

Criminal History Primer



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CRIMINAL HISTORY PRIMER

The purpose of this Primer is to provide a general overview of the sentencing guidelines, pertinent statutes, issues, and case law relating to the calculation of a defendant's criminal history pursuant to Chapter Four of the Guidelines.

I. INTRODUCTION - Overview

The Grid. The Guideline sentencing table is comprised of two components: Offense Level and Criminal History Category. Criminal history forms the horizontal axis and is divided into six categories, from I (low) to VI (high). Chapter Four, Part A provides instruction on how to calculate a defendant's criminal history score by assigning points for certain prior convictions. The number of points scored for a prior sentence (from 1-3) is based primarily on the length of the prior sentence. Two points are added if the defendant commits the instant federal offense while under criminal justice supervision. However, prior sentences for conduct that was part of the instant offense are not counted. Some prior sentences are not counted because of staleness, their minor nature, or other reasons. For offenses committed before the age of 18, some prior convictions are scored differently regarding staleness issues. A defendant's criminal history category, combined with the total offense level, determines the advisory Guideline range.

Certain Repeat Offenders. The nature of a defendant's criminal record may affect the calculation of the criminal history score. Statutory enhancements that require mandatory minimum sentences may result in increased statutory maximums and the application of different criminal history guidelines. Certain criminal convictions, generally relating to crimes of violence and drug offenses, may increase the defendant's guideline offense level. Assessing these prior convictions requires careful scrutiny to determine whether a particular prior state or federal conviction fits the specific definition that triggers the enhanced penalty provisions. Chapter Four, Part B provides instruction on how to calculate enhanced criminal history scores and offense levels for certain repeat offenders.

Timing. Because statutory and guideline provisions contain different definitions of prior offenses, the timing requirements of each require careful consideration. For example, Chapter Four and the firearms guideline impose remoteness constraints on the use of prior convictions, but the statutes do not. *See* 8 U.S.C. § 1326(b); 18 U.S.C. § 924(e); 21 U.S.C. § 841(b). The immigration guideline contains a sliding scale for prior convictions depending on whether the prior sentences received criminal history points.

Departures. Departures for over-representation or under-representation of criminal history are authorized by the policy statements set forth in §4A1.3. A departure from the guideline range may be warranted when a defendant's criminal history does not adequately reflect the seriousness of past criminal conduct or the likelihood that the defendant will commit other crimes. Likewise, a departure may be authorized if a defendant's criminal history overstates the seriousness of his past criminal record.

II. CHAPTER FOUR, PART A – CRIMINAL HISTORY

A. Computation

At the outset, and excluding staleness concerns, the calculation of the criminal history category starts with computing how many points each prior conviction carries.

1. Section §4A1.1 provides as follows:

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.
- (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status.
- (e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a),(b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points.

Please note that an unlimited number of points can be assigned for (a) and (b) type convictions and, under subsection (e), convictions for crimes of violence can override the four point limit on (c) type sentences up to three additional criminal history points.

B. Definitions and Instructions

Section 4A1.2 contains key definitions and specific instructions for computing criminal history.

- 1. **“Prior Sentence”** Under §4A1.2(a), a “prior sentence” is “any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.” A conviction counts as a sentence even if it was for conduct that occurred after the offense of conviction. *United States v. Lopez*, 349 F.3d 39, 41 (2d Cir. 2003). Courts are divided over whether to consider a sentence imposed after the original sentencing but before re-sentencing. *Compare United States v. Klump*, 57 F.3d 801 (9th Cir. 1995) (can consider), and *United States v. Bleike*, 950 F.2d 214 (5th Cir. 1991) (not plain error to consider), with *United States v. Ticchiarelli*, 171 F.3d 24 (1st

Cir. 1999) (improper to consider intervening sentence under law of the case doctrine).

- a. **Relevant Conduct.** A sentence is not counted for conduct that is “part of the instant offense” if it would be considered relevant conduct under §1B1.3. Compare *United States v. Henry*, 288 F.3d 657 (5th Cir. 2002) (firearms and trespass), *United States v. Salter*, 241 F.3d 392 (5th Cir. 2001) (tax evasion related to money laundering and drug offenses), and *United States v. Thomas*, 54 F.3d 73 (2d. Cir. 1995) (state larceny related to federal forgery), with *United States v. Yerena-Magana*, 478 F.3d 683 (5th Cir. 2007) (illegal reentry not part of drug offense).
- b. **Multiple prior sentences.** Prior sentences are always counted separately if the offenses were separated by an intervening arrest (an arrest that precedes commission of the second offense). Compare *United States v. Williams*, 533 F.3d 673, 676-77 (8th Cir. 2008) (no intervening arrest where defendant was arrested for first offense after commission of second), with *United States v. Smith*, 549 F.3d 355, 361 (6th Cir. 2008) (count second offense committed while on bond for the first). See also *United States v. Leal-Felix*, 665 F.3d 1037, 1039 (9th Cir. 2011) (Defendant’s two driving while license suspended “citations” are not considered formal arrests for criminal history purposes and thus, cannot be “intervening arrests”). “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) the sentences were imposed on the same day.” §4A1.2(a)(2) (emphasis added).
- c. **Single prior sentences.** If prior sentences are counted as a single sentence, use the longest sentence if concurrent sentences were imposed and the aggregate sentence if consecutive sentences were imposed. §4A1.2(a)(2).
- d. **Revocation sentences.** Sentences imposed upon revocation of probation, parole, or supervised release sentences are counted and the term of imprisonment is added to the original sentence to compute the correct number of criminal history points. See §4A1.2(k)(1).

