

REPORT TO THE LEGISLATURE
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MINNESOTA SENTENCING GUIDELINES COMMISSION

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I. Summary Information on Minnesota Sentencing Guidelines Commission

The nine member Minnesota Sentencing Guidelines Commission was created by the Legislature in 1978 and embarked upon its second four year term in July, 1982. That point marks a juncture both in Commission membership and Commission functions.

Four new members were appointed to the Commission including Dan Cain, citizen member; Sheriff James Trudeau, representing law enforcement; Justice Glenn Kelley, representing the Supreme Court; and Orville Pung, Commissioner of Corrections. Members of the Commission who were reappointed include Stephen Rathke, Crow Wing County Attorney; Bill Falvey, Ramsey County Public Defender; District Court Judge O. Russell Olson, Olmsted County; District Court Judge David Marsden, Ramsey County; and Barbara Andrus, citizen member. The addition of the law enforcement position on the Commission in July 1982 coincided with the deletion of the Minnesota Corrections (parole) Board position, maintaining a nine member Commission. A probation or parole officer will be added to the membership of the Sentencing Guidelines Commission in January 1983, resulting in a ten member Commission. Stephen Rathke, Crow Wing County Attorney, became the chairman of the Commission in August 1982.

Commission functions during the second term are changed significantly from the first term. The primary functions performed during the first four years of the Commission were the development and implementation of the Sentencing Guidelines. The Guidelines have been thoroughly implemented and their application has become routine in felony sentencing. The successful implementation coupled with budget cuts resulted in the reduction of Commission staff by approximately half in May 1982, from six and one half positions to three and one half positions. The current annual state appropriation is approximately \$150,000, reduced from a budget of approximately \$270,000 in fiscal year 1982. Commission functions that remain include:

- A. To monitor sentencing practices
- B. To evaluate the impact of the Sentencing Guidelines
- C. To modify the Sentencing Guidelines

A. Monitor Sentencing Practices

The Commission monitors approximately 6,000 cases sentenced annually under the Guidelines. Information on the conviction offense, criminal history score, presumptive sentence, and actual sentence imposed is obtained for each case. In addition, the offender's race, gender, age, and county of commitment is recorded for each case. The data base allows the Commission to 1) determine the extent of departures from the Guidelines; 2) estimate prison population projections based on current sentencing practices, and estimate prison population impacts of proposed revisions to the Guidelines; and 3) identify problem areas that arise with respect to the Guidelines, such as inaccurate computation of criminal history scores, and problem areas that arise with respect to sentencing practices such as sentencing without regard to mandatory minimum sentences.

B. Evaluate Guidelines' Impact

The monitoring data support a second Commission function, which is to evaluate the impact of the Sentencing Guidelines on sentencing practices, court processing of cases (e.g., the incidence of trials and sentence appeals), and the impact of the Sentencing Guidelines on corrections. The issues addressed in the evaluation include whether uniformity and proportionality in sentencing has been increased under the Guidelines, and whether sentencing is neutral with respect to social factors such as gender, race, and economic status.

The monitoring data are necessary but not sufficient to address those concerns. Additional data regarding the alleged circumstances of the offense, plea negotiation practices, and social history of the offender are necessary to adequately judge the impact of the Guidelines on sentencing practices, and this information must be collected manually from case files. As a result of the widely perceived national significance of the presumptive sentencing system established in Minnesota, we have been able to obtain outside funding to aid the evaluation effort. The National Institute of Corrections awarded \$60,000 to the Commission in 1981 for the first years' evaluation of the Sentencing Guidelines. The John D. and Catherine T. MacArthur Foundation supplemented the evaluation with a \$25,000 award. The Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines published July 1982, summarizes the impact of the Guidelines on sentencing practices

during the first year of Guidelines operation. Briefly, the findings include the following:

- Sentencing practices have substantially conformed to the articulated sentencing policy. There has been a 73% increase in imprisonment of offenders convicted of high severity crimes with low criminal histories. There has been a 72% reduction in imprisonment for offenders convicted of low severity crimes with moderate to high criminal histories.
- Disparity in sentencing has decreased under the Sentencing Guidelines. The reduction in disparity is indicated by increased sentence uniformity and proportionality. Sentences are more uniform in terms of who goes to prison and in how long imprisoned offenders serve. Sentences are more proportional in that offenders convicted of more serious offenses receive more severe sanctions than prior to the Sentencing Guidelines.
- Minority offenders receive somewhat more severe sanctions than White offenders, controlling for severity level and criminal history score. An independent assessment of substantial and compelling circumstances suggest that offenses committed by minority offenders deserve aggravation somewhat more frequently than those committed by White offenders. However, the data are not adequate to precisely determine the extent of justifiable differences and the extent of racial bias.
- Prison populations remained within state correctional capacity during 1980 and 1981. Commitments were close to the level projected.
- A review of indeterminate cases by the Minnesota Corrections Board for consistency with the Sentencing Guidelines resulted in adjusting the release date of 95 inmates. Approximately 250 indeterminate cases have been resentenced by district courts under post conviction remedy.
- The overall rate of trials has not increased since the Sentencing Guidelines were implemented. Processing time between conviction and sentencing changed very little following implementation of the Guidelines. Less than 1% of presumptive sentences have been appealed.

- Case law on sentencing has reinforced the principles that alleged but unproven criminal behavior should not be used in sentencing offenders and that sentence durations should be proportional to the seriousness of the offense of conviction and offender's criminal history score.

In October 1982, the John D. and Catherine T. MacArthur Foundation awarded the Commission an additional \$65,500 to replicate the initial evaluation for the second year of Guidelines' operation. The Commission is currently conducting that study, which will be expanded to focus extensively on charging and plea negotiation practices. The evaluation report will be completed in August 1983.

C. Modification of the Guidelines

The third Commission function is to modify and improve the Sentencing Guidelines. The Commission has modified the Guidelines on four occasions since the Guidelines went into effect on May 1, 1980.

The first set of revisions, which essentially corrected errors and inadvertent omissions in the initial Guidelines, became effective on October 30, 1980.

