

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
May 22, 2014

The Minnesota Sentencing Guidelines Commission (MSGC) meeting was held on May 22, 2014, at the Department of Corrections – Central Office, St. Croix Room; 1450 Energy Park Drive, St. Paul, Minnesota, 55108. Commission members present were Chair Jeffrey Edblad, Jason Anderson, Justice Christopher Dietzen, Judge Carrie Lennon, DOC Commissioner Tom Roy, Judge Heidi Schellhas, John Stuart, and Sarah Walker. MSGC staff members present were Interim Executive Director Anne Wall and Jill Payne. Members of the public present were Fatima Frahzen, Mark Haase, Council on Crime and Justice, and Andrew Morley, Student, St. John’s University. Jim Early from the Attorney General’s Office was also present.

1. Call to Order

The meeting was called to order at 2:03 p.m.

2. Approval of Meeting Minutes from March 20, 2014

Motion to approve minutes was made by Justice Dietzen and seconded by Jason Anderson.

Motion carried.

3. Executive Committee update on Vacant Executive Director Position

Chair Edblad gave an update. At its March, 20, 2014 meeting, the Commission delegated finalizing the job description and posting the position to the Executive Committee. Applications were accepted from March 28, 2014 through April 24, 2014. The Human Resources Department at the Department of Corrections screened the applicants for minimum qualifications. Twenty-nine applicants were forwarded to the Executive Committee for review. Executive Committee members will finish reviewing the candidates within the next week and the full Commission will conduct interviews of the finalists at its June 19, 2014, meeting. The meeting will be held at the State Capitol.

4. Legislative Modifications to the Guidelines

A. Amended Offenses: The Commission reviewed nine existing offenses that were amended by the 2014 Legislature to determine whether the offenses needed to be re-ranked based on the amendment. In some cases, the amendments expanded definitional statements; in others, the amendments expanded the scope of the

offense. The Commission discussed each amended offense and made the following motions.

1. Lawful Gambling Fraud (Minn. Stat. § 609.763)

Gambling fraud was expanded to include anyone who: a) knowingly tampers with or attempts to alter a component or device used in the conduct or play of electronic pull-tabs or electronic linked bingo as authorized under chapter 349 or attempts to convert legal gambling into illegal gambling at an establishment licensed under chapter 340A; or b) has unauthorized possession of an electronic pull-tab device, an electronic linked bingo device, or other component used in electronic pull-tabs or electronic linked bingo as authorized under chapter 349.

It was explained that lawful gambling fraud was unranked and felony offenses carried dollar amounts of more than \$2,500, and have a three-year statutory maximum. Since 2001, 16 offenders have been sentenced and none have received an executed prison sentence. The severity levels assigned by the court have been: two cases at Severity Level 1; five cases at Severity Level 2; seven cases at Severity Level 3; and two cases at Severity Level 4. All of the offenders sentenced have had a Criminal History Score of 0.

Motion to leave the offense unranked was made by John Stuart and seconded by Sarah Walker.

Motion carried.

2. Fraudulent Finance Statements (Minn. Stat. § 609.7475)

Fraudulent financial statements under Minn. Stat. § 609.7475 was amended to expand the list of victims for which the penalty would be enhanced from a gross misdemeanor to a felony. It was explained that, under current law, the offense was a gross misdemeanor to file or promote the filing of a record with the intent to harass or defraud another person. Under current law, the penalty was enhanced to a five-year felony if the person commits the offense with the intent to influence a juror; retaliate against a judicial officer, prosecutor, defense attorney, or officer of the court, because of that person's performance in a judicial proceeding; retaliate against a sheriff or deputy sheriff because of that person's performance of official duties; or retaliate against a county recorder because of that person's performance of official duties. The felony enhancement list was expanded to include police

officers, chiefs of police, and employees of the Department of Corrections or a local correctional agency.

