

MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
Fr: Commissioner Mark Wernick
Re: MSGC Controlled Substance Crime Recommendations to Legislature
Date: October 20, 2015

At its September 23, 2015 meeting, the MSGC Executive Director Nate Reitz summarized three bills now pending before the legislature; SF 773, SF 1382, and HF 2107. These bills reflect two basic approaches to controlled substance crime reform. Both approaches would revise the threshold quantities defining controlled substance crimes with a view towards reducing the number of lower level drug offenders in prison. In SF 1382/HF 2107, this approach is coupled with a list of “aggravating factors” that, if proved beyond a reasonable doubt, would result in a more severe guidelines sentence than what would otherwise be presumed in the absence of an aggravated factor.

A more important difference between the two approaches is in the area of mandatory minimum sentencing. SF 773 would eliminate all mandatory minimum sentencing from chapter 152. SF1382/HF 2107 would eliminate mandatory minimum sentencing for 3rd, 4th, and 5th degree controlled substance crimes, but would increase mandatory minimum sentences for new “aggravated” 1st and 2nd degree controlled substance crimes. HF 2107 would also expand mandatory minimum sentencing for controlled substance crimes involving a firearm.

With these bills as a backdrop, I suggest that the MSGC make the following recommendations to the legislature:

1. Mandatory minimum sentencing provisions in chapter 152 should be repealed and no other mandatory minimum sentencing provisions should be enacted with respect to controlled substance crimes.
2. Controlled substance crime statutes should, at a minimum, return to their pre-*Russell* structure so that punishment for selling drugs can be based primarily on whether an offender is a major wholesaler, a mid-level wholesaler, or a low level dealer.

1. Mandatory minimum sentencing should be eliminated for controlled substance crimes.

SF 1382/HF 2107 create new “aggravated” 1st and 2nd degree controlled substance crimes that require a judge to impose and execute a prison sentence having, at a minimum, the duration called for by the applicable sentencing guideline. A 1st or 2nd degree controlled substance crime becomes “aggravated” under either of the following circumstances: 1) the offender has a prior 1st or 2nd degree controlled substance crime conviction; 2) there are two

aggravating factors (among a list of about 10); or, 3) with respect to 1st degree crimes, the offense involved more than a specified threshold quantity (e.g., 100 grams of cocaine, heroin or methamphetamine).

The MSGC should oppose this mandatory minimum sentencing scheme because: 1) it gives too much sentencing power to the executive branch of government; 2) it is not necessary to protect public safety; and, 3) it will exacerbate the already unfair, racially disparate imprisonment rates that result from drug law enforcement policies.

1. Executive Branch Sentencing

The Minnesota County Attorney's Office Association (MCAA) has recognized the importance of discretion in sentencing controlled substance crimes. In a December 2012 position paper in which the MCAA sought to justify Minnesota's high mitigated departure rates for 1st and 2nd degree controlled substance crimes, the MCAA said the following (at page 6) about the need for discretion in sentencing such crimes:

*[I]rrespective of the amount of drugs seized, when charging, negotiating, or sentencing a drug case an appropriate amount of discretion is necessary. It is important to take into consideration other facts such as the offender's prior criminal history, the drug offender's motivation (profit or addiction), the size of the illegal drug operation, the offender's position in the drug hierarchy, sophistication of operations, the use of dangerous weapons, the offender's propensity for violence, the level of the offender's role in the operation, or his/her cooperation with law enforcement in deciding a convicted drug offender's sentence. While difficulty may exist in attempting to identify which of those considerations should be applied in a given case and how much weight should be afforded to each factor, *it is proper to rest such discretion in our elected professionals in the criminal justice system, i.e., prosecutors and judges.* The fact that a significant number of downward departures occur in this area does not, therefore, necessarily mean the system needs to be fixed. (Emphasis added.)*

Under the mandatory minimum provisions in SF 1382/HF 2107, the foregoing paragraph would remain true, except that the phrase "*and judges*" would be eliminated in aggravated cases.

