

**Minnesota Sentencing Guidelines Commission**  
**Approved Meeting Minutes**  
**December 10, 2009**

The Commission meeting was held on December 10, 2009, at the Department of Corrections, 1450 Energy Park Drive, Suite 200, Saint Paul, Minnesota. Commission members in attendance were Tracy Jenson, Justice Helen Meyer, Judge Edward Cleary, Judge Gordon Shumaker, Sheriff Brad Gerhardt, Reverend Robert Battle, and Connie Larson. Executive Director Suzanne Alliegro and MSGC staff members Jill Payne, Anne Wall, and Bethany Habinek were present. Also in attendance was Jim Early from the Minnesota Attorney General's Office; Cheryl Thomas and Mary Ellison from The Advocates for Human Rights; Caroline Palmer and Elizabeth Morrissey from the Minnesota Coalition Against Sexual Assault; David Brown from the Hennepin County Attorney's Office; Heather Caillier from Breaking Free; Matt Majovski from Dakota County Community Corrections; and Gloria Fressia from Battered Women's Legal Advocacy Project.

**I. Call to Order**

The meeting was called to order by Vice Chair Tracy Jenson at 2:04 p.m.

**II. Executive Director's Report**

Executive Director Suzanne Alliegro shared the 2010 meeting schedule with the Commission. Because the Legislature will not be back in session again until February and because the Commission has finalized its mandated report to the legislature, a January meeting is not necessary unless something unforeseen comes up that requires the Commission's attention. The Commission's next tentative meeting is scheduled for February 2010.

As mentioned previously at the June 11, 2009 Commission meeting, included in the public safety omnibus budget bill this year was an amendment to Fifth-Degree Controlled Substance crimes for repeat offenders (2009 MN Session Law, Chapter 83, Article 3, Section 3). The amendment included converting the current mandatory minimum sentence of six months in a local correctional facility

for repeat offenders from an unwaivable to a waivable one. The language in the bill further indicated that “sentencing a person in this manner is a departure from the sentencing guidelines.” According to sentencing guidelines policy, this is not a departure since the mandatory minimum for repeat offenders is jail and not prison. As part of a short-term solution, Director Alliegro communicated by e-mail to all district court judges that a departure report is not required for these cases where mandatory jail time is waived. Long-term, Director Alliegro will attempt to get the language changed next session, either by seeking out a legislative sponsor or by working with the Governor’s office. Ms. Alliegro asked the Commission if they would like a letter to be sent to the Governor’s office to correct this problem. All Commission members agreed to this solution.

Director Alliegro reported that staff members have been working on a new report regarding sentencing practices for assault offenses. This report is now available on the website. In the last legislative session there was a change in law that allowed for members to participate in meetings by telephone (2009 Minnesota Statute, Section 13D.015). Director Alliegro discussed this as an option in cases of severe weather conditions in order to have a quorum. After talking over the details with Jim Early, it appears that a ten day notice prior to the meeting would need to be indicated on the website if any Commission members were to participate by phone. Judge Shumaker and Justice Meyer commented that it would be nice to have this option available.

**III. Approval of Meetings Minutes from November 19, 2009**

**Motion** was made by Judge Cleary to approve the minutes from November 19, 2009, and was seconded by Sheriff Gerhardt.

**Motion approved** without dissent.

**IV. Approval of the Proposed Modifications to the Sentencing Guidelines Effective August 1, 2010**

Executive Director Alliegro reviewed the proposed modifications to the MN Sentencing Guidelines and Commentary that passed through the November 19, 2009 public hearing.

**A. Re-Ranking Riot First Degree**

In response to a request from Hennepin County Attorney Mike Freeman, the Commission proposed to change the severity level ranking for riot first degree (resulting in death) from a severity level V to a severity level VIII, to bring the ranking and presumptive sentence in-line with other similar crimes.

**Proposed Modifications to Guidelines Section V:**

**V. OFFENSE SEVERITY REFERENCE TABLE**

<b>V</b>	<del>Riot 1 - 609.71, subd. 1</del>
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<b>VIII</b>	<u>Riot 1 - 609.71, subd. 1</u>
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**Proposed Modifications to the Numerical Reference Table:**

STATUTE	OFFENSE	SEVERITY LEVEL
609.71 subd. 1	Riot 1	<u>5</u> <u>8</u>

**Motion** was made by Sheriff Gerhardt and seconded by Judge Shumaker to rank Riot First Degree (resulting in death) as a severity level VIII.

