Attached please find the Robina Institute's written comment in response to the Minnesota Sentencing Guidelines Commission's request for input on possible modifications to the criminal history score. Thank you for providing this opportunity.

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I. Introduction

The Guidelines Commission has a statutory duty to monitor the implementation and impacts of the sentencing guidelines, and make recommendations to the legislature regarding needed changes in criminal laws, procedures, and other aspects of sentencing (Minn. Stat. Sec. 244.09). Offender criminal history is one of the two major determinants of recommended guidelines sentences, and this factor has major impacts on the form and severity of sentences, prison populations, and correctional expenditures. Since the guidelines became effective in 1980, the Commission has made several changes in the criminal history score. The most important change was the adoption in 1989 of a system for weighting prior felony convictions according to their guidelines offense severity level. That change was prompted in part by the Commission’s observation that increasing numbers of property offenders were being recommended for prison commitment, due to a steady increase in offender criminal history scores that pushed more and more low-offense-severity offenders across the disposition line into guidelines grid cells recommending prison (Minn. Sent. Guidelines Comm. [MSGC], 1989 Report to the Legislature).

Recently, the Commission has once again observed rising criminal history scores and score components, as well as other potential problems with the operation of this important aspect of guidelines sentencing. The Commission is also concerned that the criminal history score in its current form may not be protecting public safety in the most efficient and effective manner; indeed, research in other guidelines jurisdictions has shown that criminal history scores can include components that add to the size and expense of prison populations without materially improving the ability of the score to identify higher-risk offenders. Accordingly, the Commission has recently conducted a comprehensive review of the operation and impacts of the current score, with a view toward improving the score’s fairness and cost-effectiveness. This is exactly the kind of on-going research and policy development that sentencing guidelines commissions are designed and uniquely equipped to conduct.

In our comments below, Part II describes recent problematic trends in the operation and impacts of the guidelines criminal history score. Part III summarizes research the Robina Institute has conducted to assess the risk-predictive accuracy of the current score and its components, with emphasis on research findings that relate directly to one or more of the Discussion Topics described in the Commission’s memo to stakeholders. Part IV identifies some broader issues.

II. Recent Trends

As noted above, criminal history scores continue to rise. After falling briefly in the early 1990s due to felony weighting, the average score rose from 1.35 in 1991 to 2.05 in 2016, and the
proportion of high scores (4 or more points) rose from 14 percent to 24 percent, while the proportion with zero points fell from 52 percent to 32 percent. Mostly as a result of rising criminal history scores, the proportion of offenders with recommended-prison sentences rose steadily – from 25 percent in 1991, to 33 percent in 2016 (it was 35 percent, in 2013 and 2014). Barring changes to the calculation of the score or changes to the sentencing structure, this trend will almost certainly continue – resulting in a steadily increasing proportion of offenders who fall into the recommended-prison grid cells.

Rising criminal history scores create a need for many additional prison beds. More and more offenders convicted at medium to low offense severity are pushed across the disposition line into recommended-prison grid cells – in 1991, 13 percent of offenders were convicted in those cells, but by 2016 that figure had risen to 18 percent. As a result, about 880 more offenders were recommended for prison in 2016 due to elevated criminal history, compared to the number who would have been convicted in those grid cells at the 1991 rate of 13 percent. Of course, rising scores also increase the durations of recommended and imposed prison sentences.

As happened in the 1980s, rising criminal history scores are again causing more property offenders to be recommended for imprisonment – from 16 percent of such offenders sentenced in 1991, to 22 percent in 2016. The guidelines were designed to send more person and fewer property offenders to prison (MSGC, Report to the Legislature, 1980, p. 15; MSGC, Three-Year Evaluation, 1984, pp. v and 97). And as noted above, this goal was a major reason for adopting felony weighting in 1989.

Older offenders tend to have lower recidivism rates, yet their criminal history scores and executed-prison rates have risen faster since 1991, compared to rates for offenders aged 40 or less at the time of sentencing. Rising criminal history scores thus contribute to an aging prison population with declining public safety benefits – more and more inmates who are past their peak offending years, and increasingly expensive to care for (in 2016, 22 percent of offenders receiving executed prison sentences were older than 40).

As more offenders are sentenced in the highest criminal history categories and receive the corresponding enhanced sentences, the overall proportionality of sentence severity to offense seriousness declines, and sentences depend more on prior record and less on the seriousness of the current offense. This result contradicts Commission policy: “The criminal history score was intended to be secondary in importance to the severity of the conviction in the determination of the appropriate guidelines sentence” (MSGC, 1989 Report to the Legislature, p. 7; see also Sentencing Guidelines, cmt 2.B.01, repeating the 1989 statement quoted above with emphasis on disposition (prison versus probation) decisions).

