

Approved Meeting Minutes

July 23, 2020

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on July 23, 2020. Due to the ongoing health pandemic, it was not feasible for members of the Commission or the public to attend at the regular meeting location in Saint Paul; instead, Commission members and members of the public participated by telephone or by electronic Webex meeting, the notice required by [Minn. Stat. § 13D.021](#), subd. 4, having been posted on the MSGC website on July 14, 2020.

Present electronically were Commission Chair Kelly Lyn Mitchell and Commission members Justice (Ret.) Christopher Dietzen, Abby Honold, Judge Michelle Larkin, Judge Kevin Mark, Cathryn Middlebrook, Sergeant Salim Omari, Peter Orput, and Commissioner of Corrections Paul Schnell. Also present by telephone and/or electronically were Executive Director Nate Reitz and MSGC staff members Nicole Jaspersen, Kathleen Madland, Linda McBrayer, Jill Payne, and Anne Wall.

Members of the public present by telephone and/or electronically included Kevin Featherly, Minnesota Lawyer and Robert Small, Minn. County Attorneys Association.

1. Call to Order & Roll Call

Chair Mitchell called the meeting to order at 1:05 p.m.

Chair Mitchell explained that the meeting was being held by telephone and internet today which is authorized by Minn. Stat. § 13D.021 which applies because an in-person meeting is not practical or prudent due to the health pandemic and peace time emergency. Chair Mitchell explained that these conditions make it unfeasible for any member of the Commission or the public to attend at the regular meeting location in Saint Paul which is currently open only to authorized state employees. Chair Mitchell stated that for the reasons stated the meeting is conducted entirely by telephone or internet and the notice was posted on the MSGC website since July 14, 2020. Chair Mitchell stated that members of the public are able to monitor the meeting remotely by telephone or computer with instructions posted on the MSGC website.

Chair Mitchell asked Director Reitz to call the roll.

Present electronically were Commission Chair Kelly Lyn Mitchell, Justice (Ret.) Christopher Dietzen, Abby Honold, Judge Michelle Larkin, Judge Kevin Mark, Cathryn Middlebrook, Sergeant Omari, Peter Orput, and Commissioner of Corrections Paul Schnell. Nine members were present; two members were absent. A quorum was present.

2. Approval of Agenda

This was on the agenda as an action item.

Motion by Commissioner Schnell and second by Judge Larkin to approve the meeting agenda.

Motion carried on a 9–0 roll-call vote.

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Honold, Judge Larkin, Judge Mark, Ms. Middlebrook, Sergeant Omari, Mr. Orput, and Commissioner Schnell.

3. Approval of Draft Meeting Minutes

This was on the agenda as an action item.

Motion by Judge Larkin and second by Judge Mark to approve the meeting minutes from June 11, 2020.

Motion carried on a 9–0 roll-call vote.

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Honold, Judge Larkin, Judge Mark, Ms. Middlebrook, Sergeant Omari, Mr. Orput, and Commissioner Schnell.

4. Accept or Reject a Proposal to Amend the Sentencing Guidelines

This was on the agenda as an action item.

A. Review of Public Hearing Record

Director Reitz stated that, on Monday, June 15, 2020 the notice of public hearing was published in the State Register and the contents of the proposed modifications were posted on the Commission’s website. Because no one is on the United States mailing list, no one was notified by mail. On Monday, June 15, 2020, an e-mail was sent to interested persons who have signed up on the Commission’s website to receive informational e-mails.

Director Reitz stated that the public hearing was held on July 16, 2020, at 1:30 p.m., entirely by telephone and the Internet because it was not feasible for members of the Commission or the public to attend at a public meeting location required by [Minn. Stat. § 13D.021](#), subd. 4. Members of the public were able to watch the public hearing on the agency’s Youtube channel. No members of the public contacted the agency in advance wishing to testify nor did

any member of the public wish to testify before the Commission at the time of the hearing. After the public hearing, the record remained open for five calendar days to accept written comments; the Commission received no written comments during this period.

