

# DRANOVE'S GUIDE THROUGH THE FEDERAL CRIMINAL JUSTICE SYSTEM

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## I. EDITOR'S PREFACE

This guide is an introduction to the federal criminal justice system, from arrest through plea or trial, and includes detailed discussions of the sentence process and what you need to know about deportation if you are not a citizen of the United States. It is not a law book or self-help book. It is not intended to give you the tools you need to represent yourself. It is a detailed summary of what every accused person needs to know to understand the Federal Criminal Justice System to be able work together with their lawyer to obtain the best possible outcome.

From Mr. Dranove's more than twenty years experience battling for the rights of his clients in the Federal Courts, it is clear that certain immediate questions and concerns are on the minds of the accused. This Guide answers many of these questions and concerns, clearly and directly and enables the accused to be more prepared to work together with their lawyer to strongly defend their case.

This guide describes the most important steps in a Federal Criminal Case, from arrest, through bail, pre-trial discovery, plea negotiations, trial, sentence, and immigration issues. This guide is not a substitute for a lawyer or an all inclusive encyclopedia. You do need an experienced lawyer to fight for your rights and your freedom against the vast powers and resources of the Federal Prosecutor's Office.

## II. ARREST, FIRST APPEARANCE and PRETRIAL SERVICES

Many defendants are arrested and brought into court to face charges contained in a complaint. Other defendants make their first appearance in court to face charges contained in an indictment. A complaint is written up by the prosecutor and is based upon a sworn statement by a law enforcement officer. An indictment is also written by the prosecutor, but the charges in it are voted upon by the members of a grand jury, which hears evidence the prosecutor presents to them in secret, without you or your attorney present.

**After arrest a Pretrial Services officer will interview you, usually at the courthouse and before you have contact with your lawyer.** Pretrial gives the judge a written report with biographical and employment information about you and, most importantly, a recommendation about whether you should be released on bail, or detained. **What you tell the interviewer is not confidential.** Meet with your lawyer as soon as possible and work with him on getting you out on reasonable bail conditions and on giving favorable information to the Pretrial interviewer.

If you and your co-defendants do not get released pre-trial, it is important for you to do what you can to be located in the same facility as they are. Your lawyer should speak to the assigned judge and ask for same jail housing. This will make it easier for your lawyer to arrange for co-defendant meetings (which the lawyers must attend), than if you are in different jails. The government will try to separate defendants to try to create mutual suspicion and see if one of the defendants will become cooperators with the government.

Be very careful talking to any of the other inmates. If you talk to anyone about your case other than your lawyer, your words may end up being used against you. Any of the inmates that may try to appear to be friendly to you can be undercover snitches! If the jail has a telephone that you can use, your conversations are recorded, and the phone numbers that you dial are listed and any conversation that you have can be used against you. In other words, if you want to talk to persons other than your lawyer, talk about sports, the weather, or your favorite foods, but never talk about anything that has to do with your case or co-defendants, or surrounding events!

### III. BAIL

The Bail Reform Act applies in all cases. In theory, most people are supposed to be released on the least serious bail conditions necessary to make sure they come back to court. The judge is not supposed to set a financial condition (excessively high bail) that results in pretrial detention. However the courts have interpreted this rule to mean that if high bail is the only condition that will reasonably assure you will come back to court, or that keeping you jail is for the safety of the community, then high bail will be set, even if you cannot raise the money. In effect, you stay in jail as though you were detained without bail. You can be required to prove to the judge that the bail funds you are intend to use were obtained through honest efforts, by presenting proof of legal income.

In some cases there is a presumption against your release and in favor of detention. Either the judge or the government may seek pretrial detention when the charges involve 1) a crime of violence, or 2) a crime for which the maximum sentence is life imprisonment or death, or 3) a drug offense carrying a maximum term of imprisonment of ten years or more, or 4) you have two or more convictions of certain serious crimes, or 5) they believe you may not come back to court.

The Bail Reform Act states that the judge is required at the Bail Hearing to consider four factors in determining whether there are conditions he can require you to meet that reasonably assure your return to court and the safety of the community. If you meet them the judge should set bail. These four factors are:

- The nature and circumstances of the offense, including whether the offense is a crime of violence, or involves a narcotic drug;
- The strength of the evidence against you;
- The history and characteristics of the accused, including personal character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history of drug or alcohol abuse, criminal history and record of appearance at court proceedings, and
- The nature and circumstances of the danger to any person or the community if be the accused is released.

