

Criminal History Outline

Criminal history forms the horizontal axis of the sentencing table. The table includes six criminal history categories. A defendant is placed in a criminal history category based on the **number of points** that he receives for prior sentences, status, and recency. The criminal history rules are located at §4A1.1 (Criminal History Category) and at §4A1.2 (Definitions and Instructions for Computing Criminal History). This document will provide some basic instructions in computing a defendant's criminal history.

I. Types of Sentences

Every prior sentence must be examined to determine if it receives points. Certain types of sentences are never counted in a defendant's criminal history score.

A. Sentences never counted

1. Prior sentences resulting from conduct included as relevant conduct of the instant offense (§4A1.2(a)(1))
2. "Stale" sentences (§4A1.2(e))
Certain prior sentences might be too "stale" to receive points. For a further discussion, see section III.
3. Certain military sentences (§4A1.2(g))

Sentences imposed by a summary court martial or Article 15 proceeding are not counted.

Note: *However, sentences resulting from military offenses are counted if imposed by general or special court martial.*

4. Foreign sentences (§4A1.2(h))
5. Tribal court sentences (§4A1.2(i))
6. Certain sentences from misdemeanor sentences and petty offenses (§4A1.2(c)(2))

"Felony offense" means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed. (§4A1.2(o))

Note: *Even if a state labels an offense a misdemeanor, the statutory maximum of that offense must be examined. For example, if under*

state law there is an offense called Misdemeanor Assault carrying a statutory maximum of 24 months, the statutory maximum for that offense makes it a felony for purposes of §4A1.2(c)(1) and (2), that would count as a felony.

Under §4A1.2(c)(2), sentences for the following misdemeanor and petty offenses never count:

- Fish and game violations
- Hitchhiking
- Juvenile status offenses and truancy
- Local ordinance violations (except those violations that are also violations under state criminal law)
- Minor traffic infractions (e.g., speeding)
- Public intoxication
- Vagrancy

Under §4A1.2(c)(1), certain other misdemeanors and petty offenses also will not count unless they meet certain criteria. The following list of offenses only count if the sentence was a term of probation of more than one year or a term of imprisonment of at least 30 days or the prior offense was similar to an instant offense:

- Careless or reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Gambling
- Hindering or failure to obey a police officer
- Insufficient funds check
- Leaving the scene of an accident
- Non-support
- Prostitution
- Resisting arrest
- Trespassing

Note: *Section 4A1.2, Application Note 12 describes the method for determining whether an unlisted offense is similar to an offense listed at §4A1.2(c)(1) or (c)(2).*

7. Expunged convictions (§4A1.2(j), Application Note 10)

8. Diversionary dispositions without finding of guilt (§4A1.2(f), Application Note 9)

Note: *However, if the diversion involved a finding or admission of guilt in a judicial proceeding, it is counted as a sentence.*

9. Convictions that have been reversed or vacated because of errors of law (§4A1.2, Application Note 6)

Note: *However, sentences resulting from a conviction which has been set aside or for which a defendant has been pardoned, does count if the law in question allows for such a disposition regardless of guilt (e.g. to restore civil rights).*

Note: *Prior sentences under appeal are counted. (See §4A1.2(l))*

B. Multiple prior sentences (§4A1.2(a)(2))

If the defendant has multiple prior sentences, determine whether those sentences are counted *separately* or as a *single sentence*. Prior sentences are always counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the *same charging instrument*; or (B) sentences were *imposed on the same day*.

II. Length of Prior Sentence

The assignment of criminal history points is most often affected by the length of a defendant's prior sentence.

Note: *A prior sentence is a sentence imposed before sentencing on the instant offense (the federal offense for which the defendant has been convicted and is being sentenced). A prior sentence resulting from conduct that is part of the defendant's relevant conduct is not counted for criminal history points. (§4A1.2(a)(1), Application Note 1)*

A. Criminal history points based on the length of the prior sentence

A prior sentence can receive either 3, 2 or 1 point. These points are based on the length of the prior sentence. In addition, the length of the sentence impacts the "time frame" within which a prior sentence can be counted.

1. Criminal history points assigned for sentences resulting from an offense committed when the defendant was 18 or older

Sentence greater than 13 months: **3 points**
 Sentence from 60 days to 13 months: **2 points**
 All other sentences: **1 point (max. of 4 points)**

2. Criminal history points assigned for sentences resulting from an offense committed prior to a defendant becoming 18

Convicted as adult and sentence greater than 13 months: **3 points**
 Sentence from 60 days to 13 months: **2 points**
 All others: **1 point (max. of 4 points)**

Note: *Regardless of when the offenses were committed, sentences counting one point can only contribute a maximum of 4 points to the criminal history score.*

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

55

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

56

3. Key points in determining length of sentence

- The length of sentence is based on the sentence imposed, not the time actually served (§4A1.2(b)(1))
- Suspended sentences (§4A1.2(b)(2))

If sentence has been suspended, the suspended portion is not counted in determining the length.

