

Recommendations to the Legislature

The Legislature invites the Minnesota Sentencing Guidelines Commission to provide it, from time to time, with recommendations regarding changes to criminal law, criminal procedure, and other aspects of sentencing. Minn. Stat. § 244.09, subd. 6. The Commission makes the following recommendations to the Legislature:

Recommendation One. The Commission passed a motion on a vote of 7 to 2 to recommend that the Legislature amend Minn. Stat. § 152.021 to add two offenses—enhanced possession of controlled substance in the first degree; and more enhanced possession of controlled substance in the first degree—with drug quantity thresholds two and three times greater, respectively, than the threshold quantities reflected in the existing first-degree possession statute.

Recommendation One – Discussion.* The Commission was informed by law enforcement and prosecutors that the U.S. Attorney’s decision to focus its resources on the prosecution of drug offenses involving more than 100 grams has resulted in more law enforcement responsibility falling to the State. Currently, the presumptive sentence for first-degree possession is the same whether the offender possesses 25 grams or a significantly higher amount. The proposed amendments to the criminal code will aid the State’s efforts in prosecuting drug king-pins. Specifically, the amendments to the criminal code create two new offenses for possession of 50 grams or more, and 75 grams or more. These enhanced possession offenses allow law enforcement to seek higher sentences for offenders conviction of possessing these higher amounts.

Recommendation One – Statutory Language: It is recommended that Minn. Stat. § 152.021 be amended to read:

152.021 CONTROLLED SUBSTANCE CRIME IN THE FIRST DEGREE.

Subdivision 1. **Sale crimes.** A person is guilty of controlled substance crime in the first degree if:

(1) on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of ten grams or more containing cocaine, heroin, or methamphetamine;

(2) on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of 50 grams or more containing a narcotic drug other than cocaine, heroin, or methamphetamine;

(3) on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of 50 grams or more containing amphetamine, phencyclidine, or hallucinogen or, if the controlled substance is packaged in dosage units, equaling 200 or more dosage units; or

(4) on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of 50 kilograms or more containing marijuana or Tetrahydrocannabinols, or one or more

* The content of this paragraph, albeit not formally adopted by the Commission as a body, is consistent with the Commission’s discussion at the time of the recommendation’s adoption.

1. Update Offense Titles for Criminal Damage to Property

Description: Absent a risk of bodily harm, felony criminal damage to property in the first degree is ranked at Severity Level 2. Criminal damage to property in the second degree involves the intentional causes to damage because of the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability. Because the descriptive titles in § 5 are incomplete, they may cause confusion.

Adopted Modifications: Update offense titles for damage to property in § 5.

2. Delete Expired Statutory Language Related to Expunged Records

Description: A portion of a comment in § 2.B related to access to expunged records is no longer in effect.

Adopted Modifications: Delete the reference to expired statutory language.

2. Adopted Modifications to the Sentencing Guidelines and Commentary – Effective August 1, 2016

Pursuant to Minn. Stat. § 244.09, the Commission adopted proposed modifications to the Sentencing Guidelines and Commentary related to controlled substance offenses and consecutive sentences. These modifications become effective August 1, 2016, unless the Legislature by law provides otherwise. All modifications are set forth in Appendix 2.2.

A. Non-Legislative Modifications to Controlled Substance Offenses

Description: The Commission adopted a motion on a vote of 7 to 3 to create a new drug sentencing grid that establishes new presumptive sentences for first-degree sales of 65 to 125 months, depending on the criminal history score of the offender, and reduces the severity levels for first-degree and second-degree possession controlled substance crimes. Additionally, the Commission adopted both new aggravating factors and a mitigating factor applicable to controlled substance crimes. The new Drug Offender Grid is found in Appendix 2.2 at page 80. For comparison, the old sentencing grid is on page 79 and in Appendix 3. The new aggravating factors and the new mitigating factor are found on pages 70-71. The remaining modifications to the text of the Guidelines resulting from the changes are found on pages 71-78.