Rising prior record scores and their resulting enhancements also contribute to racially disproportionate prison populations. In 2001 through 2016, the average criminal history score for black offenders was 38 percent higher than the average score for non-Hispanic white offenders;
the scores for offenders who were American Indian averaged 25 percent higher. This is a major reason why much higher proportions of nonwhite offenders are recommended for prison. In 2001 through 2016, the recommended-prison rate for black offenders was 47 percent higher than the rate for white offenders, and the rate for those who were American Indian was 22 percent higher.

These troubling trends and impacts call for further examination of the operation of the criminal history score, to make sure that the sentence enhancements produced by higher scores are serving public safety and other important goals in a cost effective manner. The next section summarizes Robina Institute research on how well the score and each score component helps to predict recidivism after offenders are released on probation or from prison.

III. Minnesota Criminal History Recidivism Project

In November of 2016, the Robina Institute of Criminal Law and Criminal Justice commenced a project, with the assistance of the Minnesota Sentencing Guidelines Commission, to analyze the relationship between Minnesota’s guideline criminal history score and offender recidivism. The goals of the project were to examine how well Minnesota’s guideline criminal history score predicts re-offending, to identify components of the score that do not add to its predictive validity, and to examine the relationship between the criminal history score and recidivism type and severity. The results of this study are relevant to many of the proposals in the Commission’s memo to stakeholders.

The Commission has noted that public safety is the primary consideration in sentencing. But the Commission has yet to articulate what public safety means or how the Commission will know when public safety has been achieved or impacted by modifications to the sentencing guidelines. One potential mechanism is use of a risk assessment tool to help identify offenders who are at a greater risk to reoffend. Prior to the advent of sentencing guidelines, criminal history had long been used as an informal risk assessment tool that judges used in sentencing. It made intuitive sense that individuals with longer criminal records were more likely to reoffend than individuals with shorter criminal records or no prior convictions. Guidelines brought formality to the consideration of criminal history by assigning rules regarding which prior convictions could be considered and how much weight to give them. The Robina Institute’s study focused on the power of the criminal history score as a forward-looking risk assessment.

The study had three main empirical questions. First, what is the relationship between Minnesota’s criminal history score and the rate of recidivism? A major justification for use of the criminal history score in sentencing is to punish offenders who are more likely to recidivate; thus, each increase in the category of the score is associated with a longer, and sometimes more incarcerative, recommended sentence. Therefore, we would expect increases in the score to be associated with incremental and statistically significant increases in the rate of offender recidivism. Second, does each component of the score (e.g. custody status point, juvenile adjudications) add to the score’s predictive utility? Each component of the score increases the
total score and thus results in a higher incarceration rate and longer sentences for offenders in the Minnesota system. Thus, we would expect that each component of the score would also increase the score’s ability to classify recidivists and non-recidivist. Third, what is the relationship between the criminal history score and reoffending type and severity? Along with the overall likelihood of recidivism, policy makers and the public are also interested in the type of recidivism offenders are at risk for. Thus, it is important to differentiate between offenders who are dangerous (i.e., those most at risk for committing a serious or violent crime) and offenders who are simply at high-risk for felony reoffending of any kind. If the score is mainly targeting repeat low-level, non-violent offenders it provides less public safety utility than a scoring system in which offenders at high risk for serious or violent crime are given the longest and more incapacitative sentences.

The Robina Institute’s research using the 2003 sentencing cohort (13,190 offenders) found that the rate of recidivism varies across the criminal history categories and steadily increases as the score goes up. Sixteen percent of offenders with a criminal history score (CHS) of zero were convicted of a new felony offense within three years of release from prison or the start of probation, while almost half (48%) of those with a CHS 6 recidivated in that period. Overall, the score is moderately predictive of recidivism (.64 AUC statistic), even though it has components that do not add to its predictive power.

The score is composed of four component parts: prior felonies, prior misdemeanors, prior juvenile adjudications, and custody status. We examined these components to determine how well each contributed to the predictive value of the criminal history score. Most relevant here, are the results for custody status and misdemeanors.

