

Minnesota Sentencing Guidelines Commission

REPORT TO THE LEGISLATURE

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INTRODUCTION

Legislative action in the 1990 session did not focus as heavily on felony sentencing as in the 1989 session. However, there were several bills passed by the Legislature which the Commission had to determine severity level rankings for. The Commission had a heavy workload this past year and focused on several projects, some of which were directed to the Commission by the Legislature and others that the Commission decided were necessary. This report summarizes the severity level rankings of the new or modified crimes, presents modifications adopted by the Commission that require legislative review, and describes the projects the Commission is currently working on. Briefly, the projects are:

- 1) The Commission began the development of a day fine model. The Legislature passed a bill in 1990 directing the Commission to develop a day fine model by June 1, 1991.
- 2) The Commission conducted two special studies, one on nonimprisonment sanctions and one on mandatory minimum sentencing practices for offenses involving dangerous weapons. Both of these studies were requested by the Legislature in a bill passed in 1989 and will be presented to the Legislature this session.
- 3) The Commission developed a set of principles and criteria to use for determining the severity level ranking of felonies. The Commission is currently in the process of evaluating severity level rankings by applying these articulated principles to every felony crime.

I. GUIDELINES MODIFICATIONS - EFFECTIVE AUGUST 1, 1990

A. Modifications that Received Legislative Review

There were only two, relatively minor, modifications that had been adopted by the Commission in 1989 and were reviewed by the 1990 Legislature. There were two offenses that had been inadvertently left unranked by the Commission. The first was Minn. Stat. § 268.18, subd. 3, which involves false representation with regard to unemployment benefits. This offense was viewed by the Commission to be similar to Wrongfully Obtaining Assistance and violations of the Federal Food Stamp Program. These similar offenses are included on the Theft Related Offense List and, therefore, the Commission adopted the proposal to add this unemployment fraud offense to the Theft Related Offense List. Theft Related offenses are ranked at severity level II or III, depending on the amount of loss involved.

The second set of offenses the Commission had inadvertently left unranked were two sub-clauses included within the theft statute. The overall clause deals with theft by false representation and the first sub-clause (a) specifically deals with the use of a check. This sub-clause (a) has been ranked on the Theft Related Offense List. The unranked sub-clauses dealt with (b) failure to perform a promise and (c) falsely representing a medical assistance claim. The Commission adopted the proposal to also include the sub-clauses (b) and (c) on the Theft Related Offense List. As noted above, Theft Related offenses are ranked at severity level II or III, depending on the amount of loss involved.

B. Ranking of New or Amended Crimes

The Commission ranked several crimes created and amended by the Legislature in the 1989 session and these are outlined below:

1. Controlled Substance Crimes

a) The legislature decreased the amount of marijuana necessary to constitute a 1st degree sale from 100 to 50 kilograms and decreased the amount of marijuana necessary to constitute a 2nd degree sale from 50 to 25 kilograms. This change was made to differentiate between the sale and possession of marijuana at each of these degrees. For both 1st and 2nd Degree Controlled Substance Crimes, the previous law (prior to August 1, 1990) did not differentiate between the amounts of marijuana necessary to constitute sale or possession offenses. **The Commission did not propose any change be made to the severity level rankings of 1st or 2nd degree controlled substance offenses.**

b) Two new marijuana offenses were created in 3rd degree; the sale of 5 or more kilograms of marijuana and the possession of 10 or more kilograms of marijuana. **The Commission ranked both crimes at severity level VI along with the majority of the 3rd Degree Controlled Substance offenses.** The Commission did not believe the possession of 10 or more kilograms of marijuana was as serious as possession of 3 or more grams of crack or 10 or more grams of cocaine which are the only 3rd degree crimes ranked at severity level VII.

c) The sale of marijuana to minors or the conspiring or employing of minors to sell marijuana was moved from 4th degree to 3rd degree. **The Commission did not propose any change be made to the severity level rankings. This has the effect of increasing the severity level of this crime from level IV to level VI.** The Commission believed it was best to reserve more detailed discussion as to where this offense may most appropriately be ranked for when the Commission creates the severity level ranking principles for drug crimes (discussed in section IV).

