

Official Notices

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Minnesota Sentencing Guidelines Commission Notice of Public Hearing to Consider Amendments to the Sentencing Guidelines and Commentary

THE MINNESOTA SENTENCING GUIDELINES COMMISSION WILL HOLD A PUBLIC HEARING on Thursday, December 17, 2020, at 1:00 p.m. The public hearing is expected to be held remotely.

The public hearing is being held to consider proposed modifications to the 2020 Minnesota Sentencing Guidelines and Commentary resulting from legislative action and non-legislative amendments. A complete copy of the proposed amendments, as well as a more detailed description of their nature and effect, will be posted on the Commission's web site at mn.gov/sentencing-guidelines from November 16 through December 22, 2020. Information on how to attend the public hearing by Internet or by telephone will also be posted on the Commission's web site.

The Commission will hold the record open for five calendar days after the public hearing to accept written comment.

Modifications described in section A, below, are subject to final adoption after public hearing. Modifications described in section B and C, below, are subject to public hearing, final adoption, and submission to the Legislature by January 15, 2021.

Modifications are subject to final adoption by the Commission at its meeting on January 14, 2021. If adopted, modifications will take effect August 1, 2021, and will apply as provided in section 3.G of the Guidelines.

A. Legislative Amendments to Crime Laws Affecting the Guidelines. As a result of its review of 2020 regular and special session laws, the Commission proposes related modifications to 2020 Minn. Sentencing Guidelines sections 5.A & 5.B and Comment 2.E.03. These modifications amend Comment 2.E.03 to list § 609.749, subd. 3(a)(3), as an offense to which mandatory minimum penalties necessarily apply; and make conforming, technical changes to the Guidelines related to the recodification of Minn. Stat. § 260E.08(c) (Failure to Report Danger to Child's Health (Death)).

B. Partial Points in Criminal History Score. The Commission proposes to modify 2020 Minn. Sentencing Guidelines sections 2.B & 2.B.1.i; to add a new Comment 2.B.04; and to amend Comment 2.B.102. These modifications clarify that if the unrounded sum of the criminal history score points is not a whole number, the criminal history score must be rounded down to the nearest whole number.

C. Use of Minors in Sexual Performance. The Commission proposes to modify 2020 Minn. Sentencing Guidelines sections 5.A & 5.B. These modifications 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). These modifications also increase, from Severity Level E to Severity Level D, the severity level assigned to Use of Minors in Sexual Performance.

For more information, please refer to the Commission's web site at mn.gov/sentencing-guidelines or call the Commission's office at (651) 296-0144.

Notice of Public Hearing

Proposed Amendments to the Minnesota Sentencing Guidelines and Commentary

Date of notice: November 16, 2020.

Date of hearing: December 17, 2020.

Refer to web site (mn.gov/sentencing-guidelines) for information on how to attend the public hearing

The Minnesota Sentencing Guidelines Commission will hold a public hearing on Thursday, December 17, 2020, at 1:00 p.m. The public hearing is expected to be held remotely. Information on how to attend the public hearing will be posted on the Commission's [web site](#).

The Commission will hold the record open for five calendar days after the public hearing to accept written comment.

On Thursday, January 14, 2021, the Commission will meet to finally adopt or reject the proposed modifications. Meeting information will be posted on the Commission's [web site](#).

All interested persons are encouraged to participate in the December 17 hearing and offer comments. Persons wishing to testify may register in advance; registration instructions will be posted on the Commission's [web site](#). If you require special accommodations to attend the public hearing, please contact the Minnesota Sentencing Guidelines Commission staff as soon as possible. This notice is available in alternative formats upon request. This notice was posted on the MSGC web site on November 16, 2020.

Proposed Modifications

The public hearing is being held to consider the following proposed modifications to the 2020 Minnesota Sentencing Guidelines and Commentary resulting from legislative action and non-legislative amendments.

Modifications are subject to final adoption by the Commission at its meeting on January 14, 2021. If adopted, modifications to the Sentencing Guidelines and Commentary will take effect August 1, 2021, and apply as provided in section 3.G of the Guidelines, unless the Legislature by law provides otherwise.

