

Minnesota Sentencing Guidelines Commission

Modifications to the Sentencing Guidelines – 2015 Legislative Bills Presented to the Governor; Creating or Amending Crime Laws May 21, 2015

The following are Legislative crime bills presented to the Governor but NOT yet signed into law. The bills must be reviewed and considered by the Commission for possible modifications to the Sentencing Guidelines provided the bills become law.

A. Amended Felony Crime Laws Affecting the Guidelines. Subject to the Governor’s approval, the following existing offenses have been amended during the 2015 Legislative Session, and must be reviewed by the Commission.

Commission Action: For each offense listed below, taking the amendment into consideration, the Commission must decide if the offense should be re-ranked, if there should be any amendments to the permissive consecutive offense list, or any other amendments to the Guidelines.

1. Engaging in, Hiring, or Agreeing to Hire Minor to Engage in Prostitution

Description: The prostitution statute is amended making the hiring of an adult prostitute a felony if the patron reasonably believes the prostitute to be a child under Minn. Stat. § 609.324, subd. 1(c). The fact that an undercover operative or law enforcement officer was involved is not a defense.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 65 , art. 6, §§ 11-12; 2014 Minn. Stat. § 609.324 .
Est. Bed Impact: Negligible.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: Unlike the existing crime, the new offense does not require that the individual actually be a child, only that the defendant reasonably believed the individual to be a child. Currently, intentionally hiring, offering to hire, or agreeing to hire a 16- or 17-year-old child to engage in sexual activity, under subd. 1(c)(2), is ranked at Severity Level 3, and the statutory maximum is five years. The Guidelines recommend a presumptive commitment sentence when an offender has a Criminal History Score of 4 or more.

Bed Impact: It is assumed that hiring an adult prostitute if the patron reasonably believed the prostitute to be a child under Minn. Stat. § 609.324, subd. 1, would have previously been pursued as an attempted child prostitution offense. Between 2011

and 2013, there were seven offenders sentenced for engaging in, or agreeing to hire a minor to engage in prostitution. All seven were given stayed probationary sentences that included confinement in a local correctional facility. The average period of conditional confinement was 71 days (serve two-thirds or 48 days). During this time period, no offenders were sentenced for attempting to hire a minor to engage in prostitution. It is therefore assumed that the fiscal impact will be negligible.

MSGC Staff Recommendation: Maintain the Severity Level 3 ranking in section 5 because the statutory maximum remains the same (5 years). Additionally, it is recommended that engaging or hiring a minor to engage in prostitution remain on the list of offenses in section 6 which are eligible for permissive consecutive sentences.

2. Expanded Fifth-Degree Criminal Sexual Conduct

Description: Fifth-degree criminal sexual conduct (CSC) under Minn. Stat. § 609.3451, subd. 1, is expanded to include intentionally touching the body or clothing with semen.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 65 , art. 6, § 14; 2014 Minn. Stat. § 609.3451 .
Est. Bed Impact: Negligible.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: Except in some special circumstances, fifth-degree CSC is a gross misdemeanor for a first offense. Felony fifth-degree CSC is ranked on the Sex Offender Grid at Severity Level F. The Guidelines recommend a presumptive commitment sentence when an offender has a Criminal History Score of 3 or more.

Bed Impact: The crime was expanded in 2014 so that it was a felony if the offender had two previous convictions for gross misdemeanor fifth-degree CSC, a felony provision of indecent exposure (Minn. Stat. § 617.23), any first- through fourth-degree CSC (Minn. Stats. §§ 609.342 to 345), criminal sexual predatory conduct (Minn. Stat. § 609.3453), and possession or dissemination of child pornography (Minn. Stat. § 617.247). MSGC has no data yet on the impact of the 2014 changes.

It is assumed that the expansion of the definition of sexual contact-by-semen to fifth-degree criminal sexual conduct will result in only minor increases in the number of cases in some years.

