright	11	11	1	8	2	2	-
Yellow Medicine	2	2	1	-	-	-	-
Total	1,274	1,166	144	111	851	774	458

Appendices

Appendix 1. 2019 Guidelines Modifications

This appendix contains modifications that the Minnesota Sentencing Guidelines Commission made to the August 1, 2018, edition of the Minnesota Sentencing Guidelines and Commentary. Each modification had a specified effective date of August 1, 2019.⁹⁰

Appendix 1.1. Changes Relating to Crimes Created or Amended in 2019

On July 25, 2019, after public hearing, the Commission made changes relating to felony offenses created or amended by the 2019 Minnesota Session Laws.

1. Criminal Sexual Conduct – Actor is Peace Officer

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. [ch. 5](#), art. 4, §§ 7–8

Description: The act amended third- and fourth-degree criminal sexual conduct (CSC) offenses by adding a clause whereby a licensed peace officer commits the crime by engaging in sexual penetration (third-degree CSC) or sexual contact (fourth-degree CSC) with someone who is physically or constructively restrained by the officer, or who does not reasonably feel free to leave the officer’s presence. Consent to the sexual activity is not a defense.

Modifications: The Commission ranked the new third- and fourth-degree CSC offenses consistently with the preexisting third- and fourth-degree CSC offenses that prohibit sexual conduct by offenders in particular occupational relationships. (By making no changes to the permissive-consecutive list in § 6, the Commission was including the new offense on the list.)

[STYLE CHANGE TO 2019 SEX OFFENDER GRID: The Commission modified the Sex Offender Grid to show example offenses only, like the Standard Grid and the Drug Offender Grid. The Commission also added plain-language examples of criminal sexual conduct to improve comprehension. Those changes begin on page 75.]

Modifications to 2018 Minn. Sentencing Guidelines §§ 4.B, 5.A, & 5.B:

4.B. Sex Offender Grid

[See consolidated modifications on page 75, below.]

* * *

5.A. Offense Severity Reference Table

* * *

⁹⁰ See Minn. Sentencing Guidelines § 3.G for an explanation of how effective dates are implemented.

Severity Level	Offense Title	Statute Number
C	Criminal Sexual Conduct 3rd Degree	609.344, subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)

* * *

Severity Level	Offense Title	Statute Number
E	Criminal Sexual Conduct 4th Degree	609.345, subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.344 subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)	Criminal Sexual Conduct 3rd Degree	C

* * *

Statute Number	Offense Title	Severity Level
609.345 subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)	Criminal Sexual Conduct 4th Degree	E

* * *

6. Offenses Eligible for Permissive Consecutive Sentences

* * *

Statute Number	Offense Title
609.344, subd. 1	Criminal Sexual Conduct 3rd Degree
609.345, subd. 1	Criminal Sexual Conduct 4th Degree

* * *

2. Child Pornography and Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. [ch. 5](#), art. 4, §§ 12–18

Description: The act amended the maximum penalties applicable to Child Pornography and Use of Minors in Sexual Performance when committed by repeat or predatory offenders, or when involving children under age thirteen. Under preexisting law, the maximum imprisonment terms for Child Pornography possession and dissemination increased when committed by repeat or predatory offenders. The act maintained (with some revisions) these two factors and added a third: the involvement of a child under age thirteen. The act also applied these three factors to increase the statutory maximum imprisonment term for Use of Minors in Sexual Performance. The act adjusted the maximum fines as well. Finally, the act increased, from 10 years to 15 years, the conditional release term applicable to violators of these offenses who had previously been convicted of one of these offenses or of a CSC offense.

Modifications: Pending completion of the Commission’s comprehensive review of the rankings of these offenses,⁹¹ the Commission maintained existing rankings for those offenses whose maximum imprisonment terms were unchanged. For Child Pornography offenses, the Commission treated the new and amended penalty-increasing factors (now including the involvement of a child under 13) the same as the existing penalty-increasing factors (when committed by repeat or predatory offenders). The Commission assigned Severity Level D to Use of Minors in Sexual Performance when the penalty-increasing factors are present, and included the enhanced offense on the list of offenses eligible for permissive consecutive sentencing. The Commission made terminology consistent, and changed statutory references to conform to the new statutory structure.

Modifications to 2018 Minn. Sentencing Guidelines §§ 2.E.3, 4.B, 5.A, 5.B, and 6; Comment 2.B.105; and Appendix 3:

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~~ dissemination of child pornography 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 ~~1½~~ 1½ points.*

⁹¹ See 2019 Minn. Laws 1st Sp. Sess. [ch. 5](#), art. 4, § 22 (requiring the Commission to review and consider modifying how the Guidelines address these crimes as compared to similar crimes, including other sex offenses and other offenses with similar maximum penalties.).

[2.]E. Mandatory Sentences * * *

3. Conditional Release. Several Minnesota statutes provide for mandatory conditional release terms that must be served by certain offenders once they are released from prison. The court must pronounce the conditional release term when sentencing for the following offenses:
- First-degree (felony) driving while impaired. Minn. Stat. § 169A.276, subd. 1(d).
 - Predatory offense registration violation committed by certain offenders. Minn. Stat. § 243.166, subd. 5a.
 - Assault in the fourth degree against secure treatment facility personnel. Minn. Stat. § 609.2231, subd. 3a(d).
 - First- through fourth-degree criminal sexual conduct and criminal sexual predatory conduct. Minn. Stat. § 609.3455, subds. 6-8.
 - Use of minors in a sexual performance. Minn. Stat. § 617.246, subd. 7.
 - ~~Possession of pornographic work involving minors.~~ Child pornography. Minn. Stat. § 617.247, subd. 9.

4.B. Sex Offender Grid

[See consolidated modifications on page 75, below.]

* * *

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
D	Dissemination of Child Pornography (Subsequent, or by Predatory Offender, <u>or Child Under 13</u>)	617.247, subd. 3(b)
	<u>Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)</u>	617.246, subd. 2(b), 3(b), 4(b)

* * *

Severity Level	Offense Title	Statute Number
E	Use Minors in Sexual Performance	617.246 subd. 2,3,4
	Dissemination of Child Pornography	617.247, subd. 3(a)
	Use of Minors in Sexual Performance	617.246, subd. 2(a), 3(a), 4(a)

* * *

Severity Level	Offense Title	Statute Number
F	Possession of Child Pornography (Subsequent, or by Predatory Offender, or Child Under 13)	617.247, subd. 4(b)

* * *

Severity Level	Offense Title	Statute Number
G	Possession of Child Pornography	617.247, subd. 4(a)

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
617.246 subd. 2(a) 3(a) 4(a)	Use of Minors in Sexual Performance Prohibited	E
617.246 subd. 2(b) 3(b) 4(b)	Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)	D
617.247 subd. 3	Dissemination of Pictorial Representation of Minors (Subsequent or by Predatory Offenders)	D
617.247 subd. 3(a)	Dissemination of Pictorial Representation of Minors Child Pornography	E*

Statute Number	Offense Title	Severity Level
<u>617.247 subd. 3(b)</u>	<u>Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)</u>	<u>D</u>
617.247 subd. 4	Possession of Pictorial Representation of Minors (Subsequent or by Predatory Offenders)	F
617.247 subd. 4(a)	Possession of Pictorial Representation of Minors <u>Child Pornography</u>	G
<u>617.247 subd. 4(b)</u>	<u>Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)</u>	<u>E</u>

* * *

6. Offenses Eligible for Permissive Consecutive Sentences

* * *

Statute Number	Offense Title
617.246, subd. 2(a), 3(a), 4(a)	Use of Minors in Sexual Performance Prohibited
617.246, subd. 3	Operation/Owner Use of Minors in Sexual Performance
617.246, subd. 4	Dissemination Use of Minors in Sexual Performance
<u>617.246, subd. 2(b), 3(b), 4(b)</u>	<u>Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)</u>
617.247, subd. 3(a)	Dissemination of Pictorial Representations of Minors <u>Child Pornography</u>
617.247, subd. 3(b)	Dissemination <u>of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)</u>
617.247, subd. 4(a)	Possession of Pictorial Representations of Minors <u>Child Pornography</u>

Statute Number	Offense Title
617.247, subd. 4(b)	Possession <u>of Child Pornography (Subsequent, by</u> <u>Predatory Offender, or Child Under 13)</u>

* * *

Appendix 3. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Reference Table

* * *

Statute	Offense	Severity Level	Statutory Maximum (Months)	Exceeds Statutory Maximum At:
609.776	Interference with Emergency Comm.	5	36 months	CHS 4
617.247, subd. 3(a)	Dissemination of Pictorial Representation of Minors <u>Child Pornography</u>	E	84 months	CHS 5

3. Surreptitious Observation Device (Minor Victim and Sexual Intent)

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. [ch. 5](#), art. 4, § 11

Description: Under preexisting law, the surreptitious installation or use of an observation device, with intent to intrude upon or interfere with privacy, in a house, hotel room, tanning booth, or other place where a person has an expectation of privacy and has exposed, or is likely to expose, their intimate parts or underwear, was a gross misdemeanor. The crime became a felony (ranked at Severity Level 1) if committed against a minor victim when the offender knew or had reason to know the minor was present. The act created a new felony, with a higher maximum penalty, when such an offense (using a surreptitious observation device against a minor victim) is committed with sexual intent by someone more than 36 months older than the minor victim. The new felony was added to the list of offenses for which persons are required to register as predatory offenders.

Modifications: The Commission assigned the new offense a severity level of G on the Sex Offender Grid, and included the new offense on the list of offenses eligible for permissive consecutive sentencing. The Commission modified Appendix 3 to reflect that the presumptive sentence exceeds the statutory maximum at higher criminal history scores.

Modifications to 2018 Minn. Sentencing Guidelines §§ 4.B, 5.A, 5.B, & 6, and Appendix 3:

4.B. Sex Offender Grid

[This offense is not listed on the Sex Offender Grid (see page 75), because the 2019 Sex Offender Grid, as modified, displays example offenses only. See page 67 (“Style Change to 2019 Sex Offender Grid”).]

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
G	<u>Surreptitious Observation Device (Minor Victim and Sexual Intent)</u>	609.746, subd. 1(f)

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.746 subd. 1(f)	<u>Surreptitious Observation Device (Minor Victim and Sexual Intent)</u>	<u>G</u> *

* See section 2.C.2 and Appendix 3 to determine the presumptive duration. Depending on the offender's criminal history score, the presumptive duration may exceed the statutory maximum.

