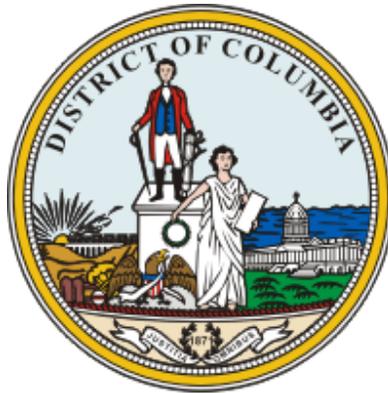# An Examination of Criminal History Decay Factors under the D.C. Voluntary Sentencing Guidelines

2011 Issues Paper Number 3

MEMBERSHIP OF THE DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMMISSION

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The D.C. Voluntary Sentencing Guidelines represent a structured sentencing system used to sentence adult felony offenders in the District. The system was created to promote consistency and proportionality in sentencing. This means ensuring that offenders who commit similar offenses and have similar criminal histories are sentenced alike while unique differences among offenses and offenders are also appropriately reflected. One of the benefits of having the Guidelines is that they provide uniformity in the way that crimes are punished. It also allows for monitoring sentencing trends that can reveal the types of crimes committed and areas of the criminal laws that may potentially need modification.

Sentencing decisions are complex and involve a range of important variables that the court must carefully assess in every criminal case. In order to impose the most just punishment, these decisions should account for the numerous ways a crime can be committed while also evaluating each defendant's individual criminal record. This issues paper examines how a defendant's criminal record is given its proper weight in a judge's sentencing decision. The prior criminal record is one of the core factors of sentencing under the Guidelines, along with the seriousness of the current criminal behavior. A proper consideration of these two factors is vital to achieving the goals of proportionality and consistency so that penalties do not overstate or understate the severity of the criminal behavior or misrepresent past criminal conduct that could potentially affect recidivism or rehabilitation concerns at sentencing.

This discussion focuses specifically on the challenges of sentencing offenders with criminal records that span over a long period of time. How should older convictions influence the sentence for recent offending? When trying to find the right punishment, the answer to this question may matter for a defendant with a long period of crime-free behavior. But just as important is how to account for an extensive criminal record or a defendant who has a past conviction for a violent crime. Under all of these circumstances, current sentencing decisions should be guided by a policy that adequately reflects prior criminal offending but also differentiates potentially less useful past criminal behavior.[1] The "decay factor," or the potential reduction in the impact of a prior conviction, is a common method for addressing these concerns. To illustrate the impact of the decay factor in assessing criminal history, a hypothetical defendant awaiting sentencing with a prior criminal record is used to demonstrate how each prior conviction—from the oldest to the most recent—factors into arriving at an appropriate sentence under the Guidelines.

> **Definition of a Compliant Sentence**
>
> An offender's criminal history score and the offense severity of the crime committed represent the axes of the Guidelines' two grids—the Drug Grid that governs drug felonies and the Master Grid that governs all other felonies. These two axes intersect at one "box" on the grid that displays a recommended sentencing range and sentencing options (prison, probation or a short split suspended sentence). The Guidelines also incorporate statutory enhancements (which increase the maximum sentence if certain factors are present), mandatory minimum provisions (where a minimum term of imprisonment must be imposed) and approved departures for sentencing outside of the recommended range. Following the rules set forth in the Guidelines results in what is referred to as a "compliant sentence."

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[1] Researcher Julian V. Roberts noted that "[a]s the interval between episodes of offending increases, the probative value of criminal history as a predictor of future behavior declines…Sentencing theorists of all stripes, then, agree that the relevance of a previous conviction declines over time. At some point the prior offending should become extinct for the purposes of future sentencing." The Role of Criminal Record in the Sentencing Process. Crime and Justice, Vol. 22 (1997), University of Chicago Press, pp. 303-362, 335. (retrieved via JSTOR May 5, 2011).

I.   Criminal History and the Guidelines: A Hypothetical Sentencing Scenario

The Guidelines provide a set of rules for determining the "criminal history score."[2] This score is calculated by adding the points assigned to certain eligible prior offenses—different types of prior offenses are assigned different weights.[3] In addition, a complex set of rules governs how older offenses are counted in the score. These rules comprise the 'decay factor,' a scoring approach used to discount the impact of criminal activity in the more distant past. However, all prior offenses, including those not scored, can be considered by the judge in determining the appropriate sentence.

