APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 20-1117

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARTEZ L. SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois.
No. 18-cr-20037—**Michael M. Mihm**, *Judge.*

ARGUED OCTOBER 28, 2020—DECIDED MARCH 3, 2021

(Filed Mar. 3, 2021)

Before RIPPLE, WOOD, and BRENNAN, *Circuit Judges.*

BRENNAN, *Circuit Judge.* Illinois law enforcement agents received a tip from a confidential source claiming that Martez Smith had been dealing methamphetamine in Mattoon, Illinois. The agents conducted controlled buys between Smith and the source, and in the course of the investigation, requested a patrol

officer stop Smith's vehicle. During that stop, the officer found marijuana, a marijuana grinder, and a firearm in Smith's vehicle. The officer arrested Smith and seized the gun. A federal grand jury indicted Smith on one count of distributing methamphetamine and one count of possessing a firearm as a felon.

Represented by court-appointed counsel, Smith pleaded guilty to both counts. He then sought to retract his guilty plea, alleging ineffective assistance of counsel. The court denied Smith's motion to withdraw his guilty plea, rejected his request for an evidentiary hearing, and sentenced him on the two counts. On appeal, Smith challenges the district court's denial of his ineffective assistance of counsel claim and his career offender sentencing enhancement. We affirm the district court's decision in full.

I

A

In July 2018, Illinois law enforcement agents received a tip from a confidential source, who claimed he had been purchasing methamphetamine from Martez Smith in the Mattoon, Illinois area for the past two months. Based on this information, the agents arranged a series of controlled buys between Smith and the source.

The first controlled buy occurred on July 9, 2018. After the transaction, the source returned to the agents and gave them approximately 46 grams of "ice"

methamphetamine that he had just purchased from Smith. With a failed attempt in the interim, the agents conducted another controlled buy on July 27. As instructed, the source text messaged Smith to purchase three ounces of methamphetamine. Smith replied "yea" and agreed on a time for the transaction. That day, the agents observed Smith driving as if to avoid surveillance while en route to the scheduled transaction and requested a nearby patrol officer to pull him over. The officer identified Smith's vehicle, noticed it had "extremely dark window tinting," and ordered Smith to stop. When he attempted to measure the window tint, the officer realized that the batteries of his tint meter had failed, so he radioed other officers to bring him a new one.

During the approximately ten-minute wait, the officer learned that Smith's driver's license had been suspended. He asked Smith if he had any contraband in the vehicle. Smith said no. The officer then searched the vehicle and found a small amount of marijuana, a marijuana grinder, and a 9mm pistol with a 30-round extended magazine attached.[1] In a later interview, Smith admitted to possessing the firearm but denied selling methamphetamine.

B

In August 2018, a federal grand jury indicted Smith on two counts: (1) distribution of 50 grams or more of

[1] Whether Smith consented to the vehicle search is disputed, but the answer to that question does not affect our decision.

methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) ("Count 1"); and (2) possession of a firearm by a felon in violation of 18 U.S.C. § 922(g) ("Count 2"). Smith pleaded not guilty to both counts.

The district court appointed Attorney Johanes Maliza to represent Smith. With Maliza's representation, Smith changed his plea to guilty in November 2018. During the change-of-plea hearing before the magistrate judge, the parties agreed that, in addition to the felon-in-possession charge, Smith would plead guilty only to the lesser-included offense of distributing controlled substance between 5 and 50 grams because the laboratory results revealed that Smith sold less than 50 grams of methamphetamine.

The ensuing plea colloquy was thorough. Smith testified under oath in response to the court's questions. The magistrate judge asked Smith whether he had sufficient time to review the case with his counsel, whether he was satisfied with his counsel's representation, and whether he discussed the specific charges with his counsel. Smith answered "yes" to all three questions and admitted under oath that he distributed methamphetamine on July 9, 2018, and knowingly possessed a firearm as a felon on July 27, 2018. The court then asked Smith how he wanted to plead, to which Smith answered "guilty" on both counts.

Following his guilty plea but before sentencing, Smith filed two pro se motions seeking to withdraw his pleas based on ineffective assistance of counsel. Among various claims, Smith alleged that Maliza

failed to investigate and to file a motion to suppress the firearm found in his car. Simultaneously, Maliza moved to withdraw as counsel, citing "a direct and irreconcilable conflict of interest" with Smith. The court granted Maliza's motion and appointed new counsel. By counsel, Smith then moved to withdraw his guilty plea and requested that the court hold an evidentiary hearing on Maliza's alleged ineffective assistance. The district court denied both requests and proceeded to sentencing.

The presentence investigation report recommended a career offender enhancement under U.S.S.G. § 4B1.1 for Smith's two prior convictions: a 2009 federal conviction for conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 and a 2013 Indiana conviction for attempted armed robbery. Smith objected to this enhancement, arguing that his conspiracy conviction does not constitute a predicate "controlled substance offense" as required by the provision. Specifically, he asserted that the plain language of the Sentencing Guidelines does not include inchoate offenses like § 846 narcotics conspiracy.

Relying on *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), the district court rejected Smith's argument and held that § 846 conspiracy constitutes a predicate "controlled substance offense." It concluded that Smith qualified for the career-offender enhancement under § 4B1.1. The district court sentenced Smith to 214 months' imprisonment on Count 1 and 120 months' imprisonment on Count 2 to be served concurrently. Smith timely appealed to this court.

II

A

Smith first challenges the district court's denial of his motion to withdraw his guilty plea, which we review for an abuse of discretion. *United States v. Barr*, 960 F.3d 906, 917 (7th Cir. 2020).

A defendant may withdraw a guilty plea after the district court accepts the plea, but before it imposes a sentence, by showing "a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(B). Ineffective assistance of counsel serves as a "fair and just" reason for withdrawing a plea. *See United States v. Graf*, 827 F.3d 581, 583-84 (7th Cir. 2016); *see also Hurlow v. United States*, 726 F.3d 958, 967 (7th Cir. 2013) (noting that a plea that resulted from ineffective assistance of counsel cannot be knowing and voluntary). To establish ineffective assistance of counsel, a defendant must show that his counsel rendered deficient performance and that the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). In other words, a defendant must show that his counsel rendered objectively unreasonable performance and that, but for counsel's errors, the outcome would have been different. *Id.* We need not address both deficient performance and prejudice prongs "if the defendant makes an insufficient showing on one." *Id.* at 697; *see Armfield v. Nicklaus*, 985 F.3d 536, 548 (7th Cir. 2021) (same).

In the guilty plea context, we apply the modified *Strickland* analysis articulated in *Hill v. Lockhart*,

474 U.S. 52 (1985). *See Gish v. Hepp*, 955 F.3d 597, 605 (7th Cir. 2020). Under *Hill*, the deficient performance prong remains largely unchanged. A defendant must show that his counsel rendered objectively unreasonable performance and "performed seriously below professional standards." *United States v. Williams*, 698 F.3d 374, 386 (7th Cir. 2012). On the prejudice prong, a defendant must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill*, 474 U.S. at 59). The prejudice inquiry into counsel's failure to investigate "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59 (adding that "[t]his assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial").

A guilty plea, however, "should not lightly be withdrawn." *United States v. Brown*, 973 F.3d 667, 715 (7th Cir. 2020). Courts must "not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 137 S. Ct. at 1967. We instead "look to contemporaneous evidence to substantiate a defendant's expressed preferences" and only allow a withdrawal if we are convinced that the defendant would have pleaded differently. *Id.*

Smith alleges three deficiencies in Maliza's performance: (1) failure to investigate and file a motion to

suppress the firearm found in the car; (2) pressure to hastily plead guilty; and (3) general unfamiliarity with the facts of the case. The district court denied these claims as either lacking merit or otherwise undermined by the record. We agree and analyze each of Smith's arguments in turn.

Motion to Suppress. When the alleged deficiency is based on counsel's failure to move to suppress evidence, a defendant must "prove the motion was meritorious." *Long v. United States*, 847 F.3d 916, 920 (7th Cir. 2017) (internal quotation marks omitted). But here any alleged deficiency by Maliza matters only if Smith could show that suppressing the firearm evidence likely would have changed the outcome of the trial. *Hill*, 474 U.S. at 59.

