

Minnesota Sentencing Guidelines Commission

Impermissible Departure Reasons April 16, 2015

Note: “Departure Reasons Listed in the Guidelines” was on the agenda March 19, 2015, at which time the Commission amended its nonexclusive list of mitigating factors (Section 2.D.3) to include amenability to probation, but tabled any action with respect to the list of factors not to be used for departure (Section 2.D.2).

Issue: Whether the Commission should modify the list of factors not to be used for departure.

Considerations: During its March, 2015, meeting, the Commission discussed the wording of Section 2.D.2, which lists reasons that should not be used as reasons for departure. As Comment 2.D.201 (in its current form) acknowledges, some of the impermissible factors are related to particular amenability to probation. In cases in which particular amenability to probation is relied upon for departure, judges should take care that the impermissible factors are not, alone, the supporting basis for departure.

It might be appropriate to revise Section 2.D.2 to reflect that some of the impermissible factors are entirely inappropriate as a basis for departure, and some are merely inappropriate when used alone.

Staff have drafted a potential set of modifications to effect this change. In this draft, race and sex are assumed to never be permissible grounds for departure, while employment and social factors are presumed to be merely inappropriate when used alone.

Staff have included the defendant’s exercise of constitutional rights in the former category. Alternatively, that factor could be moved into the latter category, reasoning that a defendant who exercised his constitutional right to testify, but testified falsely, may, to the extent of the falsity of his testimony, have that exercise of his constitutional right held against him at sentencing.

Questions for the Commission: Does the Commission wish to create distinctions between the factors that may never be used for departure, and those that may be used to support particular amenability to probation, but never alone?

Possible Guidelines Modifications to Section 2.D:

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2. Factors that **should not** be used as Reasons for Departure. The following are factors that should not be used as reasons for departing from the presumptive sentences provided in the appropriate cell on the applicable Grid:
 - a. The following factors should never be used as reasons for departure:
 - (1) ~~a.~~ Race.
 - (2) ~~b.~~ Sex.
 - (3) The defendant's exercise of constitutional rights during the adjudication process.
 - b. The following factors should not be used, in and of themselves, as reasons for departure:
 - (1) ~~c.~~ Employment factors, including:
 - (a) ~~(1)~~ occupation or impact of sentence on profession or occupation;
 - (b) ~~(2)~~ employment history;
 - (c) ~~(3)~~ employment at time of offense;
 - (d) ~~(4)~~ employment at time of sentencing.
 - (2) ~~d.~~ Social factors, including:
 - (a) ~~(1)~~ educational attainment;
 - (b) ~~(2)~~ living arrangements at time of offense or sentencing;
 - (c) ~~(3)~~ length of residence;
 - (d) ~~(4)~~ marital status.
 - e. ~~The defendant's exercise of constitutional rights during the adjudication process.~~

Comment

2.D.201. *The Commission believes that sentencing should be neutral with respect to an offender's race, sex, and income level. Accordingly, the Commission has listed employment and social factors that should not be used as reasons for departure from the presumptive sentence, because these factors are highly correlated with sex, race, or income level. Employment is excluded as a reason for departure not only because of its correlation with race and income*

levels, but also because this factor is manipulable – e.g., offenders could lessen the severity of the sentence by obtaining employment between arrest and sentencing. While it may be desirable for offenders to obtain employment between arrest and sentencing, some groups (those with low income levels, low education levels, and racial minorities generally) find it more difficult to obtain employment than others. It is impossible to reward those employed without, in fact, penalizing those not employed at time of sentencing. ~~The use of the factors “amenable to probation (or treatment)” or “unamenable to probation” to justify a dispositional departure, could be closely related to~~ While some social and economic factors may be related to particular amenability to probation (including particular amenability to treatment). ~~The use of these factors, alone, to explain the reason for departure is~~ insufficient, and the trial court should demonstrate that the departure is not based on any of the excluded factors.

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