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Robina Institute of Criminal Law and Criminal Justice

UNIVERSITY OF MINNESOTA LAW SCHOOL | 229 19TH AVE SOUTH | N160 MONDALE HALL | MINNEAPOLIS, MN 55455 | ROBINA@UMN.EDU | ROBINAINSTITUTE.UMN.EDU

Comparing Criminal History Enhancements in Three Jurisdictions

By Rhys Hester

INTRODUCTION

How much weight does a prior conviction carry at sentencing for a current offense? The answer is that it greatly depends where the offender is sentenced. In some states, a prior felony means a few extra months imprisonment. In others, it can mean additional years. In 2015, the Robina Institute of Criminal Law and Criminal Justice published the *Criminal History Enhancements Sourcebook*, which provides a detailed comparison of the various ways 18 U.S. sentencing guidelines jurisdictions use an offender's prior criminal record to enhance punishment for a current crime. Among the primary takeaways from the *Sourcebook* are that

(1) jurisdictions have very different approaches to criminal history enhancements and that (2) these different approaches can have considerable impacts on important policy outcomes like racial disparities and the financial costs of imprisoning more offenders (many of whom are aging and convicted of non-violent crimes). This Policy Brief illustrates the extraordinary variation in the use of criminal history enhancements by comparing the impact of criminal history scores for offenders in three states: Kansas, Minnesota, and Pennsylvania.

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BACKGROUND

Currently, 20 U.S. jurisdictions utilize sentencing guidelines in the criminal sentencing process, of which 18 have an identifiable criminal history formula. One of the primary purposes of guidelines is to "guide" the decision-making of judges and other court actors so that sentencing outcomes are more fair and consistent. In order to accomplish this, most guidelines use the seriousness of the current offense and the offender's criminal history to determine a recommended sentence. Figure 1 provides the Minnesota Standard Grid as a typical example of how a guidelines jurisdiction structures sentencing around these two elements of current offense and criminal history. Minnesota felony offenses are categorized into 11 Offense Severity Levels that make up the rows of the grid, with more serious offenses on the top rows and less serious offenses on the bottom. Each offender also has a Criminal History Score which is comprised of his or her prior felonies, prior misdemeanors, whether he or she had any juvenile adjudications, and whether he or she was on probation or supervised release when committing the current offense (frequently referred to as "custody status violation"). Before the guidelines, judges were free to sentence an offender within a wide range of, say, 0 to 15 years for an offense. Since the implementation of guidelines in 1980, Minnesota judges now identify the appropriate cell based on the Offense Severity Score and Criminal History Score, and select a punishment from the much narrower window provided in that cell.

Figure 1. Minnesota Standard Sentencing Grid

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Murder, 2nd Degree (intentional murder; drive-by- shootings)	11	306 *261-367*	326 *278-391*	346 *295-415*	366 *312-439*	386 *329-463*	406 *346-480[2]*	426 *336-480[2]*
Murder, 3rd Degree Murder, 2nd Degree (unintentional murder)	10	150 *128-180*	165 *141-198*	180 *153-216*	195 *166-234*	210 *179-252*	225 *192-270*	240 *204-288*
Assault, 1st Degree	9	86 *74-103*	98 *84-117*	110 *94-132*	122 *104-146*	134 *114-160*	146 *125-175*	158 *135-189*
Aggravated Robbery, 1st Degree Burglary, 1st Degree (with weapon or assault)	8	48 *41-57*	58 *50-69*	68 *58-81*	78 *67-93*	88 *75-105*	98 *84-117*	108 *92-129*
Felony DWI; Financial Exploitation of a Vulnerable Adult	7	36	42	48	54 *46-64*	60 *51-72*	66 *57-79*	72 *62-84[2,3]*
Assault, 2nd Degree Burglary, 1st Degree (occupied dwelling)	6	21	27	33	39 *34-46*	45 *39-54*	51 *44-61*	57 *49-68*
Residential Burglary Simple Robbery	5	18	23	28	33 *29-39*	38 *33-45*	43 *37-51*	48 *41-57*
Nonresidential Burglary	4	12[1]	15	18	21	24 *21-28*	27 *23-32*	30 *26-36*
Theft Crimes (Over $5,000)	3	12[1]	13	15	17	19 *17-22*	21 *18-25*	23 *20-27*
Theft Crimes ($5,000 or less) Check Forgery ($251-$2,500)	2	12[1]	12[1]	13	15	17	19	21 *18-25*
Assault, 4th Degree Fleeing a Police Officer	1	12[1]	12[1]	12[1]	13	15	17	19 *17-22*

12[1]=0ne year and one day

☐ Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.

