Staff Issue Paper

Murder of Unborn Child in the First Degree: Undefined Minimum Term for Life Sentences

March 7, 2019

Issue

Although Minn. Stat. § 609.2661 requires that an offender convicted of Murder of Unborn Child in the First Degree “must be sentenced to imprisonment for life,” neither a minimum term of imprisonment nor an authorization for supervised release is established by law. It is therefore unclear what minimum term of imprisonment applies—and, therefore, what minimum term of imprisonment should be specified on an MSGC sentencing worksheet.

Should the Minnesota Sentencing Guidelines Commission recommend legislative action to clarify the law?

Background

1986

- Murder of Unborn Child in the First Degree was created and codified at Minn. Stat. § 609.2661.\(^1\)
- The mandatory sentence was (and continues to be) life imprisonment.
- The minimum term of imprisonment applicable to all mandatory life sentences was 17 years.\(^2\)
- After an inmate serving a mandatory life sentence had served the 17-year minimum term of imprisonment, the Commission of Corrections was authorized to give supervised release.\(^3\)

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\(^1\) 1986 Minn. Laws ch. 388.
\(^2\) Minn. Stat. § 244.05, subd 4 (1986).
\(^3\) Minn. Stat. § 244.05, subd. 5 (1986).
The minimum terms of imprisonment for mandatory life sentences were separated into three:

- For violators of heinous crimes law, no possible release.
- For other offenders serving mandatory life sentences for Murder in the First Degree under Minn. Stat. § 609.185, 30-year minimum term of imprisonment.
- For offenders serving mandatory life sentences for Treason, 17-year minimum term of imprisonment.

Likewise, the Commissioner of Corrections’ supervised release authority over inmates serving mandatory life sentences was limited to Murder in the First Degree and Treason.

Murder of Unborn Child in the First Degree was not mentioned in the 1989 changes.

Catch-all provisions for mandatory life sentences were removed, apparently eliminating, for Murder of Unborn Child in the First Degree, both the statutory minimum term of imprisonment and the Commissioner of Corrections’ statutory supervised release authority.

The list of offenses requiring mandatory life without the possibility of release has grown.

The list of mandatory life sentences requiring 30-year minimum term of imprisonment has been modified.

A special provision for mandatory life sentences for certain criminal sexual conduct offenses involving repeat offenses or a heinous element—where the minimum term of imprisonment is established by the court—has been added.

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4 1989 Minn. Laws. ch. 290, art. 2, § 6 (amending Minn. Stat. § 244.05, subd. 4).
5 Minn. Stat. § 609.385.
6 Under Minn. Stat. § 609.185, not to be confused with Murder of Unborn Child in the First Degree under Minn. Stat. § 609.2661.
7 1989 Minn. Laws. ch. 290, art. 2, § 7 (amending Minn. Stat. § 244.05, subd. 5).
8 Minn. Stat. § 244.05, subd. 4(a).
9 If resulting in the death of a human being other than an unborn child, violations of Minn. Stat. § 609.2661, clause (1) (Murder of Unborn Child in the First Degree – Premeditation) and clause (2) (Murder of Unborn Child in the First Degree – Criminal Sexual Conduct in the First or Second Degree), being analogous to Minn. Stat. § 609.185(a)(1) & (a)(2), would carry a mandatory penalty of life without the possibility of release. See Minn. Stat. § 609.106, subd. 2(1).
10 Minn. Stat. § 244.05, subd. 4(b).
11 If resulting in the death of a human being other than an unborn child, violations of Minn. Stat. § 609.2661, clause (3) (Murder of Unborn Child in the First Degree – While Committing Certain Crimes), being analogous to Minn. Stat. § 609.185(a)(3), would carry a mandatory penalty of life imprisonment with a 30-year minimum term of imprisonment. See Minn. Stat. § 244.05, subd. 4(b).
12 Minn. Stat. § 244.05, subd. 4(d).
• Treason remains the only mandatory life sentence requiring a 17-year minimum term of imprisonment.13
• Murder of Unborn Child in the First Degree continues to be the only mandatory life sentence not mentioned in Minn. Stat. § 244.05, subd. 4 (specifying minimum terms of imprisonment for mandatory life sentences) or subd. 5 (authorizing the Commissioner of Corrections to give supervised release to offenders who have completed the minimum term of imprisonment applicable to a mandatory life sentence).
• Because Murder of Unborn Child in the First Degree is not listed in the “life without release” subdivision of the heinous crimes statute,14 the Supreme Court recently determined that a sentence of life without the possibility of release is unauthorized. The Supreme Court did not decide what, if any, minimum term of imprisonment applies to the offense.15

