# CONSECUTIVE SUPERVISED RELEASE

Minnesota Sentencing Guidelines Commission

October 16, 2014

## Situation

- When two sentences are consecutively executed—
  - DOC implements the **term of imprisonment (two-thirds of the sentence)** as expected.
  - Some issues have emerged with the implementation of the **term of supervised release (one-third of the sentence)**.
- Department of Corrections practice differs from the policy of Minnesota Sentencing Guidelines Comment 2.F.02.
- These competing policies will be the first two proposals presented; a third proposal will also be presented.

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**Considerations:**

Under Minnesota's "truth in sentencing" law, when a court pronounces an executed prison sentence, it must explain that the executed sentence is fixed and that it consists of two parts: a minimum term of imprisonment equal to 2/3 of the executed sentence; and a maximum period of supervised release equal to 1/3 of the executed sentence (less any disciplinary confinement). Minn. Stat. § 244.101, subd. 1.

The Commission has talked about this issue for the past year. MSGC staff offered to prepare proposals for the Commission's review that would include cost information on supervision and possible bed impact. A Commission member has since suggested a third option. Proposal 3, a compromise proposal, is based on that suggestion.

In addition to terms of imprisonment and supervised release terms, a third period of time at issue is **conditional release**. Similar to supervised release, several offenses require conditional release in the community of 5 or 10 years or life, which the court must pronounce at sentencing. The legislature recently unified the start date for all newly imposed conditional release periods: "after the [offender] has been released from prison." 2013 Minn. Laws ch. 96. Accordingly, these proposals are silent as to conditional release, leaving DOC to calculate when the offender has been released from prison.

# PROPOSAL 1

Consecutive Supervised Release Terms as Currently Implemented by the Department of Corrections

