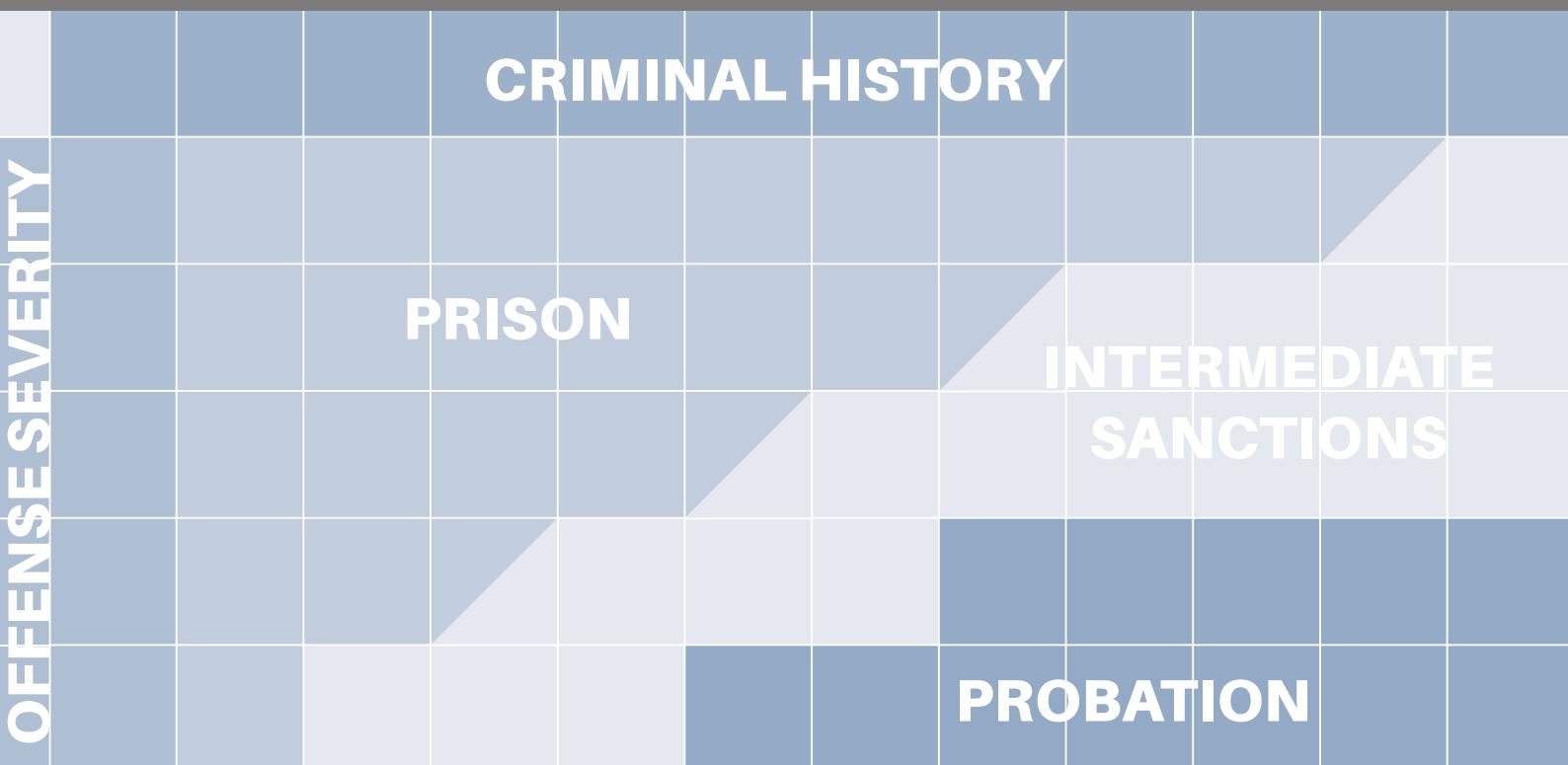


UNIVERSITY OF MINNESOTA

# CRIMINAL HISTORY ENHANCEMENTS SOURCEBOOK

*A publication by the Robina Institute of Criminal Law and Criminal Justice*





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## Purpose and Scope of Criminal History Enhancements Sourcebook

Criminal history scores make up one of the two most significant determinants of the punishment an offender receives in a sentencing guidelines jurisdiction. While prior convictions are taken into account by all U.S. sentencing systems, sentencing guidelines make the role of prior crimes more explicit by specifying the counting rules and by indicating the effect of prior convictions on sentence severity. Yet, once established, criminal history scoring formulas go largely unexamined. Moreover, there is great diversity across state and federal jurisdictions in the ways that an offender's criminal record is considered by courts at sentencing. This Sourcebook brings together for the first time information on criminal history enhancements in all existing U.S. sentencing guidelines systems. Building on this base, the Sourcebook examines major variations in the approaches taken by these systems, and identifies the underlying sentencing policy issues raised by such enhancements.

The Sourcebook contains the following elements:

- A summary of criminal history enhancements in all guidelines jurisdictions;
- An analysis of the critical dimensions of an offender's previous convictions;
- A discussion of the policy options available to commissions considering amendments to their criminal history enhancements;
- A bibliography of key readings on the role of prior convictions at sentencing.

Each chapter of the Sourcebook summarizes existing arrangements across eighteen jurisdictions and highlights some critical issues for consideration. The information is intended to be presented as objectively as possible. Where particular policy arguments are presented, counterarguments will also be included.

Most of the descriptions of enhancement provisions are based on the formal rules stated in guidelines documents, but in Chapters 2 and 12, dealing respectively with the magnitude of enhancements and their racially disparate impacts, we also provide sentencing data from several jurisdictions to show how the rules translate into practice. We encourage all commissions to collect data and conduct research on their system's use of prior convictions at sentencing to ensure that criminal history enhancements are applied in the most effective way.

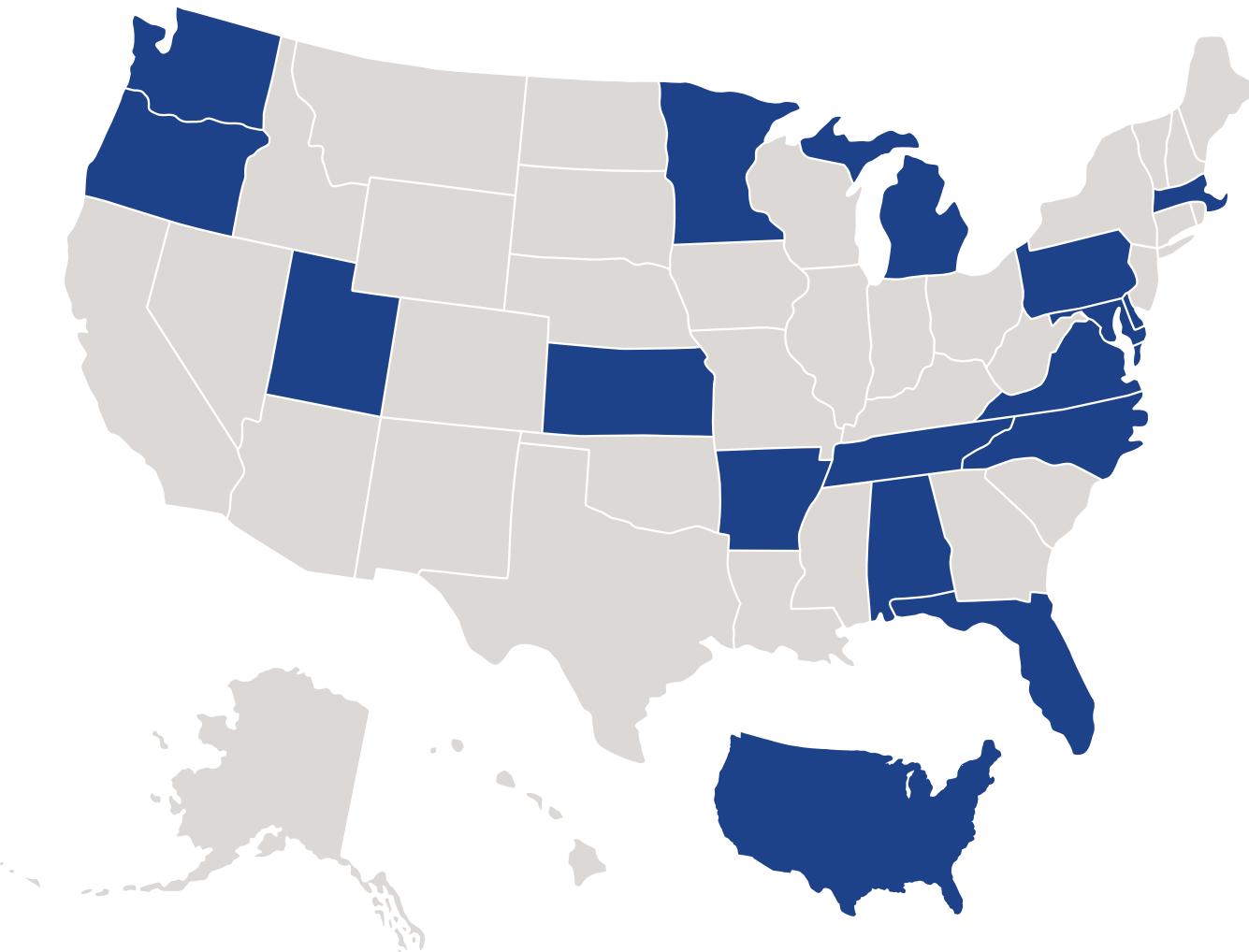
The central purpose of this book is to encourage guidelines jurisdictions to take a critical look at how criminal history enhancements are defined, how they are used, and how their use impacts prison and probation populations within the jurisdiction. The tremendous variation in the component factors and levels of impact of scoring formulas suggests that criminal history is a sentencing policy area that is ripe for review. By examining and revising their use of criminal history enhancements, guidelines jurisdictions may find that they can increase public safety through better prediction of risk, reduce racial disproportionality, mediate the aging prisoner problem, and reduce the number of prison beds needed.

Maintaining public safety is a paramount goal of sentencing and criminal justice policy, and criminal history formulas can help to achieve that goal if they accurately identify offenders who pose a lesser or greater risk to public safety. However, as we discuss, most criminal history formulas have not been developed through an empirical assessment of offender risk. We encourage all guidelines systems that have not already done so to validate their criminal history formulas to ensure that they predict the risk of future offending.

Another reason that is sometimes given to justify criminal history enhancements is that repeat offenders are believed to be more culpable than offenders with fewer prior convictions. But there is rarely any discussion of why each component of that system's criminal history formula contributes to increased culpability for the current offense or offenses. We encourage each guidelines system to decide whether, why, and to what extent its criminal history enhancements are based on a culpability rationale.

### We encourage each guidelines system to:

- 1) identify its goals and principles related to criminal history enhancements, in general and for each criminal history score component;
- 2) use sentencing data to examine how well those goals and principles are being followed; and
- 3) consider changes in criminal history scoring and/or weight, to better achieve the system's goals and principles.



Our aim is not to provide commissions with answers to all the policy questions posed by criminal history scoring. Instead, our intent is to raise these often-overlooked issues and to provide a comprehensive accounting and comparison of the varied ways jurisdictions enhance punishment based on an offender's prior crimes. We do, however, make three policy-neutral suggestions throughout the *Sourcebook*.

Ultimately, our goal is to help sentencing commissions across the U.S. develop a "best practices" model of criminal history enhancements. We hope this *Sourcebook* will serve as a resource and a starting point for re-evaluating the role of criminal history in sentencing policy.

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1. identify its goals and principles related to criminal history enhancements, in general and for each criminal history score component;

2. use sentencing data to examine how well those goals and principles are being followed; and
3. consider changes in criminal history scoring and/or weight, to better achieve the system's goals and principles.

This book examines prior record enhancements in eighteen state and federal jurisdictions:

Alabama	Arkansas
Delaware	District of Columbia
Federal	Florida
Kansas	Maryland
Massachusetts	Michigan
Minnesota	North Carolina
Oregon	Pennsylvania
Tennessee	Utah
Virginia	Washington

These jurisdictions all have a system of rules currently being used by judges that provides recommended sentences for "typical" cases (those not presenting aggravating or mitigating circumstances) that judges are required, or at least encouraged, to follow. These rules function as sentencing guidelines even if that term is not used; in Alabama, for example, the rules are referred to as "standards" rather than guidelines. We do not examine enhancements in Ohio because that state's guidelines only refer to criminal history in broad terms, and have nothing equivalent to a criminal history score. We also do not examine enhancements in statutory determinate sentencing systems like the one in California. Besides lacking criminal history scoring rules, those systems differ from the eighteen systems we examine in that the statutory systems were constructed without input from a sentencing commission.

Guidelines Format		
	Grid	Non-Grid
Alabama		X
Arkansas	X	
Delaware		X
District of Columbia	X	
Federal	X	
Florida		X
Kansas	X	
Maryland	X	
Massachusetts	X	
Michigan	X	
Minnesota	X	
North Carolina	X	
Oregon	X	
Pennsylvania*	X	
Tennessee	X	
Utah	X	
Virginia		X
Washington	X	

Most of the guidelines systems we examine use a grid or matrix format to summarize the recommended sentences for typical cases.

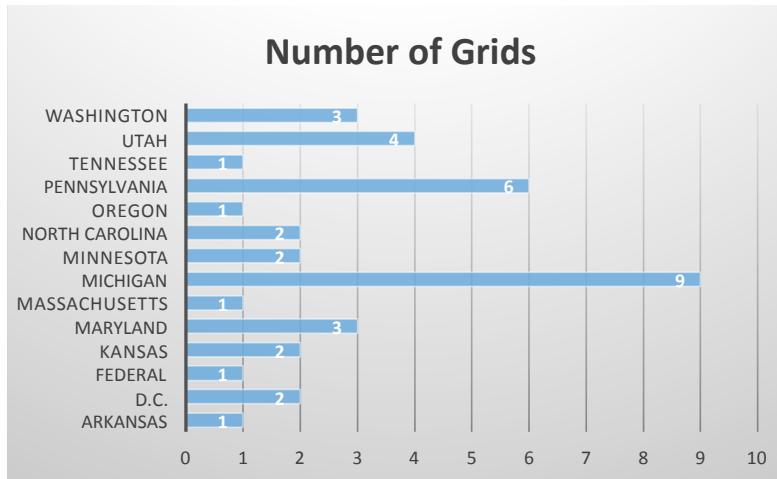
There is variation in how criminal history is represented in the guidelines. Criminal history forms one axis of the grid while current-offense severity forms the other axis. Five systems use a single grid for all crimes, while nine employ separate grids for certain crimes. Four states do not use a grid format. Recommended sentences are computed on a worksheet with a point system or other formula that reflects both criminal history and offense severity. Thirteen jurisdictions use a point-based system in which the total criminal history score is determined by adding up points for the various criminal history components.

The remaining five jurisdictions take a categorical approach whereby the applicable criminal history category is determined by the number and severity of prior offenses. For example, Kansas arranges criminal history into nine categories ranging from most serious at Criminal History Category A to least serious at Criminal History Category I. Category A is defined by a criminal history consisting of 3+ person felonies whereas Category I is defined by a criminal history consisting of 1 misdemeanor or no prior record.

See page 10 for charts on Number of Grids and Criminal History Styles.

Publication of this Sourcebook completes the first stage of a multi-year project. For updated and additional research on these issues, please check the project website, at [www.robinainstitute.org/criminal-history-project](http://www.robinainstitute.org/criminal-history-project).

We invite your feedback and opinions of the *Criminal History Enhancements Sourcebook*. Please email [robinia@umn.edu](mailto:robinia@umn.edu) with any feedback, concerns, or comments.



Criminal History Style		
	Categorical	Point System
Alabama		X
Arkansas		X
Delaware	X	
District of Columbia		X
Federal		X
Florida		X
Kansas	X	
Maryland		X
Massachusetts	X	
Michigan		X
Minnesota		X
North Carolina		X
Oregon	X	
Pennsylvania*		X
Tennessee	X	
Utah		X
Virginia		X
Washington		X

\* Pennsylvania has a hybrid criminal history system. The first six criminal history categories are point-based. The top two are categorical.

### Key Points

- There are two principal justifications for criminal history sentencing enhancements. First, prior convictions serve as a proxy for the offender's risk of future offending – on the reasoning that past conduct predicts future behavior. This higher risk justifies the imposition of more punishment in order to prevent re-offending. Second, many people believe that recidivists are more culpable than first offenders and this retributive consideration also justifies the imposition of some additional punishment.
- Criminal history enhancements affect the majority of offenders appearing for sentencing.
- Although all guidelines systems note the relevance of previous convictions for sentencing, only a few explicitly state whether criminal history enhancements are justified by risk or retribution, or a combination of the two rationales.
- In jurisdictions that provide no explicit justification for criminal history enhancements, the rationale can often be inferred from statements of the overall goals of the guidelines. These statements usually stress the importance of protecting society from re-offending rather than the need to punish repeat offenders more harshly for the purposes of retribution.
- States might consider making the justification for criminal history enhancements explicit – this would clarify the practice for all parties and guide the ways that prior convictions are counted at sentencing. The nature and magnitude of criminal history enhancements may differ, depending upon whether prevention or punishment is the primary sentencing objective.

## INTRODUCTION

Sentencing regimes in all U.S. and almost all foreign jurisdictions impose harsher sentences on repeat offenders and more lenient sentences on first offenders.<sup>1</sup> Why? The practice of *criminal history enhancements* at sentencing carries great intuitive appeal, yet still requires justification. Offenders have a right to know why additional punishment is imposed in recognition of their previous convictions. As noted by the Massachusetts Sentencing Commission, one of the goals of sentencing guidelines is to "provide greater uniformity and certainty in sentencing so that victims and offenders alike will understand the meaning and effect of the sentence imposed"<sup>2</sup> and this includes knowing the reasons for enhanced sentences.

Although commissions need not provide reasons or justifications for all offense or offender characteristics which serve to aggravate sentences, the volume of offenders affected by criminal history enhancements sets this factor apart. Most offenders appearing for sentencing have previous convictions. For example, 60 percent of felony

defendants in the 75 largest counties in the U.S. in 2009 had at least one prior conviction.<sup>3</sup> In Minnesota, two-thirds of offenders sentenced in 2013 received at least one criminal history point.<sup>4</sup> In Florida, in fiscal year 2012-2013, seventy-eight percent of offenders had at least one prior offense.<sup>5</sup> At the federal level, sixty-four percent of offenders sentenced in 2014 attracted at least one criminal history point.<sup>6</sup> In addition, as documented in Chapter 2 of this Sourcebook, prior convictions can result in significant additional punishment for offenders.

Why should an offender's previous offenses—for which he has already been punished—count against him at sentencing hearings for subsequent offenses? The answer lies in the two main sentencing philosophies, *utilitarianism* and *retributivism*.

According to the utilitarian perspective, the principal objective of legal punishment is to prevent crime. This perspective is therefore forward looking—aiming to

achieve some future benefit (less crime). Crime prevention is promoted through the mechanisms of deterrence, incapacitation, and rehabilitation. Previous convictions may indicate that the offender is a higher risk to re-offend, or a less likely candidate for rehabilitation, and for these reasons utilitarian sentencers regard prior misconduct as relevant to sentencing.

In contrast, retributive sentencing is concerned with recognizing the harm caused by the offense and the offender's level of culpability for that harm. Under a retributive sentencing model, the severity of the sentence imposed is proportional to the seriousness of the offense and the offender's level of culpability. Some retributive theories see repeat offenders as being more culpable. Finally, the two perspectives are not mutually exclusive: repeat offenders may be regarded as more culpable and as representing a higher risk to the community.

## DISCUSSION

### 1. Criminal History Enhancements as a Means to Prevent Further Crime

The existence of prior offending increases the risk of future offending on the reasoning that past conduct predicts future behavior. This higher risk justifies the imposition of additional punishment to the degree that this enhanced punishment helps to prevent future crime. There are four specific mechanisms by which a criminal history enhancement may contribute to preventing re-offending.

First, imposing additional punishment, particularly more prison time, incapacitates offenders for a longer period and prevents crime for the period in which they are confined. Second, the experience of punishment, or the fear of receiving more severe punishment in the future, may deter the specific individual from further offending. Third, the existence of a repeat offender sentencing premium may serve to deter *other* potential offenders. Finally, additional time in prison may rehabilitate the offender, thereby making him less likely to re-offend upon release.

All four mechanisms carry assumptions. *Incapacitation* assumes that prisoners subject to additional periods of prison time would have committed crimes had they been at liberty in the community (rather than confined in prison). *Individual deterrence* assumes that offenders are rational decision-makers, making cost-benefit calculations about the benefits of committing more crime, the likelihood of detection, prosecution, and conviction, as well as the severity of punishment. *General deterrence* assumes that

potential offenders are aware of the policy of imposing harsher sentences for repeat offenders, and that they believe they will be subject to these enhanced sentences if they re-offend. *Rehabilitation* rests on the assumption that prisons can effectively promote offender reformation.

A large body of research raises questions about the validity of some of these assumptions. Studies on incapacitation have demonstrated that there is a danger of over-prediction: many offenders deemed likely to re-offend do not do so, or their rate of prior offending declines substantially due to aging and other factors.<sup>7</sup> Indeed, some incarcerated offenders are made more crime-prone<sup>8</sup>, and for drug and some other vice crimes, incarcerated offenders are quickly replaced by other offenders.<sup>9</sup> As for deterrence, many offenders act impulsively, without considering the likely consequences of their acts in terms of future punishment. In addition, the research on deterrence sustains the conclusion that fear of the likelihood of conviction is more important as a deterrent than the magnitude of any imposed punishment. In other words, certainty of punishment is a more effective deterrent than severity.<sup>10</sup> Finally, criminal history enhancements assume that harsher sentences (prison rather than community punishments) and longer terms of imprisonment lead to lower re-offending rates. With respect to this key assumption, research has supported two important findings, namely that:

- Recidivism outcome comparisons between custody and community sanctions reveal either that no differences emerge or that custody is associated with higher rates of re-offending than community sentences; this is referred to as the 'criminogenic effect' of imprisonment<sup>11</sup> and;
- Longer prison terms are not associated with lower re-offending rates.<sup>12</sup> The more limited research on whether a criminal history enhancement effectively reduces crime also supports this conclusion.<sup>13</sup>

#### Principal Justifications for Criminal History Sentencing Enhancements

- 1) Prior convictions are a proxy for the offender's risk of reoffending, and higher risk justifies the imposition of more punishment in order to prevent re-offending.
- 2) Repeat offenders are more culpable than first-time offenders and deserve more punishment.

## Calibrating Risk, and Other Recidivism-related factors

For the sake of predictability, certainty, and clarity, most guidelines adopt a relatively simple approach to considering the offender's criminal record. Generally, each prior conviction results in the imposition of one or more criminal history points. Additional points are assigned for other dimensions of criminal history such as the offender's custody status at the time of the offense (these are explored in subsequent chapters of this Sourcebook). Yet risk is a multidimensional concept, and prior convictions influence the likelihood of future offending in complex ways. Prior convictions also interact with other recidivism risk factors (such as substance abuse or employment status) and these interactions are also discussed in a later chapter. The challenge to sentencing guidelines is to maximize the preventive power of criminal history enhancements, without imposing additional punishment where this may prove to be a poor policy choice.

### 2. Criminal History Enhancements Reflect Increased Culpability

The second reason for imposing harsher sentences on recidivists (or more lenient sentences for first offenders) is because prior offending may increase the offender's level of culpability for the current offense. If he is more *culpable*, he accordingly *deserves* more punishment. Some sentencing theorists argue that prior offending has no bearing on the offender's level of culpability for the current offense.<sup>14</sup> These theorists argue that sentencing should punish the offender for his current crime and not for previous offenses for which he has already been punished.<sup>15</sup> Other retributive theorists disagree, and argue that repeat offenders deserve more punishment for failing to take the necessary steps to correct the causes of their offending.<sup>16</sup>

### 3. Importance of Validation Research

This sourcebook advocates validation of the dimensions of criminal history currently employed. States could consider conducting validation research to determine whether a specific dimension of criminal history—for example, custody status or 'recency' of the previous conviction—actually predicts re-offending, and if it does, how much weight each particular dimension should carry. The U.S. Sentencing Commission provides a useful model in this regard, in its validation research upon the recency provision in the federal guidelines.<sup>17</sup> Risk-based enhancements may be validated by empirical research on recidivism: does a particular factor (e.g., patterning) indicate higher risk of re-offending?

Since risk is only one of the two justifications for criminal history enhancements, Commissions could consider validation exercises on the alternate, retributive dimension. Here the question is different. How much additional punishment should be imposed to reflect the offender's enhanced level of blameworthiness? Retribution is harder to validate. However, public opinion surveys may shed light on how much weight any given factor – recency or custody status – should carry in the criminal history computation in order to reflect the offender's enhanced blameworthiness.

### 4. Summary

These two justifications – risk and retribution – may operationalize criminal history enhancements in different ways. If preventing crime is the purpose, and individual deterrence is the means by which this objective is achieved, sentence severity should escalate relatively continuously to reflect the increasing risk of re-offending as measured by the criminal history. If repeat offenders are punished more severely because they *deserve* greater punishment on account of their criminal past, the prior record enhancement may not be configured in the same way. Thus if retributive punishment is the primary basis for the enhancement, the critical decision will be to ensure that the enhancement is sufficient to reflect the enhanced culpability, but not disproportionate to the seriousness of the offense.

### 5. Criminal History Enhancements and Sentencing Objectives

Sentencing systems across the U.S. and around the world promote specific objectives or purposes. These are provided in statute, identified in sentencing manuals, or noted on Commission websites. The purposes of sentencing normally include: public protection; crime prevention; punishment; rehabilitation and promoting respect for the law. Some state guidelines identify the purposes of sentencing and then link the use of criminal history or prior record enhancements to those purposes, while other states note the relevant sentencing purposes and then describe the ways that criminal history is considered. Oregon is an example of this latter approach, where the statement of purpose simply affirms that "the appropriate punishment for a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender's criminal history."<sup>18</sup> Table 1.1 at the conclusion of this chapter summarizes the position of the jurisdictions included in this project.

## POLICY CONSIDERATIONS

All guidelines provide detailed counting rules for previous convictions, but there is also a benefit to providing a clear statement explaining *why* prior convictions are considered at sentencing. This could take the form of a policy statement within the Guidelines manual or on the Commission's website. At present, most state sentencing schemes affirm the importance of prior convictions without articulating whether criminal history relates to risk of reoffending, or retribution, and if both are relevant, which is the primary consideration. Most references to the justifications for prior record enhancements were written years ago, when the guidelines were created. Commissions might wish consider revisiting the issue, in the interests of greater transparency and in order to reflect recent research developments.

It may be useful for Commissions to revisit the rationale for criminal history enhancements on a periodic basis,

and to amend the rationale if this seems appropriate. Having a clear sense of the primary justification for criminal history enhancements helps to determine the ways that prior convictions should affect the sentence. For example, if crime prevention is the only (or primary) justification, then criminal history calculations should be exclusively or primarily sensitive to the offender's perceived risk of further offending. The criminal history score should be weighted to track and reflect the offender's risk of re-offending. A retributive justification would in contrast assign higher scores to reflect the number and seriousness of prior convictions, regardless of the degree to which these priors reflect a higher risk of further offending. If crime prevention is the objective, offenders perceived to represent a high risk will attract increasingly harsher sentences. In contrast, most retributive justifications may impose limits on the extent to which prior convictions aggravate sentence severity, on the basis that culpability at some point "caps out."

Table 1.1 Summary of Justification Provisions in Each Jurisdiction

 <b>Alabama</b>	No explicit justification is provided for criminal history enhancements. However, the enumerated purposes of sentencing in this state include the following: "Protecting the public; Promoting respect for the law; providing just and adequate punishment for the offense; Deterring criminal conduct; Imposing sanctions which are the least restrictive while consistent with the protection of the public and the gravity of the crime; and Promoting the rehabilitation of offenders." <sup>19</sup>
 <b>Arkansas</b>	No explicit justification provided for criminal history enhancements. The Sentencing Manual specifies that the Arkansas Sentencing Standards "provide similar sentences for similar offenders with similar criminal histories." <sup>20</sup>
 <b>Delaware</b>	Links criminal history to risk to society: "The overall sentencing philosophy of the General Assembly and SENTAC [the Sentencing Accountability Commission] is that offenders should be sentenced to the least restrictive and most cost-effective sanction possible given the severity of the offense, <i>the criminal history of the offender and the focus, which is, above all, to protect the public's safety. Other goals in order of priority include:</i>
	<ol style="list-style-type: none"> <li>1. Incapacitation of the violence-prone offender;</li> <li>2. Restoration of the victim as nearly as possible to the victim's pre-offense status, and</li> <li>3. Rehabilitation of the offender."<sup>21</sup></li> </ol> <p>In addition, the 2015 Benchbook notes that: "The purposes of the Sentencing Standards are as follows: (a) To incapacitate, through incarceration, the violence prone offender...."<sup>22</sup></p>
 <b>District of Columbia</b>	No explicit justification provided for criminal history enhancements.

Table 1.1, continued

	The U.S. guidelines provide an explicit statement of justification for criminal history enhancements, and affirm the relevance of prior convictions for multiple sentencing purposes: "The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." <sup>23</sup> It is also worth noting that the Commission created its criminal history categories to reflect 'extant empirical research assessing correlates of recidivism and patterns of career criminal behavior,' suggesting that risk rather than retributive punishment served as the guiding rationale. <sup>24</sup>
	No explicit justification provided for criminal history enhancement.
	No explicit justification provided for criminal history enhancements but a relatively recent report expanded and restated reform goals which begin with "promoting public safety by incarcerating violent offenders." <sup>25</sup>
	No justification provided for criminal history enhancement, but one of the six objectives of the Maryland State Commission on Criminal Sentencing Policy is to "give priority to the incarceration of violent and career offenders" which suggests a primarily incapacitative justification for the most prolific repeat offenders. <sup>26</sup>
	No explicit justification provided for criminal history enhancement.
	No explicit justification provided for criminal history enhancement.
	Explicitly links its criminal history enhancements to several sentencing objectives: "Offenders who have a history of serious felonies are considered more culpable than those offenders whose prior felonies consist primarily of low severity, nonviolent offenses." <sup>27</sup> At the outset of its work the Commission reported that "In terms of philosophies of punishment, the Commission considered dispositional lines which emphasised (a) just deserts, (b) incapacitation, and (c) various degrees of emphasis between the two." <sup>28</sup> The dispositional line reflects the way that prior convictions interact with offense seriousness. Commentary in the current guideline manual also clarifies the subordinate role of criminal history relative to crime seriousness: "Under the Guidelines, the conviction offense is the primary factor, and criminal history is a secondary factor in dispositional decisions." <sup>29</sup>

Table 1.1, continued

 North Carolina	No explicit justification provided for criminal history enhancement.
 Oregon	The statement of purpose identifies the relevance of prior convictions but without clarifying the underlying justification: "Subject to the discretion of the sentencing judge to deviate and impose a different sentence in recognition of aggravating and mitigating circumstances, the appropriate punishment for a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender's criminal history." <sup>30</sup>
 Pennsylvania	The Guidelines recommend a range of minimum sentence based on the seriousness of the offense (Offense Gravity Score) and the prior criminal history (Prior Record Score) of the offender. Therefore, the more serious the offense, the more serious is the recommended punishment. Additionally, an offender with a more serious and/or more extensive criminal history will have a more serious punishment recommended. <sup>31</sup> The guidelines note that previous convictions are relevant to both preventing crime through incapacitation and recognizing the higher culpability of repeat offenders: "The Commission created the Repeat Violent Offender Category (REVOC) as a means of isolating offenders who have demonstrated violent criminal activity against persons. The category provides the Commission with the opportunity to recommend the imposition of the longest minimum sentences allowed by law when the offender's current conviction is for a violent offense and the offender has a violent criminal history. This recommendation is consistent with the Commission's desire to increase severity in order to incapacitate violent offenders and to impose severe sentences to reflect the seriousness of the victimization and the culpability of the offender." <sup>32</sup>
 Tennessee	No explicit justification provided for criminal history enhancement.
 Utah	The Sentencing and Release Guidelines contain a statement of philosophy which notes that the guidelines provide for consideration of "crime history and risk to society." <sup>33</sup> The guidelines further note that: "Sanctions should be proportionate to the severity of the current offense. Guidelines should reflect the culpability of the offender based on the nature of the current offense and the offender's role coupled with the offender's supervision history and overall likelihood to recidivate as inferred by the offender's "Criminal History Assessment." <sup>34</sup>
 Virginia	No explicit justification provided for criminal history enhancement.
 Washington	No explicit justification provided for criminal history enhancement, but the 1981 enabling statute specifies six goals of reform, the first of which entails sentences "proportionate to the seriousness of the offense and the offender's criminal history." In 1999, a seventh goal was added with implications for criminal history: sentences should "reduce the risk of reoffending by offenders in the community." <sup>35</sup>

<sup>1</sup> See Julian V. Roberts, *Punishing Persistent Offenders*, ch. 5 (2008).

<sup>2</sup> Mass. Sentencing Guidelines 3 (1998).

<sup>3</sup> Bureau of Justice Statistics, NCJ 243777, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, Table 9, 12 (December 2013).

<sup>4</sup> Minn. Sentencing Guidelines Commission, *2013 Sentencing Practices: Annual Summary Statistics for Felony Offenders*, Table 10, 43 (November 2014).

<sup>5</sup> Fla. Dept. of Corr., *Florida's Criminal Punishment Code: A Comparative Assessment*, Table 7, 43 (September 2013).

<sup>6</sup> U.S. Sentencing Commission, *2014 Sourcebook of Federal Sentencing Statistics*, Table 20, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table20.pdf>

<sup>7</sup> For a comprehensive review of the deterrence and incapacitation effects of incarceration, see National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, ch. 5 (Jeremy Travis, Bruce Western, and Steve Redburn, eds.) (2014).

<sup>8</sup> Lynne M. Vieraitis, Tomislav V. Kovandzic, & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002*, 6 (3) *Criminology & Public Policy* 589-622 (2007).

<sup>9</sup> Raymond V. Liedka, Anne Morrison Piehl, & Bert Useem, *The Crime Control Effect of Incarceration: Does Scale Matter?* 5 (2) *Criminology & Public Policy* 245-276 (2006); Alfred Blumstein, *U.S. Criminal Justice Conundrum: Rising Prison Populations and Stable Crime Rates*, 44 (1) *Crime & Delinquency* 127-35 (1998).

<sup>10</sup> See Daniel S. Nagin, *Deterrence in the Twenty-first Century: A Review of the Evidence* (forthcoming). Earlier reviews reached the same conclusion. See, e.g., Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney, & Per-Olaf Wikstrom, *Criminal Deterrence and Sentence Severity* (1999); Anthony Doob & Cheryl Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis in Crime and Justice: A Review of Research* (Michael Tonry, ed. 2003).

<sup>11</sup> A systematic (Campbell Collaboration) review of studies comparing the effects of prison vs community sanctions found that the most common outcome was for community penalties to be associated with lower re-offending rates. See generally Patrice Villetaz, Martin Killias & Isabel Zoder, The Campbell Collaboration, *The effects of Custodial vs Non-custodial Sentences on Re-Offending: A Systematic Review of the State of Knowledge* (2006). For representative research, see William Bales and Alex Piquero, *Assessing the impact of imprisonment on recidivism*, 8 *Journal of Experimental Criminology* 71-101, (2012); Frank Cullen, Cheryl Johnson & Daniel Nagin, *Prisons do not reduce recidivism: The high cost of ignoring science*, 91(3) *The Prison Journal*, 485-655, (2011); Daniel Nagin & Mathew Snodgrass, *The Effect of Incarceration on Re-Offending: Evidence from a Natural Experiment in Pennsylvania*. 29 *Journal of Experimental Criminology*, 624 (2013); Aiden Mews, Joseph Hillier, Michael McHugh & Chris Coxon, Ministry of Justice, *The impact of short custodial sentences, community orders and suspended sentence orders on re-offending* 18 (2015), <https://www.gov.uk/government/publications/the-impact-of-short-custodial-sentences-community-orders-and-suspended-sentence-orders-on-reoffending>.

<sup>12</sup> See generally Paul Gendreau, Claire Goggin & Frank Cullen, *The Effects of Prison Sentences on Recidivism* (1999) (prepared for the Solicitor General Canada); D.A. Andrews & James Bonta, *The Psychology of Criminal Conduct*, (5th Ed. 2003); Pieter Baay, Marieke Liem & Paul Nieuwbeerta, "Ex-Imprisoned Homicide Offenders: Once Bitten, Twice Shy?" *The Effect of the Length of Imprisonment on Recidivism for Homicide Offenders*, 16 *European Journal of Criminology* 259-274 (2012).

<sup>13</sup> Kazemian reviewed the research on the relationship between incarceration and recidivism and concluded that: "incremental increases in sentence set by the recidivist sentencing premium are unlikely to lead to substantial, long-term reductions in crime and recidivism rates." See Lila Kazemian, *Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates in Previous Convictions at Sentencing*, Chapter 10, 244 (Julian V. Roberts & Andreas von Hirsch, eds. 2010).

<sup>14</sup> See Fletcher, G., *The Recidivist Sentencing Premium*, 1 *Crim. Just. Ethics* 54-59 (1982); for discussion, see generally Julian V. Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (2008); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus and Unresolved Issues*, 105 *Colum. L. Rev.* 1190-1232 (2005).

<sup>15</sup> Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 *Cornell L. Rev.* 45-86 (2011).

<sup>16</sup> Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 *Tex. L. Rev.* 571-622; Thomas Mahon, *Justifying the Use of Previous Convictions as an Aggravating Factor at Sentencing*, 2012 *Cork Online Law Review* 85-87, <http://corkonlinelawreview.com/index.php/2012/03/13/justifying-the-use-of-previous-convictions-as-an-aggravating-factor-in-sentencing/>.

<sup>17</sup> U.S. Sentencing Commission, *Computation of "Recency" Criminal History Points Under USSG § 4A1.1(e)* (Aug. 2010).

<sup>18</sup> Or. Admin. R. § 213-002-001(3)(d) (2014).

<sup>19</sup> Ala. Code § 12-25-2 (b) (2014).

<sup>20</sup> Ark. Sentencing Standards Grid Offense Seriousness Rankings and Related Material 1 (2013).

<sup>21</sup> Del. Sentencing Accountability Benchbook 22 (2015).

<sup>22</sup> *Id.* at 27.

<sup>23</sup> U.S. Sentencing Guidelines Manual ch. 4, pt. A, introductory cmt. (2013).

<sup>24</sup> *Id.*

<sup>25</sup> Kansas Sentencing Commission & Kansas Criminal Code Recodification Commission, *Kansas Sentencing Proportionality Recommendations: Report on Proposed Improvements and Modifications to Kansas* 2 (2009), <http://www.sentencing.ks.gov/docs/default-source/publications-reports-and-presentations/2009-kansas-sentencing-proportionality-recommendations.pdf?sfvrsn=0>.

<sup>26</sup> Md. State Comm'n on Crim. Sentencing Policy, *Origin and Purpose*, <http://www.msccsp.org/About/Origin.aspx> (last visited March 20, 2015).

<sup>27</sup> Minn. Sentencing Guidelines cmt. 2.B.103 (2014).

<sup>28</sup> Minn. Sentencing Guidelines Comm'n, *Report to the Legislature*, 9 (1980).

<sup>29</sup> Minn. Sentencing Guidelines cmt. 2.B.01 (2014).

<sup>30</sup> Or. Admin. R. 213-002-001(3)(d) (2014).

<sup>31</sup> See generally Pa. Sentencing Guidelines Implementation Manual § 303.16(a) to § 303.18(c) Matrices (7th Ed. Amend. 2, 2014).

<sup>32</sup> Pa. Sentencing Guidelines Implementation Manual 117 (7th Ed. 2012).

<sup>33</sup> Utah Adult Sentencing and Release Guidelines 1 (2014).

<sup>34</sup> *Id.*

<sup>35</sup> Washington Sentencing Guidelines Comm'n, *20 years in Sentencing: A Look at Washington State Adult Sentencing, Fiscal years 1989 to 2008* (2010), [http://www.cfc.wa.gov/PublicationsSentencing/SentencingManual/Adult\\_Sentencing\\_Manual\\_2011.pdf](http://www.cfc.wa.gov/PublicationsSentencing/SentencingManual/Adult_Sentencing_Manual_2011.pdf).



### Key Points

- The magnitude of a system's criminal history enhancements refers to how much more punishment is inflicted because of criminal history. In this chapter we focus on two aspects of magnitude: (1) the extent to which criminal history leads to an increased likelihood of a prison disposition; and (2) the extent to which the duration of imprisonment is increased because of criminal history.
- In all guidelines systems criminal history enhancements are a major factor determining the form and severity of recommended and imposed sentences, but the magnitude of enhancement varies greatly across systems, as well as across offenses within a system.
- Magnitude can be measured in a variety of ways and the best method to use depends on the policy concerns underlying the analysis. The measures most useful to policymakers are based on sentencing data, where that is available; however, the impact of criminal history enhancements can be estimated and compared across jurisdictions "on paper," based on recommended sentences in guidelines grids.
- Magnitude estimates are no less important in non-grid systems but they are harder to make and less comparable across systems, and therefore are not presented in this chapter.
- Criminal history enhancements can have a number of unintended consequences which may be inconsistent with a jurisdiction's sentencing policy goals. The larger the magnitude of enhancement, the more pronounced these consequences are likely to be.
- Given the potential for unintended and undesired consequences, sentencing policymakers in each system should examine the magnitude of criminal history enhancements and decide whether the resulting impacts are consistent with that system's policy goals. If they are not, policymakers may wish to consider adjusting the magnitude of enhancement, which can be done in a variety of ways.

## INTRODUCTION

Criminal history "magnitude" refers to how much more punishment is inflicted on account of criminal history. We focus on two measures of increased punishment, each addressing a key dimension of guidelines sentencing: (1) *the in/out indicator*, which is the proportion of offenders who receive a recommended executed-prison disposition because of their elevated criminal history score; and (2) *the sentence length multiplier*, which is the ratio between the prison duration recommended for offenders in the highest criminal history category compared to the term recommended for lowest-history offenders. Stated differently, the issues are—what proportion of offenders is recommended for prison because of high criminal history, and how much longer are prison terms for those with high criminal histories? This chapter uses these two measures to compare the magnitude of criminal history enhancements found in American guidelines jurisdictions.<sup>1</sup>

These comparisons permit policymakers to see where their scheme fits within a range of potential enhancement sizes.

The chapter also examines potential unintended consequences and undesired impacts of higher enhancement magnitudes, for example: criminal history enhancements contribute to high rates of racial disproportionality in prison populations. Several additional measures are proposed to quantify the contribution of criminal history enhancements to each of these potentially problematic impacts. By applying these measures, policymakers can determine whether the enhancements are consistent with that jurisdiction's sentencing policy goals. If they are not, attention can be directed to identifying which aspects of the system's criminal history formula are contributing to this high magnitude; policymakers can then decide whether and how to adjust those aspects of their system to more effectively achieve policy goals.

Part 1 of this chapter summarizes the potential unintended consequences of substantial criminal history enhancements, and explains why these impacts may raise serious policy concerns. Part 2 presents two grid-based, “on-paper” measures of the magnitude of these enhancements, and shows how existing guidelines systems rank on each measure. The same measures, based on actual sentencing data, are then presented for selected systems, to illustrate the added value of data-based measures. In Part 3 a more detailed data-based appraisal is provided for one system, to further illustrate ways in which different impacts can be assessed when data is available. For those systems that find their policy goals disrupted by the unintended consequences of higher criminal history magnitudes, the final section in this chapter (previewing the more detailed discussions in later chapters of this book) suggests several dimensions of typical criminal history formulas that could be revised to lessen the magnitude of criminal history enhancements and thereby offset undesired impacts.

## DISCUSSION

### Part 1: Adverse Impacts of Substantial Criminal History Enhancements

Criminal history enhancements can have a number of unintended and potentially undesirable consequences, and those consequences are more problematic the larger the magnitude of the enhancement (that is, the greater the impact of criminal history on sentencing decisions related to prison commitment and prison duration). This part summarizes the most important potential adverse impacts of these enhancements.

Criminal history enhancements can, of course, also have positive impacts, but those benefits do not necessarily keep rising with higher and higher enhancement magnitudes. As discussed in Chapter 1, criminal history enhancements are sometimes justified on retributive grounds (that repeat offenders are more culpable). But most guidelines systems have not expressly adopted this rationale. And even if they do, the magnitude of criminal history enhancements must be kept within limits to avoid undercutting another central retributive goal: making punishment severity proportional to the harms caused or threatened by the crime(s) being sentenced (see further discussion of offense proportionality, item 4 below). The alternative, crime-control rationale for criminal history enhancements is much more widely endorsed—repeat offenders are deemed to pose an elevated risk of future recidivism, thus justifying higher penalties to achieve greater deterrence and incapacitation effects. As Chapter 1 also noted, however, there is limited

empirical support for the crime-control value of criminal history enhancements – higher levels of penalty severity generally do not produce correspondingly higher crime control benefits.

Five of the most important adverse consequences of high-magnitude criminal history enhancements are summarized below.

#### 1. Increasing the size and expense of prison populations

High-magnitude criminal history enhancements make more offenders eligible for recommended commitment to prison, and increase the length of recommended prison terms, thus raising prison costs and potentially causing or contributing to prison overcrowding. As shown in Part 3, the resulting prison bed impacts due to criminal history enhancements can be quite substantial, accounting for a high proportion of total prison beds. As noted above, larger prison populations can also have desired crime control and retributive impacts, but commissions may conclude that at some point these impacts are no longer cost effective or deserved, particularly for nonviolent and low-severity offenders.

*“By the time offenders have reached their forties and fifties their rates of offending have substantially declined, and most of them have desisted entirely, or soon will... [But] criminal history enhancements and other sentencing rules generally apply without regard to the offender’s current age.”*

#### 2. Shifting the age composition and risk level of prison inmates

Sentencing guidelines permit policy makers to set priorities in the use of limited and expensive prison resources; targeting high-risk offenders for imprisonment is one commonly-endorsed priority. Criminal history enhancements would seem to help achieve this goal since, as noted above, prior record is generally viewed as one of the best indicators of offender risk. But many offenders with higher criminal history scores are already older and well past their peak offending years, or they will reach that past-peak age well before they finish serving their enhanced prison terms. Arrest data and criminological research have repeatedly demonstrated a strong “age-crime curve” – the

frequency of criminal behaviour tends to peak in the teens and early twenties, and declines steadily thereafter.<sup>2</sup> By the time offenders have reached their forties and fifties their rates of offending have substantially declined, and most of them have desisted entirely. Even the small subset of “chronic” career, or “life course persistent” offenders display this pattern and eventually desist, albeit more slowly.<sup>3</sup> Despite these well-documented patterns, criminal history enhancements and other sentencing rules generally apply without regard to the offender’s current age.<sup>4</sup> Moreover, since the medical and other costs of incarcerating aging offenders can be quite high, their incarceration becomes increasingly less cost-effective as they grow older. High-magnitude criminal history enhancements thus are likely to contribute to an aged, low-risk, high-cost inmate population. The aging offender issue may not raise concerns for purely retributive systems, but for commissions motivated by public safety and related utilitarian concerns, prisoner age profiles may be of interest.

