

## 2. DETERMINING PRESUMPTIVE SENTENCES

The presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by the Sentencing Guidelines in effect on the date of the conviction offense, except that:

(1) If multiple offenses are an element of the conviction offense, the date of the conviction offense must be determined by the factfinder.

(2) If offenses have been aggregated under one of the following statutes, or as otherwise permitted by statute, the date of the earliest offense should be used as the date of the conviction offense:

<b>Statute Number</b>	<b>Offense Title</b>
349.2127, subsd. 2 and 6	Gambling Regulations
609.322, subd. 1c	Sex Trafficking
609.52, subd. 3(5)	Theft
609.527, subd. 7	Identity Theft
609.535, subd. 2a(b)	Issuance of Dishonored Checks
609.551, subd. 3	Rustling and Livestock Theft
609.595	Criminal Damage to Property
609.631, subd. 4	Check Forgery
609.632, subd. 5	Counterfeiting Currency
609.763, subd. 3	Lawful Gambling Fraud
609.821, subd. 3	Financial Transaction Card Fraud
609.86, subd. 3(2)	Commercial Bribery
609.893, subd. 3	Telecommunications Fraud
609.895, subd. 3	Counterfeited Intellectual Property

The presumptive sentence is found in the cell of the appropriate Grid located at the intersection of the criminal history score and the severity level. The Grids represent the two dimensions most important in sentencing decisions.

### A. Offense Severity

1. General Rule. The applicable offense severity level is determined by the conviction offense, not the charging offense. The severity level for each felony offense is found in section 5.A, Offense Severity Reference Table.

2. Theft and Damage to Property; Foreseeable Risk of Bodily Harm. For an offender sentenced for theft under Minnesota Statutes, section 609.52, subdivision 3a, the severity level ranking is elevated by one severity level from that listed on the Offense Severity Reference Table if the offense creates a foreseeable risk of bodily harm to another and:

- a. the violation involves a monetary value over \$1,000; or

b. the violation involves a monetary value between \$500 and \$1,000, and the offender has been convicted within the preceding five years for an offense under Minnesota Statutes, section 609.52, subdivision 3.

3. First-Degree Murder. A severity level has not been assigned to first-degree murder because by law the punishment is a mandatory life sentence.

4. Unranked Offenses. Some offenses are designated as unranked offenses. When the court sentences an unranked offense, the court must assign an appropriate severity level for the offense and specify on the record why that particular level was assigned. The court may consider, but is not limited to, the following factors:

- a. the gravity of the specific conduct underlying the unranked offense;
- b. the severity level assigned to any ranked offense with elements that are similar to the elements of the unranked offense;
- c. the conduct of and severity level assigned to other offenders for the same unranked offense; and
- d. the severity level assigned to other offenders engaged in similar conduct.

If an offense is omitted from the Offense Severity Reference Table, the offense is considered unranked.

5. Attempts, Conspiracies, and Other Sentence Modifiers. When the current offense includes a sentence modifier, such as attempt or conspiracy, the severity level is found by determining the severity level for the underlying offense. Determining the presumptive sentence for these offenses is described in section 2.G.

### *Comment*

*2.A.01. The date of the offense is important because the offender's age at the time of the offense will determine whether the juvenile record is considered, and the date of the offense might determine whether a custody status point should be given and the order of sentencing with multiple convictions.*

*2.A.02. If multiple offenses are an element of the offense and the determination of which presumptive sentence applies depends on the offense date, the date of the conviction offense must be determined by the factfinder. See State v. DeRosier, 719 N.W.2d 900 (Minn. 2006) (where defendant was charged with first-degree criminal sexual conduct occurring from June through August of 2000 and the presumptive sentence increased on August 1, 2000, from 86 to 144 months, the court erred when it made a finding without a jury that the offense occurred after the effective date of the increased presumptive sentence).*

*2.A.03. If the offense occurred on or before April 30, 1980, the Sentencing Guidelines should not be used to sentence the case.*

*2.A.04. An unranked offense typically has one or more of the following characteristics: (1) the offense is rarely prosecuted; (2) the offense covers a wide range of underlying conduct; or (3) the offense is new and the severity of a typical offense cannot yet be determined. If a significant number of future convictions are obtained under one or more of the unranked offenses, the Commission will reexamine the ranking of these offenses and assign an appropriate severity level for a typical offense. Practitioners can contact the Commission for information on severity levels assigned to unranked offenses.*

**2.A.05.** *For Theft of a Motor Vehicle, to be ranked at Severity Level 4, the offender must be convicted under the general theft statute, Minnesota Statutes, section 609.52, subdivision 2, paragraph (a), clause (1), and the offense must involve theft of a motor vehicle. It is the Commission's intent that any conviction involving the permanent theft of a motor vehicle be ranked at Severity Level 4, regardless of the value of the motor vehicle.*

**2.A.06.** *When a sentencing worksheet is completed under Minnesota Statutes, section 609.115, subdivision 2a, for first-degree murder, Severity Level 12 should be used.*

**2.A.07.** *When an offender is convicted of two or more felony offenses arising from a single behavioral incident, Minnesota Statutes, section 609.035, "contemplates that a defendant will be punished for the 'most serious' of the offenses." State v. Kebaso, 713 N.W.2d 317, 322 (Minn. 2006). When this occurs, the applicable severity level to use in determining the presumptive sentence is the severity level assigned to the offense being sentenced, which is ordinarily the most serious offense.*

## **B. Criminal History**

The horizontal axis on the Sentencing Guidelines Grids is the criminal history score. An offender's criminal history score is the sum of points from eligible:

- (1) prior felonies;
- (2) custody status at the time of the offense;
- (3) prior misdemeanors and gross misdemeanors; and
- (4) prior juvenile adjudications.

This section details the requirements for calculating the criminal history points in each of these areas. This section also details the requirements for calculating criminal history points for convictions from jurisdictions other than Minnesota and convictions for enhanced felonies.

### **Comment**

**2.B.01.** *The Guidelines reduce the emphasis given to criminal history in sentencing decisions. Under past judicial practice, criminal history was the primary factor in dispositional decisions. Under the Guidelines, the conviction offense is the primary factor, and criminal history is a secondary factor in dispositional decisions. Prior to enactment of the Guidelines, there were no uniform standards regarding what should be included in an offender's criminal history, no weighting format for different types of offenses, and no systematic process to check the accuracy of the information on criminal history.*

**2.B.02.** *The Guidelines provide uniform standards for the inclusion and weighting of criminal history information. The sentencing hearing provides a process to assure the accuracy of the information in individual cases.*

**2.B.03.** *Minnesota Statutes, section 609A.03, subdivision 7a, paragraph (b), provides, in part:*

*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 Minnesota Statutes, 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.*

1. Prior Felonies. Assign a particular weight, as set forth in paragraphs a. and b., to each extended jurisdiction juvenile (EJJ) conviction and each felony conviction, provided that a felony sentence was stayed or imposed before the current sentencing or a stay of imposition of sentence was given before the current sentencing.

The severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense.

a. Current Offense on Standard Grid or Drug Offender Grid. If the current offense is **not** on the Sex Offender Grid, determine the weight assigned to each prior felony sentence according to its severity level, as follows:

**Current Offense on Standard Grid or Drug Offender Grid**

SEVERITY LEVEL	POINTS
1-2, D1-D2	1/2
3-5, D3-D5	1
6-8, D6-D7	1 1/2
9-11, D8-D9	2
Murder 1st Degree	2
A	2
B-E	1 1/2
F-G	1
H	1/2
I	1/2 (for first offense); 1 (for subsequent offenses)

b. Current Offense on Sex Offender Grid. If the current offense is on the Sex Offender Grid, determine the weight assigned to each prior felony sentence according to its severity level, as follows:

**Current Offense on Sex Offender Grid**

SEVERITY LEVEL	POINTS
1-2, D1-D2	1/2
3-5, D3-D5	1
6-8, D6-D7	1 1/2
9-11, D8-D9	2

Murder 1st Degree	2
A	3
B-C	2
D-E	1 1/2
F-H	1
I	1/2 (for first offense); 1 (for subsequent offenses)

c. Felony Decay Factor. In computing the criminal history score, a prior felony sentence or stay of imposition following a felony conviction must not be used if all of the following, to the extent applicable, occurred before the date of the current offense:

- (1) the prior felony sentence or stay of imposition expired or was discharged;
- (2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and
- (3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence.

d. Assigning Felony Weights - Previous Court Appearances Resulting in Multiple Sentences. Following are exceptions to including prior felonies in criminal history when multiple felony sentences were imposed in a previous court appearance:

- (1) Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minnesota Statutes, section 152.137, 609.585, or 609.251, include in criminal history only the weight from the offense at the highest severity level.
- (2) Single Course of Conduct / Multiple Victims. When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, include in criminal history only the weights from the two offenses at the highest severity levels.

e. Assigning Felony Weights - Current Multiple Sentences. Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced (also known as "*Hernandizing*") except as follows:

- (1) Single Course of Conduct / Multiple Sentences. When multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day under Minnesota Statutes, section 152.137, 609.585, or 609.251, the conviction and sentence for the "earlier" offense does not increase the criminal history score for the "later" offense.
- (2) Single Course of Conduct / Multiple Victims. When multiple current convictions arise out of a single course of conduct in which there were multiple victims, weights are given only to the two offenses at the highest severity levels.

f. Prior Offense with Attempt, Conspiracy, or Other Sentence Modifier. When a prior offense included a sentence modifier, such as attempt, conspiracy, or other sentence modifier as described in section 2.G, the prior conviction must be given the same felony weight as a completed offense.

g. Prior Offenses with No Conviction. Assign no weight to an offense for which a judgment of guilty has not been entered before the current sentencing, such as a stay of adjudication or continuance for dismissal.

h. Non-Felony Sentence. When a prior felony conviction resulted in a non-felony sentence (misdemeanor or gross misdemeanor), the conviction must be counted in the criminal history score as a misdemeanor or gross misdemeanor conviction as indicated in section 2.B.3.

i. Total Felony Points. The felony point total is the sum of the felony weights. If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number.

### *Comment*

**2.B.101.** *The basic rule for computing the number of prior felony points in the criminal history score is that the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given for a felony level offense, no matter what period of probation is pronounced, before the current sentencing.*

**2.B.102.** *No partial points are given -- thus, an offender with less than a full point is not given that point. For example, an offender with a total weight of 2 1/2 would have 2 felony points.*

**2.B.103.** *The Commission determined that it was important to establish a weighting scheme for prior felony sentences to assure a greater degree of proportionality in the current sentencing. Offenders who have a history of serious felonies are considered more culpable than those offenders whose prior felonies consist primarily of low severity, nonviolent offenses.*

**2.B.104.** *The Commission recognized that determining the severity level of the prior felonies may be difficult in some instances. For that reason, the severity level of the prior offense is based on the severity level in effect when the offender commits the current offense.*

**2.B.105.** *If an offense has been repealed, but the elements of that offense have been incorporated into another felony statute, determine the appropriate severity level based on the severity level ranking for the current felony offense containing those similar elements. For example, in 2010, the Legislature recodified violations of domestic abuse no contact orders from Minnesota Statutes, section 518B.01, subdivision 22, paragraph (d), into Minnesota Statutes, section 629.75, subdivision 2, paragraph (d). This policy also applies to offenses that are currently assigned a severity level ranking, but were previously unranked and excluded from the Offense Severity Reference Table. For example, dissemination of child pornography under Minnesota Statutes, section 617.247, subdivision 3, paragraph (a), was unranked until August 1, 2006. It is currently ranked at Severity Level E, and receives a weight of 1-1/2 points.*

**2.B.106.** *If the prior offense has been removed from the current Severity Offense Reference Table in response to a legislative action that repealed the prior offense and created separate offenses with new or removed elements, use the current severity level for the newly created offense that has been added to Severity Offense Reference Table and encompasses the behavior necessarily proven by the prior conviction. It was contemplated that the sentencing court, in its discretion, should make the final determination as to the weight accorded prior felony sentences.*

**2.B.107.** *In cases of multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered. The phrase "before the current sentencing" means that in order for prior convictions to be used in computing the criminal history score, the felony sentence*

*for the prior offense must have been stayed or imposed before sentencing for the current offense. When multiple current offenses are sentenced on the same day before the same court, sentencing must occur in the order in which the offenses occurred. The dates of the offenses must be determined according to the procedures in section 2.*

**2.B.108.** *The Commission established policies to deal with several specific situations that arise under Minnesota law: a conviction under Minnesota Statutes, section 152.137, under which offenders convicted of methamphetamine-related crimes involving children and vulnerable adults are subject to conviction and sentence for other crimes resulting from the same criminal behavior; Minnesota Statutes, section 609.585, under which offenders committing another felony offense during the course of a burglary could be convicted of and sentenced for both the burglary and the other felony; and a conviction under Minnesota Statutes, section 609.251, under which offenders who commit another felony during the course of a kidnapping can be convicted of and sentenced for both offenses. For purposes of computing criminal history, the Commission decided that consideration should only be given to the most severe offense when there are prior multiple sentences under provisions of Minnesota Statutes, section 152.137, 609.585, or 609.251. This was done to prevent inequities due to past variability in prosecutorial and sentencing practices with respect to these statutes, to prevent systematic manipulation of these statutes in the future, and to provide a uniform and equitable method of computing criminal history scores for all cases of multiple convictions arising from a single course of conduct, when single victims are involved.*

