

## Approved Meeting Minutes

**January 9, 2020**

---

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on January 9, 2020, in the Minnesota Judicial Center, Room 230, 25 Rev. Dr. Martin Luther King, Jr. Blvd., Saint Paul, MN 55155.

Present in person were Commission Chair Kelly Lyn Mitchell and Commission members Justice (Ret.) Christopher Dietzen, Valerie Estrada, Abby Honold, Tonja Honsey, Judge Michelle Larkin, Judge Kevin Mark, Cathryn Middlebrook, Peter Orput, and Commissioner of Corrections Paul Schnell. Present by telephonic conference call was Sergeant Salim Omari, the notice required by [Minn. Stat. § 13D.015](#), subd. 5, having been posted on the MSGC website on December 30, 2019. Also present were MSGC Executive Director Nate Reitz and MSGC staff members Nicole Jaspersen, Jill Payne, and Anne Wall.

Members of the public present included Senator Dan Hall, Minnesota Senate; Robert Small, Minn. County Attorneys Association; Nancy Eder, ISAIAH; Cynthia Jackson; Chuck Turchick; Randy Anderson, Minn. Second Chance Coalition; Anita Alexander, ISAIAH; Larry Moloney, ISAIAH; Kgen Kimzu, Minn. Court of Appeals; Munica Mohamed, ACLU-Minnesota; Ismael Dore, ACLU-Minnesota; James Johnson, DFO Community Corrections; Ron Joki, ISAIAH; Lars Negstad, ISAIAH; Katherine DuGarm, ISAIAH; Elliot Butay, NAMI Minnesota; Ben Johnson, Minn. House of Representatives Research; Rachel Ganani, House DFL Caucus; Callie Lenmeun, Minn. House; Jeff Simard, Minn. Court of Appeals; Jana Kooren, ACLU-Minnesota; Kathryn Lundquist, ISAIAH; Nikki Engel, Violence Free Minnesota; Eliot Howard, ISAIAH; EJ Eiffler; Michael Spakorsky; Safia Khan, Department of Corrections; Aaron Ernst, Life Rebuilders; Justin Terrell, Council for Minnesotans of African Heritage; Gina Evans, Minn. Second Chance; and Brian Fullman, ISAIAH.

### **1. Call to Order**

Chair Mitchell called the meeting to order at 1:01 p.m. All members being present, whether in person or telephonically, a quorum was present. No members were absent.

### **2. Approval of Agenda**

This was on the agenda as an action item.

**Motion** by Commissioner Schnell and second by Ms. Middlebrook to approve the meeting agenda.

**Motion carried** on an 11–0 roll-call vote.

### **3. Approval of Draft Meeting Minutes**

This was on the agenda as an action item.

**Motion** by Ms. Estrada and second by Ms. Honsey to approve the meeting minutes from December 12, 2019.

**Motion carried** on a roll-call vote with 10 votes in favor, 0 votes against, and 1 abstention. Judge Mark abstained.

### **4. Attorney General Legal Opinion**

Chair Mitchell explained Director Reitz’s December 13, 2019, request for a legal opinion from the Attorney General’s Office regarding issues related to the proposed modification to the Sentencing Guidelines that the Commission, on November 6, 2019, forwarded for public hearing.

#### **A. Decision on Waiver of Attorney-Client Privilege**

This was on the agenda as a possible action item.

**Motion** by Justice Dietzen and second by Commissioner Schnell to waive attorney-client privilege with respect to the Deputy Attorney General’s legal opinion dated January 8, 2020.

**Motion carried** on an 11–0 roll-call vote.

#### **B. Opinion Review**

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz, who briefly reviewed the legal opinion and the process by which it was obtained. Chair Mitchell and Director Reitz both noted that the opinion’s specific references to the memorandum written by Commissioner Schnell and Chair Mitchell entitled, “Revised Proposed Guidelines Modifications to Limit Probation Terms,” dated January 2, 2020 (the “Schnell-Mitchell memorandum”), were not part of the original request, but likely resulted from the fact that the Attorney General’s office is copied on all electronic correspondence to the Commission, including the January 2 email to Commission members that included the Schnell-Mitchell memorandum.

