PRIMER

CRIMINAL HISTORY

June 2015

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I. INTRODUCTION AND OVERVIEW

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. This primer focuses on some applicable cases and concepts relating to Chapter Four but is not intended as a comprehensive compilation of all case law addressing these issues.

The following are some of the main features of Chapter Four—

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.

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.[1] The immigration guideline contains a sliding scale for prior convictions depending on whether the prior sentences received criminal history points.[2]

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

[1] *See* 8 U.S.C. § 1326(b); 18 U.S.C. § 924(e); 21 U.S.C. § 841(b).

[2] USSG §2L1.2.

to calculate enhanced criminal history scores and offense levels for certain repeat offenders.

Departures. Departures for over-representation or under-representation of criminal history are authorized by the policy statements set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). An upward 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 downward departure may be authorized if a defendant's criminal history overstates the seriousness of his past criminal record or the likelihood that the defendant will commit other crimes.

II. CRIMINAL HISTORY (CHAPTER FOUR, PART A)

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. Section 4A1.1 (Criminal History Category) 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 subsection.

(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 for this subsection.[3]

[3] *Id.* §4A1.1.

Please note there is no limit to the number of points that can be assigned for subsections (a) and (b) type convictions. Under subsection (e), convictions for crimes of violence can override the four point limit on subsection (c) type sentences up to three additional criminal history points.

B. DEFINITIONS AND INSTRUCTIONS

Section 4A1.2 (Definitions and Instructions for Computing Criminal History) 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."[4] The term "prior sentence" "is not directed at the chronology of the conduct, but the chronology of the sentencing."[5] Thus, a previously imposed sentence counts even if it was for conduct that occurred after the offense of conviction.[6] Courts are divided over whether to consider a sentence imposed after the original sentencing but before re-sentencing.[7]

a. **Relevant Conduct.** A sentence cannot be taken into account in calculating criminal history if it encompassed conduct that would be considered relevant conduct to the offense of conviction under §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)).[8]

b. **Multiple prior sentences.** Prior sentences are always counted separately if the offenses were separated by an intervening arrest (the defendant is arrested for the first offense prior to committing the

[4] *Id*. §4A1.2(a)(1).

[5] United States v. Lopez, 349 F.3d 39, 41 (2d Cir. 2003) (*citing* United States v. Espinal, 981 F.2d 664, 668 (2d Cir. 1992).

[6] *Lopez*, 349 F.3d at 41.

[7] *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).

[8] *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).

second offense).[9] Section 4A1.2(a)(2) states that "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."[10]

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.[11]

d. **Revocation sentences.** Revocation of probation, parole, or supervised release sentences are counted and the term of imprisonment imposed upon revocation is added to the original sentence to compute the correct number of criminal history points.[12]

2. "Sentence of Imprisonment"

This term refers to the maximum sentence imposed; that is, the sentence pronounced by the court, not the length of time actually served.[13] In the case of an indeterminate sentence, the high end of the prescribed sentencing range is treated as the maximum sentence.[14] If the court reduces the prison sentence, however, the reduced sentence controls.[15]

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9 *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").

10 USSG §4A1.2(a)(2).

11 *Id*. §4A1.2(a)(2). In amendments promulgated on April 30, 2015, the Commission revised §§4A1.1 and 4A1.2 so that sentences "counted" as a single sentence are referred to instead as sentences "treated" as a single sentence. *See* Amendment 6 of the amendments submitted by the Commission to Congress on April 30, 2015, 80 Fed. Reg. 25782 (May 5, 2015). Absent action by Congress to the contrary, the amendment will take effect on November 1, 2015.

12 USSG §4A1.2(k)(1).

13 *Id*. §4A1.2(b)(1).

14 *Id*. §4A1.2, comment. (n.2). *See also* United States v. Levenite, 277 F.3d 454 (4th Cir. 2002) (indeterminate sentence of two days to 23 months scored as sentence "exceeding one year and one month" under §4A1.1(a) even though defendant actually served two days).

