

***PART***

***ONE***

# Introduction

If you are reading this book, you are probably already facing criminal charges in the federal courts. You, or someone you know, have reason to fear federal prosecution. This is probably your first experience with the federal criminal court system. Although you may have been sentenced in the federal courts in the past, this may be your first such experience since the federal sentencing guidelines went into effect, and for all practical purposes you are a novice, just as if you were a first time offender.

If this is the second or subsequent time you have been prosecuted under the guidelines, you will probably feel like a novice after you read this book. You will realize what you did wrong in the past, and you will understand why your last case turned out the way it did.

Whether or not you have previous experience with the guidelines, in the following chapters you will find the type of information that only comes with experience. If you pay close attention and study this book well, you will greatly improve your chances of getting through this experience with the shortest possible sentence and with a minimum of damage to your life. Here you will learn how to choose a lawyer, *and what you can reasonably expect from the attorney whom you hire or have appointed to your case. You will also learn how to protect yourself against the most common errors made by defendants under pressure from their own attorneys.* You will learn the basics of plea bargaining in the federal system, and how to tell if a plea offer is truly a good deal.

You will also learn about many other subjects of great importance to you and to your future, including many things that would otherwise probably never occur to you until it was too late to protect yourself. This book has been written with the intention of helping federal criminal defendants from the moment of their arrest through their sentencing and transfer to prison. Ideally, every federal defendant should read this book the day *before* he or she is arrested, but as that is an unrealistic goal, the sooner after arrest a defendant reads this the more helpful it will be.

On November 1, 1987, the present system of sentencing went into effect in all federal criminal cases. Instead of the old system, where the judges determined a prisoner's sentence pretty much as they pleased, within the statutory limits, the new system provides a set of sentencing guidelines that the judges are required to follow. Congress adopted this method in order to bring an end to the wide discrepancies that used to exist between the sentencing practices of the district court judges. Today, in theory, if not in practice, anyone convicted of a particular federal crime should receive the same sentence as anyone else with an identical prior record who commits the same crime, no matter where in the United States he is sentenced or who the judge is who sentences him.

Although judges are allowed to go above or below the guidelines in special cases, there are strict requirements that must be met before they can do so. As a result, almost all federal court defendants are sentenced according to the guidelines, including defendants who plead guilty pursuant to a plea bargain.

Nevertheless, there are still wide disparities in the sentences given to similar defendants for similar crimes. These disparities are almost always the result of one of two causes: (1) the defense attorney is not familiar with the guidelines or has not taken the time to study them as they apply to

the specific case, or (2) the U.S. Attorney has asked the court to sentence a defendant to less than the normal term, usually in return for cooperation.

This book is intended to give you an understanding of sentencing practices in the federal courts as they exist today, as well as other valuable information that will be very useful to defendants in federal cases.

**Part I** of this book describes how the federal guideline system works and how lawyers, prosecutors, and the police all twist it to their advantage. **Part I** also contains the specific guideline information needed for a drug case, including aggravating and mitigating factors. If you are concerned with a federal case involving marijuana, cocaine, heroin, methamphetamine, or any other drugs or chemicals used to manufacture drugs, you should find everything you need in **Part I**. **Part I** also explains the process that most defendants go through, and the tricks and lies that defendants are exposed to. *Every* defendant should read **Part I**.

**Part II** of this book contains additional information of general interest to federal defendants. You should look at the Table of Contents for **Part II** and determine which chapters might interest you. Some of the material in **Part II** will be important to almost all defendants; other material in **Part II** will only interest a few.

**Part III** contains all of the guidelines for other federal crimes: those that aren't drug offenses. Many have been combined into tables according to the major categories of crime in order to make them easier for the average person to understand. Although the tables do vary somewhat, in general all that is necessary to find a specific guideline is to go to the appropriate table; find the specific crime (or category of crime) that you are looking for; start with the base level for that crime, and follow the row across the table to add or subtract levels for each aggravating or mitigating factor that applies to the specific case on which you are working.

**Part IV** contains several true stories from cases I have worked on. I include them as examples of what is actually occurring in the federal law enforcement world today.

