Welcome to introducing the Federal Courts, the Federal Judicial center orientation series for court employees. This is program two of the series: How Criminal Cases Move Through the District Courts. It's designed to help you to become familiar with basic procedures involved in processing criminal cases in the Federal District Court. This program has four parts. Part I. Initial Stages. Part II. Pre-Trial Proceedings Part III. Trials and Guilty Pleas. Part IV Sentencing and Post-Judgment Proceedings.

Part I Initial Stages

Hello
I'm Bruce Clarke. Welcome to your new job and to the Federal Courts. I am standing here in the clerk's office for our District court. The clerk's office plays a vital role in the processing of criminal cases through the Federal courts. Generally speaking, the clerk's office assists the court in seeing to it that criminal cases proceed through the federal system in a timely and orderly fashion, we also assist the parties in following the district court's administrative and procedural rules and see to it that information about specific criminal cases is made available to those who need it.

These responsibilities are quite important and the system is busy as the Federal court system, which is now processing over fifty thousand criminal cases a year. In addition, the clerk's office itself works within a much wider and very complex adversary system for the resolution of criminal cases. In order to perform you job in the clerk's office effectively, you'll have to become familiar with how that adversary system works, and with terms commonly used by the people who work in it.

Let me show you what I mean,

Jack: Hello Ann
Ann: Hi Jack. How is everything in the public defender's office.
J: Just fine, I want to introduce you to a new attorney in our office. This is Alida Herrero. Alida this is Ann Callas.
AC: Pleased to meet you.
Alida: I am very glad to meet you too.
J: I wanted to introduce Alida to you and also have her see how the clerk's office is set up. So I was wondering if I could take a look at the file of one of my cases, United States versus Clarke. AC: Alright, what's the case number?
J: Ah...Let's see it was filed this year, twelve twenty eight. It should be a pretty thick file I filed two suppression motions in the case.
AC: Has your client been indicted by the grand jury?
J: He sure has.
AC: What Judge has been assigned to the case for trial?
J: Judge Scott.
AC: And has the trial date has been set yet?
J: trial is set for November fifteenth.
AH: wow, that's coming up pretty soon.
AC: well, under the Speedy Trial Act, Alida. Here it is United States versus Clarke.
J: Thank you.
AC: Lets see. Mr. Lee's client was detained pre-trial under the Bail Reform Act, which makes the case a priority case for trial under the Speedy Trial Act.
J: I told you Ann knows what she is talking about.
AH: She does.

AC: I see you do have some motions in there.

J: There is a motion to suppress some oral statements, which the DEA agent says my client made at the time of arrest, the motion also alleges that my client's arrest was made without probable cause.

AC: So the drugs should be suppressed as fruit of an illegal arrest.

J: That's right.

AC: And of course the government is contesting the defense motions so the Prosecutor's responses to Mr. Lee's motions are also in the file.

AH: Who is the Prosecutor on this case?

J: Assistant US attorney Johnson.

AC: Oh, sure. She started with the US attorney's office around the same time you started with the public defender, right?

J: That's right.

AC: When will the magistrate hear the suppression motions?

AH: Wait, the magistrate? I thought that the case assigned to Judge Scott.

AC: Well, magistrates are allowed to hear motions to suppress, if Judges handling the case authorizes them. So it depends on how the particular Judge handles his cases. Judge Scott's practice is to authorize a magistrate to conduct hearings on motions to suppress.

AH: I see.

J: If the magistrate denies the motions, we have ten days to file any objections with Judge Scott.

AC: See, the magistrate gives his report and recommendations in the case to Judge Scott but the Judge reviews the magistrate's recommendations considers the defendant's objections and enters a final order. Now most Judges...

As you can see, to do you job well in the clerk's office you must become familiar with the roles different people play in the Federal Criminal Process. What is the role of a Federal Public Defender, or an assistant United States' attorney? What is the difference between a Federal Judge and a Federal Magistrate? You'll also have to learn what happens as a criminal case makes its ways through the system. What exactly is an indictment, or motion to suppress evidence? In order to understand these matters, you'll also have to get to know the rules that govern the system, including certain provisions of the United States constitution and the Federal rules of criminal procedure. And of course it would help to have a grasp of statute that are commonly referred to, like the Bail Reform Act, and the Speedy Trial Act, which our clerk, just mentioned to the new public defender.

Obviously, it'll take some time for you to absorb all this information and learn how to apply it in your own courthouse. This video program is designed to assist you in this process by giving you an overview of our Federal criminal court system. We hope that providing you with such an overview will help you master the portions of the process you will be responsible for.

Each videocassette in this program comes with a set of written materials and each set of materials includes an outline of the script for that cassette. It also includes a glossary of terms and several other documents relating to the information covered in the script. When watching the video programs you should have the outlines in front of you, the outlines follow the programs very carefully. If you are viewing this by yourself and you want to take some notes you can stop the tape and do so in the

space provided in the outline. You can take the outlines and the other materials with you of course and refer to them later to answer questions you may have.

The first program in this series, will introduce you to the major players in the Federal Criminal court system and the rules that govern their conduct. It will also discuss what a Federal crime is and how federal crimes are investigated, and reported. Later segments will cover preliminary procedures after an individual charged with a crime is arrested, pre-Trial and trial procedures, and, sentencing and post-judgment matters.

Throughout this program we will be referring to the Federal rules of criminal procedure. You might want to keep a copy of these rules handy as you view this video program. These rules govern procedures in all criminal cases in United States District Courts. Like Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure are developed by the Federal Judiciary and take effect after review by congress. The Federal rules have the same force as any law passed by congress. The Federal rules of criminal procedure are designed to provide a comprehensive procedural guide for use in Federal Criminal cases. But the Federal rules themselves recognize that some procedural matters are best addressed on a local basis, thus Federal rule of criminal procedure Fifty Seven invites individual district courts to make local rules regulating more detailed procedural matters. For example, you district court may have its own rule of procedure governing the way the judge and lawyers go about picking a jury, which lawyer gets to go first and things of that nature. In some courts neither gets to go first. Rule Fifty Seven allows these matters to be covered by local rules of

procedure rather than the federal rules. No local district court rule can be inconsistent with the federal rules of criminal procedure, however.

Of course, while the federal rules govern procedural matters in federal criminal cases, they must, like all laws in our country comply with the requirements of the United States constitution to be valid. When the federal government accuses a person of committing a crime, that person is guaranteed certain rights under the constitution. For example, the constitution guarantees the accused the right to remain silent in the face of accusation by the government, the right to a jury trial, and the right to be represented by an attorney at all stages of the proceedings. Our system of criminal justice is what's known as the adversary system. The adversaries are the government and the defendant, under the adversary system the government must prove the charge it has brought beyond a reasonable doubt before the defendant can be convicted. The defendant is allowed to contest the government's evidence present a defense to the charge and seek acquittal. The jury decides the case by returning a verdict finding the defendant, guilty or not guilty of the charge. The theory of our system is that the truth is most likely to emerge if each side has a full opportunity to present its side of the case to the jury. In a rare case, if it's OK with the parties, the judge decides the case without a jury. That brings us to the role of the courts, which is to see to it that justice is administered fairly that is according to the constitution, statues and rules of procedure that govern each case. Essentially the judge sees to it that the opposing parties play fairly and by the rules. The judge also makes sure that the case moves through the system in a timely manner so that justice is done but not

delayed. Most federal criminal trials are presided over by the United States district court judges. Under article two of the constitution, district court judges are appointed by the president with the advice and the consent of the senate but not all federal criminal proceedings are presided over by district court judges. United States magistrate judges often referred to as magistrates are also federal judicial officers, but what's the difference between district and magistrate judges? The basic differences are these. District judges are appointed by the president, they may hold their offices for life, and congress may not reduce their pay. The constitution includes these requirements so district judges will not be afraid of losing office or their salary for making unpopular decisions. By contrast, United States magistrate judges are judicial officers appointed by the district judges of each United States district court, to help them do their jobs. Magistrate judges serve an eight-year term. There are full and part time magistrate judges and they perform a variety of tasks in civil and criminal cases.

District courts can vary considerably in the ways in which they use magistrate judges. In criminal cases magistrate judges are authorized by law to issue search warrants and arrest warrants, issue orders releasing or detaining defendants prior to trial, conduct trials of misdemeanors, that is criminal offenses punishable by up to a year in prison, although defendants consent is required in some cases, and conduct many other procedures under the federal rules of criminal procedure. In other words, congress has listed a range of things that magistrate judges may do and it's up to each district court to decide which things they'll do in that particular district.

But only district judges may conduct trials of more serious cases called felonies. Felony offenses carry a potential penalty of more than one year in prison. And only district judges have the power to make final decisions on such crucial pre-trial motions, as motions to suppress evidence or motions to dismiss the case, while district judges may conduct hearings on such important motions, they often assign magistrate judges to do so, when authorized the magistrate judge conducts the hearing on the motion and then submits a set of proposed findings of fact and recommendations to the district judge, the proposed findings are commonly referred to as the magistrate's report and recommendations or R and Rs. After being served with the copy of the magistrate judges R and Rs the parties have ten days in which to file any objections. A district judge then rules on the objections. In doing so the district judge may accept, reject or modify the R and Rs. In other words, if either party objects to the magistrate judge's findings and motions to suppress, or dismiss, the district judge handling the case will make the final rulings. So there are some limitations on the tasks that magistrate judges are allowed to perform in criminal cases but overall they perform a substantial number of duties in both felony and misdemeanor cases.

OPTIONAL DISCUSSION BREAK

Next, lets discuss the definition of a federal crime. What is a federal crime and how does it differ from a violation of state law. Remember our system of government assigns separate powers to federal and state governments, this means the criminal court system is separate from criminal court system run by the state. Of course it is true that both the state and the

federal government have passed statutes punishing certain types of crimes such as selling illegal drugs. So a person who sells illegal drugs can be prosecuted for that offense in either state or federal court. But it is important to remember that not every criminal act committed in the United States can be prosecuted in the federal court system. In fact the great majority of criminal charges filed in this country involve violations of state laws. And a criminal law or statute passed by a given state legislature can only be enforced in that state. For example, a statue passed in New York State may only be enforced in New York it does not apply in any other state, or in the federal courts. On the other hand, federal criminal statutes, that is, criminal laws passed by congress, our national legislature, can only be enforced in federal courts. So there are separate state and federal criminal justice systems in our country. Violations of federal criminal statutes cannot be prosecuted in state courts, and violations of state criminal statutes cannot be prosecuted in the federal court system. This means that federal courts are courts of limited jurisdiction in criminal cases. Jurisdiction refers to the power or authority of a court to hear a certain type of case. We say that federal courts have limited jurisdiction because they can only hear those kinds of criminal offenses that congress gives them the power to hear. Congress has defined most of the crimes that may be prosecuted in federal courts in Title 18 of United States code. Definitions of crime may also be found in other statues such as Title 21 of the code, which defines offenses relating to illegal drugs. So when we speak of federal crimes, we refer to violations of criminal laws passed by congress, which are prosecuted in the federal courts but Congress cannot decide to make any crime at once to be federal crime. To be a federal crime, what we call crime against

the United States, the criminal act must have some connection with the United States and not just with a particular state. Federal crimes fall into three general categories.

These are, first, crimes, which affect an area that the federal government has the power to regulate under the constitution. Here, I am talking about areas of national interest, such as banking practices, interstate commerce or imports and exports. For example, a person charged with holding up a local grocery store will ordinarily, be prosecuted for robbery in state court. Like the vast majority of the crimes committed in this country most robberies are prosecuted in state courts. But if a bank is robbed the offense can be prosecuted as either a state or federal offense. Why? Well... Let's assume that the bank is a member of the Federal Reserve System, has its deposits insured by the federal deposit insurance corporation, an agency of the federal government, and is subject to federal regulations governing the banking industry. Robbery of money from that bank could have an effect on the national banking system, which Congress has the authority to regulate under the constitution. Congress establishes national banks, bank depositories, and other financial agencies needed for the fiscal operation of the federal government, so while the crime of bank robbery can be prosecuted under state law in a state court, congress also has the power to pass laws to protect the banks and other financial institutions which it regulates. And Congress has done so by passing a law, which allows bank robbery to be prosecuted as a federal crime.

A second type of crime, which qualifies as a federal offense is that which affects an agency of the United States government.

Such as the post office or the internal revenue service. For example, let's consider the crime of destruction of property. Ordinarily a person who intentionally destroys someone else's property would be prosecuted in state court. But a person who destroys United States mail or equipment belonging to United States postal service commits a federal offense, so does the person who uses the US mail to promote a dishonest business, these offenses adversely affect the interest of a federal agency so Congress has made them federal offenses.

A third group of crimes, that qualify, as federal offenses are those which occur on property owned by the federal government. This time let's use the offense of assault as an example. Assault cases involving civilians are ordinarily prosecuted in state courts, but if an assault occurs on federal property, for example, if one civilian assaults another, while they are visiting a military base, the offense is treated as federal offense and is prosecuted in federal court, under the Assimilative Crimes Act. Notice that the defendant is prosecuted for the assault in federal court, even though there is no federal criminal law, which applies to assaults between civilians. Under the Assimilative Crimes Act, the Congress provided that the federal courts should simply apply the law of the state in which the federal property is located, converting that law into a federal offense; so our assault defendant, still ends up being prosecuted for a federal offense in a federal court. Notice that in each of our examples there is a direct, connection between the prohibited conduct and the United States government. That connection enables Congress to declare that the conduct is a federal criminal offense.

Next, lets look at the steps that lead to the prosecution of a criminal case in federal court. Under our system, the judiciary is a separate branch of government, independent of the executive, and legislative branches. Thus the courts themselves have nothing to do with the decision whether to say a certain action, robbing a bank, say, is a federal offense. That is for Congress to decide by passing appropriate legislation. And the courts do not decide whether to charge a person with committing a federal crime. The executive branch is responsible for investigating criminal conduct and deciding whether to file formal criminal charges. The president is charged with this executive branch function, under our constitution. The president exercises his power through the attorney general, who heads the Justice Department. The Justice Department has been characterized as the largest law firm in the world. In addition to the attorney general, the president appoints a United States attorney to represent the United States in each of the ninety-four judicial districts. The United States attorney is the government's lawyer for each judicial District, and has exclusive authority to represent the position of the United States in the federal courts of that district. The United States attorney also has the authority to hire enough assistant United States attorney to handle the caseload of criminal cases in the district.

It is the job of the United States attorney in each district. To decide which alleged criminal conduct in the district should be prosecuted, but the task of investigating alleged criminal activity is not ordinarily performed by the United States attorney's office. Investigative tasks are performed instead by separate law enforcement agencies. United States attorney's office, reviews the evidence developed by these agencies, and decides, which

cases are worthy of prosecution, here are few of the law enforcement agencies which investigate alleged federal crimes and develop evidence for the United States attorney's office. We'll start, with the Federal Bureau of Investigation. The FBI or Federal Bureau of Investigation is a part of the Justice Department. The FBI has brought authority to investigate violations of the Federal criminal law. The FBI investigates allocations of banking crimes, gambling offenses, white-collar fraud, public corruption, interstate transportation of stolen property, election offenses, and civil rights violation. The DEA, or Drug Enforcement Administration, is also part of the Justice Department. The DEA is the law enforcement agency of the United States government, with primary responsibility for investigating narcotics cases. The Bureau of alcohol tobacco, and Firearms, AT&F is part of the Treasury Department. It investigates violations of federal gun laws, arson cases, cases involving the illegal use of explosives, and cases involving the illegal production of the alcoholic beverages. The secret service is also part of the treasury department. In addition to protecting the president, and other public officials, the secret service investigates alleged violations of federal currency laws, such as counterfeiting and theft of government checks.

The CID, or criminal investigation division, of the internal revenue service, investigates violation of the criminal tax laws. And federal postal inspectors of the United States postal service investigate offenses involving the use of the mails. Agents from these and other agencies, investigate alleged federal crimes occurring within their Jurisdiction. If they conclude from their investigation that a federal crime may have occurred, they then recommend to the appropriate United States attorney's office

that the case be prosecuted. However, the decision whether or not to actually file criminal charges against an individual or an organization is not made by the agent who investigated the case, that decision is made by the United States attorney's office after prosecutors from that office review the case.

OPTIONAL DISCUSSION BREAK

Lets see how an investigative agency works together with the United States attorney's office to develop evidence, make arrests, and initiate formal criminal charges against the suspect. We'll use a typical drug case to illustrate this process. We will refer to this hypothetical case throughout our program tracking the case as it makes its way through each phase of the federal criminal court system.

Let us suppose that Ralph Brown, an agent of the drug enforcement administration has been conducting an investigation into alleged drug trafficking in the Centerville section of the city. Working undercover, Brown approaches two people sitting in a Van, parked in a secluded area. Brown asks them if they have any cocaine for sale, the passenger turns, and says something to the driver. But Brown cannot hear what she says. Then the passenger later identified as Angela Smith gets out of the van. Smith negotiates an agreement with Brown as they walk into a clearing. Brown then buys five hundred and forty grams of cocaine from Smith. After Brown makes the purchase, he leaves the area, where he bought the drugs from Smith. Brown then uses a radio to broadcast descriptions of Smith and the driver of the van to a DEA arrest team waiting near by. The van leaves the scene as the arrest team moves in and

detains Smith. Meanwhile Brown conducts a field test, to ensure that the substance he received from Smith was really cocaine. After Brown identifies Smith, as the person who sold the cocaine to him, Smith is placed under arrest, and advised of her rights to remain silent. A search of Smith after her arrest reveals she is in possession of special pre-marked DEA money, which Brown gave her in exchange for the cocaine.

At this point, you may be wondering why DEA agents rather than State or local law enforcement officers are involved in this case. First of all, congress has passed laws making it a federal crime to possess or sell illegal drugs and as you know federal crimes are investigated by federal law enforcement agencies. But you may be saying illegal drug activity is already regulated on the state and local level in our country, why has congress also passed laws making it illegal to possess or sell drugs. Congress did so because it found that majority of the illegal drug traffic in this country flows through interstate commerce. For example, illegal drugs may be imported into the country through one state, sold in a second state, and used in a third state. The drugs may move from state to state by car, train, airplane and many other means of transportation. As the drugs move throughout the country, they affect interstate commerce, by endangering people and property in may different states. And the commerce clause of the constitution, give congress the power to regulate illegal activity having a bad effect upon commerce, between the states. So congress exercises this power under the commerce clause, to pass laws outlawing the possession and sale of illegal drugs. These laws are collected in Title 21 of the United States code at section eight forty one, the statue calls these illegal drugs, controlled substances a term

you may hear frequently in court. Of course under our federal system, law making drug related activity illegal can also be passed and enforced at the state and local level. As we've seen illegal drug activity which surfaces in any one state, usually involves several other states as well.

