

COLLABORATION ACROSS JURISDICTIONS: How to Maximize Sentencing Resources with Concurrent Prosecutions

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OUR CLIENTS



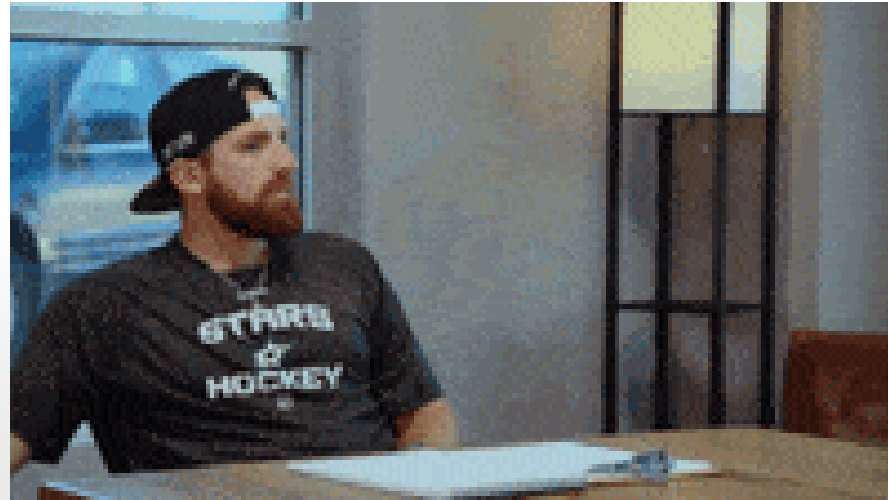
MOST COMMON CASES WITH CONCURRENT STATE JURISDICTIONS

FEDERAL

- Firearms
- Hobbs Act Robbery
- PWITD
- Fraud

STATE

- Firearms
- Robbery/carjacking
- Possessions/Possession with Intent/Sales
- Theft/Embezzlement/Bad checks



OUR CLIENTS AFTER FINDING OUT THEY CAN BE
PROSECUTED IN BOTH JURISDICTIONS

FEW FACTS OF FEDERAL DEFENDANTS

Most federal defendants in Mississippi have a co-existing state offense or probation/parole complications

- Make this inquiry a standard interview question

According to the United States Sentencing Commission (2020):

99% of cases in the 5th Circuit are resolved by plea

- 98.5% in Northern District, 96.4% in Southern District

92.2% of defendants in the 5th Circuit were sentenced to prison

BEFORE CLIENT SENTENCED, IS THERE ANYTHING I CAN DO?

- Try to get state plea BEFORE federal involvement, under Petite Policy (DOJ 9-2.031, updated 1/2020)
- “This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially **the same act(s)** or **transaction(s)** unless **three substantive prerequisites** are satisfied:
 - First, the matter must involve a substantial federal interest;
 - Second, the prior prosecution must have left that interest demonstrably unvindicated;
 - Third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.”
 - **In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be approved by the appropriate Assistant Attorney General.**
- Most times, unfortunately, there will be nothing you can do.



JAMES BROWN*

STORY OF JAMES BROWN*

- Client is from Jackson, MS
- Has state arrest for Possession With Intent (April 15, 2020)
 - Released on bond
- Another state arrest for Possession With Intent (May 15, 2020)
 - Released on bond, state attorney got client admitted into drug rehabilitation classes
- Drug raid—client arrested for Possession With Intent, federal charges (July 17, 2020)
 - Detained
- PSR guidelines would have been house arrest, so we file NOI (late August, 2020)
 - Government supersedes with 924(c), since client gave statement admitting to having gun (September 2, 2020)

All names and images have been changed for educational purposes

DUELING SOVEREIGNS

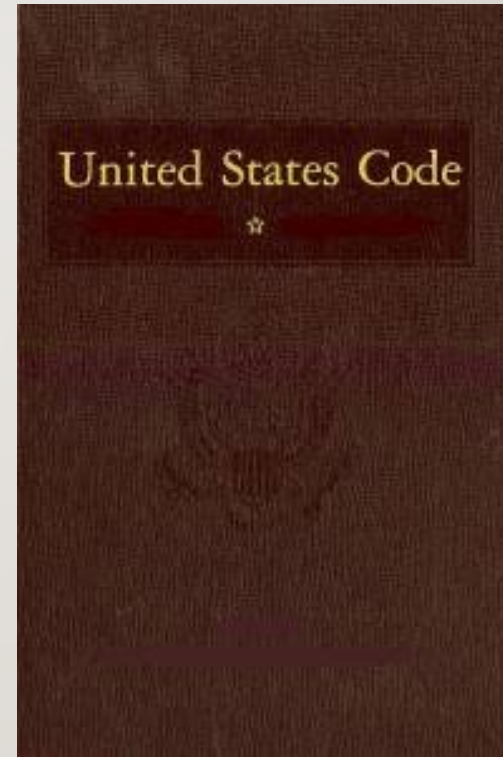
MAKING SENSE OF CUSTODY, PRETRIAL CREDITS, AND HOW TO
HELP YOUR CLIENT WHO HAS PENDING FEDERAL & STATE CASES

WHY DOES THIS MATTER?