* * *

6. Offenses Eligible for Permissive Consecutive Sentences

* * *

Statute Number	Offense Title
609.746, subd. 1(f)	<u>Surreptitious Observation Device (Minor Victim and Sexual Intent)</u>

* * *

Appendix 3. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Reference Table

* * *

Statute	Offense	Severity Level	Statutory Maximum (Months)	Exceeds Statutory Maximum At:
609.746, subd. 1(f)	<u>Surreptitious Observation Device (Minor Victim and Sexual Intent)</u>	<u>G</u>	48	<u>CHS 5</u>

4.B. Sex Offender Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

		CRIMINAL HISTORY SCORE						
SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in <i>italics</i>)		0	1	2	3	4	5	6 or more
<i>Criminal Sexual Conduct (CSC) 1st Degree</i>	A	144 144-172	156 144-187	168 144-201	180 153-216	234 199-280	306 261-360	360 306-360 ²
<i>CSC 2nd Degree–1(c)(d)(e)(f)(h) (e.g., contact, force, & injury) Prostitution; Sex Trafficking³ 1st Degree–1(a)</i>	B	90 90 ³ -108	110 94-132	130 111-156	150 128-180	195 166-234	255 217-300	300 255-300 ²
<i>CSC 3rd Degree–1(c)(d)(g)(h)(i) (j)(k)(l)(m)(n)(o)(p) (e.g., pene- tration & force/occupation) Prostitution; Sex Trafficking 2nd Degree–1a</i>	C	48 41-57	62 53-74	76 65-91	90 77-108	117 100-140	153 131-180	180 153-180 ²
<i>CSC 2nd Degree–1(a)(b)(g) (e.g., contact & victim under 13) CSC 3rd Degree–1(a)(e)(f) or 1(b) with ref. to subd. 2(1) (e.g., penetration & child victim) Dissemination of Child Pornography (Subsequent or by Predatory Offender)</i>	D	36	48	60 51-72	70 60-84	91 78-109	119 102-142	140 119-168
<i>CSC 4th Degree–1(c)(d)(g)(h)(i) (j)(k)(l)(m)(n)(o)(p) (e.g., contact & force/occupation) Use Minors in Sexual Performance Dissemination of Child Pornography²</i>	E	24	36	48	60 51-72	78 67-93	102 87-120	120 102-120 ²
<i>CSC 4th Degree–1(a)(b)(e)(f) (e.g., contact & child victim) CSC 5th Degree Possession of Child Pornography (Subseq./Pred. Off./Under 13) (Subsequent or by Predatory Offender)</i>	F	18	27	36	45 39-54	59 51-70	77 66-92	84 72-100
<i>CSC 3rd Degree–1(b) with subd. 2(2) (i.e., penetration & child victim 24–48 mo. younger) Indecent Exposure Possession of Child Pornography Solicit Child for Sexual Conduct²</i>	G	15	20	25	30	39 34-46	51 44-60	60 51-60 ²
<i>Registration Of Failure to Register as a Predatory Offenders</i>	H	12 ¹ 12 ¹ -14	14 12 ¹ -16	16 14-19	18 16-21	24 21-28	30 26-36	36 31-43

¹ 12¹=One year and one day



Presumptive commitment to state imprisonment. Sex offenses under Minn. Stat. § 609.3455, subd. 2, have mandatory life sentences and are excluded from the Guidelines. See section 2.E, for policies regarding those sentences controlled by law, including conditional release terms for sex offenders.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenders in the shaded area of the Grid may qualify for a mandatory life sentence under Minn. Stat. § 609.3455, subd. 4. See sections 2.C and 2.E.

² Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1—2.

³ Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking 1st Degree is not subject to a 90-month minimum statutory presumptive sentence so the standard range of 15% lower and 20% higher than the fixed duration applies. (The range is 77—108.)

* * *

4. Wage Theft

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. [ch. 7](#), art. 3, §§ 14–16

Description: The act amended the theft statute to include Wage Theft. The new offense was listed among those select theft offenses whose violators may, if the value of the property stolen exceeds \$35,000, be sentenced to a maximum penalty of 20 years in prison and a fine of \$100,000.

Modifications: The Commission ranked Wage Theft at Severity Level 2 (\$5,000 or Less), Severity Level 3 (Over \$5,000), and Severity Level 6 (Over \$35,000). The Commission added Wage Theft to the Theft Offense List.

Modifications to 2018 Minn. Sentencing Guidelines §§ 5.A, 5.B, and 7:

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
6	Theft Over \$35,000	609.52, subd. 2(a)(3), (4), (15), & (16), <u>& (19)</u> with 609.52, subd. 3(1)

* * *

Severity Level	Offense Title	Statute Number
3	Theft Crimes – Over \$5,000	See section 7: Theft Offense List

* * *

Severity Level	Offense Title	Statute Number
2	Theft Crimes – \$5,000, or Less <u>Theft Crimes – \$5,000 or Less</u>	See section 7: Theft Offense List

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
<u>609.52 subd. 2(a)(19) with subd. 3(1)</u>	<u>Wage Theft (Over \$35,000)</u>	<u>6</u>
<u>609.52 subd. 2(a)(19)</u>	<u>Wage Theft (\$5,001–\$35,000)</u>	<u>3</u>
<u>609.52 subd. 2(a)(19)</u>	<u>Wage Theft (\$5,000 or Less)</u>	<u>2</u>

* * *

7. Theft Offense List

* * *

Statute Number	Offense Title
<u>609.52 subd. 2(a)(19)</u>	<u>Wage Theft</u>

* * *

5. Harassment and Stalking Terminology Change

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. [ch. 5](#), art. 2, § 17–21 & 26.

Description: In Minn. Stat. § 609.749 (Stalking), the term “stalking” or “stalks” was changed to “harass,” “harassment,” or “harasses.” “Pattern of stalking conduct” was changed to “stalking.”

Modifications: The Commission made conforming changes and deleted erroneous references to a second “or Subsequent” offense (because the offense subsequent to a second offense is a third offense, ranked separately).

Modifications to 2018 Minn. Sentencing Guidelines §§ 5.A, 5.B, § 6, and Comment 2.D.308:

2.D.308. *The aggravating factor involving bias motivation under section 2.D.3.b(11) cannot be used when sentencing an offender for a crime with an increased statutory maximum penalty under Minn. Stat. § 609.2233 (felony assault motivated by bias), or for a crime that was elevated to a felony offense because of bias motivation (e.g., Minn. Stat. §§ 609.2231, subd. 4 (fourth-degree assault); 609.595, subd. 1a(a) (criminal damage to property); 609.749, subd. 3(a)(1) (~~stalking-harassment~~)). The Commission intends that a penalty for a bias-motivated offense be subject to enhancement only once.*

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
5	Stalking <u>Harassment</u> (3rd or Subsequent Violations)	609.749, subd. 4(b)
	Stalking (Pattern of Stalking Conduct)	609.749, subd. 5
4	Stalking <u>Harassment</u> (Aggravated Violations)	609.749, subd. 3(a),(b)
	Stalking <u>Harassment</u> (2nd or Subsequent Violation)	609.749, subd. 4(a)

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.749, subd. 3(a)(b)	Stalking <u>Harassment</u> (Aggravated Violations)	4
609.749, subd. 4(a)	Stalking <u>Harassment</u> (2nd or Subsequent Violation)	4
609.749, subd. 4(b)	Stalking <u>Harassment</u> (3rd or Subsequent Violations)	5
609.749, subd. 5	Stalking (Pattern of Conduct)	5

* * *

6. Offenses Eligible for Permissive Consecutive Sentences

* * *

Statute Number	Offense Title
609.749, subd. 3	Stalking <u>Harassment</u> (Aggravated Violations)
609.749, subd. 4	Stalking <u>Harassment</u> (Subsequent Violations)
609.749, subd. 5	Stalking (Pattern of Conduct)

* * *

Appendix 1.2. Changes to Criminal History Score Calculation & Creation of Second or Subsequent Severe Violent Offense Modifier

On December 20, 2018, after public hearing, the Minnesota Sentencing Guidelines Commission adopted and submitted to the Legislature⁹² several modifications to the 2018 Minnesota Sentencing Guidelines and Commentary changing the calculation of the criminal history score and adding a sentencing enhancement for second or subsequent severe violent offenses. On July 25, 2019, after public hearing, the Commission made a small number of amendments to those modifications. The December 2018 modifications, as amended in July 2019, are shown below; the presence of each July amendment is indicated with a footnote.

The Minnesota Sentencing Guidelines Commission intends to make the following modifications to the Minnesota Sentencing Guidelines and Commentary on August 1, 2019, unless the Legislature by law provides otherwise. Each modification is intended to apply to offenders whose date of offense is on or after August 1, 2019. See State v. Otto, 899 N.W.2d 501, 503 (Minn. 2017) (describing language sufficient to abrogate the amelioration doctrine).

[1.]B. Definitions * * *

14. Sentence Modifier. A “sentence modifier” is a statute or policy that aids in defining the punishment for the underlying offense. A sentence modifier can affect either or both the duration and the disposition of the presumptive sentence. See section 2.G for policies relating to determining the presumptive sentence for offenses that include a sentence modifier. * * *

[2.]B. Criminal History * * *

1. Prior Felonies. * * *
 - c. Felony Decay Factor. In computing the criminal history score, a 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~~

⁹² The Commission submitted these proposed modifications to the Legislature January 11, 2019. Minn. Sentencing Guidelines Comm’n, *Report to the Legislature* (Jan. 11, 2019). Retrieved July 26, 2019, at <https://go.usa.gov/xysku>. The Legislature took no action to provide that the changes should not take effect. See Minn. Stat. § 244.09, subd. 11.

date of discharge from or expiration of the sentence to all of the following, to the extent applicable, occurred before the date of the current offense:

- (1) the prior felony sentence or stay of imposition expired or was discharged;
- (2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and
- (3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence. * * *

2.B.113. *The Commission established a "decay factor" for the consideration of prior felony offenses in computing criminal history scores. The Commission decided it was important to consider not just the total number of felony sentences and stays of imposition, but also the age of the sentences and stays of imposition. The Commission decided that the presence of old felony sentences and stays of imposition should not be considered in computing criminal history scores after a significant period of time has elapsed. A prior felony sentence or stay of imposition ~~will~~ will not be counted in criminal history score computation if fifteen years ~~has had~~ has elapsed from the prior sentencing date (or from the date the prison sentence, if executed, expired) date of discharge or expiration of that sentence or stay of imposition to the date of the current offense, provided the offender was then no longer on supervision for the prior sentence. If the offender received a stay of imposition for the prior offense, that sentencing date marks "the date of the initial sentence," even if a stay of execution subsequently occurred as the result of, e.g., a probation violation. While this procedure does not include a measure of the offender's subsequent criminality, it has the overriding advantage of accurate and simple application, while also ensuring that prison offenses do not decay before probation offenses. * * **

