
Minnesota Sentencing Guidelines Commission
Proposals Relating to Sentencing for
First- and Second-Degree Controlled Substance offenses
November 21, 2013

Submitted by Commissioners Anderson, Larson, Stuart, and Walker

Proposal 1: Recommend to the Legislature that the controlled substance threshold amounts that define first- and second-degree offenses should be adjusted so that they better differentiate between the seriousness of the offenses.

Rationale: First-degree offenses currently cover a broad range of criminal activity. Both the street-level dealers selling 10 grams and sophisticated wholesale drug rings trafficking in hundreds of grams to pounds are punishable under this same offense. Both actions cause damage to the community and endanger public safety, but wholesale dealing is arguably a more serious offense and should be punished more severely. Amending the drug threshold amounts to more clearly differentiate between these actors will allow the Sentencing Guidelines Commission to establish offense severity rankings that are more proportional to the seriousness of the offenses.

While studying first- and second-degree controlled substance offenses over the past year, the Commission collected data from complaints for offenders sentenced for first- and second-degree controlled substance offenses in 2011. The Commission noticed these trends. Over half of the first-degree sale offenses were for an amount slightly more than double the threshold of 10 grams (58% were less than 30 grams) and 15 percent involved more than 200 grams. Almost one-fourth of the first-degree possession offenses involved an amount just over the threshold of 25 grams (21% were 30 grams or less) and 24 percent involved 200 grams or more. Approximately one-third of the second-degree offenses involved amounts that were less than double the thresholds (36% of sale offenses; and 34% of possession offenses). Forty-one percent of the second-degree sale offenses involved first-degree amounts (10 grams or more) as did 25 percent of the second degree possession offenses (25 grams or more). Table 1 summarizes the information collected on cases involving cocaine, methamphetamine, and heroin for which the amount of the controlled substance was measured in grams.

Table 1.

Offense	Threshold in grams	< Double Threshold (% of cases)	Mid-ranges (% of cases)	Upper ranges (% of cases)
1 st Degree Sale	10 g	Less than 20 g (43%)	20<100 g (34%)	100+ g (23%)
1 st Degree Poss.	25 g	50 g or less (40%)	50<200 g (36%)	200+ g (24%)
2 nd Degree Sale	3 g	6 g or less (36%)	6<10 g (23%)	10+ g (41%)
2 nd Degree Poss.	6 g	12 g or less (34%)	12<25 g (41%)	25+ g (25%)

Proposal 2: Recommend to the Legislature that the mandatory minimum sentence for subsequent controlled substance convictions be repealed. Alternatively, recommend that the definition of “subsequent controlled substance conviction” under Minn. Stat. § 152.01, subd. 16a be amended to exclude prior dispositions under Minn. Stat. § 152.18.

Rationale: The Commission received feedback from Round Table participants that mandatory minimum sentences for subsequent controlled substance convictions are extremely problematic. The mandatory minimum sentence for a first-degree subsequent controlled substance conviction is commitment to prison for 48 months. Minn. Stat. § 152.021, subd. 3(b). The mandatory minimum for a second-degree subsequent controlled substance conviction is commitment to prison for 36 months. Minn. Stat. § 152.022, subd. 3(b). These mandatory minimums are applied when, prior to the current offense, the offender was either previously convicted of a controlled substance offense or received a disposition under Minn. Stat. § 152.18.

The sentence duration for each mandatory minimum is less than the duration on the Grid at every criminal history score. Therefore, it *is* possible for the court to give a durational departure (prison for less time than called for on the Grid) and still comply with the mandatory minimum sentence. However, the provisions mandate that the offender be sentenced to prison, so it is not possible for the court to give a dispositional departure (that is, sentence the offender to a term of probation rather than prison). Prior to 2007, the courts frequently *did* depart from these mandatory minimum provisions. But in 2007, the Court of Appeals in *State v. Turck*, 728 N.W.2d 544 (Minn. Ct. App. 2007), determined that the mandatory minimum sentence must be served, and the court cannot stay execution of the sentence. It should also be noted that these mandatory minimum sentences are different than some others found in the criminal code in that the language clearly provides for a minimum sentence but does not provide an alternative to that minimum. In contrast, for example, the mandatory minimum sentence for offenses involving dangerous weapons or firearms under Minn. Stat. § 609.11 includes a provision permitting the court to sentence without regard to the mandatory minimum upon motion of the prosecutor or on its own motion. Minn. Stat. § 609.11, subd. 9.

