
No. _____

In the

Supreme Court of the United States

DAVID JOSEPH BUNEVACZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Appendices to Petition for a Writ of Certiorari

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 1 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID JOSEPH BUNEVACZ,

Defendant-Appellant.

No. 22-50295

D.C. No.
2:22-cr-00175-DSF-1
Central District of California,
Los Angeles

ORDER

Before: FORREST and BUMATAY, Circuit Judges, and DONATO,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Forrest and Judge Bumatay have voted to deny the petition for rehearing en banc, and Judge Donato has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.

* The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

FILED

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 22 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID JOSEPH BUNEVACZ,

Defendant-Appellant.

No. 22-50295

D.C. No.
2:22-cr-00175-DSF-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted May 6, 2024
Pasadena, California

Before: FORREST and BUMATAY, Circuit Judges, and DONATO, ** District Judge.

David Bunevacz challenges his 210-month custodial sentence for securities and wire fraud. We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

1. *Victim-Impact Statements.* Bunevacz argues that the victim-impact statements presented at sentencing were improper. Because he did not object to the statements below, we review for plain error. *See United States v. Cannel*, 517 F.3d 1172, 1176 (9th Cir. 2008). Bunevacz contends that the district court plainly erred under the Fifth, Eighth, and Fourteenth Amendments because the statements presented were unreliable, some bordered on expert testimony regarding his mental health, and they were unduly prejudicial because victims referred to him using derogatory epithets. A district court may hear sworn or unsworn victim-impact statements at sentencing, which are not subject to cross-examination or the Federal Rules of Evidence. *United States v. Christensen*, 732 F.3d 1094, 1102 (9th Cir. 2013). Bunevacz points to no caselaw, outside the capital-sentencing context, addressing whether harsh language by victims violates the Eighth Amendment. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 985 (9th Cir. 2002). And there is no evidence in the record to indicate that any epithets or allegedly unreliable statements were the basis for the court's sentence. *See United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009). Thus, there was no plain error.

2. *Substantive Reasonableness.* Bunevacz challenges the substantive reasonableness of his sentence. We review this challenge considering the whole record to ensure that the sentencing judge meaningfully and logically considered the 18 U.S.C. § 3553(a) factors. *United States v. Ressam*, 679 F.3d 1069, 1089 (9th Cir.

2012) (en banc). Relief from a sentence is granted only in rare cases. *Id.* at 1087–88.

While Bunevacz argues that the district court erred in making its discretionary departures, “our review of a departure error is subsumed in the review of the ultimate sentence for substantive reasonableness.” *United States v. Vasquez-Cruz*, 692 F.3d 1001, 1007 (9th Cir. 2012).

Here, the district court properly analyzed the § 3553(a) factors by considering the scope of Bunevacz’s fraud, his lack of true remorse, the impact on his victims, the sophisticated means that he used in committing the crime, his use of stolen funds to avoid a jail sentence in state court, and his likelihood of recidivism. The district court additionally expressed a policy disagreement with the Sentencing Guidelines to the extent they did not fully account for the circumstances of Bunevacz’s crime. *Cf. United States v. Kabir*, 51 F.4th 820, 828 (9th Cir. 2022). Considering the entire record, we conclude that the sentence was substantively reasonable. *See Ressam*, 679 F.3d at 1087.

3. *Breach of the Plea Agreement.* Lastly, Bunevacz argues that the government implicitly breached his plea agreement by arguing for sentencing enhancements without a legal basis, using inflammatory language, and introducing improper victim-impact statements. Because he did not raise this issue below, we again review for plain error. *United States v. Farias-Contreras*, 104 F.4th 22, 27 (9th Cir. 2024) (en banc). A plea agreement may be implicitly breached where the

government's actions serve no purpose other than to wrongly influence the court to impose a sentence higher than what the government agreed to recommend. *United States v. Whitney*, 673 F.3d 965, 971 (9th Cir. 2012). Here, the plea agreement specifically allowed both parties to "argue [for] additional specific offense characteristics, adjustments, and departures under the Sentencing Guidelines." There was also no agreement regarding Bunevacz's "criminal history or criminal history category." Accordingly, it was not plain error for the government to argue for upward departures, while maintaining its obligation to request a low-end sentence within the applicable guideline range. *Cf. Farias-Contreras*, 104 F.4th at 30–31 (concluding there was no plain error where the government implicitly breached a plea agreement, which required the government to recommend a low-end sentence, by going too far in *responding* to a defendant's arguments for a below guidelines sentence).

