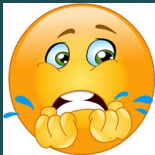


What if...  ?

Common Questions and Criminal Defense Conundrums

FEDERAL CRIMINAL DEFENSE TRAINING 2022



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

- ▶ Motion to amend standard conditions
- ▶ Motions denied: *US v. Adorno*, 1:21-CR-0329-CCC (M.D. Pa. Jan. 10, 2022); *US v. Griffin*, No. 21-385-6, 2021 WL 5917185 (W.D. Pa. Dec. 14, 2021)

What if. . .my client is caught with a burnt blunt and a medical marijuana card?

- ▶ 35 P.S. § 10231.303; 28 Pa. Code § 1141.21 – dry leaf or plant form is permitted “for administration by vaporization”
- ▶ 35 P.S. § 12031.304 – it is unlawful to smoke medical marijuana
- ▶ 35 P.S. § 10231.103 – defines “serious medical condition”
See also www.pa.gov confirming “anxiety disorders” and “Tourette syndrome” were added to the list

What if...my client asks me to continue his case because of the EQUAL ACT?

- ▶ Eliminating a Quantifiably Unjust Application of Law (EQUAL) Act to equalize crack and powder
- ▶ Introduced in 2021; passed the House 361-66; Senate may have 60
- ▶ Retroactivity language included
- ▶ DOJ has encouraged Congress to pass it
Brief of US at 5-6, *US v. Wise*, 1:05-CR-0449-YK (M.D. Pa. Aug. 19, 2021), ECF No. 267

What if...my client asks me about the First Step Implementation Act?

- ▶ Introduced in 2021
- ▶ Would make provisions of the First Step Act retroactive
 - Section 401 (recidivist drug sentences)
 - Section 403 (stacked 924(c) sentences)
- ▶ Broadens safety valve

What if. . .my client asks me about earned time credit?

- ▶ Incentives for completing rehabilitative programs from First Step Act
- ▶ 18 U.S.C. § 3632(d)
- ▶ 28 C.F.R. pt. 523
- ▶ Approved Programs Guide at www.bop.gov
- ▶ Ineligibility based on statute of conviction – 18 U.S.C. § 3632(d)(4)(D)

What if...I think I need an investigator?

- ▶ Investigator/expert can be obtained without prior authorization up to \$900 plus **reasonable** expenses – subject to later review – so be careful
- ▶ If you need to exceed, you must seek authorization in an *ex parte*, under seal motion
- ▶ If you believe you will exceed statutory max of \$2700 (services provided from 1/1/21 to present) – make motion ASAP
- ▶ All payments for investigator/expert services go through eVoucher system

What if...I need to file a motion to continue trial?

- ▶ Seek concurrence of AUSA and all co-defendants before filing
- ▶ Include length of desired continuance in your motion – otherwise most judges default to 30 days
 - ▶ Be specific if you need a pretrial motion extension
 - ▶ Don't ask for date certain unless you are sure the case is trial ready
- ▶ Include Speedy Trial language and citation in motion and proposed order
- ▶ Utilize FPD samples available to you or mimic a prior order of the judge you are before
- ▶ Keep each individual judge's preferences in mind

What if...I want an 11(C)(1)(c) plea agreement?

- ▶ Negotiate with AUSA
- ▶ Current state in MDPA

What if...my plea agreement contains an appellate waiver?

- ▶ Direct appeal v. collateral waivers
- ▶ Cross out or modify and limit terms
- ▶ AG Memo of 3/11/2022 instructing prosecutors not, as a general matter, to seek broad waivers of compassionate release in plea agreements

What if...my client “tells all” at a presentence interview with Probation?

- ▶ Beware of unnecessary admissions like “I smoke marijuana”
- ▶ Object when you can!

What if...I get a 1326 case?

