

**Minnesota Sentencing Guidelines Commission**  
**Approved Meeting Minutes**  
**October 21, 2010**

The Commission meeting was held on October 21, 2010, at the Department of Corrections, 1450 Energy Park Drive, Suite 200, Saint Paul, Minnesota. Commission members in attendance were Chair Jeffrey Edblad, Rev. Robert Battle, Judge Edward Cleary, Sheriff Brad Gerhardt, Tracy Jenson, Connie Larson, and Judge Gordon Shumaker. Executive Director Suzanne Alliegro, MSGC staff members Jill Payne, Anne Wall, and Kathleen Madland were also in attendance. Member of the public, Matt Majovski from Dakota County Community Corrections, was also present at the meeting.

**1. Call to Order**

The meeting was called to order by Chair Edblad at 2:04 p.m.

**2. Approval of Meeting Minutes from July 22, 2010**

**Motion** was made by Judge Cleary and seconded by Sheriff Gerhardt to approve the minutes from July 22, 2010.

**Motion approved** without dissent.

**3. Executive Director's Report**

Suzanne Alliegro gave her executive director's report.

- **Introduction of Staff Member**

Director Alliegro introduced Kathleen Madland as the new Research Analyst. She has a Master of Arts in Criminology from Indiana University of Pennsylvania and a Bachelor of Science in Criminology and Criminal Justice from the University of South Carolina.

- **Reformatting/Rewriting 2010 Guidelines**

Technical writer Teeghan Parfitt was hired by MSGC to help with the reformatting of the guidelines. Several format changes were presented to the commission, and went into effect August 1, 2010. Additional reformatting changes will be presented to the commission at a later date. In addition to reformatting, rewriting the guidelines had also been discussed. The executive director recommended that the second phase of the project be put on-hold for now due to time constraints on staff, and because it became clear that a technical writer with knowledge of the law would be required for the completion of the project.

- **Update on the Minnesota Sex Offender Program Legislative Study**

At a previous meeting, Executive Director Alliegro explained that the 2010 Legislature mandated the Department of Human Services to report on several issues relating to sex offenders in Minnesota: a study of bed space options, an examination of civil commitment, sex offender treatment, perpetration prevention and sentencing for sex offenders. An advisory committee and five subcommittees, including a sex offender sentencing team, were established by the Department of Human Services. One advisory meeting was held on July 12, 2010. Prior to the start of the first subcommittee meeting, the Department of Human Services decided to disband the subcommittees except for the sex offender sentencing subcommittee. The sex offender sentencing team was going to look into the issue of indeterminate sentencing and was going to be co-chaired by two members of the legislature: Representative Michael Paymar and Representative Debra Hilstrom. The co-chairs decided that, since the other subcommittees had disbanded, they did not want to go forward with the sex offender sentencing subcommittee at that time. The co-chairs of the sex offender sentencing subcommittee had indicated that they were going to move forward on this matter, however, no action has been taken in this regard since August 2010.

Judge Shumaker asked why the legislature was looking into indeterminate sentencing for sex offenders. Executive Director Alliegro replied, stating that a concern lies with the cost of confining offenders in the Moose Lake facility when it may be less expensive to confine them in prison.

- **Legislative Days on Drug Policy**

On September 29<sup>th</sup> and 30<sup>th</sup> of 2010, Representative Debra Hilstrom held Drug Offender Policy Days. During these two days law enforcement, prosecutors, and defense attorneys, among others, presented issues related to drug offenses. Executive Director Alliegro presented on behalf of the guidelines. Her presentation included background on the guidelines some of the trends. These trends include the increase in the number of drug convictions that started in 2001, peaked in 2006, and have been in decline the past three years. Also discussed in Ms. Alliegro's presentation were the increase in the length of sentences, high departure rates, and the disparate sentences across the state.

