

Minnesota Sentencing Guidelines Commission

Proposed Amendments to the Sentencing Guidelines and Commentary Prospective Effective Date: August 1, 2015

The Minnesota Sentencing Guidelines Commission will hold a public hearing on Wednesday, July 15, 2015, at 2:00 p.m. in Room 200, at the State Office Building, 100 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155. The Commission will consider the following proposed amendments to the Sentencing Guidelines and Commentary resulting from new and modified legislation, non-legislative amendments, and technical amendments.

The Commission will hold the record open for five days after the public hearing to accept written comment. On Wednesday, July 22, 2015, the Commission will meet at 2:00 p.m. in Room 225 at the Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155, to formally adopt or reject the proposed amendments. If adopted, amendments become effective August 1, 2015.

A. New Legislation (New Offense from the 2015 Legislative Session). The Commission reviewed one felony offense that was newly enacted by the 2015 Legislature, and proposes severity-level rankings as follows.

- **Wrongful Employment at a Child Care Center**

Reference: [2015 Minn. Laws ch. 78](#), § 59; Minn. Stat. § [609.52](#) (2014)

Description: A new felony for wrongful employment at a child care center will be codified at Minn. Stat. § 609.816. This applies to persons who require child care center applicants or employees to have one or more children who are eligible for or receive child care assistance. The crime is punishable under the theft penalty provisions in Minn. Stat. § 609.52, subd. 3, clauses (1) to (5) which range from misdemeanor to felony depending on the monetary value of the theft.

Commission Proposal: Add “609.816, Wrongful Employment at a Child Care Center” to the Theft Offense List in Section 7, and reference the new offense in section 5.B at Severity Level 3 (Over \$5,000) and Severity Level 2 (\$5,000 or Less), as follows.

Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
<u>609.816</u>	<u>Wrongful Employment at a Child Care Center (Over \$5,000)</u>	<u>3</u>
<u>609.816</u>	<u>Wrongful Employment at a Child Care Center (\$5,000 or Less)</u>	<u>2</u>

* * *

Section 7. Theft Offense List

It is recommended that the following property crimes be treated similarly. Below is the Theft Offense List cited for the Theft Crimes (\$5,000 or less and over \$5,000) in section 5.A Offense Severity Reference Table. The severity level for these offenses is based on the monetary amount of the conviction offense. The monetary amount is contained in the penalty statute as cited below:

- Severity Level 2. When the monetary value of the Theft Crime is \$5,000 or less, the penalty statute is Minn. Stat. § 609.52, subdivision 3(3)(a).
- Severity Level 3. When the monetary value of the Theft Crime is over \$5,000, the penalty statute is Minn. Stat. § 609.52, subdivision 3(2).

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Statute Number	Offense Title
<u>609.816</u>	<u>Wrongful Employment at a Child Care Center</u>

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B. Modified Legislation—Modified Offenses from the 2015 Legislative Session.

The following are felony offenses (unless otherwise noted) modified by the 2015 Legislature. In some cases, the modifications expanded definitional statements; in others, the modifications expanded the scope of the offense. For each offense listed below, taking the modification into consideration, the Commission decided if the Guidelines needed amending including whether offenses should be re-ranked and whether there should be any amendments to the permissive consecutive offense list in Guidelines section 6.

1. Extended Protection and Mandatory Minimum, Fourth-Degree Assault

Reference: [2015 Minn. Laws ch. 23](#) § 1; Minn. Stat. § [609.2231](#) (2014)

Description: Fourth-degree assault protections were extended to employees supervising and working directly with mentally-ill and dangerous patients by modifying Minn. Stat. § 609.2231, subd. 3a.

Commission Proposal: 1) maintain Severity Level 1 ranking in section 5 because the statutory maximum remained two years; 2) keep assault in the fourth degree on the list of offenses in section 6 which are eligible for permissive consecutive sentences; 3) update fourth-degree assault offense titles, as listed in section 5.B, to reflect statutory changes to fourth-degree assault enacted since 2004; 4) update Appendix 1; and 5) revise the footnote in section 5.B pertaining to fourth-degree assault. The proposed amendments follow.

Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
609.2231 subd. 1	Assault 4th Degree (Bodily Harm , Peace Officer)	1
609.2231 subd. 2	Assault 4th Degree (Bodily Harm , Firefighters and Emergency Medical Personnel)	1
609.2231 subd. 3	Assault 4th Degree (Bodily Harm , Corrections Employee, Prosecutor, Judge, Probation Officer)	1 *
609.2231 subd. 3a	Assault 4th Degree (Bodily Harm , Secure Treatment Facility Personnel)	1 *

* See section 2.C and Appendix 1 to determine the presumptive disposition for a ~~felony~~ assault committed by an State prison inmate ~~servin~~g an ~~executed~~ term of imprisonment or for assault on secure treatment facility personnel by persons committed to the Minnesota Sex Offender Program.

* * *

Appendix 1. Mandatory and Presumptive Sentences Reference Table

This table is for convenience when applying mandatory sentences (section 2.E) and presumptive sentences (section 2.C). It is not exhaustive.

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Statute	Offense	Prerequisite or Conditions	Minimum Duration
<u>609.221, 609.222, 609.223, = 609.2231 or 609.224</u>	Assault <u>1st through 5th Degree</u>	<u>Committed by State prison inmate while confined (609.2232) Must commit during "Term of Imprisonment" portion of executed sentence</u>	<u>Grid Time, Consecutive</u>
<u>609.2231, subd. 3a(b)</u>	<u>Assault 4th Degree</u>	<u>Committed by person committed to the Minnesota Sex Offender Program</u>	<u>Grid Time</u>

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2. Engage or Hire Minor to Engage in Prostitution Elements Revised

Reference: [2015 Minn. Laws ch. 65](#), art. 6, §§ 11-12; Minn. Stat. § [609.324](#) (2014)

Description: The prostitution statute was modified making the hiring of an adult prostitute a felony if the patron reasonably believes the prostitute to be a child under Minn. Stat. § 609.324, subd. 1(c). The fact that an undercover operative or law enforcement officer was involved is not a defense.

Commission Proposal: 1) maintain the Severity Level 3 ranking in section 5 because the statutory maximum remains the same (5 years); and 2) keep engaging or hiring a minor to engage in prostitution on the list of offenses in section 6 which are eligible for permissive consecutive sentences. No amendments to the Guidelines are proposed.

3. Fifth-Degree Criminal Sexual Conduct Elements Revised

Reference: [2015 Minn. Laws ch. 65](#), art. 6, § 14; Minn. Stat. § [609.3451](#) (2014)

Description: Fifth-degree criminal sexual conduct (CSC 5) under Minn. Stat. § 609.3451, subd. 1, was expanded to include intentionally touching the body or clothing with semen.

Commission Proposal: 1) maintain the Severity Level F ranking in section 5 because the statutory maximum remains the same (7 years); and 2) keep CSC 5 on the list of offenses in section 6 which are eligible for permissive consecutive sentences. No amendments to the Guidelines are proposed.

4. Change Offense Title to Include Ammunition, Certain Persons Not to Have Firearms

Reference: [2015 Minn. Laws ch. 65](#), art. 3, §§ 16-20, 26, & 33; Minn. Stat. §§ [609.02](#), [609.11](#), [609.165](#), [624.713](#), & [624.715](#) (2014).

Description: A definition for ammunition under Minn. Stat. § 609.02, subd. 17 was added. Persons who are not allowed to possess firearms are not allowed to possess ammunition, and felons previously convicted of a crime of violence who do so are subject to the 5-year mandatory minimum prison sentence under Minn. Stat. § 609.11.

Commission Proposal: Amend sections 5.A and 5.B to add “or Ammunition” after “Certain Persons Not to Have Firearms” in the existing offense titles, as follows.

Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
6	Certain Persons Not to Have Firearms <u>or Ammunition</u>	624.713, subd. 2(b); 609.165, subd. 1b
3	Dangerous Weapons/Certain Persons Not to Have Firearms <u>or Ammunition</u>	609.67, subd. 2; 624.713, subd. 2(a)

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
609.165 subd. 1b	Certain Persons Not to Have Firearms <u>or</u> <u>Ammunition</u>	6
624.713 subd. 2(a)	Certain Persons Not to Have Firearms <u>or</u> <u>Ammunition</u>	3
624.713 subd. 2(b)	Certain Persons Not to Have Firearms <u>or</u> <u>Ammunition</u>	6

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Note: Following the Commission’s vote on the proposal, above, staff identified changes that must be made to comment 2.E.03 and Appendix 2, as well. Consistent with the Commission’s intent to conform the offense title to the statutory change, the following amendment is also proposed.

*2.E.03. Some offenses by statutory definition involve a dangerous weapon, and therefore the mandatory minimum provision dealing with dangerous weapons always applies: Assault in the Second Degree under Minn. Stat. § 609.222; Certain Persons Not to Have Firearms or Ammunition under Minn. Stat. §§ 624.713, subd. 2(b) and 609.165, subd. 1b; Drive-By Shootings under Minn. Stat. § 609.66; and Stalking (Aggravated Violations) and Possessing a Dangerous Weapon under Minn. Stat. § 609.749, subd. 3(a)(3). The presumptive disposition for these types of offenses is imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is longer. * * **

Appendix 2. Dangerous Weapons Offense Reference Table

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Dangerous Weapons – Minn. Stat. § 609.11			
Statute	Offense	Prerequisite or Conditions	Minimum Duration
609.11, subd. 5(b)	Certain Persons not to have Firearms <u>or</u> <u>Ammunition</u>	Current conviction under Minn. Stat. § 609.165 or Minn. Stat. § 624.713 subd. 1(2)	60 Months

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5. Change Offense Title, Firearm Suppressor

Reference: [2015 Minn. Laws ch. 65](#), art. 3, §§ 19-20; Minn. Stat. § [609.66](#) (2014)

Description: The bill permits firearm suppressors (formerly known as “silencers”) to be possessed if lawfully possessed under federal law. The bill also amends the title of the reckless discharge offense under Minn. Stat. § 609.66 by striking “silencers” and inserting “suppressors.” The law clarifies that it is lawful to carry a firearm in the Capitol area provided there was an issuance of a permit to carry.

Commission Proposal: Amend sections 5.A and 5.B to strike “silencer” and add “suppressor” in the existing offense titles, as follows.

Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
2	Firearm Silencer <u>Suppressor</u>	609.66 subd. 1a(a)(1)
3	Firearm Silencer <u>Suppressor</u> (Public Housing, School or Park Zone)	609.66 subd. 1a(a)(1)

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
609.66 subd. 1a(a)(1)	Firearm Silencer <u>Suppressor</u>	2
609.66 subd. 1a(a)(1)	Firearm Silencer <u>Suppressor</u> (Public Housing, School or Park Zone)	3

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6. Financial Transaction Card Fraud Expanded to Include Trafficking of SNAP Benefits

Reference: [2015 Minn. Laws ch. 78](#), § 60; Minn. Stat. § [609.52](#) (2014)

Description: Financial Transaction Card Fraud was amended to include trafficking of Supplemental Nutrition Assistance Program (SNAP) benefits.

Commission Proposal: Continue to rank financial transaction card fraud at Severity Level 2 when the value was at \$2,500 or less but more than \$250; Severity Level 3 when the value was more than \$2,500; and Severity Level 5 when the value was more than \$35,000. No amendments to the Guidelines are proposed.

7. Treat New Gross Misdemeanor Reckless Driving Like Non-Traffic Gross Misdemeanors for Purposes of Criminal History Score

Reference: [2015 Minn. Laws ch. 65](#), art. 6, § 3; Minn. Stat. § [169.13, subd. 1 \(a\)](#) (2014)

Description: The crime of reckless driving under Minn. Stat. §169.13, subd. 1 (a) was amended to read: “A person who drives a motor vehicle while aware of and consciously disregarding a substantial and unjustifiable risk that the driving may result in harm to another or another’s property is guilty of reckless driving. The risk must be of such a nature and degree that disregard of it constitutes a significant deviation from the standard of conduct that a reasonable person would observe in the situation.” A new gross misdemeanor is established if a person causes great bodily harm or death to another person.

