

Minnesota Sentencing Guidelines Commission
Approved Meeting Minutes
September 19, 2013

The Minnesota Sentencing Guidelines Commission (MSGC) meeting was held on September 19, 2013 in the Pung Conference Room at the Department of Corrections (DOC), 1450 Energy Park Drive, St. Paul, Minnesota. Commission members present were Chair Jeffrey Edblud, Hon. Christopher Dietzen, Sgt. Paul Ford, Hon. Carrie Lennon, DOC Commissioner Tom Roy, Hon. Heidi Schellhas, John Stuart, and Yamy Vang. MSGC staff members present were Executive Director Kelly Mitchell, Jackie Braun, Jill Payne, and Anne Wall. Also present were Jim Early from the Attorney General's Office and Fatima Franzen.

1. Call to Order.

The meeting was called to order at 2:05 p.m.

2. Approval of Meeting Minutes from July, 18 2013.

Motion to approve minutes was made by Yamy Vang and seconded by Heidi Schellhas.

Motion carried.

3. NASC Conference Recap

Members reflected on the National Association of Sentencing Commissions Conference which was held in Minneapolis in August. Members commented that they found the information valuable and thought provoking. Members noted that a highlight from them was talking with practitioners from other states. Kelly Mitchell stated that the evaluation responses from attendees were generally very positive and the NASC board was very pleased.

A member noted that it was interesting to see the juxtaposition of a just deserts perspective which looks back versus the new emerging concept of reducing recidivism which looks forward. Members discussed differences in other states such as variations in decay periods, capping probationary periods, and limitations on what probation violations will result in revocation. A member requested more information on the scoring systems which require violent offenses for a presumptive prison sentence.

Chair Edblud thanked the staff for their work during the conference and the members for attending the conference. The papers presented at the conference are available on the NASC website.

4. Ongoing Discussion of Controlled Substance Offender Study

The Commission has previously discussed offenses with high departure rates and has focused on first- and second-degree drug offenses. Commission staff presented two studies on first- and second-degree drug offenses in the past.

A. Regression Analysis

A member requested the Commission continue to study these offenses and requested that future research include a regression analysis to determine a causal link. The member noted that the raw data presented show departure rates are high but does not show the cause or causes for the departures. Members identified several variables to include in the regression analysis including the plea policies of county attorney offices and whether the offender agreed to be a confidential informant on other cases. The member stressed that it would be important to determine which variables affect the sentence and in what way before considering whether to change the presumptive sentence. This is important because some of these factors may not result in the Commission wanting to change the presumptive sentence. The member proposed hiring a statistician to perform the regression analysis.

Kelly Mitchell informed the Commission that the agency currently does not have the funding available to hire any outside person to do this work; however the staff does have the knowledge to do this work and has the support of researchers throughout the Minnesota criminal justice system.

A member noted that we will be having a significant meeting with stakeholders in the next month and proposed waiting until after the roundtable meeting so that the Commission would have more information to focus the research project. Other members indicated that they see the roundtable as separate from the regression analysis.

A member noted that it may be difficult to get attorneys or police to disclose which individuals in the study agreed to be a confidential informant. Another member noted that informants generally don't get charged or sentenced. Cooperation of the county attorney's office would be necessary in order to see which offenders cooperated with law enforcement. It was noted that there was the possibility of working with county attorneys to get generalized information, but it would need to be tied to individual case numbers to be part of the regression analysis.

Motion to move forward with a regression analysis in collaboration with other public criminal justice agencies was made by Justice Dietzen and seconded by Judge Lennon.

A member expressed concern that the staff may not be able to move forward because of limited staff time. Another member proposed doing a feasibility study in order to determine if staff would be able to perform the study.

Motion carried.

Motion to bring model of the regression study to the Commission was made by Justice Dietzen seconded by Judge Schellhas.

Motion carried.

B. Round Table Format

A list of attendees created by the Round Table Subcommittee was provided for members. The subcommittee determined that the round table will focus on two questions: is this a problem; and what do the regional disparities mean?

