

Approved Meeting Minutes

November 5, 2020

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on November 5, 2020. 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 October 29, 2020.

Present electronically were Commission Chair Kelly Lyn Mitchell and Commission members Justice (Ret.) Christopher Dietzen, Valerie Estrada, 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 Executive Director Nate Reitz and MSGC staff members Nicole Jaspersen, Kathleen Madland, Jill Payne, and Anne Wall.

Members of the public present by telephone and/or electronically included Ann Olson; John Hultquist; Paulette Orlicki; Max Page; Robert Small, Minn. County Attorneys Association; and Ben Johnson, Minn. House of Representatives Research.

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 today which is authorized by Minn. Stat. § 13D.021, which applies because an in-person meeting is not practical or prudent due to the health pandemic and peacetime emergency. Chair Mitchell explained that these conditions make it unfeasible for any member of the Commission or the public to attend at the regular meeting location in Saint Paul which is currently open only to authorized state employees. Chair Mitchell stated that for the reasons stated the meeting is conducted entirely by telephone or internet and the notice was posted on the MSGC website since October 29, 2020. Chair Mitchell stated that members of the public are able to monitor the meeting remotely by telephone or computer with instructions posted on the MSGC website.

Chair Mitchell asked Director Reitz to call the roll.

Present electronically were Commission Chair Kelly Lyn Mitchell, Justice (Ret.) Christopher Dietzen, Valerie Estrada, Abby Honold, Tonja Honsey, Kyra Ladd, Judge Michelle Larkin, Cathryn

Middlebrook, and Commissioner of Corrections Paul Schnell. Nine members were present; two members were absent. Sgt. Omari was excused. A quorum was present.

2. Approval of Agenda

This was on the agenda as an action item.

Motion by Justice Dietzen and second by Commissioner Schnell to approve the meeting agenda.

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

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Estrada, Ms. Honold, Ms. Honsey, Ms. Ladd, Judge Larkin, Ms. Middlebrook, and Commissioner Schnell.

3. Approval of Draft Meeting Minutes

This was on the agenda as an action item.

Motion by Commissioner Schnell and second by Ms. Middlebrook to approve the meeting minutes from October 8, 2020.

At this time, Judge Mark joined the meeting.

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

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Estrada, Ms. Honold, Ms. Honsey, Ms. Ladd, Judge Larkin, Judge Mark, Ms. Middlebrook, and Commissioner Schnell.

4. Child Pornography Review

A. Ranking Proposals

This was on the agenda as an action item.

Chair Mitchell explained that staff prepared a paper entitled, “Comprehensive Review of Child Pornography Sentencing Guidelines; Proposals to Modify the Sentencing Guidelines” which breaks the Commission’s proposals into six discrete, numbered components. The Commission agreed to discuss the proposals in numbered order as outlined in the staff’s paper.

1) Raise Severity Level, Use of Minors in Sexual Performance (Enhanced Offenses)

Chair Mitchell explained the proposal to increase, from severity level D to severity level C, the severity level assigned to Use of Minors in Sexual Performance by a subsequent offender, predatory offender, or involving a child under 13.

Motion by Justice Dietzen and second by Ms. Estrada to approve item 1 of the staff paper dated October 28, 2020 entitled, “Proposals to Modify the Sentencing Guidelines” subject to a public hearing on December 17, 2020, as follows:

Modifications to 2020 Minn. Sentencing Guidelines §§ 5.A & 5.B:

5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
C	<u>Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)</u>	<u>617.246, subd. 2(b), 3(b), 4(b)</u>
D	Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)	617.246, subd. 2(b), 3(b), 4(b)

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5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
617.246 subd. 2(b) 3(b) 4(b)	Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)	D <u>C</u>

* * *

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

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Estrada, Ms. Honold, Ms. Honsey, Ms. Ladd, Judge Larkin, Judge Mark, Ms. Middlebrook, and Commissioner Schnell.