d) The legislature created a new 5th degree drug crime involving possession of marijuana with intent to sell. **The Commission did not propose any change to the severity level ranking for 5th degree drug crimes. This has the effect of ranking this new crime with all the other 5th degree drug crimes at severity level II.**

e) A new crime was created for Importing Controlled Substances Across State Borders when the person is in possession of an amount of controlled substance that constitutes a 1st degree controlled substance crime. **The Commission ranked this crime at severity level VIII, which is the same level as 1st Degree Controlled Substance Crimes.**

2. Criminal Vehicular Homicide and Injury

The Legislature made several changes to the Criminal Vehicular Homicide and Injury statute that required Commission consideration. The provision involving injury was separated into those resulting in great bodily harm (5 year statutory maximum) and those resulting in substantial bodily harm (3 year statutory maximum). Also, changes were made to the statute that removed the need to prove negligence. In clause 3, the phrase "in a negligent manner" was removed and a clause 4 was added: "while having an alcohol concentration of 0.10 or more, as measured within two hours of the time of driving. **The Commission ranked the "great bodily harm" offenses at severity level V (where the current injury level is ranked), and ranked "substantial bodily harm" offenses at severity level III. The Commission also ranked those offenses resulting in death: for the two clauses where gross negligence or negligence is involved, the ranking was increased to severity level VII and for the two clauses that do not involve negligence, the ranking remained at severity**

level VI. All offenses resulting in death whether ranked at severity VII or VI are presumptive prison sentences under the sentencing guidelines.

The majority of the Commission believed that the crime of Criminal Vehicular Homicide involving gross negligence or negligence was similar to Manslaughter 2 and both should be ranked at severity level VII. There were some members who were concerned that increasing the presumptive prison duration from 21 months to 48 months would result in a greater number of departures and others believed that the severity level should not be increased until there has been an opportunity to study the types of cases that will be charged under clauses 1 and 2 (negligence) compared to clauses 3 and 4 (negligence not necessary).

3. New Crimes Involving Assaults Against Children

a) The legislature added a new provision to Assault in the 3rd Degree when someone assaults a minor and there has been a pattern of child abuse against the minor (a 5 year statutory maximum penalty). The injury to the victim would be comparable to misdemeanor level assaults. **The Commission ranked this offense at severity level I.** The Commission believed this offense was similar to the misdemeanor level assault on a police officer which makes the crime a felony and is also ranked at severity level I.

b) The legislature expanded the crime of Malicious Punishment of a Child to include the situation where the punishment results in great bodily harm to the child (a 10 year statutory maximum penalty). **The Commission ranked this offense at severity level VII.** The Commission did not believe it should be ranked as high as Assault 1st Degree because the culpability of the offender is greater with the 1st Degree Assault where the offender "intends" to assault. The Commission believed the typical case would likely be a baby-shaking incident. These cases would typically involve a caregiver other than the parents and would likely involve a high degree of violence. In these situations a prison sentence would be appropriate even for someone with no prior criminal history.

Some Commission members were concerned that the typical case would involve "mom" and that there were more appropriate sanctions than prison for these cases. Other members were concerned that these offenders do not intend to injure, but that are extremely

frustrated and find out too late that shaking a baby is harmful. Members believed strong efforts should be made to educate caregivers on the dangers of shaking infants. Education is more effective in preventing future baby-shaking incidents than long prison terms.

4. New Crimes Involving Weapons and Bullet Resistant Vests

a) The legislature created a new crime when someone commits a crime (gross misdemeanor or felony) while wearing or possessing a bullet-resistant vest. The crime carries a 5 year statutory maximum and the offender can be convicted and sentenced for this offense along with any other crime committed by the offender as part of the same conduct. **The Commission ranked this offense at severity level I.** The Commission believed that because the offender did not need to actually be committing felony behavior that the offense should be ranked at the lowest level.

b) The legislature created three new weapons crimes, each carrying a statutory maximum penalty of 2 years:

- sells or has in possession any device designed to silence or muffle the discharge of a firearm.

