

	Recidivist Statutory Drug Penalties 21 U.S.C. §§841, 844, 846, 851, 960, 963	Career Offenders USSG 4B1.1; 28 U.S.C. §944(h)	Armed Career Criminals USSG §4B1.4; 18 U.S.C. §924(e)																
Requirements	<ol style="list-style-type: none"> <li>Instant federal drug offense has enhanced statutory penalties if Deft has prior felony drug conviction(s), e.g., <b>21 U.S.C. §§841, 844, 846, 960, 963</b></li> <li>Deft has 1 or more prior convictions for “serious drug felony” or “serious violent felony.”</li> <li>Govt timely files notice/information that strictly complies with <b>21 U.S.C. §851</b></li> </ol>	<ol style="list-style-type: none"> <li>Defendant is at least 18 yrs old.</li> <li>Instant offense is felony conviction for “crime of violence” or “controlled substance” offense.</li> <li>Two prior convictions for “crimes of violence” or “controlled substance offenses.”</li> </ol> <p>§924(c) convictions = crime of violence for purposes of “instant offense” &amp; “predicate offense”</p>	<ol style="list-style-type: none"> <li>Convicted under 18 U.S.C. §922(g), prohibited person (e.g., felon) in possession of firearm/ammo.</li> <li>Three prior convictions for violent felonies and/or serious drug offenses committed on different occasions.</li> </ol>																
Predicate Offense Definitions*	<p>Prior “felony drug offense” = state/federal felony offense, involving manufacture, distribution, possession with intent, that has a stat. max. of 10 or more years, that the Deft served more than 12 months on, and that the Deft was released from within 15 years of commencement of instant offense.</p> <p>Prior “serious violent felony” definition has elements &amp; residual clauses &amp; Murder; manslaughter; assault with intent to commit murder; 18 U.S.C. § 113; assault with intent to commit rape; aggravated sexual abuse and sexual abuse; abusive sexual contact; kidnapping; aircraft piracy; robbery; carjacking; extortion; arson; 18 U.S.C. §§ 924(c) or 929(a) &amp; firearm brandished, discharged, or otherwise used; attempt, conspiracy, or solicitation to commit any of the above <i>BUT each offense has qualifications and exceptions</i></p>	<p>“Controlled Substance Offense” = any state or federal offense involving manufacture, distribution, or intent to distribute. (NOT SIMPLE POSSESSION; NOT PURCHASE— Fla. Stat. §893.135 (Fla trafficking ) includes purchase &amp; is not divisible, &amp; so is not a “controlled substance offense” <i>see US v. Shannon, 631 F.3d 1187 (11th Cir. 2011). Cintron v. U.S. Atty Gen., 882 F.3d 1380 (11th Cir. 2018)**</i></p> <p>“Crime of violence” = any felony that has an element of the use, attempted use, or threatened use of physical force against the person of another; or that 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).</p>	<p>“Violent felony” = any felony that has an element the use, threat of use, or attempted use of force against another person or is burglary, arson, extortion, or involves use of explosives.</p> <p>“Serious drug offense” = fed drug offenses with at least a 10-yr stat max, or state drug offenses involving manufacture/distribution/possession with intent to manufacture/distribution &amp; at least 10-yr max.</p>																
Results	<p>Increases mand. min., stat max, &amp; sup. rel., e.g.,</p> <table border="0"> <tr> <td><i>Statute</i></td> <td><i>no enh</i></td> <td><i>1prior</i></td> <td><i>2priors</i></td> </tr> <tr> <td>§841(a)(1)(A):</td> <td>10-Life</td> <td>15-Life</td> <td>25-Life</td> </tr> <tr> <td>§841(a)(1)(B):</td> <td>5-40</td> <td>10-Life</td> <td>10-Life</td> </tr> <tr> <td>§841(a)(1)(C):</td> <td>0-20</td> <td>0-30</td> <td>0-30</td> </tr> </table>	<i>Statute</i>	<i>no enh</i>	<i>1prior</i>	<i>2priors</i>	§841(a)(1)(A):	10-Life	15-Life	25-Life	§841(a)(1)(B):	5-40	10-Life	10-Life	§841(a)(1)(C):	0-20	0-30	0-30	<p>Criminal history category becomes VI.</p> <p>Base offense level determined by stat. max, e.g.,</p> <p>Life = BOL 37; §924(c) convictions = BOL 37</p> <p>25yrs or more = BOL 34; 20 to &lt;25yrs = BOL 32;</p> <p>→ <i>See table at USSG §4B1.1(b)←</i></p>	<p>§924(e)→ 15-year mandatory minimum</p> <p>USSG §4B1.4→ Offense level is at least 33 or 34 &amp; criminal history at least IV</p>
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Notes	<p><b>NOT AUTOMATIC Statutory Enhancement—</b></p> <p>Notice required: Govt must give notice under, &amp; strictly comply with, §851 before trial/plea;</p> <p><b>TIME LIMIT ON FELONY DRUG OFFENSE PRIORS, BUT NO TIME LIMIT ON SERIOUS VIOLENT FELONY PRIORS.</b></p> <p>Mandatory minimum trumps guideline range. Only USSG § 5K1.1 motions with 18 USC §3553(e) or Rule 35 motions or safety valve will waive mandatory minimum.</p>	<p><b>AUTOMATIC Guideline Enhancement—</b></p> <p>NO notice required (but guidelines are advisory).</p> <p><b>TIME LIMIT ON PRIORS depends on prior sentence, e.g.,</b></p> <p>Prior sentence ..... Time limit</p> <p>&gt;13 months..... 15 yrs from sentencing or service of sentence</p> <p>60 days—13mos..... 10 yrs from sentencing</p> <p>→ Prior convictions “sustained” before commission of instant offense.</p> <p>→ Priors counted separately cannot be “related cases.”</p>	<p><b>AUTOMATIC Statutory Enhancement—</b></p> <p>NO notice required.</p> <p><b>NO TIME LIMIT ON PRIORS.</b></p> <p>→ Priors must be committed on separate occasions (discrete criminal episodes) to count separately.</p>																

