



What To Do When The Feds Come Knocking At Your Client's Door

Marlo P. Cadeddu

Law Office of Marlo P. Cadeddu, P.C.

2911 Turtle Creek Blvd, Suite 300 - #390

Dallas, TX 75219

214.220.9000

mc@marlocadeddu.com

Progression of a Federal Criminal Case

Pre-indictment investigation ✓

Case filed/detention determination ✓

Pretrial discovery ✓

Motions practice

Trial

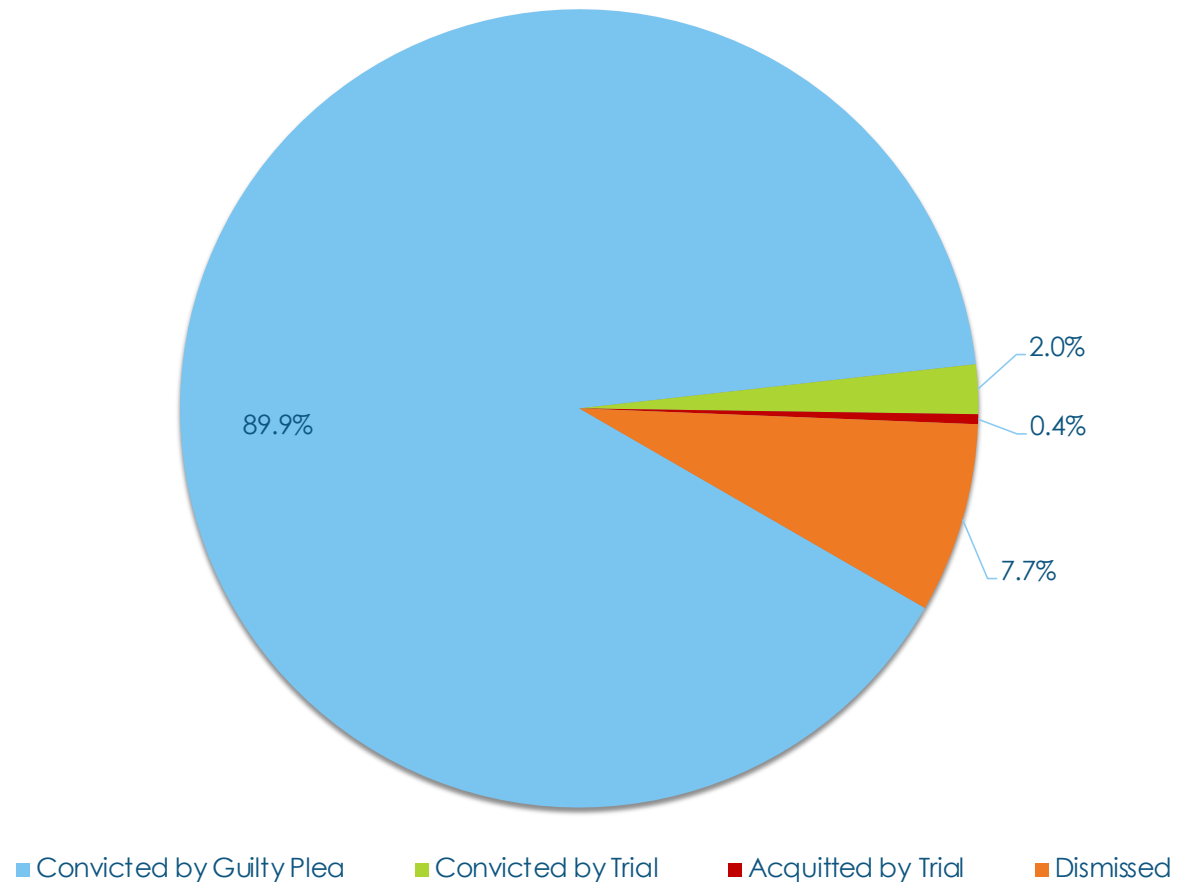
Plea negotiations and sentencing ✓

Sentencing is the Foundation



Federal Criminal Trial Statistics

Disposition of Cases FY 2018 (Most Serious Charge)



USSG - Relevant Conduct

A Trap for the Unwary

Δ is accountable for anything that s/he does:

- In preparation for the offense
- During the offense
- To avoid detection

In jointly undertaken criminal activity even if not charged as conspiracy, Δ accountable for all conduct of others:

- Within the scope of the jointly undertaken criminal activity
- In furtherance of criminal activity
- Reasonably foreseeable

Δ may be accountable for conduct outside count of conviction

- Same course of conduct or common scheme or plan
- In certain type of cases (e.g. drugs, fraud)

Implications of Relevant Conduct

- ▶ Relevant sentencing facts effectively determined by US Probation Officer
- ▶ Sentence driven more by relevant conduct than by facts alleged in charging instrument
- ▶ Charge-bargaining after indictment has limited impact on sentencing outcomes
 - ▶ Except when statutory maximum limits exposure

Sample Factual Scenario

- ▶ Girlfriend of cocaine dealer – “Dawn”
- ▶ Not actively assisting BF in dealing
- ▶ Permits BF to store 4.9 KG of cocaine in her apartment
- ▶ Rides with BF in trail car following load of 2 KG of cocaine
- ▶ BF’s organization has distributed approximately 100 KG of cocaine during conspiracy
- ▶ Arrested in her apartment – BF’s handgun on the nightstand
- ▶ No priors

What is Dawn's Relevant Conduct?

