

To: Kelly Lyn Mitchell, Chair and members of the Commission

From: Justice Christopher Dietzen, Commission member

Re: Probation Cap Public Hearing

Date: December 4, 2019

INTRODUCTION

The purpose of this memorandum is to set forth my objections to the action taken by the Commission setting a public hearing on the Schnell probation cap proposal first given to me minutes before the October meeting. In my view, the Commission must postpone the hearing to correct grievous errors that infected the action taken. In this memorandum I will set forth the basis for my objection and propose a path that will properly present this issue to the 2020 State Legislature.

BACKGROUND

The Commission is subject to the Open Meeting Law and therefore must follow certain procedures so that the public receives notice of the dates and times of Commission meetings

and is given an opportunity to be heard on matters that come before the Commission.

I served as chair of the Commission from May 2015 until April 2019. Jeffrey Edblad served as chair of the Commission from September 2007 to May 2015. Prior to that Steve Borchardt served as chair. Chair Edblad and I recently discussed the procedures followed during Commission meetings when Borchardt and Edblad were chairs. Edblad confirmed that their procedures were the same procedures I followed when I was chair. Specifically, the public and the members of the Commission received seven days written notice of the time and place of the Commission meetings. Further the agenda of the meeting was sent to Commission members seven days in advance of the meeting to give Commission members and members of the public adequate time to prepare for the meeting. The agenda always made clear whether each agenda item was FYI, discussion or an action item. Commission members relied on those designations to prepare for specific items on the agenda. For example, if an

agenda item was not listed as an action item no action could be taken on that item. And the Commission followed Roberts Rules to resolve procedural issues that came up in the course of a public meeting. My estimate is that these three rules of notice and procedure have been followed at Commission meetings for at least the past 15 years. Commission members, Commission staff and attendees of the meetings during this time period were aware of these rules and observed them.

As chair, it was also my practice to not allow a vote on any proposal to amend or modify the Guidelines the first time it was presented at a commission meeting. I call this the first reading rule. This is the same rule followed by the Minnesota Judicial Council. The purpose of the rule is to allow debate on an item at the time of the first reading, and then to allow a month to pass before a vote is actually taken. This practice was followed when the Commission considered Drug Sentencing Reform, Racial Impact Statements and the Criminal History Score. Chair Mitchell stated at her first meeting that she intended to follow this rule.

This brings us to the November meeting. At that meeting Commissioner Schnell brought a motion to hold a public hearing on December 19, 2019 to consider whether the Commission should adopt probation duration caps for most felonies. I heard about the Schnell proposal minutes before the meeting. On the agenda given to the Commission seven days before the meeting the agenda item “Probation” was not listed as an “action” item; rather it was listed as a “discussion” item. That agenda was approved by unanimous vote. Moreover, the Schnell proposal was not part of the packet submitted to the Commission seven days before the meeting; instead the Schnell proposal was e-mailed to Commission members at 4:41 pm the night before the Commission meeting.

What happened felt like a well-orchestrated ambush. The Schnell proposal was e-mailed to Commission members at the eleventh hour with little or no time to prepare a response to the proposal. Moreover, there were three witnesses present at the meeting prepared to testify in favor of the Schnell proposal.

I wonder if other Commission members knew of the proposal before it was sent that night.

The Schnell proposal will significantly change how probation is used in Minnesota district courts. The proposal will take away judicial discretion to set probation duration and will likely cause judges to execute the sentence rather than be stuck with a probation cap. Because this change is so significant it is important that all stakeholders have meaningful input. Here, the process employed will evade any meaningful input from significant stakeholders, such as the Minnesota Judicial Branch, The Minnesota County Attorney's Association and victim advocacy groups. Specifically, the Schnell plan is to hold a public hearing on December 19, and then the MSGC will vote on the proposal at its January meeting. If the proposal is approved it would become law subject only to a legislative override.

MOTION TO POSTPONE

I bring this motion to postpone the scheduled public hearing on December 19 for three reasons. First, postponement

is necessary to correct grievous errors that led to the adoption of the motion to schedule the public hearing. Specifically, the action taken disrespected the long-standing rules of the Commission to not take action on a proposal to amend the Guidelines for which written materials were not furnished seven days before the meeting, was not listed as an action item on the proposed agenda and the proposal was only at the first reading stage. As a result, the action taken disrespects the long-standing rules of procedure of the Commission, disrespects the Commission members and members of the public who had no prior notice of the proposal until the time of the meeting. If permitted to stand this unlawful action will seriously undermine the credibility and integrity of the Commission and place it in disrepute before the Legislature and the public. As an unelected body the Commission relies upon its reputation to get matters approved by the Legislature.

Second, the action taken will foreclose discussion of alternative proposals by Commission members and members of the public. For example, I proposed that the Commission study

whether to adopt presumptive probation terms for most felony crimes, subject to aggravating and mitigating factors. This proposal would give judges the discretion to tailor-make probation terms to the unique circumstances of each sentencing case. I tried to bring my proposal up at the last Commission meeting. Unfortunately, the action taken by the Commission foreclosed discussion of this alternative. Also, I'm certain that other stakeholders such as the Minnesota County Attorneys Association, victim advocacy groups and, perhaps, some judges will have alternatives that ought to be explored. Unlike the discussions that preceded Drug Sentencing Reform and Criminal History Score Reform there was no discussion of alternatives before the adoption of the Schnell proposal. As a result, there was no full vetting of the Schnell proposal.

Third, I question whether the Commission has the authority to promulgate mandatory probation duration caps which direct the judge to limit probation duration to not more than five years. Mn. Stat. 244.09, subd. 5 states that: "The guidelines promulgated by the commission shall be advisory to the district

court...” The next paragraph states that the commission may establish noninstitutional sanctions including “probation and the conditions thereof.” A fair reading of this paragraph is that the commission can promulgate guidelines regarding probation and the conditions of probation, including advisory recommendations regarding the duration of probation. But the Schnell proposal mandates a five-year cap. Clearly, a five-year cap violates the statutory limitation that Guidelines be advisory, not mandatory. Put differently, I see no prohibition against the Commission setting presumptive probation durations for certain offenses. Such Guidelines would be analogous to setting presumptive ranges of sentences for certain crimes. Similarly, the Commission may establish presumptive probation terms for various felonies, but the Commission lacks the authority to establish probation duration caps.

Alternatively, the Commission could make recommendations to the Legislature to adopt probation duration caps. Such a recommendation would not need a public

hearing and could be adopted at a regular meeting of the Commission. Moreover, such a proposal and reasons thereof could be adopted by the Commission after several months of study and then be submitted to the Legislature.

CONCLUSION

Based on the foregoing I move that the Commission postpone the public hearing to a later date to comply with its rules and procedure, and to give notice and opportunity to Commission members and the public to present and debate alternative proposals, including the Schnell proposal. Further work is necessary to explore the scope of the Commission's authority in this situation. The Commission should study the issue and allow various stake-holders to present their views. Following that process the Commission should vote on a proposal to recommend to the Legislature.