The Commission ranked this offense at severity level II. It was agreed that this offense requires a high level of sophistication with some expectation that the firearm will be used.

- in any municipality of this state, furnishes a minor under 18 years of age with a firearm, airgun, ammunition, or explosive without the written consent of the minor's parent or guardian or of the police department of the municipality.

The Commission ranked this offense at severity level I.

- intentionally discharges a firearm under circumstances that endanger the safety of another.

The Commission ranked this offense at severity level I. The "reckless" discharge of a firearm under circumstances that endanger the safety of another is a misdemeanor.

5. **Changes to Fraud Crimes Involving Telecommunication Services**

This new statute replaces the repealed 609.785 which involves Fraudulent Long Distance Telephone Calls. The previous statute was ranked as a Theft Related offense. **The Commission ranked this offense as a Theft Related offense with regard to subd. 1 and subd. 3.; i.e., severity level II when the value of the services is more than \$500 but not more than \$2,500 and severity level III when the value of the services is in excess of \$2,500.** These rankings would be the same as the rankings currently in place for Fraudulent Long Distance Telephone Calls. **The Commission ranked this offense at severity level II with regard to subd. 2 and subd. 4 which do not specify the value of the services lost.**

C. **Other Modifications not Requiring Legislative Review**

The Commission also adopted several changes to the guidelines that do not require legislative review. The changes involved the clarification of policy and did not actually change the guidelines. See the Appendix for the specific language changes.

1. **Update of Statutory Reference**

In section G. **Convictions for Attempts or Conspiracies** of the Minnesota Sentencing Guidelines and Commentary, the statutory reference to Minn. Stat. 152.09 was changed to 152.096 to reflect the changes in state law.

2. **Commentary Change to Consecutive Policy for Escapes**

The Commission added language to the commentary in section II.F.02. to clarify that escapes can be consecutive to any other current offenses committed while on escape status.

3. Correction to Receiving Stolen Property (firearm)

In the 1989 Legislative session, the Legislature passed a bill regarding Receiving Stolen Property that changed the existing penalties to be the same as and to be referenced by the statutory penalties for Theft, Minn. Stat. § 609.53. The Commission adopted the modification to rank the Receiving Stolen Property offenses the same as the Theft crimes. These changes went into effect August 1, 1989. An error was made in publishing the sentencing guidelines with regard to Receiving Stolen Property (firearm) by not changing the severity level from IV to III where Theft (firearm) is ranked. The reference has now been corrected and will appear in the next publication of the Minnesota Sentencing Guidelines and Commentary. This change is a result of an oversight and not a change in Commission policy.

4. Clarification of Commission Intent on Mandatory Minimums

The Commission added commentary language to clarify that when the mandatory minimum is for less than one year and one day, the Commission interprets the minimum to mean any incarceration, including time spent in local confinement as a condition of a stayed sentence. The presumptive disposition would not be a commitment to the Commissioner unless the case falls below the dispositional line on the sentencing guidelines grid.

II. 1990 ADOPTED MODIFICATIONS REQUIRING LEGISLATIVE REVIEW

There is only one modification that has been adopted by the Commission which will need to be reviewed by the 1991 Legislature. Concern had been raised by several probation agents that Minn. Stat. 641.165 Introduction of Contraband in Jail/Lockup/Correctional Facility was not included on the Misdemeanor/Gross Misdemeanor List. **The Commission shared this concern and added Introduction of Contraband in Jail/Lockup/Correctional Facility to the Misdemeanor/Gross Misdemeanor List.**

III. OTHER LEGISLATIVE ACTION REQUIRING COMMISSION ATTENTION

A. Day Fine Model

The 1990 Legislature passed a bill directing the Minnesota Sentencing Guidelines Commission to develop a day fine model:

Subdivision 1. [MODEL SYSTEM.] By June 1, 1991, the sentencing guidelines commission shall develop a model day-fine system. Each judicial district must adopt either the model system or its own day-fine system by January 1, 1992.

