

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

ARE THESE SCORED CORRECTLY?

1. On April 29, 2018, the defendant, armed with a Glock pistol, carjacked a vehicle. After the carjacking, he led police on a high-speed chase. After crashing the vehicle, the defendant exited the car and fired the Glock pistol at one of the officers. The officer was grazed in the arm by a bullet and required stitches. The defendant was arrested by state police on the scene. The state charged the defendant with aggravated assault for the assault on the police officer.

On May 15, 2018, the defendant was charged in federal court with carjacking (18 U.S.C. § 2119) and possession of a firearm in connection with a crime of violence (18 U.S.C. §924(c)). The defendant pleaded guilty to both counts. The guideline applicable to the carjacking is §2B3.1.

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
04/29/2018	Aggravated Assault (felony) Anne Arundel County Circuit Court Annapolis, MD	06/13/2018: 18 months custody	§4A1.1(a)	30

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant is a career offender.

No. The aggravated assault should not receive any criminal history points.

Section 4A1.2 states: "The term 'prior sentence' means any sentence previously imposed upon adjudication of guilt ... for conduct **not part of the instant offense.**" The aggravated assault is

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relevant conduct to the defendant’s instant offense of conviction, carjacking. The defendant committed the assault against the police officer to avoid detection or responsibility for the offense of conviction. When applying §2B3.1 for the instant offense, the increase for bodily injury at subsection (b)(3) is applied based on the assault of the officer. As a result, the assault is relevant conduct to the instant offense, and cannot be a “prior sentence” for the purpose of calculating criminal history points under §4A1.1.

2. 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 indictment alleges that the defendant, on December 17, 2018, distributed over 50 grams of methamphetamine.

The defendant’s criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
11/15/2012	Distribution of crack cocaine (felony) Hennepin County District Court Minneapolis, MN CR-14-98484	01/07/2013: 60 days custody	§4A1.1(b)	2
11/15/2012	Distribution of crack cocaine (felony) Hennepin County District Court Minneapolis, MN CR-14-98652	01/07/2013: 60 days custody, to run concurrent with CR-14-98484	§4A1.2(a)(2)	0
12/12/2012	Possession with Intent to Distribute Crack Cocaine (felony) U.S. District Court District of Minnesota	05/22/2013: 30 months custody	§4A1.1(a)	3

In 2013, when the defendant was sentenced in federal court for possession with intent to distribute crack, the prior state convictions did not count for criminal history because they were relevant conduct to the federal offense. Therefore, the defense attorney argues that the

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prior state and federal cases should be treated as a single sentence so that his client is not a career offender.

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant is a career offender.

Yes. The criminal history is scored correctly.

The two state offenses for distribution of crack cocaine are treated as a single sentence because the offenses were not separated by an intervening arrest, and the sentences were imposed on the same day. Sixty days custody was imposed for each count to run concurrently to each other. When concurrent sentences are imposed on multiple prior sentences treated as a single sentence, you use the longest sentence to determine the amount of criminal history points. A prior sentence of imprisonment of at least sixty days results in the assignment of two criminal history points.

Three points are assigned to the prior federal offense of possession with intent to distribute crack cocaine because the sentence exceeded 13 months and it is within 15 years of the instant offense. This prior federal offense is counted separately from the prior state distribution offenses because the prior state offenses and prior federal offense are separated by an intervening arrest.

The fact that these prior state and federal offenses of conviction were relevant conduct to each other in 2013 has no bearing on the calculation of criminal history points.

3. Defendant pleaded guilty to one count of possession with intent to distribute fentanyl, in violation of 21 U.S.C. § 841 (applicable guideline §2D1.1). The indictment alleges that the defendant, from August 2018 through October 2018, distributed over 40 grams of fentanyl.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
10/12/2011	Theft (felony) Miami-Dade Circuit Court Miami, FL	12/30/2011: 60 days custody	§4A1.1(b)	2
09/14/2013	Burglary (felony)	11/27/2013: 6 months custody	§4A1.1(b), §4A1.2(a)(2)	2

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Miami-Dade Circuit
Court
Miami, FL
2010-CR-34873

09/14/2013	Aggravated Assault (felony) Miami-Dade Circuit Court Miami, FL 2010-CR-37124	11/27/2013: 2 months custody consecutive to 2010-CR-34873	§4A1.2(a)(2), §4A1.1(e)	±0
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Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant has five criminal history points and is automatically ineligible for relief under the statutory safety valve.

No. The aggravated assault should not receive a criminal history point under §4A1.1(e).

The prior convictions for burglary and aggravated assault are properly treated as a single sentence pursuant to §4A1.2(a)(2). The prior offenses are not separated by an intervening arrest and are sentenced on the same day. The court imposed a sentence of six months custody on the burglary count and two months custody on the assault count to run consecutively. A total sentence of eight months requires application of two criminal history points under §4A1.1(b).

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.

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).

"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,

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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.

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).

4. 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 January 29, 2017 through May 30, 2017, distributed over 100 grams of heroin.

