

CRIMINAL DEFENSE IN STATE COURT
– WITH THE FEDS IN MIND

Lunch and Learn 1-16-2008

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I. CRIMINAL HISTORY POINTS FOR FEDERAL DEFENDANTS

A. Sentences for the following offenses are **never** counted:

- Fish and game violations
- Hitchhiking
- Juvenile status offenses and truancy
- Local Ordinance violations (except when also violations of criminal law)
- Loitering
- Minor traffic infractions (e.g. speeding)
- Public intoxication
- Vagrancy

PRACTICE TIP: If the client is offered a summary offense, try to get something on this list. If alcohol is involved, always try for public drunkenness – 18 Pa. C.S.A. § 5505.

B. Sentences for the following offenses are **sometimes** counted*:

- Careless or reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Gambling
- Hindering or failure to obey a police officer
- Insufficient funds check
- Leaving the scene of an accident
- Non-support
- Prostitution
- Resisting arrest
- Trespassing

* counted if the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days.

PRACTICE TIP: If given a choice, always pick disorderly conduct – 18 Pa. C.S.A. § 5503. If a driving offense is involved, always pick careless driving – 75 Pa. C.S.A. § 3714. But remember to negotiate a sentence of probation of one year or less or imprisonment of less than 30 days.

C. Criminal History Points Generally

1. Prior sentence of imprisonment exceeding 1 year and 1 month = 3 points
2. Prior sentence of imprisonment of at least 60 days = 2 points
3. Any other sentence not already counted = 1 point
4. Up to 3 more points depending on status of defendant at time of offense
5. Age of prior conviction may eliminate it from counting

D. When is a prior, a prior?

If a defendant enters a guilty plea or is found guilty at trial but has not been sentenced prior to sentencing in federal court, the defendant will receive one criminal history point in federal court.

PRACTICE TIP: If you know that a federal prosecution is pending at the same time as a state prosecution, do not allow the client to enter a plea or go to trial in state court without first contacting the attorney representing the client in federal court to determine whether it will impact the federal case.

II. CAREER OFFENDERS (U.S.S.G. § 4B1.1)

A. Crime of Violence

1. Adult conviction punishable by imprisonment for a term exceeding one year

PRACTICE TIP: Any PA misdemeanor 3 will never be a crime of violence. If a client is charged with simple assault as a result of a bar fight or a domestic dispute, try to negotiate a plea to mutual combat (M3) – 18 Pa. C.S.A. § 2701(b)(1).

2. Other Qualifications:

- a. Has as an element the use, attempted use, or threatened use of physical force against the person of another.

- b. Involves conduct that presents serious potential risk of physical injury to another.
- c. Enumerated offenses = burglary of a dwelling, arson, extortion, involves the use of explosives, murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, extortionate extension of credit

3. Specific Crimes of Violence:

Recklessly endangering another person – 18 Pa. C.S.A. § 2705
Fleeing or attempting to elude police officer – 75 Pa. C.S.A. § 3733
Terroristic threats – 18 Pa. C.S.A. § 2706
Possession of a weapon in prison
Escape – 18 Pa. C.S.A. § 5121

4. Prior Felon in Possession of a Firearm

– **not** a crime of violence **unless** the firearm was a particular type like a sawed-off shotgun, silencer, bomb or machine gun.

B. Controlled Substance Offense

- 1. Adult conviction punishable by imprisonment for a term exceeding one year
- 2. Simple possession does not qualify but any other offense that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance or a counterfeit substance qualifies

3. Specific Controlled Substance Offenses

Use of a communication facility – 18 Pa. C.S.A. § 7512
maintaining any place for the purpose of facilitating a drug offense (if the underlying offense would qualify)
possessing equipment with the intent to manufacture a controlled substance

