

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.)

Proposed modifications to 2018 Minn. Sentencing Guidelines §§ 4.B, 5.A, & 5.B:

4.B. Sex Offender Grid

[SEE CONSOLIDATED MODIFICATIONS ON PAGE 10, BELOW]

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Section 5.A. Offense Severity Reference Table

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Severity Level	Offense Title	Statute Number
C	Criminal Sexual Conduct 3rd Degree	609.344 _z subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)

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Severity Level	Offense Title	Statute Number
E	Criminal Sexual Conduct 4th Degree	609.345 _z subd. 1(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o)(p)

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
609.344 subd. 1(c)(d)(g)(h)(i)(j)(k)(l) (m)(n)(o)(p)	Criminal Sexual Conduct 3rd Degree	C

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Statute Number	Offense Title	Severity Level
609.345 subd. 1(c)(d)(g)(h)(i)(j)(k)(l) (m)(n)(o)(p)	Criminal Sexual Conduct 4th Degree	E

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Section 6. Offenses Eligible for Permissive Consecutive Sentences

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Statute Number	Offense Title
609.344, subd. 1	Criminal Sexual Conduct 3rd Degree
609.345, subd. 1	Criminal Sexual Conduct 4th Degree

* * *

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.

Proposed modifications to 2018 Minn. Sentencing Guidelines §§ 2.E.3, 4.B, 5.A, 5.B, and 6; Comment 2.B.105; and Appendix 3:

* * *

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 unranked 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 unranked until August 1, 2006. It is currently ranked at Severity Level E, and receives a weight of ~~1½~~ 1½ 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.

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 ~~a~~ sexual performance. Minn. Stat. § 617.246, subd. 7.
- ~~Possession of pornographic work involving minors.~~ Child pornography. Minn. Stat. § 617.247, subd. 9.

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4.B. Sex Offender Grid

[SEE CONSOLIDATED MODIFICATIONS ON PAGE 10, BELOW]

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Section 5.A. Offense Severity Reference Table

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

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Severity Level	Offense Title	Statute Number
E	Use Minors in Sexual Performance	617.246 subd. 2,3,4
	Dissemination of Child Pornography	617.247, subd. <u>3(a)</u>
	<u>Use of Minors in Sexual Performance</u>	<u>617.246, subd. 2(a), 3(a), 4(a)</u>

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Severity Level	Offense Title	Statute Number
F	Possession of Child Pornography (Subsequent, or by Predatory Offender, or Child Under 13)	617.247, subd. 4(b)

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Severity Level	Offense Title	Statute Number
G	Possession of Child Pornography	617.247, subd. 4(a)

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Section 5.B. Severity Level by Statutory Citation

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

Statute Number	Offense Title	Severity Level
<u>617.247 subd. 4(b)</u>	<u>Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)</u>	<u>E</u>

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Section 6. Offenses Eligible for Permissive Consecutive Sentences

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

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

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Statute	Offense	Severity Level	Statutory Maximum (Months)	Exceeds Statutory Maximum At:
609.776	Interference with Emergency Comm.	5	36 months	CHS 4

Statute	Offense	Severity Level	Statutory Maximum (Months)	Exceeds Statutory Maximum At:
617.247, subd. 3(a)	Dissemination of Pictorial Representation of Minors <u>Child Pornography</u>	E	84 months	CHS 5

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.

Proposed modifications to 2018 Minn. Sentencing Guidelines §§ 4.B, 5.A, 5.B, & 6, and Appendix 3:

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

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Severity Level	Offense Title	Statute Number
G	<u>Surreptitious Observation Device (Minor Victim and Sexual Intent)</u>	<u>609.746, subd. 1(f)</u>

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Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
<u>609.746 subd. 1(f)</u>	<u>Surreptitious Observation Device (Minor Victim and Sexual Intent)</u>	<u>G*</u>

* 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.

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Section 6. Offenses Eligible for Permissive Consecutive Sentences

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Statute Number	Offense Title
<u>609.746, subd. 1(f)</u>	<u>Surreptitious Observation Device (Minor Victim and Sexual Intent)</u>

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

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

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.

