Approved Meeting Minutes

July 25, 2019

A meeting of the Minnesota Sentencing Guidelines Commission (MSGC) was held on July 25, 2019, in Centennial Office Building, Lady Slipper Conference Room, 658 Cedar St., St. Paul, MN 55155.

Present were Commission Chair Kelly Lyn Mitchell, Vice-Chair Judge Heidi Schellhas, and Commission members Justice (Ret.) Christopher Dietzen, Valerie Estrada, Tonja Honsey, Judge Caroline Lennon, Cathryn Middlebrook, Sergeant Salim Omari, and Commissioner of Corrections Paul Schnell. Also present were MSGC Executive Director Nate Reitz and MSGC staff members Nicole Jasperson, Kathleen Madland, Jill Payne and Anne Wall.

Members of the public present included Chuck Turchick; Robin Tu, University of Minnesota, Robina Institute of Criminal Law and Criminal Justice; and Robert Small, Minn. County Attorneys Association.

1. Call to Order
   Chair Mitchell called the meeting to order at 1:30 p.m.

2. Approval of Agenda
   This was on the agenda as an action item.

   Chair Mitchell discussed amending the agenda to include public testimony at item 6, Commission’s Work Plan. There was no objection by the Commission.

   **Motion** by Commissioner Schnell and second by Ms. Estrada to approve the meeting agenda, as amended.

   **Motion carried.**

3. Approval of Meeting Minutes
   This was on the agenda as an action item.

   **Motion** by Ms. Middlebrook and second by Judge Lennon to approve the meeting minutes from June 6, 2019.

   Chair Mitchell asked if there were any additions or corrections to the minutes.
Vice-Chair Schellhas requested to add reference to statutes Minn. Stat. §§ 617.246 & 617.247 on page 5 of the draft meeting minutes from June 6, 2019.

**Motion** by Ms. Middlebrook and second by Judge Lennon to approve the meeting minutes from June 6, 2019, as amended.

**Motion carried.**

4. **Review of Public Hearing Record**

This was on the agenda as an information item.

Chair Mitchell detailed how the Commission complied with the public hearing requirements. Executive Director Reitz supplied the following information to the Commission:

On Monday, June 17, 2019, the notice of public hearing was published in the State Register and emailed to interested persons, and the contents of the proposed modifications were posted on the Commission’s website the same day. Because no one is on the United States mailing list, no one was notified by mail. The public hearing was held on July 18, 2019, in Room 1100; Minnesota Senate Building, 95 University Ave. W., St. Paul, MN 55155. Two members of the public wished to testify before the Commission. After the public hearing, the record remained open for five calendar days to accept written comments; the Commission received a written copy of Mr. Lemons’ public testimony and a written submission by Mr. Gruzebeck during this period. A summary of the testimony, a link to the audio of the testimony, and copies of the written comments were provided to all Commission members before the current meeting.

5. **Accept or Reject Proposed Modifications to the Sentencing Guidelines**

This was on the agenda as an action item.

Chair Mitchell asked the Commission if everyone had a chance to review the record from the public hearing and if anyone had questions or concerns.

Vice-Chair Schellhas discussed re-visiting the vote that was taken with respect to the new enhanced portion of the child pornography statute (A.2 from Proposed Modifications) at the June 6, 2019 meeting.

A discussion by the Commission followed.

**Motion** by Vice-Chair Schellhas and second by Sergeant Omari to reconsider the vote regarding the rank of Use of Minors in Sexual Performance (Aggravated Violations).

**Motion carried** with 5 votes in favor and 4 against.
Motion by Vice-Chair Schellhas and second by Judge Dietzen to rank Use of Minors in Sexual Performance (Aggravated Violations) at Severity Level C.

Motion defeated with 3 votes in favor and 6 against.

Chair Mitchell called for a motion.

Motion by Commissioner Schnell and second by Ms. Middlebrook to adopt the proposed modifications to the Minnesota Sentencing Guidelines and Commentary set forth in section A (“New Crime Laws Affecting the Guidelines – Effective August 1, 2019”) of the appended Notice of Public Hearing dated June 17, 2019.

Motion carried.

Chair Mitchell called for a motion.


Motion carried.

6. Commission’s Work Plan

This was on the agenda as a discussion item.

A. Commission Members’ Submissions

Chair Mitchell presented the staff issued summary entitled, “Staff Summary of MSGC Work Plan Submissions for Discussion at Meeting on July 25, 2019.”

A discussion ensued.

Dr. Grant Duwe, Director of Research and Evaluation, Minnesota Department of Corrections, addressed the Commission. Dr. Duwe described the two main factors affecting the size of the Minnesota prison population which includes prison admissions and lengths of stay. He explained how to reduce the prison population and the pros and cons to these strategies.
B. Judge Kulick Letter to Lt. Gov. Flanagan

Chair Mitchell explained that the Commission received a letter from Judge Kulick on racial disparity in probation revocations. The letter was directed to Lt. Gov. Flanagan and redirected to the Commission to ask the Commission to look at the issue. Chair Mitchell pointed the Commission to pages 7–9 of the staff data report entitled, “2017 Probation Revocations: Offenders Sentenced from 2012–2016 Revoked to Prison through 2017.” She explained that the report shows that individuals who are Native American have much higher probation revocations rates compared to people of other races.

Chair Mitchell called on members of the public present and asked if anyone wished to speak regarding the Commission’s Work Plan.

Rep. Carlos Mariani, Chair of the House Public Safety and Criminal Justice Reform Finance and Policy Division, addressed the Commission. Rep. Mariani addressed the issue of probation reform. Rep. Mariani said that inequities have mounted in the use of probation that are having a grossly disparate impact on communities of color, indigenous communities, and regional communities in Minnesota, compounded by overly long probationary times. Rep. Mariani expressed his belief that the Commission has the statutory authority to act on providing strong guidelines.

Terry Gruzebeck addressed the Commission. Mr. Gruzebeck spoke about a proposal to modify Minnesota Sentencing Guidelines for convicted murderers. The proposal is to adopt the United Kingdom’s new ‘Helens law’. Helen’s law provides that no convicted murderer who has not disclosed the location of the decedent’s body may be granted probation or parole of any form until they disclose that location.

Chair Mitchell thanked the members of the public for their comments.

Director Reitz explained the process for the recording Commission members’ preferred workplan priority preferences. Director Reitz displayed a table summarizing the members’ workplan ideas, as submitted to him after the June meeting, and explained that each Commission member’s folder contained 5 dots. He invited each member, during the upcoming recess, to place dots in the table’s center column to represent the priority that topic should receive in the workplan. He also invited Commission to place a Post-it Note in the right column to indicate a belief that the topic can and should be finalized in 2019.

A 5-minute recess was called at 3:13 p.m. to give the members an opportunity to indicate their preferences. The meeting was called back to order at 3:19 p.m.

At the conclusion of the recess, 18 priority dots had been allocated to the topic of “Probation guidelines/term limits/revocations”; 11 dots had been allocated to “Theft and theft-related offense rankings”; 7 dots had been allocated to “Mandatory minimum sentencing under § 609.11; review offense with high departure rates; review violent felonies definition”; and 6 dots had been
allocated to “Reducing the State’s prison population without impacting public safety.” Because “Comprehensive review of child pornography rankings” was a legislatively mandated topic, members had not been asked to prioritize it.

