



Hernandizing Overview

What is Hernandizing?

- *Hernandizing* is a method of sentencing in which, when multiple offenses are sentenced in a single sentencing hearing, as each offense is sentenced, the offense is added to a person's criminal history.
- The higher criminal history score is then used when sentencing the next offense. Minn. Sent. Guidelines § 2.B.1.e (2026).

Derived from Case Law

- The sentencing method arose from a Supreme Court case issued not long after the Guidelines were enacted: *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981).
- In *Hernandez*, the defendant committed a string of burglaries over a period of several months, and, while showing officers where he had committed those offenses, also escaped from custody.
- In a plea deal, the defendant agreed to sentencing on two of the burglaries and the escape charge in return for not being charged for up to 50 additional burglaries he had admitted to.
- When the district court imposed sentences for these offenses, it included the earlier sentenced offenses in the criminal history score applicable to sentencing for the latter offenses.

Derived from Case Law (cont'd)

- The defendant had a criminal history of 3 at the start of the sentencing event. With that history, the most severe sentence that could be imposed was a stayed 19-month sentence.
- The prosecutor argued for a “technical departure,” and a 60-month executed sentence, stating that because there were three separate offenses, had they been sentenced on separate days, the defendant’s criminal history would increase with each sentencing event, and the defendant would be facing a prison sentence by the third sentencing.
- Hinging its decision on a rationale of judicial economy, the Supreme Court stated,” All the court was trying to do was avoid mere formalities and, in the interests of judicial economy, do in one day what the Guidelines allow to be done in three or more days.” *Id.* at 481.
- This decision resulted in the method of calculating criminal history that we call “Hernandizing” today.

Why are we looking at this policy?

- One of the findings from the comprehensive review was that criminal history scores are rising → the Hernandez policy increases criminal history.
- One of the major points of feedback we received from stakeholders is that the Guidelines are too complex → the Hernandez policy is one of the most complex policies we have.
 - It was actually too complex to tackle during the condensed timeframe for the review last year.

What are the issues with this policy?

1. Contravenes the purpose of criminal history
2. Undermines uniformity and proportionality in sentencing
 - a. Can result in significant movement across the grid (e.g., going from 0 to 6 criminal history points in one sentencing event)
 - b. Can push people across the dispositional line
 - c. Can result in offense disproportionality
 - d. There are high departure rates for sentences involving *Hernandizing*
 - e. The intersection with same behavioral incident law is both confusing and inconsistent

Contravenes the Purpose of Criminal History

Purpose of Criminal History

- The Minnesota Sentencing Guidelines were built on a retributive (“just desserts”) theory.
- Under this theory, utilizing criminal history is justified because an individual who has been previously convicted and sentenced is more culpable (blameworthy) for the current offense:
 - The individual has previously been given a warning, in the form of a conviction and sentencing, that criminal behavior will not be tolerated, and has been given an opportunity to receive rehabilitative services.
 - However, knowing this, the individual chose to engage in criminal behavior again.
- The *Hernandez* policy contravenes this justification for including criminal history in the sentencing guidelines because there is no opportunity for the individual to benefit from intervention and demonstrate they can follow the law.

Undermines Uniformity and Proportionality

Can result in significant movement across the grid

A first-time defendant convicted of multiple low severity level offenses, such as check forgery, can jump from 0 criminal history points to 6 criminal history points in a single sentencing event.

