



**US Sentencing Commission's Annual National Seminar
on the Federal Sentencing Guidelines**

National Seminar

Criminal History Answers



SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

ARE THESE SCORED CORRECTLY?

1. On October 19, 2016, at 1:44 a.m., the defendant, armed with a Glock pistol, entered Lucky's Convenience Store and robbed the cashier at gunpoint. The cashier gave the defendant all the money in the register's drawer and the store's safe, totaling \$1,387.00.

The defendant was arrested by local law enforcement on October 24, 2016, and was charged with armed robbery. Law enforcement recovered the Glock pistol used during the robbery.

On November 3, 2016, the defendant was charged in federal court with felon in possession of a firearm. The indictment cites only the Glock pistol. The defendant pleaded guilty to one count of 18 U.S.C. § 922(g). The applicable guideline for the instant offense is §2K2.1.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
03/04/2012	Distribution of a Controlled Substance (felony) Wicomico County Circuit Court Salisbury, MD	04/07/2012: 6 months custody	§4A1.1(b)	2
10/24/2016	Armed Robbery (felony) Anne Arundel County Circuit Court Annapolis, MD	01/13/2017: 18 months custody	§4A1.1(a)	3 0

Is the defendant's criminal history scored correctly? Why or why not?

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No. The conviction for armed robbery should not receive any criminal history points.

Section 4A1.2(a)(1) states: “The term ‘prior sentence’ means any sentence previously imposed upon adjudication of guilt ... for conduct **not part of the instant offense.**” The armed robbery is relevant conduct to the defendant’s instant offense of conviction, felon in possession. When applying §2K2.1 for the instant offense, the four-level increase at subsection (b)(6)(B) is applied based on the armed robbery conduct. This specific offense characteristic applies when the defendant possesses a firearm in connection with another felony offense. In this scenario, the Glock pistol charged in the instant offense is the same firearm that the defendant possessed when he committed the armed robbery in October 2016. As a result, the armed robbery is relevant conduct to the instant offense, and cannot be a “prior sentence” for the purpose of calculating criminal history points under §4A1.1.

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2. The instant offense of conviction is possession with intent to distribute heroin, in violation of 21 U.S.C. § 841 (applicable guideline §2D1.1). The indictment alleges that the defendant, from on or about April 29, 2016 through May 30, 2017, distributed over 200 grams of heroin.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
07/10/2012	Driving Under the Influence (misdemeanor) Fort Smith District Court, Fort Smith, AR	7/15/2012: \$500 fine	§4A1.1(c)	1
8/22/2015	Reckless Driving (misdemeanor) Fort Smith District Court Fort Smith, AR	9/1/2015: 3 months' probation 12/1/2015: probation discharged	§4A1.2(c)(1)	0
02/17/2016	Sale of more than 5 grams of Heroin (felony) Oklahoma District Court for Muskogee County	03/27/2016: Time Served (30 days custody)	§4A1.2(a)(1)	0 1
01/22/2017	Sale of more than 5 grams of Heroin (felony) Oklahoma District Court for Muskogee County	01/24/2018: 90 days custody	§4A1.2(a)(1)	0

Is the defendant's criminal history scored correctly? Why or why not?

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No. The 2016 conviction for sale of heroin should receive one criminal history point.

Application Note 5(C) at the relevant conduct guideline (§1B1.3) discusses when conduct associated with a prior sentence **cannot** be included as relevant conduct. The note states that “offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.”

In this scenario, the sentence for the 2016 heroin sale was imposed on March 27, 2016. The indictment establishes that the offense of conviction occurred from April 29, 2016 through May 30, 2017. The conduct from the 2016 heroin sale cannot be considered to be the same course of conduct or common scheme or plan as the offense of conviction because the sentence was imposed prior to the acts constituting the instant federal offense. As a result, the 2016 heroin sale is a “prior sentence” and should be assigned one criminal history point under §4A1.1(c).

