

Preliminary Staff Draft of Commission Report

Report on Comprehensive Review of Child Pornography Sentencing Guidelines (October Staff Draft)*

October 1, 2020

In May 2019, the Legislature directed the Minnesota Sentencing Guidelines Commission to comprehensively review and consider modifying how the Sentencing Guidelines and the Sex Offender Grid address child pornography crimes as compared to similar crimes, including other sex offenses and other offenses with similar maximum penalties. From September 2019 through June 2020, the Commission gathered information as part of this mandated review. From July 2020 through January 2021, the Commission decided on what action to take as a result.

The next three sections report on the Commission’s comprehensive review. The first section (“Comprehensive Review Chronology”) provides a timeline of the Commission’s work. The second section (“Findings of the Comprehensive Review”, p. 4) lays out the Commission’s findings. The third section (“Action Resulting from Comprehensive Review”, p. 20) describes the Commission’s action as a result of its findings.

Comprehensive Review Chronology

May 24 & May 30, 2019 – Legislative Action

- The Legislature passes, and the Governor enacts, the 2019 omnibus public safety bill.
- The act applies three sentencing-enhancing factors¹ uniformly to child pornography offenses, including a new factor: that the offense involves a minor under age 13. These uniform sentencing-enhancing factors are extended to Use of Minors in Sexual Performance.²
- The act also requires the Commission to comprehensively review and consider modifying how the Sentencing Guidelines address child pornography crimes.³

* This preliminary draft document was prepared by the staff of the Minnesota Sentencing Guidelines Commission for the Commission’s review. This draft has not been adopted by the Commission and does not represent the final views of the Commission or its staff.

¹ *I.e.*, factors that, if proven to be present, increase the statutory maximum penalty for the underlying crime.

² [2019 Minn. Laws, 1st Sp. Sess. art. 4, §§ 12–18.](#)

³ [“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.](#)

June 6, July 18, & July 25, 2019 – The Commission’s Initial Response

- After an initial meeting and a public hearing, the Commission assigns a higher severity level to Use of Minors in Sexual Performance when the new statutory sentencing-enhancing factors apply to the crime.
- The Commission also assigns a higher severity level to dissemination and possession offenses involving preteen children, thus treating the involvement of a child under age 13 like the preexisting statutory sentencing-enhancing factors involving prior offenses or predatory offender registration status.
- These changes to the Sentencing Guidelines take effect August 1, 2019, to coincide with the effective date of the statutory changes.

September 12, 2019 – Comprehensive Review, Part 1

- The Commission studies the review mandate and the three years of legislative history preceding it.⁴
- The Commission reviews the history and structure of Minnesota’s child pornography laws.⁵
- The Commission reviews the current Sex Offender Grid, including how child pornography offenses are ranked compared to similar crimes.⁶
- The Commission reviews child pornography sentencing practices and case data.⁷
- The Commission studies the 2012 report of the United States Sentencing Commission’s multi-year assessment of federal child pornography sentencing.⁸

October 10, 2019 – Comprehensive Review, Part 2

- The Commission reviews child pornography definitions in detail.^{9, 10}
- The Commission examines issues related to sentencing Use of Minors in Sexual Performance.^{9, 11}

November 6, 2019 – Comprehensive Review, Part 3

- The Commission examines how Use of Minors in Sexual Performance is sentenced with other crimes that were committed at the same time.¹²
- The Commission compares Minnesota’s statutory maximum penalties for child pornography offenses with the statutory maximum penalties of other states.¹³
- The Commission receives testimony from federal and state child pornography prosecutors.

⁴ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/MandateLegHistoryRecap.pdf>

⁵ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/HistoryChildPornLaws.pdf>

⁶ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/SexOffenderGridOverview.pdf>

⁷ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/CaseData.pdf>

⁸ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/USSCReport.pdf>

⁹ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CPReviewPart2.pdf>

¹⁰ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CPDefinition.pdf>

¹¹ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CPProduction.pdf>

¹² <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/November/CoOccurringCaseOutcomes.pdf>

¹³ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/November/InterstateCPPenalties.pdf>

- The Commission receives testimony from state child pornography investigators.¹⁴

February 13 & April 9, 2020 – Comprehensive Review, Part 4

- The Commission compares Minnesota’s child pornography sentencing practices with the sentencing practices of four states with comparable sentencing guidelines structures.¹⁵
- The Commission examines the elements of similarly ranked sex offenses in greater detail.¹⁶
- The Commission reviews state policy for sentencing multiple child pornography offenses.¹⁷
- The Commission studies recidivism among child pornography offenders.¹⁸

May 7, 2020 – Comprehensive Review, Part 5

- The Commission receives testimony from a child sexual abuse therapist on the victim’s perspective.
- The Commission conducts a detailed examination into 2018 child pornography sentencing practices.¹⁹
- The Commission reviews the statutory structure of child pornography dissemination and possession offenses and compares the statutory and grid maximum penalties for child pornography offenses.²⁰

June 11, 2020 – Comprehensive Review, Part 6

- The Commission reviews how judges ranked the severity of child pornography offenses before the Sentencing Guidelines Commission issued severity rankings in 2006.²¹
- The Commission analyzes the extent to which Minnesota’s sentencing policy captures prior criminal sexually dangerous behavior, examines other offenses related to child pornography, and looks at victims’ rights in child pornography cases.²²

July 23, 2020, through January 14, 2021

- The Commission meets [six] times to develop the findings and recommendations that follow.

