

# District of Columbia Voluntary Sentencing Guidelines Issue Paper: The Role of Misdemeanor Prior Convictions in D.C. Voluntary Sentencing Guidelines

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## I. District of Columbia Voluntary Sentencing Guidelines

The District of Columbia (“the District”) Voluntary Sentencing Guidelines (“the Guidelines”) were developed by the D.C. Sentencing Commission (“the Commission”) to promote certainty, consistency, and adequacy of punishment when sentencing felony offenses. Superior Court of the District of Columbia (“Superior Court”) judges utilize the Guidelines when making a sentencing decision: the Guidelines determine the recommended sentence type and length for each felony offense to be sentenced. The recommended sentence is based on a defendant’s criminal history and the severity of the offense for which they are convicted. When judges follow the Guidelines and impose the recommend sentence (both type and length), that sentence is deemed “Guidelines Compliant”. It should be noted that the District's Guidelines are voluntary, thus judges are not required to follow them.

In order to determine the recommended sentence, judges will reference one of two Grids: the Drug Grid or the Master Grid.<sup>1</sup> The Drug Grid is used to determine the recommended sentence for felony drug offenses, while the Master Grid is used for all non-drug felony offenses. Both Grids provide a list of offenses on the left side (vertical axis) of the Grid. All felony offenses are ranked into one of nine offense severity groups (“OSG”), with the most serious offenses at the top. Across the top of the Grid (horizontal axis) the five criminal history (“CH”) categories are presented.

The intersection (“Grid Box”) of a defendant’s CH category and the OSG of their offense of conviction is used as the proxy to measure the seriousness of the offense, the dangerousness of the defendant, the need to protect the safety of the community from the defendant, and the defendant’s potential for rehabilitation.<sup>2</sup> The Grid Box identifies the Guidelines recommended sentence. The color of the box indicates the recommended sentence type(s); the numbers in each box represent the recommended range of sentence length, in months. The more serious the offense of conviction and the higher the CH category, the more severe the Guidelines recommended sentence will be.

A defendant’s criminal history score includes points scored for their prior convictions for both felony and misdemeanor offenses. This paper will examine when and how prior misdemeanor convictions count towards defendants’ criminal history scores, in order to increase awareness among practitioners and residents of the impact of such convictions under the Guidelines.

## II. Scoring Prior Misdemeanor Convictions

Under the Guidelines, unless lapsed<sup>3</sup>, only prior adult convictions and juvenile adjudications are scored in calculating defendants’ criminal history points. In line with the principle of presumption of innocence (innocent until proven guilty), defendants’ other criminal justice contacts, such as arrests, are not counted towards a criminal history score. The scoring of prior convictions and adjudications are determined by their type and severity. For instance, convictions for the most severe felony adult offenses, classified in OSGs M1 to M5, are scored 3 points. In comparison, those for the least severe felony adult offenses in OSG D4 are scored 0.75 points.

Unlike felonies, misdemeanors are criminal offenses that may be punishable by one year of incarceration, *or less*, including probation, monetary fines, community service, and so forth. Examples of misdemeanors include disorderly conduct, possession of an open container of alcohol, and drinking or urinating in public. Misdemeanors are considered to be significantly less severe than felonies. Like most jurisdictions, the District’s Guidelines limit the contribution that misdemeanors can make to the criminal history score. Adult prior misdemeanor convictions are scored at 0.25 points. Lapsed misdemeanor convictions, along with juvenile misdemeanor adjudications, are never scored. Similarly, misdemeanors for which the maximum penalty is less than 90 days of incarceration are not scored. Finally, misdemeanors are capped at 1 point in total: only up to four prior misdemeanor convictions can be scored for criminal history purposes.

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<sup>1</sup> See Appendix or <https://scdc.dc.gov/page/sentencing-guideline-grid-charts> for the Master and Drug Grids.

<sup>2</sup> See D.C. Code § 3–101 regarding the statutory duties of the Commission.

<sup>3</sup> If the amount of time between the completion of the sentence for a prior conviction and the commission of the instant/current offense is more than ten years, then that prior conviction *lapses*: it is not counted towards a defendant’s criminal history score. All lapsed prior felony convictions are *revived* and scored if the defendant had any non-lapsed prior felony convictions.