For this reason, the commerce clause also allows congress to regulate illegal drug activity occurring on a purely local or intrastate basis. This means that federal drug laws can be applied to illegal drug activity, which takes place in only one state, city, or town. Usually, however, federal agents like those from the DEA are called into investigate larger and more widespread illegal drug activity, and that's what happened in our hypothetical case. Federal agents investigating the illegal activities of a widespread drug reign, learn that large quantities of drugs were being sold by reign members, near the scene of Smith's arrest, the DEA then set up an under cover drug operation, hoping to arrest street sellers, like Angela Smith. The DEA hopes that arrestees like Smith, who are at the lowest level in the drug reign activities might then be persuaded to identify higher ups in the reign. Lets return now to the facts of our hypothetical case. Suppose that while in custody Smith volunteers some information to agent Brown.

Ralph Brown: This way.
Angela Smith: Never should have gotten involved with this guy Jones. Never should have listened to him.
RB: Settle down, now...
AS: Look! You should talk to Michael Jones, the one in the van. He is the one who gave me the drugs that I sold you.
RB: Michael Jones, huh?

Later agent Brown runs Jones's name through the computer and learns that he has prior convictions for grand theft and assault with a dangerous weapon. Brown next obtains photograph of Jones from the DEA files. Looking at the photo, he recognizes Jones as the driver of the van. Then while other DEA agents continue to work on the potential case against Jones. Agent Brown sees to it that Smith is brought to the office of the US Marshall for processing. Brown then heads for the United States attorney's office to help an assistant US attorney prepare Smith's case for court. This is because Rule five of the federal rules of criminal procedure requires that an officer making an arrest without a warrant take the arrested person before the nearest available federal magistrate without unnecessary delay for what is called the initial appearance. Rule five of the federal rules also requires that when a person arrested without a warrant, a complaint shall be filed against him when is brought before a magistrate, the complaint, as defined in rule three, is a written statement of the essential facts of the charged offense. Rule four requires that an Affidavit be filed with the complaint. Alleging that there is probable cause to believe a crime has been committed and that the defendant in this case Angela Smith has committed it. An affidavit is a sworn statement and probable cause is the legal standard which must be met to justify an arrest. You'll hear the term probable cause a lot. To say that a judge has found probable cause to believe a crime was committed is not the same as saying that the Judge is certain a crime was committed. It just means that the judge thinks that there's a reasonable belief that a crime has been committed and the person who has been arrested committed it. The probable cause standard requires that arresting officers

have a reasonable belief after considering all the information known to them that a crime has been committed, and that the person they're arresting committed the crime. Prior to Smith's initial appearance in court, agent Brown met with an Assistant United States attorney to discuss the facts of the case, against Smith, and provide the assistant with enough information to draft the complaint.

Ronda Johnson: Hi
Agent Brown: Hi
RJ: I'm AUSA Ronda Johnson
AB: agent Ralph Brown, pleased to meet you
RJ: have a seat
AB: alright
RJ: I don't think I've seen you around are you new?
AB: the Smith case is my first undercover buying bust.
RJ: you're off to a good start
AB: thanks
RJ: I've read you reports on the case. They look fine to me. Looks like a valid arrest and a strong case
AB: yup!
RJ: you don't have any doubt about the identification, do you?
AB: none whatsoever, Smith was the seller
RJ: good! We'll proceed with the case then file a complaint
AB: good! I've also got a lead on the guy who's driving the van. He's name is Michael Jones and he has got two prior convictions. Grand theft, and assault with a dangerous weapon. Let's get a warrant on him and pick him up.
RJ: we'll get to him later right now I've got to prepare a complaint against Smith. You're affidavit has will have to be filed along with the complaint.

AB: I've haven't finished writing that yet. I wanted to get to work right on this Jones's case.

RJ: well, that complaint has to be backed up by an affidavit, and we don't have a lot of time. Why don't you finish drafting your affidavit, while I prepare the complaint.

AB: ok! I'm a little new with this. Exactly how much information do I need to put in the affidavit?

RJ: the affidavit has to have enough information to lead the magistrate to conclude that there is probable cause to believe Angela Smith distributed the cocaine.

AB: well, that's what she is going to be charged with in the complaint, right? Distribution of cocaine.

RJ: right! The complaint will charge a violation of 21U.S.C.841(a)(1), which makes it unlawful to intentionally distribute a controlled substance like cocaine.

AB: well, if that's what we're going to say in the complaint. How come we have to say in the affidavit? I would really like to get moving on the Jones's case, you know?

RJ: I know, but complaint and the affidavit are two different things, the complaint only describes very basic facts of the offense the government says was committed, it give the name and position of the person making the accusation, you, and the name and the address of the defendant, so the affidavit is necessary to supplement the facts in the complaint and provide the magistrate with enough reliable factual information to hopefully support a finding of probable cause.

AB: ok. I'll crank out an affidavit. Just bothers me that Jones is probably out there selling more drugs in the street while I'm stuck here doing paper work.

RJ: I know how you feel, but take your time on this, there is

more at stake in here than paper work. You've arrested Smith, I take it you'd like formal criminal charges filed against her today?

AB: you bet I would.

RJ: well! Without a proper affidavit, the magistrate won't even sign the complaint.

AB: uh hmm...

RJ: no criminal charges will be allowed against Smith and we might as well all go home, Smith sure will.

AB: But if we provide an affidavit with enough reliable facts, show probable cause, and she will be held pending her initial appearance before the magistrate, right?

RJ: right!

AB: Yah! It's all coming back to me. I got this in training and that's when the magistrate will determine bail, right?

RJ: that's correct, and at that point, I'll ask that Smith be detained without bond.

AB: Ok. Now I've got it. Why don't I write up a draft of affidavit then bring it back to you to look it over.

RJ: fine. Let's get moving on this, though. I've got to prepare the affidavit and the complaint, before they finishing processing the defendant. Once they're done. We'll take a look at that case against Jones.

AB: Ok. Thanks a lot.

Copies of the complaint and affidavit in our hypothetical case, United States versus Angela Smith are included in your written materials. You might want to look them over at this point.

OPTIONAL DISCUSSION BREAK

After Smith is processed by the United States Marshalls, she'll be taken to a holding cell, to wait her initial appearance before the magistrate. While in the cell, Smith will be interview by a pre-trial services officer. Pre-trial services officers, or in some district, probation officers assigned to exercise pre-trial services responsibilities, assist the court by collecting and verifying information about criminal defendants like Smith, first the officers interviews the defendant, obtaining information about her personal history and financial status. This includes information relating to the defendants family, employment status and ties to the community. The officer then verifies the information volunteered by the defendant and checks with law enforcement agencies to see if the defendant has a criminal record. The officer incorporates this information in a report that goes to a magistrate. The magistrate uses the pre-trial services report at the initial appearance when deciding bail issues, that is, issues relating to whether the defendant should be released or detained pending trial. Copies of the pre-trial services report also go to council for the defendant and the assistant United States attorney handling the case for their use at the bail hearing.

Because of the restrictive purpose of the interview, none of the information revealed to the pre-trial services officer can be used against the defendant on the issue of guilt in any later court proceeding. If the defendant is later found guilty, however, the information given in the interview is made available to probation officers for sentencing purposes. And may affect the defendant's sentence. Thus before interviewing the defendant, the pre-trial services officer advises the defendant of the different ways in which the information provided may be used at

sentencing. The officer also advices the defendant that there is no obligation to answer any of the interview questions before speaking with an attorney. Pre-trial services officer interviewing defendants often use the form found in your materials entitled notice to defendants to advise of the defendants of their interview options. After speaking with an attorney, some defendants refuse to be interviewed. Pre-trial services officers also ask defendants whether they wish to retain an attorney or have an attorney appointed by the court to represent them. Of course defendants who wish to hire an attorney and have the money to do so, may retain any attorney they choose. But what if the defendant wants to be represented by a lawyer, but cannot afford to have one.

Pre-trial Services Officer: Ok. Do you want to hire a lawyer? or...

Angela Smith: I can't here an attorney.

PSO: ok.

AS: I can't it. Can't they appoint me one?

PSO: sure, if the court finds that you're unable to afford an attorney, the court will appoint one for you. Then you don't have to pay the lawyer fees. Is that what you'd like, the court to appoint you a lawyer?

AS: yes, yes as long as it's free.

PSO: ok. Then I just need you to fill out this financial affidavit and then you'll swear to it that all the information is true. The court will review it and if you qualify, it appoints you a court attorney. Ok? First you need to fill out...

The defendant must complete the financial affidavit form in

order to have an attorney appointed to represent her. A copy of a financial affidavit form is included in your written materials. The pre-trial services officer then gives the affidavit to a magistrate, who reviews it and decides whether or not the defendant qualifies for court appointed council. If the defendant qualifies for court appointed council, the magistrate will appoint council to represent the defendant under the Criminal Justice Act. Eighteen United States Code section 3006(A). The Sixth Amendment to the constitution, guarantees persons accused of most crimes the right to be represented by an attorney. The criminal justice act implements this guarantee in the federal courts by providing legal council to represent defendants who don't have enough money to hire attorneys for criminal cases. The act calls for the appointment by the court of defense council in felony and misdemeanor cases, and in a variety of other situations in which the accused may be incarcerated if convicted.

Cases in which lawyers are appointed under the Act are often called CJA cases. The criminal justice act allows United States district courts to set up different plans for appointing lawyers for indigent defendants. In each district, the act requires the appointment of panel attorneys in private practice to a substantial number of cases. These attorneys are selected from a group or panel of attorneys previously approved by the district court. In qualifying districts, the criminal justice act also allows for the representation of indigent defendants by a defender organization. In these districts both private attorneys and attorneys working for the defender organization are appointed to represent indigent defendants. There are two kinds of defender organizations under the act, Federal public defender

and community defender organization. A community defender organization is a non-profit defense council service, organized by a group of attorneys in private practice. The attorneys, who work for the Community defender organization, must already be authorized by the district court, to act as council in CJA cases. By contrast, each public defender office is run by a Federal Public Defender, the defense equivalent of the United States attorney for that district. But the public defender is not appointed by the Justice Department, he or she is appointed by the courts themselves. Like the US attorney, federal public defender is allowed to hire assistants or staff attorneys. Lets assume that the magistrate finds that Smith is financially unable to hire council and appoints attorney Jack Lee from the public defender's office to represent her under the criminal justice act. Upon learning of his appointment, Lee heads for the cell block to interview Smith.

Jack Lee: Miss Smith
Angela Smith: yah, that's me
JL: hi, my name is Jack Lee. I'm an attorney with the federal public defender, and I've been appointed to represent you in your case. Here's my card.
AS: I see. Who appointed you?
JL: I've been appointed by one of the magistrate in this courthouse. The magistrate that appointed me did so under the criminal justice act, a law that provides you with lawyer when you can't afford to hire one.
AS: Now, hmm...magistrate that's like a judge, right?
JL: that's right
AS: well, I mean I'm more glad that the judge appointed you and all, but I have a question. How can you work for me, if

you work for the judge?

JL: well that's a good question miss Smith. My answer is this. Like all lawyers I have to follow certain legal and ethical rules in my dealings with the court. And it's true that the court has appointed me as your attorney in this case. But I don't work for that judge and I don't work for the court.

AS: so who do you work for?

JL: I work for the Federal Public Defender

AS: what's that?

JL: it's an organization of lawyers separate from a court. It's like a law firm full of lawyers who specialize in defending criminal cases.

AS: well I just hope that youl do the same thing defending my case as a private lawyer would.

JL: I will, and just like a lawyer in private practice, my job is to protect your legal rights and make sure you get the best possible results in your case.

AS: but if you make the judge angry, won't he fire you?

JL: Look! Miss Smith the bottom line is this. When the judge appointed me to defend you in this case, he knew like any defense lawyer, paid or appointed, my job is to give you the best legal representation I can, and that is what I intend to do.

AS: ok! I feel a little bit better, for while there I was thinking I might represent myself. They let you do that don't they?

JL: yes, they do! That is the court's will that you represent yourself if it finds you have freely chosen to waive your right to council.

A defendant who represents himself or herself is said to

proceed pro *se*. Pro *se* is Latin for 'for himself'. A defendant has a right to proceed pro *se* in a criminal case as long as he or she waives the right to council. A waiver is the act of intentionally and voluntarily giving up a known right. The defendant who waives the right to council and goes pro *se*, handles all matters relating to the case, that is the defendant represents himself or herself not only a trial but during all pre-trial matters as well.

Defendant Smith decides that she would like to be represented by attorney Lee. So she does not proceed pro *se*. If Smith had decided to go pro *se*, however, she will be shown handling all those matters handled by attorney Lee throughout the rest of this video program.

Angela Smith: ok, I want...I want you to represent me. I mean you're trained a lawyer you sound like you know what you're doing, but if I tell you about my case don't you have to go tell the judge of the DEA?

Jack Lee: No in fact I'm not allowed to tell people anything I've learned from you that might be harmful in you interest. The law recognizes that it is important for you to tell me exactly what happened in the case, so I can represent you well. And I don't suppose you'd feel confident in telling me what happened if you thought that I was going to turn around and tell the court and the DEA everything you said. So I can't do that. My obligation is to keep the information you tell me about the case confidentially. Just between you and me.

AS: So I can tell you what happened in my case.
JL: yup! But don't talk to anyone else about it, all right?
AS: ok? I got you!
JL: all right! Now let's talk about bail. From the information that I have received, it said...

Now that Angela Smith has spoken with her attorney, the stage is set for her initial appearance before the magistrate. We'll see what happens at an initial appearance in the next segment of this video program. We'll also discuss such pre-trial matters as the preliminary examination, indictment by a grand jury, arraignment, discovery, and motions practice all in the context of our hypothetical drug case. It should be easier for you to understand these pre-trial matters now that you've been introduced to the major components of the adversary system in federal criminal cases.

Part II: Pre-Trial Proceedings

In this segment, we'll discuss what happens in a criminal case between the time the defendant first appears in court, and when the case goes to trial. In fact, most criminal cases about nine out of ten, never get to trial because they get disposed of in this so-called pre-trial period. A number of important events often called pre-trial matters occur during this time. The Fed. R. Crim. P. in our hypothetical drug case will again provide the context for our discussion. Let's review what's happened in Angela Smith's case thus far.

In our first segment, defendant Smith was arrested for selling some cocaine to agent Brown of the drug enforcement administration. Another suspect Michael Jones drove away from the crime scene. While Smith was being processed by the Marshalls, agent Brown discussed the case with assistant United States attorney Ronda Johnson. Johnson decided to file formal criminal charges against Smith. With agent Brown's assistance, Johnson then drafted a complaint, and affidavit against Angela Smith. The complaint and affidavit required by Fed. R. Crim. P. 3 and 4 will be filed at Smith's initial appearance before a magistrate. Meanwhile, Smith was interviewed by her attorney, federal public defender Jack Lee in the cell block. The stage is now set for Angela Smith's initial appearance before the magistrate. The defendant's initial appearance is governed by rule 5 of Fed. R. Crim. P.

Clerk: All rise in the presence of the court.

Of course when the clerk uses the term 'the court', she is referring to the magistrate presiding over the case. Ordinarily when say the court will do something. For example, 'court will issue an order', we're also referring to a Judge, or a magistrate.

Judge: Good morning. Will counsel please identify themselves for the record?
RJ: Good morning, your honor, Assistant United States attorney Ronda Johnson for the United States.
JL: Jack Lee, on behalf of Ms. Smith, your honor. Good morning.
J: State your name for the record please, ma'am.
AS: Angela Smith.
J: Would the deputy clerk please administer the oath to Ms. Smith?
Clerk: Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth so help you God?
AS: I do.
J: Ms. Smith. Let me advise you that you are not required to make any statement in connection with this matter. Even if you'vemade a statement you need not say anything more than anyone about this case other than to your attorney of course. Now if you start to make a statement to anyone, you have the right to stop at any time. Any statement made by you can be used against you. Do you understand those rights ma'am?

AS: Yes, your honor.
J: Have you had an opportunity to speak with Mr. Lee about this case?
AS: Yes.
J: Now, Ms. Smith, as you know I reviewed your financial affidavit and I've appointed Mr. Lee to be your counsel to

represent you under the criminal justice act. But I want you to know, you have the right to employ counsel of your own choosing, if you can afford it.
AS: I understand. I am going to stick with Mr. Lee.
J: Very well. Ms. Johnson, do you have a matter for the court to consider?
RJ: Yes, you honor. The United States has filed a complaint and affidavit against Ms. Smith on this matter.
J: Now Ms. Smith, you've been brought before me today because the United States attorney has charged you with a violation of law, to wit, distribution of cocaine, a controlled substance in violation of Title 21 Section 841 of the code. Now the purpose of this hearing is not to decide your guilt or innocence, but to advise you of your rights, and to make some preliminary decisions about bail. Now I've read the complaint and affidavit filed by the United States on this matter and I find probable cause to believe that Ms. Smith committed the offense of distribution of a controlled substance, that is, cocaine. Ms. Smith, you have a right to what is called a preliminary hearing in this case, since it is a felony case. Now, at the preliminary hearing the government must present evidence that there is probable cause to believe that the offense of distribution of cocaine was committed and that you committed it. Mr. Lee does you client wish a preliminary examination?
JL: She does your honor.
J: Very well, we'll pick a date in just a minute. Let's consider the matter of bail first. Now, I reviewed the pre-trial services agency report and I'd like to hear from the government first. Ms. Johnson, does the United States wish to move for detention on the 18 U.S.C. §§ 3142(d),(r),(f)?
RJ: Your honor, at this time, the government moves for the

pre-trial detention of Ms. Smith pursuant to the Bail Reform Act, 18 U.S.C. §§ 3142(f).

As the magistrate noted the final matter to be addressed under Rule 5 is the question whether Smith, will be released or detained pending her trial. In complying with this portion of Rule five, the magistrate must apply the provisions of the Bail Reform Act of 1984 contained in Title 18 of the US Code. The Bail Reform Act requires that every accused person be released without posting bail or meeting special conditions unless the judicial officer finds that the defendant is likely to flee, endanger the safety of any other person or endanger the community. A judicial officer can also release the defendant subject to one or more conditions designed to assure the defendant's appearance at trial. The safety of others and the safety of the community, for example, a magistrate may order the defendant to comply with the following conditions among others if released pre-trial. The defendant may be ordered to remain in custody of another person, obey restrictions on travel, personal associations or residence, seek or maintain employment or enroll in an educational program, avoid contact with alleged victims of the crime and potential government witnesses, or to post bail to be forfeited upon failure to appear in court as required.

