

Minnesota Sentencing Guidelines Commission
Impact of Possible Recommendations to the Legislature
December 30, 2015

In establishing and modifying the Sentencing Guidelines, the primary consideration of the Commission is to be public safety. The Commission is also to consider, among other considerations, correctional resources. Minn. Stat. § 244.09, subd. 5. The Legislature has directed the Commission to provide it with recommendations, from time to time, regarding changes in the criminal code, criminal procedure, and other aspects of sentencing. Minn. Stat. § 244.09, subd. 6. Historically, the Commission's research staff has provided the Commission with estimates of the impact that such recommendations would have upon correctional resources. Because several Commission members have proposed making such recommendations, the following estimates are provided to the Commission regarding the estimated correctional impact of these proposals.

1. Repeal Mandatory Minimums

Recommendation

It has been proposed that the Commission recommend that the Legislature repeal the mandatory minimum sentencing provisions in Chapter 152, Minnesota Statutes. This would be intended to complement the Commission's proposed modifications to the Guidelines relating to sentencing of drug offenses and to give the courts and prosecutors more discretion on the appropriate sentence for individual defendants.

Prison-Bed Impact

Under the current Sentencing Guidelines, all first- and second-degree offenses are presumptive commitments, regardless of the mandatory minimums for subsequent offenders set forth in Chapter 152, Minnesota Statutes, and the presumptive durations are longer than the mandatory minimums. Because of this, the proposed repeal of mandatory minimums would not affect the presumptive sentences for those offenders.

A repeal might result in some increase in the mitigated dispositional departure rate for subsequent first- and second-degree subsequent offenders. Table 1 displays the number of first- and second-degree offenders sentenced in 2014 along with the mitigated dispositional departure rates for first-time offenders and subsequent offenders.

Table 1. Actual Mitigated Dispositional Departure Rates, First- and Second-Degree Drug Offenders, 2014

Degree and Number of Offenders	First-Time Offenders	Mitigated Dispositions First-Time Offenders	Subsequent Offenders	Mitigated Dispositions Subsequent
First: 278	164	88 54%	114	21 18%
Second: 427	236	130 55%	191	32 17%

The Commission is currently considering the adoption of a new Drug Offender Grid. If that proposal were adopted and permitted to take effect, second-degree offenders would move to a severity level at which offenders with a criminal history score of less than three would have presumptive stayed sentences. Among that group, there were 72 subsequent drug offenders in 2014. For these offenders, the presumptive disposition would remain imprisonment due to the existing mandatory-minimum law, but, under the Drug Offender Grid, the presumptive durations would be reduced.

If mandatory minimums were repealed, and the Drug Offender Grid were permitted to take effect, those 72 offenders would shift to presumptive probation. Of those 72 offenders, 50 (69%) received a prison sentence. If those offenders received probation as a result of a repeal of the mandatory minimum, there would be an estimated savings of 116 prison beds.

Under both current law and the Drug Offender Grid, if a third-degree offender is a subsequent offender and the criminal history score is less than three, the mandatory minimum creates a presumptive prison disposition for what would otherwise be a presumptive stayed disposition. Of the 603 third-degree offenders sentenced in 2014, 74 had presumptive prison dispositions because they are subsequent offenses. Of those 74 offenders, 43 actually received a prison sentence. If the mandatory minimum for subsequent offenders is repealed, the estimated prison bed savings for third degree offenders is 64 beds.

In sum, if the mandatory minimums for subsequent drug offenders were repealed in conjunction with the implementation of the Drug Offender Grid, it is estimated that the eventual prison-bed savings—in addition to the prison-bed savings from the implementation of the Drug Offender Grid alone—would be 180 beds.

2. Remove Fifth-Degree Possession as a Prior for Mandatory Minimums

Recommendation

It has been proposed that the Commission recommend that the Legislature remove Controlled Substance Crime in the Fifth Degree – Possession from the list of offenses for which a

subsequent controlled substance conviction will trigger a mandatory minimum prison sentence. Minn. Stat. § 152.01, subd. 16a.

Prison-Bed Impact

Currently, all first- and second-degree offenses are presumptive commitments, regardless of the mandatory minimums for subsequent offenders set forth in Chapter 152, Minnesota Statutes, and the presumptive durations are longer than the mandatory minimums. If a third-degree offender is a subsequent offender and the criminal history score is less than three, the mandatory minimum creates a presumptive prison disposition for what would otherwise be a presumptive stayed disposition.

