Primer

Criminal History

Prepared by the
Office of the General Counsel

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I. INTRODUCTION AND OVERVIEW

This primer provides a general overview of the sentencing guidelines and statutes relevant to application of Chapter Four of the *Guidelines Manual* (Criminal History and Criminal Livelihood). Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

The following are some of the main considerations that affect criminal history computations under Chapter Four:

The Grid.—The guideline sentencing table is comprised of two components: offense level and criminal history category.[1] Criminal history forms the horizontal axis and is divided into six categories, from I (lowest) to VI (highest). Chapter Four, Part A provides instruction on how to calculate a defendant's criminal history category by assigning points for certain prior convictions.[2] A defendant's criminal history category, combined with the total offense level, determines the advisory guideline range.

Timing.— Statutory and guideline provisions contain different timing requirements for which prior offenses should be counted. For example, §4A1.1 (Criminal History Category), §4B1.1 (Career Offender), and the immigration and firearms guidelines impose remoteness constraints on the use of prior convictions, but §4B1.4 (Armed Career Criminal), §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), and their corresponding statutes do not.[3]

Repeat Offending.— For certain offenses, statutory enhancements for repeat offenders that require mandatory minimum sentences may result in the application of different criminal history guidelines. In addition, certain prior state and federal convictions, generally relating to crimes of violence and drug and sex offenses, may increase the defendant's guideline offense level for the instant offense. Such prior convictions require scrutiny to determine whether they fit the specific definitions that triggers the enhanced penalty provisions.

Departures.—The guidelines authorize departures from the calculated guideline range for overrepresentation or underrepresentation of a defendant's criminal history.[4] 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

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1 U.S. SENT'G COMM'N, *Guidelines Manual*, Ch.5, Pt.A (Nov. 2021) [hereinafter USSG].

2 USSG Ch.4, Pt.A.

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

4 *See* USSG §4A1.3.

likelihood that the defendant will commit other crimes. Similarly, a downward departure may be authorized if a defendant's criminal history overstates the seriousness of his or her criminal record or the likelihood that the defendant will commit other crimes.

II. CRIMINAL HISTORY

Part A of Chapter Four outlines how to calculate a defendant's criminal history for most cases.

A. COMPUTATION (§4A1.1)

The calculation of a defendant's criminal history category starts with computing how many points, if any, 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 treated as a single sentence, up to a total of 3 points for this subsection.[5]

There is no limit to the number of points that may be counted for prior sentences under subsections (a) and (b).[6] A maximum of four points may be counted under subsection (c).[7] Under subsection (e), convictions for crimes of violence can override the 4-point limit in subsection (c) by up to three additional criminal history points.[8]

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5 USSG §4A1.1.

6 USSG §4A1.1, comment. (n.1); USSG §4A1.1, comment. (n.2).

7 USSG §4A1.1, comment. (n.3).

8 USSG §4A1.1, comment. (n.5).

B. Definitions and Instructions (§4A1.2)

Section 4A1.2 (Definitions and Instructions for Computing Criminal History) contains key definitions and specific instructions for computing criminal history under §4A1.1.

1. "Prior Sentence"

Under §4A1.2(a), a "prior sentence" is defined as "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."[9] Whether a sentence is a "prior sentence" or not does not depend on the order of crimes because "it is the sequence of *sentences* not the sequence of crimes that matter."[10] Thus, a previously imposed sentence counts in computing criminal history even if it was for conduct that occurred after the offense of conviction.[11] Courts are divided over whether to consider a sentence imposed after the original sentencing but before resentencing in the same matter.[12]

a. Relevant conduct

A "prior sentence" does not include a sentence for conduct that would be considered relevant conduct to the offense of conviction under §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)).[13] Some factors a court may consider in determining

[9] USSG §4A1.2(a)(1). *Compare* United States v. Eustice, 952 F.3d 686, 693–94 (5th Cir.) (prior sentence imposed upon adjudication of guilt based on revocation of deferred adjudication probation resulting in sentence of imprisonment is a "prior sentence"), *cert. denied*, 141 S. Ct. 433 (2020), *with* United States v. Baptiste, 876 F.3d 1057, 1062 (11th Cir. 2017) (where adjudication of guilt is withheld, it does not qualify as a "prior sentence" under §4A1.2).

[10] United States v. Burke, 863 F.3d 1355, 1360 (11th Cir. 2017) (collecting cases).

[11] *See*, *e.g.*, United States v. McSmith, 968 F.3d 731, 737 (8th Cir. 2020) (sentence imposed seven months before sentence in instant case and also occurring after the relevant conduct in instant case was a prior sentence justifying one criminal history point); United States v. Lopez, 349 F.3d 39, 41 (2d Cir. 2003) (per curiam) (same).

[12] *Compare* United States v. Hopper, 11 F.4th 561, 573 (7th Cir. 2021) (can consider), *Burke*, 863 F.3d at 1360 (can consider), United States v. Tidwell, 827 F.3d 761, 764 (8th Cir. 2016) (can consider), United States v. Klump, 57 F.3d 801, 803 (9th Cir. 1995) (can consider), *and* United States v. Bleike, 950 F.2d 214, 221 (5th Cir. 1991) (not plain error to consider), *with* United States v. Ticchiarelli, 171 F.3d 24, 34–37 (1st Cir. 1999) (improper to consider intervening sentence under law of case doctrine).

[13] USSG §4A1.2(a)(1); USSG §4A1.2, comment. (n.1); *see, e.g.*, United States v. Kieffer, 681 F.3d 1143, 1166 (10th Cir. 2012) (defendant's convictions for mail fraud and making false statements in one state were relevant conduct to his convictions for making false statements, wire fraud, and contempt of court in another); United States v. Irvin, 369 F.3d 284, 289–91 (3d Cir. 2004) (federal firearms offense related to state manslaughter offense); United States v. Henry, 288 F.3d 657, 664–65 (5th Cir. 2002) (federal firearms offense related to state trespass offense). *But see* United States v. Fries, 796 F.3d 1112, 1115–18 (9th Cir. 2015) (use of a chemical weapon and making false statements not related to possession of unregistered destructive

whether a prior sentence is relevant conduct to the instant offense include temporal or geographic proximity; whether the offense had common victims; whether the prior conviction is used to prove the instant offense; and whether there is continuity between the two offenses.[14]

b. Multiple prior sentences

Under §4A1.2(a)(2), multiple prior sentences are to be counted separately or as a single sentence, depending on the circumstances.[15] Prior sentences always are counted separately if the offenses were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense).[16] Section 4A1.2(a)(2) states that "[i]f 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," in which case prior sentences are treated as a single sentence.[17] If prior sentences are treated as a single sentence, the longest sentence is used if concurrent sentences were imposed, and the aggregate sentence is used if consecutive sentences were imposed.[18]

c. Revocation sentences

Sentences for prior revocations of probation, parole, or supervised release also are

devices); United States v. Thomas 760 F.3d 879, 890–92 (8th Cir. 2014) (state conviction for possession of cocaine not relevant conduct to federal heroin distribution offense); United States v. Robinson, 744 F.3d 293, 300–01 (4th Cir. 2014) (2003 conviction for simple possession of marijuana not part of conspiracy to sell cocaine occurring between 2002 and 2011); United States v. Yerena-Magana, 478 F.3d 683, 686–90 (5th Cir. 2007) (illegal reentry not part of drug offense).

[14] United States v. Hernandez, 712 F.3d 407, 409 (8th Cir. 2013) (citing United States v. Pinkin, 675 F.3d 1088, 1091 (8th Cir. 2012)); *see also* United States v. Pepper, 747 F.3d 520, 526 (8th Cir. 2014); USSG §1B1.3.

[15] USSG §4A1.2(a)(2).

[16] *Id.*; *see also* United States v. Stuart, 1 F.4th 326, 330–31 (4th Cir. 2021) (if offenses are separated by an intervening arrest, sentences always counted separately under §4A1.2(a)(2) even when a suspended sentence for the first offense is activated at the same sentencing hearing where sentence is imposed for the second offense); United States v. Fuehrer, 844 F.3d 767, 773–74 (8th Cir. 2016) (no intervening arrest where defendant was arrested for first offense after commission of second); United States v. Leal-Felix, 665 F.3d 1037, 1039–44 (9th Cir. 2011) (no intervening arrest for two "citations" for driving while license suspended because not considered formal arrests for criminal history purposes). *But see* United States v. Crippen, 627 F.3d 1056, 1066 (8th Cir. 2010) (felonies separated by intervening arrests were not single criminal episode counted separately).

[17] USSG §4A1.2(a)(2).

[18] *Id.*; *see also* United States v. Garcia-Sanchez, 916 F.3d 522, 525–26 (5th Cir. 2019) (district court correctly applied §4A1.2's single sentence rule to §2L1.2 enhancement); United States v. Marroquin, 884 F.3d 298, 300 (5th Cir. 2018) (error to count individual convictions separately where multiple convictions were consolidated and single sentence was imposed); United States v. Davis, 720 F.3d 215, 219 (4th Cir. 2013) ("consolidated sentence" for multiple offenses considered "one sentence" regardless of intervening arrest).

counted, under §4A1.2(k)(1).[19] The term of imprisonment imposed upon revocation, if any, is added to the original sentence to compute the total criminal history points for that offense as a whole.[20]

2. "Sentence of Imprisonment"

The term "sentence of imprisonment" for purposes of computing criminal history refers to the maximum sentence of incarceration imposed—that is, the sentence pronounced by the court, not the length of time actually served.[21] Application Note 2 to §4A1.2 instructs that "[t]o qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence."[22] In the case of an indeterminate sentence, the high end of the prescribed sentencing range is treated as the maximum sentence.[23] If the court reduces the prison sentence, however, the reduced sentence controls.[24]

a. Suspended sentence

Under §4A1.2(b)(2), if part of the sentence was suspended, the "sentence of imprisonment" includes only the portion that was not suspended.[25] If a defendant received

[19] USSG §4A1.2(k)(1).

