NO.

IN THE
SUPREME COURT OF THE UNITED STATES

DEARICK SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that the United States Sentencing Commission's commentary to the Sentencing Guidelines was akin to an agency's interpretation of its own regulations. As such, this Court held that the Commission's commentary was entitled to the same level of deference afforded to agency interpretations. That deferential standard of review has historically been referred to as *Auer* deference, after this Court's holding in *Auer v. Robbins*, 519 U.S. 452 (1997).

More recently, however, in *Kisor v. Wilkie*, 588 U.S. 558 (2019), this Court revisited the *Auer* standard, clarifying that an agency's interpretation is not entitled to deference unless the regulation in question is genuinely ambiguous. This Court held that where the language of a regulation is clear, courts should give effect to the plain language of the regulation, without reference to agency interpretation.

Since that time, circuit courts have split evenly as to whether the commentary of the Sentencing Guidelines continues to enjoy the heightened level of deference described by *Stinson* and *Auer*, or whether this Court's holding in *Kisor* applies equally to the Guidelines.

The instant Petition for Certiorari presents two questions:

1. Whether this Court's holding in *Kisor v. Wilkie*, 588 U.S. 558 (2019) applies to the United States Sentencing Guidelines; and

2. If so, whether a sentencing court errs in deferring to the commentary of U.S.S.G. § 2E1.1, over and above the plain language of U.S.S.G. § 4A1.2(a)(1).

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OPINION BELOW

The summary order of the United States Court of Appeals for the Second Circuit appears at the Appendix to the Petition, and is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 2024; no petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sections 2E1.1 and 4A1.2 of the United States Sentencing Guidelines are reproduced in the Appendix.

STATEMENT OF THE CASE

I. Petitioner's Prior State Court Conviction

On March 17, 2007, at age 17, Dearick Smith was arrested and charged in state court with Criminal Possession of a Controlled Substance in the Third Degree. In October of that year, he pled guilty as a Youthful Offender and was sentenced to eighteen months' incarceration and one-year post-release supervision.

II. Federal Indictment

On April 22, 2009, Mr. Smith was indicted on federal charges relating to the activities of a criminal organization known as the "Chain Gang," which operated in the Rochester area from 2006 through 2009. The indictment specifically referenced, as an overt act in furtherance of the enterprise, the events underlying Mr. Smith's March 17, 2007 arrest.

III. Trial

Mr. Smith and two co-defendants ultimately proceeded to trial upon a superseding indictment charging four counts: (1) conspiracy to engage in a pattern of racketeering activity under 18 U.S.C. § 1962(d); (2) possession of a firearm in furtherance of a crime of violence (*i.e.*, the RICO conspiracy), in violation of 18 U.S.C. § 924(c); (3) conspiracy to distribute over 50 grams of base cocaine and 5 kilograms of powder cocaine, in violation of 18 U.S.C. § 846; and (4) possession of a firearm in furtherance of a drug trafficking crime (*i.e.*, the narcotics conspiracy), in violation of 18 U.S.C. § 924(c).

At trial, the Government relied upon the evidence underpinning Mr. Smith's state court conviction to establish his participation in the organization and his culpability with respect to Counts One and Three. Hence, the Government introduced testimony from a police officer concerning the Petitioner's March 17, 2007 arrest for possession of controlled substances, and introduced a stipulation establishing that on such date, police recovered 21 bags of base cocaine with a total weight of 10.579 grams. In summation, prosecutors argued that the jury should rely upon the weights listed on the stipulation to conclude that the Petitioner had conspired to distribute at least 50 grams of base cocaine.

In addition to the above evidence, the Government also adduced further evidence of narcotics distribution and gun crimes committed by members of the Chain Gang. Most notably, the Government adduced evidence that in June of 2007, Mr. Smith and a co-defendant fired shots into a home where a house party was being held,

killing one of the guests therein, a fifteen-year-old girl. The Petitioner himself was only seventeen years old on the night of the shooting.

