

Sentencing Multiple Counts of Conviction
Minnesota's "*Hernandez Rule*" and Alternatives
from Other Systems

1

Presented to the Minnesota Sentencing Guidelines
Commission

February 12, 2026

Kevin R. Reitz

James La Vea Professor of Law, University of
Minnesota Law School

Faculty Chair, Robina Institute of Criminal Law and
Criminal Justice

2

The comparative analysis in this presentation draws heavily on research conducted by Emma Walsh-Aker, University of Minnesota Law School Class of 2027

3

Introduction

4

The *Hernandez* Rule deviates from the great majority of other guidelines systems in its treatment of multiple counts of conviction as criminal history

9

The *Hernandez* Rule has a significant impact on Minnesota's prison population and almost certainly contributes to racial disparities in prison admissions and rates

10

Large numbers of cases are affected
Severe consequences in many
sentencing outcomes

11

In recent years, the *Hernandez* Rule has been applied in more than 25 percent of all Guidelines sentences and has caused the presumptive sentence to cross the dispositional line in 45 percent of those cases

12

The frequency of use of the *Hernandez* Rule has been growing and the average number of current convictions fed into the *Hernandez* counting rules has been increasing

13

Who has responsibility to reassess the
Hernandez Rule?

14

The Minnesota Supreme Court has said repeatedly over four decades that problems with the *Hernandez* Rule should be addressed by the Guidelines Commission

15

State v. Williams, 771 N.W.2d 514, 524 (Minn. 2009) (“we decline to step in where the Commission has decided not to act. It is the proper function of the Commission to determine whether a *Hernandez* prohibition should be created ...”); *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997) (“While application of the *Hernandez* method for convictions resulting from undercover drug operations may very well result in [manipulation of investigative or charging procedures], we have repeatedly recognized that arguments concerning disparities in sentencing are more appropriately addressed to the Sentencing Guidelines Commission.”); *State v. Pittel*, 518 N.W.2d 606, 608 (Minn. 1994) (“The trial court was free to use the *Hernandez* method. We have conceded that “there is some disparity in cases like this stemming from the fact that one prosecutor might let a defendant connected to 50 [crimes] plead to 3 charges ... whereas another prosecutor might want to build up the defendant's criminal history score to six or more using the *Hernandez* method. ... However, in a number of cases we have made it clear that any change must come from the Sentencing Guidelines Commission.”); *State v. Moore*, 340 N.W.2d 671, 673 (Minn. 1983) (“[T]here may be a strong argument for ... limiting the use of the *Hernandez* Rule in a case such as this where the multiple offenses were all committed against the same victim. In either case, the aim of the limitation would be to limit the effect of prosecutorial variability in charging practices. However, whether or not such a limitation should be adopted is a decision which we believe should be left to the

16

The *Hernandez* Rule in operation
A brief overview

17

When *Hernandez* applies, the Guidelines deal with multiple current counts of conviction through additive increases in the Criminal History Score of each “extra” count by date of occurrence

Minn. Sent. Guidelines 2.B.1.e (2024)

23

This moves cases from left to right across
the Guidelines grid

24

The review of many different scenarios under
the *Hernandez* Rule raises a growing list of
policy questions

26

One illustration:
Hernandez at full reach

27

Based on *State v. Bakken*, 883 N.W.2d 264 (Minn. 2016)

On 7 different days over several months, Defendant downloaded, viewed, and saved to his computer's hard drive 7 pornographic images of minors engaged in sexual conduct. Each photograph depicted a different minor.

