



**MINNESOTA**

SENTENCING GUIDELINES COMMISSION

# **2021 REPORT TO THE LEGISLATURE**

JANUARY 15, 2021

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# Introduction

The Minnesota Sentencing Guidelines Commission submits this report to the Legislature to fulfill its two statutory reporting requirements:

- To identify and explain all modifications made during the preceding twelve months and all proposed modifications that are being submitted to the Legislature in 2021;<sup>1</sup> and
- To summarize and analyze reports received from county attorneys on criminal cases involving a firearm.<sup>2</sup>

The Commission also takes this opportunity to highlight other topics that may be of interest to the Legislature, including updates on Commission activities, recommendations to the Legislature, staff activities, and sentencing trends.

In 1980, Minnesota became the first state to implement a sentencing guidelines structure. The Minnesota Sentencing Guidelines Commission is a legislatively created body whose purpose is to establish and improve the Minnesota Sentencing Guidelines, evaluate outcomes of changes in sentencing policy, analyze trends, make appropriate recommendations, and provide education on sentencing law and policy.

When establishing and modifying the Guidelines, the Commission's primary consideration is public safety.<sup>3</sup> Other considerations are current sentencing and release practices, correctional resources—including, but not limited to, the capacities of local and state correctional facilities—and the long-term negative impact of crime on the community.<sup>4</sup> The Commission has stated that the purpose of the Sentencing Guidelines is to establish rational and consistent sentencing standards that reduce sentencing disparity and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender's criminal history.<sup>5</sup> The Sentencing Guidelines embody principles including that sentencing should be neutral, rational, consistent, and uniform, and that departures from the presumptive sentences should be made only when substantial and compelling circumstances can be identified and articulated.<sup>6</sup>

Minnesota's imprisonment rates are related to Sentencing Guidelines recommendations—based on the seriousness of the offense and the criminal history score—as to who should go to prison and for how long. In each of the first 40 years the Guidelines have been in effect—from 1980 through 2019—Minnesota has ranked nationally among the five states with the lowest imprisonment rates. In 2019, Minnesota was fourth-lowest.<sup>7</sup>

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<sup>1</sup> [Minn. Stat. § 244.09](#), subd. 11.

<sup>2</sup> [Minn. Stat. § 244.09](#), subd. 14 (referencing the reports required by [Minn. Stat. § 609.11](#), subd. 10).

<sup>3</sup> [Minn. Stat. § 244.09](#), subd. 5.

<sup>4</sup> *Id.*

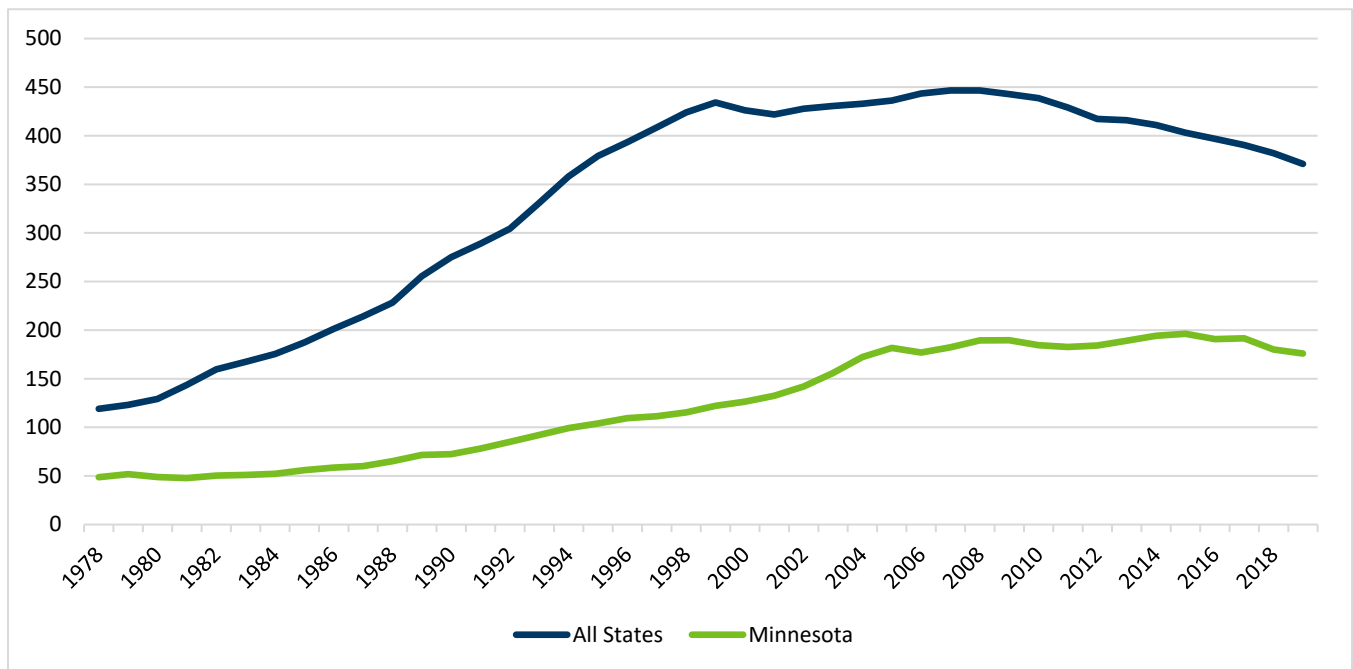
<sup>5</sup> [Minn. Sentencing Guidelines](#) § 1.A.

<sup>6</sup> *Id.*

<sup>7</sup> Minnesota had the 5th-lowest imprisonment rate in 2017; the 4th-lowest in 2014, 2018, & 2019; and the 1st-, 2nd-, or 3rd-lowest in the other years. E. Ann Carson, "Imprisonment Rate of Sentenced Prisoners under the Jurisdiction of State or Federal Correctional Authorities per 100,000 U.S. Residents, Dec. 31, 1978–2018" (Bureau of Justice Statistics, Dec. 9, 2019) (retrieved Oct. 22, 2020, at [http://www.bjs.gov/nps/resources/documents/QT\\_imprisonment%20rate\\_total.xlsx](http://www.bjs.gov/nps/resources/documents/QT_imprisonment%20rate_total.xlsx)); E. Ann

Minnesota’s 2019 rate—176 prisoners per 100,000 residents, down from a rate of 180 in 2018—returned Minnesota to an imprisonment rate last seen in 2004 (Figure 1).<sup>8</sup> Minnesota joined 39 other states with falling imprisonment rates from 2018 to 2019, causing the U.S. state imprisonment rate to fall by 2.7 percent.<sup>9</sup> Minnesota’s imprisonment rate continues to be less than half the national state imprisonment rate.<sup>10</sup>

Figure 1. Imprisonment Rate per 100,000 Residents, 1978–2019



Source: Bureau of Justice Statistics

In cases in which prison sentences are stayed, the court usually places the defendant on probation. Until 2020, the Sentencing Guidelines gave no specific guidance regarding the appropriate length of a period of probation.<sup>11</sup> Minnesota’s fourth-lowest imprisonment rate stands in contrast to its probation rate, which, in 2018, was the fifth highest among all states.<sup>12</sup>

Carson, “Prisoners in 2019” (NCJ 255115) (Bureau of Justice Statistics, Oct. 2020), Table 7 (retrieved Oct. 22, 2020, at <http://www.bjs.gov/content/pub/pdf/p19.pdf>).

<sup>8</sup> Minnesota’s 2004 imprisonment rate was 174 per 100,000. For purposes of comparison, its 1980 rate was 49 per 100,000.

<sup>9</sup> “Prisoners in 2019,” tables 5 & 7.

<sup>10</sup> The 2019 imprisonment rate for all states was 371 prisoners per 100,000 U.S. residents. Neither rate includes inmates of federal prisons or local correctional facilities. “Prisoners in 2019,” Table 5.

<sup>11</sup> See Appendix 1.3 (p. 75) (five-year presumptive probation cap established Aug. 1, 2020, for most offenses).

<sup>12</sup> About 1 in 43 (2,312 in 100,000) Minnesotans was on probation in 2018, compared to about 1 in 72 (1,383 in 100,000) residents of all states. Danielle Kaeble, “Probation and Parole in the United States, 2017–2018” (NCJ 252072) (Bureau of Justice Statistics, Aug. 2020), Appendix Table 2 (retrieved Dec. 22, 2020, at <https://www.bjs.gov/content/pub/pdf/ppus1718.pdf>).

# Executive Summary

## **The Commission’s Activities in 2020 (p. 5)**

One of the fundamental responsibilities of the Commission is to maintain the Guidelines by annually amending them in response to legislative changes, case law, and issues raised by various parties. The Commission met 11 times in 2020 to fulfill its statutory responsibilities of improving the Sentencing Guidelines and conducting ongoing research into sentencing practices and other matters relating to the improvement of the criminal justice system. The Commission began a neutrality review of the Guidelines and intends to continue this project into 2021. In addition, the Commission held two public hearings, on July 16 and December 17.

The Commission’s 2020 modifications made one technical amendment to the Guidelines resulting from the 2020 Revisor’s Bill. In addition, the Commission made non-legislative amendments to the Guidelines commentary to conform to, and clarify, the presumptive probation-cap policy. These modifications took effect August 1, 2020.

The Commission is also proposing several modifications to the 2021 Sentencing Guidelines in this report: Modifications related to crime laws amended during the 2020 legislative sessions, and an increase to the severity ranking assigned to Use of Minors in Sexual Performance.

In addition, the Commission makes three recommendations to the Legislature: To review the child pornography definition for constitutionality; to create a sexting exception to child pornography production; and to transfer MSGC staff members to the state’s classified service.

## **Report on Comprehensive Review of Child Pornography Sentencing Guidelines (p. 9)**

This section contains the report of the Commission’s legislatively mandated comprehensive review of child pornography sentencing guidelines, which is now complete. One of the Commission’s proposals to modify the 2021 Guidelines, and two of its legislative recommendations, resulted from this comprehensive review. In the report’s conclusions (p. 29), the Commission explains why it is proposing to increase the severity levels assigned to Use of Minors in Sexual Performance—which includes child pornography production—but not child pornography possession and dissemination.

## **Staff Activities (p. 39)**

In 2020, staff provided Sentencing Guidelines guidance to an average of 150 practitioners per month; provided the Legislature with 17 fiscal impact statements and 2 demographic impact statements for pending crime bills; compiled and reported sentencing information for over 250 individual data requests; participated in various criminal justice boards, forums and committees; processed and ensured the accuracy of over 17,000 sentencing records; worked with the Department of Corrections to generate prison bed projections and revise the Electronic Worksheet System to meet the requirements of the current Sentencing Guidelines; published the annual edition of the Minnesota Sentencing Guidelines and Commentary; and provided reports on sentencing practices to the public.

## **2019 Sentencing Practices Data Summary (p. 42)**

In 2019, 17,335 felony cases were sentenced, a 5.2 percent decrease from the record-high case volumes in 2017 and 2018 (18,288 and 18,284 cases, respectively). The 2019 case volume represented the first significant annual decline since 2010, and the steepest single-year decrease since 1983.

All seven offense categories decreased from 2018 to 2019. This decrease ranged from less than one percent to nine percent. Drug offenses decreased more than most categories, by 6.5 percent. Of those sentenced in 2019, 80.4 percent were male and 19.6 percent were female. The female percentage was slightly lower than in 2018, the only year when females accounted for more than 20 percent of cases.

The 2012–2015 imprisonment rates were the highest rates observed since the Guidelines were implemented. The imprisonment rate declined from 26.2 percent in 2015 to 23.1 percent in 2018. In 2019, the imprisonment rate increased to 24 percent. Of those who did not receive an executed prison sentence, 89 percent received local confinement. The average pronounced prison sentence was 48.4 months.

Statewide, 73.7 percent of felony cases received the presumptive Guidelines sentence. The rate varied by gender, race/ethnicity, judicial district, offense type, and presumptive disposition.

## **County Attorney Firearms Reports (p. 66)**

County attorneys must collect and report disposition information for specified crimes for which a defendant is alleged to have possessed or used a firearm, and the Commission must summarize and analyze that information in its annual report. In fiscal year 2020, county attorneys disposed of 1,063 firearms cases.

## The Commission's Activities in 2020

The Minnesota Sentencing Guidelines Commission is an eleven-member body created by the Legislature. Three members are appointed by the Chief Justice of the Supreme Court: The Chief Justice's designee; a judge of the Court of Appeals; and a district court judge. Eight members are appointed by the Governor: one public defender; one county attorney; the Commissioner of Corrections; one peace officer; one probation officer; and three public members, one of whom must be a felony crime victim. The Governor also designates the Chair.

Public member Kelly Lyn Mitchell serves as the Commission's Chair by appointment of Governor Tim Walz. The two other public members are Abby Honold and Tonja Honsey. Governor Walz's five other appointees are probation officer member Valerie Estrada, Corrections Unit Supervisor, Hennepin County Community Corrections & Rehabilitation and the Commission's Vice-Chair; the county attorney member, Wadena County Attorney Kyra Ladd;<sup>13</sup> the public defender member, Cathryn Middlebrook, Chief Appellate Public Defender; the peace officer member, Saint Paul Police Commander Salim Omari; and the Commissioner of Corrections, Paul Schnell.

The three appointees of Chief Justice Lorie S. Gildea are Associate Supreme Court Justice (Retired) Christopher Dietzen; Court of Appeals Judge Michelle A. Larkin; and First Judicial District Court Judge Kevin Mark.

One of the fundamental responsibilities of the Commission is to maintain the Guidelines by annually amending them in response to legislative changes, case law, and issues raised by various parties. The Commission met 11 times in 2020 to fulfill its statutory responsibilities of improving the Sentencing Guidelines and conducting ongoing research into sentencing practices and other matters relating to the improvement of the criminal justice system. In addition, the Commission held two public hearings, on July 16 and December 17.<sup>14</sup>

Beginning with the April 9 meeting, it was determined not feasible for members of the Commission or the public to attend meetings at the regular meeting location in Saint Paul due to the ongoing COVID-19 health pandemic and declared peacetime emergency;<sup>15</sup> instead, members of the Commission members and of the public participated by telephone or other electronic means.<sup>16</sup>

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<sup>13</sup> Washington County Attorney Peter Orput was a member of the Commission until his resignation effective August 1, 2020. Effective September 28, 2020, Governor Walz appointed Kyra Ladd as his successor.

<sup>14</sup> December 17 was both a public hearing and meeting date. The meeting was held immediately following the hearing.

<sup>15</sup> For context, refer to the emergency executive orders Governor Walz issued in 2020 at <https://www.lrl.mn.gov/execorders/eoresults?gov=44&title=Emergency> (retrieved Dec. 3, 2020).

<sup>16</sup> [Minn. Stat. § 13D.021](#).

## Completion of Child Pornography Sentencing Review

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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. The ensuing review occupied much of the Commission’s attention in 2020, and is now complete. The full report begins on page 9.

## Initiation of Sentencing Guidelines Neutrality Review

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Since 1980, the Minnesota Sentencing Guidelines have declared, “Sentencing should be neutral with respect to the race, gender, social, or economic status of convicted felons.”<sup>17</sup> On June 11, 2020, the Commission adopted a motion to review the Guidelines for conformity with the Commission’s policy of neutrality, with an emphasis on impact by race.<sup>18</sup>

In July, the Commission began its neutrality review and established Sentencing Guidelines policies as its scope.<sup>19</sup> In September, the Commission reviewed probation revocation rates by gender, race and ethnicity, and geography. In November, the Commission reviewed a staff inventory of Guidelines policies and discussed research approaches. The Commission intends to continue its neutrality review in 2021.

## 2020 Guidelines Modifications

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The following are adopted modifications to the August 1, 2019, edition of the Minnesota Sentencing Guidelines and Commentary. Each modification had a specified effective date of August 1, 2020, and applied to crimes committed on or after that date.

### Severity-Level Rankings

As it proposed to do in last year’s report to the Legislature, the Commission ranked two previously unranked offenses: Escape from Electronic Monitoring (Severity Level 3) and Offering Counterfeit Currency (Severity Level 2, 3, or 6, depending on value). Modifications are set forth in Appendix 1.1 (p. 72) and Appendix 1.2 (p. 73).

### Five-Year Presumptive Probation Cap

As it proposed to do in last year’s report to the Legislature, the Commission amended the Guidelines to allow for a presumptive probation term, subject to departure, of up to five years or the statutory maximum sentence,

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<sup>17</sup> Minn. Sentencing Guidelines § I.1 (1980); Minn. Sentencing Guidelines § 1.A.2 (2020).

<sup>18</sup> [Approved MSGC Meeting Minutes \(June 11, 2020\)](#), pp. 3–4. This was in response to a letter from Chair Mitchell to members of the Commission following the death of George Floyd on May 25, 2020. Mitchell, Kelly Lyn, Letter to Members of the Sentencing Guidelines Commission (retrieved Oct. 23, 2020, at <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/June/2B-Mitchell%20Remarks%20for%20MSGC.pdf>).

<sup>19</sup> [Approved MSGC Meeting Minutes \(July 23, 2020\)](#), p. 12.

whichever is less, for most felony offenses. On July 23, 2020, after public hearing, the Commission adopted a proposal to amend the commentary in section 3.A to conform to, and to clarify the Commission’s intent with respect to, the five-year presumptive probation cap. Modifications are set forth in Appendix 1.3 (p. 75).

### **Technical Changes to Appendix 1 – Citation for First Degree DWI**

On July 23, 2020, after public hearing, the Commission adopted modifications to Guidelines Appendix 1 to correct the citation for Driving while Intoxicated. The modifications resulted from a technical amendment in the Revisor’s Bill, 2020 Minn. Laws [ch. 83, art. 1, § 57](#). Modifications are set forth in Appendix 1.4 (p. 82).

## **2021 Proposed Guidelines Modifications**

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The following proposed modifications have been adopted by the Commission and are hereby submitted to the Legislature. Each modification is to the August 1, 2020, edition of the Minnesota Sentencing Guidelines and Commentary; each has a specified effective date of August 1, 2021; and each will apply as provided in section 3.G of the Guidelines,<sup>20</sup> unless the Legislature by law provides otherwise.

### **Modifications Related to Amended Crime Laws**

The Commission proposes two changes to the Guidelines as a result of legislative amendments to crime laws in 2020. In response to a change to the Harassment and Stalking statute, the Commission proposes a clarifying commentary change. In response to a change to Failure to Report Danger to Child’s Health (Death), the Commission proposes technical and clarifying changes. The proposed modifications are set forth in Appendix 2.1 (p. 83) and Appendix 2.2 (p. 84).

### **Use of Minors in Sexual Performance**

As a result of its review of its child pornography sentencing guidelines, the Commission adopted a proposal to increase the severity levels assigned to Use of Minors in Sexual Performance. The full report of this review begins on page 9, and the rationale for this action is detailed on page 32. The modifications themselves are set forth in Appendix 2.3 (p. 85).

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<sup>20</sup> Generally, the modifications will apply to crimes committed on or after August 1, 2021, but changes to the commentary and appendices relating to existing Guidelines policy will apply to offenders sentenced on or after August 1, 2021. See Guidelines section 3.G for exact language.

## Recommendations to the Legislature

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Pursuant to its mandate to make recommendations to the Legislature regarding changes to criminal law, criminal procedure, and other aspects of sentencing,<sup>21</sup> the Minnesota Sentencing Guidelines Commission respectfully submits the following three recommendations to the Legislature:

### **Recommendation 1: Review the Child Pornography Definition for Constitutionality**

As a result of its review of its child pornography sentencing guidelines, the Commission recommends that the Legislature review the constitutionality of the definition of “pornographic work,” Minn. Stat. § 617.246, in light of *Ashcroft v. Free Speech Coalition*, 535 U. S. 234 (2002), and take appropriate action. The full rationale for this unanimous recommendation is on page 31.

### **Recommendation 2: Create a Sexting Exception to Child Pornography Production**

As a result of its review of its child pornography sentencing Guidelines, the Commission recommends that the Legislature create a statutory exception—either as a lesser crime, or as no crime at all—for “youth-produced, youth-only experimental” production of child pornography, or “sexting.” The full rationale for this unanimous recommendation is on page 33.

### **Recommendation 3: Transfer MSGC Staff Members to the Classified Service**

On a vote of 10 to 0, Commission recommends that the Legislature enact a bill to transfer the Commission’s staff—other than its executive director—from the unclassified service to the classified service of the State of Minnesota. Because MSGC staff require a great deal of specialized, technical expertise where continuity is vital, these five positions are long overdue for the employment protections that come with classified service.

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<sup>21</sup> “The commission shall from time to time make recommendations to the legislature regarding changes in the Criminal Code, criminal procedures, and other aspects of sentencing.” Minn. Stat. § [244.09, subd. 6](#).

# Report on Comprehensive Review of Child Pornography Sentencing Guidelines

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. 12) lays out the Commission's findings. The third section ("Conclusions," p. 29) describes the Commission's action as a result of its findings.

## Comprehensive Review Chronology

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### 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 factors<sup>22</sup> 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.<sup>23</sup>
- The act also requires the Commission to comprehensively review and consider modifying how the Sentencing Guidelines address child pornography crimes.<sup>24</sup>

### 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.

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<sup>22</sup> *I.e.*, factors that, if proven to be present, increase the statutory maximum penalty for the underlying crime.

<sup>23</sup> [2019 Minn. Laws, 1st Sp. Sess. art. 4, §§ 12–18.](#)

<sup>24</sup> "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.](#)

- 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.<sup>25</sup>
- The Commission reviews the history and structure of Minnesota’s child pornography laws.<sup>26</sup>
- The Commission reviews the current Sex Offender Grid, including how child pornography offenses are ranked compared to similar crimes.<sup>27</sup>
- The Commission reviews child pornography sentencing practices and case data.<sup>28</sup>
- The Commission studies the 2012 report of the United States Sentencing Commission’s multi-year assessment of federal child pornography sentencing.<sup>29</sup>

### October 10, 2019 – Comprehensive Review, Part 2

- The Commission reviews child pornography definitions in detail.<sup>30, 31</sup>
- The Commission examines issues related to sentencing Use of Minors in Sexual Performance.<sup>30, 32</sup>

### 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.<sup>33</sup>
- The Commission compares Minnesota’s statutory maximum penalties for child pornography offenses with the statutory maximum penalties of other states.<sup>34</sup>
- The Commission receives testimony from federal and state child pornography prosecutors.
- The Commission receives testimony from state child pornography investigators.<sup>35</sup>

### 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.<sup>36</sup>

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<sup>25</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/MandateLegHistoryRecap.pdf>

<sup>26</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/HistoryChildPornLaws.pdf>

<sup>27</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/SexOffenderGridOverview.pdf>

<sup>28</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/CaseData.pdf>

<sup>29</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/September/USSCReport.pdf>

<sup>30</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CPReviewPart2.pdf>

<sup>31</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CPDefinition.pdf>

<sup>32</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CPProduction.pdf>

<sup>33</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/November/CoOccurringCaseOutcomes.pdf>

<sup>34</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/November/InterstateCPPenalties.pdf>

<sup>35</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2019/November/ICACSentencingCommissionMeeting.pdf>

<sup>36</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/February/InterstateCPReview.pdf>

- The Commission examines the elements of similarly ranked sex offenses in greater detail.<sup>37</sup>
- The Commission reviews state policy for sentencing multiple child pornography offenses.<sup>38</sup>
- The Commission studies recidivism among child pornography offenders.<sup>39</sup>

### **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.<sup>40</sup>
- 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.<sup>41</sup>

### **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.<sup>42</sup>
- 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.<sup>43</sup>

### **July 23, 2020, through January 14, 2021**

- The Commission meets six times to develop the findings and conclusions that follow.

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<sup>37</sup> [http://mn.gov/msgc-stat/documents/meeting%20materials/2020/April/CP\\_SentGuidelines.pdf](http://mn.gov/msgc-stat/documents/meeting%20materials/2020/April/CP_SentGuidelines.pdf)

<sup>38</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/April/6C1CPSentencePractices.pdf>

<sup>39</sup> <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](http://mn.gov/msgc-stat/documents/meeting%20materials/2020/May/5C1-Staff-CP-UMSP-Recidivism_Answers.pdf)

<sup>40</sup> [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/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](http://mn.gov/msgc-stat/documents/meeting%20materials/2020/May/5B2-Staff-Present-Charging+Sentencing_Case_Data-CP_2018.pdf)

<sup>41</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/May/5D2-Staff-Dissemination-Possession.pdf>

<sup>42</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/June/ChildPornography2008.pdf>

<sup>43</sup> <http://mn.gov/msgc-stat/documents/meeting%20materials/2020/June/OtherIssues.pdf>

## Findings of the Comprehensive Review

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### Introduction to Ranking Child Pornography Offenses

Minnesota’s Sentencing Guidelines are based on reasonable offense and offender characteristics.<sup>44</sup> 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.<sup>45</sup> The Commission intends each assigned severity level to be the dominant factor in determining the presumptive sentence.<sup>46</sup> Presumptive sentences are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.<sup>47</sup>

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.<sup>48</sup>

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.<sup>49</sup> In 2019, the Commission, responding to legislative action, updated some of those rankings.<sup>50</sup> 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.

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<sup>44</sup> Minn. Stat. § [244.09, subd. 5](#).

<sup>45</sup> Minn. Sentencing Guidelines § 1.B.17 (Aug. 1, 2020).

<sup>46</sup> Dale G. Parent, *Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines* at 38, 51 (Butterworth Legal Publishers 1988).

<sup>47</sup> Minn. Sentencing Guidelines § 1.B.13 (Aug. 1, 2020).

<sup>48</sup> Minn. Stat. § [244.09, subd. 5](#).

<sup>49</sup> [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.

<sup>50</sup> See the section entitled, “June 6, July 18, & July 25, 2019 – The Commission’s Initial Response,” on page 9, 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 3.2 (page 88) 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 14) 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 16.) 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 3.2 (page 87) 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 duration<sup>51</sup> is equal to—or, in some cases, exceeds—the statutory maximum.

