December 28, 2016

MEMORANDUM

TO: MEMBERS OF THE MINNESOTA SENTENCING GUIDELINES COMMISSION, EXECUTIVE DIRECTOR NATE REITZ, AND STAFF

FROM: CHAIRMAN CHRISTOPHER J. DIETZEN

RE: Proposed Amendment to Minn. Sent. Guidelines 2.B.7

On December 30, 2016, the Commission will vote on a proposed amendment to Minn. Sent. Guidelines 2.B.7, which would add the following underlined language:

7. Determining Offense Levels for Prior Offenses.

a. *Classification of Prior Offense*. The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies. Offenses that are petty misdemeanors by statute, or that are certified as or deemed to be petty misdemeanors under Minn. R. Crim. P. 23, must not be used to compute the criminal history score.
b. *Monetary Threshold.* When a monetary threshold determines the offense classification, the monetary threshold in effect when the prior offense was committed, not the current threshold, determines the offense classification in calculating the criminal history score.
c. *Drug Threshold.* When an offender's criminal history contains a Minnesota felony conviction for controlled substance crime in the first, second, third, or fifth degree with an offense date prior to August 1, 2016, the current felony offense of the same name determines the offense classification in calculating the criminal history score, notwithstanding the redefinition of the offense, unless the court finds, by a preponderance of evidence, that the facts underlying the prior conviction would have constituted a controlled substance crime of a lesser degree, or a gross misdemeanor controlled substance crime, if the offense had been committed on or after August 1, 2016. If the court makes such a finding, then the controlled substance crime of the lesser degree, or the gross misdemeanor controlled substance crime, determines the offense classification in calculating the criminal history score.

The proponents of the modification of Minn. Sent. Guidelines 2.B.7 argue that the "proposed guideline is not retroactive," and therefore it is lawful. It is true that Minn. Sent. Guidelines 3.G would limit the proposed modification to offenders who commit a new offense on or after the effective date of the modification. But this does not fully address the retroactivity problem. Specifically, the problem is that the substance of the proposed modification allows application of the new thresholds to an offender's prior convictions. This is the epitome of retroactivity. Because the substance of the proposed modification is in direct conflict with the express intent of the Legislature that the 2016 drug thresholds not be applied retroactively, the proposed modification must be rejected.

To fully appreciate the retroactivity concerns it is important to understand the process for calculating a defendant's criminal history score, which involves three steps—identify the defendant's prior conviction, check the offense severity chart, and assign criminal history points based upon those determinations. Under the current methodology, a defendant's prior conviction is defined by the law that existed at the time the prior offense was committed. Based on the severity level of each prior conviction, the probation officer calculates the defendant's criminal history score. A defendant's prior conviction is not altered by subsequent changes in the law. This well-established procedure will be significantly altered if the Commission adopts the proposed modification. More specifically, under the proposed modification a defendant's prior conviction of *first-degree* sale of a controlled substance would be treated as a prior conviction of *second-degree* sale of a controlled substance for purposes of calculating the defendant's current criminal history score, if the defendant proves that application of the *new drug thresholds* to his *old*

conduct would have resulted in a second-degree conviction. It is therefore clear that the proponents seek to redefine a defendant's pre-amendment conduct using the new 2016 threshold, which in my view is the epitome of retroactivity.

Allowing a court to rewrite a defendant's criminal history if the defendant shows that application of the 2016 amendments to his or her pre-amendment convictions would result in a lesser degree of conviction is not only unprecedented, it is contrary to well-established law. Let me explain.

The general principle is that changes in criminal laws operate prospectively, not retroactively. Minn. Stat. § 645.21 (2016) (providing that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature"); *Krause v. Merickel*, 344 N.W.2d 398, 402 (Minn. 1984) (explaining that "[o]ur examination of the 1975 amendment and its legislative history fails to indicate any legislative intent to apply the repeal retroactively"). Thus, a new law may not be applied retroactively to prior conduct unless expressly provided for by the Legislature.

Here, the Legislature clearly stated that the law was prospective in its application and not retroactive. In enacting the statutory amendments to the drug thresholds, the Legislature expressly stated that the effective date of the amendments was August 1, 2016, and that the amendments applied "to crimes committed on or after that date." Thus, the statutory amendments apply to crimes committed after the effective date of the law and the sentences imposed for those crimes. Notably, the Senate tried to make the new drug thresholds retroactive, but was unsuccessful in doing so.