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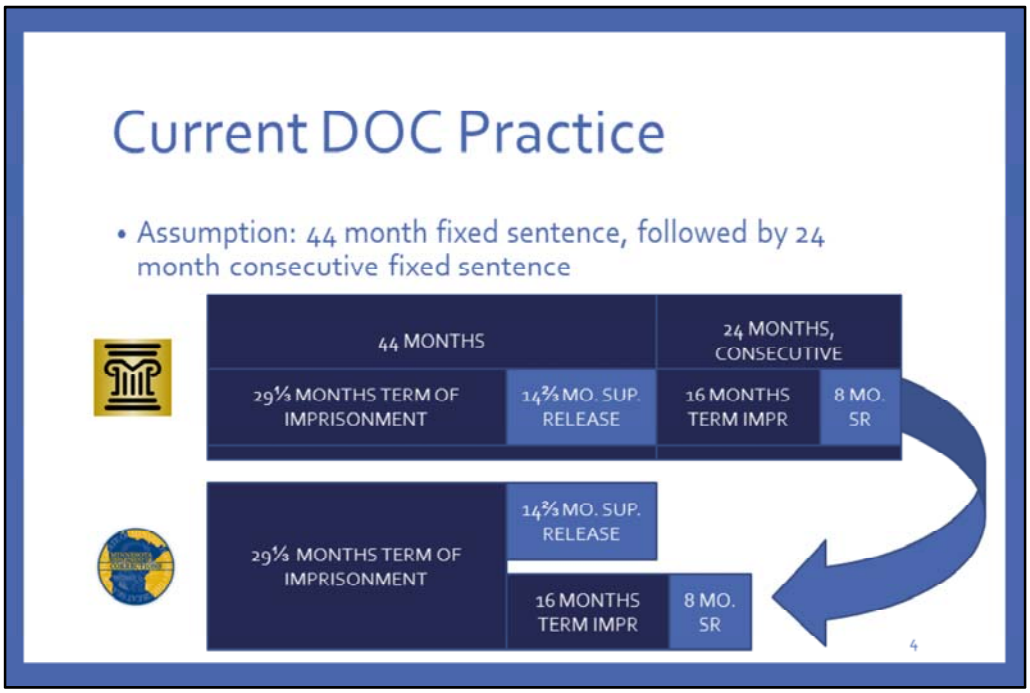
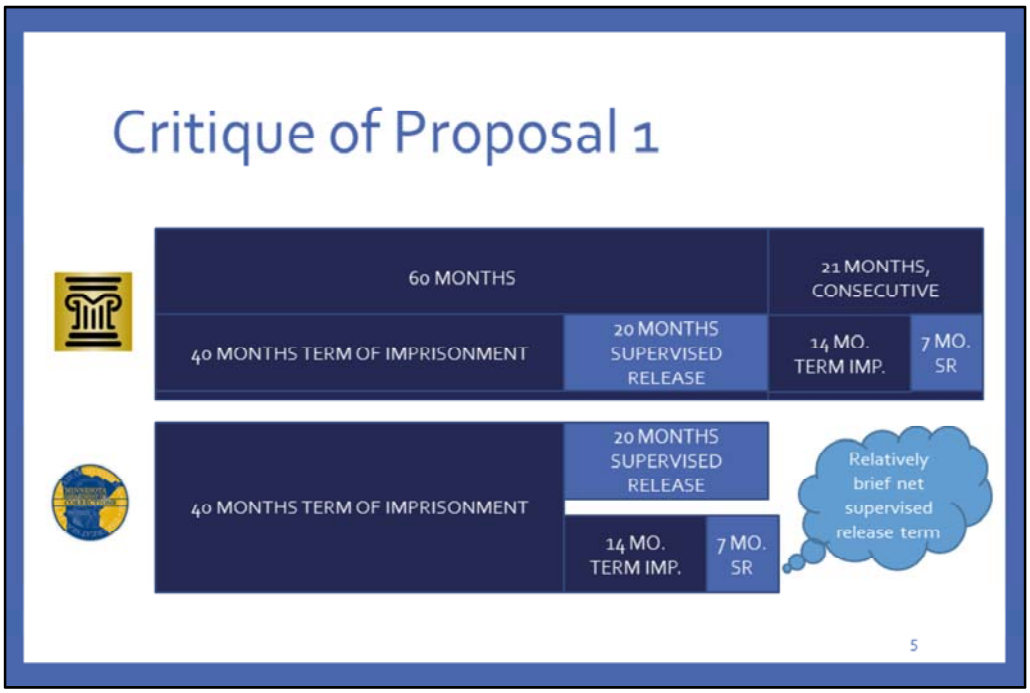



**<u>Considerations</u>:**

Proposal 1 would make the current DOC practice explicit in the Guidelines. That is, that the supervised release portion of the first sentence overlaps with the term of imprisonment on the second sentence. As a result of the overlap, the offender serves the first supervised release term, or at least part of it, in prison.




