



# Revocations Among Federal Offenders

UNITED STATES SENTENCING COMMISSION



## United States Sentencing Commission

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## Introduction

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A defendant's criminal history plays an important role in federal criminal sentencing. Congress, by statute, and the United States Sentencing Commission (the "Commission") in the sentencing guidelines have highlighted the importance of a defendant's criminal history as a factor to be weighed in sentencing defendants. Section 3553(a) of title 18, which details factors to be considered in imposing a sentence, lists "the history and characteristics of the defendant" as one of the primary considerations.<sup>1</sup> Likewise, the sentencing guidelines consider the criminal history of a defendant as one of two primary considerations—along with offense severity—in determining the appropriate sentence for an offense.

The Commission has engaged in an ongoing study of the criminal history of federal offenders and has issued several reports examining the overall role and impact of its criminal history rules. These publications have examined criminal history as a predictor of recidivism, the overall impact of criminal history on sentencing, and the nature and severity of criminal history of federal offenders. Most recently, the Commission released *The Criminal History of Federal Offenders*,<sup>2</sup> which utilized recent technological improvements to expand the scope of information the Commission collects on an offender's criminal history and provided a more complete assessment of the criminal histories of federal offenders.

This publication explores a subset of the Commission's criminal history rules—those regarding the revocation of terms of probation, parole, supervised release, special parole, and mandatory release. These rules affect an offender's criminal history score<sup>3</sup> and Criminal History Category. Additionally, this report explores the impact of revocations upon safety valve relief and the career offender guideline. As part of this work, the Commission analyzed the prevalence of revocations among federal offenders and the nature of the revocations.

## Key Findings

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The key findings of the Commission's study of revocations are that:

- Only a minority of offenders (35.0%) with criminal history points under the federal sentencing guidelines had at least one scored conviction with a revocation. Most often such offenders had only one such conviction.
- For the minority of offenders who did have at least one scored conviction with a revocation, it often increased their criminal history score and resulting Criminal History Category. Among offenders with at least one scored conviction in their criminal history, three-fifths (60.2%) received additional criminal history points, and just under a third (30.9%) received an increase in Criminal History Category. For those offenders who received an increase into a higher Criminal History Category, the impact was generally limited to one Criminal History Category.
- The rate at which offenders had at least one scored conviction with a revocation varied significantly depending on the type of federal offender. Firearms offenders were the most likely (54.3%) and immigration offenders the least likely (20.9%) to have at least one scored conviction with a revocation. However, the impact of such convictions on their criminal history scores and Criminal History Categories varied much less. Among offenders with at least one such conviction, firearms offenders were the most often (66.2%) and immigration offenders least often (55.9%) to receive additional criminal history points. Furthermore, among offenders who received additional criminal history points, those points resulted in a higher Criminal History Category most often for drug trafficking offenders (53.1%) and least often for firearms offenders (42.9%).
- The Commission cannot state with certainty how often revocations are based on new crimes versus technical violations because the underlying basis for the revocation could not be determined in 38.7 percent of the cases studied. However, between 38.9 percent and 77.5 percent of the

revocations studied were for new crimes, and between 22.5 and 61.1 percent were for technical violations.

- Prior revocations did not significantly limit offender eligibility for the statutory safety valve, which relieves certain drug trafficking offenders from otherwise applicable statutory mandatory minimum penalties. Of the drug trafficking offenders studied, only 2.3 percent appear to be ineligible for the safety valve based solely on scored convictions with revocations.
- Prior revocations had a more significant impact on offenders who received the career offender enhancement at §4B1.1. Of the career offenders studied, 10.7 percent qualified for the career offender enhancement in part because of scored convictions with revocations.

## Background

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### *Criminal History Rules*

Chapter Four of the *Guidelines Manual* provides the process to score a defendant's criminal history. Just as Congress recognized in 18 U.S.C. § 3553(a) and 28 U.S.C. § 994<sup>4</sup> that a defendant's record of past criminal conduct is relevant to the purposes of sentencing, so too did the original Commission in its *Guidelines Manual* promulgated in 1987. Accordingly, the *Introductory Commentary* to Chapter 4 states:

To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of a successful rehabilitation.<sup>5</sup>

As a practical matter, the Commission's recent report on the criminal history and recidivism of federal offenders found that criminal history score is a strong predictor of an offender's likelihood of recidivating. It states, "...[C]onsistent with its past work in this area, the Commission's present study found that

recidivism rates are closely correlated with total criminal history points and resulting Criminal History Category classification, as offenders with lower criminal history scores have lower recidivism rates than offenders with higher criminal history scores.”<sup>6</sup>

The sentencing guidelines establish a method for evaluating a defendant’s criminal history by assigning points to certain prior criminal convictions and adjudications of juvenile delinquency based on the length of the sentence imposed for those offenses. Through this process, the court calculates a defendant’s “criminal history score,” which is then assigned to one of six Criminal History Categories. The combination of the “offense level” of a defendant’s instant offense and the defendant’s Criminal History Category determines the sentencing range, expressed in months, for the offense.

As part of this process, a defendant’s past convictions are assigned one, two, or three points based on the nature of the offense and the type and length of the sentence imposed. These point assignments are designed to reflect the seriousness of the crime of conviction. Criminal history points are assigned as follows:

- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

An additional two points are added when the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. One point is also added, up to a total of three additional points, for each prior sentence resulting from a conviction of a “crime of violence” that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence.<sup>7</sup>

### *Revocations and the Federal Sentencing Guidelines*

Since the inception of the first *Guidelines Manual* in 1987, the calculation of the defendant's criminal history score has included the consideration of sentences imposed upon revocations of terms of probation, parole, and supervised release in §4A1.2(k).<sup>8</sup> A revocation occurs when an offender has been released from incarceration under the supervision of the court, or placed on probation as an alternative to incarceration, and subsequently the court determines that the offender has violated the conditions of supervision. Usually, but not always, this results in an additional period of incarceration. For example, a defendant might be sentenced to a term of two years of incarceration with three years of supervised release to follow. If, while the defendant is on supervised release, the defendant violates the conditions of supervision,<sup>9</sup> the sentencing court can revoke the defendant's term of supervised release. The judge then determines whether to extend or modify conditions of supervision, or whether to return the defendant to incarceration. In addition, a revocation can occur upon a violation of probation. For example, a sentencing court might decide that as an alternative to incarceration, a defendant is to be placed on 12 months of supervised probation. If, during that 12 months, the defendant violates the conditions of the defendant's probation, the sentencing court can revoke the defendant's probation and either modify the defendant's conditions of supervised probation or impose a term of incarceration.

