

REVISED PROPOSED AMENDMENT: CAREER OFFENDERS AND CONVICTIONS UNDER 18 U.S.C. §§ 924(c) AND 929(a)

Synopsis of Proposed Amendment: *This proposed amendment provides special rules in §§4B1.1 (Career Offender) and 5G1.2 (Sentencing on Multiple Counts of Conviction) for determining and imposing a guideline sentence in a case in which the defendant is convicted of an offense under 18 U.S.C. § 924(c) or § 929(a) and, as a result of that conviction, is determined to be a career offender under §§4B1.1 and 4B1.2 (Definitions of Terms Used in Section 4B1.1). The amendment supplements Amendment 600 (effective November 1, 2000) in which the Commission first dealt with this complicated area. In Amendment 600, the Commission decided that offenses under 18 U.S.C. § 924(c) and 929(a) can qualify as prior crimes of violence or prior controlled substance offenses for purposes of §4B1.1 (Career Offender). The Commission deferred until this amendment cycle addressing the more complicated issues of whether convictions under 18 U.S.C. §§ 924(c) and 929(a) can qualify as instant offenses for purposes of §4B1.1, and if they do so qualify, how the sentence would be imposed. Promulgation of this amendment reflects the Commission's decision that the amendment, while somewhat complex, is necessary to comply with 28 U.S.C. § 994(h).*

The goal of the career offender guideline is to increase sentences, if necessary, to ensure a lengthy period of incarceration and crime incapacitation. The career offender guideline is not designed to ensure that career offenders are always sentenced more severely than all other offenders who commit the same offense but do not meet the precise career offender requirements (i.e., that every career offender receives a higher sentence than if not a career offender). Thus, the adjustment does not always add time to the sentence if it is already very lengthy.

Operationally, this amendment achieves the goals of (1) permitting 18 U.S.C. § 924(c) or § 929(a) offenses, whether as the instant or prior offense of conviction, to qualify for career offender purposes, and (2) ensuring that, in a case in which such an instant offense establishes the defendant as a career offender, the resulting guideline sentence is determined under §4B1.1 using a count of conviction that has a statutory maximum of life imprisonment.

This amendment does not change the current guideline rules forbidding application of guideline weapon enhancements in a case in which the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense. Furthermore, under this amendment, when the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense but that offense, together with any prior convictions, does not establish the defendant as a career offender, the current guideline rules for sentencing on that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count continue to apply. Accordingly, under §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), the guideline sentence on that count is the statutory minimum, and that sentence is imposed independently and consecutively to the sentence on other counts. No adjustments in Chapters Three (Adjustments) or Four (Criminal History) apply to adjust the guideline sentence for that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count.

However, under this amendment, in a case in which the 18 U.S.C. § 924(c) or 18 U.S.C.

§ 929(a) count establishes the defendant as a career offender, which the court will determine under §§4B1.1 and 4B1.2, new special rules/instructions will apply. To determine the guideline sentence on the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count, the court moves directly from §2K2.4 to §4B1.1 and applies the new special instruction therein. New special instructions for imposing sentence in these cases have also been added to §5G1.2.

Proposed Amendment:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

~~(a) If the defendant, whether or not convicted of another crime, was convicted of violating:~~

~~(1) Section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute.~~

~~(2) Section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute.~~

(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.

(bd) Special Instructions for Fines

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Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. (A) Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Subsection (a) reflects this distinction. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by the statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 924(c) or § 929(a) is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 844(h), 924(c), and 929(a) Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
- (B) Application of Subsection (b).—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant’s criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses but is not determined to be a career offender under §4B1.1. See Application Note 3.
- (C) Application of Subsection (c).—In a case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts).

