

## Draft Minutes of the Special Commission Meeting – Custody Status Roundtable

**July 21, 2022**

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A special meeting of the Minnesota Sentencing Guidelines Commission took place on Thursday, July 21, 2022, at 1:00 p.m. in Room 230, Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155; and by telephone and/or electronically. The purpose of the special meeting was to conduct a roundtable on the custody status component of the criminal history score.

Commission members present were Commission Chair Kelly Lyn Mitchell, Vice-Chair Valerie Estrada, and members Mohamoud Ibrahim, Judge David Knutson, Kyra Ladd, Judge Michelle Larkin, Cathryn Middlebrook, Justice Gordon L. Moore, III, Brooke Morath, and Commissioner of Corrections Paul Schnell. Professor Kevin Reitz, University of Minnesota Law School, was present as the roundtable moderator. Also present were invited roundtable participants John Chitwood, Minn. Association of Criminal Defense Lawyers board member; Rep. Athena Hollins, Minn. House of Representatives; Catherine Johnson, Minn. Association of Community Corrections Act Counties president; Artika Roller, Minn. Coalition Against Sexual Assault executive director; Robert Small, Minn. County Attorneys Association executive director; Justin Terrell, Minn. Justice Research Center executive director; and David Zimmer, Center of the American Experiment policy fellow. MSGC staff members present in person were Executive Director Nate Reitz and staff members Jill Payne and Shanna Mohabir. Members of the public present in person included Elliot Butay.

The meeting was open to the public, and members of the public were allowed to monitor the meeting remotely, the notice required by Minn. Stat. § 13D.015 having been posted on the MSGC website on July 7, 2022. No Commission members or roundtable participants attended by telephone and/or electronically. Present by telephone and/or electronically were MSGC staff members Linda McBrayer, Kathleen Madland, and Anne Wall, and 17 members of the public including Ben Johnson, Dana Ferguson, Dana Mahoney, John Hultquist, Jacqueline Williams, Matt Majovski, Pafoua Yang, Stephanie Engel, Elizabeth Ruhland, Julie Wicklund, Rachel Aplikowski, Michelle Hipsag, Jocelyn Williams, Lisa Walker, Elliot Butay and Kelly Janssen.

### 1. Welcome and Introductions

Director Nate Reitz began the meeting at 1:05 p.m., by welcoming everyone and gave information about room logistics before turning it over to Commission Chair Mitchell who explained that the purpose of the special meeting was to conduct a roundtable on the custody status component of the

criminal history score. Chair Mitchell said that the format of the meeting was intended to be a collaborative, problem-solving workshop between Commission members and invited guests.

Chair Mitchell introduced the facilitator, University of Minnesota Law School Professor Kevin Reitz saying that the Commission was honored to have Prof. Reitz facilitate because he has been a national expert on sentencing guidelines for most of his career and was one of the creators of the National Association of Sentencing Commission (NASC). Chair Mitchell introduced herself and the roundtable participants each introduced themselves.

## **2. Staff Background Presentation/Information Relating to Custody Status**

Director Reitz presented “Staff Background Presentation” dated July 21, 2022. Director Reitz began with an overview of the Minnesota Sentencing Guidelines explaining the primary consideration is public safety. Director Reitz went on to explain the 2016 to 2018 criminal history review of each of the criminal history components which was conducted by the Robina Institute of Criminal Law and Criminal Justice which reported that Minnesota’s criminal history score was moderately predictive of recidivism and that the custody status point increased the presumptive sentence length without adding to the score’s predictive power for recidivism. Director Reitz reviewed sentencing practices including case distribution for those people having a custody status point by race & ethnicity, gender, grid, and offense type and reported that the average criminal history score had increased over time, from 1.7 in the mid- to late-90s to 2.5 by 2018; that probation made up the largest percentage of those on custody status at 78 percent; that the percentage with custody status points in their criminal history had risen markedly over the past 20 years, with the Black and American Indian demographic groups consistently leading the annual percentages; that 16 percent of executed prison sentences were presumptive commits due to custody status; that, among the remainder, the average durational increase attributable to custody status was 3.3 months. Director Reitz explained that, due to a technical mistake in implementing the creation of the half custody status point in 2018, partial custody status points are now disregarded when calculating the presumptive sentence (*State v. Beganovic*, 974 N.W.2d 278, 288 (Minn. App. 2022), *review granted on other grounds* (Minn. June 29, 2022)), thus creating tension between the Guidelines language and practice. Director Reitz explained the resolution brought to public hearing by the Commission to eliminate the custody status point was not adopted because the Commission sought more public input and wished to further educate the public, which led to this roundtable.

