PRIMER


# CRIMINAL HISTORY

February 2019

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## Contents

## I. INTRODUCTION AND OVERVIEW

The purpose of this primer is to provide 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 this primer identifies some of the issues and cases related to the guidelines' Chapter Four provisions on Criminal History and Criminal Livelihood, it is not intended to be comprehensive or a substitute for independent research, including reading and interpreting the Guidelines Manual, statutes, and case law.

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

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

***Timing.*** Because statutory and guideline provisions contain different definitions of prior offenses, the timing requirements of each require careful consideration. For example, §4A1.1, §4B1.1, and the immigration and firearms guidelines impose remoteness constraints on the use of prior convictions, but §4B1.4, §4B1.5, and their corresponding statutes do not.[1]

***Certain Repeat Offenders.*** The nature of a defendant's criminal record may affect the calculation of the criminal history score. Statutory enhancements that require mandatory minimum sentences may result in increased statutory maximums and the application of different criminal history guidelines. Certain criminal convictions, generally relating to crimes of violence and drug and sex offenses, may increase the defendant's guideline offense level. Assessing these prior convictions requires scrutiny to determine whether a prior state or federal conviction fits the specific definition that triggers the enhanced penalty provisions.

***Departures.*** Departures from the otherwise-properly-calculated guideline range for over-representation or under-representation of a defendant's criminal history are

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

authorized by the policy statements set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category [Policy Statement]). An upward departure from the guideline range may be warranted when a defendant's criminal history does not adequately reflect the seriousness of past criminal conduct or the likelihood that the defendant will commit other crimes. Likewise, a downward departure may be authorized if a defendant's criminal history overstates the seriousness of his/her past criminal record or the likelihood that the defendant will commit other crimes.

## II. CRIMINAL HISTORY (CHAPTER FOUR, PART A)

### A. Computation

At the outset, and excluding staleness concerns, the calculation of the criminal history category starts with computing how many points each prior conviction carries. Section 4A1.1 (Criminal History Category) provides as follows:

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.[2]

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

[2] USSG §4A1.1.

## B. Definitions and Instructions

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

### 1. *"Prior Sentence"*

Under §4A1.2(a), a "prior sentence" is "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense."[3] The term "prior sentence" "is not directed at the chronology of the conduct, but the chronology of the sentencing."[4] Thus, a previously imposed sentence counts even if it was for conduct that occurred after the offense of conviction.[5] Courts are divided over whether to consider a sentence imposed after the original sentencing but before re-sentencing.[6]

#### *a. Relevant Conduct*

A sentence cannot be counted in calculating criminal history if it encompassed conduct that would be considered relevant conduct to the offense of conviction under §1B1.3 (Relevant Conduct [Factors that Determine the Guideline Range]).[7]

#### *b.* Multiple prior sentences

Prior sentences are always counted separately if the offenses were separated by an intervening arrest (the defendant is arrested for the first offense prior to committing the second offense).[8] Section 4A1.2(a)(2) states that "If there is no intervening arrest, prior

[3] *Id*. §4A1.2(a)(1). See also United States v. Baptiste, 876 F.3d 1057, 1061 (11th Cir. 2018) (Where adjudication is withheld, it does not qualify as a "prior sentence" for 4A1.2).

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

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

[6] *Compare* United States v. Burke, 863 F.3d 1355, (11th Cir. 2017) (can consider); United States v. Klump, 57 F.3d 801 (9th Cir. 1995) (can consider), *and* United States v. Bleike, 950 F.2d 214 (5th Cir. 1991) (not plain error to consider), *with* United States v. Ticchiarelli, 171 F.3d 24 (1st Cir. 1999) (improper to consider intervening sentence under law of the case doctrine).

[7] *Compare* United States v. Henry, 288 F.3d 657 (5th Cir. 2002) (firearms and trespass), United States v. Salter, 241 F.3d 392 (5th Cir. 2001) (tax evasion related to money laundering and drug offenses), *and* United States v. Thomas, 54 F.3d 73 (2d. Cir. 1995) (state larceny related to federal forgery), *with* United States v. Yerena-Magana, 478 F.3d 683 (5th Cir. 2007) (illegal reentry not part of drug offense).

[8] *See* United States v. Fueher, 844 F.3d 767 (8th Cir. 2016) (no intervening arrest where defendant was arrested for first offense after commission of second), United States v. Smith, 549 F.3d 355, 361 (6th Cir. 2008) (no intervening arrest between the first two prior offenses, but intervening arrest between the second

sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day."[9]

### *c.* Single sentence

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

### *d.* Revocation sentences

Revocations of probation, parole, or supervised release sentences are also counted. The term of imprisonment imposed upon revocation, if any, is added to the original sentence to compute the correct number of total criminal history points to be assessed towards that offense as a whole.[11]

## *2. "Sentence of Imprisonment"*

This term refers to the maximum sentence imposed; that is, the sentence pronounced by the court, not the length of time actually served.[12] 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."[13] In the case of an indeterminate sentence, the high end of the prescribed sentencing range is treated as the

and third offense committed while on bond). *See also* United States v. Leal-Felix, 665 F.3d 1037, 1039 (9th Cir. 2011) (Defendant's two driving while license suspended "citations" are not considered formal arrests for criminal history purposes and, thus, cannot be "intervening arrests").