Under §4A1.2(k), a defendant's criminal history score can be affected by revocations of probation, parole, supervised release, special parole, and mandatory release. When a revocation has occurred, any term of imprisonment imposed for the violation that led to the revocation is added to the original sentence, and the total sentence is then used for the purposes of assigning criminal history points.<sup>10</sup> The addition of the revocation time to the original sentence can affect both criminal history points and Criminal History Category. For example, if an offender received a term of one year of imprisonment with two years of supervised release, that sentence would be treated as a 12-month sentence and, under §4A1.1, assigned two criminal history points. However, if the offender had his or her supervised release revoked and

received a six-month imprisonment sentence on the revocation, under §4A1.2(k), the six-month sentence would be added to the original twelve-month sentence. The resulting 18-month sentence would then receive three criminal history points. In effect, the original sentence and the revocation sentence are combined and treated as one sentence. Accordingly, any increase in criminal history points due to the revocation may also result in an increase in Criminal History Category.<sup>11</sup>

Revocations can also affect the time frame for scoring a criminal history event under §4A1.2(e), which provides that any prior sentence exceeding 13 months imposed within 15 years of the commencement of the instant offense is scored. It further provides that regardless of when the sentence was imposed, the sentence is counted if it resulted in the defendant being incarcerated during any part of that 15-year period. As for any other prior adult sentence, the guidelines require that the sentence be imposed within ten years of the defendant's commencement of the instant offense. This means that some prior offenses are deemed "stale"—that is, too old to be relevant—and are not counted.<sup>12</sup> However, where a two-point offense became a three-point offense because of a revocation, the resulting total of adding both sentences (the original sentence and the revocation sentence) also affects the time period for which it is scored. The original two-point offense only can be scored during a ten-year period from the date of imposition of the sentence. The three-point offense, however, is not only subject to a 15-year period, but the time frame is measured from the date of last incarceration rather than from the date of the imposition of sentence.<sup>13</sup>

Because of the shift in both the length of the applicable time period and the date used for measuring that time period, revocations can "revive" otherwise stale convictions. That is, sentences that were too old to be scored as one or two points can potentially be scored if a revocation sentence increases the criminal history points to three and the offense falls within 15 years from the date of last incarceration. The change in scoring can have potentially significant consequences, including additional criminal history points, a higher Criminal History Category, or even the imposition of a sentencing enhancement.

For example, the career offender guideline<sup>14</sup> at §4B1.1 requires that a defendant have “two prior felony convictions of either a crime of violence or a controlled substance offense” before the enhancement applies. Section 4B1.2(c)(2) provides that at least two of the “prior felony convictions” must receive criminal history points and be scored separately under §4A1.1. Stale convictions, therefore, cannot count as predicate “prior felony convictions” for a career offender enhancement. However, where a revocation “revived” a stale conviction, that conviction is scored and can count as a predicate offense resulting in a sentencing enhancement under the career offender guideline.

Although not examined in this study, stale convictions can also be revived and used to enhance base offense levels under §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and §2L1.2 (Unlawfully Entering or Remaining in the United States). For example, under §2K2.1, a defendant receives a four-level increase to the Base Offense Level if the instant offense occurs subsequent to the defendant being convicted of two prior felonies which are crimes of violence or controlled substance offenses. Like the career offender guideline, when a revocation revives an otherwise stale conviction, the prior conviction is then scored and can count as a predicate offense for the purposes of an enhancement under §2K2.1<sup>15</sup> and §2L1.2.<sup>16</sup>

Similarly, a revived conviction might also bar an otherwise-qualified defendant from receiving relief from a statutory mandatory minimum penalty under 18 U.S.C. § 3553(f).<sup>17</sup> Commonly known as the “statutory safety valve,” this provision allows a sentencing court to impose a sentence without regard to a statutory minimum penalty when a defendant meets certain requirements. The first of these requirements is that the defendant does not have more than one criminal history point under the sentencing guidelines. In some cases, a “revived” conviction that would not be scored without a revocation could potentially add criminal history points, barring an individual from receiving the safety valve relief they would otherwise receive, which would result in a higher guidelines range<sup>18</sup> and longer sentence.

## Data Analysis

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To determine the impact of revocations upon criminal history scores and Criminal History Categories, the Commission examined a ten-percent random sample of fiscal year 2016 offenders who had a criminal history score of one point or greater. There were 3,696 offenders in the sample. Offenders who had convictions but a criminal history score of zero may have had revocations in their criminal history, but those revocations did not impact their criminal history score. They were thus not included in the sample.<sup>19</sup>

As the purpose of the study was to determine the impact of the Chapter Four rules regarding revocations, the Commission collected information only for convictions<sup>20</sup> that ultimately received criminal history points. These convictions are referred to as “scored convictions” in this publication. For each “scored conviction,” the Commission collected the following information:

1. Whether the offender had a term of probation, parole, or supervised release for the conviction that was revoked;
2. The number of points the conviction received;
3. The number of points the conviction would have received without the revocation(s); and
4. Whether the conviction would have been stale without the revocation(s);

This information was then used in the analyses discussed below.

**Figure 1. Revocations**  
FY 2016



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

### Prevalence and Impact of Revocations

As reflected in Figure 1, 35.0 percent of the offenders in the study had a scored conviction with a revocation in their criminal history.

Of the offenders in the sample, 22.0 percent had a total of one scored conviction with a revocation, 7.7 percent had two, and 5.3 percent had three or more (see Table 1).

While only a minority of the offenders studied had a scored conviction with a revocation, when such convictions did occur, they often affected the offenders' criminal history score. As shown in Table 2, for those offenders who had at least one scored conviction with a revocation, the majority received additional criminal history points. Of the 1,294 offenders with at least one scored conviction with a revocation, three-fifths (60.2%) received

**Table 1. Distribution of Revocations**  
FY 2016

	Offenders in Revocation Study
<b>TOTAL OFFENDERS</b>	<b>N=3,696</b>
No Revocations	65.0%
One Revocation	22.0%
Two Revocations	7.7%
Three or More Revocations	5.3%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 2. Distribution of Points Due to Revocations**  
FY 2016

	Offenders With At Least One Revocation
<b>TOTAL OFFENDERS</b>	<b>N=1,294</b>
No Points	39.8%
One Point	20.6%
Two Points	16.1%
Three Points	14.7%
Four or More Points	8.8%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

additional criminal history points. Most often (20.6%) one criminal history point was added, but 16.1 percent received two additional points, 14.7 percent received three additional points, and 8.8 percent received an additional four or more points. Two offenders received 15 additional points resulting from multiple revocations.

For many offenders, the additional criminal history points also increased their resulting Criminal History Category. In fact, a higher Criminal History Category resulted for just over one-half (51.4%) of the 776 offenders who received additional criminal history points.

Where an offender’s Criminal History Category increased due to a revocation, the impact was generally a difference of one category. Each column in Table 3 reflects the number of offenders studied in each Criminal History Category. In order to determine the impact of revocations on the Criminal History Category, for each offender, the Commission recalculated the offender’s Criminal History Category in the absence of any revocations, which is termed the “adjusted” Criminal History Category. The adjusted Criminal History Category is shown along the rows. For example, there were 82 offenders who were in Criminal History Category VI in part because of a revocation. If the additional criminal history points they received for revocations were subtracted from their criminal history score, of the 82 offenders, 79.3 percent would drop by one category to Criminal History

**Table 3. Actual and Adjusted CHCs for Offenders Whose CHCs Increased Due to Revocations**  
FY 2016

	Actual CHC I N=0	Actual CHC II N=34	Actual CHC III N=71	Actual CHC IV N=113	Actual CHC V N=99	Actual CHC VI N=82
Adjusted CHC I		100.0%	19.7%	0.9%	0	0
Adjusted CHC II			80.3%	7.1%	1.0%	0
Adjusted CHC III				92.0%	7.1%	2.4%
Adjusted CHC IV					91.9%	18.3%
Adjusted CHC V						79.3%
Adjusted CHC VI						

SOURCE: U.S. Sentencing Commission’s FY 2016 Revocations Datafile.  
Cases missing information necessary for analysis were excluded from that analysis.

