

Approved Meeting Minutes

June 3, 2021

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on June 3, 2021. Due to the ongoing health pandemic and peacetime emergency, the Chair determined that it was not practical, prudent, or feasible for members of the Commission, staff, 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 May 27, 2021.

Present electronically were Commission Chair Kelly Lyn Mitchell, Vice-Chair Valerie Estrada, and members Captain Brooke Blakey, Justice Christopher Dietzen (Retired), Abby Honold, 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 MSGC 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 Christina Warren, Senior Attorney, Office of Hennepin County Attorney – Sexual Assault Initiative; Suzanne Elwell, Director, Crime Victim Justice Unit, Office of Justice Programs, Minnesota Department of Public Safety; Elliot Butay; Kevin Featherly, BridgeTower Media; Matt Majovski, Dakota County Community Corrections; and Robert Small, Minn. County Attorneys Association.

1. Call to Order & Roll Call

Chair Mitchell called the meeting to order at 1:00 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 Christopher Dietzen (Retired), Abby Honold, Tonja Honsey, Kyra Ladd, Judge Michelle Larkin, Judge Kevin Mark, and Cathryn Middlebrook. 10 members were present; one member was absent. A quorum was present.

2. Approval of Agenda

This was on the agenda as an action item.

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

Motion carried unanimously on a 10–0 roll-call vote.

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

3. Approval of Draft Meeting Minutes

This was on the agenda as an action item.

Motion by Commissioner Mark and second by Commissioner Larkin to approve the meeting minutes from May 6, 2021.

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

Voting “Yes” were Chair Mitchell, Vice-Chair Estrada, and commissioners Blakey, Honold, Honsey, Ladd, Larkin, Mark, and Middlebrook. Commissioner Dietzen abstained.

Chair Mitchell explained that much of today’s meeting was in preparation for action to be taken at a later date on crime laws that will be enacted as a result of the forthcoming 1st Special Session of the 2021 Legislative Session.

4. Proponents’ Rationale for Dividing Criminal Sexual Conduct Offenses by Adult & Child Victims – *Christina Warren, Hennepin County Attorney’s Office, & Suzanne Elwell, Dep’t of Public Safety* (Discussion)

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz to introduce the item. Director Reitz explained that the Criminal Sexual Conduct Statutory Reform Working Group convened in 2019 as a multidisciplinary working group to examine the statutory framework for criminal sexual conduct crimes and were required to file a report to the legislature by January 15, 2021. Director Reitz welcomed to the Commission two members of Steering Committee: Christina Warren, Senior Attorney, Office of Hennepin County Attorney – Sexual Assault Initiative; and Suzanne Elwell, Director, Crime Victim Justice Unit, Office of Justice Programs, Minnesota Department of Public Safety.

At 1:09 p.m., Commissioner Paul Schnell had joined the meeting.

Ms. Warren was a member of the working group’s steering committee and several subcommittees, including the age subcommittee, which had, as one of its objectives, to restructure the criminal sexual conduct statutes. The age subcommittee proposed creating a second subdivision that would apply to child victims to distinguish them from adult victims. Ms. Warren said that when issues of sentencing and punishment would arise, the subcommittee remained silent.

Ms. Elwell, the Working Group Coordinator, said that some members wished to take a wholesale approach to reorganizing the criminal sexual conduct statutes and start from scratch, while others wished to only reorganize and separate child victims from adult victims. Ms. Elwell said subcommittees avoided sentencing issues because it was outside the scope of the working group and there was not the time or capacity. Ms. Elwell said Department of Public Safety took no role in crafting legislation; rather, the language from the report was agreed upon and stakeholders pursued legislation based off the report.

The Commission discussed the item. One member noted that the testimony did not leave them thinking there was not any desire to make sentencing distinctions for child victims. One member, who participated on a subcommittee, said issues of consequences and impact came up routinely and it was understood that they were out of scope but they were naturally discussed.

Chair Mitchell thanked the guests for their testimony.

5. Commission's Response to Current Legislative Situation (Action)

This was on the agenda as an action item.