2. **“Sentence of Imprisonment”** This term refers to the maximum sentence imposed; that is, the sentence pronounced by the court, not the time

actually served. §4A1.2(b)(1). An indeterminate sentence is treated as the maximum sentence. §4A1.2, comment. (n.2); see *United States v. Levenite*, 277 F.3d 454 (4th Cir. 2002) (indeterminate sentence of two days to 23 months scored under §4A1.1(a) even though defendant actually served two days). If the court reduces the prison sentence, however, the reduced sentence controls. *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006).

- a. **Suspended sentence.** If part of the sentence is suspended, the “sentence of imprisonment” includes only the portion that was not suspended. §4A1.2(b)(2); see, e.g., *United States v. Tabaka*, 982 F.2d 100 (3d Cir. 1992) (all but two days suspended). If a defendant receives “time served” the actual time spent in custody will be counted. Compare *United States v. Rodriguez-Lopez*, 170 F.3d 1244 (9th Cir. 1999) (adding two points for 62 days served), with *United States v. Dixon*, 230 F.3d 109 (4th Cir. 2000) (58 days spent in custody did not warrant two points); see also *United States v. Hall*, 531 F.3d 414 (6th Cir. 2008) (time credited on another sentence did not count in calculating criminal history points).

- b. **Did defendant serve a term of imprisonment?** In determining whether a defendant has served a term of imprisonment, the court looks to the nature of the facility, rather than its purpose. *United States v. Brooks*, 166 F.3d 723 (5th Cir. 1999); *United States v. Latimer*, 991 F.2d 1509 (9th Cir. 1993). In *Brooks*, the court held that incarceration boot camp was a prison sentence. 166 F.3d at 725-26. The court distinguished between facilities like the boot camp “requiring 24 hours a day physical confinement” and other dispositions such as “probation, fines, and residency in a halfway house.” *Id.* Generally, community type confinement is deemed to be a substitute for imprisonment. §§5B1.3(e)(1), (2), 5C1.1(c), (d); see *United States v. Phipps*, 68 F.3d 159 (7th Cir. 1995); *Latimer*, 991 F.2d at 1512-13. A six-month sentence of home detention is not considered a sentence of imprisonment. *United States v. Gordon*, 346 F.3d 135 (5th Cir. 2003). The courts have largely held that community treatment centers or halfway houses are not imprisonment. *United States v. Pielago*, 135 F.3d 703, 711-14 (11th Cir. 1998); *Latimer*, 991 F.2d at 1511. *But see United States v. Rasco*, 963 F.2d 132 (6th Cir. 1992) (community treatment center upon revocation of parole is to be viewed as part of the original term of imprisonment and, thus, incarceration).

3. **Felony Offense.** A felony offense is **any** offense under federal, state, or local law that is punishable by a term of imprisonment exceeding one year, regardless of the actual sentence imposed. §4A1.2(o). This definition requires careful review of certain prior misdemeanors in jurisdictions where some misdemeanor offenses carry two-year or three-year statutory maximums. *United States v. Coleman*, 635 F.3d 380 (8th Cir. 2011) (state misdemeanor punishable by less than two years is a qualifying felony for career offender purposes). However, in at least one jurisdiction, certain classes of felonies are not punishable by more than one year. *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc) (prior North Carolina felony that did not expose defendant to a term of imprisonment greater than one year was not a qualifying felony for purposes of a sentencing enhancement under 21 U.S.C. § 851).
4. **Minor Sentences.** Certain misdemeanors — careless or reckless driving, gambling, driving without a license, disorderly conduct, prostitution, resisting arrest, trespassing — are counted only if they resulted in a prison sentence of at least thirty days or more than one year of probation, or they are similar to the instant offense. §4A1.2(c)(1). Other petty offenses — fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, vagrancy — are never counted. §4A1.2(c)(2). Convictions for driving while intoxicated and other similar offenses are always counted. §4A1.2, comment. (n.5).
5. **Timing and Status Concerns.** Whether a prior conviction is scored for the criminal history computation depends on a number of factors — the age of the prior conviction, the date of imposition of the sentence, the length of the prior sentence, and any sentence imposed upon revocation of the prior sentence — and whether the prior convictions were for offenses committed before the age of 18. Likewise, the status of the defendant at the time of the instant federal offense matters and may result in criminal history points.
 - a. **15 year window for prior sentences greater than 13 months.** Three points are assigned to each adult sentence of imprisonment exceeding one year and one month **imposed** within fifteen years of the instant offense **or** resulting in incarceration during the fifteen year period. §4A1.2 (e)(1). This provision may result in the scoring of remote convictions, especially where a defendant was on parole or supervised release and was revoked and incarcerated during the fifteen-year period immediately preceding the instant offense. §4A1.2(k)(2)(A). *See, e.g., United States v. Semsak*, 336 F.3d 1123 (9th Cir. 2003) (revocation of parole). The court will

