

2023 Regular Session Laws

Conforming Changes to the Sentencing Guidelines

June 5, 2023

Background

After each session, the Commission reviews “crime[s] created or amended by the legislature in the preceding session” for possible related modifications to the Sentencing Guidelines. In accordance with Minn. Stat. § 244.09, subd. 11, the Commission may make such modifications without advance submission to the Legislature. This paper reviews crime laws created or amended in the 2023 Regular Session that contain conforming amendments that require review by the Commission.

This paper is to be presented to the Commission on June 7 and, if required, June 8, 2023. Unless the Commission decides otherwise, it is understood that any modifications adopted by the Commission will be subject to a public hearing on July 20, 2023, and to the Commission’s final action on July 27, 2023. It is also understood that the specified effective date of all modifications is August 1, 2023, to apply as provided in Guidelines section 3.G.

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This document was prepared by the staff of the Minnesota Sentencing Guidelines Commission for the Commission’s review. This document has not been adopted by the Commission and does not necessarily represent its views.

Legislation Apparently Requiring Conforming Guidelines Changes

In staff’s opinion, the following legislative changes require conforming changes to the Sentencing Guidelines.

1. Bias Crimes Expanded

Act: [2023 Minn. Laws ch. 52, art. 4, §§ 4, 5, 13, 14, & 18.](#)

Description: The act changes the elements for of bias-motivated crimes: assault motivated by bias, criminal damage to property in the second and third degrees motivated by bias, and harassment motivated by bias under Minn. Stat. section 609.2231, subdivision 4; 609.2233; 609.595, subdivisions 1a, 2; and 609.749, subdivision 3.

The act expands biased motivation to encompass—

- Categories of ethnicity, gender, gender identity, and gender expression;
- Partial, but substantial, biased motivation; and
- Association with someone in, or perceived to be in, one of the categories.

For the criminal damage to property offenses, the act clarifies that intent to intimidate or harm due to one of the categories satisfies the elements of the crime.

Effective date: August 1, 2023, and applies to crimes committed on or after that date.

References: Minn. Stat. §§ [609.2231](#); [609.2233](#); [609.595](#); [609.749](#); [Guidelines sections 2.G.11; 2.D.3.b\(11\)](#). (2022).

Long-Term Fiscal Impact (H.F. 181-1UE): Minimal impact.

Demographic Impact (H.F. 181-1UE): Not applicable.

Sentencing Guidelines Considerations: The Guidelines rank the severity of bias-motivated crimes as follows:

Table 1. Severity-Level Ranking of Felony Bias-Motivated Crimes.

Act	Without-Bias Statute	Without-Bias Severity	With-Bias Statute	With-Bias Severity
Assault (2nd or Subsequent)	609.225, subd. 2	Gross Misdemeanor	609.2231, subd. 4(b)	SL 1
Criminal Damage to Property \$501–\$1,000	609.595, subd. 2	Gross Misdemeanor	609.595, subd. 1a	SL 1
Harassment	609.749, subd. 2	Gross Misdemeanor	609.749, subd. 3(a)(1)	SL 4

When felony assault is motivated by bias, Minn. Stat. § 609.2233 increases the statutory maximum penalty by 25 percent. The Guidelines, likewise, increase the presumptive duration by 25 percent.

The Guidelines' nonexclusive list of factors that may be used as reasons for aggravated departure includes the following: "The offender intentionally selected the victim or the property against which the offense was committed, in whole or in part, because of the victim's, the property owner's, or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age, or national origin." Guidelines 2.D.3.b(11).

In 2009, the Legislature essentially reproduced the Guidelines' nonexclusive list of aggravated departure factors in Minn. Stat. § [244.10, subd. 5a](#). The 2023 Legislature did not alter subd. 5a(11), the language of which remains consistent with the language of the Guidelines' departure factor quoted above.

Staff Recommendation: Staff recommends the Commission make changes to the departure factor and associated commentary conforming to the 2023 changes to bias crimes. These recommendations, as applied to the Sentencing Guidelines, are shown below. (In the future, the Commission may wish to recommend that the 2024 Legislature amend Minn. Stat. § 244.10, subd. 5a, to conform to this change.)

Possible modifications to 2022 Minn. Sentencing Guidelines & Commentary section 2.D.3:

[2.]D. Departures from the Guidelines * * *

3. Factors that may be used as Reasons for Departure. The following is a nonexclusive list of factors that may be used as reasons for departure: * * *

- b. Aggravating Factors. * * *

- (11) The offender intentionally selected the victim or the property against which the offense was committed, in whole or in substantial part, because of the victim's, the property owner's, or another's actual or perceived race, color, ethnicity, religion, sex, gender, sexual orientation, gender identity, gender expression, age, national origin, or disability as defined in Minn. Stat. § 363A.03, ~~age, or national origin~~ or because of the victim's actual or perceived association with another person or group of a certain actual or perceived race, color, ethnicity, religion, sex, gender, sexual orientation, gender identity, gender expression, age, national origin, or disability as defined in Minn. Stat. § 363A.03.