Sentencing Guidelines Considerations

Sentencing Worksheets

• Although mandatory life sentences are not governed by the Minnesota Sentencing Guidelines,16 the MSGC is required to collect sentencing worksheets on mandatory life sentences.17
• Because Murder of Unborn Child in the First Degree is missing from the list of mandatory life sentences for which the MSGC is required to collect sentencing worksheets,18 it is not clear whether the MSGC is required, or authorized, to collect sentencing worksheets for that offense.
• Presently, an MSGC sentencing worksheet for a mandatory life sentence will indicate whether the life sentence is with or without the possibility of release, and, if release is possible, what minimum term of imprisonment applies.
• Although the Supreme Court has now clarified that, for Murder of Unborn Child in the First Degree, “life without the possibility of release” is not correct,19 the minimum term of imprisonment required of such offenders is unclear (due to the offense’s absence from the lists in Minn. Stat. § 244.05, subds. 4 & 5).

13 Minn. Stat. § 244.05, subd. 4(c).
14 Minn. Stat. § 609.106, subd. 2.
15 State v. Mouelle, ___ N.W.2d ___, 2019 WL 455218, part IV (Minn. 2019).
16 Minn. Sentencing Guidelines § 2.E.4 (“Mandatory life imprisonment sentences for first-degree murder and for sex offenses subject to Minn. Stat. § 609.3455, subdivision 2, are not governed by the Guidelines.”).
18 Id.
19 See footnote 15 and accompanying text.
Staff Considerations

- In the event that the Commission wishes to recommend legislative action, MSGC staff offers a draft resolution for the Commission’s consideration (“Draft Resolution,” p. 5).
- As drafted by staff, the resolution does not make a specific recommendation as to what minimum term of imprisonment (17 years, 30 years, or no possible release) should apply to Murder of Unborn Child in the First Degree.
- On the other hand, the draft resolution does recommend against subjecting violations of Minn. Stat. § 609.2661, clause (3), to life without the possibility of release, in order to avoid the anomaly of first-degree felony murder\(^\text{20}\) being punished less severely than its counterpart within the Murder of Unborn Child in the First Degree statute.\(^\text{21}\)

Commission’s Options

1. The Commission may take no action. Sentences for Murder of Unborn Child in the First Degree are rare, and have never, to MSGC staff’s knowledge, occurred without a co-occurring mandatory sentence of life without the possibility of release (for premeditated murder of the mother).\(^\text{22}\)

2. Alternatively, pursuant to its advisory mandate,\(^\text{23}\) the Commission may make a general recommendation that the Legislature define some minimum term of imprisonment for Murder of Unborn Child in the First Degree. By establishing such definition, the Legislature would avoid the foreseeable implications of the uncertainty caused, in the event of a lone or primary sentence for Murder of Unborn Child in the First Degree, by the absence of a statutory minimum term of imprisonment and authorization for supervised release. (The staff-drafted resolution on the following page is intended to effectuate such action.)

