

2013

The Exception that Swallowed the Rule: Fixing the Multiple-Victim Exception to Minnesota Statute Section 609.035

Benjamin J. Butler
Office of the Minnesota Appellate Public Defender

Follow this and additional works at: <http://open.mitchellhamline.edu/symposium-minnesota-criminal-code>

 Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Butler, Benjamin J., "The Exception that Swallowed the Rule: Fixing the Multiple-Victim Exception to Minnesota Statute Section 609.035" (2013). *Symposium: 50th Anniversary of the Minnesota Criminal Code-Looking Back and Looking Forward*. Paper 3.
<http://open.mitchellhamline.edu/symposium-minnesota-criminal-code/3>

This Article is brought to you for free and open access by the Mitchell Hamline Events at Mitchell Hamline Open Access. It has been accepted for inclusion in Symposium: 50th Anniversary of the Minnesota Criminal Code-Looking Back and Looking Forward by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

**The Exception That Swallowed the Rule: Fixing the Multiple-Victim Exception to
Minnesota Statute Section 609.035**

By Benjamin J. Butler¹

I. INTRODUCTION.

Consider the following situation: Dick and Jane are in a domestic relationship. During a heated argument, Dick strikes Jane several times, hits her with a broken beer bottle, and threatens to kill her if she calls the police. Jane calls the police anyway and Dick is arrested. The county attorney could charge Dick with several crimes: second-degree assault with a dangerous weapon (the beer bottle)²; terroristic threats (based upon the verbal threat)³; and/or domestic assault⁴. One prosecutor might focus the charges on the most serious crime. Another might want to “throw the book at him” and file every charge supported by the evidence. But no matter how many crimes the prosecutor charges, the defendant will probably only be sentenced on the most serious crime for which he is convicted.

This is the result of Minnesota statutes section 609.035. Since its introduction as part of the Criminal Code of 1963, section 609.035 has provided that a district court may impose only a single sentence for multiple crimes committed by a criminal defendant during the a single behavior incident. The theory behind the statute is simple:

¹ Assistant State Public Defender, Office of the Minnesota Appellate Public Defender, St. Paul, Minnesota. The author thanks professors Ted Sampsell-Jones and Peter Knapp of the William Mitchell College of Law for their support, encouragement, and invaluable suggestions regarding this article. The author also thanks the staff of the William Mitchell Law Review, in particular executive editor Frances Kern for her patience and Robert Hamilton for his research assistance. The author thanks his family for pretty much everything.

² See Minn. Stat. § 609.222, subd. 2 (2010).

³ See Minn. Stat. § 609.713, subd. 1 (2010).

⁴ See Minn. Stat. § 609.2242 (2010).

punishment for the most serious crime committed during a single behavioral incident incorporates punishment for all the less-serious crimes committed during the same behavioral incident. Application of the statute not only keeps sentences rational and proportional to a defendant's conduct, but also reduces the incentive for prosecutors to over-charge cases. This is true because in most cases adding duplicative charges will not change the defendant's total sentence.

What if, however, during Dick and Jane's argument, their neighbor Sally came over to see what was wrong? After Dick hit Jane with the bottle, he turned to Sally and punched her in the face, knocking out one of her teeth. In addition to the charges involving Jane, a prosecutor could charge Dick with third-degree assault for his actions against Sally⁵ But under the plain language and rationale of section 609.035, the court could not sentence Dick for assaulting Sally because that crime was committed during the same behavioral incident as a more serious crime: the second-degree assault of Jane.

Almost forty years ago, the Minnesota Supreme Court held that the second scenario described above required a different result than the one mandated by the plain language of section 609.035. Thus was born the "multiple victim exception" to section 609.035. Where a defendant commits crimes during a single behavioral incident against multiple victims, a court may impose multiple sentences of up to one sentence per victim. Although the statute contained no such exception, the Court held that the Legislature did not intend to prevent the imposition of multiple sentences in such cases.

⁵ See Minn. Stat. § 609.223, subd. 1 (2010). The loss of a tooth is ordinarily, but not always, evidence of "substantial bodily harm," required for conviction under section 609.223, subd. 1. *State v. Moore*, 699 N.W.2d 733, 736-37 (Minn. 2005); *State v. Bridgeforth*, 357 N.W.2d 393, 394 (Minn. Ct. App. 1984).

The Court later added a caveat to the multiple-victim exception: the total sentence imposed under the exception must not unfairly exaggerate the criminality of the defendant's conduct.⁶ The purpose of this caveat was to maintain in multiple-victim cases some consideration into the proportionality of the sentence to the defendant's conduct.⁷

The multiple-victim exception as it currently exists is problematic in several respects. By allowing a court to impose without limit one sentence per behavioral incident per victim, the exception encourages the kind of over-charging and charge bargaining that section 609.035 was designed to prevent. This is especially true in cases involving a multitude of victims. More fundamentally, the exception is problematic because it was created by the Court, rather than the Legislature, and results from a rather dubious piece of statutory interpretation. Because the exception is not moored to the language of a statute, it remains subject to change on a case-by-case basis. Recently, the Court expanded the exception to, for the first time, affirm the imposition of more than one sentence per victim, and, in the same case, dramatically altered how a district court is to determine for which offense to impose a sentence.⁸ In addition, the “fail safe” provision of the exception – that the total sentence imposed not unfairly exaggerate the criminality of the defendant's conduct – is not much of a fail-safe at all. It is amorphous, difficult to apply, and leads to inconsistent results.

⁶ See, e.g., *State v. Rieck*, 286 N.W.2d 724, 727 (Minn. 1979).

⁷ See *State v. Edwards*, 774 N.W.2d 596, 606 n.6 (Minn. 2009) (using “unfairly exaggerate” standard to refute suggestion that multiple-victim exception “did not incorporate notions of proportionality”) (citations omitted).

⁸ *State v. Ferguson*, 808 N.W.2d 586, 589-92 (Minn. 2012). The author of this article represented Michael Ferguson in the appeals of his convictions and sentences.

This article proposes that the Legislature should amend section 609.035 to address the problems with the court-created version of the multiple-victim exception. First, the Legislature should amend the statute to allow for the imposition of multiple sentences in cases involving crimes committed against multiple victims. Second, in keeping with Minnesota's goal of maintaining a rational, proportional sentencing system, the Legislature should limit the district court to imposing no more than two sentences per behavioral incident. Third, the Legislature should codify Minnesota Supreme Court caselaw holding that the court can only impose a sentence for the most serious offense committed per victim, using comparison of the statutory maximum sentences and the offense's severity-level rankings under the Minnesota Sentencing Guidelines to determine which of several offenses is most serious. These changes will ensure that Minnesota's sentencing system is applied consistently and even-handedly and that criminal defendants receive sentences commensurate with their culpability.

II. SECTION 609.035 AND THE MULTIPLE-VICTIM EXCEPTION.

Minnesota statute section 609.035 provides, in pertinent part, that "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."⁹ The statute prohibits the imposition of multiple sentences for multiple crimes committed during a single behavioral incident.¹⁰ The

⁹ Minn. Stat. § 609.035, subd. 1 (2010).

¹⁰ See *State v. Scott*, 298 N.W.2d 67, 68 (Minn. 1980). The statutory phrase "a person's conduct" refers to a "single behavioral incident." *State v. Johnson*, 141 N.W.2d 517, 523 (Minn. 1966). Intentional crimes are committed during a single behavioral incident when they share a unity of time, place, and criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 293-96 (Minn. 1995).

purpose of section 609.035 is to limit punishment for multiple crimes “to the maximum permitted for the most serious crime committed.”¹¹

In an early case interpreting the statute, the Minnesota Supreme Court explained its purpose: “to insure that punishment for a single incident of criminal behavior involving a multiplicity of violations will be commensurate with the criminality of defendant’s misconduct.”¹² The drafters felt that the best way to ensure that punishment was commensurate with conduct was to limit punishment to just one crime per behavioral incident.¹³ This was true, the drafters believed, because “as a practical matter a single sentence will necessarily take into account all violations, and imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.”¹⁴ The drafters were concerned that “permitting a series of prosecutions and sentences where a single behavioral incident constitutes more than one offense will ‘exaggerate the criminality of the behavior involved and, in a sense, defeat the policy underlying the constitutional protection against double jeopardy.’”¹⁵ This legislative history shows that the single-sentence rule is not some accident of history or unintended consequence of another policy. Instead, the prohibition against multiple sentences was a well-thought-out and rational policy decision by the Legislature.

¹¹ *Johnson*, 141 N.W.2d 520-21 (discussing Minn. Stat. § 609.035, cmt. By Maynard E. Pirsig).

¹² *Id.* at 521-22.