### 3. Undercutting the goal of using limited prison beds for violent offenders

Many guidelines systems have chosen to give higher priority to incarcerating violent offenders, and to use community-based sanctions for property and other non-violent offenders. But since non-violent offenders often have high recidivism rates,<sup>5</sup> they tend to accumulate higher criminal history scores. Robust criminal history enhancements thus send many of these offenders to prison, and increase the length of their prison terms. As shown in Part 3, such non-violent offenders can require a substantial number of additional prison beds.

### 4. Decreasing the proportionality of sentence severity relative to offense severity

Sentencing proportionality is an important goal of most guidelines reforms. Proportionality is deemed important not just under a retributive theory of punishment but also for reasons of effective crime control—penalties that increase in proportion to crime seriousness tend to match punishment costs with expected deterrence, incapacitation, and other crime-control benefits, while also sending valuable standard-setting and norm-reinforcing messages about the relative seriousness of different crimes.<sup>6</sup> Under sentencing guidelines, recommended and imposed sentence severity depends primarily on two factors: the severity of the conviction offense and the magnitude of the offender’s criminal history score. Accordingly, the greater the magnitude of prior-record enhancements, the less the sentence depends on the severity of the conviction offense, thus lowering the proportionality of punishment relative to the crime for which the offender is being sentenced. The issue is one

of degree: focusing on proportionality concerns, the question is to what extent should the punishment be driven primarily by the current offense with comparatively modest criminal history enhancements, versus having the punishment determined in substantial part by criminal history at the expense of the current offense.

*“[B]ecause non-white offenders tend to have more extensive prior conviction records, criminal history enhancements can have a strong disparate impact on these offenders.”*

### 5. Increasing racial disproportionality in prison inmate populations

Another goal of many guidelines reforms is to reduce racial disparities in sentencing. But because non-white offenders tend to have more extensive prior conviction records, criminal history enhancements can have a strong disparate impact on these offenders. This in turn increases the disproportionality of prison populations beyond the levels that would result solely from racial differences in the nature and severity of conviction offenses. Because of the complexity and importance of this impact of criminal history enhancements, more detailed discussion is provided in chapter 12.

### Part 2: Comparing Jurisdictions with Magnitude-of-Impact Measures

In this part we present two ways of measuring the magnitude of criminal history enhancements in sentencing guidelines systems. The two measures correspond to the two primary sentencing decisions typically regulated by guidelines: (1) whether to sentence an offender to prison or a non-prison sanction (frequently referred to as *the in/out or disposition decision*); and (2) *the sentence length (duration) decision* for offenders who are sent to prison. Part A presents these measures based on prison-disposition and executed-prison-duration recommendations contained in guidelines grids. (Non-grid guidelines jurisdictions do not lend themselves to comparison with such measures so we were forced to exclude Alabama, Delaware, Florida, and Virginia from the comparisons; we also excluded Michigan due to complications related to that state’s use of nine separate grids.) Part B then examines the same two measures for two states, to show how data on cases sentenced under each system’s guidelines can be incorporated into the measures to provide better

estimates of the actual impact of higher criminal history magnitudes. In the absence of such data, the “on paper” measures presented in Part A provide the best estimate of the magnitude of criminal history enhancements in a given system, and using such measures is the only way to compute and compare these magnitudes across all grid-based systems.

### A. Measuring Criminal History Enhancement Magnitude on Paper (Grid Recommendations)

#### Disposition: The Percentage of Cells Recommending Prison Due to Criminal History

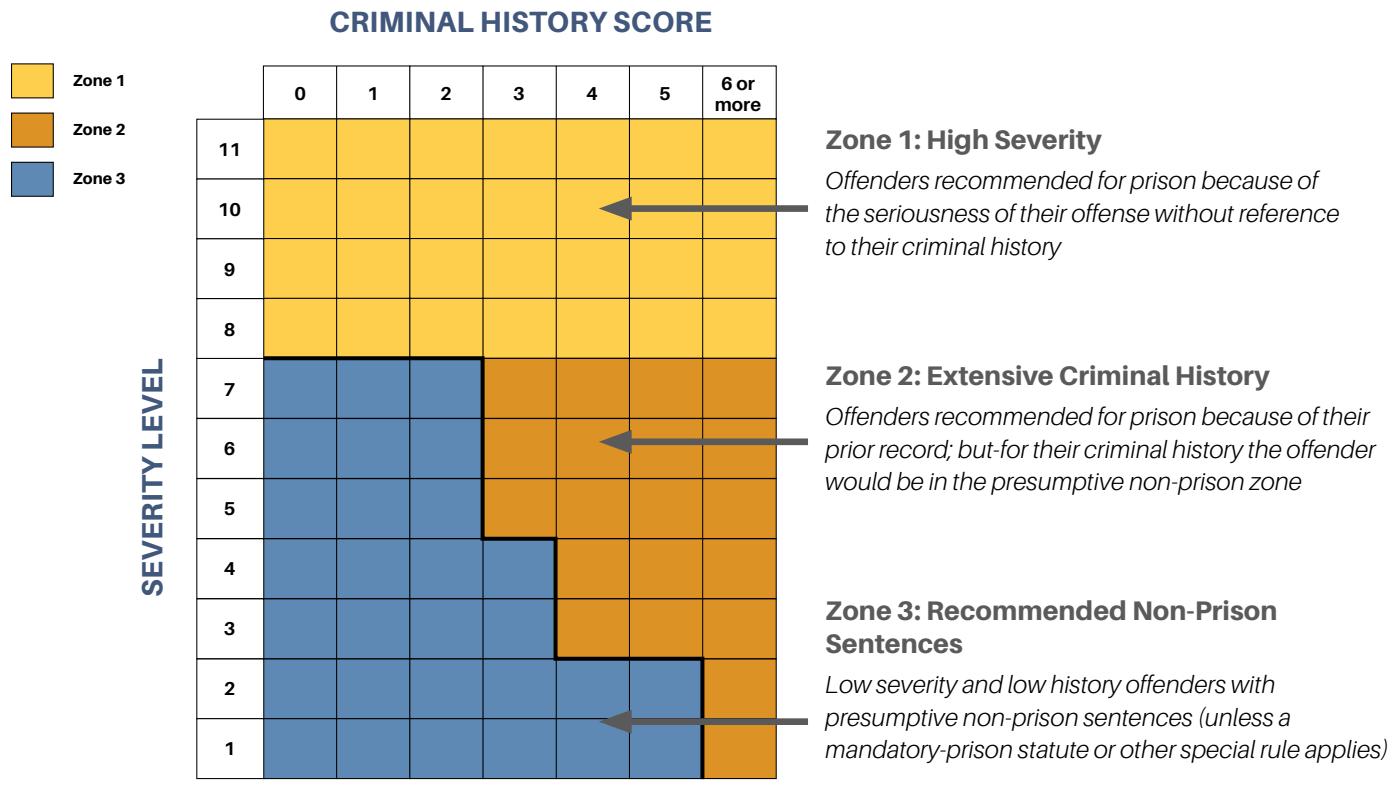
The first magnitude measure, *the in/out indicator*, addresses the extent to which more robust criminal history enhancements affect disposition decisions by increasing the proportion of offenders who have recommended executed prison sentences. On most guidelines grids many offenders at medium or low offense severity are recommended for prison only because their elevated criminal history score has pushed them out of the non-prison zone of the grid into a grid cell where prison is recommended. We measure this effect by counting the number of such prior-record-driven recommended-for-prison cells and then computing that number as a percentage of all cells on that grid. As illustrated in Figure 2.1, most grids can be divided into three sections or zones. Zone 1 represents high severity offenders

who are always recommended for prison even if they have no criminal history. Zone 2 contains the cells central to this in/out indicator: were it not for their higher levels of criminal history, offenders in these Zone 2 cells would have otherwise been in Zone 3 and thus recommended for a non-prison sentence. Finally, Zone 3 constitutes the remaining cells which reflect both lower levels of severity and lower levels of history.

Where the in/out or disposition line is drawn on a grid constitutes an important policy decision and one in which criminal history is directly implicated. Jurisdictions with grids that have a relatively high proportion of cells for which the in/out disposition is based solely on criminal history will likely have higher proportions of offenders recommended

**“On most guidelines grids many offenders at medium or low offense severity are recommended for prison only because their elevated criminal history score has pushed them out of the non-prison zone of the grid into a grid cell where prison is recommended.”**

**Figure 2.1 Calculating the In/Out Indicator**



Note: The in/out formula applies to this sample grid as follows. Zone 2 contains 20 cells, and there is a total of 77 cells on the entire grid. Thus 20 out of 77, or 26%, of the cells on the grid recommend prison on account of criminal history.

for prison. In turn, these jurisdictions will be more likely to experience the unintended and potentially undesired criminal-history-related policy impacts discussed in Part 1 above (see also Chapter 12, for further discussion of racial impacts).

Table 2.1 provides the jurisdiction rankings for this in/out indicator, with separate rankings for the more specialized secondary grids found in some states. As the table shows, there is considerable variation in the percentage of cells in which prison is recommended based solely on criminal history—the primary grids range from a low of 8% under the federal guidelines to a high of 28% in Utah (the mean for these twelve grids is 18%). The range is even greater for the secondary grids, from a low of 3% under the Utah Sex grid to a high of 58% for the Maryland Property grid (the mean for these eight grids is 23%). It is interesting to note that Utah has the highest in-out criminal history impact among the primary grids, but the lowest impact among the secondary grids. This spread underscores the critical point that the in/out magnitude apportioned to criminal history is a policy choice. On the Utah Sex Grid, the choice was to make offense severity the overwhelming driver of disposition – for eight of the ten severity levels on that grid prison is recommended for all offenders, regardless of their criminal history scores.

**Figure 2.1 Rank by Recommended Prison Due to Criminal History (Percentage of Cells)**

Primary Grids	
Federal	8%
Oregon	11%
Massachusetts	13%
Arkansas	13%
Tennessee	16%
Kansas	17%
Pennsylvania	18%
North Carolina	19%
DC	22%
Washington	22%
Secondary Grids	
Utah Sex	3%
Kansas Drug	9%
Washington Drug	11%
Maryland Person	12%
Maryland Drug	29%
Minnesota Sex	29%
DC Drug	30%
Maryland Property	58%

## Duration: Custodial Sentence Length Multipliers (Highest- vs Lowest-History Offenders)

The second magnitude measure is the *sentence length multiplier*. The multiplier indicates how much more executed prison time is recommended for an offender in the highest criminal history category compared to an offender in the lowest category (assuming both are convicted at the same offense severity level). As demonstrated in Figure 2.2, the multiplier is calculated by dividing the presumptive sentence for the highest criminal history score by the presumptive sentence for the lowest criminal history score.<sup>7</sup> The example is from severity level 8 of the Minnesota Standard Grid where an offender with a criminal history score of 6 or more is recommended to a 108 month prison sentence and an offender guilty of the same crime, but with a criminal history score of 0, is recommended for a 48 month sentence. Accordingly, the recommended sentence for offenders with the highest criminal history is 2.25 times greater than the recommended sentence for offenders with the lowest criminal history, and all of this recommended enhancement is attributable to criminal history. The multipliers are not the same for all offense severity levels, so the measure calculates a multiplier for each level and then averages the multipliers to produce an overall multiplier figure for that grid.

**Figure 2.2 Calculating the Sentence Length Multiplier**

CRIMINAL HISTORY SCORE							
	0	1	2	3	4	5	6 or more
11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 <sup>2</sup>	426 363-480 <sup>2</sup>
10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129

$108 \div 48 = 2.25$

Custody-duration recommendations are very important policy decisions; the greater the criminal history sentence length multiplier, the more significant the impact an offender's criminal history will have on overall sentencing outcomes. As Table 2.2 shows, in several jurisdictions (DC, NC, Fed., and MA) the main grid multiplier roughly doubles sentence length; at the other extreme, Washington and Arkansas have main grid multipliers of about 10, and in Kansas the multiplier is over 14. The mean is 6.4 for these twelve main grids. For the secondary grids the range runs from 2.1 for the DC Drug grid to 43.7 for Maryland Property (with a mean of 11.1).

<b>Table 2.2 Rank by Sentence Length Multiplier (average of offense severity level multipliers)</b>	
<i>Primary Grids</i>	
DC	1.7
North Carolina	2.2
Federal	2.5
Massachusetts	2.5
Minnesota	4.7
Tennessee	5.5
Oregon	7.2
Pennsylvania	7.7
Utah	8.0
Washington	9.8
Arkansas	10.5
Kansas	14.4
<i>Secondary Grids</i>	
DC Drug	2.1
Utah Sex	2.8
Washington Drug	4.5
Maryland Person	6.8
Minnesota Sex	8.0
Kansas Drug	9.5
Maryland Drug	11.1
Maryland Property	43.7

It is worth noting, however, that the magnitude of sentence length multipliers depends on both the low end and the high end of the range for each offense severity level. Reducing the recommended sentence for offenders in the lowest criminal history category will increase the multiplier for that offense level, as will raising the recommended sentence for offenders in the highest criminal history category.<sup>8</sup>

## Comparing systems on both magnitude measures

Examination of the rank orders of both the in/out and sentence-length magnitude measures displayed in Tables 2.1 and 2.2 reveals that some grids rank consistently low or high on these measures. Thus, the federal and Massachusetts primary grids consistently rank low, while the Washington primary grid has the third highest rank on both measures. But some primary grids rank low on one measure and high on the other. For instance, the DC main grid has the lowest sentence length multiplier but one of the highest in/out cell percentages. Arkansas illustrates the opposite pattern: its grid has the second highest sentence length multiplier but the fourth lowest in/out cell percentage. As for the secondary grids, the Utah Sex and Washington Drug grids are among the three lowest ranks on both measures, while the Maryland Property grid has by far the greatest criminal history enhancement magnitude on each measure.

## B. Measuring Criminal History Enhancement Magnitude with Sentencing Data

The measures presented thus far have estimated the magnitude of criminal history enhancements *on paper*. What percentage of cells have a recommended prison sentence on account of elevated criminal history? How much longer are recommended sentences for offenders in the highest criminal history category at each offense severity level, compared to those in the lowest category? We now take the analysis one step further by calculating these two magnitude measures based on the actual number of offenders convicted in each grid cell, and the average sentences imposed on those offenders. Such data-based measures yield different magnitude estimates for any given grid, and different rank orders of grids, in comparison to the on-paper measures reported in Section A.<sup>9</sup> Because the magnitude measures presented below are based on cases sentenced, these measures give policymakers and researchers a more accurate estimate of the impact that policy choices about recommended criminal history enhancements have on actual sentencing decisions and on resulting prison populations.

We selected two jurisdictions with well-maintained sentencing data, Minnesota and Washington, to illustrate how measures based on sentencing data can provide an indispensable complement to on-paper analysis. As shown in Table 2.3, the data-based indicators show a contrast between Minnesota and Washington. In Minnesota the impact of criminal history on the in/out (disposition) decision is lower when estimated based on actual cases sentenced, while in Washington the impact is higher. In terms of prison duration, the data-based sentence length multiplier is much higher in both states, more than doubling the on-paper estimates.

<b>Table 2.3 Criminal History Enhancement Magnitudes On Paper, and With Sentencing Data</b>	
<b>Minnesota</b> (standard grid)	<b>Washington</b> (main grid)
<i>In/Out Due to Criminal History Score</i>	<i>In/Out Due to Criminal History Score</i>
On paper 26%	On paper 22%
With sentencing data 19%	With sentencing data 37%
<i>Sentence Length Multiplier</i>	<i>Sentence Length Multiplier</i>
On paper 4.7	On paper 9.8
With sentencing data 10.1	With sentencing data 21.0

Note: *On paper* figures are based on recommended sentences, as discussed in Section A and reported in Tables 2.1 and 2.2. *With sentencing data* figures are based on cases sentenced (for in/out measures these are the percentage of all offenders who were convicted in grid cells that carry recommended prison terms due to elevated criminal history; for multipliers, the figures represent the ratio of the average duration of executed custody sentences imposed on highest- versus lowest-criminal- history offenders).

Our purpose here is not to provide an exhaustive evaluation of sentencing practices in these two states, nor to determine which state has more preferable policies vis-à-vis the criminal history impacts. Instead, we introduced these data-based versions of the in/out and sentence length magnitude measures to illustrate that the most complete picture of sentencing outcomes is informed by assessment of the policies both on paper and in action. The on-paper measures reported in Tables 2.1 and 2.2 allow any guidelines jurisdiction, even one without usable sentencing data, to estimate the magnitude of its criminal history enhancements, determine how that magnitude compares to estimates for other guidelines systems, and consider whether that jurisdiction's disposition and prison-length policies are interacting with criminal history enhancements in ways that mitigate or exacerbate the unintended impacts discussed in Part 1. However, commissions considering making changes to their grids will likely also wish to evaluate those changes using actual sentencing data of the kind presented in Table 2.3. Part 3 below provides further examples of the ways in which such data can be used to evaluate adverse impacts of substantial criminal history enhancements.<sup>10</sup>

### Part 3: Additional Magnitude Measures to Assess Varied Criminal History Enhancement Impacts

The comparisons in Part 2 emphasized two "on paper" magnitude measures that can be applied to all grid-based guidelines systems, even those without sentencing data. That discussion also showed that, where sentencing data is available for a jurisdiction, those two measures can be extended to provide more accurate estimates of how high-magnitude criminal history enhancements are likely to translate into prison-bed and other impacts. This part provides a more complete picture of how various data-based magnitude measures can be used to assess the five adverse criminal history enhancement impacts that were summarized in Part 1. We use Minnesota as an example because of the extensive sentencing data available for that state.<sup>11</sup>

#### 1. Increasing the size and expense of prison populations

In Minnesota over half of all recommended and imposed executed prison terms in 2012 were due to high criminal history—the offenders were convicted of medium- or low-severity offenses and would not have been recommended for prison but for their elevated criminal history scores, which pushed them across the grid into the zone carrying recommended executed-prison sentences. (In the remainder of this discussion, these are referred to as "pushed-in" offenders.) The prison bed impact caused by this aspect of criminal history enhancement can be quite substantial. In Minnesota, pushed-in offenders accounted for about 40% of the beds required to house all offenders sentenced in 2012.

Criminal history enhancements also greatly increase prison durations, and thus prison bed needs, for all offenders sentenced to prison initially or by revocation of probation. This effect applies not only to pushed-in offenders but also to presumptive-probation offenders sentenced to prison by upward dispositional departure or by later revocation, and to high-offense-severity offenders whose eligibility for imprisonment was not due to their elevated criminal history score. The overall impact of criminal history enhancements is more difficult to estimate for prison duration than for prison commitment, since the latter impact depends on a simple dichotomy – at medium and low offense severity levels, a given offender is or is not recommended for prison, depending on his criminal history score. But the impact of criminal history enhancements on executed prison durations and on prison populations can be illustrated by an example comparing offenders in

two adjoining cells on the main Minnesota grid. In 2012 there were 57 offenders with a criminal history score of three and an offense severity level of eight who received an executed prison term; if these offenders had had one less criminal history point, and as a result had received the average prison term given to offenders with two points at that severity level, their average prison term would have been over a year shorter (56.5 instead of 71.1 months), and 46 fewer prison beds would have been required.<sup>12</sup>

## 2. Shifting the age composition and risk level of prison inmates

As noted in Part 1, older offenders tend to have higher criminal histories than younger offenders but lower recidivism rates when they are released, resulting in a mismatch between criminal history enhancement and efficient risk management. In Minnesota the average prison inmate was almost 37 years old in 2014, and one out of every seven inmates was 50 or older.<sup>13</sup> Many of these offenders were convicted of low- and medium-severity crimes, and were given an executed prison sentence, or a longer sentence, because of their elevated criminal history scores. As noted above these pushed-in offenders account for over half of all prison commitments in Minnesota. In 2012 more than one-third of those pushed-in offenders were 40 or older at the time of sentencing, and over 1,000 additional prison beds were required to house these aging offenders.

## 3. Undercutting the goal of using limited prison beds for violent offenders

Minnesota is one of the states that chose to use sentencing guidelines to change prison-use priorities; in particular, the decision was made to recommend prison sentences for more violent offenders, and to limit the use of prison for property and other non-violent offenders.<sup>14</sup> But non-violent offenders tend to accumulate higher criminal history scores,<sup>15</sup> causing many of them to receive recommended and imposed prison sentences, while also increasing the length of their prison terms. With respect to the prison-commitment (in/out) decision, it is again useful to focus on the pushed-in offenders – those who were convicted of low- or medium-severity crimes who became eligible for an executed prison sentence based on their elevated criminal history score. Sixty percent of pushed-in Minnesota offenders sentenced in 2010<sup>16</sup> had a non-violent conviction offense, and 34 percent had a totally non-violent record – none of their current or prior convictions was for a violent crime. Over 1,000 prison beds were required to house these never-violent, medium- and low-offense-severity offenders.

## 4. Decreasing the proportionality of sentence severity relative to offense severity

The higher a system's criminal history enhancement magnitude, the more these enhancements tend to undercut the widely-shared guidelines goal of making the severity of punishment proportional to the seriousness of the offender's conviction offense. One way to measure the extent to which criminal history enhancements undercut offense proportionality is to examine the degree of overlap between recommended sentencing ranges for adjoining offense severity levels, and in the durations of sentences actually imposed. Such overlaps cause two kinds of disproportionality relative to offense severity: some high-history offenders are recommended for and receive sentences more severe than offenders convicted of more serious crimes; and some low-history offenders are recommended for and receive sentences less severe than offenders who are convicted of less serious crimes but who have higher criminal history scores.

This effect can be seen clearly in Minnesota even though that state appears to have only a modest degree of criminal history enhancement magnitude compared to other states (see Table 2.2, reporting sentence length multipliers for each system and grid). In 2012, only 23 percent of the cells on the two Minnesota grids were fully proportionate in the sense that the recommended prison duration was less than in all cells at higher levels of offense severity, and greater than in all cells at lower severity levels. Even greater disproportionality becomes evident when we make this assessment based on actual cases sentenced, to take account of the uneven distribution of offenders across these grids. In 2012, only six percent of offenders were convicted in a grid cell with a fully-proportionate prison duration. Moreover, in some cases the degree of offense disproportionality is quite substantial – for example, offenders convicted at offense severity 1 on the main Minnesota grid who fall in the highest criminal history category have recommended prison durations greater than are provided for the lowest-history offenders at severity level 5, almost half-way up the grid.

## 5. Increasing racial disproportionality in prison inmate populations

As discussed more fully in Chapter 10, non-white offenders tend to have more extensive prior conviction records, so high degrees of criminal history enhancement magnitude will add substantially to the problem of racial disproportionality in prison populations. In Minnesota the average criminal history score of African-American offenders in 2012 was 32 percent higher than the average score for white offenders, and this was a major reason why the rate of recommended prison commitment was much higher for

the former (43 percent for African-Americans, versus 30 percent for whites). Further discussion of this issue, and additional data from Minnesota and other guidelines states, will be provided in Chapter 12.

## POLICY CONSIDERATIONS

Given the important potential fiscal and other unintended impacts of criminal history enhancements (Part 1 above), and the substantial magnitude of these enhancements in some guidelines systems (Parts 2 and 3), policymakers in each system should examine the magnitude of their enhancements and decide whether the resulting impacts are consistent with their policy goals. To the extent that the impacts are not consistent with such goals, policymakers should explore ways to reduce their criminal history enhancement magnitude, and thus the extent of adverse impacts. Some examples of changes that might be made are summarized below. As indicated, each of these criminal history enhancement features is also discussed at greater length in one or more later chapters, or in earlier parts of this chapter.

- Limiting the kinds of prior crimes, custody-status factors, and other elements that are counted in the criminal history score, and/or reducing the weight certain factors receive (see chapters 5, 7, 8, 9, and 10).
- Reducing the number of years after which certain crimes are no longer counted, and adopting such "decay" ("look-back;" "washout") limits where none are currently being applied (see chapter 3).
- Adopting or expanding "gap" rules that give an offender credit (e.g., by reducing the criminal history score, or allowing downward departure) for substantial periods of time the offender has spent in the community without a new conviction (see chapter 3).
- Limiting eligibility for the highest criminal history categories to offenders whose current offense is violent or otherwise very serious and who also have violent or very serious prior convictions (see chapter 8).
- Reducing the range of sentence severity from the lowest criminal history category to the highest category. One

simple way to do this would be to eliminate or reduce overlaps between recommended sentences for high-history offenders and recommended sentences for low-history offenders convicted of more serious crimes. In addition to reducing the magnitude of criminal history enhancements within each severity level, this change would increase the degree of proportionality between sentence severity and offense seriousness (see Parts 1 and 3 of this chapter).

- Eliminating or reducing the weight given to criminal history score components that do not increase the ability of the score to predict future recidivism risk, or that increase sentence severity in ways that are not cost-effective (see chapter 11).
- Giving judges authority to lower the criminal history score or depart downward, to reflect the offender's advancing age or other factors indicating reduced risk (see chapter 11).
- Eliminating or reducing the weight given to any criminal history score component that has been shown to have a strong disparate impact on non-white offenders, especially when such a component cannot be shown to substantially increase the ability of the score to predict future recidivism risk in a cost-effective manner (see chapter 12).

<sup>1</sup> Other chapters of this book discuss the rules pertaining to the construction and components of criminal history scores—for example, whether certain prior offenses are given greater weight in the score, whether probation or parole status at the time of the current offense adds to the score, and so forth. This chapter examines the magnitude of the impact of criminal history on sentencing outcomes once those scoring decisions have been made.

<sup>2</sup> See, e.g., Alex R. Piquero, David Farrington & Alfred Blumstein, *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development* (2007); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points through Life* (1995); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89(3) Am. J. Sociology 552 (1983).

<sup>3</sup> See, e.g., Sampson & Laub, *supra* note 2; U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, Research Series on the Recidivism of Federal Guideline Offenders, Release 1, at 28 (2004) (table showing that recidivism rates decline with advancing age, even for offenders with high criminal history scores at the time of their last sentencing).

<sup>4</sup> The relationship between criminal history enhancements and recidivism risk is further examined in Chapter 11 of this Sourcebook.

<sup>5</sup> See Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1994* (2002).

<sup>6</sup> For discussion of the crime-control values of offense-proportionate punishment, see Richard S. Frase, *Theories of Proportionality and Desert*, in: Oxford Handbook on Sentencing and Corrections (Joan Petersilia & Kevin Reitz eds., 2012). See also Richard S. Frase, *Punishment Purposes*, 58(1) Stan. L. Rev. 67 (2005).

<sup>7</sup> Where only a range is provided for a cell, rather than a specific presumptive prison term, we use the midpoint of that range. If a non-prison sentence is recommended for the lowest-history offenders, but an executed jail sentence is recommended or permitted, we use the midpoint of the jail sentence range. If no executed custody sentence of any kind is recommended or permitted, we omit that severity level from the analysis.

<sup>8</sup> The separate effects of reducing low-history sentences and raising high-history sentences can be illustrated by comparing the recommended sentences for highest-history and lowest-history offenders in three guidelines systems with very different primary-grid multipliers: Kansas (with a multiplier of 14.4), Washington (9.8), and Minnesota (4.7). These comparisons reveal that the much higher Kansas and Washington grid multipliers are primarily due to those states having much longer average recommended sentences for highest-history offenders—about 60 percent longer than the corresponding recommendations in Minnesota. Shorter recommended sentences for lowest-history offenders are an additional contributing factor to Kansas' high grid multiplier: the average recommended custody sentence for these offenders is 29 percent shorter in Kansas than in Minnesota (in Washington the average recommended term for lowest-history offenders is actually longer than in Minnesota, so all of Washington's much higher primary-grid multiplier is a product of its longer recommended sentences for highest-history offenders).

<sup>9</sup> There are two reasons for the differences between on-paper and data-based magnitude estimates. First, data-based measures take account of the fact that offenders are distributed unevenly across offense severity levels on the grid, and across criminal history categories – more offenders are convicted at lower severity and lower criminal history levels than at higher severity and higher history levels. (On-paper in/out measures essentially assume that a given percentage of grid cells reflects a similar percentage of sentenced offenders; on-paper sentence length multipliers are unweighted averages across all offense severity levels, which assumes that equal numbers of offenders are sentenced at each level.) Second, actual data on the duration of custody sentences imposed allows the sentence-length multiplier measure to take account of how guidelines durational recommendations are translated into actual sentences. (On-paper multipliers assume that departures from recommended sentence durations are similar for offenders in the lowest and highest criminal history categories.)

<sup>10</sup> Additional details on how we constructed the measures discussed in this Part and in Part 3 are available upon request from the Robina Institute.

<sup>11</sup> Except where otherwise noted, the data reported in this part is based on annual sentencing data files obtained from the Minnesota Sentencing Guidelines Commission and analyzed by Professor Richard Frase, one of the authors of this Sourcebook. Estimated prison bed impacts for various categories of offenders are based on average executed prison terms given to those offenders, expressed in years and assuming no loss of good-conduct credit, multiplied by the number of offenders.

<sup>12</sup> See Minn. Sent. Guidelines Comm'n, *Sentencing Practices: Annual Summary Statistics for Felony Offenders* 66 (2013) (reporting the number of offenders with executed prison terms, and the average prison duration before allowance of good-conduct credits, in each cell of the main guidelines grid).

<sup>13</sup> Minn. Dept. of Corrections, *Adult Inmate Profile* as of 07/01/2014, [http://www.doc.state.mn.us/PAGES/files/8314/1511/5797/Minnesota\\_Department\\_of\\_Corrections\\_Adult\\_Inmate\\_Profile\\_\\_07-01-2014.pdf](http://www.doc.state.mn.us/PAGES/files/8314/1511/5797/Minnesota_Department_of_Corrections_Adult_Inmate_Profile__07-01-2014.pdf), p. 1.

<sup>14</sup> Minn. Sent. Guidelines Comm'n, *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation*, at v, 97 (1984).

<sup>15</sup> See Langan & Levin, *supra*, note 5.

<sup>16</sup> 2010 is the only year for which data is currently available on prior conviction offense types.

### Key Points

- Nearly half of the jurisdictions included in this sourcebook have no decay or gap policy, so all prior convictions, no matter when committed, are counted in the criminal history enhancement score.
- Three jurisdictions have enacted a decay policy, so that once a defined period has passed, the prior conviction is no longer counted for criminal history purposes.
- Six jurisdictions have enacted a gap policy, requiring the offender to remain crime free for a specified period of time before an offense will be removed from or discounted in the criminal history calculation.
- In the jurisdictions that have a decay or gap period, the most common length of time for that period is 10 years.
- The timing of when a decay or gap period starts and ends can result in unanticipated outcomes, such as less serious offenses being counted in the criminal history score for longer periods of time than more serious offenses.
- The majority of jurisdictions that have enacted a decay or gap policy apply it to all offenses so that any type of offense could potentially be removed from the criminal history calculation. But three states – Arkansas, Delaware, and Washington – exclude certain offenses from their decay or gap policy so that the offenses are always counted.
- Commissions might consider examining their justifications for using prior convictions as a basis for enhancing the current sentence and determine whether those justifications remain relevant if the convictions are very old or if the offender has managed to achieve a significant crime-free period, even if the offender has been unable to completely desist from offending.

### INTRODUCTION

Of the 18 jurisdictions discussed in this sourcebook, nearly half place no limits on how far back in time a prior conviction must have occurred in order to be counted or excluded for criminal history enhancement purposes. Nine jurisdictions *do* place such limits, often referred to as “decay” or “gap” policies. One jurisdiction (VA) has established a completely unique approach whereby only the five most recent convictions or sentencing events are counted. Since this approach does not fit cleanly into either category (decay or gap), it will not be further discussed in this chapter.

As used in this chapter, a *decay* policy is one in which a prior conviction eventually ages out of the criminal history calculation. Once a defined period has passed, the conviction is no longer counted, regardless of whether the offender has remained crime free for the full duration of the

defined period. Three jurisdictions currently utilize a decay policy (AR, Federal, and MN).

As used in this chapter, a *gap* policy is one that requires the offender to achieve a crime-free existence for a defined period of time (or gap). If the offender is able to achieve the crime-free period, the prior conviction no longer contributes to the criminal history enhancement score; but if the offender commits another crime within that time period, the prior offense *will* be counted, and in some jurisdictions, so will any offenses prior to that one. What happens to an offense when such a crime-free gap is present may be referred to as “washout” or “lapse.” Five jurisdictions have enacted a gap policy (DC, DE, FL, MI and WA). One jurisdiction (MD) has enacted a gap policy that discounts the value of the prior conviction for criminal history enhancement purposes, but may not remove it altogether.

This chapter first discusses potential rationales for enacting a decay or gap policy. Following that, this chapter will discuss the main considerations in existing policies. The chapter will close with a discussion of the policy considerations related to the enactment of a decay or gap policy. This chapter primarily covers prior adult convictions; the application of decay and gap policies to prior juvenile adjudications is addressed in Chapter 4.

## DISCUSSION

### The Choice to Enact a Decay or Gap Policy

An offender's prior record has always been a paramount factor utilized by judges to establish an appropriate sentence in both determinate and indeterminate sentencing systems. But consideration may also be given to whether there are limits on how long that prior record should be used. Jurisdictions have essentially two choices: (1) allow prior convictions to be used to enhance the current sentence in perpetuity; or (2) enact a policy providing that at some point in time the value of the prior conviction is discounted or can no longer be used for criminal history enhancement purposes.

So why might one jurisdiction choose to enact a decay or gap policy when another would not? The rationales for counting offenses in perpetuity are similar to those articulated in Chapter One for counting prior convictions at all: (1) as a means of identifying risk to reoffend and preventing future crime; and (2) as a means of recognizing increased culpability or blameworthiness. But that leaves open the question as to whether the prior convictions are always relevant or whether there is a limit to their usefulness in achieving these sentencing purposes.

As noted in Chapter One, most jurisdictions articulate the overarching purposes of sentencing within their guidelines, but few articulate reasons for enacting specific policies such as decay or gap policies. In utilizing a decay policy, the jurisdiction seems to be making a statement that at some point, a conviction becomes so old that it is no longer relevant in determining how culpable the offender is for this new crime or in predicting the offender's propensity for future offending. When a jurisdiction includes a crime-free or gap policy in its criminal history calculation, the jurisdiction appears to be encouraging offenders to strive for a crime-free existence. Offenders who are able to remain crime-free for the set period are rewarded for their efforts, even if the fact of their current offense means they were

unable to completely desist from reoffending. Offenders who do not remain crime free will be subject to enhanced penalties.

The Minnesota Sentencing Guidelines Commission had the following to say when it included a decay policy in its very first set of guidelines:

The Commission decided it was important to consider not just the total number of felony sentences, but also the time interval between those sentences. A person who was sentenced for three felonies within a five-year period is more culpable than one sentenced for three felonies within a twenty-year period. The Commission decided that after a significant period of conviction-free living, the presence of old felony sentences should not be considered in computing criminal history scores.<sup>1</sup>

Thus, the Commission was primarily focused on two ideas: the offender's culpability and recognizing the value of crime-free periods. The Commission's comment indicates that the length of the interval between offenses impacted – or was at least relevant to – the offender's culpability. An offender with an old conviction, while not devoid of blameworthiness, appeared to the Commission to be more similar to an offender with no prior conviction. Thus, if increased punishment due to prior convictions is ordinarily justified on the basis of greater culpability, then crime-free periods may serve to negate or at least mitigate that increase in culpability. One reason to utilize a decay or gap period, then, is to temper the punishment for the current offense in recognition of a crime-free period.

*"Studies in the U.S. and Europe have shown that if an offender with a criminal record manages to stay crime free for a long period of time (e.g., 7 to 10 years), then the offender's risk to reoffend becomes close to that of a person without any criminal record."*

The intuition of the Minnesota Sentencing Guidelines Commission regarding the importance of the crime-free period has since been borne out in empirical research. But the focus of the research was not on proving or disproving culpability; it was focused on risk to reoffend. Studies in the U.S. and Europe have shown that if an offender with

a criminal record manages to stay crime free for a long period of time (e.g., 7 to 10 years), then the offender's risk to reoffend becomes close to that of a person without any criminal record.<sup>2</sup> The crime-free period (or gap) matters. Another reason to utilize a decay or gap period, then, is to recognize the declining value of old prior convictions in predicting future offending. One might argue that even if the empirical research is correct, the justification for continuing to use the prior convictions is that the offender being sentenced today *did* in fact reoffend thereby negating the statistical likelihood that the individual was low risk. But as noted above, the risk was nearly equal that anyone in the population might have committed the offense.

## Components of Existing Decay and Gap Policies

Nine of the jurisdictions discussed in this book have enacted decay or gap policies that place limits on the use of prior convictions for criminal history enhancement purposes (see Table 3.1). This section will examine four main considerations present in the existing policies: (1) the length of the decay or gap period; (2) when to start counting the decay or gap period; (3) revival of prior convictions; and (4) offenses for which prior convictions are always counted.

### A. Length of Decay or Gap Period

For jurisdictions that do have a decay or gap policy, a key question is how long the defined decay or gap period should be. For decay policies specifically, the question is how long a conviction should remain live for criminal

history enhancement purposes before it decays. And for gap policies, the question is how long an offender must remain crime-free in order for a prior conviction to no longer be counted for criminal history purposes. As discussed further in the policy section below, in answering these questions, a jurisdiction must decide for what purpose the prior conviction is being utilized and then consider how long the prior conviction is relevant to that purpose.

Nearly every jurisdiction that has a decay or gap policy has multiple defined periods within which a conviction might decay or that an offender must remain crime free. Jurisdictions typically set a lengthier period for prior convictions of more serious crimes and shorter periods for less serious crimes. The most commonly used period is 10 years. But as Table 3.1 shows, in some jurisdictions (e.g., Minnesota), the 10-year period applies to lower level offenses, while in others it applies to either more serious crimes (e.g., Washington) or to all crimes (e.g., Florida). And as explained in section 3 below, the District

**Decay is a policy in which a prior conviction eventually ages out of the criminal history calculation. Once a defined period has passed, the conviction is no longer counted, regardless of whether the offender has remained crime-free for the full duration of the defined period.**

**Table 3.1. Decay or Gap Periods by Length and Jurisdiction**

Decay or Gap Periods By Length and Jurisdiction		
15 years	10 years	5 years
Arkansas (felonies)	Arkansas (misdemeanors)	--
--	Delaware	--
--	District of Columbia	--
Federal (more severe offenses)	Federal (less severe offenses)	--
--	Florida	--
--	Maryland	--
--	Michigan	--
Minnesota (felonies)	Minnesota (misdemeanors and gross misdemeanors)	--
--	Washington (certain felonies and repeat domestic violence offenses)	Washington (Class C felonies and serious traffic convictions)

of Columbia and Michigan can revive convictions that are beyond the 10-year period under certain conditions. Three jurisdictions (Arkansas felonies, Federal, and Minnesota felonies) have a 15-year period, but for all three, this lengthier timeframe applies only to more serious offenses, and there is a shorter period for offenses of lesser severity. Only Washington allows for an even shorter period, stating that Class C felonies (i.e., controlled substance crimes, firearms possession, third-degree assault) and serious traffic convictions will not be included in the criminal history score if the offender has spent 5 years in the community without having been convicted of a crime.

### B. When to Start Counting the Decay or Gap Period

Corollary to the question of how long the decay or gap period should be is when it should start to run. Although most jurisdictions appear to utilize a 10-year period, the conviction may count for criminal history enhancement purposes for much longer depending on when one starts counting the period. Most jurisdictions begin counting the period upon discharge from sentence, meaning when any incarceration time has been served and probation or post-confinement supervision has ended. As a result, the period of time that an offense will count for criminal history enhancement purposes is the period of the sentence plus the defined decay or gap period.

For example, compare the length of time that a prison sentence might be counted under the Minnesota Sentencing Guidelines to the time that a probation sentence might be counted. The Minnesota Sentencing Guidelines Commission reported that the average pronounced prison sentence in 2013 was 45.2 months, or nearly 4 years.<sup>3</sup> Under the Minnesota 15-year decay rule, a felony given the average sentence would be counted in the offender's criminal history score for close to 19 years before it would decay (3.75-year sentence plus 15-year look back period). The Commission has also determined that from 2008-2012, the average pronounced length of probation for drug offenses was 84 months (7 years),<sup>4</sup> so a felony sentenced to this average would be counted in the offender's criminal history score for about 22 years before it would decay (7-year probation sentence plus 15-year look back period). Thus, because the clock on the decay period does not begin to run until discharge from sentence, the offender given the probation sentence would have to wait three years longer for the conviction to decay than the offender sentenced to prison.

Two jurisdictions, Federal and Delaware, start counting the decay or gap period closer to the date of the offense. Under the Federal Sentencing Guidelines, which utilize a decay policy, the clock starts upon the date of sentencing

for the prior offense.<sup>5</sup> And in Delaware, which utilizes a gap policy, the clock starts at the end of incarceration or at the date of sentencing if the offender received probation.<sup>6</sup> In both cases, not requiring full completion of the sentence to trigger the start of the period has the potential to significantly shorten the length of time that an offense counts for criminal history purposes. The Delaware approach seems to introduce an element of proportionality in that the gap period starts sooner for offenders sentenced to probation (at sentencing) than for offenders sentenced to prison (end of incarceration). This approach also seems to recognize time at risk to reoffend. The crime-free period does not run while the offender is in prison, which is a time when the offender is theoretically not at risk to recidivate in the same way that an offender on probation in the community is at risk.



**Gap** is a policy that requires the offender to achieve a crime-free existence for a defined period of time (or "gap"). If the offender is able to achieve the crime-free period, the prior conviction no longer contributes to the criminal history enhancement score, but if the offender commits another crime within that time period, the prior offense will be counted.

### C. Revival of Prior Convictions

In jurisdictions that count prior convictions in perpetuity, prior convictions are always included for criminal history enhancement purposes, no matter how far back they occurred. But jurisdictions that place limits on the use of prior convictions face the question of whether there are any circumstances under which an offense, having once fallen out of the criminal history score, should again be counted. Only the District of Columbia appears to have answered that in the affirmative, though Michigan also has a policy that has the potential to reach very far back into the offender's past.

The District of Columbia has a 10-year look back period, meaning the prior conviction is no longer counted for criminal history enhancement purposes if the amount of time between the completion of the sentence for the prior conviction and the commission of the instant offense is more than 10 years. The D.C. Guidelines refer to this event as "lapse." But if the prior felony conviction or any part of the sentence occurred within the 10-year window preceding commission of the current offense, then *all* prior felonies are

revived and must be counted.<sup>7</sup> If a serious felony is revived, it is weighted normally in the criminal history score. But the weighting for less serious felony offenses that are revived is discounted. In contrast, prior misdemeanors, once lapsed, cannot be revived.<sup>8</sup>

Michigan's policy is a variation on this theme, taking the approach of stringing prior convictions together based on the time elapsed between them. Michigan also has a 10-year look back period. If there are fewer than 10 years between the discharge date of the offender's conviction or juvenile adjudication and commission of the current offense, the prior conviction must be counted. Once a prior conviction is found and scored in this manner, it resets the clock on the 10-year period, and the exercise starts over to look backwards from the prior conviction to determine if there is yet another conviction that occurred within 10-years of *that* conviction. The exercise continues "until a time span equal to or greater than 10 years separates the discharge date of an earlier conviction or adjudication from the commission date of the next conviction or adjudication or until no previous convictions or adjudications remain."<sup>9</sup> Thus, like the District of Columbia, an insufficient gap between the current and prior crime is cause for looking further back into the offender's past for additional prior convictions. But unlike the District of Columbia, which revives *all* prior felonies, Michigan has a limit. Once a 10-year gap is achieved, any priors older than the gap period are permanently removed from the calculation of the offender's criminal history score.

#### D. Prior Convictions That Are Always Counted

The majority of jurisdictions that have enacted a decay or gap policy apply it to all offenses so that any type of offense could potentially be removed from the criminal history calculation. But three states – Arkansas, Delaware, and Washington – exclude certain offenses from their decay or gap policy so that the offenses are always counted. Each of these policies excludes only those offenses deemed most serious, and each utilizes an objective standard to identify those offenses, such as guidelines severity levels or legislative offense definitions.

Arkansas, which utilizes a decay policy, appears to be the most expansive, stating that there are no time limitations on counting prior convictions at offense seriousness levels 6 through 10.<sup>10</sup> These seriousness levels encompass a broad range of more severe crimes including murder, terrorism, kidnapping, aggravated robbery, rape, and manufacture of methamphetamine.<sup>11</sup> But offenses deemed to be of lesser severity such as drug possession in lesser amounts, driving while intoxicated, and lower degrees of assault (including sexual assault and domestic assault) can decay.<sup>12</sup>

In Delaware, which utilizes a gap policy, all offenses except Felony A and Felony B may "wash out" after a 10-year crime-free period.<sup>13</sup> As in Arkansas, the exempted crimes are the most severe, including murder, first- through third-degree rape, hate crimes, kidnapping, home invasion, trafficking of persons, and crimes against children such as sexual abuse, negligence resulting in death, and child pornography.<sup>14</sup> But there are still a range of serious crimes that are classified as violent felonies that have the potential to wash out, such as second-degree assault and first-degree arson of an occupied building.<sup>15</sup>

In Washington, which utilizes a gap policy, offenses except prior Class A felonies and sex convictions at any level "wash out" if after completion of the sentence the offender spends 5 to 10 years in the community without being convicted of a new crime.<sup>16</sup> Class A felonies carry a maximum sentence of life imprisonment, and include offenses such as murder, first-degree assault and rape, first-degree arson, trafficking, and kidnapping with sexual motivation.<sup>17</sup>

### POLICY CONSIDERATIONS

The first policy consideration for any jurisdiction is whether to count prior convictions in perpetuity or whether to enact a decay or gap policy. That decision requires that a commission examine its justifications for using prior convictions as a basis for enhancing the current sentence and determine whether those justifications remain relevant even after a significant period of time has passed. As discussed above, research suggests that the value of prior convictions in predicting future offending declines with the passage of time.

Additionally, a jurisdiction might have more practical reasons to consider enacting a decay or gap policy. A jurisdiction that is facing prison overcrowding might need to think more parsimoniously about how to use its limited correctional resources. Utilizing a decay or gap policy focuses punishment on the *current* offense. As a result, some offenders who might have received a prison sentence when an old conviction is factored in might instead receive community supervision or other intermediate punishments without it. Moreover, if the current offense would not have warranted a prison sentence but for the enhancement due to an old prior conviction, it is most likely a nonviolent offense. In that case, enacting a decay or gap policy would have the added benefit of reserving prison for violent offenders.

For jurisdictions that decide to enact a decay or gap policy, each aspect of the decay and gap policies addressed in the Discussion section above presents a potential policy consideration, which will be further examined here.

**Deciding Between Decay and Gap.** An initial question might be how to decide between a decay or gap policy. If the jurisdiction's justification for using prior convictions is retribution, then a gap policy – requiring a *crime-free* period – makes a policy declaration that efforts to remain crime free can mitigate culpability. A gap policy encourages desistence. It also recognizes a change in the offender's risk profile.<sup>18</sup> A gap policy is therefore an incentive for the individual, a reflection of the general probability of the offender's lower risk, and recognition that an offender who has remained crime-free for a period is less culpable than one without such a gap.

