

2021 1st Special Session Laws

Special Topic – Dividing Criminal Sexual Conduct Offenses by Adult & Child Victims

May 27, 2021

Background

At the Commission’s May 6 meeting, a member asked staff to draft an option to make Guidelines changes in connection with a legislative proposal to subdivide some sex offenses based on whether the victim was an adult or a child. The underlying proposed legislative change is described in the MSGC staff paper entitled, “2021 1st Special Session Laws: Possible Amendments to Crime Laws Affecting the Guidelines” (May 27, 2021). The change description begins on page 8 of that paper, under the heading, “Identical offenses in both subdivisions 1 and 1a.”

Staff had raised this issue at the May meeting by pointing out that, when the Legislature creates a new statutory distinction between two offenses—in this case, by dividing one offense in two, depending on whether the victim is an adult or a child—a reasonable Commission member may view this as an opportunity for the Commission to distinguish between the severity of the two offenses—in this case, to distinguish between the severity of an offense committed against an adult and the severity of the same offense committed against a child.

Authority to use expedited modification process. While staff does not doubt the Commission’s authority to make such a distinction, it does question what process is available. The Commission is generally not authorized to modify a severity level without first submitting the change to the Legislature in January—thus giving the Legislature an opportunity to block the change before it takes effect the following August. Advance submission is not required, however, when the modification is “mandated or authorized by the legislature or relat[es] to a crime created or amended by the legislature in the preceding session” Minn. Stat. § [244.09, subd. 11](#).

The Commission may question the limits of when a ranking change “relat[es] to a crime created or amended by the legislature in the preceding session.” Is a purely technical statutory numbering change an amendment of sufficient substance that it would authorize expedited reranking without advance submission to the Legislature? Perhaps not. Is the Legislature’s decision to subdivide child victims from adult victims—without otherwise changing offense elements or applicable penalties—a purely technical statutory numbering change, or is it more substantial? If the Commission determines that the division of an

offense between adult victims and child victims does not truly constitute the creation or amendment of a crime, then the expedited modification process would apparently not be available.

Staff-drafted amendments. The following Guidelines amendments have been drafted—but are not recommended—by staff as a reasonable way to distinguish between the same sex offense committed against a child as opposed to an adult. Staff assumes that, if the Commission were interested in making such a penalty distinction, it would intend that a sex offense committed against a child be punished more severely than the same offense committed against an adult.

As drafted, the amendments do not increase the severity ranking of the identical child offense. Staff had three concerns with a severity-level increase.

- First, because Sex Offender Grid does not evenly space the durations associated with each severity level, staff was concerned that this course of action would result in uneven treatment of offenses. At zero criminal history, for example, the presumptive sentence increases 50 percent when jumping from Severity Level E to Severity Level D; 88 percent when jumping from Severity Level C to Severity Level B; and 60 percent when jumping from Severity Level B to Severity Level A. At maximum criminal history, these increases are 17 percent, 67 percent, and 20 percent, respectively.
- Second, because the Sex Offender Grid was built to recommend the statutory maximum penalty for sex offenders with lengthy criminal histories, the current severity levels already display the statutory maximums, which the bill does not alter. If the next higher severity level were to apply, the durations would be dramatically constrained by the applicable statutory maximum penalties.
- Third, there is no severity level above A to rank the Criminal Sexual Conduct First Degree offenses for which an increased penalty is desired.

Instead, staff drafted a fifteen-percent durational sentencing enhancement. Fifteen percent was chosen as a number that did not cause the enhanced durations to exceed the statutory maximum penalty until the criminal history score was 6 or more, and as a number that did not cause the penalty to exceed that of the next higher severity level.

Drafted Guidelines amendments: Punish sex offenses involving child victims more severely than identical offenses involving adult victims. When an identical offense appears in both subdivision 1 (adult victims) and subdivision 1a (child victims), punish the offense involving the child victim more severely by increasing the presumptive duration by fifteen percent.

Possible Amendments to 2020 Minn. Sentencing Guidelines¹ §§ 2.C.3.a, 4.B & 5.B:

¹ To avoid confusion caused by multiple mark-ups, the 2020 Minn. Sentencing Guidelines are displayed as if already amended by amendments previously discussed within the document, “2021 1st Special Session Laws: Possible Amendments to Crime Laws Affecting the Guidelines.”

