

Staff Information Paper

Use of Extended Supervision as a Reason for Departure

January 2, 2020

The following tables display how often extended supervision has been cited as a reason for mitigated dispositional departures for cases sentenced from 2014 through 2018. This includes cases where the court stated¹ that the departure was in order to allow for an extended period of supervision, or to ensure compliance with conditions of probation, or because extended supervision best serves long-term public safety.² During the five years from 2014 through 2018, 28,619 (33%) of the cases sentenced had presumptive prison dispositions. Of those 28,619 cases, 10,240 (36%) received a mitigated disposition. In 13% of those mitigated dispositions, extended supervision was among the reasons cited as a reason for the departure.

Table 1. Extended Supervision Cited as a Reason for Departure by Offense Type, 2014–18

Offense Type	Number of Mitigated Dispositional Departures	Extended Supervision Cited	
		Number of Cases	Percent of Cases
Person	3,645	469	12.9%
Property	1,549	192	12.4%
Drug	2,536	309	12.2%
Non-Criminal Sexual Conduct on Sex Grid	995	129	13%
DWI	637	105	16.5%
Weapons	688	78	11.3%
Other	190	24	12.6%
Total	10,240	1,306	12.8%

¹ The sentencing court must forward its statement of the grounds for departure to the MSGC; see Minn. R. Crim. P. 27.03, subd. 4(C) (requiring the court to file with the MSGC a sentencing order or departure report stating the grounds for departure within 15 days after imposing a departure from the Sentencing Guidelines).

² This reason for departure is abbreviated on the MSGC's departure report form as a checkbox labeled, "Ensure compliance w/ probation or allow longer supervision."

Table 2. Extended Supervision Cited as a Reason for Departure by Judicial District, 2014–18

Judicial District	Number of Mitigated Dispositional Departures	Extended Supervision Cited	
		Number of Cases	Percent of Cases
First	1,206	303	25.1%
Second	1,379	100	7.3%
Third	847	102	12.0%
Fourth	2,348	225	9.6%
Fifth	609	91	14.9%
Sixth	671	108	16.1%
Seventh	859	121	14.1%
Eighth	194	24	12.4%
Ninth	790	69	8.7%
Tenth	1,337	163	12.2%
Total	10,240	1,306	12.8%

Table 3. Extended Supervision Cited as a Reason for Departure by Pronounced Probation Term, 2014–18

Pronounced Probation Term	Number of Mitigated Dispositional Departures	Extended Supervision Cited	
		Number of Cases	Percent of Cases
Up to 3 years	2,377	152	6.4%
Over 3–5 years	3,964	568	14.3%
Over 5–7 years	1,097	183	16.7%
Over 7–10 years	1,284	180	14.0%
Over 10–15 years	465	69	14.8%
Over 15–20 years	485	68	14.0%
Over 20 years	568	86	15.1%
Total	10,240	1,306	12.8%

Date: January 2, 2020

To: Members of the Minnesota Sentencing Guidelines Commission (MSGC)

From: Paul Schnell, MSGC / Department of Corrections
Kelly Mitchell, MSGC / Public Member

Re: Revised Proposed Guidelines Modifications to Limit Probation Terms

Background

At the November meeting, Commissioner Paul Schnell put forth a proposal to amend the Sentencing Guidelines to provide for a probation cap of no greater than five years except for certain felony homicide or sex offenses. The Commission voted by a narrow margin to preliminarily approve the proposal and advance it to a public hearing. The Commission held a public hearing on December 19, 2019, and heard from 31 individuals. The Commission held the record open for five days following the hearing, and received written submissions from 63 individuals, some of whom had also testified in person.