With respect to posting bail, the Bail Reform Act does not allow a judicial officer to set a defendant's bond so high that the defendants can not afford to post it, if that occurred the defendant would be unable to post bond for financial reasons, and would have to remainin jail pre-trial. To prevent this, the act states that the court may not impose a financial condition

that results in the pre-trial incarceration of the defendant. A defendant who is released pre-trial must comply with all the conditions of release imposed by the court or be prepared to face serious consequences.

J: Sir, I am ordering your release pre-trial subjected to the conditions I've just gone over with you. Let me further advise you, that if you do not appear in this court as required, you will be committing separate crime, for which may be also sentenced to a period of imprisonment.
Man: Yes sir.
J: And if you violate any conditions of your release, a warrant for your arrest may be issued and you may be jailed until your trial, and you may also be prosecuted for contempt of court. Now be advised that if you commit a crime while release prior to your trial…

When a defendant is released before trial on conditions the court executes a bond form and gives a copy to the defendant, you have a copy of such a form in your written materials. If you'll take a look at it, you'll notice that the form sets forth all pre-trial release conditions imposed on the defendant and on the back of the form, the consequences of not complying with the conditions of release are also listed for the defendant to read.

If the case involves an arrestee, who is charged with a serious felony, the magistrate may hold a hearing called a detention hearing.

Detention hearings are hold in cases involving defendants who

are charged with crimes of violence or have aserious record of prior convictions or pose a serious risk of flight or obstructing justice or like defendant Smith, face a maximum term of imprisonment of ten years or more in a drug case. The purpose of the detention hearing is to decide, whether any of the pre-trial release conditions we've discussed is reasonably likely to ensure the defendant will not flee, instead of reporting to court and to ensure the defendant won't harm others while out on bond.

If after holding the hearing, the magistrate finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, the magistrate can order the defendant detained without bail pending trial. In other words the defendant may be detained before trial on 3 separate grounds, first, if the risk of the defendant's flight is too great, that is, when the magistrate finds that no condition or combination of conditions will reasonably assure the defendant's appearance in court.

Second, if the defendant's release pre-trial will pose too great a risk of danger to another person, that is, when the magistrate finds that no condition or combination of conditions will reasonably assure the safety of another person and third, when the magistrate finds that no conditions or combination of conditions will reasonably assure the safety of the community. Note, however, that the government bears a higher burden of proof when it seeks detention on grounds that no conditions will reasonably assure the safety of other persons or the community. Such a finding really requires that magistrate to predict the

defendant's future behavior to predict, in other words, that the defendant's behavior may pose a danger to the community if he or she is released. Thus the magistrate must be convinced by clear and convincing evidence, a rather heavy burden of proof that the defendant's release will pose such a danger. Let's see what happens in Angela Smith's case.

Judge: Very well, Mr. Lee.
JL: Your honor. We would ask for a continuance to allow us to prepare for the hearing.
J: Now, does the government take any positions on the defendant'srequest for a continuance of the detention hearing?
RJ: No your honor.
J: All right then, um...Under statue the detention hearing cannot be continued for more than five days without showing a good cause. So, I will set the hearing day for five days from now, if you have no objection, Mr. Lee.
JL: Very well.
J: Now Ms. Smith, I realize that you have no prior record of convictions and looking at your pre-trial services report, I also see that you have very strong ties to the community, but this court must detain you under the Bail Reform Act, at least until the date of your detention hearing. And as Mr. Lee can tell you, the offense that you've been charged with carries a maximum sentence of 40 years upon conviction.
JL: I've already discussed that with Ms. Smith, your honor.
J: That means, that there is a statutory presumption that the court must apply at your detention hearing, subject to rebuttal by the defense. I must presume that no condition or combination of conditions will reasonably assure your appearance in court and the safety of the community which of course is a

reasonable presumption to make in a serious drug case like this; that's if Ialso find of course that there's probable cause to believe that you committed this offense.

At the detention hearing the government will call one of the agents who worked on the case against Smith to testify that she distributed 540 grams of cocaine. Smith will then have a chance through attorney Lee to cross-examine the agent and any other government witnesses at the hearing. She also has a right to testify and to present witnesses or evidence on her behalf. For instance, the magistrate just mentioned the presumption under the Bail Reform Act that in drug cases with potential sentences of 10 years or more, there're no conditions of release, which will reasonably assure the defendant's appearance for trial or the safety of others and the community. But that presumption can be overcome under the statute. In other words, the defendant can present information at the detention hearing which rebuts that presumption and puts the ball back in the government's court, so to speak.

J: So, Ms. Smith. I'm sure you can see why Mr. Lee has requested a continuance. In order to give him time to prepare for your detention hearing. It's a very important hearing. Now, let's set a date for the preliminary examination. Uh…counsel, how…

Let's review what happened to Smith at her initial appearance. First, the magistrate informs Smith of the charge against her and of her right to the assistance of counsel. Since Smith is an indigent defendant, arrangements were made to have a federal public defender represent her under the criminal justice act.

Smith was also told that she has a right to remain silent. That is, that she is not required to make any statement and any statement she does make can be used against her, and Smith was informed of her right to a preliminary examination. Finally, Angela Smith was incarcerated pending her detention hearing under the provisions of the Bail Reform Act. What happens next? Let's say that after Smith's initial appearance, assistant United States Attorney Johnson and agent Brown, returned to Johnson's office with a draft of complaint and affidavit against Michael Jones.

Their purpose in preparing those documents is to obtain an arrest warrant for Jones. Smith was arrested without a warrant, because no warrant is required, when the agents actually see a person committing a criminal offense and arrest the person at the crime scene. But the situation is different with respect to Jones, since he wasn't apprehended during commission of the crime. Now that agent Brown can identify him as the person who drove the van, however the government is in a position to seek a warrant for Jones's arrest. Rule four of the federal rules states that if it appears from the complaint or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it. A warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Notice that rule four requires that a magistrate sign the arrest warrant, the decision to issue an arrest warrant allowing a law enforcement officer to take a person into custody is a very important one. With far-reaching consequences for an individual's liberty, the constitution therefore requires that it'll be made by a neutral official that is a magistrate, rather than by

an interested law enforcement officer like Johnson or Brown. In addition, Rule four embodies the constitutional requirement that no warrant's shall issue but upon probable cause, supported by oath or affirmation. This requirement is found in the fourth amendment to the constitution. The magistrate will therefore sign the arrest warrant for Jones, only when satisfied that the facts presented in the complaint against Jones together with the facts in Brown's affidavit in support of the warrant for his arrest establish probable cause. That is probable cause to believe that a crime was committed and that Michael Jones committed it. This means that after the complaint and affidavit for Jones have been drafted, Johnson and Brown must present them to the magistrate and ask the magistrate to issue a warrant for Jones's arrest. Notice that Brown chooses to appear before the magistrate in chambers because time if of the essence and Brown knows that magistrates sitting in court have many other matters to handle. The magistrate will examine the affidavit to see that it identifies the particular person to be seized in this case, Michael Jones. And the particular offense Jones's is charged with if the warrant meets these requirements of Rule 4, and the US constitution and Brown swears that the facts contained in the affidavit and complaint against Jones are true, the magistrate will sign the warrant. In signing the warrant the magistrate also orders the US Marshall to arrest Jones and bring him forthwith before the nearest available Judicial officer. As we'll see Michael Jones will soon be arrested and his case will be prosecuted together with Angela Smith's case. A copy of the arrest warrant signed by the magistrate in Jones's case, including the affidavit in support of the warrant is included in your materials. You might want to read it over, during the break.

OPTIONAL DISCUSSION BREAK

Let's focus now upon the preliminary examination mentioned by the magistrate. The preliminary examination takes the form of a hearing at which witnesses give evidence by testifying. It is required by Rule 5.1 of the federal rules of criminal procedure. The defendant is entitled to a preliminary examination when charged with a felony offense which will be tried by a judge of the district court, Federal Criminal rule 5.1 requires that a preliminary examination be held within ten days of the initial appearance, if the defendant is detained and within 20 days of the initial appearance if the defendant is released on bond, the purpose of the preliminary examination is to determine whether there is justification for holding the defendant while he or she is in custody or on bail for further court proceedings. The court will continue to hold the defendant if the government proves there is probable cause to believe that a federal crime has been committed and that the defendant did it. Rule 5.1 states that if the government's evidence at the preliminary hearing does not establish probable cause to believe a crime has been committed and that the defendant committed it. The complaint must also be dismissed. In that event, the defendant must also be released. That's because our constitution requires that when a person looses his or her liberty following an arrest there must be a prompt judicial determination that there is probable cause to believe the person has committed an offense. As a practical

matter, preliminary examinations are not held very often, this is because of another player in the process, the grand jury. The grand jury usually decides the probable cause issue before the defendant's preliminary examination is held. The basic purpose of the grand jury is to decide whether there is probable cause to require a defendant to stand trial on the pending charges. If the grand jury decides there is probable cause, it returns an indictment against the defendant. When the grand jury does this prior to the scheduled preliminary hearing date, there is no longer any need to hold the examination, since the finding of probable cause has already been made. The case then proceeds directly to arraignment. In our hypothetical case, we'll say hat the magistrate found probable cause at Smith's preliminary examination. And for practical purposes, Smith's preliminary examination and detention hearing were combined in one court hearing. Smith, therefore, remains detained pre-trial. Let's also say that right after Smith's preliminary examination and detention hearing are held, Jonesis arrested in the apartment he shares with his roommate Lawrence Greene.

Greene is not present when Jones is arrested but he hears about the arrest later from a friend at the time of the arrest DEA agent sees 2kilograms of cocaine from the apartment about ten feet from where Jones was standing, the cocaine have been placed in a large metal cookie tin. However, since the lid was not fully on the tin, one of the agents saw the cocaine while making the arrest. Following his arrest Jones appeared before a magistrate for an initial appearance similar to Smith's. Jones is represented by attorney Christine Harrison, a former federal public defender now in private practice. At the initial hearing Jones requests a preliminary examination but remember we said

that a defendant is not entitled to a preliminary examination if a grand jury returns an indictment before the examination is held. Let's assume that shortly after Jones's arrest the government presents its evidence both Smith and Jones to the grand jury. In other words, the government presents its evidence against both defendants to the grand jury at the same time, which is easy to do since the same agents are involved in both cases. The grand jury then returns indictments against both Smith and Jones prior to the date set by the magistrate for Jones's preliminary examination since the grand jury has already found probable cause in Jones's case he has not entitled to a preliminary examination. At this point you may be asking yourself what exactly is a grand jury, why is it required, what is an indictment, and how does the grand jury decide whether or not to return an indictment these are important questions. Rules six and seven of the federal rules of criminal procedure govern indictments and proceedings before the grand jury and we'll discuss them in a moment. But first, you should know that the fifth amendment to the constitution states that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or an indictment of a grand jury. Rule seven embodies this constitutional guarantee in the federal system by requiring that any offense carrying a potential penalty in excess of one year be prosecuted by indictment. An offense carrying a potential penalty of more than one year in prison is called a felony. Offenses punishable by a year or less in prison are called misdemeanors. An indictment is not required in misdemeanor cases. In misdemeanor cases the prosecutor ordinarily files an information. An information is a written statement of the essential facts of the charged offense. Unlike an indictment which must be signed by both the prosecuting

attorney and the four personof the grand jury, an information is signed only by the prosecutor. A grand jury is a group of citizens, whose duty is to determine whether there is probable cause to believe that a defendant has committed a crime, and should be brought to trial. The constitution calls for a grand jury, in order to provide protection from hasty, misguided, or oppressive prosecutions. In order to fulfill this function, the constitution requires a grand jury that is independent of the prosecutor and the court. Thus while it performs its function within the judicial branch of the government, the grand jury has a great deal of independence. Nevertheless, as a practical matter, it is the United States attorney who gathers the evidence for presentation to the grand jury calls and examines witnesses before, explains the law to it, and asks it to return an indictment. Since it is an independent body however, the grand jury need not grant the prosecutor's request. It may return a no true bill, instead of an indictment. In that event, the complaint is dismissed. Rule six requires the grand juries be assembled by the court, whenever required by the pubic interest. The clerk's office is responsible for summoning or calling citizens to serve as grand jurors. Congress has set out specific requirements for their selection to assure that the process is random, that is, to ensure that everyone in the district has an equal chance to be selected. Grand jury serves until discharged by the court, but ordinarily cannot be made to serve for more than eighteen months. The grand jury may consist of between 16 and 23 members. The court appoints one of the grand jurors to be foreperson. The foreperson is responsible for handling many administrative matters, relating to the grand jury's work. The grand jury may return an indictment charging an individual with a crime if at least 12 of its members vote to do so.

Traditionally, grand jury proceedings have been conducted secretly. Rule six establishes strict rules governing the disclosure of matters, which occur before the grand jury. When the grand jury accuses an individual of committing a crime, it does so by issuing an indictment. An indictment is also called a true bill. A copy of the indictment returned by the grand jury in the Smith and Jones case is included in your written materials. An indictment is a formal written document charging one or more persons with a crime. Rule Seven requires that the indictment shall be a plain concise and definite written statement of the essential facts constituting the offense charged. This ensures that those who stand accused know exactly what charges they must defend themselves against. An indictment may contain allocations that the defendant has committed more than one crime. Each allocation must be listed separately, however. The separate allocations are referred to as separate counts, and each count of the indictment must specify the statute, which the defendants are accused of violating. As you can see even though their cases came into the system at different times, the grand jury has indicted both Smith and Jones in the same indictment. And both defendants have been charged with two criminal offenses, distribution of cocaine, and conspiracy to distribute cocaine in counts one and two of the indictment. This is because of rule eight A of the rules of criminal procedure allows two or more offenses to be charged in the same indictment as long as they are of similar character, are based on the same act, or a part of a common scheme or plan. And rule eight B allows two or more defendants to be charged in the same indictment if they are alleged to have participated in same act or series of acts. Since both Smith and Jones are alleged to have participated in the sale of cocaine to

agent Brown, they are joined in the same indictment as co-defendants. In addition, in count three of the indictment Jones has been charged with possession with intent to distribute cocaine. This additional charge is based on the seizure of drugs found near Jones at the time of his arrest.

OPTIONAL DISCUSSION BREAK

A defendant who has been charged must formally enter a response or plea to the charge. This is done at arraignment. Rule ten states that arraignment shall be conducted in open court and show consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead their, too. The defendant shall be given a copy of the indictment before being called upon to plead. At the arraignment, the clerks will first place the defendant under oath. Then judge will then the defendants their names and ages. Then the courts will ask the defendants a few questions bearing on their ability to understand the proceedings they are involved in.

Judge: Now, Mr. Jones, are you now or have you recently been under the care of a physician or a psychiatrist?
Jones: No sir.
Jdg: Have you ever been hospitalized or treated anywhere for any form of narcotics addiction?
Jns: No.
Jdg: Are you presently suffering from any physical problems?
Jns: No sir. I am doing…I am doing all right.
Jdg: All right, and we've already covered Ms. Smith. Mr. Jones have you received the copy of the indictment?

Jns: Yes sir.
Jdg: Have you had time to consult with your attorney?
Jns: What do you mean?
Jdg: I am asking whether you've spoken with Ms. Harrison about the case.
Jns: Yes sir. I have.
Jdg: Counsel. Would Mr. Jones like the indictment read to him or does he wish to waive a formal reading of the indictment?
Harrison: Mr. Jones will waive a formal reading of the indictment your honor.

If Michael Jones wanted the charges read to him the deputy clerk will read them aloud to Jones in the courtroom. But like most defendants Jones has already discussed the case with his attorney. And has good idea what offense he has been indicted for. So he waives a formal reading of the indictment.

Jdg: Very well. How do you wish to plead the charges against you Mr. Jones?
H: At this time Mr. Jones wishes to enter a plea not guilty to each count of the indictment.
Jdg: Now I realize, Ms. Smith that you have been detained pending trial. What's the status of Mr. Jones? Ms. Harrison?
H: Mr. Jones is also detained without bond your honor.
Jdg: Very well, that status will continue. Now if either counsel wishes to file a bond review motion, the court will consider it. Now let's see about setting a date for the hearing on the motions please.

At this point the magistrate will usually set dates for the filing of motions and the pre-trial conference, and may even set a

trial date. Asyou can see if the defendant enters a plea of not guilty, the arraignment is rather a short proceeding. In misdemeanor cases the arraignment and initial appearance are usually held at the same time. This is because misdemeanors can be prosecuted without a grand jury indictment. In felony cases, sometimes a grand jury returns an indictment against the person before that person has been arrested, when that happens the government may ask the court to issue a summons rather than an arrest warrant to bring the defendant before the court. Rule four of the federal rules of criminal procedure, allows judicial officers to issue a summons rather than a warrant when requested to do so by the government. Like an arrest warrant a summons must be supported by probable cause, but when a summons issues the defendant is not arrested and brought before a magistrate by law enforcement officers. Instead, since a summons simply requires the defendants to appear in court at a stated time and place in the future the defendant appears in court voluntarily on the appointed day. A copy of a judicial summons is included in your materials. Arraignments can be conducted by magistrates or judges. Magistrates often conduct arraignments and may handle arraignments in both felony and misdemeanor cases. However, whenever a defendant intends to enter a plea of guilty at the time of the arraignment in a felony case, the arraignment must be conducted by a judge. As we've seen Smith and Jones entered not guilty pleas at their arraignment so the magistrate set dates for later proceedings in the case, such as pre-trial conferences, motions hearing, and the trial itself. The courts discretion in this area is controlled by statue passed by the congress, called the Speedy Trial Act. Congress concerned about lengthy delays in getting criminal cases to trial in federal courts imposed series of time deadlines

upon courts and prosecutors in the Speedy Trial Act. For example, the act requires that a defendant arrested on federal charges be indicted within thirty days of arrest. It also requires that a defendant's trial start, no later than 70 days from the date of his or her first court appearance in the district, on the charges at issue or 70 days from the filing of the indictment or information, whichever date comes later. In drafting the Speedy Trial Act, Congress recognize that many events may occur during the pre-trial stages of a criminal case that make it impossible to begin the trial within 70 days. The Speedy Trial Act lists these events and provides that the delay resulting from them is not subtracted from the 70 day limit. These events are often referred to as excludables. And the period of delay resulting from these events is called excludable time. The events which result in excludable time include, examinations to determine the competency of the defendant to stand trial, the trial of other charges against the defendants, pre-trial appeals, the removal of the defendant from another district, the filing of pre-trial motions, and reasonable delay caused by joinder of the defendant's case with that of a co-defendant whose 70 day time limit has not yet run. Any delay resulting from these events simply stops the running of Speedy Trial Clock, thus for example the time that passes between the filing of a pre-trial motion and the court's ruling on the motion is normally excluded in computing the 70 day limit. On the other hand the speedy trial act does provide for penalties as severe as dismissal of the charges against the defendant if the case does not proceed to trial within the required time period. The way to avoid those penalties of course is for the court, the prosecutor and the defense attorney to move the case along without undue delay. Finally the Speedy Trial Act requires that the trial of certain

defendants including those who are ordered detained prior to trial be given priority. For example, the trial of person detained without bond must begin no later than 90days from the beginning of the detention period. What happens if through no fault of his own, a detainee like Jones is not tried within that 90day period? In that instance, he must be released from custody and the court is required to review the conditions of his release.

