

MEMORANDUM

To: Minnesota Sentencing Guidelines Commission
Fr: Mark Wernick
Re: Custody Status Point
Date: June 4, 2018

At the Commission's May 10, 2018, meeting, I sought to explain why I support of the elimination of the custody status point in determining criminal history scores for all current offenses (May 10, 2018, Staff Issue Paper, Proposal 1); or, for current offenses that are presumptive probation offenses at criminal history score 0 (May 10, 2018, Staff Issue Paper, Proposal 3). I decided to put my reasons in writing.

I. Purposes of Criminal Sentencing

In discussing whether to eliminate or modify how a criminal history score is calculated, a brief review of the purposes of criminal sentencing may be helpful.

As a general matter, there are two philosophies that guide sentencing decisions; namely, utilitarian and retribution. Richard S. Frase, Julian R. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancement Sourcebook*, p. 11 (2015).

Under the utilitarian philosophy, the purpose of sentencing is to prevent future crime. This is the public safety aspect of criminal sentencing. A criminal sentence can prevent future crime by deterring criminal conduct, incapacitating the offender and rehabilitating the offender. Because repeat offenders have a higher risk of reoffending than first offenders, additional punishment for repeat offenders is justified to protect public safety.

Under the retribution philosophy, the purpose of sentencing is to recognize the the offender's level of moral culpability. To the extent repeat offenders are considered more morally culpable than first offenders; additional punishment for repeat offenders can be justified.

Retribution and utilitarian purposes are not mutually exclusive. A repeat offender may be regarded both as more culpable and as representing a higher risk to reoffend.

A repeat offender who commits a crime while on probation or supervised release may be considered more morally culpable than a repeat offender who commits that same crime while not on supervision. But this relative difference in moral culpability does not correspond to a significant difference in their risks to reoffend.

II. The Custody Status Point and Public Safety

On December 14, 2017, and again on May 10, 2018, Dr. Julia Laskorunsky, Research Fellow at the Robina Institute of Criminal Law and Criminal Justice, presented findings regarding the extent to which the Minnesota Sentencing Guidelines criminal history score predicts reoffending. (Ideally, the criminal history score should identify offenders more likely to reoffend.) Specifically, Dr. Laskorunsky studied 13,190 Minnesota felony offenders sentenced in 2003. Among other things, she documented each offender's 2003 criminal history score and whether or not they were convicted of another felony within three years after the start of their probation or release from prison or jail.

Overall, as the 2003 criminal history score increased, a larger portion of offenders were reconvicted during the relevant three years within each criminal history score group. Dr. Laskorunsky also used what is called an AUC measure to determine how accurately the score can separate reoffenders from non-reoffenders. The accuracy of the score would be 100% if every single reoffender had a higher criminal history score (in 2003) than every non-reoffender. Minnesota's criminal history score was higher for reoffenders in 64% of the random pairings between reoffenders and non-reoffenders. Based on this calculation, Dr. Laskorunsky concluded that Minnesota's criminal history score does "moderately well" in discriminating between reoffenders and non-reoffenders. (May 10, 2018, Laskorunsky presentation, p. 1.) (A rate of 50% would have meant that the criminal history score had no predictive value and could not be used to identify reoffenders and non-reoffenders; *i.e.*, that the likelihood of reoffending would stay the same across scores.)

With respect to the custody status point, Dr. Laskorunsky determined that 20% of the 2003 offenders who did not have a custody status point (in 2003) were convicted of a new felony during the three year time frame. Of those 2003 offenders who did have a custody status point (in 2003), the reconviction rate was similar; namely, 21%. (December 14, 2007, Laskorunsky presentation, page 8.) By eliminating the custody status point, the overall prediction rate of Minnesota criminal history scores would be reduced marginally, from 64% to 63%. (May 10, 2018, Laskorunsky presentation, p. 2.)

According to Dr. Laskorunsky, the 63% measurement would still mean that Minnesota's criminal history score does moderately well in discriminating between reoffenders and non-reoffenders. The 1% reduction does not pose a significant public safety risk.

A. Incapacitation

The custody status point does result in more offenders being imprisoned and more offenders serving longer prison sentences. By eliminating the custody status point under proposals 1 and 3, staff estimates that, over a period of years, the presumptive sentence for 363 offenders would move from prison to probation. Combining this prison bed savings with the prison bed savings for shorter prison durations, staff estimates that there would be a 786 prison bed savings under proposal 1, and a 597 prison bed savings under proposal 3. (May 10, 2018, Staff Issue Paper, Tables 1 and 3). Because those with a custody status point are basically no

more likely to reoffend than those without a custody status point, using prison beds to accommodate a custody status point yields little gain to public safety.