3. Alternatively, pursuant to its advisory mandate, the Commission may make a specific recommendation that the Legislature define a particular minimum term of imprisonment for Murder of Unborn Child in the First Degree (e.g., 17 years, 30 years, or no possible release).\(^\text{24}\)

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\(^{21}\) Compare footnote 11, above, with footnote 9, above.

\(^{22}\) The two known cases—made known to the MSGC after implementation of the 2005 mandate for MSGC to collect sentencing worksheets on mandatory life sentences—are State v. Holland, 865 N.W.2d 666 (Minn. 2015), and State v. Mouelle, ___ N.W.2d ___, 2019 WL 455218 (Minn. 2019).

\(^{23}\) “The commission shall from time to time make recommendations to the legislature regarding changes in the Criminal Code, criminal procedures, and other aspects of sentencing.” Minn. Stat. § 244.09, subd. 6.

\(^{24}\) For the reasons stated in footnotes 20 and 21 and accompanying text, staff recommends against subjecting violations of Minn. Stat. § 609.2661, clause (3), to life without the possibility of release.
Staff-Drafted Resolution

Whereas the Minnesota Sentencing Guidelines Commission is statutorily required, from time to time, to make recommendations to the Legislature regarding changes in the criminal code, criminal procedures, and other aspects of sentencing;

Whereas a violation of Minn. Stat. § 609.2661, Murder of Unborn Child in the First Degree, carries a mandatory penalty of life imprisonment;

Whereas Minn. Stat. § 244.05, subd. 4, which defines minimum terms of imprisonment for other mandatory life sentences, does not define the minimum term of imprisonment for Murder of Unborn Child in the First Degree;

Whereas Minn. Stat. § 244.05, subd. 5(a), which authorizes the Commissioner of Corrections to give supervised release to inmates serving mandatory life sentences for certain other offenses, does not authorize the Commissioner to give such release to an offender serving a mandatory life sentence for Murder of Unborn Child in the First Degree;

Whereas the Minnesota Supreme Court, in State v. Mouelle, has nevertheless determined life without the possibility of release to be an unauthorized sentence for Murder of Unborn Child in the First Degree; and

Whereas a mandatory life sentence for Murder of Unborn Child in the First Degree is absent from the definition of “mandatory life sentence” contained in Minn. Stat. § 609.115, subd. 2a; now, therefore, be it

Resolved, that the Minnesota Sentencing Guidelines Commission does hereby recommend to the Legislature:

(1) that the minimum term of imprisonment for Murder of Unborn Child in the First Degree be statutorily defined;

(2) that Minn. Stat. § 244.05, subdivisions 4 and 5(a), accordingly be amended to refer to an inmate serving a mandatory life sentence under section 609.2661;

(3) if the Legislature chooses to forbid the possibility of release for an inmate serving a mandatory life sentence under section 609.2661, clause (1) or (2), that Minn. Stat. § 609.106, subd. 2, be amended accordingly; provided, however, that the Commission recommends against forbidding the possibility of release for clause (3) offenses; and

(4) that the definition of “mandatory life sentence” found in Minn. Stat. § 609.115, subd. 2a, be amended to refer to section 609.2661.
Appendix: Excerpts of Pertinent Sections of Minnesota Statutes (2018)

244.05 SUPERVISED RELEASE TERM.

** Subd. 4. Minimum imprisonment, life sentence. (a) An inmate serving a mandatory life sentence under section 609.106 or 609.3455, subdivision 2, must not be given supervised release under this section.

(b) An inmate serving a mandatory life sentence under section 609.185, paragraph (a), clause (3), (5), or (6); or Minnesota Statutes 2004, section 609.109, subdivision 3, must not be given supervised release under this section without having served a minimum term of 30 years.

(c) An inmate serving a mandatory life sentence under section 609.385 must not be given supervised release under this section without having served a minimum term of imprisonment of 17 years.

(d) An inmate serving a mandatory life sentence under section 609.3455, subdivision 3 or 4, must not be given supervised release under this section without having served the minimum term of imprisonment specified by the court in its sentence.

