

PUBLISHED VERSION: PRIOR FELONIES
(Proposed Amendment 17 of User Friendly, Volume Two)

Synopsis of Proposed Amendment: *This proposed amendment resolves a circuit conflict regarding whether a crime committed after the commission of the instant offense of felon in possession of a firearm, but sentenced before sentencing on the instant offense, is counted as a "felony conviction" for purposes of determining the defendant's base offense level. The proposed amendment adopts the minority view that an offense committed after the commission of any part of the offense cannot be counted as a "felony conviction". Accordingly, the proposed amendment clarifies, in §2K2.1(a)(1), (a)(2), (a)(3) and (a)(4)(A), that the instant offense must have been committed subsequent to sustaining the prior felony conviction(s). In so doing, the proposed amendment adopts a rule that is consistent with the requirements concerning the use of prior convictions under §§4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1).*

The proposed amendment also makes conforming changes to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials).

Proposed Amendment:

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials;
Prohibited Transactions Involving Explosive Materials

(a) Base Offense Level (Apply the Greatest):

- (1) ~~24~~, if the defendant ~~had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) ~~20~~, if the defendant ~~had one prior felony conviction of either a crime of violence or a controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

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Commentary

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Application Notes:

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2. ~~"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," as used in subsections (a)(1) and (a)(2), are defined at §4B1.2 (Definitions of Terms Used in~~

~~Section 4B1.1), subsection (a), subsection (b), and Application Note 1 of the Commentary, respectively. [For purposes of determining the number of such convictions under subsections (a)(1) and (a)(2),~~

~~count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).]~~

For purposes of this guideline—

“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

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9. For purposes of applying subsection (a)(1) or (a)(2), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under §4A1.1 (a), (b), or (c). *See* §4A1.2(a)(2); §4A1.2, comment. (n.3).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), or (a)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

- (1) **26**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant ~~had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

- (2) **24**, if the defendant ~~had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.
- (3) **22**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant ~~had one prior felony conviction of either a crime of violence or controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (4) **20**, if --
- (A) the defendant ~~had one prior felony conviction of either a crime of violence or a controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
- (B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) is a prohibited person; or (ii) is convicted under 18 U.S.C. § 922(d); ~~or~~
- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); ~~or~~
- (6) **14**, if the defendant (A) is a prohibited person; or (B) is convicted under 18 U.S.C. § 922(d); ~~or~~

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Commentary

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Application Notes:

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5. ~~"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsection (a), subsection (b), and Application Note 1 of the Commentary, respectively. [For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).]~~

For purposes of this guideline—

“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

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15. *For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) or (a)(2), use only those felony convictions that are counted separately under §4A1.1 (a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).*

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

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