A more substantive set of modifications were implemented on August 1, 1981. That set of revisions were to 1) add an aggravating factor for major controlled substance offenses; 2) change the dispositional line on the Sentencing Guidelines grid to presume imprisonment for severity level one offenses with criminal history score of six or more; 3) increase the severity level for burglary with a weapon or assault from severity level six to severity level seven; and 4) incorporate new offenses such as Intrafamilial Sexual Abuse, Fleeing a Peace Officer, Precious Metal Dealers, and Receiving Stolen Goods into the Sentencing Guidelines severity levels.

The Guidelines were further revised effective December 9, 1981 to 1) include current multiple conviction offenses in the computation of criminal history scores; and 2) subtract jail credit for time spent in custody between arrest and sentencing from the term of imprisonment instead of the sentence.

The most recent revisions to the Guidelines were effective August 1, 1982, and involved the incorporation of new felony offenses, such as Computer Damage and

Computer Theft offenses and Sale of Simulated Controlled Substance into the severity reference table. The severity level for Sale of Cocaine was increased from severity level three to four.

At a minimum, annual modifications of the Guidelines effective on August 1 of each year will continue to be done in order to incorporate statutory revisions into the Guidelines. The Guidelines will be modified as frequently and extensively as deemed necessary to maintain a proportional and rational sentencing system.

II. Resolutions of the House of Representatives Committee on Criminal Justice

The House Committee on Criminal Justice passed a resolution in the 1982 session that recommended a series of modifications to the Sentencing Guidelines. The Sentencing Guidelines Commission was instructed to report to the House Criminal Justice Committee during the 1983 session regarding deliberations on the recommended modifications. The recommendations to the Commission were to:

- A. Increase the severity level of certain drug offenses.
- B. Increase the severity level of certain burglary offenses.
- C. Establish the same severity level for criminal sexual conduct against children under 16 as criminal sexual conduct against mentally defective, mentally incapacitated, or physically helpless adults.
- D. Study the feasibility of juvenile guidelines.
- E. Investigate the reasons for disparity in departure rates between the races.
- F. Establish a grid for offenders for whom imprisonment is presumptively improper that would show presumptive durations of probation and that would show whether incarceration in a local correctional facility is proper as a condition of probation.

In addition, the Commission was instructed to study data collected by the Supreme Court State Judicial Information System on crimes against the person where the victim and defendant are related, and to report those findings in the 1984 session.

A. Drug Offense Rankings

The House Committee on Criminal Justice recommendations regarding drugs contained two components: 1) that sale of cocaine be ranked at least as high as severity level four rather than severity level three; and 2) that sale of heroin, PCP, or hallucinogens be ranked at severity level seven rather than severity level six.

The Sentencing Guidelines Commission studied the drug offense rankings over a period of several months. Extensive testimony was obtained from drug enforcement officers with the Bureau of Criminal Apprehension, pharmacologists from the University of Minnesota, various county attorneys and public defenders, and citizens.

The ideas that emerged from the testimony suggested that it is the manner in which a drug is used, in addition to the nature of the drug itself, that indicates its seriousness. The manner of use is related to availability of a drug which varies significantly over time. As a result, the ranking of a drug's seriousness is not likely to be stable over time.

Cocaine provides a case in point. As recently as four years ago, cocaine was used relatively infrequently, i.e., it was the drug of choice for relatively few people, and those who used it tended to use it sparingly. Since that time, the manner in which cocaine is used has changed dramatically. It is available in larger quantities and is subject to widespread and heavy abuse. On the other hand, testimony indicated that heroin abuse has decreased significantly and is currently not a problem of major proportions. Some testimony suggested that abuse of PCP and other hallucinogens has more serious psychological and behavioral consequences than abuse of heroin.

1) Ranking of Cocaine: The Sentencing Guidelines Commission determined that changes in patterns of cocaine use since the original ranking, indicated an increase in the seriousness of selling cocaine. Consequently, the Sentencing Guidelines Commission increased the severity level from three to four for sale of cocaine effective for crimes committed on or after August 1, 1982. Some sentiment has been expressed within the Commission to further increase the severity level of selling cocaine, to make it commensurate with the sale of heroin, PCP, and hallucinogens.

2) Ranking of Heroin, PCP, or Hallucinogens Sale: The Commission reviewed the severity level ranking for sale of heroin, PCP, and hallucinogens and concluded that the penalty structure provided at severity level six was appropriate for the typical drug sale offense. The Commission considered several factors in their deliberations including: a) the nature of the typical drug sale; b) major drug offenders; and c) repetitive drug offenders.

a) Typical Drug Sale Offense: The vast majority of offenders convicted of sale of heroin, PCP, or hallucinogens have criminal history scores of zero. The typical dealing engaged in by this type of offender is selling a small quantity of drugs to an acquaintance in order to help support his own habit. The quantities of drugs, area of distribution, and sophistication of this type of drug offender are very limited. The typical penalty for this type of offense both before and after the Sentencing Guidelines, is a stayed felony sentence with the option of incarceration in a local jail or workhouse at the discretion of the court. The Sentencing Guidelines Commission believes that a stayed sentence with up to a year in a jail or workhouse, plus other conditions that may be imposed by the court, is a commensurate sanction for the first time "user-seller" drug offense, and that the limited prison beds should be reserved for more violent and predatory offenses.

b) Major Drug Dealers: The offense of selling drugs, when the criminal history score is zero, generally, but not always, fits the pattern described above. Occasionally, the offense is a major drug offense, involving large quantities of drugs, distributed over a wide geographical area, and involving a high level of sophistication. The Commission developed a major drug offense aggravating factor in order to differentiate the common "user-seller" from the infrequent major dealer. The aggravating factor regarding drugs became effective for crimes committed on or after August 1, 1981, and contains the following language:

- (5) The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:
 - (a) the offense involved at least three separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so; or

- (b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
- (c) the offense involved the manufacture of controlled substances for use by other parties; or
- (d) the offender knowingly possessed a firearm during the commission of the offense; or
- (e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy; or
- (f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or
- (g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional).