*When multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day under Minnesota Statutes, section 152.137, 609.585, or 609.251, the conviction and sentence for the "earlier" offense should not increase the criminal history score for the "later" offense.*

**2.B.109.** *The Commission has carefully considered the application of the Hernandez method to sentencing in provisions of Minnesota law other than Minnesota Statutes, sections 152.137, 609.585, and 609.251. The Commission's decision not to amend the Sentencing Guidelines is deliberate. See, State v. Williams, 771 N.W.2d 514 (Minn. 2009).*

**2.B.110.** *To limit the impact of past variability in prosecutorial discretion, the Commission decided that for prior multiple felony sentences arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe offenses. For example, if an offender had robbed a crowded liquor store, he could be convicted of and sentenced for the robbery, as well as one count of assault for every person in the store at the time of the offense. Past variability in prosecutorial charging and negotiating practices could create substantial variance in the number of felony sentences arising from comparable criminal behavior. To prevent this past disparity from entering into the computation of criminal histories, and to prevent manipulation of the system in the future, the Commission limited consideration to the two most severe offenses in such situations. This still allows differentiation between those getting multiple sentences in such situations from those getting single sentences, but it prevents the perpetuation of gross disparities from the past.*

*This limit in calculating criminal history when there are multiple felony sentences arising out of a single course of conduct with multiple victims also applies when such sentences are imposed on the same day.*

**2.B.111.** *When an offender was convicted of a felony but was given a misdemeanor or gross misdemeanor sentence, the offense will be counted as a misdemeanor or gross misdemeanor for purposes of computing the criminal history score. The Commission also recognized that where such sentences were given, it was the opinion of the court that the offending behavior did not merit*

*felonious punishment, or other circumstances existed that justified a limit on the severity of the sanction.*

**2.B.112.** *The decision to stay execution of sentence rather than to stay imposition of sentence as a means to a probationary term following a felony conviction is discretionary with the court. Considerable disparity appears to exist in the use of these options. In the case of two similar offenders it is not uncommon for one to receive a stay of execution and another to receive the benefit of a stay of imposition. There may also be geographical disparities. As a result of the disparity that exists in the use of stays of imposition, the Commission determined to treat stays of execution and stays of imposition the same with respect to criminal history point accrual. Similar treatment has the additional advantage of a simplified procedure for computing criminal history scores.*

**2.B.113.** *The Commission established a "decay factor" for the consideration of prior felony offenses in computing criminal history scores. The Commission decided it was important to consider not just the total number of felony sentences and stays of imposition, but also the age of the sentences and stays of imposition. The Commission decided that the presence of old felony sentences and stays of imposition should not be considered in computing criminal history scores after a significant period of time has elapsed. A prior felony sentence or stay of imposition will not be counted in criminal history score computation if fifteen years has elapsed from the prior sentencing date (or from the date the prison sentence, if executed, expired) to the date of the current offense, provided the offender was then no longer on supervision for the prior sentence. If the offender received a stay of imposition for the prior offense, that sentencing date marks "the date of the initial sentence," even if a stay of execution subsequently occurred as the result of, e.g., a probation violation. While this procedure does not include a measure of the offender's subsequent criminality, it has the overriding advantage of accurate and simple application, while also ensuring that prison offenses do not decay before probation offenses.*

**2.B.114.** *An offense upon which a judgment of guilty has not been entered before the current sentencing (e.g., under Minnesota Statutes, section 152.18, subdivision 1), must not be assigned any weight in computing the criminal history score.*

**2.B.115.** *Under Minnesota Statutes, section 260B.130, a child alleged to have committed a felony offense under certain circumstances may be prosecuted as an extended jurisdiction juvenile (EJJ). If the prosecution results in a guilty plea or finding of guilt and the court imposes a disposition according to Minnesota Statutes, section 260B.130, subdivision 4, paragraph (a), the extended jurisdiction juvenile conviction must be treated the same as an adult felony sentence for purposes of calculating the prior felony record component of the criminal history score. All of the policies under section 2.B.1, and corresponding commentary apply to EJJ convictions. If the EJJ conviction resulted in execution of the stayed adult prison sentence, the offense can only be counted once in the criminal history.*

**2.B.116.** *Legal authorities use the terms "single course of conduct" and "single behavioral incident" interchangeably. In the Guidelines, this is referred to as "single course of conduct."*

## 2. Custody Status at the Time of the Offense.

a. One or One-Half Custody Status Point. Assign **one** custody status point when the conditions in paragraphs (1), (2), and (3)(ii) or (iii) are met. In all other cases when the conditions in paragraphs (1) through (3) are met, assign **one-half** custody status point:

(1) The offender was under one of the following custody statuses at the time the current offense was committed:

(i) probation;

(ii) parole;

(iii) supervised release;

(iv) conditional release following release from an executed prison sentence (see conditional release terms listed in section 2.E.3);

(v) release pending sentencing;

(vi) confinement in a jail, workhouse, or prison pending or after sentencing; or

(vii) escape from confinement following an executed sentence.

(2) The offender was under one of the custody statuses in paragraph (1) after entry of a guilty plea, guilty verdict, or conviction.

(3) The offender was under one of the custody statuses in paragraph (1) for one of the following:

(i) a felony currently assigned a severity level ranking, on the Offense Severity Reference Table, of 1 or 2 on the Standard Grid or D1 or D2 on the Drug Offender Grid, a felony from a jurisdiction other than Minnesota equivalent to an offense currently ranked at one for those severity levels, or an extended jurisdiction juvenile (EJJ) conviction for an offense currently ranked at one of those severity levels;

(ii) any other felony;

(iii) any other EJJ conviction;

(iv) a non-traffic gross misdemeanor;

(v) gross misdemeanor driving while impaired, refusal to submit to a chemical test, or reckless driving; or

(vi) a targeted misdemeanor.

(4) Assigning Points to Offenses Committed Over Time. Assign one or one-half custody status point when the offender meets the conditions in paragraphs (1) through (3) and the offender was placed under one of the custody statuses in paragraph (1) at any point in time during which the offense occurred when:

(i) multiple offenses are an element of the conviction offense; or

(ii) the conviction offense is an aggregated offense.

b. Two Custody Status Points. Assign **two** custody status points if:

(1) the current conviction offense is an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minnesota Statutes, section 243.166); and

(2) the offender qualifies for one custody status point, as described in section a, above, for an offense currently found on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minnesota Statutes, section 243.166).

c. Additional Duration. An **additional three months** must be added to the duration of the appropriate cell time, which then becomes the presumptive duration, when:

(1) at least one-half custody status point is assigned; and

(2) the offender's total Criminal History Score exceeds the maximum score on the applicable Grid (i.e., 7 or more).

Three months must also be added to the lower and upper end of the range provided in the appropriate cell on the applicable Grid.

If the current conviction is an attempt, conspiracy, or other offense with a sentence modifier that reduces the presumptive sentence, the three months must be added to the cell duration before the duration is reduced as outlined in section 2.G. The presumptive duration, however, cannot be less than one year.

d. No Custody Status Points Assigned. The offender must not be assigned custody status points when:

(1) The offender was committed for treatment or examination under Minn. R. Crim. P. 20.

(2) The offender was on juvenile custody status other than for an extended jurisdiction juvenile (EJJ) conviction, at the time the adult felony was committed.

(3) The offender was on custody status for a misdemeanor or gross misdemeanor DWI committed when the offender was 16 or 17 years old, and the DWI was processed in adult court under Minnesota Statutes, section 260B.225, subdivisions 3 and 8.

e. Waiver. Subject to the limitations in paragraph (4) below, the court, on its own motion or on the motion of a party, may, but is not required to, waive assignment of a custody status point or half-point pursuant to section 2.B.2, provided the offender establishes that granting a waiver is consistent with public safety. Specifically, the court has the discretion, but is not required, to grant a waiver if the offender establishes that waiver is consistent with public safety and promotes the traditional purposes of sentencing which are retribution, incapacitation, deterrence, restitution, and rehabilitation. See Minnesota Statutes, section 244.09. In considering rehabilitation, the court may examine the following:

(1) Whether the offender has consistently utilized available probation services, such as drug, alcohol, and psychological treatment services, and has otherwise been in substantial compliance with the conditions of probation, parole, or conditional or supervised release, apart from the commission of the current offense, for the past twelve months;

(2) Whether the current offense represents an escalation of criminal activity; and

(3) Whether the offender has made any progress toward rehabilitation and reentry into society, such as additional education and/or vocational training.

(4) The court may not, however, waive assignment of a custody status point or half-point if either the current offense or a custody status offense is any of the following offenses, including an equivalent felony offense from a jurisdiction other than Minnesota. As used within this paragraph, "custody status offense" means a prior offense resulting in a custody status that caused the offender to qualify for a custody status point as described in section a, above.

(i) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of 8, 9, 10, or 11 on the Standard Grid;

(ii) an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minnesota Statutes, section 243.166);

- (iii) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of D8 or D9 on the Drug Offender Grid;
- (iv) an offense listed in section 8, Severe Violent Offense List;
- (v) Fleeing Peace Officer (Great Bodily Harm) (Minnesota Statutes, section 609.487, subdivision 4, paragraph (b)); or
- (vi) an attempt or conspiracy to commit one of these offenses.

### ***Comment***

**2.B.201.** *The basic rule assigns offenders one or one-half point if they were under some form of eligible criminal justice custody status when they committed the offense for which they are now being sentenced.*

**2.B.202.** *The Commission intended to avoid criminal history scores in which a prior offense's custody status point outweighed the criminal history of the prior offense itself. Accordingly, when the criminal history weight of a prior felony is one-half point (but excluding severity level H or I offenses; see generally section 2.B.1) or the prior gross misdemeanor or misdemeanor contributes one or two misdemeanor units (see section 2.B.3), the custody status from that prior offense results in one-half, rather than one, custody status point.*

**2.B.203.** *In determining whether to grant a waiver in a particular case, the primary consideration is public safety. In this context, public safety means protecting the public from crime. The court should consider the values of retribution, incapacitation, deterrence, restitution, and rehabilitation. In doing so, the court should apply a balanced approach in which all five values are examined and applied. For rehabilitation, the court may also consider the three factors listed in section 2.B.2.e in order to examine the whole person. When custody status is waived, the presumptive sentence will be calculated without the addition of the waived custody status point, or half-point, in the criminal history score. Thus, provided the processes of section 2.B.2.e are followed, granting a waiver of custody status for the current offense does not, in itself, constitute a departure from the Sentencing Guidelines.*

**2.B.204.** *Commitments under Minn. R. Crim. P. 20 and juvenile custody status are not included because, in those situations, there has been no conviction. However, a custody point will be assigned if the offender committed the current offense while under some form of custody following an extended jurisdiction juvenile (EJJ) conviction.*

**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 Minnesota Statutes, section 299C.10, subdivision 1, paragraph (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 Minnesota Statutes, section 299C.10, subdivision 1, paragraph (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.206.** *As a general rule, the Commission excludes traffic offenses from consideration in computing the criminal history score. Given the increased penalties associated with driving while impaired (DWI) offenses and the serious impact on public safety, the Commission determined that these offenses should be considered for custody status points in the same manner as non-traffic offenses.*

**2.B.207.** *The most problematic consequence of a Criminal History Score of 7 or more (in excess of the maximum points differentiated by the Sentencing Guidelines Grids) is that no additional penalty accrues for engaging in felonious behavior while under custody supervision. For example, if an offender has a Criminal History Score of 7 and is released pending sentencing for a Severity Level 3 offense, and he or she commits another Severity Level 3 offense while awaiting sentencing, the presumptive sentence for the most recent offense is the same as for the prior offense. A presumption exists against consecutive sentences for most property offenses, and therefore no additional penalty results when this situation occurs. The addition of three months to the cell duration provides a uniform presumptive standard for dealing with this situation.*

**2.B.208.** *While the Commission believes that the impact of the custody status provision should be maintained for all cases, incrementing the sanction for each criminal history point above seven is deemed inappropriate. The primary determinant of the sentence is the seriousness of the current conviction offense. Criminal history is of secondary importance, and the Commission believes that proportionality in sentencing is served sufficiently with the criminal history differentiations incorporated in the Sentencing Guidelines Grid and with the special provision for maintaining the impact of the custody status provision. The Commission deems further differentiation unnecessary to achieve proportionality in sentencing.*

**2.B.209.** *The Commission believes that when multiple offenses are an element of the conviction offense or the conviction offense is an aggregated offense, offenders should receive a custody status point if they become subject to one of the custody status types listed in section 2.B.2.a(1) at any point during the time period in which the offenses occurred. While the Commission recognizes that its policy for determining the presumptive sentence states that for aggregated offenses, the earliest offense date determines the date of offense, it believes that eligibility for a custody status point should not be limited to the offender's status at the time of the earliest date of offense.*

