

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

State of Minnesota,

Court File No.: 19HA-CR-18-██████████

Plaintiff,

vs.

**NOTICE OF MOTION AND MOTION  
FOR A DOWNWARD DEPARTURE AND  
SENTENCING MEMORANDUM**

F██████████ P██████████

Defendant.

TO: THE STATE OF MINNESOTA AND ██████████, ASSISTANT DAKOTA  
COUNTY ATTORNEY, 1560 HIGHWAY 55, HASTINGS, MN 55033

PLEASE TAKE NOTICE that on the ████████ day of February, 2019, at 1:30 pm before the  
Honorable Presiding Judge of the above-named District Court at the Dakota County Government  
Center, 1560 Highway 55, Hastings, Minnesota, Mr. P██████████ by and through his attorney, will  
move this Court for an Order granting the relief requested in the following Motion.

**MOTION**

Mr. P██████████ through his undersigned counsel, hereby moves the Court to grant him a  
downward dispositional or durational departure pursuant to the argument below.

At sentencing, Mr. P██████████ will respectfully request a sentence to include the following  
terms:

1. Stay of imposition of sentence for 3 years,
2. No executed incarceration,
3. A period of electronic home monitoring (EHM), and
4. The standard conditions of probation at sentencing.

Mr. P [REDACTED] has almost completed intensive outpatient chemical dependency treatment with [REDACTED]. A downward durational or dispositional departure allows Mr. P [REDACTED] to complete his extensive chemical health treatment and appropriately reflects the seriousness of the crime.

This Motion is made on all the files and records in the case, the United States and Minnesota Constitutions, the Minnesota Statutes and Rules of Criminal Procedure, the Minnesota Sentencing Guidelines, the interests of justice, the following argument, and upon such other and further points and authorities as may be subsequently presented to the Court.

### FACTS

On July [REDACTED], 2018, Mr. P [REDACTED] was found by law enforcement in possession of approximately 1000 grams of marijuana and a handgun, which was located in a vehicle. Mr. P [REDACTED] confessed and admitted to these facts immediately after he was arrested.

On August [REDACTED], 2018, Mr. P [REDACTED] entered a straight plea to *Felony Firearm Violation (Possess with Altered/Removed Serial Number)* and *Felony Fifth Degree Drug Possession*. Part of the plea agreement called for the dismissal of case number 19HA-CR-18-[REDACTED]. While the government may seek the mandatory minimum sentence of 36 months in prison at sentencing, and the defense seeks a downward dispositional or durational departure. Pursuant to the plea agreement, all parties agree that the Court may grant a departure under Minnesota Statute section 609.11, subdivision 8. All standard terms and conditions will apply.

### BACKGROUND

Mr. P [REDACTED] was born in Minneapolis, yet his family traveled extensively when he was a young child due to his father's career in construction. They lived in many different cities. When Mr. P [REDACTED] was a young boy, they returned to Minnesota. He grew up with his mother, who has

always been a stay-at-home mom, his father, who has always been self-employed in construction, and his older sister who currently attends [REDACTED]. His father was absent during much of Mr. P [REDACTED]'s childhood because of his need to travel for work. While the family moved back to Minnesota, his father continued traveling for work and is currently working in South Carolina.

Mr. P [REDACTED] attended [REDACTED] Elementary School, [REDACTED] Middle School, and [REDACTED] High School and graduated in [REDACTED]. He was an exceptional athlete and played hockey, soccer, football, baseball, skateboarding, snowboarding, and mountain biking. He did well in school, graduated with a high GPA, and took AP physics, AP psychology, AP pre-calculus, and honors chemistry. He did not have much help at home with his schoolwork because his parents did not have the education to help him.

Mr. P [REDACTED] grew up in a wholesome home, devoid of drugs. He was not around any drugs until late high school when he went to parties, and he experimented with marijuana and alcohol in his senior year of high school.

After high school, Mr. P [REDACTED] worked 80 hours a week for [REDACTED] and [REDACTED]. As soon as he got home from one shift, he had seven hours until he had to get to his next shift. After some time living with this heavy schedule, he stopped working at [REDACTED] but continued working at [REDACTED]. He was also working construction with his father. Unfortunately, he was fired from [REDACTED] for missing one day, so he went to work in construction full-time with his father.

