



**MINNESOTA**  
SENTENCING GUIDELINES  
COMMISSION

## 2021 Report to the Legislature

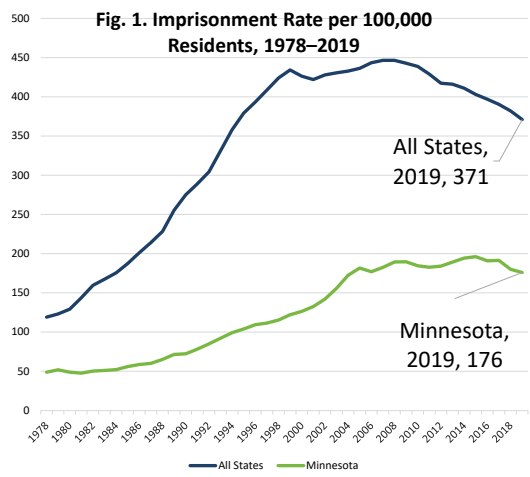
February 3, 2021  
 Kelly Lyn Mitchell, MSGC Chair • Nate Reitz, MSGC Executive Director  
 Senate Judiciary and Public Safety Finance and Policy Committee  
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## Introduction

*pp. 1-2*

- During the first 40 years of Sentencing Guidelines, Minnesota has been among the bottom five states by imprisonment rate
- Minnesota most recently ranked fourth-lowest in the nation for imprisonment rate
- (Probation rate is a different story: fifth-highest)



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## The Commission's Activities in 2021

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## Members Represent Criminal Justice System and Public p. 5

 Supreme Court Hon. Christopher Dietzen	 Court of Appeals Hon. Michelle Larkin	 District Court Hon. Kevin Mark
 Public Defenders Cathryn Middlebrook	 County Attorneys Kyra Ladd	
 Corrections Comm'r Paul Schnell	 Police Cdr. Salim Omari (vacant)	 Probation Valerie Estrada
 Public (Crime Victims) Abby Honold	 Public Kelly Lyn Mitchell, Chair	 Public Tonja Honsey

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## Commission's Work in 2020

*pp. 6-8*

- Completed child pornography sentencing review (legislatively mandated)
- Initiated Sentencing Guidelines neutrality review
- Modified the Sentencing Guidelines
- Proposed new Sentencing Guidelines modifications for 2021
- Made three recommendations to the Legislature

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## Commission's Work in 2020

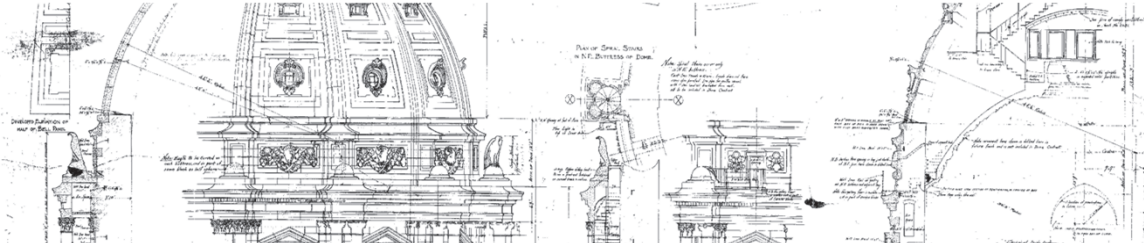
*pp. 6-8*

<div style="background-color: #1a3d4d; color: white; padding: 5px; text-align: center; font-weight: bold;">2020 GUIDELINES MODIFICATIONS</div> <ul style="list-style-type: none"> <li>Included 5-year presumptive probation cap for most offenses</li> </ul>	<div style="background-color: #1a3d4d; color: white; padding: 5px; text-align: center; font-weight: bold;">2021 PROPOSED MODIFICATIONS</div> <ul style="list-style-type: none"> <li>Include increasing severity of child pornography production</li> <li>All unanimous</li> </ul>	<div style="background-color: #1a3d4d; color: white; padding: 5px; text-align: center; font-weight: bold;">THREE LEGISLATIVE RECOMMENDATIONS</div> <ul style="list-style-type: none"> <li>Two regarding child pornography</li> <li>One to transfer MSGC staff to classified service</li> <li>All unanimous</li> </ul>
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**Staff Activities, 2019 Sentencing Practices Data Summary,  
 & County Attorney Firearms Reports**