Observations

- The majority of the oral and written testimony favored action by the Commission to limit probation terms.
- No evidence was presented to suggest that longer probation terms serve public safety.
 - Research conducted by Dr. Julia Laskorunsky at the Robina Institute showed that the effect of long probation lengths on recidivism is extremely low, requiring significant resources to see an impact on public safety. After controlling for offender and case level characteristics, differences in recidivism remain by judicial district, suggesting a need to focus instead on local services and criminal justice practices.
 - Midge Christianson, President of the Minnesota Association of Community Corrections Act Counties testified that probation is more effective when it is frontloaded to focus on the first couple of years when re-offense and revocation are most likely; she noted that after five years, the public safety benefit of probation dramatically drops off. Further, Ms. Christianson testified research has shown that excessive probation terms can actually increase recidivism for individuals classified as low risk.
- The testimony presented suggested that very lengthy probation terms engender more costs than benefits.
 - Robert Stewart presented an analysis showing that average probation terms are many times greater—in some cases exponentially greater— than the comparable guidelines prison terms. While he agreed that the terms do not need to be equal, he testified that the literature indicates that there is very little penological benefit to these very lengthy terms and urged the Commission to balance the diminishing public safety returns against the collateral consequences that stem from being on probation.
 - Andy Doom, a retired corrections official with a career spanning 40 years in both urban and rural districts, submitted written testimony indicating that lengthy probation terms “contribute to burdensomely large caseloads” forcing probation officers to prioritize supervision by reducing the level of supervision for some. He also indicated that discharge policies and practices vary widely, compounding the disparities in the initial assignment of probation terms.

- The Justice Action Network submitted testimony stating that “[o]verly lengthy probation terms require state and local governments to spend time and resources in ways that are not the best use of taxpayer dollars given the high caseload handled by probation officers across the state” and that such terms create “unnecessary barriers to success” for individuals on probation.
- Michelle Phelps, Assistant Professor at the University of Minnesota, testified that probation “strips adults of their independence and the ability to make autonomous choices about their lives.”
- Several individuals testified that being subject to lengthy probation terms caused them to lose hope, and made it hard for them to plan for the future and participate meaningfully in the community.
- A few of those testifying in person and in writing raised questions about the substance of the proposal.
 - Bob Small, with the Minnesota County Attorney’s Association, raised concerns that the short term would foreclose dispositional departures, result in more convictions to achieve longer terms through consecutive sentences, and limit recovery of restitution. He also expressed concern that the proposal does not address attempted versions of the excluded offenses, does not include criminal vehicular homicide, does not include an exception for those who remain a threat to public safety (citing multiple offenses that would remain subject to the cap), and imposes a shorter probation term than that authorized for gross misdemeanor offenses.
 - Professor Richard Frase, University of Minnesota Law School, expressed concern that the provision is a hard cap, and offered his opinion that the limitation of probation lengths would be appropriate if it were a presumptive term subject to departure.
 - Bill Ward, State Public Defender, suggested some minor wording changes, including removing the phrase “appropriate cell on the applicable grid” from section 3.A.1 to clarify that the provision applies to all stayed sentences, changing the title of section 3.A.2 to “Length of Stay” rather than “Duration of Stay” because the term duration has traditionally applied to the presumptive prison sentence, and changing the phrase “statutory maximum probation term” to “statutory maximum punishment” in section 3.A.2. Mr. Ward also suggested a two-tiered maximum probation term of 5 years for presumptive stays and 7 years for presumptive commits.

Conclusions

Based upon the testimony received by the Commission, we conclude that it is imperative for the Commission to move forward with modifications to limit the length of probation. Extremely lengthy terms are not necessary to serve public safety, overburden our state and local correctional resources, and compound the effects of collateral consequences for individuals serving on probation. However, we also recognize that some revisions to the proposal are necessary to address the concerns that were raised at the public hearing. Therefore, we put forward the following revised proposal, which is explained in detail in the next section, for the Commission’s consideration. There are two notable changes to the original proposal: the ability to depart from the 5-year probation term guideline and the addition of criminal vehicular homicide to the list of offenses that are excluded from the guideline.

Explanation of Revised Proposal

A. General Outline

In broad outline, the proposal we put forth establishes a sentencing guideline providing that except for specifically enumerated offenses (including criminal vehicular homicide), probation should be no longer than 5 years subject to departure for substantial and compelling circumstances.

Stemming from the recommendation made by Professor Frase, and in accord with current guidelines protocols, the ability to depart has been added to the proposal to be more in line with the traditional form and application of the guidelines. The new 5-year probation term guideline will apply to the majority of cases, in “typical” situations. Testimony provided by the Minnesota County Attorneys Association (MCAA) raised concern about a 5-year probation term for violent offenses. The proposed 5-year term meets or exceeds the statutory maximum punishment for many of the offenses that MCAA identified (e.g., domestic assault (5 years), domestic assault by strangulation (3 years), false imprisonment (3 years), operating a machine gun (5 years), threats of violence (5 years), aggravated harassment (5 years), shooting at a public transit vehicle (3 to 5 years), and child endangerment (5 years)). But, as multiple testifiers noted, the ability to depart preserves judicial discretion to impose a longer sentence in cases that are “atypical,” thereby warranting different treatment based on substantial and compelling circumstances, which must be articulated by the court. The proposed departure option also seeks to address concern about the Commission’s authority to establish a maximum term of probation. The updated language creates a probation term guideline, but maintains the legislatively created cap up to the statutory maximum punishment.

