**Introduction: “You Had Me at Hello”¹**

In the game of life, decisions have a cause and effect. We learned in science class that with every action, there is an equal and opposite reaction. As a criminal defense attorney, we are not involved in the first portion of that equation and therefore, we are limited. We also get charged ourselves, though not with a crime. We are charged with minimizing the effect; minimizing the size and impact of the opposite reaction. One-third of federal criminal prosecutions are for drug offenses.² As a result, drug crimes are the most frequently prosecuted offenses in the federal system.³ This chapter will address the varying approaches available in the usual drug crime cases from start to finish.

**Your Case: “Life is Like a Box of Chocolates, You Never Know What You’re Gonna Get”⁴**

You hang up the phone. You have been retained to represent your new client in a felony drug crime case in federal court. Your engagement comes after the client has been arrested, charged, and indicted. At present, your client is incarcerated and a true bill of indictment just returned from the grand jury.⁵ As is often the case with most defendants charged with a drug crime, your client has prior drug convictions in both state and federal courts. After examining the facts which led to the arrest of your client, you realize that you are not in the movie, “My Cousin Vinny,” and you do not have a successful argument for a dismissal of all charges. Even worse and yet unsurprisingly, the facts as your client relayed them to you are not the same facts that occurred after you watched the video surveillance of the same circumstances. The best strategy available to you is to pursue any potential technical nuances that may reduce the sentence of imprisonment for your client. So what’s next?

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¹ Quote from “Jerry MacGuire” (1996).


³ *Id.*

⁴ Quote from “Forrest Gump” (1994).

⁵ *See* FED. R. CRIM. P. 7.

⁶ *See* FED. R. CRIM. P. 6.
The Crime(s) Charged: “Don’t Hate the Player, Hate the Game”\textsuperscript{7}

The first step is to review the crime(s) for which your client has been charged to ensure that the Government has not charged your client in error based on the facts and circumstances surrounding the charge(s). It may seem unnecessary, but it is not uncommon to have crimes charged where the elements of each charge cannot be met. For example, your client may have co-defendants charged with crimes that occurred at the same time as the basis for your client’s charge(s), though your client was not involved. This often occurs when there are multiple defendants and the circumstances occurred during a routine traffic stop when all defendants were in a vehicle together. Unbeknownst to your client, one of the individuals in the vehicle could have an additional drug on their person. Another drug could be found in the vehicle of which your client had no knowledge. One of the co-defendants may have brought a firearm without your client’s knowledge. The Government is not concerned with your client’s intent or knowledge. Often times, the Government will charge all individuals involved in the situation with all charges, especially if no one individual claims responsibility for certain charges.

As the defense attorney, catching such technicalities is key prior to the discussion of any potential plea negotiations. If not, you may find your client presented with a plea offer to dismiss a charge for which your client should never have been charged. Ultimately, the goal during plea negotiations is to negotiate a better offer than what your client would receive if the case went to trial. The Government has an interest in preventing the unnecessary expenditure of resources because having to try a case that could easily have been pleaded out would certainly be waste of resources.

“To Be or Not to Be (Guilty), That is (Not) the Question”\textsuperscript{8}

I often have people ask me if I have trouble defending clients that I know committed a crime. When I am asked this question, the concern, I imagine, is whether I am morally conflicted when defending a client for a crime that I know my client committed. But that is the wrong question to ask because I am not charged with making that determination as the defense attorney. Guilt or innocence is not determined by any officer of the court, be it a defense attorney, judge, prosecutor, probation officer, or any other officer of the court. That heavy burden rests solely upon the shoulders of each and every juror that hears the case at trial. So my answer to that question is that my client’s guilt or innocence is not relevant to my defense of the case. My job is to ensure that the legal process, as established over centuries of case law, is correctly followed and appropriately applied by law enforcement and the Court to each defendant in each case. My job is to prevent bad case law from setting precedents that tilt the balance of justice too far in either direction. This is how I proceed in each of my criminal cases.