In 2009, the definition of sexual contact in Minn. Stat. § 609.341, subd. 11, for purposes of defining second- and fourth-degree offenses, was amended to include “the intentional touching with seminal fluid or sperm by the actor of the

complainant’s body or ... clothing”; the new law extends this sexual contact definition to fifth-degree offenses. Following the 2009 change, there has been no increase in the number of offenders sentenced for second- and fourth-degree criminal sexual conduct (CSC) offenses. In 2009, there were 147 offenders sentenced for second-degree CSC and 118 offenders sentenced for fourth-degree CSC. In 2012, there were 135 offenders sentenced for second-degree CSC and 89 offenders sentenced for fourth-degree CSC. In 2013, the numbers were 126 offenders and 85 offenders, respectively. Because the change to the definition of second- and fourth-degree CSC does not appear to have resulted in an increase in the number of offenders sentenced, it is assumed that application of the same change to the definition of fifth-degree CSC will also not result in an increase in the number of offenders sentenced. Because the expansion of the definition of sexual contact will result in an increase in felony offenses only if the offender has two relevant prior offenses, it is assumed that this provision will result in very few additional felony cases.

MSGC Staff Recommendation: Maintain the Severity Level F ranking in section 5 because the statutory maximum remains the same (7 years). Additionally, it is recommended that CSC 5 remain on the list of offenses in section 6 which are eligible for permissive consecutive sentences.

3. Felons Not to Possess Ammunition

Description: A definition for ammunition is added to Minn. Stat. § 609.02, subd. 17. Ammunition is defined as “cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.” Felons who are not allowed to possess firearms are not allowed to possess ammunition and are subject to the mandatory minimum prison sentence under Minn. Stat. § 609.11. The bill amends the offense to include ammunition under Minn. Stat. §§ 609.165; 624.713. A person under the age 18 may possess ammunition designed for use in a firearm lawfully possess under direct supervision of a parent or guardian. Antique and ornamental ammunition is exempt.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 65 , art. 3, §§ 16-20, 26, 33. 2014 Minn. Stat. §§ 609.02 ; 11 ; 165 ; 624.713 ; 715 .
Est. Bed Impact: Not estimated.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: Because the bill amends the offense to include ammunition Minn. Stat. §§ 609.165; 624.713, references in sections 5.A and 5.B of the Guidelines must be changed.

MSGC Staff Recommendation: Staff recommends that sections 5.A and 5.B be amended as outlined below.

Section 5.A. Offense Severity Reference Table

Severity Level	Offense Title	Statute Number
6	Certain Persons Not to Have Firearms <u>or Ammunition</u>	624.713, subd. 2(b); 609.165, subd. 1b

Section 5.B. Severity Level by Statutory Citation

Statute Number	Offense Title	Severity Level
609.165 subd. 1b	Certain Persons Not to Have Firearms <u>or Ammunition</u>	6
624.713 subd. 2(b)	Certain Persons Not to Have Firearms <u>or Ammunition</u>	6

4. Suppressors

Description: The bill permits firearm suppressors (formerly known as “silencers”) to be possessed if lawfully possessed under federal law. A suppressor is defined as “any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.” The bill also amends the title of the reckless discharge offense under Minn. Stat. § 609.66, by striking “silencers” and inserting “suppressors.” The law clarifies that it is lawful to carry a firearm in the Capitol area provided there was an issuance of a permit to carry.

Effective Date:	Reference: 2015 Minn. Laws ch. 65 , art. 3, §§ 19-20; 2014 Minn. Stat. § 609.66 .
Est. Bed Impact: Not estimated.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: Because the bill amends the title of reckless discharge under Minn. Stat. § 609.66, references in sections 5.A and 5.B of the Guidelines must be changed.

MSGC Staff Recommendation: Staff recommends that sections 5.A and 5.B be amended as outlined below.