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3. Defendant pleaded guilty to one count of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841 (applicable guideline §2D1.1). The instant offense occurred on June 2, 2017. The defendant's relevant conduct includes two other sales of cocaine that occurred on May 19, 2017, and June 17, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/16/2017	Theft (felony) Superior Court of Connecticut; Hartford, CT	07/30/2017: 3 months custody	§4A1.1(b)	2

Defendant was released on bond for the theft offense on April 18, 2017. The probation officer did not assign two criminal history points under §4A1.1(d) for committing the instant offense while under a criminal justice sentence.

Is the defendant's criminal history scored correctly? Why or why not?

Yes. The criminal history is scored correctly.

Two criminal history points at §4A1.1(d) apply when a defendant commits any part of the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

In this scenario, the defendant was released on bond for a theft offense in April 2017. The defendant committed the instant offense in May and June of 2017. The defendant was not sentenced for the theft offense until July 30, 2017. The defendant was not under a criminal justice sentence at any time during the commission of the instant offense. Therefore, an increase of two criminal history points under §4A1.1(d) is not applied.

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4. The instant offense of conviction is embezzlement, in violation of 18 U.S.C. § 656, applicable guideline §2B1.1. The offense occurred from November 2017 through December 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
05/30/2005	Driving While Intoxicated (misdemeanor) Chester County District Court West Chester, PA	06/01/2005: 2 years' probation 05/01/2007: Warrant issued for probation violation; warrant still outstanding	§4A1.1(d)	2 0

Is the defendant's criminal history scored correctly? Why or why not?

No. The DWI conviction should not receive any criminal history points.

Two criminal history points at §4A1.1(d) apply when a defendant commits any part of the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. In this scenario, the defendant has an outstanding warrant for violating the terms of his probation from a 2005 conviction for DWI when he commits the instant offense of embezzlement.

Application Note 4 at §4A1.1 states that for the purpose of §4A1.1(d), "a 'criminal justice sentence' means a sentence **countable** under §4A1.2." Application Note 4 further clarifies that "a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding ... shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise **countable**, even if that sentence would have expired absent such warrant." The term **countable** means that the prior sentence (the prior conviction that resulted in the "criminal justice sentence") meets the appropriate criteria set forth in §4A1.2 and therefore is assigned criminal history points under §4A1.1(a), (b) or (c). In order to receive an increase for being under a criminal justice sentence at §4A1.1(d), the prior sentence must also be counted under §4A1.1(a), (b), or (c).

In this scenario, the DWI conviction is outside the applicable ten-year time frame (§4A1.2(e)(2)), and therefore, cannot be assigned criminal history points under §4A1.1(c). As a result, the two criminal history points for status under §4A1.1(d) also cannot be applied.

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5. The defendant was found guilty of armed robbery, in violation of 18 U.S.C. § 2113(a). The applicable guideline is §2B3.1. The robbery occurred on March 7, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
11/18/1988	Second Degree Murder (felony) Superior County Court of Los Angeles County Los Angeles, CA	02/18/1989: 6 years to life imprisonment; 08/31/2001: Released on parole 11/30/2006: Parole revoked, 2 years custody	§4A1.1(a), §4A1.2(k)	3
09/11/2006	Burglary (felony) Superior County Court of Orange County Santa Ana, CA	11/24/2006: 3 years custody, 2 years suspended, probation to follow 6/20/2008: Probation revoked, re-imposition of 2 years suspended custody	§4A1.1(a), §4A1.2(k)	3
05/11/2017	Driving While License Suspended Superior County Court of San Diego County San Diego, CA	06/15/2017: \$200 fine	§4A1.2(c)(1)	0

Is the defendant's criminal history scored correctly? Why or why not?

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Yes. The criminal history is scored correctly.

Section 4A1.2(k) provides instruction on prior sentences that involve revocations of probation, parole, mandatory release, or supervised release. Section §4A1.2(k)(1) states that where there is a “prior revocation ... add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.” Section 4A1.2(k)(2) lists the circumstances where revocation of probation “may affect the time frame under which certain sentences are counted under §4A1.2(d)(2) and (e).”

