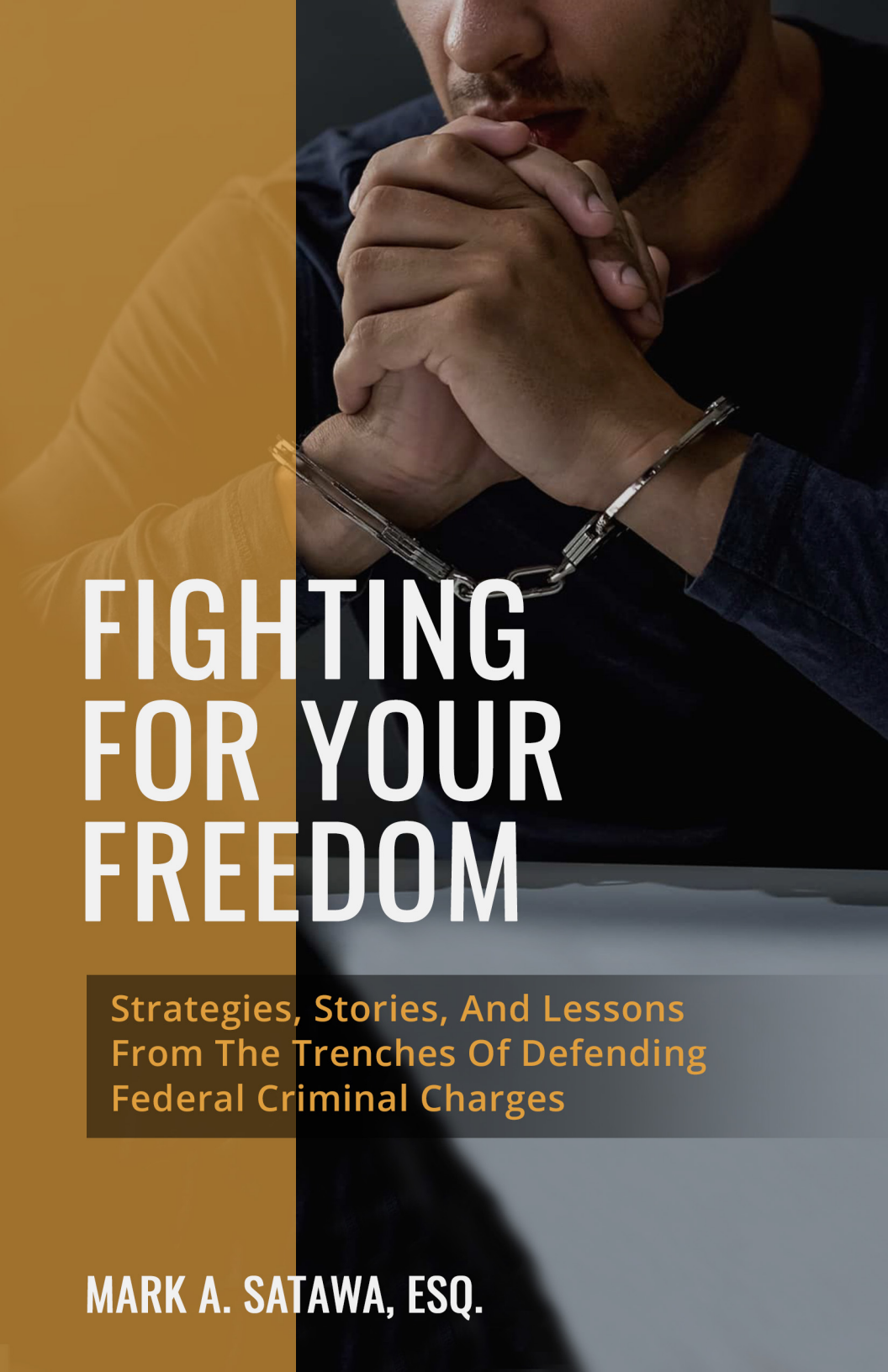

FIGHTING FOR YOUR FREEDOM

Strategies, Stories, And Lessons From The Trenches Of Defending Federal Criminal Charges

MARK A. SATAWA, ESQ.

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PREFACE

Yes, I went to law school because I wanted to stand up in court on behalf of a client with the odds stacked against them and make an argument on their behalf. I did not know exactly where that would take me or what it would look like, but it's what I wanted to do.

I started as a prosecutor. A great job, I worked with fabulous lawyers and learned a great deal. I was in court every day and tried 100's of cases—no place better to begin a legal career as a trial lawyer. But one day, I knew it was time for a change, that a new challenge awaited me. I became a criminal defense lawyer.

I knew immediately, it was the right move. I liked being a prosecutor, but I loved being a criminal defense attorney. There is nothing better than standing up in a courtroom and being the only thing that stands between an accused citizen and the power of the police, the prosecution, and the government. I was born to do this.

I have been fortunate and blessed to represent a special and diverse group of clients, many charged in the major leagues of criminal cases – Federal Court. I quickly learned how different Federal Court really is – from discovery, procedure, motion practice, plea negotiation, trial practice, sentencing guidelines, sentencing, and appeals -- everything is bigger, more formal, more nuanced, and more complex.

The goal of this book is to provide guidance and assistance if you or a loved one is accused of a criminal offense in federal court. I talk about how these cases are different, why these cases are different, and the ways in which that affects the proper way to build an effective defense. I then go into great detail about my time-tested strategies for building that defense, discussing both legal and factual investigation and preparation to help ensure the case is presented in the strongest way, and the client is acquitted. Every case is different, and this book is not designed to be a one size fits all solution; but rather a general overview for individuals facing these accusations.

I sincerely hope that you find this book interesting, informative, and easy to understand. It is designed to answer your basic questions and help you decide on a course of action when the unthinkable happens to you. Hopefully, it helps you even a little bit navigate this difficult journey.

DEDICATION

One more time (third time is the charm?), this book is dedicated to the only people I could ever dedicate a book to – my family. To my wife Lisa, you really were the first person in my life to believe in me, and give me the confidence to believe in myself, and go out on my own to start my own practice. Without you, I would be hammering away, working for someone else, and be far short of where I am now.

And to my kids Megan and Justin. We laugh, we share, we live the way a family should. Megan, I cannot imagine a father having a closer, tighter, and more rewarding relationship with a daughter. Watching you transform into adulthood has been pure joy. Justin, you are everything a son should be – you truly are the best of us, and I have treasured walking your journey with you. The world really does need more people like you in it. I could not be more proud of you both.

DISCLAIMER

This publication is intended to be used for educational purposes only. No legal advice is being given, and no attorney-client relationship is intended to be created by reading this material. The author assumes no liability for any errors or omissions or for how this book or its contents are used or interpreted, or for any consequences resulting directly or indirectly from the use of this book. For legal or any other advice, please consult an experienced attorney or the appropriate expert, who is aware of the specific facts of your case and is knowledgeable in the law in your jurisdiction.

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TESTIMONIALS

"We are presently engaged with Attorney Mark A. Satawa to represent our son Daniel, who has been wrongfully convicted of a crime he did not commit. When we met and after talking and observing Mark I was convinced that Mark is a true innovator in terms of his approach to defending our son. I feel that he uses his superior people skills and legal prowess to either convince the Michigan State Supreme Court, at the same time the Parole Board and also the prosecutor to do what he wants for a client and that is: that justice will be served. I noticed Mark's focused approach in my son's case, his solid integrity, and his zealous approach in our son's case, have earned my highest respect and therefore I believe Mark will also have the highest respect of the judges before whom he practices. With confidence, I, therefore, state that in my opinion, Mark is an outstanding attorney and counselor and we along with our son Dan put our trust and hope into his hand, to demonstrate and will prove that an innocent man was wrongfully convicted, imprisoned due to a false allegation by women, and with the hope that our son's name will be cleared and that he will regain his Freedom again. A family that is bounded by love and caring."

– Ursula

****

"There are times when the legal system can be frustrating and complex, and it takes an expert to intricately navigate its corridors and achieve success. That expert was attorney Mark A. Satawa. My relative was caught up in low-risk misconduct and was serving time. With the outbreak of COVID-19 and its rapid spread through the prisons, we feared he would not survive the virus because of chronic health issues. Mark's extensive expertise, compassion, and understanding of the law contributed to my relative's release within a very short period. Mark was in constant communication with me and kept me abreast of matters every step of the way. He's extremely savvy, well-connected, kind, and considerate. I highly recommend him."

– Mary

****

"I can't say enough positive things about Mr. Satawa. He is one of the most detail-oriented, thorough, and committed attorneys I've ever worked with. You don't need to worry about him exploring every option possible for your defense, he thinks out of the box and will do whatever it takes to provide you with the most effective defense possible. When looking for an attorney, I can assure you they are not all created equal, and Mark Satawa is at the top of the food chain."

– J. S.

****

"As a family, we have dealt with many lawyers, some good and some bad. However, I can finally say that my family met a great lawyer. Mark's passion for his clients is rare. His responsiveness, patience, and attention to detail set him apart from many other lawyers that have represented our family during difficult times. Do not ever underestimate having a great lawyer in your corner, especially when the odds are against you. Mark's exemplary representation is definitely appreciated."

– Lameese

****

"Mark Satawa is a skilled and caring attorney who has been helping me address some challenging issues. He does not miss any details and is capable of creating a positive environment for finding the best solution. I strongly recommend him."

– Tekva C.

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About The Author

My experience started when I graduated from law school in 1992. My first job was as an assistant attorney general for the state of Michigan, prosecuting civil tax fraud.

After that, I went to the Wayne County prosecutor's office and worked there for five years, from 1994 to 1999, prosecuting violent crimes, cell phone fraud, and other complex conspiracy-type cases. I left the Wayne County prosecutor's office in 1999 and worked for what's commonly referred to as a "silk-stocking" law firm for a year until 2000.

Then in 2000, I left to go out on my own. I have been the principal attorney in my law firm ever since. Ninety-five percent of my practice has been in criminal defense for the last 22 years, and about half of that practice has been in federal criminal defense.

The cases range from guns and drugs charges, to child pornography, internet solicitation of a minor, production of child pornography, child exploitation enterprise cases, and complex conspiracy cases. The complex conspiracy cases include racketeering, medical and Medicare fraud, and many other conspiracy-type racketeering cases. These racketeering cases take the form of both violent and white-collar conspiracies. The cases I've handled include Racketeer Influenced and Corrupt Organizations (RICO) allegations, as well as racketeering in Medicare and Medicaid fraud. I have represented folks from everyday citizens, businesspeople, doctors, other medical providers, and everyone in between.

In the last 20 years, half of my practice has been in federal court, and I have successfully defended the

gamut of federal criminal offenses. My successful defense of federal criminal cases includes several significant wins at trial, dismissals through motions practice (such as motions to dismiss), and very favorable plea negotiated resolution when appropriate.

My federal criminal practice is significant, and it makes up, at any one time and for the last 20 years, approximately 50% of my practice.

Only Qualified Attorneys Can Represent Clients In Federal Court

Not every attorney is qualified to represent clients accused of crimes in Federal court. Federal criminal law is an incredibly unique and focused practice area of law. Unless you are a specialist in federal criminal defense, these cases are not the kind of work you should do on the side or dabbling.

