

Statement of Professor Richard S. Frase, University of Minnesota Law School,
regarding the proposed 2021 modification of rules for scoring criminal history points

For the reasons stated below, I do not support the proposed changes in the scoring of criminal history points, and would urge the Commission to either make no changes, or make the different changes I've suggested in paragraph 2.

1. On its face, the proposal seems like it's just clarifying a pro-defendant change, as of the August 2019 amendments, in how custody status (CS) points are scored – that $\frac{1}{2}$ CS points are rounded down or ignored, just like partial felony points, misdemeanor units less than four, and single felony-level juvenile priors. But on closer reading it appears that what this change does is partially nullify the effect of adopting $\frac{1}{2}$ CS points -- the separate felony round-down provision is being deleted and incorporated into a general round-down rule; this means that any felony point score ending in .5 will add another CH point when combined with a $\frac{1}{2}$ CS point, thus eliminating any benefit to such an offender from the August 2019 CS change. This can be illustrated by the Commission's second example in proposed revised comment 2.B.04. That example assumes a $1\frac{1}{2}$ -felony-points offender [e.g., 1 pt + $\frac{1}{2}$ pt] who has custody status that used to add 1 point and now adds $\frac{1}{2}$ point. Under the proposed 2021 change, such an offender gets no benefit from the August 2019 amendment – he has a CH score of 2 both before and after that amendment. [Before: $1\frac{1}{2}$ felony pts --> 1 felony pt., plus 1 CS pt., = 2 CH points; After, under the 2021 proposal: $1\frac{1}{2}$ felony pts., + $\frac{1}{2}$ CS pt., = 2 CH points.] By contrast, under the current guidelines language (without the proposed 2021 change), this offender's $1\frac{1}{2}$ felony points total would be rounded down to 1.0 before felony points are added to the CH score; then, since the grid only allows whole-point CH scores, when the $\frac{1}{2}$ CS point is added in most judges would probably round CH down to 1, rather than round 1.5 up to 2. This also makes sense because it means that all four score components are treated the same – partial points and their equivalents are ignored in computing each component.

2. It would be good to make this result (ignore $\frac{1}{2}$ CS points) explicit. I think that could best be accomplished by revising the August 2019 language to state that no CS points are scored for offenders who qualify for $\frac{1}{2}$ point under the original language. Instead, as the above example shows, the proposed clarification actually nullifies the August 2019 change in CS scoring for any offender with a felony-points score ending in .5 (X.5 offenders). Oddly enough, the 2019 change still helps offenders with a felony-points score ending in .0 (X.0 offenders). In the above example, if the offender had a felony-points total of 2.0, consisting of a one-point felony and two half-point felonies, his CS would have added one point prior to the August 2019 change, giving him a CH score of 3; after the 2019 change he would have a CH score 2, with or without the proposed 2021 change (assuming, again, that without the proposed 2021 change judges would round a CH score of 2.5 down to 2, rather than up to 3). Note also that this X.0 offender has one more prior felony than the X.5 example in paragraph 1 above, yet they both end up with a CH score of 2.

3. In addition to the anomaly of treating X.5-felony-point offenders less favorably than X.0 offenders, and the further anomaly of ignoring partial points and their equivalents for

misdemeanor and juvenile priors but not for low-level-felony priors and custody status, the proposed 2021 change also undercuts an important policy goal -- limiting prison commitments and durations for low-severity property offenders --that supported the 1989 decision to assign only a ½ point to severity level 1 and 2 felony priors. Many ½ CS point offenders have committed low-severity property crimes, both as prior and as current offenses.

4. There are also several other good reasons why the Commission should limit the impact of prior record wherever it can. As Robina Institute research and research by myself and other scholars has shown, prior record enhancements have weak policy justifications and many adverse consequences, including strongly disparate impacts on African American and Native American offenders. Moreover, all of the adverse impacts of prior record have increased over time -- steadily-rising CH scores have driven more and more low- and medium-severity offenders across the grid disposition lines into presumptive-prison grid cells (and have driven all offenders to higher prison-duration cells even if the line isn't crossed).