If you are going to go to trial in your case, or for some other reason you need more detailed information about the guidelines, you should refer to the Federal Sentencing Guideline Manual for detailed information on the offense levels and other factors applicable to your crime. The Guideline Manual contains commentary on most of the offenses and their mitigating and aggravating factors, which helps to clarify the fine points in marginal circumstances. If your case is a particularly notorious case, or for some other reason you believe that the government is going to try to "throw the book at you," then you might also find it useful to read the Guideline Manual for more detailed information. If you do, you will often find that things that the government (or your own lawyer) is threatening you with, simply aren't permitted under the guidelines.

In the overwhelming majority of cases, you will find all the information you need to calculate your own guidelines and to protect your own rights and freedom, right here in this book. Of course, if you want the whole thing, complete with all the commentary and historical information on the guidelines, such as the dates of changes or amendments to specific guidelines, then you should refer to the Manual itself. But for almost all readers of this book, everything you need to calculate your own sentencing guidelines is included in this book.

## Basic Procedure

A federal sentence today is determined by finding the Offense Level that applies to the defendant's crime, and by determining the defendant's Criminal History Category. The offense level is usually referred to as a "level," and the criminal history is referred to as "points." It is useful to keep this distinction in mind to avoid confusion when discussing the guidelines. Offense information is calculated in "levels," and criminal history is calculated in "points." Many lawyers and inmates tend to refer to offense "levels" as "points" when they are discussing a case. This can be confusing to someone who is not familiar with the guidelines and is best avoided. I repeat: offense information is calculated in *levels* and criminal history in *points*.

Once you have identified the offense level and criminal history category applicable to your case, you refer to the Sentencing Table to get the actual range of sentences the judge can choose from. Each sentencing range, which is given in months, is referred to as the "Sentencing Guideline" which the judge must follow when he sentences you. At sentencing the judge can give you a sentence anywhere within the guideline range without having to justify his decision. If he wants to sentence you below or above the guidelines, he has to give specific reasons on the record to justify doing so.

The judge is also limited by law as to what reasons he can use to go outside the guidelines, so it is not a simple thing for him to do. The general rule is that there has to be something special about your case before going outside of your guidelines can be justified. For instance, if you are convicted of assault with intent to kill, and your intended victim was the Chief Justice of the Supreme Court, going above the guidelines would be permitted. Or if you are convicted of distributing a small amount of cocaine, and the circumstances of the crime make it apparent that you did it only because someone else was holding your mother hostage and threatening her life if you didn't do as he said, the judge could use that to justify sentencing you below the guidelines. Your attorney will normally be able to tell you in advance if you face a real chance of sentencing outside of the guidelines, so it is not something you need to worry about unduly.

# Your Indictment and Statutory Sentence Ranges

When Congress passes a law that makes an act a federal crime, it also sets the penalty for that crime. In most cases and almost always for drug crimes, this “statutory” penalty consists of a range of years, with a minimum and maximum, from which the judge can choose when he imposes sentence.

For drug crimes, the most common statutory sentencing ranges are 0 to 20 years, 5 to 40, and 20 to life. The lower number in each range is the “statutory minimum,” or the smallest sentence that the judge can impose. The higher number in each range is the “statutory maximum,” or the greatest sentence that the judge can impose. *These statutory limits outweigh the sentencing guidelines.* This means that if your guideline falls outside of the limits, the judge has to sentence you to a term as close to the guidelines as possible but still *within* the statutory limits.

Sometimes there are also special circumstances that will allow a judge to sentence you to less than the statutory minimum. These circumstances usually involve cooperation with the government, and they are discussed more fully in the chapters titled **5K1.1 Letters** and **The Safety Valve**.

The practical effect of the statutory minimums is very important. If you are convicted of a crime with statutory penalties of 5 to 40 years, but your guidelines are only 48 months, the judge will still have to sentence you to the 5-year mandatory (statutory) minimum. This works the same way with maximum sentences: if your guidelines are 292 to 365 months, but the crime carries a maximum of only 20 years, then the judge cannot sentence you to more than 20 years. It is relatively rare that the statutory maximum will limit a sentence, but it is quite common for the statutory minimum to require a sentence higher than the guidelines.