IV. Original Sentencing

Mr. Smith was originally sentenced on June 24, 2013. The court calculated a Total Offense Level of 41, and a Criminal History Category of I.

In calculating the Petitioner's Criminal History Category, the court originally followed the guidance of U.S.S.G. § 4A1.2, which defines the types of prior sentences that may be used to calculate a defendant's criminal history category. In particular, § 4A1.2(a)(1) defines a "prior sentence" as a sentence previously imposed "for conduct not part of the instant offense." Following this guidance, the sentencing court did not enhance the Petitioner's criminal history based upon his March 17, 2007 state court arrest, because such conduct was also part of the offense of conviction.

The court imposed concurrent sentences of 240 months' incarceration on Counts One and Three, and consecutive sentences of 60 and 300 months on Counts Two and Four, respectively.

V. Resentencing

In the wake of this Court's decision in *United States v. Davis*, 139 S.Ct. 2319 (2019), Petitioner's § 924(c) conviction under Count Two was vacated and a plenary resentencing was ordered.

That resentencing took place in November of 2022. During those proceedings, the trial court adopted a criminal history calculation which differed from its initial calculation. In particular, the court determined that, notwithstanding the plain

language of U.S.S.G. § 4A1.2(a)(1), the state court sentence arising from Mr. Smith's March 17, 2007 arrest *should be* considered in calculating his criminal history category.

This result, it claimed, was dictated by Application Note 4 of U.S.S.G. § 2E1.1 – the Guidelines applicable to racketeering conduct. That Note provides:

> Certain conduct may be charged in the count of conviction as part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under §4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

In accordance with this guidance, the court assigned three criminal history points based upon the Petitioner's 2007 conviction for Criminal Possession of a Controlled Substance in the Third Degree. Additionally, it assigned two more criminal history points under U.S.S.G. § 4A1.2(d), because the 2007 conviction resulted in a year of post-release supervision, and because the Petitioner had committed the instant offense while under such supervision. As a result, the Petitioner's criminal history was increased from Category I to Category III.

The district court again calculated a Total Offense Level of 41. It imposed a sentence of 288 months on Counts One and Three, and a consecutive 60-month sentence on the remaining § 924(c) count, for a cumulative sentence of 348 months. Notably, the 288-month sentence which the court imposed upon Counts One and

Three was *higher than* the original sentence of 240 months which it imposed upon such counts in 2013.

VI. Appeal

On appeal, Petitioner argued that the lower court erred in following Application Note 4 over U.S.S.G. § 4A1.2(a)(1). In particular, Petitioner argued that under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), a district court should not defer to Guidelines commentary which contravenes the plain language of a Guidelines provision, or which constitutes an unreasonable interpretation of such provision. Petitioner argued that both considerations strongly counseled against deference in this case.

First, the language of § 4A1.2 – the actual provision defining the meaning of "a prior sentence" for purposes of U.S.S.G. Chapter 4 – is unambiguous on its face. It provides that when prior adjudication of guilt arose from conduct that was "part of the instant offense," such conduct should not be counted towards a defendant's criminal history. As such, Petitioner argued there was no need or legal basis to resort to the commentary of § 2E1.1 – a provision contained in U.S.S.G. Chapter Two (which deals with Offense Conduct, *not* Criminal History) – to override the actual, applicable Guidelines provision.

Second, Petitioner argued that deference to the commentary would lead to disparate and unreasonable results for similarly situated defendants. Application Note 4 was presumably adopted because the United States Sentencing Commission was aware that the criminal conduct underlying a previous, state court conviction

could be used as a predicate act to establish liability under 18 U.S.C. § 1962. But § 1962 is hardly unique in this regard. To the contrary, it is well established that the Government can likewise admit evidence relating to a prior state-court drug conviction to prove that a defendant was part of a conspiracy under 21 U.S.C. § 846. *See United States v. Lyle*, 919 F.3d 716, 736 (2d Cir. 2019) (evidence underlying prior state charges was properly admitted because it was not evidence of *other* crimes, but rather evidence of the very conspiracy charged in the indictment). But in such a case, the state court offense would be treated as relevant conduct at sentencing, *not* a prior sentence under U.S.S.G. § 4A1.2. Petitioner argued that § 2E1.1's commentary offers *no* coherent explanation as to why a defendant charged under RICO should be subject to a *higher* criminal history category than his counterpart charged under § 846.