It is expected that the court will depart from the presumptive sentence and aggravate the sentence when a major drug offense is encountered in order to maintain proportionality of sanctions with the seriousness of the offense.

c) Repetitive Drug Offender: The majority of felony offenders, including drug offenders, are never convicted of a second felony offense; and those that are convicted of subsequent felony offenses tend to be "generalists" in crime rather than "specialists." It is unlikely, for example, that an offender who currently stands convicted of selling drugs and who has a criminal history score of one or two, will have a prior conviction for selling drugs. However, the Commission believes that a harsher penalty for offenders who sell drugs subsequent to a prior sentence for selling drugs is appropriate and serves to differentiate specialists in drug dealing from other offenders convicted of a drug offense.

When the Guidelines were initially developed, the Commission had assumed that imprisonment was mandatory (and therefore presumptive) for second and subsequent offenses involving sale of drugs, under 152.15 subd. 1 clauses (1) and (2). The Supreme Court opinion in State v. Childers, 309 N.W.2d 37 (Minn. 1981) ruled that the second and subsequent sentencing law for sale of drugs was somewhat ambiguous, and therefore, mandatory imprisonment under that statute was not required. The

Commission believes that clarification of the mandatory minimum for second and subsequent sale of drug offenses would provide an appropriate sanction for repetitive drug offenders. Such clarification would provide the most efficient sentencing solution for repetitive drug offenders.

It should be noted, that the second and subsequent provision applies to most drug sale offenses including sale of cocaine and marijuana as well as heroin, PCP, and hallucinogens. It is recommended that the application of second and subsequent provisions be clarified to be situations in which a sentence for a drug sale offense was imposed before the commission of the second or subsequent offense. Suggested language for 152.15, subd. 1(1), subd. 1(2), and subd. 1a is as follows:

Subdivision 1. Any person who violates section 152.09, subdivision 1, clause (1) with respect to:

(1) A controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than 15 years or fined not more than \$25,000, or both for a first violation, and for a second or subsequent violation, upon conviction, shall be imprisoned for not less than one year and one day nor more than 30 years or fined not more than \$50,000, or both;

(2) Any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than \$15,000, or both for a first violation, and for a second or subsequent violation, upon conviction, shall be imprisoned for not less than one year and one day nor more than ten years or fined not more than \$30,000, or both;

Subd. 1a. No Early Release. Any person convicted of a second and subsequent violation as required by this section shall not be eligible for probation, parole, discharge, or supervised release until that person shall have served the full mandatory minimum term of imprisonment as provided by law, notwithstanding the provisions of sections 242.19, 243.05, 244.04, 609.12, and 609.135. For the purposes of this section, a violation is

considered a second or subsequent violation if, prior to the commission of the second or subsequent violation, the actor has been at any time adjudicated guilty under section 152.15 or under any similar statute of the United States or this or any other state.

Summary of Drug Offense Rankings

The Sentencing Guidelines Commission agrees that changes in patterns of cocaine use since the original ranking supports an increase in severity ranking from level three to level four.

The Commission believes that the sanctions contained at severity level six are appropriate and proportional for the typical offense of selling heroin, PCP, and other hallucinogens. The typical offense involves a "user-seller" dealing drugs with his friends or acquaintances. The major drug offense factor for aggravating sentences would appear to be the most appropriate mechanism for dealing with the uncommon case that involves major drug dealing. The most efficient mechanism for addressing sentences for the repetitive drug dealer would appear to be a mandatory minimum sentence for second and subsequent convictions for sale of drugs. Consequently, the Commission believes that severity level six is the appropriate ranking for the usual case of sale of heroin, PCP, and hallucinogens, and that sentences for the uncommon major drug offenses and repetitive drug offenses can be addressed with the major drug offense aggravating factor, and with a clarified second and subsequent mandatory minimum sentence for sale of drugs.

B. Burglary Offense Rankings

The House of Representatives Committee on Criminal Justice strongly recommended that the burglary offenses ranked at severity level four be moved to severity level five because the current ranking is not proportionate to the seriousness of those offenses.

The Commission agrees that the current ranking of burglary is nonproportional to the seriousness of these offenses. The problem is particularly acute in regard to

burglaries of unoccupied residences which generally fall within 609.58 subd. 2(3). That clause as currently defined includes, without differentiation, both nonresidential burglaries (e.g., burglary of a warehouse, unattached garage, or other building) and unoccupied residential burglaries as felony offenses with a five year statutory maximum sentence. There appears to be virtual unanimity in the belief that burglary of a residence is a more serious offense than burglary of a nonresidence such as a warehouse, gas station, or garage, and that the two types of offenses should be ranked at different levels in order to reflect the difference in seriousness.

After extensive study, the Commission concluded that proportionality in sanctions for burglary offenses could only be achieved with a revised burglary statute. The Commission drafted a revised burglary statute which is appended to this report for the Committee's consideration. This section discusses: 1) a summary of the proposed statute; 2) assignment of severity levels for the proposed statute; 3) repetitive burglary offenses; and 4) impact of proposed changes on prison populations.

1) Summary of Proposed Burglary Statute: The proposed burglary statute defines four degrees of burglary that more accurately reflect the varying seriousness of burglary offenses. Burglary in the first degree would include burglary with a dangerous weapon or assault, or burglary of an occupied dwelling (maximum 20 years, \$20,000). Burglary in the second degree would include burglary of a permanent dwelling, or burglary of a banking business (maximum 10 years, \$10,000). Burglary in the third degree includes nonresidential felony burglaries, (maximum five years, \$5,000). Burglary in the fourth degree would include gross misdemeanor burglaries, i.e., burglary with intent to commit a misdemeanor other than to steal (maximum one year, \$1,000).

The major difference between the proposed burglary statute and the current statute is that increased seriousness is accorded to burglary of a permanent dwelling. Another difference is that permanent dwellings are differentiated from unoccupied seasonal dwellings to distinguish between burglary of a person's home and a "cabin kick-in" of an unoccupied seasonal dwelling. Like the other differentiations made in the proposed burglary statute, distinguishing between a person's home and an unoccupied seasonal dwelling serves the cause of proportionality in sentencing. The Commission believes that the psychological trauma to the victim, the potential for loss of property that has emotional as well as monetary value, and the potential for

victim injury are all greater with permanent dwellings than with seasonal dwellings. More serious penalties should, therefore, be attached to burglary of a permanent dwelling.