Federal criminal cases are complex and have very targeted and specific rules relating to things like discovery, the procedure of a criminal case, and the way it moves through the system. In addition, very tight deadlines under the Speedy Trial Act must be navigated.

The pleading and motion practice is unique in federal criminal cases, and the trial practice has its own evidentiary rules and procedures that differ from state court. The federal sentencing guidelines are as complex, detailed, and thick as the income tax code. They should not be navigated by anyone who doesn't have a significant amount of knowledge and experience in federal criminal case guidelines.

The bottom line is that federal criminal cases are a minefield of potential problems that can easily blow up if you do not have the requisite experience, expertise, and specialty in navigating them.

Why This Book Is For You

The most crucial thing in understanding a federal criminal case is to be aware of two things: (1) the resources behind a federal criminal prosecution; and (2) the overarching impact of the US sentencing guidelines.

The first is that the resources available to the government in federal criminal cases are astronomical. They have the full power of the federal government, and law enforcement agencies including the FBI, DEA,

ATF, Homeland Security, ICE (Immigration Customs Enforcement), and the USPS inspector.

Each of these agencies has an enormous workforce. They also have technological resources, the use of drones, infrared technology, computer experts, and the ability to analyze any and every form of technology. For example, their experts can analyze a cellphone, a tablet, a laptop, and a desktop. Also, federal criminal investigations have access to the FBI crime lab and the DEA drug crime lab when they need to analyze or process evidence.

Federal Law Enforcement has access to the world's most technologically advanced and well-funded crime labs, that that can analyze fingerprints, a cell phone, a computer, or a laptop.

Also, federal prosecutors have large staffs of lawyers, whether the Department of Justice or the local US attorney's office. They are the most prominent criminal practice law firm in every city they exist in. They are fully staffed with well-trained, well-paid, and competent prosecutors (called Assistant United States Attorneys), paralegals, investigators, and support staff.

Because of all their advantages, it's complicated for a lawyer to fake the defense of a federal criminal case. The Government's resources, workforce, money, technology, and other support make winning a federal criminal case difficult, even by accident. Without a massive amount of preparation, investigation, and research, it is an enormous undertaking for an attorney to defend a federal criminal case.

The second aspect to understand in a federal criminal case is the tremendous impact of the sentencing guidelines. Federal criminal practice is driven by the guidelines, even before a conviction, whether by trial or a plea agreement.

The federal criminal case guidelines are draconian and call for extremely long sentences (which the guidelines make presumably valid). Therefore, every facet of a federal criminal case must be viewed through the prism of how this will affect the guidelines if this client ever goes to sentencing. In other words, every decision in a federal criminal case is driven in some way by the ultimate guideline calculation that applies to the case. Several decisions must be made

throughout a federal criminal case and right from the beginning with the initial appearance.

Frequently a decision must be made as early as at the detention hearing or during pretrial motion practice, whether to plead guilty to trial or what to plead guilty to, and how to negotiate a Rule 11 Plea Agreement. That will often include a decision whether to cooperate with the Feds. Finally, a decision must be made to prepare the case and the client for sentencing.

Because federal investigators and investigations often use a great deal of finesse and keep investigations quiet, they have an advantage because the subject matter and the people who are the investigation's target are kept secret.

In the initial part of an investigation for a potential target, it is common that they underestimate their exposure or believe they are not a target. Federal law enforcement certainly does not dissuade you from that idea. In fact, most often it is just the opposite – they will encourage that fact that telling the client "Look, you are not a target here. We're just looking at you as a witness; you don't need a lawyer."

Thus, it is imperative for anyone contacted by federal law enforcement, FBI, DEA, ATF, IRS, or Homeland Security to immediately consult with, and ultimately hire, an experienced federal criminal defense lawyer.

Quite often, the investigation itself becomes the thing that poses the biggest threat to a client's freedom and future. Always remember that Martha Stewart went to jail not for insider stock trading, but for lying to federal law enforcement during an investigation.

Even if the client end's up only being a witness, hiring an attorney early is the only strategy. In that case, a federal practitioner is in the best position to negotiate the terms of an immunity agreement. A federal criminal defense lawyer will sit with you during a Proffer or debriefing, and ensure that you remain a witness and don't become a target or a potential defendant at trial.

But importantly, very few witnesses have zero exposure or no chance of becoming a target in a federal criminal case. Most of the time, the sweeping net of federal investigations is cast so wide that even

potential witnesses carry at least some, if not significant, exposure as a target and potential defendant of a criminal charge.

The only way to properly analyze your actual position as target versus witness, and the true risks associated when the Feds contact you, is through consulting with an experienced federal criminal defense attorney.

An experienced federal defense attorney will help you make decisions, and their advice and help early in the case will make a difference between whether you are a witness or a target, which makes all the difference in the world. So the earlier you get a lawyer involved in your federal criminal case, the better it will be on all levels.

CHAPTER 1

DIFFERENCES BETWEEN FEDERAL AND STATE CRIMINAL CASES

The Major Differences Between A Federal Case And A State Criminal Case

The first significant difference between a federal and a state criminal case is the tremendous differences in the resources. The Feds have a tremendous workforce, money, technology, and support.

The second significant difference is that federal criminal cases tend to be more formal. Judges expect

lawyers to adhere strictly to the many procedural rules in federal criminal cases.

These procedural rules are lengthy, nuanced, and detailed. Therefore, Judges expect everything to be more formal in federal criminal cases and expect a higher level of practice from the lawyers in front of them. Thus, things like oral motions are not done – Judges expect everything to be in writing, and adequately briefed in a federal criminal case. Most federal courts even have stringent pleading rules about what size font a brief must be in, and how many words or characters are allowed in that brief. Also, any brief submitted must have any footnotes formatted. Finally, many federal courts even have a rule that requires a lawyer to contact the other side to ask them if they agree or stipulate to the relief you request. All this must happen before even filing a motion.

These protocols and stipulations are theoretically designed to make federal criminal cases move faster than state cases. However, these rules frequently have the opposite effect. Federal criminal cases almost always

take more time to go through the system than their state counterparts, tend to be more complex, and have more pre-trial and evidentiary issues.

In addition, the sentencing guidelines are higher in most federal criminal cases than in an equivalent state crime. The infamous guidelines in federal cases are far more complicated than any state guideline system by a significant margin. The procedures for federal sentencing guidelines are more formalistic, more complex, more challenging to understand, and more draconian.

For the most part, federal criminal cases result in higher, longer sentences than state offenses or longer sentences than the same offense in a state case. As a result, Federal cases tend to go to trial less often than state cases, and there are two reasons for that: (a) the resources possessed by federal law enforcement; and (b) the significant impact of the federal sentencing guidelines.

The first is that the workforce, resources, and technology available to federal investigations make their cases difficult to disprove and, in turn,

exceedingly difficult to win. A federal criminal defense lawyer must look for holes or flaws in a federal criminal investigation and prosecution. If the feds find something bad about the defendant, they will make sure it appears as evidence against your client in court.

The federal case guidelines are the second reason federal criminal cases go to trial less often than state criminal cases. When evaluating the sentence length that results from a negotiated Rule 11 Plea Agreement in federal court, going to trial and losing can sometimes double your sentencing exposure. So, because a 5-year sentence becomes 10, or 10 becomes 20 (or longer), federal criminal practitioners become conservative (and frequently even cautious) when evaluating a case in whether it can be defended at trial. The consequences of losing become so extreme and catastrophic that it tends to result in a situation where only cases with a strong defense are taken to trial.

Sometimes, the United States Attorney handling the prosecution may not extend a reasonable plea offer. In that case, the defendant may have

nothing to lose by going to trial. Alternatively, there may be some collateral reason why the defendant must take a case to trial (and win), such as they're a doctor who can't lose their license to practice medicine, or the defendant is not a citizen (say a green card holder), and any conviction would result in deportation.

Several federal criminal offenses have a 5, 10, or 20-year mandatory minimum, which requires a judge to sentence a defendant to no lower than that minimum. It is hard to plead guilty in those instances, so that can be another compelling reason to take a federal criminal case to trial.

How A Federal Investigation Usually Begins

Federal criminal investigations begin like any investigation. First, federal law enforcement learns of information that they believe warrants or deserves an investigation, so an investigation begins.

The one nuance in federal criminal cases is that they have a much higher rate of cooperation, tips, and information coming from other defendants than in state cases. Those criminal defendants cooperate with

the government and try to better their position by giving information to federal law enforcement. An informant's tip frequently sparks a new investigation. As a result, federal investigators will often involve the participation of a prosecutor far earlier in the process than most state investigations.

Federal criminal investigations are far more complex and tend to be larger, with most having more than one defendant; a multi-defendant, multi-targeted investigation is much more common. Federal criminal investigations take longer to complete because there are so many different investigative leads and trails to walk down and evaluate.

The People Involved In A Federal Case

Also, federal investigations usually involve a team of law enforcement officers working on a case. Because so many people and experts are involved in investigating federal criminal cases, they tend to take longer, be more involved, and be more substantive. As a result, it's common for a federal investigation to take months, if not longer, to go from beginning to end.

CHAPTER 2

INVESTIGATIVE TOOLS & TECHNIQUES USED BY FEDERAL AGENTS

Investigative Tools And Techniques Federal Law Enforcement Agents Have At Their Disposal

Federal Law Enforcement has access to anything in the private sector. They have computer experts that can review and investigate computers, laptops, and tablets. They have cellphone experts; they are elbows deep into the latest developments in

technology. They look at an IP address for a computer, and cell phone technology and find where a phone is pinging, and GPS technology in cars.

A recent case I had was broken open through the use of a dash-cam video from a vehicle that the complaining witness, the alleged victim, was driving. Federal Law Enforcement will rely on detailed search warrants and grand jury subpoenas to compel the production of evidence or even the testimony of witnesses.

The Feds will use immunity or limited immunity, where you will be forced to testify under a "compulsion order." if you refuse to testify while under a compulsion order, you can be held in contempt and put in jail for as long as you refuse to answer questions before a grand jury.

In exchange for that, the Feds will give you limited immunity. Not that you won't get prosecuted, but that anything you say to federal law enforcement, the United States attorney's office, and a grand jury will not be used against you in prosecuting you.

Federal Law Enforcement uses consultants and experts of every kind: forensic psychologists, fingerprint experts, drug recognition experts, crime labs, video surveillance, audio surveillance, and Title 3 wiretaps. Title 3 wiretaps are where government agents intercept phone calls. In addition, they will frequently monitor and record phone calls coming from jails or other detention centers.

The federal use of undercover and confidential informants to infiltrate the group or a set of defenses is undoubtedly a well-known and commonly used technique. Almost any way they can investigate a person or a group of people they do.

If it's done in the private sector, federal law enforcement can access it and try to acquire it.

How To Find Out If You Are A Target Or Part Of A Federal Investigation

People generally find out Federal Law Enforcement is investigating them due to a feeling they get. It's interesting because you often sense, "Hey,

something's going on." So, it's not uncommon for people to get a vibe or a sense that something is swirling around or going on around them.

The most common way to find out or confirm is to have federal law enforcement agents knock on your door and say, "We'd like to ask you some questions." Sometimes you receive a letter from the United States Attorney's Office informing you that you are either a target of a federal investigation or seen as a potential witness in a federal investigation.