## **3. Facilitator-Led Discussion (Kevin Reitz, Professor, University of Minnesota Law School)**

Professor Reitz began by asking whether participants had questions or initial reactions to the staff presentation. There was a question for staff as to whether the Commission ever considered rounding in the one-half custody status point when the policy was changed. Director Reitz said that, in 2018, staff incorrectly assumed such rounding would happen; that, in 2020, staff proposed to correct the error by amending the rounding rules; and that the Commission initially supported, but ultimately rejected, staff’s proposal.

Prof. Reitz asked questions to help facilitate the conversation: What is the underlying purpose to the custody status point? Why is it used? Is it for punishment? Are these people more dangerous or more likely to be a recidivist?

Some participants said it was a matter of these people being blameworthy and that similarly situated people should receive the same punishment but if one person was on custody status and one person was not, they should be treated differently.

Some disagreed with the custody status point because it was not predictive of recidivism and enforcement of laws were not universal and this was true especially in communities of color.

Some thought there were other ways to account for custody status because the type of supervision can vary dramatically in intensity—including probation in name only, probation to the court, and one-on-one intensive probation—and suggested that less restrictive probation should not necessarily receive a custody status point.

Some thought custody status was relevant because people should not be allowed to maintain their status in the community when they have violated a generous opportunity to be on probation rather than in prison. This point was illustrated by a parental analogy: if a parent doesn't sanction a child who has done wrong, what prevents the child from doing it again?

Some wanted to make distinctions between punishment and accountability; *i.e.*, there are ways to hold people accountable and get them services without punishment.

Some suggested discretion should be given to the court when assigning custody status while others disagreed because this would lead to less uniformity.

At 2:43 p.m., the group took a short break. The roundtable resumed at 2:55 p.m.

#### **4. Wrap-up/ Themes**

After the break, Prof. Reitz discussed whether the group wished to move on to discuss implementation recognizing one option was to do nothing; *i.e.*, keep the status quo. Prof. Reitz summarized the earlier discussion noting two dimensions to the conversation: one was about public safety and applying a sanction to those people who were concerning and worrisome; and the other was about the nuance of custody status given there were different levels of supervision and there may be a need to make further distinctions in who gets custody status sanctions.

Professor Reitz took the remainder of the time to ask participants to go around the room and share their views about the custody status issue. Some wished to modify the custody status policy and some wished to eliminate it. There was discussion about the fact that the Commission had recently changed its policy, and it was suggested that the error could just be corrected by less drastic means than eliminating the custody status policy. There was a discussion about race and ethnicity and how Black and Indigenous people in Minnesota are disproportionately impacted by public safety policies, reminding the Commission that its policy decisions have impacts for generations of people. There were discussions about how public-safety policies should build safe communities for all Minnesotans. There

were discussions about the impact on victims and survivors of crime and that justice may look different to individual victims and survivors. There were discussions about finding middle-ground with a nuanced proposal and the possibility for compromise.

Prof. Reitz reviewed examples of demographic impact statements and how they are used by the Commission to review how proposals may impact people by race & ethnicity, sex, and judicial district if adopted.

Chair Mitchell thanked Professor Reitz for facilitating and asked commissioners to be prepared to discuss the roundtable and the one-half custody status issue at its next regularly scheduled meeting Thursday, July 28, 2022.

## **5. Public Comment**

Chair Mitchell asked if members of the public present either in person or by telephone and/or electronically wished to speak. No members of the public were present in person at that time. Four public members present by telephone and/or electronically asked to speak.

Lisa Walker, a crime victim, shared her story with the group and the affects it continues to have on her and her daughter who was the victim of a carjacking. She mentioned that she testified at the Public Hearing in December of 2021 as well. Walker expressed that she appreciated what everyone at the meeting had to say. Walker said these problems were deep-rooted. She stated that the current message is that you can keep reoffending and there will be no repercussions. Walker thanked the group for their time.

Matt Majovski, a Dakota County probation officer speaking only for himself, stated that he would like to support what was said about the custody status point. He provided his views on the custody status point based on his experience being a probation officer. Majovski thanked the group for their time.

Michelle Hipsag, a victim thanked the group for holding the meeting. She found these meetings to be informative and appreciated hearing different points of view. She expressed that she appreciated Commissioner Judge Larkin's honest opinion on the custody status point. Higsag stated that if we keep rewarding bad behavior what will it get us and would like to know what is causing the recidivism in Minnesota. She is not in favor of eliminating the custody status point and would like to know what the root of the problem is.

Jocelyn Williams, an attorney, agreed with Commissioner Judge Larkin and that public safety needs to be a priority. She stated that eliminating the custody status point would be sending the wrong message. Williams discussed the two possible proposals she heard during the meeting. She thanked the group for their time.

## **6. Adjournment**

The business of the roundtable having concluded, the special Commission meeting adjourned at 4:39 p.m., without objection.