¹³ *Id.* at 522

¹⁴ *Id.*

¹⁵ *Id.* (quoting Advisory Committee Comment, 40 M.S.A. pp. 58). In addition to prohibiting multiple sentences, section 609.035 prohibits serialized prosecutions by requiring that all crimes arising from a single behavioral incident are charged in a single complaint and provides broader double-jeopardy protections than those afforded by federal law. *Johnson*, 141 N.W.2d at 522; Minn. Stat. § 609.035, subd. 1 (2010).

Under section 609.035, a court may impose a sentence for only the most serious offense committed during a single behavioral incident. In order to determine which of several offenses is most serious, courts should compare the actual sentences which would be imposed for different offenses, the severity-level rankings for those offenses under the Minnesota Sentencing Guidelines, and the statutory maximum sentences.¹⁶ If those factors are identical, or if the crimes at issue are non-felonies, the court may consider “the nature of the offenses to determine which offense is most serious.”¹⁷ Using this method, a court imposing a single sentence can be sure that it is punishing the defendant for the worst of his or her conduct and, therefore, punishing the defendant for all of his or her criminal conduct.¹⁸

The number of sentences imposed has significant practical consequences both for the total sentence imposed in a particular case and for subsequent cases. In many cases, multiple sentences can often be consecutive to one another.¹⁹ An offender who has to serve two sentences consecutive to one another will almost always be in prison longer than an offender who does not. But even if the multiple sentences are to be served

¹⁶ *State v. Kebaso*, 713 N.W.2d 317, 322-23 (Minn. 2007). Curiously, it was not until 2007 that the Minnesota Supreme Court explicitly detailed how a court should determine which of several crimes committed during a behavioral incident was the more serious. *Id.* at 322.

¹⁷ *Id.* at 323. For example, the defendant in *Kebaso* was convicted of gross-misdemeanor domestic assault and gross-misdemeanor interference with a 911 call. *Id.* at 320. The offenses occurred during a single behavioral incident. *Id.* The crimes had the same statutory maximum sentences and, because they were not felonies, were not ranked in the Sentencing Guidelines. *Id.* at 323. Considering the nature of the offenses, the Supreme Court held that domestic-assault was more serious than interference with a 911 call because domestic assault is a crime against a person rather than against the administration of justice. *Id.* The Court also considered the fact that, under the facts of the case, domestic assault was the primary crime and the interference crime was incidental to the domestic assault. *Id.* Finally, the Court held that the lower courts could not consider the possible immigration consequences of the two crimes when deciding which is more serious. *Id.* at 323.

¹⁸ See Minn. Stat. § 609.035 (1963 Advisory Committee Comment).

¹⁹ Consecutive sentences are sentences to be served one after the other. Minn. Sent. Guidelines 1.B.3 (2012). Depending on the types of offenses involved and the circumstances thereof, consecutive sentencing is either presumptive (that is, required unless the court departs), permissive (may be imposed, or not imposed, without a departure), or would require a departure from the presumptive sentence. Minn. Sent. Guidelines 2.F (2012).

concurrent with one another, the imposition of multiple sentences can affect the total sentence.²⁰ Under the Minnesota Sentencing Guidelines, a defendant's presumptive sentence is determined by comparing on a grid the defendant's criminal-history score with the severity level of the to-be-sentenced offense.²¹ The criminal-history score is made up of one point or half-point for each felony offense which has been sentenced at the time of the sentencing on the instant offense.²² In many situations, a court can use one of a defendant's convictions and sentences from a single behavioral incident to increase his or her criminal-history score for a second conviction and sentence arising from the same incident.²³ This sentencing practice is known as the *Hernandez* method and leads to increased sentences because the increased criminal-history score leads to an increased presumptive sentence.²⁴ When the criminal-history score is increased, the end-result presumptive sentence is likewise increased.

²⁰ Section 609.035 in most cases precludes the imposition of multiple concurrent sentences for crimes committed during a single behavioral incident. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995).

²¹ See Minn. Sent. Guidelines 2 (2012); see also *Taylor v. State*, 670 N.W.2d 584, 586-87 (Minn. 2003) (describing Minnesota's determinate-sentencing system and sentencing-guidelines grid). Minnesota's sentencing-guidelines system was "the dominant model for the creation of guidelines in other states and for the federal system as well." Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 Alb. L. Rev. 1209, 1263 (2010-11). The purpose of the Guidelines is "is to establish rational and consistent sentencing standards which ... are proportional to the severity of the offense of conviction and the extent of the offender's criminal history." Minn. Sent. Guidelines § 1 (2012).

²² Minn. Sent. Guidelines § 2.B (2012).

²³ See, e.g., *State v. Gartland*, 330 N.W.2d 881, 883 (Minn. 1983). The Minnesota Sentencing Guidelines prohibit the use of the *Hernandez* method when imposing multiple sentences for certain drug crimes, burglary and crimes committed during a burglary, and kidnapping and crimes committed during a kidnapping. See Minn. Sent. Guidelines § 2.b.e.1 (2012); *Williams*, 771 N.W.2d at 522-23.

²⁴ Minn. Sent. Guidelines § 1.B.9; 2.b.1.e (2012). Under the *Hernandez* method of sentencing, "when a defendant is sentenced for multiple offenses on the same day, a conviction for which the defendant is first sentenced is added to his or her criminal-history score for another offense for which he or she is also sentenced." *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2007) (citation omitted). The Minnesota Supreme Court affirmed the legitimacy of this sentencing method in *State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981). Court opinions often use the terms "*Hernandize*" or "*Hernandez* method" to describe this form of sentencing. See *Williams*, 771 N.W.2d at 521 -22 (citing *State v. Soto*, 562 N.W.2d 299, 302-03 (Minn. 1997)). The Sentencing Guidelines do the same. Minn. Sent. Guidelines §1.B.9 (2012).

As an example of the practical effect of the multiple-victim exception, consider *State v. Patterson*.²⁵ Patterson was convicted of aiding and advising the drive-by shooting of T.D. and aiding and advising the second-degree murder of R.A.²⁶ The crimes occurred during a single behavioral incident.²⁷ The multiple-victim exception allowed the district court to sentence him for both crimes.²⁸ Using Patterson's criminal-history score of zero, the presumptive sentences for the offenses were 48 months in prison and 306 months in prison, respectively.²⁹ The district court, however, used the *Hernandez* method to increase Patterson's criminal-history score from zero to one before sentencing Patterson for the murder of R.A.³⁰ This, in turn, increased Patterson's sentence from 306 months to 326 months in prison.³¹ Applying both the multiple-victim exception and the *Hernandez* sentencing method not only caused Patterson to receive two sentences for crimes committed during a single behavioral incident but it increased the length of his total sentence by 20 months.

Even if the imposition of multiple sentences would not increase the total sentence for a defendant in the case at bar, multiple sentences will adversely affect the defendant's criminal-history score in subsequent cases. For example, the imposition of concurrent sentences for two misdemeanor assaults might not affect the defendant's total sentence in

²⁵ *State v. Patterson*, 796 N.W.2d 516 (Minn. Ct. App. 2011), *aff'd* 812 N.W.2d 106 (Minn. 2012). The Minnesota Court of Appeals held that Patterson was properly sentenced. *Patterson*, 796 N.W.2d at 532. The Minnesota Supreme Court granted review of the case only to address one of Patterson's challenges to his conviction, and it affirmed the court of appeals on that point. *Patterson II*, 812 N.W.2d at 108.

²⁶ *Patterson*, 796 N.W.2d at 522.

²⁷ *Id.* at 532

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

that case, because non-felony sentences cannot be *Hernandized* and probationary and jail time is capped by statute.³² But in any subsequent cases, the sentences will result in the defendant receiving two misdemeanor units instead of one, which will get him or her that much closer to the four such units required to add a point to the criminal-history score.³³

Section 609.035 also helps achieve consistent and rational results in charging practices. A person's criminal behavior during a single behavioral incident might support one or multiple criminal charges. Only the prosecutor can decide which and how many charges to level in a particular case.³⁴ If a defendant could be sentenced for every crime he or she committed during a single behavioral incident then the prosecutor could determine the final sentence by deciding how many crimes to charge because a defendant's total sentence could increase with each conviction. In order to achieve the longest possible sentence, a prosecutor might be tempted to file duplicative charges, convictions for which would add nothing of value to a defendant's culpability but could dramatically increase the presumptive sentence. A different prosecutor, on the other hand, might charge the defendant with only the most serious crime committed during the behavioral incident under the theory that punishing the defendant for that crime will encompass punishment for all other, less-serious crimes committed during the same behavioral incident. Because section 609.035 normally allows only one sentence per behavioral incident, prosecutors have little incentive to over-charge defendants because

³² Minn. Stat. §§ 609.02, subs. 3-4 (2010) (defining misdemeanor as a crime punishable by no more than 90 days in jail and gross-misdemeanor as a crime punishable by no more than 365 days in jail); § 609.135, subd. 2 (2010) (providing for maximum probationary terms for misdemeanor and gross-misdemeanor offenses).