2. Custody Status at the Time of the Offense.

- a. One or One-Half Custody Status Point. Assign **one** custody status point when the conditions in paragraphs (1), (2), and (3)(ii) or (iii) are met. In all other cases when the conditions in paragraphs (1) through (3) are met, assign **one-half** custody status point:
 - (1) The offender was under one of the following custody statuses at the time the current offense was committed:

- (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 currently assigned a severity level ranking, on the Offense Severity Reference Table, of 1 or 2 on the Standard Grid or D1 or D2 on the Drug Offender Grid, a felony from a jurisdiction other than Minnesota equivalent to an offense currently ranked at one of those severity levels, or an extended jurisdiction juvenile (EJJ) conviction for an offense currently ranked at one of those severity levels;
- (ii) any other felony;
- (iii) any other extended jurisdiction juvenile (EJJ) conviction;
- (iv) a non-traffic gross misdemeanor;
- (v) gross misdemeanor driving while impaired, refusal to submit to a chemical test, or reckless driving; or
- (vi) a 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.~~

~~(4)(5)~~ Assigning Points to Offenses Committed Over Time. Assign a one or one-half 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. * * *

c. Additional Duration. An **additional three months** must be added to the duration of the appropriate cell time, which then becomes the presumptive duration, when:

- (1) at least one-half custody status point is assigned; and
- (2) the offender's total Criminal History Score exceeds the maximum score on the applicable Grid (i.e., 7 or more). * * *

e. Waiver. Subject to the limitations in paragraph (4) below, the court, on its own motion or on the motion of a party, may, but is not required to, waive assignment of a custody status point or half-point pursuant to section 2.B.2, provided the offender establishes that granting a waiver is consistent with public safety. Specifically, the court has the discretion, but is not required, to grant a waiver if the offender establishes that waiver is consistent with public safety and promotes the traditional purposes of sentencing which are retribution, incapacitation, deterrence, restitution, and rehabilitation. See Minn. Stat. § 244.09. In considering rehabilitation, the court may examine the following:

- (1) Whether the offender has consistently utilized available probation services, such as drug, alcohol, and psychological treatment services, and has otherwise been in substantial compliance with the conditions of probation, parole, or conditional or supervised release, apart from the commission of the current offense, for the past twelve months;
- (2) Whether the current offense represents an escalation of criminal activity; and
- (3) Whether the offender has made any progress toward rehabilitation and reentry into society, such as additional education and/or vocational training.

- (4) The court may not, however, waive assignment of a custody status point or half-point if either the current offense or a custody status offense is any of the following offenses, including an equivalent felony offense from a jurisdiction other than Minnesota. As used within this paragraph, “custody status offense” means a prior offense resulting in a custody status that caused the offender to qualify for a custody status point as described in section a, above.
- (i) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of 8, 9, 10, or 11 on the Standard Grid;
 - (ii) an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166);
 - (iii) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of D8 or D9 on the Drug Offender Grid;
 - (iv) an offense listed in section⁹³ 8, Severe Violent Offense List;
 - (v) Fleeing Peace Officer (Great Bodily Harm) (Minn. Stat. § 609.487, subd. 4(b));
or
 - (vi) an attempt or conspiracy to commit one of these offenses.

Comment

2.B.201. *The basic rule assigns offenders one or one-half point if they were under some form of eligible criminal justice custody status when they committed the offense for which they are now being sentenced.*

2.B.202. *The Commission intended to avoid criminal history scores in which a prior offense’s custody status point outweighed the criminal history of the prior offense itself. Accordingly, when the criminal history weight of a prior felony is one-half point (but excluding severity level H offenses; see generally section 2.B.1) or the prior gross misdemeanor or misdemeanor contributes one or two misdemeanor units (see section 2.B.3), the custody status from that prior offense results in one-half, rather than one, custody status point. ~~The Commission determined that the potential for a custody status point should remain for the entire period of the probationary sentence. If an offender receives an initial term of probation that is definite, is released from probation prior to the expiration of that term and commits a new crime within the initial term, it is clear that a custody point will be assigned. For example, if the offender is put on probation for five years, is released from probation in three years, and commits a new crime in year four, at least one custody status point will be added to the offender’s criminal history. When the offender is given an indefinite initial term of probation and commits a new crime at any time prior to the end date of~~*

⁹³ The Commission changed this word to lowercase on July 25, 2019.

~~the pronounced range, the offender will be assigned a custody status point. Thus, an initial term of probation "not to exceed three years" is, for this purpose, three years; "three to five years" is five years; "up to the statutory maximum" is the statutory maximum. If probation is revoked and the offender serves an executed prison sentence for the prior offense, eligibility for the custody status point ends with discharge from the sentence.~~

2.B.203. In determining whether to grant a waiver in a particular case, the primary consideration is public safety. In this context, public safety means protecting the public from crime. The court should consider the values of retribution, incapacitation, deterrence, restitution and rehabilitation. In doing so, the court should apply a balanced approach in which all five values are examined and applied. For rehabilitation, the court may also consider the three factors listed in section 2.B.2.e in order to examine the whole person. When custody status is waived, the presumptive sentence will be calculated without the addition of the waived custody status point, or half-point, in the criminal history score. Thus, provided the processes of section 2.B.2.e are followed, granting a waiver of custody status for the current offense does not, in itself, constitute a departure from the Sentencing Guidelines. Probation given for an offense under Minn. Stat. § 152.18, subd. 1, will result in the assignment of a custody status point because a guilty plea has previously been entered and the offender has been on a probationary status.

* * *

3. Prior Gross Misdemeanors and Misdemeanors. Prior gross misdemeanor and misdemeanor convictions count as units comprising criminal history points. Four units equal one criminal history point; give no partial point for fewer than four units. Determine units as specified in this section.
 - a. General Assignment of Units. ~~Except as provided in paragraph g. If the current conviction is for an offense other than criminal vehicular homicide or operation or felony driving while impaired (DWI),~~ assign the offender one unit for each prior conviction of the following offenses provided the offender received a stayed or imposed sentence or stay of imposition for the conviction before the current sentencing:
 - (1) targeted misdemeanor, as defined in Minn. Stat. § 299C.10, subd. 1(e);
 - (2) non-traffic gross misdemeanor;
 - (3) gross misdemeanor driving while impaired;
 - (4) gross misdemeanor refusal to submit to a chemical test;

- (5) gross misdemeanor reckless driving;
- (6) a felony conviction resulting in a misdemeanor or gross misdemeanor sentence.

* * *

- e. Decay Factor. A prior misdemeanor or gross misdemeanor sentence or stay of imposition following a misdemeanor or gross misdemeanor conviction must **not** be used in computing the criminal history score if ten years ~~has~~ have⁹⁴ elapsed between the date of⁹⁵ ~~discharge from or expiration of the~~ initial sentence following the prior conviction and the date of the current offense. However, misdemeanor sentences that result from the successful completion of a stay of imposition for a felony conviction are subject to the felony decay factor in section 2.B.1.c.

* * *

2.B.304. *The Commission believes that offenders whose current conviction is for criminal vehicular homicide or operation or first-degree (felony) driving while impaired, and who have prior violations under Minn. ~~Stat.~~ Stats. §§ 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, 609.2112, 609.2113, or 609.2114 are also more culpable, and for these offenders there is no limit to the total number of misdemeanor points included in the criminal history score due to DWI or criminal vehicular homicide or operation (CVO) violations. To determine the total number of misdemeanor points under these circumstances, first add together any non DWI/CVO misdemeanor units. If there are less than four units, add in any DWI/CVO units. Four or more units would equal one point. Only DWI/CVO units can be used in calculating additional points. Each set of four DWI/CVO units would equal an additional point. For example, if an offender had two theft units and six DWI/CVO units, the theft would be added to the two DWI/CVO units to equal one point. The remaining four DWI/CVO units would equal a second point. In a second example, if an offender had six theft units and six DWI/CVO units, the first four theft units would equal one point. Four of the DWI/CVO units would equal a second point. The remaining two theft units could not be added to the remaining two DWI/CVO units for a third point. The total misdemeanor score would be two.* * * *

[2.]G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers

- 1. In General. Sentence modifiers are statutes or policies that aid in defining the punishment for the underlying offense. Modifiers can affect either or both the duration

⁹⁴ To achieve subject-verb agreement, the Commission changed this word on July 25, 2019.

⁹⁵ The Commission restored this inadvertently stricken word on July 25, 2019.

and the disposition of the presumptive sentence. Any change to the presumptive fixed sentence under this section must also be applied to the upper and lower ends of the range found in the appropriate cell on the applicable Grid, except that the presumptive sentence cannot be less than one year and one day, nor can it be less than any applicable mandatory minimum. * * *

14. Second or Subsequent Severe Violent Offense.

b. The following definitions apply to this section:

- (1) A "severe violent offense" is an offense listed in section⁹⁶ 8, Severe Violent Offense List. "Severe violent offense" includes attempt or conspiracy, and includes an equivalent felony from a jurisdiction other than Minnesota, as outlined in section 2.B.5 (Convictions from Jurisdictions other than Minnesota).⁹⁷ A current offense is not a "severe violent offense" if section 2.E.4 (Mandatory Life Sentences) applies.
 - (2) "Second or subsequent severe violent offense" means that prior to the commission of current severe violent offense, the offender has been adjudicated guilty of one or more severe violent offenses.
 - (3) A "prior severe violent offense conviction" is an adjudication that qualifies the current offense as a second or subsequent severe violent offense. A conviction for an offense excluded from criminal history score computation under section 2.B.1.c (Felony Decay Factor) does not qualify as a "prior severe violent offense conviction." A conviction that resulted in a non-felony sentence (see section 2.B.1.h) does not qualify as a "prior severe violent offense conviction" if the non-felony sentence was imposed before the current offense date.⁹⁸
- c. If the current offense is a second or subsequent severe violent offense, the presumptive fixed sentence for the current offense, as determined in section 2.C,

⁹⁶ The Commission changed this word to lowercase on July 25, 2019.

⁹⁷ The Commission added a clarifying clause after the preceding comma on July 25, 2019.