Section 5.A. Offense Severity Reference Table

Severity Level	Offense Title	Statute Number
2	Firearm Silencer <u>Suppressor</u>	609.66 subd. 1a(a)(1)
3	Firearm Silencer <u>Suppressor</u> (Public Housing, School or Park Zone)	609.66 subd. 1a(a)(1)

Section 5.B. Severity Level by Statutory Citation

Statute Number	Offense Title	Severity Level
609.66 subd. 1a(a)(1)	Firearm Silencer <u>Suppressor</u>	2
609.66 subd. 1a(a)(1)	Firearm Silencer <u>Suppressor</u> (Public Housing, School or Park Zone)	3

5. Expanded Financial Transaction Card Fraud

Description: Financial Transaction Card Fraud was amended to include trafficking of SNAP (Supplemental Nutrition Assistance Program) benefits.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 78, § 60 ; 2014 Minn. Stat. § 609.52 .
Est. Bed Impact: None.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: Severity-level rankings for financial transaction card fraud (FTCF) are based on the level of loss involved. If the value of the property obtained was more than \$35,000, the offense is ranked at Severity Level 5. Crimes with a loss valued at more than \$2,500 are ranked at Severity Level 3; and at Severity Level 2 for crimes with values of \$2,500 or less but more than \$250. Crimes with a loss of less than \$250 are gross misdemeanors.

The gross misdemeanor will be eligible to be counted as one unit in the calculation of the misdemeanor/gross misdemeanor criminal history point. Four units are needed to equal one misdemeanor/gross misdemeanor point as described in section 2.B.3. A person is assigned a custody status point if they are on gross misdemeanor probation (including early discharge from probation) at the time he or she commits a felony offense.

Bed Impact: It was assumed that the behavior proscribed was already a crime under Minn. Stat. § 393.07, subd. 10(c), which makes the unauthorized exchange of food stamps (now known as supplemental nutrition assistance), including unauthorized barter of food stamps, a crime under Minn. Stat. §§ 256.98 (welfare fraud), 609.821 (financial transaction card fraud), or both. It was assumed that all SNAP benefits are now given on Electronic Benefit Transfer cards, and that all unauthorized transactions would therefore already be violations of Minn. Stat. § 609.821 under current law. It was therefore assumed that there would be no fiscal impact.

MSGC Staff Recommendation: Continue the existing severity-level rankings for financial transaction card fraud:

- Severity Level 2. When the value was at \$2,500 or less but more than \$250.
- Severity Level 3. When the value was more than \$2,500.
- Severity Level 5. When the value was more than \$35,000.

B. New Offense. The following new offense was enacted by the Legislature during the 2015 Legislative session. Subject to the Governor’s approval, it must be reviewed and acted on by the Commission.

Commission Action: One of the responsibilities of the Commission is to assign severity-level rankings to new crimes and to consider whether they should be added to the list of offenses eligible for permissive consecutive sentences. The Commission bases its decisions, in part, on the level of harm caused by the offense and the culpability of the offender. Statutory maximums are also considered.

For the new offense listed below, the Commission must decide:

1. What severity level should be assigned?
2. Should the offense be eligible for a permissive consecutive sentence?
3. Are there other amendments that must be made to the Guidelines?

- **Wrongful Employment at a Child Care Center**

Description: A new felony was created for wrongful employment at a child care center under Minn. Stat. § 609.816. This applies to persons who require child care center applicants or employees to have one or more children who are eligible for or receive child care assistance. The crime is punishable under the theft penalty provisions in Minn. Stat. § 609.52, subd. 3, clauses (1) to (5) which range from misdemeanor to felony depending on the monetary value of the theft.

Effective Date: August 1, 2015.	Reference: Reference: 2015 Minn. Laws ch. 78 , § 59; 2014 Minn. Stat. § 609.52 .
Est. Bed Impact: None.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: The Guidelines recommend that property crimes be treated similarly and listed on the Theft Offense List in section 7. The severity level for these offenses is based on the monetary amount of the conviction offense. The monetary amount is contained in the penalty statute as cited below:

- Severity Level 2. When the monetary value of the theft crime is \$5,000 or less, the penalty statute is Minn. Stat. § 609.52, subdivision 3(3)(a); and
- Severity Level 3. When the monetary value of the theft crime is over \$5,000, the penalty statute is Minn. Stat. § 609.52, subdivision 3(2).

