

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
July 22, 2015

The Minnesota Sentencing Guidelines Commission (MSGC) meeting was held on July 22, 2015 in Room 225, Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155. Commission members present were Chair Justice Christopher Dietzen, Angela Champagne-From, Sergeant Paul Ford, Judge Caroline Lennon, Cathryn Middlebrook, Judge Heidi Schellhas, Yamy Vang, and Senior Judge Mark Wernick. MSGC staff members present were Executive Director Nate Reitz, and staff members Mike Jones, Kathleen Madland, Anne Wall, and Jill Payne. Assistant Attorney General Jim Early was present.

Members of the public present were Joshua Esmay, Council on Crime and Justice; Lisa Netzer, MN Department of Corrections; Ann Olson, Animal Folks Minnesota; and Robert Small, MN County Attorneys Association.

1. Call to Order

The Chair called the meeting to order at 2:00 p.m.

2. Approval of Agenda

This was on the agenda as an action item.

Motion made by Judge Schellhas and seconded by Judge Lennon to approve the meeting agenda.

Motion carried.

3. Approval of June 18, 2015, Meeting Minutes

This was on the agenda as an action item.

Motion made by Ms. Vang and seconded by Judge Wernick to approve the meeting minutes from June 18, 2015.

Motion carried.

4. Review of Public Hearing Record and Written Materials Submitted Thereafter

The Chair called on the Executive Director who reviewed a summary of the public hearing. Mr. Reitz indicated that there were no members of the public who gave oral

testimony at the July 15, 2015, public hearing. Executive Director Reitz indicated that there were no members of the public who submitted written testimony during the five-day period that followed the public hearing.

5. Accept or Reject Proposed Amendments to the Guidelines and Commentary

This was on the agenda as an action item.

The Chair called on the Executive Director Reitz to outline the entirety (items A through D) of the proposed amendments to the Guidelines and Commentary. Director Reitz explained that the Commission proposed rankings for one felony offense that was newly enacted by the 2015 Legislature.

A. New Legislation (New Offense from the 2015 Legislative Session)

Wrongful Employment at a Child Care Center was a newly-created felony offense under Minn. Stat. § 609.816.

The Commission proposed adding “609.816, Wrongful Employment at a Child Care Center” to the Theft Offense List in Section 7, and reference the new offense in section 5.B at Severity Level 3 (Over \$5,000) and Severity Level 2 (\$5,000 or Less).

B. Modified Legislation—Modified Offenses from the 2015 Legislative Session

Director Reitz explained that for each of the eight items listed below, taking the legislative modification into consideration, the Commission decided if the Guidelines needed amending including whether offenses should be re-ranked and whether there should be any amendments to the permissive consecutive offense list in Guidelines section 6.

1. Extended Protection and Mandatory Minimum, Fourth-Degree Assault

Fourth-degree assault protections were extended to employees supervising and working directly with mentally-ill and dangerous patients by modifying Minn. Stat. § 609.2231, subd. 3a.

The Commission proposed to: 1) maintain Severity Level 1 ranking in section 5 because the statutory maximum remained two years; 2) keep assault in the fourth degree on the list of offenses in section 6 which are eligible for permissive consecutive sentences; 3) update fourth-degree assault offense titles, as listed in section 5.B, to reflect statutory changes to fourth-degree assault enacted since 2004;

4) update Appendix 1; and 5) revise the footnote in section 5.B pertaining to fourth-degree assault.

2. Engage or Hire Minor to Engage in Prostitution Elements Revised

The prostitution statute was modified making the hiring of an adult prostitute a felony if the patron reasonably believes the prostitute to be a child under Minn. Stat. § 609.324, subd. 1(c). The fact that an undercover operative or law enforcement officer was involved is not a defense. No amendments to the Guidelines were proposed.

3. Fifth-Degree Criminal Sexual Conduct Elements Revised

Fifth-degree criminal sexual conduct (CSC 5) under Minn. Stat. § 609.3451, subd. 1, was expanded to include intentionally touching the body or clothing with semen. No amendments to the Guidelines were proposed.