The defendant’s criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
06/22/2000	Robbery (felony) Danville Circuit Court Danville, VA	08/03/2001: 20 years’ probation	§4A1.2(e)(2)	0
05/29/2013	Theft (misdemeanor) Bibb County Superior Court Macon, GA	06/15/2013: 90 days custody; 15 days credit time served	§4A1.1(b)	2
02/18/2015	Sale of Methamphetamine (felony) Bibb County Superior Court Macon, GA	04/03/2015: 3 years’ imprisonment, 2 years suspended	§4A1.1(b)	2

The defendant committed the instant offense while serving a term of probation for robbery. Therefore, two additional criminal history points were assigned under §4A1.1(d). The defendant has a total of six criminal history points.

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Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant has six criminal history points and is automatically ineligible for relief under the statutory safety valve.

No. There are no points assigned under §4A1.1(d) for being under a criminal justice sentence at the time the instant offense was committed.

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 committed the instant offense while serving a 20-year probation sentence.

However, Application Note 4 at §4A1.1 states that "a 'criminal justice sentence' means a sentence **countable** under §4A1.2." 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 robbery 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.

5. 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 July 28, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/24/2005	Distribution of Marijuana (felony) Pima County Superior Court Tucson, AZ	07/30/2005: 3 years' probation 11/03/2007: Probation revoked, 180 days imprisonment	§4A1.1(b)	2 0

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Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant will receive a four-level increase at §2L1.2.

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

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 occurred in July 2018. The original probation sentence imposed for the distribution of marijuana conviction was imposed on July 30, 2005. 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 probation for the marijuana distribution is more than ten years prior to the commission of the instant offense.

This defendant violated the terms of his probation in November 2007. He received 180 days of imprisonment. According to §4A1.2(k)(1), the original term of imprisonment (zero months) is added to any term of imprisonment imposed upon revocation (180 days). The length of the sentence for the distribution of marijuana now totals six 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)).

The date of the original sentence for the distribution 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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6. The defendant pleaded guilty to one count of distribution of 500 grams of methamphetamine that occurred on March 22, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/16/2003	Burglary (felony) Superior Court of Connecticut; Hartford, CT	07/30/2003: 3 months' custody, 57 months' probation to follow 11/03/2005: Probation revoked, 6 months' custody 06/20/2006: Probation terminated, 6 months' custody	§4A1.1(a)	3

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant will not be eligible for the safety valve.

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 occurred in March 2018. The original sentence for the felony burglary was imposed on July 30, 2003. The defendant received a sentence of three months custody followed by 57 months' probation. 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 sentence for the burglary is more than ten years prior to the commission of the instant offense.

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This defendant violated the terms of his probation in November 2005. He received six months of imprisonment. He again violated the terms of his probation in June 2006 where he again received six months custody. According to §4A1.2(k)(1), the original term of imprisonment (three months) is added to any term of imprisonment imposed upon revocation (one year). The length of the sentence for the distribution of marijuana now totals 15 months custody.

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 revocation in 2006, the date of last release on this burglary conviction is in 2006, which is now within 15 years of the instant offense. Therefore, this prior sentence receives three criminal history points.

7. 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
12/05/2004	Distribution of Cocaine (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	Distribution of Cocaine (felony) Kenton County Circuit Court Covington, KY Case number: 2005-CR-125	04/27/2005: 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

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Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant will be a career offender.

Yes. The criminal history is scored correctly.

The earliest date of relevant conduct for the instant offense is March 7, 2018. The defendant has two prior felony theft convictions. In 2004 and 2005, he was sentenced to a term of probation for each theft conviction. The imposition of the original sentences for these theft offenses are outside of the applicable ten-year time frame.

In 2007, both terms of probation are revoked based upon the same conduct – 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 the two theft 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 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 felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (applicable guideline is §2K2.1). The instant offense occurred on July 19, 2017, when his state probation officer conducted a home visit and discovered the weapon. The defendant was arrested by federal law enforcement on August 1, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
01/18/2017	Burglary (felony) Superior County Court of Los Angeles County Los Angeles, CA	04/11/2017: 2 years' probation 09/05/2017: probation revoked, 2 years' custody	§4A1.1(a), §4A1.2(k)	3

The defendant committed the instant offense while serving a term of probation for burglary. Therefore, two additional criminal history points were assigned under §4A1.1(d). The defendant has a total of five criminal history points.

The defense attorney argues that the revocation time imposed for the state burglary conviction should not be added to calculate the criminal history points for his client because the revocation time was imposed solely based upon the fact that the defendant committed the instant offense of felon in possession. The attorney argues that this is "triple counting" of criminal history is unwarranted – the state burglary conviction is counted; the revocation time is counted; and the fact that the defendant was serving a probation term at the time of the instant offense is also counted.

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

Yes. The criminal history is scored correctly.

The instant offense occurred while the defendant was serving a term of probation for burglary. As a result of the instant offense, the probation was revoked, and he was sentenced to 2 years custody. According to §4A1.2(k)(1), the original term of imprisonment (zero months) is added to any term of imprisonment imposed upon revocation (two years). The length of the sentence for the burglary now totals two years custody. The sentence is imposed well within the applicable 15-year time frame, resulting in the assignment of three criminal history points.

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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 committed the instant offense while on probation.

Application Note 4 at §4A1.1 states that “a ‘criminal justice sentence’ means a sentence **countable** under §4A1.2.” 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 burglary receives criminal history points under §4A1.1(a) and status points under §4A1.1(d). Although the defendant’s state probation term was revoked precisely for the commission of the instant offense, the reason behind the revocation is not considered in calculating the appropriate amount of criminal history points.