

November 10, 2015

MEMORANDUM

TO: MEMBERS OF THE MINNESOTA SENTENCING GUIDELINES COMMISSION, EXECUTIVE DIRECTOR NATE REITZ, AND STAFF

FROM: JUSTICE CHRISTOPHER J. DIETZEN

RE: Drug Sentencing Reform Compromise Proposal

Based upon our discussion, I would like to propose a compromise that does not depend on legislative action. This memorandum describes the drug sentencing problem, the role of the commission, my compromise proposal, and concerns regarding several alternative proposals, including the legislature's bills.

A. The Drug Sentencing Problem

To propose a solution it is first necessary to identify the nature and extent of the drug sentencing problem. In my view, the problem is three-fold. First, the recent statistical data prepared by MSGC staff indicates the downward dispositional and durational departure rates for sentences imposed for first- and second-degree drug offenses is quite high, particularly in Hennepin County. For example, in 2013, only 37% of the defendants statewide received the presumptive sentence for a first-degree controlled substance conviction. See Attachment 1 (Bar Graph of actual sentencing practices in first- and second-degree offenses from 2011 to 2013). At our workshop, 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.

Second, drug sentencing is part of a larger drug problem in this country that is serious, complicated, and requires a comprehensive solution. In Minnesota, over 52,000 people are admitted annually for substance abuse. See Attachment 2 (Pie Chart of Annual Treatment Rates). Law enforcement tells us that the sale of illicit drugs in Minnesota has changed dramatically over the last 15 years. Currently, it is operated as a business enterprise by sophisticated groups such as the Mexican cartel. Most stakeholders agree that drug sentencing should have the flexibility to differentiate between offenders who are arrested for possession of drugs they are using, and offenders who are selling drugs to make money. The Minnesota judicial branch has established drug courts throughout the state. Offenders who meet certain criteria are sent to drug court to help the offenders address their chemical dependency. As long as objective criteria are used in determining a person's chemical dependency, a drug sentencing scheme that allows persons to address their chemical dependency not only benefits the individual, but also the State. See Attachment 3 (2012 Statewide Drug Court Evaluation).

Third, 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% increase. See Attachment 4 (Prison Population Rates from 1998 to 2015). During the same time period, the prison population for drug offenses increased from 704 to 1911, which is a 171% increase. See Attachment 4.

Moreover, Commissioner Roy has indicated that our state prison facilities are currently full.

B. The Role of the Minnesota Sentencing Guidelines Commission

Any proposed solution must be consistent with the purpose of the guidelines. In that regard, a review of the historical development of the guidelines is necessary. In 1978, the legislature enacted a statute that created the MSGC and enabled the development of statewide sentencing guidelines. Act of April 5, 1978, ch. 723, art. I, § 9, subd. 5, 1978 Minn. Laws 761, 766 (codified as Minn. Stat. § 244.09, subd. 5 (2014)). A major purpose of the enabling statute was *to reduce sentencing discretion*, thus promoting greater uniformity of sentences. *State v. Shattuck*, 704 N.W.2d 131, 145 (Minn. 2005) (emphasis added). Another major goal was maintaining Commission control over state sentencing policy to ensure that such policy remained informed, well-coordinated, and less subject to political pressures. Richard S. Frase, *The Role of the Legislature, The Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 Wake Forest L. Rev. 345, 364 (1993); *see also* Michael Tonry & Kathleen Hatlestad, *Overcrowded Times A Comparative Perspective*, at 13 (Oxford University Press 1997) (the MSGC “still retains primary control over the formulation of the statewide sentencing policy”). Put differently, “[T]he use of an independent, appointed commission was designed to insulate sentencing policy decisions from short-term political pressures (and the tendency of elected politicians to prefer more punitive policies, so as not to appear ‘soft on crime’).” Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St. Louis U. L. J. 425, 432

(2000); *see also* Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California*, at (Oxford University Press 2001) (The sentencing commission is a mechanism that was designed to insulate the standards that govern sentencing decision from direct political pressure. In Minnesota the mechanism has achieved this function).

In establishing and modifying the Sentencing Guidelines, the primary consideration of the MSGC is public safety. Minn. Stat. § 244.09, subd. 5 (2014). “The commission shall also consider current sentencing and release practices; correctional resources, including but not limited to the capacities of local and state correctional facilities; and the long-term negative impact of the crime on the community.” *Id.*; *State v. Zeimet*, 696 N.W.2d 791, 796 (Minn. 2005); *Taylor v. State*, 670 N.W.2d 584, 586 (Minn. 2003). The sentencing guidelines permit departures from the presumptive sentence, but a court departing from the guidelines must articulate “substantial and compelling” circumstances justifying the departure. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). The MSGC has identified a non-exclusive list of mitigating and aggravating factors. Minn. Sent. Guidelines 2.D.3. The factors listed in section 2.D.3 focus primarily on the degree of a defendant’s culpability, which is relevant when considering a durational departure. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). “However, when justifying only a *dispositional* departure, the trial court can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society.” *Id.*