⁹⁸ The Commission added this clarifying sentence on July 25, 2019.

shall increase by the number of months corresponding, in the following table, to the number of prior severe violent offense convictions, provided that:

- (1) If the current severe violent offense is an attempt under Minn. Stat. § 609.17 or conspiracy under Minn. Stat. § 609.175, the increase shall be one-half the number of months stated; and
- (2) This section shall not apply to a presumptive or permissive consecutive sentence pursuant to section 2.F.

<u>NUMBER OF PRIOR SEVERE VIOLENT OFFENSE CONVICTIONS</u>	<u>MONTHS</u>
<u>1</u>	<u>12</u>
<u>2</u>	<u>18</u>
<u>3 or more</u>	<u>24</u>

* * *

2.G.03. *While the Commission recognizes the enhanced punishments available in the existing dangerous offender law (Minn. Stat. § 609.1095, subd. 2 and 3), it is also aware of the limited scope of those provisions, which, in practice, rarely result in enhanced sentences. It views the establishment of an automatic sentence modifier applicable to second or subsequent severe violent offenses as being necessary to protect the public from crime and thereby to promote public safety. The term "second or subsequent severe violent offense" incorporates the statutory term "second or subsequent offense" (Minn. Stat. § 609.02, subd. 11).*

* * *

8. Severe Violent Offense List

Each of the following is a "severe violent offense" within the meaning of sections 2.B.2.e and 2.G.14. Attempt or conspiracy is included, as is an equivalent felony from a jurisdiction other than Minnesota.

<u>Statute Number</u>	<u>Offense Title</u>
<u>609.185</u>	<u>Murder 1st Degree</u>
<u>609.19</u>	<u>Murder 2nd Degree</u>
<u>609.195(a)</u>	<u>Murder 3rd Degree (Depraved Mind)</u>

<u>Statute Number</u>	<u>Offense Title</u>
<u>609.221</u>	<u>Assault 1st Degree</u>
<u>609.222, subd. 2</u>	<u>Assault 2nd Degree (Dangerous Weapon, Substantial Bodily Harm)</u>
<u>609.245, subd. 1</u>	<u>Aggravated Robbery 1st Degree</u>
<u>609.25, subd. 2(2)</u>	<u>Kidnapping (Great Bodily Harm/Unsafe Release/Victim Under 16)</u>
<u>609.2661</u>	<u>Murder of an Unborn Child 1st Degree</u>
<u>609.2662</u>	<u>Murder of an Unborn Child 2nd Degree</u>
<u>609.2663</u>	<u>Murder of an Unborn Child 3rd Degree</u>
<u>609.282</u>	<u>Labor Trafficking</u>
<u>609.342, subd. 1(c)(d)(e)(f)</u>	<u>Criminal Sexual Conduct 1st Degree</u>
<u>609.343, subd. 1(c)(d)(e)(f)</u>	<u>Criminal Sexual Conduct 2nd Degree</u>
<u>609.498, subd. 1b</u>	<u>Tampering with Witness, Aggravated 1st Degree</u>
<u>609.561, subd. 1 or 2</u>	<u>Arson 1st Degree</u>
<u>609.66, subd. 1e(b)</u>	<u>Drive-By Shooting (Toward a Person or Occupied Motor Vehicle or Building)</u>

* * *

Appendix 4. 8. Targeted Misdemeanor List

Directive to MSGC staff: The existing section 8, Targeted Misdemeanor List, shall be restyled as Appendix 4, Targeted Misdemeanor List, and moved to the end of the Minnesota Sentencing Guidelines and Commentary.

Appendix 1.3. Changes to Clarify Effective Dates

On July 25, 2019, after submission to the Legislature and public hearing,⁹⁹ the Commission adopted the following modifications to section the 2018 Minnesota Sentencing Guidelines and Commentary to clarify that Guidelines modifications generally apply to offenses committed on or after the effective date of the modification. This action was taken in light of *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017).

Modifications to 2018 Minn. Sentencing Guidelines § 3.G:

[3.]G. Modifications

1. Policy Modifications. Modifications to sections 1 through 8 of the Minnesota Sentencing Guidelines, and associated commentary and appendices, apply to offenders whose date of offense is on or after the specified modification effective date.
2. Clarifications of Existing Policy. Modifications to ~~C~~commentary and appendices relating to existing Guidelines policy apply to offenders sentenced on or after the specified effective date.

⁹⁹ The Commission adopted these proposed modifications December 20, 2018, and submitted them to the Legislature January 11, 2019. Minn. Sentencing Guidelines Comm’n, *Report to the Legislature* (Jan. 11, 2019). Retrieved July 26, 2019, at <https://go.usa.gov/xysku>. The Legislature took no action to provide that the changes should not take effect. See Minn. Stat. § 244.09, subd. 11. The modifications were the subject of a public hearing on July 18, 2019, and were finally adopted July 25, 2019.

Appendix 1.4. Other Non-Legislative Amendments to the Guidelines

On July 25, 2019, after public hearing, the Commission adopted the following modifications to the 2018 Minnesota Sentencing Guidelines and Commentary.

1. Reconcile Conflicts Regarding Offenses Committed while Under Sentence

Modifications: The Commission reconciled policy conflicts regarding offenses committed while under sentence, and, specifically, to clarify the application of consecutive sentencing policy to offenses, such as Escape from Electronic Monitoring, committed while under sentence.

Modifications to 2018 Minn. Sentencing Guidelines §§ 2.C.3.e, 2.F.1.b, & 2.F.2.a(2)(i); Comment 2.F.102; and Appendix 1:

[2.]C. Presumptive Sentence * * *

3. Finding the Presumptive Sentence for Certain Offenses. * * *

- e. Offenses Committed While Under State Authority. The presumptive disposition for escape from an executed sentence, felony assault committed by an inmate serving an executed term of imprisonment, or assault on secure treatment facility personnel is commitment. ~~It Pursuant to section 2.F.1, it is presumptive for escape from an executed sentence~~ term of imprisonment and for felony assault committed by an inmate serving an executed term of imprisonment to be sentenced consecutively to the offense for which the inmate was confined. The presumptive duration is determined by the presumptive sentencing consecutive policy (see section 2.F.1, Presumptive Consecutive Sentences). * * *

[2.]F. Concurrent/Consecutive Sentences * * *

1. Presumptive Consecutive Sentences. * * *

- b. Finding the Presumptive Disposition. ~~The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an executed term of imprisonment is always commitment. In all other cases, the~~ The presumptive disposition is determined using the criteria in section 2.C. The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an executed term of imprisonment is always commitment. * * *

2.F.102. *When the court pronounces presumptive consecutive sentences for multiple offenses, each new offense will be sentenced at a Criminal History Score of 1. The new offenses will run concurrently to each other, but consecutive to the prior offense.*

For example, an offender is convicted of Escape from Custody and First-Degree Burglary of an Occupied Dwelling following escape from an executed ~~sentence~~ term of imprisonment. The term of imprisonment remaining on the original offense from which the offender escaped is 18 months. Each of the new offenses will have a presumptive consecutive sentence duration found at a Criminal History Score of 1: Escape from Custody (Severity Level 3), 13 months; Burglary (Severity Level 6), 27 months. The two sentences will run concurrently to each other, and the longer of the two durations will be added to the time remaining on the original term of imprisonment (here, 27 months will be added to the time remaining on the original 18-month sentence). Aggregated, the new presumptive consecutive sentence duration is 45 months.

2. Permissive Consecutive Sentences.

- a. Criteria for Imposing a Permissive Consecutive Sentence. Consecutive sentences are permissive (may be given without departure) only in the situations specified in this section. * * *

- (2) Other Offenses. Consecutive sentences for the following offenses are always permissive and there is no dispositional departure if the sentences are executed.

- (vii) Felony Escape. If the offender is convicted of felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – and the offender did not escape from an executed ~~prison sentence~~ term of imprisonment, disciplinary confinement, or reimprisonment (see section 2.F.1.a(1)(ii)), the escape may be sentenced consecutively to the sentence for which the offender was confined.

* * *

Appendix 1. Mandatory and Presumptive Sentences Reference Table

* * *

Statute	Offense	Prerequisite or Conditions	Minimum Duration
609.485	Escape	Offense committed during "Term of Imprisonment" portion of <u>Escape from</u> executed sentence	Grid Time

* * *

2. Clarify Prior Felony Resulting in Non-Felony Sentence

Modifications: The Commission eliminated the ambiguity identified in *State v. Stewart*, 923 N.W.2d 668, 677–80 (Minn. Ct. App. 2019), *review denied* (Minn. Apr. 16, 2019), by deleting the first clause of § 2.B.1.h.

Modifications to 2018 Minn. Sentencing Guidelines § 2.B.1.h:

[2.]B. Criminal History * * *

1. Prior Felonies. * * *

- h. Non-Felony Sentence. ~~Except when a monetary threshold determines the offense classification of the prior offense (see section 2.B.7), w~~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.

* * *

Appendix 1.5. Technical Amendments to the Guidelines

On July 25, 2019, the Commission adopted the following technical modifications to the 2018 Minnesota Sentencing Guidelines and Commentary.

1. Correct Cross-References in Comment

Modifications: The Commission corrected the erroneous cross-reference in Comment 2.B.107.

Modification to 2018 Minn. Sentencing Guidelines Comment 2.B.107:

2.B.107. *In cases of multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered. The phrase “before the current sentencing” means that in order for prior convictions to be used in computing the criminal history score, the felony sentence for the prior offense must have been stayed or imposed before sentencing for the current offense. When multiple current offenses are sentenced on the same day before the same court, sentencing must occur in the order in which the offenses occurred. The dates of the offenses must be determined according to the procedures in section ~~2A. 2.~~ 2.*

2. Clarify Examples on Standard Sentencing Grid

Modifications: The Commission clarified the Standard Sentencing Grid, adding to the example offense of murder in the third degree listed at Severity Level 10, “(Depraved Mind)”; listing “Murder, 3rd Degree (Controlled Substances)” as an example offense at Severity Level 9; and making consistent stylistic changes to example offenses listed at severity levels 9, 10 and 11.

Modifications to 2018 Minn. Sentencing Guidelines § 4.A:

4.A. Sentencing Guidelines Grid

* * *

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree (intentional murder; drive- by-shootings)</i>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ²	426 363-480 ²
<i>Murder, 3rd Degree (unintentional murder) Murder, 3rd Degree (Depraved Mind)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288

<u>Murder, 3rd Degree (Controlled Substances)</u> Assault, 1st Degree	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
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* * *

3. Strike Reference to Specific Statute Year

Modifications: The Commission deleted an unnecessary reference to a particular year’s edition of Minnesota Statutes, as such references are not consistent with the Guidelines style.