*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					
<b>Use of Minors in Sexual Performance (enhanced)</b>			<b>D</b>					
<b>Dissemination of Child Pornography (enhanced)</b>			<b>D</b>					
Felony DWI					7†			

<sup>51</sup> Including the upper end of the presumptive range, as noted by the dagger.

Offense	Statutory Maximum Penalty (Years of Imprisonment)							
	30	25	15	10	7	5	4	3
CSC 4th Degree (contact & force/occupation)				E*				
<b>Use of Minors in Sexual Performance</b>				E*				
<b>Dissemination of Child Pornography</b>					E‡			
Certain Persons Not to Have Firearms or Ammunition			6					
Assault 2nd Degree (subd. 1)					6			
CSC 4th Degree (contact & child victim)				F				
<b>Possession of Child Pornography (enhanced)</b>				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*		
<b>Possession of Child Pornography</b>						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	<b>Statutory maximum</b> is greater
Use of Minors (enhanced)	D	180	140	<b>Statutory maximum</b> is greater
Dissemination	E	84	120	<b>Grid maximum</b> is greater
Use of Minors	E	120	120	The two are <b>equal</b>
Possession (enhanced)	F	120	84	<b>Statutory maximum</b> is greater
Possession	G	60	60	The two are <b>equal</b>

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.<sup>52</sup> 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.

<sup>52</sup> Offense descriptions in this report are not precise. For actual CSC offense elements, refer to CSC statutes (Minn. Stat. §§ [609.342](#) through [609.3451](#)).

- 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).

**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).

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

**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.
- 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).\*

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

- 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)

## 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).

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

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.<sup>53</sup> 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.

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.<sup>54</sup>

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.

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<sup>53</sup> 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 34, above.

<sup>54</sup> See materials linked in footnote 36, above.

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.

Table 4. 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. 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
<b>Possession</b>	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
<b>Distribution</b>	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	
<b>Production</b>	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 Federal Sentencing Practices – Testimony

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 reported<sup>55</sup> 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.<sup>56</sup>

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

<sup>55</sup> 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.

<sup>56</sup> Hernandizing is discussed in the section entitled, "Typical Cases: Collection Sizes & Hernandizing," beginning on page 24, below.

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.<sup>57</sup>

### *Comparison with Federal Sentencing Practices – Data*

Over a recent five-year period, the federal government sentenced an annual average of 21 non-production offenders and 11 production offenders for child pornography offenses within the District of Minnesota.<sup>58</sup> A majority (50.5% of the non-production offenders; 55.6% of the production offenders) had a criminal history in the lowest of six categories.

All of these child pornography offenders were sentenced to imprisonment. For the non-production (*e.g.*, possession and distribution) offenders, 36 percent of the imprisonment lengths were at least five years, but less than ten years; and 62 percent of the imprisonment lengths were ten years or longer. For the production offenders, 98 percent of the imprisonment lengths were ten years or longer.

About two-thirds of these sentences (69% of non-production offenders', and 66% of production offenders') reflected downward variances from the U.S. Sentencing Guidelines Manual—most without a motion for a downward variance by the prosecutor.

These departure rates are consistent with the U.S. Sentencing Commission's 2012 report to Congress of a growing judicial perception that the U.S. Sentencing Guidelines were too severe with respect to non-production child pornography offenses, 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.<sup>59</sup>

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<sup>57</sup> See materials linked in footnotes 25 and 35, above.

<sup>58</sup> Federal fiscal years 2015 through 2019. Data obtained by MSGC staff from the U.S. Sentencing Commission's Interactive Data Analyzer. For data details, refer to the MSGC staff information paper entitled, "District of Minnesota Child Pornography Offenses" (retrieved Dec. 4, 2020, at [http://mn.gov/msgc-stat/documents/meeting%20materials/2020/November/04B2-Staff-Federal\\_CP\\_Prosecutions.pdf](http://mn.gov/msgc-stat/documents/meeting%20materials/2020/November/04B2-Staff-Federal_CP_Prosecutions.pdf)).

<sup>59</sup> See materials linked in footnote 29, above.

## Special Considerations Bearing on Minnesota’s Child Pornography Rankings

Because presumptive sentences are based on the typical case,<sup>60</sup> it is helpful, when making ranking decisions, to understand what is typical in child pornography cases.

### *Typical Cases: Collection Content*

In its 2012 report to Congress, the U.S. Sentencing Commission reported that child pornography collections can be very large and can contain a spectrum of images from legal child images, sexually explicit poses, sex acts, violence, humiliation, bondage, and bestiality. Some collections can be organized and specialized. The overwhelming majority of federal child pornography collections included images depicting oral, vaginal, or anal penetration of a prepubescent child. A substantial minority included images depicting sex acts involving infants or toddlers. Most images were of girls; images of boys were more likely to involve younger children.<sup>61</sup>

While the Commission did not conduct such a rigorous content analysis of Minnesota child pornography collections, MSGC staff reviewed the facts alleged in a large number of criminal complaints as part of this review. The Commission’s impression is that the U.S. Sentencing Commission’s disturbing findings generally apply to child pornography collections found in typical Minnesota possession and dissemination cases.<sup>62</sup>

### *Typical Cases: Collection Sizes & Hernandizing*

Generally, only one sentence is permitted per criminal behavioral incident.<sup>63</sup> 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.<sup>64</sup>

“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 262 child pornography cases sentenced from 2017–2019, Hernandizing was used at sentencing—*i.e.*, the defendant was sentenced for multiple counts—in 58 percent (151) of the cases. Of the 25 percent (66) of child

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<sup>60</sup> “ ‘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).

<sup>61</sup> U.S. Sentencing Commission, *2012 Report to Congress: Federal Child Pornography Offenses*, chapter 4, pp. 80–90.

<sup>62</sup> One Commission member, who personally reviewed a number of such complaints, presented excerpts to the Commission describing the “deeply disturbing” nature of some of the collections. Larkin, Michelle A., Memorandum to Chair and Sentencing Guidelines Commissioners (retrieved Dec. 4, 2020, at [http://mn.gov/msgc-stat/documents/meeting%20materials/2020/November/04A4-Larkin-Hernandizing\\_Memorandum.pdf](http://mn.gov/msgc-stat/documents/meeting%20materials/2020/November/04A4-Larkin-Hernandizing_Memorandum.pdf)).

<sup>63</sup> See footnote 73, below, and accompanying text.

<sup>64</sup> *State v. Bakken*, 883 N.W.2d 264 (Minn. 2016); see also Minn. Sentencing Guidelines § 2.B.1.e(2) (multiple-victim rule).

pornography cases that were presumptive commits to prison, 66 percent (40) of them became presumptive commits only because the defendant's criminal history score was increased through Hernandizing. In fact, 50 percent (33) 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.<sup>65</sup>

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 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.<sup>66</sup>

### *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.<sup>67</sup>

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.

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<sup>65</sup> [2019 Minn. Laws 1st Sp. Sess. ch. 5, art. 4, §§ 12–18.](#)

<sup>66</sup> 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 28, above.

<sup>67</sup> U.S. Sentencing Commission, [2012 Report to Congress: Federal Child Pornography Offenses](#), chapter 3, pp. 48–53.

- 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.<sup>68</sup>

### *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.<sup>69</sup> 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.<sup>70</sup>

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<sup>68</sup> 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 28, above.

<sup>69</sup> 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](http://www.unh.edu/ccrc/pdf/CV270_Child%20Porn%20Production%20Bulletin_4-13-12.pdf))

<sup>70</sup> 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>).

In Minnesota, at least one such sexting case more recently resulted in juvenile prosecution<sup>71</sup>—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.”<sup>72</sup>

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.<sup>73</sup> As an exception, CSC offenses committed with force or violence may be separately punished from a simultaneously committed crime.<sup>74</sup> As a consequence of this rule, an offender who commits an offense 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.<sup>75</sup>

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<sup>71</sup> 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>).

<sup>72</sup> 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](https://www.aclu-mn.org/sites/default/files/field_documents/redacted_order_granting_motion.pdf)).

<sup>73</sup> Minn. Stat. § 609.035, subd. 1.

<sup>74</sup> Minn. Stat. § 609.035, subd. 6.

<sup>75</sup> 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](https://www.smart.gov/SOMAPI/sec1/ch4_internet.html)).

In its 2012 report to Congress, the U.S. Sentencing Commission reported a 30 percent known general recidivism<sup>76</sup> 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.<sup>77</sup>

To measure recidivism among Minnesota’s child pornography offenders, MSGC staff studied 609 child pornography offenders—547 probationers and 62 ex-prisoners<sup>78</sup>—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.<sup>79</sup> These narrow criteria—requiring a new felony sentence during 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.<sup>80</sup>

MSGC staff found an overall recidivism rate among child pornography offenders of 10.2 percent, compared to the 24 percent recidivism rate that Robina found among Minnesota’s general felony population.<sup>81</sup> In the MSGC staff study, recidivism rates were highest among production of child pornography offenders (25%) and lowest among possession of child pornography offenders (9.2%). The recidivism rate for dissemination of child pornography offenders was 17.6 percent. Recidivism rates were slightly lower for offenders who received a prison sentence (9.7%) than for offenders who received probation (10.2%).

Among the 609 child pornography offenders studied, the most common new offenses were child pornography possession (20 offenders, 3.2%) and failure to register as a predatory offender (20 offenders, 3.2%). Six (1%) offenders were sentenced for a new criminal sexual conduct offense within the study period.

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<sup>76</sup> For this study, recidivism was defined as new arrest or conviction for a felony or misdemeanor (with some exceptions).

<sup>77</sup> U.S. Sentencing Commission, *2012 Report to Congress: Federal Child Pornography Offenses*, chapter 11.

<sup>78</sup> An additional 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).

<sup>79</sup> For study details, see materials linked in footnote 39, above. The data presented in this report are slightly different from the MSGC staff study linked in footnote 39; the data presented above include more offenders and follow them for a longer period of time, through the end of 2019.

<sup>80</sup> 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 81, 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.

<sup>81</sup> Julia A. Laskorunsky, Robina Inst. of Crim. Law & Crim. Just., *Minnesota Criminal History Score Recidivism Project* (2018).

## Conclusions

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### Overall Ranking Principles

One of the key responsibilities of the Commission is to rank the severity of felony offenses—that is, to determine how serious each felony offense is in relation to every other felony offense. Child pornography offenses are ranked on the Sex Offender Grid. The severity level forms the vertical axis on the grid. In ranking the severity of offenses, the Commission consults both the statutory elements of the offense, including the maximum penalty imposed by the Legislature, as well as actual case information, which provides details about typical offenses. The presumptive sentences determined by the intersection of the severity of the offense and a person’s criminal history score “are presumptive because they are presumed to be appropriate for all *typical* cases” sharing these characteristics.<sup>82</sup>

One of the key signals to the Commission as to the seriousness of an offense is the statutory maximum penalty. For the baseline offenses of Use of Minors in a Sexual Performance (child pornography production), dissemination, and possession, the Legislature has communicated a clear hierarchy of seriousness by enacting maximum penalties of 10, 7, and 5 years, respectively. For the enhanced versions of the offenses, the signal offered by the Legislature is slightly muddled. The statutory maximum penalties are 15, 15, and 10 years, respectively. All three statutory maximum penalties are higher than that for the baseline offense, making it clear that the Legislature sees the enhanced offenses as more serious than the baseline offenses. But the maximum penalties for enhanced Use of Minors in a Sexual Performance and enhanced dissemination are the same, making it appear the Legislature sees those two offenses as equal in seriousness despite that fact that the Legislature had already signaled that the baseline offense of Use of Minors in a Sexual Performance is more serious than the baseline offense of dissemination.

This incongruity presented a ranking challenge for the Commission. It was clear that the enhanced offenses should be ranked higher than the baseline offenses, and the Commission did this immediately following their enactment in 2019. But it was not clear how Use of Minors in a Sexual Performance should be ranked in relation to dissemination because the signals provided by the Legislature were different for the baseline and enhanced versions of these offenses. The Commission engaged in a lengthy and robust discussion on this topic, and resolved the matter by also considering the typical case for each type of offense. Here, a majority of the Commission concluded that Use of Minors in a Sexual Performance is more serious than dissemination because it involves making a pornographic work with a direct victim whereas dissemination involves sharing pornographic works that have already been made. Both involve victims—and the Commission does not discount the impact of dissemination on the original victim—but Use of Minors in a Sexual Performance is a direct act upon a victim in a current case whereas dissemination is a secondary act that is one-step removed from the original harm to the victim. Both are serious crimes, but Use of Minors in a Sexual Performance was deemed to be higher in severity, meriting a harsher sentence. For these reasons, the Commission concluded that it would be appropriate to rerank one severity level higher both the baseline and enhanced offenses of Use of Minors in a Sexual Performance. This includes the offenses of ownership of a business that disseminates pornography and

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<sup>82</sup> Minn. Sentencing Guidelines section 1.B.13 (emphasis added).

dissemination for profit, which are included in the same statute as the production offenses, at Minn. Stat. § 617.246, subds. 3 and 4.

This reranking produces a result wherein the severity of child pornography offenses increases in proportion to the offender’s increasingly active involvement in the harm inflicted on the child. It also responds to the criticism that Minnesota sentencing for child pornography is not harsh enough compared to sentencing in other states and compared to sentencing at the federal level by increasing the range of possible sentences for the baseline offense of production, and by ranking the enhanced version of production, including production involving children under age 13, at a level where prison is the presumptive sentence for a first-time offense.

### **Possession & Dissemination**

The Commission did not modify the rankings for child pornography possession and dissemination offenses (Minn. Stat. § 617.247). The Commission finds that these offenses are ranked appropriately, particularly in light of Hernandizing and the 2019 statutory amendments.

The Commission acknowledges that, by comparison to other states and the United States, Minnesota’s child pornography sentencing scheme—in statute, in sentencing guidelines, and in practice—may be viewed as more lenient than other jurisdictions. Minnesota has a long tradition of parsimony and precision when it expends correctional resources,<sup>83</sup> and child pornography sentencing is no exception. In the absence of evidence of high recidivism rates among child pornography possessors and disseminators, the Commission’s public-safety mandate does not require that a more severe penalty be imposed in the typical case. For those offenses that are more egregious than the typical case, the Guidelines departure procedures permit the court to impose a harsher sentence, provided *Blakely* procedures have been followed or waived.

The Commission recognizes that these offenses are severe and are committed against real victims. The images are often brutal depictions of serious sex offenses committed against young children, and, thanks to the possessors and disseminators who endlessly traffic such images on the Internet, each child depicted remains locked in perpetual victimization. But the Commission also recognizes that these offenses, which do not involve live sexual penetration or contact against children, are equated on the Sex Offender Grid with other sex offenses that do involve live sexual penetration or contact against children. In light of the similar offense severity—and in light of the constraints of the child pornography offenses’ statutory maximum penalties—the Commission deems it appropriate to keep these offenses ranked as they are.

As briefly mentioned above, two special considerations weighed heavily in the Commission’s consideration: Hernandizing and the 2019 statutory amendments.

Hernandizing is the term describing the ability of a sentenced offense—or several offenses—to contribute to the criminal history score of another, currently sentenced offense. Through this method, a child pornography possessor or disseminator with no criminal history may receive a presumptive prison sentence—if he amassed his collection on several different dates and the prosecutor chose to Hernandize—even though the Sentencing Guidelines presume a stayed sentence for a first-time child pornography possessor or disseminator. In light of

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<sup>83</sup> See Figure 1 (p. 2) and accompanying text.

this powerful, discretionary tool often uniquely available to prosecutors of child pornography possession and dissemination cases, the Commission views additional sanctions as excessive.

Finally, the Commission has already increased the penalty for most child pornography possession and dissemination cases. In 2019, the Legislature enhanced the statutory maximum penalties for child pornography offenses involving children under age 13, and the Commission ranked these enhanced offenses higher than the base offenses. It is important to note, however, that because a large number of child pornography collections contain images of such young children, this ranking will have a significant impact on sentencing. Commission staff determined that had the enhancements been in effect and applied to cases sentenced from 2016 to 2018, the enhancements could have been applied to 17 of the 19 (89%) dissemination cases and 169 of the 225 (75%) possession cases.<sup>84</sup> Thus, going forward, it is likely that nearly all dissemination cases and a majority of possession cases will be charged and sentenced under the enhanced provisions. Thus, the enactment of these new provisions was the most significant legislative sentencing enhancement since 1999, when the Legislature made child pornography possession or dissemination a felony. Because the Commission has already ranked these enhanced offenses more severely than the base offenses, prosecutors already have the option to make most child pornography offenses committed today more severe than those committed before 2019. To increase the rankings further would result in disproportionate penalties for the enhanced offenses and result in the need for 55 additional prison beds annually.<sup>85</sup>

The Commission's decisions to maintain the severity levels assigned to possession and dissemination offenses were made at its November 5, 2020, meeting by the following vote margins:

- For Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13): A motion to maintain ranking at Severity Level D passed on a vote of 5 to 4.
- For Dissemination of Child Pornography: No motion to modify ranking.
- For Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13): A motion to raise ranking to Severity Level E failed on a vote of 4 to 6.
- For Possession of Child Pornography: No motion to modify ranking.

A minority report is found on page 34.

## Child Pornography Definition

One of the statutory definitions of child pornography ("pornographic work") includes an image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that"

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<sup>84</sup> Among dissemination and possession cases not already enhanced due to predatory offender status or previous child pornography offense conviction. See discussion entitled, "Typical Cases: Preteen Victims & the Impact of 2019 Ranking Decisions," on p. 25, above. For study details, see materials linked in footnote 28, above.

<sup>85</sup> MSGC staff prison-bed impact estimates of proposals to increase, by one level each, the severity assigned to Dissemination of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13) and Possession of Child Pornography (Subsequent, by Predatory Offender, or Child Under 13). MSGC staff paper, "Comprehensive Review of Child Pornography Sentencing Guidelines: Proposals to Modify the Sentencing Guidelines" (Oct. 28, 2020) (retrieved Jan. 6, 2021, at [http://mn.gov/msgc-stat/documents/meeting%20materials/2020/November/04A1-Staff-CP\\_Proposals.pdf](http://mn.gov/msgc-stat/documents/meeting%20materials/2020/November/04A1-Staff-CP_Proposals.pdf)).

it depicts a minor engaging in sexual conduct. The Commission is concerned about the similarity between Minnesota’s definition and federal language found to be unconstitutional in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).<sup>86</sup> While the Commission expresses no opinion about the ultimate constitutionality of the “conveys the impression” definition, it notes that several district court judges have severed, on constitutional grounds, this definition from the larger “pornographic work” definition.<sup>87</sup>

To ensure that constitutional error does not occur, the Commission recommends that, with the assistance of legislative legal staff, the Legislature review the “pornographic work” definition for constitutionality and take appropriate action. This recommendation, adopted January 14, 2021, on a vote of 11 to 0, is found on page 8.

### **Use of Minors in Sexual Performance**

The Commission deems it appropriate to rerank Use of Minors in Sexual Performance offenses. As discussed above, the Commission views these offenses—which largely consist of child pornography production—as being more severe than possession and dissemination. The Commission’s conclusion, that these offenses should be ranked more severely, is grounded in several reasons.

- First, although Use of Minors in Sexual Performance is now ranked equally to Dissemination of Child Pornography, the former offense is plainly more severe. Dissemination is a requirement of, and therefore lesser than, two of the means of committing Use of Minors in Sexual Performance: ownership or operation of a dissemination or reproduction business, and dissemination for profit.<sup>88</sup>
- Second, without the original act of production, other child pornography offenses would be impossible. Production uniquely enables child-pornography trafficking in a way that the other offenses do not.
- Third, production offenses are the only child pornography offenses that require the in-person, real-time victimization of a child.
- Fourth, the Legislature has assigned statutory maximums to Use of Minors in Sexual Performance that are as severe as, or more severe than, any other child pornography offense.

The Commission therefore considers it appropriate to increase the severity level assigned to Use of Minors in Sexual Performance from Severity Level E to Severity Level D, and to increase the severity level assigned to Use

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<sup>86</sup> Compare Minn. Stat. § 617.246, subd. 1(f)(2)(iii) (including an image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that” it depicts a minor engaging in sexual conduct within the definition of pornographic work) with *Free Speech Coalition*, 535 U.S. at 242 & 257–258 (holding unconstitutional a definition of child pornography that includes a sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that it depicts a minor engaging in sexually explicit conduct).

<sup>87</sup> The following appellate opinions acknowledge the respective district court’s severance of Minn. Stat. § 617.246, subd. 1(f)(2)(iii), from the definition of “pornographic work” in light of *Free Speech Coalition*: *State v. Fingal*, 666 N.W.2d 420, 422 (Minn. Ct. App. 2003), *review denied* (Minn. Oct. 21, 2003); *State v. Dodd*, No. C1 03 320, 2003 WL 22889408 at \*1 (Minn. Ct. App. Dec. 9, 2003) (unpublished), *review denied* (Minn. Feb. 25, 2004); *State v. Cannady*, 727 N.W.2d 403 n.2 (Minn. 2007).

<sup>88</sup> Minn. Stat. § 617.246, subs. 3 & 4, respectively.

of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13) from Severity Level D to Severity Level C—where prison is always presumed, even for a first offense.

These proposed modifications, adopted January 14, 2021, on a vote of 11 to 0, are set forth in Appendix 2.3 (p. 85).

If permitted to take effect, these modifications will have a fiscal cost. MSGC staff estimates that these modifications will cause the eventual need for an additional 3.5 prison beds.

## **Sexting**

The Commission is concerned about the potential misuse of these elevated severity levels. The Commission assigns severity levels based on the typical offense, and it does not consider “youth-produced, youth-only experimental” production of child pornography, or “sexting,”<sup>89</sup> to be as severe as a typical violation of the Use of Minors in Sexual Performance statute. As noted on pages 26 and 27 of the report, sexting presents a ranking challenge for the Commission because the behavior is qualitatively different from other behavior chargeable under child pornography statutes. The Commission is aware of at least one case in which a juvenile was charged with sexting under the dissemination statute.

This is particularly concerning in light of the Commission’s proposal to elevate Use of Minors in Sexual Performance (Subsequent, by Predatory Offender, or Child Under 13) to a severity level at which prison is presumed for all offenders. As a consequence of this change, a 16- or 17-year-old juvenile alleged to have committed such an offense will be presumptively certified to stand trial as an adult<sup>90</sup>—even if the child pornography was “youth-produced, youth-only experimental.”

Exempting the behavior or redefining it in a way that would allow the Commission to rank it differently would restore proportionality and recognize the immaturity of youth that drives their engagement in the behavior. As a result, the Commission recommends that the Legislature create a statutory exception—either as a lesser crime, or as no crime at all<sup>91</sup>—for such behavior. This recommendation, adopted January 14, 2021, on a vote of 11 to 0, is found on page 8.

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<sup>89</sup> See discussion entitled “Atypical Cases: Sexting as Production of Child Pornography” (p. 26).

<sup>90</sup> Minn. Stat. § 260B.125, subd. 3. The prosecutor is also empowered to designate such a juvenile proceeding as an extended jurisdiction juvenile (EJJ) prosecution. Minn. Stat. § 260B.130, subd. 1(2).

<sup>91</sup> If the Legislature opts to decriminalize sexting entirely, it should consider what further action, if any, should be taken to avoid any undesirable consequences of removing victims of such cases from the protections of the “sexually exploited youth” definition found in Minn. Stat. § 260C.007, subd. 31.

## Minority Report – Severity of Child Pornography Dissemination and Possession

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### MINNESOTA SENTENCING GUIDELINES COMMISSION 2021 MINORITY REPORT TO THE LEGISLATURE

This five-person minority report presents the recommendations of the law-enforcement, prosecutorial, and judicial officers of the eleven-member Sentencing Guidelines Commission. Specifically, the minority recommends that offense severity rankings be raised one level for the following offenses: Possession of Pornographic Work Involving Minors—Enhanced Dissemination (enhanced dissemination), Minn. Stat. § 617.247, subd. 3(b) (Supp. 2019), and Possession of Pornographic Work Involving Minors—Enhanced Possession (enhanced possession), Minn. Stat. § 617.247, subd. 4(b) (Supp. 2019).

Child-pornography dissemination and possession offenses are enhanced if the offense is a subsequent qualifying offense, the offender is a predatory offender, or the victim is a child under age 13. Minn. Stat. § 617.247, subds. 3(b), 4(b). The minority fully supports the majority’s recommendation to raise the severity rankings for certain enhanced child-pornography offenses. But the minority would go further to protect children from offenders who prey on their vulnerabilities and take pleasure in viewing the extreme sexual abuse, physical assault, and humiliation that is depicted in child pornography.

Child-pornography possession is not a victimless crime.

The language of section 617.247 plainly establishes the legislature’s intent to punish possession of child pornography as a crime that victimizes, or harms, the minor subject of the pornographic work. Indeed, the harm associated with possession of child pornography is twofold, (1) disclosure of the identity of the minor depicted in pornographic images and (2) perpetuation of the illicit use and exploitation of children. In its codified statement of intent, the legislature makes clear its view that the individual children depicted in [child] pornography . . . are also victimized by the act of possession.

*State v. Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004) (citation omitted).

Child-pornography images frequently depict children, toddlers, and infants being sexually assaulted, physically abused, tortured, and humiliated. For example, the following content supported a recent guilty plea and conviction for child-pornography possession. “Not one but multiple videos of babies literally being tied, hung upside down from a ceiling, their mouths muffled to reduce their screams, objects inserted in them, and burned with fire.” Respondent’s Brief at 3, *State v. Ramirez*, No. A19-1961, 2020 WL 6706174 (Minn. App. Nov. 16, 2020).

A review of criminal complaints by commission staff revealed the extreme nature of the images that support charges of child-pornography possession. The following examples are quoted from the probable-cause sections of those complaints.