Another difference between the proposed burglary statute and the current statute is that burglary with a tool is deleted from the proposed statute. Burglary with a tool currently carries the most severe statutory maximum sentence there is for burglary, that is \$20,000 and/or 20 years. Burglary with a tool was intended for differentiating the professional from the amateur burglar, and the severe statutory maximum sentence was viewed as commensurate with the seriousness of the offense. However, burglary with a tool has not served to differentiate the professional burglar from the amateur burglar in practice. The difficulty arises from the ambiguity of the concept "tool", which can range from a screwdriver to a sophisticated set of entry devises. Commensurability is not served when a charge carrying the most severe penalty can be brought against the least serious and most serious burglary offenders at the discretion of the prosecutor. Since burglary with a tool does not serve the purpose of proportionality and leads to disparity through different charging practices, the Commission believes that burglary with a tool should be omitted from the burglary statute.

2) Assignment of Severity Levels for Proposed Burglary Statute: Should this proposed burglary statute, or one similar to it, be enacted, the Commission's intention is to assign severity levels as follows:

- | | |
|------------|---|
| 1st Degree | Burglary with a dangerous weapon - remain at severity level seven. |
| 1st Degree | Burglary with an assault - remain at severity level seven. |
| 1st Degree | Burglary of an occupied dwelling - remain at severity level six. |
| 2nd Degree | Burglary of a permanent dwelling - change from severity level four to five. |
| 2nd Degree | Burglary of a banking business - change from severity level four to five. |
| 3rd Degree | Burglary of other buildings - remain at severity level four. |

The proposed changes in severity levels for burglary of a permanent dwelling, and burglary of a banking establishment would result in increased sanctions for residential burglaries and would result in greater proportionality in sanctions for residential and nonresidential burglaries.

3) Repetitive Burglary Offenders: Another concern that has been expressed repeatedly with respect to burglary is that convictions for several burglary offenses can occur before imprisonment is the presumptive sentence. Many of the statements regarding that point are inaccurate in that 1) the Guidelines presume imprisonment whenever a weapon is possessed or an assault occurs; and 2) the criminal history score and number of prior felonies are not synonymous. In fact, there are virtually no cases in which there are three prior sentences for burglary prior to a presumptive sentence of imprisonment, and very few in which there are two prior sentences for burglary prior to a presumptive imprisonment sentence.

Misstatements notwithstanding, the Commission believes that proportionality would be served by imposing presumptive imprisonment when the current offense is burglary of an occupied dwelling (a severity level six offense) and there was a previous adjudication of guilt for a felony burglary that was imposed before the current offense occurred. Although this policy change would affect relatively few cases, it does address an issue that has been a consistent source of misunderstanding and criticism.

4) Impact of Proposed Changes on Prison Populations: The statutory and Guidelines changes proposed by the Commission regarding burglary would enhance proportionality of sentences. However, increasing the severity of sanctions for residential burglars has attendant correctional costs. Without compensating reductions in sanctions, the proposal is unfeasible because the capacity of state correctional facilities would be exceeded. The Commission proposes a limited revision to durations in the Sentencing Guidelines Grid, primarily at severity levels five and six, to compensate for the increase in prison populations that would result from increased sanctions for residential burglaries. The revised durations shown in Figure 1 would maintain the proportionality in sentencing that exists with current durations shown in Figure 2. The significant increase in durations that currently occurs between severity levels four and five would be decreased and the significant increase in durations would occur between severity levels six and seven.

FIGURE 2: Sentencing Guidelines Grid

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Unauthorized Use of Motor Vehicle</i>	I	12*	12*	12*	15	18	21	24
<i>Possession of Marijuana</i>								23-25
<i>Theft Related Crimes (\$150-\$2500)</i>	II	12*	12*	14	17	20	23	27
<i>Sale of Marijuana</i>								25-29
<i>Theft Crimes (\$150-\$2500)</i>	III	12*	13	16	19	22	27	32
						21-23	25-29	30-34
<i>Burglary - Felony Intent</i>	IV	12*	15	18	21	25	32	41
<i>Receiving Stolen Goods (\$150-\$2500)</i>						24-26	30-34	37-45
<i>Simple Robbery</i>	V	18	23	27	30	38	46	54
					29-31	36-40	43-49	50-58
<i>Assault, 2nd Degree</i>	VI	21	26	30	34	44	54	65
					33-35	42-46	50-58	60-70
<i>Aggravated Robbery</i>	VII	24	32	41	49	65	81	97
		23-25	30-34	38-44	45-53	60-70	75-87	90-104
<i>Assault, 1st Degree</i>	VIII	43	54	65	76	95	113	132
<i>Criminal Sexual Conduct, 1st Degree</i>		41-45	50-58	60-70	71-81	89-101	106-120	124-140
<i>Murder, 3rd Degree</i>	IX	97	119	127	149	176	205	230
		94-100	116-122	124-130	143-155	168-184	195-215	218-242
<i>Murder, 2nd Degree</i>	X	116	140	162	203	243	284	324
		111-121	133-147	153-171	192-214	231-255	270-298	309-339

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

*one year and one day

Summary of Commission Proposal for Burglary

The Commission agrees that the current ranking of burglary is nonproportional to the seriousness of these offenses. After extensive study, the Commission concluded that proportionality in sanctions for burglary offenses could only be achieved with a revised burglary statute. The Commission has drafted a proposed burglary statute that captures various distinctions, the most important of which is to distinguish residential from nonresidential burglaries. Increased sanctions for residential burglaries is proposed and presumptive imprisonment is proposed for burglary of an occupied dwelling if the offender had a prior felony sentence for burglary. Increasing the severity of sanctions for residential burglaries has attendant correctional costs. Without compensating reductions in sanctions, the proposal is unfeasible because the capacity of state correctional facilities would be exceeded. The Commission proposes a limited revision to durations in the Sentencing Guidelines Grid, primarily at severity levels five and six, to compensate for the increase in prison populations that would result from increased sanctions for residential burglaries.

