



Summary of Comprehensive Review (June 2021) 8th Edition Sentencing Guidelines

Introduction – The Need for a Comprehensive Review

Since the implementation of the first sentencing guidelines in 1982, the Pennsylvania Commission on Sentencing has adopted eighteen changes (i.e., new editions, amendments, revisions, and supplements) which most recently include the incorporation of guidelines for probation, for the use of restrictive conditions (i.e., county intermediate punishment programs), and for fines and community service; fourteen legislatively-mandated sentencing enhancements; and recommendations to identify eligible and appropriate candidates for programs at the Pennsylvania Department of Corrections. During the same period, the Commission adopted and implemented a sentence risk assessment instrument and guidelines for resentencing following revocation of probation, proposed a model pretrial risk assessment tool related to domestic violence, and held public hearings on proposed guidelines for parole and recommitment ranges to be considered following revocation of parole.

The need to regularly review and revise the sentencing guidelines, and the expansion of the scope of activities undertaken by the Commission over the course of 40 years, is a response to legislative mandates and to court decisions, and a recognition that criminal justice policies and practices are not static. The guidelines are informed by monitoring existing practices, and researching best practices, and considering the shifting expectations of the public and their elected officials. So it is not surprising that the guidelines of today are substantially different... and more complicated... than those adopted in 1982.

And it is for this reason that the Commission occasionally undertakes a comprehensive review of the sentencing guidelines, to take stock of where we are and how we got there, before considering next steps. The Commission completed such a review in 1994, focused on evaluating the first decade of sentencing guidelines, which resulted in the rebuilt 4th Edition Sentencing Guidelines. The current review, underway since 2014, provides an opportunity to streamline, automate, and update the sentencing guidelines, and to harmonize these guidelines with others developed by the Commission, including guidelines for resentencing and parole.

This document is intended to provide a brief history of the development of sentencing guidelines in Pennsylvania, the critical events that determined the trajectory of the guidelines, the efforts underway since 2014 as part of this second comprehensive review of the sentencing guidelines, and information on the most recent phase of that review: a summary of the work and recommendations of the Academic Review Panel.

Background – Pennsylvania’s Sentencing Guidelines

The Pennsylvania Commission on Sentencing was established by Act 319 of 1978, and held its first meeting in April 1979. The Commission was required to adopt and submit sentencing guidelines to the General Assembly within eighteen months. At that time, sentencing guidelines were an innovation, and Pennsylvania was in the vanguard of states establishing sentencing commissions. The adoption of sentencing guidelines was viewed as a means of structuring the exercise of discretion by judges and providing for appellate review of sentences. In Pennsylvania’s General Assembly, a Commission and guidelines were seen as a viable alternative to mandatories: a Commission small enough to be effective in reaching consensus while representing the interests of the three branches of government; and guidelines to promote uniformity, to limit the unchecked discretion of judges while avoiding the



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extreme restraints of mandatorics, and to recommend appropriate sentences to address perceived excessive leniency, especially for serious violent offenses.¹

The Commission submitted the initial sentencing guidelines to the General Assembly on January 24, 1981. These guidelines were rejected by the General Assembly, with the House and Senate passing a concurrent resolution calling for consideration of increased judicial discretion and sentence severity for violent offenders. The Commission responded by widening the guidelines ranges through an increase in the upper boundary of the recommendations; this both expanded judicial discretion and made available the consideration of harsher penalties, while retaining the initial recommendations as the base of the ranges. But for misdemeanor offenses, this effectively eliminated meaningful guidance for sentences. The Commission also eliminated recommendations that restricted the imposition of consecutive sentences. These revised sentencing guidelines were adopted and submitted to the General Assembly, and took effect for all offenses committed on or after July 12, 1982.

Consistent with the view that the sentencing guidelines are intended to structure the exercise of discretion, the Pennsylvania Superior Court's review of sentences during the initial implementation of the sentencing guidelines was based on a 'reasonableness' standard. This standard was less deferential to judicial discretion and focused on a careful review of both the procedural issues related to the application of the guidelines and the substantive issues related to the justification of the sentence. Under the first two editions of the sentencing guidelines, the Superior Court was actively creating a 'common law of sentencing' in the application of the guidelines.²

As described below, a number of critical events during this early period would shape the Commission and limit appellate review, thus shifting the nature of the sentencing guidelines from "presumptive" to "advisory," and emphasizing the crucial role of pre-sentence reports.

- ***Com. v. Sessoms (532 A.2d 775, Pa., 1987)*** – Five years after the implementation of the guidelines, the Pennsylvania Supreme Court invalidated the 1982 Sentencing Guidelines and all revisions to those guidelines, holding that the procedure used to reject the 1981 guidelines violated the presentment requirement contained in Article III, § 9 of the Pennsylvania Constitution, in that the concurrent resolution was not presented to the Governor for action. The Court noted that new guidelines could be adopted by the Commission, and a legislative veto could be employed to review the guidelines, as long as any concurrent resolution to reject the guidelines is presented to the Governor. The Court clarified that guidelines adopted through this procedure could not be given the effect of law, and therefore imposed no substantive change in a court's sentencing discretion. In sum, the sentencing guidelines were advisory rather than presumptive. As the Supreme Court stated:

Consultation of the guidelines will assist in avoiding excessive sentences and further the goal of the guidelines, viz., increased uniformity, certainty, and fairness in sentencing. Guidelines serve the laudatory role of aiding and enhancing the judicial exercise of judgment regarding case-specific sentencing. ... they are advisory guideposts that are valuable, may provide an essential starting

¹ See: John H. Kramer and Jeffrey T. Ulmer (2009). *Sentencing Guidelines: Lessons from Pennsylvania*. Lynne Reiner (Chapter 1).

² *Ibid.* (Chapter 3).



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point, and that must be respected and considered; they recommend, however, rather than require a particular sentence.