A photo of a prepubescent juvenile female positioned on her hands and knees with her hands tied to a bed and a sex toy protruding from her anus; [a] photo of a prepubescent juvenile female positioned on her hands and knees with her hands tied to a bed and a clear plastic bag over her head; [a] photo of a prepubescent juvenile female positioned lying on the bed with the words, “Cut me,” “Slut,” and “Hurt me” written on her body in red; [and a] photo of a prepubescent juvenile female sitting in a bath tub and being urinated on by an adult male.

This video shows multiple sexual assaults of a 3 to 5 year old female. During this video, the camera zooms in on the child's vagina. The female also has what appears to be an adult male's penis in her mouth. An adult male's penis is also inserted into the child's vagina and anus.

The image . . . depicts a pre-teen nude girl on her knees with semen on her face and dripping down her body.

The Commission has an obligation to protect children and promote public safety by appropriately penalizing enhanced offenders who disseminate and possess such images. See Minn. Stat. § 244.09, subd. 5 (2018) (“In establishing and modifying the Sentencing Guidelines, the primary consideration of the commission shall be public safety.”). The minority therefore recommends that the legislature increase the severity ranking for enhanced dissemination and enhanced possession of child pornography by one level, consistent with the following statement of clear legislative intent.

It is the policy of the legislature in enacting [section 617.247, possession of pornographic work involving minors] to *protect minors* from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors. It is therefore the intent of the legislature to *penalize possession* of pornographic work depicting sexual conduct which involve minors or appears to involve minors *in order to protect the identity of minors who are victimized by involvement in the pornographic work, and to protect minors from future involvement in pornographic work depicting sexual conduct.*

Minn. Stat. § 617.247 (2018) (emphasis added).

The minority's recommendation is consistent with the statutory punishments for enhanced dissemination and enhanced possession. For example, the current severity ranking for enhanced dissemination results in a maximum guidelines sentence of 140 months. Minn. Sent. Guidelines 4.B, 5.A (2020). But the statutory sentence for enhanced dissemination is imprisonment for up to 180 months, 40 months more than the guidelines maximum. Minn. Stat. § 617.247, subd. 3(b). The legislature has authorized the same sentence—imprisonment for up to 180 months—for enhanced child-pornography production, enhanced operation or ownership of a business that disseminates child pornography, and enhanced dissemination of child pornography for profit. See Minn. Stat. § 617.246, subds. 2(b), 3(b), 4(b) (Supp. 2019) (providing for imprisonment for up to 180 months). The majority recommends, and the minority agrees, that the severity rankings for those enhanced offenses should be raised one level, which will result in a maximum guidelines sentence that is consistent with the maximum statutory sentence of 180 months.

Even though the legislature's provision of *identical* sentences for the enhanced offenses of child-pornography production, business dissemination, dissemination for profit, and dissemination indicates that it views those offenses as *equally* serious, the majority reasons that enhanced dissemination is *less* serious and therefore opposes raising the severity ranking for that offense. But the minority cannot ignore the maximum sentences authorized by the legislature. The minority therefore recommends that the severity ranking for enhanced dissemination be raised one level, from D to C, consistent with the majority's proposed rankings for enhanced child-pornography production, enhanced business dissemination, and enhanced dissemination for profit. That change would result in a maximum guidelines sentence of 180 months for enhanced dissemination, consistent with the maximum statutory sentence of 180 months for that offense.

The minority similarly recommends raising the severity ranking one level for enhanced possession, from F to E, again relying on legislative guidance. The statutory sentence for child-pornography possession authorizes imprisonment for up to 60 months. Minn. Stat. § 617.247, subd. 4(a) (Supp. 2019). The statutory sentence for enhanced child-pornography possession authorizes imprisonment for up to 120 months, twice as long. *Id.*, subd. 4(b). Even though the legislature increased the potential penalty for enhanced child-pornography possession 100%, the current severity ranking for that offense increases the potential penalty only 40%. Thus, the current ranking for enhanced child-pornography possession results in a maximum guidelines sentence of 84 months, 36 months *less* than the potential statutory sentence. The minority recommends raising the severity ranking for enhanced possession one level, which would result in a potential maximum guidelines sentence of 120 months, consistent with the potential statutory sentence of 120 months.

The minority has considered the reasons offered to maintain the current severity rankings for enhanced dissemination and enhanced possession. For example, the majority report cites a "relatively low risk of sexually recidivating" for internet sex offenders. But as the majority notes, the study on which it relies indicates that more research is needed. And, as Representative Matt Grossell, a Clearwater County Deputy Sheriff who works with investigators on child pornography cases, states in his written comment dated December 18, 2020, "most of the perpetrators who possess and disseminate child pornography are not just casual viewers; they are also actors." In addition, most of the criminal charges come to the Minnesota BCA via cybertips which are then forwarded to local law enforcement for investigation for potential charges. The BCA reports that the number of cybertips reported for child pornography has increased significantly. Specifically, in 2010 the BCA received 250 cybertips, compared to 3,000 in 2019 and nearly 4,500 through the end of 2020.

Representative Grossell's comments are underscored by a recent, comprehensive international survivor study of victims of child pornography published by the Canadian Centre for Child Protection in 2017. The study analyzed 152,000 reports and 43,000 unique images received by Cybertip.ca from 2008-2015. The Canadian study reached the following conclusions relevant to sentencing offenders. First, recording the sexual abuse of a child has a significant lifelong impact on the victim. Nearly 70% of respondents indicated that they worry constantly about being recognized, and 30% report being identified by a person who viewed the imagery of their abuse. Second, the unique needs of survivors of child-sexual-abuse imagery are not being adequately addressed. One victim of child porn said: "I perceive the world as terribly unsafe. Very, very unsafe. I often feel like a hunted animal. It is clear that this is due to the existence of photo imagery . . . ."

The Canadian study found, among other things, that 78% of children in the images and videos were estimated to be younger than 12 years of age, 80% of the children appeared to be girls, and 70% of the images and videos appeared to be taken in a home setting. Most telling is that the imagery and videos will continue to be shown on the internet over and over again indefinitely. As one survivor stated: “If you ask me, a crime that will never end is worse than a crime that is over, no matter how much more serious it may appear.”

The majority report also cites the possibility of increased sentences resulting from the *Hernandez* method of sentencing. When multiple convictions and sentences are allowed and the district court sentences a defendant on the same day for all of the convictions, the criminal history point(s) resulting from the first convictions sentenced are included in the criminal history score for the next conviction sentenced. *State v. Hernandez*, 311 N.W.2d 478, 479 (Minn. 1981). The majority report notes that the *Hernandez* method is often used when sentencing child-pornography cases because a single child-pornography collection can result in multiple convictions and sentences if the images were downloaded at substantially different times. A single child-pornography collection can also result in multiple convictions and sentences if the images contain multiple victims. *Rhoades*, 690 N.W.2d at 139. The majority report states that the additional sanctions that would result from increased severity rankings for enhanced dissemination and enhanced possession would be excessive in light of the *Hernandez* method of calculating criminal-history scores.

However, the chair recently introduced a proposal to limit the number of child-pornography-possession offenses that can be included in a criminal-history score when using the *Hernandez* method. Although the chair withdrew the proposal, the chair indicated an intent to revisit ways to limit the impact of the *Hernandez* decision in child-pornography cases. Thus, the *Hernandez* justification for rejecting increased severity rankings for enhanced dissemination and enhanced possession may be short-lived.

Lastly, the majority report notes that child-pornography offenses are now enhanced if the victim was under 13, that enhanced offenses are ranked higher than baseline offenses, and that a significant number of child-pornography offenses involve victims under 13. Thus, the majority concludes that the current severity rankings for enhanced dissemination and enhanced possession will result in harsher sentences for a significant number of offenders and that additional consequences are inappropriate. The minority recognizes that child-pornographers receive harsher penalties when they victimize children under 13. But given the ongoing harm caused to those victims and the legislatively enhanced sentences, the minority believes that the current severity rankings and resulting presumptive sentences are inadequate to ensure public safety.

In sum, it is undisputed that child-pornography collections in typical Minnesota cases are very large and include images of sexually explicit poses, sex acts, violence, humiliation, bondage, and bestiality, and that a substantial minority include images depicting sex acts with infants or toddlers. It is undisputed that each child depicted in those images “remains locked in perpetual victimization.” It is undisputed that child-pornography investigators have criticized the Minnesota Sentencing Guidelines as being too lenient when compared to federal sentences imposed for child-pornography offenses, particularly in dissemination cases. It is undisputed that Minnesota’s child-pornography sentencing scheme may be viewed as more lenient than other state and federal jurisdictions. It is undisputed that more research is necessary to support a conclusion that child-pornography offenders have a low recidivism rate. Finally, it is undisputed that child-pornography offenses are included on the Sex Offender Grid and that the Sex Offender Grid was designed to impose harsher penalties on repeat offenders.

Nonetheless, the majority report concludes that Minnesota’s “long tradition of parsimony and precision” when expending correctional resources does not warrant more severe penalties in the form of increased severity rankings for enhanced dissemination and enhanced possession of child pornography. The minority respectfully disagrees and is more concerned with the severe and permanent impact of child pornography on children—especially children under age 13—than the interests of child-pornography offenders. The perpetual victimization resulting from the dissemination and possession of images of sexual abuse, physical assault, and humiliation of children justifies the expenditure of correctional resources to penalize enhanced dissemination and enhanced possession of child pornography in a manner that is consistent with the statutorily prescribed sentences and the commission’s public-safety mandate. The minority therefore recommends that the offense-severity rankings be raised one level for enhanced child-pornography dissemination and enhanced child-pornography possession.

Respectfully submitted,

Christopher Dietzen, Associate Supreme Court Justice (Retired)

Michelle A. Larkin, Minnesota Court of Appeals Judge

Kevin Mark, First Judicial District Judge

Kyra Ladd, Wadena County Attorney

Salim Omari, Saint Paul Police Commander

## Staff Activities

The following provides a summary of the activities performed by Minnesota Sentencing Guidelines Commission (MSGC) staff—in addition to providing support and research for the Guidelines modifications detailed in this report—to further the goals and purposes of the Commission. In particular, staff assist the Commission in fulfilling its statutory charter<sup>92</sup> to serve as a clearinghouse and information center for the collection, preparation, analysis, and dissemination of information on sentencing practices. This includes information regarding the impact of statutory changes to the state's criminal laws related to controlled substances, including the Drug Sentencing Reform Act.<sup>93</sup>

Since mid-March, staff was directed to telework from home due to the ongoing COVID-19 health pandemic.<sup>94</sup> Staff occasional scheduled trips to the worksite to pick-up USPS Mail. One staff member was redeployed to the Department of Health to make contact-tracing telephone calls under the COVID-19 Peacetime State of Emergency from May 18 to June 22, 2020.

### Monitoring Sentencing Data

One of the primary functions of the MSGC staff is to monitor sentencing practices. The monitoring system is designed to maintain data on all offenders convicted of a felony and sentenced under the Guidelines.<sup>95</sup> A case is defined when a sentencing worksheet is received from the probation officer and matched with sentencing data from the District Court. As part of the agency's core functions, MSGC staff collected and analyzed data of over 17,000 felony offenders. Additionally, staff published the annual edition of the Sentencing Guidelines and Commentary and its annual reports on sentencing practices and trends.<sup>96</sup>

### Training & Assistance

The staff provides training and assistance with the Guidelines in a variety of ways: monthly webinars on individual sentencing topics, website materials, and email and telephone assistance. In an average month, the staff fields an average 150 calls and emails per month. The majority of questions come from judges, attorneys, and probation officers asking about the application of the Guidelines to their felony cases. Between March and August, phone calls and emails dropped to an average 72 per month. This may be due to the ongoing COVID-19 health pandemic.<sup>97</sup>

MSGC staff and Department of Corrections' Information Technology staff released updates to correspond with the changes implemented by the Commission in 2020 to the five-year probation cap. These technology changes

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<sup>92</sup> [Minn. Stat. § 244.09](#), subd. 6.

<sup>93</sup> *Id.*

<sup>94</sup> See footnote 15.

<sup>95</sup> Beginning in 2005 and 2006, MSGC began maintaining data on life sentences, even if not governed by the Guidelines.

<sup>96</sup> This information is summarized in this report ("2019 Sentencing Practices Data Summary," beginning on 42. The detailed reports may be found at <https://mn.gov/sentencing-guidelines/reports/>.

<sup>97</sup> See footnote 94.

were made to not only assist probation agents with determining eligibility under the new policies, but enhance the data collected by MSGC staff for prior offenses.

## **Website & Data Requests**

The Commission's website receives over 7,000 views each month. The majority of visitors are interested in accessing the Sentencing Guidelines. The website includes easily accessible email signup for upcoming trainings, public hearing notices, and Commission meeting notices. One-click data requests makes getting sentencing information quick and easy.

One of the important ways in which the Commission's staff works with fellow agencies and criminal justice practitioners across the state is researching and compiling statistical data in response to information requests. MSGC staff responded to over 250 data requests in 2020. The numbers are down from 2019 when staff prepared 300 requests. Requests may be down because of the ongoing COVID-19 health pandemic.<sup>98</sup>

Requests are most often made by lawyers or corrections agents to show evidence of specific sentencing practices to the court. However, the requests are also made by academics, students, other state agencies, legislative staff, law enforcement, and the press for other purposes. The topics range from departure data for a single type of offense within a given county to comparative data on how an offense has been sentenced from one jurisdiction to another.

## **Collaboration with Criminal Justice Agencies**

The staff's knowledge of felony sentencing and practice makes it a valued contributor to criminal justice policy discussions. Each year, Commission staff works with the Department of Corrections to generate prison bed projections. MSGC staff serves on the Criminal and Juvenile Justice Information Advisory Group and the newly formed Criminal Sexual Conduct Statutory Reform Working Group in addition to providing support to the Commission's representative on the Community Competency Restoration Task Force. Staff also participated in trainings that were arranged by the Minnesota County Attorneys Association and Minnesota Corrections Association.

## **Fiscal Impact Statements & Demographic Impact Statements**

During the 2020 legislative sessions, staff provided fiscal impact statements for 17 bills. These impact statements include details as to any increase or decrease in adult offender populations, the estimated net increase in state correctional facility beds, and the impact on confinement in local correctional facilities. Staff provided all requested information within the time requirements set by the Legislature.

In 2008, MSGC staff began providing the Minnesota Legislature demographic impact statements<sup>99</sup> on certain crime bills when such a statement was anticipated to be helpful to the Legislature. When, in the course of preparing a required fiscal impact statement, MSGC staff identifies a bill that meets its criteria for preparing a

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<sup>98</sup> See footnote 94.

<sup>99</sup> These had previously been referred to as "racial-impact statements."

demographic impact statement, it prepares such a statement and sends it to the chairs of the crime committees in the Senate and the House. This is done separately from the required fiscal-impact statements. The full demographic impact statements are available on the MSGC web site.<sup>100</sup>

During the 2020 Legislative Sessions, two legislative policy proposals met the criteria for preparing a demographic impact statement:

- [House File 2013-1CE](#): Reclassified certain nonresinous marijuana sale and possession offenses that now qualify as fifth-degree felony offenses and established a new statute for nonfelony marijuana offenses with penalties based on the quantity of marijuana sold or possessed, or possession of marijuana in a motor vehicle; and
- [House File 3070-0](#): Added sex trafficking to the list of violent crimes as defined in Minn. Stat. § 609.1095, subdivision 1(d) making it subject to sentencing enhancements; increased statutory maximums for 1st and 2nd Degree Sex Trafficking; elevate the general offense of Patrons of Prostitution from a misdemeanor to a gross misdemeanor; directed the Sentencing Guidelines Commission to comprehensively review and consider modifying how the Sentencing Guidelines and Sex Offender Grid address sex trafficking crimes in Minn. Stat. § 609.322.

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<sup>100</sup> Full statements are available at <https://mn.gov/sentencing-guidelines/reports/#1>.

# 2019 Sentencing Practices Data Summary

The following data summarize information about sentencing practices and case volume and distribution in 2019. The recommended sentence under the Guidelines is based primarily on the severity of the offense of conviction and secondarily on criminal history. In most cases, the recommended sentence is applied.

In Minnesota, sentencing of felony offenses is governed by the Sentencing Guidelines. It is important, therefore, to be aware of the effect of differences in offense severity and criminal history when evaluating sentencing practices. This is particularly important when comparing cases (e.g., by gender, race/ethnicity, or judicial district). For example, if in a particular district the proportion of serious person offenses is fairly high, the imprisonment rate for that district will likely be higher than for districts with predominantly lower-severity offenses.

## Case Volume and Distribution

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In 2019, 17,335 people were sentenced for felony offenses in Minnesota, a 5.2 percent decrease from the record-high case volumes in 2017 and 2018. The 2019 case volume represented the first significant annual decline since 2010, and the steepest single-year decrease since 1983.

All seven offense categories decreased from 2018 to 2019. This decrease ranged from less than one percent to nine percent. Drug offenses decreased more than most categories, by 6.5 percent.

By contrast, in the nine years from 2010 to 2019, the number of drug offenses grew by 56 percent, accounting for most of the 21-percent overall growth in people sentenced for felonies over that time. Only the “weapon”<sup>101</sup> category surpassed the drug category in growth from 2010 to 2019 (77.5% increase). The specific “weapon” offense that contributed the most to that growth was possession of a firearm by a felon convicted of a crime of violence, which increased from 234 cases in 2010 to 473 cases in 2019—a 102 percent increase. Person offenses grew by ten percent during these nine years, while property offenses had the smallest growth rate, at eight percent. Non-CSC sex offenses<sup>102</sup> grew by 13 percent, and “other”<sup>103</sup> offenses grew by 32 percent. The only offense category that showed a decline from 2010 to 2019 was felony driving while impaired (DWI), which fell by 20 percent.

The total volume of cases sentenced over time is illustrated in Figure 2 (p. 43), and changes in annual growth rates, are illustrated in Figure 3 (p. 43). In addition to the growth from 2010 to 2017, discussed above, significant growth also occurred between 2001 and 2006, when the total volume of cases sentenced rose by 52 percent. That increase was largely attributable to growth in the number of drug cases, particularly involving methamphetamine, as well as the implementation of the felony DWI law.

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<sup>101</sup> “Weapon” offenses include: possession of a firearm by a felon convicted of a crime of violence, firearm discharge, possession of teargas and explosive devices, and other weapon related offenses.

<sup>102</sup> “Non-CSC sex offenses” are offenses on the Sex Offender Grid other than criminal sexual conduct (chiefly failure to register as a predatory offender and possession and dissemination of child pornography).

<sup>103</sup> “Other” category: Fleeing police, escape, and other offenses of less frequency including crimes against the government such as tax offenses, failure to appear in court, and aiding an offender.

According to Department of Public Safety data, Minnesota’s index crime rate<sup>104</sup> has fluctuated over time, but was generally falling between 1996 and 2017. In 2018 and 2019, the index crime rate rose.<sup>105</sup>

Figure 2. Number of Cases Sentenced for Felony Convictions, 1981–2019

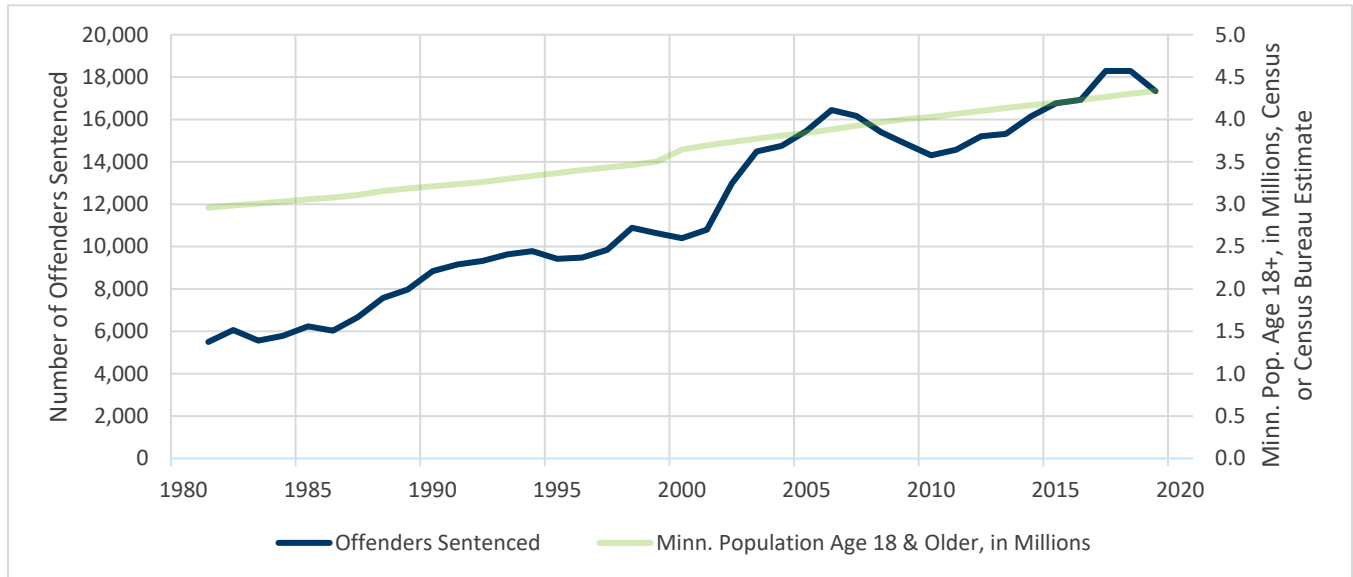
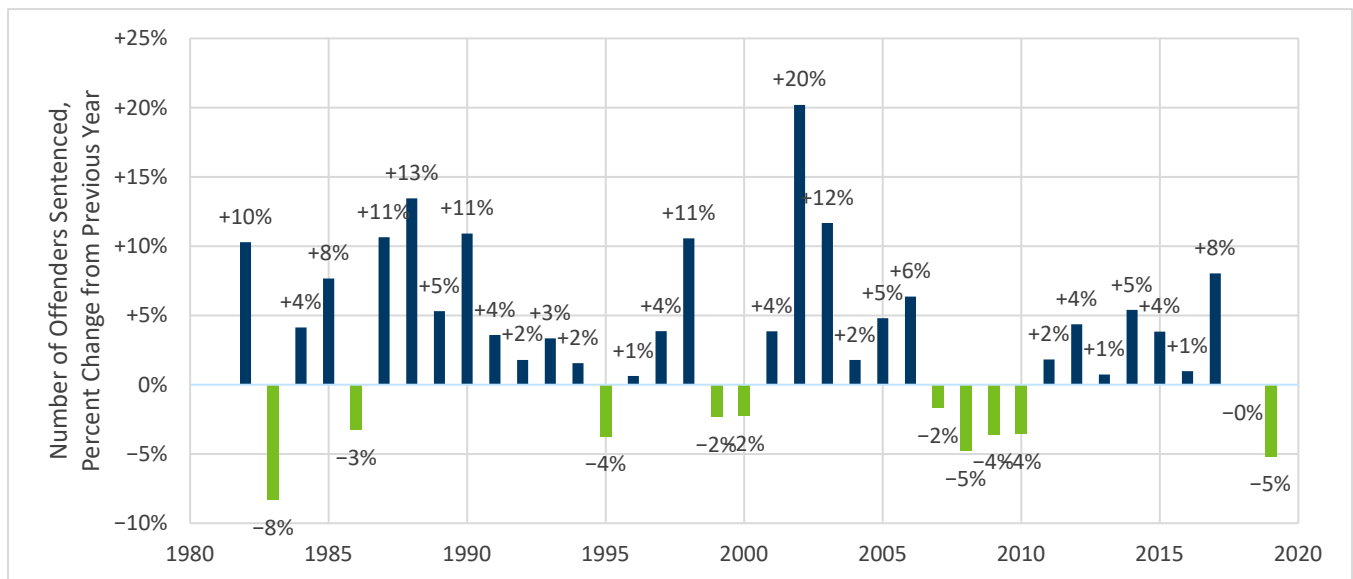


Figure 3. Annual Percent Change in Number of Cases Sentenced for Felony Convictions, 1982–2019



<sup>104</sup> “Index crimes” are comprised of “violent crimes” (Murder, Forcible Rape, Robbery, Aggravated Assault, & Human Trafficking) and “property crimes” (Burglary, Larceny, Motor Vehicle Theft, & Arson). The rate is population-adjusted.

<sup>105</sup> Minn. Uniform Crime Report – 2019, Minn. Dep’t of Public Safety, obtained Nov. 2020 at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Pages/uniform-crime-reports.aspx> & <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Documents/2019UCR-HistoricalCrimeIndex.xls>.

## Change in Case Volume by Offense Type

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Figure 4 (p. 45) shows recent trends in felony case volume by offense types. While cases are divided into seven offense types, the first three offense categories (in bold) generally total at least 85 percent of each year's case volume:

- **Person offenses** (including criminal sexual conduct (CSC));
- **Drug offenses;**
- **Property offenses;**
- Felony DWI;
- Non-CSC sex offenses<sup>106</sup>;
- Weapon offenses<sup>107</sup>; and
- Other offenses.<sup>108</sup>

Table 6 (p. 46) displays the year-to-year percent change in case volume by offense type.

### *Person Offenses*

Except for a slight decrease in 2013 and a decrease of 2.5 percent in 2016, the number of person offenses increased every year from 2001 to 2018, including a 1.5-percent increase in 2018. In 2019, the number decreased by almost five percent, the largest annual decrease since 2000 (Table 6, p. 46).

### *Drug Offenses*

Drug offenses grew for seven consecutive years from 2010 to 2017, making drug offenses the largest offense category beginning in 2016 (Figure 4, p. 45). Although the number of drug cases decreased in 2018 and 2019, drug offenses remain the largest offense category, accounting for 30 percent of cases.

### *Property Offenses*

The property offense category has declined in most years since 2006 (Table 6, p. 46). After increasing in 2017 and 2018, property offenses decreased by five percent in 2019. As a share of all felony cases, the property offense category fell from 30 percent in 2013 to 27 percent in 2019.

