

Comprehensive Review of Child Pornography Sentencing Guidelines

Proposals to Modify the Sentencing Guidelines

October 28, 2020

Pursuant to a legislative mandate,¹ the Sentencing Guidelines Commission has been comprehensively reviewing its child pornography sentencing guidelines since September 12, 2019. On October 8, 2020, the Commission discussed several proposals to modify the Sentencing Guidelines as a result of this review. This staff paper describes each proposal, estimates its impact, and suggests draft language to effect each proposal. No attempt is made to replicate the arguments in favor of, or opposed to, any proposal. The actual packages of proposals may be found here:

- http://mn.gov/msgc-stat/documents/meeting%20materials/2020/October/05B2-Larkin-SGC_Proposed_Rankings.pdf
- http://mn.gov/msgc-stat/documents/meeting%20materials/2020/October/05B3-Mitchell-CP_Reranking_Proposal.pdf

Although the authors packaged their proposals, this paper breaks the proposals into six discrete, numbered components. The Commission may choose to combine these numbered proposals at the time of action.

Depending on the proposals adopted, it may be necessary to change the example offenses displayed on the Sex Offender Grid. Those changes are not included in this document's Guidelines modification language, but will be included in the proposed amendments provided to the public in advance of the public hearing.

One of the proposal packages included legislative recommendations, which are outside the scope of this staff paper.

1. Raise Severity Level, Use of Minors in Sexual Performance (Enhanced Offenses)

Authors: Chair Mitchell & Judge Larkin

Proposal: Increase, from Severity Level D to Severity Level C, the severity level assigned to Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13).

¹ "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. art. 4, § 22.](#)

Included are the enhanced versions of child pornography production (Minn. Stat. § 617.246, subd. 2(b)); ownership or operation of a child pornography dissemination or reproduction business (subd. 3(b)); and dissemination of child pornography for profit (subd. 4(b)).

Guidelines Considerations:

Table 1 displays several Guidelines considerations that would attach to increasing the offense severity from Severity Level D to Severity Level C.

Table 1. Guidelines Considerations in Comparing Existing Severity Level and Proposed Severity Level, Use of Minors in Sexual Performance (Enhanced Offenses) – Proposal 1

Point of Comparison	Severity Level D (Existing)	Severity Level C (Proposed)
Presumptive commit at criminal histories greater than or equal to:	2	0
Presumptive sentence at no criminal history:	36-month stayed sentence	48-month commit
Presumptive sentence at maximum criminal history:	140-month commit	180-month commit
Comparison of Guidelines maximum to statutory maximum (15 years' imprisonment):	Guidelines maximum is 40 months less than statutory maximum	The two are equal
Weight in future criminal history scores of sex offenses:	1½ points	2 points
Weight in future criminal history scores of non-sex offenses:	1½ points	1½ points
Example CSC offense:	Sexual penetration of a 13-, 14-, or 15-year old victim by someone at least four years older (CSC 3rd Degree)	Sexual penetration by force or coercion (CSC 3rd Degree)

Prison-Bed and Demographic Impact:

Assumptions

To prepare an estimate of the prison-bed and demographic impacts of this proposal, MSGC staff assumed that future Use of Minors in Sexual Performance cases will be similar to, and offenders will share the demographic characteristics of, those Use of Minors in Sexual Performance cases and offenders sentenced from 2015–2019. Over those five years, 20 such cases were sentenced, an average of 5 per year.

Because the Severity Level D (enhanced) offense did not take effect until August 1, 2019, no offenders were sentenced for the Severity Level D offense from 2015–2019. Accordingly, staff further assumed that those offenses known to have been committed by registered predatory offenders or against victims under age 13 would have been Severity Level D offenses if committed on or after August 1, 2019, and would be increased to Severity Level C offenses under this proposal. Over those five years, sentence-enhancing circumstances applied in 8 (40%) of the cases (5 against victims under age 13; 3 by registered predatory offenders).

Estimated Prison-Bed Impact

If the above assumptions are correct, MSGC staff estimates that Proposal 1 would cause the eventual need for 2.5 additional prison beds a year (1 prison bed caused by offenders moving from probation to prison, and 1.5 prison beds caused by offenders serving more time).² One case that received a mitigated dispositional departure was assumed to continue to receive that departure even though it would be ranked at a higher severity level.