☐ Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

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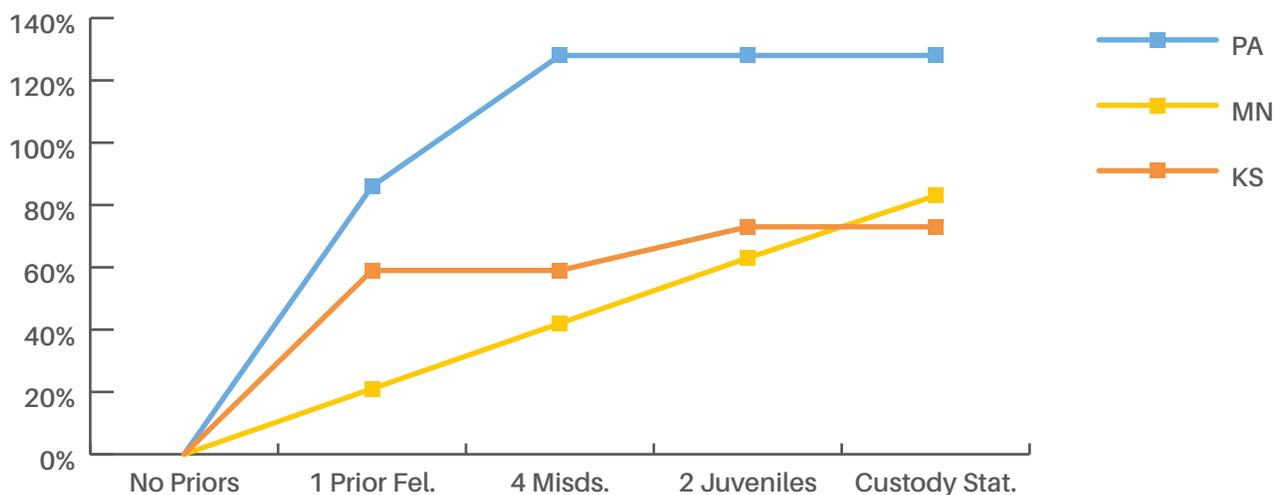
THREE-STATE COMPARISON

Importantly, as discussed below, the Criminal History Score components found in Minnesota are not necessarily included in every jurisdiction's criminal history score. Instead, jurisdictions have adopted different scoring formulas. Consequently, the rules that determine Criminal History Scores are a powerful determining factor of the final outcome of an offender's sentence. The *Sourcebook* identifies a variety of differences among states when it comes to criminal history scores. Jurisdictions allocate felony points differently; they treat misdemeanors differently; some automatically add points for probation and parole violations while others do not; most but not all include juvenile adjudications; and so forth. In addition, once the score is set, jurisdictions vary widely in how much more a repeat offender is punished compared to the first time offender (that is, how much more the recommended punishment increases from the first offender to an offender with the maximum criminal history score). In the lowest impact jurisdictions, high-criminal history offenders receive a recommended prison sentence that is about twice as long as the recommendation for a first-time offender; in other, high-impact jurisdictions, the average sentence length multiplies by ten times or more (see *Sourcebook* Ch. 2).

To illustrate some of these differences, the following example tracks a hypothetical offender, John Smith, through several different versions of a prior record to show how he would be sentenced differently in three guidelines states. For each of these scenarios we'll assume that John is being convicted of armed robbery. We'll first consider John as a first-time offender, and then track the differences as follows:

(1) First, what would happen if instead of being a first-time offender, John had one prior armed robbery conviction;

(2) Second, what if in addition to the prior armed robbery he also had four minor misdemeanor convictions;

(3) Third, what if he also had two juvenile adjudications from when he was a minor; and

(4) Fourth, what if, in addition to all of these, he was on probation, parole, or supervised release (i.e., "custody status violation") when he committed this most recent armed robbery.

Figure 2 shows the substantial differences in how John's prior record would impact his current sentence in these three jurisdictions (see the Appendix for an explanation of the methodology).

Figure 2. Three-State Comparison of Criminal History Enhancements

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Beginning with Minnesota, John would receive a steady but comparatively modest increase in punishment across each of the scenarios. Minnesota is the only one of these three jurisdictions that includes each of the case attributes (prior felonies, prior misdemeanors, prior juvenile adjudications, and custody status violation) in the criminal history score. Consequently, the punishment increases across the scenarios as each new fact adds to John's criminal history score. But while the criminal history score goes up for each case, the increase for any given attribute is fairly low, reflecting around a 20% premium in the recommended sentence each time.