* * *

2.D.308. *The aggravating factor involving bias motivation under section 0 cannot be used when sentencing an offender for a crime with an increased statutory maximum penalty under Minn. Stat. § 609.2233 (felony assault motivated by bias), or for a crime that was elevated to a felony offense because of bias motivation (e.g., Minn. Stat. §§ 609.2231, subd. 4 (fourth-degree assault); 609.595, subd. 1a(a) (criminal damage to property); 609.749, subd. 3(a)(1) (harassment)). The Commission intends that a penalty for a bias-motivated offense be subject to enhancement only once.*

In determining when domestic violence, sexual assault and sexual abuse cases are motivated by a victim's sex, gender, sexual orientation, gender identity, or gender expression and may be appropriately enhanced, proof must be shown of at least one factor, such as: offender makes abusive or derogatory references based on sex, gender, sexual orientation, gender identity, or gender expression; offender states hatred for a sex, gender, sexual orientation, gender identity, or gender expression as a class; crime involves excessive violence, including mutilation; or there are multiple victims of the same sex, gender, sexual orientation, gender identity, or gender expression.

2. “Felony” Redefined

Act: [2023 Minn. Laws ch. 52, art. 6 §§ 4–7, 9, & 16](#).

Description: The act redefines a “felony” to be a crime for which a sentence of imprisonment for one year or more may be imposed. In statute, a “gross misdemeanor” or a “one year” offense is deemed to have a 364-day maximum penalty, and the Revisor of Statutes is instructed to change “one year” to “364 days” accordingly. A sentence of imprisonment for one year or 365 days imposed or executed before July 1, 2023, shall be deemed to have been a sentence for 364 days. Going forward, a one-year sentence will commit the defendant to the custody of the Commissioner of Corrections.

Effective date: Immediate and retroactive effect.

References: Minn. Stat. §§ [609.02](#); [609.03](#); [609.105](#); [609.1055](#). (2022).

Long-Term Fiscal Impact: Not applicable.

Demographic Impact: Not applicable.

Sentencing Guidelines Considerations: There are several references to a felony sentence being a sentence of “one year and one day” in the Guidelines. There is an example in commentary to an out-of-state gross misdemeanor sentence of 365 days.

Note that mandatory minimum penalties and statutory maximum penalties are not altered. Thus, for example, neither the “one year plus one day” mandatory minimum of Minn. Stat. § 609.11, subd. 4, nor the

“one year and one day” statutory maximum for Threats of Violence (Replica Firearm) (Minn. Stat. § 609.713, subd. 3(a)), is changed.

Staff Recommendation: Staff recommends making conforming changes to the Guidelines and Commentary. Incidentally, in Comment 2.E.02, staff also recommends deleting an obsolete reference to a mandatory minimum penalty that was repealed in [2016 Minn. Laws ch. 160 § 7](#).

These recommendations, as applied to the Sentencing Guidelines, are shown below.

Possible modifications to 2022 Minn. Sentencing Guidelines & Commentary sections 2 & 4 (displaying in red proposed language expected to take effect August 1, 2023):

[2.]B. Criminal History * * *

2. Custody Status at the Time of the Offense. * * *

c. Additional Duration. An **additional three months** must be added to the duration of the appropriate cell time, which then becomes the presumptive duration, when:

(1) at least one-half custody status point is assigned; and

(2) the offender’s total Criminal History Score exceeds the maximum score on the applicable Grid (i.e., 7 or more).

Three months must also be added to the lower and upper end of the range provided in the appropriate cell on the applicable Grid.

If the current conviction is an attempt, conspiracy, or other offense with a sentence modifier that reduces the presumptive sentence, the three months must be added to the cell duration before the duration is reduced as outlined in section 2.G. The presumptive duration, however, cannot be less than one year ~~and one day~~.

* * *

2.B.502. *The Commission concluded that convictions from other jurisdictions must, in fairness, be considered in the computation of an offender’s criminal history score. No uniform nationwide characterization of the terms “felony,” “gross misdemeanor,” and “misdemeanor” exists. Therefore, the Commission recognizes that criminal conduct may be characterized differently by the various state and federal criminal jurisdictions. Generally, the classification of prior offenses as petty misdemeanors, misdemeanors, gross misdemeanors, or felonies should be determined by current Minnesota offense definitions and sentencing policies, except as provided in section 2.B.7. For example, an assault with a*

dangerous weapon committed in Texas that received a ~~364-day~~ 365-day sentence would be given one gross misdemeanor unit due to the sentence length despite being the equivalent by definition of a Minnesota felony second-degree assault.

[2.]C. Presumptive Sentence

1. Finding the Presumptive Sentence. * * *

Each cell on the Grids provides a fixed sentence duration. Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitments. For cells above the solid line, the Guidelines provide both a fixed presumptive duration and a range of time for that sentence except as provided in section 2.C.3.c(1). The shaded areas of the grids do not display ranges. If the duration for a sentence that is a presumptive commitment is found in a shaded area, the standard range – 15 percent lower and 20 percent higher than the fixed duration displayed – is permissible without departure, provided that the minimum sentence is not less than one year ~~and one day~~, and the maximum sentence is not more than the statutory maximum.

