

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
September 14, 2017

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on September 14, 2017, 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 Valerie Estrada, Sargent Paul Ford, 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 Jill Payne and Anne Wall.

Members of the public present included Anita Alexander, ISAIAH; Marquita Clardy and Mariana Schunk, Parents of Murdered Children – Minnesota Hope Chapter; Lisa Netzer, Minn. Department of Corrections; and Robert Small, Executive Director of the Minn. County Attorneys Association.

1. Call to Order

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

2. Approval of Agenda

This was on the agenda as an action item.

Motion by Mr. Orput and second by Vice-Chair Schellhas to approve the meeting agenda.

Motion carried unanimously.

3. Approval of Meeting Minutes

This was on the agenda as an action item.

Motion by Ms. Vang and second by Ms. Middlebrook to approve the meeting minutes from July 27, 2017.

Motion carried unanimously.

4. Criminal History Scores

This was on the agenda as a presentation and discussion item.

Chair Dietzen called on Senior Research Analysis Specialist Anne Wall.

Agenda Item 4.B. Review of Sentences under Minn. Stat. § 609.1095 for Certain Dangerous and Repeat Felony Offenders:

Ms. Wall said that at its July 27, 2017, meeting, the Commission asked staff to report back on the number of offenders sentenced under Minn. Stat. § 609.1095 for certain dangerous and repeat felony offenders. Ms. Wall reported that between 2011 and 2015, 26 offenders (4.4% of offenders who received aggravated durational departures) were sentenced to prison and given aggravated durational departures where the dangerous offender provision (subd. 2) was cited; and 95 offenders (15.4% of offenders who received aggravated durational departures) were sentenced to prison and given aggravated durational departures where the career offender provision (subd. 4) was cited.

Ms. Wall further explained that the percentage increased to eight percent when the 26 “dangerous” offenders (i.e., those who received aggravated durational departures under the dangerous offender provision (subd. 2)) were limited to only those offenses listed as a “violent crime” under Minn. Stat. § 609.1095, subd. 1d.

A member asked what the average durational departure expansion was for those people who received an aggravated durational departure under Minn. Stat. § 609.1095, subs. 2 & 4.

Agenda Item 4.A & 4.C. General Review of Other Guidelines States; and Review of Other Guidelines States’ Treatment of Prior Convictions of Violence:

Ms. Wall next presented a comparison of how other states with sentencing guidelines addressed custody status and prior criminal history convictions. Ms. Wall explained that the comparison was based on the Robina Institutes Criminal History Enhancements Sourcebook (Richard S. Frase, Julian R. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* (2015)).

Ms. Wall said that most guidelines jurisdictions imposed a more severe sentence if an offender was under some form of court order; however the approach varied by jurisdiction.

Ms. Wall reviewed methods for counting prior offenses in other states. Some jurisdictions required special eligibility for people to reach the highest criminal history categories. Some states assigned more weight to prior offenses that were similar to the current offense i.e., “patterning premium.” Ms. Wall indicated that most jurisdictions

count prior misdemeanor offenses and prior juvenile offenses in criminal history scoring.

The Commission asked questions and discussed the issue. Chair Dietzen asked staff to report back at the October meeting where the Commission will continue to discuss the item.

Chair Dietzen said that the District of Columbia Sentencing Commission is also studying the criminal history aspect of sentencing and exploring the possibility of reform. Because of the Minnesota Sentencing Guidelines Commission's ongoing exploration of the topic, the D.C. Commission invited Chair Dietzen to attend a one-day retreat on the topic in November. The agency has sufficient funds to pay for the "no-frills" trip, and Chair Dietzen believes his participation in the retreat will benefit the Minnesota Sentencing Guidelines Commission in its deliberations on the topic. No objections were raised by the Commission.

5. Possible Modifications to the Sentencing Guidelines

This was on the agenda as a discussion item.

A. Offenses Involving a Dangerous Weapon-Application of Mandatory Sentences (Comment 2.E.03)

Chair Dietzen called on Executive Director Reitz who said that Guidelines commentary 2.E.03 referenced applicable offenses listed in Minn. Stat. § 609.11, subd. 9 that, by definition, involve a dangerous weapon, and that these offenses are always presumptive commitments because, by virtue of the conviction statute, a dangerous weapon was involved. Executive Director Reitz said that staff recommended adding aggravated controlled substance crime in the first degree with a firearm under Minn. Stat. § 152.021, subd. 2b(1), which, by definition, involves the use or possession of a firearm, and therefore always triggers Minn. Stat. § 609.11, subd. 5; and staff recommended removing aggravated stalking while possessing a dangerous weapon because, while mere possession of a dangerous weapon other than a firearm is sufficient to satisfy the aggravated stalking element of possessing a dangerous weapon under Minn. Stat. § 609.749, subd. 3(a)(3), it is insufficient to trigger Minn. Stat. § 609.11, subd. 4.

Executive Director Reitz offered draft language for the Commission to consider. Commission members discussed the item and asked questions of staff. Chair Dietzen asked that the item be put on the October 12, 2017, meeting agenda as an action item.