Under these bills, it is a prosecutor's charging decision that determines whether the mandatory minimum sentencing provisions will be invoked, including when the basis for the "aggravated" charge is a prior conviction. *See State v. Berkelman*, 355 N.W.2d 394, 396 (Minn. 1984) (prior misdemeanor DWI conviction that enhances the penalty for a subsequent DWI conviction is an element of the subsequent DWI offense). A prosecutor can easily avoid the aggravated controlled substance crime statutes by an initial charging decision or by plea bargaining. Unlike a judge's decision to impose or depart from a presumptive sentence, the prosecutor's decision to invoke or avoid a provable mandatory minimum charge is

neither limited by procedural due process nor otherwise subject to judicial review. While the public may expect that mandatory minimum sentencing statutes result in uniformity and certainty in sentencing; that is not the case.¹

A prosecutor's use of mandatory minimum sentencing statutes during plea negotiations can be unseemly. While it is wholly appropriate for a prosecutor to threaten higher charges or threaten to seek more severe penalties if the defendant does not plead guilty, prosecutors should not be empowered to tell a defendant, in effect, "plead guilty under my terms or I will take away the judge's power to consider leniency." While prosecutors have a duty to serve the public interest, they are also litigants who, unlike judges, play to win. Particularly in the area of controlled substance crime, where sentencing discretion is so important (as the MCAA has acknowledged), the final sentencing decision should reside in the judicial branch, appropriately constrained by sentencing guidelines. *See State v. Bluhm*, 676 N.W.2d 649, 655 (Minn. 2004) (Gilbert, J., concurring) ("In the context of sentencing for drug related charges, one size simply does not fit all.").

2. Public Safety

a) Mandatory Minimum Sentencing Based on Prior 1st or 2nd Degree Conviction

As stated above, under SF 1382/HF 2107, a 1st or 2nd degree controlled substance crime is an aggravated crime calling for mandatory minimum sentencing if the defendant has a prior 1st or 2nd degree conviction. This mandatory minimum provision apparently assumes that someone previously convicted of a 1st or 2nd degree controlled substance crime was determined to be a major drug dealer. This assumption is not true.

In 1989, proof of drug amounts took over as a proxy for determining an offender's position within the drug distribution hierarchy. MSGC, *Drug Sentencing in Minnesota, August 26, 2015*, slide 4 (hereafter "Drug Sentencing"). For 1st, 2nd, and 3rd degree controlled substance crimes, the hierarchy was defined in terms of an actual sale amount (the word "sell" did not include possession with intent to sell) or an actual possession amount (where intent to sell would be presumed). According to the legislative history, the possession/sale amounts within each degree of a controlled substance crime were designed to define the same level in the drug distribution hierarchy. Swanson, *Minnesota's Controlled Substance Law: A History*, Bench & Bar of Minnesota, December 1999. With respect to cocaine, heroin and methamphetamine, the possession/sale threshold amounts defined the following drug distribution hierarchy:

- 1st Degree – 500 grams possession (25 grams for crack), 50 grams sale (10 grams for crack). These thresholds were designed to describe a major drug wholesaler. The

¹ See generally, Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Justice 65, 67-68 (2009).

legislature determined that someone in possession of 500 grams was likely selling 50 gram quantities.² In 1989, the presumptive sentence for this offense at criminal history score 0 was 86 months imprisonment.

- 2nd Degree – 50 grams possession (6 grams for crack), 10 grams sale (3 grams for crack). These thresholds were designed to describe a mid-level drug wholesaler. The legislature determined that someone in possession of 50 grams was likely selling 10 gram quantities. In 1989, the presumptive sentence for this offense at criminal history score 0 was 48 months imprisonment.
- 3rd Degree – 10 grams possession (3 grams for crack), sale of any amount. These thresholds were designed to describe a low level drug wholesaler or a retail dealer. The legislature determined that someone in possession of 10 grams was likely selling 3 ½ gram (“8-ball”) quantities or less. In 1989, the presumptive sentence for this offense at criminal history score 0 was probation.

In *State v. Russell*, the Minnesota Supreme Court found that the disparate impact on black defendants resulting from the powder/crack cocaine distinction could not be justified; and, as a result, the distinction violated the Minnesota Constitution’s equal protection clause. 477 N.W.2d 886 (Minn. 1991).³ The Court also questioned (but did not decide) the constitutionality of the mandatory intent to sell presumption based on possession of a certain amount.⁴ The Court’s equal protection decision meant that the higher, powder cocaine quantity thresholds governed all cocaine offenses.