The new sentencing guidelines (Third Edition) took effect April 25, 1988 and applied to all offenses committed on or after that date.

- ***Com. v. Devers (546 A.2d 12, Pa., 1988)*** – Departing from Superior Court’s ‘reasonableness standard’ which required reasons on the record and included a review of explanations of departures from the sentencing guidelines, the Pennsylvania Supreme Court established a ‘presumption of reasonableness’ of a sentence when the judge was aided by a pre-sentence report. This deference to the discretion of the sentencing judge effectively eliminated substantive review of guidelines-related appeals, leaving little more than procedural review. As the Court noted...
Court are not permitted to mete out punishment based on the mere fact of the crime. On the contrary, sentencing must result both from the consideration of the nature and circumstances of the crime as well as the character of the defendant. The sentencer has broad discretion to choose a penalty from the sentencing alternatives and the range of permissible confinements, provided the choices are consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. ...
Where a pre-sentence report exists, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors.... Having been fully informed by the pre-sentence report, the sentencing court’s discretion should not be disturbed.
- ***First Comprehensive Review of the Sentencing Guidelines (1988-1994)*** – Pennsylvania’s initial sentencing guidelines were developed during the infancy of the structured sentencing reform era. The data available to build the guidelines was limited, and many of the innovations untested. The Commission was committed to collecting detailed data on the application of the guidelines and the sentences imposed, with special consideration of reasons provided for departures from the guidelines. The information collected served as the foundation for the first comprehensive review of the sentencing guidelines. The analysis of the data, along with extensive interviews with judges and practitioners, the engagement with statewide committees and organizations, and the establishment of advisory committees, all contributed to this review. The Commission also benefitted from the guidance provided by the Pennsylvania’s appellate courts, both the ‘common law of sentencing’ that was emerging from the Superior Court, and the pronouncement by the Supreme Court that the sentencing guidelines were advisory. Additionally, since other state sentencing commissions had been created during the previous decade, a comparison of policies and practices across jurisdictions was possible. This comprehensive review informed the development and adoption of the 4th Edition Sentencing Guidelines (1994). The guidelines included the following substantial changes:
 - Introduction of the Standard Range Chart as the basic sentencing matrix, illustrating the standard range recommendations for each combination of OGS and PRS;
 - Further incorporated Boot Camp (BC) and County Intermediate Punishment (CIP) into the sentencing guidelines, and refined sentencing options to address Restrictive Intermediate Punishments (RIP) and Restorative Sanctions (RS);
 - Introduced the lapsing of certain juvenile adjudications as a consideration in calculating the Prior Record Score, and increased the weight of prior crimes of violence to four points;



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- Added two new Prior Record Score categories, targeting serious repeat offenders: RFEL (Repeat F1/F2 Offender) and REVOC (Repeat Violent Offender);
- Added Sentencing Levels associated with purposes of sentencing to the Standard Range Chart.
- **Special Session on Crime (1995)** – Following the implementation of the 4th Edition Sentencing Guidelines (1994), the Commission received feedback that recommendations for repeat violent offenders were not adequate. The Commission also recognized that the guidelines needed to be responsive to new legislation enacted during the 1995 Special Session on Crime and the 1995-1996 Session of the General Assembly, which included 'three strikes' legislation that revised the mandatory sentences for violent offenders. In response, the Commission adopted the 5th Edition Sentencing Guidelines (1997). The guidelines included the following substantial changes:
 - The Commission adopted harsher sentence recommendations targeting the increased statutory limit for Murder 3 and inchoate murder (attempts, solicitations and conspiracies) and re-drafted sexual assault statutes.
 - To provide consistency between the three-strikes legislation (42 Pa.C.S. §9714) and the guidelines recommendations, the Commission designated all completed 'crimes of violence' be assigned to Level 5 of the guidelines, exclusively recommending state incarceration.
 - The Commission increased the sentence recommendations for the RFEL Prior Record Score category, which targets serious repeat felony offenders;
 - The Commission linked OGS assignments to PRS point values, thus providing that all completed crimes of violence were assigned 4 points;
 - The Commission shifted the guidelines from transaction-based sentence recommendations to offense-based sentence recommendations, with the PRS applied to every offense, instead of applying only to the most serious offense of a transaction;
 - The Commission expanded the sentencing levels by adding a level that targets offenders who by statute are permitted to serve a state sentence in a county facility;
 - Linked to the guidelines, the Commonwealth provided funding to counties to support the use of clinically prescribed drug and alcohol treatment in lieu of confinements (through sentences to CIP) for eligible Level 3 and Level 4 drug dependent offenders.
- **Com. v. Yuhasz (923 A.2d 1111, Pa., 2007); Com. v Walls (926 A.2d 957, Pa. 2007)** – In 2004, the United States Supreme Court's decision in *Blakely v. Washington* held that certain sentencing guidelines structures, in which a judge imposed a sentence in excess of the recommended range of the guidelines relying on factors not found by a jury beyond a reasonable doubt, violated the Sixth Amendment of the United States Constitution. At issue was whether the sentencing guidelines were presumptive, for which the court was required to impose a sentence within the prescribed ranges unless there were substantial and compelling reasons to depart, or advisory, in which the court could exercise discretion to sentence outside the prescribed ranges. The Pennsylvania Supreme Court reaffirmed that Pennsylvania's sentencing guidelines are advisory, and therefore do not violate the Sixth Amendment. The Court addressed the nature of the guidelines and the standard of review in the following cases:
 - *Com. v. Yuhasz* – *As it is evident that Pennsylvania's Sentencing Guidelines are merely advisory, the United States Supreme Court's holding in Booker makes clear that they do not violate the Sixth Amendment... As the range is merely a suggestion, it avoids the constitutional problems encountered by the sentencing schemes reviewed in Booker and Blakely. Thus, the maximum*



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sentence for *Apprendi* purposes is the statutory maximum, not the maximum recommendation of the Sentencing Guidelines.