¹⁴ <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/November/ICACSentencingCommissionMeeting.pdf>

¹⁵ <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/February/InterstateCPReview.pdf>

¹⁶ http://mn.gov/msgc-stat/documents/meeting%20materials/2020/April/CP_SentGuidelines.pdf

¹⁷ <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/April/6C1CPSentencePractices.pdf>

¹⁸ <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/April/CPRecidivism.pdf>; see also http://mn.gov/msgc-stat/documents/meeting%20materials/2020/May/5C1-Staff-CP-UMSP-Recidivism_Answers.pdf

¹⁹ http://mn.gov/msgc-stat/documents/meeting%20materials/2020/May/5B1-Staff-Report-Charging+Sentencing_Case_Data-CP_2018.pdf & http://mn.gov/msgc-stat/documents/meeting%20materials/2020/May/5B2-Staff-Present-Charging+Sentencing_Case_Data-CP_2018.pdf

²⁰ <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/May/5D2-Staff-Dissemination-Possession.pdf>

²¹ <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/June/ChildPornography2008.pdf>

²² <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/June/OtherIssues.pdf>

Findings of the Comprehensive Review

Introduction to Ranking Child Pornography Offenses

Minnesota’s Sentencing Guidelines are based on reasonable offense and offender characteristics.²³ With respect to offense characteristics, the Commission ranks each offense by severity level to indicate the seriousness of the offense, and it considers the offenses listed within each severity level to be equally serious.²⁴ The Commission intends each assigned severity level to be the dominant factor in determining the presumptive sentence.²⁵ Presumptive sentences are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.²⁶

In determining offense severity, the Commission considers the type of interest protected by the statute, the type and level of harm caused by the crime, and the culpability of the offender. The Commission also considers the statutory maximum penalty assigned by the Legislature. Whenever modifying the Sentencing Guidelines, the Commission’s primary consideration is public safety.²⁷

Prior to 2006, child pornography offenses were unranked. When they promulgated the sex offender grid in 2006, the Commission assigned, and the Legislature approved, severity levels for these offenses.²⁸ In 2019, the Commission, responding to legislative action, updated some of those rankings.²⁹ At legislative direction, the Commission is now revisiting those rankings.

Overview of Minnesota’s Child Pornography Offenses

Minnesota’s child pornography offenses are codified at Minn. Stat. §§ [617.246](#) & [617.247](#).

Use of Minors in Sexual Performance

While the Legislature and the Commission classify all offenses under Minn. Stat. § 617.246 as “Use of Minors in Sexual Performance,” the statute contains three distinct offenses.

Subdivision 2 (“Use of minor”) functions as Minnesota’s child pornography production statute. This subdivision criminalizes using or permitting a minor to engage in “posing or modeling” in a “sexual performance or pornographic work” (*i.e.*, child pornography). In 2019, 3 offenders were sentenced for violating this subdivision.

²³ Minn. Stat. § [244.09, subd. 5](#).

²⁴ Minn. Sentencing Guidelines § 1.B.17 (Aug. 1, 2020).

²⁵ Dale G. Parent, *Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines* at 38, 51 (Butterworth Legal Publishers 1988).

²⁶ Minn. Sentencing Guidelines § 1.B.13 (Aug. 1, 2020).

²⁷ [Minn. Stat. § 244.09, subd. 5](#).

²⁸ [2006 Minn. Laws. ch. 260, art. 1, § 46](#). The Legislature’s apparent partial “rejections” of the Sex Offender Grid were not actually rejections of the Commission’s proposal, but were instead intended to rectify printing errors in an early edition of the Commission’s 2006 Report to the Legislature. Minutes of the Minn. Sentencing Guidelines Comm’n (May 25, 2006), p. 8.

²⁹ See the section entitled, “June 6, July 18, & July 25, 2019 – The Commission’s Initial Response,” on page 2, above.

Subdivisions 3 and 4 criminalize aggravated circumstances of child pornography dissemination or reproduction. Subdivision 3 (“Operation or ownership of business”) outlaws a child pornography dissemination or reproduction business, and subdivision 4 (“Dissemination”) proscribes child pornography dissemination for profit. These subdivisions are rarely used, and no offenders were sentenced under them in 2019.

Dissemination & Possession of Child Pornography

Minn. Stat. § 617.247 (“Possession of pornographic work involving minors”) prohibits both dissemination (subd. 3) and possession (subd. 4) of child pornography. In 2019, 7 offenders were sentenced for dissemination and 73 offenders were sentenced for possession.

Sentencing Enhancements

For all child pornography offenses, the statutory maximum penalty increases if any of the following is true:

- The offender has a prior conviction or delinquency adjudication for a child pornography offense;
- The offender was a registered predatory offender at the time of the offense; or
- The offense involved a minor under age 13 (new in 2019).

Of the 83 child pornography offenses sentenced in 2019, sentencing enhancements applied in 5 (6%) of the cases—although none of the 2019 offenses was committed after August 1, 2019, when the preteen victim enhancement took effect.

Comparing Minnesota’s Child Pornography Rankings to Other Sex Offenses and Other Offenses with Similar Statutory Maximums

Introduction to the Sex Offender Grid

Child pornography offenses are ranked on the Sex Offender Grid, which is reproduced in Appendix [x.x] (page [xx]) of this report. Established in 2006, the Sex Offender Grid has eight graduated severity levels.

At the three highest severity levels, A through C, executed prison is the presumptive disposition for all, even first-time, offenders. At the lowest severity level, H, executed prison is also always presumed because the predatory offender registration statute requires a prison term for its violators. At each of the remaining four severity levels, D through G, the presumptive disposition for offenders with lesser criminal histories is a stayed sentence—but the court, at its discretion, may impose up to one year of confinement and other non-jail sanctions as conditions of probation.

The Sex Offender Grid—which contains fewer non-prison boxes and longer underlying sentences than the other grids—was designed to impose harsher penalties on repeat offenders, particularly repeat sex offenders. For all three sentencing grids, the presumptive sentence lengths increase with increased criminal history. For the Sex Offender Grid, however, those increases accelerate beyond a criminal history score of 3, and the weight of prior sex offenses—in both felony points and custody status points—is magnified.