* * *

2.E.02. *When the mandatory minimum sentence is ~~for~~ less than one year ~~and one day~~, the Commission interprets the minimum to mean any incarceration including time spent in local confinement as a condition of a stayed sentence. The presumptive disposition is not commitment unless the case falls above the dispositional line on the applicable Grid. An example is a conviction for a Fifth-Degree-Controlled Substance Crime. If the offender has previously been convicted of a controlled substance crime, the mandatory minimum law requires at least six months incarceration, which can be served in a local jail or workhouse.*

* * *

2.F.103. *A concurrent sentence is presumptive if ~~the result is that an offender will serve~~ it results in a longer time to serve in prison. For example, an inmate with a Criminal History Score of 6 assaults a prison guard ~~during his term of imprisonment and has only one month remaining until his~~ before supervised release ~~term~~ is scheduled to begin. The Guidelines would typically recommend that the assault run consecutively to the unexpired prior except that a concurrent sentence is longer; therefore, a concurrent sentence is presumptive.*

$$\begin{array}{r}
 1 \text{ month (before scheduled supervised release date)} \\
 + \quad 12 \text{ mos. } \del{\text{and 1 day}} \text{ (Severity Level 1; Criminal History Score of 1)} \\
 = \quad 13 \text{ mos. } \del{\text{and 1 day}}, \text{ consecutive}
 \end{array}$$

vs.

19 months, concurrent (Severity Level 1; Criminal History Score of 6).

* * *

[2.]G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers

1. In General. Sentence modifiers are statutes or policies that aid in defining the punishment for the underlying offense. Modifiers can affect either or both the duration and the disposition of the presumptive sentence. Any change to the presumptive fixed sentence under this section must also be applied to the upper and lower ends of the range found in the appropriate cell on the applicable Grid, except that the presumptive sentence cannot be less than one year ~~and one day~~, nor can it be less than any applicable mandatory minimum.
2. Attempt or Conspiracy. ~~When an offender is sentenced for~~ For an attempted offense under Minn. Stat. § 609.17 or for conspiracy to commit an offense under Minn. Stat. § 609.175, the presumptive duration is one-half of that found in the appropriate cell on the applicable Grid for the underlying offense. When the underlying offense has a mandatory minimum sentence of a year ~~and a day~~ or more, the presumptive duration is the mandatory minimum sentence in statute or one-half the duration found in the appropriate cell on the applicable Grid, whichever is longer.

* * *

12. Attempt or Conspiracy to Commit First-Degree Murder. When an offender is sentenced for attempt or conspiracy to commit murder in the first degree under Minn. Stat. § 609.185 or murder of an unborn child in the first degree under Minn. Stat. § 609.2661, the presumptive disposition is commitment. The presumptive durations are as follows:

SEVERITY LEVEL OF CONVICTION OFFENSE	CRIMINAL HISTORY SCORE						
	0	1	2	3	4	5	6 or more
<i>Conspiracy / Attempted Murder, 1st Degree</i>	180 153-216	190 162-228	200 170-240	210 179-240 ¹	220 187-240 ¹	230 196-240 ¹	240 204-240 ¹

¹ Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum

sentence is not less than one year ~~and one day~~ and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

* * *

4.A. Sentencing Guidelines Grid

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

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree (Intentional; Drive-By-Shootings)</i>	11	306 <i>261-367</i>	326 <i>278-391</i>	346 <i>295-415</i>	366 <i>312-439</i>	386 <i>329-463</i>	406 <i>346-480</i> ^{2,1}	426 <i>363-480</i> ^{2,1}

* * *

<i>Felony DWI Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 <i>46-64</i>	60 <i>51-72</i>	66 <i>57-79</i>	72 <i>62-84</i> ^{2,3,1,2}
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* * *

<i>Nonresidential Burglary</i>	4	12 ¹	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Theft Crimes (\$5,000 or less) Check Forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 <i>18-25</i>
<i>Assault, 4th Degree Fleeing a Peace Officer</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 <i>17-22</i>

¹ 12¹ = One year and one day



Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.



Presumptive stayed sentence; at the discretion of the court, up to ~~one year~~ 364 days of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

^{2,1} Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year ~~and one day~~ and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

^{3,2} The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

Examples of Executed Sentences (Length in Months) Broken Down by: Term of Imprisonment and Supervised Release Term

Under Minn. Stat. § 244.101, offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 will receive an executed sentence pronounced by the court consisting of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence and a supervised release term equal to the remaining one-third. The court is required to pronounce the total executed sentence and explain the amount of time the offender will serve in prison and the amount of time the offender will serve on supervised release, assuming the offender commits no disciplinary offense in prison that results in the imposition of a disciplinary confinement period. The court must also explain that the amount of time the offender actually serves in prison may be extended by the Commissioner if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison.

