The Effect of Prior State Convictions on Federal Court Sentences

Presented by the lawyers of the Iowa Federal Public Defender's Office

Nick Drees
Jim Whalen
B. John Burns
John Messina
300 Walnut Street, Suite 295
Des Moines, Iowa 50309-2255
(515) 246-1761

Jane Kelly
JoAnne Lilledahl
222 Third Avenue SE, Suite 501
Cedar Rapids, Iowa 52401-1542
(319) 363-9540

Priscilla Forsyth
Jeff Neary
Federal Building, Room 202
320 Sixth Street
Sioux City, Iowa 51101
(712) 233-3922

Terry McAtee
Phil MacTaggart
Federal Building, Room 392
131 E. 4th Street
Davenport, Iowa 52801
(563) 322-8931

I. Calculating criminal history points under the Federal Sentencing Guidelines

A. Guilty pleas in state court that take place before sentencing in federal court can increase the client's criminal history points on the federal sentencing

United States Sentencing Guidelines [USSG] §4A1.2.
DEFINITIONS AND INSTRUCTIONS FOR COMPUTING CRIMINAL HISTORY

(a) Prior Sentence Defined

(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.

. . .

(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.

Under this guideline, a quick resolution of pending state charges by guilty pleas to lesser offenses or to more lenient sentences can sometimes increase a client's sentence on pending federal charges. Application note 1 to the commentary for U.S.S.G. § 4A1.2 provides, "prior sentence means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. . . . A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense." Application note 1 also provides, "under § 4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under § 4A1.1(c) if a sentence resulting from such

conviction otherwise would have been counted." In short, even if the defendant has only pled guilty in state court, that guilty plea can still be counted against him for purposes of determining his criminal history score on the federal offense.

B. Offenses that don't count for criminal history points

USSG §4A1.2(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 at least 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
Fish and game violations
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)
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:

Hitchhiking
Juvenile status offenses and truancy
Loitering
Minor traffic infractions (e.g., speeding)
Public intoxication
Vagrancy.

II. Mandatory minimum sentences for drug offenses

A. The "Safety Valve"

USSG §5C1.2 LIMITATION ON APPLICABILITY OF STATUTORY MINIMUM SENTENCES IN CERTAIN CASES

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) 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;

(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, as defined in _____; and

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

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

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and

level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

For some clients facing federal drug charges, it can be particularly important to recognize the possible adverse impact of guilty pleas to state

sentence under the so-called safety valve provisions of U.S.S.G. § 5C1.2, and 18 U.S.C. § 3553(f). In order to qualify for the safety valve, the

if you have a state client facing minor state charges who is also facing federal drug charges, you should avoid, if at all possible, pleading that

what impact such a guilty plea would have on his eligibility for the safety valve.

criminal history point in this circumstance can be extreme. If the defendant is convicted in federal court of delivery of 10 grams of crack cocaine, his

(zero or one criminal history point), his sentencing range would be 63 to 78 months. Ordinarily, when a defendant pleads guilty in federal court, he

reduction, this defendant's offense level would go down to level 23, for a sentencing range of 46 to 57 months. But if the statutory mandatory

60 months. If, however, he qualifies for the safety valve, the statutory mandatory minimum does not apply. He would not only receive a three-

he would be entitled to an additional two-level reduction. Thus, his sentencing range could go as low as 37 to 46 months. If, prior to his

pending charge of driving while license suspended, he will instead receive a federal sentence of at least 60 months.

Illegal reentry into the United States

A.

felony, 8 USC § 1326(b)(2): 20 year maximum sentence.

B. Under USSG §2L1.2, if a defendant was previously deported or unlawfully remained in the U.S. following a conviction for a felony that is
   1. a drug trafficking offense for which the sentence imposed exceeded 13 months; or
   2. a crime of violence; or
   3. a firearms offense; or
   4. a child pornography offense; or
   5. a national security or terrorism offense; or
   6. a human trafficking offense; or
   7. an alien smuggling offense committed for profit, then

   the defendant's offense level under the sentencing guidelines is increased from a level 8 to a level 24.