- ▶ 4.9 KG of cocaine in her apartment?
- ▶ 6.9 KG of cocaine (total cocaine in apartment plus 2 KG from transport)?
- ▶ Only 2 KG from transport?
- ▶ 100 KG of cocaine from entire conspiracy?
- ▶ Did death or serious bodily injury result?
- ▶ Is she entitled to a role adjustment as a minimal or minor participant?
- ▶ Is she responsible for the gun?
- ▶ Is she entitled to the "safety valve" adjustment for first time drug offender? What about adjustment for intimate partner with limited knowledge?



Pre-Indictment Investigation

Action Plan

Determine

- Determine status of client (Witness, subject, target)

Evaluate

- Evaluate likely focus of prosecution

Request

- Request reverse proffer

Investigate

- Investigate case and evaluate potential defenses

Consider

- Consider pre-indictment cooperation/disposition
 - Obtain proffer letter with protections of USSG 1B1.8 and FRE 410
 - Cooperation may defer or prevent indictment or reduce seriousness of charges

Early Disposition Options

- ▶ Declined prosecution
- ▶ Pretrial diversion
- ▶ Misdemeanor plea
- ▶ “Management” of charges



Pre- Indictment Action Plan for Dawn

- ▶ Seek voluntary discovery related to Dawn's role
- ▶ Position Dawn as a witness, not target
- ▶ Consider cooperation
- ▶ Seek beneficial disposition:
 - ▶ Non-prosecution, diversion, misdemeanor
 - ▶ Rule 11(c)(1)(C) plea to an agreed sentence
 - ▶ Limit exposure by pleading to offense with lower statutory max
 - ▶ Rule 11(c)(1)(B) plea w/ recommendations regarding role in offense, relevant conduct drug amount, no responsibility for gun, entitlement to mitigating adjustments – NOT BINDING



Case Filed

Charging Document

Fed. R. Crim. Pro. 3 & 7

Usually by
indictment

- Grand Jury

Information

- Misdemeanor
- Waiver of indictment

Complaint

- Δ entitled to preliminary hearing
- May waive but good opportunity to get discovery

Initial Appearance /Arraignment Fed. R. Crim. Pro. 5

- ▶ Notice/explanation of charges
- ▶ Copy of charges provided
- ▶ Notice of rights
- ▶ Appointment of counsel, if eligible
- ▶ If seeking to detain, prosecution must request at initial appearance

Preliminary Hearing

Fed. R. Crim. Pro. 5.1

- ▶ If no indictment, hearing held at instance of Δ to determine probable cause
- ▶ Δ may cross-examine and call witnesses, but cannot move to suppress
- ▶ Illegally obtained evidence admissible

- Establish Dawn's minimal role as dealer's GF
- Establish Dawn's lack of knowledge of drug transport/storage of drugs in her apartment
- Establish lack of responsibility for gun

Detention

18 U.S.C. § 3142

- ▶ Presumption for release on PR or unsecured appearance bond
- ▶ Government has burden to show by clear and convincing evidence that release will not reasonably assure appearance or will endanger safety of others/community

Detention

- ▶ Rebuttable presumption that release cannot ensure safety of others/community when Δ has priors for:
 - ▶ violent crime, serious drug offense, capital or life crime or third time recidivist when priors are one of above;
 - ▶ Committed while on release pending trial; and
 - ▶ Was convicted or released from prison less than five years before instant offense

Detention

- ▶ Rebuttable presumption that release will not assure appearance of Δ or safety of others when:
 - ▶ Δ charged with 10 year minimum drug crime; or
 - ▶ Carrying or using firearm in commission of a felony

- If Dawn is charged with distribution of > 5KG of cocaine, presumption for detention
- If charged with carrying or use of gun, also presumption for detention

Detention

- ▶ Rules not applicable in detention hearing
 - ▶ Federal Rule of Evidence do not apply
 - ▶ Hearsay admissible
 - ▶ Δ may present evidence by proffer (including Δ testimony)



Pretrial Discovery

Δ's Entitlement to Pretrial Discovery

- ▶ No constitutional right to discovery except *Brady* material
- ▶ Rule 16 is primary discovery tool
- ▶ Government work-product is exception to discovery disclosure, except that may be superseded by *Brady*

Discovery Motions

- ▶ Certain requests “trigger” government’s duty to respond
 - ▶ Rule 16
 - ▶ Jencks Act (18 U.S.C. § 3500)/FRCP 26.2 Material
 - ▶ *Brady* Material
 - ▶ Notice of Rule 404(b)
- ▶ File discovery motions even when open file discovery offered