Executed Sentence	Term of Imprisonment	Supervised Release Term	Executed Sentence	Term of Imprisonment	Supervised Release Term
12-and 1 day	8-and 1 day	4	78	52	26

* * *

4.B. Sex Offender Grid

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

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)	CRIMINAL HISTORY SCORE						
	0	1	2	3	4	5	6 or more

* * *

<i>CSC 5th Degree–3(a)</i> <i>(nonconsensual penetration)</i>	H	12 ¹	14	16	18	24	24 ³ 24-24	24 ³ 24-24
<i>Failure to Register as a Predatory Offender</i>	I	12 ¹ 12 ¹ -14	14 12 ¹ -16	16 14-19	18 16-21	24 21-28	30 26-36	36 31-43

¹12¹=One year and one day mandatory minimum under Minn. Stat. § 243.166 subd. 5(b).

- Presumptive commitment to state imprisonment. Sex offenses under Minn. Stat. § 609.3455, subd. 2, have mandatory life sentences and are excluded from the Guidelines. See section 2.E, for policies regarding those sentences controlled by law, including conditional release terms for sex offenders.
- Presumptive stayed sentence; at the discretion of the court, up to ~~one year~~ 364 days of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenders in the shaded area of the Grid may qualify for a mandatory life sentence under Minn. Stat. § 609.3455, subd. 4. See sections 2.C and 2.E.

² Sex Trafficking is not subject to a 144- or 90-month minimum statutory presumptive sentence so the standard range of 15% lower and 20% higher than the fixed duration applies. (For Severity Level A, Criminal History Scores 0, 1, & 2, the ranges are 123–172, 133–187, & 143–201, respectively. For Severity Level B, Criminal History Score 0, the range is 77–108.)

³ Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year ~~and one day~~ and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2. For Severity Level H, all displayed durations, including the upper and lower ranges, are constrained by the statutory maximum at criminal history scores above 4.

* * *

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.

* * *

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		0	1	2	3	4	5	6 or more
<i>Controlled Substance Crime, 4th Degree</i>	D4	12 ¹	15	18	21	24 21-28	27 23-32	30 26-36
<i>Meth Crimes Involving Children and Vulnerable Adults</i>	D3	12 ¹	13	15	17	19 17-22	21 18-25	23 20-27
<i>Controlled Substance Crime, 5th Degree</i>	D2	12 ¹	12 ¹	13	15	17	19	21 18-25
<i>Sale of Simulated Controlled Substance</i>	D1	12 ¹	12 ¹	12 ¹	13	15	17	19 17-22

* Lower range may not apply. See section 2.C.3.c(1) and Minn. Stat. § 152.021, subdivisions 3(c) & 3(d).

¹ 12¹ = One year and one day



Presumptive commitment to state imprisonment.



Presumptive stayed sentence; at the discretion of the court, up to ~~one year~~ 364 days of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

Examples of Executed Sentences (Length in Months) Broken Down by: Term of Imprisonment and Supervised Release Term

Under Minn. Stat. § 244.101, offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 will receive an executed sentence pronounced by the court consisting of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence and a supervised release term equal to the remaining one-third. The court is required to pronounce the total executed sentence and explain the amount of time the offender will serve in prison and the amount of time the offender will serve on supervised release, assuming the offender commits no disciplinary offense in prison that results in the imposition of a disciplinary confinement period. The court must also explain that the amount of time the offender actually serves in prison may be extended by the Commissioner if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison.

Executed Sentence	Term of Imprisonment	Supervised Release Term	Executed Sentence	Term of Imprisonment	Supervised Release Term
12 and 1 day	8 and 1 day	4	58	38 ½	19 ½

* * *

3. Probation Lengths – Five Year Cap Codified

Act: [2023 Minn. Laws ch. 52, art. 6, § 13–15.](#)

Description: Chapter 52, article 6, section 13 amends Minn. Stat. § 609.135, subd. 2, to establish a five-year limit on the length of probation for felonies. Excepted are the following homicide and sex offenses:

- Minn. Stat. §§ 609.19 (Murder 2nd Degree),
- 609.195 (Murder 3rd Degree),
- 609.20 (Manslaughter 1st Degree),
- 609.2112 (Criminal Vehicular Homicide),
- 609.2662 (Murder of an Unborn Child 2nd Degree),
- 609.2663 (Murder of an Unborn Child 3rd Degree),
- 609.2664 (Manslaughter of an Unborn Child 1st Degree),
- 609.268 (Death or Injury of an Unborn Child in Comm. of Crime),
- 609.342 (Criminal Sexual Conduct 1st Degree),
- 609.343 (Criminal Sexual Conduct 2nd Degree),
- 609.344 (Criminal Sexual Conduct 3rd Degree),
- 609.345 (Criminal Sexual Conduct 4th Degree),
- 609.3451 (Criminal Sexual Conduct 5th Degree), and
- 609.3458 (Sexual Extortion).