OPTIONAL DISCUSSION BREAK

During the period between arraignment and the next scheduled court date the defense attorney and the prosecutor will engage in what is called discovery. The term discovery refers to the process by which each side in the case finds out or discovers some of the evidence, which the other side has in its possession. The pre-trial discovery process in criminal cases is governed by rule sixteen of the federal rules of criminal procedure. The discovery process is based on the belief that since the stakes in a criminal case are so high neither side should be completely surprised by evidence introduced by the other side at trial. On the other hand, since our system is an adversary system, each side is allowed to keep certain pieces of information and its possessions confidential. Usually by the time the discovery process begins, the prosecutor has already learned a significant amount of information about the case. The government's investigation has been proceeding for sometime, and the grand jury process has been completed. The defense attorney, however, may just be beginning his or her investigation of the case. Let's see how the prosecutor and the defense attorney handle discovery in the Smith case.

Jack Lee: Hi, Ms. Johnson.
Rhonda Johnson: Hello, Mr. Lee. You're here for the discovery?
JL: That's right. United States versus Angela Smith.
RJ: Have a seat.
JL: Thanks.
RJ: Here's the file. Shall we begin?
JL: All right. First I'll request discovery of any statements made by Miss Smith, which might be in government's possession?
RJ: I'm not aware of any written statements made by your client, and the co-defendant Jones made no statements at all. However, your client made an oral statement to agent Brown following her arrest, which is substantially as follows. Smith said, she never should have listened to Jones that agent Brown ought to talk to Jones and that Jones was driving the van. Smith also said she got the drugs she sold to agent Brown from Jones.
JL: And she was in custody at that time, did she make those statements in response to questioning by any government agent?
RJ: No. It was a spontaneous statement to Brown. We'll probably introduce it in our case in chief.
JL: I'll have to file a suppression motion, I am afraid. What about any prior record? Is the government aware of any prior criminal record, by my client?
RJ: The Pre-trial Services Report says she has no priors.
JL: What about the FBI rap sheet? Do you have a…
RJ: Yes I do, she has no priors that we know of.
JL: All right. How about physical evidence?
RJ: The government has the drugs, the purse, the bag the drugs were kept in, and the marked money.
JL: Let me make request to view all tangible evidence, then.

RJ: The drugs and the bag will be at the DEA lab. I'll draft a letter authorizing you to view the drugs at the lab. They've been analyzed already, so there is no problem…
JL: Is there a report of the analysis? I believe the Rule 16 provides for disclosure of any scientific tests that may be in government's possessions.
RJ: I was coming to that. Here is the report, looks like 540 grams of cocaine according to the chemist.
JL: I'd also like to see the marked money.
RJ: Uh huh? Well…I'm not sure you are entitled to see that. I don't think we'll introduce the marked money during our case in chief at trial. Rule 16 only requires disclosure of tangibleevidence taken from the defendant or tangible evidence the governments intends to introduce at trial.
JL: But I think the rule also calls for disclosure of any tangible objects, which might be material to the defendant's defense at trial, doesn't it?
RJ: How are these material?
JL: Well, I think you'll find out at trial.
RJ: (laughter)
JL: (laughter)
RJ: Well, let me think about it. You may have to file a motion.
JL: All right, I guess that's about it then.
RJ: Actually, since you've requested discovery of documents and tangible evidence in government's possessions, I'll make a reciprocal request under Rule 16(b). Does the defense have any tangible evidence, which it intends to introduce at trial?
JL: I may have some photographs of the area and some diagrams of the area. I'll send them over as soon as they're prepared.
RJ: Good enough. I'd also like to extend a plea offer to you

client at this time.

As you can see, the attorneys in a criminal case usually meet informally in order to comply with the discovery requirements of Rule 16. In our hypothetical case, assistant US attorney Johnson disclosed the following information to attorney Lee as required by Rule 16. First, AUSA Johnson disclosed the defendant's statements to law enforcement officers. Second, the assistant disclosed the defendant's prior criminal record. In this case, defendant Smith has no prior record. Third, the prosecutor disclosed for inspection by defense council, certain physical evidence, which the government will use in the case. Fourth, the prosecutor disclosed results or reports of scientific tests or experiments conducted by the government in the case.

After the defendant requests this information, and the government discloses it, Rule 16 provides that the government can make a return or reciprocal discovery request of the defendant. In particular the government is entitled to discovery of any physical evidence and test results or reports in possession of the defendant. To minimize surprise, Rule 16 also provides for reciprocal discovery of written summaries of the testimony and qualifications of expert witnesses that will be called at trial. The government has also entitled to know ahead of time whether the defendant intends to use certain defenses at trial. For example, an alibi defense contends that the defendant could not have committed the crime because he was at another place, when the crime occurred. Rule 12.1 allows the government to prepare for an alibi defense by asking the defendant to disclose prior to trial the particulars of any such defense. Similarly if the defense intends to rely on an insanity

defense, rule 12.2 requires that to notify the government of this during the time provided for the filing of pre-trial motions. The defendant is not ordinarily required to disclose the nature of the defense prior to trial, however.

You're also likely to hear the term Brady material come up when the court and counsel are discussing trial discovery.
Jack Lee: One last question, are you aware of any Brady material?
RJ: Hm…Nothing comes to mind, but let me look through my file.

Johnson and Lee are referring to a Supreme Court case decided in 1963 called Brady v. Maryland. In that case, the court decided that the Constitution requires the government to disclose to the defendant, upon request, any evidence in its possession that is material and favorable to the accused. Such favorable evidence is often referred to as Brady Material. And it includes evidence favorable to the defendant on issues of either punishment or guilt. For example, evidence tending to show that someone other than the defendant committed the offense. Perhaps the presence of another person's fingerprint on the murder weapon would be favorable to the defendant on the issue of guilt; so, it must be disclosed by the government. And evidence that an accomplice had confessed to being the actual shooter in a murder case would be favorable to the defendant on the issue of punishment, even if the confession named the defendant as an accessory to the crime. So under the Brady doctrine, evidence favorable to the defendant on the issues of guilt or punishment, must be revealed to the defense. And the disclosure of favorable evidence must be timely that is soon

enough for the defense to make use of the information at trial. The prosecutor's duty to disclose Brady material to the defense is required by the constitution. In other words, it is a duty, which exists independently of the discovery requirements of rule sixteen. But the burden is on the defense to request Brady material from the government. For that reason, the defense attorney will ordinarily make a Brady request, during a discovery conference with the prosecutor. That is what attorney Lee has just done.

RJ: I don't see anything that would tend to exculpate your client.
JL: All right. If you should learn of anything that might…
RJ: Sure. If I learn of anything favorable to your client on the issues of guilt or punishment, I'll let you know right away.
JL: Great.

Most discovery issues are resolved informally by the attorneys involved. But if the prosecutor and the defense attorney disagree about whether or not an item is discoverable, a judge or magistrate must resolve the issue. Thus in our hypothetical case, attorney Lee may decide to file a motion with the court, asking it to order the government to let him view the marked DEA money prior to trial. The government might then file a response opposing that request. This takes us to the issue of pre-trial motions. A motion is a request by either the government or the defense for a ruling by the court on a particular matter. Federal rule of criminal procedure 47 requires that pre-trial motions ordinarily be in writing. Rule 47 also requires that each motion shall state the grounds upon which it is made and shall set forth the relief or order sought. Federal

rule of criminal procedure 12 discusses the types of motions, which may be filed before trial. It permits the filing of motions relating to the discovery process, defects in the indictment or prosecution of a case, the manner in which the trial will be conducted, and the suppression of evidence. Thus attorney Lee's discovery motion asking the court to order the government to let him view the marked DEA money seized from Angela Smith prior to her trial would be filed under rule 12. So would a motion filed by Jones contending that there was a constitutional defect in the grand jury proceedings, or that the indictment failed to charge him with the criminal offense. Smith might file a motion under rule 12 requesting that her trial be conducted separately from Jones's trial. And both defendants may file motions under rule 12 seeking to prevent the government from using certain evidence against them at trial. Thus, Jones may contend that evidence against him was obtained as the result of an illegal search of his apartment. Or, Smith may file a motion alleging that the oral statement, the government intends to use against her was obtained unlawfully. These types of motions are called suppression motions. They seek to suppress or exclude evidence that the defendant claims the government has obtained illegally. Some motions filed pursuant to Rule 12 may be resolved without the presentation of evidence by either side. The motion may simply require the court to rule on a matter of law or interpreted statue. The court can do this without hearing the testimony of the witnesses. On the other hand many Rule 12 motions involve factual disputes that must be resolved before the law can be properly applied. Since these motions involve both questions of fact and questions of law it is necessary for the judge or magistrate to hold an evidentiary hearing before deciding them. At the hearing each side is entitled to present

evidence. The evidence may take the form of exhibits, affidavits, or live testimony. After hearing the evidence, the court will be in a position to decide what the facts are. It will then apply the law to the facts. Of course the court cannot know whether or not evidentiary hearings on pretrial motions will be necessary in a given case until the motions themselves are filed. And motions requiring evidentiary hearing should be scheduled and heard without delay, in order to assure compliance with the Speedy Trial Act. At arraignment the court will often set a deadline for the filing of motions by defense counsel in order to expedite matters. Rule 17.1 allows the court to schedule one or more pre-trial conferences to consider motions and other issues that the parties believe will result in a fair and speedy trial. In some districts pre-trial conferences are called status hearings. The last pre-trial conference in the case usually occurs a week or two before the start of the trial. At this hearing any remaining pre-trial motions will be decided. The court and counsel will then decide matters related to the conduct of the trial itself, such as how the jury will be selected and instructed.
Judge: Finally, I would urge the government to give the defense counsel, any Jencks Act statement it is aware of before the start of the trial.

Ronda Johnson: I've already provided the defense council, copies of all the Jencks Act material I am aware of your honor, with the exception of the grand jury testimony of some of our witnesses against defendant Jones, which the government will produce after those witnesses have testified for the government at trial.

J: Ms. Harrison?
Harrison: I have received certain Jencks Act statement from Ms. Johnson, but with respect to the testimony of the two witnesses who testified for the government and the grand jury, which is rather lengthy and which I have not yet received.

The Jencks Act is a statute passed by congress. It requires the prosecutor to produce, in other words, give to defense council the prior statements or reports of each witness who testifies for the government in a criminal prosecution. The Jencks Act does not require the government to give the defense, this material until after the prosecutor has finished questioning the witness on direct examination. Under the act only those statements and reports, which relate to the direct testimony of the witness must be produced. The defense frequently uses statements given to it under the Jencks Act in cross-examining government witnesses.

Judge: Ms. Johnson. As you know when defense counsel is given Jencks material at the conclusion of government's direct examination of a witness at trial, he or she must be given an opportunity to review it before cross-examining the witness. This can take time and disrupt the orderly presentation of evidence at trial, so like many of my colleagues I encourage prosecutors to give all Jencks statements to the defense in advance of trial.

RJ: Very well, your honor. I'll have copies of the grand jury testimony made so that counsel can review them before the trial.

J: Is that the grand jury testimony of the witnesses you've

referred to earlier Ms. Harrison?

H: Yes it is, your honor.

J: Very well. I'd appreciate that Ms. Johnson that way we won't have to stop the trial every time the government finishes questioning one of its witnesses. Now, as far as the defense is concerned, under the Rule 26.2…

Fed. R. Crim. P. 26.2 requires the production of prior statements of defense witnesses other than the defendant at trial in the same manner as required by the Jencks Act with government witnesses.

This concludes our discussion of pre-trial matters. We'll see whether defendant Angela Smith and defendant Michael Jones go to trial in our next tape.

Part III: Trials and Guilty Pleas

In the last segment of our video program, we discussed our hypothetical case, United States v. Angela Smith and Michael Jones in the context of pre-trial proceedings. We saw that the grand jury returned an indictment charging both defendants with criminal offenses. We then follow the case through arraignment, discovery, and the filing of pre-trial motions. In this tape, we'll see whether Smith and Jones resolve their cases by going to trial or pleading guilty. Some criminal cases are resolved by the government's dismissal of the charges against the defendant. Thus Rule 48 of the Fed. R. Crim. P. allows federal prosecutors to dismiss an indictment, information or complaint with the court's permission the government may move to dismiss the charges against the defendant for a variety of reasons. For example, newly discovered evidence may make it clear that the defendant could have not committed the crime, or the death of a crucial witness may make it impossible for the government to get a conviction in the case. The government would then move to dismiss the charges under Rule 48. The defendant may also move the court to dismiss the charges under Rule 48. When the court dismisses a case, under Rule 48 it may do so with prejudice or without prejudice. Normally, when a case is dismissed by the court on grounds not involving a violation of the defendant's constitutional rights, the dismiss is said to be without prejudice. This means the government has the right to re-indict the case and prosecute the defendant again on the same charge. But when a case is dismissed by the court with prejudice, the government may not prosecute the defendant again on the same charge. The vast majority of criminal cases are resolved by trials or guilty pleas, however. Let's talk first about guilty pleas. When a defendant enters a plea of guilty to a particular offense, he admits to a judge or magistrate, that he

committed that crime. This means that if the court accepts the plea, the defendant will not have a trial and the case will proceed to sentencing. As we'll soon see, there are many requirements that must be satisfied before the court can accept a guilty plea. But for now, consider this, a defendant has the right under our constitution to have a trial by jury, and to have a jury decide if he is guilty or not guilty. As I am sure you know, the defendant may be acquitted if he exercises this right. Even if convicted, the defendant has the right to appeal conviction to a higher court. On appeal he can argue he was prejudiced by errors made at the trial and ask for a new trial. Why then would a defendant choose to give up these rights, and enter a plea of guilty? Does the defendant receive any benefit in return for giving up these rights? And if so, what benefit does the defendant receive? Fed. R. Crim. P. 11 governs guilty pleas. So we can begin to answer these questions by examining the plea procedures set forth in Rule 11. We can begin to answer these questions, by looking at the plea procedures set forth in Rule 11. First, the rule allows the prosecutor and defense attorney to meet and attempt to negotiate a plea agreement to resolve the case. The district or magistrate judge handling the case, is not involved in these negotiations, but if the parties reach an agreement, it must be disclosed to the judge in open court. The judge can then decide, whether to accept or reject the plea agreement. Rule 11 requires that under any plea agreement the defendant must plea guilty to an offense he is charged with or less serious offense, which is related to an offense he is charged with. That is the defendant's part of the agreement. In return the government may agree to do number of different things including, moving to dismiss other charges pending against the defendant, recommending a

particular sentence to the court, not opposing the sentence which the defendant recommends to the court, or agreeing with the defendant that a specific sentence is the appropriate sentence in the case. So as you can see the defendant can benefit from a plea-bargain in several ways. For example, assume that a defendant is charged with two separate offenses, and that each offense carries a maximum penalty of ten years in prison. In convicted of both offenses, he will be exposed to a maximum penalty of 20 years in prison. But if he entered an agreement to plead guilty to one offense, in return for the government's dismissal of the other, the most time he could spend in prison would be ten years. That's one example of how a defendant can benefit from a plea agreement. But of course it takes two sides to make an agreement, so you may be asking yourself how does the government benefits from a entering into a plea bargain. Well, the government benefits from a plea bargain, because it obtains the defendant's conviction without the burden of having to prove his guilt, beyond a reasonable doubt, at trial. From the government's perspective, there is always the risk that a defendant may be acquitted after trial. But a guilty plea, even to a lesser charge makes the defendant's conviction a certainty. The government also benefits from a plea agreement by saving the work, which is required to a bring case to trial. The Supreme Court has approved the use of plea agreements as a fair method of resolving criminal cases, and recognized that guilty pleas serve the community's interest, by helping to accomplish some of the fundamental goals of our legal system. Among other things agreements resulting in pleas of guilty ensure the criminal offenders are punished, and thus help deter others from committing crime. In addition, plea agreements provide an opportunity for offenders to assume

responsibilities for their conduct. This can be an important first step toward their rehabilitation. In the Smith and Jones's case, we saw that Angela Smith's attorney Jack Lee met with the prosecutor to get discovery, during the discovery conference, the prosecutor started to make a plea offer to Smith. Let's see what that offer was, and how Smith responds to it.

Ronda Johnson: I'd like to extend a plea offer to your client at this time. It seems to me that Smith sold these drugs to make some quick money, possibly to pay off a debt. Not a great choice on her part, but I don't think she's been involved in any other drug trafficking, and in this case, she was just a runner for the higher ups.
Jack Lee: Higher ups like her co-defendant Jones.
RJ: Exactly! So I'd like to extend an offer to Smith to give her the opportunity to plead guilty to one count of conspiracy to distribute 540 grams of cocaine, and also avoid the five-year mandatory minimum sentence that will go along with that offense.
JL: Well, it's certainly correct that Smith would be exposed to the mandatory minimum of five years in prison for conspiracy to distribute over 500 grams of cocaine, so I take it your plea offer provides her the chance to avoid the mandatory minimum by cooperating with the government.
RJ: Exactly. As you know the court has statutory authority to impose a sentence below the mandatory minimum, if the government files a motion requesting it to do so on the basis of the defendant's co-operation with the government prosecuting another offender. The government will agree to file such a motion in this case as part of the plea-bargain, that is, if Smith can provide us with enough substantial assistance in prosecuting

Jones and actually does so at trial.
JL: But I am sure that even if you file that motion and the court grants it, the court will still be required to apply the sentencing commission's guidelines in sentencing Ms. Smith. Under those guidelines, the court will be required to use the actual amount of cocaine distributed in order to determine her sentence.
RJ: I realize that. I've taken a look at the applicable guidelines. Distribution of 540 grams of cocaine gives Smith a base offense level of 26 under the guidelines. If the court concludes that Smith has accepted responsibility for her criminal conduct, it can reduce the offense level to 23.