### TREATMENT

Mr. P [REDACTED] entered intensive outpatient treatment at [REDACTED] on [REDACTED], and he has been in perfect attendance. He also meets with a counselor twice per week. As of [REDACTED], he has attended [REDACTED] group sessions and [REDACTED] individual sessions.

According to his treatment records, he “has been an active participant in the group and has had excellent attendance since his admission to [REDACTED].” Beginning [REDACTED], he will step down to one night per week, and he is expected to complete aftercare on [REDACTED].<sup>1</sup>

Besides his very first test, Mr. P [REDACTED] has submitted random urinalysis tests, all of which have been negative. He has had “consistent motivation, cooperation, and commitment to treatment and his recovery process.” He has also recognized relapse triggers and has “successful[ly] implement[ed] relapse prevention skills and refusal skills.”

Mr. P [REDACTED] found treatment to be very helpful. By taking AP psychology, he has a basis for how the brain works, and his treatment at [REDACTED] has given him tools on how to stay sober. He found it helpful to talk to people who have been life-long drug addicts to see what life becomes if you satisfy your addiction. He has changed his entire social friendship group to include friends that are sober. Treatment has been educational and rewarding. He is sober and well.

#### STATUTORY SENTENCE

Mr. P [REDACTED] was charged with *Felony Firearm Violation (Possess with Altered/Removed Serial Number)*, in violation of Minn. Stat. § 609.667(2), and *Felony Fifth Degree Drug Possession*, in violation of Minn. Stat. §§ 152.025, subdvs. 2(1), 4(b), and 609.11, subd. 5. The first count carries no mandatory minimum incarceration, just a 5-year maximum. Count 2 carries a 3-year mandatory minimum under Minn. Stat. § 609.11, subd. 5(a) and a 5-year maximum under Minn. Stat. § 152.025, subd. 4(b). Notably, the firearm was in Mr. P [REDACTED]'s vehicle at the time; he did not use it in any way.

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<sup>1</sup> The treatment records have been filed confidentially.

The law allows an exception to the mandatory minimum sentence in this case:

Except as otherwise provided in paragraphs (b) and (c) [having to do with prior convictions], prior to the time of sentencing, the prosecutor may file a motion to have the defendant sentenced without regard to the mandatory minimum sentences established by this section. The motion shall be accompanied by a statement on the record of the reasons for it. When presented with the motion, or **on its own motion, the court may sentence the defendant without regard to the mandatory minimum sentences established by this section if the court finds substantial and compelling reasons to do so.** A sentence imposed under this subdivision is a departure from the Sentencing Guidelines.

MINN. STAT. § 609.11, subdiv. 8(a) (emphasis added).

### **GUIDELINES SENTENCE**

Mr. P's count 1 carries a presumptive guidelines sentence of a stayed 1 year and 1 day (severity level 1). MINN. SENT. GUIDELINES IV.A. Count 2 carries the same presumptive guidelines sentence (severity level D2). *Id.* at IV.C.

### **DOWNWARD DEPARTURE**

This Court may depart from the Minnesota Sentencing Guidelines and grant Mr. P's motion for a downward departure. MINN. SENT. GUIDELINES II.D.1 ("The court must pronounce a sentence of the applicable disposition and within the applicable range *unless* there exist identifiable, substantial, and compelling circumstances to support a departure." (emphasis added)). A departure is an exercise of judicial discretion. *Id.* The sentencing court's decision to depart will not be reversed absent a clear abuse of that discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). The appellate court is "loath to interfere" with the trial court's sentencing decision. *State v. Bendzula*, 675 N.W.2d 920, 921, 924 (Minn. Ct. App. 2004) (citing *State v. Case*, 350 N.W.2d 473, 476 (Minn. Ct. App. 1984)) ("Because the trial court in this case dealt with the departure issue both deliberatively and thoroughly, and because the court adequately identified considerations favoring its downward departure that were both atypical and

substantial, we must defer to its judgment.”). “When departing from the sentence calculated under the guidelines, the sentencing judge ‘should pronounce a sentence which is proportional to the severity of the offense of conviction and the extent of the offender’s prior criminal history.’” *Id.* at 923–24 (citing MINN. SENT. GUIDELINES II.D). “[A]lthough the guidelines, as intended, produce consistency, they also preserve traditional trial court discretion to employ broadly stated standards, both in determining cause to depart and in determining an apt departure. And the guidelines expressly enlarge the trial court’s discretion when assessing reduced culpability and determining a downward departure.” *Id.* at 923.