Smith claims that a motion to suppress would have succeeded because the patrol officer did not have consent or a warrant to search his vehicle. Warrantless searches are per se unreasonable under the Fourth Amendment, unless an exception applies. *United States v. Kizart*, 967 F.3d 693, 695 (7th Cir. 2020) (citing *Arizona v. Gant*, 556 U.S. 332, 338 (2009)). The record suggests that the automobile exception applies here. Under the automobile exception, an officer may search a vehicle without a warrant if there is probable cause. *Kizart*, 967 F.3d at 695; *see United States v. Sands*, 815 F.3d 1057, 1061-62 (7th Cir. 2015) ("A warrantless arrest is constitutionally permissible if supported by probable cause. . . ."). Probable cause exists "if, given the totality of the circumstances, there is a fair probability that contraband or evidence of a crime

will be found in a particular place." *United States v. Eymann*, 962 F.3d 273, 286 (7th Cir. 2020) (internal quotation marks omitted).

The patrol officer here had probable cause to stop Smith and search his vehicle. Law enforcement agents had already conducted a controlled buy, and they had scheduled another on the day of the arrest. The agents even had text message evidence detailing the transaction planned for later that day. Smith was also driving suspiciously moments before the officer stopped him and had illegally tinted windows on his car. And although the officer may not have known all the facts supporting probable cause, he was acting at the direction of the agents who did. *See United States v. Khan*, 937 F.3d 1042, 1052 (7th Cir. 2019) (noting that the collective knowledge doctrine "permits a stop at the direction of, or based on information relayed from, another law enforcement agency"); *see also United States v. Nicksion*, 628 F.3d 368, 376-77 (7th Cir. 2010) (finding that the collective knowledge of law enforcement provided ample probable cause for officers to stop and arrest the defendant and search his vehicle). The totality of the circumstances leading up to the stop demonstrates a fair probability that Smith's vehicle contained contraband. The officer therefore had probable cause to stop Smith and to search his vehicle. Without more, Smith cannot establish that he would have succeeded on his motion to suppress the firearm evidence.

Time Pressure. Smith also contends that Maliza rendered ineffective assistance by pressuring him to

take the guilty plea. He alleges Maliza did so in part by telling him that the government would file a superseding indictment with an additional charge if Smith did not plead guilty before the grand jury reconvened. The district court dismissed Smith's claims as conclusory or otherwise undermined by the record noting that "that there was no pressure for the defendant to plead immediately."

We give special weight to a defendant's sworn testimony in a Rule 11 plea colloquy. *See Graf*, 827 F.3d at 584 ("A defendant's motion to withdraw is unlikely to have merit if it seeks to dispute his sworn assurances to the court."). That testimony is presumed true, and the defendant bears a heavy burden to overcome this presumption. *See United States v. Chavers*, 515 F.3d 722, 724 (7th Cir. 2008). Smith expressly acknowledged during his plea colloquy that he had sufficient time to discuss the case with Maliza. As the district court found, the magistrate judge "was careful to give the defendant several opportunities where he could have said that he was being pressured . . . [and] sufficient opportunity to say that he wanted more time." At one point, Maliza even offered to adjourn the hearing to allow time to file corrected information, which cuts against Smith's argument that his counsel had rushed him to plead guilty.

Smith cannot show prejudice. He fails to demonstrate a reasonable probability that, but for Maliza's pressure, he would not have pleaded guilty. The district court was correct to reject this claim.

Counsel's Lack of Familiarity. Smith next asserts Maliza rendered ineffective assistance because he lacked familiarity with the facts of the case, emphasizing that the public defender was "confused and unfamiliar with the relevant facts." To support this claim, Smith points to a portion of the change-of-plea hearing transcript where Maliza appears to fumble with his words: "Again, Your Honor, I haven't seen as much. There was some stuff that I did—I don't, I don't think I noticed, but the—certainly, the evidence that pertains to the elements . . . the essential elements of the crime, yes." Smith also complains that he "himself had to speak up to correct his attorney's misrepresentations."

Smith's challenge falls short of demonstrating ineffective assistance of counsel. "An ineffective assistance of counsel claim cannot stand on a blank record, peppered with the defendant's own unsupported allegations of misconduct." *United States v. Hodges*, 259 F.3d 655, 660 (7th Cir. 2001). The district court noted that Smith took Maliza's statements "out of context" and read "far too much into them." The hearing transcript shows that Maliza made the spotlighted statement to confirm that the government presented evidence that met the essential elements of the drug and firearm charges while disagreeing with some of the details. Viewing the statement in context, the district court recognized that Maliza actually demonstrated familiarity with the case. There is no support in the record for the assertion that Maliza made a misrepresentation or that suggests his unfamiliarity with

the case. The district court therefore properly exercised its discretion to conclude that Smith's arguments lack record support and that he was not prejudiced.

B

Smith insists that the district court erred by denying his request for an evidentiary hearing to support his motion to withdraw his guilty plea. We review the district court's decision not to hold an evidentiary hearing for abuse of discretion, *see United States v. Jones*, 381 F.3d 615, 618 (7th Cir. 2004), and its "factual findings, including whether the defendant knowingly and voluntarily entered the plea, for clear error." *United States v. Perillo*, 897 F.3d 878, 883 (7th Cir. 2018).

A motion to withdraw a plea does not automatically entitle a defendant to an evidentiary hearing because "[w]hether to hold a hearing on the plea's validity is a matter left to the trial court's sound discretion." *United States v. Collins*, 796 F.3d 829, 834 (7th Cir. 2015). To illustrate, an evidentiary hearing is not required "if the petitioner makes allegations that are vague, conclusory, or palpably incredible, rather than detailed and specific." *Gaylord v. United States*, 829 F.3d 500, 506-07 (7th Cir. 2016) (internal quotation marks omitted). A district court need not hold an evidentiary hearing if the defendant fails to offer substantial evidence "or if the allegations advanced in support of the motion are conclusory or unreliable." *Collins*, 796 F.3d at 834.

The district court did not abuse its discretion by denying Smith's request for an evidentiary hearing. The only argument that it found as "possibly not a conclusory allegation" was the potential success of the motion to suppress. But the district court explained that the government provided "the uncontested proffer" of independent probable cause to stop Smith and search his car. Because Smith's motion to suppress would not have been successful, no evidentiary hearing was necessary.

III

Smith next challenges his career offender enhancement. According to Smith, his prior conviction for conspiring to traffic cocaine, in violation of 21 U.S.C. § 846, does not constitute a predicate "controlled substance offense" under U.S.S.G. § 4B1.2. We review the district court's application of the Sentencing Guidelines de novo. *United States v. Lewis*, 842 F.3d 467, 476 (7th Cir. 2016).

We look first to the text of the guidelines provisions that Smith disputes. Under § 4B1.1, a defendant is a career offender if: (1) he was at least 18 years old when he committed the offense; (2) the instant offense is a crime of violence or a controlled substance offense; and (3) he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Section 4B1.2, in relevant part, defines "controlled substance offense" as "an offense under federal or state law . . . that prohibits the

manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2. Application Note 1 to § 4B1.2 defines "controlled substance offense" to include aiding and abetting, conspiring, and attempting to commit such offenses. U.S.S.G. § 4B1.2 cmt. n.1. Smith contends that Application Note 1 is an improper expansion of § 4B1.2.

Courts treat the application notes to the Sentencing Guidelines like an agency's interpretation of its own rules. *See Stinson v. United States*, 508 U.S. 36, 44-45 (1993). In *Stinson*, the Supreme Court held that courts must give application notes "controlling weight." *Id.* at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). A corresponding application note is binding authority "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38; *see United States v. Tate*, 822 F.3d 370, 375 (7th Cir. 2016) (same). We apply the application notes as "authoritative glosses on the Guidelines, unless the notes conflict with the text." *United States v. Raupp*, 677 F.3d 756, 759 (7th Cir. 2012), *overruled on other grounds by United States v. Rollins*, 836 F.3d 737 (7th Cir. 2016).