III. DRUGS

A. PWID and related offenses

1. No drug amount – 21 U.S.C. § 841(b)(1)(C)
 - a. statutory maximum 20 years
 - b. with a prior felony drug conviction, statutory maximum 30 years
2. 100 grams heroin; 500 grams cocaine; 5 grams crack – 21 U.S.C. § 841(b)(1)(B)
 - a. mandatory minimum 5 years and statutory maximum 40 years
 - b. prior felony drug conviction, mandatory minimum 10 years and statutory maximum life
3. 1 kilo heroin; 5 kilos cocaine; 50 grams crack – 21 U.S.C. § 841(b)(1)(A)
 - a. mandatory minimum 10 years and statutory maximum life
 - b. prior felony drug conviction, mandatory minimum 20 years and statutory maximum life
 - c. with 2 prior felony drug convictions, mandatory life

B. Prohibited Locations – 21 U.S.C. § 860

1. Within 1000 feet of a:
 - a. School
 - b. Playground – outdoor public facility with at least 3 apparatus & parking lot
 - c. Housing facility owned by a public housing authority
 - d. Youth center – recreational center or gymnasium & parking lot
 - e. Public swimming pool – including the parking lot
 - f. Video arcade – minimum of 10 pinball and/or video machines
2. Penalty = doubles the maximum penalty

IV. GUNS

A. Unlawful Possession of Firearms – 18 U.S.C. § 922(g)

1. Who qualifies?

- a. Anyone with a conviction for a felony OR misdemeanor 1 in PA
– 18 U.S.C. § 922(g)(1)
– the statute specifically excludes any state offense classified as a misdemeanor and punishable by a term of imprisonment of 2 years or less (18 U.S.C. § 921(a)(20)(B))
- b. A fugitive from justice – 18 U.S.C. § 922(g)(2)
- c. Anyone who is an unlawful user of or addicted to any controlled substance – 18 U.S.C. § 922(g)(3)
- d. Anyone who has been adjudicated as a mental defective or committed to a mental institution – 18 U.S.C. § 922(g)(4)
- e. An illegal alien – 18 U.S.C. § 922(g)(5)
- f. Anyone who has a dishonorable discharge from the Armed Forces – 18 U.S.C. § 922(g)(6)
- g. Anyone who has renounced citizenship – 18 U.S.C. § 922(g)(7)
- h. Anyone subject to a PFA – 18 U.S.C. § 922(g)(8)
- i. Anyone with a conviction for a misdemeanor crime of domestic violence – 18 U.S.C. § 922(g)(9); 18 U.S.C. § 921(a)(33)

2. What qualifies as a firearm? (18 U.S.C. § 921(a)(3))

- a. any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
– no requirement that the weapon be operable
- b. the frame or receiver of any such weapon;
- c. any firearm muffler or firearm silencer;
- d. any destructive device (bomb, grenade, rocket, missile, etc.);

3. What does NOT qualify as a firearm? (18 U.S.C. § 921(a)(16))

- a. antique firearms – manufactured in or before 1898
- b. replicas – not designed for using conventional ammo or the ammo is no longer manufactured in the United States or available in the ordinary channels of commercial trade
- c. muzzleloaders – use black powder, not fixed ammo

4. Ammunition is also prohibited.

– ammo is defined in 18 U.S.C. § 921(a)(17)

5. Penalty = statutory maximum of 10 years (18 U.S.C. § 924(a)(2))

B. Armed Career Criminal Act – 18 U.S.C. § 924(e)

1. Who qualifies?

A prohibited person being prosecuted under 18 U.S.C. § 922(g) who has three previous convictions for a violent felony or a serious drug offense committed on occasions different from one another.

2. Penalty = mandatory minimum 15 years

C. Gun & Crime of Violence or Drug Trafficking Offense – 18 U.S.C. § 924(c)

1. Penalty = consecutive mandatory minimum terms of 5, 7 or 10 years depending on conduct with gun

2. Stacking of mandatory minimums for second or subsequent offense (5 years + 25 years)

Deal v. United States, 113 S.Ct. 1993 (1993)(finding that second or subsequent conviction can be in the same indictment for purposes of enhanced sentence under 18 U.S.C. § 924(c)(1)(C))

3. Better to Receive Than Give A Gun For Drugs

Watson v. United States, 128 S.Ct. 579 (2007): The Supreme Court decided unanimously that one does not “use” a gun, for purposes of imposing a mandatory 5 year sentence, if the person receives the gun in trade for drugs.

