Child Pornography Sentencing: Comprehensive Review, Part 2

October 10, 2019
Staff Presentation
Nate Reitz, MSGC Executive Director

Issues from September meeting

Examples of possible issues

Definitions
- “Pornographic work”
- “Sexual performance”

Production
- Use of Minor
- Soliciting
- Distinctions
- Rankings
- Other crimes

Possession
- Distinctions
- Hermelinding
- Rankings

Other Issues
- CSDB history
- Grooming
- Invasion of privacy
- Victims’ rights
- Affirmative defense

mn.gov/sentencing-guidelines
Answers to questions from September meeting

- Effect of *State v. Bakken* (Minn. 2016) on charging practices
- Criminal histories in mitigated dispositional departure cases
- Age at which child porn offenders committed prior contact offenses

Statutory offense characteristics & Guidelines severity levels

- *Why are offense characteristics different under the U.S. Sentencing Guidelines compared to the Minnesota Sentencing Guidelines?*
- *How do the Minnesota Sentencing Guidelines distinguish offense severity?*
Background: Four key cases

- **Apprendi**: A jury must find, beyond reasonable doubt, facts that raise offense’s statutory maximum
- **Blakely**: A jury must find aggravating factors for departure from Washington’s statutory sentencing guidelines
- **Booker**: Reconciles U.S. Sentencing Guidelines with Blakely by making the guidelines merely “advisory”
- **Shattuck**: Reconciles Minn. Sentencing Guidelines with Blakely by requiring juries to find aggravating factors

Applications of **Blakely**

<table>
<thead>
<tr>
<th>U.S. Sentencing Guidelines</th>
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<tr>
<td>• Guidelines are <em>advisory</em></td>
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<td>• Offense’s severity derives from offense of conviction ...</td>
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<tr>
<td>• ... plus Guidelines-defined “offense characteristics” (as judge determines they apply)</td>
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<table>
<thead>
<tr>
<th>Minnesota Sentencing Guidelines</th>
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<tr>
<td>• Judges <strong>must</strong> use presumptive sentence absent substantial and compelling circumstances</td>
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<tr>
<td>• The offense of conviction determines severity level</td>
</tr>
<tr>
<td>• Statutes, not Guidelines, define offense characteristics</td>
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How Minnesota’s Guidelines distinguish severity levels

Guidelines may distinguish severity by statutory offense or degree.

Guidelines may distinguish severity even within the same offense or degree, if different crimes are defined...

... by differently numbered divisions within the same offense or degree...

... or even by language within the same numbered statutory division.

Example: Controlled substance crimes

Example: Criminal sexual conduct

Example: Kidnapping (SL 8 vs. SL 9)

Counterexample: Aggravated 1st degree witness tampering

Example: Defeating security on personality (SL 3 vs. SL 2)

Severity distinctions based on non-statutory offense characteristics are very rare.

Child pornography definitions

Three key definitions—

• “Sexual conduct”

• “Sexual performance”

• “Pornographic work”

(child pornography)
# Child pornography definitions

- **Sexual conduct (SC):**
  - Intercourse
  - S&M abuse or bondage, even if somewhat clothed
  - Masturbation
  - Lewd exhibitions of genitals
  - Physical contact with clothed/unclothed pubic area, butt, or female breast, for apparent sexual stimulation or gratification

- **Sexual performance (SP):**
  - Exhibition using minor to depict SC

- **Pornographic work:** Visual depiction
  - Of a SP
  - Of a minor in actual/simulated SC
  - That looks like an identifiable minor engaging in SC
  - That is promoted in a way that conveys the impression of a minor engaging in SC

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# Issue: Are the definitions overbroad?

- Similar “conveys the impression” definition was found to be overbroad and unconstitutional by U.S. Supreme Court in 2002.

**Staff suggestion:**

- Consider recommending that the Legislature revise the definition of child pornography to comply with the Constitution
  - Repeal “conveys the impression” clause
  - Consult with legal staff about the constitutionality of the rest of the definition
Issue: Are the definitions not broad enough?

- Minnesota’s child pornography definition has been criticized as not being broad enough.

**Staff suggestion:**

- Consider recommending that the Legislature look at broadening the definition of child pornography
  - Image indistinguishable from one showing an actual child (per federal definition)
  - Image lewdly depicting pubic area (per federal definition)
  - Nude image of child possessed with sexual intent by one in authority (reported from Bjerknes)

Issue: Do definitions need updating or separating?