With respect to whether the topic can and should be finalized in 2019, there was one “yes” vote for “Comprehensive review of child pornography rankings”; 4 “yes” votes for “Probation guidelines/term limits/revocations”; and 1 “yes” vote for “Mandatory minimum sentencing under § 609.11; review offense with high departure rates; review violent felonies definition.”

At this point, the table appeared as shown:

<table>
<thead>
<tr>
<th>TOPIC</th>
<th>TOPIC PRIORITY (ALLOCATE YOUR FIVE DOTS)</th>
<th>THIS TOPIC CAN AND SHOULD BE FINALIZED IN 2019 (I.E., IT’S A THREE-MONTH PROJECT) (A POST-IT NOTE IS YOUR “YES” VOTE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive review of child pornography rankings</td>
<td>[N/A – THIS IS MANDATORY SO THERE IS NO NEED TO PRIORITIZE]</td>
<td></td>
</tr>
<tr>
<td>Reducing the State’s prison population without impacting public safety</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Probation guidelines/term limits/revocations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mandatory minimum sentencing under § 609.11; review offenses with high departure rates; review violent felonies definition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Theft and theft-related offense rankings</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A discussion from the Commission followed regarding clarification of the right column. Some Commission members did not understand that “Comprehensive review of child pornography rankings” was an option for a “yes” vote in the right column. Following the discussion, three more Commission members added their Post-it Notes to support the proposition that “Comprehensive review of child pornography rankings” can and should be finalized in 2019, after which the table appeared as shown:
7. **Appointments to Groups Established in 2019 Session Laws**

This was on the agenda as a possible action item.

**A. Criminal Sexual Conduct Statutory Reform Working Group**

Chair Mitchell stated that the Commission has been asked to appoint a member to the Criminal Sexual Conduct Statutory Reform Working Group. Chair Mitchell asked if anyone on the Commission was interested in serving as a representative. Ms. Honsey volunteered, and Chair Mitchell stated Ms. Honold is interested as well.

**Motion** by Ms. Middlebrook and second by Ms. Estrada to appoint Ms. Honsey as a representative to the Criminal Sexual Conduct Statutory Reform Working Group.

**Motion carried.**

**B. Community Competency Restoration Task Force**

Chair Mitchell stated that the Commission has been asked to appoint a member to the Community Competency Restoration Task Force. Chair Mitchell asked if anyone on the Commission was interested in serving as a representative. Ms. Middlebrook volunteered.
Motion by Ms. Estrada and second by Ms. Honsey to appoint Ms. Middlebrook as a representative to the Community Competency Restoration Task Force.

Motion carried.

8. Commission’s Meeting Calendar

This was on the agenda as a possible action item.

A. Possibly Moving Nov. 14, 2019 Meeting (to the Week of Nov. 4–8)

Chair Mitchell explained that, to accommodate both her own schedule and a potential December public hearing, it was desirable to advance the date of the Nov. 14, 2019, meeting. Chair Mitchell asked what dates were best for the November meeting. The date of Wednesday, November 6, 2019, was suggested. No Commission member objected. Without objection, the Chair moved the November Commission meeting date to November 6, 2019.

B. Meeting Durations

Chair Mitchell asked the Commission to consider increasing the scheduled length of the meetings from two hours to three hours. A discussion ensued. Without objection, the Chair announced that future meetings would ordinarily be scheduled for 2½ hours, to begin at 1 p.m. and end at 3:30 p.m.

9. Executive Director’s Report

This was on the agenda as an information item.

Chair Mitchell asked Director Reitz if there were other pressing issues in his report. Director Reitz said that staff will publish the revised 2019 Sentencing Guidelines on Thursday, August 1, 2019. He explained that the electronic worksheet changes are in production right now, and extended his compliments and thanks to Commissioner Schnell for his technology staff’s excellent assistance in making the changes to criminal history calculation in a professional and timely manner. Director Reitz said that the National Association of Sentencing Commissions annual conference will be held in early August and that Commissioner Orput, Commissioner Honsey, and Chair Mitchell will be attending, as well as two staff members.

10. Public Input

Chair Mitchell called on members of the public present and asked if anyone wished to speak. No members of the public came forward.

11. Adjournment

Without objection, the Chair adjourned the meeting at 3:43 p.m.
Notice of Public Hearing

Proposed Amendments to the Minnesota Sentencing Guidelines and Commentary

Date of Notice: June 17, 2019
Date of Hearing: July 18, 2019

The Minnesota Sentencing Guidelines Commission will hold a public hearing on Thursday, July 18, 2019, at 1:30 p.m. in Room 1100 of the Minnesota Senate Building, 95 University Ave. W., Saint Paul, Minnesota 55155. The public hearing is being held to consider proposed modifications to the Minnesota Sentencing Guidelines and Commentary resulting from legislative amendments, non-legislative amendments, and technical corrections. Modifications described in sections A through E, below, are subject to final adoption after public hearing. Modifications described in section F, on page 29, are subject to public hearing, final adoption, and submission to the Legislature by January 15, 2020. The modifications are effective on the date described in each section.

All interested persons are encouraged to attend the hearing and offer comments. Persons wishing to speak may register in advance by contacting the Commission’s office at the below address or telephone number, or by e-mail at sentencing.guidelines@state.mn.us. If you need special accommodations to attend, please contact the Minnesota Sentencing Guidelines Commission as soon as possible. This notice is available in alternative formats upon request.

The Commission will hold the record open for five calendar days after the public hearing to accept written comment. On Thursday, July 25, 2019, the Commission will meet at 1:30 p.m. in the Lady Slipper Conference Room, Centennial Office Building, 658 Cedar Street, Saint Paul, Minnesota 55155, to finally adopt or reject the proposed modifications.

A. New Crime Laws Affecting the Guidelines – Effective August 1, 2019

On June 6, 2019, the Commission reviewed new felony offenses created or amended by the 2019 Minnesota Session Laws and proposes the following related modifications.
Subject to public hearing and final adoption, the following amendments are effective August 1, 2019, and apply to offenders whose date of offense is on or after that date.

1. **Criminal Sexual Conduct – Actor is Peace Officer**

   **Legislative Act:** 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, §§ 7–8

   **Description:** The act amends third- and fourth-degree criminal sexual conduct (CSC) offenses by adding a clause whereby a licensed peace officer commits the crime by engaging in sexual penetration (third-degree CSC) or sexual contact (fourth-degree CSC) with someone who is physically or constructively restrained by the officer, or who does not reasonably feel free to leave the officer’s presence. Consent to the sexual activity is not a defense.

   **Proposed Modifications:** Rank the new third- and fourth-degree CSC offenses consistently with the existing third- and fourth-degree CSC offenses that prohibit sexual conduct by offenders in particular occupational relationships. (By making no changes to the permissive-consecutive list in § 6, the Commission is including the new offense on the list.)


