

APPENDICES

8th Circuit Court of Appeals – *United States v. Lamar Harris*, 21-2353

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Appendix A

A – Judgment (June 10, 2022)

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

No: 21-2353

United States of America

Plaintiff - Appellee

v.

Lamar Harris

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Eastern
(3:19-cr-00129-JAJ-7)

JUDGMENT

Before SMITH, Chief Judge, BENTON, and KELLY, 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.

June 10, 2022

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

/s/ Michael E. Gans

Appendix B

B – Panel Opinion (per curiam) (June 10, 2022)

United States Court of Appeals
For the Eighth Circuit

No. 21-1696

United States of America

Plaintiff - Appellee

v.

Lavelle Harris

Defendant - Appellant

No. 21-2353

United States of America

Plaintiff - Appellee

v.

Lamar Harris

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Eastern

Submitted: February 14, 2022
Filed: June 10, 2022
[Published]

Before SMITH, Chief Judge, BENTON and KELLY, Circuit Judges.

PER CURIAM.

Co-Defendants Lavelle Harris and Lamar Harris (Lavelle and Lamar, respectively) each pleaded guilty to conspiracy to distribute a controlled substance. On appeal, both claim the district court¹ erred at their respective sentencings. We have jurisdiction under 28 U.S.C. § 1291.

I. Lavelle Harris

A. Background

Lavelle pleaded guilty to conspiracy to distribute at least 50 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). The Presentence Investigation Report (PSR) assessed a base offense level of 38, with a three-level reduction for acceptance of responsibility, for a total offense level of 35. The PSR also recommended that Lavelle qualified for an enhancement as a career offender pursuant to United States Sentencing Guidelines § 4B1.1(a) based on his two prior Iowa convictions for delivery of a controlled substance. With a total offense level of 35² and a criminal history category of VI, the advisory Guidelines range was 292 to 365 months of imprisonment.

Lavelle disputed the quantity and type of methamphetamine attributed to him in the calculation of his base offense level. He argued that he should only be held

¹The Honorable John A. Jarvey, then Chief Judge, United States District Court for the Southern District of Iowa, now retired.

²In the PSR, the offense level calculated pursuant to § 2D1.1 based on drug quantity was higher than the offense level calculated pursuant to § 4B1.1, the career offender provision.

responsible for the 242.8 grams of methamphetamine he sold to a confidential informant during a controlled buy and that the government had not shown that the methamphetamine he was selling was “ice.”³ He also objected to his classification as a career offender.

At sentencing, the government presented testimony from one of its investigators, as well as grand jury transcripts from two cooperating witnesses and documents related to Lavelle’s two prior controlled substance convictions. The investigator testified that Lavelle told him during an interview that he distributed “1 to 2 pounds” of “ice” methamphetamine to an individual on multiple occasions. In the grand jury testimony, one of the witnesses testified to obtaining approximately four pounds of ice methamphetamine from Lavelle each week over a period of several months.

The district court concluded that “the probation office appropriately began with a base offense level of 38.” The court found the grand jury testimony “was sufficiently corroborated, not only through other evidence but through the statements of the defendant.” It further noted that the methamphetamine that was tested during the investigation was ice, and that the “drug dealers and users” involved in the case, who “have a remarkable ability to know the difference between ice and methamphetamine mixtures,” referred to the methamphetamine being distributed as “ice.” Noting that “it only takes 4.5 kilos of ice to get to a level 38,” the district court found that a base level of 38 was justified because “there was substantially more than that present here.” The court also found that Lavelle qualified as a career offender based on his prior drug convictions, and concluded that his advisory Guidelines range was 292 to 365 months of imprisonment. After both parties were given an opportunity to make final arguments, the court varied downward and sentenced Lavelle to 262 months of imprisonment followed by a five-year term of supervised release. Lavelle timely appealed.

³“Ice” is defined under the Guidelines as “a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.” USSG § 2D1.1(c) n.(C).

B. Discussion

Lavelle first argues that the district court erred in classifying him as a career offender. We review the district court's determination that a defendant is a career offender de novo. United States v. Boose, 739 F.3d 1185, 1186 (8th Cir. 2014).