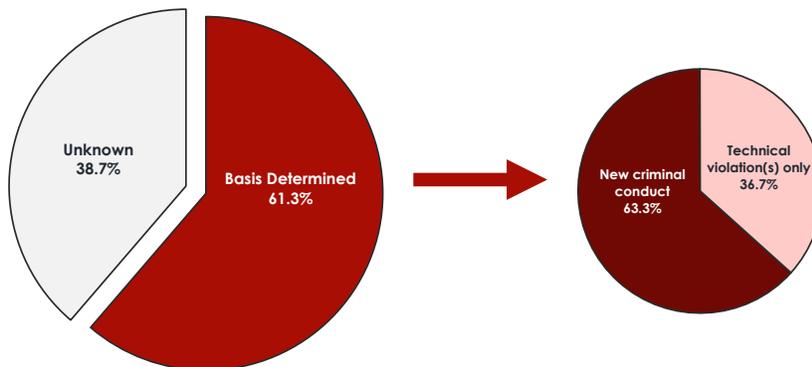
Category V, meaning that revocations increased their Criminal History Category by one category. Another 18.3 percent would drop by two categories to Criminal History Category IV, meaning that revocations increased their Criminal History Category by two categories. And 2.4 percent would drop by three categories to Criminal History Category III, meaning that revocations increased their Criminal History Category by three categories. This pattern generally holds across all Criminal History Categories, as 100 percent of Criminal History Category II offenders, 80.3 percent of Criminal History Category III offenders, 92.0 percent of Criminal History Category IV offenders, and 91.9 percent of Criminal History Category V offenders received an increase of one category because of revocations.

### *Reasons for Revocation*

There were 1,294 offenders in the sample who had at least one scored conviction with a revocation. These 1,294 offenders had a total of 2,108 scored convictions with a revocation. The Commission analyzed sentencing documents to determine whether the underlying basis for each of the revocations was the result of a new crime or a technical violation, which is a question often asked by policy makers.

In this report, technical violations are defined as violations of the conditions of supervision that typically do not involve the commission of new criminal offenses and which did not result in new criminal charges or convictions.<sup>21</sup> Examples of technical violations include failure to report to a probation officer or failure to pay a fine. Technical violations are contrasted with “new crime” violations, which occur when an offender commits a new criminal offense, resulting in new criminal charges or convictions. As reflected in other studies, a failed drug test or an admission of drug use to a probation officer is often considered to be a technical violation,<sup>22</sup> and therefore is classified as such for this publication. Several circuits, however, have held that possession of a controlled substance may be inferred from a failed drug test,<sup>23</sup> and therefore is in fact a “new crime” violation. For readers who would classify such offenses as a “new crime” violation, the Commission determined that over 40 percent of the 474 technical-

**Figure 2. Reasons for Revocations – Basis of Revocation Determined**  
FY 2016

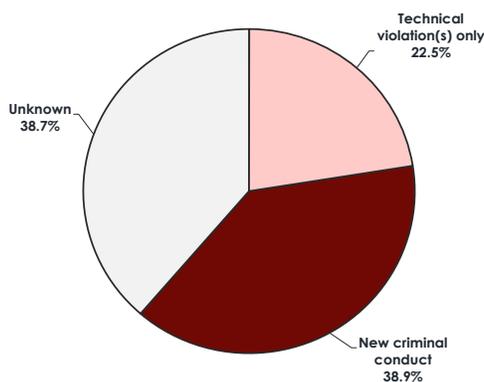


SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

only violations in the study involved either a failed drug test or other evidence of possession of a controlled substance—142 (30.0%) involved failed drug testing and an additional 55 (11.6%) involved other evidence of possession of a controlled substance, such as an admission to a probation officer of drug use.

As reflected in Figure 2, of the cases for which the basis for the revocation could be determined, 63.3 percent were for new crimes and 36.7 percent were for technical violations. However, the Commission could not determine the basis for the revocation in a substantial portion of the revocations studied—38.7 percent—because presentence investigation reports are not uniform in reporting whether a revocation has occurred, and they frequently do not provide details on the nature of the revocation. In

**Figure 3. Reasons for Revocations**  
FY 2016



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

particular, the amount and quality of information reported on the nature of revocation varies by jurisdiction.

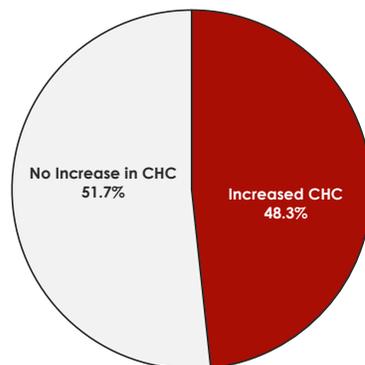
Because the reason is unknown for so many revocations, a more accurate reading of the data in Figure 3 is that at least 38.9 percent of the revocations were for new crimes, but that figure could be as high as 77.5 percent if all the revocations for unknown reasons were for new crimes. Similarly, at least 22.5 percent of all revocations resulted from a technical violation, but that figure could be as high as 61.1 percent if all revocations for unknown reasons were for technical reasons.

### *Impact of Technical Revocations on Criminal History Score and Category*

The Commission has received comment over the years regarding the impact of revocations, much of which focused on the impact of technical violations. As noted above, at least 22.5 percent of all revocations in fiscal year 2016 were technical in nature.<sup>24</sup> Given the ongoing interest in the impact of technical revocations,<sup>25</sup> the Commission further analyzed this subset of offenders.

Of the 368 offenders who had a scored conviction with at least one revocation for a technical violation, 57.5 percent received additional criminal history points. As reflected in Figure 4, almost half (48.3%) of those offenders who received criminal history points due to technical revocations increased to a higher

**Figure 4. Impact on CHC for Offenders Who Received Points Due to Technical Revocations FY 2016**



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

Criminal History Category as a result. The overwhelming majority of offenders whose Criminal History Category increased received an increase of only one category (87.3%).

### **Variation by Instant Offense**

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In fiscal year 2016, the four most common instant offenses of conviction<sup>26</sup> were drug trafficking, immigration, firearms, and fraud. For this report, the Commission separately analyzed the prior convictions that received points in the criminal histories for these four groups of offenders.<sup>27</sup> Firearms offenders were the most likely to have at least one scored conviction with a revocation. Additionally, they were the most likely to receive additional criminal history points. Firearms offenders were the only group in which over half of offenders had at least one scored conviction with a revocation. Drug trafficking offenders were the second most likely to have a scored conviction with a revocation, followed by fraud offenders. Immigration offenders were the least likely to have at least one scored conviction with a revocation.

#### *Firearms Offenders*

Of the four groups of offenders compared in this report, firearms offenders were the only group in which a majority had at least one scored conviction with a revocation. Of the 573 firearms offenders, 54.3 percent had at least one scored conviction with a revocation. A total of 29.0 percent had one, 13.8 percent had two, and 11.5 percent had three or more scored convictions with a revocation.

