

## Sex Trafficking & Prostitution Review

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# Ranking Prostitution Offenses on the Sex Offender Grid

May 6, 2022

The prostitution offenses within the scope of this review are currently ranked on the Standard Grid at Severity Level (SL) 9, SL 5, and SL 3. The Central Minnesota Human Trafficking Task Force (CMHTTF) recommends that the Commission rerank these offenses on the Sex Offender Grid at SL B, SL F, and SL G, respectively. This staff paper discusses this topic and provides preliminary staff recommendations. (These recommendations are “preliminary” because full evaluation of their merit will be possible only after reviewing draft implementing language and estimating the impact of each.)

## Should Prostitution Offenses Appear on the Sex Offender Grid?

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### Sexual Motivation & Predation

As noted in the background paper, the Commission originally created the Sex Offender Grid to respond to concerns about the danger of recidivist sex offenders. Its primary criterion for including an offense on the new grid appeared to be whether the crime in question was a “sex offense”—although it made an exception for Failure to Register as a Predatory Offender.

On one hand, prostitution offenses would seem to be “sex offenses.” A patron of prostitution is one who trades, or seeks to trade, money for sexual contact or penetration. Although motivations can be complex—including thrill-seeking, for example<sup>1</sup>—is the offense not inherently sexual, and therefore a “sex offense”?<sup>2</sup> Likewise, if committing a sex act on a child age 15 or younger is a sex offense,<sup>3</sup> is hiring the child for the

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<sup>1</sup> See Erinn B. Valine, “The Demand Side of Sex Trafficking in Minnesota: The Who, Where, and Why—And What We Can Do about It,” *Mitchell Hamline L. Rev.*, vol. 45, issue. 1, art. 12, n. 108 (2019) (retrieved April 27, 2022, at <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1160&context=mhlr>) (citing Michael Shively et al., “A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts” (2012), at p. 7 (retrieved April 27, 2022, at <https://www.ojp.gov/pdffiles1/nij/grants/238796.pdf>)).

<sup>2</sup> Prostitution has been categorized under the heading of “Sex Crimes” since it was moved to Minn. Stat. chapter 609 in 1967. Prior to that, it was categorized in chapter 617, “Offenses Relating to Chastity, Morals, Decency” (which included sex offenses).

<sup>3</sup> The act is a sex offense if the person committing it is more than 36 months older than the child. The applicable offenses are CSC 1st Degree (Minn. Stat. § [609.342, subd. 1a\(e\)](#), sexual penetration with a child age 13 or younger, ranked at SL A), CSC 2nd Degree (§ [609.343, subd. 1a\(e\)](#), sexual contact with a child age 13 or younger, ranked at SL D), CSC 3rd Degree (§ [609.344, subd. 1a\(e\)](#), sexual penetration with a child age 14 or 15, ranked at SL D), and CSC 4th Degree (§ [609.345, subd. 1a\(e\)](#), sexual contact with a child age 14 or 15, ranked at SL F).

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

same sex act not also a “sex offense”? On the other hand, if it is generally not a sex offense for two adults to have consensual sex with each other—or for an adult to have consensual sex with a child age 16 or 17—one might argue that the overlay of a financial transaction should not convert it into a “sex offense.”<sup>4</sup>

### Concerns for Sex-Trafficking Victims

The 2009 Commission considered whether to place prostitution offenses other than sex trafficking on the sex offender grid but decided not to do so at that time. The Commission’s rationale is discussed in page pages 7 & 8 of the Commission’s [2010 Report to the Legislature](#), as well as in its meeting minutes of September 17, 2009 (excerpt appended at page 11). From those materials, the 2009 decision not to rank prostitution offenses on the Sex Offender Grid appears to have been motivated by concern for possible “unintended consequences for victims of sex trafficking and prostituted individuals.” The Commission appears to have viewed its decision as a delay (until after the 2010 session), rather than as its final action.

One might suppose that child prostitution offenses generally involve adults seeking to pay for sex with children—and at least one staff study would support that supposition.<sup>5</sup> Yet, it is theoretically possible for a prostitute to commit the offense of engaging in prostitution with a child—if, for example, the prostitute were hired by a 17-year-old patron. It seems significantly less likely that a prostitute shares the patron’s sexual or predatory motivations, particularly if the prostitute is also a sex-trafficking victim. Do these considerations make child prostitution offenses lesser candidates for ranking on the Sex Offender Grid than offenses involving only patron defendants?

### Preliminary Staff Recommendation

Staff’s preliminary recommendation is to **rank these felony prostitution offenses on the Sex Offender Grid**. This recommendation is consistent with CMHTTF recommendations. Staff’s analysis follows:

- **Patrons of Prostitution.** For the reasons discussed in footnote 4, it would be problematic to impose a blanket rule that prostitution offenses—particularly offenses committed by prostitutes—are always sex crimes. In the context of patrons, however—particularly repeat patrons, and in light of the motivations and behavior typically observed in patrons<sup>6</sup>—classification of Patrons of Prostitution (2nd or Subsequent Violation) as a sex offense would seem to be generally appropriate.
- **Child Prostitution.** If sex with a child is a sex offense, it would seem rational to consider offering money for sex with a child likewise to be a sex offense. The strength of this principle appears only slightly diminished if the child is a year or two above the age lawfully to consent to sex that is not financially induced.

