STATE OF MINNESOTA

IN SUPREME COURT

A19-0679

Court of Appeals

Moore, III, J.
Dissenting, Gildea, C.J.

State of Minnesota,

Appellant,

v.

Filed: August 25, 2021
Office of Appellate Courts

Derek James Robinette,

Respondent.

Keith M. Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, Saint Paul, Minnesota; and

Michelle M. Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota, for appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant State Public Defender, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

1. Under the amelioration doctrine, the phrase "statement by the Legislature" from *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017), means statutory language expressly declaring or clearly indicating the intent of the Legislature to abrogate the doctrine.

2. Minnesota Sentencing Guidelines and associated commentary that have not been ratified by the Legislature are not statements by the Legislature abrogating the amelioration doctrine and therefore respondent is entitled to resentencing.

Affirmed.

O P I N I O N

MOORE, III, Justice.

This case asks us to decide whether a Minnesota Sentencing Guideline and associated commentary adopted by the Minnesota Sentencing Guidelines Commission but not ratified by the Legislature can abrogate the common law amelioration doctrine. The amelioration doctrine applies to a statute that mitigates the punishment for "acts committed before its effective date, as long as no final judgment has been reached." *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979). The court of appeals concluded that unratified Commission statements cannot abrogate the amelioration doctrine because they do not constitute a "statement by the Legislature" as set forth in *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). Accordingly, the court of appeals affirmed respondent's conviction but held that he is entitled to the benefit of a change to the Sentencing Guidelines adopted by the Commission in 2019, which resulted in a reduction of his criminal history score. Thus, the court of appeals remanded to the district court for respondent to be resentenced in accordance with the modified guidelines. Because we agree with the court of appeals' conclusion, we affirm.

FACTS

In 2015, respondent Derek James Robinette was convicted of felony assault by strangulation in violation of Minn. Stat. § 609.2247 (2020). The district court stayed imposition of Robinette's sentence and placed him on probation until 2020. On December 1, 2017, Robinette was discharged from probation 3 years early.

In 2018, Robinette was charged in Otter Tail County with first-degree and second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342 (2020), and Minn. Stat. § 609.343 (2020), based on allegations that he sexually assaulted his stepdaughter on multiple occasions in 2017 and 2018. A jury found Robinette guilty of all charges.

At sentencing in February 2019, Robinette was assigned a custody status point to his criminal history score under the Sentencing Guidelines for committing the sexual assaults during the initial probationary period for his 2015 felony conviction.[1] The custody status point was mandated, notwithstanding Robinette's early discharge from probation, by Minn. Sent. Guidelines 2.B.2.a(4) (2018) (assigning a criminal history point "if the offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court"). The district court sentenced Robinette to 168 months in prison, the presumptive sentence based on his criminal history score of two.

In January 2019, a month before Robinette was sentenced, the Commission submitted its 2019 Report to the Legislature, which contained proposed modifications to

[1] He was assigned a second custody sentence point for having a previous felony conviction. Minn. Sent. Guidelines 2.B.1.

the Sentencing Guidelines. *See* Minn. Stat. § 244.09, subd. 11 (2020) (requiring the Commission to "submit a written report" to the Legislature by January 15th "that identifies and explains all . . . proposed modifications" to the Sentencing Guidelines). Within the report, the Commission proposed eliminating Guideline 2.B.2.a(4), the guideline that assigned Robinette a custody status point for committing these sexual assaults during the initial probationary period for his earlier offense. Minn. Sent. Guidelines Comm'n, August 2019 Amendments (2019). All such proposed modifications automatically become effective on August 1 of that year "unless the legislature by law provides otherwise."[2] *Id.* The Legislature did not act in response to the Commission's 2019 report. Therefore, the proposed modifications within it which would result in a reduction of a defendant's sentence, including the elimination of Guideline 2.B.2.a(4), became effective on August 1, 2019.

In the Commission's 2019 Report to the Legislature, the Commission also included several modifications of the Guidelines and recommended legislative changes regarding the effective dates of changes to the Guidelines in response to our decision in *State v. Kirby*. Minn. Sent. Guidelines Comm'n, August 2019 Amendments at 13–14. First, the Commission declared that its proposed 2019 modifications to the Guidelines would only apply to crimes committed on or after August 1, 2019. Second, the Commission modified Guideline 3.G.1, governing the effective date to modifications of the Guidelines, associated commentary, and appendices to clarify its intent that the Guideline applies to the entire

[2] All other modifications to the Sentencing Guidelines "shall take effect according to the procedural rules of the commission." Minn. Stat. § 244.09, subd. 11.

Sentencing Guidelines, not just part. *Id.;* s*ee Kirby,* 899 N.W.2d at 493. And third, the Commission recommended that the Legislature amend Minn. Stat. § 244.09, subd. 11, to clarify that August 1 Guidelines changes will apply to crimes committed on or after that date, unless the Commission or the Legislature directs otherwise. Minn. Sent. Guidelines Comm'n, August 2019 Amendments at 14 & app. 4.2 at 76. Again, the Legislature took no action in response to the report.