The proponents of the modification appear to concede that the new drug thresholds apply prospectively to new offenses that occur after August 1, 2016, but then allege that the new drug thresholds may be applied retroactively to calculate the criminal history score. The problem with this argument is that a portion of the sentence—the criminal history score, which measures the seriousness of an offender's *past* convictions—is recalculated using the *new* drug thresholds. Specifically, the proposed modification applies the new drug thresholds to criminal conduct that occurred before August 1, 2016. Thus, the proposed modification attempts to alter the rights of the defendant for conduct that occurred before August 1, 2016. Because the substance of the proposed modification to Minn. Sent. Guidelines 2.B.7 retroactively applies the new law to prior conduct in direct conflict with legislative intent that the new law only apply to criminal conduct that occurred after August 1, 2016 and sentence imposed for those crimes, the proposed modification must be rejected.

Additionally, the proposed modification is directly contrary to recent amendments to the guidelines. On November 17, 2016 the Commission considered whether the severity level of a prior conviction should be modified every time the Legislature redefines an offense. There were conflicting arguments of when and under what circumstances an alteration of the severity level was appropriate. The Commission decided that if an offense has been redefined by the Legislature the severity level for the prior conviction should not be recalculated unless the Legislature either added or removed an element of the prior offense and the Commission in response to the legislative action removed the prior offense from the Offense Severity Reference Table and added the newly created offense to the Offense Severity Reference Table. The purpose of the proposed modification to Minn.

Sent. Guidelines 2.B.7 is to create a specific exception to the general rule that the severity level of a prior conviction should not be recalculated every time the Legislature amends an offense. An objective reason for why prior controlled substance convictions should be treated differently than all other offenses has not yet been articulated.

II

The proponents of the modification also argue that the legislative intent of the 2016 drug laws was to overturn the "injustice" of lower drug thresholds, and that additional relief in the form of lower sentences is necessary to relieve the alleged injustice against prior drug offenders. This argument not only mischaracterizes the legislative intent, it is contrary to the past practices of the Commission and will adversely affect the criminal justice system.

The proponent's characterization of the legislative intent is inconsistent with Legislature's express statement that the 2016 amendments are to be applied prospectively. Although some of the people who lobbied in favor of the 2016 amendments argued there was a need to correct perceived injustices, others supported the amendments for different reasons. The fact that the Legislature rejected a request that the 2016 amendments be given retroactive effect, and instead expressly stated that the amendments applied prospectively, significantly undermines the proponent's claim that the 2016 amendments were enacted to remedy 25-years of injustice.

Moreover, the past practice has been to apply changes to drug threshold prospectively. For example, when the Legislature lowered the thresholds for the sale of heroin 20 years ago, *see* Act of May 30, 1997, ch. 239 § 6-7, 1997 Minn. Laws 2742, 2789-2790 (lowering the threshold for first-degree sale of heroin from 50 grams to 10 grams and the threshold for second-degree sale of heroin from 10 grams to 3 grams), there is no evidence that the Commission directed probation officers or courts to reexamine prior convictions of second-degree sale of heroin to determine whether they constituted first-degree sale of heroin under the newly enacted thresholds for purposes of determining the offender's criminal history score. Moreover, it is my understanding that prosecutors in the metro never requested that criminal history be recalculated based on the new heroin thresholds. Rather, those changes to drug thresholds were applied prospectively. It would be inconsistent to change that approach to drug sentencing laws. There is no rational basis to treat reductions in thresholds one way and increases to thresholds differently.

Not only is the proposed modification inconsistent with past practices, it will also adversely affect public safety and substantially benefit repeat drug dealers. The actual purpose of the drug sentencing reform was to reduce sentences for drug users and give those who were addicted the opportunity for treatment, and to give the prosecutors the tools they needed to go after drug dealers. It was believed that the new law would improve public safety by allowing a judge to send an offender who was chemically dependent and wanted to get better to receive treatment and become a productive citizen; and to give the prosecutors the tools go to after drug dealers. The proposed modification does not further any of these goals.