Estimated Demographic Impact

If the above assumptions are correct, MSGC staff estimates that the occupants of the additional prison beds would have the following demographic characteristics:

- Male – 100 percent;
- White – 74 percent; and
- American Indian – 36 percent.

Guidelines Modification Language:

Possible modifications to 2020 Minn. Sentencing Guidelines §§ 5.A and 5.B, effective August 1, 2021, and applicable to crimes committed on or after that date:

5.A. Offense Severity Reference Table

* * *

² “Prison beds” refers to the expected pronounced, executed sentences per year, in years, multiplied by two-thirds. Thus, for example, an 18-month, executed sentence every year would equal one prison bed. The estimate is limited to the impact of increasing the severity from D to C, and excludes the impact of the 2019 increase in severity from E to D.

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

* * *

5.B. Severity Level by Statutory Citation

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

* * *

2. Raise Severity Level, Dissemination of Child Pornography (Enhanced Offenses)

Author: Judge Larkin

Proposal: Increase, from Severity Level D to Severity Level C, the severity level assigned to Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13) (Minn. Stat. § 617.247, subd. 3(b)).

Not included are enhanced versions of ownership or operation of a child pornography dissemination or reproduction business, nor dissemination of child pornography for profit; these offenses are classified under Use of Minors in Sexual Performance (Minn. Stat. § 617.246) and are covered by Proposal 1.

Guidelines Considerations:

The same Guidelines considerations applicable to Proposal 1 are also applicable to Proposal 2. Please refer to Table 1 (p. 2) for that explanation.

Prison-Bed and Demographic Impact:

Assumptions

To prepare an estimate of the prison-bed and demographic impacts of this proposal, MSGC staff assumed that future Dissemination of Child Pornography cases will be similar to, and offenders will share the demographic characteristics of, those Dissemination of Child Pornography cases and offenders sentenced from 2017–2019. Over those three years, 24 such cases were sentenced, an average of 8 per year. Of those, the sentences of 4 cases were enhanced due to the offender’s prior child pornography record or status as a registered predatory offender.

Because the sentencing enhancement for victims under age 13 did not apply to crimes committed before August 1, 2019, that enhancement applied to no dissemination cases sentenced in 2019. Staff assumed that the age enhancement would have applied to those cases whose complaints identified the victim as under age 13, as prepubescent, or using similar language. Based on that assumption, the age enhancement would have applied to an additional 17 cases. Of the 24 total cases over three years, it is estimated that 21 (88 percent) would be enhanced cases (7 a year).

Estimated Prison-Bed Impact

If the above assumptions are correct, MSGC staff estimates that Proposal 2 would cause the eventual need for 10 additional prison beds per year (7 prison beds caused by offenders moving from probation to prison, and 3 prison beds caused by offenders serving more time). One case that received a mitigated dispositional departure was assumed to still receive that departure. Two mitigated durational departures were similarly applied to new sentence lengths.

Estimated Demographic Impact

If the above assumptions are correct, MSGC staff estimates that the occupants of the additional prison beds would have the following demographic characteristics:

- Male – 100 percent;
- White – 87 percent;
- Black – 3 percent;
- Hispanic – 10 percent.

Guidelines Modification Language:

Possible modifications to 2020 Minn. Sentencing Guidelines §§ 5.A and 5.B, effective August 1, 2021, and applicable to crimes committed on or after that date:

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
C	<u>Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)</u>	<u>617.247, subd. 3(b)</u>
D	Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)	617.247, subd. 3(b)

* * *

5.B. Severity Level by Statutory Citation

Statute Number	Offense Title	Severity Level
617.247 subd. 3(b)	Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)	D <u>C</u>

* * *

3. Raise Severity Level, Use of Minors in Sexual Performance (Base Offenses)

Author: Chair Mitchell

Proposal: Increase, from Severity Level E to Severity Level D, the severity level assigned to Use of Minors in Sexual Performance. This includes child pornography production (Minn. Stat. § 617.246, subd. 2(a)); ownership or operation of a child pornography dissemination or reproduction business (subd. 3(a)); and dissemination of child pornography for profit (subd. 4(a)).