4. Change Offense Title to Include Ammunition, Certain Persons Not to Have Firearms

A definition for ammunition under Minn. Stat. § 609.02, subd. 17 was added. Persons who are not allowed to possess firearms are not allowed to possess ammunition, and felons previously convicted of a crime of violence who do so are subject to the 5-year mandatory minimum prison sentence under Minn. Stat. § 609.11.

The Commission proposed to amend sections 5.A and 5.B adding “or Ammunition” after “Certain Persons Not to Have Firearms” in the existing offense titles. Following the Commission’s vote on the proposal, and consistent with the Commission’s intent to conform the offense title to the statutory change, amendments to comment 2.E.03 and Appendix 2 were also proposed by staff.

5. Change Offense Title, Firearm Suppressor

The law amended the title of the reckless discharge offense under Minn. Stat. § 609.66 by striking “silencers” and inserting “suppressors.” The law clarified that it is lawful to carry a firearm in the Capitol area provided there was an issuance of a permit to carry. The Commission proposed amending sections 5.A and 5.B to strike “silencer” and add “suppressor” in the existing offense titles.

6. Financial Transaction Card Fraud Expanded to Include Trafficking of SNAP Benefits

Financial Transaction Card Fraud was amended to include trafficking of Supplemental Nutrition Assistance Program (SNAP) benefits. No amendments to the Guidelines are proposed.

7. Treat New Gross Misdemeanor Reckless Driving Like Non-Traffic Gross Misdemeanors for Purposes of Criminal History Score

The crime of reckless driving under Minn. Stat. §169.13, subd. 1 (a) was amended to read: "A person who drives a motor vehicle while aware of and consciously disregarding a substantial and unjustifiable risk that the driving may result in harm to another or another's property is guilty of reckless driving. The risk must be of such a nature and degree that disregard of it constitutes a significant deviation from the standard of conduct that a reasonable person would observe in the situation." A new gross misdemeanor was established and it is a crime if a person causes great bodily harm or death to another person.

The Commission proposed to: 1) assign a custody status point to an offender for being in a custody status for gross misdemeanor reckless driving; and 2) assign one gross misdemeanor unit to an offender for a prior conviction of gross misdemeanor reckless driving.

8. Change Offense Title, Terroristic Threats

The modification did not affect the criminal provisions, but created the need to change several references in the Guidelines. The headnote of Minn. Stat. § 609.713 was changed from "Terroristic Threats" to "Threats of Violence." The Commission proposed to authorize technical changes to the Guidelines.

C. Non-Legislative Amendments

Director Reitz explained that the following four items were proposed non-legislative amendments made by the Commission in 2015, with the exception of item 1, below: ranking medical assistance fraud over \$35,000 at Severity Level 6, which was voted on May 24, 2014, and inadvertently omitted from the July 17, 2014, public hearing notice.

1. Rank Medical Assistance Fraud over \$35,000 at Severity Level 6

The Guidelines rank particular theft offenses that exceed \$35,000, at a severity level higher than Severity Level 3. The Commission proposed to rank medical assistance fraud over \$35,000 at Severity Level 6.

2. Clarify Application of Guidelines upon Revocation of Stay of Adjudication

If the initial sentence following felony conviction is commitment to the Commissioner of Corrections and the Guidelines recommend a stayed sentence, the decision to sentence to prison is an aggravated dispositional departure. This is true even if the felony conviction results from the revocation of a previously granted stay of adjudication.

The Commission proposed to amend the Guidelines to make it explicit that a revocation of a stay of adjudication to a prison commitment is an aggravated dispositional departure if a stayed sentence is presumptive.

3. Classify Sentence Executed Pursuant to Offender's Right to Demand for Execution as not a Dispositional Departure

An offender generally has the right to demand execution of sentence. The Commission proposed to amend the Guidelines making it explicit that a sentence that is executed pursuant to an offender's right to demand execution is not an aggravated dispositional departure.

4. List Particular Amenability to Probation as Mitigating Factor

The Minnesota Supreme Court emphasized that mere amenability to probation does not justify a departure, but that a defendant must be particularly amenable to probation. *State v. Soto*, 855 N.W.2d 303 (Minn. 2014).

The Commission proposed to add to section 2.D.3, regarding mitigating factors that may be used as reasons for departure "[T]he offender is particularly amenable to probation. This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting."

D. Technical Amendments

Director Reitz explained that there were two technical amendments proposed to the Guidelines.