Modification to 2018 Minn. Sentencing Guidelines § 2.D.3.a(8):

[2.]D. Departures from the Guidelines * * *

[3.a.](8) In the case of a controlled substance offense conviction, the offender is found by the district court to be particularly amenable to probation based on adequate evidence that the offender is chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minn. Stat. § 152.152-(2014).

4. Correct Statute Citation – Theft of Services (Over \$5,000)

Modifications: The Commission corrected the citation for “Theft of Services (Over \$5,000)” in § 5.B, which listed the wrong numbered clause.

Modification to 2018 Minn. Sentencing Guidelines § 5.B:

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.52 subd. 2(a)(12)(13)	Theft of Services (Over \$5,000)	3
609.52 subd. 2(a)(13)	Theft of Services (\$5,000 or Less)	2

* * *

5. Correct Statute Citation – Financial Transaction Card Fraud (Over \$35,000)

Modifications: The Commission changed the citation for Financial Transaction Card Fraud (Over \$35,000) to conform to the current statutory structure.¹⁰⁰

Modifications to 2018 Minn. Sentencing Guidelines §§ 5.A and 5.B:

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
5	Financial Transaction Card Fraud (Over \$35,000)	609.821 subd. 3(a)(1)(i)

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.821 subd. 3(a)(1)(i)	Financial Transaction Card Fraud (Over \$35,000)	5

* * *

6. Correct Statute Title – Unlawful Transfers or Sales of Recordings

Modifications: The Commission changed an offense title from “Unlawful Transfer of Sounds” to “Unlawful Transfers or Sales of Recordings” to conform to the current statutory language.¹⁰¹

Modifications to 2018 Minn. Sentencing Guidelines §§ 5.A and 5.B:

5.A. Offense Severity Reference Table

* * *

¹⁰⁰ See 1999 Minn. Laws [ch. 218](#), § 5.

¹⁰¹ See 1993 Minn. Laws [ch. 221](#).

Severity Level	Offense Title	Statute Number
UNRANKED	Unlawful Transfers <u>or Sales of Recordings of</u> Sounds; Sales	325E.201

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
325E.201	Unlawful Transfers <u>or Sales of Recordings of</u> Sounds; Sales	Unranked

* * *

Appendix 2. Proposed 2020 Guidelines Modifications – Submitted to the Legislature

Following public hearing on July 18, 2019, the Commission adopted the Guidelines modifications contained in Appendix 2.1 and Appendix 2.2 on July 25, 2019. Following public hearing on December 19, 2019, the Commission adopted the Guidelines modifications contained in Appendix 2.3 on January 9, 2020. These modifications to the 2019 Minn. Sentencing Guidelines and Commentary will become effective August 1, 2020, and will apply to crimes committed on or after that date, unless the Legislature by law provides otherwise.

Appendix 2.1. Rank Escape from Electronic Monitoring at Severity Level 3

Adopted Modifications: The Commission adopted a proposal to assign Severity Level 3 to Escape from Electronic Monitoring under Minn. Stat. § 609.485, subd. 4(f). The offense is now designated as unranked. Additionally, the Commission adopted a proposal to strike the word “home” from the title to conform to the statute.

Adopted modifications to 2019 Minn. Sentencing Guidelines §§ 5.A and 5.B:

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
Unranked	Escape from Electronic Home Monitoring	609.485, subd. 4(f)

* * *

Severity Level	Offense Title	Statute Number
<u>3</u>	<u>Escape from Electronic Monitoring</u>	<u>609.485, subd. 4(f)</u>

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.485 subd. 4(f)	Escape from Electronic Home Monitoring	Unranked <u>3</u>

* * *

Appendix 2.2. Rank Offering Counterfeit Currency

Adopted Modifications: The Commission adopted a proposal to rank Offering Counterfeit Currency under Minn. Stat. § 609.632, subd. 3, at Severity Level 2 (\$5,000 or Less), Severity Level 3 (\$5,001–\$35,000), and Severity Level 6 (Over \$35,000). Counterfeiting of Currency is now designated as unranked, and that designation will continue for Counterfeiting of Currency (Manufacturing or Printing) and Counterfeiting of Currency (Means for False Reproduction).

Adopted modifications to 2019 Minn. Sentencing Guidelines §§ 5.A and 5.B:

5.A. Offense Severity Reference Table

Severity Level	Offense Title	Statute Number
6	<u>Offering Counterfeit Currency (Over \$35,000)</u>	<u>609.632, subd. 3 with subd. 4(b)(1)</u>

* * *

Severity Level	Offense Title	Statute Number
3	<u>Offering Counterfeit Currency (\$5,001–\$35,000)</u>	<u>609.632, subd. 3 with subd. 4(b)(2)</u>

* * *

Severity Level	Offense Title	Statute Number
2	<u>Offering Counterfeit Currency (\$5,000 or Less)</u>	<u>609.632, subd. 3 with subd. 4(b)(3)</u>

* * *

Severity Level	Offense Title	Statute Number
UNRANKED	Counterfeiting of Currency (<u>Manufacturing or Printing/Means for False Reproduction</u>)	609.632, subd. 1 & 2 with subd. 4(a)

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
<u>609.632 subd. 3 with subd. 4(b)(1)</u>	<u>Offering Counterfeit Currency (Over \$35,000)</u>	<u>6</u>
<u>609.632 subd. 3 with subd. 4(b)(2)</u>	<u>Offering Counterfeit Currency (\$5,001–\$35,000)</u>	<u>3</u>
<u>609.632 subd. 3 with subd. 4(b)(3)</u>	<u>Offering Counterfeit Currency (\$5,000 or Less)</u>	<u>2</u>
<u>609.632 subd. 1 & 2 with subd. 4(a)</u>	Counterfeiting of Currency (<u>Manufacturing or Printing/Means for False Reproduction</u>)	Unranked

* * *

Appendix 2.3. Limitation on the Length of Probation

Adopted Modifications: The Commission adopted a proposal to amend 2019 Minn. Sentencing Guidelines section 3.A (Establishing Conditions of Stayed Sentences) to allow for a presumptive probation term, subject to departure, of up to five years or the statutory maximum sentence, whichever is less, for most felony offenses, and to make conforming amendments to sections 1.B (Definitions), 2.C (Presumptive Sentence), and 2.D (Departures from the Guidelines).

Adopted modifications to 2019 Minn. Sentencing Guidelines §§ 1.B, 2.C, 2.D, and 3.A:

Minnesota Sentencing Guidelines and Commentary

1. Purpose and Definitions

* * *

B. Definitions

* * *

5. Departure. A “departure” is a pronounced sentence other than that recommended in the appropriate cell on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a “departure.”

* * *

- b. Durational Departure. A “durational departure” occurs when the court orders a sentence with a prison duration other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid or when the court pronounces a length of stay other than as provided in section 3.A.2.
 - (1) Aggravated Durational Departure. An “aggravated durational departure” occurs when the court pronounces a prison duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid or when the court pronounces a length of stay longer than provided in section 3.A.2.

- (2) Mitigated Durational Departure. A “mitigated durational departure” occurs when the court pronounces a prison sentence that is more than 15 percent lower than the fixed duration displayed in the appropriate cell on the applicable Grid.

* * *

13. Presumptive Sentence. “Presumptive sentences” are those sentences provided on the Sentencing Guidelines Grids and in section 3.A.2. They are presumptive because they are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.

* * *

2. Determining Presumptive Sentences

* * *

C. Presumptive Sentence

1. Finding the Presumptive Sentence. The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable Grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis). The conviction offense determines the severity level. The offender’s criminal history score is computed according to section 2.B above. For cases contained in cells outside of the shaded areas, the sentence should be executed. For cases contained in cells within the shaded areas, the sentence should be stayed unless the conviction offense carries a mandatory minimum sentence. Section 3.A governs conditions of stayed sentences.

* * *

D. Departures from the Guidelines

1. Departures in General. The sentences provided in the Grids are presumed to be appropriate for the crimes to which they apply. The court must pronounce a sentence of the applicable

disposition, ~~and within the applicable prison range, and within the applicable length of stay,~~ unless there exist identifiable, substantial, and compelling circumstances to support a departure.

The court may depart from the presumptive disposition or duration provided in the Guidelines, and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence. A pronounced sentence for a felony conviction that is outside the appropriate prison range on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence, is a departure from the Guidelines. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a departure from the Guidelines. A departure is not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by statute or case law.

- a. Disposition and Duration. Departures with respect to disposition and duration are separate decisions, each requiring written departure reasons. A court may depart from the presumptive disposition without departing from the presumptive duration, and vice-versa. ~~A court departing from the presumptive disposition as well as the presumptive duration has made two separate departure decisions, each requiring written departure reasons.~~
- b. Aggravated Departure. When imposing a sentence that is an aggravated departure, it is recommended that the court pronounce a sentence proportional to the severity of the crime for which the sentence is imposed and the offender's criminal history, and take into consideration the purposes and underlying principles of the Guidelines.

* * *

2. Factors that **should not** be used as Reasons for Departure. The following factors should not be used as reasons for ~~departing from the presumptive sentences provided in the appropriate cell on the applicable Grid;~~ departure:

* * *

3. Related Policies

A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the appropriate cell on the applicable Grid specifies court orders a stayed sentence, the court may pronounce a stay of execution or a stay of imposition. The court must pronounce the length of the stay, which may exceed the duration of the presumptive prison sentence, as provided in section 3.A.2 and may establish appropriate conditions subject to the considerations in section 3.A.3.
 - a. Stay of Execution. When ordering a stay of execution, the court must pronounce the prison sentence duration, but its execution is stayed. The presumptive duration is shown in the appropriate cell.
 - b. Stay of Imposition. When ordering a stay of imposition, the court must not pronounce a prison sentence duration, and the imposition of the sentence is stayed.

The Commission recommends that stays of imposition be used for offenders who are convicted of lower severity offenses and who have low criminal history scores. The Commission further recommends that convicted felons be given one stay of imposition, although for very low severity offenses, a second stay of imposition may be appropriate.

* * *

2. Length of Stay.

- a. When the court stays execution or imposition of sentence for a felony offense, including an attempt or conspiracy, the pronounced length of stay must not exceed five years or the length of the statutory maximum punishment, whichever is less, unless the court identifies and articulates substantial and compelling reasons to support a departure from this rule.
- b. Subject to the limitation in section 3.A.2.a, the pronounced length of stay may exceed the presumptive prison sentence duration provided in the appropriate cell on the applicable Grid.