If the Drug Offender Grid were adopted and permitted to take effect, second-degree offenders would move to a severity level at which offenders with a criminal history score of less than three would have presumptive stayed sentences. If fifth-degree possession were removed from the list of offenses for which a subsequent controlled substance conviction triggers a mandatory minimum sentence and the Drug Offender Grid were to take effect, second- and third-degree offenders with a criminal history score of less than three, who are now subsequent offenders solely because of a prior fifth-degree possession conviction, would have presumptive stayed sentences.

In 2014, 93 second- and third-degree subsequent offenders had criminal history scores of less than three and received prison sentences: 50 second-degree; and 43 third-degree. MSGC staff reviewed the criminal history for these offenders and determined that, if fifth-degree possession were removed from the list of eligible offenses for which a subsequent controlled substance is based, 45 offenders would shift to presumptive probation: 22 second-degree; and 23 third-degree.¹

If the 22 second-degree offenders received probation as a result, there would be an estimated prison bed savings of 49 beds. If the 23 third-degree offenders received probation as a result, there would be an estimated prison bed savings of 34 beds.

In sum, if fifth-degree possession were removed from the definition of “subsequent controlled substance conviction,” in conjunction with the implementation of the Drug Offender Grid, it is estimated that the eventual prison-bed savings—in addition to the prison-bed savings from the implementation of the Drug Offender Grid alone—would be 83 beds.

¹ Excluded from this estimate are 3 third-degree offenders who had 1 prior fifth-degree controlled substance offense; however, it could not be determined if it was a sale or possession offense.

3. Trace Amounts

Recommendation

It has been proposed that the Commission recommend that the Legislature reduce Controlled Substance Crime in the Fifth Degree – Possession, Minn. Stat. § 152.025, subd. 2, in a case involving possession of a trace amount of a controlled substance, to a gross misdemeanor rather than a felony.

Prison-Bed Impact

The prison-bed impact cannot be estimated because no information is available as to what percent of fifth-degree cases involve trace amounts. It is expected that the reduction of fifth-degree offenses involving trace amounts to gross misdemeanor offenses would result in some decrease in the number of offenders receiving prison sentences for those offenses either as the original sentence or as a result of a probation revocation. Those offenders would also shift from felony probation to gross misdemeanor probation and therefore would be likely to serve less time on probation and might receive less local jail time. In addition, because a gross misdemeanor conviction is excluded from the definition of “subsequent controlled substance conviction,” this proposal, if adopted, would result in some additional prison-bed savings in cases in which offenders would no longer be regarded as subsequent offenders.

Although this proposal’s prison-bed impact is not estimated, the following data provide information on the total number of fifth-degree possession offenses that currently involve prison sentences.

In 2014, 2,664 offenders were sentenced for fifth-degree possession offenses. Of the 2,664 offenders sentenced, 422 (16%) received a prison sentence, creating the need for 371 estimated prison beds. Of the 422 prison sentences, 266 (63%) were the result of aggravated dispositional departures; 81 percent of which were the result of requests for prison or a plea negotiation for a prison sentence. In the other 19 percent of the aggravated dispositions, no information was provided as to agreement or objection of the offender to the mitigated disposition. In 34 (65%) of those cases, the departure resulted from a failed stay of adjudication.

From 2001 to 2013, 23,242 offenders were placed on felony probation for fifth-degree possession offenses. Through the end of 2014, 4,136 (18%) were revoked from probation and sent to prison for some reason other than a prison sentence for a new felony offense.

4. Enhanced Possession of a Controlled Substance in the First Degree

Recommendation

It has been proposed that the Commission recommend that the Legislature amend controlled substance in the first degree by adding two new enhanced possession of a controlled substance in the first-degree offenses, both based on total weight of the controlled substance.

A person would be guilty of enhanced controlled possession of a controlled substance in the first degree if:

- (1) the person unlawfully possesses one or more mixtures of a total weight of 50 grams or more containing cocaine, heroin, or methamphetamine;
- (2) the person unlawfully possesses one or more mixtures of a total weight of 1000 grams or more containing a narcotic drug other than cocaine, heroin, or methamphetamine;
- (3) the person unlawfully possesses one or more mixtures of a total weight of 1,000 grams or more containing amphetamine, phencyclidine, or hallucinogen or, if the controlled substance is packaged in dosage units, equaling 1,000 or more dosage units;
- (4) the person unlawfully possesses one or more mixtures of a total weight of 200 kilograms or more containing marijuana or Tetrahydrocannabinols.