### *Felony DWI*

The number of felony DWI cases peaked in 2004, at 860, and has declined in most years since. The 2019 volume, 534 cases, is 62 percent of that peak volume. In the five years between 2012 and 2017, the numbers fluctuated

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<sup>106</sup> "Non-CSC sex offenses" are offenses on the Sex Offender Grid other than criminal sexual conduct (chiefly failure to register as a predatory offender and possession and dissemination of child pornography).

<sup>107</sup> "Weapon" category includes: Possession of a firearm by a felon convicted of a crime of violence, discharge of firearm, and other weapon related offenses.

<sup>108</sup> "Other" category includes: Fleeing police, escape, voting violations, tax evasion laws, and other offenses of less frequency. "Other" category also includes DWI before 2004 and non-CSC sex offenses and weapon offenses before 2010.

sharply (Table 6, p. 46), possibly in connection with the timing of legal challenges to DWI laws and evidence-collection practices.

### Non-CSC Sex Offenses

There was a nine percent decrease in the non-CSC sex offense category (Table 6, p. 46). The most common offense in this category, failure to register as a predatory offender, decreased by five percent (from 428 in 2018 to 405 in 2019). Following a one-year increase, 2019 child pornography case volumes returned to 2017 levels (81 in 2017, 101 in 2018, and 80 in 2019).

### Other Offenses

The number of cases in the “other” offense category—largely crimes against the government—decreased slightly, by 0.4 percent. Fleeing a peace officer, the most common offense in this category, increased from 547 cases in 2018 to 572 cases in 2019 (up 4.5%). Tax offenses saw an increase to 29 cases after remaining relatively steady in 2017 and 2018 (18 cases in 2017, 17 in 2018).

Figure 4. Number of Cases Sentenced by Offense Type, 2004–2019

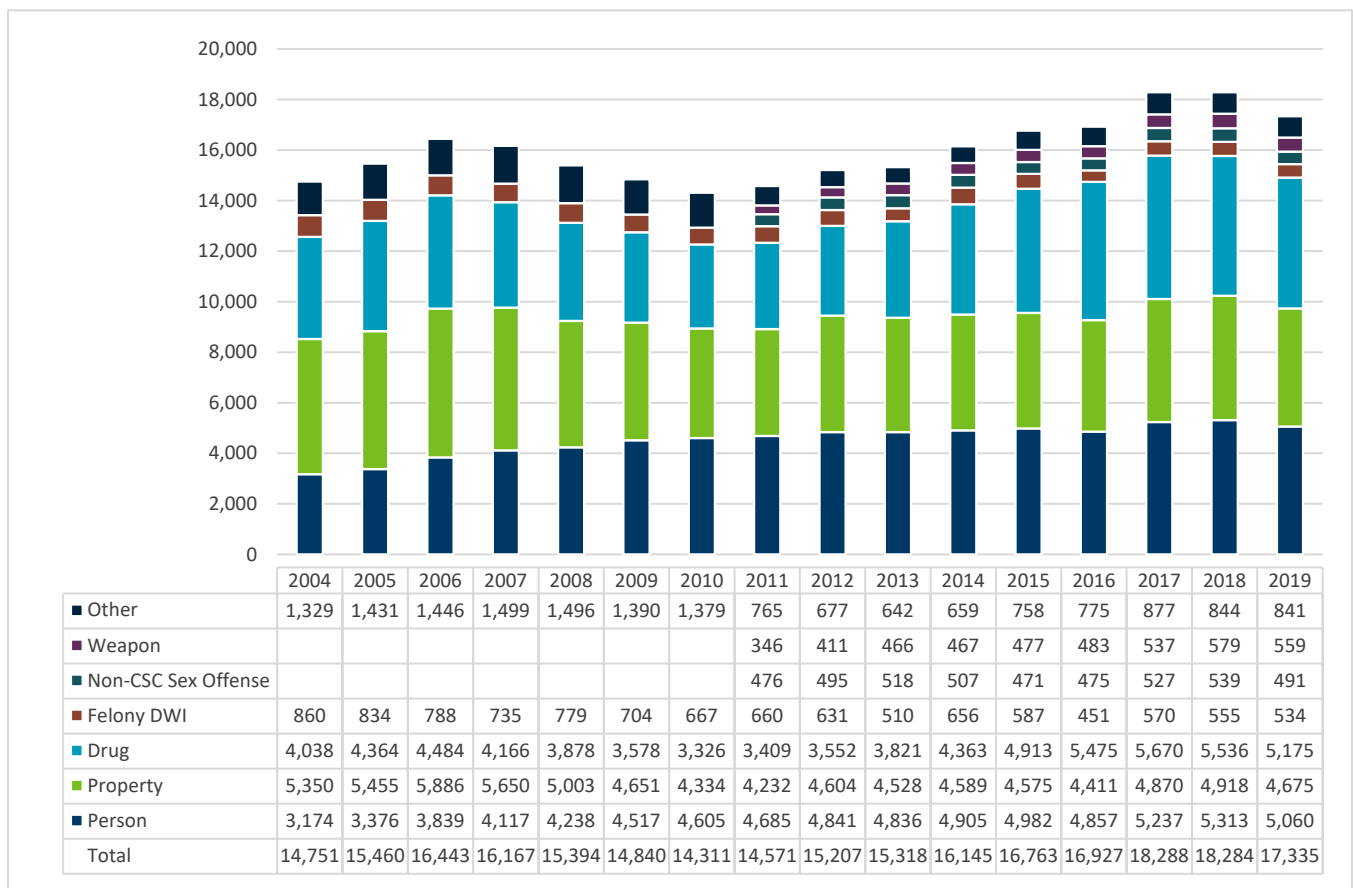


Table 6. Cases Sentenced, Percent Change from Previous Year, by Offense Type, 2000–2019

Year Sentenced	All Offenses	Person	Property	Drug	Felony DWI	Non-CSC Sex Offense	Weapon	Other
2001	+3.9%	+3.8%	+4.2%	0.0%				+13.3%
2002	+20.2%	+10.4%	+17.9%	+31.9%				+16.3%
2003	+11.7%	+6.2%	+2.4%	+13.8%				+2.2%
2004	+1.8%	+1.1%	-0.8%	+3.6%	+6.2%			+6.2%
2005	+4.8%	+6.4%	+2.0%	+8.1%	-3.0%			+7.6%
2006	+6.4%	+13.7%	+7.9%	+2.7%	-5.5%			+1.1%
2007	-1.7%	+7.3%	-4.0%	-7.1%	-6.7%			+3.7%
2008	-4.8%	+2.9%	-11.5%	-6.9%	+6.0%			-0.1%
2009	-3.6%	+6.6%	-7.0%	-7.7%	-9.6%			-7.0%
2010	-3.6%	+2.0%	-6.8%	-7.0%	-5.3%	+3.1%	-1.3%	-3.0%
2011	+1.8%	+1.7%	-2.4%	+2.5%	-1.0%	+9.9%	+9.8%	+20.3%
2012	+4.4%	+3.5%	+8.8%	+4.2%	-4.4%	+4.0%	+18.8%	-11.5%
2013	+0.7%	-0.1%	-1.7%	+7.6%	-19.2%	+4.6%	+13.4%	-5.2%
2014	+5.4%	+1.4%	+1.3%	+14.2%	+28.6%	-2.1%	+0.2%	+2.6%
2015	+3.8%	+1.6%	-0.3%	+12.6%	-10.5%	-7.1%	+2.1%	+15.0%
2016	+1.0%	-2.5%	-3.6%	+11.4%	-19.1%	-4.3%	+1.3%	+2.2%
2017	+8.0%	+7.8%	+10.4%	+3.6%	+20.0%	+16.9%	+11.2%	+13.2%
2018	-0.0%	+1.5%	+1.0%	-2.4%	-2.6%	+2.3%	+7.8%	-3.8%
2019	-5.2%	-4.8%	-4.9%	-6.5%	-3.8%	-8.9%	-3.5%	-0.4%

## Distribution of Cases by Gender, Race/Ethnicity and Judicial District

Of those sentenced in 2019, 80.4 percent were male and 19.6 percent were female (Table 7). The female percentage was slightly lower than in 2018, the only year when females accounted for more than 20 percent of cases.

Figure 5 (p. 47) shows the racial or ethnic composition of those sentenced from 1981 through 2019. The white percentage decreased by 25 points between 1981 (81.8%) and 2009 (56.5%). This was largely due to an increase in the black percentage, although the percentages of other races or ethnicities (particularly Hispanic) also increased.

From 2018 to 2019, the white percentage increased from 56.6 percent to 56.8 percent. The black percentage decreased from 26.7 percent in 2018 to 26.4 percent in 2019. The percentage of other races or ethnicities remained similar to that seen in 2018.

Figure 5. Distribution of Cases by Race/Ethnicity, 1981–2019

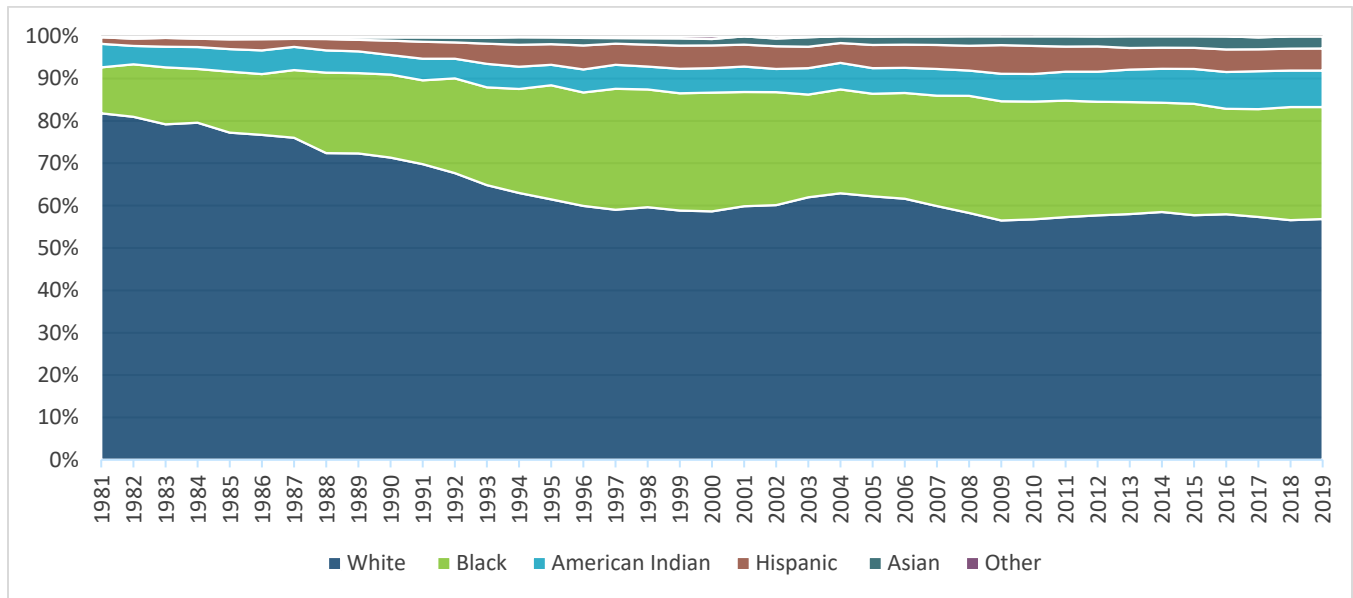


Figure 6 (p. 47) displays the distribution of the racial or ethnic composition of those sentenced in 2019 by Minnesota judicial district. The districts with the largest black percentages were the Second Judicial District (Ramsey County) and the Fourth Judicial District (Hennepin County). A map of the judicial districts can be found in Appendix 4 (p. 90).

Figure 6. Distribution of Cases by Race and Judicial District, 2019

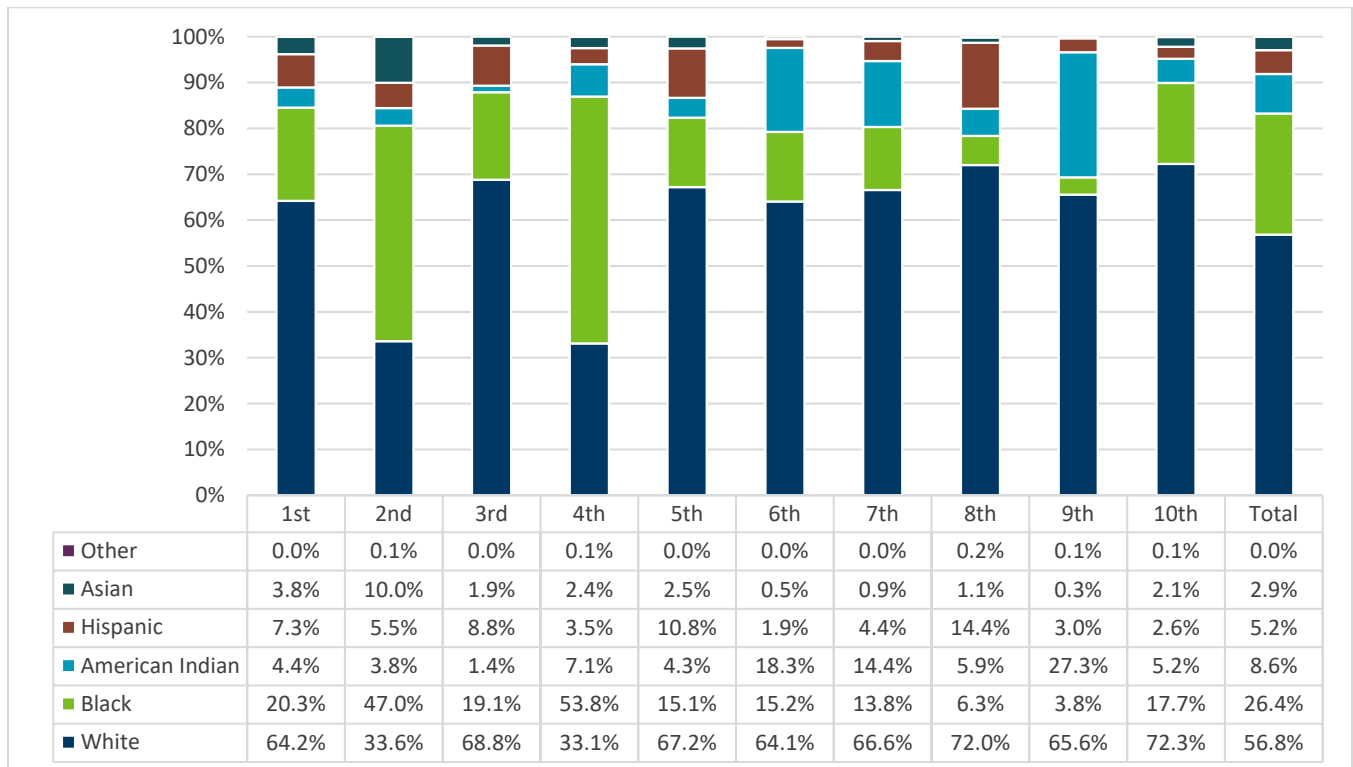


Table 7 compares, by the categories of sex, race or ethnicity, and judicial district, the population of felony cases sentenced in 2019 with the 2019 estimated state adult population. Within those comparison categories, Table 7 also calculates the rate of cases sentenced in 2019 per 100,000 Minnesota residents age 18 and older on July 1 of the respective year.

*Table 7. Cases Sentenced, 2019, by Gender, Race/Ethnicity, and Judicial District, Compared to 2019 Estimated Adult Population*

	Cases Sentenced in 2019		U.S. Census Category	2019 Estimated Adult Population		Cases Sentenced per 100,000	
	MSGC Category	Number		Percent	Number		Percent
	Male	13,937	80.4%	Male	2,144,041	49.4%	650
	Female	3,398	19.6%	Female	2,192,434	50.6%	155
Race & Ethnicity	White	9,853	56.8%	White*	3,629,537	83.7%	271
	Black	4,580	26.4%	Black or African American*	278,909	6.4%	1,642
	American Indian	1,492	8.6%	American Indian*	66,414	1.5%	2,247
	Hispanic**	903	5.2%	Hispanic**	197,548	4.6%	457
	Asian	499	2.9%	Asian*	228,242	5.3%	219
	Other/Unknown	8	0.0%	Native Hawaiian/Other Pacific Islander*	4,975	0.1%	***
Judicial District****	First	2,213	12.8%	First	608,254	14.0%	364
	Second	1,902	11.0%	Second	422,368	9.7%	450
	Third	1,254	7.2%	Third	372,086	8.6%	337
	Fourth	3,551	20.5%	Fourth	989,707	22.8%	359
	Fifth	1,064	6.1%	Fifth	221,404	5.1%	481
	Sixth	732	4.2%	Sixth	202,578	4.7%	361
	Seventh	1,810	10.4%	Seventh	379,092	8.7%	477
	Eighth	522	3.0%	Eighth	122,619	2.8%	426
	Ninth	1,620	9.3%	Ninth	264,123	6.1%	613
	Tenth	2,667	15.4%	Tenth	754,244	17.4%	354
	<b>Total</b>	<b>17,335</b>	<b>100.0%</b>	<b>Total</b>	<b>4,336,475</b>	<b>100.0%</b>	<b>400</b>

Source of July 1, 2019, population estimate: U.S. Census Bureau (Sept. 2020).

\*Not Hispanic, alone or in combination with one or more other races. The sum of percentages of residents in each racial or ethnic category exceeds 100 percent (101.6%) because residents of more than one race are counted in more than one category.\*\*Table 7 lists all Hispanic offenders and residents as Hispanic, regardless of race.

\*\*\*The MSGC category of "Other/Unknown" is not a valid comparison group to the U.S. Census category of "Native Hawaiian/Other Pacific Islander."

\*\*\*\*See Appendix 4 (p. 90) for a map of Minnesota's ten judicial districts.

## Incarceration Rates

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Under Minn. Stat. § [609.02](#), a felony sentence must be at least 366 days long. Sentences of one year or less are gross misdemeanors or misdemeanors and are served in local correctional facilities (i.e., county jail or workhouse).

The Guidelines presume who should go to state correctional institutions (prison) and for how long. Imprisonment rates are related to the Guidelines recommendations and are based on the seriousness of the offense and the criminal history score. In cases in which prison sentences are stayed, the court usually places the defendant on probation. As a condition of probation, the court may impose up to one year of incarceration in a local correctional facility. Probationers usually serve time in a local facility and are often given intermediate sanctions such as treatment (residential or nonresidential), restitution, and fines. There are few specific guidelines to the court regarding the imposition of these intermediate sanctions.<sup>109</sup>

### Total Incarceration

The total incarceration rate describes the percentage of cases in which the sentence included incarceration in a state prison or local correctional facility, such as a county jail or workhouse. Figure 7 (p. 50) shows the total incarceration rate, as well as the separate rates for prison and local confinement, from 1982 to 2019. The total incarceration rate in 1978 (pre-Guidelines) was 55.8 percent (20.4% incarcerated in state prison and 35.4% in local confinement). In 1981, the total incarceration rate was 61.2 percent (15% incarcerated in state prison and 46.2% in local confinement). The total incarceration rate has grown steadily over the last 33 years, from 61 percent in 1981, to 85 percent or more since 1991. Except for 2010, the total incarceration rate has remained above 90 percent since 2003. In 2019, 91.5 percent of sentences for felony convictions included incarceration in a state prison or a local correctional facility.

The 2012–2015 imprisonment rates were the highest rates observed since the Guidelines were implemented. The imprisonment rate declined from 26.2 percent in 2015 to 23.1 percent in 2018. In 2019, the imprisonment rate increased to 24 percent. Of those who did not receive an executed prison sentence, 89 percent received local confinement.<sup>110</sup>

For comparison, Figure 7 also displays the Guidelines-recommended (“presumptive”) imprisonment rate over time. More cases are recommended imprisonment than actually receive prison sentences. In 2019, the Sentencing Guidelines recommended imprisonment in 34.4 percent of cases, compared to the actual imprisonment rate of 24 percent. The difference between these two rates—of 10.4 percentage points—was easily the largest disparity between presumptive and actual imprisonment rates on record.

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<sup>109</sup> For general guidance, see 2019 Minn. Sentencing Guidelines § 3.A.

<sup>110</sup> This figure includes either confinement time as a condition of probation or a non-felony local confinement sentence. See Table 8. Of the 17,335 cases, 4,154 received prison and 13,181 did not. The 11,700 receiving local confinement totaled 89% of the 13,181 not receiving prison.

Figure 7. Actual & Presumptive Incarceration Rates, 1982, 1984, 1986, 1988, 1990–2019

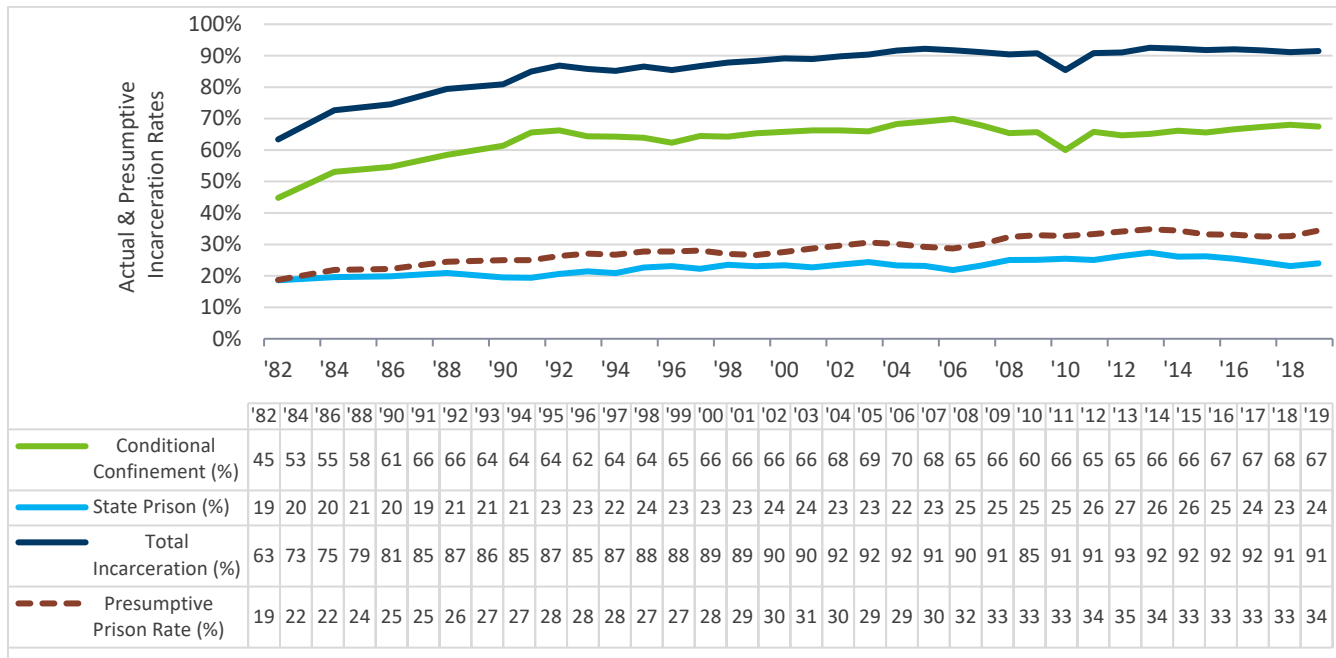


Table 8 (p. 51) provides total incarceration information for cases sentenced in 2019. “Total Incarceration” includes all sentences that included a prison sentence or local confinement time as a condition of a stayed sentence. When comparing imprisonment rates across various demographic groups (sex, race/ethnicity, or judicial district), it is important to note that much of the variation is directly related to the proportion of cases in any particular group recommended a prison sentence by the Guidelines.

### Race/Ethnicity

Some variation in the 2019 total incarceration rate was observed across the five racial or ethnic groups, ranging from 90.4 percent (observed in the white group) to 93.6 percent (observed in the Asian group) (Figure 8, p. 52). Greater variation existed in the separate rates for imprisonment and local confinement. The white and Asian groups had the lowest imprisonment rate at 21.4 percent. (For these two groups, the “presumptive prison rate”—the rate at which prison is recommended—was 31.0% and 34.3%, respectively.) The American Indian group had an imprisonment rate of 22.4 percent (and the lowest presumptive prison rate of 29.0%). The black group had the highest imprisonment rate at 30.1 percent (and the highest presumptive prison rate at 43.3%) (Figure 8, p. 52).

### Judicial District

Variation in incarceration rates was also observed by judicial district (Figure 9, p. 52). The Second Judicial District (Ramsey County) had the highest total incarceration rate (98.7%) and the Ninth Judicial District (northwest Minnesota) had the lowest total incarceration rate (77.9%). Variation was also seen with respect to the separate rates for prison and local confinement. The Eighth and Seventh Judicial Districts (west-central counties) had the highest imprisonment rates (27.6% and 27.5%), and the First Judicial District (southern metro counties) had the lowest imprisonment rate (18.5%). With regard to use of local confinement, the Second District had the highest

rate (76.5%), and the Ninth Judicial District had the lowest rate (52.0%). A map of the judicial districts can be found in Appendix 4 (p. 90).