[9] USSG §4A1.2(a)(2).

[10] *Id*. *See also* United States v. Garcia-Sanchez, No. 18-40088, 2019 WL 851069, at *5 (5th Cir. Feb. 22, 2019) (holding that §4A1.2's single sentence rule applies to §2L1.2); United States v. Marroquin, 884 F.3d 298, (5th Cir. 2018) (Where multiple convictions are consolidated and a single sentence is imposed, it is error to count the individual convictions); United States v. Davis, 720 F.3d 215, 219 (4th Cir. 2013) (holding that where a defendant receives a "consolidated sentence" for multiple offenses under North Carolina law, "it is one sentence" regardless of whether there was an intervening arrest between the two offenses).

[11] *Id*. §4A1.2(k)(1). Even when 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 defendant's argument that this constitutes impermissible "double counting").

[12] USSG §4A1.2(b)(1).

[13] §4A1.2, comment. (n.2). *See also* United States v. Valente, No. 17-2311-CR, 2019 WL 637971, at *3 (2d Cir. Feb. 15, 2019) (holding that a defendant's prior 60-day term of imprisonment should have been assigned one criminal history point, rather than two, because "he had not yet served it because of medical issues").

maximum sentence.[14] If the court reduces the prison sentence, however, the reduced sentence controls.[15]

### *a.* Suspended sentence

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

### *b.* What is a sentence of imprisonment?

In determining whether a defendant has served a sentence of imprisonment, the court looks to the nature of the facility, rather than its purpose.[19] In *United States v. Brooks*,[20] the court held that incarceration in a boot camp was a prison sentence. The court distinguished between facilities like the boot camp "requiring 24 hours a day physical confinement" and other dispositions such as "probation, fines, and residency in a halfway house."[21] Work release may constitute a sentence of imprisonment.[22] Generally, community-type confinement is deemed to be a "substitute for imprisonment" and not a

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

[15] United States v. Kristl, 437 F.3d 1050 (10th Cir. 2006).

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

[17] *See* United States v. Fernandez, 743 F.3d 453, 457 (5th Cir. 2014) (holding that "because 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) of the Sentencing Guidelines when the prior sentence is otherwise suspended); United States v. Dixon, 230 F.3d 109 (4th Cir. 2000) (58 days spent in custody did not warrant two points); United States v. Rodriguez-Lopez, 170 F.3d 1244 (9th Cir. 1999) (adding two points for 62 days served). *See also* United States v. Hall, 531 F.3d 414, 419 (6th Cir. 2008) ("a defendant who receives full credit for time served on an entirely separate conviction does not in fact 'actually serve' any time for the offense in question.").

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

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

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

[21] *Id.* at 725–26.

[22] United States v. Enrique-Ascencio, 857 F.3d 668 (5th Cir. 2017) *and* United States v. Schomburg, 929 F.2d 505 (9th Cir. 1991).

"sentence of imprisonment."[23] A six-month sentence of home detention is not considered a sentence of imprisonment.[24] The courts have largely held that community treatment centers or halfway houses are not imprisonment.[25]

### 3. *Felony Offense*

A felony offense is *any* offense under federal, state, or local law that is *punishable* by a term of imprisonment exceeding one year, regardless of the actual sentence imposed.[26] This definition requires careful review of certain prior misdemeanors in jurisdictions where some misdemeanor offenses carry two-year or three-year statutory maximums.[27] However, in at least one jurisdiction, certain classes of felonies are not punishable by more than one year.[28]

### 4. *Misdemeanor and Petty Offenses*

Certain misdemeanors (*e.g.*, careless or reckless driving, gambling, driving without a license, disorderly conduct, prostitution, resisting arrest, trespassing) are counted only if they resulted in a sentence of at least thirty days' imprisonment or requiring more than one year of probation, or they are similar to the instant offense.[29] Other petty offenses (*e.g.*, fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, and vagrancy) are never counted.[30] Convictions for driving while intoxicated and other similar offenses are always counted.[31]

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

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

[25] United States v. Pielago, 135 F.3d 703, 711–14 (11th Cir. 1998); United States v. Latimer, 991 F.2d 1509, 1511 (9th Cir. 1993). *But see* United States v. Rasco, 963 F.2d 132 (6th Cir. 1992) (community treatment center upon revocation of parole is to be viewed as part of the original term of imprisonment and, thus, additional incarceration under §4A1.2(k)(1)), and United States v. Jones, 107 F.3d 1147 (6th Cir. 1997) (time served in home detention is not "sentence of imprisonment").

[26] USSG §4A1.2(o).

[27] United States v. Coleman, 635 F.3d 380 (8th Cir. 2011) (state misdemeanor punishable by less than two years is a qualifying felony for career offender purposes).

[28] United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc) (prior North Carolina felony that did not expose defendant to a term of imprisonment greater than one year was not a qualifying felony for purposes of a sentencing enhancement under 21 U.S.C. § 851).

[29] USSG §4A1.2(c)(1).

[30] *Id*. §4A1.2(c)(2).