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**Staff Activities**  
*pp. 39–41*

- Legislature envisions MSGC as a clearinghouse & information center for sentencing-practices data
- MSGC staff monitors sentencing data, reviewing 17,000 worksheets annually, and prepares individualized data reports upon request
- MSGC staff conducts training and assistance for practitioners statewide
- MSGC staff estimate prison-bed impact for fiscal notes on crime bills (and demographic impact of select bills)

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## Key Points of 2019 Sentencing Practices Summary

*pp. 42–65*

- 2019 felony case volume (17,335 cases) fell sharply from record highs in 2017–18
- For the past three years (but not before), drugs have been the largest offense category (30% of felonies in 2019)
- 24 percent of felony sentences were for executed prison—but Guidelines recommended prison for 34.4 percent (largest gap on record)
- A record-high 13.6 percent of felony sentences were mitigated dispositional departures (stayed sentence when Guidelines recommended prison)
- Presumptive & actual imprisonment rates vary by gender, race/ethnicity, geography

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## County Attorney Firearms Reports

*pp. 66–71*

- County attorneys must report to MSGC the disposition of firearms cases subject to the mandatory minimums of Minn. Stat. § 609.11
- In FY20, they reported disposing of 1,063 such cases – a 17 percent decrease from the record high number of 1,274 set in FY19
- Of the 597 such cases in which the defendant was convicted and a firearm was established on the record, county attorneys reported that the mandatory minimum was imposed and executed in 357 cases
- The statute specifically authorizes the prosecutor and/or the judge to waive the mandatory minimum, which is either three or five years in prison

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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>	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>	150	165	180	195	210	225	240

## Overview of Sentencing Guidelines

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## Sentencing Guidelines Grid Structure

- Vertical Axis: Offense Severity (least severe offenses at the bottom)
- Horizontal Axis: Criminal History (zero criminal history at the left)
- Each cell contains a presumptive prison duration (in months)
- Judges must impose this duration (+20%/-15%) or explain reasons why
- Shaded cells: Presumptive stayed sentence (up to 1 yr. jail) unless mandatory minimum applies

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<i>Murder, 2nd Degree (Unintentional)</i>	10 150	165	180	195	210	225	240
<i>Murder, 3rd Degree (Depraved Mind)</i>	10 128-180	141-198	153-216	166-234	179-252	192-270	204-288
<i>Murder, 3rd Degree (Controlled Substances)</i>	9 86	98	110	122	134	146	158
<i>Assault, 1st Degree</i>	9 74-103	84-117	94-132	104-146	114-160	125-175	135-189
<i>Agg. Robbery, 1st Degree</i>	8 48	58	68	78	88	98	108
<i>Burglary, 1st Degree (w/ Weapon or Assault)</i>	8 41-57	50-69	58-81	67-93	75-105	84-117	92-129
<i>Felony DWI</i>	7 36	42	48	54	60	66	72
<i>Financial Exploitation of a Vulnerable Adult</i>	7 46-64	51-72	57-79	62-84 <sup>1,3</sup>			
<i>Assault, 2nd Degree</i>	6 21	27	33	39	45	51	57
<i>Burglary, 1st Degree (Occupied Dwelling)</i>	6 34-46	39-54	44-61				
<i>Residential Burglary</i>	5 18	23	28	33	38	43	48
<i>Simple Robbery</i>	5 29-39	33-45	37-51	41-57			
<i>Nonresidential Burglary</i>	4 12 <sup>1</sup>	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	3 12 <sup>1</sup>	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less)</i>	2 12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21
<i>Check Forgery (\$251-\$2500)</i>	2 12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21
<i>Assault, 4th Degree</i>	1 12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19
<i>Fleeing a Peace Officer</i>	1 12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19

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## Presumptive Sentences

- The presumptive sentences on the grid are generally believed to be appropriate for all “typical” cases sharing the same or similar characteristics.
- A *departure* is a sentence that is something other than the sentence recommended under the guidelines. If the crime or the offender is truly “atypical” then a departure sentence may be more appropriate than the presumptive sentence.