Lavelle contends his Iowa convictions for delivery of a controlled substance under Iowa Code § 124.401(1) do not count as predicate convictions for the career offender enhancement because § 124.401(1) is overbroad. This court considered and rejected this argument in United States v. Boleyn, 929 F.3d 932, 936–37 (8th Cir. 2019). Lavelle challenges Boleyn's reasoning, but this panel is bound by its holding. See United States v. Olness, 9 F.3d 716, 717 (8th Cir. 1993) (“We are bound to follow the decision of another panel, which becomes the law of the circuit. Only the court en banc may overrule an earlier decision and adopt a differing rule of law.”). Lavelle's argument is thus foreclosed by Boleyn.

Lavelle next contends the district court erred in finding that he was responsible for distributing more than 4.5 kilograms of ice methamphetamine. Specifically, he argues the government failed to prove he distributed that amount of methamphetamine and failed to prove the distributed methamphetamine was ice. We review the district court's finding of drug quantity and type for clear error. United States v. Lugo, 702 F.3d 1086, 1089 (8th Cir. 2013) (type); United States v. Garcia, 774 F.3d 472, 474 (8th Cir. 2014) (quantity).

In cases where “the amount seized does not reflect the scale of the offense,” a sentencing court “shall approximate the quantity of the controlled substance.” Garcia, 774 F.3d at 474 (quoting USSG § 2D1.1, cmt. n.5). “[T]he court can determine drug quantity using imprecise evidence, so long as the record reflects a basis for the court's decision.” Id. (quoting United States v. Zimmer, 299 F.3d 710, 720 (8th Cir. 2002)). In finding that Lavelle was responsible for more than 4.5 kilograms of ice methamphetamine, the district court relied on sworn testimony from the witnesses and the investigator. Lavelle argues that by submitting the grand jury

testimony in transcript form, the government deprived him of the opportunity to meaningfully contest the witnesses' testimony. But Lavelle did not object to the admission of the grand jury testimony, and we have "repeatedly upheld the consideration of grand jury testimony at sentencing." United States v. Cross, 888 F.3d 985, 993 (8th Cir. 2018). Moreover, as noted by the district court, the testimony was corroborated by other evidence in the record, including Lavelle's own statements to law enforcement.

As to the drug type, "[w]here only a small portion of the methamphetamine recovered during an investigation is tested for purity, the testing evidence combined with the testimony of witnesses who actively participated in the drug conspiracy can amply support a sentencing court's conclusion as to drug type for a quantity of drugs greater than the amount seized." Lugo, 702 F.3d at 1089 (cleaned up) (quotation omitted). Here, the methamphetamine seized from the controlled buy was tested and shown to be ice, and the dealers and users in this case, including Lavelle, referred to the drugs being sold as "ice." See United States v. Walker, 688 F.3d 416, 424 (8th Cir. 2012) (information from users and distributors can be particularly compelling, as they "are among the most knowledgeable experts on such drugs" (quotation omitted)). This evidence is sufficient to support the district court's conclusion that the methamphetamine Lavelle distributed was ice.

The district court's findings regarding drug type and quantity were adequately supported by the record and free of clear error.

II. Lamar Harris

Lamar pleaded guilty to conspiracy to distribute five grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). The PSR assessed a total offense level of 37 and a criminal history category of VI, resulting in a Guidelines range of 292 to 365 months of imprisonment. Lamar initially made several objections to the PSR. One of his objections was to the assignment of three criminal history points for a 2011 conviction for possession with

intent to deliver cocaine. Lamar argued that this conviction was relevant conduct committed during the course of the instant offense, and therefore it should not have been included in the calculation of his criminal history category. See USSG § 4A1.2(a)(1).

At sentencing, however, Lamar withdrew this and his other objections pursuant to an agreement with the government, whereby the government agreed not to pursue an enhancement for possession of a firearm. Based upon the parties' agreement, the district court calculated a lower Guidelines range of 235 to 293 months of imprisonment. Lamar's counsel argued for a downward variance and requested a sentence of 210 months. The court granted the request, sentencing Lamar to 210 months of imprisonment.