Guidelines Considerations:

Table 2 displays several Guidelines considerations that would attach to increasing the offense severity from Severity Level E to Severity Level D.

Table 2. Guidelines Considerations in Comparing Existing Severity Level and Proposed Severity Level, Use of Minors in Sexual Performance (Base Offenses) – Proposal 3

Point of Comparison	Severity Level E (Existing)	Severity Level D (Proposed)
Presumptive commit at criminal histories greater than or equal to:	3	2
Presumptive sentence at no criminal history:	24-month stayed sentence	36-month stayed sentence
Presumptive sentence at maximum criminal history:	120-month commit	140-month commit
Comparison of Guidelines maximum to statutory maximum (10 years' imprisonment):	The two are equal	Guidelines maximum is 20 months greater than statutory maximum
Weight in future criminal history scores:	1½ points	1½ points
Example CSC offense:	Sexual contact by force or coercion (CSC 4th Degree)	Sexual penetration of a 13-, 14-, or 15-year old victim by someone at least four years older (CSC 3rd Degree)

Prison-Bed and Demographic Impact:

Assumptions

To prepare an estimate of the prison-bed and demographic impacts of this proposal, MSGC staff assumed that future Use of Minors in Sexual Performance cases will be similar to, and offenders will share the demographic characteristics of, those Use of Minors in Sexual Performance cases and offenders sentenced from 2015–2019. Over those five years, 20 such cases were sentenced, an average of 5 per year.

Because the Severity Level D (enhanced) offense did not take effect until August 1, 2019, no offenders were sentenced for the Severity Level D offense from 2015–2019. Accordingly, staff further assumed that those offenses known to have been committed by registered predatory offenders or against victims under age 13 would have been Severity Level D offenses if committed on or after August 1, 2019, and would be increased to Severity Level C offenses under this proposal. Over those five years, sentence-enhancing circumstances applied in 8 (40%) of the cases (5 against victims under age 13; 3 by registered predatory offenders). Therefore, the proposed change in severity level would apply to the remaining 12 offenses.

Estimated Prison-Bed Impact

If the above assumptions are correct, MSGC staff estimates that Proposal 3 would cause the eventual need for 5 additional prison beds for all 12 offenders (3.5 prison beds caused by offenders moving from probation to prison, and 1.5 prison beds caused by offenders serving more time). This would result in an average of 1 additional prison bed a year. One mitigated dispositional departure was applied to the offense at the higher severity level.

Estimated Demographic Impact

If the above assumptions are correct, MSGC staff estimates that the occupants of the additional prison beds would have the following demographic characteristics:

- Male – 100 percent;
- White – 100 percent.

Guidelines Modification Language:

Possible modifications to 2020 Minn. Sentencing Guidelines §§ 5.A and 5.B, effective August 1, 2021, and applicable to crimes committed on or after that date:

5.A. Offense Severity Reference Table

* * *

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

* * *

5.B. Severity Level by Statutory Citation

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

* * *

4. Raise Severity Level, Possession of Child Pornography (Enhanced Offenses)

Author: Judge Larkin

Proposal: Increase, from Severity Level F to Severity Level E, the severity level assigned to Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13) (Minn. Stat. § 617.247, subd. 4(b)).

Guidelines Considerations:

Table 3 displays several Guidelines considerations that would attach to increasing the offense severity from Severity Level F to Severity Level E. In addition, the section in Proposal 6 entitled “Interaction with Proposal 4” (p. 14) discusses additional Guidelines considerations that would attach to Proposal 6 if Proposal 4 were adopted.