**Considerations**:

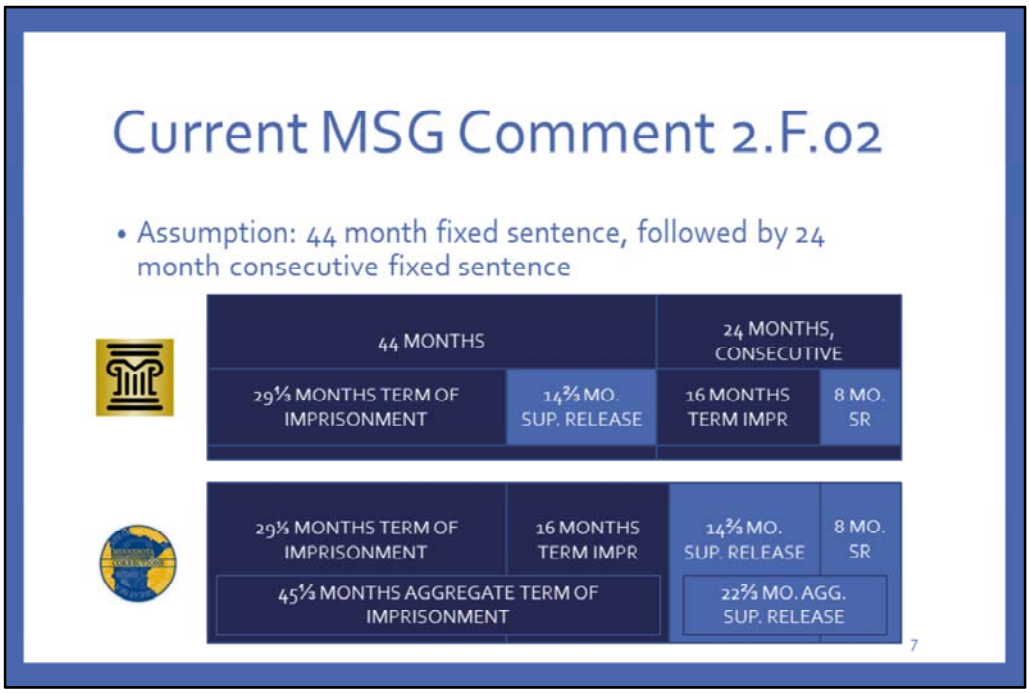
In this example, an offender is being sentenced to 21 months consecutively to a 60-month sentence. Assuming no extended incarceration or early release, the offender will serve 54 months in prison, followed by 7 months of supervised release. This supervised release term is relatively short compared to the time of incarceration.

Per Dr. Doug Marlowe, the release of a high-risk offender after a lengthy term of imprisonment with little or no subsequent community supervision increases public safety risks. Source: Marlowe, Douglas B., Remarks at the National Association of Sentencing Commissions Annual Conference, August, 2014, as noted by Nate Reitz. For more general information regarding Dr. Marlowe's work, see Marlowe, Douglas B.; Evidence-Based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs; 1 *Chapman Journal of Criminal Justice* 167-201 (2009) <http://goo.gl/NrmsXq>.

In addition to public safety risks, Proposal 1 partially thwarts the purpose of consecutive sentencing, which is to provide a more severe sanction than concurrent sentencing. While the imprisonment term will be longer, the supervised release term is reduced. Under concurrent sentencing, the offender receives the longer of the two supervised release terms, which, in this case, would be 20 months.

**Considerations:**

Although this proposal is written into the Guidelines, it is contained only in Comment 2.F.02, not in the Guidelines themselves. The DOC does not view the commentary as legislatively binding, and will not implement the procedure contained within Comment 2.F.02 unless the sentencing judge uses the word "aggregate" when pronouncing the consecutive sentences.




**<u>Considerations</u>:**

Proposal 2 would move the comment that describes how to aggregate consecutive sentences into the Guidelines. That is, that the two executed sentences are added together (aggregated) and then the 2/3-1/3 split is determined from the total time. Under this proposal, the offender serves more time on supervised release than in the first proposal.

## Critique of Proposal 2

- "Consecutive sentences are a more severe sanction because the intent is to confine the offender for a longer period than under concurrent sentences." – M.S.G. Comment 2.F.01.
- It does not necessarily follow, however, the more severe sanction of a longer period of confinement must be accompanied by a lengthier, and more costly, period of community supervision.

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**Considerations:**

Estimated increased supervision costs for Proposal 2 are from $164,400 to $312,360, per year.

## An Unresolved Issue …

*What if an offender completes the term of imprisonment before being sentenced consecutively to that sentence?*

- How can the supervised release terms be separately aggregated when the first supervised release term started before the second term of imprisonment began?
- Is the offender considered to be on "supervised release" for the first offense while serving the second term of imprisonment? If not, what about credit for time served, which is only ascertained at sentencing? Will the first supervised release term be retroactively reduced?
  - Quite difficult for DOC to administer.