- *Com. v. Walls* – (W)e decline to fashion any concrete rules as to the unreasonableness inquiry for a sentence that falls outside the applicable guidelines under Section 9781(c)(3). We are of the view, however, that the Legislature intended that considerations found in Section 9721 inform appellate review of unreasonableness. That is, while a sentence may be found to be unreasonable after review of Section 9781(d)'s four statutory factors, in addition a sentence may also be unreasonable if the appellate court finds that the sentence was imposed without express or explicit consideration by the sentencing court of the general standards applicable to sentencing found in section 9721...

While the guidelines are an important factor in sentencing, they are but one factor when determining individualized sentences. They do not create a presumption and do not predominate. Here, the sentencing court considered the guidelines, but departed therefrom for reasons that were not foreclosed by the law.

Given the numerous legislative mandates requiring annual and complicated amendments to the sentencing guidelines, and the need to rebuild the Commission's JNET-based web application for the preparation of guidelines and the reporting of sentences to the Commission, the Commission decided to undertake a second comprehensive review of the sentencing guidelines. This effort was initiated in 2014 and the efforts to date frame the development of proposals for the 8th Edition Sentencing Guidelines.

Second Comprehensive Review (2014-2021)

Since 2014, the Commission has been involved in a second comprehensive review of its sentencing guidelines. From the beginning of this effort, the Commission viewed a rebuilding of the sentencing guidelines as a vehicle to reform and improve Pennsylvania's criminal justice system, advancing the goals of the Commonwealth's Justice Reinvestment Initiatives (JRI-I and JRI-II). But it was also seen as an opportunity to promote better policies and outcomes by harmonizing the various guidelines adopted by the Commission, including those related to sentencing and resentencing, parole and recommitment, and risk assessment. The recent national unrest added urgency to this effort and required heightened focus on racial justice and against over-reliance on incarceration and long periods of community supervision. Since they were first implemented in 1982, Pennsylvania's sentencing guidelines have become increasingly complicated, with revisions occurring nearly every year to keep pace with legislative mandates. In an effort to streamline, simplify and update the guidelines, the Commission has undertaken the following activities to review and rebuild toward new 8th Edition Sentencing Guidelines:

- *Strategic Planning Work Group (2014-2016)* – The Commission established the Strategic Planning Work Group in 2014, involving a representative statewide group of 35 criminal justice stakeholders to take a fresh look at the sentencing guidelines. The group met for seventeen meetings over the course of almost two years to conduct a full external review of the guidelines. The goals of the review were to streamline and simplify the guidelines, to better incorporate the mandated sentencing enhancements, to promote greater certainty in sentences and more efficient use of correctional programs. Specific recommendations included: recalibration and expansion of the number of OGS categories (from 14 to 48) in order to provide more targeted recommendations and more uniform and proportional increases; reduction in the impact of PRS through expanded lapsing



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provisions and simplified/automated consideration of previous convictions; use of adjustments to OGS assignments to consistently address offense-based and offender-based factors; and modification of OGS assignments to address mandated enhancements.

- *Commission Subcommittees (2016-2018)* -- The Commission created three sub-committees to review the work group recommendations.
 - The Offense-Related Subcommittee recommended a reduction on the total number of OGS categories from 48 to 36, modified and narrowed the recommended ranges, linked the aggravated/mitigated recommendations to adjustments to the OGS assignment, and provided specific recommendation for OGS assignments.
 - The Offender-Related Subcommittee supported recommendations to reduce the impact of criminal history through the restructuring of the PRS, and partnered with students at Carnegie Mellon University and Drexel University to develop more detailed proposals.
 - Students at CMU's Heinz College found little distinction between PRS 3 and PRS 4, and between PRS 5 and PRS RFEL in terms of recidivism, suggesting a simpler approach would be to create a PRS category for high-risk and more frequent offenders and one for those with lower risk of recidivism.
 - Students at Drexel's Thomas R. Kline School of Law prepared proposals to limit the effect of stale criminal records, by recommending the linking of lapsing policies to offense seriousness: a five-year decay period for lower-level offenses (OGS 1-5), a ten-year gap period for mid-level offenses (OGS 6-8), and a reduction in the weight of the previous convictions following a 15-year period for high-level offenses (OGS 9-14).
 - The Sentencing Policy Subcommittee focused on efforts to align changes to the sentencing guidelines with a second round of the Justice Reinvestment Initiative (JRI-II). This is discussed in the next section.
- *Justice Reinvestment II (2016-2019)* – A statewide JRI-II working group, with members appointed by the Governor, the Chief Justice, and the leaders of the General Assembly, was assembled in 2016, with the purpose of recommending reforms to improve the operations at the 'front-end' of Pennsylvania's criminal justice system. The working group presented consensus recommendations in December of 2018, and related legislation was enacted in November of 2019. Commission-related recommendations and mandates are listed below:
 - Working Group Recommendations (2016-2018) – One of the goals of JRI-II was to revise policies to guide sentencing decisions to reduce recidivism. Specifically, the working group recommended that the Commission: revise the prior record scoring to reflect risk to offend; adjust some minimum ranges incrementally, to support further reinvestments in recidivism reducing interventions; guide the use of restrictive conditions of probation, terms of probation, use of split sentences, and maximum sentences; create interactive guideline information to support decisions with risk, recidivism, and cost information; and continue to analyze the cost and impact of restoring mandatory minimum sentences.
 - Legislation (Acts 114 and 115 of 2019) – JRI-II legislation expanded the scope of the Commission's research and evaluation of the outcomes of various interventions and programs, and provided: modification of factors to be considered in adopting the guidelines; adjustments to criminal history to better address risk to reoffend and substantial risk to public safety; and greater targeting of the use of specific sentencing options, including new guidelines to address the intensity and duration of probation, including the use of CIP programs as restrictive



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conditions of probation. The legislation linked funding of CIP programs to the full reporting of information to the Commission, and required the Commission to certify compliance by each county with the guidelines for imposing restrictive conditions; directed the Commission to provide interactive information to support decisions with risk and recidivism information; and provided that the sentence risk assessment instrument could be used to help determine the intensity of intervention, use of restrictive conditions, and duration of supervision.