As the high departure rates indicate, the criminal justice system is individualizing sentencing in this area, but automatic application of the mandatory minimum does not allow such individualizing for repeat offenders. The Commission heard from Round Table participants that relapse is an expected and ordinary part of the addiction cycle, and that offenders often need more than one course of treatment. The mandatory minimum does not take these points into account. While harsher sentencing may be appropriate for repeat offenders motivated by criminal tendencies, such sentences are not appropriate for repeat offenders who are motivated by addiction. Some Round Table participants also commented that it is unfair for the mandatory minimum to be based on previous conduct for which the offender was never convicted but instead received a disposition under Minn. Stat. § 152.18.

Proposal 3: Rerank first-degree possession offenses (Minn. Stat. § 152.021, subd. 2) at Severity Level 8 and second-degree possession offenses (Minn. Stat. § 152.022, subd. 2) at Severity Level 7.

SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Assault, 1st Degree</i> <i>Controlled Substance Crime</i> <i>Sale, 1st Degree</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Aggravated Robbery, 1st Degree</i> <i>Controlled Substance Crime</i> <i>Possession, 1st Degree</i> <i>Sale, 2nd Degree</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI</i> <i>Controlled Substance Crime</i> <i>Possession, 2nd Degree</i>	7	36	42	48	54 46-64	60 51-72	66 57-79	72 62- 86 84

Rationale: The Commission issued reports on drug offender sentencing issues in 2004 and 2007. In the 2007 report, the Commission suggested that first- and second-degree controlled substance offenses should each be reranked by moving them down one severity level. The Commission concluded at the time that because criminal justice professionals were agreeing to less-than-Guidelines sanctions for these offenses, the professionals were suggesting that they found the presumed sentences too harsh. The Commission also noted that the fact that the mandatory minimum sentences for repeat offenders are less harsh than the Guidelines suggests that the sentences are more severe than the Legislature would agree upon. Reranking possession offenses only is a more conservative step than previously offered. But it is consistent with feedback heard from Round Table participants that sale is a very serious offense that greatly impacts our communities. Reranking possession but not sale would make a strong policy statement that sale of controlled substances is a more serious offense than possession of controlled substances.

Proposal 4: Establish border boxes for first- and second-degree controlled substance offenses at a criminal history score of 0 and 1. Within the border box, the presumptive sentence would still be prison for the indicated duration, but if the offender meets the established criteria, the court could impose a stayed sentence without departure.

SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Assault, 1st Degree Controlled Substance Crime, 1 st Degree	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
		48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129



Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See Guidelines section 2.E, for policies regarding those sentences controlled by law.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. Guidelines sections 2.C and 2.E.



Presumptive commitment to state imprisonment; however, the disposition may be stayed at the discretion of the court, without departure as described in section 2.C.3.c.

Following are suggested criteria for a stayed sentence within the border box; the criteria could be incorporated into Minn. Sentencing Guidelines § 2.C.3.c:

c. Controlled Substance Offenses.

(1) Optional Stayed Sentence. If an offender is convicted of a first- or second-degree controlled substance offense and the offender’s criminal history score is 0 or 1, the presumptive sentence is prison for the duration indicated, but the court may impose without departure an optional stayed sentence upon making the following findings on the record:

- (i) The offender has received a chemical dependency evaluation; and
- (ii) The offender qualifies for drug court or a treatment program and the offender can be admitted to the drug court or treatment program within a reasonable period of time; and
- (iii) The drug court or treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; or

(iv) The stayed sentence will serve public safety by promoting offender reformation.

