



Child Pornography Charging and Sentencing Practices

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 Staff Presentation
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A Brief Primer on Sentencing Multiple Current Offenses

Minn. Stat. § 609.035

- General rule: only one sentence per behavioral incident
- Exceptions include multiple victims
- Separate behavioral incidents may get separate sentences

Concurrent sentencing

- Use *Hernandez* method (“Hernandizing”)
- Offense #1 is included in the criminal history score for Offense #2’s sentence

Consecutive sentencing

- For Offense #2, permissive consecutive sentencing applies only if the presumptive sentence for Offense #1 is a prison commit
- Offense #2: additional prison, but use zero criminal history score

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Single Course of Conduct/Multiple Victim Rule

- Multiple convictions for possession of multiple images, even if together on the same computer, may receive multiple sentences—
- When the images involve **multiple victims**
 - State v. Rhoades*, 690 N.W.2d 135 (Minn. Ct. App. 2004)
- But, if sentencing concurrently, felony weights are assigned to only **two offenses**, per Guidelines § 2.B.1.e(2)

Illustration: Hernandizing multiple current child pornography offenses under the multiple-victim rule, starting with no criminal history

CSC	CP	S L	CHS 0	CHS 1	CHS 2	CHS 3	CHS 4	CHS 5	CHS 6+
1		A	12	13	14	15	19.5	25.5	30
2		B	7.5	9.2	10.8	12.5	16.3	21.3	25
3		C	4	5.2	6.3	7.5	9.8	12.8	15
2/3	U+, D+	D	5			5.8	7.6	9.9	11.7
4	U, D	E	5			6.5	8.5	10	
4/5	P+	F				3.8	4.9	6.4	7
3	P	G					3.3	4.3	5

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Separate Behavioral Incidents Rule

- Multiple convictions for possession of multiple images, even if together on the same computer, may receive multiple sentences—
- When the images were **downloaded at substantially different times** (e.g., days apart), and the offenses were not in furtherance of each other
 - State v. Bakken*, 883 N.W.2d 264 (Minn. 2016)
- No limit on Hernandizing

Illustration: Hernandizing multiple current child pornography offenses as separate behavioral incidents, starting with no criminal history

CSC	CP	S L	CHS 0	CHS 1	CHS 2	CHS 3	CHS 4	CHS 5	CHS 6+
1		A	12	13	14	15	19.5	25.5	30
2		B	7.5	9.2	10.8	12.5	16.3	21.3	25
3		C	4	5.2	6.3	7.5	9.8	12.8	15
2/3	U+, D+	D	5			5.8	7.6	9.9	11.7
4	U, D	E	5			6.5	8.5	10*	
4/5	P+	F				3.8	4.9	6.4	7
3	P	G					3.3	4.3	5

*Statutorily limited to 7 years for dissemination

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Staff's Questions About Hernandizing & CP Possession

- Minnesota Sentencing Guidelines have been criticized as being too lenient toward child pornography
- In light of Hernandizing options available to prosecutor and judge, are child pornography guidelines as lenient as they appear?
- The Commission has learned that a typical child pornography collection is very large, and includes many images of children under age 13
- Is the effective presumptive range for typical possession actually 0 to 7 years, at the prosecutor's discretion?

P+	F				3.8	4.9	6.4	7
P	G					3.3	4.3	5

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Staff's Proposed Study Approach (Guidance Solicited)

HYPOTHESIS

- The degree to which prosecutors and judges choose probationary sentences for child pornography possessors and disseminators—through mitigated dispositional departures, plea agreements, and not employing available Hernandizing options—can inform the Commission's ranking decisions

SCOPE

- All child pornography possession & dissemination sentenced in 2018

EXAMINATION

- Starting and ending criminal history scores, and how widespread Hernandizing is now
- Dismissed charges, and whether they apparently could have been Hernandized
- Facts alleged in criminal complaints apparently supporting possible additional charges that could have been Hernandized
- Plea-bargaining and sentencing practices

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