Example: 18 month sentence with 12 month suspended = 6 month sentence

Note: *If sentence has been completely suspended, it counts 1 point.*

- Indeterminate sentences are based on the maximum length imposed. (§4A1.2, Application Note 2)

Example: A court had imposed a sentence of one to three years. The maximum sentence length imposed is three years and thus counts 3 points.

- Sentences of “time served” (§4A1.2, Application Note 2)

In this type of sentence the length of the time served is used for establishing the length of the sentence.

Example: Defendant was in custody 90 days while awaiting sentencing. Defendant sentenced to “time served.” This is a 90 day sentence and thus counts 2 points.

Note: *This type of sentence is an exception to the general criminal history rule that length of sentence is not based on time served.*

- Alternative sentences (§4A1.2, Application Note 4)

A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment is treated as a non-imprisonment sentence.

Example: Defendant sentenced to \$1,000 fine or 90 days imprisonment. This is treated as a sentence of a fine, and counts 1 point.

- Revocation sentences (§4A1.2(k), Application Note 11)

In the case of a prior revocation of supervision, the original term of imprisonment, if any, is added to any term of imprisonment imposed upon revocation.

Example: Defendant originally sentenced to 3 years, suspended on service of 1 year imprisonment with 3 years of probation. The probation was subsequently revoked and 6 months imprisonment for the revocation was imposed. The original time of 12 months is added to the 6 months imposed upon revocation. This is now treated as an 18 month sentence and counts as 3 points.

III. “Time frames” (§4A1.2(d) and (e), Application Notes 7 and 8)

In order for a prior sentence to be counted, it has to have occurred within a certain time frame which is determined by the length of the prior sentence, and whether the defendant was under the age of 18, or 18 or older at the time of the commission of the previous offense. The following charts illustrate these time frames:

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

55

Criminal History Points

Prior Offense Committed Before 18

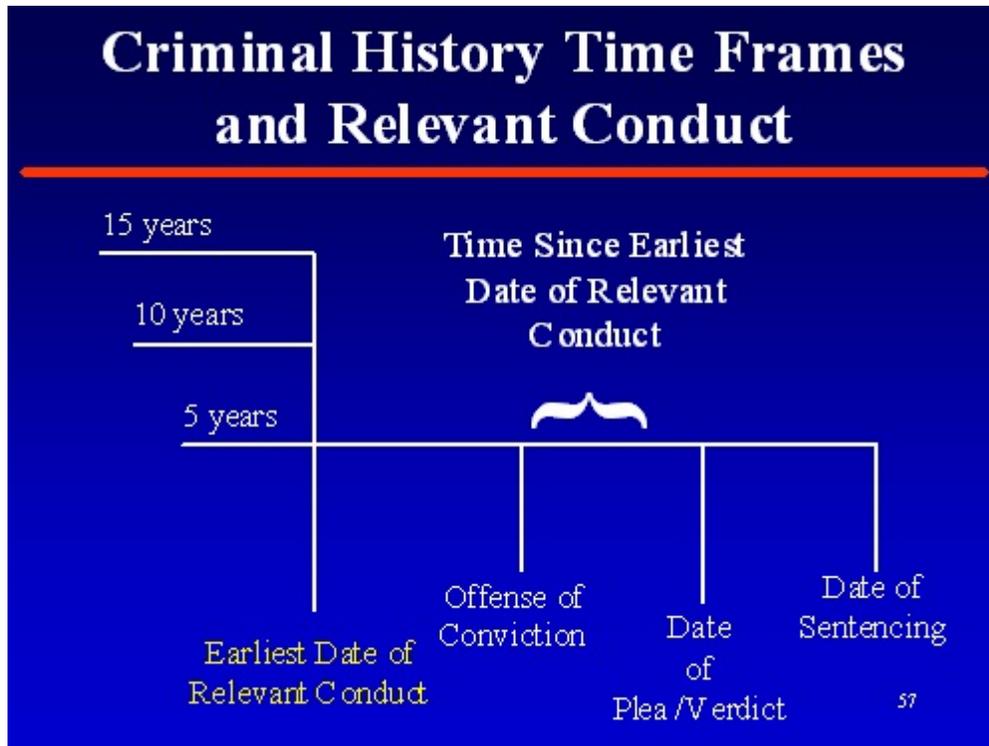
Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	Only if convicted as an adult and >13 months	Within 15 yrs. of prior sentence imposition or release
2	≥ 60 days	Within 5 yrs. of prior sentence imposition or release
1 (max of 4)	All others**	Within 5 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

56

The point from which the 15, 10, and 5 year time frames are counted back to decide whether a prior sentence will be counted is based on the earliest date of relevant conduct of the instant offense. The following chart illustrates the time frame relationship with relevant conduct:



Example: The defendant pled guilty to drug distribution that occurred on January 1, 2005. The court determines that the defendant’s relevant conduct for this offense actually began five years earlier on January 1, 2000. The 5, 10, or 15 year time frames for determining whether prior sentences are counted, will be based on the earliest date of the defendant’s relevant conduct-- January 1, 2000.

