M E M O R A N D U M

DATE: March 4, 2020

TO: Kelly Mitchell, Chair, Minnesota Sentencing Guidelines Commission (MSGC)
Commissioners of the MSGC

CC: Nate Reitz, Executive Director, MSGC

FROM: Justice Christopher Dietzen, Commissioner, MSGC
Judge Michelle A. Larkin, Commissioner, MSGC
Judge Kevin Mark, Commissioner, MSGC
County Attorney Peter Orput, Commissioner, MSGC
Sergeant Salim Omari, Commissioner, MSGC

RE: Recommendation for Legislative Consideration of Probation-Term Grid

PLEASE TAKE NOTICE, on March 12, 2020, at the regularly scheduled meeting of the Minnesota Sentencing Guidelines Commission, the undersigned commissioners will move the Commission, under Minn. Stat. § 244.09, subd. 6 (2018), to recommend, forthwith, that the Legislature direct the Commission to study, adopt, and forward to the Legislature, by January 15, 2021, a probation-term grid that sets forth presumptive probation terms based on offense severity and offender criminal history for all felonies except homicide and criminal-sexual-conduct offenses, as well as mitigating and aggravating factors based on offense and offender characteristics that may be used as reasons for departure.

At the last meeting of the Commission, Chair Mitchell invited Commission members to consider adoption of certain changes to the guidelines modifications set forth in the Schnell/Mitchell proposal for probation reform (Proposal). The Commission

submitted that Proposal to the Legislature in January pursuant to its statutory reporting obligation, which provides that

> *[o]n or before January 15 of each year*, the commission shall submit a written report to the committees of the senate and the house of representatives with jurisdiction over criminal justice policy that identifies and explains all *modifications* made during the preceding 12 months and all proposed *modifications* that are being submitted to the legislature that year.

Minn. Stat. § 244.09, subd. 11 (2018) (emphasis added).

The reporting statute further provides that

> [a]ny *modification* which . . . would result in the reduction of any sentence . . . , 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.

Id. (emphasis added).

Because the deadline for submitting self-executing guidelines modifications to the Legislature has passed, some Commission members questioned whether the Commission has authority to change the modifications described in the Proposal, which will take effect on August 1, 2020 absent legislative override. Although technical, conforming changes might not be objectionable, the changes identified by the Chair would materially change the proposal and are substantive modifications. Allowing such amendments would seem to violate the statutory January 15 submission deadline for any self-executing guidelines modification that would result in the reduction of any sentence. It would seem that at this

point in time, substantive changes to the Proposal may only be made by the Legislature, and not by the Commission.[1]

However, the Commission may make recommendations for legislative action, as opposed to self-executing guidelines modifications, at any time under Minn. Stat. § 244.09, subd. 6. That statute provides, "The commission shall from time to time make recommendations to the legislature regarding changes in the Criminal Code, criminal procedures, and other aspects of sentencing." Minn. Stat. § 244.09, subd. 6. Unlike subdivision 11, which sets forth a January 15 deadline for reporting and submitting "modifications" to the guidelines, subdivision 6 does not impose any time limit on legislative recommendations by the Commission. *Compare* Minn. Stat. § 244.09, subd. 6, *with* Minn. Stat. § 244.09, subd. 11.

For the three reasons that follow, we urge the Commission, pursuant to Minn. Stat. § 244.09, subd. 6, to recommend that the Legislature direct the Commission to develop a probation-term grid as an alternative to the Proposal. First, we remain concerned that the Proposal fails to adequately address the public-safety purposes of probation, is incomplete, and will result in the unintentional incarceration of more offenders. Second, a probation-term grid is consistent with legislative intent that probation is a sanction and that sentencing guidelines governing probation sanctions must be based on reasonable offense and offender characteristics. Third, a probation-term grid is consistent with the established penal

[1] In response to these concerns, the Chair once again agreed to seek legal advice from Minnesota's Attorney General.

objectives of probation. Because we have previously explained our concerns supporting the first reason above, this memo focuses on the second and third reasons.

As to legislative intent, the Commission relies on the following language in its enabling statute as authority to adopt sentencing guidelines governing probation conditions, including term lengths:

> The *Sentencing Guidelines* promulgated by the commission may also establish appropriate sanctions for offenders for whom imprisonment is not proper. Any guidelines promulgated by the commission establishing sanctions for offenders for whom imprisonment is not proper shall make specific reference to noninstitutional sanctions, including but not limited to . . . *probation and the conditions thereof*.

Minn. Stat. § 244.09, subd. 5 (emphasis added). The introductory language to that statutory text states, "The commission shall promulgate *Sentencing Guidelines* for the district court. The guidelines shall be based on *reasonable offense and offender characteristics*." *Id*. (emphasis added).

"The plain language of [a] statute is our best guide to the Legislature's intent." *Rodriguez v. State Farm Mut. Auto. Ins. Co.*, 931 N.W.2d 632, 634 (Minn. 2019). "If the statutory language is clear, the Legislature's intent is clear and we follow it." *Id*. A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant. *Martin v. Dicklich*, 823 N.W.2d 336, 345 (Minn. 2012). One does not examine different provisions in isolation; instead, the statute is construed "as a whole" and "words and sentences are understood in the light of their context." *State v. Gaiovnik*, 794 N.W.2d 643, 647 (Minn. 2011) (quotation omitted). Moreover, "[t]he canons of statutory construction provide that

'shall' is mandatory." *State v. Humes*, 581 N.W.2d 317, 319 (Minn. 1998); *see* Minn. Stat. § 645.44, subd. 16 (2018) ("'Shall' is mandatory.").