- Can considerably shorten your client's total sentence
- Primary custody jurisdiction controls the analysis in state and federal sentencing interaction.
- Primary custody may shift between state and the feds

AUTHORITY FOR THE DOCTRINE

- 18 U.S.C. § 3584 – Multiple sentences of imprisonment
- 18 U.S.C. § 3585 – Calculation of a term of imprisonment
- 18 U.S.C. § 3621 - Imprisonment of a convicted person



RULE I: PRIMARY (AND SECONDARY) CUSTODY

The basics



DEFINITIONS

-
- **Primary Custodian** – sovereign that first arrests *unless* it relinquishes custody (bail release, charges dismissed, parole release, or expiration of sentence, etc.). ***Writ* ≠ *custody*.**
 - **Secondary Custodian** – next government in line. This sovereign can run a sentence concurrent (or consecutive)*! If federal court is second, sentence is consecutive unless J&C states otherwise.**

BENEFITS OF PRIMARY FEDERAL CUSTODY

- Begin federal sentence when imposed and serve it in the BOP.
- Avoid “automatic stacking” that can occur when client is sentenced first by State while in primary state custody.
- Can leverage impending federal sentence to enhance State plea bargain

RULE 2: CALCULATING TERM OF IMPRISONMENT –

CALCULATE PRIOR CUSTODY CREDIT: 18 U.S.C. § 3585(B)

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

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

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

that has not been credited against another sentence.

RULE 3: CONSECUTIVE & CONCURRENT SENTENCES

- 18 U.S.C. § 3584: Court can impose prison sentence concurrent or consecutively to an ***undischarged term of imprisonment***
- Court must explicitly order concurrent
- Silence = consecutive sentence

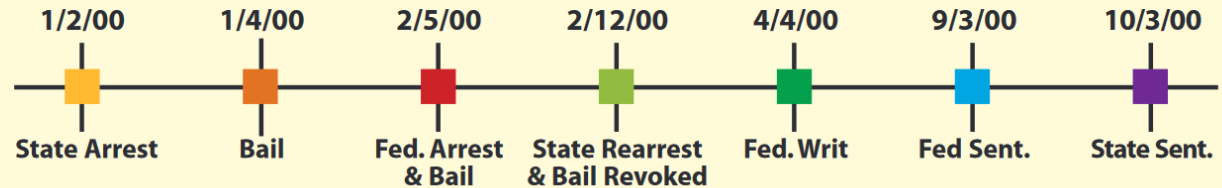
RULE 4: ANTICIPATED TERM OF IMPRISONMENT

- *Setser v. United States*, 566 U.S. 231 (2012)
- U.S.S.G. §5G1.3: If undischarged state sentence is relevant conduct, federal sentence ***shall be concurrent***
- If state conduct is relevant conduct, court ***shall*** adjust sentence to account for time served on non-federal term, if that time will not be credited by BOP
- Ask for a variance!

HYPO

Interaction of State and Federal Sentences: Example One

- **January 2, 2000** — state arrest
- **January 4, 2000** — state bail
- **February 5, 2000** — federal arrest and bail
- **February 12, 2000** — state rearrest of same charges, bail revoked
- **April 4, 2000** — inmate produced to U.S. Marshal via federal writ of habeas corpus ad pro
- **September 3, 2000** — federal sentence to 60 months; inmate returned to state
- **October 3, 2000** — state sentence of 10 years



State is primary custodian — responsible for last arrest without relinquishment of jurisdiction. State sentence is primary. Federal sentence may be consecutive or concurrent to state term. Usual rule — No prior custody credit on federal sentence for time credited towards state sentence. Credit would be given by BOP for February 5, 2000. If federal sentence not specific, default under 18 U.S.C. § 3584 if sentence is consecutive. Ascertain intent of federal judge — check sentencing transcript. BOP will follow intent of federal sentencing judge to the extent possible. If concurrent, federal sentence may begin on date it is imposed (September 3, 2000), but not earlier. If consecutive, federal sentence will begin on completion of state sentence.