Moving to Pennsylvania reveals a stark contrast. First consider the difference between John having no priors and then having one prior felony armed robbery. In Minnesota this prior felony increases John's punishment by around 20%. In Pennsylvania the prior increases his punishment by over 85% because the recommended impact of having the prior felony is much greater in Pennsylvania, demonstrating the consequences of different approaches to scoring and implementing enhancements in these two states. Adding the misdemeanors in Pennsylvania again adds to the criminal history score and brings an additional large increase in punishment. On these two factors alone, John would get less than a 50% increase in Minnesota, while he would experience a 128% increase of his recommended sentence in Pennsylvania. Notice, however, that at this point in Pennsylvania John's sentence enhancement levels out—he does not automatically receive additional months in prison in Pennsylvania for having two prior juvenile adjudications or for committing the current offense while on probation or parole.

Finally, consider Kansas, which displays a mixture of the policy decisions illustrated by Minnesota and Pennsylvania. In Kansas, like Pennsylvania, the initial move from no priors to one prior felony carries a substantial increase (almost 60%) in punishment, again a reflection of the different policy choices among the states as to how much a prior crime should affect a current sentence recommendation. Due to the criminal history rules in place in Kansas, John would not receive any additional increase for these prior misdemeanors, would receive a modest increase of 12%

for adding the prior juvenile adjudications, and again would receive no automatic increase for the custody status violation. Thus, while Kansas criminal history enhancements start out by rapidly increasing John's punishment in these scenarios, his punishment enhancement quickly levels off to ultimately finish just below Minnesota in the completed analysis.

DISCUSSION

There are significant implications for increasing an offender's prison sentence for what he did in the past, and there are vast differences in the way jurisdictions do this. This comparison illustrates some important points. The same prior crime has a profoundly different aggravating impact on sentencing, depending on the state in which the offender is sentenced. Consider John with one prior armed robbery in Minnesota versus John with one prior robbery in Pennsylvania. In Minnesota his sentence is increased around 10 months from about 4 years to just less than 5 years. In Pennsylvania his minimum sentence is increased by over 40 months, from around 4 years to nearly 8 years. If it costs around $40,000 per year to incarcerate John in Pennsylvania, what additional benefit is the state receiving (compared with Minnesota) for its additional investment of $120,000? What detriments might John and the public incur for this additional loss of 3 years of freedom?

While the *Criminal History Enhancements Sourcebook,* and other work at the Robina Institute, address the policy implications of prior record enhancements, the primary purpose of this Policy Brief is to provide a concrete illustration of the drastic differences among states in their approaches to enhancing punishment on the basis of an offender's criminal record. This work should encourage policymakers and other researchers to explore these and many other policy questions related to the use of criminal history enhancements in sentencing. For example, as suggested by the questions posed above, a state which assigns great weight to prior convictions might want to consider what benefits arise from this additional prison time—and whether these benefits outweigh the costs associated with placing more offenders in prison, and for longer terms.

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APPENDIX

Methodology For Robina Institute Policy Brief: Comparing Criminal History Enhancements in Three Jurisdictions

States have different definitions and elements for similar crimes, which can be a daunting challenge for cross-jurisdictional comparison. This example chose armed robbery as a commonly-occurring crime that the jurisdictions have similar definitions for. The underlying statutory provisions can be found here:

- **Kansas:** Aggravated Robbery, Kan. Stat. Ann. § 21-5420(b).
- **Minnesota:** Aggravated Robbery, First Degree, Minn. Stat. Ann. § 609.245.
- **Pennsylvania:** Robbery, 18 Pa.C.S. § 3701(a)(1)(ii).

There are differences in the sentences each of these jurisdictions recommends for John as a first offender. In Kansas the recommended sentence is 59 months in prison; in Minnesota it is 48 months in prison; and in Pennsylvania it is a minimum of 29 months in prison (with a maximum at least twice that also imposed by the judge, up to the statutory maximum).

For the purposes of this Policy Brief, we are primarily interested in how aspects of the prior record change an offender's sentence, not in any pre-existing sentencing policy differences among these states for armed robbery.

Accordingly, we "zero out" these different starting points by analyzing the various enhancements as percentage increases in the recommended sentence based on each iteration of the hypothetical (e.g., how much more, in percentage terms, does John receive if he has a prior felony, prior misdemeanors, and so on).

For example, in Minnesota, the aggravated robbery is a Severity Level 8 offense, with a recommendation of 48 months in prison. Once we give John a prior felony conviction, he moves over one column with a Criminal History Score of 1 and a recommended sentence of 58 months, or a 21% increase over the recommendation he would have received with a Criminal History Score of 0. Thus the line in the Figure shows a 21% increase between John as first offender and first iteration of the scenario where we consider John with a prior armed robbery conviction. By focusing on these percentage increases over the first offender recommendations we are able to isolate the impacts of the criminal history enhancements apart from the baseline differences in recommended punishment for the underlying offense in each state.

For questions, comments, or additional information, please contact Rhys Hester of the Robina Institute at **rahester@umn.edu**.

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