The drug sentencing reform already gives the drug user a substantial reduction in the sentence, and does not change the ability of a judge to send the person to treatment if a mitigating factor is found. This proposal simply benefits repeat offenders who have a prior drug conviction. A substantial number of those offenders are drug dealers who pleaded to a lesser offense as part of a negotiated plea. The early release of those drug dealers does not promote public safety; instead it adversely affects public safety. Further, there is no evidence that such proposal will improve the geographic disparity in drug sentences between metro and out-state counties. In fact, it is more likely that the proposed modification will exacerbate the problem. Specifically, it is more likely that a repeat drug offender in Hennepin County will receive a reduced criminal history score for a prior drug offense than his/her repeat offender counterpart in Olmsted county.

The following hypothetical provides an example of how a repeat drug dealer would benefit under the proposed amendment to Minn. Sent. Guidelines 2.B.7. The defendant has a prior 2015 conviction of first-degree sale of 16 grams of cocaine. As part of his factual basis he admits selling 16 grams of cocaine. His current conviction also involves the sale of 16 grams of cocaine. Again, the defendant admits as part of his factual basis that he sold 16 grams of cocaine. Under the existing guidelines, the defendant's 2015 conviction of first-degree sale of 16 grams of cocaine would be a severity level D-8, *see* Minn. Sent. Guidelines 5.A (2016), and result in a criminal history score of 2, *see* Minn. Sent. Guidelines 2.B.1.a. (2016). The guidelines "presumptive range" for his current conviction of second-degree sale of cocaine would be an *executed* prison sentence of 58 to 81 months with a "presumptive duration" of 68 months in prison (offense severity of D-7 for the

second-degree sale conviction and a criminal history score of 2). Before the 2016 amendments, the guidelines "presumptive range" for the defendant's current offense (which would have been a first-degree sale of cocaine) would have been an executed prison sentence of 94 to 132 months with a "presumptive duration" of 110 months in prison. Put differently, even when the existing guidelines are used, the 2016 amendments result in a *42-month decrease* in the guideline presumptive duration.

Under the proposed amendment to Minn. Sent. Guidelines 2.B.7, the defendant's 2015 conviction of first-degree sale of 16 grams of cocaine would be reduced to a severity level D-7 (if the defendant proved by a preponderance of the evidence that his prior sale of 16 grams of cocaine now falls within the definition of second-degree sale of cocaine), *see* Minn. Sent. Guidelines 5.A (2016), and would result in a criminal history score of 1½, which would be rounded down to 1 in accordance with Minn. Sent. Guidelines 2.B.1.i (2016) ("The felony point total is the sum of the felony weights. If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number"). The guidelines presumptive range for his current conviction of second-degree sale of 16 grams of cocaine would be a *stayed* prison sentence of 58 (offense severity of D-7 for the second-degree sale conviction and a criminal history score of 1). Put differently, the proposed amendment to Minn. Sent. Guidelines 2.B.7 results in a non-prison commit for a drug dealer who has repeatedly sold 16 grams of cocaine.

Perhaps more troubling is the hypothetical in which a defendant, who has two prior convictions for *possession of shoplifting gear* (which gives the defendant a criminal history score of 2 because possession of shoplifting gear is a severity level 3 and he would receive

1 criminal history point for each of the prior convictions), and who is convicted of selling of 16 grams of cocaine for the first-time. Because the proposed amendment to Minn. Sent. Guidelines 2.B.7 is limited to prior controlled substance convictions, the defendant's criminal history score would remain a 2 and the "presumptive duration" would be an *executed* 68 month prison sentence. Put differently, under the proposed amendment to Minn. Sent. Guidelines 2.B.7, the 2016 amendments result in a *68-month executed prison sentence* for a first time drug dealer who sells 16 grams of cocaine and who has two prior convictions for possession of shoplifting gear, while a person who has repeatedly sold 16 grams of cocaine would receive *a 58-month stayed sentence.*

Not only does the proposed modification benefit repeat drug offenders, it precludes a court from applying the new thresholds to an offender's pre-amendment convictions if such an application would result in a greater degree of conviction. Under the proposed modification, a court is authorized to rewrite a defendant's criminal history if the defendant shows that application of the 2016 amendments to his or her pre-amendment convictions would result in a lesser degree of conviction. But if application of the 2016 amendments to the offender's pre-amendment convictions would result in a greater degree of conviction (as would be the case in most sale of marijuana cases), the district court is not allowed to rewrite a defendant's criminal history.

