December 13, 2019

Matthew Frank
Assistant Attorney General
Minnesota Attorney General’s Office
445 Minnesota Street, Suite 1800
Saint Paul, MN  55101-2134

Dear Mr. Frank:

On behalf of the Chair of the Minnesota Sentencing Guidelines Commission, I request that you provide a legal opinion to the Commission on the following questions in time for the Commission’s consideration at its meeting on January 9, 2020. The questions pertain to a proposed modification to the Sentencing Guidelines that the Commission, on November 6, 2019, forwarded for public hearing.

1. Generally, to what extent may the Commission impose upon the district court binding limitations on the duration of pronounced felony probation beyond those limitations established by law? Specifically, is the proposed modification a permissible policy option? If not, how might the proposal be amended to achieve the goals of uniformity and proportionality in probation sentence durations?

2. Prior to the Commission’s final adoption of a proposed modification of the Sentencing Guidelines previously forwarded for public hearing pursuant to Minn. Stat. § 244.09, subd. 11, and Minn. R. chap. 3000, to what extent may the Commission revise the proposed modification, whether in response to public comment or otherwise, without forcing the need for another public hearing on the revised version?

The proposed modification and the public hearing notice are attached. Please direct your reply to my email address, which is nate.reitz@state.mn.us. Thank you.

Sincerely,

Nathaniel J. Reitz
Executive Director
Date: November 5, 2019

To: Mr. Nate Reitz, Executive Director - Minnesota Sentencing Guidelines Commission

From: Commissioner Paul Schnee
Minnesota Sentencing Guidelines Commission/Minnesota Department of Corrections

CC: Chair Kelly Mitchell, Minnesota Sentencing Guidelines Commission
Commissioners – Minnesota Sentencing Guidelines Commission

Re: Proposed Guidelines Modification to Limit Probation Terms

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**Background**

Since Chair Mitchell presented probation term data at the last meeting, I have spoken with a variety of people from the community and system stakeholders, which provided meaningful context around probation terms. As a result, I am concerned that a failure to consider the rationality, proportionality, and uniformity of probation terms is contrary to the legislative direction provided in M.S. 244.09. That statute provides that “sentencing pursuant to the Sentencing Guidelines is ... a procedure based on state public policy to maintain uniformity, proportionality, rationality, and predictability,” and also authorizes the MSGC to “establish appropriate sanctions for offenders for whom imprisonment is not proper,” including with respect to “probation and the conditions thereof.” Based on community and stakeholder input, review of the function and role of the Minnesota Sentencing Guidelines Commission, and consideration of the probation term summary data provided to members by Chair Mitchell, I submit the observations, conclusions, and proposal noted below.

**Observations**

- Probation terms vary widely across the state – in the 4th and 6th judicial districts the average probation term is 3.3 years, whereas in the 3rd and 7th districts they are 7.1 and 7.4 years, respectively.
- Because the majority of probation revocations occur in the first 24 months and profoundly diminish at 60 months and beyond, there are no compelling reasons in most cases to impose probation terms beyond that period.

**Conclusions**

- It is a duty of the Sentencing Guidelines Commission to ensure “uniformity, proportionality, rationality, and predictability” in sentencing throughout Minnesota.
- Probation term consistency is one small step toward addressing both the racial and geographic disparities that exist in Minnesota’s criminal justice system. A defendant’s zip code (judicial district) should not serve as the basis for variation in the term of probation, which most impacts people in greater Minnesota.
• A lack of MSGC guidance and direction maintains a system that continues to adversely impact some people more than others based on geography.
• Acting now is important because it would not only create a more consistent probation system but would also minimize voter disenfranchisement, as lesser probation terms for some people would result in the earlier restoration of their voting rights without negatively impacting public safety.

Proposal
To limit the length of time that certain felony offenders may be placed on probation, I propose that the Commission adopt the following Guidelines modifications to become effective on August 1, 2020, and apply to crimes committed on or after that date:

[Section 2.] C. Presumptive Sentence

1. Finding the Presumptive Sentence. The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable Grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis). The conviction offense determines the severity level. The offender’s criminal history score is computed according to section 2.B. above. For cases contained in cells outside of the shaded areas, the sentence should be executed. For cases contained in cells within the shaded areas, the sentence should be stayed unless the conviction offense carries a mandatory minimum sentence. Section 3.A governs conditions of stayed sentences.