Dispositional and durational departures are different results and require different analyses. MINN. SENT. GUIDELINES II.D.1.a. The Minnesota Sentencing Guidelines provide this Court with factors that may be used as reasons for a departure. *Id.* at II.D.3. Mitigating factors include the victim being the aggressor, the offender playing a passive role, other substantial grounds that mitigate the offender’s culpability not arising to a defense, amenability to probation,<sup>2</sup> and amenability to treatment. *Id.* at II.D.3.a.

Regarding Minnesota Statutes section 609.11, a departure in the form of a stay of execution or stay of imposition is a dispositional departure while any sentence lower than the mandatory minimum or presumptive duration or range is a durational departure. MINN. GUIDELINES II.E.2.b.(2).

**A. Downward Dispositional Departure.**

A downward dispositional departure occurs when the Court sentences a defendant to a stayed sentence when a prison commitment is recommended. MINN. GUIDELINES I.B.5.a.(2). Factors that warrant departure include amenability to probation. MINN. GUIDELINES II.D.3.a. In

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<sup>2</sup> “This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individual treatment in a probationary setting.” MINN. SENT. GUIDELINES II.D.3.a.(7).

determining whether an individual is amenable to probation, factors to consider include “age, prior record, remorse, cooperation, attitude before the court, and social support.” MINN. GUIDELINES cmt. II.D.303 (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

In *Trog*, a burglary and assault case, the court listed numerous factors in consideration of whether a mitigated dispositional departure was warranted:

1. Defendant’s age
2. Defendant’s prior record
3. Defendant’s remorse
4. Defendant’s cooperation
5. Defendant’s attitude while in court
6. Defendant’s support of family and/or friends

*Trog*, 323 N.W.2d at 31. The court found that a sentence of probation, when the guidelines recommended a prison commitment, was warranted when the PSI was favorable, showing that he had otherwise been an “outstanding citizen,” had no prior involvement with police, did well in school, had a good work record, had been intoxicated during the offense, cooperated with police, was “shaken” by the incident, and was “extremely contrite.” *Id.* at 29. In addition, at sentencing, defense counsel cited the defendant’s clean criminal record, remorse, cooperation, respectful attitude, strong community support, and presented statements by family and friends. *Id.* at 30.

In 2017, the Minnesota Sentencing Guidelines Commission completed a study on criminal cases receiving departures and found that of all the cases that expected a presumptive commit to prison, 35.8% received a mitigated dispositional departure. MINNESOTA SENTENCING GUIDELINES COMMISSION, *2017 Sentencing Practices: Annual Summary Statistics for Felony*

*Offenders Sentenced in 2017*, p. 63 (Nov. 2018).<sup>3</sup> In the First Judicial District (including Dakota County), **39.6%** of cases with a presumptive commit received a mitigated dispositional departure. *Id.* The Guidelines Commission stated, “the presumptive sentence is based on ‘the typical case’” and so “appropriate use of departures by the courts when substantial and compelling circumstances exist can actually enhance proportionality by varying the sanction in an atypical case.” *Id.* at p. 21.

Mr. P [REDACTED] deserves a dispositional departure in this case. He immediately cooperated with police, confessed to his crime, blamed no one but himself, was respectful and has accepted full responsibility by pleading guilty to both charged counts in this case. He did not challenge the legality of the search, and he has been remorseful and apologetic to all parties involved. He voluntarily entered intensive treatment through [REDACTED], and he has done exceptionally well. As stated in his treatment documents, Mr. P [REDACTED] is motivated to stay sober and continue in his recovery. He has been very active and engaged in his treatment team. He is seeking employment now that treatment is becoming less intensive. Appearing before this Court, he has been respectful and candid, making no excuses for his conduct.

Mr. P [REDACTED] is [REDACTED] years old and has absolutely no criminal history. He is a smart young man, having taken multiple AP and honors courses in high school. Further, his cooperation with law enforcement and instant confession shows that he immediately accepted responsibility for his actions and did not attempt to blame others. Mr. P [REDACTED] is living at home and is supported by his mother and father. Rather than prison, Mr. P [REDACTED] would benefit from higher education with a job setting that provides opportunity for growth and achievement.

A downward dispositional departure is appropriate.

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<sup>3</sup> Available at <http://mn.gov/msgc-stat/documents/reports/2017/UpdatedMSGC2017AnnualSummaryStatistics.pdf>.



