

Legal Sidebar

Collateral Consequences: What Role, if any, Should They Play in Crafting Sentences?

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In recent years, sentencing courts have acknowledged the long-term effects of federal criminal convictions in matters involving employment, licensure, immigration status, and public benefits. Courts are divided as to what, if any, role collateral consequences should play in sentencing a criminal defendant. Can a judge impose a just and reasonable sentence without considering the collateral consequences of a criminal conviction? Recently, a [federal district court in New York](#) answered that question in the negative when it imposed a non-imprisonment sentence for a criminal defendant convicted of drug offenses. This decision is contrary to decisions in other circuits, namely the [Sixth](#), [Seventh](#), [Tenth](#), and [Eleventh](#). The Supreme Court has yet to address whether it is permissible to consider collateral consequences when crafting sentences for criminal defendants (however, the Court [found](#) that an attorney's failure to warn a defendant of the immigration-related consequences of a plea deal might form a basis for an ineffective assistance of counsel claim).

Collateral consequences of a criminal conviction are the additional civil penalties and restrictions mandated by statute or regulation because of the criminal conviction. They differ from direct consequences which are part of the court record and include a fine, imprisonment, or post-conviction control. Some collateral consequences are narrow and serve an important public safety or regulatory function, such as denying felons the right to purchase or possess [firearms](#), protecting children or the elderly from individuals with an [abusive history](#), or barring people convicted of fraud from [positions of trust](#). Other collateral consequences are directly related to the particular crime, such as [registration requirements for sex offenders](#), driver's license restrictions for those convicted of serious [traffic offenses](#), or [debarment](#) of those convicted of procurement fraud. Also, under federal [law](#), a felony drug conviction may render an individual ineligible for federal benefits including [public housing](#), [Section 8 vouchers](#), [Social Security Act benefits](#), [supplemental nutritional benefits](#), and [student loans](#).

Crafting a sentence in the federal system is a [two-part process](#) consisting of both a procedural and substantive component. First, the sentencing judge must consult the federal Sentencing Guidelines to [determine the applicable guideline range](#). Second, the court [must consider the statutory sentencing factors](#) under 18 U.S.C. §3553(a). Such factors include: “[the nature and circumstances of the offense and the history and characteristics of the defendant](#),” providing adequate deterrence, and “[protect\[ing\] the public from future crimes of the defendant](#).” Generally, appellate courts will review sentences under a [deferential abuse-of-discretion standard](#), which permits a decision to stand unless it is either procedurally or substantively unreasonable. In [Gall v. United States](#), the Supreme Court identified potential procedural errors as including failure to calculate or miscalculating the Guidelines range; treating the Guidelines as mandatory as opposed to advisory; failing to consider the §3553(a) factors; selecting a sentence based on clearly erroneous facts; or failing to adequately explain the chosen sentence which includes an explanation for any deviation from the Guidelines range. The *Gall* Court described a sentence as being [substantively unreasonable](#) if the court fails to afford consideration to relevant factors that were due significant weight, gives significant weight to an improper or irrelevant factor; or commits a clear error of judgment when considering the proper factors.

Courts are split as to whether they may consider collateral consequences under state and federal law when sentencing criminal defendants. The key issue of dispute concerns application of §3553(a)(2), which states that a sentence should “[reflect the seriousness of the offense, \[to\] promote respect for the law, and \[to\] provide just punishment for the](#)

offense.” The [Sixth](#), [Seventh](#), [Tenth](#) and [Eleventh](#) Circuits have found that collateral consequences are generally impermissible factors for consideration under §3553(a)(2). They have concluded that consideration of such consequences fails to reflect the seriousness of the offenses and tends to favor defendants from “privileged backgrounds.” For example, in [United States v. Musgrave](#), the Sixth Circuit vacated the district court’s one-day sentence for a bank and wire fraud offense and remanded for resentencing. The one-day sentence had represented a downward departure from the Guidelines range of 57 to 71 months’ imprisonment. In crafting the sentence, the district court considered the defendant’s personal financial loss, the lengthy litigation, legal fees, restitution, and loss of his CPA license. The sentencing court concluded that a lengthier prison term would not serve “any greater societal purpose” or deter the defendant from future frauds due to the collateral consequences of his criminal conviction. Upon review, the Sixth Circuit found such consideration as impermissible under §3553(a)(2). The court characterized the sentence as contrary to [“Congress’s own view of the crimes’ seriousness.”](#) The court ruled that [“when a district court varies downward on the basis of the collateral consequences of the defendant’s prosecution and conviction, the defendant’s sentence will not reflect the seriousness of the offense, nor will it provide just punishment.”](#)

Conversely, the [Second](#) and [Fourth](#) Circuits have found that consideration of collateral consequences is consistent with §3553(a)’s [“directive that the sentence reflect the need for ‘just punishment and ‘adequate deterrence.’”](#) In [United States v. Pauley](#), for example, the Fourth Circuit found that the district court’s consideration of the loss of a defendant’s teaching certificate and state pension due to his conviction of possession of child pornography was permissible under 18 U.S.C. § 3553(a)(2). Similarly, the Second Circuit commented: [“It is difficult to see how a court can properly calibrate a ‘just punishment’ if it does not consider the collateral effects of a particular sentence.”](#)

Recently, in [United States v. Nesbeth](#) before the U.S. District Court for the Eastern District of New York, the defendant was convicted of importation of cocaine and possession of cocaine with intent to distribute. The sentencing guidelines’ range was 33-41 months. The judge sentenced the defendant to probation rather than prison, in part “because of a number of statutory and regulatory collateral consequences she will face as a convicted felon.” The judge considered what the collateral consequences would be if the defendant faced a longer prison term, namely her curtailment of the right to vote as well as the inability to visit her family in Jamaica because of the loss of her passport during her probationary term, and her unlikely inability to pursue a career in teaching. The judge concluded that [“she has been sufficiently punished, and that jail is not necessary to render a punishment that is sufficient but not greater than necessary to meet the ends of sentencing.”](#)

Criminal sentencing issues are a matter of continuing interest to Congress, including the collateral consequences such sentences may have. Notably, the [Court Security Improvement Act of 2007](#) directed the Department of Justice’s National Institute of Justice to perform a comprehensive study (ultimately conducted by the American Bar Association’s Criminal Justice Section), which catalogued a multitude of federal and state statutes and regulations that impose collateral consequences, and in September, the ABA launched a [website featuring this information](#). Such information, along with the circuit split as to whether consequences may properly be considered under §3553(a)(2) for sentencing purposes, might be relevant to future legislation in the field of criminal justice.

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