6 + 2 + 2 + 2 + 2 + 2 = 3

Rick was a bail bond agent in San Diego. Martha was an old friend whom he had known for many years. Rick knew that Martha sometimes used drugs, and he figured she probably also sold a few from time to time, but he kept out of her business and she kept out of his. Except when somebody got busted, and Martha used Rick to arrange the bail.

One day Martha offered Rick $500 to help her move to Kentucky. Martha was going to pack up a U-Haul trailer, and she needed a man to help make the trip. (The trailer contained her furniture and personal property – not drugs.) Rick said, "Sure, why not?" and they made the trip.

Rick went back to Kentucky to visit Martha one other time. He stayed about a week and then returned to California.

Then one of Martha's friends in Kentucky got arrested trying to sell a pound of methamphetamine to the police. He quickly flipped and gave up Tom, his connection. Tom also flipped, and gave up Martha, who had been selling him the meth that she purchased in California and shipped to Kentucky.

So far, there'd been no mention of Rick, who's back in San Diego busy bailing people out of jail. But then one day the DEA went looking for more people to arrest, and they showed Tom a bunch of personal photos that they had taken from Martha's home. In one of those photos Rick is standing with Martha at an outdoor barbecue and the DEA wants to know if Tom can tell them who he is.

Tom, who needs to help the DEA bust others in order to stay out of jail himself, is of course anxious to help. "Yeah, sure, I know him!" says Tom. "He once delivered some drugs to me for Martha. His name is...uh...uh…uh….well anyway, he brought me some drugs for Martha!"

The DEA, being the clever sleuths that they are, quickly figured out who Rick was. Then they also discovered that Rick had been stopped and given a traffic ticket on one of those trips when he was visiting Martha in Kentucky. So back to Tom the DEA goes: "Tom," they ask, "don't you remember once doing some business with Rick on or about the date on this ticket?" This is very important to them, because if Tom says "yes," then they can use the ticket to "prove" that Tom is telling the truth.

By now Tom knows the game, and he is quick to "remember" that one time he gave Rick a package containing $30,000 in cash to take back to Martha. He met Rick at the airport, and he took him into the bathroom to give him the package. (Tom never did explain why he had to go into the bathroom to hand the package over; perhaps it was because that's the way it's often done in the movies.)

Tom has told the DEA what they wanted to hear, so now they have to find a second "witness" to the incident. Who better than Tom's wife? Of course she wants to help her husband stay out of prison, so she also says that she saw Tom meet Rick at the airport. She also knows that Tom gave Rick the money because Tom told her so.

The DEA now has a case. They arrest Rick in California and bring him back to Kentucky. Rick hires a local lawyer, based on the recommendation of someone he meets in the jail. That lawyer doesn't tell Rick, but he has never handled a federal criminal case before and has no familiarity with the Federal Sentencing Guidelines.

The lawyer proceeds to defend Rick. Eventually he comes to Rick and tells him that the prosecution has offered a deal: plead guilty and do three years. Rick has never been in this kind of trouble before, but he is not stupid. He is a bail bondsman and he has some knowledge of how things

work in the federal courts. So he quickly considers the offer. Rick wants to know what sentence he will get if he goes to trial and loses. The lawyer tells him six years. Rick hates to plead guilty to a crime he didn't do, but he also knows how difficult it is to beat the feds at their own game. He knows that if he goes to trial Tom and his wife will lie to help themselves, and he will probably lose and get six years. So Rick agrees to plead guilty and accept the three years he was offered, rather than go to trial and get six.

A change-of-plea hearing is scheduled, and Rick goes to court to plead guilty. But at the last minute Rick's conscience gets to him, and he can't plead guilty to a crime he didn't commit. He decides that he'd rather risk the six years than plead guilty for three. At least that way he has a chance to beat the charge, and he won't be guilty of helping the government to frame himself. It's a tough decision, with lots of last minute hesitation in the courtroom, but ultimately Rick opts to go to trial.

