

Child Pornography Ranking Discussion

Minnesota Sentencing Guidelines Commission

September 10, 2020

Ranking Considerations

- Gravity of offense
 - Harm caused directly, or as a consequence of the crime
- Blameworthiness of individual
 - Motivation, intent, and behavior in the crime

Source: Parent, D. G. (1988). Structuring criminal sentences: The evolution of Minnesota's sentencing guidelines (p. 51). Stoneham, MA: Butterworth Legal Publishers.

Ranking Considerations

- Indicators used for ranking offenses
 - Offense elements
 - Statutory maximum sentence
- Process
 - Compare offense elements between similar crimes or crimes with similar statutory maximum sentences
 - Consider the “typical case”

Today

- Process
 - Compare offense elements between similar crimes or crimes with similar statutory maximum sentences
 - Consider the “typical case”
 - Consider additional information we covered in the review (e.g., how other states sentence)
- Start with baseline offenses (no enhancements)
- Move on to enhancements

Production (use of a minor) Minn. Stat. § 617.246, subd. 2	Dissemination Minn. Stat. § 617.247, subd. 3	Possession Minn. Stat. § 617.247, subd. 4
<p>Subd. 2. Use of minor.</p> <p>(a) It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage minors in posing or modeling alone or with others in any sexual performance or pornographic work if the person knows or has reason to know that the conduct intended is a sexual performance or a pornographic work.</p> <p>Any person who violates this paragraph is guilty of a felony and may be sentenced to imprisonment for not more than <u>ten years</u> or to payment of a fine of not more than \$20,000, or both.</p>	<p>(a) A person who disseminates pornographic work to an adult or a minor, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than <u>seven years</u> or to payment of a fine of not more than \$10,000, or both.</p>	<p>Subd. 4. Possession prohibited.</p> <p>(a) A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than <u>five years</u> or to payment of a fine of not more than \$5,000, or both.</p>

Typical Cases

- Possession
 - Large collections of images and videos
 - Staff estimates about 75% of cases 2016-18 involved images of preteen children
 - Individuals are often sentenced for multiple counts (i.e., downloads on different days, images of different identifiable children)
 - In 2018, about half (48%) had a criminal history score of zero prior to sentencing
 - In 2018, of the 29% that were presumptive commits, 66% got there because of Hernandizing

Source: Draft report at p. 16-17

Typical Cases

- Dissemination
 - Achieved through peer-to-peer file sharing, which creates a decentralized file-sharing network across its participants' computers, allowing unsupervised, impersonal, mutual access to child pornography.
 - In 2018, of the 22 dissemination cases, 19 (86%) were sharing offenses with no evidence of creating the image(s).
 - Staff estimates about 89% of cases 2016-18 involved preteen children.

Source: Draft report at p. 17

Typical Cases

- Production
 - Staff review of 17 cases sentenced from 2015-18 revealed four types of behavior:
 1. Videos or images of sex acts involving minors (5 cases).
 2. Individuals offering inducement (money, gift cards, lodging, modeling photo shoot) for nude pictures (6 cases).
 3. Exchange of nude photos via text or online; in two cases some sort of threat or coercion appeared to have been alleged (4 cases).
 4. Taking explicit photos of very young children under age 6 (2 cases).
 - Four cases involved children under age 13.

Source: Staff Memo – Sentenced Case Data and the Use of Minors in a Sexual Performance, Aug. 28, 2019, Table 5, pp. 5-6

Atypical Cases

- Sexting
 - Images created in romantic relationships or for sexual attention-seeking among adolescents
 - Has been described as “youth-produced, youth-only experimental” production of child pornography, or “sexting”
 - At least one case in MN has been prosecuted under the dissemination statute

Source: Draft report at p. 17-18

Offense	Ranking by Statutory Maximum (Years)		
	10	7	5
Criminal Vehicular Homicide	8		
CSC 4th Degree (contact & force/occupation)	E		
CSC 4th Degree (contact & child victim)	F		
Child Pornography Production	E		
Burglary 2nd Degree	5		
Simple Robbery	5		
Dissemination		E	
Felony DWI		7	
Assault 2nd Degree (subd. 1)		6	
CSC 5th Degree (felony only)		F	
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
Assault 3rd Degree			4
Domestic Assault (felony only)			4
Failure to Register as a Predatory Offender			H

Comparison to Other Offense Rankings (no enhancements for now)

Source: Draft report, Table 1, p. 7

Comparison to Sentencing in Other States

Table 4. Five-Year Imprisonment Rate for Child Pornography Offenders, 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)	<i>Possession & production: 41% (20 of 49)</i>
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)	

Source: Draft Report, p. 14

Based on the prior information, what's the relative severity of possession, dissemination, and production?
(no enhancements for now)

Production

Dissemination

Possession

Production, Dissemination

Possession

Are there any caveats to that order? Any concerns or other consideration that we should think more about?