C. Technical Changes to Appendix 1 (Mandatory and Presumptive Sentences Reference Table)

This was item 4.C on the agenda and item A in the “Notice of Public Hearing: Proposed Amendments to the Minnesota Sentencing Guidelines and Commentary.” Director Reitz summarized item A.1, Amendments to Harassment and Stalking, explaining that amendments were made to Minn. Stat. § 609.749 (Harassment and Stalking). The Commission proposed no Guidelines modifications because no changes were made to the statutory maximums and no new felonies were created as a result of the amendments. Chair Mitchell asked Director Reitz to move to the next amended crime law.

Director Reitz explained Section A.2, Citation for Criminal Vehicular Homicide in First Degree DWI, saying it was a technical amendment in the Revisor’s Bill made to Minn. Stat. § 169A.24, subd. 1, that affected Appendix 1 of the Guidelines.

Motion by Commissioner Schnell and second by Ms. Middlebrook to adopt Section A.2 as published in the Notice of Public Hearing, as follows.

Motion carried on a 9–0 roll-call vote.

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Honold, Judge Larkin, Judge Mark, Ms. Middlebrook, Sergeant Omari, Mr. Orput, and Commissioner Schnell.

Proposed modifications to 2019 Minn. Sentencing Guidelines Appendix 1:

Appendix 1. Mandatory and Presumptive Sentences Reference Table

This table is for convenience when applying mandatory sentences (section 2.E) and presumptive sentences (section 2.C). It is not exhaustive.

* * *

Statute	Offense	Prerequisite or Conditions	Minimum Duration
169A.24, subd. 1(3)	Driving while Intoxicated	Prior Criminal Vehicular Homicide or Operation under Minn. Stat. § 609.2112.1(a)(2) thru (6); § 609.2113.1(2) thru (6); § 609.2113.2(2) thru (6); § 609.2114.1(a)(2) thru (6); § 609.2114.2(2) thru (6)	Grid Time

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B. Commentary in Section 3.A (Establishing Conditions of Stayed Sentences)

This was item 4.B on the agenda and Section B in the “Notice of Public Hearing: Proposed Amendments to the Minnesota Sentencing Guidelines and Commentary.” Chair Mitchell called on Director Reitz to explain the Non-Legislative Amendments to Guidelines Commentary Section 3.A. Director Reitz did so. Chair Mitchell called for a motion.

Motion by Ms. Middlebrook and second by Mr. Orput to adopt the commentary changes in Section B of the Notice of Public Hearing, as follows.

Motion carried on a 6–3 roll-call vote.

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

Proposed modifications to 2019 Minn. Sentencing Guidelines § 3.A commentary, with pending 2020 amendments to § 3.A shown:

3. Related Policies

A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the 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 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.

Comment

3.A.101. *The use of either a stay of imposition or stay of execution is at the discretion of the court. The Commission has provided a non-presumptive recommendation regarding which categories of offenders should receive stays of imposition, and has recommended that convicted felons generally should receive only one stay of imposition. The Commission believes that stays of imposition are a less severe sanction, and should be used for those convicted of less serious offenses and those with short criminal histories. Under current sentencing practices, courts use stays of imposition most frequently for these types of offenders.*

[Comment 3.A.102. is moved below]

2. Length of Stay.

- a. When the court stays execution or imposition of sentence for a felony offense, including an attempt or conspiracy, 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)).

