

Staff Issue Paper

Possible Modifications to the Sentencing Guidelines Relating to 2018 Regular Session Laws

Presented June 7, 2018

Background

After each session, the Commission reviews “crime[s] created or amended by the legislature in the preceding session”¹ for possible related modifications to the Sentencing Guidelines. The following crime, created or amended by the laws of the 2018 Regular Session, 90th Minnesota Legislature, is subject to Commission review.

A. New Crime Law Affecting the Guidelines

The following new felony offense was created within the Minnesota Session Laws, 2018 Regular Legislative Session, and is therefore subject to the Commission’s review.

Commission Action:

One of the responsibilities of the Commission is to assign severity-level rankings to new crimes and to consider whether they should be added to the list of offenses eligible for permissive consecutive sentences. The Commission bases its decisions, in part, on the level of harm caused by the offense and the culpability of the offender. Statutory maximums are also considered.

For the new offense listed below, the Commission may decide:

1. What severity level should be assigned?
2. Should the offense be added to the list in Section 6 (Offenses Eligible for Permissive Consecutive Sentences)?
3. Are there other modifications that must be made to the Guidelines?

¹ Minn. Stat. § [244.09](#), subd. 11 (related modifications need not be submitted to Legislature in advance).

Unauthorized Computer Access (Electronic Terminal)

Chapter: [2018 Minn. Laws ch. 123](#) (from [H.F. 817](#), 90th Minn. Legislature)

Description: This law creates new gross misdemeanor and felony offenses of Unauthorized Computer Access (Electronic Terminal) within the existing crime of Unauthorized Computer Access, Minn. Stat. § 609.891.

Gross misdemeanor. Under this law, a person who intentionally and without authorization attempts to, or does, penetrate an electronic terminal by accessing, or attempting to access, the electronic terminal by the unauthorized opening of a panel or access door is guilty of a gross misdemeanor. (An “electronic terminal” is defined as “an electronic device, other than a telephone operated by a consumer, through which an individual or company may initiate an electronic fund transfer. The term includes, but is not limited to, point-of-sale terminals, automated teller machines, cash dispensing machines, and gas pump dispensers.”)

Felony. The gross misdemeanor becomes a felony if the person also places or attaches, or attempts to place or attach, an electronic device to capture, store, or communicate access device information. (An “access device” is defined as a transaction card that may be used to access either an account, prepaid funds, or government benefits.)

Effective Date: August 1, 2018, and applies to crimes committed on or after that date.

Fiscal Note Estimated Impact: In its fiscal note, MSGC staff assumed that the felony behavior proscribed by the bill is already largely prosecutable under Minn. Stat. § [609.527](#), subd. 5b (Unlawful Possession or Use of Scanning Device or Reencoder).² MSGC staff therefore estimated that this law will not result in the need for additional prison beds.

Demographic Impact Statement: The bill did not meet screening significance threshold.

Reference: Minn. Stat. §§ [609.527](#) & [609.891](#) (2016).

Guidelines Considerations: Because no statutory maximum is specified for the felony offense of Unauthorized Computer Access (Electronic Terminal), the five-year statutory maximum found in Minn. Stat. § [609.03](#) (punishment when not otherwise fixed) will apply.

The new felony is codified within Minn. Stat. § [609.891](#), Unauthorized Computer Access, which, in its present form, contains two felony offenses that require either a grave risk of death or a repeat

² The “payment card” in Minn. Stat. § 609.527 appears to be roughly synonymous with the new law’s “access device”; the definitions of “scanning device” and “reencoder” in Minn. Stat. § 609.527 appear consistent with the new law’s description of an “electronic device to capture, store, or communicate access device information”; and the use and possession prohibited by Minn. Stat. § 609.527 appear to be included within the attempted or actual emplacement or attachment prohibited by the new law.

gross misdemeanor offense. Each offense carries a maximum penalty of ten years in prison, a \$20,000 fine, or both. Both offenses are unranked. According to MSGC monitoring data, no one has ever been sentenced for Unauthorized Computer Access as a felony.

As noted above,³ the new felony's elements appear similar to the elements of the existing offense of Unlawful Possession or Use of a Scanning Device or Reencoder under Minn. Stat. § [609.527](#), subd. 5b, which also has a five-year statutory maximum and is ranked at Severity Level (SL) 2 and. Offenses ranked at SL 2 are "presumptive stays" with a criminal history score (CHS) of 5 or less, and "presumptive commitments" at CHS 6 or more; the presumptive prison duration ranges from 18 months to 28 months.

