

PRIMER



CRIMINAL HISTORY

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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, §4A1.1, §4B1.1, the immigration and firearms guidelines impose remoteness constraints on the use of prior convictions, but §4B1.4, §4B1.5, and the statutes do not.¹

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, drug and sex offenses, may increase the defendant's guideline offense level. Assessing these prior convictions requires scrutiny to determine whether a prior state or federal conviction fits the specific definition that triggers the enhanced penalty provisions.

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

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

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.²

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.

² 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 §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.”³ The term “prior sentence” “is not directed at the chronology of the conduct, but the chronology of the sentencing.”⁴ Thus, a previously imposed sentence counts even if it was for conduct that occurred after the offense of conviction.⁵ Courts are divided over whether to consider a sentence imposed after the original sentencing but before re-sentencing.⁶

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]).⁷

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 second offense).⁸ Section 4A1.2(a)(2) states that “If there is no intervening arrest, prior

³ *Id.* §4A1.2(a)(1).

⁴ *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)).

⁵ *Lopez*, 349 F.3d at 41.

⁶ *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).

⁷ *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).

⁸ *See* *United States v. Fueher*, 844 F.3d 767 (8th Cir. 2016) (no intervening arrest where defendant was arrested for first offense after commission of second), *United States v. Smith*, 549 F.3d 355, 361 (6th Cir.

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.”⁹

c. Single sentence

If prior sentences are treated as a single sentence, use the longest sentence if concurrent sentences were imposed, and the aggregate sentence if consecutive sentences were imposed.¹⁰

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.¹¹

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.¹² In the case of an indeterminate sentence, the high end of the prescribed sentencing range is treated as the maximum sentence.¹³ If the court reduces the prison sentence, however, the reduced sentence controls.¹⁴

2008) (no intervening arrest between the first two prior offenses, but intervening arrest between the second and third offense committed while on bond). *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”).

⁹ USSG §4A1.2(a)(2).

¹⁰ *Id.*

¹¹ *Id.* §4A1.2(k)(1).

¹² *Id.* §4A1.2(b)(1).

¹³ *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).

¹⁴ 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.¹⁵ If a defendant receives “time served,” the actual time spent in custody will be counted.¹⁶ A discharged sentence does not qualify as a suspended sentence under §4A1.2(b)(2) if the “suspension” was not ordered by a court.¹⁷

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.¹⁸ In *United States v. Brooks*,¹⁹ 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.”²⁰ Generally, community type confinement is deemed to be a “substitute for imprisonment” and not a “sentence of imprisonment.”²¹ A six-month sentence of home detention is not considered a sentence of imprisonment.²² The courts have largely held that community treatment centers or halfway houses are not imprisonment.²³

¹⁵ USSG §4A1.2(b)(2). *See, e.g.*, *United States v. Tabaka*, 982 F.2d 100 (3d Cir. 1992) (all but two days suspended).

¹⁶ *See United States v. Rodriguez-Lopez*, 170 F.3d 1244 (9th Cir. 1999) (adding two points for 62 days served), and *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) (“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.”).

¹⁷ *See United States v. Rodriguez-Bernal*, 783 F.3d 1002 (5th Cir. 2015).

¹⁸ *United States v. Brooks*, 166 F.3d 723 (5th Cir. 1999); *United States v. Latimer*, 991 F.2d 1509 (9th Cir. 1993).

¹⁹ 166 F.3d 723 (5th Cir. 1999).

²⁰ *Id.*, at 725–26.

²¹ 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).

²² *United States v. Gordon*, 346 F.3d 135 (5th Cir. 2003).

²³ *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, additional incarceration under §4A1.2(k)(1)), and *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (time served in home detention is not “sentence of imprisonment”).

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.²⁴ This definition requires careful review of certain prior misdemeanors in jurisdictions where some misdemeanor offenses carry two-year or three-year statutory maximums.²⁵ However, in at least one jurisdiction, certain classes of felonies are not punishable by more than one year.²⁶

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.²⁷ Other petty offenses (*e.g.*, fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, vagrancy) are never counted.²⁸ Convictions for driving while intoxicated and other similar offenses are always counted.²⁹

5. Timing and Status Concerns

Whether a prior conviction is scored for the criminal history computation depends on several 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.

²⁴ USSG §4A1.2(o).

²⁵ *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).

²⁶ *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).

²⁷ USSG §4A1.2(c)(1).

²⁸ *Id.* §4A1.2(c)(2).

²⁹ *Id.* §4A1.2, comment. (n.5).

a. Fifteen-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* 15 years of the instant offense *or* resulting in incarceration of the defendant during any part of the 15-year period.³⁰ 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 15-year period immediately preceding the instant offense.³¹ 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.³² A defendant on escape status is deemed incarcerated.³³

b. Ten-year window for sentences less than 13 months

For prior sentences less than 13 months, there is a 10-year time limitation, which runs from the date the prior sentence was imposed, not when it was served.³⁴ 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.³⁵

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.³⁶ This provision covers virtually all forms of suspended sentences where there is a possibility of a custodial sentence, even if

³⁰ *Id.* §§4A1.1(a), 4A1.2 (e)(1).

³¹ *Id.* §4A1.2(k)(2)(A). *See, e.g.*, *United States v. Semsak*, 336 F.3d 1123 (9th Cir. 2003) (revocation of parole).

³² *United States v. Ybarra*, 70 F.3d 362 (5th Cir. 1995).

³³ *United States v. Radzicz*, 7 F.3d 1193, 1195 (5th Cir. 1993) (“[the defendant] *would have* been in custody during the 15-year period preceding commencement of the instant offense had he not escaped from custody while serving the eight-year sentence.”).

³⁴ USSG §4A1.2(e)(2).

³⁵ *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) . . .”).

³⁶ USSG §4A1.1(d).

there is no active supervision.³⁷ However, a suspended sentence where a fine is the only sanction is not considered to be a criminal justice sentence.³⁸ A defendant, whose probation would have otherwise expired but for an outstanding revocation warrant, is deemed to be under a criminal justice sentence even if the state did not use due diligence to execute the warrant.³⁹ For purposes of §4A1.1(d), a defendant must be “under a criminal justice sentence” at the time he or she committed the instant offense.⁴⁰ Note, however, that a defendant who fails to report for service of a sentence of imprisonment shall be treated as having escaped and therefore is under a criminal justice sentence.⁴¹

d. Offenses Committed Prior to Age 18

For an offense committed by the defendant before age 18 that resulted in an *adult* prison sentence exceeding 13 months within the prior 15-year period, three criminal history points are added.⁴² For an offense committed before age 18 that resulted in a *juvenile or adult* sentence to confinement of at least 60 days, two points are added if the defendant *was released* from that confinement within *five years* of the instant offense.⁴³ Otherwise, one point is added for an offense committed before age 18 that resulted in a juvenile or adult sentence *imposed* within five years of the instant offense.⁴⁴

Juvenile adjudications are counted even though not considered “convictions” in state court.⁴⁵ But, the discontinuance of a juvenile adjudication is not considered a sentence.⁴⁶ A sentence of commitment to the custody of the state’s juvenile authority constitutes a

³⁷ 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).

³⁸ *Id.* §4A1.1, comment. (n.4); *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993).

³⁹ *Id.* §4A1.2(m); See also *United States v. Anderson*, 184 F.3d 479 (5th Cir. 1999). See also *United States v. McCowan*, 469 F.3d 386 (5th Cir. 2006).

⁴⁰ See *United States v. Caldwell*, 585 F.3d 1347 (7th Cir. 2009). (At the time of the offense, the defendant was on probation for driving while a habitual offender, but he had not served any portion of his 30-day sentence. Therefore, he was not under a “criminal justice sentence.”).

⁴¹ *Id.* §4A1.2(n); See also *United States v. Aska*, 314 F.3d 75 (2nd Cir. 2002), *United States v. Fisher*, 137 F.3d 1158, 1167 (9th Cir. 1998).

⁴² *Id.* §4A1.2(d)(1); *United States v. Gipson*, 46 F.3d 472 (5th Cir. 1994).

⁴³ *Id.* §4A1.2(d)(2)(A) & comment (n. 7).

⁴⁴ See §4A1.2(d)(2)(B).

⁴⁵ *United States v. Holland*, 26 F.3d 26 (5th Cir. 1994).

⁴⁶ *United States v. Langford*, 516 F.3d 205, 210 (3rd Cir. 2008).

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

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.

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 *Id.* §4A1.2(h), (i).

⁵² *Id.* §4A1.2(l).

A. Career Offender

1. General Application (§4B1.1)

An individual is a “career offender” if (1) he or she was at least 18 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

a. 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 establish that a career offender’s criminal history category is VI.⁵⁵

b. Career Offender and 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

⁵³ See *id.* §4B1.1(a). See also §4B1.2, comment. (n.1) (A conviction for using [carrying or possessing] a firearm during a violent felony or drug trafficking offense may qualify as a predicate offense for career offender purposes.).

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).

⁵⁷ USSG §4B1.1(c)(3).

⁵⁸ See *id.* §4B1.1(c)(2).

⁵⁹ *Id.* §5G1.2(e).

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

c. 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

d. Predicate Convictions

(1) 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 17 can be considered a career offender.⁶⁴

(2) 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

⁶⁰ *Id.* §2K2.4, comment. (n.2(B)).

⁶¹ *Id.* §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 *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. Guerrero*, 768 F.3d 351 (5th Cir. 2014).

⁶⁶ *Id.* §4B1.2(c).

(3) Predicate convictions must be counted separately.

The prior convictions must be counted separately under §4A1.1(a), (b), or (c), to qualify as predicate convictions for career offender purposes. But, 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.⁶⁷

(4) 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)), and must receive criminal history points under §4A1.1(a), (b), or (c) to qualify as predicates for the career offender enhancement.⁶⁸ A prior sentence included in a single sentence, that is remote in time, and would not independently receive criminal history points, cannot serve as a predicate offense.

e. Inchoate Offenses

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.”⁶⁹ 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,⁷⁰ 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.⁷¹

2. 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:

⁶⁷ *Id.* §4A1.2, comment. (n.3).

⁶⁸ *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).

⁶⁹ *See* United States v. Shumate, 341 F.3d 852 (9th Cir. 2003) and United States v. Medina, 714 F.3d 232 (4th Cir. 2013) (solicitation of controlled substance offense is included); *see also* United States v. Dolt 27 F.3d 235 (6th Cir. 1994) (solicitation of controlled substance offense is not included); United States v. Lightbourn, 115 F.3d 291 (5th Cir. 1997) (conspiracy).

⁷⁰ United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) (en banc) (not drug trafficking under §2L1.2).

⁷¹ United States v. Liranzo, 944 F.2d 73, 79 (2d Cir. 1991).

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).⁷²

The “crime of violence” definition is used not only to determine whether a defendant’s sentence is subject to the career offender enhancement in §4B1.1, but also whether a defendant’s sentence is subject to enhancement in other guidelines.⁷³ 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]).

3. Controlled Substances 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.”⁷⁴

a. Predicate Drug Offense Punishable by More than One Year

Note that this guideline covers trafficking offenses punishable by more than one year and therefore applies to a number of minor drug offenses not covered by the Armed Career

⁷² USSG §4B1.2(a).

⁷³ 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).

⁷⁴ *Id.* §4B1.2(b).

Criminal Act (ACCA), which limits “serious drug offenses” to offenses punishable by at least ten years.⁷⁵ Some state misdemeanor convictions may qualify.⁷⁶

b. Predicate Drug Conviction Limited to Drug Trafficking Offenses Firearm 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.⁷⁷

c. 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).⁷⁸ 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.⁷⁹

4. Categorical and Modified Categorical Approach

The categorical approach and modified categorical approaches apply to the determination whether an offense is a “crime of violence” or “controlled substance offense.”⁸⁰

⁷⁵ 18 U.S.C. § 924(e)(2)(A).

⁷⁶ See “felony” definition at USSG §4A1.2(o). *See also* USSG §4B1.1, comment (n. 4) for a downward departure provision for state misdemeanors counted as predicate convictions.

⁷⁷ *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).

⁷⁸ USSG §4B1.2, comment. (n.1).

⁷⁹ *Abuelhawa v. United States*, 556 U.S. 816 (2009).

⁸⁰ *See* section IV *infra*.

C. 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.” Full face value of stolen checks, and gross profit has been used to calculate the defendant’s derived income for purposes of applying the enhancement.⁸¹

D. Armed Career Criminal

1. General Application (§4B1.4)

A defendant convicted of a violation of 18 U.S.C. 922(g), and who has three prior convictions, for a violent felony or serious drug trafficking offense, or both, committed in occasions different from one another is considered an “armed career criminal.”⁸² The defendant is subject to an enhanced sentence under 18 U.S.C. § 924(e).

a. Offense Level and Criminal History Category

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.⁸³

The criminal history category is raised to a minimum level of IV and is calculated as the greatest of the following:

⁸¹ See *United States v. Quertermous*, 946 F.2d 375 (5th Cir. 1991), *United States v. Gordon*, No. 15-2395, 2017 WL 1164364, (1st Cir. Mar. 29, 2017).

⁸² See 18 U.S.C. § 924(e) and §4B1.4, comment (n.1).

⁸³ USSG §4B1.4(b).

- (1) Chapter Four, Part A
- (2) Career Offender Guideline if applicable,
- (3) Category VI, if the defendant used or possessed a firearm or ammunition in connection with either a crime of violence or a controlled substance offense; or the firearm possessed by the defendant was of the type described in 26 U.S.C. § 5845(a)⁸⁴; or
- (4) Category IV.

b. Armed Career Offender and 844(h), 924(c), or 929(a)

Sections 4B1.4(b)(3)(A) and (c)(2) do not apply if a defendant is also convicted of a violation of 18 U.S.C. § 844, 924(c), or 929(a).⁸⁵ However, if the maximum penalty resulting from the guideline range, combined with the mandatory consecutive sentences, is lower than the maximum penalty that would have resulted if such provisions applied, an upward departure may be warranted. Note that the upward departure has a cap.⁸⁶

c. Acceptance of Responsibility

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.

d. Predicate convictions

Different than the career offender guideline, 18 U.S.C. § 924(2) does not provide for time limitations in predicate convictions. It refers to convictions committed on occasions different from one another. In addition, burglary is included as a predicate offense.

2. Violent Felony

The term “violent felony” means:

- a. Any crime punishable by imprisonment for a term exceeding one year, **or** any act of juvenile delinquency involving the use or carrying of a firearm, knife or

⁸⁴ *Id.* §4B1.4(c). See also the Commission’s subject matter primer on *Firearms* at <http://www.ussc.gov/guidelines/primers/firearms>.

⁸⁵ *Id.*, comment (n. 1).

⁸⁶ *Id.*, comment (n. 2).

destructive device that would be punishable of such term if committed by an adult that:

- 1) has as an element of, the use, attempted use, or threatened use of physical force against the person of another; or
- 2) is burglary, arson, or extortion, involving the use of explosives.⁸⁷

3. Serious drug offense

The term serious drug offense refers to an offense under 21 U.S.C. § 801 et seq., § 951 et seq., or 46 U.S.C. § 70501 et seq., or an offense under state law involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance for which a maximum term of imprisonment is at least ten years.⁸⁸

4. Categorical and Modified Categorical Approach

The categorical approach and modified categorical approaches apply to the determination whether an offense is a “crime of violence” or “controlled substance offense.”⁸⁹

E. Repeat and Dangerous Sex Offender Against Minors

1. General Application (§4B1.5)

If the defendant’s instant offense is one of the covered sex crimes,⁹⁰ and the defendant has a prior qualifying sex offense conviction, or has engaged in a pattern of activity involving prohibited sexual conduct, then the defendant is subject to the conditions set forth in §4B1.5.

⁸⁷ The Supreme Court invalidated the residual clause in *United States v. Johnson*, 135 S. Ct. 2551 (2015). Different than the career offender guideline, the armed career criminal statute includes a burglary conviction.

⁸⁸ 18 U.S.C. § 924(e)(2)(A).

⁸⁹ See section IV *infra*.

⁹⁰ USSG §4B1.5 (comment. n. 2).

a. Offense Level and Criminal History Category

If the defendant has a prior qualifying sex conviction and is not a career offender, then the offense shall be the greater of (1) Chapter Two and Three; or (2) the offense level from the table decreased by the acceptance of responsibility deduction. The criminal history category is not less than V.⁹¹

A 5-level enhancement is applied if the defendant is not a career offender, has no prior qualifying sex conviction, and engaged in a pattern of prohibited sexual conduct.⁹²

b. Acceptance of Responsibility

Acceptance of responsibility under §3E1.1 is applicable.

c. Predicate convictions

The Sixth Circuit concluded that the time limitations of §4A1.2 are not applicable.⁹³ Section 4B1.5(a) applies to a defendant whose prior sex conviction is based on the adjudication of guilty but has not yet been sentenced.⁹⁴

2. Categorical and Modified Categorical Approach

The categorical approach and modified categorical approaches apply to the determination of whether an offense is a qualified prior sex conviction.⁹⁵

IV. CATEGORICAL APPROACH AND MODIFIED CATEGORICAL APPROACH

As set forth above, offenders whose criminal history evidences violence or other types of serious felony conduct may be subject to enhanced penalties both in federal statutes and in the United States Sentencing Guidelines. Congress, in statutes, and the

⁹¹ *Id.* §4B1.5(a).

⁹² *Id.* §4B1.5(b).

⁹³ *See* United States v. Babcock, 753 F.3d 587 (6th Cir. 2014).

⁹⁴ *See* United States v. Leach, 491 F.3d 858 (8th Cir. 2007).

⁹⁵ *See* section IV *infra*. *See also* United States v. Dahl, 833 F.3d 345 (3rd Cir. 2016).

Commission, in the sentencing guidelines, have each attempted to single out the types of prior convictions that they consider particularly relevant to sentencing, and which therefore have a greater effect on sentence length. Sentencing and appellate courts have interpreted these terms through application of the “categorical approach” mandated by the Supreme Court in *Taylor v. United States*,⁹⁶ and the “modified categorical approach” established in *Shepard v. United States*⁹⁷ and further clarified in *Descamps v. United States*⁹⁸ and *Mathis v. United States*.⁹⁹ Although these cases dealt with statutory enhancements at 18 U.S.C. § 924(e), lower courts have applied their categorical approach in other contexts where a sentencing enhancement is based on a prior conviction, including the career offender guideline.¹⁰⁰

The categorical approach was first adopted in *Taylor v. United States*.¹⁰¹ Under the categorical approach, courts must look to the statutory elements of an offense, rather than the defendant’s conduct, when determining the nature of a prior conviction. Thus, *Taylor* held that, when deciding whether a prior conviction falls within a certain class of crimes, a sentencing court may “look only to the fact of conviction and the statutory definition of the prior offense.”¹⁰² A court is *not* concerned with the “facts underlying the prior convictions;” in other words, the court may not focus on the underlying criminal conduct itself.¹⁰³ This form of analysis permits a federal sentencing court to examine only the statute under which the defendant sustained a conviction (and, in certain cases, judicial documents surrounding that conviction) in determining whether the prior conviction fits within a federal predicate definition.

The modified categorical approach may only be used “when a prior conviction is for violating a ‘divisible statute’—one that sets out one or more of the elements in the alternative, *e.g.*, burglary involving entry into a building *or* an automobile.”¹⁰⁴ Under the modified categorical approach, sentencing courts may only consult a limited class of documents, such as indictments and jury instructions, to determine which alternative element formed the basis of the defendant’s prior conviction.

⁹⁶ 495 U.S. 575 (1990).

⁹⁷ 544 U.S. 13 (2005).

⁹⁸ 133 S. Ct. 2276 (2013).

⁹⁹ 136 S. Ct. 2243 (2016).

¹⁰⁰ See *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008).

¹⁰¹ 495 U.S. 575 (1990).

¹⁰² *Taylor*, 495 U.S. at 602.

¹⁰³ *Id.* at 600–02; see also *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) (“[W]e employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime.”).

¹⁰⁴ *Descamps*, 133 S. Ct. 2276 at 2279.

For a prior trial conviction, the sentencing court may consult judicial records such as the indictment and jury instructions. For a prior guilty plea conviction, the sentencing court's review is "limited to the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."¹⁰⁵

The Fifth Circuit extended this list of judicial records from a prior conviction to include New York Certificates of Disposition if it specifies the subsection under which the defendant was convicted,¹⁰⁶ and the Ninth Circuit included California Minute Entries.¹⁰⁷ On the other hand, courts typically may not rely on the description in a federal PSR,¹⁰⁸ California abstracts,¹⁰⁹ or police reports.¹¹⁰ The Fifth Circuit has allowed use of a police record from a state that allows "a complaint written by a police officer [to] be the charging document,"¹¹¹ and the Ninth Circuit has authorized courts to look at police records "to determine that [a] prior conviction was for selling marijuana" because the defendant had "stipulated during the plea colloquy that the police reports contained a factual basis for his guilty plea."¹¹² Similarly, while abstracts cannot be used to determine the nature of a prior

¹⁰⁵ *Shepard*, 544 U.S. at 26.

¹⁰⁶ *United States v. Neri-Hernandes*, 504 F.3d 587, 592 (5th Cir. 2007) (holding district court may rely on a New York Certificate of Disposition "to determine the nature of a prior conviction," but this evidence "is not conclusive and may be rebutted," such as "where the defendant shows a likelihood of human error in the preparation of the Certificate"). *United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding certificate of disposition did not support enhancement because it did not specify which subsection of a statute with multiple parts was the basis of conviction).

¹⁰⁷ *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008); *overruled on other grounds by Young v. Holder*, 697 F.3d 976, 986 (9th Cir. 2012) (when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes conviction under at least one of those theories, but not necessarily all of them).

¹⁰⁸ *See, e.g., United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005) (holding the court may not "rely on the PSR's characterization of the [prior] offense in order to make its determination of whether it [fit within one of the categories in §2L1.2]").

¹⁰⁹ *See, e.g., United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2005); *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

¹¹⁰ *See, e.g., Shepard*, 544 U.S. at 16; *United States v. Almazan-Becerra*, 482 F.3d 1085, 1090 (9th Cir. 2007) (noting "[t]he Supreme Court appears to have foreclosed the use of police reports in a *Taylor* analysis" but that such reports may be used when stipulated to by defendant).

¹¹¹ *United States v. Rosas-Pulido*, 526 F.3d 829, 832 (5th Cir. 2008) (citing Minnesota law), *superseded on other grounds by guideline amendment*.

¹¹² *United States v. Almazan-Becerra*, 537 F.3d 1094, 1098, 1100 (9th Cir. 2008).

conviction, under the modified categorical approach, they may be used to establish the fact of conviction or the length of a prior sentence.¹¹³

In the absence of supporting documents that limit the scope of a conviction under an overbroad statute, the enhancement does not apply.¹¹⁴

“The modified approach serves – and serves solely – as a tool to identify the elements of the crime of conviction when a statute’s disjunctive phrasing renders one (or more) of them opaque.”¹¹⁵ Once the elements of the crime of conviction are identified, the categorical approach is followed, *i.e.*, “the elements of the offense of conviction are compared with the elements of the statutory offense and only if they align may the offense count.”¹¹⁶

In recent years, the Supreme Court has clarified the operation of the categorical and modified categorical approaches.

In *Descamps*, the Supreme Court explained that, in the categorical approach, the comparison is between the prior conviction’s elements of the offense with the elements of the generic offense. *Id.* 2285. If the “relevant statute has the same elements of the ‘generic’ ACCA crime, then the prior conviction can serve as an ACCA predicate, so too if the statute defines the crime more narrowly.”¹¹⁷ But, a “state crime cannot qualify as ACCA if its elements are broader than those of a listed generic offense.”¹¹⁸

Descamps held that “the sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.”¹¹⁹ In other words, the sentencing court cannot look at the documents as defined in *Taylor* in a trial conviction, or the documents set forth in *Shepard* in the context of a conviction upon a plea, in the categorical approach.¹²⁰ It clarified that “Taylor

¹¹³ See, e.g., *United States v. Sandoval-Sandoval*, 487 F.3d 1278 (9th Cir. 2007) (length of sentence); *United States v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007) (fact of conviction); *United States v. Zuniga-Chavez*, 464 F.3d 1199 (10th Cir. 2006) (fact of conviction).

¹¹⁴ See, e.g., *United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003) (holding conviction for “assault in violation of a court order” could not categorically be a crime of violence where the government did not provide statute of conviction).

¹¹⁵ *Mathis*, 136 S. Ct. 2243 at 2253, citing *Descamps*, 133 S. Ct. 2276 at 2285.

¹¹⁶ *United States v. Faust*, No. 14-2292, 2017 WL 1244844, at *7 (1st Cir. Apr. 5, 2017).

¹¹⁷ *Taylor*, 495 U.S. at 599.

¹¹⁸ *Mathis*, at 2251.

¹¹⁹ *Descamps*, 133 S. Ct. 2276 at 2282.

¹²⁰ See *United States v. Hinkle*, 832 F.3d 569, 574–75 (5th Cir. 2016), and *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017).

recognized a ‘narrow range of cases’ in which sentencing courts—applying what we would later dub the ‘modified categorical approach’—may look beyond the statutory elements to ‘the charging paper and jury instructions’ used in a case.”¹²¹

In *Mathis*, the Court held that when the predicate conviction statute enumerates factual means of committing a single element of an offense, those alternative factual means are not elements of the offense. The sentencing court cannot use the modified categorical approach when the statute of conviction is indivisible¹²², *i.e.*, it cannot look beyond the fact of conviction to establish the defendant’s conduct in the prior offense. Therefore, the “first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means.”¹²³ The Court went further and identified aids to be used to determine if a statute enumerates alternative elements or factual means. Specifically, the Court explained that, in making this determination, the sentencing court may examine state supreme court opinions, review the statute to determine whether it provides different punishments for each alternative¹²⁴ and examine any “illustrative examples” provided in the statute. Additionally, if the “state law fails to provide clear answers,” the sentencing court may take a “peek at the record documents” to determine if the “listed items are elements of the offense.”¹²⁵

V. 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.”¹²⁶

¹²¹ *Descamps*, at 2283–84.

¹²² *See* United States v. Titties, No. 15-6236, 2017 WL 1102867, (10th Cir. Mar. 24, 2017).

¹²³ *Mathis*, 136 S. Ct. 2243 at 2256.

¹²⁴ *See* United States v. Dozier, 848 F.3d 180, 187 (4th Cir. 2017).

¹²⁵ *Mathis*, at 2256.

¹²⁶ USSG §4A1.3(a)(1) (emphasis added).

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:

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.¹²⁷

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.¹²⁸

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.¹²⁹

¹²⁷ See *United States v. Lente*, 759 F.3d 1149 (10th Cir. 2014).

¹²⁸ See *United States v. Beltramea*, 785 F.3d 287 (8th Cir. 2015).

¹²⁹ *United States v. Hernandez*, 896 F.2d 642, (1st Cir. 1990).

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.¹³⁰ Note that the offense(s) must be similar,¹³¹ and significant.¹³²

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.¹³³

b. Previous lenient treatment

The court may also depart because the defendant previously received "extreme leniency" for a serious offense.¹³⁴

c. Relevant conduct

The court cannot rely on a prior conviction as the basis for a departure because 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.¹³⁵

¹³⁰ 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).

¹³¹ *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).

¹³² *United States v. Martinez-Perez*, 916 F.2d 1020 (5th Cir. 1990) (departure not justified by remote misdemeanor conviction).

¹³³ 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).

¹³⁴ *Id.* §4A1.3, comment. (backg'd.). See *United States v. Delgado-Nunez*, 295 F.3d 494 (5th Cir. 2002).

¹³⁵ *United States v. Cade*, 279 F.3d 265 (5th Cir. 2002); *United States v. Hunerlach*, 258 F.3d 1282 (11th Cir. 2001).

d. Prior arrests without conviction

The court cannot depart based on a prior arrest record itself.¹³⁶

e. Categorical approach

In *United States v. Gutierrez-Hernandez*,¹³⁷ 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 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 because the enhancement should have applied.

B. Downward Departures

A downward departure may be warranted where “reliable information indicates that the criminal history category *substantially overrepresents* the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.”¹³⁸

1. Lower Limit

A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.¹³⁹

¹³⁶ 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).

¹³⁷ 581 F.3d 251 (5th Cir. 2009).

¹³⁸ 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).

¹³⁹ USSG §4A1.3(b)(2)(A).

2. Limitation for Career Offenders

A downward departure under §4A1.3 for a career offender may not exceed one criminal history category.¹⁴⁰

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 §4B1.5.¹⁴¹

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.”¹⁴² If a defendant is already at the highest criminal history category, the court should move incrementally along the offense levels.¹⁴³ 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.¹⁴⁴ The same findings should be made for downward departures.¹⁴⁵

In a post-*Booker* world, strict compliance with this procedure may no longer be required.¹⁴⁶ The Sixth Circuit reviews criminal history departures under the *Gall v. United States*¹⁴⁷ framework for both procedural and substantive reasonableness.¹⁴⁸

¹⁴⁰ *Id.* §4A1.3(b)(3)(A).

¹⁴¹ *Id.* §4A1.3(b)(2)(B).

¹⁴² *Id.* §4A1.3(a)(4)(A).

¹⁴³ *Id.* §4A1.3(a)(4)(B). *See also* United States v. Pennington, 9 F.3d 1116 (5th Cir. 1993).

¹⁴⁴ United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc). *See also* USSG §4A1.3(c)(1).

¹⁴⁵ USSG §4A1.3(c)(2).

¹⁴⁶ *See* United States v. Colon, 474 F.3d 95 (3d Cir. 2007); United States v. Zuniga-Peralta, 442 F.3d 345 (5th Cir. 2005).

¹⁴⁷ 552 U.S. 38 (2007).

¹⁴⁸ United States v. Tate, 516 F.3d 459 (6th Cir. 2008).