To demonstrate how the decay factor operates, consider the hypothetical case of Joy Rider, a 42 year old defendant awaiting sentencing in D.C. Superior Court. On September 29, 2010, she broke into a car and was seen driving it around her neighborhood for three days before abandoning it in a parking lot several blocks from her apartment. She was arrested and eventually pleaded guilty to Unauthorized Use of a Motor Vehicle (UUV). Ms. Rider has a lengthy criminal record dating back to 1988 that includes both drug and property convictions as well as a previous conviction for UUV.

CRIMINAL RECORD FOR JOY RIDER		
Prior Conviction	**Felony/Misdemeanor**	**Sentenced**
Burglary II	Felony	7/11/1988 (ended 5/1991)
Possession of Cocaine	Misdemeanor	7/15/1991
Theft II	Misdemeanor	4/16/1993
PWID Cocaine	Felony	8/12/1994 (ended 4/1996)
Theft I	Felony	11/1/1996 (ended 6/2000)
Unlawful Entry	Misdemeanor	2/5/2004
Possession of Marijuana	Misdemeanor	3/8/2005
Possession of Cocaine	Misdemeanor	10/13/2005
UUV	Felony	12/2/2006
Shoplifting	Misdemeanor	9/22/2009

Because the Guidelines contain limitations on how older convictions contribute to an offender's criminal history, decay factors will certainly have an impact on Ms. Rider's criminal history score. With a criminal record spanning over two decades, the important issues to consider are whether any convictions could be excluded due to decay factors and under what circumstances could those convictions be considered in sentencing decisions for her current crime.
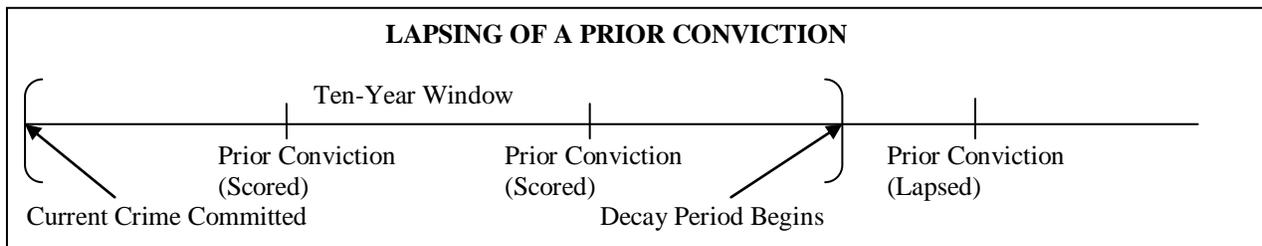
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[2] The criminal history score is calculated by adding all of the points accumulated from prior adult convictions and prior juvenile adjudications that are not decayed under the criminal history scoring rules. Points are weighted based on the seriousness of the offense, as ranked by the Guidelines. The total score then places the offender in one of five categories along the horizontal axis of the Guidelines grid, ranging from Category A, representing offenders with little or no criminal history, to Category E, representing those with six or more criminal history points. The intersection of this category with the Offense Severity Group determines the box containing the proposed sentencing range and sentencing options for that offender.

[3] Point values range from one-fourth to three points for adult convictions and from one-half to one and one-half points for felony juvenile adjudications. There are special rules for accessory after the fact convictions and, as detailed in this paper, for convictions that have decayed due to their age. See D.C. Voluntary Sentencing Guidelines (DCVSG) § 2.2.2 for an overview of these scoring rules.

II. Which Prior Convictions Count: "The Ten-Year Window"

"A prior conviction counts for scoring purposes if any portion of its sentence falls within the ten-year window before the <u>commission</u> of the instant offense." D.C. Voluntary Sentencing Guidelines (DCVSG) § 2.2.3

This rule sets the initial boundary for when a conviction in Ms. Rider's record might be too old to count in the criminal history score. The Guidelines refer to a "ten-year window" or a period of time in which prior convictions are active and automatically count in criminal history. It is called the ten-year window because it is defined by counting back ten years from the date of the current offense. Looking at what falls inside or outside of the ten-year window is a simple way of determining whether a prior felony or misdemeanor conviction will be excluded from the criminal history because of its age. Thus, recent convictions will be treated as more relevant than convictions committed over ten years ago. In the case of Ms. Rider, her current crime was committed on September 29, 2010, so her ten-year window is between that date and September 29, 2000. Prior convictions that fall within this ten-year period will always be scored while prior convictions that fall beyond the ten-year window will expire or "lapse" and not be included in the criminal history score, unless revived under the rules discussed in section III.

