

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
April 23, 2009

The Commission meeting was held on April 23, 2009, at the Department of Corrections, 1450 Energy Park Drive, Suite 200, Saint Paul, Minnesota. Commission members in attendance were Chair Jeffrey Edblad, Commissioner of Corrections Joan Fabian, Tracy Jenson, Sheriff Brad Gerhardt, Connie Larson, and Reverend Robert Battle. Executive Director Suzanne Alliegro and MSGC staff members Jill Payne, Anne Wall, and Jeff Holtz were present. Also in attendance was Jim Early from the Minnesota Attorney General's Office and Matt Majovski from Dakota County Community Corrections.

I. Call to Order

The meeting was called to order by Chair Edblad at 2:07 p.m.

II. Executive Director's Report

A. Commission's Summer Meeting Schedule

The Commission must meet once more following the Legislative Session to review possible modifications to the sentencing guidelines related to new legislation. It will also review any possible non-legislative modifications that result from this meeting. It will need to hold a public hearing in July and a meeting one week later to adopt or reject proposed modifications to the sentencing guidelines that received a public hearing. The Commission's meeting schedule was changed to take these time-sensitive events into account:

May 20, 2009 – Meeting Cancelled.

June 11, 2009 at 2PM – MSGC Meeting at Dept. of Corrections to discuss new and amended Crime Legislation and non-legislative modifications.

July 16, 2009 at 2PM – Public Hearing at the State Capitol, Room 107.

July 23, 2009 at 2PM – MSGC Meeting at Dept. of Corrections to formally accept or reject the proposed modifications

B. Training

Executive Director Suzanne Alliegro reported that information on guideline training sessions is available on the MSGC website. Two trainings have been held in the metro area and four have been scheduled in greater Minnesota. Connie Larson mentioned that she would be interested in attending a training session. Director Alliegro stated that she and Linda McBrayer had met with staff from the courts to discuss training sessions specifically for judges and court staff. The focus would be on sentencing pronouncement practices and data entry issues.

C. Legislative Update

Director Alliegro stated that so far, MSGC staff has completed fiscal notes for approximately 70 legislative bills. She also stated that bills which had fiscal notes with a bed impact predicted were not moving because of the pending budget deficit. Director Alliegro reported that both the House and Senate public safety omnibus bills included a repeal of the MSGC reporting requirements for out-of-state juvenile placements. She said that there is a bill moving through the Minnesota Senate which would allow all state agencies to send annual and legislative reports electronically and also calls for MSGC, Department of Correction and Department of Public Safety to review its reports for consolidation. At this point, Director Alliegro noted that MSGC could have its budget cut by anywhere from 3% to 5.7%.

Director Alliegro also reported that the public safety omnibus budget bill in the Minnesota Senate would repeal the mandatory sentencing provisions for repeat drug offenses, amend the felony DWI laws by striking language requiring the three-year minimum sentence, request MSGC to re-rank felony DWI at a lower severity level, and repeal the mandatory minimums for failure to register crimes. Additionally, the bill would limit the time an offender would serve for first-time supervised release violations capping it at 90 days. The provision excludes sex offenders. The bill previously had called for changing the 2/3 time of imprisonment ratio to 3/5 and revising drug thresholds; those provisions were dropped from the bill.

D. Race Research

Director Alliegro said that MSGC has been meeting with research staff from the State Court Administrator's Office as well as Professor Richard Frase from the University of

Minnesota to discuss race research. Director Alliegro has arranged for Professor Frase to present his latest research on racial disproportionality in Minnesota's prison and jail population to the Supreme Court's Racial Fairness Committee on April 28, 2009. Director Alliegro stated that the Committee includes in its work plan coordination and communication with MSGC on racial justice issues and activities. Director Alliegro then presented the findings from Professor Frase's research regarding crime, race, and sentencing practices within Minnesota.

III. Approval of February 19th Meeting Minutes

Motion was made by Connie Larson to approve the minutes from February 19, 2009, and was seconded by Reverend Battle.

Motion carried without dissent.

IV. Draft Permissive Consecutive Language Changes

A proposed language modification discussed at the Commission's February 19, 2009, meeting were presented. The proposal is in response to the *State v. Brandon M. Johnson* case (*Minn. App. 2008*), and would make it so that all crimes listed as being permissive consecutive, whether they are attempts or not, are eligible for consecutive sentencing.

Chair Jeff Edblad stated that the proposed language is consistent with the discussion that had occurred at the previous commission meeting.

