

Understanding Departure Patterns: Practitioner Perspectives on Failure to Register, Felony DWI, and Criminal Vehicular Homicide

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Introduction and Context

- Robina Institute partnered with the commission to support the comprehensive review.
- Examine very high (downward) departure cases.

Why are the guidelines are not guiding?

- Although downward departures can only be granted by judges, **prosecutors and defense attorneys play a major behind-the-scenes role** in shaping whether a departure occurs.
- **Purpose of Presentation:**
 - Assist the commission members in their decision-making about potential reranking or legislative recommendations.
 - Provide insights from prosecutors and defense attorneys on why departures happen for high-departure offense.



Methodology

- 20 semi-structured interviews across MN:
 - *Prosecutors*
 - *Defense attorneys*
 - *Dispositional advisors*
- Thematic analysis focused on perceptions and reasoning behind departures and recommendations for policy changes.
- Themes reported appeared multiple times across both defense attorneys and prosecutors.



Failure to Register as a Predatory Offender

- **Defendant knowingly fails to comply with registration requirements or lies to an agent.**
- **Severity Level:** I (sex offense grid)
- **Mandatory Minimums:**
 - *First offense: 1 year + 1 day*
 - *Subsequent: 2 years*
- **Departure Rates:**
 - *Dispositional Departure: ~53% (first offense); 39% (subsequent)*
 - *Durational Departure (for those who get prison): ~37% (first offense); 40% (subsequent)*

Complexity of Registration Statute

- Registration is at least 10 years, but can be life.
- Registration *does not* require conviction of a registrable offense.
- Many registration requirements have a short window (5 days) for filing
- Homeless registrant are required to report in person to the police weekly
- Violations extend the registration period by 5 years.

Common Factors Supporting Departures - FTR

Non-deliberate infractions:

- “A lot of times there's confusion over what the obligations are. And the client is honestly trying to comply with the law and makes a mistake. And it's not an intentional one. So I think (Prosecutors) look at their cases and they just think it's not worth going to trial over. And they'll offer something that clients will consider taking.”

– Defense (Rural)

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Instability-Based Factors:

“When you're homeless and you lose your residency, you have to report to your local law enforcement agency within a very short period of time. And people don't do that because they're worried about shelter, food, water medicine, etc. And they're also addicted to other things. You didn't comply with that very short window, so now there's a charge for failure to register. And then with every charge...you now have additional time where you have to statutorily register. So this perpetual cycle where you'll never not have to register. And so really what we end up doing is prosecuting indigency, right?”

– Prosecutor (Urban)

Common Factors Supporting Departures- FTR

- **No Direct Harm:**

“You could have five, six prior felony fleeings in a motor vehicle and it's still presumptive probation, but failure to register, any single one, and you have to argue for probation and it just doesn't seem to fit the harm involved.”
– Defense (Rural)
- **Consideration of Underlying Offense:**
 - It's a world of difference between someone who's been convicted of a sex offense, or even a violent crime sex offense, not notifying authorities where they're at. To me, that's a higher public safety risk than the individual whose crime technically is not on the list of registration offenses. But because it was charged under the same sentence, that defendant now has to register. ”
- Prosecution (Rural)

Common Factors Supporting Departures- FTR

First Time Offense:

- “I think they're getting prison mostly because of the cumulative nature of their criminal history. If genuinely all they have on their record is sex offense that got them there and the failure to register, they're not going to prison.”
– Defense (Rural)

Common Factors Supporting Departures- FTR

- **Prosecutors were much less likely to offer pleas for subsequent FTRs.**
- **Durational Departures for Prison Offenses:**
"If you cannot get an agreement for probation or the judge is just like, no, I'm not doing this, they generally will give a durational departure.... because everybody agrees and acknowledges that it's a victimless crime."
– Defense (Urban)

Common Factors Supporting Departures- FTR

Systemic and Practical Considerations

- **Reticence to Try FTRs:** “Do I want one of my attorneys trying a predatory offender violation case? I absolutely do not because that attorney needs to be trying a case where we have an active victim...if someone's willing to accept responsibility and go to prison for a shorter period of time, I would absolutely incentivize that.”
– Prosecutor (Urban)
- **Duration Departure to Equal Jail Credit:**
- “A lot of times they're in custody, so they're just stacking up credit. So you're doing durational to get that case done. Well, you've already been in for 16... I'll give you a durational to 17, you'll do a few more days and you're outta here. ”
Prosecutor (Urban)

Challenges with Mandatory Minimums- FTR

Almost all defense attorneys and prosecutors expressed negative sentiments for the mandatory minimums applied to FTR cases - particularly first time FTR.