LAPSING OF A PRIOR CONVICTION

Ten-Year Window

Prior Conviction (Scored)   Prior Conviction (Scored)   Prior Conviction (Lapsed)

Current Crime Committed   Decay Period Begins

For a prior conviction to lapse, <u>every part of the sentence</u> must have been completed prior to the ten-year window, including probation, parole, and supervised release.[4] This is an important rule because even if the offender was released from prison outside of the ten-year window, the conviction will be scored if the offender was still on probation or supervised release for that conviction within the ten year window.[5]

Hypothetical: Will Any of Joy Rider's Convictions Lapse Due to Decay Factors?

The sentencing dates in Ms. Rider's criminal record clearly show that the last five convictions were sentenced after September 29, 2000, and are within the ten-year window. Those convictions will be included in the criminal history score. The sentences for the remaining convictions were all

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[4] A sentence is considered complete when the offender was sentenced, released from prison or finished probation, parole, or supervised release, whichever is later. If any of these events occurs within the ten-year window then the prior conviction will be included in the criminal history score.

[5] The decay rules for juvenile adjudications (crimes committed by persons under 18) function similarly to those for adult convictions but with a few differences. For juvenile adjudications, the window is <u>five</u> years rather than ten years. Also, the date used for determining when an adjudication lapses is different as well. For adult convictions, the date that the sentence for the prior conviction was completed is used to determine whether it lapses. However, for adjudications this date depends on the Offense Severity Group for the offense and whether the juvenile received a sentence to Oak Hill (or its functional equivalent) or to a locked residential facility. See DCVSG § 2.2.4 for complete scoring rules for juvenile adjudications.

completed by June 2000, which is beyond the ten-year window. This results in the convictions being excluded. So half of Ms. Rider's prior convictions will count towards her criminal history score while the other half of her prior convictions are too old, have lapsed, and will not be scored in her criminal history unless they are revived.
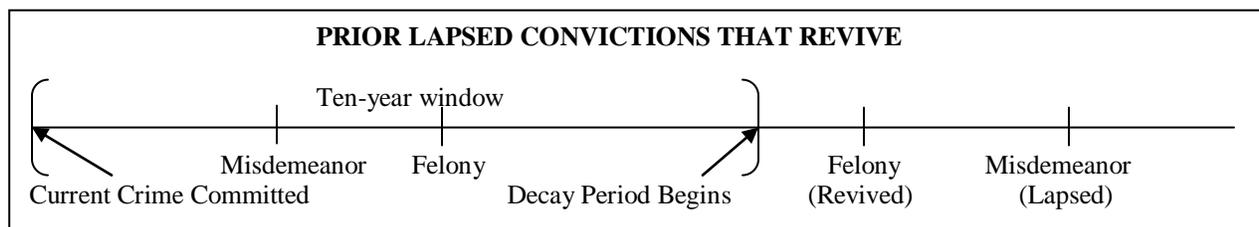
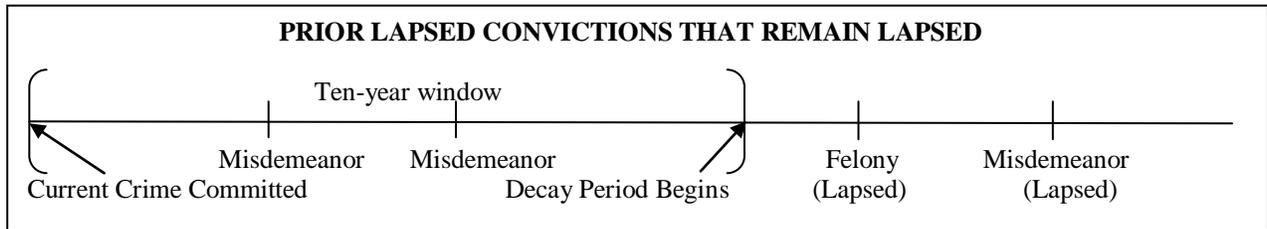| CRIMINAL RECORD FOR JOY RIDER			
Prior Convictions	**Felony/Misdemeanor**	**Sentenced**	**Scored?**
Burglary II	Felony	7/11/1988 (ended 5/1991)	Lapsed
Possession of Cocaine	Misdemeanor	7/15/1991	Lapsed
Theft II	Misdemeanor	4/16/1993	Lapsed
PWID Cocaine	Felony	8/12/1994 (ended 4/1996)	Lapsed
Theft I	Felony	11/1/1996 (ended 6/2000)	Lapsed
Unlawful Entry	Misdemeanor	2/5/2004	Yes
Possession of Marijuana	Misdemeanor	3/8/2005	Yes
Possession of Cocaine	Misdemeanor	10/13/2005	Yes
UUV	Felony	12/2/2006	Yes
Shoplifting	Misdemeanor	9/22/2009	Yes

III. When Can a Lapsed Conviction Be Revived?

"If any prior <u>felony</u> conviction or any part of its sentence (including incarceration, probation, parole or supervised release) occurred within the ten-year window preceding the commission of the instant offense, then all lapsed <u>felony</u> convictions are revived." DCVSG § 2.2.3.

