

## Staff Issue Paper

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# Potential Recommendations to the Legislature

December 10, 2020

*To the best of staff's recollection, each of the following four topics has been mentioned by one or more Commission members as a topic upon which the Commission may wish to make a recommendation to the Legislature. In light of the upcoming publication of the 2021 Report to the Legislature, staff has drafted sample recommendation language for the Commission's consideration.*

*Nothing in this document should be construed as an assumption by staff that the Commission will, in fact, make any of these recommendations to the Legislature, or that it will adopt them in the form drafted.*

*As envisioned by staff, the first reference to possible legislative recommendations would be found in the Executive Summary (see placeholder in draft report). The actual draft language is:*

In addition, the Commission makes four recommendations to the Legislature: To give immediate effect to the proposed modification clarifying criminal history calculation; 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.

*The recommendations themselves would be contained in a separate section immediately before the Report on Comprehensive Review of Child Pornography Sentencing Guidelines. As drafted by staff, they read as follows:*

## 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>1</sup> the Minnesota Sentencing Guidelines Commission respectfully submits the following four recommendations to the Legislature:

### **Recommendation 1: Give Immediate Effect to the Guidelines Changes in Appendix 2.3.**

The Commission recommends that the Legislature, by law, give immediate effect the proposed changes to section 2.B of the Minnesota Sentencing Guidelines and Commentary that are set forth in Appendix

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<sup>1</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](#).

2.3 (p. XX). Those proposed amendments eliminate the possibility of criminal history scores containing partial points, something that became possible after the 2019 creation of the one-half custody status point.

By way of background, the criminal history score is the sum of points from the four criminal history factors found in section 2.B. Among these factors are prior felonies, and custody status at the time of the offense.

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

Appendix 2.3 proposes to clarify that if the unrounded sum of the criminal history score points is not a whole number, the criminal history score must be rounded down to the nearest whole number. This important clarification will not apply, however, to crimes committed before August 1, 2021. By giving Appendix 2.3 immediate effect, the Legislature would provide sentencing judges with this needed clarification more promptly.

### **Recommendation 2: 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 recommendation is on page XX.

### **Recommendation 3: 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 recommendation is on page XX.

### **Recommendation 4: Transfer MSGC Staff Members to the Classified Service**

The Commission recommends the Legislature enact HF/SF xxxx, which would 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>2</sup> The sentencing grids are reproduced in Appendix 3 (p. XX).

As drafted by staff, the two recommendations relating to child pornography would be further explained in the conclusions of the Report on Comprehensive Review of Child Pornography Sentencing Guidelines:

### 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” 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>3</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>4</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 is found on page XX.

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### Sexting

The Commission is concerned about the potential misuse of these elevated severity levels.<sup>5</sup> 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>6</sup> to be as severe as a typical violation of the Use of Minors in Sexual Performance statute. As noted on pages XX and XX 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.

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

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<sup>3</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>4</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>5</sup> *Staff note (not for publication): This is a reference to the Commission’s decision to elevate severity rankings of Use of Minors in Sexual Performance, which the preceding section, as drafted, discusses.*

<sup>6</sup> See discussion entitled “Atypical Cases: Sexting as Production of Child Pornography” (p. XX).

exception—either as a lesser crime, or as no crime at all<sup>7</sup>—for such behavior. This recommendation is found on page XX.

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<sup>7</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.