According to MSGC monitoring data from 2011 to 2015, three people were sentenced for Unlawful Possession or Use of a Scanning Device or Reencoder under Minn. Stat. § 609.527, subd. 5b. All three were recommended "presumptive stays" according to the Guidelines. The average probation sentence was three years and the average conditional confinement period was 17 days.

Compared with the existing crime of Unlawful Possession or Use of a Scanning Device or Reencoder, the new felony offense does contain one additional element: The new offense requires the opening of the electronic terminal's panel or access door.

MSGC Staff Recommendation: Rank felony Unauthorized Computer Access (Electronic Terminal) at Severity Level 2, as illustrated.

Alternatively, depending on the significance the Commission attaches to the additional element of opening the panel or access door, the Commission may wish to rank the offense at Severity Level 3.

Staff has no recommendation as to whether the offense should be added to the list in Section 6 (Offenses Eligible for Permissive Consecutive Sentences).⁴ Note: For a crime to be sentenced permissively consecutive, it must be a presumptive commitment offense; i.e., over the dispositional line and in the non-shaded area of the applicable grid.

Illustration: Possible modifications to sections 5.A and 5.B are shown below. In this illustration, the new offense is ranked at SL 2, technical modifications are made to the existing felony, and the permissive-consecutive list in Section 6 is not altered.

³ See footnote 2 and accompanying text.

⁴ While not explicitly enumerated, Unlawful Possession or Use of a Scanning Device or Reencoder is apparently included within the permissive consecutive list as a subset of Minn. Stat. § 609.527, Identity Theft.

Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
2	<u>Unauthorized Computer Access (Electronic Terminal)</u>	<u>609.891, subd. 2(c)</u>

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Severity Level	Offense Title	Statute Number
UNRANKED	<u>Unauthorized Computer Access (Grave Risk or Subsequent)</u>	<u>609.891, subd. 2(a) & (b)</u>

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
<u>609.891, subd. 2(a) & (b)</u>	<u>Unauthorized Computer Access (Grave Risk or Subsequent)</u>	Unranked
<u>609.891, subd. 2(c)</u>	<u>Unauthorized Computer Access (Electronic Terminal)</u>	<u>2</u>

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B. Technical Amendment to Crime Law Affecting the Guidelines

Statutes in which technical revisions were made during the 2018 Regular Session must be reviewed by the Commission for possible modification to the Sentencing Guidelines. Staff recommends making modifications due to this technical amendment.

Revisor’s Bill – Obsolete Paragraph Citations for Methamphetamine Manufacture Crime

Chapter: [2018 Minn. Laws ch. 182](#), art. 1 § 39

Description: As part of the Revisor’s bill, technical amendments were made to Minn. Stat. § [152.021](#), subdivision 2a, removing obsolete paragraph references for paragraphs (a) and (b) but preserving the language within the subdivision, as follows:

Subd. 2a.Methamphetamine manufacture crime.

(a) Notwithstanding subdivision 1, sections 152.022, subdivision 1, 152.023, subdivision 1, and 152.024, subdivision 1, a person is guilty of controlled substance crime in the first degree if the person manufactures any amount of methamphetamine.

(b) ~~[Renumbered 152.0262, subdivision 1]~~

MSGC Staff Recommendation: Make necessary technical modifications to the Guidelines, as follows:

Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
D9	Manufacture Any Amount of Methamphetamine	152.021, subd. 2a(a)

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
152.021, subd. 2a(a)	Manufacture Any Amount of Methamphetamine	D9

* * *

Section 6. Offenses Eligible for Permissive Consecutive Sentences

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Statute Number	Offense Title
152.021, subd. 2a(a)	Manufacture any Amount of Methamphetamine

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C. New and Amended Crime Laws Not Directly Affecting the Guidelines

These are new and amended statutes passed during the 2018 Regular Session that may be of interest to the Commission. No action is required or recommended.

1. Misrepresenting a Service Animal

Chapter: [2018 Minn. Laws ch. 106](#) (from [H.F. 3157](#), 90th Minn. Legislature)

Description: This bill makes misrepresenting an animal as a service animal a petty misdemeanor.

Effective Date: August 1, 2018, and applies to crimes committed on or after that date.

Fiscal Note Estimated Impact: Not requested.

Demographic Impact Statement: Not applicable.