- *Sentence Risk Assessment Instrument (2010-2020)* – While a separate mandate from the General Assembly, the Commission’s work in developing and implementing a sentence risk assessment instrument complemented the JRI-II goals and recommendations, focusing the use of an automated risk assessment to identify cases for which additional information would benefit the court in determining the appropriate intervention, and the intensity and duration of community supervision. Given the relatively low volume of PSI reports statewide (25-30%), and the inconsistent quality of the reports, the Commission has advocated the preparation of pre-sentence reports that include information on risk, needs, and responsivity, especially for high and low risk cases.
- *Sentencing Guidelines (7th Edition, Amendment 6) (adopted 2020)* – In order to respond in a timely manner to the JRI-II mandates included in Act 115 of 2019, the Commission adopted Amendment 6 of the 7th Edition Sentencing Guidelines (2021), which applies to all offenses committed on or after January 1, 2021. Amendment 6 contains the following JRI-II-related changes: recommendations related to the duration of probation, with limits suggested for offense-specific and aggregate sentences; recommendations related to the intensity of probation, with limits suggested for the use of CIP programs as restrictive conditions; expansion of the policy statements related to the advisory nature of the guidelines and the consideration of various purposes; articulation concerning the use of risk, needs, and responsivity (RNR) to guide decisions related to the intensity of intervention, the use of restrictive conditions, and the duration of community supervision; and of the appropriateness to use validated RNR assessments and diagnostic evaluations to support aggravated and mitigated sentences.
- *Academic Review Panel (2020-2021)* – As the last phase of the comprehensive review, the Commission Chair, Rep. Todd Stephens, appointed members to an Academic Review Panel, with the purpose of reviewing the recommendations proposed to date for a fundamental rebuilding of the sentencing guidelines, and consideration of further changes that address racial disparity and incorporate evidence-based practices. A summary of the activities and recommendation of the Academic Review Panel follow.



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Academic Review Panel

The Commission convened an Academic Review Panel (see Attachment 1), chaired by Commission Member Judge Leon Tucker, comprising legal and social science faculty and practitioners who are subject matter experts in the areas of sentencing and corrections, guidelines, juvenile and criminal justice policy, social justice, and race and ethnicity. Commission staff facilitated 11 meetings between November 2020 and May 2021 (see Attachment 2) for the purpose of discussing the systemic changes needed to address racial disparity and to incorporate evidence-based practices, and of reviewing proposed structural changes to the sentencing guidelines that prioritize simplification, automation, and a reduction of the impact of criminal history. The goal of this effort was to form recommendations that are “necessary and advisable to carry out an effective, humane and rational statewide sentencing, resentencing and parole policy.”³

As noted in the text of the sentencing guidelines, and as required by statute, the Commission’s recommendations are intended to serve as:

“... a benchmark for the judges of Pennsylvania, a common starting point with a range of recommendations for the typical offender. The guidelines provide sanctions proportionate to the severity of the crime and the severity of the offender’s prior conviction record. This establishes a system with a primary focus on retribution, but one in which the recommendations allow for fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation.”⁴

While Pennsylvania’s advisory guidelines provide a formal structure to promote uniformity and proportionality in sentencing, Pennsylvania’s appellate courts have long required that sentences be individualized. The sentencing court must consider factors other than those addressed in the guidelines, including the circumstances of the offense, the character of the defendant, and the impact of the crime on any victim. Many members of the Academic Review Panel noted that consideration of purposes other than retribution, and in particular rehabilitation and restoration, should be given greater prominence. Additionally, they noted that improving the information available to the court prior to sentencing, and increasing resources to support community-based programs as alternatives to incarceration, will promote fairness and equity through appropriate and individualized sentences.

To this end, the panel recommended that assessment reports prepared by the Sexual Offender Assessment Board (SOAB) be provided to the court; by statute, the SOAB is only required to submit the report to the district attorney. The panel also expressed concern about the use of juvenile adjudications at sentencing, the need for a more sensitive reading of juvenile records, and the value of the research on brain development when imposing sentences involving those less than 25 years of age. In terms of community-based programming, the panel discussed cultural components of recidivism, including the African-American experience linked to slavery and lost progress, and the importance of retaining culture and providing hope as components of alternative programs.

Turning to the review of the sentencing guidelines, the work of the Academic Review Panel is reflected in a draft version of a new sentencing guidelines matrix (see Attachment 3). The narrative that follows

³ 42 Pa.C.S. §2153(a)(12) (relating to the powers and duties of the commission).

⁴ 204 Pa. Code §303.11(a)



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describes the draft sentencing matrix and the principles and rationales that underlie the proposed revisions to the prior record score (PRS) and the offense gravity score (OGS). Because disproportionality and duration of sentence increase with prior record, the proposed PRS revisions seek to mitigate these impacts by reducing the weight of prior convictions and adjudications, reducing the number of PRS categories, and reducing the sentence recommendations linked to the PRS. Commission staff is analyzing the impact of these proposed changes.

Prior Record Score

The Academic Review Panel (ARP) spent much of their time focused on the prior record score. Commission staff provided detailed overviews of how prior score is currently configured and the resultant implications associated with the current scoring rubric, including examining potential racial and gender disparities. Based on extensive feedback a new prior score was proposed (see Exhibit 1).

Exhibit 1: ARP Proposed Prior Record Score

Low (base)	Medium (base * 1.5)	High (base * 2)	REVOC (range up to stat max)
<i>a</i> No Priors Most serious prior is M3/M2	<i>a</i> Single incident and single victim F2/F1	Multiple incidents or multiple victims F2/F1	2 or more prior conviction offenses for <i>crimes of violence</i> during separate incidents and current offense is <i>crime of violence</i>
<i>b</i> (allows for multiple incidents or multiple victims)	<i>b</i> Multiple incidents or multiple victims M1/F3		
<i>c</i> Single incident and single victim M1/F3			

The ARP proposed prior record score...