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3. Related Policies

A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the appropriate cell on the applicable Grid specifies a stayed sentence, the court may pronounce a stay of execution or a stay of imposition. The court must pronounce the length of the stay, which may exceed the duration of the presumptive prison sentence, and may establish appropriate conditions. The length of the stay may exceed the duration of the presumptive prison sentence, subject to section 3.A.2.

2. Durations of Stayed Sentences. When the court stays execution or imposition of sentence for a felony offense, the length of the stay must not exceed five years or the statutory maximum term of probation, whichever is less. This limitation on the length of probation does not apply to convictions for felony homicide or sex offenses in violation of Minn. Stat. §§ 609.19 (second-degree murder), 609.195 (third-degree murder), 609.20 (first-degree manslaughter), 609.2662 (second-degree murder of an unborn child), 609.2663 (third-degree murder of an unborn child), 609.2664 (first-degree manslaughter of an unborn child), 609.268 (injury or
death of an unborn child during the commission of a crime), 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 609.3451 (fifth-degree criminal sexual conduct). Extensions of probation are governed by statute (see Minn. Stat. § 609.135, subd. 2(g)–(h)).

23. **Other Conditions of Stayed Sentences.** While the Commission has otherwise chosen not to develop specific guidelines for the conditions of stayed sentences, it recognizes that there are several penal objectives to be considered in establishing conditions of stayed sentences, including:

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(6) **Work Release and Community Based Programs.** The Commission has chosen not to establish specific guidelines relating to work release programs in local facilities or community-based residential and nonresidential programs.
Notice of Public Hearing

Proposed Amendments to the Minnesota Sentencing Guidelines and Commentary

Date of Notice: November 18, 2019
Date of Hearing: December 19, 2019

The Minnesota Sentencing Guidelines Commission will hold a public hearing Thursday, December 19, 2019, at 1:30 p.m. in Room 1100 of the Minnesota Senate Building, 95 University Ave. W., St. Paul, MN 55155, to consider a proposal to amend 2019 Minn. Sentencing Guidelines sections 2.C (Presumptive Sentence) and 3.A (Establishing Conditions of Stayed Sentences). Subject to public hearing, final adoption, and submission to the Legislature by January 15, 2020, modifications will take effect August 1, 2020, and will apply to crimes committed on or after that date.

All interested persons are encouraged to attend the hearing and offer comments. Persons wishing to speak may register in advance by contacting the Commission’s office at the below address or telephone number, or by e-mail at sentencing.guidelines@state.mn.us. If you need special accommodations to attend, please contact the Minnesota Sentencing Guidelines Commission as soon as possible. This notice is available in alternative formats upon request.

The Commission will hold the record open for five calendar days after the public hearing to accept written comment. On Thursday, January 9, 2020, the Commission will meet at 1:00 p.m. in Room 230 of the Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Blvd., St. Paul, MN 55155, to finally adopt or reject the proposed modifications.

Proposed Modifications

Proposed modifications to 2019 Minn. Sentencing Guidelines § 2.C:

[Section 2.]C. Presumptive Sentence

1. Finding the Presumptive Sentence. The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable Grid located at the intersection of

Persons with hearing or speech disabilities may contact us via their preferred Telecommunications Relay Service
the criminal history score (horizontal axis) and the severity level (vertical axis). The conviction offense determines the severity level. The offender’s criminal history score is computed according to section 2.B above. For cases contained in cells outside of the shaded areas, the sentence should be executed. For cases contained in cells within the shaded areas, the sentence should be stayed unless the conviction offense carries a mandatory minimum sentence. Section 3.A governs conditions of stayed sentences.