15 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.[16] If a defendant receives "time served" the actual time spent in custody will be counted.[17] A discharged sentence does not qualify as a suspended sentence under §4A1.2(b)(2) if the "suspension" was not ordered by a court.[18]

b. **What is a sentence of imprisonment?** In determining whether a defendant has served a sentence of imprisonment, the court looks to the nature of the facility, rather than its purpose.[19] In *United States v. Brooks*,[20] the court held that incarceration in a boot camp was a prison sentence. 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."[21] Generally, community type confinement is deemed to be a "substitute for imprisonment" and not a "sentence of imprisonment."[22] A six-month sentence of home detention is not considered a sentence of imprisonment.[23] The courts have largely held that community treatment centers or halfway houses are not imprisonment.[24]

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16 USSG §4A1.2(b)(2). *See*, *e.g.*, United States v. Tabaka, 982 F.2d 100 (3d Cir. 1992) (all but two days suspended).

17 *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, 419 (6th Cir. 2008) (time credited on another sentence did not count in calculating criminal history points) ("a defendant who receives full credit for time served on an entirely separate conviction does not in fact 'actually serve' any time for the offense in question.").

18 *See* United States v. Rodriguez-Bernal, 783 F.3d 1002 (5th Cir. 2015).

19 United States v. Brooks, 166 F.3d 723 (5th Cir. 1999); United States v. Latimer, 991 F.2d 1509 (9th Cir. 1993).

20 166 F.3d 723 (5th Cir. 1999).

21 *Brooks*, 166 F.3d at 725-26.

22 USSG §§5B1.3(e)(1)-(2), 5C1.1(c)-(d). *See also* United States v. Phipps, 68 F.3d 159 (7th Cir. 1995); United States v. Latimer, 991 F.2d 1509, 1512-13 (9th Cir. 1993).

23 United States v. Gordon, 346 F.3d 135 (5th Cir. 2003).

24 United States v. Pielago, 135 F.3d 703, 711-14 (11th Cir. 1998); United States v. Latimer, 991 F.2d 1509, 1511 (9th Cir. 1993). *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.[25] This definition requires careful review of certain prior misdemeanors in jurisdictions where some misdemeanor offenses carry two-year or three-year statutory maximums.[26] However, in at least one jurisdiction, certain classes of felonies are not punishable by more than one year.[27]

4. Misdemeanor and Petty Offenses

Certain misdemeanors (*e.g.*, 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.[28] Other petty offenses (*e.g.*, fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, vagrancy) are never counted.[29] Convictions for driving while intoxicated and other similar offenses are always counted.[30]

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.

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[25] USSG §4A1.2(o).

[26] 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).

[27] 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).

[28] USSG §4A1.2(c)(1).

[29] *Id.* §4A1.2(c)(2).

[30] *Id.* §4A1.2, comment. (n.5).

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 of the defendant during any part of the fifteen year period.[31] Section 4A1.2(e)(1) 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.[32] 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.[33] A defendant on escape status is deemed incarcerated.[34]

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.[35] Likewise, the time limit runs *from the original imposition date*, not the revocation date, *unless* the original sentence added to the revocation sentence exceeds 13 months.[36]

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.[37] This provision covers virtually all forms of suspended sentences where there is a possibility of a custodial sentence, even if there is no active

[31] *Id*. §§4A1.1(a), 4A1.2 (e)(1).

[32] *Id*. §4A1.2(k)(2)(A). *See*, *e.g*., United States v. Semsak, 336 F.3d 1123 (9th Cir. 2003) (revocation of parole).

[33] United States v. Ybarra, 70 F.3d 362 (5th Cir. 1995).

[34] United States v. Radziercz, 7 F.3d 1193, 1195 (5th Cir. 1993) ("[the defendant] *would have* been in custody during the fifteen-year period preceding commencement of the instant offense had he not escaped from custody while serving the eight year sentence.").