But there may be more practical considerations. For example, although Minnesota initially started with a crime-free period, it later switched to a decay policy for ease of administration.<sup>19</sup> It is interesting to note that the three jurisdictions shown in Table 3.1 that have a 15-year period – Arkansas, Minnesota, and the Federal Sentencing Guidelines – have enacted decay rather than gap policies. It is arguably easier to implement a decay policy that simply requires the passage of a set number of years than it is to implement a gap policy that requires one to obtain detail about subsequent criminal activity. The longer time period for decay could potentially represent a tradeoff between simplicity of application and concern for public safety.

Alternatively, a jurisdiction could consider enacting a policy that combines the decay and gap approaches. That is, if an individual manages to achieve a specified crime-free period, the prior conviction will be washed out forever. This is the approach taken in Delaware.

**Length of Decay or Gap Period.** If the prior record is being used because of its value to predict the offender's risk to reoffend, jurisdictions might consider looking to empirical research to help establish the length of the look back period. Several studies using data sets that followed offenders for long periods of time in both the U.S. and England and Wales have shown that the risk of offending for those with criminal records nears that of those without a record as substantial time passes (e.g., 7 to 10 years).<sup>20</sup> If a commission takes the view that a prior conviction should be counted in the criminal history score until the offender is of comparable risk to the non-offender population, then a look-back period of 10 years might be appropriate. But a commission might also seek to understand how much

higher risk the offender is compared to the non-offender at various points prior to the expiration of the 10-year period, and whether those differences justify stepping down the value that a prior offense contributes to the criminal history score as it ages.

Another approach might be to look at research that addresses the time frame in which recidivism occurs, and set the decay or gap period outside of that. The Bureau of Justice Statistics has published several studies dating back to 1994 on recidivism rates of state prisoners.<sup>21</sup> The most recent study found that three of four prisoners were rearrested within five years of release. But the study also found that the longer prison releasees went without being arrested, the less likely they were to be rearrested at all during the follow up period.<sup>22</sup>

A commission could utilize existing empirical research such as the studies described here or it could replicate such research with its own population to establish an appropriate decay or gap period.

**When to Start Counting the Decay or Gap Period.** When to start counting the decay or gap period is a multi-layered policy consideration. As demonstrated in section 2.B above, a policy that appears to be neutral on its face can be disparate in its application when, for example, the period starts at discharge from sentence, and a lengthy probation term results in the conviction counting for a longer period of time than for an offender who was sentenced to a prison term. The commission might want to consider steps to rectify these types of disparities by, for example, starting the period earlier for probation than for prison sentences, as in Delaware. Additionally, there may be practical issues in implementing the desired timing. For example, in Minnesota, the clock starts at discharge from sentence, but because there is no consistent process for recording that discharge it is not always easy to determine if and when discharge occurred.

**Revival of Convictions.** The question of whether to revive old convictions that had been removed from criminal history is similar to the question of whether to enact a decay or gap policy at all because revival is similar to the policy of counting offenses in perpetuity. A commission must examine its justifications for using prior convictions as a basis for enhancing the current sentence and determine whether those justifications remain relevant even if the offender has managed to achieve a significant crime-free period, but was unable to completely desist from offending.

Table 3.2. Decay and Gap Provisions

 Alabama	No provision.
 Arkansas	Convictions for adult felonies in levels 6-10 are always counted for criminal history purposes. Convictions for felonies in levels 1-5 "will not be counted if a period of fifteen (15) years has elapsed since the date of discharge from or the expiration of the sentence, to the date of the current offense." And prior class A misdemeanors "must have occurred within ten (10) years of the current offense." <sup>23</sup>
 Delaware	Felony A and B crimes are always counted for criminal history purposes. For other offenses, "a conviction-free period of ten (10) years after final release from incarceration, or from date of sentence if only probation at levels I thru IV was ordered, shall be sufficient to 'wash' the criminal history prior to that date." <sup>24</sup>
 District of Columbia	A prior conviction is counted for criminal history purposes "if the amount of time between the completion of the sentence for the prior conviction and the commission of the instant offense is 10 years or less." The conviction will lapse, and not be scored, if the entire sentence is beyond the ten-year window. However, lapsed felony convictions can be revived and scored. "If a prior felony conviction or any part of its sentence (including incarceration, probation, parole or supervised release) occurred within the ten-year window preceding the commission of the instant offense, then all lapsed felony convictions are revived." Prior misdemeanors will also lapse if they fall outside of the 10-year window, but they cannot be revived and they cannot revive other lapsed convictions. <sup>25</sup>
 Federal	Prior convictions are no longer counted for criminal history purposes once they are older than the timeframes set forth in the guidelines. Convictions receiving a sentence of imprisonment for a year and one month or more are counted for 15 years. All other convictions are counted for 10 years. <sup>26</sup>
 Florida	"Convictions for offenses committed more than 10 years before the date of the commission of the primary offense must not be scored as prior record if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or other sanction, whichever is later, to the date of the commission of the primary offense." <sup>27</sup>

Table 3.2, *continued*

 Kansas	No provision.
 Maryland	Older prior convictions continue to be counted. But if the offender has lived in the community “for at least ten years prior to the instant offense without criminal justice system involvement... the criminal record should be reduced by one level: from Major to Moderate, from Moderate to Minor, or from Minor to None.” <sup>28</sup>
 Massachusetts	No provision.
 Michigan	Prior convictions “that precede[] a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the commission date of the next offense resulting in a conviction or juvenile adjudication” are not scored. However, if the most recent conviction falls within that period and must be counted, then the exercise must be repeated “until a time span equal to or greater than 10 years separates the discharge date of an earlier conviction or adjudication from the commission date of the next conviction or adjudication or until no previous convictions or adjudications remain.” <sup>29</sup>
 Minnesota	A prior felony conviction is not counted for criminal history purposes “if a period of fifteen years has elapsed since the date of discharge from or expiration of the sentence to the date of the current offense.” For prior gross misdemeanors and misdemeanors, the period is ten years. <sup>30</sup>
 North Carolina	No provision.
 Oregon	No provision.
 Pennsylvania	No provision.
 Tennessee	No provision.

Table 3.2, continued

 Utah	No provision.
 Virginia	Only the five most recent adult conviction/sentencing or juvenile adjudication/sentencing events are scored. <sup>31</sup>
 Washington	Prior Class A and felony sex convictions are always counted for criminal history purposes. Prior Class B (juvenile or adult) felony convictions, other than sex offenses, are not counted if "since the last date of release from confinement . . . the offender had spent ten consecutive years in the community without having been convicted of any crime." Prior convictions for repetitive domestic violence offenses are also subject to a ten-year crime-free period. For Class C felonies and prior serious traffic convictions, the required crime-free period is five years. <sup>32</sup>

## End Notes

<sup>1</sup> Minn. Sentencing Guidelines cmt. II.B.106 (1981).

<sup>2</sup> See, e.g., Keith Soothill & Brian Francis, *When Do Ex-Offenders Become Like Non-Offenders?*, 48 The Howard Journal 373, 385 (2009); Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 Crime & Delinquency 64, 80 (2007); Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Public Policy no. 3, 483-504 (2006).

<sup>3</sup> Minnesota Sentencing Guidelines Commission, *2013 Sentencing Practices: Annual Summary Statistics for Felony Offenders* 20 (2013).

<sup>4</sup> Minnesota Sentencing Guidelines, *Length of Stayed Sentences: Sentenced 2008-102* (May 15, 2014) (on file with the author).

<sup>5</sup> U.S. Sentencing Guidelines Manual § 4A1.2 (2014).

<sup>6</sup> Del. Sentencing Accountability Comm'n Benchbook 26 (2014).

<sup>7</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.3 (2014).

<sup>8</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.2 (2014).

<sup>9</sup> Mich. Sentencing Guidelines Manual Step.1.D (2014).

<sup>10</sup> Arkansas Sentencing Standards Grid Offense Serious Rankings & Related Material 102 (2013).

<sup>11</sup> See *id.* at 5-9 (identifying common offenses at seriousness levels 6-10; offenses at these seriousness levels cannot decay).

<sup>12</sup> See e.g., *id.* at 10-14 (identifying common offenses at seriousness levels 1-5; offenses at these seriousness levels can decay).

<sup>13</sup> Del. Sentencing Accountability Comm'n Benchbook 26 (2014).

<sup>14</sup> See *id.* at 31-39 (identifying Felony A and B offense; offenses defined in this manner cannot decay).

<sup>15</sup> See, e.g., *id.* at 40-73 (identifying Felony C through G offenses, some of which are labeled as violent).

<sup>16</sup> Wash. State Adult Sentencing Guidelines Manual 58 (2013).

<sup>17</sup> See *id.* at 89-96 (identifying offense seriousness levels by offense level).

<sup>18</sup> See Soothill et al., *supra* note 2.

<sup>19</sup> See Minn. Sentencing Guidelines cmt. 2.B.113 (2014) ("While this procedure does not include a measure of the offender's subsequent criminality, it has the overriding advantage of accurate and simple application").

<sup>20</sup> See sources cited *supra* note 2.

<sup>21</sup> See Bureau of Justice Statistics, Data Collection: Recidivism of State Prisoners, available at [http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&id=270#BJS\\_data\\_experts](http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&id=270#BJS_data_experts).

<sup>22</sup> Alexia D. Cooper, Matthew R. Durose, & Howard N. Snyder, Ph.D., *Recidivism of Prisoners Released in 30 States in 2005: Patterns From 2005 to 2010* (Bureau of Justice Statistics 2014).

<sup>23</sup> Arkansas Sentencing Standards Grid Offense Serious Rankings & Related Material 102-03 (2013).

<sup>24</sup> Del. Sentencing Accountability Comm'n Benchbook 26 (2014).

<sup>25</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.3 (2014).

<sup>26</sup> U.S. Sentencing Guidelines Manual § 4A1.2(e) (2014).

<sup>27</sup> Fla. Crim. Punishment Code: Scoresheet Preparation Manual 10 (2014).

<sup>28</sup> Md. Sentencing Guidelines Manual § 7.1.C.2 (April 2013).

<sup>29</sup> Mich. Sentencing Guidelines Manual Step.1.D (2014).

<sup>30</sup> Minn. Sentencing Guidelines §§ 2.B.1.c and 2.B.3.e. (2014).

<sup>31</sup> Va. Sentencing Guidelines Gen'l Instructions 27 (17th Ed. July 1, 2014).

<sup>32</sup> Wash. State Adult Sentencing Guidelines Manual 58 (2013).



### Key Points

- The definition of a “prior” conviction in guidelines systems ranges from very narrow (only convictions entered before commission of the current crime or crimes being sentenced) to very broad (any crime sentenced before or during the current sentencing event, and regardless of the order in which the “prior” and the current crimes were committed).
- Several retributive rationales for criminal history enhancement require that the prior crime have been both convicted and sentenced before the offender committed the current crime(s) being sentenced, but no guidelines system uses that narrow a definition.
- Sentencing commissions should clarify the punishment purposes they believe are served by enhancing sentences based on crimes committed or convictions entered after commission of the current offense or offenses. If a broad definition of “prior” conviction is proposed or is already being used, the commission should examine the fiscal and other impacts resulting from that choice.

## INTRODUCTION

The concept of a “prior” conviction, used to enhance the sentence for the current offense or offenses, can be defined in a variety of ways. Under the narrowest definition, the offender must have been sentenced or at least convicted for the prior crime before he committed the current offense(s). But as shown in this chapter, only five guidelines systems apply such a narrow definition.

In eleven systems a conviction entered after the current offense or offenses were committed can also count as a “prior” conviction provided the conviction had been entered before the start of the current sentencing event, and is not for a current offense to be sentenced at that event. Two systems have even broader rules – when multiple current offenses are being sentenced, some or all of those offenses are counted as prior convictions in the sentencing of some or all other current offenses. Thus, in these two systems, the same crime can count as both a current offense and as a prior conviction.<sup>1</sup>

This chapter first explains the policy and practical importance of choices about how “prior” convictions are defined. The chapter then describes the variety of ways guidelines systems define what qualifies as a “prior” conviction. Following that, the chapter further examines the underlying policy issues at stake, and suggests research and reform measures for sentencing commissions and other researchers to undertake in this area.

## DISCUSSION

### Part 1: Why These Rules Matter

The definition of “prior” convictions has both principled and practical significance. Several of the retributive (“just deserts”) rationales for criminal history sentencing enhancements posit higher culpability for a new offense on the assumption that, at the time the new offense was committed, the offender had previously been given an official warning, in the form of conviction and sentencing, that criminal behavior will not be tolerated; in light of the offender’s heightened awareness of his duty to obey the law, his further criminal acts demonstrate a deliberate disregard for and defiance of the criminal law’s commands.<sup>2</sup> This rationale would support the narrowest definition of a prior conviction, generating lower criminal history scores and therefore fewer fiscal and other impacts associated with high magnitudes of criminal history enhancement (see Chapter 2 for further discussion of those impacts). But as shown in Part 2 below, no guidelines system requires that the offender have already been *sentenced* for the prior offense before committing the current offense, and only five systems even require *conviction* for the prior offense to have been entered before the current offense was committed. Versions of the latter rule are often found in laws imposing higher penalties for a second or subsequent violation of the same or similar type, and in habitual offender statutes—“priors” must have resulted in conviction before

the current offense was committed, or the next in a series of prior offenses was committed.<sup>3</sup> But that narrower approach is the exception, not the rule, among guidelines criminal history formulas.

***"No guidelines system requires that the offender have already been sentenced for the prior offense before committing the current offense, and only five systems even require conviction for the prior offense to have been entered before the current offense was committed."***

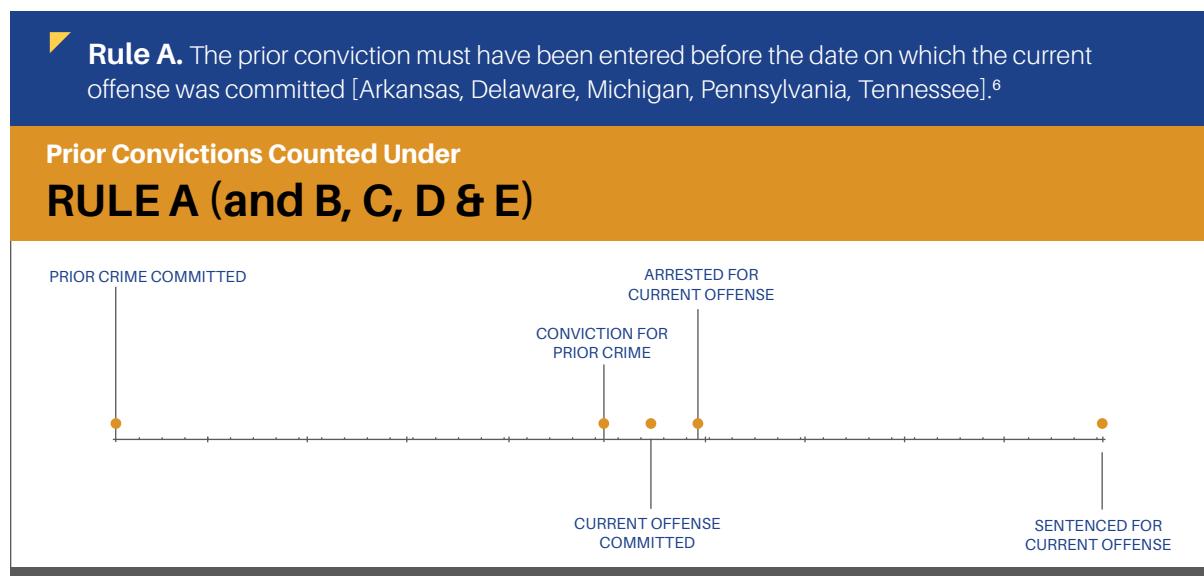
Systems that count convictions entered after commission of the current offense may be assuming that it is the total number of offenses, not the order in which they are committed or adjudicated, that increases the offender's

culpability and/or his or her risk of recidivism. It is well known that an offender's risk of committing future crimes generally increases in proportion to the number of crimes committed,<sup>4</sup> but there does not appear to be any data showing that such risk increases at the same rate regardless of the timing of crimes and convictions.

The two guidelines systems with the broadest definitions allow some or all multiple current convictions to be counted as prior convictions in criminal history scoring. Such broad rules maximize the short-term<sup>5</sup> sentencing impact of repeat offending, and they are probably based on assumed greater recidivism risk rather than on retributive punishment goals. As noted above, there is substantial data to support the assumption that offender risk increases in proportion to the total number of crimes committed; however, there is no data to support the necessary further assumption that this relationship holds true for multiple crimes sentenced at one time as well as those sentenced over a longer period of time.

## Part 2: Varying Definitions of "Prior" Convictions

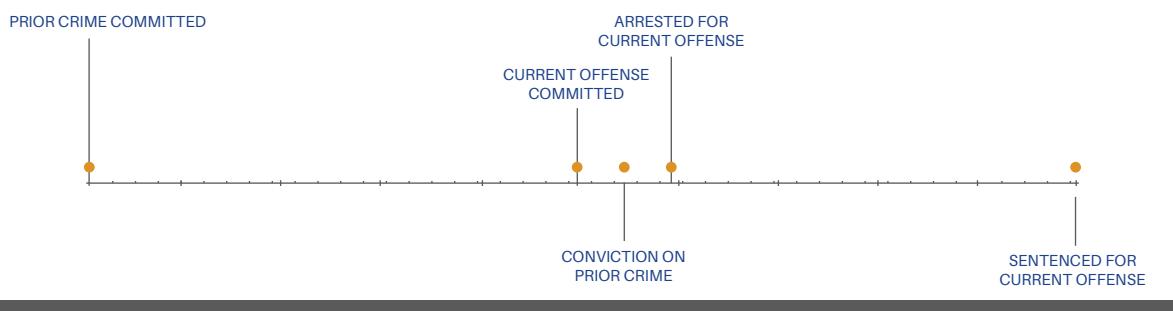
Toward the end of this chapter, Table 4.1 reveals how guidelines systems employ a variety of rules to determine which convictions qualify as "prior" when calculating the criminal history score (or which prior convictions enter into the total point score or textual rules, in non-grid systems such as those in Alabama and Delaware). The rules fall into five general categories, which are illustrated below in order of increasing inclusiveness (from the narrowest/fewest qualifying priors, to the broadest):



► **Rule B.** The prior conviction must have been entered before the defendant was *arrested* for the current offense [Alabama]. This rule operates very similarly to Rule A, provided that arrest for the current offense occurs soon after commission of that offense, but in some cases a “prior” conviction will be counted that had not been entered on the date the current offense was committed.<sup>7</sup>

#### Prior Convictions Counted Under

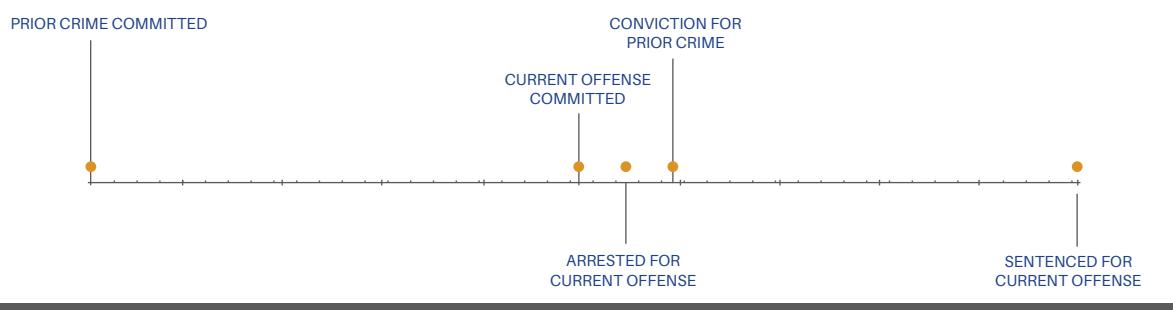
### RULE B (and C, D & E, but not A)



► **Rule C.** The prior conviction must be for a crime committed (but not necessarily convicted) before the primary (most serious) current offense was committed [Florida].<sup>8</sup>

#### Prior Convictions Counted Under

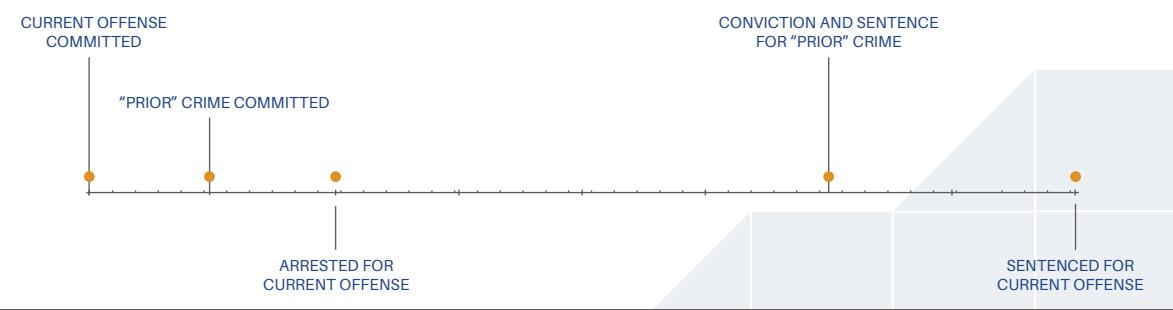
### RULE C (and D & E, but NOT A or B)



► **Rule D.** The criminal history score is determined before the start of the current sentencing event; it excludes any current offense to be sentenced at that event, but can include convictions for crimes that had not yet resulted in conviction (and may not have even been committed) before the current offense or offenses were committed [District of Columbia, Federal, Kansas, Maryland, Massachusetts, North Carolina, Oregon, Utah, Virginia].<sup>9</sup>

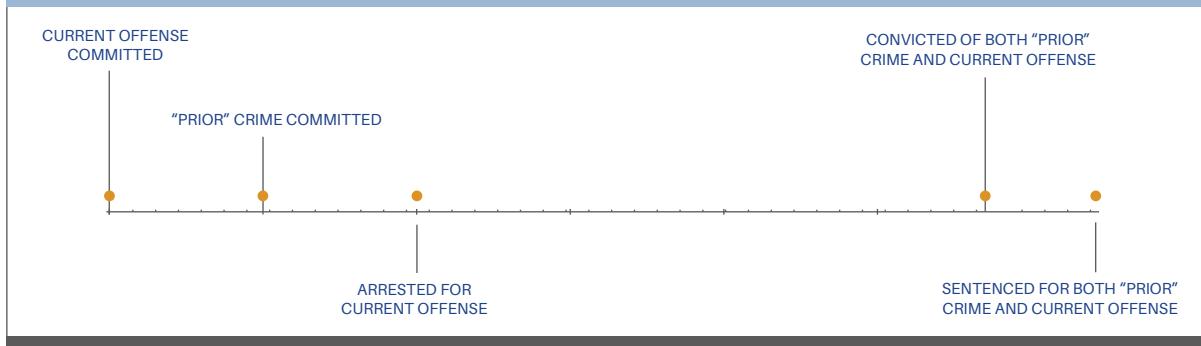
#### Prior Convictions Counted Under

### RULE D (and E, but not A, B or C)



► **Rule E.** The criminal history score is determined during the current sentencing event [Minnesota, Washington]. This means that, in addition to convictions that were already part of an offender's criminal history score at the start of sentencing, current offenses can also count as prior convictions in the sentencing of some or all of the other current offenses.<sup>10</sup>

### Prior Convictions Counted Under RULE E ONLY (not A, B, C or D)



*"Systems that count convictions entered after commission of the current offense may be assuming that it is the total number of offenses, not the order in which they are committed or adjudicated, that increases the offender's culpability and/or his or her risk of recidivism."*

Sentencing works somewhat differently in the two Rule E states. In Minnesota, multiple current offenses are sentenced in the order in which they were committed. If concurrent sentences are imposed, after each crime is sentenced that crime is added to the criminal history score applicable to the remaining crimes; this means that the last crime sentenced (the last crime to be committed) will have the highest criminal history score, even if it is not the most serious of the crimes. But when multiple current offenses

are sentenced consecutively, the second and any further offenses are given a criminal history score of one or zero, depending upon whether consecutive sentencing was recommended or discretionary.

The Washington rules applicable to sentencing of multiple current offenses are broader than the Minnesota rules in two respects. First, when such offenses are sentenced concurrently Washington includes most of the other current offenses when calculating the criminal history score for each current offense. Since the longest concurrent sentence is the controlling sentence, that sentence is likely to be longer under the Washington rules since the most serious current offense, even if it was not committed last in time, will have a criminal history score that includes most of the other current offenses. The Washington rules are also broader in another way: when multiple current offenses are sentenced consecutively, more current offenses are included in criminal history scoring than in Minnesota.

## POLICY CONSIDERATIONS

Each sentencing commission should examine its approach to the definition of a "prior" conviction. The first step is to examine and clarify which retributive, risk-management, or other punishment goals are believed to justify criminal history enhancements, and whether achievement of those goals depends on the timing of prior and current offenses. As was noted in Part 1, some retributive rationales for criminal history enhancements require a narrow definition of "prior" convictions; if a commission views desert as a major reason for criminal history enhancements the commission may wish to specify, if it has not already done so, that for a prior conviction to be included in criminal history it must have been entered before commission of the current offense.

Risk management goals are consistent with a broader definition of "prior" convictions-- there is a large body of research showing that recidivism risk increases in direct proportion to the total number of an offender's convictions. However, there is a lack of empirical validation for the necessary further assumption that this remains true regardless of the order or timing of prior and current offenses and convictions. Under some circumstances it could be the case that the additional crimes included under broader definitions of a "prior" conviction are more indicative of elevated risk than the crimes included under a narrow definition that requires the prior conviction to have already been entered when the current offense was committed; the latter group of crimes will tend to be farther back in time, whereas crimes committed or convicted after commission of the current offense will be more recent, and thus potentially more indicative of an offender whose criminal career is still active. On the other hand, very recent or contemporaneous offenses might have limited additional risk-predictive value, particularly if they reflect situational or other temporary pressures or temptations. Where possible, sentencing commissions and/or independent researchers should use commission and other data to examine whether and to what extent a broader definition of prior convictions improves the ability of the criminal history score to identify higher-risk offenders. (See Chapter 11 for further discussion of research to validate the risk-predictive value of criminal history scores and score components.)

Even if the more recent crimes included in a broader definition of a "prior" conviction are found to have substantial value as indicators of heightened risk, research and policy analysis should also examine whether the higher criminal history enhancements resulting from use of a broader (more inclusive) definition are cost-effective. For example, in the case of drug crimes and other offenses involving prohibited goods and services, it may be that high-risk offenders taken off the streets are quickly replaced by other offenders. And as was noted in Chapter 1, there is little evidence that increased sentence severity provides much additional deterrence of criminal activity. Commissions in systems that have chosen or propose to define prior convictions broadly should also examine other potential adverse consequences of a broad definition resulting in more substantial criminal history enhancements, including increased racial disparate impact and reduced proportionality of sentence severity to current offense severity.

Table 4.1. What Counts as a “Prior” Conviction [PC] When Computing the Criminal History Score [CHS]?

Alabama <sup>11</sup>	[Rule B] PC conviction date must precede the arrest date of the current offense.
Arkansas <sup>12</sup>	[Rule A] PC conviction date must precede commission date of current offense.
Delaware <sup>13</sup>	[Rule A] PC conviction date must precede commission date of current offense.
District of Columbia <sup>14</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction can be after current offense commission date(s)).
Federal <sup>15</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction date can be after the current offense commission date(s)).
Florida <sup>16</sup>	[Rule C] PC must be committed before primary current offense was committed.
Kansas <sup>17</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction date can be after the current offense commission date(s)).
Maryland <sup>18</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction date can be after the current offense commission date(s)).
Massachusetts <sup>19</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction date can be after the current offense commission date(s)).
Michigan <sup>20</sup>	[Rule A] PC conviction date must precede commission date of current offense.
Minnesota <sup>21</sup>	[Rule E] CHS is defined during the current sentencing event; if multiple current offenses are sentenced concurrently, CHS rises as each offense is sentenced.
North Carolina <sup>22</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction data can be after current offense commission date(s)).
Oregon <sup>23</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction date can be after current offense commission date(s)).
Pennsylvania <sup>24</sup>	[Rule A] PC conviction date must precede commission date of current offense.
Tennessee <sup>25</sup>	[Rule A] PC conviction date must precede commission date of current offense.
Utah <sup>26</sup>	[Rule D] CHS is defined before start of sentencing (but prior offense date or conviction date can be after current offense commission date(s)).
Virginia <sup>27</sup>	[Rule D] CHS is defined before the start of sentencing (but prior offense date or conviction date can be after current offense commission date(s)).
Washington <sup>28</sup>	[Rule E] CHS is defined during the current sentencing event; if there are multiple current offenses, CHS for each offense generally includes all or most of the other offenses.

<sup>1</sup> There are five other systems in which, although multiple current offenses do not add to criminal history, they nevertheless increase the severity of the recommended sentence – by increasing the offense severity level; by increasing the total point score used in lieu of a grid to compute the presumptive sentence; or by increasing the recommended time to serve in prison before parole. The treatment of multiple current offenses poses particularly complex issues, and these will be further examined in Chapter 10 of this Sourcebook.

<sup>2</sup> For a summary and critique of retributive rationales for criminal history enhancements, see Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* 181-87 (Oxford Univ. Press 2013); see also Chapter 1 of this Sourcebook.

<sup>3</sup> See, e.g., Minn. Stat. §§ 152.01, subd. 16a (2015) (defining “subsequent” drug crimes subject to mandatory minimum prison terms); 609.1095, subd. 1(c) (2015) (defining “prior conviction” in statute imposing sentence enhancements for a sixth felony or third violent felony).

<sup>4</sup> See, e.g., Paul Gendreau, Tracy Little, & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works?* 34 Criminology 575 (1996) (providing meta-analysis of 131 studies found that criminal history was one of the strongest predictors of recidivism). The relationship between repeat offending and recidivism risk is further discussed in Chapter 11 of this Sourcebook.

<sup>5</sup> Of course, any conviction that has no immediate sentencing impact – because it is not included in the current criminal history score, otherwise allowed to directly affect the presumptive guidelines sentence, or sentenced consecutively—will eventually be counted if the offender is later sentenced for further crimes.

<sup>6</sup> Here is an example of a prior conviction that would be counted under rule A (and also under any of the other four rules): the prior crime is committed on February 1st; defendant is convicted of the prior crime on July 1st; the current offense is committed on July 15th; defendant is arrested for the current offense on July 30th; defendant is sentenced for the current offense on December 1st.

<sup>7</sup> For example, in the following case the prior conviction would be counted under Rule B (and also under Rules C to E), but not under Rule A: the prior crime is committed on February 1st; the current offense is committed on July 1st; defendant is convicted of the prior crime on July 15th; defendant is arrested for the current offense on July 30th; defendant is sentenced for the current offense on December 1st.

<sup>8</sup> Here is an example of a case in which a prior conviction would be counted under Rule C (and also under Rules D and E), but not under either Rule A or Rule B: the prior crime is committed on February 1st; the current offense is committed on July 1st; defendant is arrested for the current offense on July 15th; defendant is convicted of the prior crime July 30th; defendant is sentenced for the current offense on December 1st.

<sup>9</sup> In this example, the prior conviction would be counted under Rule D (and also under Rule E), but not under Rules A, B, and C: the current offense is committed on February 1st; the “prior” crime is committed on March 1st; defendant is arrested for the current offense on April 1st; defendant is convicted and sentenced for the prior crime on August 1st; defendant is sentenced for the current offense on October 1st.

<sup>10</sup> Here is an example in which a conviction would be included in criminal history for some or all current offenses under Rule E, but would not be counted under any of the other four rules: the current offense is committed on February 1st; the “prior” crime is committed on March 1st; defendant is arrested for the current offense on April 1st; defendant is convicted of both the prior crime and the current offense on July 15th; defendant is sentenced for both the prior crime and the current offense on July 30th.

<sup>11</sup> Ala. Presumptive and Voluntary Sentencing Standards Manual 21, 32 (Oct. 1, 2013).

<sup>12</sup> Ark. Code Ann. § 16-90-803(b)(2)(C)(v)(c) (2015) (felonies at seriousness levels I to V decay after a period of at least 15 years between discharge or expiration of sentence and the date of the current offense). The sentencing guidelines contain no further information on the definition of a “prior” offense, but according to staff at the Sentencing Commission prior convictions are defined as of the date the current offense was committed. See generally Ark. Sentencing Standards Grid, Offense Sentencing Rankings, and Related Material (Nov. 2013).

<sup>13</sup> Del. Sentencing Accountability Comm'n Benchbook 27, item 5 (2015).

<sup>14</sup> D.C. Voluntary Sentencing Guidelines Manual 6-7 (June 30, 2014) (stating that prior conviction or adjudication judgment must be entered before the day of current sentencing; order in which offenses occurred is not controlling; sentences entered on the same day as the current sentencing or that arise out of the same event are not prior convictions/adjudications).

<sup>15</sup> U.S. Sentencing Guidelines Manual § 4A1.2, application note 1 (Nov. 1, 2014) (defining a “prior sentence” as one imposed prior to sentencing on the instant offense, other than for conduct that is part of the instant offense).

<sup>16</sup> Fla. Crim. Punishment Code: Scoresheet Preparation Manual 10 (Oct. 1, 2014) (“prior record” refers to any conviction for an offense committed by the offender prior to the commission of the primary offense; it does not appear that the same offense can count both in criminal history and as a current “additional offense.”).

<sup>17</sup> Kan. Stat. Ann. § 21-6810(a) (2014) (“[P]rior conviction is any conviction, other than another count in the current case . . . which occurred prior to sentencing in the current case regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case.”).

<sup>18</sup> Maryland Sentencing Guidelines Manual, Version 6.3, eff. Dec. 1, 2014, p. 23 (“prior adult criminal record includes all adjudications preceding the current sentencing event, whether the offense was committed before or after the instant one”).

<sup>19</sup> Mass. Sentencing Guidelines 7 (Feb. 1998) (dictating that prior convictions include offenses which reached final disposition prior to the disposition date of the current offense being sentenced).

<sup>20</sup> Mich. Sentencing Guidelines Manual 14 (May 1, 2014) (“[A prior conviction is] one that was entered on the offender’s criminal record before the commission date of the current offense being sentenced.”).

<sup>21</sup> Minn. Sentencing Guidelines § 2.B.1(e) (Aug. 1, 2014) (providing that multiple current offenses are sentenced in the order in which they occurred; when concurrent sentences are imposed, as each offense is sentenced it is included in the criminal history on the remaining offense(s) to be sentenced.) Different rules apply when multiple current offenses are sentenced consecutively. See *id.*, §§ 2.F.1(b) and 2.F.2(a).

<sup>22</sup> N.C. Structured Sentencing Training and Reference Manual 15 (Dec. 1, 2009) (providing that an offender has a prior conviction when on the date of sentencing if the offender has been finally convicted in District Court, convicted in Superior Court even if still subject to appeal, or has been convicted by a court outside of the state).

<sup>23</sup> Oregon Sentencing Guidelines Implementation Manual 51 (Sept. 1989) (explaining that the legislative intent behind the state sentencing guidelines was for criminal history to include all convictions that had been entered at the time of the current sentencing but not any of the current offenses, even one committed prior to another current offense).

<sup>24</sup> 204 Pa. Code § 303.8(a) (2015) (“In order for an offense to be considered in the Prior Record Score, both the commission of and conviction for the previous offense must occur before the commission of the current offense.”).

<sup>25</sup> See, e.g., Tenn. Code Ann. § 40-35-106, subd. (b)(1) (2015) (“Prior conviction” means a conviction for an offense that was entered prior to the commission of the offense for which the defendant is being sentenced.”).

<sup>26</sup> Utah Adult Sentencing and Release Guidelines 4 (2014) (explaining that a prior felony conviction must have already been sentenced, and it cannot be a current offense).

<sup>27</sup> Va. Sentencing Guidelines Gen'l Instructions 27 (July 1, 2014) (“A prior conviction or delinquency adjudication is any offense, other than the instant offense(s), for which the offender has been convicted or pled guilty prior to the present sentencing event;” this includes cases pending sentencing in another court, even if that crime was committed after the current one).

<sup>28</sup> Wash. Rev. Code § 9.94A.589(1)(a) (2014) (providing that when imposing concurrent sentences for two or more current offenses, the sentence range for each current offense is determined by using all other current and prior convictions as if they were prior convictions).



### Key Points

- Nearly every guidelines jurisdiction includes prior juvenile adjudications in their criminal history enhancement scores (only NC does not).
- Juveniles who start offending prior to age 12 are more likely to offend into early adulthood than juveniles who start offending at a later age.
- Juvenile arrests and adjudications have been found to be predictive of recidivism.
- The U.S. Supreme Court found that juveniles are “categorically less culpable than the average criminal.”
- A balanced approach might be to include prior juvenile adjudications in the criminal history enhancement score, but to limit their application.
- In jurisdictions that place a cap on the number of points that can be derived from juvenile adjudications, a prior juvenile record could move an offender nearly 30 to 50% of the way across the grid. In a jurisdiction that does not impose such limits, a prior juvenile record could potentially move an offender much further across the grid.
- All of the jurisdictions that utilize a point-based criminal history system discount the point values of some or all prior juvenile adjudications.
- Regardless of the exact formula used for discounting juvenile adjudications, the impact of such a policy is that prior juvenile adjudications will move the offender into higher criminal history scores more slowly than prior adult convictions.

### INTRODUCTION

Nearly every guidelines jurisdiction includes prior juvenile adjudications in their criminal history enhancement scores (only NC does not). Seven jurisdictions treat prior juvenile adjudications the same as prior adult convictions (DE, FL, KS, MA, OR, PA, TN). But the majority of jurisdictions have enacted policies that limit the use of juvenile adjudications in some way. Among them, there is a great deal of variation in the types of prior offenses that will be counted and for how long, and the weight given to them. This chapter first describes research related to juvenile offending. The chapter then delineates the different ways in which jurisdictions have chosen to limit the use of prior juvenile adjudications, and then raises potential policy considerations relating to their use.

### DISCUSSION

#### 1. Research on Juvenile Offending

Prior juvenile adjudications are commonly considered when determining an appropriate sentence for an offense. Seventeen of the eighteen jurisdictions discussed in this Sourcebook include juvenile adjudications in their criminal history enhancement scores. This section provides a brief overview of research about juvenile offending that has a bearing on the general justifications for use of criminal history enhancements.<sup>1</sup>

When considering whether or to what extent juvenile adjudications should be included in the criminal history enhancement score, it is helpful to examine the relationship between juvenile and adult offending. Research has shown the existence of an age-crime curve whereby

criminal activity begins between ages 8 and 14, peaks in the late teens, and then declines into adulthood.<sup>2</sup> Individuals who begin offending at an earlier age tend to have longer criminal careers and to commit relatively more offenses than individuals who begin offending later in life.<sup>3</sup> For example, one study found that individuals who began offending between ages 10 and 17 had an average criminal career duration that was nearly twice that of individuals who began offending between ages 18 and 25 (11.5 years vs. 6.6 years, respectively). The 10-17 age group also garnered an average number of convictions three times that of the 18-25 age group (6.5 convictions vs. 2.3 convictions, respectively).<sup>4</sup> Another study found that juveniles who start offending prior to age 12 are more likely to offend into early adulthood than juveniles who start offending at a later age.<sup>5</sup> Thus, the age of onset (when an individual begins offending) is a critical factor.<sup>6</sup>

In addition to being examined for its relationship to the criminal career pattern, juvenile offending has also been examined for its predictive power. The Pennsylvania Commission on Sentencing, as part of a larger risk assessment project, recently studied the impact of a juvenile record on recidivism risk. The Commission found that juvenile arrests and juvenile adjudications are predictive of recidivism. However, the Commission also found adding these juvenile factors to the factors that had already been included in their risk assessment model did not improve the overall accuracy of the model.<sup>7</sup>

There have also been recent developments in brain science and behavioral development research that helps to explain juvenile behavior.

There are dramatic differences between the brains of adolescents and those of adults. Studies show that the brain continues to develop into the twenties, and this is particularly true of physiological developmental processes relating to judgment and impulse-control. Researchers have found that the parts of the brain in the frontal lobe associated with regulating aggression, long-range planning, abstract thinking and, perhaps, even moral judgment... are not fully developed until adulthood. Because they lack frontal lobe functions, adolescents tend to make decisions using the amygdala, a part of the brain associated with impulsive and aggressive behavior.<sup>8</sup>

In line with this research, the U.S. Supreme Court recently recognized in three cases –*Roper v. Simmons*, *Graham vs. Florida*, and *Miller v. Alabama*<sup>9</sup> – that juveniles are different than adults in ways that justify different treatment under the constitution. As the Supreme Court recognized in *Roper*, juveniles are “categorically less culpable than the average criminal.”<sup>10</sup> The Court further explained, juveniles have a

tendency to conform, are more susceptible to negative influences and peer pressure, and are not as well formed in their personality.<sup>11</sup> Additionally, in *Miller*, the Court noted that juveniles may be subject to brutal or dysfunctional home environments and have no ability to remove themselves from that environment.<sup>12</sup>

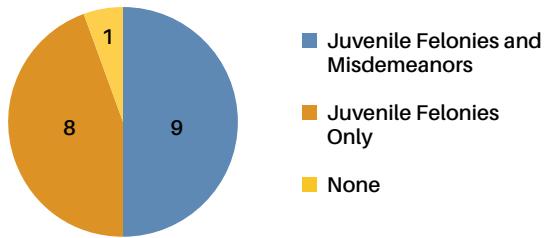
All of the research described in this section suggests that sentencing commissions face a balancing act when deciding how to utilize prior juvenile adjudications. On the one hand, because juvenile offending is a predictor of adult offending, especially for individuals who begin offending at a very early age, utilizing prior juvenile adjudications is consistent with the use of criminal history as a proxy for risk to reoffend. On the other hand, if individuals are less culpable for crimes they commit as juveniles, there is some question as to the degree to which juvenile adjudications affects the culpability of individuals who later commit offenses as adults. A balanced approach might be to include prior juvenile adjudications in the criminal history enhancement score, but limit their application. The following sections explain the various ways that jurisdictions have achieved such limitation.

**“Sentencing commissions face a balancing act when deciding how to utilize prior juvenile adjudications.”**

## 2. Limiting Juvenile Adjudications by Offense Type

Although the majority of guidelines jurisdictions (17 of 18) include juvenile adjudications in the criminal history calculation, about half limit the kinds of offenses for which juvenile adjudications will be counted. Eight jurisdictions (AR, DC, DE, MA, MN, OR, TN, WA) only count adjudications for felony offenses. Three of the eight states narrow that even further, and count only a subset of felonies. In Arkansas, only offenses for which the individual could have been tried as an adult count.<sup>13</sup> In Massachusetts, only prior adjudications for offenses that fall into the top three seriousness levels on the grid, all of which are in the incarceration zone, are counted for criminal history enhancement purposes.<sup>14</sup> In Tennessee, only juvenile adjudications for Class A or B felonies will be counted, as well as any felony for which the juvenile was transferred to adult court and convicted.<sup>15</sup>

## Juvenile Offenses Included in Criminal History



Nine jurisdictions (AL, Federal, FL, KS, MD, MI, PA, UT, VA) count not only felony juvenile adjudications, but also juvenile misdemeanors. Where juvenile misdemeanors are counted, the rules tend to mirror the rules for counting adult misdemeanor convictions. Thus, there is a great deal of variation, with some counting all but traffic offenses (except driving under the influence),<sup>16</sup> and others counting only a subset of the more serious misdemeanors.<sup>17</sup> For more detail on the inclusion of misdemeanors in criminal history, see Chapter 6 – Prior Misdemeanor Convictions.

### 3. Limiting Juvenile Adjudications by the Offender's Age or Elapsed Time

Another approach jurisdictions may take in limiting the contribution of juvenile adjudications to criminal history is to limit how long they may be counted for criminal history enhancement purposes. A small minority of jurisdictions (KS, MN, and MD) use the offender's age to establish a hard limit. Kansas takes the approach of both defining an age beyond which juvenile adjudications will no longer count, and limiting the scope of adjudications to which this decay policy will apply. At age 25, lower level felonies and misdemeanors will decay; but all other juvenile adjudications will continue to be counted in the same manner that adult convictions are counted.<sup>18</sup> In contrast, Minnesota and Maryland look solely at the offender's age at the time of the current offense. In Minnesota, juvenile adjudications are no longer counted if the offender is 25 or older;<sup>19</sup> in Maryland, juvenile adjudications will be scored at zero if the offender is 23 or older.<sup>20</sup>

A larger number of jurisdictions take the decay or gap approach, instructing that once a certain period of time has passed (decay: AR, DC, Federal, FL) or if the individual is able to maintain a crime-free existence for a certain number of years (gap: MI and WA), juvenile adjudications will no longer be counted.<sup>21</sup> The majority of states that utilize the decay

approach set the decay period at 5 years (only Arkansas sets it at 10 years).<sup>22</sup> But the jurisdictions vary as to when to count the five-year period: some count it from the date of the juvenile offense to the date of the current offense;<sup>23</sup> others count it from completion of the juvenile sentence to the date of the current offense.<sup>24</sup> One state – Pennsylvania – takes a much stricter hybrid approach. There, juvenile adjudications will not be counted if the offender was 28 or older when the current crime was committed *and* if the offender has been crime-free for the 10 years prior to his or her 28th birthday.<sup>25</sup> For more detail about decay and gap policies, see Chapter 3.

### 4. Point Values

A final consideration with regard to prior juvenile adjudications is whether they should be given the same value within the criminal history enhancement score as similar adult convictions. As described in the Purpose and Scope section of this book, jurisdictions may represent criminal history in two different ways: (1) a point-based system in which the total criminal history score is determined by adding up points for the various criminal history components; or (2) a categorical system in which criminal history is divided into categories representing different numbers and severities of prior offenses. The five jurisdictions taking the categorical approach treat prior juvenile offenses the same as prior adult convictions for purposes of determining the appropriate criminal history category.<sup>26</sup> Of the jurisdictions that utilize a point-based criminal history score, ten jurisdictions (AL, AR, DC, Federal, MD, MI, MN, UT, VA, WA) assign criminal history points to some or all prior juvenile adjudications differently than the points are assigned to prior adult convictions.<sup>27</sup>

First, all of the jurisdictions that utilize a point-based system discount the point values of some or all prior juvenile adjudications. For example, Minnesota assigns one point for every two prior juvenile felony adjudications, regardless of the type of offense.<sup>28</sup> In contrast, for adults, prior offenses are assigned points based upon the severity level of the prior offense, with higher weights applied to more serious offenses, and lower weights assigned to less serious offenses.<sup>29</sup> Washington uses individual scoring sheets by offense type. On each one, the points allocated for some prior juvenile adjudications (typically more serious or violent) are equal to the points allocated for similar adult prior convictions. But the points for less serious or nonviolent offenses are typically half that allocated for similar adult offenses.<sup>30</sup> And in Utah, points for juvenile adjudications are discounted by half the value allocated to similar adult offenses.<sup>31</sup> Regardless of the exact formula used for discounting juvenile adjudications, the impact of

such a policy is that prior juvenile adjudications will move the offender into higher criminal history scores more slowly than prior adult convictions.