A split of authority exists among many of the circuits as to whether courts are to defer to Application Note 1 when applying § 4B1.2. In *United States v. Winstead*, the D.C. Circuit recognized a conflict between

the text of § 4B1.2 and Application Note 1. 890 F.3d 1082 (D.C. Cir. 2018). It applied the *interpretative* canon *expressio unius est exclusio alterius* to note that § 4B1.2 "presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses." *Id.* at 1091. Given that the text of § 4B1.2 does not expressly include inchoate offenses, the D.C. Circuit concluded that Application Note 1 improperly expands the provision's scope and declined to recognize an attempt crime as a controlled substance offense. *Id.* at 1091-92.

Similarly, the Sixth Circuit in *United States v. Havis* did not extend the definition of controlled substance offense to include attempt crimes. 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam). It emphasized that the application notes to the Sentencing Guidelines "serve[] only to *interpret* the Guidelines' text, not to replace or modify it." *Id.* at 386 (emphasis in original). Because Application Note 1 adds to § 4B1.2's textual definition, rather than interprets it, the Sixth Circuit found the more expansive construction impermissible. *Id.* at 386-87. Finally, the Third Circuit concluded the same in *United States v. Nasir*, 982 F.3d 144, 159-60 (3d Cir. 2020) (en banc). In addition to the *expressio unius* argument, that court raised a separation-of-powers concern—namely, that deferring to the application notes circumvents "the checks Congress put on the Sentencing Commission." *Id.* at 159. The Third Circuit "conclude[d] that inchoate crimes are not included in the definition of 'controlled substance

offenses' given in section 4B1.2(b)." *Id.* at 160. Smith relies on these cases to support his position.

Our court's precedent holds otherwise, and we see no reason here to diverge from it. In *United States v. Adams*, we held that the term "controlled substance offense" encompasses inchoate offenses. 934 F.3d at 729-30. There, the defendant challenged the sentencing enhancement under U.S.S.G. § 2K2.1, which raises the base offense level for a felon-in-possession conviction when the defendant also has a prior conviction for a controlled substance offense. *Id.* at 727. Section 2K2.1's Application Note 1 references § 4B1.2's Application Note 1 for the definition of "controlled substance offense." U.S.S.G. § 2K2.1 cmt. n.1 (noting that "'[c]ontrolled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2"). We concluded that § 4B1.2's Application Note 1 is authoritative and that "controlled substance offense" includes inchoate offenses. *Adams*, 934 F.3d at 729-30. In reaching this conclusion, we relied on *Raupp*, which deferred to Application Note 1 when applying § 4B1.2 and found no conflict between them. 677 F.3d at 759. ("There cannot be a conflict because the text of § 4B1.2(a) does not tell us, one way or another, whether inchoate offenses are included or excluded."). Several other circuits agree. *See, e.g.*, *United States v. Lange*, 862 F.3d 1290, 1294-96 (11th Cir. 2017); *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011); *United States v.*

Mendoza-Figueroa, 65 F.3d 691, 694 (8th Cir. 1995) (en banc).

Smith attempts to distinguish *Adams* from this case but to no avail. He emphasizes that *Adams* dealt with a sentencing enhancement under § 2K2.1, whereas here we address a sentencing enhancement under § 4B1.1. But to distinguish *Adams* would require us to find that there is a conflict between § 4B1.2 and Application Note 1 when interpreting § 4B1.1 but that no such conflict exists when interpreting § 2K2.1. We cannot reconcile Smith's position with our holding in *Adams*.

That brings us to our final issue: does § 4B1.2's Application Note 1 encompass § 846 conspiracy under the categorical approach? The categorical approach asks courts to look to the generic elements of a crime, rather than the facts underlying how the crime was committed, when determining whether a prior conviction is a "controlled substance offense." *United States v. Smith*, 921 F.3d 708, 712 (7th Cir. 2019). A "generic" version of an offense means "the offense as commonly understood." *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). "If the elements of the crime of conviction are the same as, or narrower than, the elements of the generic version of the offense, the crime of conviction qualifies as a predicate offense." *Smith*, 921 F.3d at 712 (citing *Mathis* 136 S. Ct. at 2247-48).

Smith thinks that under the categorical approach, his § 846 conspiracy conviction does not qualify as a predicate "controlled substance offense." He points to

decisions from other circuits that have concluded Application Note 1 does not include § 846 conspiracy. *See, e.g.*, *United States v. McCollum*, 885 F.3d 300, 308-09 (4th Cir. 2018); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016). These decisions found generic conspiracy to require an overt act in furtherance of the conspiracy. Because § 846 lacks an overt-act requirement, Smith asserts, it "criminalizes a broader range of conduct than that covered by generic conspiracy." He adds that a § 846 offense does not fall within the ambit of § 4B1.2's definition of "controlled substance offense."

The Second Circuit recently took a different approach in *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020). The defendant in *Tabb* argued that Application Note 1 covers only "generic" conspiracy, and by implication, excludes the broader § 846 narcotics conspiracy. *Id.* at 88. The Second Circuit disagreed. It first explained that generic conspiracy encompasses § 846 conspiracy because "[t]he essence of a conspiracy is an agreement by two or more persons to commit an unlawful act." *Id.* Although it recognized that common law often required an overt act as an element of a conspiracy offense, the Second Circuit found the requirement unnecessary given that "Congress has chosen to eliminate this requirement in the case of several federal crimes, most notably narcotics conspiracy." *Id.* (citing *United States v. Shabani*, 513 U.S. 10, 14-15 (1994)). The court concluded that reading Application Note 1 to cover § 846 narcotics conspiracy would best preserve the internal consistency

of the Sentencing Guidelines. *Id.* (noting that the defendant's reading would "require finding that term 'conspiracy' includes Section 846 narcotics conspiracy in some parts of the guidelines, but not others" (citations omitted)). Other circuits have drawn similar conclusions. *See, e.g.*, *United States v. Rivera-Constantino*, 798 F.3d 900, 903-94 (9th Cir. 2015); *United States v. Rodriguez-Escareno*, 700 F.3d 751, 753-54 (5th Cir. 2012).

We agree that Application Note 1 encompasses § 846 conspiracy. First, the plain language of Application Note 1 unambiguously includes conspiracy as a "controlled substance offense." U.S.S.G. § 4B1.2 cmt. n.1. We find no reason to construe the word "conspiring" in Application Note 1 to exclude § 846 conspiracy, especially given that an overt act is not always a required element in the narcotics conspiracy context.

Second, the narrow reading that Smith proposes would lead to conflicting textual and structural consequences. Under his reading, a § 846 conspiracy would constitute a controlled substance offense when interpreting § 2K2.1, as we do in *Adams*, but not when interpreting § 4B1.1, as we do here. It would also mean that the Sentencing Commission, when it included the term "conspiring" in § 4B1.2's Application Note 1, intended to exclude *federal* conspiracy from the *federal* Sentencing Guidelines. *See Tabb*, 949 F.3d at 88 (citing *Rivera-Constantino*, 798 F.3d at 904). That cannot be, so we are not persuaded by Smith's interpretation. Considering that "identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp. v.*

Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007), we conclude that reading § 4B1.2's Application Note 1 to include § 846 conspiracy would best preserve the internal consistency of the Sentencing Guidelines and avoid any textual or structural pitfalls. Smith's § 846 conspiracy conviction is thus a valid predicate offense under § 4B1.1, and the district court correctly applied the career offender enhancement to his sentence.

IV

For these reasons, we AFFIRM the district court's decision.

APPENDIX B

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA v. Martez Smith	**JUDGMENT IN A CRIMINAL CASE** (Filed Jan. 15, 2020) Case Number: 18-cr-20037-001 USM Number: 08988-028 J. Steven Beckett Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 and 2

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

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

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC § 841(a)(1)	Distribution of 50 grams or more of Methamphetamine	7/9/2018	1
21 USC § 841(b)(1)(B)			
21 USC § 922(g)(1)	Possession of a Firearm by a Felon	7/27/2018	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____
☐ is ☐ are dismissed on the motion of the United States.