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<sup>4</sup> This argument probably makes sense only if the prostitute is freely engaging in an arms-length financial transaction, which may not be possible with 16- and 17-year-olds, and is perhaps rarely the case with adult prostitutes. The law review article referenced in footnote 1, above, contains related discussions on whether prostitutes ought to be referred to as sex “providers” or as “victims” (part II.B, pp. 86–90), and on the motivations and actions of patrons (part III.C, pp. 96–97).

<sup>5</sup> See footnote 10 (page 3).

<sup>6</sup> See Lauren Martin et al., “Mapping the Demand: Sex Buyers in the State of Minnesota,” pp. 77–101 (August 2017) (links to executive summary & full report retrieved April 29, 2022, at <https://uroc.umn.edu/research/sex-trading-trafficking-and-community-well-being-initiative>).

## Should the Commission Make Further Severity Distinctions Among Prostitution Offenses?

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The Sentencing Guidelines now vary the SLs assigned to prostitution offenses with the various statutory maximum penalties provided by the Legislature. This section asks whether the Commission should consider making other severity distinctions based on differing degrees of culpability or the level of harm that may be involved in the commission of the offense.

### Incomplete Acts: Hiring vs. Offering/Agreeing

“Prostitution” includes hiring someone for sex as well as offering or agreeing to hire someone for sex. For most offenses, offering or agreeing to commit a crime would be considered an attempt or conspiracy, and punished half as severely.<sup>7</sup> Likewise, the level of harm caused by merely offering or agreeing to hire someone for sex would seem to be significantly less than the level of harm caused by actually hiring someone for sex.

### Penetration vs. Contact

One could make the same point about sexual penetration vs. sexual contact, which are treated the same in the sex trafficking and prostitution statutes but very differently in the Criminal Sexual Conduct (CSC) statutes (and in the Guidelines; see Table 1, below).

### Real Children vs. Undercover Officers Posing as Children

Along the same lines, would it not be appropriate to assign different severity levels to child prostitution offenses<sup>8</sup> depending on whether the person the patron hired (or offered or agreed to be hired) for sex was, in fact, a child (clause (1) or (2)),<sup>9</sup> or was merely a person reasonably believed to be a child (clause (3)—apparently the predominant fact pattern in Minnesota<sup>10</sup>)?

### Preliminary Staff Recommendation

Staff does not recommend making SL distinctions based on whether someone was actually hired for sex—rather than merely offered or agreed to be hired—because the structure of the prostitution statute does

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<sup>7</sup> See Minn. Stat. §§ [609.17](#) (attempts) & [609.175](#) (conspiracy); Minn. Sentencing Guidelines & Commentary § 2.G.2 (halving the presumptive duration for attempt or conspiracy). On the other hand, for several offenses, not-completed crimes are arguably treated identically to their completed counterparts for sentencing purposes. Examples include: [conspiracy to commit a controlled substance crime](#); [assault by fear or attempt](#); and [possessing a forged document with intent to offer it](#).

<sup>8</sup> *I.e.*, Minn. Stat. § [609.324, subd. 1](#)(a), 1(b), and 1(c).

<sup>9</sup> Clause (2), which applies only to patrons, appears to be superfluous, as the definition of “[prostitution](#)” (used in clause (1)) already contains the concept of hiring, or offering or agreeing to hire, someone to engage in a sex act (used in clause (2)).

<sup>10</sup> To prepare a 2021 fiscal note, MSGC staff examined records of the 50 cases sentenced in 2019 for prostitution offenses involving minors from age 13 through 15. All cases but one involved sting operations, with undercover agents posing as children. Minn. Leg. Budget Office, Consolidated Fiscal Note, HF613-1UE, p. 8 (March 18, 2021) (retrieved April 27, 2022, at <https://mn.gov/mmbapps/fnsearchlbo/?number=HF613&year=2021> & then selecting bill number “HF613 - 1UE”).

not permit a clear reference to a particular numbered section, subdivision, paragraph, or clause upon which such a distinction could be made. The same is true of the distinction between sexual penetration and sexual contact. All of these concepts are combined, without enumeration, in the definition of “[prostitution](#),” and it would be problematic for the Commission to distinguish concepts that the Legislature lumped together.

The same is not true of the distinction between real children and undercover officers posing as children, however. Clause (1) and (2) child prostitution offenses involve real children, while clause (3) covers people believed to be children; *i.e.*, undercover police posing as children. Just as completed offenses are punished more severely than attempts—presumably due to the greater degree of harm—it would seem rational to consider child prostitution crimes involving actual children to be more harmful, and therefore more severe, than crimes not involving actual children (see footnote 10). To account for the difference in harm<sup>11</sup> caused by these different types of crimes, staff preliminarily recommends that **the Commission consider ranking clause (3) offenses below clause (1) and (2) offenses**. This is not a CMHTTF recommendation.

## How Should Prostitution Offenses be Ranked on the Sex Offender Grid?

### Statutory Maximums

For felony prostitution offenses, Table 1 displays the statutory maximums, current Guidelines rankings, and CMHTTF-proposed Guidelines rerankings. To permit a comparison with CSC offenses analogous to those prostitution offenses involving actual or purported children under age 16, the table also displays the statutory maximums and Guidelines rankings for CSC offenses involving children of the same age (see footnote 3 for statutory references).