**2.B.210.** *When offenders on any custody status condition listed in section 2.B.2.b for a sex offense commits another sex offense, they are assigned an additional custody status point. The Commission believes that offenders who commit a subsequent sex offense pose so significant a risk to public safety that their criminal history scores should be enhanced to reflect this risk. This policy does not apply to the offense of Failure to Register as a Predatory Offender (Minnesota Statutes, section 243.166).*

**2.B.211.** *Assign a custody status point to an offender on any custody status type who absconds and commits a new felony offense. The custody status type depends on the form of supervision that exists when the offender commits a new offense. For example, assign a custody status point to an offender who absconds from supervised release and commits a new felony offense. The custody status type would be "supervised release."*

**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.** Except as provided in paragraph g, 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:

- (1) targeted misdemeanor, as defined in Minnesota Statutes, section 299C.10, subdivision 1, paragraph (e);
- (2) non-traffic gross misdemeanor;
- (3) gross misdemeanor driving while impaired;

- (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.

b. Gross Misdemeanors Sentenced as Misdemeanors. A gross misdemeanor conviction resulting in a misdemeanor sentence for an offense not defined as a targeted misdemeanor under Minnesota Statutes, section 299C.10, subdivision 1, paragraph (e), must **not** be used to compute units.

c. Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minnesota Statutes, section 152.137, 609.251, or 609.585, the offender must not be assigned more than one unit.

d. Single Course of Conduct / Multiple Victims. When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, assign only the two most severe offenses units in criminal history.

e. Decay Factor. A prior misdemeanor or gross misdemeanor sentence or stay of imposition following a misdemeanor or gross misdemeanor conviction must **not** be used in computing the criminal history score if ten years have elapsed between the date of the initial sentence following the prior conviction and the date of the current offense. However, misdemeanor sentences that result from the successful completion of a stay of imposition for a felony conviction are subject to the felony decay factor in section 2.B.1.c.

f. Maximum Assignment of Points. Except as provided in paragraph g, an offender cannot receive more than one point for prior misdemeanor or gross misdemeanor convictions.

g. Assignment of Units for Criminal Vehicular Homicide or Operation or Felony Driving While Impaired (DWI). If the current conviction is for criminal vehicular homicide or operation or felony DWI, assign previous violations of Minnesota Statutes, section 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, 609.2112, 609.2113, or 609.2114, two units each. There is no limit to the total number of misdemeanor points that can be included in the offender's criminal history score due to criminal vehicular homicide or operation or DWI offenses. For DWI offenses, see section 2.B.6 for exceptions to this policy relating to predicate offenses used for enhancement purposes. For Criminal Vehicular Homicide (Death or Death to an Unborn Child, and Qualified Prior Conviction), assign no misdemeanor units to the qualified prior driving offense that was used to increase the statutory maximum penalty.

h. Prior Misdemeanor or Gross Misdemeanor Driving While Impaired (DWI) Committed by Juvenile Offenders. Assign no units under this section if the offender was 16 or 17 years old when the prior misdemeanor or gross misdemeanor DWI was committed, and the DWI was processed in adult court under Minnesota Statutes, section 260B.225, subdivisions 3 and 8.

### ***Comment***

**2.B.301.** *The Commission established a measurement procedure based on units for misdemeanor and gross misdemeanor sentences, which are totaled and then converted to a point value. The purpose of this procedure is to provide different weightings for convictions of felonies, gross misdemeanors, and misdemeanors. Under this procedure, misdemeanors and gross misdemeanors are assigned one unit. An offender must have a total of four units to receive one point in the criminal history score, thus an offender with three units is assigned no point value.*

**2.B.302.** *The Commission decided to reduce the weight of prior gross misdemeanors (other than DWI-related offenses) to create a more proportional weighting scheme for prior felonies at Severity Level 1 and Severity Level 2 which receive a weight of 1/2 point each. The Commission believes that a weighting scheme that sets the same weight for both misdemeanors and gross misdemeanors is more consistent and equitable.*

**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 Minnesota Statutes, section 299C.10, subdivision 1, paragraph (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.*

**2.B.304.** *The Commission believes that offenders whose current conviction is for criminal vehicular homicide or operation or first-degree (felony) driving while impaired, and who have prior violations under Minnesota Statutes, section 169A.20, 169A.31, 169.121, 169.1211, 169.129, 360.0752, 609.2112, 609.2113, or 609.2114, are also more culpable, and for these offenders there is no limit to the total number of misdemeanor points included in the criminal history score due to DWI or criminal vehicular homicide or operation (CVO) violations. To determine the total number of misdemeanor points under these circumstances, first add together any non DWI/CVO misdemeanor units. If there are less than four units, add in any DWI/CVO units. Four or more units would equal one point. Only DWI/CVO units can be used in calculating additional points. Each set of four DWI/CVO units would equal an additional point. For example, if an offender had two theft units and six DWI/CVO units, the theft would be added to the two DWI/CVO units to equal one point. The remaining four DWI/CVO units would equal a second point. In a second example, if an offender had six theft units and six DWI/CVO units, the first four theft units would equal one point. Four of the DWI/CVO units would equal a second point. The remaining two theft units could not be added to the remaining two DWI/CVO units for a third point. The total misdemeanor score would be two.*

*When the current offense is a conviction under Minnesota Statutes, section 609.2112, subdivision 1, paragraph (b) (Death, and Qualified Prior Conviction), or Minnesota Statutes, section 609.2114, subdivision 1, paragraph (b) (Death to an Unborn Child, and Qualified Prior Conviction), the Commission excluded consideration of the qualified prior driving offense, if a misdemeanor or gross misdemeanor, from the criminal history score because, by virtue of the conviction offense, the qualified prior conviction has been accounted for in the enhanced penalty.*

**2.B.305.** *For purposes of computing criminal history, the Commission decided that consideration should only be given to the most severe offense when there are prior multiple sentences under provisions of Minnesota Statutes, section 152.137, 609.251, or 609.585. This was done to prevent inequities due to past variability in prosecutorial and sentencing practices with respect to these statutes, to prevent systematic manipulation of these statutes in the future, and to provide a uniform and equitable method of computing criminal history scores for all cases of multiple convictions arising from a single course of conduct, when single victims are involved. References are made to felony convictions under Minnesota Statutes, sections 152.137, 609.251, and 609.585, in the event that they result in a misdemeanor or gross misdemeanor sentence.*

*The Commission has carefully considered the application of the Hernandez method to sentencing in provisions of Minnesota law other than Minnesota Statutes, sections 152.137, 609.251, and*

609.585. *The Commission made a deliberate decision not to amend the Sentencing Guidelines. See State v. Williams, 771 N.W.2d 514 (Minn. 2009).*

**2.B.306.** *The Commission also adopted a "decay" factor for prior misdemeanor and gross misdemeanor offenses for the same reasons articulated for felony offenses; however, given that these offenses are less serious, the decay period is ten years rather than 15.*

**2.B.307.** *Convictions that are petty misdemeanors by statutory definition, that have been certified as petty misdemeanors under Minn. R. Crim. P. 23.04, or that are deemed to be petty misdemeanors under Minn. R. Crim. P. 23.02 are not used to compute the criminal history score.*

**2.B.308.** *When multiple misdemeanor or gross misdemeanor sentences arose out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe offenses for purposes of computing criminal history. These are the same policies that apply to felony convictions and juvenile adjudications.*

#### 4. Prior Juvenile Adjudications.

a. Assignment of Points for Juvenile Adjudications. Assign an offender one point for every two adjudications for felony offenses the offender committed, and for which the offender was prosecuted as a juvenile, provided that:

(1) each adjudication must have been for a separate offense or must have involved separate victims in a single course of conduct, except as provided in paragraphs c. and d. below; and

(2) the juvenile adjudications must have been for offenses committed after the offender's fourteenth birthday; and

(3) the offender was under the age of twenty-five when the offender committed the current felony.

b. Maximum Points for Juvenile Adjudications. An offender may receive only **one point** for juvenile adjudications as described in this section, except that the point limit does not apply to juvenile adjudications for offenses for which the Sentencing Guidelines would presume imprisonment if the offenses had been committed by an adult. Make this determination regardless of the criminal history score, and include offenses that carry a mandatory minimum prison sentence and other presumptive imprisonment offenses described in section 2.C.

c. Single Course of Conduct / Multiple Sentences. When multiple adjudications for a single course of conduct were imposed under Minnesota Statutes, section 152.137, 609.251, or 609.585, only one offense may be used in the criminal history calculation.

d. Single Course of Conduct / Multiple Victims. When the prior adjudications involve multiple offenses arising from a single course of conduct involving multiple victims, include only the two most severe offenses in criminal history.

#### ***Comment***

**2.B.401.** *Juvenile history is included in the criminal history score to identify those young adult felons whose criminal careers were preceded by repeated felony-type offenses committed as a juvenile. The Commission held several public hearings devoted to the issue of using juvenile records in the criminal history score. Those hearings pointed out differences in legal procedures and safeguards between adult and juvenile courts, differing availability of juvenile records, and differing procedures among juvenile courts. As a result of these issues, the Commission decided to establish*

*rigorous standards regulating the consideration of juvenile records in computing the criminal history score.*

**2.B.402.** *Only juvenile adjudications for offenses that are felonies under Minnesota law will be considered in computing the criminal history score. Exclude from consideration status offenses, dependency and neglect proceedings, and misdemeanor or gross misdemeanor-type offenses.*

**2.B.403.** *Consistent with Minnesota Statutes, section 609.035, which provides for a single sentence for adult offenders when multiple convictions arise from a single course of conduct, only juvenile adjudications for offenses arising from separate courses of conduct contribute to the juvenile point(s), unless multiple victims were involved.*

**2.B.404.** *The juvenile adjudications must result from offenses committed after the offender's fourteenth birthday. The Commission chose the date of the offense rather than the date of adjudication to eliminate variability in application based on differing juvenile court practices.*

**2.B.405.** *Juvenile adjudications will be considered in computing the criminal history score only for adult offenders who had not attained the age of 25 when they committed the felony for which they are now being sentenced. Again, the Commission chose to examine the age of the offender at the time of the offense rather than at time of sentencing to prevent disparities resulting from system processing variations.*

**2.B.406.** *The Commission decided that it would take two juvenile adjudications to equal 1 point on the criminal history score, and generally, an offender may not receive more than 1 point on the basis of prior juvenile adjudications. This point limit does not apply to offenses committed and prosecuted as a juvenile for which the Guidelines would presume imprisonment, regardless of criminal history, if committed by an adult. This includes offenses in the non-shaded portions of the applicable Grids at a Criminal History Score of 0 (e.g., Severity Level 8 or I), offenses subject to mandatory minimum laws (e.g., Assault in the Second Degree), or any other applicable policies under section 2.C. The criminal history record is not used to determine whether the juvenile offense carries a presumptive imprisonment sentence because of the difficulty in applying criminal history score computations to prior juvenile offenses. Two juvenile adjudications are required for each additional point. Again, no partial points are allowed, so an offender with only one juvenile adjudication meeting the above criteria would receive no point on the criminal history score.*

**2.B.407.** *To provide a uniform and equitable method of computing criminal history scores for cases of multiple felony offenses with adjudications arising from a single course of conduct when single victims are involved, and when the adjudications involved provisions of Minnesota Statutes, section 152.137, 609.251, or 609.585, consideration should be given to only the most severe offense with an adjudication when computing criminal history.*

*When there are multiple felony offenses with adjudications arising out of a single course of conduct in which there were multiple victims, consideration should be given only to the two most severe felony offenses with adjudications when computing criminal history. These are the same policies that apply to felony, gross misdemeanor and misdemeanor convictions for adults.*

*The Commission has carefully considered the application of the Hernandez method to sentencing in provisions of Minnesota law other than Minnesota Statutes, sections 152.137, 609.251, and 609.585. The Commission made a deliberate decision not to amend the Sentencing Guidelines. See State v. Williams, 771 N.W.2d 514 (Minn. 2009).*

## 5. Convictions From Jurisdictions Other Than Minnesota.

a. In General. The court must make the final determination as to whether and how a prior non-Minnesota conviction should be counted in the criminal history score. The court should consider, but is not limited to, the factors in paragraphs b through e, below. Sections 2.B.1 through 2.B.7 govern the use of these convictions.

b. How to Count. Find the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense. The section in which to count the non-Minnesota offense in criminal history depends on:

(1) whether the offense is defined as a felony, gross misdemeanor, or targeted misdemeanor in Minnesota; **and**

(2) the sentence imposed.