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

1/14/2020
Date of Imposition of Judgment

s/Michael M Mihm
Signature of Judge

Michael M Mihm U.S. District Judge
Name and Title of Judge

1/15/2020
Date

IMPRISONMENT

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

214 months on Count 1 and 120 months on Count 2, to be served concurrently

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

It is recommended that the defendant serve his sentence at the lowest security facility as close to his family in Mattoon, Illinois as possible, specifically FCI Terre Haute. It is further recommended that he serve his sentence in a facility that will allow him to participate in the Residential Drug Abuse Program and maximize his exposure to educational and vocational opportunities.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

8 years on Count 1 and 3 years on Count 2, to be served concurrently

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the following conditions:

1. The defendant shall not knowingly leave the federal judicial district without the permission of the court or probation officer.

2. You shall report to the probation office in the district to which you are released within 72 hours of release from custody. You shall report to the probation officer in a reasonable manner and frequency as directed by the court or probation officer.

3. The defendant shall follow the instructions of the probation officer as they relate to the defendant's conditions of supervision. Any answers the defendant gives in response to the probation officer's inquiries as they relate to the defendant's conditions of supervision must be truthful. This condition does not prevent the

defendant from invoking his Fifth Amendment privilege against self-incrimination.

4. The defendant shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.

5. The defendant shall permit a probation officer to visit the defendant at home or elsewhere between the hours of 6:00 a.m. and 11:00 p.m., unless investigating a violation or in case of an emergency. The defendant shall permit confiscation of any contraband observed in plain view by the probation officer.

6. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

7. The defendant shall not knowingly be present at places where controlled substances are illegally sold, used, distributed, or administered.

8. The defendant shall not knowingly meet, communicate, or otherwise interact with a person whom he knows to be engaged, or planning to be engaged, in criminal activity.

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

ADDITIONAL SUPERVISED RELEASE TERMS

9. You shall not purchase, possess, use, distribute, or administer any controlled substance or psychoactive substances that impair physical or mental functioning except as prescribed by a physician. You shall, at the direction of the U.S. Probation Office, participate in a program for substance abuse treatment including not more than six tests per month to determine whether you have used controlled substances. You shall abide by the rules of the treatment provider. You shall pay for these services, if financially able, as directed by the U.S. Probation Office.

10. The defendant shall attempt to secure regular and lawful employment, unless excused by the probation office for schooling, training, or other acceptable reasons. The defendant shall keep the probation officer advised of any changes in his employment status.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

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

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$ $0.00	$ $0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18

U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

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

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

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 117-22.

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

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of

criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, vs. MARTEZ SMITH, Defendant.	)	Docket No. 18-cr-20037 Peoria, Illinois January 14, 2020

RECORD OF PROCEEDINGS
SENTENCING HEARING
BEFORE THE HONORABLE MICHAEL M. MIHM
UNITED STATES DISTRICT JUDGE

(Filed Jan. 6, 2021)

THE APPEARANCES

BRYAN DAVID FRERES, ESQ.
Assistant U.S. Attorney
201 South Vine
Urbana, IL 61802
On behalf of the Plaintiff

STEVE BECKETT ESQ.
Beckett Law Office, P.C.
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On behalf of the Defendant

Nancy Mersot, CSR, RPR
United States District Court Reporter
100 N.E. Monroe Street
Peoria, IL 61602

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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[3] (In open court, 2:00 p.m.)

THE COURT: Good afternoon.

MR. FRERES: Good afternoon.

MR. BECKETT: Good afternoon.

THE COURT: This is the case of the *United States of America v. Martez Smith*, criminal number 18-20037.

The defendant is in court represented by his attorney Steven Beckett.

The United States is represented by Bryan Freres.

The matter is set today for sentencing.

The defendant previously entered a plea of guilty to Count 1 of an indictment charging distribution of 50 grams or more of methamphetamine, and Count 2 charging possession of a firearm by a felon.

MR. BECKETT: Judge, may I correct that? He actually pled guilty to less and [sic] 50 grams.

THE COURT: Oh, he did?

MR. BECKETT: Yes.

THE COURT: Thank you.

MR. BECKETT: Thank you, Your Honor.

THE COURT: The Court directed the probation office to prepare a written Presentence Report.

[4] That was done. Copies were made available to everyone including the defendant.

Mr. Beckett, have you had a reasonable opportunity to read the report and review it with your client?

MR. BECKETT: I have, Your Honor.

THE COURT: As I understand it, you've identified three objections: two of them in the standard format, and an additional one in your sentencing commentary.

MR. BECKETT: That's correct, Your Honor.

THE COURT: Well, let's take these one at a time.

The first one is an objection to the inclusion of 425 grams of methamphetamine. As I understand it, the objection is that, that information comes from the confidential informant and is not credible and shouldn't be used to have such a dramatic effect on where we end up here.

MR. BECKETT: Yes, Your Honor. And I have spoken with Mr. Freres. I do have—I mentioned in my sentencing commentary that I had some additional information about the confidential source that I wanted to present to the Court, but I do not want to identify the confidential source. We discussed [5] doing that sort of off the record.

THE COURT: Where are we on this? Does either side wish to present evidence on this issue?

MR. BECKETT: I only wish to present these criminal cases involving the confidential source, and I've spoke to Mr. Freres about that and make those part of record under seal.

MR. FRERES: Your Honor, the government's position on this is that the Court actually addresses the third objection first, the career offender provision; and that these two other objections are not necessary to resolve because they are subsumed in the career offender provision itself.

The government's position is not—I don't necessarily—obviously, I'm not going to present a witness here today to identify the specific drug amount, but I do think that it's credible to argue that the defendant's a multi-ounce drug dealer based on the unobjected to portions of the PSR, so that's my intention for today.

THE COURT: It seems to me that all of the objections are relevant. You're saying that if I rule in your favor on the career criminal, that the others becomes moot. It does in one sense, but it [6] doesn't in another because the guideline or the place where I actually set the guideline range is certainly an important part of the record in the case.

Now, if defense counsel agrees that they address the other matter first, and if I agree with the government that this is moot, I will go along with that.

MR. BECKETT: I think that I have a responsibility to argue each objection, even if you were to agree with the government on the third objection. I

would have a responsibility to make a record on the other two.

THE COURT: Okay.

MR. FRERES: And just for simplicity sake, Your Honor, the second objection I don't have an issue with. We can—as far as the two-level enhancement, I don't have a problem with it—the Court accepting the defendant's objection.

With regard to the drug weight, you know, again, I'm not going to present the witness. I do think that we have unobjected to portions of the PSR that can get us to an amount. But the one that I honestly care about the most is the third objection.

THE COURT: I'm glad to know that.

[7] MR. BECKETT: So may we approach so that I can show you this?

THE COURT: Yeah.

Have you seen this stuff?

MR. FRERES: Yes, I have, Your Honor.

THE COURT: Let me take a look at this.

(Pause.)

THE COURT: So you're saying this is the informant?

MR. BECKETT: This is the informant. This is—

THE COURT: So you're saying that—

MR. BECKETT: These are subsequent to the—so, in other words, these events all occurred in July of 2018. She was first arrested—I should say, he or she was first arrested in October, in Douglas County. That case was dismissed. Then he or she was arrested in January in Coles County. That case was presented. You have the record showing that the person was convicted of unlawful delivery of meth and sentenced to six years IDOC. Then brought to Douglas County and had a second conviction in Douglas County, also for unlawful delivery with a concurrent six years at IDOC.

We say those go both to the credibility of [8] the information for the enhancement and also the credibility of the person for 3553(a).

THE COURT: Okay.

MR. BECKETT: So we would ask that you take that under seal.

THE COURT: To become part of the sealed record?

MR. BECKETT: Yes.

THE COURT: Do you have any objection to that?

MR. FRERES: No, Your Honor.

THE COURT: All right.

MR. BECKETT: Thank you, Your Honor.

THE COURT: So neither side is planning to call witnesses on this?

MR. FRERES: No, Your Honor.