The proposal does not include the bases for probation term extension included in the 2019 legislation, because we do not believe the Commission has the authority to establish the conditions for or terms of extending probation after the original sentence has been pronounced. However, allowing courts to depart should address any concerns raised about individuals who commit inchoate forms of the excluded offenses (e.g., attempt or conspiracy) and individuals deemed to be a greater threat to public safety (e.g., those who commit crimes for the benefit of a gang), and should eliminate the need to seek multiple convictions in order to achieve longer probation terms. While we recognize that full payment of restitution is an important step toward making victims whole, holding offenders accountable, and restoring the community, the data suggests that longer probation terms do not reflect the best use of correctional resources given the parallel civil judgment process for restitution collection.

It is our belief that the modifications made to the original proposal reflect reasonable alterations based upon public testimony. The very purpose of obtaining public testimony regarding a given proposal is to submit it to scrutiny, and to integrate suggestions into the proposed language as warranted. Furthermore, the alterations to the original proposal do not reflect the wholesale creation of a new process since the departure requirement integrated in the proposal is in keeping with current guidelines requirements and regular practice.

Finally, as a matter separate but related to the proposed changes, it is recommended that the Commission adopt a resolution encouraging the Minnesota Legislature to consider legislation to address the expressed proportionality concern that certain gross misdemeanor offenses have potential probation terms longer than the 5-year term established in the proposed guideline.

B. Detailed Explanation

This section describes the proposed modifications to the sentencing guidelines. The proposal presents the guidelines in numerical order. This explanation addresses the modifications to develop the probation guideline first, and then covers the conforming amendments needed for the departure provision.

a. Probation Guidelines

Section 1.B.13. modifies the definition of “presumptive sentence” to include the length of stay guideline in section 3.A.2.

Section 2.C.1. is the same as in the original proposal.

The first paragraph in Section 3.A.1 has been amended. First, this proposal recognizes that there is an error in the existing guidelines. Currently the paragraph indicates that it is applicable only to presumptive stayed sentences; however, even without any further changes, this section is applicable to *all* stayed sentences because it sets forth the requirement to pronounce the length of stay and the differences between stays of execution and stays of imposition. Thus, the paragraph has been amended to replace the phrase “appropriate cell on the applicable grid” with “court orders” to clarify that the provision applies to all stayed sentences. This is one of the corrections that was suggested by Bill Ward.

Paragraph 3.A.1 already contains some direction relating to the length of stay, which is that the length of stay can exceed the presumptive prison duration in the applicable cell. This language has been retained but moved to new paragraph 3.A.2.b in order to keep all guidelines language relating to the length of stay together.

Additionally, some directional language has been added to paragraph 3.A.2 to clarify that guidelines language about the length of stay is in new paragraph 3.A.2, and guidelines language relating to other conditions of probation are in renumbered paragraph 3.A.3.

New paragraph 3.A.2 has been amended. As Bill Ward suggested, the title of the paragraph has been changed to Length of Stay to differentiate it from the use of “duration” elsewhere in the guidelines, which typically refers to prison sentence length. The phrase “statutory maximum probation term” has also been changed to “statutory maximum punishment” at Bill Ward’s suggestion, to clarify that this guideline is working within the statutory maximum punishment as provided by the Legislature. The rest of the guideline has been restructured into sub-paragraphs to enhance readability.

Paragraph 3.A.2.a. establishes presumptive probation terms of 5 years, but allows for a longer probation term by departure.

Paragraph 3.A.2.b. is the new location of the language previously in 3.A.1. allowing for the length of stay to be longer than the presumptive prison term indicated in the cell.

Paragraph 3.A.2.c. clarifies that even when the court departs to impose a longer term of probation, the length of stay cannot exceed the statutory maximum punishment for the offense. This ensures that probation terms will fit within the current legislatively-created cap for probation terms.

Paragraph 3.A.2.d. sets forth the offenses that are excluded from the probation guidelines. The list is the same as the 2019 legislation except that criminal vehicular homicide has been added. As noted by MCAA

Executive Director Bob Small at the public hearing, the omission of this offense from the legislation was on oversight.

