

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
September 17, 2009

The Commission meeting was held on September 17, 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, Justice Helen Meyer, Judge Edward Cleary, Judge Gordon Shumaker, Sheriff Brad Gerhardt, 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 Sara Thome from the Minnesota Coalition Against Sexual Assault; Amy Brenengen; David Brown from the Hennepin County Attorney's Office; Julie Kurtz; Nigel Verrobe; Bonnie Dumanis and Gail Stewart from The San Diego District Attorney's Office; and Bill Lemons.

I. Call to Order

The meeting was called to order by Chair Edblad at 2:03 p.m.

II. Approval of Meeting Minutes from July 23, 2009

Motion was made by Commission member Connie Larson to approve the minutes from July 23, 2009, and was seconded by Sheriff Gerhardt.

Motion approved without dissent.

III. Severity Level Ranking for 1st Degree Riot

Executive Director Suzanne Alliegro made note of a letter that was sent to Chair Edblad from Hennepin County Attorney Mike Freeman. Mr. Freeman requested that the Commission consider increasing the severity ranking of 1st Degree Riot (resulting in death), M.S. § 609.71, subd. 1, to bring the ranking and presumptive sentence in line

with other similar crimes. The offense has a 20 year statutory maximum sentence, but is only ranked as a severity level V.

The Commission previously discussed the ranking of M.S. § 609.71, subd. 1 at its July 20, 1993 meeting where the initial recommendation was to leave the offense unranked. A motion was made to rank the offense at severity level VII (which is now severity level VIII) due to the fact that the offense was similar to Manslaughter in the Second Degree, Culpable Negligence. The motion failed. A motion was then made and approved to rank the offense at Severity Level V.

Staff reviewed sentencing practices for 1st Degree Riot (resulting in death) for the years 2001-2008. During this period of time, there were only two offenses sentenced both resulting in jail time with an average duration of 198 days.

Commission members were provided copies of the Riot, Manslaughter in the First Degree and Second Degree and Murder in the Third Degree statutes and the Statutory Maximums for Severity Level V and above. Judge Shumaker noted that Manslaughter seemed to be a lesser offense than 1st Degree Riot.

Motion was made by Judge Shumaker to rank 1st Degree Riot (resulting in death) at a severity level 9 and move to the public hearing notice.

Judge Cleary questioned why the offense shouldn't be ranked as severity level 8. Judge Shumaker responded that ranking 1st Degree Riot as severity level 9 would leave room for ranking 2nd and 3rd Degree Riot. Director Alliegro clarified that the request by Mike Freeman was to re-rank 1st Degree Riot only.

Motion was **amended** by Judge Shumaker and seconded by Judge Cleary to rank 1st Degree Riot (resulting in death) as a severity level 8 and move to the public hearing notice.

Motion carried without dissent.

IV. Discussion: Moving Prostitution Offenses to the Sex Offender Grid

Commission members received information regarding moving prostitution offenses to the sex offender grid which Director Alliegro outlined. The Advocates for Human Rights

with support from Minnesota Coalition against Sexual Abuse requested that the Commission consider reviewing the rankings for felony prostitution offenses as defined in M.S. § 609.324 as well as M.S. § 609.322 to increase their severity levels in order to make them more consistent with offenses on the sex offender grid.

The Commission discussed the request at its July 23, 2009 meeting and directed staff to study this issue including seeking information from the County Attorneys regarding charging practices in prostitution cases involving minors.

Staff reviewed current statutory maximums for felony prostitution offenses and provided the Commission with a table of possible severity level rankings on the Sex Offender Grid according to comparable sex offense statutory maximums and presumptive sentences.

In most cases, placement of prostitution offenses on the sex offender grid will result in more presumptive prison sentences and longer sentences. Additionally, offenders who commit these offenses would be eligible for a second custody status point if they commit the offense while on probation or supervised release for a prior offense on the sex offender grid other than failure to register, and some prior criminal sexual conduct offenses would carry higher criminal history weights. Also, if the offense described in M.S. § 609.322 subd.1 is placed at Severity Level B; an offender will reach the statutory maximum at a criminal history score of 5.

Commission members were provided a summary of sentencing practices for felony prostitution offenses from 2005-2008 including incarceration rates, average pronounced durations and departure rates.

A questionnaire for prosecution was prepared by staff and sent out through the County Attorneys Association. Most of the MNCAA committee and Board members indicated that they rarely or never see these types of cases so not many questionnaires were returned. Responding prosecutors indicated that they charged cases involving minors as Criminal Sexual Conduct, Kidnapping or False Imprisonment. They did so because of the age and lack of consent of the victim, the higher penalties and easier elements to prove. In general, those that responded were in favor of moving prostitution offenses to the sex offender grid. .