Table 3. Guidelines Considerations in Comparing Existing Severity Level and Proposed Severity Level, Possession of Child Pornography (Enhanced Offense) – Proposal 4

Point of Comparison	Severity Level F (Existing)	Severity Level E (Proposed)
Presumptive commit at criminal histories greater than or equal to:	3	3
Presumptive sentence at no criminal history:	18-month stayed sentence	24-month stayed sentence
Presumptive sentence at maximum criminal history:	84-month commit	120-month commit
Comparison of Guidelines maximum to statutory maximum (10 years’ imprisonment):	Guidelines maximum is 36 months less than the statutory maximum	The two are equal
Weight in future criminal history scores:	1 point	1½ points
Example CSC offense:	Sexual contact of a 13-, 14-, or 15-year old victim by someone at least four years older (CSC 4th Degree)	Sexual contact by force or coercion (CSC 4th Degree)

Prison-Bed and Demographic Impact:

Assumptions

To prepare an estimate of the prison-bed and demographic impacts of this proposal, MSGC staff assumed that future Possession of Child Pornography cases will be similar to, and offenders will share the demographic characteristics of, those Possession of Child Pornography cases and offenders sentenced from 2017–2019, when 238 such cases were sentenced (79 a year). Of those, the sentences of 21 (9%) cases were enhanced due to the offender’s prior child pornography record or status as a registered predatory offender.

Because the sentencing enhancement for victims under age 13 did not apply to crimes committed before August 1, 2019, that enhancement applied to no possession cases sentenced from 2017–2019. Staff assumed that the age enhancement would have applied to those cases whose complaints identified the victim as under age 13, as prepubescent, or using similar language. Based on that assumption, the age enhancement would have applied to an additional 171 cases. Therefore, it is estimated that the enhanced penalties could apply to 192 (81%) of the 238 cases sentenced (64 a year).

Estimated Prison-Bed Impact

If the above assumptions are correct, MSGC staff estimates that Proposal 4 would cause the eventual need for 45 additional prison beds a year (19 prison beds caused by offenders moving from probation to prison, and 26 prison beds caused by offenders serving more time). To develop this estimate, it was assumed that the current mitigated dispositional departure rate (41% of presumptive commits) and mitigated durational departure rates (16% of prison sentences) would apply in the future. The increase in the weights of prior possession offenses from 1 point to 1.5 points resulted in an increase to the criminal history scores (CHS) for 111 (47%) offenders, which contributed to the bed impact. The increase to CHS resulted in 22 offenders (9%) moving from presumptive probation dispositions to presumptive prison dispositions.

Estimated Demographic Impact

If the above assumptions are correct, MSGC staff estimates that the occupants of the additional prison beds would have the following demographic characteristics:

- Male – 100 percent;
- White – 95 percent;
- Black – 1 percent; and
- Hispanic – 4 percent.

Guidelines Modification Language:

Possible modifications to 2020 Minn. Sentencing Guidelines §§ 5.A and 5.B, effective August 1, 2021, and applicable to crimes committed on or after that date:

5.A. Offense Severity Reference Table

* * *

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

* * *

5.B. Severity Level by Statutory Citation

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

* * *

5. Lower Severity Level, Dissemination of Child Pornography (Base Offense)

Author: Judge Larkin

Proposal: Decrease, from Severity Level E to Severity Level F, the severity level assigned to Dissemination of Child Pornography (Minn. Stat. § 617.247, subd. 3(a)).

Guidelines Considerations:

Table 4 displays several Guidelines considerations that would attach to decreasing the offense severity from Severity Level E to Severity Level F:

Table 4. Guidelines Considerations in Comparing Existing Severity Level and Proposed Severity Level, Dissemination of Child Pornography (Base Offense) – Proposal 5

Point of Comparison	Severity Level E (Existing)	Severity Level F (Proposed)
Presumptive commit at criminal histories greater than or equal to:	3	3
Presumptive sentence at no criminal history:	24-month stayed sentence	18-month stayed sentence

Point of Comparison	Severity Level E (Existing)	Severity Level F (Proposed)
Presumptive sentence at maximum criminal history:	120-month commit	84-month commit
Comparison of Guidelines maximum to statutory maximum (7 years' imprisonment):	Guidelines maximum is 36 months greater than statutory maximum	The two are equal
Weight in future criminal history scores:	1½ points	1 point
Example CSC offense:	Sexual contact by force or coercion (CSC 4th Degree)	Sexual contact of a 13-, 14-, or 15-year old victim by someone at least four years older (CSC 4th Degree)

Prison-Bed and Demographic Impact:

Assumptions

To prepare an estimate of the prison-bed and demographic impacts of this proposal, MSGC staff assumed that future Dissemination of Child Pornography cases will be similar to, and offenders will share the demographic characteristics of, those Dissemination of Child Pornography cases and offenders sentenced from 2017–2019. Over those three years, 24 such cases were sentenced, an average of 8 per year. Of those, the sentences of 4 cases were enhanced due to the offender's prior child pornography record or status as a registered predatory offender.

