

**Minnesota Sentencing Guidelines Commission**  
**Approved Meeting Minutes**  
**December 30, 2015**

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on December 30, 2015, in Room 230 of the Minnesota Judicial Center, 25 Reverend Dr. Martin Luther King, Jr. Blvd., St. Paul, MN 55155. Commission members present were Chair Justice Christopher Dietzen, Angela Champagne-From, Jeffrey Edblad, Sergeant Paul Ford, Judge Caroline Lennon, Cathryn Middlebrook, Commissioner of Corrections Tom Roy, and Judge Heidi Schellhas. Commission members Yamy Vang and Senior Judge Mark Wernick participated telephonically, the notice required in Minn. Stat. § [13D.015](#), subd. 5, having been posted on the MSGC website on December 18, 2015.

MSGC staff members present were Executive Director Nate Reitz and staff members Anne Wall and Jill Payne. Assistant Attorney General Jim Early was also present.

Members of the public present included Robert Small, Minn. County Attorneys Association, Tom C. Freeman, Faegre Baker Daniels/Minn. Chiefs of Police Assoc.; Lars Negstad, ISAIAH; Josh Esmay, Council on Crime and Justice; and Rachel English and Tom Marver, Jewish Community Action.

**1. Call to Order**

The Chair called the meeting to order at 2:01 p.m.

**2. Approval of Agenda**

This was on the agenda as an action item.

**Motion** by Sgt. Ford and second by Judge Lennon to approve the meeting agenda.

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

**3. Approval of Meeting Minutes**

This was on the agenda as an action item.

**Motion** by Mr. Edblad and second by Ms. Middlebrook to approve the meeting minutes from November 18, 2015.

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

#### **4. Review of Public Hearing Record**

The Chair called on the Executive Director to detail how the Commission complied with the public hearing requirements. Director Reitz supplied the following information to the Commission:

The notice of public hearing was published in the State Register on November 23, 2015, and the contents of the proposed amendments or modifications were posted on the Commission's website at the same time. The public hearing was held on December 23, 2015, in Room 10 of the State Office Building; all people who wished to speak were given the opportunity; and 33 people addressed the Commission. All public comments were related to the changes to the sentencing of drug crimes; no public comments were related to consecutive sentencing. The comments were both for and against the drug sentencing proposal. A link to a partial audio recording of the public hearing was forwarded to the Commission on December 24, 2015, and a link to the complete audio recording was forwarded on December 28, 2015, along with a written summary of the public hearing testimony. The public hearing record remained open for a total of six days—through December 29, 2015—and the Commission received a total of 18 written comments, including some comments from speakers at the public hearing. The public hearing summary and written comments were part of today's meeting materials.

#### **5. Act on Proposed Amendments/Modifications to the 2016 Guidelines and Commentary**

This was on the agenda as an action item. If adopted, amendments/modifications become effective August 1, 2016, unless the Legislature by law provides otherwise.

##### **A. Non-Legislative Amendments/Modifications to Controlled Substance Offenses**

The Chair wished to amend the original proposal to include the revised aggravating factors as set forth in the "Attachment 7 (revised 12-18-15)" document, and to include a new comment in Guidelines § 2.D.3 (relating to mitigating factors) that would acknowledge that the term "chemical dependency" is no longer clinically current and has been replaced by "substance use disorder" in the Diagnostic and Statistical Manual of Mental Disorders-5<sup>th</sup> Edition (DSM-5). The Chair explained that, "chemically dependent" is used in the new mitigating factor § 2.D.3.a(8) because the term is commonly used in Minnesota Statutes. The Chair explained that the Guidelines would be updated in the event of future statutory change.

**Motion** by Chair Justice Dietzen and second by Commissioner of Corrections Roy to amend the controlled substance proposal to add a new comment

2.D.304 (related to mitigating factors), and to modify § 2.D.3 as shown in the following red type:

**Section 2.D.3**

b. Aggravating Factors.

