

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
November 17, 2016

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on November 17, 2016, in Room 1100 of the Minnesota Senate Building, 95 University Ave. W., St. Paul, MN 55155. Present were Commission Chair Justice (Ret.) Christopher Dietzen, Commission Vice-Chair Judge Heidi Schellhas, and Commission members Angela Champagne-From, Valerie Estrada, Sergeant Paul Ford, Judge Caroline Lennon, Cathryn Middlebrook, Peter Orput, Commissioner of Corrections Tom Roy, Yamy Vang, and Senior Judge Mark Wernick.

Also present were MSGC Executive Director Nate Reitz and MSGC staff members Kathleen Madland, Linda McBrayer, Brian E. Oliver, Jill Payne and Anne Wall. Assistant Attorney General Jim Early was also present.

Members of the public present included Lars Negstad, Anita Alexander, Sarah Mullins, Bruce Nordstrom-Loeb ISAIAH MN; Tom Marver, Jewish Community Action (JCA); Mariana and Monty Schunk; Nancy From; Jane Legwold; Josh Esmay, Legal Rights Center; Lisa Netzer, Minn. Department of Corrections; Amy Levad, University of St. Thomas; Ryan Erdmann, Minnesota Association of Community Corrections Act Counties (MACCAC); John Schott, Carleton College; Brock Hunter, Minnesota Association of Criminal Defense Lawyers; Robert Small, Executive Director of the Minn. County Attorneys Association; William Ward, State Public Defender for Minnesota.

1. 2015 Sentencing Data Overview

At 1:30 p.m., before the meeting was called to order, Senior Research Analysis Specialist Anne Wall presented an overview of the 2015 sentencing data for inclusion in the 2017 Report to the Legislature. Ms. Wall reported that a total of 16,763 people were sentenced in Minnesota in 2015, which was an increase of 3.8 percent over 2014. Commission members asked that MSGC staff include the total number (16,763) on the figure that will be in the 2015 Sentencing Practices Data Report and the 2017 Report to the Legislature.

Ms. Wall reported on the distribution by offense type: person at 29.7 percent; drug at 29.3 percent; property at 27.3 percent; "other" at 4.5 percent; weapon at 2.8 percent; and non-criminal sexual conduct sex offense at 2.8 percent. Ms. Wall reported on the distribution by race and ethnicity, and by judicial district. Ms. Wall reported on total incarceration rates in 2015 by race and ethnicity, and judicial district: A total 91.8% received a sentence that included incarceration in a state prison (26.2%) or a local correctional facility (65.6%). Ms. Wall reported on departures: 28 percent of people sentenced in 2015 received a departure.

Ms. Wall reported on dispositional departures and durational departures and how the rates varied by gender, race and ethnicity, judicial district, and offense type.

Chair Dietzen thanked Ms. Wall for her presentation.

2. Call to Order

Chair Dietzen called the meeting to order at 2:00 p.m.

3. Approval of Agenda

This was on the agenda as an action item.

Motion by Vice-Chair Schellhas and second by Ms. Vang to approve the meeting agenda.

A discussion ensued.

Motion carried unanimously.

4. Approval of Draft Meeting Minutes

This was on the agenda as an action item.

Motion by Vice-Chair Schellhas and second by Judge Lennon to approve the meeting minutes from October 26, 2016.

Motion carried unanimously.

5. Weighting Prior Drug Offenses

This was on the agenda as a discussion and possible action item.

Chair Dietzen said that there were three individuals who wished to address the Commission on the item.

William Ward, State Public Defender for Minnesota, spoke in opposition to the proposal to reconsider the weighting of prior drug offenses. Mr. Ward said that, as he understood it, the proposal was before the Commission because some practitioners found it difficult to assign criminal history weights to prior drug offenses, and that was not a good enough reason to reconsider a policy. Mr. Ward stated that criminal history scores are key drivers of racial disparity and that this proposal would promote institutional racism.