count a conviction of a defendant whose parole is revoked during the operative time period, even if the defendant is incarcerated for a new offense at the time of revocation. *United States v. Ybarra*, 70 F.3d 362 (5th Cir. 1995). A defendant on escape status is deemed incarcerated. *United States v. Radzicz*, 7 F.3d 1193 (5th Cir. 1993).

- b. **Ten year window for sentences less than 13 months.** For sentences less than 13 months, there is a ten year time limitation, which runs from the date sentence is imposed, not when it is served. §4A1.2(e)(2). Likewise, the time limit runs from the original imposition date, not the revocation date, **unless** the defendant receives more than one year and one month upon revocation. §§ 4A1.2 (a)(1), (e)(2), (k)(2)(B); *United States v. Arviso-Mata*, 442 F.3d 382 (5th Cir. 2006) (sentence imposed when defendant found guilty and sentence was suspended); *United States v. Arnold*, 213 F.3d 894 (5th Cir. 2000).
- c. **Status of defendant at time of federal offense.** Two criminal history points are added if the instant offense was committed while the defendant was under a criminal justice sentence. §4A1.1(d). This provision covers virtually all forms of suspended sentences where there is a possibility of a custodial sentence, *see, e.g., United States v. Giraldo-Lara*, 919 F.2d 19 (5th Cir. 1990) (diversion); *see also United States v. Perales*, 487 F.3d 588 (8th Cir. 2007) (same), even if there is no active supervision. *See, e.g., United States v. Miller*, 56 F.3d 719 (6th Cir. 1995) (conditional discharge similar to unsupervised probation). However, a suspended sentence where a fine is the only sanction is not considered to be a criminal justice sentence. §4A1.1, comment.(n.4); *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993). A defendant is deemed to be on probation even if the State did not use due diligence to arrest him. *United States v. Anderson*, 184 F.3d 479 (5th Cir. 1999); *see also United States v. McCowan*, 469 F.3d 386 (5th Cir. 2006). The defendant must actually be serving the sentence at the time he commits the federal offense. Thus, a defendant whose probation was imposed following indictment is not under a criminal justice sentence. *United States v. Brazell*, 489 F.3d 666 (5th Cir. 2007); *see also United States v. Caldwell*, 585 F.3d 1347 (7th Cir. 2009). Note, however, that a defendant who escapes while awaiting sentencing is deemed to be under a criminal justice sentence, *United States v. Arellano-Rocha*, 946 F.2d 1105 (5th Cir. 1991), as is a defendant

who has yet to surrender. *See, e.g., United States v. Fisher*, 137 F.3d 1158, 1167 (9th Cir. 1998).

d. **Youthful Convictions.** Adult convictions where a prison sentence of more than thirteen months was imposed are counted within the standard fifteen-year period, even if the defendant was not eighteen at the time of the prior offense. §4A1.2(d)(1); *United States v. Gipson*, 46 F.3d 472 (5th Cir. 1994). However, other convictions prior to the defendant's eighteenth birthday are counted only if the sentence was **imposed within five years** of the federal offense. §4A1.2(d)(2); *United States v. Green*, 46 F.3d 461, 467 (5th Cir. 1995). Juvenile adjudications are counted even though not considered "convictions" in state court. *United States v. Holland*, 26 F.3d 26 (5th Cir. 1994). A juvenile sentence is deemed to be a sentence of confinement if the defendant was sent to the state agency responsible for confining juveniles. *See, e.g., United States v. Birch*, 39 F.3d 1089 (10th Cir. 1994). The juvenile's age at the time of a revocation resulting in confinement, rather than the time of the offense, controls. *United States v. Female Juvenile*, 103 F.3d 14, 17 (5th Cir. 1996). Juvenile detention that does not result in an adjudication does not count. *United States v. Johnson*, 205 F.3d 1197 (9th Cir. 2000).