Discussion: The Commission has considered the topic of drug sentencing for many years. Between 1989 and 1998, through a series of legislative and Guidelines changes, the severity of Minnesota's criminal drug penalties grew significantly. The Commission began examining options for drug sentencing reform as early as 1995, and repeatedly

thereafter. In 2003, the Legislature directed the Commission to report drug sentencing findings and recommendations.⁷ In 2007, the Legislature directed the Commission to propose changed rankings for drug offenses.⁸ In 2008, the Legislature created a working group on controlled substance laws, with directions to report its findings and recommendations.⁹ During these years, neither the Commission nor the Legislature made policy changes related to drug sentencing reform.

MSGC staff presented a summary of recent statistical data which indicates that the downward dispositional and durational departure rates for sentences imposed for first- and second-degree drug offenses are quite high, particularly in Hennepin County. For example, in 2013, only 37 percent of the defendants statewide received the presumptive for a first-degree controlled substance conviction. See “Drug Sentencing Reform Compromise Proposal,” Attachment 1 (bar graph of actual sentencing practices in first- and second-degree offenses from 2011 to 2013).¹⁰

In October 2013, the Commission held a round table to discuss the most recent data on first- and second-degree controlled substances and to seek feedback from various stakeholders in the criminal justice community. The explanation given for these downward departures was that the prosecutor settled the case (1) in exchange for help in pursuing a drug case against a dealer, or (2) to resolve a case that had evidentiary issues. The net result, however, is a perceived lack of uniformity in that an offender in Hennepin County gets a better deal than an offender in greater Minnesota.¹¹ Since the workshop, the Commission has discussed the topic of drug sentencing at several meetings. During the 2015 legislative session, the drug reform proposals set forth in House File 2107 and Senate Files 773 and 1382 never made it out of committee. Several legislators have indicated that they intend to renew these proposals during the 2016 legislative session.

When the Legislature failed to act on drug sentencing reform, the Commission more earnestly discussed the topic. At its August 2015 meeting, the Commission decided it would formally discuss drug sentencing reform at its September and October meetings and determine what formal action, if any, should be taken. The Commission, at its meeting on November 18, 2015, voted 7 to 3 in favor of the modifications set forth in the new Drug Offender Grid, the new aggravating factors, a new mitigating factor, and related changes, all of which are set forth in Appendix 2.2. The majority adopted the modifications on the basis that they promote the goals of the Commission “to assure public safety, promote uniformity and proportionality in sentencing, provide greater

⁷ 2003 Minn. Laws ch. 2, art. 1, § 14.

⁸ 2007 Minn. Laws ch. 54, art. 1, § 15. The Commission did not propose the requested changes at that time for reasons described in its 2008 Report to the Legislature.

⁹ 2008 Minn. Laws ch. 299, § 27. The report is at: <http://archive.leg.state.mn.us/docs/2009/mandated/090252.pdf>.

¹⁰ This document, dated Nov. 10, 2015, is available on the MSGC website under the meeting materials pertaining to the November 18, 2015, MSGC meeting, and was retrieved Jan. 4, 2016, at http://mn.gov/sentencing-guidelines/assets/4C%20Dietzen%20Submission_tcm30-91000.pdf.

¹¹ See “Sentencing Practices: Controlled Substance Offenses Sentenced in 2014,” figures 19 and 20 (available on the MSGC web site under annual summary reports).

honesty or ‘truth in sentencing,’ and coordinate sentencing practices with correctional resources.” *Taylor v. State*, 670 N.W.2d 584, 586 (Minn. 2003) (citations omitted). Four reasons support this conclusion.*

First, the modifications add a new mitigating factor that allows a judge who finds the offender truly chemically dependent to put the person on probation and send him or her to receive treatment. Currently, when an offender is convicted of first-degree controlled substance crime—sale and possession with a zero criminal history score—the presumptive sentencing disposition is incarceration. The proposal adds a new mitigating factor that allows a judge who finds the offender truly chemically dependent to put the person on probation and send him or her to drug treatment under Minn. Stat. § 152.152. For second-degree controlled substance crime, the presumptive disposition is changed from incarceration to probation.

Importantly, the modifications for the first time set forth separate presumptive sentences for first-degree drug possession and first-degree drug sale. Currently, individuals who are convicted of first-degree drug possession or sale receive the same presumptive executed sentence of 86 months. The proposal separates the sentences for first-degree drug possession and sale on the basis that drug possession is less culpable than drug dealing. The sentence for first-degree drug possession is reduced from 86 months to 48 months.

