UNITED STATES
FEDERAL SENTENCING GUIDELINES
SUMMARY AND ANALYSIS

ENGLISH AND SPANISH

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INTRODUCTION

The Federal Sentencing Guidelines are the rules that govern the imposition of sentences in federal courts in the United States. The guidelines are a set of rules that were created by the United States Government in 1987 with the intent to make sentencing fairer and more predictable. The purpose of this pamphlet is to summarize how the Guidelines work and then explain the procedures for sentencings in federal court, including a discussion about the concept of "cooperation" with the United States. The focus of this analysis will be federal drug crimes, but the concepts apply to all sentencings.

The contents of this pamphlet are based upon my experiences as a former federal prosecutor and a defense lawyer in criminal cases in courts throughout the United States. This material is not meant to convey legal advice, but is merely an outline of how the federal sentencing guidelines are organized. Every case is different and the advice of an attorney as to the best manner to proceed is necessary for anyone who is charged in a federal criminal case.

Every defendant in a criminal case has three options as to how to proceed in their case: (1) demand a jury trial and require the Government to prove their guilt beyond a reasonable doubt; (2) plead guilty and proceed to sentencing; or (3) plead guilty and attempt to cooperate with the prosecutors and agents in an effort to receive a sentence reduction. The decision as to whether a defendant wishes to go to trial or plead guilty is very complicated and cannot be made until the attorney and the client understand and analyze what evidence the Government has, as well as what legal and factual defenses exist. It is clear to me that every defendant needs to carefully consider all his options before deciding what route is best for him – and every defendant needs a lawyer who has the capacity and experience to defend his interests regardless of which path is selected. I have tried more than eighty (80) jury trials in my professional career, and have

submitted hundreds of legal motions in furtherance of my clients' interests.

My contact information is contained on the back of this pamphlet and I am available to consult with anyone seeking legal advice and representation.

FEDERAL SENTENCINGS IN GENERAL

Every federal sentencing has three parts: (1) a calculation of the "guideline" sentence; (2) a consideration of other general sentencing factors, including the personal characteristics of the defendant; and (3) if applicable, the nature and extent of the defendant's "cooperation" with the United States. Before every sentence, both the prosecution and the defense have the opportunity to submit written materials to the judge. The judge also receives a written report from an independent Probation Officer, who reviews the evidence and makes recommendations concerning the calculation of the appropriate guideline range.

THE FEDERAL SENTENCING GUIDELINES

For every federal crime in the United States, there is a minimum and maximum penalty in the law. In addition, for some crimes there is a "mandatory minimum" jail sentence, that is, a minimum amount of time that a judge must impose for the crime. The mandatory minimum sentence for a drug crime involving more than five (5) kilograms of cocaine is ten (10) years. As discussed in detail in this pamphlet, there are several ways for a defendant to negate this mandatory minimum and give the judge discretion to impose any sentence. The maximum potential sentence for a drug offense involving more than five kilograms of cocaine is life.

In order to calculate the "guideline" sentence for a drug offense, it is necessary to consider certain relevant factors.

Quantity of Drugs

The most important factor in a federal drug case is the quantity of drugs attributable to the defendant, because obviously, the law punishes someone who is responsible for 5 grams of cocaine less harshly than someone with 5 kilograms or someone with 500 kilograms.

The rules used to determine how much cocaine a person is responsible for seem unfair to many defendants. In a conspiracy case, the law in the United States holds that people in a conspiracy are like members of a sports team and that the actions of one are considered the actions of all. The law specifically provides that each member of a conspiracy is responsible for the total amount of drugs that were part of the conspiracy, if they were reasonably foreseeable to the defendant. What does this mean? It means that even if a defendant was only involved in only one aspect of the conspiracy, he can be held accountable for all of the drugs that he knew others were involved with. Thus, for example, a person whose responsibility was only to verify the amount of drugs that were received in one shipment, could be found responsible for drugs sent by the group to others, if he knew about them.

In determining the amount of drugs that a person is responsible for, the law in the United States makes no distinction between the people who own the drugs, or those who invested in the shipments or those who simply transported them.

For each quantity of drugs, there is a chart that corresponds to a certain level in the sentencing guidelines.