6. **Military, Foreign, and Tribal Court Sentences.** Military sentences resulting from a general or special court martial are counted. Sentences imposed as a result of Article 15 proceedings do not count. Foreign sentences and Native American tribal court sentences do not count but may be considered under §4A1.3 (Adequacy of Criminal History Category).

7. **Sentences on Appeal.** Prior sentences under appeal are counted. Where the execution of a prior sentence has been stayed pending appeal, §§4A1.1(a) - (e) shall still apply in computing criminal history. §4A1.2(l).

III. CHAPTER FOUR, PART B – REPEAT OFFENDERS

A. Career Offender - §4B1.1 - General Application

An individual is a "career offender" if (1) he or she was at least eighteen at the time of the instant offense, (2) the offense of conviction is a felony crime of violence or felony 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. **Offense Level and Criminal History Category.** The guidelines provide significantly enhanced offense levels for career offenders. Generally, the offense level increases depending on the statutory maximum for the offense of conviction. *See* the table set forth in §4B1.1(b). Likewise, the guidelines mandate that a career offender's criminal history category will always be Category VI. *Id.*
2. **Career Offender and 18 U.S.C. § 924(c).** The interplay between the career offender enhancement and 18 U.S.C. § 924(c) warrants careful consideration. *See* §4B1.1(c), the §4B1.1(c)(3) table, and §4B1.1, comment.(n.3). *See also United States v. Diaz*, 639 F.3d 616 (3d Cir. 2011). If the defendant is only convicted of the firearms offense, the guideline range is 360 months to life, although the reduction for acceptance of responsibility is still available. §4B1.1(c)(3). If there are multiple counts of conviction, the range is the greater of the mandatory minimum consecutive sentence plus the range for the underlying offense or the range derived from the firearms table, whichever is greater. *See* §4B1.1(c)(2). The sentence is apportioned among the counts to meet any mandatory minimum requirements. §5G1.2(e). If the defendant is not a career offender but has multiple convictions, pursuant to § 924(c), the court can depart upward. §2K2.4, comment. (n.2(B)). The court can also depart if the defendant's guideline range is lower than if he did not have a §924(c) conviction. §2K2.4, comment. (n.4).
3. **Acceptance of Responsibility.** A career offender may receive a reduction for acceptance of responsibility, §3E1.1. However, other Chapter 3 adjustments may not apply. *United States v. Warren*, 361 F.3d 1055 (8th Cir. 2004) (plain error to apply an obstruction enhancement to the career offender offense level); *United States v. Perez*, 328 F.3d 96 (2nd Cir. 2003) (career offender cannot receive minor role reduction if it would result in an offense level below the career offender minimum).
4. **Predicate Convictions.**
 - a. **Adult convictions required.** Unlike other criminal history provisions, only adult convictions can serve as a predicate under the career offender guideline. §4B1.2, comment. (n.1). However, a defendant who was convicted as an adult but was only seventeen can be considered a career offender. *See, e.g., United States v. Otero*, 495 F.3d 393 (7th Cir. 2007); *United States v. Moorer*, 383 F.3d 164 (3d Cir. 2004); *but see United States v. Mason*, 284 F.3d 555, 558-62 (4th Cir. 2002) (adult conviction did not count because defendant sentenced as juvenile).

- b. **Predicate conviction must be prior to federal offense.** Because the career offender enhancement applies to criminal “convictions,” not sentences, the defendant must have been convicted of the offense before he committed the federal offense. §4B1.2(c). *United States v. Gooden*, 116 F.3d 721 (5th Cir. 1997). The date that guilt is established is the date of conviction. §4B1.2(c).
- c. **Predicate convictions must be counted separately.** In order to qualify as predicate convictions for career offender purposes, the prior convictions must be counted separately under §4A1.1(a), (b), and (c).
- d. **Predicate convictions must be scored.** Prior convictions must not be too old; they must receive criminal history points under §4A1.1(a), (b), and (c) to qualify as predicates for the career offender enhancement. *United States v. Dewey*, 599 F.3d 1010 (9th Cir. 2010) (affirming reliance on 18-year old sentence where defendant was incarcerated within previous 15 years).

B. Crime of Violence

The term “crime of violence” is defined in §4B1.2(a) as, “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The “crime of violence” definition is used not only to determine whether a defendant's sentence is subject to the career offender enhancement in §4B1.1, but also whether a defendant’s sentence is subject to enhancement in other guidelines. *See*, §2K1.3(a)(1)–(2) & comment. (n.2); §2K2.1(a)(1),(2),(3)(B),(4)(A) & comment. (n.1), §2K2.1(b)(5) & comment. (n.13(B)); §2S1.1(b)(1)(B)(ii) & comment. (n.1); §4A1.1(e) & comment. (n.5).