- reduces the number of prior record score categories from eight to four (low; medium; high; REVOC);
- retains REVOC as a category, or in the alternative incorporate REVOC as an adjustment to the OGS assignment as proposed for prior convictions that are elements of a crime;
- moves from a point-based system to a set of prior record score categories that are based upon the highest statutory grade of all prior convictions and the number of such prior convictions;
- reviews all prior convictions, and determines the number of prior convictions in each statutory grade category (i.e., M3/M2, M1/F3, F2/F1); then, based on the prior convictions in the highest statutory grade category, determines if it is considered a ‘single incident’ or ‘multiple incidents or multiple victims’:
 - a single incident is viewed as one or more offenses occurring in a single location during an uninterrupted period of time, and limited to a single victim; if all prior convictions in the highest statutory grade category occurred in a single location during an uninterrupted period of time and there was no more than one victim, the prior convictions are considered a single incident;
 - if there are two or more prior convictions in the highest statutory grade category, an they occurred on different dates or involved more than one victim, multiple incidents or multiple victims applies.



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- expands the Low category to include offenders with no prior record, offenders with no convictions but admitted to ARD or court diversion, offenders whose most serious prior conviction is a Misdemeanor 3 or Misdemeanor 2, or offenders whose most serious prior conviction or adjudication is a Misdemeanor 1 or Felony 3 with a single incident and a single victim.
- retains the policy of considering convictions or adjudications prior to the commission of the current offense, and of excluding M3/M2 juvenile adjudications;
- expands the criteria for the lapsing of juvenile adjudications to include:
 - prior Misdemeanor 1 and Felony 3 adjudications lapse at age 21
 - prior Felony 2 and Felony 1 adjudications lapse at age 25, except for crimes of violence
 - prior crimes of violence adjudications lapse if the offender has remained crime free between the ages of 18 and 28; and
- includes lapsing provisions for adult offenders
 - prior Misdemeanor 3, Misdemeanor 2, Misdemeanor 1, and Felony 3 convictions lapse if the offender is crime free for 10 years; Clean Slate can be accepted as proof for certain offenses;
 - prior Felony 2 and Felony 1 convictions lapse if the offender is crime free for 15 years.

The proposed changes to the prior record score *simplifies* and allows for easier *automation* of prior record score. Currently, calculating the prior record score is overly complicated and often leads to combinations of prior record points that similarly situate offenders with very different prior criminal histories. Simplification and automation of the prior record score improves efficiency and accuracy, especially given the variance in law enforcement and prosecution practices across the Commonwealth and the substantial number of out-of-state records being considered. A simplified and automated PRS provides greater consistency in the use of all criminal history records and in the weight given to prior convictions and adjudication in the sentence recommendation.

For example, an offender convicted of seven prior misdemeanors and an offender convicted of a prior aggravated assault attempting serious bodily injury would both receive 3-points. Likewise, an offender with four, 1-point theft prior convictions and offender with one prior aggravated assault causing seriously bodily injury would both receive 4-points. Further, by basing the prior record score on the statutory grade of the most serious prior, the proposed ARP prior record score allows for the classification of out-of-state convictions and adjudications to be made based upon the statutory maximum sentences for each of the prior record categories (e.g., M3/M2 \leq 2 years; M1/F3 $>$ 2 years and $<$ 10 years; F2/F1 \geq 10 years). The proposed ARP prior record score will be easier to calculate by practitioners in the field, will help mitigate existing ambiguity about what the current prior record scores represents, and can be efficiently incorporated into the NexGen SGS Web application.

The ARP proposed guidelines also *reduce the impact of prior criminal history*. Under the current guidelines the ratio of recommended incarceration months, based upon the lower limit of the standard range, can be as much as nine times when comparing an offender with a PRS score of 0 (OGS 6 = 3 months) and an offender with a PRS score of RFEL (27 months). Under the proposed system the offense gravity score is the primary driver of the sentencing recommendation, and not prior record score. In the proposed model, the recommended sentence for the Medium category is 1.5 times and the High category is 2 times the duration of the recommended sentence of the base sentence (the Low category). And, while REVOC is retained to address certain repeat violent offenders, the proposal introduces a



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range of sentences up to the statutory limit, as opposed to the statutory limit as the sole recommendation. This restructuring of the prior record score reduces sentence recommendations consistent with a guiding principle first adopted in 1982 and reaffirmed in all subsequent sentencing guidelines: the offense gravity score measures the seriousness of the current conviction and is the primary determinant of the suggested guideline sentence ranges. And the proposal seeks to reduce disproportionality associated with race and ethnicity by reducing the impact of criminal history.

Reduction in impact also applies to previous juvenile adjudications. The ARP discussed the differences in due process and purposes between the juvenile system (adjudications) and the adult system (convictions). The group noted advancements in brain science and recent appellate decisions that suggest juveniles are less culpable for their behavior. While juvenile adjudications only contribute to the prior record score in roughly 6 percent of reported sentences, their impact on the recommended sentence (e.g., Restorative Sanctions, County Incarceration, State Incarceration) and/or the recommended incarceration minimums based on the lower limit of the standard range, can be substantial. Building upon the work of the Robina Institute who advocate for a balanced approach that includes “prior juvenile adjudications in their enhancement score, but limit their application” (p. 48)⁵ the ARP tested the impact of reducing the weight of juvenile adjudications in the PRS. Some suggested not including juvenile adjudications, a recommendation considered but rejected when developing the initial sentencing guidelines, and now required by statute for consideration. Others thought that juvenile adjudications should be capped or weighted to reflect a distinction when compared to adult convictions. The final proposal includes a combination of age-based decay and gap policies that substantially reduce the impact of juvenile adjudications.