Additionally, six of the nine point-based jurisdictions also cap the number of points that can be derived from juvenile adjudications (AR, DC, Federal, MD, MN, UT). The caps range from 1 point in Minnesota to 4 points in Utah.<sup>32</sup> However, in order to understand the impact of the cap, one must look at the entire scoring system for the jurisdiction. In each, multiple factors contribute to the total criminal history enhancement score. The scales vary by jurisdiction. So while one point may be very impactful in a jurisdiction like the District of Columbia, which uses fractions of points to create a total score,<sup>33</sup> one point would be virtually meaningless in a jurisdiction like Michigan, which scores prior convictions in 5 to 25-point increments.<sup>34</sup> To account for these differences in scale, the table below demonstrates the impact of juvenile points on the criminal history enhancement score within each jurisdiction shown (the U.S. Sentencing Guidelines are not included due to the complexity of scoring criminal history in this systems).

Jurisdiction	Cap (Points)	Furthest Grid Location Due to Juvenile Points	Percentage of Grid Traveled
Arkansas	2	3rd column of 6	50%
District of Columbia	1½	2nd column of 5	40%
Maryland	2	3rd column of 8	37.5%
Minnesota	1*	2nd column of 7	28.5%
Utah	4	2nd row of 5	40%

*\*Jurisdiction allows the cap to be exceeded for certain high-severity-level offenses.*

The cap on the number of points from juvenile adjudications limits where on the grid a juvenile record might place the individual. In Minnesota, juvenile adjudications can typically only result in a criminal history score of 1, which places the individual in the second column of the grid, or about one-third of the way across.<sup>35</sup> But in Arkansas, an offender can travel as much as half way across the grid based on prior juvenile adjudications.<sup>36</sup> Thus, unlike other jurisdictions, which treat juvenile adjudications the same as adult offenses, in these five jurisdictions, there is a limit as to how much juvenile adjudications can contribute to the criminal history enhancement score, and therefore to the severity of the sentence that can be imposed based solely on a juvenile record.

## POLICY CONSIDERATIONS

As explained above, prior juvenile adjudications can be an indicator of the risk to reoffend. Thus, from a recidivism risk perspective, including prior juvenile adjudications in criminal history may contribute to public safety. But developments in brain science call into question the degree to which an individual can be considered culpable for an offense committed as a juvenile.

Another consideration is that juvenile adjudications proceed differently than adult convictions. There are no jury trials in juvenile court. And although juveniles have the constitutional right to counsel, many delinquency proceedings occur without the benefit of this counsel. Moreover, juvenile court is intended to be a rehabilitative setting, so proceedings may not take on the same adversarial nature as proceedings in adult court, resulting in less scrutiny of the evidence. The cumulative effect of these differences is that juvenile adjudications may not be as reliable or factually accurate as adult convictions.<sup>37</sup>

Neither of the preceding points suggests that juvenile adjudications should not be considered at all. Instead, they suggest that there may be reasons to treat juvenile adjudications differently than adult convictions for criminal history enhancement purposes.

The question for commissions to grapple with then may not be “should juvenile adjudications be counted?” but “to what extent?” Jurisdictions looking to balance these considerations might consider any of the limitations described in this chapter. But the following are a few additional considerations.

For jurisdictions considering a decay or gap period, a decay period has the benefit of ease of administration. Once the defined period has ended or the juvenile reaches a specified age, the adjudication no longer counts. This approach offers the benefit of simplicity in application. In contrast, requiring a crime-free period (gap) imposes a greater administrative burden, but it could also be a more stringent approach. If the individual is not immediately able to remain crime free, the juvenile adjudication could impact the individual’s criminal history score further into adulthood than a decay policy.

Another place to balance the impact of juvenile adjudications is in how the offenses are weighted. The primary considerations for jurisdictions in offense weighting are fully discussed in Chapter 8. Juvenile adjudications add an additional layer of consideration given the recent findings by the Supreme Court that juveniles are less culpable. This suggests that, for jurisdictions utilizing a point-based system, if a weighting approach is taken then the jurisdiction should consider weighting juvenile adjudications at some fraction of the weight given to similar adult convictions. A cap on the number of points that can be derived from juvenile adjudications could have the same effect. A jurisdiction that uses a categorical system could consider only counting juvenile adjudications in the lower criminal history categories (that is, excluding juvenile adjudications from the highest categories).

*"Developments in brain science call into question the degree to which an individual can be considered culpable for an offense committed as a juvenile."*

► **Table 5.1. Juvenile Provisions**

 <b>Alabama</b>	Juvenile adjudications are counted for the in/out decision, but not the prison sentence length decision. On all except the property in/out worksheet, juvenile adjudications garner fewer points than similar adult offenses. Misdemeanors are counted the same as for adults. <sup>38</sup>
 <b>Arkansas</b>	Only juvenile adjudications for which the juvenile could have been tried as an adult are counted. The offenses must have occurred within 10 years of the current offense. A maximum of 1 or 2 points may be accrued, depending on the offense levels. <sup>39</sup>
 <b>Delaware</b>	Offenses adjudicated at age 14 or older are included in the criminal history score. There are no other limitations. <sup>40</sup>
 <b>District of Columbia</b>	Juvenile adjudications count if the disposition or date of release for the juvenile offense is within five years or less of commission of the current offense. Prior adjudications lapse, that is, they are not counted or scored, if they are beyond the five-year window, and once lapses, can never be revived. <sup>41</sup>

Table 5.1, continued

	Offenses committed prior to the age of 18 are scored (there is no floor for the age because of the variation in juvenile systems across the country). Juvenile adjudications are counted if they were sentenced or if the juvenile was released from sentence within five years of committing the current offense. If the juvenile was convicted as an adult, the conviction will garner more points. <sup>42</sup>
	Juvenile dispositions of offenses committed by the offender within 5 years before the date of the commission of the primary offense must be scored as prior record if the offense would have been a crime if committed by an adult. Juvenile sex offenses must be counted if the offender has not maintained a conviction-free record for a period of 5 consecutive years from the most recent date of release from supervision to commission of the current offense. Misdemeanors are also counted. <sup>43</sup>
	Juvenile offenses, including juvenile misdemeanor offenses, are primarily the same as adult offenses. The more serious offenses are counted in perpetuity. But less serious offenses will decay when the juvenile turns. <sup>44</sup>
	Juvenile adjudications are counted in the same manner as adult offenses, except that they are scored as 0 if the offender is 23 or older, or if the offender has been crime free for 5 years since the last finding of a delinquent act or last adjudication. Misdemeanors are counted. <sup>45</sup>
	Juvenile adjudications for the top three offense seriousness categories are counted in criminal history. There are no other limitations. <sup>46</sup>
	All prior juvenile adjudications (felony and misdemeanor) are counted. Juvenile misdemeanors are generally scored the same as adult misdemeanors, but juvenile felonies are given less weight. <sup>47</sup>
	Juvenile adjudications for felony offenses (no misdemeanors) are counted if the individual was 14 or older at the time of the juvenile offense and was 25 or younger at the time of the current offense. An individual may generally only receive one point for juvenile adjudications, although there are some exceptions. <sup>48</sup>
	No provision.

Table 5.1, continued

 Oregon	Juvenile adjudications are counted for acts that if committed by an adult would be punishable as felonies. Juvenile misdemeanors are not counted, but juvenile felonies are counted in every criminal history category. <sup>49</sup>
 Pennsylvania	Juvenile adjudications are counted for felonies and certain enumerated misdemeanors. Juvenile adjudications lapse if the offender is 28 and was crime-free for the immediately preceding 10 years. <sup>50</sup>
 Tennessee	Juvenile adjudications for the most serious felonies and offenses that resulted in transfer of the juvenile to criminal court can move an offender into a higher criminal history category. Misdemeanors are not counted. <sup>51</sup>
 Utah	All juvenile adjudications that would be criminal convictions if committed by an adult are counted, including misdemeanors. Juvenile adjudications are given about half the points that similar adult convictions are given. <sup>52</sup>
 Virginia	Juvenile record can be scored in three places: (1) in section scoring the five most recent sentencing events; score is based on number of events; (2) in section scoring prior incarcerations/commitments; yes/no question resulting in flat point value; (3) in section scoring prior juvenile record; yes/no question resulting in flat point value. State law requires that low-level juvenile crimes decay once the juvenile turns 19 and at least 5 years have elapsed since culmination of the juvenile case. <sup>53</sup>
 Washington	Washington uses individual scoring sheets by offense type. On each one, the points allocated for some prior juvenile adjudications (typically more serious or violent) are equal to the points allocated for similar adult prior convictions. But the points for less serious or nonviolent offenses are typically half that allocated for similar adult offenses. <sup>54</sup> Juvenile offenses wash out if the offender has spent five or ten consecutive years, depending on the severity of the juvenile offense, in the community without having been convicted of any crime. However, Class A and felony sex offense convictions are always included in the offender's history score. <sup>55</sup>

<sup>1</sup> The justifications for use of criminal history discussed throughout this book are: (1) as a means of identifying risk to reoffend and preventing future crime; and (2) as a means of recognizing increased culpability or blameworthiness. See Chapter 1.

<sup>2</sup> Gary Sweeten, Alex R. Piquero & Laurence Steinberg, *Age and the Explanation of Crime Revisited*, 42 J. Youth Adolescence 921 (2013); Alex R. Piquero, David P. Farrington & Alfred Blumstein, *Key Issues in Criminal Careers Research: New Analyses of the Cambridge Study in Delinquent Development* 3 (2007).

<sup>3</sup> Alex R. Piquero, David P. Farrington & Alfred Blumstein, *Key Issues in Criminal Careers Research: New Analyses of the Cambridge Study in Delinquent Development* 3, 69 (2007).

<sup>4</sup> David P. Farrington, *Childhood Risk Factors for Young Adult Offending: Onset and Persistence in Young Adult Offenders: Lost in Transition?*, Table 4.2 at 72 (F. Lösel, A. Bottoms & David P. Farrington eds., 2012).

<sup>5</sup> Rolf Loeber, David P. Farrington & David Petechuk, *Bulletin 1: From Juvenile Delinquency to Young Adult Offending (Study Group on the Transitions Between Juvenile Delinquency and Adult Crime)* 5 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242931.pdf>.

<sup>6</sup> There is additional research addressing gender differences, and differences by offense type. However, the findings with regard to these and other factors are not as well settled, so they are not covered in this publication. For additional information, see generally Rolf Loeber, David P. Farrington & David Petechuk, *Bulletin 1: From Juvenile Delinquency to Young Adult Offending (Study Group on the Transitions Between Juvenile Delinquency and Adult Crime)* 5 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242931.pdf>; Alex R. Piquero et al., *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions Between Juvenile Delinquency and Adult Crime)* 11 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242932.pdf>; David P. Farrington, *Childhood Risk Factors for Young Adult Offending: Onset and Persistence in Young Adult Offenders: Lost in Transition?* (F. Lösel, A. Bottoms & David P. Farrington eds., 2012); Alex R. Piquero, David P. Farrington & Alfred Blumstein, *Key Issues in Criminal Careers Research: New Analyses of the Cambridge Study in Delinquent Development* (2007).

<sup>7</sup> The Commission had previously found the following factors to be predictive of recidivism: age, race, county, number of prior arrests, property arrest, and prior drug arrest. Pa. Comm'n on Sentencing, *Special Report: The Impact of Juvenile Record on Recidivism Risk* 12, <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/special-report-the-impact-of-juvenile-record-on-recidivism-risk-view>

<sup>8</sup> American Bar Association, *Resolution and Report 105C* 10-11 (Adopted by the House of Delegates Feb. 11, 2008), [http://www.americanbar.org/content/dam/aba/directories/policy/2008\\_my\\_105c.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_105c.authcheckdam.pdf) (internal citations omitted).

<sup>9</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

<sup>10</sup> *Roper*, 543 U.S. at 552.

<sup>11</sup> *Id.* at 569-572.

<sup>12</sup> *Miller*, 132 S.Ct. at 2468.

<sup>13</sup> Ark. Sentencing Standards Grid Offense Serious Rankings & Related Material 103 (2013). If the offender was 16 years or older, any offense that would be a felony if committed by an adult would count; if the offender was 14 or 15, a more narrow scope of serious offenses such as murder, rape, and serious assaults would count. Ark. Code Ann. § 9-27-318 (2014).

<sup>14</sup> See Mass. Sentencing Guidelines 8 (1998).

<sup>15</sup> Tenn. Code Ann. § 40-35-106 to -108 (2015).

<sup>16</sup> See, e.g., Alabama Presumptive & Voluntary Sentencing Standards Manual 32, 40, 64, 76 (2013).

<sup>17</sup> See, e.g., Penn. Sentencing Guidelines Implementation Manual § 303.6 (7th Ed. 2012).

<sup>18</sup> Kan. Stat. Ann. § 21-6810(d)(4) (2014).

<sup>19</sup> Minn. Sentencing Guidelines § 2.B.4.a.3 (2014).

<sup>20</sup> Md. Sentencing Guidelines Manual § 7.1.B (Feb. 2015).

<sup>21</sup> See, e.g., D.C. Voluntary Sentencing Guidelines Manual § 2.2.4 (2014) (juvenile adjudications decay, or lapse, if they are beyond a five-year window); Wash. State Adult Sentencing Guidelines Manual 58 (2013) (juvenile offenses "wash-out" if there is a gap of crime-free years in the community).

<sup>22</sup> Compare D.C. Voluntary Sentencing Guidelines Manual § 2.2.4 (2014), with Ark. Code Ann. § 16-90-803(b)(2)(C)(v) (2015).

<sup>23</sup> See, e.g., Fla. R. Crim. P. 3.704(d)(14) (2014).

<sup>24</sup> See, e.g., D.C. Voluntary Sentencing Guidelines Manual § 2.2.4 (June 30, 2014).

<sup>25</sup> Penn. Sentencing Guidelines Implementation Manual § 303.6 (7th Ed. 2012). It should be noted that Florida also takes a hybrid approach for sex offenses. Juvenile adjudications for sex offenses will continue to be counted even if they occurred more than 5 years prior to the current offense if the offender has not maintained a conviction-free period for at least 5 consecutive years from the most recent date of discharge from sentence. Fla. R. Crim. P. 3.704(d)(14) (2014).

<sup>26</sup> See, e.g., Kan. Sentencing Guidelines Desk Reference Manual 38 (2014).

<sup>27</sup> Virginia has a much more complex approach to counting juvenile adjudications that do not fall cleanly into either option, so that jurisdiction will not be discussed in this section.

<sup>28</sup> Minn. Sentencing Guidelines § 2.B.4.a (2014).

<sup>29</sup> Minn. Sentencing Guidelines § 2.B.1 (2014).

<sup>30</sup> See, e.g., Wash. State Adult Sentencing Guidelines Manual 458 (2013) (scoring sheet for Vehicular Assault).

<sup>31</sup> See Utah Adult Sentencing & Release Guidelines at Form 1 (2014).

<sup>32</sup> Minn. Sentencing Guidelines § 2.B.4 (2014); Utah Adult Sentencing & Release Guidelines 11 (2014).

<sup>33</sup> See D.C. Voluntary Sentencing Guidelines Manual § 2.2 (2014).

<sup>34</sup> Mich. Sentencing Guidelines Manual PRV 1-2 (2015).

<sup>35</sup> Minn. Sentencing Guidelines § 4.A (2014).

<sup>36</sup> Ark. Sentencing Standards Grid Offense Serious Rankings & Related Material 3 (2013).

<sup>37</sup> See generally Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111 (2003). See also *State v. Tucker*, 573 S.E.2d 197 (N.C. Ct. App. 2002) (finding juvenile court lacks the full array of constitutional guarantees to provide for an informal protective proceeding and that unlike adult criminal proceedings, which are focused on rehabilitation, juvenile court has a much stronger focus on rehabilitation); *State v. Harris*, 118 P.3d 236, 246 (Or. 2005) (holding that juvenile adjudications may be used as enhancement factors to increase a subsequent criminal sentence, but that existence of the adjudications must be proved by a factfinder).

<sup>38</sup> Alabama Presumptive & Voluntary Sentencing Standards Manual 32-35, 40-43, 64-67, 76-79 (2013).

<sup>39</sup> Ark. Code Ann. § 16-90-803 (b)(2)(C)(iii), (v) (2015).

<sup>40</sup> Delaware Sentencing Accountability Book 26 (2014).

<sup>41</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.4 (2014).

<sup>42</sup> U.S. Sentencing Guidelines Manual § 4A1.2(d) (2014).

<sup>43</sup> Fla. Criminal Punishment Code: Scoresheet Preparation Manual 10 (2014).

<sup>44</sup> Kan. Sentencing Guidelines Desk Reference Manual 38 (2014); Kan. Stat. Ann. § 21-6810(d)(3) (2014).

<sup>45</sup> Md. Sentencing Guidelines Manual § 7.1.B (April 2013).

<sup>46</sup> Mass. Sentencing Guidelines 8 (1998) (explaining how to assign a level to an unranked misdemeanor).

<sup>47</sup> Mich. Sentencing Guidelines Manual PRV 3-5 (2015).

<sup>48</sup> Minn. Sentencing Guidelines § 2.B.4 (Aug. 1, 2014).

<sup>49</sup> Or. Admin. R. §§ 213-003-0001(11), 213-004-007 (2015).

<sup>50</sup> Penn. Sentencing Guidelines Implementation Manual § 303.6 (7th Ed. 2012).

<sup>51</sup> Tenn. Code Ann. §§ 40-35-106, -107, -108 (2015).

<sup>52</sup> Utah Adult Sentencing & Release Guidelines 4-5, Form 1 - General Matrix (2014).

<sup>53</sup> Va. Sentencing Guidelines, Gen'l Instructions 27-29 (17th Ed. July 1, 2014).

<sup>54</sup> See, e.g., Wash. State Adult Sentencing Guidelines Manual 458 (2013) (scoring sheet for vehicular assault).

<sup>55</sup> *Id.* at 58.

### Key Points

- The majority of jurisdictions included in this Sourcebook (16 out of 18) count prior misdemeanor convictions to some degree in their criminal history scores.
- Most jurisdictions limit the contribution that misdemeanors can make to the criminal history score in one or more of these ways: (1) adjusting the weight; (2) capping the number of criminal history points that can be derived from prior misdemeanors; (3) limiting the criminal history categories into which the prior record consisting of misdemeanors may be classified.
- Limiting the contribution of prior misdemeanors to the criminal history score or category indicates that the jurisdictions have made one of two policy judgments: (1) at some point, prior misdemeanors have limited value in predicting the risk of reoffending or in determining the offender's blameworthiness for the current offense; or (2) some restraint should be imposed in counting prior misdemeanors so as not to exaggerate the punishment for the current offense to the point that the sentence will be disproportionate to sentences imposed for more serious crimes.
- Three jurisdictions (KS, MI, MN) have developed policy that prohibits counting the prior misdemeanors when they are used to enhance the current offense. If the current sentencing scheme within a jurisdiction utilizes prior misdemeanors to enhance the offense level of the current offense, the commission may wish to consider whether, given the enhanced offense level put in place by the legislature, it is necessary to the achievement of the commission's sentencing goals to also enhance the sentence by counting the prior misdemeanor(s) in the criminal history score.
- One jurisdiction (KS) excludes from the criminal history calculation uncounseled misdemeanor convictions for which the individual received an incarceration sentence. Commissions may wish to consider whether a similar provision would be appropriate in their jurisdiction.

### INTRODUCTION

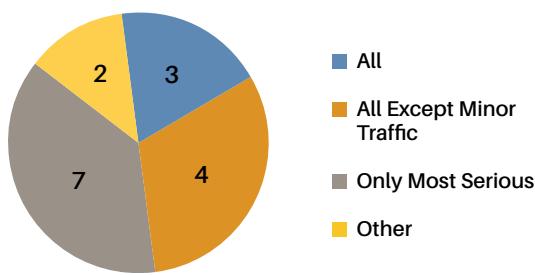
Nearly every guidelines jurisdiction analyzed in this Sourcebook includes prior misdemeanors in their criminal history scores. But variations exist as to which misdemeanor offenses are counted and the extent to which misdemeanors contribute to the individual's overall criminal history. This chapter first describes the different ways in which jurisdictions include prior misdemeanors and then discusses the various weighting schemes. The chapter also discusses how jurisdictions handle special situations that arise with prior misdemeanor convictions. The chapter closes with a discussion of policy considerations relating to the use of misdemeanor convictions.

### DISCUSSION

#### 1. Which Misdemeanors Are Counted

The majority of jurisdictions included in this Sourcebook (16 out of 18) count prior misdemeanor convictions to some degree in their criminal history scores (DE and TN do not). But there is variation in the types of misdemeanor offenses included. Three jurisdictions (FL, MA, PA) appear to place no limits on the types of misdemeanors that may be counted, but the other ten jurisdictions *do* impose limits. Four jurisdictions count nearly all misdemeanors except minor traffic offenses (AL, MD, UT, VA). Seven jurisdictions (AR, DC, KS, MI, MN, NC, OR) only count the most serious misdemeanor offenses. For example, in Arkansas, Class A misdemeanors, which carry a potential

## Which Misdemeanors Are Counted



sentence of up to one year, are counted, but Class B and C misdemeanors, which are punishable by just 90 days and 30 days respectively, are not counted.<sup>1</sup> The U.S. Sentencing Guidelines appear to have the most complicated set of rules: only certain misdemeanor offenses are counted, and then only if the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days or if the current offense is the same or similar; another set of offenses, such as hitchhiking, public intoxication, and minor traffic offenses, are never be counted.<sup>2</sup> Washington is the most restrictive, counting only prior related misdemeanors when the current offense is a felony traffic offense, felony driving while under the influence, or homicide or assault by watercraft.<sup>3</sup>

### 2. Weighting and Capping the Contribution of Misdemeanors to Criminal History

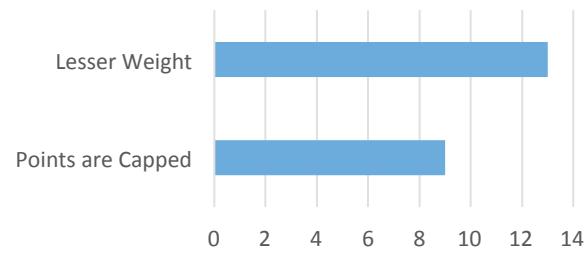
In addition to limiting the inclusion of misdemeanor convictions based on offense type, guidelines jurisdictions often limit the contribution of misdemeanor convictions to the overall criminal history score in one or more of these ways: (1) adjusting the weight; (2) capping the number of criminal history points that can be derived from prior misdemeanors; (3) limiting the criminal history categories into which the prior record consisting of misdemeanors may be classified. These approaches to limiting the contribution of prior misdemeanors indicate that the jurisdictions have made one of two policy judgments: (1) at some point, prior misdemeanors have limited value in predicting the risk of reoffending or in determining the offender's blameworthiness; or (2) some restraint should be imposed in counting prior misdemeanors so as not to exaggerate the punishment for the current offense to the point that the sentence will be disproportionate to sentences imposed for more serious crimes.

### A. Counting Misdemeanors in a Point-Based Criminal History Scale

Thirteen of the sixteen jurisdictions permitting the inclusion of misdemeanors use a point-based criminal history scale (AL, AR, DC, Federal, FL, MD, MI, MN, NC, PA,<sup>4</sup> UT, VA, WA). The total criminal history score is determined by adding up points for the various criminal history components. All of these jurisdictions weight prior misdemeanors to a lesser degree than prior felonies; most at a fraction of the weight accorded to felony offenses. For example, in Florida, a prior misdemeanor is scored at .20 points compared to a prior Level 10 offense (the most severe), which is scored at 29 points.<sup>5</sup> And in the District of Columbia, prior misdemeanors are assigned a quarter point, compared to prior offenses in Master Groups 1-5 (the most serious), which are assigned three points.<sup>6</sup>

Eight of the twelve jurisdictions also place a cap on the number of points that misdemeanors can contribute to the criminal history score (AL, AR, DC, MI, MN, PA, UT, VA). For example, in the District of Columbia, misdemeanors can only contribute one point to the criminal history score.<sup>7</sup> The cap limits how far a misdemeanor-only record will move the individual across the grid. But if the individual has additional felony-level history, a misdemeanor record, even if capped at only one or two points, could be enough to shift the offender into the next highest criminal history category.

### Weighting and Capping Misdemeanors



### B. Counting Misdemeanors in a Categorical Criminal History Scale

Three jurisdictions that take misdemeanors into account take a categorical approach to criminal history (KS, MA, OR). Criminal history is determined by the number and severity of prior offenses. In all of these jurisdictions, the lowest criminal history categories are defined to include prior misdemeanors. To move into higher criminal history categories, the individual's record must consist of felonies.

For example, Oregon arranges criminal history into nine categories ranging from most serious at Criminal History Category A to least serious at Criminal History Category I. Only categories G, H, and I are defined to include misdemeanors.<sup>8</sup>

The potential benefit of the categorical approach is that, theoretically, misdemeanors are not counted at all when deciding whether an offender qualifies for the highest criminal history categories; prior misdemeanors are only taken into account when the individual's record falls into the lower criminal history categories. But two of the four jurisdictions that utilize criminal history categories in this way (KS, OR) also provide a mechanism for misdemeanors to be converted to felonies, which can then move the individual into a higher criminal history category. However, even in this situation, there is not a one-for-one relationship between misdemeanors and felonies. Rather, it takes multiple, higher-severity prior misdemeanors to equal one prior felony.<sup>9</sup>

### 3. Special Situations

Special situations can arise when considering the inclusion of prior misdemeanor convictions. One situation is whether to count prior misdemeanor convictions committed when the offender was a juvenile. Commissions already grapple separately with the independent questions of whether and to what extent to count prior juvenile adjudications and whether and to what extent to count prior misdemeanors. A more difficult question is how to address them when they both occur at once. This topic is addressed more fully in Chapter 5. A second question is how long a prior misdemeanor should be counted for criminal history purposes. This topic is addressed more fully in Chapter 3. Two remaining situations, which will be addressed in this section, are prior misdemeanors used to enhance the current offense and uncounseled prior misdemeanor convictions.

#### A. Misdemeanors Used to Enhance the Current Offense

In exercising their authority to define criminal acts and punishments, state legislatures will often establish increasing penalties for repeated offenses of the same or similar conduct. For example, in Minnesota a first-time driving while impaired offense is a misdemeanor<sup>10</sup> whereas a subsequent driving while impaired offense is a felony if the individual has any combination of three prior driving while impaired convictions and/or losses of license due to similar behavior.<sup>11</sup> This definitional structure is referred to as enhancement.

When determining if a prior misdemeanor offense or offenses can be used to enhance the current offense to a more serious level (e.g., felony), sentencing commissions must think about whether it is fair to count the prior misdemeanor(s) in the criminal history score. The elevation of the offense to a more serious crime will in and of itself expose the individual to a harsher possible sentence than would have been applicable without the prior offenses. Having a policy that also adds the prior misdemeanors into the criminal history score for that offense increases the possible sentence even further. But given the enhanced offense level put in place by the legislature, it may not be necessary for the commission to also enhance the possible sentence to achieve its sentencing goals.

Four jurisdictions (KS, MI, MN, PA) have developed policy that prohibits counting prior misdemeanors when they are used to enhance the current offense. The Minnesota Commission cited fairness as its rationale for enacting the policy.<sup>12</sup> The Pennsylvania Commission said excluding such offenses "reflects the Commission's general policy against the 'double counting' of factors against the offender."<sup>13</sup> The Kansas policy is broader than the other three, stating that any prior conviction that serves to "enhance the severity level for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction" cannot be counted in the criminal history score.<sup>14</sup>

#### B. Use of Uncounseled Misdemeanors

A second issue that might arise with regard to prior misdemeanors is whether the defendant had the benefit of counsel leading up to the prior misdemeanor conviction. The right to counsel in criminal prosecutions is based in the Sixth Amendment to the U.S. Constitution, and is applicable to the states through the Fourteenth Amendment.<sup>15</sup> Though the right to representation in misdemeanor cases is unquestionable, the obligation of the state to provide that representation at state expense is not without limit. In a series of cases, the U.S. Supreme Court clarified that the constitutional right to appointed counsel in misdemeanor cases only applies if the sentence imposed includes a term of actual or suspended incarceration.<sup>16</sup> Following these decisions, many states have determined that an uncounseled misdemeanor conviction resulting in incarceration cannot be used to enhance a new offense to a felony.<sup>17</sup> But the Kansas Supreme Court has taken the concept one step further, holding that such an uncounseled misdemeanor conviction also cannot be scored in an offender's criminal history.<sup>18</sup> As a result, the Kansas Sentencing Guidelines contain the following unique provision:

A previous misdemeanor conviction in which the defendant was denied counsel and sentenced to a term of imprisonment, even if such term of imprisonment was suspended or conditioned upon a nonprison sanction, may not be counted in the offender's criminal history. However, if the offender's sentence did not include a term of imprisonment, the previous conviction may be counted in the offender's criminal history.<sup>19</sup>

The only other guidelines to mention the concept of the uncounseled misdemeanor conviction are the U.S. Sentencing Guidelines, which do so only in a comment to clarify that prior uncounseled misdemeanor sentences where imprisonment was not imposed should be counted.<sup>20</sup>

## POLICY CONSIDERATIONS

**Whether to Include Misdemeanors in Criminal History:** Prior misdemeanor convictions are included in the criminal history score by a majority of jurisdictions. But there is little to no research available to guide jurisdictions as to value of misdemeanors in predicting recidivism or as to the weight that should be accorded misdemeanors in response to blameworthiness. The research that does exist tends to focus on the value of criminal history as a whole rather than its component parts<sup>21</sup> or on adult versus juvenile offending.<sup>22</sup> Thus, with regard to establishing policy for prior misdemeanor convictions, jurisdictions appear to have been guided more by intuition than empirical evidence, and this is an area in which a commission may wish to perform further research.

*"There is little to no research available to guide jurisdictions as to value of misdemeanors in predicting recidivism or as to the weight that should be accorded misdemeanors in response to blameworthiness."*

**Which Misdemeanors to Count:** A commission that chooses to include misdemeanors in criminal history might consider whether all misdemeanors should be counted or only some (e.g., the most serious or those similar to the current conviction). For example, the Minnesota Sentencing Guidelines Commission commented that it "limited consideration of misdemeanors to particularly

relevant misdemeanors."<sup>23</sup> The Commission accomplished that objective by counting only gross misdemeanors and "targeted misdemeanors," all of which are required to be reported to the Minnesota Bureau of Criminal Apprehension for inclusion in the offender's official criminal record.<sup>24</sup> In Virginia, though each worksheet may have a section for misdemeanors, which misdemeanors are scored appears to depend on the type of offense currently being sentenced. For instance, prior criminal traffic misdemeanors are not scored on the Assault Worksheets<sup>25</sup> but are scored on the Murder/Homicide Worksheet if the primary offense is involuntary manslaughter with a vehicle.<sup>26</sup>

**Limiting the Impact of a Misdemeanor Record:** A commission might also consider whether there should be a limit (weight, cap, or both) as to how much a misdemeanor record can contribute to the overall criminal history score. This consideration plays out somewhat differently in states that utilize a point-based criminal history score versus a categorical one.

In states that utilize a point-based system, if the jurisdiction permits points to be derived from misdemeanor offenses without limit, a lengthy misdemeanor record could push the individual into a very high criminal history category. This is why the Minnesota Sentencing Guidelines Commission, in imposing a one-point limit on the contribution of prior misdemeanors to the criminal history score, said, "This was done because, with no limit on point accrual, offenders with lengthy, but relatively minor, misdemeanor records could accrue high criminal history scores and thus be subject to inappropriately severe sentences upon their first felony conviction."<sup>27</sup> In a point-based system, misdemeanors contribute to the record all the way across the grid, so even more so than considering whether a misdemeanor record should result in a moderately increased sentence at the low end of the grid, a jurisdiction must consider whether a misdemeanor record should continue to enhance the sentence at the high end of the grid. In contrast, jurisdictions that utilize a categorical approach, typically do not include misdemeanors when defining the higher criminal history categories. But even categorical systems have mechanisms by which a misdemeanor record might push the offender into the higher criminal history category (e.g., converting certain misdemeanors to felonies when calculating the criminal history score).

Ultimately, this relates to the purpose of punishment. Is an individual more blameworthy for the current felony conviction if that individual has a lengthy misdemeanor record? Similarly, does such an offender represent a greater risk to public safety? The Pennsylvania Commission on

Sentencing seemed to take the view that there are degrees of blameworthiness and risk when it assigned a cap to the contribution that non-weapons misdemeanors could make to criminal history, “because, in the Commission’s view, even a long record of comparatively minor offenses does not equal in seriousness a record of violent crime.”<sup>28</sup>

**Decay and Gap Policies:** Having decided which misdemeanors to count, and how much weight to afford them, commissions may wish to consider whether there are limits on how long prior misdemeanors should be used. As discussed in Chapter 3, a commission might consider whether to enact a decay or gap policy such that the offense is either no longer counted after a certain period of time has passed or is no longer counted if the offender is able to achieve a specified crime-free period. In some of the jurisdictions that utilize a decay or gap approach, prior misdemeanors are counted for a shorter period of time than prior felonies (AR, Federal, MN, WA).<sup>29</sup> Such a difference in timing is an indicator that the jurisdictions may view prior misdemeanors as less relevant to the offender’s level of culpability or risk to reoffend than prior felonies.

**Special Situations:** Finally, commissions should consider the special situations highlighted above. If the sentencing scheme within the jurisdiction utilizes prior misdemeanors to enhance the offense level of the current offense, then also including those misdemeanors in the criminal history score is a form of double counting, and the resulting sentence may be disproportionate to the severity of the offense. Including prior misdemeanors for which the defendant received a sentence of imprisonment but did not have the benefit of counsel raises a fairness issue rather than a proportionality issue. Without counsel, the individual may not have been aware of the potential consequences of pleading guilty to the prior offense, and may have pleaded guilty to a more serious offense than necessary to resolve the case.

*“Including prior misdemeanors for which the defendant received a sentence of imprisonment but did not have the benefit of counsel raises a fairness issue rather than a proportionality issue.”*

Table 6.1. Misdemeanor Provisions

 Alabama	Prior misdemeanors, except minor traffic offenses, are included in determining the prison in/out decision. Prior misdemeanors receive a much lower point value than prior felonies. <sup>30</sup>
 Arkansas	Only Class A Misdemeanors are counted. Each is assigned a quarter point, and no more than one point may be accrued from a misdemeanor record. <sup>31</sup>
 Delaware	No provision.

Table 6.1, continued

 <b>District of Columbia</b>	The inclusion of prior misdemeanors is dependent on the maximum penalty for the offense of conviction. Prior misdemeanors with a maximum penalty of 90 days or more are assigned a quarter point; offenses with a maximum penalty of less than 90 days are not scored. Prior misdemeanor convictions are capped at 1 point. <sup>32</sup>
 <b>Federal</b>	Prior convictions are scored based upon the punishment received. Misdemeanors could potentially be scored at one or two points. <sup>33</sup> There is no cap on the number of points that can be derived from misdemeanor convictions. Certain misdemeanor offenses are only counted if the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days or if the current offense is the same or similar; another set of offenses, such as hitchhiking, public intoxication, and minor traffic offenses, are never be counted. <sup>34</sup>
 <b>Florida</b>	Misdemeanors are counted, but only at a fraction of the point value of more severe offenses. There does not appear to be a cap as to how much misdemeanors can contribute to the score. <sup>35</sup>
 <b>Kansas</b>	All misdemeanors are counted except Class B and C non-person misdemeanors. Prior misdemeanor convictions can only put an offender into the lowest two criminal history categories, but Class A and B person misdemeanors are converted to felonies at a rate of three to one. Misdemeanors used to enhance the current offense and uncounseled misdemeanors resulting in imprisonment are not counted. <sup>36</sup>
 <b>Maryland</b>	Prior misdemeanors are counted except for non-incarcerable traffic offenses. A misdemeanor-only record would most likely be classified as a Minor Record; however, a lengthy misdemeanor record could be classified as Moderate, or even Major. <sup>37</sup>
 <b>Massachusetts</b>	Misdemeanors are counted. A misdemeanor-only record could only move an individual to Criminal History Group B out of Groups A (lowest) through E (highest). <sup>38</sup>
 <b>Michigan</b>	Only the most serious misdemeanors are counted including offenses against a person or property, drug offenses, weapons offenses, and operating a vehicle under the influence. Misdemeanor offenses are accorded less weight than felonies. <sup>39</sup>
 <b>Minnesota</b>	Targeted misdemeanors (a specific list of more serious offenses) and gross misdemeanors are counted. Each is accorded one unit, and four units equal one criminal history point. A maximum of one criminal history point may be derived from misdemeanor and gross misdemeanor convictions. <sup>40</sup> One exception is that when the current offense is a driving while intoxicated offense, any similar prior misdemeanor or gross misdemeanor offenses will be accorded two units, and there is no limit to the number of points that can be included the criminal history score from these prior offenses. <sup>41</sup>

Table 6.1, continued

 North Carolina	Class A1 and 1 misdemeanors and misdemeanor driving while impaired offenses are counted, but Class 2 and 3 and traffic misdemeanors are not. Each counts as 1 point (compared to 10 points for the most severe felony), but there does not appear to a cap on the number of points that can be derived from misdemeanor convictions. <sup>42</sup>
 Oregon	Prior misdemeanor offenses are counted. A misdemeanor-only record will typically be classified in Criminal History Categories G and H out of categories A through H. <sup>43</sup> Misdemeanors can be converted to felonies at a rate of two to one, thereby moving the individual's record into a higher category. <sup>44</sup>
 Pennsylvania	Prior misdemeanor offenses are counted. Certain more serious misdemeanors will accrue one point; other misdemeanors accrue points if there are multiple offenses in the individual's record. A maximum of three points may be accrued for non-weapons misdemeanors; there is no limit for the points that may be accrued for misdemeanors that involve weapons or death or danger to children. <sup>45</sup>
 Tennessee	No provision.
 Utah	Prior misdemeanors are counted except traffic offenses other than driving under the influence and reckless driving. <sup>46</sup> A maximum of four points may be accrued for misdemeanor offenses, which is half the number of points that may be accrued for prior felonies. <sup>47</sup>
 Virginia	Prior record is scored based upon the five most recent events. Misdemeanors are scored if there are fewer than five prior felony events. <sup>48</sup> Which misdemeanors are scored is dependent on the nature of the current offense. <sup>49</sup>
 Washington	Prior related misdemeanors are counted when the current offense is a felony traffic offense, felony driving while under the influence, or homicide or assault by watercraft. <sup>50</sup>

<sup>1</sup> Ark. Code Ann. §§ 5-4-401, 16-90-803(b)(2)(C)(ii) (2015).

<sup>2</sup> U.S. Sentencing Guidelines Manual § 4A1.2(c) (2014).

<sup>3</sup> Wash. Rev Code § 9.94A.525(2)(e), (11) & (12) (2015).

<sup>4</sup> Pennsylvania has a hybrid criminal history system. The first six criminal history categories are point-based. The top two are based on the number of specific types of prior convictions. 204 Pa. Code § 303.4 (2015).

<sup>5</sup> Fla. Criminal Punishment Code: Scoresheet Preparation Manual 24 (Oct. 1, 2014).

<sup>6</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.2 (2014).

<sup>7</sup> *Id.*

<sup>8</sup> Or. Admin. R. 213-004-0007 (2014).

<sup>9</sup> Kan. Sentencing Guidelines Desk Reference Manual 40 (2014); Or. Admin. R. 213-004-0008 (2014).

<sup>10</sup> Minn. Stat. § 169A.27 (2014).

<sup>11</sup> Minn. Stat. § 169A.24 (2014).

<sup>12</sup> Minn. Sentencing Guidelines cmt. 2.B.601 (Aug. 1, 2014).

<sup>13</sup> Penn. Sentencing Guidelines Implementation Manual 156 (7th Ed. 2012).

<sup>14</sup> Kan. Sentencing Guidelines Desk Reference Manual 39 (2014).

<sup>15</sup> *Gideon v. Wainright*, 372 U.S. 335, 342–45 (1963).

<sup>16</sup> See *Alabama v. Shelton*, 535 U.S. 654 (2002); *Scott v. Illinois*, 440 U.S. 367 (1979); *Arsinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>17</sup> See, e.g., *State v. Kelly*, 999 So.2d 1029 (Fla. 2008); *State v. Von Ferguson*, 169 P.3d 423 (Utah 2007); *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983).

<sup>18</sup> *State v. Long*, 225 P.3d 754 (Kan. Ct. App. 2010).

<sup>19</sup> Kan. Sentencing Guidelines Desk Reference Manual 43 (2014).

<sup>20</sup> U.S. Sentencing Guidelines § 4A1.2(c) cmt. background (2014).

<sup>21</sup> See, e.g., Paul Gendreau, Tracy Little & Clair Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 Criminology 575 (1996); U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, Research Series on the Recidivism of Federal Guideline Offenders, Release 1 (May 2004).

<sup>22</sup> See, e.g., Pa. Comm'n on Sentencing, *Review of Factors used in Risk Assessment Instruments*, Risk/Needs Assessment Project, Interim Report 1, app. B (2011) (the various static predictors listed under criminal history tend to be differentiated by age at time of offense but not between levels of offense such as misdemeanor and felony).

<sup>23</sup> Minn. Sentencing Guidelines cmt. 2.B.303 (Aug. 1, 2014).

<sup>24</sup> Minn. Sentencing Guidelines cmt. 2.B.303 (Aug. 1, 2014); Minn. Stat. §§ 299C.10, .11 (2014).

<sup>25</sup> Va. Sentencing Guidelines, Gen'l Instructions 30, Assault 5 (17th Ed. July 1, 2014).

<sup>26</sup> *Id.* at Gen'l Instructions 33.

<sup>27</sup> Minn. Sentencing Guidelines cmt. 2.B.303 (Aug. 1, 2014).

<sup>28</sup> Penn. Sentencing Guidelines Implementation Manual 140 (7th Ed. 2012).

<sup>29</sup> Ark. Sentencing Comm'n, *Sentencing Standards Grid Offense Serious Rankings and Related Material* 102–03 (2013); U.S. Sentencing Commission Guidelines Manual § 4A1.2(e) (2014); Minn. Sentencing Guidelines §§ 2.B.1.c & 2.B.3.e. (2014); Washington State Adult Sentencing Guidelines Manual 58 (2013).

<sup>30</sup> Alabama Presumptive & Voluntary Sentencing Standards Manual 21, 55 (2013).

<sup>31</sup> Ark. Code Ann. § 16-90-803(b)(2)(C)(ii) (2015).

<sup>32</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.2 (2014).

<sup>33</sup> U.S. Sentencing Guidelines Manual § 4A1.1 (2014).

<sup>34</sup> *Id.* § 4A1.2(c).

<sup>35</sup> Fla. Criminal Punishment Code: Scoresheet Preparation Manual 8–9, 11 (Oct. 1, 2014).

<sup>36</sup> Kan. Sentencing Guidelines Desk Reference Manual 36–43 (2014).

<sup>37</sup> Misdemeanors tend to be ranked at seriousness Level 1 or Level 2. See, e.g., Mass. Sentencing Guidelines 6 (1998) (explaining how to assign a level to an unranked misdemeanor). It takes higher level offenses to move into the higher Criminal History Groups. *Id.* at 56 (Criminal History Groups).

<sup>38</sup> Md. Sentencing Guidelines Manual Figure 7-1 (April 2013).

<sup>39</sup> Mich. Sentencing Guidelines Manual, at PRV 1, 2, & 5 (2014).

<sup>40</sup> Minn. Sentencing Guidelines § 2.B.3 (Aug. 1, 2014).

<sup>41</sup> *Id.* § 2.B.3(g).

<sup>42</sup> N.C. Structured Sentencing Training & Reference Manual 11–14 (Dec. 1, 2014).

<sup>43</sup> Or. Admin. R. 213-004-0007 (2014).

<sup>44</sup> Or. Admin. R. 213-004-0008, -0009 (2014).

<sup>45</sup> Penn. Sentencing Guidelines Implementation Manual § 303.7(a) (7th Ed. 2012).

<sup>46</sup> Utah Adult Sentencing & Release Guidelines 4 (2014).

<sup>47</sup> Utah Adult Sentencing & Release Guidelines 11 (Form 1: General Matrix), 18 (Form 3: Sex Offender Matrix) (2014).

<sup>48</sup> Va. Sentencing Guidelines, Gen'l Instructions 27 (17th Ed. July 1, 2014).

<sup>49</sup> Compare Va. Sentencing Guidelines Gen'l Instructions 30 (17th Ed. July 1, 2014) with *id.* at Gen'l Instructions 33.

<sup>50</sup> Wash. Rev. Code § 9.94A.525(2)(e), (11) & (12) (2015).

### Key Points

- Approximately two-thirds of guidelines systems assign more weight to prior convictions which are similar to the current offense, described here as a Patterning Premium. Patterning is not a major feature in the sentencing guidelines, however, and most jurisdictions operating a patterning premium restrict this enhancement to certain offenses.
- The justification for considering the relationship between previous and current offending is three-fold. First, a series of the same or similar crimes may indicate the offender is a higher overall recidivism risk, and this may justify overweighting prior convictions in similar prior cases. Second, similar offending in the past may help predict the nature of any subsequent offending. Third, offenders who commit the same offense having been punished already for the same conduct may be seen as being more blameworthy, for committing exactly the same crime.
- Research suggests that while a concentrated series of similar offenses – such as robberies or drug offenses – may indicate a career or persistent offender, the likelihood of re-offending is not consistently higher when the prior and current offense is the same.
- Patterning rules are more easily justified if high proportions of offenders specialize in their offending. If this were the case, a prior sexual offense and a current conviction for a sexual offense would reliably predict future sexual offending, and sentence severity could be calibrated accordingly. With respect to specialization, the evidence is mixed in terms of whether knowing the nature of the previous conviction predicts the nature of the next conviction: Most offenders have heterogeneous criminal histories.
- No research or validation exercise has focused on the question of whether offenders convicted of similar priors are reasonably regarded as more blameworthy than offenders convicted of dissimilar previous misconduct.
- **Conclusion:** a patterning premium is likely to generate only modest additional reductions in subsequent re-offending. For this reason, States applying this form of enhancement might consider limiting this element of prior record enhancement, or possibly focusing on offenders convicted and reconvicted of the crimes of greatest concern, for example serious violent or sexual offending.

### INTRODUCTION

The relationship between the offender's current and prior offending constitutes one important dimension of prior record enhancements. Sentencing statutes in foreign jurisdictions sometimes direct courts to consider the relationship between the current and prior convictions when deciding whether and how much to aggravate the sentence.<sup>1</sup> In some U.S. states, prior offenses *similar* to the current offense carry more weight than *dissimilar* priors. We refer to this as "patterning." These guideline schemes use *patterning* rules to enhance punishments for the repeat offender who commits the same (or similar) offense.

In addition, most U.S. jurisdictions have repeat offender statutes which suggest more severe punishments are appropriate for offenders re-convicted of a similar offense.<sup>2</sup> These statutes often link the increased punishment to the fact that the prior and current felonies were similar and are noted here but not discussed further. Our emphasis is upon the guidelines rather than related statutory provisions. This chapter reviews the limited empirical research related to patterning and summarizes the patterning rules and similar offense premiums found in the guidelines.