- 1. **Specific listed offenses.** The commentary identifies specific offenses that are crimes of violence: “murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.” §4B1.2, comment. (n.1).

2. **The residual clause.** The phrase, “otherwise involves conduct ...” is called the residual clause or the otherwise provision. The commentary explains that the “conduct” referenced in the residual clause must be expressly charged in the count of conviction and must “by its nature” present a “serious potential risk of physical injury to another.” *Id.*, see also *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) (en banc).
3. **Prior offense of conviction is the focus.** §4B1.2 comment. (n.2) states that in determining whether an offense is a crime of violence for career offender purposes, “the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of the inquiry.” In *United States v. Turner*, 349 F.3d 833 (5th Cir. 2003), the court rejected reliance on indictment charging burglary of a habitation where the record showed that the defendant pled guilty to the lesser included offense of burglary of a building. Because the elements of the lesser included offense did not qualify as a crime of violence under §4B1.2, the defendant was not a career offender.
4. **Categorical approach.** The “categorical approach” to analyzing prior convictions originates with the Supreme Court’s decision in *Taylor v. United States*, 495 U.S. 575 (1990). *Taylor* instructs the sentencing court to first consider only the statutory elements of the prior conviction to determine whether it qualifies as a crime of violence. *Taylor* then states that a modified categorical approach can be used to determine whether a conviction for an offense committed under a statute with a broad spectrum of offense conduct (where conviction under one part of the statute may not be a crime of violence while conviction under a different section may be a crime of violence) qualifies as a crime of violence. Under the modified categorical approach, the sentencing court may only examine certain types of documents such as the charging document, written plea agreement, a transcript of the plea colloquy and any explicit factual findings made by the judge in the prior proceedings to determine whether the defendant’s prior conviction qualifies as a crime of violence. *See also, Shepard v. United States*, 544 U.S. 13 (2005). The categorical approach applies to the list of enumerated offenses as well as offenses under the residual clause.
 - a. **Categorical Approach and ACCA.** Interpreting almost identical language in the Armed Career Criminal Act (ACCA), the Supreme Court has found that the “violent felony” definition requires an offense “of a type that, by its nature, presents a serious potential risk of injury to another.” *James v. United States*, 550 U.S. 192 (2007). The relevant inquiry is whether the “conduct encompassed by the elements of the offense, in the ordinary case, presents a

serious potential risk of injury to another.” *Id.* In *Begay v. United States*, 553 U.S. 137 (2008), the Court found that the use of physical force requires “purposeful, violent and aggressive” force that must be characteristic of the enumerated offenses. The Court focused on a risk analysis that determines whether the prior offense is comparable to the enumerated offenses and found that a comparable offense for ACCA purposes is one that is “roughly similar, in kind as well as in degree of risk posed, to the examples themselves.” *Begay*, 553 U.S. at 143. In *Chambers v. United States*, 555 U.S. 122 (2009), the Court held that a failure to report does not entail such a risk. See also *Johnson v. United States*, 130 S.Ct. 1265 (2010) (force is a violent act, it is a degree of power greater than mere touching).

- b. **Categorical Approach and *Begay*.** Lower courts have applied the *Begay* ACCA analysis to find that various offenses were not crimes of violence under the career offender guideline. See, e.g., *United States v. Herrick*, 545 F.3d 53 (1st Cir. 2008) (negligent vehicular homicide); *United States v. Gray*, 535 F.3d 128 (2d Cir. 2008) (reckless endangerment); *United States v. Bartee*, 529 F.3d 357 (6th Cir. 2008) (attempted criminal sexual conduct); *United States v. Templeton*, 543 F.3d 378 (7th Cir. 2008) (DUI and escape); *United States v. Williams*, 537 F.3d 969 (8th Cir. 2008) (auto tampering and remanding on auto theft).
- c. **Limits on Categorical Approach pre-*Begay*.** Even before *Begay*, courts had limited the application of the Guidelines crime of violence definition. See, e.g., *United States v. Garcia*, 470 F.3d 1143 (5th Cir. 2006) (Colorado assault not crime of violence); *United States v. Piccolo*, 441 F.3d 1084 (9th Cir. 2006) (walkaway from halfway house not violent). *United States v. Kelly*, 422 F.3d 889 (9th Cir. 2005) (eluding police not crime of violence); *United States v. Insaulgarat*, 378 F.3d 456 (5th Cir. 2004) (aggravated stalking not crime of violence); *United States v. Jones*, 235 F.3d 342 (7th Cir. 2000) (assault and battery not necessarily crime of violence); *but see United States v. Rodriguez-Jaimes*, 481 F.3d 283 (5th Cir. 2007) (possession of weapon in penal institution is a crime of violence), *abrogated as recognized by United States v. Marquez*, 626 F.3d 214 (5th Cir. 2010); *United States v. Rivas*, 440 F.3d 722 (5th Cir. 2006) (unlawful restraint is a crime of violence); *United States v. Guevara*, 408 F.3d 252 (5th Cir. 2005) (threat to use weapon of mass destruction is a crime of violence).