   **4.B. Sex Offender Grid**

   [SEE CONSOLIDATED MODIFICATIONS ON PAGE 10, BELOW]

   * * *

   **Section 5.A. Offense Severity Reference Table**

   * * *

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Criminal Sexual Conduct 3rd Degree</td>
<td>609.344, subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)</td>
</tr>
<tr>
<td></td>
<td>Criminal Sexual Conduct 4th Degree</td>
<td>609.345, subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)</td>
</tr>
</tbody>
</table>

   * * *

   **Section 5.B. Severity Level by Statutory Citation**

   * * *
<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.344 subd.</td>
<td>Criminal Sexual Conduct 3rd Degree</td>
<td>C</td>
</tr>
<tr>
<td>1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)</td>
<td></td>
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<tr>
<td>** * * *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>609.345 subd.</td>
<td>Criminal Sexual Conduct 4th Degree</td>
<td>E</td>
</tr>
<tr>
<td>1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>** * * *</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Section 6. Offenses Eligible for Permissive Consecutive Sentences**

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.344, subd.1</td>
<td>Criminal Sexual Conduct 3rd Degree</td>
</tr>
<tr>
<td>609.345, subd.1</td>
<td>Criminal Sexual Conduct 4th Degree</td>
</tr>
</tbody>
</table>

**2. Child Pornography and Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)**

**Legislative Act:** 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, §§ 12–18

**Description:** The act amends the maximum penalties applicable to Child Pornography and Use of Minors in Sexual Performance when committed by repeat or predatory offenders, or when involving children under age thirteen. Under current law, the maximum imprisonment terms for Child Pornography possession and dissemination increase when committed by repeat or predatory offenders. The act maintains (with some revisions) these two factors and adds a third: the involvement of a child under age thirteen. The act also applies these three factors to increase the statutory maximum imprisonment term for Use of Minors in Sexual Performance. The act adjusts the maximum fines as well. Finally, the act increases, from 10 years to 15 years, the conditional release term applicable to violators of these offenses who had previously been convicted of one of these offenses or of a CSC offense.
**Proposed Modifications:** Pending completion of the Commission’s comprehensive review of the rankings of these offenses,\(^1\) maintain existing rankings. For Child Pornography offenses, treat the new and amended penalty-increasing factors (now including the involvement of a child under 13) the same as the existing penalty-increasing factors (i.e., when committed by repeat or predatory offenders). Assign Severity Level D to Use of Minors in Sexual Performance when the penalty-increasing factors are present, and include the enhanced offense on the list of offenses eligible for permissive consecutive sentencing. Make “Child Pornography” terminology consistent. Change statutory references to conform to the new statutory structure.


* * *

**2.B.105.** If an offense has been repealed, but the elements of that offense have been incorporated into another felony statute, determine the appropriate severity level based on the severity level ranking for the current felony offense containing those similar elements. For example, in 2010, the Legislature recodified violations of domestic abuse no contact orders from Minn. Stat. § 518B.01, subd. 22(d) into Minn. Stat. § 629.75, subd. 2(d). This policy also applies to offenses that are currently assigned a severity level ranking, but were previously unrated and excluded from the Offense Severity Reference Table. For example, possession of pornographic work involving minors dissemination of child pornography under Minn. Stat. § 617.247, subd. 3(a), was unrated until August 1, 2006. It is currently ranked at Severity Level E, and receives a weight of 1\(\frac{1}{2}\) points.

* * *

**2.E.3. Conditional Release.** Several Minnesota statutes provide for mandatory conditional release terms that must be served by certain offenders once they are released from prison. The court must pronounce the conditional release term when sentencing for the following offenses:

- First-degree (felony) driving while impaired. Minn. Stat. § 169A.276, subd. 1(d).

- Predatory offense registration violation committed by certain offenders. Minn. Stat. § 243.166, subd. 5a.

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\(^1\) See 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, § 22 (requiring the Commission to review and consider modifying how the Guidelines address these crimes as compared to similar crimes, including other sex offenses and other offenses with similar maximum penalties.).
• Assault in the fourth degree against secure treatment facility personnel. Minn. Stat. § 609.2231, subd. 3a(d).

• First- through fourth-degree criminal sexual conduct and criminal sexual predatory conduct. Minn. Stat. § 609.3455, subds. 6-8.

• Use of minors in sexual performance. Minn. Stat. § 617.246, subd. 7.


* * *

4.B. Sex Offender Grid

[SEE CONSOLIDATED MODIFICATIONS ON PAGE 10, BELOW]

* * *

Section 5.A. Offense Severity Reference Table

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>D</td>
<td>Dissemination of Child Pornography (Subsequent, or by Predatory Offender, or Child Under 13)</td>
<td>617.247, subd. 3(b)</td>
</tr>
<tr>
<td></td>
<td>Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)</td>
<td>617.246, subd. 2(b), 3(b), 4(b)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>E</td>
<td>Use Minors in Sexual Performance</td>
<td>617.246 subd. 2,3,4</td>
</tr>
<tr>
<td></td>
<td>Dissemination of Child Pornography</td>
<td>617.247, subd. 3(a)</td>
</tr>
<tr>
<td></td>
<td>Use of Minors in Sexual Performance</td>
<td>617.246, subd. 2(a), 3(a), 4(a)</td>
</tr>
</tbody>
</table>
### Section 5.B. Severity Level by Statutory Citation

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>617.246 subd. 2(a) 3(a) 4(a)</td>
<td>Use of Minors in Sexual Performance Prohibited</td>
<td>E</td>
</tr>
<tr>
<td>617.246 subd. 2(b) 3(b) 4(b)</td>
<td>Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)</td>
<td>D</td>
</tr>
<tr>
<td>617.247 subd. 3</td>
<td>Dissemination of Pictorial Representation of Minors (Subsequent or by Predatory Offenders)</td>
<td>D</td>
</tr>
<tr>
<td>617.247 subd. 3(a)</td>
<td>Dissemination of Pictorial Representation of Minors Child Pornography</td>
<td>E*</td>
</tr>
<tr>
<td>617.247 subd. 3(b)</td>
<td>Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)</td>
<td>D</td>
</tr>
<tr>
<td>617.247 subd. 4</td>
<td>Possession of Pictorial Representation of Minors (Subsequent or by Predatory Offenders)</td>
<td>F</td>
</tr>
<tr>
<td>617.247 subd. 4(a)</td>
<td>Possession of Pictorial Representation of Minors Child Pornography</td>
<td>G</td>
</tr>
</tbody>
</table>
**Statute Number | Offense Title | Severity Level**
--- | --- | ---
617.247 subd. 4(b) | Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13) | F

**Section 6. Offenses Eligible for Permissive Consecutive Sentences**

**Statute Number | Offense Title**
--- | ---
617.246, subd. 2(a), 3(a), 4(a) | Use of Minors in Sexual Performance Prohibited
617.246, subd. 3 | Operation/Owner Use of Minors in Sexual Performance
617.246, subd. 4 | Dissemination Use of Minors in Sexual Performance
617.246, subd. 2(b), 3(b), 4(b) | Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)
617.247, subd. 3(a) | Dissemination of Pictorial Representations of Minors Child Pornography
617.247, subd. 3(b) | Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)
617.247, subd. 4(a) | Possession of Pictorial Representations of Minors Child Pornography
617.247, subd. 4(b) | Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)