With regard to, I think, a simplistic way to resolve the drug amount. If you look at the paragraphs 9, 10, and 11, paragraph 9 sets exactly what the defendant was selling his methamphetamine for. He was selling two ounces for $1,800.

In paragraph 10, you see that that's exactly what he did. He sold two ounces for $1,800.

In paragraph 11, it came out during the recorded conversations that weren't objected to, [9] that the source owed him $3,600 for previously fronted meth, which would be an additional four ounces. So the floor here is at least six ounces of methamphetamine.

With regard to the actual amount, again, the government's position is that the career offender provision will subsume this in the guidelines. So the actual, the Court can calculate the amount but it doesn't make a difference on the—it doesn't make a difference on the actual guideline numbers is the government's position. So I wouldn't object to six ounces being the relevant conduct amount and again that enhancement.

THE COURT: Let me ask defense counsel: So you are suggesting that I make a finding of six ounces?

MR. BECKETT: Well, the difficulty I am having with that is the defendant was charged with

more than six. We have no lab analysis. When the lab was done in this case, the quantity wasn't accurate at all. So how can I agree that there's six ounces for purposes of the sentencing?

THE COURT: The amounts that are discussed in paragraphs 9 and 10, were they tested?

MR. BECKETT: No. The only one that was [10] tested was the amount from the controlled buy.

THE COURT: So the controlled buy was the one in paragraph 9.

MR. BECKETT: That's correct.

THE COURT: Well, the 425 ounces.

MR. BECKETT: No the 46—I'm sorry—it's 10, paragraph 10, the 46.9.

So if, in fact, you were to accept the government's position, which I understand the reasonableness of what the government's arguing, because of the 3,600—

THE COURT: So the government only actually has possession of the 46.9 grams?

MR. BECKETT: That's correct.

THE COURT: Is that correct? And that was tested?

MR. BECKETT: That's correct.

THE COURT: All right. Well, this is always a mess in these cases from my point of view because on

one hand it may be because of what is set out here that what the confidential source is saying is absolutely accurate. On the other hand, there's no way to test it by cross-examination, for example, and it may be way off. I think the only thing that I can do here at this point is to hold him [11] responsible for the 46.9 grams.

I have had cases where the government has called the confidential informant and have them testify under oath, but, anyway—46.9 grams.

MR. MILLER: Your Honor, may I? One thing that I've done and I've had our various judges do in previous cases, again, paragraph 11 is unobjected to, so the idea that $3,600 was owed for previously fronted drugs—

THE COURT: Hold on a minute. You may be right about that. Hold on.

MR. FRERES: And if—

THE COURT: Hold on.

MR. FRERES: I'm sorry, Your Honor.

THE COURT: So, you're saying in paragraph 11 there was—during the recorded conversations between the informant and the defendant, it came out that the defendant owed him $3,600?

MR. FRERES: The source owed the defendant $3,600 for previously fronted drugs.

THE COURT: Okay. So how much would that be?

MR. FRERES: My position, Your Honor—

THE COURT: Three ounces?

MR. FRERES: We know from paragraph 10 if [12] this was arranged as a two-ounce transaction and what he got, what the source got was 49.9 grams of "ice." So $3,600 would be four ounces. So it would basically be 46.9 times 3 to get to the "ice" amount, which would be 140.7 grams of "ice." That's the government's position for what this portion—

THE COURT: Okay.

MR. BECKETT: I accept that logic, Judge.

THE COURT: Okay. That's fine. So we are talking 140 grams?

MR. FRERES: Yes, Your Honor. 140.7.

THE COURT: Okay. 140.7. Great.

The second one has to do with the enhancement for a handgun.

Does either side wish to present evidence on this one?

MR. BECKETT: No, Your Honor.

MR. FRERES: No, Your Honor.

THE COURT: All right. I would like to hear the government's argument then on this.

MR. MILLER: Your Honor, well, my position is that I don't—again, if you take the gun guidelines, his gun guidelines would be level 30.

He possessed the firearm, but he possessed it—again, I'm not necessarily objecting, I [13] conceded, I think, this objection.

So the two levels though, I mean, there is credible argument that it could apply given that they had arranged a three-ounce drug transaction over a continuing course of conduct.

THE COURT: If I understand your argument, you're saying the gun was in the car, and the gun was in the car at a time when he was stopped while he was supposedly perhaps conducting a counter-surveillance or something like that; that there had been an arrangement for him to sell an amount of methamphetamine, but there was no methamphetamine in the car at that time.

MR. FRERES: Correct. So the—as far as the—what we see from paragraphs 9, 10 and 11 is that this source and the defendant had an established relationship, a drug relationship. A history that involved multiple ounces of methamphetamine. So on this instance, they arranged for a three-ounce transaction the defendant didn't have. But yet he was still driving around expecting to meet the source. So the source is going there expecting to buy drugs. The defendant had arranged a drug transaction and is carrying the firearm. So my argument would be that this is an established [14] course of conduct involving a firearm. The

danger is all say the same. The source is going there expecting a drug transaction, and the person they are meeting doesn't have the drugs but they have a gun, which presents all of the problems that the guidelines are associated with, are concerned with.

THE COURT: Okay. Thank you.

What's the response?

MR. BECKETT: Well, my response is that the source of information about whether there's going to be a drug transaction is the confidential source. The confidential source has told these people *he is meeting with me and he is going to have, going to have drugs.* And so they stop him and he doesn't have drugs. And then they interview him and ask for consent to search his apartment and he gives consent to search his apartment and he doesn't have drugs, but he does have a gun in the car.

THE COURT: All right. I'm going to adopt the defendant's position on this one. I don't think the government has established this by a preponderance of the evidence. At the time he was stopped, there was no meth in the car.

The third objection is one that would affect the career, career offender guideline. And as I [15] understand that, the objection is that one of the crimes was the crime of conspiracy. And it's your position that conspiracy should not be counted for that?

MR. BECKETT: That's correct. I tried to put it—set it out pretty succinctly in the objections

regarding the contrary authority in another circuit. But I've also pointed out to you the authority that the Seventh Circuit—I have the responsibility to tell you.

THE COURT: I appreciate that. We know the guideline; it doesn't address it. It is addressed in the application note. And you're saying that that's not as good as the guideline.

But there are two cases that seem to address this. One, they are both Seventh Circuit cases. One of them is the—*U.S. v. Anderson*, 766 Fed appendix 377. In that one the Court says "adopting this reasoning, other courts routinely have affirmed sentencing enhancements under ACA based on convictions for attempt and conspiracy to manufacture, distribute or possess with intent to distribute.

And then we've got one from our own court, which is the *U.S. v. Adams*. It was just [sic] Shadid's [16] case where they talk quite a bit about this and talk about how some of the other circuits have gone the other way. But as I understand it, they clearly, they clearly say the conspiracy would be included. Am I incorrect about that?

MR. BECKETT: No, I think that's what I said. I think that it might—

THE COURT: Would you recognize a duty on my part to follow Seventh Circuit law?

MR. BECKETT: Absolutely, Judge, but I have a duty on my client to make—

THE COURT: I understand. I assume what I've just said you would agree with.

MR. MILLER: I agree with, Your Honor; yes.

THE COURT: So, I'm going to deny that objection.

So, let's see. What's the net effect of all of that? Hold on. Just a minute.

So the two level for possession of the firearm, that's out. That's paragraph 26. That becomes a zero.

And the—paragraph 25, the amount drops down from 471.9 to what, 140?

MR. FRERES: 140.7.

THE COURT: Kendrick, how would it change [17] that?

PROBATION OFFICER: It would change the base offense level to a 30.

THE COURT: 30. Okay. But then because of the career offender at 37, that would stay at 37, so we would still end up with a total offense level of 34, correct?

Okay. Do you have any objections to the report?

MR. BECKETT: I do not, Your Honor.

THE COURT: Thank you.

Mr. Smith, have you had a reasonable opportunity to read this report and review it with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Based on your reading and review, other than the matter that we've already addressed and I've ruled on, is there anything else in the report that you feel is inaccurate or incomplete that you wish to challenge?

THE DEFENDANT: No, Your Honor.

