

## Minnesota Sentencing Guidelines

### Panel Presenters

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### Kay Knapp

#### *I. History and Development of the Guidelines*

The Minnesota sentencing guidelines<sup>1</sup> replaced a highly indeterminate sentencing system. Before the guidelines came into effect, the criminal code defined crimes and defined sentences that were generally zero to twenty, zero to ten, or zero to five year sentences—just broad ranges. The judges determined who they would sentence to prison, but they generally pronounced a highly symbolic sentence. The judge usually said, “I commit you to the Commissioner of Corrections for a sentence of zero to twenty years.” It was the parole board who actually determined the sentence length with very little input from the judge.

In the 1970's, Minnesota legislators became disillusioned with this indeterminate system. First, they observed the wide discretion that existed at the time and the disparity that resulted from that system. Second, they believed the sentencing system was primarily based on rehabilitation and led to game playing by offenders, both in and outside of prison, trying to convince people that they had become rehabilitated. Third, the legislators were concerned with investing so much sentencing authority in the hands of an administrative parole board rather than in the hands of judges and other publicly accountable officials.

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1. Minnesota Sentencing Guidelines and Commentary (rev. ed. 1985), reprinted in Minn. Stat. Ann. § 244 app. (West Supp. 1986) [hereinafter cited as Minn. Guidelines]. For a copy of the guidelines grid, see *infra* text accompanying note 3.

The issue was debated in the Legislature for three years with the Senate supporting a determinate sentencing system where the Legislature would set specific sentences and the judge would impose them. The House of Representatives, and particularly the House Criminal Justice Committee, wanted to retain an indeterminate system and retain the authority of the parole board. After two to three years of debate, the Legislature still had not resolved the issue and essentially recognized a stalemate in the debate. At that point in conference committee, the Legislature decided to establish a Sentencing Guidelines Commission and have the Commission try to resolve some of the issues that the Legislature had been unable to resolve. The only thing on which the Legislature instructed the Commission was to establish for each crime fixed presumptive sentences that would be advisory to the district court. The Legislature said that those sentences should be based on reasonable offense and offender characteristics. The directive was quite vague. Finally, the Legislature instructed the Commission to take into substantial consideration the current sentencing practices and correctional resources including, but not limited to, prison and jail capacities.<sup>2</sup>

The Commission determined that the two most important factors that should determine sentences would be the seriousness of the current offense and the criminal history of the offender. The Commission excluded offender characteristics that were not related to the criminal record. It excluded factors such as employment, family situation, and living situation from consideration in the guidelines.

The sentencing guidelines grid is provided below. I will briefly explain how it works.


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2. Minn. Stat. § 244.09 (1984).

Sentencing Guidelines Grid<sup>3</sup>

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle	I	12*	12*	13*	13	15	17	19
Possession of Marijuana								18-20
Theft Related Crimes (\$250-\$2500)	II	12*	12*	13	15	17	19	21
Aggravated Forgery (\$250-\$2500)								20-22
Theft Crimes (\$250-\$2500)	III	12*	13	15	17	19	22	25
						18-20	21-23	24-26
Nonresidential Burglary	IV	12*	15	18	21	25	32	41
Theft Crimes (over \$2500)						24-26	30-34	37-45
Residential Burglary	V	18	23	27	30	38	46	54
Simple Robbery					29-31	36-40	43-49	50-58
Criminal Sexual Conduct, 2nd Degree (a) & (b)	VI	21	26	30	34	44	54	65
					33-35	42-46	50-58	60-70
Aggravated Robbery	VII	24	32	41	49	65	81	97
		23-25	30-34	38-44	45-53	60-70	75-87	90-104
Criminal Sexual Conduct 1st Degree	VIII	43	54	65	76	95	113	132
Assault, 1st Degree		41-45	50-58	60-70	71-81	89-101	106-120	124-140
Murder, 3rd Degree	IX	105	119	127	149	176	205	230
Murder, 2nd Degree (felony murder)		102-108	116-122	124-130	143-155	168-184	195-215	218-242
Murder, 2nd Degree (with intent)	X	120	140	162	203	243	284	324
		116-124	133-147	153-171	192-214	231-255	270-298	309-339

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

 At the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation.

 Presumptive commitment to state imprisonment.

\*one year and one day

The vertical dimension is the seriousness of the current offense. These are severity levels. A severity level of one represents the least serious among offenses, such as unauthorized use of motor vehicle or possession of a relatively small amount of marijuana, down to severity level ten, which is murder, homicides, and crimes of that seriousness. The Commission ranked all of these offenses according to how serious they are and then collapsed them into ten severity levels. The horizontal dimension represents the criminal history score of the offender; the score is based upon four prior relevant criminal factors.

The Commission developed a dispositional line, or an "in and out line," that separates those who presumptively would go to the state prison. Any offender who falls into a cell below the dispositional line is given a presumptive prison sentence. Above the dispositional line, the presumption is that the person will not go to

3. Minn. Guidelines, *supra* note 1, § IV. For the offense severity reference table, see *infra* appendix, at 72.

state prison. Under Minnesota law, however, offenders who do not go to state prison but are convicted of a felony and placed on probation can serve up to a year in the local jail at the discretion of the judge as a condition of that probation.

Placement above the line, therefore, does not mean non-incarceration. It just means non-imprisonment and a limit of one year that can be spent at the local jail. The numbers in the cells located below the dispositional line are months of imprisonment. For example, with a severity level of seven and a zero criminal history score (under which aggravated robbery is the most common offense), the presumptive sentence is twenty-four months in prison.

There is a small range underneath that, twenty-three to twenty-five months, within which the judge can sentence without departing from the presumptive sentence. The amount of the sentence that is actually served in prison in Minnesota is reduced by good behavior credit. One day of good time can be earned for every two days of good behavior.<sup>4</sup> Essentially we would anticipate that two-thirds of the sentence would be served in prison with the last third being spent on supervised release before the sentence actually expired.