Minnesota Sentencing Guidelines Commission
658 Cedar Street, G-58
Saint Paul, Minnesota 55155

Voice: (651) 296-0144

Website: <http://mn.gov/sentencing-guidelines>

E-mail: sentencing.guidelines@state.mn.us

Persons with hearing or speech disabilities may contact us via their preferred Telecommunications Relay Service

A. Legislative Amendments to Crime Laws Affecting the Guidelines

On July 23, 2020, the Commission reviewed legislative amendments resulting from the 2020 Minnesota Session Laws and provisionally adopted and advanced to public hearing the following proposed modifications to the Minnesota Sentencing Guidelines.

1. Amendments to Harassment and Stalking (2020 Regular Session)

2020 Minn. Laws [ch. 96, § 3](#).

Background: [Chapter 96](#) of the 2020 Regular Session Laws amended the Harassment and Stalking statute. On June 11, 2020, these revisions were initially considered by the Commission for possible modification to the Sentencing Guidelines. After the July public hearing, the Commission reopened its review of those amendments, examining the interplay between the amendment to Minn. Stat. § 609.749, subd. 3(a)(3), and the mandatory minimum penalties established by Minn. Stat. § 609.11. As a result of this review, the Commission proposes to amend Comment 2.E.03 to list § 609.749, subd. 3(a)(3), as an offense to which the mandatory minimum necessarily applies.

Description: The act amended the Harassment and Stalking statute, Minn. Stat. § 609.749, by changing elements and terminology. The felony offense described in subdivision 3(a)(3)—Harassment (Aggravated Violations) with a dangerous weapon—was changed. While the subdivision formerly established a felony for harassment while in possession of a dangerous weapon, the amendment now requires that the dangerous weapon be used, not merely possessed.

[Minn. Stat. § 609.11](#) applies mandatory minimum penalties to certain offenses if committed while possessing a firearm or using another dangerous weapon. These mandatory minimum penalties apply to Minn. Stat. § 609.749, subd. 3(a)(3).

Comment 2.E.03 lists offenses that by definition involve a dangerous weapon, and for which the mandatory minimum sentence always applies. Prior to August 2020, the elements of Minn. Stat. § 609.749, subd. 3(a)(3), could have been met by mere possession of a dangerous weapon other than a firearm, which would not require application of the mandatory minimum sentence. Accordingly, the offense was not listed in Comment 2.E.03.

Because Minn. Stat. § 609.749, subd. 3(a)(3), now requires the dangerous weapon to be used, not merely possessed, a conviction will now necessarily require application of the mandatory minimum. Accordingly, the Commission proposes to modify Comment 2.E.03 to list that offense among the offenses to which the mandatory minimum sentence always applies. In addition, for the sake of style consistency, the first instance of the word “firearm” within the comment is made lowercase because it is not part of an offense title.

Proposed Modifications

Proposed modifications to 2020 Minn. Sentencing Guidelines comment 2.E.03, effective August 1, 2021:

2.E.03. *Some offenses by statutory definition involve a dangerous weapon, and therefore the mandatory minimum provision dealing with dangerous weapons always applies: Aggravated Controlled Substance Crime in the First Degree with a ~~Firearm~~ firearm under Minn. Stat. § 152.021, subd. 2b(1); Controlled Substance Crime in the First or Second Degree with a firearm under Minn. Stat. § 152.021, subd. 1(2)(i) or 2(a)(2)(i), or Minn. Stat. § 152.022, subd. 1(2)(i) or 2(a)(2)(i); Assault in the Second Degree under Minn. Stat. § 609.222; Harassment (Aggravated Violations) with a dangerous weapon under Minn. Stat. § 609.749, subd. 3(a)(3); Certain Persons Not to Have Firearms or Ammunition under Minn. Stat. §§ 624.713, subd. 2(b) and 609.165, subd. 1b; and Drive-By Shootings under Minn. Stat. § 609.66. The presumptive disposition for these types of offenses is imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is longer.*

