Comity of Errors: When Federal Sentencing Guidelines Ignore State Law Decriminalizing Sentences

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By James A. Shapiro

[Synopsis:]

Many states have sentences called “diversionary dispositions” that are not supposed to count as convictions under state law. The purpose of these so-called diversionary dispositions is to give first-time offenders for relatively minor crimes such as shoplifting a chance to keep their criminal records, or “rap sheets,” clean. If they do not commit another crime during the period of the diversionary disposition, then they usually have the opportunity to erase, or “expunge,” the diversionary disposition from their record. But whether they expunge their record or not, the diversionary disposition is never supposed to count as a conviction under state law.

The Federal Sentencing Guidelines, however, count these state law non-convictions as convictions, as long as they have not yet been expunged. This article argues that the Guideline approach disrespects state law and should not be followed as a matter of comity. Since the Guidelines have recently become advisory rather than mandatory, the article suggests that federal sentencing judges decline to follow the Guidelines with respect to counting state diversionary dispositions as part of a defendant’s criminal history.

Many states have criminal sentences that the United States Sentencing Guidelines refer to as “diversionary dispositions.” Diversionary dispositions are sentences that generally do not count as convictions under state law. But federal law, particularly the federal sentencing

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2 U.S.S.G. § 4A1.2(f). 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 (emphasis added).

3 See, e.g., Cal. Stat. § 1000.1(d) “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 guilt is entered.”); Fla. Stat. § 985.228(6) (considering juvenile adjudication as non-conviction, and juvenile not deemed to have been found guilty or criminal by such adjudication); 730 Ill. Stat. 5/5-6.3-1(f) (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 under this Section, unless
guidelines, often does treat state diversionary dispositions as convictions, contrary to state statutory language. In fact, unless the diversionary disposition contains no “finding of guilt,” is expunged, or is a diversion from juvenile court, it will always count as a conviction no matter what state law says.

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 Stat. § 77-2a-1 (Utah’s diversionary “Plea 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, 168 Ill. 2d 298, 305-09 (1995) (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”).

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 non-conviction and holding it was conviction for purposes of federal law). Many 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, 1997 WL 428588, at *1 (4th Cir. July 31, 1997) (West Virginia statute deferred adjudication upon a plea or finding of guilt); United States v. Cox, 114 F.3d 1189, 1997 WL 321116 (6th Cir. June 11, 1997) (Michigan law requires guilty plea before defendant is eligible for diversion); United States v. Jiles, 102 F.3d 278, 280 (7th Cir.1996) (Wisconsin statute deems failure to appear in court as a plea of no contest); United States v. Craft, 82 F.3d 419, 1996 WL 185783, at *2 (6th Cir. Apr. 17, 1996) (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 (10th Cir.1993) (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) (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) (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) (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.S.G. § 4A1.2(f).

5 U.S.S.G. § 4A1.2(f) (“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) (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 countable “deferred adjudication”).

6 U.S.S.G. § 4A1.2(j) (“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 guideline law. See, e.g., United States v. Townsend, 408 F.3d 1020, 1024 (8th Cir. 2005) (counting expunged
The Guidelines’ policy behind counting most diversionary dispositions as 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.” In fact, most states seem to follow the Guidelines’ approach as well. But 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. And one such a purpose would seem to be aggravation of future sentences. A fortiori, when statutory language is clear, legislative intent is clear, and courts should not override it with caselaw. Using diversionary dispositions as convictions to aggravate future sentences does precisely that.

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).

7 U.S.S.G. § 4A1.2(f) (“diversion from juvenile court is not counted”). Compare Fla. Stat. § 985.228(6) (considering juvenile adjudication as non-conviction, and juvenile not deemed to have been found guilty or criminal by such adjudication) with State v. Presha, 27 Kan. App. 2d 645, 649, 8 P.3d 14, 17 (2000) (refusing to defer to Florida’s treatment of juvenile adjudication as non-conviction).