**Appendix 3. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Reference Table**

**Statute | Offense | Severity Level | Statutory Maximum (Months) | Exceeds Statutory Maximum At:**
--- | --- | --- | --- | ---
609.776 | Interference with Emergency Comm. | 5 | 36 months | CHS 4
<table>
<thead>
<tr>
<th>Statute</th>
<th>Offense</th>
<th>Severity Level</th>
<th>Statutory Maximum (Months)</th>
<th>Exceeds Statutory Maximum At:</th>
</tr>
</thead>
<tbody>
<tr>
<td>617.247, subd. 3(a)</td>
<td>Dissemination of Pictorial Representation of Minors Child Pornography</td>
<td>E</td>
<td>84 months</td>
<td>CHS 5</td>
</tr>
</tbody>
</table>

### 3. Surreptitious Observation Device (Minor Victim and Sexual Intent)

**Legislative Act:** 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, § 11

**Description:** Under existing law, the surreptitious installation or use of an observation device, with intent to intrude upon or interfere with privacy, in a house, hotel room, tanning booth, or other place where a person has an expectation of privacy and has exposed, or is likely to expose, their intimate parts or underwear, is a gross misdemeanor. The crime becomes a felony (ranked at Severity Level 1) if committed against a minor victim when the offender knew or had reason to know the minor was present. The act creates a new felony, with a higher maximum penalty, when such an offense (using a surreptitious observation device against a minor victim) is committed with sexual intent by someone more than 36 months older than the minor victim. The new felony is added to the list of offenses for which persons are required to register as predatory offenders.

**Proposed Modifications:** Assign the new offense a severity level of G on the Sex Offender Grid, and include the new offense on the list of offenses eligible for permissive consecutive sentencing. Modify appendix 3 to reflect that the presumptive sentence exceeds the statutory maximum at higher criminal history scores.


### 4.B. Sex Offender Grid

*THIS OFFENSE IS NOT LISTED ON THE SEX OFFENDER GRID (SEE PAGE 10), BECAUSE THE 2019 SEX OFFENDER GRID, AS PROPOSED, WILL DISPLAY EXAMPLE OFFENSES ONLY. SEE PAGE 9 (“PROPOSED STYLE CHANGE TO 2019 SEX OFFENDER GRID”).*

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### Section 5.A. Offense Severity Reference Table

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>G</td>
<td>Surreptitious Observation Device (Minor Victim and Sexual Intent)</td>
<td>609.746, subd. 1(f)</td>
</tr>
</tbody>
</table>
** Section 5.B. Severity Level by Statutory Citation **

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.746 subd. 1(f)</td>
<td>Surreptitious Observation Device (Minor Victim and Sexual Intent)</td>
<td>G*</td>
</tr>
</tbody>
</table>

* See section 2.C.2 and Appendix 3 to determine the presumptive duration. Depending on the offender’s criminal history score, the presumptive duration may exceed the statutory maximum.

** Section 6. Offenses Eligible for Permissive Consecutive Sentences **

<table>
<thead>
<tr>
<th>Statute Number</th>
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</tr>
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<tbody>
<tr>
<td>609.746, subd. 1(f)</td>
<td>Surreptitious Observation Device (Minor Victim and Sexual Intent)</td>
</tr>
</tbody>
</table>

** Appendix 3. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Reference Table **

<table>
<thead>
<tr>
<th>Statute</th>
<th>Offense</th>
<th>Severity Level</th>
<th>Statutory Maximum (Months)</th>
<th>Exceeds Statutory Maximum At:</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.746, subd. 1(f)</td>
<td>Surreptitious Observation Device (Minor Victim and Sexual Intent)</td>
<td>G</td>
<td>48</td>
<td>CHS 5</td>
</tr>
</tbody>
</table>

PROPOSED STYLE CHANGE TO 2019 SEX OFFENDER GRID: The Commission proposes modifying the Sex Offender Grid to show example offenses only, like the Standard Grid and the Drug Offender Grid. The Commission also proposes adding plain-language examples of criminal sexual conduct to improve comprehension. The proposed modifications begin on page 10, below.
4.B. Sex Offender Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

### SEVERITY LEVEL OF CONVICTION OFFENSE

(Example offenses listed in italics)

<table>
<thead>
<tr>
<th>CRIMINAL HISTORY SCORE</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6 or more</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criminal Sexual Conduct (CSC) 1st Degree</strong></td>
<td>A</td>
<td>144</td>
<td>156</td>
<td>168</td>
<td>180</td>
<td>234</td>
<td>306</td>
</tr>
<tr>
<td></td>
<td></td>
<td>144-172</td>
<td>144-187</td>
<td>144-201</td>
<td>153-216</td>
<td>199-280</td>
<td>261-360</td>
</tr>
<tr>
<td><strong>CSC 2nd Degree–1(c)(d)(e)(f)(h) (e.g., contact, force, &amp; injury) Prostitution: Sex Trafficking³ 1st Degree–1(a)</strong></td>
<td>B</td>
<td>90</td>
<td>110</td>
<td>130</td>
<td>150</td>
<td>195</td>
<td>255</td>
</tr>
<tr>
<td></td>
<td></td>
<td>90³-108</td>
<td>94-132</td>
<td>111-156</td>
<td>128-180</td>
<td>166-234</td>
<td>217-300</td>
</tr>
<tr>
<td><strong>CSC 3rd Degree–1(c)(d)(g)(h)(i) (j)(k)(l)(m)(n)(o)(p) (e.g., penetration &amp; force/occupation) Prostitution: Sex Trafficking 2nd Degree–1a</strong></td>
<td>C</td>
<td>48</td>
<td>62</td>
<td>76</td>
<td>90</td>
<td>117</td>
<td>153</td>
</tr>
<tr>
<td></td>
<td></td>
<td>41-57</td>
<td>53-74</td>
<td>65-91</td>
<td>77-108</td>
<td>100-140</td>
<td>131-180</td>
</tr>
<tr>
<td><strong>CSC 2nd Degree–1(a)(b)(g) (e.g., contact &amp; victim under 13) CSC 3rd Degree–1(a)(e)(f) or 1(b) with ref. to subd. 2(1) (e.g., penetration &amp; child victim) Dissemination of Child Pornography (Subsequent or by Predatory Offender)</strong></td>
<td>D</td>
<td>36</td>
<td>48</td>
<td>60</td>
<td>70</td>
<td>91</td>
<td>119</td>
</tr>
<tr>
<td></td>
<td></td>
<td>41-72</td>
<td>51-84</td>
<td>60-93</td>
<td>78-109</td>
<td>102-142</td>
<td>119-168</td>
</tr>
<tr>
<td><strong>CSC 4th Degree–1(c)(d)(g)(h)(i) (j)(k)(l)(m)(n)(o)(p) (e.g., contact &amp; force/occupation) Use Minors in Sexual Performance Dissemination of Child Pornography²</strong></td>
<td>E</td>
<td>24</td>
<td>36</td>
<td>48</td>
<td>60</td>
<td>78</td>
<td>102</td>
</tr>
<tr>
<td></td>
<td></td>
<td>20-57</td>
<td>41-72</td>
<td>51-84</td>
<td>67-93</td>
<td>87-120</td>
<td>102-120²</td>
</tr>
<tr>
<td><strong>CSC 4th Degree–1(a)(b)(e)(f) (e.g., contact &amp; child victim) CSC 5th Degree Possession of Child Pornography (Subseq./Pred. Off./Under 13) (Subsequent or by Predatory Offender)</strong></td>
<td>F</td>
<td>18</td>
<td>27</td>
<td>36</td>
<td>45</td>
<td>59</td>
<td>77</td>
</tr>
<tr>
<td></td>
<td></td>
<td>18-54</td>
<td>39-54</td>
<td>51-70</td>
<td>66-92</td>
<td>72-100</td>
<td></td>
</tr>
<tr>
<td><strong>CSC 3rd Degree–1(b) with subd. 2(2) (i.e., penetration &amp; child victim 24–48 mo. younger) Indecent Exposure Possession of Child Pornography Solicit Child for Sexual Conduct²</strong></td>
<td>G</td>
<td>15</td>
<td>20</td>
<td>25</td>
<td>30</td>
<td>39</td>
<td>51</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15³-26</td>
<td>16-28</td>
<td>17-30</td>
<td>34-46</td>
<td>44-60</td>
<td>51-60²</td>
</tr>
<tr>
<td><strong>Registration Of Failure to Register as a Predatory Offenders</strong></td>
<td>H</td>
<td>12³</td>
<td>14</td>
<td>16</td>
<td>18</td>
<td>24</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12³-14</td>
<td>12³-16</td>
<td>14-19</td>
<td>16-21</td>
<td>21-28</td>
<td>26-36</td>
</tr>
</tbody>
</table>

