

MEMORANDUM

DATE: December 4, 2019

TO: Kelly Mitchell, Chair, Minnesota Sentencing Guidelines Commission
Commissioners of the Minnesota Sentencing Guideline Commission

CC: Nate Reitz, Executive Director, Minnesota Sentencing Guidelines
Commission

FROM: The Honorable Michelle A. Larkin, Minnesota Sentencing Guidelines
Commissioner

RE: Advance Notice of Motion to Rescind

PLEASE TAKE NOTICE, on December 12, 2019, at the regularly scheduled meeting of the Minnesota Sentencing Guidelines Commission, the undersigned commissioner will move to rescind the Commission's November 6, 2019 vote to approve for a public hearing, the "Proposed Guidelines Modification to Limit Probation Terms" dated November 5, 2019, for the following reasons: (1) the Commission's failure to follow its customary practices unfairly prejudiced the public, certain commissioners, and certain stakeholder groups, (2) it remains unclear whether the Commission is authorized to adopt "probation caps" as a self-executing "modification" of the sentencing guidelines, and (3) because a majority of the Commission does not support the Proposal in its current form, it is not ripe for a public hearing under the governing administrative rules. Each ground is explained below.

The Minnesota Sentencing Guideline Commission

The Minnesota Sentencing Guidelines Commission was established in 1978 and is comprised of 11 members: the chief justice of the supreme court or a designee; one judge of the court of appeals appointed by the chief justice of the supreme court; one district court judge appointed by the chief justice of the supreme court; one public defender appointed by the governor upon recommendation of the state public defender; one county attorney appointed by the governor upon recommendation of the board of directors of the Minnesota County Attorneys Association; the commissioner of corrections or a designee; one peace officer appointed by the governor; one probation officer or parole officer appointed by the governor; and three public members appointed by the governor, one of whom shall be a victim of a crime defined as a felony. Minn. Stat. § 244.09, subds. 1-2 (2018).

The legislature directed the Commission to promulgate sentencing guidelines that establish “the circumstances under which imprisonment of an offender is proper” and “a presumptive, fixed sentence for offenders for whom imprisonment is proper.” *Id.*, subd. 5 (2018). In laymen’s terms, the Commission decides what sentence is normally appropriate given a particular felony offense and the offender’s criminal history. The legislature also authorized the Commission to promulgate guidelines establishing appropriate sanctions for offenders for whom imprisonment is not proper, including “probation and the conditions thereof.” *Id.* Lastly, the legislature directed the Commission to meet as necessary for the purpose of modifying and improving the guidelines. *Id.*, subd. 11 (2018). All guidelines promulgated by the Commission “shall be *advisory* to the district court.” *Id.*, subd. 5

(emphasis added). “In establishing and modifying the Sentencing Guidelines, the primary consideration of the commission shall be public safety.” *Id.*

The Factual Background

The Commission has historically followed certain practices that ensure that its commissioners and the public have meaningful notice and opportunity to be heard regarding proposed modifications to the guidelines. *See Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) (stating that the fundamental requirements of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner). First, the Commission applies Robert’s Rules of Order to proceedings before the Commission, which is a widely used manual of parliamentary procedure. *See* Henry M. Robert III et al., *Robert’s Rules of Order Newly Revised* (11th ed. 2011). Second, the Commission provides its members with a written agenda setting forth the orders of business that will be addressed at Commission meetings. The agenda is normally provided one week before the meeting. Third, the agenda clearly indicates whether an order of business is scheduled for information, discussion, or action. Fourth, the agenda is publicly posted on the “Meetings” section of the Commission’s website. Lastly, the Commission has historically followed the practice of not voting on an action item at its first reading. The Chair of the Commission has described that practice an “informal rule,” stating that the goal is to “work with that timeline when possible.” E-mail from Kelly Mitchell, Chair, Minn. Sentencing Guidelines Comm’n, to author (Nov. 12, 2019, 8:37 CST).

