

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
April 21, 2011

The Commission meeting was held on April 21, 2011, at the Department of Corrections, 1450 Energy Park Drive, Suite 200, Saint Paul, Minnesota. Commission members in attendance were Chair Jeffrey Edblad, Reverend Bob Battle, Darci Bentz, Judge Edward Cleary, Deputy Commissioner of Corrections Richard Crawford, Tracy Jenson, Connie Larson, and Justice Helen Meyer. Executive Director Kelly Mitchell, MSGC staff members Jill Payne, Anne Wall and Kathleen Madland, and Jim Early from the Minnesota Attorney General's Office were also in attendance. Members of the public, Joe Heitkamp, Ann Nasseff, Elliss Wyse, and Dustin Rocha, and Bill Lemons from the Minnesota County Attorneys Association were 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 February 17, 2011

Motion was made by Reverend Battle and seconded by Connie Larson to approve the minutes from February 17, 2011.

Motion approved without dissent.

3. Executive Director's Report

Kelly Mitchell gave the executive director's report.

• **Getting Settled as Executive Director**

Director Mitchell is learning more about the day-to-day operations of the sentencing guidelines and the specific duties and responsibilities of the staff. Director Mitchell commented that it has been a positive experience.

• **Commission Appointments**

There have been several discussions with the governor's office about the appointment process. It has been stressed that the commission needs to have the membership settled soon due to the post-session timeline. A formal announcement is expected shortly.

• **New Prosecutor Training**

Last week, Executive Director Mitchell and Chair Edblad conducted a new prosecutor training. Their presentation included an introduction to the guidelines and discussed sentencing concepts. This was a great opportunity to work with new prosecutors. The training went very well.

- **Drug Court Evaluation**

Director Mitchell, Jill Payne, and Anne Wall met with research staff from the State Court Administrator's Office to discuss ways that MSGC could help further the statewide drug court evaluation. MSGC staff has thought of different options for gathering data, evaluating criminal history scores, and other information that is needed for the overall evaluation of the drug courts. It is hoped that this will be a positive partnership for both the commission and the court.

- **Legislature**

Director Mitchell has been following MSGC's funding bill. The bill is going to conference committee, which will likely start next week. The bill contains a number of policy provisions, including indeterminate sentencing for predatory sex offenders, creation of a sex offender policy task force, and a requirement that the DOC, in consultation with the guidelines, develop performance incentives for counties to reduce the number of probation revocations by ten percent.

The legislature will return from break next week. It is expected that the Legislature will begin focusing on policy bills, so there is likely to be some activity related to new crimes. Staff will closely monitor the policy provisions in the funding bill and any new crimes legislation and report back at a later meeting.

- **PEW Report**

The Pew Center on the States, in collaboration with the Association of State Correctional Administrators, conducted a survey of 33 state corrections departments to determine recidivism rates following release from prison. For purposes of the study, recidivism was defined as the rate at which offenders returned to prison within three years after release. A major finding of the report was that 45.4% of people released from prison in 1999 and 43.3% of those released in 2004 were reincarcerated within three years. Minnesota results were higher, with a 61% recidivism rate for offenders released in 2004: 36% for a new offense; 26% for technical violations. DOC has stated that this percentage is overstated by approximately 10% because some offenders were counted twice (both a new offense and a technical violation within the three-year period). The report indicated that the result could vary from state to state based on differences in types of offenders who are incarcerated, differences in policies regarding lengths of supervision, and differences in policies for response to probation violations. For example, Minnesota may put more low-risk offenders on probation when compared to other states, so offenders that are incarcerated in Minnesota may be those that are at a higher risk of recidivating.

4. Summary of Non-Legislative Modifications

Jill Payne reviewed the prior non-legislative decisions of the commission.

A. Effective August 1, 2011. The following were adopted in 2009 by the commission after public hearing. The effective date for these items was delayed by the 2010 Legislature until August 1, 2011. 2010 Minn. Laws Ch. 215, Art. 11, § 23.

1. *Re-rank riot first degree (Guidelines Section 5).* Increase the severity level ranking for riot first degree resulting in death from 5 to 8.

