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Hon. James A. Shapiro

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## COMITY OF ERRORS: WHEN FEDERAL SENTENCING GUIDELINES IGNORE STATE LAW DECRIMINALIZING SENTENCES

*Hon. James A. Shapiro \**

### INTRODUCTION

Many states have criminal sentences that the United States Sentencing Guidelines (hereinafter, “the Guidelines”) refer to as “diversionary dispositions.”<sup>1</sup> Diversionary dispositions are sentences that generally do not count as convictions under state law.<sup>2</sup> But federal

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1. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (2007). Section 4A1.2(f) provides:  
Diversionary Dispositions

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A1.1(c) *even if a conviction is not formally entered*, except that diversion from juvenile court is not counted.

*Id.* (emphasis added).

2. See, e.g., CAL. PENAL CODE § 1000.1(d) (West 2007) (“A defendant’s plea of guilty pursuant to this chapter [relating to drug offenses] shall not constitute a conviction for any purpose unless a judgment of guilty is entered, pursuant to Sec. 1000.3.”); FLA. STAT. ANN. § 985.35(6) (West 2007) (considering juvenile adjudication as non-conviction, and juvenile not deemed to have been found guilty or criminal by such adjudication); 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f) (West 2007) (explaining Illinois’s diversionary disposition of “supervision shall be deemed without adjudication of guilt and *shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime*. Two years after the discharge and dismissal

law, particularly the Guidelines, treats diversionary sentences the same as convictions,<sup>3</sup> contrary to state statutory language.<sup>4</sup> For example, the

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under this Section, unless the disposition of supervision was for a violation of [certain specified offenses, which require a longer waiting period], a person may have his record of arrest sealed or expunged as may be provided by law.” (emphasis added); UTAH CODE ANN. § 77-2A-1 (2007) (explaining Utah’s diversionary “[p]lea in abeyance” means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant *but not, at that time, entering judgment of conviction against him nor imposing sentence upon him* on condition that he comply with specific conditions as set forth in a plea in abeyance agreement”) (emphasis added); W. VA. CODE § 60A4-407 (1992) (“Whenever any person who has not previously been convicted of any offense under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, or stimulant, depressant, or hallucinogenic drugs, *pleads guilty or is found guilty* of possession of a controlled substance . . . the court, *without entering a judgment of guilt* and with the consent of the accused, *may defer further proceedings* and place him on probation upon terms and conditions.”) (emphasis added). *But cf.* People v. Sheehan, 659 N.E.2d 1339, 1342-45 (Ill. 1995) (finding a prior diversionary sentence of supervision for driving while intoxicated could be used to enhance subsequent sentence for same offense because sentencing enhancement statute used term “committed” rather than “convicted”).

3. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 (2007). Although Guideline § 4A1.2 generally speaks in terms of “sentences,” or “prior sentences,” it frequently muddies the issue by speaking in terms of “convictions” as well. *Id.* § 4A1.2(a)(3) (convictions with suspended sentences); § 4A1.2(a)(4) (discussing and defining “convicted of an offense” before sentencing occurs); § 4A1.2(d)(1) (adult convictions); § 4A1.2(h) (sentences for “foreign convictions”); § 4A1.2(i) (sentences for “tribal court convictions”); § 4A1.2(j) (sentences for “expunged convictions”). In fact, the one criminal history point the Guidelines award defendants for diversionary dispositions is the exact same number they award defendants for misdemeanor and even felony *convictions* with jail sentences of up to 60 days. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d)(2)(A) (“add 2 points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days”) *with* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d)(2)(B) (“add 1 point under §4A1.1(c) for each adult or juvenile sentence . . . not covered in (A)”) (emphasis added). In any event, by counting sentences rather than convictions, Guideline § 4A1.2 blurs the line, apparently deliberately, between convictions and non-convictions, and thereby treats them identically. At least one state, Utah, does not even impose a sentence, much less a conviction, upon defendants who receive its “plea in abeyance.” UTAH CODE ANN. § 77-2a-1 (2007). Moreover, many federal courts refer to and treat diversionary dispositions as “convictions” even though state law says otherwise. *See, e.g.,* United States v. Lluvias, 168 F. App’x 732, 733-734 (7th Cir. 2006) (unpublished opinion) (a “*conviction* for drunk driving is counted”) (emphasis added); United States v. Passeur, 148 Fed. App’x. 404, 409 (6th Cir. 2005) (unpublished opinion) (repeatedly referring to a Mississippi order of non-adjudication as a “conviction”).

4. *See, e.g.,* United States v. Dell, 359 F.3d 1347, 1348-49 (10th Cir. 2004) (expressly declining to use Utah’s interpretation of a “plea in abeyance” as a non-conviction and holding it was a conviction for purposes of the guideline definition of “felony conviction” pursuant to Guideline § 2K2.1(a) & cmt. n.1). In accordance with Guideline § 4A1.2(f), most federal opinions find diversionary dispositions countable as prior sentences when the defendant is statutorily required or otherwise does plead guilty or enter a plea of no contest or when the court makes a finding of guilt. *See, e.g.,* United States v. Charlton, 121 F.3d 700, 700 (4th Cir. 1997) (unpublished opinion) (highlighting West Virginia statute that deferred adjudication upon a plea or finding of guilt); United States v. Cox, 114 F.3d 1189, 1189 (6th Cir. 1997) (unpublished opinion) (explaining that Michigan law requires guilty plea before defendant is eligible for diversion); United States v. Jiles, 102 F.3d 278, 280 (7th Cir. 1996) (explaining that Wisconsin statute deems failure to appear in court as a plea of no contest); United States v. Craft, Nos. 95-5508, 95-5545, 1996 WL 185783, at