At the Commission’s November 6, 2019 meeting, a majority voted, six to five, to approve for a public hearing, a “Proposed Guidelines Modification to Limit Probation

Terms” dated November 5, 2019. That Proposal purports to restrict a judge’s sentencing discretion such that the judge cannot impose a term of felony probation longer than five years, except for certain homicide and criminal-sexual-conduct offenses. *See* Minn. Stat. § 244.09, subd. 5 (stating that the guidelines “shall be advisory to the district court”). The proposal is intended to address the imposition of disparate probationary terms in different geographic areas of the state.

The procedural circumstances leading to the Commission’s approval of the Proposal for a public hearing are as follows. On October 31, 2019, the Commission’s executive director emailed the commissioners an agenda for the November 6 meeting. The agenda did not refer to the Proposal. Instead, the agenda listed a related order of business as a discussion item as follows: “Probation – Next Steps (Discussion Item).” That discussion item was listed as the sixth order of business on an agenda that included twelve agenda items. The agenda’s general reference to “Probation – Next Steps (Discussion Item),” was preceded by a detailed description of the following agenda item:

5. Comprehensive Review of Child Pornography Sentencing (Information & Discussion Item)
 - Recidivism Research – Status Update
 - Use of Minors in Sexual Performance – Frequency of Co-Occurring Crimes
 - Interstate Review of Child Pornography Sentencing
 - Federal Prosecution – *Miranda Dugi, Assistant United States Attorney*
 - Investigations – *Minnesota Internet Crimes Against Children Task Force, Bureau of Criminal Apprehension*
 - State Prosecutions – *Cheri Townsend, Criminal Division Head, Dakota County Attorney's Office*
 - Next Steps

The juxtaposition of agenda items five and six reasonably suggested that child-pornography sentencing would be the main topic at the meeting, which was scheduled for 1:00 p.m. to 3:30 p.m. Indeed, the Commission did not reach the “Probation – Next Steps (Discussion Item)” until 3:00 p.m.

On November 5, 2019, at 4:41 p.m., the Commission’s executive director emailed the commissioners a copy of the Proposal, along with two other documents, stating, “Attached are three additional documents pertaining to tomorrow’s meeting.” The email did not indicate that the Proposal would be added to the agenda as an action item. After the chair called the November 6 meeting to order, the Commission voted to approve the agenda that was emailed to the commissioners on October 31. No one moved to amend the agenda to include the proposal.

When the Commission reached agenda item number six, “Probation – Next Steps (Discussion Item),” the Proposal was raised for discussion. A Commissioner objected that the Proposal was not on the approved agenda and that, therefore, it should not be discussed. That Commissioner moved to table the proposal for two reasons. First, the proposal was not noticed in the agenda that was emailed to the commissioners on October 31, 2019. Second, the moving Commissioner—who has been a long-standing member of the Commission and its most recent past chair—objected that the Commission’s rules of procedure provide that no action item shall receive a vote at its first reading. Neither the chair nor any commissioner refuted the repeated assertion that the Commission adheres to a rule that no action item shall receive a vote at its first reading.

Several commissioners spoke in favor of the motion to table the Proposal. The undersigned commissioner observed that Commission meetings are subject to Minnesota’s Open Meeting Law, Minn. Stat. §§ 13D.01-.08 (2018 & Supp. 2019), and expressed concern that because the approved agenda—which had been publicly posted on the Commission’s website—did not reference the Proposal, the public did not have notice that the Proposal would be subject to discussion or action at the November meeting. The undersigned commissioner also objected that she had not had an opportunity to obtain input regarding the proposal from Minnesota’s district court judges, whose sentencing practices and decisions will be impacted by the proposal. Another commissioner objected that he had not had an opportunity to obtain input regarding the proposal from the Minnesota County Attorneys Association. Another commissioner simply objected that he was “appalled” by the process.

