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April 25, 2016

Julie Rosen
Minnesota Senate
100 Rev. Dr. Martin Luther King Jr. Blvd.
State Office Building, Room 139
St. Paul, MN 55155-1206

Re: Proposed Amendments to the Minnesota Sentencing
Guidelines and/or Minnesota's Controlled
Substance Crime Law

Dear Senator Rosen:

I appreciate you taking the time out of your busy schedule in order to consider my views on the proposed changes to the Minnesota Sentencing Guidelines for drug offenders. I realize that you do not know anything about me, so I have included a copy of my resume for you to review. As you can see, I have been involved in the criminal justice system for almost 30 years in one form or another, and for more than 20 years now, I have been a prosecutor in Polk County and other areas in Minnesota.

When I first became a prosecutor, I did not realize how much illegal drugs - whether sales, possessions, or use - impacted the criminal justice system (and society in general). However, I now recognize that illegal drugs are one of the biggest problems facing the criminal justice system (and society) today, not just in Minnesota but around the country. On average, I would estimate that close to two-thirds of the felony cases I prosecute involve illegal drugs in one way or another. This goes beyond just the cases involving the sale and/or possession of illegal drugs. It includes the large number of cases in which individuals commit crimes because they were under the influence of illegal drugs (such as murder, criminal sexual conduct, criminal vehicular homicide/operation, domestic abuse, child abuse, etc.) and/or to gain money to purchase illegal drugs (such as robbery, burglary, theft, forgery, financial transaction card fraud, etc.). Of course, in recent years, there has been an epidemic of drug overdoses and deaths in this state due to heroin, fentanyl, prescription pain medications, and synthetic drugs. You see

reports of these overdoses and/or deaths just about every day now on the television or in the papers. In addition, National Public Radio and Minnesota Public Radio recently have broadcast a series of reports into opiate abuse, and you can view a video called “Faded,” which addresses some of the recent drug problems in northwestern Minnesota and northeastern North Dakota at <https://vimeo.com/163793364>. (I currently am reading Sam Quinones’ “Dream Land - The True Tale of America’s Opiate Epidemic,” which is a very well-written, informative, and frightening book.) Even in rural Polk County (which has a population of approximately 32,000 people), there have been overdoses and deaths from heroin, fentanyl, prescription pain medications, synthetic drugs, cocaine, and methamphetamine in recent years. (Methamphetamine has not gone away. In fact, I have seen a resurgence in methamphetamine cases recently, and a number of these cases involved quantities substantially larger than I normally see.)

As a prosecutor, I have the job of trying to prosecute the individual(s) who sold the drugs which resulted in a victim’s death. This job is extremely difficult because there often are no witnesses and/or little evidence to tie a drug-dealer to the specific sale which resulted in a victim’s death. This is hard to explain to the victim’s family members, who are looking for justice and some closure. Even when I am able to prosecute someone for Murder in the Third Degree, in violation of Minn. Stat. § 609.195(b), the penalties rarely fit the crime, and this only adds to the sense of frustration or outrage that the victim’s family members feel. (The presumptive guidelines sentence for Murder in the Third Degree is the same for Controlled Substance Crime in the First Degree, but the statutory maximum sentence for the latter, Minn. Stat. § 152.021, subd. 3, is greater than the former.) Having met with a number of these family members over the years, I have seen first-hand this frustration and outrage. More importantly, I have seen up close and personal the loss inflicted upon these family members. (I also lost a childhood friend to a cocaine-heroin overdose more than a decade ago, and I know a number of individuals personally who have been addicted to one drug or another. As a result, I know what illegal drugs can do to an individual, their family members, their friends, and their community from a personal, as well as a professional, perspective.)