8 Id. (“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).


11 See, e.g., Cal. Stat. § 1000.1(d) “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 guilt is entered.” (emphasis added); 730 Ill. Stat. 5/5-6-3.1(f) (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, 99 Cal. App. 4th 201, 208, 121 Cal. Rptr. 2d 419, 424 (6th Dist. 2002)

12 See, e.g., Zuni Public Schools Dist. No. 89 v. Department of Educ., 127 S. Ct. 1534, 1551 (2007) (Scalia, J.,
The purpose of diversionary dispositions is to give an offender the chance to abide by the law *during the diversionary period.* If the offender behaves during that period, the record is supposed to be effectively wiped clean. If not, then the diversionary disposition turns into a conviction. 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 diversionary disposition. But it is not legitimate to use a successfully completed diversionary disposition to aggravate a subsequent sentence, in violation of express statutory language.

**Scope of the Problem**

The Guidelines’ treatment of state diversionary dispositions as convictions is a widespread problem. For example, in *United States v. Lluvias,* the defendant received a sentence of “supervision” under Illinois law for drunk driving. However, that non-conviction dissenting) (“today'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) (“Absent a clearly expressed legislative intention to the contrary, that language [of the statute itself] must ordinarily be regarded as conclusive,” citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).


15 See, e.g., Ken. Rev. Stat. 533.256(1) (if defendant does not successfully complete pretrial diversion, statute contemplates that trial court will enter final judgment in accordance with defendant's guilty plea).

16 2006 WL 279061, *1-*2 (7th Cir. Feb. 6, 2006) (unpublished order). For some reason, courts have seen fit to treat many of these issues in unpublished opinions. This article frequently relies on such 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.

17 See supra, n.3.

18 2006 WL 279061 at *1.
under Illinois law counted as one criminal history point under the federal sentencing guidelines. This raised his number of criminal history points from one to two, which automatically disqualified him from getting the benefit of the so-called “safety valve,” a two-point reduction in the offense level calculation that also allows defendants get out from under the draconian effects of the mandatory statutory minimums for many drug offenses. The prospective appeal from that one criminal history point assessment was deemed so frivolous that appellate counsel moved to withdraw and filed an “Anders” brief on that issue, among others.

But the United States Court of Appeals for the Seventh Circuit noted that a “conviction for drunk driving is counted.” Under express Illinois statutory law, a sentence of supervision is

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19 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.S.G. § 4A1.1 (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). In turn, these criminal history categories constitute the entire horizontal axis on the guidelines’ sentencing table. See U.S.S.G. Ch. 5, Pt. A. It is the guidelines’ sentencing table that ultimately determines a defendant’s now-advisory guideline sentencing range. See discussion infra, pp.__

20 Id. (citing U.S.S.G. § 4A1.2(f) & cmt. nn. 5, 9; 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)).

21 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.


23 U.S.S.G. § 2D1.1(b)(9).


25 Anders v. California, 386 U.S. 738, 744 (1967) (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).

26 2006 WL 279061 at *2.

27 Id. (citing Binford, 108 F.3d at 726-28) (emphasis added).
most decidedly not a conviction. Thus, the Seventh Circuit completely ignored and even disrespected Illinois law in finding that an argument to the contrary would have been frivolous.

To make matters worse, in *United States v. Paseur* 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. 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 became a second reason he was ineligible for the “safety valve.” In *Paseur*, the Mississippi state court had “entered an order of non-adjudication for two years” on a charge of possession of burglary tools. The Sixth Circuit begged the question by repeatedly referring to this order of non-adjudication as a “conviction,” “even though the Mississippi court ha[d] yet to formally enter a conviction.”

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28 See supra, n.3 cf. *State v. Hodgden*, 29 Kan. App. 2d 36, 41, 25 P.3d 138, 142 (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*, 27 Kan. App. 2d 645, 649, 8 P.3d 14, 17 (Kan. 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. § 985.228(6)). But cf. *Sheehan*, supra, note 3, 168 Ill. 2d at 305-09 (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*, 128 Ill.2d 253, 287 (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*, 30 Kan. App.2d 79, 82-83, 39 P.3d 85, 88 (2002) (refusing to defer to Texas deferred adjudication in using it to aggravate defendant’s sentence under Kansas law);

29 2006 WL 279061 at *2.


32 *Id.*

33 *Id.* (emphasis added).

34 *Id.* at *1, *3.
However, because the defendant pled guilty to possessing burglary tools, the non-adjudication of guilt did not matter. The Mississippi state diversionary disposition counted as a conviction under federal sentencing guideline § 4A1.2(f). 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). Section 4A1.1(d) requires the two-point increase whenever a federal defendant commits a federal crime “while under any criminal justice sentence.”

A “criminal justice sentence” under the express terms of § 4A1.1(d) includes “probation, parole, supervised release, imprisonment, work release, or escape status.” But certain caselaw, upon which the Paseur court relied, adds “diversionary dispositions” to this seemingly exhaustive list. In fact, Application Note 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

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35 Id. at *4.
37 U.S.S.G. § 4A1.2(f).
39 Id.
40 Id.
42 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, 45 (1993); see also U.S.S.G. §1B1.7 (incorporating Stinson principle into guidelines themselves).
supervision is not required for this item to apply.” 43 Since diversionary dispositions count as a sentence under § 4A1.2, Application Note 4 to § 4A1.1 would make them count for purposes of § 4A1.1(d) as well. 44

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.” 45 By its express terms, § 4A1.1(d) includes only “probation, parole, supervised release, imprisonment, work release, or escape status.” 46 It does not say “including but not limited to.” It only says “including.” 47 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. 48 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). 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. 49

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 50 that under Illinois law, 

43 Id. n.4.

44 Accord Wolf, 101 F.3d 110, 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 section 4A1.1(d)), but it is countable as a sentence after successful completion and dismissal of charges.”)

45 Stinson v. United States, 508 U.S. 36, 38, 45 (1993); see also U.S.S.G. § 1B1.7 (incorporating Stinson principle into guidelines themselves).


47 Id.

48 Id.

49 Id.

50 108 F.3d 723 (7th Cir. 1997).
“supervision is the functional equivalent of conditional discharge, which we previously have held to be the functional equivalent of probation.”51 In fact, probation and conditional discharge are permanent convictions under Illinois law.52 By express statutory directive, supervision is not.53 The Binford court did acknowledge, “The only difference between conditional discharge and supervision is that the charges against a convicted defendant on supervision may ultimately be dismissed.”54 However, it held “[t]his is of no consequence for purposes of” the federal sentencing guidelines.55 The court thus increased Mr. Binford’s sentence for the peccadillo of illegal transportation of alcohol.56

The Seventh Circuit has found that “the guidelines ‘do not rely on state definitions or labels.’ ”57 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

51 Id. at 727.

52 People v. Cooper, 132 Ill. 2d 347, 357 (1989) (“Probation is a sentence imposed for criminal convictions”); People v. Tufte, 165 Ill. 2d 66, 77 (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.”)

53 730 Ill Stat. 5/5-6-3.1(f) (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).

54 108 F.3d at 727-28.

55 Id. at 728 (counting supervision as conviction for purposes of U.S.S.G. § 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).

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

57 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); United States v. Williams, 176 F.3d 301, 311 (6th Cir. 1999) (same); United States v. Gray, 177 F.3d 86, 93 (1st Cir. 1999) (same).
found guilty, whether or not Illinois still considers him a misdemeanant.”58 Perhaps he should not be.