\* When attacking prior convictions, challenge all facts in PSR describing prior convictions, *see US v. Wade*, 458 F.3d 1273 (11th Cir. 2006), and any prior not supported by court documents approved by *Shepard v. US*, 544 U.S. 13 (2005), e.g., indictment, judgment, plea transcript.

\*\* . A prior conviction under §893.135, therefore, for career offender purposes. But litigation continues about whether it can qualify as a “serious drug offense” for ACCA purpose

	Safety Valve USSG § 5C1.2; 18USC § 3553(f) USSG § 2D1.1(b)(17)	Substantial Assistance USSG § 5K1.1 18 U.S.C. § 3553(e)	Substantial Assistance Rule 35 - FRCRP 18 U.S.C. §3553(e)	Downward Departures USSG Ch. 5	Downward Variances 18 U.S.C. § 3553 (a) Factors
Requirements	<ol style="list-style-type: none"> <li>Deft has 0 or 1 criminal history points.</li> <li>Deft did not use/ threaten violence or possess gun.</li> <li>Offense did not result in death or serious injury.</li> <li>Deft was not supervisor, organizer, leader, manager, see §3B1.1, and not engaged in CCE.</li> <li>Deft provided Govt information about offense &amp; relevant conduct by sentencing.</li> </ol>	<p>Govt motion at or before sentencing stating Deft provided substantial assistance in investigation or prosecution of another</p> <p>Court may consider:</p> <ul style="list-style-type: none"> <li>significance &amp; usefulness;</li> <li>truthfulness, completeness, reliability of info</li> <li>nature &amp; extent of asst.;</li> <li>injury/risk to Deft &amp; family;</li> <li>timeliness of asst.</li> </ul>	<p>Govt post-sentencing motion...</p> <p><b>(a) within 1 yr</b> of sentencing, may include cooperation rendered before (“place holder” motion can be filed within 1yr so Govt can evaluate cooperation); <b>or</b></p> <p><b>(b) &gt; 1 yr</b> after sentencing if:</p> <ul style="list-style-type: none"> <li>info not known to Deft till 1 yr or more after sentencing;</li> <li>info provided within 1 yr did not become useful to Govt till &gt; 1 yr; or</li> <li>Deft could not reasonably anticipate usefulness of info till &gt; 1 yr after sentencing &amp; Deft promptly provided info to Govt after its usefulness became reasonably apparent.</li> </ul>	<p>Motion no later than time of sentencing (check local rules or specific judge’s rules on timeliness).</p> <p>USSG Ch 5 sets out different bases for departures, each having different criteria, e.g., outside the heartland; diminished capacity, voluntary disclosure of offense; aberrant behavior; age; mental or emotional condition; military service; physical condition</p>	<p>§ 3553 (a) Factors:</p> <ol style="list-style-type: none"> <li>nature &amp; circumstances of offense &amp; history &amp; characteristics of Deft;</li> <li>need to reflect seriousness of offense, promote respect for the law, &amp; provide just punishment for offense;</li> <li>need for deterrence;</li> <li>need to protect the public;</li> <li>need to provide Deft with educational or vocational training or medical care;</li> <li>kinds of sentences available;</li> <li>sentencing guidelines range;</li> <li>Sentencing Commission’s pertinent policy statements;</li> <li>need to avoid unwarranted sentencing disparities; and</li> <li>need to provide restitution to victims.</li> </ol>
Results	<p><b>§5C1.2 &amp; §3553(f)</b> waives mandatory minimum in 21 U.S.C. §§841, 844, 846, 960, 963, &amp; MDLEA, 46 U.S.C. §40501, et seq. (boat cases)</p> <p><b>§2D1.1(b)(17)</b> takes 2 levels off.</p>	<p>Court may depart below guideline range without limit, even below amount requested by Govt, &amp; if Govt cites §3553(e) below mandatory minimum.</p>	<p>No limit on departure downward from guideline sentence or statutory minimum once government “opens door” by making motion.</p>	<p>Departure in guideline levels, but not below mandatory minimum</p>	<p>Must impose a sentence that is “sufficient, but not greater than necessary” to achieve the purposes of sentencing, but may not sentence below mandatory minimum</p>