In 1991, the Minnesota legislature responded to *Russell* in two ways. First, instead of allowing powder cocaine quantity thresholds to govern crack, as contemplated by the Minnesota Supreme Court, the legislature decreased the quantity thresholds for powder cocaine to those formerly set for crack.⁵ Second, the legislature amended the definition of “sell” to include possession with intent to sell. Minn. Stat. § 152.01, subd. 15a(3).

These changes had drastic consequences. For example, before *Russell*, possession of 10 grams of cocaine (with intent to sell presumed) was a 3rd degree crime; i.e., a crime describing a low level wholesaler or a retail dealer. After *Russell*, the very same conduct, possession of 10 grams with intent to sell, became a 1st degree crime. This change was not motivated by new evidence about drug distribution markets or the dangers of illegal drugs.

² These amounts could be aggregated over 90 days.

³ The cocaine/crack distinction first arose in Minnesota statutes in 1987. In 1988, 96.6% of the people charged with possession of crack cocaine were black while 79.6% of the people charged with possession of powder cocaine were white. *Russell*, 477 N.W.2d at 887 n.1.

⁴ The mandatory presumption was later upheld in *State v. Clausen*, 493 N.W.2d 113 (Minn. 1992).

⁵ In 1997 the legislature similarly reduced the quantity thresholds for heroin and methamphetamine presumably because of its 1989 determination that there was no reason to treat these drugs differently from cocaine.

As most every criminal justice observer recognized at the time, this change was motivated by political animus towards the Minnesota Supreme Court.

The post-*Russell* change in the controlled substance statutes did not result in a change to the governing sentencing guidelines. The high mitigated departure rates for 1st and 2nd degree controlled substance crimes reflect that these statutes do not define major or mid-level drug wholesalers. From 2011 through 2013, only 33% of the defendants convicted of a 1st degree controlled substance crime received a guidelines sentence. Drug Sentencing, slide 20. Similarly, only 46% of the defendants convicted of a 2nd degree controlled substance crime received a guidelines sentence (with that larger percentage likely reflecting cases bargained down from 1st degree). *Id.* With substantially less than 1/2 of the defendants convicted of 1st or 2nd degree controlled substance crimes receiving a guidelines sentence, one cannot fairly say that the people sentenced for these crimes were major or mid-level drug wholesalers.

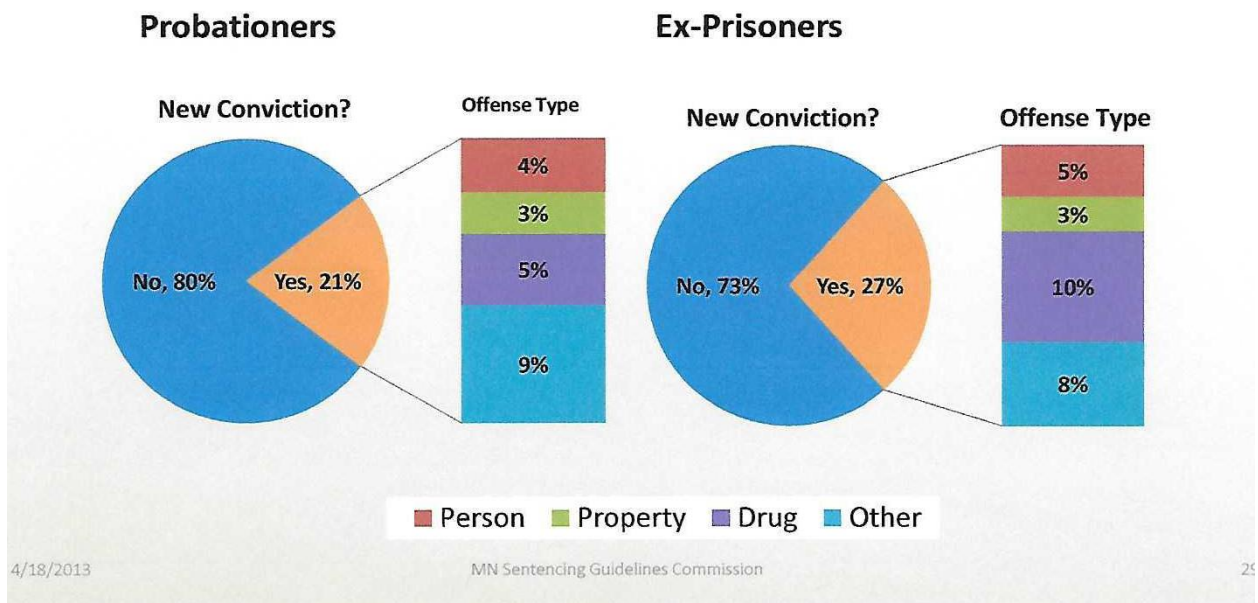
Because Minnesota's 1st and 2nd degree controlled substance crime statutes have not accurately defined major or mid-level drug wholesalers, public safety does not justify their use as a basis for mandatory minimum sentencing.

