

AN INTRODUCTION

TO THE

FEDERAL PUBLIC DEFENDER'S OFFICE

FOR THE DISTRICTS OF

SOUTH DAKOTA AND NORTH DAKOTA

**Federal Public Defender's Office
for the Districts of
South Dakota and North Dakota**

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**THE OFFICE OF FEDERAL
PUBLIC DEFENDER**

The office of Federal Public Defender exists solely to provide legal assistance to people who are facing criminal charges (or potential charges) in federal court, and who are unable to afford to pay a lawyer to represent them. The expenses of this Office, as well as your attorney's salary, are paid by the federal government. Your attorney's loyalty, however, is to you, and to you alone.

The attorney assigned to your case specializes in defending people charged with the commission of federal crimes. Your attorney will defend you to the fullest extent allowed by law. Your attorney will be able to provide you with answers to your legal questions and to tell you how the law applies to your case.

CONFIDENTIALITY

Do not talk to anyone regarding anything about your case without first discussing the matter with your attorney. You may discuss anything concerning your case with your attorney because these matters are confidential under the law. Remember: this confidential privilege extends only to discussions between you and your attorney and your attorney's staff. Anything you tell your family, friends or others such as cellmates is **not** confidential, and the court can compel those people to testify about what you have said whether they want to testify or not.

The attorney-client privilege exists between you, your attorney and your attorney's staff only. For this reason your attorney cannot discuss your case with your family or friends without your permission. You alone would have to give such permission to your attorney after serious discussion with your attorney.

APPOINTMENT OF COUNSEL

The law provides that, under most circumstances, a person facing criminal charges in federal court is entitled to the assistance of an attorney. If a person

cannot afford to hire an attorney, then the court can appoint a lawyer for the person. Under some circumstances, the court can order the person to pay part of the cost of the attorney during the case, or to repay the cost of the legal services after the case is over.

The decision to appoint a lawyer is normally made by a United States Magistrate Judge. Lawyers in the Federal Public Defender's Office cannot give legal advice to anyone unless the court has approved the appointment of an attorney. Legal advice and representation must be limited to those matters related to the criminal charge for which an attorney was appointed.

CONTACT WITH LAW ENFORCEMENT

Always check with your attorney before talking to anyone about your case. That includes those in law enforcement. Law enforcement agents may express an interest in helping you. Keep in mind that one of their duties is to solve crimes. If they did not already think you were guilty, you would not be charged. Do not discuss your case with **anyone** without first talking to your attorney and getting the benefit of your attorney's advice.

OUTLINE OF A CRIMINAL CASE

PRELIMINARY PROCEEDINGS

I. COMPLAINT

Unless you have already been indicted (formally charged) by a grand jury, the charges against you are begun by a sworn statement (called a complaint) presented to a U.S. Magistrate Judge. The complaint may be issued either before or after you have been arrested. The magistrate determines whether there is probable cause to believe that an offense has been committed and that you committed it. If you have not already been arrested, a warrant for your arrest will be issued if the judge determines there is probable cause.

II. FIRST APPEARANCE

After your arrest, the officer making the arrest is required to take you before the nearest available magistrate without unnecessary delay. The magistrate will

inform you of the charges, your right to counsel, and your right to request the appointment of an attorney, if you qualify financially. The magistrate also will inform you of your rights concerning statements by you and to a preliminary hearing, if appropriate. **You will not be required to answer questions about the charges against you.**

III. DETENTION HEARING

You will be entitled to a detention hearing (bail hearing). That is usually held within 3 days of your first federal court appearance. Both the prosecution and the defense may request a later hearing date under certain circumstances. At this hearing the magistrate will determine whether, under the facts of your case, you will be released prior to trial. If you are released, you may be required to provide urine samples, surrender your passport, and comply with restrictions on your travel or residence. The court may set many other conditions. If you have been charged with a drug trafficking crime or a crime of violence, the law imposes a “presumption of detention,” which means that you and your attorney have the burden of convincing the judge to release you pending trial. Many are detained while awaiting trial due to this presumption. You should discuss this matter with your attorney to determine how best to proceed at the detention hearing.