Firearms offenders were the group of offenders most likely to receive additional criminal history points due to revocations. As seen in Table 5, two-thirds (66.2%) of the 311 firearms offenders with at least one scored conviction with a revocation received additional criminal history points due to the revocation(s). One-fifth (20.0%) received one additional point, and almost the

**Table 4. Distribution of Revocations**  
FY 2016, Firearms Offenders

Firearms Offenders in Revocation Study	
<b>TOTAL OFFENDERS</b>	<b>N=573</b>
No Revocations	45.7%
One Revocation	29.0%
Two Revocations	13.8%
Three or More Revocations	11.5%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 5. Distribution of Points Due to Revocations**  
FY 2016, Firearms Offenders

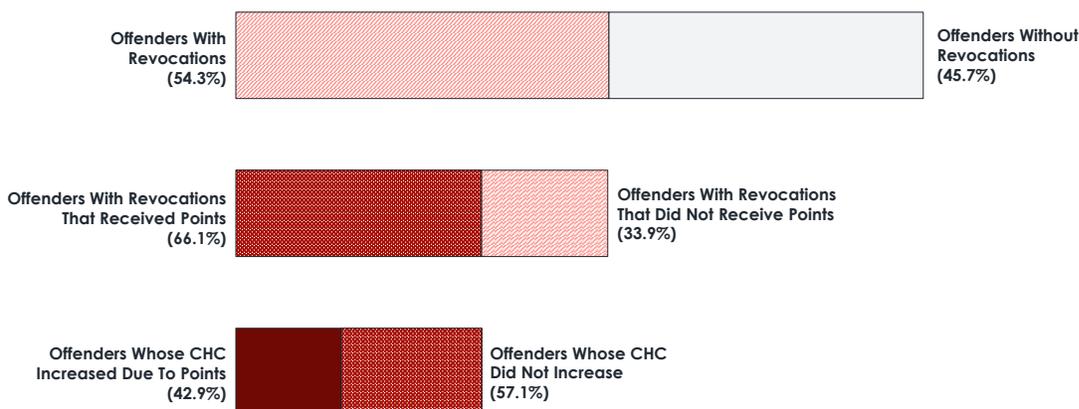
Firearms Offenders With At Least One Revocation	
<b>TOTAL OFFENDERS</b>	<b>N=311</b>
No Points	33.9%
One Point	20.0%
Two Points	21.0%
Three Points	13.9%
Four or More Points	11.3%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

same share (21.0%) received two additional points. However, 13.9 percent received three additional points, and 11.3 percent received four or more additional points.

Although firearms offenders were the most likely to receive additional criminal history points, they were the least likely to have their Criminal History Category increase as a result. As shown in Figure 5, less than half (42.9%) of the 205 firearms offenders who received criminal history points due to revocations had a resulting increase in their Criminal History Category.

**Figure 5. Revocations**  
FY 2016, Firearms Offenders



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 6. Actual and Adjusted CHCs for Offenders Whose CHCs Moved Due to Revocations**  
 FY 2016, Firearms Offenders

	Actual CHC I N=0	Actual CHC II N=4	Actual CHC III N=12	Actual CHC IV N=24	Actual CHC V N=25	Actual CHC VI N=23
Adjusted CHC I		100.0%	16.7%	0	0	0
Adjusted CHC II			83.3%	8.3%	4.0%	0
Adjusted CHC III				91.7%	8.0%	4.3%
Adjusted CHC IV					88.0%	21.7%
Adjusted CHC V						73.9%
Adjusted CHC VI						

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

As reflected in Table 6, when revocations increased the Criminal History Category of firearms offenders, generally the increase was one Criminal History Category. For example, of the 23 firearms offenders placed into CHC VI in part as a result of revocations, 73.9 percent received an increase of one of Criminal History Category, 21.7 percent received an increase of two Criminal History Categories, and 4.3 percent received an increase of three Criminal History Categories. This pattern applied across Criminal History Categories as revocations resulted in an increase of one category for 100 percent of offenders in CHC II, 83.3 percent of offenders in CHC III, 91.7 percent of offenders in CHC IV, and 88.0 percent of offenders in CHC V.

### *Drug Trafficking Offenders*

Following the general trend, a minority of drug trafficking offenders had scored convictions with revocations. Of the 1,077 drug trafficking offenders in the study, two-fifths (40.6%) had at least one scored conviction with a revocation. One-quarter (24.7%) had one, 9.7 percent had two, and 6.2 percent had three or more scored convictions with a revocation.

**Table 7. Distribution of Revocations**  
FY 2016, Drug Trafficking Offenders

Drug Trafficking Offenders in Revocation Study	
<b>TOTAL OFFENDERS</b>	<b>N=1,077</b>
No Revocations	59.4%
One Revocation	24.7%
Two Revocations	9.7%
Three or More Revocations	6.2%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 8. Distribution of Points Due to Revocations**  
FY 2016, Drug Trafficking Offenders

Drug Trafficking Offenders With At Least One Revocation	
<b>TOTAL OFFENDERS</b>	<b>N=437</b>
No Points	41.0%
One Point	18.8%
Two Points	17.2%
Three Points	13.5%
Four or More Points	9.5%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

The majority of drug trafficking offenders who had at least one scored conviction with a revocation received additional criminal history points. Of the 437 drug trafficking offenders with at least one scored conviction with a revocation, three-fifths (59.0%) received additional criminal history points. About an equal share received one additional point (18.8%) as received two additional points (17.2%). However, 13.5 percent received three points, and 9.5 percent received four or more additional points.

As shown in Figure 6, over half (53.1%) of the 258 drug trafficking offenders who received additional criminal history points due to revocations had a resulting increase in their Criminal History Category.

**Figure 6. Revocations**  
FY 2016, Drug Trafficking Offenders



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 9. Actual and Adjusted CHCs for Offenders Whose CHCs Moved Due to Revocations**  
 FY 2016, Drug Trafficking Offenders

	Actual CHC I N=0	Actual CHC II N=16	Actual CHC III N=22	Actual CHC IV N=37	Actual CHC V N=32	Actual CHC VI N=30
Adjusted CHC I		100.0%	27.3%	2.7%	0	0
Adjusted CHC II			72.7%	10.8%	0	0
Adjusted CHC III				86.5%	6.3%	3.3%
Adjusted CHC IV					93.8%	16.7%
Adjusted CHC V						80.0%
Adjusted CHC VI						

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile.  
 Cases missing information necessary for analysis were excluded from that analysis.

As reflected in Table 9, when revocations increased the Criminal History Category of drug trafficking offenders, generally the increase was one Criminal History Category. For example, of the 30 drug trafficking offenders in CHC VI in part as a result of revocations, 80.0 percent received an increase of one of Criminal History Category, 16.7 percent received an increase of two Criminal History Categories, and 3.3 percent received an increase of three Criminal History Categories. This pattern applied across Criminal History Categories as revocations resulted in an increase of one category for 100 percent of offenders in Criminal History Category II, 72.7 percent of offenders in Criminal History Category III, 86.5 percent of offenders in Criminal History Category IV, and 93.8 percent of offenders in Criminal History Category V.

### *Fraud Offenders*

Following the general trend, a minority of fraud offenders had a scored conviction with a revocation. Of the 225 fraud offenders in the study, almost one-third (30.7%) had at least one scored conviction with a revocation. One-fifth (18.7%) of the fraud offenders had one, 4.9 percent had two, and 7.1 percent had three or more scored convictions with a revocation.

**Table 10. Distribution of Revocations**  
FY 2016, Fraud Offenders

	Fraud Offenders in Revocation Study
<b>TOTAL OFFENDERS</b>	<b>N=225</b>
No Revocations	69.3%
One Revocation	18.7%
Two Revocations	4.9%
Three or More Revocations	7.1%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 11. Distribution of Points Due to Revocations**  
FY 2016, Fraud Offenders