THE COURT: You understand you have the opportunity to present evidence in mitigation here this afternoon; you also have the right to make a statement to the Court on your own behalf before [18] you—before I impose sentence? Do you understand?

THE DEFENDANT: Yes, Your Honor.

MR. BECKETT: Your Honor, I do indicate—

THE COURT: I'm sorry.

MR. BECKETT: I did indicate to Mr. Freres and your chambers that the defendant's mother and the mother of his child wish to speak briefly to you and testify.

THE COURT: Okay. That's fine. Do you have any evidence to present?

MR. FRERES: No, Your Honor.

THE COURT: All right. Go ahead.

MR. BECKETT: Thank you.

I will call Shenelia Currie.

THE COURT: Will you come up front, please? All the way up. All the way up here, please. Thank you.

And raise your right hand to be sworn.

(Witness sworn.)

THE COURT: Have a seat right here, please. Watch your step.

All right. Keep your voice up so we can all hear you.

SHENELIA CURRIE,

after having been duly sworn, testified as follows:

[19] DIRECT EXAMINATION

BY MR. BECKETT:

Q. State your name for the record.

A. Shenelia Currie.

MR. BECKETT: And you have the spelling, correct? (To court reporter.)

BY MR. BECKETT:

Q. And you're Martez Smith's mother; is that correct?

A. Yes.

Q. Where do you live?

A. 1817 South 9th Street, Mattoon, Illinois.

Q. The Presentence Report tells us that Martez had two brothers, correct?

A. Yes, sir.

Q. All right. And it also tells us that they have passed away; is that right?

A. Yes.

Q. You wanted to explain to the judge, when did the oldest brother, Bartholomeus, when did he pass away?

A. December 25th. And my youngest, he passed May the 17th.

Q. Okay. So that was December of 2018 and May of 2019; is that correct?

A. Yes. Yeah.

[20] Q. When I spoke to you last week, you told me that you were actually in court in Coles County; is that right?

A. Yes. We been having a jury trial since Monday. We just—it just got over with Friday.

Q. Okay. And this is the person who killed your younger son, Mark; is that right?

A. Yes, sir.

Q. And he was convicted of murder; is that right?

A. First degree murder on two counts.

Q. All right. Now, during the period of time that your two sons have died, Martez has been in custody; is that correct?

A. Yes.

Q. Your son, Martez?

A. Yes.

Q. Now, have you had contact with him during that period of time?

A. Yes, sir.

Q. Tell the Court how you've had contact with him.

A. He call me and I go visit him once a week. And—

Q. How would you describe your relationship with your son?

A. We have a good relationship. We—

[21] Q. Has he been able to provide comfort and support to you during this period of time?

A. Yes.

Q. Okay. Now I asked you if you wanted to write a letter and you felt uncomfortable writing a letter. So I told you that you would be able to say to the judge whatever it is you wanted to say regarding the decision he has to make, so why don't you do that.

A. I would—I would—Martez is the only support I have right now. He's my only son I have got left. I would just like you to have a little leniency with him and let him be able to come back home to me and his kids.

MR. BECKETT: Okay. Thank you, Your Honor. I have no other questions.

MR. FRERES: No.

THE COURT: All right. Thank you very much, ma'am. You may step down. Be careful stepping down.

Thank you.

MR. BECKETT: I'm going to ask Miss Currie to take the baby outside the courtroom because—

THE COURT: Sure, that would be great.

MR. BECKETT: Thank you.

THE COURT: Would you raise your hand, [22] please, to be sworn.

(Witness sworn.)

THE COURT: Have a seat here, please.

KIARA WILLIAMS,

after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BECKETT:

Q. Please state your name.

A. Kiara Williams.

Q. And what's your address?

A. 2514 Buckster Drive, Mattoon, Illinois.

Q. Okay. Now, the baby that you had here in court is your and Martez Smith's baby; is that correct?

A. Yes.

Q. What's his name? What's the baby's name?

A. Martez, Jr.

Q. How old is he?

A. He's one year's old.

Q. So during the period of time after the baby was born up until now, Martez has always been in custody; is that correct?

A. Uh-huh.

Q. Is that yes?

A. Yes. I'm sorry.

Q. And would you explain to the Court how you [23] maintained contact with Martez during this period of time?

A. I usually go see him twice a week and he calls me every day.

Q. All right. Do you feel that Martez has a relationship with your child?

A. Yes, I do.

Q. Martez has a child—another child, an older girl Mar'Tezia; is that right, am I saying that right?

A. Uh-huh.

Q. Is she part of this extended family as well?

A. Oh, yeah, most definitely; that's my stepdaughter.

Q. You actually wrote a letter, I included with the judge, although it was written some time ago and you asked me to allow you to say something else to the judge. So, if you would, please, whatever else you would like to say to the judge.

A. Yeah. I'm just asking if you could be as lenient as possible. Martez is a really wonderful father and a really wonderful person. And I believe that he deserves a second chance at life. And I'm just asking if you could be as lenient as possible.

MR. BECKETT: All right. Thank you.

[24] I have no other questions, Your Honor.

THE COURT: All right. Thank you very much. You may step down.

MR. BECKETT: No other witnesses, Your Honor. Thank you.

THE COURT: All right. So the sentencing profile in this case is a total offense level of 32 now? No, it's still 34. I'm sorry.

PROBATION OFFICER: Yes, Your Honor.

THE COURT: 34, a Criminal History Category VI; a custody range on Count 1 of 262 to 327, and on Count 2, 120; supervised release as to Count 1, eight years to life, as to Count 2, one to three years; the fine range is 35,000 to 8 million; there's no element of restitution; and a special assessment of $100.

MR. BECKETT: I think it might be $200.

THE COURT: I'm sorry, $200.

Mr. Freres, do you have a statement to make?

MR. FRERES: Is the Court ready for argument?

THE COURT: Yes.

MR. FRERES: May it please the Court, Mr. Beckett.

MR. BECKETT: Counsel.

[25] MR. FRERES: Your Honor, the government's recommendation in this case would be the low end of the Sentencing Guideline range for Count 1, along with 120 months for Count 2, to run concurrent with supervised release terms; at the minimum, the

eight years on Count 1, and then the three years on Count 2, again, to run concurrent.

I'm not asking for any sort of a fine or anything.

Calculating relevant conduct as the Court noted is often inartful. It is not a perfect science. Whenever our law enforcement sets out to investigate a drug trafficking network, the best they can always do is capturing a very small portion of whatever the greater whole is.

Sometimes pieces though of the investigation itself gives you a little bit more insight into the capacity of a drug dealer. Obviously, the source wasn't here to testify today, but we do know from the unobjected to portions of the PSR, sort of what the defendant was up to.

We know from paragraph—at the end of his arrest, the defendant gave a statement. In paragraph 15 he acknowledged that he was able to get large quantities of methamphetamine from a source in [26] Kentucky. We know that over at least two instances, he delivered six ounces of "ice" to the confidential source, and had arranged a third instance for over three ounces. So what you can see from this is that a multi-ounce distribution to this individual was not an uncommon practice.

The drug trafficking trade is not something that—I can't walk up to a drug dealer on the street and just, say, *Hey, I want to buy multiple ounces.* It's based on relationships; it's based on history.

So we know from the unobjected to portions of the PSR, the defendant is a multi-ounce methamphetamine dealer. We also know that he is willing to carry firearms, and, in particular, a firearm involving an extended magazine that had a capacity for 30 bullets, which there is absolutely no purpose on planet earth for an extended magazine on a handgun except to instill fear or whatever the case may be. It is not something that is needed for any sort of lawful purpose.

So when you combine these things, you get a multi-ounce drug dealer, methamphetamine dealer, that is willing to carry firearms. That is a significant danger that the guidelines have always [27] tried to account for.

In particular in this case, the defendant is a career offender. When you look at the career offender, the history, the policy statement, it suggests that it wants the Court to sentence certain people at or near the maximum, that's the language used in the guidelines itself. And that's the defendant in this case. It's very rare. I know the Court has been doing this a long time. At least for the ten or so years I've been doing this, I see very few cases involving individuals who have a prior federal conviction, serve out their time on supervised release, get a violent felony and then come back for a second federal conviction. Usually when you get the benefit of our excellent probation office and those services through the first go around, even with revocations people tend to get their life cleared up, but the defendant didn't in this instance. He went out and committed a violent act, and then he became what we

have here today, which is the multi-ounce methamphetamine dealer carrying firearms during drug deals.