The statutory limits for your offense(s) set the outer bounds for the time you can possibly serve if convicted. To know these limits you must start by looking at your indictment and at every count therein for which you are being charged. For example, here is part of an actual indictment for a drug offense:

## COUNT ONE

1. On or about February 10, 1999, in the Southern District of New York, Carlos D., the defendant, and others known and unknown, unlawfully, intentionally and knowingly did combine, conspire, confederate and agree together and with each other to violate the narcotics laws of the United States.
2. It was a part and an object of such conspiracy that Carlos D., the defendant, and others known and unknown, would and did possess with intent to distribute 5 kilograms and more of a mixture and substance containing cocaine in violation of Sections 812, 841 (a) (1) and 841 (b) (1) (A) of Title 21, United States Code.

The key information is in paragraph 2: “5 kilograms and more of a mixture and substance containing cocaine in violation of Sections 812, 841 (a) (1) and 841 (b) (1) (A) of Title 21, United States Code.” This information determines the statutory limits. To see how it works, you simply need a copy of Sections 812, 841 (a) (1) and 841 (b) (1) (A) of Title 21, United States Code. If you were the defendant in the above case, that is the first information you would want from your

attorney. You would *insist* on it as soon as possible, and not allow for excuses or delays. In a federal crime the indictment is always available within a few days of your arrest; often it exists even before you are arrested, so there is rarely any excuse for your attorney not to promptly give you the indictment and the corresponding information from the U.S. Code.

In the above indictment, upon reading the relevant parts of the U.S. Code, you would discover that Section 812 is a long, detailed list of the controlled substances in the United States, and – sure enough – cocaine is one of them. Thus, Section 812 establishes that the defendant trafficked in a controlled substance. More important are Sections 841 (a) (1) and 841 (b) (1) (A):

### **Section 841. Prohibited Acts**

#### **Unlawful acts**

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

#### **Penalties**

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ...such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.

If you read the above carefully, you will see that because the weight of cocaine in the indictment is more than 5 kilograms the statutory limits are: 10 years to life (20 years to life if also “death or serious bodily injury results from the use of such substance”); 20 years to life if the defendant has one prior conviction for a felony drug offense (mandatory life if also “death or serious bodily injury results from the use of such substance”); and mandatory life if the defendant has two or more prior convictions for a felony drug offenses. These are the statutory limits for Count One of the indictment.

This same procedure goes for any federal offense: note the counts in the indictment and the corresponding Sections of the U.S. Code for each count and then calculate the statutory limits from reading those Sections of the U.S. Code.

Your indictment is also important because the Sections of the U.S. Code determine which Parts of the Guidelines apply to each count charged. If you go to **Appendix A** on page 420 of this book you will see that every Section of the U.S. Code has a corresponding Part (and Section) of the Guidelines that apply. In addition, some enhancements (and some reductions) to the base offense level in the Guidelines are specific to the Section of the U.S. Code that the defendant is being accused of violating. In other words, not only does the indictment contain information needed to know the statutory limits of the offense(s) you are being charged with, it also contains information that determines which parts of the Guidelines (contained in **Part I** and **Part III** of this book) apply in your case. The indictment is the first truly important document in your case. You should insist on obtaining it promptly and obtaining copies of the relevant parts of the U.S. Code that spell out the statutory limits in your case. Also, if there was a complaint filed in your case before the indictment or instead of an indictment, make sure you have a copy of it for the same reasons.

As a practical matter, your attorney will probably give you a copy of your indictment at your formal arraignment hearing, or the next time he meets with you. But not all attorneys will want to give you a copy of the federal statutes you are charged with violating. If you have a drug case and your attorney doesn't give you a copy of the statutes, you will find the information in the next several pages of this book. And it will be easier to understand here. If you don't have a drug case, the chances are you also do not have a mandatory minimum; but, if your lawyer or the prosecutor or judge has said something that indicates you do, then you should press your attorney hard to get you a copy of the relevant statute. You should also pay close attention to the chapter in **Part III** of this book that contains the guidelines for your case, and you may find the mandatory minimum that applies to you mentioned there.

