

Minnesota Sentencing Guidelines Commission
Meeting Minutes
May 20, 2010

The Commission meeting was held on May 20, 2010, at the Department of Corrections, 1450 Energy Park Drive, Suite 200, Saint Paul, Minnesota. Commission members in attendance were Chair Jeffrey Edblad, Darci Bentz, Judge Edward Cleary, Sheriff Brad Gerhardt, Tracy Jenson, Connie Larson, and Justice Helen Meyer. Executive Director Suzanne Alliegro, MSGC staff members Jill Payne and Anne Wall, Jim Early from the Minnesota Attorney General's Office, and Matt Majovski from Dakota County Community Corrections were also in attendance.

1. Call to Order

The meeting was called to order by Chair Edblad at 2:00 p.m.

2. Approval of Meeting Minutes from March 18, 2010

Motion was made by Sheriff Gerhardt to approve the minutes from March 18, 2010, and was seconded by Connie Larson.

Motion approved without dissent.

3. Executive Director's Report

Suzanne Alliegro gave her executive director's report.

Legislative Update:

The supplemental budget bill (Chapter 215) was signed by the governor on April 1, 2010 and provided for budget reductions at a number of state agencies including sentencing guidelines. The sentencing guidelines budget was reduced by \$11,000 for the fiscal year ending June 30, 2010, and by \$18,000, for the fiscal year ending June 30, 2011 (Article 11, Section 14). The cost-savings by the agency following the move to a State building will cover most of the reduction to the budget this fiscal year and all of

the reduction next fiscal year.

The proposed non-legislative changes to the sentencing guidelines relating to the crimes of solicitation, inducement, and promotion of prostitution and sex trafficking; and riots were delayed by one year; these changes are effective on August 1, 2011 (Article 11, Section 23). The legislature delayed the effective date because there is an estimated two prison beds during the first year that will be required as a result of the proposal.

The Revisor's bill (Chapter 382) corrected erroneous, obsolete, and ambiguous references in statute. The statute for fifth-degree controlled substances (M.S. § 152.025) was corrected by striking a reference to the sentencing guidelines. The mistake was in place for one year, after the statute was amended in the 2009 omnibus crime bill, changing local jail time from "unwaivable" to "waivable" for repeat offenders. However, it incorrectly read that "sentencing a person in this manner is a departure from the sentencing guidelines." The sentencing guidelines do not have authority over mandatory minimum jail sentences, so the language was removed (Section 35).

Director Alliegro testified before the Senate Judiciary Committee regarding a bill introduced by Senator Latz which addressed racial impact notes. Since 2007, the commission has provided to the legislature racial impact notes of proposed changes in criminal law, in addition to the required fiscal notes. Ms. Alliegro was asked why not as many racial impact notes had been forwarded in the last two sessions. She explained that there were fewer notes because there were fewer amendments to criminal law considering the State's budget situation.

Non-Legislative Modifications:

The commission was presented with a document summarizing the non-legislative modifications effective August 1, 2010. The commission adopted three proposals related to the misdemeanor point on July 23, 2009: 1) Replace the Misdemeanor/Gross Misdemeanor List with a policy that counts 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); 2) Change the policy for a gross misdemeanor custody status point that applies a 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 will make it consistent with the policy change for handling misdemeanor and gross misdemeanor offenses in criminal history; and 3) Change the start-date and end-date used to calculate the misdemeanor and gross misdemeanor decay to make it uniform with the dates used for felony decay. In addition to simplifying the calculation of the misdemeanor point, it will no longer be necessary for the commission to review new misdemeanors and gross misdemeanors for possible inclusion on the obsolete Misdemeanor/Gross Misdemeanor List.

On December 10, 2009, the commission adopted a proposal to amend the criminal history section to consistently reference the three exceptions to the “Hernandize” rule and amend the commentary to clarify its actions are deliberate. The Commission added language to the commentary referencing a recent MN Supreme Court case to that effect. The Commission adopted a proposal to amend the presumptive sentence section to be consistent with a recent MN Supreme Court case in which procedures for determining the minimum term of imprisonment for certain repeat sex offenders under Minn. Stat. § 609.3455, subd. 5, were decided.

