# 09-2908-cr

*To Be Argued By*:
CHRISTOPHER M. MATTEI

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-2908-cr**

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

BRIAN SLUTZKIN,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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## BRIEF FOR THE UNITED STATES OF AMERICA

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## Statement of Jurisdiction

The district court (Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 26, 2009. On July 6, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction pursuant 18 U.S.C. § 3742(a).

## Statement of Issues
## Presented for Review

1. Whether the district court properly allocated three criminal history points to a sentence imposed in state court on December 18, 2008, based on a road-rage incident that was unrelated to the instant offense.

2. Whether the district court properly allocated two criminal history points because, while on probation, the defendant engaged in a series of drugs-for-firearms transactions that constitute relevant conduct.

3. Whether the district court abused its discretion in imposing a consecutive sentence after considering all the relevant sentencing factors.

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### Preliminary Statement

On the evening of November 2, 2007, the defendant-appellant Slutzkin attempted to shoot Jamie and Michael Wright following a dispute about the defendant's driving. The defendant was arrested, and the ensuing investigation revealed that from late August 2007 through November 2, 2007, the defendant had engaged in a series of illegal transactions with Thomas Farruggio, in which he provided cocaine to Farruggio in exchange for firearms. The

investigation also resulted in the seizure of 15.7 grams of cocaine base from the defendant's truck.

The defendant was prosecuted by the State of Connecticut for the attempted shooting of Jamie and Michael Wright and his unlawful possession of a firearm. On March 13, 2009, the defendant appeared in the United States District Court for the District of Connecticut, waived his right to indictment and entered a guilty plea to a one-count Information charging him with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B). On June 26, 2009, the district court sentenced the defendant to 84 months of imprisonment, followed by five years of supervised release, and ordered the sentence to run consecutively to the defendant's undischarged term of imprisonment imposed in the Connecticut Superior Court.

On appeal, the defendant challenges the district court's calculation of his criminal history score and its imposition of a consecutive sentence. This Court should reject the defendant's claims and affirm.

## Statement of the Case

Between late August 2007 and November 2, 2007, the defendant sold various quantities of cocaine to Farruggio in exchange for firearms. Pre-Sentence Report ("PSR") ¶¶ 11-15. Then, on the evening of November 2, 2007, the defendant engaged in a dispute with Jamie and Michael Wright about the defendant's driving. PSR ¶¶ 6-7. During that encounter, the defendant, who was in possession of a

.357 caliber pistol, fired several shots at Jamie and Michael Wright, missing both of them. *Id*. The defendant was arrested later that night, and charged by the State of Connecticut with two counts of Criminal Attempt to Commit Assault in the 1st Degree and one count of Carrying a Pistol Without a Permit. PSR ¶¶ 8, 35. A subsequent search of the defendant's vehicles and apartment resulted in the seizure of, *inter alia*, 15.7 grams of cocaine base packaged for distribution. PSR ¶¶ 16-19.

On October 7, 2008, the defendant pleaded guilty to the state charges in the Connecticut Superior Court. PSR ¶ 35. On December 18, 2008, the defendant was sentenced to ten years in prison on each assault count, and two years in prison on the weapons charge. *Id*. All sentences were ordered to run concurrently. *Id*.

On March 13, 2009, the defendant appeared before United States District Judge Vanessa L. Bryant, at which time he waived his right to indictment and pleaded guilty to a one-count Information charging him with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). GA 4, 7. The defendant entered his plea pursuant to a written plea agreement. GA 7. On June 26, 2009, the defendant appeared before Judge Bryant, and was sentenced to 84 months of imprisonment, followed by five years of supervised release. GA 6. Judge Bryant imposed her sentence consecutively to the defendant's undischarged state term of imprisonment. GA 6, 45. Judgment entered on June 26, 2009. GA 6. On July 6,

2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). *Id*.

The defendant is currently in state custody serving his state sentence. PSR ¶ 2.

## Statement of Facts and Proceedings Relevant to this Appeal

### A. The offense conduct

Absent objection, the district court found the following facts, as reflected in the PSR. GA 21.

In approximately late August or early September 2007, Thomas Farruggio, a resident of Fairfield, Connecticut, met the defendant and began to purchase cocaine from him on a near-weekly basis. PSR ¶ 11. Approximately two weeks after meeting Farruggio, the defendant provided him with four baggies of cocaine in exchange for a Glock .45 caliber handgun and 20 boxes of ammunition. *Id*.

Approximately one week later, the defendant and Farruggio met in Meriden, Connecticut. PSR ¶ 12. On this occasion, the defendant provided Farruggio with four baggies of cocaine in exchange for a Tomkat .32 caliber handgun. *Id*.

On approximately September 20, 2007, the defendant and Farruggio met at a location near Route 9 in Meriden. PSR ¶ 13. The defendant provided Farruggio with cocaine

in exchange for a Smith & Wesson .40 caliber handgun. *Id*.

On approximately September 28, 2007, the defendant again met with Farruggio at a location near Route 9 in Meriden. PSR ¶ 14. The defendant provided Farruggio with 10 baggies of cocaine in exchange for a Glock .357 caliber handgun and a Smith & Wesson .45 caliber handgun. *Id*.