Commission Proposal: 1) an offender will receive a custody status point for being in a custody status for gross misdemeanor reckless driving; and 2) an offender will receive one unit for a prior conviction of gross misdemeanor reckless driving. The proposed amendments are as follows.

Section 2.B. Criminal History

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2. Custody Status at the Time of the Offense.

- a. One Custody Status Point. Assign **one** custody status point when the conditions in paragraphs (1) through (3) are met:

* * *

- (3) The offender was under one of the custody statuses in paragraph (1) for one of the following:
(i) a felony;

- (ii) extended jurisdiction juvenile (EJJ) conviction;
- (iii) non-traffic gross misdemeanor;
- (iv) gross misdemeanor driving while impaired, ~~or~~ refusal to submit to a chemical test, or reckless driving; or
- (v) targeted misdemeanor.

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3. Prior Gross Misdemeanors and Misdemeanors. Prior gross misdemeanor and misdemeanor convictions count as units comprising criminal history points. Four units equal one criminal history point; give no partial point for fewer than four units. Determine units as specified in this section.
 - a. General Assignment of Units. If the current conviction is for an offense other than criminal vehicular homicide or operation or felony driving while impaired (DWI), assign the offender one unit for each prior conviction of the following offenses provided the offender received a stayed or imposed sentence or stay of imposition for the conviction before the current sentencing:

* * *

- (4) gross misdemeanor refusal to submit to a chemical test;
- (5) gross misdemeanor reckless driving;
- (6) a felony conviction resulting in a misdemeanor or gross misdemeanor sentence. * * *

Note: Following the Commission’s vote on the proposal, above, staff identified changes that must be made to comments 2.B.205 and 2.B.303, as well. Consistent with the Commission’s intent to apply a custody status point to an offender for being in a custody status for gross misdemeanor reckless driving and an offender receiving one unit for a prior conviction of gross misdemeanor reckless driving, the following amendments are also proposed.

***2.B.205.** The custodial statuses covered by this policy are those occurring after conviction of a felony, non-traffic gross misdemeanor, gross misdemeanor driving while impaired or refusal to submit to a chemical test, gross misdemeanor reckless driving, or misdemeanor on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e). Thus, an offender who commits a new felony while on pre-trial diversion or pre-trial release on another charge does not get a custody status point. Likewise, offenders serving a misdemeanor sentence for an offense not on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e), do not receive a custody status point, even if the court imposed the misdemeanor sentence upon conviction of a gross misdemeanor or felony. * * **

*2.B.303. The Commission placed a limit of one point on the consideration of misdemeanors or gross misdemeanors in the criminal history score. This was done because, with no limit on point accrual, offenders with lengthy, but relatively minor, misdemeanor records could accrue high criminal history scores and thus be subject to inappropriately severe sentences upon their first felony conviction. The Commission limited consideration of misdemeanors to particularly relevant misdemeanors under existing state statute. Offenders whose criminal record includes at least four prior sentences for misdemeanors on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e), non-traffic gross misdemeanors, gross misdemeanor reckless driving, and gross misdemeanor driving while impaired or refusal to submit to a chemical test are considered more culpable and are given an additional criminal history point. * * **

8. Change Offense Title, Terroristic Threats

Reference: [2015 Minn. Laws ch. 21](#), art. 1, § 109, subd. 10; Minn. Stat. § [609.713](#) (2014)

Description: The modification did not affect the criminal provisions, but created the need to change several references in the Guidelines. The headnote of Minn. Stat. § 609.713 was changed from "Terroristic Threats" to "Threats of Violence."

Commission Proposal: Authorize technical changes to the Guidelines, as follows.

