

## Notice of Public Hearing

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# Proposed Amendments to the Minnesota Sentencing Guidelines and Commentary

**Date of notice:** November 15, 2021

**Date of hearing:** December 16, 2021

The Minnesota Sentencing Guidelines Commission will hold a public hearing on Thursday, December 16, 2021, at 1:00 p.m., in the Minnesota State Capitol Building, Room G-3, 75 Rev. Dr. Martin Luther King, Jr. Blvd., Saint Paul, Minnesota 55155, to consider a proposal to amend the Minnesota Sentencing Guidelines and Commentary. A remote-participation option will be available: Members of the public may monitor and participate in the hearing remotely, and some Commission members may participate by interactive technology. Refer to the Commission's web site ([mn.gov/sentencing-guidelines](http://mn.gov/sentencing-guidelines)) for information on how to attend the public hearing remotely.

All interested persons are encouraged to participate and offer comments. Persons wishing to testify may register in advance; registration instructions will be posted on the Commission's [web site](#). If you require special accommodations to attend the public hearing, please contact the Minnesota Sentencing Guidelines Commission (MSGC) staff as soon as possible. The Commission will hold the record open for five calendar days after the public hearing to accept written comment.

Modifications are subject to final adoption by the Commission at its meeting on January 13, 2022. Meeting information will be posted on the Commission's [web site](#). If adopted, modifications will be effective on August 1, 2022, unless the Legislature by law provides otherwise.

This notice, which is available in alternative formats upon request, was posted on the MSGC web site on November 15, 2021.

## Proposed Modifications

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The Commission proposes to amend sections 2.B and 8 of the 2021 Minnesota Sentencing Guidelines and Commentary, as well as Comment 2.A.01, as set forth below. The proposed changes include the repeal of section 2.B.2 (Custody Status at the Time of the Offense); conforming changes in sections 2.B (Criminal History) and 8 (Severe Violent Offense List); conforming and clarifying changes in section 2.B.6 (Felony Enhancement Due to Prior Misdemeanor or Gross Misdemeanor

Convictions); and a conforming change in Comment 2.A.01. The specified effective date of all proposed modifications is August 1, 2022.

*Proposed modifications to 2021 Minn. Sentencing Guidelines §§ 2.B & 8 and Comment 2.A.01:*

## **Minnesota Sentencing Guidelines and Commentary**

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### **2. Determining Presumptive Sentences**

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#### **A. Offense Severity**

\* \* \*

*Comment*

**2.A.01.** *The date of the offense is important because the offender's age at the time of the offense will determine whether the juvenile record is considered, and the date of the offense might determine ~~whether a custody status point should be given and~~ the order of sentencing with multiple convictions.*

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#### **B. Criminal History**

The horizontal axis on the Sentencing Guidelines Grids is the criminal history score. An offender's criminal history score is the sum of points from eligible:

- prior felonies;
- ~~custody status at the time of the offense;~~
- prior misdemeanors and gross misdemeanors; and
- prior juvenile adjudications.

2. Custody Status at the Time of the Offense. [Repealed, Aug. 1, 2022]

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.~~

~~(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 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) Assigning Points to Offenses Committed Over Time. Assign 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.~~

~~b. Two Custody Status Points. Assign **two** custody status points if:~~

~~(1) the current conviction offense is an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166); and~~

~~(2) the offender qualifies for one custody status point, as described in section a, above, for an offense currently found on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166).~~

~~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).~~

Three months must also be added to the lower and upper end of the range provided in the appropriate cell on the applicable Grid.

If the current conviction is an attempt, conspiracy, or other offense with a sentence modifier that reduces the presumptive sentence, the three months must be added to the cell duration before the duration is reduced as outlined in section 2.G. The presumptive duration, however, cannot be less than one year and one day.

d. ~~No Custody Status Points Assigned.~~ The offender must not be assigned custody status points when:

(1) ~~The offender was committed for treatment or examination under Minn. R. Crim. P. 20.~~

(2) ~~The offender was on juvenile custody status other than for an extended jurisdiction juvenile (EJJ) conviction, at the time the adult felony was committed.~~

(3) ~~The offender was on custody status for a misdemeanor or gross misdemeanor DWI committed when the offender was 16 or 17 years old, and the DWI was processed in adult court under Minn. Stat. § 260B.225, subs. 3 and 8.~~

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 section 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 or I 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.~~

~~**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.~~

~~**2.B.204.** Commitments under Minn. R. Crim. P. 20, and juvenile custody status are not included because, in those situations, there has been no conviction. However, a custody point will be assigned if the offender committed the current offense while under some form of custody following an extended jurisdiction juvenile (EJJ) conviction.~~

~~**2.B.205.** The custodial statuses covered by this policy are those occurring after conviction of a felony, non-traffic gross misdemeanor, gross misdemeanor driving while impaired or refusal to submit to a chemical test, gross misdemeanor reckless driving, or misdemeanor on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e). Thus, an offender who commits a new felony while on pre-trial diversion or pre-trial release on another charge does not get a custody status point. Likewise, offenders serving a misdemeanor sentence for an offense not on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e), do not receive a custody status point, even if the court imposed the misdemeanor sentence upon conviction of a gross misdemeanor or felony.~~

~~**2.B.206.** As a general rule, the Commission excludes traffic offenses from consideration in computing the criminal history score. Given the increased penalties associated with driving while impaired (DWI) offenses and the serious impact on public safety, the Commission determined that~~

