

Criminal History

Honorable Gerald Bruce Lee

Elisabeth F. Irvin

Marjorie Myers

Amy Pope

Moderator: Alan Dorhoffer

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10:00 a.m. – 11:30 a.m. and 1:00 p.m. – 2:30 p.m.

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Criminal History

- Overview of Chapter Four (Criminal History)
- Recidivist enhancements
 - §4B1.1 (Career Offender)
 - Armed Career Criminal Act (ACCA)

Numerous “Rules” in Chapter Four

- Typically clear regarding previous federal record
- Issues more likely to arise regarding previous state/local record
 - Look to case law
 - Established methods used in your office for recurring issues

Criminal History

- ✓ “Prior Sentences”
(1, 2, or 3 points each)
- ✓ “Status”
(2 points)
- ✓ “Recency”
(2 or 1 point)

Criminal History Points

Prior Offense Committed at 18 or Older

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Criminal History Points

Prior Offense Committed Before 18

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	Only if convicted as an adult and >13 months	Within 15 yrs. of prior sentence imposition or release
2	≥ 60 days	Within 5 yrs. of prior sentence imposition or release
1 (max of 4)	All others**	Within 5 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Length of Prior Sentences

§4A1.2(a) and App. Note 2

- Set by maximum sentence imposed
 - If sentence or any portion is suspended, the maximum is established by the unsuspended portion
- Unaffected by release
 - *E.g.*, release to parole or for “good time”

Some Considerations in Establishing a “Prior Sentence”

1. Is it part of relevant conduct?
2. Is it within the time frame?
3. Treatment of multiple prior sentences
4. Excluded offenses
5. Various other considerations

Is the Previous Sentence Part of Relevant Conduct?

“Prior Sentence”

§4A1.2(a)(1) & App. Note 1

Conduct that is part of the relevant conduct of the instant offense will **not** be a “prior sentence” for criminal history

“Prior Sentence” (cont.)

§4A1.2(a)(1) & App. Note 1

Note: Some Chapter Two guidelines that consider a defendant’s prior convictions and certain other conduct direct that those considerations also be used in Criminal History, *e.g.*,

§2K2.1 (Felon in Possession), App. Note 12;

§2L1.2 (Illegal Reentry), App. Note 6

Is the Previous Sentence Within the Time Frame?

Criminal History Points

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Criminal History Time Frames and Relevant Conduct

15 years

10 years

5 years

Time Since Earliest
Date of Relevant
Conduct



Earliest Date of
Relevant Conduct

Offense of
Conviction

Date
of
Plea /Verdict

Date of
Sentencing

Relevant Conduct and “Status” and “Recency”

§§4A1.1(d) & (e), App. Notes 4 & 5

- “Status” if under criminal justice sentence during any relevant conduct
- “Recency” if any relevant conduct less than two years from release from imprisonment

Note: “status” and “recency” can only count if the sentence from which they resulted has been counted¹⁶

Treatment of Multiple Prior Sentences

§4A1.2(a)(2)

Multiple Prior Sentences

§4A1.2(a)(2)

- Requires a determination of whether multiple prior sentences are counted “separately” or as a “single sentence”
- Note: A 2007 guideline amendment eliminated the previously used term “related cases” and its accompanying rules

Threshold Determination: Intervening Arrest

§4A1.2(a)(2)

Multiple prior sentences for offenses
separated by an intervening arrest
are counted separately

Examples: Separated by Intervening Arrest

offense
arrested
offense
arrested

**Intervening
Arrest**

offense
offense
offense
arrested

**Not an
Intervening
Arrest**

offense
offense
offense
arrested
arrested
arrested

**Not an
Intervening
Arrest** 20

Single Sentence Criteria

§4A1.2(a)(2)

Multiple prior sentences will be treated as a “single sentence” *if*

1. Prior sentences are for offenses **NOT** separated by an intervening arrest

AND

2. The offenses *either*

- Were named in the same charging document, *or*
- Resulted in sentences imposed on the same day

Impact of a “Single Sentence”

§4A1.2(a)(2)

Rather than add points for each prior sentence:

- If concurrent sentences
 - Use the longest sentence
- If consecutive sentences
 - Use the aggregate length of the sentences

Example:
Point Assignments and “Single” Sentences

Length

Point Assignments

“Single Sentence”

Counted Separately

1 mo.
4 mos. **consec.**
9 mos. **consec.** }

14 mos.

3 pts.

1 pt.
2 pts.
2 pts.

5 pts.

Example:
Point Assignments and “Single” Sentences

Length

Point Assignments

“Single
Sentence”

Counted
Separately

1 mo.
4 mos. **concur.**
9 mos. **concur.** }

9 mos.

2 pts.

1 pt.

2 pts.

2 pts.

5 pts.