Illinois Unified Code of Corrections<sup>5</sup> provides that “discharge and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime.”<sup>6</sup> The plain meaning of this statute is that the crime should not be treated as a conviction.<sup>7</sup> The statute makes no distinction between diversionary dispositions in which a finding of guilt was made and those in which no such finding was made. In contrast, the Guidelines make this distinction.<sup>8</sup> Unless the diversionary disposition contains no “finding of guilt,”<sup>9</sup> is expunged,<sup>10</sup> or is a diversion from juvenile court,<sup>11</sup> the diversionary disposition will always count as

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\*2 (6th Cir. April 17, 1996) (unpublished opinion) (finding that defendant signed and filed a petition for acceptance of plea of guilty that included an express admission of guilt); *United States v. Vela*, 992 F.2d 1116, 1117-18 (10th Cir. 1993) (explaining that Oklahoma deferred sentencing statute required a verdict, plea of guilty, or a plea of *nolo contendere* before the court could defer sentencing and place the defendant on probation); *United States v. Cox*, 934 F.2d 1114, 1124 (10th Cir. 1991) (explaining that Colorado deferred judgment law required a plea, as opposed to a deferred prosecution which required no plea); *United States v. Giraldo-Lara*, 919 F.2d 19, 22-23 (5th Cir. 1990) (explaining that Texas statute required a plea of guilty to be eligible for “deferred adjudication probation”); *United States v. Rockman*, 993 F.2d 811, 813-14 (11th Cir. 1993) (holding a plea of *nolo contendere*, where court withholds adjudication of guilt, is countable diversionary disposition). This line of authority stands for the rule that a diversionary disposition will be counted as a sentence under § 4A1.1(c) if the court merely defers its adjudication and sentencing upon a plea or finding of guilt. In contrast, a “[d]iversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted.” U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (2007).

5. 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f) (West 2007).

6. *Id.*

7. *See id.*

8. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (2007).

9. *Id.* (“Diversion from the judicial process without a finding of guilt . . . is not counted.”); *see also United States v. Kozinski*, 16 F.3d 795, 812 (7th Cir. 1994) (finding a stipulation to facts, as opposed to guilty plea, leading to supervision under Illinois law not a countable conviction under Guidelines); *United States v. Porter*, 51 F. Supp. 2d 1168, 1171 (D. Kan. 1999) (treating “diversion agreement” for driving under influence of alcohol or drugs under Kansas law as a non-countable “deferred prosecution” rather than as a countable “deferred adjudication”).

10. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(j) (2007) (“Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).”). Yet even many expunged convictions can count as convictions under Federal Guidelines law. *See, e.g., United States v. Townsend*, 408 F.3d 1020, 1024 (8th Cir. 2005) (counting expunged convictions under Iowa law that do not reverse or vacate diversionary dispositions due to legal errors or newly discovered evidence of actual innocence, or are not constitutionally invalid).

11. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (2007) (“diversion from juvenile court is not counted”). *Compare* FLA. STAT. ANN. § 985.35(6) (West 2007) (considering juvenile adjudication as non-conviction, and juvenile not deemed to have been found guilty or criminal by such adjudication), *with State v. Presha*, 8 P.3d 14, 17 (Kan. App. Ct. 2000) (refusing to defer to Florida’s treatment of juvenile adjudication as non-conviction).

criminal history for the purpose of federal sentencing, regardless of what state law says.<sup>12</sup>

Illinois is not the only state in which this conflict between the Guidelines and state diversionary statutes exists. California too does not consider findings of guilt as convictions for the purpose of sentencing. Under California's statute, a plea of guilty "shall not constitute a conviction for any purpose."<sup>13</sup> Following the Guidelines would directly conflict with this statute, because under the Guidelines, "a diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence."<sup>14</sup>

The Guidelines' policy behind counting most diversionary dispositions as if they were criminal convictions is that "defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency."<sup>15</sup> However, it is not "further leniency" to treat a state diversionary disposition in a way that state statutes say they should not be treated, thereby ratcheting up a federal defendant's sentence. "Further leniency" would be to give a federal defendant another diversionary disposition for the federal crime. It is not principled for the Guidelines to undo the original leniency of the state diversionary disposition by counting it the same way a conviction would be counted.

In fact, most states seem to follow the Guidelines' approach of increasing a sentence in the case of a prior diversionary disposition.<sup>16</sup> However, the express language of most, if not all, of these state statutes is that diversionary dispositions are not supposed to count as convictions for any purpose.<sup>17</sup> And one such purpose would seem to be aggravation

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12. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (2007) ("A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A1.1(c) *even if a conviction is not formally entered.*") (emphasis added).

13. CAL. PENAL CODE § 1000.1(d) (West 2007).

14. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (2007).

15. *Id.* § 4A1.2 cmt. n.9.

16. *See, e.g.,* *People v. Laino*, 87 P.3d 27, 38 (Cal. 2004) (remarking that diversionary disposition for domestic violence under Arizona law counted as "strike" under California's three strikes law); *State v. Macias*, 39 P.3d 85, 88 (Kan. App. Ct. 2002) (refusing to defer to Texas deferred adjudication in using it to aggravate defendant's sentence under Kansas law); *State v. Hodgden*, 25 P.3d 138, 142 (Kan. App. Ct. 2001) (refusing to defer to Alaska's procedure whereby defendant's conviction can be set aside and not counted in his criminal history); *State v. Presha*, 8 P.3d 14, 17 (Kan. App. Ct. 2000) (refusing to defer to Florida's treatment of juvenile adjudication as non-conviction); *People v. Johnson*, 538 N.E.2d 1118, 1133 (Ill. 1989) ("Neither the language nor history of the [supervision] statute precludes later use as aggravation evidence of criminal behavior relevant to a criminal charge.").

17. *See, e.g.,* CAL. PENAL CODE § 1000.1(d) (West 2007) ("A defendant's plea of guilty

of future sentences. *A fortiori*, when statutory language is clear, legislative intent is clear, and courts should not override it with caselaw.<sup>18</sup> Using diversionary dispositions to aggravate future sentences does precisely that by effectively undoing any benefit from the previously awarded diversionary disposition.

The purpose of diversionary dispositions is to give an offender the chance to abide by the law *during the diversionary period*.<sup>19</sup> If he behaves during that period, the record is supposed to be effectively “wiped clean.”<sup>20</sup> If not, then the diversionary disposition turns into a conviction.<sup>21</sup> If an offender commits another offense after he successfully completes the diversionary disposition, then it is a legitimate use of the first diversion not to give him another one. But it is not legitimate to use a successfully completed diversionary disposition as if it were a conviction to aggravate a subsequent sentence, in violation of express statutory language.

#### SCOPE OF THE PROBLEM

The Guidelines’ treatment of state diversionary dispositions the same as convictions is a widespread problem. In *United States v. Lluvias*,<sup>22</sup> the Seventh Circuit affirmed a sentence wherein the

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pursuant to this chapter [relating to drug offenses] *shall not constitute a conviction for any purpose* unless a judgment of guilty is entered. . . .”) (emphasis added); 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f) (West 2007) (stating that Illinois’s diversionary disposition of “supervision shall be deemed without adjudication of guilt and *shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime*”) (emphasis added). One of the purposes of the California statute is to “prevent otherwise law-abiding citizens who are amenable to rehabilitation from acquiring a criminal record.” *People v. Wright*, 121 Cal. Rptr. 2d 419, 424 (Ct. App. 2002).

18. See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1551 (2007) (Scalia, J., dissenting) (“[T]oday’s decision is nothing other than the elevation of judge-supposed legislative intent over clear statutory text.”); *Briscoe v. LaHue*, 460 U.S. 325, 347 (1983) (Marshall, J., dissenting) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)) (“Absent a clearly expressed legislative intention to the contrary, that language [of the statute itself] must ordinarily be regarded as conclusive.”).

19. See, e.g., *People v. Martinsen*, 238 Cal. Rptr. 530, 533 (Ct. App. 1987).

20. See, e.g., *People v. Mazurette*, 14 P.3d 227, 231 (Cal. 2001) (quoting *People v. Perez*, 80 Cal. Rptr. 2d 188, 195 (Ct. App. 1998) (Kremer, J., concurring)); *Commonwealth v. Shouse*, 183 S.W.3d 204, 206 (Ky. Ct. App. 2006); *Flynt v. Commonwealth*, 105 S.W.3d 415, 418 (Ky. 2003); *Hyatt v. Commonwealth*, 17 S.W.3d 121, 123 (Ky. Ct. App. 2000) (holding a pretrial diversion under Kentucky Revised Statutes § 533.258 effectively wiped slate clean).

21. See, e.g., KEN. REV. STAT. ANN. § 533.256(1) (West 2007) (explaining that if defendant does not successfully complete pretrial diversion, statute contemplates that trial court will enter final judgment in accordance with defendant’s guilty plea).

22. 168 Fed. App’x 732 (7th Cir. 2006) (unpublished opinion). For some reason, courts have seen fit to treat many of these issues in unpublished opinions. This article frequently relies on such

sentencing court counted a prior supervision as a conviction, in direct contradiction to express Illinois statutory law.<sup>23</sup> In *Lluvias*, the defendant entered a guilty plea for conspiracy to distribute cocaine.<sup>24</sup> Prior to this conviction, the defendant received a sentence of “supervision”<sup>25</sup> under Illinois law for drunk driving.<sup>26</sup> This non-conviction under Illinois law, which should have awarded him no criminal history points, counted as one criminal history point<sup>27</sup> under the Guidelines.<sup>28</sup> The discrepancy between the Guidelines and state statutory law raised Mr. Lluvias’s number of criminal history points from one to two,<sup>29</sup> which automatically disqualified him from getting the benefit of the so-called “safety valve,”<sup>30</sup> a two-point reduction<sup>31</sup> in the offense level calculation that also allows defendants to get out from under the draconian effects of the statutorily mandated minimum sentences for most federal drug offenses.<sup>32</sup> The prospective appeal from that one criminal history point assessment was deemed so frivolous that

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opinions despite their limited precedential value. However, new Federal Rule of Appellate Procedure 32.1 allows citation of unpublished orders issued on or after January 1, 2007. Despite the fact that all of the unpublished opinions in this article were issued before that date, the new-found citeability of this type of opinion should give them a bit more credibility for academic, if not practitioner, purposes.

23. *Id.* at 733-734.

24. *Id.* at 732.

25. 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f) (West 2007); *see supra* note 2 (discussing 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f)).

26. *Lluvias*, 168 Fed. App’x at 733.

27. Criminal history points are the Guidelines’ way of calculating a federal defendant’s criminal history for purposes of increasing his sentence. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2007) (explaining point system for computing criminal history category). Each criminal history point adds up to determine a defendant’s “criminal history category.” *Id.* Criminal history categories range from I on the lowest end (for zero or one criminal history point) to VI on the highest end (for thirteen or more criminal history points). U.S. SENTENCING GUIDELINES MANUAL § 5A (2007). In turn, these criminal history categories constitute the entire horizontal axis on the Guidelines’ sentencing table. *See id.* It is the Guidelines’ sentencing table that ultimately determines a defendant’s now-advisory guideline sentencing range. *See infra* notes 99-111 and accompanying text.

28. *Lluvias*, 168 Fed. App’x at 733 (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) & cmt. n.5, 9 (2007)); *United States v. Binford*, 108 F.3d 723, 726-28 (7th Cir. 1997); *United States v. Redding*, 104 F.3d 96, 98-99 (7th Cir. 1996).

29. *See Lluvias*, 168 Fed. App’x at 734. This, in turn, raised Mr. Lluvias’s Criminal History Category from I to II, but that ultimately didn’t have an effect on his sentence, because the statutory mandatory minimum took his sentence far in excess of what his guideline range would have been without it. *Id.*

30. U.S. SENTENCING GUIDELINES MANUAL § 3553(f) (2007).

31. *Id.* § 2D1.1(b)(9).

32. 21 U.S.C. § 841 (2007).

appellate counsel moved to withdraw and filed an “*Anders*”<sup>33</sup> brief on that issue, among others.<sup>34</sup>

But the United States Court of Appeals for the Seventh Circuit noted that a “*conviction* for drunk driving is counted.”<sup>35</sup> The Court’s holding is counter to express Illinois statutory law, in which a sentence of supervision is most decidedly *not* a conviction.<sup>36</sup> Thus, the Seventh Circuit completely ignored and even disrespected Illinois law in finding that an argument to the contrary would have been frivolous.<sup>37</sup>

To make matters worse, in *United States v. Paseur*<sup>38</sup> the United States Court of Appeals for the Sixth Circuit not only affirmed the district court’s assessment of one criminal history point for a Mississippi diversionary disposition, but added insult to injury by affirming the assessment of two additional criminal history points because the defendant committed the federal crime during the two-year period of the diversionary disposition.<sup>39</sup> This had the effect of not only raising the defendant’s Criminal History Category from I to II, thereby increasing his advisory guideline sentencing range, but also of becoming a second reason he was ineligible for the “safety valve.”<sup>40</sup> In *Paseur*, the Mississippi state court had “entered an order of *non-adjudication* for two years” on a charge of possession of burglary tools.<sup>41</sup> The Sixth Circuit

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33. *Anders v. California*, 386 U.S. 738, 744 (1967) (explaining that in order to discharge appellate duties, counsel must file motion to withdraw, accompanied by brief exploring all possible appellate arguments together with explanation why each is frivolous).

34. *United States v. Lluvias*, 168 Fed. App’x 732, 734 (7th Cir. 2006) (unpublished opinion).

35. *Id.* (citing *United States v. Binford*, 108 F.3d 723, 726-28 (7th Cir. 1997)) (emphasis added).

36. 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f) (West 2007); *see supra* note 2 (discussing 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f)). *Cf.* *State v. Hodgden*, 25 P.3d 138, 142 (Kan. Ct. App. 2001) (“Kansas, unlike Alaska, does not have a process whereby after a suspended sentence, successful probation, and discharge by the court, a defendant’s conviction can be set aside and not counted in a defendant’s criminal history.”); *State v. Presha*, 8 P.3d 14, 17 (Kan. Ct. App. 2000) (“Florida does not consider a juvenile adjudication as a conviction, nor is the juvenile deemed to have been found guilty or a criminal by the adjudication.” (citing FLA. STAT. ANN. § 985.228(6) (West 2007))). *But cf.* *People v. Sheehan*, 659 N.E.2d 1339, 1342-45 (Ill. 1995) (finding that a prior diversionary sentence of supervision for driving while intoxicated could be used to enhance subsequent sentence for same offense because sentencing enhancement statute used term “committed” rather than “convicted”); *People v. Johnson*, 538 N.E.2d 1118, 1133 (Ill. 1989) (“Neither the language nor history of the [supervision] statute precludes later use as aggravation evidence of criminal behavior relevant to a criminal charge.”); *State v. Macias*, 39 P.3d 85, 88 (Kan. Ct. App. 2002) (refusing to defer to Texas deferred adjudication in using it to aggravate defendant’s sentence under Kansas law).

37. *Lluvias*, 168 Fed. App’x at 734.

38. 148 Fed. App’x 404 (6th Cir. 2005) (unpublished opinion).

39. *Id.* at 409.

40. *Id.* at 406.

41. *Id.* at 408 (emphasis added).



begged the question by repeatedly referring to this order of non-adjudication as a “conviction,”<sup>42</sup> “even though the Mississippi court ha[d] yet to formally enter a conviction.”<sup>43</sup>

However, because the defendant *pled guilty* to possessing burglary tools, the non-adjudication of guilt did not matter.<sup>44</sup> The Mississippi state diversionary disposition counted as a conviction, or at least a “prior sentence,”<sup>45</sup> under federal sentencing guideline § 4A1.2(f).<sup>46</sup> And because the defendant was still under the two-year non-adjudication order, the Sixth Circuit affirmed the assessment of an additional two criminal history points pursuant to guideline § 4A1.1(d).<sup>47</sup> Section 4A1.1(d) requires the two-point increase whenever a federal defendant commits a federal crime “while under any criminal justice sentence.”<sup>48</sup>

A “criminal justice sentence” under the express terms of § 4A1.1(d) includes “probation, parole, supervised release, imprisonment, work release, or escape status.”<sup>49</sup> But certain caselaw, upon which the *Paseur* court relied, adds “diversionary dispositions” to this seemingly exhaustive list.<sup>50</sup> Application Note 4 to § 4A1.1 supports this caselaw.<sup>51</sup> Application Note<sup>52</sup> 4 to § 4A1.1 further defines a “criminal justice sentence” to include “a sentence countable under § 4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this item to apply.”<sup>53</sup> Since diversionary dispositions count as a sentence

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42. *Id.* at 406, 408.

43. *Id.* at 409.

44. *Id.* at 408.

45. *See supra* note 3 for a discussion of the distinction (or lack thereof) between “prior sentence” and “conviction.”

46. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) (2007).

47. *Id.* at § 4A1.1(d).

48. *Id.*

49. *Id.*

50. *Paseur*, 148 Fed. App’x at 409 (citing *United States v. Gorman*, 312 F.3d 1159, 1164 (10th Cir. 2002)); *United States v. Craft*, Nos. 95-5508, 95-5545, 1996 WL 185783, at \*2 (6th Cir. Apr. 17, 1996) (unpublished opinion); *see also* *United States v. Velasquez-Meza*, 76 Fed. App’x 926, 929 (10th Cir. 2003). *United States v. Wolf*, No. 96-2235, 1996 WL 647248, at \*2-\*3 (7th Cir. Nov. 1, 1996) (unpublished opinion).

51. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 app. n.4 (2007).

52. Application notes are commentary that interpret and further define terms used in a guideline. “[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” *Stinson v. United States*, 508 U.S. 36, 38, 45 (1993); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.7 (2007) (incorporating the *Stinson* principle into the Guidelines themselves).

53. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 app. n.4 (2007).

under § 4A1.2, Application Note 4 to § 4A1.1 would make them count for purposes of § 4A1.1(d) as well.<sup>54</sup>

Several circuits have adopted the approach set forth in Application Note 4. In *United States v. Gorman*,<sup>55</sup> the Tenth Circuit relied heavily on Application Note 4 in its reasoning.<sup>56</sup> In *Gorman*, the defendant argued that the lower court erroneously took past diversionary dispositions into account when determining his sentence.<sup>57</sup> The Tenth Circuit affirmed the district court's decision, based on the fact that the Application Note included diversionary dispositions in its definition of a "criminal justice sentence."<sup>58</sup>

The Seventh Circuit also followed this approach in *United States v. Wolf*.<sup>59</sup> The court reasoned that a "criminal justice sentence" for purposes of calculating criminal history points should include those sentences with court supervision because of the "language and the intent of the guidelines" – language and intent articulated in Application Note 4.<sup>60</sup>

However, Application Note 4 is guideline commentary, and guideline commentary is not authoritative if it is "inconsistent with, or a plainly erroneous reading of, that guideline."<sup>61</sup> By its express terms, § 4A1.1(d) includes only "probation, parole, supervised release, imprisonment, work release, or escape status."<sup>62</sup> It does not say "including but not limited to." It only says "including."<sup>63</sup> Moreover, its list of criminal justice sentences is reasonably exhaustive. It is true that immediately preceding this list, § 4A1.1(d) says "any" criminal justice sentence.<sup>64</sup> But it appears that the seemingly exhaustive word "including" (rather than "including but not limited to") would make the list of criminal justice sentences finite for purposes of § 4A1.1(d).

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54. *Wolf*, 1996 WL 647248 at \*3 ("It would be anomalous to hold that an order of court supervision is not a sentence while it is in effect (for purposes of § 4A1.1(d)), but it is countable as a sentence after successful completion and dismissal of charges.").

55. 312 F.3d 1159.

56. *Id.* at 1164.

57. *Id.*

58. *Id.* at 1167.

59. 1996 WL 647248 at \*3.

60. *Id.*

61. *Stinson v. United States*, 508 U.S. 36, 38, 45 (1993); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.7 (2007) (incorporating the *Stinson* principle into the Guidelines themselves).

62. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (2007).

63. *Id.*

64. *Id.*

*Expressio unius est exclusio alterius*.<sup>65</sup> Guideline § 4A1.1(d)'s expression of a finite list of sentences excludes other sentences such as diversionary dispositions. Therefore, Application Note 4 to § 4A1.1(d) would at least be inconsistent with, if not a plainly erroneous reading of, guideline § 4A1.1(d) itself. It would thus be non-authoritative.<sup>66</sup>

Perhaps the biggest effrontery to state sentencing law came when the United States Court of Appeals for the Seventh Circuit held in *United States v. Binford*<sup>67</sup> that under Illinois law, "supervision is the functional equivalent of conditional discharge, which we previously have held to be the functional equivalent of probation."<sup>68</sup> In fact, probation and conditional discharge are permanent *convictions* under Illinois law.<sup>69</sup> By express statutory directive, supervision is not.<sup>70</sup> The *Binford* court did acknowledge, "[t]he only difference between conditional discharge and supervision is that the charges against a convicted defendant on supervision may ultimately be dismissed."<sup>71</sup> However, it held "[t]his is of no consequence for purposes of" the Guidelines.<sup>72</sup> The court thus increased Mr. Binford's sentence for the peccadillo of illegal transportation of alcohol.<sup>73</sup>

The Seventh Circuit has found that "the guidelines 'do not rely on state definitions or labels.'"<sup>74</sup> As a matter of comity, perhaps they should. In the view of federal law, a "defendant is no less guilty of the offense after completing his court supervision than he was when he was found guilty, whether or not Illinois still considers him a misdemeanor."<sup>75</sup> If that is true, why is a defendant any less guilty of the

65. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 703 (1991).

66. *Stinson*, 508 U.S. at 38, 45; U.S. SENTENCING GUIDELINES MANUAL § 1B1.7 (2007).

67. 108 F.3d 723 (7th Cir. 1997).

68. *Id.* at 727.

69. *People v. Cooper*, 547 N.E.2d 449, 454 (1989) ("Probation is a sentence imposed for criminal convictions."); *People v. Tuft*, 649 N.E.2d 374, 380 (1995) ("A defendant who has been sentenced to conditional discharge has already been tried and convicted of the underlying criminal offense giving rise to the sentence of conditional discharge.").

70. 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f) (West 2007); *see supra* note 2 (discussing 730 ILL. COMP. STAT. ANN. 5/5-6-3.1(f)).

71. *United States v. Binford*, 108 F.3d 723, 727-28 (7th Cir. 1997).

72. *Id.* at 728 (counting supervision as conviction for purposes of Guideline § 4A1.2(c)(1), which is supposed to count as a conviction only offenses for which a term of *probation* — which is clearly a conviction under Illinois and most other states' law — is imposed).

73. *Id.*; *see also* *United States v. Jones*, 448 F.3d 958, 960-61 (7th Cir. 2006).

74. *Jones*, 448 F.3d at 960 (quoting *United States v. Burke*, 148 F.3d 832, 839 (7th Cir. 1998)); *see also* *United States v. McKoy*, 452 F.3d 234, 237 (3d Cir. 2006) ("In determining what constitutes a 'prior sentence' under the Sentencing Guidelines, courts must look to federal, not state law."); *United States v. Morgan*, 390 F.3d 1072, 1074 (8th Cir. 2004); *accord* *United States v. Williams*, 176 F.3d 301, 311 (6th Cir. 1999); *United States v. Gray*, 177 F.3d 86, 93 (1st Cir. 1999).

75. *Jones*, 448 F.3d at 960 (quoting *Burke*, 148 F.3d at 840).

offense he pled guilty to after he gets the offense expunged?<sup>76</sup> After all, expunction does not “unring the bell” of the guilty plea and supervision.<sup>77</sup> It merely erases it from the defendant’s criminal record.<sup>78</sup>

In *United States v. Jones*,<sup>79</sup> the Seventh Circuit considered and rejected the argument that the Guidelines “‘undermine the design and effect’ of Illinois law,” or “violate principles of federalism or the Ninth Amendment.”<sup>80</sup> It affirmed a sentence that raised Mr. Jones’s Criminal History Category by two levels, from I to III, because of the four criminal history points assessed on the basis of four Illinois non-convictions.<sup>81</sup> Other cases have similarly found that dispositions treated as non-convictions under state law are treated as convictions under federal law.<sup>82</sup>

To make matters worse, the Guidelines draw a distinction between diversionary dispositions that have been expunged from those that have not been expunged.<sup>83</sup> Thus, even if a diversionary disposition is eligible for expunction, but has not actually been expunged, the disposition will count as a conviction.

#### COMITY AND *MCNARY*

Longstanding principles of comity demand that federal law respect state statutory treatment of state convictions.<sup>84</sup> The leading United

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76. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(j) (2007) (“Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).”).

77. *But cf.* R.J.L. v. State, 887 So.2d 1268, 1280-81 (Fla. 2004) (distinguishing between an expunction and a pardon and explaining that a pardon “does not remove the historical fact that the conviction occurred; a pardon does not mean that the conviction is gone”).

78. See *State v. Dorn*, 94 P.3d 709, 712-13 (Idaho Ct. App. 2004) (Gutierrez, J., dissenting) (quoting BLACK’S LAW DICTIONARY (6th ed. 1990)).

79. 448 F.3d 958 (7th Cir. 2006).

80. *Id.* at 961-62.

81. *Id.* at 959.

82. See, e.g., *Phillips v. United States*, No. 04-1324, 2007 WL 1838055, at \*14, \*16 (6th Cir. 2007) (affirming, in post-conviction motion under 28 U.S.C. § 2255, sentencing court’s use of three juvenile diversionary dispositions to increase sentence); *United States v. Davis*, 17 Fed. App’x 652, 653 (9th Cir. 2001) (highlighting that a guilty plea for domestic violence that was later withdrawn and dismissed in state court counted as conviction for purposes of computing criminal history category). *Accord* *United States v. McKoy*, 452 F.3d 234, 237 (3d Cir. 2006).

83. See *supra* note 10 (discussing the distinction).

84. Ironically, these courts only mention of “comity” is in the context of purporting to respect, rather than disrespect, prior state judgments. *United States v. Jiles*, 102 F.3d 278, 281 (7th Cir. 1996) (holding, in part, that collaterally attacking municipal default judgments would “offend[ ] principles of finality and comity”). *But cf.* *United States v. Hines*, 802 F. Supp. 559, 574 (D. Mass. 1992) (finding that a failure to object to constitutionality of Massachusetts state conviction by not

States Supreme Court case on comity as a rationale to prevent federal meddling in state business is *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*.<sup>85</sup> In *McNary*, the petitioners were a group of property tax protesters complaining of unequal treatment at the hands of various state tax officials.<sup>86</sup> In order to avoid the bar of the Tax Injunction Act,<sup>87</sup> the taxpayers sued for damages under 42 U.S.C. § 1983.<sup>88</sup> And in order to avoid the bar of Eleventh Amendment sovereign immunity against suits seeking to recover damages from state coffers,<sup>89</sup> they sued the tax officials in their individual rather than official capacities.<sup>90</sup>

The Court noted that an award of damages under § 1983 would first require a “federal-court declaration” that the tax officials acted unconstitutionally.<sup>91</sup> Yet the taxpayers’ suit did not request injunctive or other equitable relief, so the Court could not and did not strike down the taxpayers’ suit on the basis of the Tax Injunction Act (at least not standing alone).<sup>92</sup> Rather, the Court struck it down on the basis of comity, and the principle of comity that was inherent in the Tax Injunction Act.<sup>93</sup>

The Court hastened to add that the principle of comity was not limited to federal interference with state taxation.<sup>94</sup> Comity underlay the principles of “Our Federalism” and equitable restraint of *Younger v. Harris*,<sup>95</sup> the *McNary* Court reminded us.<sup>96</sup> *Younger* applied notions of comity to prevent federal injunctions against pending state criminal prosecutions.<sup>97</sup> But the *Younger* doctrine quickly expanded during the

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appealing it resulted in waiver having “nothing to do with comity, but rather with time-honored considerations of judicial efficiency”).

85. 454 U.S. 100 (1981).

86. *Id.* at 105-06.

87. 28 U.S.C. § 1341 (2004).

88. *McNary*, 454 U.S. at 106-107.

89. U.S. CONST. amend. XI; *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

90. *McNary*, 454 U.S. at 113.