*Table 8. Incarceration Rates by Gender, Race/Ethnicity, and Judicial District, 2019*

	Total Number	Total Incarceration		Local Confinement		State Prison			
		Number	Rate (%)	Number	Rate (%)	Number	2019 Rate (%)	2015–19 5-Yr. Rate	
Male	13,937	12,889	92.5	9,081	65.2	3,808	27.3	27.8	
Female	3,398	2,965	87.3	2,619	77.1	346	10.2	11.4	
Race & Ethnicity	White	9,853	8,908	90.4	6,804	69.1	2,104	21.4	21.5
	Black	4,580	4,279	93.4	2,902	63.4	1,377	30.1	30.7
	American Indian	1,492	1,364	91.4	1,030	69.0	334	22.4	25.3
	Hispanic	903	831	92.0	599	66.3	232	25.7	27.9
	Asian	499	467	93.6	360	72.1	107	21.4	22.7
	Other/Unknown	8	5	62.5	5	62.5	0	0.0	12.2
	Judicial District	First	2,213	2,035	92.0	1,625	73.4	410	18.5
Second		1,902	1,878	98.7	1,455	76.5	423	22.2	25.4
Third		1,254	1,080	86.1	777	62.0	303	24.2	24.6
Fourth		3,551	3,206	90.3	2,261	63.7	945	26.6	27.8
Fifth		1,064	967	90.9	735	69.1	232	21.8	20.8
Sixth		732	643	87.8	472	64.5	171	23.5	21.8
Seventh		1,810	1,744	96.4	1,246	68.8	498	27.5	28.6
Eighth		522	501	96.0	357	68.4	144	27.6	27.8
Ninth		1,620	1,262	77.9	842	52.0	420	25.9	25.4
Tenth		2,667	2,538	95.2	1,930	72.4	608	22.8	22.3
<b>Total</b>	<b>17,335</b>	<b>15,854</b>	<b>91.5</b>	<b>11,700</b>	<b>67.5</b>	<b>4,154</b>	<b>24.0</b>	<b>24.6</b>	

Figure 8. Actual & Presumptive Incarceration Rates by Gender & Race/Ethnicity, 2019

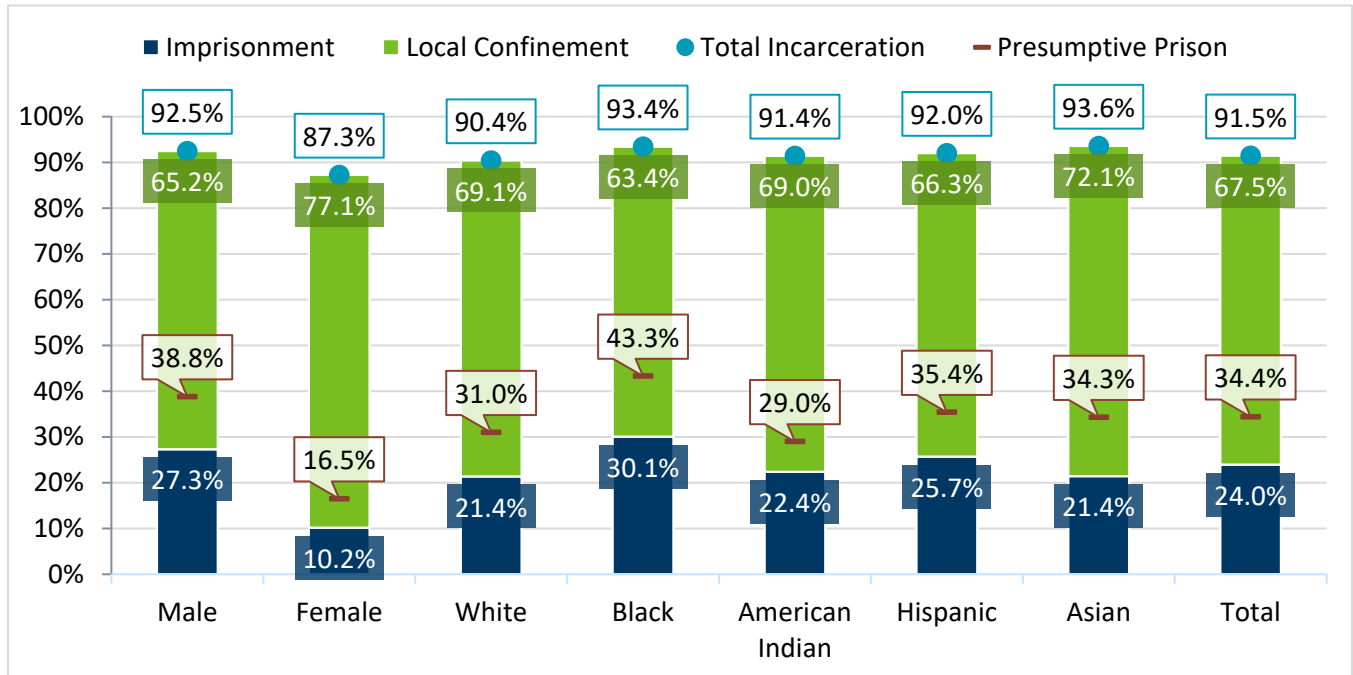
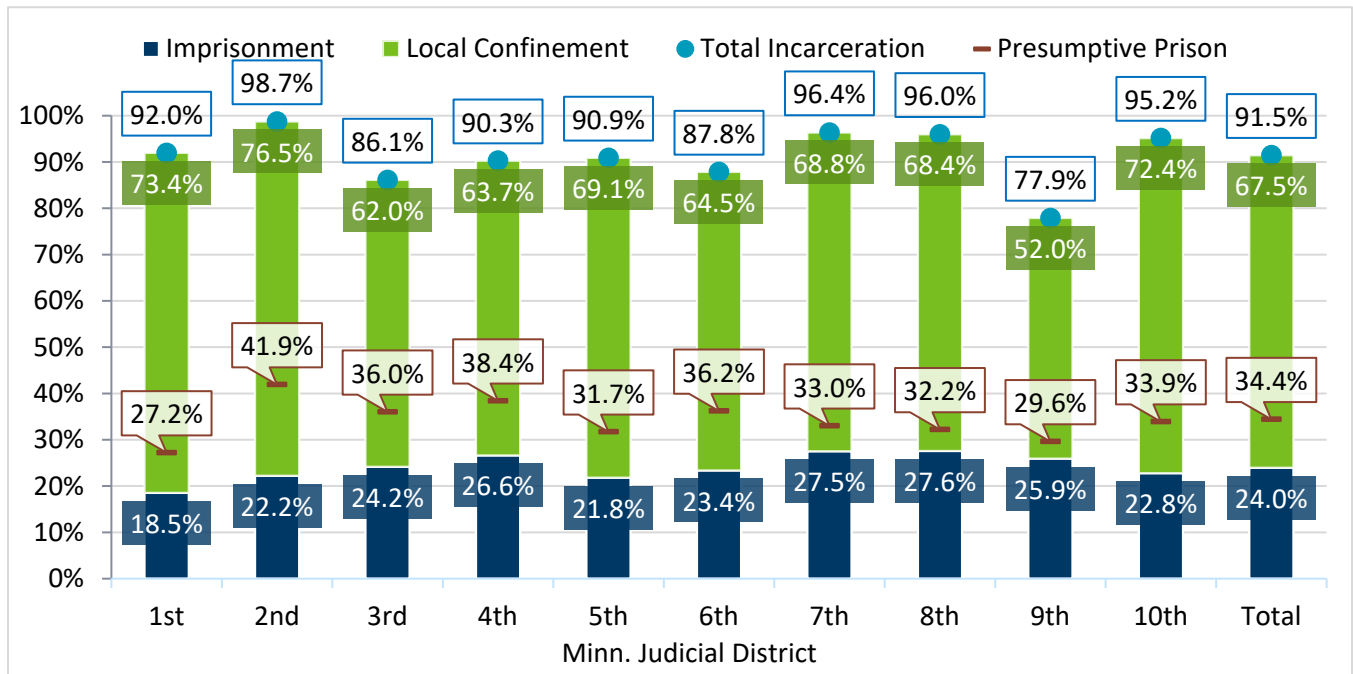


Figure 9. Actual & Presumptive Incarceration Rates by Judicial District, 2019



## Average Pronounced Sentences (Durations)

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### State Prison

Among executed prison sentences in 2019, the average pronounced prison duration was 48.4 months, a slight increase from 2018 (Figure 10, p. 54). The average varied by applicable Grid: 44 months for cases on the Standard Grid; 87 months for cases on the Sex Offender Grid;<sup>111</sup> and 42 months for cases on the Drug Offender Grid.

The average has fluctuated over time, but sentence lengths increased after 1989. From 1981 to 1989, the average was 37.5 months, increasing to 47.7 months from 1991<sup>112</sup> to 2000 and 46.2 months from 2001 to 2019. Numerous changes in sentencing practices and policies, as well as changes in the distribution of cases affected the average. Increases after 1989 were due to both the increased presumptive sentences adopted by the Commission in 1989<sup>113</sup> and, until recent years, an increase in the number of upward durational departures.

Fluctuations since 1989 appear to be further impacted by changes to presumptive sentences and changes in the distribution of cases across severity and criminal history. In addition, variations in aggravated and mitigated durational departure rates have contributed to changes in the length of sentences pronounced. In 2005, the Commission widened the ranges on the Standard Grid. In 2006, a separate Sex Offender Grid was adopted, giving higher presumptive sentences to repeat offenses and people with criminal history.

### Life Sentences

Eight people received life sentences in 2019, down from sixteen in 2018, but similar to seven in 2017. Of the eight life sentences, seven were for first-degree murder and one was for first-degree criminal sexual conduct. For four of those life sentences, no release will ever be possible: three because the conviction was premeditated first-degree murder, and one for first-degree criminal sexual conduct under egregious circumstances.<sup>114</sup> The four life sentences with possibility of release resulted from convictions of first-degree murder while committing a specified felony. Life sentences are excluded from the average pronounced prison sentences reported here.

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<sup>111</sup> In 2019, 33 cases (0.2%) were sentenced in which the offense was committed before August 1, 2005, some of which were sex offenses. The applicable pre-2005 Standard Grid was therefore used to determine the presumptive sentence. Twelve of these 33 cases received prison sentences with an average pronounced sentence of 109 months. This is higher than the average on the Standard Grid and Drug Offender Grid because 7 of the prison sentences were for first-degree criminal sexual conduct (average sentence of 143 months) and 1 pronounced sentence of 121 months for second-degree murder.

<sup>112</sup> 1990 data is not included because of a mixture of presumptive sentences.

<sup>113</sup> See “Changes to the Sentencing Grid Over Time – 1989,” [2019 Sentencing Practices: Annual Summary Statistics for Felony Cases](#), p. 4.

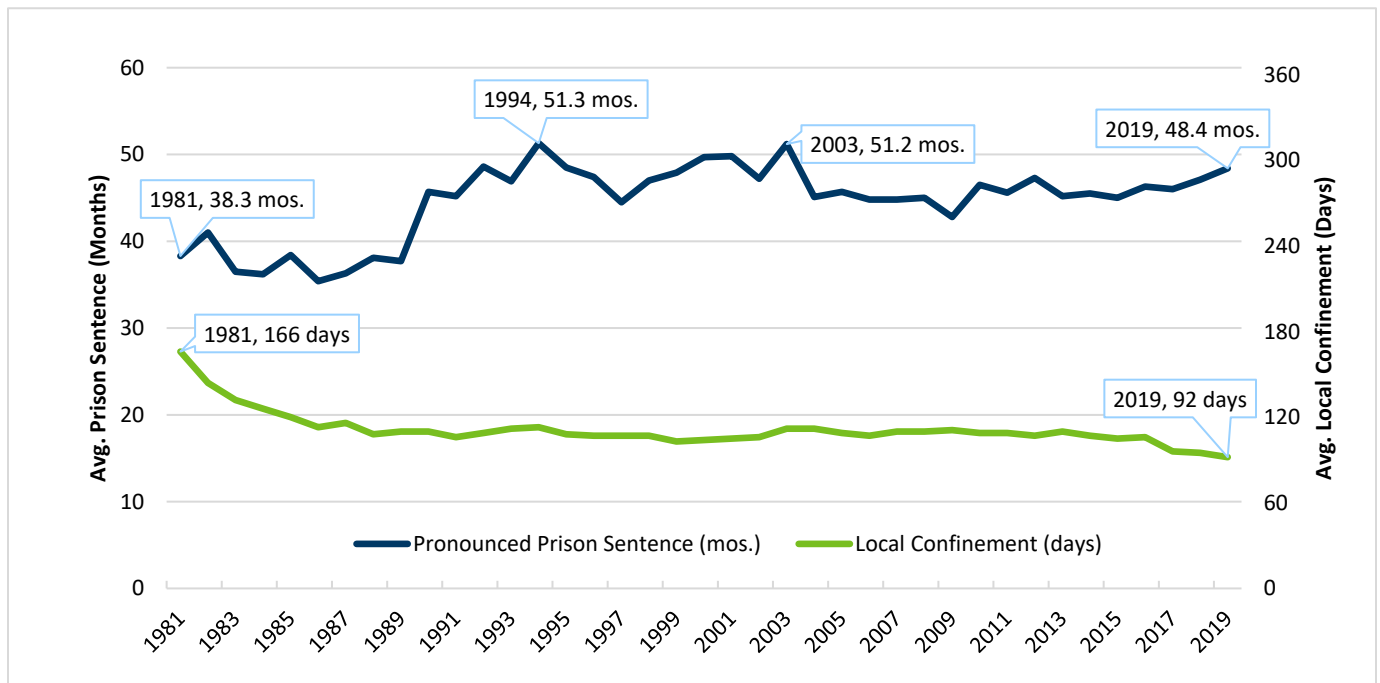
<sup>114</sup> Life imprisonment without possibility of release has been the mandatory sentence for premeditated murder and certain sex offenses since 2005. [2005 Minn. Laws ch. 136](#), art. 2, §§ 5 & 21, & art. 17, § 9.

## Local Confinement (i.e., County Jails, Local Correctional Facilities and Workhouses)

Although information is available in the monitoring system regarding the amount of local confinement a judge pronounces as a condition of probation, case data on the actual amount of time served are not. The average term of local confinement pronounced as a condition of probation does not always provide a complete picture of how much time people are spending in local confinement. For a variety of reasons, many will not serve the full amount of time pronounced by the judge. Some who have served time prior to sentencing may receive credit for this time off of the post-sentence time. For some, this credited time will constitute the entire period of local confinement. Others may be released to a treatment program.

The average amount of local confinement pronounced was 92 days in 2019, the lowest average on record. The average amount of local confinement was also less than 100 days in 2018 and 2017, and had remained in a fairly narrow range—between 103 and 113 days—from 1988 through 2016 (Figure 10, p. 54).

Figure 10. Average Pronounced Prison Sentences and Local Confinement, 1981–2019



## Departures from the Sentencing Guidelines

A “departure” is a pronounced sentence other than that recommended in the appropriate cell of the applicable Guidelines Grid. There are two types of departures – dispositional and durational – as further explained below. Since the presumptive sentence is based on “the typical case,” the appropriate use of departures by the courts when substantial and compelling circumstances exist can actually enhance proportionality by varying the sanction in an atypical case.

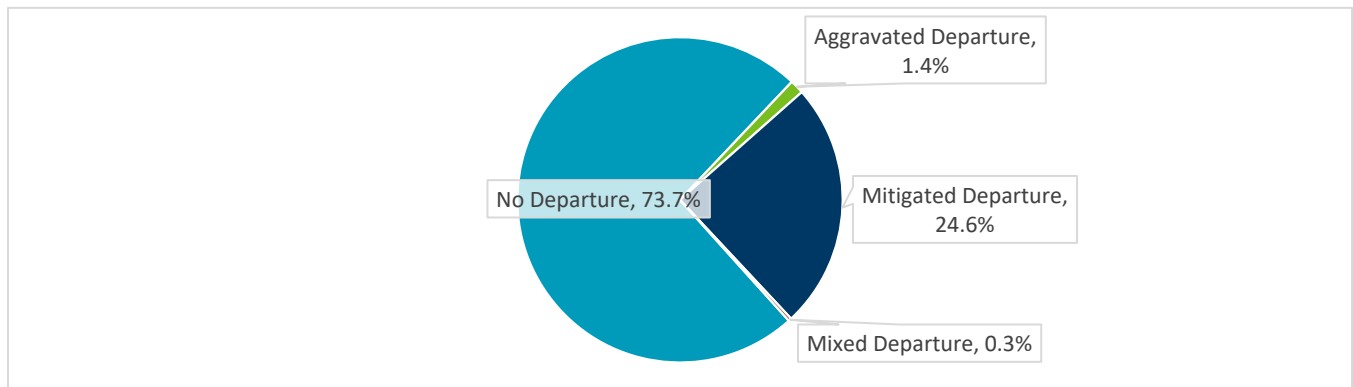
While the court ultimately makes the sentencing decision, most sentences pronounced by the court are based on judicial acceptance of plea agreements between prosecutors and defendants after victim input. Probation officers make recommendations to the courts regarding whether a departure from the presumptive sentence is appropriate, and prosecutors and defense attorneys commonly arrive at agreements regarding acceptable sentences for which an appeal will not be pursued. Prosecutors did not object to at least 61 percent of mitigated dispositional departures, nor to at least 74 percent of mitigated durational departures.<sup>115</sup>

When there is a departure from the presumptive sentence, the court is required to submit reasons for the departure to the Commission.<sup>116</sup> Along with reasons for departure, the court may supply information about the position of the prosecutor regarding the departure. In 2019, the Commission received departure reasons, information about the position of the prosecutor, or both, in 97 percent of departure cases, and 97 percent of felony convictions were settled without a trial. The Commission recognizes the need to balance the importance of plea agreements with the goals of the Guidelines. In the case of a plea agreement, the Commission asks courts to explain the underlying reasons for the plea agreement or for the court’s acceptance of it.<sup>117</sup>

### Total Departures

In 73.7 percent of cases in 2019, the sentence imposed was not a departure from the presumptive, Guidelines-recommended sentence (17,335 cases). In the remaining 26.3 percent of cases, there was some type of departure; i.e., aggravated, mitigated, or mixed<sup>118</sup> (Figure 11).

Figure 11. Total Departure Rates, All Cases, 2019



<sup>115</sup> See Figure 14 and Figure 16, “Total.”

<sup>116</sup> Minn. R. Crim. P. [27.03](#), subd. 4(C).

<sup>117</sup> See Minn. Sentencing Guidelines comment 2.D.104 (“Plea agreements are important to our criminal justice system because it is not possible to support a system where all cases go to trial. However, it is important to have balance in the criminal justice system where plea agreements are recognized as legitimate and necessary and the goals of the Guidelines are supported. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to make informed policy decisions or to ensure consistency, proportionality, and rationality in sentencing. Departures and their reasons highlight both the success and problems of the existing Guidelines. When a plea agreement involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain its reasons for accepting the negotiation.”).

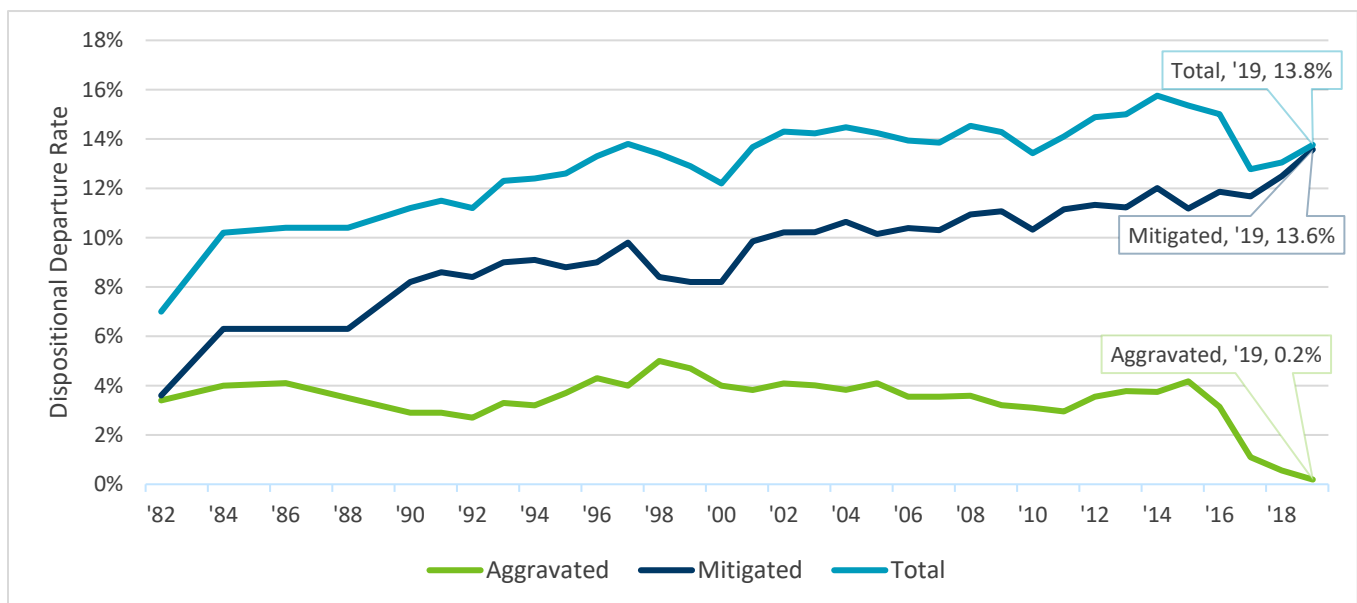
<sup>118</sup> A “mixed” departure is a mitigated dispositional departure with an aggravated durational departure, or vice-versa.

## Dispositional Departures

While Figure 11, above, reports both the dispositional and durational departure rates among all cases, this section examines only dispositional departures. A “dispositional departure” occurs when the court orders a disposition other than that recommended in the Guidelines. There are two types: aggravated and mitigated. An aggravated dispositional departure occurs when the Guidelines recommend a stayed sentence but the court pronounces an executed prison sentence. A mitigated dispositional departure occurs when the Guidelines recommend an executed prison sentence but the court pronounces a stayed sentence.

In 2,386 cases (14%) in 2019, the sentence was a dispositional departure from the Guidelines. In 33 cases (0.2%), the sentence was to prison when the Guidelines recommended probation (“aggravated dispositional departure”). In 2,353 cases (13.6%), the sentence was to probation when the Guidelines recommended prison (“mitigated dispositional departure”). The majority of the increase in the total departure rate since 1981 has resulted from increases in the mitigated dispositional departure rate (Figure 12, p. 56).

Figure 12. Dispositional Departure Rates, 1982, 1984, 1986, 1988, 1990–2019



## Mitigated Dispositional Departure Rates by Gender, Race/Ethnicity, and Judicial District

Table 9 (p. 57) lists dispositional departure rates by gender, race or ethnicity, and judicial district for presumptive commitment offenses. These rates are illustrated graphically in Figure 18 (p. 64) and Figure 19 (p. 65). The mitigated dispositional departure rate is higher for females (59.5%) than males (37.4%). When examined by racial or ethnic group, the mitigated dispositional departure rate ranged from a low of 32.6 percent for the American Indian group to a high of 43.3 percent for the Asian group and 43.1 percent for the white group. There was also variation in the rate by judicial district, ranging from a low of 29.8 percent in the Eighth Judicial District (includes west-central counties) to a high of 50.9 percent in the Second Judicial District (Ramsey

County). This is a larger variation than seen in 2018, where the range by judicial district was 32.3 to 48.3 percent.

When reviewing Table 9, note the observed variations may be partly explained by regional differences in case volume, charging practices, and plea agreement practices, as well as differences in the types of offenses sentenced, criminal history scores of offenders across racial groups or across regions, and available local correctional resources. (See Appendix 4 on page 90 for a map of Minnesota’s ten judicial districts.)

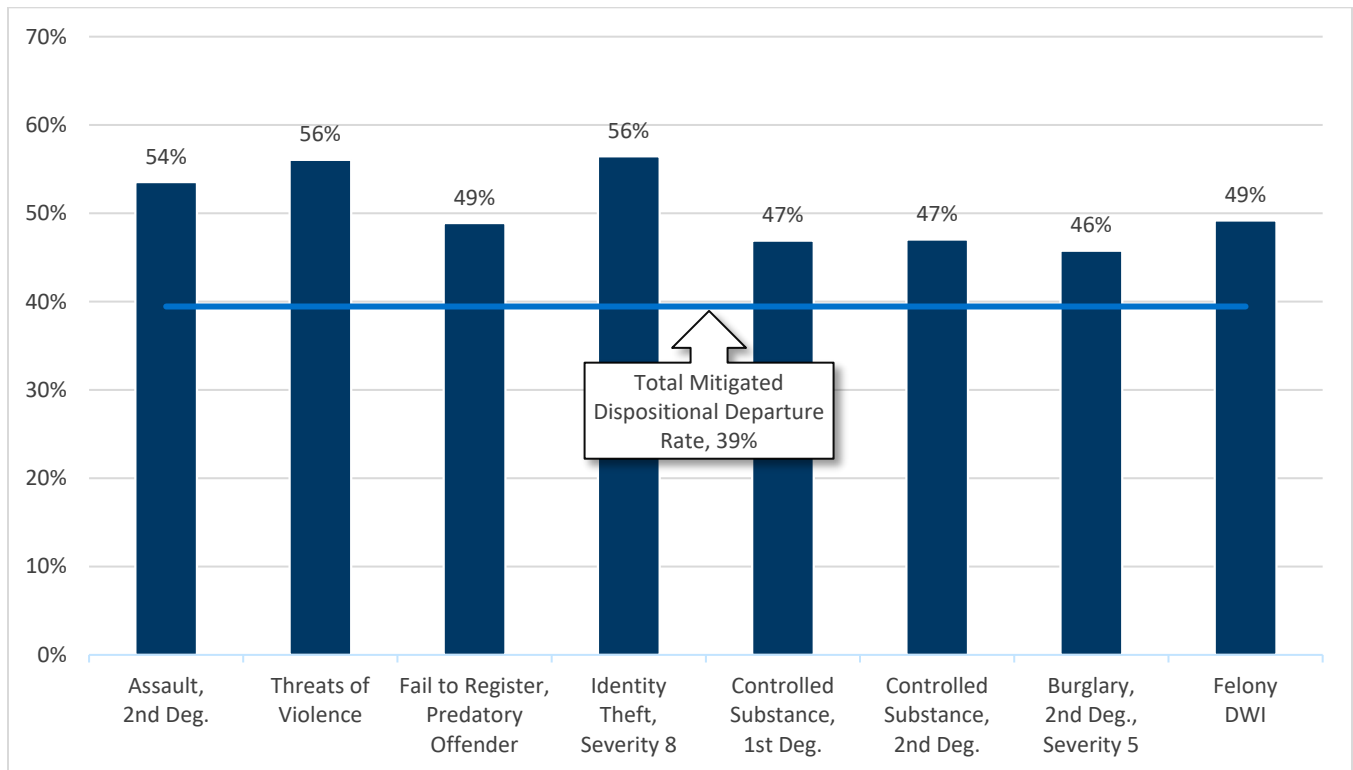
*Table 9. Dispositional Departures by Presumptive Disposition, by Gender, Race/Ethnicity, & Judicial District, 2019*

		Total Number	Presumptive Stays			Presumptive Commitments			
			Total	Aggravated Dispositional Departure		Total	Mitigated Dispositional Departure		
				Number	Rate (%)		Number	2019 Rate (%)	2015–19 5-Yr. Rate
	Male	13,937	8,532	22	0.3	5,405	2,020	37.4	34.7
	Female	3,398	2,838	11	0.4	560	333	59.5	55.3
Race/Ethnicity	White	9,853	6,794	23	0.3	3,059	1,317	43.1	39.8
	Black	4,580	2,597	3	0.1	1,983	703	35.5	34.0
	American Indian	1,492	1,060	5	0.5	432	151	32.6	30.2
	Hispanic	903	583	2	0.3	320	118	36.9	33.0
	Asian	499	328	0	0.0	171	74	43.3	38.8
	Other/Unknown	8	8	0	---	0	---	---	66.7
Judicial District	First	2,213	1,610	4	0.2	603	246	40.8	40.1
	Second	1,902	1,106	1	0.1	796	405	50.9	41.1
	Third	1,254	803	4	0.5	451	195	43.2	39.7
	Fourth	3,551	2,187	3	0.1	1,364	471	34.5	34.0
	Fifth	1,064	727	4	0.6	337	147	43.6	43.3
	Sixth	732	467	1	0.2	265	118	44.5	44.2
	Seventh	1,810	1,212	6	0.5	598	185	30.9	28.6
	Eighth	522	354	0	0.0	168	50	29.8	28.8
	Ninth	1,620	1,141	8	0.7	479	159	33.2	32.7
	Tenth	2,667	1,763	2	0.1	904	377	41.7	37.7
	<b>Total</b>	<b>17,335</b>	<b>11,370</b>	<b>33</b>	<b>0.3</b>	<b>5,965</b>	<b>2,353</b>	<b>39.4</b>	<b>36.7</b>

## Mitigated Dispositional Departure Rate by Offense Type

Dispositional departure rates vary for the type of offense. Figure 13 (p. 58) displays the highest rates of mitigated dispositional departure compared to the total rate of 39 percent. The selected offenses were those with 50 or more presumptive commitment cases and a mitigated dispositional departure rate of 45 percent or more.