C. Criminal Sexual Conduct

The House of Representatives Committee on Criminal Justice recommended that the Commission similarly rank 609.344(b), which is third degree criminal sexual conduct against a child aged 13 to 16, and 609.344(d), which is third degree criminal sexual conduct against mentally defective, mentally incapacitated, or physically helpless victims. It was also recommended that a similar correspondence be obtained between fourth degree criminal sexual conduct victims aged 13 to 16 (609.345(b)) and fourth degree criminal sexual conduct victims who are mentally defective, mentally incapacitated, or physically helpless (609.345(d)).

The Commission feels that proportionality in offense seriousness is better captured with the current ranking than with a revised ranking. Criminal sexual conduct in the third degree, clauses (b), (c), and (d) are defined and ranked as follows:

603.344 Criminal Sexual Conduct in the Third Degree.

A person is guilty of criminal sexual conduct in the third degree and may be sentenced to imprisonment for not more than ten years, if he engages in sexual penetration with another person and any of the following circumstances exists:

- Severity Level 5 (b) The complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. In any such case it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor believes the complainant to be 16 years of age or older. If the actor in such a case is no more than 48 months but more than 24 months older than the complainant, he may be sentenced to imprisonment for not more than five years. Consent by the complainant is not a defense; or
- Severity Level 7 (c) The actor uses force or coercion to accomplish the penetration; or
- Severity Level 7 (d) The actor knows or has reason to know that the complainant is mentally defective, mentally incapacitated, or physically helpless.

The acts defined in clauses (b), (c), and (d) are not mutually exclusive, but rather accumulate in their effect. Sexual penetration with force accomplished against a 15 year old, mentally defective child would violate all three clauses, the most serious of which would be ranked at severity level seven. Penetration of a child 13 to 16 with force or coercion would violate clauses b and c, the most serious of which would be ranked at severity level seven. There is only one situation in which sexual abuse of a child 13 to 16 would be ranked at a lower severity level than sexual abuse of a mentally defective, mentally incapacitated, or physically helpless victim--that is if no force or coercion was used to accomplish the sexual abuse of the child.

Under the current ranking it is a more serious offense to sexually abuse a mentally defective child than a normal, noncoerced child. It is also currently a more serious offense to sexually abuse a 13 to 16 year old child using force or coercion, than to sexually abuse a 13 to 16 year old child without the use of force or coercion. The Commission believes that these distinctions should be maintained. Furthermore, the Commission believes that the principle of proportionality is not violated by ranking sexual abuse of adult mentally defective, incapacitated, or physically helpless adults at a slightly higher level than sexual abuse of a normal, noncoerced 13 to 16 year old child.

Summary Regarding Criminal Sexual Conduct

The Commission feels that proportionality in offense seriousness is better captured with the current ranking than with a revised ranking. The acts defined in criminal sexual conduct are not mutually exclusive but rather accumulate in their effect. Currently, it is more serious to sexually abuse a 13 to 16 year old mentally defective child using force, than it is to sexually abuse a normal 13 to 16 year old child without the use of force or coercion. The Commission believes that these distinctions should be maintained.

D. Feasibility of Juvenile Guidelines

The House Committee on Criminal Justice recommended that the Sentencing Guidelines Commission assist the Committee in: 1) studying the juvenile dispositional guidelines prepared by Correctional Service of Minnesota (recently renamed Minnesota Citizens Council on Crime and Justice); 2) studying the juvenile dispositional standards of the Washington Department of Social and Health Service; 3) studying other information on juvenile dispositional guidelines; and 4) reporting to the House Committee on Criminal Justice on the results of the studies, and recommend whether or not adoption of juvenile dispositional guidelines would be feasible in this state.

The Sentencing Guidelines Commission was unable to study the impact of juvenile guidelines and standards due to lack of resources (time and staff). The

Commission's priorities during 1982 were to examine the impact of the Minnesota Sentencing Guidelines and to modify the Sentencing Guidelines. As noted earlier, the staff was reduced by almost half in May 1982 and the Commission underwent significant changes in membership in the middle of the year. There was not sufficient time for the study of juvenile justice, an area in which the Commission is inexperienced.

Furthermore, there are other groups that have invested a substantial amount of time and energy to the study of juvenile dispositions. The Supreme Court, after extensive study, adopted comprehensive Juvenile Court Rules that will go into effect May 1, 1983. The Rules define specific procedures for the Juvenile Court in imposing dispositions. Procedural uniformity in juvenile courts is likely to have a significant affect on dispositional practices. Substantive changes in the juvenile court should be delayed until after the Juvenile Court Rules are thoroughly implemented.

Although the Sentencing Guidelines Commission was unable to study prior efforts at developing guidelines and standards for juveniles, there are features inherent in guidelines systems and features associated with juvenile justice that appear to lack compatability. For example, the Sentencing Guidelines that were developed for felonies in the state have several characteristics, all of which contribute to a more rational, proportional, and uniform sentencing system for adults. Three essential characteristics of Sentencing Guidelines for adult felons are as follows:

- First, the Sentencing Guidelines address whether imprisonment is appropriate and the duration of imprisonment that is appropriate.
- Second, the primary sentencing goal embodied in the Sentencing Guidelines is retribution based on the culpability of the offender for the offense of conviction.
- Third, the Sentencing Guidelines stress uniformity in sentencing, after the seriousness of the offense and criminal history score of the offender are taken into account. The Sentencing Guidelines encourage uniformity by providing:
 - narrow ranges within which judges may sentence without departing;
 - a high standard for departure, i.e., substantial and compelling circumstances; and

- a nonexclusive list of aggravating and mitigating circumstances that are specific in nature (i.e., apply to a small number of cases) rather than general in nature (i.e., apply to many cases).

These characteristics are probably pre-requisite for a guidelines system which will effectively increase uniformity in sentencing. The application of these characteristics to the area of juvenile dispositions is problematic. Incarceration is an infrequent disposition for juveniles, and incarceration is the sanction most suitable to address with guidelines, because durations of confinement are easily measured (days, months, or years) and equivalency of sanctions is not a problem as it is with other sanctions (e.g., is 40 hours of community work service equivalent to \$150 in restitution or three months of weekly chemical dependency meetings?).