IV. PRETRIAL RELEASE AND DETENTION

(A) After your arrest, the U.S. Probation Office will interview you to prepare a written report to the court. This report will be used to determine whether you will be eligible for release pending trial. If you are released, the probation office will supervise the conditions of your pretrial release. **You should be aware that anything you say during such interviews may be used against you later in determining a sentence if you are convicted.** A copy of the report, including your responses, will be provided to your attorney, the prosecutor, and the court. **You are entitled to speak with an attorney before being interviewed.** You should fully discuss the risks involved and, like most items discussed in this brochure, get legal advice before making decisions.

(B) If the magistrate orders pretrial detention, you usually will be housed at a county jail pending trial. Technically, you remain in custody of the U.S. Marshal.

V. QUALIFYING FOR APPOINTMENT OF AN ATTORNEY

If you cannot afford to hire an attorney prior to your first appearance, a representative from the Federal Defender's Office will provide you with a financial form to complete. This form is an affidavit or sworn statement by you. You must be accurate in the information that you put on the affidavit. The magistrate will then decide if you qualify for the Federal Public Defender or other court-appointed counsel. If you qualify for appointment of an attorney, and it is determined that an attorney from the Federal Defender's Office cannot represent you, the magistrate will appoint an attorney in private practice who has been determined to be qualified to represent you in these matters. The court-appointed attorney's fees will be paid by the federal government, but your attorney's loyalty is to you and you alone.

VI. PRELIMINARY HEARING

You are entitled to a preliminary hearing within 10 days of your initial federal court appearance if you are in custody, or not later than 20 days if you are not in custody, **unless you extend the hearing date, waive the hearing, or are indicted by a grand jury.** The magistrate also may find that extraordinary circumstances exist, and that delay is necessary in the interest of justice.

The prosecutor is required to present evidence at a preliminary hearing to convince a judge that there is enough evidence against you ("probable cause") to justify proceeding on the charges. The preliminary hearing may be the first opportunity that you and your attorney will have to learn something about the facts of your case. You will not be required to testify at the preliminary hearing. If the magistrate determines at a hearing that probable cause has been shown, you will have to answer the charges in U.S. District Court. Whether a preliminary hearing would be useful is a matter your attorney will discuss with you.

Keep in mind that any statements you make throughout this complete process may be used against you and you are advised to obtain an attorney as soon as possible to fully advise you concerning the decisions you must make.

FILING OF YOUR CASE

I. INDICTMENT

At some point in the process, either before your arrest or within a few weeks of arrest, the prosecutor will present your case to a grand jury. Neither you nor your attorney usually will be present. If the grand jury decides that there is enough evidence against you to justify charging you with a crime, then the grand jury will issue a formal charging document, called an indictment, stating the exact charges against you.

In some cases, it is appropriate to waive your right to indictment and permit the government to file an information against you. An information also is a formal charging document. It has the same effect as an indictment. The filing of an information bypasses the grand jury process. If waiver of indictment is an option in your case, your attorney will discuss it with you.

II. ARRAIGNMENT

On an indictment, you will be scheduled for an arraignment before a U.S. Magistrate Judge. At the arraignment, your charges are read to you. At that time, you will be required to enter a plea of guilty or not guilty to the charges against you. You will be advised of your rights. If the case is a felony charge and your arraignment is before a U.S. Magistrate Judge, you usually will be required to enter a plea of not guilty even if you have already entered into a plea agreement. No evidence will be taken at this time. Shortly after this, the court will set dates for motions to be filed and for evidence to be disclosed, and a date for your case to be tried. Your attorney will advise you of your rights and options.

PREPARING YOUR CASE

I. GETTING READY

From this point on, your attorney will be gathering the facts and considering the law necessary to advise you of the strength of the prosecutor's case, defenses you may have, the possible sentence you may face, and whether the attorney feels your interests are better served by a trial or a plea of guilty to one or more

of the charges. Each case is different. Complicated cases take more time to investigate, evaluate, and prepare for trial than do simple cases. Your attorney will be doing whatever is necessary to prepare your case as quickly as possible. **Remember:** complete investigation may take several months. Taking the time necessary to properly prepare your case may save you years in prison. Time spent at this stage of the proceedings, even if you are in pretrial confinement, is worth it.