Finally, in the current Guidelines prior adult convictions are always included in the calculation of the prior record score. The ARP reviewed extant research on the age crime curve, including research by Professor Alfred Blumstein and colleagues on redemption and aging out of criminality, and considered arguments against including ‘stale’ criminal records in the prior record score calculation. These findings of reduced risk of re-offense add support to the recommendations of the Drexel Law project and for the ARP prior record score proposal to include gap policies (crime free periods) for the lapsing of prior adult convictions.

Offense Gravity Score (OGS)

Commission staff presented a revised offense gravity score system that built upon the work of the Strategic Planning Workgroup and the Policy Subcommittees. Recognizing that the sentencing guidelines are advisory and serve to provide a common starting point for the typical sentence, the proposal expands the number of OGS categories which allows for both narrower standard ranges within cells and a granular OGS assignment process that more accurately reflects similarities and differences in the elements of conviction offenses. Commission staff presented an overview of the methodology that will be used to assign an OGS to specific offenses.

⁵ Richard S. Frase, Julian R. Roberts, Rhys Hester, and Kelly Lyn Mitchell (2015). *Criminal History Enhancements Sourcebook*. Robina Institute of Criminal Law and Criminal Justice.



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The ARP proposed offense gravity score...

- increases the number of OGS categories from 14 to 40;
- increases the number of OGS categories within each of the sentencing levels, allowing for fewer overlaps in sentencing recommendations;
- allows for the tightening of the standard range, while still allowing for individualized sentencing and judicial discretion;
- provides specific sentencing recommendations for restorative sanctions (e.g., probation, community service, fines);
- includes six OGS categories for juvenile and adult Murder 1 and Murder 2 on the proposed sentencing matrix; and
- defines 'typical sentence' as the median sentence imposed for an offense based on the elements and sentencing factors identified by the Commission;
- increases the OGS assignment, rather than adding to the PRS, previous convictions that raise the classification of the offense; as noted in the PRS proposals, adjusted OGS assignments could be considered as an alternative to retaining the REVOC PRS category;
- allows for a consistent OGS step-up or step-down approach for mitigated, aggravated, sentence enhancements, and other adjustments.

ARP Proposed Matrix (see Appendix 3)

The intersection of PRS and OGS leads to a sentencing recommendation, which specifies the standard range of sentences. As one moves up the OGS scale or moves across the PRS scale the recommended length of probation or the recommended minimum of confinement, increase modestly. For example, each increase in OGS, or increase in PRS, for a Level E recommendation (state incarceration) is met with a 6-month increase to the lower limit of the standard range, as compared to 12-months under the current guidelines. The proposed matrix also provides explicit guidance on the use of restorative sanctions (e.g., guilt without further penalty, community service, and economic sanctions), the duration of restrictive conditions of probation in lieu of county incarceration, and recommended probation and restrictive conditions of probation durations. By incorporating juvenile and adult murder into the proposed sentencing matrix and incorporating a step-up or step-down approach, the need for multiple supplemental matrices (e.g., Deadly Weapon Enhancement; School and Youth Enhancement) is eliminated. Finally, the proposed matrix increases the number of cells that have sentencing recommendations other than incarceration. In the 7th Edition, 6th Amendment Basic Sentencing Matrix only 2-cells include sentencing recommendations other than incarceration and the proposed matrix has 23.



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Attachment 1: Academic Review Panel Members

Chair:

Hon. Leon W. Tucker, Supervising Judge, Criminal Court Trial Division, Philadelphia Court of Common Pleas and Commission Member

Members:

Emmanuel Babatunde, D.Phil., Ph.D., Professor & Chair, Department of Sociology and Criminal Justice, Lincoln University

Steven L. Chanenson, J.D., Professor of Law, Villanova University Charles Widger School of Law

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Attachment 2: Academic Review Panel Meetings (held via Zoom)

[1] November 5, 2020. Overview of sentencing guidelines.

The Executive Director reviewed the need for development of 8th Edition Sentencing Guidelines. Given the wide-ranging areas of specialization of Academic Review Panel members, a foundation in sentencing operations, policies, and practices was laid. The session included a basic overview of sentencing in Pennsylvania and Sentencing Guidelines fundamentals.

[2] November 19, 2020. Policy considerations.

Staff reviewed recommendations of the Justice Reinvestment Initiative II and how they may be incorporated into the new guidelines. Staff discussed alternatives in OGS, sentencing structures, and concurrent/consecutive sentencing practices. Staff shared the initial analysis of PRS, including the weight of prior criminal history on current sentences and racial disparities. The members discussed the purpose of including some or any prior record as well as other options.

[3] December 3, 2020. Re-envisioning the Guidelines.

PCS staff continued the discussion of the prior meeting. Expansion of the number of OGS lends to using a consistent method of an increase or decrease in OGS steps for aggravation, mitigation, enhancements, and adjustments. Staff also presented on alternatives to calculating a PRS. Categories may be consolidated into none, some, or many prior convictions. Less serious offenses would carry much less weight. Prior record scoring may exclude stale records or reduce the weight of the score, depending upon the time between current and prior offenses and the type of prior offense.

[4] December 17, 2020. Model Penal Code.

PCS staff presented on key concepts found in the [Model Penal Code](#) (e.g., simplicity, proportionality, typical case, no double counting) and discussed how they can be incorporated into the rebuild of the sentencing guidelines. In addition, the group reviewed the purposes of sentencing (incapacitation, retribution, rehabilitation, deterrence, and restoration) and how these principles can be used to reexamine the current guidelines.

[5] February 11, 2021. Prior Record Score reconfiguration: Two alternatives.

