



Child Pornography Sentencing: Comprehensive Review, Part 5

May 7, 2020
Staff Presentation
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Issues from September meeting

Examples of possible issues

Definitions <ul style="list-style-type: none"> • "Pornographic work" • "Sexual performance" 	Production <ul style="list-style-type: none"> • Use of Minor • Sexting • Distinctions • Rankings • Other crimes 	Dissemination <ul style="list-style-type: none"> • Distinctions • 617.246 (for profit) • Rankings 	Possession <ul style="list-style-type: none"> • Distinctions • Hermandizing • Rankings 	Other Issues <ul style="list-style-type: none"> • CSDB history • Grooming • Invasion of privacy • Victims' rights • Affirmative defense
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SENTENCING GUIDELINES MODIFICATION.

The Sentencing Guidelines Commission shall 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.

—2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, § 22

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The commission **shall from time to time make recommendations to the legislature** regarding changes in the Criminal Code, criminal procedures, and other aspects of sentencing.

—from Minn. Stat. § 244.09, subd. 6

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Dissemination – Statutory Structure

§ 617.247, subd. 3 Dissemination

- To disseminate [a] pornographic work
- To an adult or minor
- If the person knows or has reason to know the content and character of the pornographic work
- SL E/D; 7/15 years max
- **82 sentences** in 10 years

§ 617.246, subd. 4 Dissemination [for profit]

- Same, but dissemination is **for profit**
- SL E/D; 10/15 years max
- **0 sentences** in 10 years (2009–2018)

§ 617.246, subd. 3 Operation or ownership of business

- Similar, but offense is **owning or operating a business** in which such dissemination occurs
- Also includes a business in which a pornographic work is **reproduced**
- SL E/D; 10/15 years max
- **0 sentences** in 10 years

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Dissemination – Questions for Discussion

Are the following statutory distinctions the right ones (in the Internet age)?

- “For profit”
- “Owns or operates a business”
- CP “is reproduced”

Are these behaviors equally culpable?

- Passive peer-to-peer (P2P) filesharing
 - True of 20 of 22 cases in 2016–18
- Passing to an acquaintance (e.g., the child)
 - True of 2 of 22 cases in 2016–18
- Active participation/bartering in a CP community, whether informal or organized
 - Should gaining more CP count as “profit”?
 - Should it matter if the dark web is used?
- Introducing previously uncirculated CP to the Internet for the first time

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Possession – Statutory Structure

§ 617.247, subd. 4 Possession

- To possess a pornographic work
- Or a computer disk, computer, or other storage system
- Knowing or with reason to know its content and character
- SL G; 5 years max

Enhancements (Applied to all CP Offenses)

- With prior UMSP/CP conviction or adjudication of delinquency;
- By registered predatory offender; or
- Involved a minor under 13.
- SL F; 10 years max

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Possession – Questions for Discussion

- Are the current statutory distinctions adequate?
 - Prior CP conviction
 - Registered predatory offender
 - Victim under 13
- Recall USSC's conclusion: Consider—
 - **Collection**: volume; depicted conduct; victim ages; organization, protection, & sophisticated tech
 - **Engagement** w/other offenders/community
 - **History** of sexual abuse/exploitation/predation

SENTENCING ISSUES

- Given the typically large collection size, does Hernandizing make the sentencing grid irrelevant?
- Even if this is an issue, can anything be done, given the fact that separate behavioral incidents get separate sentences?
- Given Hernandizing and the current statutory maximums, would it make sense to increase severity levels without increasing statutory maximums?
- Is probationary treatment better than prison for untreated child porn possessors?

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Yet another way of looking at rankings

- Commission considers **statutory maximums**—as one factor among many—when ranking offense severity
- Statutory maximum may be viewed as a legislative signal of intended severity
- Commission generally prefers that grid time does not exceed the statutory maximum
- Many of the severity levels on the sex offender grid were designed so that the statutory maximum was found at maximum criminal history

A thought experiment:

- **What if child pornography offenses were ranked so the statutory maximum was found at the maximum criminal history?**

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CSC	CP	S L	CHS 0	CHS 1	CHS 2	CHS 3	CHS 4	CHS 5	CHS 6+
1		A	12	13	14	15	19.5	25.5	30
2		B	7.5	9.2	10.8	12.5	16.3	21.3	25
3		C	4	5.2	6.3	7.5	9.8	12.8	15
2/3	U+, D+	D			5	5.8	7.6	9.9	11.7
4	U, D	E	Presumptive stayed prison (up to 1 year in jail)			5	6.5	8.5	10
4/5	P+	F				3.8	4.9	6.4	7
3	P	G					3.3	4.3	5

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CSC	CP	SL	CHS 0	CHS 1	CHS 2	CHS 3	CHS 4	CHS 5	CHS 6+
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2		B	7.5	9.2	10.8	12.5	16.3	21.3	25
3		C	4	5.2	6.3	7.5	9.8	12.8	15
2/3	U+, D ^{\$} +, D+	D			5	5.8	7.6	9.9	11.7
4	U, D ^{\$} , D	E	Presumptive stayed prison (up to 1 year in jail)			5	6.5	8.5	10
4/5	P+	F				3.8	4.9	6.4	7
3	P	G					3.3	4.3	5

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CSC	CP	SL	CHS 0	CHS 1	CHS 2	CHS 3	CHS 4	CHS 5	CHS 6+
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4/5	D	F				3.8	4.9	6.4	7
3	P	G					3.3	4.3	5

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Proposed next steps

- Discuss remaining issues at next meeting
- Answer any questions from today
- Identify possible topics that may be appropriate for Commission action
- If Commission could identify topics at July meeting, staff could develop options for consideration during August hiatus
- Commission could make final decisions and complete report in the fall



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