Lee points out that even with an offense level of 23, the guideline sentencing range in Angela Smith's case would be from 46 to 57 months, not much less than the five-year statutory minimum. He argues that if Smith gives the government substantial assistance in prosecuting Jones, the plea agreement should also require the government to file a motion under section 5 K 1.1of the sentencing guidelines asking the court to give Smith a sentence below the guideline range because of her assistance. Johnson notes that it's the court's decision whether or not to grant such a motion, but agrees to file it.

RJ: Well, all right. I will move for a downward departure under 5K 1.1 as part of the plea agreement.
JL: Thank you.
RJ: That is, I will move for departure at sentencing if I conclude by that time that Smith has given the government substantial assistance in prosecuting Jones.
JL: Can you tell me specifically what type of assistance do you think Smith could give?

RJ: Well, for one thing, the government would be interested in any information Smith may have about any other criminal conduct on Jones part. And with respect to the pending case, the government may have some difficulty in proving that Jones actually was in possession of 2 kilos of cocaine we've recovered in his apartment. When Jones was arrested, 2 kilos of cocaine were discovered about 10 feet from him.

JL: I take it that's why you've also charged him with possession with intent to distribute cocaine?

RJ: That's right. But one problem in our case is that the agents didn't see him with the cocaine in his actual possession, and he was sharing the apartment with a roommate at the time. So Jones says that the cocaine belonged to the roommate, and the roommate has since skipped town.

JL: Ah! So if Smith ever saw Jones package cocaine in that apartment, or if Jones ever told Smith that they were holding cocaine in that apartment, that information would be very useful to the government.

RJ: That's right. We would be much more likely to get a conviction in the possession with intent to distribute case against Jones, if we were able to come up with that type of evidence. So that question is, first, whether or not Smith is capable of providing us with that kind of assistance in those areas.

JL: And, second, whether Smith would be willing to do so, if she had that type of information. Well, it's possible that Smith could be a big help to you. But I also think Smith runs a big risk in providing the kind of information that you're asking for. If the government's characterization of Jones is accurate I am sure that one phone call from Jones to the right people could put Smith off the charges for good. Given the kind of risk that

Smith is running in co-operating with the government, I'd also like any plea agreements to specify specific length for her sentence.
RJ: No. I don't want to enter into a plea agreement that specifies a specific sentence, but I would be willing to move for departure and to recommend to the judge that Smith receive a particular sentence, possibly 18 months in prison. If it turns out she can provide us with the kind of evidence we've been talking about.
JL: How about a recommendation for 12 months.
RJ: (*dumbfounded)*
JL: Look. We are talking about substantial cooperation with the government at a substantial risk to my client and besides she is young, not a sophisticated offender.
RJ: What about 15 months, I really think 15 months is about as low as I can go, given the seriousness of this offense, even if she does cooperate. After all Jones did not force Smith to sell those drugs at gunpoint.
JL: All right.
RJ: But remember, Rule 11 provides that when a plea agreement includes a government recommendation for a particular sentence, that recommendation is not binding on the court. That means that if the courts accepts this plea, but does not accept the 15-month recommendation, Smith may not be able to withdraw her plea.
JL: I know that, and I'll go over that with Ms. Smith, so she knows it, too.

The Assistant United States Attorney is making an important distinction here in some situations, Rule 11 allows the defendant to withdraw a plea and go to trial, if the court rejects the plea

agreement. For example, if the court rejects the plea agreement involving the dismissal of charges, the defendant can withdraw the plea and go to trial; the same with the plea agreement, where the parties agree that a specific sentence is appropriate. If the court rejects that sort of plea agreement calling for a specific sentence, the defendant is also allowed to withdraw the plea and go to trial. But in the situation Johnson and Lee are talking about, where the court accepts the plea, but later decides not to accept the government's sentencing recommendation, the defendant does not have an absolute right to withdraw his plea.

JL: All right then, like I said, I will go over all this with my client. After all, it is not our decision. It's hers.

Whenever a defense attorney receives a plea offer from a prosecutor, the attorney is obligated to discuss it with the defendant. But as attorney Lee stated, the actual decision whether or not to plead guilty is the defendant's alone. Of course, the defendant may maintain his or her innocence, and thus have no interest in a plea agreement. In that event, the case will go to trial as scheduled. Or, the defendant may express interest, in the proposed agreement, but want better terms. In our hypothetical case, let's say that after weighing the strength of the government's case against her. Smith decides that she is likely to be convicted after a trial. She is willing to admit her guilt and expresses remorse for becoming involved in the drug sale with Jones. She decides to accept the plea offer, and cooperate with the government in an effort to minimize the amount of time she will spend in jail. Attorney Lee informs the prosecutor of Smith's decisions. The attorneys then notify the

court that Smith intends to change her plea. A date is then set for Smith to formally enter her plea of guilty in court.

OPTIONAL DISCUSSION BREAK

Notice that in our hypothetical case, Angela Smith enters into a plea agreement with the government after she is indicted and arraigned, when her case is pending trial. This is not always the case, however. Rule 11 states that ordinarily, the court is to be notified of a plea agreement at arraignment or such other time prior to trial as may be fixed by the court. As a practical matter, plea agreements may be entered into at anytime prior to trial. The parties may negotiate a plea agreement before the case is indicted by the grand jury or even before the defendant's preliminary hearing. In some cases, the earlier in the proceedings the defendant and government reach a plea agreement the more favorable that agreement is likely to be for the defendant. Thus many plea agreements are reached after the defendant's initial appearance but before the case is presented to the grand jury for indictment. On the other hand, the case may be one in which neither side initially expresses interest in a plea. So the defendant is indicted, and the case is set for trial. But then shortly before the trial, perhaps one side learns about a piece of evidence, which is particularly damaging to its case. Or it learns that evidence it was counting on cannot be produced at trial. Such a change in circumstances may lead that party to seek a plea agreement. In the Smith and Jones case, perhaps the government planned to call Jones's roommate Lawrence Greene as a witness to establish that the cocaine found in the apartment belonged to Jones. But then after indictment Greene became unavailable as a witness, making

Angela Smith's cooperation crucial to the case against Jones. So the government extended a plea offer to Smith after indictment. The point is that the parties may enter into a plea agreement at any time, even before the defendant is formally charged in the case, if the circumstances of the case make such an agreement attractive to both sides. Let's see what action the court takes on the plea agreement Angela Smith and the government have entered into.

Clerk: The court calls the case, of United States versus Angela Smith.
Judge: I understand that the United States and the defendant Smith have reached a plea agreement in this case. Is that correct?
JL&RJ: Correct, your honor.
J: As you know Rule 11 of the Fed. R. Crim. P. requires me to make certain inquiries before deciding whether or not to accept the defendant's plea. Ms. Smith, I am going to ask you a lot of questions because I want make certain that you're making a knowing, intelligent, and voluntary decision to plead guilty in this case. That's what the law requires and I want to make sure you understand what you are doing here today.
AS: Okay, you honor.
J: Now what are the terms of the plea agreement, Mr. Lee?
JL: Under the agreement, if Ms. Smith pleads guilty to one count of conspiracy to distribute cocaine, the government will drop the count of the indictment charging her with actual distribution of cocaine. The agreement also calls for the government to file a motion under 18U.S.C. §§ 3553 (e) asking the court to impose a sentence below the mandatory minimum of five years.

RJ: That's correct, your honor. The agreement calls for the government to file such a motion if Ms. Smith provides us with substantial assistance in the prosecution of her co-defendant, Michael Jones.
JL: And Ms. Smith has agreed to provide such assistance to the government.
RJ: That is she has agreed to testify truthfully for the government at trial as to what she knows about defendant Jones involved in this case.
J: I see, any other agreements?
RJ: The government will also ask for departure from thesentencing guidelines, if Ms. Smith cooperates to the degree we expect.
JL: In addition, the government has agreed to recommend a sentence of 15 months of imprisonment for Ms. Smith in its motion, if she cooperates as expected.
RJ: That is correct, your honor.
JL: Those are all the terms of the agreement.
J: Will the clerk please administer the oath to the defendant?
Clerk: Raise you right hand ma'am. I do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?
AS: I do.
J: Do you understand that you are now under oath, and if you answer any of my questions falsely, your answers may later be used against you, and another prosecution for perjury or making a false statement?
AS: Yes.
J: State your full name for the record, ma'am.

The court will next ask a series of questions to determine

whether the defendant is mentally competent to enter a plea and understands the nature of the charge against her. In this part of the plea proceeding, the defendant will be asked her age, how far she went in school, and whether she has ever received treatment for mental illness or addiction to narcotic drugs. She'll also be asked whether she is under the influence of any drug, medication, or alcoholic beverages. She will then be asked, if she has received the copy of the indictment, had an opportunity to fully discuss the charges against her with her attorney, and whether she is satisfied with the services of her attorney.

J: Are you satisfied fully with the services in the representation given to you in this case by your counsel, Mr. Lee?
AS: I am.
J: All right. Now I am going to summarize the terms of the plea agreement. First…

The court will then review the essential terms of the plea agreement with the defendant, after doing so, the court will ask the defendant if those are in fact the terms of the agreement with the government as the defendant understands them.

J: Has anyone made any other or different promise to you of any kind in an effort to get you to enter a plea of guilty in this case?
AS: No, your honor.

Rule 11 also requires the court to make certain the defendant is entering the plea of guilty voluntarily, that is, as the result of the defendant's own free will.

J: Has anyone attempted in any way to force you to plead guilty in this case. AS: Force?! No. No one used force
J: Well let me ask it this way. Has anyone has made any promises to you or threatened you in order to get you to plead guilty.
AS: No.
J: Friends, relatives, your attorney, anyone at all?
AS: No, your honor.
J: Are you entering this plea of guilty voluntarily?
AS: Yes, I am.
J: That is, of your own free will?
AS: Yes.
J: Because you are guilty, and for no other reason?
AS: Yes.

To be truly voluntary, the defendant's decision to plead guilty must be an informed and intelligent one, which means that the defendant must be aware of all penalties the court may impose. So in order to make sure that Angela Smith's plea is voluntary, the court must find out if she is aware of the potential term of imprisonment she will be exposed to, if the plea is accepted. This includes the maximum possible prison sentence and any minimum term of imprisonment required by law. Smith must also be aware of the maximum fine which may be imposed upon her and any other penalty she may be subjected to.

J: Do you understand that the offense to which you are pleading guilty, conspiracy to distribute cocaine is a felony offense?
AS: I do.
J: Do you realize that if your plea is accepted, you will be found guilty of that offense, and such a finding may deprive you

of valuable civil rights, such as the right to vote, theright to hold public office, the right to serve on a jury, the right to possess any kind of firearm?
AS: Yes, I understand.
J: All right then, next, Ms. Smith, I am going to ask you a series of questions about the offense to which you wish to plead guilty. Do you understand that if you plead guilty to conspiracy to distribute five hundred or more grams of cocaine, I must impose a mandatory minimum sentence of five years in prison on you, unless the government files a motion, like the one we've discussed?
AS: Yes.
J: And do you know what the maximum penalty for that offense is, under law?
AS: Uh…you mean like the most time I can do?
J: That's right. What's the longest amount of time I can put you in prison for if I accept your plea to one count of conspiracy to distribute cocaine, and what's the most I can fine you?
AS: Um…I believe up to forty years and the fine is up to two million dollars.
J: And also there is a mandatory term of supervised release that the court will…

At this point the court will discuss any other penalties that might be imposed upon the defendant as the result of the guilty plea. In appropriate cases, Rule 11 requires the court to tell the defendant that she may be required to pay restitution to the victim of the offense. Restitution involves the payment of money or services to the victim of the crime in order to compensate the victim for the losses resulting from the offense. Restitution will not be required in Angela Smith's case, however, that is

because the drug offense, which Smith seeks to plead guilty to, does not involve an individual victim.

J: And finally Ms. Smith, since you are pleading guilty to a felony offense, you will be required to pay a special statutory assessment to the crime victim's fund. Do you understand all those possible consequences of your plea?
AS: Yes, I do, you honor.

Next the court will ask some questions designed to reveal whether the defendant is aware of how the sentencing guidelines, which attorneys Lee and Johnson discussed earlier might apply to the case.

J: Now Ms. Smith, I want you to understand something important, it is correct, that the government's motion regarding your cooperation will give the court statutory authority to impose a sentence upon you, which is less than the mandatory minimum of five years in prison.
AS: Yes.
J: However, in that event, I am still required by statute to apply certain sentencing guidelines in sentencing you under the Sentencing Reform Act of 1984. The United States Sentencing Commission has issued guidelines for judges to follow in figuring out sentences in criminal cases. These guidelines translate such things as the type of charge you are pleading guilty to, the amount of drugs involved, your prior criminal history, things of that nature into numerical values, numbers, using the appropriate numbers, I then decide what sentencing range applies to your case, do you follow me so far?
AS: Yah, I follow you.

J: Have you and Mr. Lee talked about these guidelines and how they would apply to your case?
AS: Yes, yes we have.
J: Do you understand that I would not be able to determine the appropriate guideline sentence for your case until after a pre-sentence report has been completed and you and Ms. Johnson here for the government have had an opportunity to challenge the facts reported by the probation officer?
AS: Yes, Mr. Lee and…we talked about that.
J: Are you also aware that even after the court determines what sentencing range applies to the case the court has the authority in some circumstances to impose a sentence that is more severe or less severe then the sentencing range called for in the guidelines?
AS: You mean, um…that's a departure, right?
J: That's right. Let's say I decide, based on the factors governing your case that the applicable guideline sentencing range under the statute is from fifty to sixty months, the sentencing statutes require me to sentence you within that range, unless I decide that a departure from that range is appropriate, you with me?
AS: Yes, I follow you.
J: Now, once again, if I accept your plea, I also have the authority to grant the downward departure that the government has agreed to request in your case. If I decide that such a departure is justified, but the bottom line is that I may or may not decide that such a departure is justified, and even if I decide the departure is justified, I may or may not accept the 15 months sentence recommended by the government. If I decide not to accept the 15 month recommendation in your plea agreement, I have the power to sentence you to a longer period

of time than that in prison. Is that understood?
AS: Yes, I understand that ma'am.
J: Do you also understand that parole has been abolished, and that if you were sentenced to prison, you will not be released on parole?
AS: Yes.
J: Do you understand also that if I accept your guilty plea, but do not accept the recommendation of the government for a 15 month sentence, you will not have an absolute right to withdraw your plea?
AS: Yes, I understand that.
J: Very well.

As we mentioned before, a defendant who enters a plea of guilty, gives up important constitutional rights. In order for the plea to be voluntary, the defendant must know what those rights are, and the defendant must make a knowing choice to waive those rights, or give them up.

J: Next I would want to talk to you about your constitutional rights. Do you understand that you have a right, to plead not guilty, to any offense you are charged with and to persist in that plea, in other words to take this case to trial.
AS: Yes, ma'am.
J: And that you will then have the right to a trial by a jury.
AS: Yes.

The court will next explain that at a jury trial, the defendant has the following rights: the right to assistance of council, the right to confront and cross-examine government witnesses, the right to present a defense, the right to subpoena witnesses, and

if the defendant does not wish to testify at trial, the right to remain silent. Also, a defendant who is convicted after trial has the right to appeal the conviction to United States court of appeals, but the defendant waives these constitutional rights, when pleading guilty. Instead of returning to court for a trial, at which the government will be required to prove the charges in the indictment, the defendant who pleads guilty will return to court only for sentencing, so Rule 11 requires the court to make certain that the defendant understands, he or she is waiving these rights before it can accept the plea.

Judge: Do you understand that by entering a plea of guilty, if the plea of guilty is accepted by the court, that there will be no trial, you will have given up your right to a trial and to all the rights I have just described to you that go with the trial.

Angela Smith: Yes.

J: You will still have a right to appeal any sentence I impose upon you, however, and argue that it was illegal.

OPTIONAL DISCUSSION BREAK

Rule 11 also requires the court to make certain there is a factual basis for a plea of guilty.

J: Ms. Smith, I've just explained what the government would be required to prove in order to convict you of conspiracy to distribute cocaine, if you went to trial on this charge. The next thing I am going to do is to ask the prosecutor what she would expect the evidence to show if this case went to trial. So you listen carefully to what she says and let me know if you

disagree with any of it. Ms. Johnson.
RJ: If this case had gone to trial the government would have expected the evidence to show that on August 4th of this year, defendant Angela Smith and her co-defendant Michael Jones, entered into a conspiracy to distribute cocaine in the Centerville section of our city. When agent Brown of the Drug Enforcement Administration approached the co-defendants, they sitting together in a van….

By asking the government to summarize its evidence against the defendant, asking the defendant to state what she did or both the court must make certain that the defendant actually committed the offense, which she is attempting to plead guilty to, if such questioning reveals that the defendant's conduct did not actually violate the law, or that a valid defense is available to the defendant, the court cannot accept the plea.

J: Well now Ms. Smith, you've heard what the prosecutor said, is that what happened? Last August 4th did you enter into a conspiracy to distribute some cocaine with a person named Michael Jones?
AS: Yes, I did.
J: How much cocaine did you and Mr. Jones agree to distribute?
AS: Little over half a kilo about 540 grams.
RJ: It was exactly 540 grams, your Honor.
J: Is that correct?
AS: Yes.
J: All right, I find there is a factual basis for the plea. How do you plead to the conspiracy to distribute540 grams of cocaine Ms. Smith, guilty or not guilty?
AS: Guilty.

J: It is the finding of the court, in the case of United States vs. Angela Smith, that the defendant is fully confident and capable of entering an informed plea and that her plea of guilty is a knowing and voluntary plea, supported by an independent basis in fact, containing each of the essential elements of offense of the conspiracy to distribute cocaine; however, the court will defer final acceptance of Ms. Smith's plea until it has reviewed the pre-sentence report in this case. This matter will, therefore, be continued for sentencing, should the court accept the plea, following completion of a pre-sentence report by the probation office and reviewal of that report by the court. Counsel, let's set a date for the sentencing. Now, I have on my calendar…

It can take up to half an hour for the court to take a guilty plea. This is because Rule 11 requires the court to inquire into several different areas before it can accept the plea. The court must make sure that the defendant understands the terms of the plea agreement, that nature of the charge he or she is pleading guilty to, and the maximum punishment that can be imposed if the plea is accepted. It must also ensure that the defendant understands which constitutional rights he or she is giving up by entering the plea. Finally, Rule 11 requires that the court ensure there is a factual basis for the defendant's admission of guilt and that the defendant is entering the plea voluntarily. Some district court judges may require completion of special forms or the filing of written plea agreements at the time the plea is offered to the court. These written documents supplement but do not replace the oral proceeding in open court, which are required by Rule 11. A sample written plea agreement is included in your materials. Rule 20 of the Federal Rules of Criminal Procedure permits charges against the defendant to be

transferred from one district to another when the defendant wants to plead guilty. Rule 20 (a) deals with the situation where defendant is located in one district, district A and charged by indictment or information with a crime in another district, district B. Let's say defendant Stones is living in District A, or as a result of previous convictions, she is already being held in state or federal custody in district A. She is then indicted in district B. Under Rule 20 (a), if Stone wants to plea guilty, she can do so in district A, instead of first being transported back to district B, first, however, Stone must state in writing a wish to plead guilty in District A. Waive trial in District B, where the indictment is pending, and agree to be sentenced in District A, then if the United States attorney for each district approves, the clerk of the court in which the indictment or information is pending in district B, will transfer the appropriate paper work to the clerk in district A, stone's plead can then be entered in district A.