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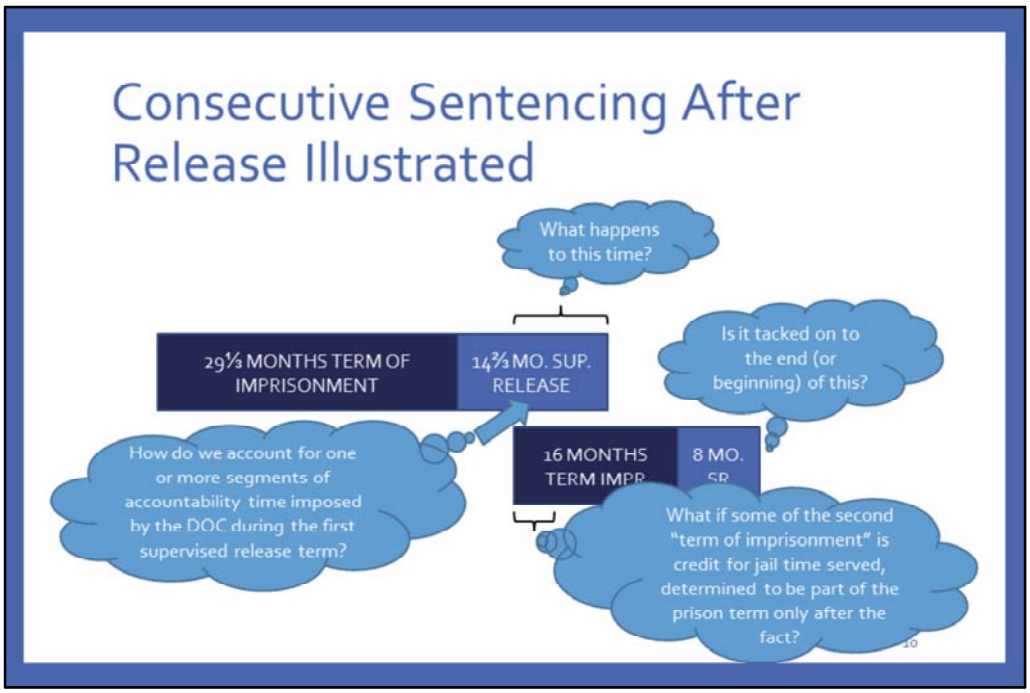
**Considerations:**

Even if the Commission were to move the language in Comment 2.F.02 into the Guidelines, that language contains a defect: It does not address how to implement consecutive sentences when an offender has been released from prison (on the first offense) before sentencing (on the second offense).


Consecutive Sentencing After Release Illustrated
What happens to this time?
29⅓ MONTHS TERM OF IMPRISONMENT
14⅔ MO. SUP. RELEASE
Is it tacked on to the end (or beginning) of this?
How do we account for one or more segments of accountability time imposed by the DOC during the first supervised release term?
16 MONTHS TERM IMPR
8 MO. SR
What if some of the second "term of imprisonment" is credit for jail time served, determined to be part of the prison term only after the fact?
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## Consecutive Sentencing After Release—Staff Proposal A

- A new rule is proposed for all consecutive offenses:
  - **A consecutive sentence executed after an offender had already begun his supervised release term for the first offense will not affect the calculation of the first supervised release term**
  - i.e., once supervised release starts, it doesn't stop.
- Will affect a small number of cases.
- Easier for courts to calculate the longer sentence, and simpler for DOC to administer.

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**Considerations:**

The Guidelines must clarify how to implement a consecutive sentence pronounced after an offender has completed his term of imprisonment for the first offense but remains under DOC custody and control. These consecutive sentences could be for offenses committed before imprisonment, during imprisonment, or after being placed on supervised release.

If an offender were to complete the term of imprisonment, were placed on extended incarceration (EI) as a disciplinary sanction, and were consecutively sentenced during that EI, this proposal would not apply because the offender would never have been placed on supervised release.