When the Commission developed this system, it changed past practices considerably. The policy was developed so that many more person offenders, or offenses against persons, and fewer property offenders were recommended for state imprisonment. To a large extent the Commission adopted retribution or just deserts as a purpose of sentencing, basing the sentence on the culpability of the offender in committing the offense. Other kinds of sentencing goals such as deterrence, incapacitation, and rehabilitation now must be pursued within the constraint of just deserts. For example, in Minnesota's system you cannot increase the sentence length because you think the offender might commit another offense sometime in the future. That would be considered inappropriate and would probably not be allowed by the Supreme Court. Rather, the primary principle is retributive with other sentencing goals pursued within that constraint.

Speaking of the appellate courts, the sentencing guidelines brought appellate review of sentencing, which is fairly new in Minnesota as it is in many states. Prior to the sentencing guidelines, the only basis on which a sentence could be appealed was the legality of the sentence. Given the highly discretionary sentencing

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4. Minn. Stat. § 244.04 (1984).

laws that existed, it was almost impossible to give an illegal sentence. Therefore, virtually no sentencing case law existed.

Under the guidelines, sentences can be appealed, not on the basis of the legality of the sentence, but on the basis of the appropriateness of the sentence. Either the defense or prosecution can appeal a sentence.<sup>5</sup> As a practical matter, most of the appeals are by the defense, as is true in many state systems. In many cases, sentences are to some extent agreed upon by the defense and the prosecution. Not all of them are, but for a majority there is some level of understanding that the sentence imposed is appropriate. Prosecutors, for example, often agree that a mitigated sentence is appropriate, and therefore will not appeal those cases. The defense most often appeals aggravated sentences. Appeals of incarceration time have created a new area of case law in Minnesota. We now have over 300 opinions handed down by the Minnesota Supreme Court and the intermediate appellate court on the issue of sentencing. Recently these appellate decisions have been annotated so the case law in particular sentencing areas is accessible.

Essentially, the system transferred discretion exercised by the parole board to judges and prosecutors, with general sentencing policy articulated by the Commission. The Commission states policy for the Legislature in order to serve as a buffer for the Legislature in this policy area which generates a lot of interest and emotion. The Commission's development of specific policies tends to offer the Legislature some protection from some of the more extreme public views on sentencing.

## *II. Impact of the Sentencing Guidelines*

The goals of the guidelines were to increase uniformity in sentencing, to increase proportionality in sentencing, and to have an implementable policy which means that we would live within the correctional resources that the Legislature made available. After the guidelines went into effect, the sentences became more uniform. Offenders with a similar severity of offense and criminal history received similar sentences more frequently than before the guidelines went into effect. In terms of proportionality, more person offenders and fewer property offenders are going to prison. Initially we had a large increase in the number of serious person offenders being sentenced to prison. There has been some slippage, however, in the proportion of property offenders and person offenders going to prison. Now more property offenders are going

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5. Minn. Stat. § 244.11 (1984).

to prison than when the guidelines first went into effect. One reason is that there is some evidence in a small number of cases that prosecutors have started to file and obtain more convictions for property crimes, which may push certain offenders across the dispositional line. Therefore the criminal history scores are getting higher. Prosecutors do not dismiss as many cases. That means more property offenders are going to prison, presumptively.

Another group of offenders going to prison that we had not anticipated are offenders who request to go to prison. Property offenders, in particular, may request this disposition. As I mentioned, the judge, with the stayed sentence or non-imprisonment sentence, does have the option of giving the offender up to a year in jail. Along with that option there can be a long period of probation and many other conditions such as treatment or community service or restitution. All of the sanctions can add up to be quite onerous. Some offenders just preferred to go to prison with a relatively short sentence and do their time. The Minnesota Supreme Court has consistently upheld the defendants' requests for going to prison. This also contributes to the increase in property offenders going to prison.

As a result of the guidelines, we have not experienced delays in case processing. The same amount of time passes between initial appearance and sentencing as occurred before the guidelines. The rate of trials in the state has remained about the same, although in some counties trials have increased and in others they have decreased. I expect the variation among counties has more to do with legal processing issues than with the guidelines.

The prison population has remained within capacity. We added a 400-bed facility to our capacity in 1982 so we do have some extra space that we did not have when the guidelines were developed. We rent out that extra space to Wisconsin and to the federal government. As a result, we have generated many millions of dollars of revenue. The income is an incentive for keeping our prison population down.

In terms of the future of the guidelines, the Commission has the authority to modify the guidelines. It has modified the guidelines seven times. The Commission modifies the guidelines annually to incorporate new crimes that the Legislature creates, to respond to the Legislature, as well as to clarify constantly the language as unique cases come up that the guidelines do not adequately cover. In the modifications, the Commission generally has increased, rather than decreased sentences. On one occasion in 1983, however, we did decrease some sentences. I expect any ma-

for changes that occur to the guidelines over the next few years will be in the area of non-imprisonment sanctions. In particular, a likely area will be establishing guidelines to deal with local jail sanctions. We have a nonproportionality problem on that level with some of the local sanctions being more severe than the prison sanction. In the future, there will be increasing interest in developing some guidelines to structure that discretion as well as the prison time.

### **Tom Johnson**

I am going to start off with some general comments from the prosecutor's perspective about sentencing guidelines and then turn to some specific issues. As a prosecutor and elected official within the prosecutor's office, I have the responsibility for representing the community, the public.

If you were to ask the public whether or not they see the courts' criminal justice system as doing justice, they probably would focus on the sentencing aspect more than anything else. The public occasionally becomes upset about cases being thrown out on technicalities. For the most part, however, they focus on the sentence and on whether it seems fair and just. In significant trials, the sentence is most often reported by both the printed and visual media. Therefore, the public is very much attuned to awaiting the sentence to determine whether or not justice has been achieved in any particular case.

To my knowledge, there has not been a Minnesota public opinion survey done on sentencing guidelines. My sense is that the public would not like the sentencing guidelines. If you were to show the chart and say—"Do you think it's fair that someone who commits an armed robbery serves twenty-four months minus one-third off for good time?"—very few people on the street corner would say, "Yeah, that sounds about right." They would say, "Five years. Ten years." Most likely the public would be very critical of some of the sentences set by the guidelines.