The main point to remember is that your attorney can best advise you only after your case is fully investigated and after determining what level of punishment the government is seeking. Your attorney then will assist you in making the final decisions on matters that may affect your constitutional rights. You will be kept informed by letter or personal visit as your case progresses. If, at any time, you do not understand **any** matters in your case, write or call your attorney, and your questions will be answered.

II. INVESTIGATING YOUR CASE

Preparation is the key to the proper resolution of your case. Your attorney may have the assistance of an investigator, a paralegal, or both in the preparation of your case. It often will be necessary for the investigator or paralegal to meet with you to help prepare your defense. Just like your attorney, public defender office investigators and paralegals are bound by the attorney-client privilege. What you tell them will be confidential just as if you were talking with your attorney.

Your attorney, your investigator, and your paralegal need to know the truth, even if the truth makes you appear to be guilty. If we know the truth, we can avoid being surprised at trial. You and your family can help in our investigation of your case by giving us the names and addresses of witnesses who can testify for you and provide an accurate explanation of what happened. **Do not contact witnesses who will be called to testify against you. Do not encourage anyone outside of the Public Defender's Office to contact witnesses.** You could be accused of witness tampering, a federal crime. Again, any conversations you have with anyone other than your attorney or their staff could later be used as evidence against you. Remember that matters involving your case should be kept confidential. Your family naturally will be concerned about your case. It is not in your best interest to discuss the facts of your case

with others, even your family. Discuss the issue of confidentiality with your attorney. Other than matters of public record, such as charging papers, motions and notices of hearings, we generally will not provide information to anyone, even family members, unless you specifically instruct us to do so after thorough discussion with us.

III. DISCOVERY

Federal law provides limited access to the government's evidence against you. In some cases, the prosecutor may provide more information than the law requires and make available the entire discovery file for review. In such cases, your attorney can review all evidence, testimony and investigative reports relevant to your case that are in the government's possession. In other cases, the prosecutor may limit access only to those materials that, under the law, must be made available to the defense. In either event, only your attorney will have direct access to the government's discovery file. Your attorney will work closely with you to make sure that you know, and understand, what evidence is contained in the government's file. The rules of discovery must be strictly adhered to. Your attorney will discuss these rules with you as your case progresses.

Your attorney also will communicate with the prosecutor to try to get an idea of the government's view of your case. These discussions can be very helpful as we prepare your case and as you make important decisions regarding how to proceed. Whenever we talk to anyone outside our Office, we are very careful not to disclose any of the confidential information that you have told us or reveal any confidential strategy or results of our investigation.

IV. MOTIONS

At different points, your attorney may file motions which may be heard by the court before or at trial. To best represent you, your attorney must be involved in all matters before the court. **You should never file your own motions** without fully discussing the proper procedures and contents with your attorney. If you have ideas about motions that might be filed in your case, you should discuss with your attorney whether those particular motions would be beneficial to your defense.

V. TRIAL OR PLEAD GUILTY?

The U.S. Constitution guarantees your right to a trial by jury. Any decisions to plead guilty, accept a plea agreement, waive trial by jury or any other decision to give up any constitutional right is exclusively yours to make. Your attorney will fully advise you as to your options and the benefit or risk of each option. Your attorney will give you his or her recommendation as to the decision that is in your best interest. However, the final decision is yours, and yours alone, to make.

Your attorney will review with you any proposed plea agreements. You should understand that people who plead guilty as compared with those who are found guilty of the same crime at trial do not necessarily receive the same sentence under the federal sentencing guidelines.

TRIAL

The law provides that, unless exceptions are granted by the court, you will be tried no earlier than 30 days or later than 70 days after your first federal court appearance. Actually, however, there are many things that can extend the 70-day speedy trial limit. Remember that your attorney has criminal defense expertise. Much in a criminal case involves strategic decisions of how and when issues should be presented. Your attorney will keep you informed of the reasons for certain decisions.