- Staff was unable identify any cases in which an offender, after being placed on supervised release for the first offense, was sentenced consecutively for a second offense committed prior to the term of imprisonment for the first offense.
- In 2012, 18 offenders who had committed an offense in prison received a sentence that was consecutive to the first sentence. One of the 18, had been placed on supervised release by the time of the second sentence.
- In 2012, 6 offenders who had committed an offense while on supervised release received a sentence that was consecutive to the supervised release offense.

# Staff Proposal A Illustrated

- Assumption: A second, consecutive sentence is executed after the offender is placed on supervised release for the first sentence.

- Note that the first supervised release term is unaffected by (concurrent with) second consecutive sentence, even if DOC imposes accountability time during that term.

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# A Corollary Issue …

- **Presumptive** consecutive sentences require that:
  - The new offense must be committed while the offender is in DOC custody, on escape from DOC custody, or on supervised/ conditional release following a DOC sentence; and
  - The consecutive sentence (using criminal history score of 1) must be "longer" than the concurrent sentence (using the offender's actual criminal history score).
- *For offenses committed on supervised release, how does the judge know whether concurrent or consecutive time is longer without guessing as to DOC sanctions?*

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## Consecutive Sentencing After Release—Staff Proposal B

- In addition to Staff Proposal A, staff proposes to **eliminate presumptive consecutive sentencing for offenses committed on supervised or conditional release.**
- When the new offense is committed after offender is placed on supervised or conditional release, concurrent sentencing will always be as long or longer than consecutive—absent often-speculative attempts to estimate DOC sanctions.
- Moreover, under Staff Proposal A, those DOC sanctions will be unlikely to affect the term of imprisonment for the second offense, as they will run concurrently.

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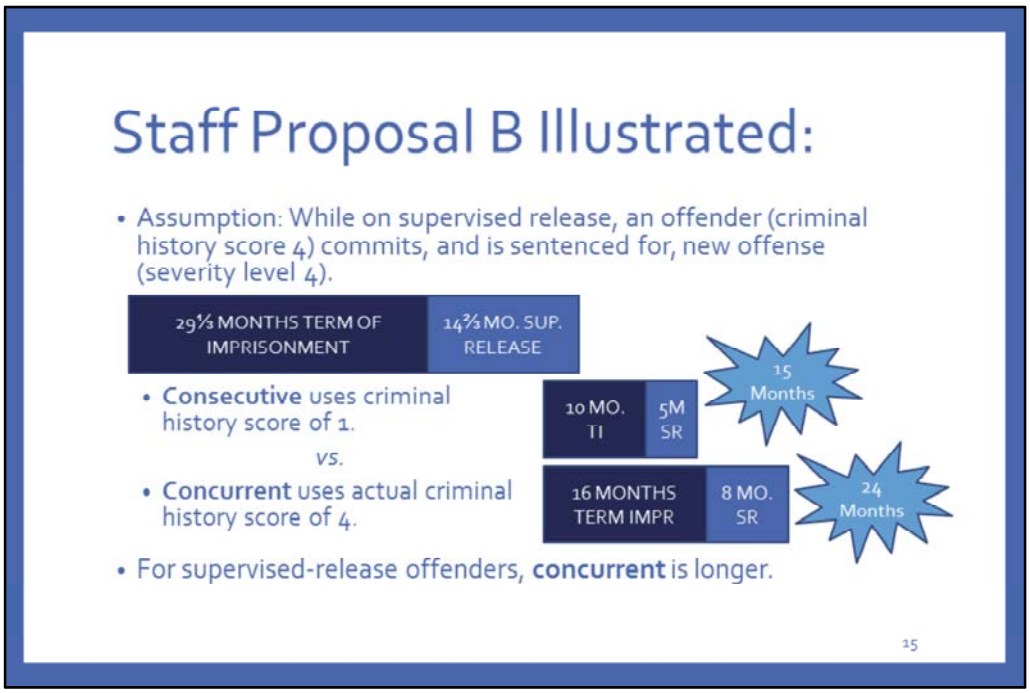
**Considerations:**

This is not expected to affect a large number of cases that are now presumptive consecutive.