[31] *Id*. §4A1.2, comment. (n.5).

## 5. Timing and Status Concerns

Whether a prior conviction is scored for the criminal history computation depends on several factors — the age of the prior conviction, the date of imposition of the sentence, the length of the prior sentence, and any sentence imposed upon revocation of the prior sentence — and whether the prior conviction was for an offense committed before the age of 18.[32] Likewise, the status of the defendant at the time of the instant federal offense matters and may result in criminal history points.

### a. Fifteen-year window for prior sentences greater than 13 months

Three points are assigned to each adult sentence of imprisonment exceeding one year and one month that was imposed within 15 years of the defendant's commencement of the instant offense *or* resulting in incarceration of the defendant during any part of that 15-year period.[33] Section 4A1.2(e)(1) may result in the scoring of remote convictions, especially where a defendant was on parole or supervised release and was revoked and incarcerated during the 15-year period immediately preceding the instant offense.[34] The court will count a conviction of a defendant whose parole is revoked during the operative time period, even if the defendant is incarcerated for a new offense at the time of revocation.[35] A defendant on escape status is deemed incarcerated.[36]

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

For prior sentences of less than 13 months' imprisonment, there is a 10-year time limitation, which runs from the date the prior sentence was imposed, not when it was served.[37] Likewise, the time limit runs *from the original imposition date*, not the revocation date, *unless* the original sentence added to the revocation sentence exceeds 13 months.[38]

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[32] USSG §4A1.2

[33] *Id*. §§4A1.1(a), 4A1.2 (e)(1).

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

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

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

[37] USSG §4A1.2(e)(2).

[38] *Id*. §§4A1.2 (a)(1), (e)(2), (k)(2)(B). *See also* United States v. Arviso-Mata, 442 F.3d 382 (5th Cir. 2006) (sentence imposed when defendant found guilty and sentence was suspended); United States v. Arnold, 213 F.3d 894, 895–96 (5th Cir. 2000) ("a sentence is 'imposed' when it is first pronounced by the court, and not when the term of imprisonment begins . . . . [S]entence pronouncement is the sole, relevant event for purposes of §4A1.2(e)(2) . . . .").

### *c.* Status of defendant at time of federal offense

Two criminal history points are added if the instant offense was committed while the defendant was under a criminal justice sentence.[39] This provision covers virtually all forms of suspended sentences where there is a possibility of a custodial sentence, even if there is no active supervision associated with the prior sentence at issue.[40] However, a sentence where a fine is the only sanction is not considered to be a criminal justice sentence.[41] A defendant, whose probation would have otherwise expired but for an outstanding revocation warrant, is deemed to be under a criminal justice sentence even if the state did not use due diligence to execute the warrant.[42] For purposes of §4A1.1(d), a defendant must be "under a criminal justice sentence" at the time he or she committed the instant offense.[43] Note, however, that a defendant who fails to report for service of a sentence of imprisonment shall be treated as having escaped and therefore is under a criminal justice sentence.[44]

### *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.[45] For an offense committed before age 18 that resulted in a *juvenile or adult* sentence to confinement of at least 60 days, two points are added if the defendant *was released* from that confinement within *five years* of the instant offense.[46]

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39 USSG §4A1.1(d).

40 *See*, *e.g.*, United States v. Perales, 487 F.3d 588 (8th Cir. 2007) (diversion); United States v. Miller, 56 F.3d 719 (6th Cir. 1995) (conditional discharge sentence as the "functional equivalent" of unsupervised probation); United States v. Giraldo-Lara, 919 F.2d 19 (5th Cir. 1990) (deferred adjudication probation). *See also* United States v. Brown, 909 F.3d 698, 700–01 (4th Cir. 2018) (holding that a suspended sentence in Virginia that is predicated on "good behavior" qualifies as a criminal justice sentence under §4A1.1(d)).

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

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

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

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

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

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

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.[47]

Under §4A1.2(d)(2), the courts may add one or two points for juvenile offenses committed before 18 that resulted in juvenile adjudications. Application Note 7 provides that for juvenile adjudications, "only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted."[48] Because states treat juvenile convictions in differing ways, it is the conduct involved and not terminology that is important.[49] A sentence of commitment to the custody of the state's juvenile authority constitutes a sentence within the meaning of §4A1.2(d)(2).[50] The juvenile's age at the time of a revocation resulting in confinement, rather than at the time of the offense, controls.[51] Juvenile detention that did not result from an adjudication of guilt does not count.[52]

### 6. *Military, Foreign, and Tribal Court Sentences*

Military sentences resulting from a general or special court-martial are counted. Sentences imposed as a result of a summary court-martial or Article 15 proceeding do not count.[53] Foreign sentences and Native American tribal court sentences do not count but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category [Policy Statement]).[54]

[47] *See* §4A1.2(d)(2)(B).

[48] USSG §4A1.2, comment. (n. 7).

[49] *See* United States v. Stewart, 643 F.3d 259, 263 (8th Cir. 2011); United States v. Lake, 198 F. App'x 788, 791 (10th Cir. 2006).

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

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

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

[53] USSG §4A1.2(g).