*Table 1. Statutory Maximums and Rankings for Prostitution Offenses; CMHTTF-Proposed Rankings; and Corresponding Criminal Sexual Conduct (CSC) Statutory Maximums & Rankings, if Applicable*

Minn. Stat. § 609.324	Offense	Stat. Max. (Prison)	Current Ranking	CMHTTF-Proposed Reranking	CSC Stat. Max.	CSC Ranking
Subd. 1(a)	Engage or Hire a Minor to Engage in Prostitution (Child Under 14)	20 years	SL 9	SL B	Penetration 12–30 years	Penetration SL A
					Contact 25 years	Contact SL D
Subd. 1(b)	Engage or Hire a Minor to Engage in Prostitution (Child Age 14 or 15)	10 years	SL 5	SL F	Penetration 15 years	Penetration SL D
					Contact 10 years	Contact SL F

<sup>11</sup> As discussed in the background paper, the Commission has historically based its severity-level ranking decisions, in part, on the level of harm caused by the offense *and* the culpability of the offender. Consider, for example, the case of a patron who hires a 14-year-old child for sex, but the child turns out to be, instead, an undercover police officer: While patron’s culpability—and, perhaps, future dangerousness—may not be altered by the fact that the patron was caught in a sting operation, the level of harm to the child is eliminated by the fact that the child does not exist.

Minn. Stat. § 609.324	Offense	Stat. Max. (Prison)	Current Ranking	CMHTTF-Proposed Reranking	CSC Stat. Max.	CSC Ranking
Subd. 1(c)	Engage or Hire a Minor to Engage in Prostitution (Child Age 16 or 17)	5 years	SL 3	SL G		N/A
Subd. 2(b)	Patrons of Prostitution (2nd or Subsequent Violation)	5 years	SL 3	SL G		N/A

### Ranking Patrons of Prostitution (2nd or Subsequent Violation)

Staff agrees with the CMHTTF recommendation to **rerank Patrons of Prostitution (2nd or Subsequent Violation) at SL G**. This ranking is consistent with the Sex Offender Grid’s pattern of ranking offenses in such a way that, at maximum criminal history, the presumptive sentence equals the statutory maximum penalty. This recommendation is represented visually—albeit in a different context—in Figure 5 (p. 10).

### Ranking Child Prostitution Offenses

There are at least three different, rational ways of reranking child prostitution offenses on the Sex Offender Grid—and, while doing so, assigning offenses involving sting operations a lower SL than offenses involving real children. These three ways are described in Table 2 as reranking options A, B, and C. Where CMHTTF recommendations are reflected in Table 2, an asterisk appears.

- Option A (“Consistency”) reranks child prostitution offenses involving real children at the CMHTTF-recommended SLs, while reranking offenses involving undercover officers posing as children one SL below the CMHTTF recommendations. Option A emphasizes consistency with the current Guidelines rankings.
- Option B (“Fit Stat. Max.”) emphasizes the Sex Offender Grid’s principle of ranking the most serious version of a sex offense (for this offense, the version involving real children) in such a way that, at maximum criminal history, the presumptive sentence equals the statutory maximum penalty.<sup>12</sup> Offenses involving sting operations are ranked one SL lower.
- Option C (“Like Penetration & Contact”) reranks the more serious child prostitution offenses (involving real children) like the sexual penetration of a child of that age, and the less serious versions (involving sting operations) like the sexual contact of a child of that age. Because Option C

<sup>12</sup> This was problematic for the offense with a 20-year statutory maximum penalty—child prostitution involving children under the age 14—because the Sex Offender Grid was not designed to reflect a duration of 20 years at maximum criminal history. SL B was designed for a 25-year maximum penalty, and SL C was designed for a 15-year maximum penalty. Neither SL B nor SL C displays the 20-year statutory maximum penalty at maximum criminal history. Option B—as reflected in Table 2, Figure 1, and Figure 2—assigns SL C, rather than SL B, to the more serious version of child prostitution involving children under the age 14. Staff did not assign SL B because, at maximum criminal history, the lowest number in the discretionary range—255 months—exceeds the 240-month statutory maximum penalty.

does not apply to cases involving children above the age of consent, severity levels for offenses involving children age 16 and 17 are borrowed from the other options (indicated by italics in Table 2, Figure 5, and Figure 6).

Table 2. Reranking Options for Child Prostitution Offenses

Minn. Stat. § 609.324, subd.	Suggested Offense Title	Current Ranking	Reranking Option A (Consistency)	Reranking Option B (Fit Stat. Max.)	Reranking Option C (Like Penetration & Contact)
1(a)(1) & (2)	Child Prostitution (Under Age 14)	SL 9	SL B*	SL C	SL A
1(a)(3)	Child Prostitution (Believed to be Under Age 14)	SL 9	SL C	SL D	SL D
1(b)(1) & (2)	Child Prostitution (Age 14 or 15)	SL 5	SL F*	SL E	SL D
1(b)(3)	Child Prostitution (Believed to be Age 14 or 15)	SL 5	SL G	SL F*	SL F*
1(c)(1) & (2)	Child Prostitution (Age 16 or 17)	SL 3	SL G*	SL G*	SL G*
1(c)(3)	Child Prostitution (Believed to be Age 16 or 17)	SL 3	SL H	SL H	SL H

Figures 3 through 8 illustrate Table 2’s various reranking options. A white square indicates the presumptive executed duration for each criminal history score (CHS), with colored bars above and below the square indicating the discretionary range, and a black horizontal line showing the statutory maximum penalty. **Dark blue bars show the presumptive sentences under current Guidelines policy; green shows Option A (“Consistency”); light blue shows Option B (“Fit Stat. Max.”); and brown shows Option C (“Like Penetration & Contact”).** A grey shaded square indicates a presumptively stayed sentence.