## DISCUSSION

### Justifying greater enhancements for similar prior convictions

As with other elements of criminal history, there are two principal justifications for assigning more weight to similar prior convictions: risk of re-offending and retribution.

#### A. Justifying a Patterning Premium on Risk Reduction

With respect to risk of re-offending, there are two potential reasons for examining the relationship between prior and current offending. First, a series of similar crimes may indicate a higher risk of re-offending. A lengthy series of similar priors may suggest that the offender is a career criminal, or at least one specializing in a particular form of offending (such as auto theft or burglary). Second, the category of prior offending may provide insight into the nature or seriousness of any future offending: if an offender is convicted of a violent felony, is he more likely (than a nonviolent offender) to commit another violent offense? If this is the case, then a pattern of prior serious crime of violence may justify an additional enhancement on the reasoning that re-offending is likely to involve violence rather than some other form of offending.

It might be argued that a guideline scheme which was blind to the correspondence between the prior and current offense—and assigned the same weight to all priors, regardless of whether they were similar or dissimilar to the current conviction—would make no more sense than a scheme which assigned the same weight regardless of the number of priors. Even before the onset of guidelines, courts examined the nature of the offender's criminal history in light of the current crime. This examination shed light on the offender's likelihood of committing future crimes. Yet the number of prior convictions (or prison commitments) is generally the most powerful predictor of re-offending, significantly more powerful than dimensions such as timing and patterning.<sup>3</sup> A patterning premium would be justified on preventive grounds if research demonstrated that offenders who repeat the same offense represent a higher risk of re-offending. Commissions might consider the research on recidivism patterns which is relevant to this question (see below).

If research does suggest similar prior offending carries a higher risk of re-offending, another question for a sentencing commission is how much *additional* weight should prior similar offending carry (relative to dissimilar prior offending).

*"A patterning premium is likely to generate only modest additional reductions in subsequent re-offending. For this reason, States applying this form of enhancement might consider limiting this element of prior record enhancement, or possibly focusing on offenders convicted and reconvicted of the crimes of greatest concern, for example serious violent or sexual offending."*

Guidelines can err in two directions: they may *overweight* prior, similar offending, imposing a patterning premium that cannot be justified by the offender's higher risk or greater culpability. Or they may *underweight* similar priors, and fail to identify offenders who are more committed to a criminal lifestyle and who represent a higher risk of re-offending. Much will depend on the degree to which offenders specialize in their offending patterns. Absent evidence of offender specialization, patterning rules would be unnecessary. If criminal specialization is very striking, the existence of a *similar* prior offense will be highly predictive of the *kind* of future crime. In state schemes which weigh similar prior offenses more heavily, offenders who commit the same category of offense repeatedly will escalate more rapidly across criminal history categories.

### Empirical Research on Patterning

There is little research on the question of whether an offender with a similar prior offense has a higher risk of re-offending than one with a dissimilar prior offense.<sup>4</sup> However, there is research on specialization and this is critical to patterning premiums. There are two principal sources of data: Commission recidivism reports and academic research.

### State Commission Data On Criminal Specialization

A number of states have published empirical analyses of recidivism, but few of these reports explore patterning or specialization.<sup>5</sup> It is hard therefore to draw definitive, *general* conclusions about the degree of criminal specialization.

The limited research has generated mixed results: there is evidence of patterning for some categories of offending, but most offenders appear for sentencing with heterogeneous offending histories.<sup>6</sup> Recidivism analyses reported in Oregon reveal some specialization in offending patterns: if an offender's first charge was property, the most likely category of the second charge was also property. The same relationship held true for driving, person offenses and drugs.<sup>7</sup> For example, in over half the cases, the second charge of crimes against the person offenders was also a personal injury offense. The next most frequent category of re-offending for this group of offenders was "other," accounting for only 18% of the sample. This is evidence of specialization, and the report notes that "most of the second charges were of the same type as the first arrest charge."<sup>8</sup>

In contrast, recent recidivism data from Washington State support a pattern of non-specialization. More than three-quarters of the assault cases were re-convicted of a different offense; the most specialized offense category was property but even this category was more likely to see subsequent convictions for a non-property related offense.<sup>9</sup> Data from Alaska also reveal little specialization: of all felons convicted of a violent offense, only 29% were reconvicted of the same type of offense; for drug offenders only 15% had a new conviction for the same type of offense.<sup>10</sup>

### Academic Research on Criminal Specialization

Academic research has questioned whether the nature of the first conviction sheds light on the nature of any subsequent re-offending.<sup>11</sup> One related finding is that the type of 'debut' offense is a significant, independent predictor of chronic offending thereafter. For example, offenders convicted of robbery as their first offense were more likely to become a chronic offender than offenders convicted of other categories of crime as their first offense.<sup>12</sup> But this is different from patterning: offenders convicted of robbery were not significantly more likely to be reconvicted of robbery (rather than other offenses).

In addition, specialization alone is not always a reliable indicator of higher risk of re-offending. For example, one study found that offense frequency rather than offense patterning was the best predictor of re-offending.<sup>13</sup> The most recent research on criminal specialization suggests more complex relationships, whereby specialization occurs for certain profiles of offending *within* particular categories of offending.<sup>14</sup> Finally, for the categories of

offending which cause most concern, violent and sexual offending, there appears to be little robust evidence of specialization.<sup>15</sup> The authors of a recent systematic review concluded that "most studies indicate that frequent offenders engage in a wide variety of crimes over their criminal career, with only a few concentrating on a limited range of crime types."<sup>16</sup>

These research findings suggest that patterning premiums will generate only limited benefits in terms of enhanced crime prevention. A robust patterning premium may result in over-predicting offending (and therefore over-punishment of the offender) on grounds of risk.

### B. Justifying Patterning Premium on Retributive Grounds

This leaves the question of retribution or punishment as a justification for a patterning premium. A pattern of priors also suggests that the offender may be particularly indifferent to the sentence of the court, and accordingly may be regarded as more blameworthy under a retributive rationale.<sup>17</sup> In order for a patterning premium to be justified under retributive grounds, it is necessary to establish the significance of this circumstance for determining the offender's level of blameworthiness. On this reasoning, not only has the individual re-offended but he has committed *exactly* the same offense again. An offender now convicted of a violent felony may be deemed more culpable if his prior felony conviction is for assault rather than, say, theft. However, retributive sentencing scholars appear to see little reason to distinguish similar from dissimilar prior convictions. The scholarly literature from the retributive perspective lays emphasis on the seriousness of the prior record, rather than whether the previous convictions are similar to the current conviction.<sup>18</sup> On the other hand, it may be the case that communities regard offenders who repeat exactly the same crime having once been punished are more culpable. Commissions could explore this possibility through empirical validation involving community surveys.

*"These research findings suggest that patterning premiums will generate only limited benefits in terms of enhanced crime prevention. A robust patterning premium may result in over-predicting offending (and therefore over-punishment of the offender) on grounds of risk."*

## Patterning Arrangements

Considerable variability exists in the way that patterning rules apply and many states disregard the similar-dissimilar distinction. No guidelines scheme applies patterning across all offense categories. Six of the surveyed jurisdictions (Arkansas; District of Columbia; Federal; Maryland; Massachusetts; and Michigan) do not operate a patterning premium. For example, the federal guidelines pay no attention to the degree of similarity between previous and current offending. Dissimilar priors carry the same weight as similar priors, provided that they resulted in comparable terms of custody. The remaining states have limited patterning rules which apply to specific offenses.<sup>19</sup> Table 7.1 at the end of this chapter summarizes patterning rules in the 18 jurisdictions.

There are two general approaches to patterning. In some states (such as Minnesota and Alabama) a patterning premium is achieved through adding points to the offender's criminal history score to reflect the number of similar priors. This reflects the structure of criminal history categories defined by the number of criminal history points. For example, in Minnesota some prior sex offenses carry more criminal history weight if the offender is currently convicted of a sexual offense. In Alabama a prior adult conviction for the same felony attracts an additional point (see Table 7.1).

A second way of overweighting similar priors is to build patterning into the structure of the criminal history categories. Thus some states have created criminal history categories according to the number and levels of offenses committed. In some of these states (e.g., Pennsylvania; Tennessee) the highest criminal history categories are patterning categories. In some other states (e.g., Kansas; Oregon) multiple lower level offenses can be converted into higher-level offenses with the result that the offender lands in a higher category.

## Potential Adverse Impacts of Similar Offense Premiums

The use of a patterning premium may carry unanticipated adverse consequences. For example, nonviolent offenders generally have higher recidivism rates than violent offenders.<sup>20</sup> A robust patterning premium would therefore escalate this profile of offender more rapidly across the categories of criminal history. Over time, this will change the profile of admissions to custody and the prison population. A system which 'overweights' similar priors will result in over-prediction. For example, offenders with previous convictions involving violence are going to pay a heavier price in terms of their criminal history score than is justified in light of the true probability of further violent offending. Finally, a strong patterning premium may disturb offense-based proportionality. An offender with several prior, similar offenses may attract a more punitive sentence than an offender convicted of a more serious current offense but with a pattern of dissimilar prior crimes.

## POLICY CONSIDERATIONS

### Alternative Approaches to Similar Offense Premiums

Commissions could consider other policy questions relating to similar prior offenses:

- How narrowly tailored should the similarity premium be? Is a conviction for a crime of the same general category sufficient to trigger a patterning premium – or must the prior crime be exactly the same offense as the current conviction?
- Should patterning rules apply only to high recidivism offenses (such as driving while impaired) on the grounds that incapacitation is more easily justified for such offenders? Or should patterning premiums only apply to crimes of high seriousness, for which the need for prevention is greatest?
- Should the relationship between prior and current offending interact with decay provisions? For example, rather than weighting similar priors more heavily, a Commission could decide to shorten the 'look-back' period for dissimilar conduct. *Dissimilar* priors might extinguish after 4 years, while *similar* priors could remain live for a longer period, say 6 years.

- Should the trend of similar, prior offending be considered? A series of similar priors which ascend in seriousness to the current, most serious conviction might reasonably be treated with more severity than a series which is declining in gravity over time. The pattern of declining (but similar) priors may suggest an offender who is partially successful in achieving desistance. A drug offender who following a series of dealing or distributing offenses is now convicted of simple possession is different from an individual who appears to be increasing the severity of his similar offending.

If a guideline scheme were overweighting similar priors, several alternative approaches could be explored:

- If the patterning premium reflects the offender's higher risk of reoffending, the enhanced premium could be imposed only after a clear pattern of offending emerges. Thus the 3<sup>rd</sup> or 4<sup>th</sup> consecutive, similar offense would be double weighted, while one or two similar priors would carry the same weight as dissimilar prior misconduct.
- If the premium threatens offense-based proportionality by over-punishing persistent offenders convicted of low or medium seriousness offenses, it could be restricted to serious crimes. The premium would be activated only when the current *and* the prior offense reached a high level of seriousness – for example, offense level 8 in the Minnesota grid.
- If the premium is designed to prevent violent crime it could be activated only when the current and prior conduct is violent or sexual in nature. There would be no overweighting for other categories of offender.
- If the patterning premium has a differential impact on visible minority defendants (or has other adverse effects, for example, by increasing the number of recidivist but nonviolent prison admissions), it could be scaled back. One prior, similar offense could attract the weight of 1.5 prior dissimilar convictions. Alternatively, the magnitude of the pattern-based premium could be capped. For example, offenders with similar prior offenses could receive a maximum of only 2 criminal history points.

As with many other policy decisions, validation research would help to determine whether these possible changes would increase the effectiveness of this element of the criminal history calculation.

Table 7.1. Indicative Patterning Rules

 <b>Alabama</b>	<p><i>Limited patterning rules in effect:</i></p> <p>For property offenses, additional points are assigned for prior adult convictions for the same felony. For example, for Property A offenses, 1-2 prior adult felonies are scored as one, and prior adult convictions for the same felony attract an additional point. This patterning is included on the worksheets used to determine both the prison in/out decision and the prison sentence length.<sup>21</sup></p>
 <b>Arkansas</b>	<i>No patterning rules in effect.</i>
 <b>Delaware</b>	<p><i>Limited patterning rules in effect:</i></p> <p>Repetitive criminal history, which is defined as conviction or adjudication for the same or similar offense on two or more previous occasions, can be used as an aggravating factor to increase the sentence.<sup>22</sup></p>
 <b>District of Columbia</b>	<i>No patterning rules in effect.</i>
 <b>Federal</b>	<i>No patterning rules in effect.</i>
 <b>Florida</b>	<p><i>Limited patterning rules in effect:</i></p> <p>Patterning only for the offense of grand theft of a motor vehicle. If the current offense is “grand theft of the third degree involving a motor vehicle” and the offender has three or more of these offenses in his or her prior record, then a multiplier is applied to the total sentence points.<sup>23</sup></p>
 <b>Kansas</b>	<p><i>Limited patterning rules in effect:</i></p> <p>Certain prior misdemeanor convictions are converted to prior “person” felonies at a rate of 3 to 1. However, if a prior conviction is used to enhance the severity level of a current charge, then it cannot be used for patterning enhancements.<sup>24</sup></p>
 <b>Maryland</b>	<i>No patterning rules in effect.</i>
 <b>Massachusetts</b>	<i>No patterning rules in effect.</i>

Table 7.1, continued

 Michigan	<i>No patterning rules in effect.</i>
 Minnesota	<i>Limited patterning rules apply to specific offense categories:</i> The criminal history weights of some prior sex offenses are increased if the current offense is a sex offense, <sup>25</sup> and the offender will be assigned an additional custody status point if the current offense is a sex offense and it was committed while under supervision for a prior sex offense. <sup>26</sup> In addition, the usual rule that prior misdemeanors can contribute no more than 1 point to the criminal history score does not apply when the current offense and prior misdemeanors involve criminal vehicular operation or DWI. <sup>27</sup>
 North Carolina	<i>Patterning rules in effect:</i> Explicit similar offense enhancement operates: 1 additional criminal history point is added if all elements of present offense are included in any prior offense. The effect is limited to 1 point. <sup>28</sup>
 Oregon	<i>Limited patterning rules in effect:</i> Prior Class A adult person misdemeanor convictions convert to adult person felonies for criminal history purposes at a ratio of 2 to 1. <sup>29</sup>
 Pennsylvania	<i>Limited patterning rules in effect:</i> The two highest prior record score categories - Repeat Violent Offender Category (REVOC) and Repeat Felony 1 and Felony 2 Category (RFEL) - are derived from repeat offending of serious and violent felonies. <sup>30</sup>
 Tennessee	<i>Limited patterning rules in effect:</i> Prior convictions are divided into several categories with associated sentencing ranges. The top three categories are defined by the presence of multiple priors, and each contains some form of patterning (e.g., a career offender is one who has 6 prior A, B, or C prior felonies and is currently being sentenced for an A, B, or C felony). <sup>31</sup>
 Utah	<i>Limited patterning rules in effect:</i> A form of patterning is found in the Sexual Offender Matrix. It contains two additional criminal history categories, which add additional points for the number of prior victims and the age of prior sex offenses. <sup>32</sup>
 Virginia	<i>Limited patterning rules in effect:</i> The sentencing worksheets for certain offenses assign additional points for similar prior convictions. <sup>33</sup>
 Washington	<i>Limited patterning rules in effect:</i> The sentencing worksheets for certain offenses assign additional points for similar prior convictions. Examples: If the present conviction is for Burglary 1, count two points for each prior Burglary 2 or Residential Burglary conviction. If present conviction is for Manufacture Methamphetamine count 3 points for each adult prior Manufacture Methamphetamine offense. <sup>34</sup>

<sup>1</sup> E.g. Criminal Justice Act, 2003, pt. 12, c. 1, § 143 (U.K.).

<sup>2</sup> For example, 515/2003 Criminal Code of Finland, c. 6, § 5 lists “grounds for increasing the punishment” and these include: “(5) the criminal history of the perpetrator, if the relation between it and the new offense, due to the similarity between the offenses or otherwise, shows that the perpetrator is apparently heedless of the prohibitions and commands of the law.”

<sup>3</sup> See for example recidivism prediction findings from U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, Research Series on the Recidivism of Federal Guideline Offenders, Release 3, Exhibit 2, 23 (2005); Florida Department of Corrections, Bureau of Research Data and Analysis, *Florida Prison Recidivism Report: Releases from 2005 to 2012*, 17 (2014).

<sup>4</sup> There is of course a very extensive empirical literature on criminal careers, but much of this work focuses on issues such as age of onset rather than whether the first few offenses are similar to each other.

<sup>5</sup> A good example of a systematic State-level analysis of recidivism is the recent recidivism report in Florida. This report examines a range of variables related to re-offending and also lists them in terms of their relative predictability, yet the variable of similarity is not examined. See Florida Department of Corrections, Bureau of Research and Data Analysis, *Florida Prison Recidivism Report: Releases from 2005 to 2012* (2014).

<sup>6</sup> See, e.g., Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 Crime and Justice 359–506 (2003); A. K. Bottomley & K. Pease, K., *Crime and Punishment: Interpreting the Data*, 27(2) The Brit. J. of Criminology 216–218 tbl.7.1 (1987).

<sup>7</sup> Richard A. Jones, Oregon Criminal Justice Commission Statistical Analysis Center, *An Analysis of the Oregon Computerized Criminal History Records by the Oregon Criminal Justice Commission* 6 (2005).

<sup>8</sup> *Id.*

<sup>9</sup> Wash. State Sentencing Guidelines Comm'n, *Recidivism of Adult Felons* 2007, p. 4, fig.6 (2008). The relationship between previous and current offending is not addressed in the most recent editions of this statistical report (see generally, J. Steiger, State of Washington Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing Fiscal Year 2014* (2015)).

<sup>10</sup> Alaska Judicial Council, *Criminal Recidivism in Alaska, 2008 and 2009*, p. 37, fig. 19 (2011). It is unclear why this specialization emerged in the data from Oregon but not the other states. The definition of recidivism may have played a role. The Oregon trends are based on charges while the data reported in Alaska pertain to re-convictions.

<sup>11</sup> E.g., Kimberly Kempf, *Offense Specialization: Does it Exist?*, in *The Reasoning Criminal: Rational Choice Perspectives on Offending*, ch. 12 (Derek B. Cornish & Ronald V. Clarke eds., 2014). One point of discussion in academic literature concerns the need for a “percentage rule” whereby a certain percentage of convictions in a criminal history have to be of the same category before an offender may be classified as a “specialist”, rather than a “generalist.” See Terance D. Miethe et al., *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types*, 43(3) *Journal of Research in Crime and Delinquency* 204–229 (2006).

<sup>12</sup> Thus in a British report 17% of male offenders convicted of robbery as their first offense subsequently became chronic offenders, but only 3% of sexual, fraud/forgery or drug offenses ended up as chronic offenders, see Natalie Owen & Christine Cooper, U.K. Home Office, Research Report 77, *The Start of a Criminal Career: Does the Type of Offence Predict Future Offending?*, 13 tbl.6 (2013).

<sup>13</sup> See generally, Alex R. Piquero, et al., *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development* (2007).

<sup>14</sup> For example, one recent study reports evidence of specialization for noncontact sex offenders but not other categories of sex offender. See Phillip Howard, Georgia Barnett, & Ruth Mann, *Specialization in and Within Sexual Offending in England and Wales*, 26(3) *Sexual Abuse: A Journal of Research and Treatment* 225–251 (2013).

<sup>15</sup> E.g., Alex R. Piquero, *Frequency, Specialization, and Violence in Offending Careers*, 37(4) *Journal of Research in Crime and Delinquency* 392–418 (2000). Piquero reports that involvement in violence is primarily a function of increasing offense frequency, and that “there is no tendency to specialize in violence.” *id.* at 409, a finding which replicates earlier research. For earlier research, see David P. Farrington, *Predictors, Causes, and Correlates of Male Youth Violence*, 24 *Crime and Justice* 421–475 (1998). With respect to sexual offending, see P. Lussier (2005) *The Criminal Activity of Sexual Offenders in Adulthood: Revisiting the Specialization Debate*, 17 *Sexual Abuse* 269–271 (2005).

<sup>16</sup> Alex R. Piquero et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, *Bulletin 2: Criminal Career Patterns* 13 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242932.pdf>.

<sup>17</sup> As noted elsewhere in this Sourcebook, enhancements are harder to validate along the retributive dimension. Along the dimension of risk, it is a question of demonstrating that specific dimensions of criminal history (e.g., custody status) are predictive of re-offending. Yet how should a commission validate sentencing enhancements retributively? One possible approach would be to survey the public, asking respondents to rate the degree to which a given circumstance increases the offender's blameworthiness.

<sup>18</sup> Thus von Hirsch notes that, “A criminal history score reflecting quality would be one which took the seriousness of the offense as well as the number of prior convictions into account.” Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65(4) *Minn. L. Rev.* 591, 620 (1981).

<sup>19</sup> This absence of clear and robust patterning premiums is consistent with research into judicial practice in non-guideline states. One such study found a weak patterning premium and only for person offenses. See Michael S. Vigorita, *Prior Offense Type and the Probability of Incarceration: The Importance of Current Offense Type and Sentencing Jurisdiction*, 17(2) *Journal of Contemporary Criminal Justice* 167–193 (2001).

<sup>20</sup> See Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1994* (2002).

<sup>21</sup> Ala. Presumptive and Voluntary Sentencing Standards Manual 40–43 (Oct. 1, 2013).

<sup>22</sup> Del. Sentencing Accountability Benchbook 27 (2014).

<sup>23</sup> Fla. Crim. Punishment Code: Scoresheet Preparation Manual 13 (2014).

<sup>24</sup> Kan. Sentencing Guidelines Desk Reference Manual 42, 44–45 (2013).

<sup>25</sup> Minn. Sentencing Guidelines §§ 2(B)(1)(a)–(b) (Aug. 1, 2014).

<sup>26</sup> *Id.* at 2(B)(2)(b).

<sup>27</sup> *Id.* at 2(B)(3)(g), 2(B)(6).

<sup>28</sup> N.C. Structured Sentencing Training and Reference Manual 11 (Dec. 1, 2009).

<sup>29</sup> Or. Admin. R. § 213-004-0008 (2015).

<sup>30</sup> Penn. Sentencing Guidelines Implementation Manual § 303.4 (7th Ed. 2012).

<sup>31</sup> Tenn. Code Ann. §§ 40-35-106–108 (2015).

<sup>32</sup> Utah Adult Sentencing and Release Guidelines 15, 18 (2014).

<sup>33</sup> See, e.g., Va. Sentencing Guidelines Burglary/Dwelling 9, Drug/Schedule I/II 3 (July 1, 2014).

<sup>34</sup> Wash. State Adult Sentencing Guidelines Manual 264, 366 (2013).

### Key Points

- Almost all jurisdictions apply some form of offense weighting so that certain offenses count more towards criminal history scores than others.
- Several approaches exist to implement offense weighting. Jurisdictions vary in whether they assign different points based on: (1) the severity level designation of the prior offense; (2) the length and type of punishment imposed for the prior; (3) the nominal category assigned to the prior (e.g., person versus nonperson offense); or (4) a composite categorization of offenders (e.g., moderate, serious, violent) based on multiple factors.
- While offense weighting appears to be universally supported, jurisdictions may wish to evaluate whether the method they employ is the best among the alternatives to meet their policy objectives.
- A related issue is present in a minority of states that reserve higher-level criminal history categories for offenders who meet special prior offense requirements. These typically only allow offenders to be assigned to the highest criminal history designation if they have a prior violent or person offense.
- Commissions in those states may wish to explore whether their special eligibility requirements are consistent with their punishment goals.

## INTRODUCTION

This chapter discusses two separate aspects of criminal history scoring: (1) the extent to which systems assign different weights to different categories of prior offenses (e.g., more weight for violent offenses, person crimes, or offenses with higher severity rankings); and (2) rules that reserve the highest criminal history category or categories for offenders who meet special requirements (e.g., at least one prior person or violent offense to be in the highest history category).

## DISCUSSION

### PART 1: Offense Weighting

#### Overview of Offense Weighting

In calculating criminal history scores, guidelines jurisdictions generally weight prior offenses based on the seriousness of the past crime. For example, a jurisdiction might assign four points for each prior serious violent offense and just one point for low-level non-violent offenses. Consequently, an offender with only low-level offenses would need four priors to equal the points of

an offender who had only one serious violent offense. These rules account for both the quantity and quality of prior offending. (Note that the following discussion does not address rules that apply additional weight for *similar* prior offenses as these rules are addressed separately in Chapter 7.)

Jurisdictions seldom articulate why they employ a particular offense weighting formula, though the rationale could be based on both retributive and utilitarian theories. An overweighting system informed by retributivism would add the largest criminal history premiums to prior offenses that, in the commission's view, make a person more blameworthy. These commissions may wish to re-evaluate overweighting from time to time to ensure weighting decisions made in the past continue to reflect the consensus view of the additional enhancement deserved based on the nature of the prior offense.

Other commissions shape their policies according to utilitarian justifications (or based on hybrid principles of both risk and retribution). If the overweighting is based on risk with the idea that offenses should carry additional weight reflective of their predictive value for future criminal

behavior, commissions may wish to empirically assess whether their weighting formulas do indeed correspond with risk-of-reoffending patterns (e.g., if a high-severity prior counts four points and a low-severity prior counts one point is it because the offender with the high-severity felony is four times more likely to reoffend or inflict harm?). In addition, weighting may help inform a utilitarian objective of setting priorities in the use of prison beds; for example, by giving more weight to violent offenses and less weight to property and drug crimes, weighting may indirectly help fill more beds with violent offenders while reducing the likelihood and length of prison for property and drug offenders who pose less risk to the public.

One practical consideration is worth mentioning. Weighting adds layers of complexity, calculations, and record keeping. A system with a very simple weighting scheme (or none at all) carries the benefit of easy application, while a more complex weighting approach will increase the processing time for guidelines calculations and the likelihood of error. Commissions might consider the costs of application compared to the benefits derived from the particular system of overweighting.

Table 8.1 contains a description of how each guidelines jurisdiction weights prior offenses. Jurisdictions typically apply offense weighting in one of the following four ways:

1. *Severity Score Weighting*, which assigns different points according to the offense severity level of the prior offense (e.g., four points for Class A felonies, one point for Class E felonies).
2. *Punishment Imposed Weighting*, which allocates different points according to the punishment imposed for the prior offense (e.g., one point for each prior felony plus an additional point for each felony punished by an executed sentence of incarceration).
3. *Nominal Category Weighting*, which distinguishes among broad nominal designations of certain types of offenses (e.g., violent versus nonviolent or person versus non-person).
4. *Offender Classification Weighting*, which classifies offenders based on more detailed formulas of the number and type of prior offenses (e.g., offenders are categorized as moderate, serious, repetitive, or serious violent with specific inclusion criteria for each classification).

**Severity Score Weighting.** Weighting by the severity score level is the most commonly employed method of weighting past offenses. Severity score jurisdictions vary considerably in how finely the system distinguishes among prior offense levels as indicated by the number of different point values assigned to offenses.

For instance, Arkansas distinguishes between three broad categories of offenses: serious felonies, less serious felonies, and serious misdemeanors. A serious felony counts one point, a less serious felony .5 points, and a serious misdemeanor .25.<sup>1</sup> Thus, in Arkansas the most serious prior offenses count four times that of the least severe in the criminal history calculation. In contrast, Florida provides a different point value for each of its 11 offense seriousness categories with point values ranging from .2 to 29.<sup>2</sup> Accordingly, in Florida the highest prior offense counts 145 times that of the lowest. North Carolina provides another example of a more detailed point-allocation scheme (with six different point values ranging from 1 to 10 assigned to various of its ten severity levels).<sup>3</sup>

**Punishment Imposed Weighting.** Only Alabama and the federal system rely on the prior punishment that was actually imposed for weighting. Alabama employs a number of different worksheets for types of crimes and sentencing decisions (i.e., separate worksheets for the decision to incarcerate and for the sentence length determination). Some in/out worksheets add points for prior executed incarceration sentences of a year or more.<sup>4</sup> And some worksheets add a predetermined number of points if there are any of these prior sentences while others add the number of prior incarceration sentences.<sup>5</sup>

In the federal system, different point allocations apply based on whether the term of prison was more than a year and month, between 60 days and a year and a month, or less than 60 days.<sup>6</sup> Particularly for the federal system, this allows for a straightforward accounting of prior convictions from other jurisdictions while maintaining some proxy for the severity of the prior offense, and avoiding the worksheet scorer having to determine how an offense committed in another jurisdiction should be scored in the federal system.

**Nominal Category Weighting.** Kansas and Oregon employ very similar criminal history scoring systems which implicate both types of rules discussed in this chapter. Rules apply differently depending on whether the prior offenses are considered person offenses or nonperson offenses, with prior person offenses receiving harsher treatment. Categories are comprised as follows in Kansas:

Category A	three or more prior person offenses
Category B	two prior person offenses
Category C	one prior person offense and one prior non-person offense
Category D	one prior person offense
Category E	three or more prior non-person offenses
Category F	two prior non-person offenses

- Category G one prior non-person offense
- Category H two or more misdemeanors
- Category I one misdemeanor or no criminal history

Aside from the nominal classification of person or nonperson, additional weighting is not applied; for instance, no distinction would be made among the person crimes of murder, robbery, and aggravated assault.<sup>7</sup>

Washington also uses a variation of nominal category weighting. In addition to the frequent use of prior similar offense premiums (see Chapter 7), Washington scoring sheets, which differ by offense severity level and crime type, sometimes distinguish between nonviolent, violent, and serious violent priors.<sup>8</sup>

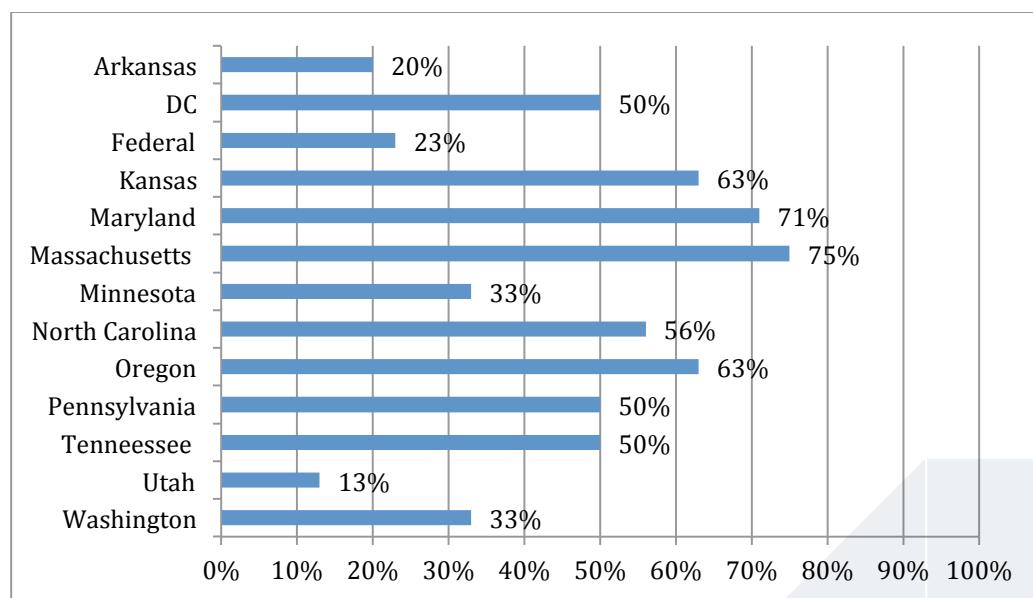
**Offender Classification Weighting.** Some jurisdictions place offenders into one of several classifications based on several indicators related to their prior offending. These states include Maryland, Massachusetts, and Tennessee. To illustrate, offenders in Massachusetts are placed into one of five prior record classifications: no/minor; moderate; serious; violent or repetitive; or serious violent. There are multiple ways to be placed into some of the classifications. For instance, offenders can be classified as violent or repetitive by: (1) accumulating six or more priors in any combination for offense severity levels 3 through 6; (2) accumulating two or more prior convictions in any combination for offenses in levels 5 and 6; or (3) acquiring

one prior level 7 through 9 conviction.<sup>9</sup> In similar ways Maryland classifies offenders as none, minor, moderate, or major<sup>10</sup>, and Tennessee organizes offenders as mitigated, standard, multiple, persistent, or career.<sup>11</sup>

Finally, several jurisdictions use unique weighting schemes that do not neatly fit into one of the four typologies discussed. These include Delaware, which increases presumptive maximum sentences based on prior offenses;<sup>12</sup> Utah, which does not generally weight felonies but which does add “violence history points”;<sup>13</sup> and Virginia, which employs elements of punishment imposed and nominal category weighting.<sup>14</sup> Brief descriptions of each state’s weighting system are provided in Table 8.1.

Figure 8.1 provides a comparison of the weighting impacts. The bar graphs signify how far (in percentage terms) the highest weighted offense in that jurisdiction can get an offender toward the points needed for inclusion in the maximum criminal history category. On average, the highest weighted offense moves an offender almost half way to the maximum category (mean = 46%). Arkansas, the federal system, and Utah have substantially lower maximum impacts at less than 25%, while Maryland and Massachusetts have the greatest impacts: in those two states a single prior offense can account for over 70% of the maximum criminal history impact.

**Figure 8.1. Highest Main-Grid Prior-Felony Weight as a Percentage of Maximum Criminal History Points**



*Note: This figure illustrates how far the highest weighted offense carries a person to the total points needed for inclusion in the maximum criminal history category. (Only main grids are considered.)*

## POLICY CONSIDERATIONS

### Offense Weighting

Commissions may wish to consider several offense weighting policy impacts. As noted, some degree of weighting appears to be employed in every jurisdiction. To the extent the commission is directed by retributive goals, the prior weighting enhancements should reflect the commission's assessment of deserved additional punishment based on the nature of the priors. Commissions might, for example, evaluate the nexus between the weighting system and the deserved punishment. The goal should be to ensure that no prior offenses are so underweighted and overly lenient that they fail to contribute the requisite level of desert for the current sentence, while also ensuring that no prior offenses are so overweighted and unduly harsh that they impose an undeserved enhancement on the basis of the prior offenses.

For commissions applying utilitarian justifications, it might not always be clear why a prior serious offense should be given greater weight in sentencing for the current offense, particularly if the current offense is dissimilar to the prior, and even more so if some meaningful amount of time has passed since the prior, more serious offense was committed.

For instance, if an offender with a fifteen-year-old violent conviction is being sentenced for larceny, the justification for the additional enhancement on the basis of the violent nature of the prior is less clear. In terms of risk, the violent offense arguably did not provide much predictive value since the offender went 15 years crime free and since the current offense is non-violent. The justification for offense weighting would appear to be strongest when the current offense is both close in time and similar in type to the past offending. While no jurisdiction currently employs a comprehensive system of *patterned weighting*, commissions interested in revisiting their weighting systems might consider such a system that adds additional weight to prior offenses with a better connection between the timing and nature of the prior offenses and the justifications for imposing criminal history enhancements.

In addition, a policy problem may exist in nominal category weighting jurisdictions if the distinction between person and non-person offenses is overbroad. For example, an offender with an infinite number of high-level non-person offenses will always be positioned lower than an offender with just one prior person offense. Depending on the circumstances and the nature of the offenses (for example a less egregious single-offense assault felon compared to a chronic burglar) this may result in unintended results. A

*"To the extent the commission is directed by retributive goals... The goal should be to ensure that no prior offenses are so underweighted and overly lenient that they fail to contribute the requisite level of desert for the current sentence, while also ensuring that no prior offenses are so overweighted and unduly harsh that they impose an undeserved enhancement on the basis of the prior offenses."*

reciprocal problem is that by having just one prior person offense, an offender is automatically moved into the half of the grid with the greatest criminal history enhancement impact, regardless of the similarity or recency of that prior. There may be situations where some observers would conclude an offender has advanced too far across the grid too quickly based only on a single prior person offense.

## DISCUSSION

### PART 2: Special Eligibility Requirements for Highest Criminal History Categories

#### Overview of Special Eligibility Requirements

A minority of jurisdictions have special eligibility prerequisites for an offender's inclusion in the highest criminal history category or categories. For this discussion jurisdictions can be distinguished on the basis of whether the special eligibility requirements reserve the ultimate categories for very serious or violent offenders, or whether the system merely requires factors in addition to the number of prior felonies for inclusion—such as when an offender can only reach the last category if they have accumulated points for a juvenile record and custody violation in addition to their adult felony convictions. Table 8.2 provides these eligibility rules by jurisdiction.

Some states reserve the highest criminal history categories for offenders who have committed at least one violent or person offense so that certain offenders could accumulate a significant record of low-level crimes without ever being classified in the highest criminal history category. As noted above, the Kansas and Oregon systems reserve eligibility for the four highest criminal history categories for offenders with

prior person offenses.<sup>15</sup> As a result, offenders with lengthy prior records that are limited to property, drug, or other nonperson crimes can move only about halfway across the grid (while offenders with just one prior person offense are automatically in the top half of criminal history categories).

Pennsylvania employs an approach which reserves the two most extensive prior record categories for repeat violent offenders. As a baseline, offenders are scored on a typical points system, with categories ranging from 0-5, and points allocated based on the severity of the prior offense (point values range from 0-4). However, in addition, a REVOC category (Repeat Violent Offender Category) is reserved for offenders with two or more prior convictions (or adjudications) for four point offenses and whose current conviction falls into an Offense Gravity Score level of 9 or higher. Further, a RFEL (Repeat Felony) offender category is reserved for offenders who have previous convictions or adjudications for Felony 1 or Felony 2 offenses, and who do not otherwise fall under the REVOC category.<sup>16</sup> Likewise Massachusetts's use of Offender Classification Weighting reserves the highest offender classifications for those with at least two Level 7-9 (the most severe) offenses.<sup>17</sup> In Tennessee, offenders are not eligible for the highest criminal history category unless they have a certain number of prior high-severity convictions.<sup>18</sup>

***"Some states reserve the highest criminal history categories for offenders who have committed at least one violent or person offense so that certain offenders could accumulate a significant record of low-level crimes without ever being classified in the highest criminal history category."***

Criminal history scores in Maryland, Michigan, and Utah are based on cumulative factors such as adult criminal history, juvenile criminal history, current probation or parole status, prior revocations, and so forth. For these three states offenders would not garner the total points required for the highest criminal history category merely by accumulating numerous low level adult offenses alone—some additional factors would have to be present. However, unlike the eligibility requirements in Kansas, Massachusetts, Oregon, Pennsylvania, and Tennessee, the add-on factors are not contingent upon violent or especially serious prior offending. For instance, the Utah

system tallies points in categories for adult felonies, adult misdemeanors, juvenile adjudications, supervision history, supervision risk, violence history, and weapons use in the current offense. Inclusion in the most serious criminal history category requires 16 or more points, which could be accumulated in a variety of ways—for example, with four or more prior felonies at any severity level (contributing a maximum of 8 points), eight or more misdemeanors (maximum of 4 points), five or more juvenile felonies (maximum of 3 points), and having previously been on parole (1 point).<sup>19</sup> Thus, while no number of prior low-level adult felonies would get one into the highest criminal history category, it is possible to get there through a steady accumulation of adult and juvenile offenses.

## POLICY CONSIDERATIONS

### Eligibility Requirements

As with offense weighting, special eligibility requirements present a double-edged policy sword. On the one hand, special eligibility requirements can prevent lower-level offenders from receiving the most substantial prior record enhancements while reserving advanced criminal history categories for the most egregious, repeat offenders. On the other hand, the restricted categories may cast too wide a net; when broadly drafted, eligibility requirements fast track certain offenders to the highest criminal history categories on the basis of a designation as a prior "person" or "violent" offender. To the extent that an offender's prior crimes are far in the past, to the extent that the current offense is dissimilar to the prior crimes, and to the extent that person and violent designations are overbroad, it may not make sense to impose substantial premiums on all eligible offenders. In terms of risk, some observers may not consider a person currently convicted of a fraud offense at greater risk of reoffending if they had a prior person offense compared to a prior non-person offense; indeed, if anything, the prior person offense may be less predictive of a future offense than a prior non-person offense would be. And in terms of retribution, the degree of similarity among offenses, time passed between offenses, and gradations of offense severity under broad umbrella terms like "person offense" may make some offenders more or less blameworthy than others.

We recognize commissions must balance their justification ideals with a system that is simple enough for courtroom professionals to score and implement. Some of the policy concerns raised in this chapter might easily be addressed through decay provisions or requirements that violent eligibility category rules only be triggered when the current offense is also a violent one.

