

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
November 21, 2013

The Minnesota Sentencing Guidelines Commission (MSGC) meeting was held on November 21, 2013 in Minnesota Judicial Center, Room G-06; Rev. Dr. Martin Luther King Jr. Blvd; St. Paul, Minnesota. Commission members present were Chair Jeffrey Edblad, Jason Anderson, Hon. Christopher Dietzen, Sgt. Paul Ford, Connie Larson, Hon. Carrie Lennon, DOC Commissioner Tom Roy, Hon. Heidi Schellhas, John Stuart, and Yamy Vang. MSGC staff members present were Executive Director Kelly Mitchell, Jackie Braun, Jill Payne, and Anne Wall. Also present were Jim Early from the Attorney General's Office, Pat Kittridge from the Second Judicial District Public Defenders Office, Scott Cutcher from the Fifth Judicial District Public Defenders Office, Dan Lew from the Sixth District Public Defenders Office, Bill Lemons and John Kingrey from the Minnesota County Attorney's Association, Karen Robinson and Kathleen Lundgren from Department of Corrections, Ellen Kennedy and Emerson Beishline from William Mitchell, and Laura Taken-Holtze from the Minnesota House of Representatives Public Safety Committee.

1. Call to Order.

The meeting was called to order at 2:00 p.m.

2. Approval of Round Table Minutes from October 15, 2013 and Meeting Minutes from October 17, 2013.

Motion to approve minutes was made by John Stuart and seconded by Yamy Vang.

Motion carried.

2. 2012 Data Summary

Staff presented an overview of the information that is included in the 2012 Data Summary. Some of the highlights from the presentation were:

- The number of felonies sentenced increased by 4%. Of note was an increase in property offenses.
- In 2012, the total incarceration rate was 91% with 26.3% of offenders being sentenced to prison and 64.7% to conditional confinement. The incarceration rate ranged from a low of 89.8% for white offenders to a high of 93.2% for black offenders. Imprisonment rates varied across judicial districts, ranging from a high of 31.5% in the Second Judicial District to a low of 20.2% in the Sixth Judicial District.

- In 2012, 72% of sentences pronounced were the presumptive Guidelines sentence, 23% were mitigated departures, 4% were aggravated departures, and 1% included both a mitigated and aggravated departure. Mitigated durational departures were particularly high in the Fourth Judicial District at 51.9% compared to the statewide average of 24.9%. There were seven offenses for which 45% or less of offenders received the presumptive sentence when the presumptive sentence is commitment: second-degree assault, first-degree aggravated robbery, first-degree burglary at Severity Level 8, first-, second-, and fifth-degree controlled substance offenses, and failure to register to register as a predatory offender.

3. Draft Legislative Report

Commission staff has prepared a draft Legislative Report for commission members to review. Commission staff asked that members review the report in the next month and submit any amendments prior to the next meeting when the Commission will need to approve the Legislative Report.

A member expressed concern for including language that “the Commission found” certain aspects of the report where the Commission did not vote on a finding. The member would like to discuss this topic at the next meeting.

4. Ongoing Discussion of Controlled Substance Offender Study

The Commission has previously discussed offenses with high departure rates and has focused on first- and second-degree controlled substance offenses. Commission staff presented two studies on first- and second-degree controlled substance offenses in the past. The Commission held a round table in October to gather input from stakeholders on the departure rates and presumptive sentences for these offenses.

Commissioners Anderson, Stuart, Walker, and Larson brought forward proposals for consideration regarding high-level controlled substance offenses. Commission members bringing forward the proposals noted that the presumptive sentences for first- and second-degree controlled substance offenses are imposed less than half the time. These proposals were prepared based on some of the feedback from the round table and the research prepared by Commission staff. The proposals range in action from recommendations to the Legislature to changing the Guidelines.

Proposal 1: Recommend to the Legislature that the controlled substance threshold amounts that define first- and second-degree offenses should be adjusted so that they better differentiate between the seriousness of the offenses.

Motion to approve Proposal 1 was made by John Stuart and seconded by Jason Anderson.

A member noted that the question is not whether illegal drug use is a serious problem that should be addressed by the justice system but whether Minnesota is deploying the most effective strategies to deal with the problem. The member noted for context as to why the proposals have been presented that our current drug sentences were put in place in 1989 before there were drug courts and discussion of evidence-based practices. The proposals seek to capitalize on what has been learned since 1989 that might make Minnesota more effective in serving public safety by reducing the problems associated with illegal drug use.

With regard to this first proposal, a member noted that the range of conduct that is in these degrees is so enormous given the changes at the federal level as to what types of cases the U.S. Attorney will prosecute. We are in a position where first-degree could reflect a low or moderate street dealer up to someone who is selling by the truckload. It would be within our discretion to recommend that they take a look at these thresholds.