2) Raise Severity Level, Dissemination of Child Pornography (Enhanced Offenses)

Chair Mitchell explained the proposal to increase, from severity level D to severity level C, the severity level assigned to Dissemination of Child Pornography by a subsequent offender, predatory offender, or involving a child under 13 (Minn. Stat. § 617.247, subd. 3(b)).

Motion by Ms. Middlebrook and second by Commissioner Schnell to keep Dissemination of Child Pornography by a subsequent offender, predatory offender, or depicting a child under 13 at Severity level D.

A discussion ensued, wherein members debated both the severity of the crime and the severity level compared to the other child pornography offenses.

Motion carried on a 5–4 roll-call vote.

Voting “Yes” were Chair Mitchell, Ms. Estrada, Ms. Honold, Ms. Middlebrook, and Commissioner Schnell. Voting “No” were Justice Dietzen, Ms. Ladd, Judge Larkin, and Judge Mark. There was no reply from Ms. Honsey.

3) Raise Severity Level, Use of Minors in Sexual Performance (Base Offenses)

Chair Mitchell explained the proposal to increase, from severity level E to severity level D, the severity level assigned to Use of Minors in Sexual Performance.

Motion by Judge Larkin and second by Justice Dietzen to approve item 3 of the staff paper dated October 28, 2020 entitled, “Proposals to Modify the Sentencing Guidelines” subject to a public hearing on December 17, 2020, as follows:

Modifications to 2020 Minn. Sentencing Guidelines §§ 5.A & 5.B:

5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
D	<u>Use of Minors in Sexual Performance</u>	<u>617.246, subd. 2(a), 3(a), 4(a)</u>

Severity Level	Offense Title	Statute Number
E	Use of Minors in Sexual Performance	617.246, subd. 2(a), 3(a), 4(a)

* * *

5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
617.246 subd. 2(a) 3(a) 4(a)	Use of Minors in Sexual Performance	E <u>D</u>

* * *

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

Voting “Yes” were Chair Mitchell, Justice Dietzen, Ms. Estrada, Ms. Honold, Ms. Honsey, Ms. Ladd, Judge Larkin, Judge Mark, Ms. Middlebrook, and Commissioner Schnell.

4) Raise Severity Level, Possession of Child Pornography (Enhanced Offenses)

Chair Mitchell explained the proposal to increase, from severity level F to severity level E, the severity level assigned to Possession of Child Pornography by a subsequent offender, predatory offender, or involving a child under 13 (Minn. Stat. § 617.247, subd. 4(b)).

Motion by Judge Larkin and second by Justice Dietzen to approve item 4 of the staff paper dated October, 28 2020 entitled, “Proposals to Modify the Sentencing Guidelines” subject to a public hearing on December 17, 2020.

A discussion ensued, wherein members debated both the severity of the crime and the severity level compared to the other child pornography offenses.

Motion failed on a 4–6 roll-call vote.

Voting “Yes” were Justice Dietzen, Ms. Ladd, Judge Larkin, and Judge Mark. Voting “No” were Chair Mitchell, Ms. Estrada, Ms. Honold, Ms. Honsey, Ms. Middlebrook, and Commissioner Schnell.

5) Lower Severity Level, Dissemination of Child Pornography (Base Offense)

Chair Mitchell explained the proposal to decrease, from severity level E to severity level F, the severity level assigned to Dissemination of Child Pornography (Minn. Stat. § 617.247, subd. 3(a)).

Judge Larkin stated that she withdraws her proposal for item 5.

6) Limit the Number of Child Pornography Possession Offenses that can be Hernandized and Included in Criminal History

Chair Mitchell reiterated that she withdrew the proposal for item 6 before the meeting and thanked Judge Larkin for her conversations about the Hernandizing proposal.

Chair Mitchell stated that the severity-level ranking proposal, above, and other items will receive a public hearing. Director Reitz stated that the public hearing and the next Commission meeting will be held on December 17, 2020, with a short break in between the hearing and meeting. Director Reitz requested that there be a quorum for the Commission meeting.

B. November Draft Report

This was on the agenda as a discussion item.