Finally, on November 2, 2007, the defendant and one of his associates met with Farruggio in the driveway of 45 Birch Road in Meriden. PSR ¶ 15. At that meeting, the defendant provided Farruggio with 17 baggies of cocaine in exchange for a CZ 9 mm handgun, a Keltec 9 mm handgun, and a Sigsauer 9 mm handgun. *Id*.

Later that evening, at approximately 9:00 p.m., patrol units of the Middletown Police Department were dispatched to the area of 28 Oak Street in Middletown on a report of shots fired. PSR ¶ 6. When they arrived they interviewed Jamie Wright. *Id*. Jamie Wright reported that earlier that evening, while driving to his uncle's house at 28 Oak Street, he was closely followed by a red Ford F-150 pick-up truck. *Id*. As he turned into his uncle's driveway, the red pick-up truck nearly rear-ended him. *Id*. Wright then got out of his vehicle and started to argue with the driver of the truck, who was later identified as the defendant. *Id*. As this argument was taking place, Jamie's cousin, Michael Wright, arrived. *Id*. As Michael approached, the defendant drove away, hitting Jamie's shoulder as he did so. *Id*. Jamie then threw his cell phone

at the back of the truck, striking the rear window. *Id*. The truck stopped in the middle of the street, and the defendant exited the vehicle. *Id*. He walked around to the front of the truck and stopped about mid-fender on the driver's side. Jamie saw him moving his arms. *Id*. At this time, Jamie got back in his car. PSR ¶ 7. The defendant then pulled out a gun, walked several steps in Jamie's and Michael's direction and fired three shots. *Id*. Michael dove behind his car. *Id*. The defendant then got back in the truck and drove away. *Id*. Officers found three shell casings in the vicinity of the vehicles, each of which was stamped Speer .357 Sig. *Id*. Officers also found at least one bullet hole in one of the Wright vehicles. *Id*.

Later that night, a Middletown police officer reported that he spotted the red pick-up truck at South Main Street and Wesleyan Hills Road. PSR ¶ 8. The officer attempted to execute a motor vehicle stop, but the red pick-up truck would not pull over. *Id*. A high speed chase through parts of Middletown and Durham ensued. *Id*. Eventually, the truck was able to elude the pursuing officers. *Id*. Dispatch then received a report that the truck had been located at a Stop & Shop parking lot in Middletown. *Id*. The defendant was apprehended in an adjacent wooded area. *Id*.

The defendant was brought back to the parking lot where he was identified by Jamie and Michael Wright as the shooter. PSR ¶ 9. A test revealed the presence of gun powder residue on the defendant. *Id*. The defendant was arrested, and the truck was seized pending the issuance of a search warrant. *Id*. A search of the defendant's person resulted in the seizure of $2,204 in cash. *Id*.

In the days following the defendant's arrest, officers of the Meriden and Middletown Police Departments executed search warrants on the defendant's vehicles and residence. PSR ¶¶ 16-19. On November 3, 2007, officers of the Meriden Police Department executed a search warrant for the defendant's apartment at 45 Birch Road in Meriden, Connecticut. PSR ¶ 16. As a result of the search, the officers seized a box of .45 caliber ammunition and a pistol clip drum fully loaded with bullets and additional loose ammunition. *Id*. The officers also seized various gun and narcotics related materials, including two holsters, a gun cleaning kit, a rifle scope and stock for an AR-15 assault rifle, a Glock gun box, three mixing dishes with pink-colored cocaine residue adhered to the sides and bottoms, and numerous narcotics baggies stamped "Boom." *Id*. Officers saw two vehicles parked on the property, a black Honda and a Jeep Cherokee. *Id*.

On November 5, 2007, Middletown police officers executed a search warrant for the red Ford F-150 pick-up truck used by the defendant on the night of November 2, 2007. PSR ¶ 17. The officers seized a Glock .357 caliber pistol, bearing serial number CRK825US, which was found in the engine compartment of the vehicle. *Id*. Police also recovered 15.7 grams of cocaine base. PSR ¶¶ 17-18. The cocaine base was contained within a plastic container, consistent with Farruggio's description. PSR ¶¶ 17-18. Some of the crack cocaine had a pink tint, which was consistent with the color of the cocaine residue found adhered to several pyrex mixing bowls in the defendant's apartment. PSR ¶ 18.

On November 5, 2007, Meriden police officers executed a search warrant for the Jeep Cherokee. PSR ¶ 19. As a result of the search, officers seized an antique Smith & Wesson .38 caliber revolver, bearing serial number 1872, a box of 9 mm ammunition, 15 boxes of .45 caliber ammunition and a small black pouch containing 31 rounds of .40 caliber ammunition. *Id*. The Jeep was registered to Lucia Silas of Middletown, Connecticut, who informed officers that she had sold the car to the defendant. *Id*. When the defendant was arrested, he possessed keys to this car. *Id*.

**B. The status of the defendant's probation at the time of his offense**

On April 25, 2003, the defendant was convicted in the Connecticut Superior Court of Sale of a Narcotic Substance. PSR ¶ 32. As a result of that conviction, the defendant was sentenced to five years of imprisonment, execution suspended, followed by five years of probation. *Id*. His term of probation, therefore, commenced on April 24, 2003, and was scheduled to expire on April 24, 2008. *Id*.