VII. Decision of the Second Circuit Court of Appeals

The Second Circuit Court of Appeals affirmed Petitioner's sentence, holding that the Guidelines commentary is entitled to continued deference under *Stinson v. United States*, 508 U.S. 36, 43, 113 S. Ct. 1913, 1918 (1993), and that *Kisor* does not apply to the United States Sentencing Guidelines. Applying the *Stinson* standard, the circuit found that the commentary to § 2E1.1 was not plainly inconsistent with § 4A1.2(a)(1) and was therefore binding on the lower court. *United States v. Smith*, No. 22-3104, 2024 U.S. App. LEXIS 25142, at *7 (2d Cir. Oct. 4, 2024).

ARGUMENT

I. There Is a Well-Developed Circuit Spilt as to Whether *Kisor v. Wilkie* Applies to the United States Sentencing Guidelines

In *Stinson v. United States*, 508 U.S. 36, 43, 113 S. Ct. 1913, 1918 (1993), this Court explained that the Sentencing Guidelines should be treated as legislative rules. In that regard, the actual provisions of the Guidelines – which are subject to congressional review and comment, as well as the approval process of the Administrative Procedure Act – stand on different legal footing than the Guidelines commentary. *Stinson* held that the Sentencing Commission's commentary was akin to an agency's interpretation of its own rules. As such, it held that the Guidelines commentary was entitled to the same level of deference normally afforded to a regulatory agency's interpretation of its own regulations. This level of deference, described in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997), has historically required courts to adhere to an agency's interpretation unless "plainly erroneous or inconsistent with the regulation." *Id.* at 461. Hence, in *Stinson*, this Court held that the Guidelines commentary was binding so long as it did not "run afoul of the Constitution or a federal statute" and was "not plainly erroneous or inconsistent" with the Guidelines themselves. *Stinson*, 508 U.S. at 47.

More recently, however, this Court clarified and sharply limited the conditions under which courts should afford *Auer* deference to an agency's interpretation of its own rules. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court emphasized that the starting point in any such analysis must be with the text of the regulation itself. If such provision is not ambiguous, courts should not defer to contrary commentary:

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense.
>
> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (internal citations omitted).

Moreover, the Court stressed, even if a regulation is genuinely ambiguous, courts should not reflexively accept an agency's interpretation if it is not "reasonable." *Id.* at 2415-2416.

Since that time, the circuit courts have split evenly on the question of whether *Kisor's* revised approach applies to the Guidelines commentary, or whether *Stinson* continues to apply. In particular, the Third, Fourth, Sixth, Ninth, and Eleventh Circuits have all held that *Kisor's* modified framework applies to the Sentencing Guidelines.[1] *See United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022) (affording commentary to U.S.S.G. § 2B1.1 "no weight" where Guideline was unambiguous on its face); *United States v. Boler*, 115 F.4th 316, 327-328 (4th Cir. 2024) (applying *Kisor* standard to analyze § 2B1.1's commentary on loss); *United States v. You*, 74 F.4th 378, 397 (6th Cir. 2023) (applying *Kisor's* framework to fraud-loss commentary); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023) (describing circuit split, holding

[1] The D.C. Circuit appears to have thus far avoided the issue. *See United States v. Sargent*, 103 F.4th 820 (D.C. Cir. 2024) (declining to address the degree of deference due to the Guidelines commentary, while discussing the differing *Kisor* / *Stinson* approaches).

that *Kisor* applies to Guidelines commentary); *United States v. Dupree*, 57 F.4th 1269, 1277 (11th Cir. 2023) (relying on *Kisor* in declining to adhere to commentary of U.S.S.G. § 4B1.2).