Between 1998 and 2015, Minnesota’s drug prisoners more than doubled, increasing from 704 to 1,911. See Attachment 4. This increase in the drug offender prison population impacted the capacities of state correctional facilities. John Stuart and Robert Sykora, *Minnesota’s Failed Experience with Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 Wm. Mitchell L. Rev. 426, 438 (2011). *Id.* In response to this problem, the MSGC issued a 2004 report that recommended (1) the MSGC re-rank drug crimes at a less serious level, or (2) the legislature redefine drug offenses by raising the threshold drug weights. *Id.* at 439 (citing Minn. Sentencing Guidelines Comm’n, Report to the Legislature on Drug Offender Sentencing Issues (2004)). Neither of these things happened. *Id.*

In 2007, the MSGC “presented an ‘Updated Report,’ explicitly recommending that the sentences for first-degree and second-degree drug crimes be moved down one level, so that the presumed first offense sentence for first degree would be forty-eight months in prison, not eighty-six.” *Id.* (citing Minn. Sentencing Guidelines Comm’n, Updated Report on Drug Offender Sentencing Issues, at 8 (2007)). According to the 2007 report, the proposed change would eventually save 700 prison beds. Updated Report on Drug Offender Sentencing Issues, at 20. In the face of powerful political pressure, it was suggested that the re-ranking of first- and second-degree controlled substance offenses “was a job for the legislature.” *Id.* Ultimately, the MSGC voted 7-3 not to submit a re-ranking plan to the legislature. *Id.* at 441. At least one commentator has suggested that this 7-3 vote sounded the death knell of the MSGC’s “independent policy-making voice in the area of drug sentencing.” *Id.*

In 2008, the legislature “created a ‘Working Group on Controlled Substance Laws,’ directed to consider nine questions that might lead to changes in the weight thresholds or offense rankings.” *Id.* (citing H.F. 2996 § 27, 2008 Leg., 85th Sess. (Minn. 2008)). “The discussions were very contentious and did not lead to the enactment of any changes in the 2009 or 2010 legislative sessions.” *Id.*

In October 2013, the MSGC held a round table to discuss the most recent data on first- and second-degree controlled substances and seek feedback from various stakeholders in the criminal justice community. Minn. Sentencing Guidelines Comm’n, Report to the Legislature, at 2 (2014). “A variety of feedback was heard, ranging from ‘the Guidelines are working well and should not be changed’ to ‘departure data suggests that the Guidelines should be adjusted.’” *Id.* During the 2015 legislative session, the drug reform proposals set forth 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.

C. My Proposal

The MSGC has the authority to make changes to drug sentencing, subject to a possible veto by the legislature. Minn. Stat. § 244.09, subd. 11 (2014). One such approach might be a modified version of the 2007 proposal to move first-degree and second-degree drug crimes down one severity level that also includes the adoption of several new aggravating and mitigating factors.

Moving first-degree and second-degree drug crimes down one severity level on the current sentencing guideline grid is unlikely to strike a palatable balance between

punishing kingpins and treating addicts. I, therefore, propose that we adopt a separate Drug Offender Grid that is akin to the Sex Offender Grid. See Attachment 5 (Drug Offender Grid). A separate drug sentencing grid allows for much needed flexibility to reach such a balance. Unlike border-boxes, I don't see any down-side to a separate Drug Offender Grid. Drug sentencing is unique in the sense that a significant portion of those arrested are chemically dependent, and may benefit from treatment. In order to benefit from treatment, however, they must be (1) chemically dependent, (2) able to admit their dependency, (3) fully committed to the treatment program, and (4) willing to comply with the requirements of drug court.

The proposed Drug Offender Grid in Attachment 5 mirrors the current sentencing grid for all offenses except first- and second-degree controlled substance crimes.¹ Under my proposal, the presumptive sentences for first-degree manufacture of methamphetamine, third-degree, fourth-degree, and fifth-degree controlled substance crimes remain unchanged. My proposal does drop the severity level for first-degree *possession* of a controlled substance from 9 to 8 and the severity level for all second-degree controlled substances crimes from 8 to 7. These changes are consistent with changes proposed in Minn. Sentencing Guidelines Comm'n, Updated Report on Drug Offender Sentencing Issues, at 8 (2007), and may save up to 700 prison beds.

¹ This part of my proposal is very similar to the first and second proposed amendments outlined in Commissioner Wernick's November 5, 2015 memorandum. But unlike Commissioner Wernick, my proposal does not reduce the severity level of first-degree drug *sales* from 9 to 8.