As we conclude there is no error warranting a remand, we need not consider Bunevacz's argument for reassignment to a new judge for resentencing.

AFFIRMED.

United States District Court
Central District of California

UNITED STATES OF AMERICA vs.

Docket No. CR 22-00175 DSF

Defendant DAVID JOSEPH BUNEVACZ

Social Security No. XXXXXXXXXX

akas: None

(Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH DAY YEAR

11 21 2022

In the presence of the attorney for the government, the defendant appeared in person on this date.

COUNSEL

James S. Threatt, DFPD / David Wasserman, DFPD

(Name of Counsel)

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea

NOLO
CONTENDERE

NOT
GUILTY

FINDING

There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of Securities Fraud: 15 U.S.C. §78j(b), 15 U.S.C. § 78ff(a) and 17 C.F.R. §240.10b-5 - Count 1 of the Indictment.

**JUDGMENT
AND PROB/
COMM
ORDER**

The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, David Joseph Bunevacz, is hereby committed on Counts 1 and 2 of the Indictment to the custody of the Bureau of Prisons for a term of 210 months. This term consists of 210 months on each of Counts 1 and 2 of the Indictment, to be served concurrently.

On release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years. This term consists of 3 years on each of Counts 1 and 2 of the Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04, including the conditions of probation and supervised release set forth in Section III of Second Amended General Order 20-04.
2. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.
3. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.
4. During the course of supervision, the Probation Officer, with the agreement of the defendant and defense counsel, may place the defendant in a residential drug treatment program approved by the

U.S. Probation and Pretrial Services Office for treatment of narcotic addiction or drug dependency, which may include counseling and testing, to determine if the defendant has reverted to the use of drugs. The defendant shall reside in the treatment program until discharged by the Program Director and Probation Officer.

5. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.
6. During the period of community supervision, the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment.
7. The defendant shall cooperate in the collection of a DNA sample from the defendant.
8. The defendant shall not be employed in any capacity wherein the defendant has custody, control, or management of the defendant's employer's funds.
9. The defendant shall not engage, as whole or partial owner, employee or otherwise, in any business involving loan programs, telemarketing activities, investment programs or any other business involving the solicitation of funds or cold-calls to customers without the express approval of the Probation Officer, and the Court, prior to engaging in such employment. Further, the defendant shall provide the Probation Officer with access to any and all business records, client lists, and other records pertaining to the operation of any business owned, in whole or in part, by the defendant, as directed by the Probation Officer.
10. The defendant shall not be self-employed nor be employed in a position that does not provide regular pay stubs with the appropriate deductions for taxes, unless approved by the Probation Officer and the Court.
11. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any other financial gains to the Court-ordered financial obligation.
12. The defendant shall submit his person, property, house, residence, vehicle, papers, computers, cell phones, other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable

USA vs. David Joseph Bunevacz

Docket No.: CR 22-00175 DSF

suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

13. The defendant shall participate in a program for gambling treatment, which may include evaluation and counseling, as directed by the Probation Officer, until discharged from the program by the service provider with the approval of the Probation Officer.

The Court authorizes the Probation & Pretrial Services Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the sentencing judge.

It is ordered that the defendant shall pay to the United States a special assessment of \$200, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

It is ordered that the defendant shall pay restitution in the total amount of \$35,267,851.98 to victims as set forth in a separate victim list prepared by the Probation Office which this Court adopts and which reflects the Court's determination of the amount of restitution due to each victim. The victim list, which shall be forwarded by the Probation Officer to the fiscal section of the Clerk's Office, shall remain confidential to protect the privacy of the victims. If the defendant makes a partial payment, each payee shall receive approximately proportional payments.

Restitution shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program. If any amount of the restitution remains unpaid after release from custody, nominal monthly payments of at least 10% of the defendant's gross monthly income but not less than \$100, whichever is greater, shall be made during the period of supervised release and shall begin 90 days after the commencement of supervision. Nominal restitution payments are ordered as the Court finds that the defendant's economic circumstances do not allow for either immediate or future payment of the amount ordered.