- d. **Categorical Approach and Non-residential Burglary** Courts have held that non-residential burglary was not a crime of violence. *See, e.g., United States v. Matthews*, 374 F.3d 872 (9th Cir. 2004) (burglary of a non-abandoned building that is not a dwelling was not a crime of violence); *United States v. Turner*, 349 F.3d 833, 836-37 (5th Cir. 2003) (Court rejected reliance on indictment charging burglary of a habitation where record showed defendant pled guilty to lesser included offense of burglary of a building and elements of lesser included offense did not support finding of crime of violence under §4B1.2).

C. **Controlled Substance Offense.**

The Guidelines defines a “controlled substance offense” as follows: [A]n 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. §4B1.2 (b).

1. **Predicate drug offense must be punishable by more than one year.** Note that this Guideline covers trafficking offenses punishable by more than a year and therefore applies to a number of minor drug offenses not covered by ACCA, which limits “serious drug offenses” to offenses punishable by at least ten years. 18 U.S.C. § 924(e)(2)(A). Some state misdemeanor convictions may qualify. (*See* “felony” definition in §4A1.2(o)).
2. **Predicate drug conviction limited to trafficking offenses.** Unlike the statutory drug enhancements, *e.g.*, 21 U.S.C. § 841(b), this guideline provision is limited to trafficking-type-offenses and does not cover mere possession of a controlled substance. *Salinas v. United States*, 547 U.S. 188 (2006) (per curiam); *United States v. Gaitan*, 954 F.2d 1005 (5th Cir. 1992) (categorical approach precludes going behind offense of conviction).
3. **Categorical approach.** The categorical approach applies to the determination whether an offense is a “controlled substance offense.” *United States v. Ford*, 509 F.3d 714 (5th Cir. 2007) (Texas offense of possession with intent to deliver is controlled substance offense). *But see United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc) (violation of California Health and Safety Code §11360(a) was not categorically an aggravated felony because it also proscribes

transportation), *superseded on other grounds by §2L1.2 as stated in Guerrero-Silva v. Holder*, 599 F.3d 1090 (9th Cir. 2010) ; *see also United States v. Martinez*, 232 F.3d 728 (9th Cir. 2000) (§11360(a) not a controlled substance offense for career offender Guideline);

4. **Specific listed offenses.** Certain drug offenses constitute controlled substance offenses including possession of listed chemicals and equipment with intent to manufacture a controlled substance, 21 U.S.C. §§ 841(c)(1), 843(a)(6); using a communication facility to commit a felony drug offense, 21 U.S.C. § 843(b); and maintaining premises to facilitate a drug offense, 21 U.S.C. § 856. §4B1.2, comment. (n.1). *See also United States v. Rinard*, 956 F.2d 85 (5th Cir. 1992) (illegal investment); *United States v. Crittenden*, 372 F.3d 706 (5th Cir. 2004) (sale of substance in lieu of controlled substance). Use of a communication facility to buy drugs for personal use is not a violation of 21 U.S.C. § 843(b) because mere possession of a controlled substance is a federal misdemeanor. *Abuelhawa v. United States*, 556 U.S. 816 (2009); *see also United States v. Henao-Melo*, 591 F.3d 798 (5th Cir. 2009) (use of communication facility not categorically drug trafficking).

D. Firearm Offenses

Being a felon in possession of a firearm is not a crime of violence. §4B1.2, comment. (n.1); *United States v. Fitzhugh*, 954 F.2d 253 (5th Cir. 1992); *see generally Stinson v. United States*, 508 U.S. 36 (1993). Possession of a sawed off shotgun, however, may be a crime of violence as such a weapon has no legitimate use. §4B1.2, comment. (n.1); *United States v. Serna*, 309 F.3d 859 (5th Cir. 2002). A conviction for using (carrying or possessing) a firearm during a violent felony or drug trafficking offense qualifies as a predicate offense for career offender purposes. §4B1.2, comment. (n.1).