b) Mandatory Minimum Sentencing Based on other Factors

Regardless of these flawed statutes, public safety does not justify mandatory minimum sentencing for serious controlled substance crimes.

MSGC research reveals that 1st and 2nd degree controlled substance crime probationers have lower recidivism rates than do offenders imprisoned for those offenses. Drug Sentencing, slide 29:

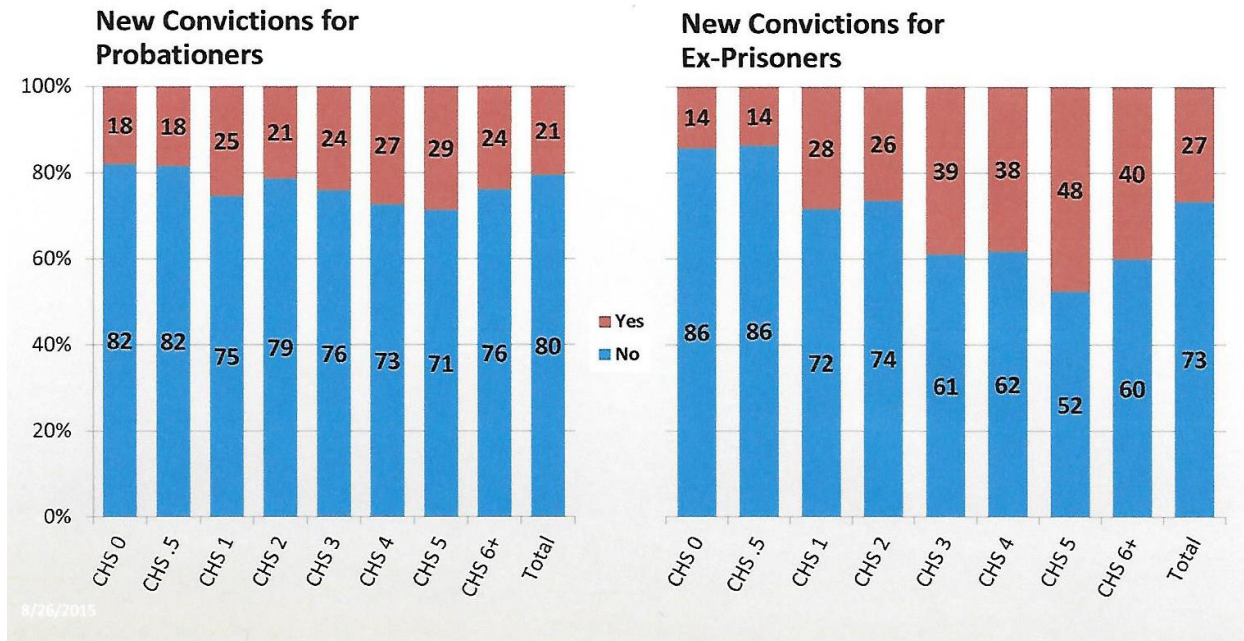
1st & 2nd degree drugs: Probationers do better than ex-prisoners ...



Note that under “Offense Type,” 10% of the new crimes committed by ex-prisoners were drug crimes, compared to 5% for probationers.

The next graph shows that the lower recidivism rates for probationers applies especially to offenders having significant criminal history scores. Drug Sentencing, slide 30:

... and this is true across most criminal history scores...



The disparity favoring probationers is greatest among offenders having a criminal history score of 4 or more at the time they were sentenced for the drug offense. The largest disparity occurred at criminal history score 5, where the recidivism rate for probationers was 29% while the recidivism rate for ex-prisoners was 48%. This research demonstrates that criminal justice professionals, including probation officers and judges, working together, can identify repeat offenders who have “hit a wall” and who are ready for effective community supervision.