Table 8.1. Prior Offense Weighting Schemes

 Alabama	The Alabama guidelines are implemented through worksheets rather than a grid. In addition to allocating points based on the number of felony convictions, some worksheets add points for prior executed incarceration sentences of a year or more. <sup>20</sup> Other worksheets assign different points for prior executed sentences of less than a year versus more than a year. <sup>21</sup> Further, some worksheets only account for whether there were any prior executed sentences (i.e., yes or no) <sup>22</sup> while others add the number of prior executed sentences. <sup>23</sup>																		
 Arkansas	Serious felonies (those that fall in levels 6-10 on the grid) count twice as much as less serious felonies (those that fall in levels 1-5 on the grid) and four times as much as serious adult misdemeanors or juvenile offenses that would have been felonies if committed by an adult. Point allocations are 1, .5, and .25, respectively. Very serious juvenile offenses can receive a full point. <sup>24</sup>																		
 Delaware	Delaware's non-grid system employs offense weighting differently than any other jurisdiction by increasing the presumptive sentencing range for the current offense. The rules vary according to the current offense, but, for example, the presumptive sentencing range might increase from a baseline 2-5 years to 2-10 years if the offender has two or more prior felonies or a prior violent felony. <sup>25</sup>																		
 District of Columbia	D.C. employs severity level weighting with point values of 3, 2, 1.5, 1, .75, .5, and .25 depending on the type and severity of offense, whether the offender was a juvenile or adult when it was committed, and, to a limited extent, how long ago the offense was committed. <sup>26</sup>																		
 Federal	The federal system employs offense weighting based on the length of imprisonment for each prior offense: 3 points for prior incarceration sentences exceeding a year and a month, 2 points for prior incarceration sentences of at least 60 days (which were not allocated 3 points), and 1 point (up to a maximum of 4) for other prior incarceration sentences. <sup>27</sup>																		
 Florida	Florida, a worksheet jurisdiction, uses a detailed offense weighting system in which each offense severity level corresponds to a different point value: .2, .5, .8, 1.6, 2.4, 3.6, 9, 14, 19, 23, and 29. <sup>28</sup> However, a different method of weighting applies to very serious prior felonies: if any offense qualifies as a "prior capital felony" it is not included in the prior record score, but instead the primary offense score is tripled. <sup>29</sup>																		
 Kansas	Kansas weights prior offenses according to a person or nonperson prior offense designation. Certain criminal history categories are only open to offenders with prior person offenses. <sup>30</sup> The classifications are as follows: <table> <tr> <td>Category A</td> <td>three or more prior person offenses</td> </tr> <tr> <td>Category B</td> <td>two prior person offenses</td> </tr> <tr> <td>Category C</td> <td>one prior person offense and one or more prior non-person offense</td> </tr> <tr> <td>Category D</td> <td>one prior person offense</td> </tr> <tr> <td>Category E</td> <td>three or more prior non-person offenses</td> </tr> <tr> <td>Category F</td> <td>two prior non-person offenses</td> </tr> <tr> <td>Category G</td> <td>one prior non-person offense</td> </tr> <tr> <td>Category H</td> <td>two or more select non-person misdemeanors or two person misdemeanors</td> </tr> <tr> <td>Category I</td> <td>one misdemeanor or no criminal history</td> </tr> </table>	Category A	three or more prior person offenses	Category B	two prior person offenses	Category C	one prior person offense and one or more prior non-person offense	Category D	one prior person offense	Category E	three or more prior non-person offenses	Category F	two prior non-person offenses	Category G	one prior non-person offense	Category H	two or more select non-person misdemeanors or two person misdemeanors	Category I	one misdemeanor or no criminal history
Category A	three or more prior person offenses																		
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Category G	one prior non-person offense																		
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Category I	one misdemeanor or no criminal history																		

Table 8.1, continued

 Maryland	Maryland employs a fairly elaborate version of offender classification weighting. An offender's prior adult criminal record is one of four components of the criminal history score and is categorized as major, moderate, minor, or none based on the number of prior offenses and where on the Maryland grids those prior offenses are located (points assigned are 5, 3, 1, or 0). <sup>31</sup> Placement in the four categories depends on the number and type of prior offenses. For example, just one prior level I offense categorizes one with a major criminal record; but an offender must have committed 10 or more level VII offenses for placement in the major category. <sup>32</sup> Points are also allocated for prior juvenile record and whether the offender had a prior parole or probation violation. <sup>33</sup>
 Massachusetts	Weighting in Massachusetts is driven by the number of prior offenses and how those offenses are categorized according to the state's nine offense seriousness levels. Offenders are given one of the following five criminal history designations: no/minor, moderate, serious, violent or repetitive, serious violent. <sup>34</sup> As an example, the violent or repetitive category is reserved for offenders with: <ol style="list-style-type: none"> <li>1. Six or more prior convictions in any combination for offenses in levels 3 through 6; or</li> <li>2. Two or more prior convictions in any combination for offenses in levels 5 and 6; or</li> <li>3. One prior conviction for offenses in levels 7 through 9.<sup>35</sup></li> </ol>
 Michigan	Michigan uses an offense weighting scheme that assigns different point subtotals for prior high severity felonies, low severity felonies, high severity juvenile adjudications, low severity juvenile adjudications, and prior misdemeanor convictions or adjudications. These classifications are based on severity levels (e.g., high severity felonies are Class M2, A, B, C, and D). For example, 25 points are allocated for one prior high severity felony, 50 points for two, and 75 points for three or more high severity felonies. For low severity priors, the points are five for one prior, 10 points for two, 20 points for three, and 30 points for four or more. <sup>36</sup> Thus, although the categories and increases are not always parallel and linear, a high severity offense counts 25:5 (or 5:1) compared to a low severity prior.
 Minnesota	Minnesota assigns prior felony offense weighting based on the severity level of the prior offense. Point possibilities are 3, 2, 1.5, 1, and .5 and are weighted differently on the standard versus the sex grid. <sup>37</sup>
 North Carolina	North Carolina assigns points based on the severity classification of the prior sentence with point possibilities consisting of: 10, 9, 6, 4, 2, and 1. <sup>38</sup>
 Oregon	Oregon's offense weighting scheme is very similar to the one in Kansas (see above) but with slight adjustments in the criteria for categories E through I. <sup>39</sup>

Table 8.1, continued

 Pennsylvania	<p>Pennsylvania's grid encompasses eight prior record categories. Special eligibility rules apply to the two highest categories. For the other six categories, offenders get points for prior offenses, with point values of 1, 2, 3, 4, or 5 depending on various offense classifications.<sup>40</sup> For example, three point offenses are designated as follows:<sup>41</sup></p> <p><b>Three Point Offenses.</b> Three points are added for each prior conviction or adjudication for the following offense:</p> <ol style="list-style-type: none"> <li>1. All other Felony 1 offenses not listed in §303.7(a)(1).</li> <li>2. All other inchoates to offenses listed in §303.7(a)(1).</li> <li>3. Violation of 35 P.S. §§780-113(a)(12)(14) or (30) involving 50 grams or more, including inchoates involving 50 grams or more.</li> </ol>
 Tennessee	<p>The Tennessee system categorizes offenders as mitigated, standard, multiple, persistent, or career offenders based on the interaction of the number and nature of the prior offenses.<sup>42</sup> For example, a persistent offender is defined<sup>43</sup> as a defendant who has received:</p> <ol style="list-style-type: none"> <li>1. Any combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes, where applicable; or</li> <li>2. At least two (2) Class A or any combination of three (3) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony.</li> </ol>
 Utah	<p>Utah's system is unique among states. Points are first allocated in separate categories for prior felonies, prior misdemeanors, and prior juvenile adjudications. For the prior felony category, 2 points are assigned for 1 prior felony, 4 points for 2 felonies, 6 points for 3 felonies, and 8 for more than 3 prior felonies. The level of felony does not matter. However, additional "violence history points" are added where a past offense "includes use of a weapon, physical force, threat of force, or sexual abuse."<sup>44</sup> Violence history points can be 1, 2, 3, or 4 per offense, depending on the severity level of the past offense.</p>
 Virginia	<p>The particular weighting mechanics vary significantly among the in/out and length worksheets for the 17 separate worksheet categories used in Virginia. Points frequently add up based on the length of prior sentences, additional points are sometimes allocated for prior person offenses, and points are also sometimes assigned for prior incarceration sentences, all of which, to some degree, add weight for certain types of offenses not including habitual patterning.<sup>45</sup> As an example, for the decision whether to incarcerate for burglary of a dwelling, offenders receive points based on (1) the total maximum years sentenced for their five most recent and serious prior record events (with 0-5 points possible); (2) the number of prior adult felony property conviction counts (with 1-4 points possible); the number of juvenile property adjudication conviction counts (with 1-3 points possible); and the number of prior misdemeanor convictions or adjudications (with 1-5 points possible). Additional points are added if there were any prior incarcerations or commitments (3 points), and prior revocations (1 point), a prior juvenile record (2 points), or if the offender was legally restrained at the time of the offense (up to 7 points).<sup>46</sup></p>
 Washington	<p>Washington employs weighting for some offenders. Depending on the classification of the current offense, points may be allocated differently according to whether the offender does or does not have certain types of priors. For example, for Robbery First Degree prior serious violent and violent felonies count 2 points each while nonviolent felonies count 1 point each.<sup>47</sup> However, for many offenses the guidelines assign 1 point for every prior adult felony conviction with no weighting.</p>

**Table 8.2. High Criminal History Category Eligibility Rules**

<i>Alabama</i>	None
<i>Arkansas</i>	None
<i>Delaware</i>	Delaware implements criminal history enhancements by raising the presumptive ceiling for a particular crime classification. The ceilings are generally raised just twice—once for either (a) two or more prior felonies, or (b) one prior violent felony, and a second time for two or more prior violent felonies or (excessive cruelty). Accordingly, offenders with even extensive prior non-violent felony records will never be included in the presumptive range with the highest ceiling. <sup>48</sup>
<i>District of Columbia</i>	None
<i>Federal (U.S. courts)</i>	None
<i>Florida</i>	None
<i>Kansas</i>	Only offenders with at least one person felony are eligible for inclusion in the four highest criminal history categories. <sup>49</sup>
<i>Maryland</i>	Maryland does not limit inclusion in the high categories by the nature of offense; however, an offender cannot get into the two highest offender score categories based solely on his or her adult prior record. To get into criminal history category 6 or 7 + an offender with the maximum 5 adult points would need a custody status point, a point for prior custody status violation, and/or points (1 or 2) for prior juvenile adjudications. <sup>50</sup>
<i>Massachusetts</i>	Massachusetts uses a sentencing grid with five criminal history categories labelled A through E for no/minor record; moderate record; serious record; violent or repetitive; serious violent. Eligibility for category E, serious violent, requires two or more prior convictions in any combination for offense serious levels 7 through 9, the three highest severity levels on the Massachusetts grid. <sup>51</sup>
<i>Michigan</i>	Each Michigan grid employs parallel criminal history categories (referred to as prior record variable levels or PRV levels) labelled A through F with F being the highest category. Category F is reserved for offenders with 75 or more PRV points. <sup>52</sup> The PRV points are allocated on the basis of 7 separate categories: prior high severity felony convictions (up to 75 points), prior low severity felony convictions (up to 30 points), prior high severity juvenile adjudications (up to 50 points), prior low severity juvenile adjudications (up to 20 points), prior misdemeanor convictions or prior misdemeanor juvenile adjudications (up to 20 points), relationship to the criminal justice system (up to 20 points), and subsequent or concurrent felony convictions (up to 20 points). Thus it is feasible that an offender could accumulate up to 70 points (30+20+20) for low level offenses plus 5 to 20 additional points for a current status relationship with the criminal justice system which could be based on a low-level offense. <sup>53</sup>

Table 8.2. High Criminal History Category Eligibility Rules

<i>Minnesota</i>	None
<i>North Carolina</i>	None
<i>Oregon</i>	Oregon shares the same eligibility requirements as Kansas: to be placed in the highest four criminal history categories, an offender must have committed at least one person crime. <sup>54</sup>
<i>Pennsylvania</i>	Pennsylvania guidelines establish eight criminal history categories; the lowest six are points-based, but the highest two, termed RFEL and REVOC, are reserved for repeat felony 1 and felony 2 offenders and repeat violent offenders. For the highest REVOC category, an offender must have committed a current offense with a severity level 9 or higher, and at least two prior "four point offenses" (e.g., murder). <sup>55</sup>
<i>Tennessee</i>	In Tennessee, offenders convicted of the highest severity crimes are not eligible for the highest criminal history category unless they have a certain number of prior high-severity convictions. <sup>56</sup>
<i>Utah</i>	Points are tallied in categories of: adult felonies, adult misdemeanors, juvenile adjudications, supervision history, supervision risk, violence history, and weapons use in current offense. Inclusion in the highest criminal history category requires 16 or more points which could be accumulated in several ways as previously discussed. <sup>57</sup>
<i>Virginia</i>	Although the Virginia worksheets do not have categorical designations like the other jurisdictions in this Table, the state does employ an analogous rule with a substantial impact on the number of prior record points an offender receives. For the primary offense points on the length worksheets, offenders are designated as Category I, Category II, or Other. Category I offenders are those with a prior violent felony conviction or adjudication which carries a statutory maximum penalty of 40 years or more; Category II are those with a violent felony or adjudication with a max of less than 40 years, and Other are all other offenders. Other offenders receive a baseline point total, while Category I and II offenders receive a point total that is typically two to four times larger than the points allocated to "Other" offenders. <sup>58</sup>
<i>Washington</i>	None

<sup>1</sup> Ark. Code Ann. § 16-90-803 (2014).

<sup>2</sup> Fla. Crim. Punishment Code: Scoresheet Preparation Manual 24 (2014).

<sup>3</sup> N.C. Structured Sentencing Training & Reference Manual 11 (2014).

<sup>4</sup> See, e.g., Alabama Presumptive & Voluntary Sentencing Standards Manual 33 (2013) (the Drug Prison In/Out Worksheet adds three points for a prior unsuspended incarceration sentence of one year or more).

<sup>5</sup> See, e.g., *id.* at 35, 67 (the Drug Prison Sentence Length Worksheet awards a straight fourteen points based on any prior unsuspended incarceration sentence of one year or more whereas the Person Prison Sentence Length Worksheet awards points on an increasing scale based on the number of prior incarcerations with an unsuspended sentence of one year or more).

<sup>6</sup> U.S. Sentencing Guidelines Manual § 4A1.1 (2014).

<sup>7</sup> Kan. Sentencing Guidelines Desk Reference Manual 38 (2013).

<sup>8</sup> See, e.g., Wash. State Adult Sentencing Guidelines Manual 412 (2013).

<sup>9</sup> Mass. Sentencing Guidelines 56 (1998).

<sup>10</sup> Md. Sentencing Guidelines Manual § 7.1 (February 2015).

<sup>11</sup> Tenn. Code Ann. §§ 40-35-105 to -109 (2015).

<sup>12</sup> See, e.g., Delaware Sentencing Accountability Book 40, 42 (2014) (indicating that the presumptive sentence of 30 months for Violent Class C Felony can increase to 5 or 10 years according to the offender's criminal history).

<sup>13</sup> Utah Adult Sentencing & Release Guidelines 11 (2013).

<sup>14</sup> See, e.g., Va. Sentencing Guidelines, Assault Worksheet 9 (17th Ed. July 1, 2014) (the worksheet assigns points based upon a combination of the severity of prior offenses and the maximum penalties assigned to previous offenses).

<sup>15</sup> Kan. Sentencing Guidelines Desk Reference Manual 38 (2013); Or. Admin. R. 213-004-0007 (2014).

<sup>16</sup> Penn. Sentencing Guidelines Implementation Manual § 303.4 (7th Ed. 2012).

<sup>17</sup> Mass. Sentencing Guidelines 56 (1998).

<sup>18</sup> See Tenn. Code Ann. § 40-25-108 (2015).

<sup>19</sup> See Utah Adult Sentencing & Release Guidelines Form 1 – General Matrix (2014).

<sup>20</sup> See, e.g., Alabama Presumptive & Voluntary Sentencing Standards Manual 33, 35, 65 (2013).

<sup>21</sup> See, e.g., *id.* at 41, 67, 77.

<sup>22</sup> See, e.g., *id.* at 77 (Blocks 7 and 8 take into account any previous prior incarcerations, regardless of the length of sentence.)

<sup>23</sup> See, e.g., *id.* at 67.

<sup>24</sup> Ark. Code Ann. § 16-90-803 (2014).

<sup>25</sup> See, e.g., Delaware Sentencing Accountability Book 39 (2014).

<sup>26</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.2 (2014).

<sup>27</sup> U.S. Sentencing Guidelines Manual § 4A1.1 (2014).

<sup>28</sup> Fla. Crim. Punishment Code: Scoresheet Preparation Manual 24 (2014).

<sup>29</sup> *Id.* at 8.

<sup>30</sup> Kan. Sentencing Guidelines Desk Reference Manual 38 (2013).

<sup>31</sup> Md. Sentencing Guidelines Manual § 7.1.C (February 2015).

<sup>32</sup> *Id.* Table 7.2 at 25.

<sup>33</sup> *Id.* at § 7.1.

<sup>34</sup> Mass. Sentencing Guidelines 7 (1998).

<sup>35</sup> *Id.* at 56.

<sup>36</sup> Mich. Sentencing Guidelines Manual 23 (2015).

<sup>37</sup> Minn. Sentencing Guidelines § 2.B.1 (2014).

<sup>38</sup> N.C. Structured Sentencing Training & Reference Manual 11 (Dec. 1, 2014).

<sup>39</sup> Or. Admin R. 213-004-0007 (2014).

<sup>40</sup> Penn. Sentencing Guidelines Implementation Manual § 303.4 (7th Ed. 2012).

<sup>41</sup> *Id.* at § 303.7(a)(2).

<sup>42</sup> Tenn. Code Ann. §§ 40-35-105 to 109 (2015).

<sup>43</sup> Tenn. Code Ann. § 40-35-107 (2015).

<sup>44</sup> Utah Adult Sentencing & Release Guidelines Form 1 – General Matrix (2014).

<sup>45</sup> See, e.g., Va. Sentencing Guidelines Larceny Worksheet 9 (2014) (assigns points based on maximum sentences, in years, for an offender's five most recent and serious prior record events); *id.* at Assault Worksheet 9 (awards points for prior felony convictions against persons); *id.* at Assault Worksheet 3 (assigns points for prior incarcerations).

<sup>46</sup> *Id.* at Burglary/Dwelling Worksheet 3.

<sup>47</sup> Wash. State Adult Sentencing Guidelines Manual 412 (2013).

<sup>48</sup> See, e.g., Delaware Sentencing Accountability Book 32 (2014) ("Sentences for Prior Criminal History Categories" table raises the presumptive sentencing range based on an offender's prior criminal history.)

<sup>49</sup> Kan. Sentencing Guidelines Desk Reference Manual 38 (2013).

<sup>50</sup> See Md. Sentencing Guidelines Manual Table 7.1 (February 2015).

<sup>51</sup> Mass. Sentencing Guidelines 56 (1998).

<sup>52</sup> See, e.g., Mich. Sentencing Guidelines Manual 145 (2015) (the PRV-level, ranging from A-F based upon total calculated PRV points, makes up the horizontal axis of the sentencing grid.)

<sup>53</sup> See *id.* at 23-28.

<sup>54</sup> Or. Admin. R. § 213-004-0007 (2014).

<sup>55</sup> Penn. Sentencing Guidelines Implementation Manual § 303.4 (7th Ed. 2012).

<sup>56</sup> Tenn. Code Ann. § 40-35-108 (2015).

<sup>57</sup> Utah Adult Sentencing & Release Guidelines Form 1- General Matrix (2014).

<sup>58</sup> See, e.g., Va. Sentencing Guidelines Assault Worksheet 5.



### Key Points

- Most guideline schemes impose a severity premium if the offender was on probation, parole, or in jail at the time of the current offense. Some jurisdictions also impose a custody status enhancement if the offense was committed while the offender was on bail or other pre-conviction release.
- This enhancement affects approximately a quarter of all offenders appearing for sentencing.
- Offenders committing the current offense while under a court order are deemed a higher risk to re-offend and/or more blameworthy.
- The paucity of research on this element of criminal history means we know little about the degree to which custody status increases the risk of further offending. One recent study demonstrated that custody status was a modest predictor of re-offending. For this reason, the use of custody status as a criminal history enhancement may be more questionable than other dimensions of a criminal record—such as the number of prior convictions—which have been the subject of more validation research.
- Approaches to incorporating this factor vary across the jurisdictions. The most common strategy is to assign additional criminal history points to reflect the offender's custody status at the time of the offense. In contrast, some schemes simply treat custody status as an aggravating factor for consideration by the court at sentencing. A small number impose no additional penalty for the commission of an offense while on active custody status.
- Considerable variation also exists in terms of the weight assigned to custody status. Under some schemes, custody status at the time of the offense carries as much weight as a prior felony. Elsewhere, custody status carries only a fraction of the weight of a prior felony conviction.
- Commissions might conduct research-based validation exercises to determine the degree to which custody status is a reliable predictor of subsequent offending. Commissions could then determine whether they need to incorporate custody status as a component of criminal history (if they do not already do so) or adjust the enhancement (if it is already incorporated into the criminal history score). These analyses could determine whether one type of custody status (e.g., probation) is associated with a higher risk of recidivism than other statuses (e.g., parole). This may lead a Commission to modify the weight of the increment, depending upon the nature of the status.

## INTRODUCTION

Most foreign jurisdictions impose a more severe sentence to reflect the fact that the offender was under some form of judicial order when the crime was committed.<sup>1</sup> During the pre-guidelines era, judicial practice across the U.S. imposed a more severe sentence when the offender fell into this category.<sup>2</sup> It is unsurprising, therefore, that most State and the federal sentencing guidelines incorporate this factor in their criminal history calculations.

*"Considerable variation also exists in terms of the weight assigned to custody status. Under some schemes, custody status at the time of the offense carries as much weight as a prior felony. Elsewhere, custody status represents only a fraction of the aggravating power of a prior felony conviction."*

Custody Status affects a significant number of offenders. For example, the Bureau of Justice reported that in 2013 approximately one fifth of the felony offender population in urban centers was on probation or parole at the time of arrest.<sup>3</sup> Data from the U.S. Sentencing Commission reveal that in 2013, slightly more than one offender in four had criminal history points added for commission of the instant offense while already serving a sentence.<sup>4</sup>

Part I of this chapter notes the relevance of custody status for sentencing and summarises some empirical findings regarding this component of a criminal history score. Part 2 highlights different approaches to incorporating custody status in guideline systems. Part 3 raises some policy questions for Commissions to consider. The important message of this chapter is that the research on custody status as a risk factor is very limited and there is a need to conduct validation research to determine the extent to which custody status increases the offender's risk of re-offending. As noted in a publication from the U.S. Sentencing Commission, custody status "captures the higher recidivism likelihood when the instant offense is committed while the offender is still meeting a sentence obligation for an earlier offense."<sup>5</sup> Yet validation research is needed to determine how much weight this circumstance should have in the criminal history score: is it a powerful or only modest predictor of re-offending?

## DISCUSSION

### PART 1: Justifying Custody Status as a Criminal History Enhancement

As with other dimensions of criminal history, the justification for this specific enhancement is two-fold. Offenders who commit an offense while on pre-trial release, probation or parole:

- represent a higher risk of re-offending; and/or
- are more culpable for the flagrant disregard for a previously imposed judicial order, or for breaching the trust of the court or the releasing authority.<sup>6</sup>

Custody status is the least well-researched dimension of criminal history and the research on predicting recidivism offers only limited insight into the predictive value of this factor. Risk scale handbooks such as the Level of Service/ Case Management Inventory (discussed below) provide validation data for their total criminal history score, but not for each specific component.<sup>7</sup> State recidivism studies do not generally include custody status as a predictor of re-offending, and Commissions do not routinely report the volume of cases affected by custody status in their

annual reports.<sup>8</sup> Failure to comply with probation or parole conditions is an accepted risk factor for future offending, but this is a different matter from custody status *per se*.

### Custody Status as a Component of Recidivism Risk Instruments

Custody status does not appear in most risk of re-offending instruments.<sup>9</sup> One widely used actuarial risk assessment tool in sentencing is the Level of Service Inventory (Revised) (LSI-R) which entails a 54-item survey of all domains relevant to re-offending.<sup>10</sup> Several versions of this instrument have been developed and validated over the past 30 years. The LSI-R incorporates 10 measures of criminal history and while any previous breach of probation is one factor, custody status *per se* is not included.<sup>11</sup> Nor is custody status included in the Level of Service/ Case Management Inventory (LS/CMI), which contains 8 criminal history items in its criminal history subcomponent. The California Static Risk Assessment (CSRA) is one of the latest risk prediction instruments, and it also omits custody status.<sup>12</sup> The absence of custody status in these instruments reflects recognition in the recidivism literature that this circumstance is not a reliable predictor of re-offending.<sup>13</sup> Finally, the Pennsylvania Commission on Sentencing, in conducting its Risk Assessment Project, reviewed 29 current risk assessment instruments with a view to establishing the most frequently cited risk factors. The resulting list of variables did not include custody status.<sup>14</sup>

Since the search for risk-related variables has generated a great deal of research, and most predictive devices omit this factor, this raises questions about this component of the criminal history score. Unlike other dimensions of prior offending – such as the number of previous convictions – there is little empirical evidence to suggest that offending while on pre-trial release or while on probation or parole is a reliable predictor of subsequent re-offending. In one of the few validation exercises, the U.S. Sentencing Commission compared the federal sentencing guidelines criminal history category with the U.S. Parole Commission's Salient Factor Score – both schemes incorporate custody status as a component.<sup>15</sup> This analysis permitted a comparison of the predictive power of custody status, relative to other dimensions of criminal history. The U.S. sentencing guidelines custody status factor ('under criminal justice sentence') emerged as a much weaker predictor of re-offending than other dimensions of criminal history (such as number of priors).<sup>16</sup> Thus while most guidelines use custody status as a criminal history component, this usage remains unsupported by validation research in each jurisdiction.

*"Unlike other dimensions of prior offending – such as the number of previous convictions – there is little empirical evidence to suggest that offending while on pre-trial release or while on probation or parole is a reliable predictor of subsequent re-offending."*

## Part 2: Variation in Approaches to Recognizing Custody Status

There is considerable variation in the way that custody status is considered, as well as the quantum of additional punishment that is imposed. Table 9.1 summarizes arrangements in the jurisdictions included in this Sourcebook. As can be seen, most of the enumerated jurisdictions include custody status in their criminal history calculation, usually by imposing additional criminal history points. In some states which do not assign additional criminal history points to reflect custody status, this circumstance is nevertheless taken into account at sentencing. For example, in Alabama, custody status is identified as a guidelines aggravating factor.<sup>17</sup> In Kansas, if the defendant was incarcerated at the time of the offense this constitutes an aggravating factor which may be considered in determining whether substantial and compelling reasons for departure exist.<sup>18</sup>

Although the majority of jurisdictions incorporate custody status in the criminal history calculation, variation arises, however, in terms of the *categories* of court order included, and the *weight* that custody status attracts as a component of the criminal history score. An important distinction which divides the jurisdictions is whether any form of court order should be included, or whether only post-conviction custody status should count. Both justifications for a custody status premium (enhanced risk or blameworthiness) may favor distinguishing between pre- and post-conviction supervision.

If increased culpability is the primary rationale, it may be appropriate to assign a higher premium when the custody status arises from the offender being on parole but not pre-trial supervision. An offender on parole has been convicted and therefore should be particularly aware of the importance of compliance with the law. In contrast, the offender who commits a crime on pre-trial release has not yet been convicted of an offense. A culpability-based

account would therefore distinguish between these two cases in terms of the magnitude of any sentencing enhancement to reflect the offender's custody status. Risk, too may be relevant: the offender who commits a crime while on parole may be a higher risk than one who commits the crime while on bail. The 12 jurisdictions that include custody status are relatively evenly divided into those that consider pre-trial custody status and those that exclude this form of custody status. Alabama is an example of a state that includes pre-trial custody status, while the federal system restricts custody status to post conviction custody (see Table 9.1).

## POLICY CONSIDERATIONS

### 1. Alternative Approaches to Recognizing Custody Status

One justification for including custody status in the criminal history calculation is because it relates to the offender's conduct *prior* to the commission of the current offense. However, custody status is unlike other dimensions of criminal history, and there may be reasons to treat it differently from the other criminal history components. First, it is a *single application* enhancement. If an offender has a prior felony conviction this normally counts against him at all subsequent sentencing decisions: the effect of a conviction is therefore cumulative (as long as the conviction remains within the "look-back" period). Custody status applies to the current conviction only, and this limits its impact on sentence severity. Second, violating conditions of probation or parole is generally subject to punishment independent of any sentencing enhancement for subsequent offending, and this is not true for other dimensions of criminal history.

An alternate strategy would exclude custody status from the criminal history score and instead sentence the offender separately for breach of a previous court order and/ or aggravate the sentence for the instant offense. Pennsylvania elected not to enhance the criminal history score to reflect the offender's custody status. The Pennsylvania Commission on Sentencing took the view that alternative approaches to punishing the offender for the probation or parole violation were more appropriate.<sup>19</sup> Removing custody status from the criminal history score and treating this circumstance as an aggravating factor at sentencing would permit a court to calibrate the degree of aggravation to reflect a number of relevant considerations, including the nature of the previously imposed court order, the timing of the new offense within that order, and the seriousness of the fresh offense.

If custody status were to be excluded from the criminal history score or defined more narrowly (for example by excluding pre-trial release), the fact that the offense was committed while the offender was under court order may still play a role. The offender committing an offense while on parole may be revoked to prison, or may receive a sentence consecutive to the current sentence. The consequence is that removing or restricting custody status from the criminal history score may yield greater disparity and potentially greater sentence severity for offenders. Commissions contemplating removing custody status from the criminal history equation would need to consider these possible outcomes.

## 2. Distinguishing Different Categories of Custody Status

Another policy question is whether custody status enhancements should be differentiated according to the *nature* of the order violated or the *timing* of the new offense – that is, did the new offense occur early or late in the previously imposed order? For the sake of operational simplicity and consistency, custody status enhancements are insensitive to potentially important variation between offenders, and also between different forms of legal status. Yet, fresh offending may vary in its significance depending upon whether the offender was on probation or parole or on pre-trial release. An offender living in the community on probation or parole is serving a sentence; committing a fresh offense seems clearly aggravating. But this justification does not apply to defendants on bail, for whom the presumption of innocence remains in effect. The offender who offends while on probation or parole is aware of his previous conviction which has given rise to the current sentence. The defendant on bail has yet to be convicted.

Similarly, the significance of the current offense could vary depending on whether it was committed very early or very late in the probation or parole period. Offenders who commit an offense near the end of a previous sentence may be less culpable and a lower risk than those who re-offend very early in the previous order. Although re-offending occurs in both cases, the offender who commits an offense immediately after beginning probation may be more culpable (and possibly a higher risk) than one who re-offends near the end of the previous sentence. Commissions might consider whether convictions occurring near the expiration of a probation or parole period should carry less weight in terms of the custody status enhancement.

Incorporating considerations such as the timing of the fresh (i.e., current) offense, or distinguishing between post-conviction and pre-trial would complicate criminal history calculations. Commissions would need to balance the utility of weighting custody status against the disadvantages of a more complex method of calculating criminal history scores. Finally, the seriousness of the fresh conviction may call into question the imposition of a custody status enhancement. For example, conviction for a low seriousness crime while on parole may trigger a custody status enhancement which is disproportionate in light of the gravity of the latest offense. Rather than adopt a generic approach which assigns additional liability no matter what kind of legal status is being infringed, custody status could be limited to violations arising post-conviction. In Minnesota for example, an offender who commits a new felony while on pre-trial diversion or pre-trial release from another charge does not acquire an additional custody status point.<sup>20</sup>

## 3. Considering the Weight of Custody Status

Another important policy question concerns the *weight* that custody status should carry at sentencing. In some jurisdictions it carries the same or almost as much weight as a prior adult felony conviction. For example, in Minnesota,<sup>21</sup> prior felonies attract different numbers of criminal history points, depending upon their severity level. For example, a prior felony at Severity Level 1 or 2 attracts half a criminal history point whereas a Severity Levels 9 to 11 prior attracts two criminal history points. Custody status attracts a single criminal history point – the equivalent weight of a single prior felony at Severity Levels 3 to 5.<sup>22</sup> It is worth considering whether the enhanced risk or blameworthiness arising from committing a crime while on probation or parole is the equivalent of a prior felony of this level of seriousness. As a general rule, aggravating factors at sentencing seldom carry the same weight as the base offense.<sup>23</sup>

Elsewhere, custody status carries significantly less weight than independent prior offending. For example, in North Carolina, custody status carries a single prior record point. This may be compared to the ten points assigned for a Class A felony, and nine points for a Class B1 felony. In other words, in that state, custody status carries a small fraction of the aggravating power of a prior felony. Commissions may consider conducting research to determine empirically whether custody status should be accorded the same, or less weight than a single felony (see validation, below).

#### 4. Validating Custody Status as a Criminal History Enhancement

How might these various policy options be evaluated? Throughout this Sourcebook we urge Commissions to consider conducting empirical validation exercises for all dimensions of criminal history. With respect to custody status, this would involve collecting data to determine the degree to which this circumstance is a significant predictor of subsequent offending.<sup>24</sup> The U.S. Sentencing Commission provided a good example of such research when it examined the validity of “recency” criminal history points. The Commission determined that “including recency in the criminal history calculation has minimal predictive power.”<sup>25</sup> A similar exercise would establish the relative power of custody status as a predictor, and the results would serve to guide Commissions in determining whether their custody status enhancement was too powerful or too weak.

Validation exercises help determine the weight particular dimensions of criminal history should carry. Future research could also resolve the question of whether there is a differential risk associated with the various categories of custody status. For example, is committing an offense while on pre-trial release associated with a higher or lower risk of re-offending than release post-conviction? Once this is established, Commissions could determine whether they need to incorporate custody status as a component of criminal history (if they do not already do so). On a crime prevention rationale, these two forms of custody status (pre-trial and post-conviction) would only result in a differential enhancement if one category was associated with a higher re-offending rate. Empirical trends regarding the relationship between custody status and re-offending are therefore critical to the risk-reduction justification. Finally, Commissions might wish to clarify whether custody status enhancements are justified by higher risk or higher culpability (or both), as this will determine how the enhancement is operationalized.

Table 9.1. Custody Status Enhancement Arrangements

JURISDICTION	CUSTODY STATUS ARRANGEMENTS
 Alabama	Custody status is identified as a guidelines aggravating factor; any upward departure sentence requires an aggravating factor to be proved: “The defendant was incarcerated, on pre-trial release, on probation or parole or serving a community corrections sentence at the time the crime was committed, or otherwise under sentence of law.” <sup>26</sup>
 Arkansas	A maximum of one Criminal History point is assigned if defendant “was on any type of criminal justice restraint for a felony at the time the current offense was committed. Criminal justice restraints include, but are not limited to incarceration, pre-trial bond, suspended imposition of sentence, probation, parole, post-prison supervision, appeal bond, and release pending sentencing for a prior crime.” <sup>27</sup>
 Delaware	“While on release or pending trial/sentencing” creates a separate criminal history category. For example, for a Class D Felony (Violent) offense, while on release or pending trial or sentencing raises the presumptive sentence range from up to 2 years at level V to Up to 4 years at level V. <sup>28</sup> (Impact of custody status therefore varies depending upon offense of conviction.)”
 District of Columbia	Custody status is not counted in criminal history score: “The defendant’s status (i.e., incarcerated, or on pre-trial release, probation, parole, or supervised release) at the time the defendant committed the offense is not counted in the criminal history score, although this status may be considered by the judge in choosing the appropriate sentence from the applicable box. Moreover, the sentence in the new case must be imposed consecutively to any sentence that the defendant was serving at the time the defendant committed the offense.” <sup>29</sup>

Table 9.1, continued

JURISDICTION	CUSTODY STATUS ARRANGEMENTS
	<p>Two Criminal history points are assigned if the instant offense was committed while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.<sup>30</sup></p>
	<p>Four sentence points are assigned for legal status violation (if defendant is under any form of pre-trial intervention or diversion program; court-imposed or post-prison release community supervision).<sup>31</sup></p>
	<p>"Defendant was incarcerated at the time of the offense" is an aggravating factor which may be considered in determining whether substantial and compelling reasons for departures exist.<sup>32</sup></p>
	<p>"In criminal justice system:" One point is added to the criminal history score if offender was on parole, probation, incarcerated work release, mandatory supervision, escape, or comparable status at the time the offense was committed. "An offender is not considered to be in the criminal justice system if the offender was on unsupervised probation for an offense not punishable by imprisonment."<sup>33</sup></p>
	<p>If the defendant "committed the offense while on probation, on parole, or during escape" is a guidelines aggravating factor.<sup>34</sup></p>
	<p>A range of additional criminal history points is assigned, depending on the nature of custody status. According to PRV 6 ("Relationship to Criminal Justice System"), offenders serving a sentence in prison, or awaiting trial, on probation, parole, or delayed sentence status are assigned between five and twenty additional Criminal History points.<sup>35</sup></p>
	<p>One or two custody status points are assigned when an offender is under various post-conviction custody statuses.<sup>36</sup> An additional custody status point can be assigned if: The current offense is found on the Sex Offender Grid at Severity Level A-G and the offender is under custody status for an offense on the Sex Offender Grid at Severity Level A-G.</p> <p>If the current offense was committed between August 1, 2006 and July 31, 2007, the additional point will be assigned if the offender is on <i>probation, supervised release, or conditional release</i> for a prior qualifying sex offense. If the current offense was committed on or after August 1, 2007, the additional point will be assigned if the offender is on <i>any type of applicable custody</i> as defined by § 2.B.2."</p>

Table 9.1, *continued*

JURISDICTION	CUSTODY STATUS ARRANGEMENTS
 North Carolina	<p>One Criminal History point is added if the offense was committed while on probation, parole, post-release supervision, while serving a sentence of imprisonment or while on escape.<sup>37</sup></p>
 Oregon	<p>No explicit custody status enhancement.</p>
 Pennsylvania	<p>No explicit custody status enhancement.</p>
 Tennessee	<p>Custody Status functions as an enhancement factor if at the time the felony was committed, one of the following classifications was applicable to the defendant: Released on bail or pre-trial release; if the defendant is ultimately convicted of the prior misdemeanor or felony; Released on parole; Released on probation; On work release; On community corrections; On some form of judicially ordered release; On any other type of release into the community under the direct or indirect supervision of any state or local governmental authority or a private entity contracting with the state or a local government; On escape status; or Incarcerated in any penal institution on a misdemeanor or felony charge or a misdemeanor or felony conviction.<sup>38</sup></p>
 Utah	<p>General Matrix: When act occurred while under current supervision or pre-trial release the offender enters criminal history row 4 (the second highest row).<sup>39</sup></p>
 Virginia	<p>“Legally restrained at time of offense” attracts additional criminal history points, depending upon the nature of current offense.<sup>40</sup></p>
 Washington	<p>One additional criminal history point is assigned if the offense was committed while the offender was under community custody, including post-release supervision.<sup>41</sup></p>

<sup>1</sup> For example, in England and Wales, § 143(3) of the *Criminal Justice Act 2003* states that “[i]n considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.” In addition, the English sentencing guidelines include “[o]ffence committed while on licence [i.e., parole or statutory release from prison]” as a factor “indicating higher culpability.” See Sentencing Guidelines Council, *Overarching Principles: Seriousness* 6 (2004).

<sup>2</sup> See, e.g., *People v. Combs*, 184 Cal. App. 3d 508, 511 (Ct. App. 1986) (“Here the ‘out on bail’ status is an appropriate factor in aggravation . . . .”).

<sup>3</sup> Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties*, 2009 at 10 (2013).

<sup>4</sup> U.S. Sentencing Commission, *2013 Sourcebook of Federal Sentencing Statistics*, Table 20 (2014).

<sup>5</sup> U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, 7 (2005).

<sup>6</sup> Dale G. Parent, *Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines* (1988). Parent noted the position that an offender “deserved greater punishment if he committed a new crime before completing service of a previous sentence.” *Id.* at 70.

<sup>7</sup> See Don Andrew, James Bonta & Stephen Wormith, (2004) *Level of Service/Case Management Inventory: An Offender Assessment System*, ch. 6 (2004).

<sup>8</sup> For example, one early review of the characteristics of recidivists identifies 19 robust predictors of re-offending, including the number of prior arrests, offender age, offense category and other variables, but omits custody status. See Dean J. Champion, *Measuring Offender Risk: A Criminal Justice Sourcebook* (1994).

<sup>9</sup> The Salient Factor Score (SFS) is one scale which does include commitment or supervision status at the time of the offense.

<sup>10</sup> See generally Christopher Slobogin, *Risk Assessment*, in *The Oxford Handbook of Sentencing and Corrections* (Joan Petersilia & Kevin R. Reitz eds., 2012).

<sup>11</sup> Access to the LSI instrument is restricted to purchasers of the User manual available from MultiHealth Systems: <http://www.mhs.com/Safety.aspx>. However, some Correctional Agencies have published sections of the instrument, e.g., New South Wales, Department of Corrective Services, *LSI-R Training Manual* 13-15 (2002).

<sup>12</sup> The CSRA includes a related item namely total sentence/ supervision violations. However, this item is a poor predictor of subsequent felony arrest rates, which differed little between offenders with one sentence violation (22.9% recidivism rate) and four sentence violations (25.3% recidivism rate). See Susan Turner et al., *Development of the California Static Risk Assessment (CSRA): Recidivism Risk Prediction in the California Department of Corrections and Rehabilitation* 9 (2013).

<sup>13</sup> One of the most widely-cited surveys of the variables affecting recidivism risk identifies the most important factors yet custody status is not cited. See Don Andrew & James Bonta, *The Psychology of Criminal Conduct* ch. 10 (5th ed. 2010).

<sup>14</sup> Pennsylvania Commission on Sentencing, *Risk/ Needs Assessment Project: Interim Report 1, Review of Factors used in Risk assessment Instruments* 2, 13-17 (2011).

<sup>15</sup> See generally, U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the US Parole Commission Salient Factor Score* (2005).

<sup>16</sup> An indication of the relative power of different criminal history components to predict recidivism can be derived from the size of the critical test statistic. The variable reflecting number of priors generated a much higher chi-square than “under criminal sentence.” See U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the US Parole Commission Salient Factor Score*, Exhibits 2 and 3, 23-24 (2005).

<sup>17</sup> Ala. Presumptive & Voluntary Sentencing Standards Manual 26 (Oct. 1, 2013).

<sup>18</sup> Kan. Sentencing Guidelines Desk Reference Manual 69 (2014).

<sup>19</sup> Penn. Sentencing Guidelines Implementation Manual 48 (3rd ed. 1988).

<sup>20</sup> Minn. Sentencing Guidelines §2.B.2 (2014).

<sup>21</sup> Custody status has been at the heart of the criminal history score in Minnesota since the creation of the guidelines. In its first report to the legislature (in 1980) the Commission identified custody status as one of two “core variables” for inclusion in the criminal history index (the second being the number of prior felony convictions); see Minnesota Sentencing Guidelines Commission (1980) Report to the Legislature, at p. 7.

<sup>22</sup> Minnesota Sentencing Guidelines Commission, Minnesota Sentencing Guidelines Manual, S. 2.B.1-2 Criminal History, at 18.

<sup>23</sup> See Ashworth, Andrew, *Sentencing and Criminal Justice* 163 (Cambridge University Press 5th Ed. 2010).

<sup>24</sup> As noted, custody status, as with other components of criminal history, is justified on the basis of risk and retribution. The research exercise suggested here addresses the validation of this factor in terms of predicting re-offending. It is less clear how this factor can be validated in terms of offender culpability. One possibility would be to determine by means of public opinion research the degree to which the public see custody status as increasing blameworthiness. This suggestion assumes that culpability is derived from, or reflected in community perceptions. To date, no research has established whether the public consider custody status to justify harsher punishment. This factor was not explored in the criminal history component of the landmark US Sentencing Commission survey of the public published in 1997, or the earlier surveys of the Canadian Sentencing Commission. For examples of empirical research which calibrates the relative importance of other circumstances relevant to sentencing, see Paul H. Robinson, *Intuitions of Justice and the Utility of Desert* (2013) and Julian Roberts et al., *Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis*, Crim. L. Rev. Nov. 2009, at 771-78.

<sup>25</sup> U.S. Sentencing Commission, *Computation of “Recency” Criminal History Points Under USSG § 4A1.1(e)* 22 (2010).

<sup>26</sup> Ala. Presumptive & Voluntary Sentencing Standards Manual 26 (Oct. 1, 2013).

<sup>27</sup> Ark. Sentencing Standards Grid Offense Seriousness Rankings & Related Material 103 (2013).

<sup>28</sup> Del. Sentencing Accountability Comm’n Benchbook 53 (2015).

<sup>29</sup> D.C. Voluntary Sentencing Guidelines Manual § 2.2.11 (2014).

<sup>30</sup> U.S. Sentencing Guidelines Manual § 4A1.1.(d) (2013).

<sup>31</sup> Fla. Crim. Punishment Code: Scoresheet Preparation Manual 25 (2014).

<sup>32</sup> Kan. Sentencing Guidelines Desk Reference Manual 68 (2013).

<sup>33</sup> Md. Sentencing Guidelines Manual § 7.1.A (April 15 2013).

<sup>34</sup> Mass. Sentencing Guidelines Attachment D (1998).

<sup>35</sup> Mich. Sentencing Guidelines Manual 17 (2013).

<sup>36</sup> Minn. Sentencing Guidelines § 2.B.1-2 (2014).

<sup>37</sup> N.C. Structured Sentencing Training & Reference Manual 14 (Dec. 1, 2009).

<sup>38</sup> Tenn. Code Ann. § 40-35-114(13) (2014).

<sup>39</sup> Utah Sentencing & Release Guidelines Form 1 General Matrix (2014).

<sup>40</sup> E.g., Va. Sentencing Guidelines Assault Worksheet (2014).

<sup>41</sup> Wash. State Adult Sentencing Guidelines Manual 61-2 (2013).

### Key Points

- Two guidelines systems use a very broad definition of what qualifies as a prior conviction, allowing multiple current offenses to be counted as part of the criminal history score for some or all of the offenses.
- In five systems, multiple current offenses can raise the recommended sentence in other ways, for example, by increasing the offender's total point score on sentencing worksheets that are used in lieu of a grid format.
- In the remaining eleven guidelines systems multiple current offenses cannot increase criminal history or the recommended sentence; but in most of these systems multiple current offenses can still greatly increase current sentence severity because judges have broad discretion to impose fully consecutive sentences on all counts. Sentencing is less uniform in these systems than in the first seven jurisdictions, since judges are free to select fully consecutive, partially consecutive, or fully concurrent sentences.
- Sentencing commissions should examine the punishment purposes they believe are served by enhancing sentences based on multiple current convictions. Based on that assessment each commission should consider adopting rules that give sentencing judges more guidance and additional options when dealing with the diverse forms of repeat offending.

## INTRODUCTION

As was shown in Chapter 4, guidelines systems employ a variety of rules to determine which convictions qualify as "prior" when calculating the criminal history score (or, in non-grid systems, when determining the total point score or textual rules that determine the recommended sentence). Two of the broadest definitions allow multiple current offenses to be included in the criminal history score applied to some or all of those offenses. In five other systems multiple current offenses do not add to criminal history but they increase the severity of the recommended sentence in other ways—by increasing the total point score used in lieu of a grid to compute the recommended sentence; by increasing the offense severity level; or by increasing the recommended time to serve in prison before parole.

It should not be assumed, however, that the seven systems described above are the most severe in their treatment of multiple current offenses. Most of those systems place important limits on consecutive sentencing of such offenses. In contrast, the other eleven systems—those that do not allow multiple current offenses to add to criminal history or otherwise increase the recommended sentence—generally give judges discretion to impose fully consecutive sentences, which can yield a total sentence more severe than under the rules used in the seven systems first described.

Part 1 of this chapter explains the principled and practical significance of choices about how multiple current offenses are handled. Part 2 describes the variety of ways guidelines systems deal with such offenses. This chapter then closes with suggested research and reform measures for scholars and sentencing commissions to undertake in this area.

## DISCUSSION

### Part 1: Why These Rules Matter

The treatment of multiple current offenses has both principled and practical significance. Crime-control and/or retributive sentencing purposes will often justify giving an offender who is sentenced for more than one offense a more severe punishment than would be justified for any one of those offenses.<sup>1</sup> On the other hand, fully consecutive sentencing of all of the offenses is not justified in many cases, and if judges are left with discretion to choose between fully consecutive, partially consecutive, or fully concurrent sentences, there will inevitably be disparity in the degree of severity imposed by different judges.

Consecutive sentencing might seem like a topic unrelated to criminal history enhancement, but these two issues need to be considered together. As shown in Part 2, there appears to be a widespread belief that multiple current offenses should increase sentence severity, at least in some cases and to some degree, so policy makers need to compare different ways of authorizing such increases – through criminal history enhancements, by consecutive sentencing, and/or by other methods. Furthermore, as a matter of substantive sentencing policy, it makes sense to adopt a comprehensive approach to the treatment of prior and multiple current offenses because such offenses are often simply different manifestations of the same phenomenon—repeat offending. Prior and current offenses fall into one category or the other due to variations in the timing of offense behavior, its location (e.g., in different counties), the progress of criminal investigations, and the pace of adjudication. These variations cause some offenses to reach the stage of conviction and sentencing earlier than other offenses, or to take the form of independent rather than consolidated charges. From this repeat-offender perspective it is arguable that criminal history scoring should include all of the offender's past and current convictions, or at least take them all into account to some extent.



*[I]t makes sense to adopt a comprehensive approach to the treatment of prior and multiple current offenses because such offenses are often simply different manifestations of the same phenomenon—repeat offending.*

## Part 2: Rules That Allow Multiple Current Offenses to Increase Sentence Severity

As shown in Table 10.1, seven guidelines jurisdictions permit multiple current offenses to directly affect the recommended sentence, but they do this in two very different ways: 1) through criminal history enhancements (two systems)<sup>2</sup>; and 2) by means of several other sentence-enhancing rules (five systems).<sup>3</sup> Even where multiple current offenses do not increase recommended sentence severity, they may greatly increase severity in a third way: 3) the judge is permitted and chooses to sentence the offenses consecutively.<sup>4</sup> As shown in Table 10.2, in most of the remaining eleven jurisdictions (and a few of the first

seven), judges retain broad discretion to sentence multiple current offenses fully concurrently, partially consecutively, or fully consecutively.

### 1. Multiple current offenses add to the criminal history score.

In Minnesota and Washington, multiple current offenses are included in the criminal history score applied to some or all of those offenses. In Minnesota, such crimes are sentenced in the order in which they were committed. When concurrent sentences are imposed, after each crime is sentenced that crime is added to the criminal history score applicable to the next offense to be sentenced.<sup>5</sup> In Washington the criminal history score for each current offense generally includes all other current offenses.<sup>6</sup> (For further discussion of these rules, see Chapter 4 discussing varying definitions of a "prior" conviction.)

### 2. Multiple current offenses otherwise increase the recommended sentence.

In five other guidelines systems (Alabama, Federal, Florida, Utah, and Virginia) multiple current offenses directly increase the recommended sentence by means other than inclusion in criminal history. The federal system does this by a formula under which such offenses increase offense severity by up to five levels (for mid-level crimes a five-level increase raises the recommended prison duration by about 70 percent).<sup>7</sup> Three states—Alabama, Florida, and Virginia—use worksheets and a total point score rather than a grid to compute the recommended guidelines sentence; in these systems, both prior convictions and current offenses can add points to the total score.<sup>8</sup> In Utah, the guidelines advise that when multiple offenses are sentenced concurrently ten percent of each shorter recommended prison term should be added to the longest of the recommended terms for the offenses being sentenced.<sup>9</sup>

### 3. Multiple current offenses are sentenced partially or fully consecutively.

In addition to contributing directly to the recommended sentence by one of the rules described in the two previous paragraphs, or in lieu of those rules, multiple current offenses can greatly increase sentence severity if some or all of the current offenses are sentenced consecutively to each other. As shown in Table 10.2, in twelve of the 18 guidelines systems judges have discretion to choose between consecutive and concurrent sentences (except in cases where consecutive sentencing is mandatory or presumptive). However, two of these systems, Kansas and Utah, recommend upper limits on the total duration of consecutive prison terms.<sup>10</sup>

Closer examination of Tables 10.1 and 10.2 reveals a correlation between these three sets of rules for multiple current offenses. In five of the seven systems that allow multiple current offenses to directly increase the recommended sentence (Alabama, Federal, Minnesota, Utah, and Washington) there are rules that expressly or in effect limit the imposition or severity of consecutive sentences. In contrast, of the eleven systems in which multiple current offenses cannot directly increase the recommended sentence, eight systems place no limits on judicial discretion to choose between consecutive or concurrent sentences.

## POLICY CONSIDERATIONS

As was shown in Part 2, eleven guidelines states do not include multiple current offenses in their criminal history score or otherwise permit such offenses to directly increase the recommended sentence. But most of those states place no restrictions on the court's discretion to sentence multiple current offenses consecutively. It thus appears that the great majority of states want multiple current offenses to increase current sentence severity, one way or another, or they at least want to preserve this result as an option. So as a practical matter, the relevant policy question may not be whether multiple current offenses will have that effect, but whether the effect will be moderate and regulated (as by inclusion of current offenses in criminal history, combined with limits on consecutive sentencing) or potentially very severe and highly disparate (because judges are left with unregulated consecutive sentencing discretion).