³³ Minn. Sent. Guidelines 2.B.3 (2012).

³⁴ See *State v. Krotzer*, 548 N.W.2d 252, 254 (Minn. 1996).

multiple, duplicative charges cannot lead to longer sentences.³⁵ Of course, section 609.035 does not limit or interfere with a prosecutor's charging options; a prosecutor may charge however many offenses probable-cause supports. But under section 609.035, the practical effect of such charging decisions is limited to punishing the defendant for only the most serious offense, under the entirely rational theory that such punishment will fully account for his or her criminal behavior.³⁶

III. THE MULTIPLE-VICTIM EXCEPTION.

A. The Judicial Creation of the Multiple-Victim Exception.

The plain language of section 609.035 created a bright-line rule: one sentence per behavioral incident. However, from the day it enacted the statute, the Legislature carved out exceptions to this rule. When it was enacted in 1963, section 609.035 contained only a burglary exception to its prohibition on multiple sentences for crimes committed during a single behavioral incident.ⁱ That is, the statute permitted punishment for a crime committed during the course of a burglary in addition to the burglary sentence itself.ⁱⁱ The legislature has amended section 609.035 throughout the past fifty years to provide several additional exceptions permitting multiple convictions arising out of a single behavioral incident.ⁱⁱⁱ These include exceptions for crimes involving ineligible people possessing firearms,^{iv} crimes committed while fleeing a peace officer,^v criminal sexual conduct crimes committed with force or violence,^{vi} and arson.^{vii} The legislature also

³⁵ Of course, if a defendant commits multiple offenses during different behavioral incidents, a prosecutor may properly charge and convict a defendant for each of them, and use each conviction to obtain a longer total sentence. *See, e.g., State v. Soto*, 562 N.W.2d 299, 304-05 (Minn. 1997) (affirming multiple *Hernandized* sentences for defendant who committed several drug-sale offenses on different days and during different behavioral incidents). Such a result violates neither section 609.035 nor the policies behind the statute because the crimes at issue were committed during different behavioral incidents rather than during a single course of conduct.

³⁶ *See* Minn. Stat. §609.035 (1963 Advisory Committee Comment).

created charging-statute exceptions to section 609.035, permitting a court to impose sentences for offenses arising out of a single behavioral incident.^{viii} These include exceptions for kidnapping,^{ix} certain crimes against unborn children,^x crimes while wearing or possessing a bullet-resistant vest,^{xi} crimes involving the solicitation of juveniles,^{xii} crimes involving the use of police radios,^{xiii} and certain driving while intoxicated offenses.^{xiv}

These exceptions reveal that the Legislature is well aware of how to make policy decisions that, in certain situations, multiple sentences for multiple crimes committed during a single behavioral incident are warranted. The Legislature has never made such a decision regarding crimes against multiple victims committed during a single behavioral incident. Instead, the Minnesota Supreme Court “created” that exception to the plain language of section 609.035.³⁷ The decision leading to that creation presents a classic case of bad facts making at least questionable law.³⁸

Philip Stangvik suffered from mental-health problems and delusions. Among other things, he thought his wife was trying to kill him by poisoning his food.³⁹ Stangvik had a history of committing violent acts against his wife and children and, as a result, had been committed to and discharged from several mental institutions.⁴⁰ In 1963, Stangvik was a patient at the Fergus Falls State Hospital.⁴¹ In May of that year, he was granted a

³⁷ The Minnesota Supreme Court has repeatedly referred to the multiple-victim exception as being “court created.” See *State v. Gartland*, 330 N.W.2d 881, 883 (Minn. 1983); *State v. McAdoo*, 330 N.W.2d 104, 107 (Minn. 1983); *State v. Wallace*, 327 N.W.2d 85, 87 (Minn. 1982).

³⁸ *State ex rel. Stangvik*, 161 N.W.2d 667 (Minn. 1968).

³⁹ *Stangvik*, 161 N.W.2d at 669.

⁴⁰ *Id.*

⁴¹ *Id.*

series of three-day provisional discharges so he could visit his parents.⁴² During one such discharge, Stangvik stabbed to death his wife and two children.⁴³

As part of a plea agreement, Stangvik pleaded guilty to first-degree murder for killing his wife and to two counts of second-degree murder, one relating to the death of each of his children.⁴⁴ The district court imposed three sentences: life in prison for the first-degree count and concurrent sentences of 40 years in prison for each of the second-degree counts.⁴⁵

On appeal, Stangvik argued, among other things, that the imposition of multiple sentences violated the then newly enacted section 609.035.⁴⁶ His argument would seem to have merit, given that the district court imposed three sentences for crimes clearly committed during a single behavioral incident, a fact the Minnesota Supreme Court acknowledged.⁴⁷ Nonetheless, the Court affirmed the imposition of multiple sentences.⁴⁸

The Court based its holding on two grounds. Primarily, the Court concluded that, when it enacted section 609.035, “the legislature did not intend in every case to immunize offenders from the consequences of separate crimes intentionally committed in a single episode against more than one individual.”⁴⁹ The Court did not cite any legislative

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 670.

⁴⁵ *Id.*

⁴⁶ The Minnesota Supreme Court held that section 609.035 applied to Stangvik’s case even though it had not been enacted at the time of his offense. *Stangvik*, 161 N.W.2d at 671-72.

⁴⁷ *Id.* at 673. Notwithstanding this acknowledgement, the Court went on to hold that “from a legal point of view [the murders] were totally unrelated.” *Id.* The Court did not explain how the three offenses committed during a single behavioral incident – until that time, the only “legal point of view” that mattered – were “totally unrelated.”

⁴⁸ *Id.*

⁴⁹ *Id.* at 672. The Court cited six decisions in support of this proposition, but none of those cases involved the imposition on multiple sentences for crimes committed during a single behavioral incident. *Id.* (citing [City of Bloomington v. Kossow](#), 269 Minn. 467, 131 N.W.2d 206; [State v. Johnson](#), 273 Minn. 394, 405, 141 N.W.2d 517,

history to support its conclusion, but rather relied upon a series of cases in which the California Supreme Court interpreted that state's single-sentence statute in a similar way.⁵⁰ Essentially, the Court held that the policy behind the single-sentence rule of section 609.035, that a sentence for the most serious crime will encompass sentencing for all other crimes committed during the behavioral incident, did not hold true in cases involving multiple victims.⁵¹

The Court also noted a second rationale for its decision: that the imposition of multiple sentences in Stangvik's case "does not offend our sense of justice."⁵² The Court held that when considering the propriety of multiple sentences under section 609.035, "much...depend[s] on the harm inflicted and whether multiple sentences would result in punishment grossly out of proportion to the gravity of the offense."⁵³ None of these concepts appear in the text of the statute. Nonetheless, they seemed to influence the Court's resolution of the question, which focused on the heinousness of Stangvik's crimes.⁵⁴ The Court also noted that the district court "was not insensitive to the severity

[525; State v. Reiland, 274 Minn. 121, 124, 142 N.W.2d 635, 638; State v. Gladden, 274 Minn. 533, 144 N.W.2d 779; State v. Murphy, 277 Minn. 355, 152 N.W.2d 507; State v. Gaulke, Minn., 161 N.W.2d 662.](#)) The Court acknowledged that it had never considered the question presented in *Stangvik*. *Stangvik*, 161 N.W.2d at 672.

⁵⁰ *Stangvik*, 161 N.W.2d at 672 (citing, inter alia, *Neal v. State*, 357 P.2d 839 (Cal. 1960)). The California statute provided that "an act or omission which is made punishable in different ways by different provisions of this code may be punishable under either of such provisions, but in no case can it be punished under more than one." *Neal*, 357 P.2d at 843 (quoting Cal. Penal Code 654). In *Neal*, the California Supreme Court held that the California statute prohibited sentencing a defendant more than once for violating more than one provision of the same statute. *Neal*, 357 P.2d at 844. However, notwithstanding the plain language of the statute, the court also held that a defendant who commits crimes against multiple victims may receive more than one sentence, because such a defendant is more culpable than is a person who commits multiple offenses against a single individual. *Id.* at 844. In 2012, the California Supreme Court reversed the portion of *Neal* which held that a court could not impose sentences for violations of different parts of the same statute. *People v. Correa*, 278 P.3d 809 (Cal. 2012).

⁵¹ *Stangvik*, 161 N.W.2d at 672-73.

⁵² *Stangvik*, 161 N.W.2d at 673.