Paragraph 3.A.2.e. includes a cross-reference to the two statutorily-permitted bases for extending probation.

Paragraph 3.A.3. has been renumbered to accommodate the insertion of new paragraph 2. Additionally, new paragraph 6 has been added to this section to clarify the Commission's intent to address probation guidelines, but not to make further recommendations regarding probation conditions.

b. Conforming Modifications Regarding Departures

The remaining amendments make conforming modifications to incorporate the concept that imposing a length of stay longer than that provided for in section 3.A.2 is a departure.

Section 1.B.5. modifies the definition of "departure" to include lengths of stay longer than provided for in section 3.A.2.

Second 1.B.5.b modifies the definitions of "durational departure" and "aggravated durational departure." Since the new probation length guideline offers a range from 0 to 60 months, there should be no need for mitigated durational departures regarding length of stay. But imposing a longer length of stay would be considered an aggravated durational departure under these amendments.

The last sentence of section 2.D.1.a. was stricken and the content moved into the first sentence to avoid confusion with regard to the two types of durational departures (prison duration and probation length duration).

Because the Commission has not discussed specific bases for departure, no attempt was made to add to the list of permissible departure reasons in section 2.D.3. It should be noted, however, that this section currently provides that the list is "nonexclusive," meaning that the court has discretion to articulate a basis for departure other than those that are listed in the guidelines. Leaving the list as is will allow the courts some flexibility in determining how best to apply the new length of stay guideline. The Commission can then monitor the articulated bases for departure over time and learn from the experience in the courts whether additional reasons should be added to the lists of permissible or impermissible bases for departure.

PROPOSED GUIDELINES MODIFICATIONS

Based on the testimony heard at the public hearing, the following is a revised proposal for the Commission's consideration at the January meeting.

Amend section 3.A to allow for a presumptive probation term of up to five years or the statutory maximum sentence, subject to a departure, and make conforming amendments to sections 1.B, 2.C, and 2.D, as follows:

Minnesota Sentencing Guidelines and Commentary

1. Purpose and Definitions

* * *

B. Definitions

* * *

5. Departure. A "departure" is a pronounced sentence other than that recommended in the appropriate cell on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a "departure."

* * *

- b. Durational Departure. A "durational departure" occurs when the court orders a sentence with a prison duration other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid or when the court pronounces a length of stay other than as provided in section 3.A.2.
 - (1) Aggravated Durational Departure. An "aggravated durational departure" occurs when the court pronounces a prison duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid or when the court pronounces a length of stay longer than provided in section 3.A.2.
 - (2) Mitigated Durational Departure. A "mitigated durational departure" occurs when the court pronounces a prison sentence that is more than 15 percent lower than the fixed duration displayed in the appropriate cell on the applicable Grid.

* * *

13. Presumptive Sentence. "Presumptive sentences" are those sentences provided on the Sentencing Guidelines Grids and in section 3.A.2. They are presumptive because they are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.

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2. Determining Presumptive Sentences

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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.

* * *

D. Departures from the Guidelines

1. Departures in General. The sentences provided in the Grids are presumed to be appropriate for the crimes to which they apply. The court must pronounce a sentence of the applicable disposition, ~~and~~ within the applicable prison range, and within the applicable length of stay, unless there exist identifiable, substantial, and compelling circumstances to support a departure.

The court may depart from the presumptive disposition or duration provided in the Guidelines, and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence. A pronounced sentence for a felony conviction that is outside the appropriate prison range on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence, is a departure from the Guidelines. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a departure from the Guidelines. A departure is not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by statute or case law.

- a. Disposition and Duration. Departures with respect to disposition and duration are separate decisions, each requiring written departure reasons. A court may depart from the presumptive disposition without departing from the presumptive duration, and vice-versa. ~~A court departing from the presumptive disposition as well as the presumptive duration has made two separate departure decisions, each requiring written departure reasons.~~
- b. Aggravated Departure. When imposing a sentence that is an aggravated departure, it is recommended that the court pronounce a sentence proportional to the severity of the crime for which the sentence is imposed and the offender's criminal history, and take into consideration the purposes and underlying principles of the Guidelines.