By way of contrast, the First, Second, Fifth, Seventh, Eighth, and Tenth Circuits continue to follow *Stinson* – declining, without further guidance from this Court, to apply *Kisor*. *See United States v. Lewis*, 963 F.3d 16, 22-24 (1st Cir. 2020); *United States v. Rainford*, 110 F.4th 455, 475, n.5 (2nd Cir. 2024); *United States v. Vargas*, 74 F.4th 673, 680 (5th Cir. July 24, 2023) (en banc); *United States v. Johnson*, 104 F.4th 662, 665 (7th Cir. 2024); *United States v. Rivera*, 76 F.4th 1085, 1089 (8th Cir. 2023); *United States v. Maloid*, 71 F.4th 795, 803-817 (10th Cir. 2023).

Accordingly, there is a well-developed circuit split on this issue which is ripe for resolution.

II. The Instant Petition Provides an Ideal Vehicle to Resolve the Circuit Split

Certiorari should be granted because the instant case presents an ideal opportunity to address an entrenched circuit spilt that broadly affects federal sentencing procedure, and which will not be resolved absent intervention from this Court.

Unlike some prior decisions discussing the *Kisor / Stinson* dichotomy, the issue here is cleanly and squarely presented. In a number of prior cases, circuit courts have suggested that they would reach the *same* result regardless of the applicable standard – either because a contested Guidelines enhancement applied unambiguously without reference to the commentary (*see*, e.g., *United States v.*

Sargent, 103 F.4th 820 [D.C. Cir. 2024]), or alternatively, because the Guideline *was* ambiguous – making reference to the commentary appropriate under *either* standard. *See United States v. Boler*, 115 F.4th 316,327 (4th Cir. 2024) (holding that term "loss" was ambiguous, making reference to commentary necessary). In other cases, where courts have applied *Kisor* to a defendant's benefit, no *certiorari* has been sought. *See, e.g., United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (remanding case for resentencing, based upon determination that career offender enhancement was inapplicable under *Kisor*); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2022) (same).

None of those circumstances exist here. The Second Circuit did not find or even suggest that U.S.S.G. § 4A1.2(a)(1) was ambiguous, so as to require clarification through commentary. Nor could it have – § 4A1.2(a)(1)'s directive is as plain as day. As such, the outcome of Petitioner's appeal necessarily hinged upon the standard of review which the circuit applied. Under *Kisor*, the plain language of § 4A1.2(a)(1) dictated that it should control without reference to the commentary. Under *Stinson*, Application Note 4 to § 2E1.1 was presumptively binding, unless it could be shown to be "plainly inconsistent" with § 4A1.2. The Second Circuit held that: (a) *Stinson* should continue to apply in the absence of direct guidance from this Court; and (b) that Application Note 4 was not plainly inconsistent with § 4A1.2 under the *Stinson* standard. In so holding, the Second Circuit squarely teed up the issue for this Court's review.

CONCLUSION

As set forth above, the Second Circuit Court of Appeals has decided an important federal question in a manner which conflicts with a decision of this Court, as well as the decisions of other circuit courts to have considered such question. Accordingly, we respectfully submit that there are compelling reasons to grant certiorari in this matter.

Respectfully submitted,

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Appendix

22-3104
United States v. Smith

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of October, two thousand twenty-four.

PRESENT:

DENNIS JACOBS,
RICHARD J. SULLIVAN,
EUNICE C. LEE,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 22-3104

DEARICK SMITH, a.k.a. "Ace," a.k.a. "Lil D,"

Defendant-Appellant,

AMAR SCOTT, a.k.a. "A," JOHN SIMMONS, JERRICK DENSON, a.k.a. "D," ISAIAH WOODS, a.k.a. "Izzy," LAMAR SIMMONS, a.k.a. "Lil