- ▶ *U.S. v. Carrillo-Lopez*, 2021 WL 3667330, 2021 U.S. Dist. LEXIS 155741 (D. Nev. Aug. 18, 2021)
 - ▶ 8 U.S.C. § 1326 was enacted with racial animus and discriminatory intent and therefore violates the equal protection guarantee of the Fifth Amendment. Motion to dismiss indictment granted.
 - ▶ Similar motions to dismiss pending in two cases in MDPA (Gonzalez-Nane, 1:21-cr-197-CCC and Rodriguez-Arevalo, 1:19-cr-281-JPW)
 - ▶ So far, district courts in the 2nd, 5th, 6th, 9th, and 10th circuits have since held otherwise, but we still have to try!
 - ▶ Stay tuned.

What if...I have a CP case and the PSR says my client owes a bajillion dollars in restitution?

- ▶ 18 U.S.C. § 2259 – mandatory restitution
- ▶ Standard plea agreement seeks restitution for relevant conduct
- ▶ *Paroline v. US*, 572 U.S. 434 (2014) (proximate cause)
- ▶ 18 U.S.C. § 2259(b)(2) – minimum amount is \$3000 for an identifiable victim

What if...I have a CP case and the PSR says my client owes a bajillion dollars in special assessments?

- ▶ 18 U.S.C. § 3013 = \$100 per count of conviction
- ▶ 18 U.S.C. § 3014(a) = \$5000 “if the Court finds the defendant is not indigent”

See *US v. Lail*, 736 F. App'x 381, 382 (4th Cir. 2018); *US v. Kelly*, 861 F.3d 790, 802 (8th Cir. 2017); *US v. Shover*, No. 20-2666, 2021 WL 4166280 (3d Cir. Sept. 14, 2021)

- ▶ 18 U.S.C. § 2259A = \$17,000, \$35,000, or \$50,000 determined by offense of conviction and 3553(a) (sentencing) and 3572 (fine) factors to be deposited in victims fund under § 2259B

See *US v. Miller*, 23 F.4th 817 (8th Cir. 2022)

What if. . .I get a drug case and the government files an 851 Information?

- ▶ 21 U.S.C. § 851 – Proceedings to establish prior conviction for enhanced penalties in § 841(b)
- ▶ Prior conviction a qualifying predicate?
 - Serious drug felony = § 802(57)
 - Serious violent felony = § 802(58)
 - Felony drug offense (for § 841(b)(1)(C) only) = § 802(44)
- ▶ Room for negotiation?

What if. . .I get a drug case involving a death?

- ▶ Enhanced penalties – 21 U.S.C. §841(b)
- ▶ *Burrage v. US*, 571 U.S. 204 (2014) (“but for” cause)
- ▶ *US v. Robinson*, 167 F.3d 824 (3d Cir. 1999) (“without regard for common law proximate cause concepts”)
- ▶ *US v. Jacobs*, 21 F.4th 106 (3d Cir. 2021) (challenge to proximate cause)

What if. . .I get a drug case with a 924(c)?

- ▶ Enhanced consecutive punishment – 18 U.S.C. § 924(c)(1)
 - 5 years for using, carrying or possessing a firearm
 - 7 years for brandishing
 - 10 years for discharging
 - 25 years for a prior 924(c)
- ▶ Instant offense a qualifying predicate?
 - Drug trafficking crime = § 924(c)(2)
 - Crime of violence = § 924(c)(3)
- ▶ Room for negotiation?

What if. . .I think my client is a career offender?

- ▶ U.S.S.G. § 4B1.1

- At least 18 years old

- Instant offense is a felony crime of violence or drug offense

- 2 qualifying priors that are assessed criminal history points

- ▶ Instant offense AND prior convictions qualifying predicates?

- Crime of violence = § 4B1.2(a)

- Controlled substance offense = § 4B1.2(b)

- Felony conviction = § 4B1.2(c)

- ▶ Room for negotiation?

What if...I get a 922(g) case and I think my client is an Armed Career Criminal?

- ▶ 18 U.S.C. § 924(e)

- Three prior convictions: violent felony or serious drug offense or both
 - Committed on occasions different from one another
 - Mandatory minimum 15 years

- ▶ Prior convictions qualifying predicates?