* * *

2. Factors that **should not** be used as Reasons for Departure. The following factors should not be used as reasons for ~~departing from the presumptive sentences provided in the appropriate cell on the applicable Grid:~~ departure:

* * *

3. Related Policies

A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the ~~appropriate cell on the applicable Grid specifies court orders~~ 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,~~ as provided in section 3.A.2 and may establish appropriate conditions subject to the considerations in section 3.A.3.
 - a. Stay of Execution. When ordering a stay of execution, the court must pronounce the prison sentence duration, but its execution is stayed. The presumptive duration is shown in the appropriate cell.
 - b. Stay of Imposition. When ordering a stay of imposition, the court must not pronounce a prison sentence duration, and the imposition of the sentence is stayed.

The Commission recommends that stays of imposition be used for offenders who are convicted of lower severity offenses and who have low criminal history scores. The Commission further recommends that convicted felons be given one stay of imposition, although for very low severity offenses, a second stay of imposition may be appropriate.

2. Length of Stay.

- a. When the court stays execution or imposition of sentence for a felony offense, the pronounced length of stay must not exceed five years or the length of the statutory maximum punishment, whichever is less, unless the court identifies and articulates substantial and compelling reasons to support a departure from this rule.
- b. Subject to the limitation in section 3.A.2.a, the pronounced length of stay may exceed the presumptive prison sentence duration provided in the appropriate cell on the applicable Grid.
- c. If the court by departure exceeds the limitation in section 3.A.2.a, the length of stay must not exceed the statutory maximum punishment for the offense.
- d. The limitation in section 3.A.2.a does not apply to a sentence for a violation of Minn. Stat. § 609.19 (Murder 2nd Degree), 609.195 (Murder 3rd Degree), 609.20 (Manslaughter 1st Degree), 609.2112 (Criminal Vehicular Homicide), 609.2662 (Murder of an Unborn Child 2nd Degree), 609.2663 (Murder of an Unborn Child 3rd Degree),

609.2664 (Manslaughter of an Unborn Child 1st Degree), 609.268 (Death or Injury of an Unborn Child in Comm. of Crime), 609.342 (Criminal Sexual Conduct 1st Degree), 609.343 (Criminal Sexual Conduct 2nd Degree), 609.344 (Criminal Sexual Conduct 3rd Degree), 609.345 (Criminal Sexual Conduct 4th Degree), or 609.3451 (Criminal Sexual Conduct 5th Degree).

e. Extensions of probation are governed by statute (see Minn. Stat. § 609.135, subd. 2(g)–(h)).

* * *

2.3. 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:

- deterrence;
- public condemnation of criminal conduct;
- public safety;
- rehabilitation;
- restitution;
- retribution; and
- risk reduction.

The Commission also recognizes that the relative importance of these objectives may vary with both offense and offender characteristics and that multiple objectives may be present in any given sentence. The Commission urges courts to utilize the least restrictive conditions of stayed sentences that are consistent with the objectives of the sanction. The Commission further urges courts to consider the following principles in establishing the conditions of stayed sentences:

* * *

(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.

MINORITY REPORT IN OPPOSITION TO SCHNELL PROPOSAL FOR MANDATORY PROBATION CAPS

The five-person minority herein represents the opinion of the law-enforcement, prosecutorial, and judicial members of the Commission. To be clear, the minority does not oppose responsible probation-duration reform. In fact, such reform is needed to address outlier probation terms of more than 15 years. But the Schnell proposal that establishes a mandatory five-year probation duration cap for all felonies, except homicide and criminal sexual conduct offenses is flawed and will not work. It is also contrary to public safety and the fundamental purpose of the sentencing guidelines. To explain our position we will discuss the statutory framework of the guidelines, identify the problem with probation durations, and then discuss the reasons for our opposition.

Statutory Framework

Pursuant to Minn. Stat. § 244.09, subd. 5 (2018), the legislature gave the Commission the responsibility to “promulgate Sentencing Guidelines for the district court.” More importantly, “[t]he guidelines promulgated by the commission shall be advisory to the district court.” Minn. Stat. § 244.09, subd. 5. Thus, the proper role and function of the Commission is to establish advisory guidelines for the district court to use when sentencing offenders. But the district court has the sole authority to determine individual sentences.

Recently, two Commission members have challenged whether a district court judge is in the best position to determine individual sentences including probation durations.