Surprisingly, however, the sentencing guidelines in general have gained fairly widespread acceptance within Minnesota. There are several reasons for the guidelines' acceptance. One reason is that those public officials who have been in the best position to launch an attack against the guidelines have demonstrated only a minimal amount of demagoguery. There have been periods, however, when the guidelines provoked political controversy. Some candidates campaigning for state offices in the 1982 and 1984 elections made the guidelines an issue against incumbents. These can-

didates questioned why certain legislators, sitting on the appropriate committees or within the general body, had not asked the Legislature to review the guidelines set by the Commission. Those candidates lost and since then the issue has really quieted down. To a certain extent the controversy went beyond the bounds of what the public in Minnesota, at least, was willing to consider rational and well-reasoned.

Another reason Minnesota citizens accept the guidelines is because they are an important breakthrough in sentencing. The guidelines represent truth-in-sentencing. As Ms. Knapp discussed, for the first time you truly know how long persons are going to serve in prison, or whether they are even going to prison, in advance of the crime being committed. That is a very significant breakthrough. Whether or not you agree with the specific number of months for which a person is incarcerated, you know that is how long the sentence is going to be. The sentence is not zero-to-ten years, and then leaving the parole boards to make the decision regarding release. The certainty of sentences has gained support from the public.

There is also an understanding that sentencing is more consistent. With more consistency, at least in the aggregate, comes greater fairness. Whether or not you like the guidelines, the public does like to sense that people are going to be treated similarly. I think these are some reasons why the guidelines have gained acceptance.

I do not know, however, how the sentencing guidelines would fare if you polled the eighty-seven county attorneys in Minnesota. My guess is that a majority of county attorneys would say, "Yeah, they're okay." The attorneys have individual gripes about particular sentences and some of the disparities that still exist. For example, the difference between the period of incarceration for murder one and for murder two is a wide gap. However, we all know that the very slimmest of evidence may distinguish between whether murder was simply intentional but not premeditated or intentional and premeditated, which is the stereotypical murder one. Yet there is a wide sentencing difference between those two offenses. In general though, the certainty and consistency of sentences are the reasons for acceptance, even among prosecutors, of a system that on its face would seem to cry out for overturn if focusing simply on the length of imprisonment that it provides for any particular offense.

Now let me turn to more specific issues: the effect of the sentencing guidelines on the charging of crimes, the negotiation of



pleas, and the appealing of sentences. Within Hennepin County the effect of the sentencing guidelines on the charging decision has been very minimal. We are not charging anyone that we did not charge before. That I can say very definitely. We are not adding any more additional counts than we did before; if we are, it is a rare occurrence. The policy within our office, and I was elected in 1978 so I predated the guidelines by a couple of years, has been that we are responsible chargers. You will not see any twenty-five to 100-count complaints coming out of our office.

We look for a course of conduct. We then choose those crimes that best describe the course of conduct that the person engaged in and charge a representative number of those counts. If someone has been on a bad check spree or a burglary spree, three, six, or eight counts are possible. Very seldom do we ever get in double figures. We have not, although Mr. Falvey may disagree, taken advantage of the guidelines in the sense of having changed our charging practices to bring people routinely as close to that black line as we can as a part of the charging decision.

Now let me move on to negotiating pleas. In that area the change has been more significant. First, we use some discretion as to whether or not we think we have charged a "bad actor." We are talking for the most part now about cases that are above the line. That means it is not a prison sentence but rather a case where the judge can sentence the person up to a year in the county facility and impose a probationary period and other conditions. If we do have bad ones charged, even though we know we cannot put these people in prison, we are inclined to try to hold tight on our negotiation—to negotiate to move them as close to the imprisonment line as possible. If we do that, then in the event they commit another offense, we have a better crack at putting them into prison. Therefore we are well aware of what is going on when it comes time to negotiate and what the effect of the guidelines may be. As Ms. Knapp has commented, this is reflected in that more property offenders are going to prison than was expected when the guidelines were adopted. This is the result of prosecutors holding tighter on people that they see as real recidivists. Prosecutors want to move those people to a place on the guidelines chart where, the next time around, they will see some prison time. The guidelines represent an articulated state policy on sentencing. Thus, there is nothing wrong with using the policy to its fullest.

When the guidelines were enacted, the state, for the first time, was given the right to appeal a sentence. So far, the Hennepin County Attorney's Office has taken only a few appeals. Prose-

cutors are hesitant to appeal sentencing decisions for practical reasons. To appeal a judge's decision is to appeal the decision of a judge you will be back before the next day. The Hennepin County Attorney's Office appeals the trial court's decision only when the best interests of justice dictate an appeal.

If we were to start all over again, we should reverse this chart so that those who go to prison, the more serious offenders, would be represented on the chart above the line rather than below the line. If legislatures are entertaining sentencing guidelines in your state, a "big" substantive suggestion would be to reverse this chart. Also, I would suggest a guidelines system that does not make a distinction between probation offenses and prison sentences. We do make such a distinction, and unfortunately, the result is that every time someone is not going to be sentenced to prison, they are going to be put on probation. To the public, of course, that means the offenders are out on the street. Well, they may actually serve up to one year in local jails or may be on probation with some heavy conditions. Despite these possible sanctions for those in the probationary part of the grid, the line distinguishing probation and prison is truly a bright line in Minnesota, and there is no way to get around that fact.

Let me close by explaining what I see as the effects of the guidelines. In our county there was an increase in the percentage of cases going to trial. It increased by about two percent following enactment of the guidelines. While I would not say the increase was solely the result of the guidelines being implemented, there is no doubt they were a significant factor. The argument was made that the number of trials was going to be significantly increased because defendants knew what their sentence was going to be and therefore had no reason to negotiate. Well, that obviously did not turn out to be true since that would have resulted in a greater increase.