⁵³ *Id.*

⁵⁴ *Id.* at 672-73 (comparing case at bar to hypothetical robbery, auto-theft, and kidnapping case and noting that defendant in hypothetical "might present a more persuasive case").

of punishment” and that it “permitted” the two of the charges to be amended to second-degree murder.⁵⁵

From this disturbing case was born a new doctrine: the “multiple-victim exception” to section 609.035. Under that exception, a district court may impose not one sentence per behavioral incident, but rather one sentence per victim per behavioral incident.⁵⁶ The one sentence imposed was to be the sentence for the most serious crime committed against that victim during the behavioral incident.⁵⁷

Subsequent to *Stangvik*, the Court added to the multiple-victim exception a caveat: when a court sentences a defendant for several crimes committed against multiple victims during a single behavioral incident, the total sentence cannot unfairly exaggerate the criminality of the defendant’s conduct.⁵⁸ The purpose of this exception to the exception was to maintain in multiple-victim cases some consideration into the proportionality of the sentence to the defendant’s conduct.⁵⁹ Essentially, the “unfairly exaggerate” standard allows appellate courts to reduce sentences which the court deems too long, even if the sentence is technically permissible under the other sentencing rules.⁶⁰

B. The Problems With the Multiple-Victim Exception.

⁵⁵ *Id.*

⁵⁶ *See State v. Schmidt*, 612 N.W.2d 871, 878 (Minn. 2000) (holding that court may impose “one sentence per victim”); *State v. Whittaker*, 568 N.W.2d 440, 453 (Minn. 1997) (“one sentence may be imposed per victim in multiple-victim cases”).

⁵⁷ *See Johnson*, 141 N.W.2d at 522.

⁵⁸ *See State v. Marquart*, 294 N.W.2d 849, 851 (Minn. 1980); *State v. DeFoe*, 280 N.W.2d 38, 42 (Minn. 1979).

⁵⁹ *See State v. Edwards*, 774 N.W.2d 596, 606 n.6 (Minn. 2009) (using “unfairly exaggerate” standard to refute suggestion that multiple-victim exception “did not incorporate notions of proportionality”) (citations omitted).

⁶⁰ *See, e.g., State v. Goulette*, 442 N.W.2d 793, 794-95 (Minn. 1989) (holding that imposition of several consecutive sentences, although allowable under multiple-victim exception, unfairly exaggerated the criminality of the defendant’s conduct).

There are several problems with the multiple-victim exception as it currently stands. Application of the exception can lead to precisely the kind of charge-based sentencing disparities that section 609.035 was enacted to prevent. More broadly, the exception is problematic because it was created by the Minnesota Supreme Court and is not tied to any statutory language. This judicial usurpation of legislative power is problematic because, without a strong statutory foundation, the terms of the exception, and how it applies to a particular situation, are always subject to change. This next section attempts to outline these problems in more detail.

1. The Multiple-Victim Exception Allows for the Kind of Charge-Based Sentencing Disparities That Section 609.035 Was Enacted to Avoid.

The multiple-victim exception allows for exactly the kind of charge-based disparity in sentencing that section 609.035 was designed to prevent. Consider, for example, the case of Michael Ferguson.⁶¹ Ferguson and his brothers Marcus and Matthew Dillard were in a van when Marcus fired several shots towards a duplex house in St. Paul.⁶² Matthew was the driver. According to the Dillard brothers' testimony at Michael Ferguson's trial, Michael handed Marcus the gun Marcus used to commit the shooting.⁶³ As it turned out, there were eight people inside one of the apartments in the duplex, including at least one sleeping baby.⁶⁴

⁶¹ See *State v. Ferguson*, 2009 WL 3172139 (Minn. Ct. App. 2009) (*Ferguson I*); *State v. Ferguson*, 786 N.W.2d 640 (Minn. Ct. App. 2010) (*Ferguson II*), *rev'd* 808 N.W.2d 586 (Minn. 2012) (*Ferguson III*).

⁶² *State v. Ferguson*, 2009 WL 3172139, *1 (Minn. Ct. App. 2009) (*Ferguson I*).

⁶³ *Id.*

⁶⁴ *Id.* at *2.

Each brother was initially charged with one count of drive-by shooting of an occupied building and one count of second-degree assault.⁶⁵ The Dillard brothers accepted plea offers under which they each received a single sentence of 41 or 72 months in prison.⁶⁶

The state offered Ferguson the same deal. But Ferguson pleaded not guilty and exercised his constitutional right to a trial. On the eve of trial, the State amended the complaint to charge a total of nine crimes: one count of drive-by shooting and eight counts of second-degree assault, one count for each occupant of the duplex.⁶⁷ Ferguson was convicted of and ultimately was sentenced for all nine crimes.⁶⁸ His total sentence, reached after partially *Hernandizing* his criminal-history score and imposing some of the

⁶⁵ See Complaint, *State v. Ferguson*, Ramsey County File No. 62-K1-07-003463. A person commits a drive-by shooting if he or she recklessly discharges a firearm at or towards a building; the sentence for the crime is enhanced if the building is occupied. Minn. Stat. § 609.66, subd. 1e(b) (2006). A person commits a second-degree assault by using a dangerous weapon to do an act intended to cause another person to fear death or immediate bodily harm. Minn. Stat. § 609.222, subd. 1 (2006). Under the second-degree assault statute, it matters not whether the person targeted by the assault was actually frightened or even knew about the act, and it matters not whether the defendant even knew that the named victim existed. See *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1997) (where defendant fired multiple shots at a home; affirming convictions for second-degree assault of all six occupants of the home, including two sleeping children who did not know about the shots at the time and about whom defendant did not know).

⁶⁶ The details of the Dillard brothers' sentences are included in Ferguson's Feb. 28, 2008, sentencing memorandum, submitted to the district court, at pgs. 4-5. Marcus Dillard pleaded guilty to drive-by shooting under a plea agreement which called for him to receive a 48-month sentence if he appeared for sentencing and a 72-month sentence if he did not. Marcus did not appear at the originally scheduled sentencing hearing, and he therefore received a 72-month sentence. Matthew Dillard appeared for the scheduled sentencing hearing and was sentenced to 41 months in prison.

⁶⁷ See Amended Complaint, Dec. 17, 2007.

⁶⁸ *Ferguson III*, 808 N.W.2d at 589. The district court initially sentenced Ferguson on the assault counts but not the drive-by shooting for a total sentence of 75 months in prison. The Minnesota Court of Appeals affirmed his convictions but reversed the sentences, holding that the court should sentence Ferguson in accordance with the Minnesota Supreme Court's decision in *State v. Franks*, 765 N.W.2d 68 (Minn. 2009). *Ferguson I*, at *5. In *Franks*, the Supreme Court held that when a defendant commits a series of crimes during a single behavioral incident, the court must impose sentence only on the single most serious crime even where imposing consecutive sentences on several less-serious crimes would result in a longer total sentence. *Franks*, 765 N.W.2d at 77-78. Ferguson argued that under *Franks*, the district court should have sentenced him only for the drive-by shooting and not for the assaults. On remand, the district court sentenced Ferguson for drive-by shooting and each count of second-degree assault. The court of appeals reversed the sentences again, holding that the district court had violated section 609.035 and *Franks*. *Ferguson II*, 786 N.W.2d at 644-45. The Minnesota Supreme Court then reversed the court of appeals and affirmed the sentences. *Ferguson III*, 808 N.W.2d at 589.

sentences consecutive to one another, was 75 months in prison.⁶⁹ The Minnesota Supreme Court ultimately held that multiple sentences were proper under the multiple-victim exception.⁷⁰

The prosecution in *Ferguson* used the multiple-victim exception to do what section 609.035 was designed to prevent: use convictions for multiple offenses committed during a single behavioral incident to drive up the defendant's sentence. The prosecution used the exception to effectively charge-bargain with Ferguson and his brothers. The Dillard brothers were able to avoid additional charges and additional sentences by pleading guilty but Ferguson, who elected to maintain his plea of not guilty, was not.⁷¹ If the Legislature intended to allow the late addition of multiple charges for offenses committed during a single behavioral incident to drive the total sentence, no such intent is evident in the plain language of section 609.035. To the contrary, the language of that statute indicates that the Legislature intended the exact opposite.

2. The Exception Was Born of Dubious Statutory Interpretation and, as a Result, is Subject to Change on a Case-by-Case Basis.

The bigger and more holistic problem with the exception is that it was born of dubious statutory interpretation. Because the exception is untethered to any statutory language, its terms and the details of its application to a given case is subject to change.

a. The Judicial Creation of an Exception to a Statutory Rule Violated Principles of Statutory Construction.

⁶⁹ *Id.* at 589.

⁷⁰ *Id.* at 592.

⁷¹ In his appeals, Ferguson challenged his sentences on, among other grounds, the argument that they were imposed to punish him for exercising his constitutional right to a trial. The Minnesota Supreme Court affirmed the sentences without addressing the argument, thus at least implicitly rejecting it.

The judicial creation of an exception to a statutory command runs counter to several well-established principles of statutory construction.