[20] *Id.*; *see*, *e.g.*, United States v. Guidry, 960 F.3d 676, 684 (5th Cir.) (affirming three points for a sentence of imprisonment exceeding one year and one month where defendant served one year in jail and an additional 180 days for a probation violation; sentence served "in lieu of revocation" after violating conditions of probation is a "modified" sentence under §4A1.2(k)(1)), *cert. denied*, 141 S. Ct. 602 (2020). Even where the conduct constituting the basis for the revocation is the same conduct at issue in the instant federal case, the rule requiring the revocation sentence to be added to the original sentence remains in effect. *See* United States v. Rivera-Berrios, 902 F.3d 20, 26 (1st Cir. 2018) (rejecting argument that this approach constituted impermissible double counting).

[21] USSG §4A1.2(b)(1).

[22] USSG §4A1.2, comment. (n.2); *see also* United States v. Valente, 915 F.3d 916, 922 (2d Cir. 2019) (defendant's prior 60-day term of imprisonment should have been assigned one criminal history point under §4A1.1, rather than two, because "he had not yet served [the term of imprisonment] because of medical issues").

[23] USSG §4A1.2, comment. (n.2); *see also* United States v. Levenite, 277 F.3d 454, 468 (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 only two days).

[24] United States v. Kristl, 437 F.3d 1050, 1057 (10th Cir. 2006) (per curiam) (reduced sentence was appropriate for criminal history purposes where state rule permitted reconsideration of sentence based on the law and facts, and government failed to meet its burden of establishing that reconsideration of sentence was for good behavior).

[25] USSG §4A1.2(b)(2); *see, e.g.*, United States v. Gonzalez Vazquez, 719 F.3d 1086, 1088, 1090–93 (9th Cir. 2013) (where 90-day sentence for driving with a suspended license was suspended for 84 days and the record was silent about probation, it did not warrant a criminal history point). *But see* United States v. Jaca-

a sentence of "time served," the actual time spent in custody will be counted.[26] A discharged sentence does not qualify as a suspended sentence under §4A1.2(b)(2) if the "suspension" was not ordered by a court.[27]

b. 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.[28] For example, in *United States v. Brooks*, the Fifth Circuit held that incarceration in a boot camp was a prison sentence.[29] The court distinguished between facilities like the boot camp "requiring twenty-four hours a day physical confinement" and other dispositions such as "probation, fines, and residency in a halfway house."[30] Work release programs also may constitute a sentence of imprisonment.[31] Generally, under Chapter Five (Determining the Sentence), community-type confinement is deemed to be a "substitute for imprisonment" and not a

Nazario, 521 F.3d 50, 56–57 (1st Cir. 2008) (a second sentence "retroactively deemed to have begun at the time the first sentence began, to have been served partially concurrently therewith until the date of the second sentencing" and the balance of which would "commence automatically when the first sentence ended" does not constitute a suspended sentence).

[26] *See* United States v. Fernandez, 743 F.3d 453, 457 (5th Cir. 2014) ("[B]ecause a time-served 'credit' noted in a prior sentencing order cannot be suspended, the period credited serves as the measure for assessing criminal history points in accordance with §4A1.2(b)(2) . . . when the prior sentence is otherwise suspended."); *see also* United States v. Carlile, 884 F.3d 554, 557–59 (5th Cir. 2018) (district court erred in assigning two criminal history points to a DWI sentence that the state court deemed satisfied based on the 21-month sentence the defendant had served for an unrelated criminal mischief conviction); 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.").

[27] *See* United States v. Rodriguez-Bernal, 783 F.3d 1002, 1005–06 (5th Cir. 2015) (per curiam) ("suspended sentence" refers to a decision by a judge, not a government agency or correctional administrator); United States v. Chavez-Diaz, 444 F.3d 1223, 1226–27 (10th Cir. 2006) (INS decision to deport defendant days into his sentence did not suspend the sentence under §4A1.2(b)(2)); United States v. Gajdik, 292 F.3d 555, 558 (7th Cir. 2002) (finding under 18 U.S.C. § 3651, only a court, not an executive agency, can suspend a sentence).

[28] *See, e.g.*, United States v. Stewart, 643 F.3d 259, 262–64 (8th Cir. 2011) (defendant's commitments to two juvenile facilities where he was not free to leave qualified as imprisonment); United States v. Morgan, 390 F.3d 1072, 1074 (8th Cir. 2004) (where defendant is not free to leave the facility for work, education, or to care for family, the sentence is for imprisonment even if the purpose is rehabilitative).

[29] 166 F.3d 723, 726–27 (5th Cir. 1999) (per curiam).

[30] *Id.* at 725–27.

[31] *See* United States v. Enrique-Ascencio, 857 F.3d 668, 675 (5th Cir. 2017) (sentence that qualified under California's work release program deemed "sentence of imprisonment" under §2L1.2, with the same meaning as "sentence of imprisonment" under §4A1.2(b)); United States v Timbrook, 290 F.3d 957, 959 (7th Cir. 2002) (sentence of work release in a county jail, as a secure facility, is a "sentence of imprisonment" for §4A1.1).

"sentence of imprisonment."[32] Additionally, a six-month sentence of home detention is not considered a sentence of imprisonment for purposes of §4A1.1 because a "sentence of imprisonment" is defined as a "sentence of incarceration."[33] Courts largely have held that community treatment centers or halfway houses are not imprisonment.[34]

3. Felony Offense

Under §4A1.2(c), sentences for all felony offenses are counted in computing criminal history.[35] A felony offense is defined at §4A1.2(o) as any offense under federal, state, or local law that is "punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed."[36] This definition requires careful review of the law in those jurisdictions where some misdemeanor offenses may carry two- or three-year statutory maximums.[37] Relatedly, in at least one jurisdiction, certain classes of felonies are not punishable by more than one year and would not meet the definition of a felony offense.[38]

4. Misdemeanor and Petty Offenses

Sentences for certain enumerated misdemeanors (*e.g.*, careless or reckless driving, gambling, driving without a license, disorderly conduct, prostitution, resisting arrest, and trespassing) are counted under §4A1.2(c)(1) "only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or

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[32] USSG §5F1.2 ("Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment."); *see* United States v. Marks, 864 F.3d 575, 581 (7th Cir. 2017) (sentences served in community treatment centers, halfway houses, home detention, or other forms of probation are not imprisonment for guideline purposes) (collecting cases).

[33] United States v. Gordon, 346 F.3d 135, 138 (5th Cir. 2003) (per curiam) ("[T]he Guidelines define a 'sentence of imprisonment' as a 'sentence of incarceration' and distinguish between 'imprisonment' and 'home detention.' " (citations omitted)).

[34] *See, e.g.*, United States v. Sullivan, 504 F.3d 969, 971–72 (9th Cir. 2007) ("[D]etention at a community treatment center, where the defendant is not subject to the control of the Bureau of Prisons, is not 'imprisonment,' " so time spent in a pre-release center is not "imprisonment." (quoting Reno v. Koray, 515 U.S. 50, 59 (1995))); United States v. Cintron-Fernandez, 356 F.3d 340, 347 (1st Cir. 2004) (under §5C1.1(d) and (e) "home detention and community confinement are considered as 'Substitute Punishments' for imprisonment, not merely different forms of imprisonment itself").

[35] USSG §4A1.2(c).

[36] USSG §4A1.2(o).

[37] *See, e.g.*, United States v. Coleman, 635 F.3d 380, 381–82 (8th Cir. 2011) (state misdemeanor punishable by less than two years is a qualifying felony for career offender purposes).

[38] *See, e.g.*, United States v. Simmons, 649 F.3d 237, 244–45 (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).

(B) the prior offense was similar to an instant offense."[39] Other petty offenses (*e.g.*, fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, and vagrancy) never are counted under §4A1.2(c)(2).[40] However, convictions for driving while intoxicated and other similar offenses always are counted.[41]

5. Timing and Status Concerns

Whether a prior conviction is scored for the criminal history computation under §4A1.1 depends on several factors—when the prior conviction occurred, the date of imposition of the sentence, the length of the prior sentence, and any sentence imposed upon revocation of the prior sentence—and on whether the prior conviction was for an offense committed before the age of 18.[42] 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 time period for prior sentences greater than 13 months

Three criminal history points are assigned for each adult sentence of imprisonment exceeding one year and one month that was imposed within 15 years of the defendant's commencement of the instant offense *or* that resulted in incarceration of the defendant during any part of that 15-year period.[43] Section 4A1.2(k)(2)(A) may affect the time period under which sentences are counted as provided in §4A1.2(e), requiring the scoring of remote-in-time convictions where a defendant was on parole or supervised release and was revoked and incarcerated during the 15-year period immediately preceding the instant offense.[44] The court will count a conviction of a defendant whose parole is revoked during

[39] USSG §4A1.2(c)(1); *see, e.g.*, United States v. Hawley, 919 F.3d 252, 256 (4th Cir. 2019) (affirming imposition of criminal history point for 30-day imprisonment for an uncounseled misdemeanor offense).

[40] USSG §4A1.2(c)(2).

[41] USSG §4A1.2, comment. (n.5).

[42] USSG §4A1.2(d), (e).

[43] USSG §§4A1.1(a), 4A1.2(e)(1).