Director Reitz discussed the preliminary staff draft of Commission report entitled, “Report on Comprehensive Review of Child Pornography Sentencing Guidelines (November Staff Draft).” Director Reitz explained that the first section (“Comprehensive Review Chronology”) provides a timeline of the Commission’s work. Director Reitz reviewed the second section (“Findings of the Comprehensive Review”) stating that it lays out the Commission’s findings. Director Reitz stated that the draft paper added the sentencing data and practices for the District of Minnesota Child Pornography offenses.

Director Reitz explained the third section (“Action Resulting from Comprehensive Review”) and stated that the next step would be to draft the Commission’s action as a result of its findings. Chair Mitchell asked members of the Commission for feedback on the draft report and how the third section of the report should be written.

A member requested that the reference to Hernandizing on page 16 of the report include more than one year of sentencing data and varying sentencing outcomes. Another member requested that both numbers and percentages are included in the report for transparency.

Director Reitz stated that the January meeting is on the 14th of the month, and the deadline for the Report to the Legislature is January 15th. Director Reitz stated that, because of the tight timeline, the Commission will want to review the bulk of the report at the December meeting.

A member requested that the draft report describes a typical possession case on page 17 and their concern with footnote 57 defining how staff measured recidivism. Director Reitz clarified the recidivism rate and how recidivism was measured.

The Commission expressed no objection to staff writing a draft of the findings of the comprehensive review.

5. Vice-Chair Election

This was on the agenda as an action item.

Chair Mitchell stated that charter statute requires that the Commission to elect any officers, in addition to the gubernatorially appointed Chair, that may be necessary for the efficient discharge of duties. Chair Mitchell said that the position has been vacant since Judge Schellhas retired and that the Vice-Chair elected today will serve until a new Commission is appointed in 2022. Chair Mitchell explained that the Commission has traditionally elected one officer, a Vice-Chair and that it is the duty of the Vice-Chair to serve in the Chair's stead when the Chair is absent or temporarily vacates the chair. Chair Mitchell explained the election procedure and then called for any nominations for the office of Vice-Chair.

Ms. Middlebrook nominated Ms. Estrada for the office of Vice-Chair. Chair Mitchell called three times for other nominations. No other Commission members nominated other members to the Vice-Chair position.

Chair Mitchell declared Ms. Estrada to be **elected** to the office of Vice-Chair by unanimous consent.

6. Presentation of 2019 Sentencing Practices Data Summary

This was on the agenda as a discussion item.

Director Reitz called on Research Analyst Intermediate Katie Madland to present the 2019 Sentencing Practices: Annual Summary Statistics for Felony Offenders.

Ms. Madland reported on the number of felony offenders sentenced in Minnesota in 2019 (17,335). Ms. Madland reported on the distribution of cases. Senior Research Analysis Specialist Jill Payne reported the total incarceration rates and average pronounced sentences. Senior Research Analysis Specialist Anne Wall presented the departure rates.

Chair Mitchell thanked staff for the data presentation.

7. December 17 Public Hearing & Meeting

This was on the agenda as a discussion item and the details were discussed earlier in the meeting at the end of agenda item number 4.A.

8. Sentencing Guidelines Neutrality Review – Policy Inventory

This was on the agenda as a discussion item.

Director Reitz presented a staff paper entitled, “Inventory of Sentencing Guidelines Policies, Sections 2 & 3. Director Reitz stated that the Sentencing Guidelines contain a multitude of policies and presented a possible process for conducting the Sentencing Guidelines Neutrality Review. Director Reitz stated that staff suggests that in order to review the neutrality of the various policies there must first be an inventory of policies and possible study questions. Director Reitz explained that the inventory of Sentencing Guidelines Policies is a working document and if any Commission members have any suggestions for modifications then staff could modify the document accordingly. Director Reitz stated that staff could research a sample study question and that Commission members could provide feedback, for example policy 2.B.4, including prior felony juvenile adjudications in criminal history.