Excluding first-time offenders, the recidivism rate was almost 7 percentage points higher for offenders who received a custody status point (33.3%) compared to those who did not (26.6%). The custody status point also appears to offer a minor (1%) boost in the predictive power of the score to identify recidivists. However removing the point from the criminal history score would result in almost a third (4,013) of offenders moving into a lower criminal history category, yielding a comparatively larger savings in resources and prison bed space than any other proposed change. By comparison, counting misdemeanor offenses also boosts the ability of the score to predict recidivism by 1 percent, however, excluding misdemeanor convictions from the score’s calculation would move only 934 (7%) of offenders into a lower criminal history category. And offenders who have one or more misdemeanor points on their record are almost twice as likely to recidivate compared to offenders who have no misdemeanor points (43% vs 22%, respectively).

Severe violent offenders (SVO) made up a small percentage (5%) of those sentenced in 2003, and had recidivism rates that were slightly lower than the rest of the sample (22% vs 24%, respectively). Very few (11 out of 607) SVOs recidivated with another severe violent crime within a three-year period after release; however they were slightly more likely to recidivate with
another person offense than non-SVOs (7% vs 4%, respectively) during that time period. These findings are consistent with other results of our research, showing that both offense severity ranking and person-offense classification are negatively correlated with general recidivism risk, meaning that as the severity of the current offense increases, the likelihood of recidivism with any felony decreases. However, the small percentage of high-severity level or person offenders who do recidivate are more likely to commit another person or high-severity offense than other recidivists.

In general, the criminal history score is more efficient at targeting frequent low-level offenders for the most severe sentences than more serious person offenders. As the criminal history score goes up the proportion of offenders convicted of a property crime rises at each level, making up almost half (48%) of all offenders at criminal history score 6. Similarly, offenders sentenced at criminal history score 6 (i.e., the highest risk offenders) are almost three times more likely to recidivate with a property offense than with a person offense. These findings are at odds with the guidelines’ original design to send more person and fewer property offenders to prison. Thus, along with targeting SVOs, the Commission may wish to consider restructuring the score to keep more low-level frequent offenders at the low ends of the scale.

IV. Additional Considerations

As noted above, the Robina Institute’s study included an analysis of each of the components of the criminal history score. One component that has not been proposed for modification is the juvenile point. An individual who was 25 or younger on the date of the current offense can earn 1 or 2 juvenile points for felony offenses committed after the age of 16. Our study found that individuals who had this point were less likely to recidivate than others within the same age group who could have earned such a point (19% vs. 26%, respectively). Our study also found that removing the juvenile point would not impact the overall predictive power of the criminal history score, but would move 668 (6%) of offenders into a lower criminal history category. Thus, the Commission might consider removing juvenile adjudications from the criminal history score.

Second, the Robina Institute found that the criminal history categories, as currently established, do not differentiate between recidivists and non-recidivists as well as they could. There is a significant difference between the reoffending rates of individuals with no prior criminal record (“true zeroes”) and those with such a minimal prior record that their score was rounded down from a half point to zero (12% vs 24%, respectively). Additionally, the difference in the rate of recidivism between the middle criminal history score categories is not substantial -- the recidivism rate only rises about 4.5 percentage points for each increase in criminal history score from 1 to 5, and the increase fails to reach statistical significance between scores 4 and 5. At the top end of the scale there is a substantial difference in the recidivism rates of offenders who score exactly 6 points (41% recidivated) and offenders with 7 or more points who are included in the “6+” criminal history category (52% recidivated). In light of these findings, the
Commission may wish to consider revising the scoring categories. For example, there could be a first-time offender discount as is done in Washington, and the middle categories could be revised to cover more than one point value (e.g., combine categories 2 and 3, and 4 and 5) as is done in Pennsylvania. If these revisions to the lower criminal history categories are made, then an additional category could be added at the upper limit for those with extremely long criminal history scores. However, we would not advocate for adding an additional criminal history category at the high end without revisions to the lower categories because offenders in criminal history category 6 already receive an extra 3 months on their recommended prison term if they have a custody status point that did not increase their criminal history score, and because any additional increases in recommended prison durations for high-history offenders would further reduce the proportionality of sentence severity to the seriousness the conviction offense.

Finally, we urge the Commission to strive for simplicity in any modifications to the criminal history score. In fact, simplicity of application was one of the Commission’s goals in creating the score (MSGC, 1980 Report to the Legislature, p. 7). Several of the current proposals are nuanced and complex (i.e., limiting custody status to a ½ point for lower severity crimes while applying 1 point for higher severity crimes; imposing increased weights for specific repeat violent offenses). As the complexity increases, it is more likely that the Commission’s policies will be subject to errors in application and differences in interpretation, thereby resulting in unintended sentencing variation and working against the Commission’s goal of establishing “rational and consistent sentencing standards.” Conversely, some of the possible modifications discussed above would have the benefit of simplifying criminal history score calculations.

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