However, as a result of conduct unrelated to this case, the defendant violated the terms of his probation. Addendum to the PSR (attached to the PSR). Coincidentally, on the morning of November 2, 2007, he appeared in the Connecticut Superior Court and pleaded guilty to the probation violation. PSR ¶ 32. The defendant's probation was immediately revoked, but he was allowed to remain on release until the date of

sentencing. *Id*. Later that very same day, the defendant committed the attempted assault of Jamie and Michael Wright, and was arrested. PSR ¶ 6.

**C. The state court prosecution**

As noted above, on the evening of November 2, 2007, the defendant was arrested and charged with two counts of Criminal Attempt to Commit Assault in the 1st Degree and one count of Carrying a Pistol Without a Permit. PSR ¶ 35. These charges stemmed from the defendant's attempted shooting of Jamie and Michael Wright. *Id*. The defendant was detained. *Id*. On November 27, 2007, while the defendant remained in detention, the State of Connecticut charged him with a variety of narcotics offenses based on evidence seized during the searches of his vehicles and residence. PSR ¶ 37. On October 7, 2008, the defendant pleaded guilty in the Connecticut Superior Court to the assault and weapons charges. PSR ¶ 35. On December 18, 2008, the defendant was sentenced to 10 years in prison on each assault count and two years in prison on the weapons count, all to run concurrently. *Id*. All remaining state charges were dismissed. PSR ¶ 37.

**D. The defendant's guilty plea in district court**

On March 13, 2009, the defendant waived his right to indictment and pleaded guilty to a one-count Information charging him with possession with intent to distribute five grams or more of a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). GA 4, 7. The

defendant entered his plea pursuant to a plea agreement. GA 7. In that agreement, the parties agreed that the defendant appeared to be in criminal history category III. GA 12. The parties also agreed that the defendant had a base offense level of 24 because he possessed with the intent to distribute between five and 20 grams of cocaine base. GA 11. The parties further agreed that a two-level enhancement, under U.S.S.G. § 2D1.1(b)(1), applied because the defendant possessed a dangerous weapon. GA 11-12. After three levels were subtracted for acceptance of responsibility, the parties agreed that the defendant had a total offense level of 23, resulting in a guideline range of 60-71 months, due to the application of the mandatory minimum penalty of 60 months. GA 12. The parties also agreed that a sentence of 60 months should be imposed consecutively to the 10-year sentence imposed on December 18, 2008, in the Connecticut Superior Court. *Id*. The parties acknowledged that the district court was not bound by the guidelines calculation set forth in the plea agreement, and the defendant expressly understood that his criminal history score was subject to final determination by the district court. GA 13.

**E. The defendant's sentencing in district court**

Following a pre-sentence investigation, the United States Probation Office issued its PSR. The PSR calculated the defendant's criminal history score to be 10, placing him in criminal history category V. PSR ¶ 36. The PSR's calculation of the defendant's criminal history score differed from the parties' calculation, as set forth in the plea agreement, because the PSR allocated three points

to the 10-year sentence imposed in the Connecticut Superior Court on December 18, 2008, and two points due to the fact that the defendant was on probation at the time of his offense. PSR ¶¶ 35-36. The PSR agreed with the parties' calculation of the defendant's offense level, and, therefore, arrived at a guideline range of 84-105 months of imprisonment. PSR ¶¶ 30, 67.

The defendant objected to the PSR's calculation of the defendant's criminal history score, contending that he was not on probation at the time of his offense and that the most recent sentence imposed in state court should not be included in his criminal history score. Addendum to the PSR. The defendant made only one substantive objection to the PSR's factual recitation of his offense conduct, namely, that though he fired a gun in the direction of Jamie and Michael Wright, only the driver's side mirror of the Wright vehicle was struck. *Id*. As noted in the addendum to the PSR, this was not so much an objection as an additional fact, and the PSR was not revised. *Id*. Although the defendant noted in his response to the PSR that Farruggio may have provided firearms to other individuals, in addition to the defendant, the defendant did not object to the PSR's account of the defendant's involvement in a series of drugs-for-firearms transactions that occurred in approximately late August 2007 and November 2, 2007. Def.'s Response to PSR (attached to PSR).

On June 26, 2009, the defendant appeared for sentencing before the district court. GA 6. At that sentencing hearing, the defendant did not make any

additional objections to the PSR, and the district court adopted the facts set forth in the PSR. GA 21. The district court then agreed with the PSR's calculation of the defendant's criminal history score, and calculated his guideline range to be 84-105 months of imprisonment. GA 22.

After hearing remarks from the parties, the district court reviewed the sentencing factors set forth in 18 U.S.C. § 3553(a), and, in particular, identified the factors that were especially relevant in this case. GA 39-45. The district court first addressed the nature and circumstances of the offense, observing that "this offense was extremely serious. It didn't just involve drug dealing, but it involved weapons dealing, the dissemination of deadly weapons into the community, weapons that were found in hands of drug dealers. This is a very, very serious offense." GA 40.

The district court next considered the history and characteristics of the defendant, noting that although the defendant's family had suffered "financial misfortune," he had also had "the benefit of drug treatment." *Id*. The court also observed that due to the "lenient treatment" he had previously received in the criminal justice system, "he has not suffered the types of penalties that most individuals who have engaged in the conduct in which he has consistently engaged in, have been exposed." GA 41.