2. *Re-rank and move certain prostitution offenses to the sex offender grid (Guidelines Section 5).* The commission adopted a proposal to change the severity level ranking for solicitation, inducement, and promotion of prostitution; sex trafficking in the first degree from a severity level 9 to a severity level B on the sex offender grid. The commission also adopted a proposal to change the severity level ranking for solicitation, inducement, and promotion of prostitution; sex trafficking in the second degree from a severity level 5 to a severity level C on the sex offender grid.

B. Moved to Public Hearing. The following were proposed and considered by the commission at the October 2010 meeting, and have been moved to public hearing.

1. *Custody status point for targeted misdemeanor offenders discharged early (Guidelines Section 2).* The commission wished to clarify that a custody status point applies to offenders who were on probation for a targeted misdemeanor offense, but were discharged early.

2. *No custody status point for misdemeanor offenders sentenced to non-targeted misdemeanor offense (Guidelines Section 2).* The commission wished to clarify that a custody status point should not apply to offenders convicted of a felony or gross misdemeanor, but sentenced to a misdemeanor that is not included on the targeted misdemeanor list.

5. Possible Non-Legislative Modifications to the Guidelines

The following issues were presented to the commission for discussion and as possible modifications to the sentencing guidelines and commentary.

A. Adding Citation for Stalking While Possessing a Dangerous Weapon to Mandatory Sentences Section (M.S. § 609.749, subd. 3(a)(3)).

Commentary in the guidelines describes certain offenses that are always presumptive commitments because they involve a dangerous weapon by definition. Felony stalking while possessing a dangerous weapon is ranked at severity level 4. By definition it involves a person who “possesses a dangerous weapon at the time of the offense...” Stalking while possessing a dangerous weapon is not one of the offenses listed in the guidelines comment indicating that the presumptive disposition is commitment, so the commission was asked whether it wished to add stalking while possessing a dangerous weapon to the comment in the mandatory sentence section.

Members discussed whether this was an exhaustive list of offenses, or whether it represented just a few of the possible offenses in this situation as indicated by the phrase “for example” prior to the statutory cites. Staff responded with the belief that if the stalking offense were added, the list would be exhaustive.

Motion was made by Judge Cleary and seconded by Tracy Jenson to modify section II.E.05 of the guidelines as follows:

E. Mandatory Sentences:

When an offender has been convicted of an offense with a mandatory minimum sentence of one year and one day or more, the presumptive disposition is commitment to the Commissioner of Corrections. The presumptive duration of the prison sentence should be the mandatory minimum sentence according to statute or the duration of the prison sentence provided in the appropriate cell of the Sentencing Guidelines Grids, whichever is longer....

II.E.05. There are some offenses that by statutory definition involve a dangerous weapon and, therefore, the mandatory minimum provision dealing with dangerous weapons always applies; ~~for example, Assault in the Second Degree, Certain Persons Not to Have Firearms, Drive-By Shootings, and Stalking (Aggravated Violations) and Possessing a Dangerous Weapon under Minn. Stat. § 609.749, subd. 3(a)(3) Certain Persons Not to Have Firearms~~. The presumptive disposition for these types of offenses is imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is greater.

Motion approved without dissent.

B. Permissive Consecutive Sentences – Current Felony Crime Sentenced Consecutive to Prior Unexpired Felony Crime

On March 2, 2011, the commission received a letter from Will Brost, Assistant Stearns County Attorney, requesting that the commission consider removing a requirement for permissive consecutive sentencing. Currently, the guidelines allow permissive consecutive sentencing when both the current and prior offense are listed in section VI and if the presumptive disposition for both offenses would have been prison commitment. Mr. Brost requested that the guidelines be amended to allow for permissive consecutive sentencing when the presumptive disposition for the *current* offense is commitment and both the prior and current offense were listed in section VI regardless of whether the presumptive disposition for the prior offense was commitment.

An estimated 200 cases a year may qualify for this situation and these cases would have a prison bed impact. One member questioned how often this policy, if changed, would be

utilized. Another member responded that it would be one more tool that prosecutors could use for certain offenders in certain situations. One member commented that this may have to do, in part, with post-Blakely issues; that the discretionary authority that the judge now has, in the appropriate case, to depart upward is significantly reduced, and stated that perhaps the commission should take a more systemic look at the guidelines post-Blakely.