III.

Moreover, pursuant to Minn. R. Crim. P. 27.03, subd. 9, an unauthorized sentence may be challenged at any time. If the Commission adopts the proposed modification, the

finality of sentences will be undermined across the state. For example, whenever an offender, who has a prior controlled substance, is sentenced for *any* felony offense following the effective date of the proposed modification, the sentence would be subject to a motion to correct at any time as long as the defendant is able to show that application of the 2016 amendments to his or her pre-amendment controlled-substance conviction would result in a lesser degree of conviction.

Not only will the proposed modification adversely affect the criminal justice system, the proposed modification is also premature. The 2016 amendments have only been effective for 4 months. In that short time frame, it is impossible to know how many addicts, if any, are being denied access to treatment based on their existing criminal history scores. Further, the Minnesota Supreme Court has granted review on the issue of whether, notwithstanding the effective date of the 2016 amendments, certain defendants are entitled to the benefit of the 2016 amendments. *See State v. Otto*, No. A15-1454, 2016 WL 3884412 (Minn. App. July 18, 2016), *rev. granted in part* (Minn. Sept. 18, 2016); *State v. Kirby*, No. A15-0117, 2016 WL 3884245 (Minn. App. July 18, 2016), *rev. granted in part* (Minn. Sept. 18, 2016). In my view, it makes sense to wait for the guidance of the Minnesota Supreme Court before moving ahead with the proposed modification to Minn. Sent Guidelines 2.B.7.

Finally, Minn. Sent. Guidelines 2.B.7 is not the appropriate location for the proposed modification and will add confusion to the guidelines. The modification uses the phrase "offense classification" in an inaccurate manner. As the opening paragraph of section 2.B.7 makes clear, the section in question addresses "[t]he classification of a prior

offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony." Minn. Sent. Guidelines 2.B.7.a.

The only "classification" of a prior offense that changed as a result of the Legislature's 2016 amendments to Minn. Stat. ch. 152 is that possession of a trace amounts of a controlled substance was reduced from a felony to a gross misdemeanor. See Act of May 22, 2016, ch. 160, § 7, 2016 Minn. Laws 576, 585 (providing that "A person convicted under the provisions of subdivision 2, clause (1), who has not been previously convicted of a violation of this chapter or a similar offense in another jurisdiction, is guilty of a gross misdemeanor if: (1) the amount of the controlled substance possessed, other than heroin, is less than 0.25 grams or one dosage unit or less if the controlled substance was possessed in dosage units; or (2) the controlled substance possessed is heroin and the amount possessed is less than 0.05 grams"). But, even without the proposed amendment to section 2.B.7, a defendant's prior conviction of fifth-degree possession of a trace amount will be treated as a gross misdemeanor under *the current* paragraph a of section 2.B.7, which states that "[t]he classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies."[1]

The classifications of all other controlled substance offenses remained felonies. In the context these offenses, the proposed modification's use the phrase "offense

[1] Admittedly, this reclassification of the defendant's prior conviction as a gross misdemeanor will impact his or her criminal history score because unlike a prior felony conviction, a prior gross misdemeanor conviction is assigned a 1/4 of a criminal history point under Minn. Sent. Guidelines 2.B.3.

classification" is inaccurate. The proposed modification actually focuses on "the degree" assigned to the prior felony controlled substance conviction. Nothing in section 2.B.7, however, addresses manner in which a probation officer calculates "the degree" of a prior felony offense that is still *classified* as a felony following a statutory amendment. If the Commission amends section 2.B.7 to include a provision that does not address the "classification" of prior offenses, it is likely to introduce confusion into Minnesota's sentencing law. Thus, in my view, Minn. Sent. Guidelines 2.B.7 is not the appropriate location for the proposed modification.

In sum, the proposed modification of Minn. Sent. Guidelines 2.B.7 violates Minn. Stat. § 645.21, when it allows application of the new thresholds to an offender's prior convictions, in spite of the Legislature's expressed intent that the new thresholds only apply to criminal conduct that occurred after August 1, 2016. Moreover, the proposed modification adversely affect the criminal justice system. Finally, the proposed modification is both premature and poorly located in the guidelines.