See the following chapter for the statutory penalties for the most important federal drug statutes.



**Additional statutory penalties for a conviction under 21 U.S.C. §§ 841 or 846**

1. For a violation of any of the above *and also* knowingly or intentionally using a poison, chemical, or other hazardous substance on Federal land, and, by such use (A) creating a serious hazard to humans, wildlife, or domestic animals, (B) degrading or harming the environment or natural resources, or (C) polluting an aquifer, spring, stream, river, or body of water, the term of imprisonment is 0-5 years.

2. For a violation of any of the above *and also* with intent to commit a crime of violence (including rape), against an individual, distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, the term of imprisonment is 0-20 years.

**3. Offenses involving listed chemicals**

Any person who knowingly or intentionally

(1) possesses a listed chemical with intent to manufacture a controlled substance; or

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be imprisoned for 0-20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical; or 0-10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) [*i.e.*, paragraph 3] involving a list I chemical, or both.

**4. Wrongful distribution or possession of listed chemicals (without knowledge of, or intent to manufacture)**

(1) 0-5 years

(2) For whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation a term of imprisonment for 0-1 year.

**5. Boobytraps on Federal property; penalties**

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for 0-10 years.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment for 0-20 years.

**6. Internet sales of date rape drugs: 0-20 years**

**Footnotes:**

1. Including gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000);

2. Other than gamma hydroxybutyric acid; including 30 milligrams or less of flunitrazepam.

3. Except in the case of 50 or more marijuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil.

4. If a term of imprisonment is imposed.

5. 4 years if a schedule III substance violation.

6. 1 year if a schedule IV substance violation.

7. 2 years if a schedule IV substance violation.

**Instructions:**

To find the applicable penalty, locate the vertical column that corresponds to the drug and quantity involved in the crime charged, and locate the group of penalties under the applicable criminal history in the horizontal lines. An "X" is marked where each penalty applies to each drug and quantity in normal cases. A "D" is marked where each penalty applies to each crime if death or serious bodily injury occurred from use of the drugs involved in the count charged.

**Note:** All weights are for a mixture containing a detectable amount of the controlled substance except for methamphetamine. The weight of meth in the table is for pure meth. For a mixture of a substance containing meth, multiply the weights in the table by a factor of ten. For an analogue of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide, divide the weights by a factor of four.

**Important Note:** See the chapter **The Importance of an Allegation of Prior Felony Convictions** on page 12 to understand how the prosecutor controls the use of prior drug convictions.

## Table of Statutory Penalties for Drug Crimes II

**For a conviction under 21 U.S.C. §§ 960 or 963** (See footnotes and instructions for this table on following page)

Schedule V controlled substances	Schedule IV controlled substances	Schedule III controlled substances <sup>2</sup>	Other schedule I and II controlled substances <sup>1</sup>	N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]propanamide	LSD		PCP		Heroin		Cocaine or Ecgonine		Meth		Marijuana		SENTENCE RANGE		Minimum term of Supervised Release in years				
					400 gms or more	40 gms – 399.99 gms	Under 40 gms	10 gms or more	1 gm – 9.99 gms	Under 1 gm	100 gms or more	10 gms – 99.99 gms	Under 10 gms	1 kg or more	100 gms – 999.99 gms	Under 100 gms	5 kgs or more	500 gms – 4.99 kgs		Under 500 gms	50 gms or more	5 gms – 49.99 gms	Under 5 gms
																		<b>No priors</b>					
X																		0 to 1 year	none				
	X																	0 to 5 years	2 <sup>4, 6</sup>				
		X																0 to 10 years	2				
		D																0 to 15 years	2				
			X			X			X			X			X		0 to 20 years	3 <sup>4</sup>					
				X			X			X			X			X	5 to 40 years	4					
				X			X			X			X			X	10 to life	5					
			D	D	D	D	D	D	D	D	D	D	D	D	D	D	20 to life	5					
																		<b>1 or more priors</b>					
X																		0 to 4 years	0-1				
	X																	0 to 10 years	4 <sup>4, 7</sup>				
		X																0 to 20 years	4				
		D	X			X			X			X			X		0 to 30 years	6 <sup>5</sup>					
				X			X			X			X			X	10 to life	8					
				X			X			X			X			X	20 to life	10					
			D	D	D	D	D	D	D	D	D	D	D	D	D	D	mandatory life						