That chart for cocaine is summarized as follows from highest to lowest:

450 kilograms or more of cocaine	Level 38
150 - 450 kilograms of cocaine	Level 36
50 - 150 kilograms of cocaine	Level 34
15 – 50 kilograms of cocaine	Level 32
5 – 15 kilograms of cocaine	Level 30
3.5 – 5 kilograms of cocaine	Level 28

For other drugs the maximum quantities are

90 kilograms of heroin or more	Level 38
45 kilograms of methamphetamine	Level 38
90,000 kilograms of marijuana	Level 38

The drug tables are interesting in that a person who is responsible for 451 kilograms of cocaine is at level 38. A person who distributes 1,000 kilograms – or more than twice as much - is also at level 38. There is a provision for a one level upward adjustment for defendants who are responsible for ten times more than the highest drug quantity (for cocaine that would be 4,500 kilogram), but the provision is hardly ever applied.

The levels above correspond to the following table. The table has a range for each level that is expressed in months. So, for example, level 33 is 135-168 months, or approximately 11-15.5 years.

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

Other Drug Offense Factors

There are other factors that can enhance (and in some situations, reduce), the Guideline Sentence.

These factors do not apply in every case and there is usually some room for discussion with the prosecutors about the factors in a case where a defendant wants to cooperate. But some of the more important factors for drug trafficking and the amount that they increase the guideline level include:

Possession Of A Firearm (to protect the drugs)	+2 levels
The Use Of Violence	+2 levels
Use Of A Submersible (submarine) or Semi-Submersible To Transport The Drugs	+2 levels
If A Private Plane Was Used To Import The Drugs Into The United States	+2 levels
Bribing or Attempted Bribing A Law Enforcement Officer	+2 levels
Special Skill or Knowledge (pilot or accountant)	+2 levels

LEADERS/ORGANIZERS/MINOR ROLE

There is an additional potential enhancement that can apply to some cases, when the Government's proof shows that someone was a leader and/or organizer of a criminal conspiracy that involved more than five persons, or was otherwise extensive. The determination of who is a leader and/or organizer turns on many factors, including: (1) the ability to exercise decision making authority; (2) the nature and extent of the person's participation in the crime; (3) the recruitment of accomplices; (4) the right to a larger share of the profits; (5) and the degree of control and authority over other persons. The courts have held that there can be more than one leader or organizer in a case.

The federal sentencing guidelines also permit an upward adjustment to the guideline range for people who were "managers" or "organizers." These are persons who exercised some control in a criminal case, but were not the leaders of the

organization. In the context of a large drug conspiracy it can be very easy for the prosecutors to convince a judge that a defendant was an organizer or leader because the standards are so vague. They only have to show, for example, that the person directed someone else to do a particular task (such as dispatching someone to a location where drugs are received in order to verify the quantity). The consequences of being designated a leader or organizer can be significant. In addition to receiving additional points in the calculation of the guideline, a person who is a leader or organizer is not eligible for what is referred to as the "safety valve."

The Federal Sentencing Guidelines also recognize that a sentence should be reduced if the person had only a "minor" or "minimal" role in an offense. Being designated as a minor or minimal role defendant can result in a sentence guideline reduction of up to 4 levels. Many defendants seek to obtain this role, claiming that what they did was relatively minor relative to the activities of other and almost always, the request for a role reduction rarely be agree to by the prosecutors. The reason that so few people are able to successfully claim a minor or minimal role is because the concept is very specific and many lawyers who defend extradites are not familiar with the requirements of the guidelines.

Under the federal sentencing guidelines, a person with a minor role is someone whose actions make him "substantially less culpable" than others. The guidelines use this example:

For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.

In this example, the defendant had a very limited role in the conspiracy – he was the person who transported the drugs and

was not an investor or owner of the shipment and was not involved in any other aspect of the conspiracy. But under United States law he is responsible for the entire amount of the drug shipment. Thus, his guideline is much higher than his actual involvement. This person may receive a sentence reduction for minor role.

The federal sentencing guidelines identify the following other factors to be considered in determining if someone has a minor role:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;
(ii) the degree to which the defendant participated in planning or organizing the criminal activity;
(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
(v) the degree to which the defendant stood to benefit from the criminal activity.