Chair Mitchell explained that staff would provide a ranking of the policies that are researchable and that make the most impact. Director Reitz explained a possible ranking scenario which estimates the relative impact of each policy and proposed that staff provide a sample of what the review may look like. The Commission stated that they had no objection to that approach.

9. Working Group/Task Force Reports

This was on the agenda as an information item.

A. Criminal Sexual Conduct Statutory Reform Working Group

Chair Mitchell called on Director Reitz to give an update about the Criminal Sexual Conduct Statutory Reform Working Group. Director Reitz stated that he had not met with anyone since his last report.

B. Community Competency Restoration Task Force

Chair Mitchell called the Commission member appointed to the Community Competency Restoration Task Force, Ms. Middlebrook, to discuss the task force. Ms. Middlebrook stated that the task force is finalizing the report for the Legislature that is due in February of 2021. Ms. Middlebrook stated that over the last few months the task force has divided into three groups for different parts of findings and recommendations. Ms. Middlebrook stated that the first two groups have completed their preliminary findings and have received feedback. Ms. Middlebrook stated that on Monday, the third group will meet and then at the next meeting the task force will put all of their findings together. Ms. Middlebrook stated that the task force was interested in more detailed data that was presented at the Commission meeting in October, referring to the disparities among Native Americans being revoked from probation. Director Reitz and Chair Mitchell offered possible avenues for finding that data.

10. Executive Director's Report

This was on the agenda as an information item.

A. Legislative Update

Director Reitz reported that the Military Veterans Offenders Restorative Justice bill did not pass in the most recent special session.

Director Reitz reported that Sergeant Omari has submitted his resignation from the Minnesota Sentencing Guidelines Commission, effective January 15, 2021, and that three applicants have applied for the future vacancy to date.

B. Bureau of Justice Statistics – 2019 Imprisonment Rates

Director Reitz stated that Minnesota had the fourth-lowest imprisonment rate nationally in 2019.

11. Public Input

Chair Mitchell asked if any member of the public present wished to speak.

Ann Olson is a member of an organization, Animal Folks, which is an animal protection organization based in Minnesota. Ms. Olson stated that the organization submitted a letter to the Commission on October 7 in regard to their concern with animal sexual abuse and child pornography. Ms. Olson thanked the Commission for their work on the child pornography project. Ms. Olson stated that Animal Folks requests that animal sexual abuse and the link to child pornography are included within the Report to the Legislature. Ms. Olson said that the organization believes that the animal sexual abuse is sexual assault and that it is about power and control. Ms. Olson stated that the abuser may sexually abuse the animal in front of a child or force the child to engage in sexual conduct with the animal. Ms. Olson explained studies that have shown that the animal, especially pets, are very trusted and loved by the child and when the abuser chooses to violate that attachment it can create a lot of damage to the child. Ms. Olson said that in reviewing the mandates from the Legislature to the Commission it said to look at the laws and compare them to similar crimes. Ms. Olson discussed the sexual abuse between a child and an animal can also fall under bestiality, Minn. Stat. § 609.294. Ms. Olson stated that the current level of offense for the bestiality statute is weak and that she would request it be moved up to a felony level sentence in relationship to children and child abuse.

Chair Mitchell thanked Ms. Olson for her comments. Chair Mitchell stated that it may be possible to acknowledge that link and add it to the report.

Paulette Orlicki stated that she attended the September Commission meeting. Ms. Orlicki stated that she has researched sentencing guidelines in multiple states in regard to DWI, CVO, and CVH offenses. Ms. Orlicki explained that she would like to share that material with the Commission so that they can review it and possibly add the subject to an upcoming meeting agenda. Ms. Orlicki requested an e-mail address. Director Reitz gave Ms. Orlicki the MSGC inbox e-mail address and stated that there was a staff paper prepared in order to summarize the ranking of offenses made for a future meeting.

Chair Mitchell thanked Ms. Orlicki for her comments.

12. Adjournment

The meeting adjourned at 3:42 p.m., without objection.