Daddy," YULANDER GREEN, a.k.a. "L," a.k.a. "Lander," JAVONNE JACKSON, a.k.a. "Dutch," a.k.a. "Von," DEREK TAYLOR, a.k.a. "Swiff," MICHAEL WALKER, a.k.a. "Awol," JEFFREY DENSON, a.k.a. "Jeff," a.k.a. "Blue," MARCUS JOHNSON, a.k.a. "Miggs," MARVIN SIMMONS, a.k.a. "Jr," a.k.a. "Junior," CAMERON CHARLES, a.k.a. "Cam," TRAVIS HOUNSHELL, a.k.a. "Trav," MICHAEL NESMITH, JEREMIAH NETTLES, JOSEPH LOVING, HARRY NESMITH, LYNNARD DAVIS, JANICE SNIPES, JAY JAYQUAN WYNNE, a.k.a. "Jayquan Gerod Wynne," a.k.a. "Tipsy," TEVON HAYMON, BRANDON WHEELER, a.k.a. "Little Man," a.k.a. "Weed," RUSSELL HAMPTON, a.k.a. "TJ," MICHAEL JACKSON, a.k.a. "Boosum," a.k.a. "Boots,"

Defendants.[*]

For Defendant-Appellant: MATTHEW W. BRISSENDEN, Matthew W. Brissenden, P.C., Garden City, NY.

For Appellee: MONICA J. RICHARDS, Assistant United States Attorney, *for* Trini E. Ross, United States Attorney for the Western District of New York, Buffalo, NY.

[*] The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Appeal from a judgment of the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the December 8, 2022 judgment of the district court is **AFFIRMED**.

Dearick Smith appeals from the district court's judgment following his resentencing on one count of conspiracy to engage in a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d); one count of conspiracy to distribute, and possess with intent to distribute, cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; and one count of possession of a firearm in furtherance of that narcotics conspiracy, in violation of 18 U.S.C. § 924(c)(1).[1] The district court resentenced Smith to an aggregate term of 348 months' imprisonment, well below the effective U.S. Sentencing Guidelines range of 420 months to life, to be followed by five years' supervised release. On appeal, Smith argues that the district court improperly calculated his criminal history category under the Guidelines. He also contends that the district court erred by declining

[1] Smith was originally convicted of an additional firearm count under section 924(c). After the Supreme Court's decision in *United States v. Davis*, 588 U.S. 445 (2019), the district court vacated his conviction as to that count and resentenced him on the remaining three counts at a plenary resentencing proceeding.

to downwardly depart to account for his now-discharged state term of imprisonment on a charge involving conduct relevant to the racketeering conviction, and by creating an unwarranted sentencing disparity in resentencing him to a term of imprisonment longer than that of a codefendant. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We review the procedural and substantive reasonableness of a district court's sentence "under a deferential abuse-of-discretion standard." *United States v. Degroate*, 940 F.3d 167, 174 (2d Cir. 2019) (internal quotation marks omitted). A sentence is procedurally unreasonable when the district court has committed a "significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [section] 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51 (2007). With respect to "substantive review, a trial court's sentencing decision will be classified as error only if it cannot be located within the range of permissible decisions." *United States v. Bonilla*, 618 F.3d 102, 108 (2d Cir. 2010) (internal quotation marks omitted). In other words, we will set

aside "only those sentences that are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (internal quotation marks omitted).

I. Criminal History Category Challenge

Smith first argues that the district court erred by adding criminal history points for his 2007 state conviction for criminal possession of a controlled substance even though the conduct underlying that offense was part of the charged racketeering conspiracy offense. We disagree.[2]

For Smith's original sentencing in 2013, the presentence investigation report ("2013 PSR") identified this 2007 state conviction as a part of his criminal history, but did not assign it any points. Instead, the 2013 PSR considered the conviction to be "relevant conduct" to his instant offenses – in other words, acts he committed in furtherance of the racketeering and/or narcotics conspiracies. *See* U.S.S.G. § 1B1.3(a) (explaining that relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or