Even though Ms. Rider's criminal history contains five convictions that have lapsed for being outside the ten-year window, there are circumstances when these lapsed convictions may be restored or "revived." What will cause her lapsed convictions to be scored is the presence of recent, serious criminal conduct, specifically felony convictions, that occurred in the previous ten years. A simple way to determine if this reviving is triggered is to look in the criminal record for any felony conviction within the ten-year window. If there is such a conviction, then every <u>felony</u> conviction in the criminal record will be scored, no matter how old and regardless of whether it had lapsed.

This rule applies only to felonies and not to misdemeanor convictions or offenses committed by juveniles—it is a felony conviction that triggers reviving and even then, it can only bring back other felonies. Once a misdemeanor or juvenile adjudication lapses, it cannot be revived or calculated into the criminal history score even if there is a later felony conviction within the ten year window. Likewise, a misdemeanor conviction or juvenile adjudication will not revive an expired, older conviction. If the ten-year window only includes misdemeanor convictions or juvenile adjudications, then all lapsed convictions will remain unscored.

PRIOR LAPSED CONVICTIONS THAT REVIVE

Ten-year window

Misdemeanor   Misdemeanor   Felony   Misdemeanor
Current Crime Committed   Decay Period Begins   (Lapsed)   (Lapsed)

However, even if a felony conviction is revived, its weight may be reduced in the criminal history score depending on the nature of the lapsed, but revived, conviction. Instead of receiving its full point value, many prior revived convictions are scored at half value; for example, a prior Receiving Stolen Property conviction is one point when active, but one-half point when revived. But certain convictions, such as Murder, Armed Robbery and first degree Burglary, are so serious that they will be scored the same whether they are within the ten-year window or are outside the ten-year window and revived by a subsequent felony within the ten-year window. This approach assures that more violent criminal behavior involving greater harm consistently receives the highest possible representation in the criminal history score.[6]

Hypothetical: Will Any of Joy Rider's Lapsed Convictions Revive?

Examining Ms. Rider's record reveals that of the convictions that are still active within the ten-year window, four are misdemeanors which cannot revive older convictions. However, the remaining unlapsed offense is a 2006 felony conviction for Unauthorized Use of a Motor Vehicle (UUV). Since it is a recent felony conviction that falls within the ten-year window, it will then revive all of the other felonies in the criminal history that had lapsed, even the oldest that goes back over two decades. This includes the 1996 conviction for Theft I, the 1994 conviction for PWID Cocaine, and the 1988 conviction for Burglary II. The remaining lapsed convictions are for misdemeanors so they cannot be revived.

CRIMINAL RECORD FOR JOY RIDER				
Prior Convictions	**Felony/Misdemeanor**	**Sentenced**	**Scored?**	**Points**
Burglary II	*Felony*	*7/11/1988 (ended 5/1991)*	*Revived*	*1*
Possession of Cocaine	Misdemeanor	7/15/1991	Lapsed	----
Theft II	Misdemeanor	4/16/1993	Lapsed	----
PWID Cocaine	*Felony*	*8/12/1994 (ended 4/1996)*	*Revived*	*1/2*
Theft I	*Felony*	*11/1/1996 (ended 6/2000)*	*Revived*	*1/2*
Unlawful Entry	Misdemeanor	2/5/2004	Yes	1/4
Possession of Marijuana	Misdemeanor	3/8/2005	Yes	1/4
Possession of Cocaine	Misdemeanor	10/13/2005	Yes	1/4
UUV	Felony	12/2/2006	Yes	1
Shoplifting	Misdemeanor	9/22/2009	Yes	1/4
TOTAL				**4**

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[6] The most serious offenses are in Master Grid Groups 1 through 5. All remaining groups on the Master Grid and Drug Grid revive at half value, except for Drug Group 4 which revives at ¼ point from ¾ point. See DCVSG § 2.2.2.

