

# Calculating Criminal History

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(Note: This outline emphasizes Sixth Circuit case law)

## OUTLINE

To calculate a criminal history category (I through VI) under Chapter 4 of the Guidelines Manual, you need to find out how many criminal history points the defendant has. To derive these points, you must ask the following questions about defendant's prior contacts with the criminal justice system:

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*NOTE:* Citations are to sections of the Guidelines Manual; Most Frequently Asked Questions About the Sentencing Guidelines (MFAQ), (June 1994); and the November 2002 edition of the Federal Sentencing Guidelines Handbook (FSGH), by Haines, Bowman and Woll.

## 1. Is it a prior sentence?

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. 4A1.2(a)(1).

- A. Don't be tricked by the word "**prior.**" A sentence is "prior" if it is imposed before the sentencing in your case. This is so, regardless of the order in which the "prior" offense and the instant offense were committed. 4A1.2(a)(1) & comment. (n.1); MFAQ 80.

### Example:

Jan. 1, 2000, defendant commits bank fraud.

Jan. 2, 2001, defendant indicted.

Sept. 1, 2001, defendant pleads guilty.

Oct. 1, 2001, defendant robs a grocery store and is caught in the act.

Nov. 1, 2001, defendant pleads guilty to the robbery in state court.

Dec. 1, 2001, defendant is sentenced for the robbery.

Jan. 15, 2002, defendant is sentenced for the bank fraud.

The sentence for the state robbery conviction is a prior sentence, even though he didn't commit the robbery until after pleading guilty to the bank fraud. *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992).

- B. Furthermore, a prior sentence doesn't even need to be a sentence yet. If defendant has been convicted (*i.e.*, pleaded guilty or been found guilty), but **not yet sentenced**, the prior sentence usually counts as one criminal history point. 4A1.2(a)(4).
- C. If the sentence that you are considering including in the criminal history score is for **conduct that is "part of the instant offense"** it is not a "prior sentence" and does not count. 4A1.2(a)(1). The Sixth Circuit takes a rather narrow view of what is "part of the instant offense". *United States v. Escobar*, 992 F.2d 87 (6th Cir. 1993); *United States v. Hicks*, 4 F.3d 1358 (6th Cir. 1993). Application Note 1 defines

this as "conduct that is relevant conduct to the instant offense," but there is a circuit split on whether the prior offense conduct actually had to be included in determining the instant offense level to qualify. Compare *United States v. Oser*, 107 F.3d 1080, 1086-88 (3d Cir. 1997) (not relevant conduct unless district court took prior offense into account in determining offense level) with *United States v. Torres*, 182 F.3d 1156 (10th Cir. 1999) (analyzing similarity, temporal proximity and regularity of the offenses).

**Example:** Defendant is convicted in state court of distributing drugs. He is also charged in federal court with a conspiracy, and the distribution for which he was convicted in state court is part of that conspiracy. The conviction doesn't count. However, those drugs (from the state conviction) are included in relevant conduct. 1B1.3, comment. (n.8).

- D. If defendant has been sentenced, but is **out on appeal bond**, the prior sentence still counts as if it had not been stayed. 4A1.2(1).
- E. The following are not counted: **foreign convictions** (4A1.2(h)), **tribal court convictions** (4A1.2(i)) and **expunged convictions** (4A1.2(j)). Some courts only disregard those convictions that were expunged for reasons related to innocence or errors of law. FSGH at 1092-93.
- F. **Diversions** are counted if there was a finding or admission of guilt in a judicial proceeding. 4A1.2(f) &, comment. (n.9). In other words, most federal pretrial diversions do not count (because there is no finding or admission of guilt on the record), but prejudgment probationary dispositions do count as one point if there is an admission of guilt on the record.
- G. A **conviction that has been set aside**, or for which a defendant has been **pardoned**, does count if the law in question allows for such a disposition regardless of guilt (e.g., to restore civil rights for the rehabilitated). 4A1.2, comment. (n.10). But

convictions that have been reversed or vacated because of errors of law or subsequently discovered evidence exonerating the defendant, and convictions that have been ruled constitutionally invalid in a prior proceeding, are not counted. 4A1.2. comment. (n.6).