## B. Downward Durational Departure

A downward durational departure occurs when the Court imposes a sentence 15% lower than the Guidelines box. MINN. GUIDELINES I.B.5.b.(2).

“A downward durational departure is justified only if the defendant’s conduct was ‘significantly less serious than that typically involved in the commission of the offense.’” *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016) (quoting *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985)). “[A] single mitigating factor may support a downward durational departure.” *Id.* at 621.

The Minnesota Sentencing Guidelines Commission’s study discussed above revealed that of all the cases that expected a presumptive commit to prison, 11.8% received a downward durational departure. *See supra*, p. 65. In the First Judicial District (including Dakota County), 12.5% of cases received a downward durational departure. *Id.* A durational departure is “based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (citation omitted, emphasis in original). “A downward durational departure is justified only if the defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *Id.* at 624 (citation and inner quotation marks omitted). A single factor may justify a durational departure. *Id.* at 624–25.

In this case, the sole reason for the mandatory minimum three-year sentence is because Mr. P█████ possessed a firearm while also possessing marijuana, a drug that continues to become legalized throughout the nation, including attempts to do so in Minnesota.<sup>4</sup> There is no allegation that Mr. P█████ used the firearm in any way, shape or form. It was found in the center

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<sup>4</sup> *See Bill Introduced Monday to Legalize Recreational Pot in Minnesota*, CBS MINNESOTA, Jan. 28, 2019, <https://minnesota.cbslocal.com/2019/01/28/bill-introduced-monday-to-legalize-recreational-pot-in-minnesota/> (last visited Feb. 2, 2019).

console of the vehicle Mr. P [REDACTED] was driving. This is not the typical case where a firearm was found on the defendant's person or where it was used during a drug deal. Given the unique facts of this case, a downward departure is warranted because it is not the typical case.

Further, Mr. P [REDACTED] cooperated with law enforcement, admitted that the firearm was his and that he had found it, and he admitted that he also possessed the marijuana. This confession shows his remorse for his actions.

Thus, a downward durational departure is also appropriate.

### **PURPOSES OF SENTENCING**

According to the Minnesota Department of Corrections, there are 9,479 inmates in the State of Minnesota, 93.2% being male, and 17.8% of all offenders being incarcerated for drug offenses.<sup>5</sup> Of all the male defendants released in 2014, 38% picked up a new felony conviction and 27% were reconvicted and reincarcerated within three years following their release.<sup>6</sup>

In 2017, Minnesota spent approximately \$100.79 per day on each adult inmate.<sup>7</sup> This averages out to \$36,788.35 per inmate per year. To put this in perspective, Minnesota spent \$12,382.00 per public school student<sup>8</sup>; the average statewide weekly cost for a childcare center taking care of an infant as of June 2017 is \$310.00, which averages to \$16,120.00 a year<sup>9</sup>; and undergraduate tuition for a Minnesota resident at the University of Minnesota for the 2018–2019

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<sup>5</sup> Minnesota Department of Corrections, *Adult Prison Population Summary 1* (2019), [https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%20201-1-2019\\_tcm1089-369002.pdf](https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%20201-1-2019_tcm1089-369002.pdf) (last visited on January [REDACTED], 2019).

<sup>6</sup> Minnesota Department of Corrections, *2018 Performance Report 20–21*, [https://mn.gov/doc/assets/2018%20DOC%20Performance%20Report\\_tcm1089-366101.pdf](https://mn.gov/doc/assets/2018%20DOC%20Performance%20Report_tcm1089-366101.pdf) (last visited Jan. [REDACTED], 2019).

<sup>7</sup> Minnesota Department of Corrections, *2018 Performance Report 34*, [https://mn.gov/doc/assets/2018%20DOC%20Performance%20Report\\_tcm1089-366101.pdf](https://mn.gov/doc/assets/2018%20DOC%20Performance%20Report_tcm1089-366101.pdf) (last visited on Feb. [REDACTED], 2019).

<sup>8</sup> Governing the States and Localities, *Education Spending Per Student by State* (2018), <http://www.governing.com/gov-data/education-data/state-education-spending-per-pupil-data.html> (last visited Feb. [REDACTED], 2019).