Draft Guidelines Language

Guidelines Section VI:

OFFENSES ELIGIBLE FOR PERMISSIVE CONSECUTIVE SENTENCES

Convictions for attempted offenses or conspiracies to commit offenses listed below are eligible for permissive consecutive sentences as well as convictions for completed offenses.

....

....

Motion was made by Sheriff Brad Gerhardt and seconded by Commissioner Fabian to move the proposed language changes to the permissive consecutive sentences section to the public hearing notice.

Motion carried without dissent.

V. Non-legislative Changes

A. Enhanced Felonies

Draft language was presented to the Commission to clarify that misdemeanor and gross misdemeanor offenses which are excluded from the criminal history for an enhanced felony should be used to calculate future criminal history provided that offense is not an enhanced felony. The section is also restructured to make the Commission's policy on the use of prior non-felony DWI criminal history clearer.

Draft Guidelines Language

Guidelines Section II.B.6:

6. *When determining the criminal history score for a current offense that is a felony solely because the offender has previous convictions for similar or related misdemeanor and gross misdemeanor offenses, the prior gross misdemeanor conviction(s) upon which the enhancement is based may be used in determining custody status, but the prior misdemeanor and gross misdemeanor conviction(s) cannot be used in calculating the remaining components of the offender's criminal history score. Except for in the case of first degree (felony) driving while impaired (DWI), misdemeanor and gross misdemeanor offenses used to enhance the current offense shall be used in calculating the offender's criminal history score on future offenses that are not enhanced felonies. Prior felony offenses used for enhancement shall always be used in calculating the offender's criminal history score.*
- ~~For instance, If the current offense is a first degree (felony) driving while impaired (DWI) offense and the offender has a prior felony DWI offense, the prior felony DWI shall be used in computing the criminal history score, but the prior misdemeanor and gross misdemeanor offenses used to enhance the prior felony DWI cannot be used in the offender's criminal~~*

history. Similarly, if the current offense is any other enhanced felony, prior misdemeanor and gross misdemeanor offenses used to enhance the current offense to a felony shall be excluded from computing the criminal history score (other than the custody status point), but prior felony offenses used for enhancement shall be included.

....

Motion was made by Commissioner Fabian and seconded by Reverend Battle to move the proposed language changes regarding enhanced felonies to the public hearing notice.

Motion carried without dissent.

B. Custody Status Point

The Commission reviewed draft language which would modify language in Guidelines Section II.B.2, to make it clearer that a custody status point is assigned to offenders released pending sentencing on a non-traffic gross misdemeanor or gross misdemeanor DWI, not just a felony. The proposed language renumbers the section and makes it consistent throughout.

Draft Guidelines Language

Guidelines Section II.B.2:

2. *One point is assigned if the offender:*

a. *was on probation, parole, supervised release, conditional release, released pending sentencing, or confined in a jail, workhouse, or prison pending sentencing, following a guilty plea, guilty verdict, or ~~extended jurisdiction juvenile~~ conviction in a felony, extended jurisdiction juvenile, non-traffic gross misdemeanor or gross misdemeanor driving while impaired or refusal to submit to a chemical test case; or*

b. *~~was released pending sentencing at the time the felony was committed for which he or she is being sentenced following a guilty plea, guilty verdict, or extended jurisdiction juvenile conviction; or~~*

b. e. *committed the current offense within the period of the initial probationary sentence.*

If an offender is given an initial term of probation that provides a range of years (e.g. “not to exceed three years,” “three to five years,” “up to the statutory maximum”), rather than a specified number of years, and commits a new crime at any time prior to the end date of the pronounced range, a custody status point will be assigned. This policy applies to a conviction in a prior felony, extended jurisdiction juvenile, non-traffic gross misdemeanor or gross misdemeanor driving while impaired or refusal to submit to a chemical test case~~an extended jurisdiction juvenile conviction~~. This policy does not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence; or

~~c. d-~~ became subject to one of the criminal justice supervision statuses listed in 2.a above at any point in time during which the offense occurred when multiple offenses are an element of the conviction offense or the conviction offense is an aggregated offense.

~~d. e-~~ An additional custody status point shall be assigned if the offender was under any of the custody status conditions in a through d above for a specified sex offense, other than Failure to Register as a Predatory Offender (M.S. 243.166), and the current offense of conviction is a specified sex offense, other than Failure to Register as a Predatory Offender (243.166).

....

Motion was made by Connie Larson and seconded by Tracy Jenson to move the proposed language changes regarding the custody status point to the public hearing notice.

Motion approved without dissent.