Subdivision 2. [COMPONENTS.] A day-fine system adopted under this section must provide for a two-step sentencing procedure for those receiving a fine as part of a probationary felony sentence. In the first step, the court determines how many punishment points a person will receive, taking into account the severity of the offense and the criminal history of the offender. The second step is to multiply the punishment points by a factor that accounts for the offender's financial circumstances. The goal of the system is to provide a fine that is proportional to the seriousness of the offense and largely equal in impact among offenders with different financial circumstances. The system may provide for community service in lieu of fines for offenders whose means are so limited that the payment of a fine would be unlikely.

The Commission has begun work on developing a day fine model. No additional state funding was provided to the Commission to facilitate the development but the Commission was able to obtain funding from the National Institute of Corrections to provide for assistance from Judith Greene, Director of Court Programs with the Vera Institute of Justice. Ms. Greene is considered the national expert on day fine systems and has conducted a day-fine pilot project in Staten Island.

The Commission will likely have to pursue additional funding to conduct further research in the area of misdemeanors and gross misdemeanors and to provide baseline information for evaluation purposes.

While the statutory language does state the goal of the day fine system, the Commission has also developed a set of goals:

- 1) Fines should be equitable.
An equal burden regardless of financial status should be placed on the offender.
- 2) Promote greater proportionality in the use of fines.
There is an inherent problem in being directed to develop this system only for felonies as this creates the potential for felony fines to be disproportionate with misdemeanor and gross misdemeanor sentences.
- 3) Promote fines, and day fines in particular, as a viable, legitimate sanction.
The use of fines tends to be influenced by the various judicial philosophies of the individual districts. Whereas some districts seek fines as legitimate sanctions and levy them in a large proportion of cases, other districts virtually never issue fines.
- 4) Promote the idea that fines are punitive, yet less expensive than incarceration for certain offenders.
- 5) Try to ensure equitable exchanges with other intermediate sanctions.
- 6) Promote fines as a self-sustaining sanction which is cost effective.
- 7) Promote fines as an enhancement to public safety. When fines are used properly, they can free up jail space for more serious offenders who presently cannot serve their time because of crowded jails.

The Commission will continue to work on the development of the day fine model. The Commission decided that the judiciary should be involved early on in the process as judges will need to either adopt the Commission's model or develop their own.

B. Intensive Community Supervision

The legislature passed a new release program where the Commissioner of Corrections may place an inmate on intensive community supervision for all or part of the offender's prison sentence, provided the offender meets certain eligibility requirements and the sentencing court approves in writing. The Commissioner of Corrections may also order that an inmate be placed on intensive community supervision for all or part of the inmate's supervised release term. The program was primarily intended to be an alternative to prison but it was also designed to provide intensive supervision for selected supervised releasees.

The RAND Corporation in cooperation with the Department of Corrections and the Office of Drug Policy will evaluate this Intensive Community Supervision program. This evaluation will be designed to assess the relative benefits of prison versus intensive supervision with "effectiveness" being assessed both in terms of cost and public safety issues. The Commission will monitor the program to ensure its effectiveness within the framework of the principles articulated by the Sentencing Guidelines.

IV. DEVELOPMENT OF PRINCIPLES FOR SEVERITY LEVEL RANKINGS

Minnesota has been in the forefront in the area of corrections and structured sentencing for a number of decades. Minnesota was the first state to develop a legislatively mandated sentencing guidelines system. Several states have modeled their sentencing systems after Minnesota and several other states are currently developing structured sentencing systems. States such as Washington, Oregon, Louisiana, Kansas, and Arizona have learned a great deal from the Minnesota experience. There is much, however, that we can now learn from these other states.

The Commission reviewed the methodology that the states of Oregon and Louisiana used when developing their severity level rankings. These states developed a set of principles and criteria to use in determining where each individual offense should be ranked. The Commission determined that it would be of great benefit if they reviewed the existing severity level rankings and developed their own set of articulated principles and criteria. The following is a list of the goals agreed upon by the Commission for this project and the benefits the Commission believes will be realized:

- 1) Articulate and document a specific and objective rationale for determining the appropriate severity level rankings.

