

## Staff Paper

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# Draft Language to Restore the Full Custody Status Point, with Special Requirements for Low-Level Custody Offenses

October 13, 2022

The following is staff’s attempt to draft language that would repeal the 2019 creation of one-half custody status point for custody status arising from prior low-level felonies, non-traffic gross misdemeanors, gross misdemeanor DWIs, and targeted misdemeanors. For these offenses, custody status would again contribute a full point to the criminal history score, but only in limited circumstances—when the total criminal history score is very high, or when the custody status was the result of a prior mitigated dispositional departure. Commissioner Larkin [submitted this proposal on September 22](#), with some clarifications discussed in the October 6 Commission meeting.<sup>1</sup>

### Incidental Changes to Section 2.B.2

This proposal requires making some significant changes to section 2.B.2 (“Custody Status at the Time of the Offense”). Because staff believes section 2.B.2 could also be clarified in other ways, the draft language includes those changes as well. Specifically, the draft language—

- Restructures 2.B.2. to define “custody status” at the outset (new 2.B.2.a), making the policy language that follows shorter and more readable.
- Clarifies that custody status does not apply to a stay of adjudication (new 2.B.2.a(5)(i)).<sup>2</sup>
- Clarifies that the two-custody-status-point-rule (in new 2.B.2.c), applicable to repeat sex offenders, is instead of, not in addition to, the one-custody-status-point-rule (in new 2.B.2.b).
- Eliminates the term “offender” when not necessary for readability.<sup>3</sup>
- Makes other changes to improve readability and brevity.

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<sup>1</sup> At that meeting, Commissioner Larkin clarified her intent that custody status would apply to prior targeted misdemeanors, non-traffic gross misdemeanors, and gross misdemeanor DWIs only if the defendant’s criminal history score was six or more, not counting custody status. The effect of custody status for such offenses would thus be limited to adding three months to the presumptive duration under the policy now found in Guidelines section 2.B.2.c.

<sup>2</sup> This was the 2019 Commission’s [stated intent](#) when it eliminated, as a custody-status type, stays of adjudication under Minn. Stat. § 152.18, but staff believes that clarification of the point would be nevertheless useful.

<sup>3</sup> While “offender” is a statutory and Guidelines term, staff has, following at least one Commission member’s objection to the term, attempted to avoid its use, when not needed, in staff reports and draft Guidelines changes.

# Minnesota Sentencing Guidelines and Commentary

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## 2. Determining Presumptive Sentences

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### B. Criminal History

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

##### a. Custody Status.

(1) Generally, "Custody status" refers to the status of:

- (i) probation;
- (ii) parole;
- (iii) supervised release;
- (iv) conditional release from an executed prison sentence;
- (v) release pending sentencing;
- (vi) confinement in a jail, workhouse, or prison pending or after sentencing; or
- (vii) escape from confinement following an executed sentence.

(2) General Requirements. A status is custody status only when the status followed entry of a guilty plea, guilty verdict, or conviction, and the offense that caused the custody status to exist (the "custody offense") was one of the following:

- (i) a felony,
- (ii) a felony extended jurisdiction juvenile (EJJ) conviction;
- (iii) a non-traffic gross misdemeanor;
- (iv) gross misdemeanor driving while impaired, refusal to submit to a chemical test, or reckless driving; or
- (v) a targeted misdemeanor.

(3) Additional Requirement for Certain Felony Custody Offenses. For a custody offense currently assigned a severity level ranking of 1 or 2 on the Standard Grid, or of D1 or D2 on the Drug Offender Grid, a status is not custody status unless either or both of the following conditions apply.

- (i) The custody status was the result of a mitigated dispositional departure from these Guidelines.
- (ii) The total criminal history score applicable to the current offense (excluding the custody status point) is 6 or more.

(4) Additional Requirement for Misdemeanor and Gross Misdemeanor Custody Offenses. For any of the following custody offenses, a status is not custody status unless the total criminal history score applicable to the current offense (excluding the custody status point) is 6 or more:

- (i) a non-traffic gross misdemeanor;
- (ii) gross misdemeanor driving while impaired, refusal to submit to a chemical test, or reckless driving; or
- (iii) a targeted misdemeanor.