RULE 5:WORDING OF THE J&C MUST BE LIT!

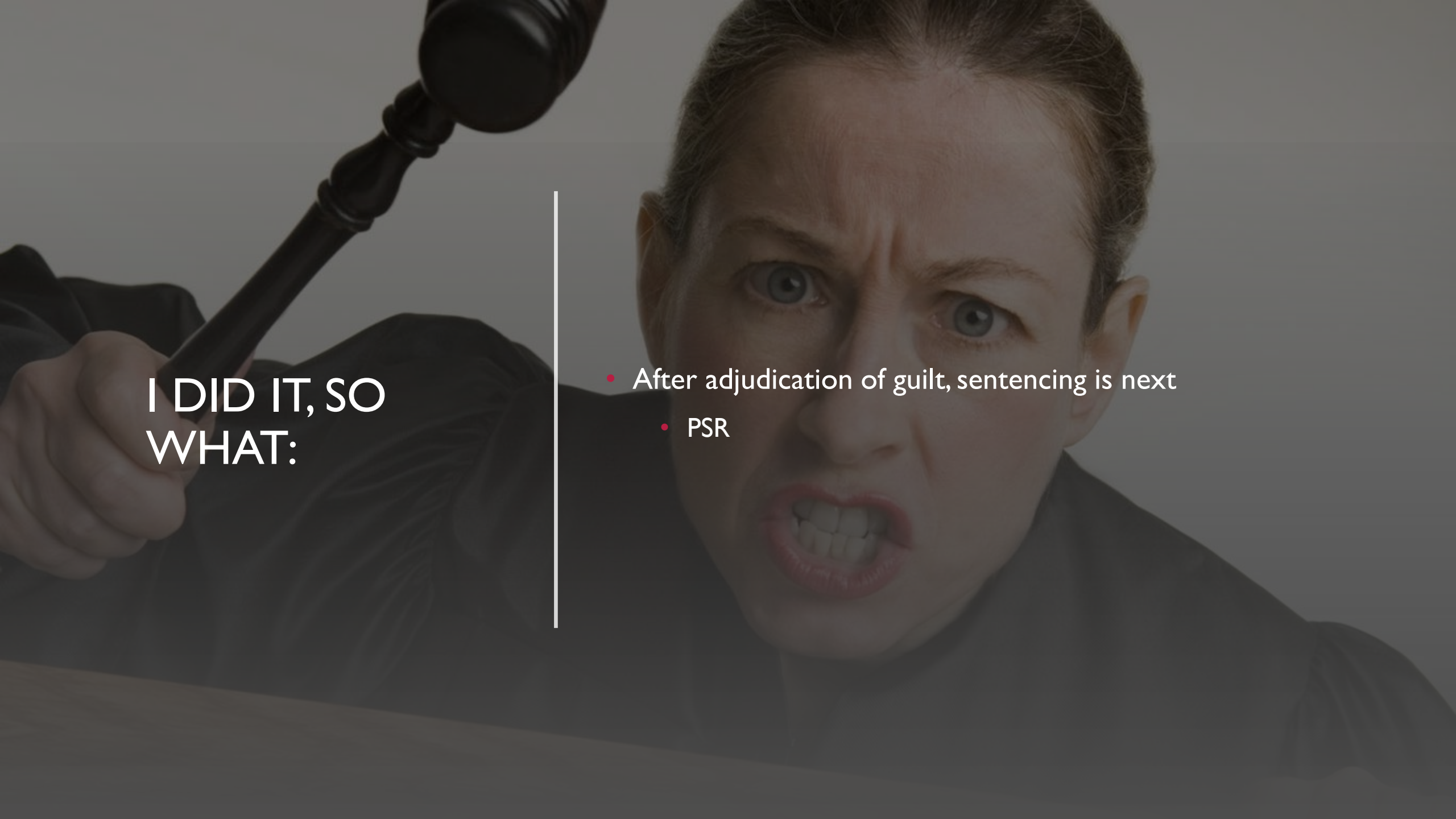
- Good: 60 Months to begin immediately and to be served concurrent to any other sentences currently being served or to be imposed.
- Better: 60 Months to begin immediately and to run concurrent with the sentence to be imposed in [state case number and court].
- Even Better: 60 Months to begin immediately and to run concurrent with the sentence to be imposed in [state case number and court].The Court designates [state facility] for service of sentence.