A “Single Sentence” That Includes Crimes of Violence

§4A1.1(f)

- When multiple prior sentences are treated as a “single sentence,” §4A1.1(f) adds 1 point for each crime of violence that did not result in additional points under §4A1.1(a), (b), or (c)

A “Single Sentence” That Includes Crimes of Violence (cont.)

§4A1.1(f)

- Example:
 - Robbery of bank and assault of the teller
 - Five year sentence for each on same day
 - Single sentence: 3 points (§4A1.1(a))
 - 1 point added for crime of violence that did not receive points (§4A1.1(f))

Significance of Multiple Prior Sentences Being Treated as a Single Sentence

- Typically results in fewer criminal history points
- Possible impact on application of certain other guideline provisions, *e.g.*,
 - counted as only a single prior in the determination of §4B1.1 (Career Offender, §4B1.2(c)) and in base offense levels of §2K2.1 (Firearms Offenses)

Excluded Offenses

§4A1.2(c)(1) & (c)(2)

Excluded Offenses

§4A1.2(c)(1) & (c)(2) & (o)

- §4A1.2(c)(1) - List of misdemeanors and petty offenses that are only counted when:
 - The sentence was probation of more than one year
 - The sentence was imprisonment of at least thirty days
 - The prior offense was similar to an instant offense
 - *E.g.*, suspended license

Excluded Offenses (cont.)

§4A1.2(c)(1) & (c)(2) & (o)

- §4A1.2(c)(2) - List of misdemeanor and petty offenses that are never counted
 - *E.g.*, minor traffic offenses
- “Misdemeanor” means having a maximum statutory penalty of one year or less
 - Note: All such offenses are counted if a “felony offense” (*i.e.*, maximum of over 1 yr.)

Other Considerations

- Expungements, diversionary dispositions, pardons
 - §4A1.2(f) & (j), App. Notes 9 & 10
- Prior revocations of supervision
 - §4A1.2(k) and App. Note 11

General Approach in Handling Revocations: Add time imposed at original sentencing with time imposed upon revocation

- Original sentence 3 yrs. imprisonment, suspended upon service of 1 yr. w/ 5 yrs. probation to follow
- Probation revoked; 6 mos. imposed

1 yr. original sentence

+ 6 mos. revocation sentence

1 yr. 6 mos. = **3 points**

Chapter Three and Chapter Four “Overrides”

§3A1.4	Terrorism
§§4B1.1 - 4B1.2	Career Offender
§4B1.3	Criminal Livelihood
§4B1.4	Armed Career Criminal
§4B1.5	Repeat and Dangerous Sex Offender Against Minors

Career Offender

§§4B1.1 & 4B1.2

- Does not impact statutory exposure
- No enhancement notice required (as required in 21 U.S.C. § 851)
- Prior offenses must be counted in criminal history
- Congressional directive at 28 U.S.C. § 994(h)

§4B1.1 Career Offender Criteria

- Defendant at least 18 at time of instant offense
- Instant offense of conviction is a felony for a “crime of violence” or a “controlled substance offense”
- At least two prior felony convictions for a “crime of violence” or “controlled substance offense”

“Two prior felony convictions”

§4B1.2(c)

- Defendant must have committed the instant offense of conviction subsequent to sustaining at least two predicate offense convictions

And

- The sentences for the two predicates must be counted separately under criminal history (See amndt. #709)

“Crime of Violence”

§4B1.2(a)

- Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that:
 - Has as an element the use, attempted use, or threatened use of physical force against the person of another,

OR

“Crime of Violence” (cont.)

§4B1.2(a)

- Is burglary of a dwelling, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another (see application notes for specific offenses)
- Note: This definition differs from 18 U.S.C. §§ 16, 924(c), 924(e), §2L1.2, and §4B1.4. (but many courts treat § 924(e) and §4B1.2 the same)

“Controlled Substance Offense”

§4B1.2(b)

- An offense under federal or state law, punishable by imprisonment for a term exceeding one year, that:
 - prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance

OR

“Controlled Substance Offense” (cont.)

§4B1.2(b)

- the possession of a controlled substance
with intent to do any of the above
- Note: This definition is the same as in §2L1.2
- Note: This definition differs from 18 U.S.C. §§
924(c), 924(e), and §4B1.4.

Career Offender

- Criminal History Category VI
- Offense level determined by a table based on statutory maximum
 - Unless the offense level from Chapters Two and Three is greater

<u>Statutory Maximum</u>	<u>Offense Level *</u>
Life	37
25 years +	34
20 years +	32
15 years +	29
10 years +	24
5 years +	17
More than 1 year	12

* Decrease by number of levels applicable at §3E1.1 (Acceptance of Responsibility)

Armed Career Criminal

- 18 U.S.C. § 924(e)– conviction under 18 U.S.C. § 922(g)
- Requires three prior convictions for “violent felonies” or “serious drug offenses” committed on different occasions.