[54] *Id*. §4A1.2(h), (i); *see also* §4A1.3, comment. (n.2(C) (listing factors, in addition to the standard ones set forth in §4A1.3(a), to be considered in determining whether, or to what extent, an upward departure based on tribal court conviction(s) may be warranted)).

#### 7. Sentences on Appeal and Diversionary Dispositions

Prior sentences under appeal are counted. Where the execution of a prior sentence has been stayed pending appeal, subsections (a) through (e) of §4A1.1 still apply in computing criminal history.[55]

Diversions from the judicial system where no actual finding of guilt is made are not counted.[56] However, where diversion from the judicial system comes about *after* some sort of finding of guilt has been made, or a plea of nolo contendere has been entered, the diversionary disposition should be counted as a one-point sentence under §4A1.1(c).[57]

## III. REPEAT OFFENDERS

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

### A. Career Offender

#### 1. General Application (§4B1.1)

An individual 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," and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[58]

#### a. Offense Level and Criminal History Category

The guidelines provide significantly enhanced offense levels for career offenders. Generally, the offense level is increased based on the statutory *maximum* for the offense of

[55] *Id.* §4A1.2(l).

[56] *Id.* §4A1.2(f).

[57] *Id.*; *see also* United States v. Baptiste, 876 F.3d 1057, 1062 (11th Cir. 2017) (finding, pursuant to §4A1.2(f), that a Florida marijuana charge warranted one criminal history point because the defendant had either pled guilty or nolo contendere to it despite receiving a diversionary sentence).

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

conviction.[59] Likewise, the guidelines establish that a career offender's criminal history category is automatically VI in every case, regardless of what it is calculated to be under Chapter Four, Part A.[60]

### *b.* Career Offender and 924(c)

The interplay between the career offender enhancement and 18 U.S.C. § 924(c) warrants careful consideration.[61] If the defendant is only convicted of the firearms offense, the guideline range is 360 months to life, although the reduction for acceptance of responsibility is still available.[62] If there are multiple counts of conviction, the applicable guideline range is the greater of the mandatory minimum consecutive sentence plus the guideline range for the underlying offense or the guideline range derived from the career offender table for § 924(c) or § 929(a) offenders in §4B1.1(c)(3).[63] The sentence is then to be apportioned among the counts to meet any mandatory minimum requirements.[64] If the defendant is not a career offender but has multiple convictions pursuant to § 924(c), the court can depart upward.[65] The court can also depart upward if, in the rare case, the defendant's guideline range is actually lower than if he had not sustained a § 924(c) conviction.[66]

### *c.* Acceptance of Responsibility

A career offender may receive a reduction for acceptance of responsibility pursuant to §3E1.1 (Acceptance of Responsibility). However, other Chapter Three adjustments, whether upward or downward, do not apply.[67]

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

60 *Id*. §4B1.1(b).

61 *See id*. §4B1.1(c), the §4B1.1(c)(3) table, and §4B1.1, comment. (n.3). *See also* United States v. Diaz, 639 F.3d 616 (3d Cir. 2011).

62 USSG §4B1.1(c)(3).

63 *See id*. §4B1.1(c)(2).

64 *Id*. §5G1.2(e).

65 *Id*. §2K2.4, comment. (n.2(B)).

66 *Id*. §2K2.4, comment. (n.4).

67 *See id.* §1B1.1(a) (providing, in the application instructions for the guidelines, that adjustments under Parts A, B, and C of Chapter Three are to be considered *prior* to the operation of any potential Chapter Four, Part B overrides). *See also* United States v. Warren, 361 F.3d 1055 (8th Cir. 2004) (plain error to apply an obstruction of justice enhancement to the career offender offense level); United States v. Perez, 328 F.3d 96 (2nd Cir. 2003) (career offender cannot receive minor role reduction if it would result in an offense level below the career offender minimum).

### *d.* Predicate Convictions

#### (1) Adult convictions required.

Unlike other criminal history provisions, only adult convictions can serve as a predicate under the career offender guideline.[68] However, a defendant who was convicted as an adult but was only 17 can be considered a career offender.[69]

#### (2) Predicate conviction must be prior to federal offense.

Because the career offender enhancement applies to criminal "convictions," not sentences, the defendant must have been convicted of the offense before he committed the instant federal offense.[70] 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*.[71]

#### (3) 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 convictions for career offender purposes. But, a sentence for a prior conviction that is included in a "single sentence" with a non-qualifying offense may be treated as a predicate offense if the sentences independently would have received criminal history points but for the single sentence rule.[72] However, "no more than one prior sentence in a given single sentence may be used as a predicate offense."[73]

#### (4) Predicate convictions must be scored.

Prior convictions must not be too old (*i.e.*, outside the time limits set forth in §4A1.2(d), (e)), and must receive criminal history points under §4A1.1(a), (b), or (c) to qualify as predicates for the career offender enhancement.[74] A prior sentence included in a

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68 *See* USSG §4B1.2, comment. (n.1).

69 *Id. See also, e.g.*, United States v. Otero, 495 F.3d 393 (7th Cir. 2007); United States v. Moorer, 383 F.3d 164 (3d Cir. 2004); *but see* United States v. Mason, 284 F.3d 555, 558–62 (4th Cir. 2002) (adult conviction did not count because the defendant was sentenced as a juvenile).