2. Information to be Collected on Human Trafficking

Chapter: [2018 Minn. Laws ch. 144](#) (from [S.F. 2554](#), 90th Minn. Legislature)

Description: Adds to the information mandated to be collected by the Department of Public Safety (DPS) under Minn. Stat. § [299A.785](#). It expands the list of offenses for which data is to be collected by adding Minn. Stat. § [617.247](#) (possession of child pornography) and Minn. Stat. § [617.293](#) (dissemination and display of harmful material to minors prohibited). Minn. Stat. § [609.3241](#) is expanded by adding offenses to the list for which monetary assessments must be imposed when an adult is convicted and sentenced.

Effective Date: Day after final enactment. Signed by the Governor May 17, 2018. By February 15 of each year, the Commissioner of Public Safety must report to the Legislature.

Fiscal Note Estimated Impact: Because the mandate relates to the collection of information and assessment of fees, it was assumed that there would be no long-term fiscal impact on state correctional resources.

Demographic Impact Statement: Did not meet screening significance threshold.

Reference: Minn. Stat. §§ [299A.785](#); [617.247](#); [617.293](#); [609.3241](#) (2016).

3. Sexual Assault Examination Kit Handling

Chapter: [2018 Minn. Laws ch. 160](#) ([S.F. 2863](#), 90th Minn. Legislature)

Description: Establishes a sexual assault examination kit handling procedure and requires victim notification.

Effective Date: Day after final enactment. Presented to the Governor May 16, 2018.

Fiscal Note Estimated Impact: Not requested.

Demographic Impact Statement: Not applicable.

4. Human Services Criminal Background Checks

Chapter: [2018 Minn. Laws ch. 166](#) (S.F. 2683, 90th Minn. Legislature)

Description: Modifies human services background study requirements and makes available a record check for national criminal history.

Effective Date: Effective 30 days following final enactment. Presented to the Governor May 16, 2018.

Fiscal Note Estimated Impact: Not requested.

Demographic Impact Statement: Not applicable.

5. Gross Misdemeanor Sale or Possession of Kratom

Chapter: [2018 Minn. Laws ch. 195](#), art. 1, § 3 (S.F. 2578, 90th Minn. Legislature)

Description: Minn. Stat. § 152.027 is amended and subdivision 7, “sale or possession of kratom,” is added. Paragraph (a) makes it a gross misdemeanor to sell to a child any amount of kratom or a substance that contains mitragynine or 7-hydroxymitragynine. Paragraph (b) makes it a misdemeanor for a child to possess any amount of kratom or a substance that contains mitragynine or 7-hydroxymitragynine.

Effective Date: August 1, 2018, and applies to crimes committed on or after that date.

Fiscal Note Estimated Impact: Not requested.

Demographic Impact Statement: Not applicable.

Reference: Minn. Stat. §§ [152.02](#); [152.027](#); (2016).

6. Driving Under the Influence of Intoxicating Substance

Chapter: [2018 Minn. Laws ch. 195](#), articles 2 & 3 (S.F. 2578, 90th Minn. Legislature)

Description: Throughout the DWI laws and all similar laws (including CVO/CVH laws), the prohibition against driving or operating a vehicle while knowingly under the influence of a “hazardous substance” is replaced with a prohibition against driving or operating a vehicle while under the influence of an “intoxicating substance”—that is, a drug or chemical, other than alcohol or a controlled substance, that impairs hearing, sight, thought, or the central nervous system—while knowing or having reason to know of the substance’s capacity to impair.

Effective Date: August 1, 2018, and applies to crimes committed on or after that date.

Fiscal Note Estimated Impact: Not requested.

Demographic Impact Statement: Not applicable.

Reference: Minn. Stat. §§ [97B.065](#); [169A.20](#); [169A.45](#) [169A.51](#); [169A.52](#); [169A.76](#); [360.0752](#); [360.0753](#); [609.2111](#) to [609.2114](#) (2016).