[2] At the outset, the parties dispute whether we should review for plain error, instead of abuse of discretion, because Smith failed to raise below the argument he now asserts on appeal. *See, e.g.*, *Degroate*, 940 F.3d at 174. We need not resolve this question because under either standard of review, we see no basis for concluding that the district court committed any procedural error.

willfully caused by the defendant . . . that occurred during the commission of the offense of conviction"). But, for criminal history purposes, the Guidelines define "prior sentence" as "any sentence previously imposed upon adjudication of guilt . . . for conduct *not* part of the instant offense" – *i.e.*, conduct that is not "relevant conduct." U.S.S.G. § 4A1.2(a)(1) (emphasis added)).[3] Accordingly, the 2013 PSR concluded that Smith had zero criminal history points, putting him in criminal history category I. The district court adopted this calculation and did not assign any criminal history points for this prior offense.

After one of Smith's firearm convictions was vacated in light of *United States v. Davis*, 588 U.S. 445 (2019), the Probation Office prepared a revised presentence investigation report (the "2022 PSR") for his plenary resentencing. Unlike the 2013 PSR, the 2022 PSR assigned Smith three criminal history points for his 2007 state possession conviction, citing section 2E1.1 of the Guidelines. Notably, application note 4 for that section provides:

> Certain conduct may be charged in the count of conviction as part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act

[3] We refer to the versions of the Guidelines in effect on the date of each of Smith's sentencings – the 2012 and 2021 versions, respectively – which avoids any possible *ex post facto* issue. *See United States v. Hendricks*, 921 F.3d 320, 331 n.51 (2d Cir. 2019).

> of the instant offense, treat as a prior sentence under § 4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

U.S.S.G. § 2E1.1 cmt. n.4. Because the conduct underlying Smith's 2007 conviction was charged as part of the racketeering conspiracy, and that conviction occurred before the last overt act of the conspiracy, the 2022 PSR treated this conviction as a prior sentence, not "relevant conduct" that was part of the instant offense, and assigned it three criminal history points. The 2022 PSR also assessed two additional criminal history points, pursuant to U.S.S.G. § 4A1.1(d), because Smith committed some of the acts underlying his conspiracy convictions while under a "criminal justice sentence" – namely, a post-release term of parole supervision imposed in connection with his 2007 conviction. Over Smith's objections, the district court adopted this revised calculation, which increased his criminal history from category I to category III.

Smith argues that the district court erred by relying on application note 4 of U.S.S.G. § 2E1.1 to add criminal history points for his 2007 state conviction that was part of the charged racketeering conspiracy. He asserts that the Supreme Court's decision in *Kisor v. Wilkie* requires us to defer to the Guidelines

commentary only when the Guidelines themselves are "genuinely ambiguous." 588 U.S. 558, 574 (2019) (directing courts to first determine that a regulation is "genuinely ambiguous" before deferring to an agency's reasonable reading of that regulation). According to Smith, *Kisor* modified the standard of deference set forth in *Stinson v. United States*, which held that the Guidelines commentary "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. 36, 38 (1993). On Smith's read, section 4A1.2(a)(1) is not ambiguous, as it clearly defines a "prior sentence" as "any sentence previously imposed . . . for conduct not part of the instant offense"; he therefore contends that the district court erred during his resentencing when it looked to application note 4 to conclude that his conviction for conduct that was part of the instant offense should be treated as a prior sentence for criminal history purposes.

This argument is foreclosed, however, by our recent holding in *United States v. Rainford* that "the Supreme Court has not overruled *Stinson*." 110 F.4th 455, 475 n.5 (2d Cir. 2024); *see United States v. Zheng*, 113 F.4th 280, 299–300 (2d Cir. 2024); *see also United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020) (post-*Kisor* decision applying *Stinson* deference); *United States v. Richardson*, 958 F.3d 151, 154–55 (2d

Cir. 2020) (same). Smith's *Kisor*-based challenge to the district court's reliance on application note 4 to section 2E1.1 therefore must fail.