Motion was made by Connie Larson and seconded by Jeff Edblad to modify the guidelines policy regarding permissive consecutive sentencing as follows:

2. Permissive Consecutive Sentences

Except when consecutive sentences are presumptive, consecutive sentences are permissive (may be given without departure) only in the following cases:

- a. A current felony conviction for a crime on the list of offenses eligible for permissive consecutive sentences found in Section VI may be sentenced consecutively to a prior felony sentence for a crime listed in Section VI which has not expired or been discharged; or ...

Consecutive sentences are permissive under the above criteria letters a, b, and d only when the presumptive disposition for the current offense(s) is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C. ~~In addition, consecutive sentences are permissive under letter a, above only when the presumptive disposition for the prior offense(s) was commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C.~~ If the judge pronounces a consecutive stayed sentence in these circumstances, the stayed sentence is a mitigated dispositional departure, but the consecutive nature of the sentence is not a departure if the offense meets one of the above criteria. The consecutive stayed sentence begins when the offender completes the term of imprisonment and is placed on supervised release.

...

Motion defeated.

Motion was made by Judge Cleary and seconded by Justice Meyer to further examine the impact of the requested modification to permissive consecutive sentencing.

Motion approved without dissent.

6. Technical Modifications to the Guidelines – Effective August 1, 2011

The following technical issues were presented to the commission for consideration.

A. Reference to Conditional Release for Certain Offenses

The sentencing guidelines set forth the statutorily provided conditional release terms that apply to certain offenders after they are released from prison. Staff was made aware that the language is incorrect as it applies to possession of child pornography, and was concerned that it may also be incorrect in other instances. Because the terms are statutorily defined, and are not a separate guidelines policy, it was recommended that the guidelines language be simplified so that it merely identifies the offenses for which there is a conditional release term, and cites to the appropriate statute.

Motion was made by Darci Bentz and seconded by Connie Larson to modify the conditional release language as follows:

E. Mandatory Sentences:

...

Several Minnesota statutes provide for mandatory conditional release terms that must be served by certain offenders once they are released from prison. The court must pronounce the conditional release term when sentencing for the following offenses:

- First degree (felony) driving while impaired. Minn. Stat. § 169A.276, subd. 1(d).
- Predatory offense registration violation committed by certain offenders. Minn. Stat. § 243.166, subd. 5a.
- Assault in the fourth degree against secure treatment facility personnel. Minn. Stat. § 609.2231, subd. 3a(d).
- First through fourth degree criminal sexual conduct and criminal sexual predatory conduct. Minn. Stat. § 609.3455, subds. 6-8.
- Use of minors in a sexual performance. Minn. Stat. § 617.246, subd. 7.
- Possession of pornographic work involving minors. Minn. Stat. § 617.247, subd. 9.
- ~~When a court commits a person subject to one of these statutes to the custody of the Commissioner of Corrections, it shall provide that after the person has been released from prison, the Commissioner shall place the person on conditional release for the designated term.~~
- ~~A person committed to prison for a sex offense or criminal sexual predatory conduct is subject to a ten-year conditional release term, unless the offense is a violation of M.S. § 609.3451 (fifth degree criminal sexual conduct).~~
- ~~If the person was committed to prison for a violation of M.S. §§ 609.342 (first degree criminal sexual conduct), 609.343 (second degree criminal sexual conduct), 609.344 (third degree criminal sexual conduct), 609.345 (fourth degree criminal sexual conduct), or 609.3453 (criminal sexual predatory conduct), and there is a previous or prior sex offense conviction, the person shall be placed on conditional release for the remainder of the person's life, unless the current offense and prior conviction were~~

- ~~both for violations of M.S. § 609.345 (fourth degree criminal sexual conduct).~~
- ~~• If both the current and prior convictions are for M.S. § 609.345 (fourth degree criminal sexual conduct), the conditional release period shall be for ten years.~~
 - ~~• If a person who is subject to a life-with-the-possibility-of-release sentence is released, that offender is subject to conditional release for the remainder of his or her life.~~
 - ~~• If a person is sentenced for failure to register as a predatory offender and the person was assigned a risk level III under M.S. § 244.052, the person shall be placed on conditional release for ten years.~~
 - ~~• A person convicted of fourth degree assault against secure treatment facility personnel under M.S. § 609.2231, subdivision 3a, use of minors in a sexual performance under M.S. § 617.246, or a child pornography offense under M.S. § 617.247, is subject to a five-year conditional release term.~~
 - ~~• If the person was committed to prison for a violation of M.S. §§ 617.246 (use of minors in a sexual performance) or 617.247 (possession or dissemination of child pornography), and there is a previous or prior conviction for either of these offenses or for a criminal sexual conduct offense, the person shall be placed on conditional release for ten years.~~
 - ~~• Finally, a person sentenced to imprisonment for first degree (felony) driving while impaired is subject to five years of conditional release.~~

Motion approved without dissent.

