

## Appendix 8B

### Memorandum on Consecutive Sentencing in Domestic Abuse Cases<sup>1</sup>

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[Section 16 of Appendix from the *Second Judicial District Domestic Abuse Guidelines and Procedures*, Updated July 2009]

**Identified Problem:** Domestic abusers often reoffend between the time of the plea and the time of sentencing and during the period of probation. If the sentence for any subsequent offense is not specifically stated to be consecutive, the law presumes it to be concurrent (Minn. Stat. § 609.15, subd. 1(a)). If a person is arrested and ultimately convicted of a new offense between plea and sentence on another charge or during probation (or supervised release), Minnesota law requires the same jail credit to be applied both to the old and new offenses unless the subsequent sentence is expressly stated to be consecutive to the first. The result can be, particularly for multiple misdemeanor and gross misdemeanor offenses, that a repeat offender may get two, three, four or more sentences for the price of one unless sentences are consecutive. In domestic abuse cases, this sends the counter-productive message to the abuser that there is no additional consequence for repeat offenses against a domestic partner. Consecutive sentencing, on the other hand, sends a clear message of accountability.

#### LEGAL ANALYSIS

##### A. The principle of accountability.

In order to make both conditions of release and conditions of probation effective in domestic abuse cases, it should be made clear to a defendant at the time conditions of pretrial release or probation are ordered and whenever a defendant is returned to court for violation, that court orders must be obeyed and that, if they are not, a defendant will be held accountable. This is particularly imperative if the order violated relates to victim safety.

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

## B. Statutory and case law basis for consecutive sentencing.

A consecutive sentence is one which commences at the termination of another term of imprisonment; i.e., the prisoner with consecutive sentences can serve only one sentence at a time. *State v. Morrissey*, 135 N.W.Second 57 (Minn. 1965).

Minnesota statutes clearly contemplate that misdemeanor and gross misdemeanor sentences may be consecutive. Minn. Stat. § 609.15, subd. 2 provides the outer limit for such sentences: 1 year of jail if all are misdemeanors; 4 years if all are gross misdemeanors; if sentences are for a gross misdemeanor and one or more misdemeanors, the total of the sentences shall not exceed two years. This statute applies only to multiple sentences of incarceration and not to the period of probation (the period for which all or a portion of the permissible jail time is stayed). *State v. Aleshire*, 451 N.W.Second 66 (Minn. Ct. App. 1990).

The period of probation for multiple offenses can also be ordered to be run consecutively. As with consecutive jail time, the court must expressly state its intention to order consecutive service or the periods of probation are presumptively concurrent. See, *Aleshire, supra* (4-year probationary period on two consecutive gross misdemeanor sentences upheld.) A defendant, however, has the right to demand execution of consecutive probationary sentences, especially when conditions of probation are more onerous than an executed sentence. *State v. Rasinski*, 472 N.W.Second 645 (Minn. 1991). A probationary sentence may also be ordered consecutive to time being served on an earlier offense; i.e., probation for a second offense may be ordered to commence after release from confinement for an earlier offense. *State v. Hague*, 229 N.W.Second 168 (Minn. 1975). Minn. Stat. § 609.135, subd. 2, sets forth the maximum probationary period for felonies, gross misdemeanors and misdemeanors.

Consecutive sentencing has great value in impressing upon a defendant the consequences of repeated unlawful acts. Concurrent sentences for multiple offenses--especially those in flagrant violation of court order, such as an OFP or other no contact order or the general order to remain law-abiding--undermine the authority of the court. Many serious domestic abuse offenses (assault, violation of an OFP or a domestic abuse no contact order) are only misdemeanors with a 90-day maximum sentence. When a defendant commits multiple such misdemeanor

violations, it should never be with the expectation that all will be subsumed under the same 90-day maximum.

The provisions of Minn. Stat. § 609.15 make no limitation on the application of consecutive sentencing by type of misdemeanor or gross misdemeanor crime. Case law affirms the imposition of consecutive gross misdemeanor sentences even in property crimes. *Aleshire, supra*.

At the felony level, the Minnesota Sentencing Guidelines control the application of consecutive sentences. Felony crimes against persons are singled out for special consideration in consecutive sentencing. Felony consecutive sentences are permissive and not a departure from the guidelines when the defendant is being sentenced for a crime against a person and has an unexpired sentence for a crime against a person. Consecutive sentencing is also permissive without any departure from the guidelines when a defendant is being sentenced for multiple crimes against the person. Minn. Sent. Guidelines II.F. 1 and 2. This principle now applies even when the multiple crimes are against the same victim and even when they involve a single course of conduct. Minn. Sent. Guidelines II.F.04 (2000)(this is a change from earlier guidelines under which multiple crimes against the same person could be sentenced consecutively only with a departure from the guidelines).