[H]e was charged with seven counts of Possession of Pornographic Work Involving Minors, Minn. Stat. § 617.247, subd. 4(a)

28

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		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or More
<i>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—(c)(d)(e)(f)(h) Prostitution; Sex Trafficking³ 1st Degree—1(a)</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—(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o) Prostitution; Sex Trafficking 2nd Degree—1a</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—(a)(b)(g) CSC 3rd Degree—(a)(b)¹ (e)(f) Dissemination of Child Pornography (Subsequent or by Predatory Offender)</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—(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o) Use Minors in Sexual Performance Dissemination of Child Pornography²</i>	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
<i>CSC 4th Degree—(a)(b)(e)(f) Possession of Child Pornography (Subsequent or by Predatory Offender)</i>	F	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>66-92</i>	84 <i>72-100</i>
<i>CSC 5th Degree Indecent Exposure Possession of Child Pornography Solicit Children for Sexual Conduct²</i>	G	15	20	25	30	39 <i>34-46</i>	51 <i>44-60</i>	60 <i>51-60</i> ²
<i>Registration Of Predatory Offenders</i>	H	12 ¹ <i>12¹-14</i>	14 <i>12¹-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

Minn. Sent. Gls. & Commentary
(Aug. 1, 2012), at 73

30

- Defendant has 0 prior convictions
- Treated as criminal history, each child pornography count at Severity Level G receives 1 Criminal History Point

31

By date of act:

- Count 1: Criminal History Score = 0
- Count 2: Criminal History Score = 1
- Count 3: Criminal History Score = 2
- Count 4: Criminal History Score = 3
- Count 5: Criminal History Score = 4
- Count 6: Criminal History Score = 5
- Count 7: Criminal History Score = 6

32

Concurrent sentences **with** *Hernandez*

- Severity Level G for all 7 counts
- Criminal History Score on 7th count = 6
- 7th count: Presumptive prison: 51-60 mos. (stat max)

35

Concurrent sentences **without Hernandez**

- Severity Level G for all 7 counts
- Criminal History Score for each count = 0
- All counts: Presumptive probation: 15 mos.

36

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		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or More
<i>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>306-360²</i>
<i>CSC 2nd Degree— (c)(d)(e)(f)(h) Prostitution; Sex Trafficking³ 1st Degree—1(a)</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>255-300²</i>
<i>CSC 3rd Degree—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Prostitution; Sex Trafficking 2nd Degree—1a</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>153-180²</i>
<i>CSC 2nd Degree—(a)(b)(g) CSC 3rd Degree—(a)(b) (e)(f) Dissemination of Child Pornography (Subsequent or by Predatory Offender)</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—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Use Minors in Sexual Performance Dissemination of Child Pornography²</i>	E	24	36	48	60 <i>51-72</i>	78 <i>67-93</i>	102 <i>87-120</i>	120 <i>102-120²</i>
<i>CSC 4th Degree— (a)(b)(e)(f) Possession of Child Pornography (Subsequent or by Predatory Offender)</i>	F	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>66-92</i>	84 <i>72-100</i>
<i>CSC 5th Degree Indecent Exposure Possession of Child Pornography Solicit Children for Sexual Conduct⁴</i>	G	15	20	25	30	39 <i>34-46</i>	51 <i>44-60</i>	60 <i>51-60²</i>
<i>Registration Of Predatory Offenders</i>	H	12 ¹ <i>12²-14</i>	14 <i>12²-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

Minn. Sent. Gls. & Commentary
(Aug. 1, 2012), at 73

37

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		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or More
CSC 1 st Degree	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
CSC 2 nd Degree— (c)(d)(e)(f)(h) Prostitution; Sex Trafficking ³ 1 st Degree—1(a)	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
CSC 3 rd Degree—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Prostitution; Sex Trafficking 2 nd Degree—1a	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
CSC 2 nd Degree—(a)(b)(g) CSC 3 rd Degree—(a)(b) ¹ (e)(f) Dissemination of Child Pornography (Subsequent or by Predatory Offender)	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>
CSC 4 th Degree—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Use Minors in Sexual Performance Dissemination of Child Pornography 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
CSC 4 th Degree— (a)(b)(e)(f) Possession of Child Pornography (Subsequent or by Predatory Offender)	F	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>66-92</i>	84 <i>72-100</i>
CSC 5 th Degree Indecent Exposure Possession of Child Pornography Solicit Children for Sexual Conduct ²	G	15	20	25	30	34-46	44-60	60 <i>51-60</i> ²
Registration Of Predatory Offenders	H	12 ¹ <i>12¹-14</i>	14 <i>12¹-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

Minn. Sent. Gls. & Commentary
(Aug. 1, 2012), at 73

38

Does this further the Guidelines' goal of proportionality in sentence severity?