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## Minn. Sentencing Guidelines Goals

- The Commission maintains and modifies the sentencing guidelines that govern felony sentences in the state, in order to support Minnesota’s sentencing goals.
  - To better assure **public safety**.
  - To promote **uniformity** in sentencing so that offenders who are convicted of similar crimes and who have similar criminal records are similarly sentenced.
  - To establish **proportionality** in sentencing by emphasizing a “just deserts” philosophy where the punishment fits the crime. First-time offenders convicted of violent offenses and those with more extensive non-violent records are recommended prison.

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## Minn. Sentencing Guidelines Principles

- In addition, the sentencing guidelines embody the following principles:
  - Sentencing should be **neutral** with respect to race, gender, social, or economic status of convicted felons.
  - Prison and jail **capacity** is finite and should be reserved for those convicted of more serious offenses or for those with longer criminal histories.
  - Departures should be made only when **substantial and compelling** circumstances exist.

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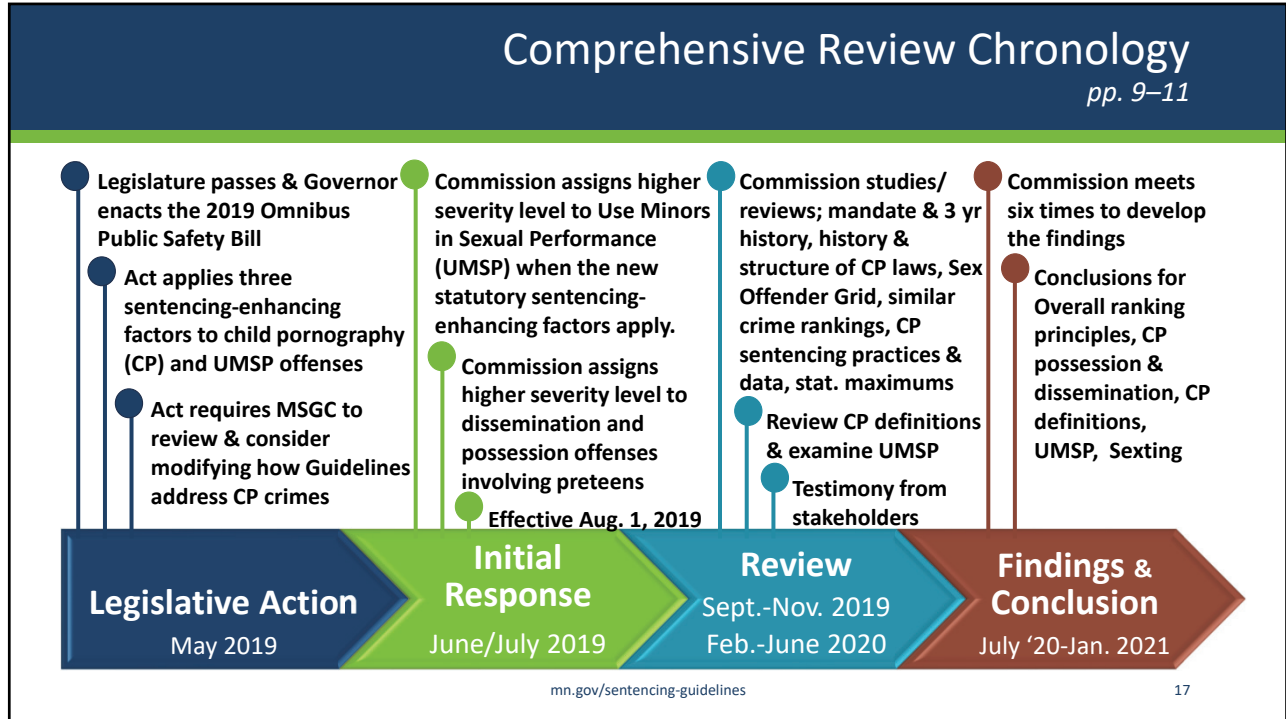
## Report on Comprehensive Review of Child Pornography Sentencing Guidelines