Misdemeanor and gross misdemeanor domestic abuse crimes are inherently crimes against the person. By analogy to felony sentencing principles, the case for the application of the consecutive sentencing provisions of Minn. Stat. § 609.15 to domestic abuse misdemeanors and gross misdemeanors is even more compelling than for other crimes. In addition, violations of express orders of the court aimed at protecting a victim (such as an OFP or no contact order) are offenses against the court as well as the victim. Repeat violations of this nature, whether they occur before or after sentencing, are compelling reasons for consecutive sentencing.

### **C. Jail credit.**

The seminal case on jail credit, *State v. Goar*, 453 N.W.Second 28 (Minn. 1990), is routinely cited for the proposition that jail credit applies to all offenses for which a defendant is in custody or could have been in custody at the same time. It stands for the general proposition that the proper amount of credit a defendant receives against a prison or probationary jail term should not be dependent on

matters subject to manipulation by the prosecution or a defendant's exercise of his right to trial. Therefore, in all concurrent sentences, a defendant being sentenced for multiple offenses is entitled to credit for any time served in custody since commission of each of the offenses even if there was a delay in charging or final disposition of the particular offense being sentenced. *Id.*; *State v. Morales*, 532 N.W.Second 268 (Minn. Ct. App. 1995).

*Goar* charges the trial court with ensuring that the withholding of jail credit does not result in *de facto* consecutive sentencing when there is no express intention to sentence consecutively.

However, *Goar* has no application to expressly ordered consecutive sentences. In applying jail credit to consecutive sentences, credit should be applied only to the first sentence since to do otherwise in these circumstances would result in unjust "double credit" and would defeat the purposes of consecutive sentencing. *State v. Allen*, 482 N.W.Second 228 (Minn. Ct. App. 1992), rev. denied (Minn. Apr. 13, 1992); *State v. Elting*, 480 N.W.Second 152 (Minn. Ct. App. 1992), rev. denied (Minn. Mar. 26, 1992); *State v. Anderson*, 520 N.W.Second 184 (Minn. Ct. App. 1994); *State v. Cameron*, 603 N.W.Second 847 (Minn. Ct. App. 1999).<sup>2</sup>

When the trial court specifically orders consecutive sentences in a domestic abuse case because of repeat crimes against person or repeat violations of court order, there is therefore no violation of *Goar*.

#### **D. Consecutive sentencing in light of *Blakely*.**

In *Blakely v. Washington*, 542 U.S. 296 (2004), the United States Supreme Court held that before a criminal defendant may be sentenced to any sentence beyond the presumptive sentence, he is entitled to a jury trial on any departure factors. This decision has no application to misdemeanors and gross misdemeanors but does impact aggravated upward durational and dispositional departures for felonies under the Minnesota Sentencing Guidelines. Numerous questions concerning the application of *Blakely* in Minnesota continue to be addressed by our

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<sup>2</sup> The post-*Goar* court of appeals decision in *State v. Fritzke*, 521 N.W.Second 859 (Minn. Ct. App. 1994) is sometimes erroneously cited for the proposition that a defendant is entitled to jail credit even on consecutive sentences for all time spent in custody, including time spent in custody on other charges, beginning on the date the prosecution acquires probable cause to charge the defendant with a crime. Such an assertion misapprehends *Fritzke*. *Fritzke* involves a prior and a current charge for theft with concurrent sentencing. It has no application to consecutive sentences. The *Fritzke* court, moreover, cites and relies upon *Goar*.

appellate courts on a case-by-case basis. However, the question of whether *Blakely* applies to consecutive sentences has been resolved: It does not. *State v. Senske*, 692 N.W.Second 743 (Minn. Ct. App. 2005), pet. for review denied.

As of 8/1/06 (and in response to *Blakely*), the Minnesota Sentencing Guidelines now contains a list of offenses eligible for permissive consecutive sentences; i.e., what were previously simply referred to as crimes against persons. This list includes not only the assaults and terroristic threats offenses commonly seen in domestic abuse case but also offenses with no assault or threat, such as burglary 1 and 2 and violations of an OFP. Minn. Sent. Guidelines VI. The Minnesota Sentencing Guidelines, of course, are only applicable to felonies, but these principles support arguments by analogy for consecutive misdemeanor or gross misdemeanor sentences for violation of and OFP or DANCO.