

Approved Meeting Minutes

September 9, 2021

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on September 9, 2021, in the Minnesota State Capitol Building, Room G3, 75 Dr Martin Luther King, Jr Blvd., St. Paul, MN 55155.

Present in person were Commission Chair Kelly Lyn Mitchell and members Judge David Knutson, Cathryn Middlebrook, and Justice Gordon L. Moore, III. Also present in person were MSGC Executive Director Nate Reitz and staff member Linda McBrayer.

Present by telephone and/or electronically were Vice-Chair Valerie Estrada and members Tonja Honsey, Kyra Ladd, Judge Michelle Larkin, and Commissioner of Corrections Paul Schnell, the notice required by Minn. Stat. § 13D.015, having been posted on the MSGC website on August 30, 2021. Also present by telephone and/or electronically were MSGC staff members Kathleen Madland, Jill Payne and Anne Wall. Members of the public present by telephone and/or electronically were Justice (Ret.) Christopher Dietzen and Judge Kevin Mark, former Commission members; Benjamin Johnson, House Research; Kevin Featherly, Session/Law; Richard Frase, Professor at the University of Minnesota Law School; Elizabeth Ruhland; Max Page; and Robert Small, Minn. County Attorneys Association.

1. Call to Order & Roll Call

Chair Mitchell called the meeting to order at 1:03 p.m.

Chair Mitchell asked Director Reitz to call the roll.

Present were Chair Mitchell, Vice-Chair Estrada, and commissioners Honsey, Knutson, Ladd, Middlebrook, Moore, and Schnell. Eight members were present; two members were absent; and one seat was vacant. A quorum was present.

2. Approval of Agenda

This was on the agenda as an action item.

The time was 1:05 p.m., and Chair Mitchell noted that Commissioner Larkin had joined the meeting by electronic means.

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

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

Voting “Yes” were Chair Mitchell, Vice-Chair Estrada, and commissioners Honsey, Knutson, Ladd, Larkin, Middlebrook, Moore, and Schnell.

3. Recognition of Outgoing Members

This was on the agenda as a discussion item.

Chair Mitchell recognized three members who recently resigned from the Commission—retired Minnesota Supreme Court Justice Chris Dietzen, Public Member Abby Honold (who was unable to attend the meeting), and Chief Judge Kevin Mark—thanking them for their service and dedication to the Commission and the State of Minnesota.

Chair Mitchell and members welcomed two new members to the Commission: Judge David Knutson from the First Judicial District who is chambered in Dakota County; and Justice Gordon Moore, III, who was appointed to the Supreme Court in 2020.

4. Approval of Draft Meeting Minutes

This was on the agenda as an action item.

Motion by Commissioner Estrada and second by Commissioner Middlebrook to approve the meeting minutes from July 22, 2021.

Motion carried on a 7–0 roll-call vote.

Voting “Yes” were Chair Mitchell, Vice-Chair Estrada, and commissioners Honsey, Ladd, Larkin, Middlebrook, and Schnell. Commissioners Knutson and Moore abstained.

5. Review the Public Hearing Record (Discussion)

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz who reviewed the public hearing record, as follows:

- On Monday, August 2, 2021, the notice of public hearing was published in pages 105 through 106 of Volume 46 of the Minnesota State Register, a copy of which was in the meeting materials.
- On the same day, the contents of the proposed modifications were posted on the Commission’s website and an e-mail notice of public hearing was sent to persons who had signed up on the Commission’s website to receive informational e-mails, also copied in the meeting materials. Instructions for remote participation, by telephone or interactive technology, were also posted on the Commission’s web site at that time.
- No one was notified by United States mail because there are no longer members of the public on the Commission’s United States mailing list.

- Pursuant to the notice, the public hearing was conducted on September 1, 2021 at 1:00 p.m. Pursuant to the notice, the hearing was conducted both in-person, in Minnesota State Capitol Hearing Room G-3, and remotely by telephone or interactive technology.
- One Commission member, Chair Kelly Lyn Mitchell, participated in person. Five Commission members participated by interactive technology: Vice Chair Estrada and Commissioners Honsey, Knutson, Ladd, and Middlebrook. Staff member Nate Reitz attended the hearing in person, and staff members Linda McBrayer, Kathleen Madland, and Jill Payne attended the hearing by telephone or interactive technology. No members of the public attended the hearing in person, and three members of the public attended the hearing by telephone or interactive technology.
- Instructions for contacting the agency to register to testify were provided to the public on the Commission’s web site, and were reiterated by the Chair at the hearing. No members of the public contacted the agency in advance of the public hearing requesting to testify, nor did any member of the public in attendance contact the agency during the public hearing requesting to testify.
- 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.

Director Reitz said that the Commission appeared to have complied with all public notice and hearing requirements to permit it to take final action on the proposed modifications.

6. **Accept or Reject Proposals to Amend the Sentencing Guidelines (Action)**

This was on the agenda as an action item.

Chair Mitchell called on Director Reitz who presented the Notice of Public Hearing document entitled “Proposed Amendments to the Minnesota Sentencing Guidelines and Commentary” dated August 2, 2021, which contained three sections (A – C). Director Reitz pointed out parts of section A, “Legislative Amendments to Crime Laws Affecting the Guidelines – 2021 1st Special Session,” in which the Commission’s proposed modifications were different than MSGC staff recommendations from “Amendments to Crime Laws Affecting the Guidelines” dated July 16, 2021.

Chair Mitchell entertained a motion to finally adopt the proposed modifications in section A of the Notice of Public Hearing.

Motion by Commissioner Schnell and second by Commissioner Larkin to finally adopt the proposed modifications in section A of the Notice of Public Hearing.