Robinette appealed his conviction and sentence, arguing as to his sentence that the amelioration doctrine should be applied and his criminal history score reduced based on the 2019 elimination of Guideline 2.B.2.a(4).[3] *State v. Robinette*, 944 N.W.2d 242, 248–49 (Minn. App. 2020). The court of appeals affirmed Robinette's conviction but agreed that he is entitled to the application of the amelioration doctrine because the change in the guidelines which resulted in the reduction of his presumptive sentence took effect before his case became final. *Id*. at 250. The court therefore reversed his sentence and remanded for resentencing under the modified sentencing guidelines. *Id.* at 251.

We granted the State's petition for review on the question of whether the amelioration doctrine may be abrogated by Commission statements which have not been acted upon by the Legislature.

[3] With one fewer criminal history point, Robinette's presumptive sentence would be 156 months in prison rather than 168 months.

ANALYSIS

This case requires us to decide whether the common law amelioration doctrine may be abrogated by statements of the Minnesota Sentencing Guidelines Commission that are not ratified by the Legislature.[4] In *State v. Kirby*, we reaffirmed the general applicability of the amelioration doctrine to cases that are not final when a change in the law duly enacted by the Legislature takes effect. 899 N.W.2d 485, 490 (Minn. 2017). We noted in *Kirby* that, while not previously referred to in our case law as "the amelioration doctrine," the doctrine is a "creature of common law [and] . . . is of long standing," *id.* at 488–89, deriving its roots from "a common-law rule more than 160 years old,"[5] *id.* at 496. *See, e.g.*, *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . ."); *Commonwealth v. Wyman*, 66 Mass. (12 Cush.) 237, 239 (Mass. 1853) ("[A]n act plainly mitigating the punishment of an offence . . . is an act of clemency"); *State v. Williams*, 31 S.C.L. (2 Rich.) 418, 422–23 (S.C. 1846) (applying amelioration based on amendments to South Carolina's forgery statute that reduced punishment from death to "whipping, imprisonment and fine");

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[4] We specifically declined to rule on this issue four years ago in *Kirby*, 899 N.W.2d at 493 ("We have never ruled—and decline to rule today—that the amelioration doctrine may be abrogated by Commission statements not ratified by the Legislature").

[5] The amelioration doctrine is similar to the European doctrine of *lex mitior* ("the milder law"), which mandates "that criminal defendants whose prosecutions are not final enjoy the retroactive benefits of statutes that either decriminalize conduct altogether or reduce punishment for it." Peter Westen, *Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert*, 18 New Crim. L. Rev. 167, 168–69 (2015).

see also Eileen L. Morrison, Note, *Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures*, 95 B.U. L. Rev. 335, 340 (2015) (discussing the origins of the amelioration doctrine).

The amelioration doctrine applies an amendment mitigating punishment to acts committed prior to that amendment's effective date, if there has not been a final judgment reached in the case. *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979). The rationale behind the doctrine "is that the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient" and "[n]othing would be accomplished by imposing a harsher punishment . . . other than vengeance." *Id.* at 514–15; *see also In re Estrada*, 408 P.2d 948, 952 (Cal. 1965) (explaining that amelioration is supported by the "modern theories concerning the functions of punishment in criminal law"). Furthermore, "[l]egislative enactments are the clearest and best evidence of a society's evolving standard of decency and of how contemporary society views a particular punishment." *Humphrey v. Wilson*, 652 S.E.2d 501, 505 (Ga. 2007).

In *Kirby*, we articulated a three-part test for the application of the amelioration doctrine.[6] We stated that an amended criminal statute applies to crimes before its effective

[6] The first portion of the dissent's analysis contains a lengthy discussion regarding an issue the State chose not to present to our court—the question of whether the amelioration doctrine reaffirmed in *Kirby* even applies to this case. The dissent's assertion that we skirt this issue without explanation is belied by the record before us, and contrary to our well-established forfeiture law. We decline to address the question of whether the *Kirby* test applies to this case, not out of avoidance, but because the State forfeited appellate review of the issue. This issue is simply not before us because it was neither raised in the State's petition for review (presenting "[t]he ultimate issue" as "whether the amelioration doctrine was abrogated") nor its briefing to our court (describing the sole legal issue as whether "the

date if: (1) there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine, (2) the amendment mitigates punishment, and (3) final judgment has not been entered when the amendment takes effect. 899 N.W.2d at 490.[7]