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		0	1	2	3	4	5	6 or more
<i>Criminal Sexual Conduct (CSC) 1st Degree</i>	A	144 <i>144-172</i>	156 <i>144-187</i>	168 <i>144-201</i>	180 <i>153-216</i>	234 <i>199-280</i>	306 <i>261-360</i>	360 <i>306-360</i> ²
<i>CSC 2nd Degree—1(c)(d)(e)(f)(h) (e.g., contact, force, & injury) Prostitution; Sex Trafficking³ 1st Degree—1(a)</i>	B	90 <i>90³-108</i>	110 <i>94-132</i>	130 <i>111-156</i>	150 <i>128-180</i>	195 <i>166-234</i>	255 <i>217-300</i>	300 <i>255-300</i> ²
<i>CSC 3rd Degree—1(c)(d)(g)(h)(i) (j)(k)(l)(m)(n)(o)(p) (e.g., penetration & force/occupation) Prostitution; Sex Trafficking 2nd Degree—1a</i>	C	48 <i>41-57</i>	62 <i>53-74</i>	76 <i>65-91</i>	90 <i>77-108</i>	117 <i>100-140</i>	153 <i>131-180</i>	180 <i>153-180</i> ²
<i>CSC 2nd Degree—1(a)(b)(g) (e.g., contact & victim under 13) CSC 3rd Degree—1(a)(e)(f) or 1(b) with ref. to subd. 2(1) (e.g., penetration & child victim) Dissemination of Child Pornography (Subsequent or by Predatory Offender)</i>	D	36	48	60 <i>51-72</i>	70 <i>60-84</i>	91 <i>78-109</i>	119 <i>102-142</i>	140 <i>119-168</i>
<i>CSC 4th Degree—1(c)(d)(g)(h)(i) (j)(k)(l)(m)(n)(o)(p) (e.g., contact & force/occupation) Use Minors in Sexual Performance Dissemination of Child Pornography²</i>	E	24	36	48	60 <i>51-72</i>	78 <i>67-93</i>	102 <i>87-120</i>	120 <i>102-120</i> ²
<i>CSC 4th Degree—1(a)(b)(e)(f) (e.g., contact & child victim) CSC 5th Degree Possession of Child Pornography (Subseq./Pred. Off./Under 13) (Subsequent or by Predatory Offender)</i>	F	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>66-92</i>	84 <i>72-100</i>
<i>CSC 3rd Degree—1(b) with subd. 2(2) (i.e., penetration & child victim 24–48 mo. younger) Indecent Exposure Possession of Child Pornography Solicit Child for Sexual Conduct²</i>	G	15	20	25	30	39 <i>34-46</i>	51 <i>44-60</i>	60 <i>51-60</i> ²
<i>Registration Of Failure to Register as a Predatory Offenders</i>	H	12 ¹ <i>12¹-14</i>	14 <i>12¹-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

¹ 12¹=One year and one day



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.)

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4. Wage Theft

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. [ch. 7](#), art. 3, §§ 14–16

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

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Severity Level	Offense Title	Statute Number
6	Theft Over \$35,000	609.52, subd. 2(a)(3), (4), (15), & (16), & (19) with 609.52, subd. 3(1)

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Severity Level	Offense Title	Statute Number
3	Theft Crimes – Over \$5,000	See section 7: Theft Offense List

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Severity Level	Offense Title	Statute Number
2	Theft Crimes – \$5,000, or Less Theft Crimes – \$5,000 or Less	See section 7: Theft Offense List

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5.B. Severity Level by Statutory Citation

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

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7. Theft Offense List

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Statute Number	Offense Title
<u>609.52 subd. 2(a)(19)</u>	<u>Wage Theft</u>

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B. Amended Crime Laws Affecting the Guidelines – Effective August 1, 2019

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.

² Senate Counsel Research Summary, SF 111 (May 9, 2019) (retrieved May 29, 2019, at https://www.senate.mn/departments/scr/billsumm/summary_display_from_db.php?ls=91&id=7007).

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**

Legislative Act: 2019 Minn. Laws 1st Sp. Sess. [ch. 5](#), art. 2, § 17–21 & 26.

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).

Proposed modifications to 2018 Minn. Sentencing Guidelines §§ 5.A, 5.B, § 6, and Comment 2.D.308:

* * *

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

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Severity Level	Offense Title	Statute Number
5	Stalking Harassment (3rd or Subsequent Violations)	609.749, subd. 4(b)
	Stalking (Pattern of Stalking Conduct)	609.749, subd. 5
4	Stalking Harassment (Aggravated Violations)	609.749, subd. 3(a),(b)
	Stalking Harassment (2nd or Subsequent Violation)	609.749, subd. 4(a)

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5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
609.749, subd. 3(a)(b)	Stalking Harassment (Aggravated Violations)	4
609.749, subd. 4(a)	Stalking Harassment (2nd or Subsequent Violation)	4
609.749, subd. 4(b)	Stalking Harassment (3rd or Subsequent Violations)	5
609.749, subd. 5	Stalking (Pattern of Conduct)	5

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6. Offenses Eligible for Permissive Consecutive Sentences

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Statute Number	Offense Title
609.749, subd. 3	Stalking Harassment (Aggravated Violations)
609.749, subd. 4	Stalking Harassment (Subsequent Violations)
609.749, subd. 5	Stalking (Pattern of Conduct)

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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 Minn. Sentencing Guidelines Comm'n, *Report to the Legislature* (Jan. 11, 2019). Retrieved April 23, 2019, at <http://mn.gov/msgc-stat/documents/reports/2017/2019MinnSentencingGuidelinesCommReportLegislature.pdf>.