**Motion approved** without dissent.

## **B. Re-Ranking and Moving Certain Prostitution Offenses to the Sex Offender Grid Effective August 1, 2010**

The Advocates for Human Rights with support from Minnesota Coalition Against Sexual Assault requested that the Commission review the rankings for certain felony prostitution offenses to make them more consistent with offenses on the sex offender grid. The Commission proposed to change the severity level ranking for solicitation, inducement, and promotion of prostitution; sex trafficking in the first degree; individual under 18, from a severity level IX to a severity level B on the sex offender grid. The Commission also proposed to change the severity level ranking for solicitation, inducement, and promotion of prostitution; sex trafficking in the second degree; individual 18 and over, from a severity level V to a severity level C on the sex offender grid.

Director Alliegro encouraged the Commission to further discuss their rationale for re-ranking the second-degree offense (victims 18 and over) at severity level C because it is a substantial increase in severity; and, further, because the ranking does not leave much room for distinction between offenses committed against minors and offenses committed against adults. The Commission's proposal would take the offense from a severity level V (18-months stayed at zero criminal history; presumptive prison at criminal history 3 or more) to a severity level C (48-months presumptive prison; presumptive prison at all criminal history). The original analysis done by staff had also recommended the Commission consider severity level D (36-months stayed at zero criminal history; presumptive prison at criminal history 2 or more).

Staff reported that the bed impact at severity level C would be 17 beds and severity level D would be between 10 and 12 beds. Staff analysis of departures assumed that there may be an increase in downward dispositional departures for cases involving victims 18 and over, based on the already high observation of dispositional departures for the cases involving victims under the age of 18.

Staff also noted that statutory maximums for current offenses ranked at severity level D are 15 and 25 years; severity level C offenses are 15 years. Judge Cleary commented that, because there is no significant difference in statutory maximums for offenses at severity level D and severity level C, there appears to

be no reason to change the proposal for second-degree (victims 18 and over) to a severity level D.

Mary Ellison, from The Advocates for Human Rights, asked to address the Commission before a final decision was made. She expressed her concerns about re-ranking at a severity level D instead of a severity level C. The sentence for an offense committed against an adult would only be half of what a sentence would be for an offense committed against a juvenile at the proposed severity level B. Sex trafficking, whether committed against a juvenile or an adult, is equally damaging.

Heather Caillier, from Breaking Free, reported to the Commission that eighty-five percent of clients are abused before the age of 18. Traffickers and pimps are rarely brought to justice, and in fact, more women are brought to court on prostitution charges. Cheryl Thomas, from The Advocates for Human Rights, also stated that sex traffickers are not punished for their crimes.

Justice Meyer commented that re-ranking at a severity level C instead of a severity level D would make more of a statement. As a result, perhaps more sex traffickers would be charged.

**Proposed Modifications to Guidelines Section V:**

**V. OFFENSE SEVERITY REFERENCE TABLE**

<b>IX</b>	<del>Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking in the First Degree—609.322, subd. 1</del>
<b>V</b>	<del>Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking in the Second Degree—609.322, subd. 1a</del>

**B** Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking in the First Degree - 609.322, subd. 1(a)

**C** Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking in the Second Degree - 609.322, subd. 1a

**Proposed Modifications to the Numerical Reference Table:**

STATUTE	OFFENSE	SEVERITY LEVEL
609.322 subd. 1(a)	Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking in the First Degree	9 <u>B</u>
609.322 subd. 1a	Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking in the Second Degree	5 <u>C</u>

**Proposed Modifications to the Sex Offender Grid:**

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SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>CSC 2<sup>nd</sup> Degree – (c)(d)(e)(f)(h) Prostitution; Sex Trafficking 1<sup>st</sup> Degree – 1(a)</i>	<b>B</b>	90 90-108	110 94-132	130 111-156	150 128-180	195 166-234	255 217-300	300 255-300 <sup>2</sup>
<i>CSC 3<sup>rd</sup> Degree – (c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o) Prostitution; Sex Trafficking 2<sup>nd</sup> Degree – 1a</i>	<b>C</b>	48 41-58	62 53-74	76 65-91	90 77-108	117 99-140	153 130-180	180 153-180 <sup>2</sup>

Effective August 1, 2010

**Motion** was made by Judge Shumaker and seconded by Judge Cleary to move solicitation, inducement, and promotion of prostitution; sex trafficking in the first degree; individual under 18, to the sex offender grid at severity level B, and to move solicitation, inducement, and promotion of prostitution; sex trafficking in the second degree; individual over 18, to the sex offender grid at severity level C.