SEVERITY LEVEL OF CONVICTION OFFENSE <i>Example offenses listed in italics</i>		CRIMINAL HISTORY SCORE							Custody Status
		0	1	2	3	4	5	6 or more	
<i>Murder 2nd Degree (intentional)</i>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ¹	426 363-480 ¹	+20
<i>Murder 2nd Degree (unintentional)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288	+15
<i>Murder 3rd Degree (drugs); Carjacking 1st Degree</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189	+12
<i>Agg. Robbery 1st Degree; Assault 1st Degree</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129	+10
<i>DWI 1st Degree; Assault 2nd Degree (weapon & SBH)</i>	7	36 31-43	42 36-50	48 41-57	54 46-64	60 51-72	66 57-79	72 62-84 ^{1, 2}	+6
<i>Ineligibly Possess Firearm; Assault 2nd Deg. (weapon)</i>	6	21 18-25	27 23-32	33 29-39	39 34-46	45 39-54	51 44-61	57 49-68	+6
<i>Assault 3rd Degree (SBH); Burglary 2nd Deg. (dwelling)</i>	5	18 16-21	23 20-27	28 24-33	33 29-39	38 33-45	43 37-51	48 41-57	+5
<i>Felony Domestic Assault; Violate No-Contact Order</i>	4	12 12-14	15 13-18	18 16-21	21 18-25	24 21-28	27 23-32	30 26-36	+3
<i>Assault 4th Degree; Vehicle Use w/out Consent</i>	3	12 12-14	13 12-15	15 13-18	17 15-20	19 17-22	21 18-25	23 20-27	+2
<i>Theft of \$5,000 or Less; Check Forgery (\$251-\$2,500)</i>	2	12 12-14	12 12-14	13 12-15	15 13-18	17 15-20	19 17-22	21 18-25	+2
<i>Fleeing a Peace Officer</i>	1	12 12-14	12 12-14	12 12-14	13 12-15	15 13-18	17 15-20	19 17-22	+2

Can push the individual across the dispositional line

This movement across the grid can also push someone across the dispositional line, changing the sentence from probation to prison.

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<i>Theft of \$5,000 or Less; Check Forgery (\$251-\$2,500)</i>	2	12 12-14	12 12-14	13 12-15	15 13-18	17 15-20	19 17-22	21 18-25	+2
<i>Fleeing a Peace Officer</i>	1	12 12-14	12 12-14	12 12-14	13 12-15	15 13-18	17 15-20	19 17-22	+2

Can result in offense disproportionality

A first-time defendant convicted of multiple low severity level offenses can receive a more punitive presumptive sentence than a defendant convicted of a single high severity level offense.

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.

		CRIMINAL HISTORY SCORE						
SEVERITY LEVEL OF CONVICTION OFFENSE		0	1	2	3	4	5	6 or More
CSC 1 st Degree	A	144 144-172	156 144-187	168 144-201	180 153-216	234 199-280	306 261-360	360 306-360 ²
CSC 2 nd Degree– (c)(d)(e)(f)(h) Prostitution; Sex Trafficking ³ 1 st Degree–1(a)	B	90 90 ³ -108	110 94-132	130 111-156	150 128-180	195 166-234	255 217-300	300 255-300 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 41-57	62 53-74	76 65-91	90 77-108	117 100-140	153 131-180	180 153-180 ²
CSC 2 nd Degree–(a)(b)(g) CSC 3 rd Degree–(a)(b) ⁴ (e)(f) Dissemination of Child Pornography (Subsequent or by Predatory Offender)	D	36	48	60 51-72	70 60-84	91 78-109	119 102-142	140 119-168
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 51-72	78 67-93	102 87-120	120 102-120 ²
CSC 4 th Degree– (a)(b)(e)(f) Possession of Child Pornography (Subsequent or by Predatory Offender)	F	18	27	36	45 39-54	59 51-70	77 66-92	84 72-100
CSC 5 th Degree Indecent Exposure Possession of Child Pornography Solicit Children for Sexual Conduct ⁵	G	15	20	25	30	39 34-46	51 44-60	60 51-60 ²
Registration Of Predatory Offenders	H	12 ¹ 12 ¹ -14	14 12 ¹ -16	16 14-19	18 16-21	24 21-28	30 26-36	36 31-43

There are high departure rates for *Hernandized* offenses

43.9% of presumptive commit *Hernandized* defendants received a departure.