ACCA

- 15 year mandatory minimum
- §4B1.4
 - Criminal history category becomes at least IV
 - Offense level raised to at least 33
- No time limit on priors (*See U.S. v. Keesee*, 358 F.3d 1217 (9th Cir. 2004))
- See statute for “different occasions”– does not rely on guideline rules for “separate sentences” (*See U.S. v. White*, 465 F.3d 250 (5th Cir. 2006))
- Circuit split on whether “juvenile convictions” can be used as a prior

“Serious drug offense”

- An offense under the C.S.A. (21 U.S.C. 801 et seq.), the Controlled Substance Import and Export Act (21 U.S.C. 951 et seq.) or chapter 705 for which a maximum term of imprisonment of ten years or more is prescribed; or an offense under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance as defined in the C.S.A. (21 U.S.C. 802) for which a maximum term of imprisonment of ten years or more is prescribed
- *See U.S. v. Rodriguez*, 128 S. Ct. 1783 (2008)

“Serious drug offense”

- Can include inchoate crime of attempted possession of cocaine with intent to distribute (*See U.S. v. Wimbush*, 407 F.3d 703 (5th Cir. 2005)(attempted possession of cocaine with intent to distribute conviction was a serious drug offense)

“Violent Felony”

- Any crime punishable by a term exceeding one year or any act of juvenile delinquency involving the use or carrying of a firearm or a destructive device that would be punishable by imprisonment for such term if committed by an adult

“Violent Felony” - Definition

- Any felony that has an element the use, threatened use, or attempted use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives or **otherwise involves conduct that presents a serious potential risk of physical injury to another**

Supreme Court Cases Involving “Crime of Violence”

- *Begay v. U.S.*, 128 S. Ct. 1581 (2008)
 - New Mexico DUI statute not a “violent felony” under Armed Career Criminal Act (ACCA)
 - Key question: “whether the crime involves purposeful, violent, and aggressive conduct”
- *U.S. v. Chambers*, 129 S. Ct. 687 (2009)
 - Illinois offense of “failure to report” is not a “violent felony” under the ACCA

Categorical Approach

Taylor v. U.S.
495 U.S. 575 (1990)

Shepard v. U.S.
544 U.S. 13 (2005)

Recent “Crime of Violence” Cases

- *U.S. v. Herrick*, 545 F.3d 53 (1st Cir. 2008)
- *U.S. v. Williams*, 529 F.3d 1 (1st Cir. 2008)
- *U.S. v. Am*, 2009 WL 1058617 (1st Cir. 2009)
- *U.S. v. Gray*, 535 F.3d 128 (2^d Cir. 2008)
- *U.S. v. Seay*, 553 F.3d 732 (4th Cir. 2009)
- *U.S. v. Thorton*, 554 F.3d 443 (4th Cir. 2009)
- *U.S. v. Roseboro*, 551 F.3d 226 (4th Cir. 2009)
- *U.S. v. Johnson*, 286 F. App’x 155 (5th Cir. 2008)
- *U.S. v. Harrimon*, 2009 WL 1332088 (5th Cir. 2009)

“Crime of Violence” Cases (cont.)

- *U.S. v. Ford*, 560 F.3d 420 (6th Cir. 2009)
- *U.S. v. Baker*, 559 F.3d 443 (6th Cir. 2009)
- *U.S. v. Oaks*, 554 F.3d 1087 (6th Cir. 2009)
- *U.S. v. Hawkins*, 554 F.3d 615 (6th Cir. 2009)
- *U.S. v. Bartee*, 529 F.3d 357 (6th Cir. 2008)
- *U.S. v. Alexander*, 543 F.3d 819 (6th Cir. 2008)

“Crime of Violence” Cases (cont.)

- *U.S. v. Templeton*, 543 F.3d 378 (7th Cir. 2008)
- *U.S. v. Jennings*, 544 F.3d 815 (7th Cir. 2008)
- *U.S. v. Wilson*, 562 F.3d 965 (8th Cir. 2009)
- *U.S. v. Sonczalla*, 561 F.3d 842 (8th Cir. 2009)
- *U.S. v. Williams*, 537 F.3d 969 (8th Cir. 2008)
- *U.S. v. Heikes*, 525 F.3d 662 (8th Cir. 2008)
- *U.S. v. Mayer*, 530 F.3d 1099 (9th Cir. 2008)
- *U.S. v. Morris*, 527 F.3d 1059 (10th Cir. 2008)
- *U.S. v. Serafin*, 562 F.3d 1105 (10th Cir. 2009)
- *U.S. v. Scoville*, 561 F.3d 1173 (10th Cir. 2009)
- *U.S. v. Williams*, 2009 WL 817498 (11th Cir. 2009)
- *U.S. v. Archer*, 531 F.3d 1347 (11th Cir. 2008)
- *U.S. v. Harrison*, 558 F.3d 1280 (11th Cir. 2009)

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