Arraignment: “Thou Doth Protest Too Much”\textsuperscript{9}

\textsuperscript{7} Song lyrics from “Don’t hate the Playa,” Album: “Seventh Deadly Sin,” by Rapper Ice-T (1999).

\textsuperscript{8} Quote from “Hamlet,” William Shakespeare.

\textsuperscript{9} See id.
After the grand jury returns a true bill and there is a formal indictment against your client, the arraignment follows. As a practical matter, pleading not guilty buys you time to meet further with your client after you review the discovery from the Government. You certainly do not want your client to “protest too much” and plead to the crimes charged before you have had adequate time to review the facts and determine the appropriate and most beneficial course of action. Generally, it is at the arraignment or other preliminary proceedings where you receive the discovery. Thanks to the Speedy Trial Act of 1974, federal courts are reliably swift setting the case for trial within seventy (70) days from the filing of the indictment or the initial appearance of the defendant, whichever is later. However, there are exceptions to this seventy day period if excusable circumstances are presented in which the court determines “that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” This means that you have to proceed accordingly...and quickly. It is critical that you set realistic expectations for your client so that the client understands all potential outcomes. In drug cases such as these, you must be clear to explain what your goals are as the defense attorney for the best possible outcome as well as the potential worse outcomes. After the arraignment, you must review the discovery and contact the prosecutor, if you have not already, to discuss a potential plea agreement.

The Plea Agreement: “I’m Going to Make Him an Offer That he Can’t Refuse”

The plea negotiation is your chance as the defense attorney, to work every avenue available in order to convince the prosecutor to present the best offer possible to your client. This is the time when the networking and the maintenance of good relationships with prosecutors will make the difference.

The plea agreement terms are disclosed to the sentencing judge in open court when the plea is offered, though there are exceptions. The court is prohibited from participating in plea agreement discussions. Ordinarily under the plea agreement, the Government agrees to dismiss


11 See 18 U.S.C. § 1361(c)(1), which provides,
   In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.


14 The court may, if good cause is shown, “allows the parties to disclose the plea agreement in camera.” See Fed. R. Crim. P. 11(c)(2).

certain charges or may agree to bring no other charges related to the underlying offense; however, the court must accept the agreement. 16 “The court must advise the defendant that [he or she] has no right to withdraw the plea if the court does not follow the recommendation.” 17

**Cooperation: “Help Me Help You”** 18

At this stage, cooperation is a promising option if your client has information that the Government deems useful. Cooperating with the Government means that your client will most likely assist in investigating or prosecuting another person. This could mean being involved in a sting operation or testifying against a co-defendant. The tradeoff for the huge risk your client takes in order to cooperate is the benefit bestowed to your client by the Government. As the defense attorney, you want the benefit to be a motion for a sentence reduction and/or a downward departure in your client’s sentencing range under the U.S. Sentencing Guidelines. 19 A motion filed by the Government for “substantial assistance” allows the sentencing judge to sentence your client below an otherwise mandatory minimum sentence.

What is most notable is what the Government considers “substantial assistance.” If your client testifies against another defendant, whether a co-defendant or a defendant in another case, then your client has met the requirements in order to receive these potential benefits. A conviction is not required; testimony alone is sufficient. Before you and your client make the decision to cooperate in any way, be sure to get a “proffer letter” from the Government first and foremost for your client’s protection.

A proffer letter is a letter from the Government which sets the ground rules for any proffer of information from your client. The purpose of your client making a proffer is to provide the Government with an opportunity to assess the value of the information proffered by your client. 20 What is most important about the proffer letter is the Government’s agreement of no direct use of any of your client’s proffered information. However, the proffer letter only guarantees no direct use in the case-in-chief against your client, should a trial occur. The information most certainly can and will be used against your client if needed for impeachment purposes or rebuttal evidence.

16 *Fed. R. Crim. P. 11(c)(3)(A); see Santobello v. New York*, 404 U.S. 257, 261-62 (1971) (holding that a defendant does not have an absolute right to have a guilty plea accepted and court may reject plea “in exercise of sound judicial discretion”).