1. 32.3% received a mitigated dispositional departure
2. 10.0% received a mitigated durational departure
3. 1.7% received an aggravated durational departure

Of people who had an increase in their presumptive prison duration because of *Hernandizing*, those that crossed the dispositional line had the highest mitigated departure rates (dispositional and durational combined):

1. Zone 1 before and after Hernandizing (35.4%)
2. Zone 2 before and after Hernandizing (43.0%)
3. Zone 3 before, Zone 2 after (50.9%)

Intersection with Same Behavioral Incident Law

Same Behavioral Incident Law Explained

- Minn. Stat. § 609.035 provides:

“if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.”
- This concept is generally referred to as “same behavioral incident.”
- The practical effect is that when several offenses arise from the same behavioral incident, the person can only be sentenced for one of them (usually the most serious).
- But the legislature has also enacted exceptions to this general rule. When there is an exception, the person can be convicted and sentenced for both the offense identified by the legislature as an exception (e.g., kidnapping) and any other offense committed as part of the same behavioral incident.
- Note: Established law also allows multiple sentences arising from the same behavioral incident when there are multiple victims.

The Commission has been inconsistent in determining how the exceptions are handled in criminal history.

Sentences arising from 3 of 13 exceptions *cannot* be included in criminal history while sentences from 10 of 13 exceptions *can* be included.

Legislature allows multiple sentences even if the offenses arose from the same behavioral incident as another offense	Guidelines explicitly prohibit using more than one sentence arising from these exceptions in criminal history
152.137 (exposing child or vulnerable adult to methamphetamine)	152.137
609.165 (felon in possession)	--
609.21, sub. 1b (2012 laws) or 609.2114 (criminal vehicular operation – death / injury to unborn child)	--
609.251 (kidnapping)	609.251
609.2691 (includes 609.2661 to 609.268, murder / manslaughter / assault / injury to unborn child)	--
609.342 to 609.345 (CSC with force or violence)	--
609.486 (bullet-resistant vest during crime)	--
609.487 (fleeing a police officer)	--
609.494 (solicitation of juveniles)	--
609.561 to 609.563 and 609.5641 (arson)	--
609.585 (burglary)	609.585
609.856 (police radios during crime)	--
624.713 (felon in possession)	--

Current Policy

d. Assigning Felony Weights – Previous Court Appearances Resulting in Multiple Sentences.
Following are exceptions to including prior felonies in criminal history when multiple felony sentences were imposed in a previous court appearance:

(1) Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minn. Stats. §§ 152.137, 609.585 or 609.251, include in criminal history only the weight from the offense at the highest severity level.

(2) Single Course of Conduct / Multiple Victims. When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, include in criminal history only the weights from the two offenses at the highest severity levels.

e. Assigning Felony Weights – Current Multiple Sentences.
Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced (also known as “Hernandizing”) except as follows:

(1) Single Course of Conduct / Multiple Sentences. When multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day under Minn. Stats. §§ 152.137, 609.585, or 609.251, the conviction and sentence for the “earlier” offense does not increase the criminal history score for the “later” offense.

(2) Single Course of Conduct / Multiple Victims. When multiple current convictions arise out of a single course of conduct in which there were multiple victims, weights are given only to the two offenses at the highest severity levels.

Hernandizing exacerbates the inconsistent treatment of the single behavioral incident exceptions because where the guidelines impose a limit, the additional sentence can be entered but cannot be *Hernandized*, but where the guidelines are silent, the additional sentence can be both imposed *and* added to criminal history on the next offense.

	Multiple separate incidents sentenced on the same day	Multiple offenses from a single behavioral incident (one or no victims)	Multiple offenses from a single behavioral incident (multiple victims)	Exceptions to single behavioral incident sentencing limitation
Determining criminal history in same sentencing event	As each is sentenced, it becomes criminal history on the next offense to be sentenced	Convictions are entered for all offenses, but a sentence should only be pronounced for the most serious offense, so criminal history should not be implicated.	Assign weights to the two offenses with the highest severity levels	Can impose additional sentences but cannot <i>Hernandize</i> if single behavioral incident involved 152.137, 609.585. or 609.251 Can impose additional sentences and <i>Hernandize</i> if case involved an offense that carried any other single behavioral incident exception (see 609.035, subd. 1)
Determining criminal history from a previous sentencing event	All are counted in the person's criminal history score	Include only the offense at the highest severity level in criminal history.	Include in criminal history only two offenses at the highest severity levels	If single behavioral incident involved 152.137, 609.585. or 609.251, include only the offense at highest severity level in criminal history If single behavioral incident involved any other exception, include all in criminal history