Brock Hunter, Minnesota Association of Criminal Defense Lawyers, stated that he shared Mr. Ward's views. Mr. Hunter said that the proposal was a "roll-back." If there were to be a change, Mr. Hunter favored a proposal that would require the state to prove beyond a reasonable doubt that the facts underlying the prior conviction would constitute a greater controlled substance crime.

Retired Judge Robert Small, Executive Director of the Minn. County Attorney Association, said that, as he stated at the October 26, 2016, meeting, both policy reasons and practical reasons favored the proposal. Judge Small said that the current procedure was not uniform and fair. Judge Small said he favored Proposal B, because it was standard, uniform, and easy to understand.

Chair Dietzen opened the Commission's discussion, framing the issue in accordance with his memorandum to the Commission dated November 9, 2016.

Motion by Vice-Chair Schellhas and second by Ms. Vang to modify Guidelines MSG Comment 2.B.106, as outlined on page 6 of Chair Dietzen's memorandum, as follows.

2.B.106. If an offense has been redefined by the Legislature, base the appropriate severity level on how the prior felony offense would currently be ranked in consideration of any new or removed elements. 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.]

A discussion ensued. The last sentence of MSG Comment 2.B.106, shown in brackets above, was discussed. Although the sentence had been marked for deletion, the maker of the motion clarified that it was the intent of the motion to keep the last sentence of MSG Comment 2.B.106 intact. There were no objections to the **amendment**. The discussion continued.

As so amended, the **motion carried** on a 6-5 vote.

Motion by Judge Wernick and second by Ms. Middlebrook to make a proposal, subject to public hearing, to add Guidelines MSG § 2.B.7.c and Comment 2.B.704, as follows.

[2.B.]7. Determining Offense Levels for Prior Offenses. * * *

c. Drug Threshold. When an offender's criminal history contains a Minnesota

felony conviction for controlled substance crime in the first, second, third, or fifth degree with an offense date prior to August 1, 2016, the current felony offense of the same name determines the offense classification in calculating the criminal history score, notwithstanding the redefinition of the offense, unless the court finds, by a preponderance of evidence, that the facts underlying the prior conviction would have constituted a controlled substance crime of a lesser degree, or a gross misdemeanor controlled substance crime, if the offense had been committed on or after August 1, 2016. If the court makes such a finding, then the controlled substance crime of the lesser degree, or the gross misdemeanor controlled substance crime, determines the offense classification in calculating the criminal history score.

* * *

2.B.704. On August 1, 2016, drug-quantity thresholds changed for various degrees of controlled substance crime, and a gross misdemeanor version of Fifth-Degree Controlled Substance Crime was created. Despite these elemental changes and the creation of the Drug Offender Grid, the essential severity of the various degrees of controlled substance crime remained unaltered by the Legislature and the Commission. The Commission decided that prior Minnesota felony drug offenses committed before August 1, 2016, should receive the same weight as offenses of the same degree committed on or after that date. On the other hand, the Commission decided that it was appropriate to permit a reduced weight when it could be proven that the facts underlying the prior offense comported with an offense that the Legislature now considered to be less serious. To illustrate, assume an offender was convicted in 2015 of Fifth-Degree Controlled Substance Crime for possessing a residual amount of methamphetamine weighing less than 0.25 grams, and that the offender had not been previously convicted of a chapter 152 offense (or similar crime from another jurisdiction). Because the prior offense was a felony Fifth-Degree Controlled Substance Crime, it will be eligible to contribute ½ felony point to the offender's criminal history score, unless it is proven by a preponderance of evidence that, under current offense definitions, the prior offense meets the definition of gross misdemeanor Fifth-Degree Controlled Substance Crime. In the latter case, the prior offense will be eligible to contribute one gross misdemeanor unit to the offender's criminal history score.

A discussion ensued.

Motion carried on a 6-5 vote.