In this situation, it becomes crucial to contact a lawyer and explore your options immediately. Although many people think, "If I go and I talk to them, maybe this will go away." That's taking the denial approach to a federal investigation. Rarely does the United States Attorney's office allow it to go that way.

So, once you get that letter, that knock on the door, or that phone call, it's time to brace for the long haul because they are not going to go away and disappear very easily.

When To Hire A Criminal Defense Attorney In A Federal Case

Hiring a federal criminal defense attorney is critically important if you know you're under federal investigation. You should never wait until you're arrested and have your initial appearance in federal court.

A federal criminal defense lawyer can impact many aspects of a federal investigation. Yes, we all watch TV and movies; we understand we have the right to remain silent and don't have to talk to law enforcement. But it is important to always remind potential targets of an investigation – very few people help themselves by talking to law enforcement. Most people say something that incriminates them, and that is used against them in a court of law. A federal criminal defense attorney can prevent you from saying anything that could incriminate you by making statements that you shouldn't be giving to federal law enforcement.

It's essential to consult with a lawyer to decide whether you will talk to federal law enforcement or not. Is there anything to be gained by talking to them? Can

you say anything to them that will help you improve your legal position, or will you only make statements that incriminate you? If you and your federal criminal lawyer agree that there is value in talking with the Feds and that you can help yourself, that lawyer must help you prepare how to say it and what to stress. It's essential to have the help of a lawyer to get you ready for the interview with Federal Law Enforcement.

If you are a witness, your federal criminal defense lawyer can assure you that you are not being looked at as a target and that you stay a witness and don't become a target, and they can do that using immunity. There are two types of immunity: transactional immunity and use immunity.

Transactional immunity is a promise that you will never be charged at all in connection with this investigation. This form of immunity is rarely if ever, given by the federal government. But even use immunity can be extremely beneficial. Use immunity simply means that the Feds can't and won't use anything you say in an interview against you in any prosecution of you.

Unlike state cases, federal cases usually have a much more extended period where the prosecutor, the assistant United States Attorney, considers which charges and crimes the defendant will be charged with. During this period of time, there is an opportunity for a federal criminal lawyer to impact that charging decision, and yet one more reason the early involvement of a criminal defense attorney is essential.

Suppose it becomes inevitable that you will be charged with a crime. The involvement of a federal criminal defense attorney early in your case will put you in a position where you could voluntarily surrender yourself in court, get interviewed by pretrial services, and make a voluntary appearance at an initial appearance. This voluntarily surrendering yourself could allow your lawyer to secure pretrial release for you (instead of pre-trial detention), and make the beginning of the case against you a far smoother transition. This way, you could be out on bond because you have been cooperative and have a lawyer acting as a liaison between you, law enforcement, and the US Attorney's office. So, for all those reasons, it's crucial to get someone involved as soon as possible.

CHAPTER 3

END-GOAL OF FEDERAL AGENTS AND PROSECUTORS

The End-Goals Of Agents And Prosecutors In A Federal Case

Federal Agents and Prosecutors (called Assistant United States Attorneys, or AUSA's), have one and only one goal – they are working towards an indictment. Yes – they want to charge as many people as possible with as serious an offense as they can; it is that straightforward.

They are looking to arrest, charge and prosecute people they feel have committed crimes. And only very rarely do other collateral corollary issues interfere with that. For example, suppose someone got caught up by accident or is simply got caught up in a scheme, plan, or conspiracy – and justice or mercy suggests that the government should pass on this defendant. Unfortunately, this kind of outside factor rarely has an impact on the goal of arresting, charging, and prosecuting as many people as they believe they can.

A Federal Criminal Complaint Versus An Indictment

Most criminal cases start with a complaint. While over 95% of federal felonies are charged by way of an indictment, grand juries are expensive, they are bulky, and federal prosecutors do not have limitless access to grand juries. Therefore, it is just not practical for a federal prosecutor to say in every case, "Hey, we're going to arrest John Jones, let's get him indicted today." For that reason, cases are frequently started by way of a criminal complaint – complaints are seen as an easy, simple approach to launching a case.

Criminal complaints are an essential tool for federal law enforcement. But, criminal complaints have a limited life, and they must be dismissed within a few weeks unless they are supported or confirmed through a preliminary exam.

At the end of that limited time period, one of a few things must happen:

- A preliminary examination must be held;
- The government must secure an indictment; or
- The US attorney's office must dismiss the complaint.

If the government dismisses a complaint, it is usually only temporarily relief/removal of the federal charges from over the head of a defendant. Most often, the government continues their investigation after the complaint is dismissed, and simply indicts the defendant further down the line.

Many criminal cases begin with a criminal complaint and not an indictment. A federal criminal complaint is supported by a signed affidavit signed by

a federal law enforcement official. The federal criminal complaint is taken to a federal magistrate judge for his/her signature.

Usually, a federal magistrate judge will handle the complaint, where it will be "sworn to" by an agent under oath. The complaint essentially charges someone with a federal crime and allows law enforcement to arrest, detain, and hold them in custody for that crime. Federal criminal complaints are usually less substantive or detailed than an indictment. In addition, while an indictment must be presented to a grand jury, a complaint does not.

Attached to every complaint is an Affidavit. An affidavit is a document signed by and sworn to by a federal law enforcement agent. An affidavit typically contains a detailed summary of the investigation against that defendant. The affidavit attached to a complaint says, "You are charged with XXXXX crime (for example, 18 USC 841 Distribution of Drugs)." It informs the defendant what crime is alleged to have committed, and it provides the defendant and the

court with basic information, such as a date, and relevant statute.

Because the federal rules of discovery can be so limited and non-transparent, and because it can be so difficult to get valuable and meaningful discovery/information about the investigation against the client in an organized form, that affidavit becomes vital in most cases. In many ways, an affidavit is the most critical single document in the initial stages of representing a client charged with a federal criminal offense, because it serves as a detailed summary of the investigation/evidence against the defendant at the very beginning of a criminal case.

A grand jury does not vote on a complaint. A complaint only requires a sworn oath by a federal law enforcement officer to a judge or a magistrate judge. Because it is not presented to a grand jury and supported by a probable cause finding, it is "temporary" – meaning it only lasts for a limited period of time and allows the federal government to detain and hold someone for a very limited time, usually a few weeks.

After that limited period of time is reached, the federal government must do one of two things. The first available option is the government can conduct a "Preliminary Exam," where an assistant United States attorney has to appear in front of a judge or a magistrate judge and present evidence establishing probable cause that a crime was committed and that a particular defendant committed that crime, the crime that that defendant is charged with in the complaint. In the case of a preliminary exam, the defendant (and his/her attorney) is allowed to take part in the hearing. The defense attorney is permitted to confront the evidence or cross-examine the witnesses against the defendant at a preliminary exam, and present contradicting or conflicting evidence on the defendant's behalf. At the end of that preliminary exam hearing, the judge or magistrate judge determines if there is probable cause. If that judge or magistrate determines that there is probable cause to believe that a crime was committed and that this defendant committed the crime, then the defendant the case will be continued, or sometimes called "bound over," for further proceedings.

It Is A Federal Right To Be Indicted For A Felony

Whether or not a preliminary exam is held, and even if a magistrate judge rules in favor of the government and finds probable cause, the defendant retains the right to be indicted by a grand jury. So, if a preliminary exam is held, probable cause is established and the case is bound over, the government still has the burden of presenting the case to a grand jury and securing an indictment for any felony charge.

A defendant can waive his right to a grand jury indictment, and agree to be charged by an "Information," but that is the exception, not the rule. Because the government eventually must indict a case that's charged with a complaint anyway, instead of going through the preliminary examination hearing, the federal government will most often go ahead and indict the case within the timeframe allowed before a preliminary examination must take place, thereby negating the need for a preliminary exam hearing.

The federal government prefers to proceed by way of indictment by a grand jury in lieu of a

preliminary exam for several reasons. A grand jury proceeding is an ex parte, one-sided, court appearance done in secret, without the defendant an/or his/her attorney involved; in contrast, a preliminary examination is in open court, with the defendant, and his/her attorney participating in the hearing, with accompanying right to cross-examine, confront, and present evidence.

Grand Jury Proceedings

Only the prosecutor is included in a grand jury proceeding, along with a witness and the grand jury members. If a witness called before a grand jury is represented by an attorney, or is a potential investigation target, the witness' attorney is still not allowed to appear with the client before the grand jury. Instead, the attorney of the witness or a target is only allowed to be present outside the grand jury room. In that case, the witness testifying before the jury is allowed to consult with their lawyer if they want while asking questions. When the witness before the grand jury wants to consult with his/her attorney, they must

leave the grand jury room, consult with their lawyer, and then come back to the grand jury room alone to answer the questions.

The transcript of what happens in a grand jury is usually not released to the defendant until trial, or the very last minute on the eve of trial. In contrast, at a preliminary exam, the defendant and the defense lawyer hear everything that happens in court and will get a transcript that they can use to help prepare the defense.

You Are Not Entitled To Discovery In A Federal Case Until You Are Indicted

Federal criminal complaints are a vital tool. Still, the indictment serves as the formal charging document for a defendant, and the true beginning of the criminal case against them.

It's very unusual to get discovery in a federal criminal case before you are indicted, and often the only information you'll have about the investigation and what your client is alleged to have gone through is in that affidavit attached to a criminal complaint.

CHAPTER 4

THE FEDERAL GRAND JURY PROCESS IN A CRIMINAL CASE

The Federal Grand Jury Process

A grand jury is a group of citizens who in theory are supposed to function as a check on executive power, the executive branch, and prosecutors. In practice, the truth is far different.

In most federal judicial districts, the local district court will have a grand jury in session most (if not all) of the time. They will sit in the grand jury

room of that district, and the Assistant United States Attorneys (or "AUSA's") will schedule time with that grand jury and present evidence in front of it – typically in the form of witness testimony. Often, grand jurors will ask questions themselves and the AUSA will answer those questions, functioning as the legal "advisor" to the grand jury.

After presenting their proofs, the AUSA will request charges against the defendant or defendants – most often requesting specific charges. The grand jury will then vote on whether to issue charges; and unlike a jury at trial, a grand jury does not need to be unanimous. Then, if the grand jury agrees with the assistant United States attorney and does authorize charges, the grand jury foreperson will approve or sign a "true bill." That true bill becomes an indictment and formally charges a defendant with a federal crime.

The role envisioned by the founding fathers a few hundred years ago was that a grand jury would serve as a check on the abuse of executive power by prosecutors, the abuse of power by the government,

and the arbitrary charging of people wrongfully with crimes that they did not commit. In theory, the grand jury was designed to prevent the random charging of offenses for reasons such as bias or prejudice, or charging based on political reasons. But unfortunately, that check has disappeared.

Grand juries now do not serve any actual protective gatekeeping function. Grand juries overwhelmingly approve every indictment requested by the Assistant United States Attorney. They rarely, if ever, reject charges and refuse to authorize a true bill. There is an old saying that has become a famous truism: a federal prosecutor could get a grand jury to indict a ham sandwich. Unfortunately, there is much truth to that.

In many ways, the grand jury process has become a formality that a federal prosecutor has to check off, but an inevitable formality without any actual screening or gatekeeping role. With the screening or gatekeeping protection gone, the grand jury is much more of a formality than anything else.