70 USSG §4B1.2(c). *See also* United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014).

71 *Id*. §4B1.2(c).

72 *Id*. §4A1.2, comment. (n.3).

73 *Id.*

74 *See* United States v. Dewey, 599 F.3d 1010 (9th Cir. 2010) (affirming reliance on 18-year old sentence where defendant was incarcerated within previous 15 years).

single sentence, that is remote in time, and would not independently receive criminal history points, cannot serve as a predicate offense.

#### *e.* Inchoate Offenses

The career offender guideline includes convictions for inchoate offenses such as aiding and abetting, conspiring, and attempting to commit a "crime of violence" and "controlled substance offense."[75] This provision is limited, however, to circumstances where the defendant intended to commit or facilitate the substantive offense. Accordingly, the Ninth Circuit has held that accessory after the fact does not constitute a predicate offense,[76] and the Second Circuit held that a New York facilitation conviction did not count because there was no requirement that the defendant intended to commit the offense.[77]

### *2. Crime of Violence (§4B1.2(a))*

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

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[78]

[75] *See* USSG § 4B1.2, comment. (n.1); United States v. Medina-Campo, 714 F.3d 232 (4th Cir. 2013) (solicitation of controlled substance offense is included); United States v. Shumate, 341 F.3d 852 (9th Cir. 2003). *See also* United States v. Lightbourn, 115 F.3d 291 (5th Cir. 1997) (conspiracy); United States v. Dolt, 27 F.3d 235 (6th Cir. 1994) (solicitation of controlled substance offense is not included). *But see United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018) (holding that an attempt to commit a controlled substance offense does not qualify as a "controlled substance offense" under §4B1.2(b) because the commentary seeking to capture this particular offense is *not* controlling, as such commentary serves to expand the scope of §4B1.2 rather than interpret it); *United States v. Havis*, 907 F.3d 439, 444 (6th Cir. 2018) (agreeing with *Winstead* but ruling differently due to prior, binding Sixth Circuit precedent).

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

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

[78] USSG §4B1.2(a).

The "crime of violence" definition is used not only to determine whether a defendant's sentence is subject to the career offender enhancement in §4B1.1, but also whether a defendant's sentence is subject to enhancement in other guidelines.[79] In addition, it is used to determine whether an upward departure may be warranted under §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Quantity Magazine [Policy Statement]).

### *3. Controlled Substances Offense (§4B1.2(b))*

The career offender guidelines define a "controlled substance offense" as follows: "[A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[80]

#### *a.* Predicate Drug Offense Punishable by More than One Year

Note that this guideline 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), which limits "serious drug offenses" to offenses punishable by at least ten years' imprisonment.[81] In fact, some state misdemeanor convictions may even qualify under this definition.[82]

#### *b.* Predicate Drug Conviction Limited to Drug Trafficking Offenses Firearm Offenses

Unlike the statutory drug enhancements (*e.g.*, 21 U.S.C. § 841(b)), this guideline provision is limited to trafficking-type offenses and does not cover mere possession of a controlled substance.[83]

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[79] *See id*., *e.g.*, §2K1.3(a)(1)–(2) & comment. (n.2); §2K2.1(a)(1), (2), (3)(B), (4)(A) & comment. (n.1), §2K2.1(b)(5) & comment. (n.13(B)); §2S1.1(b)(1)(B)(ii) & comment. (n.1); §4A1.1(e) & comment. (n.5).

[80] *Id*. §4B1.2(b).

[81] 18 U.S.C. § 924(e)(2)(A).

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

[83] Salinas v. United States, 547 U.S. 188 (2006) (per curiam); United States v. Gaitan, 954 F.2d 1005 (5th Cir. 1992) (categorical approach precludes going behind offense of conviction).

### *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 a premises to facilitate a drug offense (21 U.S.C. § 856).[84] Use of a communication facility to buy drugs for personal use is not a violation of 21 U.S.C. § 843(b) because mere possession of a controlled substance is a federal misdemeanor.[85]

### *4. Categorical and Modified Categorical Approach*

The categorical approach and modified categorical approaches apply to the determination whether an offense is a "crime of violence" or "controlled substance offense."[86]

## B. Criminal Livelihood (§4B1.3)

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level must be at least **13** unless acceptance of responsibility applies, in which case the minimum offense level shall be **11**.[87] The Commentary to §4B1.3 includes definitions of the key terms "pattern of criminal conduct" and "engaged in as a livelihood." Full face value of stolen checks and gross profit have been used to calculate the defendant's derived income for purposes of applying the enhancement.[88]

[84] USSG §4B1.2, comment. (n.1).

[85] Abuelhawa v. United States, 556 U.S. 816 (2009).

[86] *See* section IV *infra*. *See also* the Commission's subject matter primer on *Categorical Approach* at http://www.ussc.gov/guidelines/primers/categorical-approach.

[87] *See* USSG §4B1.3.

[88] See United States v. Gordon, 852 F.3d 126 (1st Cir. 2017); United States v. Quertermous, 946 F.2d 375 (5th Cir. 1991).

