

## Staff Issue Paper

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# Criminal History – Potential Areas of Reform – Focus on Custody Status Point and Decay Periods

March 8, 2018

## Background

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From March through October of 2017, the Commission conducted an eight-part review of criminal history scores. The Commission discussed the role of criminal history in punishment; reviewed the four components of Minnesota’s criminal history score: custody status, juvenile history, misdemeanor/gross misdemeanor history, and felony history; and compared criminal history score computations from other sentencing guidelines jurisdictions.

In December of 2017, Dr. Julia Laskorunsky, Research Fellow, Robina Institute of Criminal Law and Criminal Justice presented Phase 1 findings of the Robina Institute’s Recidivism Study on Minnesota’s Criminal History Score (CHS) which concluded that Minnesota’s CHS predicted recidivism “moderately well” but it had components that did not add to its predictive value.<sup>1</sup>

At its January 11, 2018 meeting, “Criminal History – Potential Areas of Reform” was on the agenda as a discussion item. Chair Dietzen introduced two areas that may be in need of reform if the Commission could find consensus: 1) the Custody Status Point; and 2) the period in which prior convictions decay.

A staff summary of policy, data, potential ideas for reform, and pros and cons for reform are presented below.

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<sup>1</sup> Laskorunsky, Julia. *The Predictive Validity of the Minnesota Sentencing Guideline’s Criminal History Score*. Robina Institute of Criminal Law and Criminal Justice University of Minnesota. Presentation to Minn. Sentencing Guidelines Comm’n, Dec. 14, 2017.

# 1. Custody Status Points (CSP)

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## Policy:

1 CSP assigned if, at the time of the offense, the offender is on probation (including original length of probation), parole, supervised release, conditional release (following release from an executed prison sentence), confined, or escaped. 2 CSP when the offender is on the Sex Offender Grid and commits a new offense that is on the Sex Offender Grid.

## Data Summary for Guideline Years (GLY) (presented 6/8/17, updated with 2016 data):

- Second-most common CHS component, after felony points (22% in 2014).
- Offenders with CSP has gone from 27% in 1991 to 45% in 2014.
- 3-year average of 43% (2012, 2013, 2014).
- Averages by Race: White-42%, Black-46%, American Indian-50%, Hispanic-37%, Asian-41% (2012-14).
- Higher for those offenders who are black or American Indian. The gap between those who are white and black was greatest in the mid-90s (usually 11-15%) and has narrowed in later years (5-6 pts).
- 80% of CSP comes from probation or original length of probation (2012-14). Average pronounced probation term of 65 mos.
- Judicial discretion in probation durations permits wide geographical variation, resulting in varying durations of custody status.

## Question for Commission about CSP Reform:

Is there consensus that CSP needs reform? If so, how?

## Possible Reform Options:

- Revert to pre-2001 policy in which CSP for probation counts until discharge; i.e., an offender was not eligible if he or she was successfully discharged from probation.
- Specify uniform duration(s) within which CSP would apply. These durations would be irrespective of actual prison or probation durations, and might vary with the severity or type of offense.
- Abolish CSP.
- Abolish CSP, freeing up prison-bed savings to focus prison beds on more dangerous offenders.

### Pros and Cons for Reforming Custody Status Point:

**Con:** Original Commission decided that offenders who committed new crimes before completing service of previous sentences deserved CSP.<sup>2</sup>

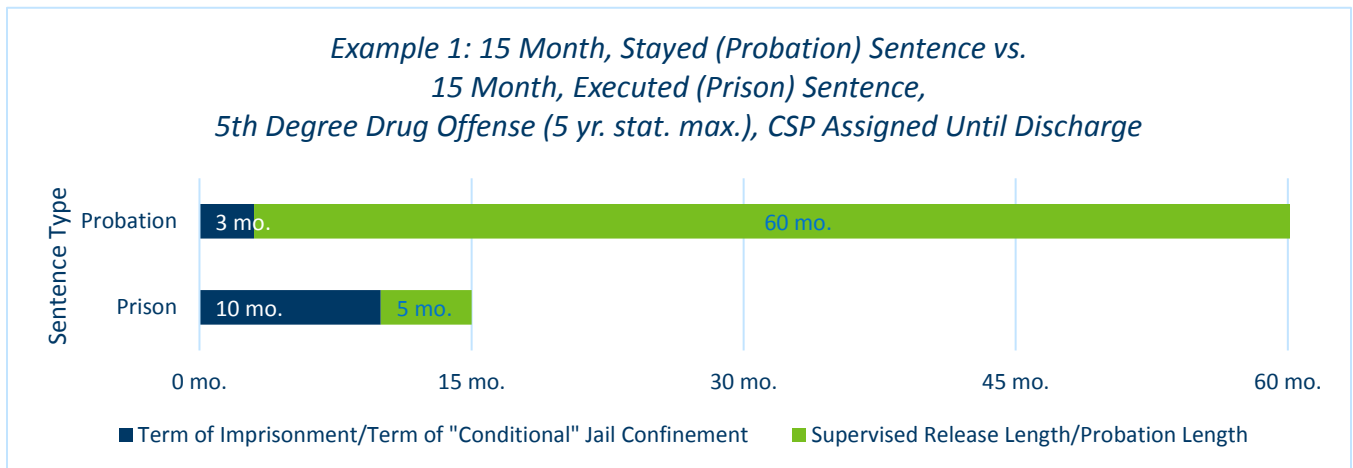
**Con:** May deter some from committing new crimes.