Staff explained that felony filing false or improper financing statements was unranked. Therefore, the court must designate a severity level before sentencing. Since the crime went into effect in 2006, only two people have been sentenced for this offense (both in 2013). Each was ranked at Severity Level 3.

Motion to leave the offense unranked was made by Judge Schellhas and seconded by Justice Dietzen.

Motion carried.

3. Criminal Sexual Conduct (CSC) in the Fifth Degree (Minn. Stat. § 609.3451)

Fifth-degree criminal sexual conduct offenses were amended in the following manner: a) Minn. Stat. § 609.135, subdivision 2, raised the length of stay for convictions of gross misdemeanor fifth-degree CSC from two years to six years; b) the statutory maximum for felony fifth-degree CSC was raised from five years to seven years; and c) the definition of prior offenses that elevate a fifth-degree CSC offense to a felony to include: anyone who has two previous convictions for gross misdemeanor fifth-degree CSC, a felony provision of indecent exposure (Minn. Stat. § 617.23), any first- through fourth-degree CSC (Minn. Stats. §§ 609.342 to 345), criminal sexual predatory conduct (Minn. Stat. § 609.3453), and possession or dissemination of child pornography (Minn. Stat. § 617.247).

Staff explained that fifth-degree CSC was a felony with a five-year statutory maximum if the offender committed fifth-degree CSC under Minn. Stat. § 609.3451, subdivision 1, clause (2), and has previously been convicted of, or adjudicated delinquent for: 1) a violation of fifth-degree CSC, under Minn. Stat. § 609.3451, subdivision 1, clause (2); or 2) a violation of gross misdemeanor indecent exposure, under Minn. Stat. § 617.23, subdivision 2, clause (1).

Staff explained that felony fifth-degree CSC was ranked at a Severity Level G on the Sex Offender Grid. Offenders with a Criminal History Score of 4 or more are recommended prison ("Presumptive Commit") according to the Guidelines.

Motion to rank the offense at Severity Level F and keep it on the list of offenses eligible for permissive consecutive sentencing because it was a subsequent offense was made by Commissioner Roy and seconded by Justice Dietzen.

Discussion:

John Stuart spoke in opposition of the motion because, in his experience, these offenses were typically not as serious and the result was that a person would have more exposure to collateral consequences as a result of his or her offense.

Judge Lennon disagreed with John Stuart saying these cases were often plea negotiations from more serious offenses.

Commissioner Roy indicated that the court would still have discretion to give a departure under compelling circumstances.

John Stuart said that he would be more comfortable with the higher severity-level ranking if it were associated only with the offense for which the victim was a child.

Motion carried. John Stuart voted in opposition.

4. Expansion of List of Crimes of Violence (Minn. Stat. § 624.712)

The list of crimes of violence contained in Minn. Stat. § 624.712, was expanded to include felony assault in the fifth degree under Minn. Stat. § 609.224, subd. 4; felony domestic assault under Minn. Stat. § 609.2242, subd. 4; and domestic assault by strangulation under Minn. Stat. § 609.2247. A person convicted of committing a crime of violence is prohibited from possession of firearms under Minn. Stat. § 609.165 or Minn. Stat. § 624.713, subd. 1(2). Three offenses that were on the list of crimes of violence were removed: motor vehicle theft; theft from an abandoned, burning, or vacant building or from an area of destruction caused by civil disaster, riot, bombing or the proximity of battle; and third-degree burglary.

Staff explained that possession of a firearm by a prohibited felon was ranked at Severity Level 6. However, because the offense has a 60-month statutory mandatory minimum, the presumptive sentence for all offenders was at least 60 months commitment to prison.

Motion to leave the offense ranked at Severity Level 6 was made by Commissioner Roy and seconded by Jason Anderson.

Discussion:

Jason Anderson commented that it was time that the domestic-assault related offenses were recognized as crimes of violence.

John Stuart commended the Legislature for its process and for adding offenses that were crimes of violence and removing offenses that were not.