Chair Mitchell called on Director Reitz who presented the staff issue paper on "Commission's Response to Current Legislative Situation" dated May 26, 2021. Director Reitz explained that the 2021 Regular Session ended with the enactment of little criminal legislation of significance, but he anticipated that the 2021 First Special Session would likely produce significant crime laws.

Director Reitz asked the Commission to first review the work of the 2021 Regular Session (presented in agenda item 6, below), and return to this item and consider revising its meeting calendar and consider making a recommendation to the Legislature regarding effective dates. He also asked the Commission to consider directing staff to reassess its fiscal note analysis, if appropriate, as a result of the review of agenda item 7, below.

6. Review Regular Session Amendments to Crime Laws Affecting the Guidelines (Action)

This was on the agenda as an action item. Chair Mitchell called on Director Reitz who presented the document, "Amendments to Crime Laws Affecting the Guidelines" dated May 27, 2021. Director Reitz asked the Commission to consider taking action on one technical amendment (in section A) resulting from a law that passed during the 2021 Regular Session directly affecting the Guidelines. Director Reitz explained that the other items (in section B of the document) were simply being brought to the Commission's attention, with no action required or recommended by staff.

With respect to the action item, Director Reitz explained that Identity Theft was being amended to separate two crimes now codified under the same penalty (Minn. Stat. § 609.527, subd. 3, clause (5)). Under current law, identity theft involving eight or more direct victims or a combined, total loss to all victims of more than \$35,000 appears in the same clause as identity theft related to possession or distribution of child pornography (regardless of the number of victims or total loss). Effective August 1, 2021, the law will divide the child-pornography-related offense into a new clause (6). Director Reitz

explained that staff recommends making conforming and technical modifications to how the offenses are described in the lists of severity level offense references in section 5 of the Guidelines.

Motion by Commissioner Dietzen and second by Commissioner Larkin to advance to public hearing a proposal to rank Identity Theft (8 or More Direct Victims or Loss Over \$35,000) under Minn. Stat. § 609.527, subd. 3(5); and Identity Theft (Related to Child Pornography) under Minn. Stat. § 609.527, subd. 3(6) at Severity Level 8 and make conforming and technical modifications, as follows.

Discussion: The Commission asked how many cases of identity theft related to possession or distribution of child pornography there were. Staff indicated that, based on review of recorded statute information, it knew of no convictions.

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

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

During the course of roll-call voting, after Vice-Chair Estrada and Commissioner Blakey had cast their votes, the maker of the motion wished to clarify that the proposed modifications were subject to a final vote after a future public hearing. Neither Vice-Chair Estrada nor Commissioner Blakey wished to change their votes after the motion was clarified.

Possible Amendments to 2020 Minn. Sentencing Guidelines § 5:

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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
8	Identity Theft <u>(8 or More Direct Victims or Loss Over \$35,000)</u>	609.527, subd. 3(5)
	<u>Identity Theft (Related to Child Pornography)</u>	<u>609.527, subd. 3(6)</u>
3	Identity Theft <u>(4–7 Direct Victims or Loss Over \$2,500)</u>	609.527, subd. 3(4)

Severity Level	Offense Title	Statute Number
2	Identity Theft (<u>2–3 Direct Victims or \$501–\$2,500 Loss</u>)	609.527, subd. 3(3)

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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
609.527 subd. 3(3)	Identity Theft (<u>2–3 Direct Victims or \$501–\$2,500 Loss</u>)	2
609.527 subd. 3(4)	Identity Theft (<u>4–7 Direct Victims or Loss Over \$2,500</u>)	3
609.527 subd. 3(5)	Identity Theft (<u>8 or More Direct Victims or Loss Over \$35,000</u>)	8
<u>609.527 subd. 3(6)</u>	<u>Identity Theft (Related to Child Pornography)</u>	<u>8</u>

* * *

Chair Mitchell called on Director Reitz to take the Commission back through the issue in agenda item 5 of whether it wished to revise its meeting calendar in light of the fact that the 2021 Regular Session ended with only technical amendment made to identity theft affecting the Guidelines. Director Reitz presented “Alternative Revision of Future Meeting & Hearing Dates” dated May 28, 2021, which recommended rescheduling the July 15, 2021, public hearing to September 1, 2021. The remainder of the calendar would not change.