The above list is identical to the list found in Guidelines 3.A.2.d, the offenses to which the Guidelines’ presumptive five-year probation cap does not apply. In addition, section 13 excepts Minn. Stat. § 609.749 (Harassment & Stalking). For the excepted offenses, the maximum length of stay remains the statutory maximum period of imprisonment.

Section 13 also repeals the four-year maximum length of probation now applicable to felonies with statutory maximum period of imprisonment of less than four years. The maximum length of probation for such felonies will be each offense’s statutory maximum period of imprisonment. Excepted is Minn. Stat. § 609.2113, subd. 2 (Criminal Vehicular Operation (Substantial Bodily Harm)), which continues to have a four-year statutory maximum period of imprisonment despite its three-year statutory maximum. Other offenses on the exception list are also subject to the four-year statutory maximum period of imprisonment, so violations of Criminal Sexual Conduct in the Fifth Degree with a two-year statutory maximum will nevertheless be eligible for a four-year probationary period.

Section 14 provides a process for retroactive application of the shorter probationary periods provided in section 13, with a mechanism for automatic retroactive application.

Section 15 contains the following mandate to the Commission (“Sentencing Guidelines Commission; Modification”):

The Sentencing Guidelines Commission shall modify the Sentencing Guidelines to be consistent with changes to Minnesota Statutes, section 609.135, subdivision 2, governing the maximum length of probation a court may order.

Effective date: August 1, 2023, and applies to sentences announced either on or after that date (section 13) or before that date (section 14).

References: Minn. Stat. §§ [609.135](#); [609.19](#); [609.195](#); [609.20](#); [609.2112](#); [609.2662](#); [609.2663](#); [609.2664](#); [609.268](#); [609.342](#); [609.343](#); [609.344](#); [609.345](#); [609.3451](#); [609.3458](#); [Guidelines section 3.A.2](#) (2022).

Long-Term Fiscal Impact (H.F. 1607-0): MSGC staff did not estimate the extent of any long-term fiscal considerations. For its local government fiscal impact, MSGC staff estimated that 5,023 probationers were eligible for resentencing, and the average probation avoided for each probationer was six years.

Demographic Impact (H.F. 1607-0): Not applicable.

Sentencing Guidelines Considerations: For offenses committed on or after August 1, 2020, Guidelines section 3.A.2 establishes a presumptive five-year cap on probation lengths, except for the homicide and sex offenses listed in the act. The act effectively codifies the Guidelines five-year probation cap, except that, while the Guidelines cap is merely presumptive—with departures permitted for substantial and compelling reasons—the act is firm and nonwaivable. As part of the law, the Commission was directed to modify the Guidelines to be consistent with statutory changes.

Staff Recommendation: As required by law, staff recommends making conforming changes. The staff-recommended changes would repeal the Commission’s 2020 establishment of a five-year presumptive probation cap, as this policy has now been entirely superseded by law, and make changes conforming to that repeal.

These recommendations, as applied to the Sentencing Guidelines, are shown below.

[1.]B. Definitions * * *

5. Departure. A “departure” is a pronounced sentence other than that recommended in the appropriate cell on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence. ~~A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a “departure.”~~

* * *

- b. Durational Departure. A “durational departure” occurs when the court orders a sentence with a prison duration other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid ~~or when the court pronounces a length of stay other than as provided in section 3.A.2.~~

- (1) Aggravated Durational Departure. An “aggravated durational departure” occurs when the court pronounces a prison duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid ~~or when the court pronounces a length of stay longer than provided in section 1.A.1.~~

* * *

13. Presumptive Sentence. “Presumptive sentences” are those sentences provided on the Sentencing Guidelines Grids ~~and in section 3.A.2.~~ They are presumptive because they are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.

* * *

[2.]D. Departures from the Guidelines * * *

1. Departures in General. The sentences provided in the Grids are presumed to be appropriate for the crimes to which they apply. The court must pronounce a sentence of the applicable disposition, and within the applicable prison range, ~~and within the applicable length of stay,~~ unless there exist identifiable, substantial, and compelling circumstances to support a departure.

The court may depart from the presumptive disposition or duration provided in the Guidelines, and stay or impose a sentence that is deemed to be more appropriate than the

presumptive sentence. A pronounced sentence for a felony conviction that is outside the appropriate prison range on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence, is a departure from the Guidelines. ~~A stayed sentence with a length of stay other than as provided in section 1.A.1 is also a departure from the Guidelines.~~ A departure is not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by statute or case law.

* * *

[3.]A. Related Policies – Establishing Conditions of Stayed Sentences * * *

1. Method of Granting Stayed Sentences. When the court orders a stayed sentence, the court may pronounce a stay of execution or a stay of imposition. The court must pronounce the length of the stay, which may exceed the duration of the presumptive prison sentence but not the maximum length of stay established in Minn. Stat. § 609.135, subd. 2. ~~The court as provided in section 3.A.2 and~~ may establish appropriate conditions subject to the considerations in section ~~3.A.3.~~ 3.A.2.