So when you piece all of this together, I do think a significant sentence is appropriate here. Obviously the prior federal sentence didn't serve [28] any form of deterrence. The defendant just escalated.

So the government's request I think is to follow the guidelines, to follow the policy statements and sentence the defendant within the guidelines specifically at the low end.

Does the Court have any questions for me?

THE COURT: No.

MR. FRERES: Thank you, Your Honor.

THE COURT: Mr. Beckett.

MR. BECKETT: May it please the Court, Mr. Freres.

The government's position I think still is that you get to take what the confidential source said and magnify it as much as you possibly can to treat the defendant as if he was a major level drug dealer. He certainly is not the street user, small quantity, but he's not the drug dealer of the magnitude that the government is arguing.

The basic premise that I have under 3553 is that the enhancement or the argument is based on the credibility of this confidential source. And the confidential

source cannot even live up to a confidential source agreement, which is to stay out of trouble.

[29] And having represented confidential sources, one knows how they tend to exaggerate and magnify what they have. So we ask that you take that into consideration in deciding just exactly what level Mr. Smith is.

With regard to his character, there's one small thing in a letter that I saw in there that I thought spoke of the kind of character that he is. There was a time when his daughter, who lived in Indianapolis with her mother, could be brought to him and he could have custody of his daughter because the daughter's mother was having poor economic circumstances; she couldn't pay rent; she became homeless. And instead of just snatching the daughter and saying, *Ah-ha, now I have got custody*, Mr. Smith brought the mother and the daughter to Mattoon where he supported them. And that speaks of a defendant who is trying to support himself and support his family in a way that society doesn't accept and certainly is unlawful and for which he is going to be sentenced here today; but it demonstrates, I think, the kind of character that he has, maybe a street wise character, but it's still appropriate.

We've indicated in our sentencing commentary [30] that we feel that 10 to 12 years is a long, long time, Judge; that's a long sentence. And that those are appropriate. And that the career—the career criminal guidelines—here is what happens: He is Category III; he is all of a sudden Category VI. Statutorily, he becomes a

mandatory minimum of 10 years because of 851 on a prior conspiracy. And then the prior conspiracy also boosts him into career criminal status. We submit, Your Honor, that's a heavy, heavy, heavy weight on the scale of justice in this case.

So, we are asking for some measure of lenience if the Court in your discretion feels that's appropriate.

We did note in there that—I've gone over the conditions of supervised release. The defendant understands them. You don't have to read them or explain any reasons why.

He would like to be recommended for Terre Haute or some other facility that is close to Mattoon as possible so that he can have his relationship with his family.

THE COURT: Let's talk about the conditions of supervision for a moment. Probation sent those out to both sides. Did you sit down with your [31] client and carefully and go over them?

MR. BECKETT: I did, Your Honor.

THE COURT: Does he have an objection to any of them?

MR. BECKETT: He does not, Your Honor.

THE COURT: Does he waive word-for-word reading of them?

MR. BECKETT: He does, Your Honor.

THE COURT: Do you also waive?

MR. FRERES: Yeah. I'm sorry. Yes, Your Honor.

THE COURT: Thank you.

MR. BECKETT: Thank you.

THE COURT: Sir, actually you can stay seated if he wishes.

Pull that microphone over in front of you and keep your voice up.

Is there anything you would like to say on your own behalf before I impose sentence?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Please go ahead.

THE DEFENDANT: As I sit here before you today, I can't help but to admit that I'm a little scared. I've never been in a position where I have ever faced as much time before, and the thought [32] frightens me.

During the 18 months that I have been incarcerated, I have had time to sit and think about the role that I played as a drug dealer, and I also understand the seriousness of it.

I caught my first and only drug conviction in 2008 when I was 19 years old, and at the time it was the first charge that I had, and it was a conspiracy charge. Back then I was young and ignorant of my actions and I felt as though I didn't get caught for selling drugs because I actually wasn't. The people that I was dealing with

was, and I didn't realize that by me knowing they were, I was conspiring with them.

Your Honor, I do understand the role that I played this time around and I'm ashamed of it. I allowed my addiction, greed, selfishness, and self-gratification to cloud my better judgement. During the short period of time that I was finally able to provide for my family financially. I was lying though. I was taking from other people's families and putting my own life in jeopardy.

My current situation has made me realize that every action has a reaction. And I'm sorry that my actions has caused other people pain and [33] suffering, and for that I'm very remorseful. These last 18 months has been the most hardest and difficult time of my life. Before I got locked up, I was a full-time dad. I had full custody of my daughter. But since I've been locked up, I haven't seen my baby one time and that alone hurts me. I figure I will get so much time that my daughter may be in bad situation in an environment due to the bad parental skills on her mother's behalf because she treat my daughter like a friend instead of a child, and I feel that she's forcing her to grow up too fast. I know that I might not be considered the best parent because of my current situation, but I've made my daughter my first priority and never exposed her to what I was doing.

Since my incarceration, I was blessed with my first and only son and that makes me and his mom have six kids total. For the sake of all of our kids, it's important, it's imperative that I change my ways and become a

positive and productive role model to our children. I'm done with the fact that I wasn't present to see my first son born. My older brother was murdered three days later. I was unable to attend his funeral, and then five months later my youngest brother was murdered. In the middle of [34] three boys, I never would have thought that I would lose both of my brothers in a five-month span.

I can't begin to tell you how much it hurt me especially while being locked up and to know that I'm the only remaining child my mom has left, and I can't be there to console her. The pain that I see on her face during our visits kills me and make me realize how much she needs me out there with her. As it stands, me and my kids are all she has left of her bloodline because neither one of my brothers had kids.

I plan to take the time that I'm sentenced to fully rehabilitate myself and grasp as many trades as I can as well as take educational programs provided for me so that I can be successful upon my release and never have to involve myself in any illegal activities ever again.

Your Honor, I just don't have it in me to be a part of this lifestyle anymore. I'm so tired of doing time and giving away my years to the system especially when I know that it's going to be the same.

I'm determined when I get out to get me a job that I can make a career out of it and help my fiancée raise our kids while I show my mom that I [35] will be okay, and that I will make something of myself before her

time is up. I want her to know that I did become a hard working man and provide for my family in a legitimate may.

Truck driving is a field that I will be pursuing upon my release, if I don't qualify with one of the trades provided for me in prison.

Your Honor, I stand before you today begging to actually to please be as lenient on me as you possibly can and please don't too harshly hold my past against me and know I can still have a bright future ahead of me and that's what I'm looking for.

I read a quote that says, "As a child, I thought as a child. When I grew up, I put those childish thoughts away." I want you and this court to know that I put childish ways of thinking away.

Your Honor, I stand before you today no matter the outcome ready to be a man. Thank you for allowing me to speak, Your Honor.

THE COURT: All right. Thank you very much.

The Court adopts the factual findings and guideline application as contained in the Presentence Report.

I'm first to look at the facts of the crime, criminal activity involved. This has been [36] characterized, the amount of methamphetamine that you actually sold is subject to serious question, but there's no doubt in my mind reading this Presentence Report that you were a dealer, dealing in large amounts of methamphetamine.

There's just no doubt about that. And there's no doubt that you carried this gun in the car. Although at the time you were stopped by the police, you didn't have any methamphetamine on you at that time. So this, this is a very—this is a serious, a serious drug crime.

I would also note this firearm, that you had had an extended magazine capable of carrying I think 20.

MR. FRERES: 30 Your Honor.

THE COURT: Okay. That's a pretty serious weapon. I'm not quite sure what you thought that you might do with that. Looking at your background, at the age of 19, you were convicted of conspiracy to possess with intent to distribute and to distribute in excess of 50 grams of crack cocaine. That was in the Southern District of Indiana. You were sentenced to 57 months imprisonment and three years supervised release. Your supervised release began in September of 2011.