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

Voting “Yes” were Chair Mitchell, Vice-Chair Estrada, and commissioners Honsey, Knutson, Ladd, Larkin, Middlebrook, Moore, and Schnell.

Chair Mitchell called on Director Reitz to present section B, “Legislative Amendments to Crime Laws Affecting the Guidelines – 2021 Regular Session” and section C, “Technical Correction – Update Conditional Release Statutory Reference.” Chair Mitchell asked if there were questions. Hearing none, Chair Mitchell entertained a motion to finally adopt the proposed modifications in sections B and C of the Notice of Public Hearing.

Motion by Commissioner Ladd and second by Commissioner Middlebrook to finally adopt the proposed modifications in sections B and C of the Notice of Public Hearing.

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

Voting “Yes” were Chair Mitchell, Vice-Chair Estrada, and commissioners Honsey, Knutson, Ladd, Larkin, Middlebrook, Moore, and Schnell.

7. Partial Points in Criminal History Working Group Update (Discussion)

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz who reviewed the staff information paper entitled, “A Brief Chronology of the Half Custody Status Point” dated September 2, 2021, which gave background on both the half custody status point and the rounding of partial points in the criminal history score.

Chair Mitchell explained that the goal of the Partial Point in Criminal History Working Group was to resolve the problem at hand of partial points in the criminal history score and that the working group met several times since the issue was discovered and discussed how custody status played a role in criminal history, and how to resolve the issue which included proposals described in the staff information paper entitled, “Four Custody Status Proposals” dated September 2, 2021.

Chair Mitchell said that today’s meeting would be spent discussing the purpose of custody status and, therefore, had invited esteemed Professor Richard Frase from the University of Minnesota Law School, who has made it his life’s work to study sentencing guidelines systems.

Professor Frase thanked Chair Mitchell and the Commission and discussed purposes of punishment that arguably justify a custody status point. Ahead of the meeting, Commission members received the copyrighted chapter, “Problematic Components Found in Many Criminal History Formulas” from the book entitled “Paying for the Past: The Case Against Prior Record Sentence Enhancements” authored by Julian V. Roberts and Richard S. Frase by the permission of the author.¹

¹ The material was not made available to the public, as doing so would violate copyright law. The publisher's synopsis of the chapter was provided instead. Please contact MSGC Staff on questions on how to purchase the book or examine the chapter.

The Commission had a lengthy discussion to include an overview of proposals in the staff information paper entitled, “Four Custody Status Proposals” dated September 2, 2021, and other proposals offered by members.

Chair Mitchell thanked members for the discussion and said that next month the Commission would continue the discussion and dig into each proposal.

8. *State v. Robinette* (Discussion)

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz who discussed the implications of *State v. Robinette* (Minn. 2021). Director Reitz discussed the common-law amelioration doctrine, identified in *State v. Kirby* (Minn. 2016), which applies when an amendment to criminal law contains no legislative statement clearly establishing intent to abrogate; the amendment mitigates punishment; and judgment in a particular case is not final on the amendment’s effective date. *Robinette* held that the Commission lacks the authority to abrogate the amelioration doctrine. Director Reitz observed that one apparent implication of *Robinette* is that all 2019 changes to criminal history score calculation appear to apply to all cases yet to be sentenced, even if committed before August 1, 2019.

Director Reitz said that staff was working with the Department of Corrections’ IT staff to develop a solution to implement this implication, and that the change was expected to be implemented soon. In light of *Robinette*, Director Reitz posed to the Commission the question of whether it wished to change Guidelines section 3.G.1—“Modifications to sections 1 through 8 of the Minnesota Sentencing Guidelines, and associated commentary and appendices, apply to offenders whose date of offense is on or after the specified modification effective date”—as it no longer seems to be a complete statement of the law.

Chair Mitchell asked if there were questions or comments from members; hearing none, the Chair suggested that the Commission continue to think about this issue.

9. Severe Violent Offense List (Discussion)

This was on the agenda as a discussion item.

Chair Mitchell called on Director Reitz who said that, following its July 22, 2021, meeting, and its discussion of whether to include a few new offenses on the Severe Violent Offense List, the Commission wished to study the list in its entirety for the criteria used in determining inclusion. Director Reitz referenced Guidelines Comment 2.G.03, which may be the Commission’s rationale for the list.

10. Treatment of Sex Offenses Divided in 2021 by Adult and Child Victims (Discussion)

This was on the agenda as a discussion item.

Director Reitz said that the Commission, following its July 22, 2021, meeting, requested more information about recidivism for those who offend against children vs adults. Director Reitz said that MSGC staff was unable to do an exhaustive literature review but found a recent academic article and summarized recent scholarly research on the topic. This was summarized in the MSGC staff information paper entitled, “Differences Between Individuals Who Sexually Offended Against Adult & Child Victims” dated September 8, 2021.

Chair Mitchell said this item and agenda item 9 will continue to be on the Commission’s agenda because it needs to continue these discussions towards resolution.

11. Executive Director Report

Director Reitz reported that the 2021 Sentencing Guidelines and Commentary, Revised September 15, 2021, will be published next week. Director Reitz also discussed that fact that hybrid and remote Commission meetings are recorded on WebEx, and the fact that the Commission does have a YouTube channel where recorded meetings could be uploaded. Director Reitz asked if this is something the Commission would like to do. No member objected and some members voiced support of the idea in the interest of transparency.

12. Public Input

No members of the public were present in person. Chair Mitchell asked if members of the public present by telephone and/or electronically wished to speak. Kevin Featherly from Session/Law spoke in favor of the Commission uploading its meetings to YouTube.

13. Adjournment

The meeting adjourned at 3:38 p.m., without objection.