Rule 16 – Oral Statements of Defendant

- ▶ Upon Δ request, gov't must disclose:
 - ▶ Relevant oral statement of Δ to known agent before/after arrest and intended to be used at trial
 - ▶ Note **relevancy** and **knowledge** requirements
 - ▶ Intent to “use” by gov't, not necessarily introduce

Rule 16 – Written/Recorded Statements of Defendant

- ▶ Upon Δ request, gov't must disclose:
 - ▶ Relevant written/recorded statement of Δ that is in gov't custody/control
 - ▶ **Relevancy** requirement
 - ▶ Can include statements to local police officers/other agencies
 - ▶ Statements in other cases
 - ▶ Prison tapes
 - ▶ Any written record of substance of oral statement given by Δ in interrogation by known agent
 - ▶ Does not include oral statements to others in front of agent
 - ▶ Δ's grand jury testimony related to offense charged

Rule 16 – Prior Record & Documents

- ▶ Upon Δ request, gov't must:
 - ▶ Disclose Δ's prior record that is in gov't custody or control
 - ▶ Permit inspection/copying of documents/objects (includes data)
 - ▶ If material to defense;
 - ▶ Gov't intends to use in case-in-chief; or
 - ▶ Item belongs to Δ
 - ▶ Must be in possession of gov't or agency so closely aligned as to be part of prosecution team

Rule 16 – Exams or Tests, Expert Reports

- ▶ Upon Δ request, gov't must:
 - ▶ Permit inspection/copying of physical or mental exams or tests
 - ▶ If material to defense; or
 - ▶ Gov't intends to use in case-in-chief
 - ▶ Provide written summary of expert testimony
 - ▶ Opinions, and bases and reasons for opinions
 - ▶ Expert's qualifications

Rule 16 – requests to consider in appropriate case

- ▶ Fingerprint and handwriting exemplars
- ▶ Drug dog records
- ▶ Photographic lineups and related records
- ▶ Voice analysis records
- ▶ Polygraph records
- ▶ Similar activities by persons not the Δ

Jencks Act (18 USC § 3500)/FRCP 26.2 Witness Statements

- ▶ Disclosure of relevant portions of written witness statements after direct examination
- ▶ Not just at trial; request Jencks at:
 - ▶ Detention hearing
 - ▶ Suppression hearing
 - ▶ Sentencing hearing
- ▶ Request:
 - ▶ Early production of Jencks to avoid delay
 - ▶ Agent notes

Brady - Exculpatory Material

- ▶ Seek favorable information whether or not admissible if reasonably likely to lead to discovery of admissible evidence
- ▶ Request information:
 - ▶ Tending to show allegations not true
 - ▶ Tending to impeach government witness (oral or written info)
 - ▶ Conviction/arrests
 - ▶ Promises or inducements to witness/friends/family
 - ▶ Known but uncharged criminal conduct
 - ▶ Inconsistencies in statements
 - ▶ Polygraphs administered
 - ▶ Information relating to conditions affecting veracity, memory, perception, mental illness
 - ▶ Drug/alcohol use that could affect veracity, perception, memory
 - ▶ Acts tending to show not truthful
 - ▶ Negative exculpatory – witness statements where Δ not mentioned

Notice of FRE 404(b)(2) – Bad acts evidence

- ▶ Crime, wrong, act admissible to show:
 - ▶ Motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, lack of accident
 - ▶ Duty of prosecutor to disclose triggered by Δ request:
 - ▶ Gov't must provide "reasonable notice" of general nature of evidence intends to offer at trial
 - ▶ Notice prior to trial or during if pretrial notice excused for good cause

Discovery Motions – things to remember

- ▶ Reciprocal discovery – FRCP 16(b)(1)
- ▶ Continuing duty to supplement – Rule 16(c)
- ▶ Reverse Jencks – FRCP 26.2
 - ▶ Avoid email communications back and forth with testifying experts, investigator
 - ▶ Reports of witness interviews of investigator if s/he testifies must be disclosed
- ▶ Avoid general requests
 - ▶ Courts have held general, non-specific requests no better than no request at all. *US v. Chaney*, 730 F.2d 1334, 1341 (10th Cir. 1984)

Electronic Discovery Stats:

In 1996, only 5% of discoverable documents derived from electronic format.

12 years later by 2008, more than 93% of all business documents were created electronically. That number is still increasing.

1TB = 220 million pages of text

If you were to look at every page of 220,000,000 pages for 10 seconds, would take 70 years

10TB holds the library of congress

ESI Protocol

- ▶ ESI (“Electronically Stored Information”) Protocol provides framework for e-discovery in federal criminal cases – best practices
- ▶ Provides for meet and confer
- ▶ Provides for production of a “Table of Contents” of ESI
- ▶ In large volume discovery cases, can seek appointment of Coordinating Discovery Attorney