## C. Armed Career Criminal

### *1. General Application (§4B1.4)*

A defendant convicted of a violation of 18 U.S.C. § 922(g) and who has three prior convictions for a violent felony or serious drug trafficking offense, or both, committed on occasions different from one another is considered an "armed career criminal."[89] Such a defendant is subject to an enhanced sentence under 18 U.S.C. § 924(e).

#### *a.* Offense Level and Criminal History Category

Section 4B1.4 provides that the offense level for an armed career criminal is the greatest of the following:

(1) the offense level applicable from Chapters Two and Three;
(2) the offense level from §4B1.1 (Career Offender), if applicable;
(3) an offense level of **34** if the defendant used or possessed the firearm, or ammunition, in connection with a crime of violence or a controlled substance offense, or possessed a firearm described in 26 U.S.C. § 5845(a); or
(4) an offense level of **33** in other circumstances.[90]

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

(1) the category determined under Chapter Four, Part A;
(2) the category determined under the Career Offender Guideline, if applicable;
(3) Category VI, if the defendant used or possessed a firearm or ammunition in connection with either a crime of violence or a controlled substance offense; or the firearm possessed by the defendant was of the type described in 26 U.S.C. § 5845(a)[91]; or
(4) Category IV.

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

Sections 4B1.4(b)(3)(A) and (c)(2) do not apply if a defendant is also convicted of violating 18 U.S.C. § 844, § 924(c), or § 929(a).[92] However, if the maximum penalty

[89] *See* 18 U.S.C. § 924(e) and §4B1.4, comment (n.1).

[90] USSG §4B1.4(b).

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

[92] *Id*. comment (n. 2).

resulting from the guideline range, combined with the mandatory consecutive sentences, is lower than the maximum penalty that would have resulted if such provisions applied, an upward departure may be warranted. Note that the upward departure has a cap.[93]

#### c. Acceptance of Responsibility

Acceptance of responsibility under §3E1.1 is available and will decrease the offense level, but not below the statutorily-required minimum sentence of 180 months.

#### *d. Predicate convictions*

Different than the career offender guideline, 18 U.S.C. § 924(e) does not provide for time limitations in predicate convictions. It also refers to convictions "committed on occasions different from one another," rather than using §4B1.2's requirement that sentences for such convictions count separately. In addition, burglary is included as a predicate offense.[94]

### *2. Violent Felony*

The term "violent felony" means:

a. Any crime punishable by imprisonment for a term exceeding one year, **or** any act of juvenile delinquency involving the use or carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such term if committed by an adult, that:

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

2) is burglary, arson, or extortion, involves the use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.[95]

### *3. Serious drug offense*

The term serious drug offense refers to an offense under 21 U.S.C. § 801 et seq., § 951 et seq., or 46 U.S.C. § 70501 et seq., or an offense under state law involving

[93] *Id.*

[94] 18 U.S.C. § 924(e)(2)(B)(ii).

[95] *Id.* § 924(e)(2)(B). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), 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.

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."[96]

#### *4. Categorical and Modified Categorical Approach*

The categorical approach and modified categorical approaches apply to the determination whether an offense is a "violent felony" or "serious drug offense."[97]

## D. Repeat and Dangerous Sex Offender Against Minors

### *1. General Application (§4B1.5)*

If the defendant's instant offense is one of the covered sex crimes,[98] and the defendant has a prior qualifying sex offense conviction, or has engaged in a pattern of activity involving prohibited sexual conduct, then the defendant is subject to the overrides set forth in §4B1.5.

#### *a.* Offense Level and Criminal History Category

If the defendant has a prior qualifying sex conviction and is not a career offender, then the offense 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.[99] The criminal history category is either VI, if determined to be so under Chapter Four, Part A, or—in any case—no less than V.[100]

If the defendant is not a career offender and the above does not apply because the defendant does not have a prior qualifying sex conviction, a 5-level enhancement under

[96] 18 U.S.C. § 924(e)(2)(A).

[97] *See* section IV *infra*. *See also* the Commission's subject matter primer on *Categorical Approach* at http://www.ussc.gov/guidelines/primers/categorical-approach.

[98] USSG §4B1.5, comment. (n. 2) (listing the "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").

[99] *Id.* §4B1.5(a)(1).

[100] *Id.* §4B1.5(a)(2).

§4B1.5(b) will instead be applied if "the defendant engaged in a pattern of activity involving prohibited sexual conduct."[101]

### *b.* Acceptance of Responsibility

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

### *c. Predicate convictions*

In 2014, the Sixth Circuit 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.[102] Furthermore, §4B1.5(a) applies to a defendant whose prior sex conviction is based on an adjudication of guilt but has not yet been sentenced for that particular offense.[103]

## *2. Categorical and Modified Categorical Approach*

The categorical approach and modified categorical approaches apply to the determination of whether an offense is a qualifying prior sex conviction.[104]

[101] *Id*. §4B1.5(b).