You may proceed by your lawyer's "proffer" of evidence at the Bail Hearing. This means that you do not have to testify or even speak to the judge at this proceeding, the lawyer does the talking and he may question any witnesses called by the government. Most judges permit the government to also present evidence about you by proffer. That is, the prosecutor will tell the court what a witness, such as an agent, would say if he testified.

## IV. WHAT IS A BAIL PACKAGE?

The Bail Reform Act contains the rules that the judge uses to decide if you get bail. If you are eligible for bail, **you and your lawyer should work to put together what is called a “bail package.”** The package should persuade the government and convince the judge to release you. Usually a bail package includes a number of components. One is co-signors of the bail bond. They usually are a number of financially responsible persons (meaning they have a legitimate job, don't have criminal records, do pay taxes, and are legally in the USA,) and of course are willing to sign a bond for you. A second possible piece of the bail picture is real estate which can be used as collateral for the bail bond. A third portion is a deposit into court of a sum of cash.

The financially responsible persons act as a type of guarantor that you will return to court. They sign a legal document called a “bond,” which requires them to pay to the government the dollar amount of the bail bond if you don't come back to court. If you put up property as collateral it could be sold to get money to pay the bond. So, the persons who sign a bond are considered to have an interest in making sure you return.

Conditions of your release on bail may include restrictions on travel, home detention, and daily phone reporting to pre-trial supervision, electronic monitoring, to confirm you stay at home 24 hours a day, or daily or weekly personal reporting to Pre-Trial Services. But, you are free, and can meet with your lawyer in his office and discuss the case in confidence, without the interruptions of daily inmate counts, inadequate interview rooms, noisy family visits, uncomfortable chairs, lack of any privacy, etc.

If a Magistrate Judge orders detention you can appeal to a District Court Judge. If a District Court Judge orders detention, you may appeal that ruling to the Court of Appeals under procedures for rapid decision. Prosecutors may also appeal orders of release or setting bail. As a general rule, once bail is denied, no judge wants to change that decision. Appeals rarely if ever are granted, therefore it is crucial that you work closely with your lawyer at this step of the prosecution.

## V. SPEEDY TRIAL ACT

The Speedy Trial Act (STA) provides time limits within which cases are to be brought to trial. In general, defendants must be indicted within 30 days from the date of arrest and must be tried within 70 days of the filing date (filing the original paper in the court clerk's office) of the information or indictment, or the date of your first appearance in court to face the charges in the information or indictment, whichever date is last. There is a defense preparation period of 30 days during which you may not be tried without your consent. The 30 day period runs from the date you first appear in court with a lawyer in the case.

Periods of time which stop the clock are set forth in the Speedy Trial Act. The government's failure to follow the rules in the Speedy Trial Act will result in dismissal of the charges. If you don't move for dismissal of the charges before trial, or before entry of a plea of or guilty or of "no contest" you give up the right to ask for a dismissal. Dismissal can be with or without prejudice. A dismissal without prejudice means the government can charge you again in a new case as long as the statute of limitations has not run out.

The period between when you file in court a pretrial motion (or make an oral motion in front of the judge) through the date on which the motion is decided does not count toward the 70 day time period.

## VI. PLEA AGREEMENTS

Plea agreements are an important part of the system, and most cases are resolved by pleas. The United States Code, (that is the official name for the federal law), the Federal Rules of Criminal Procedure, the Supreme Court and the US Sentencing Commission all recognize the importance of plea agreements. **The crucial work needed to get the best deal involves you and your attorney learning the strengths and weaknesses of the case against you before talking to the prosecutor.** You must discuss with your lawyer the possible sentence for the most serious and provable charge that could be brought against you. You may also want to discuss with your attorney the possibility of cooperating with the government. If you are willing to discuss cooperation with the prosecutor in the investigation and prosecution of others, tell your lawyer immediately. You need to discuss this with your lawyer thoroughly before talking to the government. The topic of cooperation is discussed after this section.

**If you decide to plead guilty, there are three types of pleas. They are:**

- Guilty
- Nolo Contendere, (a Latin phrase), if you get court approval
- Conditional Plea of Guilty or Nolo Contendere, if you get court and government approval, which preserves the right to appeal.

A nolo contendere plea is very rarely used. It has the consequences of a guilty plea, without your admitting that you did anything wrong. The government tells the judge what it could prove against you, instead of you admitting you did anything wrong. You are sentenced under the regular sentencing rules. The plea cannot be used against you in a civil proceeding. So if you are sued over your conduct, your plea cannot be used as evidence against you. The judge does not have to accept the plea in any event. However, if your plea is accepted, you will get no sentencing guideline credit for accepting responsibility, which means a longer sentence than if you admitted the crime.