Motion carried.

5. Accidents (Minn. Stat. § 169.09; § 609.21)

Terminology changed from “accident” to “collision” in Minn. Stat. § 169.09 for accidents and in Minn. Stat. § 609.21 for criminal vehicular homicide.

Staff explained that Minn. Stat. § 169.09, subdivision 14 establishes penalties for a driver who did not cause the accident, but fails to stop or report an injury and Minn. Stat. § 609.21, subdivision 1a establishes penalties for a driver who causes the accident, but fails to stop or report an injury.

Motion to retain the existing severity level-rankings and to keep the offenses on the list of eligible offenses for permissive consecutive sentences in § 6 was made by Judge Schellhas and seconded by Justice Dietzen.

Discussion:

John Stuart opposed the part of the motion that would keep the offenses on the permissive consecutive sentencing list. He felt it over-penalized the mental state of a person who caused an accident.

Jason Anderson pointed out that the offense would be permissive consecutive i.e., allowable for the court to sentence consecutive. Keeping the offenses on the permissive consecutive list would allow the court to make judgments about a person’s mental state of mind when they caused an accident and sentence consecutively if it deemed it was appropriate.

Motion carried. John Stuart abstained from the vote.

6. Predatory Offender Registration and Third Degree Criminal Sexual Conduct (Minn. Stat. § 243.166; § 609.344)

The statute requiring predatory offenders to register was amended to clarify that offenders must register if they commit any prostitution offense involving a minor under Minn. Stat. §§ 609.322 or 344. It also provides that offenders who are civilly committed under Minn. Stat. § 253B.185 are required to register, as well as those committed under Chapter 253D.

Staff explained that there were no changes to the offense elements or penalty provisions of failure to register as a predatory offender.

Motion to retain the existing severity level-rankings for failure to register as a predatory offender was made by Commissioner Roy and seconded by Judge Lennon.

Motion carried.

Additionally, staff explained that third-degree criminal sexual conduct (CSC) under Minn. Stat. § 609.344 was amended, moving an offense with a five-year statutory maximum from the definition section into the penalty section. The general statutory maximum for third-degree CSC was 15 years. However, if the person was convicted under subdivision 1, paragraph b, and was at least 24 months older than the complainant, but not more than 48 months older, the statutory maximum was five years. The penalties were now separated into two distinct paragraphs in the penalty section.

Motion to rank third-degree CSC under subdivision 1, paragraph b at Severity Level G and keep the offense on the list of offenses eligible for permissive consecutive sentences in § 6 was made by Commissioner Roy and seconded by Jason Anderson.

Motion carried.

7. Criminal Vehicular Homicide and Operation (Minn. Stat. §§ 609.21; 2113; 2114)

Mostly technical amendments were made to § 609.21, separating language for criminal vehicular homicide (CVH) from language for criminal vehicular injury (CVI) and arranging CVI offenses by level of harm. Subdivision 1 currently pertains only to criminal vehicular homicide and subdivision 1a pertains to great bodily harm. Staff explained that the amendment created a new Minn. Stat. § 609.2113, Criminal Vehicular Operation; Bodily Harm, which addressed criminal vehicular operations resulting in substantial bodily harm (subdivision 1) and bodily harm (subdivision 2). Offenses involving harm to unborn children were addressed in a new statute, Minn. Stat. § 609.2114, Criminal Vehicular Operation; Unborn Child. Subdivision 1 of the new section described criminal vehicular operation resulting in death to an unborn child. Subdivision 2 described criminal vehicular operation resulting in injury to an unborn child.

Staff explained that the amendments recodified CVH to be more clearly distinguished from criminal vehicular injury. There were no changes to criminal definitions, offense elements or penalties for offenses involving persons. Previously, the unborn child offenses were: death (10-year statutory maximum; Severity Level 8) and great bodily harm (five-year statutory maximum; Severity Level 5). Under the new statutes, Minn. Stat. § 609.2114, the unborn child offenses are: death (10-year statutory maximum) and injury (five-year statutory maximum).