Even among repeat offenders who are not good candidates for probation, mitigated prison sentences may still be appropriate, based on many of the factors described in the December 2012 MCAA position paper, quoted above. Indeed, research reveals that mitigated prison sentences “cause no significant differences in recidivism rates or timing of recidivism.” Drug Sentencing, slide 32.

The foregoing evidence demonstrates that public safety does not justify the elimination of judicial discretion in sentencing “aggravated” controlled substance crimes.

3. Racially Disparate Impact on Imprisonment Rates

MSGC research shows that while the black adult population in Minnesota from 2011-2013 was only 4% of the total adult population; the black population in prison for drug crimes was 30% of the imprisoned drug offenders. In contrast, while the white adult population in Minnesota was 86% of the total adult population; the white population in prison for drug crimes was 49% of the imprisoned drug offenders. Drug Sentencing, slide 19. Assuming a

2011-2013 adult population in Minnesota of 4 million,⁶ with a drug prisoner population of 1900 (Drug Sentencing, slide 17), 27 out of 100,000 white adults were imprisoned for drug offenses in 2011-2013 while 356 out of 100,000 black adults were so imprisoned. This is a 13 to 1 disparity rate.⁷

This racial disparity in imprisonment rates for drug offenders should be troubling to Minnesota lawmakers. The weight of the evidence suggests that a 13-1 disparity in imprisonment rates cannot be justified by the relative rates that blacks and whites in Minnesota commit serious drug offenses. See Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 *Stanford Law and Policy Review* 257, 266-68 (2009) (hereafter “Fellner”) (arguing that blacks and whites commit drug offenses, including trafficking offenses, at roughly the same rate); Tonry and Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *Crime & Justice* 1, 25-27 (2008) (hereafter “Tonry and Melewski”) (same). University of Minnesota Law School Professor Richard Frase cites other evidence showing that because of “neighborhood disadvantage and other social and psychological stressors that disproportionately afflict blacks...” blacks may use and sell drugs at higher rates than whites. But, he says, any disparity in offense rates is likely not enough to explain the disparity in black imprisonment rates. Frase, *What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations*, 38 *Crime & Justice* 201, 238-241 (2009) (hereafter Frase).

According to the authors above, the racial disparity in imprisonment rates for drug offenses is largely attributable to racial disparities in arrest rates: “The data demonstrates clearly and consistently that blacks have been and remain more likely to be arrested for drug offending behavior relative to their percentage among drug offenders than whites who engage in the same behavior.” Fellner at 269-270. Similar patterns are found in Minnesota – the 4% of the adult population who are black account for 21% of adult drug arrests.⁸

Unlike arrests for violent crimes, “drug arrests are often more a reflection of law enforcement policies than offense behavior: drug crime has few civilian witnesses and direct victims, so arrests are almost always the result of police decisions to target certain areas or suspects.” Frase at 238. Throughout the country, there is a tendency to allocate drug enforcement resources on poor, densely populated, urban areas where black people are more likely to be arrested. Generally, this allocation of resources occurs for two reasons.

⁶ United States Census Bureau, Quick Facts Beta 2.0.

⁷ I calculated the imprisonment rate as recognized by criminologists: Out of 1900 drug prisoners, 931 were white (49%) and 570 were black (30%). I divided 931 white prisoners by 3,440,000 white adults (86% of adult population) and 570 black prisoners by 160,000 black adults (4% of adult population), and then multiplied each number by 100,000. In 2008, Human Rights Watch published a study showing that in 2003, in Minnesota, the white/black disparity in imprisonment rates for drug offenses was 10 to 1 (23 out of 100,000 white adults, 234 out of 100,000 black adults). Human Rights Watch, *Targeting Blacks*, p. 15 (2008).

⁸ Minn. Bureau of Criminal Apprehension, Table 15, *Offense and Race of persons arrested for 2014*.

First, in poor, urban neighborhoods, drug sales are more likely to occur in public places. Fellner at 270 n.59; Tonry and Melewski at 29. As a result, police can make more warrantless arrests based on observed behavior than they can in working, middle or upper class neighborhoods, where search warrants are more likely required. Racial profiling in making traffic stops or “stops and frisks” play a significant role in this regard. Fellner at 270 n.58, Tonry and Melewski at 20, Frase at 241-242.

Second, people who sell drugs in poor, urban neighborhoods are more likely to sell to strangers. Fellner at 270 n.59; Tonry and Melewski at 29. Undercover police officers can more readily infiltrate distribution networks that sell to strangers than networks having more stable buyer-seller relationships.