(5) Exceptions. Custody status does not apply to:

- (i) probation or other custody that occurs while adjudication of guilt is stayed;
- (ii) juvenile custody status other than for a felony EJJ conviction;
- (iii) custody for a misdemeanor or gross misdemeanor DWI committed at age 16 or 17 and processed in adult court under Minn. Stat. § 260B.225, subs. 3 and 8; or
- (iv) commitment for treatment or examination under Minn. R. Crim. P. 20.

b. a. ~~One or One-Half~~ Custody Status Point.

(1) Assign **one** custody status point if the current offense was committed while in a custody status.

(2) When multiple offenses are an element of the current offense, or when the current offense is an aggregated offense, the current offense was "committed while in a custody status" if the custody status existed at any point in time during which the current offense occurred. ~~when the conditions in paragraphs (1), (2), and (3)(ii) or (iii)~~

are met. In all other cases when the conditions in paragraphs (1) through (3) are met, assign **one-half** custody status point:

~~(1) The offender was under one of the following custody statuses at the time the current offense was committed:~~

- ~~(i) probation;~~
- ~~(ii) parole;~~
- ~~(iii) supervised release;~~
- ~~(iv) conditional release following release from an executed prison sentence (see conditional release terms listed in section 2.E.3);~~
- ~~(v) release pending sentencing;~~
- ~~(vi) confinement in a jail, workhouse, or prison pending or after sentencing; or~~
- ~~(vii) escape from confinement following an executed sentence.~~

~~(2) The offender was under one of the custody statuses in paragraph (1) after entry of a guilty plea, guilty verdict, or conviction.~~

~~(3) The offender was under one of the custody statuses in paragraph (1) for one of the following:~~

- ~~(i) a felony currently assigned a severity level ranking, on the Offense Severity Reference Table, of 1 or 2 on the Standard Grid or D1 or D2 on the Drug Offender Grid, a felony from a jurisdiction other than Minnesota equivalent to an offense currently ranked at one of those severity levels, or an extended jurisdiction juvenile (EJJ) conviction for an offense currently ranked at one of those severity levels;~~
- ~~(ii) any other felony;~~
- ~~(iii) any other EJJ conviction;~~
- ~~(iv) a non-traffic gross misdemeanor;~~
- ~~(v) gross misdemeanor driving while impaired, refusal to submit to a chemical test, or reckless driving; or~~
- ~~(vi) a targeted misdemeanor.~~

~~(4) Assigning Points to Offenses Committed Over Time. Assign one or one-half custody status point when the offender meets the conditions in paragraphs (1) through (3) and the offender was placed under one of the custody statuses in paragraph (1) at any point in time during which the offense occurred when:~~

- ~~(i) multiple offenses are an element of the conviction offense; or~~
- ~~(ii) the conviction offense is an aggregated offense.~~

~~c. b. Two Custody Status Points. Assign **two** custody status points, rather than one, if:~~

~~(1) the current offense was committed while in a custody status;~~

~~(2) (1) both the custody offense and the current conviction offense is an offense are currently found on the Sex Offender Grid; ~~Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166); and~~~~

~~(3) (2) the offender qualifies for one custody status point, as described in section a, above, for an offense currently found on the Sex Offender Grid other than neither offense is Failure to Register as a Predatory Offender (Minn. Stat. § 243.166).~~

~~d. e. Additional Duration.~~

~~(1) An **additional three months** must be added to the duration of the appropriate cell time, which then becomes the presumptive duration, when:~~

- ~~(i) (1) at least ~~one-half~~ one custody status point is assigned; and~~
- ~~(ii) (2) the offender's total Criminal History Score total criminal history score exceeds the maximum score on the applicable Grid (i.e., 7 or more).~~

~~(2) Three months must also be added to the lower and upper end of the range provided in the appropriate cell on the applicable Grid.~~