REAL LIFE JUDGMENT THAT DOES IT ALL

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 30 months as to Count 1 of the Indictment, to run concurrently with the violation of probation sentence imposed in the Circuit Court of Maryland, Prince Georges County, Docket No.: CT170041A in the custody of the Maryland Commissioner of Corrections in the Maryland State Facility he designates with credit for time served from 11/20/2018 to 07/25/2019 pursuant to 18 U.S.C. 3585(b)(2) and BOP Policy Statement 5880.28 because time spent in federal detention occurred after the commission of the offense, before the state sentence was imposed and has not been credited towards any other sentence.

RECAP

- Primary jurisdiction is not affected by the order of imposition of federal and state sentence.
- If state has primary jurisdiction, BOP computes the federal sentence as consecutive to the state sentence regardless of which sentence was imposed first – except if *federal* judge orders concurrent.
- Federal judge can order concurrent sentence to state sentence
- A sentence may *not* be ordered to run concurrently with a sentence which has been served (“time served” may hurt).

A woman in a judge's robe is shown from the chest up, holding a gavel in her right hand. She has a stern, intense expression on her face, with her teeth slightly bared. The background is a plain, light-colored wall. The image is overlaid with a semi-transparent dark grey layer, and text is placed on the left side of the frame.

I DID IT, SO
WHAT:

- After adjudication of guilt, sentencing is next
 - PSR

PRESENTENCE REPORT

- Bridge Between “I did it” and “What will the consequences be?”
- One of most important aspects of our representation
- 18 U.S.C. 3552 (a)
- **PRESENTENCE INVESTIGATION AND REPORT BY PROBATION OFFICER.—**A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

PRESENTENCE REPORT

- Rule 32
- The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
 - (i) 18 U.S.C. §3593 (c) or another statute requires otherwise; or
 - (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. §3553, and the court explains its finding on the record.

WHAT DO YOU HAVE TO SAY:

- Probation has to speak with Defendant
 - You ALWAYS want to be present
 - Prepare your defendant before the interview
 - Know what questions you will allow to be answered
 - Prior criminal history (will not discuss)
 - Gang membership

ASK QUESTIONS ON FRONT END:

- As soon as you know there is any possibility of a guilty plea/conviction, starting thinking presentence report
- Look at guidelines
 - Can I plead to something with less statutory exposure?
 - Can I make a stipulation to try to limit client's exposure?
 - Have I considered their criminal history category?
 - Role in the offense?
 - Enhancements?

ACCEPTANCE OF RESPONSIBILITY

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

KNOWING WHEN TO OBJECT

- Make sure you file timely objections
- Should you object just because a client wants you to, even though you have no law?
- Doesn't hurt to ask AUSA their position, especially if client cooperated
- Any documentation that you can use to support your position?
- Ask probation to see their documentation

HOW CAN I USE PSR TO HELP ME

- Highlight dysfunctional upbringing
- Talk about prior drug use
- Mental Health Issues
- Pay attention to offense conduct (Role in the criminal conduct)
- Lack of prior treatment
- State resources vs federal resources

DOMESTIC VIOLENCE CONVICTIONS

- Client arrested by local police department
- Spends weekend in jail
- Monday morning goes for arraignment: City prosecutor says plead guilty and I will give you time-served and you can be released after court
- Implications when he is arrested on federal charge
- 18 U.S.C. 922(g)



STATE COURT CRIMINAL HISTORY = GREATER FEDERAL TIME

- If state and federal case pending, try not to plea in state court until federal case resolved
- Consider USSG 4A1.1
- 4A1.1 (d)
 - Add 2 points if the defendant committed the instant offense while under any criminal justice sentence
 - Many state court sentences are eligible for early release

GET STATE COURT CRIMINAL HISTORY EXPUNGED

- 4A1.2 (j) Expunged Convictions
 - Sentences for expunged convictions are not counted, but may be consider under 4A1.3
 - MS Code 99-19-71
 - Entitled to have on misdemeanor expunged
 - Under sentencing guidelines, the less points, the better your client

PRESENTATION



RULE 6: SENTENCING MEMO MUST BE LIT

- Use engaging, readable fonts (Century Schoolbook, Baskerville, Garamond)
- Tell your clients' story on paper
 - First page must contain best facts
- Use an interesting anecdote, scenario, quote or statistic
 - If facts don't sway your judge, incorporate the BOP costs vs. probation
- Be classy: bury the offense conduct in the middle
- End on a positive note

JAMES WATSON'S SENTENCING MEMORANDUM

I. FACTS

When James was born, his father was in jail.

When James was 5, he was kidnaped.

When James was 13, he saw his mother repeatedly stabbed in the chest to death. At home. By his stepfather. Who had broken into the house in the middle of the night. *See* Exhibit 1. While two younger siblings (ages 4 and 2) were in the room.