"I'm less enthused about the mandatory minimum. Part of me says you have somebody who's registering because they committed a serious crime...and we need to know where they are. But again, there are situations where yes, we do know where you are, but you're not doing it through the correct channels. And so now to say you have to go to prison. I don't I necessarily agree with that one. And that's why I think prosecutorial discretion on those cases is so important."

- Prosecutor (Rural)

Reranking Alignment – FTR

- **Almost all practitioners thought this offense was appropriately ranked.**
- **Commissioner Feedback on Ranking:**
- No rerank for first and subsequent offense.
- Legislative recommendations to either eliminate or refine the mandatory minimum (e.g. exclude first time offenders).
- **General alignment between commission feedback and practitioner views.**

Felony DWI

- Operating a motor vehicle while under the influence of alcohol, or controlled substance.
 - *Within the first of three prior convictions for a DWI in ten years or*
 - *After a previous conviction for a felony DWI or CVO with injury while intoxicated*
- **Severity Level: 7**
- **Mandatory Minimums/Guideline Recommendation:**
 - *3 years in prison - can stay execution for first time felony DWI, otherwise departure*
 - *5 years minimum stayed sentence (statutory min)*
 - *Presumptive commit if prior felony DWI or CVO/I while intoxicated*
- **Departure Rates (felony DWI with CHS of 3 or more; prior Felony DWI or CVO/I):**
 - *57% recommended for prison*
 - *Dispositional Departure: ~48% (Prosecutor objection rate: 45%)*
 - *Durational Departure (for those who get prison): ~19%*
- **Practitioner opinion: overly complicated statute**

Common Factors Supporting Departures – Felony DWI

Role of Dispo Advisor:

- “The public defender system has dispositional advisors. A lot of times they have a social work background. They are very good at presenting prison alternatives to judges in DUI cases. A lot of times that is extremely chemical dependency oriented. If you're a judge and you're, comfortable with short-term inpatient, long-term aftercare treatment - you maybe are willing to give that a chance as opposed to the prison commit.”
– Defense (State)

Common Factors Supporting Departures – Felony DWI

Treatment and Sobriety Progress:

Enrollment in chemical dependency treatment +ongoing sobriety:

- “It's that kind of offense where it's easier for the defense to argue to a judge that they're going through treatment, they're doing well in treatment, they're following through on their conditions, therefore the court should give them that chance to prove that they can follow through.”
– Prosecutor (Rural)
- **Participation in DWI or Drug Court as part of plea deal:**
“DWIs, pretty frequently. And they're all going to drug court or DWI court. When you get to this point you are either going to drug treatment court, which is the highest level of supervision we have in X County, and it's with Waseca. It is a phenomenal program. Ran by a great Judge Butell...he does a really good job. I think we're at 110 or 120 graduates, and our recidivism rate is in the high nineties.”
– Prosecutor (Rural)

Common Factors Supporting Departures- Felony DWI

Long Interval Between Offenses

- **Offense seen as relapse:**
- “You'll have clients who had a felony DUI back in like 2000 who stay sober for 25 years and then get another DUI 25 years later and it's a mandatory minimum. And everyone's like, wait, what? Well, obviously that person gets probation, like they held it together for 25 years.”
– Defense (Suburban)

Common Factors Supporting Departures- Felony DWI

- **Lack of Direct Harm/No Victim:**

- “So if you're a judge and you're sentencing a bunch of felonies over the course of a month, if you have to pick between the person who shot somebody... or they beat someone up so badly. You're going to pick who goes to prison: that person or the person with the DUI? The person who is committing the offenses against other people very directly, that might be the person they send to prison.”
– Defense (State)

The Availability of Enhanced Probation and Monitoring:

- “Intensive supervision gives the court the comfort level that they'll be able to monitor sobriety in a way that they couldn't either on traditional probation or with nobody watching. So I have heard judges say, ‘Well, because you have intense supervision, I'm more comfortable giving you a departure because we'll know if you've been drinking or we know if you're going to fail’.
- Prosecutor (Urban)

Common Factors Supporting Departures- Felony DWI

- **Defendant Characteristics:**

- Clients who have resources
- Criminal History Score Zero
- Private Attorney

"I also think DWIs are crimes that cross all socio and economic statuses. And so, it is possible that on subsequent offenses, you're hiring that great private attorney to come in who puts on a better show for the judge. You get the soccer mom in the school line just like you get the most hardened criminals."