What To Do If You're Facing Charges Of A Federal Crime

A federal case begins with the defendant coming into court for an Initial Appearance. That initial appearance requires a federal magistrate to read the defendant's rights, caution him that he has the right to remain silent and doesn't have to speak and that anything he says can and will be used against him.

The judge will also inform the defendant of the charges in the complaint and address the bond, which the federal system calls "Detention." For that reason, an interview with pretrial services becomes extremely important.

When Arrested By Federal Law Enforcement vs. When Surrendering To Federal Law Enforcement

The first appearance in federal court on a criminal charge can happen in one of two basic ways: either you are arrested by federal law enforcement and brought into court, or you voluntarily walk into court and surrender yourself to answer the charges. Either way, you get into

court for the first time, and your detention decision begins with an interview by pretrial services.

So, if you are arrested and brought into custody by a federal law enforcement agency, then you are put into the custody of the United States Marshall, and the pretrial services officer will come and interview you while in custody.

On the other hand, if you voluntarily surrender to a complaint (or Indictment), you can schedule a pretrial services interview on the morning of your initial appearance, walk into the pretrial service office with your lawyer, and be interviewed that way.

For example, suppose federal agents executed a search warrant, seized some guns and drugs, and arrested some people. In this case, the Government would quickly draft a Complaint for each defendant charging that person with a crime, and an affidavit supporting that complaint. That Complaint would then be presented to the court at the defendant's initial appearance.

In contrast, let's assume that federal law enforcement has issued a Complaint against a defendant who is not in custody. That complaint would allow federal agents to go out and arrest that defendant. However, in the right circumstances, the government may allow the defendant to voluntarily walk into the courthouse and self-surrender, get processed, and then appear at the initial appearance.

Pretrial Services Interview

Once the pretrial services ("PTS") interview has taken place, PTS will generate a pretrial services report and recommend to the magistrate judge whether you can be given pretrial release or must be detained.

It is important to understand that for the most part, there is no real concept of monetary bond in a federal case: you are either granted pretrial release (without posting money), or you are detained. If the facts suggest that you should be detained, federal courts generally don't believe that posting an amount of money alleviates whatever concerns prevent you from being released.

There Is No Bond In Federal Detention Hearings

The decision in a federal detention hearing is not how much bond will be required for a defendant to post in order to be released; it's whether the defendant will be released or detained.

The bond hearing, known as the "Detention Hearing," can be held at the same time as the initial appearance, but that usually happens only when there is an agreement between the parties. For example, the Assistant United States Attorney and the defense lawyer agree that the person should either be detained or that the person should be granted pretrial release.

In an overwhelming number of cases, there isn't an agreement. The government will seek pretrial detention, but the defendant and his lawyer will seek pretrial release. In these cases, the detention hearing will be adjourned and set for a later date. The government has the right to ask for up to three business days to prepare for that detention hearing and convince the court why someone should be held in custody. The defense has up to five business days to

request an adjournment or a delay to prepare for a detention hearing.

Once that detention hearing is scheduled and held, there are two legal concepts that a magistrate judge will consider when deciding whether somebody should or should not receive pretrial release or pretrial detention:

- Will the community be safe if this defendant is released?
- Is this defendant a flight risk?

If the government argues that someone should be detained because they are, the government bears the burden of proving the risk of flight by a preponderance of the evidence, which is basically 51% to 49% proof. However, if the government is arguing that releasing the defendant would pose a danger to the community, the government must prove dangerousness by "clear and convincing evidence." Clear and convincing evidence has a threshold higher than a preponderance but below the “beyond reasonable doubt” standard used at trial.

If the person is a flight risk, a danger to the community, or both, then a federal or magistrate judge is legally required to detain them without bond – unless there is a combination of conditions that would ensure both safety to the community and the defendant's appearance in court. If the person is neither a danger to the community nor a flight risk, the federal judge or a magistrate judge is supposed to release them and give them a pretrial release.

The critical legal concept in a detention hearing is that a person should be released if there is some combination of conditions that achieve the dual purpose of protection of the community and risk of flight. So, if a set of conditions would assure the community's safety and prevent the risk of flight, short of detaining the defendant, then a judge or a magistrate judge under the law must give that person a pretrial release.

Common conditions that would assure the safety of the community and prevent the risk of flight include:

- Home detention
- A curfew

- A GPS tether or GPS monitor
- A requirement for a third-party custodian
- Restrictions on travel
- Restrictions on who you can be around
- Requirements that you have a job
- Requirements to attend counseling
- Requirements to get drug tested

Third-Party Custodians

Often courts will order a "third-party custodian," which means not only are you ordered to have home detention, but you must also live in a particular house, must not leave there except for limited reasons, and must live with someone who is acting as a legal custodian for you.

This third-party custodian will promise the court to watch you and ensure you are doing what you're supposed to do and following all the bond conditions. A third-party custodian can often reduce a court's concerns of flight risk or danger to the community instead of detention.

CHAPTER 5

AFTERMATH OF A FEDERAL ARREST

To Cooperate Or Not Cooperate With The Feds

Whether or not to cooperate with the Feds is one of the most important decisions every defendant must make with their lawyer once they are subject to a federal criminal accusation. Importantly, it must be made early in the process.

The fact of the matter is that 91% of federal cases are resolved by plea and not going to trial. While it is true

that as United States Attorney's offices throughout the country are becoming increasingly unreasonable in their plea offers, more defendants and their lawyers are choosing to plead guilty as charged and not take a plea offer. However, it remains true that many of those plea cases involve some level of cooperation by the defendant

If you are going to take a Rule 11 plea offer, one of the general requirements that the federal government will impose is that you sit down and talk to them. Sometimes those early discussions lead to cooperation that you will ultimately get credit for through reducing years from your sentence. But not all cooperation leads to a reduction in your sentence or substantial assistance.

Substantial Assistance

If a defendant's cooperation rises to the level of providing "substantial assistance" to the government, that person may get what is called a 5K motion – 5K is simply the provision or section of the United States sentencing guidelines that allow the government to go in front of the judge and ask the judge to give a

defendant some credit (in the form of a reduction in sentence) for the substantial assistance in the prosecution of others.

But before a defendant gets to the point of getting a 5K for substantial assistance, his cooperation must begin – and importantly, not all cooperation results in substantial assistance and a 5K. So, whether or not a defendant wants to testify against other people, and receive the opportunity to try and earn a 5K because of substantial assistance, negotiating a Rule 11 plea offer typically begins with what's called a "Proffer."

A Kastigar Letter

A proffer is a meeting between a defendant, his lawyer, the federal investigators, and nearly always the federal prosecutor assigned to the case. That Proffer happens under a form of immunity provided in a "*Kastigar* letter."

A *Kastigar* letter is a form of immunity that says, "Mr. Defendant. You agree to tell us everything and anything you know about the commission of this

offense. And if you don't lie, nothing you say can be used against you in our case-in-chief to prosecute you if we go to trial or to raise your sentencing guidelines if you get sentenced. However, if you lie, exaggerate, minimize, leave anything out, or fail to volunteer information related to the questions you're asked in this Proffer, this immunity promised goes out the window".

This initial Proffer is done whether you want to try and get a Rule 11 Plea Agreement and a 5K with cooperation, or alternatively, if you merely intend to talk only about what you did and not try to get substantial assistance for your cooperation. If you are not attempting to secure a 5K substantial assistance reduction, the proffer interview will focus initially on what you did. However, even in that case the agents can and will ask you about co-defendants, co-conspirators, and other participants. Under the terms of the Kastigar letter, you must answer those questions.

In addition, in some cases, a Proffer must be done in order to qualify for certain considerations at sentencing. For example, a Proffer is required before he

is eligible for sentencing relief that would allow a judge to go below the mandatory minimum in certain offenses (particularly drug offenses), such as the "safety valve," a Rule 35 motion, or a motion under 18 USC 3553.

In cases where cooperation is not being done in an attempt to get a plea offer from the government, the defendant will frequently be required to give a Proffer about his involvement. That defendant will participate in a Proffer under the terms of the *Kastigar* Agreement, the US Attorney's office will provide a plea offer, the defendant signs the plea offer, and then proceeds to sentencing without any further cooperation.

If, however, your cooperation is designed to attempt to provide substantial assistance and get a 5K motion, that will be just the beginning of your cooperation. Frequently, there will be a second and sometimes even a third meeting or Proffer that will still be under the terms of that original *Kastigar* letter and the immunity promised in that letter. Then, if the cooperation leads to a 5K substantial assistance motion, that will usually lead to an appearance as a

witness in front of a grand jury. In the grand jury, you will have to testify against co-defendants, co-conspirators, or other participants.

Once a defendant has testified in front of a grand jury, that defendant would usually be eligible for a 5K motion for that cooperation because the government will have determined that the defendant has provided substantial assistance. But some defendants' cooperation goes even further and culminates with testimony at trial against co-defendants, co-conspirators, or other participants. If you appear in a courtroom and testify in open court (say at trial), you will get even more credit for that substantial assistance. The theory behind the extra credit is that your assistance has been even more significant than somebody who just testifies in front of a grand jury.

Put another way, a 5K motion from the government will give a defendant credit for his cooperation as substantial assistance. The more cooperation and substantial assistance you provide,

the more credit the government will ask the judge to give you in a 5K motion. A 5k motion may ask the judge to provide up to a 50% time cut in your sentence. It is extremely uncommon to see more than a 50% time cut. Somebody who testifies before a grand jury will get a more significant 5K motion than somebody who doesn't. Somebody who testifies at a trial will get more of a 5K recommendation than somebody who only testifies in front of a grand jury.

CHAPTER 6

THE PROCESS OF FEDERAL DISCOVERY IN A CRIMINAL CASE

How Does Federal Discovery Work?

Federal Discovery is very rigid, and it is not open Discovery. In fact, Federal Discovery is anything but open, and for that reason, it is very controversial. It is far easier to get Discovery in a civil case where your checkbook is on the line than in a criminal case where your liberty is at stake. It seems wrong and backward to most people, but it is the truth.

There are three primary forms of Federal Discovery. There is "Brady material," "Rule 16 Discovery," and "Jencks Act Discovery."

Brady material is evidence that tends to prove the defendant's innocence, sometimes called "exculpatory evidence." From the very inception of the case, the government has the continuing obligation under Brady to disclose Brady material immediately to the defense upon them getting possession of it, regardless of what stage your case is in (even prior to indictment).

Your case could be at the criminal complaint stage, pre-indictment, post-indictment, pretrial, during trial, or even after trial. Regardless of when, if the government becomes in possession of Brady material that suggests the defendant's innocence, the government must disclose it immediately.

Rule 16 Discovery is a discovery based on the Federal Rules of Criminal Procedure 16, which is the rule that covers most of pretrial Discovery practice. Federal Rule of Criminal Procedure 16 allows a defendant to get certain items of Discovery once he is

indicted. In general, Federal Criminal Rule 16 Discovery is provided or turned over following your indictment and your arraignment on that indictment.

What Does Rule 16 Discovery Cover?