Section 2.C. Presumptive Sentence

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*2.C.06. There are rare instances where the presumptive sentence length exceeds the statutory maximum sentence. If this situation occurs, the statutory maximum sentence becomes the presumptive sentence. For example, ~~Terroristic Threats of Violence~~ under Minn. Stat. § 609.713, subd. 3(a)(1) or (2) carries a statutory maximum sentence of 12 months and 1 day. * * **

Section 2.D. Departures from the Guidelines

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2.D.105. Under Minn. Stat. § 609.13, if a court pronounces a misdemeanor or gross misdemeanor sentence for a felony conviction, that conviction is deemed a gross misdemeanor or misdemeanor. The sentence is a departure because it is outside the appropriate range on the applicable Grid. Because courts sometimes fail to issue departure reports in these cases, section 2.D was amended to clarify that if the court stays or imposes a gross misdemeanor or misdemeanor sentence for a felony conviction, the sentence is a departure.

In contrast, if the prosecutor amends the charge to a gross misdemeanor or misdemeanor offense prior to conviction, a gross misdemeanor or misdemeanor

*sentence will not be a departure because the sentence will be consistent with the level of the charge. When the prosecutor amends the charge, the prosecutor must amend it to an existing offense. For example, there is no gross misdemeanor version of ~~terroristic threats of violence~~ (Minn. Stat. § 609.713) in statute, so a ~~terroristic threats~~ charge of threats of violence cannot be amended from a felony to a gross misdemeanor. * * **

Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
4	Terroristic Threats of Violence (Terror/Evacuation)	609.713, subd. 1
2	Terroristic Threats of Violence (Bomb Threat)	609.713, subd. 2
1	Terroristic Threats of Violence (Replica Firearm)	609.713, subd. 3(a)

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
609.713, subd. 1	Terroristic Threats of Violence – Violence Threat (Terror/Evacuation)	4
609.713, subd. 2	Terroristic Threats of Violence – (Bomb Threat)	2
609.713, subd. 3(a)	Terroristic Threats of Violence – (Replica Firearm)	1**

** See section 2.C.2 and Appendix 3 to determine the presumptive duration. Depending on the offender’s criminal history score, the presumptive duration may exceed the statutory maximum. * * *

Note: Following the Commission’s vote on the proposal, above, staff identified changes that must be made to section 6 and Appendix 3, as well. Consistent with the Commission’s intent to conform the offense title to the statutory change, the following amendment is also proposed.

Section 6. Offenses Eligible for Permissive Consecutive Sentences

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Statute Number	Offense Title
609.713, subd. 1	Terroristic-Threats_of_Violence – Violence Threat (Terror/Evacuation)
609.713, subd. 2	Terroristic-Threats_of_Violence – (Bomb Threat)
609.713, subd. 3(a)	Terroristic-Threats_of_Violence – (Replica Firearm)

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Appendix 3. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Reference Table

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Statute	Offense	Severity Level	Statutory Maximum (Months)	Exceeds Statutory Maximum At:
609.713, subd. 3(a)	Terroristic-Threats_of_Violence – (Replica Firearm)	1	12, and 1 Day	CHS 3

* * *

C. Non-Legislative Amendments

The following are proposed non-legislative amendments to the Guidelines.

1. Rank Medical Assistance Fraud Over \$35,000 at Severity Level 6

Description: The Guidelines rank particular theft offenses that exceed \$35,000, at a severity level higher than Severity Level 3.

Commission Proposal: Rank medical assistance fraud over \$35,000 at Severity Level 6, and remove it from the theft offense list, as follows.

Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
<u>6</u>	<u>Medical Assistance Fraud (Over \$35,000)</u>	<u>609.466</u>
<u>3</u>	<u>Medical Assistance Fraud (Over \$5,000)</u>	<u>609.466</u>
<u>2</u>	<u>Medical Assistance Fraud (\$5,000 or Less)</u>	<u>609.466</u>

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
<u>609.466</u>	<u>Medical Assistance Fraud (Over \$35,000)</u>	<u>6</u>
609.466	Medical Assistance Fraud (Over \$5,000)	3
609.466	Medical Assistance Fraud (\$5,000 or Less)	2

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Section 7. Theft Offense List

It is recommended that the following property crimes be treated similarly. Below is the Theft Offense List cited for the Theft Crimes (\$5,000 or less and over \$5,000) in section 5.A Offense Severity Reference Table. The severity level for these offenses is based on the monetary amount of the conviction offense. The monetary amount is contained in the penalty statute as cited below:

- Severity Level 2. When the monetary value of the Theft Crime is \$5,000 or less, the penalty statute is Minn. Stat. § 609.52, subdivision 3(3)(a).
- Severity Level 3. When the monetary value of the Theft Crime is over \$5,000, the penalty statute is Minn. Stat. § 609.52, subdivision 3(2).

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Statute Number	Offense Title
609.466	Medical Assistance Fraud

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2. Clarify Application of Guidelines Upon Revocation of Stay of Adjudication

Description: If the initial sentence following felony conviction is commitment to the Commissioner of Corrections and the Guidelines recommend a stayed sentence, the decision to sentence to prison is an aggravated dispositional departure. This is true even if the felony conviction results from the revocation of a previously granted stay of adjudication.

Commission Proposal: Amend the Guidelines to make it explicit that a revocation of a stay of adjudication to a prison commitment is an aggravated dispositional departure if a stayed sentence is presumptive, as follows.

Section 2.C. Presumptive Sentence

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*2.C.10. Because a stay of adjudication is not a felony conviction, the Guidelines do not apply unless and until the stay is vacated and conviction is entered.** * *

Note: The modifications in the first paragraph of section 2.D.1, below, are intended to clarify the general departure language and are unrelated to stays of adjudication.

Section 2.D. Departures from the Guidelines

1. Departures in General. The sentences ~~ranges~~ provided in the Grids are presumed to be appropriate for the crimes to which they apply. The court must pronounce a sentence of the applicable disposition and within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a departuresentence outside the appropriate range on the applicable Grid.

* * *

- e. Revoked Stay of Adjudication. When a felony stay of adjudication is vacated and conviction is entered, the Guidelines must be applied. To

the extent that the sentence pronounced immediately following a revocation of a stay of adjudication is contrary to the Guidelines presumptive sentence, that sentence is a departure.* * *

2.D.106. The Guidelines do not apply to a stay of adjudication because it is not a conviction (see Section 1.A and Comment 2.C.10). If the initial sentence following felony conviction is commitment to the Commissioner of Corrections, and the Guidelines disposition is a presumptive stayed disposition, it is contrary to the Guidelines presumption. Accordingly, the sentence is an aggravated dispositional departure from the Guidelines, and "revocation of a stay of adjudication" will be noted as the reason for departure, unless the court offers another explanation.

* * *

3. Classify Sentence Executed Pursuant to Offender's Right to Demand for Execution As Not a Dispositional Departure

Description: An offender generally has the right to demand execution of sentence.

Commission Proposal: Amend the Guidelines making it explicit that a sentence that is executed pursuant to an offender's right to demand execution is not an aggravated dispositional departure, as follows:

Section 2.D. Departures from the Guidelines

1. Departures in General.* * *

- f. Offender's Demand for Execution. A sentence that is executed pursuant to an offender's right to demand execution is not an aggravated dispositional departure. * * *

2.D.107. An offender generally has the right to demand execution of sentence. State v. Rasinski, 472 N.W.2d 645, 651 (Minn. 1991); see also Minn. Stat. § 609.135, subd. 7. The Commission does not regard the execution of a presumptively stayed sentence as a departure from the Guidelines if the record, or the Court's communication to the Commission, reflects that the sentence was executed upon the offender's preemptory demand.* * *

3.A.202. While the Commission has resolved not to develop guidelines for nonimprisonment sanctions at this time, the Commission believes it is important

*for the sentencing courts to consider proportionality when pronouncing a period of local confinement as a condition of probation. This is particularly important given Minn. Stat. § 609.135, subd. 7, which states ~~that~~ when an offender may not demand execution of sentence. The period of local confinement should be proportional to the severity of the conviction offense and the criminal history score of the offender. Therefore, the period of local confinement should not exceed the term of imprisonment that would be served if the offender were to have received an executed prison sentence according to the presumptive Guidelines duration. * * **

4. List Particular Amenability to Probation as Mitigating Factor

Description: The Minnesota Supreme Court emphasized that mere amenability to probation does not justify a departure, but that a defendant must be *particularly* amenable to probation. *State v. Soto*, 855 N.W.2d 303 (Minn. 2014).