Because the sentencing enhancement for victims under age 13 did not apply to crimes committed before August 1, 2019, that enhancement applied to no possession cases sentenced from 2017–2019. Staff assumed that the age enhancement would have applied to those cases whose complaints identified the victim as under age 13, as prepubescent, or using similar language. Based on that assumption, the age enhancement would have applied to an additional 17 cases. Therefore, it is estimated that the enhanced penalties could apply to 21 (88%) of the 24 cases sentenced.

That leaves 3 non-enhanced cases (an average of 1 a year) that would be ranked at Severity Level F rather than E. None of those cases received a prison sentence.

Estimated Prison-Bed Impact

If the above assumptions are correct, MSGC staff estimates that Proposal 5 would have no impact in the need for prison beds.

Guidelines Modification Language:

Possible modifications to 2020 Minn. Sentencing Guidelines §§ 5.A and 5.B and Appendix 3, effective August 1, 2021, and applicable to crimes committed on or after that date:

5.A. Offense Severity Reference Table

* * *

Severity Level	Offense Title	Statute Number
E	Dissemination of Child Pornography	617.247, subd. 3(a)
F	Dissemination of Child Pornography	617.247, subd. 3(a)

* * *

5.B. Severity Level by Statutory Citation

Statute Number	Offense Title	Severity Level
617.247 subd. 3(a)	Dissemination of Child Pornography	E [*] F

* * *

* 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.

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

This table is for convenience when determining if a presumptive duration exceeds the statutory maximum sentence as described in section 2.C.2. * * * The table may not be exhaustive.

* * *

Statute	Offense	Severity Level	Statutory Maximum (Months)	Exceeds Statutory Maximum At:
617.247, subd. 3(a)	Dissemination of Child Pornography	E	84	CHS-5

* * *

6. Limit the Number of Child Pornography Possession Offenses that can be Hernandized and Included in Criminal History

Author: Chair Mitchell

Proposal: If more than two Possession of Child Pornography offenses are sentenced on the same day, limit to two the number of such offenses that may contribute to criminal history—whether to the criminal history of other offenses sentenced the same day, or to the criminal history of offenses to be sentenced in the future.

Guidelines Considerations:

Generally

- The proposed rule applies whenever more than two Possession of Child Pornography offenses are, or were, sentenced on the same day—whether base offenses, enhanced offenses, or a combination of the two.
- Dissemination offenses are not governed by the proposed rule. The number of dissemination cases that could be Hernandized would be limited only if they arose out of a single course of conduct, in which case the Single Course of Conduct/Multiple Victims rule might apply (see discussion below).
- If, for example, an offender separately committed offenses in the following sequence—possession, possession, dissemination, and possession—all of the first three offenses could be used in the criminal history for the fourth offense, even if sentenced for all on the same day.
- The proposed rule not only limits Hernandizing when more than two current Possession of Child Pornography offenses are being sentenced, it also limits using more than two prior Possession of Child Pornography offenses in criminal history—if those prior possession offenses had been sentenced on the same day.
- This is true even if the prior offenses occurred and were sentenced before the proposed rule’s effective date.

Interaction with Proposal 4

- Under the current Sentencing Guidelines, every Possession of Child Pornography offense—whether enhanced or not—contributes 1 point to criminal history.
- If the proposed rule (Proposal 6) were added to the current sentencing Guidelines, then, no first-time offender could become a presumptive commit due solely to the number of possession offenses Hernandized in a single day, because the criminal history score would be capped at 2 points, which, for possession offenses, is in the shaded area of the Sex Offender Grid.
- Under Proposal 4, however, Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13) offenses would each contribute 1½ points to criminal history.
- Thus, if both Proposal 4 and Proposal 6 were adopted, and if a first-time offender who possessed multiple images of children under 13 were sentenced for three such Hernandized offenses, then the presumptive sentence would be a 60-month prison commit, because the criminal history score for

the third offense—3 points—would place the presumptive sentence outside the shaded area of the Sex Offender Grid.