On March 18, 2010, the commission proposed moving an item to a public hearing clarifying that a prior controlled substance conviction or stay of adjudication cannot “trigger” a prison sentence for a subsequent first- through third-degree controlled substance offense after 10 years have passed; consistent with M.S. § 152.01, subd. 16a.

Staff Projects:

Following informal approval by the commission at its March meeting, the executive director and staff met with a technical writer regarding reformatting and rewriting the sentencing guidelines and commentary. The technical writer came prepared to the meeting with examples that were intended to improve on the continuity and style of the manual. The project will be in two parts: 1) reformatting; and 2) rewriting. The reformatting will begin in the next few months after the technical writer is hired as a temporary Information Specialist 2. The rewriting is tentatively scheduled to begin after reformatting. Judge Shumaker agreed to act as an advisor for the second part of the

project; any draft rewrites would come before the full commission for approval.

MN Veterans in Criminal Court:

Judge Cleary e-mailed the chair and executive director on May 12, 2010, regarding a presentation by attorneys John Baker and Brock Hunter that the judge had attended. The presentation focused on veterans in criminal court; specifically, a provision in M.S. § 609.115, subd. 10, regarding military veterans. The provision was passed by the 2008 Legislature, and directed the court to 1) determine the military status of a convicted defendant; and 2) if the defendant is currently serving in or is a veteran of the armed forces and has been diagnosed as having a mental illness, the court can “consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence.” (See, Minn. Stat. § 609.115, subd. 10).

Judge Cleary spoke to the issue and asked the commission to consider placing a reference to the provision in the sentencing guidelines and commentary so that more sentencing professionals are made aware of its existence and so that it is contained in the MN Rules of Court. The executive director provided draft sentencing guidelines language for the commission to consider.

The commission reviewed the statute and draft sentencing guidelines language. Justice Meyer asked whether or not the statute applied to any military veteran appearing in court or if it was only for criminal matters. Judge Cleary clarified that it applied to defendants appearing in court who were convicted of crimes.

Members supported the amendment saying it was important to highlight the statute. Commissioner Jenson felt it was important to reference it in the sentencing guidelines because both the military veterans section and sentencing guidelines worksheet section were contained in the pre-sentence investigation statute (Minn. Stat. § 609.115).

Motion was made by Judge Cleary and seconded by Justice Meyer to accept the draft sentencing guidelines language related to military veterans.

Discussion: Chair Edblad suggested adding “by a qualified psychiatrist or clinical psychologist or physician” in the second sentence after “diagnosed as

having a mental illness.” This was done to be consistent with statute and to avoid any ambiguity as to who could make such diagnoses. The friendly amendment was accepted.

Motion approved without dissent.

Proposed Modification to Sentencing Guidelines, Section III:

F. Military Veterans: The Commission recognizes that the 2008 Legislature established a provision in law relating to defendants who are military veterans. If the defendant is currently serving in or is a veteran of the armed forces of the United States and has been diagnosed as having a mental illness by a qualified psychiatrist or clinical psychologist or physician, the court can “consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence.” (See, Minn. Stat. § 609.115, subd. 10.)

F. G. Modifications: Modifications to the Minnesota Sentencing Guidelines and associated commentary will be applied to offenders whose date of offense is on or after the specified modification effective date. Modifications to the Commentary that relate to clarifications of existing policy will be applied to offenders sentenced on or after the specified effective date.

Further discussion: After further consideration, Judge Cleary suggested that the commission propose language that introduces the law, then, simply references the statute verbatim. This would avoid misinterpretations and make it clear that it is a directive to the court to inquire whether or not a defendant is a veteran or active member of the armed forces of the United States.