<sup>9</sup> ChildCare Aware of Minnesota, *Cost of Care*, <https://www.childcareawaremn.org/community/cost-of-care/> (last visited Feb. [REDACTED], 2019).

school year is \$6,529.00 for 13 or more credits a semester, which calculates to \$13,058.00 for the year.<sup>10</sup>

*Commitment to the Commissioner of Corrections is the most severe sanction that can be imposed for a felony conviction, but it is not the only significant sanction available to the court.*

*Because state and local correctional facility capacity is finite, confinement should be imposed only for offenders who are convicted of more serious offenses or who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of sentencing.*

~MINN. SENT. GUIDELINES 1.A.4. and 5.

Mr. P [REDACTED] is not a danger to the public. If this Court sentences Mr. P [REDACTED] to the mandatory minimum 36 months in prison, the State of Minnesota will spend approximately \$110,365.05 on Mr. P [REDACTED]'s incarceration. The purposes of sentencing are not served by a sentence of incarceration. According to federal statute, the purposes of sentencing include the following:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). In other words, these purposes of sentencing are general and specific deterrence, punishment, public safety, and rehabilitating Mr. P [REDACTED]

General deterrence. General deterrence means that the sentence given to Mr. P [REDACTED] would encourage others to avoid the same crime. Mr. P [REDACTED]'s case has not made the news or otherwise been made known to the public. Any sentence issued for Mr. P [REDACTED] will not affect

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<sup>10</sup> University of Minnesota, *2018–19 Undergraduate Tuition* (2013), <https://onestop.umn.edu/finances/tuition> (last visited Feb. 2019).

others seeking to commit the same crime. Further, a felony conviction reflects the need for general deterrence.

Specific deterrence. Specific deterrence means that the sentence would encourage Mr. P [REDACTED] to avoid the same crime. This is not a concern for Mr. P [REDACTED]. Mr. P [REDACTED] has now gone through the court system and will likely be convicted of a felony. He has also been progressing through treatment with outstanding success. He has changed his friend group, and he is supported by his family. This experience and a probationary sentence will deter Mr. P [REDACTED] from future crimes.

Punishment. Punishment is self-explanatory: punishing Mr. P [REDACTED] for his actions. A felony conviction is enough punishment in this case. If other considerations of sentencing were present, such as needing to protect the public or deterrence, then perhaps punishment should include actual incarceration. But there are other ways of punishing Mr. P [REDACTED] as discussed below.

Public safety. Mr. P [REDACTED] is not a danger to the public.

Rehabilitation. Rehabilitating Mr. P [REDACTED] would include treatment and education. Mr. P [REDACTED] voluntarily entered and is completing treatment at [REDACTED]. As stated above, he benefited from the treatment program and has taken it seriously. Mr. P [REDACTED] is self-motivated and able to do what he sets his mind to. He does not need incarceration in order to change his life for the better; he needs the support of his family and friends and to keep reaffirming the knowledge that he can do better by keeping on the path he has begun. Further, given Mr. P [REDACTED]'s AP and honors classes in high school, higher education would also do Mr. P [REDACTED] good so that he could secure a job that would offer him growth and other opportunities.

Because the above considerations do not support incarcerating Mr. P [REDACTED] in either local jail or prison, the undersigned suggests an alternative sentence. The reasoning is the same as above—there are ways to sentence Mr. P [REDACTED] without incarceration and respect the purposes of sentencing. A term of electronic home monitoring (EHM) with work and school release would keep Mr. P [REDACTED] confined to his home while allowing him to work and attend all the treatment and programs he needs to stay sober. A term of probation would add to Mr. P [REDACTED]'s motivation to avoid further crime; the threat of probation violations and jail or prison incarceration would be hanging over his head for 3 years. Further, the standard conditions of probation, especially random chemical tests, would provide further motivation to remain sober.

By imposing a sentence of 3 years probation, 30 days on EHM, and staying imposition of sentence, Mr. P [REDACTED] is punished, deterred from further criminal offenses, and able to keep his life moving in a better direction by working, attending school, and finishing his outpatient treatment. Further, he will be responsible for paying probation fees and EHM costs, and be accountable to probation. Should he fail his probation officer, an executed prison sentence is still available.

### CONCLUSION

For the foregoing reasons, Mr. P [REDACTED]'s case warrants a downward departure in this case. To take him out of treatment at [REDACTED] and send him to prison would not reflect the purposes outlined by the Minnesota Sentencing Guidelines.

Respectfully submitted,

**RYAN GARRY, ATTORNEY, LLC**

Dated: February 2, 2019

s/ Ryan Garry

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