Because the longer sentence (concurrent vs. consecutive) is presumptive, and concurrent sentences are pronounced using the offender's total criminal history score, few offenders who commit offenses while on supervised release actually receive consecutive sentences.

In 2012, 515 offenders who committed an offense while on supervised release received a prison sentence for that offense. Only 23 of the 515 received a consecutive sentence, but 17 received a sentence consecutive to something other than the offense for which they were on supervised release. Only 6 offenders, or 1.2% of the offenders who were imprisoned for committing an offense while on supervised release, received a sentence consecutive to the supervised release offense.

**Note:** Even under Staff Proposal B, consecutive sentences would still be allowed if the offenses qualified under the permissive consecutive sentencing rules.




**Considerations:**
Because every offender on supervised release will have a criminal history score of at least 1 (for the custody-status point), and likely higher, concurrent will always be equal to or longer than consecutive (which only employs a criminal history score of 1 in the presumptive-consecutive scheme). Because the longer sentence is presumptive, concurrent will always be presumptive.

Consecutive would only be longer if it were necessary to sentence consecutively to the first offense in order to avoid credit for time served on the first offense. But, because these offenders committed their offenses while on supervised release, they had already completed their term of imprisonment and extended incarceration. The only credit for time served would be in the form of post-release accountability time. Credit for accountability time is problematic for two reasons:
**First**, DOC practice is to wait to impose accountability time until after sentencing for the new offense, requiring the sentencing court to speculate as to executive-branch sanctions in order to determine whether concurrent or consecutive would be longer.
**Second**, per current DOC practice (and consistent with Staff Proposal A), the accountability time for the first offense is concurrent with, and independent of, a consecutive term of imprisonment. Thus, in the absence of a complex change in policy, the sentencing court's attempts to deprive an offender of credit for post-release time served will be fruitless.

# PROPOSAL 3

Compromise Between Current DOC Practice and the Current MSG Commentary

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## Review of Permissive vs. Presumptive Consecutive

### Permissive Consecutive

- Both **offenses** must be on the list of eligible offenses (person crimes, generally)
- Must be a presumptive commit if full criminal history score were used
- Duration: Use CHS of zero
- Judge may sentence concurrently or consecutively without departure

### Presumptive Consecutive

- Key is **DOC status** at time of crime:
  - Executed prison
  - Escape from prison
  - Supervised release, or
  - Conditional release
- Must be a presumptive commit if full CHS were used, or f. assault
- Duration: Use CHS of one
- Concurrent/consecutive: longer sentence is presumptive

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Proposal 3 treats these categories differently, reasoning that offenders who commit new offenses while in DOC status will require additional community supervision.

## Permissive Consecutive Proposal

- DOC will generally apply the following rules when it receives a consecutive, executed prison sentence:
  - All terms of imprisonment are consecutively aggregated.
  - The supervised release terms are concurrent with each other.
  - The supervised release terms all begin at the end of the aggregate term of imprisonment.
  - As a result, the offender serves the longest period of supervised release.