Comment

[The following comment is moved from above]

~~3.A.102.~~ 3.A.201. *When a court grants a stayed sentence, the duration of the stayed sentence may exceed the presumptive sentence length indicated in the appropriate cell on the applicable Grid, and may be as long as the statutory maximum punishment for the conviction offense. See Minn. Stat. § 609.135, subd. 2. Absent substantial and compelling reasons to depart, however, the length of the stay may not exceed five years, unless the current offense is a homicide or criminal sexual conduct offense, including an attempt or conspiracy. Thus, for an offender convicted of Theft over \$5,000 (Severity Level 3), with a*

Criminal History Score of 1, the duration of the stay could be up to five years—or, upon a finding of substantial and compelling reasons to depart, up to ten years. ~~The~~ Regardless of the length of stay, the 13-month sentence shown in the Guidelines is the presumptive sentence length and, if imposed, would be executed if: (a) the court departs from the dispositional recommendation and decides to execute the sentence; or (b) the stay is later revoked and the court decides to imprison the offender.

3.A.202. *Before section 3.A.2.a took effect, case law required durational departures to be based on the nature of the offense rather than on the individual characteristics of the offender. See State v. Solberg, 882 N.W.2d 618, 625 (Minn. 2016). Although a pronounced length of stay longer than provided in section 3.A.2 is defined as an aggravated durational departure, the Commission recognizes that judicial considerations for pronouncing a longer-than-recommended length of stay may differ substantially from considerations for imposing a longer-than-recommended prison duration. As a result of these differences, the individual characteristics of the offender may be relevant to the district court’s finding of substantial and compelling reasons justifying a longer-than-recommended length of stay.*

3.A.203. *Within section 3.A.2, “statutory maximum punishment” refers to the applicable maximum period for a stay of sentence established in statute. For most felonies, this is the maximum period for which the sentence of imprisonment might have been imposed, but, for some felonies, this is four or six years. Minn. Stat § 609.135, subd. 2(a)–(b).*

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:

- (1) Retribution. If retribution is an important objective of the stayed sentence, the severity of the retributive sanction should be proportional to the severity of the offense and the prior criminal record of the offender. A period of confinement in a local jail or correctional facility may be appropriate.
- (2) Rehabilitation. If rehabilitation is an important objective of the stayed sentence, the court should make full use of available local programs and resources. The absence of a rehabilitative resource, in general, should not be a basis for enhancing the retributive objective in sentencing and, in particular, should not be the basis for more extensive use of incarceration than is justified on other grounds.
- (3) Restitution. The Commission urges courts to make expanded use of restitution and community work orders as conditions of a stayed sentence, especially for offenders with short criminal histories who are convicted of property crimes, although the use of these conditions in other cases may be appropriate.
- (4) Supervision. Supervised probation should be a primary condition of stayed sentences.
- (5) Fines. If fines are imposed, the Commission urges the expanded use of day fines, which standardizes the financial impact of the sanction among offenders with different income levels.
- (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.

Comment

~~**3.A.201-3.A.301.**~~ *The court may attach any conditions to a stayed sentence that are permitted by law and that the court deems appropriate. The Guidelines neither enlarge nor restrict the conditions that courts may attach to a stayed sentence. Minn. Stat. § 244.09, subd. 5 permits, but does not require, the Commission to establish guidelines covering conditions of stayed sentences. The Commission ~~chose not to develop~~ has developed such guidelines during its initial guideline development effort. The Commission has provided some language in the above section of the Guidelines that provides with respect to the pronounced length of stay in section 3.A.2, and has provided additional, general direction in the use of conditions of stayed sentences in the above section.*

~~**3.A.202-3.A.302.**~~ *While the Commission has ~~resolved not to develop~~ otherwise not developed guidelines for nonimprisonment sanctions ~~at this time~~, the Commission believes it is important for the sentencing courts to consider proportionality when pronouncing a period of local confinement as a condition of probation. This is particularly important given Minn. Stat. § 609.135, subd. 7, which states when an offender may not demand execution of sentence. The period of local confinement should be proportional to the severity of the conviction offense and the criminal history score of the offender. Therefore, the period of local confinement should not exceed the term of imprisonment that would be served if the offender were to have received an executed prison sentence according to the presumptive Guidelines duration.*

* * *

5. Possible Further Amendments to the Sentencing Guidelines in Light of Recent Legislation

This was on the agenda as an action item.