Unlike the 2007 report, my proposal leaves the severity level for first-degree sale of a controlled substance of 9 unchanged. In my view, lowering the severity level for first-degree sale unduly depreciates the seriousness of these offenses and provides inadequate punishment for high level dealers. Nevertheless, a review of the sentences actually imposed for first-degree sales during the last 10 years reveals that the presumptive sentences in the current sentencing grid are no longer in alignment with statewide averages. See Attachment 6 (Average Sentencing Durations for First-Degree Sales from 2004 to 2014). Because presumptive sentences are supposed to reflect the sentence that is “appropriate for all typical cases,” Minn. Sent. Guidelines B.13, realigning the presumptive sentences for first-degree sales to reflect actual long-term sentencing practices makes sense. Consequently, the presumptive sentences for first-degree sales in Attachment 5 reflect the statewide averages based on data from 2004 through 2014. The adjustments to the presumptive sentences for first-degree sales result in sentencing reductions that vary from 15 to 32 months. These reductions not only free up scarce prison resources, they ensure that the presumptive sentences truly reflect sentences received in “all typical cases.”

The lower ranking of the first- and second-degree crimes would be balanced by the addition of aggravating factors that are commonly associated with mid- to high-level drug dealing. Law enforcement persuasively argues that there are objective factors that distinguish between a user, a distributor, and a dealer. Under my proposal, the aggravating factors in HF 2107, except the proposed amendment that reads, “the offense was committed for the benefit of a gang as described in section 609.229” are added to

Minn. Sent. Guidelines 2.D.3.b(5) (major controlled substance offense). See Attachment 7 (New Aggravating Factors). Because section 609.229 creates a stand-alone crime, *see State v. Lopez-Rios*, 669 N.W.2d 603, 615 (Minn. 2003) (noting that the crime underlying an offense of a crime committed for the benefit of a gang is a lesser-included offense), including it as an aggravating factor is problematic because “benefit of a gang” would be *both* an element of the offense and an aggravating factor. *State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005) (stating that certain facts cannot be used to support a departure, including facts necessary to prove elements of the offense for which a sentence is imposed). The new aggravating factors in Attachment 7 would be subject to a *Blakely* trial. If proven, the State would be able to argue that the offender should receive an upward durational departure up to twice the presumptive sentence, or more if the aggravating factor is severe. *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981).

Leaving all first-degree offenses above the presumptive prison commitment line would be balanced by the addition of mitigating factors that are commonly associated with drug addicts. A proposed amendment to the mitigating factors set forth in Minn. Sent. Guidelines 2.D.3.a is included as Attachment 8 (New Mitigating Factor). The proposed amendment would allow a downward dispositional departure when a defendant submits to a drug test that reveals the presence of a controlled substance and there is other objective indicium of chemical dependency.

In sum, the adoption of a modified version of the proposal set forth in the 2007 MSGC Updated Report has many advantages. First, the required changes can be made by the MSGC, subject to a possible veto by the legislature. Second, such action would

demonstrate that the MSGC is still an independent policy-making voice in the area of drug sentencing. Third, the creation of a Drug Offender Grid and the refinement of aggravating and mitigating factors offer a system that can be fine-tuned to strike a palatable balance between punishing kingpins and treating addicts.

D. Concerns Regarding Alternative Proposals

Judge Schellhas has proposed changes to first-degree sale and possession that create different presumptive sentences depending on the amount of drugs possessed by the offender at the time of the arrest. Although I think her proposal has merit, I fear that it would run afoul of *State v. McIntosh*, 641 N.W.2d 3 (Minn. 2002).

In *McIntosh*, we considered whether the district court improperly applied a different aggravating factor for major controlled substance offenses. 641 N.W.2d at 8 (referring to the major-controlled-substance-offense aggravating factor in Minn. Sent. Guidelines II.D.2b(5)). *McIntosh* involved a defendant who was convicted of multiple controlled-substance offenses, including second-degree sale of a controlled substance, defined as involving 3 grams or more of cocaine. *Id.* at 6, 11 n.13. The district court departed upward from the presumptive sentence for the second-degree sale conviction based on Minn. Sent. Guidelines II.D.2.b(5). 641 N.W.2d at 7. The court cited multiple sub-factors to support the existence of this aggravating factor, including that the drug sale involved “quantities substantially larger than for personal use.” *Id.* (citing to Minn. Sent. Guidelines II.D.2.b(5)(b)). The defendant argued that application of the major-controlled-substance-offense aggravating factor was invalid because it was “*based upon considerations already taken into account by the legislature through its categorization of*

drug offenses by the quantity of drugs sold,” therefore “amount[ing] to a double-counting” of an element that establishes the seriousness of the offense. *Id.* at 11 (emphasis added). Although we did not need to reach this specific issue because there was insufficient support in the record for application of the major-controlled-substance-offense aggravating factor, we “caution[e]d . . . against using quantity to support a departure under the major controlled substance offense departure criteria when to do so duplicates an element of the offense.” *Id.* at 12; *see State v. Meyers*, __ N.W.2d __ 2015 WL 5714646 *5 (Minn. Sept. 30, 2015).