Figure 13. Mitigated Dispositional Departure Rates for Selected Offenses Compared to Total Rate, 2019



Note: Offenses were selected based on criteria that there were 50 or more presumptive commitment cases and the mitigated dispositional departure rate was 45 percent or more.

Two of the offenses highlighted in Figure 13, assault in the second degree and failure to register as a predatory offender, have mandatory minimum sentences specified in statute, with provisions allowing for departure from those mandatory minimums.

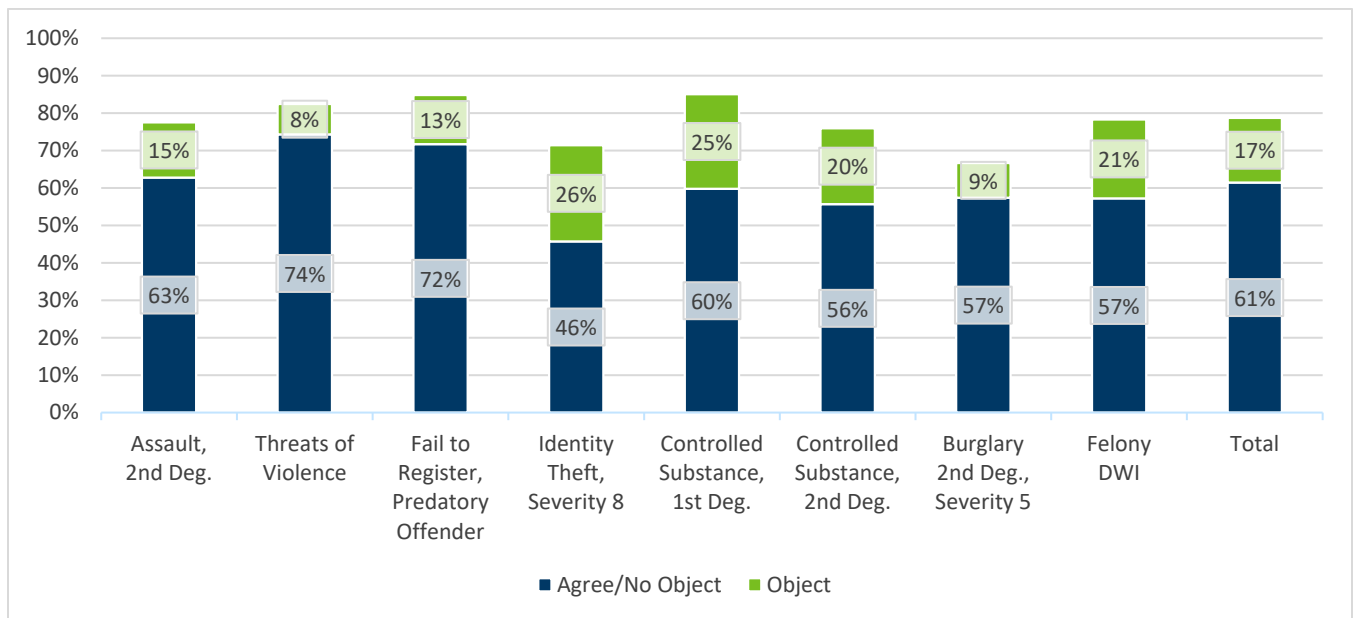
Assault in the second degree, by definition, involves the use of a dangerous weapon and therefore carries a mandatory minimum prison sentence (Minn. Stat. § [609.11](#), subs. 4, 5, and 9). The second-degree assault statute proscribes a broad range of misbehavior: Injury to, or physical contact with, the victim may or may not occur, and the type of dangerous weapon involved can vary widely, from a pool cue to a knife to a firearm. Circumstances surrounding the offense can also vary significantly, from barroom brawls to unprovoked confrontations. The mandatory minimum statute specifically permits the court to sentence without regard to the mandatory minimum, provided that substantial and compelling reasons are present (Minn. Stat. § [609.11](#),

subd. 8). It is perhaps unsurprising to find many departures in the sentencing of a crime that can be committed in many different ways.

Failure to register as a predatory sex offender also has a statutory mandatory minimum sentence, accompanied by a statutory provision that allows for sentencing without regard to the mandatory minimum (Minn. Stat. § 243.166, subd. 5(d)).

In 61.5 percent of the mitigated dispositional departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In 17 percent of these cases, the court stated that the prosecutor objected to the departure (Figure 14, “Total”). The court did not supply information on the prosecutor’s position in 21 percent of these departures. Prosecutor agreement can vary by offense (Figure 14). In all offense categories, amenability to probation and amenability to treatment were the most frequently cited substantial and compelling reasons for departure recorded.

Figure 14. Court-Cited Position of Prosecutor for Mitigated Dispositional Departures, Selected Offenses, 2019



Notes: Departure reports do not always include information on the prosecutor’s position, which is why the columns do not add up to 100% for each offense. Offenses were selected based on criteria that there were 50 or more presumptive commitment cases and the mitigated dispositional departure rate was 45 percent or more. “Total” refers to the total 2,353 cases receiving mitigated dispositional departures.

### Durational Departures

A “durational departure” occurs when the court orders a sentence with a duration that is other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid. There are two types of durational departures: aggravated durational departures and mitigated durational departures. An aggravated durational departure occurs when the court pronounces a duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid. A mitigated durational departure occurs

when the court pronounces a sentence that is more than 15 percent lower than the fixed duration displayed in the appropriate cell on the applicable Grid.

From 2018 to 2019, the mitigated durational departure rate fell from 22.8 percent to 20.3 percent, the lowest rate since the mid-1990s. The aggravated durational departure rate rose, from 2.7 percent to 2.9 percent. The trend in lower aggravated durational departure rates since the mid-2000s likely reflects the impact of increased presumptive sentences over the past years and issues related to the U.S. Supreme Court ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), which required a jury to find all facts—other than the fact of a prior conviction or those facts agreed to by the defendant—used to enhance a sentence under mandatory sentencing guidelines.<sup>119</sup>

In response to the *Blakely* decision, the 2005 Legislature widened the ranges on the Standard Grid to 15 percent below and 20 percent above the presumptive fixed sentenced, within which the court may sentence without departure. In 2006, a Sex Offender Grid was adopted. The Sex Offender Grid introduced higher presumptive sentences for repeat offenses and those with criminal history.<sup>120</sup>

### Durational Departure Rates by Gender, Race/Ethnicity and Judicial District

Table 10 (p. 60) lists durational departure rates for executed prison sentences by gender, race or ethnicity, and Minnesota Judicial District. These rates are illustrated graphically in Figure 18 (p. 64) and Figure 19 (p. 65). The mitigated durational departure rate for males sentenced in 2019 was slightly higher than for females (20% vs. 19%). When the departure rate is examined by racial or ethnic group, the rate varies from a low of 15.4 percent for the white group to a high of 28.0 percent for the black group. There is also considerable variation in mitigated durational departure rates by Minnesota Judicial District, ranging from a low of 3.5 percent in the Eighth Judicial District to a high of 41.1 percent in the Second Judicial District.

When reviewing the information in Table 10, it is important to note that the observed variations may be partly explained by regional differences in case volume, charging practices, and plea agreement practices, as well as differences in the types of offenses sentenced and criminal history scores of offenders across racial groups or across regions. A map of Minnesota’s ten judicial districts can be found in Appendix 4 (p. 90).

Table 10. Durational Departures, Executed Prison Sentences by Gender, Race/Ethnicity, & Judicial District, 2019

		Number Executed Prison	Total Durational Departure Rate (%)	Durational Departures, Executed Prison Sentences Only						
				No Departure		Aggravated		Mitigated		
				Number	Rate	Number	Rate	Number	2019 Rate	2015–19 5-Yr. Rate
	Male	3,808	23.3	2,922	76.7	108	2.8	778	20.4	23.0
	Female	346	22.3	269	77.7	11	3.2	66	19.1	20.0

<sup>119</sup> The Minnesota Supreme Court determined that *Blakely’s* jury requirements applied to aggravated departures under the Sentencing Guidelines. *State v. Shattuck*, 689 N.W.2d 785 (Minn. 2004), *modified on reh’g*, 704 N.W.2d 131 (Minn. 2005).

<sup>120</sup> For a deeper examination of the effect of the *Blakely* decision on sentencing practices, see the MSGC special report: “Impact of *Blakely* and Expanded Ranges on Sentencing Grid,” at <http://mn.gov/sentencing-guidelines/reports>.

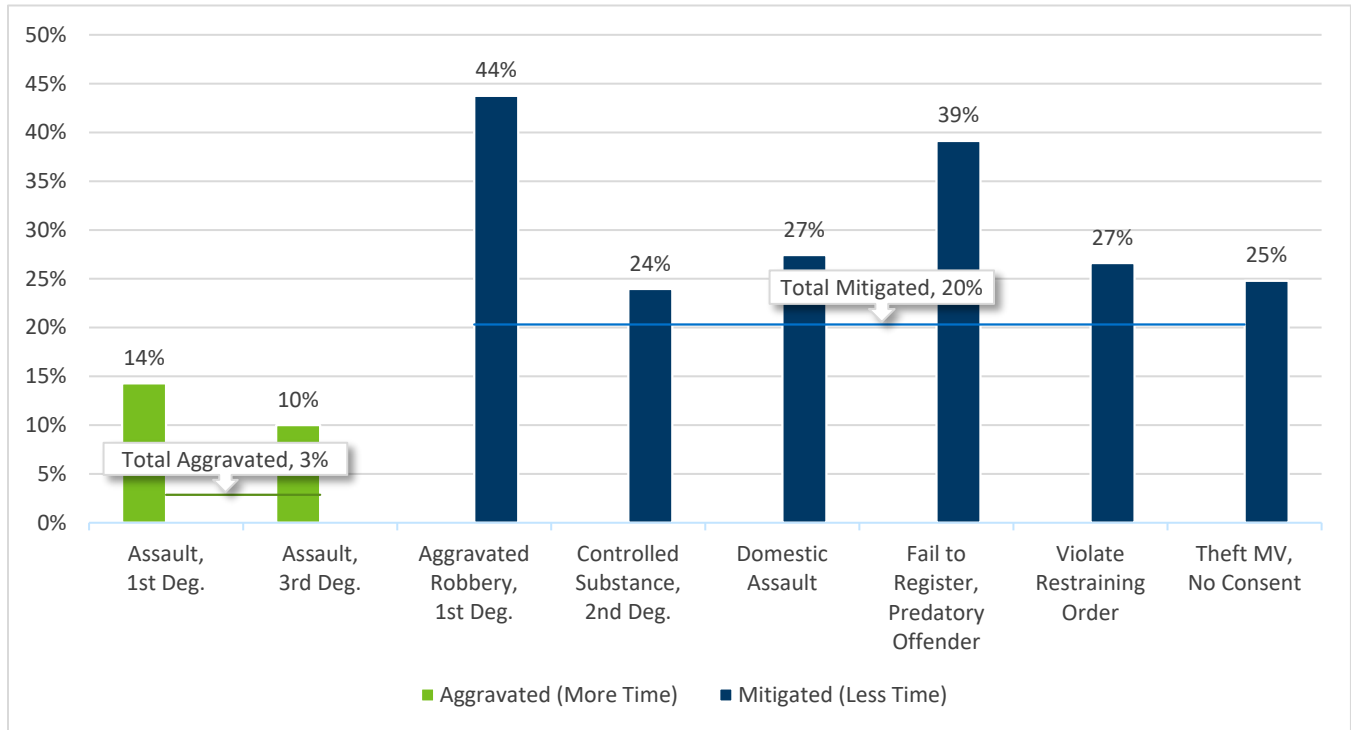
		Number Executed Prison	Total Durational Departure Rate (%)	Durational Departures, Executed Prison Sentences Only						
				No Departure		Aggravated		Mitigated		
				Number	Rate	Number	Rate	Number	2019 Rate	2015–19 5-Yr. Rate
Race/Ethnicity	White	2,104	18.3	1,720	81.7	59	2.8	325	15.4	18.2
	Black	1,377	30.9	952	69.1	40	2.9	385	28.0	31.6
	American Indian	334	21.3	263	78.7	9	2.7	62	18.6	17.1
	Hispanic	232	25.0	174	75.0	8	3.4	50	21.6	18.8
	Asian	107	23.4	82	76.6	3	2.8	22	20.6	28.0
	Other/Unknown	0	---	---	---	---	---	---	---	---
Judicial District	First	410	22.7	317	77.3	19	4.6	74	18.0	17.6
	Second	423	42.8	242	57.2	7	1.7	174	41.1	37.4
	Third	303	13.2	263	86.8	10	3.3	30	9.9	8.6
	Fourth	945	40.5	562	59.5	43	4.6	340	36.0	42.6
	Fifth	232	17.7	191	82.3	3	1.3	38	16.4	18.8
	Sixth	171	11.1	152	88.9	4	2.3	15	8.8	12.3
	Seventh	498	16.7	415	83.3	14	2.8	69	13.9	16.5
	Eighth	144	6.3	135	93.8	4	2.8	5	3.5	4.5
	Ninth	420	11.2	373	88.8	7	1.7	40	9.5	10.7
	Tenth	608	11.0	541	89.0	8	1.3	59	9.7	11.6
	<b>Total</b>	<b>4,154</b>	<b>23.2</b>	<b>3,191</b>	<b>76.8</b>	<b>119</b>	<b>2.9</b>	<b>844</b>	<b>20.3</b>	<b>22.7</b>

As with dispositional departures, it may be helpful to look at offenses with higher than average durational departure rates. Figure 15 (p. 62) displays offenses with the highest durational departure rates among offenses with at least 40 executed prison cases. Included in this graph are offenses with a mitigated durational departure rate of 24 percent or more; or an aggravated durational departure rate of seven percent or more.

Aggravated durational departure rates were highest for assault in the first degree and assault in the third degree. Mitigated durational departure rates were highest for aggravated robbery in the first degree, controlled substance crime in the second degree, felony domestic assault, failure to register as a predatory offender, violations of restraining orders, and theft of motor vehicle with no consent.

For both mitigated and aggravated durational departures, plea agreement or recommendation of the prosecutor were the most frequently cited reasons for departure for all offense types.

Figure 15. Durational Departure Rates for Cases Receiving Executed Prison Sentences, Selected Offenses, 2019



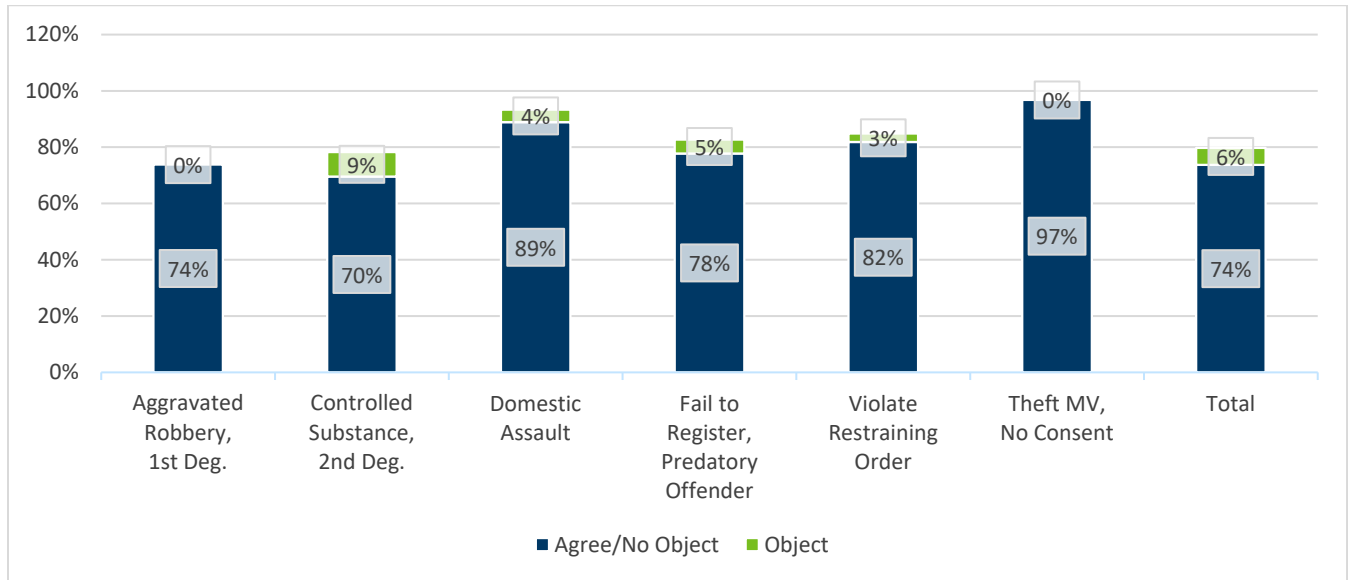
Note: Offenses were selected based on criteria that there were 40 or more executed prison cases and the aggravated durational departure rate was 7 percent or more or the mitigated durational departure rate was 24 percent or more.

In 74 percent of the mitigated durational departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In six percent of these cases, the court stated that the prosecutor objected to the departure (Figure 16, p. 63, “Total”). In 20 percent of the mitigated durational departures, the court did not provide information on the position of the prosecutor. These rates varied somewhat by offense (Figure 16).

In 59 percent of the aggravated durational departures, the court stated that the prosecutor agreed to the departure, recommended the departure, or did not object to the departure. In 41 percent of the aggravated durational departures, the court did not provide information on the position of the prosecutor. There were no cases in which the court stated that the prosecutor objected to the aggravated durational departure (Figure 17, p. 63).

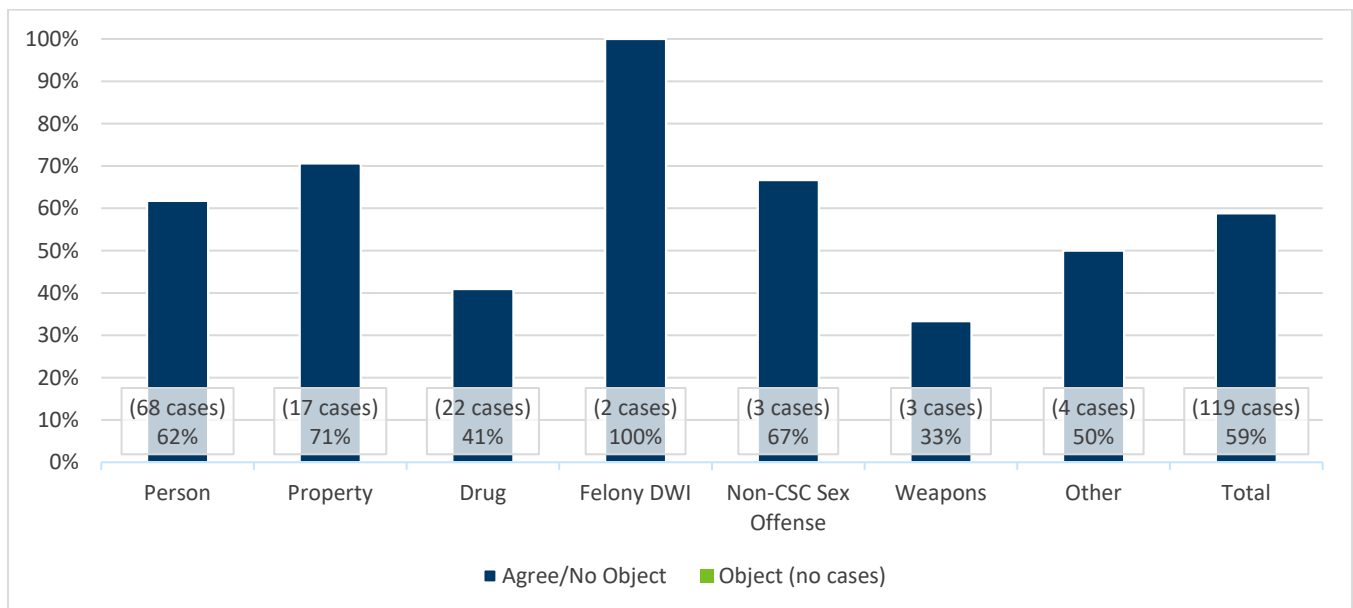
The discussion on page 58 regarding mandatory minimums applies here: The mandatory minimum provisions applicable to one of the high-durational-departure crimes—failure to register as a predatory offender—allow for sentencing without regard to the mandatory minimum prison term (Minn. Stat. § 243.166, subd. 5(d)). This fact, together with the wide variety of ways in which the crime can be committed, may lend this offense to the application of discretion in prosecutorial or judicial sentencing practice.

Figure 16. Court-Cited Position of Prosecutor, Mitigated Durational Departures, Executed Prison Sentences, Selected Offenses, 2019



Notes: Departure reports do not always include information on the prosecutor’s position, which is why the columns do not add up to 100 percent for each offense type. Offenses were selected based on criteria that there were 40 or more executed prison cases and the mitigated durational departure rate was 24 percent or more. “Total” refers to the total 844 cases receiving mitigated durational departures.

Figure 17. Court-Cited Position of Prosecutor, Aggravated Durational Departures, Executed Prison Sentences by Offense Type, 2019



Notes: Departure reports do not always include information on the prosecutor’s position, which is why the columns do not add up to 100 percent for each offense type. In no case did the court record a prosecutorial objection to an aggravated durational departure.

## Mitigated Departures: Gender, Race/Ethnicity, & Judicial Districts

Previous sections discussed variations—by gender, race or ethnicity, and judicial district—in mitigated dispositional departure rates for presumptive commitment offenses (p. 57) and in mitigated durational departure rates for executed prison sentences (p. 60). Figure 18 and Figure 19, below, present a combined illustration of these variations. Among racial or ethnic groups whose members were sentenced in 2019 (Figure 18)—

- The white group had a higher mitigated dispositional departure rate than the total rate, but a lower durational departure rate;
- The black and Hispanic groups had higher mitigated durational departure rates than the total rate, but lower dispositional departure rates;
- The American Indian group had a lower mitigated durational and dispositional departure rates than the total rate; and
- The Asian group had higher mitigated durational and dispositional departure rates than the total rate.

Recall from Figure 6 (p. 47) that racial or ethnic composition varies by Minnesota judicial district. When reviewing Figure 18, note that the observed variations may be partly explained by regional differences in charging, plea agreement, and sentencing practices, as well as by regional differences in case volume, the types of offenses sentenced, criminal history scores across racial groups, and available local correctional resources. (See Appendix 4, p. 90, for a map of Minnesota’s ten judicial districts.)