1. Update Offense Titles for Criminal Damage to Property

Absent a risk of bodily harm, felony criminal damage to property in the first degree is ranked at Severity Level 2. Criminal damage to property in the second degree involves the intentional causes to damage because of the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability. Because the descriptive titles in section 5 are incomplete, they may cause confusion.

The Commission proposed to update offense titles for damage to property in section 5.A. and 5.B.

2. Delete Expired Statutory Language Related to Expunged Records

A portion of a comment in section 2.B related to access to expunged records is no longer in effect. The Commission proposed to delete the reference to expired statutory language.

Motion to adopt the proposed amendments in sections A through D, made by Sgt. Ford and seconded by Judge Schellhas.

Motion carried.

6. Public Input

The Chair recognized members of the public including Ann Olson from Animal Folks Minnesota who wished to address the Commission stating that her organization supported the Commission's review of unranked offenses, namely felony animal cruelty under Minn. Stat. § 343.21.

Additionally, Executive Director Reitz pointed out materials in the meeting folder from the family of murder victim Anarae Schunk. The Schunk family is seeking input from the Commission on possible proposals that they may bring to the Legislature during the next session.

7. Commission Work Plan

The Chair called on the Executive Director to introduce Commission work plan options for 2015-16. Director Reitz presented four project areas with 11 potential tasks which

were derived from Commission members' priorities articulated at the June 2015 workshop as well as unfinished tasks of the Commission. The Commission discussed the 11 potential tasks within the four project areas, which were:

1 Project: Unfinished business

- 1.1 Task: Report to the legislature
- 1.2 Task: Clarify consecutive supervised release policy
- 1.3 Task: Resolve ranges in shaded area of grid
- 1.4 Task: Expand impermissible reasons for departure

2 Project: Vertical grid axis

- 2.1 Task: Review proportionality of current offense rankings
- 2.2 Task: Restructure controlled substance offenses rankings
- 2.3 Task: Review unranked offenses

3 Project: Horizontal grid axis

- 3.1 Task: Examine criminal history scores
- 3.2 Task: Examine slope/overlap of grid durations

4 Project: Recommendations to legislature

- 4.1 Task: Make recommendations regarding controlled substance crimes
- 4.2 Task: Make recommendations regarding mandatory minimums

Motion to set the following tasks as the Commission's non-ranked priorities for 2015 made by Judge Wernick and seconded by Judge Schellhas: report to the legislature (Task 1.1); clarify consecutive supervised release policy (Task 1.2); restructure controlled substance offenses rankings (Task 2.2); make recommendations (to the Legislature) regarding controlled substance crimes (Task 4.1); and make recommendations (to the Legislature) regarding mandatory minimums (for controlled substance crimes only) (Task 4.2).

A discussion ensued.

Motion carried, with Judge Lennon opposed.

The Commission next discussed changing the November Commission meeting date to avoid holiday travel conflicts.

Motion to move the Commission meeting from November 25, 2015 to November 18, 2015, made by Judge Schellhas and seconded by Judge Wernick.

Motion carried.

8. Director's Report

Director Reitz indicated that the agency's information technology (IT) expenses would go up considerably in the 16-17 biennium. Director Reitz said that this was not something that was known at the time the budget was set and that the price increase was in response to a 2015 financial audit of the Office of MN.IT (the agency that provides IT services to State agencies) in which it was found that MN.IT significantly overcharged some agencies for shared IT services to offset other billing rates that significantly undercharged other agencies. Director Reitz stated that the agency's budget would now be dedicated to non-discretionary budget items i.e., personnel, rent, and IT and staff was looking at ways to save costs including conducting paperless meetings.

Director Reitz stated that the annual meeting of the National Association of Sentencing Commissions (NASC) would be held August 16th to 18th in Alaska. The delegates from Minnesota's Commission are Chair Dietzen, former Chair Edblad, Executive Director Nate Reitz, and Senior Research Analyst Anne Wall.

Director Reitz said that he had recently contacted the Governor's office and that there was nothing new to report on the probation officer appointment to the Commission.

9. Adjournment

Motion to adjourn made by Judge Wernick and seconded by Sgt. Ford.

Motion carried.

The meeting adjourned at 3:45 p.m.