* * *

~~2. Length of Stay.~~

- ~~a. When the court stays execution or imposition of sentence for a felony offense, including an attempt or conspiracy, the pronounced length of stay must not exceed five years or the length of the statutory maximum punishment, whichever is less, unless the court identifies and articulates substantial and compelling reasons to support a departure from this rule.~~
- ~~b. Subject to the limitation in section 3.A.2.a, the pronounced length of stay may exceed the presumptive prison sentence duration provided in the appropriate cell on the applicable Grid.~~
- ~~c. If the court by departure exceeds the limitation in section 3.A.2.a, the length of stay must not exceed the statutory maximum punishment for the offense.~~
- ~~d. The limitation in section 3.A.2.a does not apply to a sentence for a violation of Minn. Stat. § 609.19 (Murder 2nd Degree), 609.195 (Murder 3rd Degree), 609.20 (Manslaughter 1st Degree), 609.2112 (Criminal Vehicular Homicide), 609.2662 (Murder of an Unborn Child~~

2nd Degree), 609.2663 (Murder of an Unborn Child 3rd Degree), 609.2664 (Manslaughter of an Unborn Child 1st Degree), 609.268 (Death or Injury of an Unborn Child in Comm. of Crime), 609.342 (Criminal Sexual Conduct 1st Degree), 609.343 (Criminal Sexual Conduct 2nd Degree), 609.344 (Criminal Sexual Conduct 3rd Degree), 609.345 (Criminal Sexual Conduct 4th Degree), 609.3451 (Criminal Sexual Conduct 5th Degree), or 609.3458 (Sexual Extortion).

e. ~~Extensions of probation are governed by statute (see Minn. Stat. § 609.135, subd. 2(g)–(h)).~~

Comment

~~**3.A.201. 3.A.102.** When a court grants a stayed sentence, the duration of the stayed sentence may exceed the presumptive sentence length indicated in the appropriate cell on the applicable Grid, and may be as long as the statutory maximum punishment for the conviction offense. See *maximum length of stay provided in Minn. Stat. § 609.135, subd. 2—for most offenses, no more than five years. Absent substantial and compelling reasons to depart, however, the length of the stay may not exceed five years, unless the current offense is a homicide or criminal sexual conduct offense, including an attempt or conspiracy. Thus, for an offender convicted of a sentence for Theft over \$5,000 (Severity Level 3), with a Criminal History Score of 1, the duration of the stay could be up to five years—or, upon a finding of substantial and compelling reasons to depart, up to ten years. Regardless of the length of stay, the 13-month sentence shown in the Guidelines is the presumptive sentence length and, if imposed, would be executed if: (a) the court departs from the dispositional recommendation and decides to execute the sentence; or (b) the stay is later revoked and the court decides to imprison the offender.*~~

~~**3.A.202.** Before section 3.A.2.a took effect, case law required durational departures to be based on the nature of the offense rather than on the individual characteristics of the offender. See *State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016). Although a pronounced length of stay longer than provided in section 3.A.2 is defined as an aggravated durational departure, the Commission recognizes that judicial considerations for pronouncing a longer than recommended length of stay may differ substantially from considerations for imposing a longer than recommended prison duration. As a result of these differences, the individual characteristics of the offender may be relevant to the district court’s finding of substantial and compelling reasons justifying a longer than recommended length of stay.~~

~~**3.A.203.** Within section 3.A.2, “statutory maximum punishment” refers to the applicable maximum period for a stay of sentence established in statute. For most felonies, this is the maximum period for which the sentence of imprisonment might have been imposed, but, for some felonies, this is four or six years. Minn. Stat § 609.135, subd. 2(a)–(b).~~

3-2. Other Conditions of Stayed Sentences. * * *

Comment

~~3.A.301.~~ **3.A.201.** *The court may attach any conditions to a stayed sentence that are permitted by law and that the court deems appropriate. The Guidelines neither enlarge nor restrict the conditions that courts may attach to a stayed sentence. Minn. Stat. § 244.09, subd. 5 permits, but does not require, the Commission to establish guidelines covering conditions of stayed sentences. ~~The~~ In 2020, the Commission has developed such guidelines with respect to the pronounced length of stay—stay—which the Legislature essentially codified in 2023 Minn. Laws ch. 52, art. 6, § 13—and in section 3.A.2, and has provided additional, general direction in the use of conditions of stayed sentences in the above section.*

~~3.A.302.~~ **3.A.202.** *While the Commission has otherwise not developed guidelines for nonimprisonment sanctions, the Commission believes it is important for the sentencing courts to consider proportionality when pronouncing a period of local confinement as a condition of probation. This is particularly important given Minn. Stat. § 609.135, subd. 7, which states when an offender may not demand execution of sentence. The period of local confinement should be proportional to the severity of the conviction offense and the criminal history score of the offender. Therefore, the period of local confinement should not exceed the term of imprisonment that would be served if the offender were to have received an executed prison sentence according to the presumptive Guidelines duration.*

* * *

4. Targeted Misdemeanor List – Obscene or Harassing Telephone Calls Added

Act: [2023 Minn. Laws ch. 52, art. 7, § 7.](#)

Description: Minn. Stat. § 299C.10, subd. 1(e), contains a list of “targeted misdemeanors”—misdemeanors that require fingerprinting. The act adds section “609.749 [sic] (obscene or harassing telephone calls)” to the list. There are two problems with this:

- There are no misdemeanors in Minn. Stat. § 609.749, only gross misdemeanors and felonies, and
- The misdemeanor offense entitled Obscene or Harassing Telephone Calls is found in [§ 609.79](#), not § 609.749.