Crimes on the Theft Offense List are as follows:

Statute Number	Offense Title
176.178	Workers Compensation Fraud
256.98	Wrongfully Obtaining Assistance
268.182	False Representations
393.07 subd. 10	Federal Food Stamp Program

Statute Number	Offense Title
471.392	False Declaration of Claim
514.02 subd. 1(b)	Non-payment for Improvement (Proceeds of Payments; Acts Constituting Theft)
609.445	Failure to Pay Over State Funds
609.455	Permitting False Claims Against Government
609.465	Presenting False Claims to Public Officer or Body
609.466	Medical Assistance Fraud
609.52	Theft of Public Funds
609.52 subd. 2(a)(1)	Theft
609.52 subd. 2(a)(2)	Taking Pledged Property
609.52 subd. 2(a)(3)(i)	Theft By Check
609.52 subd. 2(a)(3) (ii), (iii), (iv), & (v)	Theft By False Representation
609.52 subd. 2(a)(4)	Theft by Trick
609.52 subd. 2(a)(5)	Temporary Theft
609.52 subd. 2(a)(6)	Refusing to Return Lost Property
609.52 subd. 2(a)(7)	Theft from Coin Operated Machines
609.52 subd. 2(a)(9)	Theft of Leased Property
609.52 subd. 2(a)(10) & (11)	Altering Serial Number
609.52 subd. 2(a)(12)	Theft of Cable TV Services
609.52 subd. 2(a)(13)	Theft of Services
609.52 subd. 2(a)(14)	Theft of Telecommunications Services
609.52 subd. 2(a)(15) & (16)	Diversion of Corporate Property
609.53	Receiving Stolen Property
609.611	Defrauding Insurer
609.615	Defeating Security on Realty
609.62	Defeating Security on Personalty

Statute Number	Offense Title
609.82	Fraud in Obtaining Credit

The new gross misdemeanor wrongful employment at a child care center offense will be eligible to be counted as one unit in the calculation of the misdemeanor/gross misdemeanor criminal history point. Four units are needed to equal one misdemeanor/gross misdemeanor point as described in section 2.B.3. A person is assigned a custody status point if they are on gross misdemeanor probation (including early discharge from probation) at the time he or she commits a felony offense.

Bed Impact: It is assumed that the new law was intended to prevent child care centers from hiring parents eligible for the Child Care Assistance Program (CCAP) to care for their own children by making such hiring schemes a felony. In light of the fact that Minn. Stat. § 119B.011, subd. 5, defines "child care" as the care of a child by someone other than a parent or other listed relative, it was assumed that the behavior was already a crime under Minn. Stat. § 256.98 (welfare fraud). Depending on the amount of assistance incorrectly paid, welfare fraud may be a misdemeanor, gross misdemeanor, or felony. It is further assumed that shrewd, fraudulent-minded operators of child care centers will avoid the third element of the new offense by merely preferring, but not explicitly requiring, that employees be CCAP-eligible parents. Therefore, it was assumed that few additional convictions will occur as a result of this change. While some offenses that had previously been misdemeanors and gross misdemeanors may become felonies, it is assumed, based on the fact that CCAP providers are required to undergo background studies (see Minn. Stat. §§ 119B.125, 245A.03, and 245C.04) that they are unlikely to have high criminal history scores, and prison sentences are very unlikely.

MSGC Staff Recommendation: Add wrongful employment at a child care center to the Theft Offense List in Section 7 and reference the new offense in section 5.B at Severity Level 3 and Severity Level 2, as outlined below.

