

MEMORANDUM

DATE: September 29, 2022

TO: Nate Reitz, Executive Director, M.S.G.C.
Kelly Mitchell, Chair, M.S.G.C.
Commissioners, M.S.G.C.

FROM: Michelle A. Larkin, Commissioner

RE: Comprehensive Review Proposal

The proposed request for funding to support a comprehensive review of the Minnesota Sentencing Guidelines comes on the heels of the following events.

- A press conference by Governor Walz, at which he stated, “If someone is going to use a firearm in a crowded area where there are innocent people and children, there needs to be a heavy penalty for that. . . . This is not a crime of poverty. This is someone shooting a firearm in a crowded area. Totally unacceptable.”
- A press conference by United States Attorney Andrew Luger, at which he described “an abiding and near-universal belief among criminals. . . that there simply won't be serious consequences" for their crimes.
- An editorial by the Star Tribune Editorial Board, which described the need for “an honest, unsparing revisiting of consequences for criminals” to “ensure that violent offenders face penalties that serve as a true deterrent.”
- A June 2022 document prepared by the United States Sentencing Commission, entitled “Length of Incarceration and Recidivism,” which reported the following findings: (1) the odds of recidivism were approximately 29 percent lower for federal offenders sentenced to more than 120 months incarceration compared to a matched group of federal offenders receiving shorter sentences and (2) the odds of recidivism were approximately 18 percent lower for offenders sentenced to more than 60 months up

to 120 months incarceration compared to a matched group of federal offenders receiving shorter sentences.¹

Given that context, and for the reasons set forth below, I will speak against the proposed comprehensive review at the October 6, 2022 commission meeting.

The chair explained that the proposal for a comprehensive review was prompted by a recent trip to the National Association of Sentencing Commission 2022 Annual Conference in Portland, Oregon. At that conference, representatives from the states of Pennsylvania and Washington described their efforts to comprehensively review and revise their sentencing guidelines. Based on those presentations, the chair and executive director of the commission decided to seek legislative funding for a comprehensive review of Minnesota's sentencing guidelines.

Representatives from the states of Pennsylvania and Washington appeared remotely at the September 8th commission meeting to explain their efforts. A few statements stand out among those made in their presentations, most notably those regarding the comprehensive review in Pennsylvania.

- Pennsylvania began its comprehensive review in 2014, and it is still not complete.
- Pennsylvania's current guidelines proposal is based on the concept of reducing the impact of criminal history in sentencing.²
- Pennsylvania's proposal is also based on the concept of reducing reliance on incarceration in sentencing.
- Pennsylvania's proposal brings decisions related to probationary terms, conditions, and supervision within its sentencing guidelines.

Given the discussions and decisions of the commission over the last few years, there is reason to believe that it will follow the lead of Pennsylvania in reducing the impact of criminal history in sentencing and the reliance on incarceration. If so, the result will likely be a reduction in sentences. Such an approach does not reflect "an honest, unsparing revisiting of consequences

¹ The executive director distributed the "Length of Incarceration and Recidivism" report to the commissioners via email on August 3, 2022, per Commissioner Larkin's request. But the commission has not formally reviewed or discussed that report.

² That concept, in turn, was prompted by research performed by the Robina Institute of Criminal Law and Criminal Justice, at the University of Minnesota.

for criminals” to “ensure that violent offenders face penalties that serve as a true deterrent.”³ Nor does it dispel the “belief among criminals. . . that there simply won't be serious consequences” for their crimes.⁴

Indeed, recent sentencing data reinforces the belief that there will not be serious consequences for criminal activity. For example, a recent report by the commission stated that "In 2020, the mitigated dispositional departure rate for cases recommended prison under the Guidelines was 43.2 percent (1,763 of the 4,083 cases recommended prison), *the highest rate ever observed.*" In other words, in 2020, there were 4083 felony cases in which application of the presumed guidelines sentence would have sent the offender to prison, but in 43% of those cases, the offender received a downward dispositional departure and was placed on probation instead of being sent to prison.

Although public safety is served by the rehabilitation of offenders who are appropriately placed on probation, the commission must be realistic about what Minnesota needs now: Sentencing policies that ensure public safety. To the extent that the proposed comprehensive review might result in such policies, it will not do so soon enough.

The executive director estimates that the proposed comprehensive review, which presumably includes the development of recommendations for changes, can be completed in two to three years. One reasonably doubts that timeline. Again, Pennsylvania’s comprehensive review began in 2014, and it is still ongoing. Washington’s comprehensive review was mandated by its legislature and began in 2019. The legislature originally set a deadline of 2022. That deadline has been extended to 2023. But as the representative from Washington told the commission, Washington still has “a lot” of work to do, it has not “even talked about the [sentencing] grid,” and it recognizes that the retroactivity of any changes is a problem that requires more attention. The Washington representative also said that the legislative members involved in the review process may draft their own sentencing grid. In sum, there is reason to doubt Washington’s ability to complete its comprehensive review by the 2023 deadline, four years after it began.

Given the commission’s inability to resolve the one-half custody point issue after nearly two years of constant discussion, debate, and public hearings, one wonders how much time it would take for the commission to comprehensively review the current guidelines. Indeed, at the September meeting, Commissioner Knutson, who previously served as a Minnesota senator, advised the executive director that any budget request to fund a comprehensive review must provide some information regarding the process that would be used for that review. The

³ Star Tribune August 27, 2022.

⁴ *Id.*

executive director responded that it would take months to develop that process and that such development would not begin until March of 2023.

Under the circumstances, there is little reason to believe that the commission could complete a comprehensive review of the Minnesota Sentencing Guidelines within two to three years as suggested. Even if the commission could comply with that timeline, Minnesota does not have two to three years to wait for the commission to address the current violent-crime crisis.

Members of the public have repeatedly spoken at commission meetings regarding the impact of violent crime on their lives and in their communities. The public has expressed frustration regarding the “revolving door” to the criminal-justice system that allows repeat offenders to be released without bail and without serious consequences, only to reoffend again and again. The public and state leaders have clearly communicated that they expect more from its criminal-justice system. The commission is an integral part of that system. Yet, whether it is capping the length of probation terms, proposing to eliminate custody points such that fewer repeat offenders are sent to prison, or embarking on a years-long comprehensive review motivated by a desire to reduce reliance on incarceration and to bring the probation system under the control of the M.S.G.C., the commission seems to be sending a message that supports the “near-universal belief among criminals” that “there simply won't be serious consequences” for their crimes.⁵ And it suggests a significant disconnect between the commission and the constant reports of violent crime and calls for a stronger response.

What Minnesota needs now is for the commission to ensure public safety by *promptly* acknowledging and addressing the increase in violent crime and recidivism. Query: Are there things the commission could do now to hold repeat, violent offenders accountable? That discussion should be the commission’s top priority. Investing the limited resources of the commission for the next two, three, four, or even more years to a comprehensive review of the guidelines does nothing to improve public safety during the interim.

In sum, the proposal for a comprehensive review of the Minnesota Sentencing Guidelines is ill-advised at this time. It will do nothing to address a widely perceived need to increase—instead of decrease—sentencing consequences in an effort to address violent crime. Minnesota should not have to wait years for its sentencing guidelines commission to conduct “an honest, unsparing revisiting of consequences for criminals.”⁶ Thus, I will oppose the proposal for a comprehensive review of the Minnesota Sentencing Guidelines. I encourage my fellow commissioners to consider whether now is the time for the proposed comprehensive review, regardless of the merits of the proposal.

⁵ *Id.*

⁶ *Id.*