**Additional statutory penalties for a conviction under 21 U.S.C. §§ 960 or 963**

A person who knowingly or intentionally –

- (1) imports or exports a listed chemical with intent to manufacture a controlled substance in violation of this subchapter or subchapter I of this chapter;
  - (2) exports a listed chemical in violation of the laws of the country to which the chemical is exported or serves as a broker or trader for an international transaction involving a listed chemical, if the transaction is in violation of the laws of the country to which the chemical is exported;
  - (3) imports or exports a listed chemical knowing, or having reasonable cause to believe, that the chemical will be used to manufacture a controlled substance in violation of this subchapter or subchapter I of this chapter;
  - (4) exports a listed chemical, or serves as a broker or trader for an international transaction involving a listed chemical, knowing, or having reasonable cause to believe, that the chemical will be used to manufacture a controlled substance in violation of the laws of the country to which the chemical is exported;
  - (5) imports or exports a listed chemical, with the intent to evade the reporting or recordkeeping requirements of section 971 of this title applicable to such importation or exportation by falsely representing to the Attorney General that the importation or exportation qualifies for a waiver of the 15-day notification requirement granted pursuant to paragraph (2) or (3) of section 971 (f) of this title by misrepresenting the actual country of final destination of the listed chemical or the actual listed chemical being imported or exported;
  - (6) imports a listed chemical in violation of section 952 of this title, imports or exports such a chemical in violation of section 957 or 971 of this title, or transfers such a chemical in violation of section 971 (d) of this title; or
  - (7) manufactures, possesses with intent to distribute, or distributes a listed chemical in violation of section 959 of this title.
- shall be fined in accordance with title 18, imprisoned not more than 20 years in the case of a violation of paragraph (1) or (3) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (3) involving a list I chemical, or both.

**Footnotes:**

1. Including gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000); including 1 gram of flunitrazepam.
2. Except a violation involving flunitrazepam and excepting a violation involving gamma hydroxybutyric acid.
3. Except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil.
4. If a term of imprisonment is imposed.
5. 4 years if a schedule III substance violation.
6. 1 year if a schedule IV substance violation.
7. 2 years if a schedule IV substance violation.

**Instructions:**

To find the applicable penalty, locate the vertical column that corresponds to the drug and quantity involved in the crime charged, and locate the group of penalties under the applicable criminal history in the horizontal lines. An “X” is marked where each penalty applies to each drug and quantity in normal cases. A “D” is marked where each penalty applies to each crime if death or serious bodily injury occurred from use of the drugs involved in the count charged.

**Note:** All weights are for a mixture containing a detectable amount of the controlled substance except for methamphetamine. The weight of meth in the table is for pure meth. For a mixture of a substance containing meth, multiply the weights in the table by a factor of ten. For an analogue of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide, divide the weights by a factor of four.

**Important Note:** See the following chapter **The Importance of an Allegation of Prior Felony Convictions** to understand how the prosecutor controls the use of prior drug convictions.

## The Importance of an Allegation of Prior Felony Convictions

I have already mentioned that your final sentencing range (your sentencing guidelines) is determined by the offense level of your crime combined with your criminal history category. Further on in this book (see pages 58-71) there is a chapter explaining the rules for calculating your criminal history category. You might assume that these rules are the exact same rules used for calculating the statutory sentencing range of your offense. However, this is not so. Your criminal history category is calculated by your PSI (Presentence Investigation Report) writer. He uses information from NCIC (National Crime Information Center) computer records, *and he must use all the information in the computer records*. However, when the PSI writer considers prior drug convictions and how they affect the statutory range of your offense, he can only use those prior drug convictions for which the prosecutor has filed a “prior felony information.” In other words, the use of prior drug convictions for purposes of the statutory sentencing range *is controlled exclusively by the prosecutor*.