**Motion approved** without dissent.

### **C. Technical Modifications to the Criminal History Section Effective August 1, 2010**

Based on the recent MN Supreme Court decision in *State v. Williams*, the Commission proposed to amend the criminal history section to consistently reference the three exceptions to the “*Hernandez*” rule and amend the commentary to clarify its actions.

#### **Proposed Modifications to Guidelines Section II.B.1:**

##### *Comment*

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**II.B.107.** *The Commission established policies to deal with several specific situations which arise under Minnesota law: a conviction under Minn. Stat. § 152.137, under which persons convicted of methamphetamine-related crimes involving children and vulnerable adults are subject to conviction and sentence for other crimes resulting from the same criminal behavior; Minn. Stat. § 609.585, under which persons committing theft or another felony offense during the course of a burglary could be convicted of and sentenced for both the burglary and the other felony; and a conviction under Minn. Stat. § 609.251 under which persons who commit another felony during the course of a kidnapping can be convicted of and sentenced for both offenses. For purposes of computing criminal history, the Commission decided that consideration should only be given to the most severe offense when there are prior multiple sentences under provisions of Minn. Stats. §§ 152.137, 609.585, or 609.251. This was done to prevent inequities due to past variability in prosecutorial and sentencing practices with respect to these statutes, to prevent systematic manipulation of these statutes in the future, and to provide a uniform and equitable method of computing criminal history scores for all cases of multiple convictions arising from a single course of conduct, when single victims are involved.*

*When multiple current convictions arise from a single course of conduct and multiple sentences are*

imposed on the same day pursuant to Minn. Stats. §§ 152.137, 609.585 or 609.251, the conviction and sentence for the "earlier" offense should not increase the criminal history score for the "later" offense.

The Commission has carefully considered the application of the Hernandez method to sentencing in provisions of Minnesota law other than Minn. Stats. §§ 152.137, 609.585 and 609.251. The Commission's decision not to amend the sentencing guidelines is deliberate. See, State v. Williams, 771 N.W.2d 514 (Minn. 2009).

### **Proposed Modifications to Guidelines Section II.B.3:**

3. Subject to the conditions listed below, ....
  - b. When multiple sentences for a single course of conduct are given pursuant to Minn. Stats. §§ 152.137, 609.585 or 609.251, no offender shall be assigned more than one unit.

#### *Comment*

**II.B.308.** For purposes of computing criminal history, the Commission decided that consideration should only be given to the most severe offense when there are prior multiple sentences under provisions of Minn. Stats. §§ 152.137, 609.585 or 609.251. This was done to prevent inequities due to past variability in prosecutorial and sentencing practices with respect to these statutes, to prevent systematic manipulation of these statutes in the future, and to provide a uniform and equitable method of computing criminal history scores for all cases of multiple convictions arising from a single course of conduct, when single victims are involved. References are made to felony convictions under Minn. Stats. §§ 152.137, 609.585 and 609.251, in the event that they result in a misdemeanor or gross misdemeanor sentence.

The Commission has carefully considered the application of the Hernandez method to sentencing in provisions of Minnesota law other than Minn. Stats. §§ 152.137, 609.585 and 609.251. The Commission's decision not to amend the sentencing guidelines is deliberate. See, State v. Williams, 771 N.W.2d 514 (Minn. 2009).