Notes	<p>No motion required; Waives mandatory minimum; Court must grant if Deft meets criteria; Court decides if Deft is truthful.</p> <p>§5C1.2 applies if mand. min. is 5 yrs or more, &amp; offense level from Ch. 2-3 is level 17 or more. §2D1.1(b)(17) does not set minimum offense level 17.</p>	<p>Govt motion required; Govt discretion to file; Court’s discretion to grant; Can waive mandatory minimum, but only if Govt motion references 18 U.S.C. §3553(e).</p>	<p>Govt motion required; Govt discretion to file; Court’s discretion to grant; Motion waives mandatory minimum automatically, without having to reference §3553(e). See Rule 35(b)(4).</p>	<p>No Govt motion required; Deft motion may be required by particular judge; should at least file a sentencing memo; Does not waive mandatory minimum; Court has discretion to grant reasonable departure if Deft proves grounds exist.</p>	<p>No motion required, but sentencing memo is good idea—know your judge; Does not waive mandatory minimum; Court’s discretion, but guideline sentence cannot be presumed reasonable. See, e.g., <i>Gall v. US</i>, 128 S. Ct. 586 (2007); <i>Rita v. US</i>, 127 S. Ct. 2456 (2007); <i>US v. Hunt</i>, 459 F.3d 1180 (11th Cir.2006); <i>US v. Talley</i>, 431 F.3d 784 (11th Cir.2005).</p>

## 21 U.S.C. § 851 Serious Violent Felony Definition

**A “Serious Violent Felony” has NO time limit; the prior conviction can be very old. But the defendant must have served more than 12 months’ imprisonment on the prior conviction.**

**Enumerated offense clause** includes the following Federal or State offenses, by whatever designation and wherever committed, for which the offender served a term of imprisonment of more than 12 months

murder (as described in section 1111);

manslaughter other than involuntary manslaughter (as described in section 1112);

assault with intent to commit murder (as described in section 113(a));

any offense that would be a felony violation of section 113 of title 18, United States Code, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months;

assault with intent to commit rape defined as an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242);

aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242);

abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2));

kidnapping defined as an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force;

aircraft piracy (as described in section 46502 of Title 49);

robbery (as described in section 2111, 2113, or 2118);

BUT § 3559(c)(3)(A) adds that robbery does NOT qualify “if the defendant establishes by clear and convincing evidence that —

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person”;

carjacking (as described in section 2119);

extortion defined as an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person;

arson defined as an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive;

firearms use defined as an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both;

firearms possession (as described in section 924(c)); or

attempt, conspiracy, or solicitation to commit any of the above offenses

**Elements Clause** includes any other offense punishable by a maximum term of imprisonment of 10 years or more — for which the offender served a term of imprisonment of more than 12 months — that has as an element the use, attempted use, or threatened use of physical force against the person of another

**Residual Clause** includes any other offense punishable by a maximum term of imprisonment of 10 years or more — for which the offender served a term of imprisonment of more than 12 months — that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense. BUT § 3559(c)(3)(A) adds that an offense described in this residual clause does NOT qualify “if the defendant establishes by clear and convincing evidence that — (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person”