This meeting primarily focused on the ways in which the PRS is currently calculated and the impact that PRS has on sentence type and duration. Staff utilized 2018 sentencing data to develop two alternative specifications of the PRS with an eye on racial equity. Both models reduce the number of PRS categories and strive to reduce the impact of PRS. Staff continue to work on refining these models by considering the type of prior offenses, whether the defendant has single or multiple prior convictions, and whether the prior offenses were misdemeanors or felonies.

[6] February 23, 2021. Revisiting the SPWG Report.

PCS staff recapped the history of the original development of sentencing guidelines and a comprehensive review which began in the late 1980's and culminated in two revisions to the Guidelines (1994 and 1997). The recommendations of the Strategic Planning Work Group, convened in 2014 as a first step for this comprehensive review, were discussed to help frame the guiding principles for the rebuild of the sentencing guidelines. They include reducing complexity, lessening the impact of a prior criminal record, increasing transparency through inclusion of adjustments, increasing the number of OGS to tighten ranges and integrate an OGS step approach to enhancements.



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[7] March 11, 2021. Translating concepts into offense gravity score assignments.

Given the great number of offenses, a standard method of OGS assignment is needed as the Commission moves forward with 8th Edition Guidelines. Based on current sentencing practices reflected in the data, various methods were discussed. Examples of two offenses were provided, showing where they may fall on the proposed matrix based on current sentencing practices. The base offense definition and factors that may increase or decrease grading were discussed. The current Guidelines recommendations are very broad, often allowing for multiple sentencing alternatives. With an expansion of OGS and cells that focus on sentencing alternatives, nuances and factors within an offense can be assigned different OGS. The Commission may take a descriptive approach to OGS assignment based on most prevalent sentencing alternative and median sentence, or it may take a prescriptive approach in which a particular sentencing alternative and length should be the starting point for certain offenses.

[8] March 25, 2021. Revised Matrix and county sentencing options.

The proposed matrix developed by prior working groups addressed PRS 0. The matrix was revised to include restrictive conditions of probation. The categories were condensed to 'none,' 'some,' and 'many.' The weight of the prior record was reduced. The recommended sentence minimum in the 'many' category is not more than twice that of the 'none' category. Recommended ranges were drafted for the probation, restrictive probation, and county incarceration. Overall, the group discussed the consistent means of increase in ranges as OGS and PRS increase. The continuum of sentencing alternatives is reflected in the matrix rather than recommendations that include the spectrum of alternatives in one cell.

[9] April 8, 2021. Sex offenders (assessments and SVP); violent offenses/offenders.

The Executive Director and Clinical Director of the Sexual Offenders Assessment Board discussed the purpose, process, and content of assessments under their jurisdiction. They are used to 1) determine if an offender meets the mental abnormality or disorder criteria of a sexually violent predator, 2) make recommendations in terms of risk to public safety considerations in parole decisions for state prisoners convicted of sex offenses, and 3) assess juvenile offenders in residential facilities who are aging out of the system and may be civilly committed. The group discussed what information may be shared with whom, when, and how. Much time and resources are invested in the process of these assessments. The Commission may wish to promote standard practices of who has access and when so that the information is available consistently and not used differentially or prejudicially between jurisdictions or courts. Staff gave an initial presentation of the proposed sentencing matrix with the additional recommendations for prior record scores beyond 0, including repeat violent offenders. The differences between prescriptive or policy recommendations and descriptive ranges based on sentencing data were discussed. These are attributed to negotiated pleas, fragile or vulnerable victims, etc.

[10] April 22, 2021. Assessing the Impact of the Juvenile Adjudications on Adult Prior Record Scores.

While statute requires criminal history as a retributive factor in the guidelines, including juvenile adjudications, it was amended to allow the Commission to exclude or reduce the valuation of certain offenses. Therefore, as part of refocusing the greater weight of sentence recommendations on the current offense rather than any prior criminal record, the Commission is exploring the impact of juvenile adjudications on the prior record score calculation. While there are many methods that may be used, three models were presented by staff: only counting 4-point offenses, lapsing all offenses at age 25 with exception of 4-point offenses, and reducing the PRS by 50%. Attendees were joined by Rick Steele,



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Executive Director of the Juvenile Court Judges Commission and Diana Woodside, Director of Policy and Legislative Affairs for the DOC.

[11] May 6, 2021. Building Blocks of the Guidelines: OGS and PRS

This meeting reviewed the building blocks of the Sentencing Guidelines and considered a configured framework. The Panel discussed moving from a point-based prior record score to a categorical one: low, medium, high, and REVOC. The method of determination of category is determined by the prior offense grade or statutory maximum, multiple incidents, or multiple victims. Options for lapsing provisions for both juvenile adjudications and adult convictions were considered. The group discussed whether using a definition of crimes of violence or direct file offenses is more appropriate for juvenile adjudications. As prior drug offense convictions have a higher statutory maximum, incentives to reduce the PRS category were explored. The consequences for prior record scoring of sentences imposed consecutively versus concurrently for offenses in the same incident were illustrated. Last, the methods to assign an OGS using the expanded number of OGS's were discussed. A descriptive approach is based on actual data, using the median sentence for PRS of 0. In a prescriptive approach, the Commission promotes certain practices or policies which may result in a lower or greater recommendation than the data reflect.



