

Staff Information Paper

Summary of Commission Members' CP Priority Responses

July 13, 2020

The following table was first introduced at the June 11, 2020, Commission meeting as a staff summary of issues raised by staff (in the column labeled, "Issue") during the Commission's [mandated comprehensive review](#) of child pornography sentencing to date.

The table, as introduced, provided a staff estimate ("Types of Foreseeable Action") of whether an issue of the type described would most foreseeably lend itself to action in the form of a Sentencing Guidelines change ("Guidelines Change"), a recommendation to the Legislature for a statutory change ("Recommend Law Change"), highlighting the issue for legislative consideration ("Flag Issue for Legislature"), or a combination of these. The table, as introduced, provided a reference to the meeting materials in which each issue was discussed ("Reference"). Although the table did not contain an entry for "no action," that option was implied to be available for each issue.

At the June 11 meeting, after reviewing the table, it was determined Commissioners would prioritize their CP issues and forward them to Director Reitz by July 7, 2020.

In the updated table below, staff summarize each responding member's child pornography review priority response in a designated column to the right of "Types of Foreseeable Action." The "Reference" column is deleted due to limited space. The "Types of Foreseeable Action" subheaders are abbreviated due to limited space: "Guide" = Guidelines Change; "Law" = Recommended Law Change; "Flag" = Flag Issue for Legislature. Additional information about a response that does not fit in the table can be found in the "Notes" at the bottom of the table.

No.	Issue	Types of Foreseeable Action			Staff Summary of Commission Members' CP Priority Responses					
		Guide	Law	Flag	Chair Mitchell	Dietzen & Larkin	Estrada	Honold	Mark	Middlebrook
1.	Do definitions for “sexual performance,” “posing or modeling,” “pornographic work,” & “sexual conduct” in Minn. Stat. § 617.246 need updating or separating?		X	X	Alert the Legislature that the "conveys the impression" clause in the definition of pornographic work may be unconstitutional.	No action. (See “Notes”)			I think we should recommend a change in the language using “impression” to “indistinguishable from.”	Recommend that legislature review definition of pornographic work to mirror the federal definition. Consider recommending legislature update definitions and separate production offenses.

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2.	Is affirmative defense for "sexual performance" constitutional?		X	X	Alert the Legislature that the affirmative defense in Minn. Stat. s. 617.27 has been found unconstitutional and of the potential that the similar provision in s. 617.246 may also be unconstitutional.	No action. (See "Notes")	I think this should be included in the report to bring to Legislations attention. I know that we can't necessarily recommend language, but I think to not mention that we found this to possibly be unconstitutional based on other ruling would be unethical.		I think we should do away with the affirmative defense sections referencing the age of 18.	

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3.	Are Child Pornography Guidelines too lenient? What about sentencing multiple images and "Hernandizing" policy?	X	X	X	Consider developing policy to impose limits on Hernandizing for possession offenses.	Priority 4 of 6. (See "Notes")			I don't see enough evidence to conclude that are guidelines and statutory language to be too lenient. Internet offenders are not synonymous with sexual offenders. Multiple images from different times and Hernandizing give the Court and prosecutors plenty of ammunition.	Consider policy to limit "Hernandizing" for CP possession offenses.
4.	How do Minnesota's punishments compare to other jurisdictions?	X	X	X		Priority 1 of 6. (See "Notes")				

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5.	How do the rankings compare to other sex offenses?	X	X	X		Priority 2 of 6. (See "Notes")	I think this would be incredibly helpful to look at for ranking purposes.	Ranking as compared to other sex offenses		
6.	Should sexting between minors be treated differently?		X	X	Recommend that Legislature create an exception for sexting between minors.	No action. (See "Notes")	I would support this suggestion being made.	Sexting and other types of child pornography laws and how they affect minors/juveniles	Sexting involving youth only should be treated differently than production, especially when it is not done with intention to exploit or harm others.	Recommend that legislature create an exception for sexting between minors (such [as] D.C. did).

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7.	Should production & dissemination be equal in severity?	X	X	X	Consider options to rerank offenses so that dissemination is ranked at a lower severity level than production.	Priority 3 of 6. (See "Notes")	I think this is helpful as well in deciding severity level.	Production vs dissemination (as well as culpability for varying levels of production)		Review and consider ranking production differently than dissemination; particularly when the violation involves a minor under the age of 13.
8.	Are the varying levels of culpability for production offenses adequately distinguished?		X	X		No action. (See "Notes")				

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9.	Are production and co-occurring offenses adequately punished?	X	X	X	<p>Consider recommending that the Legislature create a CP Production exception to Minn. Stat. s. 609.035.</p> <p>Consider possibility of adding production to the permissive consecutive sentencing list if the Legislature created such an exception.</p>	Priority 6 of 6. (See "Notes")				I agree with staff recommendation to permit punishment for both production and co-occurring offense.	

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10.	Do the Guidelines adequately account for reoffense risk and responsivity to treatment?	X				Priority 5 of 6. (See "Notes")	Think this is also important as we look at ranking and public safety. public safety does not always equate to prison time.	Reoffense risk questions		

Notes:

Judge M. Larkin (email communication to N. Reitz, July 2, 2020).

Greetings. I am responding to your request that commission members identify the top issues that the Commission should prioritize for action moving forward. I have discussed the following approach with Justice Dietzen, and we are in accord. For ease of reference, we refer to the issues in the May 27, 2020 Staff Information Paper as issues one through ten.

Our response is informed by the Commission’s legislative mandate, which requires the Commission to “comprehensively review and consider modifying how the Sentencing Guidelines and the sex offender grid address the crimes described in Minnesota Statutes, sections 617.246 and 617.247, as compared to similar crimes, including other sex offenses and other offenses with similar maximum penalties.” Given the parameters of that clear mandate, we do not think the Commission should prioritize any issue that does not foreseeably lend itself to action in the form of a sentencing guidelines change. For that reason, the Commission should not focus on the following issues:

- Issue one regarding the definitions in Minnesota Statutes section 617.246
- Issue two regarding the affirmative defense for “sexual performance”
- Issue six regarding sexting between minors
- Issue eight regarding the varying levels of culpability for production offenses

[Staff notes the above issues as “no action” in table.]

Instead of addressing legal and policy issues regarding substantive criminal law, the Commission should focus on the issues that most foreseeably lend themselves to action in the form of a sentencing guidelines change. Those issues follow and are listed in the order in which we believe they should be prioritized:

- Issue four regarding how Minnesota’s punishments compare to other jurisdictions’ punishments
- Issue five regarding how the rankings compare to other sex offenses
- Issue seven regarding the relative severity of production and dissemination
- Issue three regarding whether the child-pornography guidelines are too lenient
- Issue ten regarding whether the guidelines adequately account for re-offense risk and treatment responsiveness
- Issue nine regarding whether production and co-occurring offenses are adequately punished

[Staff notes the above issues with a priority number in the table.]

Those issues address the proportionality of criminal conduct and sentencing, the goal of rational and consistent sentencing, and the Commission’s primary public-safety consideration and are appropriately addressed the Commission. Those issues address the proportionality of criminal conduct and sentencing, the goal of rational and consistent sentencing, and the Commission’s primary public-safety consideration and are appropriately addressed the Commission. * * *