Additionally, I considered Judge Lennon’s proposed new mitigating factors. I agree with her chemically dependency factors. The other factors proposed, however, seem to be inconsistent with the guidelines and our case law. Specifically, Minn. Sent. Guidelines 2.D.3 provides that mitigating factors which focus on the offender’s culpability are relevant to considering a durational departure. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). But when justifying only a dispositional departure, the trial court focuses more on the defendant as an individual and whether the presumptive sentence would be best for him and society. My concern is that the other factors proposed by Judge Lennon focus on culpability of the defendant, and therefore cannot be used to justify a dispositional departure.²

² Commissioner Wernick’s October 20, 2015 Memorandum suggests that the federal definitions of organizers, leader, managers, and supervisors could be added to the guidelines as “advisory” reasons to depart. October 20, 2015 Memorandum, at 11. But, unlike the federal guidelines which are merely advisory, the Minnesota Supreme Court has said that the Minnesota Sentencing Guidelines are mandatory. *Shattuck*, 704 N.W.2d at 141.

The proposals in House File 2107 and Senate File 1382 are problematic for at least three reasons. First, the proposals create a new offense called “Aggravated controlled substance crime in the first-degree,” which includes as a possible element of the offense the existence of two or more aggravating factors that mirror an amended list of the aggravating factors in Minn. Sent. Guidelines 2.D.3.b.5. But, as discussed above, facts necessary to prove an element of the offense for which a sentence is imposed cannot be used to support a departure. *Blanche*, 696 N.W.2d at 378-79. The creation of an offense that incorporates all the relevant aggravating factors into one of the elements of the offense substantially increases the risk of sentencing errors and a proliferation of sentencing litigation.

The second problem with House File 2107 and Senate File 1382 is they place the list of aggravating factors in three different locations: Minn. Sent. Guidelines 2.D.3.b.5, Minn. Stat. § 244.09, and a newly created Minn. Stat. § 152.01, subd. 24. This creates a substantial risk that future changes to the guidelines by MSGC and/or future changes to the two statutes by the legislature will lead to inconsistencies.

The final problem with House File 2107 and Senate File 1382 is they create a mandatory minimum sentence that is tied to the presumptive sentence. Put differently, the mandatory minimum sentence proposed in House File 2107 and Senate File 1382 does not mandate a minimum length of sentence, but instead prohibits “downward dispositional departures” from the presumptive sentence. This rather unusual approach is likely to lead to sentencing disparity. For example, a defendant with a zero history score and no aggravating factors might receive a presumptive sentence of 86 months in the 8th

judicial district (a district that tends to impose presumptive prison sentence), while a defendant with a zero criminal history score and two aggravating factors might receive the exact same sentence of 86 months in the 4th judicial district (a district that tends to depart from presumptive prison sentences). Moreover, unlike decisions regarding sentence duration, which are based on the nature of the offense, decisions regarding sentence disposition (prison or probation) are based on the nature of the defendant. *See Heywood*, 338 N.W.2d at 244. The mandatory sentence set forth in House File 2107 and Senate File 1382 ignores this distinction when it uses factors that relate to *the nature of the offense* (the aggravating factors set forth in 2.D.3.b.5) to prohibit dispositional decisions regarding prison or probation.

The proposal in Senate File 773 to eliminate the mandatory minimum sentences is problematic for two reasons. First, the fundamental principle underlying the promulgation of statewide sentencing guidelines is that reductions in sentencing discretion promote greater uniformity of sentences. *Shattuck*, 704 N.W.2d at 145. A repeal of the mandatory sentencing provisions would fly in the face of that fundamental principle because it would provide greater sentencing discretion. Second, providing a district court greater discretion to impose a downward dispositional departure (placing the defendant on probation, rather than sending him or her to prison), will have a disparate impact on people of color. In exercising their discretion, Minnesota district courts gave dispositional departures to 36.6% of the white defendants who appeared before them. Minn. Sentencing Guidelines Comm'n, Report to the Legislature, at 14 (2014). By contrast, those same courts gave dispositional departures to only 29.9% of the

black defendants who appeared before them. *Id.* Providing district courts greater discretion is likely to exacerbate this problem.

The proposal in Senate File 773 to increase the weight thresholds for cocaine, methamphetamine, and heroin to the *Russell*-era (1991) levels is also problematic. It relies on the outdated idea that the quantity of drugs involved in the offense, by itself, is an *accurate* indicator of whether the person is a drug addict, a kingpin, or something in between. Just as the current 10 grams or more weight arguably casts too wide a net, capturing some drug addicts, a 50 gram or more weight arguably casts too narrow a net, missing some kingpins. According to law enforcement personnel, kingpins have adopted a sophisticated business model that uses stash houses and limits quantity of drugs transferred during any given sale to avoid the statutory thresholds. As discussed above, the better approach is to retain the current 10 gram limit to prevent kingpins from evading the net, but releasing persons whom the court determines, through the use of objective tests, to be drug addicts.