Most people agree that long prison sentences for drug users who are chemically dependent do not help them get better. Recent data indicate that, with respect to first-time drug users, long prison sentences not only fail to deter the drug users’ short-sighted and impulsive behavior, but also long sentences transform first-time drugs users into hardened career criminals. Moreover, as one writer observed, over-imprisonment of first-time drug users impacts the building blocks of our society by “excessively disrupt[ing] work, families and communities.” Stephanos Bibas, “Prisoners without Prisons: Incarceration is Important, but Sometimes Alternatives Work Better,” *National Review*, Sept. 21, 2015.

Second, the modifications promote both truth in sentencing and uniformity in sentencing. The modifications adjust the presumptive sentence for first-degree drug sale from 86 months to 65 months to reflect the sentence actually given to first-time drug dealers. The adjustment is necessary to achieve the goal of truth in sentencing. MSGC staff studied the sentence actually given for a first-time drug offender with a zero criminal history score and determined that, when an executed sentence was imposed, it was significantly lower than the Guidelines recommendation. Therefore, the presumptive

* The contents of this paragraph and the following six paragraphs have been included to provide a complete explanation of the Commission’s most recent amendments to the non-legislative modifications to controlled substance offenses. While not all this content was formally adopted by the Commission as a body, the content is consistent with the Commission’s discussion at the time of the adoption of the modifications.

sentence was adjusted.¹² Further, the adjustment was necessary to correct a geographic disparity in sentencing.

To offset for the adjustment, the modifications add several aggravating factors that allow the court to significantly increase the sentence. For example, if the offender is convicted of first-degree sale and the State proves two or more of the aggravating factors, the sentence could be increased from 65 to 130 months. In short, the presumptive sentence for first-degree drug sale is adjusted from 86 to 65 months, but the new aggravating factors give the prosecutors the tools to secure an upward durational departure that would increase the sentence to 130 months.

Third, the proposal will positively affect public safety. A scheme that allows persons to address their chemical dependency benefits not only the individual, but also the State. Currently, drug users are convicted of drug possession offenses, and the related offenses of theft and burglary to support their habit. The downhill spiral of the drug user's life takes down the family through job loss and often abuse and neglect of their children. The proposal will give drug users who are truly chemically dependent the treatment they need to get better, and to take their lives back. The benefit to public safety is clear. The drug user who stops using drugs will be able to rebuild his or her life and become a productive member of society. When this happens the overall number of drug users and the crime rate attributable to drug use will drop. In sum, offenders need to be punished for the crimes they commit. But longer prison sentences don't help those who are chemically dependent get better, and become productive members of society. Additionally, the proposal will give law enforcement and prosecutors additional tools to go after drug dealers. The new aggravating factors allow the prosecutors to seek high sentences against drug dealers. Moreover, we request that the Legislature amend the criminal code to add two enhanced first-degree possession offenses to increase the sentences for those found with higher amounts of drugs.

Fourth, we have seen an increase in the number of individuals who are incarcerated for drug offenses. Minnesota's prison population has increased from 5,485 in 1995 to 10,090 in 2015, which is an 84 percent increase. During the same time period, the prison population for drug offenses increased from 704 to 1,911, which is a 171 percent increase.¹³ Commissioner Roy has indicated that our state prison facilities are full.

Impact: MSGC staff estimates that the adopted proposal would have a long-term prison-bed savings of 523 beds, and that 76 offenders would shift from a prison sentence to probation supervision. The complete impact analysis is in Appendix 2.3, on page 91.

¹² For a detailed explanation of how the adjusted severity level's sentences were derived from actual sentencing data, refer to "Explanation of Staff-Proposed Durations in Proposed Severity Level D9," retrieved January 11, 2016, at <http://go.usa.gov/cnFXe>.

¹³ See "Drug Sentencing Reform Compromise Proposal," Attachment 4, showing Minnesota's prison population by offense type from 1998 to 2015. Source: Minn. Dep't of Corrections adult inmate profiles, retrieved July 30, 2015, at <http://www.doc.state.mn.us/PAGES/index.php/about/statistics/>.