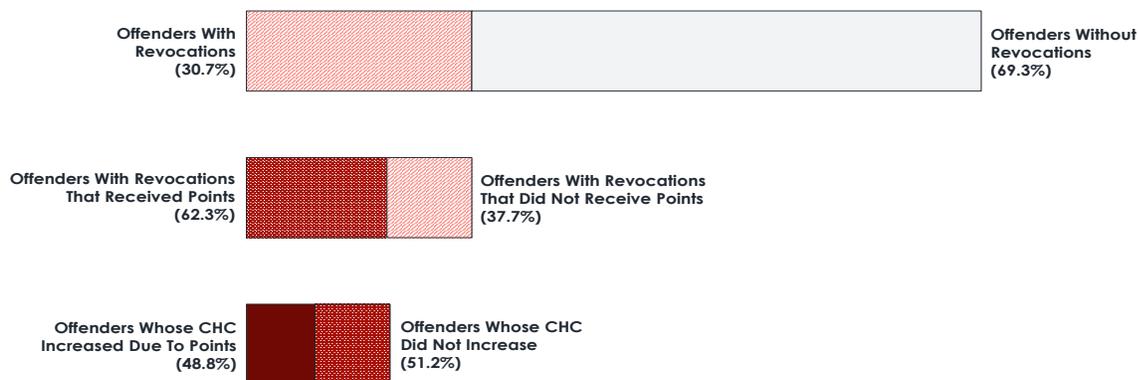
	Fraud Offenders With At Least One Revocation
<b>TOTAL OFFENDERS</b>	<b>N=69</b>
No Points	37.7%
One Point	24.6%
Two Points	13.0%
Three Points	15.9%
Four or More Points	8.7%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

Of the 69 fraud offenders with at least one scored conviction with a revocation, 62.2 percent received additional criminal history points due to the revocation(s). One-quarter (24.6%) received one additional criminal history point, and 13.0 percent received two additional criminal history points. However, 15.9 percent received three additional points, and 8.7 percent received four or more additional points.

After firearms offenders, fraud offenders who received criminal history points due to revocations were the second least likely to have a resulting increase in Criminal History Category. The minority of fraud offenders (48.8%) who received additional criminal history points due to revocations had a resulting increase in Criminal History Category.

**Figure 7. Revocations**  
FY 2016, Fraud Offenders



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 12. Actual and Adjusted CHCs for Offenders Whose CHCs Moved Due to Revocations**  
 FY 2016, Fraud Offenders

	Actual CHC I N=0	Actual CHC II N=1	Actual CHC III N=7	Actual CHC IV N=4	Actual CHC V N=7	Actual CHC VI N=2
Adjusted CHC I		100.0%	14.3%	0	0	0
Adjusted CHC II			85.7%	0	0	0
Adjusted CHC III				100.0%	0	0
Adjusted CHC IV					100.0%	0
Adjusted CHC V						100.0%
Adjusted CHC VI						

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

As reflected in Table 12, when revocations increased the Criminal History Category of fraud offenders, the substantial majority received an increase of one Criminal History Category. In fact, only one fraud offender with revocations that resulted in an increase in Criminal History Category received an increase of more than one Criminal History Category.

### *Immigration Offenders*

Immigration offenders were the least likely type of offender to have at least one scored conviction with a revocation. Of the 1,315 immigration offenders in the study, one-fifth (20.9%) had at least one scored conviction with a revocation. A total of 15.8 percent of immigration offenders had one, 3.6 percent had two, and 1.5 percent had three or more scored convictions with a revocation.

Despite the low percentage of immigration offenders who had at least one scored conviction with a revocation, those immigration offenders who did often received additional criminal history points. Of the 275 immigration offenders with at least one scored conviction with a revocation, just over half (55.9%) received additional criminal history points due to the revocation(s). Slightly less than one-quarter (23.5%) of these offenders received

**Table 13. Distribution of Revocations**  
FY 2016, Immigration Offenders

Immigration Offenders in Revocation Study	
<b>TOTAL OFFENDERS</b>	<b>N=1,315</b>
<b>No Revocations</b>	79.1%
<b>One Revocation</b>	15.8%
<b>Two Revocations</b>	3.6%
<b>Three or More Revocations</b>	1.5%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 14. Distribution of Points Due to Revocations**  
FY 2016, Immigration Offenders

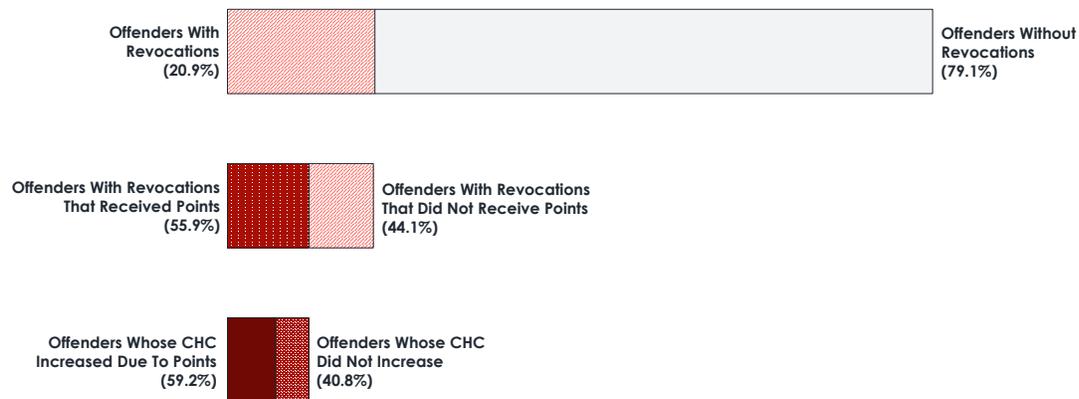
Immigration Offenders With At Least One Revocation	
<b>TOTAL OFFENDERS</b>	<b>N=275</b>
<b>No Points</b>	44.1%
<b>One Point</b>	23.5%
<b>Two Points</b>	13.6%
<b>Three Points</b>	16.2%
<b>Four or More Points</b>	2.6%

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

one additional point, and 13.6 percent received two additional points. However, 16.2 percent of immigration offenders with scored convictions with revocations received three additional points, and 2.6 percent received four or more additional points.

When immigration offenders received additional criminal history points due to revocations, they often resulted in an increase in Criminal History Category. A majority (59.2%) of the 152 immigration offenders who received additional criminal history points due to revocations had a resulting increase in Criminal History Category.

**Figure 8. Revocations**  
FY 2016, Immigration Offenders



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Table 15. Actual and Adjusted CHCs for Offenders Whose CHCs Moved Due to Revocations**  
 FY 2016, Immigration Offenders

	Actual CHC I N=0	Actual CHC II N=8	Actual CHC III N=18	Actual CHC IV N=33	Actual CHC V N=20	Actual CHC VI N=11
Adjusted CHC I		100.0%	5.6%	0	0	0
Adjusted CHC II			94.4%	6.1%	0	0
Adjusted CHC III				93.9%	0	0
Adjusted CHC IV					100.0%	27.3%
Adjusted CHC V						72.7%
Adjusted CHC VI						

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile.  
 Cases missing information necessary for analysis were excluded from that analysis.

As with offenders overall, the substantial majority (93.3%) of immigration offenders whose revocations increased their Criminal History Category received an increase of one Criminal History Category. As demonstrated by Table 15, of the 11 firearms offenders in CHC VI in part because of revocations, 72.7 percent received an increase of one of Criminal History Category, and 27.3 percent received an increase of two Criminal History Categories. This pattern applied across Criminal History Categories as revocations resulted in an increase of one category for 100 percent of immigration offenders in CHC II, 94.4 percent of offenders in CHC III, 93.9 percent of offenders in CHC IV, and 100.0 percent of offenders in CHC V.

### Revived Convictions

As noted above, the Commission has received comment that revocations can effectively revive stale convictions, which in turn can impact an offender's sentencing range in several ways. In addition to potentially adding criminal history points and thus increasing an offender's Criminal History Category, revived convictions can also affect an offender's eligibility for safety valve

relief under 18 U.S.C. § 3553(f) or trigger the career offender enhancement at §4B1.1.<sup>28</sup> The impact of revived convictions upon both safety valve relief and the career offender enhancement is explored below.

