

## MEMORANDUM

DATE: October 28, 2020

TO: Chairwoman Mitchell and Sentencing Guidelines Commissioners

FROM: Commissioner Larkin

RE: Proposal to Limit the Number of Child Pornography Possession Offenses that can be *Hernandized* and included in Criminal History

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**“It is the policy of the legislature in enacting this section to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors. It is therefore the intent of the legislature to penalize possession of pornographic work depicting sexual conduct which involve minors or appears to involve minors in order to protect the identity of minors who are victimized by involvement in the pornographic work, and to protect minors from future involvement in pornographic work depicting sexual conduct.”**  
Minn. Stat. § 617.247 (2018)

Chairwoman Mitchell has proposed that the Commission adopt a policy that “A first-time offender for both the base level possession offense and enhanced version of the offense, will earn no more than 2 criminal history points in a single sentencing event, thereby ensuring that . . . the first offense will result in a probation sentence unless the prosecutor seeks and the court imposes an aggravated dispositional departure.” The chair explains that “[t]he practical effect of this proposal is that it will only ensure that a first-time offender receives a probation sentence.”

It is my understanding that the Commission could vote on the proposal at the November meeting. I will speak against the proposal at that time. Because the sentencing reduction set forth in the proposal is unprecedented and the Commission did not have a meaningful opportunity to discuss it when it was first introduced at the October meeting, I write to highlight some issues for consideration.

- 1) According to information provided by Commission staff, 238 child-pornography-possession cases were sentenced from 2017-2019. Of those cases, only 13 of the offenders were sentenced to prison despite a criminal history score of 0 at their first sentencing event. Thus, only 5.5% of offenders with a criminal history score of 0 at their first sentencing event were sent to prison for multiple

child-pornography offenses. Thus, there is no danger that many “first-time” offenders are going to prison.

- 2) It is incorrect to describe those offenders as “first-time” offenders. Under well-established Minnesota law, if an offender takes possession of child-pornography images at different times and locations, each act of possession is defined as a separate criminal offense that may be separately prosecuted and sentenced.<sup>1</sup> If an offender is convicted and sentenced for multiple, separate child-pornography-possession offenses, he is a “first-time” offender only regarding the first offense of conviction and sentencing. As to the convictions and sentences for the remaining child-pornography-possession offenses, he is a repeat offender.
- 3) The proposal to limit the criminal history score and thereby reduce the punishment that lawfully may be imposed for an offender is who sentenced for multiple, separate child-pornography-possession offenses is unprecedented. The sentencing guidelines do not otherwise limit the criminal history and sentence that may be imposed for any other type of offense arising from separate behavioral incidents. By way of comparison, if an offender is convicted of five separate felony-domestic-assault offenses that occurred on five different days, there is no limit on the number of criminal history points or sentence that may be imposed for the five offenses, other than the policies that generally govern sentencing of all offenses. The commission has not been provided a reason that justifies treating multiple, separate child-pornography-possession offenses less seriously than other victim crimes.
- 4) As to the last point, Minnesota law is clear: child-pornography possession is not a victimless crime.

**“The language of section 617.247 plainly establishes the legislature's intent to punish possession of child pornography as a crime that victimizes, or harms, the minor subject of the pornographic work. Indeed, the harm associated with possession of child pornography is twofold, (1) disclosure of the identity of the minor depicted in pornographic images and (2) perpetuation of the illicit use and exploitation of children . . . In its codified statement of intent, the legislature makes clear its view that the individual children depicted in the pornography Rhoades possessed are also victimized by the act of possession.”** *State v. Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004)

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<sup>1</sup> Indeed, the proposal is described as an effort to avoid the sentencing effect of this well-established law.

Child-pornography images frequently depict children, toddlers, and infants being sexually assaulted, physically abused, tortured, and degraded. For example, following is a description of the content of images supporting a recent guilty plea and conviction for six child-pornography-possession offenses: “Not one but multiple videos of babies literally being tied, hung upside down from a ceiling, their mouths muffled to reduce their screams, objects inserted in them, and burned with fire.” Respondent’s Brief, *State of Minnesota v. Angel Torrejon Ramirex*, A19-1961, State of Minnesota, Court of Appeals.

