

Criminal Sentencing Task Force
Sentencing Grid Subgroup

**DRAFT Potential Recommendations – Misdemeanor Scoring in Criminal History Score
as of 5.26.22**

Criminal History Score Overview

Criminal History Score (called the offender score, RCW 9.94A.525) is one factor affecting a felony sentence and is measured on the horizontal axis of the sentencing guidelines grid. An individual may receive from 0 to 9+ points on that axis. In general, the number of points received depends on five factors: (1) the number of prior criminal convictions or juvenile dispositions; (2) the relationship between any prior offense(s) and the current offense of conviction; (3) the presence of other current convictions; (4) the person's community custody status at the time the crime was committed; and (5) the length of crime-free behavior between offenses.

Pursuant to RCW 9.94A.030(11), criminal history includes the defendant's prior adult convictions and juvenile court dispositions, whether in this state, in federal court, or elsewhere, and any issued certificates of restoration of opportunity. Although criminal history consists almost exclusively of felony convictions, in some instances, it also includes misdemeanors. The effect of criminal history also relates to the felony class of the crime (Class A, Class B or Class C), and the type of offense (i.e., serious violent, violent, nonviolent, sex, etc.).

The general rule for scoring is that prior felony convictions count as:

- Adult offenses count as 1 point
- Juvenile Violent offenses count as 1 point
- Juvenile non-violent (NV) offenses count as 1/2 point (rounded down)

In addition:

- If there is more than one offense in a sentence, the current offenses will score against one another, but are run concurrently (at the same time). There are exceptions that we'll go over in the scoring document (SV & certain weapon offenses)
- If a person was under community custody at the time of the current offense, 1 pt is added to the criminal history score.
- Offenses score as if they were a completed offense (example: Robbery 2° is a Violent offense and Attempted Robbery 2° is NV, but would be scored as Violent offense).

- Only offenses ranked on the adult felony sentence grid are scored – unranked offenses have a score of 0 and a standard range of 0-12 months.

Misdemeanor Scoring in Criminal History Scoring

Prior Misdemeanor convictions count in the criminal history score in four unique situations:

1) Felony Traffic Offenses

- Adult and Juvenile Vehicular Homicide or Vehicular Assault offenses count as 2 points
- Certain adult Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1 point***
- Certain juvenile Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1/2 point***
- Adult convictions of Operation of a Vessel under the Influence offenses count as 1 point and juvenile offenses for Operation of a Vessel offenses under the Influence count as ½ point.
- Any other felony offenses count standard

2) Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1st degree or 2nd degree – Vehicular Prowling Misdemeanor Priors

- Misdemeanor offense of vehicular Prowling counts as 1 point***
- Adult and Juvenile offenses of Theft 1° or 2° of a Motor Vehicle, Possession of Stolen Property 1° or 2° of a Motor Vehicle, Theft of a Motor Vehicle, Possession of a Stolen Vehicle, or Taking a Motor Vehicle without the Owner's Permission 1° or 2, count as 3 points
- Any other felony offenses count standard

3) Homicide or Assault by Watercraft Offenses

- Adult and Juvenile Homicide or Assault by Watercraft offenses count as 2 points
- Certain adult Traffic Misd/Gross Misd offenses count as 1 point**
- Certain juvenile Traffic Misd/Gross Misd offenses count as ½ point**
- Any other felony offenses count standard

4) Felony Domestic Violence

- Count 2 points for each Adult offense where DV was pleaded/proven after 8/1/2011 for any of the following offenses: Violation of a No Contact or Protection Order, felony Harassment, felony Stalking, Burglary 1°, Kidnapping 1° or 2°, Unlawful Imprisonment, Robbery 1° or 2°, Assault 1°, 2° or 3°, or Arson 1° or 2°.
- Count 2 points for each Adult offense where DV was pleaded/proven after 7/23/2017 for any of the following offenses: Assault of a Child 1°, 2° or 3°, or Criminal Mistreatment 1° or 2°.

- c. Count 1 point for each 2nd and subsequent Juvenile offense with DV was pleaded/proven after 8/1/2011 for the list of offenses under (a) above.
- d. Count one point for each adult offense for a repetitive domestic violence offense (misd/GMs), where domestic violence was pleaded/proven after 8/1/2011**
- e. Any other felony offenses count standard

Potential Recommendations

Scoring exceptions depend on the type of current offense and the types of prior misdemeanor convictions. As Superior Courts primarily handle felony offenses under the SRA, it may be argued that the criminal history score calculations should be limited to the same jurisdiction – felony offenses. The current misdemeanor scoring exceptions create confusion for courts and other agencies who use the CHS (e.g., Caseload Forecast Council, Department of Corrections).

The Grid Subgroup discussions focused on the logic behind the four scoring exceptions and explored ways that the same goals can be achieved through alternative means while increasing transparency, simplifying the CHS calculation process (increasing efficiency), and reducing errors in calculating CHS.

The following potential recommendations include a separate change for each of the four current scoring exceptions. In combination, these changes would eliminate all special scoring exceptions for misdemeanors in the CHS. An additional potential recommendation recommends including language in the SRA that would define the scope of the CHS as limited to prior felony convictions.

Scoring exception 1: Felony Traffic (Felony DUI, veh assault/homicide)

Status Quo:

Certain adult Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1 point

Certain juvenile Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1/2 point

Potential Recommendation 28: *Eliminate the special misdemeanor scoring exceptions for felony traffic offenses.*

Potential Recommendation 28a: *Reclassify felony DUI and physical control from OSL 4 to OSL 6.*

Grid Subgroup Discussion Notes:

Reduces complexity and errors:

- Prior misdemeanor DUIs are themselves an element of felony DUI. Thus, in the status quo, the prior convictions both increase the seriousness of offense in the court and increase a person's criminal history score. This means that individuals charged with felony DUI will rarely have a CHS of 0 or 1.