**Con:** Some jurisdictions may be less likely to discharge offenders early from probation if probationers lose CSP e.g., custody status point during original length of probation.

**Pro:** May free up prison beds for more dangerous offenders in need of confinement.

**Pro:** 1 CSP contributes more to CHS than felony convictions weighted at ½ point.

**Pro:** Because a CSP is assigned until discharge from custody, some probationers are eligible for CSP longer than some prisoners. (See Example 1.)



**Pro:** CSP during original length of probation has contributed to the increase in the number with a CSP and possible longer periods of eligibility for a CSP for probationers compared to prisoners.

**Pro:** CSP is not predictive of recidivism. Offenders with a CSP had a recidivism rate of 21% vs. 20% for offenders without a CSP.<sup>3</sup>

**Pro:** Geographically varied probation durations cause geographical disparity in time exposed to CSP.

<sup>2</sup> Parent, D.G. *Structuring Criminal Sentences*. Butterworth Legal Publishers. 1988. 70.

<sup>3</sup> Laskorunsky, Julia. *The Predictive Validity of the Minnesota Sentencing Guideline's Criminal History Score*. Robina Institute of Criminal Law and Criminal Justice University of Minnesota. Presentation to Minn. Sentencing Guidelines Comm'n, Dec. 14, 2017.

## 2. Decay of Prior Felonies, Gross Misdemeanors (GM) and “Targeted” Misdemeanors (TM)

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### Policy:

Felonies *must not* be used if 15 yrs. has passed from discharge date to current offense date. TM/GM *must not* be used if 10 yrs. has passed from discharge date to current offense date.

### Points from presentation to Commission (7/27/17):

- Felony points are the most common component of CHS.
- Almost 50% of prior felonies are 5 years old or less, 75% are 10 years old or less, and 25% are more than 10 years old.

### Question for Commission about Decay Reform:

Is there consensus that the decay policies need reform? Both 15-year policy for prior felonies and 10-year policy for prior gross misdemeanors and misdemeanors? All offense types or just some? If so, how?

### Possible Reform Options:

- Shorten or standardize the decay periods.
- Start the decay period for probationers sooner, perhaps at time of sentence rather than discharge from sentence.

### Pros and Cons for Reforming Decay Period:

**Con:** Original Commission believed that offenders who were not “crime-free” were more blameworthy.<sup>4</sup>

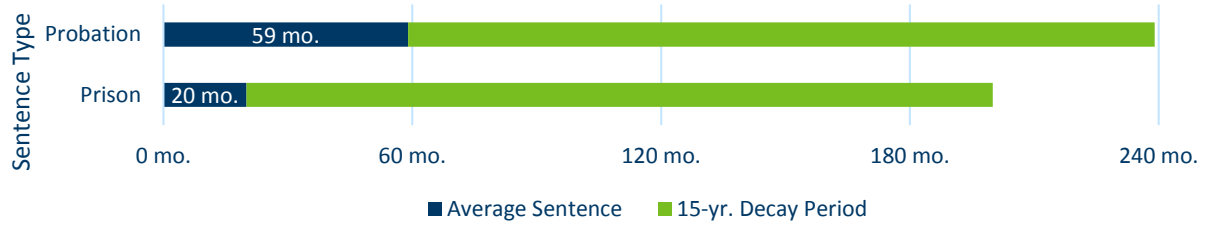
**Pro:** Because the current policy begins decay at date of discharge, there is a longer period until the start of decay for probationers compared to prisoners. (See examples 2 and 3.)<sup>5</sup>

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<sup>4</sup> Parent, D.G. *Structuring Criminal Sentences*. Butterworth Legal Publishers. 1988. 73.

<sup>5</sup> “The Minnesota Bar Association’s Criminal Law Section and public defenders urged that the decay period begin on the date of sentencing for prior offenses. Prosecutors wanted it to begin at the expiration or discharge of the prior sentence. The Commission adopted the prosecutor’s position, agreeing that during the decay period the offender had to be free from criminal justice jurisdiction on the offense subject to decay.” *Id.* 74.

*Example 2: 5th Degree Drug Offense (5 yr. stat. max.)*



*Example 3: 2nd Degree Burglary of Dwelling (10 yr. stat. max.)*