B. Felony Escape from Electronic Home Monitoring (EHM)

Chair Dietzen called on Executive Director Reitz who described escape from EHM under Minn. Stat. § 609.485, subd. 4(f); that it was established in law in 2002; that the statutory maximum sentence is five years; and that the offense is unintentionally omitted from the Offense Severity Reference Table (Guidelines § 5.A) and is therefore considered unranked. Executive Director Reitz said that, since the law was established, MSGC is aware of one person receiving a sentence for escape from EHM, in 2016.

Executive Director Reitz said that, because MSGC staff knows of only one conviction since the law was passed, staff recommends listing the offense in the Guidelines and officially designating it as “unranked.”

Executive Director Reitz offered draft language for the Commission to consider. Commission members discussed the item and asked questions of staff. Chair Dietzen asked that the item be put on the October 12, 2017, meeting agenda as an action item.

6. Phone Inquiries Regarding *State v. Kirby*

This was on the agenda as a discussion item.

Chair Dietzen called on Executive Director Reitz who said that at the July 27, 2017, meeting, the Commission asked the Chair and the Executive Director to draft a statement regarding how the Commission should respond to phone inquiries regarding *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017). Executive Director Reitz said that the following statement was put on the MSGC website on August 3, 2017:

Sentences After *State v. Kirby*

On July 26, 2017, in [State v. Kirby](#), the Minnesota Supreme Court held that the amelioration doctrine required the resentencing of a person whose conviction was not yet final on May 23, 2016—the effective date of section 18 of the Drug Sentencing Reform Act (2016 Minn. Laws ch. 160)—in a case in which the Drug Offender Grid, as established under that section, reduced the offender’s presumptive sentencing range from that of the sentencing grid in effect at the time of the offense. (A second case decided the same day, [State v. Otto](#), held that the amelioration doctrine did not apply to the Drug Sentencing Reform Act’s controlled substance weight threshold changes.) When the sentencing judge determines that the 2016 Drug Offender Grid applies under *Kirby* to sentence, or resentence, certain first- or second-degree drug offenses, even though the offenses occurred before August 1, 2016, it will be necessary to prepare the sentencing worksheet using the “Override”

button. Also, please make a note in the worksheet comments such as “Sentencing judge applied the Drug Offender Grid because of *State v. Kirby*,” “Sentencing judge found that the amelioration doctrine required use of the Drug Offender Grid,” or similar language. These comments will allow MSGC staff to code these cases properly pending receipt of formal guidance by the Sentencing Guidelines Commission.

Executive Director Reitz said that, currently, staff responded to telephone inquiries regarding *Kirby* using the language of this notice.

Executive Director Reitz said that staff proposed changing the text of the *Kirby* announcement simply to read, after the headline, “For information about preparing sentencing worksheets affected by *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017), please visit our Guidelines Assistance page on that topic.” Executive Director Reitz said that the link would pass the user to a webpage, organized under the “Drug Modifications 2016” topic of the “Guidelines Assistance” section of the MSGC web site, that would contain the “Sentences After *State v. Kirby*” statement.

Commission members asked questions and discussed the issue.

7. Director’s Report

Chair Dietzen called on Executive Director Reitz who reported on the following items:

Executive Director Reitz said that this year's National Association of Sentencing Commissions (NASC) conference was held in Santa Fe, New Mexico, August 27 to August 29, 2017. Executive Director Reitz said that, the keynote speaker was David Boerner, Professor Emeritus of Seattle University School of Law, who made the point that, for good or ill, sentencing guidelines are effective at putting criminal justice policies into effect—which is unusual in the field of criminal justice. Executive Director Reitz said that Prof. Kevin Reitz of the University of Minnesota Law School, led the American Law Institute’s (ALI) recent “Model Penal Code: Sentencing” project, and the resulting document, which Professor Reitz presented to NASC, was just adopted by the ALI in May and is pending publication. Executive Director Reitz said that the black-letter text—without commentary and notes—is available for free download for registered guests of the ALI's web site; and, if the Commission wished, Director Reitz would be happy to present a brief comparison of the policy positions selected by the ALI with Minnesota's current sentencing laws at a future meeting.

Executive Director Reitz said that the Robina Institute of Criminal Law and Criminal Justice will be holding its annual conference on Friday, December 8, 2017. Executive Director Reitz asked Commission members to save the date.

Executive Director Reitz invited Commission members and members of the public to a special Commission meeting to take place immediately following adjournment of the regular meeting at the Centennial Office Building, 658 Cedar Street; Suite G-58. Executive Director Reitz said that staff will introduce the participants both to the Commission's new office area and to the adjacent conference rooms where future meetings will be held.

Executive Director Reitz reported that the next Commission meeting will be October 12, 2017, at 2:00 p.m., in the Centennial Office Building, 658 Cedar Street; Ground Floor, Lady Slipper Conference Room.

8. Public Input

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

9. Adjournment

Motion by Commissioner Roy and second by Ms. Vang to adjourn.

Motion carried unanimously.

The meeting was adjourned at 3:32 p.m.