Application note 4 is not "inconsistent with" section 4Al.2 and thus applies here. *Stinson*, 508 U.S. at 38; *see, e.g.*, *United States v. Mizell*, 671 F. App'x 826, 828 (2d Cir. 2016); *see also United States v. Hampton*, No. 20-2986, 2021 WL 5918303, at *2–3 (2d Cir. Dec. 15, 2021) (rejecting application note 4 challenge by one of Smith's codefendants). Because "the previously convicted RICO offender is in effect a repeat offender who breaks the law once by committing a predicate act and again by engaging in a pattern of racketeering activity," application note 4 "avoids the anomaly of treating [that] defendant . . . as a first offender with a criminal history category of I." *United States v. Marrone*, 48 F.3d 735, 738–39 (3d Cir. 1995) (concluding that application note 4 is "not plainly erroneous or inconsistent with section 4A1.2(a)(1)" and therefore binding under *Stinson* (internal quotation marks omitted)). Such a result is consistent with Chapter Four of the Guidelines, which acknowledges that "a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." U.S.S.G. Ch. 4, intro. cmt.

Smith's alternative assertion – that the district court erred by not downwardly departing to avoid an "anomalous result," as permitted under application note 4 – is likewise unpersuasive. For starters, "a refusal to downwardly depart is generally not appealable." *United States v. Cuevas*, 496 F.3d 256, 268 (2d Cir. 2007) (internal quotation marks omitted). And, in any event, none of Smith's arguments suggest an anomalous result here. Smith contends in his principal brief that the district court "effectively double-counted" the conduct (*i.e.*, drug possession) involved in his 2007 state conviction as both relevant conduct and a part of his criminal history. Smith Br. at 20. But he provides no response to the government's argument that such conduct had no effect on his total offense level. And while Smith complains that the district court's adherence to application note 4 led to a higher criminal history category and a correspondingly higher Guidelines range at his resentencing, he points to no authority suggesting that a district court errs by declining to adhere to its prior Guidelines calculations.

In short, we find no error in the district court's reliance on application note 4 to calculate Smith's criminal history.

II. Remaining Sentencing Challenges

Smith's remaining sentencing challenges fare no better. *First*, Smith insists that the district court erred by not downwardly departing under U.S.S.G. § 5K2.23, to account for a by-then discharged term of state imprisonment that he served from 2008 to 2013 for conduct relevant to his federal offenses but for which he received no federal credit at his initial sentencing. He acknowledges that the district court committed no procedural error in applying section 5K2.23 at his plenary resentencing, but faults the district court for not, in his view, departing to correct his prior counsel's failures to argue for the time credit at his original sentencing, when it would have been required under U.S.S.G. § 5G1.3.

This challenge, however, is not proper, since review of a refusal to downwardly depart is "available only when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *Cuevas*, 496 F.3d at 268 (internal quotation marks omitted). Neither circumstance is present here. As Smith concedes and the plain language of section 5K2.23 makes clear, "a downward departure for a discharged term is discretionary even where an adjustment would have been required for an undischarged term." *United States v. Boodie*, 590 F. App'x 67, 68 (2d Cir. 2015). Nor did the district court

misapprehend its authority to so depart. To the contrary, at resentencing, the district correctly noted the discretionary nature of section 5K2.23, expressly stated that it would take Smith's uncredited state custody into consideration, and did in fact downwardly depart on that basis (among others) – just not as much as Smith would have liked.[4]

Second, Smith asserts that the district court created an unwarranted sentencing disparity by giving a lower sentence to one of Smith's codefendants, notwithstanding the similarities in their records, criminal conduct, and post-conviction rehabilitation. But any procedural reasonableness argument here is a "nonstarter" because, as this Court has "repeatedly made clear[,] . . . section 3553(a)(6) requires a district court to consider *nationwide* sentence disparities" – not disparities between codefendants. *United States v. Bryant*, 976 F.3d 165, 180 (2d Cir. 2020) (internal quotation marks omitted); *see United States v. Alcius*, 952 F.3d 83, 89 (2d Cir. 2020) ("There is no requirement that a district court consider or explain sentencing disparities among codefendants."). In any event, at the codefendant's resentencing, the district court explicitly observed the need to avoid

[4] Indeed, the Court imposed a term of 288 months' imprisonment on his narcotics and racketeering conspiracy counts – *i.e.*, seventy-two months below the Guidelines range of 360 months to life.