[44] USSG §4A1.2(k)(2)(A); *see, e.g.*, United States v. Allen, 809 F.3d 1049, 1049–50 (8th Cir. 2016) (revocation of supervised release); United States v. Semsak, 336 F.3d 1123, 1127–28 (9th Cir. 2003) (revocation of parole). *But see* United States v. Lee, 974 F.3d 670, 677–80 (6th Cir. 2020) (vacating an upward variance as substantively unreasonable where the sentence imposed was almost double the guideline range calculated under §4A1.2(k) for a prior revocation of probation for offenses that "bore no meaningful relationship to the instant offense" and where there was "nothing else uniquely troublesome about [defendant's] criminal history that demonstrated a need for deterrence beyond that already captured in his guideline range").

the operative time period, even if the defendant is incarcerated for a new offense at the time of revocation.[45] Further, a defendant on escape status is deemed incarcerated.[46]

b. Ten-year time period for sentences less than 13 months

For prior sentences of less than 13 months' imprisonment, there is a ten-year time limitation, which runs from the date the prior sentence was imposed, not from when the sentence was served.[47] Likewise, in the case of a revocation of supervision, the time limit runs from the original imposition date, not the revocation date, unless the length of the original sentence plus the revocation sentence exceeds 13 months.[48]

c. Status of defendant at time of federal offense

Two criminal history points are added under §4A1.1(d) if the instant offense was committed while the defendant was under a criminal justice sentence.[49] A "criminal justice sentence" includes probation, parole, supervised release, imprisonment, work release, or escape status "having a custodial or supervisory component, although active supervision is not required."[50] Among other things, this provision covers virtually all forms of suspended sentences.[51] However, a sentence where a fine is the only sanction is not considered to be a

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45 *Semsak*, 336 F.3d at 1128.

46 USSG §4A1.2, comment. (n.2) ("To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentences (or, if the defendant escaped, would have served time.").

47 USSG §4A1.2(e)(2).

48 USSG §4A1.2(k)(1), (e)(2); *see also* United States v. Rengifo, 832 F.3d 220, 222–24 (3d Cir. 2016) (original sentence of "time served to 12 months," of which the defendant served 71 days before parole, plus 294 days served after revocations sufficient to trigger 15-year time limit); United States v. Arviso-Mata, 442 F.3d 382, 385 n.11 (5th Cir. 2006) (sentence "imposed" when defendant found guilty and sentence of probation was pronounced).

49 USSG §4A1.1(d); *see also* United States v. DeJournett, 817 F.3d 479, 482–84 (6th Cir. 2016) (a 180-day conditionally suspended jail term requiring the defendant to "obey [the] laws for 2 years" was "the functional equivalent of probation" and, thus, a criminal justice sentence). *But see* United States v. Caldwell, 585 F.3d 1347, 1354–55 (10th Cir. 2009) (not under a "criminal justice sentence" where, at time of offense, defendant was on probation for driving while a habitual offender but had not yet served any portion of a 30-day jail sentence).

50 USSG §4A1.1, comment. (n.4). In addition, the criminal justice sentence must be "a sentence countable under §4A1.2." *Id.*; *see also* United States v. Madrid-Becerra, 14 F.4th 1096, 1100 (9th Cir. 2021) ("[D]espite the lack of active supervision, 'deportation does not terminate supervised release . . . [or] probation.' " (quoting United States v. Ramirez-Sanchez, 338 F.3d 977, 981 (9th Cir. 2003))).

51 *See, e.g.*, United States v. Perales, 487 F.3d 588, 589 (8th Cir. 2007) (per curiam) (deferred entry of judgment with requirement to complete certain conditions); United States v. Rollins, 378 F.3d 535, 538 (6th Cir. 2004) (two-year conditional discharge sentence as "functional equivalent" of "unsupervised probation"); *see also* United States v. Brown, 909 F.3d 698, 700–01 (4th Cir. 2018) (suspended sentence in Virginia that is predicated on "good behavior" qualifies as criminal justice sentence under §4A1.1(d)).

criminal justice sentence.[52] A defendant whose probation otherwise would have expired but for an outstanding revocation warrant is deemed to be under a criminal justice sentence if that sentence is otherwise countable.[53] Some courts have applied this provision even if the state did not use due diligence to execute the warrant.[54] Under §4A1.2(n), 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 for the purposes of §4A1.1(d).[55]

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 under §4A1.2(d)(1).[56] For an offense committed before age 18 that resulted in a juvenile or adult sentence to confinement of at least 60 days, two points under §4A1.2(d)(2)(A) are added if the defendant was released from that confinement within five years of the instant offense.[57] 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.[58]

Because states treat juvenile convictions in differing ways, it is the conduct involved and not the terminology that is important.[59] A sentence of commitment to the custody of the state's juvenile authority constitutes a sentence within the meaning of §4A1.2(d)(2).[60] The juvenile's age at the time of a revocation resulting in confinement, rather than at the

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52 USSG §4A1.1, comment. (n.4); *see, e.g.*, United States v. Spikes, 543 F.3d 1021, 1024 (8th Cir. 2008) ("[A] fine alone is not a 'criminal justice sentence.' ").

53 USSG §4A1.2(m).

54 *See, e.g.*, United States v. McCowan, 469 F.3d 386, 392–93 (5th Cir. 2006) (guidelines do not require a court to consider the diligence of state authorities in executing a warrant); United States v. Davis, 313 F.3d 1300, 1306 (11th Cir. 2002) (per curiam) (irrelevant whether a warrant is invalid because of a lack of diligence by state authorities to execute it).

55 USSG §§4A1.2(n); 4A1.1(d); *see also* United States v. Aska, 314 F.3d 75, 77–79 (2d Cir. 2002) (it is permissible double counting under §4A1.2(n) to increase criminal history points when the offense of conviction is failure to surrender to serve a previously imposed sentence); United States v. Fisher, 137 F.3d 1158, 1167 (9th Cir. 1998) (criminal history score properly increased under §4A1.1(d) where state had an outstanding bench warrant for defendant who failed to report for sentence on a prior conviction).

56 USSG §4A1.2(d)(1); United States v Conca, 635 F.3d 55, 65–66 (2d Cir. 2011) (affirming three criminal history points for an offense committed by defendant before age 18).

57 USSG §4A1.2(d)(2)(A); USSG §4A1.2, comment. (n.7).

58 USSG §4A1.2(d)(2)(B).

59 *See* United States v. Stewart, 643 F.3d 259, 263 (8th Cir. 2011).

60 *See, e.g.*, Howard v. United States, 743 F.3d 459, 466 (6th Cir. 2014); *Stewart*, 643 F.3d at 263–64.

time of the offense, controls.[61] Juvenile detention that did not result from an adjudication of guilt does not count.[62]

6. Military, Foreign, and Tribal Court Sentences

Military sentences resulting from a general or special court-martial are counted in computing criminal history under §4A1.2(g).[63] However, sentences imposed as a result of a summary court-martial or Article 15 proceeding do not count.[64] Foreign sentences and tribal court sentences do not count but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).[65]

7. Sentences on Appeal and Diversionary Dispositions

Prior sentences under appeal are counted for criminal history purposes under §4A1.2(l).[66] 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.[67]

Diversions from the judicial system where no actual finding of guilt is made are not counted.[68] However, where diversion from the judicial system comes about after a finding of guilt has been made, or a plea of *nolo contendere* has been entered, the diversionary disposition should be counted as a 1-point sentence under §4A1.1(c).[69]

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

62 *See* United States v. Ramirez, 347 F.3d 792, 799 (9th Cir. 2003) (determination by the Youth Offender Parole Board for temporary detention was not an adjudication of guilt; government failed to show detention resulted from a finding of guilt.).

63 USSG §4A1.2(g).

64 *Id.*

65 USSG §4A1.2(h), (i); *see also* USSG §4A1.3, comment. (n.2(C)) (listing factors, in addition to standard factors set forth in §4A1.3(a), to be considered in determining whether, or to what extent, upward departure based on tribal court conviction(s) may be warranted); United States v. Brown, 992 F.3d 665, 672 (8th Cir. 2021) (affirming upward departure based on defendant's underrepresented criminal history for multiple tribal convictions).

66 USSG §4A1.2(l).

67 *Id.*

68 USSG §4A1.2(f).

69 *Id.*; *see also* United States v. Miller, 992 F.3d 322, 325–26 (4th Cir. 2021) (affirming addition of one criminal history point under §4A1.1(c) for a prior North Carolina conviction resolved through a prayer for judgment continued (a "PJC disposition"), a type of deferred disposition under which the court renders an adjudication of guilt but an entry of final judgment is not required); United States v. Baptiste, 876 F.3d 1057, 1062 (11th Cir. 2017) (finding, pursuant to §4A1.2(f), that Florida marijuana charge warranted one criminal history point because defendant had either pled guilty or *nolo contendere* to the charge despite receiving diversionary sentence).

III. CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

Part B of Chapter Four 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 (§4B1.1)

1. General Application

Section 4B1.1 (Career Offender) provides significantly enhanced offense levels and a higher criminal history category for career offenders. A defendant is a "career offender" if (1) he or she was at least 18 years old at the time of the instant offense, (2) the offense of conviction is a felony that is either a "crime of violence" or a "controlled substance offense,"[70] and (3) the defendant has "at least two prior felony convictions of either a crime of violence or a controlled substance offense."[71] A "prior felony conviction" is a "prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed."[72]

a. Offense level and criminal history category

The guideline offense level for career offenders is determined based on the statutory maximum for the offense of conviction.[73] Likewise, §4B1.1 establishes that a career offender's criminal history category is automatically VI in every case, regardless of what the criminal history was calculated to be under Chapter Four, Part A.[74]

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[70] *See* USSG §4B1.2(a), (b) (defining "crime of violence" and "controlled substance offense"); *see also infra* Sections III.A.2, III.A.3.