Under Rule 20 (b), a similar procedure can be followed before the defendant is indicted that is, if defendant Stone is located in a district, other than the district in which a complaint is pending against her, she may follow a similar procedure and plead guilty in the district where she is presently located.

This program continues on a second tape

OPTIONAL DISCUSSION BREAK

Part 3: Trials and Guilty Pleas (Tape Two)

As we've seen, the case of United States versus Angela Smith was resolved without trial, when Smith entered a guilty plea to one count of conspiracy to distribute cocaine. But the case against Smith's co-defendant Michael Jones is still pending and Jones's case differs from Smith's case in several important ways. As we know, Smith had no prior criminal record, but Jones has prior convictions for grand theft and assault with a dangerous weapon. In addition, the charges against Jones are even more serious than those against Smith. Like Smith, Jones was indicted on two felony counts, arising from the alleged distribution of five hundred and forty grams of cocaine to agent Brown. Unlike Smith, however, Jones's has also been indicted on a third felony count, the one charging him with possession with intent to distribute the two kilograms of cocaine found in the apartment he shared with Lawrence Greene. Indeed from the government's perspective, we'll say that Jones is considered a very serious criminal offender, such factors as the amount of drugs involved in his charges, the leading role he appears to have played in the sale of drugs to Brown, and his criminal history indicate to the government that Jones is heavily involved in the distribution of illegal drugs. The government views him as a habitual criminal offender who is pre-disposed to support himself by selling illegal drugs. It hopes that he will be convicted of the charges pending against him and then upon conviction he will be incarcerated for a lengthy period of time. With these considerations in mind the government decides that a

plea agreement with Jones is unlikely. On the other hand, Jones continues to deny his guilty and wants to go to trial.

Jones: So I was in the van when the undercover came over. And I heard him ask Angela about selling him some coke. But I told Angela, "if you want to be selling drugs, then you get out of this van," and that's what she did. Now I don't know what she did after she left but if it was selling drugs I don't know nothing about that.
Lawyer: I see what you are saying. See the problem is that Smith says that you were in on it. That you gave Smith the cocaine in your apartment and then you went out in the van together, hoping to make a sale.
Jones: That Angela! I never did trust her. She is lying. Telling them what they want to hear save her own skin. Trying to get herself probation or something.
Lawyer: Right. I just wanted you to know she will be testifying for the government at trial.
Jones: Ain't that Something? Hm?! She is lying and they believe her, they want to believe her, just because I got two prior convictions they think I'm big time or something. Well, I'm not.
Lawyer: Ok! Now, what about the two kilos of cocaine they found in the apartment when you were arrested.
Jones: Now look, all I do is sub-let from Lawrence Greene. That was Lawrence's cocaine. You see about half an hour before the police got there, I saw Lawrence with that cookie tin. Now, I didn't know there was cocaine in it at that time. And I can tell the jury that can't I?
Lawyer: You can if you want to. The problem with that is then the jury would learn about your two prior convictions. Was there anyone in the apartment that morning who could stands as

witness.
Jones: Sure, my friend Sharon was there, when Lawrence was fussing around with that cookie tin. We both was there. So Sharon can tell them that, that she saw Lawrence with the package. Yes sir! We can go to trial in this case.

As you can see, the case of United States v. Michael Jones will go to trial. But where would the Jones trial be held? Criminal Rule 18 requires that with certain limited exceptions the prosecution and trial of criminal defendants must take place in the Federal Judicial District, where the offense was allegedly committed. Michael Jones would therefore be tried in the Judicial District which includes the Centerville Section of our hypothetical town. The case of United States v. Jones will also be tried before a jury, rather than a judge. Why is that? Well, the Sixth Amendment to our constitution guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. Rule 23 of the Fed. R. Crim. P. embodies the Sixth amendment right to trial by jury. It states that cases require to be tried by a jury, shall be so tried, unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government. If the waiver requirements of Rule 23 are satisfied in a given case, that case is tried by a judge instead of a jury. While the great majority of criminal cases which go to trial are decided by juries, many of them are decided by judges or magistrates sitting without a jury. Rule 23 also provides for a jury of 12 people, unless the parties agree that the case shall be tried to a jury of less than 12. At this point you may be asking what does the right to trial by jury mean as a practical matter. It means that after hearing the evidence. A jury of 12 citizens lay

persons from defendant's community decides whether the defendant is guilty or not. The proceeding at which the jury hears the evidence receives instruction on the law and decides the case is of course the trial. In order to serve on a jury, each juror must be impartial, that is capable of reviewing the evidence presented by both sides fairly and with an open mind. The jurors return their verdict after deliberating in secret. The jury's verdict must also be unanimous and based solely upon the evidence in the case. How then is the jury selected in a criminal case? Like grand jurors potential trial jurors are selected at random from a fair cross-section of the community in the district where the trial is held. When a case is ready for trial, the courtroom clerk calls the jury room and asks that a group or panel of these perspective jurors be sent to the courtroom. The jurors actually selected to try the case will be chosen from this panel. After the panel members arrive either the judge or the lawyers in the case will begin asking them questions. The questioning of the potential jurors is called the Voir Dire. Voir Dire is a French term meaning to speak the truth. Most of the questioning takes place in open court. But questioning on more sensitive matters may take place at the bench. The questions asked during voir dire, are designed to gather information about the perspective jurors. The court then evaluates this information and decides whether or not each perspective juror can decide the case fairly and impartially. Either lawyer can seek to prevent a potential juror from sitting on the case, if the juror's answers indicate he cannot approach the case impartially. This is called challenging the juror for cause. If the judge agrees with the lawyer, he or she will then strike the perspective juror for cause. This means the perspective juror cannot sit on the jury. In addition to

challenges for cause, both the prosecutor and the defense attorney have the right to strike a certain number of jurors from the panel without stating any reason whatsoever. The lawyers do this by making peremptory challenges. The lawyers exercise their peremptory challenges after the first 12 potential jurors are seated in the jury box. If a lawyer challenges a juror for cause, he or she must tell the judge the basis for the challenge. But a lawyer does not have to tell the judge the basis for a peremptory challenge. When a lawyer believes that perspective juror will not respond favorably to his or her case the lawyer can use a peremptory challenge to strike that juror from the panel. While preemptory challenges can be made for a variety of reasons, including a lawyer's hunch or gut feeling about a perspective juror. They cannot be made on the basis of the juror's race or gender. Notice that attorneys Johnson and Harrison take turns exercising their preemptory challenges. In addition, that judge announces that challenges two at a time, so that the potential jurors cannot tell which lawyer has challenged a particular juror. Notice also that the challenged jurors are replaced by other perspective jurors, so that there are always 12 perspective jurors in the jury box, while the lawyers are exercising their preemptory challenges. As you can see, the parties select the jury by making challenges for cause and preemptory challenges. In other words, they use the challenges available to them to remove panel members they do not want on the jury. The actual trial jurors would be the first 12 panel members who are not removed from the case by the exercise of challenges. Federal Rule of Criminal Procedures 24 governs selection of trial jurors in Federal court. This rule gives the court discretion to ask the voir dire questions of the perspective jurors itself or to allow the lawyers in the case to handle the

questioning. Most magistrate and district court judges elect to ask questions themselves, when they do so, Rule 24 requires that they consider asking any additional questions suggested by counsel. Rule 24 also sets limits on the number of preemptory challenges allowed each side in felony and misdemeanor cases. Finally, Rule 24 provides for the selection of as many as six alternate jurors in each case. Alternate jurors are selected in the same manner as regular jurors, they hear the evidence in the case along with the rest of the jury members, but they do not help decide the case unless they are called upon to replace a regular juror. This may happen if a regular juror becomes ill or for some other reason cannot continue to serve as a juror in the case.

After the jury is selected and sworn each side makes an opening statement, the opening statement is the attorney‘s opportunity to explain to the jury what they intent to present as evidence during the course of the trial. The defense has three options available to it with respect to opening statements. It can make its opening statement immediately after the government's opening, reserve its opening statement until after the government has presented its case or elect not to make any opening statement at all. Let's say that attorney Harrison decides to make an opening statements on her behalf of her client Michael Jones right after the government's opening.

Johnson: And I'll ask you again to pay particular attention to the testimony of Angela Smith on this matter. Angela Smith who is going to take that witness stand and tell you, "yes I sold drugs to agent Brown," and so did the defendant on this case, Michael Jones. And after you've heard all of the evidence ladies and

gentlemen, including the testimony of agent Brown, the testimony of the chemist and the testimony of Angela Smith, the government is going to ask you to return a verdict of guilty on all three of the charges in this indictment. Thank you.
Judge: Ms. Harrison, do you wish to give an opening statement at this time?
Harrison: Yes, thank you, your honor. Ms. Johnson, Mr. Jones, ladies and gentlemen of the jury, the evidence in this case will show that Michael Jones had nothing to do with the sale of any cocaine to agent Brown, the evidence will also show that the cocaine that was recovered from the apartment belonged to Lawrence Greene, not to Michael Jones. You'll also learn that it was Ms. Smith, who made the deal to sell cocaine to agent Brown in that park in Centerville, and Ms. Smith alone. And that is not the only deal Angela Smith got for herself in this case ladies and gentlemen. The evidence will show that once she was arrested Ms. Smith made another kind of deal with the government.

After the opening statements the presentation of evidence begins. Throughout the trial, the law presumes that the defendant is innocent. It is the government's job to try to overcome this presumption and convince the jury by proof beyond a reasonable doubt that the defendant is guilty, since the government carries the burden of proof it presents its evidence first. It does so by calling its witnesses to the stand and asking them questions. The testimony of these witnesses, given an answer to the prosecutor's questions becomes the government's evidence. The initial questioning of any witness by the attorney who calls the witness to the stand is called direct examination. Let's take a look at some of AUSA Johnson's direct examination

of agent Brown. Notice that on direct examination, the attorney asking the questions is not allowed to lead the witness, that is, the attorney may not ask questions that by their very wording, suggest how the attorney would like the witness to answer the question.

Johnson: And did there come a time when you learned the name of the individual who handed you the drugs in return for the marked money?
Brown: Yes, I let her learn that her name was Angela Smith.
Johnson: Was Ms. Smith the passenger in the van you told us about?
Brown: Yes, she was.
Johnson: Now, Ms. Smith had a conversation with the driver of the van, before she got out of the van, didn't she?
Harrison: Objection, your Honor. Counsel is leading the witness.
Judge: Objection is sustained. Please rephrase your question Ms. Johnson.

When a judge thinks that a lawyer's objection is valid, he or she will sustain the objection. If there is no basis for the objection, the judge will overrule it.

Johnson: Very well, your Honor. At any time before Ms. Smith got out of the van did she have a conversation with the driver of that van?
Brown: Well, Mrs. Smith…Ms. Smith looked over at the driver, said something to him, but I couldn't hear what it was.
Johnson: What, if anything, did Ms. Smith do at that point?
Brown: Right after she said something to the driver, she got out of the van, walked away with me. We went to a clearing in the

woods, at that point we made…

The defendant has the right to confront witnesses like Brown, who testify against him. The right to confrontation is guaranteed to the defendant by the Sixth Amendment to the constitution. The Sixth Amendment allows the defendant to confront and cross-examine each government witness after the prosecutor is done asking the witness questions on direct examination. The defense attorney's questions on cross-examination are usually designed to highlight evidence favorable to the defendant or to show that the testimony the witness gave for the government is not true. Let's watch a portion of attorney Harrison's cross-examination of agent Brown.

Harrison: Agent Brown, you didn't see Michael Jones hand any drugs to Ms. Smith before she got out of the van, did you?
Brown: No, I did not.
Harrison: And from the time you first approached the van until the time Ms. Smith got out of the van, you didn't see Mr. Jones with any drugs, did you?
Brown: No.
Harrison: Your conversation at the van was with Smith, correct?
Brown: That's correct.
H: You never spoke with Jones then?
B: No.
H: About drugs or anything else?
B: No, I did not.
H: And it was of course Smith, who got out of the van and went into the clearing with you right?
B: That's right.
H: Because you had negotiated the deal with Smith, right?

B: Well…
H: You and Ms. Smith did all the talking at the van, right?
B: Yes, that's right.
H: And she, excuse me, Smith was wearing this purse around her waist when you spoke with her at the van right?
B: That's right.
H: And it was zipped closed at that point wasn't it?B: I believe it was.
H: Well agent Brown was it zipped closed or wasn't it?
B: Yes it was.
H: And the first time you saw any cocaine, was when Smith unzipped her purse in the clearing?
B: That's correct.
H: And when Smith sold you the cocaine you were what more a hundred feet from the van at that point?
B: About that far.
H: And Mr. Jones at that point wasn't present, was he?
B: No he was not, he stayed in the van.
H: He stayed in the van, the whole time, didn't he?
B: Yah. He stayed in the van.

Under the rules of evidence, both the government and the defense are allowed to cross-examine witnesses after the witnesses complete their direct testimony. After the government presents all of its witnesses and introduces any physical or any documentary evidence it may have. The defendant can ask the court to enter a judgment of acquittal on the charges in the indictment. Rule 29 of Fed.R. Crim. P. permits the defense to make such a motion. The rule permits the court to grant a motion for judgment of acquittal if it finds the evidence presented by the government is legally insufficient to permit a

conviction on the charge at issue. As mentioned earlier, the government has the burden of proving the charges in the indictment by proof beyond a reasonable doubt thus in order to grant a motion for judgment of acquittal, the court must conclude that based upon the evidence presented by the government. No reasonable juror could find that the charges have been proven beyond a reasonable doubt. Rule 29 allows the defense to renew its motion for judgment of acquittal after its own case have been presented and even after the trial is over. Of course if the court denies the defendant's motion for a judgment of acquittal at the end of the government's case, the trial continues. At that point it becomes the defense's turn to present evidence. However, the defense has no obligation to present any evidence, whatsoever. The defendant does not have to testify a point which attorney Harrison stresses to her client in the Jones case.

Jones: I told you Angela was going to lie. Now, I want to get to tell my side of story.
Harrison: I know you do, but my concern is that if you do testify the prosecutor will be allowed to question you about your prior convictions. I am not so the we want the jury to hear about your felony theft and assault convictions.
J: I know, you told me that before. But I got the right to testify don't I?
H: Absolutely, but if you do here's what will happen.

Judge: You may cross-examine Ms. Johnson.
Johnson: Thank you, your Honor. Mr. Jones are you the same Michael Jones who was convicted of grand theft in this state in case number F1443.

Jones: Uh…I don't remember.
Johnson: Would it refresh your recollection to take a look at a certified copy of the judgment of conviction in that case?
Jones: Uh…no, that's all right. I remember now, yah…that was me.
Johnson: And are you also the same Michael Jones, who was convicted of assault with a dangerous weapon in this state in case number F8989.
Jones: Yes, that was me, too.

H: That's what will happen. If you testify the law will allow the judge to know you had two prior felony convictions. The jury would be entitled to weigh that information in deciding whether to believe your trial testimony.
J: If the jury hears that stuff, they won't believe a word I say.
H: That's why I keep reminding you that you also have a right not to testify. Because your Fifth's Amendment privilege against self-incrimination applies at trial. That means that your privilege to remain silent in the face of a government's accusations.
J: But won't the jury think I am trying to hide something if I don't testify?
H: The jury will be instructed that you are not required to testify and the jury will be told that it cannot assume that you're guilty, because you choose not to testify. The judge will tell them that.
J: Then my friend Sharon would be our only witness.
H: That's true.
J: But Sharon would be a good witness and you'll argue they ain't prove the case beyond a reasonable doubt, right?
H: Right.
J: Alright, I see what you're saying, and I won't testify then.

Attorney Harrison has raised an important point. Even in cases where the defendant does not testify and no other defense evidence is presented, the defense may still argue to the jury that it must acquit, because the government has not made its burden of proof. So Jones decides not to testify, but his friend Sharon Booth is called as a defense witness. Ms. Booth testifies that she had seen Jones's roommate Lawrence Greene, with the cookie tin in his possession, when she visited Jones in the apartment.

Harrison: And is this the cookie tin you saw Mr. Greene holding?
Sharon: Yah, that's it.
H: What was he doing with it?
S: He was just holding in his hands. I didn't get to see what was in the package though, cause when I walked over to Lawrence he seemed all nervous and everything and he just covered up with his hands.
H: And approximately what time did you see Mr. Greene holding this?
S: I don't remember what time it was but it was about the time that Mike, sorry, um…Michael Jones was taking a shower, I got tired of waiting for him, so I went down to the lobby of the building to buy a pack of cigarettes. And that's I knew the tim e…

On cross-examinations the prosecutor's questioning reveals that Ms. Booth has known defendant Jones for several years, and considers him to be a close friend.

Johnson: Now, Ms. Booth. You said on direct examination that, you're friends with Michael Jones, is that correct?
Sharon: Yah.
J: You…In fact you're pretty good friends with Mr. Jones isn't that fair to say?
S: Well…yes.
J: You've known him for about four years?
S: Hm…about that long.
J: You're good enough friends with Michael Jones that you see him at least once or twice a week, isn't that fair to say?
S: Hm…Not every week…but about that much.
J: And you wouldn't want Mr. Jones to get into any trouble, would you?
S: Well…No…I mean…I don't…

After all of the evidence in the case has been presented, but before the jury begins its deliberations, the judge must instruct the jury on the principles of law, which govern the case. The government and the defense may disagree about which principles of law apply, however. So before instructing the jury, the judge must resolve any disagreements and decide which instructions are appropriate. Rule 30 of the Fed. R. Crim. P. governs jury instructions. Rule 30 allows the attorneys for each side to file written requests for specific jury instructions with the court. In addition, under the rule, the court must tell the attorneys which instructions it intends to give the jury prior to closing argument. Rule 29.1 governs closing arguments to the jury. In its closing argument, each side summarizes the evidence and attempts to convince the jury that its interpretation of the evidence is correct. Rule 29.1 requires that the prosecution gives its argument first. Next, the defense gives its closing

argument. After the defense argument, the prosecution is permitted to give a final argument in rebuttal. In her closing argument for Mr. Jones, attorney Harrison contends that the government has not met its burden of proof on any of the charges against Jones.