* * *

2. Technical Amendment Affecting Failure to Report Danger to Child's Health (2020 1st Special Session)

2020 Minn. Laws 1st Spec. Sess. [ch. 2, art. 7, § 8.](#)

Background: During the 2020 1st Special Session, the Legislature passed an act relating to human services. Among other provisions, the act reorganized an existing section, Minn. Stat. § 626.556 (Reporting of Maltreatment of Minors), under a new chapter, Minn. Stat. chap. 260E. No changes were made to the criminal statutory maximums or elements currently found in Minn. Stat. § 626.556, subd. 6. The Commission proposes to make conforming, technical changes to the Guidelines.

Description: Certain professionals who work with children are mandated reporters of child maltreatment under Minn. Stat. § 260E.06. Minn. Stat. § 260E.08 provides misdemeanor and gross misdemeanor penalties for a mandated reporter's failure to report child maltreatment.

In addition to mandated reporters, Minn. Stat. § 260E.06 also imposes a similar reporting duty upon a parent, guardian, or other caretaker who employs spiritual means or prayer for treatment in lieu of medical care, if the lack of medical care may cause serious danger to the child's health. Minn. Stat. § 260E.08 provides gross misdemeanor penalties for a parent, guardian, or caretaker who fails to report under such circumstances if the person knows or reasonably should know that the child's health is in serious danger, and the child suffers substantial or great bodily harm due to the lack of medical care. If the child dies because of the lack of medical care, the person is guilty of a felony and may be sentenced to imprisonment for not more than two years or to payment of a fine of not more than \$4,000, or both.

Because no changes were made to statutory maximums or elements, the Commission proposes to maintain the offense’s existing severity as unranked, and to make technical and clarifying amendments.

Proposed Modifications

Proposed modifications to 2020 Minn. Sentencing Guidelines sections 5.A & 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
UNRANKED	Failure to Report <u>Danger to Child’s Health (Death)</u>	626.556, subd. 6 <u>260E.08(c)</u>

* * *

5.B. Severity Level by Statutory Citation

* * *

Statute Number	Offense Title	Severity Level
626.556, subd. 6 <u>260E.08(c)</u>	Failure to Report <u>Danger to Child’s Health (Death)</u>	Unranked

* * *

3. Use of Force by Peace Officers (2020 2nd Special Session)

2020 Minn. Laws 2nd Spec. Sess. [ch. 1, §§ 8–10](#).

Background: During the 2020 2nd Special Session, the Legislature passed an act relating to public safety, providing law enforcement peer counseling, critical incident stress management, residency incentives, crisis intervention and mental illness crisis training, autism training, and duty to intercede and report for peace officers. The act expanded membership of the Board of Peace Officer Standards and Training; prohibited warrior-style training; provided a community relations advisory council, certain

peace officer data and reporting, and peace officer grievance arbitration selection procedures and reports; and appropriated money. The act amended 2018 Minn. Stat. §§ 609.06 and 609.066 which regulates authorized use of force and authorized use of deadly force by peace officers. The Commission proposes no changes to the Guidelines as a result of this act.

Description: Among its other provisions, the act changed two sections of the Criminal Code, Chapter 609.

Section 8 amended Minn. Stat. § 609.06, which authorizes use of force in certain circumstances, including the reasonable use of force by a public officer executing a duty imposed by law. Section 8 added an exception: peace officers may not use chokeholds, hog-tying, or face-down transport unless the circumstances would permit use of deadly force under Minn. Stat. § 609.066. The definition of “deadly force,” which applies to some felonies, remained unchanged.*

No Proposed Modifications: The Commission proposes no modifications because the act’s changes did not directly affect the Sentencing Guidelines.

* The act did not add chokeholds, hog-tying, or face-down transport to the definition of “deadly force” found in Minn. Stat. § 609.066, subd. 1. That definition states, in part, “For the purposes of this section, ‘deadly force’ means force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm. The intentional discharge of a firearm, other than a firearm loaded with less lethal munitions and used by a peace officer within the scope of official duties, in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force.”