CHAPTER 123--H.F.No. 817

An act relating to public safety; establishing crimes for interfering or attempting to interfere with point-of-sale terminals, gas pump dispensers, and automated teller machines; amending Minnesota Statutes 2016, sections 609.87, subdivision 2a, by adding subdivisions; 609.891, subdivisions 1, 2, 3.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2016, section 609.87, subdivision 2a, is amended to read:

Subd. 2a. **Authorization.** (a) "Authorization" means:

(1) with the permission of the owner of the computer, computer system, computer network, computer software, or other property;

(2) access by employees of the Department of Commerce acting under the authority and powers granted to the director of the Weights and Measures Division in chapter 239 at any time the device is commercially available for use;

(3) access by registrants in the voluntary placing in service program and registered liquefied petroleum gas (LPG) meter inspectors acting under the authority and powers granted in Minnesota Rules, part 7601, but only at times specified by the device owner or operator or the device owner's or operator's designated representative; or

(4) access by other people who have the express permission of the device owner or operator or the device owner's or operator's designated representative but only at times as approved by the device owner or operator and only for purposes approved by the device owner or operator.

(b) Authorization may be limited by the owner by:

(1) giving the user actual notice orally or in writing;

(2) posting a written notice in a prominent location adjacent to the computer being used; or

(3) using a notice displayed on or announced by the computer being used.

EFFECTIVE DATE. This section is effective August 1, 2018, and applies to crimes committed on or after that date.

Sec. 2. Minnesota Statutes 2016, section 609.87, is amended by adding a subdivision to read:

Subd. 15. **Electronic terminal.** "Electronic terminal" means an electronic device, other than a telephone operated by a consumer, through which an individual or company may initiate an electronic fund transfer. The term includes, but is not limited to, point-of-sale terminals, automated teller machines, cash dispensing machines, and gas pump dispensers.

EFFECTIVE DATE. This section is effective August 1, 2018, and applies to crimes committed on or after that date.

Sec. 3. Minnesota Statutes 2016, section 609.87, is amended by adding a subdivision to read:

Subd. 16. **Access device.** "Access device" means a card that is used by an individual or company to initiate transactions and is:

- (1) a means of access to an individual's or company's account;
- (2) issued on a prepaid basis to the individual or company in a specific amount; or
- (3) used by the individual or company to access government benefits.

EFFECTIVE DATE. This section is effective August 1, 2018, and applies to crimes committed on or after that date.

Sec. 4. Minnesota Statutes 2016, section 609.891, subdivision 1, is amended to read:

Subdivision 1. **Crime.** A person is guilty of unauthorized computer access if the person intentionally and without authorization attempts to or does penetrate a computer security system or electronic terminal.

EFFECTIVE DATE. This section is effective August 1, 2018, and applies to crimes committed on or after that date.

Sec. 5. Minnesota Statutes 2016, section 609.891, subdivision 2, is amended to read:

Subd. 2. **Felony.** (a) A person who violates subdivision 1 in a manner that creates a grave risk of causing the death of a person is guilty of a felony and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.

(b) A person who is convicted of a second or subsequent gross misdemeanor violation of subdivision 1 is guilty of a felony and may be sentenced under paragraph (a).

(c) A person who violates subdivision 1 by accessing, or attempting to access, an electronic terminal through opening any panel or access door without authorization and placing or attaching, or attempting to place or attach, an electronic device to capture, store, or communicate access device information is guilty of a felony.

EFFECTIVE DATE. This section is effective August 1, 2018, and applies to crimes committed on or after that date.

Sec. 6. Minnesota Statutes 2016, section 609.891, subdivision 3, is amended to read:

Subd. 3. **Gross misdemeanor.** (a) A person who violates subdivision 1 in a manner that creates a risk to public health and safety is guilty of a gross misdemeanor and may be sentenced to imprisonment for a term of not more than one year or to payment of a fine of not more than \$3,000, or both.

(b) A person who violates subdivision 1 in a manner that compromises the security of data that are protected under section 609.52, subdivision 2, clause (8), or are not public data as defined in section 13.02, subdivision 8a, is guilty of a gross misdemeanor and may be sentenced under paragraph (a).

(c) A person who violates subdivision 1 and gains access to personal data is guilty of a gross misdemeanor and may be sentenced under paragraph (a).

(d) A person who is convicted of a second or subsequent misdemeanor violation of subdivision 1 within five years is guilty of a gross misdemeanor and may be sentenced under paragraph (a).

(e) A person who violates subdivision 1 by accessing, or attempting to access, an electronic terminal through opening, or attempting to open, any panel or access door without authorization is guilty of a gross misdemeanor and may be sentenced under paragraph (a).

EFFECTIVE DATE. This section is effective August 1, 2018, and applies to crimes committed on or after that date.

Presented to the governor May 4, 2018

Signed by the governor May 8, 2018, 12:38 p.m.