Their challenge is answered by clear legal authority establishing that the district court, and not the Commission, has the authority to determine individual sentences. “The power to define the conduct which constitutes a criminal offense and to fix the punishment for such conduct is vested in the legislature. However, the imposition of the sentence is purely a judicial function.” *State v. Olson*, 325 N.W.2d 13, 17-18 (Minn. 1982) (citations omitted).

Based on its constitutional authority, the Minnesota judiciary imposes sentences upon offenders. Our incarceration rate is the third lowest in the nation. Yes, Minnesota has a higher probation rate. But that is a good thing. Minnesota’s probation rate shows that we work with offenders to enable them to reform and to avoid incarceration. The appropriate probation-term length varies depending on the offense, the individual offender characteristics, and the offender’s criminal history. Before imposing a sentence, a judge hears from the prosecutor, the defense attorney, the probation officer, the victim, and the offender. The judge is the impartial decision-maker uniquely qualified to take the evidence presented, including the advisory sentencing guidelines, and determine the appropriate sentence. The judge is the person who has the constitutional authority to determine the sentence. Further, the judge has all the relevant information to consider, and has the collective wisdom and experience of dealing with sentencing issues on a day-to-day basis. Moreover, as an elected official, a judge is directly accountable to the people.

But the Schnell proposal establishes a mandatory probation term cap of five years for all felonies except homicide and criminal sexual conduct offenses. The Schnell proposal eliminates judicial discretion to determine an offender’s sentence by placing an arbitrary, mandatory five-year limit on probation terms.

The Problem

Approximately 82 percent of Minnesota probation terms imposed are five years or fewer. Robina Inst., *Probation Sentencing In-Depth (2010-2015)* 1 (2017). Most probation terms that exceed five years fall within the range of 5-10 years. For the majority of cases, a probation term of 5-10 years is long enough to ensure public safety, to provide rehabilitative services, and to adequately punish offenders. However, at the public hearing regarding the Schnell proposal, Midge Christianson, President of the Minnesota Association of Community Corrections Act Counties, testified that a probation term of 5-10 years is appropriate for other offenders.

Although examples were provided of probation terms exceeding 15 years and going as long as 40 years, those durations are the outliers and are relatively rare. We believe those cases warrant a closer examination. For example, Jen Schroeder, a licensed professional drug and alcohol counselor who is also serving a probation sentence, testified that she was placed on probation for 40 years for a controlled-substance-possession offense. She stated that she had legal representation at her sentencing hearing and that she did not object to the 40-year probation term. She *agreed* to the 40-year probation term to avoid the presumptive sentence, which would have resulted in over 90 months of incarceration. Lastly, she did not appeal her sentence.

Unfortunately, such outlier cases, as well as cases involving probation terms greater than 10 years, are hard to categorize, and the data we have on them is incomplete. Specifically, the data reports the probation term pronounced by the judge at the time of sentence, and not the actual probation term served. It is undisputed that many judges

discharge offenders from probation early, as soon as three to five years after sentencing, based on compliance with probation supervision. But those early discharges are not captured in the data. Consequently, the data collected by the Robina study, on which the current reform efforts are based, likely overestimates the actual length of probation terms in Minnesota.

Moreover, the Robina study does not reflect the extent to which longer probation terms were the result of settlement agreements between prosecutors and offenders. As revealed in the testimony described above, there are cases in which the guidelines presumed that imprisonment was the appropriate sentence and the offender agreed to plead guilty and have a longer period of probation supervision. An offender does this to avoid going to prison. The State Public Defender of Minnesota, William M. Ward, expressed concern that if judges are limited to five-year probation terms, they will be less likely to place an offender on probation when the guidelines presume that a prison sentence is appropriate. In fact, Mr. Ward suggested that an additional, longer probation cap of seven years is necessary to provide flexibility in such cases.

Such negotiated probation terms skew the statistics resulting in an overestimation of outlier probation terms. Moreover, the number of these settlement agreements are significant. Judicial branch statistics show that approximately 95% of all cases filed, including felony cases, are settled before trial. An offender is often willing to plead guilty to avoid an executed prison sentence in exchange for a longer probation term. In exchange, the state is satisfied with a longer period of probation supervision that protects public

safety. And the district court judge who ultimately must approve such settlements gives the offender an opportunity to rehabilitate within the community.

The Schnell proposal takes away the criminal-justice system's ability to cooperatively give offenders who would otherwise be sent to prison an opportunity to prove that they can remain in the community without compromising public safety. Thus, the Schnell proposal may have the unintended consequence of increasing the number of offenders who are sent to prison while attempting to reduce the length of time offenders spend on probation.

