



# 2017 Minnesota Criminal Justice Institute CLE

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## “Full Service” Sentencing

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# The four truths of sentencing

- ▶ **Recognize the time value of work:** more work early yields better results than more work later
- ▶ **Take every opportunity to tell your client's story:** Don't depend upon the sentencing hearing. Use motions, status reports, emails, telephone calls, etc.
- ▶ **And tell the story:** People are not convinced by reference to statutes and case law. They are moved by a narrative. Find your client's narrative and tell it.
- ▶ **Treat sentencing like trial:** Discover and create facts, leverage every opportunity to convince and manipulate stakeholders, run the marathon from start to finish.



# Chronology of federal sentencing (remember the time value of work)

- ▶ Pre-indictment
- ▶ Counsel appointed/hired (hopefully)
  - ▶ Cooperation/avoid indictment
- ▶ Indictment
- ▶ Counsel appointed/hired
- ▶ Plea (in 97% of cases)
  - ▶ Cooperation (possibly)
- ▶ Trial (in 3% of cases)
- ▶ Sentencing
- ▶ Appeal (possibly)

# Legal elements of federal sentencing

- ▶ Statutory mandatory minimums/maximums
  - ▶ Sec. 851 certifications (no time to cover this, specific to drug cases)
- ▶ 18 U.S.C. sec. 3553(a) factors
- ▶ Federal Sentencing Guidelines



# Federal Sentencing Guidelines: The defendant (p. 8)

- ▶ Crime: armed bank robbery, 18 U.S.C. sec. 2113(a) and (d)
- ▶ Federally insured bank
- ▶ Carried a working, loaded firearm
- ▶ Pushed a teller, resulting in injury
- ▶ Restrained a customer
- ▶ Stole \$18,000
- ▶ Caught, cooperated, and announced intent to plead guilty
- ▶ Prior criminal record

# FSG: Guidelines worksheet (p. 9)

## ▶ RELEVANT FACTS:

- ▶ Crime: armed bank robbery, 18 U.S.C. sec. 2113(a) and (d)
- ▶ Federally insured bank
- ▶ Carried a working, loaded firearm
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- ▶ Caught, cooperated and announced intent to plead guilty



## FSG RELEVANCE (2B3.1):

base offense level: 20

bank prop taken: +2

firearm possessed: +5

bodily injury: +2

restrained: +2

under 20k: +0

ADJ OFFENSE LEVEL: 31

accept resp.: -2



# Open questions about our bank robber

- ▶ Was the money stolen the bank's or customers'?
- ▶ Did defendant discharge, use, brandish, possess the gun? Did he make a threat of death?
- ▶ How serious was the teller's injury?
  - ▶ Did the defendant's conduct present a "serious potential risk of harm"? (*Sessions v. Dimaya*)
- ▶ Was the customer restrained to facilitate the crime or defendant's escape?
- ▶ Was the teller or customer a government employee and was the crime motivated by that status?

# Criminal history (p.11-12)

- ▶ ADJUSTED OFFENSE LEVEL: 31
- ▶ Defendant has two priors (p. 8):
  - ▶ Auto theft, 2 years probation: 3 points (probation = incarceration)
  - ▶ Grand larceny, 6 months jail: 2 points
- ▶ CRIMINAL HISTORY POINTS: 5
- ▶ CRIMINAL HISTORY CATEGORY: III



# Summing up bank robber's sentence (p. 13)

- ▶ ADJUSTED OFFENSE LEVEL: 31
- ▶ ACCEPT RESPONSIBILITY: -2
- ▶ OFFENSE LEVEL TOTAL: 29
- ▶ CRIMINAL HISTORY CATEGORY: III
- ▶ GUIDELINES RANGE (29, III): 108-135 months (p. 17)
- ▶ STATUTORY LIMITS: 25 years maximum (p. 8)

# On to sec. 3553(a) (luckily!) (p. 35)

- ▶ Being able to argue 3553(a) is a gift. Treat it like a trial: discover facts and prove them, tell a story
- ▶ Allows for broad, pre-Guidelines discretion (history and characteristics of defendant, retribution, incapacitation, deterrence, rehabilitation)
- ▶ Sentence should be “sufficient, but not greater than necessary, to comply” with these traditional sentencing goals.



# Build your case from the foundation up.

- ▶ **Get to know your client personally:** TBI, childhood abuse, mental illness, drug addiction, low IQ (p. 48), financial difficulties, lack of educational opportunities, family structure growing up, physical illnesses, job skills. Speak with friends and family, teachers, pastors, etc.
- ▶ **Prove your client legally:** medical/psych experts, investigators, bank records, school records, affidavits/witnesses.
- ▶ **Start client's rehabilitation now:** counseling, job training, whatever she needs. Proactively create your own cooperation.
- ▶ **Sell your client convincingly:** send messages to AUSA, court, and probation officer at every stage.

# Stakeholders

- ▶ AUSA: use email, telephone, records, unsealed motions to convince AUSA of your client.
- ▶ Court: use motions, status reports, hearings to convince court of your client.
- ▶ Probation officer: Make sure interview is in person, send materials to officer ahead of time, guide the interview where appropriate, prepare client for interview.



# Using motions to manipulate stakeholders

- ▶ In a sealed motion for expert funds (p. 49), I:
  - ▶ Ask for the funds
  - ▶ Note that AUSA's 851 certification would impose a life mandatory sentence
  - ▶ Show why my client shouldn't get life, and thus why the AUSA is morally wrong
  - ▶ Relate that the AUSA was open to decertifying a prior, upon review of psych records
- ▶ What this does:
  - ▶ Gets the funds
  - ▶ Gets the court on my side, morally
  - ▶ May get the court to put pressure on AUSA to decertify prior

# Proving your client through experts and records

- ▶ Generate medical and psych records (pp. 46-47), and any other relevant records
- ▶ Send records to AUSA as early as possible, with a relevant request
- ▶ In the case of severe physical or mental hardship, this could mean life or death for your client (p. 111)



# Using status reports to manipulate stakeholders

- ▶ I file a status report (p. 65).
  - ▶ I seek clarification: will AUSA depart downward? Will AUSA decertify a prior?
  - ▶ I note that I've done everything the AUSA said he needed to decide whether to decertify
  - ▶ I remind the court of defendant's exceptional cooperation
- ▶ What this does:
  - ▶ Puts pressure on AUSA to decertify
  - ▶ Extends my advocacy beyond the sentencing hearing, reminding the court repeatedly of my client's sympathetic reality

# Resetting presumptions about numbers

- ▶ Larceny amounts (pp. 20-21)
- ▶ Number of child exploitation images (p. 19)
  - ▶ Miller article (p. 55)
- ▶ Amount of drugs (pp. 26-27)
- ▶ What does “life” equal? 470 months (Sentencing Commission), 360 months (ND AUSA), something else?



# Using sentencing memo to convince stakeholders (tell a story)

- ▶ Write a factually rich, not legally rich, memorandum (p. 37)
  - ▶ Note client's abandonment of viable pre-plea motions
  - ▶ Note cooperation (great if you helped client proactively start rehabilitation early)
  - ▶ Note offer to be a confidential informant
  - ▶ Judge quality of cooperation in relation to client's traumatic personal history and drug addiction (sneak 3553(a) factors into the cooperation question)
  - ▶ Use statistics to discuss uniformity and proportionality (pp. 57-64)



# Conclusion

- ▶ **Recognize the time value of work:** more work early yields better results than more work later
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