First, section 609.035 unambiguously did not, and still does not, contain a multiple-victim exception to its otherwise bright-line rule. This lack of ambiguity should have precluded the Court from inquiring into whether the legislature intended to allow multiple sentences for crimes against multiple victims.⁷² Ambiguity in a statute's language is a threshold issue for any statutory interpretation.^{xv} That is, a statute is only subject to judicial interpretation when it is "susceptible to more than one reasonable interpretation."^{xvi} As such, an unambiguous statute presents no occasion for statutory construction or inquiry into legislative intent.^{xvii} The Minnesota Supreme Court did not follow this principle when it created the multiple-victim exception. The plain language of section 609.035 did not then, and does not now, contain a multiple-victim exception. Moreover, the statute's exceptions have been anything but ambiguous since enactment. In light of the statute's unambiguous language, the Court should not have inquired into legislative intent.

Second, by creating the multiple-victim exception, the Court essentially added language to section 609.035 under the guise of interpreting it. This is normally impermissible. When a statute's language is clear, a court is bound by the language and may not read into the statute a provision that the legislature omitted.^{xviii} This is true regardless of the intent or inadvertence of the omission.^{xix} Minnesota courts have

⁷² See *Stangvik*, 161 N.W.2d 672 (holding that "the legislature did not intend" to prohibit imposition of multiple sentences against separate victims).

repeatedly held that decisions regarding statutes' amendments are firmly within the province of the legislature, not the judiciary.^{xx} As such, the Court's reading a multiple-victim exception into section 609.035 where none existed was an overreach of the Court's authority, which simultaneously undercut the legislature's power.^{xxi}

Third, the legislature's failure to enact a multiple-victim exception to section 609.035, in light of the numerous other legislatively created exceptions, indicates a legislative intent not to create such an exception at all. Where the legislature is aware of its authority to create exceptions to a statute, and has exercised that authority, a court is barred from creating further exceptions.^{xxii} Such an action by the court violates the canon of statutory construction "*expressio unius est exclusio alterius*," or "the expression of one thing is the exclusion of another."^{xxiii} The *expressio unius* doctrine reflects the inference that any legislative omissions in a statute are intentional, particularly when the language of the statute supports such an inference.^{xxiv}

State v. Williams, provides an example of the application of the *expressio unius* doctrine.^{xxv} In *Williams*, the Court considered whether the Sentencing Guidelines permitted use of the *Hernandez* method^{xxvi} in calculating a defendant's criminal history score when he was sentenced under section 609.035's felon-in-possession-of-a-firearm exception to section 609.035.^{xxvii} The court considered the fact that the Sentencing Guidelines Commission had "carefully considered the applicability of the *Hernandez* method to sentencing in several contexts" over the prior thirteen years, creating specific prohibitions to its use.^{xxviii} The Court "decline[d] to step in where the Commission has

decided not to act,” and held that the *expressio unius* doctrine prohibited extending the exception for *Hernandizing* to felon-in-possession cases.^{xxxix}

Like the *Hernandez* method, Section 609.035 applies broadly but with exceptions which have been gradually and periodically carved out by the legislature.^{xxx} In light of the legislature’s exemption of certain offenses from the one-sentence rule, its failure to exempt crimes involving multiple victims from the statute’s ambit implicates the *expressio unius* doctrine.^{xxxi} That is, the legislature’s silence on a multiple-victim exception creates an inference that it desired no such exception.^{xxxii}

Finally, the Court relied on its own policy opinion about the propriety of imposing multiple sentences in a particular case to create the multiple-victim exception. In *Stangvik*, the Court affirmed the imposition of multiple sentences because such sentencing “does not offend our sense of justice.”^{xxxiii} Ordinarily, courts do not interpret statutes to conform to the Court’s policy positions;^{xxxiv} rather, policy considerations expressed in statute remain the province of the legislature.^{xxxv} Even where the language of the statute leads to an unintended result, it remains the prerogative of the legislature, not the courts, to correct it.^{xxxvi} Because it is for the legislature to determine policy implications in enacting and amending statutes, the court’s relying on its “sense of justice” to create the multiple-victim exception to section 609.035 was inappropriate.^{xxxvii}

b. Because it is unmoored from the language of a statute, the multiple-victim exception is subject to change on a case-by-case basis.

Because the multiple-victim exception is unmoored from the language of section 609.035, application of the exception can change on a case-to-case basis. In *Ferguson*,

for example, the Minnesota Supreme Court changed the exception in two dramatic ways. Before that case, courts applying the multiple-victim exception had affirmed the imposition of no more than one sentence per victim per behavioral incident.⁷³ The Court had never before affirmed the imposition of more sentences than there were victims in a particular behavioral incident.⁷⁴ But in *Ferguson*, a case involving at most eight victims, the Court affirmed the imposition of nine sentences.⁷⁵ The Court did so by holding that drive-by shooting of an occupied building was a victimless crime.⁷⁶ This result was unprecedented and was at least arguably contrary to previous Supreme Court decisions in this area.⁷⁷ This expansion of the multiple-victim exception runs afoul not only of the plain language of section 609.035 but also goes beyond the point of the multiple-victim exception, which is to account for each person victimized during a single behavioral incident.

Ferguson also changed the exception in a second dramatic way. In Part II of its opinion, the Court held that the district court could impose sentences for drive-by shooting and for assault against the building's occupants because the building's

⁷³ See, e.g., *Schmidt*, 612 N.W.2d at 878; *Whittaker*, 568 N.W.2d at 453.

⁷⁴ This was true even where the intended victim of an offense was not so clear. In *State v. Rieck*, 286 N.W.2d 724 (Minn. 1979), for example, the defendant firebombed a house in an attempt to intimidate a person the defendant thought was inside against being a witness against the defendant's half-brother. *Id.* at 725. The intended target was not inside the house, but five other people were. *Id.* The Supreme Court held that the district court properly imposed separate sentences for one count of attempted witness tampering and five counts of assault. *Id.* at 726-27. This was because each crime had a separate "victim" – the absent potential witness was the victim of the tampering charge, and each occupant of the house was a victim of his or her own assault. *Id.*

⁷⁵ *Id.* at 592.

⁷⁶ See *Ferguson III*, 808 N.W.2d at 591 (holding that victims of assaults who were inside building were not also victims of drive-by shooting at an occupied building); see also *Id.* at 594-96 (P. Anderson, J., dissenting) (disagreeing with majority for holding that drive-by shooting of an occupied building is a "victimless crime").

⁷⁷ See *Ferguson III*, 808 N.W.2d at 597 (P. Anderson, J., dissenting) (citing *SkipintheDay*, 717 N.W.2d at 427) (discussing case in which Court held that crimes without concrete victims did not qualify for sentencing under multiple-victim exception). This was the topic of *Ferguson*'s petition for rehearing, which the Court denied.

occupants were not victims of drive-by shooting.⁷⁸ In Part III of the opinion, the Court wrote that even if it was wrong, and that “drive-by shooting at an occupied building [was] the most serious offense committed against each victim,” the district court still could properly have imposed multiple sentences for drive-by shooting and assault.⁷⁹ This was true, the Court wrote, because the rationale behind section 609.035 – that punishment for the most serious crime committed during a behavioral incident includes and adequately accounts for punishment for all crimes committed during that incident – “does not hold true” in this situation.⁸⁰ The Court opined that sentencing Ferguson only for the most serious offense committed during the behavioral incident “fails to reflect Ferguson’s increased culpability for committing an act of violence with intent to harm more than one person.”⁸¹ The Court then pronounced a new rule: when “a sentence on the most serious offense unfairly depreciates the criminality of the defendant’s conduct...the rule [that a defendant may only be sentenced on the most serious offense per victim] does not apply.”⁸²

⁷⁸ *Id.* at 590-92.

⁷⁹ *Id.* at 592. Part III of the Court’s opinion in *Ferguson* is arguably dicta, because the Court affirmed Ferguson’s sentences in Part II of its opinion and therefore the discussion in Part III was not necessary to the holding of the case. See *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring) (defining dictum as “language in a decision not necessary to the holding”); see also Black’s Law Dictionary (9th Ed. 2009) (defining “obiter dictum” as “A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).”). But the Minnesota Supreme Court has used a more narrow definition of dicta. See *State v. Timberlake*, 744 N.W.2d 390, 395 n.7 (Minn. 2008) (defining dicta as “expressions in a court’s opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases.”) (quoting *State ex rel. Foster v. Naftalin*, 74 N.W.2d 249, 266 (Minn. 1956)). Part III of *Ferguson III* does not “go beyond the facts before the court,” *Id.*, and therefore Part III is probably not dicta under the standard articulated in *Timberlake*.

⁸⁰ *Ferguson III*, 808 N.W.2d at 592.

⁸¹ *Id.*

⁸² *Ferguson III*, 808 N.W.2d at 592 n.4. The footnote actually referenced “the rule announced in *Kebaso*, 713 N.W.2d at 322.” The specific “rule announced in *Kebaso*” was that a sentencing court may not consider possible immigration consequences of a particular crime when determining which of several crimes is the most serious.