The government is required to provide the following things under Rule 16 once you are arraigned in your indictment:

- Any oral statement made by the defendant
- Any written or recorded statement by the defendant
- The defendant's prior record

In addition, the government must allow the defendant to inspect or copy documents and objects such as:

- Books, papers, data, and photographs
- Tangible objects (in other words evidence, such as cocaine or guns)
- Copies of reports of any examinations or tests of any physical or mental examination, and any scientific tests or experiments.

- Identification of any potential expert witnesses and, under Federal Rules of Evidence 702, 703, or 705, a written summary or a report of any expert witnesses they intend to call in their case in chief.

Importantly, reports, memoranda, or other internal government documents made by an attorney for the government or a government agent in preparation for trial or the investigation in prosecuting the case are also excluded under Rule 16. This means what is referred to as "work product" is not covered by Rule 16 and does not have to be turned over.

Jencks Act material is purposefully excluded from Rule 16 Discovery. The Jencks Act – 18 USC 3500 – is a statute that states that witness statements and testimony of government witnesses do not need to be provided in pretrial discovery – they are excluded from discovery production until trial.

The Jenks Act reads:

"No statement or report in possession of the United States, which was made by a government witness, or a prospective government witness shall be the subject of

subpoena, discovery or inspection until that witness has testified on direct examination in the trial."

Now, when one thinks about that description, it's easy to see the danger and the potential for abuse of the Jencks Act. The Jencks Act goes on to explain that witness statements, transcripts of their testimonies in front of things like the grand jury, and interviews by government agents do not need to be turned over until not just the trial begins but after that witness has testified at trial.

Information covered by the Jencks Act and excluded from Rule 16 discovery include witness statements, grand jury testimony, or any government reports relating to the interview of their witnesses. The Jencks Act could be the most controversial part of Federal Discovery. The Jencks Act 18 USC 3500 is a statute that protects the government from ever having to produce witness statements before trial.

Unlike Discovery Rules in many states, which require the prosecution to turn over witness statements in pretrial discovery, the Federal government does not

have to turn them over under the Jencks Act. But rather than allow the government to hang on to those witness statements until after the witness has testified at trial, most judges encourage the prosecution to turn that information over at some time before trial.

This is done in order to avoid trial delays. Otherwise, the government would call a witness who would testify at trial. Then, under the Jencks Act, the government would be required to turn over that witness's statement to the defense. As a result, the defense would typically ask the Court for a recess to review those statements and prepare for their cross-examination. And if it's a short witness with little material, that delay may be only an hour. But if it's a long witness with many prior statements and grand jury testimony, that delay can be a day or more. In order to avoid those delays during the trial, most judges will pressure, encourage, and coerce the US attorney's office to provide Jencks material before trial. But by "Prior to trial," that means days and (maybe, sometimes) a few weeks before trial – but it is never more than that.

The Jencks Act can make it extremely complicated to have a complete evaluation of how strong the government's case is against you or your client. The defense is not getting the government's witness statements, nor the grand jury testimony. In fact, the government can even withhold the identity of its witnesses. The government is not required to disclose to the defense who their witnesses will be at trial, nor the order in which they will be called. Importantly, the government will never give witness information in the case of witnesses that were co-defendants, co-conspirators, or other participants of the crime. The government claims that by doing so they are trying to protect that witness's identity and safety.

For these reasons, pretrial preparation in a federal case becomes extremely important. The defense must undergo an intense trial preparation procedure with any client charged in a federal criminal case. This requires a thorough, extensive debrief of the client – which would include everything the client knows and any witnesses you have in your control, such as friends and family of your client.

CHAPTER 7

HOW TO SPEAK WITH AUTHORITIES WHEN CHARGED IN A FEDERAL CRIMINAL CASE

One of the most important decisions most federal criminal defendants face in their criminal law cases is the decision to cooperate with authorities. Cooperation in a federal case generally involves a two-step inquiry.

First, the government will ask a defendant's lawyer whether the defendant is willing to give a

proffer. A proffer is a meeting between the defendant, their lawyer, the prosecutor, the Assistant United States Attorney prosecuting the case, and one or more of the case agents that investigated the case. The offer of a proffer is made in the majority of cases and is given under the terms of an immunity agreement that is sometimes called *Kastigar Immunity or Use Immunity*.

Kastigar or Use Immunity is a limited immunity that forbids anything said during this interview from later being used against the defendant. This differs from transactional immunity, which basically prevents authorities from prosecuting the defendant for the case in question or in connection with the investigation.

Depending on the result of that proffer, and if the government likes what the defendant disclosed, they may then reach out to the defendant and his lawyer again. If that happens, the government will likely extend a plea offer, which would include a promise of a sentence reduction in exchange for further cooperation via substantial assistance.

The main obligation of defendants in this situation is, to tell the truth — the whole and complete truth. The government expects defendants to not just answer questions with technical truths, but to go beyond that and not withhold ***anything*** – this includes a requirement that the defendant ***voluntarily provide any and all information that would be reasonably related*** to the questions and subject matter. Provided that a defendant adheres to that requirement to tell the whole and complete truth, then nothing said during any proffer, debriefing, or meeting with the government will be used against them at trial or at sentencing to increase their guidelines can do well in this proffer/substantial assistance process.

The government will then take the proffer and evaluate it. If it deems the defendant told the truth but did not have much value as a witness or cooperator, it will honor its word and give the defendant the credit it said it would grant them. These credits can be things like authorization for a judge to grant a sentence that is lower than the mandatory minimum. The government

may require a proffer to qualify for a Rule 11 plea agreement that does not include cooperation.

On the other hand, if after the proffer the government deems the information provided by the defendant is particularly valuable and wants to move forward with them as a witness or cooperator, they will offer the defendant to take the next step. This would be to go from just giving a proffer to providing substantial assistance in the investigation or prosecution of other people.

The individuals a cooperator can provide assistance against can be in the indictment that the defendant is already charged in, or involved in the same investigation the defendant was involved with but just had not yet been charged or indicted with a crime. In some cases, new offenses, crimes, and investigations can be launched based on the cooperator's substantial assistance.

If the cooperator provides substantial assistance, the government will offer a 5K motion. 5K motions are when the government goes before a judge to inform them that the defendant has provided

substantial assistance in the investigation and prosecution of others, as well as recommend a break in the defendant's sentence.

These recommendations are usually expressed in one of two ways: a percentage of time reduced off the sentence or a reduction in the offense level of the crime. Recommendations tend to range from 20 to 50 percent off the sentence duration in the first method, and anywhere from a two to ten-level decrease in the latter (which results in the applicable guidelines being reduced accordingly).

Despite this, judges are not constrained or bound by the government's recommendation. If a court grants the 5K motion and deems a defendant worthy of credit for their substantial assistance in the investigation or prosecution of others, the judge can exercise discretion and reward the defendant with as much (or as little) of a sentence reduction as they want for that substantial assistance.

CHAPTER 8

WHAT HAPPENS LEADING UP TO A FEDERAL CRIMINAL TRIAL

Preparation is one of the most important stages of any federal criminal law case going to trial, yet it is so often overlooked. People tend to equate progress in their cases with going to court and seeing something happening. As such, it is very common for people to become frustratingly convinced that nothing is happening because they are not going to court or seeing their case move forward. This is a huge mistake.

Contrary to what you may be led to believe from the numerous law-based popular television programs, it is by far more common than not that a case does **not** go to court (at all) between an arraignment on the indictment and the trial.

The vast majority of judges will set what is referred to as a *final pretrial* about a week or two before trial. This is essentially a plea cut-off, a last chance for a defendant to take a plea to a reduced charge. If a final pretrial is not set (for whatever reason), in most circumstances the only reason a case would end up going to court is because the government or the defense files a motion. With motions come delays in the trial date, often anywhere from three to nine months.

The period leading up to trial is critical to the defense of a federal criminal charge. The defendant and their lawyer must meet frequently to evaluate the discovery and charges of the case. Since federal discovery is often considerably large in scope, this quickly becomes a daunting endeavor. It is not unheard of to have gigabytes, if not terabytes, of information provided in the discovery process.

The federal government has several ways to acquire information, a virtually unmeasurable amount of manpower to investigate cases, and unlimited financial and technical resources at its disposal. All this information has to be evaluated, reviewed, and discussed by the defendant and his/her lawyer – on top of examining the potential for pretrial motions.

When considering pretrial motions, it is imperative to understand that federal criminal practice tends to be more formalized and, in most cases, more pretrial motion-driven than a state court procedure. Federal judges expect and encourage both parties to identify and focus on legal issues, and potentially find resolution, in pretrial motions so that these issues do not have to be dealt with in a trial.

The most common types of motions to suppress in federal court are:

1. Motions for pretrial release.
2. Motions to suppress evidence because of a violation of the Fourth Amendment right to be protected from unreasonable search and seizure.

3. Motions to suppress a statement made by the defendant due to a violation of their Fifth Amendment Miranda Right to not self-incriminate, a Sixth Amendment right to counsel, or a claim the statement was not voluntary.
4. A motion to dismiss an indictment as a matter of law, or at least one count of an indictment
5. Miscellaneous federal pretrial motions, which are limited only by a lawyer's imagination and creativity.
6. A motion in limine addressing some evidentiary issue related to a case before the trial begins.

These motions must be filed in federal court prior to trial.

The first motion (chronologically) that may be considered is a motion for pretrial release. If the defendant waived their detention hearing at the time of filing the complaint or their arraignment on an indictment, they still have the right to one detention hearing. If they have not had a detention hearing yet,

it is a simple process to file a motion for pretrial release and set aside the detention order.

Every bond motion is determined de novo, which means looked at fresh and new. Federal judges are required to look at a motion for pretrial release fresh and not give any credence to prior decisions made by a magistrate judge, particularly if a defendant has not yet had a detention hearing.

An additional (or subsequent) motion for pretrial release and to revoke a detention order can be renewed anytime there is a change in circumstances in the case. With this, even if a defendant was previously denied pretrial release and was detained, a change in circumstances would allow a defendant to file a new motion for pretrial release and to revoke a detention order.

Motions to suppress must also be brought in advance of trial. It is difficult to imagine a situation where a federal judge would entertain a motion to suppress evidence or a defendant's statement during a trial. In fact, an untimely motion to suppress may be

filed beyond the motion cut off only upon a showing of good cause. Remembering this is critical.

Motions to suppress evidence or statements should assert specific facts – they should not presume an evidentiary hearing will be granted where facts can be established. Instead, the motion and brief should proffer facts that would allow a federal judge to conclude that the evidence or statement may have been seized in some violation – or at least that an evidentiary hearing is necessary to make a proper ruling. Federal judges demand to see focused and case-specific arguments – citing specific authority that supports your position is extremely beneficial, if not necessary. Cut-and-pasting or broiler plate motions and briefs should be avoided.

The third most commonly seen motion in federal court is a motion in limine. A motion in limine is a motion that attempts to resolve some evidentiary issue related to a case before the trial begins. For example, suppose a defendant plans to produce evidence that would otherwise be banned because of

hearsay – his/her lawyer can file a motion in limine before the trial and disclose that the defense plans to elicit hearsay from government witnesses. Doing this gives the court notice as to the fact that it will likely happen, why it will happen, and the legal reasoning behind why the court should allow it to happen. These in limine motions tend to be far more important in federal court than they are in state court.