Despite the Commission’s failure to follow its historic practice of providing notice of action items in an agenda one week before the hearing; despite objections that, because notice was inadequate, certain commissioners had not had an opportunity to obtain input regarding the proposal from the stakeholders they represent; and despite the lack of notice to the public, a majority rejected the motion to table the Proposal, on a six-five vote. Then, despite the Commission’s historic practice of not voting on an action item at its first reading, the Commission voted on the merits of the Proposal, approving it for a public hearing, again on a six-five vote.

A bare majority of the commissioners voted to approve the Proposal for a public hearing even though several of those commissioners acknowledged that the Proposal, in its

current form, has unintended negative consequences and therefore needs significant modification. Notably, the Chair went on record saying that although she supports probation caps, there are problems with the Proposal and that she would not cast a final vote for it in its current form. Given the late hour, there was inadequate time to amend the Proposal to address the concerns of its supporters. Thus, the majority voted to hold a public hearing on the Proposal, fully intending to significantly modify its language *after* the public hearing.

The Majority's Justification

The majority's stated justification for proceeding without regard to the Commission's customary practices is its desire to adopt the Proposal as a sentencing guidelines modification, which will automatically become effective absent legislative override, under the following statute.

Any modification . . . which would result in the reduction of any sentence or in the early release of any inmate, with the exception of a modification mandated or authorized by the legislature or relating to a crime created or amended by the legislature in the preceding session, *shall be submitted to the legislature by January 15 of any year in which the commission wishes to make the change and shall be effective on August 1 of that year, unless the legislature by law provides otherwise.*

Minn. Stat. § 244.09, subd. 11 (emphasis added). The majority's desire to submit the Proposal to the legislature as a self-executing modification requires the Commission to comply with the January 15 submission date described above. The Commission must also comply with administrative rules requiring notice and a public hearing. *See* Minn. R. 3000.0100-.0600 (2019).

The Grounds for Rescission

There are three reasons to rescind the Commission's vote to approve the Proposal for a public hearing: (1) the Commission's failure to follow its customary practices unfairly prejudiced the public, certain commissioners, and certain stakeholder groups, (2) it remains unclear whether the Commission is authorized to adopt "probation caps" as a self-executing "modification" of the sentencing guidelines, and (3) because a majority of the Commission does not support the Proposal in its current form, it is not ripe for a public hearing under the governing administrative rules. Each ground is addressed in turn.

1. The Commission's failure to follow its customary practices unfairly prejudiced the public, certain commissioners, and certain stakeholder groups.

The Commission's failure to follow its customary procedures when adopting the Proposal for a public hearing compromises the fundamental requirements of meaningful notice and opportunity to be heard in several ways. First, the Commission's failure to include the Proposal on the publicly posted agenda left the public without notice of the Commission's intent to discuss or act on the proposal.

The purpose of Minnesota's Open Meeting Law is "to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning [public bodies'] decisions or to detect improper influences," "to assure the public's right to be informed," and "to afford the public an opportunity to present its views to the [public body]." *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002); see *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 442 (Minn. App. 2005) (stating that

the open-meeting law is designed in part to allow the public to be informed about public officials' decision-making), *review denied* (Minn. June 14, 2005). No member of the public was present to speak against the proposal at the November 6 meeting. But three members of the public were present to speak in favor of the proposal, suggesting that they had been told that the commission would act on the Proposal at that meeting. Those three members of the public had the opportunity to be fully informed regarding the Commission's decision and to present their views regarding probation-caps to the Commission. All interested public stakeholders should have had the same opportunity regarding this important sentencing issue. *See id.*

Second, as a result of the Commission's failure to follow its customary practices, certain commissioners did not have an opportunity to discuss the Proposal with their respective stakeholder groups—including district court judges and prosecutors—before the November meeting. More importantly, no crime victim or victim advocate provided information regarding how the proposal will impact the victims of felony offenses. In creating the Commission, the legislature directed that its unelected commissioners be appointed from designated stakeholder groups, including prosecutors, district court judges, and victims of felony crime. Minn. Stat. § 244.09, subd. 2. The legislature clearly intended that the interests of those stakeholder groups would be represented when the Commission considers modifications to the sentencing guidelines. Yet, the major sentencing change set forth in the Proposal was approved for a public hearing without adequate input from those stakeholder groups.