The district court next considered the purposes of a criminal sentence. Specifically, the district court focused on the need for a criminal sentence to engender respect for

law, noting that this was "something which Mr. Slutzkin has demonstrated consistently that he lacks." *Id*.

The district court next noted the need for the sentence to promote general deterrence and to protect the public from future crimes committed by the defendant. PSR ¶¶ 41-42. In that regard, the district court commented that the need to protect the public from the defendant applied with particular weight, given his "recidivism, which he has demonstrated over these many years." GA 42.

The district court next considered the need for rehabilitation, and observed that "[p]erhaps more time then less is needed for him to mature and to rejoin society as a contributing member . . . ." *Id*.

The district court then went on to consider the types of sentences available, the policy statements contained in the Sentencing Guidelines, the recommended sentencing range, and the need to avoid unwarranted sentencing disparities. GA 42-43. After consideration of these factors as well as its authority to impose a sentence outside the guideline range, the district court imposed a guidelines sentence of 84 months of imprisonment, followed by five years of supervised release, and ordered its sentence to run consecutively to the defendant's undischarged term of state imprisonment. GA 45-47. The district court explained its decision to impose a consecutive rather than a concurrent sentence as follows:

> In fact the Court has give quite a bit of consideration to consecutive versus concurrent

> sentences, and given the upper limit of the recommended range; that is, the 105 months, if the Court were to have imposed a concurrent sentence Mr. Slutzkin's actual sentence would be below the recommended sentence of 60 months - - the agreed-upon sentence of 60 months, the Court being aware that given the nature of his offense, he would serve 85 percent of his state time and 85 percent of his federal time.

GA 47-48.

The judgment entered on June 26, 2009. GA 6. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on July 6, 2009. *Id*.

## Summary of Argument

The district court properly calculated the defendant's criminal history score by including three criminal history points as a result of a sentence imposed in the Connecticut Superior Court on December 18, 2008. Specifically, on that date, the defendant was sentenced to two 10-year terms of imprisonment as result of his conviction on two state assault charges. Those convictions were based on the defendant's attempted "road rage" shooting of Jamie and Michael Wright on November 2, 2007. As such, the district court properly did not treat that underlying conduct as relevant conduct in connection with the defendant's federal drug offense, and properly allocated three criminal history points to those convictions under U.S.S.G. § 4A1.1(a).

In addition, the district court properly allocated two additional criminal history points because the defendant was on probation at the time he committed his federal offense. Although the defendant's probation was revoked on the morning of November 2, 2007, his relevant conduct – which included multiple drugs-for-firearms transactions during late August and September 2007 – occurred while the defendant's probation was still in effect. Because the defendant was on probation when he engaged in this relevant conduct, which is considered part of the offense under U.S.S.G. § 4A1.1(d), the district court properly added two criminal history points.

Finally, the district court's imposition of a consecutive sentence was procedurally reasonable. The district court identified the Guidelines range based upon undisputed facts, treated the Guidelines as advisory, and considered the other § 3553(a) factors in determining that a guideline sentence imposed consecutively to the defendant's undischarged state term of imprisonment was appropriate.

## Argument

### I. The district court did not err in calculating the defendant's criminal history category or considering the sentencing guidelines as advisory and imposing a consecutive sentence.

#### A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

#### B. Governing law and standard of review

After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory, a sentence satisfies the Sixth Amendment if the sentencing judge "(1) calculates the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with other § 3553 factors; and (3) imposes a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors." *Fernandez*, 443 F.3d at 30.

This Court reviews a sentence for reasonableness. *See Rita v. United States*, 127 S. Ct. 2456, 2459 (2007);

*Fernandez*, 443 F.3d at 26-27. The Court has generally divided reasonableness review into procedural and substantive reasonableness. For a sentence to be procedurally reasonable, the Court must review whether the sentencing court identified the Guidelines range based upon found facts, treated the Guidelines as advisory, and considered the other § 3553(a) factors. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009). Substantive reasonableness is contingent upon the length of the sentence in light of the case's facts. *Id.*

The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27. This Court has noted that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Id.*; *see also United States v. Rigas*, 583 F.3d 108, 123-34 (2d Cir. 2009) (holding that sentence will be set aside for substantive unreasonableness only in the "rare case" where the sentence constitutes a "manifest injustice" or "shock[s] the conscience").

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *Fernandez*, 443 F.3d at 29. The

requirement that the district court consider the § 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita*, 127 S. Ct. at 2468-69 (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. Indeed, a court's reasoning can be inferred from what the judge did in the context of what was argued by the parties and contained in the PSR. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) ("As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred."). Thus, this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)]." *Fernandez*, 443 F.3d at 30.

This Court further presumes that a sentencing judge considers all arguments presented, unless the record clearly suggests otherwise. *See United States v. Carter,* 489 F.3d 528, 540-41 (2d Cir. 2007); *Fernandez*, 443 F.3d at 29-30. This presumption is particularly applicable when the judge emphasizes that all submissions have been heard and the § 3553 factors have been considered. *See United States v. Banks*, 464 F.3d 184, 190 (2d Cir. 2006)

("[T]here is no requirement that the court mention the required [§ 3553(a)] factors, much less explain how each factor affected the court's decision. In the absence of contrary indications, courts are generally presumed to know the laws that govern their decisions and to have followed them."); *Fernandez,* 443 F.3d at 29-30 ("We will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument related to those factors that the defendant advanced.").