- H. A defendant's **right to collaterally attack a prior conviction** at the instant sentencing proceeding has been sharply limited. The Supreme Court has held that a defendant's constitutional right to attack a prior conviction is limited to cases where defendant was completely denied the right to appointed counsel. *Custis v. United States*, 511 U.S. 485 (1994). The courts have generally extended this ruling, which dealt with the Armed Career Criminal Act, to criminal history calculations under the guidelines. FSGH at 1079-83.
- I. The Supreme Court has also held that **prior uncounseled misdemeanor convictions** that did not result in imprisonment can be used under criminal history, despite the fact that counting them will increase the defendant's potential prison sentence for the instant offense. *Nichols v. United States*, 511 U.S. 738 (1994).
- J. **Juvenile proceedings** do count, but as is noted below a "prior sentence" where the defendant was treated as a juvenile will not yield more than 2 points.
- K. Certain **"weeny" prior convictions** are never counted (e.g., loitering), and convictions for more serious, but still weeny, offenses (e.g., contempt of court or writing NSF checks) are counted only if they resulted in a sentence of at least a year of probation or 30 days in jail, or if they are similar to the instant offense. See 4A1.2(c). Convictions for driving while intoxicated or under the influence are counted, 4A1.2, comment. (n.5); as is reckless driving, *United States v. Kingston*, 922 F.2d 1234 (6th Cir. 1990).

IF YOU HAVE A PRIOR SENTENCE THAT "COUNTS" UNDER THE RULES JUST STATED, YOUR NEXT QUESTION IS:

## 2. How long was the prior sentence?

There are three categories of "sentence length" under the guidelines. The length of the prior sentence is important for two reasons. First, the longer the sentence, the older it can be and still be counted. Second, a longer prior sentence yields more criminal history points. The categories are:

- A. **More than 13 months** = 3 criminal history points.  
4A1.1(a).
- B. **From 60 days to 13 months** = 2 criminal history points.  
4A1.1(b).
- C. **All others** = 1 criminal history point (up to a total of 4 points under this provision). 4A1.1(c).

In determining the category into which your defendant's prior sentence falls, the critical question is "what sentence was imposed?" rather than "what sentence was served?" 4A1.2(b)(1). If the imposition or execution of sentence was totally suspended, it counts as if there was no sentence of imprisonment (1 point). 4A1.2(a)(3). Likewise, any portion of the sentence that was suspended (presumably by the court) is not counted. 4A1.2(b)(2). With those two caveats, the maximum sentence announced by the judge at sentencing is the sentence for guidelines purposes.

### **Examples:**

- \* **Indeterminate sentence.** Judge imposes sentence of one to five years. Defendant serves one year. The sentence is five years. (3 points)
- \* **Parole (no violations).** Judge imposes sentence of two years. Defendant is paroled after 10 months and finishes his sentence without incident. The sentence is two years. (3 points)
- \* **Probation with confinement condition.** Judge imposed probation, with a condition that the defendant serve 60 days in prison. The sentence is 60 days. 4A1.2, comment. (n.11) (2 points)

- \* **Suspension of part of sentence.** Judge imposes five years, but suspends the execution of all but the first 6 months. The sentence is six months. (2 points)
- \* **Sentencing in the alternative.** Judge imposes a sentence of \$500 or 60 days in jail. The sentence is \$500. 4A1.2, comment. (n.4). (1 point)
- \* **Time served.** Defendant is detained pending trial. At sentencing, the judge imposes "time served". The pretrial detention lasted 92 days. The sentence is 92 days. MFAQ 73. (2 points)
- \* **Halfway house as condition of probation.** Judge imposes, as a condition of probation, six months in a halfway house. The sentence is probation. 4A1.1 (backg'd, 2d ¶), MFAQ 76. (1 point)
- \* **"Halfway house" as place of designation.** Judge imposes sentence of 14 months, but - under prior BOP policy - successfully recommends to the Bureau of Prisons that they designate the community correctional center (CCC). The sentence is 14 months. MFAQ 76 (issue not clearly addressed). (3 points)
- \* **Multiple counts; concurrent sentences.** Two-count indictment. Judge imposes one year on count one and one year on count two, sentences to run concurrently. The sentence is one year. 4A1.2(a)(2). (2 points)
- \* **Multiple counts; consecutive sentences.** Two-count indictment. Judge imposes one year on count one and one year on count two, sentences to run consecutively. The sentence is two years. 4A1.2(a)(2). (3 points)
- \* **Supervised release violation.** Defendant is sentenced to 13 months, followed by three years supervised release. He serves about 11 months (with good time credit), goes on supervised release, violates a condition of supervised release, and is sentenced on the violation petition to six months. The sentence is 18 months (the original 12 imposed, plus 6 more imposed for the violation). 4A1.2(k)(1). (3 points total)