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amelioration doctrine [can] be abrogated by express statements by the Minnesota Sentencing Guidelines Commission"). In other words, the State conceded that the *Kirby* test applied to this case and contested only the question of whether prong one from that test was satisfied with the facts presented. We disagree with the dissent's decision to raise the general applicability of the *Kirby* test to this case sua sponte. *Leuthard v. Indep. Sch. Dist. 912–Milaca*, 958 N.W.2d 640, 648–49 (Minn. 2021) (explaining that appellate courts typically confine review to issues actually raised by the parties). We have long held that a party forfeits appellate review by failing to brief or argue an issue on appeal, even if raised in an earlier stage of the proceedings, including in a petition for review. *State v. Williams*, 771 N.W.2d 514, 517 n.2 (Minn. 2009). And "we do not address issues that were not raised in a petition for review." *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). This principle is particularly important here because the unargued issue is complicated and nuanced; in such circumstances, we are well-served by thorough briefing by the parties. We therefore decline to address the merits of the dissent's first argument, because to do so would defy the "axiomatic" principle "that issues not 'argued' in the briefs are deemed waived on appeal." *In re Application of Olson for Payment of Servs.*, 648 N.W.2d 226, 228 (Minn. 2002) (quoting *State v. Grecinger*, 569 N.W.2d 189, 193 n.8 (Minn. 1997)).

[7] We also note our concern with the undefined dimensions of the dissent's assertion that we may exercise discretion "to reach dispositive legal threshold issues even though not presented by the parties." We have no quarrel with the general proposition that in "exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1935). But given our previous assertion that "issues not argued in the briefs are deemed waived on appeal," *Grecinger*, 569 N.W.2d at 193 n.8, we should be extremely cautious about exercising our discretion to consider an issue that the State raised before the court of appeals and chose not to present in its appeal to our court. Throughout any given case, there may well be potentially important threshold legal issues abandoned by parties on appeal for unarticulated reasons. Such issues should be left for the parties to raise in

Here, the State concedes that the second and third parts of the *Kirby* test are met.[8] Therefore, we are asked to only consider whether there was a "statement by the Legislature that clearly establishes an intent to abrogate the amelioration doctrine" that is applicable to Robinette's sentence. *Kirby*, 899 N.W.2d at 496.

The State argues that the Legislature has made two statements that clearly establish its intent to abrogate the application of the amelioration doctrine. The first statement is Sentencing Guideline 3.G.1, which provides that "[m]odifications to . . . the Minnesota Sentencing Guidelines . . . apply to offenders whose date of offense is on or after the specified modification effective date." The second statement is the portions of the Commission's 2019 report to the Legislature that show the Commission's intent to abrogate the amelioration doctrine. Robinette counters that the Legislature did not clearly abrogate the amelioration doctrine by its inaction on the Commission's report because only express language in an enacted statute can do so. We agree with Robinette.

I.

We begin our analysis by defining a "statement by the Legislature." Although we adopted the standard in *Kirby*, we did not specifically define it.

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another case, and we should not resurrect them sua sponte once forfeited, even if they are the arguable result of oversight or error. *Cf. Puckett v. United States*, 556 U.S. 129, 134 (2009) (explaining that "errors are a constant in the trial process" and appellate courts should refrain from exercising a "reflexive inclination" to reverse based on an unpreserved error) (quoting *United States v. Padilla*, 415 F.3d 211, 224 (1st Cir. 2005) (Boudin, C.J., concurring)).

[8] Specifically, the State stated in its briefing to our court that "Only the first prong is contested here; the last two prongs are clearly satisfied."

Historically, we have concluded that the amelioration doctrine was abrogated by legislative action in only one of our previous decisions, *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982). In *Edstrom*, the defendant sought postconviction relief in the form of resentencing based on an amendment to a criminal sexual conduct statute. *Id.* Within the statutory language of the amendment, however, the Legislature stated that the changes to the statute were to "have no effect on crimes committed before the effective date of the act." *Id.* (citing Minn. Stat. § 609.351 (1980)). Based on this explicit language, we determined the Legislature had clearly abrogated the amelioration doctrine and thus affirmed the district court's denial of the defendant's requested relief. *Id.* Thus, our holding in *Edstrom* demonstrates that a "statement by the Legislature" includes express language within an enacted statute.

In all our other cases analyzing the issue, we have concluded based on legislative actions that the amelioration doctrine was not abrogated. *See Coolidge*, 282 N.W.2d at 514–15 (reducing a defendant's sentence by 9 years after amendments to Minnesota's anti-sodomy statute mandated application of the amelioration doctrine); *Ani v. State*, 288 N.W.2d 719, 720 (Minn. 1980) (same); *Kirby*, 899 N.W.2d at 496 (applying amelioration to a defendant's sentence based on the 2016 Drug Sentencing Reform Act, Act of May 22, 2016, ch. 160, § 18, 2016 Minn. Laws 576, 590–91); *State v. Otto*, 899 N.W.2d 501, 504 (Minn. 2017) (same). But with no clear jurisprudence on the question of whether a change in sentencing guidelines adopted through legislative inaction can abrogate the amelioration doctrine, we turn to other jurisdictions for additional guidance.

Nearly every state has addressed the amelioration doctrine and the circumstances under which it may be abrogated in one way or another. The approaches vary widely.