[71] USSG §4B1.1(a); *see also* USSG §4B1.2, comment. (n.1) (conviction under 18 U.S.C. § 924(c) for using, carrying, or possessing firearm during violent felony or drug trafficking offense may qualify as predicate offense for career offender purposes).

[72] USSG §4B1.2, comment. (n.1); United States v. Carter, 961 F.3d 953, 957 n.1 (7th Cir. 2020) (state "aggravated misdemeanors" punishable by up to two years in prison can qualify as predicates under §4B1.2); United States v. Coleman, 635 F.3d 380, 381–82 (8th Cir. 2011) ("prior felony conviction" for a crime of violence under the career offender guidelines differs from the definition of "violent felony" in the Armed Career Criminal Act and includes state misdemeanor convictions with punishments exceeding one year); United States v. Almenas, 553 F.3d 27, 31–32 (1st Cir. 2009) (state misdemeanor offense punishable by two and a half years is a prior felony conviction under §4B1.2).

[73] USSG §4B1.1(b).

[74] *Id.*

b. Career offender guideline and 18 U.S.C. §§ 924(c), 929(a)

The interplay between the career offender enhancement at §4B1.1 and convictions under 18 U.S.C. §§ 924(c) and 929(a)—offenses involving the use of firearms during an underlying crime of violence or controlled substance offense—warrants careful consideration.[75] If the defendant is only convicted of one of the firearms offenses, the guideline range is calculated under §4B1.1(c)(3) and will be 360 months to life, although the reduction for acceptance of responsibility under §3E1.1 is still available and can reduce the range by two or three levels.[76]

If there are multiple counts of conviction where at least one count is for an offense other than one of the firearms offenses at section 924(c) or 929(a), the applicable guideline range is calculated at §4B1.1(c)(2).[77] The range will be the greater of (A) the mandatory minimum consecutive sentence required by 18 U.S.C. §§ 924(c) or 929(a) plus the guideline range for the underlying offense, and (B) the guideline range derived from the career offender table for section 924(c) or section 929(a) offenders at §4B1.1(c)(3).[78] The sentence then is apportioned among the counts to meet any mandatory minimum requirements.[79]

If the defendant is not a career offender but has multiple convictions pursuant to section 924(c), the substantive Chapter Two guideline permits the court to depart upward.[80] The court also can depart upward in the rare case where the defendant's guideline range is actually lower than if he had not sustained a section 924(c) conviction.[81]

c. Acceptance of responsibility

A defendant who qualifies as a career offender may receive a reduction for acceptance of responsibility pursuant to §3E1.1 (Acceptance of Responsibility).[82] However,

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75 *See* USSG §4B1.1(c), (c)(3); USSG §4B1.1, comment. (n.3); *see also* United States v. Diaz, 639 F.3d 616, 619–20 (3d Cir. 2011) (interdependence of career offender enhancements and convictions under § 924(c) requires close examination).

76 USSG §4B1.1(c)(1), (c)(3).

77 USSG §4B1.1(c)(2).

78 *Id.*

79 USSG §5G1.2(e).

80 USSG §2K2.4, comment. (n.2(B)).

81 USSG §2K2.4, comment. (n.4).

82 USSG §3E1.1.

§1B1.1 provides that other Chapter Three adjustments, whether upward or downward, do not apply.[83]

d. Predicate convictions

i. Adult convictions required

Unlike other criminal history provisions, the Commentary to §4B1.2 provides that only adult convictions can serve as predicate felony convictions under the career offender guideline.[84] However, a defendant who was convicted as an adult but who was under 18 at the time the offense was committed can be considered a career offender.[85]

ii. Predicate conviction must be prior to current offense

Because the career offender enhancement applies to criminal convictions, not to sentences, the defendant must have been convicted of the offense before he committed the instant federal offense for the enhancement to apply.[86] Section 4B1.2(c) provides that 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*.[87]

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[83] *See* USSG §1B1.1(a) (guideline application instruction providing that adjustments under Parts A, B, and C of Chapter Three are to be considered prior to operation of any potential Chapter Four, Part B overrides); *see also* United States v. Hill, 982 F.3d 441, 445 (6th Cir. 2020) (section 4B1.1 "assumes that a court has already calculated the 'offense level otherwise applicable' " when it decides whether a defendant is a career offender, and the guideline "overrides any previously applied reduction on the basis of a mitigating role"); United States v. Cashaw, 625 F.3d 271, 273–74 (5th Cir. 2010) (per curiam) (minor role adjustment not available to defendant sentenced under the career offender guidelines); United States v. Warren, 361 F.3d 1055, 1057–58 (8th Cir. 2004) (plain error to apply obstruction of justice enhancement to career offender offense level).

[84] *See* USSG §4B1.2, comment. (n.1) (predicate offenses must be prior adult federal or state convictions punishable by death or imprisonment for a term of more than one year regardless of the actual sentence imposed).

[85] *Id.* ("A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."); *see also, e.g.*, United States v. Wallace, 663 F.3d 177, 181 (3d Cir. 2011) (although New York's youthful offender statute vacates and replaces a prior conviction, "the juvenile eligible for such an adjudication must first be 'convicted as an adult,' " so such dispositions qualify as "prior felony convictions"); United States v. Gregory, 591 F.3d 964, 967 (7th Cir. 2010) ("[T]he critical question is whether the juvenile was convicted as an adult, not how he was sentenced."). *But see* United States v. Mason, 284 F.3d 555, 558–62 (4th Cir. 2002) (adult conviction did not count because defendant was sentenced as a juvenile).

[86] USSG §4B1.2(c); *see also* United States v. Guerrero, 768 F.3d 351, 366–67 (5th Cir. 2014) (for purposes of the career criminal enhancement, it is the conviction and not the sentence that follows that counts, thus even though defendant had not been sentenced on two prior felony convictions when he committed the instant offense, the convictions count for criminal history purposes); United States v. French, 312 F.3d 1286, 1287 (9th Cir. 2002) (per curiam) (same).

[87] USSG §4B1.2(c).

iii. Predicate convictions must be counted separately

The prior convictions must be counted separately under the provisions of §4A1.1(a), (b), or (c) to qualify as predicate felony convictions for career offender purposes, pursuant to §4B1.2(c). [88] But, where multiple prior sentences are treated as a "single sentence" in the calculation of the criminal history score under §4A1.1(a), (b),or (c), the Commentary to §4A1.2(a)(2) provides that a court may treat a sentence for a prior conviction included in a "single sentence" with a non-qualifying offense as a predicate offense if the sentence independently would have received criminal history points but for the "single sentence" rule.[89] However, the commentary further specifies that "no more than one prior sentence in a given single sentence may be used as a predicate offense."[90]

iv. Predicate convictions must be scored

The Commentary to §4A1.2 provides that to qualify as predicates for the career offender enhancement, 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).[91] 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.[92]

e. Inchoate offenses

Application Note 1 to §4B1.2 defines "crime of violence" and "controlled substance offense" to include the inchoate offenses of "aiding and abetting, conspiring, and attempting to commit such offenses."[93] The majority of circuits to have addressed the issue agree that predicate offenses for the career offender guideline include convictions for inchoate offenses such as aiding and abetting, conspiring, and attempting to commit a "crime of violence" and "controlled substance offense," as set forth in the commentary.[94] But some

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88 *Id.*

89 USSG §4A1.2, comment. (n.3(A)).

90 *Id.*

91 *Id.*; *see also* United States v. Dewey, 599 F.3d 1010, 1014–15 (9th Cir. 2010) (affirming reliance on 18-year old sentence where defendant was incarcerated within previous 15 years).

92 USSG §4A1.2, comment. (n.3(A)).

93 USSG §4B1.2, comment. (n.1).

94 *See, e.g.*, United States v. Smith, 989 F.3d 575, 583–85 (7th Cir.) (concluding Application Note 1 to §4B1.2 is authoritative and thus a "controlled substance offense" includes inchoate offenses), *cert. denied* 142 S. Ct. 488 (2021); United States v. Lewis, 963 F.3d 16, 21–23 (1st Cir. 2020) (controlled substance offenses include inchoate offenses such as conspiracy to distribute), *cert. denied*, 141 S. Ct. 2826 (2021); United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir.) (commentary did not impermissibly expand the definition of "controlled substance offense" under §4B1.2), *cert. denied*, 141 S. Ct. 423 (2020); United States v.

circuits have held to the contrary.[95] This dispute turns in part on the weight to be afforded to guideline commentary.[96]

2. Crime of Violence (§4B1.2(a))

Subsection (a) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) defines the term "crime of violence" as follows:

> [A]ny 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,[97] or

Merritt, 934 F.3d 809, 811–12 (8th Cir. 2019); United States v. Lange, 862 F.3d 1290, 1295 (11th Cir. 2017); United States v. Chavez, 660 F.3d 1215, 1228 (10th Cir. 2011) ("We conclude that the Commission acted within this broad grant of authority in construing attempts to commit drug crimes as controlled substance offenses for purposes of determining career offender status."); United States v. Shumate, 329 F.3d 1026, 1030 (9th Cir. 2003) (the word "include" in Application Note 1 to §4B1.2 allows inclusion of solicitation for crimes of violence and for controlled substance offenses).