A conditional plea is very rarely used. It may take place when a question of law remains undecided in the court, and your case will decide the issue once it is reached on appeal, but there will not be an appeal if you plead and give up your right to appeal.

All plea agreements are legal agreements (contracts). The agreement should be in writing and signed by all parties. Your lawyer should negotiate the plea agreement only after you and your lawyer decide that a plea is the best thing to do. You should know the sentence guidelines for your case, including the extent of relevant conduct either you or other conspirators undertook. Don't forget that in drug cases, if you try to get a sentence below a statutory minimum, and sit and talk to

the prosecutor to be awarded the “safety valve” sentence reduction, **what you say about your other dealings will usually end up told to the person who writes the pre-sentence report and is given to the judge.** That may increase your guideline sentence above what it could have been if you had not tried to get the safety valve.

Plea agreements are not “one size fits all,” and you must carefully review yours with your lawyer before you agree to it. If you plead guilty, the judge will ask you if you understand the agreement, and if you are aware of the sentencing calculations in the agreement. He will also tell you that he is not bound to accept the calculations, and that you may be sentenced to a higher guideline calculation. This is an example of why it is so **important for you to understand the terms of your plea agreement.** Ask your lawyer about what circumstances in your case and your criminal history might give the judge an opportunity to sentence you to more time than is calculated in the plea agreement.

There are situations where no plea agreement can be reached, but you don’t want to go to trial. In that case, you could plead guilty to the charges. In the district courts in the Second Circuit, for example, what happens is that at the plea proceeding, the government gives a letter to the judge describing what the government believes your sentence calculations should be. You, your lawyer, and the judge are not bound by that letter. Your lawyer should give the judge several days before the sentence date your own version of the calculations.

## VII. COOPERATION

The Sentencing Guidelines recognize that the government relies upon cooperators, and at sentence, rewards them. Guideline 5K 1.1 gives the judge the power to lower your sentence, to depart downward from the guideline, if the government makes a formal motion that you be sentenced without the Guidelines preventing a reduction in sentence. In other words, you may be rewarded for providing substantial assistance to the government in the investigation or prosecution of other people.

If you want to explore this process, **make sure your lawyer knows your case strengths and weaknesses, the relevant sentence guidelines, your criminal history and your need for protection if you cooperate.** Since you must tell to the prosecutor everything about your criminal conduct, from your first crime until the date of the meetings, you should only talk with a written agreement protecting you. It is usually called a “proffer” agreement. Basically it should protect you from having your words used against you if you go to trial. But, if you testify at trial or take a different position at sentence, your words can be used by the prosecutor to show you’re untruthful. This rule applies to any proffer agreement. Be certain your lawyer clearly explains this to you.

It is very important to understand that the proffer agreement usually does not prevent the information you give from being used against you and increasing your guideline calculations for sentence, because most proffer agreements do not completely protect you from sentencing consequences of your own admitted conduct. This applies even if you are only trying to get a “safety valve” reduction in a drug case. Carefully go over any proffer agreement with your lawyer before talking to the government.

If you get the cooperation agreement, it may be worth it. However, it may not. **You must speak to your lawyer before meeting with the prosecutor and tell your lawyer privately what you would tell the prosecutor.** If you want to cooperate on a robbery case and tell the prosecutor about a murder you did during a different robbery, for example, you may not get cooperation, and may have your guideline calculation seriously increased because in trying to get credit for cooperation you admitted to other crimes.

**Your lawyer should be present at all meetings with the prosecutor.** If you do get a cooperation agreement, it will be a written agreement. You plead guilty in accordance with the terms of the agreement, assist the government, even if it requires you to testify against your own family and best friends, and if the government writes a “5K” letter to the judge, you could get a

better sentence than if you did not cooperate. The 5K letter describes your cooperation, details the substantial assistance you gave the government, and informs the judge he can sentence you below the guideline range, but does not suggest to the judge what the sentence should be. The letter should be filed in secret, which is called “under seal.”