Director Reitz presented staff information paper entitled, "Possible Further Amendments to the Sentencing Guidelines in Light of Recent Legislation." Director Reitz explained the three sections of the document, including the 2020 Regular Session amendments to harassment and stalking affecting comment 2.E.03, 2020 First Special Session technical amendment affecting failure to report danger to child's health, and the 2020 Second Special Session use of force by peace officers. Director Reitz explained the background and descriptions, guidelines considerations, and staff recommendations.

Motion by Commissioner Schnell and second by Judge Larkin to move to public hearing the recommendations of staff in the document entitled, “Possible Further Amendments to the Sentencing Guidelines in Light of Recent Legislation,” dated July 21, 2020.

Discussion: Members discussed the difference between moving the item to public hearing and tabling it until a further date and determined it would be moved to the next public hearing.

Motion carried on a 9–0 roll-call vote.

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Honold, Judge Larkin, Judge Mark, Ms. Middlebrook, Sergeant Omari, Mr. Orput, and Commissioner Schnell.

Proposed modifications to 2019 (or 2020) Minn. Sentencing Guidelines comment 2.E.03:

2.E.03. *Some offenses by statutory definition involve a dangerous weapon, and therefore the mandatory minimum provision dealing with dangerous weapons always applies: Aggravated Controlled Substance Crime in the First Degree with a ~~Firearm~~ firearm under Minn. Stat. § 152.021, subd. 2b(1); Controlled Substance Crime in the First or Second Degree with a firearm under Minn. Stat. § 152.021, subd. 1(2)(i) or 2(a)(2)(i), or Minn. Stat. § 152.022, subd. 1(2)(i) or 2(a)(2)(i); Assault in the Second Degree under Minn. Stat. § 609.222; Harassment (Aggravated Violations) with a dangerous weapon under Minn. Stat. § 609.749, subd. 3(a)(3); Certain Persons Not to Have Firearms or Ammunition under Minn. Stat. §§ 624.713, subd. 2(b) and 609.165, subd. 1b; and Drive-By Shootings under Minn. Stat. § 609.66. The presumptive disposition for these types of offenses is imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is longer.*

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Modifications to 2019 (or 2020) Minn. Sentencing Guidelines §§ 5.A & 5.B:

5.A. Offense Severity Reference Table

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law.

* * *

Severity Level	Offense Title	Statute Number
UNRANKED	Failure to Report <u>Danger to Child’s Health (Death)</u>	626.556, subd. 6 <u>260E.08(c)</u>

* * *

5.B. Severity Level by Statutory Citation

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law.

* * *

Statute Number	Offense Title	Severity Level
626.556, subd. 6 <u>260E.08(c)</u>	Failure to Report <u>Danger to Child’s Health (Death)</u>	Unranked

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6. Comprehensive Review of Child Pornography Sentencing – Next Steps

This was on the agenda as an action item.

Chair Mitchell discussed staff information paper entitled, “Summary of Commission Members’ CP Priority Responses.” Chair Mitchell explained that at the June 11, 2020, meeting it was determined Commissioners would prioritize their CP issues and forward them to Director Reitz by July 7, 2020. Chair Mitchell stated that staff summarized each responding member’s child pornography review priority response. Chair Mitchell and the commission discussed each issue, types of foreseeable action, and commission members’ child pornography priority responses. A discussion ensued.

Chair Mitchell stated that the general consensus is that ranking offenses is the heart of the discussion. Chair Mitchell stated that the Commission will have a general discussion in September

which could lead to proposals. Chair Mitchell stated that the Commission will have a robust discussion on rankings so that members can come back with multiple proposals.

7. Sentencing Guidelines Neutrality Review, Part 1

This was on the agenda as a discussion item.

Director Reitz presented staff presentation entitled, “Sentencing Guidelines Neutrality Review, Part 1.” Director Reitz discussed sentencing neutrality with respect to race, the Commission’s research mandate, and research within existing MSGC resources. A discussion ensued.