An offense may be counted as a felony only if it would **both** be defined as a felony in Minnesota, and the offender received a sentence of 366 days or more, which includes the equivalent of a stay of imposition. The offense definitions in effect when the current Minnesota offense was committed govern the designation of non-Minnesota convictions as felonies, gross misdemeanors, or misdemeanors.

c. Assigning Felony Weights. Section 2.B.1 governs the weight of a prior felony conviction from a jurisdiction other than Minnesota, and must be based on the severity level of the equivalent Minnesota felony offense.

d. Federal Offenses; No Minnesota Equivalent. Federal felony offenses that received a sentence that in Minnesota would be a felony-level sentence, but for which no comparable Minnesota offense exists, must receive a weight of one in computing the criminal history score.

e. Juvenile Offenses From Other Jurisdictions. Minnesota law governs the inclusion of a prior felony offense from jurisdictions other than Minnesota committed by an offender who was under 18 years old in the juvenile section or adult section of the criminal history score. The offense should be included in the juvenile history section only if it meets the requirements in section 2.B.4. The prior can be included in the adult history section only if the factfinder determines that it is an offense for which the offender would have been certified to adult court if it had occurred in Minnesota.

### *Comment*

**2.B.501.** *Convictions from jurisdictions other than Minnesota include convictions under the laws of any other state, or the federal government, including convictions under the Uniform Code of Military Justice, or convictions under the law of other nations.*

**2.B.502.** *The Commission concluded that convictions from other jurisdictions must, in fairness, be considered in the computation of an offender's criminal history score. No uniform nationwide characterization of the terms "felony," "gross misdemeanor," and "misdemeanor" exists. Therefore, the Commission recognizes that criminal conduct may be characterized differently by the various state and federal criminal jurisdictions. Generally, the classification of prior offenses as petty misdemeanors, misdemeanors, gross misdemeanors, or felonies should be determined by current Minnesota offense definitions and sentencing policies, except as provided in section 2.B.7. However, with respect to out-of-state offenses, the Commission chose not to apply Minnesota's 2023 redefinition of "felony," which now defines a felony as including a 365-day sentence. This is consistent with the Commission's policy before 2023 and with Minnesota Statutes, section 609.0342, paragraph (b)'s treatment of pre-2023 365-day sentences as gross misdemeanor sentences.*

**2.B.503.** *For prior non-Minnesota controlled substance convictions, the amount and type of the controlled substance should be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense.*

**2.B.504.** *A non-Minnesota conviction committed by a juvenile can only be included in the adult section of the criminal history score if the offender would have been certified as an adult under Minnesota law. See State v. Marquetti, 322 N.W.2d 316 (Minn. 1982).*

#### 6. Felony Enhancement Due to Prior Misdemeanor or Gross Misdemeanor Convictions.

a. **Enhanced Felonies.** When the current offense is a felony solely because the offender has previous convictions for misdemeanor and gross misdemeanor offenses, the prior misdemeanor conviction(s) on the targeted misdemeanor list provided in Minnesota Statutes, section 299C.10, subdivision 1, paragraph (e), or gross misdemeanor conviction(s) upon which the enhancement is based may be used in determining custody status, but cannot be used in calculating the remaining components of the offender's criminal history score.

b. **Counting Prior Misdemeanors and Gross Misdemeanors; Future Felony.** Except as provided in paragraph c., misdemeanor and gross misdemeanor offenses used to enhance the current offense must be used in calculating the offender's criminal history score on future offenses that are not enhanced felonies. Prior felony offenses used for enhancement must always be used in calculating the offender's criminal history score.

c. **Counting Prior Misdemeanors and Gross Misdemeanors; Felony Driving While Impaired (DWI).** If the current offense is a felony DWI offense and the offender has a prior felony DWI offense, the prior felony DWI must be used in computing the criminal history score. The prior misdemeanor and gross misdemeanor offenses used to enhance the first prior felony DWI cannot be used in the offender's criminal history. Any other misdemeanor or gross misdemeanor DWI offenses may be included as provided in section 2.B.3.g.

#### **Comment**

**2.B.601.** *A number of instances exist in Minnesota law in which misdemeanor or gross misdemeanor behavior carries a felony penalty as a result of the offender's prior record. The Commission decided that in the interest of fairness, a prior misdemeanor or gross misdemeanor offense that elevated the misdemeanor or gross misdemeanor behavior to a felony should not also be used in criminal history points other than custody status. Only one prior offense should be excluded from the criminal history score calculation, unless more than one prior was required for the offense to be elevated to a felony. For example, Assault in the Fifth Degree is a felony if the offender has two or more convictions for assaultive behavior. In those cases, the two related priors at the lowest level should be excluded. Similarly, theft crimes of more than \$500 but less than \$1,000 are felonies if the offender has at least one previous conviction for an offense specified in that statute. In those cases, the prior related offense at the lowest level should be excluded.*

**2.B.602.** *A first-time first-degree (felony) driving while impaired (DWI) offense involves a DWI violation within ten years of the first of three or more prior impaired driving incidents. Because the DWI priors elevated this offense to the felony level, they should be excluded from the criminal history score. Those predicate misdemeanor and gross misdemeanor offenses should also be excluded for a subsequent felony DWI, but any prior felony DWI would be counted as part of the felony criminal history score.*

#### 7. Determining Offense Levels for Prior Offenses.

a. Classification of Prior Offense. The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minnesota Statutes, section 609.02, subdivisions 2 to 4a) and sentencing policies. Offenses that are petty misdemeanors by statute, or that are certified as or deemed to be petty misdemeanors under Minn. R. Crim. P. 23, must not be used to compute the criminal history score.

b. Monetary Threshold. When a monetary threshold determines the offense classification, the monetary threshold in effect when the prior offense was committed, not the current threshold, determines the offense classification in calculating the criminal history score.

### **Comment**

*2.B.701. The Commission recognized that the classification of criminal conduct as a felony, gross misdemeanor, misdemeanor, or petty misdemeanor is determined legally by the sentence given rather than the conviction offense.*

*2.B.702. A monetary threshold determines the offense classification when the value of property or services is an element of the offense. Punishment for the offense typically increases as the dollar amount increases.*

*2.B.703. When the offense severity level is determined by a monetary threshold, the threshold in effect when the prior offense was committed determines the offense classification in criminal history. For example, beginning August 1, 2007, the monetary threshold for a felony level Theft of Moveable Property offense under Minnesota Statutes, section 609.52, subdivision 2, paragraph (a), clause (1), was divided between Severity Level 2 and Severity Level 3 by the dollar amount of \$5,000. Prior to that, this offense would have been assigned a severity level based on a dollar amount of \$2,500. Because this was a change by the Legislature for inflation and no change was made by the Commission to the severity levels, a Theft of Moveable Property offense over \$2,500 which previously received a Severity Level of 3 and a weight of 1 point in criminal history would continue to receive that same weight.*

## **C. Presumptive Sentence**

1. Finding the Presumptive Sentence. The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable Grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis). The conviction offense determines the severity level. The offender's criminal history score is computed according to section 2.B above.

a. Presumptive Disposition. For cases contained in cells outside of the shaded areas, the sentence should be executed. For cases contained in cells within the shaded areas, the sentence should be stayed unless the conviction offense carries a mandatory minimum sentence. Section 3.A governs conditions of stayed sentences.

b. Presumptive Duration. Each cell on the Grids provides a fixed sentence duration. If a cell, or other Guidelines policy, provides a fixed sentence duration of 12 months, a sentence duration of one year and one day is permissible without departure. Minnesota Statutes, section 244.09, requires that the Guidelines provide a range for sentences that are presumptive commitments. For cells above the solid line, the Guidelines provide both a fixed presumptive duration and a range of time for that sentence except as provided in section 2.C.3.c(1). The shaded areas of the grids do not display ranges. If the duration for a sentence that is a presumptive commitment is found in a shaded area, the standard range - 15 percent lower and 20 percent higher than the fixed duration displayed - is permissible without departure, provided that the minimum sentence is not less than one year, and the maximum sentence is not more than the statutory maximum.

2. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence. If the presumptive sentence duration in the appropriate cell on the applicable Grid exceeds the statutory maximum sentence for the conviction offense, the statutory maximum is the presumptive sentence. See Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Table in Appendix 3.

3. Finding the Presumptive Sentence for Certain Offenses.

a. Sex Offenses. Under Minnesota Statutes, section 609.3455, certain sex offenders are subject to mandatory life sentences and certain repeat sex offenders are subject to presumptive executed prison sentences of at least 36 months.

(1) Mandatory Life Sentence. The Sentencing Guidelines presumptive sentence does not apply to offenders subject to mandatory life without the possibility of release under subdivision 2 of that statute. For offenders subject to life with the possibility of release under subdivisions 3 and 4 of that statute, the court must specify a minimum term of imprisonment, based on the Sentencing Guidelines presumptive sentence as determined in section 2.C, or any applicable mandatory minimum sentence not contained in Minnesota Statutes, section 609.3455, that must be served before the offender may be considered for release.

(2) Presumptive Executed Prison Sentences of at least 36 Months. Except when a life sentence applies, if the current conviction offense is criminal sexual conduct in the first, second, third, or fourth degree (Minnesota Statutes, sections 609.342 to 609.345) or criminal sexual predatory conduct (Minnesota Statutes, section 609.3453) within 15 years of a previous sex offense conviction, under Minnesota Statutes, section 609.3455, subdivision 10, the presumptive disposition is commitment. The presumptive duration is at least 36 months, or the fixed duration indicated in the appropriate cell on the Grid, whichever is longer.

b. Burglary. If the current conviction offense is burglary of an occupied dwelling (Minnesota Statutes, section 609.582, subdivision 1, clause (a)) and there was a previous conviction for a felony burglary before the current offense occurred, the presumptive disposition is commitment. Prior burglary convictions trigger the presumptive commitment even if they have decayed for criminal history purposes, as set forth in section 2.B.1.c. The presumptive duration for a burglary conviction falling under this section is the fixed duration indicated in the appropriate cell on the Grid.

c. Controlled Substances Offenses.

(1) Certain First-Degree Offenses. If the current conviction is for controlled substance crime in the first degree and the penalty statute is Minnesota Statutes, section 152.021, subdivision 3, paragraph (c) (related to sale or possession of at least 100 grams or 500 dosage units of certain controlled substances), or if the current conviction is for aggravated controlled substance crime in the first degree, then the lower range, although displayed on the Drug Offender Grid, is excluded from what would otherwise be the presumptive range for that offense.

(2) Subsequent Controlled Substance Convictions. If the current conviction offense is for a controlled substance crime in the first or second degree and is a "subsequent controlled substance conviction" as defined in Minnesota Statutes, section 152.01, subdivision 16a, the presumptive disposition is commitment. Such a conviction triggers the presumptive commitment unless more than ten years have elapsed since discharge from sentence. The presumptive duration for a controlled substance conviction falling under this section is the duration indicated in the appropriate cell on the Drug Offender Grid, or the mandatory minimum, whichever is longer.

d. Driving While Impaired (DWI) Offenses. If the current conviction is for felony DWI and if, prior to the commission of the current offense, the offender had a previous conviction (as

conviction is defined in Minnesota Statutes, section 609.02, subdivision 5) for a felony DWI or for a criminal vehicular homicide or operation as defined in Minnesota Statutes, section 169A.24, subdivision 1, clause (3), the presumptive disposition is commitment. Prior felony DWI or criminal vehicular homicide or operation convictions trigger the presumptive commitment even if they have decayed for criminal history purposes as set forth in section 2.B.1.c.

e. Offenses Committed While Under State Authority. The presumptive disposition for escape from an executed sentence, felony assault committed by an inmate serving an executed term of imprisonment, or assault on secure treatment facility personnel is commitment. Pursuant to section 2.F.1, it is presumptive for escape from an executed term of imprisonment and for felony assault committed by an inmate serving an executed term of imprisonment to be sentenced consecutively to the offense for which the inmate was confined. The presumptive duration is determined by the presumptive consecutive sentencing policy (see section 2.F.1, Presumptive Consecutive Sentences).