Commission members discussed who they would like to welcome attendees, frame the issue, and facilitating the discussion. Members agreed to have Chair Edblad welcome attendees and have a staff member present the background information. Professor Sampsel-Jones from William Mitchell College of Law will be facilitating the discussion. Commission members will be present to listen to input from stakeholders but not presenting or advocating positions.

Members expressed concern that some communities are underrepresented at the round table but over represented in the prison population, particularly the Hispanic and Native American communities. The Commission agreed to invite representatives from the Hispanic and Native American communities. Also noted by several members was the lack of community members who are not involved in the criminal justice system. Subcommittee members explained that choices had been made to limit the total number of invitees in order to allow for meaningful discussion. It was noted that additional people are welcome to attend as observers. Kelly informed the Commission that a public notice is sent out before any public meeting of the Commission, including this one.

Commission members expressed support for inviting more people or groups to attend as observers and to allow for public input at the end of the round table.

5. Juvenile Justice Advisory Committee Call for Comment on Juvenile Life Without Parole

The Juvenile Justice Advisory Committee is in the process of creating recommendations to the Legislature in response to two Supreme Court decisions. They have sent a call for

comment to several organizations to receive input on how to amend Minnesota statutes to bring them in line with the two decisions.

The judicial members informed the Commission that because this is an issue that may come before them, they would not be able to offer input as Commission members. Other members expressed discomfort with the topic because life sentences are outside of the purview of the Guidelines.

Motion to respond that the Sentencing Guidelines Commission takes no position relating to juvenile life sentences was made by Commissioner Roy and seconded by Paul Ford.

Motion carried.

6. Clarifying Application of a Second Custody Status Point for Offenders Discharged Early from Probation

MSGC staff received a question from a practitioner: Should a second custody status point be applied to a sex offender who committed the current sex offense after being discharged early from probation for a sex offense, but within the original probationary period?

According to the 2013 Minn. Sentencing Guidelines § 2.B.2.b, an additional custody status point is assigned to an offender who was on custody status for a sex offense when they commit a sex offense. However, the Guidelines are unclear if a second point applies to an offender discharged early from probation under § 2.B.2.a(4).

Staff believes that this is an oversight; a result of the extensive Guidelines revisions that took effect August 1, 2012. The Commission's intent to assign a second Custody Status Point appears clear in the 2011 Minn. Sentencing Guidelines, § 2.B.2.

Staff recommends revising 2014 Minn. Sentencing Guidelines, § 2.B, to make it clear that a sex offender committing an offense within the original length of probation qualifies for two custody points, as outlined below.

Motion to adopt staff recommendation was made by Commissioner Roy and seconded by Paul Ford.

Motion carried.

2. Custody Status at the Time of the Offense.

- a. One Custody Status Point. Assign **one** custody status point when the conditions in paragraphs (1) through (3) are met:

(1) The offender was under one of the following custody statuses:

- (i) probation;
- (ii) parole;
- (iii) supervised release;
- (iv) conditional release following release from an executed prison sentence (see conditional release terms listed in section 2.E.3);
- (v) release pending sentencing;
- (vi) confinement in a jail, workhouse, or prison pending or after sentencing; or
- (vii) escape from confinement following an executed sentence.

(2) The offender was under one of the custody statuses in paragraph (1) after entry of a guilty plea, guilty verdict, or conviction. This includes a guilty plea for an offense under Minn. Stat. § 152.18, subd. 1.

(3) The offender was under one of the custody statuses in paragraph (1) for one of the following:

- (i) a felony;
- (ii) extended jurisdiction juvenile (EJJ) conviction;
- (iii) non-traffic gross misdemeanor;
- (iv) gross misdemeanor driving while impaired or refusal to submit to a chemical test; or
- (v) targeted misdemeanor.

(4) Early Discharge from Probation. Assign a custody point if the offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court. **Do not** assign a point if probation is revoked and the offender serves an executed sentence.