Motion to retain the existing severity-level rankings, policies, and listing in § 6 made by Jason Anderson and seconded by Judge Lennon.

Motion carried.

8. Criminal Record Expungement (Minn. Stat. § 609A.20)

Laws related to the expungement of criminal records were amended to allow the court to expunge juvenile arrest and delinquency proceedings if it determined that the expungement would benefit the subject and the benefit would not be detrimental to public safety. Business screening services were ordered to delete criminal records if it was known that the record had been sealed, expunged, or was the subject of a pardon. The eviction law was amended giving the court authority to expunge actions in which the defendant prevailed without an additional action required. Certain records will be automatically expunged without filing a petition when the prosecutor agrees unless the court finds that it would be detrimental to public safety. The law required court administration to notify the petitioner of entities receiving the expungement order. Those entities are then required to send a letter to the petitioner confirming that the record was expunged. The circumstances under which a person may petition to have his or her criminal record expunged were expanded to a petitioner who 1) successfully completed a diversion program or stay of adjudication and has not been charged with a new crime for at least one year since completion of the program or stay of adjudication; 2) was convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years since discharge of the sentence; 3) was convicted of or received a stayed sentence for a gross misdemeanor and has not been convicted of a new crime for at least four years since discharge of the sentence; or 4) was convicted of or received a stayed sentence for certain felony offenses and has not been convicted of a new crime for at least five years since discharge of the sentence. Expungement orders effective on or after January 1, 2015, “may be opened, used or exchanged between criminal justice agencies without a court order for purposes of initiating, furthering or completing a criminal

investigation or prosecution or for sentencing purposes or providing probation or other correctional services.” Ex parte orders are necessary until that time.

Staff explained that comment 2.B.03 referenced the process for using expunged records for Guidelines criminal history purposes.

Motion to modify the commentary to clarify the procedures for the use of expunged records for sentencing purposes before January 1, 2015 and on or after January 1, 2015 was made by Commissioner Roy and seconded by Sarah Walker.

Motion carried.

Discussion:

In general, Justice Dietzen had questions about how the comments in the Guidelines were organized in their entirety. He wanted to ensure that the ordering of the comments made sense with regard to the comment that immediately preceded a comment and the comment that immediately followed it.

Commissioner Roy explained that the Guidelines and Commentary underwent an extensive rewriting in 2012 in which the staff and a subcommittee of Commission members and Guidelines’ experts reviewed the Guidelines and Commentary in its entirety. The ordering and placement of comments were also considered.

9. Perjury (Minn. Stat. § 609.48)

A new law related to court documents was enacted under Minn. Stat. § 358.166. The law stated that a court document does not need to be notarized. Signing a document filed with the court constitutes “verification upon oath or affirmation.” A person who signs a court document knowing that it is false is guilty of perjury under Minn. Stat. § 609.48.

Staff explained that perjury is ranked at Severity Level 5 for perjury related to a felony trial and Severity Level 4 for perjury related to a non-felony trial. Perjury is not listed in § 6; Offenses eligible for permissive consecutive sentences.

Motion to retain the existing severity-level rankings was made by John Stuart and seconded by Justice Dietzen.

Discussion: Several members had concerns about the new court documents law and how it might expand prosecutions under the perjury statute.

Motion carried.

B. New Offenses: The Commission reviewed three new felony offenses for violations of medical use of marijuana that were enacted by the Legislature during the 2014 legislative session. Criminal penalties for violations of medical cannabis laws are provided in Minn. Stat. § 152.33. For each felony offense, the Commission decided the severity level and whether the offense should be added to the list of offenses eligible for permissive consecutive sentencing in § 6, as follows:

1. Intentional Diversion (subdivision 1): In addition to any other applicable penalty in law, a manufacturer or agent of a manufacturer who intentionally transfers medical cannabis to a person other than a patient, a registered designated caregiver or a parent or legal guardian of a patient is guilty of a felony with a two-year statutory maximum. A person convicted under this subdivision may not continue to be affiliated with the manufacturer and is disqualified from further participation.