*How Often Are Stale Convictions Revived?*

Of the 1,294 offenders with a scored conviction with a revocation, just under one-fifth (18.5%) had at least one scored conviction that would have been considered stale under the rules of Chapter Four of the guidelines except for a parole, supervised release, or probation revocation for that conviction (termed a “revived conviction” for this report). Of the 239 offenders with at least one revived conviction, the substantial majority (85.8%) had just one revived conviction. A total of 10.0 percent had two, and 0.8 percent had three or more revived convictions. Ten offenders had five revived convictions, the most in this study.

When considering the specific type of instant offense of conviction, fraud offenders were most likely to have had a revived conviction, but there was not substantial variation among the types of offenders. Among fraud offenders with at least one scored conviction with a revocation, 21.7 percent had at least one revived conviction, compared to 18.7 percent of firearms offenders, 17.4 percent of drug trafficking offenders, and 17.5 percent of immigration offenders.

**Table 16. Distribution of Revived Convictions**  
FY 2016

	<i>Offenders With At Least One Revocation</i>
<b>TOTAL OFFENDERS</b>	<b>N=1,294</b>
<b>No Revived Convictions</b>	81.5%
<b>One Revived Conviction</b>	15.8%
<b>Two Revived Convictions</b>	1.9%
<b>Three or More Revived Convictions</b>	0.8%

SOURCE: U.S. Sentencing Commission’s FY 2016 Revocations Datafile.  
Cases missing information necessary for analysis were excluded from that analysis.

## **Impact of Revocations on Safety Valve Eligibility**

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As discussed in several Commission publications, mandatory minimum penalties can have a significant impact on an offender's sentence.<sup>29</sup> Of equal impact on sentence length is whether an offender convicted of an offense carrying a mandatory minimum receives relief through one of two statutorily available mechanisms.<sup>30</sup> One such statutory relief provision, applicable to drug trafficking offenders, is the statutory safety valve provision at 18 U.S.C. § 3553(f).

### *Background*

The congressionally enacted safety valve provision requires courts to sentence drug offenders without respect to any otherwise applicable statutory mandatory minimum if five criteria are met. The first of the five criteria, and the only one relevant to this study, is that the defendant must not have more than one criminal history point as determined under the guidelines.<sup>31</sup>

The guidelines incorporate the statutory safety valve provision at §5C1.2.<sup>32</sup> Safety valve relief, which is only available to drug trafficking offenders, is one of the two ways<sup>33</sup> certain drug offenders can be sentenced below an otherwise applicable mandatory minimum penalty. Additionally, drug offenders who meet the requirements of the statutory safety valve receive a two-level decrease in their guideline calculation under §2D1.1, regardless of whether the offender was convicted of a statute carrying a mandatory minimum penalty.<sup>34</sup> Thus, application of the safety valve often results in a significantly reduced sentence.

Some commenters have hypothesized that the inclusion of revocations in the criminal history calculation, particularly the ability of revocations to revive otherwise stale convictions, has an adverse effect on offenders' eligibility for the statutory safety valve. As previously noted, revocations can impact the criminal history score in two ways. First, and most commonly, a revocation can increase the number of criminal history points a prior offense receives. For example, a revocation could increase a one-point

offense to two or three points, and thereby disqualify an offender from safety valve relief. Second, it can revive a stale conviction, potentially adding points and disqualifying an offender from safety valve relief.

In light of the interest in the area, the Commission studied how often a revocation ultimately rendered an otherwise qualified offender ineligible for the safety valve. To isolate the impact of revocations, this study focuses solely on the first statutory criterion, which requires that the defendant not have more than one criminal history point.

### *Analysis*

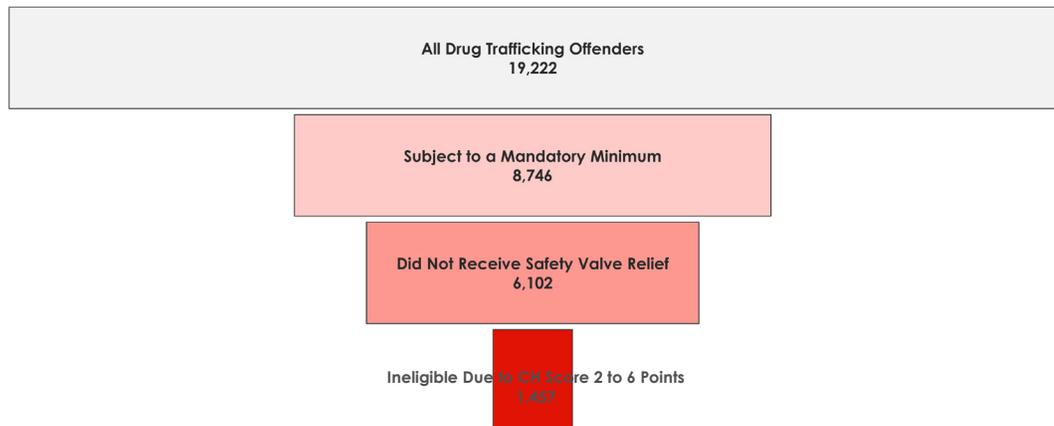
As noted, only drug trafficking offenders are eligible for the statutory safety valve. As such, the Commission analyzed the 19,222 drug trafficking offenders sentenced in fiscal year 2016 for this portion of the publication. Of the 19,222 drug trafficking offenders, 8,746 (45.5%) were convicted of a drug statute carrying a mandatory minimum penalty, 6,102 (69.9%) of whom did not receive safety valve relief.

To isolate the impact of the criminal history score on safety valve eligibility, the Commission next examined how many of the 6,102 offenders who did not receive safety valve relief were disqualified for eligibility based solely on their criminal history score, *i.e.*, they had more than one criminal history point but otherwise would be considered for safety valve relief.<sup>35</sup> Because the data available to the Commission does not allow for an exact determination of the offenders who would be otherwise eligible for safety valve relief, the Commission used the following criteria to eliminate offenders who would likely have been disqualified for safety valve based on a factor other than criminal history score: (1) had a conviction for an 18 U.S.C. § 924(c) or 21 U.S.C. § 848 offense; (2) received an enhancement for using violence or credible threats of violence under §2D1.1(b)(2); (3) received an adjustment under §3B1.1 (Aggravating Role) or §3C1.1 (Obstruction of Justice); or (4) did not receive a reduction under §3E1.1 (Acceptance of Responsibility). By using the preceding criteria as proxies for the safety valve eligibility requirements, the Commission narrowed

the pool of eligible defendants who may be considered for safety valve relief. For example, the Commission cannot state with certainty whether a given offender would have truthfully provided to the Government all information and evidence the offender has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan. However, the Commission uses the acceptance of responsibility adjustment as a proxy for the defendant providing to the Government all relevant information. Lastly, the Commission limited the study to those offenders who had a criminal history score between two and six points, as offenders exceeding that point range would have been unlikely to qualify even in the absence of a revocation.

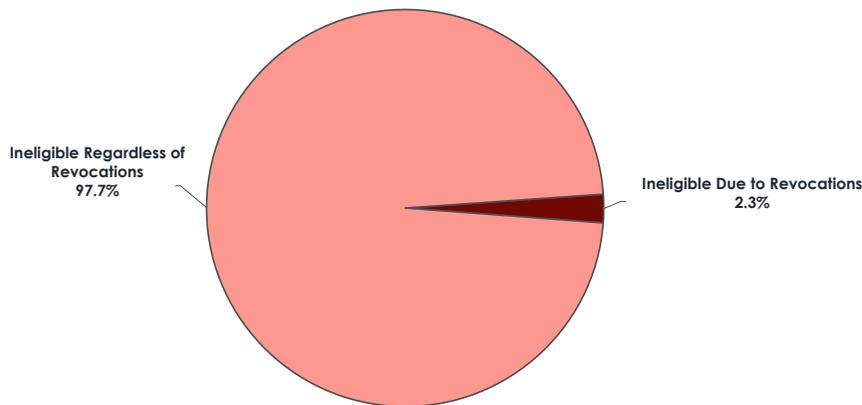
As reflected in Figure 9, 1,457 offenders had a criminal history score between two and six points but otherwise would be considered for safety valve relief. The Commission examined a 50 percent sample of these 1,457 offenders.