Harrison: Isn't it clear what happened that day in the Centerville ladies and gentlemen, if my client had really been involved in that drug deal, would Angela Smith had have to leave that van and go into the woods to sell agent Brown the drugs? Of course not! If all three of those people had wanted to do a drug deal, the deal would have taken place right there at the van. But it didn't. It didn't because one of those three people didn't want to do anything to do with dealing drugs. And that one person was my client, Michael Jones. Doesn't the evidence show that Mr. Jones shook his head as if to say "no", when Smith turned to. And isn't that way why Smith and Brown had to leave that van and go in to a clearing in the woods in order to make a deal of their own. And then Angela Smith comes in here and tells you about the second deal she made in this case, a deal that says the government will recommend that she'll serve as little as 15 months in prison…

Attorney Harrison also argues that the two kilograms of cocaine found in the apartment belonged to Jones's roommate, Lawrence Greene.

Harrison: And how you would you know that cocaine belonged to Lawrence Greene? Well, first of all, Sharon Booth told you that she saw Lawrence Greene not Michael Jones with the container that morning. What kind of container? A cookie tin

ladies and gentlemen, the same cookie tin in which the drugs were later found. Government exhibit number 9, and when Ms. Booth came over to Lawrence Greene, you remember her testimony? He became all nervous and you know why he was nervous ladies and gentlemen, because he had cocaine in his possession and he didn't want anyone else to know about it, so now you know who had possession of the two kilograms of cocaine. Lawrence Greene, not Michael Jones. And if you had any doubt about that, who took off after the DEA showed up, not my client, Michael Jones didn't skip town after being charged in this case he is here in court today fighting these charges. And then Angela Smith tells you, "Oh, Michael Jones and I got the cocaine we sold to agent Brown from Michael's apartment." But can you believe Ms. Smith's testimony? Can you believe her when you know she is doing her best she can to earn herself a 15 months sentence?

After closing arguments are completed, the judge instructs the jury on the principles of law which they must apply to the case. The jury then retires to a private room, and begins its deliberations. The jury's deliberations may take minutes, hours, or days, depending on the complexity of the case. When the jury agrees upon a verdict, all parties convene again in open court, the verdict is then read. In the next and final segment of this video program we'll learn what the jury's verdict was in the case of United States v. Michael Jones.

Part 4 Sentencing and Post-Judgment Proceedings

In the first three segments of this video program, we've been following the case of United States v. Angela Smith and Michael Jones through the federal criminal system. In our third tape, we saw that defendant Smith entered a plea of guilty and that defendant Jones elected to go to trial. In this final tape, we'll see if the jury finds Jones guilty or not guilty then we'll take a look at sentencing procedures. Once again we'll be referring to the Fed. R. Crim. Procedure. We'll also be referring to certain statutes and guidelines that apply at sentencing. And finally we'll take a look at some matters that occur post-judgment. That is, after sentencing. Fed. R. Crim. P. 31 governs the taking of the verdict in the Michael Jones case. Rule 31 requires that the jury's verdict be unanimous and that it be returned by the jury to the judge in open court. Let's see what the verdict is in the Jones case.

Judge: Ladies and gentlemen, I've received your note which says you've reached a verdict in this case. Will the foreperson please stand. Would you please hand the verdict form to the clerk who will then deliver it to me for inspection. Thank you. Very well, Mr. Jones could you please stand and face the jury. Mr. foreperson, as to count one to the indictment, alleging distribution of controlled substance, to wit cocaine, has the jury

reached a verdict?
Foreperson: Yes, it has.
J: On count one of the indictment, how do you, the members of the jury, find the defendant, guilty or not guilty?
FP: Guilty.

The jury finds Michael Jones guilty on all counts of the indictment. Rule 31 requires a poll of the jury after the verdict is returned upon motion of the court or any party. In a poll of the jury, each juror is asked whether he or she agrees with the verdict announced by the foreperson. Rule 31 provides that if the poll reveals there is not unanimous agreement on the verdict the jury may be sent back to the jury room for further deliberations, or if it appears the jury cannot agree on a verdict, the jury may be discharged. A jury which cannot agree on a verdict, after considering the case for a reasonable amount of time is called a hung jury. When there is a hung jury, a mistrial is declared and the defendant may be tried again before a new jury. A mistrial is a ruling by the court that the trial is to be terminated at that point and given no effect. Of course a jury can also return a verdict of not guilty. A not guilty verdict is also called an acquittal. Once a defendant is acquitted of a criminal charge, that charge cannot be brought against him, a second time.

THE PRESENTENCE PROCESS

It appears then, that both Angela Smith and Michael Jones will be proceeding to sentencing. The sentence is the judgment of the court imposing a particular punishment upon the defendant, after he or she is found guilty of a crime. In examining Angela

Smith's plea bargain and guilty plea we've already isolated some of the factors which will come into play in shaping her sentence. So let's use Smith's case to examine the statues and procedural rules which govern sentencing. Rule 32 of the criminal rules, which govern sentencing procedures in Fed. Courts, says that criminal sentences, should ordinarily be imposed without necessary delay. But how does the judge figure out what that sentence will be. In order to impose an appropriate sentence, the judge must learn a tremendous amount about the individual he or she is sentencing. The judge must also come to have a full and accurate understanding of the facts of the offense. Finally, the judge must know what types of penalties may be imposed upon the sort of person who committed that kind of offense. United States probation officers like probation officer, Mumford assist the court by providing it with information bearing upon these matters.

Mumford: Hi, I'm United States probation officer Charles Mumford. Probation officers provide the court with the information required by rule 32 and Federal laws governing sentencing. We do this in the form of a written pre-sentence investigation report to the court. As you can gather from its name, the pre-sentence report is prepared prior to sentencing. When a defendant enters a guilty plea or is found guilty after trial the judge orders the probation office to prepare the pre-sentence report. At that timethe judge also tells the defendant, that the probation officer will ask for information for the report, and that the defendant's attorney may be present when the defendant gives it. The sentencing judge will rely heavily upon the information presented in the pre-sentence report, in fashioning the defendant's sentence. So let's take a

look at what goes into the report. One thing a probation officer's pre-sentence report has to do under rule 32 is to tale for the court the officer's recommendation as to how the sentencing guidelines and policy statements of the United States sentencing commission apply to a particular case. Take Angela Smith case for example, Smith like any defendant who has been found guilty of a Federal crime must be sentenced under the provisions of certain sentencing statutes passed by congress. One of these statutes called the sentencing reform act of 1984 established an agency called the United States sentencing commission. The mission of the sentencing commission is to establish sentencing policies and practices for use in the Federal courts. Under the act, the sentencing commission issues guidelines for judges to use in fashioning criminal sentences. But when sentencing guidelines and statutes conflict, statutes govern, so the guidelines don't apply in cases where a statute requires the application of a mandatory minimum sentence that is longer than the guideline range. In Smith case, the statutory minimum sentence is five years, so ordinarily, she would sentenced to a minimum of five years in prison and the prison term calculated under the guidelines would not be applied. But as we know §3553(e) of Title 18 gives the court authority to impose a sentence below a mandatory minimum when the government files a motion asking it to do so to reflect the defendant's substantial assistance in the prosecution of another person. And the government has agreed to file such a motion in Smith case. If the court grants the motion, the mandatory minimum won't apply, and Smith will be sentenced under the guidelines. So in Smith's pre-sentence report I'll note that a statutory minimum sentence of five years applies, but I'll also mention the government's 3553(e) motion and because the court

may grant the motion, calculate Smith's guideline sentence as well. In cases where mandatory minimum sentences don't apply, judges are required to use the guidelines to help them decide what kind of a sentence to impose, that is whether to impose a sentence to probation, to pay a fine, or to serve a period of imprisonment, the appropriate length of a sentence, the appropriate amount of a fine, whether the offender should serve a term of supervised release following the imprisonment, and if so the length of that term, and whether multiple sentences, the terms of imprisonment should be ordered to run concurrently, at the same time, or consecutively, one followed by another. Congress created this guideline sentencing system because it wanted to promote honesty in sentencing, by doing away with parole, and making certain the offender serves the actual sentence imposed. Uniformity in sentencing, by setting sentencing ranges, which help ensure that similar offenders who commit similar crimes, are given similar sentences and proportionality in sentencing, for example, by ensuring that an offense which is twice as serious as another offense will result in a penalty which is twice as serious. Complete and accurate fact finding is an important part of achieving these goals, this is because guideline sentencing involves the application of rules, the guidelines themselves to facts, what facts, the facts of the offense, after all the court can only impose a just sentence when it applies the guidelines to the actual facts of the offense, thus the probation officer must conduct a thorough investigation of the facts involved in the offense. The probation officer reports the facts of an offense in the pre-sentence report, and the judge usually adopts these facts and the finding of the court, unless the lawyers convince the judge that the probation officer was wrong. I am about to show you how I apply these

guidelines in preparing my pre-sentence investigation reports. There are several steps involved in this process, keep in mind though, that each step of the way I will be developing recommendations as to how the guidelines apply to the facts of the offense as my investigation has revealed them. The guidelines themselves and many materials useful in applying them are found in the United States sentencing commission guidelines manual, the guidelines manual contains the sentencing guidelines themselves, policy statements, which interpret the guidelines and explain how to apply them, and commentary to assist in interpreting the guidelines. The manual also contains a sentencing table. I'll use this table in computing the sentencing range applicable Angela Smith case. I use the term sentencing range because the relevant statutes require the sentencing commission to establish sentencing ranges for example a range to six to twelve months instead of setting the precise length of prison terms. In my pre-sentence report I'll tell the judge the sentencing range I think applies to the case, but the final sentencing decisions for example, whether the correct sentencing range is 6 to 12 months and if so whether to sentence the offender to 6, 7, 9, or 12 months within that range are left to the judge. As you can see, the sentencing table has offense levels on its vertical axis and criminal history category on its horizontal axis. The point atwhich these axis meet reveals the applicable range of sentences. For example, for offense level 21 and criminal history category 5, the sentence range is 70 to 87 months. Of course before I can use the sentencing table, I must determine the offense level and the criminal history category which apply to a given case. Most probation officers do this by using special worksheets, in filling out the work sheets I first go to appendix A, the statutory index, to see

which set of guideline instructions applies to the offense committed. Thus for defendant Smith, who pled guilty to one count of conspiracy to distribute more than 500 grams of cocaine in violation of 21U.S.C. §841(b)(1) guideline 2D1.1 applies. I then review instructions found at guideline2D1.1. These instructions tell me to consult the drug quantity table in order to find the offense level, which applies to conspiracies to distribute over 500 grams of cocaine. Consulting the table, I find that a base offense level of 26 applies. Adjustments are then made to that base offense level, by adding or subtracting points assigned to such factors as the size of the offender the role in the offense, whether the offender obstructed justice, whether the victim was injured, whether the defendant has accepted responsibility for committing the offense and so forth. In Angela Smith case, I have concluded after reviewing the charges in plea agreement and also talking to both counsel and Smith herself, that the only applicable adjustment is the acceptance of responsibility adjustment, and that's what I recommend in the pre-sentence report. To get the adjustment, the defendant must clearly accept responsibility for her criminal conduct. Entry of a plea is considered significant evidence of this. Applying the adjustment can result in either 2 or 3 point reduction in the defendant's base offense level. Defendant Smith has clearly accepted responsibility for her criminal act which qualifies her for at least a 2 point adjustment.

Charles Mumford: Well, that's what the government says happened. What do you say?
Angela Smith: They're right. I did sell drugs, you know. Everything they say I did, I did. It was a big mistake.

But because Smith's base offense level is above 16 and because she gave the government timely notice of her intention to enter a guilty plea, allowing it to avoid preparing for trial she qualifies for the full 3point acceptance of responsibility adjustment. Deducting the 3 points from Smith's base offense level leaves her with an adjusted base offense level of 23.

Next I determine the appropriate criminal history category. The sentencing commission has established a system that assigns numerical values, numbers of points to the offender's prior criminal convictions, since this is Smith's first conviction she has no history of criminal convictions. So she receives no points, and thus falls within the lowest criminal history category, category 1. The next step is to find the intersection of offense level 23 and criminal history category 1, on the sentencing table. As we can see, the sentencing table yields a sentencing range, of 46 to 57 months, for that offense level, and criminal history category.

OPTIONAL DISCUSSION BREAK

Now that I know the sentencing range to recommend in Smith's case, I can check to see what sentencing options the court has available to it. That is, probation, supervised release, restitution, imposing a fine, and imprisonment. The sentencing statutes and guidelines do no allow the court to choose from the entire range of these options in every case however. Let's see what the court's sentencing options are in Smith's case. First, what about probation, statutes like the sentencing reform act make probation a sentence in and of itself. Offenders placed on probation must observe certain conditions a probation required

by statue or the sentencing court. Probationers must also report to the probation officer as directed by the court, and follow the officer's instructions. But the statute governing the offense to which Angela Smith pleads guilty expressly prohibits a sentence of probation. In addition, the sentencing guidelines do not permit a sentence to probation if the minimum term of imprisonment, specified by the sentencing table is more than six months. Here it is 46 months, so probation is not an option for Smith. What about supervised release? The guidelines state that the court, shall order a term of supervised release to follow imprisonment, when a sentence of more than one year is imposed, or when required by statute. Like offenders placed on probation, offenders placed on supervised release, must observe certain conditions required by statue, or the sentencing court. The statute governing the offense, to which Smith plead guilty, states that the court, should impose a term of supervised release of at least four years to follow any term of imprisonment imposed by the court. So Smith's prison sentence will be followed by four years of supervised release. Next, what about restitution? Restitution, payment of money or services to the victim of a crime for losses suffered as a result of the offense must be ordered as a part of the sentence for violating certain sections of the criminal code, such as Title 18 of the United States code, or it may be imposed as a condition of probation or supervised release, in any other case. Here however, Smith's drug offense violates Title 21 of the code which does not require restitution nor is there any identifiable victim in this case. So restitution is not a sentencing option for the court. Another sentencing option available to the court is imposition of a fine. The guidelines require the court to impose a fine within the applicable range in all cases. That is, except

where the defendant establishes an inability to pay a fine, or that paying a fine would unduly burden his or her dependence. At this point, Smith has not done this. Having pled guilty to a felony, Smith must also pay a Special Assessment of 100 dollars, that money will go into a crime victim fund, established under the victims of crime act of 1984. Finally, Smith may be required to pay an addition fine in order to compensate the government for the cost of her imprisonment and supervised release. Payment of this fine is also subject to Smith's ability to pay. Smith has not yet shown that she would be unable to pay these costs or doing so would unduly burden her dependence. So at least at this point, the court has the option of ordering Smith to pay for the cost of her imprisonment. The court will use materials developed by the Bureau of Prisons and other federal agencies in calculating such costs. Of course imprisonment is another option available to the court under the applicable statutes in the guidelines, and we know from our use of sentencing table that the court must impose a period of imprisonment in Smith's case. Remember, the sentencing statutes require that the judges use the sentencing guidelines in considering all of these sentencing options and fashioning all aspects of Smith's sentence. This means that with respect to Smith's imprisonment probably the most significant aspect of Smith's sentence, at least from her point of view. The court must impose a sentence that falls within the forty six to fifty seven months range specified in the sentencing table, that is, unless the court concludes that a departure from the guidelines is justified in Smith's case. The term departure has a very specific meaning in the context of guideline sentencing, however. The applicable statutes states that the court may depart from the sentencing guidelines in the case before it, that

is, impose a sentence, above or below the ranges established by the sentencing guidelines, which would otherwise apply to the case, only if it finds that there is aggravating and mitigating circumstance in the case which the sentencing commission has not already considered in the guidelines. For example, in one case a defendant who is an employee of the Federal government pled guilty to theft of government property amongst other offenses, the employee stole property repeated over 6year period the applicable guideline range was 30 to 37 months. But the sentencing court departed upward from that range, because it decided the case included aggravating circumstance, which the sentencing commission had not already addressed in the guidelines. The court found that while the guidelines consider the seriousness of the offenses, it did not consider the added factor of their lengthy duration. The court decided that the commission of the offenses over lengthy six year period of time was an aggravating factor. Since the sentencing commission hadnot considered this factor in fashioning the guidelines, the court was allowed to make an upward departure from the guidelines so the court did so and sentenced the offender to more than 37 months in prison. A policy statement in the guidelines themselves, however, suggest that the court may depart from the guidelines and impose a reduced sentence if the government files a motion with the court saying that the defendant has provided substantial assistance to it in the prosecution of another person. As we know from the terms of Smith's plea bargain, the government agreed to file such a motion asking the court to depart downward from the guidelines and sentence Smith to fifteen month in prison, if she provided substantial assistance in the prosecution of Jones. We also know that Smith has cooperated with the government in its

prosecution of Michael Jones providing vital testimony for the government at Jones's trial. Once Smith held up her end of the plea agreement, the government met its obligation under the agreement by filing a motion with the court saying that Smith had provided it with substantial assistance in the prosecution and conviction of Jones. Why is this of interest to me? Because under Rule 32 a pre-sentence report must contain an explanation of any factors that indicated a departure from the guidelines would be justified. My pre-sentence report therefore reflects Smith's cooperation with the government and reminds the judge that the departure from the guidelines would be permissible because of that cooperation. It is the judge however, who will actually decide whether or not to grant the departure. Let me summarize for you what I've done in recommending how the sentencing guidelines apply to Smith's case. First, I calculated the total offense level for Smith's offense. Second, I determined defendant Smith's criminal history category. Third, I selected the guideline sentencing range which apply to Smith's offense level in criminal history category. Fourth, I reviewed the sentencing alternative available under the guidelines in Smith's case that is, what options the court has available to it regarding probation, prison, supervised release, finds and restitution. And fifth, I decided whether a departure from the sentencing guidelines would be justified in the case. It is important to remember that the pre-sentence report is not a public document. Under rule 32, it cannot be submitted to the court, and its content cannot be disclosed to anyone, unless the defendant has consented in writing, pled guilty, or had been found guilty after trial. Rule 32 does allow the court to permit the defendant and his counsel to read those parts of the pre-sentence report that contain the material we've been

discussing prior to sentencing. But information that might be harmful to the defendant or others must be excluded from the report. This includes diagnostic opinions, sources of information revealed in confidence, or other information which if revealed might harm the defendant or anyone else. For example, a psychologist might have recommended that Angela Smith undergo therapy, but it might be harmful for her to know all the reasons for that recommendation. If the court does intend to rely on information excluded from the report in fashioning a sentence, the excluded information must be summarized in writing and disclosed to the defendant and counsel before sentencing, so they can comment on it.