Sentencing commissions should examine the principled and practical issues surrounding the treatment of multiple current offenses, and decide how to coordinate the latter question with policies relating to the definition and weighting of "prior" crimes included in the criminal history score. The first step is to clarify which punishment goals the commission believes are served by consecutive sentencing, and consider how those goals can be translated into rules structuring the selective use of consecutive sentences. Commissions should also examine and consider adopting rules implemented in other guidelines systems, for example, presumptions that nonviolent offenses should, absent departure, be sentenced concurrently. Even if such limiting rules are adopted, but particularly if they are not,

commissions should consider giving judges additional options to use in lieu of consecutive sentencing, such as including multiple current offenses, or some of them, in the criminal history score when the offenses are sentenced concurrently.



*"[C]ommissions should consider giving judges additional options to use in lieu of consecutive sentencing, such as including multiple current offenses, or some of them, in the criminal history score when the offenses are sentenced concurrently."*

Table 10.1. Systems in Which Multiple Current Offenses Increase the Recommended Sentence by adding to the Offender's Criminal History Score or Otherwise\*

 Alabama <sup>11</sup>	Multiple current offenses add to the offender's total point score on most prison-length worksheets.
 Federal <sup>12</sup>	Multiple current offenses add to the offender's current offense severity level.
 Florida <sup>13</sup>	Multiple current offenses add to the offender's total point score for all crimes.
 Minnesota <sup>14</sup>	When multiple current offenses are sentenced concurrently they are sentenced in the order in which the crimes were committed, and as each offense is sentenced, it is included in the criminal history score on the next offense sentenced.
 Utah <sup>15</sup>	When multiple current offenses are sentenced concurrently the guidelines add 10% of each shorter recommended prison term to the longest recommended term. If multiple current offenses are ordered to run consecutively, the guidelines add 40% of the recommended prison term of the shorter sentence to the longest recommended term.
 Virginia <sup>16</sup>	Multiple current offenses add to the offender's total point score for most crimes.
 Washington <sup>17</sup>	With limited exceptions, when multiple current offenses are sentenced concurrently "the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions." Thus, all multiple current offenses are included in the criminal history score applied to each of those current offenses.

\* Does not include consecutive-sentencing options in these seven systems; those rules are covered in Table 10.2, below. In the eleven other guidelines systems not shown in the table above, multiple current offenses do not raise the recommended sentence.

Table 10.2. Limits on Consecutive-sentencing of Multiple Current Offenses\*

<b>Alabama<sup>18</sup></b>	Combined duration of consecutive sentences cannot exceed sentence for the most serious of the offenses (so sentences are effectively concurrent, given that limit).
<b>Arkansas<sup>19</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Delaware<sup>20</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>District of Columbia<sup>21</sup></b>	Concurrent sentencing presumptive for non-violent crimes from a single event.
<b>Federal<sup>22</sup></b>	Consecutive only when and to extent needed to authorize the guidelines sentence.
<b>Florida<sup>23</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Kansas<sup>24</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive), but consecutive sentences may not total more than two times the longest term.
<b>Maryland<sup>25</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Massachusetts<sup>26</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Michigan<sup>27</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Minnesota<sup>28</sup></b>	Concurrent sentencing is presumptive for most non-violent crimes. When sentencing consecutively, the court must use a criminal history score of 0 or 1 for each offense sentenced consecutively to another.
<b>North Carolina<sup>29</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Oregon<sup>30</sup></b>	Concurrent sentencing presumptive for crimes in a continuous course of conduct. Also, consecutive sentences may not total more than two times the longest term.
<b>Pennsylvania<sup>31</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Tennessee<sup>32</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Utah<sup>33</sup></b>	Discretionary/no limits (except where consecutive is mandatory/presumptive), but only 40% of each shorter recommended prison term is to be added to the longest term.
<b>Virginia<sup>34</sup></b>	Discretionary/ no limits (except where consecutive is mandatory/presumptive).
<b>Washington<sup>35</sup></b>	Concurrent sentencing presumptive except for separate serious violent offenses.

\* System names shown in bold indicate the seven systems in which multiple current offenses add to Criminal History or otherwise increase the recommended sentence (see Table 10.1).

<sup>1</sup> See Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System*, 181–187, 201–202 (2013). See also Paul Gendreau, Tracy Little, & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works?* 34 *Criminology* 575 (1996) (meta-analysis of 131 studies, showing that an offender's risk of committing future crimes generally increases in proportion to the number of crimes committed). However, there does not appear to have been much research on whether multiple current offenses are associated with the same degree of heightened risk, a higher degree, or a lower degree in comparison to multiple prior convictions. One difference between these two types of repeat offending is that multiple current offenses are more likely to have been committed in a short space of time, which may suggest a lower risk of reoffending than multiple offenses committed over a longer period of time – the latter indicate persistent criminality, unlike a series of crimes committed in a “spree” or in response to situational factors not likely to reoccur. On the other hand, current offenses are almost always more recently-committed than previously-sentenced offenses; recent crimes suggest an “active” offender, whereas older crimes may reflect different life circumstances, younger age, and a higher risk of offending than the offender currently poses. As for retributive rationales, there has likewise been little discussion of whether multiple current offenses add the same increment of culpability as the same number and type of previously-sentenced crimes.

<sup>2</sup> See, e.g., Wash. Rev. Code § 9.94A.589 (2014); Minn. Sentencing Guidelines § 2.B.1.e (2014).

<sup>3</sup> Multiple current offenses can also sometimes directly increase the recommended guidelines sentence by application of rules that permit aggregation of the dollar or drug amounts of multiple current crimes into a single figure (e.g., five small thefts within a defined time period are treated as one big theft). See, e.g., Minn. Stat. § 609.52, subd. 3(5) (2014) (aggregation of dollar amounts for thefts committed within a six-month period); U.S. Sentencing Guidelines Manual § 3D1.2(d) (2014) (listing crimes eligible for aggregation due to the total amount of harm or loss, the drug or other contraband amounts, or another “measure of aggregate harm”).

<sup>4</sup> See, e.g., Del. Code Ann. tit. 11 § 3901(d) (2014) (giving judges broad discretion to choose either concurrent or consecutive sentences except for a list of crimes where consecutive sentencing is mandatory).

<sup>5</sup> Minn. Sentencing Guidelines § 2.B.1.e (2014). The court must use a criminal history score of 0 or 1 for each offense sentenced consecutively to another. *Id.* §§ 2.F.1.b and 2.F.2.a.

<sup>6</sup> Wash. Rev. Code § 9.94A.589 (2014).

<sup>7</sup> U.S. Sentencing Guidelines Manual § 3D1.4 (2014).

<sup>8</sup> E.g., Alabama Presumptive & Voluntary Sentencing Standards Manual 34–35 (2013) (on the drug prison sentence length worksheet, points are added to the offender's total score for all offenses being sentenced at the same time); Fla. Criminal Punishment Code: Scoresheet Preparation Manual 8, 24 (2014) (step II awards points for each additional offense being sentenced at the time of the primary offenses).

<sup>9</sup> Utah Adult Sentencing & Release Guidelines 8 (2014).

<sup>10</sup> See, e.g., Kan. Stat. Ann. § 21-6819(b)(4) (2014) (limiting the total prison sentence in a case involving multiple convictions arising from multiple counts to no more than twice the base sentence); Utah Adult Sentencing & Release Guidelines 8 (2014) (if sentences are ordered to run consecutively, 40% of the recommended stay for the shorter sentence is added to the length of the longer sentence).

<sup>11</sup> See, e.g., Alabama Presumptive & Voluntary Sentencing Standards Manual 35 (2013) (prison durations for drug crimes).

<sup>12</sup> See U.S. Sentencing Guidelines Manual § 3D1.4 (2014). See generally, *id.* at § 4A1.2 (section 4A1.2(a)(1) defines “Prior sentence” as “a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense; but few currently-sentenced crimes would have already received a separate sentence because, under Sec. 3D1.4, multiple current offenses are generally combined and entered into a formula that can raise offense severity by up to five levels).

<sup>13</sup> See Fla. Criminal Punishment Code: Scoresheet Preparation Manual 24 (2014) (the “Additional Offense(s)” section of the Criminal Punishment Code Scoresheet adds points for any current offenses); See also *id.* at

8–10 (criminal history score only counts convictions for crimes committed prior to the “primary” offense, which is the one with the most severe recommended sentence; however, all “additional offenses” being sentenced add to the total offense-offender point total).

<sup>14</sup> Minn. Sentencing Guidelines § 2.B.1(e) (2014). (multiple current offenses are sentenced in the order in which they occurred; when concurrent sentences are imposed, as each offense is sentenced it is included in the criminal history on the remaining offense(s) to be sentenced); see generally *id.* at § 2.F.1(b) (different rules apply when multiple current offenses are sentenced consecutively).

<sup>15</sup> Utah Adult Sentencing & Release Guidelines 8 (2014).

<sup>16</sup> Prior convictions or adjudications are those entered “prior to the present sentencing event,” including those in cases pending sentencing before a different judge or in another jurisdiction, even if the offenses took place after the instant offense. Va. Sentencing Guidelines Gen'l Instructions 27 (2014). However, any additional offenses sentenced in the present sentencing event add points to the total offense-offender score. See *id.*, Gen'l Instructions 10–13; see, e.g., *id.* Assault 8–9, Burglary/Dwelling 2–3.

<sup>17</sup> Wash. Rev. Code § 9.94A.589 (2014) (with certain exceptions, “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for purpose of the offender score”).

<sup>18</sup> Alabama Presumptive & Voluntary Sentencing Standards Manual 23, 57 (2013) (judge may sentence consecutively, but the total sentence for all counts cannot exceed the sentence selected for the most serious offense).

<sup>19</sup> Ark. Code Ann. § 5-4-403 (2014) (the statute provides a presumption of concurrent sentencing, but allows the court to sentence consecutively upon recommendation of the jury or on its own motion).

<sup>20</sup> Del. Code Ann. tit. 11 § 3901(d) (2014) (giving judges discretion to choose either concurrent or consecutive sentences except for a list of crimes where consecutive sentencing is mandatory).

<sup>21</sup> D.C. Voluntary Sentencing Guidelines Manual § 6.2 (2014).

<sup>22</sup> See U.S. Sentencing Guidelines Manual § 3D1.1 (2014) (multiple counts of a similar nature are typically grouped together, increasing the severity level of the most serious offense; consecutive sentences are awarded when required by statute); *id.* § 5G1.2 (there is a presumption that multiple counts are to run concurrently; consecutive sentences are awarded in only specific circumstances).

<sup>23</sup> Fla. Criminal Punishment Code: Scoresheet Preparation Manual 14 (2014) (stating that a sentencing court may impose a sentence concurrently or consecutively).

<sup>24</sup> Kan. Stat. Ann. § 21-6819(b)(4) (2014).

<sup>25</sup> When consecutive sentences are imposed the total amount of time to be served must fall within the overall guidelines range for those offenses or the sentence is a departure. Md. Sentencing Guidelines Manual § 13.5 (April 2013). However, in most cases that overall range will be increased to authorize fully consecutive sentencing (a range consistent with fully concurrent sentencing is only recommended where the offenses are ranked at category III or lower and arise out of a single criminal event that did not involve different victims). *Id.* ch. 9.

<sup>26</sup> Mass. Sentencing Guidelines 26–28 (1998).

<sup>27</sup> Mich. Comp. Laws. § 769.1h (2015).

<sup>28</sup> Minn. Sentencing Guidelines § 2.F (2014).

<sup>29</sup> N.C. Gen. Stat. § 15A-1340.15.

<sup>30</sup> Or. Admin R. 213-012-0020(2)(b); Or. Rev. Stat. § 137.123 (2015) (for crimes committed while incarcerated consecutive sentencing is mandatory; where multiple crimes arise from the same continuous and uninterrupted course of conduct consecutive sentencing is only permitted if certain standards are met; in all other cases consecutive sentencing is discretionary).

<sup>31</sup> *Commonwealth v. Perry*, 883 A.2d 599, 603 (Pa. Super. Ct. 2005).

<sup>32</sup> Tenn. R. Crim. Pro. 32(c).

<sup>33</sup> E.g., Utah Code Ann. § 76-3-401 (West 2014); Utah Adult Sentencing & Release Guidelines 8 (2014).

<sup>34</sup> Va. Code Ann. § 19.2-308 (2014).

<sup>35</sup> Wash. Rev. Code § 9.94A.589 (2014).

### Key Points

- An offender's prior conviction record is generally assumed to provide a useful proxy for recidivism risk, and research shows that this is true as a general matter; but criminal history scoring formulas vary widely across guidelines systems, and only the federal system has conducted research to validate the risk-predictive accuracy of its score and score components.
- As discussed more fully in earlier chapters, many guidelines systems incorporate factors such as prior-record decay (look-back limits) that may be based at least in part on an assumed relationship to recidivism risk, but the risk-predictive value of these factors has likewise rarely been validated.
- Criminological research has identified a number of additional offender characteristics (e.g., age) and offense factors (e.g., the current offense is a property crime) that predict higher or lower risk of recidivism, but very few guidelines systems expressly allow such factors to be considered as an adjustment to the criminal history score or a basis for departure.
- Each sentencing commission should use its monitoring data to conduct research on the risk-predictive accuracy of that system's criminal history score and each score component; if any component is found to provide little additional risk-predictive value, or if its added value is outweighed by increased correctional costs, racial disparate impact, or other negative consequences, the commission should consider dropping that factor or giving it less weight.
- Commissions should consider increasing the weight of components found to have strong risk-predictive value, while keeping in mind penalty-versus-offense proportionality, racial neutrality, and other guidelines goals and principles in that jurisdiction.
- Commissions should also use their data to assess the within-jurisdiction risk-predictive accuracy of additional offense- and offender-related risk factors that have been validated in criminological research and/or recognized in other guidelines systems.
- If any such factor has been found by the commission or other commissions to have substantial value in identifying higher- or lower-risk offenders, the commission should consider adding that factor to the criminal history score, allowing it to be used to adjust the score, or recognizing it as a basis for departure (again keeping in mind competing guidelines goals and principles such as proportionality to conviction offenses and racial neutrality).

### INTRODUCTION

This chapter examines the extent to which criminal history enhancements and other offense- and offender-based sentencing factors do, or could, accurately and efficiently predict recidivism risk. Part 1 explains why this issue is so important. Part 2, drawing on the more detailed analyses in other chapters, summarizes the ways in which guidelines systems have directly or indirectly incorporated positive and negative risk-related factors into their guidelines. In addition

to the number and seriousness of prior convictions, risk factors such as the remoteness in time of a prior conviction, crime-free "gap" periods, and the offender's custody status at the time of the current offense are often included in the guidelines criminal history score. Alternatively, some guidelines systems allow these and other assumed risk factors to be considered as grounds for departure after the recommended sentence has been computed based solely

on current offense and prior convictions. Part 2 also briefly notes offense and offender-based factors, such as the offender's current age, that criminological research has found to be good predictors of the risk of reoffending but that have not generally been given any formal role in guidelines sentencing. Part 3 suggests research and reform measures that could improve the accuracy and cost-effectiveness of the risk prediction function of criminal history enhancements, and examines some ethical objections that have been raised about the use of some risk factors.

This chapter has two central messages:

1. Although an offender's criminal history is clearly related to his or her risk of recidivism, the risk-predictive accuracy of each guidelines system's criminal history score and all score components should be validated using recidivism data. The risk-prediction value of each score component should also be measured against the added costs or other negative consequences of the sentence enhancements associated with that component.
2. Sentencing commissions should consider allowing judges to take account of well-documented risk factors beyond criminal history (for example, the offender's advancing age) as additions or adjustments to the criminal history score or as grounds for departure, so as to further improve risk predictive accuracy and efficiency.

## DISCUSSION

### Part 1: The Critical But Rarely Examined Issues of Criminal History and Recidivism Risk

Some sentencing guidelines commissions have expressly justified criminal history enhancements in whole or in part on the ground that a more extensive prior conviction record indicates a higher risk of repeat offending,<sup>1</sup> and most commissions have probably assumed this to be the case. But sentencing commissions and other researchers have conducted almost no research to validate this assumption, either when that system's initial criminal history score was being constructed, or at a later point in time – even though all commissions have, or could assemble, offender-specific sentencing data that would serve to validate the risk-predictive accuracy of the system's criminal history score and each score component.

The widespread assumption that criminal history serves as a proxy for recidivism risk is supported by criminological research showing that, in general, the more prior convictions an offender has the more likely he or she is to commit further crimes.<sup>2</sup> But are all existing criminal history scores equally accurate and efficient in their risk predictive power? This seems very unlikely to be the case, given the wide variations in criminal history scores and other offender factors found in existing guidelines systems. It is far more likely that many guidelines systems have criminal history scoring formulas that include components with little additional risk-predictive value that are enhancing sentences and unnecessarily consuming scarce resources and burdening offenders and their families. As further discussed in Part 3, this is indeed what the federal sentencing commission found when it examined the risk-predictive accuracy of various components of that system's criminal history formula. Conversely, there may be score components with strong risk-predictive power that are underweighted in some guidelines systems.



*"The widespread assumption that criminal history serves as a proxy for recidivism risk is supported by criminological research showing that, in general, the more prior convictions an offender has the more likely he or she is to commit further crimes. But are all existing criminal history scores equally accurate and efficient in their risk-predictive power? This seems very unlikely to be the case..."*

It also seems likely that even the guidelines systems whose criminal history scores most accurately predict recidivism risk could do a much better job if their rules also included offender factors besides criminal history, such as the offender's current age, gender, employment history, or family status, that criminological research has shown to be significant predictors of higher or lower recidivism risk. Some of these factors raise important fairness questions that need to be addressed, but as will be discussed further in Part 3, most of these factors can be employed in ways that minimize such concerns. Criminological research has also shown that, apart from criminal history and other offender factors, recidivism risk may depend on the nature or circumstances of the current conviction offense (e.g., whether it was a property or drug crime).

*“[E]ven the guidelines systems whose criminal history scores most accurately predict recidivism risk could do a much better job if their rules also included offender factors besides criminal history, such as the offender’s current age, gender, employment history, or family status, that criminological research has shown to be significant predictors of higher or lower recidivism risk. Some of these factors raise important fairness questions that need to be addressed, but... most of these factors can be employed in ways that minimize such concerns.”*

## Part 2: How Guidelines Rules Have (and Have Not) Incorporated Risk Factors

Existing guidelines systems include very few explicit offender risk or risk-related factors in their criminal history formulas or other rules, and only the federal guidelines system has sought to validate its history score as a risk prediction instrument.<sup>3</sup> Section A examines the factors plausibly related to recidivism risk that guidelines systems have included in their criminal history scores. Section B describes ways in which several guidelines states have directly or indirectly applied risk assessments after the recommended sentence has been determined. Section C notes risk factors that have been widely validated in criminological research, but which have generally not yet been recognized in guidelines rules.

### A. Risk Factors that Affect or Are Included in the Criminal History or Offender Score

As discussed more fully in earlier chapters, many features of guidelines criminal history or offender scores reflect factors that help to identify offenders with lower or higher risk of recidivism, or that are thought to have this benefit (almost none of these factors have been empirically shown to predict risk, and in some cases the limited available evidence is actually to the contrary). Risk-related features of criminal history or offender scores include the following:

- **Number of convictions.** In most guidelines systems the principal component of the criminal history score is the number of prior convictions, reflecting the

assumption (supported by empirical evidence<sup>4</sup>) that recidivism risk generally rises in proportion to the number of prior convictions.

- **Age of convictions.** Some guidelines systems have rules that no longer count convictions entered more than a certain number of years earlier (these are variously known as decay, lapse, washout, or look-back limits; see generally chapter 3). These rules plausibly (but with limited research support) reflect the lower assumed risk-predictive value of very old convictions —such convictions may date from a very different living environment and/or phase of the offender’s life, and in any case they reflect the higher propensity to crime found in younger persons. Indeed, such rules may function and be intended as proxies for current offender age;<sup>5</sup> as noted in Section C below, age is a well-documented risk factor but one that is rarely expressly recognized in guidelines rules.
- **Crime-free periods.** Some systems have “gap” rules (see chapter 3) that permit decay of older convictions, or otherwise lower recommended sentence severity, if an offender has succeeded in remaining crime-free in the community for a substantial period of time. Such periods of desistance suggest that, despite the offender’s recent relapse in committing the crime for which he is now being sentenced, his criminal career is tapering off and may soon end entirely (see further discussion of the age-crime curve, and individual variations therein, in section C and Part 3). Moreover, there is empirical support for the assumption of lower risk after such a gap.<sup>6</sup>
- **Juvenile priors.** Most systems include at least some juvenile adjudications in the criminal history score (see chapter 5), and this factor finds support in criminological research on factors predicting the length of adult criminal careers (see Section C).
- **Patterning.** Some systems have rules that give more weight to prior crimes that are the same or similar to the current crime or crimes (see chapter 7). Criminological research casts some doubt on the added risk-predictive value of this factor, since relatively few offenders seem to specialize in a particular kind of crime. But it remains possible that the few who do specialize represent the kinds of professional, career, or persistent offenders who pose an elevated risk.
- **Weighting.** A similar assumption of elevated risk may underlie rules that give higher weight to prior violent crimes, or reserve the highest criminal history categories for offenders with one or more violent priors (see chapter 8). One of the purposes of such rules may be

to identify for separate treatment “violent offenders” and “non-violent offenders” – those who are thought to be more likely than the average offender to commit a violent crime in the future, and those who are less likely to do so.

- **Custody status.** The majority of guidelines systems assign one or more points for committing the current offense while in criminal justice custody or in a designated supervision status (see chapter 9). Offenders in these statuses may be deemed to pose a higher risk of recidivism than the average offender not placed or retained in one of these statuses, thus meriting extra punishment to incapacitate them for longer. Although empirical support is limited, it is plausible to assume that custody-status offenders pose a higher risk of further crime, or at least a higher risk of supervision failure, since they were unwilling to obey the law even when under the direct control of officials. Moreover, the fact of custody status often means that the offender has one or more recent convictions which, in turn, suggests that the offender’s criminal career is still “active.” Although recency of prior offending is rarely directly recognized in criminal history scoring (perhaps because this information is not consistently recorded), custody status may be intended to serve as a proxy for recency.
- **Violation of release conditions.** A similar rationale may underlie another element found in some criminal history scores: the offender’s violation of previous release conditions, with or without revocation of release. Like custody status (which usually involves violation of current release conditions), such prior violations suggest elevated risk of crime or supervision failure if the offender were to be again released.

## B. Risk Factors Considered after the Criminal History Score Has Been Applied

A few jurisdictions recognize “inadequacy” or other problems of criminal history scoring as a basis for departure from the recommended guidelines sentence. The federal guidelines permit departure up or down if the criminal history score substantially under- or over-states the “seriousness” of the defendant’s criminal history or the risk he poses.<sup>7</sup> Three state systems authorize adjustments in one direction only, and although these adjustments are not expressly linked to risk prediction, that may be at least part of their rationale. Washington state permits upward departure if the omission of certain prior crimes from the offender’s criminal history score yields a recommended sentence that is “clearly too lenient.”<sup>8</sup> Pennsylvania permits

upward departure if the court finds that excluded crimes yield an inadequate criminal history score.<sup>9</sup> Minnesota permits downward departure based on a factor – the offender’s prior convictions were all entered in one or two court events – that is arguably an indicator of lower risk (the offender hasn’t failed to respond to as many prior interventions as his criminal history score might suggest).<sup>10</sup>

Several jurisdictions recognize, as a basis for departure, the risk-related concepts of amenability or unamenability to probation. Some systems only recognize this factor in case law,<sup>11</sup> while other systems include it, or similar factors, in lists of permitted departure factors.<sup>12</sup>

*“A few jurisdictions recognize ‘inadequacy’ or other problems of criminal history scoring as a basis for departure from the recommended guidelines sentence... Several jurisdictions recognize, as a basis for departure, the risk-related concepts of amenability or unamenability to probation... Of guidelines systems currently in effect, only Virginia makes regular use of validated risk assessment tools at sentencing.”*

Of guidelines systems currently in effect, only Virginia makes regular use of validated risk assessment tools at sentencing. These tools can be used to lengthen the prison term for certain sex offenders, or to impose a non-prison sentence on a non-violent offender for whom ordinary guidelines rules recommend a prison sentence.<sup>13</sup> Factors currently employed to identify low-risk larceny or fraud offenders include the offender’s age at the time of the current offense, gender, the numbers of prior adult felony convictions and adult incarcerations, and whether the offender was legally restrained at the time of the offense; factors used to identify high-risk sex offenders include age, education, employment, relationship to the victim, actual or attempted penetration offense, crime location, prior adult person-crime arrests, prior incarcerations, and prior participation in treatment programs.<sup>14</sup>

The Pennsylvania Sentencing Commission is currently working on developing and implementing a system of risk assessments at sentencing.<sup>15</sup> Also, under the advisory guidelines formerly used in Missouri (repealed in 2012), judges were provided with a validated risk assessment tool for use at sentencing which included the following factors: prior convictions and incarcerations, gaps in offending, similarity of prior and current offenses, prior release revocations, prior escapes, and several offender characteristics (current age, substance abuse, education, and employment).<sup>16</sup>

### C. Other Risk Factors Recognized in Criminological Research but Not in Most Guidelines

A recent review reported that the following non-criminal-history factors have been found to consistently predict higher or lower risk of reoffending:<sup>17</sup>

[Y]oung age, male gender, substance abuse, employment problems, antisocial associates, criminal thinking patterns (e.g., feeling entitled, rationalizing misbehavior, poor empathy), and antisocial personality features (e.g., impulsive, hostile, pleasure seeking).

Other factors identified in the extensive criminal careers literature, that help to predict a longer or shorter remaining (“residual”) criminal career, are: *older* age (see further discussion in Part 3 below); age of onset of delinquency (age at first arrest); education; social support and quality of family or other relationships; residential stability; degree of urbanization of the offender’s home community; and whether the current or prior convictions were for property and/or drug crimes.<sup>18</sup>

Except for the Virginia and former Missouri guidelines noted in section B above, none of these other validated risk factors have been incorporated into the computation of criminal history scoring, nor have they been expressly recognized as grounds for departure (however, factors such as current employment and social support are sometimes considered in applying the risk-related concepts of amenability and unamenability to probation, discussed above).

## Part 3: Policy Considerations

As we have stressed throughout this book, each guidelines system should clarify the punishment goals that criminal history enhancements are intended to serve. If these goals include prediction and management of offender recidivism risk, the sentencing commission should examine the extent to which the current criminal history score and each score component accurately predicts offender risk, and should also consider whether additional risk-predictive factors other than criminal history should be taken into account. Even if a particular prior record or other factor has risk-predictive value, the commission should consider whether it is fair to base sentencing on such a factor, and even if it is, whether that factor’s predictive value is outweighed by added correctional costs, racial disparate impact, or other negative consequences.

### Validating the risk-predictive value of criminal history score components

This assessment can be based on the commission’s monitoring data over a period of several years;<sup>19</sup> the general research questions are:

1. Which offenders who were sentenced in an earlier year then reappear in the commission’s sentencing data for one or more later years?
2. Is the likelihood, frequency, and/or seriousness of reoffense (question 1, above) greater for offenders with higher criminal history scores or with particular score components?

States interested in conducting such research can find a useful template in the work done by the U.S. Sentencing Commission.<sup>20</sup> That commission studied offenders sentenced in fiscal year 1992, and identified those who had been rearrested, reconvicted, or had their supervision revoked by June 1, 2001. Researchers examined how well the federal criminal history score and its components predicted reoffending, and also compared that score to a validated risk measure available for these offenders (the Salient Factor Score developed by the U.S. Parole Commission).

On the basis of the proposed state-level research described above, the sentencing commission should consider whether some score components should be dropped or given less weight because they provide little additional predictive value. Also, if a component has only modest incremental risk-predictive value the commission may wish to drop it or give it less weight if its predictive value is outweighed by negative consequences such as racial disparate impact or substantial added correctional costs.

An example of this kind of evidence-based policy change was the decision of the U.S. Sentencing Commission to drop the “recency” point from the federal criminal history score because that component was found to have only slight added risk predictive value and a substantial prison bed impact.<sup>21</sup>

Conversely, if a criminal history score component has strong risk-predictive value the commission may wish to give it greater weight, subject of course to competing policy considerations and guidelines goals in that jurisdiction, such as avoiding racial disparity or maintaining a satisfactory level of proportionality between sentence severity and the seriousness of the offense(s) being sentenced.

### **Consideration of additional, non-prior-record risk factors**

Sentencing commissions should consider the possibility of adding new elements or adjustments to the criminal history score that will improve its accuracy and efficiency as a predictor of recidivism risk. This research, which might be conducted in partnership with academic or other independent researchers, should focus on risk factors not already included in the criminal history score that have been recognized in the criminological literature and/or in other guidelines systems (see discussion of guidelines and non-guidelines risk factors in Part 2 above).

Commissions may also wish to examine whether some of these additional risk factors are already being considered, even without formal recognition in the guidelines, when judges exercise their departure powers (which, as noted above, are sometimes explicitly justified by criminal history scoring problems). To the extent that such factors are not usually recorded in existing court and sentencing data, they can be identified by conducting surveys of judges. If a factor is already being considered in many cases, formal recognition is less likely to be resisted by judges and practitioners and is more likely to improve the consistency of practices from case to case.

### **Fairness considerations**

Some non-prior-record risk factors raise important fairness concerns. In particular, it would probably strike many people as unfair to enhance the sentence of a 20-year-old offender simply because he belongs to an age group with an elevated risk of recidivism. Such offenders cannot help being in that age group, and there is also growing evidence indicating that their culpability is diminished, albeit to a lesser degree, in the same way that juvenile culpability is diminished – many younger offenders, even if legally adults, are still morally and cognitively immature.<sup>22</sup>

Some have argued that because gender is likewise a characteristic an offender cannot control, it should have no bearing on the severity of punishment;<sup>23</sup> it has also been argued that the use of employment history or status, educational attainment, and family or living arrangements as risk factors is invalid because these reflect legitimate life-style choices (or conversely, lack of real choice due to bias or disadvantage), and that such factors have a disparate impact on nonwhite offenders.<sup>24</sup> Many of these critical views find support in guidelines provisions that expressly prohibit departure based on factors such as gender and socio-economic status.<sup>25</sup>

These are all valid concerns, but there are also arguments on the other side. If females are given reduced penalties reflecting their lower risk, this policy is not necessarily unfair to male offenders provided that the penalties given to the latter are proportionate to their current offenses and prior convictions.<sup>26</sup> Similarly, the rejection of young age as an aggravating factor does not necessarily mean that old age cannot be considered in mitigation. And as to both of these demographic factors, risk-based mitigation of sentences (for women and older offenders) results in more favorable treatment for groups that have traditionally been victims of discrimination. Thus, unlike race-based distinctions, there is little reason to fear that differential treatment is motivated by bias or would worsen inequality; nor is the premise for such treatment—lower risk—likely to reinforce negative stereotypes about these groups.

From the perspective of accurate and cost-effective risk prediction, a strong case can be made for mitigating sentences given to older offenders. One of the best-documented findings of criminological research has been called the “age-crime curve” – the odds of further crime steadily diminish with age, and this is true even for offenders who at earlier ages had substantial criminal records.<sup>27</sup> One of the most serious limitations of criminal history enhancements in guidelines systems is that they take no account of the offender’s current age, and thus result in the confinement of large numbers of aging prisoners whose risk of reoffending is dropping while the cost of holding them, especially medical costs, is rising. Sentencing commissions should therefore give particularly careful consideration to the possibilities of reducing the contribution of criminal history enhancements to the problem of aging prison inmate populations. This could be done, for example, by shortening the decay (washout or look-back) period for older offenders, or by downward adjustments to the total criminal history score based on a formula tied to advancing age.

As for the use of socio-economic risk factors, guidelines systems that recognize racial neutrality as an important goal should give careful attention to the disparate impact of such factors on nonwhite offenders. However, these factors do occasionally benefit non-white offenders, suggesting lower risk than would otherwise be predicted by their current offense(s) and criminal history, so at least in those cases it may be permissible to take such factors into account.<sup>28</sup> Similarly, it would not add to racial disparities – indeed, it would reduce them – to consider socio-economic risk factors when they suggest that a white offender poses a higher risk than would otherwise be predicted.

To the extent that a particular socio-economic risk factor relates to circumstances over which the offender has little control, a commission might conclude that such a factor should be ignored, at least in the absence of substantial evidence of control. It is certainly true that for many offenders (especially non-white offenders), limited education, poor employment history, and residential instability are not matters of choice or cause for blame. But offenders usually have more control over things like marital status and whether they live with and support their children and spouse or partner. And although choices about these matters are usually not illegal (although non-support may be), are such “life-style” decisions really beyond the law’s power to consider when assessing risk of further criminal behavior? Some legal “choices” (for instance: heavy use of alcohol) clearly cause or at least correlate with higher risk. A commission might conclude that sentencing courts may take account of legal but risky behavior, at least as long as the enhanced penalties given to higher-risk offenders do not exceed the punishment they deserve for their crimes.<sup>29</sup> Conversely, a commission might decide that some offender choices result in lower risk and that it is appropriate to recognize and reward such choices (for example, when an offender addresses his substance abuse problem by undergoing treatment, goes back to school, or seeks job-related training).

Sentencing commissions should address these ethical issues and decide how they wish to resolve them. Non-prior-record factors that improve risk prediction accuracy and that are deemed acceptable in principle should then be considered for inclusion in that system’s criminal history or offender score; alternatively, such factors could be taken into account through rules permitting judges to adjust the criminal history or offender score, or by adding such factors to the list of recognized grounds for departure. Such added factors must, of course, also be deemed consistent with offense proportionality, racial neutrality, and other guidelines goals and principles in that jurisdiction. Although most added risk factors are likely to relate to the offender, some may relate to the offense, or to the interaction between offense and offender factors. To the extent that a risk prediction factor relates entirely to a proven aspect of the current conviction offense(s), treating that factor as aggravating or mitigating for risk-management purposes would be unlikely to interfere with offense proportionality goals, although it might raise concerns about racial disparate impact.

One further consideration, when adding or expanding offense or offender-based risk prediction factors, is that their use as aggravating factors may trigger jury-trial and proof-beyond-reasonable doubt requirements under *Blakely v. Washington*.<sup>30</sup> This would not be a problem for any offense-related factor that corresponds to an element of the conviction offense; nor would there be any problem adding a factor inherent in the elements of a prior conviction, or otherwise sufficiently related to conviction and court records that it falls within the prior-record exception to *Blakely*.<sup>31</sup> And of course, mitigating factors are not subject to *Blakely* requirements, so that case puts no limits on the use of factors that predict low risk of recidivism.

- <sup>1</sup> See, e.g., Minn. Sentencing Guidelines Comm'n, *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation* 12, 14 (1984); Utah Adult Sentencing & Release Guidelines 1 (2013).
- <sup>2</sup> See, e.g., Paul Gendreau, Tracy Little, & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 Criminology 575 (1996) (describing how a meta-analysis of 131 studies found that criminal history was one of the strongest predictors of recidivism).
- <sup>3</sup> For further discussion of the U.S. Sentencing Commission's research, see *infra* notes 20–21 and accompanying text.
- <sup>4</sup> See Gendreau et al., *supra* note 2.
- <sup>5</sup> See U.S. Sentencing Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 8 (2005), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104\\_Recidivism\\_Salient\\_Factor\\_Computation.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf) ("[T]he 'decay' factor of the [criminal history score] is often interpreted as a proxy for age at current offense.").
- <sup>6</sup> See, e.g., Alex R. Piquero, David Farrington, & Alfred Blumstein, *Key Issues in Criminal Career Research* 190–92 (2007) (reporting that after seven years with no new conviction the likelihood of further convictions is substantially lower, albeit not zero; these offenders had an average remaining active criminal career of 2.3 years, in which time they would commit an average of less than one further offense).
- <sup>7</sup> U.S. Sentencing Guidelines Manual § 4A1.3 (2014).
- <sup>8</sup> Wash. Rev. Code §§ 9.94A.535(2)(b)–(d) (2013).
- <sup>9</sup> 204 Pa. Code § 303.5(d) (2015).
- <sup>10</sup> Minn. Sentencing Guidelines § 2.D.3.a (4) (2014).
- <sup>11</sup> See, e.g., *State v. Park*, 305 N.W.2d 775 (Minn. 1981) (unamenability to probation); *State v. Trog*, 323 N.W.2d 28 (Minn. 1982) (amenability to probation).
- <sup>12</sup> For example, the following are listed as mitigating factors in North Carolina: "(17) The defendant supports the defendant's family. (18) The defendant has a support system in the community. (19) The defendant has a positive employment history or is gainfully employed. (20) The defendant has a good treatment prognosis, and a workable treatment plan is available." N.C. Gen. Stat. § 15A-1340.16(e) (2013). In Utah, one of the listed aggravating circumstances is that the "Offender's attitude is not conducive to supervision in a less restrictive setting," conversely, the listed mitigating circumstances in Utah include that "Offender's attitude suggests amenability to supervision," and that the "Offender has exceptionally good employment and/or family relationships." Utah Adult Sentencing & Release Guidelines 15 (2013).
- <sup>13</sup> Va. Criminal Sentencing Comm'n, 2014 Annual Report 36–41.
- <sup>14</sup> See, e.g., Va. Sentencing Guidelines, Nonviolent Risk Assessment, Larceny 11 (17th Ed. July 1, 2014); Va. Sentencing Guidelines, Other Sexual Assault 17 (17th Ed. July 1, 2014). To identify low-risk drug offenders, prior juvenile adjudications are also counted, and a recency factor – arrest or confinement within 12 months prior to the current offense – is substituted for the larceny assessment's custody status. See Va. Sentencing Guidelines, Nonviolent Risk Assessment, Drug/Schedule I/II 11 (17th Ed. July 1, 2014).
- <sup>15</sup> See Pa. Comm'n on Sentencing, Risk Assessment Project, <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment>.
- <sup>16</sup> See Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform*, 83 N.Y.U. L. Rev. 1389 (2008).
- <sup>17</sup> See John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sentencing*, 26 Fed. Sent'g Rep. 158, 165 n.27 (2014).
- <sup>18</sup> *Id.* at 163, 164 n.16.
- <sup>19</sup> This assumes that the outcome measure of greatest interest is reconviction, within the same jurisdiction, for an offense covered by the guidelines. Re-arrest can also be used as a recidivism measure, using state and national police data, which has the advantage of covering

out-of-state and non-guidelines crimes. On the other hand, arrest measures require analysis and comparison of data that is less familiar to commissions and their staff. Moreover, many arrests do not lead to conviction, and an unknown number are not legally or factually well-founded.

- <sup>20</sup> The U.S. Sentencing Commission published four reports summarizing this research, in chronological order: (1) *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004), [http://www.ussc.gov/Research/Research\\_Publications/Recidivism/200405\\_Recidivism\\_Criminal\\_History.pdf](http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf); (2) *Recidivism and the "First Offender"* (2004), [http://www.ussc.gov/Research/Research\\_Publications/Recidivism/200405\\_Recidivism\\_First\\_Offender.pdf](http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf); (3) *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (2005), [http://www.ussc.gov/Research/Research\\_Publications/Recidivism/20050104\\_Recidivism\\_Salient\\_Factor\\_Computation.pdf](http://www.ussc.gov/Research/Research_Publications/Recidivism/20050104_Recidivism_Salient_Factor_Computation.pdf); and (4) *Computation of "Recency" Criminal History Points under USSG §4A1.1(e)* (2010), [http://www.ussc.gov/Research/Research\\_Publications/2010/20100818\\_Recency\\_Report.pdf](http://www.ussc.gov/Research/Research_Publications/2010/20100818_Recency_Report.pdf).
- <sup>21</sup> U.S. Sentencing Comm'n, Computation of "Recency" Criminal History Points, *supra* note 29, at 18–21.
- <sup>22</sup> Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 Fed. Sent'g Rep. 167, 172 (2014). For further discussion of the diminished culpability of juvenile offenders, see Chapter 5 of this Sourcebook.
- <sup>23</sup> Sonja B. Starr, *The New Profiling: Why Punishment Based on Poverty and Identity is Unconstitutional and Wrong*, 27 Fed. Sent'g Rep. 229, 230 (2015).
- <sup>24</sup> Tonry, *supra* note 22, at 171–74; Starr, *supra* note 23, at 230.
- <sup>25</sup> See, e.g., Minn. Sentencing Guidelines § 2.D.2 (2014).
- <sup>26</sup> For further discussion of this and related principled issues, see Richard S. Frase, *Recurring Policy Issues of Guidelines (and non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 Fed. Sent'g Rep. 145, 147–51 (2014).
- <sup>27</sup> See, e.g., Piquero et al., *supra* note 6; Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life* (1993); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552 (1983); U.S. Sentencing Comm'n, *Measuring Recidivism*, *supra* note 20, at 28 (showing that recidivism rates decline with advancing age, even for offenders with high criminal history scores at the time of their earlier sentencing); U.S. Sentencing Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, *supra* note 20, at 14 (explaining that with the addition of a variable estimating the offender's age at the time of the current offense, the federal criminal history score's recidivism-predictive power was increased to equal that of the Parole Commission's risk-validated Salient Factor Score).
- <sup>28</sup> See, e.g., Debra Dailey, *Prison and Race in Minnesota*, 64 U. Colo. L. Rev. 761, 774 (1993) (showing that black offenders were less likely than whites to be employed at sentencing, but among employed offenders, a higher percent of blacks received a downward dispositional departure probation in lieu of the recommended executed prison sentence).
- <sup>29</sup> See generally, Frase, *supra* note 26.
- <sup>30</sup> 542 U.S. 961 (2004). For a brief introduction to this important case and its impact on sentencing guidelines systems, see Kelly Lyn Mitchell, *What is Blakely and Why is it so Important?*, <http://sentencing.umn.edu/content/what-blakely-and-why-it-so-important> (last visited June 3, 2015).
- <sup>31</sup> See, e.g., *State v. Brooks*, 690 N.W. 2d 160 (Minn. App. 2004) (discussing how facts supporting addition of a custody status point to defendant's criminal history score fall within the *Blakely* exception for "the fact of prior conviction").

### Key Points

- A number of guidelines states have prison populations with high rates of racial disproportionality, as measured by the ratio of nonwhite to white per capita incarceration rates; however, many guidelines states have low ratios and there does not appear to be anything inherent in guidelines sentencing that increases prison racial disproportionality.
- Given the perceived unfairness and negative social and individual consequences of such disproportionality, it is important to determine whether particular guidelines sentencing rules and policies are contributing to this problem in some guidelines systems.
- Racial differences in conviction offenses explain much of the disproportionality found in prison populations, but criminal history enhancements appear to further increase prison disproportionality; in some states those increases are very substantial.
- Nonwhite offenders tend to have higher criminal history scores, and consequently have higher rates of recommended prison commitment and longer recommended prison durations, elevating both the frequency and the duration of nonwhite prison sentences.
- In most of the systems examined thus far, substantial proportions of the higher nonwhite rates of recommended and imposed prison commitment are due to rules that recommend prison for medium- and low-offense-severity crimes only when the offender has an elevated criminal history score; higher nonwhite criminal history scores also appear to explain a substantial proportion of the longer durations of recommended and imposed prison terms given to nonwhite offenders.
- An important unresolved question is whether there are particular aspects of criminal history scoring in some jurisdictions that contribute more strongly to the patterns described above. Each sentencing commission should examine the racial impact of all components of that system's criminal history score. If a particular component is found to have a substantial racially disparate impact, the commission should consider dropping that component or giving it less weight, particularly if its risk-prediction value or other justification is weak.

## INTRODUCTION

One of the most troubling aspects of the use of criminal history at sentencing is its potential to increase the disproportionate numbers of racial-minority prisoners, since minorities tend to have more extensive prior records. Part 1 of this chapter examines the general problem of disproportionate minority confinement in American prisons and jails, the particularly high levels in certain states, and the negative social and individual consequences of such disproportionality. Emphasis is placed on prison populations since prison sentences are more severe and damaging, and the majority of guidelines systems only regulate the imposition and duration of prison sentences. Part 2

presents data from several guidelines states on the role of guidelines criminal history enhancements in the production of racially disproportionate prison populations. To simplify presentations only data on African-Americans versus whites is examined in most of the analyses in this chapter, but the available data suggests that similar disparities are often found for other non-white groups. This chapter closes by suggesting ways in which, on the basis of further system-specific research, criminal history formulas or related guidelines rules could be revised to lessen the contribution of these sentence enhancements to prison racial disproportionality.

## DISCUSSION

## Part 1: The Problem of Disproportionate Minority Confinement

### A. Scope of the Problem

Studies comparing incarceration rates by race have found wide variations among American states. As shown in Table 12.1, the ratio of black to white per capita incarceration rates (inmates of each race per 100,000 state residents of that race) in 2005 ranged from a high of 14.9 in New Jersey to a low of 2.2 in Hawaii – New Jersey's ratio was almost seven times higher than Hawaii's.<sup>1</sup> Sentencing guidelines states (shown with bolded type in Table 12.1) are widely distributed across these rankings. Ten of these 17 states are found in the second (lower-ratio) half of the list, but there does not appear to be any simple relationship between the use of sentencing guidelines and racially disproportionate prison populations. Perhaps the clearest pattern evident in Table 12.1 is the tendency for states

with low overall prison rates (both guidelines and non-guidelines states) to have high black/white incarceration ratios, and vice versa, a pattern which appears to reflect differing state incarceration priorities interacting with racial differences in conviction offenses.<sup>2</sup>

Disparate inmate populations are, of course, part of a larger problem of racial and ethnic disparity throughout the criminal justice system.<sup>3</sup> Indeed, racial disparities seem to appear at every stage of the criminal process, from arrest to sentencing and several post-sentencing stages;<sup>4</sup> thus, much of the substantial racial disproportionality found in prison populations is already present when cases enter the criminal justice system.<sup>5</sup> But the system adds further degrees of disproportionality at various stages, including sentencing. Research has only just begun to explore the contributions of each of these stages to the bottom line of racially disproportionate prison populations.<sup>6</sup> The available data is summarized in Part 2 below.