Commission Proposal: Add to section 2.D.3 regarding mitigating factors that may be used as reasons for departure, as follows.

Section 2.D. Departures from the Guidelines

3. Factors that may be used as Reasons for Departure. The following is a nonexclusive list of factors that may be used as reasons for departure:

a. Mitigating Factors. * * *

(7) The offender is particularly amenable to probation. This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting. * * *

2.D.303. The requirement that a defendant be “particularly” amenable to probation ensures that the defendant’s amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances necessary to justify a departure. State v. Soto, 855 N.W.2d 303, 309 (Minn. 2014). While social or economic factors cannot justify a departure, such facts may be relevant to determining whether a defendant is particularly amenable to probation. Id at 312. In determining whether a defendant is particularly suitable to individualized treatment in a probationary setting, for example, a court is permitted to consider the defendant’s age, prior

record, remorse, cooperation, attitude before the court, and social support. State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982). * * *

2.D.303304. * * *

2.D.304305. * * *

2.D.305306. * * *

2.D.306307.* * *

D. Technical Amendments

The following are proposed technical amendments.

1. Update Offense Titles for Criminal Damage to Property

Description: Absent a risk of bodily harm, felony criminal damage to property in the first degree is ranked at Severity Level 2. Criminal damage to property in the second degree involves the intentional causes to damage because of the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability. Because the descriptive titles in section 5 are incomplete, they may cause confusion.

Commission Proposal: Update offense titles for damage to property in section 5, as follows.

Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
2	Damage to Property (Over \$500/Service to Public, Over \$1,000, Over \$500 and Subsequent)	609.595, subd. 1(2), (3), & (4)

Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
609.595 subd. 1(2)(3)(4)	Damage to Property (Over \$500/Service to Public, Over \$1,000, Over \$500 and Subsequent)	2

* * *

2. Delete Expired Statutory Language Related to Expunged Records

Description: A portion of a comment in section 2.B related to access to expunged records is no longer in effect.

Commission Proposal: Delete the reference to expired statutory language, as follows.

Section 2.B. Criminal History

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~~2.B.03. Effective before January 1, 2015, Minn. Stat. § 609A.03, subd. 7(b) applies to expungement orders subject to its limitations, and provides that:~~

~~Notwithstanding the issuance of an expungement order:~~

~~(1) an expunged record may be opened for purposes of a criminal investigation, prosecution, or sentencing, upon an ex parte court order;~~

~~...~~

~~Upon request by law enforcement, prosecution, or corrections authorities, an agency or jurisdiction subject to an expungement order shall inform the requester of the existence of a sealed record and of the right to obtain access to it as provided by this paragraph...~~

~~Effective January 1, 2015, Minn. Stat. § 609A.03, subd. 7a(b), provides, in part that:~~

~~Notwithstanding the issuance of an expungement order:~~

~~(1) except as provided in clause (2), an expunged record may be opened, used, or exchanged between criminal justice agencies without a court order for the purposes of initiating, furthering, or completing a criminal investigation or prosecution or for sentencing purposes or providing probation or other correction services;~~

~~(2) when a criminal justice agency seeks access to a record that was sealed under~~

section 609A.02, subdivision 3, paragraph (a), clause (1), after an acquittal or a court order dismissing for lack of probable cause, for purposes of a criminal investigation, prosecution, or sentencing, the requesting agency must obtain an ex parte court order after stating a good-faith basis to believe that opening the record may lead to relevant information;

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