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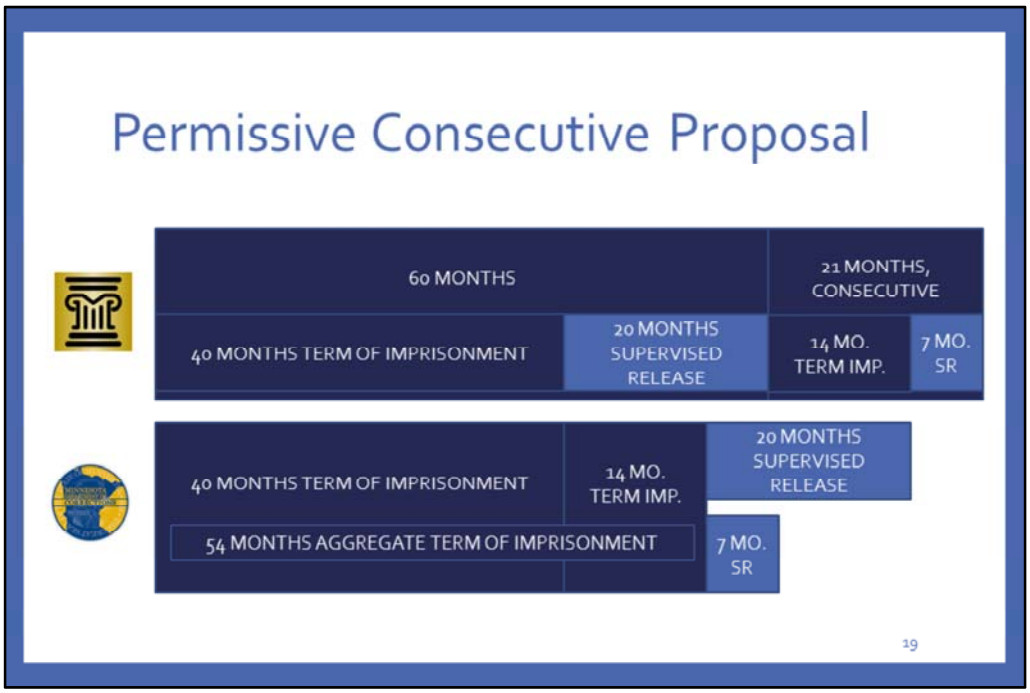
**Considerations:**

We use the term "permissive" here, but this rule would also cover non-permissive consecutive sentences imposed as a MSG departure.

The supervised release terms are concurrent with the supervised release terms of the other offenses.

The ending date of the aggregate term of imprisonment is used to calculate the beginning date of each supervised release term.




**Considerations:**

The offender will serve the longest period of supervised release. Proposal 3 is a compromise under which the original supervised release term is not reduced by time served during the consecutive term of imprisonment (as is the case with Proposal 1), but the supervised release terms are not added together (as is the case with Proposal 2).

Recall that one of the weaknesses of Proposal 1 was that it reduced the time of supervised release below that of concurrent sentencing. Under Proposal 3, the offender receives the same amount of supervised release time with a permissive consecutive sentence as with a concurrent sentence.

## Presumptive Consecutive Proposal

- DOC will apply the following rules when it receives a consecutive sentence for an offense committed when the offender was serving, or on escape status from, an executed prison sentence:
  - All terms of imprisonment are consecutively aggregated.
  - The supervised release terms are consecutively aggregated.
  - The aggregate supervised release term begins at the end of the aggregate term of imprisonment.

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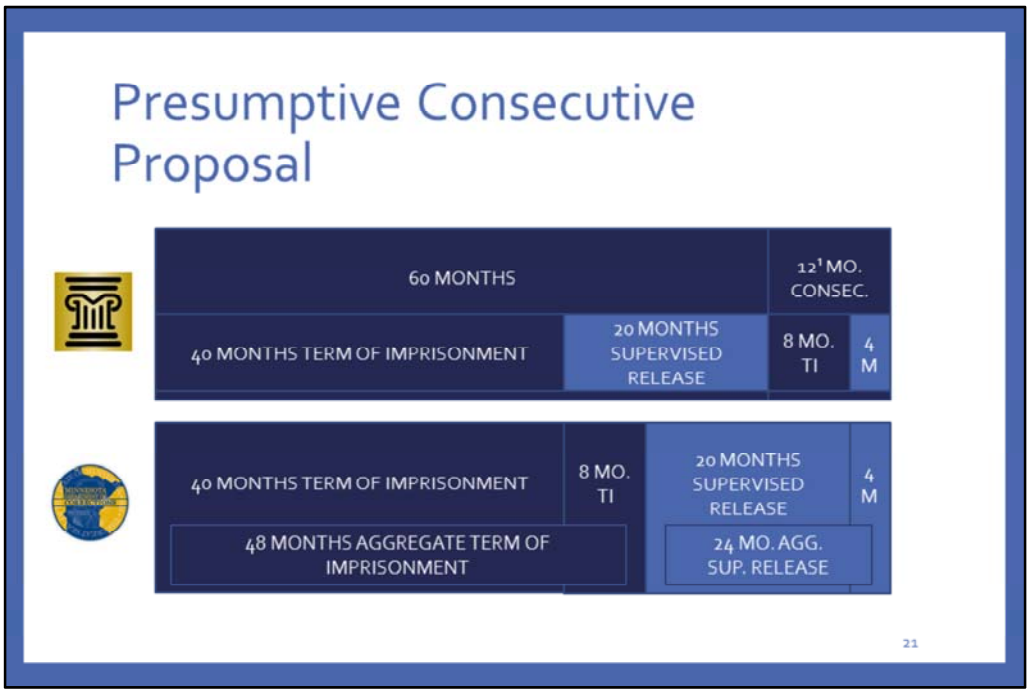
**Considerations:**