Before the Commission continued to discuss this issue, Director Alliegro summarized a letter received on September 16, 2009, from Cheryl Thomas and Mary Ellison from The Advocates for Human Rights. The letter asked that the Commission delay any changes made to the sentencing guidelines regarding M.S. § 609.324 until after the 2010 Legislative Session, as they are concerned that such changes may have unintended consequences for victims of sex trafficking and prostituted individuals. The Advocates, however, support new rankings for M.S. § 609.322, subd. 1(a). Commission member Darci Bentz, who could not attend the meeting, sent a letter dated September 17, 2009, which also urged the Commission not to proceed on making changes to M.S. § 609.324 until after the 2010 session.

Director Alliegro asked the Commission if it would make sense to wait on making changes to M.S. § 609.322 with the thought that these offenses may also be addressed in the 2010 Legislative Session. The Commission previously expressed a desire to consider rankings for all prostitution offenses together. The Commission discussed procedures and it was noted that changes to the grid including severity levels and criminal history needed legislative review before going into effect; therefore, any changes that the Commission wanted to go into effect August 1, 2010, would need to be included in the January 2010 Report to the Legislature. Justice Meyer questioned if adding these changes to the annual report would actually guarantee no delay.

Advocate members Cheryl Thomas and Mary Ellison both clarified that they did not expect any action to be taken in the 2010 Legislative Session regarding M.S. § 609.322. They urged that the Commission make changes to the severity ranking for subd. 1(a).

Motion was made by Connie Larson and seconded by Judge Shumaker to make no changes to M.S. § 609.324.

Motion carried without dissent.

The Commission then discussed M.S. § 609.322. Possible severity level rankings on the sex offender grid were discussed. If the Commission moved forward with re-ranking, two severity levels would need to be assigned: 1) M.S. § 609.322, subd. 1(a)-- individuals under 18 currently at severity level IX; and 2) M.S. § 609.322, subd. 1a-- individuals 18 and older currently a severity level V. When looking at statutory maximums, M.S. § 609.322, subd. 1(a) is comparable to offenses ranked at severity level B or severity level C on the sex offender grid.

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.

Motion carried without dissent. This item will be moved to the public hearing notice.

Motion was made by Commission member Connie Larson and seconded by Justice Meyer 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 carried without dissent. This item will be moved to the public hearing notice.

V. Executive Director's Report

Executive Director Suzanne Alliegro informed the Commission about a memo the office sent to all district court judges regarding 2009 legislative amendments to fifth-degree controlled substance crimes for repeat offenders and key modifications to the Minnesota Sentencing Guidelines and Commentary.

Narrated online training has been added to the MSGC website. This new feature

contains around six hours of narrated training that can be broken into shorter segments. Director Alliegro finally reported that she and staff member Anne Wall have been attending subcommittee meetings for the State Court Race Fairness Committee. The committee has been reviewing data from the courts and the guidelines commission and the impact of race on drug offenses.

Before the Commission meeting proceeded, Chair Edblad introduced two guests from the San Diego District Attorney's Office. District Attorney Bonnie Dumanis and Special Assistant Gail Stewart visited with members of the Commission and staff to learn about Minnesota's sentencing guidelines in an effort to introduce sentencing guidelines to the state of California.

VI. Recent MN Supreme Court Decisions

Commission members received information regarding two recent Minnesota Supreme Court decisions which staff outlined.

A. Booker T. Hodges (File August 13, 2009)

Appellant Booker Hodges pleaded guilty to one count of third degree criminal sexual conduct. He had multiple prior criminal sexual conduct offenses that complied with Minn. Stat. § 609.3455, subd. 4(a)(1) (2008), which mandates a life sentence for certain repeat sex offenders. As part of a plea agreement, Hodges was sentenced to life in prison with a minimum of 240 months imprisonment before becoming eligible for supervised release.

At the time of sentencing, the district court imposed a 240 month minimum based on the theory that the sentencing guidelines didn't apply in this case. However, the district court also found that the same 240 month minimum applied using the sentencing guidelines due to the fact that there were multiple aggravating factors (presumptive sentence would have been 91 months).

In two opinions, the MN Court of Appeals and the MN Supreme Court addressed mandatory life sentences for certain repeat sex offenders (Minn. Stat. § 609.3455, subd. 5) and how to determine the minimum term of imprisonment when it is to be based on the sentencing guidelines or any applicable mandatory minimum sentence.

The Court of Appeals affirmed, deciding that it is up to the district courts to set the minimum term of imprisonment to at least the sentence called for by the sentencing guidelines, *State v. Hodges* 757 N.W.2d 693 (Minn. App. 2008).