The instant offense of robbery occurred on March 7, 2018. Pursuant to §4A1.2(e)(1), a prior sentence with a sentence length of greater than 13 months must be imposed within 15 years of the instant offense, or the defendant must be released from such a sentence within 15 years of the instant offense. The sentence for the prior conviction for second degree murder was imposed in 1989, well beyond the 15-year time frame. The defendant was released from imprisonment in 2001, also outside of the 15-year time frame. However, the defendant violated his terms of parole and the parole was revoked in 2006. According to §4A1.2(k)(1), the original term of imprisonment is added to any term of imprisonment imposed upon revocation. And, pursuant to §4A1.2(k)(2)(A), the applicable time frame for an adult term of imprisonment totaling more than one year and one month is determined by the date of last release from incarceration on such sentence. Due to the defendant’s parole revocation in 2006, the date of last release on this second degree murder conviction is in 2008, which is now within 15 years of the instant offense. Therefore, this prior sentence receives three criminal history points.

The original sentence for the felony burglary was imposed November 2006. The defendant was sentenced to three years’ custody, with two years suspended, followed by probation. Section 4A1.2(b)(2) provides that “if part of a sentence of imprisonment was suspended, ‘sentence of imprisonment’ refers only to the portion that was not suspended.” Therefore, the length of the original sentence imposed in 2006 is one year of imprisonment. Pursuant to §4A1.2(e)(2), for any other prior sentence that is not a term of imprisonment exceeding 13 months, the applicable time frame is the imposition of a sentence within ten years of the defendant’s commencement of the instant offense. The imposition of the original sentence in 2006 would be outside of the ten-year time frame. However, the defendant violated his conditions of probation in 2008. The probation was revoked, and the court imposed the two years of custody that were suspended at the time of the original sentencing. According to §4A1.2(k)(1), the original term of imprisonment (one year) is added to any term of imprisonment imposed upon revocation (two years). The length of the sentence for the felony burglary now totals three years imprisonment. And, pursuant to §4A1.2(k)(2)(A), the applicable time frame for an

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adult term of imprisonment totaling more than one year and one month is determined by the date of last release from incarceration on such sentence. Due to the revocation of probation for this felony burglary conviction, the date of last release for this defendant is 2010, which is within 15 years of the instant offense. Therefore, this prior sentence receives three criminal history points.

Finally, the prior conviction for driving while license suspended does not receive any criminal history points. Driving while license suspended is an offense that is listed at §4A1.2(c)(1). Section 4A1.2(c)(1) provides a list of offenses that count for criminal history points only if the sentence imposed is a term of probation greater than one year or a term of imprisonment of at least 30 days. The defendant received a \$200 fine for this prior conviction, so no criminal history points are assigned.

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6. The instant offense of conviction is illegal reentry in violation of 8 U.S.C § 1326 (applicable guideline §2L1.2). The defendant illegally reentered the United States on January 28, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/24/2006	Illegal Entry (misdemeanor) U.S. District Court; District of New Mexico Las Cruces Division	4/27/2006: 30 days custody	§4A1.2(e)(2)	0
02/22/2007	Importation of Marijuana (felony) U.S. District Court; District of Arizona Tucson Division	04/29/2007: 8 months custody; 3 years supervised release 05/24/2010: supervised release revoked; 30 days custody	§4A1.1(b), §4A1.2(k)	2 0
05/22/2010	Illegal Reentry (felony) U.S. District Court; District of Arizona Tucson Division	05/24/2010: 15 months custody; 3 years supervised release	§4A1.1(a)	3

Is the defendant's criminal history scored correctly? Why or why not?

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No. The importation of marijuana conviction should not receive any criminal history points.

The instant offense occurred January 2018. The original eight-month custody sentence for the importation of marijuana conviction was imposed on April 29, 2007. Any prior sentence that is not a term of imprisonment exceeding 13 months has an applicable time frame of imposition of a sentence within ten years of the defendant's commencement of the instant offense. The imposition of eight months incarceration is more than ten years prior to the commission of the instant offense.