¹ 12¹=One year and one day

² 306=Thirty-six months

³ 255=Two hundred fifty-five months
Presumptive commitment to state imprisonment. Sex offenses under Minn. Stat. § 609.3455, subd. 2, have mandatory life sentences and are excluded from the Guidelines. See section 2.E, for policies regarding those sentences controlled by law, including conditional release terms for sex offenders.

Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenders in the shaded area of the Grid may qualify for a mandatory life sentence under Minn. Stat. § 609.3455, subd. 4. See sections 2.C and 2.E.

² Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1–2.

³ Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking 1st Degree is not subject to a 90-month minimum statutory presumptive sentence so the standard range of 15% lower and 20% higher than the fixed duration applies. (The range is 77–108.)

4. Wage Theft


Description: The act amends the theft statute to include Wage Theft. The new offense is listed among those select theft offenses whose violators may, if the value of the property stolen exceeds $35,000, be sentenced to a maximum penalty of 20 years in prison and a fine of $100,000.

Proposed Modifications: Rank Wage Theft at Severity Level 2 ($5,000 or Less), Severity Level 3 (Over $5,000), and Severity Level 6 (Over $35,000). Add Wage Theft to the Theft Offense List.

Proposed modifications to 2018 Minn. Sentencing Guidelines §§ 5.A, 5.B, and 7:

5.A. Offense Severity Reference Table

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Theft Over $35,000</td>
<td>609.52, subd. 2(a)(3), (4), (15), &amp; (16), &amp; (19) with 609.52, subd. 3(1)</td>
</tr>
</tbody>
</table>

5.B. Offense Title

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Theft Crimes – Over $5,000</td>
<td>See section 7: Theft Offense List</td>
</tr>
</tbody>
</table>
### 5.B. Severity Level by Statutory Citation

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.52 subd. 2(a)(19) with subd. 3(1)</td>
<td>Wage Theft (Over $35,000)</td>
<td>6</td>
</tr>
<tr>
<td>609.52 subd. 2(a)(19)</td>
<td>Wage Theft ($5,001–$35,000)</td>
<td>3</td>
</tr>
<tr>
<td>609.52 subd. 2(a)(19)</td>
<td>Wage Theft ($5,000 or Less)</td>
<td>2</td>
</tr>
</tbody>
</table>

### 7. Theft Offense List

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.52 subd. 2(a)(19)</td>
<td>Wage Theft</td>
</tr>
</tbody>
</table>
The Commission reviewed the following felony and felony-sentencing-related offenses amended by the 2019 Minnesota Session Laws and proposes no resulting modifications.

1. Certain Criminal Sexual Conduct Crimes – Repeal of Marital Defense

   **Legislative Act:** 2019 Minn. Laws ch. 16

   **Description:** This act repeals Minn. Stat. § 609.349, which provides a voluntary relationship defense for criminal sexual conduct crimes involving the complainant’s age or state of mind.

2. Certain Criminal Sexual Conduct Crimes – Current or Recent Position of Authority

   **Legislative Act:** 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, §§ 2–8

   **Description:** This act amends the definition of position of authority in Minn. Stat. § 609.341 subd. 10, to include persons in “current or recent” positions of authority. The definition is expanded to include persons who have “assumed” positions of authority “within 120 days immediately preceding” the act. This expanded definition is applied to first- through fourth-degree criminal sexual conduct offenses.

3. Criminal Sexual Conduct in the First Degree – Clarification of Scope

   **Legislative Act:** 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, § 5

   **Description:** This act clarifies criminal sexual conduct in the first degree by amending Minn. Stat. § 609.342, subd. 1. Specifically, by changing the term “sexual penetration” to “act,” it clarifies that all section’s provisions apply to either “sexual penetration” or “sexual contact with a person under age 13” (as defined in Minn. Stat. § 609.341, subd. 11(c)). The change abrogates *State v. Ortega-Rodriguez*, 920 N.W.2d 642 (Minn. 2018).

4. Criminal Sexual Conduct in the Fifth Degree – Clothed-Buttocks Exception Repeal

   **Legislative Act:** 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, § 9

   **Description:** This act amends Minn. Stat. § 609.3451, subd. 1(1), which prohibits nonconsensual sexual contact, by eliminating the exclusion of “the intentional touching of the clothing covering the immediate area of the buttocks” from the definition of “sexual contact.”

5. Failure to Register as a Predatory Offender – Offender’s State of Mind Clarified

   **Legislative Act:** 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 5, § 9
Description: Currently, an offender commits a crime who “knowingly violates” the predatory offender registration (POR) statute’s provisions. This phrase was construed, in State v. Mikulak, 903 N.W.2d 600 (Minn. 2017), to require actual knowledge of the POR law’s provisions. In response to Mikulak,2 the act eliminates the “knowingly violates” requirement. After the change, an offender who was given notice of, knew, or reasonably should have known of, the duty to register, commits a crime by knowingly committing an act or omission that violates the law’s provisions. The penalty provisions are unchanged.

6. Felony Driving While Impaired (DWI) – Expanded List of Prior Offenses

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 6, § 3

Description: A previous conviction for a criminal vehicular homicide or criminal vehicular operation from Minnesota or another jurisdiction qualifies as a prior impaired driving incident.

7. Reckless Driving – Operating or Halting Transit Vehicle

Legislative Act: 2019 Minn. Laws ch. 10

Description: This act amends the description of reckless driving under Minn. Stat. § 169.13 to include driving a light rail transit vehicle in addition of a motor vehicle. It is a misdemeanor unless the person causes great bodily harm or death. The act also amends careless driving by adding a misdemeanor for operating or halting a light rail transit vehicle carelessly or heedlessly in disregard of the rights of others or in a manner that endangers or is likely to endanger any property or any person.

C. Technical Amendment to Crime Laws Affecting the Guidelines – Effective August 1, 2019

The Commission reviewed the following crime amended by the 2019 Minnesota Session Laws and proposes making related technical modifications.

Subject to public hearing, the following modifications are effective August 1, 2019.