A district court's interpretation of the Sentencing Guidelines is reviewed *de novo* and its findings of fact are reviewed for clear error. *See United States v. Phillips*, 431 F.3d 86, 90 (2d Cir. 2005); *see, e.g., United States v. Matthews*, 205 F.3d 544, 545 (2d Cir. 2000) ("we note the district court's decision to include Matthews' youthful offender adjudication in the calculation of his criminal history category presents a straightforward question of law"); *United States v. LaBarbara*, 129 F.3d 81, 86 (2d Cir. 1997) ("Appellate review of a district court's determination of whether particular acts are relevant conduct for purposes of Section 1B1.3 employs clear error analysis.").

In the context of a district court's imposition of a concurrent or consecutive sentence, the issue of whether sub-section (a), (b) or (c) of § 5G1.3 applies is reviewed *de novo*. *United States v. Brennan*, 395 F.3d 59, 66 (2d Cir. 2005). However, once a district court determines that § 5G1.3(c) applies, its sentencing decision thereunder

"'will not be overturned absent an abuse of discretion.'" *Id*. (quoting *United States v. Livorsi*, 180 F.3d 76, 82 (2d Cir. 1999)). Here, because the defendant did not object to the court's imposition of a consecutive sentence, he must establish that the district court plainly erred in imposing its sentence consecutively to an undischarged term of state imprisonment. *See United States v. Walker*, 142 F.3d 103, 115 (2d Cir. 1998); *United States v. Margiotti*, 85 F.3d 100, 104-05 (2d Cir. 1996).

**C. Discussion**

**1. The district court properly allocated three criminal history points to a sentence imposed in state court on December 18, 2008, based on a road-rage incident that was unrelated to the instant offense.**

The defendant argues that the district court erred in allocating an aggregate of three criminal history points for sentences imposed in the Connecticut Superior Court on December 18, 2008, following the defendant's conviction on two counts of assault and one count of illegal weapons possession. The defendant incorrectly asserts that the conduct for which he was sentenced in state court constitutes relevant conduct in relation to his federal drug conviction, and therefore cannot also be considered under § 4A1.1(a)(1) when calculating his criminal history score. The premise of this argument is flawed. The district court properly did not treat the conduct underlying the defendant's assault convictions – i.e., the attempted shooting of Jamie and Michael Wright – as relevant

conduct in relation to his drug offense. Because the 2008 convictions did not involve relevant conduct, the district court properly counted them when calculating the defendant's criminal history score.

U.S.S.G. § 4A1.1(a) provides that three points should be added "for each prior sentence of imprisonment exceeding one year and one month." A "prior sentence" is defined as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). The Commentary to Section 4A1.2(a)(1) explains that a sentence for conduct that is "relevant conduct to the instant offense under the provisions of §1B1.3," does not constitute a prior sentence for purposes of calculating the defendant's criminal history score. *See* U.S.S.G. § 4A1.2(a)(1), Commentary n.1. Finally, Section § 1B1.3 defines relevant conduct as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" that "were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(1)(A), (a)(2). *See United States v. Thomas*, 54 F.3d 73, 83 (2d Cir. 1995). "Thus, a sentence imposed for conduct that was part of the same course of conduct as the offense of conviction is not a 'prior sentence' within the meaning of Section 4A1.1." *Brennan*, 395 F.3d at 70 (quoting U.S.S.G. § 4A1.2).

Here, the defendant's attempted shooting of Jamie and Michael Wright was not related in any way to his drug

offense. The PSR makes clear that the impetus for the attempted assaults was a simple dispute about the defendant's driving, and had nothing to do with his unlawful possession of crack cocaine. PSR ¶ 35; Addendum to PSR. The addendum to the PSR addressed the defendant's objection to the allocation of three points to the defendant's assault convictions as follows:

> The defendant's conduct and conviction cited in Paragraph 35, is neither part of a common scheme or plan, or part of the same course of conduct as the instant offense. Specifically, the defendant's incident of "road rage" and the ensuing assault, had nothing to do with his distribution of cocaine base.

Addendum to PSR. It is also worth noting that the attempted shooting did not serve as the basis for any adjustment to the defendant's offense level or as an offense characteristic bearing on the defendant's offense level. Therefore, because the assault convictions did not arise out of relevant conduct, the district court properly allocated three points to that sentence. *See United States v. Marler*, 527 F.3d 874, 881 (6th Cir. 2008) (at sentencing on federal firearms offense, district court properly allocated three points to prior state sentence for robbery conspiracy where facts showed the defendant's gun possession was unrelated to conspiracy); *United States v. Chibukhchyan*, 491 F.3d 722, 724-25 (8th Cir. 2007) (district court properly allocated criminal history points to state sentence even though conduct underlying that

conviction "led to the discovery of evidence of this federal offense").