C. Assault at a Secure Treatment Facility

The Commission reviewed draft language to clarify that assault on a secure treatment facility employee under M.S. § 609.2231, subd. 3a(b) is a felony which carries a mandatory minimum prison sentence of at least one year and one day; and, therefore, the presumptive disposition is commitment to the Commissioner of Corrections.

Staff suggested language in the same section related to presumptive consecutive sentences be stricken because it doesn't belong in that section. The Commission

disagreed and wanted the language to remain in the presumptive sentence section to serve as a reminder to practitioners.

Draft Guidelines Language

Guidelines Section II.C:

C. Presumptive Sentence: *The offense of conviction determines the appropriate severity level on the vertical axis of the appropriate grid. The offender's criminal history score, computed according to section B above, determines the appropriate location on the horizontal axis of the appropriate grid.*

....

~~*In addition, the presumptive disposition is commitment to the Commissioner of Corrections for an escape from an executed sentence, and for a felony assault committed by an inmate serving an executed term of imprisonment, is or assault on secure treatment facility personnel. commitment to the Commissioner of Corrections.*~~

Motion was made by Commission Fabian and seconded by Sheriff Gerhardt to move the proposed changes, without striking the presumptive consecutive language, to the public hearing notice.

Motion approved without dissent.

D. Theft with a Risk of Bodily Harm

A previous oversight has left this crime without an assigned severity level. The Commission had previously decided that when the risk of bodily harm is a part of a theft crime, then the severity for that crime should rise by one level. However, the Commission never ranked the enhanced felony theft crime of \$501-\$1,000, with a prior conviction. This proposal simply corrects an oversight and does not change the intent of the Commission.

Draft Guidelines Language

Guidelines Section II.A:

A. Offense Severity: *The offense severity level is determined by the offense of conviction....*

For persons sentenced under Minn. Stat. § 609.52, subd. 3a for which a violation involves a

monetary value over \$1,000, or a monetary value between \$500 and \$1,000 and the person has been convicted within the preceding five years for an offense under this section, and creates a reasonably foreseeable risk of bodily harm to another, the severity level ranking is elevated by one severity level from that listed on the Offense Severity Reference Table.

....

NUMERICAL REFERENCE OF FELONY STATUTES

This statutory felony offense listing is for convenience in cross-referencing to the Offense Severity Table; it is not official nor is it intended to be used in place of the Offense Severity Reference Table.

<i>Statute</i>	<i>Title</i>	<i>Severity Level</i>
609.52 subd. 3a(1)	Theft (\$1,000, or less; risk of bodily harm)	2
609.52 subd. 3a(2)	Theft (over \$1,000; risk of bodily harm)	see note
<u>609.52 subd. 3a(2)</u>	<u>Theft (\$501-\$1,000, and prior conviction; risk of bodily harm)</u>	<u>see note</u>

....

The Commission discussed listing the elevated severity level (severity level 3) in the numerical reference table rather than “see note.” It concluded that this would be more straightforward. Staff could not think of a reason why not to do that instead.

Motion was made by Connie Larson and seconded by Tracy Jenson to move the proposed changes, with added severity levels, to the public hearing notice.

Motion approved without dissent.

E. Calculation of Juvenile Points

The Commission reviewed a technical modification to change a reference from juvenile “finding” to juvenile “adjudication” to be consistent with the Commission’s new juvenile point policy which takes effect August 1, 2009. This reference is found in the section related to misdemeanor criminal history and was missed when the juvenile point modifications were approved in July of 2008.

Draft Guidelines Language

Guidelines Section II.B.3:

II.B.312. *In order to provide a uniform and equitable method of computing criminal history scores for cases of multiple convictions arising from a single course of conduct when single victims are involved, consideration should be given to the most severe offense for purposes of computing criminal history when there are prior multiple sentences under provisions of Minn. Stats. § 609.585 or 609.251. When there are multiple misdemeanor or gross misdemeanor sentences arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe offenses for purposes of computing criminal history. These are the same policies that apply to felony convictions and juvenile findings adjudications.*

....

Motion was made by Tracy Jenson and seconded by Connie Larson to move the proposed language changes to the public hearing notice.

Motion approved without dissent.

VI. Modifications to Simplify the Guidelines

In introducing several possible changes to the guidelines, Director Alliegro said that the proposals highlight concerns that have been made over the years from practitioners and from staff about certain guideline policies. Director Alliegro then stated that the proposed changes are meant to simplify the guidelines from a practitioner's point of view and to allow for less confusion about certain policies.