Amended motion was made by Judge Cleary and seconded by Justice Meyer to accept the amended proposal which would modify sentencing guidelines language in section III, related to military veterans. The proposal will be forwarded to a public hearing.

Amended motion approved without dissent.

Proposed Modification to Sentencing Guidelines, Section III:

F. Military Veterans: The Commission recognizes that the 2008 Legislature established a provision in law relating to defendants who are military veterans which states:

“(a) When a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States. (b) If the defendant is currently serving in the military or is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist or clinical psychologist or physician, the court may:

(1) order that the officer preparing the report under subdivision 1 consult with the United States Department of Veterans Affairs, Minnesota Department of Veterans Affairs, or another agency or person with suitable knowledge or experience, for the purpose of providing the court with information regarding treatment options available to the defendant, including federal, state, and local programming; and

(2) consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence.” (See, Minn. Stat. § 609.115, subd. 10.)

F. G. Modifications: Modifications to the Minnesota Sentencing Guidelines and associated commentary will be applied to offenders whose date of offense is on or after the specified modification effective date. Modifications to the Commentary that relate to clarifications of existing policy will be applied to offenders sentenced on or after the specified effective date.

4. Possible modifications to the sentencing guidelines: new and amended crimes passed by the 2010 Legislature – Effective August 1, 2010

The commission considered new and amended crimes passed by the 2010 Legislature.

1. The statutory maximum for possession of a dangerous weapon on school property was raised from two years to five years (Chapter 268 - S.F. 2339; 2009 M.S. § 609.66.) Brandishing a replica firearm or BB gun on school property was reduced to a gross misdemeanor. Possession of a replica firearm or BB gun on school property

was reduced to a misdemeanor (currently a gross misdemeanor-level offense). It is effective August 1, 2010, and applies to crimes committed on or after that date. It is estimated that there will be minimal impact on state and local correctional resources and no impact on racial disparity.

An existing felony offense with a two-year statutory maximum is ranked at severity level 1. Possession of a dangerous weapon in a courthouse, which has a statutory maximum of five years, is ranked at severity level 4.

Judge Cleary wished to clarify that the definition for “dangerous weapons” was the same for both dangerous weapons in a courthouse and dangerous weapons on school property. It was verified that the same definition applied to both, and was found in M.S. § 609.02, subd. 6.

Motion was made by Connie Larson and seconded by Tracy Jenson to propose raising the severity level ranking for possession of dangerous weapons on school property to severity level 4. The proposal will be moved to a public hearing.

Motion approved without dissent.

Proposed Sentencing Guidelines Modifications:

V. OFFENSE SEVERITY REFERENCE TABLE

I
Dangerous Weapons on School Property - 609.66, 1d(a)

IV
Dangerous Weapons on School Property - 609.66, subd. 1d(a)

NUMERICAL REFERENCE OF FELONY STATUTES

STATUTE	OFFENSE	SEVERITY LEVEL
609.66 subd. 1d(a)	Dangerous Weapons on School Property	± <u>4</u>

2. Identity theft (Chapter 293 - S.F. 2493; 2009 M.S. § 609.527) was amended to include scanning devices and reencoders. These devices are used to access, read, scan and store personal information. A new felony offense (subdivision 5b) was created for a person who uses either of these devices, without the permission of the cardholder, to obtain information “with the intent to commit, aid, or abet any unlawful activity.” The statutory maximum is five years. It is effective August 1, 2010, and applies to crimes committed on or after that date. It was estimated that there would be minimal impact on state correctional resources and an unknown impact on local resources. There is no impact on racial disparity excepted.

The existing identity theft involving electronic use of false pretense (subdivision 5a) is ranked at severity level 2; it carries a five-year statutory maximum. All identity theft offenses are on the list of offenses eligible for permissive consecutive sentences (Section VI).

MSGC Staff recommended ranking unlawful possession or use of a scanning device or reencoder at severity level 2, consistent with identity theft involving electronic use of false pretense and maintaining the list of offenses eligible for permissive consecutive sentences (Section VI).