[35] USSG §4A1.2(e)(2).

[36] *Id*. §§4A1.2 (a)(1), (e)(2), (k)(2)(B). *See also* 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, 895-96 (5th Cir. 2000) ("a sentence is 'imposed' when it is first pronounced by the court, and not when the term of imprisonment begins . . . . [S]entence pronouncement is the sole, relevant event for purposes of § 4A1.2(e)(2) . . . .").

[37] USSG §4A1.1(d).

supervision.[38] However, a suspended sentence where a fine is the only sanction is not considered to be a criminal justice sentence.[39] A defendant, whose probation would have otherwise expired but for an outstanding revocation warrant, is deemed to be on probation even if the State did not use due diligence to execute the warrant.[40] 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.[41] Note, however, that a defendant who escapes while awaiting sentencing is deemed to be under a criminal justice sentence,[42] as is a defendant who has yet to surrender.[43]

d. Offenses Committed Prior to Age 18. 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.[44] 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.[45] Juvenile adjudications are counted even though not considered "convictions" in state court.[46] A sentence of commitment to the custody of the state's juvenile authority constitutes a sentence within the meaning of §4A1.2(d)(2).[47] The juvenile's age at the time of a revocation resulting in confinement, rather than the time of the

[38] *See*, *e.g.*, United States v. Giraldo-Lara, 919 F.2d 19 (5th Cir. 1990) (deferred adjudication probation); United States v. Perales, 487 F.3d 588 (8th Cir. 2007) (diversion); *United States v. Miller*, 56 F.3d 719 (6th Cir. 1995) (conditional discharge sentence as the "functional equivalent" of unsupervised probation).

[39] USSG §4A1.1, comment. (n.4); United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993).

[40] United States v. Anderson, 184 F.3d 479 (5th Cir. 1999). *See also* United States v. McCowan, 469 F.3d 386 (5th Cir. 2006).

[41] United States v. Brazell, 489 F.3d 666 (5th Cir. 2007). *See also* United States v. Caldwell, 585 F.3d 1347 (7th Cir. 2009).

[42] United States v. Arellano-Rocha, 946 F.2d 1105 (5th Cir. 1991).

[43] *See*, *e.g.*, United States v. Fisher, 137 F.3d 1158, 1167 (9th Cir. 1998).

[44] USSG §4A1.2(d)(1); United States v. Gipson, 46 F.3d 472 (5th Cir. 1994).

[45] USSG §4A1.2(d)(2); United States v. Green, 46 F.3d 461, 467 (5th Cir. 1995).

[46] United States v. Holland, 26 F.3d 26 (5th Cir. 1994).

[47] *See, e.g.*, United States v. Birch, 39 F.3d 1089 (10th Cir. 1994).

offense, controls.[48] Juvenile detention that did not result from an adjudication of guilt does not count.[49]

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 a summary court-martial or Article 15 proceeding do not count.[50] Foreign sentences and Native American tribal court sentences do not count but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).[51]

7. Sentences on Appeal

Prior sentences under appeal are counted. Where the execution of a prior sentence has been stayed pending appeal, subsections (a) through (e) of §4A1.1 still apply in computing criminal history.[52]

III. REPEAT OFFENDERS

Part B of Chapter Four (Career Offenders and Criminal Livelihood) provides instruction on how to calculate enhanced criminal history scores and offense levels for certain repeat offenders, such as career offenders, armed career criminals, and repeat and dangerous sex offenders against minors.

A. CAREER OFFENDER: GENERAL APPLICATION (§4B1.1)

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.[53]

48 United States v. Female Juvenile, 103 F.3d 14, 17 (5th Cir. 1996).

49 United States v. Johnson, 205 F.3d 1197 (9th Cir. 2000).

50 USSG §4A1.2(g).

51 *Id.* §4A1.2(h), (i).

52 *Id.* §4A1.2(l).

53 *See id.* §4B1.1(a).

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.[54] Likewise, the guidelines mandate that a career offender's criminal history category will always be Category VI.[55]

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.[56] 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.[57] If there are multiple counts of conviction, the applicable guideline range is the greater of the mandatory minimum consecutive sentence plus the guideline range for the underlying offense or the guideline range derived from the career offender table for § 924(c) or § 929(a) offenders in §4B1.1(c)(3).[58] The sentence is apportioned among the counts to meet any mandatory minimum requirements.[59] If the defendant is not a career offender but has multiple convictions, pursuant to § 924(c), the court can depart upward.[60] The court can also depart if the defendant's guideline range is lower than if he did not have a § 924(c) conviction.[61]

54 See the table set forth in *id*. §4B1.1(b).

55 *Id*. §4B1.1(b).

56 *See id*. §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), *overruled in part by* United States v. Snellenberger, 548 F.3d 699 (9th Cir. 2008).

57 USSG §4B1.1(c)(3).

58 *See id*. §4B1.1(c)(2).

59 *Id*. §5G1.2(e).

60 *Id*. §2K2.4, comment. (n.2(B)).

61 *Id*. §2K2.4, comment. (n.4).

3. Acceptance of Responsibility

A career offender may receive a reduction for acceptance of responsibility pursuant to §3E1.1 (Acceptance of Responsibility). However, other Chapter Three adjustments, whether upward or downward, may not apply.[62]

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.[63] However, a defendant who was convicted as an adult but was only seventeen can be considered a career offender.[64]

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.[65] The date of conviction is the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.[66]

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), or (c).[67]

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62 United States v. Warren, 361 F.3d 1055 (8th Cir. 2004) (plain error to apply an obstruction of justice 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).

63 *See* USSG §4B1.2, comment. (n.1).

64 *Id. See also, 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 the defendant was sentenced as a juvenile).

65 USSG §4B1.2(c). *See also* United States v. Gooden, 116 F.3d 721 (5th Cir. 1997).

66 *Id*. §4B1.2(c).

67 *See* United States v. Williams, 753 F.3d 626 (6th Cir. 2014) (holding that when multiple prior sentences are treated as a single sentence every sentence in the group has been "counted," however, multiple sentences in a single sentence will be counted only once if it contains more than one predicate offense); *but see* King v. United States, 595 F. 3d 844 (8th Cir. 2010) (holding that when two or more prior sentences are treated as a single sentence under the guidelines, the only prior sentence that counts separately and is assigned the criminal history points attributable to the single sentence is the longest sentence of imprisonment). The

d. Predicate convictions must be scored. Prior convictions must not be too old (*i.e.*, outside the time limits set forth in §4A1.2(d), (e)),[68] and must receive criminal history points under §4A1.1(a), (b), or (c) to qualify as predicates for the career offender enhancement.[69]

B. CRIME OF VIOLENCE (§4B1.2(a))

The term "crime of violence" is defined in subsection (a) of §4B1.2 (Definition of Terms Used in Section 4B1.1) 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.[70]

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

Commission recently voted to resolve this circuit conflict by adopting a new application note regarding the "single sentence" rule at §4A1.2(a)(2). *See* Amendment 6 of the amendments submitted by the Commission to Congress on April 30, 2015, 80 Fed. Reg. 25782 (May 5, 2015). Newly promulgated Application Note 3 provides that, for purposes of determining predicate offenses, prior sentences included in a single sentence may each be treated as a predicate if the sentences independently would have received criminal history points but for the single sentence rule. Absent action by Congress to the contrary, the amendment will take effect on November 1, 2015.

[68] In addition to resolving the circuit conflict regarding the "single sentence" rule, the amendment promulgated by the Commission on April 30, 2015 also clarified how the single sentence rule interacts with the time limits set forth in §4A1.2(e), providing that when a prior sentence included in the single sentence was so remote in time that it does not independently receive criminal history points, it cannot serve as a predicate offense. *See* Amendment 6 of the amendments submitted by the Commission to Congress on April 30, 2015, 80 Fed. Reg. 25782 (May 5, 2015). Absent action by Congress to the contrary, the amendment will take effect on November 1, 2015.

[69] *See* 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).

[70] USSG §4B1.2(a).

whether a defendant's sentence is subject to enhancement in other guidelines.[71] In addition, it is used to determine whether an upward departure is warranted under §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Quantity Magazine (Policy Statement)).

1. The Residual Clause

The phrase that begins with "otherwise involves conduct . . ." is called the residual clause or the otherwise provision. [72] 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." [73]

2. 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." [74]

3. Prior Offense of Conviction is the Focus

The Commentary to §4B1.2 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." [75] In *United States v. Turner*,[76] the court rejected reliance on an indictment charging burglary of a habitation where the record showed that the defendant pled guilty to the lesser included offense of

[71] *See id*. §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).

[72] The "crime of violence" definition at §4B1.2 is similar to the definition of "violent felony" found in the Armed Career Criminal Act of 1984 (ACCA). In June 2015, the Supreme Court struck down as unconstitutionally vague the "residual clause" of the ACCA's definition of violent felony. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). While addressing similar language, the Court's opinion in *Johnson* did not consider the career offender guideline's definition of crime of violence. As such, *Johnson* did not strike the residual clause in the career offender guideline, and therefore nothing in the application of the career offender guideline has changed at the time of this update.

[73] USSG §4B1.2, comment. (n.1). *See also* United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc).

[74] USSG §4B1.2, comment. (n.1).

[75] *Id*. §4B1.2, comment. (n.2).

[76] 349 F.3d 833 (5th Cir. 2003).

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.*[77] *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.[78] The Supreme Court has clarified that the modified categorical approach is not applicable where the defendant was convicted of a statute that does not contain alternative elements.[79] The categorical approach applies to the list of enumerated offenses as well as offenses under the residual clause.

The definition of the term "crime of violence" for purposes of the career offender guideline has been the subject of substantial litigation in the federal courts. The volume of case law on this issue results primarily from the legal determinations required by the categorical approach established by the Supreme Court and the variety of different state laws to which it must be applied. Although an exhaustive treatment of this issue is beyond the scope of this primer, some cases relating to the scope of the guideline's definition are provided below:

a. Categorical Approach and Negligent/Reckless *Mens Rea*. In interpreting the career offender residual clause, courts have applied the Supreme Court's analysis from *Begay v. United States*,[80] in which

[77] 495 U.S. 575 (1990).

[78] *See also* Shepard v. United States, 544 U.S. 13 (2005).

[79] Descamps v. United States, 133 S. Ct. 2276 (2013) (modified categorical approach inappropriate as to statute with a single, indivisible set of elements). *See also* United States v. Castleman, 134 S. Ct. 1405 (2014) (applying modified categorical approach, where the parties did not contest that the statute is divisible); United States v. Quintero-Junco, 754 F.3d 746 (9th Cir. 2014) (holding that the district court properly invoked the modified categorical approach where the relevant statute, an Arizona forcible sex offense statute, was divisible).

[80] 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 purposes of the Armed Career Criminal Act (ACCA) is one that is "roughly similar, in kind as well as in degree of risk posed, to the examples themselves."[81] Lower courts have applied the *Begay* ACCA analysis to find that various offenses were not crimes of violence under the career offender guideline.[82] While the *Begay* case itself is no longer good law following the Court's recent decision in *Johnson v. United States*,[83] these underlying circuit opinions decided in the career offender guideline context continue to apply.

b. Limits on Categorical Approach pre-Begay. Even before *Begay*, courts had limited the application of the Guidelines crime of violence definition.[84]

c. Categorical Approach and Non-residential Burglary. Courts have held that non-residential burglary is not a crime of violence.[85] The circuit courts agree that a dwelling need not be actually inhabited to

[81] *Begay*, 553 U.S. at 143.

[82] *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).

[83] 135 S. Ct. 2551 (2015). *See also supra* note 72.

[84] *See, e.g.*, United States v. Garcia, 470 F.3d 1143 (5th Cir. 2006) (Colorado offense of assault in the third degree 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).

[85] *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).

qualify as a "dwelling" within the meaning of §4B1.2(a). Instead, it is sufficient that a "dwelling" be intended for habitation.[86]

C. CONTROLLED SUBSTANCE OFFENSE (§4B1.2(b))

The career offender guidelines define 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."[87]

1. Predicate Drug Offense 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 Armed Career Criminal Act, which limits "serious drug offenses" to offenses punishable by at least ten years.[88] Some state misdemeanor convictions may qualify.[89]

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.[90]

[86] *See* United States v. Ramirez, 708 F.3d 295, 303 (1st Cir. 2013); United States v. Rivera–Oros, 590 F.3d 1123, 1132 (10th Cir. 2009); United States v. McClenton, 53 F.3d 584, 587 (3rd Cir. 1995); United States v. Graham, 982 F.2d 315, 316 (8th Cir. 1992).

[87] USSG §4B1.2(b).

[88] 18 U.S.C. § 924(e)(2)(A).

[89] See "felony" definition at USSG §4A1.2(o).

[90] 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."[91]

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).[92] 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.[93]

D. FIREARM OFFENSES

Being a felon in possession of a firearm is not a crime of violence.[94] However, possession of a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, sawed off shotgun) is a crime of violence as such a weapon has no legitimate use.[95] 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.[96]

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

92 USSG §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).

93 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).

94 USSG §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).

95 USSG §4B1.2, comment. (n.1); United States v. Serna, 309 F.3d 859 (5th Cir. 2002).

96 USSG §4B1.2, comment. (n.1).

E. INCHOATE CRIMES

The career offender guideline includes convictions for inchoate offenses such as aiding and abetting, conspiring, and attempting to commit a "crime of violence" and "controlled substance offense."[97] 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,[98] 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.[99]

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**. The Commentary to §4B1.3 includes definitions of the key terms "pattern of criminal conduct" and "engaged in as a livelihood."

G. ARMED CAREER CRIMINAL (§4B1.4)

A defendant subject to an enhanced sentence under 18 U.S.C. § 924(e) is considered an "armed career criminal." Section 4B1.4 provides that the offense level for an armed career criminal is the greatest of the following: (1) the offense level applicable from Chapter Two and Three; (2) the offense level from §4B1.1 (Career Offender), if applicable; (3) an offense level of **34** if the defendant 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); or (4) an offense level of **33** in other circumstances.[100] 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 defendant used or possessed the firearm or ammunition in connection with a crime of

[97] *Id*. *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).

[98] United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) (en banc) (not drug trafficking under §2L1.2).

[99] United States v. Liranzo, 944 F.2d 73, 79 (2d Cir. 1991).

[100] USSG §4B1.4(b).

violence or controlled substance offense, or possessed a firearm described in 26 U.S.C. § 5845(a).[101]

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

If the defendant's instant offense is one of the covered sex crimes,[102] the defendant has a prior qualifying sex offense conviction, and the instant offense of conviction was committed "subsequent to" a prior sex offense conviction, then the defendant is subject to the conditions set forth in §4B1.5 rather than §4B1.1, the career offender guideline. The Sixth Circuit has refused to graft the time limitation of §4A1.2 onto §4B1.5.[103]

IV. DEPARTURES (CHAPTER FOUR, PART A)

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."[104]

1. Basis for Upward Departure

Factors considered in imposing an upward departure are set forth in subdivisions (A) through (E) of §4A1.3(a)(2) and include the following:

[101] *Id*. §4B1.4(c). See also the Commission's subject matter primer on *Firearms* at http://www.ussc.gov/training/primers.

[102] The Commentary to §4B1.5 enumerates the offenses that qualify as a "covered sex crime."

[103] *See* United States v. Babcock, 753 F.3d 587 (6th Cir. 2014).

[104] USSG §4A1.3(a)(1) (emphasis added).

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.[105]

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.[106]

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.[107]

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.[108] Note that the offenses must be similar,[109] and significant.[110]

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.[111]

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105 *See* United States v. Lente, 759 F.3d 1149 (10th Cir. 2014).

106 *See* United States v. Beltramea, 785 F.3d 287 (8th Cir. 2015).

107 *See* United States v. Ravitch, 128 F.3d 865 (5th Cir. 1997).

108 *See* United States v. Bolt, 782 F.3d 388 (8th Cir. 2015); United States v. Luna-Trujillo, 868 F.2d 122 (5th Cir. 1989); United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002).

109 United States v. Leake, 908 F.2d 550 (9th Cir. 1990); United States v. Allen, 488 F.3d 1244 (10th Cir. 2007) (post-*Booker* reversal of departure based on uncharged, unrelated misconduct).

110 United States v. Martinez-Perez, 916 F.2d 1020 (5th Cir. 1990) (departure not justified by remote misdemeanor conviction).

111 USSG §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.[112]

c. Relevant conduct. The court cannot rely on a prior conviction as the basis for a departure on the ground that the criminal history category does not adequately reflect the seriousness of the past criminal conduct, if the court previously determined that the conduct underlying that conviction is relevant conduct to the instant offense and considers it in calculating the offense level.[113]

d. Prior arrests without conviction. The court cannot depart based on a prior arrest record itself.[114]

e. Categorical approach. In *United States v. Gutierrez-Hernandez*,[115] 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 a trafficking offense 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."[116]

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112 USSG §4A1.3, comment. (backg'd.). *See* United States v. Delgado-Nunez, 295 F.3d 494 (5th Cir. 2002).

113 United States v. Cade, 279 F.3d 265 (5th Cir. 2002); United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001).

114 USSG §4A1.3(a)(3). *See* 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).

115 581 F.3d 251 (5th Cir. 2009).

116 USSG §4A1.3(b)(1) (emphasis added). *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.

1. Lower Limit

A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.[117]

2. Limitation for Career Offenders

A downward departure under §4A1.3 for a career offender may not exceed one criminal history category.[118]

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 or who are repeat and dangerous sex offenders against minors within the meaning of §4B1.5.[119]

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."[120] If a defendant is already at the highest criminal history category, the court should move incrementally along the offense levels.[121] Previously, courts had held that the sentencing court must consider adjacent categories, determine on the record whether each category is

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).

117 USSG §4A1.3(b)(2)(A).

118 *Id.* §4A1.3(b)(3)(A).

119 *Id.* §4A1.3(b)(2)(B).

120 *Id.* §4A1.3(a)(4)(A).

121 *Id.* §4A1.3(a)(4)(B). *See also* United States v. Pennington, 9 F.3d 1116 (5th Cir. 1993).

inadequate, and provide reasons for these findings.[122] The same findings should be made for downward departures.[123]

In a post-*Booker* world, strict compliance with this procedure may no longer be required.[124] The Sixth Circuit reviews criminal history departures under the *Gall v. United States*[125] framework for both procedural and substantive reasonableness.[126] 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.[127]

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.

122 United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc). *See also* USSG §4A1.3(c)(1).

123 USSG §4A1.3(c)(2).

124 *See* United States v. Colon, 474 F.3d 95 (3d Cir. 2007); United States v. Zuniga-Peralta, 442 F.3d 345 (5th Cir. 2005).

125 552 U.S. 38 (2007).

126 United States v. Tate, 516 F.3d 459 (6th Cir. 2008).

127 *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).