E. Inchoate Crimes

The career offender guideline includes convictions for inchoate offenses such as aiding and abetting, conspiracy, and attempt. §4B1.2, comment. (n.1). *See, e.g., United States v. Walker*, 181 F.3d 774 (6th Cir. 1999) (solicitation of crime of violence); *see also United States v. Shumate*, 341 F.3d 852 (9th Cir. 2003) (solicitation of controlled substance offense); *United States v. Lightbourn*, 115 F.3d 291 (5th Cir. 1997) (conspiracy). This provision is limited, however, to circumstances where the defendant intended to commit or facilitate the substantive offense. Accordingly, the Ninth Circuit has held that accessory after the fact does not constitute a predicate offense, *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc) (not drug trafficking under §2L1.2), and the Second Circuit held that a New York facilitation conviction did not count because

there was no requirement that the defendant intended to commit the offense. *United States v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991).

F. Criminal Livelihood - §4B1.3

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level must be at least 13 unless acceptance of responsibility applies, in which case the minimum offense level shall be 11.

G. Armed Career Criminal - §4B1.4

A defendant subject to an enhanced sentence under 18 U.S.C. § 924(e) as an armed career criminal is generally subject to the offense level from §4B1.1 (Career Offender) if applicable, or a guideline level of 34 if he used or possessed the firearm, or ammunition, in connection with a crime of violence, or a controlled substance offense, or possessed a firearm described in 26 U.S.C. § 5845(a), §4B1.4(a) & (b)(3), or a level 33 in other circumstances. Acceptance of responsibility under §3E1.1 is available and will decrease the offense level, but not below the statutorily required minimum sentence of 180 months. The criminal history category is likewise raised to a minimum level of IV or VI if the prior convictions are for crimes of violence or drug trafficking. §4B1.4(c). *See also the "Firearms Primer."*

H. Repeat and Dangerous Sex Offender Against Minors - §4B1.5.

If the defendant's instant offense is one of the specified sex offenses and the defendant has a prior qualifying sex offense conviction, then the defendant is subject to the conditions set forth in §4B1.5 rather than §4B1.1, the Career Offender Guideline.

IV. CHAPTER FOUR, PART A – DEPARTURES

Upward and downward departures are encouraged where the defendant's criminal history overstates or understates the seriousness of a defendant's criminal record or the likelihood of recidivism. There are some limitations on the availability of the departure, particularly for career and sex offenders.

A. Upward Departures

An upward departure may be warranted if "reliable information indicates that the criminal history category *substantially under-represents* the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." §4A1.3(a)(1)(Emphasis added).

1. **Basis for upward departure.** Factors considered in imposing an upward departure are set forth in §4A1.3(a)(2)(A)-(E) and include the following:
 - a. **Prior sentence not used in criminal history score.** The court may rely on a sentence not used in computing criminal history, such as tribal or foreign convictions. See *United States v. Barakett*, 994 F.2d 1107 (5th Cir. 1993).
 - b. **Prior sentence substantially longer than one year.** Prior sentences of substantially more than one year imposed as a result of independent crimes committed on different occasions may form the basis for an upward departure.
 - c. **Similar misconduct established by an alternative proceeding.** Prior misconduct adjudicated in a civil proceeding or by a failure to comply with an administrative order that is similar to the instant offense.
 - d. **Whether the defendant was pending trial or sentencing.** The court may consider whether the defendant was pending trial or sentencing on another charge at the time of the instant offense. *United States v. Ravitch*, 128 F.3d 865 (5th Cir. 1997).
 - e. **Prior similar conduct not resulting in a criminal conviction.** Similar adult conduct not resulting in conviction may be relied upon for an upward departure. *United States v. Luna-Trujillo*, 868 F.2d 122 (5th Cir. 1989); see also *United States v. Hefferon*, 314 F.3d 211 (5th Cir. 2002). Note that the offenses must be similar, *United States v. Leake*, 908 F.2d 550 (9th Cir. 1990); see also *United States v. Allen*, 488 F.3d 1244 (10th Cir. 2007) (post-*Booker* reversal of departure based on uncharged, unrelated misconduct), and significant. *United States v. Martinez-Perez*, 916 F.2d 1020 (5th Cir. 1990) (departure not justified by remote misdemeanor conviction).
2. **Other considerations.**
 - a. **Nature of prior conviction.** The nature, rather than the number, of prior convictions is more indicative of the seriousness of a defendant's criminal record. §4A1.3, comment. (n.2(B)). See, e.g., *United States v. Carillo-Alvarez*, 3 F.3d 316 (9th Cir. 1993) (reversing upward departure where criminal history not egregious).

