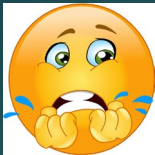


What if...  ?

Common Questions and Criminal Defense Conundrums

FEDERAL CRIMINAL DEFENSE TRAINING 2023

What if. . .my client wants to testify at a detention hearing?

- ▶ 18 USC §3142(f)
- ▶ Weigh the benefits

What if. . .my client is released on conditions and has a medical marijuana card?

- ▶ *US v. Cannon*, 36 F.4th 496 (3d Cir. 2022): use of marijuana violated federal law; repeated use, despite repeated warnings, supported finding that no bond conditions would adequately protect the public or cause defendant to conform to law

What if...I think a pretrial release condition is overly broad?

Like computer monitoring in a fraud case?

Argue the condition is not the least restrictive bail condition necessary to assure appearance and safety. See *US v. Himler*, 797 F.2d 156, 159 (3d Cir. 1986)

See also *US v. Holena*, 906 F.3d 288 (3d Cir. 2018) (recognizing that SR condition which prohibited accessing Google Maps or Amazon was too broad)



What if...my client is in a local prison and has medical issues?

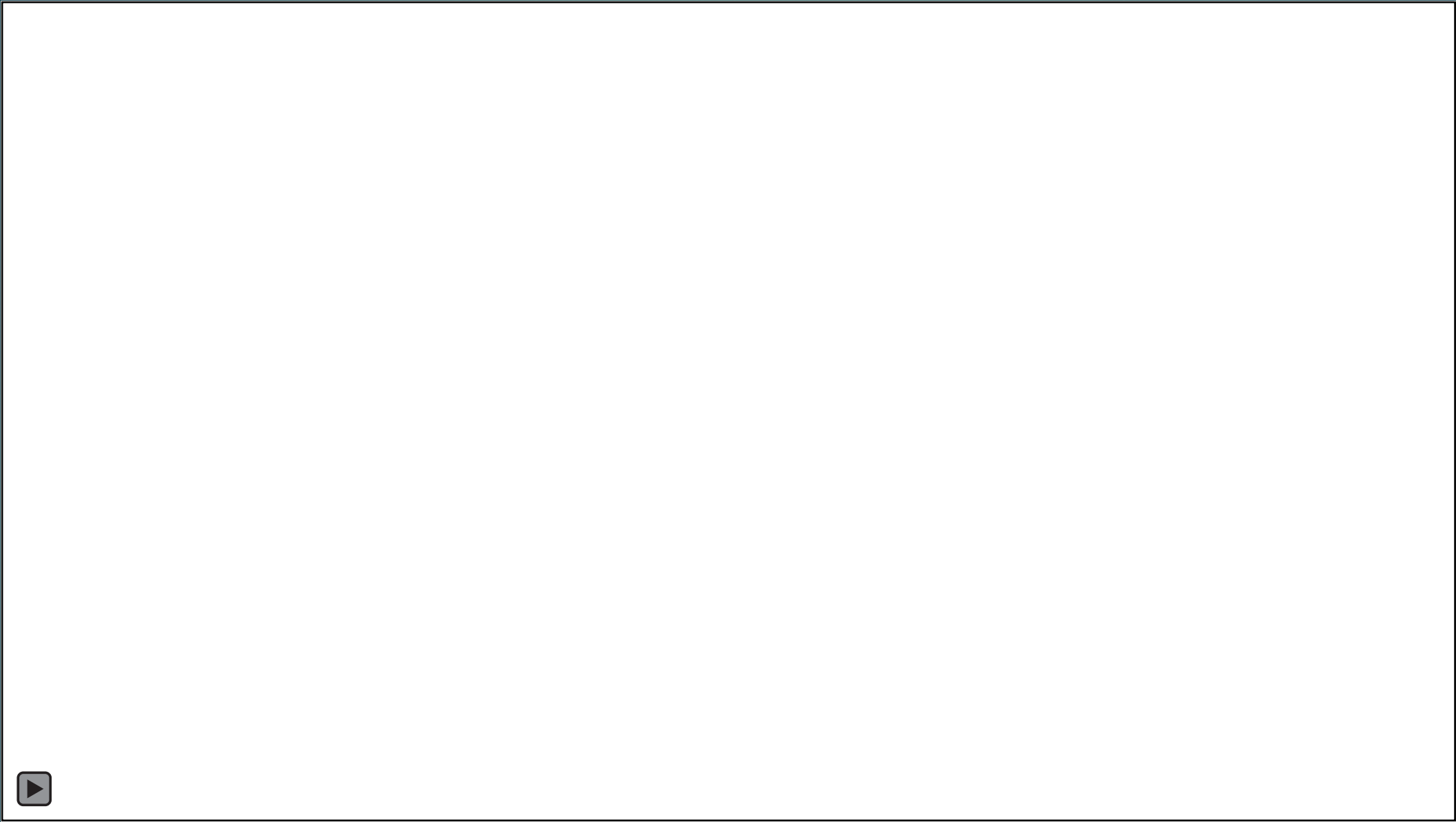
Contact the Marshals

What if. . .I get a case with a huge amount of discovery?

- ▶ Website: <https://www.fd.org/litigation-support>
- ▶ I Have Electronic Data. . . . Now What?
- ▶ Who is the National Litigation Support Team?
- ▶ Direct Assistance for CJA Panel
- ▶ CJA Panel Software Discounts

What if. . .I need to know the current position of US Attorneys?

- ▶ Two DOJ Memos from December 16, 2022 to review:
 - ▶ General Department Policies Regarding Charging, Pleas and Sentencing
 - ▶ Additional Department Policies Regarding Charging, Pleas and Sentencing in Drug Cases



What if. . .I need a refresher on the categorical approach?

- ▶ *US v. Brasby*, No. 21-1527, 2023 WL 2175740 (3d Cir. Feb. 23, 2023) – enumerated offenses clause
- ▶ *Borden v. US*, 141 S. Ct. 1817, 1822 (2021) – elements clause
- ▶ *Shular v. US*, 140 S. Ct. 779, 785 (2020) – serious drug offense