The five degrees of Minnesota’s Criminal Sexual Conduct (CSC) offenses are ranked on the Sex Offender Grid at severity levels A through G. Each CSC degree is ranked so that the Guidelines maximum penalty (*i.e.*, the presumptive sentence at the maximum criminal history score of 6) and the statutory maximum penalty are the same—although, for CSC 2nd, 3rd, and 4th Degree, certain age-related offenses within each degree are deemed less serious and are therefore ranked at lesser severity levels.

Overview of Statutory Maximums and Severity Levels

Table 1 (page 7) displays the statutory maximum penalties for sex offenses, with child pornography offenses in bold type. (The nature of each sex offense will be described in greater detail beginning on page 9.) At each offense’s statutory maximum, the offense’s assigned severity level is shown. The table is arranged in descending order of severity level.

In addition to sex offenses, Table 1 displays some other, common offenses with statutory maximums similar to child pornography offenses. These offenses are ranked on the Standard Grid (reproduced in Appendix [x.x] on page [xx] of this report), not the Sex Offender Grid. Although the structures of the Standard Grid and the Sex Offender Grid are different, these non-sex offenses are inserted into Table 1 near sex offenses of similar severity.

When Table 1 displays a footnote marker after a severity level, the presumptive sentences for that offense, at that severity level, are somewhat constrained by the offense’s statutory maximum penalty: For offenders with the maximum number of criminal history points (6 or more), the presumptive duration³⁰ is equal to—or, in some cases, exceeds—the statutory maximum.

³⁰ Including the upper end of the presumptive range, as noted by the dagger.

Table 1. Statutory Maximum Penalties for Sex Offenses and Select Non-Sex Offenses, by Severity Level

Offense	Statutory Maximum Penalty (Years of Imprisonment)							
	30	25	15	10	7	5	4	3
Criminal Sexual Conduct (CSC) 1st Degree	A*							
CSC 2nd Degree (contact, force, & injury)		B*						
Sex Trafficking 1st Degree (actually 20-yr. stat. max.)		B						
Manslaughter 1st Degree			9†					
CSC 3rd Degree (penetration & force/occupation)			C*					
Sex Trafficking 2nd Degree			C*					
Criminal Vehicular Homicide				8†				
CSC 2nd Degree (contact & victim under 13)		D						
CSC 3rd Degree (penetration & child victim)			D					
Use of Minors in Sexual Performance (enhanced)			D					
Dissemination of Child Pornography (enhanced)			D					
Felony DWI					7†			
CSC 4th Degree (contact & force/occupation)				E*				
Use of Minors in Sexual Performance				E*				
Dissemination of Child Pornography					E‡			
Certain Persons Not to Have Firearms or Ammunition			6					
Assault 2nd Degree (subd. 1)					6			
CSC 4th Degree (contact & child victim)				F				
Possession of Child Pornography (enhanced)				F				
CSC 5th Degree (felony only)					F*			
Burglary 2nd Degree				5				
Simple Robbery				5				
Criminal Vehicular Operation (Great Bodily Harm)						5		
CSC 3rd Degree (penetration & child victim 24–48 mo. younger)						G*		
Possession of Child Pornography						G*		
Indecent Exposure						G*		
Surreptitious Observation Device (Minor Victim & Sexual Intent)							G‡	
Solicitation of Children to Engage in Sexual Conduct								G‡
Assault 3rd Degree						4		
Domestic Assault (felony only)						4		
Failure to Register as a Predatory Offender						H		

*At maximum criminal history, the Guidelines' presumptive duration equals the statutory maximum.

†At maximum criminal history, the upper end of the Guidelines' presumptive range contains the statutory maximum.

‡At maximum criminal history, the Guidelines' presumptive duration exceeds the statutory maximum.

A Closer Look at Child Pornography Statutory Maximum Penalties

As Table 2 shows, some—but not all—child pornography offenses are ranked at severity levels where the presumptive sentence for offenses at maximum criminal history (“grid presumptive maximum”) equals the statutory maximum.

Table 2. Severity Levels Assigned to Child Pornography Offenses

Child Pornography Offense	Severity Level	Statutory Maximum (Months)	Grid Presumptive Maximum (Months)	How Statutory Maximum Compares to Grid Maximum
Dissemination (enhanced)	D	180	140	Statutory maximum is greater
Use of Minors (enhanced)	D	180	140	Statutory maximum is greater
Dissemination	E	84	120	Grid maximum is greater
Use of Minors	E	120	120	The two are equal
Possession (enhanced)	F	120	84	Statutory maximum is greater
Possession	G	60	60	The two are equal

When constructing the Sex Offender Grid, the Commission ranked all dissemination offenses at a higher severity level than all possession offenses, and subsequent offenses at a higher severity level than first-time offenses. For this reason—

- Dissemination, which has an 84-month statutory maximum, is ranked at Severity Level E, where the presumptive sentence at maximum criminal history is 120 months; and
- Subsequent possession, with a statutory maximum of 120 months, is ranked at Severity Level F, where the presumptive sentence at a maximum criminal history is 84 months.

Because dissemination (Severity Level E) has an 84-month statutory maximum, dissemination offenses with criminal history scores of 5 and 6 have a maximum presumptive sentence capped at 84 months, which is only slightly longer than the presumptive sentence of 78 months at a criminal history score of 4.

On the other hand, subsequent possession offenses (Severity Level F) have a maximum presumptive sentence of 84 months, which is less than the statutory maximum of 120 months. Likewise, subsequent dissemination and production offenses (Severity Level D) have a maximum presumptive sentence of 140 months, which is less than the statutory maximum of 180 months.

Comparing Child Pornography Offenses with Other Sex Offenses by Severity Level

This section details the eight severity levels on the Sex Offender Grid and the various offenses assigned to each severity level.³¹ Child pornography offenses are listed in bold type.