17 *Fed. R. Crim. P. 11(c)(3)(B).*

18 Quote from “Jerry MacGuire” (1996).

19 *See* 18 U.S.C. § 3553(e). Section 3553(e) permits a court to reduce a sentence below the statutory minimum if the defendant provided substantial assistance in the investigation or prosecution of another person; *Fed. R. Crim. P. 35(b)*, which permits a court to reduce a defendant’s sentence if the defendant provided substantial assistance *after being sentenced* in the investigation or prosecution of another person; *see also*, U.S. Sentencing Guidelines Manual § 5K1.1 (2016), which permits a court to depart from the Guidelines if the defendant provided substantial assistance and providing factors for the court to consider when determining the extent of the departure; *see generally*, Kevin Bennardo, *United States v. Erwin and the Folly of Intertwined Cooperation and Plea Agreements*, 71 WASH. & LEE L. REV. (online) 160, 168 (2014).

should your client make materially contrary statements to the substance of the proffer. Ultimately, the key for this step in the case is to make sure your client proffers information that assists the Government sufficiently without creating additional risks for your client. While this may seem common sense, having the same conversation more than once is highly encouraged.

**Case Study**

I was involved in a trial with a client who was testifying against his cell mate who had confided in my client while bunking together. After my client’s nervousness resulted in him making a clear and obvious blunder on the stand which was a blatant lie, though somewhat inconsequential, I was granted the rare and serendipitous opportunity to meet with my client during a quick, five minute break in the trial immediately after my client made this statement, though his testimony was not finished. My client realized immediately that the blunder was potentially critical; however, my focus was to prevent any further untruths during the remainder of his testimony so that my client’s “substantial assistance” would not be jeopardized. During our mid-testimony meeting, I reviewed any other potential topics to avoid with my client. Fortunately for my client, the Government was not as concerned with the blunder as I was and the Government filed a 5k1.1 motion for my client’s substantial assistance.

Another case in which I was involved resulted in the cooperation of my client through an actual “sting” operation with the FBI. My client was tasked with getting another individual on the phone and getting that individual to acknowledge and/or make some sort of statement which could be used against that individual so the Government could bring formal charges against that individual. In that situation, my client made numerous, concerted attempts to accomplish this goal, but was ultimately unsuccessful. Though the goal was not accomplished, the Government filed a 5k1.1 motion based on the substantial assistance of my client. In that case, it was critical that I, as the defense attorney, also made every effort to assist the Government in its attempts with this individual, especially since the sting operation was not fruitful. In this case, the relationship that I established with the FBI agent proved valuable, albeit unintentionally, because the agent further supported the filing of a 5k1.1 motion for my client.

As the defense attorney, you must explore all options, even if your client does not initially agree with your approach. Cooperation, regardless of the outcome, can only benefit your client when it comes to the sentence, especially when your client was caught red-handed. Significantly, your client’s cooperation is not the only thing that can make an impact. The cooperation of the attorney can, surprisingly, have an impact as well. In the sting operation case above, the prosecutor and the FBI agent stated to me that the significant work I did as the attorney to assist in the sting operation, positively swayed the discussion to file a 5k1.1 motion. Hence, even the efforts and willingness to work with the Government on the part of the defense attorney can make a positive impact for your client.

**Presentence Investigation Report: “What we’ve Got Here is a Failure to Communicate”**

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21 *Id.*

The presentence investigation report is completed by the probation office and is an in-depth review of your client’s personal and family history and criminal background, in addition to the detailed information of the underlying case. The report also contains the guideline range, based on the U.S. Sentencing Guidelines, for the specific crimes to which your client is pleading. It is crucial that the report is examined extremely thoroughly.