39

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		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or More
CSC 1 st Degree	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
CSC 2 nd Degree— (c)(d)(e)(f)(h) Prostitution; Sex Trafficking ³ 1 st Degree—1(a)	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
CSC 3 rd Degree—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Prostitution; Sex Trafficking 2 nd Degree—1a	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
CSC 2 nd Degree—(a)(b)(g) CSC 3 rd Degree—(a)(b) ¹ (e)(f) Dissemination of Child Pornography (Subsequent or by Predatory Offender)	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>
CSC 4 th Degree—(c)(d) (g)(h)(i)(j)(k)(l)(m)(n)(o) Use Minors in Sexual Performance Dissemination of Child Pornography 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
CSC 4 th Degree— (a)(b)(e)(f) Possession of Child Pornography (Subsequent or by Predatory Offender)	F	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>60-92</i>	84 <i>72-100</i>
CSC 5 th Degree Indecent Exposure Possession of Child Pornography Solicit Children for Sexual Conduct ²	G	15	20	25	30	39 <i>34-46</i>	51 <i>44-60</i>	60 <i>51-60</i> ²
Registration Of Predatory Offenders	H	12 ¹ <i>12¹-14</i>	14 <i>12¹-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

Minn. Sent. Gls. & Commentary
(Aug. 1, 2012), at 73

40

Under *Hernandez*, 7 counts of possession of child pornography receive a more severe presumptive sentence than a conviction of:

- Manslaughter 1st Degree (609.20(3) & (4))
- Manslaughter 2nd Degree (culpable negligence) (609.205(1) & (5)),
- Criminal Vehicular Homicide (causing death) (609.2112, subd. 1(a))
- Aggravated Robbery 1st Degree (609.245, subd. 1)
- Arson 1st degree (609.561)
- Kidnapping (victim under 16 or not released in a safe place) (609.25, subd. 2(2)(i) & (iii))
- Burglary 1st Degree (with weapon or assault) (609.582(1)(b) & (c))
- Sex Trafficking 2nd Degree (609.322, subd. 1a)
- Use of Minors in Sexual Performance (subsequent offense, predatory offender, or child under 14) (617.246, subd. 2(b),3(b), 4(b))
- Criminal Sexual Conduct 3rd Degree (e.g., penetration & coercion) (609.344, subd. 1(a)(b)(c)(d) & 1a(c)(d)(g)(h)(i))
- Criminal Sexual Conduct 2nd Degree (age) (609.343, subd. 1a(e)(f)(g))

41

In its review, the Commission should study of a wide range of *Hernandez* case results and hypothetical scenarios

43

Changes in prosecutorial practices after adoption of the *Hernandez Rule*

46

the percentage of property offenders with criminal history scores of four or more doubled from 1981 to 1989, and the percentage with presumptive prison sentences increased from 7% to almost 17%. The higher scores were apparently the result of prosecutors charging and requiring defendants to plead to more counts, combined with the application of *Hernandez* concurrent-counts sentencing.

Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 Cornell J. L. & Pub. Pol'y 279, 324 (Spring 1993)

48

the immediate consequence of the Hernandez rule is that prosecutors can "stack the deck" in charging and plea bargaining practices. Specifically, the retention of "separate behavioral incidents" in any felony complaint can be used to "target the dispositional line" or increase the period of confinement through the successive escalation of criminal history points

Terance D. Miethe & Charles A. Moore, *Evaluation of Minnesota's Sentencing Guidelines: Final Report Submitted to the National Institute of Justice* (1987), at 28

49

In each of these cases, the ability of prosecutors to dismiss or reduce additional charges can be a major enticement for acceptance of a guilty plea.