In some states, including ours, abrogation can be accomplished by a "savings clause" located within the statutory language. *See Edstrom*, 326 N.W.2d at 10; *Coolidge*, 282 N.W.2d at 514–15. A savings clause is a statutory provision "which in certain circumstances 'saves' [sentences] from the common-law effect of supervening enactments." *Bell v. Maryland*, 378 U.S. 226, 232 (1964). In *Edstrom*, we noted the Legislature's use of a savings clause and declined to apply the amelioration doctrine. 326 N.W.2d at 10; Minn. Stat. § 609.351 ("[C]rimes committed prior to August 1, 1975, are not affected by [this statute].").

We have found numerous examples in foreign jurisdictions with similar applications of savings clauses. *See, e.g.*, *La Porte v. State*, 132 P. 563, 564–65 (Ariz. 1913) (noting that "[t]he history of legislation . . . shows that . . . crime and penalties have been abolished, changed, or modified after the commission of the offense and before trial in such material way to effect many legislative pardons" and "many of the states have enacted general saving statutes" to prevent "miscarriages of justice"); *In re Estrada*, 408 P.2d at 953 ("[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed."); *State v. Chrisman*, 514 N.W.2d 57, 61–62 (Iowa 1994) (discussing Iowa's general savings statute that requires courts to apply ameliorative amendments at the time of sentencing); *Nassar v. Commonwealth*, 171 N.E.2d 157, 160 (Mass. 1961) (recognizing that the general savings statute abolished the doctrine of amelioration); *People v. Schultz*,

460 N.W.2d 505, 530–31 (Mich. 1990) (same); *Ex parte Wilson*, 48 S.W.2d 919, 920–21 (Mo. 1932) (same); *People v. Oliver*, 134 N.E.2d 197, 201 (N.Y. 1956) (explaining that amelioration can be abrogated through savings clauses while declining to apply New York's general savings clause to a particular statute); *State v. Pardon*, 157 S.E.2d 698, 701 (N.C. 1967) (explaining that the amelioration doctrine is applied "absent a saving clause, a manifest legislative intent to the contrary, or a constitutional prohibition"); *Belt v. Turner*, 479 P.2d 791, 793 (Utah 1979) (noting that a savings clause can abrogate the amelioration doctrine, but rejecting the application of Utah's general savings clause to a certain criminal statute).

Other states have abrogated the amelioration doctrine through constitutional provisions. *See, e.g.*, N.M. Const. art IV, § 33 ("No person shall be exempt from prosecution and punishment for any crime or offenses against any law of this state by reason of the subsequent repeal of such law."); Okla. Const. art. V, § 54 ("The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute."). Georgia has even found that failing to apply a form of the amelioration doctrine can constitute cruel and unusual punishment. *Humphrey*, 652 S.E.2d at 507. The State has not cited, and we have not found, any case here or in any other jurisdiction where the amelioration doctrine has been abrogated by administrative action or legislative inaction.

But, we have held in other contexts that "a person is not to be deprived of his common-law rights unless the intention to do so is clearly expressed" by the Legislature.

See McCourtie v. U.S. Steel Corp., 93 N.W.2d 552, 559 (Minn. 1958). Because the amelioration doctrine is a common law rule, that doctrine can only be abrogated by express declaration or indication in an enacted statute. Indeed, we "do not presume that the Legislature intends to abrogate or modify a common law rule except to the extent expressly declared or indicated in [a] statute." *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012); *see, e.g.*, Minn. Stat. § 604.02, subd. 1 (2020) (amending Minnesota's common law rule of joint and several liability for negligence claims); Minn. Stat. § 176.031 (2020) (eliminating common law remedies for work-related injuries); Minn. Stat. § 65B.51, subd. 3 (2020) (limiting the amount of noneconomic damages a plaintiff can receive after a motor vehicle accident). Based on these principles, we hold that the phrase "statement by the Legislature" in *Kirby* means an express declaration or clear indication of the Legislature's intent to abrogate the amelioration doctrine within an enacted statute.[9]

II.

Having defined what a "statement by the Legislature" is, we turn to the State's argument that the amelioration doctrine should not be applied to Robinette's sentence in this case. The State relies on two purported statements by the Legislature to argue that the amelioration doctrine has been abrogated.

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[9] By enacted statute, we mean a statute that has been passed by both chambers of our state's Legislature and signed by the Governor. Minn. Const. art. IV, § 23. An enacted statute would also include a statute that has been vetoed by the Governor, but the veto is overridden by two-thirds of the Legislature. *Id.* In both instances, the Legislature has clearly expressed its intent. We further note that any other definition of "statement by the Legislature" would allow a common-law rule to be abrogated by non-binding legislative action, such as a legislative proclamation or a bill that is vetoed by the Governor or by administrative action outside the purview of the Legislature.

First, the State contends that Minnesota Sentencing Guideline 3.G.1 is, in essence, a statement by the Legislature that abrogates the amelioration doctrine. This guideline states that "[m]odifications to . . . the Minnesota Sentencing Guidelines . . . apply to offenders whose date of offense is *on or after* the specified modification effective date." Minn. Sent. Guidelines 3.G.1 (emphasis added). Under the language of this guideline, the 2019 changes would not apply to Robinette's offense because he committed the assaults before the modifications to the sentencing guidelines were adopted.

