

APPENDICES

8th Circuit Court of Appeals - *United States v. Henry Eilders*, 21-2352

A - Judgment (May 19, 2022)

B - Per Curium Opinion (May 19, 2022)

C - Order Appointing Criminal Justice Act Counsel (June 21, 2022)

United States District Court for Northern District of Iowa

***United States v. Henry Eilders*, No. 1:20-cr-00027-CJW-MAR-2**

D - Notice of Appeal (June 18, 2021)

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Relevant Guidelines

F - U.S.S.G. § 4A1.1 and U.S.S.G. § 4A1.2

A - Judgment (May 19, 2022)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-2352

United States of America

Plaintiff - Appellee

v.

Henry Wilke Eilders

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:20-cr-00027-CJW-2)

JUDGMENT

Before SMITH, Chief Judge, WOLLMAN, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 19, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

B - Per Curium Opinion (May 19, 2022)

United States Court of Appeals
For the Eighth Circuit

No. 21-2352

United States of America

Plaintiff - Appellee

v.

Henry Wilke Eilders

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: April 11, 2022

Filed: May 19, 2022

[Unpublished]

Before SMITH, Chief Judge, WOLLMAN and GRASZ, Circuit Judges.

PER CURIAM.

Henry Wilke Eilders pleaded guilty to conspiracy to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, and possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). The conspiracy occurred from summer 2018 to

March 10, 2020, primarily in Linn County and Des Moines County, Iowa, and the possession with intent to distribute occurred on March 10, 2020, in Linn County.

The presentence report scored one criminal history point for Eilders's state sentence relating to his September 2016 possession of methamphetamine in Tama County, Iowa, and one point for Eilders's state sentence relating to his September 2017 possession of methamphetamine in Black Hawk County, Iowa. Although Eilders did not object to the assessment of these criminal history points, the district court¹ nonetheless found that the state offenses were separate from the federal offense conduct and thus were properly scored under the U.S. Sentencing Guidelines. The district court also added two criminal history points because Eilders committed the federal offense while under criminal justice sentences for the Iowa offenses. Eilders's Guidelines sentencing range was 236 to 294 months' imprisonment. The district court varied downward and imposed a 230-month sentence.

We conclude that the district court did not plainly err in assessing the two criminal history points for the sentences related to Eilders's 2016 and 2017 methamphetamine possession offenses. See United States v. Olano, 507 U.S. 725, 732 (1993) (standard of review); United States v. Ault, 598 F.3d 1039, 1041 (8th Cir. 2010) ("If the conduct is part of the instant offense, it is relevant conduct and is considered in the calculation of the defendant's offense level, not the criminal history category."); U.S.S.G. § 4A1.1 (assessing points for certain "prior sentences"); U.S.S.G. § 4A1.2 (defining "prior sentence" as "any sentence previously imposed . . . for conduct not part of the instant offense"). Eilders's state offenses were severable and distinct from his federal offenses because they occurred well before the charged conspiracy, they involved only small quantities of methamphetamine, they did not involve distribution, they were not used to prove the federal offenses, they occurred

¹The Honorable C.J. Williams, United States District Judge for the Northern District of Iowa.

in different Iowa counties, and there were no common victims. See United States v. Campbell-Martin, 17 F.4th 807, 818–19 (8th Cir. 2021) (district court did not clearly err in determining defendant’s prior offense was not relevant conduct because there was a four-month gap between the offenses, there was no common scheme or purpose, the prior offense involved different controlled substance, the offenses occurred in two different Iowa counties, and there were no common victims), *petition for cert. filed*, 90 U.S.L.W. 3326 (U.S. Apr. 11, 2022) (No. 21-1344). The district court also properly assessed Eilders two criminal history points for committing the federal offense while under the Iowa sentences. See U.S.S.G. § 4A1.1(d).

The judgment is affirmed.

C - Order Appointing Criminal Justice Act Counsel (June 21, 2022)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-2352

United States of America

Appellee

v.