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Proposed modifications to 2019 Minn. Sentencing Guidelines § 3.A:

3. Related Policies

A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the appropriate cell on the applicable Grid specifies a stayed sentence, the court may pronounce a stay of execution or a stay of imposition. The court must pronounce the length of the stay, which may exceed the duration of the presumptive prison sentence, and may establish appropriate conditions. The length of the stay may exceed the duration of the presumptive prison sentence, subject to section 3.A.2.

2. Durations of Stayed Sentences. When the court stays execution or imposition of sentence for a felony offense, the length of the stay must not exceed five years or the statutory maximum term of probation, whichever is less. This limitation on the length of probation does not apply to convictions for felony homicide or sex offenses in violation of Minn. Stat. §§ 609.19 (second-degree murder), 609.195 (third-degree murder), 609.20 (first-degree manslaughter), 609.2662 (second-degree murder of an unborn child), 609.2663 (third-degree murder of an unborn child), 609.2664 (first-degree manslaughter of an unborn child), 609.2668 (injury or death of an unborn child during the commission of a crime), 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 609.3451 (fifth-degree criminal sexual conduct). Extensions of probation are governed by statute (see Minn. Stat § 609.135, subd. 2(g)–(h)).

23. Other Conditions of Stayed Sentences. While the Commission has otherwise chosen not to develop specific guidelines for the conditions of stayed sentences, it
recognizes that there are several penal objectives to be considered in establishing conditions of stayed sentences, including:

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(6) **Work Release and Community Based Programs.** The Commission has chosen not to establish specific guidelines relating to work release programs in local facilities or community-based residential and nonresidential programs.
January 8, 2020

Mr. Nathaniel Reitz
Executive Director
Sentencing Guidelines Commission
309 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

Dear Mr. Reitz:

In a letter dated December 13, 2019, you ask two questions on behalf of the Minnesota Sentencing Guidelines Commission (“Commission”) regarding the Commission’s authority to implement proposed amendments to the Sentencing Guidelines (“Guidelines”). The proposed amendments impose a five-year cap on the duration of probation for a stayed sentence for most felonies, and are described in a Notice of Public Hearing dated November 18, 2019, for a public hearing held on December 19, 2019. Regarding the proposed amendments, you ask:

1) To what extent may the Commission impose upon the district court binding limitations on the duration of the pronounced felony probationary period beyond those established by law?

2) Prior to the Commission’s final adoption of a proposed modification of the Guidelines previously forwarded for public hearing pursuant to Minn. Stat. § 244.09, subd. 11, and Minn. R. chap. 3000, to what extent may the Commission revise the proposed modification, whether in response to public comment or otherwise, without forcing the need for another public hearing?

In addition to your December 13, 2019 correspondence, I also received a January 2, 2020 Memo from Commissioner Paul Schnell and Commission Chair Kelly Mitchell with proposed revisions to the amendments that were considered at the public hearing on December 19, 2019. The proposed revisions replace the five-year cap on probation duration with a system establishing a presumptive probation term of five years. The proposed revisions allow judges to depart from the presumptive probation term and impose a longer or shorter probation length in cases involving substantial and compelling circumstances.

A limit on probationary terms that is presumptive but allows for judicial discretion maintains the advisory nature of the Guidelines and is consistent with the Commission’s statutory authority. It is therefore a permissible amendment to the current Guidelines. In addition, the Commission appears to have complied with the necessary public hearing
requirements outlined by rule, and therefore a second public hearing is unnecessary for the proposed revised amendments.

**Probation Duration**

For most felony offenses, judges may impose periods of probation “for not more than four years or the maximum period for which the sentence of imprisonment might have been imposed, whichever is longer.” Minn. Stat. § 609.135, subd. 2(a) (2019). In other words, judges have discretion to impose a term of probation as long as the statutory maximum sentence. For some offenses, such as a first-degree controlled substance crime, a court may impose a probationary term as long as forty years. See Minn. Stat. § 152.021, subd. 3 (2019).