Policy Proposals

Monitoring for Disparities

- Cases involving *Hernandizing* have been repeatedly appealed when the resulting sentence is disproportionate compared to other cases.
- The Supreme Court has typically upheld these sentences because they do not violate the process of *Hernandizing*. But the Court has also repeatedly held that it is up to the Commission to address arguments regarding disparities.

Option 3: Include in criminal history only those offenses that have been sentenced as of the date of the current offense

Revise Section 2.B.1 as follows and delete sections 2.B.1.d and e:

1. Prior Felonies. Assign a particular weight, as set forth in paragraphs a and b, to each extended jurisdiction juvenile (EJJ) conviction and each felony conviction, provided that a felony conviction and sentence ~~was stayed or imposed before the current sentencing or a stay of imposition of sentence was given the current sentencing~~ were entered on or before the date of the current offense. Sentences that are entered on the same day as the sentencing in the current case or arising from the same behavioral incident are not consider prior convictions.

Option 3 Explained

- This option greatly simplifies both the *Hernandizing* and single behavioral incident policies and is consistent with the theoretical justification for criminal history that people who recidivate after having been through the criminal justice system are more culpable (blameworthy) for their offense
- No offenses sentenced on the same day can be included in criminal history
- Same behavioral incident law is no longer a factor that needs to be considered; any offense that was actually *sentenced* will be included in criminal history in the future

Option 5: Allow *Hernandizing* in all cases but limit the number of offenses that can be *Hernandized*

Replace sections 2.B.1.d and e with the following:

d. Assigning Felony Weights – Current Multiple Sentences. When multiple offenses are sentenced at the same time before the same court, as each offense is sentenced, include it in the criminal history on the next offense to be sentenced for up to two offenses.

e. Assigning Felony Weights – Previous Court Appearances Resulting in Multiple Sentences. When multiple felony sentences were imposed in a previous court appearance, include in criminal history only the weights from up to two offenses at the highest severity levels for which there were both convictions and sentences imposed.

Option 5 Explained

- This option simplifies both the *Hernandizing* and single behavioral incident policies.
- Sentencing still occurs in the order in which the offenses occur.
- The first two sentences imposed can be included as criminal history on subsequent sentences.
- This option strikes a balance with the current policies by continuing to allow the excepted offenses (like felon in possession and kidnapping) to garner criminal history within the same sentencing event but prevents criminal history from being increased from 0 to 6+ in a single sentencing event.
- Multiple victims are not addressed separately because they are part of the two additional sentences that can be imposed for a single behavioral incident.
- This option also provides the potential for the criminal history score to be greater if the individual recidivates because at a subsequent sentencing, the two most serious offenses rather than the first two offenses sentenced will be included in criminal history.

Option 6: Same as Option 5, but allow for up to three offenses to be counted if the person recidivates

Replace sections 2.B.1.d and e with the following:

d. Assigning Felony Weights – Current Multiple Sentences. When multiple offenses are sentenced at the same time before the same court, as each offense is sentenced, include it in the criminal history on the next offense to be sentenced for up to two offenses.

e. Assigning Felony Weights – Previous Court Appearances Resulting in Multiple Sentences. When multiple felony sentences were imposed in a previous court appearance, include in criminal history only the weights from up to three offenses at the highest severity levels for which there were both convictions and sentences imposed.

Option 6 Explained

- This is similar to Option 5, but it allows the use of up to three offenses in criminal history if the person recidivates.
- The rationale is that the prior rule applied criminal history to up to two offenses, so there logically could have been a third offense sentenced that day. Thus, the premium for recidivating is that all three offenses can be used in criminal history.
- If more than three were sentenced in the prior sentencing event, only the three most serious comprise criminal history in the subsequent sentencing event.