

To: Members of the Minnesota Sentencing Guidelines Commission

From: Kelly Lyn Mitchell, Chair

Date: October 3, 2022

Re: Comprehensive Review of Minnesota Sentencing Guidelines

On June 11, 2020, the Minnesota Sentencing Guidelines Commission met for the first time following the death of George Floyd. We knew then as we do now that there was racial disparity in sentencing outcomes in our state. But until Mr. Floyd's death, we had been remiss in asking ourselves whether our policies played a role in creating or exacerbating that disparity. Therefore, on that day, I asked the Minnesota Sentencing Guidelines Commission if it would support a systematic review of the guidelines for racial impact. As I stated in my remarks (attached below):

Criminal justice policies that disproportionately affect specific groups of people have a cascading affect that amplifies disadvantages in all areas of life. We know that people who are convicted of crimes face numerous collateral consequences that affect their ability to complete their education, obtain jobs, and make a decent living. These disadvantages affect not only the person caught up in the criminal justice system, but also their families, and their children. And when our policies concentrate these disadvantages into communities of color, we run the risk of disenfranchising and marginalizing entire communities for generations. To serve public safety, then, is to be parsimonious with our policies; to ensure that we carefully consider the manner in which we are holding people accountable for their crimes, and to recommit to the principle that has been written in our guidelines since the very beginning: "Sentencing should be neutral with respect to the race, gender, social, or economic status of convicted felons." Minn. Sent. Guidelines § 1.A.2 (2019).

The Commission agreed to undertake this review, but asked that it be broadened to "include a consideration of other factors bearing on neutrality and uniformity, to include factors such as gender, employment status, etc., but with race as the primary focus."¹

Commission staff was originally going to lead this effort, but was unable to direct adequate time towards it due to understaffing. During the pandemic, one staff member left their employment with the Commission, and because the state imposed a hiring freeze, Director Reitz was unable fill the position for a significant period of time. As the Commission has discussed at several recent meetings, this staffing deficit has had long-lasting impacts on the work of the Commission.

To keep the review moving forward, we asked Professor Christopher Uggen at the University of Minnesota if he would have capacity to assist with the review without compensation. Professor Uggen did agree to do so, and brought on doctoral student, Hannah Schendeman to assist with the work. Professor Uggen and Ms. Schwendeman

¹ Minnesota Sentencing Guidelines Commission, Minutes of the June 11, 2020 meeting, at 3.

attended the Commission meeting on May 6, 2021 to gather input on the research question. They returned to deliver initial findings on June 9, 2022, but because they were also working with limited resources and this project was not their sole focus, progress has been slower than we had hoped, and has thus far only scratched the surface. Among some of the findings presented in June were that people who are Black and Native American have higher criminal history scores than people who are white, Hispanic, or Asian; that a greater proportion of people who are Black and Native American have felony and custody status points in their criminal history; and that criminal history scores have risen for all groups over time (rising from an average of 1.6 in 2001-05 to 2.2 in 2015-19).² More work is needed to understand these trends and to disentangle whether the increases are the result of guidelines policy or other causes such as changes in crimes rates or legislative action. However, without dedicated resources, this review will continue to move slowly, if at all.

During the same period, the Commission has been working on the custody status issue. Throughout that process, the Commission has received extensive input through public hearings, the recent round table on custody status, via email, and from individuals who regularly attend Commission meetings. It is clear that there is concern about increases in violent crime and—more to the point of what this Commission can address—about holding repeat violent offenders accountable for their crimes. There is also a perception that changes to the custody status policy will decrease punishment and accountability for repeat violent offenders, though that has not been the focus of any proposed policy changes.

All of these events have led me to the conclusion that we should conduct a comprehensive review of our guidelines. A comprehensive review will allow us to achieve the neutrality review that we already committed to do and to review the guidelines to ensure that repeat violent offenders are appropriately addressed. Moreover, it will help us to understand additional questions such as why presumptive sentences and departure rates are both increasing. Because the neutrality review was already underway, I do not see this as a new or recent idea. Instead, it is an opportunity to take a more comprehensive approach so that we can more fully understand the impact of our guidelines on public safety. However, it is only by securing dedicated staff for the work that we will be able to perform the review within a reasonable timeframe.

This does not preclude consideration of other issues in the meantime. However, even if the Commission were to take up potential policy changes in the next few months, the earliest they would go onto effect is August of 2024. That is because our enabling statute requires any policy changes to be presented to the Legislature in our January report to allow that body one legislative session to veto or amend those changes if they wish to do so.³ Though January is still several months away, other procedural rules inhibit our ability to act prior to the next legislative session. First, Commission policy requires that policy changes must be

² See Uggen/Schwendeman presentation slides 18-23, https://mn.gov/sentencing-guidelines/assets/04-Uggen_Schwendeman-Neutrality_Review_6_9_22_Redacted_tcm30-530246.pdf

³ Minn. Stat. § 244.09. subd. 11 (2022).

discussed in at least two meetings prior to a vote.⁴ Second, policy changes must be vetted in a public hearing prior to being finalized and submitted to the Legislature. Our current public hearing procedures require about 2-3 months to complete in order to provide notice to the public, hold a hearing, and then allow for a vote after considering public input.⁵ As such, any potential policy changes must be discussed by the Commission by October each year in order to go into effect by August of the following year. None of this precludes us from taking up new policy issues yet this fall; I only raise this to demonstrate that ours is not a body that can react quickly to events, and this is by design. The Minnesota Sentencing Guidelines Commission was designed to be a deliberative body to develop data-driven policies.