Currently, the Guidelines do not limit or otherwise address the length of probation. The authority of the Commission, however, does include probation durations. The legislature directed the Sentencing Guidelines Commission to promulgate Guidelines for the district court. Minn. Stat. § 244.09, subd. 5 (2019). “The guidelines promulgated by the commission shall be advisory to the district court.” Id. In addition to providing presumptive durations for prison sentences, the Guidelines may also establish appropriate sanctions for offenders for whom imprisonment is not proper. Minn. Stat. § 244.09, subd. 5(2) (2019). The law explicitly authorizes the Commission to establish, “noninstitutional sanctions, including but not limited to the following: payment of fines, day fines, restitution, community work orders, work release programs in local facilities, community based residential and nonresidential programs, incarceration in a local correctional facility, and probation and the conditions thereof.” Id. (emphasis added). Although the Sentencing Guidelines are advisory to the district court, the court is required to follow the procedures of the guidelines when it pronounces sentence. Id.

The original proposed amendments considered at the December 19 hearing contain a mandatory cap in the length of probation, which is contrary to the statutory mandate that the guidelines be advisory to the district court. In Section 3.A.1., the court when granting a stayed sentence, “must pronounce the length of the stay.” Pursuant to Section 3.A.2., “when the court stays execution or imposition of sentence for a felony offense, the length of the stay must not exceed five years.” Because the original proposed amendment does not include a mechanism for departure, it removes discretion currently afforded to the district court in sentencing. This is inconsistent with the advisory nature of the Guidelines. Minn. Stat. § 244.09, subd. 5 (2019). In addition, the proposed amendment in its original form limits judicial discretion regarding the length of probation terms in violation of Minn. Stat. § 609.135, subd. 2 (2019) (allowing length of probation terms up to the statutory maximum).

In limiting judicial discretion in a manner not authorized by the legislature, the original proposed amendments may also violate the constitutional Separation-of-Powers Doctrine. The Separation-of-Powers Doctrine holds that no government branch may encroach on the exclusive constitutional functions of another. Browder v. State, 899 N.W.2d 525, 530 (Minn. App. 2017), rev. denied (Minn. Aug. 22, 2017) (citing State v. T.M.B., 590 N.W.2d 809, 812 (Minn. App. 1999), rev. denied (Minn. June 16, 1999)). The legislature created the Commission, and retains authority over it. Browder 899 N.W.2d at 530; Minn. Stat. § 244.09 (2019). The legislature
further authorizes the Commission to establish a guide for how those felonies may be sentenced within the statutory maximum. *Id.* But by imposing a mandatory five-year cap on probationary sentences, the Commission exceeds its legislative authority and encroaches upon the judicial authority to impose appropriate probationary periods up to the statutory maximum.

The Revised Guidelines Modifications to Limit Probation Terms dated January 2, 2020, allow the district court to depart from the presumptive probation length. This preserves the judicial discretion of the district court, and conforms with the advisory nature of the Guidelines. Because these proposed modifications include a mechanism for departure consistent with current Guideline practices, they eliminate the issues discussed above and are within the authority of the Commission.

**Public Hearing**

A public hearing was held on December 19, 2019 to consider the original proposed amendments to the Guidelines. The purpose of the public hearing was to give interested persons an opportunity to present oral and written statements regarding the proposed amendments to the sentencing guidelines. The Commission also allowed written materials to be submitted after the public hearing ended. It appears that the Commission complied with the procedures outlined in Minn. R. chap. 3000. The question is whether a second public hearing under Minn. R. 3000.0300, is required for the Revised Guideline Modifications dated January 2, 2020, which were proposed following the public hearing on December 19, 2019.

The January 2, 2020 proposed revisions do not create a substantially different proposal from the original proposed amendments. The modifications do not change the nature of the originally proposed amendments. They merely adjust the implementation of probation duration limits based on comments received during the hearing. They appear to be reasonably related to the original concerns voiced at the December 19 public hearing. *Cf. City of Morton v. Minnesota Pollution Control Agency*, 437 N.W.2d 74, 746-48 (Minn.Ct.App. 1989) (In rulemaking context, procedure contemplates modification of proposed rules, which is permissible so long as there is no substantial change.) Because the revisions do not substantially modify the original proposed amendments that were subject to scrutiny, a new public hearing is not necessary.

Sincerely,

![Signature]

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