[2]C. Presumptive Sentence

* * *

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

* * *

Statute	Offense	Prerequisite or Conditions	Minimum Duration
609.485	Escape	Offense committed during “Term of Imprisonment” <u>portion of Escape from</u> executed sentence	Grid Time

* * *

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, 2019,⁴ will apply to second or subsequent severe violent offenses committed on or after August 1, 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.

Proposed modifications to 2019 amendments to Minn. Sentencing Guidelines (§ 2.G.14.a):

* * *

[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.

⁴ Minn. Sentencing Guidelines Comm’n, *Report to the Legislature* (Jan. 11, 2019). Retrieved April 23, 2019, at <http://mn.gov/msgc-stat/documents/reports/2017/2019MinnSentencingGuidelinesCommReportLegislature.pdf>.

- (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 ~~2A. 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

* * *

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree (Intentional murder; Drive-by-shootings)</i>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ²	426 363-480 ²
<i>Murder, 3rd Degree Murder, 2nd Degree (Unintentional murder) Murder, 3rd Degree (Depraved Mind)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Murder, 3rd Degree (Controlled Substances) Assault, 1st Degree</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189

* * *

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

* * *

Statute Number	Offense Title	Severity Level
609.52 subd. 2(a) (12) (13)	Theft of Services (Over \$5,000)	3
609.52 subd. 2(a)(13)	Theft of Services (\$5,000 or Less)	2

* * *

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

* * *

Severity Level	Offense Title	Statute Number
5	Financial Transaction Card Fraud (Over \$35,000)	609.821 subd. 3(a)(1)(i)

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.821 subd. 3(a)(1)(i)	Financial Transaction Card Fraud (Over \$35,000)	5

⁵ See Minn. Laws 1999 Regular Session. Ch. 218, sec. 5. Retrieved April 25, 2019, at <https://www.revisor.mn.gov/laws/1999/0/218>.

* * *

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

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

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
UNRANKED	Unlawful Transfers or Sales of Recordings of Sounds; Sales	325E.201

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
325E.201	Unlawful Transfers or Sales of Recordings of Sounds; Sales	Unranked

* * *

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

⁶ See Minn. Laws 1993 Regular Session. Ch. 221. Retrieved April 25, 2019, at <https://www.revisor.mn.gov/laws/1993/0/221>.

January 11, 2019.⁷ 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, 2019.⁸

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;

⁷ Minn. Sentencing Guidelines Comm’n, *Report to the Legislature* (Jan. 11, 2019). Retrieved April 23, 2019, at <http://mn.gov/msgc-stat/documents/reports/2017/2019MinnSentencingGuidelinesCommReportLegislature.pdf>.

⁸ Minn. Sentencing Guidelines Comm’n, *Report to the Legislature* (Jan. 11, 2019). Retrieved April 23, 2019, at <http://mn.gov/msgc-stat/documents/reports/2017/2019MinnSentencingGuidelinesCommReportLegislature.pdf>.

- (iv) 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

* * *

Severity Level	Offense Title	Statute Number
Unranked	Escape from Electronic Home Monitoring	609.485, subd. 4(f)

* * *

Severity Level	Offense Title	Statute Number
<u>3</u>	<u>Escape from Electronic Monitoring</u>	<u>609.485, subd. 4(f)</u>

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
609.485 subd. 4(f)	Escape from Electronic Home Monitoring	Unranked <u>3</u>

* * *

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).

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

5.A. Offense Severity Reference Table

Severity Level	Offense Title	Statute Number
6	<u>Offering Counterfeit Currency (Over \$35,000)</u>	<u>609.632, subd. 3 with subd. 4(b)(1)</u>

* * *

Severity Level	Offense Title	Statute Number
3	<u>Offering Counterfeit Currency (\$5,001–\$35,000)</u>	<u>609.632, subd. 3 with subd. 4(b)(2)</u>

* * *

Severity Level	Offense Title	Statute Number
2	<u>Offering Counterfeit Currency (\$5,000 or Less)</u>	<u>609.632, subd. 3 with subd. 4(b)(3)</u>

* * *

Severity Level	Offense Title	Statute Number
UNRANKED	Counterfeiting of Currency (<u>Manufacturing or Printing/Means for False Reproduction</u>)	609.632, <u>subd. 1 & 2 with subd. 4(a)</u>

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
<u>609.632 subd. 3 with subd. 4(b)(1)</u>	<u>Offering Counterfeit Currency (Over \$35,000)</u>	<u>6</u>
<u>609.632 subd. 3 with subd. 4(b)(2)</u>	<u>Offering Counterfeit Currency (\$5,001–\$35,000)</u>	<u>3</u>
<u>609.632 subd. 3 with subd. 4(b)(3)</u>	<u>Offering Counterfeit Currency (\$5,000 or Less)</u>	<u>2</u>
<u>609.632 subd. 1 & 2 with subd. 4(a)</u>	Counterfeiting of Currency (<u>Manufacturing or Printing/Means for False Reproduction</u>)	Unranked

* * *