- Serious drug offense = § 924(e)(2)(A)

- See also Lewis v. US*, No. 20-7617 (US) (cert. pending)

- Violent felony = § 924(e)(2)(B)

- ▶ Priors committed on occasions different from one another?

- See Wooden v. US*, 142 S. Ct. 1063 (2022)

What if...my client has a prior conviction for a marijuana offense?

- ▶ *US v. Lewis*, No. 21-2621 (3d Cir.) (considering NJ marijuana)
- ▶ PA conviction for PWID marijuana is not a COV
 - ▶ *US v. Miller*, 480 F. Supp. 3d 614 (M.D. Pa. 2020) (Conner, J.)
 - ▶ *US v. Jamison*, 502 F. Supp. 3d 923 (M.D. Pa. 2020) (Jones, J.)
 - ▶ *US v. Totten*, No. 1:18-CR-0201 (M.D. Pa. July 19, 2021) (Kane, J.)
- ▶ Consider challenges to other controlled substances
 - See, e.g., *US v. Drummond*, No. 1:18-CR-0220-CCB (D. Md.) (heroin)

What if. . .my client has a prior conviction for PA delivery or PWID of any drug?

- ▶ Challenge it

- ▶ ACCA = *US v. Murphy*, No. 19-1653 (3d Cir.)

- ▶ CO = *US v. Dawson*, No. 20-3338 (3d Cir.)

What if. . .my client is a career offender and has an instant offense or prior conviction for an inchoate offense?

- ▶ *US v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc)

Not a qualifying offense because listed in commentary

- ▶ *US v. Roman*, No. 19-1598 (3d. Cir.) ECF No. 78

Govt conceded that 21 U.S.C. § 846 does not qualify as a controlled substance offense under U.S.S.G. § 4B1.2(b)

What if...my client has a prior conviction for an inchoate offense (other than a CO)?

- ▶ Attempt

 - US v. Taylor*, No. 20-1459 (U.S.) (argued 12-7-2021)

 - US v. Walker*, 990 F.3d 316, 328 (3d Cir. 2021) (qualifies)

- ▶ Aiding and Abetting

 - US v. Stoney*, No. 21-1781 (3d Cir.)

 - US v. Styles*, No. 19-3217, 2022 WL 34126 (3d Cir. Jan. 4, 2022) (qualifies)

- ▶ Conspiracy

 - See *US v. Davis*, 139 S. Ct. 2319 (2019) (under invalid residual clause)

- ▶ Pinkerton

 - US v. Stoney*, No. 21-1781 (3d Cir.)

What if. . .my client's instant offense or prior conviction is a completed Hobbs Act robbery (18 U.S.C. § 1951)?

- ▶ CO = NO

US v. Scott, 14 F.4th 190 (3d Cir. 2021)

Elements clause covers the use of force or threats of force only against persons; sweeps more broadly than enumerated robbery

- ▶ 924(c) = YES

US v. Walker, 990 F.3d 316, 325 (3d Cir. 2019)

What if. . .my client has a prior conviction with a *mens rea* of recklessness?

- ▶ *Borden v. US*, 141 S. Ct. 1817 (2021)
 - ▶ Offenses with *mens rea* of recklessness do not qualify as predicates
 - ▶ Left open the question of “circumstances manifesting extreme indifference to the value of human life”

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

- ▶ Not a qualifying predicate because PA burglary is broader than generic burglary
- ▶ *Mathis v. US*, 579 U.S. 500 (2016)
- ▶ *US v. Steiner*, 847 F.3d 103 (3d Cir. 2017)

What if. . .my client has a prior conviction for PA simple assault?

- ▶ ACCA = NO

In most cases it is a misdemeanor 2 punishable by 2 years or less (18 Pa. C.S. § 1104) and does not qualify as a violent felony under 18 U.S.C. § 921(a)(20)(B)

- ▶ CO = ?