**Figure 9. Eligibility for Statutory Safety Valve**  
 FY 2016, Drug Trafficking Offenders



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

**Figure 10. Impact of Revocations on Statutory Safety Valve**  
 FY 2016, Drug Trafficking Offenders



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

As reflected in Figure 10, only 2.3 percent of drug trafficking offenders in the study were rendered ineligible for safety valve due to scored convictions with revocations.

A total of 0.8 percent of the drug trafficking offenders studied were ineligible at least in part<sup>36</sup> due to revocations for new criminal conduct. The remaining 1.5 percent of drug trafficking offenders who were ineligible did not have known criminal conduct as the reasons for their revocations. Ten offenders (1.4%) were ineligible at least in part due to revocations for unknown reasons, and 0.1 percent were ineligible only due to technical revocations.

**Table 17. Offenders Ineligible for Safety Valve Due to Revocations**  
 FY 2016, Drug Trafficking Offenders

<i>Offenders Ineligible for Safety Valve Due to Revocations</i>	
<b>TOTAL OFFENDERS</b>	<b>N=17</b>
<b>Ineligible due to criminal revocations</b>	0.8% (6 offenders)
<b>Ineligible due to technical and unknown reason revocations</b>	1.4% (10 offenders)
<b>Ineligible only due to technical revocations</b>	0.1% (1 offender)

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

## Impact of Revocations on Career Offender Status

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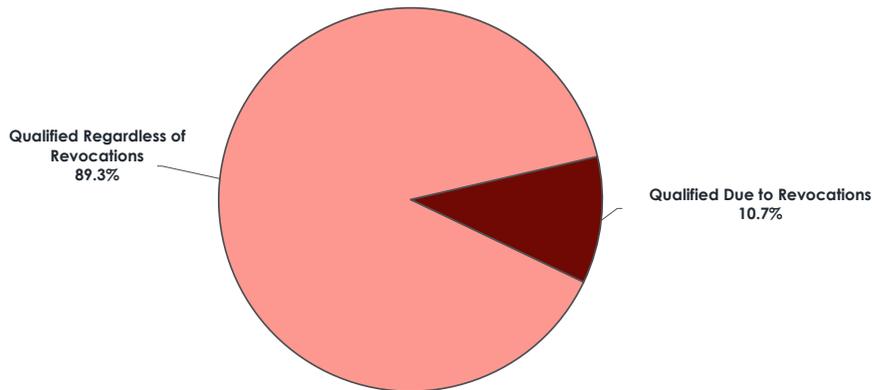
### *Background*

Some commenters have expressed concern that revocations can qualify offenders for the career offender sentencing enhancement at §4B1.1. Pursuant to a statutory directive at 28 U.S.C. § 994(h),<sup>37</sup> the Commission promulgated §4B1.1 to ensure that certain repeat drug traffickers and repeat violent offenders are sentenced “at or near the maximum [term of imprisonment] authorized.” When applied, the sentencing enhancement at §4B1.1 typically results in a guidelines range significantly greater than would otherwise apply.

The career offender guideline accomplishes this increase through two potential adjustments to the otherwise applicable guidelines calculations. First, it provides for a potentially increased final offense level for the offender’s instant offense. A table at §4B1.1(b) provides a range of applicable final offense levels based on the statutory maximum penalties for an offender’s instant federal statute of conviction that apply if the offense level is otherwise lower. Second, §4B1.1(b) also assigns all career offenders to Criminal History Category VI, regardless of their otherwise applicable Criminal History Category.

Revocations can qualify otherwise ineligible offenders for the career offender enhancement. This occurs when an otherwise stale conviction is revived, and then serves as a predicate conviction for a crime of violence<sup>38</sup> or controlled substance offense.<sup>39</sup> In order for the career offender enhancement to apply, an offender must have at least two prior felony convictions for a crime of violence or a controlled substance offense that are scored separately under §4BA1.1.<sup>40</sup> Because the predicates need to be scored separately, a stale offense, which is not scored, cannot serve as a predicate conviction. Once revived through a revocation, however, the previously stale conviction is scored, and may count as a predicate.

**Figure 11. Impact of Revocations on Career Offender Status**  
FY 2016



SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

### Analysis

The Commission examined a fifty percent sample of fiscal year 2016 career offenders to determine the impact of revocations on qualifying for the career offender enhancement. Of the 912 career offenders studied, 10.7 percent qualified as career offenders in part due to scored convictions with revocations.

A total of 5.9 percent of career offenders studied qualified at least in part due to revocations for new criminal conduct. The remaining 4.8 percent of career offenders studied who qualified for the career offender enhancement in part due to revocations did not have new criminal conduct as the reasons for their revocations. A total of 3.5 percent qualified at least in part due to revocations for unknown reasons, and 1.3 percent qualified in part due to technical revocations.

**Table 18. Qualified for Career Offender Due to Revocations**  
FY 2016

<i>Offenders Qualified for Career Offender Due to Revocations</i>	
<b>TOTAL OFFENDERS</b>	<b>N=98</b>
Qualified due to criminal revocations	5.9% (54 offenders)
Qualified due to technical and unknown reason revocations	3.5% (32 offenders)
Qualified only due to technical revocations	1.3% (12 offenders)

SOURCE: U.S. Sentencing Commission's FY 2016 Revocations Datafile. Cases missing information necessary for analysis were excluded from that analysis.

## Conclusion

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Revocations affected a minority of offenders in the study, with only 35.0 percent having a scored conviction with a revocation. However, among those offenders who did have a scored conviction with a revocation, three-fifths (60.2%) received additional criminal history points, and just under a third (30.9%) of those offenders saw an increase in their Criminal History Category. For those that had their Criminal History Category increased due to the scored conviction with a revocation, the increase was generally limited to one Category.

The Commission cannot state with certainty how often revocations are based on new crimes versus technical violations because the underlying basis for the revocation could not be determined in 38.7 percent of the cases studied. However, the available data demonstrates that between 38.9 percent and 77.5 percent of the revocations studied were for new crimes, and between 22.5 and 61.1 percent were for technical violations.

Prior revocations did not significantly limit offender eligibility for the statutory safety valve. Of the drug trafficking offenders studied, only 2.3 percent appear to be ineligible for the safety valve based solely on scored convictions with revocations. However, prior revocations had a more significant impact on offenders who received the career offender enhancement at §4B1.1. Of the career offenders studied, 10.7 percent qualified for the career offender enhancement in part because of scored convictions with revocations.

## Endnotes

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1 18 U.S.C. § 3553(a)(1).

2 U.S. SENTENCING COMM'N, *THE CRIMINAL HISTORY OF FEDERAL OFFENDERS* (2018) available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517\\_criminal-history.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf).

3 United States Sentencing Commission, *Guidelines Manual*, §§4A1.2(e) & 4A1.2(k) (Nov. 2016) [hereinafter USSG].

4 28 U.S.C. § 994 contains the duties of the Commission, as well as directives from Congress. Section 994(d)(10) instructs the Commission to consider the history of the defendant in sentencing.