Angela Smith: Ok. Ok. So I know all that but what I really want to know is what is the sentence that the probation officer recommended to the judge?
Jack Lee: That information has been removed from our copy of the pre-sentence report. The probation officer makes sentencing recommendation to the judge, but we're not allow to see that part of the report. But we do know however, which sentencing classification and guideline range the probation officer says applies to your case.

Attorney Lee is correct. Rule 32 requires disclosure to the defense, and prosecution of probation officer's conclusion on what sentencing classification and sentencing guideline range the officer believes applicable to the case. But it also permits the court to direct the officer to exclude the actual sentencing recommendation from the report, and as attorney Lee points out, the courts did so in this case. Rule 32 requires that the report be given to the defendant and counsel at least thirty five days

before sentencing. The parties then have 14 days to let the probation officer know if they have objections to the report. After receiving objections, the officer may meet with the defendant and opposing counsel to discuss them. The officer may also decide to conduct an additional investigation and revise the report. A revised report must be submitted to the court, at least seven days before the sentencing hearing. The officers must discuss any unresolved objections to the report in an addendum. In addition to submitting objections to the probation officer, the parties can file motions stating their objections with the court, or agree on written stipulation of fact relevant to sentencing. The federal and local rules governing disclosure of pre-sentence reports recognize that pre-sentence report plays central role in helping the judge determine the facts relevant to sentencing. And by providing for timely disclosure of the pre-sentence report prior to sentencing, these rules give the parties and an opportunity to identify and resolve legal and factual issues that they disagree on before the sentencing hearing is held.

OPTIONAL DISCUSSION BREAK

Rule 32 also gives the court the option of allowing the defense and the prosecution to introduce testimony relating to objections to the pre-sentence report at the sentencing hearing itself. Of course the court ultimately resolves the issues involved after reviewing the evidence and the material submitted by counsel. After doing so the court is required by rule 32 to state its finding in writing. The judge's finding must attached to the pre-sentence report, which will eventually go to the Bureau of prisons. The structure of the sentencing hearing itself is also

largely shaped by the requirements of federal rule of criminal procedure 32. At the sentencing hearing the defendant, defense counsel, and the prosecutor appear before the court. The probation officer may also be present along with any witnesses the parties have subpoenaed to give testimony at the hearing. The judge has a copy of the pre-sentence report and any other reports necessary. Now that the ground work has been laid for the hearing, let's see what happens at the hearing itself.

Judge: Good afternoon everyone. Mr. Lee, have you and Ms. Smith each had an opportunity to review the pre-sentence report in this case?
Jack Lee & Angela Smith: Yes, you honor.
J: um...and have you discussed the contents of that report?
JL: We have.
J: Alright, hm...at this time does the defense have any objections to the pre-sentence report, other than the objections noted in the addendum to the report?
JL: The defense does not have any additional objections your honor.
J: At this time then the court will accept as fact those factual finding made in the pre-sentence report, which have not been challenged by any party. Next, I'll hear testimony or argument with respect to the matter in controversy, which concerns whether Ms. Smith is entitled to an adjustment on the theory that she played a minor role in this offense. After I make all relevant findings of fact, I'll decide which guidelines are applicable to this case. I'll then ask counsel for their recommendations on sentencing. Ms. Smith will also have a chance to address the court prior to sentencing. Finally, the court will impose sentence and state for the record the reasons

for the sentence it has imposed. Now, with respect to the controverted issue in this case I believe the defense has raised an objection to the probation officer's finding that Ms. Smith did not play a minor role in this offense, and is therefore not entitled to a downward adjustment of two points. Mr. Lee, I'll hear you on that.

JL: Thank you, your honor. Our contention is that the court should find in applying the guidelines to the facts of this case, that Ms. Smith was a minor participant in this offense, and as such that her offense level should be decreased by two points under guidelines 3B1.2 mitigating role. Our argument is simply this, the commentary dissection 3B1.2 clearly defines a minor participant as someone who is less culpable than most other participants, but whose role could not be described by as minimal, and we would submit under, even under the facts as the probation officer finds them in the report the court must conclude that Ms. Smith has a minor role in this offense. The fact shows that Jones was the person who was conducting this elaborate conspiracy to distribute cocaine that Jones have procured the cocaine that he and Smith distributed to Agent Brown, and that Jones even drove Ms. Smith to the crime scene. In short, Jones took all the planning and leadership steps necessary for this crime to be committed. Smith on the other hand was clearly hired by Jones on only this one occasion. She performed what was only the last act in the lengthy series of act sin which Jones has masterminded and which led to the sale of drugs to Agent Brown. And we would suggest that's because Jones himself didn't want to assume the risk of actually, physically distributing cocaine to a purchaser on the street. So he assigned that task to Smith. Smith was just Jones's delivery person in this situation, so we submit she's entitled to a two

point reduction as a minor participant in this crime.
J: Ms. Johnson, what's the government position on this issue.
Ronda Johnson: The government disagrees, your honor. We think that although it is clear that defendant Jones has committed a larger number of offenses than Ms. Smith, and more serious offenses than Ms. Smith, Jones's overall conduct is not relevant to Smith's role in this particular sale. Smith's involvement as a co-conspirator in this sale cannot be considered minor, by any stretch of the imagination. Smith accompanied Jones to his apartment to get the cocaine, went with him to Centerville to make the sale and was present when the deal was negotiated. Smith herself made the proposed deal in reality by taking the cocaine from the van walking to a secluded spot with agent Brown and actually transferring the cocaine to him. So we contend that when the actual conduct of Jones and Smith are committing this particular offense is considered, Smith's role must be considered at least as significant as Jones.
J: Thank you, counsel. Having heard the arguments of counsel, the court is prepared to rule on this issue, the court finds that Smith played a significant role in this offense, since among other things she actually, physically transferred the cocaine to agent Brown. She is therefore not entitled to have her offense level adjusted downward by two points under guideline 3B1.2, because she did not play a minor role in the offense. So the court will over-rule the defendant's objection to that finding in that report.
JL: Very well, we have no other objections your honor.
J: Ms. Smith, let me advise you that the court has decided to accept your plea agreement, as you remember, at the time you offered your guilty plea to the court the court decided to postpone the question whether to accept or reject the plea

agreement, until it review the pre-sentence report, um...this is the report I am discussing, the court has now reviewed it and resolved all disputed issues regarding that report. Having done so, the court now concludes that it is appropriate to accept you plea agreement. Is that understood?
AS: Yes.
J: Now, the court makes the following determination with respect to the application of the sentencing guidelines. The court finds that the appropriate base offense level in this case involving five hundred and forty grams of cocaine is twenty six. The pre-sentence report indicates and I so find that an adjustment is appropriate under guideline 3E1.1 because Ms. Smith has clearly accepted personal responsibility for her criminal conduct. This adjustment reduces the base offense level to twenty three and with no prior criminal record, Ms. Smith's criminal history category is category one.

As you know, this makes the appropriate sentencing range under the guidelines forty-six to fifty seven months.

J: Are there any objections to the courts findings with respect to the applicable guidelines?
JL: Nothing in addition to the objection already raised your honor.
J: Ms. Johnson?
RJ: No, your honor.
J: Alright then, next, I'll hear your arguments as to the appropriate sentence in this case. But first, let me mention that I have reviewed the motions filed by the government in this case, and I've reviewed some materials filed on behalf of Ms. Smith, by Mr. Lee, including a memorandum to court in aide of

sentencing. And letters to the court from Ms. Smith's sister and cousin, and that's everything that I have reviewed. Has anything else have been filed that I should be aware of?
Jack Lee & Ronda Johnson: No, your honor.
J: Very well, then let's proceed to allocution.

Allocution refers to the opportunity for the counsel for the defendant, counsel for the government, and the defendant to address the court about matters bearing on sentencing. This includes arguing to the court that a particular sentence should or should not be imposed.

J: Mr. Lee, I'll hear you on behalf of you client, sir.
JL: Thank you, your honor. I would stress that Ms. Smith made two fundamental choices earlier on in this case. First, she chose to admit her guilt and accept responsibility for her criminal conduct. And secondly, she chose to cooperate with the government in its prosecution of Mr. Jones. As the court knows, the government has moved for a departure from the sentencing guidelines in this case, under policy statement 5K1.1. The government has moved for a downward departure on Ms. Smith's behalf precisely because she provided with substantial assistance in the prosecution of Mr. Jones.
RJ: That's correct your honor.
JL: Now the government's motion explains in detail the nature of Ms. Smith's cooperation as how her cooperation led to the conviction of Mr. Jones. And of course the jury returned verdicts of guilty in the Jones's case on all three counts, so we can assume the jury found Ms. Smith's testimony to be truthful and reliable. I would also like to mention...

The prosecutor is then given a chance to address the court. Finally defendant Smith addresses the court.

Judge: Very well, Ms. Smith, do you wish to speak on your on behalf. Before the court impose a sentence?
AS: I do, your honor. I...would just like to say that I am sorry for what I've done and I would like your honor to remember that at the time I got involved in all of this, I had two children and I was unemployed I had looked for a job, I couldn't find one, there just didn't seem to be anything out there for me..the bills were piling up, so I made a choice and now I know that it was a wrong choice, so I am sorry. That's all that I have to say.
J: Very well, the court will know proceed to impose sentence.

OPTIONAL DISCUSSION BREAK

J: The court has considered materials filed by both counsel, including the motions filed by the government in this case. Ordinarily, a mandatory minimum sentence of five years would apply in this case but the government's motion authorizes me to utilize the sentencing guidelines in this case. So I can apply the guidelines, if I see fit to do so, rather then simply sentencing Ms. Smith to the mandatory minimum sentence, which is ordinarily required by the statute. The government also requests that I grant Ms. Smith a downward departure in this case, in light of the substantial assistance she has provided to law enforcement authorities. It recommends a sentence of 15 months of imprisonment. The court will now proceed to impose sentence under the sentencing reform act. Are there any other objections before I do so?

RJ: No, your honor.
JL: No, your honor.

The judge asks this questions because after sentence is imposed she looses jurisdiction of the case and with it the power to correct any sentencing error, other than technical errors called to her attention within seven days of sentencing. So the judge is giving the parties a last chance to raise objections. All right then, pursuant to the sentencing reform act of 1984, it is the judgment of the court that the defendant Angela Smith is here by committed to the custody of the Bureau of Prisons for term of 21 months. Upon release from imprisonment, Ms. Smith shall be place on supervised release for period of 4 years, with respect to the matter of a fine, it is the court's conclusion that...

It appears that the court did not accept the 15 months sentence recommended by the government. As we know when a court accepts a guilty plea, accompanied by a plea agreement containing a recommended sentence but later decides not to follow the recommendation the defendant does not have an absolute right to withdraw the plea.

J: No restitution is necessary, since there is no individual victim in this case. Now let me state for the record as I am required to by statute my reasons for imposing this sentence. In light of the government's motions I am authorized by statute to apply the sentencing guidelines instead of simply imposing the mandatory minimum sentence, and that is what I have done. Second, I have decided that a departure from the guidelines is justified in light of Ms. Smith's substantial assistance to the

authorities in the Jones's case. Ms. Smith's assistance was timely and involved truthful testimony which was obviously quite useful to the government in securing convictions in the Jones's case. But as you know, in accepting the plea of guilty, the court was not required to accept the recommendation regarding sentencing, which the government made pursuant to that plea agreement. The government agreed to make a recommendation and it did so. But as you were previously advised, that recommendation was not binding on this court. I have considered the matter carefully and my conclusion is that although a substantial downward departure is justified in this case, a sentence of 15 months does not adequately take into consideration the seriousness of the offense, which Ms. Smith committed. This was a felony offense and which Ms. Smith made a possible for a sophisticated drug dealer to distribute more than half a kilogram of cocaine on the street. So the court rejects the fifteen months sentence recommended by the government as part of the plea agreement in this case. In sum Ms. Smith, taking into consideration both your cooperation with the government and the seriousness of your offense, the court sentences you to a term of imprisonment of 21 months. The court also finds its conclusion on the matter of a fine to be reasonable in light of the evidence present in the pre-sentence report. Does either the government or defense have any objection to the form of the sentence which the court has imposed? Or know why the sentence should not be imposed to stated?

RJ: No objection from the government, your honor.

JL: No your honor.

J: Mr. Mumford, please prepare written record of the court's findings with respect to the disputed matter in the pre-sentence

report. The court will also prepare written statement of its reasons for imposing sentence using the standard form. You can pick up a copy of court's statement of reasons in my chambers later today.
CM: Yes your honor.

A copy of the form the court referred to on which it will state its reasons for imposing sentence is included in your written materials. Not all courts use this forms however. The court may take its statement of reasons directly from the pre-sentence report, or the court reporter may be ordered to prepare a transcript of the statement of reasons given by the court at the sentencing hearing.

J: Huh...Mr. Lee, Mr. Mumford will see to it that the court's findings and statement of reasons accompany Ms. Smith's pre-sentence report to the Bureau of Prisons.
JL: Very well.
J: The Bureau will use these materials in classifying and supervising you Ms. Smith.

The Bureau of Prisons(이하 BP) is not part of the judiciary. Like the United States attorney's office and United States marshal service, the BP is part of the executive Branch of the government, thus although defendant's often ask judges to send them to specific prisons to serve their time, a judge cannot order the Bureau to place a defendant in a specific prison. However, judges often recommend to the BP that a defendant's term of imprisonment be served at a particular prison.

J: Huh...the clerk will also prepare an appropriate judgment of conviction setting forth the plea, the court's findings and the court's sentence. Ms.Smith, good luck to you ma'am. Please step after the marshal. It there is nothing further the court will take short recess at this time.

Let summarize what rule 32 requires at the sentencing hearing. First, the rule requires that the parties be given an opportunity hearing to object to the probation officer's findings regarding which sentencing classification and guidelines apply to the case. The rule also requires the court to ensure that the defendant and his counsel have had an opportunity to read and discuss the pre-sentence report or summary thereof which has previously been made available to them. With respect to any alleged factual inaccuracies in the pre-sentence report or summary, Rule 32 requires the court to either make a finding resolving the issue or state that no such finding is necessary. Rule 32 also provides that both counsel and the defendant be given an opportunity to address the court, regarding the defendant's sentence before the court imposes sentence. After weighing all of this information, the judge imposes sentence. Finally, rule 32 also requires that a judgment of conviction be prepared after sentencing. The judgment sets forth, the plea, the verdict, and the sentence. It must be signed by the judge, and entered by the clerk. Fed. R. Crim. P.55 governs record keeping in criminal proceedings and calls upon the clerk to enter in the records each order or judgment of the court, and the date such entry is made. So entry of a criminal judgment means entry of the judgment by the clerk, on the criminal docket. After sentencing, pre-sentence reports are available only to the defendant, counsel, the Bureau of Prisons, the district court, and if the case is appealed the

appropriate United States court of appeals. Pre-sentence reports are not considered public documents.

POST-JUDGMENT PROCEEDINGS

The date of entry of the judgment on the docket is significant, because the time period for filing an appeal begins to run at the time. Ordinarily under the Federal Rules of Appellate procedure, a defendant has ten days from entry of a criminal judgment, to file a notice of appeal. But if a defendant files certain post-trial motions such as a motion for a new trial, a motion in arrest of judgment, or a motion for a judgment of acquittal, an appeal from a judgment of conviction can be taken within ten days of entry on the docket of an order by the court, disposing of alas such motion.

Let's talk about post-trial motions for a moment, a defendant who is gone to trial and been convicted like Michael Jones, they file a motion for a new trial within seven days of a verdict of guilty. Rule 33 of the Fed. R. Crim. P. permits the filing of such a motion. The trial court may grant a defendant's motion for a new trial if it concludes that a new trial was required in the interest of justice. Michael Jones could also file motion in arrest of judgment under Rule 34.The basis for this motion is either that the indictment did not charge an offense, or that the court, was without jurisdiction to try the case. This motion must also be filed, within seven days of a guilty verdict or the entry of a guilty plea. Finally, under Rule 29 a defendant like Michael Jones can file or renew a motion for judgment of acquittal, within seven days of the verdict. If the jury is discharged without reaching a verdict, the motion can be filed within seven

days of that time. The court may issue and order extending the seven day time limitation for filing any of these post-judgment motions. However, the court's extension order must be issued within the initial seven day time period. Other court actions, which may occur after sentencing and judgment in a criminal case, include correction of a sentence and revocation of probation. Under Rule 35(a), the court can correct the sentence, which has been determined by the court of appeals to be illegal, unreasonable, or imposed as the result of an incorrect application of the sentencing guidelines. And on government motion, Rule 35(b) which defendant Jones may develop a keep interest in. Allows the court to reduce a sentence, to reflect the defendant's subsequent and substantial assistance in the investigation or prosecution of another person, who has committed an offense.

RJ: Mr. Jones, it's been a while since you've been convicted and I guess has some time to think things over. I don't think I have to tell you that you're facing a pretty long stretch in prison.
MJ: A very long stretch in prison.
RB: right.
RJ: But I brought you here today to see if you might be interested at this point, in assisting the government, in its investigation in to drug trafficking in the Centerville area. As Ms. Harrison has told you, I am sure the government can still file a motion under Rule 35(b) asking the court to reduce your sentence of your...
MJ: Yah, she told me.
RJ: Huh hm...
MJ: Go ahead I am listening.
RB: Well, do you have any interest?

MJ: I said I was listening.
RB: Uh huh.
MJ: Yes, I am interested. What is it you want to know?

Rule 33(b) requires that a government motion requesting the court to lower a defendant's sentence to reflect substantial assistance in the investigation or prosecution of another person, be filed within one year of the court's initial imposition of sentence. Finally, Rule 32.1 governs procedures which apply when a defendant is alleged to a violated conditions of probation or supervised release. The rule also governs procedures which apply when a defendant's probation or supervised release is modified or extended. This concludes the forth and final segment of our orientation video program on procedures in criminal cases in United States district court. Thank you for your attention. And remember, your local district court rules may provide for different ways of conducting many of the procedures we've examined, if anything we've discussed here differs from what happened in your court, ask your supervisor to explain the reasons for the difference and follow your supervisor's instructions.