The ending date of the aggregate term of imprisonment is used to calculate the beginning date of the aggregate supervised release term.

This is, essentially, Proposal 2 (the current Guidelines commentary), but only applied to presumptive consecutive sentencing. The rationale is that people who commit new felony offenses while in the very structured environment of prison likely need an extended period of community supervision.




**Considerations:**

Unlike permissive consecutive, presumptive consecutive supervised release terms will be aggregated.

## Consecutive Sentencing After Release

- Exception for consecutive sentences executed after the offender had already been placed on supervised release for the first offense: Once supervised release starts, it doesn't stop.
  - This was previously referred to as "Staff Proposal A."
- Presumptive consecutive sentencing will no longer be triggered by supervised/conditional release status.
  - This was previously referred to as "Staff Proposal B."

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# CONCLUSIONS

Comparative Evaluation and Next Steps

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## Ranking the Proposals by Comparison Criteria

| | Proposal 1 (Current DOC Practice) | Proposal 2 (Current MSG Comment) | Proposal 3 (Compromise) |
|---|---|---|---|
| Ease of Administration | Second | First | Third |
| Low Community Supervision Costs | First | Third | Second |
| Public Safety Protection | Third | First | Second |
| Transparent Sentencing | Third | First | Second |

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**Considerations**:

Proposal 3 increased supervision costs: Less than the range estimated for Proposal 2 ($164,400 to $312,360 annually).

There may be some increased costs to DOC for sentence administration. While DOC has methods to administer both Proposal 1 and Proposal 2, it does not have a method to executive Proposal 3. There may also be an increase in the number of challenges through Habeas Corpus petitions.

Proposal 2 and 3 may increase prison bed costs if the number of supervised release revocations increases because supervised release terms are extended.

## Next Steps – New Policy Effective

- 10/16/2014 – Propose new policy language
  - *Must be published 30 days before Public Hearing.*
  - *Finalizing proposed language may be delegated to staff.*
- Between 12/1/2014 to 12/11/2014 – Hold public hearing
  - *Must hold public hearing when proposal effects Grid, Severity Level, CHS, sentence reduction or early release.*
- 12/18/2014 – Adopt new policy and approve Report to the Legislature
  - *Must wait 5 days after public hearing for written comment.*
- 1/15/2015 – Report to the Legislature
  - *Must submit on or before date. New policy included, if adopted on 12/18/2014.*
- 8/1/2015 – New policy effective
  - *Unless the 2015 Legislature by law provides otherwise.*

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**Considerations**:

A public hearing is required when a proposed modification effects the Grid, Severity Levels, criminal history score, sentence reductions or early release. No quorum would be required for the public hearing. A quorum is necessary for the follow-up meeting in which the Commission would vote on final modified language.