The defendant correctly notes that he was also sentenced in state court to two years of imprisonment for carrying a pistol without a permit. This conviction arose from the defendant's possession of the handgun used in the shooting. PSR ¶ 35. The defendant then argues that his state weapons conviction should not have been included in his criminal history score because the same conduct was used to support a two-level enhancement in connection with his federal drug offense. The defendant is correct that he received a two-level enhancement under § 2D1.1(b)(1) for possessing a gun in connection with his drug offense. PSR ¶ 25. Section 2D1.1(b)(1) applied because a loaded handgun was found in the same truck as the crack cocaine that the defendant intended to sell. However, his possession of a gun in connection with his drug activities is distinct from his possession and use of the gun in connection with the shooting, which is the conduct underlying his state sentence. PSR ¶ 35. That said, even if the defendant's two-year sentence for carrying a pistol without a permit were excluded from the defendant's criminal history score, the 10-year sentences imposed on two unrelated assault counts support the district court's addition of three criminal history points.

Still, the defendant argues that because the shooting occurred while the defendant happened to be in possession of the crack cocaine with which he is charged federally, the two offenses should be considered as part of a "common scheme or plan," or the "same course of

conduct," under § 1B1.3. In order to be considered part of a "common scheme or plan," offenses must be "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." U.S.S.G.§ 1B1.3, Application Note 9(A). Here, the assault and the drug possession bear none of the hallmarks of a common scheme or plan. The victims of the assault were not involved in the defendant's drug activities, and the defendant's purpose in shooting them bore no nexus to his drug dealing. Likewise, the purpose of the defendant's gun possession in connection with the assault, i.e., to give effect to his road rage, was distinct from the gun's role in connection with his drug offense. The defendant also suggests that the assaults and his drug offense were part of the same course of conduct. In support of this conclusion, the defendant asserts that (1) the assault occurred while the defendant was in possession of crack cocaine, (2) the defendant was under the influence of an unidentified drug at the time of the assault; and (3) the assault and the federal narcotics violation were prosecuted by the same law enforcement agency. This final assertion is simply not true. The PSR makes clear that all state drug charges were nolled in deference to the federal drug prosecution. The fact that the defendant may have been under the influence of drugs at the time of the assault is irrelevant because his personal drug use is not the subject of his federal conviction. The defendant's argument, then, rests solely on the fact that he happened to possess a distribution quantity of crack cocaine at the time he attempted to shoot Jamie and Michael Wright. In light of the obvious distinction between the attempted shooting

and the drug possession, the district court did not clearly err in allocating three criminal history points to the state sentence imposed on December 18, 2008.

**2. The district court properly allocated two criminal history points because, while on probation, the defendant engaged in a series of drugs-for-firearms transactions that constitute relevant conduct.**

The defendant argues that the district court erred in allocating two criminal history points on the ground that he was on probation at the time he committed the present offense. More specifically, the defendant asserts that two points should not have been added under U.S.S.G. § 4A1.1(d) because the defendant's probation had been revoked prior to the seizure of the cocaine base underlying his federal conviction. The defendant's claim is meritless because part of his offense took place between late August and September 2007, when he engaged in a series of drugs-for-firearms transactions with Farruggio.

U.S.S.G. § 4A1.1(d) provides that two points should be added "if the defendant committed the instant offense while under any criminal justice sentence, including probation . . . ." Two points are added under this section "if the defendant committed *any part of the instant offense* (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation . . . ." U.S.S.G. § 4A1.1(d), Commentary n.4 (emphasis added).

As an initial matter, the Government agrees that the defendant's probation was revoked prior to the seizure of the cocaine base with which he was charged federally. Indeed, the cocaine base itself was not recovered until November 3, 2007 – one day after his probation had been revoked. However, beginning in approximately late August 2007, the defendant began to provide cocaine to Farruggio in exchange for firearms. PSR ¶¶ 11-15. The defendant's repeated distribution of cocaine during August and September of 2007 is clearly relevant to his federal drug conviction, and clearly occurred while he was on probation. The district court referenced this conduct when discussing the seriousness of the defendant's offense, stating that "this offense was extremely serious. It didn't just involve drug dealing, but it involved weapons dealing, the dissemination of deadly weapons into the community . . . ." GA 40.

The defendant now claims that it was "unestablished" that his offense conduct commenced prior to November 2, 2007. It is important to note that the defendant did not object to the PSR's factual recitation of the defendant's participation in drug-for-firearms transactions with Farruggio during August and September of 2007. Rather, he simply advanced the same argument that he does here, namely, that because his actual, unlawful possession of cocaine base was not discovered until after the revocation of his probation, he was not on probation at the time of his offense. This argument is meritless, given the Guidelines' clear instruction that if any relevant conduct is committed while the defendant is on probation, such conduct is considered part of the instant offense and is sufficient to

support the addition of two points to the defendant's criminal history score. *See United States v. Hernandez*, 541 F.3d 422, 423 (1st Cir. 2008) (defendant was subject to two-level enhancement under § 4A1.1(d) where sentence of criminal supervision was imposed during 14-month heroin conspiracy, even though defendant's personal involvement in conspiracy post-dated the termination of that supervision), *cert. denied*, 129 S. Ct. 961 (2009); *United States v. Wilson*, 168 F.3d 916, 922-23 (6th Cir. 1999) (two-level enhancement under § 4A1.1(d) appropriate where any part of drug conspiracy extended into defendant's term of probation).