This defendant violated the terms of his supervised release in May 2010. He received 30 days of custody. According to §4A1.2(k)(1), the original term of imprisonment (eight months) is added to any term of imprisonment imposed upon revocation (30 days). The length of the sentence for the importation of marijuana now totals nine months custody. Although the time imposed upon revocation brings the release date for this sentence within the ten-year time frame, §4A1.2(k)(2)(C) states that the date of the original sentence is to be used to determine the applicable time frame, not the date of release.

In other words, there are only two circumstances under which the date of last release from incarceration upon revocation of a sentence can be used. The first is in a case involving an adult term of imprisonment totaling more than one year and one month (§4A1.2(k)(2)(A)). The second is in the case of any other confinement sentence for an offense committed prior to the defendant's 18th birthday (§4A1.2(k)(2)(B)). In any other case, the date of the original sentence, not the date of last release from incarceration is to be used (§4A1.2(k)(2)(C)).

As a result, the date of the original sentence for the importation of marijuana conviction is outside the applicable time frame of ten years. Therefore, the prior conviction does not receive any criminal history points.

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7. The instant offense of conviction is bank fraud, in violation of 18 U.S.C. § 1344 (applicable guideline §2B1.1). The offense occurred from January 2017 through September 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
12/05/2004	Theft (felony) Kenton County Circuit Court Covington, KY Case number: 2004-CR-856	4/27/2005: 2 years' probation 01/12/2007: Probation revoked; 15 months custody	§4A1.1(a), §4A1.2(k)	3
1/29/2005	Theft (felony) Kenton County Circuit Court Covington, KY Case number: 2005-CR-125	04/22/2005: 2 years' probation 01/12/2007: Probation revoked; 15 months custody concurrent with case number 2004-CR-856	§4A1.2(e)(2),	0
12/07/2006	Robbery (felony) Kenton County Circuit Court Covington, KY	01/12/2007: 15 months custody concurrent with revocation time imposed in case numbers 2004-CR-856 and 2005-CR-125	§4A1.1(a)	3

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

Yes. The criminal history is scored correctly.

The earliest date of relevant conduct for the instant offense is January 2017. The defendant has two prior felony theft convictions. In 2005, he was sentenced to a term of probation for each theft conviction. The imposition of the original sentences is outside of the applicable ten-year time frame.

In 2007, both terms of probation are revoked based upon the same conduct for the felony robbery offense committed in 2006. For each revocation, a sentence of 15 months custody was imposed. Application Note 11 at §4A1.2 states that in a case where a revocation applies to multiple sentences, and the sentences are counted separately, the term of imprisonment imposed upon revocation can be added to the one sentence that results in the greatest increase in criminal history points.

Therefore, in this scenario, because the revocation applies to multiple sentences that are counted separately, the revocation time is only added to one of the felony theft offenses, not both. According to §4A1.2(k)(1), the original term of imprisonment (zero months) is added to any term of imprisonment imposed upon revocation (15 months). The length of the sentence for the felony theft conviction now totals 15 months custody. And, pursuant to §4A1.2(k)(2)(A), the applicable time frame for an adult term of imprisonment totaling more than one year and one month is determined by the date of last release from incarceration on such sentence. Due to the revocation of probation, the date of last release from incarceration for this defendant is 2009, which is within 15 years of the instant offense. Three criminal history points are therefore applied to the first felony theft conviction.

The revocation time is not added to the second felony theft conviction based on the instructions in Application Note 11. Therefore, without the addition of the revocation time, the original sentence imposed is outside of the applicable ten-year time frame. This conviction does not receive any criminal history points.

On January 12, 2007, the court imposed a 15-month sentence on the felony robbery conviction. This sentence is within the applicable 15-year time frame, and receives three criminal history points.

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8. The instant offense of conviction is possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841 (applicable guideline §2D1.1). The defendant's relevant conduct for this offense began in April 2016 and ended with his arrest in the instant offense on March 15, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
10/15/2014	Second Degree Burglary (felony) Hennepin County District Court Minneapolis, MN CR-14-98484	03/07/2015: 15 months custody	§4A1.1(a)	3
10/15/2014	Aggravated Assault (felony) Hennepin County District Court Minneapolis, MN CR-14-98652	03/07/2015: 15 months custody, to run concurrent with CR-14-98484	§4A1.2(a)(2), §4A1.1(e)	± 0

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

No. The aggravated assault conviction should not receive a criminal history point.