E. Conclusion

The MSGC is required to consider, among other things, public safety, uniformity in sentencing, and correctional resources. The current problems with drug sentencing require some action to not only adjust for the high rate of dispositional and durational departures, but also provide flexibility to increase the presumptive sentence for “kingpin” drug dealers while allowing offenders who are deemed to be chemically dependent to address their chemical dependency. My proposal will provide the necessary adjustments and flexibility to achieve those goals. Specifically, the proposal will

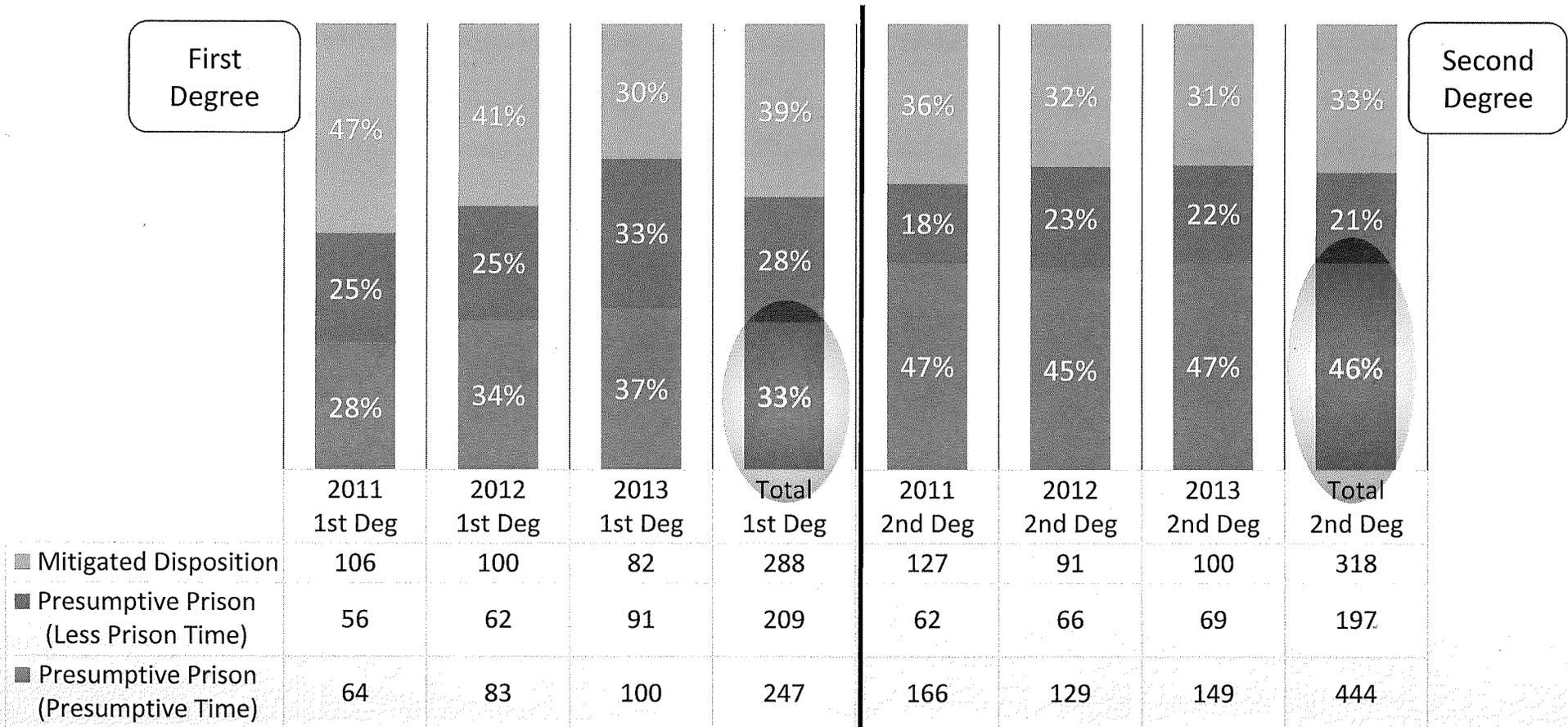
significantly reduce the number of downward dispositional and durational departures. Additionally, the new aggravating factors will allow prosecutors to seek sentences that more accurately reflect the culpability of “king-pin” drug dealers. Similarly, the new mitigating factor will allow judges to impose downward dispositional departures, which will allow offenders who are deemed to be chemically dependent through objective criteria, to address their chemical dependency. Further, the drug offender population in Minnesota prisons requires the MSGC’s attention because correctional resources are at capacity.³ Most importantly, these adjustments will not decrease public safety; instead public safety will be improved through sentences that are more predictive and uniform, and cast a broader net to catch “king-pin” drug dealers.

