

# Minnesota Sentencing Guidelines Commission

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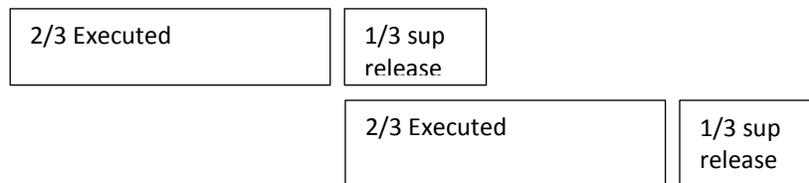
## Clarifying Executed Consecutive Sentences – Standard Consecutive vs. Aggregate Consecutive January 16, 2014

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*To understand the issue below, it may help to understand Minnesota’s “truth in sentencing” law. The law applies to offenders who commit offenses on or after August 1, 1993. 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.*

**Issue:** Recently, MSGC and Department of Corrections (DOC) staff has discussed how consecutive sentences are executed, that is, when and how the time from the second or subsequent sentence is served in relation to the time from the first sentence. DOC looks for two scenarios, and executes the time differently based upon how the sentencing order is written. DOC’s default is to execute the sentence as described in Scenario 1, below. The sentence will only be executed as described below in Scenario 2, if the sentencing order explicitly says to do so. MSGC staff understood the intent of the Guidelines to be to execute consecutive sentences as described in Scenario 2. But as explained below in the Guidelines Consideration section, changes to Guidelines language over time have made this intent less clear.

**Scenario 1 = “Standard” Consecutive Sentence** – 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 only serves the supervised release term from the *second* sentence. It would look something like this:



**Scenario 2 = “Aggregate” Consecutive Sentence** – The two executed sentences are added together (aggregated) and then the 2/3-1/3 split is determined from the total time. Under this scenario, the offender serves more time on supervised release than in the first scenario. Visually, that would look more like this:



**Guidelines Considerations:** In the current Guidelines, comment 2.F.02, supports Scenario 2, by describing “aggregate” executed consecutive sentences. The commentary is advisory only.

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**II.F.02.** *The service of the consecutive sentence begins at the end of any incarceration arising from the first sentence. The Commissioner of Corrections aggregates the separate durations into a single fixed sentence. The terms of imprisonment and the periods of supervised release are aggregated as well. For example, if a court executes a 44-month fixed sentence, and a 24-month fixed sentence to be served consecutively to the first sentence, the Commissioner of Corrections aggregates the sentences into a single 68-month fixed sentence, with a specified minimum 45.3-month term of imprisonment and a specified maximum 22.7-month period of supervised release.*

44 months (first sentence)  
+24 months consecutive (second sentence)  
=68 months (fixed sentence)

45.3 months (2/3 – term of imprisonment)  
22.7 months (1/3 – supervised release)

\* \* \* \*

When the Guidelines were originally proposed, Guidelines text was very clear that consecutive sentences should be aggregated as in Scenario 2 above:

“For persons given consecutive sentences, the sentence durations for each separate offense sentenced consecutively shall be aggregated into a single presumptive sentence.” *Section II.F, Report to the Legislature, January 1, 1980, p. 33.*

A comment similar to that in the Guidelines today was added in 1983:

**II.F.02.** *The guidelines provide that when one judge gives consecutive sentences in cases involving multiple current convictions, sentence durations shall be aggregated into a single fixed presumptive sentence. Moreover, the Commission recommends that when an offender is charged with multiple offenses within the same judicial district the trials or sentencings be consolidated before on judge, whenever possible. This will allow the judge to perform the aggregation process described in the guidelines if consecutive sentences are given. Minn. Sentencing Guidelines II.F.02 (Revised Nov. 1, 1983).*

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In 1995, the Commission modified the consecutive sentencing section to differentiate between offenses that may be sentenced “permissive consecutive” and offenses that must be sentenced “presumptive consecutive.” These modifications significantly changed the section. As a result, the “aggregate” policy language in the Guidelines was stricken, but the comment describing the execution of consecutive sentences was retained. Although speculative, the Guidelines

language may have been removed because it did not fit easily with the modifications that separated “permissive” and “presumptive” consecutive sentences, and it was probably thought to be redundant given that the comment still existed. It should be noted that the 1995 modifications preceded the Court of Appeals decision<sup>1</sup> holding that Guidelines commentary is advisory only, so at the time, the Commission perceived the Guidelines and commentary to have equal weight.

**Number of Consecutive Sentences:** The table below shows the number of cases counted as executed consecutive sentences by both MSGC and DOC from 1991 to 2011. For every year, the MSGC numbers were higher. Not all, but some of the difference may be explained by the two interpretations of executed consecutive sentences.