Third, the failure to follow customary practices foreclosed consideration of alternative ways to address the justification for the Proposal (i.e., disparate probation terms). Such alternatives are available and need to be considered. For example, at the November meeting, the Commission’s most recent past chair suggested the creation of a system of presumptive probation terms similar to the system of presumptive sentencing embodied in the current sentencing guidelines.¹ Also at the November meeting, the undersigned commissioner suggested that a probation-cap limit other than five years should be considered, as well as the possibility of limiting the Proposal to cases in which the guidelines presume a probationary sentence. Regrettably, the Commission was unaware of any alternatives that might have been suggested by stakeholders such as district court judges, prosecutors, and victim-advocacy groups because they were not aware of the Proposal. As a result of inadequate notice, the late hour, and the insistence that a vote on the Proposal occur at the November hearing, the opportunity to consider any alternatives to the Proposal was denied.

Fourth, and most importantly, as a result of the Commission’s failure to follow its customary practices, the Commission did not discuss or consider the Proposal’s impact on public safety, which must be the Commission’s “primary consideration” when “modifying

¹The Chair has publicly endorsed this alternative. See Kelly Lyn Mitchell, *It’s Time to Rethink Probation Lengths in Minnesota*, Robina Inst. of Criminal Law & Criminal Justice (Jan. 13, 2017), <https://robinainstitute.umn.edu/news-views/it%E2%80%99s-time-rethink-probation-lengths-minnesota> (“Minnesota could make two changes that would bring greater uniformity and proportionality to probation sentences. . . . either in conjunction with a new probation cap or as an alternative to that solution, Minnesota could task the Sentencing Guidelines Commission with developing presumptive probation terms and incorporating them into the sentencing grids.”).

the Sentencing Guidelines.” *Id.*, subd. 5. Thus, there was no opportunity to consider whether offenses in addition to the designated homicide and criminal-sexual-conduct crimes should be excluded from the Proposal. For example, a concern has been raised that a mandatory five-year probation cap has negative public-safety implications in felony DWI cases because those offenders present a significant risk to public safety.² *See* Minn. Stat. § 169A.24, subd. 2 (allowing up to seven years of imprisonment); Minn. Stat. § 244.09, subd. 5 (stating that “the primary consideration of the commission shall be public safety”). Certainly, there are other crimes that impact public safety and justify probation terms longer than five years. Yet, the Commission did not consider *any* additional offense-specific exceptions to the Proposal.

In sum, instead of thoughtfully considering the Proposal and all viable alternatives in an effort to arrive at some consensus regarding how to improve consistency when setting probation terms, the majority dispensed with fundamental procedural safeguards and effectively limited consideration of this important sentencing issue to the Proposal’s five-year one-size-fits-all probation cap. The Commission’s process offends traditional notions of fair play and is unacceptable. The Commission must give any proposal for probation reform the time and attention that it deserves, as it has for other recent initiatives such as drug-sentencing reform.

² A recent article in the Star Tribune highlights this concern. *See* Paul Walsh, *4-Vehicle Pileup in Coon Rapids Leaves 2-Year-Old Critically Hurt; Suspected Drunken Driver in Jail*, Star Trib. (Dec. 1, 2019, 12:42 PM), <http://www.startribune.com/4-vehicle-pileup-in-coon-rapids-leaves-2-year-old-critically-hurt-suspect-drunken-driver-in-jail/56565652/>.

2. It remains unclear whether the Commission is authorized to adopt “probation caps” as a self-executing “modification” of the sentencing guidelines.