Severity Level A. At maximum criminal history, the Guidelines recommend 30 years' imprisonment for a Severity Level A offense. All CSC 1st Degree offenses (statutory maximum 30 years' imprisonment) are ranked at Severity Level A. Severity Level A offenses may be briefly described as follows:

- Sexual penetration by force or coercion, resulting in personal injury.
- Sexual penetration of a mentally impaired or incapacitated, or physically helpless, victim, resulting in personal injury.
- Sexual penetration, where the circumstances gave the victim reasonable fear of imminent great bodily harm, or where an offender or accomplice used a dangerous weapon to cause the victim to submit, or where an accomplice used force or coercion to cause the victim to submit.
- Sexual penetration, or bare genital-to-genital contact, of a victim under the age of 13.*
- Sexual penetration of a victim under the age of 16 either by someone in a position of authority and at least four years older, or by a significant relative.*

Severity Level B. At maximum criminal history, the Guidelines recommend 25 years' imprisonment for a Severity Level B offense. Several CSC 2nd Degree offenses (statutory maximum of 25 years' imprisonment) are ranked at Severity Level B. Severity Level B offenses may be briefly described as follows:

- Sexual contact by force or coercion, resulting in personal injury.
- Sexual contact of a mentally impaired or incapacitated, or physically helpless, victim, resulting in personal injury.
- Sexual contact, where the circumstances gave the victim reasonable fear of imminent great bodily harm, or where an offender or accomplice used a dangerous weapon to cause the victim to submit, or where an accomplice used force or coercion to cause the victim to submit.
- Sexual contact of a victim under the age of 16 by a significant relative, if the contact involved force, coercion, personal injury, or multiple acts occurring over a long time.*
- One non-CSC sex offense is ranked at Severity Level B: Sex Trafficking in the 1st Degree (statutory maximum of 20 years' imprisonment).

³¹ Offense descriptions in this report are not precise. For actual CSC offense elements, refer to CSC statutes (Minn. Stat. §§ [609.342](#) through [609.3451](#)).

* For this CSC offense, consent is not a defense.

Severity Level C. At maximum criminal history, the Guidelines recommend 15 years' imprisonment for a Severity Level C offense. Several CSC 3rd Degree offenses (statutory maximum 15 years' imprisonment) are ranked at Severity Level C. Severity Level C offenses may be briefly described as follows:

- Sexual penetration by force or coercion.
- Sexual penetration of a mentally impaired or incapacitated, or physically helpless, victim.
- Sexual penetration where the offender was in a specified occupational relationship to the victim, such as prison guard or psychotherapist.*
- Sexual penetration of a 16- or 17-year-old victim by a significant relative, if the penetration involved force, coercion, personal injury, or multiple acts occurring over a long time.*
- One non-CSC sex offense is ranked at Severity Level C: Sex Trafficking in the 2nd Degree (statutory maximum of 15 years' imprisonment).

Severity Level D. At maximum criminal history, the Guidelines recommend almost 12 years' (140 months) imprisonment for a Severity Level D offense. Ranked at Severity Level D are those CSC 2nd Degree offenses not ranked at Severity Level B, and, with one exception, those CSC 3rd Degree offenses not ranked at Severity Level C. Severity Level D offenses may be briefly described as follows:

- Sexual contact of a victim under the age of 13 (CSC 2nd Degree).*
- Sexual contact of victim under the age of 16 by a significant relative (CSC 2nd Degree).*
- Sexual contact of a 13-, 14-, or 15-year-old victim by someone in a position of authority and at least four years older (CSC 2nd Degree).*
- Sexual penetration of a 13-, 14-, or 15-year-old victim by someone at least four years older (CSC 3rd Degree).*
- Sexual penetration of a victim under the age of 13 by a juvenile offender less than 3 years older than the victim (CSC 3rd Degree).*
- **Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)** (non-CSC sex offense; 15-year statutory maximum).
- **Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)** (non-CSC sex offense; 15-year statutory maximum).

Severity Level E. At maximum criminal history, the Guidelines recommend 10 years' imprisonment for a Severity Level E offense. Several CSC 4th Degree offenses (statutory maximum 10 years' imprisonment) are ranked at Severity Level E. Severity Level E offenses may be briefly described as follows:

- Sexual contact by force or coercion.
- Sexual contact of a mentally impaired or incapacitated, or physically helpless, victim.

* For this CSC offense, consent is not a defense.

- Sexual contact where the offender was in a specified occupational relationship to the victim, such as prison guard or psychotherapist.*
- Sexual contact of a 16- or 17-year-old victim by a significant relative, if the contact involved force, coercion, personal injury, or multiple acts occurring over a long time.*
- **Use of Minors in Sexual Performance** (non-CSC sex offense; 10-year statutory maximum).
- **Dissemination of Child Pornography** (non-CSC sex offense; 7-year statutory maximum).

Severity Level F. At maximum criminal history, the Guidelines recommend 7 years' imprisonment for a Severity Level F offense. Ranked at Severity Level F are those CSC 4th Degree offenses not ranked at Severity Level E, as well as all felony CSC 5th Degree offenses (statutory maximum 7 years' imprisonment). Severity Level F offenses may be briefly described as follows:

- Sexual contact of a 13-, 14-, or 15-year-old victim by someone at least four years older, or by someone in a position of authority (CSC 4th Degree).*
- Sexual contact of a 16- or 17-year-old victim either by someone in a position of authority and at least four years older, or by a significant relative (CSC 4th Degree).*
- Sexual contact of a victim under the age of 13 by a juvenile offender less than 3 years older than the victim (CSC 4th Degree).*
- Nonconsensual sexual contact (subsequent offense) (CSC 5th Degree).
- Indecent exposure (subsequent offense) (CSC 5th Degree version).
- **Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13)** (non-CSC sex offense; 10-year statutory maximum).