What if. . .my client is charged with 924(c) and Hobbs Act robbery?

- ▶ Hobbs Act robbery is a COV
US v. Stoney, __ F.4th __, 2023 WL 2443060 (3d Cir. Mar. 10, 2023)
- ▶ Attempted Hobbs Act robbery is NOT a COV
US v. Taylor, 142 S. Ct. 2015 (2022)
- ▶ Aiding and Abetting Hobbs Act robbery may be a COV
US v. Styles, No. 19-3217, 2022 WL 34126 (3d Cir. Jan. 4, 2022) BUT. . . .

Beware Hobbs Act robbery is *NOT* a COV under the Guidelines
US v. Scott, 14 F.4th 190 (3d Cir. 2021)

What if. . .my client has a prior PA drug conviction?

- ▶ ACCA – conduct element
 - ▶ *US v. Murphy*, No. 19-1653 (3d Cir.) (whether PA delivery is broader than distribution in ACCA definition of serious drug offense)
- ▶ Career Offender – conduct element
 - ▶ *US v. Dawson*, 32 F.4th 254(3d Cir. 2022) (finding that distribution plainly includes “attempted transfer” from PA statute)
 - ▶ *US v. Womack*, 55 F.4th 219 (3d Cir. 2022) (finding that PA statute does not prohibit administering and thus, is not broader)

What if. . .my client has a prior PA drug conviction for cocaine?

▶ ACCA

- ▶ *US v. Cann*, No. 22-2525 (3d Cir.) (considering whether prior PA cocaine convictions are serious drug offenses)
- ▶ *US v. Baskerville*, No. 1:19-CR-0033-JPW, 2022 WL 4536136 (M.D. Pa. Sept. 28, 2022) (prior PA cocaine convictions are not serious drug offenses)

▶ Career Offender

- ▶ *US v. Lewis*, 58 F.4th 764 (3d Cir. 2023) (a controlled substance within the meaning of 4B1.2(b) is one regulated by either state or federal law)

What if. . .my client has a prior PA drug conviction for heroin?

- ▶ *US v. Foushee*, No. 22-1699 (3d Cir.) – from EDPA
Challenge to ACCA & Guidelines in Dist Ct
- ▶ *US v. Ward*, No. 22-1281 (3d Cir.) – from WDPA
Challenge to Guidelines in Dist Ct
- ▶ *US v. Welsh*, No. 2:20-CR-0054 (E.D. Pa.) (ECF No. 64)
Challenge to ACCA in Dist Ct

What if. . .my client has a prior drug conviction from a neighboring state?