- Minnesota’s child pornography definitions contain arguably obsolete language
- Combined definitions for child pornography and use of minors in sexual performance may be called into question

**Staff suggestion:**

- Consider taking no action on this issue
  - No harm in obsolete language
  - Combining child pornography and minors in sexual performance will be addressed later
Child pornography production

Use of Minors in Sexual Performance

- Using a minor to engage in posing or modeling
- While knowing or having reason to know that the conduct is a sexual performance or pornographic work

Child pornography production is ranked at SL E or D

Severity level E

- Use of Minors in Sexual Performance

Severity level D

- Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)
Other offenses ranked at severity level E

1. Criminal Sexual Conduct in the Fourth Degree (sexual contact) when—
   • Force or coercion was used
   • Victim was mentally impaired/incapacitated or physically helpless
   • Specified occupational relationship present
   • Victim was 16 or 17, significantly related to offender, and there was force, coercion, personal injury, or multiple acts committed over a long period of time

2. Dissemination of Child Pornography
   • Presumptive commit for offenders at 3+ criminal history score
   • Each offense contributes 1½ points toward criminal history

Other offenses ranked at severity level D

1. Criminal Sexual Conduct in the Fourth Degree (sexual contact) when—
   • Victim was under 13
   • Offender was in a position of authority over, or significantly related to, 13-, 14-, or 15-year-old victim

2. Criminal Sexual Conduct in the Third Degree (sexual penetration) when—
   • Victim was 13, 14, or 15 years old and offender was 4+ years older ("statutory rape")
   • Offender was in a position of authority over, or significantly related to, 16- or 17-year-old victim

3. Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)
   • Presumptive commit for offenders at 2+ criminal history score
   • Each offense contributes 1½ points toward criminal history
Issue: Do statutory terms reflect offense’s nature?

- “Posing or modeling”
  - Arguably excludes forced or surreptitious recording, or very young victims of child pornography production

- “Sexual performance”
  - These terms arguably imply victim’s knowing participation, or even cooperation

**Staff suggestion:**
- Consider recommending that the Legislature create a new and separate child pornography production offense
  - Using comprehensive, updated terms
  - Use of Minors in Sexual Performance would cover sexual performances, not child pornography production

Issue: Treating sexting like other production

- A few children are arrested, and possibly even prosecuted, for voluntary, self-produced pornographic images of themselves, when only youth are involved

- One Minnesota judge found such prosecution violated statute’s stated intent: To protect the children involved in child pornography

**Staff suggestion:**
- Consider recommending that the Legislature exempt “sexting” from child pornography offenses
  - Could apply both to the child and to a youthful recipient if the situation is voluntary
  - Child protection consequences should be considered
Issue: Equating production & dissemination in severity

• By ranking them equally, the Sentencing Guidelines imply that dissemination of child pornography is equal in severity to producing the child pornography in the first place
• But: A reasonable observer might conclude that the production of child pornography is inherently more severe than its dissemination
• (Staff suggestion in three slides)

Issue: Distinguishing varying degrees of culpability

• Commission may be reluctant to rank offenses covering a wide range of underlying conduct
• Child pornography production is arguably a very broad offense, covering:
  • Persuading a teenager to text a lewd photo
  • Hiring an underage dancer at a strip club
  • Recording an encounter with a child prostitute
  • Surreptitiously filming a pre-adolescent using the bathroom
  • Creating a permanent visual record of the violent sexual assault of a young child
• (Staff suggestion in two slides)
Issue: Adequately punishing co-occurring offenses

- Child pornography production may co-occur with other offenses. Examples:
  - Criminal sexual conduct as a result of the victim’s age or state of mind, or offender’s relationship to or authority over the victim
  - Sex trafficking
  - Solicitation of children to engage in sexual conduct
  - Surreptitious observation device (minor victim and sexual intent)

- But: Minnesota law permits only one punishment for multiple offenses arising out of a single course of conduct
  - There is a criminal sexual conduct exception, but force or violence is required

(Staff suggestion on next slide)

Staff suggestion: Permit multiple punishments

- Staff suggestion: Consider recommending that the Legislature permit punishment for both child pornography production and a co-occurring offense
  - Create a child pornography production exception to Minn. Stat. § 609.035

- This would arguably resolve each of the last three issues by—
  - Effectively elevating punishment for most production above most dissemination
  - Capturing varying degrees of severity within presumptive sentence
  - Permitting a separate sanction for the separate harm of child pornography production

- Otherwise, consider elevating severity level of child pornography production