**Criminal Background**

The criminal background portion of the report details each and every single crime for which your client was ever charged, including the outcome/disposition for each. This section is often overlooked and the points accumulated from this section assumed correct. It would be a mistake to assume so, however. Your client can rack up a great deal of points due to criminal history, depending on the nature of the convictions, whether time was served, the amount of time served, etc. For example, any conviction which resulted in your client being imprisoned/jailed for over a year adds three (3) points for each instance. It is irrelevant if the previous convictions were in state or federal court. The Guidelines add two (2) points for any conviction which resulted in a sentence of at least sixty (60) days that was not already counted. It does not stop there. Any sentence not counted in either (a) or (b) of this section receives one point for each instance. Any prior conviction resulting in a sentence for a crime of violence adds additional points if not counted in the previous sections. Your client will receive two (2) points if the underlying offense occurred while your client was on probation, parole, work release, or any other form of a sentence. Notably, any sentence imposed and completed over fifteen (15) years before the underlying offense occurred is not counted.

**Underlying Charges**

Under the U.S. Sentencing Guidelines, there are a plethora of ways points are accumulated. Each crime has a very specific assessment of points, including the assignment of additional points for certain facts, if applicable. When reviewing this portion of the report, it is critical that the application of the appropriate guidelines is correct. This may seem like a no brainer, but mistakes are often made in this portion as well and in cases like these, it is at this point in the process where the defense attorney can make the most impact. One reason mistakes occur is due to the timing of the preparation of the report. Because of the in-depth nature of the report, the probation officer often begins investigating the relevant information of the defendant early on in the case.

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23 See USSG § 4A1.1(a).

24 See USSG § 4A1.1(b).

25 See USSG § 4A1.1(c).

26 See USSG § 4A1.1(e).

27 See USSG § 4A1.1(d).

28 See USSG § 4A1.2(e).
for obstruction of justice may have been originally charged in the indictment, but dismissed pursuant to the plea agreement. Amounts are another key area that are often overlooked, though critical in the points assessed in the guideline range. The best way to illustrate the impact of these seemingly minor details is to look at previous cases.

Case Study

I had one client who was sentenced and began serving his time long before I was hired to represent him. In this particular case, the defendant filed a § 2255 motion after he had been sentenced based on substantial mistakes made in the guidelines calculation, which were not caught by his previous counsel, the probation office, nor the Court. The defendant filed the 2255 motion pro se and the Court granted his motion for a correction of the sentence imposed. My involvement came after the Court had already reduced the sentence because of the reduction in the point calculation. However, my client hired me because he felt strongly that even after the reduction, the guidelines calculation remained incorrect. After reviewing the facts and thoroughly examining the corrected presentence investigation report, I found a variety of errors. First, the amount assigned to my client as the financial impact/damages which resulted from his criminal actions was incorrect. The amount was higher than it should have been, which pushed my client’s point calculation just over the threshold of an increase in the points assigned. Additionally, though the Government previously accepted a plea agreement that dismissed a charge of obstruction of justice, the two-point increase for the obstruction charge remained in his guideline calculation. After speaking with the prosecutor regarding the error, I was informed that it was not an error and the Government intended for the two-point increase to remain. As a result, I filed my objections to the report and proceeded to prepare to make my argument to the sentencing judge at the sentencing hearing. I was ultimately successful.

In another case, I was hired by a client who had been charged and pleaded guilty to possession of methamphetamine and counterfeiting currency. Once the presentence investigation report was issued, I noticed that the dollar amount of counterfeit bills was well over the amount that was either on my client’s person at the time of arrest, or the amount that was actually uttered (used) to purchase food. Instead, the dollar amount that was found on his co-defendant was added to the dollar amount for my client. On top of that, law enforcement searched my client’s apartment and discovered several other counterfeit bills, which were found in the trash can and on the counter. The counterfeit currency found at the apartment was also added to my client’s dollar amount. In addition to the incorrect dollar amount, the report increased the calculation by two (2) points on the basis of my client possessing counterfeiting tools. The counterfeiting tool was a color printer. This aspect required an argument supported by similar cases wherein the Court determined that a printer shall not be considered a “counterfeiting tool” warranting a two point increase. The tricky part was that there was case support that also found circumstances where a color printer would be considered a counterfeiting tool. After filing my objections to the report, I proceeded to argue the issues at the sentencing hearing. The Court ruled in my client’s favor and reduced the dollar amount of counterfeit currency to the amount that was found on his person at the time of arrest and the single counterfeit bill used to purchase food. This reduced his guideline range by three (3) points due to the substantial reduction. The Court also agreed that a printer, in these circumstances, is not a counterfeiting tool warranting a two-point increase and thus, my client received an additional two-point reduction to correct the calculation.
The Sentencing Hearing: “Friends, Romans, Countryman, Lend Me Your Ears”