- c. If the court by departure exceeds the limitation in section 3.A.2.a, the length of stay must not exceed the statutory maximum punishment for the offense.
- d. The limitation in section 3.A.2.a does not apply to a sentence for a violation of Minn. Stat. § 609.19 (Murder 2nd Degree), 609.195 (Murder 3rd Degree), 609.20 (Manslaughter 1st Degree), 609.2112 (Criminal Vehicular Homicide), 609.2662 (Murder of an Unborn Child 2nd Degree), 609.2663 (Murder of an Unborn Child 3rd Degree), 609.2664 (Manslaughter of an Unborn Child 1st Degree), 609.268 (Death or Injury of an Unborn Child in Comm. of Crime), 609.342 (Criminal Sexual Conduct 1st Degree), 609.343 (Criminal Sexual Conduct 2nd Degree), 609.344 (Criminal Sexual Conduct 3rd Degree), 609.345 (Criminal Sexual Conduct 4th Degree), or 609.3451 (Criminal Sexual Conduct 5th Degree).
- e. Extensions of probation are governed by statute (see Minn. Stat. § 609.135, subd. 2(g)–(h)).

2.3. Other Conditions of Stayed Sentences. While the Commission has otherwise chosen not to develop specific guidelines for the conditions of stayed sentences, it recognizes that there are several penal objectives to be considered in establishing conditions of stayed sentences, including:

- deterrence;
- public condemnation of criminal conduct;
- public safety;
- rehabilitation;
- restitution;
- retribution; and
- risk reduction.

The Commission also recognizes that the relative importance of these objectives may vary with both offense and offender characteristics and that multiple objectives may be present in any given sentence. The Commission urges courts to utilize the least restrictive conditions of stayed sentences that are consistent with the objectives of the sanction. The Commission further urges courts to consider the following principles in establishing the conditions of stayed sentences:

* * *

(6) Work Release and Community Based Programs. The Commission has chosen not to establish specific guidelines relating to work release programs in local facilities or community-based residential and nonresidential programs.

* * *

[Staff note: To conform to the renumbering of section 3.A.2 as section 3.A.3, staff intends to renumber comments 3.A.201 and 3.A.202 as comments 3.A.301 and 3.A.302, respectively, in the August 1, 2020, edition of the Minnesota Sentencing Guidelines and Commentary.]

UPDATED MINORITY REPORT

This Minority Report is filed on behalf of Retired Justice Christopher Dietzen, Minnesota Supreme Court, Judge Michelle A. Larkin, Minnesota Court of Appeals, and Sergeant Salim Omari, Saint Paul Police Department, who voted against the Schnell/Mitchell proposal to place five-year caps on probation subject to the existing departure mechanism in Minn. Sent. Guidelines 2.D (Supp. 2019). Although the minority supports meaningful probation reform, for the reasons that follow, we are concerned that the proposal is unworkable and may actually increase Minnesota's incarceration rate.

At the November 2019 meeting, on a 6-5 vote, the majority approved Commissioner Schnell's motion to hold a public hearing in December regarding his proposal for a mandatory five-year probation cap for the majority of felonies. The minority raised several concerns regarding the proposal, including whether the Commission had authority to adopt mandatory probation caps. By letter dated January 8, 2020, the Minnesota Attorney General issued an opinion regarding the Schnell proposal. *See* Letter from David S. Voight, Deputy Attorney Gen., Office of Minn. Attorney Gen. Keith Ellison, to Nathaniel Reitz, Exec. Dir., Minn. Sent. Guidelines Comm'n (Jan 8, 2020). The attorney general concluded that the Commission would exceed its legislative authority if it were to impose a mandatory five-year cap on probation lengths. *Id.* However, the attorney general also concluded that a guidelines modification that would allow a sentencing court discretion to depart from a five-year presumptive probation length up to the statutory maximum would be within the authority of the Commission. *Id.*

On January 2, 2020, Commissioners Schnell and Mitchell forwarded a new proposal to the Commission. The proposal established a presumptive five-year length of probation for all but a few felonies and incorporated the existing departure mechanism in paragraph 2.D of the sentencing guidelines. We generally support the idea of a system of presumptive probation lengths with judicial discretion to depart based on substantial and compelling circumstances. However, for the reasons that follow, we have ongoing concerns regarding the proposal.

1. The majority's proposal is inconsistent with the Minnesota Sentencing Guidelines.

The purpose of the Sentencing Guidelines is to establish rational and consistent sentencing standards that promote public safety, reduce sentencing disparity, and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender's criminal history.

Minn. Sent. Guidelines 1.A (Supp. 2019).

“The severity of the sanction should increase in direct proportion to an increase in offense severity or the convicted felon’s criminal history, or both. This promotes a rational and consistent sentencing policy.” Minn. Sent. Guidelines 1.A.3 (Supp. 2019). “Probation” is defined as “a court-ordered sanction imposed upon an offender for a period of supervision no greater than that set by statute.” Minn. Stat. § 609.02, subd. 15 (2018). Because it is a sanction, probation “should increase in direct proportion to an increase in offense severity or the convicted felony’s criminal history, or both.” Minn. Sent. Guidelines 1.A.3 (Supp. 2019).

The majority explains that the five-year length of probation is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” But the presumptive probation length entirely ignores offense severity and criminal history in its application. In every case in which the presumption applies, a five-year length of probation is presumed to be appropriate regardless of offense severity or criminal history. That approach is the antithesis of the principle that “[t]he severity of the sanction should increase in direct proportion to an increase in offense severity or the convicted felon’s criminal history, or both.” Minn. Sent. Guidelines 1.A.3 (Supp. 2019).

The following example illustrates the minority’s concern. Assume an offender with no criminal history is convicted of first-degree assault, that is, infliction of “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” *See* Minn. Stat. §§ 609.221, subd. 1, .02, subd. 8 (2018). The presumptive sentence for this offender is an executed prison sentence of 86 months. Minn. Sent. Guidelines 4.A (Supp. 2019). If a judge agrees to give the offender an opportunity on probation, instead of sending the offender to prison, five years of probation is presumed appropriate for this offender under the majority’s proposal.

Next, assume that an offender with no criminal history is convicted of fourth-degree assault, that is, “intentionally throw[ing] or otherwise transfer[ing] bodily fluids or feces at or onto [a peace] officer.” Minn. Stat. § 609.2231, subd. 1(c)(2) (2018). The presumptive sentence for this offender is a stayed prison term of one year and one day. Minn. Sent.

Guidelines 4.A (Supp. 2019). Nonetheless, five years of probation is also presumed appropriate for this offender under the majority’s proposal.

Because the majority has deemed a five-year probation length appropriate for every offense to which the presumption applies, without making any attempt to distinguish between offense severity, five years of probation is presumed appropriate for both a fourth-degree-assault offender who faces a stayed prison term of one year and one day, as well as a first-degree-assault offender who faces an executed prison term of 86 months. The minority is concerned that the majority’s proposal does not “ensure that the [probation lengths] imposed for felony convictions are proportional to the severity of the conviction offense,” as is required by the sentencing guidelines. Minn. Sent. Guidelines 1.A (Supp. 2019).

In sum, the majority’s proposal replaces one unacceptable disparity with another. The minority would prefer a system of varying presumptive probation lengths that takes into account offense severity and criminal history, as is plainly required under the sentencing guidelines.

2. The majority’s proposal imposes an unprecedented requirement of a 12-member sentencing jury for imposition of a probation term length greater than five years.

The constitutional rule of *Apprendi/Blakely* provides that “any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004); see *Apprendi v. New Jersey*, 530 U.S. 466,

490, 120 S. Ct. 2348, 2362-63 (2000). The sentencing jury trial required under that constitutional rule of law is known as a *Blakely* trial. Originally, *Blakely* trials were thought to apply only when a judge sought to impose a longer prison term than set forth in the presumptive guidelines. But in *State v. Allen*, the Minnesota Supreme Court held that the *Blakely* rule applies to probation determinations, that is, the supreme court held that a defendant has a Sixth Amendment right to a jury trial on the factors used to support a decision to sentence a defendant to an executed prison term if a term of probation supervision is presumed to be appropriate under the guidelines. 706 N.W.2d 40, 47 (Minn. 2005). In *Allen*, the Minnesota Supreme Court emphasized that under United States Supreme Court precedent, “it is for the jury to make the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Id.* at 46 (quotation omitted); *see also Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63.

The minority is not aware of any case holding that a decision regarding the length of probation supervision must be supported by facts admitted by the defendant or proved to a jury beyond a reasonable doubt. Yet the majority’s proposal uses terminology that suggests such findings are necessary. Indeed, statements made by the Commission’s chair prior to the vote on the proposal indicate that the majority intends to require a *Blakely* trial (or a waiver and admissions by the defendant) before a judge can impose a length of probation greater than five years.

Adopting the majority’s proposal for sentencing jury trials regarding the length of probation will increase costs for all criminal-justice stakeholders. The majority’s creation of that requirement will obviously divert limited resources from other uses. The judiciary,

local county attorney offices, and the public-defense system will have to hear, prosecute, and defend the new *Blakely* trials. And, the public will be obligated to serve as jurors. The minority is concerned that the unprecedented, cost-increasing *Blakely* trial requirement requires more fulsome evaluation, especially when there are alternative ways of restricting judicial discretion without imposing the constitutional requirement of a *Blakely* trial.

3. *The majority treats probation as a sentence, which is inconsistent with sentencing statutes.*

To impose a jury-trial requirement for decisions regarding probation length, the majority modified existing language in the sentencing guidelines. For example, the guidelines define “presumptive sentence” as the sentences provided on the Sentencing Guidelines Grids, that is, prison terms. Minn. Sent. Guidelines 2.C.1 (Supp. 2019). The proposal expands that definition to include the new presumptive five-year length of probation. By defining probation as a “sentence,” the majority brings the presumptive five-year length of probation within the holdings of *Apprendi*, *Blakely*, and *Allen*.