## 5. Review of Public Hearing Record

This was on the agenda as an information item.

Chair Mitchell called on Director Reitz who reported how the Commission complied with the public notice and hearing requirements to take final action on the proposed amendments to the Minnesota Sentencing Guidelines and Commentary given a public hearing on December 19, 2019.

Director Reitz stated that, on November 18, 2019, the notice of public hearing was published in the State Register and the contents of the proposal were simultaneously posted on the Commission's website, and an e-mail was sent to interested persons who have signed up on the Commission's website to receive informational e-mails. Director Reitz said that, because no one was on the United States mailing list, no one was notified by US Mail. Director Reitz said that this notice was in compliance with Minn. Stat. § 244.09 and Chapter 3000 of the Minnesota Administrative Rules.

Director Reitz stated, pursuant to the notice, the public hearing was held on December 19, 2019, in Room 1100, Minnesota Senate Building. Thirty-one members of the public spoke. Director Reitz said that a link to an audio recording of the hearing was sent by e-mail to the Commission members before this meeting. Director Reitz said that, after the public hearing, the record remained open for five calendar days to accept written comments; the Commission received written comments from 63 individuals. Director Reitz said that a summary of the testimony, a link to the audio of the testimony, and copies of the written comments were part of the meeting materials.

## 6. Proposal to Amend the Sentencing Guidelines

This was on the agenda as an action item.

Chair Mitchell called on Commissioner Schnell, who discussed the Schnell-Mitchell memorandum, which contained background, observations, and conclusions regarding probation terms, as well as an explanation of a revised proposal to modify the Sentencing Guidelines in response to the public hearing.

**Motion by** Commissioner Schnell and second by Ms. Honsey to revise the language of the proposed amendments to the Minnesota Sentencing Guidelines and Commentary, as forwarded for public hearing by the Commission on November 6, 2019, by replacing its language with the language in the Schnell-Mitchell memorandum, as follows:

## Minnesota Sentencing Guidelines and Commentary

### 1. Purpose and Definitions

\* \* \*

#### B. Definitions

\* \* \*

5. Departure. A “departure” is a pronounced sentence other than that recommended in the appropriate cell on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a “departure.”

\* \* \*

- b. Durational Departure. A “durational departure” occurs when the court orders a sentence with a prison duration other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid or when the court pronounces a length of stay other than as provided in section 3.A.2.

- (1) Aggravated Durational Departure. An “aggravated durational departure” occurs when the court pronounces a prison duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid or when the court pronounces a length of stay longer than provided in section 3.A.2.

- (2) Mitigated Durational Departure. A “mitigated durational departure” occurs when the court pronounces a prison sentence that is more than 15 percent lower than the fixed duration displayed in the appropriate cell on the applicable Grid.

\* \* \*

13. Presumptive Sentence. “Presumptive sentences” are those sentences provided on the Sentencing Guidelines Grids and in section 3.A.2. They are presumptive because they are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.

\* \* \*

### 2. Determining Presumptive Sentences

\* \* \*

#### C. Presumptive Sentence

1. Finding the Presumptive Sentence. The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable Grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis). The conviction offense determines the severity level. The offender’s criminal history score is computed according to section 2.B above. For cases contained in cells outside of the shaded areas, the sentence should be executed. For cases contained in cells within the

shaded areas, the sentence should be stayed unless the conviction offense carries a mandatory minimum sentence. Section 3.A. governs conditions of stayed sentences.

\* \* \*

#### D. Departures from the Guidelines

1. Departures in General. The sentences provided in the Grids are presumed to be appropriate for the crimes to which they apply. The court must pronounce a sentence of the applicable disposition, ~~and~~ within the applicable prison range, and within the applicable length of stay, unless there exist identifiable, substantial, and compelling circumstances to support a departure.