\* \* \*

(4) The offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below ~~are~~ is an aggravating factor~~s~~ with respect to the offense:

\* \* \*

(5) The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below ~~are~~ is an aggravating factor~~s~~ with respect to the offense:

(a) the offense involved at least three separate transactions ~~wherein~~ in which controlled substances were sold, transferred, or possessed with intent to ~~do so~~ sell or transfer;

(b) the ~~offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use~~ offender or an accomplice possessed equipment, drug paraphernalia, or monies evidencing the offense was committed as part of wholesale trafficking of a controlled substance;

(c) the offense involved the manufacture of controlled substances for use by other parties;

(d) the offender or an accomplice knowingly possessed a firearm or other dangerous weapon, as defined by Minn. Stat. § 609.02, during the commission of the offense;

(e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; ~~or~~

(g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional);

(h) the offense involved separate acts of sale or possession of a controlled substance in three or more counties;

~~(i) the offense involved the transfer of controlled substance across a state or international border and into Minnesota~~ offender has a prior conviction for a crime of violence, as defined in Minn. Stat. § 609.1095, subd. 1(d), other than a violation of a provision under Minn. Stat. chapter 152, including attempt or conspiracy, or was convicted of a similar offense by the United States or another state;

(j) the offense involved the sale of a controlled substance to a minor or vulnerable adult; and

(k) the defendant, or an accomplice, manufactured, possessed or sold a controlled substance in a school zone, park zone, public housing zone, federal, state, or local correctional facility, or drug treatment facility. \* \* \*

**Motion carried** on a 10–0 roll-call vote. Voting “Yes” were Commissioner Champagne-From, Commissioner Edblad, Commissioner Ford, Commissioner Lennon, Commissioner Middlebrook, Commissioner Roy, Commissioner Schellhas, Commissioner Vang, Commissioner Wernick, and Commission Chair Dietzen.

Next, Sgt. Ford wished to offer an amendment.

**Motion** by Sgt. Ford and second by Mr. Edblad to amend the controlled substance proposal by ranking sale of controlled substance in the first degree at Severity Level D10 (instead of D9), and sale of controlled substance in the second degree at Severity Level D8 (instead of D7).

A discussion ensued.

**Motion Failed** on a 3–7 roll-call vote. Voting “Yes” were Commissioner Edblad, Commissioner Ford, and Commissioner Vang. Voting “No” were Commissioner Champagne-From, Commissioner Lennon, Commissioner Middlebrook, Commissioner Roy, Commissioner Schellhas, Commissioner Wernick, and Commission Chair Dietzen.

The Commission moved on to the question of the adoption of the proposed non-legislative amendments/modifications to controlled substance offenses, as amended.

**Motion** by Chair Justice Dietzen and second by Judge Lennon to adopt the controlled substance proposal, as amended, to modify the Minnesota Sentencing Guidelines and add a new § 2.D.3.a(8) (relating to mitigating factors); to add a new comment § 2.D.304 (related to mitigating factors); to modify §§ 2.D.3.B.(5)(b), 2.D.3.B.(5)(d); to add new §§ 2.D.3.b(5)(h), 2.D.3.b(5)(i), 2.D.3.b(5)(j), and 2.D.3.b(5)(k) (relating to aggravating factors); add a new § 4.C (Drug Offender Grid); to make conforming amendments (principally in §§ 1.B.15, 1.B.17, 2.B.1.a, 2.B.1.b, 2.C, 2.E, 4.A, 5.A, and 5.B; and comment 2.E.05) and to make technical modifications to §§ 2.D.3.b(4), 2.D.3.b(5), and 2.D.3.B.(5)(a).

A discussion ensued.

**Motion Carried** on a 7-3 roll-call vote. Voting “Yes” were Commissioner Champagne-From, Commissioner Lennon, Commissioner Middlebrook, Commissioner Roy, Commissioner Schellhas, Commissioner Wernick, and Commission Chair Dietzen. Voting “No” were Commissioner Edblad, Commissioner Ford, and Commissioner Vang.

## **B. Non-Legislative Amendments/Modifications to Consecutive Sentencing Policies**

Ms. Middlebrook wished to offer an amendment. Ms. Middlebrook wished to remove the “tolling” policy from the proposal.

**Motion** by Ms. Middlebrook to amend the consecutive sentencing policy proposal to remove the tolling policy.

**Motion Failed** for lack of a second.

Next, a motion was made to adopt the proposed consecutive sentencing policy changes.