Thus, the language of the enabling statute, when read in its entirety, reasonably suggests that any "Sentencing Guidelines" establishing the "sanction[]" of "probation and the conditions thereof" must "be based on reasonable offense and offender characteristics." Minn. Stat. § 244.09, subd. 5. A probation-term grid that establishes presumptive probation terms based on offense and offender characteristics would satisfy the legislative requirement that "Sentencing Guidelines" must be based on reasonable offense and offender characteristics. For that reason, a probation-term grid is a better alternative to the Proposal, which establishes a single presumptive probation term of five years without consideration of offense and offender characteristics.

A probation-term grid would also be consistent with existing guidelines. The guidelines list the penal objectives to be considered in establishing conditions of a stayed probationary sentence, one of which is "retribution." Minn. Sent. Guidelines 3.A.2 (Supp. 2019). The guidelines explain that "[i]f retribution is an important objective of the stayed sentence, the severity of the retributive sanction should be proportional to the severity of the offense and the prior criminal record of the offender." *Id.* (emphasis added). Thus, the current guidelines are consistent with Minn. Stat. § 244.09, subd. 5, which states that probation is a "sanction[]" and that any "Sentencing Guidelines" establishing the "sanction[]" of "probation and the conditions thereof" must "be based on reasonable offense and offender characteristics."

A probation-term grid that establishes presumptive probation terms based on offense severity and offender criminal history would be consistent with the use of probation as retributive sanction, as authorized in the guidelines. Again, a probation-term grid is a better alternative to the Proposal, which establishes s a single presumptive probation term of five years without consideration of offense and offender characteristics.

In sum, a probation-term grid that establishes presumptive probation terms based on offense severity and offender criminal history would be consistent with the legislative mandate that "Sentencing Guidelines" shall be based on reasonable offense and offender characteristics, as well the provisions in the current guidelines requiring consideration of offense severity and offender criminal history when establishing the conditions of a probationary sentence. Specifically, a probation-term grid:

- would be consistent with the clear legislative statement that probation is a "sanction[]," Minn. Stat. § 244.09, subd. 5;

- would serve the purpose of the guidelines, which is "to establish rational and consistent sentencing standards that promote public safety, reduce sentencing disparity, and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender's criminal history," Minn. Sent. Guidelines 1.A (Supp. 2019);

- would reflect the following guidelines principle: "The severity of the sanction should increase in direct proportion to an increase in offense severity or the convicted felon's criminal history, or both. This promotes a rational and consistent sentencing policy," *id*;

- would be consistent with the guidelines' attempt to establish consistent sentencing through the use of sentencing grids based on offense severity and offender criminal history, s*ee* Minn. Sent. Guidelines 4.A, 4.B, 4.C (Supp. 2019);

- would be consistent with the guidelines' allowance of sentencing departures based on mitigating and aggravating factors, s*ee* Minn. Sent. Guidelines 2.D.3 (Supp. 2019);

- would meet the goal of eliminating what may be perceived as unjustifiably long probation terms by establishing presumptive terms as low as three years; and
- would meet the goal of eliminating geographically inconsistent probation terms.

Additionally, the probation-term grid concept finds support in the public-hearing remarks of Richard S. Frase, Professor, Criminal Law, University of Minnesota, and Co-Director of Robina Institute of Criminal Law, and of Dan Cain, former Chair of the Commission.[2]

The concept of a probation-term grid with allowance for departures was introduced by Justice Dietzen at the Commission's November 6, 2019 meeting. Despite the obvious appeal of a probation-term grid, the Commission never stopped to consider that alternative. Once the Commission voted, in November, to schedule the Proposal for a public hearing in December, the Proposal effectively became the only probation reform that the Commission could present to the Legislature by the January 15, 2020 deadline.

This bears repeating: The surprise introduction of the Proposal and request to advance the Proposal to a public hearing that would occur less than one month before the Commission's deadline for its annual report to the legislature effectively foreclosed discussion of *any* alternative to the Proposal. Thus, we remain concerned that the Proposal

[2] Chair Mitchell has also publicly endorsed the idea of a presumptive probation-term grid, suggesting that "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*." 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 (emphasis added).

was not properly vetted, and we strongly believe that the concept of a probation-term grid—which is most consistent with legislative intent—warrants legislative consideration.

In conclusion, we are confident that a probation-term grid that complies with the legislative mandate that "Sentencing Guidelines" must be based on offense and offender characteristics is a superior alternative to the Proposal. We therefore move that the Commission recommend, forthwith, that the Legislature direct the Commission to study, adopt, and forward to the Legislature, by January 15, 2021, a probation-term grid that sets forth presumptive probation terms based on offense severity and offender criminal history for all felonies except homicide and criminal-sexual-conduct offenses, as well as mitigating and aggravating factors based on offense and offender characteristics that may be used as reasons for departure.