Guideline 3.G.1 was initially adopted by the Commission in 1986 without legislative action. Minn. Sent. Guidelines III.F (1986).[10] Although Guideline 3.G.1 has been part of the Sentencing Guidelines for 34 years, it is not part of an enacted statute and therefore is not a "statement by the Legislature" that can abrogate the amelioration doctrine.[11]

Second, the State contends that commentary in the Commission's 2019 Report to the Legislature are also statements that abrogate the amelioration doctrine. The State points

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[10] The guideline has been renumbered but remains substantively the same. Initially, it read "Modifications to the Minnesota Sentencing Guidelines and Commentary will be applied to offenders whose date of adjudication of guilt is on or after the specified modification effective date." Minn. Sent. Guidelines III.F (1986).

[11] We do not disagree with the dissent that the Commission has expressed its intent to abrogate the amelioration doctrine in Guideline 3.G.1. We do, however, respectfully disagree that the Commission is the appropriate body to abrogate the amelioration doctrine when *Kirby* plainly requires a "statement by the Legislature." 899 N.W.2d at 490. Notably, the Legislature has not acted on the Commission's recommendation to codify Guideline 3.G.1 in Minn. Stat. § 244.09, subd. 11.

to several portions of the report that demonstrate the Commission's intent to abrogate the amelioration doctrine through proposed policy modifications. Comments in the report refer to our decision in *Kirby* and state the Commission's desire to avoid the application of the amelioration doctrine.[12]

The report, however, is not part of the Sentencing Guidelines. It is, rather, a report that the Commission must submit to the Legislature annually pursuant to state law to document any modifications to the Guidelines made during the preceding 12 months and all proposed modifications submitted to the Legislature that year. *See* Minn. Stat. § 244.09, subd. 11. The report is therefore not a "statement by the Legislature" sufficient to abrogate the amelioration doctrine. Accordingly, we agree with the court of appeals: Robinette is entitled to relief under the amelioration doctrine. We therefore conclude that Robinette is entitled to resentencing under the amelioration doctrine.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

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[12] The State specifically cites to three different provisions. The first is a background provision that reads: "[u]nless the Legislature by law provides otherwise, these modifications will take effect August 1, 2019, and will apply to crimes committed on or after that date." The second is a section referring to *State v. Kirby* that reads in relevant part: "The Commission does not intend for the amelioration doctrine to apply to the 2019 Guidelines modifications." Finally, the third is a provision in the appendix that reads: "Each modification is intended to apply to offenders whose date or offense is on or after August 1, 2019" with a corresponding citation to *State v. Otto*.

D I S S E N T

GILDEA, Chief Justice (dissenting).

The majority assumes without explanation that the amelioration doctrine applies to modifications to the Minnesota Sentencing Guidelines ("Guidelines") and then decides whether there is a sufficient statement by the Legislature to *abrogate* the doctrine in this case. Because the majority's assumption frustrates the Legislature's clear intent to delegate authority to the Commission to promulgate the Guidelines, I would hold that the amelioration doctrine does not apply in this case. In the alternative, even if the amelioration doctrine could be applied, as a theoretical matter, to revisions to the Guidelines, I would hold that the Commission has clearly expressed its intention to abrogate the doctrine. For these reasons, I respectfully dissent.

I.

In *State v. Kirby*, we formally recognized the amelioration doctrine for the first time and considered whether a defendant should be resentenced under the newly-enacted Drug Sentencing Reform Act. 899 N.W.2d 485, 490 (Minn. 2017). We decided that the doctrine "applies to 'a statute mitigating punishment.' " *Id.* at 491 (quoting *State v. Edstrom*, 326 N.W.2d 10, 10 (Minn. 1982)). And ultimately, we held that "our rule of law is clear. *An amended statute* applies to crimes committed before its effective date" when the three-prong test is met. *Id.* at 490 (emphasis added). Specifically, "the amelioration doctrine applies to *legislation* amending the sentencing grids with the same force as to laws amending criminal statutes." *Id.* at 491–92 (emphasis added).

The majority does not address whether there is any legislation here and instead focuses solely on the three-prong test articulated in *Kirby*. In my view, the majority's focus is misplaced.[1] Our precedent, including *Kirby*, has only applied the amelioration doctrine to legislative action. *Id.* at 492 (collecting cases); *State v. Coolidge*, 282 N.W.2d 511, 512 (Minn. 1979) (repeal and replacement of a sodomy statute); *State v. Hamilton*, 289 N.W.2d 470, 474 (Minn. 1979) (same); *Ani v. State*, 288 N.W.2d 719, 720 (Minn. 1980) (same); *Edstrom*, 326 N.W.2d at 10 (amendment to criminal sexual conduct statute). The cases we relied on in *Coolidge* and *Kirby* also addressed statutory changes. *See In re Estrada*, 408 P.2d 948, 951 (Cal. 1965); *People v. Rossi*, 555 P.2d 1313, 1314 (Cal. 1976); *Commonwealth v. Wyman*, 66 Mass. (12 Cush.) 237, 239 (Mass. 1853); *People v. Hayes*, 35 N.E. 951, 952–53 (N.Y. 1894).