**Motion** by Sgt. Ford and second by Judge Lennon to adopt the consecutive sentencing policy proposal, as presented, to modify Minnesota Sentencing Guidelines §§ 1.B.3, 2.F, 2.F.1.a(1), 2.F.1.a(2), 2.F.2.a, and 2.F.2.a(1); add new §§ 2.F.1.b, 2.F.1.e, and 2.F.2.b; renumber the existing §§ 2.F.1.b, 2.F.1.c,

2.F.1.d, and 2.F.1.e; modify comments 2.F.02, 2.F.103, 2.F.104, and 2.F.203; and add new comments 2.F.03 and 2.F.04.

Director Reitz informed the Commission that Department of Corrections (DOC) staff have estimated the technical costs of changing the DOC computer system to conform to the proposed changes to be approximately \$294,000.

**Motion Carried** on a 9-1 roll-call vote. Voting “Yes” were Commissioner Champagne-From, Commissioner Edblad, Commissioner Ford, Commissioner Lennon, Commissioner Roy, Commissioner Schellhas, Commissioner Vang, Commissioner Wernick, and Commission Chair Dietzen. Voting “No” was Commissioner Middlebrook.

## **6. Act on Adoption of Recommendations to the Legislature Regarding Changes in the Criminal Code**

This was on the agenda as an action item. If approved, the recommendations will go into the Commission’s 2016 Report to the Legislature discussed in agenda item 7.

First, the Commission discussed a proposal to recommend to the Legislature that it amend Minn. Stat. § 152.021, controlled substance in the first degree, to add crimes of enhanced possession of a controlled substance in the first degree and more enhanced possession of a controlled substance in the first degree, both based on total weight of the controlled substance, as follows:

\* \* \*

Subd. 2. **Possession crimes.** \* \* \*

(c) A person is guilty of enhanced possession of a controlled substance in the first-degree if:

(1) the person unlawfully possesses one or more mixtures of a total weight of 50 grams or more containing cocaine, heroin, or methamphetamine;

(2) the person unlawfully possesses one or more mixtures of a total weight of 1000 grams or more containing a narcotic drug other than cocaine, heroin, or methamphetamine;

(3) the person unlawfully possesses one or more mixtures of a total weight of 1000 grams or more containing amphetamine, phencyclidine, or hallucinogen or, if the controlled substance is packaged in dosage units, equaling 1000 or more dosage units; or

(4) the person unlawfully possesses one or more mixtures of a total weight of 200 kilograms or more containing marijuana or Tetrahydrocannabinols.

(d) A person is guilty of more enhanced possession of a controlled substance in the first-degree if:

(1) the person unlawfully possesses one or more mixtures of a total weight of 75 grams or more containing cocaine, heroin, or methamphetamine;

(2) the person unlawfully possesses one or more mixtures of a total weight of 1500 grams or more containing a narcotic drug other than cocaine, heroin, or methamphetamine;

(3) the person unlawfully possesses one or more mixtures of a total weight of 1500 grams or more containing amphetamine, phencyclidine, or hallucinogen or, if the controlled substance is packaged in dosage units, equaling 1500 or more dosage units; or

(4) the person unlawfully possesses one or more mixtures of a total weight of 300 kilograms or more containing marijuana or Tetrahydrocannabinols. \* \* \*

**Motion** by Chair Justice Dietzen and second by Mr. Edblad to make this recommendation to the Legislature.

A discussion ensued.

**Motion Carried** on a 7-2 roll-call vote. Voting “Yes” were Commissioner Champagne-From, Commissioner Edblad, Commissioner Ford, Commissioner Lennon, Commissioner Schellhas, Commissioner Vang, and Commission Chair Dietzen. Voting “No” were Commissioner Middlebrook and Commissioner Roy. Commissioner Wernick abstained.

Second, the Commission discussed a proposal to recommend that the Legislature repeal the mandatory minimum sentencing provisions in Chapter 152, Minnesota Statutes.

**Motion** by Ms. Middlebrook and second by Judge Wernick to make this recommendation to the Legislature.

A discussion ensued.

**Motion withdrawn.**

Third, the Commission discussed a proposal to recommend that the Legislature remove Controlled Substance Crime in the Fifth Degree – Possession from the list of offenses for which a subsequent controlled substance conviction will trigger a mandatory minimum prison sentence. Minn. Stat. § 152.01, subd. 16a.

**Motion** by Judge Lennon and second by Commissioner of Corrections Roy to recommend that the Legislature remove fifth-degree possession of a controlled substance from the definition of “subsequent controlled substance conviction.”

A discussion ensued.