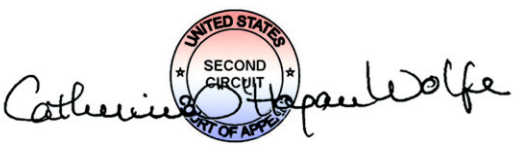
sentencing disparities between him and Smith, and then gave the codefendant a slightly lower sentence – a 320-month aggregate term, in comparison to Smith's 348-month term – in recognition of his more significant rehabilitation.

Any substantive reasonableness challenge likewise fails. The "weight to be given sentencing disparities, like the weight to be given any [section] 3553(a) factor, is a matter firmly committed to the discretion of the sentencing judge." *United States v. Gates*, 84 F.4th 496, 505 n.1 (2d Cir. 2023) (internal quotation marks omitted). Thus, "we will only set aside those outlier sentences that reflect actual abuse of a district court's considerable sentencing discretion." *Id.* (internal quotation marks omitted). On this record, we cannot say that the district court abused its discretion in arriving at Smith's below-Guidelines sentence. *See United States v. Messina*, 806 F.3d 55, 66 (2d Cir. 2015) (explaining that it is "especially" "difficult to find that a below-Guidelines sentence is substantively unreasonable" (alterations and internal quotation marks omitted)).

* * *

We have considered Smith's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: October 04, 2024
Docket #: 22-3104cr
Short Title: United States of America v. Amar Scott (Smith)

DC Docket #: 6:09-cr-6064-10
DC Court: WDNY (ROCHESTER)
DC Judge: Siragusa

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

18 USCS Appx § 2E1.1

Current through Public Law 118-157, approved December 17, 2024.

§ 2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

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

(1) 19; or

(2) the offense level applicable to the underlying racketeering activity.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1962, 1963.

Application Notes:

1. Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

2. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.

3. If the offense level for the underlying racketeering activity is less than the alternative minimum level specified (i.e., 19), the alternative minimum base offense level is to be used.

4. Certain conduct may be charged in the count of conviction as part of a “pattern of racketeering activity” even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under § 4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

History

HISTORY:

Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 26); November 1, 1989 (see Appendix C, amendment 142).

End of Document

18 USCS Appx § 4A1.2

Current through Public Law 118-157, approved December 17, 2024.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > 18 USCS appendix > SENTENCING GUIDELINES FOR THE UNITED STATES COURTS > CHAPTER FOUR. Criminal History and Criminal Livelihood > Part A. Criminal History

Notice

This section has more than one version with varying effective dates.

§ 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(d).

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 (Adequacy of Criminal History Category).

(i) Tribal Court Sentences

Sentences resulting from tribal court convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).

(j) Expunged Convictions

Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).

(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(e), 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(e), 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(d), 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.* 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.

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

History

HISTORY:

Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 262–265); November 1, 1990 (see Appendix C, amendments 352 and 353); November 1, 1991 (see Appendix C, amendments 381 and 382); November 1, 1992 (see Appendix C, amendment 472); November 1, 1993 (see Appendix C, amendment 493); November 1, 2007 (see Appendix C, amendment 709); November 1, 2010 (see Appendix C, amendment 742); November 1, 2011 (see Appendix C, amendment 758); November 1, 2012 (see Appendix C, amendment 766); November 1, 2013 (see Appendix C, amendment 777); November 1, 2015 (see Appendix C, amendment 795); November 1, 2018 (see Appendix C, amendment 813); November 1, 2023 (see Appendix C, amendment 821); November 1, 2024 (see Appendix C, amendment 831).

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