[37] In November, there was a Petition to Revoke and that was granted and you were sentenced to 13 additional months.

That was due to your arrest for possession of a firearm and for charges of burglary resulting in bodily injury.

And then in 2012 at the age of 23, attempted armed robbery. You entered the residence of the person with the intent to rob. You were in possession of a firearm. The burglary charges were dropped. You were sentenced to seven years for that. I'm not quite sure I understand this. You were received by the Indiana

Department of Corrections in April of 2013 and released in December of 2014. It doesn't sound like seven years, but whatever.

So you end up with a total criminal history score of VI.

A bunch of other arrests that did not result in a conviction and I did not consider those in imposing sentence.

And personal and family history is absolute disaster. Your father was stabbed to death at the age of 32 when you were six years old. Your brother Bart was shot and killed in December 2018 in [38] Atlanta. Your other brother, Mark, was shot and killed at the age of 29 in Mattoon, Illinois. And then your mother was convicted of manslaughter and served time in prison for that. Not a good childhood. It looks like you've made sincere efforts to try to care for your daughter. You have one son that I think was just recently in the courtroom. Good physical condition. No history of mental or emotional health problems.

In term of substance abuse: It looks like marijuana, alcohol. You did complete a—successfully complete a residential substance abuse treatment program. That's great.

You don't have—oh, you do have a GED. That's very good.

Your net worth is zero.

The sentence that I impose should reflect the seriousness of the offense, promote respect for the law, provide just punishment, provide adequate deterrence to others, and specifically deter you from further criminal conduct.

This sentence is going to be a major life altering event for you because you're going to be going away for a long time, and how you spend your time while you're away will in large part determine [39] how you spend the rest of your life. If you go off to prison and listen to all of those voices saying *it's okay, it's not your fault, you couldn't have done any differently. You couldn't have made it. You won't make it.* If you listen to those voices, then when you do get out, you won't make it. You have to find a new strength inside of yourself, certainly, to cover those very dark days when you're going to be in prison, but also looking forward to coming out into the light and hopefully living the rest of your life in a meaningful way.

These—there's no way that based on this record that I can do what your attorney is asking me to do. I also believe that the bottom of the guideline range on Count 2 is too high. So I'm going to be reflecting that in my sentence. Excuse me. The bottom of the guideline range on Count 1 is 262.

Pursuant to the Sentencing Reform Act of 1984, the defendant is hereby committed to the custody of the Bureau of Prisons for a period of 214 months. That's four years less than the bottom of the guideline range.

That term will consist of 214 months on count—on count—let's see. Hold on. I'm [40] sorry. I'm confused. Yeah. 214 months on Count 1, and 120 months on Count 2 to be served concurrently.

You do not have the ability to pay a fine and no fine is imposed.

Following your release from custody, you shall serve an eight-year term of supervised release. That will consist of eight years on Count 1, and three years on Count 2 to be served concurrently.

While on supervision, you shall not commit another federal, state, or local crime.

You shall not possess a controlled substance.

You shall submit to one drug test within 15 days of release and at least two drug tests thereafter as directed.

You shall cooperate in the collection of DNA as directed.

You shall comply with all of the conditions that we've talked about, that parties received. You've looked at them and approved. And I have read them carefully and adopted them myself because I believe that those are each necessary components in the efforts to try to help you successfully complete supervised release.

[41] Was there a waiver in this case?

MR. BECKETT: No.

THE COURT: You do, of course, have the right to file a notice of appeal. If it is your wish to appeal, I instruct you that any notice of appeal must be filed with the Clerk of the Court within 14 days of today's date, as your attorney, Mr. Beckett has an absolute responsibility to file that notice for you, if that is your wish.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: Now in terms of recommendations to the Bureau of Prisons, I assume that you want me to recommend the lowest level of security as close to his family as possible?

MR. BECKETT: That's correct.

THE COURT: I'm guessing, is that Terre Haute?

MR. BECKETT: Right.

THE COURT: I don't know if they will put him in the camp to begin with because of the amount of time, but they do have both there. So hopefully, you can stay there.

I'll recommend during the time that you are there that you be able to receive whatever drug [42] treatment you can receive, any vocational or educational training you can receive.

Anything else?

MR. FRERES: Not on behalf of the government, Your Honor.

MR. BECKETT: Judge, I have spoken about the appeal with Mr. Smith and he is going to direct me to file a notice of appeal. Before I do that, I wondered if Miss Thompson from my firm could also be appointed to assist me, if I could do it at this level then I don't have to do it with the Seventh Circuit.

THE COURT: That's fine. I'm willing to do that.

MR. BECKETT: Thank you.

THE COURT: We'll add her to the—add her as an attorney of record.

THE CLERK: Is she admitted?

THE COURT: Oh, sure, yeah.

Give the clerk his name.

MR. BECKETT: I will. Thank you.

THE COURT: I would ask the marshal, if you could, give him five minutes. If you want to turn around in your seat, don't stand up.

Mom, if you come up in the front row, you [43] can go up there. If you want to go get the lady with the baby, you can bring her in, talk to her for a couple of minutes before you leave the courtroom.

MR. BECKETT: Thank you, Your Honor.

MR. FRERES: Thank you.

(Court adjourned, 2:54 p.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Nancy Mersot Date: January 30, 2019
Court Reporter

APPENDIX D

U.S. CODE PROVISIONS

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts the race, sex, national origin, creed, and socioeconomic status of offenders of the United States and to the United States Probation System—

> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—
>
> > (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
> >
> > (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
> >
> > (C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;
> >
> > (D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) 1 of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the

term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents 2 of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents 2 of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the

purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse

Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(*l*) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed

while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(*o*) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after

being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify 'the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such

defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described

in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

2018 U.S. SENTENCING GUIDELINES PROVISIONS

§ 1B1.7. Significance of Commentary

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

Commentary

Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements.

"[C]ommentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it

violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 498).

§ 4B1.1 Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL*
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17

OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL*
(7) More than 1 year, but less than 5 years	12.

* If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) CAREER OFFENDER TABLE FOR 18 U.S.C. § 924(C) OR § 929(A) OFFENDERS

§3E1.1 REDUCTION	GUIDELINE RANGE FOR THE 18 U.S.C.§ 924(C) OR § 929(A) COUNT(S)
No reduction	360–life
2-level reduction	292–365
3-level reduction	262–327.

Commentary

Application Notes:

1. **Definitions.**—***"Crime of violence," "controlled substance offense,"*** and ***"two prior felony convictions"*** are defined in § 4B1.2.

2. **"Offense Statutory Maximum".**—***"Offense Statutory Maximum,"*** for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug

convictions, the "Offense Statutory Maximum" for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.

3. **Application of Subsection (c).—**

(A) **In General.**—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1(a).

(B) **Subsection (c)(2).**—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.

(C) **"Otherwise Applicable Guideline Range".**—For purposes of subsection (c)(2)(A), "otherwise applicable guideline range" for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

(i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history

category determined under § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History).

(ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under § 4B1.1(a) and (b).

(D) **Imposition of Consecutive Term of Imprisonment.**—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

(E) **Example.**—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under § 4B1.1(a). Under § 4B1.1(a), the otherwise applicable guideline range for the drug count is 188–235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of

responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248–295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262–327 months. The range with the greatest minimum, 262–327 months, is used to impose the sentence in accordance with §5G1.2(e).

4. **Departure Provision for State Misdemeanors.**—In a case in which one or both of the defendant's "two prior felony convictions" is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in § 4A1.3(b)(3)(A).

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the

Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798).

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled

substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this guideline—

   "Crime of violence" and ***"controlled substance offense"*** include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

   "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

   "Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2 (Definitions and Instructions for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding

one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Applicability of § 4A1.2.**—The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.

4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in § 4B1.2(a) and, as a result, the defendant does not receive a higher offense level or

higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798).

2015 U.S. SENTENCING GUIDELINES PROVISIONS

§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

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Application Notes:

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5. **Aiding and Abetting, Conspiracies, and Attempts.**—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

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