[95] *See* United States v. Campbell, 22 F.4th 438, 446 (4th Cir. 2022) (definition of "controlled substance offense" in §4B1.2(b) does not include attempt crimes); United States v. Nasir, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) (the definition of "controlled substance offense" in the career offender guideline at §4B1.2(b) does not include inchoate offenses because inchoate offenses are listed only in the commentary rather than the plain text of the guideline); United States v. Havis, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc) (per curiam) ("The text of §4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses."); United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses."); *see also* United States v. Crum, 934 F.3d 963, 966–67 (9th Cir. 2019) (per curiam) ("If we were free to do so, we would follow the Sixth and D.C. Circuits' lead . . . [but] [w]e are nonetheless compelled by our court's prior decision . . . to reject [their] view.").

[96] In *Stinson v. United States*, the Supreme Court held that courts are to consider the commentary to the guidelines as authoritative "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. 36, 38 (1993). Subsequently, in *Kisor v. Wilkie*, the Supreme Court held that deference to an agency's interpretation "can arise only if a regulation is genuinely ambiguous . . . after a court has resorted to all the standard tools of interpretation." 139 S. Ct. 2400, 2409, 2414 (2019). Some circuits have determined that *Kisor* alters the deference owed to Application Note 1's defining "crime of violence" and "controlled substance offense" to include inchoate offenses. *See Campbell*, 22 F.4th at 444–45, 449 (relying in part on *Kisor* to hold that the text of §4B1.2(b), its structure, and the traditional tools of construction all counsel against classifying inchoate offenses as controlled substance offenses). *But see Lewis*, 963 F.3d at 23–25 (concluding that *Kisor* did not provide a basis for revisiting prior circuit precedent holding that inchoate offenses fall within the ambit of §4B1.2).

[97] Every circuit to have considered the issue has determined that offenses under 18 U.S.C. § 1951(b)(1) (Hobbs Act robbery) are not categorically crimes of violence under §4B1.2(a) because while the statute includes as an element using force or threatening force against any person or property, §4B1.2(a) only covers convictions that had as an element the use, attempted use, or threatened use of physical force against the person. *See* United States v. Scott, 14 F.4th 190, 195 (3d Cir. 2021); United States v. Green, 996 F.3d 176, 181

> (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).[98]

The court is to use the "crime of violence" definition at §4B1.2 to determine not only 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.[99] In addition, the court is to use the same definition of "crime of violence" to determine whether an upward departure may be warranted under §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)).[100]

3. Controlled Substance Offense (§4B1.2(b))

Section 4B1.2(b) defines a "controlled substance offense" as follows:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[101]

The circuits generally treat this definition as coextensive with the term "drug trafficking offense" from §2L1.2(b).[102] However, the circuits are split on whether the definition refers only to an offense involving substances that are identified by the Controlled Substances Act at 21 U.S.C. § 841 or whether the substances controlled by state

(4th Cir. 2021); Bridges v. United States, 991 F.3d 793, 801 (7th Cir. 2021); United States v. Prigan, 8 F.4th 1115, 1119–22 (9th Cir. 2021); United States v. Eason, 953 F.3d 1184, 1194–95 (11th Cir. 2020); United States v. Camp, 903 F.3d 594, 604 (6th Cir. 2018); United States v. O'Connor, 874 F.3d 1147, 1158 (10th Cir. 2017). In addition, the Supreme Court has concluded that attempted Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c). United States v. Taylor, 142 S. Ct. 2015, 2020–26 (2022).

98 USSG §4B1.2(a).

99 *See id.*; *see also, e.g.*, USSG §2K1.3(a)(1)–(2), USSG §2K1.3, comment. (n.2); USSG §2K2.1(a)(1), (2), (3)(B), (4)(A), USSG §2K2.1, comment. (n.1); USSG §2K2.1(b)(5), USSG §2K2.1, comment. (n.13(A), (B)); USSG §2S1.1(b)(1)(B)(ii), USSG §2S1.1, comment. (n.1); USSG §4A1.1(e), USSG §4A1.1, comment. (n.5).

100 USSG §5K2.17, comment. (n.1).

101 USSG §4B1.2(b).

102 USSG §2L1.2, comment. (n.2); *see, e.g.*, United States v. Guerrero, 910 F.3d 72, 77 (2d Cir. 2018) (describing the two definitions as "virtually identical"); United States v. Pillado-Chaparro, 543 F.3d 202, 205 (5th Cir. 2008) (explaining that cases discussing these definitions are "cited interchangeably").

law also qualify.[103] In addition, in various contexts, the circuit courts continue to scrutinize predicate conviction statutes to ensure the requisite intent to distribute required by the definition of a "controlled substance offense."[104]

[103] *Compare* United States v. Jones, 15 F.4th 1288, 1292–93 (10th Cir. 2021) (prior state offense qualifies as a "controlled substance" under §4B1.2 even if the substance does not match those in the Act), *petition for cert. filed*, No. 22-5342 (U.S. Aug. 8, 2022), United States v. Henderson, 11 F.4th 713, 718 (8th Cir. 2021) ("There is no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law."), *cert. denied*, 142 S. Ct. 1696 (2022), United States v. Jackson, 995 F.3d 476, 480–81 (6th Cir. 2021) (prior state offense qualifies as a "controlled substance" under §4B1.2; even though state law prohibits "transfer" of controlled substances and guideline does not, the guideline draws its definition from the Act which defines "distribute" to include "transfer"), United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) ("The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to 'include state-law offenses' . . . ."), *cert. denied*, 141 S. Ct. 1239 (2021), United States v. Ward, 972 F.3d 364, 370–71 (4th Cir. 2020) ("a conviction under [a state statute] categorically satisfies . . . §4B1.2" and is therefore a "controlled substance offense"), *cert. denied*, 141 S. Ct. 2864 (2021), *and* United States v. Thomas, 939 F.3d 1121, 1125–26 (10th Cir. 2019) (rejecting argument to limit "counterfeit substances" in §4B1.2(b) to those identified by the Controlled Substance Act because the guideline does not reference the definition in the Act.), *with* United States v. Townsend, 897 F.3d 66, 70–71 (2d Cir. 2018) (any ambiguity in defining "controlled substance offense" must be "resolved according to federal—not state—standards), United States v. Gomez-Alvarez, 781 F.3d 787, 793–94 (5th Cir. 2015) ("For a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction" is covered by the Act.), *and* United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012) ("Controlled substance" as used in the "drug trafficking offense" definition in §2L1.2 "means those substances listed in" the Act). *See also* United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021) (discussing circuit split and noting the approach of the Second, Fifth, and Ninth Circuits to employ the federal Controlled Substances Act approach to determine if a substance is a "controlled substance" is "appealing," and the approach of the Fourth, Seventh, and Eighth Circuits referring to state law as "fraught with peril"), *cert. denied*, 142 S. Ct. 2877 (2022).

[104] *See, e.g.*, United States v. Johnson, 945 F.3d 174, 182–83 (4th Cir. 2019) (Maryland statute proscribed conduct involving an intent to sell or distribute, consistent with §4B1.2), *cert. denied*, 141 S. Ct. 255 (2020); United States v. Mohamed, 920 F.3d 94, 99 (1st Cir. 2019) ("We have held that the definition of 'controlled substance offense' requires that the statute under which the defendant was charged involve[] an intent to distribute or other indicia of trafficking."); United States v. Madkins, 866 F.3d 1136, 1145–48 (10th Cir. 2017) (Kansas's "offer to sell" possession-with-intent-to-distribute statute is broader than §4B1.2); United States v. Hinkle, 832 F.3d 569, 572–77 (5th Cir. 2016) (similar Texas statute is broader than §4B1.2); United States v. Savage, 542 F.3d 959, 964–66 (2d Cir. 2008) (similar Connecticut statute broader than §4B1.2); United States v. Lopez-Salas, 513 F.3d 174, 180 (5th Cir. 2008) ("The [g]uidelines could have defined a drug trafficking offense based on the quantity of drugs possessed. Instead, they require that a state prove an intent to manufacture, import, export, distribute, or dispense."); United States v. Villa-Lara, 451 F.3d 963, 965–66 (9th Cir. 2006) (focusing on the guidelines' definition of a drug trafficking offense to conclude that defendant's Nevada trafficking by possession conviction did not qualify); United States v. Montanez, 442 F.3d 485, 488 (6th Cir. 2006) ("[U]nder the Guidelines, simple possession—that is, possession without the proof beyond a reasonable doubt of the requisite intent to 'manufacture, import, export, distribute, or dispense'—is not a controlled substance offense."), *superseded by statute*, OHIO REV. CODE ANN. § 2925.03 (West 1996), *as recognized in* King v. United States, No. 07 CR 236, 2011 WL 1059624 (N.D. Ohio Mar. 21, 2011); United States v. Herrera-Roldan, 414 F.3d 1238, 1241–43 (10th Cir. 2005) (rejecting the government's argument that the guidelines permit an inference of intent to distribute based on defendant's possession of more than 50 pounds of marijuana).

a. Predicate drug offense punishable by more than one year

Note that §4B1.2 covers drug trafficking offenses punishable by more than one year and therefore applies to a number of drug offenses that are not covered by the Armed Career Criminal Act (ACCA) at 18 U.S.C. § 924(e). The ACCA is a repeat offender statute that limits predicate "serious drug offense" convictions triggering enhanced penalties to offenses for which a maximum term of imprisonment of ten years or more is prescribed by law.[105] In fact, some state misdemeanor convictions even may qualify under the definition of "controlled substance offense."[106]

b. Predicate drug convictions limited to drug trafficking offenses

Unlike statutory drug enhancements (*e.g.*, 21 U.S.C. § 841(b)), to be a countable predicate conviction under §4B1.2(b), the conviction must have been a trafficking-type offense and not a conviction for mere possession of a controlled substance.[107] The Commentary to §4B1.2 provides that a prior federal conviction under 18 U.S.C. § 924(c) (criminalizing the possession of a firearm in furtherance of either a crime of violence or a drug trafficking crime) also can be a "controlled substance offense" within the meaning of §4B1.2(b), "if the offense of conviction established that the underlying offense was a 'controlled substance offense.' "[108]

c. Specific listed offenses

The Commentary to §4B1.2 lists other types of drug offenses that may qualify as a "controlled substance offense" 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).[109]

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[105] 18 U.S.C. § 924(e)(2)(A).