Figure 18. Mitigated Departure Rates by Gender & Race/Ethnicity, 2019

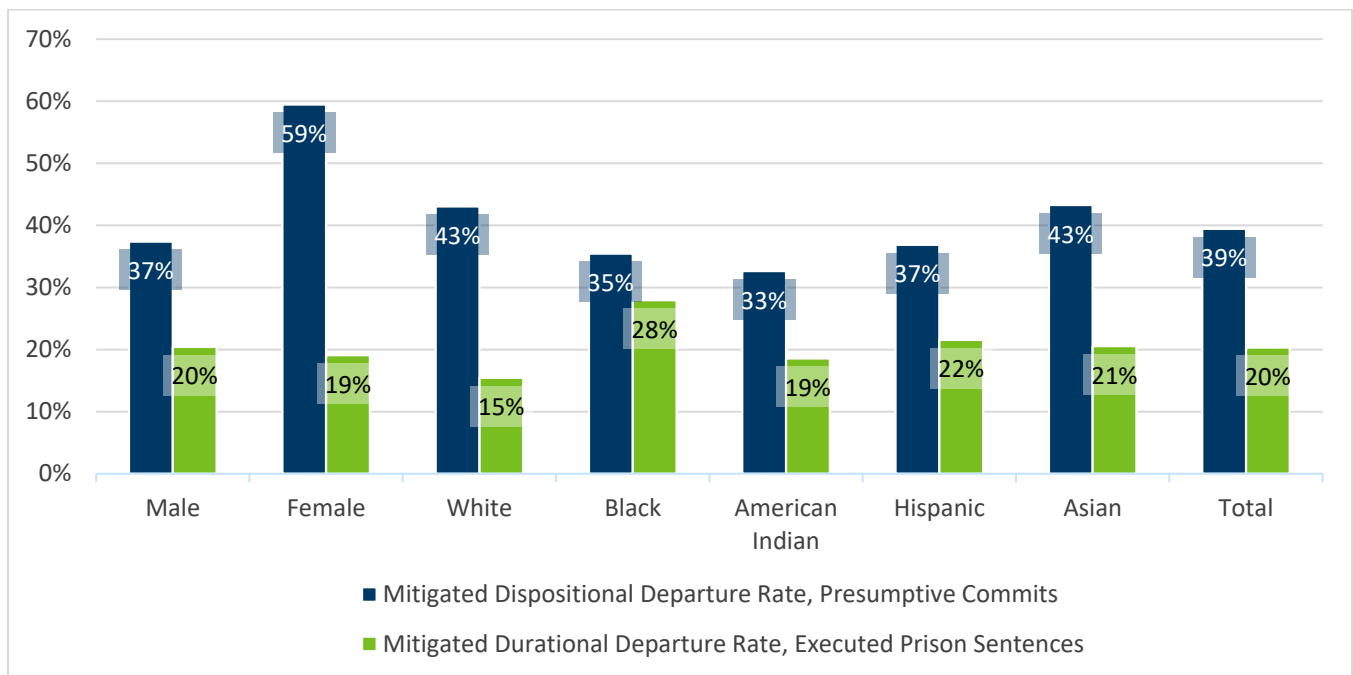
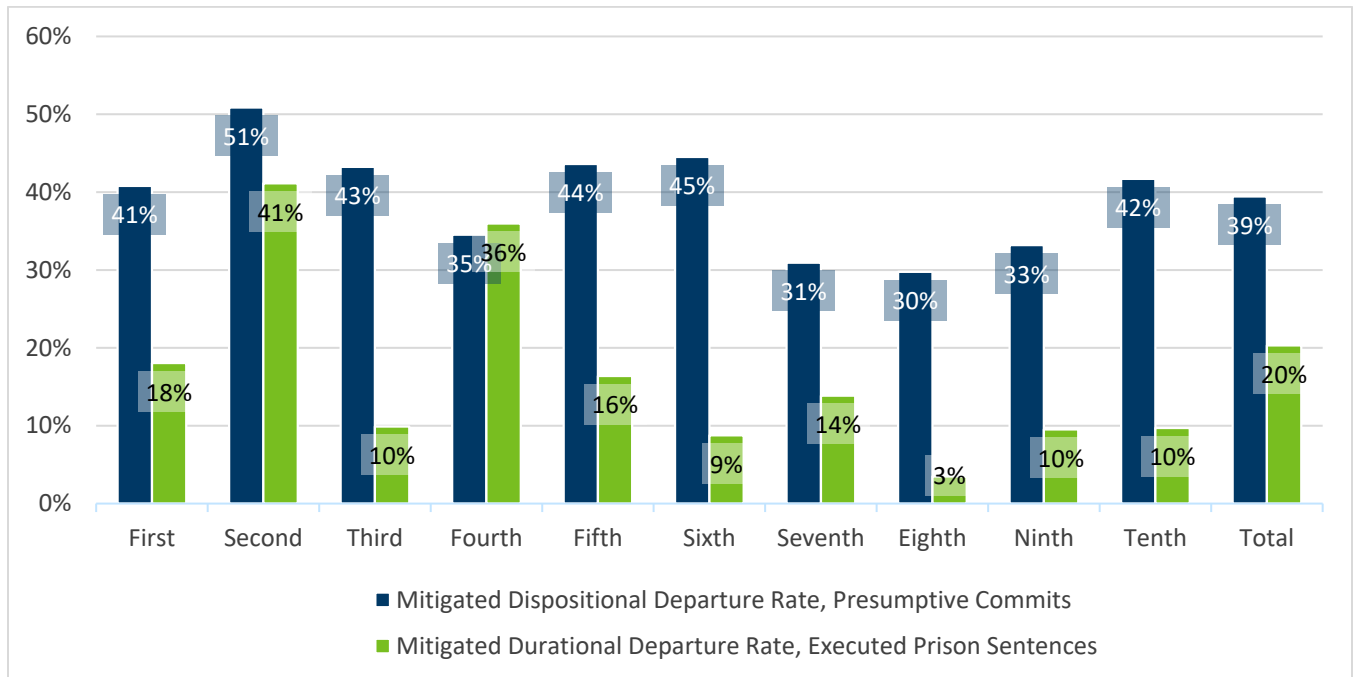


Figure 19. Mitigated Departure Rates by Minnesota Judicial District, 2019



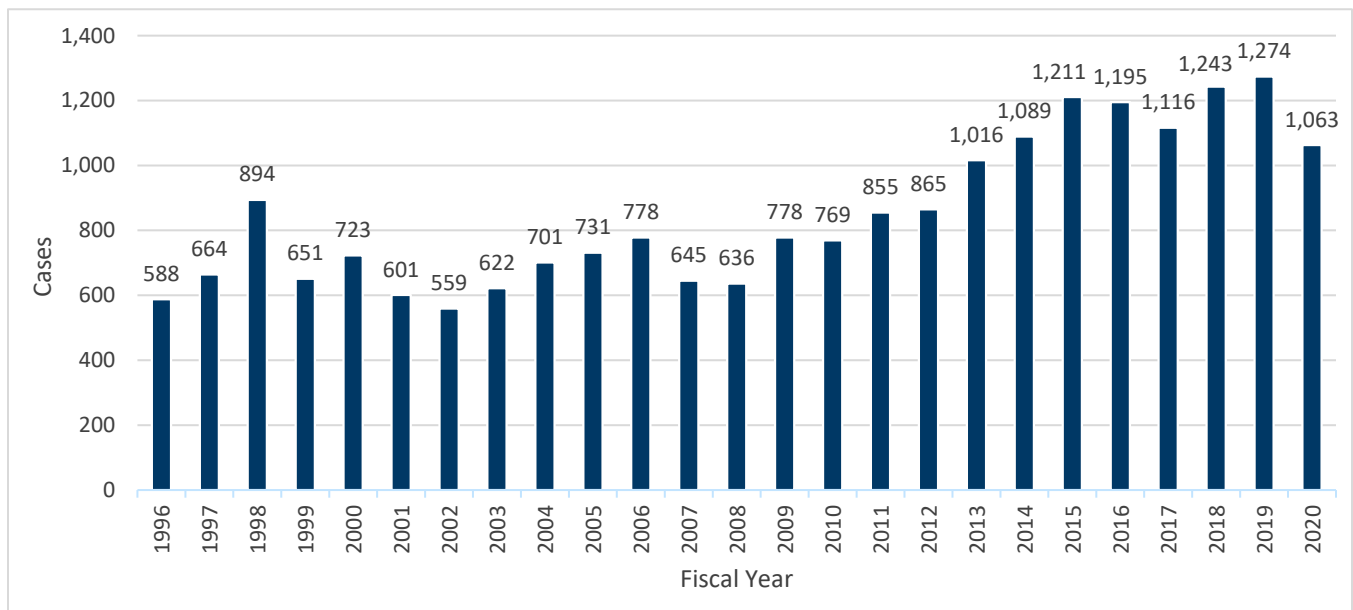
# County Attorney Firearms Reports

Current law requires all county attorneys in Minnesota, by July 1 of each year, to submit to the Commission their data regarding felony cases in which defendants allegedly possessed or used a firearm and committed offenses listed in [Minn. Stat. § 609.11](#), subdivision 9.<sup>121</sup> The Commission is required to include in its annual Report to the Legislature a summary and analysis of the reports received. Memoranda describing the mandate, along with report forms, are distributed by MSGC staff to county attorneys. Although MSGC staff clarifies inconsistencies in the summary data, the information received from the county attorneys is reported directly as provided.

## Cases Allegedly Involving a Firearm, 1996 to 2020

Since the mandate began in 1996, the average number of annual cases allegedly involving firearms statewide has been 851. Between July 1, 2019 and June 30, 2020 (FY 2020), county attorneys report disposing of 1,063 cases allegedly involving a firearm (Figure 20). This was a 17 percent decrease from FY 2019, which was the largest number of such cases on record. In early August 2020, soon after the FY 2020 reporting period ended, the Minnesota Judicial Branch reported higher than usual pending felony cases (by about 6,000 cases) due to the COVID-19 Health Pandemic. This backlog may have affected county attorney firearms reporting.<sup>122</sup>

Figure 20. Cases Allegedly Involving a Firearm, FY 1996 to FY 2020



<sup>121</sup> The statute provides a mandatory minimum sentence of 36 months for the first conviction of specified offenses, and 60 months for a second. Designated offenses include murder in the first, second, or third degree; assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; first-degree or aggravated first-degree witness tampering; some criminal sexual conduct offenses; escape from custody; arson in the first, second, or third degree; felony drive-by shooting; aggravated harassment and stalking; felon in possession of a firearm; and felony controlled substance offenses.

<sup>122</sup> G. Hoheisel (personal communication with MSGC staff, August 3, 2020), discussing pending felony cases.

## Cases Charged, 2020

Of the 1,063 cases in which defendants allegedly possessed or used firearms, prosecutors charged 922 cases (87%), while 141 cases (13%) were not charged (Figure 21, “Charged” and “Not Charged”).

## Case Outcomes, 2020

Of the 922 cases charged, 637 (69%) were convicted of offenses designated in [Minn. Stat. § 609.11](#); 111 (12%) were convicted of non-designated offenses (not covered by the mandatory minimum (e.g., threats of violence under [Minn. Stat. § 609.713](#)); 104 (11%) had all charges dismissed; 12 (1%) were acquitted on all charges; and 58 (6%) were “other” cases, including federal prosecutions and stays of adjudication (Figure 21).

## Cases Convicted of Designated Offense & Firearm Established on the Record, 2020

In 597 (94%) of the 637 cases in which there was a conviction for a designated offense, use or possession of a firearm was established on the record (Figure 21, “Firearm Established”). The fact-finder, i.e., the judge or jury, must establish whether the defendant or an accomplice used or possessed a firearm in the commission of the offense at the time of conviction. Minn. Stat. § 609.11, subdivision 7.

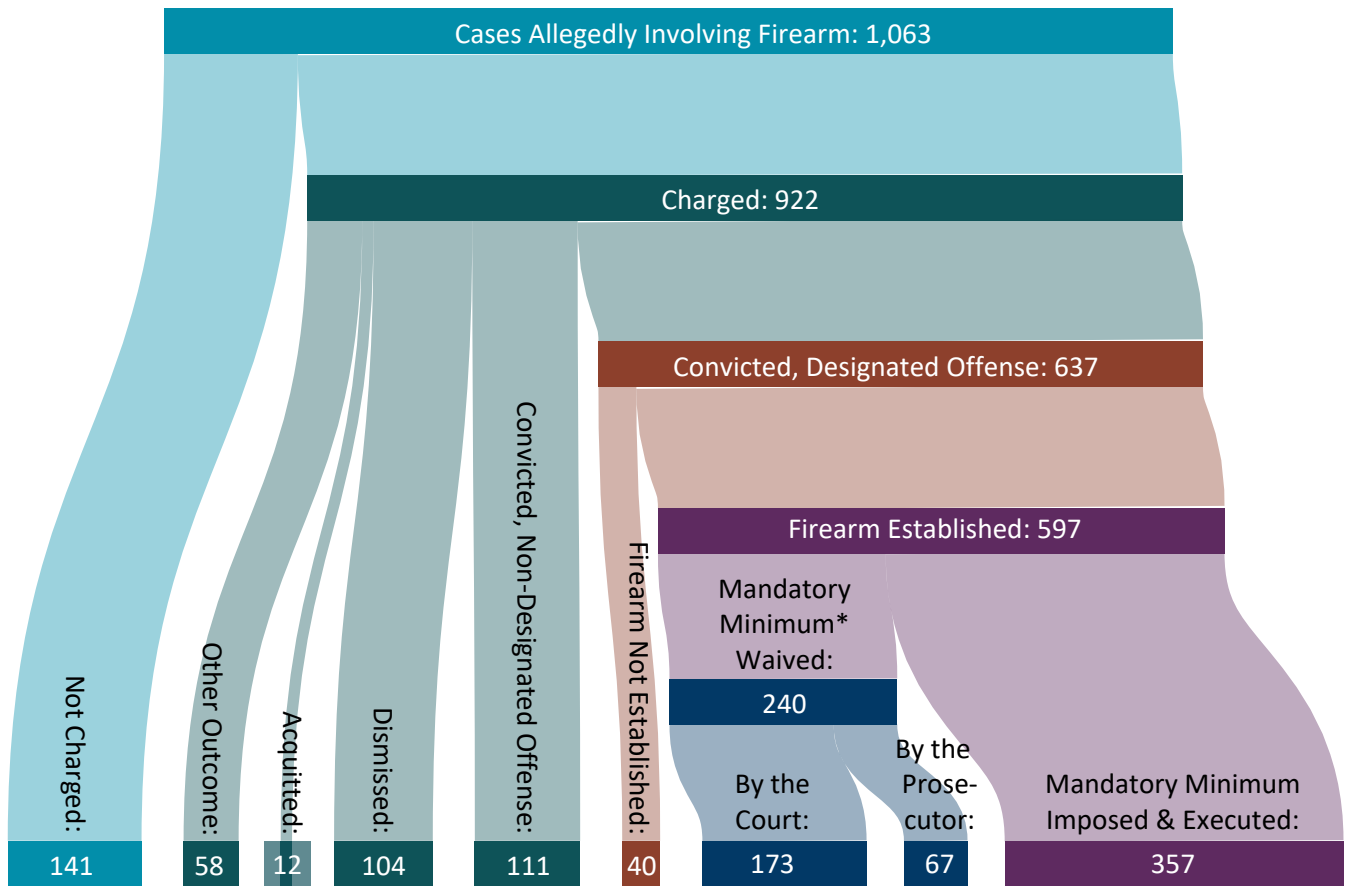
In the cases in which the firearm was established on the record, 357 offenders (60%)<sup>123</sup> were sentenced to the mandatory minimum prison term (Figure 21, “Mandatory Minimum Imposed & Executed”). The statute specifically allows the prosecutor to file a motion to have the defendant sentenced without regard to the mandatory minimum. The prosecutor must provide a statement as to the reasons for the motion. If the court finds substantial mitigating factors, with or without a motion by the prosecutor, the defendant may be sentenced without regard to the mandatory minimum. Minn. Stat. § 609.11, subdivision 8.<sup>124</sup>

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<sup>123</sup> County attorneys’ data for fiscal year 2020 (ending June 30, 2020). According to MSGC monitoring data from calendar year 2019, of those offenders whose sentencing worksheets reflected the use or possession of a firearm or prohibited persons from possessing a firearm (excluding ammunition-only cases) requiring a mandatory prison sentence under Minn. Stat. § 609.11, 50 percent (439 offenders) received both the mandatory prison disposition and the mandatory minimum duration or longer. In addition, 10 percent (86 offenders) received the mandatory prison disposition, but less than the mandatory minimum duration.

<sup>124</sup> Although [Minn. Stat. § 609.11](#) uses the term “mandatory minimum” to describe the sentences it prescribes, the term includes cases in which the court, on the motion of the prosecutor or on its own motion, is statutorily permitted, when substantial and compelling reasons are present, to sentence a defendant without regard to those prescribed sentences. Minn. Stat. § 609.11, subd. 8(a); but see subd. 8(b) & 8(c) (the court is not permitted to sentence a defendant without regard to the mandatory minimum if the defendant was previously convicted of a designated offense in which the defendant used or possessed a firearm or other dangerous weapon, nor if the defendant or an accomplice used or personally possessed a firearm in the commission of a first- or second-degree sale of a controlled substance).

Figure 21. Disposition of Cases, Alleged Designated Offenses Involving Firearms, as Reported by County Attorneys, Cases Disposed of Between July 1, 2019, and June 30, 2020



\*For an explanation of the term "mandatory minimum," see footnote 124.

Table 11. County Attorney Firearms Reports on Criminal Cases Allegedly Involving a Firearm, by Minn. County, Cases Disposed of Between July 1, 2019, and June 30, 2020

County	Cases Allegedly Involving Firearm	Charged	Dismissed	Convicted, Non-Designated Offense	Convicted, Designated Offense	Firearm Established	Mandatory Minimum Imposed and Executed
Aitkin	8	8	0	5	3	2	1
Anoka	48	45	8	13	23	23	12
Becker	4	4	0	0	4	4	4
Beltrami	76	17	1	3	13	13	9
Benton	14	11	0	2	7	7	7
Big Stone	0	0	0	0	0	0	0
Blue Earth	18	18	3	1	12	10	8
Brown	0	0	0	0	0	0	0
Carlton	2	2	1	0	1	1	0
Carver	2	2	0	0	0	0	0
Cass	22	15	2	5	8	6	4
Chippewa	2	2	0	0	1	0	0
Chisago	1	1	0	0	1	1	1
Clay	5	4	0	2	2	2	2
Clearwater	1	1	1	0	0	0	0
Cook	1	1	0	1	0	0	0
Cottonwood	1	1	0	0	0	0	0
Crow Wing	10	8	7	0	1	0	0
Dakota	40	40	2	6	29	28	15
Dodge	0	0	0	0	0	0	0
Douglas	5	5	2	0	3	3	2
Faribault	1	1	0	0	1	0	0
Fillmore	1	1	0	0	1	1	1
Freeborn	0	0	0	0	0	0	0
Goodhue	13	13	1	5	4	4	1
Grant	0	0	0	0	0	0	0
Hennepin	351	351	30	14	272	272	166
Houston	1	1	0	0	1	1	1
Hubbard	13	9	1	4	4	4	2

County	Cases Allegedly Involving Firearm	Charged	Dismissed	Convicted, Non-Designated Offense	Convicted, Designated Offense	Firearm Established	Mandatory Minimum Imposed and Executed
Isanti	3	2	0	1	0	0	0
Itasca	8	5	0	1	4	4	4
Jackson	2	2	0	0	2	2	0
Kanabec	12	5	0	2	3	2	1
Kandiyohi	4	1	0	1	0	0	0
Kittson	0	0	0	0	0	0	0
Koochiching	5	4	0	0	4	4	2
Lac qui Parle	1	1	0	0	1	1	0
Lake	1	0	0	0	0	0	0
Lake of the Woods	3	3	0	1	1	1	1
Le Sueur	3	2	0	0	2	2	1
Lincoln	0	0	0	0	0	0	0
Lyon	5	5	0	0	5	5	2
McLeod	3	3	0	1	1	1	1
Mahnomen	9	9	2	1	6	3	3
Marshall	0	0	0	0	0	0	0
Martin	3	3	0	2	1	1	1
Meeker	2	2	0	0	2	1	1
Mille Lacs	10	10	1	1	5	4	4
Morrison	2	2	0	0	2	2	2
Mower	27	10	0	0	10	9	5
Murray	0	0	0	0	0	0	0
Nicollet	3	3	0	0	3	3	2
Nobles	5	2	0	0	2	1	1
Norman	2	2	0	0	2	2	1
Olmsted	27	20	7	3	10	5	3
Otter Tail	1	1	0	0	1	1	1
Pennington	1	1	0	0	1	1	0
Pine	8	4	3	0	1	0	0

County	Cases Allegedly Involving Firearm	Charged	Dismissed	Convicted, Non-Designated Offense	Convicted, Designated Offense	Firearm Established	Mandatory Minimum Imposed and Executed
Pipestone	4	4	0	0	4	2	1
Polk	5	5	0	0	5	5	3
Pope	4	1	0	0	1	1	1
Ramsey	106	105	13	7	76	72	30
Red Lake	0	0	0	0	0	0	0
Redwood	2	2	1	0	1	0	0
Renville	8	8	2	1	5	3	2
Rice	12	12	0	5	7	6	4
Rock	0	0	0	0	0	0	0
Roseau	1	1	0	0	1	1	0
Scott	7	6	0	2	4	4	2
Sherburne	8	6	0	0	6	6	2
Sibley	0	0	0	0	0	0	0
St. Louis	33	29	1	4	23	23	18
Stearns	24	24	6	0	18	16	9
Steele	10	10	2	2	5	5	5
Stevens	0	0	0	0	0	0	0
Swift	0	0	0	0	0	0	0
Todd	3	3	0	0	3	3	2
Traverse	0	0	0	0	0	0	0
Wabasha	2	2	0	0	2	0	0
Wadena	1	1	1	0	0	0	0
Waseca	3	3	0	0	3	3	1
Washington	7	7	2	1	4	4	1
Watonwan	3	2	0	0	2	1	1
Wilkin	2	2	1	1	0	0	0
Winona	13	11	0	6	3	1	1
Wright	14	14	3	7	4	4	2
Yellow Medicine	1	1	0	0	0	0	0
<b>Total</b>	<b>1,063</b>	<b>922</b>	<b>104</b>	<b>111</b>	<b>637</b>	<b>597</b>	<b>357</b>

# Appendices

## Appendix 1. 2020 Guidelines Modifications

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Appendix 1 contains modifications made to the August 1, 2019, edition of the Minnesota Sentencing Guidelines and Commentary. The following amendments were effective August 1, 2020, and applied to offenses committed on or after that date.<sup>125</sup>

### Appendix 1.1. Rank Escape from Electronic Monitoring at Severity Level 3

**Adopted Modifications:** As it proposed to do in last year’s report to the Legislature, the Commission assigned Severity Level 3 to Escape from Electronic Monitoring under Minn. Stat. § 609.485, subd. 4(f). The offense was previously designated as unranked. Additionally, the Commission struck the word “home” from the title to conform to the statute.

*Adopted modifications to 2019 Minn. Sentencing Guidelines §§ 5.A and 5.B:*

#### 5.A. Offense Severity Reference Table

\* \* \*

Severity Level	Offense Title	Statute Number
Unranked	Escape from Electronic Home Monitoring	609.485, subd. 4(f)

\* \* \*

Severity Level	Offense Title	Statute Number
<u>3</u>	<u>Escape from Electronic Monitoring</u>	<u>609.485, subd. 4(f)</u>

\* \* \*

#### 5.B. Severity Level by Statutory Citation

\* \* \*

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<sup>125</sup> See Minn. Sentencing Guidelines § 3.G for an explanation of how effective dates are implemented.

Statute Number	Offense Title	Severity Level
609.485 subd. 4(f)	Escape from Electronic Home Monitoring	Unranked <u>3</u>

\* \* \*

## Appendix 1.2. Rank Offering Counterfeit Currency

**Adopted Modifications:** As it proposed to do in last year’s report to the Legislature, the Commission ranked Offering Counterfeit Currency under Minn. Stat. § 609.632, subd. 3, at Severity Level 2 (\$5,000 or Less), Severity Level 3 (\$5,001–\$35,000), and Severity Level 6 (Over \$35,000). Counterfeiting of Currency was previously designated as unranked, and that designation continues for Counterfeiting of Currency (Manufacturing or Printing) and Counterfeiting of Currency (Means for False Reproduction).

*Adopted modifications to 2019 Minn. Sentencing Guidelines §§ 5.A and 5.B:*

### 5.A. Offense Severity Reference Table

Severity Level	Offense Title	Statute Number
6	<u>Offering Counterfeit Currency (Over \$35,000)</u>	<u>609.632, subd. 3 with subd. 4(b)(1)</u>

\* \* \*

Severity Level	Offense Title	Statute Number
3	<u>Offering Counterfeit Currency (\$5,001–\$35,000)</u>	<u>609.632, subd. 3 with subd. 4(b)(2)</u>

\* \* \*

Severity Level	Offense Title	Statute Number
2	<u>Offering Counterfeit Currency (\$5,000 or Less)</u>	<u>609.632, subd. 3 with subd. 4(b)(3)</u>

\* \* \*

<b>Severity Level</b>	<b>Offense Title</b>	<b>Statute Number</b>
UNRANKED	Counterfeiting of Currency ( <u>Manufacturing or Printing/Means for False Reproduction</u> )	609.632, <u>subd. 1 &amp; 2 with subd. 4(a)</u>

\* \* \*

### 5.B. Severity Level by Statutory Citation

\* \* \*

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
<u>609.632 subd. 3 with subd. 4(b)(1)</u>	<u>Offering Counterfeit Currency (Over \$35,000)</u>	<u>6</u>
<u>609.632 subd. 3 with subd. 4(b)(2)</u>	<u>Offering Counterfeit Currency (\$5,001–\$35,000)</u>	<u>3</u>
<u>609.632 subd. 3 with subd. 4(b)(3)</u>	<u>Offering Counterfeit Currency (\$5,000 or Less)</u>	<u>2</u>
<u>609.632 subd. 1 &amp; 2 with subd. 4(a)</u>	Counterfeiting of Currency ( <u>Manufacturing or Printing/Means for False Reproduction</u> )	Unranked

\* \* \*

### Appendix 1.3. Five-Year Presumptive Probation Cap

**Adopted Modifications:** As it proposed to do in last year’s report to the Legislature, the Commission amended 2019 Minn. Sentencing Guidelines section 3.A (Establishing Conditions of Stayed Sentences) to allow for a presumptive probation term, subject to departure, of up to five years or the statutory maximum sentence, whichever is less, for most felony offenses, and to make conforming amendments to sections 1.B (Definitions), 2.C (Presumptive Sentence), and 2.D (Departures from the Guidelines).