This new rule was unprecedented. It also generates a host of questions: when does sentencing on the most serious offense “unfairly depreciate[] the criminality of the defendant’s conduct”? By what standard should courts use to determine whether this is the case? How much of depreciation must exist before the depreciation becomes unfair? To whom must the final sentence be unfair: the victim or victims, or the prosecution, or society in general? If sentencing a defendant for the most serious offense “unfairly depreciates the criminality of the defendant’s conduct,” can the sentencing court choose a different offense on which to sentence the defendant, or can the sentencing court ignore section 609.035 altogether if the court determines that the rationale behind the statute “does not hold true”? The Court did not address any of these questions or provide any guidance to lower courts on how to apply this new standard.⁸³ But taken to its logical conclusion, the new rule of *Ferguson III* threatens to gut the protections of section 609.035, or at least reduce that previously mandatory statute to an optional one based upon an exercise of judicial discretion.

3. The “unfairly exaggerates” standard is insufficient to ensure rational and proportional sentences imposed under the multiple-victim exception.

Recall that when a court imposes multiple sentences for offenses committed against several victims during the same behavioral incident, the total sentence imposed

Kebaso, 713 N.W.2d at 322 (“We granted review on the narrow issue of whether the court of appeals erred in refusing to consider the potential immigration consequences to *Kebaso* when deciding which sentence to vacate.”). It appears that the Court in *Ferguson III* was referring to *Kebaso*’s discussion of the then almost fifty-year-old rule requiring sentencing on the most serious offense per victim per behavioral incident. See Minn. Stat. § 609.035 (1963 Committee Comment); *Johnson*, 141 N.W.2d 520-21.

⁸³ The dissent did not address Part III of the majority opinion.

cannot unfairly exaggerate the criminality of the defendant's conduct.⁸⁴ This rule is designed to ensure that sentences imposed under the exception are proportional to the defendant's conduct.⁸⁵ But this rule is difficult to apply because the Minnesota Supreme Court has never set forth a specific standard for determining whether a sentence is proportional to or unfairly exaggerates the criminality of a defendant's conduct.⁸⁶ Not surprisingly, this lack of clarity can lead to inconsistent results.

For example, in *State v. Norris*, the Minnesota Supreme Court held that a defendant's sentence of life imprisonment plus a consecutive 300-month prison term, which was the result of imposing six consecutive sentences for crimes committed against multiple victims, unfairly exaggerated the criminality of the defendant's conduct.⁸⁷ In reaching its conclusion, the Court focused not on the defendant's conduct – shooting up a bar full of patrons, killing one of them – but rather on the number of consecutive sentences imposed.⁸⁸ Other than noting that in other cases it had affirmed the imposition of two or three consecutive sentences but never six, the Court provided no guidance on why the sentences imposed in *Norris* were so unfair as to require reversal.⁸⁹ But just six years later, in *State v. Cole*, the Court affirmed the imposition of six consecutive

⁸⁴ *Marquart*, 294 N.W.2d at 851.

⁸⁵ *See Edwards*, 774 N.W.2d at 606 n.6.

⁸⁶ Sometimes Minnesota's appellate courts use their "collective, collegial experience in reviewing a large number of criminal appeals" to determine whether the imposition of multiple sentences, or the total length of such a sentence, is unreasonable. *See State v. Rhoades*, 690 N.W.2d 135, 140 (Minn. Ct. App. 2004) (citing, *inter alia*, *State v. Miller*, 488 N.W.2d 235, 241 (Minn. 1992)). Often this review involves comparing the facts and sentence of the case at bar to the facts of other, purportedly similar sentences. *See, e.g., State v. Vickla*, 793 N.W.2d 265, 270-71 (Minn. 2011).

⁸⁷ *Norris*, 428 N.W.2d at 70-71.

⁸⁸ *Id.*

⁸⁹ *Id.*; *see also Goulette*, 442 N.W.2d at 794-95.

sentences for murder, assault, and kidnapping.⁹⁰ In *Cole*, the Court focused not on the number of consecutive sentences but rather on the heinousness of the defendant's conduct.⁹¹ The Court did not cite or distinguish *Norris* but instead relied upon a case in which it had affirmed the imposition of two consecutive sentences.⁹² Situations like this reveal that district courts have little guidance on when the imposition of numerous sentences under the multiple-victim exception will be deemed excessive.

In applying the “unfairly exaggerated” standard, courts often compare the facts and sentences in the case at bar to the facts and sentences in other cases.⁹³ But even this standard proves difficult to apply because courts often struggle with identifying appropriate comparable offenses, and individual Justice can view a particular sentence in dramatically different ways. In *State v. Poole*, for example, the Minnesota Court of Appeals reversed the imposition of six consecutive sentences, totaling 18 years, for several counts of fourth-degree criminal-sexual-conduct offenses committed against separate victims.⁹⁴ The court acted because “[d]espite the egregious facts, [the court found] it...troubling that Poole received a sentence (216 months) substantially greater than the presumptive sentence for felony murder (150 months).”⁹⁵ The Minnesota Supreme Court affirmed the sentence reduction without much comment.⁹⁶ But Justice Tomjanovich dissented from the portion of the opinion affirming the sentence reduction. In her mind, the original 18-year sentence did not unfairly exaggerate the criminality of

⁹⁰ *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996).

⁹¹ *Id.*

⁹² *Id.* (citing *State v. Montalvo*, 324 N.W.2d 650, 652 (Minn. 1982)).

⁹³ See, e.g., *Vickla*, 793 N.W.2d at 270-71.

⁹⁴ *State v. Poole*, 489 N.W.2d 537, 544 (Minn. Ct. App. 1992).

⁹⁵ *Id.*

⁹⁶ *State v. Poole*, 499 N.W.2d 31, 36 (Minn. 1993).

the defendant's conduct.⁹⁷ Justice Tomjanovich would have held that the reduction of the sentence “minimizes the criminality of his conduct,” and would have compared the total sentence to not one but rather 16 felony murders.⁹⁸ Because neither the majority nor the dissent provided much rational for their respective opinions, decisions like *Poole* provide little guidance for lower courts on whether a particular sentence, which appears otherwise lawful, will be deemed unfair.

In the next section, this article encourages the Legislature to step back into this arena and provide guidance to courts on how to sentence defendants who commit several crimes during a single behavioral incident.

IV. THE LEGISLATURE SHOULD AMEND SECTION 609.035 TO CODIFY THE MULTIPLE-VICTIM EXCEPTION AND CLARIFY THAT THE EXCEPTION SHOULD NOT SWALLOW THE RULE.

This article proposes that the Minnesota Legislature should amend section 609.035 to codify the multiple-victim exception. The Legislature should do so in a way that ensures that the exception will not be used as a charge-bargaining weapon; that the exception will not drive sentences to unreasonable lengths; and that the exception will not swallow the rule against multiple sentences or the rationale behind it.

Before we begin, however, a quick word about legislative authority in this area is in order. Under Minnesota's constitutional separation-of-powers principles, “the power to fix the limits of punishments for criminal acts lies with the legislature.”⁹⁹ The Legislature may use this power to limit the range of sentencing opinions available to a

⁹⁷ *Id.* at 36 (Tomjanovich, J., dissenting)

⁹⁸ *Id.* (emphasis original).

⁹⁹ *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004) (citation omitted).

judge in a particular case. The Legislature has done so in many situations, including by enacting mandatory sentencing guidelines, mandatory-minimum sentencing statutes, and section 609.035 itself.¹⁰⁰ Under these principles, the Legislature would act entirely appropriately by amending section 609.035 to account for, and/or to limit, the multiple-victim exception. This is particularly true because although the Supreme Court has contended that the multiple-victim exception stemmed from its opinion about the intent of the Legislature.¹⁰¹ The Legislature is therefore free to express its actual intent by amending the statute.¹⁰²

The multiple-victim exception is worth preserving, at least partially. Imposing one sentence per victim can, in some number of cases, produce perfectly just sentencing results. However, for the reasons discussed *supra.*, the legislature should also limit the exception so that it does not swallow the rule or its rationale. In order to do so, the Legislature could amend section 609.035 as follows:

Subd. 7. Exception; multiple victims. Notwithstanding subdivision 1, when a case involves offenses committed against multiple victims during a single behavioral incident, a court may, subject to the limitations expressed herein, impose one conviction and sentence per offense per victim. When proceeding under this subdivision, the court shall impose a sentence for the most serious crime committed against each victim. The court shall determine which crime is most serious by comparing the statutory-maximum sentences and the offense-severity levels under the Minnesota Sentencing Guidelines. If those provisions are equal

¹⁰⁰ See *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005) (holding that sentencing guidelines are mandatory); *Bluhm*, 676 N.W.2d at 651 (upholding mandatory-minimum sentencing provision). See also *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (holding that creation of federal sentencing guidelines did not violate federal separation-of-powers principles).