Applying this rule adds two points to Ms. Rider's criminal history score; several lapsed convictions were revived, but all at a reduced point value. This increase in her criminal history score will ultimately result in Ms. Rider's exposure to steeper penalties under the Guidelines.[7] Thus, the presence of a recent, serious crime had a substantial effect on the treatment given to old convictions in her criminal history.

IV. Lapsed but Not Forgotten

What becomes of old prior convictions that lapse due to decay rules and are not reflected in the criminal history score? Under the Guidelines, imposing a just penalty still involves considering criminal history as a whole even if not all of an offender's convictions are scored in the criminal history. As stated above, calculating the criminal history score is the initial step in identifying an appropriate, compliant sentence under the Guidelines. Although certain older convictions may be excluded, they may still be reflected in the sentence that an offender ultimately receives.

After using the criminal history score to determine the correct "box" on either the Master or Drug Grid, the sentence length within the range presented in each box must be determined. If the range is from 14 to 32 months for example, the judge must decide where to sentence within the given range. In order to determine the actual length of the sentence imposed within the given range, the sentencing judge can still give the appropriate weight to any conviction that was not scored due to the lapsing rules.[8]

Hypothetical: How Do Ms. Rider's Unscored Convictions Factor into Her Sentence?

In the hypothetical sentencing, Ms. Rider has two prior convictions that were excluded from the criminal history score due to decay factors—a 1991 conviction for Possession of Cocaine and a 1993 conviction for Theft II. These convictions still remain among the many factors that the sentencing judge must consider when imposing the most appropriate imprisonment term within the 18 to 36 month range in her recommended Guidelines box. These convictions may not have added any points to her criminal history score, but they continue to be a relevant aspect of her overall criminal record that the judge might consider in finding the right penalty for her current offense.

V. Summary of the Decay Rules under the D.C. Voluntary Sentencing Guidelines

There are a variety of ways that structured sentencing systems can evaluate an offender's criminal history even when the prior convictions date back many years. Under the District's Voluntary Sentencing Guidelines, a criminal sentence must account for certain prior convictions. The effect of each prior conviction on the offender's criminal history score, if any, depends on exactly how much older the prior criminal conviction is as well as the passage of time without serious criminal

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[7] Unauthorized Use of a Motor Vehicle is ranked in Group 8 on the Master Grid. If half of Ms. Rider's convictions lapsed, she would have a criminal history score of two points, placing her in Column C. The intersection of Master Group 8 and Column C (Box 8C) would have put her in a short split eligible box with a recommended range of 14 to 32 months. However, the additional two points from the revived convictions move her to Column D. Box 8D is a prison only box with a range of 18-36 months.

[8] This can include misdemeanor convictions or juvenile adjudications that lapsed for being beyond the ten-year window or also lapsed felony convictions that did not revive because there was no recent felony conviction to trigger the Guideline's reviving rules. There are caps to misdemeanor convictions and juvenile adjudications and the court can also consider in the same manner offenses that were not scored because they exceeded the cap. See DCVSG § 2.2.2.

offending.[9]   Convictions for which a sentence was completed at least ten years before the commission of the current crime are not ordinarily factored into the criminal history score. These lapsed felony convictions, however, are revived if the offender has another felony conviction on his or her record within the ten-year window. A judge can even consider lapsed convictions in choosing a sentence within the range and options set forth on the Master Grid or Drug Grid. These rules aim to provide proportionality and consistency in sentencing and help judges impose a just and appropriate punishment.

Ms. Rider's sentencing illustrates how these principles come into play under the Voluntary Sentencing Guidelines. Every one of her convictions factor into the court's ultimate sentencing decision, either as a part of her criminal history score or as a factor in determining the appropriate sentence length within the recommended range. Ms. Rider's felony conviction within the ten-year window had implications for reconsidering and increasing the impact of some of the older convictions that had lapsed due to their age. After several of her older convictions revived, her criminal history score went up and increased her exposure to a more severe penalty. Unless the court elected to depart from the Guidelines, the court was bound to impose a prison term of at least 18 months and no more than 36 months.[10]

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[9] Other considerations could include the type or classification of offenses committed between the older conviction and the current criminal conduct or the amount of punishment served since the older conviction.

[10] Departure principles allow a judge to "depart" or sentence outside of the recommended Guidelines ranges and options while still imposing a compliant sentence. This explanation of the judge's sentencing decision in Ms. Rider's case bars application of one of these departure principles or of any applicable statutory enhancement (which expand the penalties for a crime).

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