(5) Assigning Points to Offenses Committed Over Time. Assign a custody status point when the offender meets the conditions in paragraphs (1) through (3) and the offender was placed under one of the custody statuses in paragraph (1) at any point in time during which the offense occurred when:

- (i) multiple offenses are an element of the conviction offense; or
- (ii) the conviction offense is an aggregated offense.

b. Two Custody Status Points. Assign **two** custody status points if:

(1) the current conviction offense is an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (243.166);

(2) the offender qualifies for one custody status point, as described in section a, above, ~~was under any of the custody statuses in paragraph a(1)~~ for an offense currently found on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166).

7. Definition for Criminal History Score and Severity Level

During its website redesign, MSGC staff realized that there were no definitions for the terms “Severity Level” and “Criminal History Score” in the 2013 Guidelines definition found in § 1.B.

Further, § 2.A.1, the general rule for assigning a severity level, describes a situation in which multiple convictions lead to the assignment of only one severity level. This language is intended to address the situation where an offender is convicted of two or more felony offenses arising from the same behavioral incident. But it incorrectly states that the severity level is determined by the most severe conviction offense when instead the court should sentence the most serious offense and then utilize the severity level attendant to that offense.

Staff recommends revising 2014 Minn. Sentencing Guidelines, by adding a definition for the terms “severity level” and “criminal history score” to §1.B, moving language from

the general rule for severity level application to the definition, and moving the information referring to the most serious offense to a comment as described below.

Motion to adopt staff recommendation was made by Paul Ford and seconded by John Stuart.

Motion carried.

B. Definitions

As used in these Sentencing Guidelines (or “Guidelines”), the following terms have the meanings given.

4. Criminal History Score. The “criminal history score” is comprised of criminal history factors detailed in section 2.B. The horizontal axis on the applicable grid represents the offender’s criminal history score.

16. Severity Level. The “severity level” is a ranking assigned to each felony offense by the Sentencing Guidelines Commission to indicate the seriousness of the offense. The vertical axis on the applicable grid represents the severity of the conviction offense. Felony offenses, other than sex offenses, are arranged on the Standard Grid into eleven levels of severity, ranging from high (Severity Level 11) to low (Severity Level 1). Sex offenses are arranged on the Sex Offender Grid into eight severity levels, ranging from high (Severity Level A) to low (Severity Level H). Offenses listed within each severity level are deemed equally serious.

§ 2.A.1

1. General Rule. The applicable offense severity level is determined by the conviction offense, not the charging offense. ~~When an offender is convicted of two or more felonies, the severity level is determined by the most severe conviction offense. Felony offenses, other than sex offenses, are arranged on the Standard Grid into eleven levels of severity, ranging from high (Severity Level 11) to low (Severity~~

~~Level 1). Sex offenses are arranged on a separate Sex Offender Grid into eight severity levels, ranging from high (Severity Level A) to low (Severity Level H). Offenses listed within each severity level are deemed to be equally serious. The severity level for each felony offense is governed by found in section 5A, Offense Severity Reference Table.~~

2.A.07. When an offender is convicted of two or more felony offenses arising from a single behavioral incident, Minn .Stat. § 609.035 “contemplates that a defendant will be punished for the ‘most serious’ of the offenses. ” State v. Kebaso, 713 N.W.2d 317, 322 (Minn. 2006). When this occurs, the applicable severity level to use in determining the presumptive sentence is the severity level assigned to the offense being sentenced, which is ordinarily the most serious offense.

8. Public Input

Fatima Franzen from Shakopee introduced herself as a board member of the Community Corrections Advisory Board for Scott County. She also has volunteered with WATCH in the past. Fatima Franzen noted she has always wondered why judges sentence to downward departures. She is here to educate herself.

9. Adjournment

Motion to adjourn was made by Justice Dietzen and seconded by Yamy Vang.

Motion carried.

Chair Edblad adjourned the meeting at 3:45 p.m.