Based on conversations with nonpartisan legislative research staff, MSGC staff believes the statutory reference to have been a typographical error; that the intended statutory reference was to Minn. Stat. § 609.79; and that the error will be corrected in future legislation, if not corrected sooner by the Revisor of Statutes.

Effective date: August 1, 2023, and applies to crimes committed on or after that date.

References: Minn. Stat. §§ [299C.10](#); [609.749](#); [Guidelines section 2.B.3](#) (2022).

Long-Term Fiscal Impact: Not applicable.

Demographic Impact: Not applicable.

Sentencing Guidelines Considerations: Non-traffic gross misdemeanors and targeted misdemeanors are used in calculating the criminal history score in two ways. First, they may contribute one-half custody status point to the criminal history score; *but see State v. Beganovic*, 974 N.W.2d 278 (Minn. Ct. App. 2022), *review granted in part* (Minn. June 29, 2022). Second, they may contribute misdemeanor units for of which generally equal one criminal history point. Appendix 4 is intended simply to be a cross-reference to the “targeted misdemeanor” list of Minn. Stat. § 299C.10, subd. 1(e).

Staff Recommendation: Although Appendix 4 is intended simply to be a mirror of the statute, staff is reluctant to recommend incorporating the act’s typo into Appendix 4. Instead, staff suggests expressing the legislative intent in Appendix 4, with a note explaining the literal statutory reference. Reasonable Commission members may, however, wish to take the reverse approach, instead placing the literal statutory reference in Appendix 4 and explaining the legislative intent with a note.

Possible modifications to 2022 Minn. Sentencing Guidelines & Commentary Appendix 4:

Appendix 4. Targeted Misdemeanor List

(As provided for in Minn. Stat. § 299C.10, subd. 1(e))

Under Minn. Stat. § 299C.10, subd. 1(e), a targeted misdemeanor is a misdemeanor violation of:

Statute Number	Offense Title
169A.20	Driving While Impaired
518B.01	Order for Protection Violation
609.224	Assault 5th Degree
609.2242	Domestic Assault
609.746	Interference with Privacy
609.748	Harassment or Restraining Order Violation
<u>609.79*</u>	<u>Obscene or Harassing Telephone Calls</u>
617.23	Indecent Exposure
629.75	Domestic Abuse No Contact Order Violation

* Literally, “609.749” (2023 Minn. Laws ch. 52, art. 7, § 7), although that citation appears to have been a typographical error.

Legislation Apparently Not Requiring Conforming Guidelines Changes

In staff’s opinion, the following legislative changes do not require conforming changes to the Sentencing Guidelines, but a reasonable Commission may disagree.

1. Truth in Sentencing – MRRA & Early Supervised Release Eligibility for Juveniles

Act: [2023 Minn. Laws ch. 52, articles 12 & 18.](#)

Description: Enacted in 1992, Minn. Stat. § 244.101 is Minnesota’s “Truth in Sentencing” law. It defines the two parts of an executed sentence as being—

- The specified minimum term of imprisonment, equal to two-thirds of the executed sentence; and
- The specified maximum supervised release term, equal to one-third of the executed sentence.

The law also requires the sentencing court, when pronouncing an executed sentence, to explain—

- The total length of the executed sentence;
- The amount of time the defendant will serve in prison;
- The amount of time the defendant will serve on supervised release, barring a disciplinary offense resulting in a disciplinary confinement period; and
- The fact that, in the event of disciplinary offenses, the amount of time served in prison could be extended to the full length of the executed sentence.

In addition, Minn. Stat. § 244.101 states that the amount of time actually served in prison and on supervised release is subject to Minn. Stat. § 244.05, subd. 1b—also originally enacted in 1992—which explains how supervised release is calculated.

Two parts of the Omnibus Judiciary and Public Safety Act change the calculation of supervised release and therefore amend Minn. Stat. § 244.05, including subd. 1b:

- The Minnesota Rehabilitation and Reinvestment Act (MRRA) (article 12); and
- The provisions of article 18 authorizing early supervised release for juveniles.

The Minnesota Rehabilitation and Reinvestment Act (MRRA) creates mechanisms for two forms of earned sentence relief (not applicable to lifers or those sentenced for pre-1993 crimes):

- *Earned incentive release credit* allows inmates to eliminate a portion of their terms of imprisonment by complying with individualized rehabilitation plans under policies the DOC will create. The prison time thus eliminated may equal up to one-sixth (17%) of a total executed sentence, and the remaining term of imprisonment may not fall below half of the executed sentence. Earned incentive release credit does not change the supervised release term.