There are also miscellaneous federal pretrial motions. What can constitute as "miscellaneous" in this context is limited only by a lawyer's imagination and creativity. Examples include motions to strike surplusage contained in an indictment if there is information that is prejudicial to a defendant and unnecessary to the charging notification of that defendant. The defendant can strike this information as a surplus.

The opposite of surplusage is the defendant can file a motion for a bill of particulars. If a defendant believes that an indictment does not properly notify him/her of the charges and their factual support in an

indictment, the defendant can file a motion demanding a bill of particulars. A bill of particulars is a statement by the government that includes information to further clarify the acts or facts that the government believes support the idea that a crime was committed, what crime the government believes the defendant committed, and why the government believes the defendant committed the crime.

Motion to dismiss an indictment as a matter of law, or at least one count of an indictment, is another commonly seen motion in federal court. A good example of this would be a motion based on the recent United States Supreme Court ruling in *New York Rifle & Pistol Ass'tion v. Bruen*. Following the holding in *Bruen*, there was a series of motions filed by the criminal defense bar arguing federal statutes that criminalize status weapon offenses. This argument is essentially that a criminal charge against the possession of a firearm by either a prohibitive person or under unlawful circumstances is an unconstitutional infringement on a person's Second Amendment right to possess and bear arms.

CHAPTER 9

THE PROCESS OF NEGOTIATING FEDERAL PLEA OFFERS

In the vast majority of criminal law cases, the federal prosecutor will make a plea offer after pretrial motions are filed and decided – and sometimes even before then. Defendants plead guilty in 90% of federal cases without going to trial. As such, prosecutors have considerable pressure on them by courts to offer a plea deal to resolve the case. What's more, defendants have a significant amount of pressure to consider and accept the plea deal, as the federal sentencing guidelines serve

as a significant deterrent to a defendant taking a case unnecessarily to trial.

This dynamic is the primary reason why 90% of federal cases are resolved by way of a plea and do not go to trial. Federal sentencing guidelines have a built-in trial penalty that increases a defendant's potential sentence, sometimes as much as by double, if they opt to go to trial and lose rather than take a pretrial plea offer.

It is important to understand that the current federal plea bargaining practice set by the Department of Justice requires federal prosecutors to seek and demand a conviction on the most serious count of an indictment once a chase is charged. This policy technically forbids them from dismissing the most serious charge in any indictment, and brings with it two consequences:

1. Plea negotiations take on an added importance prior to indictment because pre-indictment negotiations enable the parties to affect the top charge, the most serious charge of an indictment.

a. If a defendant can negotiate a reduced most serious offense prior to indictment, that is incredibly advantageous.

2. As a result, federal prosecutors will frequently begin the plea negotiation process early in federal criminal law cases. There are strong incentives that encourage sincere early plea negotiations by both parties.

If there are pretrial motions, defendants should explore, research, file, argue, and litigate all relevant and necessary legal issues in court prior to deciding to accept a plea offer and plead guilty in court. If there is a robust, fact-driven defense that can be used at trial, the same applies – that should be investigated and built out before accepting a plea offer and pleading guilty.

If a defendant and the lawyer decide that it is in their best interest to accept a plea offer and enter a plea of guilty, then the actual plea taking process includes:

- Going to court;
- Be placed under oath;
- Plead guilty;

- Make out a factual basis;
    - This is a defendant telling a judge what they did that makes them think they are guilty of the charged offenses.
- Receive a sentencing date from the judge.

From here, the case would enter the sentencing phase.

In contrast, if your federal criminal law case goes to trial, the general timeline is much longer. There are several reasons for this, and it may seem odd since the federal criminal justice system has a relatively strict speedy trial act that in theory requires a case to go to trial in just over 70 days from the time of the arraignment on the indictment.

This is simply unrealistic: the scope of federal criminal investigations, the amount of defendants that are frequently part of an indictment, the complexity and size of the discovery, and the requirement that pretrial motions be filed and litigated in advance of the trial, all work against this time frame being practical. Compiling the discovery, getting it to the defendant

and their lawyer, reviewing the discovery, filing pretrial motions, hearing those motions, and the possibility of plea negotiations all mean most cases do not wrap up in under a year.

However, there is good news — if a defendant goes to trial, wins, and is found not guilty, that is the end of the case. The defendant is acquitted and can move on with their life, and the case is completely over in most instances.

CHAPTER 10

THE TIMING OF A FEDERAL PLEA OFFER

The stage at which the federal prosecutor may make a plea offer can vary case by case. Factors that drive this decision include:

- The complexity of the case,
- The number of defendants involved,
- The size of the investigation,
- The amount of data in the discovery, and
- The severity of the charges.

All of these factors are combined to create something of a sliding scale on when a plea offer could be advanced by the government. However, the following two things that have the largest impact on the timing of the plea offer:

1. The Speedy Trial Act

Behind every federal case, there's something called a Speedy Trial Act. The Speedy Trial Act gives courts a very, very narrow amount of time to take a federal criminal case to trial. In fact, the court technically only has 70 days from the time of the arraignment to when a trial is supposed to be scheduled. In general, this isn't a realistic timeframe. Even the simplest, most straightforward federal case requires more preparation, investigation, and research by the defense attorney to be ready for a trial.

It is so rare as to be basically unheard of that the Speedy Trial Act is actually followed. It is almost always extended or adjourned. Instead, the 70-day timeframe acts more as a starting point to give

everyone an idea of how serious the federal system is about at least trying to move cases forward.

Federal cases tend to be larger, more complex and involve more defendants. This typically leads to cases with a larger catalog of discovery, and therefore cases take longer to resolve from beginning to end than state cases do. But as a result of the Speedy Trial Act, federal judges will frequently believe that criminal cases should move forward faster than any of the parties, including the government, feel comfortable with moving. It's for that reason that plea offers are frequently explored or at least suggested very early in the process.

2. The Client's Cooperation

The second factor that will impact the timing of a plea offer is whether or not your client is going to cooperate. Every federal criminal client has basically one of four options available to them:

- Plead guilty to a Rule 11 plea offer with cooperation,

- Plead guilty to a Rule 11 plea offer without cooperation,
- Plead guilty as charged without a plea offer, or
- Reject plea offers and go to trial.

A client may plead guilty with cooperation if they hope to gain the benefit of providing a proffer to the government, and thereby minimizing their exposure and cutting their sentence exposure down – even if it is only about their own involvement in the case. If the client's proffer warrants enough cooperation as to rise to the level of substantial assistance, then a defendant has the potential for a significant time cut in their sentence.

Pleading guilty to a plea offer without cooperation requires a meeting of the minds between the government, the AUSA, and the defense lawyer. Both sides must agree on multiple things. As an example, the government will frequently ask the defendant and the defense lawyer to agree to factual concessions that affect the scoring of sentencing guidelines. In addition, Federal plea offers in the

present time, even without cooperation, almost always include an appellate waiver. The appellate waiver says that if the defendant gets a sentence that falls within a certain range within the guidelines, the defendant waives their right to appeal both his conviction and his sentence – with very, very limited exceptions. In exchange for this, the government will typically agree to dismiss certain charges, which will sometimes bring the guidelines down.

The government will typically agree in a Rule 11 plea offer to make a non-binding recommendation to the judge for a certain sentence, under Federal Rule of Criminal Procedure 11(c)(1)(B). Frequently, that recommendation will be the midpoint of a guideline range. Of course, the judge does not have to follow this recommendation. Sometimes, the government will even agree not to score certain guidelines, not file certain enhancements, or not argue for certain enhancements under the guidelines at sentencing. There's give and take, which requires a lot of negotiation on both sides.

More and more clients are choosing to plead guilty as charged without a plea offer. This happens most often in two particular instances.

1. If the client believes he has a legitimate appellate issue on something, such as a pre-trial motion or sentencing issue.

In this instance, a client would not want to waive their right to appeal. In order to take a plea offer, the government will almost always require an appellate waiver, which removes a client's ability to appeal. If the ability to appeal outweighs whatever benefits the client would get in the plea offer, their option is to plead guilty as charged.

2. If the client believes that fighting the guidelines, certain enhancements, or factual scoring would lead to a lower sentence.

As part of a plea offer, the government often asks for concessions regarding the scoring of guidelines or enhancements. If the client feels that these concessions are likely to raise their guidelines (and sentence), they

may prefer to take their chances by pleading guilty as charged without a plea agreement.

Plea offers are offering fewer and fewer benefits, and becoming more draconian in nature, which is another reason why pleading guilty is becoming more prevalent. If what a plea offer is demanding from the defendant doesn't outweigh the benefits, choosing to plead guilty as charged is often the best course of action. This is particularly true due to the near-universal demand that a defendant gives up their right to appeal by accepting a plea offer.

It is every defendant's right to reject all plea offers and simply plead guilty as charged. Pleading guilty as charged can frequently be the fastest way to resolve a case as well. Agreeing to disagree with the government is a faster path than having to negotiate with them on all terms, especially when the government isn't offering particularly attractive benefits.

The option that can take the longest time to finalize is to plead with cooperation, because that cooperation takes time, and sometimes the

government doesn't want the defendant to plead guilty and/or get sentenced until their cooperation is completed. This means that the defendant may have to testify in front of a grand jury. If the government wants the defendant to testify in front of a trial, sometimes they will withhold the plea offer until after the trial testimony. For that reason, this option will frequently take the longest.

CHAPTER 11

FEDERAL CRIMINAL TRIAL PROCEDURE

The General Timeline Of A Federal Criminal Case

Many factors will play a role in what the timeline of a federal criminal case will ultimately be. Compared to state cases, a federal case will usually be far more complex and therefore involve a longer time frame. These factors include:

- Larger investigations,
- More complex factual and legal issues,

- A longer discovery review process,
- Complex federal criminal statutes, and
- Multiple defendants.

The Federal Speedy Trial Act allows for just over two months before a case is supposed to be brought to trial, and typically the discovery review process isn't even completed within that time frame. It takes a significant amount of time for the federal government to get discovery to the defense, for the defense to review it, and then for the defense to go over it with the defendant. It's only once all of this happens that you can start to formalize the factual and legal steps that the defense can or should take.

So, the first step in a federal criminal case is discovery. How long discovery takes is going to play a significant role in how long the overall process is going to take. Discovery will often take multiple months. Only once discovery has been completed, including the review by all parties, can the defense begin to draft and file motions.

Filing and drafting motions can also take months to complete. The federal government is then given a few weeks to a month to respond to those motions and, rather frequently, a federal judge will allow the defense to reply to the government's response. After that briefing schedule, a motion hearing is set, and the motions are argued. The entire time period from the day the motions are filed, to the day they are decided, is excluded under the speedy trial act. Once the defense has a motion filed and until the court rules on that motion, the Speedy Trial Act is paused.

Sometimes the time that the defense asks to review the discovery is excluded from the speedy trial clock as well. A defendant must agree to waive his/her right to a speedy trial in order to get the time necessary to review that discovery.

After the court decides on any and all pre-trial motions, the court will then set a trial date. The trial is typically set several months out, and during this entire process, the court would expect both parties to be negotiating and exploring any potential resolution and plea. Given the complexity of this process, it isn't

unheard of for a federal case to take a year or longer to go through the system.