[106] See "felony" definition at USSG §4A1.2(o); *see also* USSG §4B1.1, comment. (n.4) (noting possibility that a downward departure may be warranted in a case where one or both predicates are classified as misdemeanor(s) at time of sentencing for instant federal offense).

[107] *See, e.g.*, Salinas v. United States, 547 U.S. 188 (2006) (per curiam) (Fifth Circuit erred in treating defendant's conviction for simple possession as a "controlled substance offense" within the meaning of §4B1.2); United States v. Gaitan, 954 F.2d 1005, 1011 (5th Cir. 1992) (district court erred in finding defendant's state possession convictions qualified as a predicate drug-trafficking offense).

[108] USSG §4B1.2, comment. (n.1);*see also* United States v. Furaha, 992 F.3d 871, 877–78 (9th Cir. 2021) (using modified categorical approach, prior conviction under § 924(c) is a "controlled substance offense" when defendant also pleads guilty to possession with intent to distribute controlled substances); United States v. Williams, 926 F.3d 966, 971 (8th Cir. 2019) (using modified categorical approach, prior conviction under § 924(c) is a "controlled substance offense" when defendant pleads guilty to indictment alleging he carried a firearm in relation to conspiracy to distribute controlled substances).

[109] USSG §4B1.2, comment. (n.1).

4. Categorical Approach and Modified Categorical Approach

The categorical approach and modified categorical approach apply to the determination of whether an offense is a "crime of violence" or "controlled substance offense" for the career offender guideline.[110]

B. CRIMINAL LIVELIHOOD (§4B1.3)

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, §4B1.3 (Criminal Livelihood) provides that the offense level must be at least 13, unless a reduction for acceptance of responsibility applies, in which case the minimum offense level shall be 11.[111]

The term " '[p]attern of criminal conduct' means planned criminal acts occurring over a substantial period of time."[112] The term "engaged in as a livelihood" means:

> (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period . . . .[113]

Periods of less than twelve months can be "substantial" and meet the definition for purposes of a "pattern of criminal conduct" under §4B1.3.[114] Additionally, the defendant does not need to have engaged in criminal conduct for the entirety of 12 months to meet the definition of "engaged in as a livelihood."[115]

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110 *See infra* Section IV; *see also* U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH (2022), https://www.ussc.gov/guidelines/primers/categorical-approach [hereinafter CATEGORICAL APPROACH PRIMER].

111 USSG §4B1.3.

112 USSG §4B1.3, comment. (n.1).

113 USSG §4B1.3, comment. (n.2).

114 *See* United States v. Pristell, 941 F.3d 44, 52 (2d Cir. 2019) (twelve-month period requirement in Commentary to §4B1.3 refers to second prong of "engaging in as a livelihood" and "six months is consistent with the plain meaning of the phrase 'substantial period of time' ").

115 *See* United States v. Patrone, 985 F.3d 81, 88–89 (1st Cir.) ("The 'engaged in as a livelihood' factor does not require that a defendant engaged in criminal conduct for the entirety of twelve months—one large criminal activity . . . could suffice, if that was a defendant's primary occupation during that time period."), *cert. denied*, 142 S. Ct. 188 (2021).

Courts have used the full-face value of stolen checks and gross income from drug trafficking to calculate the defendant's derived income for purposes of applying the enhancement.[116]

C. ARMED CAREER CRIMINAL (§4B1.4)

1. General Application

A defendant convicted of a violation of 18 U.S.C. § 922(g)—a firearms offense—who has three prior convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another, is considered an "armed career criminal" under §4B1.4[117] Such a defendant is subject to an enhanced sentence with a mandatory minimum of 15 years under the ACCA (18 U.S.C. § 924(e)),[118] and different treatment under §4B1.4.

a. Offense level and criminal history category

Section 4B1.4 provides that the offense level for an armed career criminal subject to an enhanced sentence under section 924(e) is the greatest of the following:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence . . . or a controlled substance offense . . . , or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or (B) 33, otherwise.[119]

The criminal history category is calculated as the greatest of the following:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1(Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence . . . or a

[116] *See* United States v. Gordon, 852 F.3d 126, 132 (1st Cir. 2017); United States v. Quertermous, 946 F.2d 375, 377–78 (5th Cir. 1991) (per curiam).

[117] *See* USSG §4B1.4(a); 18 U.S.C. § 924(e).

[118] 18 U.S.C. § 924(e).

[119] USSG §4B1.4(b).

controlled substance offense . . . , or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a);[120] or

(3) Category IV.[121]

b. Armed career criminal and sections 844(h), 924(c), or 929(a)

Sections 4B1.4(b)(3)(A) and (c)(2)—relating to the use or possession of a firearm or ammunition in connection with a crime of violence or controlled substance offense—do not apply if a defendant also is convicted of violating 18 U.S.C. §§ 844(h), 924(c), or 929(a).[122] Those statutes relate to using explosives or firearms in connection with other offenses, and the penalties required by those statutes already account for the conduct covered by these guideline sections.[123] However, if the maximum penalty resulting from the guideline range, combined with the mandatory consecutive sentences required by these statutes, is lower than the maximum penalty that would have resulted if the guideline provisions applied, an upward departure may be warranted.[124] Note that the upward departure has a cap—the maximum of the otherwise applicable guideline range.[125]

c. Acceptance of responsibility

Acceptance of responsibility reductions under §3E1.1 are available for armed career criminals and will decrease the offense level, but the offense level cannot be below the statutorily required minimum sentence of 180 months.[126]

d. Predicate convictions

Unlike the career offender guideline, the ACCA does not provide for time limitations on predicate convictions. The ACCA also refers to convictions "committed on occasions different from one another," rather than the requirement at §4B1.2 that sentences for such

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120 USSG §4B1.4(c); *see also* U.S. SENT'G COMM'N, PRIMER ON FIREARMS (2022), https://www.ussc.gov/guidelines/primers/firearms.

121 USSG §4B1.4(c).

122 USSG §4B1.4, comment. (n.2).

123 *Id.*

124 *Id.*

125 *Id.*

126 *See* United States v. Collins, 683 F.3d 697, 708 n.1 (6th Cir. 2012) (noting that regardless of the application of §3E1.1, defendant's mandatory minimum sentence was 180 months because he qualified as an armed career criminal under 18 U.S.C. § 924(e)).

convictions count separately.[127] In addition, the statute includes burglary as a predicate offense, unlike the career offender context.[128]

2. Violent Felony

With respect to armed career criminals, the term "violent felony" in the ACCA means:

> 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 destructive device that would be punishable by imprisonment for such term if committed by an adult, that:
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (2) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.[129]

3. Serious Drug Offense

The term serious drug offense in the ACCA refers to an offense under 21 U.S.C. § 801 et seq., 21 U.S.C. § 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 of ten years or more is prescribed by law."[130]

4. Categorical Approach and Modified Categorical Approach

Courts apply the categorical approach and modified categorical approach to determine whether an offense is a "violent felony" or "serious drug offense."[131]

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[127] 18 U.S.C. § 924(e)(1); USSG §4B1.2(c).

[128] *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* USSG §4B1.2(a)(2).

[129] 18 U.S.C. § 924(e)(2)(B) (emphasis added). In *Johnson v. United States*, the Supreme Court invalidated the italicized portion of the definition of "violent felony" as unconstitutionally void for vagueness under the Fifth Amendment's Due Process Clause. 135 S. Ct. 2551 (2015). In *Borden v. United States*, the Supreme Court held that reckless offenses cannot qualify as "violent felonies" under the elements clause of ACCA. 141 S. Ct. 1817 (2021).

[130] 18 U.S.C. § 924(e)(2)(A).

[131] *See* CATEGORICAL APPROACH PRIMER, *supra* note 110; *see also* Shular v. United States, 140 S. Ct. 779, 782 (2020) (the term "serious drug offense" in § 924(e)(2)(A)(ii) "requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses")

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

1. General Application

Defendants are subject to the criminal history overrides set forth in §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) if the instant offense is a covered sex crime,[132] and the defendant has a prior qualifying sex offense conviction,[133] or has engaged in a pattern of activity involving prohibited sexual conduct.[134]

a. Offense level and criminal history category

If the defendant has a prior qualifying sex offense conviction and is not a career offender under §4B1.1, then the offense level shall be the greater of: (1) the offense level determined under Chapters Two and Three; or (2) the offense level taken from the table set forth in §4B1.5(a)(1)(B), decreased by any applicable reduction for acceptance of responsibility under 3E1.1.[135] The criminal history category for such defendants is the greater of the criminal history determined under Chapter Four, Part A (Criminal History), or Criminal History Category V.[136]

If the defendant is not a career offender under §4B1.1 and the provision above does not apply because the defendant does not have a prior qualifying sex conviction, a 5-level enhancement under §4B1.5(b) instead will be applied if "the defendant engaged in a pattern of activity involving prohibited sexual conduct."[137] If §4B1.5(b) applies, the base offense level is the offense level determined under Chapters Two and Three increased by five levels. If, however, the resulting offense level is less than 22, the offense level is 22,

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132 USSG §4B1.5(a); *see also* USSG §4B1.5, comment. (n.2) (defining "covered sex crime[s]" as "(A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any [such] offense") *see also* United States v. Haas, 986 F.3d 467, 481 (4th Cir.) (section 4B1.5 applies where a defendant has been convicted on multiple counts, "as long as one count is a covered sex crime, the 'instant offense of conviction is a covered sex crime' and the enhancement applies"), *cert. denied*, 142 S. Ct. 292 (2021).