Note: *Revocations of supervision may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). (§4A1.2(k), Application Note 11)*

IV. Other Items When Criminal History Points Are Assigned

In addition to points based on the length of a prior sentence, additional points are assigned based on the defendant committing the instant offense while serving a prior sentence (§4A1.1(d)), or within two years after being released from prison (§4A1.1(e)). In order for points to be given under §4A1.1(d), the prior sentence must have been counted under §4A1.1(a), (b), or (c). In order for points to be given under §4A1.1(e), the prior sentence must have been counted under §4A1.1(a) or (b).

A. Status of defendant at time of instant offense (§4A1.1(d), Application Note 4)

Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. For purposes of this item, a “criminal justice sentence” means a sentence countable under §4A1.1(a), (b), or (c), having a custodial or supervisory component, although active supervision is not required for this to apply.

B. Recency (§4A1.1(e), Application Note 5)

Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b).

Note: *If 2 points are added for §4A1.1(d), add only 1 point for this item.*

Note: *The Commission has promulgated an amendment that will delete the recency provision effective November 1, 2010 unless Congress acts to the contrary.*

C. Sentences for crimes of violence offenses not counted because they are treated under §4A1.2(a)(2) as a single sentence (§4A1.1(f))

Section 4A1.1(f) provides that 1 point is added for each prior sentence resulting from a conviction for a crime of violence that did not receive any points under (a), (b), or (c) because such a sentence was counted as a single sentence under §4A1.2(a)(2). A maximum of 3 such points can be added under this provision.

Example: Defendant robbed a bank on December 1, 2005 and another bank on January 1, 2006. The defendant was arrested for both offenses on February 1, 2006. The defendant was sentenced on the same day for both offenses and received 5 year concurrent sentences for each offense. As there was no intervening arrest and the offenses

were sentenced on the same day, these multiple sentences are treated as a single sentence receiving 3 points because one robbery did not add to the criminal history points under §4A1.1(a),(b), or (c). An additional point would be added under §4A1.1(f).

VI. “Criminal History Overrides”

There are certain instances where a defendant’s criminal history category might be increased based on another guideline provision other than §§4A1.1 and 4A1.2. These overrides include:

- §3A1.4 Terrorism Enhancement
- §4B1.1 Career Offender
- §4B1.4 Armed Career Criminal
- §4B1.5 Repeat and Dangerous Sex Offender Against Minor

The most common “override” is the career offender enhancement at §4B1.1.

A. Career Offender (§§4B1.1 and 4B1.2)

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

1. Definitions:

- a. "Crime of violence" (§4B1.2(a), Application Note 1)

Means any offense under federal or state law punishable by imprisonment for a term exceeding one year, that –

- (1) has an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is a burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

b. “Controlled substance offense” (§4B1.2(b), Application Note 1)

Means 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 a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

2. Prior convictions (§4B1.2(c), Application Notes 1 and 3)

- The two predicate offenses have to be counted separately under criminal history rules. Thus, both offenses must receive points under §4A1.1(a), (b), or (c).
- The convictions must be adult convictions.
- The convictions had to occur prior to committing the instant offense.

Note: *In some instances a prior sentences will be counted under criminal history because the sentence was imposed prior to the instant sentencing, but will not count as a career offender predicate because the conviction did not precede the instant federal offense.*

- Must look to elements of the offense to determine if the prior conviction was a crime of violence or a controlled substance. Courts will use the case law developed “categorical approach” to determine if the offense is a crime of violence or a controlled substance offense.

3. Impact of the career offender guideline

a. Criminal history category

If the defendant is a career offender, the criminal history category must be **VI**. For example, a defendant who had a criminal history category IV before application of §4B1.1, will automatically have a

criminal history category VI.

b. Offense level

The defendant's offense level may also be increased according to a table at §4B1.1(b)(1) which is based on the statutory maximum of the instant offense of conviction. This occurs when the table results in a greater offense level than was established in the application of Chapter Two and Three

<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

Note: *Section 4B1.1(b) directs that if an adjustment from §3E1.1 (Acceptance of Responsibility) applies, the career offender offense level determined by the table is decreased by the number of levels corresponding to that adjustment. No other Chapter Three adjustment will affect the offense level determined by the career offender table.*