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

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

[104] *See* section IV *infra*. *See also* the Commission's subject matter primer on *Categorical Approach* at http://www.ussc.gov/guidelines/primers/categorical-approach; United States v. Dahl, 833 F.3d 345 (3rd Cir. 2016) (concluding it was plain error for the district court to fail to apply the categorical approach in determining the applicability of an enhancement under §4B1.5)

## IV. CATEGORICAL APPROACH AND MODIFIED CATEGORICAL APPROACH

The following is a brief discussion of the categorical approach. For an in-depth look at the process, history, and caselaw concerning this doctrine, see the Commission's Primer on the Categorical approach.[105] As discussed above, there are sentencing guidelines and federal statutes that provide enhanced penalties for offenders whose criminal history evidences violence or other types of serious felony conduct. Typically, the relevant guidelines that require the categorical approach are §§4B1.1 and 4B1.2 (Career Offender), §4B1.4 (Armed Career Criminal), §4B1.5 (Repeat and Dangerous Sex Offenders Against Minors), and §2L1.2 (Illegal Entry until Nov. 1, 2016). The relevant statutes include 18 U.S.C. § 16 (Crime of Violence Definition), 18 U.S.C. § 924(e) (Armed Career Criminal Act), 18 U.S.C. § 2252 (Prior Sex Offense Convictions), and 8 U.S.C. § 1326 (Reentry of Removed Aliens).

Sentencing and appellate courts have interpreted terms such as "crime of violence" or "serious drug offense" found within these provisions through application of the "categorical approach," first mandated by the Supreme Court in *Taylor v. United* States,[106] and the "modified categorical approach" that was introduced and discussed in *Shepard v. United States*[107] and further clarified in *Descamps v. United States*[108] and *Mathis v. United States*.[109] Although these cases dealt with statutory enhancements at 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.[110]

The categorical approach was first adopted in *Taylor v. United* States.[111] 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

105 U.S. SENT'G COMM'N, *Categorical Approach,* available at http://www.ussc.gov/guidelines/primers/categorical-approach.

106 495 U.S. 575 (1990).

107 544 U.S. 13 (2005).

108 570 U.S. 254 (2013).

109 136 S. Ct. 2243 (2016).

110 *See, e.g.*, United States v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008) (noting the existence of extensive precedent requiring application of case law interpreting § 924(e)'s definition of "violent felony" to §4B1.2(a)'s definition of "crime of violence").

111 495 U.S. 575 (1990).

prior offense."[112] A court is *not* concerned with the "facts underlying the prior convictions;" in other words, the court may not focus on the underlying criminal conduct itself.[113] This form of analysis permits a federal sentencing court to examine only the statute under which the defendant sustained a conviction (and, in certain cases, judicial documents surrounding that conviction) in determining whether the prior conviction fits within a federal predicate definition.

The modified categorical approach may only be used "when a prior conviction is for violating a 'divisible statute'—one that sets out one or more of the elements in the alternative, *e.g.,* burglary involving entry into a building *or* an automobile."[114] Under the modified categorical approach, sentencing courts may only consult a limited class of documents, such as indictments and jury instructions, to determine which alternative element formed the basis of the defendant's prior conviction.

For a prior trial conviction, the sentencing court may consult judicial records such as the indictment and jury instructions. For a prior guilty plea conviction, the sentencing court's review is "limited to the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[115]

In the absence of supporting documents that limit the scope of a conviction under an overbroad statute, the enhancement does not apply.[116]

"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."[117] 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."[118]

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[112] *Taylor*, 495 U.S. at 602.

[113] *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.").

[114] *Descamps,*133 S. Ct. 2276 at 2279.

[115] *Shepard*, 544 U.S. at 26.

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

[117] *Mathis,* 136 S. Ct. at 2253 (citing *Descamps,* 570 U.S. at 263–65).

[118] United States v. Faust, 853 F.3d 39, at 51 (1st Cir. 2017).

In *Descamps*, the Supreme Court explained that, in the categorical approach, the comparison is between the prior conviction's elements of the offense with the elements of the generic offense. *Id*. 2285. If the "relevant statute has the same elements of the 'generic' ACCA crime, then the prior conviction can serve as an ACCA predicate, so too if the statute defines the crime more narrowly."[119] But, a "state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense."[120]

*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."[121] In other words, the sentencing court cannot look at the documents as defined in *Taylor* in a trial conviction, or the documents set forth in *Shepard* in the context of a conviction upon a plea, in the categorical approach.[122] It 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."[123]

In *Mathis*, the Court held that when the predicate conviction statute enumerates factual means of committing a single element of an offense, those alternative factual means are not elements of the offense. The sentencing court cannot use the modified categorical approach when the statute of conviction is indivisible,[124] *i.e*., it cannot look beyond the fact of conviction to establish the defendant's conduct in the prior offense. Therefore, the "first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."[125] 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,[126] and examine any "illustrative examples" provided in the statute. Additionally, if the "state law fails to provide clear

[119] *Taylor,* 495 U.S. at 599.

[120] *Mathis,* 136 S. Ct. at 2251.

[121] *Descamps,* 570 U.S. at 258.

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

[123] *Descamps*, 570 U.S. at 261.

[124] *See* United States v. Titties, 852 F.3d 1257 (10th Cir. 2017).

[125] *Mathis,* 136 S. Ct. 2243 at 2256.