Benefits:

- The articulated rationale will specify the principles that should be considered when ranking new felony crimes or when there is an interest in changing a particular severity level ranking.
 - The articulated rationale will provide the necessary criteria for the Commission to consider when making ranking decisions and therefore the Commission will not need to rely exclusively on the recollections of staff and members who were involved in developing the "original" guidelines.
 - The Commission and staff will be able to readily describe to the media, the public, the legislature, criminal justice professionals, etc., the reason a particular offense is ranked where it is.
 - The articulated rationale will provide a more useful mechanism for determining how to deal with currently unranked offenses.
- 2) Consider the appropriateness of current severity level rankings that do not reflect the chosen principles and either articulate why the offense(s) should remain at the current ranking or propose to change the ranking to reflect the principles.
 - 3) Determine whether and how to address the issue of the decreasing number of crimes ranked at severity level I and the suggestion by some to create a new severity level between VI and VII. Once the Commission has articulated the criteria and principles for determining severity level rankings, the Commission will be in a much better position to address these issues.

The Commission believed it was important that the general principles of the guidelines be considered the "ground rules" for determining what the severity level ranking principles should be. The Commission has developed three general criteria for determining severity level rankings.

1st Criteria - The Interests Protected by Statute

Offenses should be grouped according to the interest that is being protected by the statute with each interest carrying a different weight with regard to severity.

Four interests have been identified by the Commission:

Person
Effects of the Misuse of Chemicals
Property
Institutional Integrity/Government Process

2nd Criteria - Type and Level of Harm Defined by Statute

Harm or the threat of harm as defined by the statute is the primary determinant of crime severity within each crime grouping.

Harm - damage or threat of damage to the interests protected by the statute.

Type of Harm - is determined by the nature of the protected interest. The type of harm is used to determine the initial seriousness ranking for each crime within a crime group (interest), whenever possible.

Level of Harm - ranked according to seriousness to differentiate between crimes of the same interest and harm type. The level of harm varies from interest to interest just as the type of harm varies.

Multiple interests - if multiple interests are protected by a single statute, additional weight should be given according to the type and level of harm of the additional interests.

3rd Criteria - Culpability of the Offender

Culpability factors are used as defined by the statute or as used in the Jury Instruction Guides.

The Commission has worked on developing the specific types and levels of harm and the degrees of culpability for each of the identified interests protected by statute. The Commission is still working through the Institutional Integrity group, which is the last major interest group they need to complete. Once all of the crimes have been assessed using these articulated criteria, the Commission will work to put all the crimes together on one scale. The ranking of crimes arrived at through this project will be compared with the existing severity level rankings. The Commission will then determine if any modifications will be recommended regarding severity level rankings. Any such modifications would be presented to the Legislature next year for review.

V. UPCOMING STUDIES

The Legislature directed the Commission to conduct two studies, one on nonimprisonment sanctions and one on weapon use. The Commission has completed data collection for the nonimprisonment sanctions study and staff is currently analyzing the data and preparing the report. This report should be available to the Legislature on its due date of February 1, 1991. Data collection for the weapons study could not begin until July 1990 because the monies were not appropriated until FY 1991. Staff is still in the process of collecting data and will need time to analyze and produce a report. Because of the tight timeline, it is possible that this report will not be available by February 1, 1991 as requested. The report will be made available as soon as possible.

In addition, Commission staff is preparing a summary report on 1989 sentencing practices that should be available by the beginning of the 1991 Legislative session. Also available by the beginning of session will be a special report on drug offenders that more closely examines the type and amount of drug, the charging practices, and the use of specific nonimprisonment sanctions such as chemical dependency evaluations, treatment, and drug testing.

APPENDIX

I. ADOPTED MODIFICATIONS EFFECTIVE AUGUST 1, 1990

Adopted Modifications to Section II. G. Convictions for Attempts or Conspiracies:

G. **Convictions for Attempts or Conspiracies:** For persons convicted of attempted offenses or conspiracies to commit an offense, the presumptive sentence is determined by locating the Sentencing Guidelines Grid cell defined by the offender's criminal history score and the severity level of the completed offense, and dividing the duration contained therein by two, but such sentence shall not be less than one year and one day except that for Conspiracy to Commit a Controlled Substance offense as per Minn. Stat. § 152.096, . . .