C. Alternative increases under the guideline if prior deportation followed convictions for:
   1. a felony drug trafficking conviction for which the sentence was 13 months or less–12 levels;
   2. an aggravated felony conviction (as defined at 8 USC §1101(a)(43))–8 levels;
   3. a conviction for any other felony offense–4 levels;
   4. three or more misdemeanor convictions that are crimes of violence or drug trafficking offenses–4 levels.

IV. Possession of firearm while under restraining order or following misdemeanor conviction for domestic violence

A. 18 USC §§ 922(g)(8) & (9) provide

> **(g)** It shall be unlawful for any person– . . .
> **(8)** who is subject to a court order that--
> **(A)** was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> **(B)** restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> **(C)(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
> **(ii)** by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
> **(9)** who has been convicted in any court of a misdemeanor crime of domestic violence,
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

B. State of Iowa simple assault conviction can count as "misdemeanor crime of domestic violence" under § 922(g)(9). *U.S. v Smith,* 171

F3d 617 (8th Cir 1999).

C. Expunged sentences do not count as misdemeanor crime of domestic violence, 18 USC § 921 (emphasis added):

(a) . . .

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that--

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

V. Recidivist Provisions

A. Armed career criminal, 18 USC § 924(e) & USSG §4B1.4:

1. Defendant subject to significant increase in sentencing guideline level and criminal history category, as well as a statutory 15-year mandatory minimum if convicted under 18 USC § 922(g) (which includes, felon in possession of a firearm or ammunition; and possession of firearm or ammunition following domestic violence conviction) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" or both, committed on occasions different from one another. Time limits for counting prior convictions under sentencing guidelines do not apply in determining whether a defendant qualifies as an armed career criminal.
2. Predicate crimes must have been "committed on occasions different from one another," but two burglaries that occurred on same night several hours apart for which trial and

sentencing consolidated count as two predicate offenses, *U.S. v Balascsak*, 873 F2d 673 (3rd Cir 1989) (en banc). See also *U.S. v Maxey*, 989 F2d 303 (9th Cir 1993) (prior violent felonies committed within hours of each other, similar in nature, and consolidated for trial and sentencing counted as separate priors); *U.S. v Godinez*, 998 F2d 471 (7th Cir 1993) (defendant stole victim's car and kidnapped her to prevent her from informing police while he committed robbery; kidnapping and robbery count as two distinct offenses).

3. Absurdities: *U.S. v Bates*, 77 F3d 1101, 1106 (8th Cir 1996) (fifteen year sentence "for the equivalent of duck hunting"); *U.S. v Yirkovsky*, 259 F3d 704 (8th Cir 2001) (fifteen year sentence for possessing one bullet).

B. Career offender, USSG §4B1.2:

1. Defendant receives substantial increase in offense level and automatically moves to criminal history category VI if (1) the defendant was at least 18 years old at the time the defendant committed the offense of conviction (2) the offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
2. *U.S. v Allegree*, 175 F3d 648 (8th Cir, 1999): prior conviction for possession of offensive weapon counts as crime of violence for determining whether defendant is a career offender.
3. *U.S. v. Wilson*, 168 F3d 916 (6th Cir 1999) and *U.S. v. Hascall*, 76 F3d 902 (8th Cir 1996): conflict on whether commercial burglary counts as "crime of violence." Eighth Circuit says it counts.

VI. Statutory and guideline provisions on concurrent and consecutive sentences

A. Iowa Code § 903A.5:

An inmate shall not receive credit upon the inmate's sentence for time spent in custody in another state resisting return to Iowa following an escape. However, an inmate may receive credit upon the inmate's sentence while incarcerated in an institution or jail of another jurisdiction during any period of time the person is receiving credit upon a sentence of that other jurisdiction.

B. 18 U.S.C. § 3584:

(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.

C. 18 U.S.C. § 3585:

(a) **Commencement of sentence.** A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) **Credit for prior custody.** A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences–

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

D. USSG §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 the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, 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.

E. USSG §5G1.3 comment. n. 6:

REVOCATIONS. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release.