The majority’s approach is concerning because defining probation as a “sentence” is inconsistent with the plain language of Minnesota’s sentencing statutes. For example, Minn. Stat. § 609.10, subd. 1 (2018), entitled “Sentences Available,” lists the sentences that are available for a convicted felon. It provides, in relevant part,

Subdivision 1. **Sentences available.** (a) Upon conviction of a felony and compliance with the other provisions of this chapter the court, if it imposes sentence, may sentence the defendant to the extent authorized by law as follows:

(1) to life imprisonment; or

(2) to imprisonment for a fixed term of years set by the court;
or

(3) to both imprisonment for a fixed term of years and payment
of a fine; or

(4) to payment of a fine without imprisonment or as an
intermediate sanction on a stayed sentence; or

(5) to payment of court-ordered restitution in addition to either
imprisonment or payment of a fine, or both; or

(6) to payment of a local correctional fee as authorized under
section 609.102 in addition to any other sentence imposed by
the court.

Id. Minn. Stat. § 609.10 unambiguously lists the “sentences” that are available for a felony conviction, and it does not include “probation” as an available sentence.¹

Minn. Stat. § 609.135 (2018) also suggests that probation supervision for a felony conviction is not a “sentence” that triggers the requirement for a sentencing jury trial under *Apprendi*, *Blakely*, and *Allen*. Minn. Stat. § 609.135 is entitled “Stay of imposition or execution of sentence” and provides,

Subdivision 1. **Terms and conditions.** (a) Except when a sentence of life imprisonment is required by law, or when a mandatory minimum sentence is required by section 609.11, any court may stay imposition or execution of sentence and:

(1) may order intermediate sanctions without placing the defendant on probation; or

(2) may place the defendant on probation with or without supervision and on the terms the court prescribes, including intermediate sanctions when practicable.

¹ In *Pageau v. State*, the Minnesota Court of Appeals rejected an argument that the word “sentence” refers to “probation and the conditions thereof.” 820 N.W.2d 271, 276 (Minn. App. 2012) (quotation marks omitted).

Under that plain language, a court may place a defendant on probation when the court stays imposition or execution of sentence. Logically, if “probation” is a “sentence,” it would not be possible to both stay imposition or execution of sentence and simultaneously place the defendant on probation; placing the defendant on probation would necessarily result in imposition or execution of sentence.

In sum, the majority’s treatment of “probation” as a “sentence” is inconsistent with Minnesota’s sentencing statutes. The minority is concerned that this statutory inconsistency will result in unintended consequences. The minority believes the better approach is to explore probation reform alternatives that are consistent with Minnesota’s sentencing statutes.

4. The majority’s proposal fails to provide necessary guidance regarding permissible departure grounds.

Under the proposal, a length of probation greater than five years is an aggravated durational departure. A judge may not order such a departure unless the judge articulates substantial and compelling reasons for doing so. The proposal explains that “Because the Commission has not discussed specific bases for departure, no attempt was made to add to the list of permissible departure reasons in [the guidelines].”

The majority acknowledges that a longer period of probation could be appropriate if an offender needs more than five years of treatment, services, or supervision. The majority also acknowledges that caselaw clearly establishes that an offender’s individual circumstances cannot be a basis for an aggravated durational departure. *See State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016) (“Durational departures must be based on the

nature of the offense, not the individual characteristics of the offender.”). The minority is concerned that the proposal does not address whether the caselaw proscription against consideration of offender-related reasons as justification for an aggravated departure applies when considering an aggravated durational departure from the five-year probation length.

The minority is also concerned that a majority of the Commission rejected a proposed amendment that would have allowed an aggravated durational departure from the five-year probation length based on the agreement of the parties. Recent statistics show that for 82% of offenders who are placed on probation, the length of probation is five years or less. Robina Inst., *Probation Sentencing In-Depth (2010-2015)* 1 (2017). Thus, 18% of offenders on probation are the subject of this proposal. Of that 18%, we are told that the majority received an extended probation term as part of a plea agreement in which the offender received a second chance: no presumptive imprisonment in exchange for a longer length of probation supervision. Such agreements allow the criminal justice system to work efficiently—approximately 90% of cases filed are settled—and should be exempted from the proposal.

The majority rejected the proposed amendment to allow an aggravated durational departure based on the agreement of the parties, reasoning that caselaw prohibits this approach. See *State v. Misquadace*, 644 N.W.2d 65, 66 (Minn. 2002) (“The sentencing court erred by basing its departures from the presumptive sentences under the Minnesota Sentencing Guidelines solely on a plea agreement without additional substantial and compelling justification for departure.”). But the Commission is writing on a clean slate.

Currently, there is no requirement that a judge justify any length of probation. Thus, it is not necessary to apply law regarding departures in other contexts here.

The proposal's failure to provide necessary guidance regarding appropriate departure grounds is a significant concern. Professionals who testified at the public hearing in support of the original proposal for mandatory probation caps acknowledged that some offenders need more than five years of probation supervision. And offenders testified that they agreed to longer probation terms to avoid imprisonment. From our perspective, such offenders may commit crimes as a result of long-term chemical dependency issues and untreated mental-health issues. Individuals who suffer from those problems could benefit from programming and treatment in those areas.

Often times, there are fits and starts as people undergo assessments to determine their treatment needs, attempt to identify appropriate treatment programs, attempt to gain admission to an appropriate program, seek funding for the program, and ultimately complete the program. In addition, people often begin one program, discontinue treatment, and enter another program. This process is further complicated when multiple treatment programs are necessary. In such situations, a judge may believe that extended treatment and supervision is in the best interests of the probationer and public safety. An aggravated durational departure would seem appropriate. Unfortunately, the departure mechanism in Minn. Sent. Guidelines 2.D (Supp. 2019), on which the proposal relies, does not include factors indicating that rehabilitative goals are permissible grounds for an aggravated durational departure.

In sum, the minority is concerned that although the proposal allows for judicial departures, departures are unlikely given the lack of guidance regarding permissible departure grounds. Never before has a judge been required to justify a length of probation longer than five years. Caselaw provides no guidance regarding durational departures in this context. Referring judges to the reasons articulated in the guidelines—which apply to prison-term durations—is inadequate. A term of probation supervision is not a prison term, and the factors that might influence a decision regarding the latter do not necessarily apply to the former. Historically, the Commission has identified permissible departure grounds in the guidelines, and the courts have relied on those grounds when considering departures. The minority believes that the Commission has a responsibility to provide similar guidance regarding permissible departure grounds regarding this new form of sentencing departure.

The majority continues to be concerned that in cases in which the guidelines presume an executed prison sentence, the safer course for a judge will be to impose the presumptive sentence, thereby denying an offender the opportunity to receive needed assistance. If, on the other hand, the judge decides to take a chance and order probation instead of a presumptive prison sentence, the easiest course will be to cap probation at five years without attempting to identify, as a matter of first impression, appropriate reasons for a durational departure. In which case, the majority’s proposal may end up being nothing more than an unconstitutional system of de facto caps. Neither outcome is desirable.

Conclusion

The minority remains committed to meaningful probation reform. But we think the Commission should work through the concerns described above, instead of forging ahead

with the expectation that the courts will sort it out. The process of developing a well-defined, workable system of probation reform that is consistent with Minnesota's sentencing guidelines, sentencing statutes, and caselaw may not be easy, but it is not impossible. That is precisely why the task is well-suited to the Commission. *See Mistretta v. United States*, 488 U.S. 361, 379, 109 S. Ct. 647, 658 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."). Failure to do so is an abdication of the Commission's responsibility.

Some commissioners contend that the Commission must recommend a proposal for probation reform in its January 15, 2020 report to the legislature, arguing that probation reform is imperative and that the Commission has been working on probation reform for over a year. In reality, the Schnell proposal for mandatory probation caps was the first proposal regarding probation reform, and it was presented at the Commission's November 2019 meeting. The Commission held a public hearing regarding that proposal in December 2019. Last week, the attorney general advised the Commission that it lacks authority to impose mandatory probation caps. In response, Commissioners Schnell and Mitchell drafted the current proposal, which was discussed at the Commission's meeting on January 9, 2020. In sum, although probation reform has been on the horizon for some time, the Commission's efforts to address it through a proposal for change are in the initial stages.

Again, probation reform is important. It is therefore important to do it correctly. The minority believes that the concerns described herein are legitimate and that failure to

address them will result in uncertainty in sentencing. The better approach is to take a little more time to resolve the concerns so the Commission's ultimate proposal for probation reform will be effective.

Appendix 3. Recommendation to the Legislature: Define Minimum Term of Imprisonment for Murder of Unborn Child in the First Degree

The following resolution was unanimously adopted by the Minnesota Sentencing Guidelines Commission on March 14, 2019:

Whereas the Minnesota Sentencing Guidelines Commission is statutorily required, from time to time, to make recommendations to the Legislature regarding changes in the criminal code, criminal procedures, and other aspects of sentencing;

Whereas a violation of Minn. Stat. § 609.2661, Murder of Unborn Child in the First Degree, carries a mandatory penalty of life imprisonment;

Whereas Minn. Stat. § 244.05, subd. 4, which defines minimum terms of imprisonment for other mandatory life sentences, does not define the minimum term of imprisonment for Murder of Unborn Child in the First Degree;

Whereas Minn. Stat. § 244.05, subd. 5(a), which authorizes the Commissioner of Corrections to give supervised release to inmates serving mandatory life sentences for certain other offenses, does not authorize the Commissioner to give such release to an offender serving a mandatory life sentence for Murder of Unborn Child in the First Degree;

Whereas the Minnesota Supreme Court, in *State v. Mouelle*, has nevertheless determined life without the possibility of release to be an unauthorized sentence for Murder of Unborn Child in the First Degree; and

Whereas a mandatory life sentence for Murder of Unborn Child in the First Degree is absent from the definition of “mandatory life sentence” contained in Minn. Stat. § 609.115, subd. 2a; now, therefore, be it

Resolved, that the Minnesota Sentencing Guidelines Commission does hereby recommend to the Legislature:

- (1) that the minimum term of imprisonment for Murder of Unborn Child in the First Degree be statutorily defined;
- (2) that Minn. Stat. § 244.05, subdivisions 4 and 5(a), accordingly be amended to refer to an inmate serving a mandatory life sentence under section 609.2661;
- (3) if the Legislature chooses to forbid the possibility of release for an inmate serving a mandatory life sentence under section 609.2661, clause (1) or (2), that Minn. Stat. § 609.106, subd. 2, be amended accordingly; provided, however, that the Commission recommends against forbidding the possibility of release for clause (3) offenses; and
- (4) that the definition of “mandatory life sentence” found in Minn. Stat. § 609.115, subd. 2a, be amended to refer to section 609.2661.