In Hennepin County, a relatively large urban county, fewer property offenders are going to prison than formerly went to prison. As Ms. Knapp indicated, this trend exists statewide. The opposite is true for crimes of violence. We are sending more people who commit crimes of violence to prison for longer periods of time. It is difficult to get up on a soapbox and say that doesn't make sense if another goal is to restrict the available space within the state prisons—a policy decision made by the Minnesota Legislature.

One of the problems, and I will close with this, is trying to keep up with the decisions of our appellate courts as to the sen-

tencing guidelines and how they should be implemented. When you look at their decisions, it is very difficult to generalize the courts' reasoning. Various publications try to characterize the different circumstances and identify the factors that lead to a departure. It is not, however, always easy to tell. For example, in some cases it may not be clear at all whether the court explicitly or implicitly upheld a specific factor as a basis for departure. One of my favorite publications on the topic was prepared by an attorney in our office. The title illustrates the problem I have been referring to. It is entitled *Compendium of Specific Factual Bases Which Have Been Used to Support the Various Possible Sentencing Outcomes under the Minnesota Sentencing Guidelines, or The Joy of Sentencing*.

William E. Falvey

Let me start by saying what a joy it is for a small town lawyer like myself to cross the great river to the land of tall buildings, glittering hotels, and apparently enlightened prosecution.

I am going to talk about the defense perspective of the Minnesota sentencing guidelines. I am also a member of the Minnesota Sentencing Guidelines Commission so there is a certain bias that I have, a bias of authorship if you will. I take credit for all the good things about the guidelines, and I blame the other nine members of the Commission for all those things that are not good about the guidelines.

In order to understand the defense perspective of sentencing guidelines, I have to take you back a little in history—back to the good old days when jails were jails and not detention centers, when we had no discovery, and trials were by ambush. For me that is the mid-1960's, when I started practicing law.

Sentences, as Ms. Knapp and Mr. Johnson pointed out, historically were indeterminate. We had the nickel offense, the dime offense, and the quarter offense. The sentences were all zero to the statutory maximum. Now plea bargaining was kind of goofy at that time. You would visit a client and the dialogue might go something like this. "Charlie, remember me? I am your public defender. We met about ninety days ago for two minutes when you were arraigned. Well, tomorrow is your trial, but I don't think we are going to have that trial, Charlie, because I had lunch with the prosecutor yesterday, and I had dinner with the judge. And because it's Friday and the National Association of Women Judges are meeting in Minneapolis and because I like you, we got that sentence cut in half. Now you know you are charged with a

twenty year burglary, but because of my skill, that's going to be reduced to ten years, Charlie. We got that baby cut in half."

Well, to the uninitiated, that looks like a good deal. To those folks who have been to prison before, they know that is absolute nonsense. Whether clients went on a limitation of ten years or the full twenty years, they were going to be doing about the same amount of time. In the 1960's and early 1970's, there was no really good accounting of how much time people spent in prison, but indeed the perception was that when offenders went to prison, if they found Jesus and learned the twelve steps of A.A., they would be out in ninety days.

On the other hand, if some poor klutzes did not understand and did not want to cure themselves of bad habits, they might end up serving their full sentences. In effect, what I am trying to tell you is that plea bargaining was very illusory in those days. The politicians finally got fed up with the indeterminate system. I have the sense that back in the 1970's when the legislators were talking about determinate sentences, they were a little mad at the parole board because almost everybody had the same perception I just gave you.

Because of these factors the parole board heard footsteps, and those footsteps were those of legislators. In 1976 the Legislature created what were called "Release Guidelines," and it was called by practitioners the "Matrix System." This was kind of a goofy thing which I do not quite understand to this day. Fortunately, the "Release Guidelines" had a life of only four years. Apparently it was what a social scientist would call a "Predicted Risk of Failure Model." They were guidelines that did not determine whether offenders were going to prison but rather when they got there how long they were going to stay based on their background. So when you had the plea bargain session with the client, you had to go up to him and say something like this: "Well, Charlie, I have got bad news and I have got good news. The bad news is I don't know whether you are going to go to prison or not. The good news is if you do go, it is only going to be sixty-three months you will have to serve because you are in that category where there is a predicted risk of failure of 'X' percent."

When they got to prison these people were all asked certain questions such as: Were you nineteen or younger at the age of offense? Did you have three or more convictions? Any probation violations? From the number of yes answers the client would be assigned a risk level which was then translated into a group failure rate. Well, in my mind, that turned out to be preemptive sentenc-

ing. It was like telling somebody, "since it is predicted that you are going to fail again, fella, we are going to punish you for that failure right now." How people can predict a failure rate for an individual, as opposed to a group, I do not know. In any event, to me that was kind of like predicting pregnancy or going ahead and playing a form of Russian Roulette with sentences.

Overall, I found something ethically perverse that people would predict this is going to happen to a group and then take the individuals and sentence them that way. In spite of its shortcomings, it did provide the defense attorney with the ability to tell a client, "If you do go to prison, here is the amount of time you are going to spend there—maybe." Because of the little rules that the corrections board developed up there, predicting sentences was not all that accurate. The corrections board said they had a departure or deviation rate of twenty percent. Others, more informed than I, however, would say the rate of deviation or departure was far greater. In any event, it was an improvement because at least you could tell a client, "If you go, this is about how much time you are going to spend." That approach was a lot more honest than the old illusory bargain of not telling clients anything or telling them that they were really getting a bargain which did not amount to anything.

Then came 1980 and skies opened and enlightenment shown down on everybody. The state of Minnesota adopted the sentencing guidelines that have been outlined by Ms. Knapp.

Before the ink was dry, as you can imagine, all the clients in the Ramsey County Adult Detention Center had a copy of the guideline grid. They had them before I could get them out to the lawyers that work in my office. They learned quickly.

Finally we could deal honestly with a client. We could tell the client, "Okay, Charlie. Here you are. Based on your criminal history and based on the severity of the offense, primarily the severity of the offense, this is what's going to happen to you. You are going to be on probation but you might spend up to a year in the workhouse," or, "You are going to prison for twenty-four months."