Sentence Year	MSGC	DOC	Difference
1991	43	4	39
1992	51	2	49
1993	56	2	54
1994	72	8	64
1995	99	24	75
1996	76	10	66
1997	64	2	62
1998	88	15	73
1999	85	27	58
2000	60	13	47
2001	74	38	36

Sentence Year	MSGC	DOC	Difference
2002	104	39	65
2003	103	40	63
2004	102	33	69
2005	118	57	61
2006	89	66	23
2007	95	4	91
2008	139	3	136
2009	103	1	102
2010	100	9	91
2011	135	5	130
	1,856	402	1,454

**Practical Considerations:** As noted above, DOC reports that the language of the order determines how the offender’s time will be executed. To learn more about how judges are pronouncing consecutive sentencing, an informal poll of twenty judges from all parts of the state was conducted. Sixteen responded. Seven indicated that they understood consecutive sentencing to work as described in Scenario 1; seven indicated that they understood consecutive sentencing to work as described in Scenario 2; two were not sure. Following are some of the comments received. The variation in practice and understanding indicates that there is a strong possibility that offenders may be receiving varying treatment without rational justification.

<sup>1</sup> *State v. Bluhm*, 663 N.W.2d 24, 30 (Minn. Ct. App. 2003).

<b>Informal Survey Comments</b>	
<b>Sentencing Preference</b>	<b>Comment</b>
Scenario 1	<p>I have always sentenced pursuant to Scenario 1 and never knew about Scenario 2 (having never read 2.F.02). Having now learned of Scenario 2, I question the legal basis for Scenario 2. By aggregating the two sentences are you disregarding the requirement that the service of the consecutive sentence begins at the end of the incarceration of the first sentence (the supervised release date). By aggregating the sentences, the first sentence, which would expire during the service of the consecutive sentence, is expanded beyond the time allowed under that first pronounced sentence. The consecutive sentence would also have a longer supervised release time than allowed by the terms of the second sentence. Under what theory of law can you extend the supervised release on the consecutive sentence beyond 1/3 of that consecutive sentence. This is really an interesting issue. It is clear I don't have any answers, only questions.</p>
Scenario 1	<p>I was taught to sentence according to Scenario 1 and was not aware of Scenario 2. Thanks for including me on the email because I learned of a different method and will keep it in mind for appropriate situations.</p>
Scenario 1	<p>I always do it as described in scenario #1. I sentence on 1 file, and then I sentence separately on the 2<sup>nd</sup> file telling the defendant that his second sentence will start running after he has done the 2/3 time on the first offense. In doing that, I was assuming that the defendant would burn up the supervised release period on the first file, that file would close because he actually did all of the time, and his supervised release would be only for the remaining file's 1/3 of the time.</p> <p>Each file has to have a separate sentencing order, therefore, the first file gets a standard sentence 2/3 and 1/3. Then, if the next file is determined to be a consecutive sentence, I always believed that the supervised release on the first file would be used up in prison and the file closed.</p> <p>One problem is that some of the longer serving judges are accustomed to handling multiple files all at the same time. This makes it difficult for court staff and does not make a clear record of what the actual sentence for each file should be. With "in-court updating" and eCourtMN the judges are supposed to call each file separately and pronounce separate sentences for each</p>

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	file, thus producing individual sentencing orders for each case. In my view, if you do one file at a time, the result is scenario #1.
Scenario 1	I have never been aware of scenario 2. It makes sense to me and in the appropriate case I will take advantage of the longer supervised release.
Scenario 2	I think intuitively I would expect the DOC to handle consecutive sentences as you have set forth in Scenario 2, Aggregate Consecutive Sentences. That seems fair to me. I would like to know what magic words others come up with to make that happen.
Scenario 2	<p>I always did it the second way and so I stated at sentencing that it was an aggregate of the two with 1/3 of the combined total being the supervised release total. I was not aware that it was or could be done the way suggested in scenario 1.</p> <p>There shouldn't be any variation if following the direction given in Comment II.F.04 where it says the Institutional records officer will aggregate per scenario 2 regardless of how the sentencing Judge states it at the sentencing hearing.</p> <p>One of the main purposes of the guidelines was to try to create consistency among Counties and Judges. This comment was designed to make sure all defendants sentenced consecutively were treated the same.</p>
Scenario 2	As is customary in [my county], I pronounce the sentence orally and let MNCIS do the sentencing order and the commit. But I am careful to say something like this: In file 1 (or count 1), the sentence is 30 months. In file 2 the sentence is 30 months, consecutive. Therefore, the total sentence is 60 months. You're eligible for supervised release after 40 months, etc.
Scenario 2	I was unaware there was another way to do the computation.

**Possible Options for Consideration:**

1. Leave the Guidelines as currently written – The current practice continues and it is up to the sentencing court to know that it must specify in the sentencing order when the sentences shall be executed aggregate consecutive. Under this option, it is suggested that judges receive training about the two possible options so that whichever option is chosen is a conscious decision and well-reasoned.

2. Clarify that the executed consecutive sentences shall always be served as described in Scenario 1 – This makes DOC’s default position the standard sentencing practice and improves the situation by making sentences uniform. But it could be argued that this approach transforms consecutive sentences to partially concurrent sentences and shortens the total sentence term.
3. Clarify that an executed consecutive sentence shall be aggregated – Add language to the Guidelines similar to that which was previously in the Guidelines and is currently in comment 2.F.02. This improves the situation by making sentences uniform. But it could be argued that this violates the requirement that the service of the consecutive sentence begins at the end of the incarceration of the first sentence.