\* **Conviction for new offense while on probation.** Defendant is sentenced to probation. While on probation, he commits a new offense. Instead of pursuing a revocation of probation, the government prosecutes for the new offense, and defendant gets 2 years. Defendant has two countable prior sentences. The first (probation) is 1 point. The second (two years) is 3 points. (4 points total)

\* **Conviction for new offense while on probation, and revocation of probation.** In the previous example, suppose the court also revokes probation and imposes two years custody for the violation of probation, and makes that sentence concurrent with the two years for the new offense. Now the sentence for the first offense counts as 3 points too. (4A1.2(k)(1) & comment. (n.11)). (6 points total)

\* **Juvenile proceeding.** Defendant, at the age of 15, is found guilty in juvenile court and placed in a juvenile home for 2 years. This counts as a sentence, but because he was not treated as an adult, it can only generate 2 points. 4A1.2(d)(2)(A). (2 points)

\* **Juvenile convicted as an adult.** In the previous example, if the defendant had been proceeded against as an adult the sentence would count as 3 points. 4A1.2(d)(1). (3 points)

**RELATED CASES.** Sometimes you will have two or more prior convictions that are "related" to one another. If they are related, they are treated as one conviction. 4A1.2(a)(2). Prior sentences are not considered related if they were for offense separated by an intervening arrest (that is, if the defendant committed the second prior after being arrested for the first one). Otherwise, they are considered related if they resulted from offenses that occurred on the same occasion, were part of a single common scheme or plan, or were consolidated for trial or sentencing. 4A1.2, comment. (n.3). "Single common scheme or plan" is often interpreted rather narrowly in this context. See, e.g., *United States v. Irons*, 196 F.3d 634 (6th Cir. 1999); FSGH at 1074-75. And there is disagreement among the circuits on whether the cases must be formally consolidated or instead can be considered functionally consolidated. Compare *United States v. Correa*, 114 F.3d 314 (1st Cir. 1997) (formal



order needed) *with United States v. Smith*, 991 F.2d 1468 (9th Cir. 1993) (formal order not needed); see FSGH at 1075-77.

**Examples:**

\* **Consolidated.** Defendant commits two robberies. They are charged separately, but defendant pleads to both, and they are consolidated under one docket number. He receives consecutive sentences of two years each. This counts as one prior four-year sentence, because the offenses were consolidated. (3 points)

\* **Consolidated, but with intervening arrest.** In the previous example, assume that defendant was arrested for the first robbery, was released on bond, and then committed the second robbery. Even though the cases were eventually consolidated, they are not considered related because of the "intervening arrest". There are two prior sentences of two years each. (Note: the result would be the same, even if the sentences were made to run concurrently). MFAQ 84. (6 points)

\* **Sentenced simultaneously by the same judge.** Defendant commits two different robberies. He is not arrested until after the second robbery (*i.e.*, there is no intervening arrest). The cases proceed with separate docket numbers, but are assigned to the same judge. He sentences them at the same time and gives two years for each robbery, to be served concurrently. Because the cases were never formally consolidated, they are not related (at least in those circuits that do not recognize functional consolidation). Unless they were part of a "single common scheme," the result is two sentences of two years each. *United States v. Carter*, 283 F.3d 755 (6th Cir. 2002) (6 points)

\* **Related cases involving crimes of violence.** If the cases are related, but they involved crimes of violence (as defined in the career offender guideline, see below), give 1 point for each conviction for a crime of violence that did not count because it was "related" to another crime of violence. There are two caveats to this exception: (1) don't give a point if the offenses occurred on the same occasion, and (2) give no more than 3 points under this exception. 4A1.1(f).