The court may depart from the presumptive disposition or duration provided in the Guidelines, and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence. A pronounced sentence for a felony conviction that is outside the appropriate prison range on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence, is a departure from the Guidelines. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a departure from the Guidelines. A departure is not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by statute or case law.

- a. Disposition and Duration. Departures with respect to disposition and duration are separate decisions, each requiring written departure reasons. A court may depart from the presumptive disposition without departing from the presumptive duration, and vice-versa. ~~A court departing from the presumptive disposition as well as the presumptive duration has made two separate departure decisions, each requiring written departure reasons.~~
- b. Aggravated Departure. When imposing a sentence that is an aggravated departure, it is recommended that the court pronounce a sentence proportional to the severity of the crime for which the sentence is imposed and the offender's criminal history, and take into consideration the purposes and underlying principles of the Guidelines.

\* \* \*

2. Factors that **should not** be used as Reasons for Departure. The following factors should not be used as reasons for ~~departing from the presumptive sentences provided in the appropriate cell on the applicable Grid:~~ departure:

\* \* \*

### 3. Related Policies

#### A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the appropriate cell on the applicable Grid specifies court orders a stayed sentence, the court may pronounce a stay of execution or a stay of imposition. The court must pronounce the length of the stay, ~~which may exceed the duration of the presumptive prison sentence,~~ as provided in section 3.A.2 and may establish appropriate conditions subject to the considerations in section 3.A.3.

a. Stay of Execution. When ordering a stay of execution, the court must pronounce the prison sentence duration, but its execution is stayed. The presumptive duration is shown in the appropriate cell.

b. Stay of Imposition. When ordering a stay of imposition, the court must not pronounce a prison sentence duration, and the imposition of the sentence is stayed.

The Commission recommends that stays of imposition be used for offenders who are convicted of lower severity offenses and who have low criminal history scores. The Commission further recommends that convicted felons be given one stay of imposition, although for very low severity offenses, a second stay of imposition may be appropriate.

2. Length of Stay.

a. When the court stays execution or imposition of sentence for a felony offense, the pronounced length of stay must not exceed five years or the length of the statutory maximum punishment, whichever is less, unless the court identifies and articulates substantial and compelling reasons to support a departure from this rule.

b. Subject to the limitation in section 3.A.2.a, the pronounced length of stay may exceed the presumptive prison sentence duration provided in the appropriate cell on the applicable Grid.

c. If the court by departure exceeds the limitation in section 3.A.2.a, the length of stay must not exceed the statutory maximum punishment for the offense.

d. The limitation in section 3.A.2.a does not apply to a sentence for a violation of Minn. Stat. § 609.19 (Murder 2nd Degree), 609.195 (Murder 3rd Degree), 609.20 (Manslaughter 1st Degree), 609.2112 (Criminal Vehicular Homicide), 609.2662 (Murder of an Unborn Child 2nd Degree), 609.2663 (Murder of an Unborn Child 3rd Degree), 609.2664 (Manslaughter of an Unborn Child 1st Degree), 609.268 (Death or Injury of an Unborn Child in Comm. of Crime), 609.342 (Criminal Sexual Conduct 1st Degree), 609.343 (Criminal Sexual Conduct 2nd Degree), 609.344 (Criminal Sexual Conduct 3rd Degree), 609.345 (Criminal Sexual Conduct 4th Degree), or 609.3451 (Criminal Sexual Conduct 5th Degree).

e. Extensions of probation are governed by statute (see Minn. Stat. § 609.135, subd. 2(g)–(h)).

\* \* \*

2-3. Other Conditions of Stayed Sentences. While the Commission has otherwise chosen not to develop specific guidelines for the conditions of stayed sentences, it recognizes that there are several penal objectives to be considered in establishing conditions of stayed sentences including:

- deterrence;
- public condemnation of criminal conduct;
- public safety;
- rehabilitation;
- restitution;
- retribution; and
- risk reduction.