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[2.]C. Presumptive Sentence

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3. Finding the Presumptive Sentence for Certain Offenses.

a. Sex Offenses. Under Minn. Stat. § 609.3455, ~~certain sex offenders are subject to mandatory life sentences and certain repeat sex offenders are subject to presumptive executed prison sentences of at least 36 months.~~

(1) Certain Sex Offenses Against Children. Among certain criminal sexual conduct offenses, if the offense is committed against a child, the presumptive duration is 15 percent greater than the duration displayed in the appropriate cell on the Sex Offender Grid for the same offense committed against an adult. This policy applies to the offenses listed in paragraphs (i) through (iv), below.

(i) For Criminal Sexual Conduct 1st Degree under Minn. Stat. § 609.342, subd. 1a(a), 1a(b), 1a(c), 1a(d), or 1a(i), the presumptive durations and ranges follow:

| CRIMINAL HISTORY SCORE | | | | | | |
|-------------------------------|----------------|----------------|----------------|----------------|----------------|------------------|
| 0 | 1 | 2 | 3 | 4 | 5 | 6 or more |
| <u>166</u> | <u>179</u> | <u>193</u> | <u>207</u> | <u>269</u> | <u>352</u> | <u>360</u> |
| <u>144-199</u> | <u>153-214</u> | <u>165-231</u> | <u>176-248</u> | <u>229-322</u> | <u>300-360</u> | <u>306-360</u> |

(ii) For Criminal Sexual Conduct 2nd Degree under Minn. Stat. § 609.343, subd. 1a(a), 1a(b), 1a(c), 1a(d), or 1a(i), the presumptive durations and ranges follow:

| CRIMINAL HISTORY SCORE | | | | | | |
|-------------------------------|----------------|----------------|----------------|----------------|----------------|------------------|
| 0 | 1 | 2 | 3 | 4 | 5 | 6 or more |
| <u>104</u> | <u>127</u> | <u>150</u> | <u>173</u> | <u>224</u> | <u>293</u> | <u>300</u> |
| <u>90-124</u> | <u>108-152</u> | <u>128-180</u> | <u>147-207</u> | <u>191-268</u> | <u>250-300</u> | <u>255-300</u> |

(iii) For Criminal Sexual Conduct 3rd Degree under Minn. Stat. § 609.344, subd. 1a(c), 1a(d), 1a(h), or 1a(i), the presumptive durations and ranges follow:

| CRIMINAL HISTORY SCORE | | | | | | |
|-------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-------------------------|
| <u>0</u> | <u>1</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5</u> | <u>6 or more</u> |
| <u>55</u> | <u>71</u> | <u>87</u> | <u>104</u> | <u>135</u> | <u>176</u> | <u>180</u> |
| <u>47-66</u> | <u>61-85</u> | <u>75-104</u> | <u>89-124</u> | <u>115-162</u> | <u>150-180</u> | <u>153-180</u> |

(iv) For Criminal Sexual Conduct 4th Degree under Minn. Stat. § 609.345, subd. 1a(c), 1a(d), 1a(h), or 1a(i), the presumptive durations and ranges follow:

| CRIMINAL HISTORY SCORE | | | | | | |
|-------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-------------------------|
| <u>0</u> | <u>1</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5</u> | <u>6 or more</u> |
| <u>28</u> | <u>41</u> | <u>55</u> | <u>69</u> | <u>90</u> | <u>117</u> | <u>120</u> |
| | | | <u>59-82</u> | <u>77-108</u> | <u>100-120</u> | <u>102-120</u> |

(1) ~~(2)~~ Mandatory Life Sentences. The Sentencing Guidelines presumptive sentence does not apply to offenders subject to mandatory life without the possibility of release under ~~subdivision 2 of that statute~~ Minn. Stat. § 609.3455, subd. 2. For offenders subject to life with the possibility of release under subdivisions 3 and 4 of that statute, the court must specify a minimum term of imprisonment, based on the Sentencing Guidelines presumptive sentence as determined in section 2.C, or any applicable mandatory minimum sentence not contained in Minn. Stat. § 609.3455, that must be served before the offender may be considered for release.

~~(2)~~ (3) Presumptive Executed Prison Sentences of at least 36 Months. ~~Except when a life sentence applies, if~~ If the current conviction offense is criminal sexual conduct in the first, second, third, or fourth degree (Minn. Stat. §§ 609.342 to 609.345) or criminal sexual predatory conduct (§ 609.3453) within 15 years of a previous sex offense conviction, under Minn. Stat. § 609.3455, subd. 10, the presumptive disposition is commitment. ~~The~~ Except when a life sentence applies, the presumptive duration is at least 36 months, or the fixed duration indicated in the appropriate cell on the Grid, whichever is longer.