Executive Director Alliegro provided the commission with copies of a slide that showed the type of sentences pronounced for presumptive commits, by judicial district, for drug offenses in 2009. Only three districts gave the presumptive sentence the majority of the time. The 8<sup>th</sup> Judicial District had the highest rate of presumptive sentences at 88 percent, followed, in order by: the 3<sup>rd</sup> at 59%; the 7<sup>th</sup> at 56%; the 9<sup>th</sup> at 47%; the 10<sup>th</sup> and 6<sup>th</sup> at 46%; 2<sup>nd</sup> at 44%; 5<sup>th</sup> at 37%; 1<sup>st</sup> at 33%; and the 4<sup>th</sup> at 32%. The information on the slide showed that the departure rates varied across the state. Ms. Alliegro pointed out that the 8<sup>th</sup> District had the fewest number of cases and, in general, had low departure rates. Hennepin County (the 4<sup>th</sup> District) had a high number of cases and, in general, had high departure rates. This raised some concern that, depending on where offenders are located in the state, they will be sentenced differently.

Judge Shumaker asked whether or not there was a correlation between the departure rates and the use of drug courts. Executive Director Alliegro responded, stating that this may be a reason why certain districts have high departure rates and that districts that believe in the drug court philosophy may be more inclined to give departures on drug offenses. Ms. Alliegro mentioned that the commission may want to look into whether there is a correlation between high departure rates and the use of drug courts.

Judge Cleary questioned if districts with the highest departure rates maybe had an overwhelming number of drug offenses. Ms. Alliegro responded that, though this is true in many districts, it is not the case in all districts. For example, the 9<sup>th</sup> District had a fairly high departure rate compared to the number of drug offenses. Also, the 1<sup>st</sup> and

10<sup>th</sup> districts tended to have higher departure rates compared to the number of drug offenses than the 2<sup>nd</sup> District.

Staff will look further into the issue of regional departure rates based on drug court locations.

- **Targeted Misdemeanor List Concerning Domestic Abuse No Contact Order**

Effective August 1, 2010, as part of the Omnibus Domestic Abuse Act, violations of a domestic abuse no contact order (DANCO) were recodified from M.S. § 518B.01 subd. 22(d) to M.S. § 629.75 subd. 2(d). For criminal history purposes, the MSGC asked the BCA whether or not they had counted both the Violation Order of Protection, M.S. § 518B.201 subd. 14(d), and the Violation of a Domestic Abuse No Contact Order, M.S. § 518B.01 subd. 22(d), on the targeted misdemeanor list. The BCA indicated that both offenses counted on the targeted misdemeanor list.

A provision was also made in the Omnibus Domestic Abuse Act that allowed the Revisor of Statutes to make corrections in statutes and rules based on the recodification of DANCO. Executive Director Alliegro contacted the Revisor of Statutes to make sure the recodified DANCO was added to the targeted misdemeanor list. The Revisor of Statutes began working on the issue and upon further study and discussion with the BCA felt that, given the statutory language, that DANCO should never have been considered part of the targeted misdemeanor list. The BCA does plan on taking the necessary steps, via the legislature, to get DANCOs included on the list. Ms. Alliegro stated that a BCA representative also indicated that they will be examining the targeted misdemeanor list because it has not been examined in many years.

- **Star Tribune Editorial -The Koua Fong Lee Case**

Commission members received a copy of a newspaper editorial provided to them in their meeting materials. On August 24, 2010, a Star Tribune editorial expressed that a single act involving multiple victims should have a concurrent, not consecutive, sentence and that judges should provide an explanation if a consecutive sentence is merited. MSGC has not received a formal request to look into the matter. In the editorial, Professor Richard Frase argued that judicial discretion to sentence

consecutive leaves a hole in the guidelines.

Judge Shumaker commented that the statistics in the article do not account for other factors that may be involved with individual cases. In these cases, when all factors are taken into account, a judge's discretion is needed for a fair ruling. There needs to be a balance between discretion and certainty and uniformity. Location of offenses may also explain how individual communities use discretion to tailor sentencing to their specific needs.

Executive Director Alliegro commented that, between 2004 and 2008, there were 13 criminal vehicular homicide cases that involved multiple victims. Of those cases, five did not receive consecutive sentences, eight were given consecutive sentences, and of those eight, six received a downward dispositional departure to probation rather than prison.