**3. The district court did not abuse its discretion in imposing a consecutive sentence after considering all the relevant sentencing factors.**

The defendant argues that it was plain error for the district court to impose a consecutive sentence because, according to the defendant, U.S.S.G. § 5G1.3 required the district court to impose its sentence concurrently with the defendant's undischarged state term of imprisonment. At the time of the defendant's sentence, although he objected to his criminal history score, he did not object to the district court's imposition of a consecutive sentence. Thus, the district court's imposition of a consecutive sentence is reviewed by this Court for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993); *see Brennan*, 385 F.3d at 71 (quoting *Olano*, 597 U.S. at 732); *Walker*,142 F.3d at 115. The defendant's claim is groundless.

As an initial matter, it bears repeating that *Booker* rendered the Sentencing Guidelines advisory. 543 U.S. 220 (2005). Therefore, to the extent the defendant argues that the guidelines required the district court to impose a concurrent sentence, he is legally incorrect. *See United States v. Matera*, 489 F.2d 115, 124 (2d Cir. 2007) (district court's imposition of sentence consecutively to state sentence reflected seriousness of crime and fell within district court's "broad discretion" to fashion appropriate sentence in light of sentencing factors); *United States v. Carrasco-De-Jesus*, 589 F.3d 22, 27 (1st Cir. 2009) ("A sentencing court's choice between a consecutive or a concurrent sentence with respect to a defendant who is subject to an undischarged state-court term of imprisonment is normally discretionary. *See* 18 U.S.C. § 3584(a). But when exercising its discretion, the sentencing court is under a direction to consider the factors enumerated in 18 U.S.C. § 3553(a), including any applicable sentencing guidelines or policy statements. *Id.* § 3584(b).") (citations in original); *United States v. Tonks*, 574 F.3d 628, 632-33 (8th Cir. 2009) (referring to Guidelines as "advisory" on the question of whether to impose a consecutive sentence, and concluding that district court's thorough discussion of the § 3553(a) factors rendered consecutive sentence reasonable). Indeed, all of the cases cited by the defendant were decided pre-*Booker*.

Given that the guidelines are simply advisory, the court's imposition of a consecutive sentence was not plain error because the district court properly calculated the guideline range, treated the guidelines as advisory, and then considered the § 3553(a) factors. *See Matera*, 489

F.2d at 124; *Cavera*, 550 F.3d at 189. As described above, the Court properly calculated the defendant's criminal history category and offense level to arrive at a sentencing range of 84-105 months of imprisonment. The district court then treated the guidelines as advisory. Specifically, the district court stated, "I certainly do recognize the guidelines are advisory only . . . ." GA 47. Further, with respect to the specific issue of whether to impose a concurrent or consecutive sentence, the district court engaged the Assistant United States Attorney in the following colloquy:

AUSA Mattei: And with respect to the imposition of a consecutive sentence, as I understand it, the Court has reviewed the factors under Chapter 5 of the Sentencing Guidelines governing, in an advisory fashion, whether to impose a sentence consecutively or concurrently, and has a arrived at a decision after consulting those.

The Court: Yes. In fact, the Court has given quite a bit of consideration to consecutive versus concurrent sentences, and given the upper limit of the recommended range; that is, the 105 months, if the Court were to have imposed a concurrent sentence, Mr. Slutzkin's actual sentence would be below the recommended sentence of 60 months – the agreed-upon

> sentence of 60 months, the Court being aware that given the nature of his offense, he would serve 85 percent of his state time and 85 percent of his federal time.

GA 47-48. In other words, the district court expressly stated that it had considered the relevant provision in the sentencing guidelines in deciding to impose a consecutive sentence. *See United States v. Lomeli*, 596 F.3d 496, 504-06 (8th Cir. 2010) (affirming district court's imposition of sentence consecutively to state sentence where "it [was] clear that the district court was cognizant of the details of [the defendant's] Texas murder sentence, which is all the Guidelines require").

That provision, § 5G1.3, provides guidance as to whether a consecutive or a concurrent sentence may be appropriate. In this case, contrary to the defendant's assertion, § 5G1.3 did not weigh in favor of a concurrent sentence. The defendant cites § 5G1.3(b), which recommends a concurrent sentence where "a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction . . . and that was the basis for an increase in the offense level for the instant offense . . . ." The defendant then argues that the defendant's two-year sentence for carrying a pistol without a permit involved relevant conduct and was the basis for a two-level increase in the defendant's offense level. As noted above, the defendant's state weapons conviction stemmed from his assault on Jamie and Michael Wright. It was unrelated to his federal drug

offense. More importantly, the defendant again fails to account for the 10-year sentences he received as a result of his assault convictions. The conduct underlying those convictions clearly does not constitute relevant conduct. As a result, even if conduct underlying the state weapons conviction is relevant to the federal drug offense, § 5G1.3(c) applies, albeit only in an advisory fashion. *See* U.S.S.G. § 5G1.3(b), Commentary n.1 ("Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).") The policy statement at § 5G1.3(c) provides:

> In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Therefore, not only did the district court consult the guidelines and treat them as advisory, but the applicable guidelines provision simply urges the court to fashion its sentence so as to achieve a reasonable punishment. *See Matera*, 489 F.2d at 124; *Carrasco-De-Jesus*, 589 F.3d at 27; *Tonks*, 574 F.3d at 632-33.

