



CRIMINAL PUNISHMENT CODE TASK FORCE Scoresheets Subcommittee Minutes

April 29, 2020 at 2PM

Conference Call

I. Members Present:

The Honorable Donna McIntosh (Chair)

Mr. Kenneth Steely

Professor Michael Morley

Senator Jason Pizzo

The Honorable Larry Eger

Ms. Kathryn Horst

II. Scoresheets Subcommittee

The subcommittee continued its efforts to walk through the offense severity ranking sheet, highlighting and recategorizing specific offenses.

Senator Pizzo pointed out that there will be offenses that fall well in excess of the 16 offense severity levels. Within Part 9 of the scoresheet, Senator Pizzo suggested that grand theft, domestic violence, criminal gang can be removed from the scoresheet. He suggests that where an underlying offense is subject to a multiplier, that statute should be amended to include a subsection to account for the same adjustments in point level. With regard to part 9 of the scoresheet, Judge McIntosh inquired how a criminal gang offense multiplier could be used given that if you are enhancing a sentence, absent a mitigating factor, there must be a finding by a jury to enhance the sentence. How could the judge apply criminal gang offense without a trial. Judge Sisco asked that staff provide research. Mr. Eger suggested that this was not consistently used.

Jennifer Mooney, Task Force Staff researched the above instance would be affected by Apprendi v. New Jersey, provided that so long as the penalty does not exceed the statutory maximum it is not affected by Apprendi. Ms. Mooney noted that it is possible to have a multiplier that is used without taking an offense beyond statutory max and therefore not requiring a jury.

Additionally, the subcommittee walked through previously proposed resolutions 1-4 to update verbiage in light of the new offense severity ranking sheets.

The subcommittee chose not advance proposed resolution #8, which addresses out of state convictions.

Scoresheets (SS)-1: Resolved that an Enhancement in Part IX should not be used if the enhancement is identical to an element of the Primary Offense of conviction. Instead, the Offense Level for each offense that involves an element identical to any Enhancement should be increased to reflect the failure to apply the multiplier, so this change does not reduce the total number of points a defendant would receive.

SS-2: Resolved that, in Part V of the Scoresheet concerning Legal Status Violations, the Escape and Failure to Appear enhancements should be eliminated. The Offense Level for each offense that involves Escape or Failure to Appear as an element should be addressed to reflect the failure to add these points. This change does not reduce the total number of points a defendant who commits these offenses would receive.

SS-3: Resolved that Victim Injury Point Adjustments in Part III should not be applied to any offense for which the basis for the adjustment is identical to an element. Instead, the Offense Level for each offense that involves an element identical to any Victim Injury Point Adjustment should be adjusted to reflect the failure to apply the adjustment. This change does not reduce the total number of points a defendant would receive. Pursuant this recommendation, the Victim Injury Enhancements for Second-Degree Murder, Death, Severe Injury, Sexual Penetration, and Sexual Contact would be deleted. The Victim Injury Enhancements for Moderate Injury and Slight Injury would be retained.

SS-4: This resolution was deleted by the subcommittee.

The subcommittee revised Proposed Resolution #9 to read as follows:

Proposed Resolution #9 – Move Prior Serious Felony points to Prior Records Points

Resolved that additional points should not be added for a Serious Felony in Part VIII. Instead, the Prior Record points in Part IV for offenses that qualify as serious felonies for Prior Release Reoffenders (“PRR”) should be increased to reflect the failure to apply this adjustment.

Under the current offense level system, these adjustments should be made as follows:

Offense Level	Current Prior Record Points in Part IV	Revised Prior Record Points in Part IV for Prior Release Reoffenders to Offset Eliminating Part VIII
8	19	37 (<i>i.e.</i> , add 18 points to current adjustment)
9	23	47 (<i>i.e.</i> , add 24 points to current adjustment)
10	29	59 (<i>i.e.</i> , add 30 points to current adjustment)

- The amount of the enhancement for Serious Felonies would generally be less under this proposal, but a defendant would be receiving it for **each prior serious felony**, potentially receiving a greater total number of points as a result.

- Part IV of the Scoresheet should be adjusted as follows:

(Level =Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)

(For Prior Release Reoffenders, Level = Points: 8=37, 9=47, 10=59)

Finally, the subcommittee voted on outstanding caselaw considerations:

RESOLUTION #13 (caselaw issue #2) – Downward departures based on minor victim’s consent to criminal offense

Those in favor of no action noted that the case was clear and to leave discretion in the hand of the presiding judge. Professor Morley urged the subcommittee not to rely on victim consent. The motion to take no action passed 3-2, with Professor Morley and Mr. Steely* voting against.

*A vote was originally taken on March 27, with Senator Pizzo needed as a tiebreaker.

RESOLUTION #14 (caselaw issue #3) – Restitution as a basis for downward departure

The subcommittee noted that this is inequitable as the wealth of the defendant is an impermissible factor to consider. Senator Pizzo and Mr. Eger provided that the defendant should be given every opportunity to make the victim whole but noted significant changes would need to be made to this statute to address its disparities. The motion to take no action passed, 3-1, with Professor Morley voting against and Ms. Horst abstaining.

RESOLUTION #15 (caselaw issue #4) – Applying the unsophisticated offense departure for accidental crimes

The subcommittee discussed what makes a crime unsophisticated. Mr. Eger distinguished between a juvenile DUI and an adult DUI, for example, noting the diminished capacity of a juvenile. The motion to take no action passed, 3-2, with Professor Morley and Mr. Steely* voting against and instead in favor of 15c which would prohibit the use of the “unsophisticated offense” mitigator for all crimes that lack a specific intent mens rea element.

*A vote was originally taken on March 27, with Senator Pizzo needed as a tiebreaker.

III. Public Comment

The Honorable Michelle Sisco, Chair of the Task Force, attended the meeting, offering feedback on the utilization of the gang enhancement multiplier.

IV. Adjourn

4:33 PM