Federal Court Pre-Trial Procedures

The federal criminal trial procedure is far more formal than what you see at the state level. There is a significant amount of pre-trial procedure that takes place before a trial can begin in the federal court. This includes:

- Discovery,
- Witness lists,
- Exhibit lists,
- Notice to use certain defenses,
- Disclosure of any experts or reports that the Parties plan to use,
- Written Voir dire or jury selection, and
- Motions in limine.

Discovery is the process of gathering all of the information and evidence of the case and sharing it with both sides. The reciprocal discovery requirement of federal rule 16 means that the defendant is obligated to share any and all evidence, which can include:

- Photographs,
- Documents,
- Data, and
- Tangible objects.

Witness lists and exhibit lists are pretrial pleading requirements that are placed on the parties by the rules. Under Federal Rule 16, both Parties (the government and the defendant) have an obligation to share any evidence they intend to use in their case with the other side. This means that any witnesses they intend to call or any exhibits they intend to show at trial must be available for the other side to review.

Notice to use certain defenses is also required by the defense. These certain defenses can include insanity, diminished capacity, or an alibi. Receiving this notice triggers the appropriate process. For example, if the defendant is going to use an alibi, the government then needs to provide a specific time, place, and date on which the offense allegedly took place.

Disclosure of any reports that the defense is going to use can include any physical examination,

any mental examination, any scientific tests, or any scientific experiment that the defense intends to present as evidence at trial.

Voir dire or jury selection is the process by which a jury is seated. Voir dire, in particular, is the process of allowing the attorneys to question potential jurors and striking a certain number of them. Attorney-conducted voir dire is not as common in federal courts as it is at the state level, but it can still occur.

Motions in limine refer to any potential evidentiary issues that both the government and defense are required and expected to identify prior to trial. The government and defense must file pre-trial motions in limine to have these issues addressed. Judges do not want and will not tolerate the arguing of evidentiary issues during trial that were anticipated by the parties and should have been the subject of pre-trial motions in limine.

Federal Court Trial Procedures

The structure of a federal court trial:

- Opening statements,
- Prosecution witnesses,
- Defense cross-examination,
- Defense witnesses,
- Prosecution cross-examination,
- Closing arguments,
- Prosecution's rebuttal,
- Jury instructions,
- Deliberation, and
- Verdict.

Each trial will begin with opening statements by the government, the prosecution in a federal case. The purpose of the opening statement is to give the jury a roadmap or a preview of the case, what they intend to prove, how they intend to prove it, and what evidence they're going to present.

Following the prosecution's opening statement, the defense is then given the opportunity to give an opening statement. The defense is not required to give an opening statement, but will often choose to do so in order to give the jury an overview of their general

defense and to remind the jury that the burden of proof rests with the prosecution.

The prosecution will then present its case to the jury by calling their witnesses. The prosecution's witnesses will give testimony on behalf of the government to meet their burden of proof. After each witness is questioned by the prosecutor, the defense is given the opportunity to cross-examine them with their own set of questions. The defense's questions must fall within the scope of examination, however, which means that they can only ask questions pertaining to the testimony already given.

Once the prosecution has questioned all of their witnesses and presented all of their evidence, they will rest their case-in-chief. The defense will make a motion for a judgment of acquittal under the federal rule of criminal procedure 29 (also known as a Rule 29 motion).

If the Rule 29 motion for an acquittal is denied, the defense will then begin to call their witnesses and present their evidence. The prosecution will have the opportunity to cross-examine each witness.

Once the defense has rested their case, the prosecution will give their closing argument. During the closing argument, the prosecution is essentially telling the jury the story of what happened, pointing to the evidence and testimony that the jury has heard, and petitioning the jury to make a decision as to whether or not the defendant is guilty.

While they are not required to do so, the defense almost always will make a closing argument. This is their opportunity to present their own version of the events, referencing their witness testimony and evidence to the contrary of the government's case.

The prosecution is then able to make a rebuttal argument, which is supposed to be limited to issues presented in the defense's closing arguments.

Finally, the court will give the jury instructions. Federal criminal cases are driven by jury instructions. Each of the various federal circuits, such as the Sixth Circuit, has its own standard criminal jury instructions. Federal judges are becoming more and more willing and likely to deviate from the standard

jury instructions, though. Most federal judges want the jury to understand the law that applies to a given case. It's a relatively recent development in federal criminal cases that the judge is willing to give jury instructions other than those in the pre-written, standard form. They have been making jury instructions more specific to the individual case.

Following the reading of the jury instructions, the jury is then ordered to deliberate. The first thing that the jury will do before beginning deliberations is to select a foreperson. In a federal criminal case, the jury must come to a unanimous decision on the verdict. Throughout the deliberations, the foreperson can ask questions to the court as needed for clarity. Whenever the foreperson asks a question, both the defense and the prosecution are able to be present.

Deliberations can take anywhere between an hour and several weeks, depending on the complexity of the case and the number of charges they're deciding.

Rule 29

At any time after the prosecution has rested its case in chief, the defense can file a motion for judgment of acquittal under the federal rule of criminal procedure 29. This motion can be for a judgment of acquittal on any or all of the offenses for which the defendant is being charged if the defense believes that the prosecution has not provided sufficient evidence to sustain a conviction.

If the judge determines that there's not enough evidence to sustain a conviction for a particular charge, they will enter a judgment of acquittal before the defense even has to present their case. If there are any charges remaining, or if the judge denies all Rule 29 motions, the case will proceed, and the defense will put forth their witnesses and evidence.

The defendant has the right to remain silent. They have no burden of proof and no obligation to present a defense at all. But, if they do, they present it after Rule 29 motions have been decided.

The Jencks Act

The Jencks Act (18 USC 3500) is very important to a federal trial. It is a federal statute that states that the government is not required to give witness statements or transcripts of any witness testimony prior to the trial beginning. If strictly enforced, the Jencks Act would cause significant and frequent delays in a federal trial. For that reason, most federal judges will require the disclosure of what is called "Jencks Act material" in advance of trial.

Once the witness is done testifying on direct examination, theoretically the Jencks Act material would be handed to the defense lawyer, and the attorney is given an amount of time that the judge thinks is appropriate for them to review that material before cross examination. Following this procedure, the defendant would be asking for hours or even days to review material after every witness, which would obviously prolong the trial process. So, to prevent such delays, most federal judges will require Jencks material to be turned over at the beginning of a trial or, sometimes, even weeks in advance.

When Jencks material is not disclosed prior to trial, it can create a real procedural twist. This is very unique to federal trials and significant because it puts the defendant at a significant disadvantage in terms of preparation.

CHAPTER 12

DEFENSE IN FEDERAL CRIMINAL TRIALS

Defenses Common In Federal Criminal Trials

Generally speaking, most defenses you can raise in federal court will be the same as those you can raise in state court. These can include:

- The case is not proven beyond a reasonable doubt,
- Alibi,

- Self-defense,
- Duress, or
- Necessity.

The first and most basic defense is always that the prosecution did not prove the defendant guilty beyond any and all reasonable doubt. If the prosecution doesn't meet their burden of proof, the defendant must be found not guilty.

A defendant may say that it wasn't them, they didn't do it, and have an alibi to that end. This is another common defense that you can raise in both state and federal courts.

Then, of course, there is a justification defense, such as self-defense, that you were under duress, or there was a necessity to commit the crime. This defense is an admission that the defendant did the thing they're accused of, but for a reason that justifies their actions.

What can be different is whether a defense is a question of law, a question of fact, or a mixed question of fact and law – and that depends on whether it is a

pre-trial defense that is determined by a judge before trial or whether it is a trial defense that is decided and determined by the jury. A very good example of that in federal cases is the defense of entrapment.

In many states, entrapment is a question of law. The process of raising this defense looks like this:

- The defense files a motion,
- The court holds an evidentiary hearing,
- Testimony is given, and
- The judge determines whether or not a defendant has been entrapped.

In federal court, entrapment is a jury issue. There are very specific, regimented jury instructions that a jury is supposed to use when making the determination of whether or not the defendant was entrapped.

The law regarding conspiracy is also significantly different in federal cases as opposed to state cases. So many federal cases involve the charge of conspiracy to commit a crime that federal criminal trials

are driven by the law of conspiracy. The most important law of conspiracy is the law of co-conspirators.

In general, statements made by a codefendant are inadmissible against any other defendant. Statements made by someone outside of a courtroom are called hearsay. However, statements made by co-conspirators that are determined to be part of the conspiracy or in what's called furtherance of a conspiracy are actually admissible against all co-conspirators.

For that reason, there's frequently a large amount of time and energy devoted to arguing about whether statements are made in furtherance of a conspiracy. A defendant will often make an argument that involves if and when they withdrew from a conspiracy. If, in fact, you withdrew from a conspiracy, what the conspiracy does after that point is now no longer attributable to you, nor are any statements by co-conspirators from the date you withdrew.

So, the law of conspiracy can frequently have a large and important impact on the government's presentation of its case-in-chief.

CHAPTER 13

SENTENCING IN FEDERAL CASES

When a defendant gets convicted, whether that's by trial or by plea, the next step is for the court to order a pre-sentence investigation for the purpose of producing a pre-sentence report. Pre-sentence reports are extremely important in federal cases and are required by law.

The pre-sentence investigation process is very extensive. There is a report which requires the interview of the defendant represented by their attorney. That

interview will cover any and all aspects of the defendant's past - good, bad, and indifferent. It will include:

- Personal history,
- Childhood,
- Employment,
- Education,
- Drug, alcohol, and other substance use and abuse,
- Mental health issues,
- Psychological issues, and
- Physical and medical history.

This pre-sentence report will summarize the procedure of the case and briefly describe the indictment and the factual allegations behind the charge. It will outline the plea agreement, if one exists, and calculate the guideline range. The report can take several weeks to prepare and, typically, a defendant is not sentenced until months following a conviction.

Once completed, the pre-sentence report is sent to the government, the AUSA, and the defense. The defense is obligated to go over that report with their

client. The probation department is required to give both parties an opportunity to file objections to that pre-sentence report. Many objections are administrative and easily corrected.

Some examples of administrative objections might be:

- Incorrect year of birth,
- Incorrect number of children, or
- Incorrect place of education.

Objections that are more substantive, like factual accusations relating to the offense, or objections to the probation department's scoring of the guideline range, must be supported in writing by factual reasons as well as legal support for that position.

The probation department will then conduct an investigation in response to the objections. Following their investigation, they will either make a change in the pre-sentence report and adopt the objection, or they will add an addendum to the report which states the objection was filed, that they disagree with the

objection, and that they are leaving it up to the judge to make a ruling on the objection.

The final pre-sentence report is then circulated to the parties and the court. At this point, sentencing can proceed.

The judge will address the pre-sentence report as the first thing when determining the sentence. The judge will ask both parties if they have any objection to the pre-sentence report and, at this point, any objection in the addendum will be addressed, argued, and ruled upon. The judge is the final determiner of the guidelines. The probation department does calculate and make recommendations about the guidelines, but the ultimate decision about sentencing belongs to the judge.

The guideline range is an important starting point for federal sentences. The guidelines were created to establish uniformity throughout the country and in various circuits and districts. A person who commits a bank robbery in Miami should be looking at the same or similar sentence as a person who commits a bank robbery in Michigan.