How does plea bargaining affect conviction?

Blurring

Should dissemination for profit be treated differently? For operation/businesses?

-- Treated more like production?

How do enhancements factor in?

- For all child pornography offenses, the statutory maximum penalty increases if any of the following is true:
 - The person has a prior conviction or delinquency adjudication for a child pornography offense (already existing);
 - The person was a registered predatory offender at the time of the offense (new in 2019 for production; existing for dissemination and possession);
 - The offense involved a minor under age 13 (new in 2019).

Statutory Maximum Sentences Including Enhancements

Source: Draft Report,
Table 2, p. 8

Offense	Severity Level	Statutory Maximum (Years)	Grid Presumptive Maximum (Years)	How Statutory Maximum Compares to Grid Maximum
Production/Use of Minors (Enhanced)	D	15	11.66	Statutory maximum is greater
Production/Use of Minors	E	10	10	The two are equal
Dissemination (Enhanced)	D	15	11.66	Statutory maximum is greater
Dissemination	E	7	10	Grid maximum is greater
Possession (Enhanced)	F	10	7	Statutory Maximum is greater
Possession	G	5	5	The two are equal

Offense	Ranking by Statutory Maximum (Years)			
	15	10	7	5
Manslaughter 1st Degree	9			
CSC 3rd Degree (penetration & force/occupation)	C			
Sex Trafficking 2nd Degree	C			
CSC 3rd Degree (penetration & child victim)	D			
Child Pornography Production (enhanced)	D			
Dissemination (enhanced)	D			
Certain Persons Not to Have Firearms or Ammunition	6			
Criminal Vehicular Homicide		8		
CSC 4th Degree (contact & force/occupation)		E		
CSC 4th Degree (contact & child victim)		F		
Child Pornography Production		E		
Possession of Child Pornography (enhanced)		F		
Burglary 2nd Degree		5		
Simple Robbery		5		
Dissemination			E	
Felony DWI			7	
Assault 2nd Degree (subd. 1)			6	
CSC 5th Degree (felony only)			F	
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
Assault 3rd Degree				4
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Failure to Register as a Predatory Offender				H

Comparison to Other Offense Rankings (with enhancements)

Source: Draft report, Table 1, p. 7

Association with Typical Cases

- Prior child pornography conviction
 - Applied to 5 of 251 (2%) possession cases sentenced 2016-18
 - Did not apply to any dissemination cases; unknown if it would have applied to production cases
- Registered as predatory offender
 - Applied to 21 of 251 (8%) possession cases sentenced 2016-18
 - Applied to 3 of 22 (14%) dissemination cases sentenced 2016-18
 - Could have applied to 3 of 17 (18%) production cases sentenced 2015-18

Source: Staff Memo – Sentenced Case Data and the Use of Minors in a Sexual Performance, Aug. 28, 2019, Table 4, p. 4

Association with Typical Cases

- Offense involved a minor under age 13
 - Could have applied to 4 of 17 (24%) production cases sentenced 2015-18
 - Could have applied to 17 of 19 (89%) dissemination cases sentenced 2016-18
 - Could have applied to 169 of 251 (67%) possession cases sentenced 2016-18

Source: Staff Memo – Sentenced Case Data and the Use of Minors in a Sexual Performance, Aug. 28, 2019, Table 4, p. 4

How do the enhanced versions of the offenses fit into the hierarchy we just discussed?

Production

Dissemination

Possession

Stat max should line up with grid max
Enhanced version at least one rank above
Concern that predatory enh different

Prod (Enh)

Dissemin (Enh)

Possession (Enh)

Production, Dissemination

Possession

Production (Enh), Dissemination(Enh)

Possession (Enh)