If your present case is a drug case, and if you have one or more prior drug convictions, then it is very important that you understand exactly how the prosecutor may, or may not, use his discretion to file such an information and alter the statutory range. He routinely uses this power as a plea bargaining tool, and if you have a prior there is a very good chance he will use it in your case. I’m going to illustrate this by briefly recounting two cases I worked on.

Juan Carlos was arrested for conspiring to import 37 kilograms of marijuana. Juan had two prior drug convictions. The government’s case was not strong, and the prosecutor offered Juan’s attorney a deal in which he would let Juan plead out without filing the prior felony information for the two prior convictions. The prosecutor also told Juan’s attorney that if Juan did not plead out, then he would file the prior felony information and he would also have the Grand Jury raise the amount of marijuana in the conspiracy to above 100 kilograms (there was some evidence in the case that supported the amount of the marijuana being above 100 kilograms). Juan’s attorney told Juan what the prosecutor had offered, and what he had threatened, but he never explained to Juan what the sentencing consequences were if Juan did not take the plea and went to trial and lost.

This is what the attorney should have told Juan: If Juan took the deal, then the amount of marijuana would be less than 50 kg, and Juan would have no prior convictions, and the statutory range would be 0 to 5 years. If Juan went to trial and lost, the amount of marijuana would be above 100 kg, and he would have two prior convictions, and the statutory range would be 10 years to life. In either case Juan’s criminal history category would be category six. The sentencing range if Juan took the deal would be 41 to 51 months; if he went to trial and lost, the sentencing range would be 360 months to life. (To understand how the final offense levels are calculated in this case, read the chapter **Career Offenders** on page 64.)

Juan went to trial(!) and lost. He received a sentence of 360 months.

If Juan had read this chapter of *Busted By The Feds* and the chapter **Career Offenders**, he would have understood that his choice of going to trial was close to a suicidal gamble. He would have taken the deal. Juan’s case is presently before the courts on appeal. Juan’s claim is that he received ineffective assistance of counsel when his attorney failed to inform him of the sentencing consequences of the plea offer compared to going to trial. The magistrate judge has granted Juan a

hearing on his claim, and there is a decent chance he will win his appeal and that his sentence will be corrected to the time in the deal the prosecutor originally offered; but there is no guarantee that Juan will win. Juan has already done five years in prison with a thirty-year sentence hanging over his head. Now he is sweating it out in the court of appeals – all because he had an attorney who did not take the time to explain the basics in regards to how his sentence would be affected if the prosecutor filed a prior felony information.

Eric's case has not yet been resolved with a plea or a trial. Eric was arrested by a highway patrolman who found one kilogram of cocaine hidden in the door panel of his car. Eric has two prior drug convictions. The government's case at a trial will be strong, but Eric has a Fourth Amendment defense based on the police search of his car because that search was probably illegal. Eric is challenging the search, and the patrolman keeps changing his version of events in order to answer each good argument Eric's lawyer presents.

The prosecutor is offering Eric's attorney a deal in which he will let Eric plea out before the prosecutor files the prior felony information for the two prior convictions, and he will agree to a ten-year sentence. The prosecutor has also told Eric's attorney that if Eric does not plea out, then he will file the prior felony information. Eric's attorney has told Eric what the prosecutor is offering if Eric will plead guilty, and what he's threatening if Eric refuses the deal. He has also explained to Eric what the sentencing consequences are if Eric does not take the plea and goes to trial and loses. (Eric faces the same possibility as Juan did if he loses at trial: a sentence of 360 months to life.)