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## Introduction to Ranking Child Pornography Offenses

*p. 12*

- The Commission ranks nearly every felony offense by severity level
- Offenses in each severity level are considered equally serious
- Rankings are based on typical cases
- Commission considers—
  - Type of interest protected
  - Type/level of harm, and
  - Culpability
- Primary consideration: Public safety

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## Overview of Minnesota's Child Pornography Offenses

*pp. 12–13*

- Use of Minors in Sexual Performance
  - Functions as Minnesota's CP production statute
  - Other things criminalized: child sex shows, CP dissemination for profit/businesses
- Dissemination & Possession of Child Pornography
- Sentencing Enhancements
  - Prior CP conviction
  - Committed while registered predatory offender
  - The offense involved a minor under 13 (new in 2019)

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## Child Pornography Rankings vs. Other Sex Offenses

*pp. 13–19*

- Nearly every CP offense has a Criminal Sexual Conduct offense with the same statutory maximum penalty and the same severity level
- Like many sex offenses, the non-enhanced CP offenses are ranked so the grid maximum is equal to or greater than the statutory maximum
  - For the enhanced CP offenses, the statutory maximum is greater than the grid maximum

Use of Minors in Sexual Performance (enhanced), CP Dissemination (enhanced), & CSC 3rd Degree (penetration & child victim): 15-yr. max, SL D

Use of Minors in Sexual Performance & CSC 4th Degree (contact & force): 10-yr. max, SL E
 

- CP Dissemination, also SL E, has only a 7-yr. max

CP Possession (enhanced) & CSC 4th Degree (contact & child victim): 10-yr. max, SL F

CP Possession & CSC 3rd Degree (penetration & child victim 2–4 yrs. younger): 5-yr. max, SL G

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## Other Ways of Evaluating Minnesota’s CP Rankings

*pp. 19–23*

- Comparison with pre-2006 rankings:
  - Today’s CP rankings are fairly similar to judges’ CP rankings when CP was unranked
- Comparison with other states’ statutory imprisonment ranges:
  - Minnesota’s statutory ranges are neither the most severe nor most lenient
  - Toward the lenient end with respect to CP distribution and production
- Comparison with four similar Guidelines states:
  - Most lenient imprisonment dispositions, particularly with distribution & possession
  - Prison durations were generally in line with the other states
- Comparison with federal prosecution:
  - Much more lenient than US Sentencing Guidelines (some criticize as harsh)

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## Special Ranking Considerations: Possession

*pp. 24–25*

- A typical CP collection is very large, and contains graphic images of the sexual penetration of a prepubescent child
- If such a collection was amassed on multiple days—as is likely—a prosecutor can charge the collection as multiple offenses
- The criminal history of each offense contributes to the next offense in turn
  - “Hernandizing”—not found in the federal guidelines or other guidelines states queried
- Thus, although first-time CP possession is not a presumptive commit, it can become so if the prosecutor opts to Hernandize (not uncommon)

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## Special Ranking Considerations: Typical Cases

*pp. 25–27*

- MSGC staff estimate that most CP possession (75%) and dissemination (89%) offenses will qualify for the 2019 preteen-victim sentencing enhancement
  - Thus, those offenses have already been ranked more severely
- A typical dissemination case involves peer-to-peer file sharing—allowing a computer to become part of an unsupervised, impersonal CP file-sharing network
- Use of Minors in Sexual Performance encompasses a wide variety of behavior
  - Unless the offender had special access to the child, victims tended to be teenagers
- No exemption for youth-produced, youth-only experimental sexting

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## Special Ranking Considerations: Recidivism & Public Safety pp. 27–28