Severity Level G. At maximum criminal history, the Guidelines recommend 5 years' imprisonment for a Severity Level G offense. One CSC 3rd Degree offense, with a special 5-year statutory maximum penalty, is ranked at Severity Level G. In addition, several non-CSC sex offenses are ranked at Severity Level G. Severity Level G offenses may be briefly described as follows:

- Sexual penetration of a 13-, 14-, or 15-year-old victim by someone at least two years older but less than four years older (CSC 3rd Degree, but special 5-year statutory maximum).*
- Indecent exposure (subsequent offense) (Minn. Stat. § 617.23 version; non-CSC sex offense; 5-year statutory maximum).
- **Possession of Child Pornography** (non-CSC sex offense; 5-year statutory maximum).
- Surreptitious Observation Device (Minor Victim and Sexual Intent) (non-CSC sex offense; 4-year statutory maximum)
- Solicitation of Children to Engage in Sexual Conduct (non-CSC sex offense; 3-year statutory maximum)

* For this CSC offense, consent is not a defense.

Other Ways of Evaluating Minnesota’s Child Pornography Rankings

Comparison with Pre-2006 Rankings

Before 2006, the child pornography offenses were unranked. When an offense is unranked, the judge must assign a severity level to the offense before pronouncing sentence.

- From 2000 to 2008, 227 unranked possession cases were sentenced. Judges assigned severity levels to possession offenses ranging from 1 to 7, with the majority of cases being ranked at severity levels 3 and 4. At those severity levels, presumptive prison dispositions begin at criminal history scores of 4.
- From 2000 to 2008, 33 unranked dissemination cases were sentenced. Judges assigned severity levels to dissemination offenses ranging from 1 to 7, with clusters of cases being ranked at severity levels 3, 4, 5, and 6. At those severity levels, presumptive prison dispositions begin at criminal history scores of 4 (severity levels 3 and 4) or 3 (severity levels 5 and 6).

Although the Sex Offender Grid and the Standard Grid have different structures, the ranking currently assigned to first-time possession (Severity Level G) is fairly similar to one of the higher severity levels formerly assigned by judges when the offense was unranked (Severity Level 4). Likewise, the ranking currently assigned to first-time dissemination (Severity Level E) is fairly similar to one of the higher severity levels formerly assigned by judges when the offense was unranked (Severity Level 6).

Comparison with Other States

Statutory Ranges Across All States. The Commission reviewed statutorily permissible punishment ranges for child pornography offenses in other states, including possession, distribution, and production.³² Statutorily permissible punishment ranges in the different states vary widely—from zero years to life in prison—with statutory mandatory minimums in some states. Minnesota’s statutorily permissible punishment ranges—zero to ten years for possession, zero to fifteen years for distribution, and zero to fifteen years for production—were neither the most severe nor the most lenient.

- For possession, approximately 24 states, plus the District of Columbia, appear to have statutorily permissible punishment ranges that begin at zero and do not extend beyond ten years.
- For distribution, approximately 16 states, plus D.C., appear to have statutorily permissible punishment ranges that begin at zero and do not extend beyond fifteen years.
- For production, approximately 12 states, plus D.C., appear to have statutorily permissible punishment ranges that begin at zero and do not extend beyond fifteen years.

³² MSGC staff relied almost entirely on the information contained in [Appendix F](#) of the U.S. Sentencing Commission’s 2012 [report](#) on federal child pornography offenses, which summarized the penalties for child pornography offenses among the 50 states and the District of Columbia. In some cases where the statutorily permissible punishment range was not clear, staff examined the statutes themselves to clarify. In the case of Minnesota, staff included the 2019 penalty enhancements applicable to some child pornography offenses. See materials linked in footnote 13, above.

Statutory maximums do not necessarily reflect actual sentences imposed. For a comparison of actual sentences imposed, the Commission reached out to four comparable sentencing guidelines jurisdictions.

Comparable Sentencing Guidelines States. The Commission requested policy and sentencing data from four states with comparable sentencing guidelines systems: Oregon, Washington, North Carolina, and Kansas.³³

Of the five states, Minnesota is the only state whose sentencing guidelines recommend probation, rather than prison, for all child pornography offenders with no criminal history—although “prison” does not mean the same thing in all jurisdictions. In Minnesota, a state prison sentence must be at least one year and one day; a probationary sentence can include up to a year of local confinement time, at the discretion of the sentencing court. As Table 3 shows, this definition of “prison” is not universally shared.

Table 3 displays the presumptive dispositions that each state reported their sentencing guidelines would recommend for a child pornography offender with no criminal history.

Table 3. Guidelines-Recommended Dispositions for Child Pornography Offenders with No Criminal History, by State

Child Pornography Offense	Minnesota	Oregon	Washington	North Carolina	Kansas
Possession	Probation	Probation	Prison 3–14 months	Prison or Probation	Prison 31–34 months
Distribution	Probation	Prison 16–18 months	Prison 6–20 months	Prison or Probation	Prison 31–300 months
Production	Probation	Prison 16–18 months	Prison 31–41 months	Prison 58–73 months	Prison 31–300 months

Sources: Or. Crim. Justice Comm’n; Wash. State Sentencing Guidelines Comm’n; N.C. Sentencing & Policy Advisory Comm’n; Kan. Sentencing Comm’n.

From each of the four states, the Commission also requested actual sentencing data over a five-year period. Table 4 shows the actual rate at which prison was imposed. Unlike Table 3, these data include all offenders, not just offenders with no criminal history.

³³ See materials linked in footnote 15, above.

Table 4. ~~Five-Year~~ Imprisonment Rate for Child Pornography Offenders, Five Years of Sentencing Data, by State

Child Pornography Offense	Minnesota	Oregon	Washington	North Carolina	Kansas
Possession	14% (61 of 427)	28% (26 of 92)	90% (691 of 770)	33% (65 of 197)	Possession & production: 41% (20 of 49)
Distribution	25% (8 of 32)	61% (158 of 260)	94% (136 of 144)	48% (130 of 271)	
Production	26% (5 of 19)	81% (101 of 125)	86% (86 of 100)	100% (23 of 23)	Distribution: No cases

Sources: Or. Crim. Justice Comm’n; Wash. State Sentencing Guidelines Comm’n; N.C. Sentencing & Policy Advisory Comm’n; Kan. Sentencing Comm’n.