Motion to rank the offense at Severity Level 1 and not include on the list of offenses eligible for permissive consecutive sentences in § 6 was made by Judge Lennon and seconded by John Stuart.

Motion carried.

2. Diversion by Patient, Registered Designated Caregiver, or Parent (subdivision 2): In addition to any other applicable penalty in law, a patient, caregiver, parent or legal guardian who sells or otherwise transfers medical cannabis is guilty of a felony with a two-year statutory maximum.

Motion to rank the offense at Severity Level 1 and not include on the list of offenses eligible for permissive consecutive sentences in § 6 was made by Commissioner Roy and seconded by Judge Schellhas.

Motion carried.

3. Submission of False Records (subdivision 4): A person who knowingly submits false records or documentation required by the commissioner to register as a manufacturer of medical cannabis is guilty of a felony with a 2-year statutory maximum.

Motion to rank the offense at Severity Level 2 because it is a forgery-related offense and warrants a higher severity level, but not include on the list of offenses eligible for permissive consecutive sentences in § 6 was made by Commissioner Roy and seconded by Justice Dietzen.

Motion carried.

C. New and Amended Gross Misdemeanors. The Commission reviewed two gross misdemeanor offenses that were enacted or amended by the 2014 Legislature. Staff explained that no action was required. These offenses were brought to the Commission's attention because they will be eligible for one unit in the calculation of the misdemeanor/gross misdemeanor criminal history point. Four units are required to equal one point.

1. Electronic Cigarettes (Minn. Stat. §§ 609.685; 609.6855)

Electronic delivery devices or "e-cigarettes" were added into the provisions in law regulating the possession of tobacco products in schools, municipal licensing of tobacco products, the sale of self-service products, and the sale of tobacco products to children. Electronic delivery devices are added to Minn. Stat. §§ 609.685, and 6855, which establish penalties for the sale or furnishing of tobacco or nicotine delivery products to children. First offenses are misdemeanors and subsequent offenses are gross misdemeanors.

2. Allowing Ineligible Person Access to Firearms (Minn. Stat. §§ 624.7144)

Staff explained that there was a new gross misdemeanor offense added to law for a person who allowed an abusing party access to a firearm.

D. Technical Changes Required. The Commission reviewed four offenses that were amended during the 2014 Legislative Session or previous legislative sessions. Staff explained that the amendments required technical changes to the Guidelines.

1. Camping Contracts (Minn. Stat. §§ 82A.03; 13; 25)

Staff explained that registration requirements under Minn. Stat. § 82A.03 was removed as a criminal penalty from membership camping practices. The statute is listed as an unranked offense in § 5A and 5B.

Motion to delete reference to Minn. Stat. 82A.03 was made by Judge Schellhas and seconded by John Stuart.

Motion carried.

2. Rank Fraudulent Instrument or Entry for Procuring a Certificate of Title (Minn. Stat. § 508.80)

Staff explained that fraudulent procurement of a certificate of title under Minn. Stat. § 508.80 was a felony with a 5-year statutory maximum. It has been inadvertently left unranked by the Commission since the inception of the Guidelines in 1980.

Motion to rank the offense at Severity Level 1 was made by Commission Roy and seconded by Judge Lennon.

Motion carried.

3. Pipeline Safety (Minn. Stat. § 299J)

Staff explained that the Guidelines listed felony failure to report emergency release by a pipeline operator under Minn. Stat. § 299J.07. The offense has a 7-year statutory maximum. It is an unranked offense; however, another pipeline safety offense existed under Minn. Stat. § 299J.15: improper disposal of a pipeline, which has a 5-year statutory maximum, but is not listed in the Guidelines.