Furthermore, as has been noted by Executive Director Reitz, our most recent annual report already shows that while *presumptive* imprisonment rates have been increasing over time, *actual* imprisonment rates have been decreasing.⁶ This means that the guidelines are increasingly recommending prison sentences, but this is not being reflected in actual sentences. It is imperative that we understand why this trend is occurring before developing any potential policies to address violent crime. A comprehensive review can help us do that. If we act without understanding the data, then we run the risk of enacting policies that will not be implemented and further exacerbating this trend.

For all of these reasons, I hope Commission members will join me in supporting a budget request to gain the resources necessary to complete a comprehensive review of the guidelines. The sooner we gain resources for a comprehensive review, the sooner we can begin to analyze and discuss the data that will help us craft and implement well-reasoned policies.



Kelly Lyn Mitchell
Chair, Sentencing Guidelines Commission

⁴ See Commission's first-reading rule, available at https://mn.gov/sentencing-guidelines/assets/5B2-MSGC_MeetingRules_tcm30-512829.pdf.

⁵ See Minn. Admin. R. 3000.0100 to 3000.0600, available at <https://www.revisor.mn.gov/rules/3000/>.

⁶ See Minnesota Sentencing Guidelines Commission, *2020 Sentencing Practices: Annual Summary Statistics for Cases Sentenced in 2020* at 19, fig. 9 (June 29, 2022), available at https://mn.gov/sentencing-guidelines/assets/2020MSGCAAnnualSummaryStatistics_tcm30-532424.pdf.

To: Members of the Sentencing Guidelines Commission

From: Kelly Lyn Mitchell, Chair

Re: Undertaking a Systematic Review of our Policies

Originally provided to the Commission as item 2B on agenda for June 11, 2020.

A few weeks ago, we witnessed the death of George Floyd. His death was tragic and unjust, and it has served to expose the many injustices that people of color experience in our community. It has also sparked frank discussions about racial disparity. Though Minnesota is often touted as one of the best places to live in the U.S., that reality is only true if you are white. I'm not originally from Minnesota, but twenty years ago I *chose* to live here because of all the wonderful things this state has to offer. I want Minnesota to be a place where *every* person in our community feels that way, so I've been asking myself what role the Sentencing Guidelines Commission has in moving forward from this point.

The Minnesota Sentencing Guidelines Commission was the first in the nation to adopt the practice of preparing racial impact notes in 2008 to inform the Legislature when proposed changes to the law had the potential to impact some citizens more than others. I have personally witnessed legislative committees taking that information to heart and deciding against proposed changes when they would more harshly affect people who are black.

It's time to turn the microscope on ourselves. Structural racism occurs in part when we take for granted the just nature of our policies; when we assume that the differences we see in outcomes between citizens who are white and citizens who are Black, Native American, Hispanic, or Asian are driven by factors that are beyond our control. But the truth is that some of those differences flow from the policy choices that we make. For that reason, I am calling upon the Sentencing Guidelines Commission to undertake a systematic review of our policies for racial impact; a deliberate analysis to determine whether our policies have a disparate impact by race, and if so, to determine what changes should be made to reduce those affects.

There is no quick fix to the issue of racial disparities in our State. It will take all of our efforts in multiple arenas of state and local policy to begin to address it. Similarly, our review of the Sentencing Guidelines should not be rushed. It will take some time to review our policies and determine their affects. I am not looking for any quick fixes here, nor am I suggesting that this will be a review that we can complete before the next legislative session. What I am suggesting is that there is no time to waste in getting started. I'd like to begin this review now and work on it deliberately and thoughtfully so that when we reach this point next year, we have a clearer view of the role of our Sentencing Guidelines in affecting racial disparities, and thoughtful proposals for addressing those disparities.

When I was first starting out in my career, I worked as a staff attorney in the Judicial Branch, and in that role, I had the pleasure of working in the same division as Deb Dailey, who was, I think the longest serving Executive Director of the Sentencing Guidelines Commission before moving to her position as Research Manager for the Branch. She was a great mentor to me, and some of the words she said to me early in my career have stuck with me and have shaped how I approach my work. She recognized that disparities often already exist at the very start of the court case, brought on by processes that precede court involvement. But then she would say, "We can't change who comes through the door, but we have to ask ourselves, are we making it worse?" I think that's our task with the Sentencing Guidelines.

We can't change the racial makeup of who receives convictions—that's not our role—but we can ask ourselves, are we making it worse?

I am well aware that the enabling statute for the Minnesota Sentencing Guidelines Commission states that our primary consideration should be public safety. I submit to you that racial injustice is a threat to public safety. Criminal justice policies that disproportionately affect specific groups of people have a cascading affect that amplifies disadvantages in all areas of life. We know that people who are convicted of crimes face numerous collateral consequences that affect their ability to complete their education, obtain jobs, and make a decent living. These disadvantages affect not only the person caught up in the criminal justice system, but also their families, and their children. And when our policies concentrate these disadvantages into communities of color, we run the risk of disenfranchising and marginalizing entire communities for generations. To serve public safety, then, is to be parsimonious with our policies; to ensure that we carefully consider the manner in which we are holding people accountable for their crimes, and to recommit to the principle that has been written in our guidelines since the very beginning: "Sentencing should be neutral with respect to the race, gender, social, or economic status of convicted felons." Minn. Sent. Guidelines § 1.A.2 (2019).

A handwritten signature in black ink, appearing to read 'Kelly Lyn Mitchell'. The signature is fluid and cursive, with a prominent initial 'K'.

Kelly Lyn Mitchell
Chair, Sentencing Guidelines Commission