ONCE YOU KNOW WHAT CATEGORY EACH PRIOR SENTENCE FALLS INTO, YOU MUST DETERMINE WHETHER THEY ARE RECENT ENOUGH TO BE COUNTED.

### 3. Is the prior sentence too old to count?

In deciding how old the prior conviction is, you count backwards from the day the defendant commenced the instant offense, including any relevant conduct.

**Example:** Defendant pleads guilty to drug distribution that occurred July 1, 2000. Included in his relevant conduct are other distributions going back to January 1, 1998. To decide whether a prior conviction is too old, count back from January 1, 1998.

- A.** If the **prior sentence was more than 13 months**, it counts so long as defendant was in custody on account of that conviction within 15 years of commencing the instant offense. 4A1.2(e)(1). If defendant was under 18 when he committed the prior offense the result is the same so long as he was proceeded against as an adult. 4A1.2(d)(1). If, however, he was proceeded against as a juvenile he only receives 2 points and only if he was released from confinement for that sentence within 5 years of commencing the instant offense. 4A1.2(d)(2)(A).

#### **Examples (all involve adult proceedings):**

\* **Released on parole more than 15 years before instant offense.** Defendant is sentenced to 2 years on February 1, 1983. He is released from prison and placed on parole on July 1, 1984. His parole expires on February 1, 1985. He commits a bank robbery on August 1, 1999. It doesn't count, because 15 years and one month elapsed between his release from prison and the robbery.

\* **Returned to prison for parole violation.** Defendant is sentenced to 2 years on February 1, 1983. He is released from prison and placed on parole on July 1, 1984. He violates his parole and is put back in prison to finish his sentence. He gets out for good on August 1, 1985. He commits a bank robbery on August 1, 1999. This one counts,

because his final release date took place only 14 years before the robbery.

\* **Relevant conduct.** Defendant is sentenced to 2 years on February 1, 1983. He is released from prison and placed on parole on July 1, 1984. He pleads guilty to distributing drugs. The count he pleads to concerns a deal on August 1, 1999. His relevant conduct includes a sale on July 1, 1998. The prior sentence counts because only 14 years elapsed between his release and the beginning of the relevant conduct.

\* **The limits of relevant conduct.** Defendant is sentenced to 2 years on February 1, 1983. He is released from prison and placed on parole on July 1, 1984. He pleads guilty to a bank robbery he committed on August 1, 1999. He committed a string of other bank robberies which the government has charged but will dismiss under the plea agreement. The first of these took place July 1, 1998. The prior sentence is too old (just like the first example). Because other bank robberies are not treated as relevant conduct, the instant offense commenced on August 1, 1999. Thus, it makes a difference which count defendant pleads to.

**B. All other prior sentences (*i.e.*, sentences of **13 months or less**).**

**1. For all other prior sentences where the defendant was 18 years or older** at the time of the prior offense, the sentence counts if it was imposed within 10 years of commencement of the instant offense. Note that you are now looking back to the date of sentencing, rather than the last date in custody. 4A1.2(e)(2).

(See below for a different rule if defendant was under 18 when he committed the prior offense).

**Examples:**

\* Defendant is sentenced to one year on July 1, 1989. He is released on July 1, 1990. He commits a bank robbery on August 1, 1999. The prior sentence does not count, because 10 years and one month have elapsed between the original sentencing date and the robbery. It does not matter that he was released within 10 years of committing the instant offense. 4A1.2(e)(2).

\* Defendant is sentenced to probation on July 1, 1989. He violates probation and on March 1, 1990, probation is revoked and he is ordered to serve one year on the violation. He is released from prison February 1, 1991. He commits the instant offense on August 1, 1999. It still doesn't count. Because the prior sentence did not exceed 13 months the applicable time period (here, 10 years) runs from the date of the original sentence. 4A1.2(k)(2)(B)(iii).