133 USSG §4B1.5(a); *see also* USSG §4B1.5, comment. (n.3(A)) (defining "sex offense conviction" as "any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor . . . and does not include trafficking in, receipt of, or possession of, child pornography").

134 USSG §4B1.5(b); *see also* USSG §4B1.5, comment. (n.4(B)) (defining "pattern of activity" as "involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor").

135 USSG §4B1.5(a)(1).

136 USSG §4B1.5(a)(2).

137 USSG §4B1.5(b).

decreased by the number of levels corresponding to any applicable adjustment under §3E1.1 (Acceptance of Responsibility).[138] The criminal history category determined under Chapter Four, Part A is the criminal history category applicable for the offense.[139]

b. Predicate convictions

The Sixth Circuit has concluded that the time limitations concerning use of prior convictions set forth in §4A1.2 do not limit the potential use of prior convictions to trigger an enhancement under §4B1.5.[140] Furthermore, the Eighth Circuit has found that §4B1.5(a) applies to a defendant whose prior sex conviction is based on an adjudication of guilt but who has not yet been sentenced for that particular offense.[141] However, the Ninth Circuit has determined that a defendant's juvenile adjudication for sexual assault did not constitute a "sex offense conviction" under §4B1.5.[142]

2. Categorical Approach and Modified Categorical Approach

Courts apply the categorical approach and modified categorical approach to determine whether an offense is a qualifying prior sex conviction under §4B1.5.[143]

IV. CATEGORICAL APPROACH AND MODIFIED CATEGORICAL APPROACH

The following is a brief discussion of the categorical approach.[144] As discussed above, certain sentencing guidelines and federal statutes provide enhanced penalties for offenders whose criminal histories evidence violence or other types of serious felony conduct. Some guidelines that result in use of the categorical approach are §§4B1.1

138 *Id.*

139 *Id.*

140 United States v. Babcock, 753 F.3d 587, 591–92 (6th Cir. 2014) (commentary to §4B1.2 stipulates that the time limitations in §4A1.2 are "applicable to the counting of convictions under §4B1.1").

141 United States v. Leach, 491 F.3d 858, 865–68 (8th Cir. 2007) (the context of §4B1.5 "makes 'it unambiguous that conviction refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction' " (quoting Deal v. United States, 508 U.S. 129, 132 (1993))).

142 United States v. Nielsen, 694 F.3d 1032, 1037–38 (9th Cir. 2012) (a plain reading of Application Note 3(A)(ii) indicates "that it is meant to address which substantive offenses count as a 'sex offense,' rather than define what constitutes a 'conviction,' " and §4B1.5(a) and its application notes include no reference to juvenile adjudications).

143 *See* CATEGORICAL APPROACH PRIMER, *supra* note 110; *see also* United States v. Dahl, 833 F.3d 345 (3d Cir. 2016) (plain error for district court to fail to apply categorical approach in determining applicability of enhancement under §4B1.5).

144 For further information about the categorical approach, see CATEGORICAL APPROACH PRIMER, *supra* note 110.

and 4B1.2 (Career Offender), 4B1.4 (Armed Career Criminal), and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors). The relevant statutes include 18 U.S.C. § 16 (Crime of violence defined), 18 U.S.C. § 924(e) (ACCA), 18 U.S.C. § 2252 (Certain activities related to material involving the sexual exploitation of minors), and 8 U.S.C. § 1326 (Reentry of removed aliens).

Sentencing and appellate courts have interpreted terms found within these provisions, such as "crime of violence" or "serious drug offense" through application of the "categorical approach," first mandated by the Supreme Court in *Taylor v. United* States,[145] and the "modified categorical approach," introduced and discussed by the Supreme Court in *Shepard v. United States*,[146] and further clarified in *Descamps v. United States*[147] and *Mathis v. United States*.[148] Although these cases dealt with statutory enhancements in the ACCA (18 U.S.C. § 924(e)), lower courts have applied the same principles concerning the categorical approach in other contexts where a sentencing enhancement is based on a prior conviction, including the career offender guideline.[149]

1. Categorical Approach

The categorical approach first was adopted in *Taylor v. United* States.[150] 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."[151] A court should not consider the "facts underlying the prior convictions;" in other words, the court may not focus on the underlying criminal conduct itself.[152] 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.

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145 495 U.S. 575 (1990).

146 544 U.S. 13 (2005).

147 570 U.S. 254 (2013).

148 579 U.S. 500 (2016).

149 *See, e.g.*, United States v. Brown, 974 F.3d 1137, 1141 (10th Cir. 2020) (definitions of "violent felony" in the ACCA and "crime of violence" in the guidelines are "substantially the same"); United States v. Sykes, 914 F.3d 615, 620 (8th Cir. 2019) (noting that cases interpreting these definitions are used "interchangeably").

150 495 U.S. 575 (1990).

151 *Id.* at 602.

152 *Id.* at 600–02; *see also* Kawashima v. Holder, 565 U.S. 478, 483 (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.").

In *Descamps*, the Supreme Court explained that, under the categorical approach, the comparison is between the elements of the offense underlying the prior conviction and the elements of the generic offense.[153] If the "relevant statute has the same elements as the 'generic' ACCA crime, then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly."[154] But, a "state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense."[155]

2. Modified Categorical Approach

The modified categorical approach only may 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—for example, stating that burglary involving entry into a building *or* an automobile."[156] Under the modified categorical approach, sentencing courts may "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."[157]

For a prior trial conviction, the sentencing court may consult judicial records such as the indictment and jury instructions.[158] For a prior guilty plea conviction, the sentencing court's review is "limited to the terms of the charging document, the terms of a 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."[159] In the absence of supporting documents that limit the scope of a conviction under a divisible statute, the enhancement does not apply.[160]

153 Descamps v. United States, 570 U.S. 254, 263–64 (2013).

154 *Id.* at 261.

155 Mathis v. United States, 579 U.S. 500, 501 (2016).

156 *Descamps*, 570 U.S. at 257.

157 *Id.* at 257.

158 *Id.*

159 Shepard v. United States, 544 U.S. 13, 26 (2005).

160 *See, e.g.*, United States v. Ramos-Gonzalez, 775 F.3d 483, 504–08 (1st Cir. 2015) (*Shepard* documents were insufficient to show that Puerto Rico conviction for unlawful use of violence or intimidation against public officials was a crime of violence under the modified categorical approach); United States v. Castillo-Marin, 684 F.3d 914, 919–20 (9th Cir. 2012) (plain error for the district court to rely solely on the factual description of the offense in the presentence report). *But see* United States v. Cunningham, 15 F.4th 818, 821–22 (7th Cir. 2021) (per curiam) (presentence report, which was based on the certified record of conviction and bolstered by criminal history reports, was reliable to show that the defendant's conviction fell within the portion of a divisible statute covering violent offenses).

"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."[161] 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."[162]

Descamps held that "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."[163] 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 such circumstances.[164] *Descamps* clarified that "*Taylor* 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."[165]

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.[166] 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."[167] 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 alternative, and examine any "illustrative examples" provided in the statute.[168] 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."[169]

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161 Mathis v. United States, 579 U.S. 500, 513 (2016) (citing *Descamps*, 570 U.S. at 263–65).

162 United States v. Faust, 853 F.3d 39, 51 (1st Cir. 2017).

163 *Descamps*, 570 U.S. at 258.

164 *See, e.g.*, United States v. Tanksley, 848 F.3d 347, 350–54 (5th Cir. 2017) (the modified categorical approach is inappropriate in this case because defendant was convicted under state statute with a single, indivisible set of elements); United States v. Hinkle, 832 F.3d 569, 574–75 (5th Cir. 2016) (same).

165 *Descamps*, 570 U.S. at 261 (citation omitted).

166 *Mathis*, 579 U.S. at 513–17.

167 *Id.* at 517.

168 *Id.* at 517–18.

169 *Id.* at 502, 518.

V. DEPARTURES

In addition to establishing the general rules to be used in calculating an individual's criminal history category, Part A of Chapter Four also provides guidance for potential upward and downward departures from the criminal history category where it either overstates or understates the seriousness of the defendant's criminal record or his or her risk of recidivism.[170] The availability of the departures is limited, particularly for career and sex offenders.

A. UPWARD DEPARTURES (§4A1.3(A))

Subsection (a) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) provides that an upward departure may be warranted if "reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." [171]

1. Basis for Upward Departure

The factors for the court to assess when considering the imposition and, if so imposed, the degree of 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 computing criminal history score

The court may rely on a sentence not used in computing criminal history, such as tribal or foreign convictions, when considering an upward departure.[172] If the conviction and sentence at issue derive from a tribal court, the Commentary to §4A1.3 lists six additional factors courts should consider in determining whether that conviction should serve as the basis for an upward departure.[173] This non-exhaustive list includes whether:

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170 *See* USSG §4A1.3(a), (b).