Director Reitz also discussed the varying topics of research including individual characteristics, research into the criminal justice system, including presentence, sentence, and post sentence data. Director Reitz asked the Commission what the next steps for staff should be.

Chair Mitchell stated that the focus on sentencing is the primary focus and Commission members agreed. Director Reitz asked if the Commission was interested in the research into individual characteristics, particularly data that may be available through the courts including defendant’s zip code, whether defendant qualified for public defender, and ICE holds’ existence.

A discussion ensued. A consensus was confirmed to focus strictly on sentencing policies that may show a disparate impact on race, gender, and other factors.

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 Director Reitz to give an update about the Criminal Sexual Conduct Statutory Reform Working Group. Director Reitz explained that he was missing the meeting on the professional occupational relationships committee because it conflicted with the Commission meeting.

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 stated that the taskforce's next meeting is August 5, 2020.

9. Executive Director's Report

Director Reitz stated that the agency had a deficiency in the budget for fiscal year 2020 and that the new estimated deficiency for fiscal year 2021 is about \$11,000. Director Reitz stated that they are current estimates and numbers will be finalized in a few weeks. Director Reitz stated that there will likely be reductions in staff hours next year, most likely at the end of June 2021.

Director Reitz stated that he Chair Mitchell would be presenting to the Tribal Court and State Court Forum on Friday, July 24, and that he will be presenting to the Criminal Justice Institute next month.

Director Reitz reported that the Minn. Court of Appeals decision regarding the timing of 2019 Sentencing Guidelines changes, *State v. Robinette*, was accepted for review by the Minn. Supreme Court.

Director Reitz stated that Mr. Orput did submit his resignation and there are two applicants for the vacancy. Director Reitz explained that there are two candidates for the position, one of whom is eligible. Director Reitz stated that the eligible candidate is Wadena County Attorney Kyra Ladd. Director Reitz said that the Governor may decide on the appointment as soon as he wishes to do so.

10. Recognition of Service – Peter Orput, Washington County Attorney

Chair Mitchell moved item 11, Recognition of Service – Peter Orput, Washington County Attorney before agenda item 10, Public Input, without objection. Chair Mitchell stated that she enjoyed working with Mr. Orput and was sorry to see Mr. Orput leave the Commission. Chair Mitchell stated that Mr. Orput was the County Attorney representative for 4 years, appointed by Governor Dayton in 2016, and re-appointed in 2019. Chair Mitchell stated that Mr. Orput has been the Washington County Attorney for the last 8 years at least and in the past has also served as a violent crimes prosecutor for Hennepin County, general counsel for the Department of Corrections, a high school history teacher, and a United States Marine.

Chair Mitchell stated that Mr. Orput's unique history brought perspective that greatly enriched the commission. Chair Mitchell stated that Mr. Orput has been instrumental in bringing forth significant changes to criminal history that occurred in the last few years, including the severe violent offense enhancements and the probation length. Chair Mitchell stated that Mr. Orput has been part of innovative practices of dosage probation and programs to proactively reach out to people to expunge their convictions for drug offenses after the Drug Sentencing Reform Act. Chair Mitchell stated that she really admires Mr. Orput's work on the commission and enjoyed having Mr. Orput on the Commission. Commission members and MSGC staff thanked Mr. Orput for his service on the commission.

Mr. Orput stated that he was thankful to work with Chair Mitchell and Justice Dietzen. Mr. Orput stated that he is also proud to have worked with the first veterans court and he is currently still working with the legislature on the Veterans Justice Rehabilitation Act. Mr. Orput stated that he appreciates the hard work of the Commission and would like them to welcome Ms. Ladd.

11. Public Input

Chair Mitchell asked if any member of the public present wished to speak. No members of the public spoke.

12. Adjournment

The meeting adjourned at 3:43 p.m., without objection.