As Mr. Johnson stated, a lot of people thought the sentencing guidelines would create all sorts of trials when people found out that this was going to happen to them with or without a trial. Everybody would go to trial. Not so! Young criminal defendants, including indigent criminal defendants, like to have some certainty in their lives. So the big bugaboo of more trials never really mate-

rialized. Therefore the system is good because, to a major extent, we can tell defendants what is going to happen with their case.

Do the sentencing guidelines solve all the problems of felony sentencing in Minnesota? I do not think they really do. The first thing to understand is that the below-the-line category (defendants who go to prison) is twenty percent of the cases, whereas the above-the-line category (defendants who receive probationary sentences) is eighty percent of the cases. A judge, of course, as a condition of probation can send somebody to the workhouse or county jail for up to one year. Here we begin playing with disparity again. Judge A may decide, "You little son of a gun, you stole a car, and I am going to make you do six months in the workhouse." Judge B, however, might say, "Aw, he is a good kid. I know he is from a good family. I am going to give him straight probation." So the potential for disparity exists, and actual disparity does go on.

The differences do not only exist from district to district but also within a district where more than one judge sentences. When people who are similarly situated are treated differently, I think that is unjust. There are always going to be exceptions. We do not want guidelines so rigid that there is no flexibility for justice to be done. By and large, however, people of similar circumstances ought to be treated alike. We are doing that with twenty percent of our cases but not with the other eighty percent. To me, this is a problem the guidelines should address.

The other problem with the guidelines is plain and simple: prosecutorial manipulation. This does happen. In my mind this accounts for an inordinate number of people going to prison on property offenses. The way this works, a prosecutor can charge some defenseless AFDC mother. Suppose she has run out of money at the end of the month. She goes and cashes a bad check at Target, one of our discount stores, and one at K-Mart. She writes another bad check at Sears, and maybe she comes to the Amfac Hotel and writes another check. On the first charge she has a zero criminal history score. As you go on with the other charges, however, she gets a criminal history point for the first one, and it goes up a point for each bad check. An unscrupulous prosecutor can push somebody to the very end and off the end of the guidelines grid. The judge is not able to be the equalizer on the prosecution's charging discretion. Before the guidelines, if a prosecutor was trying to make a big name by prosecuting the AFDC mother, the judge could kind of equalize things with the sentence, but judges cannot do that under the guidelines. It is what we call the "Hernandez problem," coming from the name of

a case, *State v. Hernandez*.<sup>6</sup>

Another way prosecutors can manipulate the guidelines is to take a case, charge aggravated robbery, an offense that falls below the dispositional line, and simple robbery, an offense above the dispositional line. Both are weak charges but result in bludgeoning a plea of guilty on the basis you do not want that poor client going to prison. Even though your above-the-line case is weak also, you are going to want to avoid the possibility of that person going to prison.

We Americans have some real crazy ideas on proportionality—that is, whether or not the time fits the crime. I would like to mention by way of example one issue that is now before the Commission. The State Attorney General has come to the Guidelines Commission and said, “We would like you to determine the severity level for bid rigging.” Bid rigging occurs when contractors in collusion with one another decide they are going to skim a little from the public coffers. The State Attorney General said to the members of the Commission that he would like to see this crime rated at a severity level of five purportedly to teach the contractors a lesson. For the first time in my experience before the Commission, which goes back to 1978, we see at our meetings corporate lawyers in the three-piece suits. You know those are the guys who represent the contractors. They said to members of the Commission, “Let’s keep this down at severity level three if you are going to rank it at all.” The corporate lawyers believe the contractor, a middle class person, should not be going to prison. What the lawyer wants for the contractor is maybe a weekend in the county jail and an essay on business ethics. You know, “boys will be boys.”

In these bid-rigging cases we are talking about public loss in thousands of dollars, according to the attorney general. Well, I can compare one of my poor indigent clients who might get in a little trouble here. You know, a client who might be on probation. He runs out of money while he is on probation and rips off that Target store for \$251, rips off the Amfac Hotel of another television, and finds another place where he gets one of those squawk boxes that kids carry on their shoulder. Total \$750 worth of goods. All of a sudden that client is doing nineteen months in prison.

For another example, in our state the Legislature says if the AFDC mother goes out and cashes a bad check, she can receive up to ten years in prison. Yet she can give the money to her boyfriend. He can get roaring drunk, go out in his car and kill somebody, and still the most that can happen to him is five years in

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6. 311 N.W.2d 478 (Minn. 1981).

prison. This example shows that we still have some system problems here.

What would I do to change the system if I could get the proxy of these other nine members? The first thing I would do is move the dispositional line so that persons convicted of crimes in severity levels one, two, and three could not be sentenced to prison, regardless of their criminal history score. In looking at the offenses that are within those severity levels, none of them in my mind is egregious enough to warrant a prison sentence.

After moving the dispositional line as described, I would go back and start creating jail guidelines so people similarly situated in these above-the-line cases would be treated fairly or relatively the same. The whole purpose of sentencing guidelines in my mind is to eliminate disparity and to create some uniformity so all people—all Americans—are treated alike. I do not, however, have those nine proxies at this point. So let me close by saying that all of us who practice law know that the judges always have the last word in things. With that I will turn it over to Judge Tomljanovich.

#### **The Honorable Esther Tomljanovich**

I am sure that the audience will agree it is appropriate that judges have the last word. That is how the world should be run.

The first question judges ask about the sentencing guidelines is whether or not guidelines will affect their discretion. Sure they will. Absolutely. The standards set that out. Guidelines supporters say they want to establish rational and consistent sentences which reduce disparity in sentencing. Guidelines that require consistency in sentencing will necessarily interfere with your discretion. The next question is, how much will it interfere? Will it really affect my personal philosophy of sentencing and what I want to accomplish as a trial judge? The answer is not much. First of all, as Mr. Falvey pointed out, it only affects substantially twenty percent of the people we see. The more substantial question is whether or not these people will or will not go to prison. At least eighty percent of them will not go to prison. The guidelines do not set forth the conditions of probation.