171 USSG §4A1.3(a)(1).

172 USSG §4A1.3(a)(2)(A); *see also* United States v. Lente, 759 F.3d 1149, 1167 (10th Cir. 2014) (affirming district court's reliance on two prior tribal convictions to depart upward based on an underrepresented criminal history).

173 *See* USSG §4A1.3, comment. (n.2(C)). Tribal court convictions are excluded from the criminal history score but have served as the bases for upward departures since the initial 1987 sentencing guidelines. In recent years, some tribal courts have gained enhanced sentencing authority under the Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 201, 124 Stat. 2258, 2261, and expanded jurisdiction over non-Indian defendants in domestic abuse cases under the Violence Against Women Act Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54. Many tribal courts also have begun to increase due process protections and reliable record-keeping. Given these developments, the Commission in 2018 amended the guidelines to

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).[174]

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.[175]

c. Similar misconduct established by an alternative proceeding

The court may consider prior misconduct adjudicated in a civil proceeding or by a failure to comply with an administrative order that is similar to the instant offense when considering an upward departure.[176]

provide "guidance to courts on how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions." USSG App C, amend. 805 (effective Nov. 1, 2018).

[174] USSG §4A1.3, comment. (n.2(C)).

[175] USSG §4A1.3(a)(2)(B); *see* United States v. Bolt, 782 F.3d 388, 391–92 (8th Cir. 2015) (prior sentences of substantially more than one year resulting from independent crimes committed on different occasions not used to calculate criminal history score may be used for upward departure based on inadequacy of defendant's criminal history category).

[176] USSG §4A1.3(a)(2)(C); *see* United States v. Beltramea, 785 F.3d 287, 289–90 (8th Cir. 2015) (affirming upward departure for understated criminal history based on a civil judgment in defendant's fraud case).

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" as the basis for an upward departure.[177]

e. Prior similar conduct not resulting in a criminal conviction

Similar adult criminal conduct not resulting in conviction may be relied upon for an upward departure.[178] Note that the conduct must be similar.[179]

2. Other Considerations

a. Nature of prior conviction

If the defendant has a serious criminal record where even a Criminal History Category VI may not adequately reflect the seriousness of the criminal history, an upward departure may be warranted.[180] When the court determines whether such a departure from a Criminal History Category VI is warranted, the nature, rather than the number, of prior convictions may be more indicative of the seriousness of a defendant's criminal record.[181]

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[177] USSG §4A1.3(a)(2)(D); s*ee* United States v. Hernandez, 896 F.2d 642, 644 (1st Cir. 1990) (affirming upward departure under §4A1.3(a)(2)(D) as defendant committed his federal offense while on bail awaiting trial for state offenses).

[178] USSG §4A1.3(a)(2)(E); s*ee Bolt*, 782 F.3d at 392 (affirming upward departure under §4A1.3(a)(2)(E) for defendant's numerous arrests for similar criminal conduct which did not result in convictions); United States v. Hefferon, 314 F.3d 211, 227–28 (5th Cir. 2002) (same); United States v. Luna-Trujillo, 868 F.2d 122, 124–25 (5th Cir. 1989) (same).

[179] *See, e.g.*, *Bolt*, 782 F.3d at 391–92 (court did not err in departing upward for numerous prior arrests for similar criminal conduct to the instant offenses); United States v. Grubbs, 585 F.3d 793, 804 (4th Cir. 2009) (noting defendant's 20 year history of child molestation and "[c]ontinued predatory conduct" in continuing the abuse after being under investigation); United States v. Ruvalcava-Perez, 561 F.3d 883, 886 (8th Cir. 2009) (noting defendant was a "serial violator" with respect to his numerous unprosecuted illegal re-entry offenses). *But see* United States v. Allen, 488 F.3d 1244, 1257–58 (10th Cir. 2007) (departure not justified as prior conduct distinctly dissimilar from the crime of conviction).

[180] USSG §4A1.3, comment. (n.2(B)).

[181] *Id.*; *see, e.g.*, United States v. King, 627 F.3d 321, 324 (8th Cir. 2010) (upward departure based on convictions unrelated to those triggering the career offender classification was appropriate where those offenses demonstrated a "longstanding propensity towards violence"); United States v. Miller, 484 F.3d 968, 971 (8th Cir. 2007) (upward departure to a statutory maximum sentence was not unreasonable when based on defendant's "recurring pattern of violent behavior"); United States v. Lee, 358 F.3d 315, 329 (5th Cir. 2004) (upward departure was not abuse of discretion where although majority of prior offenses were non-violent, "the record is replete with convictions . . . that pose an obvious danger to society").

b. Previous lenient treatment

The court also may depart upward because the defendant previously received "extremely lenient treatment" for a serious offense.[182]

c. Relevant conduct

The court cannot rely on a prior conviction as the basis for a departure 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.[183]

d. Prior arrests without conviction

The court cannot depart upward based on a prior arrest record itself.[184] However, in *United States v. Lopez-Hernandez*, the Seventh Circuit noted that while a court may not rely on a defendant's arrest history itself, it may consider the underlying conduct that is detailed in the arrest records if there is a sufficient factual basis for the court to determine that the conduct occurred.[185]

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[182] USSG §4A1.3, comment. (backg'd.); *see Miller*, 484 F.3d at 971 (upward departure under §4A1.3 "may be particularly appropriate in the context of 'defendants in their early twenties or younger' who repeatedly have received lenient sentences" (quoting USSG §4A1.3, comment. (backg'd.))); *Lee*, 358 F.3d at 328 (upward departure was not an abuse of discretion where defendant "has been afforded considerable leniency . . . yet has continued to reoffend despite several opportunities to undergo treatment for his drug abuse"); United States v. Delgado-Nunez, 295 F.3d 494, 497–98 (5th Cir. 2002) (affirming upward departure based on "extremely lenient treatment" of defendant's prior conduct).

[183] USSG §4A1.2, comment. (n.1) (defining the conduct underlying a "prior sentence" and "relevant conduct" as mutually exclusive); USSG §1B1.1, comment. (n.1(I)) (defining the term "offense" as "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context"); *see also* United States v. Cade, 279 F.3d 265, 270–73 (5th Cir. 2002) (section 4A1.2 defines prior sentences and relevant conduct as mutually exclusive).

[184] USSG §4A1.3(a)(3); *see* United States v. Marrero-Pérez, 914 F.3d 20, 22 (1st Cir. 2019) ("[N]o weight should be given in sentencing to arrests not buttressed by convictions or independent proof of conduct."); United States v. Jones, 444 F.3d 430, 434 (5th Cir. 2006) (cannot depart based only on arrest, but error harmless). *But see* United States v. White, 840 F.3d 550, 553 (8th Cir. 2016) (per curiam) (while a prior arrest record standing alone cannot be considered as the basis for an upward departure, a court may consider the "specific facts underlying the arrests"); United States v. Drain, 740 F.3d 426, 431–33 (7th Cir. 2014) (sentencing court is not mandated to follow the Commission's policy statements, and a court may consider a defendant's "long arrest record" combined with "his adjudicated criminal history as a part of its holistic evaluation of the [18 U.S.C.] § 3553(a) factors").

[185] 687 F.3d 900, 901–02 (7th Cir. 2012).

e. Interplay with categorical approach

In *United States v. Gutierrez-Hernandez*, the district court departed above the guideline range because the defendant's prior 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.[186] The Fifth Circuit reversed, holding that adjusting the offense level based on a hypothetical federal crime was an inappropriate mechanism for a departure based on the inadequacy of criminal history.[187]

B. Downward Departures (§4A1.3(b))

A downward departure may be warranted under §4A1.3(b) where "reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[188]

1. Lower Limit

Departing below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.[189]

2. Limitation for Career Offenders

A downward departure under §4A1.3 for a career offender may not exceed one criminal history category.[190]

3. Prohibitions for Certain Repeat Offenders

Downward departures for overrepresentation 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.[191]

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186 581 F.3d 251, 255 (5th Cir. 2009).

187 *Id.* at 254–55.

188 USSG §4A1.3(b)(1); *see, e.g.*, United States v. Marin-Castano, 688 F.3d 899, 905 (7th Cir. 2012) (sentencing court has authority to depart downward pursuant to §4A1.3(b)(1), but it is not required to do so).

189 USSG §4A1.3(b)(2)(A).

190 USSG §4A1.3(b)(3)(A).

191 USSG §4A1.3(b)(2)(B).

C. DEPARTURES: PROCEDURAL CONCERNS

In considering the extent of an upward departure under §4A1.3(a) based on inadequacy of 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 that of the defendant's."[192] If a defendant is already at the highest criminal history category, the court should move "incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case."[193] Courts have held that the sentencing court must consider adjacent categories, determine on the record whether each category is inadequate, and provide reasons for these findings.[194] The same findings should be made for downward departures.[195]

[192] USSG §4A1.3(a)(4)(A).

[193] USSG §4A1.3(a)(4)(B); *see, e.g.*, United States v. Ballard, 950 F.3d 434, 436–39 (7th Cir. 2020) (remanding where district court did not adequately explain reasons for departure or use §4A1.3's recommended approach to determine departure range).

[194] *See, e.g.*, United States v. Mees, 640 F.3d 849, 854 (8th Cir. 2011) (explaining that a sentencing court should first "proceed along the criminal history axis of the sentencing matrix, comparing the defendant's criminal history with the criminal histories of other offenders in each higher category" but also noting that the process is not a "ritualistic exercise" requiring the court to "mechanically discuss[]" each rejected category (citation omitted)); *see also* USSG §4A1.3(c)(1) (court shall specify in writing the "the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes").

[195] USSG §4A1.3(c)(2) (court shall specify in writing the "the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes").