

COLLATERAL CONSEQUENCES IN FEDERAL COURT

And You...

A FEW POTENTIAL CONSEQUENCES

- Criminal History Points
- Career Offender
- Armed Career Criminal
- Consecutive Time



**DOMMAGE
COLLATERAL**

CRIMINAL HISTORY POINTS BASICS

The Sentencing Guidelines Assign Points to Prior Convictions Based on the Sentence that the Client Received

- Up to 60 days = 1 Point
- At Least 60 Days = 2 Points
- Over 1 year and 1 month = 3 points

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	0-6	2-8
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

THE NUMBER
OF POINTS
YOU HAVE
PUTS YOU IN A
CRIMINAL
HISTORY
CATEGORY, I -
VI

0 or 1 = I

2 or 3 = II

4, 5, 6 = III

7, 8, 9 = IV

10, 11, 12 = V

13 and up = VI

WHAT THIS MEANS FOR YOU

- Credit assigned for time served can affect your client in federal court
- The point system can lead to inequality and unfairness, i.e. two defendants might get probation on the same charge but one bonded out right away and the other sat in jail for over a year before getting the probation deal – the first has acquired 1 Point and the second has acquired 3 Points (we are working on this)

CREDIT FOR TIME SERVED: What the Judge Writes on the Sentencing Sheet Matters

- Your client spends 130 days in county jail before being sentenced to time served and probation.
- If the judge writes, “Probation with Credit for 130 Days” on the sentencing sheet – your client has just acquired 2 criminal history points in federal court
- Side note: Indeterminate YOA sentences are 3 pointers, unless they get probation and never get revoked

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE #: _____ -GS- _____

AW#: _____

Date of Offense: _____

S.C. Code §: _____

CDR Code #: _____

SENTENCE SHEET

who was CONVICTED OF or PLEADS

Code of Laws, bearing CDR Code # _____

MOST SERIOUS Mandatory GPS §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd) (def.'s initials)

Defendant Waives Presentment to Grand Jury.

Recommendation by the State _____

Initiated Sentence, _____

ctions _____

Attorney _____

IF YOU CAN, PLEAD TO ONE COUNT

- Sometimes, pleading to multiple counts during the same course of criminal conduct can lead to multiple predicates for career offender and armed career criminal
- This can be true EVEN IF the incidents occur on the same day and the Client is sentenced for all counts on the same day

CAREER OFFENDER

- The “Career Offender” designation is a guideline provision
- If the Client has 2 convictions for a “Controlled Substance Offense” or “Crime of Violence,” they are a career offender
- Their criminal history category automatically goes to VI, regardless of criminal history points
- It will almost always increase their guideline range
- A Client who is a career offender and charged with being in possession of a firearm in furtherance of a drug trafficking crime will have severely enhanced guidelines



WHAT YOU CAN DO



- DRUGS: Try to get it reduced to possession
- PWID, PROX and Distribution are predicates
- Trafficking is NOT a predicate for career offender and neither is general conspiracy
- What qualifies as a predicate for crime of violence can be tricky and sometimes the law changes – we should always talk with each other before entering into guilty pleas



BIGGEST CONCERN

- The biggest concern is avoiding an unnecessary state conviction that serves as a predicate for career offender, when that conviction could have been delayed until the client was sentenced federally

ARMED CAREER CRIMINAL

- STATUTORY PROVISION
- Applies to federal gun charges
- If Client has 3 prior convictions for “Serious Drug Offense” or “Violent Felony,” they will be considered an Armed Career Criminal (remember that a misdemeanor in state court might be a felony in federal court)
- What qualifies as a predicate can be complicated and is frequently changing – we should communicate with each other before a plea is entered
- Again, Trafficking is NOT a Serious Drug Offense
- **For a charge of Felon in Possession of a Firearm:**
 - **Non-ACCA = 0 – 10 Years**
 - **ACCA = 15 to LIFE**



BIGGEST CONCERN

- AVOIDING A STATE ACCA PREDICATE CONVICTION THAT CAN BE HELD OFF UNTIL FEDERAL SENTENCING IS COMPLETE
- COMMUNICATION IS CRUCIAL



BOND IN FEDERAL COURT

- Johnny gets arrested by state cops for selling crack
- Johnny bonds out in state court
- Johnny goes about his life, working, raising his kids, etc.
- Johnny gets busted by the federales
- Johnny thinks he will bond out on the federal charge because it is the same case
- Johnny is WRONG

BAIL REFORM ACT & Anthony “Fat Tony” Salerno

- Same as state court:
 - Flight risk and danger to the community
- But sometimes they work differently
- \$\$\$ - federal judges do not set high bonds for show
- They either set an affordable bond or deny bond altogether
- Side note: the recording of your prelim can be helpful in federal court later on



WHY IT MATTERS FOR YOU: CREDIT FOR TIME SERVED

- RULES OF THUMB:
 - Time credited toward a state sentence might not be credited in the Federal Bureau of Prisons EVEN IF the Client has been continuously incarcerated after their federal arrest
 - Concurrent time is more likely to be given in state court
 - So...usually better to let the federal case go first
 - The question of who has custody can be crucial for time credit in federal court
 - Communication: but we should talk about it first



FEDERAL SUPERVISED RELEASE

- SCENARIO:
 - Client arrested for state drug charge
 - Bonds out
 - Months later, they are served with a violation of their federal supervised release
 - Client remains in jail on federal violation



Schitt's Creek

- Client has paid hundreds, maybe thousands of dollars to bond out on the state charge, yet they sit in jail on the same conduct
- There is no court date set in state court
- There is no court date set in federal court



Bureaucratic Quagmire

- The state judge wants to wait for the federal charges to “work themselves out”
- The federal judge wants to wait for the state charges to “work themselves out”
- Ditto with the ASOL and the AUSA



Who Can Fix this Problem?

PUBLIC DEFENDERS WORKING TOGETHER!

The Default

- The default often is to have the federal issues handled first because the federal cases move fast
- This has advantages and drawbacks





The Advantages of the Feds Going First

- AVOIDING POSSIBLE CONSECUTIVE TIME
- The biggest advantage is usually that the state judges will count all the federal jail and prison time that are served in the matter.
- Federal Judges often do not like to give credit for state jail and prison time.



The Drawbacks of Waiting for the Feds to go First

- If the Client contests the state charges, the federal supervised release violation hearing will be a bench trial with a preponderance standard of proof.
- The Client can be found in violation just for the state arrest.
- They might spend some time in federal prison for a state charge that is eventually dismissed or reduced in state court.
- This is an inherently offensive prospect.
- Sometimes going first in state court can reduce the level of violation in federal court

The Prosecutors, What I Imagine...

- The AUSA does not care about the state case or the supervised release violation. For some reason however, they string the ASOL along with the idea that they might indict the drug charges in federal court. And they might indict, but they might not.
- The ASOL just wants the AUSA to indict the drug case because they would then get to close their file.
- The AUSA just wants the state case to go forward so they can handle the SRV based entirely on the state result.



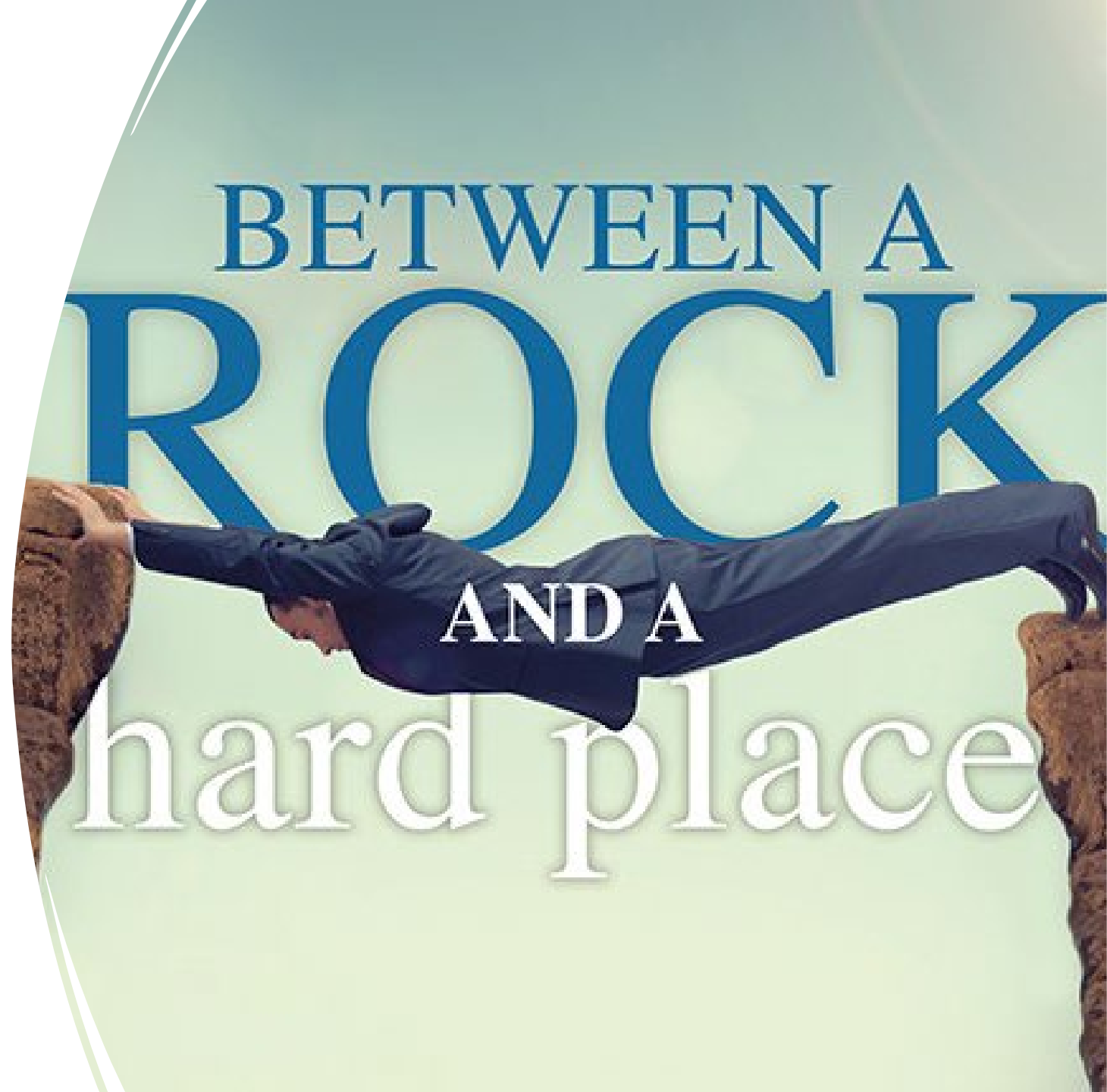
The Public Defenders

- We want to minimize time pretrial detention and future prison time.
- The only thing that will minimize the time the Client sits in jail is good communication between the two public defenders.



The Solution

- There is no perfect solution. The Client is in jail, prosecuted by two sovereigns for a crime they did not commit.
- SO WHAT SHOULD WE DO?!?!?!?



A man in a white shirt and tie is shown from the chest up, covering his face with both hands. He has a distressed expression. Surrounding him are several hands, each with the index finger pointing towards him, suggesting blame or accusation. The background is plain white.

When in Doubt...

-
- BLAME THE SOLICITOR

But Seriously, the Solicitor Really is to Blame



- Why? Because the ASOL is the root of the problem.
- They drag their feet because they know the Client is wallowing in jail and they think they can squeeze out an easy plea or wait for the feds to do something.