#### **4. Overview of 2009 MSGC Monitoring Data**

The 2009 Sentencing Practices reports are now available on the MSGC website. Commission members were supplied with copies of the 2009 Sentencing Practices Data Summary. This data summary will be incorporated in the MSGC annual report to the legislature. The report highlights that felony convictions have decreased again in 2009 for the third year in a row, for a total decrease of 10.1 percent. There were 14,840 felony offenders sentenced in 2009; a decrease of 3.6 percent from the number sentenced in 2008. Felony convictions increased from 2001 to 2004. This was mainly attributed to the implementation of the felony DWI law and the increase of drug crimes, particularly methamphetamine cases. The convictions started declining in 2007, and continued declining in 2008 and 2009. There was also a decrease in all offense types, excluding person offenses. Property offenses had a three-year decline of 22.7 percent, drug offenses had a three-year decline of 21 percent, and DWI offenses had a decline of 22.8 percent. The crime category of "other" also had a two-year decrease of 6.5 percent. Person offenses have increased 6 percent in 2009 and 3 percent in 2008, 7 percent in 2007, and 13 percent in 2006. This increase is mainly attributed to the increase in certain domestic assault-related offenses and first-degree assaults. Sex offenses stayed relatively the same, with a

slight decrease in 2009. There was a decrease in first-degree sex offenses from 144 in 2008 to 105 in 2009.

An article from the Star Tribune was presented that reiterated the decline in violent crime over the last three years.

## **5. Discussion Items**

Chair Edblad directed members to materials in their packets related to possible modifications to the sentencing guidelines. These materials included draft sentencing guidelines language.

### **1) Custody Status Point for Targeted Misdemeanor Within Original Probationary Term**

Effective August 1, 2010, a custody status point applied to an offender on probation for a felony, EJJ, non-traffic gross misdemeanor (including DWI) or misdemeanor on the targeted misdemeanor list provided for in M.S. § 299C.10 (including DWI). The same policy does not apply to offenders who were discharged early from probation for a targeted misdemeanor offense. The commission was asked whether or not they wished to apply a custody status point to offenders who were on probation for a targeted misdemeanor offense, but were discharged early. Staff recommended making the policy consistent by applying a custody status point to offenders discharged early from probation for a targeted misdemeanor offense. Language from section 2.a could be applied to 2.b.

### **Draft Sentencing Guidelines Language for Section II.B.2**

2. One point is assigned if the offender:

....

- b. 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 or

misdemeanor on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e). This policy does not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence; or

**Motion** was made by Connie Larson and seconded by Judge Shumaker to approve the draft language for public hearing. The modification would become effective August 1, 2011, if adopted.

**Motion approved** without dissent.

**2) Custody Status Point for Felony or Gross Misdemeanor Conviction Resulting in Misdemeanor Sentence that is Not on the Targeted Misdemeanor List**

As noted in item 1, effective August 1, 2010, a custody status point applies to an offender on probation for a felony, EJJ, non-traffic gross misdemeanors (including DWI) or misdemeanors on the targeted misdemeanor list (including DWI). This policy applies to offenders following conviction. Recently an agent asked whether or not to apply a custody status point to an offender who was convicted of a gross misdemeanor, but was sentenced as a misdemeanor. The misdemeanor sentence was not an offense listed on the targeted misdemeanor list (e.g., a conviction for a GM theft, but received a misd. theft sentence).

Prior to August 1, 2010, the guidelines had commentary in II.B.203, specifying that a custody status point shall not apply to a person serving a misdemeanor sentence even if it followed a gross misdemeanor or felony conviction. This language was stricken, making it appear as though a custody status point should be applied to an offender on misdemeanor probation after a gross misdemeanor or felony conviction. However, this conflicts with the guidelines misdemeanor and gross misdemeanor criminal history unit policy, revised August 1, 2010, where non-targeted misdemeanor sentences do not count toward units even if they resulted from gross misdemeanor convictions.

The commission was asked whether or not it intended for a custody status point to apply to offenders convicted of a felony or gross misdemeanor, but sentenced as a non-targeted

misdemeanor. If not, staff recommended revising and reinstating the language in comment II.B.203, making it clear that persons serving a non-targeted misdemeanor sentence at the time the current offense would not receive a custody status point, even if the misdemeanor sentence was imposed upon conviction of a gross misdemeanor or felony. This would be consistent with the misdemeanor and gross misdemeanor criminal history unit policy.