- Eliminating the scoring exceptions without changing the offense seriousness level would create a situation where individuals may have a lesser sentence for the felony DUI than the mandatory minimum for a 3rd misdemeanor DUI which is 180 days.

Improving Effectiveness of the Sentencing System:

- Felony is a class B felony. Reclassifying it as OSL 6 would put it in the middle of the grid where Class B offenses are generally concentrated. For an individual in OSL 6 with a CHS of 0, the recommended sentence range would be highly similar to the recommended sentence range of individuals in OSL 4 with a CHS of 3. Thus, prosecutors and judges would still be able to seek similar sentences, but without the unnecessary complication in the Criminal History Score.

Scoring Exception 2: Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner’s Permission 1st degree or 2nd degree – Vehicular Prowling Misdemeanor Priors

Status Quo:

Misdemeanor offense of Vehicular Prowling 2° counts as 1 point

Potential Recommendation 29a: Eliminate the special misdemeanor scoring exceptions for vehicular prowling and create a new subsection on Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner’s Permission 1st degree or 2nd degree for individuals with two prior misdemeanor convictions of vehicle prowl. Make this new subsection OSL 4.

Grid Subgroup Discussion Notes:

Reduces complexity and errors and Improving the Effectiveness of the Sentencing System:

- The rationale for this scoring exception is that stealing a car is considered a continuation or escalation of previous vehicle prowl behaviors. A third or subsequent vehicle prowl 2 offense becomes a felony offense at OSL 4. For individuals with their first theft of a motor vehicle, it is a felony offense at OSL 2, but the prior prowls increase criminal history score.
- Not all vehicle prowls are with the intent to steal a car – thus theft of a motor vehicle may not always reflect increasing intensity of behaviors – it may be a change in behavior. However, for those who are prowling with intent to steal a car, it doesn’t make sense that the third time they’re caught for prowl (i.e., they are stopped before they steal the car) the sentence is greater than the individual who successfully steals the car on the third try.
- Creating a new offense for theft of a MV with two prior vehicle prowls and making that OSL 4 makes it consistent with the third and subsequent vehicle prowl convictions. However, it should be considered whether it makes sense to have these MV theft offense at OSL 4, given the other offense in this OSL.

- Eliminating the special scoring rules increases transparency, increases defense flexibility in plea bargaining process, and significantly reduces complexity and error in the calculation of CHS.

Potential Recommendation 29b: *Eliminate the special exception misdemeanor scoring for vehicle prowl.*

Grid Subgroup Discussion Notes:

Reduces complexity and errors and Improving the Effectiveness of the Sentencing System:

- Given the type of offenses in OSL 4, theft of motor vehicle does not seem to fit in this OSL – not comparable to the type of offenses.
- Concerns expressed that this scoring exception is the result of the “crime-of-the-day” logic. Represents an expansion of the authority under the SRA which is otherwise focused on felony offenses.

Scoring exception 3: Homicide or Assault by Watercraft Offenses

Status Quo:

Certain adult Traffic Misd/Gross Misd count as 1 point

Certain juvenile Traffic Misd/Gross Misd offenses count as 1/2 point

Potential Recommendation 30: *Eliminate the special misdemeanor scoring exceptions for homicide or assault by watercraft offenses and reclassify to the same OSL as the felony traffic offense.*

Grid Subgroup Discussion Notes:

Reduces Complexity and Errors and Improving the Effectiveness of the Sentencing System:

- Reduces complexity by having these offenses mirror traffic offenses. Committing the same offense in a boat vs. a car is really about a different affluence of the individual committing the offense.
- Felony traffic offenses for which misdemeanors count should be limited to offenses that can be committed by vehicle and boat.
- Felony traffic does include things that you wouldn’t have in a boat, for example, eluding.

Scoring exception 4: Felony Domestic Violence

Status Quo:

Count one point for each adult offense for a repetitive domestic violence offense (misd/GMs), where domestic violence was pleaded/proven after 8/1/2011

Potential Recommendation 31: *Eliminate the misdemeanor scoring exception and instead create an aggravated factor or enhancement.*

- *Maintain a way for judges to consider prior misdemeanor DV at sentencing.*
- *Aggravating factor would then be constrained under the potential recommendation for limiting increases in sentences as a result of aggravating factor.*
- *Potentially limited to offenses involving the same victim/same relationship.*
- *Potentially an option similar to the repeat violent column approach.*

Grid Subgroup Discussion Notes:

Reduces Complexity and Errors, Improving the Effectiveness of the Sentencing System, and Promotes/Improves Public Safety:

- Prior DV is a high predictor of lethality in DV.
- Doesn't require that the priors be against the same person. But still allowed to be introduced in court.

Potential Recommendation 32: *Include language in the SRA that would define the scope of the CHS as limited to prior felony convictions.*

Grid Subgroup Discussion Notes:

Reduces Complexity and Errors and Improving the Effectiveness of the Sentencing System:

- Would increase the likelihood of long-term consistency and prevent future misdemeanor scoring exceptions, which create complexity and increase calculation errors. Currently disproportionate discretion in that full discretion of the legislature to decide when they should or should not count.
- SRA was not originally intended to cover misdemeanors except for where there is an explicit step up of the same offense (e.g., DUI).
- Inclusion of misdemeanors has led to complexity, errors in calculating CHS, and uncertainty. Inherent issues with reliability and accuracy of prior misdemeanors because reliance on municipal court data.