In United States v. Jones, 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.59 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.60 Other cases have similarly found that dispositions treated as non-convictions under state law are treated as convictions under federal.61

To make matters worse, the guidelines draw a distinction between diversionary dispositions that have been expunged from those that have not been expunged.62 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.63 The leading United States Supreme Court case on comity as a

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

59 Id. at 961-62.

60 Id. at 959.


62 See supra, n. 6.

63 Ironically, these courts’ only mention of “comity” is in the context of purporting to respect, rather than disrespect, prior state judgments. Jiles, 102 F.3d at 281 (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) (failure to object to constitutionality of Massachusetts state conviction by not appealing it resulted in waiver having “nothing to do with comity, but rather with time-honored considerations of judicial
rationale to prevent federal meddling in state business is *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*.\(^{64}\) In *McNary*, the petitioners were a group of property tax protesters complaining of unequal treatment at the hands of various state tax officials.\(^{65}\) In order to avoid the bar of the Tax Injunction Act,\(^{66}\) the taxpayers sued for damages under 42 U.S.C. § 1983.\(^{67}\) And in order to avoid the bar of Eleventh Amendment sovereign immunity against suits seeking to recover damages from state coffers,\(^{68}\) they sued the tax officials in their individual rather than official capacities.\(^{69}\)

The Court noted that an award of damages under § 1983 would first require a “federal-court declaration” that the tax officials acted unconstitutionally.\(^{70}\) 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).\(^{71}\) Rather, the Court struck it down on the basis of comity, and the principle of comity that was inherent in the Tax Injunction Act.\(^{72}\)

\(^{64}\) 454 U.S. 100 (1981).

\(^{65}\) *Id.* at 105-06.


\(^{67}\) 454 U.S. at 106.


\(^{69}\) *Id.* at 114.

\(^{70}\) 454 U.S. at 106-07; *see also id.* at 113, 115.

\(^{71}\) 454 U.S. at 107.

\(^{72}\) 454 U.S. at 116; *see also id.* at 110 (“Congress'[s] . . . enactment of § 1341[ ] was motivated in large part by comity concerns”).
The Court hastened to add that the principle of comity was not limited to federal interference with state taxation. Comity underlay the principles of “Our Federalism” and equitable restraint of Younger v. Harris, the McNary Court reminded us. Younger applied notions of comity to prevent federal injunctions against pending state criminal prosecutions. But the Younger doctrine quickly expanded during the 1970s and ‘80s to prevent federal injunctions of many state non-criminal judicial proceedings too.

73 Id. at 111.

74 401 U.S. 37, 44 (1971).

75 Id. at 111-12.

76 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 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).

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 is not one in which the federal system “borrows” an element from the state system and effectively “federalizes” it. In the context of the federal sentencing guidelines, for example, the 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 for federal purposes? This rationale is even more compelling when one considers the real-life consequences of treating state dispositions in ways other than the state intended.

**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 little 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 clients 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) 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 record clean.

**Booker and New-Found Federal Sentencing Flexibility**

The landmark case of *United States v. Booker* has opened the door to federal sentencing courts rectifying this injustice. In *Booker*, the United States Supreme Court rendered the federal sentencing guidelines advisory instead of mandatory, as they had been before *Booker*. Although federal sentencing courts must still consider a correctly calculated guideline range, including its criminal history score, 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.” Part of a defendant’s “history” is his criminal history. And usually, most of that criminal history is *state* criminal history.

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79 Id. at 757.

80 Id. at 764; see also *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

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


83 See, e.g., *United States v. Robinson*, 2007 WL 2031998, *1 (4th Cir. 2007) (“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*, ___ F.3d ___, ___ 2007 WL 1754492, *5 (6th Cir. 2007) (even though criminal history calculation 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*, 2007 WL 1703678, *2 (6th Cir. 2007) (district court adequately took into account history and characteristics of defendant when it noted defendant's lengthy criminal history); *United States v. Rios*, 224 Fed. Appx. 529 (7th Cir. 2007) (sentencing court considered defendant’s personal history and characteristics, noting he did not have a lengthy criminal history and had never been incarcerated).
Courts can and should consider the fact that state law, unlike the federal sentencing 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 counseled by their state court criminal defense lawyers that their guilty pleas to diversionary dispositions would not be considered convictions. They 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.

**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.