¹⁰¹ *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995) (multiple-victim exception was based upon the Court’s “interpretation of legislative intent as expressed in the wording of the statute”); *Stangvik*, 161 N.W.2d at 672 (contending that “the legislature did not intend” to disallow multiple punishments for crimes against multiple victims).

¹⁰² This is particularly true because “the statutory text is the authoritative statement of legislative intent.” *Gassler v. State*, 787 N.W.2d 575, 584 n.9 (Minn. 2010).

or do not apply, the court may compare the nature of the offenses. A court proceeding under this subdivision shall not impose more than two convictions and sentences per behavioral incident.

This type of amendment would address several of the problems with the court-created exception. It would codify the Minnesota Supreme Court’s decades-old, common-sense standard for determining which of several offenses is most serious.¹⁰³ The standard is easy to apply and, because it is largely objective, should lead to consistent and rational results by judges considering similar cases. This kind of clarity will produce more consistent results. Also, given that the Legislature and the Sentencing Guidelines Commission have spent decades making policy decisions regarding the seriousness of offenses – as expressed in statutory maximum sentences and severity-level rankings – there is no reason to not follow their respective leads.

By providing that the court “shall” impose sentence only on the most serious offense committed against a particular victim, the amendment should prevent Part III of the Minnesota Supreme Court’s opinion in *Ferguson III* from gutting section 609.035.¹⁰⁴ Recall that *Ferguson III*, the Court held the district court did not need to impose sentence on the most serious offense per victim if the court determined that doing so would “unfairly depreciate[] the criminality of the defendant’s conduct.”¹⁰⁵ The proposed

¹⁰³ *Kebaso*, 713 N.W.2d at 322 (citing cases dating to 1980 as providing guidance on determining which of several offenses is most serious).

¹⁰⁴ The amendment would negate Part III of *Ferguson III* because it provides that the court “shall impose a sentence for the most serious crime” committed against each victim, and goes to describe how a court is to decide which crime is most serious. The word “shall” imposes a mandatory duty. See *Bluhm*, 676 N.W.2d at 652 (holding that sentencing statute providing that the court “shall” impose a jail term imposed a mandatory requirement) (citing *State v. Humes*, 581 N.W.2d 317, 319 (Minn. 1998) (holding that a sentencing statute providing that the court “shall” impose a conditional-release term as part of a sentence created a mandatory requirement)). Under the proposed amendment, the court would not be free to disregard the “most serious crime” rule, as it is under *Ferguson III*.

¹⁰⁵ *Ferguson III*, 808 N.W.2d at 592 n.4.

amendment replaces that vague standard with a clear, easy-to-apply statutory rule; a rule which will ensure that the defendant is sentenced for the most serious crime he or she commits against a particular victim. The “most serious crime” rule has served Minnesota well since 1963, and the Legislature should make sure that the rule continues to do so.

The proposed amendment would replace the “unfairly exaggerates” standard with a more objective limit on sentencing: the statute should cap at two the total number of sentences a district court may impose under the multiple-victim exception. This type of “hard cap,” or objective limit on the number and thus the length of sentences to be imposed, is much easier to apply than the current “soft cap,” which asks whether the total sentence unfairly exaggerates the criminality of the defendant’s conduct.¹⁰⁶ Replacing the “unfairly exaggerates” standard with a two-sentence rule solves the problem of inconsistent results caused by the current soft cap, described above. An objective two-sentence rule is clearer and much easier to apply than the subjective “unfairly exaggerates” rule. Because the proposed standard is objective, it will lead to less diverse sentencing results, one of the goals of Minnesota’s sentencing system.¹⁰⁷ A two-sentence rule will also eliminate an incentive for the kind of charge-bargaining which occurred in *Ferguson*, because the prosecution will not have an incentive to load up the complaint with duplicative charges, which could result in multiple and longer sentences.

Furthermore, the “unfairly exaggerates” portion of the multiple-victim exception is unnecessary. In every case, an appellate court may review a sentence to determine if it is

¹⁰⁶ See *Skipin the day*, 717 N.W.2d at 426.

¹⁰⁷ See Minn. Sent. Guidelines § 1 (2012) (goal of the sentencing guidelines is essentially to ensure that defendants with similar criminal histories who commit similar crimes receive similar sentences).

“inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.”¹⁰⁸ Appellate courts will be able to use this authority to reduce an unreasonably long sentence even if the “unfairly exaggerates” standard is replaced by a two-sentence rule.¹⁰⁹

A two-sentence rule for the multiple-victim exception would be consistent with the Minnesota Sentencing Guidelines’ provisions on determining how many criminal-history points to assign a defendant who was sentenced under the multiple-victim exception. The Guidelines provide that, when calculating a criminal-history score, “[w]hen 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.”¹¹⁰ The purpose of this provision is “[t]o limit the impact of past variability in prosecutorial [charging] discretion,”¹¹¹ which is also the purpose of the proposed two-sentence amendment to section 609.035. While the Sentencing Guidelines Commission purported to be concerned about “past variability in prosecutorial discretion,”¹¹² there is no evidence that such variability is only a thing of the past.

The Guidelines rule is similar to the proposed amendment because both are concerned with multiple sentences imposed during a “single course of conduct” or “single behavioral incident.” The Guidelines provision applies “to a situation in which a

¹⁰⁸ Minn. Stat. § 244.11, subd. 2(b) (2010).

¹⁰⁹ See *Neal v. State*, 658 N.W.2d 536, 547-48 (Minn. 2003) (acting under authority of section 244.11, subd. 2, to reduce 480-month sentence for kidnapping because sentence was “not commensurate with the gravity of the crime.”).

¹¹⁰ Minn. Sent. Guidelines 2.B.1.d.(2) (2012).

¹¹¹ Minn. Sent. Guidelines 2.B.110 (2012) (Comment).

¹¹² *Id.* (emphasis added).

crime or crimes are committed against multiple victims during the course of an incident which is limited in time and place,” a standard similar to the test for when multiple crimes were committed during a single behavioral incident for purposes of section 609.035.¹¹³ Given the similarities between the two concepts, it is not surprising that appellate courts have looked to cases interpreting the “single behavioral incident” requirement of section 609.035 for guidance on what constitutes a “single course of conduct” under the Guidelines.¹¹⁴ The Sentencing Guidelines-based two-sentence rule has not generated any major controversial decisions or, indeed, much caselaw at all. The lack of controversy surrounding the Sentencing Guidelines version of the two-sentence rule shows that such a rule can be applied in a fair, evenhanded way, and can lead to fair results.

A two-sentence rule might be subject to a couple of criticisms. First, a limit of two sentences might be deemed arbitrary. This same criticism, however, would hold against any numerical limit on sentencing. Almost any numeric limit on anything can be dismissed as “arbitrary.” Why, for example, must certain second-time controlled-substance-crime offenders serve six months in jail?¹¹⁵ Why not a three-month term, a one-month term, or a nine-month term? In addition, by equating the number of sentences which could be imposed with the already-existing two-sentence rule of the Minnesota Sentencing Guidelines, the proposed amendment would not be arbitrary. Instead, the

¹¹³ *State v. Parr*, 414 N.W.2d 776, 780 (Minn. Ct. App. 1987) (emphasis original); see also *Bookwalter*, 541 N.W.2d at 293-96 (explaining single-behavioral-incident standard).

¹¹⁴ See *State v. Watkins*, 2012 WL 3155948, *4 (Minn. Ct. App. 2012) (citing *State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983)), *rev. denied* (Minn. Oct. 24, 2012) (relying upon a Minnesota Supreme Court case interpreting the “single behavioral incident” rule to decide whether defendant’s prior crimes occurred during a “single course of conduct” under Sentencing Guidelines). The author of this article represented the appellant in *Watkins*.

¹¹⁵ See *Bluhm*, 676 N.W.2d at 651-52 (affirming mandatory six-month jail sentence).

goal of the amendment would be to make sentencing under the multiple-victim exception consistent with well-established sentencing law in a similar area. Furthermore, following the lead of the Guidelines Commission is particularly appropriate because “on most issues, the [Commission] retains primary control over sentencing policy formulation.”¹¹⁶

A second, more valid criticism might be that under the two-sentence rule a defendant would not receive a separate punishment for offending against a particular victim. One of the purposes of the multiple-victim exception is to account, in the punishment for a crime or crimes, for each victim.¹¹⁷ But even under a two-sentence rule, the total sentence imposed can account for all of the victims of a crime. A court may impose a sentence of aggravated duration upon a defendant whose criminal conduct puts several people at risk of harm, even where the defendant is convicted and sentenced for several of the offenses.¹¹⁸ Thus, under the two-sentence rule a defendant who is convicted of multiple offenses against multiple victims might only be able to be sentenced for two of those crimes, but at least one of those sentences might be enhanceable because of the existence of other victims or possible victims.¹¹⁹

Finally, the Legislature would legitimize and endorse the multiple-victim exception by codifying it. Codification of the multiple-victim exception would neutralize

¹¹⁶ Richard S. Frase, *Sentencing Guidelines in Minnesota 1978-2003*, 32 *Crime & Just.* 131, 204 (2005).