A member stated that the first- and second-degree controlled substance offenders are dealers rather than users: people who will carry just enough for a sale, get more then sell again. This proposal just does not address those issues. The member indicated that the discussions in the past the issue had been departure rates but today the concerns seem different. The member asked, do we have an issue with departures or do we have an issue with the drug laws? If the issue is departures, these proposals do not seem to be the best way to address it. Another member questioned how the proposals address uniformity and certainty.

Another member stated that the research done by staff does not indicate that the departure rates are too high but that departure rates are based on a variety of reasons. The member stated that the departure rates indicate that the system is working and are based on settlement agreements. Rather than proposing legislative action without getting into specific amounts, which makes the proposal incomplete, the Commission should wait for the Legislature to approach the Commission.

Members were concerned whether it is within the Commission's purview to recommend changes to the legislature. Kelly Mitchell directed Commission members to the enabling statute Minn. Stat. § 244.09 which states, "The commission shall from time to time make recommendations to the legislature regarding changes in the Criminal Code, criminal procedures, and other aspects of sentencing." Members also discussed how the proposal would balance the

primary goal of public safety with the goals of uniformity and certainty in sentencing.

Members discussed how controlled substance offenses are unique, both in respect to the high departure rates and also based on the availability of drug courts. A member mentioned that drug court is not equally available statewide.

A member reminded Commission members of the study finding that those sentenced to probation are performing better than those sentenced to prison, and stated it would not make sense to spend more by sentencing an offender to prison when they perform worse. The member stated that the use of prison for low criminal history drug offenders is not a good public policy.

A member stated that the lack of a kingpin statute or aggravating factors to permit harsher sentencing is problematic and does not best serve public safety. Another member also noted that those who receive probation may still serve up to one year in jail as local time. A member noted that Proposal 1 does not recommend making sentences less severe. The proposal states that the current thresholds treat those who sold 10 grams the same as it treats wholesale dealers, and that the thresholds should better differentiate between different kinds of offenses.

Members voted by voice:

Jason Anderson: Yes

Hon. Carrie Lennon: No

Hon. Christopher Dietzen: No

Commissioner Tom Roy: Yes

Jeff Edblad: No

Hon. Heidi Schellhas: No

Sgt. Paul Ford: No

John Stuart: Yes

Connie Larson: Yes

Yamy Vang: No

Motion failed.

Proposal 2: Recommend to the Legislature that the mandatory minimum sentence for subsequent controlled substance convictions be repealed. Alternatively, recommend that the definition of “subsequent controlled substance conviction” under Minn. Stat. § 152.01, subd. 16a be amended to exclude prior dispositions under Minn. Stat. § 152.18.

Motion to adopt Proposal 2 was made by Jason Anderson and seconded by Connie Larson.

A member stated that the fact that the court is allowed by statute to sentence without regard to the mandatory minimums for weapon offenses but not drug offenses is remarkable. Another member noted that the case law that precludes the court from departing from the mandatory minimum for subsequent controlled substance offenses comes from Dakota County. The member questioned whether we are trying to establish policy for an issue that exists in just one county. The issue arises only when the county attorney appeals the sentence, but the member talked with colleagues, and outside of Dakota County it does not seem to be an issue. A member noted that offenders are receiving prison sentences due to mandatory minimums in some counties but not in others. Another member argued that judges should have the ability to make individualized determinations.

A member stated that Proposal 2 would increase departures and create greater disparity because it would give more discretion to the court. Another member stated that if the issue is broader – that we are sending people to prison who do not need to go to prison – then this proposal would lead to better outcomes. Low risk people are going to prison currently because of the mandatory minimums, and research has shown that prison increases recidivism in low risk individuals.

Jason Anderson: Yes

Hon. Carrie Lennon: No

Hon. Christopher Dietzen: No

Commissioner Tom Roy: Yes

Jeff Edblad: No

Hon. Heidi Schellhas: No

Sgt. Paul Ford: No

John Stuart: Yes

Connie Larson: Yes

Yamy Vang: No

Motion failed.

Motion to adopt clause two of Proposal 2, which is to recommend to the Legislatures that the definition of “subsequent controlled substance conviction” under Minn. Stat. § 152.01, subd. 16a be amended to exclude prior dispositions under Minn. Stat. § 152.18, was made by John Stuart and seconded Jason Anderson.

A member stated that a new offense is a relapse and there should not be a mandatory prison response for relapses. Another member agreed that those receiving Minn. Stat. §152.18 dispositions are very minor offenders but the new conviction of a first- or second-degree controlled substance offense would be a jump in conduct so the mandatory minimum is appropriate.