Past efforts to secure a legislative solution to the problem have been unsuccessful, and the proposals made during the 2015 legislative session fall short for a number of reasons. Consequently, the best course of action would be for the MSGC to adopt of a modified version of the proposal set forth in the 2007 MSGC Updated Report. The advantages of such an approach are that it does not require legislative action; it demonstrates that MSGC is still an independent policy-making voice in the area of drug sentencing; and it offers a system that not only saves 700 prison beds, but can be fine-tuned to effectively punish kingpins and treat addicts.

³ Even if the current prison population is not result of “mass incarceration” as some liberal pundits claim, that does not mean the sentencing reform is not required. Stephanos Bibas, *Prisoners without Prisons, Incarceration is Important, but Sometimes Alternatives Work Better*, National Review, Sept. 21, 2015, at 28.

Attachment 1

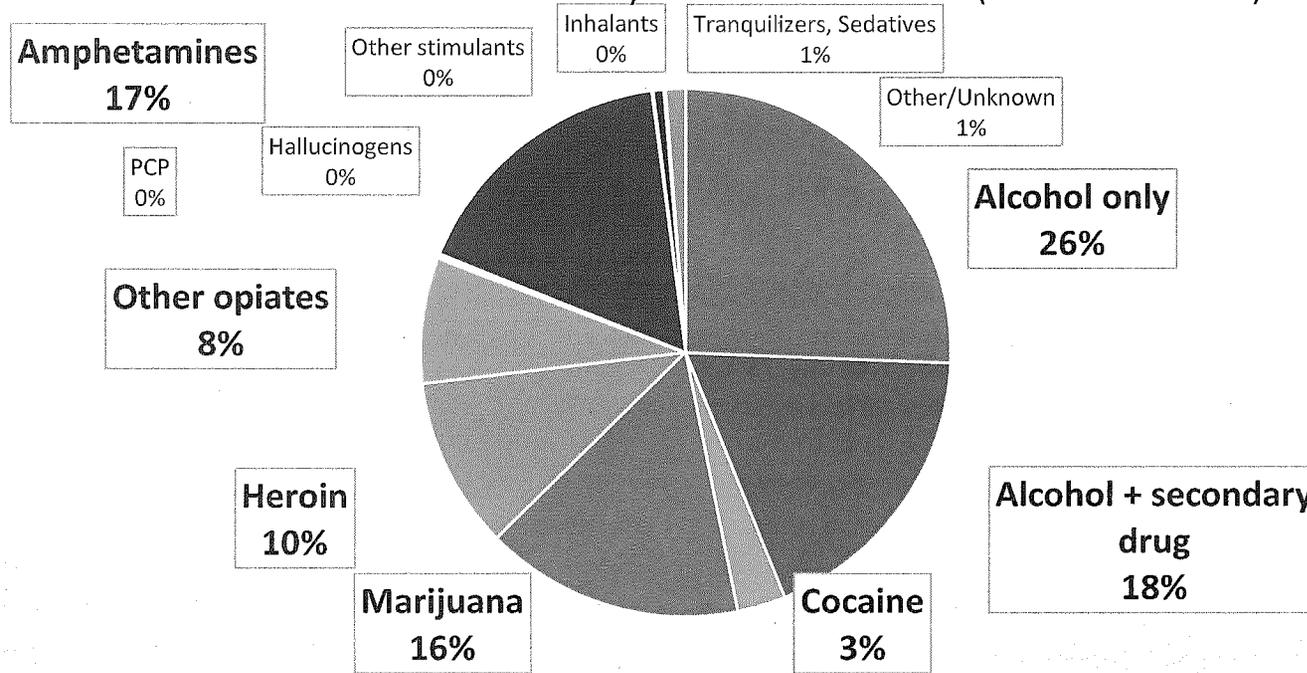
1st and 2nd Degree offenders receive presumptive sentence less than half of the time



Attachment 2

Over 52,000 people in Minnesota are admitted for substance abuse treatment annually