Terance D. Miethe & Charles A. Moore, *Evaluation of Minnesota's Sentencing Guidelines: Final Report Submitted to the National Institute of Justice* (1987), at 28

50

The Minnesota Supreme Court has noted in several cases that the *Hernandez* Rule can produce sentencing disparities based on the charging discretion of prosecutors

51

State v. Pittel, 518 N.W.2d 606, 608 (Minn. 1994):

“ The trial court was free to use the *Hernandez* method. We have conceded that “there is some disparity in cases like this stemming from the fact that one prosecutor might let a defendant connected to 50 [crimes] plead to 3 charges ... whereas another prosecutor might want to build up the defendant's criminal history score to six or more using the *Hernandez* method. ... However, in a number of cases we have made it clear that any change must come from the Sentencing Guidelines Commission.”

52

State v. Pittel, 518 N.W.2d 606, 608 (Minn. 1994):

“ The trial court was free to use the *Hernandez* method. We have conceded that “there is some disparity in cases like this stemming from the fact that one prosecutor might let a defendant connected to 50 [crimes] plead to 3 charges ... whereas another prosecutor might want to build up the defendant's criminal history score to six or more using the *Hernandez* method. ... However, in a number of cases we have made it clear that any change must come from the Sentencing Guidelines Commission.”

53

The Criminal History Score in Minnesota and other guidelines systems is an important factor in racial disparities in prison sentencing

56

In a classic 2009 study of racial disparities in Minnesota prison sentences, Richard Frase found that “high criminal history accounted for about two-thirds of the black/white difference in recommended-prison rates”

Richard S. Frase , *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations*, in Michael Tonry ed., *Crime and Justice* 249-50 (2009)

57

Later research across four guidelines states produced similar findings

Table 12.4 Percentage Allocation of Disparity in Recommended Prison by Grid Zone

Primary Grids			
<i>Jurisdiction/Grid</i>	<i>Zone 1: High Severity</i>	<i>Zone 2: High Criminal History</i>	<i>Zone 3: Mandatories & Other Special Rules</i>
Kansas	48%	57%	-4%
Minnesota	36%	56%	8%
North Carolina	61%	41%	-2%
Washington	51%	49%	0%

Richard S. Frase, Julian R. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* (2015) (based on 2012 data).

58

Hernandez magnifies all effects of the Criminal History Score by extending it into the domain of multi-count cases

60

Comparative Observations

61

A key consideration in **comparison to other guidelines jurisdictions:**

62

A key consideration in **comparison to other guidelines jurisdictions:**

The *Hernandez Rule* pushes significant numbers of presumptive sentences across the Guidelines' dispositional line

63

Cases Pushed over the Dispositional Line: 2019-2023

All Offenses

From 2019 to 2023, there were 18,714 Hernandez cases sentenced in severity levels with presumptive stay cells. 8,495 of these cases were pushed over the dispositional line due to the to Hernandez Rule, or about 45% of cases all Hernandez Rule cases.

MSGC, Staff Information Paper: *Hernandez* Quick Facts (Apr. 10,2025), at 2

64

Compared with other states' guidelines, Minnesota's Guidelines have unusually high "cliffs" when crossing the dispositional line