**Table 12.1: Black/White Incarceration-Rate Ratios and Total Per Capita Prison Rates, 2005**  
(Guidelines states are shown in bold type)

B/W ratios - Rank order	State	Black/White ratio	per capita prison rate (all races)	B/W ratios - Rank order	State	Black/White ratio	per capita prison rate (all races)
1	New Jersey	14.9	313	26	<b>Maryland</b>	<b>6.6</b>	<b>394</b>
2	Vermont	14.8	247	27	<b>Oregon</b>	<b>6.4</b>	<b>365</b>
3	Iowa	13.8	297	28	<b>Michigan</b>	<b>6.4</b>	<b>489</b>
4	Wisconsin	12.9	380	29	Indiana	6.4	388
5	<b>Minnesota</b>	<b>12.7</b>	<b>180</b>	30	<b>Delaware</b>	<b>6.1</b>	<b>467</b>
6	New Mexico	11.8	323	31	<b>Virginia</b>	<b>6.1</b>	<b>464</b>
7	Connecticut	11.7	373	32	Arizona	5.7	521
8	<b>Utah</b>	<b>11.2</b>	<b>252</b>	33	<b>North Carolina</b>	<b>5.3</b>	<b>360</b>
9	<b>Pennsylvania</b>	<b>11.1</b>	<b>340</b>	34	Missouri	5.2	529
10	New York	10.3	326	35	Kentucky	5.1	459
11	Illinois	9.5	351	36	Texas	5.1	691
12	Rhode Island	9.0	189	37	Idaho	5.1	472
13	South Dakota	8.8	443	38	Oklahoma	4.7	652
14	Maine	8.8	144	39	West Virginia	4.6	291
15	North Dakota	8.6	208	40	Louisiana	4.5	797
16	Nebraska	8.5	245	41	South Carolina	4.5	525
17	<b>Kansas</b>	<b>8.5</b>	<b>330</b>	42	<b>Florida</b>	<b>4.5</b>	<b>499</b>
18	<b>Massachusetts</b>	<b>8.2</b>	<b>239</b>	43	<b>Tennessee</b>	<b>4.4</b>	<b>440</b>
19	Colorado	8.1	457	44	Alaska	4.1	414
20	Montana	7.4	373	45	<b>Arkansas</b>	<b>4.0</b>	<b>479</b>
21	New Hampshire	7.3	192	46	<b>Alabama</b>	<b>3.8</b>	<b>591</b>
22	<b>Washington</b>	<b>7.3</b>	<b>273</b>	47	Mississippi	3.7	660
23	California	7.2	466	48	Georgia	3.2	533
24	Wyoming	6.9	400	49	Nevada	3.0	474
25	<b>Ohio</b>	<b>6.8</b>	<b>400</b>	50	Hawaii	2.2	340
All states		<b>6.0</b>	<b>435</b>				

#### Sources

Black/white ratios: Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, National Council on Crime & Delinquency 20 (Mar. 2009), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf).

Per capita prison rates: Paige M. Harrison & Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics 4, tbl.4 (2006), <http://www.bjs.gov/content/pub/pdf/p05.pdf>. Incarceration rates are per 100,000 state residents; black/white ratios compare per capita rates for each race.

## B. Negative Social and Individual Consequences of Prison Race Disproportionality

Criminal history enhancements, and the higher incarceration rates they produce for offenders of all races, undoubtedly have crime control value, and some people believe such enhancements are deserved and thus achieve retributive punishment goals. But these enhancements also have many negative consequences, one of which is to increase racial disproportionality in prison populations. Even apart from that effect, some offenders believe such enhancements are unfair – that they punish the offender twice for the same crime. Perceived unfairness is probably felt more deeply by nonwhite offenders, many of whom generally view the criminal justice system and its processes with suspicion. Disproportionate minority confinement further reinforces the perception, particularly in nonwhite communities, of systemic and societal unfairness, symbolizing our nation’s failure to achieve its goals of racial fairness and equality. Perceived unfairness also undermines the effectiveness of punishment and crime control efforts generally; research shows that people are more willing to obey the law and cooperate with law enforcement if they believe they are being treated fairly.<sup>7</sup>

Besides reducing perceived unfairness, efforts to reduce disproportionality in prison populations caused by criminal history enhancements are likely to have other, more concrete beneficial effects. The fastest and least expensive way to achieve such reduction will be to reduce or eliminate criminal history rules that have a disparate impact on nonwhite offenders, causing fewer of them to be sent to prison and/or shortening their prison terms. Policy makers should not assume that choosing this option will cause crime rates to increase. As was noted in Chapter 1, a large body of research suggests that more severe sentences have little demonstrable added benefit in controlling crime, and may indeed be counter-productive – greater severity sometimes produces more crime, not less. That seems particularly likely to be true for minority offenders; there is good reason to believe that lowering incarceration rates for minority offenders will actually reduce crime, and will also have a variety of other desirable consequences. Numerous studies<sup>8</sup> have revealed the many ways in which conviction and especially incarceration compound individual, family, and community disadvantage, and thus increase the odds of further criminal behavior by the offender, members of his or her family, and members of the community. Thus, if closer attention to the racially disparate impact of criminal history enhancements were to lead to proposals to reduce the magnitude of these enhancements in ways that send fewer nonwhite offenders to prison, or send them for shorter terms, the effect will very likely be less crime, especially in the long run.

## Part 2: Criminal History Enhancements as a Cause of Prison Racial Disproportionality

This Part presents data from several guidelines states, showing how criminal history enhancements contribute to racially-disproportionate prison populations. Section A examines data from four guidelines systems that have sufficient data to permit cross-jurisdictional comparisons. Section B takes a closer look at one of these jurisdictions, to show how more detailed sentencing data can promote a more complete understanding of how criminal history enhancements and other factors contribute to prison disproportionality. All of the data presented is for 2012, the most recent year for which complete data was available for all of these states when this chapter was written.

### A. Multi-Jurisdictional Data

A number of researchers have noted the disparate racial impact of criminal history in sentencing guidelines systems generally.<sup>9</sup> In this section we examine 2012 sentencing data from four guidelines jurisdictions (Kansas, Minnesota, North Carolina, and Washington) to determine: (1) whether and to what extent racial disproportionality increases across several key criminal justice stages; (2) whether black offenders have greater criminal histories than white offenders across multiple jurisdictions; and (3) the extent to which differences in criminal history contribute to overall racial disproportionality in sentencing. We find that disproportionality does increase across key stages, that black offenders do have longer criminal histories than white offenders, and that these differences in criminal history are the source of a substantial proportion of the black/white disproportionality in both recommended and executed prison sentences in each of these four jurisdictions.

#### 1. Racial Disproportionality Across Key Stages of Case Processing

We begin by comparing the progression of black-to-white disproportionality across key processing stages: (1) felony convictions, (2) recommended prison sentences, and (3) executed prison sentences. These three stages lead to: (4) disproportionality in prison populations.<sup>10</sup> The comparisons of these four stages are shown in Table 12.2, and the data is reported as ratios of per capita rates—the numbers in the table signify how much more likely black offenders are to be represented at that stage in the process compared to white offenders, using per capita measures to control for the widely differing numbers of state residents of each race.

**Table 12.2: Per Capita Black-to-White Ratios at Key Stages**

	1. <i>Felony Conviction</i>	2. <i>Recommended Prison</i>	3. <i>Executed Prison</i>	4. <i>Prison Population</i>
Kansas	4.8	6.2	6.3	8.5
Minnesota	7.4	10.8	11.1	12.7
North Carolina	3.4	5.1	4.4	5.3
Washington	3.6	4.5	4.5	7.3

*Note: Ratios are based on per capita rates (per 100,000 in the population).<sup>11</sup>*

*"We find that disproportionality does increase across key stages, that black offenders do have longer criminal histories than white offenders, and that these differences in criminal history are the source of a substantial proportion of the black/white disproportionality in both recommended and executed prison sentences in each of these four jurisdictions. [Kansas, Minnesota, North Carolina, and Washington]."*

Any disproportionality at the first stage – felony conviction – reflects actions that precede decisions about guidelines policy and case-level sentencing. The disproportionality here may be attributable to differences in offending, differences in police apprehension, differences in prosecutorial charging decisions, and so forth. Changes in guidelines policies would have no direct effect at this stage. Guidelines policies are, however, pertinent at the second stage: recommended prison sentences. An increase in disproportionality from the felony conviction to the recommended prison stage (which is present in each jurisdiction) is not necessarily inappropriate. Offenders who are black could be more likely to receive a prison

recommendation because they are convicted of more serious offenses, offenses with mandatory penalties, or for other reasons that might be justified on public safety or other policy grounds. On the other hand, while not inherently unwarranted, the increase in disproportionality might be unjustified if the additional disproportionality is not attributable to more serious violent offending or some other overriding public policy objective. Further inspection is warranted and we accordingly turn our attention to parsing out the sources of the disparity at the recommended and executed prison stages below.

## 2. Racial Differences in Average Criminal History and Offense Severity Scores

Figure 12.1 presents the average criminal history scores and average offense severity scores for offenders who are black versus offenders who are white in each of the four jurisdictions (also reported in Table 12.3). In each state, offenders who are black have both higher average severity scores and higher average criminal history scores compared to offenders who are white. However, in each state the racial difference in history scores is greater than the racial difference in severity scores. This can be confirmed both visually in Figure 12.1 and by comparing ratios in Table 12.3; for each state the black-to-white ratio for average criminal history score is larger than the black-to-white ratio for average offense severity level. Thus, while some of the disparity in recommended and executed prison sentences is likely attributable to offenders who are black being convicted of more serious offenses, an even greater race gap exists based on criminal history.

*[W]hile some of the disparity in recommended and executed prison sentences is likely attributable to offenders who are black being convicted of more serious offenses, an even greater race gap exists based on criminal history.*

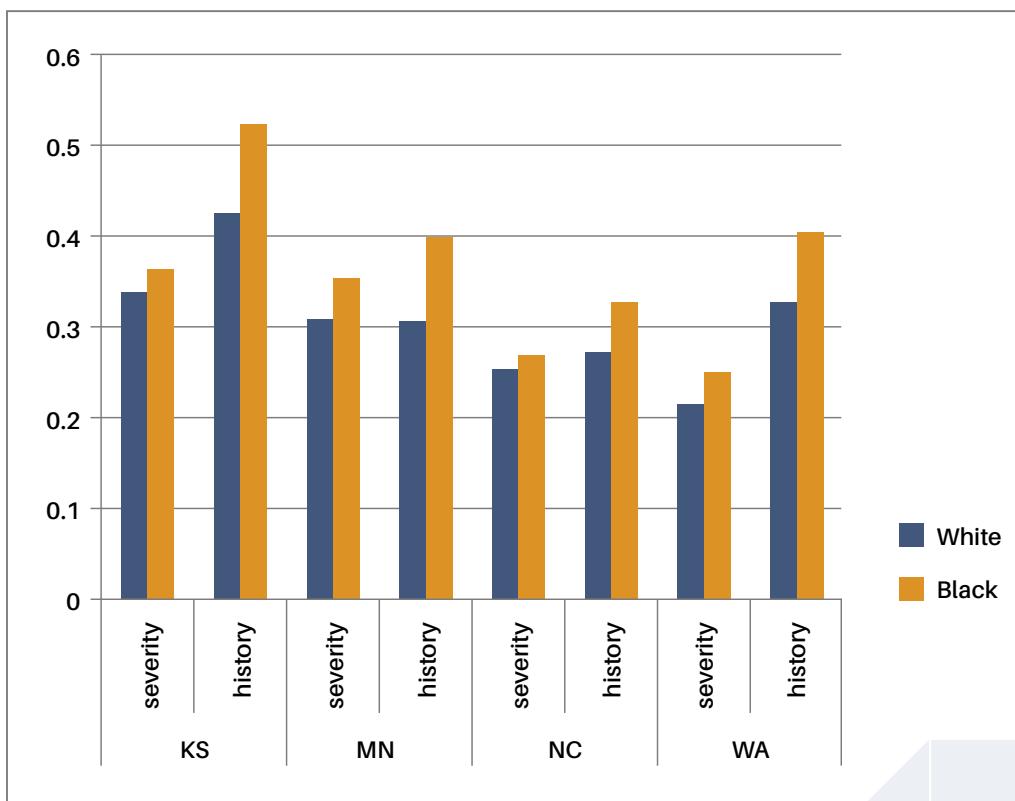
These findings are consistent with other data and research from both guidelines and non-guidelines jurisdictions. Combined data for 1990 through 2006, from a sample of counties representing the seventy-five largest U.S. counties shows that, by every measure, offenders who are black had more substantial prior criminal history records. Further,

numerous studies have found that criminal history exerts a strong effect on sentencing severity. Based on the existing research and our findings from the four states we analyze, it appears that the strong influence of criminal history on sentencing severity, and its disproportionate impact on offenders who are black, are nearly universal phenomena among current U.S. sentencing jurisdictions.

### 3. Racial Disproportionality in Sentencing Attributable to Criminal History

Having found that racial disparity increases between the stage of felony conviction and the stages of recommended and executed prison sentences (Table 12.2), and having confirmed that offenders who are black have higher criminal history scores than offenders who are white (Figure 12.1), we conclude this multi-jurisdictional assessment by identifying the proportion of racial disparity in recommended and executed prison sentences that is attributable solely to criminal history enhancements.

**Figure 12.1: Average Offense Severity and Criminal History Scores by Race and by State**



*Note: The bars represent the average criminal history score and average offense severity level for each race group, as a percentage of the highest criminal history score or offense severity level in that jurisdiction. For ease of presentation only data from the main grids is shown, but the pattern is the same across all seven grids from these four states.*

**Table 12.3: Average Offense Severity and Criminal History Score by Race and by State**

	<i>Average Offense Severity Black: White Ratio</i>	<i>Average Criminal History Score Black: White Ratio</i>
Kansas	1.07	1.23
Minnesota	1.14	1.30
North Carolina	1.06	1.21
Washington	1.16	1.23

*Note: The averages are reported as percentages of the highest criminal history score or offense severity level in that jurisdiction. Only main grids are reported.*

In most guidelines systems there are three paths by which offenders become eligible for a recommended prison sentence, one of which is by criminal history enhancements. For each of these recommended-prison paths we compute the number of additional black offenders who were recommended for prison beyond the number that would be expected if offenders who are black and offenders who are white were distributed across the grid in the same proportions. Figure 12.2 uses the Minnesota main grid to illustrate these three paths to a recommended-prison sentence, which correspond to three groups of offenders and three zones on a guidelines grid: (1) high offense-severity areas of the grid, where all offenders are recommended for prison regardless of their criminal history scores; (2) high criminal-history cells at lower levels of offense severity, where offenders are recommended for prison only because of their elevated criminal history scores; and (3) offenders in cells at medium or low offense severity, with relatively low criminal history scores, who are subject to a mandatory-minimum penalty or other special rule that turns what would otherwise be a non-prison recommendation into a prison sentence. In Minnesota, offenders who are black are over-represented in all three of these areas of the grid, but because of the high volume of offenders of all races who fall into the second (high-history) zone, that zone makes a particularly strong contribution to racial disproportionality in executed-prison

sentences and in prison populations.

The results for the Minnesota Standard Grid recommended-prison analysis are presented in the pie chart in Figure 12.3. As the chart illustrates the largest source of black-to-white disparity in recommended prison sentences comes not from racial differences in high severity offending (zone 1), but from differences in criminal history scores (zone 2).

*"In the four primary grids (referred to by these states as their main, standard, or felony grid), criminal history accounts for 41% to 57% of the racial disparity in recommended prison sentences."*

Figure 12.2: Minnesota Standard Grid: Grid Zones

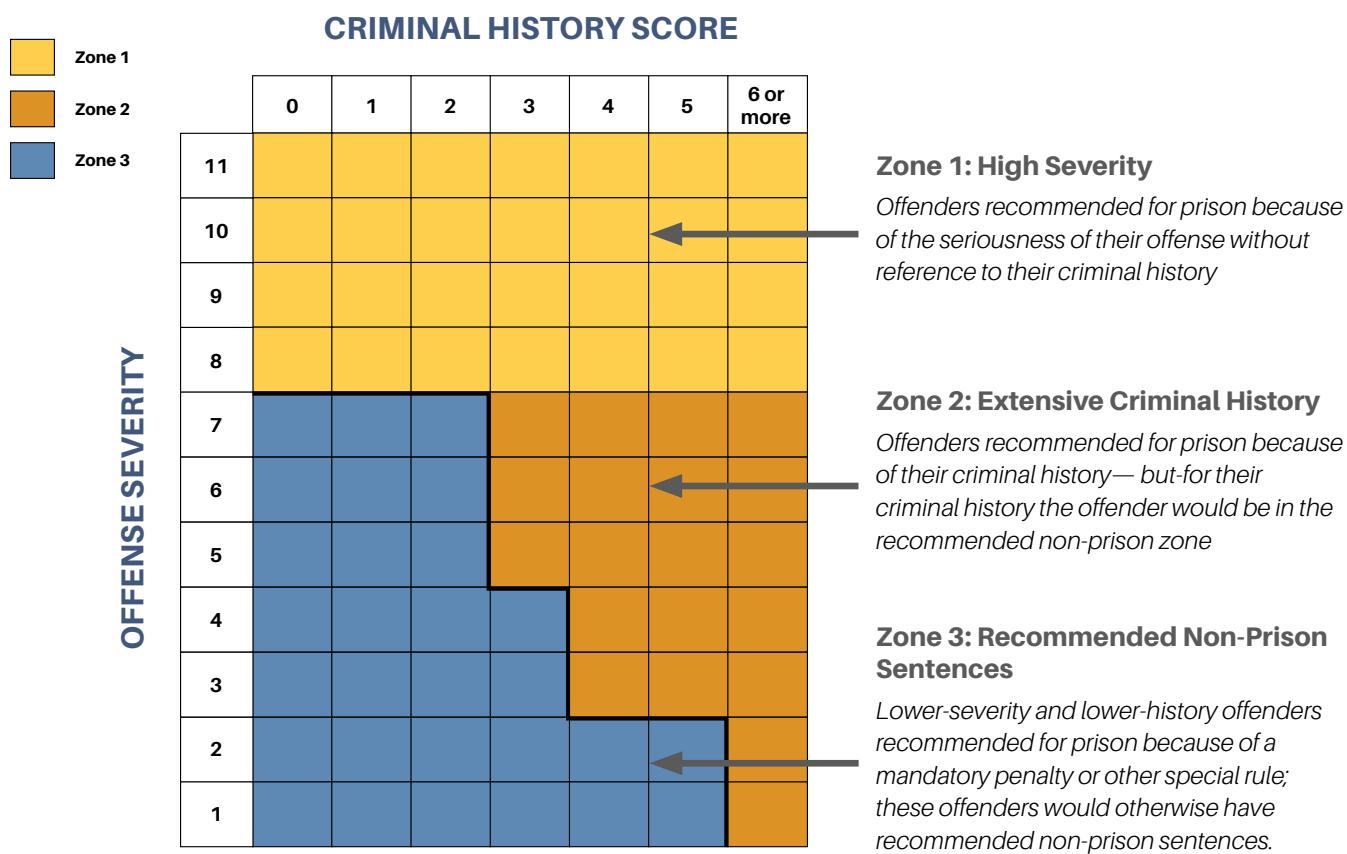


Figure 12.3: Minnesota Standard Grid: Disparity in Recommended Prison by Grid Zones

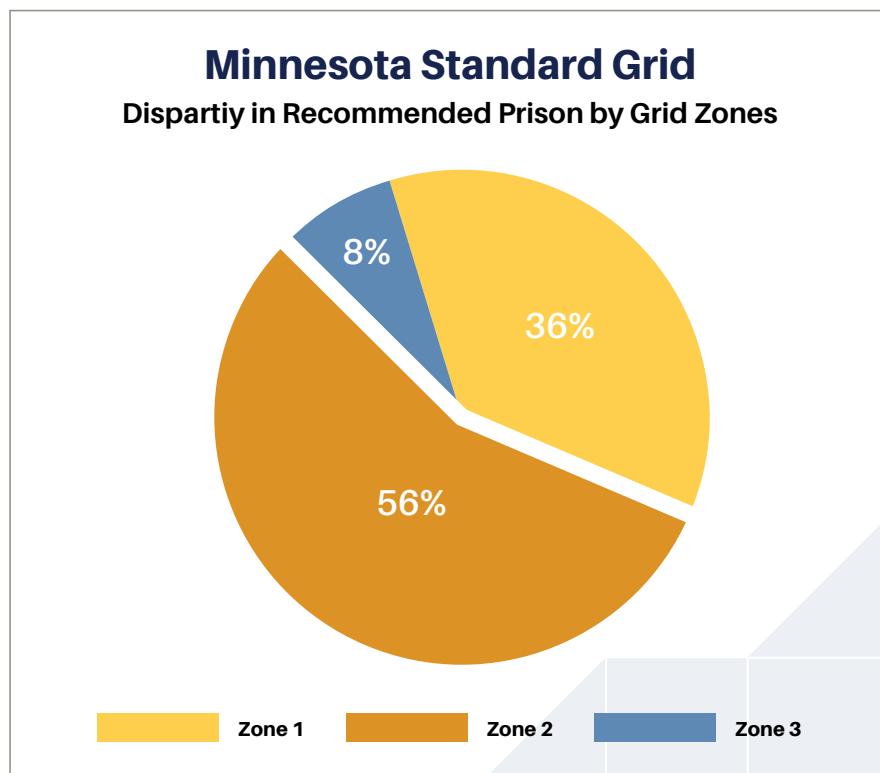


Table 12.4 reports the percentage allocations for each of the seven grids found in the four jurisdictions examined. In the four primary grids (referred to by these states as their main, standard, or felony grid), criminal history accounts for 41% to 57% of the racial disparity in recommended prison sentences. In Kansas and Minnesota, criminal history accounts for well over half of the disparity. The three secondary grids show more diverse patterns, which is perhaps not surprising given the different policy concerns that often lead to creation of a separate grid for certain types of offenses.

Table 12.5 repeats the three-zone analysis for executed prison sentences, again focusing on the population of defendants for whom prison was recommended. Changes between recommended and executed prison sentences reflect the degree to which court actors exercise discretion to depart from guidelines recommendations, and the extent to which such departures exacerbate or mitigate racial disproportionality. As Table 12.5 shows, the allocation of disparity in executed prison sentences among those who had a prison recommendation closely tracks the allocation based on recommended prison sentences – the patterns

of racial disparity found in recommended sentences are carried over with very little change into actual imposed sentences. In the four primary grids, criminal history accounts for 42% to 58% of the racial disparity in executed prison sentences, and again accounts for well over half of the disparity in Kansas and Minnesota. As was the case for recommended sentences, the three secondary grids show more diverse patterns than the primary grids.

The three-zone analysis in Table 12.5 shows the relative contributions of criminal history (zone 2) and other factors (zones 1 and 3) to racial disparity in imposed prison sentences, but the practical impact of such disparity depends on the number of offenders affected. On the Minnesota main grid, for example, there were a total of 440 additional black offenders sentenced to prison, compared to the number that would be expected using the white executed-prison rate. Those 440 black offenders represented 39 percent of all imprisoned black offenders sentenced on this grid. Looking at this proportion the other way around: the actual number of imprisoned offenders who are black (1,127) was 64 percent higher than the expected number (687).<sup>12</sup>

**Table 12.4: Percentage Allocation of Disparity in Recommended Prison by Grid Zone**

Primary Grids			
Jurisdiction/Grid	Zone 1: High Severity	Zone 2: High Criminal History	Zone 3: Mandatories & Other Special Rules
Kansas	48%	57%	-4%
Minnesota	36%	56%	8%
North Carolina	61%	41%	-2%
Washington	51%	49%	0%
Secondary Grids			
Jurisdiction/Grid	Zone 1: High Severity	Zone 2: High Criminal History	Zone 3: Mandatories & Other Special Rules
Kansas Drug	100%	0%	0%
Minnesota Sex	30%	-17%	87%
Washington Drug	64%	36%	0%

**Table 12.5: Percentage Allocation of Disparity in Executed Prison Sentences (Among Those Recommended to Prison) by Grid Zone**

Primary Grids			
Jurisdiction/Grid	Zone 1: High Severity	Zone 2: High Criminal History	Zone 3: Mandatories & Other Special Rules
Kansas	50%	57%	-8%
Minnesota	35%	58%	7%
North Carolina	61%	42%	-2%
Washington	54%	46%	0%
Secondary Grids			
Jurisdiction/Grid	Zone 1: High Severity	Zone 2: High Criminal History	Zone 3: Mandatories & Other Special Rules
Kansas Drug	100%	0%	0%
Minnesota Sex	36%	-5%	68%
Washington Drug	64%	36%	0%

The findings of our examination of sentencing data from Kansas, Minnesota, North Carolina, and Washington can be summarized as follows:

- For each jurisdiction, a large degree of racial disproportionality exists prior to the sentencing phase, yet in each jurisdiction additional disproportionality is also introduced at sentencing (Table 12.2).
- In each jurisdiction offenders who are black have more extensive criminal histories than offenders who are white, and racial differences are greater for criminal history than for offense severity (Figure 12.1 and Table 12.3).
- In all four jurisdictions (and for most of the seven grids examined) criminal history accounts for a significant amount of the racial disproportionality in recommended and executed prison sentences (Tables 12.4 and 12.5). We distinguished among disproportionality attributable to: (1) offenders who are black being sentenced to higher severity crimes; (2) offenders who are black being sentenced for medium- or low-severity crimes but with elevated criminal history scores; and (3) low criminal history black offenders being sentenced for medium- or low-severity crimes but under a mandatory-prison law or other special rule. On the four primary grids, roughly half of the disparity was attributable to the high-criminal-history zone, and on two of those grids that zone accounted for well over half of the total disparity.

## B. Criminal History Enhancements and Prison Disproportionality in Minnesota

The most extensive research to date on the contribution of criminal history enhancements to racially disproportionate prison populations has been conducted in Minnesota.<sup>13</sup> This is a state which is blessed with some of the most complete criminal justice data of any state but which, as was shown in Table 12.1, also has a high degree of prison disproportionality. This section summarizes and updates the results of prior Minnesota research,<sup>14</sup> and illustrates how a sentencing commission can use its sentencing data to identify and quantify the separate contributions of criminal history enhancements and other factors that cause racial disproportionality in punishment.

The Minnesota studies mentioned found that most of the black-white disproportionality in Minnesota prison populations was already evident at the point of arrest. Except for drug crimes, where racial disparities largely result from law enforcement decisions about where to enforce those laws, the large racial differences in arrest rates for serious crimes punishable with imprisonment appear to reflect racial differences in offending patterns. Those patterns, in turn, reflect very substantial differences in the socio-economic status of individuals who are black and individuals who are white in Minnesota.

But (as section A shows is also true in other guidelines systems) the prior Minnesota studies found a major increase in racial disparity at the point where guidelines prison-commitment recommendations take effect – black-

white disproportionality in the rates at which offenders are recommended for prison sentences is almost 50 percent greater than black-white disproportionality in felony conviction rates (the procedural stage just before sentencing).

### 1. Racial differences in recommended-prison rates

There are very substantial racial differences in the proportions of Minnesota offenders recommended to receive an executed prison sentence. In 2012, the percentages<sup>15</sup> were as follows:

White	29.7
Black	43.2
Hispanic	36.3
Asian	30.7
Native American	35.5

The two principal factors determining guidelines recommendations as to prison commitment are the conviction offense severity level and the offender's criminal history score. Of these, the impact of racial differences in offense severity levels is smaller. In 2012 the average offense severity levels of offenders who are black and offenders who are white sentenced on the sex-crimes grid were almost identical. On the main grid (used to sentence 93 percent of offenders that year), the average offense severity level of black offenders was only 14 percent higher than for white offenders (4.24 versus 3.72, respectively).

But there are major racial differences in average criminal history scores. In 2012, the average criminal history score for offenders who are black was 32 percent higher than the average score for offenders who are white (2.41 versus 1.82, respectively). Average criminal history scores were also much higher for Native American offenders (2.20), but were lower for offenders who were Asian or Hispanic (1.54 and 1.38, respectively).

The differences between criminal history scores for offenders who were black or white are similar or greater in most years, and hold up within almost all offense severity levels. Criminal history scores for black offenders are also higher within all major offense types (e.g., violent, property, drug, felony DWI), but the disparities tend to be highest for drug and felony DWI offenders. Offenders who are black are also generally more likely than offenders who are white to receive points for each of the components contributing to the total criminal history score: juvenile record, prior misdemeanors, custody status points, and prior felonies. Data on the types of prior crimes included in higher black offender criminal history scores is limited, but in a recent year for which it was collected (2010) black offenders

were much more likely to have prior convictions for violent crimes, sex crimes against a person, and drug crimes.<sup>16</sup>

The prior Minnesota studies also examined the relative contributions of these racial differences to higher recommended-prison rates for offenders who are black, using the three-zone analysis explained in section A above. As was reported there, offenders who are black are overrepresented in each of the three grid categories that make an offender eligible for a recommended executed-prison sentence: high offense severity, high criminal history, and mandatory-prison or other special rules. The overrepresentation of black offenders in the high-history grid zone accounted for 63 percent of the higher recommended-prison rate for black offenders in the ten-year period ending in 2009 (that is, 63 percent of the total difference between expected and actual numbers of black offenders with recommended prison sentences, combining data from the main and sex grids). The high-offense-severity zone accounted for 20 percent of the higher recommended-prison rate for black offenders in those years, and the third zone (mandatories and other special rules) accounted for 17 percent. In some years the contribution of high criminal history has been even greater than this ten-year average but in other years, especially those since 2009, that contribution has been somewhat lower.

### 2. Racial differences in the recommended duration of executed-prison sentences

Racial differences in the duration of recommended prison sentences are smaller than the recommended-prison-commit differences discussed above. In 2012, the average recommended executed-prison duration for black offenders was only 10 percent higher than the average for white offenders (53.2 months versus 48.5 months, respectively). The recommended executed-prison durations for other racial/ethnic groups were: 57.6 months for Hispanic offenders, 51.6 months for Native American offenders, and 48.2 months for Asian offenders. Similar racial disproportionality in executed-prison-duration recommendations is found in earlier years.

### 3. Combined effects of prison-commitment and prison-duration recommendations

When the modestly higher recommended executed-prison duration for black offenders is combined with the substantially higher recommended prison-commitment rate for black offenders, the overall disparate racial impact as measured by average recommended prison months per offender, is very substantial: the average for black offenders is 60 percent higher (22.9 months for black offenders versus 14.4 months for white offenders). (For this

comparison a recommended non-prison sentence is coded as zero, so the averages for each race are much lower than the recommended prison durations reported in section 2 above, which were only for cases with recommended prison-commitment.)

Of course, much of this overall racial difference is due to black offenders being convicted at higher severity levels. But when recommended prison months are examined separately for each offense severity level, the averages are higher for offenders who are black than for offenders who are white in 17 of the 20 severity levels on the two Minnesota grids. Overall, criminal history and other within-severity-level factors account for almost half of the 60 percent higher combined duration measure for black offenders noted in the previous paragraph.

#### 4. Guidelines departure decisions

There are two kinds of departures from recommended guidelines sentences: durational departures from the length of the recommended prison term and dispositional departures from the recommendation as to prison commitment (execution versus suspension [or “stay”] of the prison term). Only downward dispositional departures appear to involve consistent racial differences contributing to prison disproportionality.

a. *Durational Departures.* In 2012 and most other years, black offenders had higher rates of both upward and downward durational departure, and this was true on both stayed and executed prison terms.

b. *Dispositional Departures.* Upward dispositional departures are infrequent; only 5 to 6 percent of offenders with a recommended stay are given an executed prison term and most of these are agreed to in plea bargaining, usually because the defendant is already in or heading to prison on other charges.<sup>17</sup> Moreover, in many years upward dispositional departure rates for black offenders have been equal to or lower than the rates for white offenders, and the rate for offenders who are black is rarely more than modestly higher.

However, in most years rates of downward dispositional departure (stayed sentences instead of the recommended prison term, as a percent of offenders with recommended executed-prison terms) have been lower for offenders who are black than for offenders who are white. In 2012 the downward dispositional departure rate was 37 percent for white offenders and 30 percent for black offenders. Rates for other racial/ethnic groups were: 30 percent for Hispanic offenders, 30 percent for Native American offenders, and 31 percent for Asian offenders.

**“[Black] offenders [in Minnesota] pay again and again for their prior crimes—their higher criminal history scores cause them to have much higher recommended executed-prison rates, somewhat higher recommended executed prison durations, much higher average recommended prison months (combining prison-commitment and prison-duration presumptions), and lower rates of downward dispositional departure from recommended executed-prison terms.”**

Several studies have used multivariate models to examine the effects of race and other factors on downward dispositional departure decisions in years in which the apparent (bivariate) black versus white disparity was particularly great. In separate logistic regression models of recommended-executed-prison cases from 1987, 1989, 2000, 2001, and 2005,<sup>18</sup> race was not a statistically significant predictor of a prison sentence after controlling for other legal and extralegal variables. However, offender criminal history was always one of the strongest factors predicting downward dispositional departure.

In short: offenders who are black pay again and again for their prior crimes. Their higher criminal history scores cause them to have much higher recommended executed-prison rates, somewhat higher recommended executed prison durations, much higher average recommended prison months (combining prison-commitment and prison-duration presumptions), and lower rates of downward dispositional departure from recommended executed-prison terms.

#### 5. Racial differences in the proportion of offenders receiving executed prison sentences

The cumulative effects of racial differences in conviction rates per capita, in guidelines prison commitment recommendations, and in guidelines departures decisions, can be seen in statistics on prison sentences imposed. In 2012, the percentage of black offenders receiving an executed prison term (both grids combined) was almost 50 percent higher than the percentage for white offenders (34 percent versus 23 percent). The prison rates for other racial/ethnic groups were: 28 percent for Hispanic offenders, 28 percent for Native American offenders, and 25 percent for Asian offenders.

## 6. Racial differences in the duration of executed-prison sentences

Differences in the duration of prison sentences imposed for offenders who are black versus offenders who are white are relatively small. In 2012, the average duration for executed-prison sentences for black offenders was 14 percent higher than the average for white offenders (49.8 months versus 43.8 months). The average executed-prison durations for other racial/ethnic groups were: 56.4 months for Hispanic offenders, 51.7 months for Native American offenders, and 49.4 months for Asian offenders.

## 7. Combined effects of prison-commitment and prison-duration decisions

When the modestly higher average executed-prison duration for black offenders is combined with the substantially higher prison-commitment rate for black offenders, the overall racial disparate impact, as measured by average prison months imposed per offender, is very substantial: the average of 16.7 months for black offenders is 70 percent higher than the average for white offenders (9.9 months). (As in the previous comparison of recommended sentences, in this comparison a non-prison sentence is coded as zero, so the averages for each race are much lower than the prison durations reported in section 6 above, which were only for cases receiving an executed prison sentence.)

Again, much of this overall racial difference is due to offenders who are black being convicted at higher severity levels. But when we examine prison months imposed by race within each offense severity level, the averages are higher for black offenders than for white offenders in 15 of the 20 severity levels on the two Minnesota guidelines grids. Overall, criminal history and other within-severity-level factors account for almost half of the 70 percent higher combined executed duration measure for black offenders noted in the previous paragraph.

## POLICY CONSIDERATIONS

Given the magnitude and serious negative consequences of disproportionate minority confinement (Part 1 above), and the strong likelihood that criminal history enhancements are contributing to this problem in most guidelines systems (Part 2), each sentencing commission should examine the racial impact of its criminal history score and all score components. If a particular component is found to have a strong disparate impact on nonwhite offenders, the commission should carefully evaluate the rationales for including that component to ensure that the degree

of added enhancement is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact.

As was noted in previous chapters, probably the most widely-accepted goal of criminal history enhancements is to serve as a proxy for the offender's risk of recidivism. Accordingly, policymakers should examine the added risk-predictive value, and any added racial disparate impact or other adverse effects, attributable to each existing or proposed criminal history score component. Particular emphasis might properly be given to components that predict violent offending. If any score component is found to have no added crime-predictive value or only moderate added value, but substantial racial/ethnic disparate impact, the commission may wish to drop that component or give it lesser weight.

The commission might also wish to consider dropping or giving limited weight to certain kinds of prior offenses (e.g., drug crimes) that are found to play a disproportionate role in raising the criminal history scores of nonwhite offenders. Such an adjustment might be deemed especially appropriate if the disparate impact is due to factors beyond the control of most offenders, such as high crime levels in the neighborhoods where many nonwhite offenders live (often, not by choice), and/or law enforcement decisions to target those neighborhoods (causing disproportionately high numbers of nonwhites to be stopped, searched, and arrested, in comparison to whites engaging in the same behaviors in neighborhoods with lower enforcement levels).

Since all criminal history enhancements are likely to have a disparate impact on nonwhite offenders, with a greater disparate impact the greater the magnitude of the enhancement, any reduction in the overall magnitude of a system's criminal history enhancements will reduce the adverse impact on nonwhite offenders, at least in absolute terms (fewer of them will be incarcerated) and probably in relative terms (since they have higher average criminal history scores than white offenders). Disparate racial impact thus provides another reason, in addition to those discussed in other chapters of this book, for reducing the overall magnitude of criminal history enhancements. This can be done by limiting the kinds of prior crimes, custody statuses, and other factors that are included in the criminal history score, reducing their weighting, and/or adding or increasing look-back ("decay") limits. As was suggested in Chapter 2, the overall weight of the criminal history score as a sentencing factor, relative to offense severity, can also be reduced by specifying sentencing ranges for adjacent offense severity levels that are non-overlapping, or that overlap only modestly.

<sup>1</sup> Black/white disparities and variations by state are also very substantial, although slightly lower, when inmates held in local jails as well as in prison are counted. See Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 11 tbl.6 (2007), (reporting state-by-state black/white ratios in 2005, including inmates in local jails as well as state prisons).

<sup>2</sup> Of the 25 states with the highest ratios of black offender to white offender incarceration rates, all but three (and all seven of the guidelines states in this higher-ratio group) had a total (all-races) incarceration rate below the national average. Of the 25 states with the lowest black/white ratios, 18 states (and seven of the ten guidelines states in this lower-ratio group) had an above-average incarceration rate. This pattern appears to reflect two factors: 1) high-incarceration-rate states tend to imprison large numbers of property offenders, more of whom are white, whereas low-rate states focus on violent and drug offenders, more of whom are black; 2) high-incarceration-rate states in the South tend to have white crime rates above the national average for whites and black crime rates below the national average for blacks, whereas the opposite is true for many low-incarceration-rate states in the Northeast and Upper Midwest. For further details, see Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System*, ch.5 (2013); Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?* 38 *Crime and Just.* 201, 223-37 (2009).

<sup>3</sup> See, e.g., Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (1995); Samuel Walker, Cassia Spohn & Miriam DeLone, *The Color of Justice: Race, Ethnicity, and Crime in America* (2007).

<sup>4</sup> Frase (2009), *supra* note 2; Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, *Final Report* (May 1993); George S. Bridges & Robert D. Crutchfield, *Law, Social Standing and Racial Disparities in Imprisonment*, 66 *Soc. Forces* 699 (1988).

<sup>5</sup> Although discretionary police practices explain some of the racial disparity in arrest rates, particularly for drug crimes, most of it appears to reflect racial differences in offending. See, e.g., Frase 2009, *supra* note 2, at 202-3; Alfred Blumstein, *On the Racial Disproportionality in United States Prison Populations*, 73 *J. Crim. L. & Criminology* 1259 (1982); Michael Tonry and Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *Crime & Just.* 1, 7-8 (2008).

<sup>6</sup> See, e.g., Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 *Criminology* 514 (2014); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 *J. of Pol. Econ.*, 1320 (2014).

<sup>7</sup> See, e.g., Tom R. Tyler, *Why People Obey the Law* (2006).

<sup>8</sup> See, e.g., Marc Mauer, *Race to Incarcerate* (1999); Bruce Western, *Punishment and Inequality in America* (2006); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 *Crime & Just.* 97 (2008); Sharon Dolovich, *Incarceration American Style*, 3 *Harv. L. & Pol'y Rev.* 237 (2009); Brett E. Garland, Cassia Spohn & Eric J. Wardahl, *Racial Disproportionality in the American Prison Population: Using the Blumstein Model to Address the Critical Race and Justice Issue of the 21st Century*, 5(2) *Just. Pol'y J.* (2008).

<sup>9</sup> See, e.g., Tonry, *supra* note 3, at 168-69.

<sup>10</sup> Racial disproportionality in prison populations (the right-hand column in Table 12.2) reflects both the frequency and the duration of prison sentences given to offenders of each race, whereas data on recommended and executed prison sentences (the two middle columns) only measures racial differences in the frequency of prison terms. In section B of this Part we present Minnesota data on racial differences in the duration as well as the frequency of prison sentences, and show how each contributes to the bottom line of racially disproportionate prison populations.

<sup>11</sup> The ratios shown in the first three columns in the table were derived from sentencing data provided to the authors by these states. The prison population ratios in the fourth column are taken from Table 7.1.

<sup>12</sup> See Frase (2009), *supra* note 2, at 217 (summarizing data compiled by the Bureau of Justice Statistics).

<sup>13</sup> See, e.g., Darrell Steffensmeier & Stephen Demuth, *Does Gender Modify the Effects of Race-Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants*, 22 *J. Quantitative Criminology* 241 (2006); Lisa Stolzenberg, Stewart J. D'Alessio, and David Eitle, *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 *Race & Just.* 275 (2013); Xia Wang, Daniel P. Mears, Cassia Spohn, and Lisa Dario, *Assessing the Differential Effects of Race and Ethnicity on Sentence Outcomes under Different Sentencing Systems*, 55 *Crime & Delinquency* 87 (2009); Robert R. Weidner, Richard S. Frase, and Jennifer S. Schultz, *The Impact of Contextual Factors on the Decision to Imprison in Large Urban Jurisdictions: A Multilevel Analysis*, 51 *Crime & Delinquency* 400 (2005).

<sup>14</sup> This method is explained in more detail, and applied to Minnesota racial disparities, in Frase (2009), *supra* note 2.

<sup>15</sup> For example, the number of additional blacks recommended for prison due to criminal history is computed by comparing the actual number of blacks in the second zone described in text to the expected number, the latter figure—the number of blacks that would be found in Zone 2 if both races were distributed in the same proportions across all areas of the grid—is derived by multiplying the total number of blacks sentenced by the percentage of white offenders found in that zone.

<sup>16</sup> For all seven grids reported in Table 12.5, the numbers of additional black offenders sent to prison, compared to the expected numbers, ranged from 169 to 819 individuals, depending on the grid, comprising 16% to 39% of imprisoned black offenders sentenced on that grid. Looking at these proportions the other way around: the actual number of imprisoned offenders who are black compared to the expected number ranged from 19 percent higher to 70 percent higher.

<sup>17</sup> See Frase (2009), *supra* note 2; Frase (2013), *supra* note 2.

<sup>18</sup> Except where otherwise noted, the data reported in this part is based on annual sentencing data files obtained from the Minnesota Sentencing Guidelines Commission and analyzed by Professor Richard Frase, one of the authors of this Sourcebook. The data is on file with the author.

<sup>19</sup> Minnesota Sentencing Guidelines Commission, *Sentencing Practices 2012* 71 (Nov. 2013) (number presumptive commit divided by total cases).

<sup>20</sup> 2010 is the only year for which data is currently available on prior conviction offense types.

<sup>21</sup> Minn. Sent. Guidelines Comm'n, *Sentencing Practices 24* (2013), <http://mn.gov/sentencing-guidelines/images/2012AnnualDataSummary.pdf> (offenders sentenced in 2012).

<sup>22</sup> See Richard S. Frase, *Implementing Commission-based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 *Cornell J.L. & Pub. Pol'y* 279 (1993) (1987 and 1989 sentencing data); Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 *Crime & Just.* 131 (2005) (2000 and 2001 data); and Frase (2009), *supra* note 2 (2005 data). However, preliminary analysis of 2012 data suggests a significant race effect for cases sentenced on the Standard grid (the earlier models reported in text were run for years when all crimes were placed on a single grid; the separate sex-crimes grid was created in 2006).

## Appendix A: Criminal History [CH] Elements and Features by Guidelines Jurisdiction

Chapters	3	4	5	6	7	8	9	10
Jurisdiction	Jurisdiction has enacted a decay or gap policy	A "prior" conviction can be entered before or after date of current offense	Prior juvenile adjudications added to CH (type and degree of impact vary)	Prior misdemeanors added to CH (types vary)	Limited patterning rules in effect	No special requirements on eligibility for highest CH category	Custody status at time of current offense adds to CH	Multiple current offenses can add to current CH (or otherwise raises the recommended sentence)
Alabama		✓	✓	✓	✓	✓		✓
Arkansas	✓		✓	✓		✓	✓	
Delaware	✓		✓		✓		✓	
District of Columbia	✓	✓	✓	✓		✓		
Federal	✓	✓	✓	✓		✓	✓	✓
Florida	✓	✓	✓	✓	✓	✓	✓	✓
Kansas		✓	✓	✓	✓			
Maryland	✓	✓	✓	✓			✓	
Massachusetts		✓	✓	✓				
Michigan	✓		✓	✓			✓	
Minnesota	✓	✓	✓	✓	✓	✓	✓	✓
North Carolina		✓		✓	✓	✓	✓	
Oregon		✓	✓	✓	✓			
Pennsylvania			✓	✓	✓			
Tennessee			✓		✓		✓	
Utah		✓	✓	✓	✓		✓	✓
Virginia	✓	✓	✓	✓	✓	✓	✓	✓
Washington	✓	✓	✓	✓	✓	✓	✓	✓

Totals: 18 systems

✓ = 10

✓ = 13

✓ = 17

✓ = 16

✓ = 12

✓ = 9

✓ = 12

✓ = 7

Notes - A check mark means the indicated feature is present. Totals below each column are the number of systems with that feature present. Additional charts comparing all systems using quantified (not yes/no) measures can be found in chapters 2, 8, and 12.

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## The Criminal History Enhancements Project

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ABOUT

An offender's criminal history (record of prior convictions) is a major sentencing factor in all American jurisdictions that have implemented sentencing guidelines—offenders in the highest criminal history category often have recommended prison sentences that are many times longer than the recommended sentences for offenders in the lowest category.

Criminal history sentence enhancements thus substantially increase the size and expense of prison populations; and since offenders with higher criminal history scores tend to be older, the result is often to fill expensive prison beds with offenders who are past their peak offending years.

Such enhancements also have a strong disparate impact on racial and ethnic minorities, and undercut the goal of making sentence severity proportional to offense severity. The Criminal History Project of the Robina Institute of Criminal Law and Criminal Justice surveys the widely varying criminal history formulas found in guidelines systems, and encourages these systems to examine their use of criminal history to determine whether it is operating in a just and cost-effective manner.

### Robina Institute of Criminal Law and Criminal Justice

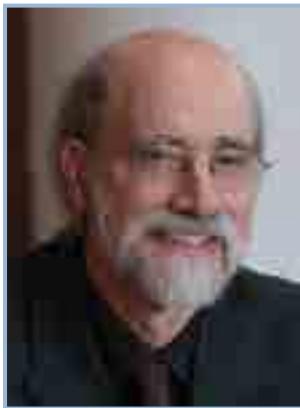
The Robina Institute of Criminal Law and Criminal Justice brings legal education, legal and sociological research, theory, policy, and practice together to solve common problems in the field of criminal justice. Through this work, we initiate and support coordinated research and policy analysis and partner with multiple local and state jurisdictions from across the nation to provide recommendations and build links between researchers, practitioners, lawmakers, governing authorities, and the public.

The Robina Institute's focus is to build these connections through three program areas: Criminal Justice Policy, Criminal Law Theory, and Sentencing Law and Policy. The emphasis in all three areas is on new ways of conceptualizing criminal law and its roles, and new ways of thinking about responses to crime. The Robina Institute is currently working on several research projects, including four in the Sentencing Law and Policy Program Area that take a close look at issues states and jurisdictions face in sentencing policy and guidelines: the Probation Revocation Project; the Parole Release and Revocation Project; the Criminal History Project; and the Sentencing Guidelines Repository Project.

The Robina Institute of Criminal Law and Criminal Justice was established in 2011 at the University of Minnesota Law School thanks to a generous gift from the Robina Foundation. Created by James H. Binger ('41), the Robina Foundation provides funding to major institutions that generate transformative ideas and promising approaches to addressing critical social issues.

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OFFENSE SEVERITY

**CRIMINAL HISTORY**

**PRISON**

**INTERMEDIATE  
SANCTIONS**

**PROBATION**

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