- Prosecutor (Suburban)

Judicial and Prosecutorial Discretion Themes- Felony DWI

- **High Prosecutor Objection Rate + Office Policies on Felony DWI:**
- “By the time it gets to my trial division, we don't make offers on felony DWIs. That's a thing that we just have not done for a very, very long time. Mainly because of the compelling public safety concerns. So if they get a departure, it's usually from the court.”
 - Prosecutor (Rural)
- **Higher Likelihood of Straight Pleas + Judicial Amenability to Departures:**
- “It might be a bit more of the in chambers, [The Prosecutor says] ‘Judge, I have to object to this, but he's doing well’ Technically that would be a straight plea if it's a judge – ‘I have to object to this, but don't send him to prison’.”
 - Defense (Suburban)

Mandatory Minimums- Felony DWI

- Practitioner opinions on mandatory minimum (statute and guidelines) were generally positive.
- Most practitioners thought stay of execution option was appropriate for first time felony DWI.
- Most practitioners support presumptive prison for subsequent offenses.

Reranking Alignment– Felony DWI

- Most practitioners through current ranking was appropriate, or slightly too high due to higher rank than some person offenses.
- This is in line with commission member consensus to not re-rank this offense.

Criminal Vehicular Homicide

- Causing a death by operating a motor vehicle in a grossly negligent manner; leaving the scene of collision; or while impaired.
- **Severity Level: 8**
- **Departure Rates :**
 - *Dispositional Departure: ~43% (Prosecutor objection rate: 38%)*
 - *Durational Departure (for those who get prison): ~10%*

Common Factors Supporting Departures – CVH

- **Smaller sample size.**
- **Some practitioners did not think this was a high departure offense in their counties.**
- **Wide variation in driving conduct and blameworthiness:**

Distracted driving vs “a chronic drunk, with a lengthy driving history”
- **Prison Too Severe Compared to Nature of Conduct/Lack of Intent:**

“It's almost just an accident, right? I had one where a motorcycle pulled out in front of the car... She had a controlled substance amount of cocaine in her system, but she was a young college student, nursing school. I recommended probation.”

-Prosecutor (Urban)

Common Factors Supporting Departures – CVH

- **Lack of Criminal History:**

"CVHs can come from someone who doesn't have any criminal history at all. They got drunk, went out, crossed the center line and killed somebody. So you're sending someone to prison who's never even spent any time in jail. And some people, if they spent one day in jail, it would be the worst thing that ever happened to them, and they would never want to go back again, and they would do anything to stay out. So a lot of the CVHs, you're dealing with a situation where this person is not going to do it again, and it's very clear that it's not going to happen again. And sending this person to prison would be a waste."

-Defense (Rural)

- **Strong Influence of the Victim's Family:**

"The cases that I had experience with is spouses killing spouses. You kill somebody in your own car. So it's a friend, it's a relative. It's in those cases, that we probably see more departures than any other, because you have the victims, the family they're saying he already feels bad enough."

-Prosecutor (Rural)

Common Factors Supporting Departures – CVH

Demographics that increase amenability to probation:

- Higher socio-economic bracket
- More private attorneys
- Already in treatment
- “The people who cause these accidents are the same type of people who are injured in these accidents. They aren't necessarily the people with huge criminal histories....these are the cases where I'm seeing more hired attorneys who are getting their people into the right treatment and taking the right steps to earn that departure from a judge.”

-Prosecutor (Suburban)

Policy and Reranking Consideration - CVH

- **High prosecutor objection rate + greater likelihood of straight pleas.**
- **Prosecutors noted frustration from victim families about the perception of inadequate punishment in certain cases.**
- "If you're talking to a family that had this person driving like a bat out of hell for no reason, endangering so many lives in our community, killing their two family members in a car, and you're like, we're looking at 48 months here. It really is disproportionate to the actions that they caused. I mean it's not an intentional murder, [but] it's like taking out a gun and shooting many times down Sixth Street. Who they hit, they don't know. So 48 months - it feels like it's not appropriate."

-Prosecutor (Urban)

Reranking Alignment- CVH

- **Widest variation in opinions on reranking/separating.**
- **Most practitioners through current ranking was appropriate.**
- **Uprank egregious conduct (heavy intoxication, extreme speeding, etc.).**
- **Commission Member Responses:**
 - Mixed support for downranking negligence and leaving the scene.
 - *Little support to downrank these offenses from practitioners, but gross negligence generally seen as least prison worthy.*
 - Mixed support for upranking CVH while intoxicated.
 - High support for upranking CVH while impaired and with a prior DWI.
 - *Somewhat in line with practitioner recommendation to uprank egregious driving conduct, which often included intoxication.*
 - *Prior reckless or intoxicated driving seen as an aggravating factor.*