The sentencing judge shall not impose an optional stayed sentence if a firearm was used in the commission of the offense or if the offense involved sale of a controlled substance to a person under the age of 18.

(2) Mandatory Minimum for Subsequent Controlled Substance Convictions. If the current conviction offense is for a controlled substance crime in the first, second, or third degree and is a “subsequent controlled substance conviction” as defined in Minn. Stat. § 152.01, subd. 16a, the presumptive disposition is commitment. A stay of adjudication under Minn. Stat. § 152.18 that occurred before August 1, 1999 is not a prior disposition under Minn. Stat. § 152.01, subd. 16a. The prior dispositions listed in Minn. Stat. § 152.01, subd. 16a trigger the presumptive commitment unless more than ten years have elapsed since discharge from sentence or stay of adjudication. The presumptive duration for a controlled substance conviction falling under this section is the fixed duration indicated in the appropriate cell on the Grid, or the mandatory minimum, whichever is longer.

Rationale: The Commission received feedback at the Round Table that drug court is the one thing that we know works to reduce recidivism and that it should be more fully integrated into sentencing. The Commission also received feedback at the Round Table that for a subset of offenders who are addicted, treatment is more effective than prison. This approach would make a policy statement that it is appropriate to separate the wholesale drug entrepreneurs who are committing offenses for financial gain from offenders who are committing offenses because they are addicted. This change allows those jurisdictions that are already differentiating between offenders to continue doing so, and will encourage those jurisdictions that are not differentiating in this way to begin to do so. The recommended criteria attempt to promote uniformity by placing parameters on when a stayed sentence is appropriate. The criteria also recognize that drug court is not yet available statewide; therefore a stayed sentence along with an appropriate treatment regimen is recommended for locations that do not currently have drug court.

Proposal 5: Establish drug court or an appropriate treatment program as the presumptive sentence when certain criteria are met.

Following are suggested criteria for a stayed sentence, which would be incorporated into Minn. Sentencing Guidelines § 2.C.3.c:

c. Controlled Substance Offenses.

- (1) Presumptive Stayed Sentence. If an offender is convicted of a first- or second-degree controlled substance offense and the presumptive sentence as reflected in the appropriate cell on the Standard Grid is prison, the sentence must be stayed upon making the following findings on the record:
- (i) The offender has received a chemical dependency evaluation; and
 - (ii) The offender qualifies for drug court or a treatment program and the offender can be admitted to the drug court or treatment program within a reasonable period of time; and
 - (iii) The drug court or treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; or
 - (iv) The stayed sentence will serve public safety by promoting offender reformation.

The sentencing judge shall not impose a stayed sentence if a firearm was used in the commission of the offense or if the offense involved sale of a controlled substance to a person under the age of 18.

- (2) Mandatory Minimum for Subsequent Controlled Substance Convictions. If the current conviction offense is for a controlled substance crime in the first, second, or third degree and is a “subsequent controlled substance conviction” as defined in Minn. Stat. § 152.01, subd. 16a, the presumptive disposition is commitment. A stay of adjudication under Minn. Stat. § 152.18 that occurred before August 1, 1999 is not a prior disposition under Minn. Stat. § 152.01, subd. 16a. The prior dispositions listed in Minn. Stat. § 152.01, subd. 16a trigger the presumptive commitment unless more than ten years have elapsed since discharge from sentence or stay of adjudication. The presumptive duration for a controlled substance conviction falling under this section is the fixed duration indicated in the appropriate cell on the Grid, or the mandatory minimum, whichever is longer.

Rationale: This proposal differs from the border box concept in that it creates a presumptive stayed sentence for the purpose of allowing the offender to enter drug court or a treatment

program when the proposed criteria are met. And unlike the border box concept, which only applies at a criminal history score of 0 and 1, this policy would apply at any criminal history score. The rationale for this proposal is the same as that for the border box proposal. This policy change would recognize that treatment is more effective than prison for addicted offenders. And this policy change would more fully integrate drug court into the overall sentencing strategy for controlled substance offenders.