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4.B. Sex Offender Grid

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> | A* ₋ | 144 <i>144-172</i> | 156 <i>144-187</i> | 168 <i>144-201</i> | 180 <i>153-216</i> | 234 <i>199-280</i> | 306 <i>261-360</i> | 360 <i>306-360</i> ² |
| <i>CSC 2nd Degree–1(a)(b)(c)(d)(e), 1a(a)(b)(c)(d)(h)(i) (e.g., contact, force, & injury)</i> | B* ₋ | 90 <i>90³-108</i> | 110 <i>94-132</i> | 130 <i>111-156</i> | 150 <i>128-180</i> | 195 <i>166-234</i> | 255 <i>217-300</i> | 300 <i>255-300</i> ² |
| <i>CSC 3rd Degree–1(a)(b)(c)(d), 1a(c)(d)(g)(h)(i) (e.g., penetration & force/occupation)</i> | C* ₋ | 48 <i>41-57</i> | 62 <i>53-74</i> | 76 <i>65-91</i> | 90 <i>77-108</i> | 117 <i>100-140</i> | 153 <i>131-180</i> | 180 <i>153-180</i> ² |
| <i>CSC 2nd Degree–1(a)(b)(g) (e.g., contact & victim under 13)</i> <i>CSC 3rd Degree–1(a)(e)(f) or 1(b) with 2(1) (e.g., penetration & child victim)</i> | D | 36 | 48 | 60 <i>51-72</i> | 70 <i>60-84</i> | 91 <i>78-109</i> | 119 <i>102-142</i> | 140 <i>119-168</i> |
| <i>CSC 4th Degree–1(a)(b)(c)(d) & 1a(c)(d)(g)(h)(i) (e.g., contact & force/occupation)</i> <i>Dissemination of Child Pornography</i> ² | E* ₋ | 24 | 36 | 48 | 60 <i>51-72</i> | 78 <i>67-93</i> | 102 <i>87-120</i> | 120 <i>102-120</i> ² |

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* A 15-percent durational increase applies to certain offenses against children. See section 2.C.3.a(1).

¹ 12¹=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.

² 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.

³ 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.)

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5.B. Severity Level by Statutory Citation

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law.

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| Statute Number | Offense Title | Severity Level |
|---|---|----------------|
| 609.342 subd. 1(a)(b)(c)(d)(e) & 1a(e)(f)(g)(h) | Criminal Sexual Conduct 1st Degree | A |
| <u>609.342 subd. 1a(a)(b)(c)(d)(i)</u> | <u>Criminal Sexual Conduct 1st Degree</u> | <u>A*</u> |
| 609.343, subd. 1(a)(b)(c)(d)(e) & 1a(a)(b)(c)(d)(h)(i) | Criminal Sexual Conduct 2nd Degree | B |
| <u>609.343, subd. 1a(a)(b)(c)(d)(i)</u> | <u>Criminal Sexual Conduct 2nd Degree</u> | <u>B*</u> |
| 609.343 subd. 1a(e)(f)(g) | Criminal Sexual Conduct 2nd Degree | D |
| 609.344 subd. 1(a)(b)(c)(d) & 1a(e)(d)(g)(h)(i) | Criminal Sexual Conduct 3rd Degree | C |
| 609.344 subd. 1a(a) | Criminal Sexual Conduct 3rd Degree (By Definition Perpetrator Must be a Juvenile) | D |
| 609.344 subd. 1a(e)(f) or subd. 1a(b) with ref. to subd. 2(1) | Criminal Sexual Conduct 3rd Degree | D |
| 609.344 subd. 1a(b) with ref. to subd. 2(2) | Criminal Sexual Conduct 3rd Degree | G |
| <u>609.344 subd. 1a(c)(d)(h)(i)</u> | <u>Criminal Sexual Conduct 3rd Degree</u> | <u>C*</u> |
| 609.345 subd. 1(a)(b)(c)(d) & 1a(e)(d)(g)(h)(i) | Criminal Sexual Conduct 4th Degree | E |
| 609.345 subd. 1a(a) | Criminal Sexual Conduct 4th Degree (By Definition Perpetrator Must be a Juvenile) | F |
| 609.345 subd. 1a(b)(e)(f) | Criminal Sexual Conduct 4th Degree | F |
| <u>609.345 subd. 1a(c)(d)(h)(i)</u> | <u>Criminal Sexual Conduct 4th Degree</u> | <u>E*</u> |

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* A 15-percent durational increase applies. See Guidelines section 2.C.3.a(1).