~~(3) 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.~~

~~d. No Custody Status Points Assigned. The offender must not be assigned custody status points when:~~

~~(1) The offender was committed for treatment or examination under Minn. R. Crim. P. 20.~~

~~(2) The offender was on juvenile custody status other than for an extended jurisdiction juvenile (EJJ) conviction, at the time the adult felony was committed.~~

~~(3) The offender was on custody status for a misdemeanor or gross misdemeanor DWI committed when the offender was 16 or 17 years old, and the DWI was processed in adult court under Minn. Stat. § 260B.225, subds. 3 and 8.~~

e. Waiver. Subject to the limitations in paragraph (4) below, the court, on its own motion or on the motion of a party, may, but is not required to, waive assignment of a custody status ~~point or half-point pursuant to section 2.B.2, point~~, provided the offender establishes that granting a waiver is consistent with public safety. Specifically, the court has the discretion, but is not required, to grant a waiver if the offender establishes that waiver is consistent with public safety and promotes the traditional purposes of ~~sentencing~~ sentencing, which are retribution, incapacitation, deterrence, restitution, and rehabilitation. See Minn. Stat. § 244.09. In considering rehabilitation, the court may examine the following:

(1) Whether the offender has consistently utilized available probation services, such as drug, alcohol, and psychological treatment services, and has otherwise been in substantial compliance with the conditions of probation, parole, or conditional or supervised release, apart from the commission of the current offense, for the past twelve months;

(2) Whether the current offense represents an escalation of criminal activity; and

(3) Whether the offender has made any progress toward rehabilitation and reentry into society, such as additional education and/or vocational training.

(4) The court may not, however, waive assignment of a custody status ~~point or half-point~~ if either the current offense or a custody ~~status~~ offense is any of the following offenses, including an equivalent felony offense from a jurisdiction other than Minnesota. ~~As used within this paragraph, "custody status offense" means a prior offense resulting in a custody status that caused the offender to qualify for a custody status point as described in section a, above.~~

(i) an offense currently assigned a severity level ~~ranking, on the Offense Severity Reference Table, ranking~~ of 8, 9, 10, or 11 on the Standard Grid;

- (ii) an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166);
- (iii) an offense currently assigned a severity level ~~ranking, on the Offense Severity Reference Table,~~ ranking of D8 or D9 on the Drug Offender Grid;
- (iv) an offense listed in section 8, Severe Violent Offense List;
- (v) Fleeing Peace Officer (Great Bodily Harm) (Minn. Stat. § 609.487, subd. 4(b));
- or
- (vi) an attempt or conspiracy to commit one of these offenses.

*Comment*

**2.B.201.** *The basic rule assigns ~~offenders one or one-half point if they were a criminal history point for being under some form of eligible criminal justice custody status when they committed the offense for which they are now being sentenced.~~ committing the current offense.*

**2.B.202.** *The Commission intended to ~~avoid~~ limit criminal history scores in which a prior offense's custody status point outweighed the criminal history of the prior offense itself. Accordingly, when the criminal history weight of a prior felony is one-half point (but excluding severity level H or I offenses; see generally section 2.B.1) or the prior gross misdemeanor or misdemeanor contributes one or two misdemeanor units (see section 2.B.3), the custody status from that prior offense results in ~~one-half, rather than one,~~ a custody status point. point only in limited circumstances—when the total criminal history score is very high, or when the custody status was the result of a prior mitigated dispositional departure.*

**2.B.203.** *In determining whether to grant a waiver in a particular case, the primary consideration is public safety. In this context, public safety means protecting the public from crime. The court should consider the values of retribution, incapacitation, deterrence, restitution and rehabilitation. In doing so, the court should apply a balanced approach in which all five values are examined and applied. For rehabilitation, the court may also consider the three factors listed in section 2.B.2.e in order to examine the whole person. When custody status is waived, the presumptive sentence will be calculated without the addition of the waived custody status point, ~~or half point,~~ in the criminal history score. Thus, provided the processes of section 2.B.2.e are followed, granting a waiver of custody status for the current offense does not, in itself, constitute a departure from the Sentencing Guidelines.*