~~The Commission adopted a policy regarding multiple misdemeanor or gross misdemeanor sentences arising from a single course of conduct under Minn. Stat. § 609.585, that parallels their policy regarding multiple felony sentences under that statute. It is possible for a person who commits a misdemeanor in the course of a burglary to be convicted of and sentenced for a gross misdemeanor (the burglary) and the misdemeanor. If that situation exists in an offender's criminal history, the policy places a one unit limit in computing the misdemeanor/gross misdemeanor portion of the criminal history score.~~

~~**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 adjudications.~~

#### **Proposed Modification to Guidelines Section II.B.4:**

##### *Comment*

**II.B.408.** *In order to provide a uniform and equitable method of computing criminal history scores for cases of multiple felony offenses with findings arising from a single course of conduct when single victims are involved and when the findings involved provisions of Minn. Stats. §§ 152.137, 609.585 or 609.251, consideration should be given to the most severe offense with a finding for purposes of computing criminal history.*

*When there are multiple felony offenses with findings arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe felony offenses with findings for purposes of computing criminal history. These are the same policies that apply to felony, gross misdemeanor and misdemeanor convictions for adults.*

*The Commission has carefully considered the application of the Hernandez method to sentencing in provisions of Minnesota law other than Minn. Stats. §§ 152.137, 609.585 and 609.251. The Commission's decision not to amend the sentencing guidelines is deliberate. See, State v. Williams, 771 N.W.2d 514 (Minn. 2009).*

**Motion** was made by Justice Meyer and seconded by Sheriff Gerhardt to adopt the language modifications to the guidelines.

**Motion approved** without dissent.

#### **D. Technical Modifications to the Presumptive Sentence Section Effective August 1, 2010**

In another recent MN Supreme Court decision, *State v. Hodges*, the procedures used to determine the minimum term of imprisonment for certain repeat sex offenders (under Minn. Stat. § 609.3455, subd. 5) were in question. It was decided that it was proper to base the minimum prison term on the presumptive

sentence absent the mandatory life sentence imposed by Minn. Stat. § 609.3455, subd. 4. The Commission proposed to amend the presumptive sentence section to be consistent with the MN Supreme Court case.

**Proposed Modifications to Guidelines Section II.C:**

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Pursuant to M.S. § 609.3455, certain sex offenders are subject to mandatory life sentences. The sentencing guidelines presumptive sentence does not apply to offenders subject to mandatory life without the possibility of release sentences under subdivision 2 of that statute. For offenders subject to life with the possibility of release sentences under subdivisions 3 and 4 of that statute, the court shall specify a minimum term of imprisonment, based on the sentencing guidelines presumptive sentence as determined in Section II.C, or any applicable mandatory minimum sentence not contained in M.S. § 609.3455, that must be served before the offender may be considered for release.

*Comment*

....

***II.C.08.** The 2005 Legislature enacted statutory changes allowing life sentences with the possibility of release for certain sex offenders. The statute requires the sentencing judge to pronounce a minimum term of imprisonment, based on the sentencing guidelines or ~~and~~ any applicable mandatory minimum not contained in M.S. § 609.3455, that the offender must serve before being considered for release. All applicable sentencing guidelines provisions, including the procedures for departing from the presumptive sentence, are applicable in the determination of the minimum term of imprisonment for these sex offense sentences. See, State v. Hodges, 770 N.W.2d 515 (Minn. 2009).*

**Motion** was made by Judge Shumaker and seconded by Commission member Connie Larson to adopt the language modifications to the guidelines.

**Motion approved** without dissent.

**V. Approval of 2010 Report to the Legislature**

Executive Director Alliegro highlighted a section in the 2010 Report to the

Legislature that discusses the adopted modifications effective August 1, 2010.

**Motion** was made by Judge Shumaker and seconded by Commission member Connie Larson to adopt the Report.

**Motion approved** without dissent.

## **VI. Public Input**

Cheryl Thomas, from The Advocates for Human Rights, thanked the Commission for supporting their recommendation regarding the rankings for felony prostitution offenses.

Matt Majovski, from Dakota County Community Corrections, thanked the Commission for making an effort to simplify the guidelines, specifically in regards to calculating juvenile points. The changes have facilitated his training of other people in the guidelines.

## **VII. Adjournment**

Justice Meyer commended the staff for the time and work put into the 2010 Legislative Report.

**Motion** was made by Justice Meyer and seconded by Commission member Connie Larson to adjourn.

**Motion approved** without dissent.

The meeting was adjourned at 2:56 pm.