### **Comment**

**2.C.01.** *The dispositional policy adopted by the Commission was designed so that scarce prison resources would primarily be used for serious person offenders and community resources would be used for most property offenders. The Commission believes that a rational sentencing policy requires such trade-offs to ensure the availability of correctional resources for the most serious offenders. For the first year of Guidelines' operation, this policy was reflected in sentencing practices. However, by the third year of Guideline operation, the percentage of offenders with criminal history scores of four or more had increased greatly, resulting in a significant increase in imprisonment for property offenses. Given finite resources, increased use of imprisonment for property offenses results in reduced prison resources for person offenses. The allocation of scarce resources has been monitored and evaluated on an ongoing basis by the Commission. The Commission has determined that assigning particular weights to prior felony sentences in computing the criminal history score will address this problem. The significance of low severity level prior felonies is reduced, which should result in a lower imprisonment rate for property offenders. The significance of more serious prior felonies is increased, which should result in increased prison sentences for repeat serious person offenders.*

**2.C.02.** *In the cells outside the shaded areas of the grids, the Guidelines provide a fixed presumptive sentence length, and a range of time around that length. Presumptive sentence lengths are shown in months, and it is the Commission's intent that months be computed by reference to calendar months. Any sentence length given that is within the range of sentence length shown in the appropriate cell on the applicable Grid is not a departure from the Guidelines, and any sentence length given that is outside the range is a departure from the Guidelines. In the cells in the shaded areas of the grids, the Guidelines provide a single fixed presumptive sentence length.*

**2.C.03.** *The presumptive duration listed on the grid, when executed, includes both the term of imprisonment and the period of supervised release. According to Minnesota Statutes, section 244.101, when the court sentences an offender to an executed sentence for an offense occurring on or after August 1, 1993, the sentence consists of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence; and a specified maximum supervised release term equal to one-third of the total executed sentence. Separate tables following the Grids illustrate how executed sentences are broken down into their two components.*

*The Commissioner of Corrections may extend the amount of time an offender actually serves in prison if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender serving the entire executed sentence in prison.*

**2.C.04.** *When a stay of execution is given, the presumptive sentence length shown in the appropriate cell should be pronounced, but its execution stayed. If the sentence length pronounced, but stayed, differs from that shown in the appropriate cell, the sentence is a departure from the Guidelines.*

**2.C.05.** *When a stay of imposition is given, no sentence length is pronounced, and the imposition of the sentence is stayed to some future date. If that sentence is ever imposed, the presumptive sentence length shown in the appropriate cell should be pronounced, and a decision should be made whether to execute the presumptive sentence length given. If the sentence length pronounced at the imposition of the sentence differs from that shown in the appropriate cell on the applicable Grid, the sentence is a departure from the Guidelines.*

**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, Threats of Violence under Minnesota Statutes, section 609.713, subdivision 3, paragraph (a), clause (1) or (2), carries a statutory maximum sentence of 12 months and 1 day. At Severity Level 1, the statutory maximum will be exceeded when the offender reaches a Criminal History Score of 3. As another example, Soliciting Children for Sexual Conduct under Minnesota Statutes, section 609.352, carries a statutory maximum sentence of three years. At Severity Level G, the statutory maximum will be exceeded when the offender reaches a Criminal History Score of 4.*

**2.C.07.** *When an offender is convicted of two or more offenses, and the most severe offense is a conviction for attempt or conspiracy under Minnesota Statutes, section 609.17 or 609.175, the presumptive sentence duration must be the longer of: (1) the duration for the attempt or conspiracy conviction; or (2) the duration for the next most severe conviction offense.*

**2.C.08.** *The 2005 Legislature enacted statutory changes allowing life sentences with the possibility of release for certain sex offenders. The statute requires the sentencing court to pronounce a minimum term of imprisonment, based on the Guidelines or any applicable mandatory minimum not contained in Minnesota Statutes, section 609.3455, that the offender must serve before being considered for release. All applicable Guidelines provisions, including the procedures for departing from the presumptive sentence, are applicable to determining the minimum term of imprisonment. See State v. Hodges, 770 N.W.2d 515 (Minn. 2009).*

**2.C.09.** *Sections 2.C.3.b and 2.C.3.d clarify that the court may consider decayed convictions when determining whether to execute a presumptively stayed sentence. See State v. Jones, 587 N.W.2d 854 (Minn. Ct. App. 1999).*

**2.C.10.** *Minnesota Statutes, section 152.021, subdivision 3, paragraphs (c) and (d), exclude the lower range, as defined in section 1.B.13.d, from what would otherwise be the presumptive range. While the mandatory-minimum provision of Minnesota Statutes, section 152.021, subdivision 3, paragraph (c), may be waived for an offender sentenced for a first-degree possession crime who had not previously been convicted of controlled substance crime in the first, second, or third degree, a sentence duration that is shorter than the fixed presumptive sentence, even if within the lower range, is nevertheless a mitigated durational departure if Minnesota Statutes, section 152.021, subdivision 3, paragraph (c), applies. Under either subdivision, the presumptive disposition is commitment.*

**2.C.11.** *The special penalty provisions for subsequent controlled substance convictions do not apply to current offenses of aggravated controlled substance crime in the first degree.*

## D. Departures from the Guidelines

1. Departures in General. The sentences 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 prison range unless there exist identifiable, substantial, and compelling circumstances to support a departure.

The court may depart from the presumptive disposition or duration provided in the Guidelines, and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence. A pronounced sentence for a felony conviction that is outside the appropriate prison range on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence, is a departure from the Guidelines. A departure is not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by statute or case law.

a. Disposition and Duration. Departures with respect to disposition and duration are separate decisions, each requiring written departure reasons. A court may depart from the presumptive disposition without departing from the presumptive duration, and vice-versa.

b. Aggravated Departure. When imposing a sentence that is an aggravated departure, it is recommended that the court pronounce a sentence proportional to the severity of the crime for which the sentence is imposed and the offender's criminal history, and take into consideration the purposes and underlying principles of the Guidelines.

c. Departure Report. In exercising the discretion to depart from a presumptive sentence, the court must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence. The reasons must be stated in the sentencing order or recorded in the departure report and filed with the Commission.

d. Departure Reasons. Because departures are by definition exceptions to the Guidelines, the departure factors in this section are advisory, except as otherwise established by case law.

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

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.

### *Comment*

**2.D.101.** *The departure report must be filed with the Commission within 15 days after sentencing. Minn. R. Crim. P. 27.03, subd. 4(C).*

**2.D.102.** *A defendant has the right to a jury trial to determine whether aggravating factors are proved beyond a reasonable doubt. See e.g., Blakely v. Washington, 542 U.S. 296 (2004); State v. Shattuck, 704 N.W.2d 131 (Minn. 2005); State v. Allen, 706 N.W.2d 40 (Minn. 2005). See also Minn. R. Crim. P. 7.03, 11.04, and 27 (detailing the procedures for seeking an aggravated sentence). If the departure facts are proved beyond a reasonable doubt, the court may exercise its discretion to depart from the presumptive sentence.*

**2.D.103.** *The aggravating or mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favor of the Guidelines sentence. The purposes of the Guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be reduced if courts depart from the*

*Guidelines frequently. Certainty in sentencing cannot be attained if departure rates are high. Prison populations will exceed capacity if departures increase imprisonment rates significantly above past practice.*

**2.D.104.** *Plea agreements are important to our criminal justice system because it is not possible to support a system where all cases go to trial. However, it is important to have balance in the criminal justice system where plea agreements are recognized as legitimate and necessary and the goals of the Guidelines are supported. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to make informed policy decisions or to ensure consistency, proportionality, and rationality in sentencing.*

*Departures and their reasons highlight both the success and problems of the existing Guidelines. When a plea agreement involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain its reasons for accepting the negotiation.*

**2.D.105.** *Under Minnesota Statutes, section 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 threats of violence (Minnesota Statutes, section 609.713) in statute, so a charge of threats of violence cannot be amended from a felony to a gross misdemeanor.*

**2.D.106.** *The Guidelines do not apply to a stay of adjudication because it is not a conviction (see Section 1.A). 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.*

**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 Minnesota Statutes, section 609.135, subdivision 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 peremptory demand.*

**2. Factors That Should Not Be Used As Reasons For Departure.** The following factors should not be used as reasons for departure:

- a. Race
- b. Sex
- c. Employment factors, including:
  - (1) occupation or impact of sentence on profession or occupation;
  - (2) employment history;

- (3) employment at time of offense;
- (4) employment at time of sentencing.
- d. Social factors, including:
  - (1) educational attainment;
  - (2) living arrangements at time of offense or sentencing;
  - (3) length of residence;
  - (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 social and economic factors. 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.*

**2.D.202.** *The Commission determined that the severity of an offender's sanctions should not vary depending on whether the offender exercised constitutional rights during the adjudication process.*

**2.D.203.** *It follows from the Commission's use of the conviction offense to determine offense severity that departures from the Guidelines should not be permitted for elements of alleged offender behavior not within the definition of the conviction offense. For example, if an offender is convicted of simple robbery, a departure from the Guidelines to increase the severity of the sentence should not be permitted because the offender possessed a firearm or used another dangerous weapon.*

**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.
  - (1) The victim was an aggressor in the incident.
  - (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
  - (3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.

(4) The offender's presumptive sentence is a commitment but not a mandatory minimum sentence, and either of the following exist:

(a) The current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or

(b) The current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance.

(5) Other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

(6) The court is ordering an alternative placement under Minnesota Statutes, section 609.1055, for an offender with a serious and persistent mental illness.

(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.

(8) In the case of a controlled substance conviction, the offender is found by the district court to be particularly amenable to probation based on adequate evidence that the offender is chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minnesota Statutes, section 152.152.

(9) In the case of a qualifying United States military service member or veteran, the offender is found by the district court to meet the criteria for particular amenability to probation found in Minnesota Statutes, section 609.1056, subdivision 4.

b. Aggravating Factors.

(1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability.

(2) The victim was treated with particular cruelty for which the individual offender should be held responsible.

(3) The current conviction is for a criminal sexual conduct offense, or an offense in which the victim was otherwise injured, and the offender has a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured.

(4) The offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below is an aggravating factor with respect to the offense:

(a) the offense involved multiple victims or multiple incidents per victim;

(b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;

(c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;

(d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or

(e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

(5) The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below is an aggravating factor with respect to the offense:

(a) the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to sell or transfer;

(b) the offender or an accomplice possessed equipment, drug paraphernalia, or monies evidencing the offense was committed as part of wholesale trafficking of a controlled substance;

(c) the offense involved the manufacture of controlled substances for use by other parties;

(d) the offender or an accomplice knowingly possessed a firearm or other dangerous weapon, as defined by Minnesota Statutes, section 609.02, during the commission of the offense;

(e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement;

(g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional);

(h) the offense involved separate acts of sale or possession of a controlled substance in three or more counties;

(i) the offender has a prior conviction for a crime of violence, as defined in Minnesota Statutes, section 609.1095, subdivision 1, paragraph (d), other than a violation of a provision under Minnesota Statutes, chapter 152, including attempt or conspiracy, or was convicted of a similar offense by the United States or another state;

(j) the offense involved the sale of a controlled substance to a minor or vulnerable adult; and

(k) the defendant, or an accomplice, manufactured, possessed, or sold a controlled substance in a school zone, park zone, public housing zone, federal, state, or local correctional facility, or drug treatment facility.

(6) The offender committed, for hire, a crime against the person.

(7) The offender is being sentenced as an "engrained offender" under Minnesota Statutes, section 609.3455, subdivision 3a.

(8) The offender is being sentenced as a "dangerous offender who commits a third violent crime" under Minnesota Statutes, section 609.1095, subdivision 2.

(9) The offender is being sentenced as a "career offender" under Minnesota Statutes, section 609.1095, subdivision 4.

(10) The offender committed the crime as part of a group of three or more offenders who all actively participated in the crime.

(11) The offender intentionally selected the victim or the property against which the offense was committed, in whole or in substantial part, because of the victim's, the property owner's or another's actual or perceived race, color, ethnicity, religion, sex, gender, sexual orientation, gender identity, gender expression, age, national origin, or disability as defined in Minnesota Statutes, section 363A.03, or because of the victim's actual or perceived association with another person or group of a certain actual or perceived race, color, ethnicity, religion, sex, gender, sexual orientation, gender identity, gender expression, age, national origin, or disability as defined in Minnesota Statutes, section 363A.03

(12) The offender used another's identity without authorization to commit a crime. This aggravating factor may not be used when use of another's identity is an element of the offense.

(13) The offense was committed in the presence of a child.

(14) The offense was committed in a location in which the victim had an expectation of privacy.

### *Comment*

**2.D.301.** *The Commission provides a non-exclusive list of factors that may be used as departure reasons. The factors are intended to describe specific situations involving a small number of cases. The Commission rejects factors that are general in nature, and that could apply to large numbers of cases, such as intoxication at the time of the offense. The factors cited are illustrative and are not intended to be an exclusive or exhaustive list. Some of these factors may be considered in establishing conditions of stayed sentences, even though they may not be used as reasons for departure. For example, whether an offender is employed at time of sentencing may be an important factor in deciding whether restitution should be used as a condition of probation, or in deciding the terms of restitution payment.*

**2.D.302.** *The Commission recognizes that the criminal history score does not differentiate between the crime spree offender who has been convicted of several offenses but has not been previously sanctioned by the criminal justice system, and the repeat offender who continues to commit new crimes despite receiving previous consequences from the criminal justice system. The Commission believes the nonviolent crime spree offender should perhaps be sanctioned in the community at least once or twice before a prison sentence is appropriate. The Commission believes that the court is best able to distinguish these offenders, and can depart from the Guidelines accordingly.*

**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.304.** *The Commission recognizes that in the medical field the diagnosis "chemically dependent" has been superseded by the diagnosis "substance use disorder; mild, moderate or severe." See the Diagnostic and Statistical Manual of Mental Disorders 5th ed.; (DSM-5); American*

*Psychiatric Association, 2013. Because the chemically dependent diagnosis language remains prevalent in Minnesota Statutes, the Commission has not adopted the new substance use disorder diagnosis language. In the event that the Legislature changes the statutory language, the Commission will take appropriate action.*

**2.D.305.** *In section 2.D.3.b(3), an aggravated durational departure is permitted when the current conviction is for a criminal sexual conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a criminal sexual conduct offense or an offense in which victim injury was established as an element of the offense. The departure is appropriate even if the prior felony offense had decayed in accordance with section 2.B.1.c. An aggravated durational departure is possible without jury determination of additional facts if victim injury is established in proving the elements of the current offense.*