These other factors attempt to analyze whether a defendant who claims he had a minor role was actually more involved in the conspiracy. In the majority drug conspiracy cases, most if not all of the defendants may decide to cooperate with the prosecutors, so that when the Government considers whether any defendant had a minor role they will also be in possession of information from the other members of the conspiracy and will compare what each defendant says about the role of each member. The most important thing to remember is that any defendant who is charged with a drug trafficking offense and believes that they may be eligible for a minor (or minimal) role reduction needs to

carefully consider how to present and organize this issue from the very first moment of their case.

SENTENCE REDUCTIONS

SAFETY VALVE

The Federal Sentencing Guidelines have a special provision that applies only to drug cases. It is referred to as the "safety valve" and if the requirements for the provision are met, there are two results for an accused: (1) there is a two-level reduction in the calculation of the guideline sentence; and (2) the mandatory minimum sentence is waived. This means that the judge has permission to reduce the sentence below the mandatory minimum.

In order to qualify for the safety valve, the following requirements must be satisfied: (1) no one was harmed during the offense; (2) the person has no history of criminal convictions; (3) the person did not use violence or possess a gun in connection with the offense; (4) the person was **not a leader or organizer** of the offense; and (5) the person tells the prosecutor everything about his involvement in the offense.

Thus, if the defendant is designated as a leader or organizer in the case, the safety valve does not apply. In order to qualify for the safety valve, the defendant must meet with the prosecutors and agents and tell them everything that they did in the offense. This means everything. The meeting with the prosecutors and agents will be done in private and the defense attorney can – and should – obtain a letter from the prosecutors promising that any statements made by the defendant cannot be used against him at the sentencing, so long as he is honest. Such a letter is referred to in the United States as an "immunity letter."

It is critically important for the attorney and client to prepare before any meeting(s) with prosecutors and agents and review the requirements under the federal sentencing guidelines for the safety valve, so there will be no room for error or misinterpretations during the meeting(s). In addition, meeting with the prosecutors and agents in order to qualify for the safety valve does not mean that a person in is "cooperation" with the United States. Thus, it is possible to plead guilty to an offense and obtain the safety valve without becoming an informant. That is because the requirement of the safety valve is to talk about the defendant's conduct, not the activities of others.

The other requirements of the safety valve must also be satisfied, including that the accused did not use violence or possess a gun in connection with the drug trafficking offense. Some prosecutors mistakenly believe that if anyone in the conspiracy committed an act of violence or possessed a gun, then no defendant can receive the safety valve. That is not the case and in the District of Columbia there is a case from the federal court of appeals that specifically says the Government must prove that a particular defendant possessed a gun in order to make the person ineligible for the safety valve. This is just another reason to locate a lawyer who is knowledgeable about the law to represent you in your criminal case.

GUILTY PLEA/ACCEPTANCE OF RESPONSIBILITY

The federal sentencing guidelines also provide for up to a three-level sentence reduction for defendants who enter a timely guilty plea in their case and accepts responsibility for their conduct. When is a guilty plea timely? There is no set amount of time but it is generally one that is made before the Government is required to prepare for trial. Thus, if a defendant demands a trial and files legal motions which the judge rules against and a week before the scheduled trial decides to plead guilty, that defendant may not

receive a three-point reduction, but perhaps only a two-level reduction.

The law also requires that the defendant accept responsibility for his criminal conduct. What does this mean? Here is an example. In order to plead guilty, a defendant must appear before a federal judge and respond to certain questions under oath. The judge will ensure that the defendant has the mental capacity to plead guilty and that the decision to plead guilty is knowing and voluntary. During a guilty plea hearing, the judge will also confirm with the defendant that he understands the charges against him and that he admits his guilt and waives his right to a trial. In federal criminal cases, there is usually a written plea agreement and a statement of the factual basis for the plea. A defendant must read and review with his attorney these documents and then sign his name to indicate that he understands the documents and agrees with them. In the United States, once a defendant pleads guilty, it is almost impossible to withdraw that plea.