Another way to get a sentence reduction based upon your cooperation is a motion by the prosecutor under Federal Rule of Criminal Procedure 35. This motion allows you to seek a reduction of the sentence based upon cooperation given after you begin serving your sentence. Remember that the 5K1.1 letter is for cooperation before you are sentenced. Rule 35 describes the grounds upon which the post-sentence cooperation motion may be made. If within one year after sentencing you give substantial assistance in investigating or prosecuting another person, the government may make a motion to reduce the sentence. The one-year time period is not the actual time limit. After more than one year has passed since sentence, the government may ask the court to reduce the sentence if you give information which you did not know about during the first year, or if information you gave during the first year has then become useful to the government, or if you promptly give information which you could not have known would be useful during the first year but which you later reasonably realized would be useful. The court may also take into account assistance you gave before sentencing, but your post-sentence cooperation should be substantial and you cannot get double credit by re-using information you already gave.

## **VIII. DISCOVERY**

Discovery involves getting from the government an evidence-based picture of the case against you. It is based upon Federal Rule of Criminal Procedure 16. Rule 16 gives you the opportunity to receive copies of your statements, criminal record, inspect physical evidence, review scientific reports, summaries of expert testimony, and the written explanation for the expert opinions.

The Jencks Act, 18 U.S.C. Section 3500, and Rule 26.2 requires the government to give you copies of pre-trial statements, but only after the witnesses testify at trial on direct examination. Generally, the Government turns over copies of investigation and surveillance tapes and transcripts well before trial, and copies of witness’ statements a few days before trial.

The prosecutor has the duty to give to you upon your official written request, copies of all evidence which is favorable to you on the issues of guilt or how heavy a sentence you get. Your requests should be as specific to the case against you as possible. That will help you win against the Government’s argument that your request was only a general request.

## IX. TRIAL

**You and your lawyer need to prepare for trial** with the assistance of experienced investigators, who know federal and local law enforcement methods, and how to locate evidence and witnesses the government doesn't want to use, or conveniently "forgets" to give you. The prosecutor will always be assisted in preparing for trial by one or more agents and the resources and power of the government. Your lawyer's investigator balances the scales.

If you choose to go to trial instead of pleading guilty, you have a right to be in the courtroom for your trial. If you are in jail, the U.S. Marshals will take you into the courtroom. You should wear business clothes, so the jurors don't know you are in custody and have a favorable first impression. The Marshals and the judge should make some time and space available for you to dress for court. If you are on bail, you must appear for the beginning of trial. If you refuse to attend, the trial will go on without you, and a guilty verdict will not be thrown out just because you were not there.

### ➤ **Opening**

The prosecutor begins the trial with an opening statement, explaining how he will prove you committed the crimes charged. Your lawyer may make an opening statement but is not required to do so, because you don't have to prove you're not guilty. The burden of proving that you are guilty is proof beyond a reasonable doubt is on the prosecutor, and that is why they have to give an opening statement.

### ➤ **What is evidence?**

Evidence consists of testimony from witnesses, whatever may be agreed to between the lawyers as evidence and the jury is told by the judge is evidence, (this is called stipulated evidence), and exhibits. Exhibits can be business records, drugs, surveillance tapes, wiretap recordings and other documents and recordings.

The prosecutor may broadcast to the jury recordings of conversations and put into evidence transcripts of them. You and your lawyer will have received the transcripts and tapes before trial and should have reviewed them for accuracy, and to learn what is on them. You and your lawyer have the right to make motions asking the court to limit use of parts of the transcripts. You may also give the judge counter transcripts if you think the accuracy of the government's translation is not perfect.

Because the prosecutor has the burden of proving guilt, the prosecutor must introduce the evidence. Witnesses are called to testify. They are questioned by the prosecutor first on “direct examination” and then cross-examined by the defense lawyer. Each side continues to take turns with the witness until they finish or the judge stops them.

➤ **Rules of Evidence**

The introduction of evidence must be done in compliance with the Federal Rules of Evidence. Either side can object to questions or the introduction of evidence. The lawyer objecting is usually required by the judge to cite a rule of evidence in support of the objection. You may hear reference to rule numbers like 403 and 404, for example. The judge decides the issue, and there is no appeal from the decision. The trial just continues. If the lawyer does not cite a rule number he may not be able to raise the judge’s evidence ruling on appeal.

➤ **Defense Case**

You do not have to present a case to the jury. You can rely upon weaknesses in the government case against you, and upon favorable evidence, or flaws and inconsistencies in the government’s case obtained from your lawyer’s questioning of the government’s witness. Of course, you can present your own evidence if you believe that will help you at the trial.

You and your attorney decide whether to present your own case to the jury. **You have a right to consult with your attorney and help make decisions as to how he will conduct the trial.** You do not have to present a case, or to produce any evidence, or testify, or present any defense at all. This is because you are presumed innocent. If you don’t testify, you can have the jury told by the judge that you are under no obligation to testify and the fact that you did not testify may not be used against you.

➤ **Summation**

At the end of trial, your attorney and the prosecutor make closing statements to the jury. The statement is called a summation. The prosecutor sums up twice, first and last. Your lawyer sums up once, in the middle.

After the summations, the judge explains to the jury the law which applies to your case. The jury is then taken to a room to discuss the case in secret and to reach a verdict by voting unanimously. While discussing the case, the jury may send notes to the judge, asking for testimony to be read back or to see exhibits. The judge reviews the notes with your lawyer in your presence, and decides how to respond. Usually the juries get what they ask for, but nothing more.

➤ **The Verdict**

The jury determines whether you were proven guilty **beyond a reasonable doubt**. Their decision is the verdict. The judge instructs them as to the definition of reasonable doubt. If the jurors have a reasonable doubt about whether you are guilty as charged, they must find you not guilty. If all twelve jurors are convinced beyond a reasonable doubt of your guilt, the jury must find you guilty. If you are being tried for more than one crime, the jury will reach separate verdicts for each crime.

Occasionally, after much deliberation, a jury cannot agree on a unanimous verdict after days of trying. In such a case, the judge may declare a mistrial. The prosecutor may then try you again.

If the jury verdict is **“not guilty”** you are **acquitted**, and you will be released if no other charges are pending and there is no immigration hold or other kind of detainer. For example, if another state has a warrant for your arrest or has filed a written request asking the government to hold you, you and your lawyer will have to deal with the other charges before you go home. The Federal Rules describe those procedures.

- If you are found **“not guilty”** you **cannot** be tried for the same crime again.
- If you are found guilty by the jury, your case is adjourned for a few months, so that the judge can receive a pre-sentence report from the Probation Department, and also for the judge to read anything you and your lawyer submit to help your sentence calculation.

➤ **Motion after Trial**

Before sentence, your attorney may make a motion to throw out the jury verdict. The judge may rule on the motion by dismissing the charges or providing for a new trial. Just remember judges rarely grant these motions.

## X. SENTENCING

Whether you pled guilty or a jury found you guilty, you will be sentenced at the end of the sentencing process. There are four basic steps in the sentencing process. These are:

- 1) Pre-sentence investigation by a probation officer, including a long and detailed interview with you, and including getting information from the prosecutor about what you did.
- 2) Preparation of the pre-sentence investigation report,
- 3) Your review of the report with your lawyer, to determine if you have to file any objections to the report, and to file your own pre-sentence papers, and
- 4) The sentencing hearing.

### ➤ **Sentencing Guidelines**

What sentence is given will be decided by the judge under the guidelines issued by United States Sentencing Guidelines Commission. The Guidelines are complicated and have caused the courts to issue thousands of decisions interpreting them. It is crucial for you that your lawyer is very familiar with this area of law. You do not want any surprises in sentencing. Surprises can result in your sentence being longer than you had expected.

### ➤ **Offense level**

The U.S. Sentencing Guidelines Commission assigns a number of points to each crime, from one to forty three. Each point level calls for certain amount of time in prison. The higher the number is, the longer the sentence will be. For certain lower numbers, a non-jail sentence is possible. For each crime the number assigned to it is called the “base offense level” for that crime. There are a number of factors which may cause the number to either increase or decrease. Different factors will cause increases and decreases to the based offense level, to reach the “**adjusted offense level.**” Once you have that “adjusted level”, your criminal history is then used to figure out the potential sentence.

### ➤ **Criminal History**

Criminal history points are given to you for prior criminal convictions. The number of points is based on the number and seriousness of the prior convictions. Certain dismissals after successful probation still count against you! Your Criminal History Category is the horizontal (left-to-right) line of the Sentencing Table for each Offense Level. It is based on the number of points your record gives you. **The higher your Criminal History Category, the higher your sentence will be for each offense level.**

➤ **Mandatory Minimum Penalties**

Certain statutes call for mandatory terms of imprisonment, for example, 18 U.S.C. §924 (c) (consecutive five- year term for using or carrying a firearm with respect to a crime of violence or a drug trafficking offense); 18 U.S.C. § 924 (e) (15 year mandatory minimum for “armed career criminals”); 21 U.S.C. § 841 (5, 10 and 20 year mandatory minimum terms for certain drug offenses); 18 U.S.C. § 1111 (mandatory life for first degree murder); the “three strikes” statute, 18 U.S.C. 3559 (conviction of a serious violent felony, with (i) a prior history of two or more serious violent felonies, or (ii) one or more serious violent felonies and one or more serious drug felonies, with additional convictions between the first and second felony convictions. The statute provides detailed definitions of “serious violent felony” and “serious drug felonies”. If you have any doubt at all about whether you could be sentenced under these statutes, please get an accurate answer. If a sentence is mandatory, your lawyer’s words or arguments won’t change anything.