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Attachment 3: Proposed 8th Edition Sentencing Guidelines Matrix

		Prior Record Score				Agg/Mit	
		Low	Medium	High	REVOC		
F	Murder 1 (≥18 years)	40	LWOP or Death	LWOP or Death	LWOP or Death	LWOP or Death	N/A
	Murder 2 (≥18 years)	39	LWOP	LWOP	LWOP	LWOP	
	Murder 1 (15<18 years)	38	420-540	480-600	540-660	LWOP	
	Murder 2 (15<18 years)	37	360-480	420-540	480-600	540-660	
	Murder 1 (10<15 years)	36	300-420	360-480	420-540	LWOP	
	Murder 2 (10<15 years)	35	240-360	300-420	360-480	420-540	
E	State Incarceration	34	108-120	114-126	120-132	150-240	+/- 1 step Levels D and E
		33	102-114	108-120	114-126	150-240	
		32	96-108	102-114	108-120	150-240	
		31	90-102	96-108	102-114	120-240	
		30	84-96	90-102	96-108	120-240	
		29	78-90	84-96	90-102	120-240	
		28	72-84	78-90	84-96	120-180	
		27	66-78	72-84	78-90	120-180	
		26	60-72	66-78	72-84	90-180	
		25 (F-1+)	54-66	60-72	66-78	90-180	
		24	48-60	54-66	60-72	90-120	
		23	42-54	48-60	54-66	90-120	
		22	36-48	42-54	48-60	90-120	
21	30-36	36-48	42-54	60-120			
D	State Incarceration (County Incarceration Exception)	20 (F-1)	24-30	30-36	36-48	60-120	
		19	18-24	24-30	30-36	60-120	
		18	12-18	18-24	24-30	60-120	
C	County Incarceration	17 (F2)	9-<12 months RC	12-18	18-24	NA	+/- 2 steps Levels B and C
		16	8-10 months RC	9-<12 months RC	12-18	NA	
		15	7-9 months RC	8-10 months RC	9-<12 months RC	NA	
		14	6-8 months RC	7-9 months RC	8-10 months RC	NA	
		13	5-7 months RC	6-8 months RC	7-9 months RC	NA	
		12	4-6 months RC	5-7 months RC	6-8 months RC	NA	
		11 (F3)	3-5 months RC	4-6 months RC	5-7 months RC	NA	
		10	2-4 months RC	3-5 months RC	4-6 months RC	NA	
		9	1-3 months RC	2-4 months RC	3-5 months RC	NA	
B	Probation	8 (M-1)	36 months Probation	36 months Probation; 3 mos. RC	2-4 months RC	NA	
		7	30 months Probation	30 months Probation; 3 mos. RC	36 months Probation; 3 mos. RC	NA	
		6	24 months Probation	24 months Probation; 3 mos. RC	30 months Probation; 3 mos. RC	NA	
		5	18 months Probation	24 months Probation	24 months Probation; 3 mos. RC	NA	
		4	12 months Probation	18 months Probation	24 months Probation	NA	
		3 (M-2)	6 months Probation	12 months Probation	18 months Probation	NA	
A	Restorative Sanctions	2 (M-3)	RS CS/ES	RS - 6 mos. Probation	12 months Probation	NA	
		1	RS GWFP	RS CS/ES	RS - 6 mos. Probation	NA	



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Next Steps – Action on Recommendations and Outstanding Issues

Offense Gravity Score (OGS) Assignments

As noted previously, Commission staff will determine the median sentence for each offense (PRS=0), which will be used to make initial OGS assignments. In addition to this use of current sentences to make OGS assignments, staff will also prepare information on the mid-point values of current sentence recommendations, of median sentences imposed in rural counties, and of median sentence imposed in urban counties. Similar information will be prepared on median sentences associated with inchoate offenses (i.e., attempt, solicitation, conspiracy), enhancements, and mandatorics in order to determine adjustments to OGS assignments when these factors are present. During an initial review of 2019 sentencing data, the ARP found substantial variation in sentences imposed for Murder 3. In order to provide more thoughtful consideration of sentence recommendations for this offense, Commission staff will obtain and analyze additional information. At the conclusion of this initial OGS assignment process, Commission members will have an opportunity to review all assignments to determine whether changes are warranted.

Prior Record Score (PRS) Policies

The recommendations contained in the Academic Review Panel summary represent substantial changes to the current PRS policies, but also add great detail to the proposals developed since 2014. Much of this was driven by the Commission's guiding principles in creating guidelines: that the Offense Gravity Score is the primary determinant of the suggested guideline sentence range, and that Prior Record Score is not a separate punishment, but rather a reflection of the seriousness of previous offenses. Whether justified on grounds of retribution or risk, PRS should be a secondary consideration at sentencing. The proposal for three PRS categories (low, medium, high) reflect the goals of simplifying and reducing the impact of PRS, and of mitigating the racial impact of previous convictions. But an issue not addressed is whether the PRS is considered for every offense, or is only considered for the most serious offense of the incident or proceeding. From 1982 until 1997, the PRS was only applied to the most serious offense of a transaction, with all other offenses assigned PRS 0. The move to offense-specific recommendations in the 5th Edition Sentencing Guidelines (1997) increased sentence recommendations for many lesser offenses of an incident, which increased aggregate sentences when imposed consecutively. A policy that would apply the PRS to only the most serious offense of a criminal incident would further reduce the impact of previous convictions.

Sentence Recommendations

The ARP summary includes a revised Matrix that incorporates provisions of the current sentencing guidelines (7th Edition, Amendment 6), including guidelines for fines and the use of community service, and guidelines for the duration and intensity of probation. The Matrix also incorporates JRI-II suggestions, such as more targeted recommendations for the disposition and duration of sentences, revising the prior record score to reflect risk to reoffend, and adjusting minimum sentence ranges incrementally. One area not addressed is any guidance regarding the use of concurrent or consecutive



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sentences. Until 1997, the Rules of Criminal Procedure (former Rule 1406, current Rule 705) included a presumption that sentences were served concurrently unless otherwise stated by the court. The elimination of this Rule in 1997 coincided with the adoption by the Commission on offense-based sentencing guidelines, and the consideration of the PRS in every sentence recommendation. While the Commission has never reached consensus concerning guidelines to address concurrent/consecutive sentencing, there may be general agreement regarding circumstances where concurrent sentences are appropriate. Similar to several PRS proposals, and consistent with policies in place in other jurisdictions, consideration could be given to recommending concurrent sentences for offenses within a single criminal incident involving no more than one victim. This would bring some consistency to the application to the guidelines, and would address the differences in charging and prosecution practices across the Commonwealth.