B. Partial Points in Criminal History Score

Background: On October 8, 2020, the Commission provisionally adopted and advanced to public hearing a proposal to eliminate the possibility of criminal history scores containing partial points, something that became possible after the 2019 creation of the one-half custody status point.

Description: The criminal history score (CHS) is the sum of points from the four criminal history factors found in section 2.B. Among these factors are *prior felonies*, and *custody status* at the time of the offense.

A partial point value—a value ending in “½”—is possible both with prior felonies (section 2.B.1), and, as of August 1, 2019, with custody status (section 2.B.2.a). Under the current Guidelines, a partial felony point value is rounded down to the nearest whole number (section 2.B.1.i), but a partial custody status point value is not. This is problematic because the sentencing grids’ horizontal axes—which reflect the CHS—contain only whole numbers.

The Commission proposes to clarify that if the unrounded sum of the criminal history score points is not a whole number, the criminal history score must be rounded down to the nearest whole number.

Proposed Modifications

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

2.B. Criminal History

The horizontal axis on the Sentencing Guidelines Grids is the criminal history score. An offender’s criminal history score is the sum of points from eligible:

- prior felonies;
- custody status at the time of the offense;
- prior misdemeanors and gross misdemeanors; and
- prior juvenile adjudications.

If the sum of these points is not a whole number, the criminal history score must be rounded down to the nearest whole number.

This section details the requirements for calculating the criminal history points in each of these areas. This section also details the requirements for calculating criminal history points for convictions from jurisdictions other than Minnesota and convictions for enhanced felonies.

Comment

* * *

2.B.04. The criminal history score contains no partial points; thus, an offender with less than a full point is not given that partial point. For example, if the sum of points from the four criminal history factors is 2½, the criminal history score is 2. On the other hand, 1½ felony points and one-half custody status point also yield a criminal history score of 2, because no rounding is necessary to create a whole number from their sum.

* * *

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.

* * *

- i. Total Felony Points. The felony point total is the sum of the felony weights. ~~If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number.~~

Comment

2.B.101. *The basic rule for computing the number of prior felony points in the criminal history score is that the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given for a felony level offense, no matter what period of probation is pronounced, before the current sentencing.*

2.B.102. ~~No partial points are given—thus, an offender with less than a full point is not given that point. For example, an offender with a total weight of 2½ would have 2 felony points. Although the felony point total may contain a partial point, the criminal history score will not~~ due to the rounding rule in section 2.B.

* * *

C. Use of Minors in Sexual Performance

Background: Pursuant to a legislative mandate,* the Sentencing Guidelines Commission began a comprehensive review of its child pornography sentencing guidelines on September 12, 2019. On October 8, 2020, the Commission discussed several proposals to modify the Sentencing Guidelines as a result of this review. On November 5, 2020, the Commission provisionally adopted and advanced to public hearing a proposal to increase the severity levels assigned to Use of Minors in Sexual Performance.

Description: The Commission proposes to increase the severity level assigned to all Use of Minors in Sexual Performance offenses (Minn. Stat. § 617.246). This includes child pornography production (subd. 2); ownership or operation of a child pornography dissemination or reproduction business (subd. 3); and dissemination of child pornography for profit (subd. 4).

- **Enhanced Offenses.** The proposal increases, 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).
- **Base Offenses.** The proposal increases, from Severity Level E to Severity Level D, the severity level assigned to Use of Minors in Sexual Performance.

Proposed Modifications

Proposed modifications to 2020 Minn. Sentencing Guidelines sections 5.A & 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>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>

* “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.

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

* * *

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(b) 3(b) 4(b)	Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13)	D <u>C</u>

* * *

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>

* * *

Proposed Amendments to the Sentencing Guidelines

Estimated Prison-Bed Impact

November 16, 2020

The Minnesota Sentencing Guidelines Commission will hold a [public hearing](#) on December 17, 2020, to consider [proposed modifications](#) to the Minnesota Sentencing Guidelines and Commentary. The purpose of this paper is to provide MSGC staff's estimate of the prison-bed impact of these proposals.