The dominant sentencing goal in the juvenile system has long been rehabilitation which stresses individual characteristics. Sentences based on rehabilitation are designed as an intervention strategy for the individual, rather than as punishment based on the offender's culpability. Guidelines require emphasis on common characteristics, not individual characteristics. While the sentencing goals for juveniles have undergone some changes, with retribution becoming more important in juvenile dispositions than previously, considerably greater change in purpose would be necessary to support a dispositional guidelines system.

Summary Regarding Guidelines for Juveniles

The Sentencing Guidelines Commission lacked the resources to study the issue of dispositional guidelines for juveniles. However, there are features inherent in guidelines systems and features associated with juvenile justice that lack compatibility. Guidelines systems are most effective if they focus on the disposition of incarceration, base sanctions on retribution, and stress common characteristics in sentencing. In the juvenile area incarceration is an infrequent disposition, sanctions tend to be based on rehabilitation rather than retribution, and individual characteristics are stressed in determining dispositions. Changes in the juvenile area would be necessary to support a dispositional guidelines system.

E. Racial Disparity in Sentencing

The Committee on Criminal Justice strongly recommended that the Sentencing Guidelines Commission investigate the reasons for the differences in departure rates from the Sentencing Guidelines presumptive sentences between the races.

The initial analysis of sentencing practices under Sentencing Guidelines revealed that rates of departure were significantly higher for minority offenders than for White offenders. For example, the dispositional departure rate for White offenders is 5.2%, for Blacks 9.6%, and for Native Americans 12.4%. State imprisonment was imposed when the presumptive sentence was a stay in 2.6% of cases involving Whites, 4.9% of cases involving Blacks, and 7.5% of cases involving Native Americans. Less severe dispositions than the Guidelines recommended were given in 2.7% of cases involving White offenders, 4.7% of cases involving Black offenders, and 4.9% of cases involving Native Americans.

The Commission extensively examined the differences in departure rates and severity of sanctions between minority offenders and White offenders. The Commission found that some, but not all, of the differences, could be explained by factors other than race, such as the types of offenses committed by minorities and Whites, the region of the state in which minorities reside, and employment factors. Some of the differences in sanctions between White and minority offenders serve the goal of proportionality in sentencing; however, some of the differences appear to be disparity in sentencing, i.e., based on inappropriate factors such as region or employment status. A summary of the findings are presented below. A somewhat more detailed discussion is contained in the Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines (July, 1982).

1. Seriousness of Offense: The distribution of offenses across the Sentencing Guidelines grid varies significantly between minority and White offenders. A greater proportion of minority offenders are convicted of serious person crimes, i.e., offenses below the dispositional line, than are White offenders. To some extent the differences in departure rates among racial groups can be accounted for in terms of the groups' different distribution across the Sentencing Guidelines grid. Departure rates tend to be lower in the upper left area of the grid where there are proportionally more White

offenders. Departure rates tend to be higher in the lower left area of the grid where there are proportionally more minority offenders.

Accounting for differences in uniformity on the basis of different distributions of offenders does not establish whether the departure rates are higher in the lower left area of the grid because of the nature of the cases or the nature of the offenders. An indepth analysis of cases for the preliminary evaluation suggested that substantial and compelling circumstances more frequently existed in the more serious person offenses than in the less serious property offenses and therefore more departures could be expected for minority offenders than White offenders based on the nature of the cases.

Furthermore, the indepth analysis of cases suggested that the nature of the substantial and compelling circumstances more frequently indicated aggravation of sentence for minority offenders than for White offenders. Some, but not all, of the differences in departure rates and severity of sanctions is attributable to the nature of the offenses committed by minority offenders compared to White offenders.

2. Regional Variation: Less uniformity in sentencing has been attained in Hennepin County than in other areas of the state. For example, the statewide dispositional departure rate (including Hennepin County) is 6.2%, the dispositional departure rate for Hennepin County alone is 10.2%. There is a confounding affect between race and region, in that sentencing in Hennepin County, the area of the state with the most minorities, especially Blacks, tends to be less uniform than elsewhere in the state, both for Whites and minorities. The dispositional departure rate for White offenders in Hennepin County is 8.6%, and is 11.4% for Black offenders, 15.7% for Native Americans, and 15.4% for other minorities. The aggravated dispositional departure rate for White offenders in Hennepin County is 3.3% and is 4.8% for Black offenders, 7.4% for Native American offenders, and 2.6% for other minority offenders. The mitigated dispositional departure rate for White offenders in Hennepin County is 5.3%, and is 6.6% for Black offenders, 8.3% for Native American offenders, and 12.8% for other minority offenders. When comparing dispositional departure rates for racial groups statewide, the White pattern is largely determined by non-metropolitan sentencing, which tends to be relatively uniform. The pattern of sentencing for minorities and especially for Blacks, is primarily determined by Hennepin County where sentencing tends to be less uniform for minorities and Whites. The findings regarding durational uniformity are similar to dispositional uniformity.

3. Employment Factors: Sentencing practices prior to the Sentencing Guidelines were found to vary significantly on the basis of the employment status of the offender at the time of sentencing, with unemployed offenders receiving more severe sanctions than employed offenders. The Sentencing Guidelines prohibit the use of employment status as a consideration in establishing disposition and duration of sentence, but an examination of sentencing practices under the Guidelines indicates that sanctions still vary substantially between employed and unemployed offenders. The imprisonment rate for employed offenders is 4.9%; for unemployed offenders the rate is 24.4%. The dispositional departure rate for unemployed offenders is 8.9%, compared to 3.4% for employed offenders.

The unemployment rate among felony offenders in eight of the most populous counties in fiscal year 1978 was 62.9%. By 1980-1981 the unemployment rate among felony offenders in the same eight counties was 67.6%. The differences in unemployment rates between White and minority offenders are substantial. Approximately 63% of White offenders were unemployed, compared to approximately 80% of Black offenders, 90% of Native Americans, and 80% of other minorities. The unemployed in every racial group were sentenced more harshly than the employed, but the higher unemployment rates for minority offenders means that sentencing on the basis of economic factors clearly works to the detriment of minority offenders.