**2.D.306.** *Special sentencing provisions were established by the legislature under Minnesota Statutes, sections 609.3455, subdivision 3a, 609.1095, subdivision 2, and 609.1095, subdivision 4, that are available to the courts when sentencing certain sex offenders, "dangerous offenders," and "career offenders." The use of one of these sentencing provisions would constitute a departure under the Guidelines and the court must provide written reasons specifying that the requirements of the statute have been met.*

**2.D.307.** *The aggravating factor involving groups of three or more offenders under section 2.D.3.b(10) cannot be used when an offender has been convicted under Minnesota Statutes, section 609.229, Crime Committed for Benefit of a Gang. See section 2.G, Convictions for Attempts, Conspiracies, and Other Sentence Modifiers, for the presumptive sentence for offenders convicted of Crime Committed for Benefit of a Gang, Minnesota Statutes, section 609.229, subdivision 3, paragraph (a).*

**2.D.308.** *The aggravating factor involving bias motivation under section 2.D.3.b(11) cannot be used when sentencing an offender for a crime with an increased statutory maximum penalty under Minnesota Statutes, section 609.2233 (felony assault motivated by bias), or for a crime that was elevated to a felony offense because of bias motivation (e.g., Minnesota Statutes, sections 609.2231, subdivision 4 (fourth-degree assault); 609.595, subdivision 1a, paragraph (a) (criminal damage to property); and 609.749, subdivision 3, paragraph (a), clause (1) (harassment)). The Commission intends that a penalty for a bias-motivated offense be subject to enhancement only once.*

*In determining when domestic violence, sexual assault and sexual abuse cases are motivated by a victim's sex, gender, sexual orientation, gender identity, or gender expression and may be appropriately enhanced, proof must be shown of at least one factor, such as: offender makes abusive or derogatory references based on sex, gender, sexual orientation, gender identity, or gender expression; offender states hatred for a sex, gender, sexual orientation, gender identity, or gender expression as a class; crime involves excessive violence, including mutilation; or there are multiple victims of the same sex, gender, sexual orientation, gender identity, or gender expression.*

## **E. Mandatory Sentences**

1. **In General.** When an offender is convicted of an offense with a statutory mandatory minimum sentence of one year and one day or more, the presumptive disposition is commitment even if the presumptive sentence would ordinarily fall within the shaded area on the applicable Grid. The presumptive duration of the prison sentence is the mandatory minimum sentence in statute or the duration provided in the appropriate cell on the applicable Grid, whichever is longer. When an offender is sentenced for an attempted offense under Minnesota Statutes, section 609.17, or conspiracy to commit an offense under Minnesota Statutes, section 609.175, and the underlying

offense has a mandatory minimum sentence of a year and a day or more, the presumptive duration is the mandatory minimum sentence in statute or one-half the duration found in the appropriate cell on the applicable Grid, whichever is longer. See Mandatory and Presumptive Sentences Reference Table in Appendix 1.

2. Specific Statutory Provisions. The following mandatory minimum provisions should be imposed as indicated.

a. Second- and Third-Degree Murder. Minnesota Statutes, section 609.107, Mandatory Penalty for Certain Murderers, determines the presumptive sentence for an offender sentenced under that statute.

b. Dangerous Weapon or Firearm. Minnesota Statutes, section 609.11, establishes the mandatory sentence for offenses committed with a dangerous weapon or firearm, or for possession of a firearm by an ineligible felon.

(1) Finding the Mandatory Sentence. Regardless of whether an offender would otherwise receive a presumptive stayed sentence under the Guidelines, the presumptive disposition for an offense subject to a mandatory sentence under Minnesota Statutes, section 609.11, is always commitment. The mandatory duration is established in the statute. See Dangerous Weapons - Minnesota Statutes, section 609.11, Table in Appendix 2.

(2) Departure. Minnesota Statutes, section 609.11, subdivision 8, provides that the court, on its own motion or on the prosecutor's motion, may sentence without regard to the mandatory minimum sentence if the court finds substantial and compelling reasons to do so. Sentencing under subdivision 8 is a departure as follows:

(i) Dispositional Departure. A stay of execution or stay of imposition is a dispositional departure.

(ii) Durational Departure. A sentence other than the mandatory minimum or the presumptive duration or applicable range in the appropriate cell on the applicable Grid, whichever is longer, is a durational departure.

c. Controlled Substance Offenses Involving a Dangerous Weapon. Pursuant to Minnesota Statutes, section 609.11, subdivision 5a, some drug offenses committed with a dangerous weapon may be subject to one of the following two provisions.

(1) Certain Aggravated First-Degree Offenses. If an offender is sentenced for aggravated controlled substance crime in the first degree under Minnesota Statutes, section 152.021, subdivision 2b, clause (2), and is also subject to Minnesota Statutes, section 609.11, subdivision 5a, the presumptive duration is the mandatory minimum sentence described in section 2.C.3.c(1) added to the mandatory minimum sentence for the dangerous weapon involvement found in Minnesota Statutes, section 609.11, subdivision 4 or 5.

(2) Subsequent Controlled Substance Offenses. If an offender is sentenced for a subsequent controlled substance offense and is subject to Minnesota Statutes, section 609.11, subdivision 5a, the presumptive duration is the longer of either:

(i) the mandatory minimum sentence for the subsequent controlled substance offense added to the mandatory minimum sentence for the dangerous weapon involvement; or

(ii) the presumptive duration for the subsequent controlled substance offense provided in the appropriate cell on the Drug Offender Grid and limited, if applicable, by section 2.C.3.c(1).

d. Dangerous and Repeat Felony Offenders. When an offender is sentenced under Minnesota Statutes, section 609.1095, subdivision 3, the presumptive disposition is commitment. The court must impose and execute the presumptive duration unless a longer mandatory minimum sentence is otherwise required by law or the court imposes a longer aggravated durational departure.

e. Felony Driving While Impaired (DWI). When the court sentences an offender for first-degree felony driving while impaired, under Minnesota Statutes, section 169A.276, it must impose a sentence of at least 36 months. The court cannot stay imposition or adjudication of the sentence, but may stay execution.

3. Conditional Release. Several Minnesota statutes provide for mandatory conditional release terms that must be served by certain offenders once they are released from prison. The court must pronounce the conditional release term when sentencing for the following offenses:

(1) First-degree (felony) driving while impaired. Minnesota Statutes, section 169A.276, subdivision 1, paragraph (d).

(2) Predatory offense registration violation committed by certain offenders. Minnesota Statutes, section 243.166, subdivision 5a.

(3) Assault in the fourth degree against secure treatment facility personnel. Minnesota Statutes, section 609.2231, subdivision 3a, paragraph (e).

(4) First- through fourth-degree criminal sexual conduct, sexual extortion, and criminal sexual predatory conduct. Minnesota Statutes, section 609.3455, subdivisions 6 to 8.

(5) Use of minors in sexual performance. Minnesota Statutes, section 617.246, subdivision 7.

(6) Child pornography. Minnesota Statutes, section 617.247, subdivision 9.

4. Mandatory Life Sentences. Mandatory life imprisonment sentences for first-degree murder and for sex offenses subject to Minnesota Statutes, section 609.3455, subdivision 2, are not governed by the Guidelines.

### ***Comment***

**2.E.01.** *The Commission attempted to draw the dispositional line so that the great majority of offenses that might involve a mandatory sentence would fall outside the shaded areas of the grids. However, some cases carry a mandatory prison sentence under state law but fall within the shaded areas of the Grids; e.g., Assault in the Second Degree. When that occurs, imprisonment of the offender is the presumptive disposition. The presumptive duration is the mandatory minimum sentence or the duration provided in the appropriate cell on the applicable Grid, whichever is longer. These crimes are ranked above the dispositional line because the Commission believes the durations at these levels are more proportional to the crime than the durations found at the higher severity levels where prison is recommended regardless of the criminal history score of the offender. For example, according to Minnesota Statutes, section 609.11, the mandatory minimum prison sentence for Assault in the Second Degree involving a knife is one year and one day. However, according to the Guidelines, the presumptive duration is the mandatory minimum sentence or the duration provided in the appropriate cell on the Standard Grid, whichever is longer. Therefore, for someone convicted of Assault in the Second Degree with a Criminal History Score of 0, the Guidelines presume a 21 month prison duration based on the appropriate cell on the Standard Grid found at Severity Level 6. The Commission believes this duration is more appropriate than the 48 month prison duration that would be recommended if this crime were ranked at Severity Level 8, which is the first severity level ranked completely above the dispositional line.*

**2.E.02.** *When the mandatory minimum sentence is less than one year, the Commission interprets the minimum to mean any incarceration including time spent in local confinement as a condition of a stayed sentence. The presumptive disposition is not commitment unless the case falls above the dispositional line on the applicable Grid.*

**2.E.03.** *Some offenses by statutory definition involve a dangerous weapon, and therefore the mandatory minimum provision dealing with dangerous weapons always applies: Aggravated Controlled Substance Crime in the First Degree with a firearm under Minnesota Statutes, section 152.021, subdivision 2, paragraph (b), clause (1); Controlled Substance Crime in the First or Second Degree with a firearm under Minnesota Statutes, section 152.021, subdivision 1, clause (2), item (i), or subdivision 2, paragraph (a), clause (2), item (i), or Minnesota Statutes, section 152.022, subdivision 1, clause (2), item (i) or subdivision 2, paragraph (a), clause (2), item (i); Assault in the Second Degree under Minnesota Statutes, section 609.222; Harassment (Aggravated Violations) with a dangerous weapon under Minnesota Statutes, section 609.749, subdivision 3, paragraph (a), clause (3); Certain Persons Not to Have Firearms or Ammunition under Minnesota Statutes, section 624.713, subdivision 2, paragraph (b) and 609.165, subdivision 1b; and Drive-By Shootings under Minnesota Statutes, section 609.66. 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.*

**2.E.04.** *The mandatory minimum provision dealing with the use of dangerous weapons in the commission of certain felonies (Minnesota Statutes, section 609.11) provides that the finder of fact must determine the firearm or other dangerous weapon use or firearm possession based upon the record of the trial or plea of guilty and does not require the citing of this provision. If the court finds that a dangerous weapon was involved, the mandatory minimum applies under Minnesota Statutes, section 609.11. This provision also provides prosecutors with the authority to make a motion to sentence apart from the mandatory minimum sentence. In State v. Olson, 325 N.W.2d 13 (Minn. 1982), the Supreme Court extended that authority to courts as well. When the prosecutor or court makes a motion to sentence apart from the mandatory minimum, it becomes legal to stay imposition or execution of sentence or to impose a lesser sentence than the mandatory minimum. When this motion is made, the presumptive disposition for the case is still imprisonment, and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is longer. A stay of imposition or execution for the case constitutes a mitigated dispositional departure. The imposition of a duration less than the mandatory minimum or cell time, if the latter is longer, constitutes a mitigated durational departure. Written reasons specifying the substantial and compelling nature of the circumstances and demonstrating why the sentence selected is more appropriate, reasonable or equitable than the presumptive sentence are required.*

**2.E.05.** *Minnesota Statutes, section 609.11, subdivision 5a, applies to aggravated controlled substance crime in the first degree only if the offender is convicted under Minnesota Statutes, section 152.021, subdivision 2b, clause (2), and the crime was committed with a firearm or other dangerous weapon. Example: An offender with a Criminal History Score of 3 possessed 100 grams of cocaine. Because two of the aggravating factors listed in Minnesota Statutes, section 152.01, subdivision 24, were present, the offender is convicted of aggravated controlled substance crime in the first degree under Minnesota Statutes, section 152.021, subdivision 2b, clause (2). It is also proven that the offender was in possession of a firearm, although the firearm possession was not an element of the crime. The mandatory minimum sentence would be 158 months, calculated as follows:*

*122 months Mand. Min. (section 2.C.3.c(1); severity level D9, Criminal History Score of 3)*

$$\begin{aligned}
 &+ \frac{36 \text{ months Mand. Min. for weapon (Minnesota Statutes, section 609.11,} \\
 &\quad \text{subdivision 5, paragraph (a))} \\
 &= 158 \text{ months}
 \end{aligned}$$

*Minnesota Statutes, section 609.11, subdivision 5a, does not apply to Minnesota Statutes, section 152.021, subdivision 2b, clause (1), which, by definition, involves the use or possession of a firearm.*

**2.E.06.** *Minnesota Statutes, section 609.11, subdivision 5a, states that for a subsequent controlled substance offense involving a weapon, the mandatory minimum duration for the drug offense and the mandatory minimum duration for the weapon offense are added together. The Guidelines presumptive duration is determined by comparing the total sum of the combined mandatory minimums and the duration found in the appropriate cell on the Drug Offender Grid for the subsequent controlled substance offense; the presumptive duration is the longer of the two. For example: A second-degree drug offender with a Criminal History Score of 2 is convicted of a subsequent controlled substance offense and was in possession of a firearm.*

Mandatory Minimums:	36 months Mand. Min. (Minnesota Statutes, section 152.022, subdivision 3, paragraph (b))
	+ $\frac{36 \text{ months Mand. Min. (Minnesota Statutes, section 609.11, subdivision 5, paragraph (a))}$
	= 72 months

vs.