Mr. Falvey calls that disparity. I call that discretion. We can still look at the person and prescribe up to a year in the county jail. I don't do that very often and neither do many other judges. We can prescribe long-term treatment. We can prescribe living situations. There are a lot of things that we can do to control offenders while they are on probation. The guidelines do not affect that



control. The guidelines suggest that we look to retribution, rehabilitation, public protection, deterrence, public condemnation of the criminal conduct, and restitution. These are the goals of the criminal justice system that are in the back of my mind whenever I decide sentences. It has always been my view that for most things a good sharp crack of jail time is probably the most effective way to accomplish all of these goals except restitution. I will often prescribe jail time, and the guidelines do not interfere with that decision.

When the guidelines were first adopted, the judges, I think, looked at them and hypothesized all sorts of horror stories. We said, What if . . . ? We feared situations where the sentences required by the guidelines would not fit the crime. The guidelines, however, specify that in certain circumstances it is appropriate to deviate from the guidelines. The guidelines set forth factors for mitigation as well as factors for aggravation.<sup>7</sup> They also set forth

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7. The guidelines provide a nonexclusive list of factors to use when departing from the presumptive sentence. Mitigating factors which may be used as reasons for departure include the following:

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

Minn. Guidelines, *supra* note 1, § II.D.2a. Aggravating factors include the following:

- (1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.
- (2) The victim was treated with particular cruelty for which the individual offender should be held responsible.
- (3) The current conviction is for an offense in which the victim was injured and there is a prior felony conviction for an offense in which the victim was 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 are aggravating factors 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

the factors we should not use: race, sex, employment factors, and social factors.<sup>8</sup> Some of the mitigating factors are that the victim was the aggressor, the offender played a passive or a minor role in the crime or committed the crime under coercion or duress.

Another mitigating factor is physical or mental capacity. We

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- 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 are aggravating factors with respect to the offense:
    - (a) the offense involved at least three separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so; or
    - (b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
    - (c) the offense involved the manufacture of controlled substances for use by other parties; or
    - (d) the offender knowingly possessed a firearm during the commission of the offense; or
    - (e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy; or
    - (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; or
    - (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).

*Id.* § II.D.2b.

8. Employment factors that should not be used as reasons for departing from the guidelines include:

- (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.

*Id.* § II.D.1c. Social factors include the following:

- (1) educational attainment;
- (2) living arrangements at time of offense or sentencing;
- (3) length of residence;
- (4) marital status.

*Id.* § II.D.1d.

see that most often with the sex offender, for example, the offender who has sexual contact with his twelve-year-old cousin. The offender may be slightly retarded. Diminished mental capacity is not enough to amount to a defense, but it is a sufficient reason to prescribe a mitigated sentence. We can provide some positive treatment so that the offender is taught social skills, among other things. Alternatively, we can provide some jail to indicate such conduct is not appropriate in our society.

The guidelines also include a catch-all provision that permits a mitigated sentence when other substantial grounds exist which tend to excuse or mitigate the offender's culpability. You can put most everything you want in there.

One of the aggravating factors is that the victim was particularly vulnerable. I had a woman just several weeks ago who killed her seventeen-month-old baby. The defendant had some mental problems that did not amount to an insanity defense. She pled guilty to a second degree murder charge. I gave her one and a half times the presumptive sentence, fifteen years, which seemed like an appropriate sentence considering the vulnerability of that seventeen-month-old child.

Another ground to deviate is when the victim was treated with particular cruelty. We see such treatment in a lot of rape cases or in other major offenses. A third ground to deviate is when the crime is a major economic offense. In those cases you have to find that the amount of the theft was in a substantially greater amount than the statutory minimum. You must also find many victims or a high degree of sophistication.

We can also deviate in a major controlled substance offense. Selling a couple of joints of marijuana is a lot different than selling three bales of marijuana. I see the judge from Miami is smiling. I am sure you are thinking about truckloads and airplane loads. In Minnesota we don't think in those terms.

When looking at the guidelines grid, it appears that someone can commit six car thefts and not go to prison. At first people threw up their hands and were shocked by that scenario. That really is not true. If someone has committed the six car thefts, no doubt the thefts occurred in a short period of time. The thief is still on probation for that first one and maybe the second one and maybe the third one.

Judges have a provision in their probationary sentence that requires the offender to remain law-abiding and on good behavior. When an offender commits the fourth, fifth, and sixth offense, he

is not law-abiding. He comes back into my court, and I send him to prison, if I choose, on a probation revocation.

There are some problems with the guidelines. Some of the definitions are too imprecise to fit a crime. I had a young man convicted of an armed robbery in which there was no weapon except the car. The crime fit the definition of armed robbery because there was an injury. The defendant was sitting in a parking lot at a shopping center. A woman came out, he drove by and grabbed her purse. She hung on, and her knees were scraped. It was really a purse snatching from a car. He was charged and convicted of armed robbery. I deviated on his sentence. The case was appealed and upheld by the Minnesota Supreme Court. I gave him a year in the county jail because what he did was not nice, but I don't think the definition of armed robbery quite fit his actions.

I believe some of the crimes should be reclassified. For example, residential burglaries are not property crimes, but they are classified that way. A residential burglary is a person crime, and I think it should be treated with a more severe sentence. Another example is the classification, or severity level, for the sale of drugs. Sentences are light for the sale of marijuana and the sale of cocaine in view of the damage they do to the victims.

Another flaw under our guidelines is that a greater sentence cannot be plea bargained. In one case a defendant agreed to plead to second degree criminal sexual conduct with a sentence in excess of the guideline. I accepted the plea because the victims did not want to testify. I gave him an aggravated sentence but I didn't set out any aggravating factors. I said it was a plea-bargained sentence. It was reversed by the state court of appeals. It seems to me that if offenders can give up their constitutional right to a trial and can give up their constitutional right to remain silent, they should be able to give up a statutory right to be sentenced under the guidelines. The court of appeals, however, did not agree with this analysis, which struck me as silly.