The majority does not cite a single case in which the amelioration doctrine was applied in the absence of legislation. In each of the cases cited by the majority, the amelioration doctrine was applied in the context of amendments to criminal statutes. *See La Porte v. State*, 132 P. 563, 564–65 (Ariz. 1913) (dealing with a statutory amendment);

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[1] As the majority notes, the State does not argue that the amelioration doctrine does not apply. But the State did raise the argument before the court of appeals, stating in its brief that "the amelioration doctrine employed in *Kirby* does not apply in this case." The question of the applicability of the doctrine is an important threshold legal question. We have exercised our discretion in other cases to reach dispositive legal threshold issues even though not presented by the parties. *See*, *e.g.*, *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (stating the responsibility of the appellate courts is not to be "diluted by counsel's oversights, lack of research, failure to specify issues or cite relevant authorities." (citation omitted) (internal quotation marks omitted)). Because the State raised the argument before the court of appeals and it is a dispositive threshold legal question, I would address that issue here.

State v. Chrisman, 514 N.W.2d 57, 61–62 (Iowa 1994) (same); *Nassar v. Commonwealth*, 171 N.E.2d 157, 160 (Mass. 1961) (same); *People v. Schultz*, 460 N.W.2d 505, 507 (Mich. 1990) (same); *Ex parte Wilson*, 48 S.W.2d 919, 920–21 (Mo. 1932) (same); *People v. Oliver*, 134 N.E.2d 197, 199–201 (N.Y. 1956) (same); *State v. Pardon*, 157 S.E.2d 698, 700–01 (N.C. 1967) (same); *Belt v. Turner*, 479 P.2d 791, 792 (Utah 1979) (same).[2]

In this case, the Legislature has not acted. This fact alone, in my view, is enough to determine that the amelioration doctrine simply does not apply. After all, the "rationale" for the application of the amelioration doctrine "is that the *legislature* has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient. Nothing would be accomplished by imposing a harsher punishment, in light of the *legislative* pronouncement, other than vengeance." *Coolidge*, 282 N.W.2d at 514–15 (emphasis added) (citations omitted).

Modifications to the Guidelines, however, are different. In writing and modifying the Guidelines, the Commission is to consider: "public safety," "current sentencing and release practices; correctional resources, including but not limited to the capacities of local and state correctional facilities; and the long-term negative impact of the crime on the community." Minn. Stat. § 244.09, subd. 5 (2020). Accordingly, the purpose behind the amelioration doctrine is not served by its application to modifications of the Guidelines.

[2] The parties and the majority do not cite, and I was unable to find, a case in which the amelioration doctrine was applied to modifications to federal or state criminal sentencing guidelines.

The majority's analysis plows ahead to apply *Kirby* without addressing the very real distinction between statutory changes and revisions to the Guidelines. The majority begins by searching for a "statement by the Legislature" and because it can find no such statement, the majority concludes that the amelioration doctrine applies and has not been abrogated. But the majority's search was doomed from the start. Of course there is no such statement. As the majority states, the modification in this case was passed through "legislative *inaction*." *Supra* at 12 (emphasis added). By determining (without explanation) that the amelioration doctrine applies even when the Legislature has *not* spoken, and then determining that the amelioration doctrine may be abrogated only when the Legislature *has* spoken, the majority creates a circular test that always yields the same answer: amelioration applies.

I disagree. I would hold that the amelioration doctrine does not apply to the Commission's revisions of the Guidelines.

II.

In the alternative, even if the amelioration doctrine applies to a non-legislative act such as the Commission's modification to the Guidelines, I would conclude that the Legislature has delegated the authority to abrogate the doctrine to the Commission and in this case, the Commission clearly expressed its intention to abrogate the doctrine.

I begin by discussing our precedent on delegation generally and then turn to the majority's implicit suggestion that the modification of the Guidelines is a "purely legislative power" that may not be delegated to the Commission. *See Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949). Finally, I explain how the Commission, in exercising

its delegated authority from the Legislature, has clearly decided to abrogate the amelioration doctrine in this case.

A.

The Minnesota Constitution demands that governmental power be separated into legislative, executive, and judicial branches. Minn. Const. art. III, § 1. In *Lee*, we explained that Article III of the Minnesota Constitution prohibits a delegation of "purely legislative power." 36 N.W.2d at 538. By "purely legislative power" we meant "the authority to make a complete law," including the ability to determine when that law takes effect. *Id.* Powers that are not "purely legislative" may properly be delegated when the Legislature "cannot conveniently or advantageously" exercise that power itself. *Id.*

In distinguishing between proper and improper delegations of power, we have said that "[t]he true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring of authority or discretion to be exercised under and in pursuance of the law." *State v. Great N. Ry. Co.*, 111 N.W. 289, 293 (Minn. 1907) (citation omitted) (internal quotation marks omitted). That is, the Legislature may "leav[e] to selected instrumentalities the making of subordinate rules within prescribed limits." *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 421 (1935). And the limits constraining those instrumentalities "may be laid down in very broad and general terms." *Lee*, 36 N.W.2d at 539. At most, courts have required some "intelligible principle" to be put in place to guide the application of delegated power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

In short, the Minnesota Constitution prohibits the Legislature from delegating the ability to "make a complete law." That type of power is exclusively mandated to the Legislature. *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949) ("It is elementary that the legislature – except where expressly authorized by the constitution, as in the case of municipalities – cannot delegate purely legislative power to any other body, person, board, or commission"). But other powers may be so delegated, provided that the Legislature puts in place "intelligible principle[s]" to guide their application. *J.W. Hampton*, 276 U.S. at 409.

B.

Applying these principles here, the Legislature's delegation of power to the Commission to promulgate and modify the Guidelines is clearly proper.

The Legislature established the Commission in 1978 with instructions to promulgate the Guidelines. *See* Act of Apr. 5, 1978, ch. 723, art. I, §§ 1–11, 1978 Minn. Laws 761, 761–68 (codified as amended at Minn. Stat. §§ 244.01–11 (2020)). Specifically, it instructed the Commission to promulgate rules that "establish: (1) the circumstances under which imprisonment of an offender is proper; and (2) a presumptive, fixed sentence for offenders for whom imprisonment is proper." Minn. Stat. § 244.09, subd. 5. And in subdivision 11 of the same statute, the Legislature gave the Commission the authority to modify the Guidelines, and specified that such modifications will be effective on August 1 of the year in which they are proposed "unless the legislature by law provides otherwise."

By delegating the power to "promulgate" and "modify" the Guidelines, the authority to abrogate the amelioration doctrine is also transferred to the Commission. And this

delegation, contrary to the majority's suggestion otherwise, is proper because: (1) criminal sentencing is not purely legislative; (2) the Legislature provided intelligible principles by which the Commission promulgates the Guidelines; and (3) the Legislature has reserved for itself a veto power.

At root, the amelioration doctrine is about criminal sentencing. Criminal sentencing is not a power exclusively held by the Legislature. Far from it. Sentencing is often left to the discretion of the district court, provided that the sentence imposed does not exceed statutory maximums established by the Legislature. *See State v. Warren*, 592 N.W.2d 440, 451 (Minn. 1999) ("Sentencing is within the discretion of the trial court absent an abuse of discretion."). Indeed, we have flatly stated that "[t]he imposition of the sentence within the limits prescribed by the legislature is purely a judicial function." *State v. Olson*, 325 N.W.2d 13, 18 (Minn. 1982).

The Guidelines do not alter the "limits prescribed by the legislature." *Id.* Instead, they curtail the discretion of district courts in sentencing defendants *within* those statutory limits. *See State v. Shattuck*, 704 N.W.2d 131, 139 (Minn. 2005), *as amended on reh'g in part* (Minn. Oct. 6, 2005). By constraining the discretion of district courts in sentencing—thereby affecting a "purely . . . judicial" function, *see Olson*, 325 N.W.2d at 18—the Guidelines clearly do not implicate power that is purely legislative. Instead, the Legislature's delegation of authority to the Commission to promulgate the Guidelines is the mere conferral of "discretion to be exercised under" the statutory maximum sentences established by the Legislature. *Great N. Ry. Co.,* 111 N.W. at 293 (citation omitted) (internal quotation marks omitted).

The Legislature provided intelligible principles to guide the Commission. For instance, Minn. Stat. § 244.09, subd. 5, reads:

> In establishing and modifying the Sentencing Guidelines, the primary consideration of the commission shall be public safety. The commission shall also consider current sentencing and release practices; correctional resources, including but not limited to the capacities of local and state correctional facilities; and the long-term negative impact of the crime on the community.

The level of specificity provided here is similar to that found in other delegations of power that we have found to be proper. *See, e.g.*, *Lee*, 36 N.W.23 at 538–39; *No Power Line, Inc. v. Minn. Env't Quality Council*, 262 N.W.2d 312, 330 (Minn. 1977).

In addition, the Legislature has expressly reserved for itself the power to veto modifications to the Guidelines when they are proposed by the Commission. Minn. Stat. § 244.09, subd. 11. Overall, it is safe to say that the Legislature's delegation of authority to the Commission to promulgate and modify the Guidelines does not violate the Minnesota Constitution.

This result is consistent with federal precedent. *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (holding that Congress did not violate the non-delegation doctrine when it delegated to the federal Sentencing Commission "the power to promulgate sentencing guidelines for every federal criminal offense"); *see also United States v. Anderson*, 686 F.3d 585, 590 (8th Cir. 2012) (holding that the Federal Sentencing Commission's

passing of a policy statement to U.S.S.G. § 1B1.10 did not violate the non-delegation doctrine).[3]

Ultimately, I would conclude that—in the context of a modification to the Guidelines without legislative action—the Legislature has delegated the ability to abrogate the amelioration doctrine to the Commission.