A. Modifying the Misdemeanor/Gross Misdemeanor Offense List Policy

One of the most common concerns and areas of confusion is in regard to the inconsistency of the misdemeanor and gross misdemeanor list. Not only does the list often get modified due to newly enacted laws, but its changing over time creates more hassles for practitioners for determining criminal history scores from the past. A rational and simpler policy could be created whereby all gross misdemeanors count towards criminal history as well as misdemeanors that are on the Targeted Misdemeanor List

under Minnesota Statute § 299C.10. This policy would be consistent with legislative intent regarding which non-felony level crimes are serious in nature, it targets person offenses, and it is proportional as well.

In 2002, the Commission considered changing this policy. At that time MSGC staff completed a study which showed that there would be a slight prison bed savings from the proposed change and that it would help to lessen the racial gap in prisons. Staff indicated that the number of misdemeanor offenses that would no longer be on the list is very few, or are seldom charged.

The Commission liked the straightforwardness of the proposal. Chair Edblad asked what the next steps would be. Staff said that if the proposal was passed by the Commission today, draft language could be presented to the Commission at its next meeting and, if approved, would go to a public hearing. If it were adopted following a public hearing, it would be presented in the annual Report to the Legislature. The policy change would be effective August 1, 2010, provided the Legislature did not pass a bill to the contrary.

Motion was made by Connie Larson and seconded by Sheriff Gerhardt to request draft language be prepared by staff for the next Commission meeting. Provided that the language is acceptable, the Misdemeanor and Gross Misdemeanor Point policy will be moved to the public hearing notice.

Motion prevailed without dissent.

B. Modifying the Custody Status Policy Related to Gross Misdemeanors

It was suggested that the Commission could replace the current policy for gross misdemeanor custody status with a policy that would apply a custody point for all non-traffic gross misdemeanors (including DWIs) and misdemeanors which are on the Targeted Misdemeanors List provided for in M.S. § 299C.10 (including DWIs). This would make it consistent with the above suggested policy change for handling misdemeanors/gross misdemeanors in criminal history.

Motion was made by Commissioner Fabian and seconded by Connie Larson to request draft language be prepared by staff for the next Commission meeting.

Provided that the language is acceptable, the Gross Misdemeanor Custody Status policy will be moved to the public hearing notice.

Motion prevailed without dissent.

C. Change the Decay Dates Used for Misdemeanors/Gross Misdemeanors

Prior misdemeanors and gross misdemeanors decay when ten years has elapsed from the conviction date of the prior offense to the sentencing date of the current felony offense. This is inconsistent with that of the felony decay policy. Practitioners often confuse the policies and apply the wrong decay factor. Additionally, when sentencing is delayed or an offender absconds, prior misdemeanor and gross misdemeanor offenses can decay and result in the loss of a point

It was suggested that the end-date used to calculate the decay period could be changed: counting from the conviction date of the prior offense to the offense date of the current felony offense.

While the Commission supported the proposal, Director Alliegro suggested that the policy could be further simplified if the both the start-date and the end-date were changed to be consistent with the felony decay policy: Instead counting from the discharge date of the prior offense to the offense date of the current felony offense. This would coincide with that of the felony policy and would make for a more uniform calculation of criminal history. Ms. Alliegro suggested that members bring this proposal back to their offices to get insight from other practitioners.

Tracy Jenson stated that while the original purpose for the Misdemeanor and Gross Misdemeanor decay was due to paperwork, that issue is no longer the case thanks to the Statewide Supervision System and the Supreme Courts' MNCIS.

VII. Departure Data

Director Alliegro stated that staff has been asked on various occasions if departure data is ever looked at and analyzed after it is collected. Because this question does come up, and because it is an important issue, Ms. Alliegro felt it was a good idea to present it to Commissioners. Director Alliegro then presented various pieces of data to the

Commission about sentencing practices and departure data that has been collected for 2007 sentencing in Minnesota.

VIII. Public Input

Matt Majovski from Dakota County Community Corrections stated that he is very appreciative of the efforts by Commission members to simplify the guidelines and to make them consistent. He also said that one of the changes he likes the most is that of changing the gross misdemeanor and misdemeanor list for both criminal history and the custody status point policy. However, he did say that one possible concern could arise with these changes when a gross misdemeanor is given a misdemeanor sentence and that offense is not on the misdemeanor list.

IX. Adjournment

Motion was made for adjournment by Reverend Battle and was seconded by Commissioner Fabian.

Motion approved without dissent.

Chair Edblad stated that the meeting was adjourned at 3:32 pm.