**Hypothetical Scenario A:** Consider the case of a defendant who had **no prior criminal history** and who plead guilty to Theft I, an offense in OSG M8. With the defendant in CH group A and their offense of conviction in OSG M8 (Grid Box M8: A), the Guidelines would recommend a sentence of *6 to 24 months of incarceration, with a short split or probation sentence permissible*.

**Hypothetical Scenario B:** Consider a second case, where the defendant plead guilty to the same offense as above, but had **a prior conviction for Possession of Heroin (misdemeanor)**. With the prior misdemeanor scored at 0.25 points, the defendant would fall in the same box as the defendant in the previous scenario (Grid Box M8: A).

**Hypothetical Scenario C:** Consider a third case, where the defendant plead guilty to the same offense as above, but **had numerous prior convictions**. The defendant's prior convictions include: two prior convictions for Possession of Heroin (misdemeanor), Possession of Cocaine (misdemeanor), Shoplifting (misdemeanor), Theft II (misdemeanor), Possession of Drug Paraphernalia (misdemeanor punishable up to 30 days incarceration), Failure to Appear for Jury Duty (misdemeanor punishable up to 7 days incarceration), and Theft I (felony in OSG M8).

In Scenario C the two prior misdemeanor convictions punishable less than 90 days are not counted (Possession of Drug Paraphernalia and Failure to Appear for Jury Duty). Of the five remaining misdemeanors, only 4 are scored at 0.25 points each, due to the misdemeanor 1 point scoring cap. The only prior felony conviction is scored at 1 point, given it is in OSG M8. With a total criminal history score of 2, the defendant falls in Grid Box M8: C, where the Guidelines recommended sentence is increased to *14 to 32 months of incarceration, with only a short split rather than a probation sentence permissible*. Note that, without counting the prior misdemeanor convictions, the sentence would have fallen instead in Grid Box M8: B, where the recommended sentence is *10 to 28 months incarceration, with both short split and the probation still permissible*.

### III. Trends in Scored Prior Misdemeanor Offenses

The Court Services and Offender Supervision Agency for the District of Columbia ("CSOSA") provides the Commission with data on defendants' prior convictions and adjudications, including the points that each contributed towards a defendant's total CH score. Accordingly, the Commission has data on 16,830 scored prior convictions and adjudications for 4,625 defendants in 5,051 cases that were sentenced between 2015 and 2019.<sup>4</sup>

Data indicated that:

- Of the 5,051 cases, almost three in four cases (74%, n=3,735) involved one or more scored prior misdemeanor convictions.
- Commonly scored misdemeanor offenses included: Simple Assault, Failure to Appear (in court), Unlawful Entry, No Permit (to operate a vehicle), and Possession of a Controlled Substance.<sup>5</sup>
- In nearly one third of the cases (28%, n=1,428), all scored prior convictions were only misdemeanors.
- A defendant was moved to a higher CH group because of prior misdemeanor(s) in 22% of cases (n=1,088), impacting 1,014 defendants. Had prior misdemeanor convictions not been scored, one in five cases would have been sentenced in a lower CH group.
  - Prior misdemeanor convictions moved defendants most frequently from CH group A to B (in 639 cases) or B to C (in 270 cases).
  - In 173 cases, a defendant was moved from a probation or short split eligible Grid Box (such as M6: A) to a presumptive prison Grid Box (such as M6: B) due to the scoring of one or more prior misdemeanors.

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<sup>4</sup> Source: D.C. Sentencing Commission 2019 Snapshot data file. Data includes felony sentences imposed between 2015 and 2019, was received from the Superior Court, and was current as of January 2, 2020. Non-Guideline and indeterminate sentences, sentences resulting from a probation revocation or remand, cases for which the Commission did not receive a list of prior conviction scored, and cases in which the defendant had no scored prior convictions are excluded from the data. A second dataset, current as of August 18, 2020, was utilized to obtain prior convictions and adjudications that were scored by CSOSA in these cases.

<sup>5</sup> Note that names for offenses of prior conviction, when available, are provided to the Commission as unstructured textual data.