2014 Treatment Admissions by Substance of Abuse (SOURCE: SAMHSA)



2012 Statewide Drug Court Evaluation

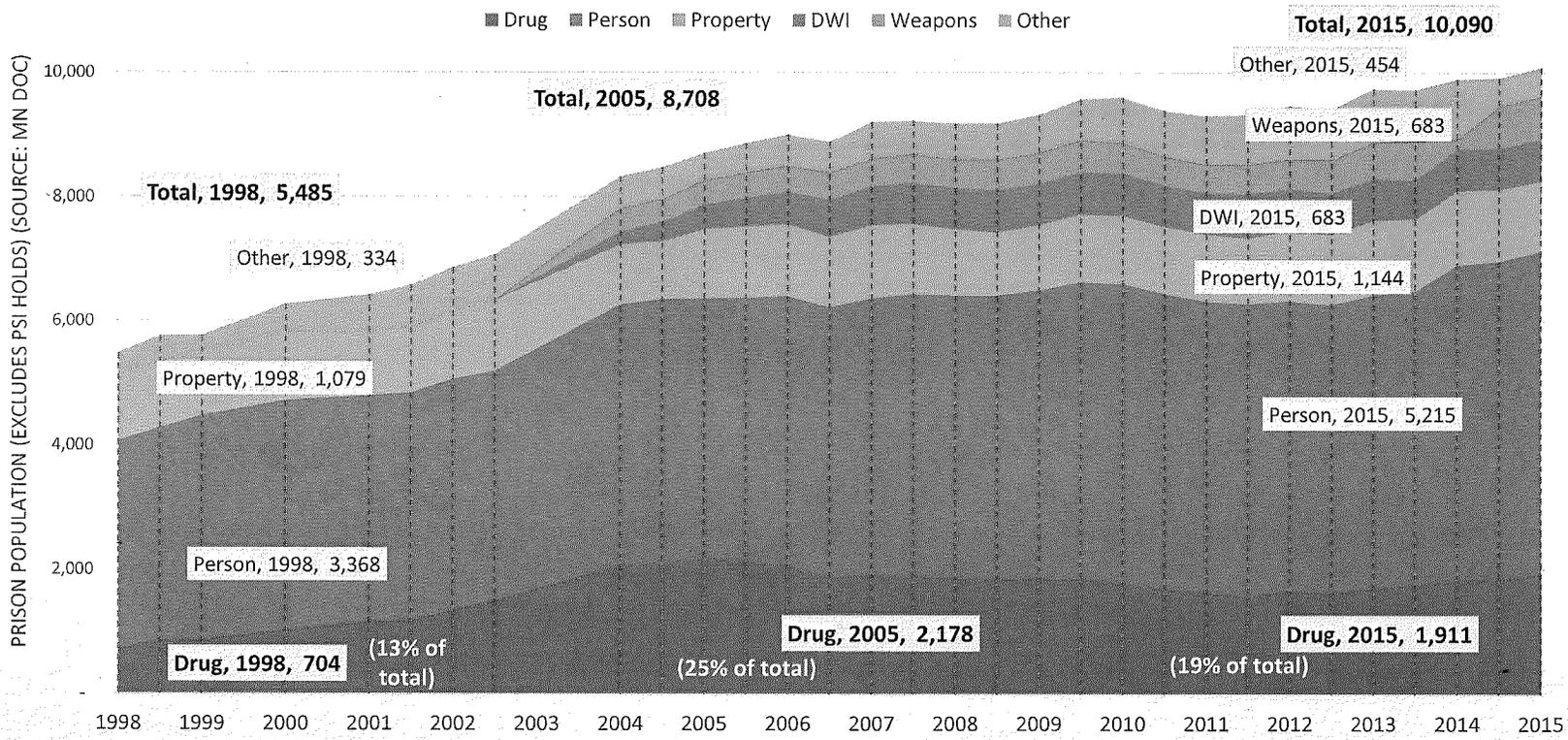
- After 2½ years, drug court participants had a 37% recidivism reduction vs. non-participating comparison group
- For the 54% of participants who graduated drug court, community functioning measures (employment, education, housing, etc.) were more likely to improve
- Overall incarceration costs were reduced for drug court participants
 - But, for Hennepin County Drug Court participants, jail costs are higher than for non-participants

(SOURCE: MINNESOTA JUDICIAL BRANCH)

Attachment 4

Minnesota's drug prisoners more than doubled from 1998 to 2015

Minnesota State Prison Population by Offense Type (1998-2015)



Attachment 5

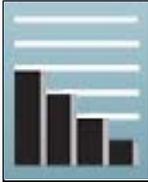
4.C Drug Offender Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denotes range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subjected to local confinement.