Eric now has a difficult decision to make. He knows that if he goes to trial he will probably be found guilty because the cocaine was found in his car. (There was someone else in the car at the time of the arrest, who admitted to a girlfriend that the cocaine was his, but that girlfriend has since died; so it would be very difficult for Eric to prove that the cocaine belonged to the other man.) Eric also knows that he would have a fair chance to win an appeal because the State Trooper has changed his story about the circumstances of the search so many times. Eric has to decide: should he plead guilty to the charge and take the ten-year sentence? Or, should he go to trial, knowing he will probably lose and then get at least 30 years, in order to preserve his right to appeal the search-and-seizure issue?

When Eric's family contacted me, I pointed out the fairest resolution of the case: Eric could ask to take the deal with one change – make the deal a conditional plea agreement. A conditional plea agreement is where Eric pleads guilty but is allowed to preserve the search and seizure issue for appeal. The government would get its conviction without the expense and risk of a trial, and Eric would get the ten-year sentence that the prosecutor has offered, with the appellate court reviewing the legality of the search and seizure. Eric's lawyer is now asking for that conditional plea agreement.

But in the real world of federal criminal cases the government is not likely to agree to the request. After all, the prosecutor knows that he could prove his case fairly easily; so there really isn't much risk for the government if it takes the case to trial. The witnesses are all local; so the trial would be short and not expensive. These are factors the prosecutor is not so concerned about. What he is concerned about is the risk to the government on appeal.

The U.S. Attorney knows that his witness has been changing his story and is probably lying in order to save the case. The U.S. Attorney may have even told the trooper what to say and how to change his story, in order to make the prosecutor's job easier. As a result, the U.S. Attorney realizes

that there is a realistic chance that the search would be held to be illegal by the Court of Appeals, and that is a chance that the government doesn't want to take. So a big part of the government's motive in Eric's plea offer is to avoid the risk of reversal and the risk of exposing the trooper's lies, *by preventing Eric from appealing*. This is the reason the government is unlikely to agree to allow Eric to preserve his right to appeal in a conditional plea agreement.

What will Eric do? We don't know yet. It's a very tough decision.

This is the kind of problem that happens to federal defendants every day when prosecutors use their power to control the filing of allegations of prior convictions against defendants. If you have prior convictions, it could easily happen to you. It is also the reason you should understand the difference in the ways your priors will be considered when determining your criminal history under the guidelines, and your statutory sentencing range based on your criminal history.

If the prosecutor is offering you a deal in which he will not file the prior felony information, you should take a hard look at that deal. Almost invariably it represents a huge difference in time served in comparison with going to trial and losing. Of course, your case may be one in which the prosecutor will file a prior felony information whether you plea out or not. In that case, the benefits of the plea will be much less, and you may wish to go to trial.

I have a final point to make: Frequently prosecutors realize that they have a defendant with a long criminal history and lots of priors, but that their current case doesn't have a leg to stand on and probably wouldn't win at trial. Sometimes they even realize that their case is so weak that they can't take it to trial; they would dismiss the charges first rather than lose at trial. When this situation occurs U.S. Attorneys are also quick to use their power to control the filing of prior allegations. They will offer not to file allegations of the priors as an inducement to get the defendant to plead guilty. They know that many defendants would rather plead guilty for a sentence of five years, even if they are innocent, than risk mandatory minimums of 20 or 30 years by going to trial. To someone who has already served time in prison, and who knows how heavily the cards are stacked in favor of the government, that five-year sentence can look awfully good. (Dump-truck defense attorneys know this too.) This scenario is one reason that there is a much higher percentage of innocent prisoners in the federal system today than there was twenty or thirty years ago. Many of those innocent prisoners would not be where they are today if they had had defense attorneys who took the time to investigate and see through the government's false charges, and had had the courage to call the government's bluff.

So, just as you should take very seriously the government's threat to file an allegation of priors if you are guilty, or if the government has a strong case against you, you should also give less weight to that threat if you know you are innocent and that the government's case against you is very weak. The threat to file the allegation of priors may be nothing more than the prosecutor's last-ditch effort to save a hopeless case against you. In this kind of situation it is very important that your defense attorney studies the discovery carefully and does good basic investigation. Only then will you be able to make an informed decision whether or not to accept the plea offer.