Summary of Sentencing and Race

Sentences for minority offenders are less uniform and more severe than for White offenders. Part of the difference is a reflection of the nature of cases that are committed. Minority offenders tend to commit serious person offenses at a higher rate than White offenders, and substantial and compelling circumstances are present in person offenses more frequently than property offenses. However, not all of the differences in uniformity and severity of sentences appear to be attributable to the seriousness of the offense. Inappropriate factors, such as region of the state and unemployment appear to contribute to the difference in uniformity and severity between White and minority offenders.

The \$65,500 grant from the MacArthur Foundation is enabling the Sentencing Guidelines Commission to replicate the first year's evaluation

study. This current study will determine whether there has been an increase or decrease in uniformity, proportionality, and neutrality in sentencing during the second year of Guidelines operation. The issues of sentencing and race will continue to be a primary focus of the evaluation.

F. Sentencing Guidelines for the Use of Jails and Workhouses

The House of Representatives Committee on Criminal Justice strongly recommended that the Commission establish presumptive durations of probation and establish whether or not incarceration in a local correctional facility is proper as a condition of probation.

Under Minnesota law, up to one year can be served in a jail or workhouse as a condition of a stayed felony sentence. The legislation that established the Commission conferred upon the Commission authority to develop nonimprisonment guidelines that would govern the use of local incarceration and other conditions of stayed felony sentences. The significance of nonimprisonment sanctions in felony sentencing is indicated by the following statistics:

- 15% to 20% of felony offenders are imprisoned
- 80% to 85% of felony offenders receive nonimprisonment sanctions
- 46% of felony offenders are given conditional confinement in a jail or workhouse as a condition of a nonimprisonment sentence.

Almost three times as many felony offenders are incarcerated in a local jail or workhouse than are incarcerated in prison.

Commission examination of jail and workhouse sanctions as a condition of probation during Guideline development in 1979 revealed considerable variation in the use of local incarceration. However, the Commission delayed the decision as to whether to develop guidelines for jails and workhouses until after Guidelines for prison had been developed and implemented. In the spring of 1981, the Commission reconsidered the feasibility of guidelines for jails and workhouses and tabled the issue indefinitely.

In response to the House Committee on Criminal Justice recommendation, the Commission explored for the third time the feasibility of establishing guidelines for the use of jails and workhouses. Unlike many other issues, a consensus on the issue of guidelines for the use of jails and workhouses has not emerged on the Commission. However, the majority opinion of the Commission is that guidelines for the use of jails and workhouses should not be developed at this time. There are four major factors involved in a condition of jail and workhouse guidelines, two of which indicate their establishment and two of which indicate continuing with the current system. The factors that would suggest the establishment of jail guidelines are:

- the existence of substantial disparity in the use of local incarceration that guidelines could address; and
- the need to more rationally allocate scarce jail and workhouse resources by reserving incarceration for more serious offenders.

The other two major factors were deemed more compelling and indicated the inadvisability of establishing guidelines for the use of jails and workhouses, at this time. Those factors are:

- the inequality of jail and workhouse resources--both regarding quantity and quality--in various locations around the state, which render uniform guidelines unfeasible; and
- the strong opposition of the criminal justice community to guidelines for the use of jails and workhouses which creates a political climate unfavorable to successful implementation.

A more thorough discussion of these four factors elucidate the complexity of the jail guidelines issue. A configuration of jail guidelines that is representative of several models considered by the Commission is contained in Appendix B to illustrate jail guidelines.

1. Disparity in Jail and Workhouse Sanctions: Incarceration in a jail or workhouse as a condition of a nonimprisonment sanction is the most frequent type of felony sanction used in the state. Commission examination of jail and workhouse sanctions in

1980 and 1981 revealed that uniformity in use of jails and workhouses within Guidelines categories (i.e., similar offense seriousness and criminal history) had not increased after implementation of Guidelines for prison. In fact, the sentencing practices indicated almost perfect nonuniformity in use of jails and workhouses--that is in any given category approximately half of the offenders would be given conditional confinement and the other half would not. Because reduction in sentencing disparity is one of the primary goals of the Sentencing Guidelines Commission, the lack of uniformity with the use of local jails and workhouses is a matter of considerable concern to the Commission.

2. Proportionality in Use of Jails and Workhouses: In addition to the nonuniformity in local incarceration, there is considerable disproportionality with more serious offenders receiving no incarceration at all and less serious offenders receiving up to a year in jail. There is also disproportionality in sanctions for those given extensive jail time compared to the term of imprisonment for an executed sentence for similar offenders. The Supreme Court has suggested standards for limiting jail time in State v. Randolph, 316 N.W.2d 508 (Minn. 1982). The Supreme Court has not addressed the other side of the issue, that is, presumptive incarceration for more serious offenders.

The imposition of jail and workhouse terms for felons has been increasing consistently since 1974 when money distributed via the Community Corrections Act became available and was used to enhance staff and programs in local facilities. That trend has continued and in 1980-1981 46% of convicted felons were given time in a jail or workhouse as a condition of probation, compared to 35% in fiscal year 1978. About half of that eleven percentage point increase can be attributed to the impact of the Sentencing Guidelines. The four to five percent reduction in the rate of state imprisonment contributed to a four to five percent increase in local incarceration. The remainder of the increase is part of the continuing trend toward increased local incarceration and reflects the discretionary decisions of courts.

Sentenced felons are, however, a relatively small proportion of jail and workhouse populations. Approximately one-third of the populations are sentenced felons, another third of the population are pre-trial defendants and a third are sentenced misdemeanants. Jails and workhouses are increasingly experiencing crowding as a result of increases in incarceration levels of all three groups. It is clear that sentencing practices for felons is contributing to the crowding situation. Because of the limited

jail and workhouse resources, the apparent irrational use of those scarce and expensive resources for felons is disturbing.

3. Varying Availability of Jail and Workhouse Resources: While the sentencing practices regarding jails and workhouses are cause for concern, a primary concern with respect to jail guidelines is the variation in the quality and size of local facilities in the state. On the whole, areas with more felons have more resources, and areas with fewer felons have fewer resources, so the problem is not as great as it initially appears. Still, the variation in resources around the state is a problem that is not immediately resolvable.