The sentencing hearing is your stage to plead the technical failures in the sentencing recommendation from the probation officer. This is your last opportunity, outside of post-sentence remedies, to advocate for your client by using any personal points that can humanize your client in the eyes of the sentencing judge. This is also your opportunity to argue any questions of law as it relates to the guidelines calculation for your client’s sentence. For all intents and purposes, this is your grand finale and closing argument. The presentation given at the sentencing hearing has the same gravity on the sentencing judge as a closing argument on the jury at trial. While many attorneys view the sentencing hearing a trivial procedural formality, it would be a mistake to miss an opportunity when you have the Court’s ear without distraction.

Ever since United States v. Booker, federal court judges have had a discretionary function when it comes to applying the United States Sentencing Commission guideline sentences. Booker changed the process of sentencing for the judge. The judge is no longer required to do his or her job by merely plugging numbers into a grid and following the procedures outlined in Rule 32.10. As the defense attorney, our argument at the sentencing hearing is no longer confined to the appropriate guideline range. Now, we must direct the court to what sentence within the range of the underlying statute, is “sufficient, but not greater than necessary, to comply with the purposes set forth” in 18 U.S.C. § 3553. A § 3553 inquiry requires the judge to view each defendant individually. The Supreme Court provides, “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”

Many attorneys file a sentencing memorandum prior to the sentencing hearing, which presents the statements that will be made at the hearing. My preference is to utilize a sentencing memorandum on a case by case basis. Of course, some judges require that a sentencing memorandum be filed prior to the sentencing hearing so the option is not always available. When it is an optional decision, the details of the case guide me on whether I draft a sentencing memorandum. For instance, if the case is very complex or if my client provided substantial assistance to the Government that was not fruitful, a sentencing memorandum would be helpful for the sentencing judge. Regardless of whether a sentencing memorandum is utilized, your presentation at the hearing is most valuable.

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29 Quote from “Julius Ceasar,” William Shakespeare.

30 See United States v. Booker, 543 U.S. 220, 264 (2005) (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”).

31 See Fed. R. Crim. P. 32.10.


In federal drug crime cases, humanizing your client to the sentencing judge is not an easy task because federal judges spend over 80% of their time sentencing defendants in drug crime cases. The “bad childhood” approach is not only the oldest excuse in the book, but also will have the judge singing “cry me a river” faster than Etta James and Justin Timberlake. The best attitude that your client can convey is one of taking responsibility for the actions and accepting the consequences. In addition, any statements on behalf of your client’s family are often persuasive for the sentencing judge. If a family member cannot be present and/or is not comfortable speaking at the sentencing, a written letter may be read at the sentencing.

Case Study

In the cases referenced in the presentence investigation report above, the sentencing hearing was in two parts. First, I had to make my arguments to the Court regarding the inaccuracies in the dollar amounts assigned to my client and the obstruction of justice charge which was dismissed, though the two-point increase remained. Second, I was tasked with humanizing my client to the Court, using individual facts and characteristics to remind the Court that there is a person behind each case number.

Conclusion: “If You Build It, They Will Come”

In the game of life, defense attorneys are most often given lemons when it comes to the facts and circumstances of our cases and our clients. It is our job to take the lemons and do our best to make lemonade. We must build our case argument and if we do, the Court will come to the same conclusion. “If you build it, they will come.” When it comes to federal drug crime cases, attention to the minor details can result in major impacts on the potential outcome for our clients. This chapter was designed to address the varying practical approaches in federal drug crime cases from which your client substantially benefits. Ultimately, it is the technical nuances of the crimes charged, the sentencing guidelines, and other seemingly minor aspects that defense attorneys must thoroughly examine.

34 Quote from “Field of Dreams” (1989).