- In a minority of cases (41), prior misdemeanor convictions moved a defendant to the highest CH group E. The Guidelines does not provide an upper limit on the recommended incarceration sentence length for defendants in this CH group.

## V. Conclusion

Under the District’s Guidelines, a defendant’s CH score is one of two key components in determining the recommended sentence for a defendant for each offense of conviction. The total CH score a defendant may receive for prior misdemeanor convictions is capped at 1 point. Further, unlike prior felony convictions, prior misdemeanor convictions that lapse after the 10-year window can never be revived.

Though misdemeanors represent a less serious criminal activity, their contribution to a defendant’s CH score has the potential to increase the severity of both the length and type of sentence imposed. Data indicated that a defendant’s CH score consisted solely of prior misdemeanor convictions for one in three felony cases. Scored prior misdemeanors moved defendants to a higher CH group in one in five felony cases. In a minority of cases, had prior misdemeanor convictions not been scored, defendants would not have moved to a prison-only Grid Box.

## Appendix: Master and Drug Grids

Master Grid

	Severity Group (OSG) Most Common Offenses	Criminal History Score / Group				
		0 to ½ A	¾ to 1¼ B	2 to 3¾ C	4 to 5½ D	6 + E
3 Points*	<b>Group 1</b> 1st degree murder w/armed 1st degree murder	360-720	360-720	360-720	360-720	360 +
	<b>Group 2</b> 2nd degree murder w/armed 2nd degree murder 1st degree sex abuse 1st degree sex abuse w/armed	144-288	156-300	168-312	180-324	192 +
	<b>Group 3</b> Voluntary manslaughter w/armed 1st degree child sex abuse Carjacking while armed Assault with intent to kill w/armed Armed burglary I	90-180	102-192	114-204	126-216	138 +
	<b>Group 4</b> Aggravated assault w/armed Voluntary manslaughter	48-120	60-132	72-144	84-156	96 +
	<b>Group 5</b> PFCOV Armed robbery Burglary I Obstruction of justice Assault with intent to kill	36-84	48-96	60-108	72-120	84 +
2 Points*	<b>Group 6</b> ADW Robbery Aggravated assault 2nd degree child sex abuse Assault with intent to rob	18-60	24-66	30-72	36-78	42 +
	<b>Group 7</b> Burglary II 3rd degree sex abuse FIP-COV Negligent homicide Attempt 2nd degree sex abuse	12-36	18-42	24-48	30-54	36 +
1 Point*	<b>Group 8</b> CPWL UUV Attempt robbery/burglary FIP 1st degree theft Assault w/significant bodily injury	6-24	10-28	14-32	18-36	22 +
	<b>Group 9</b> Escape/prison breach BRA Receiving stolen property Forgery/uttering Fraud	1-12	3-16	5-20	7-24	9 +

Drug Grid

	Severity Group (OSG) Most common offenses	Criminal History Score / Group				
		0 to ½ A	¾ to 1¼ B	2 to 3¾ C	4 to 5½ D	6 + E
2 Points*	<b>Group 1</b> Distribution w/a (any drug) PWID w/a (any drug)	30-72	36-78	42-84	48-90	54+
	<b>Group 2</b> Distribution or PWID (schedule I or II narcotic/ abusive drugs)	12-30	16-36	20-42	24-48	28+
1 Point*	<b>Group 3</b> Distribution or PWID (except schedule I or II narcotic or abusive drugs) Attempt distribution or attempt PWID (schedule I or II narcotic/ abusive drugs) Possession of Liquid PCP	6-18	10-24	14-30	18-36	22+
	<b>Group 4</b> Attempt distribution or attempt PWID (except schedule I or II narcotic or abusive drugs) Attempt possession of liquid PCP	3-12	5-16	7-20	9-24	11+

\*Criminal History Points for prior convictions in these groups.

White/unshaded boxes – prison or compliant long split only.

Green shaded boxes – prison, compliant long split, or short split permissible.

Yellow shaded boxes – prison, compliant long split, short split, or probation permissible.

\*Criminal History Points for prior convictions in these groups.

White/unshaded boxes – prison or compliant long split only.

Green shaded boxes – prison, compliant long split, or short split permissible.

Yellow shaded boxes – prison, compliant long split, short split, or probation permissible.