\* Defendant is sentenced to probation on July 1, 1989. He violates probation and on March 1, 1990, probation is revoked and he is ordered to serve 18 months on the violation. Unlike the previous example, this one counts (for 3 points). The 18-month sentence on the probation revocation turned this into a sentence of over 13 months, which means it counts because he was released from the sentence within 15 years of commencement of the instant offense. 4A1.2(k)(2)(B)(i).

**2. If defendant was under 18 years old when he committed the prior offense**, a sentence of 13 months or less (whether he was treated as an adult or as a juvenile) counts in the following circumstances:

- a. If the prior sentence was **between 60 days and 13 months**, count the sentence (for 2 points) if defendant served any part of the sentence in custody within five years of commencing the instant offense. 4A1.2(d)(2)(A). This is the same rule for sentences of more than 13 months where the defendant was treated as a juvenile. *Id.*

- b. If the prior sentence was **less than 60 days**, count the sentence (for 1 point) if the sentence was imposed within five years of defendant's commencement of the instant offense. 4A1.2(d)(2)(B).

*IN ADDITION TO THE RULES ABOVE, DEFENDANT MAY HAVE EARNED . . .*

#### **4. Extra Points.**

In addition to points for the prior convictions (sentences) themselves, a defendant earns points for committing the instant offense (a) while still serving a prior sentence or (b) too soon after being released from prison.

- A. While still serving a sentence.** If the defendant was still under any criminal justice sentence when he committed the instant offense, he gets 2 more points. This includes engaging in any relevant conduct while in custody or while on probation, parole, supervised release, work release or escape status. The sentence that he is "still under" must be countable under the rules set forth above. 4A1.1(d) & comment. (n.4).

#### **Examples:**

\* Defendant is sentenced to probation. While on probation he deals drugs. That drug dealing is part of the relevant conduct for the instant offense. He gets 1 point for the prior sentence of probation, and 2 points for committing the instant offense while on probation. If he doesn't get the 1 point for the probation sentence (*e.g.*, the offense was too weeny), he doesn't get the 2 points either.

\* Defendant is sentenced to one year of probation for theft on February 1, 2000 (to expire February 1, 2001). He violates the conditions, and a probation violation warrant is issued January 15, 2001. On July 1, 2002, while still at large on the violation warrant, he robs a bank. He is arrested and charged with the bank robbery. The state does not pursue the

probation violation. Defendant gets 1 point for the probation sentence and 2 points for committing the bank robbery while on probation. Even though the one-year period for the probation expired prior to his arrest, he is considered to have been on probation when he robbed the bank, because there was a probation violation warrant outstanding. 4A1.2(m); 4A1.1, comment. (n.4).

\* Defendant is sentenced to three years custody and allowed to report voluntarily. He fails to report as directed, and later commits a bank robbery. He gets 3 points for the prior sentence, and 2 points for committing the instant offense while on escape status. 4A1.1, comment. (n.4); 4A1.2(n).

\* Defendant is sentenced to three years custody and placed on bond pending appeal. He then commits a bank robbery. He gets 3 points for the prior sentence, and 2 points for committing the instant offense while under a criminal justice sentence. 4A1.2(l).

**B. New crime after being recently released.** If the defendant committed the instant offense (including any relevant conduct) within 2 years of being released from prison on a sentence of 60 days or more, add 2 points. The prior sentence must have been countable itself. If the defendant got 2 points for committing the instant offense while under a criminal justice sentence (see above), only add 1 more point. 4A1.1(e).

**Examples:**

\* Defendant is sentenced to three years custody. He is paroled after two years. In the fourth month of parole, he robs a bank. He gets 3 points for the prior sentence, 2 points for committing the instant offense while still under that sentence (*i.e.*, while on parole) and 1 point for committing the instant offense within two years of being released from custody on the three-year sentence.

\* Defendant is sentenced to 10 years. He is paroled after 4 years. In his fourth year of parole, he robs a bank. His parole is revoked after the robbery. He

gets 3 points for the ten-year sentence, 2 points for committing the instant offense while on parole, but no points for "recent release" because he got out of prison more than two years before the new crime.