Notes: Kansas reported its possession and production cases together. Kansas reported no distribution cases sentenced during the five-year reporting period.

Among those child pornography offenders who received prison sentences, Table 5 displays the average prison durations over a five-year period.

Table 5. ~~Five-Year~~ Average Prison Duration for Child Pornography Offenders Receiving Prison Sentences, Five Years of Sentencing Data, by State

Child Pornography Offense	Minnesota	Oregon	Washington	North Carolina	Kansas
Possession	45 months for base offense; 46 months for subsequent; 60 months for predatory offender	51 months	15 mo. (Viewing 2nd Degree); 61 mo. (Viewing 1st Degree); 45 mo. (Poss’n 2nd Degree); 88 mo. (Poss’n 1st Degree)	7 months	No data
Distribution	71 months for base offense; 85 months for predatory offender	57 months	75 mo. (Sending 1st Degree); 77 mo. (Dealing 2nd Degree); 90 mo. (Dealing 1st Degree)	23 months	
Production	107 months	110 months	179 months	65 months	

Sources: Or. Crim. Justice Comm’n; Wash. State Sentencing Guidelines Comm’n; N.C. Sentencing & Policy Advisory Comm’n; Kan. Sentencing Comm’n.

Notes: Oregon’s data reflect a median of five annual averages, rather than a five-year average. Kansas did not report prison durations.

Comparison with the Federal Sentencing Guidelines

Although relatively few child pornography possession cases—absent recidivism or the presence of other special factors—are prosecuted federally, federal child pornography prosecutors testifying before the Minnesota Sentencing Guidelines Commission reported³⁴ that the statutory imprisonment range for possession of child pornography is 0 to 10 years (0 to 20 years if a child is under age 12; 10 to 20 years for recidivists). To the extent such cases are prosecuted, the federal sentencing guidelines would typically recommend, for a typical first-time possession case, from approximately 60 months up to the statutory maximum, depending on aggravating factors present. On the other hand, Hernandizing is not available to federal prosecutors; all images seized as the result of one search warrant will typically result in one count of possession.³⁵

The federal prosecutors reported that the statutory imprisonment range for distribution of child pornography is 5 to 20 years (15 to 40 years for recidivists), and that, for production of child pornography, the range is 15 to 30 years (25 to 50 years for recidivists). The prosecutors estimated that approximately 15 production cases might be prosecuted in a year in the District of Minnesota.

Minnesota child pornography investigators, testifying [in 2019](#) both before the Minnesota House crime committee and before the Minnesota Sentencing Guidelines Commission, criticized the Minnesota Sentencing Guidelines as being too lenient when compared with federal sentences received for child pornography offenses—particularly in dissemination and production cases.³⁶

On the other hand, in 2012, the U.S. Sentencing Commission reported to Congress a growing judicial perception that the U.S. Sentencing Guidelines were too severe with respect to non-production child pornography offenses (*e.g.*, possession and distribution), resulting in high departure rates and disparities. Although the report made no similar conclusions about production offenses, the U.S. Sentencing Commission noted an increasing mitigated departure rate for production offenses and promised to continue to monitor sentencing practices for such cases carefully.³⁷

Special Considerations Bearing on Minnesota’s Child Pornography Rankings

Because presumptive sentences are based on the typical case,³⁸ it is helpful, when making ranking decisions, to understand what is typical in child pornography cases.

³⁴ Testimony of Miranda Dugi, Assistant United States Attorney, and Laura Provinzino, Chief, Major Crimes Unit, U.S. Attorney’s Office, District of Minnesota, before the Minnesota Sentencing Guidelines Commission, November 6, 2019.

³⁵ Hernandizing is discussed in the section entitled, “Typical Cases: Collection Sizes & Hernandizing,” beginning on page 15, below.

³⁶ See materials linked in footnotes 4 and 14, above.

³⁷ See materials linked in footnote 8, above.

³⁸ “ ‘Presumptive sentences’ ... are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sentencing Guidelines § 1.B.13 (Aug. 1, 2020).

Typical Cases: Collection Sizes & Hernandizing

Generally, only one sentence is permitted per criminal behavioral incident.³⁹ A single possession of child pornography may be deemed to encompass multiple behavioral incidents, however, if the images were downloaded at substantially different times. Thus, a single collection of child pornography may result in multiple sentences.⁴⁰

“Hernandizing” is the unofficial term for the process of counting criminal history when multiple offenses are sentenced on the same day before the same court. As each offense is sentenced, it is included in the criminal history of the next-sentenced offense, with some exceptions. Many child pornography cases are presumptive commits only because multiple current offenses are sentenced at the same time.

In its review of the facts alleged in child pornography complaints, MSGC staff found that typical cases involve large collections of images and videos.

Of the 101 child pornography cases sentenced in 2018, Hernandizing was used at sentencing—*i.e.*, the defendant was sentenced for multiple counts—in 59 percent of the cases. Of the 29 percent of child pornography cases that were presumptive commits to prison, 66 percent of them became presumptive commits only because the defendant’s criminal history score was increased through Hernandizing. In fact, 48 percent of the presumptive commits had a criminal history score of zero when sentencing began.

Typical Cases: Preteen Victims & the Impact of 2019 Ranking Decisions

Effective August 1, 2019, the Legislature amended the maximum penalties applicable to child pornography offenses. Prior to 2019, the maximum imprisonment terms for child pornography possession and dissemination were increased when committed by repeat or predatory offenders. The 2019 changes maintained (with some revisions) those two factors and added a third: the involvement of a child under age thirteen. The three factors are now also applied to increase the statutory maximum imprisonment term for Use of Minors in Sexual Performance.⁴¹

In response to these statutory changes, the Commission assigned a higher severity level to the enhanced version of Use of Minors in Sexual Performance. With respect to dissemination and possession offenses, the Commission assigned the same elevated severity level to cases involving preteen children as was already assigned to cases involving repeat or predatory offenders.