65

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>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ^{2,1}	426 363-480 ^{2,1}
<i>Murder, 2nd Degree (Unintentional) Murder, 3rd Degree (Depraved Mind)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Murder, 3rd Degree (Drugs) Assault, 1st Degree (Great Bodily Harm)</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Agg. Robbery, 1st Degree Burglary, 1st Degree (w/ Weapon or Assault)</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48 → 54 46-64	60 51-72	66 57-79	72 62-84 ^{2,3,1,2}	
<i>Assault, 2nd Degree Burglary, 1st Degree (Occupied Dwelling)</i>	6	21	27	33 → 39 34-46	45 39-54	51 44-61	57 49-68	
<i>Residential Burglary Simple Robbery</i>	5	18	23	28 → 33 29-39	38 33-45	43 37-51	48 41-57	
<i>Nonresidential Burglary</i>	4	12 ³	15	18	21 → 24 21-28	27 23-32	30 26-36	
<i>Theft Crimes (Over \$5,000)</i>	3	12 ³	13	15	17 → 19 17-22	21 18-25	23 20-27	
<i>Theft Crimes (\$5,000 or less) Check Forgery (\$251-\$2,500)</i>	2	12 ³	12 ³	13	15	17	19 → 21 18-25	
<i>Assault, 4th Degree Fleeing a Peace Officer</i>	1	12 ³	12 ³	12 ³	13	15	17 → 19 17-22	

66

In our research, we haven't found any state guidelines system with penalty consequences across the dispositional line as severe as those in Minnesota

67

In Minnesota, it doesn't take a big "push" from the Criminal History Score to move a case across the dispositional line

68

It takes only one Criminal History Point to cross Minnesota's dispositional line

69

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>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ^{2,1}	426 363-480 ^{2,1}
<i>Murder, 2nd Degree (Unintentional) Murder, 3rd Degree (Depraved Mind)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Murder, 3rd Degree (Drugs) Assault, 1st Degree (Great Bodily Harm)</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Agg. Robbery, 1st Degree Burglary, 1st Degree (w/ Weapon or Assault)</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84 ^{2,3,1,2}
<i>Assault, 2nd Degree Burglary, 1st Degree (Occupied Dwelling)</i>	6	21	27	33	39 34-46	45 39-54	51 44-61	57 49-68
<i>Residential Burglary</i>	5	12 ¹	23	28	33 29-39	38 33-45	43 37-51	48 41-57
<i>Nonresidential Burglary</i>	4	12 ¹	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less) Check Forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 18-25
<i>Assault, 4th Degree Fleeing a Peace Officer</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 17-22

As low as Severity Level 3

70

- Theft > \$5,000
- Check Forgery > \$2,500
- Credit Card Fraud > \$2,500
- Computer Theft or Damage > \$2,500
- Repeat Shoplifting (3rd Degree Burglary)

71

Insights from other systems

72

Decades of research on judges' discretionary decisions when sentencing multiple counts of conviction

Andrew A. Ashworth, *Sentencing and Criminal Justice*, 7th ed. (2021); Mandeep K. Dhali, *Sentencing Multiple- Versus Single-Offence Cases: Does More Crime Mean Less Punishment?*, 62 *Brit. J. Criminol.* 55 (2021); Richard S. Frase, Principles and Procedures for Sentencing of Multiple Current Offenses, in J. Ryberg, J. V. Roberts, & J. W. de Keijser, eds, *Sentencing Multiple Crimes* (Oxford University Press 2017); Kevin R. Reitz, *The Illusion of Proportionality: Desert and Repeat Offenders*, in Julian Roberts & Andreas von Hirsch eds., *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing, 2010); Austin Lovegrove, *Sentencing the Multiple Offender: Judicial Practice and Legal Principle* (Australian Institute of Criminology 2004); Nils Jareborg, *Why Bulk Discounts in Multiple Sentencing?*, in A. Ashworth & M. Wasik (eds), *Fundamentals of Sentencing Theory* (Oxford University Press 1998); Paul Robinson and John Darley, *Justice, Liability and Blame* (Westview Press 1995).

76

In the U.S. and across national boundaries, judges with broad discretion increase sentence severity for multiple counts of conviction ...

... but the increment of severity per count typically diminishes with larger and larger numbers of “extra” counts

77

This has been called the “bulk discount” for multi-count cases, particularly as the number of counts increases

Andrew A. Ashworth, *Sentencing and Criminal Justice*, 7th ed. (2021);
Robinson and Darley, *Justice, Liability and Blame* (Westview 1995).