\* Defendant is sentenced to ten years on a federal case. He escapes. In being sentenced for the escape he'll get 3 points for the ten-year sentence, 2 points for committing the escape while under a criminal justice sentence, and 1 more point for committing the escape less than two years after release from that sentence. *United States v. Carroll*, 893 F.2d 1502 (6th Cir. 1990). (The "less than two years" rule also includes an offense committed while in prison or on escape status. 4A1.1(e) & comment, (n.5)).

\* Defendant is sentenced to one year of probation, with the first thirty days in jail. After his 30 days, and while on probation, he robs a bank. Probation violation proceedings are pending at the time he is to be sentenced for the bank robbery. He gets 1 point for the prior sentence, 2 points for committing the offense while on probation, and no points for committing the offense after being recently released. The "recently released" provision only applies to release from a sentence of 60 days or more. The sentence here was 30 days.

\* Defendant is sentenced to one year of probation, with the first thirty days in jail. After his 30 days, and while on probation, he robs a bank. While the bank robbery charge is pending his probation is revoked and he gets 10 months in custody. He gets 2 points for the prior sentence (which was a total sentence of 11 months), 2 points for committing the offense while on probation, and possibly 1 point for committing the offense after being recently released. Because the probation was revoked and time was added, the 30 day sentence became a sentence of "60 days or more". Accordingly, the "recently released" provision arguably applies. 4A1.2(k)(1).

C. Committing the **instant offense while on bond** in another case.

If a defendant commits your offense while on bond pending trial of another case, the criminal history chapter does not provide for any additional points. Whether defendant is treated more harshly for committing the instant offense while on bond depends on the jurisdiction that is handling the other case.

**1. On bond in another federal case.**

The criminal history chapter does not address it, but 18 U.S.C. § 3147 provides for a sentence enhancement if the defendant committed the instant offense while on bond in another federal case. The government may need to include a sentencing enhancement notice in the indictment invoking section 3147, especially after *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Section 2J1.7 of the Guidelines provides for adding three levels to the offense level for the instant offense (that is, to the offense that was committed while on bond).

**2. On bond in a state case.**

There is no provision for adding to the offense level or criminal history score of a defendant who commits the instant offense while on bond in a state case.

*AFTER ALL OF THIS, YOU MAY FIND THAT THE CAREER OFFENDER PROVISION "TRUMPS" THE CRIMINAL HISTORY SCORE . . . .*

**5. Is defendant a career offender?**

A career offender is a defendant whose instant offense of conviction is either a crime of violence or a controlled substance offense, and who has at least two prior adult convictions, each of which is a crime of violence or a controlled substance offense punishable by more than one year in prison. 4B1.1.

**A. The instant offense.**

If your defendant is not going to be convicted of either a crime of violence (e.g., bank robbery, or some



other offense that has as an element the use or threatened use of physical force against the person of another, or that involves conduct that presents a serious potential risk of injury to another) or a drug trafficking offense (e.g., section 841 or 846), you don't need to go any further. For definitions, see 4B1.2. Note that the *offense of conviction* must be one of these types of offenses, so it matters what the defendant pleads to if that is how the case will be resolved. Drug attempts and drug conspiracies do trigger the career offender provision. 4B1.2, comment. (n. 1, first ¶).

#### **B. The defendant's age.**

The defendant had to have been 18 when he committed the instant crime of violence or controlled substance offense. (Usually the government needs a "certification" from the Attorney General when proceeding against a person who committed a crime before his eighteenth birthday, so this issue won't come up very often).

#### **C. The prior convictions.**

1. The **two predicates have to be countable separately** under the regular criminal history rules. In other words, they can't be too old, they can't be for conduct that is part of the instant offense, and they can't be "related" to each other.

2. Each of the two predicates must be either a crime of violence or a drug trafficking offense and must be **punishable by over one year in prison** (regardless of the punishment actually imposed or whether the offense is designated a felony). The convictions can be under state or federal law. 4B1.2, comment. (n.1).