C.

Finally, I explain how the Commission abrogated the amelioration doctrine in this case.

In its 2019 report, the Commission eliminated Guideline 2.B.2.a.(4), which mandated the addition of one criminal history point to the calculation of the criminal history score for certain defendants. Using the adapted *Kirby* test, the modification to the Guidelines applies to a crime committed before the effective date of the modification if: (1) there is no statement by the Commission that clearly establishes its intent to abrogate the amelioration doctrine, (2) the modification mitigates punishment, and (3) the conviction was not final on the date that the modification to the sentencing guidelines took effect. *See Kirby*, 899 N.W.2d at 503.

The parties agree that the second and third parts of the *Kirby* test are satisfied in this case. I agree. When Robinette was sentenced in February 2019, one point was assigned

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[3] While "[t]he Federal Sentencing Guidelines system is a complex one that differs significantly from Minnesota's," *Shattuck*, 704 N.W.2d at 147, we have repeatedly relied on cases interpreting the Federal Sentencing Guidelines when interpreting the Minnesota Sentencing Guidelines. *See id*. at 142; *see also Williams v. State*, 910 N.W.2d 736, 742 (Minn. 2018) ("When a Minnesota rule is modeled after a federal rule, federal cases are instructive in the interpretation of the corresponding Minnesota rule.").

to his criminal history score based on the application of Guideline 2.B.2.a(4), which mandated the assignment of one point if an offender had been discharged from probation but committed a new offense within the initial period of probation announced by the district court. *See* Minn. Sent. Guidelines 2.B.2.a(4) (2018). The district court imposed a presumptive sentence of 168 months in prison based on Robinette's criminal history score, including the point mandated by Guideline 2.B.2.a(4). Robinette appealed his conviction and sentence. On August 1, 2019, while his appeal was pending, the Commission's modification to the sentencing guidelines went into effect and Guideline 2.B.2.a(4) was eliminated. With one fewer point in his criminal history score, the presumptive sentence for Robinette would have been 156 months. Thus, the modification mitigated Robinette's punishment and became effective before his conviction was final.

The open question is whether the first part of the *Kirby* test is satisfied. The parties dispute this question but fail to identify the correct premise. The question is not whether the Legislature has made a statement that clearly abrogates the amelioration doctrine. As noted above, the Legislature is not the actor in this case because it has delegated its authority to speak to the Commission. The question is whether there is a statement by the Commission that clearly establishes its intent to abrogate the amelioration doctrine. And there is such a statement.

There is no question that Guideline 3.G.1 is a statement by the Commission. Guideline 3.G.1 reads: "[m]odifications to sections 1 through 8 of the Minnesota Sentencing Guidelines and associated commentary and appendices, apply to offenders whose date of offense is on or after the specified modification effective date." *See* Minn.

Sent. Guidelines 3.G.1 (2020). This constitutes a statement by the Commission that clearly establishes its intent to abrogate the amelioration doctrine. *See Kirby*, 899 N.W.2d at 488 (discussing other statutes that included "crimes committed on or after [the effective] date" language). As noted by the majority, Guideline 3.G.1 was initially enacted by the Commission in 1986. *See* Minn. Sent. Guidelines III.F (1986). Guideline 3.G.1 has been a part of the sentencing guidelines for 34 years and has gone through some language modifications.[4] The majority is wrong to cast aside Guideline 3.G.1 based on a flawed application of *Kirby*.[5]

Because Guideline 3.G.1 constitutes a statement by the Commission that clearly establishes its intent to abrogate the amelioration doctrine, the first part of the modified *Kirby* test is not satisfied in this case. Thus, the amelioration doctrine should not be applied to Robinette's sentence, and he should not receive the benefit of the 2019 modification to

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[4] Initially, the guideline read: "[m]odifications to the Minnesota Sentencing Guidelines and Commentary will be applied to offenders whose date of adjudication of guilt is on or after the specified modification effective date." Minn. Sent. Guidelines III.F (1986). The guideline was subsequently changed to read: "[m]odifications to the Minnesota Sentencing Guidelines will be applied to offenders whose date of offense is on or after the specified modification effective date. Modifications to the Commentary will be applied to offenders sentenced on or after the specified effective date." Minn. Sent. Guidelines III.F (1987). The guideline was renumbered from III.F to 3.G. Minn. Sent. Guidelines 3.G (2010). And in 2019, the guideline was modified to its current form.

[5] I am not suggesting that if a statute is enacted, modified, or repealed by the Legislature, Guideline 3.G.1. controls. In such a situation, the *Kirby* test would be applied to the Legislature as the actor and the statutory change as the action. The question in that context would be whether the Legislature has made a statement that clearly establishes its intent to abrogate the amelioration doctrine when it enacts, modifies, or repeals a statute.

the sentencing guidelines that eliminated Guideline 2.B.2.a(4). Accordingly, I would reverse the decision of the court of appeals.