- ▶ *US v. Gott*, 2023 WL 362388 (M.D. Pa. Jan. 23, 2023) (Mannion, J.) – NY cocaine predicate too broad for 851
- ▶ *US v. Paredes*, No. 21-2657 (3d Cir.) –
Guideline challenge to NJ marijuana and heroin in Dist Ct

What if. . .I am confused about the timing for the statute comparison?

- ▶ ACCA

- ▶ *US v. Brown*, 47 F.4th 147 (3d Cir. 2022), cert. filed, No. 22-6389 (time of commission of federal offense)

- ▶ Career Offender

- ▶ *US v. Lewis*, 58 F.4th 764 (3d Cir. 2023) (time of prior conviction)

- ▶ BUT *McNeill v. US*. 563 US 816 (2011) (look to state statute at time of state conviction to determine maximum punishment)

What if...my client is charged with 922(g)?

- ▶ Stat max raised from 10 years to 15 years. 18 U.S.C. § 924(a)(8) (crimes committed on or after June 25, 2022)
- ▶ *NY State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2011 (2022)
- ▶ *Range v. Att'y Gen.*, 53 F.4th 262 (3d Cir. 2022) reh'g en banc granted, opinion vacated, 56 F.4th 992 (3d Cir. 2023)

What if...I don't like the language in the Guidelines commentary?

- ▶ *US v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc)
- ▶ *US v. Adair*, 38 F.4th 341 (3d Cir. 2022)

What if...I think my client is eligible for the safety valve?

- ▶ 18 USC §3553(f)
- ▶ Section 402 of the First Step Act amended (f)(1) - used the word “and” between 3 listed criteria of criminal history points
- ▶ *US v. Jones*, No. 21-4605 (4th Cir. Feb. 21, 2023): “and” means “and”
- ▶ *Pulsifer v. US*, No. 22-340 (cert. granted Feb. 27, 2023): does “and” mean “and”?

What if. . .the PSR contains a list of irrelevant conditions for supervised release?

- ▶ Review for Odd Conditions
 - ▶ Computer monitoring
 - ▶ Search of electronic communications
 - ▶ Restricting associations with categories of people
- ▶ OBJECT

What if. . .my client has old charges listed as unresolved in the PSR?

- ▶ Scour the PSR for any unresolved cases OR detainers
- ▶ Get the documents to resolve any issue before the PSR is finalized
- ▶ Failure to deal with unresolved cases will hurt your client at the BOP

33. 11/09/2016 **Defiant Trespass /** 12/21/2016: Pled 4A1.2(c)
(Filed) ~~Magistrate 02-2-04,~~ guilty, fine/cost
(Age 21) ~~Lancaster, PA~~
~~NT-957-2016~~ 03/23/2017: Warrant
(active) - failure to
pay

35. 11/30/2016 **Defiant Trespass /** 12/21/2016: Pled 4A1.2(c) 0
(Filed) ~~Magistrate 02-2-04,~~ guilty, fine/cost
(Age 21) ~~Lancaster, PA~~
~~NT-1027-2016~~ 03/14/2018: Warrant
(active) - failure to
pay

On November 25, 2016, ~~Vinichell~~ was found in an area posted "Private Property - No Trespassing."

36. 12/16/2016 **Defiant Trespass /** 12/21/2016: Pled 4A1.2(c) 0
(Filed) ~~Magistrate 02-2-04,~~ guilty, fine/cost
(Age 21) ~~Lancaster, PA~~
~~NT-1067-2016~~ 02/15/2019: Warrant
(active) - failure to

	<u>Date of Arrest</u>	<u>Charge</u>	<u>Agency</u>	<u>Disposition</u>
40.	08/20/1999 (Age 14)	Burglary: Armed With Explosives/Deadly Weapon	Chautauqua County Family Court, NY	Unknown

Other Arrests

38. On June 17, 2008, the defendant was arrested in New York City and charged with Grand Larceny. The criminal complaint alleged that she stole a credit card and made purchases in excess of \$3,000. The probation officer was unable to locate documents associate with the arrest. The disposition is unknown.

24. 10/03/2004 **Sexual Assault/** 11/29/2006: 2 years 4A1.1(a) **3**
(Age 29) **Superior Court,**
San Juan, PR



DRAFT PSR

FINAL PSR - entry removed

What if. . .my client has state charges and I am asking for a concurrent federal sentence?