After a defendant pleads guilty, but before the sentencing, a report is prepared for the sentencing judge by the United States Probation Department. This requires each defendant to be interviewed by a probation officer. If during the interview a defendant who pled guilty were to tell the probation officer that he had committed no crime and was innocent, it is likely that the person would not receive a three-point reduction because although he pled guilty, he did not really admit responsibility. In the most famous example of how to lose the reduction for acceptance of responsibility, a significant Mexican drug trafficker pled guilty in Washington, D.C. a week before his scheduled trial. Almost immediately after his lawyer filed motions to withdraw the guilty plea and contended that the defendant was not the leader of a criminal organization and had not personally been involved in sending drugs to the United States. At the sentencing, the district court judge found that the defendant had not accepted responsibility for his criminal conduct, did not give him any

reduction for having pled guilty and sentenced him to life in jail. The lesson from this case is that a defendant needs to carefully consider the consequences of pleading guilty and that if you do enter a plea of guilty, do not play games with the judge.

EXAMPLE OF A SENTENCING GUIDELINE CALCULATION

The following example is how a guideline sentence is computed.

Let us assume that that a defendant from Central or South America is charged with being a member of a conspiracy to distribute five kilograms of more of cocaine, knowing or intending that the cocaine would be unlawfully imported into the United States. This is the most common charge brought against foreign national defendants. The person's role was to locate fast boats that were used to transport the cocaine from the northern coast of Colombia to Guatemala. The person was not an investor in the drug shipments, but received a commission for his work based upon the quantity of drugs sent via the fast boats. In total the organization sent three shipments of 350 kilograms each, for a total of 1,050 kilograms. The final shipment was seized by the Colombian coast guard. The defendant was arrested in Colombia because of a wiretap that had been secretly intercepting the blackberry messages and phone calls between the members of the organization.

His extradition was approved and he was brought to the United States. After reviewing this pamphlet and consulting with his excellent United States lawyer, he decided he wanted to plead guilty and try to cooperate.

The first question for any lawyer to ask, is whether the person is even guilty of the crime against him. He never came to the United States, never made a telephone call to the United States, and his involvement in the case was limited to obtaining motors for boats sent from Colombia to Guatemala.

Under the law in the United States, a person can be found guilty of a drug trafficking offense even if never entered the United States, as long as he knew or intended, or it was reasonably foreseeable that the drugs would be imported into the United States. Many defendants claim that they had no idea where the drugs were going, did not care where the drugs were going, did not get paid a dollar more if they went to the United States or were thrown into the ocean, and thus are not guilty of this offense. This claim is almost always unpersuasive with the prosecutors and agents. They assume that almost every gram of cocaine produced in Colombia winds up in the United States and that the amounts that go to Europe and African and Australia are so insignificant that anyone involved in cocaine production and/or transportation in South or Central America knows that the drugs are ultimately going to the United States. Also, anyone in the chain of drug trafficking who is paid in U.S. dollars is believed by United States law enforcement to also know that the drugs are coming to America, or else why would you be paid in dollars. Moreover, the prosecutors and agents believe that if drugs are going to be sent from Colombia or Central America to Europe or Africa, the shipments would not be sent through Mexico or Central America.

Thus, if the defendant wants to defend himself based upon the argument that he did not know where the drugs were going, it would be best for him not to meet with the prosecutors and agents in the case and instead proceed to a jury trial because no one in United States law enforcement is going to believe that he did not know where the cocaine was going.

The second question to be asked is how much cocaine the defendant in this example is responsible for in the conspiracy. Under the law, he is responsible for each of the three drug shipments of 350 kilograms, plus any other drug shipments that he knew about. Since the high end of the drug quantity table is

450 kilograms of cocaine, the defendant is at level 38 of the federal sentencing guidelines for drug quantity.

The next issue is whether any upward adjustments would apply to the case. Under the circumstances of the hypothetical it does not appear that any upward adjustments would apply. Locating fast boats does not appear to require any special skill (which is one of the upward adjustments). If the defendant had been responsible for locating the crew for the fast boats, however, or was in charge of dispatching the boats, then the prosecutors would probably argue that the defendant was an organizer and might argue for a 2 or even 3 level upward adjustment to the guideline. This example shows again why it is important to begin to organize the defense as soon as possible in a case, with a total understanding of the federal sentencing guidelines.

Assuming that no upward adjustments apply and the defendant meets with the prosecutors and fully admits to his own activities in the criminal case, that he does not have any prior convictions, that no violence or a gun was used in connection with the crime and that the defendant is thus eligible for the safety valve, he would be entitled to a two-level reduction in this guideline calculation and thus, the mandatory minimum sentence would no longer apply to the case.