Finally, the district court considered the § 3553(a) factors in determining the appropriate sentence. The district court thoroughly explained its analysis of the sentencing factors and the extent to which several of those factors militated in favor of a significant term of

imprisonment. Most importantly, the district court expressly stated that it had "given quite a bit of consideration to consecutive versus concurrent sentences." GA 47-48. Specifically, the district court stated that it had considered the actual amount of time the defendant was likely to serve in determining that a consecutive sentence was appropriate.

Having identified the applicable guideline range, treated the guidelines as advisory and considered the § 3553(a) factors, the district court did not plainly err in imposing a sentence within the advisory range and ordering that sentence to run consecutively to the defendant's undischarged state term of imprisonment.

## Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 7, 2010

Respectfully submitted,

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**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,705 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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# ADDENDUM

**18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

**(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

**(2)** the need for the sentence imposed –

**(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

**(B)** to afford adequate deterrence to criminal conduct;

**(c)** to protect the public from further crimes of the defendant; and

**(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

**(3)** the kinds of sentences available;

**(4)** the kinds of sentence and the sentencing range established for –

**(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

**(I)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

**(B)** in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of

whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

**(5)** any pertinent policy statement–

**(A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

**(7)** the need to provide restitution to any victims of the offense.

* * * *

**18 U.S.C. § 3584. Multiple sentences of imprisonment**

**(a) Imposition of concurrent or consecutive terms**.--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

**(b)** Factors to be considered in imposing concurrent or consecutive terms.--The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

**(c) Treatment of multiple sentence as an aggregate**.--Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

* * * *

**Rule 52. Harmless and Plain Error**

**(a)** Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

**(b)** Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

* * * *

**U.S.S.G. § 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

**(a)** Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (I) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

> **(1)(A)** all acts and ommissions comitted, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> **(B)** in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in

furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

**(2)** solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

**(3)** all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

**(4)** any other information specified in the applicable guideline.

**(b)** Chapters Four (Criminal History and Criminal Livelihood) and Give (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

* * * *

**U.S.S.G. § 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

**(a)** Base Offense Level (Apply the greatest):

**(1)** 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(c), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

**(2)** 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(c), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

**(3)** 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

**(4)** 26, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

**(5)** The offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.

**(b)** Specific Offense Characteristics

**(1)** If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

**(2)** If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export th econtrolled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

**(3)** If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

**(4)** If the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

**(5)** If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.

**(6)** If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.

**(7)** If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

**(8)** If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

**(9)** If the defendant was convicted under 21 U.S.C. 841(g)(1)(A), increase by 2 levels.

**(10)** (Apply the greatest):

**(A)** If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

**(B)** If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possession with intent to distribute, methamphetamine on the premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

**(c)** If –

**(I)** the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

**(ii)** the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

**(D)** If the offense (I) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

**(11)** If the defendant meets the criteria set forth in subdivisions (1) to (5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

* * * *

**3D1.2. Groups of Closely Related Counts**

**1.** All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

**(a)** When counts involve the same victim and the same act or transaction.

**(b)** When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

**(c)** When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

**(d)** When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

* * * *

**4A1.1. Criminal History Category**

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

**(a)** Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

**(b)** Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

**(c)** Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

**(d)** Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

**(e)** Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

**(f)** Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this item.

* * * *

**4A1.2. Definitions and Instructions for Computing Criminal History**

**(a)** Prior Sentence

**(1)** The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

**(2)** If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(f).

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

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

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

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

**(b)** Sentence of Imprisonment Defined

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

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

**(c)** Sentences Counted and Excluded

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

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

Careless or reckless driving

Contempt of court

Disorderly conduct or disturbing the peace

Driving without a license or with a revoked or suspended license

False information to a police officer

Gambling

Hindering or failure to obey a police officer

Insufficient funds check

Leaving the scene of an accident

Non-support

Prostitution

Resisting arrest

Trespassing.

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

Fish and game violations

Hitchhiking

Juvenile status offenses and truancy

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

Loitering

Minor traffic infractions (e.g., speeding)

Public intoxication

Vagrancy.

**(d)** Offenses Committed Prior to Age Eighteen

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

**(2)** In any other case,

**(A)** add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such

confinement within five years of his commencement of the instant offense;

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

**(e)** Applicable Time Period

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

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

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

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

**(f)** Diversionary Dispositions

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a

judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

**(g)** Military Sentences

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

**(h)** Foreign Sentences

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

**(I)** Tribal Court Sentences

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

**(j)** Expunged Convictions

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

**(k)** Revocations of Probation, Parole, Mandatory Release, or Supervised Release

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

**(2)(A)** Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for § 4A1.1(e) in respect to the recency of last release from confinement.

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

the date of the defendant's last release from confinement on such sentence (see § 4A1.2(d)(2)(A)); and (iii) in any other case, the date of the original sentence (see § 4A1.2(d)(2)(B) and (e)(2)).

**(l)** Sentences on Appeal

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

**(m)** Effect of a Violation Warrant

For the purposes of § 4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

**(n)** Failure to Report for Service of Sentence of Imprisonment

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

**(o)** Felony Offense

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

**(p)** Crime of Violence Defined

For the purposes of § 4A1.1(f), the definition of "crime of violence" is that set forth in § 4B1.2(1).

* * * *

**5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment**

**(a)** If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

**(b)** If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

> **(1)** the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
>
> **(2)** the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

**(c)** (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.