Section 5.B. Severity Level by Statutory Citation

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Statute Number	Offense Title	Severity Level
<u>609.816</u>	<u>Wrongful Employment at a Child Care Center (Over \$5,000)</u>	<u>3</u>

Statute Number	Offense Title	Severity Level
<u>609.816</u>	<u>Wrongful Employment at a Child Care Center (\$5,000 or Less)</u>	<u>2</u>

Section 7. Theft Offense List

Statute Number	Offense Title
609.62	Defeating Security on Personalty
<u>609.816</u>	<u>Wrongful Employment at a Child Care Center</u>
609.82	Fraud in Obtaining Credit

C. New and Amended Gross Misdemeanor Crimes. The following gross misdemeanor offenses were created or amended by the 2015 Legislature. Staff brings these offenses to the Commission’s attention because gross misdemeanors are used in the calculation of an offender’s Criminal History Score. No action is required, although the Commission may wish to consider taking action on the gross misdemeanor reckless driving, as noted below.

1. Purchasing Firearm on Behalf of Ineligible Person

Description: Any person who purchases or obtains a firearm for another person known to be ineligible to possess or purchase a firearm is guilty of a gross misdemeanor under the newly created Minn. Stat. § 624.7133.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 65 , art. 3, § 31.
Est. Bed Impact: Not estimated.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: The gross misdemeanor offense will be eligible to be counted as one unit in the calculation of the misdemeanor/gross misdemeanor criminal history point. Four units are needed to equal one misdemeanor/gross misdemeanor point as described in section 2.B.3. A person is assigned a custody status point if they are on gross misdemeanor probation (including early discharge from probation) at the time he or she commits a felony offense.

MSGC Staff Recommendation: No action required.

2. Reckless Driving

Description: The crime of reckless driving under Minn. Stat. §169.13, subd. 1 (a) is amended to read: “A person who drives a motor vehicle while aware of and consciously disregarding a substantial and unjustifiable risk that the driving may result in harm to another or another’s property is guilty of reckless driving. The risk must be of such a nature and degree that disregard of it constitutes a significant deviation from the standard of conduct that a reasonable person would observe in the situation.” Currently, reckless driving is a misdemeanor. A new gross misdemeanor is established if a person causes great bodily harm or death to another person.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 65 , art. 6, § 3.
Est. Bed Impact: Not estimated.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: It is assumed that the new offense will be considered to be, for purposes of the sections 2.B.2.a.(3)(iii) and 2.B.3.a.(2), a traffic gross misdemeanor. The gross misdemeanor offense will be eligible to be counted as one unit in the calculation of the misdemeanor/gross misdemeanor criminal history point. Four units are needed to equal one misdemeanor/gross misdemeanor point as described in section 2.B.3. A person is assigned a custody status point if they are on gross misdemeanor probation (including early discharge from probation) at the time he or she commits a felony offense.

MSGC Staff Recommendation: Staff recommends that the Commission consider whether it wishes to treat gross misdemeanor reckless driving like other traffic gross misdemeanors, or like gross misdemeanor DWIs and non-traffic gross misdemeanors.

Note: For purposes of comparison, the following list contains the non-DWI gross misdemeanors found in Minn. Stat. chapters 169, 169A, and 171, which may or may not be considered “traffic gross misdemeanors”:

1. Minn. Stat. §§ 169.09 (leaving the scene of a personal injury accident – less than great bodily harm);
2. 169.21 (failing to yield to pedestrian in crosswalk – 2nd offense w/in year); 169.444 (passing school bus stop arm – on right or child present);
3. 169.781 (commercial inspection decal forgery);
4. 169.791 & 169.797 (no proof of insurance – 2nd offense w/in 10 years);
5. 169A.31 (alcohol-related school bus driving);

6. 171.09 (driving in violation of drug/alcohol restriction);
7. 171.22 (counterfeit driver's license; false name and date of birth of another);
8. 171.24 (driving after cancellation as inimical to public safety).