Finally, if the defendant pled guilty and accepted responsibility for his actions "promptly," he would be entitled to an additional three level sentence reduction. This would make the final guideline sentence at Level 33, which is equal to 135-167 months (or 11.0 – 15.5 years). This is the calculation:

Base Offense Level (450 kgs or more of cocaine)	38
Downward Adjustment Acceptance of Responsibility By Guilty Plea	-3
Safety Valve	-2
Adjusted Total Offense Level	33

(135-168 months)

NOTE: In this hypothetical, if the defendant was found to be an organizer (not even a leader), the calculation would be much different. An organizer is eligible for a two point upward and adjustment and is ineligible for the safety valve. This would yield the following result:

Base Offense Level (450 kgs of more of cocaine)	38
Downward Adjustment Acceptance of Responsibility By Guilty Plea	-3
Organizer	+2
Adjusted Total Offense Level	37

(210-262 months)

As you can see, the designation as an "organizer" has a very significant effect on the guideline sentence. PLEASE NOTE: Every extradite receives credit toward his sentence for the time spent awaiting extradition to the United States. In addition, there is a reduction of 13.9 percent reduction applied to every sentence if the defendant does not have problems while incarcerated in the United States. This discount is referred to as "good time" credit.

GENERAL SENTENCING FACTORS

After the Court calculates the federal sentencing guideline, it must then consider the following factors, which the district judge can rely upon to decrease the guideline sentence. The factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. How does these factors work in practice?

First, most of these factors have already been considered in the guideline calculation. For example, factor (2)(A) – the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense - is built into the guideline calculation. In addition, some of the factors are irrelevant for many cases that involve extradited defendants. For example, factor (2)(D) – the need to provide the defendant with educational or vocational training – is almost never relied upon by the courts to change the guideline sentence.

What factors are important then? The following is a list of some of the most important arguments that can – and should be made – to support a request for a downward adjustment of the guideline sentence.

1. *Age* – the law in the United States supports the argument that a defendant who is older than 40 is much less likely to commit additional crimes in the future and is a basis for the judge to reduce the sentence.
2. *Health* – other cases support the argument that a defendant in poor health, such as a person with cancer or who needs a kidney transplant, should receive a reduced sentence because: (1) the prison system in the United States cannot always provide appropriate medical treatment; and (2) the person has a reduced life expectancy and the sentence should be reduced to reflect this reality.
3. *Conditions of Confinement While Awaiting Extradition* – there are judges who have concluded that harsh conditions of confinement for defendants pending their extradition to the United States can be considered as a reason for granting a sentence reduction. The arguments include overcrowding in the jail, poor sanitary conditions, lack of medical treatment, insufficient food, danger from other inmates, danger from guards, etc. A lawyer should always investigate this argument; there are also many reports from international agencies documenting the harsh conditions of

confinement in jails in Colombia, Honduras, Guatemala, and others. A federal judge is more likely to accept the report from the Red Cross than just the arguments of a defense lawyer.

4. *Family Responsibilities* – it is also possible to convince a judge to reduce a sentence when the defendant has "unique" family responsibilities. The majority of defendants have families that they need to support and so in order to convince a judge to reduce the sentence because of family responsibilities, a defendant has to show something unusual about the relationship. For example, if a defendant could show that the mother of his children abandoned them while he was incarcerated, or that a child was very ill, or that his children were having proven mental health problems, then it might be possible to obtain a sentence reduction.
5. *Love and Support of Family* – another important fact to present to a sentencing judge is that the defendant has the love and support of his family waiting for him after his period of incarceration. A defense lawyer should always seek to obtain letters from a defendant's spouse and children, as well as photographs of them, to present to a sentencing judge. Most federal judges have families and they need to be reminded of the human suffering that accompanies incarceration of an extradited defendant, who is thousands of miles away from his family and loved ones.
6. *Conditions of Confinement In The United States* – the conditions of confinement for a foreign national who is extradited to the United States are more oppressive than ordinary. First, extradites who do not speak English have many problems in jail communicating about basic needs such as access to telephones or getting a doctor's visit. In addition, foreign defendants are denied certain opportunities in federal prison; they are not allowed to work in prison jobs, cannot be sent to the lowest level security jail (called a "camp"), cannot receive visits from the family and loved ones who often do not have visas to enter the United States, and have a much more difficult time even communicating with their families because of the cost of making international phone calls. These are all arguments that should be presented to the sentencing judge.

7. *Halfway House* – under the regulations of the United States Bureau of Prisons, federal inmates can be sent to what is referred to as a "halfway house" up to six months before the end of their sentence. A halfway house is usually a facility designed to help inmates become integrated back into society. A halfway house is not a prison; there are no fences around the facility and inmates are allowed to leave the halfway house during the day to look for work – but must return at night. Foreign national defendants are not permitted to live in a halfway house before the end of their sentence and as a result, some courts have agreed to reduce a defendant's sentence because of this restriction.
8. *Immigration Detention* – another argument that should be made in support of a sentence reduction is that after foreign nationals complete their jail sentence, they are not released into the community, but are taken to an immigration jail to await their deportation. It is impossible to predict how long a person will spend in immigration detention, but some courts have also given defendants a sentence reduction up to six months based upon this factor.
9. *Voluntary Surrender* – a factor that is also relied upon by judges to reduce a sentence is a defendant's voluntary surrender (if applicable). This factor can influence a judge's view of a defendant. As you can imagine, (almost) every defendant who appears before a federal judge in the United States expresses remorse for the crime(s) they committed. What judges are looking for is evidence that a defendant will no longer will be involved in criminal conduct. One effective argument is to explain to the judge that the defendant has done more than simply say he wants to change is life, but has demonstrated this intent with his actions. A defendant who voluntarily surrenders to the United States leaves behind his family and his life, with the knowledge that he will be incarcerated in the United States. It is a very difficult thing to do, but most judges recognize that it demonstrates a commitment to change one's life and they reward this act with a downward sentencing adjustment.

This list contains some examples of the arguments that can be made in support of a sentence reduction. There may well be other factors that warrant a reduced sentence depending on the circumstances of the case. It is very hard to predict just how big a sentence reduction a judge might grant after considering these factors, but each and every one of these arguments that is applicable, should always be brought to the attention of the sentencing judge.

Federal law also requires that a federal judge consider the need to avoid "unwarranted sentencing disparity" between similarly situated defendants who are guilty of similar conduct. What does this mean? That the judge is supposed to consider the sentences of other defendants in order to avoid a situation where one person is punished more harshly than another when they both committed the same type of crime. This is an opportunity - for an experienced attorney - to argue that other defendants at your level have received lesser sentences and to prove these matters to the court with the submission of written materials from other courts.

COOPERATION

The final step in any sentencing, is consideration of a defendant's "cooperation" with the United States. The federal sentencing guidelines are designed to give the largest sentence reductions to those defendants who are "cooperating" with the prosecutors and agents. This pamphlet will discuss how such cooperation works, but it is important for every defendant to understand two important points. First, there is no right under the law to cooperate; rather, is considered a "privilege" and the prosecutors have complete discretion to decide whether a defendant will be permitted to cooperate or not. Second, the Government has the sole power to recommend a sentence reduction for cooperation; the defense has no power to file a motion asking the judge to grant a sentence reduction as the result of cooperation (except under extraordinarily limited circumstances which will be discussed later).

There are some defendants who were never allowed to cooperate and some defendants decide not to cooperate with the United States because it involves providing information against other persons, which often include family members. The large majority of defendants who decide to plead guilty, however, want to cooperate with the United States in return for a potential sentence reduction.

Please note the phrase that is used here – "a potential sentence reduction." Under the law, there is never a guarantee that a defendant will receive a sentence reduction for cooperation.

SUBSTANTIAL ASSISTANCE

In order to successfully cooperate with the United States, it is important to understand what the concept means. Cooperation is not merely talking with the prosecutors. Likewise, it is not sufficient to simply admit to one's own criminal conduct. Rather, in order to receive a sentence reduction, the prosecutors must file a motion with the Court:

stating that the defendant has provided **substantial assistance** in the investigation or prosecution of **another person** who has committed an offense, [and] the court may depart from the guidelines.