### Preliminary Staff Recommendation

Of these three reranking options, staff recommends **Option B** (“Fit Stat. Max.,” **light blue**), for three reasons. First, it is the only option that keeps presumptive sentences within the statutory maximums. The

other two options have instances where the statutory maximum penalty is below the lowest point on the presumptive range (three times in Figure 1 and once in Figure 3), thus eliminating the presumptive range in those instances. In some cases, this will cause people to receive no additional penalty for a higher criminal history score. This is generally contrary to the Guidelines' grid design.

Second, its rationale is the easiest to articulate, and the most like current Sex Offender Grid rankings: The most severe version of each offense (involving real children) is ranked in such a way that, at maximum criminal history, the presumptive sentence equals the statutory maximum penalty (or gets as close to it as the grid will allow; see footnote 12). This is precisely how each CSC offense is ranked, and it is one of the principles around which the Sex Offender Grid was designed.

Third, as child prostitution offenses decline in severity, Option B establishes a consistent, staircase-like decrease in the SLs assigned: from C, to D, to E, to F, to G, to H.

Figure 1. Presumptive Sentences for Child Prostitution (Under Age 14): Current Guidelines & Three Options

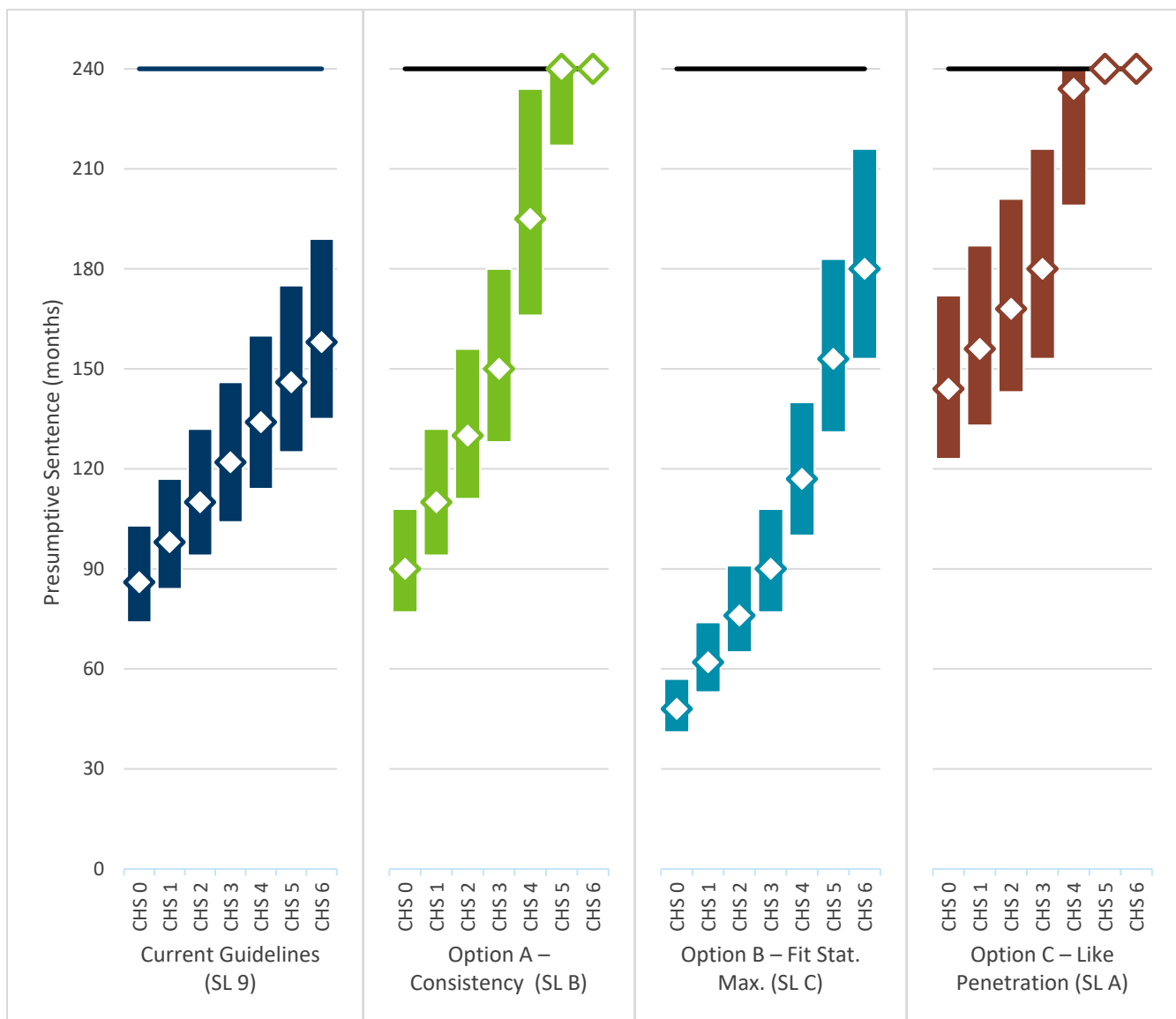


Figure 2. Presumptive Sentences for Child Prostitution (Believed to be Under Age 14): Current Guidelines & Three Options