Interaction with Single Course of Conduct/Multiple Victims rule, etc.

- Proposal 6 is very similar to the existing Single Course of Conduct/Multiple Victims rule, found in sections 2.B.1.d(2) (felony history), 2.B.1.e(2) (Hernandizing), 2.B.3.d (misdemeanor history), and 2.B.4.d (juvenile history) of the Sentencing Guidelines. That rule, which applies when multiple offenses arising from a single course of conduct involving multiple victims were sentenced, is similar in that it also limits to two the number of such offenses that may be included in criminal history. See Comment 2.B.110 (discussing the Commission’s rationale for this rule).
- Staff believes Proposal 6 would interact with the Single Course of Conduct/Multiple Victims rule as follows: If many Possession of Child Pornography offenses, involving many victims, were sentenced on the same day, the proposed rule would limit to two the number of such offenses that could be included in criminal history, making the Single Course of Conduct/Multiple Victims rule redundant in such a case.
- Like the Single Course of Conduct/Multiple Victims rule, the proposed rule is extended to section 2.B.3 (Prior Gross Misdemeanors and Misdemeanors) in the event that prior felony Possession of Child Pornography offenses resulted in a misdemeanor or gross misdemeanor sentence. See Comment 2.B.305.
- Unlike the Single Course of Conduct/Multiple Victims rule, it is not necessary to extend the proposed rule to section 2.B.4 (Prior Juvenile Adjudications), because two Possession of Child Pornography offenses will suffice to reach the maximum one juvenile point, and the maximum will not be exceeded because the offense is not a presumptive commit at all criminal histories.

Prison-Bed and Demographic Impact:

Assumptions

To prepare an estimate of the prison-bed and demographic impacts of this proposal, MSGC staff assumed that future Possession of Child Pornography cases will be similar to, and offenders will share the demographic characteristics of, those Possession of Child Pornography cases and offenders sentenced from 2017–2019, when 238 such cases were sentenced. Of those, the sentences of 21 (9%) cases were enhanced due to the offender’s prior child pornography record or status as a registered predatory offender.

Because the sentencing enhancement for victims under age 13 did not apply to crimes committed before August 1, 2019, that enhancement applied to no possession cases sentenced from 2017–2019. Staff assumed that the age enhancement would have applied to those cases whose complaints identified the victim as under age 13, as prepubescent, or using similar language. Based on that assumption, the age enhancement would have applied to an additional 171 cases. Therefore, it is estimated that the enhanced penalties could apply to 192 (81%) of the 238 cases sentenced (64 a year). The impact of this proposal was assessed after the Severity Level change for the enhanced offenses was applied.

To develop this estimate, it was assumed that the current mitigated dispositional departure rate (41% of presumptive commits) and mitigated durational departure rates (16% of prison sentences) would apply in the future. To evaluate the Impact of the proposed limit to Hernandizing, staff looked at the worksheets for offenders sentenced for multiple offenses. Of the 238 possession offenders sentenced from 2017–2019, 128 were sentenced for multiple offenses. Staff looked at the worksheets for those for those 128, and found that the proposed limit on Hernandizing would affect the CHS of 56 (44%). (They were sentenced for more than three offenses or had more than two prior offenses sentenced at the same time.) Of the 56 offenders affected by this proposed policy change, 46 started with a CHS of 0 before the first offense was sentenced.

Estimated Prison-Bed Impact – Proposal 6 Without Proposal 4

The limit on Hernandizing would apply to 56 (24%) of the 238 child pornography possession cases sentenced from 2017–2019. If the above assumptions are correct, and if Proposal 4 were not also adopted, MSGC staff estimates that Proposal 6 would cause an eventual reduction in the need for 26 prison beds (24 prison beds caused by offenders moving from prison to probation, and 2 prison beds caused by offenders serving less time).

