

Staff Issue Paper

Publication of August 1, 2021, Edition of the Minnesota Sentencing Guidelines

July 13, 2021

Background

January 2021 Proposed Guidelines Modifications

On January 15, 2021, the Minnesota Sentencing Guidelines Commission proposed to the Legislature several changes to the Sentencing Guidelines and Commentary. Those proposed modifications, contained in [Appendix 2 of the Commission’s 2021 Report to the Legislature](#), consisted of three parts:

- An update of Comment 2.E.03, to add Harassment (Aggravated Violations) with a dangerous weapon to the comment’s list of offenses that, by definition, always implicate the mandatory-minimum provisions dealing with dangerous weapons.
- An update to the statutory citation and offense title of an unranked, never-charged offense, Failure to Report Danger to Child’s Health (Death).
- Increases in the severity levels assigned to Use of Minors in Sexual Performance offenses.

By law, any change to severity levels—unless mandated or authorized by the Legislature or relating to a recently enacted or amended crime—shall be effective August 1 of the year in which it was submitted in the Commission’s January 15 Report to the Legislature, “unless the legislature by law provides otherwise.” Minn. Stat. § [244.09, subd. 11](#).

At no time has the 2021 Legislature taken any action to block these three modifications to the Sentencing Guidelines.

June 2021 Legislation

At its meeting on June 3, 2021, the Commission discussed implications of the legislative delay in enacting 2021 criminal law changes. Anticipating the enactment of significant criminal law changes at a special session scheduled for the second half of June, the Commission adopted a calendar that would permit it to make responsive Sentencing Guidelines changes by September 15, 2021. To synchronize the effective date of the special session laws with the release of the Guidelines, the Commission asked the Legislature to

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postpone, from August 1, 2021, to September 15, 2021, the effective date of changes to crime and sentencing laws enacted during the special session.

The Legislature did, in fact, enact significant criminal law changes during its June special session, almost all of which were contained in [Chapter 11](#) of the 2021 First Special Session Laws, enacted June 30, 2021. Throughout Chapter 11, the Legislature followed the Commission’s recommendation to postpone the effective date of the act’s changes to crime and sentencing laws until September 15, 2021.

Chapter 11 contained the following section, entitled “SENTENCING GUIDELINES COMMISSION DIRECTED TO INCREASE THE RANKINGS FOR CERTAIN CHILD PORNOGRAPHY CRIMES”:

*The Sentencing Guidelines Commission is directed to increase the severity rankings on the sex offender grid for a violation of Minnesota Statutes, section 617.247, subdivision 3, paragraph (b), from severity level D to C, and subdivision 4, paragraph (b), from severity level F to E, consistent with the recommendations contained in the minority report in the commission's 2021 report to the legislature. **The other modifications to the grid relating to child pornography crimes proposed in the main report are adopted.***

EFFECTIVE DATE. This section is effective September 15, 2021, and applies to crimes committed on or after that date.

[2021 Minn. Laws 1st Sp. Sess. ch. 11, art. 2, § 52](#) (emphasis added).

Issues

1. Are the severity-level increases for Use of Minors in Sexual Performance effective August 1, 2021, or September 15, 2021?
2. If those increases are effective September 15, 2021, is there a need to publish an August 1, 2021, edition of the Minnesota Sentencing Guidelines and Commentary?

Effective Date – Use of Minors in Sexual Performance Severity Increase

The Legislature intends that every law “be construed, if possible, to give effect to all its provisions.” Minn. Stat. § [645.16](#). In that light, how can the sentence, “The other modifications to the grid relating to child pornography crimes proposed in the main report are adopted,” be construed to give it effect?

While Minnesota’s criminal statutes do not contain the exact term of “child pornography,” the Commission’s [2021 Report to the Legislature](#) extensively used that term to describe the offenses described in Minn. Stat. §§ [617.246](#) (Use of Minors in Sexual Performance) & [617.247](#) (Possession of Pornographic Work Involving Minors). Moreover, the only “modifications to the grid” that were “proposed in the main report”—that is, changes to severity levels proposed by the Commission in its 2021 Report to the

Legislature—were changes to the severity-level rankings assigned to Use of Minors in Sexual Performance. Thus, it seems, “The other modifications to the grid relating to child pornography crimes proposed in the main report,” refers either to the increases in the severity levels assigned to Use of Minors in Sexual Performance offenses, or to nothing at all—and the latter interpretation would violate the rules of statutory construction.

If Chapter 11 declares the Use of Minors in Sexual Performance severity-level increases to be “adopted,” then, are they adopted when proposed—effective August 1, 2021—or are they adopted with an effective date of September 15, 2021? Reasonable minds may disagree, but a straightforward reading of the section would seem to be the following: “This section”—which includes the adoption of the proposed increases—“is effective September 15, 2021, and applies to crimes committed on or after that date,” means that the proposed increases are adopted September 15, 2021, and apply to crimes committed on or after that date.*

Need to Publish an August 1, 2021, Edition of the Sentencing Guidelines

It is clear that there will be a September 15, 2021, edition of the Minnesota Sentencing Guidelines and Commentary. Is it also necessary to publish an August 1, 2021, edition?

If the Use of Minors in Sexual Performance severity-level increases take effect August 1, then there are good reasons to publish an August 1 edition. People should be on notice that their misbehavior carries more severe presumptive penalties than before.

On the other hand, if the Use of Minors in Sexual Performance severity-level increases take effect September 15, then the reasons for publishing an August 1 edition are much less. There are only two remaining changes to the Sentencing Guidelines and Commentary that take effect August 1. One is an update to an advisory, nonbinding comment; the other is an update to the statutory citation of a never-charged, unranked offense.

Weighing against August 1 publication is the potential confusion of having two editions of the Sentencing Guidelines published within 45 days of each other. It would be much clearer for practitioners to know that the “2021 edition” was the correct edition, without having to focus on whether the edition in question was dated August 1 or September 15. Also, some publishers might incorrectly assume that the August 1 edition was the final annual edition, and publish it in lieu of the more significant September 15 edition.

Conclusion—Staff Recommendation

If the Commission believes that the Use of Minors in Sexual Performance severity-level increases are effective September 15, 2021, then staff recommends that the Commission postpone the next publication of the Minnesota Sentencing Guidelines and Commentary until September 15, 2021.

* If the effective date is ambiguous, the rule of lenity—which applies to the interpretation of criminal statutes when a grievous ambiguity or uncertainty in the statute remains after consideration of other canons of statutory construction—requires resolution of the ambiguity in favor of the defendant. *State v. Nelson*, 842 N.W.2d 433, 443-44 (Minn. 2014). In this case, the September 15 effective date would favor the defendant.