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

answers," the sentencing court may take a "peek at the record documents" to determine if the "listed items are elements of the offense."[127]

## V. DEPARTURES (CHAPTER FOUR, PART A)

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 otherwise-properly-calculated criminal history category where the defendant's criminal history either overstates or understates the seriousness of the defendant's criminal record or his/her risk of recidivism.[128] There are some limitations on the availability of the departure, particularly for career and sex offenders.

### A. Upward Departures

An upward departure may be warranted if "reliable information indicates that the criminal history category *substantially under-represents* the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[129]

#### *1. Basis for Upward Departure*

Factors to be considered in considering the imposition and, if so imposed, 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 criminal history score

The court may rely on a sentence not used in computing criminal history, such as tribal or foreign convictions.[130] 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 tribal court conviction should serve as the basis for an upward departure.[131] This non-exhaustive list includes whether:

[127] *Mathis*, 136 S. Ct. at 2256.

[128] *See* USSG § 4A1.3(a), (b).

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

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

[131] *See* USSG §4A1.3, comment. (n.(2)(C)) (effective November 1, 2018). As noted in the Reason for Amendment accompanying Amendment 805, this additional language was meant to provide "guidance 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).

### *b.* Prior sentence substantially longer than one year

Prior sentences of substantially more than one year imposed as a result of independent crimes committed on different occasions may form the basis for an upward departure.

### *c.* Similar misconduct established by an alternative proceeding

Prior misconduct adjudicated in a civil proceeding or by a failure to comply with an administrative order that is similar to the instant offense.[132]

courts on how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions."

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

#### *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.[133]

#### *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.[134] Note that the offense(s) must be similar[135] and, according to some courts, significant.[136]

### *2. Other Considerations*

#### *a.* Nature of prior conviction

The nature, rather than the number, of prior convictions is more indicative of the seriousness of a defendant's criminal record.[137]

#### *b.* Previous lenient treatment

The court may also depart because the defendant previously received "extreme leniency" for a serious offense.[138]

#### *c.* Relevant conduct

The court cannot rely on a prior conviction as the basis for a departure because the criminal history category does not adequately reflect the seriousness of the past criminal

[133] United States v. Hernandez, 896 F.2d 642, (1st Cir. 1990).

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

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

[136] *See, e.g.*, United States v. Martinez-Perez, 916 F.2d 1020, 1025 (5th Cir. 1990) (departure not justified by remote misdemeanor conviction).

[137] USSG §4A1.3, comment. (n.2(B)). *See, e.g.*, United States v. Carillo-Alvarez, 3 F.3d 316 (9th Cir. 1993) (reversing upward departure where criminal history not egregious).

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

conduct, if the court previously determined that the conduct underlying that conviction is relevant conduct to the instant offense and considers it in calculating the offense level.[139]

#### *d.* Prior arrests without conviction

The court cannot depart based on a prior arrest record itself.[140]

#### *e.* Interplay with Categorical approach

In *United States v. Gutierrez-Hernandez*,[141] the district court departed above the guideline range because a misdemeanor state firearm conviction could have been prosecuted as a more serious federal felony, and the police report suggested that a drug conviction was a trafficking offense even though the categorical approach prohibited treating it as such. The Fifth Circuit reversed, holding first that the court could not adjust the offense level based upon a hypothetical federal crime. Second, the court could not escape the requirement of the categorical approach by relying on a police report to depart because the enhancement should have applied.

### B. Downward Departures

A downward departure may be warranted where "reliable information indicates that the criminal history category *substantially overrepresents* the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[142]

#### *1. Lower Limit*

Departing below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.[143]

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

[140] USSG §4A1.3(a)(3). *See* United States v. Jones, 444 F.3d 430 (5th Cir. 2006) (cannot depart based on arrest, but error harmless); Williams v. United States, 503 U.S. 193 (1992).

[141] 581 F.3d 251 (5th Cir. 2009).

[142] USSG §4A1.3(b)(1) (emphasis added). *See, e.g.*, United States v. Shoupe, 988 F.2d 440 (3d Cir. 1993).

[143] USSG §4A1.3(b)(2)(A).

### 2. Limitation for Career Offenders

A downward departure under §4A1.3 for a career offender may not exceed one criminal history category.[144]

### 3. Prohibitions for Certain Repeat Offenders

Downward departures for over representation of criminal history are prohibited for defendants who are armed career criminals under §4B1.4 or who are repeat and dangerous sex offenders against minors within the meaning of §4B1.5.[145]

## C. Departures: Procedural Concerns

The criminal history departures are procedurally regulated as well. In considering an upward departure based on inadequacy of the criminal history, the court is instructed to use "as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's."[146] 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."[147] 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.[148] The same findings should be made for downward departures.[149]

In a post-*Booker* world, strict compliance with this procedure may no longer be required.[150] The Sixth Circuit reviews criminal history departures under the analytical framework concerning the procedural and substantive reasonableness of sentences set forth in *Gall v. United States*.[151]

144 *Id*. §4A1.3(b)(3)(A).

145 *Id*. §4A1.3(b)(2)(B).

146 *Id*. §4A1.3(a)(4)(A).

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

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

149 USSG §4A1.3(c)(2).

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

151 552 U.S. 38 (2007); United States v. Tate, 516 F.3d 459 (6th Cir. 2008).