

Criminal History Primer



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CRIMINAL HISTORY PRIMER

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

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

² USSG §2L1.2.

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

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.

³ USSG §4A1.1.

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 Section 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

⁴ USSG §4A1.2(a)(1).

⁵ *Mitchell v. United States*, 2016 U.S. Dist. LEXIS 21923 (S.D. Ala. Jan. 8, 2016) (The court looks to section 4A1.2(a)(1) to determine the merit of the defendant’s claim; it defines a “prior sentence” as “any sentence previously imposed upon adjudication of guilt.” USSG §4A1.2(a)(1). Also, the Commentary for section 4A1.2 is dispositive of the defendant’s issue, stating: “‘Prior sentence’ means a sentence imposed prior to sentencing on the instant offense, other than conduct that is part of the instant offense. . . . A sentence imposed after the defendant’s commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense.” USSG §4A1.2 commentary note 1. Accordingly, the guidelines fully support the consideration of the defendant’s state court sentences, occurring prior to his federal firearms sentence, in determining his criminal history category.”), *and* *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. Griffith*, 2015 U.S. Dist. LEXIS 81710 (S.D. W. Va. June 24, 2015) (Where defendant was involved in a kickback scheme and pled guilty to making false statements to the IRS, the sentencing enhancement pertaining to loss under Section 2B1.1(b)(1) was not applicable because the kickback scheme and its associated loss were not relevant conduct attributable to defendant under Section 1B1.3(a)), *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).

arrested for the first offense prior to committing the 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

- 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

⁹ Compare *United v. Powell* 798 F.3d 431 (6th Cir. 2015), *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 USSG §4A1.2(a)(2). Effective August 1, 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 USSG App. C Amendment 6.

¹² USSG §4A1.2(k)(1).

¹³ USSG §4A1.2(b)(1).

¹⁴ USSG §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).

¹⁶ USSG §4A1.2(b)(2). See, e.g., *United States v. Fernandez*, 743 F.3d 453 (5th Cir. 2014) (Where defendant was convicted of methamphetamine-related offenses, district court did not err in assessing two criminal history points under USSG §4A1.2(b)(2) for his prior Colorado sentence for assault because entire sentence was not suspended and non-suspended portion exceeded 60 days) and *United States v. Tabaka*, 982 F.2d 100 (3d Cir. 1992) (all but two days suspended).

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

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-

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) (finding time credited on another sentence did not count in calculating criminal history points because “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. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005) (A “sentence of imprisonment” is defined as a sentence of incarceration and refers to the maximum sentence imposed, rather than the time actually served. If part of the sentence of imprisonment is suspended, “sentence of imprisonment” refers only to the portion that was not suspended). See also *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).

²⁵ USSG §4A1.2(o).

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.
 - 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

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 USSG §4A1.2(c)(2).

³⁰ USSG §4A1.2, comment. (n.5).

³¹ USSG §§4A1.1(a), 4A1.2 (e)(1).

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

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 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

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

³⁴ United States v. Radzicz, 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 USSG §§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).

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).

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 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

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).

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 USSG §4A1.2(h), (i).

⁵² USSG §4A1.2(l).

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

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

⁵³ See USSG §4B1.1(a).

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

⁵⁵ USSG §4B1.1(b).

⁵⁶ See USSG §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 USSG §4B1.1(c)(2).

⁵⁹ USSG §5G1.2(e).

⁶⁰ USSG §2K2.4, comment. (n.2(B)).

also depart if the defendant’s guideline range is lower than if he did not have a § 924(c) conviction.⁶¹

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

⁶¹ USSG §2K2.4, comment. (n.4).

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 USSG See also, e.g., United States v. Otero, 495 F.3d 393 (7th Cir. 2007); United States v. Moorner, 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 USSG §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). In 2015, the Commission resolved this circuit conflict by adopting a new application note regarding the “single sentence” rule at §4A1.2(a)(2). See USSG App. C Amendment 6.

- 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))

(a) 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 murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. 5845(a) or explosive material as defined in 18 U.S.C. 841(c).

(b) The term “controlled substance offense” means an 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.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. *See* USSG App. C, Amend 789 (effective August 1, 2016).

See also §4A1.2(a)(2) (n.3) which provides, 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.

⁶⁸ In addition to resolving the circuit conflict regarding the “single sentence” rule, the 2015 amendment 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* USSG App. C Amendment 6.5.

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).

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.”⁷⁰

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 Armed Career Criminal Act, which limits “serious drug offenses” to offenses punishable by at least ten years.⁷¹ Some state misdemeanor convictions may qualify.⁷²
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.⁷³
3. **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).⁷⁴ 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.⁷⁵

⁷⁰ USSG §4B1.2(b).

⁷¹ 18 U.S.C. § 924(e)(2)(A).

⁷² See “felony” definition at USSG §4A1.2(o).

⁷³ *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).

⁷⁴ 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).

⁷⁵ *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.⁷⁶ 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.⁷⁷ 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.⁷⁸

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.”⁷⁹ 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,⁸⁰ 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.⁸¹

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

⁷⁶ 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).

⁷⁷ USSG §4B1.2, comment. (n.1); *United States v. Serna*, 309 F.3d 859 (5th Cir. 2002).

⁷⁸ USSG §4B1.2, comment. (n.1).

⁷⁹ *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).

⁸⁰ *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc) (not drug trafficking under §2L1.2).

⁸¹ *United States v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991).

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.⁸² 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 violence or controlled substance offense, or possessed a firearm described in 26 U.S.C. § 5845(a).⁸³

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

If the defendant's instant offense is one of the covered sex crimes,⁸⁴ 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 §4B1.5.⁸⁵

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."⁸⁶

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:

⁸² USSG §4B1.4(b).

⁸³ USSG §4B1.4(c). *See also* OFFICE OF GENERAL COUNSEL, U.S. SENTENCING COMM'N, FIREARMS PRIMER (June 2015), at <http://www.ussc.gov/training/primers>.

⁸⁴ The Commentary to §4B1.5 enumerates the offenses that qualify as a "covered sex crime."

⁸⁵ *See United States v. Babcock*, 753 F.3d 587 (6th Cir. 2014).

⁸⁶ 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.⁸⁷
- 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.⁸⁸
- 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.⁸⁹
- 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.⁹⁰ Note that the offenses must be similar,⁹¹ and significant.⁹²

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.⁹³
- b. **Previous lenient treatment.** The court may also depart because the defendant previously received "extreme leniency" for a serious offense.⁹⁴

⁸⁷ See *United States v. Lente*, 759 F.3d 1149 (10th Cir. 2014).

⁸⁸ See *United States v. Beltramea*, 785 F.3d 287 (8th Cir. 2015).

⁸⁹ See *United States v. Ravitch*, 128 F.3d 865 (5th Cir. 1997).

⁹⁰ 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).

⁹¹ *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).

⁹² *United States v. Martinez-Perez*, 916 F.2d 1020 (5th Cir. 1990) (departure not justified by remote misdemeanor conviction).

⁹³ 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).

⁹⁴ USSG §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 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.⁹⁵
- d. **Prior arrests without conviction.** The court cannot depart based on a prior arrest record itself.⁹⁶

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.”⁹⁷

- 1. **Lower limit.** A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.⁹⁸
- 2. **Limitation for career offenders.** A downward departure under §4A1.3 for a career offender may not exceed one criminal history category.⁹⁹
- 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 §4B1.5.¹⁰⁰

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

⁹⁵ United States v. Cade, 279 F.3d 265 (5th Cir. 2002); United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001).

⁹⁶ 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).

⁹⁷ 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. 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).

⁹⁸ USSG §4A1.3(b)(2)(A).

⁹⁹ USSG §4A1.3(b)(3)(A).

¹⁰⁰ USSG §4A1.3(b)(2)(B).

reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles the defendant's.”¹⁰¹ If a defendant is already at the highest criminal history category, the court should move incrementally along the offense levels.¹⁰² Previously, courts had held that the sentencing court must consider adjacent categories, determine on the record whether each category is inadequate, and provide reasons for these findings.¹⁰³ The same findings should be made for downward departures.¹⁰⁴

In a post-*Booker* world, strict compliance with this procedure may no longer be required.¹⁰⁵ The Sixth Circuit reviews criminal history departures under the *Gall v. United States*¹⁰⁶ framework for both procedural and substantive reasonableness.¹⁰⁷ 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.¹⁰⁸

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.

¹⁰¹ USSG §4A1.3(a)(4)(A).

¹⁰² USSG §4A1.3(a)(4)(B). *See also* *United States v. Pennington*, 9 F.3d 1116 (5th Cir. 1993).

¹⁰³ *United States v. Lambert*, 984 F.2d 658 (5th Cir. 1993) (en banc). *See also* USSG §4A1.3(c)(1).

¹⁰⁴ USSG §4A1.3(c)(2).

¹⁰⁵ *See* *United States v. Colon*, 474 F.3d 95 (3d Cir. 2007); *United States v. Zuniga-Peralta*, 442 F.3d 345 (5th Cir. 2005).

¹⁰⁶ 552 U.S. 38 (2007).

¹⁰⁷ *United States v. Tate*, 516 F.3d 459 (6th Cir. 2008).

¹⁰⁸ *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).