Grid Cell:	= 68 months (Severity Level D7; Criminal History Score of 2)
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## **F. Concurrent/Consecutive Sentences**

Generally, when an offender is convicted of multiple current offenses, or when there is a prior felony sentence that has not expired or been discharged, concurrent sentencing is presumptive.

This section sets forth the criteria for imposing consecutive sentences. Imposition of consecutive sentences in any situation not described in this section is a departure. When the court imposes consecutive sentences, the court must sentence the offenses in the order in which they occurred.

If two or more sentences are consecutively executed at the same time and by the same court, the Commissioner of Corrections must aggregate the sentence durations into a single fixed sentence. The aggregate term of imprisonment must be served before the aggregate supervised release period.

If a sentence is executed consecutively to an earlier executed sentence (executed at an earlier time or by a different court), and the offender has not yet been placed on supervised release for the earlier executed sentence, the Commissioner of Corrections must aggregate both terms of imprisonment into a single, fixed term of imprisonment. The offender will serve the longer of the two supervised release terms.

If a sentence is executed consecutively to an earlier executed sentence after the supervised release date for the earlier sentence, any remaining supervised release term from the earlier executed sentence is tolled while the offender serves the consecutive term of imprisonment. The offender will serve what remains of the previously tolled supervised release term or the supervised release term for the consecutive sentence, whichever is longer.

**Comment**

**2.F.01.** *Consecutive sentences are a more severe sanction because the intent is to confine the offender for a longer period than under concurrent sentences. If the severity of the sanction is to be proportional to the severity of the offense, consecutive sentences should be limited to more severe offenses.*

*The Commission recommends that the court consider carefully whether the purposes of the Guidelines (in terms of punishment proportional to the severity of the offense and the offender's criminal history) would be served best by concurrent rather than consecutive sentences.*

**2.F.02.** *When a sentence is executed consecutively to another executed sentence on the same day and before the same court, the Commissioner of Corrections aggregates the separate durations into a single fixed sentence. The two-thirds terms of imprisonment are aggregated and served consecutively; then, the one-third supervised release terms are aggregated and served consecutively as well.*

*For example, if a court executes a 60-month fixed sentence, and, at the same time, executes a 21-month fixed sentence to be served consecutively to the first sentence, the Commissioner of Corrections must aggregate the 40-month and 14-month terms of imprisonment into a single 54-month fixed term of imprisonment, and must aggregate the supervised release terms of 20 months and 7 months into a single 27-month fixed term of supervised release to be served consecutively, as illustrated below:*

<i>1st: 40-mo. term of imprisonment</i>		<i>1st: 20-mo. supervised release term</i>	
	<i>2nd: 14-mo. term of imp.</i>		<i>2nd: 7-mo. s.r.t.</i>
<b>= 54-mo. aggregate term of imprisonment</b>		<b>= 27-mo. agg. sup. rel. term</b>	

**2.F.03.** *When two sentences are executed on different days or before different courts, the second sentence is consecutive to the first, and the offender has not yet been placed on supervised release for the first sentence at the time the second sentence is executed, then the terms of imprisonment will be aggregated. The first supervised release term will not run during the aggregate term of imprisonment, but the supervised release terms will run at the same time as each other.*

*For example, Judge A sentences an offender to a 60-month executed sentence. Judge B later sentences the offender to a 21-month executed sentence, consecutive to the 60-month sentence. Neither of the offender's two supervised release terms will begin until the offender has completed the term of imprisonment (including disciplinary confinement) for both offenses. When the supervised release terms do begin, they will not be aggregated, as they would have been if the consecutive sentences were executed by the same judge at the same time. Instead, the longer supervised term release will effectively control the duration, and they will run simultaneously, as illustrated below:*

<i>1st: 40-mo. term of imprisonment</i>		<i>1st: 20-mo. supervised release term</i>	
	<i>2nd: 14-mo. term of imp.</i>	<i>2nd: 7-mo. s.r.t.</i>	
<b>= 54-mo. aggregate term of imprisonment</b>		<b>= 20-mo. s.r.t.</b>	

**2.F.04.** *When an offender has already been placed on supervised release by the time the second, consecutive sentence is executed, the terms of imprisonment cannot be aggregated. In such a case, the first supervised release term stops running during the second term of imprisonment. When the offender is placed on supervised release for the consecutive sentence, the first supervised release term will resume; the offender will serve the remaining balance on the first supervised release term and the second supervised release term at the same time.*

*For example, Judge A sentences an offender to a 60-month executed sentence. The offender serves a 40-month term of imprisonment and is placed on supervised release for 20 months. Five months after being placed on supervised release, Judge B sentences the offender to a 21-month executed sentence, consecutive to the 60-month sentence. During the ensuing 14-month term of imprisonment (and any disciplinary confinement thereafter), the first sentence's supervised release term is tolled. Upon release, the offender will serve the remaining balance of the original supervised release term (now 15 months) simultaneous to the service of the consecutive sentence's supervised release term. The longer supervised release term will effectively control the duration, as illustrated below:*

<i>20-month supervised release term</i>			
<i>1st: 40-mo. term of imprisonment</i>	<i>5 mo.</i>	<i>(tolled sup. release)</i>	<i>15 mo. sup. release</i>
		<i>2nd: 14-mo. term of imp.</i>	<i>7-mo. s.r.t.</i>
<b>= 40-mo. term of imprisonment</b>	<b>=5</b>	<b>= 14-mo. t.i.</b>	<b>= 15-mo. s.r.t.</b>

1. Presumptive Consecutive Sentences.

a. Criteria for Imposing a Presumptive Consecutive Sentence. Consecutive sentences are presumptive (required under the Guidelines) when:

(1) the offender was, at the time of the current offense:

(i) serving an executed term of imprisonment, disciplinary confinement, or reimprisonment; or

(ii) on escape status from an executed term of imprisonment, disciplinary confinement, or reimprisonment; and

(2) the presumptive disposition for the current offense(s) is commitment.

b. Finding the Presumptive Disposition. The presumptive disposition is determined using the criteria in section 2.C. The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an executed term of imprisonment is always commitment.

c. Finding the Presumptive Duration. For each offense sentenced consecutively to another offense(s) under this section, the presumptive duration is the duration in the appropriate cell on the applicable Grid at a Criminal History Score of 1, or the mandatory minimum for the offense, whichever is longer.

d. Exception When Presumptive Concurrent Sentence is Longer. If the criteria in paragraph 2.F.1.a have been met but the total time to serve in prison would be longer if a concurrent sentence were imposed, a concurrent sentence is presumptive. Otherwise, a concurrent sentence is a departure.

e. Consecutive Sentences for Multiple Offenses. When the court pronounces presumptive consecutive sentences for multiple offenses, each new offense will be sentenced at a Criminal History Score of 1. The new offenses will run concurrently to each other, but consecutive to the prior offense. Permissive consecutive sentencing under section 2.F.2 is not a departure if it would result in a longer sentence than the sentence resulting from this rule.

f. Departure Factor. If there is evidence that the defendant has provided substantial and material assistance in the detection or prosecution of crime, the court may depart from the presumptive consecutive sentence and impose a concurrent sentence.

g. Felony Driving While Impaired (DWI). Minnesota Statutes, section 169A.28, subdivision 1, requires a consecutive sentence when the court sentences an offender for a felony DWI and:

- (1) the offender has a prior unexpired misdemeanor, gross misdemeanor or felony DWI sentence; and
- (2) the disposition for the current offense will be probation; **but not**
- (3) when the disposition for the current offense will be commitment.

If the court pronounces a consecutive sentence, the presumptive duration is based on a Criminal History Score of 1. Any pronounced probationary jail time should be served consecutively to any remaining time to be served on the prior DWI offense.

#### *Comment*

*2.F.101. This section establishes criteria requiring the use of consecutive sentences under the Guidelines. These are called "presumptive consecutive sentences." When consecutive sentencing is presumptive, it is a departure to give concurrent sentences.*

*2.F.102. When the court pronounces presumptive consecutive sentences for multiple offenses, each new offense will be sentenced at a Criminal History Score of 1. The new offenses will run concurrently to each other, but consecutive to the prior offense.*

*For example, an offender is convicted of Escape from Custody and First-Degree Burglary of an Occupied Dwelling following escape from an executed term of imprisonment. The term of imprisonment remaining on the original offense from which the offender escaped is 18 months. Each of the new offenses will have a presumptive consecutive sentence duration found at a Criminal History Score of 1: Escape from Custody (Severity Level 3), 13 months; Burglary (Severity Level 6), 27 months. The two sentences will run concurrently to each other, and the longer of the two durations will be added to the time remaining on the original term of imprisonment (here, 27 months will be added to the time remaining on the original 18-month sentence). Aggregated, the new presumptive consecutive sentence duration is 45 months.*

*2.F.103. A concurrent sentence is presumptive if it results in a longer time to serve in prison. For example, an inmate with a Criminal History Score of 6 assaults a prison guard only one month before supervised release is scheduled to begin. The Guidelines would typically recommend that the assault run consecutively to the unexpired prior except that a concurrent sentence is longer; therefore, a concurrent sentence is presumptive.*

$$\begin{aligned}
 & 1 \text{ month (before scheduled supervised release date)} \\
 & + 12 \text{ months (Severity Level 1; Criminal History Score of 1)} \\
 & = 13 \text{ months, consecutive}
 \end{aligned}$$

vs.

*19 months, concurrent (Severity Level 1; Criminal History Score of 6)*

**2.F.104.** *If the offense is an attempt under Minnesota Statutes, section 609.17, or a conspiracy under Minnesota Statutes, section 609.175, and the court pronounces a presumptive consecutive sentence, the presumptive duration for each offense sentenced consecutively to another offense is determined by first locating the duration in the appropriate cell on the applicable Grid at a Criminal History Score of 1, then applying the rules for attempts and conspiracy set forth in section 2.G.2.*

## 2. Permissive Consecutive Sentences.

a. Criteria for Imposing a Permissive Consecutive Sentence. Consecutive sentences are permissive (may be given without departure) only in the situations specified in this section.

(1) Specific Offenses; Presumptive Commitment. Consecutive sentences are permissive if the presumptive disposition for the current offense(s) is commitment, as outlined in section 2.C, and paragraph (i), (ii), or (iii) applies. If the court pronounces a consecutive stayed sentence under one of these paragraphs, the stayed sentence is a mitigated dispositional departure, but the consecutive nature of the sentence is not a departure. The consecutive stayed sentence begins when the offender completes the term of imprisonment and is placed on supervised release.

(i) Prior Felony Sentence. A current felony conviction for a crime on the list in section 6 of offenses eligible for permissive consecutive sentences may be sentenced consecutively to a prior felony sentence that has not expired or been discharged if the prior felony conviction:

(a) is for a crime on the list in section 6 of offenses eligible for permissive consecutive sentences; or

(b) is from a jurisdiction other than Minnesota and would be equivalent to a crime on the list in section 6.

The presumptive disposition for the prior offense(s) must also be commitment as outlined in section 2.C. A non-Minnesota conviction is equivalent to a crime on the list in section 6 if it would both be defined as a felony in Minnesota, and received a sentence that in Minnesota would be a felony-level sentence, including the equivalent of a stay of imposition.

(ii) Multiple Current Felony Convictions. If the offender is being sentenced for multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences in section 6, the convictions may be sentenced consecutively to each other.

(iii) Felony Conviction After Escape (Non-Executed Sentence). If the offender commits and is convicted for a new felony crime while on felony escape from lawful custody - as defined in Minnesota Statutes, section 609.485 - from a non-executed felony sentence, the new felony conviction may be sentenced consecutively to the sentence for the escape or the offense for which the offender was confined.

(2) Other Offenses. Consecutive sentences for the following offenses are always permissive and there is no dispositional departure if the sentences are executed.

(i) Felony Escape. If the offender is convicted of felony escape from lawful custody - as defined in Minnesota Statutes, section 609.485 - and the offender did not escape from an executed term of imprisonment, disciplinary confinement, or reimprisonment (see section 2.F.1.a(1)(ii)), the escape may be sentenced consecutively to the sentence for which the offender was confined.

(ii) Felony Conviction After Escape (Executed Sentence). If the offender committed and is convicted for a new felony crime committed while on felony escape from lawful custody - as defined in Minnesota Statutes, section 609.485 - from an executed felony sentence, the new felony may be sentenced consecutively to the sentence for the escape.

(iii) Fleeing a Police Officer; Criminal Sexual Conduct. The court may impose consecutive sentences as permitted under Minnesota Statutes, section 609.035, subdivisions 5 and 6, if both of the following occur:

(a) the offender is convicted of either of the following offenses:

(1) Fleeing a Peace Officer in a Motor Vehicle, as defined in Minnesota Statutes, section 609.487; or

(2) Criminal Sexual Conduct in the First through Fourth Degrees with force or violence, as defined in Minnesota Statutes, sections 609.342 through 609.345; and

(b) the court imposes punishment for any other crime committed by the defendant as part of the same conduct.