The Commission also recognizes that the relative importance of these objectives may vary with both offense and offender characteristics and that multiple objectives may be present in any given sentence. The Commission urges courts to utilize the least restrictive conditions of stayed sentences that are consistent with the objectives of the sanction. The Commission further urges courts to consider the following principles in establishing the conditions of stayed sentences:

\* \* \*

(6) Work Release and Community Based Programs. The Commission has chosen not to establish specific guidelines relating to work release programs in local facilities or community-based residential and nonresidential programs.

**A discussion ensued**, wherein members debated the Schnell-Honsey motion.

**Motion by** Mr. Orput and second by Commissioner Schnell to amend the Schnell-Honsey motion by inserting the clause “including an attempt or conspiracy,” after the words “When the court stays execution of imposition of sentence for a felony offense,” in the Schnell-Honsey motion’s proposed section 3.A.2.a.

**Orput motion carried** on an 11–0 roll-call vote.

Discussion of the Schnell-Honsey motion continued.

**Motion by** Justice Dietzen and second by Judge Larkin to amend the Schnell-Honsey motion by adding the sentence, “The limitation in section 3.A.2.a may be waived by agreement of the parties,” to the end of the Schnell-Honsey motion’s proposed section 3.A.2.d.

**Dietzen-Larkin motion failed** on a roll-call vote with 4 votes in favor and 7 votes opposed.

Voting “Yes” were Justice Dietzen, Judge Larkin, Sgt. Omari, and Mr. Orput. Voting “No” were Ms. Estrada, Ms. Honold, Ms. Honsey, Judge Mark, Ms. Middlebrook, and Commissioner Schnell. Chair Mitchell voted “No.”

Discussion of the Schnell-Honsey motion continued.

**Motion by** Justice Dietzen and second by Judge Mark to amend the Schnell-Honsey motion by inserting the sentence, “Agreement of the parties is a sufficient basis for an aggravated departure from the limitation in section 3.A.2.a (Length of Stay),” as a new section 2.D.3.b(15) (relating to aggravating factors that may be used as reasons for departure).

**Dietzen-Mark motion failed** on a roll-call vote with 5 votes in favor and 6 votes opposed.

Voting “Yes” were Justice Dietzen, Judge Larkin, Judge Mark, Sgt. Omari, and Mr. Orput. Voting “No” were Ms. Estrada, Ms. Honold, Ms. Honsey, Ms. Middlebrook, and Commissioner Schnell. Chair Mitchell voted “No.”

Chair Mitchell called for a vote on the Schnell-Honsey motion, as amended.

**Schnell-Honsey motion, as amended, carried** on a roll-call vote with 8 votes in favor and 3 votes opposed.

Voting “Yes” were Ms. Estrada, Ms. Honold, Ms. Honsey, Judge Mark, Ms. Middlebrook, Mr. Orput, and Commissioner Schnell. Voting “No” were Justice Dietzen, Judge Larkin, and Sgt. Omari. Chair Mitchell voted “Yes.”

As the Commission had just revised the language of the proposed amendments to the Minnesota Sentencing Guidelines and Commentary, as forwarded for public hearing by the Commission on November 6, 2019, Chair Mitchell explained that a motion for final adoption of the revised proposal would be in order.

**Motion by** Commissioner Schnell and second by Ms. Estrada to amend the 2019 Minn. Sentencing Guidelines sections 1.B (Definitions), 2.C (Presumptive Sentence), 2.D (Departures from the Guidelines), and 3.A (Establishing Conditions of Stayed Sentences), to take effect August 1, 2020, and to apply to crimes committed on or after that date, subject to submission to the Legislature by January 15, 2020, by finally adopting the proposed amendments to the Minnesota Sentencing Guidelines and Commentary, as forwarded for public hearing by the Commission on November 6, 2019, and as revised by the Commission on January 9, 2020.