Your case will be tried by a jury of 12 people unless you waive jury trial. First, the prospective jurors are selected and sworn. Then each side makes an opening statement to describe what the case is about. After the statements, the prosecutor (Assistant U.S. Attorney) presents the government's witnesses and evidence. You have the right to have your attorney cross-examine every witness presented against you.

The government has the burden of proving your guilt beyond a reasonable doubt. That burden is different and a higher level of proof than at a preliminary hearing or before a grand jury. You are never required legally to disprove the charges.

Unless the court dismisses the charges against you at the end of the government's witnesses, your attorney will have the opportunity to present your evidence and witnesses, if any. The decision as to which witnesses to call will be made by your attorney, after consultation with you. You must decide whether or not you will testify. Your attorney will give you advice on this matter. The final decision as to whether you will take the stand is yours alone.

Next, each side has an opportunity to argue their case to the jury. The judge then will read the legal instructions to the jury. The instructions state what law applies to the case. The jury will leave the courtroom to talk about the case until they have reached a unanimous verdict. If the jury cannot agree on a unanimous verdict, then a mistrial occurs, and you may have to have a new trial at a later date with a different jury.

If the jury acquits you on the charges, the case is over. An "acquittal" is the same as "not guilty."

Remember that no two trials are alike. Your attorney will answer questions you have about your trial.

SENTENCING

The court will schedule a sentencing hearing if you have been found guilty. Prior to the hearing, the court will order that a Presentence Investigation Report (PSR) be prepared by the U.S. Probation Office. Sentencing guidelines, which are law, will be used to determine your sentence.

Under the guidelines, the severity of the offense and the extent of your criminal history will largely dictate the sentence you receive. In some cases, your criminal history alone may be the key factor. Federal law mandates severe sentences for persons with certain types of prior convictions. As you can see, your criminal record may play a significant role in your decision to plead guilty or go to trial.

Your sentence also will depend, in part, on whether your decision was to plead guilty or go to trial. The decision to plead guilty or go to trial is a critical decision in your case. You must discuss the application of the guidelines with your attorney to ensure that your decision is fully informed.

Your attorney will get a copy of the PSR, and you will have an opportunity to review it for accuracy before you are sentenced. You may want to speak to the judge at your sentencing hearing. If so, you should discuss that with your attorney well before the sentencing hearing. Do not wait until the day of the sentencing to make this important decision.

The judge also will give your attorney and, perhaps, other interested persons an opportunity to speak on your behalf. Friends, colleagues, or family members also may choose to write a letter to the sentencing judge on your behalf. Any such letters should be sent directly to your attorney who will present them to the court. Let your attorney or investigator know well in advance of sentencing the names and addresses of the people you believe will want to write or speak on your behalf at sentencing. Remember: you may seriously jeopardize your case if anything presented by you or your witnesses appears to be untrue or conflicts with the PSR and cannot be satisfactorily explained. Here, as always in your case, it is important that you provide accurate information.

TYPES OF SENTENCES

In federal court, most people found guilty are jailed as part of their sentence. While probation is an option in some cases, probation alone is rare. In many cases probation is not an option the judge can consider. The harshest sentence you can receive upon conviction (aside from the death penalty which is applicable to certain federal crimes) will be an order sentencing you to confinement in a federal prison, which is controlled by the U.S. Bureau of Prisons (B.O.P.). You could be placed in any institution in the U.S. While the B.O.P. tries to place most people as close to their home state as possible, many factors are involved in assigning the place of confinement. Such factors include the offense of conviction, your prior record, and the length of sentence. The Federal Defender's Office has some limited materials about the B.O.P. which your attorney can provide you if your case gets to that stage. Parole has been abolished in the federal system. Sentence reductions for good conduct in prison are limited. If sentenced to prison, you can expect to serve at least 85% of your sentence.