91. *Id.* at 106-07, 113, 115.

92. *Id.* at 107.

93. *Id.* at 110, 116 (“Congress’ . . . enactment of § 1341 was motivated in large part by comity concerns.”) (punctuation omitted).

94. *Id.* at 111.

95. 401 U.S. 37 (1971).

96. *McNary*, 454 U.S. at 111-12.

97. In a particularly famous riff on the importance of comity in our federal system, the *Younger* Court said:

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are

1970s and '80s to prevent federal injunctions of many state non-criminal judicial proceedings too.<sup>98</sup>

The counter-argument is that comity is a principle in which the federal system respects the sovereignty of the state system *qua* state system. It does not apply when the federal system "borrows" an element from the state system and effectively "federalizes" it. In the context of the Guidelines, for example, the federal criminal history calculation would "borrow" a state criminal disposition and then incorporate it into the federal calculation. In effect, the state criminal disposition would lose its state quality and take on a federal one. Under that rationale, a non-conviction for state purposes would legitimately become a conviction for federal purposes.

But this counter-argument ignores a fundamental precept of comity law: one sovereign's respect for another sovereign's law. If a criminal disposition does not count as a conviction for state purposes, why should it count as one federally? This rationale is even more compelling when one considers the real-life consequences of treating state dispositions in ways other than the state intended.

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left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

*Younger*, 401 U.S. at 44-45 (quoted in *McNary*, 454 U.S. at 112).

98. See, e.g., *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (nuisance abatement of obscenity); *Juidice v. Vail*, 430 U.S. 327, 334 (1977) (civil contempt); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (recovery of fraudulently obtained welfare benefits); *Moore v. Sims*, 442 U.S. 415, 434-35 (1979) (child custody proceeding); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982) (state administrative proceeding of judicial nature involving attorney discipline); *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 627-28 (1986) (state administrative proceeding of a judicial nature involving civil rights); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987) (state court enforcement of judgments). *But cf.* *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364-65 (1989) (holding that *Younger* does not require deference to state court review of legislative or executive action); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238-39 (1984) (finding that abstention in favor of state administrative proceedings not required when state judicial proceedings have not yet commenced).

## PRACTICAL CONSEQUENCES

First, many criminal defense practitioners only practice in state court and not federally. As such, they are well within their rights to advise clients that diversionary dispositions do not count as convictions. For under state law, they indeed do not. Is it reasonable to expect a state criminal practitioner to foresee (1) that their petty state court client might eventually be indicted and convicted federally; and (2) that if and when s/he is, that petty state non-conviction could very well make a difference in the client's criminal history category and sentence?

Second, even criminal defense lawyers who practice in both state and federal court would be hard-pressed not to advise their state court client to accept a non-conviction under state law on the off-chance their client would later be charged with and convicted of a relatively rare (by comparison to the number of state criminal cases) federal crime. It is simply unrealistic to expect even lawyers who know the potential federal consequences of a state court diversionary disposition to avoid giving their state court clients the chance to keep their state "rap sheet" clean.

*BOOKER* AND NEW-FOUND FEDERAL SENTENCING FLEXIBILITY

The landmark case of *United States v. Booker*<sup>99</sup> has opened the door to allow federal sentencing courts to rectify this injustice. In *Booker*, the United States Supreme Court rendered the Guidelines advisory instead of mandatory, as they had been before *Booker*.<sup>100</sup> Although federal sentencing courts must still consider a correctly calculated guideline range,<sup>101</sup> including the defendant's criminal history score,<sup>102</sup> they are no longer required to sentence based exclusively on that range. They must now sentence based on a variety of factors contained in the federal sentencing statute, 18 U.S.C. § 3553(a). One of those factors is "the *history* and characteristics of the defendant."<sup>103</sup> Part of a defendant's "history" is his *criminal* history.<sup>104</sup> And usually, most of that criminal history is *state* criminal history.

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99. 543 U.S. 220 (2005).

100. *Id.* at 246.

101. *Id.* at 259; *see also* *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

102. *See, e.g.*, *United States v. Barrero*, 425 F.3d 154, 156-57 (2d Cir. 2005).

103. U.S. SENTENCING GUIDELINES MANUAL § 3553(f) (2007) (emphasis added).

104. *See, e.g.*, *United States v. Robinson*, 234 Fed. App'x 77, 79 (4th Cir. 2007) (unpublished opinion) ("pursuant to § 3553(a)(1), [a defendant's] criminal history and characteristics properly are subject to the district court's consideration when formulating a sentence"); *United States v. Kathman*, 490 F.3d 520, 526 (6th Cir. 2007) (finding that even though criminal history calculation

As a matter of comity, courts can and should consider the fact that state law, unlike the Guidelines, treats some of that state criminal history as non-convictions. They can also consider the fact that most of those state court defendants were probably counseled by their state court criminal defense lawyers that their guilty pleas to diversionary dispositions would not be treated as convictions. Courts can then ameliorate the unwarranted harshness of a criminal history category calculated on the basis of a state diversionary disposition by sentencing lower than the advisory guideline range.

#### OVERREPRESENTATION OF CRIMINAL HISTORY

Alternatively, federal sentencing courts can work more within the Guidelines' structure by discounting state diversionary dispositions on the grounds that they overrepresent a defendant's criminal history.<sup>105</sup> Overrepresentation of criminal history was a recognized ground for so-called "departure" from the guideline range even before *Booker* made the Guidelines advisory.<sup>106</sup>

Since *Booker*, a circuit split exists as to whether traditional guideline departure methodology is now obsolete since the Guidelines are merely advisory, and courts can deviate from the Guidelines on many more grounds than the old departure methodology permitted.<sup>107</sup> The Seventh and Ninth Circuits have both held that "departures are no longer relevant in a post-*Booker* regime where district courts enjoy authority, within the bounds of reason, to impose sentences that fall inside or outside the now-advisory guidelines."<sup>108</sup> Other circuits have

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already took into account lack of prior convictions, "history and characteristics of the defendant" permitted court to consider fact that defendant had not been in any trouble with law before); *United States v. Ramirez-Perez*, No. 06-1640, 2007 WL 1703678, at \*5 (6th Cir. June 14, 2007) (unpublished opinion) ("The district court adequately took into account the history and characteristics of the offense and the history and characteristics of the defendant when it noted defendant's lengthy criminal history."); *United States v. Rios*, 224 Fed. App'x 529, 530 (7th Cir. 2007) ("[T]he [sentencing] court considered [defendant's] personal history and characteristics, noting that he did not have a lengthy criminal history and had 'never been incarcerated.'" (citations omitted).

105. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(b) (2007).

106. See *id.*

107. Compare *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005) (departure methodology obsolete) and *United States v. Mohamed*, 459 F.3d 979, 986-87 (9th Cir. 2006) with *United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006) (departure methodology still applicable even after *Booker*); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005); and *United States v. Sierra-Castillo*, 405 F.3d 932, 939 n.5 (10th Cir. 2005).

108. *Mohamed*, 459 F.3d at 986; see also *Johnson*, 427 F.3d at 426.



held otherwise, finding that departures are still a crucial part in determining sentences and that the district courts are required to consider them.<sup>109</sup> The Sixth Circuit, for example, has held that Guideline departures continue to be mandatory after *Booker* because they are essential to calculating an advisory Guideline sentencing range.<sup>110</sup>

But whether cast in terms of departure methodology or not, overrepresentation of criminal history is an established means of deviating from the guideline range.<sup>111</sup> Since state court non-convictions do tend to overrepresent criminal history under the Guidelines, federal sentencing courts can discount state diversionary dispositions on those grounds too. Additionally, because the Supreme Court, in *Rita v. United States*,<sup>112</sup> held that federal courts of appeals are permitted to presume that a federal sentence imposed within the guideline range is reasonable provided the sentencing court considered the § 3553(a) factors, there

109. *Mohamed*, 459 F.3d at 986; *see also Johnson*, 427 F.3d at 426.

110. *United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006) (“Now, because the Guidelines are no longer mandatory and the district court need only consider them along with its analysis of the section 3553(a) factors, the decision to deny a Guidelines-based downward departure is a smaller factor in the sentencing calculus. Furthermore, many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court – with greater latitude – under section 3553(a). *See e.g.*, *United States v. Mickelson*, 433 F.3d 1050, 1055 (8th Cir. 2006) (“In contrast to the sentencing scheme before *Booker* when a sentence outside the mandatory guideline range was permitted only on very limited grounds, there are now more sentencing variables.”).

111. *See, e.g.*, *United States v. Hammond*, 240 F. Supp. 2d 872, 879 (E.D. Wis. 2003) (citing *United States v. Mishoe*, 241 F.3d 214, 219 (2d Cir. 2001)) (explaining that “the sentencing court could consider the amount of drugs involved in the prior offenses, defendant's role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by the guidelines”); *United States v. Fletcher*, 15 F.3d 553, 557 (6th Cir. 1994) (affirming departure based in part on type and unrelatedness of prior convictions); *United States v. Brown*, 985 F.2d 478, 482 (9th Cir. 1993) (holding that court could consider nature of defendant's prior convictions under § 4A1.3); *United States v. Santiago*, No. 3:02CR162, 2007 WL 1238610, at \*3, \*5 (D. Conn. Apr. 24, 2007) (denying further sentence reduction on *Booker* remand after court had already compensated for two “not especially serious” drug convictions by departing downward two criminal history categories, from VI to IV, one level further than it otherwise would have); *United States v. Wilkes*, 130 F. Supp. 2d 222, 239-40 (D. Mass. 2001) (departing to category I where defendant had only “two convictions for minor drug offenses” yet was placed in category III); *United States v. Leviner*, 31 F. Supp. 2d 23, 32-34 (D. Mass. 1998) (departing where defendant's priors were minor, mostly motor vehicle and possession charges, and non-violent); *United States v. Anderson*, 955 F. Supp. 935, 937 (N.D. Ill. 1997) (departing from category III to II based on determination that inclusion of drunk driving and misdemeanor battery convictions resulted in overstatement of seriousness of defendant's criminal history); *United States v. Stevenson*, 829 F. Supp. 99, 100 (S.D.N.Y. 1993) (holding that a departure may be warranted where prior crimes arise from personal drug use); *United States v. Hughes*, 825 F. Supp. 866, 869 (D. Minn. 1993) (departing from category II to I where defendant's record consisted of a one-point conviction for stealing two packs of cigarettes and a seven-year-old, one-point misdemeanor conviction).

112. 127 S. Ct. 2456 (2007).

may be added importance for federal sentencing courts to not overrepresent criminal history.<sup>113</sup>

#### CONCLUSION

Federal sentencing courts should use their new-found discretion under *United States v. Booker* to defer, under principles of comity, to state law treatment of diversionary dispositions as non-convictions. They should (1) consider guideline § 4A1.2(f), as they must still do under *Booker*; (2) include it in the calculation of an advisory guideline range; and then (3) reject including it in the ultimate sentence under 18 U.S.C. § 3553(a)(1) as an ill-advised treatment of state law. Alternatively, federal sentencing courts should discount state court non-convictions when calculating federal sentences, either as a departure or on grounds that such non-convictions overrepresent criminal history. Regardless of methodology, it is not “further leniency” for federal sentencing courts to treat state diversionary dispositions as proscribed by state statutes.

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113. *Id.* at 2465. The Supreme Court further stated “sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).” *Id.* at 2464.