¹¹⁷ See *Stangvik*, 161 N.W.2d at 673.

¹¹⁸ See *Edwards*, 774 N.W.2d at 606-07 (holding that where defendant is convicted of several offenses against multiple victims during a single behavioral incident, the court may impose multiple sentences and an upward durational departure if facts show the defendant committed the crime in a particularly serious way); *State v. Mitjans*, 408 N.W.2d 824, 834 (Minn. 1987) (upward-departure sentence affirmed where defendant fired two shots into a bar, killing one person and “put[ting] a number of people at risk and in fear”).

¹¹⁹ *Edwards*, 774 N.W.2d at 606-07 & 609 n.10; see also Minn. Stat. § 244.10, subd. 5a(b) (2012) (providing that, notwithstanding section 609.035, a court may impose an aggravated sentence based upon any factor which occurs during the same course of conduct as the to-be-sentenced offense).

criticism, such as that in this article, that the exception itself is invalid. More importantly, codification would finally moor the exception to a statute. This anchoring should prevent the kind of case-by-case shift in application epitomized by *Ferguson*. It would make the exception more readily apparent to practitioners and judges and would standardize its application.

When it enacted section 609.035 fifty years ago, the legislature evinced an intent to not allow criminal sentencing to veer out of control, or to be subject to the whims of individual judges, or to change dramatically based upon the facts of a particular case. Put simply, the legislature evinced intent to limit judicial discretion in this area. Codification, and limitation, of the multiple-victim exception to the protections of section 609.035 would legitimately re-establish legislative authority in this area; would protect criminal defendants from the kind of charge-bargaining that section 609.035 was designed to prevent; and would serve Minnesota's laudable goal of maintaining a rational and predictable sentencing system.

V. CONCLUSION.

Sentencing in Minnesota is motivated by two equally important concerns: that defendants should receive a sentence commensurate with their criminal conduct, and that similar defendants who commit similar crimes should receive similar sentences. Section 609.035 serves both of these goals. The court-created multiple-victim exception to the one-sentence rule of section 609.035 does not. Accordingly, the Minnesota Legislature should amend section 609.035 and create a multiple-victim exception which is simple, easy to apply, will lead to sentences proportionate with criminal conduct, and will ensure

that similarly situated criminal defendants are treated similarly. By acting in this manner, the Legislature will ensure that Minnesota’s sentencing system will continue to produce just results in future cases.

ⁱ MINN. STAT. § 609.035 (1963). The original text of the statute read:

Except as provided in section 609.585, if a person’s conduct constitutes more than one offense under the laws of this state he may be punished for only one of such offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All such offenses may be included in one prosecution which shall be stated in separate counts.

ⁱⁱ MINN. STAT. § 609.585 (1963).

ⁱⁱⁱ *See State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

^{iv} MN Session Laws, 1996 Regular session, Chapter 408-S.F. No. 2856.

^v MN Session Laws, 1999 Regular Session, Chapter 216-S.F. No. 2221

^{vi} MN Session Laws, 2000 Regular Session, Chapter 311-H.F. No. 2688

^{vii} MN Session Laws, 1997 Regular Session, Chapter 239-S.F. No. 1880

^{viii} *See Williams*, 771 N.W.2d at 520.

^{ix} MN Session Laws, 1983 Regular Session, Chapter 139—H.F. No. 529

^x MN Session Laws, 1986, Regular Session, Chapter 388—H.F. No. 1844

^{xi} MN Session Laws, 1993, Regular Session, Chapter 326—H.F. No. 1585

^{xii} MN Session Laws, 1993, Regular Session, Chapter 326—H.F. No. 1585

^{xiii} MN Session Laws, 1987, Regular Session, Chapter 111—S.F. No. 605

^{xiv} MN Session Laws, 1994 Regular Session, Chapter 615-S.F. No. 1961

^{xv} *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009) (“The threshold issue in any statutory interpretation analysis is whether the statute’s language is ambiguous”) (citation omitted).

^{xvi} *State v. Heiges*, 806 N.W.2d 1, 15 (Minn. 2011).

^{xvii} *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012) (“Only if a statute is ambiguous will we engage in statutory construction.”); *Green Giant Co. v. Comm’r of Revenue*, 534 N.W.2d 710, 712 (Minn. 1995) (“No room for judicial

construction exists when the statute speaks for itself.”) (quoting *Comm’r of Revenue v. Richardson*, 302 N.W.2d 23, 26 (Minn. 1981)).

^{xviii} *Munger v. State*, 749 N.W.2d 335, 339 (Minn. 2008) (“[W]here the language of the statute is clear, the court is bound to give effect thereto.”) (quoting *State v. Loge*, 608 N.W.2d 152, 156–57 (Minn. 2000)).

^{xix} *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). (noting that a court “will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently”).

^{xx} See, e.g., *State v. Rodriguez*, 754 N.W.2d 672, 684 (Minn. 2008) (“[I]t is the prerogative of the legislature, not this court, to extend the statute accordingly.”); *Beardsley v. Garcia*, 753 N.W.2d 735, 740 (Minn. 2008) (“The prerogative of amending a statute . . . belongs to the legislature, not to this court.”); *Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963) (“If there is to be a change in the statute, it must come from the legislature.”).

^{xxi} *Hutchinson Tech., Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 12 (Minn. 2005) (“[W]e are unwilling to write into a statute what the legislature did not.”); *State ex rel. Verbon v. St. Louis County*, 216 Minn. 140, 145, 12 N.W.2d 193, 196 (1943) (“Courts cannot amend a statute under the pretext of construction.”).

^{xxii} *State v. Williams*, 771 N.W.2d 514, 523 (Minn. 2009).

^{xxiii} *Id.*

^{xxiv} *State v. Caldwell*, 803 N.W.2d 373, 383 (Minn. 2011) (citing 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.25 (7th ed. 2007)).

^{xxv} 771 N.W.2d at 514.

^{xxvi} The “*Hernandez* method” is implicated when a defendant is being sentenced on the same day for offenses arising out of different behavioral incidents and involving different victims. *Hernandez* permits a court to use an offense for which the defendant is being sentenced to enhance his criminal history score in calculating a subsequent sentence to be imposed that same day. *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981); see also *Williams*, 771 N.W.2d at 521–22.

^{xxvii} *Williams* 771 N.W.2d at 520.

^{xxviii} *Id.* at 523.

^{xxix} *Id.* at 523, 524.

^{xxx} Compare MINN. STAT. § 609.035 (1963) (providing one exception to the single behavioral incident rule) and MINN. STAT. § 609.035 (2012) (providing several additional exceptions to the single behavioral incident rule) with *Hernandez*, 311 N.W.2d at 478 (broadly creating the *Hernandez* method) and *Williams*, 711 N.W.2d at 522 (noting the three exceptions that the Sentencing Commission had carved from the *Hernandez* method).

^{xxx}_i See *Williams*, 771 N.W.2d at 523. It might be argued that, by its silence on the question, the legislature has acquiesced to the propriety of the multiple-victim exception. See *State v. Anderson*, 666 N.W.2d 696, 700 (Minn. 2003) (“We have said that where the legislature does not amend our construction of a statute, the court’s construction stands.”) (citations omitted); see also Minn. Stat. § 645.17 (2012) (“when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language”). This argument would be misplaced for two reasons. First, legislative silence in the wake of *Stangvik* does not necessarily mean that *Stangvik* was rightly decided or, more to the point, that *Stangvik* was a proper application of principles of statutory construction. More practically, legislative options in this situation were quite limited. The plain language of section 609.035 already appeared to prohibit the imposition of multiple sentences per behavioral incident. Adding language akin to “including in cases involving multiple victims” would have been redundant.

^{xxx}_{ii} See *Williams*, 771 N.W.2d at 524.

^{xxx}_{iii} *State ex rel. Stangvik*, 161 N.W.2d 667, 673 (Minn. 1968).

^{xxx}_{iv} *Arlandson v. Humphrey*, 224 Minn. 49, 56, 27 N.W.2d 819, 823 (1947) (“We cannot, however much we might wish to do so, change or expand legislation by judicial interpretation to conform to our personal views.”)

^{xxx}_v *State v. Rodriguez*, 754 N.W.2d 672, 684 (Minn. 2008); *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 524 (Minn. 2005) (noting that, while the court agrees that the policies supporting certain statutes may need reexamination, the legislature, and not the courts, are “the proper forum to enact such policy change”).

^{xxx}_{vi} *Haghighi v. Russian-Am. Broad. Co.*, 577 N.W.2d 927, 930 (Minn. 1998).

^{xxx}_{vii} *State ex rel. Stangvik*, 161 N.W.2d 667, 673 (Minn. 1968).