3. The convictions must be **adult convictions**. This requirement is satisfied if *either* the defendant was 18 or older when he committed the predicate *or* he was proceeded against as an adult. You do not need both circumstances. 4B1.2, comment. (n.1); *United States v. Muhammad*, 948 F.2d 1449 (6th Cir. 1991).

4. **"Prior" convictions means a conviction that occurred prior to committing the instant offense.**

Unlike the regular criminal history rule (which counts any sentence imposed before the instant sentencing, regardless of when the prior offense or conviction occurred) the career offender provision counts only those convictions that took place before the defendant committed (or, more accurately put, before he completed) the instant crime of violence or controlled substance offense.

**Examples:**

\* **Prior convictions.** Defendant commits an armed robbery on January 1, 1994, and is sentenced to 4 years. He is released and commits a drug distribution. He is sentenced on February 1, 2000 to three years. While in prison, he assaults a guard. He is prosecuted under section 111 (assaulting a federal employee). He is a career offender. He was convicted of a crime of violence and a controlled substance offense prior to committing a crime of violence.

\* **Not a prior conviction.** Defendant commits an armed robbery on January 1, 1994, and is sentenced to 4 years. After his release he robs a gas station, but is not apprehended. A year later he robs a bank. He is arrested and pleads guilty to the gas station robbery in state court and is sentenced to ten years. He then comes into federal court and is convicted of the bank robbery. He is not a career offender. The *conviction* for the gas station robbery came after he *committed* the instant crime of violence (the bank robbery). Although the gas station robbery conviction does not count as a career offender predicate, it does count under the regular criminal history rules.

\* **Related cases.** Defendant commits a rape. Before he is apprehended, he commits an unrelated murder. Two separate cases are filed. At sentencing, the cases are consolidated. He receives consecutive sentences of ten years and twenty years. While in prison he joins a drug distribution conspiracy for which he is prosecuted in federal court. He is not a career offender because the prior cases were "related" by virtue of their consolidation at sentencing.

\* **Instant offense while awaiting sentencing on a predicate.** Defendant commits a rape. He is convicted, serves his sentence, and is released. He then commits a drug trafficking offense. He pleads guilty and is on bond awaiting sentencing, when he robs a bank. He is a career offender even though he robbed the bank before being sentenced on the drug charge. He is considered to have been convicted of the drug charge at the time his guilt was established in court (*i.e.*, by plea or by verdict). 4B1.2(c); MFAQ 101.

\* **Simple possession of drugs as a predicate.** One of defendant's possible predicates is a drug offense. He was arrested for distribution, but pleaded to simple possession. The government can prove he was really a distributor who got a good plea bargain. This is not a controlled substance offense under the career offender guideline. The question is whether the *offense of conviction* meets the definition, not whether the underlying conduct does. MFAQ 96. Nonetheless, this prior conviction could be included in a section 851 information to enhance the statutory maximum and minimum if it was a felony. *See, e.g., United States v. Rolfe*, 997 F.2d 189 (6th Cir.), *cert. denied*, 510 U.S. 956 (1993) (state offense of attempted possession of cocaine, which carries 2-year maximum, is a prior felony drug offense even though the state calls it a misdemeanor, because the state treats it as a felony under *its* habitual offender statute).

#### **D. What do we do with a career offender?**

If defendant is a career offender, his criminal history category is VI (the highest category). His offense level may also be different. Consult the table at 4B1.1. The offense level is determined by the statutory maximum for the instant crime of violence or controlled substance offense. If this offense level is higher than that already calculated under the guidelines for your defendant, use it instead.

**Examples:**

\* Defendant commits an armed bank robbery. His offense level is 26 and his criminal history category is III. You determine that he is a career offender. Now his criminal history category is VI, and his offense level is 32. (The table gives an offense level of 32 if the statutory maximum is 20 years or more, but less than 25 years. The statutory maximum for bank robbery is 20 years. If it was charged as an armed robbery, the 25 year maximum would yield an offense level of 34). If defendant accepts responsibility, he is still eligible for up to a three-level reduction in the offense level.