Henry Wilke Eilders

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:20-cr-00027-CJW-2)

ORDER

Attorney Rockne Ole Cole is hereby appointed to represent appellant in this appeal under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

June 21, 2021

Order Entered under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

D - Notice of Appeal (June 18, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,) No. 1:20-CR-00027-CJW-MAR
)
Plaintiff,)
) DEFENDANT'S NOTICE OF APPEAL
vs.)
)
HENRY EILDERS,)
)
Defendant.)

Pursuant to Fed. R. of Crim. Proc., Defendant, through counsel, appeals the final sentence and judgment entered on June 7, 2021. Defendant will be submitting an updated financial affidavit and application for appointment of counsel.

RESPECTFULLY SUBMITTED,

/s/ Rockne Cole

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Rockne Cole, certify that a true
Copy was served on all Parties of Record
via EM-ECF on June 18, 2021
/s/ Rockne Cole

E - Judgment (June 7, 2021)

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA

v.

HENRY WILKE EILDERS

) JUDGMENT IN A CRIMINAL CASE

)

) Case Number: 0862 1:20CR00027-002

)

) USM Number: 18408-029

)

Rockne Cole

Defendant's Attorney

☒ ORIGINAL JUDGMENT☐ AMENDED JUDGMENT

Date of Most Recent Judgment:

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 4 of the Indictment filed on May 19, 2020☐ pleaded nolo contendere to count(s) _____

which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846	Conspiracy to Distribute a Controlled Substance	03/10/2020	1
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)	Possession with Intent to Distribute a Controlled Substance	03/10/2020	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☒ Count(s) 5 of the Indictment is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

C.J. Williams

United States District Court Judge

Name and Title of Judge

June 4, 2021

Date of Imposition of Judgment



Signature of Judge

June 7, 2021

Date

DEFENDANT: **HENRY WILKE EILDERS**
CASE NUMBER: **0862 1:20CR00027-002**

PROBATION

☐ The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

☒ The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **230 months. This term of imprisonment consists of a 230-month term imposed on Count 1 and a 230-month term imposed on Count 4 of the Indictment, to be served concurrently. It is ordered that the term of imprisonment for the instant offense be served concurrently with any term of imprisonment that may be imposed for the case set forth in paragraph 102 of the presentence report (Black Hawk County, Iowa, Case No. AGCR221367), pursuant to 18 U.S.C. § 3584.**

☒ The court makes the following recommendations to the Federal Bureau of Prisons:
It is recommended that the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

It is recommended that the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Federal Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the United States Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEFENDANT: **HENRY WILKE EILDERS**
CASE NUMBER: **0862 1:20CR00027-002**

SUPERVISED RELEASE

- ☒ Upon release from imprisonment, the defendant will be on supervised release for a term of:
5 years. This term of supervised release consists of a 5-year term imposed on Count 1 and a 5-year term imposed on Count 4 of the Indictment, to be served concurrently.

MANDATORY CONDITIONS OF SUPERVISION

- 1) The defendant must not commit another federal, state, or local crime.
- 2) The defendant must not unlawfully possess a controlled substance.
- 3) The defendant must refrain from any unlawful use of a controlled substance.
The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future controlled substance abuse. *(Check, if applicable.)*
- 4) ☒ The defendant must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- 5) ☐ The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. *(Check, if applicable.)*
- 6) ☐ The defendant must participate in an approved program for domestic violence. *(Check, if applicable.)*

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **HENRY WILKE EILDERS**
CASE NUMBER: **0862 1:20CR00027-002**