** Subd. 5. Supervised release, life sentence. (a) The commissioner of corrections may, under rules promulgated by the commissioner, give supervised release to an inmate serving a mandatory life sentence under section 609.185, paragraph (a), clause (3), (5), or (6); 609.3455, subdivision 3 or 4; 609.385; or Minnesota Statutes 2004, section 609.109, subdivision 3, after the inmate has served the minimum term of imprisonment specified in subdivision 4.

** 609.095 LIMITS OF SENTENCES.

(a) The legislature has the exclusive authority to define crimes and offenses and the range of the sentences or punishments for their violation. No other or different sentence or punishment shall be imposed for the commission of a crime than is authorized by this chapter or other applicable law.

** 609.106 HEINOUS CRIMES.

** Subd. 2. Life without release. The court shall sentence a person to life imprisonment without possibility of release under the following circumstances:

(1) the person is convicted of first-degree murder under section 609.185, paragraph (a), clause (1), (2), (4), or (7);
(2) the person is convicted of committing first-degree murder in the course of a kidnapping under section 609.185, paragraph (a), clause (3); or

(3) the person is convicted of first-degree murder under section 609.185, paragraph (a), clause (3), (5), or (6), and the court determines on the record at the time of sentencing that the person has one or more previous convictions for a heinous crime.

[See Note.]

NOTE: Subdivision 2 as applied to juvenile defendants was severed and the previous version of that subdivision revived in Jackson v. State, 883 N.W.2d 272 (Minn. 2016).

609.115 PRESENTENCE INVESTIGATION.

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Subd. 2a. Sentencing worksheet; sentencing guidelines commission. If the defendant has been convicted of a felony, including a felony for which a mandatory life sentence is required by law, the court shall cause a sentencing worksheet as provided in subdivision 1 to be completed and forwarded to the Sentencing Guidelines Commission.

For the purpose of this section, "mandatory life sentence" means a sentence under section 609.106, subdivision 2; 609.185; 609.3455; 609.385, subdivision 2; or Minnesota Statutes 2004, section 609.109, subdivision 3, and governed by section 244.05.

* * *

609.185 MURDER IN THE FIRST DEGREE.

(a) Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

(1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another;

(2) causes the death of a human being while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence, either upon or affecting the person or another;

(3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit burglary, aggravated robbery, kidnapping, arson in the first or second degree, a drive-by shooting, tampering with a witness in the first degree, escape from custody, or any felony violation of chapter 152 involving the unlawful sale of a controlled substance;

(4) causes the death of a peace officer, prosecuting attorney, judge, or a guard employed at a Minnesota state or local correctional facility, with intent to effect the death of that person or another, while the person is engaged in the performance of official duties;
(5) causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child and the death occurs under circumstances manifesting an extreme indifference to human life;

(6) causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim or upon another family or household member and the death occurs under circumstances manifesting an extreme indifference to human life; or

(7) causes the death of a human being while committing, conspiring to commit, or attempting to commit a felony crime to further terrorism and the death occurs under circumstances manifesting an extreme indifference to human life.

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609.2661 MURDER OF UNBORN CHILD IN THE FIRST DEGREE.

Whoever does any of the following is guilty of murder of an unborn child in the first degree and must be sentenced to imprisonment for life:

(1) causes the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another;

(2) causes the death of an unborn child while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence, either upon or affecting the mother of the unborn child or another; or

(3) causes the death of an unborn child with intent to effect the death of the unborn child or another while committing or attempting to commit burglary, aggravated robbery, kidnapping, arson in the first or second degree, tampering with a witness in the first degree, or escape from custody.

609.385 TREASON.

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Any person owing allegiance to this state who does either of the following is guilty of treason against this state and shall be sentenced to life imprisonment:

(1) levies war against this state; or

(2) adheres to the enemies of this state, giving them aid and comfort.

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