### **Draft Sentencing Guidelines Language for Comment II.B.203**

....

**II.B.203.** *It should be emphasized that the custodial statuses covered by this policy are those occurring after conviction of a felony, non-traffic gross misdemeanor, gross misdemeanor driving while impaired or refusal to submit to a chemical test case or misdemeanor on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e). Thus, a person who commits a new felony while on pre-trial diversion or pre-trial release on another charge would not get a custody status point. Likewise, persons serving a misdemeanor sentence for an offense not on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e), would not receive a custody status point, even if the misdemeanor sentence was imposed upon conviction of a gross misdemeanor or felony.*

**Motion** was made by Tracy Jenson and seconded by Judge Shumaker to approve the draft language for public hearing. The modification would become effective August 1, 2011, if adopted.

**Discussion:** Ms. Larson raised concerns about the custody status point being determined by the sentence level and not the conviction level.

**Motion carried** with one member opposed. Commissioner Larson opposed the motion.

### **3) Custody Status Point for Enhanced Felonies**

A custody status point applies to an offender who is on gross misdemeanor probation at the time he or she commits a felony crime that is a felony solely because of previous convictions for similar or related misdemeanor and gross misdemeanor convictions. This type of felony is referred to as an “enhanced felony.”

A gross misdemeanor offense used to enhance the current offense to a felony can be used to assign a custody status point even though it cannot otherwise be used to calculate the criminal history score. A probation agent recently asked if a custody status point would be applied to an offender who is on probation for a targeted misdemeanor at the time he or she commits an “enhanced felony.”

The commission was asked if it wished to apply a custody status point to offenders on probation for targeted misdemeanors. Staff recommended that the targeted misdemeanor language from the custody status section (Section II.B.2) be applied to section II.B.6.

### **Draft Sentencing Guidelines Language for 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 misdemeanor conviction(s) on the targeted misdemeanor list provided in Minn. Stat. § 299C.10, subd. 1(e) or 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.

....

**Motion** was made by Judge Shumaker and seconded by Sheriff Gerhardt to approve the draft language for public hearing. The modification would become effective August 1, 2011, if adopted.

**Motion carried** with one member opposed. Commissioner Larson opposed the motion.

#### 4) Adding a Provision of First-Degree DWI to the Permissive Consecutive List

Felony first-degree driving while impaired (DWI) has been listed as an offense eligible for permissive consecutive sentencing since the list was first adopted in 2005. First-degree DWI – previous conviction for criminal vehicular homicide or injury – was added to the first-degree DWI law in 2006, but was not added to the list of offenses eligible for permissive consecutive sentencing. Staff asked whether or not the commission wished to add the offense to the list; removing references to subdivisions and paragraphs so that the reference is for all first-degree DWI.

### Suggested Guidelines Language for Section VI

#### 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.

....

Statute Number	Offense Title
169A.24, subd. 1 (1)	First-Degree DWI—4 or more w/in 10 years
169A.24, subd. 1 (2)	First Degree DWI – 2 <sup>nd</sup> or subsequent

....

**Motion** was made by Reverend Battle and seconded by Tracy Jenson to approve the draft language for public hearing. The modification would become effective August 1, 2011, if adopted.

**Motion approved** without dissent.

#### 6. Public Input

Matt Majovski from Dakota County Community Corrections, inquired about the new custody status point rule regarding targeted misdemeanors. This was one of the clarifications the commission addressed and approved on earlier in the meeting.

## 7. Adjournment

The next commission meeting is tentatively scheduled for November 18, 2010. The report to the legislature will be reviewed and approved. Chair Edblad suggested that a celebration be held at the meeting to recognize the 30<sup>th</sup> year of the Minnesota Sentencing Guidelines.

**Motion** for adjournment was made by Sheriff Gerhardt and was seconded by Judge Shumaker.

**Motion approved** without dissent.

Chair Edblad adjourned the meeting at 3:00 p.m.