The legislature has authorized the Commission to promulgate “guidelines” regarding “probation and the conditions thereof.” Minn. Stat. § 244.09, subd. 5. All guidelines promulgated by the Commission “shall be *advisory* to the district court.” *Id.* (emphasis added). A “guideline” is defined as “[a] statement or other indication of policy or procedure by which to determine a course of action.” *The American Heritage College Dictionary* 781 (5th ed. 2011). A “cap” is defined as “[a]n upper limit; a ceiling.” *Id.* at 274. There is a significant difference between a “guideline” and a “cap,” especially when one considers that the Commission’s guidelines are “advisory.” Thus, it is not clear that the Proposal’s five-year cap on probation terms is a “guideline[.]” within the meaning of Minn. Stat. § 244.09, subd. 5.

Indeed, although the Minnesota Sentencing Guidelines impose lower limits on the exercise of sentencing discretion in circumstances in which the legislature has mandated minimum terms of incarceration, Minn. Sent. Guidelines 2.E.1 (Supp. 2019), the current guidelines do not prescribe maximum terms of incarceration less than those authorized by the legislature without also recognizing a judge’s discretion to exceed any guidelines maximum based on substantial and compelling circumstances. *See* Minn. Sent. Guidelines 2.D.1 (Supp. 2019) (providing that “[t]he sentences provided in the [sentencing guidelines] Grids are presumed to be appropriate for the crimes to which they apply” but that a

departure from the presumptive guidelines is permitted if “there exist identifiable, substantial, and compelling circumstances to support a departure”).

At the November meeting, a commissioner suggested that the Commission does not have authority to adopt probation caps because “caps” are not “guidelines.” That suggestion was summarily dismissed without the benefit of legal research or analysis by Commission staff. But research is appropriate given the possibility of a constitutional challenge. The United States Supreme Court has rejected a separation-of-powers challenge to the Sentencing Guidelines promulgated by the U.S. Sentencing Commission, based on its conclusion that “the Guidelines, though substantive, [do not] involve a degree of political authority inappropriate for a nonpolitical Branch.” *Mistretta v. United States*, 488 U.S. 361, 396-97, 109 S. Ct. 647, 667-68 (1989). However, the Supreme Court based its conclusion in part on the fact that the Guidelines do not vest in the federal Commission “the legislative responsibility for establishing minimum and maximum penalties for every crime.” *Id.* “They do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences *within the broad limits established by Congress.*” *Id.* (emphasis added). It would appear that the Proposal for a five-year-maximum probation cap exceeds the appropriate degree of political authority described in *Mistretta*.³

³ The Minnesota Court of Appeals has rejected a challenge to the Commission’s “statutory or Constitutional authority under the Separation of Powers doctrine.” *Browder v. State*, 899 N.W.2d 525, 530-31 (Minn. App. 2017), *review denied* (Minn. Aug. 22, 2017). However, the court did so because the appellant’s “undeveloped separation-of-powers argument ha[d] no obvious merit,” reasoning in part that “[t]he legislature defines the maximum penalties for felony crimes and authorized the commission to establish a guide

If the Proposal is indeed the first of its kind in that it absolutely limits judicial discretion regarding the length of probation terms despite the existence of statutory authorization for longer terms—effectively establishing a new statutory maximum—the Commission has a responsibility to make an informed determination regarding whether the Proposal is within the scope of its authority under Minn. Stat. § 244.09 before holding a public hearing on the Proposal.⁴ If the Commission does not have authority to adopt probation caps as a modification to the sentencing guidelines it does not follow that the Commission cannot pursue implementation of probation caps. The Commission would simply have to pursue that reform through a recommendation for legislative action.⁵

3. Because a majority of the Commission does not support the Proposal in its current form, it is not ripe for a public hearing under the governing administrative rules.

At the November meeting, the undersigned Commissioner noted that the Proposal’s scope is not limited to presumptive probationary sentences. In response, the author of the Proposal, the Chair of the Commission, and a majority of Commissioners acknowledged that the language of the current proposal is problematic because it does not allow a district

for how those felonies may be sentenced *within that statutory maximum.*” *Id.* at 531 (emphasis added).

⁴ Note that the unexplored suggested alternative for a system of presumptive probation terms does not raise this issue.