If the Commission believes that some or all the 600-800 prison beds that would be saved by eliminating the custody status point should still be used for incapacitation purposes, the Commission can target the most serious offenses and the most dangerous offenders where increased imprisonment may be justified. But because the custody status point fails to identify an offender's public safety risk more than the underlying felony point, the custody status point should not be used as a measure for imprisonment needs.

B. Deterrence

The reduction in prison bed need resulting from the elimination of the custody status point will not reduce the deterrent value of the Sentencing Guidelines. All offenders know that repeat offenders get more time than first offenders, and that offenders who violate probation or supervised release can go to prison for that reason alone. Presumably, these known consequences deter crime.

If an offender on probation or supervised release knows that repeat offenders get more time than first offenders and that supervision can be revoked for committing a new crime; then, the question becomes, to what extent will that offender be *additionally* deterred from committing a new crime because it would result in a custody status point under the Sentencing Guidelines? Any additional deterrence is likely either negligible or nonexistent.

III. The Custody Status Point – Economic and Social Costs of Retribution

The real justification for the custody status point is retribution; that is, the custody status point is being used as a measure of moral culpability. But any difference in culpability between a repeat offender on supervision and a repeat offender not on supervision cannot justify the economic and social costs associated with an extra 600-800 prison beds.

A. Economic Costs

The basic legal principles underlying the Minnesota Sentencing Guidelines do not support significant economic expenditures for the custody status point's retribution purpose.

Minn. Stat. § 244.09 subd. 5, provides in part:

In establishing and modifying the Sentencing Guidelines, *the primary consideration of the commission shall be public safety*. The commission shall also consider current sentencing and release practices; correctional resources, including but not limited to the capacities of local and state correctional facilities; and the long-term negative impact of the crime on the community. (Italics added).

With respect to the Commission’s consideration of correctional resources, Sentencing Guidelines 1.A.4. provides:

Because state and local correctional facility capacity is finite, confinement should be imposed only for offenders who are convicted of more serious offenses or who have longer criminal histories. *To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.* (Italics added).

The significant economic costs of maintaining 600-800 prison beds for a marginal retribution purpose is inconsistent with the Commission’s mandate to give primary consideration to public safety and to cause no more money to be spent for imprisonment than is necessary to achieve the purpose of the sentence.

B. Social Costs – Racially Disparate Imprisonment Rates

Staff estimates that for offenders sentenced in 2016, the rate of prison bed need (over a period of years) for white, black, American Indian, Hispanic and Asian offenders would be as follows:

White	139 per 100,000
Black	1,456 per 100,000
American Indian	1,267 per 100,000
Hispanic	480 per 100,000
Asian	123 per 100,000

(May 10, 2018, Staff Issue Paper, Table 1).

The rate of prison bed need for all of these racial/ethnic groups will be reduced if the custody status point is eliminated, but the reduction for blacks, American Indians and Hispanics will have a greater relative impact than for whites.

If the custody status point is eliminated for all offenses (proposal 1), the rate of prison bed need would be reduced as follows:

White	10 per 100,000
Black	93 per 100,000
American Indian	106 per 100,000
Hispanic	31 per 100,000
Asian	9 per 100,000

(May 10, 2018, Staff Issue Paper, Comparing Tables 1 and 2).

If the custody status point were eliminated for current severity level 8-11 offenses (proposal 3), the rate of prison bed need would be reduced as follows:

White	8 per 100,000
Black	64 per 100,000
American Indian	84 per 100,000
Hispanic	22 per 100,000
Asian	6 per 100,000

(May 10, 2018, Staff Issue Paper, Comparing Tables 1 and 4).

In arguing for a reduction in these prison bed needs, I am *assuming* that the current imprisonment disparity among black, American Indian and Hispanic populations generally reflects a disparity in offense rates. This assumption carries with it the assumption that the disparity in offense rates is largely attributable to socio-economic disadvantages for these populations. *See, e.g.,* Richard Rothstein, *The Color of Law, A Forgotten History of How Our Government Segregated America* (2017) (documenting history of discrimination against African Americans in housing, and the impact of that discrimination on educational and employment opportunities).

Even if the racial/ethnic imprisonment disparity represents an offense disparity, the imprisonment disparity comes with a social cost. The imprisonment disparity reinforces a perception of systemic injustice in our current social institutions, including our criminal justice system. That perception undermines respect for the law. In addition, higher imprisonment rates for offenders from disadvantaged populations add to the disadvantages confronting the offender's family and other community members. This can serve to increase crime rates in the affected communities.

Because the custody status point causes a disproportionately higher prison bed need for black, American Indian and Hispanic populations, and because the custody status point is a poor predictor of future crime, the custody status point should be eliminated from an offender's criminal history score.

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