B. Change to Unofficial Mandatory Sentences Reference Table

The sentencing guidelines include an unofficial table with references for practitioners about dangerous weapons offenses. The table contains an error relating to subsequent offenses with a dangerous weapon that is other than a firearm. A 36-month mandatory minimum applies if a current offense involves a dangerous weapon other than a firearm, and a prior offense involves a dangerous weapon other than a firearm (M.S. § [609.11](#), subd. 4).

Motion was made by Darci Bentz and seconded by Reverend Battle to modify the unofficial mandatory reference table as follows:

MANDATORY SENTENCES REFERENCE TABLE

Dangerous Weapons – M.S. § 609.11			
Statute	Offense	Prerequisite or Conditions	Minimum Duration
609.11, subd. 4	Dangerous Weapon (Other than firearm)	<i>Weapon is an element of crime</i>	1 year and 1 day
609.11, subd. 4	Dangerous Weapon (Other than firearm) – Subsequent offense	<i>Current <u>dangerous weapon offense (other than firearm) with prior dangerous weapon offense firearm offense with prior firearm or dangerous weapon offense</u></i> <i>Weapon is an element of crime</i>	36 months

Motion approved without dissent.

C. Repealed Statute: Securities Violation

Securities violation under Minn. Stat. § 80A.22 was repealed in 2006 and replaced with Minn. Stat. § 80A.68. (Repealed, [2006 c 196 art 1 s 51](#)). Staff recommends that the statutory reference be corrected in section V and in the Numerical Reference of Felony Statutes located in the Appendix.

Motion was made by Tracy Jenson and was seconded by Reverend Battle to modify the guidelines to reflect the repeal and reenactment of the security violations statute as follows:

V. OFFENSE SEVERITY REFERENCE TABLE

IV	Security Violations (over \$2,500) – 80A.22, subd. 1; <u>80A.68</u> ; 80B.10, subd. 1; 80C.16, subd. 3(a) & (b)
III	Security Violations (over \$2,500, or less) – 80A.22, subd. 1; <u>80A.68</u> ; 80B.10, subd. 1; 80C.16, subd. 3(a) & (b)

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.

Statute Number	Offense Title	Severity Level
80A.22 subd. 1 <u>80A.68</u> or 80B.10 subd. 1 or 80C.16 subd. 3(a)(b)	Securities Violation (over \$2,500)	4
80A.22 subd. 1 <u>80A.68</u> or 80B.10 subd. 1 or 80C.16 subd. 3(a)(b)	Securities Violation (\$2,500, or less)	3

Motion approved without dissent.

D. Reformatted Sentencing Guidelines and Commentary

In July 2010, the commission approved extensive formatting changes to the sentencing guidelines. Most of these changes went into effect with the August 2010 edition of the guidelines. However, some formatting changes were delayed so that they could be reviewed closely for accuracy. These formatting changes are scheduled to be included in the 2011 edition of the sentencing guidelines, and are: using bullet points to make long passages of text more readable; changing roman numerals to numbers; and reformatting the offense severity reference table into a more legible, shaded table.

The reformatted sentencing guidelines are available in their entirety at:

http://www.msgc.state.mn.us/commission_info/Reformatted%20Sentencing%20Guidelines%20August%202011.pdf

Motion to reformat the sentencing guidelines and commentary was made by Justice Meyer and seconded by Darci Bentz.

Motion approved without dissent.

7. Public Input

There was no input from members of the public.

8. Adjournment

The next commission meeting is tentatively scheduled for May 19, 2011.

Motion for adjournment was made by Reverend Battle and was seconded by Chair Edblad.

Motion approved without dissent.

Chair Edblad adjourned the meeting at 3:07 p.m.