79

Policies and Principles

82

England and Wales: The “Totality Principle”

Multi-count sentences for less serious offenses should not be disproportionate to the punishment levels for a significantly more serious offense

Andrew A. Ashworth, Sentencing and Criminal Justice, 7th ed. (2021)

83

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		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or More
<i>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>306-360²</i>
<i>CSC 2nd Degree—(c)(d)(e)(f)(h) Prostitution; Sex Trafficking³ 1st Degree—1(a)</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>255-300²</i>
<i>CSC 3rd Degree—(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o) Prostitution; Sex Trafficking 2nd Degree—1a</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>153-180²</i>
<i>CSC 2nd Degree—(a)(b)(g) CSC 3rd Degree—(a)(b)⁴ (e)(f) Dissemination of Child Pornography (Subsequent or by Predatory Offender)</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—(c)(d)(g)(h)(i)(j)(k)(l)(m)(n)(o) Use Minors in Sexual Performance Dissemination of Child Pornography²</i>	E	24	36	48	60 <i>51-72</i>	78 <i>67-93</i>	102 <i>87-120</i>	120 <i>102-120²</i>
<i>CSC 4th Degree—(a)(b)(e)(f) Possession of Child Pornography (Subsequent or by Predatory Offender)</i>	F	18	27	36	45 <i>39-54</i>	59 <i>51-70</i>	77 <i>66-92</i>	84 <i>72-100</i>
<i>CSC 5th Degree Indecent Exposure Possession of Child Pornography Solicit Children for Sexual Conduct⁴</i>	G	15	20	25	30	39 <i>34-46</i>	51 <i>44-60</i>	60 <i>51-60²</i>
<i>Registration Of Predatory Offenders</i>	H	12 ¹ <i>12¹-14</i>	14 <i>12¹-16</i>	16 <i>14-19</i>	18 <i>16-21</i>	24 <i>21-28</i>	30 <i>26-36</i>	36 <i>31-43</i>

Minn. Sent. Gls. & Commentary (Aug. 1, 2012), at 73

85

In its review, the Commission should study the “internal proportionality” of *Hernandez* sentences within the Minnesota Guidelines

89

England and Wales: The “Totality Principle”

Multi-count sentences should not be so severe that they are no longer justified by the purposes of sentencing, e.g., rehabilitation, incapacitation, desistance

Andrew A. Ashworth, *Sentencing and Criminal Justice*, 7th ed. (2021)

90

What are the purposes of the *Hernandez* Rule?

91

The Minnesota Supreme Court has said that the purpose of the *Hernandez* Rule is to promote “judicial economy” on the theory that prosecutors could otherwise charge each count in a separate proceeding on different days and obtain separate sentences. The *Hernandez* court said that *Hernandez* is only allowing what prosecutors could accomplish in a less efficient way.

State v. Hernandez, 311 N.W.2d 479, 481 (Minn. 1981) (in this case, the rule, “avoid[s] mere formalities and, in the interest of judicial economy, do[es] in one day what the Guidelines allow to be done in three or more days.”)

92

After decades of experience, is this rationale sufficient to justify the severity effects of *Hernandez*?

Does the rationale realistically reflect prosecutorial behavior?

93

In its review, the Commission should focus on whether the utilitarian and retributive purposes of the Guidelines are well served by the *Hernandez* Rule

94

Alternatives to the *Hernandez* Rule

95

- Concurrent sentences: “extra” counts may be considered as aggravating factors for a durational departure on the most serious count

96

The Minnesota Supreme Court has identified this as an alternative to the *Hernandez* Rule

98

State can't use *Hernandez* and also argue that multiple counts are grounds for a durational departure. This would be "having it both ways."
State v. Pittel, 518 N.W.2d 606, 608 (Minn. 1994):