Appendix 4. Sentencing Guidelines Grids

Appendix 4.1. Standard Sentencing Guidelines Grid – Effective August 1, 2019

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in <i>italics</i>)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree (Intentional; Drive-By-Shootings)</i>	11	306 <i>261-367</i>	326 <i>278-391</i>	346 <i>295-415</i>	366 <i>312-439</i>	386 <i>329-463</i>	406 <i>346-480²</i>	426 <i>363-480²</i>
<i>Murder, 2nd Degree (Unintentional)</i> <i>Murder, 3rd Degree (Depraved Mind)</i>	10	150 <i>128-180</i>	165 <i>141-198</i>	180 <i>153-216</i>	195 <i>166-234</i>	210 <i>179-252</i>	225 <i>192-270</i>	240 <i>204-288</i>
<i>Murder, 3rd Degree (Controlled Substances)</i> <i>Assault, 1st Degree</i>	9	86 <i>74-103</i>	98 <i>84-117</i>	110 <i>94-132</i>	122 <i>104-146</i>	134 <i>114-160</i>	146 <i>125-175</i>	158 <i>135-189</i>
<i>Agg. Robbery, 1st Degree</i> <i>Burglary, 1st Degree (w/ Weapon or Assault)</i>	8	48 <i>41-57</i>	58 <i>50-69</i>	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Felony DWI</i> <i>Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 <i>46-64</i>	60 <i>51-72</i>	66 <i>57-79</i>	72 <i>62-84^{2,3}</i>
<i>Assault, 2nd Degree</i> <i>Burglary, 1st Degree (Occupied Dwelling)</i>	6	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Residential Burglary</i> <i>Simple Robbery</i>	5	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Nonresidential Burglary</i>	4	12 ¹	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Theft Crimes (\$5,000 or less)</i> <i>Check Forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 <i>18-25</i>
<i>Assault, 4th Degree</i> <i>Fleeing a Peace Officer</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 <i>17-22</i>

¹ 12¹=One year and one day



Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

² Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

³ The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

Appendix 4.2. Sex Offender Grid – Effective August 1, 2019

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in <i>italics</i>)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Criminal Sexual Conduct (CSC) 1st Degree</i>	A	144 <i>144-172</i>	156 <i>144-187</i>	168 <i>144-201</i>	180 <i>153-216</i>	234 <i>199-280</i>	306 <i>261-360</i>	360 <i>306-360</i> ²
<i>CSC 2nd Degree–1(c)(d)(e)(f)(h) (e.g., contact, force, & injury)</i>	B	90 <i>90</i> ³ -108	110 <i>94-132</i>	130 <i>111-156</i>	150 <i>128-180</i>	195 <i>166-234</i>	255 <i>217-300</i>	300 <i>255-300</i> ²
<i>CSC 3rd Degree–1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p) (e.g., penetration & force/occupation)</i>	C	48 <i>41-57</i>	62 <i>53-74</i>	76 <i>65-91</i>	90 <i>77-108</i>	117 <i>100-140</i>	153 <i>131-180</i>	180 <i>153-180</i> ²
<i>CSC 2nd Degree–1(a)(b)(g) (e.g., contact & victim under 13)</i> <i>CSC 3rd Degree–1(a)(e)(f) or 1(b) with 2(1) (e.g., penetration & child victim)</i>	D	36	48	60 <i>51-72</i>	70 <i>60-84</i>	91 <i>78-109</i>	119 <i>102-142</i>	140 <i>119-168</i>
<i>CSC 4th Degree–1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p) (e.g., contact & force/occupation)</i> <i>Dissemination of Child Pornography</i> ²	E	24	36	48	60 <i>51-72</i>	78 <i>67-93</i>	102 <i>87-120</i>	120 <i>102-120</i> ²
<i>CSC 4th Degree–1(a)(b)(e)(f) (e.g., contact & child victim)</i> <i>CSC 5th Degree</i> <i>Possession of Child Pornography (Subseq./Pred. Off./Under 13)</i>	F	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>66-92</i>	84 <i>72-100</i>
<i>CSC 3rd Degree–1(b) with 2(2) (i.e., penetration & child victim 24–48 mo. younger)</i> <i>Possession of Child Pornography Solicit Child for Sexual Conduct</i> ²	G	15	20	25	30	39 <i>34-46</i>	51 <i>44-60</i>	60 <i>51-60</i> ²
<i>Failure to Register as a Predatory Offender</i>	H	12 ¹ <i>12¹-14</i>	14 <i>12¹-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

¹ 12¹=One year and one day



Presumptive commitment to state imprisonment. Sex offenses under Minn. Stat. § 609.3455, subd. 2, have mandatory life sentences and are excluded from the Guidelines. See section 2.E, for policies regarding those sentences controlled by law, including conditional release terms for sex offenders.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenders in the shaded area of the Grid may qualify for a mandatory life sentence under Minn. Stat. § 609.3455, subd. 4. See sections 2.C and 2.E.

² Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1–2.

³ Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking 1st Degree is not subject to a 90-month minimum statutory presumptive sentence so the standard range of 15% lower and 20% higher than the fixed duration applies. (The range is 77–108.)

Appendix 4.3. Drug Offender Grid – Effective August 1, 2019

Presumptive sentence lengths are in months. Italicized numbers within the grid denotes range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subjected to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in <i>italics</i>)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Aggravated Controlled Substance Crime, 1st Degree</i> <i>Manufacture of Any Amt. Meth</i>	D9	86 <i>74*-103</i>	98 <i>84*-117</i>	110 <i>94*-132</i>	122 <i>104*-146</i>	134 <i>114*-160</i>	146 <i>125*-175</i>	158 <i>135*-189</i>
<i>Controlled Substance Crime, 1st Degree</i>	D8	65 <i>56*-78</i>	75 <i>64*-90</i>	85 <i>73*-102</i>	95 <i>81*-114</i>	105 <i>90*-126</i>	115 <i>98*-138</i>	125 <i>107*-150</i>
<i>Controlled Substance Crime, 2nd Degree</i>	D7	48	58	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Controlled Substance Crime, 3rd Degree</i> <i>Failure to Affix Stamp</i>	D6	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Possess Substances with Intent to Manufacture Meth</i>	D5	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Controlled Substance Crime, 4th Degree</i>	D4	12 ¹	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Meth Crimes Involving Children and Vulnerable Adults</i>	D3	12 ¹	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Controlled Substance Crime, 5th Degree</i>	D2	12 ¹	12 ¹	13	15	17	19	21 <i>18-25</i>
<i>Sale of Simulated Controlled Substance</i>	D1	12 ¹	12 ¹	12 ¹	13	15	17	19 <i>17-22</i>

* Lower range may not apply. See section 2.C.3.c(1) and Minn. Stat. § 152.021, subdivisions 3(c) & 3(d).

¹ 12¹=One year and one day

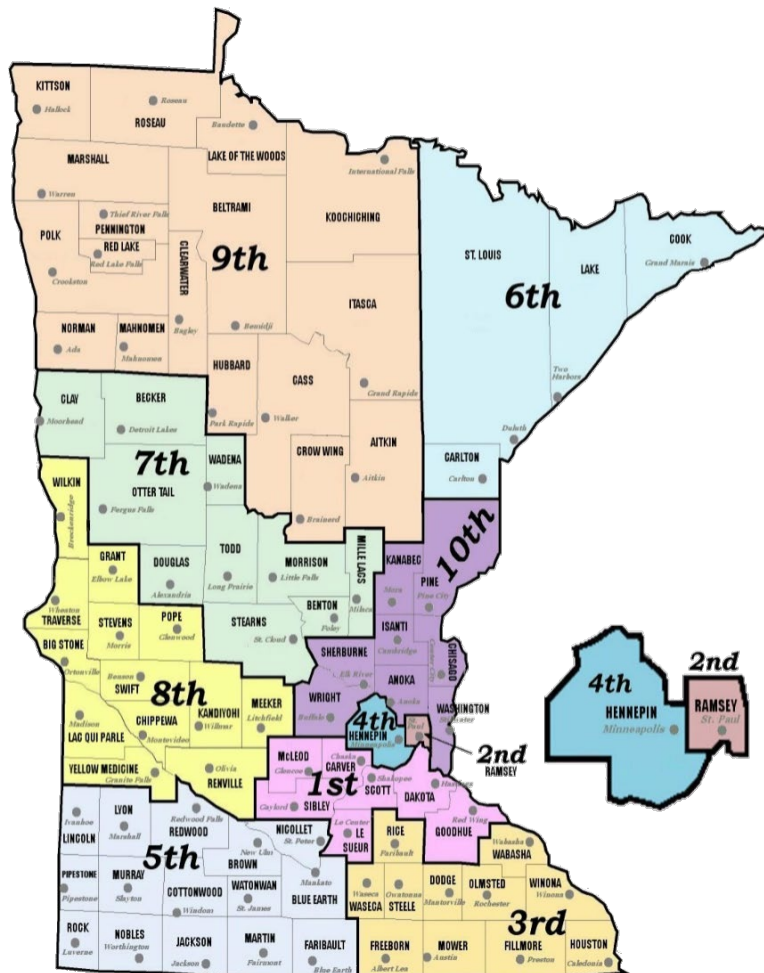


Presumptive commitment to state imprisonment.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

Appendix 5. Minnesota Judicial District Map



<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>	<u>Sixth</u>	<u>Seventh</u>	<u>Eighth</u>	<u>Ninth</u>	<u>Tenth</u>
Carver	Ramsey	Dodge	Hennepin	Blue Earth	Carlton	Becker	Big Stone	Aitkin	Anoka
Dakota		Fillmore		Brown	Cook	Benton	Chippewa	Beltrami	Chisago
Goodhue		Freeborn		Cottonwood	Lake	Clay	Grant	Cass	Isanti
Le Sueur		Houston		Faribault	St. Louis	Douglas	Kandiyohi	Clearwater	Kanabec
McLeod		Mower		Jackson		Mille Lacs	Lac qui Parle	Crow Wing	Pine
Scott		Olmsted		Lincoln		Morrison	Meeker	Hubbard	Sherburne
Sibley		Rice		Lyon		Otter Tail	Pope	Itasca	Washington
		Steele		Martin		Stearns	Renville	Kittson	Wright
		Wabasha		Murray		Todd	Stevens	Koochiching	
		Waseca		Nicollet		Wadena	Swift	Lake of the Woods	
		Winona		Nobles			Traverse	Mahnomen	
				Pipestone			Wilkin	Marshall	
				Redwood			Yellow Medicine	Norman	
				Rock				Pennington	
				Watonwan				Polk	
								Red Lake	
								Roseau	

Source: Minn. Judicial Branch.