V. SEX OFFENDERS

A. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program – 42 U.S.C. §§ 14071 - 14073 (enacted September 13, 1994 and to be repealed as of July 27, 2009)

1. Required states to establish a sex offender registry

2. Pennsylvania Law regarding registration – 42 Pa. C.S.A. § 9795.1

a. Ten year period of registration – 42 Pa. C.S.A. § 9795.1(a)

– kidnapping of a minor, luring a child into a motor vehicle, institutional sexual assault, indecent assault (M1 or higher), incest of a minor, prostitution or a minor, obscene materials involving a minor, sexual abuse of children, unlawful contact with a minor, sexual exploitation of children

b. Lifetime registration – 42 Pa. C.S.A. § 9795.1(b)

– repeat offenders, rape, IDSI, sexual assault, aggravated indecent assault, incest (victim under 12);
– sexually violent predators – 42 Pa. C.S.A. § 9792

c. Natural disasters or other event requiring evacuation of residences do not relieve individuals of the duty to register – 42 Pa. C.S.A. § 9795.1(c)

3. Pennsylvania Registration Procedures – 42 Pa. C.S.A. § 9795.2

a. Register with the PSP with information about residence, employment and school enrollment upon release, parole or a sentence of intermediate punishment or probation

b. Register with the PSP within 48 hours of a change in residence, employment, or school

c. Penalty for failure to register – 18 Pa. C.S.A. § 4915

– felony ranging from third degree to first degree

B. Sex Offender Registration and Notification Act [SORNA] – 42 U.S.C. §§ 16901-16929 (enacted July 27, 2006)

1. Generally

- creates a new sex offender registry law
- requires registered sex offenders to provide more extensive info
- creates new offenses directed at persons required to register with stiffer penalties, including in some cases consecutive mandatory minimum sentences (18 U.S.C. § 2250)
- national guidelines were published for comment in May, 2007 and are intended to provide all registration jurisdictions with guidance, explanation and advice regarding the implementation and administration of SORNA

2. Who is a “sex offender” subject to SORNA?

- a. A person is a “sex offender” subject to SORNA if the person was convicted of a “sex offense,” 42 U.S.C. § 16911(1), which generally means, 42 U.S.C. § 16911(5)(A):
 - (1) Sexual Acts and Sexual Contact Offenses (except consensual contact, 42 U.S.C. § 16911(5)(C), if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim)
 - (2) Specified Offenses Against Minors
 - (3) Specified Federal Offenses
 - (4) Specified Military Offenses [10 U.S.C. § 951 note, *i.e.*, sex offenses as defined in SORNA and such other conduct as the Secretary deems appropriate]
 - (5) Attempt or Conspiracy to commit an offense described above

- b. Adjudications of Delinquency; but only if the person was at least 14 years old at the time of the offense and the offense was comparable to or more severe than aggravated sexual abuse [18 U.S.C. § 2241] or attempt or conspiracy to commit such an offense. 18 U.S.C. § 16911(8)
- c. Substantive Offenses Added By Regulation

3. Registration by Tier Classifications

- a. Tier III (42 U.S.C. § 16911(4)) offenders must register for life or 25 years if “clean record” for that long and the offense was a delinquent adjudication
- b. Tier II (42 U.S.C. § 16911(3)) offenders must register for 25 years with no relief for a “clean record”
- c. Tier I (42 U.S.C. § 16911(2)) offenders must register for 15 years, reduced by 5 years if “clean record” for 10 years

4. Information to be Provided – 42 U.S.C. § 16914

– the information to be provided is quite extensive and in addition to the name, address, phone number, employment and school information, the sex offender must provide, *inter alia*, his license plate number and description of any vehicle owned or operated; Internet identifiers and addresses; temporary lodging information about any place in which the sex offender is staying for 7 or more days (vacation for a week or more).

5. In Person Verification – 42 U.S.C. § 16916

Offenders must appear in person in each jurisdiction where they are required to be registered to allow a photograph to be taken and verify the information once a year for Tier I offenders, once every 6 months for Tier II offenders, and once every 3 months for Tier III offenders.