Estimated Demographic Impact – Proposal 6 Without Proposal 4

If the above assumptions are correct, and under the scenario where Proposal 4 were not also adopted, MSGC staff estimates that the people who would have occupied the reduced prison beds would have the following demographic characteristics:

- Male – 100 percent;
- White – 93 percent; and
- Hispanic – 7 percent.

Estimated Prison-Bed Impact – Proposal 6 With Proposal 4

The limit on Hernandizing combined with increasing the severity level for enhanced offenses would apply to 52 (24%) of the 238 child pornography possession cases sentenced from 2017–2019. If the above assumptions are correct, and if Proposal 4 were also adopted, MSGC staff estimates that Proposal 6 would cause an eventual reduction in the need for 22 additional prison beds (8 prison beds caused by offenders moving from prison to probation, and 14 prison beds caused by offenders serving less time).

Estimated Demographic Impact – Proposal 6 With Proposal 4

If the above assumptions are correct, and under the scenario where Proposal 4 were also adopted, MSGC staff estimates that the people who would have occupied the reduced prison beds would have the following demographic characteristics:

- Male – 100 percent;
- White – 94 percent; and

- Hispanic – 6 percent.

Guidelines Modification Language:

Possible modifications to 2020 Minn. Sentencing Guidelines §§ 2.B.1 & 2.B.3, effective August 1, 2021, and applicable to crimes committed on or after that date:

[2.]B. Criminal History

* * *

1. Prior Felonies. Assign a particular weight, as set forth in paragraphs a and b, to each extended jurisdiction juvenile (EJJ) conviction and each felony conviction, provided that a felony sentence was stayed or imposed before the current sentencing or a stay of imposition of sentence was given before the current sentencing.

* * *

- d. Assigning Felony Weights – Previous Court Appearances Resulting in Multiple Sentences. Following are exceptions to including prior felonies in criminal history when multiple felony sentences were imposed in a previous court appearance:

- (1) Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minn. Stats. §§ 152.137, 609.585 or 609.251, include in criminal history only the weight from the offense at the highest severity level.

- (2) Single Course of Conduct / Multiple Victims. When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, include in criminal history only the weights from the two offenses at the highest severity levels.

- (3) Multiple Convictions, Child Pornography Possession, When more than two sentences for violations of Minn. Stat. § 617.247, subd. 4, were imposed on the same day, include in criminal history only the weights from the first two such offenses sentenced.

- e. Assigning Felony Weights – Current Multiple Sentences. Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced (also known as "*Hernandizing*") except as follows:

- (1) Single Course of Conduct / Multiple Sentences. When multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day under Minn. Stats. §§ 152.137, 609.585, or 609.251, the conviction and sentence for the “earlier” offense does not increase the criminal history score for the “later” offense.
- (2) Single Course of Conduct / Multiple Victims. When multiple current convictions arise out of a single course of conduct in which there were multiple victims, weights are given only to the two offenses at the highest severity levels.
- (3) Multiple Convictions, Child Pornography Possession. When more than two sentences are imposed on the same day for multiple convictions under Minn. Stat. § 617.247, subd. 4, weights are given only to the first two such offenses sentenced.

* * *

3. Prior Gross Misdemeanors and Misdemeanors. Prior gross misdemeanor and misdemeanor convictions count as units comprising criminal history points. Four units equal one criminal history point; give no partial point for fewer than four units. Determine units as specified in this section.

* * *

- c. Assigning Misdemeanor Units – Previous Court Appearances Resulting in Multiple Sentences. Following are exceptions to including prior misdemeanors in criminal history when multiple sentences were imposed in a previous court appearance:
 - (1) Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minn. Stat. §§ 152.137, 609.585, or 609.251, the offender must not be assigned more than one unit.
 - (2) ~~(2)~~ Single Course of Conduct / Multiple Victims. When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, assign only the two most severe offenses units in criminal history.

(3) Multiple Convictions, Child Pornography Possession. When more than two sentences for violations of Minn. Stat. § 617.247, subd. 4, were imposed on the same day, assign only two such offenses units in criminal history.

[Sections 2.B.3.e, 2.B.3.f, 2.B.3.g, and 2.B.3.h are renumbered as 2.B.3.d, 2.B.3.e, 2.B.3.f, and 2.B.3.g, respectively.]

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