- ▶ Who has primary jurisdiction?
 - ▶ *Chambers v. Holland*, 920 F. Supp. 618 (M.D. Pa. 1996) (bail changes it); *Holloman v. Warden*, 635 F. App'x 12 (3d Cir. 2015) (a writ does not)
- ▶ Sentence cannot begin before date of imposition
 - ▶ 18 USC § 3585(a); *Rashid v. Quintana*, 372 F. App'x 260 (3d Cir. 2010)
- ▶ BOP decides credit for time served
 - ▶ 18 USC § 3585(b)
- ▶ BOP can designate a state facility for service of federal sentence
 - ▶ *Barden v. Keohane*, 912 F.2d 476 (3d Cir. 1990)
- ▶ Federal court must vary downward to assure credit
 - ▶ USSG § 5G1.3

What if. . .the judge imposes a hefty fine?

- ▶ Ask for interest to be suspended during imprisonment
- ▶ Ask for payment to commence after release from imprisonment
- ▶ Inmates are required to participate in the Inmate Financial Responsibility Program (IFRP) or face severe sanctions that include limits on commissary spending, bars on participation in many prison programs, assignment to the worst housing and inability to earn early releases

What if. . .my client is being denied earned time credits by the BOP?

- ▶ Eligibility depends on statute of conviction
 - ▶ *Lallave v. Martinez*, 2022 WL 7578794 (E.D.N.Y. Oct. 13, 2022) (not convicted of drug delivery resulting in death)
 - ▶ *Noe v. True*, 2022 WL 5080196 (10th Cir. 2022) (conspiracy is not a conviction for the substantive offense)
- ▶ Advise your client to start administrative remedy process
- ▶ § 2241 in the jurisdiction where client is housed

What if. . .I have a difficult witness at trial?

- ▶ Attorney: You may have suspected that drugs were involved, and I think you've so testified?
- ▶ Correctional Officer: Yes, that was a suspicion.
- ▶ Q: Was his conduct, also, potentially, consistent with a mental health-related issue?
- ▶ A: I'm not a psychologist, sir.
- ▶ Q: What did you go to college for?
- ▶ A: Psychology.

What if. . .

▶ ETHICS BONUS!!



What if. . .I am representing a defendant in a murder case AND a jailhouse informant (the prosecution's sole fact witness) at the same time?

- ▶ Is that ok?
- ▶ If you do it, you may have some of these problems when conducting your cross-examination:

Trial Transcript Excerpt 1:

Attorney: You know, I told the jury in opening, and I have to tell you this; that I am under ethical restraint. Correct? You know what that restraint is?

Witness: Yes, sir.

Q: And that restraint is: There is no issue, so that my license doesn't get in jeopardy for cross-examining you; that I am not allowed to ask you anything which I may know about you that nobody else knows about you. It is called confidential relationships. Do you understand that?

A: Yes, sir.

Q: And I will not violate that. I value my license too much to violate that. But I will ask you questions on things I do know about you, okay?

A: Fine.

Trial Transcript Excerpt 2:

Q: When the heck did I tell you I was scared about you taking the witness stand?

A: When you and I met on a Sunday.

Q: Now, is this confidential stuff?

A: Not in my opinion.

A: You came to visit me on a Sunday at the prison. You sat there in the room, and that was your exact words.

Q: You are such — you know what, I am not ascaresd (sic.) of you. I have never been ascaresd (sic.) of you, and this jury knows I have never been afraid of anybody. I said I am ascaresd (sic.) of you?

A: You said, I am afraid of my testimony because of the detail, because you have to have me sign a form that I would waive that would allow you to depose me.

And it gets confrontational:

Q: Didn't I in fact tell you I don't want to know what you knew? Didn't I tell you that? Are you calling me a liar now?

A: I did not call you a liar, but that's what you told me.

Q: And if I say I didn't tell you that, then one of us is telling the truth and one is lying?

A: That's the reason I wrote the letter.

Q: Is one of us lying and one of us telling the truth?

A: I am telling absolutely the truth.

What if...I have no idea where to start?

- ▶ Federal Public Defender's Office: 717-782-2237
- ▶ www.fd.org
- ▶ CJA Attorney Hotline: 800-788-9908