As you may be aware, the Minnesota Sentencing Guidelines Commission (MSGC) has proposed drastic changes to the Minnesota Sentencing Guidelines for most drug offenders. Simply put, the MSGC wants less drug offenders in prison and more of them left at large in society. The proposals put forth by the MSGC would have offended me (as well as most prosecutors and law enforcement officers) at any time, but the fact that these proposals are being put forth at a time when record numbers of individuals are overdosing and dying in this state as a result of heroin and other drugs is appalling and irresponsible. (I recognize that the Minnesota County Attorney’s Association (MCAA) also has put forth some proposals for modifying this state’s controlled substance crime laws and sentencing

guidelines. However, I believe the MCAA's proposals are flawed for many of the same reasons noted below. Frankly, I do not know one law enforcement officer or actual drug prosecutor in this state, such as myself, who affirmatively supports the changes proposed by the MSGC or the MCAA.)

According to the MSGC, the reasons supporting their proposals are as follows: (1) "the downward dispositional and durational departure rates for sentences imposed for first- and second-degree drug offenses are quite high, particularly in Hennepin County"; (2) "long prison sentences for drug users who are chemically dependent do not help them get better"; (3) reducing the presumptive guidelines sentence for Controlled Substance Crime in the First Degree - Sale "is necessary to achieve the goal of truth in sentencing"; (4) "the proposal will positively affect public safety"; and (5) "[t]he new aggravating factors allow the prosecutors to seek high sentences against drug dealers." MSGC, Report to the Legislature 15-17 (Jan. 15, 2016). Every one of these reasons are flawed, and I will attempt to explain why.

First, the fact that Hennepin County chooses to depart dispositionally (placing a defendant on probation rather than sending them to prison) and/or durationally (sending a defendant to prison for less time) than most other counties in the State of Minnesota says nothing about the propriety of the guidelines sentences. Instead, it simply may be a reflection that some judges in Hennepin County are not doing their jobs properly. If Hennepin County decides to start reducing sentences for sex offenders, child abusers, domestic abusers, and other criminals, is the MSGC going to recommend reductions in the guidelines for those offenders as well just to meet the lowered expectations of Hennepin County? I was not aware that Hennepin County set the minimum threshold for criminal prosecutions in this state, and I take exception to the suggestion that judges and prosecutors who faithfully follow and apply the law in the more rural areas of this state do not know what they are doing or should lower their expectations.

Second, the idea that long prison sentences are handed out for defendants simply because they are chemical dependent is ludicrous. Long prison sentences are handed out because defendants commit serious crimes and/or have lengthy criminal histories. The fact that a defendant is chemically dependent when they commit a serious crime does not make the crime any less serious, and the fact that a defendant continues to commit crimes over and over again does not mean their criminal histories should be ignored when they are sentenced. Implicit in the MSGC's argument on this point is the suggestion that the only purpose for the criminal justice system is to treat and/or rehabilitate those who commit crime. However, such an argument ignores the sentencing guidelines themselves, which recognize that the penal objectives in sentencing include deterrence, public condemnation of criminal conduct, public safety, rehabilitation, restitution, retribution, and risk reduction. Minn. Sent. Guid. 3.A.2. According to the MSGC, rehabilitation should trump all of these other legitimate penal objectives, which is ridiculous.

The idea that Minnesota's prisons are filled with low-level drug possessors simply is false. Under the current sentencing guidelines, Controlled Substance Crime in the Fifth Degree, which essentially is simple possession of a controlled substance, is ranked as a Severity Level 2 offense, and for criminal history score purposes, Controlled Substance Crime in the Fifth Degree is weighted at .5 point. Since a defendant who commits Controlled Substance Crime in the Fifth Degree is not presumed to go to prison unless their criminal history score is 6 or more, this means that it is only on the defendant's thirteenth conviction (or eleventh conviction if the defendant was on probation when the offense was committed) when the guidelines call for a commitment to prison for such an offense. (Of course, if the defendant was sentenced to prison for violating their probation after being convicted for such an offense, this means the defendant must have ignored or defied a court's order, and most likely did so several times, before this could occur, and even then, the commitment to prison would have been for a short time period. As discussed below, there can be significant benefits to sending a defendant to prison for such a short time.)