➤ **Safety Valve**

In drug cases where there is a mandatory minimum sentence, (and in most cases there is), the court must impose a sentence without regard to any statutory minimum, (meaning you can get a lower than mandatory minimum sentence) if the court finds at sentencing, after the Government has been given the opportunity to make a recommendation, that:

- You don’t have more than one criminal history point;
- You did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or convince another participant to do so) in connection with the offense;
- The offense did not result in death or serious bodily injury to any person;
- You were not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and were not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- Not later than the time of the sentencing hearing, you have truthfully given to the government all information and evidence the you have concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The fact that you have no relevant or useful other information to provide or that the government is already aware of the information doesn’t prevent the judge from determining you have complied with this requirement.

➤ **Relevant Conduct**

**The relevant conduct guideline is a potential trap.** The sentence calculation is to be made based upon all “relevant conduct.” Relevant conduct includes your own actions; reasonably expected conduct of others in a conspiracy and uncharged conduct that were part of the same course of conduct or common scheme or plan as the crime you were convicted of. It sometimes includes

acquitted conduct, dismissed counts of an indictment, or conduct committed outside of a statute of limitations period. **This is a complex and important sentencing issue. It is crucial your lawyer and you understand your potential exposure.**

Under the guidelines you will be held accountable and sentenced for the offense of the conviction, and other criminal conduct committed which is sufficiently related to the offense of conviction.

➤ **Role In The Crime**

Your role in the crime can result in a substantial adjustment in your offense level. For example, **if you were the leader or organizer** of a criminal activity, a conspiracy, that involved five or more participants, **your offense level will be increased** by four levels. If you were a manager or supervisor (but not the organizer or leader) of a similar activity, your offense level will be increased by three levels. If you were an organizer, leader, manager or supervisor in any smaller criminal activity, your offense level will be increased by two levels.

Your role in the offense may also result in a decrease in your offense level. **If you were a minimal participant** in the criminal activity, **your level should be decreased** by four levels. If you were a minor participant, you should receive a two level decrease. If you fall in between minimal and minor participation, you get a three level decrease. These reductions in your offense level are also frequently the subject of plea-bargaining, and they certainly should be pursued to the maximum extent possible.

A November 2002 Amendment to the guidelines puts the upper limit for defendants with minor or minimal involvement in drug cases at a maximum base offense level of 30 points. This can save you many years, if you were in a drug case. The reduction in points for role, acceptance of responsibility and safety valve still apply. This amendment is a powerful weapon for the defense, if the facts demonstrate you had a minor or minimum role.

Role in the offense is one area of frequent disagreement between the prosecution and defense, with the judge making the decision. There are published court decisions about role in the offense, and the Guidelines have a Commentary giving examples of facts which support a reduction in role, or an increase in role. Decisions on role are fact sensitive, so you and your lawyer should review the facts in your case carefully before pleading guilty.

➤ **Guns and Drugs: Increases in sentence**

You or your co-defendant's possession of a gun during a drug crime increases your offense level. If you are charged with using a firearm during a drug offense, the "924" charge, you are facing a consecutive five year sentence. If you have a prior drug conviction, the U.S. Attorney can file a notice with the court that they will seek a twenty year minimum if you are again convicted. If you have two prior narcotics felony convictions, you may even face life without parole. **Discuss your criminal history honestly with your lawyer.** If you try to hide a conviction the government will uncover it anyway.

➤ **Abuse of Trust or Use of Special Skill**

If your criminal conduct includes abusing a public or private trust, such as employment or if you used a special skill, in the commission of your crime, you will get a two level enhancement to your offense level.

➤ **Victim Related Adjustment**

If there was an individual victim, there are special adjustments which might apply. If the victim was unusually vulnerable due to age, physical or mental condition, or for other special reasons, your offense level will be increased by two levels. If the victim was a government officer or employee or a family member of such a person, and the victim was in law enforcement, but that fact had no effect on your decision to commit the crime, then you will not this enhancement.