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

- 1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed. The defendant must also appear in court as required.
- 3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant must answer truthfully the questions asked by the defendant's probation officer.
- 5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- 7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- 10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **HENRY WILKE EILDERS**
CASE NUMBER: **0862 1:20CR00027-002**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. **The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.**
2. **The defendant must participate in a substance abuse evaluation. The defendant must complete any recommended treatment program, which may include a cognitive behavioral group, and follow the rules and regulations of the treatment program. The defendant must participate in a program of testing for substance abuse. The defendant must not attempt to obstruct or tamper with the testing methods.**
3. **The defendant must not use or possess alcohol. The defendant is prohibited from entering any establishment that holds itself out to the public to be a bar or tavern without the prior permission of the United States Probation Office.**
4. **If not employed at a lawful type of employment as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.**
5. **The defendant must pay any fine, restitution, costs, and/or assessment imposed by this judgment.**
6. **For as long as the defendant owes any fine, restitution, costs, and/or assessment imposed by this judgment, the defendant must provide the United States Probation Office with access to any requested financial information.**
7. **For as long as the defendant owes any fine, restitution, costs, and/or assessment imposed by this judgment, the defendant must not incur new credit charges or open additional lines of credit without the approval of the United States Probation Office unless the defendant is in compliance with the installment payment schedule.**

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant

Date

United States Probation Officer/Designated Witness

Date

Judgment 6 of 7

DEFENDANT: **HENRY WILKE EILDERS**
CASE NUMBER: **0862 1:20CR00027-002**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>AVAA Assessment¹</u>	<u>JVTA Assessment²</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200	\$ 0	\$ 0	\$ 2,000	\$ 0

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss³</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	-------------------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☒ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

¹Amy, Vicky, and Any Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

²Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.

³Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **HENRY WILKE EILDERS**
CASE NUMBER: **0862 1:20CR00027-002**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ \$ **2,200** due immediately;
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

It is ordered that \$2,000 of the defendant's fine is payable immediately and the balance is due immediately in accordance with the following payment plan. If any of the defendant's court ordered financial obligations are still owed while the defendant is incarcerated, the defendant must make monthly payments in accordance with the Bureau of Prisons Financial Responsibility Program. The amount of the monthly payments will not exceed 50% of the funds available to the defendant through institution or non-institution (community) resources and will be at least \$25 per quarter. If the defendant still owes any portion of the financial obligation(s) at the time of release from imprisonment, the defendant must pay it as a condition of supervision and the United States Probation Office will pursue collection of the amount due pursuant to a payment schedule approved by the Court. The defendant must notify the United States Attorney for the Northern District of Iowa within 30 days of any change of the defendant's mailing or residence address that occurs while any portion of the financial obligation(s) remains unpaid.

The \$200 special assessment was paid on October 19, 2020, receipt #IAN110028066.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
- Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant must pay the cost of prosecution.

- ☒ The defendant must pay the following court cost(s): **The defendant must pay the Clerk of Court \$12,175.90 in attorney fees for the defendant's court-appointed counsel.**

- ☒ The defendant must forfeit the defendant's interest in the following property to the United States:
As set forth in the Preliminary Order of Forfeiture filed on June 2, 2021, Document No. 121.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

F - U.S.S.G. § 4A1.1 and U.S.S.G. § 4A1.2

§4A1.1 AND §4A1.2 at p. 5

§4A1.1 - CRIMINAL HISTORY CATEGORY

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in [Chapter Five, Part A](#).

(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.

Commentary

The total criminal history points from [§4A1.1](#) determine the criminal history category (I–VI) in the Sentencing Table in [Chapter Five, Part A](#). The definitions and instructions in [§4A1.2](#) govern the computation of the criminal history points.

Therefore, [§4A1.1](#) and [§4A1.2](#) must be read together. The following notes highlight the interaction of [§4A1.1](#) and [§4A1.2](#).

Application Notes:

1. §4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term “*prior sentence*” is defined at §4A1.2(a). The term “*sentence of imprisonment*” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than fifteen years prior to the defendant’s commencement of the instant offense is not counted unless the defendant’s incarceration extended into this fifteen-year period. *See* §4A1.2(e).

A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. *See* §4A1.2(d).

A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. §4A1.1(b). Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term “*prior sentence*” is defined at §4A1.2(a). The term “*sentence of imprisonment*” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant’s commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

3. §4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "*prior sentence*" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

4. §4A1.1(d). Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this subsection, a “**criminal justice sentence**” means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).