*these offenses should be considered for custody status points in the same manner as non-traffic offenses.*

**2.B.207.** *The most problematic consequence of a Criminal History Score of 7 or more (in excess of the maximum points differentiated by the Sentencing Guidelines Grids) is that no additional penalty accrues for engaging in felonious behavior while under custody supervision. For example, if an offender has a Criminal History Score of 7 and is released pending sentencing for a Severity Level 3 offense, and he or she commits another Severity Level 3 offense while awaiting sentencing, the presumptive sentence for the most recent offense is the same as for the prior offense. A presumption exists against consecutive sentences for most property offenses, and therefore no additional penalty results when this situation occurs. The addition of three months to the cell duration provides a uniform presumptive standard for dealing with this situation.*

**2.B.208.** *While the Commission believes that the impact of the custody status provision should be maintained for all cases, incrementing the sanction for each criminal history point above seven is deemed inappropriate. The primary determinant of the sentence is the seriousness of the current conviction offense. Criminal history is of secondary importance, and the Commission believes that proportionality in sentencing is served sufficiently with the criminal history differentiations incorporated in the Sentencing Guidelines Grids and with the special provision for maintaining the impact of the custody status provision. The Commission deems further differentiation unnecessary to achieve proportionality in sentencing.*

**2.B.209.** *The Commission believes that when multiple offenses are an element of the conviction offense or the conviction offense is an aggregated offense, offenders should receive a custody status point if they become subject to one of the custody status types listed in 2.B.2.a(1) at any point during the time period in which the offenses occurred. While the Commission recognizes that its policy for determining the presumptive sentence states that for aggregated offenses, the earliest offense date determines the date of offense, it believes that eligibility for a custody status point should not be limited to the offender's status at the time of the earliest date of offense.*

**2.B.210.** *When offenders on any custody status condition listed in section 2.B.2.b for a sex offense commit another sex offense, they are assigned an additional custody status point. The Commission believes that offenders who commit a subsequent sex offense pose so significant a risk to public safety that their criminal history scores should be enhanced to reflect this risk. This policy does not apply to the offense of Failure to Register as a Predatory Offender (Minn. Stat. § 243.166).*



~~**2.B.211.** Assign a custody status point to an offender on any custody status type who absconds and commits a new felony offense. The custody status type depends on the form of supervision that exists when the offender commits a new offense. For example, assign a custody status point to an offender who absconds from supervised release and commits a new felony offense. The custody status type would be "supervised release."~~

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6. Felony Enhancement Due to Prior Misdemeanor or Gross Misdemeanor Convictions.

a. Enhanced Felonies: Counting Prior Offenses Used to Enhance Current Offense.

When the current offense is a felony solely because the offender has of one or more previous convictions for misdemeanor and or gross misdemeanor offenses convictions, the prior misdemeanor conviction(s) on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e) or gross misdemeanor conviction(s) upon which the enhancement is based ~~may be used in determining custody status, but~~ cannot be used in calculating the remaining components of the offender's criminal history score. A prior felony offense needed to enhance the current offense to a felony is counted in criminal history as provided in section 2.B.1 or 2.B.4.

b. Counting Prior Misdemeanors and Gross Misdemeanors; Future Felony Not Needed to Enhance Current Offense. Except as ~~provide~~ provided in paragraph c, a misdemeanor and or gross misdemeanor offenses used to enhance conviction not needed to enhance the current offense must be to a felony is used in calculating the offender's criminal history score ~~on future offenses that are not enhanced felonies as provided in section 2.B.3.~~ Prior felony offenses used for enhancement must always be used in calculating the offender's criminal history score.

c. Counting Prior Misdemeanors and Gross Misdemeanors; Felony Driving While Impaired (DWI). If the current offense is a subsequent felony DWI offense ~~and the offender has based on~~ a prior felony DWI offense conviction, the prior felony DWI ~~must be~~ is used in ~~computing~~ calculating the criminal history score. The prior misdemeanor ~~and or~~ gross misdemeanor offenses used needed to enhance

the first prior felony DWI cannot be used in calculating the offender's criminal history score. Any other misdemeanor or gross misdemeanor DWI ~~offenses may~~ be convictions are included in the criminal history score as provided in section 2.B.3.g.

*Comment*

**2.B.601.** *A number of instances exist in Minnesota law in which misdemeanor or gross misdemeanor behavior carries a felony penalty as a result of the offender's prior record. The Commission decided that in the interest of fairness, a prior misdemeanor or gross misdemeanor offense that elevated the misdemeanor or gross misdemeanor behavior to a felony should not also be used in criminal history ~~points other than custody status~~. Only one prior offense should be excluded from the criminal history score calculation, unless more than one prior was required for the offense to be elevated to a felony. For example, Assault in the Fifth Degree is a felony if the offender has two or more convictions for assaultive behavior. In ~~those cases, the~~ such a case, if two related priors at the lowest misdemeanor or gross misdemeanor level were needed to enhance the current offense to a felony, they should be excluded. Similarly, theft crimes of more than \$500 but less than \$1,000 are felonies if the offender has at least one previous conviction for an offense specified in that statute. In ~~those cases, such a case, if the prior related offense needed to enhance the current offense to a felony was a gross misdemeanor, it at the lowest level~~ should be excluded.*

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## **8. Severe Violent Offense List**

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

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