Adopted Modifications to Section V. Offense Severity Reference Table:

VIII	[<u>Importing Controlled Substances Across State Borders - 152.0261</u>
VII	[<u>Criminal Vehicular Homicide and Injury - 609.21, subd. 1 (1) & (2) and subd. 3 (1) & (2)</u> <u>Malicious Punishment of Child (great bodily harm) - 609.377</u>
VI	[<u>Controlled Substance Crime in the Third Degree - 152.023, subd. 1 and subd. 2 (3), (4), & (5), & (6)</u> <u>Criminal Vehicular Operation Homicide and Injury - 609.21, subd. 1 (3) & (4) and subd. 3 (3) & (4)</u>
V	[<u>Criminal Vehicular Operation Homicide and Injury - 609.21, subd. 2 & 4</u>
IV	[<u>Assault 3 - 609.233, subd. 1</u> <u>Malicious Punishment of Child (substantial bodily harm) - 609.377</u>
III	[<u>Criminal Vehicular Homicide and Injury - 609.21, subd. 2a</u>

- II [Firearm Silencer - 609.66, subd. 1a (1)
Telecommunications Fraud - 609.893, subd. 2

- I [Assault 3 - 609.223, subd. 2
Bullet-Resistant Vest During Commission of Crime - 609.486
Discharge of Firearm - 609.66, subd. 1a (3)
Furnishing Firearm to Minor - 609.66, subd. 1a (2)

Adopted Modifications to the Theft Related Offense List:

Theft Related Offense List

~~Fraudulent Long Distance Telephone Calls~~
~~609.785~~

Telecommunications and Information Services Fraud
609.893, subd. 1

Adopted Modifications to Commentary Regarding Consecutive Sentences for Escape Convictions:

II.F.02. . . . Under this method, if the most severe current offense is sentenced first, the resulting aggregated sentence lengths would be the same as if one judge had sentenced the offenses consecutively.

It is permissible for a sentence for an escape conviction to be consecutive to any other current sentence and any prior sentence regardless of whether the other sentences are for crimes against the person. If the sentencing judge determines that the sentence for an escape conviction is to be consecutive with sentences for other current felony convictions, the escape conviction should be sentenced last with the presumptive duration found at the zero criminal history column and the appropriate severity level.

II. ADOPTED MODIFICATIONS TO THE COMMENTARY EFFECTIVE DECEMBER 21, 1990

Adopted Modification to the Commentary Regarding Mandatory Minimums for Less than One Year and One Day

II.E.02 The Commission attempted to draw the dispositional line so that the great majority of offenses that might involve a mandatory sentence would fall below the dispositional line. However, some cases carry a mandatory prison sentence under state law but fall above the dispositional line on the Sentencing Guidelines Grid; e.g., Assault in the Second Degree. When that occurs, imprisonment of the offender is the presumptive disposition. The presumptive duration is the mandatory minimum sentence or the duration provided in the appropriate cell of the Sentencing Guidelines Grid, whichever is longer. When the mandatory minimum sentence is for less than one year and one day, the Commission interprets the minimum to mean any incarceration including time spent in local confinement as a condition of a stayed sentence. The presumptive disposition would not be commitment to the Commissioner unless the case falls below the dispositional line on the Sentencing Guidelines Grid. An example would be a conviction for simple possession of cocaine, a Fifth Degree Controlled Substance Crime. If the person has previously been convicted of a controlled substance crime, the mandatory minimum law would require at least six months incarceration which could be served in a local jail or workhouse.

III. ADOPTED MODIFICATIONS EFFECTIVE AUGUST 1, 1991 BARRING LEGISLATIVE ACTION TO THE CONTRARY

Adopted Modifications to the Misdemeanor and Gross Misdemeanor Offense List:

Misdemeanor and Gross Misdemeanor Offense List

Contraband Articles Forbidden (Jail/Lock-up/Correctional Facility)
641.165