How does this work in practice? Most defendants are given the opportunity to meet with the prosecutors and agents in their case for the purpose of: (1) admitting to their own criminal conduct; and (2) discussing what they know about the criminal activity of other persons. Before these meeting take place the Government usually provides the defendant with what is called a "proffer letter." Although the form of this letter is different in each jurisdiction, the letter essentially provides that if the defendant is truthful during the meeting, the Government will not use what he says against him in the criminal case. No defendant

should ever meet with a prosecutor without the protection afforded by such a proffer letter.

During the meeting the prosecutors and agents will ask questions about other persons, who could include: (1) the co-defendants in the criminal case; (2) defendants in other criminal cases; (3) persons who have not yet been formally charged but are already under investigation by the United States; and (4) even persons who the prosecutors and agents are not yet aware of, but who the defendant knows are involved in criminal activity. The Government has interest in everyone involved in drug trafficking, including laboratory owners, transporters, investors, as well as politicians, members of the police or military who aid drug trafficking. In my legal practice, I meet extensively with my clients before these meetings to review their history, to identify persons of interest to the prosecutors and agents, and to organize the relevant facts. In addition, we send a written summary of this information to the prosecutors before the meeting to make the process work smoothly. In addition, very often after a meeting, we will send a letter to the prosecutors confirming the topics that were discussed.

There are other types of information that a defendant can provide which might result in a substantial assistance reduction, including details about pending drug shipments on land or sea; the location of drug laboratories; information about drug or money stash houses; the names of companies that are involved in money laundering and similar such matters. All of these issues need to be discussed at length with your attorney before the first meeting with the prosecutors and agents.

If the Government is satisfied that the defendant is being truthful during these meetings, then it will offer the defendant the opportunity to plead guilty and cooperate. The terms of the cooperation are contained in a written plea agreement that both the prosecutors and the defendant sign and which are presented to the district court judge in the case. In general, however, the terms of the cooperation are always in favor of the Government. While each prosecutor's office in the United States has a

slightly different version of a cooperation plea agreement, there are some common features in almost all of them. Thus, each cooperation plea agreement generally requires a defendant to acknowledge and agree that: (1) the decision as to whether to file a motion for a sentence reduction as the result of substantial assistance is within the sole discretion of the United States; (2) the district court judge has no power over the Government's decision as to whether or not to file such a motion; (3) the defendant cannot withdraw his guilty plea if the Government decides not to file a motion to reduce the sentence as the result of cooperation; (4) the Government can delay the defendant's sentencing if the prosecutors decide that the cooperation is not complete; and (5) if at any time before the sentencing the Government learns that the defendant has not been truthful, it is not required to file a motion to reduce the sentence.

These terms are not negotiable with the Government and it means that a defendant has to rely upon the good faith of the prosecutors in his case. Moreover, the law in the United States is clear that if the Government does not file a motion for a sentence reduction in any case, the defendant's options are very limited. A defendant can only challenge the decision with the judge in the criminal case if he can prove that the Government's decision was based upon an improper factor, such as race or religion. In my experience, the prosecutors are generally truthful with the Court about a defendant's cooperation because they know that if they are not, other defendants will not want to cooperate. The prosecutors also understand that they have to be honest with federal judges. Nonetheless, it is critically important that your attorney attend every meeting with the Government and take notes and send a letter after each meeting summarizing the topics of conversation. Your attorney may have a different perspective about what information is important and can argue other matters to the judge at sentencing. Also, the prosecutor may change during the course of your case and the only other person who was present for all the meetings would be your attorney.

THE TIMING OF A SENTENCE REDUCTION FOR SUBSTANTIAL ASSISTANCE – 5K1.1 or RULE 35

Under federal law in the United States there are two separate times at which a sentence might be reduced for substantial assistance. Thus, there are two different legal provisions that authorize the sentencing judge to reduce the sentence because of cooperation. The first is a motion under the federal sentencing guidelines law referred to as "5K.1;" and the other is referred to as a "Rule 35" motion. The requirements for both procedures are exactly the same. The only difference is that a 5K motion is filed at the time of the sentencing in a criminal case. Oftentimes, however, a defendant's cooperation is not complete at the time of the sentencing and the court is unwilling to wait until it is complete. Thus, the law provides that a defendant's sentence can also be reduced as the result of cooperation after it is imposed. In general, defendants in Miami, Tampa, and Virginia are sentenced first and then have their sentences reduced later when their cooperation is complete. Defendants in Washington, D.C., New York, and Boston have their sentences delayed until the Government concludes that their cooperation is complete. Defendants who are sentenced first are also usually sent to a federal prison to begin serving their sentence while defendants who have to wait are usually held in a local jail or federal detention center. The conditions in a federal prison are generally more favorable, but sometimes it is better to wait at a local jail because the defendant is closer if the prosecutors want to speak with him.