Govt withdrew its cross appeal in *US v. Stanton*, No. 16-4395 (3d Cir.) following *Borden v. US*, 141 S. Ct. 1817 (2021)

But see US v. Folk, No. 1:11-CR-0292-JEJ, 2018 WL 3093396 (M.D. Pa. June 22, 2018) (2701(a)(3) is a COV)

What if. . .my client has a prior conviction for PA aggravated assault?

- ▶ ACCA – elements clause

US v. Mayo, 901 F.3d 218 (3d Cir. 2018) (2702(a)(1) is not)

US v. Harris, No. 17-1861 (3d Cir.)

Question certified to PA Supreme Ct = Whether the PA first degree aggravated assault provision requires some use of physical force, as the government contends, or, instead, is not an element as the Pa Superior Ct said in *Commonwealth v. Thomas*, 867 A.2d 594 (Pa. Super. Ct. 2005)?

- ▶ CO – enumerated or elements clause

US v. Ramos, 892 F.3d 599 (3d Cir. 2018) (2702(a)(4) is a COV)

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

- ▶ ACCA = Maybe

Stokeling v. US, 139 S. Ct. 544 (2019)

US v. Peppers, 899 F.3d 211 (3d Cir. 2018) (not 3701(a)(1)(v))

US v. Harris, No. 17-1861 (3d Cir.)

Govt concedes 3701(a)(1)(i) & (iii) can be committed recklessly

Govt argues 3701(a)(1)(ii) & (iv) are divisible

But see *US v. Parrott*, No. 09-245, 2022 WL 377017 (E.D. Pa. Feb. 8, 2022)
(3701(a)(1)(iv) is indivisible and not an ACCA predicate)

- ▶ CO = Yes

United States v. Graves, 877 F.3d 494 (3d Cir. 2017)

What if. . .the judge ignores my sentencing arguments?

- ▶ OBJECT after sentence!
- ▶ *US v. Flores-Mejia*, 759 F.3d 253 (3d Cir. 2014) (en banc)
 - ▶ Objection to procedural error after sentence is imposed to avoid plain error review on appeal
- ▶ *US v. Mercer*, 603 F.3d 203, 217 (3d Cir. 2010); *US v. Fountain*, 792 F.3d 310, 323 (3d Cir. 2015)
 - ▶ Procedural = failure to give meaningful consideration to a defendant's arguments or the factors listed in §3553(a)
 - ▶ Substantive = failure to give a particular § 3553(a) enough weight



"My incompetence will become the basis of your appeal."

What if. . .my client wants to appeal and I don't?

- ▶ Third Circuit Local Rule 109.1
- ▶ Counsel in criminal cases are expected to continue on appeal “**absent extraordinary circumstances.**”
- ▶ So, if you file a notice of appeal or if your client files one *pro se*, and you're listed on the district court docket, you're in and unlikely to get out.

What if. . . I want to avoid being stuck in an appeal?

- ▶ Move to withdraw in the district court and attach the form *pro se* notice of appeal from the Clerk's office.
- ▶ Third Circuit wheel

What if. . .I want to handle the appeal, but don't know the process?

- ▶ Call Sue!!!
- ▶ 1. Notice of appeal w/in 14 days on the entry of judgment
- ▶ 2. You'll then receive an opening letter telling you to file 3 things
 - ▶ Appearance form
 - ▶ Information statement
 - ▶ Transcript purchase order

...appeal process continued

- ▶ Once the transcripts are filed, you'll receive a briefing schedule
- ▶ The Third Circuit does not favor extensions, but you can obtain an informal two-week one from the case manager with a telephone call provided the government agrees and the request is at least 3 days before the deadline. Third Circuit Local Rule 31.4

What if. . .my client signed an appellate waiver and still wants to appeal?

- ▶ You must file the notice of appeal but . . .
- ▶ Consider withdrawing in the district court
- ▶ And if you stay in, the government will *generally* move to enforce the appellate waiver and you'll have 10 days to file a response, however:
 - ▶ *U.S. v. Erwin*, 765 F.3d 219 (3d Cir. 2014)

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