⁵ See Mitchell, *supra* (“Minnesota could make two changes that would bring greater uniformity and proportionality to probation sentences. First, Minnesota could impose a cap on probation terms. A data brief on probation length published by the Robina Institute shows that a common cap on the length of probation in other states is 5 years. *Minnesota could amend its law* to institute a similar cap, or it could set differing caps by offense type.”) (emphasis added).

court judge to set a probation term greater than five years when ordering a downward dispositional sentencing departure, which could result in more executed prison sentences. Attempts to amend the Proposal to limit its scope to presumptive probationary sentences were welcomed by its author but ultimately rejected because the Commission lacked the time necessary to do so.

As a result of inadequate notice and placement of this major sentencing change near the end of a long agenda, the commissioners were unable to have a reasoned, productive discussion regarding amendments to address the dispositional-departure issue. Instead, the majority voted to advance the Proposal for a public hearing by a six-five vote. And the majority did so even though the Chair voted in favor of approving the Proposal for a public hearing while at the same timing stating—for the public record—that she would not cast a final vote for the proposal in its current form because there are problems with the Proposal. The Chair's public rejection of the Proposal in its current form essentially means that the Proposal does not have the support of a majority of the Commission, even though it will be the subject of a public hearing.

At least one commissioner objected that it is inappropriate to hold a public hearing on the Proposal under these circumstances. Another commissioner responded that the Commission should hold a public hearing on the Proposal and revise the Proposal to address the concern regarding its scope, as well as any other issues related to the proposal. Five commissioners and the Chair agreed to that approach.

The majority's approach puts the proverbial cart before the horse and is inconsistent with the plain language of the administrative rules governing public hearings before the

Commission. Public hearings on proposed amendments to the Minnesota Sentencing Guidelines are governed by Minn. R. 3000.0100-.0600. Those rules provide that “[a] hearing on proposed amendments to the sentencing guidelines, including any modifications of severity levels and criminal history scores, must proceed substantially in the manner specified in this part.” Minn. R. 3000.0300, subp. 1. “Persons may indicate to the commission in writing their desire to be informed of the date on which the proposed amendments will be considered for adoption at a public hearing . . .” *Id.*, subp. 2. “The commission shall make copies of the proposed amendments available at the hearing.” *Id.*, subp. 4. “Interested persons must be given an opportunity to present oral and written statements regarding the proposed amendments to the sentencing guidelines.” *Id.*, subp. 6. The record of the public hearing must include “a copy of the proposed amendments to the sentencing guidelines as heard at the hearing.” Minn. R. 3000.0500. “After holding the hearing . . . , the Sentencing Guidelines Commission may, by a majority vote of a quorum of the commission present, adopt proposed amendments to the sentencing guidelines.” Minn. R. 3000.0600.

The plain language of the administrative rules describes a process in which the Commission holds a public hearing on a *particular* proposed amendment to the sentencing guidelines, the Commission receives public comments regarding that *particular* proposal, and the Commission may then vote to adopt that proposal. Thus, the rules as a whole indicate a presumption that a majority of the Commission supports the particular proposed amendment that is the subject of the public hearing. That simply is not the case here.

The majority's decision to forge ahead with a public hearing on the Proposal in its current form—even though it lacks majority support—and to significantly modify the proposal after the public hearing undermines the purpose of a public hearing: to notify the public of the Commission's intentions and to let the public weigh in regarding those intentions. *See Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 168 (Minn. App. 2009) (stating that “[t]he purpose of [a mandated public] hearing [on a proposed rule] is to ensure that the agency does not deprive the public of fair notice of the agency's intentions”), *review denied* (Minn. Aug. 11, 2009); Minn. R. 3000.0300, subp. 6 (“Interested persons must be given an opportunity to present oral and written statements regarding the proposed amendments to the sentencing guidelines.”).