If the Commission wishes to treat gross misdemeanor reckless driving like other traffic gross misdemeanors, no action is required.

If the Commission wishes that an offender receive a custody status point for being in a custody status (e.g., probation) for gross misdemeanor reckless driving, the following amendment to Section 2.B.2.a.(3) is recommended:

- (3) The offender was under one of the custody statuses in paragraph (1) for one of the following:
 - (i) a felony;
 - (ii) extended jurisdiction juvenile (EJJ) conviction;
 - (iii) non-traffic gross misdemeanor;
 - (iv) gross misdemeanor driving while impaired, ~~or~~ refusal to submit to a chemical test, or reckless driving; or
 - (v) targeted misdemeanor.

If the Commission wishes that gross misdemeanor reckless driving may contribute to an offender's criminal history score, the following amendment to Section 2.B.3.a. is recommended:

- a. General Assignment of Units. If the current conviction is for an offense other than criminal vehicular homicide or operation or felony driving while impaired (DWI), assign the offender one unit for each prior conviction of the following offenses provided the offender received a stayed or imposed sentence or stay of imposition for the conviction before the current sentencing:
 - (1) targeted misdemeanor, as defined in Minn. Stat. § 299C.10, subd. 1(e);
 - (2) non-traffic gross misdemeanor;
 - (3) gross misdemeanor driving while impaired;
 - (4) gross misdemeanor refusal to submit to a chemical test;
 - (5) gross misdemeanor reckless driving;
 - (6) a felony conviction resulting in a misdemeanor or gross misdemeanor sentence.

3. Adulteration by Bodily Fluid

Description: The new misdemeanor and gross misdemeanor offenses of adulteration by bodily fluid are created under Minn. Stat. § 609.688. Bodily fluid is defined as “blood, seminal fluid, vaginal fluid, urine, or feces of a human.” A person is guilty of a misdemeanor if he or she adulterates any substance intended for human consumption. A person is guilty of a gross misdemeanor if he or she adulterates any substance and another person ingests it.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 65 , art. 6, § 17.
Est. Bed Impact: Not estimated.	Racial Disparity Impact: Not estimated.

Guidelines Considerations: The gross misdemeanor offense will be eligible to be counted as one unit in the calculation of the misdemeanor/gross misdemeanor criminal history point. Four units are needed to equal one misdemeanor/gross misdemeanor point as described in section 2.B.3. A person is assigned a custody status point if they are on gross misdemeanor probation (including early discharge from probation) at the time he or she commits a felony offense.

MSGC Staff Recommendation: No action required.

D. Amended Crime Laws Not Affecting the Guidelines. Although bills affecting these laws were amended by the 2015 Legislature, the crimes themselves were not amended. No action is necessary on the part of the Commission. Staff brings these changes forward for the Commission’s information.

1. Lowered Aggravated Alcohol Concentration to .16

Description: The aggravated alcohol concentration standard, used to enhance criminal penalties in cases of driving while impaired (DWI) in the third and second degree, is lowered from 0.20 to 0.16. The aggravated alcohol concentration standard is not an element of felony first-degree DWI.

Effective Date: August 1, 2015.	Reference: 2015 Minn. Laws ch. 65 , art. 6, § 5; 2014 Minn. Stat. § 16A.03 .
Est. Bed Impact: Not estimated.	Racial Disparity Impact: Not estimated.

Commission Action: No action is necessary.

2. Affirmative Defense to Marijuana Possession for Industrial Hemp

Description: An affirmative defense to a prosecution for the possession of marijuana under Chapter 152 is established: That the defendant possesses industrial hemp grown pursuant to the newly established Chapter 18K, the Industrial Hemp Development Act.

Effective Date: The day following enactment.	Reference: 2015 Minn. Laws ch. 79 , art. 2, § 45
Est. Bed Impact: Not estimated.	Racial Disparity Impact: Not estimated.

Commission Action: No action is necessary.