

## Approved Meeting Minutes

**March 11, 2021**

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A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on March 11, 2021. Due to the ongoing health pandemic and peacetime emergency, 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 March 5, 2021.

Present electronically were Commission Chair Kelly Lyn Mitchell, Vice-Chair Valerie Estrada, and members Captain Brooke Blakey, Justice (Ret.) Christopher Dietzen, Tonja Honsey, Kyra Ladd, Judge Michelle Larkin, Judge Kevin Mark, Cathryn Middlebrook, and Commissioner of Corrections Paul Schnell. Also present by telephone and/or electronically were Executive Director Nate Reitz and MSGC staff members Kathleen Madland, Linda McBrayer, Jill Payne, and Anne Wall.

Members of the public present by telephone and/or electronically were Elliot Butay; Amy Johnson; James Johnson; Ashlee Lloyd; and Robert Small, Minn. County Attorneys Association.

### **1. Call to Order & Roll Call**

Chair Mitchell called the meeting to order at 1:01 p.m.

Chair Mitchell explained that the meeting was being held by telephone and Internet as authorized by statute, which applied because an in-person meeting was not practical or prudent due to the health pandemic and peacetime emergency.

Chair Mitchell asked Director Reitz to call the roll.

Present electronically were Commission Chair Kelly Lyn Mitchell, Vice-Chair Valerie Estrada, and members Captain Brooke Blakey, Justice (Ret.) Christopher Dietzen, Tonja Honsey, Kyra Ladd, Judge Michelle Larkin, Judge Kevin Mark, and Cathryn Middlebrook. Nine members were present; two members were absent. A quorum was present.

Chair Mitchell welcomed Commissioner Blakey as the new peace officer member and asked her to introduce herself. Commissioner Blakey said she is a Police Captain with the Metro Transit Police Department, and that her education is in forensic psychology where she holds a Master's Degree. Commissioner Blakey said that before becoming a police officer she worked for the Ramsey County Public Defender's Office.

## 2. Approval of Agenda

This was on the agenda as an action item.

To accommodate guest speakers, Chair Mitchell requested that the agenda be amended so that approval of the meeting minutes would follow item 5.

**Motion** by Commissioner Dietzen and second by Commissioner Larkin to approve the meeting agenda, as amended.

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

Voting “Yes” were Chair Mitchell, Vice-Chair Estrada, and members Commissioners Blakey, Dietzen, Honsey, Ladd, Larkin, Mark, and Middlebrook.

## 3. Racial Disparity Considerations in Sentencing Council of England and Wales

This was on the agenda as a discussion item.

Chair Mitchell welcomed to the Commission Dr. Julian Roberts, a Professor at the University of Oxford, a former member of the Sentencing Council of England and Wales, and a foreign advisor to the American Law Institute Model Penal Code Sentencing project. Chair Mitchell said that Dr. Roberts’s latest book is called, *Paying for the Past*. Ahead of the meeting, Dr. Roberts prepared a background memo to the Commission entitled “*Sentencing Guidelines and Black and Minority Ethnic Offenders, Background Memo for Presentation to the MSGC, Julian Roberts, University of Oxford.*”

Dr. Roberts talked about the experience of the Sentencing Council of England and Wales and racial disproportionality and the Council’s response to it. Dr. Roberts presented the initiative developed in England and Wales in the context that it may be relevant as the Commission begins its neutrality review. Dr. Roberts observed that Minnesota has had the same eight words in its Guidelines manual for over 40 years related to race, “[S]entencing should be neutral with respect to...race....” He suggested that it may be time for the Commission to consider whether it needs to evaluate this statement in the context of today’s circumstances and acknowledge that while sentencing must be neutral with respect to race, it is not necessarily blind to race. Dr. Roberts questioned whether Minnesota’s Guidelines may wish to give additional guidance with respect to race. The Commission asked questions and discussed such things as how it could be more intentional about presenting its demographic data. Chair Mitchell thanked Dr. Roberts for his time and discussing the initiative with the Commission.

## 4. Crimes of Violence Definitions

This was on the agenda as a discussion item.

Chair Mitchell asked Commissioner Honsey to introduce the agenda item. Commissioner Honsey thanked the other Commissioners for putting this item on its agenda. Commissioner Honsey specifically

wanted to address that in Minnesota, all controlled substance crimes under Minn. Stat. Chapter 152 are defined as crimes of violence; therefore, by definition, there is no such thing as a “non-violent drug crime” in Minnesota and that creates collateral consequences for people who are convicted when they are trying to get a second chance when moving forward with their lives. Commissioner Honsey next introduced her guest speaker Ramsey County Attorney John Choi.

County Attorney Choi thanked the Commission for the opportunity to engage with the Commission on this topic and discuss the work done in Ramsey County related to inequities in the cash bail system. County Attorney Choi explained that a working group of community leaders developed a public safety risk assessment tool used by the Sheriff’s Office addressing the question of who needs to be in jail pending charges. County Attorney Choi said that one of the major factors in developing the tool was to determine how to define “violent crime,” and that there was more latitude than necessarily using definitions in statute. County Attorney Choi said that most importantly, it listened and engaged with the community to develop the risk assessment tool. Commissioner Honsey spoke of her justice-involved experience as well.

The Commission discussed collateral consequences, impact on community members, fact finding for violent crimes, which crimes should be deemed violent and which should not. Members asked questions of County Attorney Choi and Commissioner Honsey and discussed the role of the Commission and the Guidelines.

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

This was on the agenda as an action item.

The time was 2:12 p.m., and Chair Mitchell noted for the record that Commissioner Schnell had joined the meeting. The Commission members and staff introduced themselves to Commissioner Blakey.

**Motion** by Vice-Chair Estrada and second by Commissioner Middlebrook to approve the meeting minutes from February 11, 2021.