The prior convictions for second degree burglary and aggravated assault are properly treated as a single sentence pursuant to §4A1.2(a)(2). The prior sentences are not separated by an intervening arrest and are sentenced on the same day. The court imposed a sentence of 15 months custody on each count to run concurrently with each other. A sentence of 15 months requires application of three criminal history points. These three criminal history points are applied to the “set” of convictions – the three criminal history points apply to both the second degree burglary and aggravated assault as a whole.

Section §4A1.1(e) provides for the addition of one point (maximum of three points total) for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was treated as a single sentence.

“Crime of violence” has the meaning given the term at §4B1.2 (Definition of Terms Used in §4B1.1 – Career Offender). A “crime of violence” is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another, or is murder, manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, involves use of explosives. Aggravated assault is enumerated as an offense that qualifies as a “crime of violence.” Burglary is not enumerated as a “crime of violence” under §4B1.2 and otherwise would not qualify as a “crime of violence” under this definition.

Application Note 5 at §4A1.1 states that “in a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c).” In other words, there must be multiple convictions for crimes of violence that are treated as a single sentence before additional points can be applied under §4A1.1(e).

In this scenario, only one of the prior convictions that is treated as a single sentence is a crime of violence. Therefore, no additional point can be assigned to the aggravated assault conviction pursuant to §4A1.1(e).

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9. Defendant pleaded guilty to one count of kidnapping, in violation of 18 U.S.C. § 1201 (applicable guideline §2A4.1). The offense occurred on July 21, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
09/14/2010	Aggravated Assault (felony) Miami-Dade Circuit Court Miami, FL 2010-CR-34873	11/27/2010: 8 months custody	§4A1.1(b), §4A1.2(a)(2)	3
09/14/2010	Aggravated Assault (felony) Miami-Dade Circuit Court Miami, FL 2010-CR-37124	11/27/2010: 6 months custody consecutive to 2010-CR-34873	§4A1.2(a)(2)	0

Is the defendant's criminal history scored correctly? Why or why not?

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Yes. The criminal history is scored correctly.

The prior convictions for aggravated assault are properly treated as a single sentence pursuant to §4A1.2(a)(2). The prior sentences are not separated by an intervening arrest and are sentenced on the same day. The court imposed a sentence of six months custody on one count of aggravated assault to run consecutively to the eight months imposed on the other count of aggravated assault. This total sentence of 14 months requires application of three criminal history points. These three criminal history points are applied to the “set” of convictions – both aggravated assaults as a whole.

Section §4A1.1(e) provides for the addition of one point (maximum of three points total) for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was treated as a single sentence.

“Crime of violence” has the meaning given the term at §4B1.2 (Definition of Terms Used in §4B1.1 – Career Offender). A “crime of violence” is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another, or is murder, manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, involves use of explosives. Aggravated assault is enumerated as an offense that qualifies as a “crime of violence.”

Application Note 5 at §4A1.1 states that “in a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c).” In other words, there must be multiple convictions for crimes of violence that are treated as a single sentence before additional points can be applied under §4A1.1(e).

In this scenario, the defendant does have multiple convictions for crimes of violence that are treated as a single sentence. However, Application Note 5 also states that points under §4A1.1(e) are added “for each such sentence **that did not result in any additional points under §4A1.1(a), (b), or (c).**”

In this scenario, both of the assault counts contributed to the calculation of criminal history points under §4A1.1(a). The six-month sentence for the second aggravated assault was imposed to run consecutively to the eight-month sentence for the first aggravated assault. The eight-month sentence alone would require application of two criminal history points. The six-month consecutive sentence added an additional criminal history point, because the aggregation of the two sentences increased the number of criminal history points from two to three.

As a result, an additional point cannot be assigned under §4A1.1(e).