| SEVERITY LEVEL OF CONVICTION OFFENSE | | CRIMINAL HISTORY SCORE | | | | | | |
|---|---|--------------------------|--------------------------|---------------------------|---------------------------|----------------------------|----------------------------|-----------------------------|
| | | 0 | 1 | 2 | 3 | 4 | 5 | 6 or More |
| Manufacture Meth | A | 86 74-103 | 98 84-117 | 110 94-132 | 122 104-146 | 134 114-160 | 146 125-175 | 158 135-189 |
| First-degree Sale | B | 71 ² 61-85 | 77 ² 66-93 | 84 ² 72-101 | 94 ² 80-113 | 102 ² 87-122 | 109 ² 95-130 | 123 ² 105-147 |
| First-degree Possession | C | 48 | 58 50-69 | 68 58-81 | 78 67-93 | 88 75-105 | 98 84-117 | 108 92-129 |
| Second-degree Controlled Substance | D | 36 | 42 | 48 | 54 46--64 | 60 51-72 | 66 57-79 | 72 62-84 |
| Third-degree Controlled Substance Failure to affix stamp | E | 21 | 27 | 33 | 39 34-46 | 45 39-54 | 51 44-61 | 57 49-68 |
| Possession of Substances with Intent to Manufacture Meth | F | 18 | 23 | 28 | 33 29-39 | 38 33-45 | 43 37-51 | 48 41-57 |
| Fourth-degree Controlled Substance | G | 12 ¹ | 15 | 18 | 21 | 24 21-28 | 27 23-32 | 30 26-36 |
| Meth Crimes Involving Children and Vulnerable Adults | H | 12 ¹ | 13 | 15 | 17 | 19 17-22 | 21 18-25 | 23 20-27 |
| Fifth-degree Controlled Substance | I | 12 ¹ | 12 ¹ | 13 | 15 | 17 | 19 | 21 18-25 |
| Sale of Simulated Controlled Substance | J | 12 ¹ | 12 ¹ | 12 ¹ | 13 | 15 | 17 | 19 17-22 |

¹ 12¹ = One year and a day

² This number reflects the average sentence received by first-degree offenders who fell within this box based on data from 2004 through 2014.



MINNESOTA SENTENCING GUIDELINES COMMISSION

First-Degree Sale of a Controlled Substance: Sentenced 2004-2014

Minnesota Sentencing Guidelines Commission (MSGC) monitoring data are offender-based, meaning cases represent offenders rather than individual charges. Offenders sentenced within the same county in a one-month period are generally counted only once, based on their most serious offense.

Information Requested: Average durations for First-Degree Sale by Criminal History Score

Analysis:

- 2004-2014
- First-Degree Sale of Controlled Substance under Minn. Stat. § 152.021, subd. 1
- By Criminal History Score and Prison Disposition

From 2004-2014, 1,538 offenders were sentenced for a first-degree sale of a controlled substance crime under Minn. Stat. § 152.022, subd. 1. Of those 1,538 offenders, 94 received a stay of imposition and are excluded from the table below. The table below displays the average pronounced prison sentences by criminal history score for all offenders and by imprisonment status. The table 2 displays the average pronounced prison sentences by criminal history score for all offenders and by imprisonment status for offenders sentenced from 2004-2014.

Average Pronounced Sentences for First-Degree Sale of Controlled Substance: Sentenced 2004-2014 By Criminal History Score and Prison Disposition

| CHS | Prison | | Probation | | Overall | |
|-------|---------|----------|-----------|----------|---------|----------|
| | # Cases | # months | # Cases | # months | # cases | # months |
| 0 | 308 | 71 | 357 | 87 | 665 | 80 |
| 1 | 128 | 77 | 72 | 96 | 200 | 84 |
| 2 | 140 | 84 | 56 | 108 | 196 | 90 |
| 3 | 116 | 94 | 30 | 122 | 146 | 100 |
| 4 | 66 | 102 | 16 | 133 | 82 | 108 |
| 5 | 38 | 109 | 13 | 139 | 51 | 116 |
| 6 | 93 | 123 | 11 | 153 | 104 | 127 |
| Total | 889 | 86 | 555 | 96 | 1,444 | 90 |

Attachment 7

b. Aggravating Factors.

(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;

(b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(c) the offense involved the manufacture of controlled substances for use by other parties;

(d) the offender knowingly possessed a firearm during the commission of the offense;

(e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(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).

(h) the offense involved separate acts of sale possession of a controlled substance in three or more counties;

(i) the offense involved the transfer of controlled substance across a state or international border and into Minnesota;

(j) the offense involved the sale of a controlled substance to a minor or vulnerable adult; and

(k) the defendant, or an accomplice, manufactured, possessed or sold a controlled substance in a school zone, park zone, public housing zone, federal, state, or local correctional facility, or drug treatment facility.

Attachment 8

a. Mitigating Factors.

- (1) The victim was an aggressor in the incident.
- (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
- (3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.
- (4) The offender's presumptive sentence is a commitment but not a mandatory minimum sentence, and either of the following exist:
 - (a) The current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or
 - (b) The current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance.
- (5) Other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense.
- (6) The court is ordering an alternative placement under Minn. Stat. § 609.1055 for an offender with a serious and persistent mental illness.
- (7) In the case of a criminal sexual conduct conviction, the offender is particularly amenable to probation. This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.
- (8) In the case of a controlled substances offense conviction, the offender is found by the district court to be particularly amenable to probation based on adequate evidence that the offender has been accepted by, and can response to, a treatment program in accordance with Minn. Stat. § 152.152 (2014). Adequate evidence shall include evidence that the offender submitted to a drug test that revealed the presence of a controlled substance and there is other objective indicium of chemical dependency.