**Schnell-Estrada motion carried** on a roll-call vote with 8 votes in favor and 3 votes opposed.



Voting “Yes” were Ms. Estrada, Ms. Honold, Ms. Honsey, Judge Mark, Ms. Middlebrook, Mr. Orput, and Commissioner Schnell. Voting “No” were Justice Dietzen, Judge Larkin, and Sgt. Omari. Chair Mitchell voted “Yes.”

## **7. Approval of 2020 Report to the Legislature – No later than 3:00 p.m.**

This was on the agenda as a special order and action item.

Chair Mitchell called on Justice Dietzen to address the “Minority Report in Opposition to Schnell Proposal for Mandatory Probation Caps,” which pertained to the original proposal language, rather than the proposal language as revised and adopted. Chair Mitchell asked if he wished to append a minority report to the 2020 Report to the Legislature. Justice Dietzen said that a revised minority report would be a possibility. Chair Mitchell asked the Commission if anyone objected to Justice Dietzen submitting a revised minority report in the 2020 Report to the Legislature and there were no objections. Director Reitz said that he foresaw no problems under the Open Meeting Law if a minority of members met to create a minority report and submit it to staff. Director Reitz described the editorial deadlines that would apply to such a report.

Chair Mitchell called on Director Reitz, who reviewed the Draft 2020 Report to the Legislature with the Commission and received editorial suggestions from members.

**Motion** by Ms. Middlebrook and second by Ms. Honold to approve the 2020 Report to the Legislature, including a possible minority report as Appendix 2.4 if submitted to staff by the beginning of January 14, 2020, and any future necessary staff modifications and corrections in light of the Commission’s editorial guidance provided today’s meeting.

**Motion carried** on an 11–0 roll-call vote.

## **8. Working Group/Task Force Reports**

This was on the agenda as an information item.

### **A. Criminal Sexual Conduct Statutory Reform Working Group**

Chair Mitchell called on Ms. Honsey to give an update about the Criminal Sexual Conduct Statutory Reform Working Group. Ms. Honsey explained that her subcommittee did not meet this month. Director Reitz said that he presented to the whole body in December about how the Sentencing Guidelines rank sex offenses, using flowcharts. He said, with Chair Mitchell’s permission, that he could present the flowcharts to the Commission, clarifying how child

pornography offenses are ranked relative to the other sex offenses on the Sex Offender Grid. Chair Mitchell approved the request and the Commission members had no objection.

Judge Larkin discussed inviting a therapist whose clients are victims of sexual abuse to the next meeting. Chair Mitchell and Commission members agreed, and Judge Larkin said she would forward the therapist's contact information to Director Reitz.

## **B. Community Competency Restoration Task Force**

Chair Mitchell called on the Commission member appointed to the Community Competency Restoration Task Force, Ms. Middlebrook, to discuss the task force. Ms. Middlebrook said that the November and December meetings were mostly about various groups who look at similar community competency topics. Ms. Middlebrook explained how there was also a survey across 30 different states about their competency programs and the effectiveness and cost. Ms. Middlebrook reported there were also presentations regarding Minnesota treatment courts and the two counties that have a community competency pilot project, including Olmsted County and Crow Wing County.

## **9. Executive Director's Report**

This was on the agenda as an information item.

Director Reitz explained that the Commissioners' annual recertifications of economic interest are due to the Campaign Finance Board by the end of the month, and asked members to contact him if there were any questions.

## **10. Public Input**

Chair Mitchell called on members of the public present and asked if anyone wished to speak. One member of the public came forward.

Chuck Turchick, who said it was his third time attending a Commission meeting, opined that receiving the public materials at the start of the Commission meeting, rather than in advance, does not allow enough time to read the materials. Mr. Turchick questioned how the public has the opportunity to provide input at meetings if they do not receive the materials in advance of the Commission meeting. Mr. Turchick requested the public materials be made available online when the Commission members receive the materials.

Chair Mitchell thanked Mr. Turchick for his input.

## **11. Adjournment**

The meeting adjourned at 3:28 p.m., without objection.