5 USSG, Ch. 4, Pt. A, intro. comment.

6 U.S. SENTENCING COMM'N., *THE PAST PREDICTS THE FUTURE: CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS* 7 (2017) [hereinafter *PAST PREDICTS THE FUTURE*], available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309\\_Recidivism-Ch.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-Ch.pdf).

7 USSG §4A1.1

8 USSG §4A1.2(k). This section has been amended three times: in 1991, 2010, and 2011. Only Amendment 381 in 1991 is relevant to this paper's focus. See *infra* note 9. Amendment 742 eliminated language that had existed since 1987 regarding the recency of an individual's last release from confinement. Prior to this amendment, §4A1.2(e) provided that one or two points were added to the criminal history score if the defendant committed the instant offense less than two years after release from imprisonment. This amendment not only eliminated the recency points from §4A1.2(e), but also eliminated the consideration of the recency of revocations of probation, parole, supervised release, special parole, or mandatory release. USSG App. C, amend. 742 (eff. Nov. 1, 2010). Amendment 758 only made stylistic changes to conform how subdivisions are designated throughout the *Guidelines Manual*. USSG App. C, amend. 758 (eff. Nov. 1, 2011).

9 Common ways of violating the conditions of supervised release include failing a drug test, failure to report as directed, or being arrested, charged, or convicted of a new crime.

10 Amendment 381 clarified how to treat revocations of multiple sentences by adding Application Note 11. See USSG App. C, amend. 381 (eff. Nov. 1, 1991). Where a revocation applies to multiple sentences, the court adds the term of imprisonment imposed upon revocation only to the sentence that will result in the most criminal history points. Additionally, this amendment added a new subsection (B), which clarified that "revocation[s] 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)." It also provided the applicable time periods: (1) for a term of imprisonment totaling more than one year and one month, use the date of last release from incarceration; (2) 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, and (3) in any other case, the date of the original sentence. This language exists in the current guideline today. USSG §4A1.2(k)(2).

11 A Criminal History Category is a grouping of numerical values with a range of two or three points. Therefore, not all increases in points will result in an increase of Criminal History Category. For example, Criminal History Category III is comprised of offenders who receive four, five, or six points. USSG Ch. 5, Pt. D, Sentencing Table. If a defendant originally received four points, and one point is added due to the counting of a revocation, the resulting score would not change the defendant's Criminal History Category.

12 See PAST PREDICTS THE FUTURE, *supra* note 6, at 7.

13 USSG §4A1.2(e).

14 The Career Offender guideline, §4B1.1, provides enhanced offense levels when a defendant (1) was at least 18 years old at the time of the instant offense; (2) the instant offense 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. USSG §4B1.1(a).

15 Section 2K2.1(a) provides for a range of base offense levels. The base offense levels are increased if the defendant has certain prior convictions. For example, if a defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense, the base offense level is a 20. USSG §2K2.1 (a)(4). If the defendant has two such convictions, the base offense level is 24. USSG §2K2.1 (a)(2). Application Note 10 of §2K2.1 provides that only scored convictions can be used to enhance the base offense level. Revived convictions, which are scored, can serve as predicate convictions, and thus enhance a defendant's base offense level under §2K2.1.

16 Section 2L1.2(b) works in a similar fashion to §2K2.1, except that it enhances the base offense level through "Specific Offense Characteristics." The guideline provides that levels are added depending on a defendant's type(s) of prior offenses and the sentence(s) imposed. Application Note 3 of §2L1.2 provides that only scored convictions can be used to apply the Specific Offense Characteristics. This means that revived conviction may be used to enhance the base offense level, but stale convictions may not.

17 Section 3553(f) of title 18 is commonly known as "the statutory safety valve." It requires a sentencing court to impose a sentence without regard to any statutory minimum if: "(1) the defendant does not have more than 1 criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other danger weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same

course of conduct or of a common scheme or plan.” 18 U.S.C. § 3553(f). These provisions are integrated into the guidelines at USSG §5C1.2.

18 Individuals who receive the statutory safety valve may be sentenced below the applicable statutory mandatory minimum penalty, and receive a reduction of two levels under USSG §2D1.1(b)(17) or §2D1.11(b)(6). This often results in shorter guidelines ranges and shorter sentences.

19 Additionally, the Commission only examined cases that had complete documentation of their cases.

20 “Conviction” includes criminal convictions, juvenile adjudications, and diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere*.

21 See, e.g., *United States v. Winfield*, 665 F.3d 107, 109 (4th Cir. 2012) (defining “technical violations” as “charges not related to the commission of state offenses.”).

22 See, e.g., James L. Johnson & Laura M. Baber, *State of the System: Federal Probation and Pretrial Services*, FED. PROBATION, September 2015, at 34, 35 (citing failed drug testing as a technical violation); Sam Torres, *A Continuum of Sanctions for Substance-Abusing Offenders*, FED. PROBATION, December 1998, at 36, 38 (same).

23 See, e.g., *United States v. Trotter*, 270 F.3d 1150, 1153 (7th Cir. 2001); *United States v. Crace*, 207 F.3d 833, 836-37 (6th Cir. 2000); *United States v. Clark*, 30 F.3d 23, 25 (4th Cir. 1994); *United States v. Dow*, 990 F.2d 22, 24 (1st Cir. 1993); *United States v. Almand*, 992 F.2d 316, 318 (11th Cir. 1993); *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992).

24 As noted above, the Commission was unable to determine the cause of the revocation in 38.7 percent of violations. While the Commission could not determine the reason for revocations for this subset, some or all of the unknown violations may have been technical violations.

25 For the 2018-19 Amendment Cycle, the Commission adopted priority 7A, which identifies as a priority the “[s]tudy of Chapter Four, Part A (Criminal History), focusing on (A) how the guidelines treat revocations under §4A1.2(k) for conduct constituting a violation of a condition of supervision that does not result in the arrest, criminal charge, or conviction for a federal, state, or local offense punishable by a term of imprisonment (other than the arrest for the violation of the condition of supervision itself)...” See 83 FR 43956-57, (Aug. 28, 2018).

26 The Commission uses the term “instant offense” to refer to the federal conviction for which an offender is sentenced.

27 Drug offenses were limited to drug trafficking offenses, rather than all drug offenses.

28 Although not analyzed in this study, revived convictions can also serve as the basis for enhancements under §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition; Prohibited Transactions Involving

Firearms or Ammunition) and §2L1.2 (Unlawfully Entering or Remaining in the United States).

29 See, e.g., U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017), available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf).

30 *Id.* at 43-44.

31 The other criteria are that the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; the offense did not result in death or serious bodily injury to any person; the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement. 18 U.S.C. § 3553(f).

32 USSG §5C1.2.

33 The other way individuals may obtain relief from a statutory mandatory minimum is a substantial assistance motion under either 18 U.S.C. § 3553(e) or Federal Rule of Criminal Procedure 35(b).

34 USSG §2D1.1(b)(17).

35 As determined by analyses of a ten percent sample, only ten offenders out of all 36,960 with seven or more points would be in Criminal History Category I absent revocations in their criminal histories. Therefore, the upper boundary for inclusion in this study was limited to six points.

36 In addition to revocations for criminal conduct, offenders in this group may have also had other revocations for technical or unknown reasons.

37 The directive provides: “[t]he 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—(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.” 28 U.S.C. § 994(h).

38 “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 offenses, 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). *See* USSG §4B1.2(a).

39 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) with intent to manufacture, import, export, distribute, or dispense. *See* USSG §4B1.2(b).

40 USSG §4B1.2(c).