As we made clear in *Litzinger*, 394 N.W.2d at 805 n.1, if all the charges are consolidated into one charge for purposes of sentencing, in which case the *Hernandez Rule* has no application, then it might be proper to lump all the offenses into one and consider all the underlying conduct together. However, where the defendant stands convicted of a number of offenses, as here, and the *Hernandez Rule* is used, as here, it is not proper to consider all of the underlying conduct of all the offenses as bearing on the decision to depart durationally from the presumptive sentence for an individual offense. Stated differently, a prosecutor may not have it both ways; having it both ways, the prosecutor could charge the defendant separately with a large number of offenses and thereby obtain a large number of convictions, which in turn would allow use of the *Hernandez* method to increase the defendant's criminal history score, and the prosecutor could also use the underlying conduct for all of the offenses as support for arguing for a durational departure from the presumptive sentence for one of the offenses.

99

Example: Utah's formulas for
concurrent and consecutive sentences
in multi-count cases

100

“If multiple convictions are ordered to run concurrently, the guidelines add 10% of the recommended length of stay for each of the shorter sentences to the full recommended length of the longer sentence.”

Utah Adult Sentencing, Release, and Supervision Guidelines (2023), at 16

101

“For example, consider an individual convicted of aggravated robbery with a recommended length of stay of 7 years (84 months) and also convicted of aggravated assault with a recommendation of 20 months. If the court orders the sentences to run concurrently, the guidelines recommend a length of stay of 86 months (10% of 20 mos = 2 mos + 84 mos = 86 mos).”

Utah Adult Sentencing, Release, and Supervision Guidelines (2023), at 16

102

“If multiple convictions are ordered to run consecutively, the guidelines add 40% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence.”

Utah Adult Sentencing, Release, and Supervision Guidelines (2023), at 16

103

“Using the same example above, if the sentences were consecutive, the guidelines would recommend a length of stay of 92 months (40% of 20 mos = 8 mos + 84 mos = 92 mos). This same approach applies even if there are three or more sentences being considered.”

Utah Adult Sentencing, Release, and Supervision Guidelines (2023), at 16

104

Contrast: In Minnesota under *Hernandez*, an “extra” aggravated assault count would add 1.5 or 2 points to the defendant’s Criminal History Score

107

From a base sentence of 84 months, each *Hernandez* count would add years to the presumptive sentence in most scenarios

108

- Limit the effects of aggravated departures in multi-count cases to durational increases

110

Example: Maryland's formulas for
concurrent and consecutive sentences
in multi-count cases

111

For some classes of offenses in the Maryland
guidelines, multiple counts of conviction
result in additive increases in the guidelines'
durational ranges

Maryland Sentencing Guidelines Manual Version 17.2 (eff. Jan. 21, 2026), at 38-43

112

But there is no mechanism in the Maryland guidelines for multiple counts of conviction to cause the guidelines sentence to cross the dispositional line from probation to prison

Maryland Sentencing Guidelines Manual Version 17.2 (eff. Jan. 21, 2026), at 38-43

113

Consecutive sentences are appropriate under Maryland's guidelines only when necessary to accommodate the total duration of the sentence imposed

Maryland Sentencing Guidelines Manual Version 17.2 (eff. Jan. 21, 2026), at 38-43

114

In its review, the Commission should study the severity consequences of *Hernandez* compared with the approaches to multi-count convictions in other guidelines systems

115

In particular, the Commission should study the permissibility and frequency of dispositional aggravation in multi-count cases in other guidelines systems

116

The leading academic argument in defense
of the *Hernandez* Rule

117

Should we fear that cutting back the
Hernandez Rule would result in greater
numbers of consecutive sentences imposed by
Minnesota judges, resulting in even more
severe consequences than those under
Hernandez?

118

Guidelines systems in Minnesota and elsewhere have pioneered mechanisms to regulate and limit the severity of consecutive sentences

119

- Consecutive sentences can be subject to presumptive rules in the guidelines limiting their use
- Some states have adopted caps on total severity of consecutive sentences
- Ensure that consecutive sentences for probationary sentences cannot move cases across the dispositional line

120