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January 8, 2020

Mr. Nathaniel Reitz
Executive Director
Sentencing Guidelines Commission
309 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

VIA EMAIL TO: [REDACTED]

Dear Mr. Reitz:

In a letter dated December 13, 2019, you ask two questions on behalf of the Minnesota Sentencing Guidelines Commission (“Commission”) regarding the Commission’s authority to implement proposed amendments to the Sentencing Guidelines (“Guidelines”). The proposed amendments impose a five-year cap on the duration of probation for a stayed sentence for most felonies, and are described in a Notice of Public Hearing dated November 18, 2019, for a public hearing held on December 19, 2019. Regarding the proposed amendments, you ask:

- 1) To what extent may the Commission impose upon the district court binding limitations on the duration of the pronounced felony probationary period beyond those established by law?
- 2) Prior to the Commission’s final adoption of a proposed modification of the Guidelines previously forwarded for public hearing pursuant to Minn. Stat. § 244.09, subd. 11, and Minn. R. chap. 3000, to what extent may the Commission revise the proposed modification, whether in response to public comment or otherwise, without forcing the need for another public hearing?

In addition to your December 13, 2019 correspondence, I also received a January 2, 2020 Memo from Commissioner Paul Schnell and Commission Chair Kelly Mitchell with proposed revisions to the amendments that were considered at the public hearing on December 19, 2019. The proposed revisions replace the five-year cap on probation duration with a system establishing a presumptive probation term of five years. The proposed revisions allow judges to depart from the presumptive probation term and impose a longer or shorter probation length in cases involving substantial and compelling circumstances.

A limit on probationary terms that is presumptive but allows for judicial discretion maintains the advisory nature of the Guidelines and is consistent with the Commission’s statutory authority. It is therefore a permissible amendment to the current Guidelines. In addition, the Commission appears to have complied with the necessary public hearing

requirements outlined by rule, and therefore a second public hearing is unnecessary for the proposed revised amendments.

Probation Duration

For most felony offenses, judges may impose periods of probation “for not more than four years or the maximum period for which the sentence of imprisonment might have been imposed, whichever is longer.” Minn. Stat. § 609.135, subd. 2(a) (2019). In other words, judges have discretion to impose a term of probation as long as the statutory maximum sentence. For some offenses, such as a first-degree controlled substance crime, a court may impose a probationary term as long as forty years. *See* Minn. Stat. § 152.021, subd. 3 (2019).

Currently, the Guidelines do not limit or otherwise address the length of probation. The authority of the Commission, however, does include probation durations. The legislature directed the Sentencing Guidelines Commission to promulgate Guidelines for the district court. Minn. Stat. § 244.09, subd. 5 (2019). “The guidelines promulgated by the commission shall be advisory to the district court.” *Id.* In addition to providing presumptive durations for prison sentences, the Guidelines may also establish appropriate sanctions for offenders for whom imprisonment is not proper. Minn. Stat. § 244.09, subd. 5(2) (2019). The law explicitly authorizes the Commission to establish, “noninstitutional sanctions, including but not limited to the following: payment of fines, day fines, restitution, community work orders, work release programs in local facilities, community based residential and nonresidential programs, incarceration in a local correctional facility, and **probation and the conditions thereof.**” *Id.* (emphasis added). Although the Sentencing Guidelines are advisory to the district court, the court is required to follow the procedures of the guidelines when it pronounces sentence. *Id.*

The original proposed amendments considered at the December 19 hearing contain a mandatory cap in the length of probation, which is contrary to the statutory mandate that the guidelines be advisory to the district court. In Section 3.A.1., the court when granting a stayed sentence, “must pronounce the length of the stay.” Pursuant to Section 3.A.2., “when the court stays execution or imposition of sentence for a felony offense, the length of the stay must not exceed five years.” Because the original proposed amendment does not include a mechanism for departure, it removes discretion currently afforded to the district court in sentencing. This is inconsistent with the advisory nature of the Guidelines. Minn. Stat. § 244.09, subd. 5 (2019). In addition, the proposed amendment in its original form limits judicial discretion regarding the length of probation terms in violation of Minn. Stat. § 609.135, subd. 2 (2019) (allowing length of probation terms up to the statutory maximum).

In limiting judicial discretion in a manner not authorized by the legislature, the original proposed amendments may also violate the constitutional Separation-of-Powers Doctrine. The Separation-of-Powers Doctrine holds that no government branch may encroach on the exclusive constitutional functions of another. *Browder v. State*, 899 N.W.2d 525, 530 (Minn. App. 2017), *rev. denied* (Minn. Aug. 22, 2017) (citing *State v. T.M.B.*, 590 N.W.2d 809, 812 (Minn. App. 1999), *rev. denied* (Minn. June 16, 1999)). The legislature created the Commission, and retains authority over it. *Browder* 899 N.W.2d at 530; Minn. Stat. § 244.09 (2019). The legislature

Mr. Nathaniel Reitz

January 8, 2020

Page 3

further authorizes the Commission to establish a guide for how those felonies may be sentenced within the statutory maximum. *Id.* But by imposing a mandatory five-year cap on probationary sentences, the Commission exceeds its legislative authority and encroaches upon the judicial authority to impose appropriate probationary periods up to the statutory maximum.

The Revised Guidelines Modifications to Limit Probation Terms dated January 2, 2020, allow the district court to depart from the presumptive probation length. This preserves the judicial discretion of the district court, and conforms with the advisory nature of the Guidelines. Because these proposed modifications include a mechanism for departure consistent with current Guideline practices, they eliminate the issues discussed above and are within the authority of the Commission.

Public Hearing

A public hearing was held on December 19, 2019 to consider the original proposed amendments to the Guidelines. The purpose of the public hearing was to give interested persons an opportunity to present oral and written statements regarding the proposed amendments to the sentencing guidelines. The Commission also allowed written materials to be submitted after the public hearing ended. It appears that the Commission complied with the procedures outlined in Minn. R. chap. 3000. The question is whether a second public hearing under Minn. R. 3000.0300, is required for the Revised Guideline Modifications dated January 2, 2020, which were proposed following the public hearing on December 19, 2019.

The January 2, 2020 proposed revisions do not create a substantially different proposal from the original proposed amendments. The modifications do not change the nature of the originally proposed amendments. They merely adjust the implementation of probation duration limits based on comments received during the hearing. They appear to be reasonably related to the original concerns voiced at the December 19 public hearing. *Cf. City of Morton v. Minnesota Pollution Control Agency*, 437 N.W.2d 74, 746-48 (Minn.Ct.App. 1989) (In rulemaking context, procedure contemplates modification of proposed rules, which is permissible so long as there is no substantial change.) Because the revisions do not substantially modify the original proposed amendments that were subject to scrutiny, a new public hearing is not necessary.

Sincerely,



DAVID S. VOIGT
Deputy Attorney General

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