Finally, there is a two level enhancement for physically restraining a victim during the course of the offense. If the victim is injured there are further enhancements.

➤ **Obstruction of Justice**

There is a two level enhancement which is applied if you obstruct justice during the investigation, prosecution, or sentencing process in the instant offense. For example, a false, material statement in support of a motion to suppress evidence or as a witness at trial can result in a 2 point upward adjustment in guideline level. Under the Guidelines **it is better to be quiet than lie.** Don't lie to the judge or the Probation interviewers. Don't lie to the Pre-Trial interviewer. If in doubt, consult with your lawyer before continuing the conversation.

➤ **Reckless Endangerment During Flight**

If while fleeing from a law enforcement officer you recklessly create a substantial risk of death or serious bodily injury to another person the offense level will increase two points. So, if you were driving at 80 mph on the shoulder of a busy highway, you added to your problems. The person who is put in danger has to be somebody other than yourself or your crime partner (if your crime partner willingly participated in your flight).

➤ **Other Enhancements**

The guidelines state that no other enhancements, except those described above, can be made for the defendant's role in the offense.

➤ **Acceptance of Responsibility**

If you demonstrate to the judge that you recognize and accept personal responsibility for your criminal conduct, you are entitled to a reduction of two levels in your offense level. It does not matter whether you pled guilty, or go to trial and are found guilty, to be eligible for this reduction, so long as you clearly demonstrate your acceptance of responsibility. It is very difficult to do this after putting the government to its proofs at trial.

If your base offense level is 16 or higher before any reduction for acceptance of responsibility then you may also qualify for an additional reduction of 1 point, making a total reduction of 3 levels. To get this additional reduction, you have to demonstrate your acceptance of responsibility early in your case and convince the prosecutor to agree.

## **XI. CRIMINAL HISTORY CATEGORY**

Your criminal history category depends on your prior criminal convictions and sentences. The first thing your lawyer must do to calculate your category is to make a list of all of your prior convictions, including the sentence you received on each one, the date(s) when you were released from each prison term, and when you were discharged from your most recent parole or probation. This is not always easy. Your memory may be inaccurate. You need your FBI rap sheet, arrest history printouts and all State Court case histories.

Once you have assembled a complete list of your priors, you calculate your criminal history points according to the guidelines. Your lawyer must carefully do the calculations. You can ask the prosecutors for their calculations, to see if there is agreement.

### **➤ Juvenile Priors**

Sentences which were imposed for an offense committed prior to your 18th birthday count only under certain circumstances. Consult with your lawyer if you think this section may apply to you.

### **➤ Selection the Jail**

The Federal Bureau of Prisons determines where you serve your sentence. The judge can make a recommendation to a prison near your family, if you ask. The Bureau of Prisons does not have to agree, but usually responds favorably to a reasonable request.

### **➤ Self- Surrender**

If you are released on bail prior to trial, you should ask to be allowed to self-surrender after you are sentenced. If the judge agrees, then you will be ordered to report to your initial designated prison on a certain date, and you will be responsible for getting there yourself.

There are substantial advantages to self-surrendering. You should get a low security classification within the system. If you have important legal papers or other materials that you want to have with you in prison, have someone mail them to you after your arrival at your destination.

### **➤ Appeals**

An appeal is a request to a higher court to review possible errors made at the trial or on deciding motions and the sentence. If you are convicted after trial you can appeal the verdict and the

judge's decisions before and during trial and the sentence. If you plead guilty, the terms of the agreement will have an impact on what issues you can appeal.

Your appeal will be decided by a panel of three judges appointed to decide appeals in the U.S. Court of Appeals. You have the right to a court appointed appellate lawyer if you can not afford to hire one yourself. The lawyer will argue the appeal without your being present, but he will consult with you on the brief and you may be able to supplement his arguments.

Most appeals are not successful. If your plea agreement gives up the right to appeal when the sentence is within a certain range of months and the sentence is within that range, the court will not quickly ignore what you agreed upon. If the sentencing judge in a plea agreement case refused to depart downward, and you appeal, usually the only way to win is if you persuade the appeals court that the sentencing judge did not understand he had the power to downwardly depart and that you had a strong argument in favor of the departure. Even then, the case is given back to the judge, who will then decide whether to depart or not.

If you were convicted after trial and claim the evidence was insufficient to support the conviction, the appellate court decisions strongly favor keeping the conviction.

Appeals are challenging work for lawyers. It is crucial for you to carefully select your lawyer. If you can't afford a lawyer, the court selects the lawyer for you.