Motion to change the reference in Guidelines §§ 5A and 5B for pipeline safety to reference the entire chapter of 299J was made by Jason Anderson and seconded by Sarah Walker.

Motion carried.

4. Animal Fighting (Minn. Stat. § 343.31)

Staff explained that felony animal fighting under Minn. Stat. § 343.31 has been an unranked offense in the Guidelines and that the citation in §§ 5A and 5B were incorrect. The statute was amended in 2005 and the felonies were moved to subdivision 1, paragraph (a).

Motion to correct the reference in Guidelines §§ 5A and 5B was made by Judge Lennon and seconded by Jason Anderson.

Motion carried.

5. Possible Non-Legislative Modifications to the Guidelines

A. Clarify Non-MN Jurisdiction Language

Staff explained that it regularly responds to questions about how to use non-Minnesota convictions in the criminal history score. During discussions of how best to respond to these questions, staff indicated that the current language in §2.B.5 regarding non-Minnesota offenses was unclear. The current language does not emphasize the role that the court must play in equating non-Minnesota offenses to Minnesota offenses nor clearly outline the steps involved in equating a non-Minnesota offense.

Motion to revise the 2014 Minn. Sentencing Guidelines by clarifying the language of § 2.B.5 was made by Commissioner Roy and seconded by Justice Dietzen.

Discussion: Several members had concerns about the draft language and wanted staff to rework the language and bring it back for review at the Commission's June meeting. The item was tabled.

Motion and second were withdrawn.

B. Clarify Severity-Level Ranking for Medical Assistance Fraud over \$35,000

Staff explained that it was recently contacted by a probation agent preparing sentencing guidelines worksheets for medical assistance fraud that exceeded \$35,000. Probation was seeking clarification on the severity-level ranking. The prosecutor intended for the crime to be ranked at Severity Level 6; however, the Guidelines explicitly rank only five theft offenses that exceed \$35,000, at severity levels higher than Severity Level 3; medical assistance fraud was not one of them.

The offenses that exceed \$35,000, that were ranked higher are referenced in Minn. Stat. § 609.52, Subd. 3(1), and have a higher statutory maximum than other theft crimes (20 years), and must be for a conviction of: theft by check or false representation (Severity Level 6); theft by swindle or trick (Severity Level 6); theft by diversion of corporate property (Severity Level 6); and financial exploitation of a vulnerable adult (Severity Level 7).

Staff explained that an argument could be made for a higher severity level if the prosecutor was relying on Minn. Stat. § 609.52, subd. 3(1) for the penalty and

referencing the act of “false representation” under Minn. Stat. § 609.52, subd. 2(a)(3), when it arrived at its Severity Level 6 ranking.

Motion to rank medical assistance fraud over \$35,000 at Severity Level 6 was made by Commissioner Roy and seconded by Judge Schellhas.

Discussion:

Judge Lennon felt that this was a highly-sophisticated offense.

John Stuart questioned whether the offense belonged in the same severity-level ranking with residential burglary.

Motion carried.

6. Public Input

There were three members of the public in attendance. The Chair thanked members of the public for their attendance.

Andrew Morley said that he was a Junior at St. John’s University studying Political Science. He recently published a paper which analyzed the success of Minnesota’s Guidelines.

Fatima Frahzen said that she attended the meetings as often as she could to educate herself. She commended the Commission for its Severity Level 6 proposal for medical assistance fraud.

Mark Haas said that he was with the Council on Crime and Justice. He said he appreciated the legislative summary provided at the meeting.

7. Adjournment

Chair Edblad reminded meeting attendees that all of the proposals to modify the Guidelines that were made today would be part of the public hearing which will be held July 17, 2014 at the State Capitol for legislative and non-legislative modification proposals

Motion to adjourn was made by Jason Anderson and seconded by Judge Lennon.

Motion carried.

Chair Edblad adjourned the meeting at 3:45 p.m.