The Supreme Court addressed the procedures that should be used to determine the minimum term of imprisonment and what it means for it to be “based on the sentencing guidelines or any applicable mandatory minimum sentence.” (Minn. Stat. § 609.3455, subd. 5).

The Supreme Court affirmed the sentence, and decided that, “the proper procedure for pronouncing Hodges’ minimum term of imprisonment was to follow the same procedure a district court would have used under the sentencing guidelines to sentence Hodges in the absence of the mandatory life sentence imposed by Minn. Stat. § 609.3455, subd. 4.”

The Commission needed to decide if the sentencing guidelines should be amended as a result of this decision. Staff recommended possible language amendments to Section II.C of the guidelines to clarify this issue.

Possible Draft Language

Section II.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. The presumptive fixed sentence for a felony conviction is found in the Sentencing Guidelines Grid cell at the intersection of the column defined by the criminal history score and the row defined by the offense severity level. The offenses within the Sentencing Guidelines Grids are presumptive with respect to the duration of the sentence and whether imposition or execution of the felony sentence should be stayed.

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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.

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, xxx N.W.2d xxx (Minn. 2009).

Motion was made by Judge Shumaker and seconded by Sheriff Gerhardt to adopt the language modifications to the guidelines and move to the public hearing notice.

Motion carried without dissent.

B. Antoine Delany Williams (Filed September 3, 2009)

After being convicted and sentenced for felon-in-possession of a firearm and first-degree assault, Antoine Williams filed an appeal in which one of his arguments was that the district court erred in how it imposed the two sentences. Williams claimed that the Sentencing Guidelines Commission, in explicitly listing burglary, kidnapping, and meth crimes involving children as being exceptions to the single course of conduct

rule, did not intend for those to be the only exceptions. Williams argued that felon-in-possession should be included in that list, thereby prohibiting it from being *Hernandized* onto a second sentence from the same course of conduct, even though the Commission never listed it. The Supreme Court disagreed and stated that because the rules of statutory construction include the reviewing premise that “the expression of one thing is the exclusion of another,” the Commission did not intend for felon-in-possession to be on the list of exceptions.

When there are multiple sentences arising from a single behavioral incident and the crime included Meth crimes with children/vulnerable adults present or burglary or kidnapping, the conviction and sentence for the “earlier” offense should not be included in the criminal history. If an offense is not one of the recognized provisions of law, the criminal history for the “earlier” offense should be used in the criminal history (*Hernandized*).

Over the past 13 years, the Commission has discussed this policy and has reviewed provisions in Minnesota Law that are exceptions to the single-behavioral-incident rule under Minn. Stat. 609.035, to determine whether or not they should be *Hernandized*. Some offenses have been added, which was the case for Meth crimes in the presence of children/vulnerable adults; others were not, which was the case for the commission of a crime while wearing or possessing a bullet-resistant vest, M.S. § 609.486.

In June 2009, the Commission considered adding language in the commentary explaining that its actions with only including three exceptions were deliberate. The issue was tabled to determine whether or not a full review of the policy had been undertaken. It was determined that it was last fully reviewed in June, 2004 (See, *Exceptions to Hernandez Rule, June 17, 2004*; and *Approved MSGC Meeting Minutes, June 17, 2004*.)

In this case, the Supreme Court determined that the Commission had carefully deliberated the policy. Staff recommended that the Commission approve the suggested sentencing guidelines language to make policy language consistent between sections. The modifications would reference the caselaw in the commentary.

Possible Language Modifications

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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, xxx N.W.2d xxx (Minn. 2009).

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, xxx N.W.2d xxx (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.~~

Possible Language Modification for 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, xxx N.W.2d xxx (Minn. 2009).

Motion was made by Judge Shumaker and seconded by Commission member Connie Larson to adopt the language modifications to the guidelines and move to the public hearing notice.

Motion carried without dissent.

VII. Public Input

San Diego District Attorney Bonnie Dumanis thanked the Commission and staff members for hosting a visit to learn more about the Minnesota Sentencing Guidelines.

She was impressed by the work of the Commission and was enthusiastic about bringing her knowledge of Minnesota's guidelines to California.

VIII. Adjournment

The public hearing will be held on November 19, 2009 at 2 p.m., to address the proposals related to the severity level ranking for Riot 1st Degree, changes to the prostitution rankings in M.S. §609.322, and technical modifications related to the recent MN Supreme Court cases. A Commission meeting will follow immediately after the public hearing. The Commission will then meet on December 10, 2009 to approve or reject the proposals. No October meeting is necessary.

Motion made by Sheriff Gerhardt and seconded by Commissioner Fabian to adjourn.

Motion approved without dissent.