The short length of the supervised release time under our guidelines is another problem. If I sentence an offender to fifteen years, she will usually serve ten, and then she is on supervised release for five years. Or when I sentence thirty-six months, the offender serves twenty-four months, and then she has just one year of supervised release. For some crimes that length of time is too short.

It occurs to me that I have told you what the guidelines have failed to do and where they do not bother us. I should also tell you what the guidelines have successfully accomplished. The guide-

lines give the inmate a predictable sentence. They do in fact reduce the disparity. They do result in the least restrictive sentence. The guidelines achieve this principally by defining what the appropriate factors are for us to take into account, and they remind us that economic background, sex, and race are not appropriate factors. If you are going to deviate you must think through those factors; you have to identify for yourself, the inmate, and the Sentencing Guidelines Commission why you will depart.

I had a case recently that really brought that home. The defendant was charged with a major economic offense. He previously committed eleven similar crimes. He always involved women in his crimes. They were not victims in the sense that they were victims in a crime. But they lived with him, they loaned him money, they loaned him their cars, they slept with him, and they let him use their checkbooks. For that reason I wanted to deviate a lot. The guidelines forced me to look carefully at the circumstance of the crime, and I realized I could not punish him because of his treatment of women.

This was, however, a major economic offense and many victims, in addition to these nice young women, were involved. The guidelines made me think through it. I deviated and I deviated for appropriate reasons. I went home knowing I did not deviate on the basis of prejudice.

Finally, the guidelines return to the judiciary the right to impose the sentence. In the past I could sit there and really look tough and say, "You do twenty years in the state prison," and then two and a half years later the offender was out on the street. Now when I sentence I have seen the victim, and I have the offense fresh in my mind. If I decide to deviate and if I say fifteen years, the person will serve ten years. Especially in sex crimes, and here another one of my prejudices comes out, the parole board would base the release of sex offenders on their behavior in the prison. Well, these were men who like to assault and victimize women and beat them up and rape them. There were no women in the prison and they behaved just beautifully in there. The parole board would look at the prison behavior of a sex offender and say, "This is just one fine fellow. He has not beaten up anybody or done anything wrong." They released him and often released him too soon. Now that power is returned to the judiciary. We do in fact have control of the sentences.

In closing, I would like to say that you can probably learn to live with guidelines, and you might even learn to like the guidelines.

## Appendix

Minnesota Sentencing Guidelines and Commentary  
V. Offense Severity Reference Table<sup>9</sup>

First Degree Murder is excluded from the guidelines by law, and continues to have a mandatory life sentence.

X	Adulteration - 609.687, subd. 3(1) Murder 2 - 609.19(1)
IX	Murder 2 - 609.19(2) Murder 3 - 609.195
VIII	Assault 1 - 609.221 Criminal Sexual Conduct 1 - 609.342 Kidnapping (w/great bodily harm) - 609.25, subd. 2(2) Manslaughter 1 - 609.20(1) & (2)
VII	Aggravated Robbery - 609.245 Arson 1 - 609.561 Burglary 1 - 609.582, subd.1(b) & (c) Criminal Sexual Conduct 2 - 609.343(c), (d), (e), (f) & (h) Criminal Sexual Conduct 3 - 609.344(c), (d), (g), (h), (i), & (j) Fleeing Peace Officer (resulting in death) - 609.487, subd. 4(a) Kidnapping (not in safe place) - 609.25, subd. 2(2) Manslaughter 1 - 609.20(3) Manslaughter 2 - 609.205(1)
VI	Arson 2 - 609.562 Assault 2 - 609.222 Burglary 1 - 609.582, subd. 1(a) Criminal Sexual Conduct 2 - 609.343(a), (b), & (g) Criminal Sexual Conduct 4 - 609.345(c), (d), (g), (h), (i), & (j) Escape from Custody - 609.485, subd. 4(4) Fleeing Peace Officer (great bodily harm) - 609.487, subd. 4(b) Kidnapping - 609.25, subd. 2(1) Precious Metal Dealers, Receiving Stolen Goods (over \$2,500) - 609.53, subd. 1(a) Precious Metal Dealers, Receiving Stolen Goods (all values) - 609.53, subd. 3(a) Receiving Stolen Goods (over \$2,500) - 609.525; 609.53 Sale of Hallucinogens or PCP - 152.15, subd. 1(2) Sale of Heroin - 152.15, subd. 1(1) Sale of Remaining I & II Narcotics - 152.15, subd. 1(1)

9. Minn. Guidelines, *supra* note 1, § V.

V

Burglary 2 - 609.582, subd. 2(a) & (b)  
 Criminal Vehicular Operation - 609.21, subd. 1  
 Criminal Sexual Conduct 3 - 609.344(b), (e), & (f)  
 Manslaughter 2 - 609.205(2), (3), & (4)  
 Perjury - 609.48, subd. 4(1)  
 Possession of Incendiary Device - 299F.79; 299F.80, subd.1,  
 299F.811; 299F.815; 299F.82, subd.1  
 Receiving Profit Derived from Prostitution - 609.323, subd. 1  
 Receiving Stolen Goods (\$1000 - \$2500) - 609.525; 609.53  
 Simple Robbery - 609.24  
 Solicitation of Prostitution - 609.322, subd. 1  
 Tampering w/Witness - 609.498, subd. 1