In order to estimate the impact of the 2019 enhancement for preteen victims, MSGC staff reviewed the facts alleged in complaints for cases sentenced from 2016 through 2018, looking for words suggesting the age of the victims. Based on this review, staff estimates that application of the 2019 changes would have increased the

³⁹ See footnote 49, below, and accompanying text.

⁴⁰ *State v. Bakken*, 883 N.W.2d 264 (Minn. 2016); see also Minn. Sentencing Guidelines § 2.B.1.e(2) (multiple-victim rule).

⁴¹ [2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, §§ 12–18.](#)

possible severity level available to the charging authority in approximately 75 percent of possession cases, 89 percent of dissemination cases, and 41 percent of the Use of Minors in Sexual Performance cases.⁴²

Typical Cases: Peer-to-Peer Dissemination

In its review of the facts alleged in complaints for child pornography cases sentenced from 2016 through 2018, MSGC staff found that the typical dissemination case involves peer-to-peer file sharing. Peer-to-peer technology, such as LimeWire, creates a decentralized file-sharing network across its participants' computers, allowing unsupervised, impersonal, mutual access to child pornography.⁴³

Of the 22 dissemination cases, 19 (86%) were sharing offenses with no evidence of creating the image(s).

Typical Cases: Use of Minors in Sexual Performance (Production)

A staff review of the facts alleged in the criminal complaints of the seventeen Use of Minors in Sexual Performance cases sentenced in the four-year period from 2015 to 2018 disclosed a wide variety of alleged behavior, but with some common threads. According to the allegations—

- Thirteen of the cases involved teenage victims; four cases involved victims under age thirteen.
- In nine of the seventeen cases, the offender had a criminal history score of zero. On the other hand, three of the offenses—all involving teenage victims—were committed by registered predatory offenders in their thirties or forties with criminal histories of five or six.
- Of the four cases involving victims under age thirteen, one complaint was not located. The remaining three offenses involved an offender with special access to the child—a father, a babysitter's boyfriend, or a community-center youth worker—making explicit images of the child's body.
- Of the thirteen cases involving teenage victims—
 - Five cases involved the offender recording sex acts between the child and himself. In two of these cases, the child was being prostituted; in a third, the child was using drugs during sex. At least three of the cases involved offenders in their thirties or forties. In one case, not involving money or drugs, a 21-year-old recorded sex acts with a 15-year-old.
 - Four other cases involved older men offering teenage children money, fame, or shelter in apparent exchange for taking nude pictures of them.
 - Three other cases involved 19-, 20-, and 37-year-old men sexting with 17-, 14-, and 16-year-old children, respectively. A fourth sexting case involved an 18-year-old man using a previously sexted picture as leverage to coerce the 16-year-old victim into taking pictures of her younger sister.⁴⁴

⁴² Possession and dissemination cases already enhanced based on the offender's prior history or predatory offender registration status were excluded from this analysis. For study details, see materials linked in footnote 7, above.

⁴³ U.S. Sentencing Commission, [2012 Report to Congress: Federal Child Pornography Offenses](#), chapter 3, pp. 48–53.

⁴⁴ The facts alleged in criminal complaints are unproven, and are not necessarily the same as the facts ultimately proven in court. For more data on each case, see materials linked in footnote 7, above.

Atypical Cases: Sexting as Production of Child Pornography

Neither Minnesota’s child pornography production (Minn. Stat. § [617.246](#), Use of Minors in Sexual Performance) nor its dissemination and possession statute (Minn. Stat. § [617.247](#)), contains an exemption for images created in romantic relationships or for sexual attention-seeking among adolescents—what has been described as “youth-produced, youth-only experimental” production of child pornography, or “sexting.”

A national study found that such images formed the basis of seven percent of child pornography production arrests in 2009, and that this percentage was rising from earlier years.⁴⁵ A follow-up study found that arrest in sexting cases was not typical, but did occur; and that a felony plea or conviction did result from a very small number of such arrests.⁴⁶

In Minnesota, at least one such sexting case more recently resulted in juvenile prosecution⁴⁷—for dissemination, rather than production, of self-produced, romantically motivated, youth-only child pornography. Although the district court judge found that the juvenile’s conduct met the statutory definitions, he dismissed her case on the grounds that prosecution would produce an “absurd, unreasonable, and unjust result that [would] utterly confound[] the stated purpose of the statute: to protect minors from victimization by others who would use them in making and disseminating child pornography.”⁴⁸

The possibility that Use of Minors in Sexual Performance may be applied to youth-only experimental imagery presents a ranking challenge to the Commission: Where the crime may be committed in such a wide variety of ways—from sexting, at one extreme, to creating a permanent visual record of child rape, on the other—it is challenging to rank the severity of the typical offense.

Sentencing Co-Occurring Offenses with Production

As a general rule, a person whose conduct constitutes more than one offense may be punished for only one of the offenses.⁴⁹ As an exception, CSC offenses committed with force or violence may be separately punished from a simultaneously committed crime.⁵⁰ As a consequence of this rule, an offender who commits an offense

⁴⁵ J. Wolak, D. Finkelhor & K.J. Mitchell, “Trends in Arrests for Child Pornography Production: The Third National Juvenile Online Victimization Study,” p. 2 (retrieved Aug. 13, 2020, at http://www.unh.edu/ccrc/pdf/CV270_Child%20Porn%20Production%20Bulletin_4-13-12.pdf)

⁴⁶ J. Wolak, D. Finkelhor & K.J. Mitchell, “How Often Are Teens Arrested for Sexting? Data From a National Sample of Police Cases,” *Pediatrics* 2012, vol. 129, pp. 4–12 (2012) (retrieved Aug. 13, 2020, at <https://pediatrics.aappublications.org/content/pediatrics/129/1/4.full.pdf>).