Regardless of when the reduction is imposed, the question that every defendant wants answered is how much of a reduction will I receive?

THE SIZE OF THE SENTENCE REDUCTION

The answer to this question is that it is impossible to predict to a certainty the size of the reduction. Moreover, there are no rules in the federal sentencing guidelines (or anywhere else) that state how much

each type of cooperation is worth as a sentence reduction. That is to say that there is no rule which states that helping the prosecutors indict a case is worth x% off a sentence and/or that testifying at a trial is worth y% off the sentence.

In advance of the sentencing, the prosecutors will submit a motion to the court – in secret because cooperation is not a public matter - advising that the defendant has provided "substantial assistance." This motion gives the judge the power to reduce the sentence – below any mandatory minimum - but the decision as to how big a reduction is appropriate is within the sole discretion of the judge. In its motion to the Court the Government will generally summarize the defendant's cooperation and may make a recommendation as to the appropriate size of the sentence reduction, but sometimes the Government may not ask for a particular sentence reduction.

Before the sentencing, the defense must also submit a legal memorandum to the judge. In my experience, not all defense attorneys are equally skilled at writing such documents. This memorandum will also not be available to anyone other than the judge and the prosecutors and must include the specifics of all of the defendant's cooperation (as well as all of the other relevant sentencing factors). Because the prosecutors sometimes only "summarize" the cooperation, the defense memorandum needs to explain in as much detail as possible the nature of the defendant's cooperation, including:

(1) the identity of the target(s) of the information and their role in drug trafficking. For most judges, providing information against a significant drug trafficker will be viewed as more important than information about a fast boat crew.
(2) the nature of the cooperation. The judge needs to know with specificity the details of the cooperation. This would include if the defendant testified before a grand jury, or at trial, or signed an affidavit in support of extradition.

(3) what else did the Government do with the information. Did the prosecutors use it to return a new criminal case against someone? Did they use it to convince a different defendant to plead guilty? Was it included in an extradition affidavit, in an application to obtain a wiretap interception, or in some other legal document.
(4) has the defendant's cooperation become known, or will become known. Even though the prosecutors and agents take great effort in order to ensure that no one knows that a defendant is in cooperation, oftentimes the target of a United States investigation. It is important for the sentencing judge and the prosecutors to know that there is reason to believe the fact of the defendant's cooperation is – or will be known – to other people.
(5) the risk to the defendant as the result of cooperation. This includes any threats made or implied against the defendant or his family. The sentencing memorandum should also argue that even if no threats have yet been made, there is good reason to believe that other persons know the defendant is cooperating are dangerous and they will seek retribution against the defendant and/or his family when the cooperation becomes known.
(6) the number of times the defendant met with the prosecutors and every name that the defendant mentioned during any debriefing. Once the Government has filed a motion under 5K1.1 or Rule 35 and in effect "opened the door" to a sentence reduction based upon cooperation, the judge should be informed about every detail of the defendant's cooperation, even if it did not result in any tangible benefit.
(7) proportionality in sentencing. There is also a principle in the law that defendants at the same level of criminal responsibility should also receive similar sentences and this rule also applies to sentence reductions as the result of cooperation. While it is sometimes difficult to compare the cooperation of one defendant with another, one important reason hire a law with significant experience in international extradition cases is because they can make a more sophisticated argument about the size of the appropriate sentence reduction, when compared with the reductions for other defendants.

CONCLUSION

No one who is incarcerated wants to spend one more day than necessary in jail. This is particularly true for extradited defendants who are thousands of miles from their friends and families. The purpose of this pamphlet is to provide a summary of the manner in which the federal sentencing guidelines function, and some of the arguments that can be made in support of receiving the lowest possible sentence possible. Every case is different and there is no one formula that applies to every case. That is why selecting the right attorney, one who has the capacity and experience to fight for you is the most important decision an inmate can make. In my legal practice, I promise to represent my clients until the day they receive their freedom and that is a promise I intend to keep.