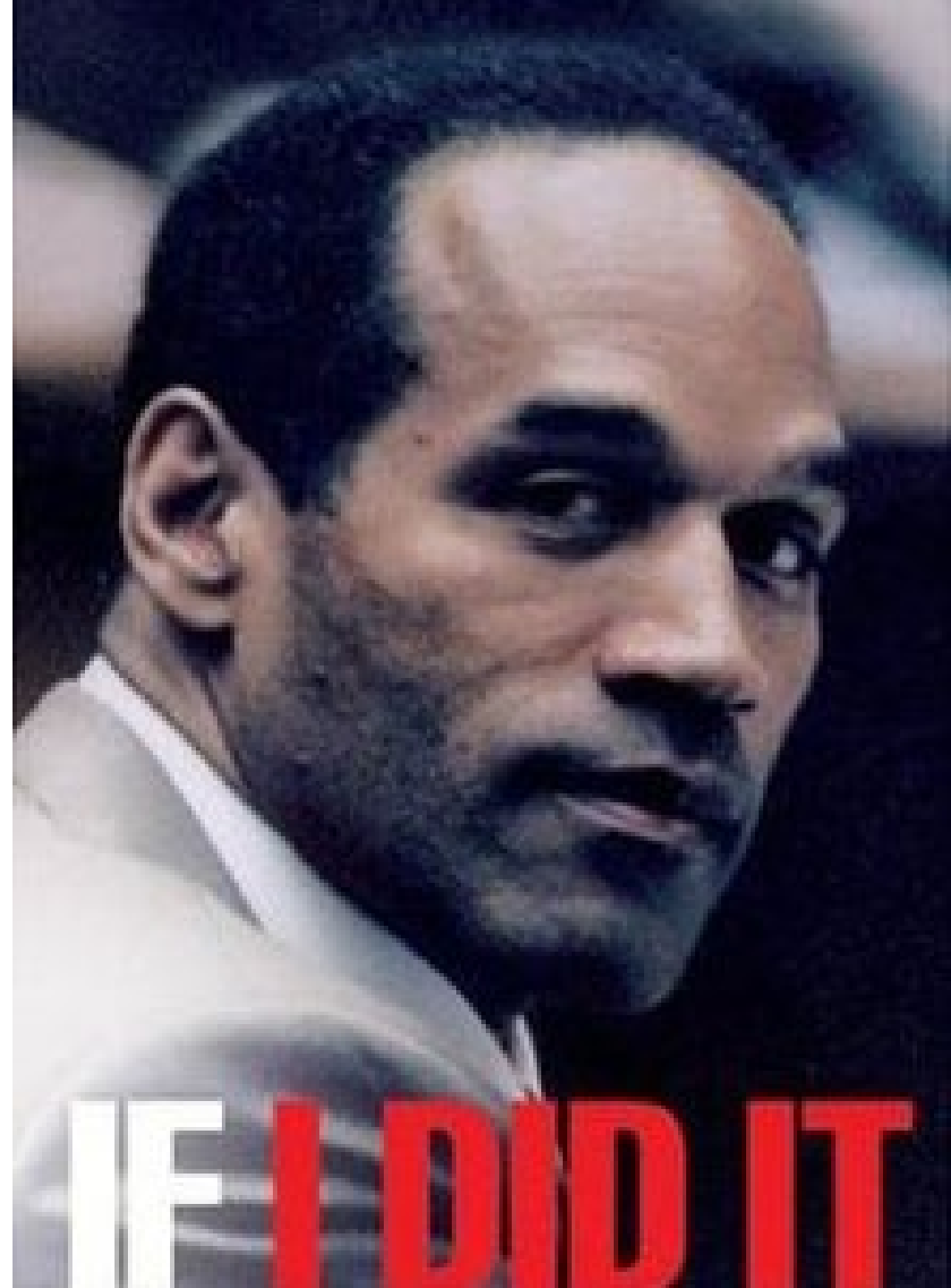
The Client Is Innocent



- The complicating issue here is that the Client does not want to work out a deal in state court.
- A deal in state court could mean federal prison.
- Side note: under the Petite Policy, the federal government can indict the Client for the same conduct after a state conviction if there is a compelling federal interest.

If the Client is Guilty...

- Probably let the feds go first.
- That way the Client can start their federal time and maybe get a deal worked out in state court that takes the federal time into consideration
- **DON'T JUST WORK OUT A DEAL IN STATE COURT AND PLEAD HER OUT WITHOUT LETTING US KNOW**



Recap...

- If the Client contests the state charges: we should do everything we can to get them a state adjudication first.
 - Press the ASOL to resolve, dismiss or set for trial.
 - Press the AUSA to be honest about whether they are going to indict.
- If Client does not contest the state charges: we should probably just get the federal SRV hearing over with as quickly as possible and try to coordinate a state plea deal around the same time.
- **DON'T JUST PLEAD OUT IN STATE COURT** – if you are going to work out a plea, check with the FPD to make sure we avoid unnecessary consecutive time.

But They Are Innocent!

- Pressure has to be put on the ASOL.
- They need to dismiss or try the case.
- Only other option will be a preponderance hearing in federal court.
This will not be easy to win.

QUICK TAKEAWAYS

- We all need to make the effort to stay in touch when we have mutual clients
- None of us should go into court for a plea or dispositive hearing without letting the other lawyer know first