\* Defendant distributes 10 grams of cocaine base. The maximum statutory penalty for that amount of drugs is 40 years if the government charges and proves the drug amount. By virtue of two prior felony drug convictions, he is also a career offender. Because of those convictions he now faces a statutory maximum of life if the government files a section 851 information. See 21 U.S.C. § 841(b)(1)(B). The offense level under the career offender provision is 37 (based on a statutory maximum of life). The "statutory maximum" from the career offender table is the maximum sentence including any enhancements based on prior convictions. 4B1.1, comment. (n.2).

*THERE ARE SPECIAL PROVISIONS FOR THE ARMED CAREER CRIMINAL . . .*

**6. Is defendant an Armed Career Criminal?**

A defendant who is convicted under 18 U.S.C. § 924(e) will have a criminal history category of at least IV. 4B1.4(c)(3). If he used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, or if the firearm was of a type that must be registered (see 26 U.S.C. § 5845(a)), he falls into category VI. 4B1.4(c)(2).

*FINALLY, THE REPEAT AND DANGEROUS SEX OFFENDER AGAINST MINORS .*

**7. Is defendant a Repeat and Dangerous Sex Offender Against Minors?**

Section 4B1.5 provides for a criminal history category of at least V if the instant offense of conviction is a "covered sex crime" and the defendant sustained at least one other sex offense conviction prior to committing the instant offense. The offense level is also determined in a manner similar to that for a career offender.

# GRID FOR DETERMINING CRIMINAL HISTORY SCORE

David Debold, AUSA, E.D. Michigan – March 2002

For every prior non-foreign, non-tribal, non-expunged proceeding at which defendant was found guilty or pleaded guilty, follow this grid

—

Might defendant be an Armed Career Criminal (924(e)), a career offender (4B1.1) or repeat sex offender (4B1.5)?



—



If **ARMED CAREER CRIMINAL**, check out 4B1.4 first. If it yields a category of VI, you can probably skip this grid.

If **NONE OF THESE**, did the proceeding involve an adjudication or admission of guilt for conduct that is part of the instant offense?

If **CAREER OFFENDER**, consult 4B1.1, or **REPEAT SEX OFFENDER**, consult 4B1.5. A career offender is automatically in category VI, and repeat sex offender is at least category V.



—

If **PART OF INSTANT OFFENSE**, 4A1.2 (n. 1), no points, but include in relevant conduct. 1B1.3 (n.8)

If **NOT PART OF INSTANT OFFENSE**, has a sentence been imposed yet?



—

If **NO**, it counts as one point. (If the offense was a "minor" one, consult 4A1.2(a)(4). If it was diversion, see 4A1.2(f) & (n.9))

If **YES**, might the prior sentence be considered related to another prior sentence?



—

If **YES**, see 4A1.2(n.3). Related sentences are counted as a single sentence. 4A1.2(a)(2)

If **NO**, what was the total sentence imposed (including time added on at any subsequent proceeding, such as a probation revocation)?



—



If **OVER 13 MONTHS** (and was treated as an adult), was defendant released from prison on this conviction within 15 years of beginning relevant conduct for the instant offense?

If **FROM 60 DAYS THRU 13 MONTHS** (whether treated as an adult or not, **OR OVER 13 MONTHS AND TREATED AS A JUVENILE**), how old was defendant when he committed the prior offense?

for **ALL OTHERS** (whether treated as an adult or not), how old was defendant when he committed the prior offense?



If **NO** does not count

If **YES** 3 points

If **18 OR OLDER**, was the prior sentence imposed within 10 years of beginning relevant conduct for the instant offense?

if **UNDER 18**, was defendant released from prison on this conviction within 5 years of the beginning of relevant conduct for the instant offense?

If **18 OR OLDER**, was the prior sentence imposed within 10 years of beginning relevant conduct for the instant offense?

If **UNDER 18**, was the prior sentence imposed within 5 years of beginning relevant conduct for the instant offense?



If **NO**

If **YES**

If **NO**

If **YES**

If **NO**

If **YES**

If **NO**

If **YES**

does not  
count      2 points

does not  
count      2 points

does not  
count      1 point

does not  
count      1 point

Limit of four points under "all others"