Third, the claim that reducing the presumptive guidelines sentence for Controlled Substance Crime in the First Degree - Sale is necessary to achieve truth in sentencing is absurd. When a judge sentences a defendant to prison, s/he does not tell the victim or the public that the Minnesota Department of Corrections (MDOC) may release the defendant from prison long before the defendant has served the two-thirds commitment portion of the sentence. Minn. Stat. § 244.101, subd. 2. In fact, many defendants sentenced to prison for controlled substance crimes in this state serve only a fraction of their pronounced prison sentence. This is because many such defendants are released early through the MDOC Challenge Incarceration Program (which also is known as boot camp). Minn. Stat. § 244.17 to § 244.172. (It is worth noting that the MSGC often refers to incarceration rates and pronounced sentences but does not acknowledge the large number of defendants who are released early through this program or through intensive community supervision. Minn. Stat. § 244.12 to § 244.15.) If there really was any truth in sentencing in this state, then the victims and the public would be told that many defendants actually may be released from prison early by the MDOC. Furthermore, the MSGC's recommendations do not add any truth to sentencing because they still ignore these early release programs. (I do believe that the MDOC Challenge Incarceration Program, if administered properly, is a good program. In fact, I have prosecuted a large number of individuals who seem to have benefited from the program, with its drug treatment component, over the years. However, there needs to be some additional limits placed on the program so it is not being used primarily as a means to reduce this state's prison population.)

Fourth, the claim that the MSGC proposals will benefit public safety would be laughable if it was not so seriously wrong. The reality is that the MSGC proposes to have more drug-dealers left in the

community, rather than sentenced to prison (even if only for a short time), at a time when record numbers of people are overdosing and dying in this state. I know the MSGC is concerned about the costs of incarcerating drug-dealers in this state, but I noticed that the MSGC did not attempt to determine the costs to the public by not incarcerating those drug-dealers. For example, how much is an overdose victim's life worth? What will the increased costs be as a result of more overdoses and hospitalizations in this state? How much more will victims and their insurance companies have to pay as a result of the crimes associated with the increased drug-dealing and usage? How much more will the state have to pay in public assistance, workers unemployment benefits, treatment programs, etc.? Where will the money come from to pay for the additional probation and corrections agents that will be required to adequately supervise the additional drug-dealers placed on probation? (As it stands now, there are not nearly enough probation and corrections agents in this state to adequately supervise the vast number of individuals on probation. As a result, many defendants who are placed on supervised probation simply are free to continue committing crime with little risk of being caught by their probation or corrections agent. In fact, I have had a number of defendants say this in recent years. In addition, I have a number of major drug cases pending right now in which most of the defendants were on supervised release after being released from prison when they committed their most recent crimes.) Simply put, the public's safety will be endangered further, not benefited, if the MSGC's recommendations are accepted.

Fifth, the MSGC claims that "the new aggravating [departure] factors give the prosecutors the tools to secure an upward durational departure that would increase the sentence to 130 months." MSGC, Report to the Legislature 17 (Jan. 15, 2016). While I agree that the proposed modification to the major controlled substance offense aggravated departure factor, Minn. Sent. Guid. 2.D.3.b(5), is a step in the right direction, the MSGC has overlooked the fact that the existing aggravated departure factor under the current guidelines, if found to exist beyond a reasonable doubt by a jury or a judge, allows a prosecutor to seek a sentence of 172 (to 206) months in prison (which is double the presumptive guidelines sentence or the high end of the presumptive guidelines range) for a Controlled Substance Crime in the First Degree offense with a criminal history score of 0. In essence, the MSGC's "additional tools to go after drug dealers," *id.*, amounts to nothing more than lesser sentences than could be achieved under the current guidelines. If the MSGC proposal had included making all defendants convicted for Controlled Substance Crime in the First Degree ineligible for the MDOC Challenge Incarceration Program and other early release programs, then the MSGC could have claimed that their proposal assisted prosecutors, but that is not their proposal. Instead, the MSGC pretends to want to assist prosecutors while knowing that the MDOC is releasing drug offenders from prison as soon as they can. (This points

out one of the absurdities of the MDOC Challenge Incarceration Program. Even when a prosecutor is able to convince a jury or a judge beyond a reasonable doubt that a drug offender has committed a major controlled substance offense, Minn. Sent. Guid. 2.D.3.b(5), and convinced a judge to sentence the defendant to prison for more than a presumptive guidelines sentence (which is not an easy task), the defendant still is eligible for early release through the MDOC Challenge Incarceration Program. Minn. Stat. § 244.17, subd. 3. This loophole needs to be closed. Any defendant who is sentenced to prison and received an aggravated departure should be ineligible for the MDOC Challenge Incarceration Program or any other early release program. In other words, the worst of the bad need to stay locked up rather than released early.)