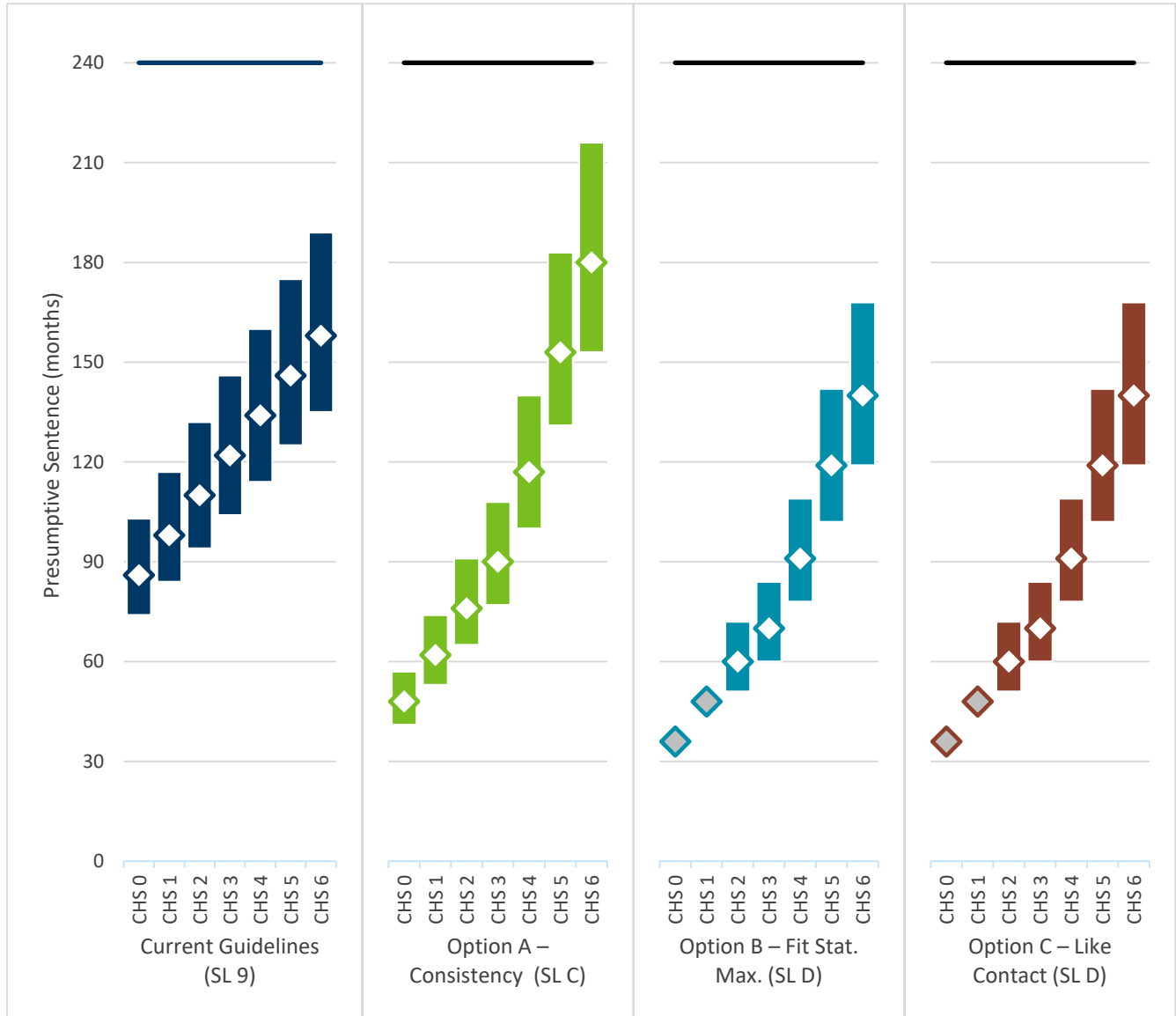




Figure 3. Presumptive Sentences for Child Prostitution (Age 14 or 15): Current Guidelines & Three Options

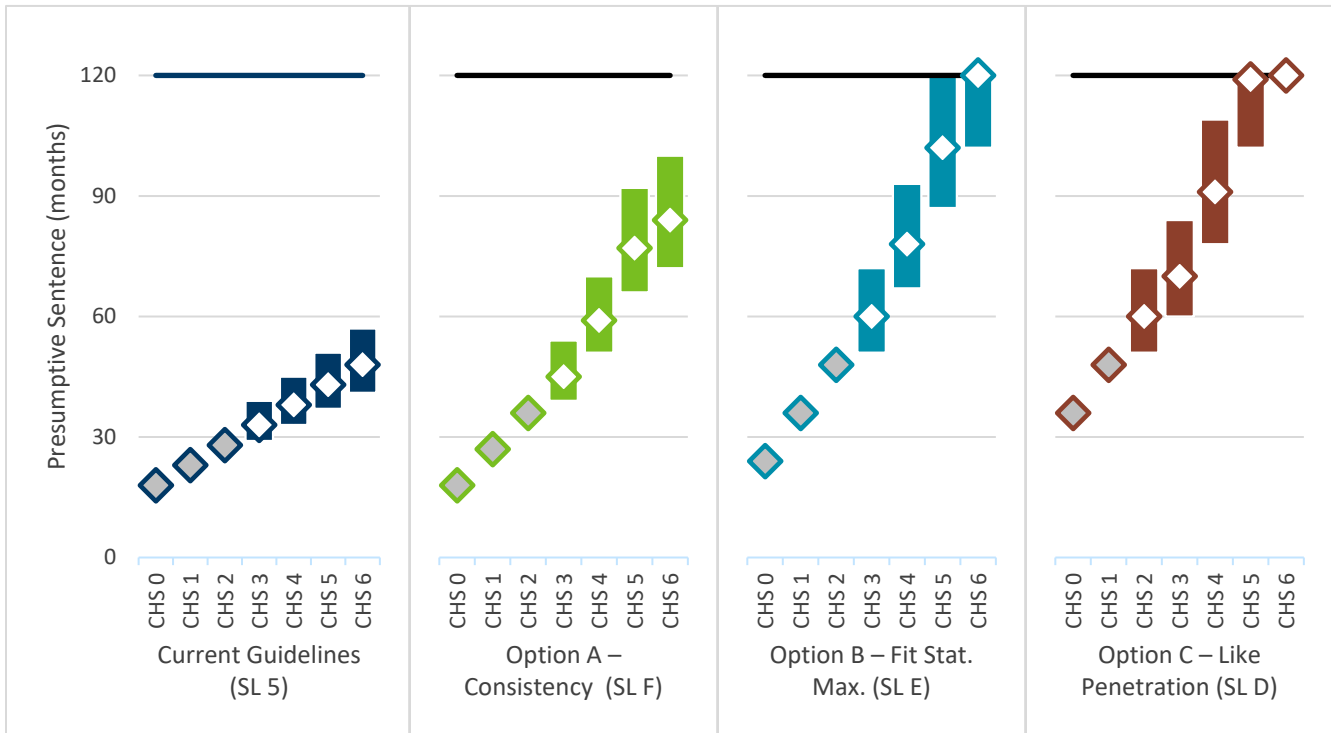


Figure 4. Presumptive Sentences for Child Prostitution (Believed to be Age 14 or 15): Current Guidelines & Three Options

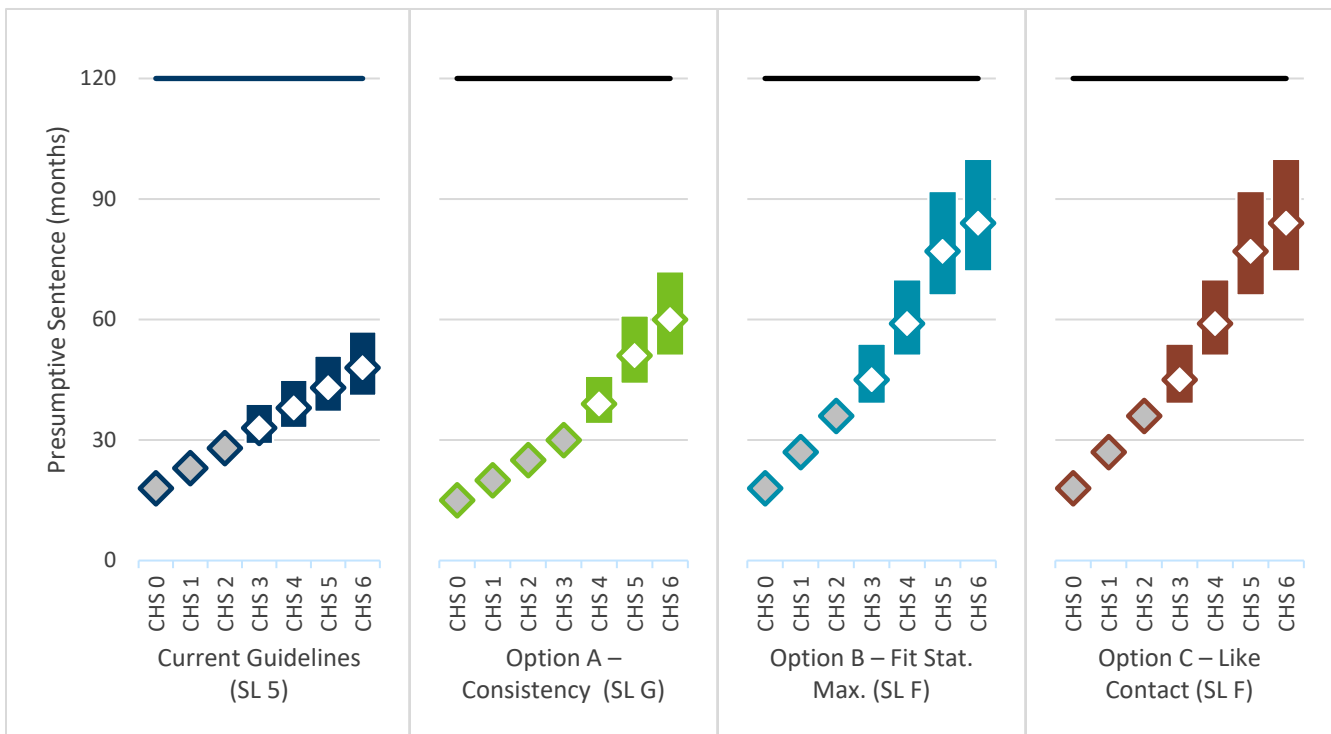


Figure 5. Presumptive Sentences for Child Prostitution (Age 16 or 17): Current Guidelines & Three Options

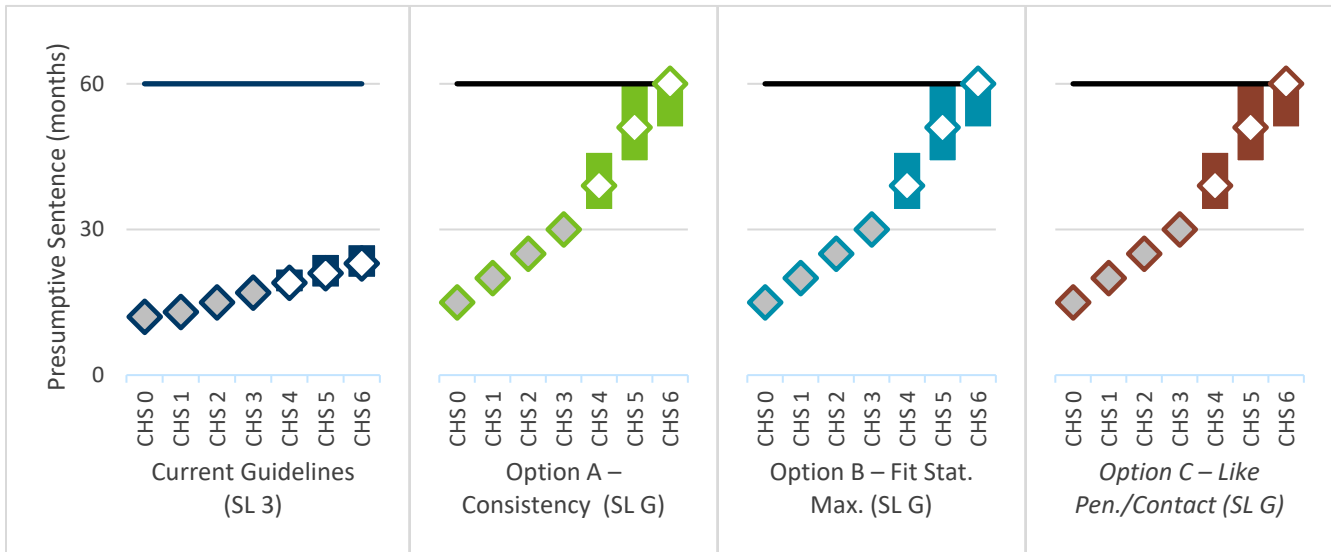
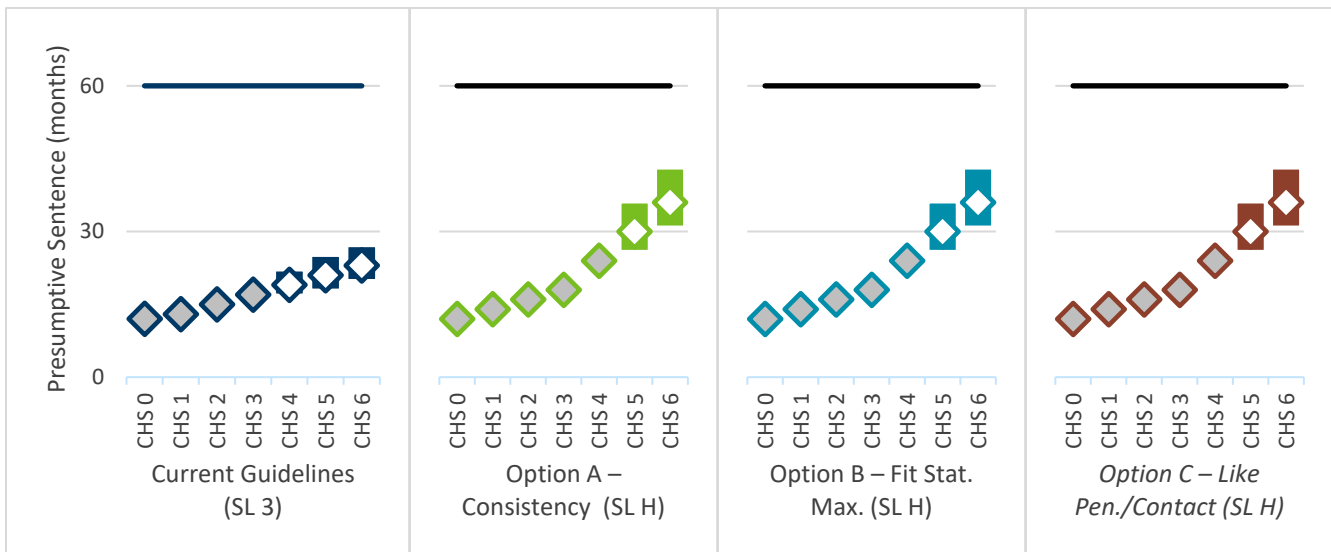


Figure 6. Presumptive Sentences for Child Prostitution (Believed to be Age 16 or 17): Current Guidelines & Three Options



## Should the Commission Recommend that the Legislature Fix a 2021 Drafting Error?

As discussed in the background paper’s footnote 3, an apparent legislative drafting error ([2021 Minn. Laws 1st Sp. Sess. ch. 11, art. 4, § 5](#)) caused the hiring for sex of people believed to be 13-year-old children to be included in both Minn. Stat. § [609.324, subd. 1\(a\)\(3\)](#) (20-year maximum penalty) and subd. 1(b)(3) (10-year maximum penalty). **Staff recommends that the Commission recommend that the Legislature change “13” to “14” in Minn. Stat. § 609.324, subd. 1(b)(3), to be consistent with the rest of the subdivision.**

## Appendix – Excerpt of September 17, 2009, MSGC Meeting Minutes

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The Commission meeting was held on September 17, 2009, at the Department of Corrections, 1450 Energy Park Drive, Suite 200, Saint Paul, Minnesota. Commission members in attendance were Chair Jeffrey Edblad, Commissioner of Corrections Joan Fabian, Tracy Jenson, Justice Helen Meyer, Judge Edward Cleary, Judge Gordon Shumaker, Sheriff Brad Gerhardt, and Connie Larson. Executive Director Suzanne Alliegro and MSGC staff members Jill Payne, Anne Wall, and Bethany Habinek were present. Also in attendance was Jim Early from the Minnesota Attorney General's Office; Cheryl Thomas and Mary Ellison from The Advocates for Human Rights; Caroline Palmer and Sara Thome from the Minnesota Coalition Against Sexual Assault; Amy Brenengen; David Brown from the Hennepin County Attorney's Office; Julie Kurtz; Nigel Verrobe; Bonnie Dumanis and Gail Stewart from The San Diego District Attorney's Office; and Bill Lemons.

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### **IV. Discussion: Moving Prostitution Offenses to the Sex Offender Grid**

Commission members received information regarding moving prostitution offenses to the sex offender grid which Director Alliegro outlined. The Advocates for Human Rights with support from Minnesota Coalition against Sexual Abuse requested that the Commission consider reviewing the rankings for felony prostitution offenses as defined in M.S. § 609.324 as well as M.S. § 609.322 to increase their severity levels in order to make them more consistent with offenses on the sex offender grid.

The Commission discussed the request at its July 23, 2009 meeting and directed staff to study this issue including seeking information from the County Attorneys regarding charging practices in prostitution cases involving minors.

Staff reviewed current statutory maximums for felony prostitution offenses and provided the Commission with a table of possible severity level rankings on the Sex Offender Grid according to comparable sex offense statutory maximums and presumptive sentences.

In most cases, placement of prostitution offenses on the sex offender grid will result in more presumptive prison sentences and longer sentences. Additionally, offenders who commit these offenses would be eligible for a second custody status point if they commit the offense while on probation or supervised release for a prior offense on the sex offender grid other than failure to

register, and some prior criminal sexual conduct offenses would carry higher criminal history weights. Also, if the offense described in M.S. § 609.322 subd.1 is placed at Severity Level B; an offender will reach the statutory maximum at a criminal history score of 5.

Commission members were provided a summary of sentencing practices for felony prostitution offenses from 2005-2008 including incarceration rates, average pronounced durations and departure rates.

A questionnaire for prosecution was prepared by staff and sent out through the County Attorneys Association. Most of the MNCAA committee and Board members indicated that they rarely or never see these types of cases so not many questionnaires were returned. Responding prosecutors indicated that they charged cases involving minors as Criminal Sexual Conduct, Kidnapping or False Imprisonment. They did so because of the age and lack of consent of the victim, the higher penalties and easier elements to prove. In general, those that responded were in favor of moving prostitution offenses to the sex offender grid. .

Before the Commission continued to discuss this issue, Director Alliegro summarized a letter received on September 16, 2009, from Cheryl Thomas and Mary Ellison from The Advocates for Human Rights. The letter asked that the Commission delay any changes made to the sentencing guidelines regarding M.S. § 609.324 until after the 2010 Legislative Session, as they are concerned that such changes may have unintended consequences for victims of sex trafficking and prostituted individuals. The Advocates, however, support new rankings for M.S. § 609.322, subd. 1(a). Commission member Darci Bentz, who could not attend the meeting, sent a letter dated September 17, 2009, which also urged the Commission not to proceed on making changes to M.S. § 609.324 until after the 2010 session.

Director Alliegro asked the Commission if it would make sense to wait on making changes to M.S. § 609.322 with the thought that these offenses may also be addressed in the 2010 Legislative Session. The Commission previously expressed a desire to consider rankings for all prostitution offenses together. The Commission discussed procedures and it was noted that changes to the grid including severity levels and criminal history needed legislative review before going into effect; therefore, any changes that the Commission wanted to go into effect August 1, 2010, would need to be included in the January 2010 Report to the Legislature. Justice Meyer questioned if adding these changes to the annual report would actually guarantee no delay.

Advocate members Cheryl Thomas and Mary Ellison both clarified that they did not expect any action to be taken in the 2010 Legislative Session regarding M.S. § 609.322. They urged that the Commission make changes to the severity ranking for subd. 1(a).

**Motion** was made by Connie Larson and seconded by Judge Shumaker to make no changes to M.S. § 609.324.

**Motion carried** without dissent.

The Commission then discussed M.S. § 609.322. Possible severity level rankings on the sex offender grid were discussed. If the Commission moved forward with re-ranking, two severity levels would need to be assigned: 1) M.S. § 609.322, subd. 1(a)--individuals under 18 currently at severity level IX; and 2) M.S. § 609.322, subd. 1a--individuals 18 and older currently a severity level V. When looking at statutory maximums, M.S. § 609.322, subd. 1(a) is comparable to offenses ranked at severity level B or severity level C on the sex offender grid.

**Motion** was made by Judge Shumaker and seconded by Judge Cleary to move solicitation, inducement, and promotion of prostitution; sex trafficking in the first degree; individual under 18, to the sex offender grid at severity level B.

**Motion carried** without dissent. This item will be moved to the public hearing notice.

**Motion** was made by Commission member Connie Larson and seconded by Justice Meyer to move solicitation, inducement, and promotion of prostitution; sex trafficking in the second degree; individual over 18, to the sex offender grid at severity level C.

**Motion carried** without dissent. This item will be moved to the public hearing notice.