On July 23, 2020, after public hearing, the Commission adopted a proposal to amend the commentary in section 3.A. The comments are modified to conform to, and clarify the Commission’s intent with respect to, the amendments to section 3.A.

The following amendments include both the amendments to the Guidelines submitted to the Legislature on January 15, 2020, and the amendments to the commentary adopted July 23, 2020. All amendments were effective August 1, 2020, and applied to offenses committed on or after that date.

*Adopted modifications to 2019 Minn. Sentencing Guidelines §§ 1.B, 2.C, 2.D, and 3.A:*

## Minnesota Sentencing Guidelines and Commentary

### 1. Purpose and Definitions

\* \* \*

#### B. Definitions

\* \* \*

5. Departure. A “departure” is a pronounced sentence other than that recommended in the appropriate cell on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a “departure.”

\* \* \*

- b. Durational Departure. A “durational departure” occurs when the court orders a sentence with a prison duration other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid or when the court pronounces a length of stay other than as provided in section 3.A.2.

- (1) Aggravated Durational Departure. An “aggravated durational departure” occurs when the court pronounces a prison duration that is more than 20 percent higher than the fixed duration displayed in the appropriate cell on the applicable Grid or when the court pronounces a length of stay longer than provided in section 3.A.2.
- (2) Mitigated Durational Departure. A “mitigated durational departure” occurs when the court pronounces a prison sentence that is more than 15 percent lower than the fixed duration displayed in the appropriate cell on the applicable Grid.

\* \* \*

13. Presumptive Sentence. “Presumptive sentences” are those sentences provided on the Sentencing Guidelines Grids and in section 3.A.2. They are presumptive because they are presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.

\* \* \*

## **2. Determining Presumptive Sentences**

\* \* \*

### **C. Presumptive Sentence**

1. Finding the Presumptive Sentence. The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable Grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis). The conviction offense determines the severity level. The offender’s criminal history score is computed according to section 2.B above. For cases contained in cells outside of the shaded areas, the sentence should be executed. For cases contained in cells within the shaded areas, the sentence should be stayed unless the conviction offense carries a mandatory minimum sentence. Section 3.A governs conditions of stayed sentences.

\* \* \*

## D. Departures from the Guidelines

1. Departures in General. The sentences provided in the Grids are presumed to be appropriate for the crimes to which they apply. The court must pronounce a sentence of the applicable disposition, ~~and~~ within the applicable prison range, and within the applicable length of stay, unless there exist identifiable, substantial, and compelling circumstances to support a departure.

The court may depart from the presumptive disposition or duration provided in the Guidelines, and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence. A pronounced sentence for a felony conviction that is outside the appropriate prison range on the applicable Grid, including a stayed or imposed gross misdemeanor or misdemeanor sentence, is a departure from the Guidelines. A stayed sentence with a length of stay other than as provided in section 3.A.2 is also a departure from the Guidelines. A departure is not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by statute or case law.

- a. Disposition and Duration. Departures with respect to disposition and duration are separate decisions, each requiring written departure reasons. A court may depart from the presumptive disposition without departing from the presumptive duration, and vice-versa. ~~A court departing from the presumptive disposition as well as the presumptive duration has made two separate departure decisions, each requiring written departure reasons.~~
- b. Aggravated Departure. When imposing a sentence that is an aggravated departure, it is recommended that the court pronounce a sentence proportional to the severity of the crime for which the sentence is imposed and the offender's criminal history, and take into consideration the purposes and underlying principles of the Guidelines.

\* \* \*

2. Factors that **should not** be used as Reasons for Departure. The following factors should not be used as reasons for ~~departing from the presumptive sentences provided in the appropriate cell on the applicable Grid:~~ departure:

\* \* \*

### 3. Related Policies

#### A. Establishing Conditions of Stayed Sentences

1. Method of Granting Stayed Sentences. When the ~~appropriate cell on the applicable Grid specifies court orders~~ a stayed sentence, the court may pronounce a stay of execution or a stay of imposition. The court must pronounce the length of the stay, ~~which may exceed the duration of the presumptive prison sentence, as provided in section 3.A.2~~ and may establish appropriate conditions subject to the considerations in section 3.A.3.
  - a. Stay of Execution. When ordering a stay of execution, the court must pronounce the prison sentence duration, but its execution is stayed. The presumptive duration is shown in the appropriate cell.
  - b. Stay of Imposition. When ordering a stay of imposition, the court must not pronounce a prison sentence duration, and the imposition of the sentence is stayed.

The Commission recommends that stays of imposition be used for offenders who are convicted of lower severity offenses and who have low criminal history scores. The Commission further recommends that convicted felons be given one stay of imposition, although for very low severity offenses, a second stay of imposition may be appropriate.

#### *Comment*

**3.A.101.** *The use of either a stay of imposition or stay of execution is at the discretion of the court. The Commission has provided a non-presumptive recommendation regarding which categories of offenders should receive stays of imposition, and has recommended that convicted felons generally*

*should receive only one stay of imposition. The Commission believes that stays of imposition are a less severe sanction, and should be used for those convicted of less serious offenses and those with short criminal histories. Under current sentencing practices, courts use stays of imposition most frequently for these types of offenders.*

2. Length of Stay.

- a. When the court stays execution or imposition of sentence for a felony offense, including an attempt or conspiracy, the pronounced length of stay must not exceed five years or the length of the statutory maximum punishment, whichever is less, unless the court identifies and articulates substantial and compelling reasons to support a departure from this rule.
- b. Subject to the limitation in section 3.A.2.a, the pronounced length of stay may exceed the presumptive prison sentence duration provided in the appropriate cell on the applicable Grid.
- c. If the court by departure exceeds the limitation in section 3.A.2.a, the length of stay must not exceed the statutory maximum punishment for the offense.
- d. The limitation in section 3.A.2.a does not apply to a sentence for a violation of Minn. Stat. § 609.19 (Murder 2nd Degree), 609.195 (Murder 3rd Degree), 609.20 (Manslaughter 1st Degree), 609.2112 (Criminal Vehicular Homicide), 609.2662 (Murder of an Unborn Child 2nd Degree), 609.2663 (Murder of an Unborn Child 3rd Degree), 609.2664 (Manslaughter of an Unborn Child 1st Degree), 609.268 (Death or Injury of an Unborn Child in Comm. of Crime), 609.342 (Criminal Sexual Conduct 1st Degree), 609.343 (Criminal Sexual Conduct 2nd Degree), 609.344 (Criminal Sexual Conduct 3rd Degree), 609.345 (Criminal Sexual Conduct 4th Degree), or 609.3451 (Criminal Sexual Conduct 5th Degree).
- e. Extensions of probation are governed by statute (see Minn. Stat. § 609.135, subd. 2(g)–(h)).

Comment

**3.A.102-3.A.201.** *When a court grants a stayed sentence, the duration of the stayed sentence may exceed the presumptive sentence length indicated in the appropriate cell on the applicable*

Grid, and may be as long as the statutory maximum punishment for the conviction offense. See Minn. Stat. § 609.135, subd. 2. Absent substantial and compelling reasons to depart, however, the length of the stay may not exceed five years, unless the current offense is a homicide or criminal sexual conduct offense, including an attempt or conspiracy. Thus, for an offender convicted of Theft over \$5,000 (Severity Level 3), with a Criminal History Score of 1, the duration of the stay could be up to five years—or, upon a finding of substantial and compelling reasons to depart, up to ten years. ~~The~~ Regardless of the length of stay, the 13-month sentence shown in the Guidelines is the presumptive sentence length and, if imposed, would be executed if: (a) the court departs from the dispositional recommendation and decides to execute the sentence; or (b) the stay is later revoked and the court decides to imprison the offender.

**3.A.202.** Before section 3.A.2.a took effect, case law required durational departures to be based on the nature of the offense rather than on the individual characteristics of the offender. See State v. Solberg, 882 N.W.2d 618, 625 (Minn. 2016). Although a pronounced length of stay longer than provided in section 3.A.2 is defined as an aggravated durational departure, the Commission recognizes that judicial considerations for pronouncing a longer-than-recommended length of stay may differ substantially from considerations for imposing a longer-than-recommended prison duration. As a result of these differences, the individual characteristics of the offender may be relevant to the district court’s finding of substantial and compelling reasons justifying a longer-than-recommended length of stay.

**3.A.203.** Within section 3.A.2, “statutory maximum punishment” refers to the applicable maximum period for a stay of sentence established in statute. For most felonies, this is the maximum period for which the sentence of imprisonment might have been imposed, but, for some felonies, this is four or six years. Minn. Stat § 609.135, subd. 2(a)–(b).

2-3. Other Conditions of Stayed Sentences. While the Commission has otherwise chosen not to develop specific guidelines for the conditions of stayed sentences, it recognizes that there are several penal objectives to be considered in establishing conditions of stayed sentences, including:

- deterrence;
- public condemnation of criminal conduct;
- public safety;
- rehabilitation;
- restitution;
- retribution; and

- risk reduction.

The Commission also recognizes that the relative importance of these objectives may vary with both offense and offender characteristics and that multiple objectives may be present in any given sentence. The Commission urges courts to utilize the least restrictive conditions of stayed sentences that are consistent with the objectives of the sanction. The Commission further urges courts to consider the following principles in establishing the conditions of stayed sentences:

\* \* \*

(6) Work Release and Community Based Programs. The Commission has chosen not to establish specific guidelines relating to work release programs in local facilities or community-based residential and nonresidential programs.

*Comment*

~~**3.A.201-3.A.301.** The court may attach any conditions to a stayed sentence that are permitted by law and that the court deems appropriate. The Guidelines neither enlarge nor restrict the conditions that courts may attach to a stayed sentence. Minn. Stat. § 244.09, subd. 5 permits, but does not require, the Commission to establish guidelines covering conditions of stayed sentences. The Commission chose not to develop~~ has developed such guidelines during its initial guideline development effort. The Commission has provided some language in the above section of the Guidelines that provides with respect to the pronounced length of stay in section 3.A.2, and has provided additional, general direction in the use of conditions of stayed sentences in the above section.

~~**3.A.202-3.A.302.** While the Commission has resolved not to develop otherwise not developed guidelines for nonimprisonment sanctions at this time, the Commission believes it is important for the sentencing courts to consider proportionality when pronouncing a period of local confinement as a condition of probation. This is particularly important given Minn. Stat. § 609.135, subd. 7, which states when an offender may not demand execution of sentence. The period of local confinement should be proportional to the severity of the conviction offense and the criminal history score of the offender. Therefore, the period of local confinement should not exceed the term of imprisonment that would be served if the offender were to have received an executed prison sentence according to the presumptive Guidelines duration.~~

\* \* \*

**Appendix 1.4. Technical Changes to Guidelines Appendix 1 – Citation for First Degree DWI**

**Adopted Modifications:** On July 23, 2020, after public hearing, the Commission adopted a proposal to modify Appendix 1 by correcting the citation for Driving while Intoxicated. This resulted from a technical amendment in the Revisor’s Bill, 2020 Minn. Laws [c. 83, art. 1, § 57](#).

One of the ways a person is guilty of First-Degree Driving While Impaired (DWI) is if they have previously been convicted of felony Criminal Vehicular Homicide (CVH) or Criminal Vehicular Operation (CVO) under Minn. Stat. §§ 609.2112, 609.2113, or 609.2114. The “paragraph (a)” is missing for two references in Minn. Stat. § 169A.24, subd. 1(3)(iii). The law corrects the omission by inserting “paragraph (a)” in subd. 1(3)(iii) as displayed, below.

- CVH under Minn. Stat. § 609.2112, subd. 1, [paragraph \(a\)](#); and
- CVO; Unborn Child under Minn. Stat. § 609.2114, subd. 1, [paragraph \(a\)](#).

The following amendments are effective August 1, 2020, and apply to offenses committed on or after that date.

*Adopted modifications to 2019 Minn. Sentencing Guidelines Appendix 1:*

**Appendix 1. Mandatory and Presumptive Sentences Reference Table**

This table is for convenience when applying mandatory sentences (section 2.E) and presumptive sentences (section 2.C). It is not exhaustive.

\* \* \*

<b>Statute</b>	<b>Offense</b>	<b>Prerequisite or Conditions</b>	<b>Minimum Duration</b>
169A.24, subd. 1(3)	Driving while Intoxicated	Prior Criminal Vehicular Homicide or Operation under Minn. Stat. § 609.2112.1(a)(2) thru (6); § 609.2113.1(2) thru (6); § 609.2113.2(2) thru (6); § 609.2114.1(a)(2) thru (6); § 609.2114.2(2) thru (6)	Grid Time

\* \* \*

## Appendix 2. 2021 Proposed Guidelines Modifications

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The following proposed modifications have been adopted by the Commission and are hereby submitted to the Legislature. Each modification is to the August 1, 2020, edition of the Minnesota Sentencing Guidelines and Commentary; each has a specified effective date of August 1, 2021; and each will apply as provided in section 3.G of the Guidelines, unless the Legislature by law provides otherwise.

### Appendix 2.1. Amendments to Harassment and Stalking (2020 Regular Session)

**Proposed Modifications:** On January 14, 2021, after a public hearing, the Commission, on a vote of 11 to 0, adopted a proposal to make modifications resulting from an amendment in 2020 Minn. Laws [ch. 96](#). 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 adopted a proposal 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 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.*

\* \* \*

**Appendix 2.2. Technical Amendments Affecting Failure to Report Danger to Child’s Health (2020 1st Special Session)**

**Proposed Modifications:** On January 14, 2021, after a public hearing, the Commission, on a vote of 11 to 0, adopted a proposal to make modifications resulting from an amendment in 2020 Minn. Laws 1st Spec. Sess. ch. 2, art. 7, § 8. 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. 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 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**

\* \* \*

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

\* \* \*

**5.B. Severity Level by Statutory Citation**

\* \* \*

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

\* \* \*

### Appendix 2.3. Use of Minors in Sexual Performance

**Proposed Modifications:** On January 14, 2021, as a result of its review of its child pornography sentencing guidelines and after a public hearing, the Commission, on a vote of 11 to 0, adopted a proposal to increase the severity levels assigned to Use of Minors in Sexual Performance (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 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).
- **Base Offenses.** The modifications increase, from Severity Level E to Severity Level D, the severity level assigned to Use of Minors in Sexual Performance.

*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>
D	<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>

\* \* \*

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	<u>Use of Minors in Sexual Performance</u>	<u>617.246, subd. 2(a), 3(a), 4(a)</u>

\* \* \*

#### 5.B. Severity Level by Statutory Citation

\* \* \*

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

\* \* \*

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
617.246 subd. 2(a) 3(a) 4(a)	Use of Minors in Sexual Performance	<del>E</del> <u>D</u>

\* \* \*

## Appendix 3. Sentencing Guidelines Grids

### Appendix 3.1. Standard Sentencing Guidelines Grid – Effective August 1, 2020

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)	CRIMINAL HISTORY SCORE						
	0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree (Intentional; Drive-By-Shootings)</i>	<b>11</b> 306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 <sup>2</sup>	426 363-480 <sup>2</sup>
<i>Murder, 2nd Degree (Unintentional)</i> <i>Murder, 3rd Degree (Depraved Mind)</i>	<b>10</b> 150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Murder, 3rd Degree (Controlled Substances)</i> <i>Assault, 1st Degree</i>	<b>9</b> 86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Agg. Robbery, 1st Degree</i> <i>Burglary, 1st Degree (w/ Weapon or Assault)</i>	<b>8</b> 48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI</i> <i>Financial Exploitation of a Vulnerable Adult</i>	<b>7</b> 36	42	48	54 46-64	60 51-72	66 57-79	72 62-84 <sup>2,3</sup>
<i>Assault, 2nd Degree</i> <i>Burglary, 1st Degree (Occupied Dwelling)</i>	<b>6</b> 21	27	33	39 34-46	45 39-54	51 44-61	57 49-68
<i>Residential Burglary</i> <i>Simple Robbery</i>	<b>5</b> 18	23	28	33 29-39	38 33-45	43 37-51	48 41-57
<i>Nonresidential Burglary</i>	<b>4</b> 12 <sup>1</sup>	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	<b>3</b> 12 <sup>1</sup>	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less)</i> <i>Check Forgery (\$251-\$2,500)</i>	<b>2</b> 12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21 18-25
<i>Assault, 4th Degree</i> <i>Fleeing a Peace Officer</i>	<b>1</b> 12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19 17-22

<sup>1</sup> 12<sup>1</sup>=One year and one day



Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

<sup>2</sup> Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

<sup>3</sup> The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

## Appendix 3.2. Sex Offender Grid – Effective August 1, 2020

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Criminal Sexual Conduct (CSC) 1st Degree</i>	<b>A</b>	144	156	168	180	234	306	360
		<i>144-172</i>	<i>144-187</i>	<i>144-201</i>	<i>153-216</i>	<i>199-280</i>	<i>261-360</i>	<i>306-360</i> <sup>2</sup>
<i>CSC 2nd Degree–1(c)(d)(e)(f)(h) (e.g., contact, force, &amp; injury)</i>	<b>B</b>	90	110	130	150	195	255	300
		<i>90</i> <sup>3</sup> -108	<i>94-132</i>	<i>111-156</i>	<i>128-180</i>	<i>166-234</i>	<i>217-300</i>	<i>255-300</i> <sup>2</sup>
<i>CSC 3rd Degree–1(c)(d)(g)(h)(i)(j) (k)(l)(m)(n)(o)(p) (e.g., penetra- tion &amp; force/occupation)</i>	<b>C</b>	48	62	76	90	117	153	180
		<i>41-57</i>	<i>53-74</i>	<i>65-91</i>	<i>77-108</i>	<i>100-140</i>	<i>131-180</i>	<i>153-180</i> <sup>2</sup>
<i>CSC 2nd Degree–1(a)(b)(g) (e.g., contact &amp; victim under 13) CSC 3rd Degree–1(a)(e)(f) or 1(b) with 2(1) (e.g., penetration &amp; child victim)</i>	<b>D</b>	36	48	60	70	91	119	140
				<i>51-72</i>	<i>60-84</i>	<i>78-109</i>	<i>102-142</i>	<i>119-168</i>
<i>CSC 4th Degree–1(c)(d)(g)(h)(i)(j) (k)(l)(m)(n)(o)(p) (e.g., contact &amp; force/occupation) Dissemination of Child Pornography<sup>2</sup></i>	<b>E</b>	24	36	48	60	78	102	120
					<i>51-72</i>	<i>67-93</i>	<i>87-120</i>	<i>102-120</i> <sup>2</sup>
<i>CSC 4th Degree–1(a)(b)(e)(f) (e.g., contact &amp; child victim) CSC 5th Degree Possession of Child Pornography (Subseq./Pred. Off./Under 13)</i>	<b>F</b>	18	27	36	45	59	77	84
					<i>39-54</i>	<i>51-70</i>	<i>66-92</i>	<i>72-100</i>
<i>CSC 3rd Degree–1(b) with 2(2) (i.e., penetration &amp; child victim 24–48 mo. younger) Possession of Child Pornography Solicit Child for Sexual Conduct<sup>2</sup></i>	<b>G</b>	15	20	25	30	39	51	60
						<i>34-46</i>	<i>44-60</i>	<i>51-60</i> <sup>2</sup>
<i>Failure to Register as a Predatory Offender</i>	<b>H</b>	12 <sup>1</sup>	14	16	18	24	30	36
		<i>12</i> <sup>1</sup> -14	<i>12</i> <sup>1</sup> -16	<i>14-19</i>	<i>16-21</i>	<i>21-28</i>	<i>26-36</i>	<i>31-43</i>

<sup>1</sup> 12<sup>1</sup>=One year and one day



Presumptive commitment to state imprisonment. Sex offenses under Minn. Stat. § 609.3455, subd. 2, have mandatory life sentences and are excluded from the Guidelines. See section 2.E, for policies regarding those sentences controlled by law, including conditional release terms for sex offenders.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenders in the shaded area of the Grid may qualify for a mandatory life sentence under Minn. Stat. § 609.3455, subd. 4. See sections 2.C and 2.E.

<sup>2</sup> Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1–2.

<sup>3</sup> Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking 1st Degree is not subject to a 90-month minimum statutory presumptive sentence so the standard range of 15% lower and 20% higher than the fixed duration applies. (The range is 77–108.)

### Appendix 3.3. Drug Offender Grid – Effective August 1, 2020

Presumptive sentence lengths are in months. Italicized numbers within the grid denotes range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subjected to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)	CRIMINAL HISTORY SCORE							
	0	1	2	3	4	5	6 or more	
<i>Aggravated Controlled Substance Crime, 1st Degree Manufacture of Any Amt. Meth</i>	<b>D9</b>	86 <i>74*-103</i>	98 <i>84*-117</i>	110 <i>94*-132</i>	122 <i>104*-146</i>	134 <i>114*-160</i>	146 <i>125*-175</i>	158 <i>135*-189</i>
<i>Controlled Substance Crime, 1st Degree</i>	<b>D8</b>	65 <i>56*-78</i>	75 <i>64*-90</i>	85 <i>73*-102</i>	95 <i>81*-114</i>	105 <i>90*-126</i>	115 <i>98*-138</i>	125 <i>107*-150</i>
<i>Controlled Substance Crime, 2nd Degree</i>	<b>D7</b>	48	58	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Controlled Substance Crime, 3rd Degree Failure to Affix Stamp</i>	<b>D6</b>	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Possess Substances with Intent to Manufacture Meth</i>	<b>D5</b>	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Controlled Substance Crime, 4th Degree</i>	<b>D4</b>	12 <sup>1</sup>	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Meth Crimes Involving Children and Vulnerable Adults</i>	<b>D3</b>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Controlled Substance Crime, 5th Degree</i>	<b>D2</b>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21 <i>18-25</i>
<i>Sale of Simulated Controlled Substance</i>	<b>D1</b>	12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19 <i>17-22</i>

\* Lower range may not apply. See section 2.C.3.c(1) and Minn. Stat. § 152.021, subdivisions 3(c) & 3(d).

<sup>1</sup> 12<sup>1</sup>=One year and one day

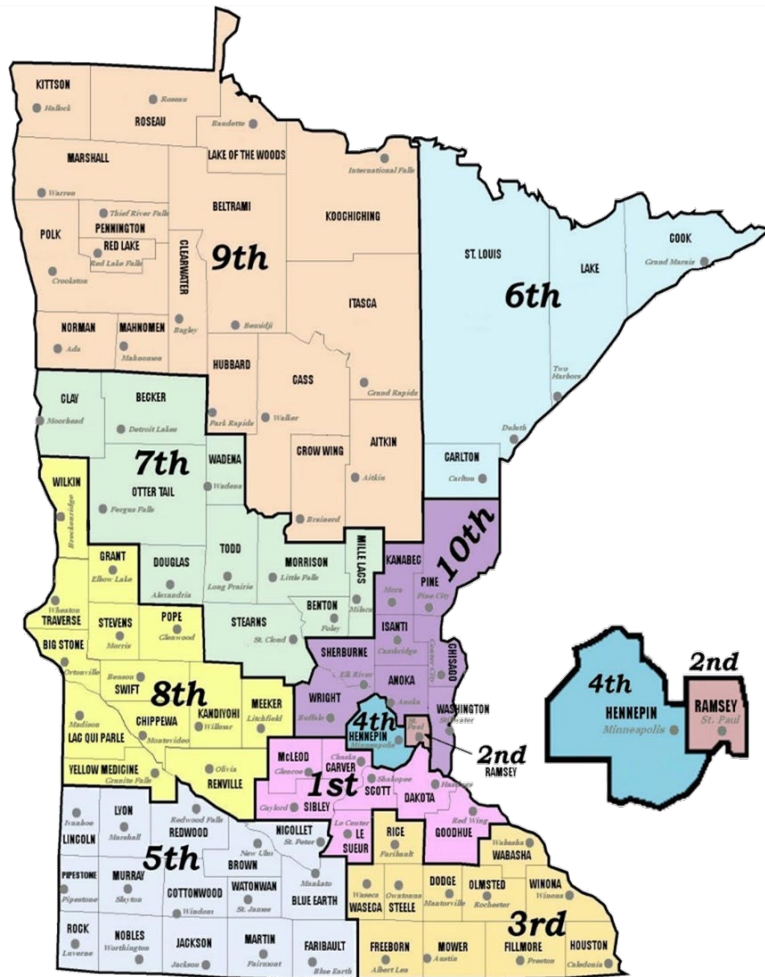


Presumptive commitment to state imprisonment.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

# Appendix 4. Minnesota Judicial District Map



<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>	<u>Sixth</u>	<u>Seventh</u>	<u>Eighth</u>	<u>Ninth</u>	<u>Tenth</u>
Carver	Ramsey	Dodge	Hennepin	Blue Earth	Carlton	Becker	Big Stone	Aitkin	Anoka
Dakota		Fillmore		Brown	Cook	Benton	Chippewa	Beltrami	Chisago
Goodhue		Freeborn		Cottonwood	Lake	Clay	Grant	Cass	Isanti
Le Sueur		Houston		Faribault	St. Louis	Douglas	Kandiyohi	Clearwater	Kanabec
McLeod		Mower		Jackson		Mille Lacs	Lac qui Parle	Crow Wing	Pine
Scott		Mower		Lincoln		Morrison	Meeker	Hubbard	Sherburne
Sibley		Rice		Lyon		Otter Tail	Pope	Itasca	Washington
		Steele		Martin		Stearns	Renville	Kittson	Wright
		Wabasha		Murray		Todd	Stevens	Koochiching	
		Waseca		Nicollet		Wadena	Swift	Lake of the Woods	
		Winona		Nobles			Traverse	Mahnomen	
				Pipestone			Wilkin	Marshall	
				Redwood			Yellow Medicine	Norman	
				Rock				Pennington	
				Watonwan				Polk	
								Red Lake	
								Roseau	

Source: Minn. Judicial Branch.