The MSGC also seems to ignore that fact that one of the best and most effective tools that a prosecutor currently possesses is the mandatory minimum prison sentences required for some repeat drug offenders and the current guidelines sentences. These sentences often give defendants an incentive to cooperate with law enforcement and prosecutors to investigate and prosecute the drug manufacturers, importers, wholesalers, and larger drug-dealers (i.e., the bigger fish). However, by doing away with the mandatory minimum sentences and the current guidelines sentences, the MSGC also would be doing away with the biggest (and sometimes only) incentive that prosecutors currently possess. In essence, there will be little reason for drug offenders to cooperate if the MSGC's recommendations are adopted, which means that more drug manufacturers, importers, wholesalers, and larger drug-dealers will go undetected and unprosecuted. It makes more sense to amend the mandatory minimum drug statutes, Minn. Stat. § 152.021, subd. 3(b), § 152.022, subd. 3(b), § 152.023, subd. 3(b), § 152.024, subd. 3(b), and § 152.025, subd. 2(b-c), and Minn. Sent. Guid. 3.a to recognize that a defendant who substantially assists law enforcement in the detection, apprehension, and prosecution of others would be entitled to be sentenced without regard to the mandatory minimum sentence and/or to receive a mitigated departure, which is similar to what the federal system has been doing successfully for years.

Finally, a major premise of the MSGC's recommendations appears to be that too many people are being sentenced to prison in this state, even though Minnesota ranks fourth lowest in prison incarceration rates in this country. MSGC, Report to the Legislature 2 (Jan. 15, 2016). I disagree. This state, as well as this country, accords greater freedoms to its citizens than just about anywhere else in the world. One of the costs for such freedom is that those who violate society's rules need to be punished, not only to deter others from violating the law but to ensure respect for society's rules. In the words of former U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., "the law must keep its promises." If a person commits a serious crime, continues to commit less serious crimes over and over again, and/or refuses to comply with a court's conditions of probation in a felony case, the law of this state promises

that the person will be sentenced to prison for doing so. It is that promise (which also is a threat) which keeps most people from committing crimes. However, for those who choose to commit crime, there must be serious consequences. Simply convicting someone of a crime and placing them on probation is not sufficient. You would be surprised at the number of defendants over the years who have told me that I either saved or significantly changed their lives for the better by convincing a judge to send them to prison, even if it was only for a short time period. They recognized that being on probation or serving time in a local jail was not enough to change their behavior. Instead, it was being sentenced to prison (i.e., getting a taste of prison life) that made them realize they needed to change their behavior. However, if the MSGC approach to sentencing is adopted, then these people most likely would not have changed their lives and may have ended up serving more time in prison sometime down the road.

I realize that in this era of political correctness there is a tendency on the part of many to blindly follow the pack. For example, I believe the MSGC's recommendations are little more than an attempt to follow the misguided policies of the O'Bama administration (which I believe are going to have a long-lasting and devastating effect on America in the very near future) of simply releasing thousands of convicted criminals into this nation's communities. (For what it is worth, I am a registered independent and have very little interest in politics.) Not only will this endanger public safety, but it will breed disrespect for the rule of law in the long run. While Minnesota is known as "the land of 10,000 lakes," catch and release is not a sound basis for this state's criminal justice system.