Consistent with these observations, New York Police Commissioner Lee Brown has summarized the racial disparity in drug arrests as follows:

“In most large cities, the police focus their attention on where they see conspicuous drug use—street-corner drug sales—and where they get the most complaints. Conspicuous drug use is generally in your low-income neighborhoods that generally turn out to be your minority neighborhoods.... It’s easier for police to make an arrest when you have people selling drugs on the street corner than those who are [selling or buying drugs] in the suburbs or in office buildings. The end result is that more blacks are arrested than whites because of the relative ease in making those arrests.”

Fellner at 271, citing Eva E. Bertram et al., *Drug War Politics* 41 (1996).

Law enforcement officials may reasonably conclude that selling drugs in conspicuous places causes more social harm than selling drugs in inconspicuous places. But the question still remains; does that increase in social harm justify the harm caused by lengthy, mandatory minimum sentences?

In making this assessment, it must be recognized that racially disparate imprisonment rates *in themselves* cause social harm. This is true regardless of whether the disparate imprisonment rates reflect actual offense rates. As stated by Professor Frase:

The criminal justice system’s response to crime in poor, nonwhite areas clearly magnifies and perpetuates racial differences in socioeconomic status. These effects are undesirable in themselves, and they also cause more crime. Poverty and lack of opportunity are associated with higher crime rates; crime leads to arrest, a criminal record, and often a jail or prison sentence; past crimes lengthen those sentences; offenders released from prison or jail confront preexisting personal disabilities as well as family and neighborhood dysfunction that are likely to have been made worse by the conviction and

incarceration of the offender and many others like him, returning from prison to ... disadvantaged communities....

Frase, *Just Sentencing, Principles and Procedures for a Workable System*, pp. 218-19 (Oxford Press 2013).

Even if racially disparate *arrest* rates for drug offenses are justified by the conspicuousness of drug dealing activity; that arrest disparity becomes unfairly exacerbated by mandatory minimum prison sentences. As demonstrated earlier, public safety is not compromised by providing drug offenders with opportunities for probation or shorter prison terms. Because mandatory minimum sentencing is not required to serve public safety, any contribution that such sentencing would make to racially disparate imprisonment rates would be especially unfair.

In addition, despite the more conspicuous nature of drug dealing in poor, urban neighborhoods, the weight of the evidence suggests that the racially disparate arrest and imprisonment rates for drug offenses do not reflect actual racial differences in offense rates. Fellner at 266-268, Tonry and Melewski at 25-27, Frase at 238-241. To maintain its credibility, the criminal justice system must be, and must appear to be, even-handed. In the drug crime context, mandatory minimum sentencing has the appearance of exacerbating unequal enforcement of the law.

Several of the aggravating factors listed in SF 1382/HF 2107 have a particularly unnecessary and unfair potential to increase the racial disparity in Minnesota imprisonment rates for drug offenses:

- Prior conviction for a crime of violence (other than drug crimes): The use of criminal history scores is a significant factor relating to Minnesota's racially disparate imprisonment rates. Frase at 61. Mandatory minimum sentencing on the basis of prior convictions has the potential to make the problem worse. This potential for unfairness is unnecessary. Prior convictions are already taken into account in determining the presumptive guidelines sentence, with prior convictions for crimes of violence weighted more heavily.
- Benefit of a criminal gang: Mandatory minimum sentencing on this basis is likely to have a disparate impact on racial minorities living in poor, urban areas. This potential for unfairness is also unnecessary. It is already a presumptive prison commitment crime to commit a felony for the benefit of a gang.
- Three or more separate acts of sale or possession: Because of the wide enforcement discretion that this factor allows, a multiple transaction aggravating factor may have a racially disparate impact. As with the factors described above, this potential for unfairness is unnecessary. A multiple transaction factor is already included in the underlying crimes, which allow for the aggregation of drug quantities over 90 days.

- Possession or sale occurred in a school, park, or public housing zone: This provision is also likely to focus on densely populated, urban areas, with the resulting racially disparate impact. The public housing provision is particularly troubling. Presumably, drug dealing adversely affects private housing to the same extent as public housing.