IV

Accidents - 169.09, subd.14(a)(1)  
 Adulteration - 609.687, subd. 3(2)  
 Assault 3 - 609.223  
 Bribery - 609.42; 90.41; 609.86  
 Bring Contraband into State Prison - 243.55  
 Bring Dangerous Weapon into County Jail - 641.165, subd. 2(b)  
 Burglary 2 - 609.582, subd.2(c) & (d)  
 Burglary 3 - 609.582, subd. 3  
 Criminal Sexual Conduct 4 - 609.345(b), (e), & (f)  
 False Imprisonment - 609.255, subd. 3  
 Fleeing Peace Officer (substantial bodily harm) - 609.487,  
 subd. 4(c)  
 Malicious Punishment of Child - 609.377  
 Negligent Fires - 609.576(a)  
 Perjury - 290.53, subd. 4; 300.61; & 609.48, subd. 4(2)  
 Precious Metal Dealers, Receiving Stolen Goods (\$150-\$2,500) -  
 609.53, subd. 1(a)  
 Precious Metal Dealers, Receiving Stolen Goods (over \$2,500) -  
 609.53, subd. 2(a)  
 Receiving Stolen Goods (\$301-\$999) - 609.525; 609.53  
 Sale of Cocaine - 152.15, subd. 1(1)  
 Security Violations (over \$2500) - 80A.22, subd. 1; 80B.10, subd. 1;  
 80C.16, subd. 3(a) & (b)  
 Tax Evasion - 290.53, subsd. 4 & 8  
 Tax Withheld at Source; Fraud (over \$2,500) - 290.92  
 subd. 25(5) & (12); 290A.11, subd. 2  
 Terroristic Threats - 609.713, subd. 1  
 Theft Crimes - Over \$2,500 (*See Theft Offense List*)  
 Theft from Person - 609.52  
 Theft of Controlled Substances - 609.52, subd. 3(1)  
 Use of Drugs to Injure or Facilitate Crime - 609.235

III

Accidents - 169.09, subd. 14(a)(2)  
 Aggravated Forgery (over \$2,500) - 609.625  
 Arson 3 - 609.563  
 Coercion - 609.27, subd. 1(1)  
 Coercion (over \$2,500) - 609.27, subd. 1(2), (3), (4), & (5)  
 Criminal Vehicular Operation - 609.21, subd. 2  
 Damage to Property - 609.595, subd. 1(1)  
 Dangerous Trespass - 609.60; 609.85(1)  
 Dangerous Weapons - 609.67, subd. 2; 624.713, subd. 1(b)  
 Escape from Custody - 609.485, subd. 4(1)  
 False Imprisonment - 609.255, subd. 2  
 Negligent Discharge of Explosive - 299F.83  
 Possession of Burglary Tools - 609.59  
 Possession of Hallucinationogens or PCP - 152.15, subd. 2(2)  
 Possession of Heroin - 152.15, subd. 2(1)  
 Possession of Remaining Schedule I & II Narcotics - 152.15,  
 subd. 2(1)  
 Possession of Shoplifting Gear - 609.521  
 Precious Metal Dealers, Receiving Stolen Goods (less than \$150)  
 - 609.53, subd. 1(a)  
 Precious Metal Dealers, Receiving Stolen Goods (\$150-\$2,500) -  
 609.53, subd. 2(a)  
 Prostitution (Patron) - 609.324, subd. 1  
 Receiving Profit Derived from Prostitution - 609.323, subd. 2  
 Sale of Remaining Schedule I, II, & III Non-narcotics - 152.15,  
 subd. 1(2)

III

Security Violations (under \$2500) - 80A.22, subd. 1; 80B.10, subd.  
 1; 80C.16, subd. 3(a) & (b)  
 Solicitation of Prostitution - 609.322, subd. 2  
 Tax Withheld at Source; Fraud (\$301-\$2,500) - 290.92, subd. 25(5)  
 & (12); 290A.11, subd. 2  
 Tear Gas & Tear Gas Compounds - 624.731, subd. 3(b)  
 Theft Crimes - \$250-\$2,500 (*See Theft Offense List*)  
 Theft of Controlled Substances - 609.52, subd. 3(2)  
 Theft of a Firearm - 609.52, subd. 3(3) (e)  
 Theft of Public Records - 609.52  
 Theft Related Crimes - Over \$2,500 (*See Theft Related Offense  
 List*)



II

Accidents - 169.09, subd. 14(b)(1)  
 Aggravated Forgery (\$250-\$2,500) - 609.625  
 Aggravated Forgery (misc) (non-check) - 609.625; 609.635; 609.64  
 Coercion (\$300-\$2,500) - 609.27, subd. 1(2), (3), (4), & (5)  
 Damage to Property - 609.595, subd.1(2) & (3)  
 Negligent Fires (damage greater than \$10,000) - 609.576(b)(3)  
 Precious Metal Dealers, Receiving Stolen Goods (less than \$150)  
 - 609.53, subd. 2(a)  
 Precious Metal Dealers, Regulatory Provisions - 325F.73  
 Riot - 609.71  
 Sale of Marijuana/Hashish/Tetrahydrocannabinols - 152.15,  
 subd. 1(2)  
 Sale of a Schedule IV Substance - 152.15, subd. 1(3)  
 Terroristic Threats - 609.713, subd. 2  
 Theft-Looting - 609.52  
 Theft Related Crimes - \$250-\$2,500 (*See Theft Related Offense  
 List*)

I

Accidents - 169.09, subd. 14(b)(2)(3)  
 Assault 4 - 609.2231  
 Aggravated Forgery (Less than \$250) - 609.625  
 Aiding Offender to Avoid Arrest - 609.495  
 Depriving Another of Custodial or Parental Rights - 609.26  
 Forgery - 609.63; and Forgery Related Crimes (*See Forgery  
 Related Offense List*)  
 Fraudulent Procurement of a Controlled Substance - 152.15,  
 subd. 3  
 Leaving State to Evade Establishment of Paternity - 609.31  
 Nonsupport of Wife or Child - 609.375, subs. 2, 3, & 4  
 Possession of Cocaine - 152.15, subd. 2(1)  
 Possession of Marijuana/Hashish/Tetrahydrocannabinols - 152.15,  
 subd. 2(2)  
 Possession of Remaining Schedule I, II & III Non-narcotics -  
 152.15, subd. 2(2)  
 Possession of a Schedule IV Substance - 152.15, subd. 2(3)  
 Sale of Simulated Controlled Substance - 152.097; 152.15, subd. 2b  
 Selling Liquor that Causes Injury - 340.70  
 Solicitation of Prostitution - 609.322, subd. 3  
 Unauthorized Use of Motor Vehicle - 609.55