ALMOST THERE...

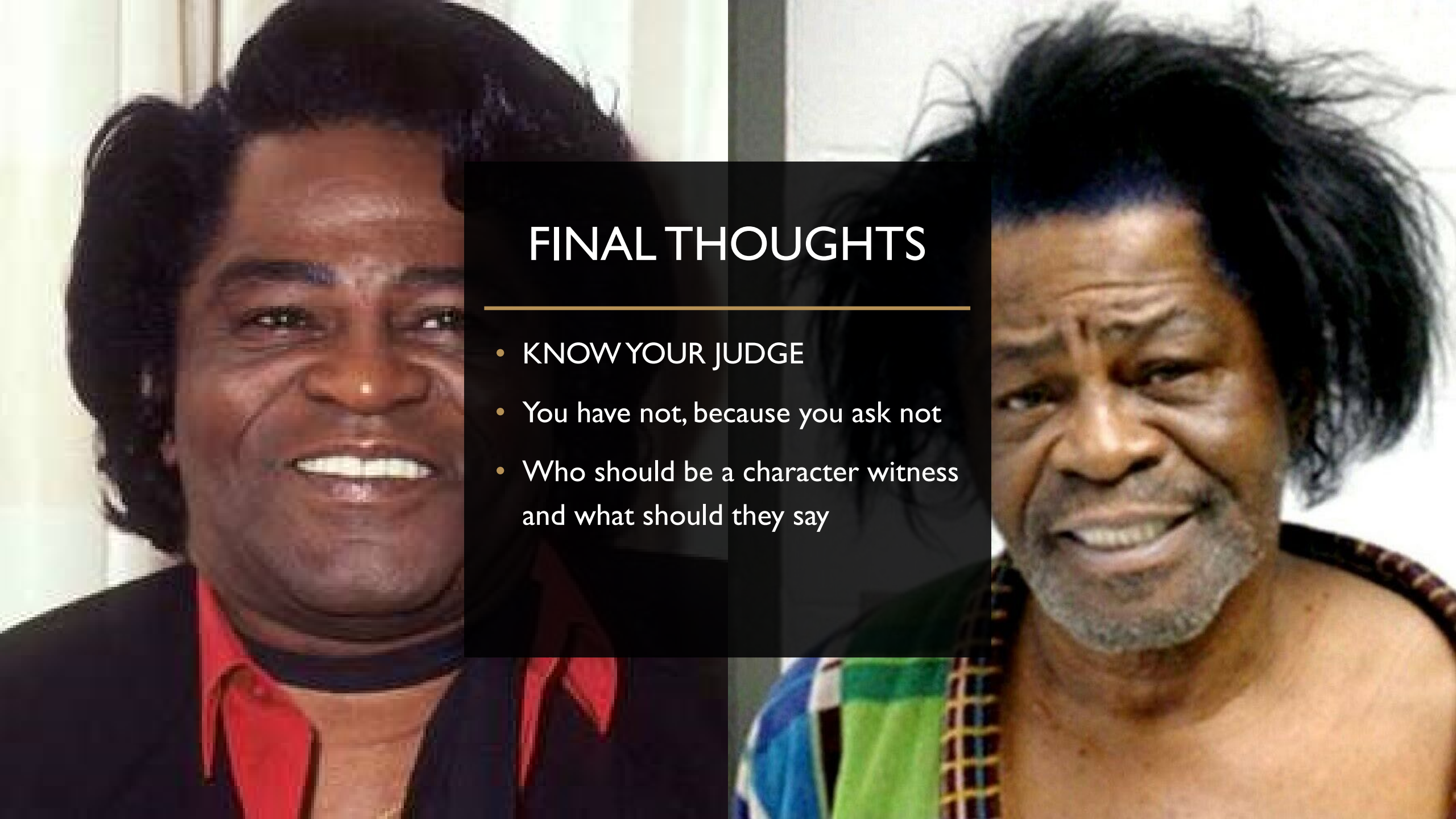


SENTENCING ALTERNATIVES

- Highlight the resources available in federal supervision that was not available in state supervision
 - Job placement
 - Reentry programs
 - Drug/substance abuse treatment
 - Mental health treatment

STATE COURT ISSUES THAT AFFECT FEDERAL SENTENCING

- How will state court plea affect future federal sentencing?
- Career Offender and Armed Career Offender
- More misdemeanors, more time.
- Importance of federal and state attorneys communicating when they are dual prosecutions.



FINAL THOUGHTS

- KNOW YOUR JUDGE
- You have not, because you ask not
- Who should be a character witness and what should they say

QUESTIONS?

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