While I could go on and on about the flaws in the MSGC's recommendations, I will not do so. If the Minnesota House of Representatives and Senate are serious about stopping the epidemic of drug overdoses and deaths in this state, it should reject the proposals put forth by the MSGC. I realize that there is no easy fix to this problem, but any drastic changes to this state's controlled substance crime and sentencing laws only should be made after serious consideration by all of those involved in the criminal justice system - judges, prosecutors, public defenders/defense lawyers, probation/corrections officers, and treatment professionals - so that a comprehensive plan can be formulated and implemented. Of course, this should start with abolishing this state's legislative policy of favoring marijuana possession and use over alcohol possession and use by teenagers and young adults. For years, any person under the age of 21 in this state who consumes, purchases, or possesses any amount of alcohol is guilty of a misdemeanor and can be sentenced to a maximum of 90 days in jail, a \$1,000 fine, or both. Minn. Stat. § 340A.503, subd. 1(a)(2) (consumption), subd. 2(2) (purchase or attempt to purchase), and subd. 3 (possession); § 340A.703 and § 609.02, subd. 3 (penalty). This means that such a person who consumes or purchases any alcohol or possesses a single beer, which may be worth only \$1, can be sentenced to jail. (In addition, the mandatory minimum fine for these offenses is \$100, Minn. Stat. § 340A.703, but

the mandatory minimum fine for a felony offense is only \$50. Minn. Stat. § 609.101, subd. 5(b). However, no law in this state prohibits any person from consuming marijuana, and any person who possesses 42.5 grams or less of marijuana is guilty of only a petty offense and can be sentenced to a maximum of a \$300 fine. Minn. Stat. § 152.027, subd. 4(a), and § 609.02, subd. 4a. Furthermore, 42.5 grams of the high-grade marijuana that is available today can be worth more than \$700. In addition, a person under the age of 21 who drives, operates, or is in physical control of a motor vehicle after having consumed any alcohol (with evidence of the consumption still in their body) is guilty of a misdemeanor offense, Minn. Stat. § 169A.33, subds. 2-3, and is subject to a revocation of their driver's license for 30 to 180 days, Minn. Stat. § 169A.33, subd. 4, while the same person who reeks of marijuana is not subject to any penalty (unless an officer can prove they were under the influence, which is not very easy to do). Given the penalties the legislature has set forth for possessing 42.5 grams or less of marijuana, as opposed to alcohol, it seems clear that the legislature inadvertently has encouraged high school students and young adults to use marijuana rather than alcohol, which only leads to their involvement with harder drugs. This needs to be stopped.

Despite what marijuana advocates will tell you, marijuana continues to be the major gateway drug to more serious drug use and abuse. I read it over and over again in interviews and presentence investigation reports how defendants started with using marijuana and then went on to using and abusing heroin, methamphetamine, cocaine, and/or other illegal drugs. In my experience, it is extremely rare for an individual to start out using any of these harder and more dangerous drugs. While I believe it is important to do everything we can to stop high school students and young adults from using and abusing alcohol, we need to do the same, if not more, for marijuana.

If this state is going to change its controlled substance crime laws and the related sentencing guidelines, then I think it also should change the firearms laws and the related sentencing guidelines. There is a well-known connection between illegal drugs and firearms and between illegal drugs and violence. However, this state's current firearms laws and the related sentencing guidelines do not deal effectively with these problems. A few examples will make my point.

First, a defendant who possesses a small quantity of heroin, methamphetamine, or cocaine is guilty of Controlled Substance Crime in the Fifth Degree. Under the sentencing guidelines, this is a severity level 2 offense and does not carry a presumptive commitment to prison unless the defendant's criminal history score is 6 or more (and for some inexplicable reason the guidelines stop counting at 6). Accordingly, a defendant's presumptive guidelines sentence for such an offense can range from 12 months and 1 day stayed with probation to 21 months in prison. However, if the defendant possesses or uses a firearm during the commission of this offense, s/he then is facing a mandatory minimum 3-year

prison sentence. Minn. Stat. § 609.11, subd. 5(a). This should be contrasted with a defendant who commits Controlled Substance Crime in the First Degree, which is this state's most serious controlled substance crime. A defendant who possesses or uses a firearm during the commission of such an offense receives no increased penalty because the guidelines sentence is greater than the 3-year mandatory minimum. Minn. Sent. Guid. 2.E.1. This is absurd. In essence, a major drug-trafficker with an arsenal of weapons does not receive any increase in sentence due to the possession or use of a firearm while a low-level drug-possessor can go from probation to 36 months in prison. (While most of these major drug-traffickers traditionally were prosecuted in federal court, that certainly is not the case today in Minnesota.)