⁴⁷ American Civil Liberties Union of Minnesota, “Victory! Judge Dismisses Charges in Minnesota Teen Sexting Case” (retrieved Aug. 13, 2020, at <https://www.aclu-mn.org/en/press-releases/victory-judge-dismisses-charges-minnesota-teen-sexting-case>).

⁴⁸ *In re Welfare of [Jane Doe]*, Order Granting Motion to Dismiss and Memorandum (3rd Jud. Dist. Ct. Feb. 20, 2018) (Cajacob, J.) (redacted) (retrieved August 13, 2020, at https://www.aclu-mn.org/sites/default/files/field_documents/redacted_order_granting_motion.pdf).

⁴⁹ Minn. Stat. § [609.035, subd. 1](#).

⁵⁰ Minn. Stat. § [609.035, subd. 6](#).

while producing child pornography may be convicted and sentenced for Use of Minors in Sexual Performance or the other offense, but generally not both—unless the other offense was CSC committed with force or violence.

In practice, the Commission found the number of cases in which child pornography production (Use of Minors in Sexual Performance) was sentenced with a co-occurring offense to be limited. Of the 57 cases sentenced from 2014 to 2018 that included a production charge, 41 cases involved an allegation that the defendant committed another offense on the same day—potentially, an offense arising out of the same behavior as the production. Most of those 41 cases involved other charges of CSC, child pornography possession, or both. In 35 of those 41 cases (85%), the offender was sentenced for either production or the other offense, but not both.

Recidivism & Public Safety

Current research suggests that Internet sex offenders, as a group, have a relatively low risk of sexually recidivating compared to conventional contact sex offenders, but more research is needed.⁵¹

In its 2012 report to Congress, the U.S. Sentencing Commission reported a 30 percent known general recidivism⁵² rate among non-production child pornography offenders who were studied for 8½ years after release. This was similar to the general recidivism rate among the total federal offender population, and lower than the rate for contact offenders. The known sexual recidivism rate—which included new child pornography offenses—among the child pornography offenders was 7.4 percent; limited to contact sex offenses only, the known recidivism rate was 3.6 percent. This was lower than the rate for contact sex offenders.⁵³

To measure recidivism among Minnesota’s child pornography offenders, MSGC staff studied 592-609 child pornography offenders—544-547 probationers and 48-62 ex-prisoners⁵⁴—to see if they were sentenced for a new felony offense within three years, or longer, of being placed on probation or released from prison.⁵⁵ These narrow criteria—requiring a new felony sentence during a three-year an at-risk period of at least three years—were designed to be similar in methodology to a recent Robina Institute study of recidivism among Minnesota’s general felony population, in order to compare results.⁵⁶

⁵¹ But “[m]ore research is needed.” Michael Seto, “Internet Facilitated Sexual Offending,” Sex Offender Management Assessment and Planning Initiative Research Brief, p. 4 (Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Office of Justice Programs, U.S. Dep’t of Justice, July 2015) (retrieved August 25, 2020, at <http://www.smart.gov/pdfs/InternetFacilitatedSexualOffending.pdf> with more-detailed information at https://www.smart.gov/SOMAPI/sec1/ch4_internet.html).

⁵² For this study, recidivism was defined as new arrest or conviction for a felony or misdemeanor (with some exceptions).

⁵³ U.S. Sentencing Commission, *2012 Report to Congress: Federal Child Pornography Offenses*, chapter 11.

⁵⁴ An additional 37-33 prison cases were excluded from this study because they were either still in prison (8) or did not yet have a three-year window of exposure (25).

⁵⁵ For study details, see materials linked in footnote 18, above. The data presented in this report are slightly different from the MSGC staff study linked in footnote 18; the data presented above include more offenders and follow them for a longer period of time, through the end of 2019.

⁵⁶ The studies were similar in that both required that offenders be at risk for three years, and both tracked new felony sentences during the at-risk period. On the other hand, while the Robina study (see footnote 57, below) followed offenders for only three years, the MSGC staff study tracked most offenders for longer. In the MSGC staff study, 8% of the offenders were at risk for less than four years; 34% were at risk for at least four years but less than six years; 29% were at risk for at least six years but less than eight years; and 28% were at risk for at least eight years but less than ten years.

MSGC staff found an overall recidivism rate among child pornography offenders of ~~8-6~~10.2 percent, compared to the 24 percent recidivism rate that Robina found among Minnesota’s general felony population.⁵⁷ In the MSGC staff study, recidivism rates were highest among production of child pornography offenders (25%) and lowest among possession of child pornography offenders (~~7.5%~~9.2%). The recidivism rate for dissemination of child pornography offenders was ~~16-17.6~~ percent. Recidivism rates were slightly lower for offenders who received a prison sentence (~~6%~~9.7%) than for offenders who received probation (~~9%~~10.2%).⁵⁸

Among the ~~592-609~~ child pornography offenders studied, the most common new offenses were child pornography ~~offenses-possession~~ (~~15-20~~ offenders, ~~2.5%~~ 3.2%) and failure to register as a predatory offender (~~16-20~~ offenders, ~~2.7%~~ 3.2%). ~~Four-Six~~ (~~0.6%~~1%) offenders were sentenced for a new criminal sexual conduct offense within the ~~three-year~~ study period.

Conclusions

[To be determined]

Action Resulting from Comprehensive Review

[To be determined]

⁵⁷ Julia A. Laskorunsky, Robina Inst. of Crim. Law & Crim. Just., [Minnesota Criminal History Score Recidivism Project](#) (2018).

⁵⁸ ~~Only half of the prison cases considered for study had the necessary three-year window of exposure.~~