In sum, additional study regarding unusually long probation terms may warrant further study. But there is no evidence that this topic should receive the Commission's highest priority. Indeed, the Minnesota Legislature has specifically directed the Commission to address the topic of child pornography. The majority has not explained why the topic of probation durations should jump to the first in line.

Reasons We Oppose the Schnell Proposal

We oppose the Schnell proposal for three reasons. First, the process leading up to the 6-5 vote to hold a public hearing on the Schnell proposal violated the Commission's long-standing rules of procedure and deprived the minority of a meaningful opportunity to be heard regarding the merits of the proposal.¹ Moreover, as a result of inadequate notice,

¹ The unorthodox procedure that led to the adoption of the Schnell proposal is set forth in Memorandum and Motion to Rescind from Michelle A. Larkin to the Minn. Sentencing Guidelines Comm'n (Dec. 4, 2019), and Memorandum and Motion to Postpone Public Hearing from Christopher Dietzen to the Minn. Sentencing Guidelines Comm'n (Dec. 4, 2019), and incorporated herein.

the Commission did not have an opportunity to consider alternatives to the Schnell proposal. For example, Commissioner Dietzen argued in favor of a proposal to create a separate probation-duration grid that would establish different presumptive probation ranges based on offenses and offender criminal history, similar to the current sentencing guidelines structure.

Commissioner Larkin suggested that the Commission amend the sentencing guidelines to require that district court judges consider specific factors when determining probation term lengths and that they be required to explain their consideration of those factors. That approach would honor the sentencing discretion that is traditionally afforded district court judges while providing a framework within which to exercise that discretion, which is currently lacking in law. That approach would also provide meaningful appellate review for those offenders who choose to challenge their probation terms.

The testimony at the public hearing shows that stakeholders believe other alternatives are appropriate. For example, Richard S. Frase, Professor, Criminal Law, University of Minnesota and Co-Director of Robina Institute of Criminal Law and Criminal Justice, testified that he would prefer that the Commission recommend presumptive probation terms and not caps, and provide a means of departing from those terms in appropriate cases. State Public Defender William M. Ward testified that the Commission should add a second, longer probation cap of seven years to allow judges more discretion in cases in which the judge is willing to place an offender on probation even though the guidelines establish that a prison sentence is appropriate. Lastly, Robert Small, Minnesota County Attorneys Association, testified that the county attorneys association supports the

negotiated proposal that was presented to the legislature last session. Although that proposal called for a legislative five-year probation cap similar to the Schnell proposal, the legislative proposal differed from the Schnell proposal in several significant ways. Most notably, it allowed a judge to extend probation beyond five years for violent crimes.

In sum, because of inadequate notice and the majority's insistence that the Commission vote on the Schnell proposal at its first reading and hold a public hearing on the proposal the following month, there was no opportunity for the Commission to discuss and consider any alternative to the Schnell proposal before holding a public hearing on probation reform.

Second, the current proposal is contrary to public safety. Under Minn. Stat. § 244.09, subd. 5, "the *primary* consideration of the commission shall be public safety." (Emphasis added.) Public safety means protecting the public from crime. Probation is a powerful tool to help the offender remain in the community. If every offender's probation term is arbitrarily capped at five years, regardless of the offender's individual rehabilitative needs, public safety is compromised. The offender does not receive the help the offender needs to be rehabilitated and remain law abiding. And the public is placed at greater risk that the offender will reoffend.

More importantly, if public safety must be the Commission's primary consideration in amending the guidelines, the Commission must consider alternatives that will bring about probation reform with the least negative impact on public safety, such as the alternatives addressed above, which would allow judicial flexibility when it is appropriate. Here, the majority intentionally cut off discussion of a better alternative.

Third, the Commission lacks the statutory authority to establish mandatory caps for probation duration. Given the discretion that is entrusted to judges at sentencing, the sentencing guidelines are advisory to the district court. Therefore, the Commission lacks the authority to establish a mandatory five-year cap binding on the district court. But we agree that the Commission has the authority to establish presumptive probation ranges that are advisory to the district court, much like the current presumptive prison ranges. We note that several witnesses, including Professor Frase of the Robina Institute, agreed that presumptive probation ranges are preferable because they are consistent with the approach of the sentencing guidelines.