Interest on the restitution ordered is waived because the defendant does not have the ability to pay interest. Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The defendant shall comply with Second Amended General Order No. 20-04.

All fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

The Court recommends to the Bureau of Prisons that defendant be designated to a BOP facility that offers the 500-hour Residential Drug Abuse Program (RDAP).

The Court recommends that the defendant be designated to a Bureau of Prisons facility that will provide medical treatment for defendant's heart condition and a facility somewhere in Southern California.

USA vs. David Joseph Bunevacz

Docket No.: CR 22-00175 DSF

The Court advised the defendant of the right to appeal this judgment.

SENTENCING FACTORS: The sentence is based on the factors set forth in 18 U.S.C. §3553, including the applicable sentencing range set forth in the guidelines, as more particularly reflected in the court reporter's transcript.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

November 21, 2022

Date



U. S. District Judge DALE S. FISCHER

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

November 21, 2022

Filed Date

By Renee A. Fisher

Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

USA vs. David Joseph Bunevacz

Docket No.: CR 22-00175 DSF

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
 Attn: Fiscal Department
 255 East Temple Street, Room 1178
 Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(1)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid):
 - Non-federal victims (individual and corporate),
 - Providers of compensation to non-federal victims,
 - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. David Joseph Bunevacz

Docket No.: CR 22-00175 DSF

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____
Defendant noted on appeal on _____
Defendant released on _____
Mandate issued on _____
Defendant's appeal determined on _____
Defendant delivered on _____ to _____
at _____
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By

Date

Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

Filed Date

By

Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____
Defendant

Date

U. S. Probation Officer/Designated Witness

Date



KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limited on Constitutional Grounds by [U.S. v. Booker](#), U.S., Jan. 12, 2005

United States Code Annotated

[Federal Sentencing Guidelines \(Refs & Annos\)](#)

[Chapter Three. Adjustments \(Refs & Annos\)](#)

[Part C. Obstruction and Related Adjustments \(Refs & Annos\)](#)

USSG, § 3C1.1, 18 U.S.C.A.

§ 3C1.1. Obstructing or Impeding the Administration of Justice

Currentness

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1993; November 1, 1997; November 1, 1998; November 1, 2002; November 1, 2004; November 1, 2006; November 1, 2010; November 1, 2011; November 1, 2014; November 1, 2018; November 1, 2023.)

COMMENTARY

<Application Notes:>

<**1. In General.**--This adjustment applies if the defendant's obstructive conduct (A) occurred with respect to the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant. Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.>

<**2. Limitations on Applicability of Adjustment.**--This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.>

<**3. Covered Conduct Generally.**--Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to

apply. Application Note 5 sets forth examples of less serious forms of conduct to which this adjustment is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.>

<**4. Examples of Covered Conduct.**--The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:>

<(A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;>

<(B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;>

<(C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;>

<(D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;>

<(E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;>

<(F) providing materially false information to a judge or magistrate judge;>

<(G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;>

<(H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;>

<(I) other conduct prohibited by obstruction of justice provisions under title 18, United States Code (e.g., [18 U.S.C. §§ 1510, 1511](#));>

<(J) failing to comply with a restraining order or injunction issued pursuant to [21 U.S.C. § 853\(e\)](#) or with an order to repatriate property issued pursuant to [21 U.S.C. § 853\(p\)](#);>

<(K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.>

<This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.>

<5. Examples of Conduct Ordinarily Not Covered.--Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.>

<The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:>

<(A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;>

<(B) making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies;>

<(C) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;>

<(D) avoiding or fleeing from arrest (see, however, § 3C1.2 (Reckless Endangerment During Flight));>

<(E) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).>

<6. “Material” Evidence Defined.--“Material” evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.>

<7. Inapplicability of Adjustment in Certain Circumstances.--If the defendant is convicted for an offense covered by § 2J1.1 (Contempt), § 2J1.2 (Obstruction of Justice), § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), § 2J1.5 (Failure to Appear by Material Witness), § 2J1.6 (Failure to Appear by Defendant), § 2J1.9 (Payment to Witness), § 2X3.1 (Accessory After the Fact), or § 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).>

<Similarly, if the defendant receives an enhancement under § 2D1.1(b)(16)(D), do not apply this adjustment.>

<8. Grouping Under § 3D1.2(c).--If the defendant is convicted both of an obstruction offense (e.g., [18 U.S.C. § 3146](#) (Penalty for failure to appear); [18 U.S.C. § 1621](#) (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.>

<9. Accountability for § 1B1.3(a)(1)(A) Conduct.--Under this section, the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.>

Notes of Decisions (1142)

Federal Sentencing Guidelines, § 3C1.1, 18 U.S.C.A., FSG § 3C1.1

As amended to 3-15-22.