- b. **Previous lenient treatment.** The court may also depart because the defendant previously received “extreme leniency” for a serious offense. §4A1.3, comment. (backg’d.); *See United States v. Delgado-Nunez*, 295 F.3d 494 (5th Cir. 2002).
- c. **Relevant conduct.** The court cannot rely on prior cases not counted because they were included in relevant conduct. *United States v. Cade*, 279 F.3d 265 (5th Cir. 2002) (citing *United States v. Hunerlach*, 258 F.3d 1282 (11th Cir. 2001)).
- d. **Prior arrests without conviction.** The court cannot depart based on arrests not resulting in convictions without proof the defendant committed the offense. §4A1.3(a)(3) & comment. (n.3); *Williams v. United States*, 503 U.S. 193 (1992); *United States v. Jones*, 444 F.3d 430 (5th Cir. 2006) (cannot depart based on arrest but error harmless).
- e. **Categorical approach.** In *United States v. Gutierrez-Hernandez*, 581 F.3d 251 (5th Cir. 2009), the district court departed above the guideline range because a misdemeanor state firearm conviction could have been prosecuted as a more serious federal felony, and the police report suggested that a drug conviction was actually trafficking even though the categorical approach prohibited treating it as such. The Fifth Circuit reversed, holding first that the court could not adjust the offense level based upon a hypothetical federal crime. Second, the court could not escape the requirement of the categorical approach by relying on a police report to depart on the ground that the enhancement should have applied.

B. Downward Departures

A downward departure may be warranted where “reliable information indicates that the criminal history category *substantially over-represents* the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” §4A1.3(b)(1). *See, e.g., United States v. Shoupe*, 988 F.2d 440 (3d Cir. 1993); *United States v. Lacy*, 99 F. Supp. 2d 108 (D. Mass. 2000); *United States v. Santos*, 406 F. Supp. 2d 320 (S.D. N.Y. 2005) (criminal convictions unnecessarily counted twice); *United States v. Frappier*, 377 F. Supp. 2d 220 (D. Me. 2005); *United States v. Swan*, 327 F. Supp. 2d 1068 (D. Neb. 2004).

- 1. **Lower limit.** A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited. §4A1.3(b)(2).

2. **Limitation for career offenders.** A downward departure under §4A1.3 may not exceed one criminal history category. §4A1.3(b)(3)(A).
3. **Prohibitions for certain repeat offenders.** Downward departures for over representation of criminal history are prohibited for defendants who are armed career criminals under §4B1.4 (ACCA) or who are repeat and dangerous sex offenders against minors within the meaning of §4B1.5.

C. Departures – Procedural Concerns

The criminal history departures are procedurally regulated as well. In considering an upward departure based on inadequacy of the criminal history, the court is instructed to use “as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles the defendant’s.” §4A1.3(a)(4)(A). If a defendant is already at the highest criminal history category, the court should move incrementally along the offense levels. §4A1.3(a)(4)(B). *United States v. Pennington*, 9 F.3d 1116 (5th Cir. 1993). Previously, courts had held that the sentencing court must consider adjacent categories, determine on the record whether each category is inadequate and must provide reasons for these findings. *United States v. Lambert*, 984 F.2d 658 (5th Cir. 1993) (en banc); *see also* §4A1.3(c)(1). The same findings should be made for downward departures. §4A1.3(c)(2). In a post-*Booker* world, strict compliance with this procedure may no longer be required. *See United States v. Colon*, 474 F.3d 95 (3d Cir. 2007); *United States v. Zuniga-Peralta*, 442 F.3d 345 (5th Cir. 2005). The Sixth Circuit reviews criminal history departures under the *Gall* framework for both procedural and substantive reasonableness. *United States v. Tate*, 516 F.3d 459 (6th Cir. 2008). While a defendant’s criminal history has traditionally been a basis for both upward and downward departures under §4A1.3, the court has additional discretion to consider the nature of the prior criminal conduct in determining whether the guideline range is appropriate. *See, e.g., United States v. Foreman*, 436 F.3d 638 (6th Cir. 2006) (sentencing court must determine whether Guideline range places “over- or under-inflated significance” on prior conviction for crime of violence), *abrogated on other grounds by United States v. Young*, 580 F.3d 373 (6th Cir. 2009); *see also United States v. Diaz-Argueta*, 447 F.3d 1167 (9th Cir. 2006), *overruled on other grounds by United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008).

V. CONCLUSION

Calculation of a defendant’s Criminal History Category requires careful analysis of the defendant’s criminal history. Calculation of the criminal history score itself requires careful attention to the timing and relationship of past offenses. Enhancements, whether statutory or guideline-based, require extra scrutiny. Enhancements based on the nature of the prior offense require an examination of the statutes and documents of conviction and a comparison of the specific offense with the provision defining the predicate offense. Controlling circuit precedent

in specific areas requires further attention because the law of the circuit as it relates to various determinations (*e.g.* crime of violence) may control whether certain prior convictions qualify as predicates for certain enhancements. Finally, the sentencing court needs to be aware of the departure provisions within the guideline for upward or downward departures.