Motion by Commissioner Mark and second by Commissioner Larkin to cancel the public hearing on July 15, 2021, and reschedule it for September 1, 2021.

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

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

Chair Mitchell asked, in light of the legislative delay described in agenda item 5 and the Commission's decision to reschedule the public hearing, whether the Commission wish to adopt a resolution recommending that the Legislature postpone the effective date of the special session's criminal law changes in order to synchronize the effective date of the special session laws with the release of the Sentencing Guidelines. The Commission discussed possible delay dates and how a later date may affect policy.

Motion by Commissioner Dietzen and second by Commissioner Middlebrook to adopt a resolution recommending that the Legislature postpone, from August 1, 2021, to September 15, 2021, the effective dates of changes to crime and sentencing laws enacted in the 2021 First Special Session.

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

Voting "Yes" were Chair Mitchell, Vice-Chair Estrada, and commissioners Blakey, Dietzen, Honold, Honsey, Ladd, Larkin, Mark, Middlebrook and Schnell.

7. Review Possible Special Session Amendments to Crime Laws Affecting the Guidelines (Discussion)

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz, who presented "Possible Amendments to Crime Laws Affecting the Guidelines," dated May 27, 2021. Director Reitz said that, as was discussed in agenda item 5, above, the 2021 regular legislative session adjourned without agreement on the public safety omnibus bill, and that the document included potential staff recommendations in advance of possible first special session amendments.

Director Reitz presented Possible Changes to Sex Offenses (agenda item 7.A); Sex Trafficking, Prostitution, & Solicitation of Children Offenses (agenda item 7.B); Possible Changes to Other Criminal Offenses (agenda item 7.C); and Possible Changes to Sentencing Policy (agenda item 7.D). The Commission asked questions and discussed the items.

Under agenda item 7.A.3, Creation of New Criminal Sexual Conduct Fifth Degree Offense, it was suggested that it may be helpful to add a footnote to the Sex Offender Grid next to the new CSC 5 offense to note that the statutory maximum was 24 months. There was discussion about whether this was advantageous because this was not current practice; current practice would be to include in Guidelines section 5.B a footnote identifying the issue, and to list the offense in Appendix 3, which shows offenses where the presumptive duration exceeds the statutory maximum.

Under agenda item 7.D.5, Limiting Imprisonment for Gross Misdemeanors, some members found the possible law change confusing, and some objected to the staff recommendation to amend Comment 2.D.105, which pertains to misdemeanor and gross misdemeanor sentences for felony convictions, saying it was not necessary to add a sentence to clarify that a 365-day sentence is still a misdemeanor.

Director Reitz then proceeded to present agenda item 7.E, “Special Topic – Dividing Criminal Sexual Conduct Offenses by Adult & Child Victims.” After the presentation, a member noted that the time was 3:28 p.m. and that this was a very important item that would need more time on the agenda. Chair Mitchell said the Commission would have time in July to have a robust discussion before a vote and that the objective for today was to introduce it and review the staff recommendations to determine if the Commission would like to see anything different from the staff in July. Members agreed it would also be important to discuss and see the prison bed impact of dividing criminal sexual conduct by adult and child victims.

8. Executive Director Report

Director Reitz asked public members to submit outstanding per diem reimbursement requests to MSGC staff by the end of the fiscal year on June 30th.

9. Public Input

Chair Mitchell asked if any member of the public present wished to speak. Matt Majovski, Dakota County Community Corrections spoke about the possible legislative change to the default maximum penalty for a gross misdemeanor change from “one year” to “364 days” which was covered under agenda item 7.D.5. Mr. Majovski spoke in favor of the staff’s recommendation to amend Comment 2.D.105 to make it clear to practitioners that a 365-day sentence is still a gross misdemeanor sentence, and therefore a Guidelines departure.

10. Adjournment

The meeting adjourned at 3:50 p.m., without objection.