**CURRENT ACADEMIC RESEARCH**

- Suggests that Internet sex offenders have a relatively low risk of sexually recidivating compared to conventional contact sex offenders
- More research is needed

**US SENTENCING COMM'N 2012 REPORT**

- Non-production CP offenders had a similar recidivism rate to federal offenders in general
- They had a lower recidivism rate than contact sex offenders

**MSGC STAFF RESEARCH**

- In a more limited study, MSGC staff found a lower rate of recidivism for CP possession & dissemination than general felony population
- Production rates were comparable to general

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## Conclusions: Overall Ranking Principles pp. 29–30

- Again: Looking at typical offenses
- Legislature signals severity through statutory maximum penalty
- For base offenses, a clear hierarchy
- For enhanced offenses, less clear
- Persuaded by nature of the offenses, Commission increases ranking for Use of Minors, not Dissemination

<b>15 yrs.</b>	Use of Minors (Enh.)	Dissemination (Enh.)	
<b>10 yrs.</b>	<b>Use of Minors</b>		Possession (Enh.)
<b>7 yrs.</b>		<b>Dissemination</b>	
<b>5 yrs.</b>			<b>Possession</b>

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## Conclusions: Possession & Dissemination

pp. 30–31



### INCREASE RANKINGS

- Relative Minn. leniency
- Severe, often brutal images
- Perpetual victimization of children depicted

### MAINTAIN RANKINGS

- No evidence of high recidivism rates/public safety need
- History of parsimony, precision
- Non-contact offenses, but ranked equally to contact sex offenses
- Typical rankings increased with 2019 preteen enhancement
- Powerful Hernandizing option

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## Conclusions: Use of Minors in Sexual Performance

pp. 32–33

- The Commission unanimously proposes to increase, by one severity level each, the severity levels assigned to both levels of Use of Minors in Sexual Performance offenses (which includes child pornography production)
- Use of Minors in Sexual Performance is more severe than other CP offenses
  - Dissemination is a lesser included offense of some UMSP offenses
  - Production uniquely enables CP trafficking in a way the other offenses do not
  - Production requires the in-person, real-time victimization of a child
  - The statutory maximums for UMSP are as high as, or higher than, any other CP offense
- This proposal takes effect August 1 unless the Legislature by law provides otherwise

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## Conclusions: Child Pornography Definition

pp. 31–32

- The Commission is concerned about “conveys the impression” language in the child pornography definition
- Very similar language has been held as unconstitutional by the U.S. Supreme Court
- Several Minnesota trial judges have followed suit
- To ensure that constitutional error does not occur ...

### RECOMMENDATION TO THE LEGISLATURE

- Review the constitutionality of the definition of “pornographic work” in light of *Ashcroft v. Free Speech Coalition* (U.S. 2002) & take appropriate action

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## Conclusions: Sexting

p. 33

- The Commission is concerned about the misuse of these elevated severity levels
- “Youth-produced, youth-only experimental” production of child pornography, or “sexting” is not what the Commission considers to be a “typical” production case
- At least one Minnesota juvenile was charged with sexting as dissemination
- To allow proportionality to be restored ...

### RECOMMENDATION TO THE LEGISLATURE

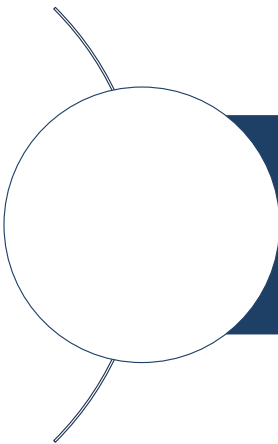
- Create a statutory exception—either as a lesser crime, or as no crime at all—for “youth-produced, youth-only experimental” production of child pornography, or “sexting”

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Minority Report  
*pp. 34–38*



**Minority Report – Severity of  
Child Pornography  
Dissemination & Possession**

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**Questions?**

Kelly Lyn Mitchell, Minnesota Sentencing Guidelines Commission Chair  
Nate Reitz, MSGC Executive Director

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