**2.B.204.** *Commitments under Minn. R. Crim. P. 20, and juvenile custody status are not included because, in those situations, there has been no conviction. However, a custody point will be assigned if ~~the offender committed~~ the current offense was committed while under some form of custody following an extended jurisdiction juvenile (EJJ) conviction.*

**2.B.205.** *The custodial statuses covered by this policy are those occurring after conviction of a felony, non-traffic gross misdemeanor, gross misdemeanor driving while impaired or refusal to submit to a*

chemical test, gross misdemeanor reckless driving, or misdemeanor on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e). Thus, ~~an offender who commits a new felony committed while on pre-trial diversion or pre-trial release on another charge does not get a custody status point. is not committed while in a custody status.~~ Likewise, ~~offenders serving a misdemeanor sentence for an offense not on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e), do not receive a custody status point,~~ does not qualify as custody status, even if the court imposed the misdemeanor sentence upon conviction of a gross misdemeanor or felony.

**2.B.206.** As a general rule, the Commission excludes traffic offenses from consideration in computing the criminal history score. Given the increased penalties associated with driving while impaired (DWI) offenses and the serious impact on public safety, the Commission determined that these offenses should be considered for custody status points in the same manner as non-traffic offenses.

**2.B.207.** The most problematic consequence of a Criminal History Score of 7 or more (in excess of the maximum points differentiated by the Sentencing Guidelines Grids) is that no additional penalty accrues for engaging in felonious behavior while under custody supervision. For example, if a person with an offender has a Criminal History Score of 7 and is 7, while released pending sentencing for a Severity Level 3 offense, and he or she commits another Severity Level 3 offense, offense while awaiting sentencing, the presumptive sentence for the most recent offense is the same as for the prior offense. A presumption exists against consecutive sentences for most property offenses, and therefore no additional penalty results when this situation occurs. The addition of three months to the cell duration provides a uniform presumptive standard for dealing with this situation.

**2.B.208.** While the Commission believes that the impact of the custody status provision should be maintained for all cases, incrementing the sanction for each criminal history point above seven is deemed inappropriate. The primary determinant of the sentence is the seriousness of the current conviction offense. Criminal history is of secondary importance, and the Commission believes that proportionality in sentencing is served sufficiently with the criminal history differentiations incorporated in the Sentencing Guidelines Grids and with the special provision for maintaining the impact of the custody status provision. The Commission deems further differentiation unnecessary to achieve proportionality in sentencing.

**2.B.209.** The Commission believes that when multiple offenses are an element of the conviction offense or the conviction offense is an aggregated offense, ~~offenders should receive a custody status point should apply if they become subject to one of the custody status types listed in 2.B.2.a(1)~~ 2.B.2.a occurs at any point during the time period in which the offenses occurred. While the Commission recognizes that its policy for determining the presumptive sentence states that for aggregated offenses, the earliest offense date determines the date of offense, it believes that eligibility for a custody status point should not be limited to the ~~offender's~~ custody status at the time of the earliest date of offense.



**2.B.210.** ~~When offenders~~ Anyone on any a custody status condition listed in section 2.B.2.b 2.B.2.a for a sex offense commit who commits another sex offense is offense, they are assigned an additional custody status point. The Commission believes that ~~offenders~~ those who commit a subsequent sex ~~offenses~~ offense pose so significant a risk to public safety that their criminal history scores should be enhanced to reflect this risk. This policy does not apply to the offense of Failure to Register as a Predatory Offender (Minn. Stat. § 243.166).

**2.B.211.** Assign a custody status point to anyone who, while an offender on any custody status type, type who absconds and commits a new felony offense. The custody status type depends on the form of supervision that exists when the offender commits a at the time of the new offense. For example, assign a custody status point to an offender who if someone absconds from supervised release and commits a new felony offense, a custody status point would be assigned and the offense. The custody status type would be "supervised release."

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