A. Legislative Amendments to Crime Laws Affecting the Guidelines

The proposed Guidelines modifications that relate to recent legislative changes are either technical changes or changes to the Commentary. As these modifications will not substantially alter Guidelines policy, staff estimates they will have no prison-bed impact.

B. Partial Points in Criminal History Score

The sentencing grids' horizontal axes—which reflect the criminal history score (CHS)—contain only whole numbers. If a CHS contains a partial point resulting from an unrounded one-half custody status point ($\frac{1}{2}$ CSP), that CHS does not fall within a column on the sentencing grids, but halfway between two columns. In such a case, the Guidelines presently provide no guidance about whether to round up (to the next greater column) or round down (to the next lesser column). The proposed modifications provide that guidance.

Assumptions

It is assumed that, without such guidance, a judge sentencing a defendant with a CHS containing a $\frac{1}{2}$ CSP presently has the discretion either to round up to the next greater column or, or to round down to the next lesser column. It is further assumed that judges presently round up if such a CHS contained a partial felony point value that was rounded down by operation of section 2.B.1.i, and that judges presently round down if section 2.B.1.i was not applied.¹

¹ This assumption is based on the following logic: To round *down* in the first situation would never give the $\frac{1}{2}$ CSP any weight at all; to round *up* in the second situation would functionally nullify the Commission's 50% reduction of the CHS weight of custody status for misdemeanors and lesser felonies. Because either interpretation would give no effect to the

Estimated Prison-Bed Impact: No Change

This assumed judicial behavior is functionally identical to the policy proposed within these Guidelines modifications. Accordingly, if the above assumptions are correct, staff estimates that these modifications will have no prison-bed impact.²

C. Use of Minors in Sexual Performance

The proposed modifications 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) (“enhanced offenses”).

Likewise, the proposed modifications increase, from Severity Level E to Severity Level D, the severity level assigned to Use of Minors in Sexual Performance (“base offenses”).

Assumptions

To prepare an estimate of the prison-bed impact of these proposals, MSGC staff assumed that future Use of Minors in Sexual Performance cases will be similar to 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, it was assumed the proposed increase in the severity level of the enhanced offenses would apply to those 8 offenses, and that the proposed increase in severity level of the base offenses would apply to the remaining 12 offenses.

Among each category, 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.

Commission’s 2019 decision to establish the ½ CSP, both interpretations would arguably violate the principle of statutory construction that “[e]very law shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. § [645.16](#).

² If the assumptions are incorrect—for example, if judges who face a CHS containing a ½ CSP always round down, even if section 2.B.1.i already rounded down a partial felony point—staff estimates the number of cases significantly affected to be relatively small. Among those cases committed on or after August 1, 2019—the effective date of the ½ CSP policy—for which MSGC had data by August 1, 2020, staff found that less than one percent of the cases would have faced a presumptive stay, rather than a presumptive commit, if judges always rounded ½ CSPs down rather than following the policy proposed. Staff did not investigate the scope of similar changes to presumptive durations. See http://mn.gov/msgc-stat/documents/meeting%20materials/2020/September/6-Partial_Points_in_CHS.pdf, notes 3 & 4 and accompanying text.

Estimated Prison-Bed Impact of Raising Severity Level, Enhanced Offenses: +2.5 Beds

If the above assumptions are correct, MSGC staff estimates that raising the severity level of Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13) from Severity Level D to Severity Level C will cause the eventual need for 2.5 additional prison beds (1 prison bed caused by offenders moving from probation to prison, and 1.5 prison beds caused by offenders serving more time).³

Estimated Prison-Bed Impact of Raising Severity Level, Base Offenses: +1 Bed

If the above assumptions are correct, MSGC staff estimates that raising the severity level of Use of Minors in Sexual Performance from Severity Level E to Severity Level D will cause the eventual need for 1 additional prison bed (70% of which is caused by offenders moving from probation to prison, and 30% of which is caused by offenders serving more time).

³ "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 does not reflect the impact of the 2019 increase in severity from E to D.