6. Failure to Register – 18 U.S.C. § 2250

- a. Penalty = statutory maximum of 10 years (18 U.S.C. § 2250(a))
- b. Affirmative Defenses (18 U.S.C. § 2250(b))
- c. Crime of Violence

Sex offender who fails to register and commits a crime of violence shall be sentenced to a consecutive term of not less than 5 years and not more than 30 years (18 U.S.C. § 2250(c))

C. Civil Commitment of a Sexually Dangerous Person – 18 U.S.C. § 4248

1. Sexually Dangerous Person defined – 18 U.S.C. § 4247(a)(5)

A person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others (18 U.S.C. § 4247(a)(6); i.e., the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released).

2. Basic Procedure

In relation to a person in BOP custody, the AG may certify that the person is a sexually dangerous person and if, after a hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the AG where the person will remain until the director of the facility where the person is housed determines that the person is no longer a sexually dangerous person and initiates proceedings with the court that ordered the commitment.

PRACTICE TIP: If you have a client in BOP custody or who is expected to be in BOP custody in the future, advise the client not to discuss any prior sex offense convictions, charges, treatment or behavior and advise the client against signing blanket releases for government officials to obtain prior treatment records.

VI. MISCELLANEOUS ISSUES

A. Double Jeopardy

1. Prosecution in the Federal system first and then the State system
– barred by 18 Pa. C.S.A. § 111
2. Prosecution in the State system first and then the Federal system
 - a. No prohibitive statute and no constitutional bar

Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959)(finding that the Double Jeopardy Clause does not bar federal prosecution of defendants who have already been prosecuted for the same acts by the state)

- b. Department of Justice Policy not followed and not enforceable

Department of Justice Manual § 9-2.142 (Petite Policy): DOJ policy precludes the initiation or continuation of a federal prosecution following a state prosecution or a prior federal prosecution based on substantially the same act, acts or transaction unless there is a compelling federal interest supporting the dual or successive federal prosecution. The United States Attorney must obtain the approval of the Assistant Attorney General before initiating such a prosecution.

– Courts have held that this is an administrative policy and unenforceable against the government. *United States v. Meade*, 110 F.3d 190, 201 (1st Cir. 1997)

B. Suppression of Evidence

1. State Court Decisions Likely To Be More Favorable to Defendants
 - protections of individual privacy against unreasonable governmental searches and seizures under the Pennsylvania Constitution are more expansive than those afforded under the United States Constitution.

2. Response to State Court Decisions That Are Favorable to Defendants

– the Third Circuit has expressed displeasure with the prosecutorial tactic of shifting cases to federal court following an unfavorable state court decision

3. Good Faith Exception

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984): The good faith exception to the exclusionary rule permits the introduction of evidence obtained under an otherwise invalid warrant if the officers acted within the scope of and in good faith reliance on the warrant. Four circumstances where the good faith exception does not apply: (1) a false or reckless affidavit; (2) a rubber stamp judicial review; (3) a facially deficient affidavit; and (4) a facially deficient warrant.

C. Credit for Time in Custody

1. Statute – 18 U.S.C. § 3585(b)

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.

2. Practical Application

a. The Bureau of Prisons is responsible for sentence computation.
– 18 U.S.C. § 3621(b)

b. The earliest date a federal sentence can commence is the date it is imposed.

c. When both state and federal sentences are imposed, the sentence imposed by the sovereign with primary jurisdiction is served first.

– If a defendant is serving a sentence in state custody at the time of a federal sentence, the federal sentence does not begin to run until the state relinquishes the defendant to federal custody (bail, dismissal of state charges, parole, expiration of the state sentence) unless the BOP agrees to designate the state facility for service of the federal sentence.

– A federal sentence does not begin to run when a federal defendant in state custody is produced for prosecution by a federal writ of habeas corpus ad prosequendum from state custody when the defendant is receiving state credit.

d. Consecutive and Concurrent Sentences

– When multiple terms of imprisonment are imposed at the same time, they will run concurrently unless the court orders or a statute mandates that they are to run consecutively. When multiple terms of imprisonment are imposed at different times, they will run consecutively unless the court orders that the terms are to run concurrently. (18 U.S.C. § 3584(a))