Chair Dietzen called on Executive Director Reitz who wished to discuss the December 2016 and January 2017 meeting schedule. Executive Director Reitz suggested canceling the

meetings scheduled for December 15, 2016, and January 12, 2017; moving the December meeting to the week of December 26, 2016; and scheduling a public hearing for December 21, 2016.

Motion by Commissioner Roy and second by Judge Wernick to hold a public hearing on December 21, 2016, and hold a meeting December 27th, 28th, 29th, or 30th, to determine whether to adopt modifications to the Guidelines

Motion carried unanimously.

Accordingly, Chair Dietzen canceled the meeting on December 15, 2016.

Chair Dietzen also canceled, for the time being, the meeting on January 12, 2017; *but see* agenda item 7, in which the January meeting was restored to the Commission's calendar in order to provide the Commission with sufficient time to hear a presentation.

6. Repeat Violent Offenders

This was on the agenda as a discussion and possible action item.

Chair Dietzen called on Vice-Chair Schellhas.

Motion by Vice-Chair Schellhas and second by Ms. Champagne-From to amend the Minnesota Sentencing Guidelines, in accordance with a written proposal submitted by the maker of the motion, to add a new § 2.B.1.j and a new Severe Violent Offender Grid. The amendments would change the weights assigned prior felonies when the current offense is listed on a new Severe Violent Offender Grid; for example, a weight of 3 points would be assigned to prior felony severe violent offense when sentencing a current severe violent offense.

A discussion ensued. The maker of the motion accepted staff suggestions that references to a "Grid" be changed to a "Table"; and that the proposed § 2.B.1.j be changed to section § 2.B.1.c, with the existing §§ 2.B.1.c through 2.B.1.i to be renumbered accordingly. There were no objections to the **amendment**.

Motion by Commissioner Roy and second by Ms. Middlebrook to table the pending motion.

There was a short recess.

Two-thirds of the membership did not concur in the **motion to table**; therefore the motion **failed**.

Discussion continued on the previous motion, as amended, to amend the Minnesota Sentencing Guidelines.

Motion failed on a 5-6 vote.

Chair Dietzen called on Commissioner Roy.

Motion by Commissioner Roy and second by Judge Lennon to research elements and principles of Vice-Chair Schellhas's proposal that could be useful.

The motion was withdrawn.

Commissioner Roy offered to submit a research proposal to the Commission at its December meeting.

7. Life Sentences for Juveniles in Minnesota

This item was on the agenda as a discussion item.

Chair Dietzen said that the Office of the State Public Defender had prepared a 30 minute presentation on this item. He asked the Commission if it wished to hear the presentation today or have it moved to a future agenda.

Motion by Ms. Middlebrook and second by Commissioner Roy to postpone the presentation until the meeting on January 12, 2017.

Motion carried unanimously.

Accordingly, Chair Dietzen restored to the regular meeting calendar the January 12, 2017, meeting, and placed this item on that meeting's agenda. Chair Dietzen apologized to members of the public in attendance for the meeting running later than anticipated.

8. Executive Director's Report

Chair Dietzen called on Executive Director Reitz who reported on three items: 1) As the Commission has its full complement of members, Executive Director Reitz offered for staff to take a photo of the Commission at a future meeting to post on its website; 2) Executive Director Reitz introduced to the Commission its new staff member, Research Analyst Brian E. Oliver; 3) the National Association of Sentencing Commissions (NASC) has put out a call for presentations to the 2017 NASC Conference, which will be hosted by the New Mexico Sentencing Commission in summer, 2017.

9. Public Input

Chair Dietzen called on members of the public present and asked if anyone wished to speak. No one came forward.

Chair Dietzen thanked members of the public for their attendance.

10. Adjournment

Chair Dietzen called for a motion to adjourn.

Motion to adjourn by Ms. Middlebrook.

Motion carried unanimously.

The meeting was adjourned at 4:53 p.m.