In summary, the mandatory minimum sentencing provisions in SF 1382/HF 2107 give undue power to the executive branch to make sentencing decisions, are unnecessary to protect public safety, and will likely exacerbate the already unfair racial disparate imprisonment rates for drug offenses. In order to reduce drug crime in disadvantaged neighborhoods, more resources should be devoted to long term strategies. The legislature's recent focus on investing in early childhood health and education is a step in the right direction. Mandatory minimum sentencing is a step in the wrong direction.

2. Controlled substance crime statutes should, at a minimum, return to their pre-*Russell* structure so that punishment for selling drugs can be based primarily on whether an offender is a major wholesaler, a mid-level wholesaler, or a low level dealer.

As described earlier, the 1989 controlled substance crime structure represented an effort to use drug quantities as a proxy to define an offender's role in the chain of drug distribution. This structure was abandoned in response to the *Russell* decision. The legislature should renew its effort to define drug crimes in terms of an offender's role in the chain of drug distribution.⁹

SF 773 attempts to revive the 1989 structure for defining major, mid-level, and low level drug offenders by returning to the 1989 drug quantity thresholds for 1st through 3rd degree crimes. But the bill's attempt to revive the 1989 structure is flawed because it neglects to eliminate "possession with intent to sell" from the definition of "sell." With respect to

⁹ The legislature may wish to cease using drug amounts as a proxy for an offender's role in the chain of drug distribution. The legislature could simply enact a statute proscribing unlawful distribution of controlled substances, and then leave it to the MSGC, using a separate controlled substance guidelines grid, to determine severity levels based on the offenders role in the distribution system. *See Note, Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 Harvard Journal on Legislation 389 (2014). In defining an offender's role, the MSGC could be guided by federal law definitions for organizers, leaders, managers, and supervisors. Recognizing the proof problems associated with these definitions, the grid could be advisory (as are the federal sentencing guidelines), and therefore not subject to *Blakely* procedures. Judges would still be required to do a guidelines calculation, and to explain the reasons for any departure. But on appellate review, a departure would be upheld so long as the sentencing decision was reasonable in light of the statutory purposes of sentencing. *See Gall v. United States*, 128 S.Ct. 586 (2007). This system would recognize the heightened need for discretion in sentencing drug offenses regardless of the amounts of drugs seized.

cocaine, heroin and methamphetamine, the effect of this omission can be seen in the following graph:

Quantity Thresholds	1989 (requiring actual sale)	SF 773 (“sell” includes possession with intent to sell)
1 st Degree: Possession of 500 grams; sale of 50 grams.	Offense describes someone who possesses a 500 gram inventory, presumably or actually selling 50 gram quantities.	Offense includes someone who possesses a 50 gram inventory, intending to sell smaller quantities.
2 nd Degree: Possession of 50 grams, sale of 10 grams.	Offense describes someone who possesses a 50 gram inventory, presumably or actually selling 10 gram quantities.	Offense includes someone who possesses a 10 gram inventory, intending to sell smaller quantities.
3 rd Degree: Possession of 10 grams, sale of any amount.	Offense describes someone who possesses a 10 gram inventory, presumably or actually selling smaller quantities.	Offense includes same offense as 2 nd degree, described above.

In its current form, SF 773 fails to establish a 1st or 2nd degree crime that adequately defines major or mid-level drug wholesalers. SF 1382 and HF 2107 similarly fail, only more so.

As an option to eliminating possession with intent to sell from the definition of “sell,” the legislature could eliminate the mandatory intent to sell presumptions based on quantity thresholds. If this was done (with respect to cocaine, heroin and methamphetamine), a 1st degree crime would require sale or possession with intent to sell 500 grams; a 2nd degree crime would require sale or possession with intent to sell 50 grams; and, a 3rd degree crime would require sale or possession with intent to sell any amount. With respect to 1st and 2nd degree crimes, prosecutors should have no difficulty proving intent to sell based on proof of possession of 500 grams or 50 grams, respectively. With respect to 3rd degree crimes, especially at 10 gram amounts or less, proving intent to sell may be more difficult. But, for those smaller amounts, that is as it should be.

In summary, whatever quantity thresholds the legislature may decide to use, those thresholds must start high enough to fairly define major drug wholesalers, mid-level drug wholesalers, and low level drug wholesalers or retail dealers. By fairly defining these different roles in the distribution system, the MSGC would be in a better position to assign credible severity levels for controlled substance crimes.

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