**Motion carried** on an 8-0-2 roll-call vote.

Voting “Yes” were Chair Mitchell, Vice-Chair Estrada, and members Commissioners Honsey, Ladd, Larkin, Mark, Middlebrook, and Schnell.

Commissioners Blakey and Dietzen abstained.

### **6. Communication Regarding Partial Points in Criminal History**

This was on the agenda as an action item.

Chair Mitchell called on Director Reitz to introduce the agenda item. Director Reitz said that, although the item was on the agenda as an action item, he did not necessarily need a vote by the Commission.

Director Reitz displayed a staff drafted memorandum from Director Reitz to district court judges, probation officers, and other criminal justice practitioners entitled “Worksheet Calculation Error – One-Half Custody Status Point.” Director Reitz explained that the memo described the error in sentencing worksheets’ automatic calculation of criminal history scores, background of the error, guidance, examples. Director Reitz looked to the Commission for feedback.

Chair Mitchell recommended sending the memo to the Minnesota County Attorney’s Association and the Chief Public Defender for distribution to County Attorneys and Public Defenders. Vice-Chair Estrada suggested that the memo should address a juvenile point and a misdemeanor/gross misdemeanor point. Director Reitz said that he would make those changes and expected to get the memo sent out to practitioners next week.

## **7. Sentencing Departures – Staff Presentation**

This was on the agenda as a discussion item.

Chair Mitchell said that this was brought before the Commission because it was articulated as a Commission priority for 2021, and that this was an initial review and could be expanded upon. Commission staff presented slides on actual and presumptive prison rates, total departure rates, mitigated dispositional departures rates for presumptive commitment offenses by offense type, select high departure-rate offenses compared to the total rate, and mitigated departures by gender, race or ethnicity, and judicial district.

The Commission discussed the presentation and asked questions.

Chair Mitchell noted that failure to register as a predatory offender and controlled substance crimes in the second degree were both high mitigated dispositional departure offenses and high mitigated durational departure offenses.

Chair Mitchell asked staff to bring back more information on historical rates of departure for certain high mitigated departure-rate offenses and to bring back more detailed information on actual and presumptive prison rates and which area of the grid these cases appear. (The “area of the grid” concept was developed by Prof. Richard Frase from the University of Minnesota Law School.)

The Commission discussed the high departure-rates for failure to register as a predatory offender, assault in the second degree and wished to look at offenses historically, and asked questions about other trends such as departures for controlled substance offenses since the Drug Sentencing Reform Act passed in 2016.

Vice-Chair Estrada made note that the Commission discussed assault in the second degree when it passed its policy for Severe Violent Offenses and the Commission discussed that the substantial bodily harm clause (subd. 2) has the same statutory maximum as subdivision 1 but an additional element.

Chair Mitchell thanked staff and said the Commission would continue to delve into departures for specific offenses and offense types and look at the trends over time. Chair Mitchell also said that Professor Frase would most likely be presenting at the April meeting about the three areas of the grid.

#### **8. Staff-Drafted Possible Technical Correction – Conditional Release Reference in the Guidelines**

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz who explained a technical error in a statutory reference in the Guidelines that needed correcting, and that staff wished to bring it forward in March for discussion so that the Commission could act on it in April.

#### **9. Working Group/Task Force – Community Competency Restoration Task Force Report**

This was on the agenda as a discussion item.

Chair Mitchell called on Commissioner Middlebrook who said that the Community Competency Restoration Task Force Report was published on the Department of Human Services website and submitted to the Legislature in February 2021. Commissioner Middlebrook said that members could contact her directly with any questions.

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

Director Reitz reported on the following items.

- Mr. Reitz reported that, by the first Legislative deadline, tomorrow, bills must have passed out of committee or they are presumably “dead.” House Bills being tracked by staff a bill requiring presentence investigations to include brain injury information; a bill overhauling criminal sexual conduct laws; a bill changing sex trafficking and prostitution laws; a bill regulating marijuana and legalizing possession of modest amounts of cannabis, particularly if obtained from licensed cannabis businesses. Mr. Reitz reported that the bill related to sentencing worksheets in the absence of PSIs (HF 167) was amended to continue to require submission of worksheets as was discussed at the February meeting. Senate Bills included a bill to increase mandatory penalties for 1st Degree assault on peace officers; and a bill adopting the MSGC minority report for child pornography rankings. Director Reitz reported that the second committee deadline is March 19.
- Demographic Impact Statements have been slowed by a staff shortage this year. When drafted by staff, Commission members will be provided an opportunity by email for comment before they are sent to the Legislature.
- Staff recently learned that the ruling from the Court of Appeals in *Robinette* – which held that the Commission does not have the power to abrogate the amelioration doctrine for the 2019 changes that took immediate effect – is binding precedent even though it is pending further review by the Minnesota Supreme Court. Director Reitz explained that staff has held off on putting out any

guidance until that review was complete, assuming that the matter was not final until the Supreme Court weighed in. *State v. Robinette*, 944 N.W.2d 242 (Minn. Ct. App. 2020), *review granted* (Minn. June 20, 2020); *State v. Chauvin*, No. A21-0201 (Minn. Ct. App. March 5, 2021).

- The short-term agency budget situation is improving due to the staffing shortage. Staff is exploring possible avenues for external research assistance to complete the neutrality review.
- Meetings continue to be held by telephone and Internet as authorized by Minn. Stat. § 13D.021, which has applied because in-person meetings have not been practical, prudent, or feasible due to the health pandemic and peacetime emergency. The situation may change this summer. Staff will know more soon and will update the Commission.

### **11. Public Input**

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

### **12. Adjournment**

The meeting adjourned at 3:37 p.m., without objection.