- **Harassment and Stalking Terminology Change**


  **Description:** In Minn. Stat. § 609.749 (Stalking), the term “stalking” or “stalks” is changed to “harass,” “harassment,” or “harasses.” The term “pattern of stalking conduct” is changed to “stalking.”

  **Proposed Modifications:** By its action of June 6, 2019, the Commission proposes to make conforming changes. The Commission also proposes to delete an erroneous reference to a second “or Subsequent” offense (because the offense subsequent to a second offense is a third offense, ranked separately).


  * * *

  **2.D.308.** The aggravating factor involving bias motivation under section 2.D.3.b(11) cannot be used when sentencing an offender for a crime with an increased statutory maximum penalty under Minn. Stat. § 609.2233 (felony assault motivated by bias), or for a crime that was elevated to a felony offense because of bias motivation (e.g., Minn. Stat. §§ 609.2231, subd. 4 (fourth-degree assault); 609.595, subd. 1a(a) (criminal damage to property); 609.749, subd. 3(a)(1) (stalking harassment)). The Commission intends that a penalty for a bias-motivated offense be subject to enhancement only once. * * *

  **5.A. Offense Severity Reference Table**

  * * *
### 5.B. Severity Level by Statutory Citation

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.749, subd. 3(a)(b)</td>
<td>Stalking Harassment (Aggravated Violations)</td>
<td>4</td>
</tr>
<tr>
<td>609.749, subd. 4(a)</td>
<td>Stalking Harassment (2nd or Subsequent Violation)</td>
<td>4</td>
</tr>
<tr>
<td>609.749, subd. 4(b)</td>
<td>Stalking Harassment (3rd or Subsequent Violations)</td>
<td>5</td>
</tr>
<tr>
<td>609.749, subd. 5</td>
<td>Stalking (Pattern of Conduct)</td>
<td>5</td>
</tr>
</tbody>
</table>

### 6. Offenses Eligible for Permissive Consecutive Sentences

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.749, subd. 3</td>
<td>Stalking Harassment (Aggravated Violations)</td>
</tr>
<tr>
<td>609.749, subd. 4</td>
<td>Stalking Harassment (Subsequent Violations)</td>
</tr>
<tr>
<td>609.749, subd. 5</td>
<td>Stalking (Pattern of Conduct)</td>
</tr>
</tbody>
</table>
D. Non-Legislative Amendments to the Guidelines – Effective August 1, 2019

As a result of action taken at its meetings on December 20, 2018, May 9, 2019, and June 6, 2019, the Commission proposes modifications both to the 2018 Minnesota Sentencing Guidelines and Commentary and to the 2019 amendments to the Minnesota Sentencing Guidelines and Commentary submitted to the Legislature on January 11, 2019.

Subject to public hearing and final adoption, the following modifications are effective August 1, 2019.

1. Clarify Guidelines’ Effective Dates

   **Proposed Modifications:** In light of *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017), the Commission, by its action of December 20, 2018, proposes to clarify effective dates of modifications. The proposed modifications to § 3.G, shown below, were submitted to the Legislature on January 11, 2019.3

   *Proposed modifications to 2018 Minn. Sentencing Guidelines § 3.G:*

   **[3]G. Modifications**

   1. **Policy Modifications.** Modifications to sections 1 through 8 of the Minnesota Sentencing Guidelines, and associated commentary and appendices, apply to offenders whose date of offense is on or after the specified modification effective date.

   2. **Clarifications of Existing Policy.** Modifications to commentary and appendices relating to existing Guidelines policy apply to offenders sentenced on or after the specified effective date.

2. Reconcile Conflicts Regarding Offenses Committed while Under Sentence

   **Proposed Modifications:** By its action of May 9, 2019, the Commission proposes to reconcile policy conflicts regarding offenses committed while under sentence, and, specifically, to clarify the application of consecutive sentencing policy to offenses, such as Escape from Electronic Monitoring, committed while under sentence.

   *Proposed modifications to 2018 Minn. Sentencing Guidelines §§ 2.C.3.e, 2.F.1.b, & 2.F.2.a(2)(i); Comment 2.F.102; and Appendix 1:

---


***

3. Finding the Presumptive Sentence for Certain Offenses. ***

   e. Offenses Committed While Under State Authority. The presumptive disposition for escape from an executed sentence, felony assault committed by an inmate serving an executed term of imprisonment, or assault on secure treatment facility personnel is commitment. Pursuant to section 2.F.1, it is presumptive for escape from an executed sentence term of imprisonment and for felony assault committed by an inmate serving an executed term of imprisonment to be sentenced consecutively to the offense for which the inmate was confined. The presumptive duration is determined by the presumptive sentencing consecutive policy (see section 2.F.1, Presumptive Consecutive Sentences).

   ***

[2]F. Concurrent/Consecutive Sentences

***

1. Presumptive Consecutive Sentences.

   a. Criteria for Imposing a Presumptive Consecutive Sentence. Consecutive sentences are presumptive (required under the Guidelines) when:

      (1) the offender was, at the time of the current offense:

         (i) serving an executed term of imprisonment, disciplinary confinement, or reimprisonment; or
         (ii) on escape status from an executed term of imprisonment, disciplinary confinement, or reimprisonment; and

      (2) the presumptive disposition for the current offense(s) is commitment.

   b. Finding the Presumptive Disposition. The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an
executed term of imprisonment is always commitment. In all other cases, the The presumptive disposition is determined using the criteria in section 2.C. The presumptive disposition for an escape from an executed sentence or for a felony assault committed by an inmate serving an executed term of imprisonment is always commitment.

* * *

2.F.102. When the court pronounces presumptive consecutive sentences for multiple offenses, each new offense will be sentenced at a Criminal History Score of 1. The new offenses will run concurrently to each other, but consecutive to the prior offense.

For example, an offender is convicted of Escape from Custody and First-Degree Burglary of an Occupied Dwelling following escape from an executed sentence term of imprisonment. The term of imprisonment remaining on the original offense from which the offender escaped is 18 months. Each of the new offenses will have a presumptive consecutive sentence duration found at a Criminal History Score of 1: Escape from Custody (Severity Level 3), 13 months; Burglary (Severity Level 6), 27 months. The two sentences will run concurrently to each other, and the longer of the two durations will be added to the time remaining on the original term of imprisonment (here, 27 months will be added to the time remaining on the original 18-month sentence). Aggregated, the new presumptive consecutive sentence duration is 45 months.

* * *

2. Permissive Consecutive Sentences.

a. Criteria for Imposing a Permissive Consecutive Sentence. Consecutive sentences are permissive (may be given without departure) only in the situations specified in this section.

(1) Specific Offenses; Presumptive Commitment. * * *

(iii) Felony Conviction After Escape (Non-Executed Sentence). If the offender commits and is convicted for a new felony crime while on felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – from a non-executed felony sentence, the new felony conviction may be sentenced consecutively to the sentence for the escape or the offense for which the offender was confined.
(2) **Other Offenses.** Consecutive sentences for the following offenses are always permissive and there is no dispositional departure if the sentences are executed.

(i) **Felony Escape.** If the offender is convicted of felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – and the offender did not escape from an executed prison sentence term of imprisonment, disciplinary confinement, or reimprisonment (see section 2.F.1.a(1)(ii)), the escape may be sentenced consecutively to the sentence for which the offender was confined.