The public deserves a definitive statement regarding how the Commission intends to modify the guidelines. Does the Commission intend to institute probation caps for all probationary sentences, except those for the offenses listed in the Proposal, as the Proposal is currently written? Or, does the Commission intend to limit probation caps to presumptive probationary sentences? There likely are members of the public and stakeholder groups who would oppose limiting probation caps to presumptive probationary sentences for the same reason that the Proposal's supporters want that change: if the Proposal is not limited to presumptive probationary sentences, it will likely reduce the number of dispositional departures, that is, the number of probationary sentences in cases in which the sentencing guidelines presume the imposition of executed prison sentences.

The Commission does not fulfill its mandate by holding a public hearing on the Proposal in its current form, while at the same time intending to modify the Proposal after

the public hearing so that it applies only to presumptive probationary sentences. It is no defense to argue that the public will be heard regarding the appropriate scope of the Proposal at the public hearing. Because the Commission has not notified the public of its true intentions—a more limited version of the Proposal—the public has no reason or basis to comment on that possibility.

In addition to the scope issue, the Commission failed to consider and address additional issues related to the Proposal. For example, should additional offenses that raise public safety concerns—such as felony driving while impaired—be excluded from application of the five-year probation cap? Is five years an appropriate probation cap for all offenses? Should there be different probation caps for different offenses?⁶ Should probation caps consider offender-specific characteristics such as criminal history and treatment needs? Comments at the November meeting once again suggest that the Commission intends to discuss and decide whether the Proposal should be amended to address those questions *after* the public hearing. If so, the proposed amendment on which the Commission finally votes will bear little resemblance to the Proposal that has been approved for a public hearing. That process does not provide fair notice of the Commission’s intentions or a meaningful public hearing.

In sum, the Commission has failed to exercise due diligence *before* holding a public hearing on the Proposal. Any argument that time constraints justify that failure is unavailing because the looming January 15 deadline is a problem of the majority’s own

⁶See Mitchell, *supra* (“Minnesota could amend its law to . . . set differing caps by offense type.”).

making. No explanation is offered regarding why the Proposal was not introduced at an earlier meeting. Moreover, these circumstances do not align with those that the Chair has proffered as justifying a departure from the “informal rule” that the Commission does not vote on a matter at its first reading: “the meeting immediately following the end of the legislative session when new and amended crimes are ranked.” E-mail from Kelly Mitchell to author, *supra*.

In addition, no reason is given why the Proposal must be presented to the legislature in 2020, without proper fulsome consideration, rather than in a subsequent year. In fact, the Commission is not required to propose any particular amendment to the sentencing guidelines in its January 15, 2020 report to the legislature. The Commission therefore has an obligation to fully consider the Proposal, as well as viable alternatives, before presenting the Proposal’s major recommendation for probation reform at a public hearing. Any other approach is inconsistent with the administrative rules governing the public hearing, does not satisfy the purpose of a public hearing, and is frankly inexcusable.

The Remedy

In *Mistretta*, the United States Supreme Court rejected an argument that by “delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine.” 488 U.S. at 371, 109 S. Ct. at 654. In doing so, the Supreme Court explained that “[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which

delegation to an expert body is especially appropriate.” *Id.* at 379, 109 S. Ct. at 658. It appears that the majority’s rash approval of the Proposal’s one-size-fits-all five-year probation cap without meaningful notice, meaningful input from all designated stakeholders, consideration of any recognized viable alternatives, or adequate time to consider necessary amendments does not reflect the expert-driven “intricate, labor-intensive task” envisioned by the Supreme Court. *Id.*

The Commission’s failure to adequately consider the Proposal is noteworthy because, even though the Commission is an unelected body, it has significant law-making authority. *See* Minn. Stat. § 244.09, subd. 11. It must at all times exercise that authority in a manner that maintains the public’s trust and confidence. The majority should carefully consider how poorly the lack of fair process described herein reflects on the Commission and whether a properly vetted proposal for probation reform would be more favorably received by the public and the legislature. By failing to provide a fully informed recommendation for probation reform, the majority has risked compromising the Commission’s authority and reputation. I urge the majority to reconsider its course of action.

The Honorable Michelle A. Larkin
December 4, 2019