Jason Anderson: Yes

Hon. Carrie Lennon: No

Hon. Christopher Dietzen: No

Commissioner Tom Roy: Yes

Jeff Edblad: No

Hon. Heidi Schellhas: No

Sgt. Paul Ford: No

John Stuart: Yes

Connie Larson: Yes

Yamy Vang: Yes

Motion failed due to a tie vote.

Proposal 3: Rerank first-degree possession offenses (Minn. Stat. § 152.021, subd. 2) at Severity Level 8 and second-degree possession offenses (Minn. Stat. § 152.022, subd. 2) at Severity Level 7.

Motion to approve Proposal 3 was made by John Stuart and seconded by Connie Larson.

A member expressed concern reranking the offenses as proposed would simply be protecting the sellers. Members expressed concern that there is not an upper limit for first-degree controlled substance offenses and would prefer if there was an exception for offenses involving particularly large amounts which were previously prosecuted federally. **The motion was amended** to change the ranking only for second-degree controlled substance possession offenses. A member reminded the Commission that the offender would still be eligible to receive up to one year in jail.

Jason Anderson: Yes

Hon. Carrie Lennon: No

Hon. Christopher Dietzen: No

Commissioner Tom Roy: Yes

Jeff Edblad: No

Hon. Heidi Schellhas: No

Sgt. Paul Ford: No

John Stuart: Yes

Connie Larson: Yes

Yamy Vang: Yes

Motion failed due to a tie vote.

Proposal 4: Establish border boxes for first- and second-degree controlled substance offenses at a criminal history score of 0 and 1. Within the border box, the presumptive sentence would still be prison for the indicated duration, but if the offender meets the established criteria, the court could impose a stayed sentence without departure.

Motion to adopt Proposal 4 was made by Jason Anderson seconded by Connie Larson.

A member stated that this proposal best aligns with what is really happening and allows for the current practice to continue without departure. This may change the minds of some judges who do not currently depart on these offenses. Members discussed how this may not fit well with the concept of determinate sentencing.

A member stated if there was uniform availability of treatment and drug court it would be easier to support the proposal. A member noted that for the vast majority there is treatment available, although there may not be drug court in every locality.

The motion was amended to apply the border box concept to first- and second-degree controlled substance possession offenses only. A member offered a friendly amendment to change the proposal to only include offenders at a criminal history score of zero. The friendly amendment was not accepted because the data show that offenders at a criminal history score of both zero and one have better outcomes on probation. A member expressed concern that offenders may have prior misdemeanor and juvenile offenses that do not add up to a point in criminal history that would be eligible for the probation sentence. A member noted that this was also true of the offenders in the controlled substance study done by the Commission and they still showed better results.

Jason Anderson: Yes

Hon. Carrie Lennon: No

Hon. Christopher Dietzen: No

Commissioner Tom Roy: No

Jeff Edblad: No

Hon. Heidi Schellhas: No

Sgt. Paul Ford: No

John Stuart: Yes

Connie Larson: Yes

Yamy Vang: No

Motion failed.

Proposal 5: Establish drug court or an appropriate treatment program as the presumptive sentence when certain criteria are met.

Motion was made by Jeff Edblad and seconded by Hon. Heidi Schellhas to not pass Proposal 5 because it is not appropriate.

Jason Anderson: No

Hon. Carrie Lennon: Yes

Hon. Christopher Dietzen: Yes

Commissioner Tom Roy: No

Jeff Edblad: Yes

Hon. Heidi Schellhas: Yes

Sgt. Paul Ford: Yes

John Stuart: No

Connie Larson: Yes

Yamy Vang: Yes

Motion passed.

Motion to establish border boxes (as in Proposal 4) for second-degree controlled substance possession offenses at a criminal history score of 0 was made by Commissioner Tom Roy and seconded by John Stuart.

A member stated that sending offenders with no criminal history to prison is not a good strategy. Sentencing these offenders to probation would enhance public safety.

Jason Anderson: Yes

Hon. Carrie Lennon: No

Hon. Christopher Dietzen: No

Commissioner Tom Roy: Yes

Jeff Edblad: No

Hon. Heidi Schellhas: No

Sgt. Paul Ford: No

John Stuart: Yes

Connie Larson: Yes

Yamy Vang: No

Motion failed.

5. Public Input

There was no input from the public.

6. Adjournment

Motion to adjourn was made by Hon. Christopher Dietzen and seconded by Jason Anderson.

Motion carried.

Chair Edblad adjourned the meeting at 3:45 p.m.