**Motion Failed** on a 5–5 roll-call vote. Voting “Yes” were Commissioner Champagne-From, Commissioner Lennon, Commissioner Middlebrook, Commissioner Roy, and Commissioner Wernick. Voting “No” were Commissioner Edblad, Commissioner Ford, Commissioner Schellhas, Commissioner Vang, and Commission Chair Dietzen.

Fourth, the Commission discussed Judge Lennon’s proposal to recommend to the Legislature that it reduce Controlled Substance Crime in the Fifth Degree – Possession, Minn. Stat. § 152.025, subd. 2, in a case involving possession of a trace amount of a controlled substance, to a gross misdemeanor rather than a felony. In making the motion, Judge Lennon referred to the need to work on the definition of “trace” to comport with the Bureau of Criminal Apprehension’s thresholds at which they would be unable to measure an amount of controlled substance.

**Motion** by Judge Lennon and second by Commissioner of Corrections Roy to amend fifth-degree possession of a controlled substance to add a gross misdemeanor for trace amounts.

A discussion ensued.

**Motion Carried** on an 8-2 roll-call vote. Voting “Yes” were Commissioner Champagne-From, Commissioner Lennon, Commissioner Middlebrook, Commissioner Roy, Commissioner Schellhas, Commissioner Vang, Commissioner Wernick, and Commission Chair Dietzen. Voting “No” were Commissioner Edblad, and Commissioner Ford.

Fifth, the Commission discussed a proposal to recommend to the Legislature that it revise quantity thresholds for controlled substance crimes so that the different degrees fairly distinguish between major drug wholesalers, mid-level drug wholesalers, and low-level drug wholesalers or retail distributors.

**Motion** by Judge Wernick and second by Commissioner of Corrections Roy to make this recommendation to the Legislature.

A discussion ensued.

**Motion failed** on a 2-8 roll-call vote. Voting “Yes” were Commissioner Middlebrook and Commissioner Wernick. Voting “No” were Commissioner Champagne-From, Commissioner Edblad, Commissioner Ford, Commissioner

Lennon, Commissioner Roy, Commissioner Schellhas, Commissioner Vang, and Commission Chair Dietzen.

## **7. Review and Approve 2016 Report to the Legislature**

This was on the agenda as an action item.

The Commission discussed the third draft of the 2016 Report to the Legislature dated 12/17/2015. The draft report was sent to members by email on 12/17/2015, in advance of the meeting. The Chair asked members if there were additional substantive changes to the report. Members made minor edits to the report before the Chair called for a motion.

**Motion** by Commissioner of Corrections Roy and second by Judge Schellhas to move forward the 2016 Report to the Legislature, as modified.

**Motion carried** on a 10-0 roll-call vote. Voting "Yes" were Commissioner Champagne-From, Commissioner Edblad, Commissioner Ford, Commissioner Lennon, Commissioner Middlebrook, Commissioner Roy, Commissioner Schellhas, Commissioner Vang, Commissioner Wernick, and Commission Chair Dietzen.

## **8. 2014 Sentencing Practices Data Presentation**

This was on the agenda as a discussion item.

The Commission discussed tabling the presentation until its January 27, 2016, meeting, in the interest of time.

**Motion** by Mr. Edblad and second by Commissioner of Corrections Roy to table the presentation.

**Motion carried** on a 10-0 roll-call vote. Voting "Yes" were Commissioner Champagne-From, Commissioner Edblad, Commissioner Ford, Commissioner Lennon, Commissioner Middlebrook, Commissioner Roy, Commissioner Schellhas, Commissioner Vang, Commissioner Wernick, and Commission Chair Dietzen.

## **9. Executive Director's Report**

Executive Director Reitz reported that there was no news from the Office of the Governor on the appointment of the probation officer to the Commission. The Director also reminded members that, as public officials, they must fill out an annual statement

of economic interest recertification form from the Minnesota Campaign Finance and Public Disclosure Board. The form is due January 25, 2016, and will be sent to members directly from the Minnesota Campaign Finance and Public Disclosure Board.

#### **10. Public Input**

The Chair called on members of the public present and asked if anyone wished to speak. No member of the public came forward.

#### **11. Adjournment**

**Motion** to adjourn by Judge Lennon and second by Judge Schellhas.

**Motion carried** without objection.

The meeting was adjourned at 4:13 p.m.