- *Earned compliance credit* is a one-month abatement of supervised release for every two months a supervised releasee exhibits compliance with the individual’s supervision plan.

Illustration: An inmate with a 54-month executed sentence commits no disciplinary offenses in prison. Before the MRRA, that inmate would ordinarily serve a 36-month term of imprisonment, followed by an 18-month supervised release term. After the MRRA is fully implemented, the inmate may have the opportunity to eliminate one-fourth¹ (9 months) of the 36-month term of imprisonment through earned incentive release credits, and to abate one-third (6 months) of the 18-month supervised release term through earned compliance credit.

Article 18’s core provision authorizing **early supervised release for juveniles** is found in [section 5](#). A person serving one or more sentences for one or more crimes committed while under age 18 is eligible for early supervised release after having served:

- 15 years, if sentenced to a single sentence involving a term of imprisonment exceeding 15 years; or to at least two consecutive sentences for crimes involving no more than one victim and a net term of imprisonment exceeding 15 years; or to a single life sentence.
- 20 years, if sentenced to two consecutive mandatory life sentences; or to a mandatory life sentence consecutive to a sentence involving a separate victim; or to at least two consecutive sentences involving at least two crimes, at least two victims, and a net term of imprisonment exceeding 20 years.
- 30 years, if sentenced to more than two consecutive life sentences.

Such release is not automatic, but within the discretion of a seven-member Supervised Release Board created by the act.

Not related to truth in sentencing, but of likely interest to the Commission, are the facts that:

- A five-member subset of the Supervised Release Board—without the two members who must have expertise in the neurological development of juveniles—is empowered to make release decisions now reserved for the Commissioner of Corrections alone, such as parole for lifers.
- Article 18 addresses the longstanding unconstitutionality of Minn. Stat. § 609.106 as applied to juveniles—establishing, for certain offenses, mandatory life without release, contrary to *Miller v. Alabama*, 567 U.S. 460 (2012)—by requiring sentences of life with the possibility of release for juveniles.
- Article 18 implements nearly² all the [Commission’s recommendations regarding life sentences for first-degree murder of an unborn child](#), for which no minimum term of imprisonment is now

¹ The maximum earned incentive release credit, being one-sixth of the executed sentence, is one-fourth the maximum term of imprisonment because the maximum term of imprisonment is two-thirds the executed sentence and one-sixth divided by two-thirds is one-fourth.

² The act did not implement the Commission’s recommendation to amend Minn. Stat. § [609.115, subd. 2a](#), to refer to Minn. Stat. § [609.2661](#).

specified. The act treats such life sentences in the same way life sentences for first-degree murder are treated.

Effective date: Various. Some provisions are retroactive, while others will have implementation delays.

References: Minn. Stat. §§ [244.05](#) & [244.101](#) (2022).

Long-Term Fiscal Impact: Not requested.

Demographic Impact: Not applicable.

Sentencing Guidelines Considerations: In its definition of “executed sentence,” Guidelines section 1.B.7 incorporates the language of Minn. Stat. § 244.101. On the reverse page of each sentencing grid, the Guidelines recapitulate Minn. Stat. § 244.101 and provides a table that calculates the term of imprisonment and supervised release term for each sentence duration displayed on the grid.

Staff Recommendations: Staff recommends no changes, as the language of Minn. Stat. § 244.101, as reflected in the Guidelines, has not changed. A reasonable Commission may disagree, reasoning that a simple recitation of the two-thirds/one-third statutory provisions no longer reflects the reality of the MRRA and early supervised release for juveniles, and thus runs counter to the truth in sentencing intended by the statute.

2. Community Supervision Reform – Probation Revocations Restrained

Act: [2023 Minn. Laws ch. 52, art. 17, § 32 & 33](#).

Description: In general, article 17 of the Omnibus Judiciary and Public Safety Act implements various reforms in community-supervision policies and funding. Section 32 specifies that revocation of probation is to be used only as a last resort when rehabilitation has failed, and section 33 limits the violations that may form a basis for revocation.

Effective date: Effective August 1, 2023, with some sections effective July 1, 2023.

References: Minn. Stat. § [609.14](#) (2022).

Long-Term Fiscal Impact: Not requested.

Demographic Impact: Not applicable.

Sentencing Guidelines Considerations: Guidelines section 3.B gives general guidance regarding probation revocations. It cautions against taking the revocation decision lightly, and urges great restraint in revoking those with low-severity offenses or short criminal histories. Conversely, it calls for less judicial tolerance for those convicted of more severe offenses or with longer criminal histories. In any case, it advises courts against reflexively revoking stayed sentences for non-criminal probation violations.

Staff Recommendations: Staff recommends no changes, as section 3.B is generally consistent with the spirit of the act. A reasonable Commission may disagree, wishing, for example, to incorporate the act’s “last resort” language into Guidelines section 3.B or its commentary.