Commission staff provided me with copies of the criminal complaints charging the 13 offenders described in paragraph 1. The descriptions of the images in the probable-cause statements supporting the child-pornography-possession charges are deeply disturbing and difficult to read. But it is imperative that every Commissioner understands exactly what is at stake for the victims of child-pornography possession when the Commission votes on the proposal. To that end, I have compiled text from the probable-cause statements in each of the 13 complaints for the Commission’s review, which is attached under a separate cover. The text fairly describes the types of images underlying the executed prison sentences in the 13 cases described in paragraph 1. Keep in mind, each case involved multiple images constituting separate child-pornography possession under the law.

In sum, every time a child-pornography image is obtained and viewed, a child is victimized. The Commission should not rush ahead with an unprecedented policy that arbitrarily limits the punishment and criminal history of offenders who repeatedly commit separate acts of child-pornography possession.

*Michelle A. Larkin*

Michelle A. Larkin  
Judge, Minnesota Court of Appeals

## Excerpts from Criminal Complaints

1. On March 17, 2019 at 12:12:52, Child A sends a video showing a female masturbating with a black object. The female's vagina is clearly visible. The bracelet on the female's right arm matches a bracelet seen on Child A's right arm in previous videos. The defendant responds with the message "I want to f\*\*\* you right now." (VIDEO I) . . . The defendant previously told Detective Jacobson that he is aware that Child A is only 16 years old.
2. Description: Prepubescent female, approximately 5 years old. Female is laying on back covering face with hands. An adult male penis appears to be penetrating the female's vagina. . . Description: Infant to toddler sized female. The image depicts the child being anally penetrated by a male.
3. Download 3: 9 minute video of a female, approximately 1 year old, and a female of unknown age. The female of unknown age touches the infant's genitalia with her fingers, and engages in oral sex by physically forcing the infants head towards her genitalia.
4. This video was uploaded to the defendant's Dropbox account on /16/2016 and is approximately 1 minute and 37 seconds in length. The video depicts a nude female child who appears to be 11-14 years old masturbating an adult male and performing fellatio on him until the adult male ejaculates onto the child.
5. This video has a creation date of 4/8/2017 and is approximately 3 minutes and 44 seconds in length. The video depicts a female child who appears to be 9-12 years of age lying next to a male child who appears to be 10-14 years of age. The male child is masturbating his penis. The female child then exposes her naked vagina. The juvenile male then performs cunnilingus on the female child and the female child performs fellatio on the male child.
6. This video depicts a juvenile female wearing a bathing suit who appears to be less than 10 years of age. An adult male is seen penetrating the juvenile female's genitals with his penis. The juvenile female is on her hands and knees, on all fours, on a bed. The adult male is wearing a blue shirt.
7. This is a 1 hour, 10 minute, 16 second video which depicts two pre-pubescent girls (approximately 12-14 years old) and two pubescent females in a shower and performing oral sex on an adult male, masturbation, oral penetration, anal penetration and cunnilingus.
8. Video showing a 3 to 5 year old female performing oral sex on an adult male. The adult male ultimately ejaculates in the child's mouth.

9. The image . . . depicts a pre-teen nude girl on her knees with semen on her face and dripping down her body.
10. Description: When the video starts the following text is observed “[name of child] 8 years old – December 2006 ...this little b\*tch is fixing to get that little \*ss busted out...” The video depicts a male having sex with a prepubescent female (approximately 8-10 years old). During the video, the pre-pubescent female lies on the bed and shows her anus to the camera. The video ends with the following text “the little whore – 8 year old [child’s name] the \*ss fucker – big daddy music – Slipknot ...now who wants \*uck this little whore next?”
11. A photo of a prepubescent juvenile female positioned on her hands and knees with her hands tied to a bed and a sex toy protruding from her anus; [a] photo of a prepubescent juvenile female positioned on her hands and knees with her hands tied to a bed and a clear plastic bag over her head; [a] photo of a prepubescent juvenile female positioned lying on the bed with the words, “Cut me,” Slut,” and “Hurt me” written on her body in red; [and a] photo of a prepubescent juvenile female sitting in a bath tub and being urinated on by an adult male.
12. Image . . . depicts a juvenile female, approximately 10-12 years of age, leaning over with her buttocks oriented towards the camera. The juvenile female is not wearing clothing. The juvenile female has what appears to be a cucumber inserted into her anus. The juvenile female's vagina is also visible in this photo.
13. This video shows multiple sexual assaults of a 3 to 5 year old female. During this video, the camera zooms in on the child's vagina. The female also has what appears to be an adult male's penis in her mouth. An adult male's penis is also inserted into the child's vagina and anus.