End of Document

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United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Four. Criminal History and Criminal Livelihood (Refs & Annos)

Part A. Criminal History (Refs & Annos)

USSG, § 4A1.1, 18 U.S.C.A.

§ 4A1.1. Criminal History Category

Currentness

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 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.
- (e) Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1991; October 27, 2003; November 1, 2007; November 1, 2010; November 1, 2013; November 1, 2015; November 1, 2023.)

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).** 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(d) 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(d). 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(d) 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(d) 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.>

<**5. § 4A1.1(e).** One point is added if the defendant (1) receives 7 or more points under § 4A1.1(a) through (d), and (2) 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).>

<**Background:** Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, § 4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.>

<Subsections (a), (b), and (c) of § 4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.>

<Section 4A1.1(e) adds one point if the defendant receives 7 or more points under § 4A1.1(a) through (d) and was under a criminal justice sentence during any part of the instant offense.>

Notes of Decisions (220)

Federal Sentencing Guidelines, § 4A1.1, 18 U.S.C.A., FSG § 4A1.1

As amended to 3-15-22.

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United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Four. Criminal History and Criminal Livelihood (Refs & Annos)

Part A. Criminal History (Refs & Annos)

USSG, § 4A1.3, 18 U.S.C.A.

§ 4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

Currentness

(a) Upward Departures.--

(1) Standard for Upward Departure.--If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) Types of Information Forming the Basis for Upward Departure.--The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) Prohibition.--A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) Determination of Extent of Upward Departure.--

(A) In General.--Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) Upward Departures from Category VI.--In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) Downward Departures.--

(1) Standard for Downward Departure.--If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) Prohibitions.--

(A) Criminal History Category I.--Unless otherwise specified, a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) Armed Career Criminal and Repeat and Dangerous Sex Offender.--A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of § 4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) Limitations.--

(A) Limitation on Extent of Downward Departure for Career Offender.--The extent of a downward departure under this subsection for a career offender within the meaning of § 4B1.1 (Career Offender) may not exceed one criminal history category.

(B) Limitation on Applicability of § 5C1.2 in Event of Downward Departure.--A defendant who receives a downward departure under this subsection does not meet the criminal history requirement of **subsection (a)(1) of § 5C1.2** (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if the defendant did not otherwise meet such requirement before receipt of the downward departure.

(c) Written Specification of Basis for Departure.--In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1991; November 1, 1992; October 27, 2003; November 1, 2018; November 1, 2023.)

COMMENTARY

<Application Notes:>

<1. Definitions.--For purposes of this policy statement, the terms “depart”, “departure”, “downward departure”, and “upward departure” have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).>

<2. Upward Departures.-->

<(A) Examples.--An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:>

<(i) A previous foreign sentence for a serious offense.>

<(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.>

<(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.>

<(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.>

<(B) Upward Departures from Criminal History Category VI.--In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.>

<(C) Upward Departures Based on Tribal Court Convictions.--In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in § 4A1.3(a) above and, in addition, may consider relevant factors such as the following:>

<(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.>

<(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90-284, as amended.>

<(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111-211.>

<(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113-4.>

<(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.>

<(vi) The tribal court conviction is for an offense that otherwise would be counted under § 4A1.2 (Definitions and Instructions for Computing Criminal History).>

<3. Downward Departures.-- >

<(A) Examples.--A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:>

<(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.>

<(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.>

<(B) Downward Departures from Criminal History Category I.--A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.>

<**Background:** This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.>

[Notes of Decisions \(612\)](#)

Federal Sentencing Guidelines, § 4A1.3, 18 U.S.C.A., FSG § 4A1.3
As amended to 3-15-22.