If you are given a sentence of imprisonment, as most people are, you should be prepared to begin serving it immediately. You usually will not be given an opportunity to go home to "get your affairs in order." You will be turned over

to the custody of the U.S. Marshal immediately after sentencing. Do not wear any jewelry, watches, or other items of value to the sentencing hearing. You should make arrangements for someone to take care of your personal and financial matters before you are taken into custody. **The Federal Defender's Office cannot hold any property for you at any time.**

As part of your sentence, you may be put on probation for a certain time. **Probation is a privilege – not a right.** Even if you are a first time offender, you will not automatically receive probation.

Oftentimes, the court also will fine you. The amount of the fine usually is set in the sentencing guidelines or under other laws. Your attorney can advise you as to whether you probably will be required to pay a fine.

Supervised release also must be imposed when you are given a prison sentence. When you are released from jail, you will be under the court's supervision for several years. If you violate the conditions of your supervised release, you can be sentenced to an additional jail term. You also can lose all credit for "street time" spent while on supervised release.

APPEAL

If you are found guilty at trial, you have the right to appeal. You may still have the right to appeal even if you pled guilty, **UNLESS YOU GAVE UP THE RIGHT TO APPEAL IN A PLEA AGREEMENT.** A notice of appeal must be filed within 10 days after judgment (your sentencing order) is entered, or you lose that right. An appeal is an opportunity to tell the appellate court (the 8th Circuit Court of Appeals) exactly how the judge did not follow the law, or what rights you were denied.

Typically, an appeal will take 6 months to a year to be decided. While your case is on appeal, it is unlikely that you will be released. You do not have an automatic right to bail while appealing.

The 10-day time period allowed for filing a notice of appeal is critical. You must inform your attorney immediately after sentencing if you wish to appeal.

OTHER REPRESENTATION

As indicated throughout this brochure, the Assistant Federal Public Defender (AFPD) cannot represent you absent appointment by the court. When all aspects of this appointment have been completed, you will receive a letter from the AFPD on your case indicating that this Office's representation is complete and the file will be closed. **This does not mean that the AFPD or someone else from this or another Federal Defender's Office cannot represent you in the future. It does mean that you will need to apply again to a magistrate if you are charged with a new federal criminal offense. A new appointment order would need to be entered before any additional legal services or representation can be provided to you on the new case.**

CORRESPONDENCE

You must be careful about writing letters. You should not write about the facts of your case to anyone other than your lawyer. If you have any questions or suggestions about your case, you should contact us immediately. Your mail might be censored. It is wise to write on the envelope:

“CONFIDENTIAL: ATTORNEY- CLIENT PRIVILEGE”

Always include your return address and indicate your dorm or location in the B.O.P. facility or jail.

Address your letter to the Federal Public Defender's Office as follows:

Name of Attorney
Federal Public Defender's Office
703 Main St., 2nd Floor
Rapid City, SD 57701

Name of Attorney
Federal Public Defender's Office
124 S. Euclid, Suite 202
Pierre, SD 57501

Name of Attorney
Federal Public Defender's Office
221 S. Phillips Ave., Suite 202
Sioux Falls, SD 57104

TELEPHONING YOUR ATTORNEY

The Federal Defender's Office handles thousands of calls each year. You may expect some difficulties in reaching your attorney by telephone. Your attorney will make every effort to take your calls if available when you call. Please remember that your attorney also has other clients, and must attend to frequent court appearances, witness interviews, and other legal matters away from the office. If your attorney is unavailable, we will try to put you in touch with an investigator, paralegal, or legal secretary who can answer your questions or pass information or questions on to the attorney.

If you are in a local jail that has a "free phone" period, try to call during that period. Otherwise, collect calls may be your only option. We require that you limit your collect calls to no more than two per week. If your attorney is not available when you call collect, the secretary usually will not accept the call. That call will not count as one of your two calls. Please understand that by not accepting your call, we are telling you that your attorney is not available. We can only accept station-to-station collect calls, not person-to-person collect calls. Telephone calls from the jail to friends and family are monitored. You should not discuss the facts of your case over the telephone, except with your lawyer.

The general phone number for each office is:

Rapid City office (605) 343-5110

Pierre office (605) 224-0009

Sioux Falls office (605) 330-4489