2. Weapon Enhancement.— * * *

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case,

an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

3. Chapters Three and Four.—~~Do~~ Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction). In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c); and (B) no other adjustments in Chapter Three and no provisions of Chapter Four (Criminal History and Criminal Livelihood), other than §§4B1.1 and 4B1.2, shall apply.
4. Terms of Supervised Release.— * * *
5. Fines.— * * *

§4B1.1. Career Offender

- (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant 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.
- (b) ~~If~~ Except as provided in subsection (c), if the offense level for a career ~~criminal~~ offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender’s criminal history category in every case **under this subsection** shall be Category VI.

<u>Offense</u>	<u>Statutory Maximum</u>	<u>Offense Level*</u>
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than 1 year, but less than 5 years	12.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the

offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

- (1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).
- (2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—
 - (A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and
 - (B) the guideline range determined using the table under subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

<u>§3E1.1 Reduction</u>	<u>Guideline Range for the § 924(c) or § 929(a) Count(s)</u>
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327

Commentary

Application Notes:

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3. Application of Subsection (c).—

- (A) In General.—*Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).*
- (B) Subsection (c)(2).—*To determine the greater guideline range under subsection (c)(2), the*

court shall use the guideline range with the highest minimum term of imprisonment.

(C) "Otherwise Applicable Guideline Range".—For purposes of subsection (c)(2)(A), "otherwise applicable guideline range" for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

(i) *If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).*

(ii) *If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).*

(D) Imposition of Consecutive Term of Imprisonment.—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts).

(E) Example.—The following example illustrates the application of subsection (c)(2)(A) in a multiple count situation in which the 18 U.S.C. § 924(c) count establishes the defendant as a career offender:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years) minus 3 levels for acceptance of responsibility and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table at subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with §5G1.2(e).

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Commentary

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Background:

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Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table at subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E.1.1 applies).

§4B1.2. Definitions of Terms Used in Section 4B1.1

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Commentary

Application Notes:

1. Definitions.—For purposes of this guideline—:

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~~A prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a "prior felony conviction" for purposes of applying §4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).~~

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the two prior convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History).)

* * *

2. ~~The guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a) is determined only by the statute and is imposed independently of any other sentence. See §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), and subsection (a) of §5G1.2 (Sentencing on Multiple Counts of Conviction). Accordingly, do not apply this guideline if the only offense of conviction is for violating 18 U.S.C. § 924(c) or § 929(a). For provisions pertaining to an upward departure from the guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a), see Application Note 1 of §2K2.4.~~

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§5G1.2. Sentencing on Multiple Counts of Conviction

(a) **Except as provided in subsection (e),** ~~The~~ sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

* * *

(e) **In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count must be imposed to run consecutively to any other count.**

Commentary

Application Notes:

1. ***In General.***—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the ***court after determining the adjusted combined offense level and the Criminal History Category.*** ~~To the extent possible, Except as otherwise required by law or by subsection (e), the total punishment is to be imposed on each count. Sentences, and the sentences on all counts are to be imposed to run concurrently, except as required to achieve the total sentence, or as required by law to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.~~

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2. ***Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).***—Subsection (a) applies if a statute (~~A~~) specifies a term of imprisonment to be imposed; and (~~B~~) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment).* ~~The~~ ***Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is determined the minimum required by the statute of conviction, and is independent of the guideline sentence on any other count. See, e.g., Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c)***

is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

3. Career Offenders Covered under Subsection (e).—

- (A) Imposing Sentence.—The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) must, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under §4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under §4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. § 924(c) or § 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.
- (B) Examples.—The following examples illustrate the application of subsection (e) in multiple count situations in which the 18 U.S.C. § 924(c) count establishes the defendant as a career offender:
- (i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262-327). The court then imposes a sentence of 60 months on the 18 U.S.C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. § 841. As required by statute, the sentence on the 18 U.S.C. § 924(c) count is imposed to run consecutively.
- (ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262-327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count, and imposes a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.
- (iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 2113(a) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 400

months is appropriate (applicable guideline range of 360-life). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 40 months on the 18 U.S.C. § 2113(a) count. The sentence on each count is imposed to run consecutively to the other counts.