Motion was made by Justice Meyer and seconded by Darci Bentz to propose ranking unlawful possession or use of scanning device or reencoder at severity level 2. The proposal will be moved to a public hearing.

Motion approved without dissent.

Proposed Sentencing Guidelines Modifications:

V. OFFENSE SEVERITY REFERENCE TABLE

II	<u>Unlawful possession or use of scanning device or reencoder - 609.527, subd. 5b</u>
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NUMERICAL REFERENCE OF FELONY STATUTES

STATUTE	OFFENSE	SEVERITY LEVEL
<u>609.527, subd. 5b</u>	<u>Unlawful possession or use of scanning device or reencoder</u>	<u>2</u>

3. A number of domestic abuse-related provisions were amended (Chapter 299 - S.F. 2437; 2009 M.S. § 609.749; M.S. § 629.75): a) “stalking” replaced “harassing;” b) pattern of stalking conduct was expanded to include felony first- to third-degree murder, first- and second-degree manslaughter, and violations of domestic abuse no contact orders, as prior qualifying offenses; and c) domestic abuse no contact order was re-codified from M.S. § 518B.01, subd. 22, to the new M.S. § 629.75. It is effective August 1, 2010, and applies to crimes committed on or after that date. It was estimated that there would be no impact on state and local correctional resources and no impact on racial disparity.

Pattern of stalking conduct is ranked at severity level 5. The offense is also on the permissive consecutive list. MSGC staff recommended that there be no changes to the sentencing guidelines as a result of the statutory amendments since the provision only expand the list of pattern of stalking conduct; however, technical modifications would still need to be made.

Motion was made by Connie Larson and seconded by Sheriff Gerhardt to propose the technical modifications related stalking offenses. The proposal will be moved to a public hearing.

Motion approved without dissent.

Proposed Sentencing Guidelines Modifications:

Comment Section II.D

II.D.206. The aggravating factor involving bias motivation under Section II.D.2.b.(11) cannot be used when a person has been convicted under a statute that elevated the crime to a felony offense because of bias motivation, e.g., Minn. Stat. §§ 609.2231, subd. 4 (fourth-degree assault), 609.595, subd. 1a(a) (criminal damage to property); 609.749, subd. 3(1) (~~harassment~~/stalking). The Commission intends that a penalty for a bias-motivated offense be subject to enhancement only once.

V. OFFENSE SEVERITY REFERENCE TABLE

V	Harassment /Stalking (third or subsequent violations) – 609.749, subd. 4(b) Harassment /Stalking (pattern of <u>stalking</u> harassing conduct) - 609.749, subd. 5
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IV	Harassment /Stalking (aggravated violations) - 609.749, subd. 3(a),(b) Harassment /Stalking (2 nd or subsequent violation) - 609.749, subd. 4(a) Violation of a Domestic Abuse No Contact Order – <u>629.75, subd. 2(d)</u> 518B.01, subd. 22(d)
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VI. OFFENSES ELIGIBLE FOR PERMISSIVE CONSECUTIVE SENTENCES

609.749, subd. 3	Harassment /Stalking (Aggravated Violations)
609.749, subd. 4	Harassment /Stalking (Subsequent Violations)
609.749, subd. 5	Harassment /Stalking (Pattern of Conduct)
<u>629.75, subd. 2(d)</u> 518B.01, subd. 22(d)	Violation of a Domestic Abuse No Contact Order

NUMERICAL REFERENCE OF FELONY STATUTES

609.749 subd. 3(a)(b)	Harassment /Stalking (aggravated violations)	4
609.749 subd. 4(a)	Harassment /Stalking (2 nd or subsequent violations)	4
609.749 subd. 4(b)	Harassment /Stalking (3 rd or subsequent violations)	5
609.749 subd. 5	Harassment /Stalking (pattern of conduct)	5
<u>629.75, subd. 2(d)</u> 518B.01 subd. 22(d)	Violation of a Domestic Abuse No Contact Order	4

***Targeted Misdemeanor List
(As provided for in Minn. Stat. § 299C.10, subd. 1(e))***

According to Minn. Stat. § 299C.10, subd. 1(e), a targeted misdemeanor is a misdemeanor violation of:

Order for Protection Violation ●
518B.01; 629.75

● According to the Bureau of Criminal Apprehension this includes violations of domestic abuse no contact orders under M.S. § 518B.01, subd. 22, which was re-codified to M.S. § 629.75, effective August 1, 2010 (2010 Minn. Session Laws, Ch, 299, section 14).

4. Third- and fourth-degree criminal sexual conduct was amended to add employees of secure treatment facilities to the clause prohibiting sexual penetration or sexual contact by correctional facility employees (Chapter 270 - S.F. 2717; M.S. 2009 §§ 609.344, subd. 1(m) and 609.345, subd. 1(m)). Third-degree is a felony with a statutory maximum of fifteen years; fourth-degree is a felony with a ten-year statutory maximum. It is effective August 1, 2010, and applies to crimes committed on or after that date. It was estimated that there would be minimal impact on state and local correctional resources and no impact on racial disparity.

Third- and fourth-degree criminal sexual conduct offenses are on the list of offenses eligible for permissive consecutive sentences (Section VI). The affected offenses are at severity level C and severity level E of the sex offender grid. MSGC staff recommended that there be no changes to the sentencing guidelines as a result of the amendments since the provision expand the scope of an existing offense.

Motion was made by Darci Bentz and seconded by Tracy Jenson to maintain the current rankings for third- and fourth-degree criminal sexual conduct as they relate to employees of secure treatment facilities and to maintain the list of offenses eligible for consecutive sentencing.

Motion approved without dissent.

5. Possible modifications to the sentencing guidelines: technical modifications – Effective August 1, 2010

The commission considered one technical modification related to aggravating factors for solicitation or promotion of prostitution; sex trafficking (M.S. § 609.322, subd. 1(b)). MSGC staff suggested adding an entry on the numerical reference of felony statutes table for solicitation or promotion of prostitution; sex trafficking which would direct readers to the section that describes how to apply the four-year enhancement for the offense.

Motion was made by Sheriff Gerhardt and seconded by Connie Larson to propose modifying the numerical reference of felony statutes table to include an entry for aggravating factors for solicitation or promotion of prostitution; sex trafficking. The proposal will be moved to a public hearing.

Motion approved without dissent.

NUMERICAL REFERENCE OF FELONY STATUTES

STATUTE	OFFENSE	SEVERITY LEVEL
609.322 subd. 1(b)	<u>Aggravating Factors for Solicitation or Promotion of Prostitution; Sex Trafficking</u>	<u>see note *</u>

* See Guidelines Section II.G., Convictions for Attempts, Conspiracies, and Other Sentence Modifiers, to determine the presumptive sentence.

6. Public input

Dakota County Sr. Probation Officer Matt Majovski spoke in support of the commission's adopted proposals related to the misdemeanor point. He indicated that these modifications would help simplify the guidelines and that it would be important for probation officers and PSI agents to understand the changes thoroughly and for practitioners to remember to use the sentencing guidelines in effect at the time the crime was committed to achieve the correct presumptive guidelines sentence. Mr. Majovski supported the commission's proposal related to military veterans.

7. Adjournment

The chair announced the dates for the public hearing and follow-up meeting. The public hearing will be July 15, 2010, at 2pm at the State Capitol. The meeting to formally adopt or reject the commission's proposals will be July 22, 2010, at 2pm at the Department of Corrections-Central Offices.

Motion for adjournment was made by Tracy Jenson and was seconded by the Chair, Jeffrey Edblad.

Motion approved without dissent. Chair Edblad adjourned the meeting at 2:43 p.m.