(ii) **Felony Conviction After Escape (Executed Sentence).** If the offender committed and is convicted for a new felony crime committed while on felony escape from lawful custody – as defined in Minn. Stat. § 609.485 – from an executed felony sentence, the new felony may be sentenced consecutively to the sentence for the escape.

* * *

**Appendix 1. Mandatory and Presumptive Sentences Reference Table**

<table>
<thead>
<tr>
<th>Statute</th>
<th>Offense</th>
<th>Prerequisite or Conditions</th>
<th>Minimum Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.485</td>
<td>Escape</td>
<td>Offense committed during “Term of Imprisonment” portion of Escape from executed sentence</td>
<td>Grid Time</td>
</tr>
</tbody>
</table>

* * *

3. **Clarify Prior Felony Resulting in Non-Felony Sentence**

**Proposed Modifications:** By its action of June 6, 2019, the Commission proposes to eliminate the ambiguity identified in *State v. Stewart*, 923 N.W.2d 668, 677–80 (Minn. Ct. App. 2019), *review denied* (Minn. Apr. 16, 2019), by deleting the first clause of § 2.B.1.h.

**Proposed modifications to 2018 Minn. Sentencing Guidelines § 2.B.1.h:**

[2]B. **Criminal History**

* * *
1. **Prior Felonies.** * * *

   h. **Non-Felony Sentence.** Except when a monetary threshold determines the offense classification of the prior offense (see section 2.B.7), when a prior felony conviction resulted in a non-felony sentence (misdemeanor or gross misdemeanor), the conviction must be counted in the criminal history score as a misdemeanor or gross misdemeanor conviction as indicated in section 2.B.3.

   * * *

4. **Clarify New Policy for Prior Severe Violent Offense Conviction – Severe Violent Offenses Converted to Misdemeanors or Gross Misdemeanors**

   **Proposed Modifications:** A new sentence modifier, submitted to the Legislature January 11, 2019,

   By its action of May 9, 2019, the Commission proposes to clarify that stays of imposition qualify as prior severe violent offenses, but sentences within misdemeanor or gross misdemeanor limits do not qualify. This proposal is consistent with existing Sentencing Guidelines’ policy regarding treatment of a prior offense as a felony or gross misdemeanor.


   * * *

   [2]G. **Convictions for Attempts, Conspiracies, and Other Sentence Modifiers**

   14. **Second or Subsequent Severe Violent Offense.**

      a. The following definitions apply to this section:

      (1) A “severe violent offense” is an offense listed in Section 8, Severe Violent Offense List. “Severe violent offense” includes attempt or conspiracy, and includes an equivalent felony from a jurisdiction other than Minnesota, as outlined in Section 2.B.5 (Convictions from Jurisdictions other than Minnesota). A current offense is not a “severe violent offense” if section 2.E.4 (Mandatory Life Sentences) applies.

---

(2) “Second or subsequent severe violent offense” means that prior to the commission of current severe violent offense, the offender has been adjudicated guilty of one or more severe violent offenses.

(3) A “prior severe violent offense conviction” is an adjudication that qualifies the current offense as a second or subsequent severe violent offense. A conviction for an offense excluded from criminal history score computation under section 2.B.1.c (Felony Decay Factor) does not qualify as a “prior severe violent offense conviction.” A conviction that resulted in a non-felony sentence (see section 2.B.1.h) does not qualify as a “prior severe violent offense conviction” if the non-felony sentence was imposed before the current offense date.

***
E. Non-Legislative Technical Amendment to the Guidelines – Effective August 1, 2019

As a result of action taken at its meeting June 6, 2019, the Commission proposes technical modifications both to the 2018 Minnesota Sentencing Guidelines and Commentary and to the proposed 2019 amendments to the Minnesota Sentencing Guidelines and Commentary submitted to the Legislature on January 11, 2019.

Subject to public hearing and final adoption, the following modifications are effective August 1, 2019.

1. Correct Cross-References in Comment

   **Proposed Modifications:** The Commission proposes to correct the erroneous cross-reference in Comment 2.B.107.

   **Proposed modification to 2018 Minn. Sentencing Guidelines Comment 2.B.107:**

   **2.B.107.** In cases of multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered. The phrase “before the current sentencing” means that in order for prior convictions to be used in computing the criminal history score, the felony sentence for the prior offense must have been stayed or imposed before sentencing for the current offense. When multiple current offenses are sentenced on the same day before the same court, sentencing must occur in the order in which the offenses occurred. The dates of the offenses must be determined according to the procedures in section 2.A. 2.

2. Clarify Examples on Standard Sentencing Grid

   **Proposed Modifications:** The Commission proposes to clarify the Standard Sentencing Grid, adding to the example offense of murder in the third degree listed at Severity Level 10, “(Depraved Mind)”; listing “Murder, 3rd Degree (Controlled Substances)” as an example offense at Severity Level 9; and making consistent stylistic changes to example offenses listed at severity levels 9, 10 and 11.
Proposed modifications to 2018 Minn. Sentencing Guidelines § 4.A:

4.A. Sentencing Guidelines Grid

** **

<table>
<thead>
<tr>
<th>SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)</th>
<th>CRIMINAL HISTORY SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Murder, 2nd Degree (Intentional murder; Drive-by-Shootings)</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>261-367</td>
</tr>
<tr>
<td>Murder, 3rd Degree Murder, 2nd Degree (Unintentional murder) Murder, 3rd Degree (Depraved Mind)</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>128-180</td>
</tr>
<tr>
<td>Murder, 3rd Degree (Controlled Substances) Assault, 1st Degree</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>74-103</td>
</tr>
</tbody>
</table>

** **

3. Strike Reference to Specific Statute Year

Proposed Modifications: The Commission proposes to delete an unnecessary reference to a particular year’s edition of Minnesota Statutes, as such references are not consistent with the Guidelines style.

Proposed modification to 2018 Minn. Sentencing Guidelines § 2.D.3.a(8):

[2.D.3.a.](8) In the case of a controlled substance offense conviction, the offender is found by the district court to be particularly amenable to probation based on adequate evidence that the offender is chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minn. Stat. § 152.152(2014).

4. Correct Statute Citation – Theft of Services (Over $5,000)

Proposed Modifications: The Commission proposes to correct the citation for “Theft of Services (Over $5,000)” in § 5.B, which presently lists the wrong numbered clause.