➤ **Conviction or Sentence Affirmed**

If the appellate court finds no error in the trial court's decision, your sentence or conviction is affirmed, and you have lost your appeal. Most cases are affirmed. You have a limited right to ask the United States Supreme Court to review your case. Nearly all such requests are denied.

➤ **Reversal**

**If the appellate court finds that the lower court made a substantial error, the decision of the trial court may be reversed.** All or some of the charges may be dismissed. You may receive a new trial. In some cases the conviction is affirmed, but the case is sent back for a re-sentence, or for the judge to explain the reasons for a particular sentence.

## **XII. IMMIGRATION CONSEQUENCES OF CONVICTION**

**If you are not a U.S. citizen, there are serious consequences to a conviction.** The consequences are usually powerful and painful. You may be deported after you finish your sentence. You may even have no chance to stop it. It is crucial to discuss the possibilities with your lawyer. If you are not a U.S. citizen, once you are arrested you have the right to contact your consulate.

If you are asked by anyone to sign any document in a language you do not fully understand, demand a translation and consult your lawyer before signing anything.

The Federal Bureau of Prisons will be your landlord if you are in jail. You will be housed in a federal detention center or local jail which has a contract with the FBP. You should be given a printed set of rules and regulations for each facility you are in when you arrive. If you do not receive one, respectfully ask your facility officer to provide you with one.

U.S. immigration law divides all the people in the world into two categories, citizens of the U.S. and aliens. Anyone who is not a U.S. citizen is an alien. All aliens are subject to removal from the U.S. All U.S. citizens are exempt from removal.

Any alien can be removed (deported or excluded, not allowed back into the USA) if one of the statutory grounds of deportation or inadmissibility applies. There is no definite protection from removal except U.S. citizenship.

The U.S. Immigration Service (Homeland Security) inspects and admits aliens to the U.S. in a specific status, either immigrant (permanent) or non-immigrant (temporary, with employment and other activities restricted).

Once an alien with an immigrant visa is inspected and admitted by Homeland Security as an immigrant to the United States, he or she has permanent resident status. Removal from the U.S. on grounds of inadmissibility or being subject to deportation terminates an alien's permanent resident status.

➤ **Crimes Which Subject You to Removal: Drugs, Guns, Crimes of Moral Turpitude, Aggravated Felonies**

The following are the basic criminal grounds of inadmissibility and deportability that subject an alien to removal from the United States, and Permanent Resident Status (Green Card) does not protect you.

**1) Drug Crimes**

- Any drug conviction, except one time possession of thirty grams or less of marijuana, makes any alien deportable. Any conviction of a drug crime makes an alien inadmissible. [You can't get back into the U.S.A., even if you were not deported.
- The Immigration Court will rule that any drug conviction except one (1) simple possession of any controlled substance is the equivalent of a federal drug felony and therefore is an "aggravated felony" which makes you deportable with no relief available.

**2) Crimes Involving Moral Turpitude**

- Every alien is **inadmissible** [they won't let you back into the U.S.A.] if he has a conviction of a crime involving moral turpitude (such as theft, murder, fraud, assault with deadly weapon) that is not within the single crime petty offense, or the single crime "under 18 years old" offense exceptions.
- Every alien is **deportable** for a conviction of a crime involving moral turpitude (such as theft, murder, fraud, assault with deadly weapon) within five years after entering the U.S. who could have been sentenced or confined in prison for one year or longer. You don't need to have been sentenced to jail.
- Every alien is **deportable** for conviction of two crimes involving moral turpitude at any time after entering the United States.
- Immigration law is a separate specialty in the practice of law. Make sure your criminal lawyer understands the immigration consequences of a conviction, before you decide what to do with your case.

### **XIII. CONCLUSION**

If you are accused of a Federal Crime, you are confronting a most powerful adversary in court, **The United States of America**. The U.S. Criminal Justice System is based upon published rules, laws, guidelines and case decisions that interpret just what they all mean, and how they can be used in your particular case. At times it can appear to be a confusing maze of roadblocks, or roadways to detrimental outcomes.

It is crucial for you to understand your rights, and the procedures in this very complex system. For the most favorable outcome to your case, you need to make the correct decisions each step of the way. This is where your lawyer is most crucial. Use your lawyer's knowledge and experience, and dedication to your case and your cause to help you decide how to best help yourself during this most serious and difficult period of your life. Even if you have not yet been arrested or accused of a crime it may be advisable to contact a knowledgeable lawyer to learn your rights and understand your situation.

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