In order for the mandatory minimum sentence for firearms possession or use to serve its purpose, it should be added (i.e., made consecutive) to the sentence for the underlying drug offense. In addition, there should be graduated mandatory minimum consecutive sentences for possession of a firearm, use of a firearm, and use of a firearm resulting in injury to another person, like the federal system utilizes.

Second, a defendant who possesses a firearm and has been convicted of a crime of violence is subject to a 5-year mandatory minimum prison sentence. Minn. Stat. § 609.11, subd. 5(b). However, the sentencing guidelines currently rank this Felon in Possession of a Firearm offense as a severity level 6 offense. This means that a defendant's criminal history score never is factored into the sentence a defendant receives for such an offense under the guidelines. In fact, a defendant who is convicted for such an offense and has a criminal history score of 6 (which is where the guidelines stop counting) is presumed to receive only a 57-month sentence. In other words, the 5-year mandatory minimum sentence also is the maximum sentence a defendant can receive under the guidelines. This is absurd. I will use two cases I have prosecuted to prove this absurdity.

In State v. Staff, 2010 WL 1753249 (Minn. App. 2010), the defendant was sentenced to 60 months in prison for his possession of a shotgun even though he had a criminal history of 0. (This was because the defendant was prohibited from possessing a firearm due to his adjudication of delinquency when a minor for committing Terroristic Threats.) In State v. Underdahl, 2009 WL 2225434 (Minn. App. 2009), the defendant initially was sentenced to prison for 120 months for selling a pistol to an informant within weeks of being released from prison, but the Minnesota Court of Appeals reduced that sentence to 60 months. The defendant in the latter case had a criminal history score far exceeding 6 based upon the following convictions: Burglary in the First Degree, Misdemeanor Assault in the Fifth Degree, Terroristic Threats (three counts), Criminal Sexual Conduct in the Third Degree, Assault in the Second Degree, Kidnapping, Felony Harassment, Perjury (three counts), Tampering with a Witness in the First Degree (three counts), Solicitation of a Juvenile (three counts), and Unlawful Possession of a

Sawed-off Shotgun. It is inconceivable to think that these two individuals (with the latter being the personification of evil) received the identical prison sentences based upon their significantly different criminal histories, and yet that is precisely what happened due to the policy set by the MSGC.

In order to remedy this problem, the MSGC should be required to rank Felon in Possession of a Firearm as a severity level 8 offense, so a defendant's criminal history score actually will be factored into the sentence s/he receives, as it should be. Minn. Sent. Guid. 1.A.2. In addition, district courts should have the discretion to impose this 5-year mandatory minimum sentence or the guidelines sentence consecutive to any other crime committed as part of the same conduct, which can be accomplished by amending Minn. Stat. § 609.035, subd. 3, and defendants sentenced to prison who possessed or used a firearm should not be eligible for the Challenge Incarceration Program, which can be accomplished by amending Minn. Stat. § 244.17, subd. 3.

The simple reality is that these changes to Minnesota's existing firearms laws will put some teeth into those laws without encroaching upon anyone's Second Amendment right to possess a firearm, and these changes will add some common sense to sentencing such firearms offenses in this state. In fact, I would think that Second Amendment advocates would welcome these changes to this state's existing firearms laws. These changes would deter the possession and use of firearms during the commission of crimes and would incapacitate for longer time periods those individuals who possess and use firearms when committing crimes. This just might put a dent in the endless gun violence that seems to be plaguing the Twin Cities these days.

I sincerely hope that you and your fellow representatives and senators will do the right thing and put a stop to the insanity put forward by the MSGC. As a prosecutor, I believe the MSGC's recommendations are dangerous and will lead to only more drug overdoses and deaths in this state. As a father of nine-year-old twins, I believe that my children, and all of the children in this state, deserve better than what the MSGC is recommending.

Thank you for your consideration, and I wish you the best of luck.

Sincerely,

Scott Buhler

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Enc.