In 2005, the United States Supreme Court ruled in *United States v. Booker,* that guidelines cannot be mandatory or binding. The ruling stated that the guidelines are unconstitutional if they are mandatory because it is a violation of the separation of powers. It takes judicial expression away from the judicial branch and puts it in the hands of the legislative branch.

The only way that guidelines are legal is if they are only advisory, not mandatory. So, due to this, the guidelines are now merely a starting point for the court. From that starting point, the court is allowed to grant a variance above or below the guidelines for any number of reasons. Those reasons are far too numerous to list, but they are controlled by Federal Statute 18 U.S. Code § 3553.

18 U.S. Code § 3553(e) says that a court shall impose a sentence that is sufficient but not greater than necessary to comply with all of the established purposes of sentencing, which include the following:

- The nature and circumstances of the offense,
- The history and characteristics of the defendant,

- Reflect the seriousness of the crime,
- Promote respect for the law,
- Provide just punishment,
- Provide adequate deterrence,
- Protect the public, and
- Provide the defendant with any necessary educational or vocational training, medical care, or other correctional treatment.

Per the statute, the judge has to impose the lowest sentence that is sufficient enough but not greater than necessary to accomplish all of those purposes.

Most judges will take a holistic look at the defendant to establish a sentence that reflects all of these many factors:

- Personal background,
- Physical and mental health issues,
- Any substance abuse problems,
- Offense committed,
- The seriousness of that offense, and
- Deterrence and punishment.

Federal sentences are substantive, complex, formalized, and regimented. They're long, almost always exceeding an hour, and are very contested. Both parties will almost always file what is called a sentencing memorandum. Sentencing memorandums are frequently long and substantive documents, which can easily be as long as 20 pages.

Sentencing memorandum from the defense may often include:

- All of the factual reasons why the court should grant a variance and go below the guideline range,
- A forensic psychological assessment,
- Documentation verifying employment and educational background,
- Letters of support from the community,
- Letters from employers or supervisors,
- Transcripts from high school or university, and
- Any other documentation that humanizes and supports that the defendant is deserving of mercy and compassion.

Once all objections have been heard, argued, and the judge has made their ruling on the guideline range, the parties will proceed to allocution. Given that close to 90% of federal cases end in a plea, it becomes really important to do a good job at allocution and advocacy as it relates to sentencing.

Sentencing advocacy is the most undervalued, underappreciated part of federal criminal practice. Good sentencing advocacy can add years to or subtract years from a defendant's sentence. The importance of sentencing advocacy cannot be overstated.

CHAPTER 14

MANDATORY MINIMUMS IN FEDERAL SENTENCING

It is extremely difficult, if not frequently impossible, to get around mandatory minimums in a federal criminal case. The only true way around a federal mandatory minimum is by two provisions of the federal truth in sentencing statute, 18 U.S.C. § 3553.

The first relevant provision is limited to defendants who cooperate with Government and provide substantial assistance – the statute is 18 U.S.C.

§ 3553(e). This is a provision that allows a federal judge to go below the mandatory minimums. The requirements of that statute state that "upon motion of the government," the court shall have the authority to oppose a sentence below a mandatory minimum "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed the offense." The motion must be filed by the Government, (or prosecutor), and the judge must still take the guidelines into account.

If the Government makes a motion under 18 U.S.C. § 3553(e), it will frequently be accompanied by a departure recommendation to the court. For example, the Government might recommend a five-year sentence, instead of the mandatory minimum of ten years. However, once the Government makes that motion, the court is not bound by that Government recommendation. Once the court is authorized to go below the mandatory minimum, the court can go as far below that minimum as the court feels appropriate. The court can reduce the sentence all the way down to probation if it wants to.

That is an important nuance – once the motion is filed by the prosecution, and the court grants that motion, the court must take the guideline range into consideration but can grant whatever variance that it deems appropriate.

The second relevant provision relevant to going below the mandatory minimum is 18 U.S.C. § 3553(f), which is commonly referred to as the "safety valve." 18 U.S.C. § 3553(f) states that in the case of certain crimes under the controlled substances act, the court shall impose a sentence below the mandatory minimum provided that the government has been afforded to make a recommendation, and the court makes the following findings at sentencing:

- The defendant has a limited criminal record,
- The defendant's criminal history has no more than 4 points,
- The defendant does not have a prior 3-point offense where the sentence was greater than one year,

- The defendant does not have a prior 2-point offense that was a crime of violence,
- The defendant did not use violence or credible threats of violence in the commission of the current offense,
- The defendant did not possess a firearm or other dangerous weapon in the commission of the current offense,
- The offense did not result in death or serious bodily injury, and
- The defendant was not a leader, organizer, or manager of the offense.

There is a final factor that the Court must find, and this factor is often a sticking point to receiving the safety valve. Prior to the sentencing hearing, the defendant is required to have truthfully provided all information and evidence to the Government concerning the offense or offenses that were part of the common scheme or plan in terms of the commission of the offense.

The statute does say that the fact that the defendant has no relevant or useful information to give to the government other than information that the government is already aware of does not preclude a determination by the court that the defendant has complied. In other words, the defendant is required to give a truthful proffer – a truthful accounting – of what the defendant did. However, the fact that that information does not help the government, or it is not information that the government already knew does not mean you do not qualify under that provision.

So, those are the two prominent and primary ways that a judge is able to go below an established mandatory minimum in the federal court. Mandatory minimums do exist for a reason, though, and most of the time a defendant is charged with a crime that carries a mandatory minimum, the defendant will face that mandatory minimum at the time of sentencing.

CHAPTER 15

AFTER CONVICTION: DESIGNATION, PROBATION, & SUPERVISORY RELEASE

How The Federal Bureau Of Prisons Determines Your Designation

Once you are sentenced in a Federal criminal case, you are committed to the custody of the Bureau of Prisons, frequently referred to as the BOP. In most cases, you will be held in a federal detention facility close to the court you are convicted in until you are designated by the BOP to a specific, permanent facility.

If you are on bond at the time of sentencing, it is fairly common in a Federal Criminal case that the Court will allow you to self-report to the BOP facility you get designated to. This means that you can wait out on bond until you're designated to a specific facility. You will be given notice, with a day and time that you'll have to report to that federal facility.

Like every other facet of federal criminal practice, the BOP has a very structured process for designation that requires establishing your security risk based on many factors, such as the nature of your offense and the length of your sentence. So, first, your security risk will need to be calculated. After that, the BOP will look at what facilities have bed space for that security level.

Federal systems have facilities that accommodate a range of security levels. These include:

- Camps,
- Federal correctional facilities (FCIs),
- United States Prisons (USPs), and
- Federal Supermax Prisons.

There are very few supermax facilities nationwide, and a person would need to have a very long sentence, often a life sentence, with very violent aspects to their charges, in order to be designated to a supermax.

The higher the security level, the fewer facilities there are. There are far more camps than there are FCIs, and there are more FCIs than there are USPs. So, geographically, where you are designated will depend on your security level and how that matches up with available bed space.

Another part of how you will be designated will depend on whether or not you need a facility with a specific program. The BOP strongly believes that their programs have a lot of value and truly help individuals on their path to rehabilitation. For this reason, they will go out of their way to designate a defendant to a facility that has a program specific to their needs.

These programs can include:

- Sex offender treatment program,

- Residential drug abuse program (RDAP), and
- Anger management.

RDAP, in particular, is a program that is highly sought after by defendants because it can significantly reduce your sentence. This program is for anyone who has a substance abuse problem, particularly if they are sentenced for a drug crime or drug-related crime.

Once the BOP makes all of the necessary determinations, they will take into account a judge's recommendation. A judge may recommend a placement to a specific facility, but the BOP is not bound by this recommendation. The BOP is an executive branch and cannot be told what to do – in their mind – by a judge, who is a member of the judicial branch.

Most defendants are placed within a reasonable distance of their home and family. The BOP does have an incentive to keep prisoners happy. Happy prisoners are easier to house than unhappy ones, so they do understand the importance of trying to keep people close to the loved ones that want to visit them. Even so,

a lot of factors are going into the decision and therefore it's never a guarantee.

Probation Or Supervisory Release After A Federal Conviction

In the event an individual is granted probation or supervisory release following a federal conviction, there could be endless possibilities for the terms of that probation or supervisory release. There are, of course, standard conditions that can include:

- You cannot engage in any new criminal conduct,
- You cannot get arrested for any new offenses,
- Drug-testing,
- You have to report regularly to a probation officer,
- You have to account for your time and be busy with work and/or school,
- Verification of employment and/or enrollment in school,
- Travel limitations,
- Consent to searches of your car and/or home,

- Consent to having your electronic media searched, and
- You cannot own or possess a firearm.

These are standard conditions, but the judge can then impose any number of additional conditions specific to an individual's offense. Some examples of offense-specific conditions could be:

- Someone convicted of internet solicitation of a minor, child pornography, distribution, or production of child pornography will likely not be permitted to own or possess any device that can access the internet.
- If it was a drug-related offense, you might have mandatory drug treatment or attendance at AA or NA.
- If it was a sex-related offense, you may have a sex offender evaluation and follow-up treatment.

The conditions that could be placed on an individual's probation or supervisory release are extensive and individualized. Judges will frequently look at the offender or the offense and come up with

conditions that become applicable for whatever specific or unique reason present in an individual case.

Federal criminal practice is very unique. It requires that an attorney have a particular specialization in federal criminal cases. If you are facing federal criminal charges, you need to make sure that your lawyer has the requisite experience and expertise in dealing with specific federal criminal offenses. They are a unique animal and require someone to have experience with both the substantive and procedural law specific to federal criminal law.

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Fighting For Your Freedom

Strategies, Stories, And Lessons From The Trenches Of Defending Federal Criminal Charges

"Mark Satawa is a skilled and caring attorney who has been helping me address some challenging issues. He does not miss any details and is capable of creating a positive environment for finding the best solution. I strongly recommend him."

– Tekva C.

Mark A. Satawa, Esq.

Mark Satawa is a criminal defense attorney specializing in forensic DNA, sex crimes, child abuse, shaken baby, medical child abuse, white collar, and federal crimes. He is a former Assistant Prosecutor for Wayne County and a Michigan Assistant Attorney General, Mr. Satawa's trial experience consists of hundreds of felony jury trials, including over 50 life felonies and 30 murder trials.

Mr. Satawa has lectured extensively on issues including DNA, defending allegations of child sexual assault, Shaken Baby, medical child abuse, Forensic Science, and trial advocacy to defense organizations and bar associations such as NACDL, the State Bar of Michigan, the Arkansas Association of Criminal Defense Lawyers, the Oakland County Bar Association, the Institute of Continuing Legal Education, and the Criminal Defense Attorneys of Michigan.

Mr. Satawa is a member of the National Association of Criminal Defense Lawyers (life member and formerly on the Board of Directors), the State Bar of Michigan (Criminal Law Committee), and the Oakland County Bar Association (Inn of Court, and Criminal Law section).

He has won a series of acquittals in both state and federal court in several sexual assaults, child sex abuse, shaken baby syndrome, and medical child abuse. He was also one of the nine lawyers who won Rule 29 acquittals for the members of the Hutaree, a Michigan Militia group. He is AV rated by Martindale Hubbell, a Michigan Super Lawyer, a Metro Detroit Top Lawyer by Business, and one of the top 100 trial lawyers in Michigan by the American Trial Lawyers Association.

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