(iv) Felony Assault in a Local Jail or Workhouse. If the offender is convicted of felony assault committed while in a local jail or workhouse, the felony assault conviction may be sentenced consecutively to any other executed prison sentence if the presumptive disposition for the other offense was commitment as outlined in section 2.C.

b. Finding the Presumptive Duration. For each felony offense sentenced consecutively to another felony offense(s), the court must use a Criminal History Score of 0, or the mandatory minimum for the offense, whichever is longer, to determine the presumptive duration. A consecutive sentence at any other duration is a departure.

### ***Comment***

**2.F.201.** *The Commission establishes criteria that permits, but does not require, the use of consecutive sentences in instances listed in the Guidelines. This is called "permissive consecutive sentences."*

**2.F.202.** *If an offender is given permissive consecutive sentences, the presumptive duration for each offense sentenced consecutive to another offense(s) is determined by using the zero criminal history column, or the mandatory minimum, whichever is longer. The purpose of this procedure is to count an offender's criminal history score only one time in the computation of consecutive sentence durations.*

**2.F.203.** *If the offense is an attempt under Minnesota Statutes, section 609.17, or a conspiracy under Minnesota Statutes, section 609.175, and the court pronounces a permissive consecutive sentence, the presumptive duration for each offense sentenced consecutively to another offense is determined by first locating the duration in the appropriate cell on the applicable Grid at a Criminal History Score of 0, then applying the rules for attempts and conspiracy set forth in section 2.G.2. For example, in the case of an attempted aggravated robbery offense sentenced permissive consecutive to another offense, the duration found at Severity Level 8 and Criminal History Score of 0 (48 months), is divided in half - making the presumptive sentence 24 months.*

**2.F.204.** *The Commission's policies on permissive consecutive sentences outline the criteria that are necessary to permit consecutive sentences without the requirement to cite reasons for departure. Courts may pronounce consecutive sentences in any other situation by citing reasons for departure. Courts may also pronounce durational and dispositional departures both upward*

and downward in cases involving consecutive sentencing if reasons for departure are cited. The reasons for each type of departure should be specifically cited. The procedures for departures are outlined in section 2.D.

**2.F.205.** *Consecutive sentences are permissive for multiple current felony convictions even when the offenses involve one victim and a single course of conduct, but only when the presumptive disposition is commitment. However, consecutive sentencing is not permissive for multiple current felony convictions involving one victim and a single course of conduct if the court is giving an upward durational departure on any of the current conviction offenses. The Commission believes that to give both an upward durational departure and a consecutive sentence when the circumstances involve one victim and a single course of conduct can result in disproportional sentencing unless additional aggravating factors exist to justify the consecutive sentence.*

**2.F.206.** *An offender given a consecutive sentence for a crime committed while using or possessing metal-penetrating bullets under Minnesota Statutes, section 624.7191, subdivision 3, can get up to the three-year statutory maximum without departing from the Guidelines. The length of the consecutive sentence is left to the discretion of the court. For example, an offender with a Criminal History Score of 0 is sentenced to a presumptive 48 months prison for aggravated robbery in the first degree, and next is sentenced to 36 months prison consecutively for possessing metal-penetrating bullets.*

3. Crime Committed for the Benefit of a Gang. When the court imposes a presumptive or permissive consecutive sentence for a crime committed for the benefit of a gang under Minnesota Statutes, section 609.229, subdivision 3, the presumptive duration includes additional months as outlined in section 2.G.

4. Pre-Guidelines Cases. If a sentence is imposed consecutively to an offense committed before May 1, 1980, the consecutive sentence begins after completion of any incarceration arising from the prior sentence.

### ***Comment***

**2.F.401.** *The Commissioner of Corrections has the authority to establish policies regarding durations of confinement for offenders sentenced for crimes committed before May 1, 1980, and will continue to establish policies for the durations of confinement for offenders revoked and re-imprisoned while on parole or supervised release, who were imprisoned for crimes committed on or after May 1, 1980.*

*If an offender is under the custody of the Commissioner of Corrections pursuant to a sentence for an offense committed on or before April 30, 1980, and if the offender is convicted of a new felony committed on or after May 1, 1980, and is given a presumptive sentence to run consecutively to the previous indeterminate sentence, the phrase "completion of any incarceration arising from the prior sentence" means the target release date the Commissioner of Corrections assigned to the inmate for the offense committed on or before April 30, 1980, or the date on which the inmate completes any incarceration assigned as a result of a revocation of parole for the pre-Guidelines offense.*

### **G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers:**

1. In General. Sentence modifiers are statutes or policies that aid in defining the punishment for the underlying offense. Modifiers can affect either or both the duration and the disposition of the presumptive sentence. Any change to the presumptive fixed sentence under this section must also be applied to the upper and lower ends of the range found in the appropriate cell on the

applicable Grid, except that the presumptive sentence cannot be less than one year, nor can it be less than any applicable mandatory minimum.

2. Attempt or Conspiracy. For an attempted offense under Minnesota Statutes, section 609.17, or for conspiracy to commit an offense under Minnesota Statutes, section 609.175, the presumptive duration is one-half of that found in the appropriate cell on the applicable Grid for the underlying offense. When the underlying offense has a mandatory minimum sentence of a year or more, the presumptive duration is the mandatory minimum sentence in statute or one-half the duration found in the appropriate cell on the applicable Grid, whichever is longer.

3. Solicitation of Juveniles or Mentally Impaired Persons. When an offender is sentenced for soliciting a juvenile under Minnesota Statutes, section 609.494, subdivision 2, paragraph (b), or for soliciting a mentally impaired person under Minnesota Statutes, section 609.493, subdivision 2, paragraph (b), the presumptive duration is one-half of that found in the appropriate cell on the applicable Grid for the underlying offense.

4. Conspiracy to Commit a Controlled Substance Offense. The modifying statute for Conspiracy to Commit a Controlled Substance offense under Minnesota Statutes, section 152.096, does not affect the presumptive sentence for the underlying offense.

5. Attempt or Conspiracy to Commit Criminal Sexual Conduct in the First or Second Degree. The Commission regards the provisions in Minnesota Statutes, sections 609.342, subdivision 2, paragraph (b), and 609.343, subdivision 2, paragraph (b), as statutorily created presumptive sentences, not mandatory minimums. When an offender is sentenced for an attempt or conspiracy to commit Criminal Sexual Conduct in the First Degree under Minnesota Statutes, section 609.342 or Criminal Sexual Conduct in the Second Degree under Minnesota Statutes, section 609.343, subdivisions 1, paragraphs (a), (b), (c), (d), (e); 1a, paragraphs (a), (b), (c), (d), (h), or (i), the presumptive duration is one-half of that found in the appropriate cell on the Sex Offender Grid for the underlying offense or any mandatory minimum, whichever is longer.

6. Taking Responsibility for Criminal Acts. When an offender is sentenced for taking responsibility for criminal acts under Minnesota Statutes, section 609.495, subdivision 4, the presumptive duration is one-half of that found in the appropriate cell on the applicable Grid for the underlying offense.

7. Offense Committed in Furtherance of Terrorism. When an offender is sentenced for an offense committed in the furtherance of terrorism under Minnesota Statutes, section 609.714, the presumptive duration found in the appropriate cell on the applicable Grid for the underlying offense must be increased by fifty percent.

8. Criminal Sexual Predatory Conduct. When an offender is sentenced for criminal sexual predatory conduct under Minnesota Statutes, section 609.3453, the presumptive duration found in the appropriate cell on the applicable Grid for the underlying offense must be increased by:

a. twenty-five percent; or

b. fifty percent, if the violation was committed by an offender with a "previous sex offense conviction" as defined in Minnesota Statutes, section 609.3455, subdivision 1.

9. Offense Committed for the Benefit of a Gang. When an offender is sentenced for an offense committed for the benefit of a gang under Minnesota Statutes, section 609.229, subdivision 3, paragraph (a):

a. Pursuant to Minnesota Statutes, section 609.229, subdivision 4, the presumptive disposition is always commitment; and

b. The presumptive duration is determined by locating the duration in the appropriate cell on the applicable Grid defined by the offender's criminal history score and the underlying crime with the highest severity level, or the mandatory minimum for the underlying crime, whichever is longer, and adding:

(1) If the offense does not involve a victim or if the victim was eighteen or older:

(i) 12 months, if the underlying offense was completed; or

(ii) 6 months, if the underlying offense was an attempt under Minnesota Statutes, section 609.17, or conspiracy under Minnesota Statutes, section 609.175; or

(2) If the offense involves a victim under the age of eighteen:

(i) 24 months, if the underlying offense was completed; or

(ii) 12 months, if the underlying offense was an attempt under Minnesota Statutes, section 609.17, or conspiracy under Minnesota Statutes, section 609.175.

10. Felony Assault Motivated by Bias. When an offender is sentenced for a crime for which the maximum penalty has been increased under Minnesota Statutes, section 609.2233, the presumptive duration found in the appropriate cell on the applicable Grid for the underlying offense must be increased by twenty-five percent.

11. Criminal Vehicular Homicide (Death or Death to an Unborn Child, and Qualified Prior Conviction). When an offender is sentenced for a criminal vehicular homicide under Minnesota Statutes, section 609.2112, subdivision 1, paragraph (b) (death, qualified prior conviction), or Minnesota Statutes, section 609.2114, subdivision 1, paragraph (b) (death to an unborn child, qualified prior conviction), the presumptive duration found in the appropriate cell on the Standard Grid for the offense must be increased by fifty percent.

12. Attempt or Conspiracy to Commit First-Degree Murder. When an offender is sentenced for attempt or conspiracy to commit murder in the first degree under Minnesota Statutes, section 609.185, or murder of an unborn child in the first degree under Minnesota Statutes, section 609.2661, the presumptive disposition is commitment. The presumptive durations are as follows:

SEVERITY LEVEL OF CONVICTION OFFENSE	CRIMINAL HISTORY SCORE						
	0	1	2	3	4	5	6 or More
<i>Conspiracy/Attempted Murder, 1st Degree</i>	180 153-216	190 162-228	200 170-240	210 179-240 <sup>1</sup>	220 187-240 <sup>1</sup>	230 196-240 <sup>1</sup>	240 204-240 <sup>1</sup>

<sup>1</sup> Minnesota Statutes, section 244.09, requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

13. Second or Subsequent Severe Violent Offense.

a. The following definitions apply to this section:

(1) A "severe violent offense" is an offense listed in section 8, Severe Violent Offense List. "Severe violent offense" includes attempt or conspiracy, and includes an equivalent felony from a jurisdiction other than Minnesota, as outlined in section 2.B.5 (Convictions from Jurisdictions other than Minnesota). A current offense is not a "severe violent offense" if section 2.E.4 (Mandatory Life Sentences) applies.

(2) "Second or subsequent severe violent offense" means that prior to the commission of current severe violent offense, the offender has been adjudicated guilty of one or more severe violent offense.

(3) A "prior severe violent offense conviction" is an adjudication that qualifies the current offense as a second or subsequent severe violent offense. A conviction for an offense excluded from criminal history score computation under section 2.B.1.c (Felony Decay Factor) does not qualify as a "prior severe violent offense conviction." A conviction that resulted in a non-felony sentence (see section 2.B.1.h) does not qualify as a "prior severe violent offense conviction" if the non-felony sentence was imposed before the current offense date.

b. If the current offense is a second or subsequent severe violent offense, the presumptive fixed sentence for the current offense, as determined in section 2.C, shall increase by the number of months corresponding, in the following table, to the number of prior severe violent offense convictions, provided that:

(1) If the current severe violent offense is an attempt under Minnesota Statutes, section 609.17, or conspiracy under Minnesota Statutes, section 609.175, the increase shall be one-half the number of months stated; and

(2) This section shall not apply to a presumptive or permissive consecutive sentence pursuant to section 2.F.

NUMBER OF PRIOR SEVERE VIOLENT OFFENSE CONVICTIONS	MONTHS
1	12
2	18
3 or more	24

#### *Comment*

**2.G.01.** *If the presumptive sentence is an odd number, division by two produces a presumptive sentence involving a half month. For example, 41 months divided by two equals 20.5 months. In that case, 20.5 months is the presumptive sentence length.*

**2.G.02.** *A modifier that reduces the duration of the presumptive sentence does not alter a presumptive disposition of commitment. For example, the presumptive sentence for completed simple robbery at a Criminal History Score of 3 is commitment for 33 months; the presumptive sentence for attempt is commitment for 16.5 months. Although 16.5 months appears to be in the shaded area on the Standard Grid, the presumptive disposition is still commitment.*

**2.G.03.** *While the Commission recognizes the enhanced punishments available in the existing dangerous offender law (Minnesota Statutes, section 609.1095, subdivisions 2 and 3), it is also aware of the limited scope of those provisions, which, in practice, rarely result in enhanced sentences. It views the establishment of an automatic sentence modifier applicable to second or subsequent severe violent offenses as being necessary to protect the public from crime and thereby to promote public safety. The term "second or subsequent severe violent offense" incorporates the statutory term "second or subsequent offense" (Minnesota Statutes, section 609.02, subdivision 11).*