Lamar now seeks to renew his argument that his 2011 cocaine conviction should have been classified as relevant conduct and therefore excluded from his criminal history calculation. However, where a defendant abandons and withdraws an objection to the PSR at the time of sentencing in exchange for a benefit, he has waived the objection and is not entitled to appellate review of that issue. United States v. Evenson, 864 F.3d 981, 983–84 (8th Cir. 2017). By asserting this objection and then affirmatively withdrawing it as part of his deal with the government, Lamar “demonstrated the intentional relinquishment or abandonment of his right to argue the point,” and we may not consider it on review. Id. at 983 (quotations omitted).

III.

We affirm the judgment of the district court in both cases.

Appendix C

C – Order Appointing CJA Counsel (June 21, 2021)

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

No: 21-2353

United States of America

Appellee

v.

Lamar Harris

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Eastern
(3:19-cr-00129-JAJ-7)

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

Appendix D

D – Notice of Appeal – (June 18, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA,) No. 3:19-CR-00129-JAJ-SBJ
)
Plaintiff,)
) DEFENDANT'S NOTICE OF APPEAL
vs.)
) **IFP PREVIOUSLY GRANTED**
LAMAR HARRIS,)
)
Defendant.)

Pursuant to Fed. R. of App. Proc. 4 (b) (1) (A) , Defendant, through counsel,
appeals the final sentence and judgment entered on June 11, 2021.

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

Appendix E

E – Judgment (June 14, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

V.

Lamar Harris

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:19-CR-00129-007

USM Number: 19375-030

Rockne Cole
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One of the Indictment filed on December 11, 2019.

☐ 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)(B), 846	Conspiracy to Distribute Five Grams or More of Actual Methamphetamine	11/19/2019	One

☐ See additional count(s) on page 2

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) ☐ 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.

June 11, 2021

Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, Chief U.S. District Judge

Name of Judge

Title of Judge

Date _____

DEFENDANT: Lamar Harris
CASE NUMBER: 3:19-CR-00129-007

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

210 months as to Count One of the Indictment filed on December 11, 2019.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends placement at FCI Greenville, Illinois, due to proximity to family, if commensurate with his security classification and needs. The Court also recommends that the defendant be made eligible for the 500 hour residential drug abuse program.

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

☐ The defendant is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

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

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

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

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/19) Judgment in a Criminal Case
vI Sheet 3 — Supervised Release

Judgment Page: 3 of 7

DEFENDANT: Lamar Harris
CASE NUMBER: 3:19-CR-00129-007

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
Four years as to Count One of the Indictment filed on December 11, 2019.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You 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 which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

AO 245B (Rev. 09/19) Judgment in a Criminal Case
v1 Sheet 3A — Supervised Release

Judgment Page: 4 of 7

DEFENDANT: Lamar Harris
CASE NUMBER: 3:19-CR-00129-007

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your 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 your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You 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. You 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. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Lamar Harris
CASE NUMBER: 3:19-CR-00129-007

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must participate in an approved treatment program for anger control. Participation may include inpatient/outpatient treatment. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You must comply with the terms and conditions ordered by Linn and Des Moines Counties, for the state of Iowa, in case numbers 917572, 931514, and 652193, requiring payments for the support and maintenance of the children, Jacion Cortez Harris, Lamar James Harris II, and Jariah Reese Harris, respectively, and the custodial parents with whom the children are living.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: Lamar Harris
CASE NUMBER: 3:19-CR-00129-007

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

- | | <u>Assessment</u> | <u>Restitution</u> | <u>Fine</u> | <u>AVAA Assessment*</u> | <u>JVTA Assessment**</u> |
|---------------|-------------------|--------------------|-------------|-------------------------|--------------------------|
| TOTALS | \$ 100.00 | \$0.00 | \$ 0.00 | \$ 0.00 | \$ 0.00 |

- 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.

☐ 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:

*** Findings 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: Lamar Harris
CASE NUMBER: 3:19-CR-00129-007**SCHEDULE OF PAYMENTS**

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

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance ☐ 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:
- All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
- While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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 shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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 A 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.