

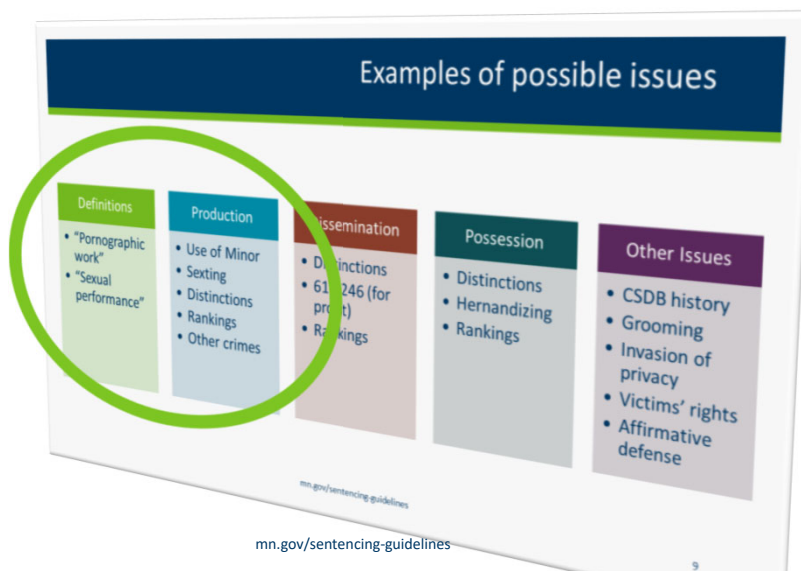


**mn** MINNESOTA  
SENTENCING GUIDELINES  
COMMISSION

## Child Pornography Sentencing: Comprehensive Review, Part 2

October 10, 2019  
Staff Presentation  
Nate Reitz, MSGC Executive Director  
[mn.gov/sentencing-guidelines](http://mn.gov/sentencing-guidelines)

## Issues from September meeting



**Examples of possible issues**

Definitions	Production	Dissemination	Possession	Other Issues
<ul style="list-style-type: none"><li>• "Pornographic work"</li><li>• "Sexual performance"</li></ul>	<ul style="list-style-type: none"><li>• Use of Minor</li><li>• Sexting</li><li>• Distinctions</li><li>• Rankings</li><li>• Other crimes</li></ul>	<ul style="list-style-type: none"><li>• Distinctions</li><li>• 61A.0246 (for profit)</li><li>• Rankings</li></ul>	<ul style="list-style-type: none"><li>• Distinctions</li><li>• Hermandizing</li><li>• Rankings</li></ul>	<ul style="list-style-type: none"><li>• CSDB history</li><li>• Grooming</li><li>• Invasion of privacy</li><li>• Victims' rights</li><li>• Affirmative defense</li></ul>

[mn.gov/sentencing-guidelines](http://mn.gov/sentencing-guidelines)

## Answers to questions from September meeting

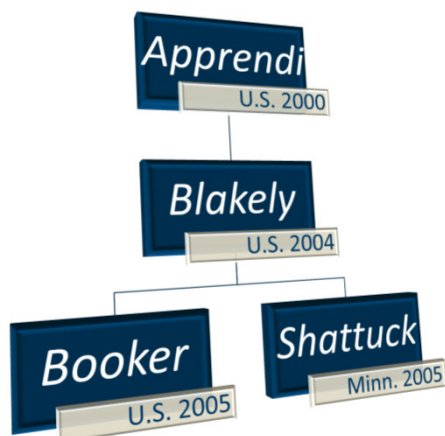
- Effect of *State v. Bakken* (Minn. 2016) on charging practices
- Criminal histories in mitigated dispositional departure cases
- Age at which child porn offenders committed prior contact offenses



## 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

[mn.gov/sentencing-guidelines](http://mn.gov/sentencing-guidelines)

5

## Applications of *Blakely*

### U.S. Sentencing Guidelines

- Guidelines are **advisory**
- Offense's severity derives from offense of conviction ...
- ... **plus** Guidelines-defined "offense characteristics" (as judge determines they apply)

### Minnesota Sentencing Guidelines

- Judges **must** use presumptive sentence absent substantial and compelling circumstances
- The offense of conviction determines severity level
- Statutes, not Guidelines, define offense characteristics

[mn.gov/sentencing-guidelines](http://mn.gov/sentencing-guidelines)

6

## 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 ...

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

... 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)*

mn.gov/sentencing-guidelines 7

## Child pornography definitions

Three key definitions—

- “Sexual conduct”
- “Sexual performance”
- “Pornographic work”  
(child pornography)

mn.gov/sentencing-guidelines 8

## 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**

[mn.gov/sentencing-guidelines](http://mn.gov/sentencing-guidelines)

9

## 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

[mn.gov/sentencing-guidelines](http://mn.gov/sentencing-guidelines)

10

## 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

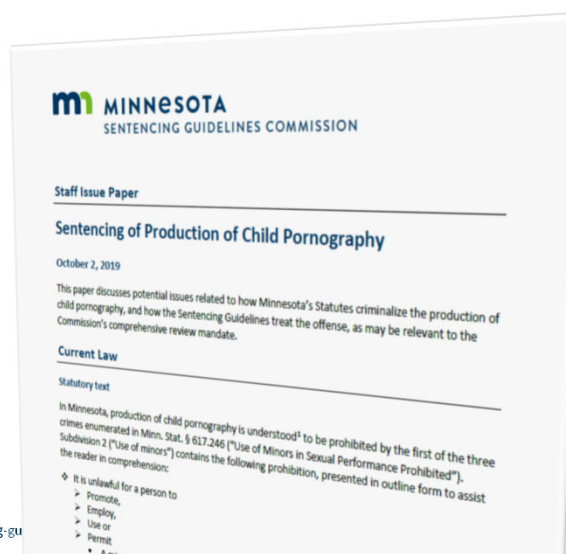
### *Staff suggestion:*

- 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)*

mn.gov/sentencing-guidelines

21

## 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

mn.gov/sentencing-guidelines

22