5. §4A1.1(e). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(e). For purposes of this guideline, “**crime of violence**” has the meaning given that term in §4B1.2(a). See §4A1.2(p).

For example, a defendant’s criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are

treated as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(e) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(e) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

USSG 4A.1.2

§4A1.2 - DEFINITIONS AND INSTRUCTIONS FOR COMPUTING CRIMINAL HISTORY

(a) PRIOR SENTENCE

- (1) The term “prior sentence” means 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.
- (2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an

intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. *See also* §4A1.1(e).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

“Convicted of an offense,” for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(b) SENTENCE OF IMPRISONMENT DEFINED

(1) The term “sentence of imprisonment” means a sentence of incarceration and refers to the maximum sentence imposed.

(2) If part of a sentence of imprisonment was suspended, “sentence of imprisonment” refers only to the portion that was not suspended.

(c) SENTENCES COUNTED AND EXCLUDED

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Careless or reckless driving

Contempt of court

Disorderly conduct or disturbing the peace

Driving without a license or with a revoked or suspended license

False information to a police officer

Gambling

Hindering or failure to obey a police officer

Insufficient funds check

Leaving the scene of an accident

Non-support

Prostitution

Resisting arrest

Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations

Hitchhiking

Juvenile status offenses and truancy

Local ordinance violations (except those violations that are also violations under state criminal law)

Loitering

Minor traffic infractions (*e.g.*, speeding)

Public intoxication

Vagrancy.

(d) OFFENSES COMMITTED PRIOR TO AGE EIGHTEEN

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under §4A1.1(a) for each such sentence.

(2) In any other case,

(A) add 2 points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add 1 point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

(e) APPLICABLE TIME PERIOD

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).

(f) DIVERSIONARY DISPOSITIONS

Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

(g) MILITARY SENTENCES

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(i) TRIBAL COURT SENTENCES

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(k) REVOCATIONS OF PROBATION, PAROLE, MANDATORY RELEASE, OR SUPERVISED RELEASE

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* §4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (*see* §4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (*see* §4A1.2(d)(2)(B) and (e)(2)).

(l) SENTENCES ON APPEAL

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) EFFECT OF A VIOLATION WARRANT

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release

violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) FAILURE TO REPORT FOR SERVICE OF SENTENCE OF IMPRISONMENT

For the purposes of §4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) FELONY OFFENSE

For the purposes of §4A1.2(c), a “felony offense” means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

(p) CRIME OF VIOLENCE DEFINED

For the purposes of §4A1.1(e), the definition of “crime of violence” is that set forth in §4B1.2(a).

Commentary

Application Notes:

1. Prior Sentence. — “*Prior sentence*” means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. *See* §4A1.2(a). A sentence imposed after the defendant’s commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).

Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction

otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are counted only if they are of a specified type and length).

2. Sentence of Imprisonment.—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). See §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (*e.g.*, in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. See §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. Application of “Single Sentence” Rule (Subsection (a)(2)).—

(A) Predicate Offenses.—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received

criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points.

However, because predicate offenses may be used only if they are counted “separately” from each other (see §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant’s commencement of the instant offense. See §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) Upward Departure Provision.—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging

instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.

4. Sentences Imposed in the Alternative.—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (*e.g.*, \$1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.

5. Sentences for Driving While Intoxicated or Under the Influence.—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.

6. Reversed, Vacated, or Invalidated Convictions.—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

7. Offenses Committed Prior to Age Eighteen.—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen,

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. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.

8. Applicable Time Period.—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "*commencement of the instant offense*" includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

9. Diversionary Dispositions.—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. Convictions Set Aside or Defendant Pardoned.—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

11. Revocations to be Considered.—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the

original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. **Example:** A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a “straight” probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

12. Application of Subsection (c).—

(A) **In General.**—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration

of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

(B) Local Ordinance Violations.—A number of local jurisdictions have enacted ordinances covering certain offenses (*e.g.*, larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (*e.g.*, a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

(C) Insufficient Funds Check.—“*Insufficient funds check*,” as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.