Proposed modification to 2018 Minn. Sentencing Guidelines § 5.B:
5.B. Severity Level by Statutory Citation

* * *

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.52 subd. 2(a)(12)(13)</td>
<td>Theft of Services (Over $5,000)</td>
<td>3</td>
</tr>
<tr>
<td>609.52 subd. 2(a)(13)</td>
<td>Theft of Services ($5,000 or Less)</td>
<td>2</td>
</tr>
</tbody>
</table>

* * *

5. Correct Statute Citation – Financial Transaction Card Fraud (Over $35,000)

**Proposed Modifications:** The Commission proposes to change the citation for Financial Transaction Card Fraud (Over $35,000) to conform to the current statutory structure.5

**Proposed modifications to 2018 Minn. Sentencing Guidelines §§ 5.A and 5.B:**

5.A. Offense Severity Reference Table

* * *

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Financial Transaction Card Fraud (Over $35,000)</td>
<td>609.821 subd. 3(a)(1)(i)</td>
</tr>
</tbody>
</table>

* * *

5.B. Severity Level by Statutory Citation

* * *

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.821 subd. 3(a)(1)(i)</td>
<td>Financial Transaction Card Fraud (Over $35,000)</td>
<td>5</td>
</tr>
</tbody>
</table>

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6. Correct Statute Title – Unlawful Transfers or Sales of Recordings

**Proposed Modifications:** The Commission proposes to change an offense title from “Unlawful Transfer of Sounds” to “Unlawful Transfers or Sales of Recordings” to conform to the current statutory language.\(^6\)


5.A. Offense Severity Reference Table

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNRANKED</td>
<td>Unlawful Transfers or Sales of Recordings</td>
<td>325E.201</td>
</tr>
</tbody>
</table>

5.B. Severity Level by Statutory Citation

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>325E.201</td>
<td>Unlawful Transfers or Sales of Recordings</td>
<td>Unranked</td>
</tr>
</tbody>
</table>

7. Restore Stricken Word & Correct Subject-Verb Agreement

**Proposed Modifications:** The Commission proposes to restore a word ("of") inadvertently stricken by the proposed 2019 amendments to the Sentencing Guidelines submitted to the Legislature on

---

January 11, 2019. Additionally, the Commission proposes to change “has” to “have” in the same sentence because it describes a plural noun.

*Proposed modifications to 2019 amendments to Minn. Sentencing Guidelines § 2.B.3.e:*

[2.B.3.e. **Decay Factor.** A prior misdemeanor or gross misdemeanor sentence or stay of imposition following a misdemeanor or gross misdemeanor conviction must **not** be used in computing the criminal history score if ten years **has** have elapsed between the date of the initial sentence following the prior conviction and the date of the current offense. However, misdemeanor sentences that result from the successful completion of a stay of imposition for a felony conviction are subject to the felony decay factor in section 2.B.1.c.]

**8. Make Word Style Consistent**

*Proposed Modifications:* For style consistency, the Commission proposes to change the word “Section” from uppercase to lowercase in two places within the proposed 2019 amendments submitted to the Legislature January 11, 2019.

*Proposed modifications to 2019 amendments to Minn. Sentencing Guidelines (§§ 2.B.2.e(4)(iv) and 2.G.14.a(1)):*

[2.B.2.e.]4. The court may not, however, waive assignment of a custody status point or half-point if either the current offense or a custody status offense is any of the following offenses, including an equivalent felony offense from a jurisdiction other than Minnesota. As used within this paragraph, “custody status offense” means a prior offense resulting in a custody status that caused the offender to qualify for a custody status point as described in section a, above.

(i) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of 8, 9, 10, or 11 on the Standard Grid;

(ii) an offense on the Sex Offender Grid other than Failure to Register as a Predatory Offender (Minn. Stat. § 243.166);

(iii) an offense currently assigned a severity level ranking, on the Offense Severity Reference Table, of D8 or D9 on the Drug Offender Grid;

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an offense listed in Section section 8, Severe Violent Offense List;

(v) Fleeing Peace Officer (Great Bodily Harm) (Minn. Stat. § 609.487, subd. 4(b));
or

(vi) an attempt or conspiracy to commit one of these offenses.

* * *

[2]G. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers

* * *

14. Second or Subsequent Severe Violent Offense.

a. The following definitions apply to this section:

(1) A “severe violent offense” is an offense listed in Section section 8, Severe Violent Offense List. “Severe violent offense” includes attempt or conspiracy, and includes an equivalent felony from a jurisdiction other than Minnesota. A current offense is not a “severe violent offense” if section 2.E.4 (Mandatory Life Sentences) applies.

* * *
F. Non-Legislative Amendments to the Guidelines, Severity-Level Rankings — Effective August 1, 2020

As a result of action taken at its meetings May 9, 2019, and June 6, 2019, the Commission proposes the following severity-level rankings.

Subject to public hearing, final adoption, and submission to the Legislature by January 15, 2020, the following amendments will become effective August 1, 2020, and will apply to offenders whose date of offense is on or after that date.

1. Rank Escape from Electronic Monitoring at Severity Level 3

   Proposed Modifications: By its action of May 9, 2019, the Commission proposes to assign Severity Level 3 to Escape from Electronic Monitoring under Minn. Stat. § 609.485, subd. 4(f). The offense is now designated as unranked. Additionally, the Commission proposes to strike the word “home” from the title to conform to the statute.

   Proposed modifications to 2019 Minn. Sentencing Guidelines §§ 5.A and 5.B:

   5.A. Offense Severity Reference Table

   * * *

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unranked</td>
<td>Escape from Electronic Home Monitoring</td>
<td>609.485, subd. 4(f)</td>
</tr>
</tbody>
</table>

   * * *

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Escape from Electronic Monitoring</td>
<td>609.485, subd. 4(f)</td>
</tr>
</tbody>
</table>

   * * *

   5.B. Severity Level by Statutory Citation

   * * *
2. Rank Offering Counterfeit Currency

**Proposed Modifications:** By its action of June 6, 2019, the Commission proposes to rank Offering Counterfeit Currency under Minn. Stat. § 609.632, subd. 3, at Severity Level 2 ($5,000 or Less), Severity Level 3 ($5,001–$35,000), and Severity Level 6 (Over $35,000). Counterfeiting of Currency is now designated as unranked, and that designation will continue for Counterfeiting of Currency (Manufacturing or Printing) and Counterfeiting of Currency (Means for False Reproduction).

Proosed modifications to 2019 Minn. Sentencing Guidelines §§ 5.A and 5.B:

**5.A. Offense Severity Reference Table**

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Offense Title</th>
<th>Statute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Offering Counterfeit Currency (Over $35,000)</td>
<td>609.632, subd. 3 with subd. 4(b)(1)</td>
</tr>
<tr>
<td>3</td>
<td>Offering Counterfeit Currency ($5,001–$35,000)</td>
<td>609.632, subd. 3 with subd. 4(b)(2)</td>
</tr>
<tr>
<td>2</td>
<td>Offering Counterfeit Currency ($5,000 or Less)</td>
<td>609.632, subd. 3 with subd. 4(b)(3)</td>
</tr>
<tr>
<td>Severity Level</td>
<td>Offense Title</td>
<td>Statute Number</td>
</tr>
<tr>
<td>----------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
<td>UNRANKED</td>
<td>Counterfeiting of Currency (Manufacturing or Printing/Means for False Reproduction)</td>
<td>609.632, subd. 1 &amp; 2 with subd. 4(a)</td>
</tr>
</tbody>
</table>

**5.B. Severity Level by Statutory Citation**

<table>
<thead>
<tr>
<th>Statute Number</th>
<th>Offense Title</th>
<th>Severity Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>609.632 subd. 3 with subd. 4(b)(1)</td>
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</tr>
<tr>
<td>609.632 subd. 3 with subd. 4(b)(3)</td>
<td>Offering Counterfeit Currency ($5,000 or Less)</td>
<td>2</td>
</tr>
<tr>
<td>609.632 subd. 1 &amp; 2 with subd. 4(a)</td>
<td>Counterfeiting of Currency (Manufacturing or Printing/Means for False Reproduction)</td>
<td>Unranked</td>
</tr>
</tbody>
</table>