A related difficulty emerges from the source of funding for local jails and workhouses. The state has contributed to the operation of some jails and workhouses through the Community Corrections Act subsidy. However, capital costs and most operating expenses come from the county budget. There is some sentiment that if jails and workhouses are to be built and operated at county expense, the use of the facilities should be controlled by the county in cooperation with the county and district courts. The Commission views uniform, statewide sentencing guidelines for use of locally funded and operated facilities as problematic. Uniform, statewide sentencing guidelines for use of jails and workhouses would almost certainly be accompanied by demands for some state funding of jails and workhouses.

4. Judicial and Professional Opposition to Jail Guidelines: Evaluation of the feasibility of jail guidelines played a major role in the Commission assessment that such guidelines should not be developed at this time. The criminal justice community strongly opposes any further limitations on discretion in sentencing. The criminal justice system has just become relatively adjusted to Guidelines for the use of prison. The Commission believes that the imposition of guidelines for the use of jails and workhouses at this time would result in a political backlash that would jeopardize the existing Sentencing Guidelines.

The Committee also recommended that the Commission modify the portion of the existing grid for offenders for whom imprisonment is presumptively improper, showing that incarceration in a local correctional facility is proper as a condition of probation for those offenses. The Commission has not yet determined whether it is advisable, or in what manner, to modify the existing grid to indicate the propriety of

local confinement as a condition of probation. Any such revision would be incorporated in the August 1, 1983 revision of the Sentencing Guidelines.

Summary Regarding Guidelines for Jails and Workhouses

The Sentencing Guidelines Commission concluded that guidelines for the use of jails and workhouses should not be developed at this time. While the lack of uniformity and proportionality in the use of jails and workhouses is troublesome, the inequality of jail and workhouse resources in the state and the judicial and professional opposition to the establishment of guidelines suggests that development and implementation of sentencing guidelines for jails and workhouses should not proceed at this time.

APPENDIX A

Proposed Burglary Statute

609.58 BURGLARY

Subd. 1. **Definitions.** For the purposes of this section:

(1) "Building" includes a dwelling or other structure suitable for affording shelter for human beings or appurtenant to or connected with a structure so adapted, and includes portions of such structure as are separately occupied.

(2) "Dwelling" means the building or part of the building used by an individual as a place of residence. The dwelling may be part of a multi-dwelling or multi-purpose building, or a mobile home as defined in section 168.011, subdivision 8. Dwelling includes a building occupied by persons living there at night on a temporary or seasonal basis.

(3) "Permanent dwelling" is a dwelling that is the primary residence of the owner or tenant.

(4) "Enter without consent" includes entering a building by using artifice, trick, or misrepresentation to obtain consent to enter from the person in lawful possession, or remaining within a building without the consent of the person in lawful possession. Whoever enters a building while open to the general public does so with consent except when, prior thereto, consent was expressly withdrawn.

Subd. 2. **Burglary in the first degree.** Whoever enters a building without the consent of the lawful possessor with intent to commit a crime therein commits burglary in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than \$20,000, or both, if:

(1) The burglar possesses a dangerous weapon or explosive when entering or at any time while in the building; or

(2) The burglar assaults a person within the building; or

(3) The building is a dwelling and another person not an accomplice is present in it.

Subd. 3. **Burglary in the second degree.** Whoever enters a building without the consent of the lawful possessor with intent to commit a crime therein commits burglary in the second degree and may be sentenced to imprisonment for not more than 10 years or to payment of a fine of not more than \$10,000, or both, if:

(1) The building is a permanent dwelling; or

(2) The portion of the building entered contains a banking business or other business of receiving securities or other valuable papers for deposit or safekeeping and the entry is with force or threat of force.

Subd. 4. **Burglary in the third degree.** Whoever enters a building without the consent of the person in lawful possession with intent to steal or to commit any felony or gross misdemeanor therein commits burglary in the third degree and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$5,000, or both.

Subd. 5. **Burglary in the fourth degree.** Whoever enters a building without the consent of the person in lawful possession commits burglary in the fourth degree and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$1,000, or both if:

(1) The burglar intends to commit a misdemeanor other than to steal therein; or

(2) The building is a dwelling and the person entering is not caused to do so because of an emergency.

APPENDIX B

Illustrative Configuration of Jail Guidelines

A configuration of jail guidelines that is representative of several models presented to the Commission is shown in Figure 1B to illustrate jail guidelines. Incarceration in a jail or workhouse would be presumptive below the "jail" line indicated on the grid and a nonincarcerative sanction would be presumptive above the "jail" line. The grid shows ranges of jail time within which durations of conditional confinement would be pronounced. The pronounced confinement could be reduced by up to one-third good time.

Figure 1B
 Durational Configuration for Jail Use (Days)

Severity Level	Criminal History Score					
	0	1	2	3	4	5
I	0-90	0-90	0-90	91-150	151-210	211-270
II	0-90	0-90	91-150	151-210	211-270	271-330
II	0-90	91-150	151-210	211-270		
IV	91-150	151-210	211-270	271-330		
V	151-210	211-270	271-330			
VI	211-270	271-330	331-365			

The impact of uniform jail guideline policies on correctional resources throughout the state were estimated to determine which policy options, if any, were feasible from a resource perspective. It appeared that the impact of a policy such as that summarized in Figure 1B would be very similar to the impact of current sentencing practices for every category of jail resources (e.g., no jail, jails subject to 90 day restrictions, jails in which incarceration for a year is approved by the Minnesota Department of Corrections). However, accurate estimates of impact regarding the use of jails and workhouses are difficult because data on current durations of confinement are lacking as a basis for comparison.

The Commission also considered several configurations for appropriate length of probation such as that indicated in Figure 2B.

Figure 2B
Length of Probation (Months)

Severity Level	Criminal History Score					
	0	1	2	3	4	5
I	24	27	30	33	36	39
II	27	30	33	36	39	42
III	30	33	36	39		
IV	36	39	42	45		
V	42	48	54			
VI	48	54	60			