A person would be guilty of more enhanced possession of a controlled substance in the first-degree if:

- (1) the person unlawfully possesses one or more mixtures of a total weight of 75 grams or more containing cocaine, heroin, or methamphetamine;
- (2) the person unlawfully possesses one or more mixtures of a total weight of 1,500 grams or more containing a narcotic drug other than cocaine, heroin, or methamphetamine;
- (3) the person unlawfully possesses one or more mixtures of a total weight of 1,500 grams or more containing amphetamine, phencyclidine, or hallucinogen or, if the controlled substance is packaged in dosage units, equaling 1,500 or more dosage units;
- (4) the person unlawfully possesses one or more mixtures of a total weight of 300 kilograms or more containing marijuana or Tetrahydrocannabinols.

Prison Bed Impact

If these recommendations were adopted by the Legislature and the Drug Offender Grid were adopted and permitted to take effect, the result would be a decrease in the projected prison bed savings from Drug Offender Grid. MSGC staff reviewed the criminal complaints for first-degree possession offenders who were sentenced in 2014. Complaints were found for 103 (85%) of the 121 cases sentenced. Of the 103 cases for which amount information was collected, 64 (53%) had total weights of 50 grams or more of heroin/meth/cocaine. Of those 64 cases, 51 (42% of the 103 cases) had total weights of 75 grams or more.

The Drug Offender Grid would rank first-degree possession offenses at Severity Level D8. It is assumed that if the proposed modifications to Minn. Stat. § 152.021 were adopted by the Legislature, the Commission would rank enhanced possession at Severity Level D9, and more enhanced possession at Severity Level D10, as these are the only two higher levels on the Drug Offender Grid.

In its review of criminal complaints, MSGC staff assigned offenders sentenced in 2014 to new severity levels based on the information collected on the total amount of drugs noted on the first-degree possession criminal complaints. Table 2, below, displays the distribution of those

offenders, the imprisonment rates, and the departure rates for each assigned severity level. The 18 cases for which amount information was not available were assigned to Severity Level D8. Because this proposal does not include sale, the drug quantities for first-degree sale cases were not reviewed. It is quite possible, however, that some Severity Level D9 first-degree sale cases could be charged as Severity Level D10 more enhanced possession, in which case the prison-bed cost would be greater than estimated.

Table 2. Distribution of First-Degree Possession Offenders on Drug Offender Grid Based on Assumed Rankings of Proposed Enhanced First-Degree Possession Offenses, 2014

Severity Level Assigned	Number Cases	Prison Rate	Mitigated Dispositional Departure Rate	Number Prison	Mitigated Durational Departure Rate	Aggravated Durational Departure Rate
D8	57 (47%)	61%	39%	35	43%	0%
D9	13 (11%)	31%	69%	4	75%	0%
D10	51 (42%)	63%	37%	32	50%	0%
Total	121	59%	41%	71	48%	0%

Only cases which receive prison sentences contribute to the impact of the recommendation, so this analysis is based on the 71 cases which received prison sentences. The creation of enhanced and more enhanced offenses would result in a reduction in the projected prison bed savings of the Drug Offender Grid of 39 beds. Under the Drug Offender Grid, there would an estimated savings of 81 beds for first-degree possession cases. Thus, if enhanced and more enhanced offenses were created, that eventual savings would drop to 42 prison beds.

Table 3, below, displays the distribution of the weights found for the meth/heroin/cocaine first-degree possession cases sentenced in 2014 where the information was available.²

Table 3. Distribution of Alleged Weights of Cocaine, Heroin, or Methamphetamine for First-Degree Possession Cases with Available Criminal Complaints, 2014

Amount Category	Number of Cases	Percent of Cases
≥25, <50 grams	39	38%
≥50, <75 grams	13	13%
≥75, <100 grams	14	14%
≥100, <500 grams	30	29%
≥500 grams	7	7%
Total	103	100%

² There were 6 cases involving more than 1,000 grams: 3 with between 1,000-2,000 grams, 1 with 3,407 grams, and 2 with more than 7,000 grams.