Rick goes to trial. Tom and his wife testify. Rick is convicted.

Rick goes for sentencing. The day before sentencing Rick asks his lawyer again what sentence he will get, and the lawyer isn't quite so sure this time, but he tells Rick that it will be about six to eight years.

Rick is sentenced to 232 months. He won his appeal (on the sentence only) and gets resentenced to 188 months. At that point he came to me for a 2255.

The 2255 raised several issues, attacking both the conviction and the sentence. The strongest claim was that Rick received ineffective assistance of counsel when his lawyer told him that he was facing six years if he lost at trial, instead of correctly telling him that he was looking at 20 to 30 years. I pointed to the fact that Rick almost pled guilty for 3 years when he thought that he was facing a sentence of six at trial, and argued that it was unrealistic to think that someone who came so close to pleading guilty rather than risk six years would not have gone through with his plea if he had known that he was actually facing in the neighborhood of 26 years. Whereas 6 instead of 3 might be an acceptable risk, 26 instead of 3 would certainly have changed the balance in favor of accepting the plea offer.

In opposition, the Assistant U.S. Attorney argued like this: If Rick was willing to risk an extra two years by going to trial, then obviously he didn't think that an extra two years were very significant. Thus, Rick would have been willing to risk 8 years instead of taking the plea offer, because 6 plus an insignificant 2 more makes 8. And if Rick would risk 8 years instead of taking 3, then obviously he would have risked 10, because 8 plus an insignificant 2 more makes 10. Now that Rick is willing to risk 10 years instead of accepting the sure 3, why of course he would be willing to risk 12, because 10 plus another insignificant 2 makes 12. And so on, until the U.S. Attorney made his point: that Rick would have been willing to risk 22, or 24, or 26 years, rather than take the three that were offered. All because Rick thought that an additional risk of two more years was acceptable!

I pointed out to the Magistrate that this was some very fuzzy arithmetic on the U.S. Attorney's part, but the Magistrate apparently liked the government's math. He recommended that Rick's 2255 be denied. Fortunately, the district judge on the case has a better head for numbers. He overruled the Magistrate and granted Rick an evidentiary hearing on his motion.

What often happens in this situation is that the U.S. Attorney on the case gets to the defense attorney right away, and obtains an affidavit in which that lawyer swears that the defendant is lying, and that the lawyer never made the statements that the defendant is attributing to him. After all, the prosecutor tells the lawyer, if you don't deny what the defendant is saying, the court might rule that you were ineffective, and then the defendant could sue you for malpractice. Rick's prosecutor did as expected and asked Rick's original lawyer to deny Rick's version of events.

But the prosecutor was surprised! Rick was lucky enough to have had an honest lawyer, who refused to sign a false affidavit. The lawyer also told the truth when he testified at the hearing, and this case is now before the court. The judge has already ruled that Rick is entitled to be resentenced and that a new sentence of time-served is appropriate. He has also released Rick on bond while he waits for the new sentencing proceedings.

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I have included this story because it illustrates an important point. To the average federal prosecutor it doesn't make any difference how much time you get, just so long as he can keep the numbers high and get his name in the newspapers. Just like Rick's prosecutor, many U.S. Attorneys think 26 years isn't much different from 6, and they will go to ridiculous (and hideous) lengths to justify the long sentences to themselves. Even if it means that $6+2+2+2+2+2=3$!

Rick's trial lawyer had never handled a federal case before, and he obviously didn't know what he was doing. Even after he received the P.S.I. report, he didn't understand the importance of that document to the sentencing hearing. To his credit, he refused to take on new federal criminal cases after he saw what happened to Rick; but that is also part of what is wrong with federal criminal justice today: too many of the honest lawyers, like Rick's, refuse to be a part of the federal system, often leaving defendants at the mercy of lawyers less conscientious about truth and justice.