Plea and Sentencing Practices and Issues

Outline

Delonia A. Watson
Assistant United States Attorney
Northern District of Texas
817-252-5200
delonia.watson@usdoj.gov

updated: November 12, 2003

Plea and Sentencing Practices and Issues Outline

I. Negotiating Effective Plea Agreements

A. Requires Knowledge of:

1. Department of Justice Policy
    a. United States Attorneys' Manual
    b. Criminal Resource Manual
    c. Departmental memoranda
2. Office Policy
    a. standard plea procedure
    b. standard plea agreements
    c. approval of plea agreements
3. Relevant facts in the case
4. Applicability of the sentencing guidelines
    a. selection of the base offense level, specific offense characteristics (SOCs), and cross-references (Chapter 2)
    b. relevant conduct (USSG §1B1.3)
    c. sentencing enhancements (victim-related, role, and obstruction of justice)
    d. impact of grouping offenses (Ch. 3 Pt. D)
    e. acceptance of responsibility (USSG §3E1.1)
    f. criminal history category, including USSG §§4B1.1 (career criminal) and 4B1.4 (armed career criminal)

g. statutory maximum and minimum sentences

h. availability of departures

5. District Court Judge

6. Circuit case law

B. **Impact of selection of charges on ultimate plea agreement**

1. Initiating or foregoing prosecutions (no prosecution should be initiated against any person unless the prosecutor believes the person probably will be found guilty by an unbiased trier of fact)

2. Broad discretion in selecting charges (prosecutor should charge the most serious, readily provable offense or offenses consistent with a defendant's conduct)

3. Availability of enhanced sentences, *e.g.*, 21 U.S.C. § 851 and 18 U.S.C. § 924(c)

4. Terms of plea agreement dependent on charges in the indictment (Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of a defendant's conduct.)

5. Unless there are reasons for doing otherwise, a defendant should be required to plead guilty to the most serious offense.

6. Changes in evidentiary support and case law may affect ability to prove a charged offense, and thus possibly affect the terms of a plea agreement.

C. **Three types of plea agreements**

1. "Charge Agreement": in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges will be dismissed

2. "Sentence Agreement": the government agrees to take a certain position regarding the sentence to be imposed

3. "Mixed Agreement": a plea agreement that combines dismissal of charges with the prosecutor also agreeing to take a certain position at sentencing

D. **Binding v. non-binding agreements**

1. FRCP 11(c)(1)(A): The prosecutor will "not bring, or will move to dismiss, other charges." (Although such agreements are not binding on the court, the prosecutor should take care to avoid a "charge agreement" which would unduly restrict the court's sentencing authority. *See* USAM 9-27.320.)

2. FRCP 11(c)(1)(B): The prosecutor will "recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court)."

3. FRCP 11(c)(1)(C): The prosecutor will "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)."

E. **Particular Provisions**

1. Substantial Assistance departures – USSG §5K1.1 – requires motion from the government. The plea agreement should make clear that the filing of such motion is discretionary and exclusively within the control of the government.

2. A district court may also depart below a mandatory minimum where a defendant meets the criteria set forth in USSG §5C1.2 ("safety valve"). As part of the negotiations, the government may offer to agree that the defendant has truthfully provided to the government all information and evidence the defendant has. The fact that a defendant has no relevant or useful information to provide or that the government is already aware of the information does not preclude a

determination by the court that the defendant has complied with the requirements of section 5C1.2.

3. Acceptance of Responsibility – USSG §3E1.1

   a. Third-level reduction requires government motion

   b. Third-level reduction may not be used as a bargaining chip where the defendant's agreement to plead is not timely

4. Non-departure agreement: both the defendant and the government agree that there is no basis for either a downward or upward departure, and that neither party will file such a motion prior to sentencing

5. Restitution/*Hughe*y (USAM 9-16.320 and 9-27.430(B)(4): when negotiating plea agreements, prosecutors must give consideration to "requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the count to which the defendant actually pleads," and where restitution is appropriate under the circumstances of a case, the plea agreement should specify the amount of restitution.) *See* USSG §5E1.1.

6. Pursuant to the sentencing guidelines, "[f]orfeiture is to be imposed upon a convicted defendant as provided by statute." *See* USSG §5E1.4.

   a. Contact the forfeiture attorney in your office or at DOJ <u>before</u> indictment.

   b. Where possible, include provisions in the plea agreement which aid the forfeiture process, *e.g.*, (1) the defendant will not contest forfeiture by civil, criminal, or administrative means, or will withdraw any such contest that he has already initiated; (2) the defendant agrees that the property is forfeitable pursuant to the relevant forfeiture statute; and (3) the defendant agrees that there are no viable defenses to the forfeiture of the property.

7. Sentencing appeal waivers in plea agreements

   a. broad versus narrow provisions

b. waiver provision should be carefully crafted so that it is, in fact, a waiver of the right to appeal the sentence, and passes muster under circuit case law

c. government's retention of the right to appeal does not violate the defendant's constitutional rights

II. Plea Agreements After the PROTECT Act

A. Review Ashcroft memos regarding sentencing policies and procedures

B. Prosecutors may not enter into plea agreements that waive the government's right to object to adjustments that are not supported by the facts and the law, *e.g.*, a prosecutor may not enter into a plea agreement that binds the government to "stand silent" with respect to a defendant's request for a particular adjustment, unless the prosecutor determines in good faith that the adjustment is supported by the facts and the law.

C. Prosecutors must not recommend a downward departure unless it is fully consistent with the Sentencing Reform Act, the PROTECT Act, applicable provisions of the guidelines manual, and office and DOJ policy.

D. Other than departures pursuant to USSG 5K1.1 and "early disposition," or "fast track," programs, government acquiescence in a downward departure should be rare.

III. Issues

A. Acceptance/rejection of plea agreements: USSG §6B1.2

1. USSG §6B1.1: District courts should defer the decision to accept or reject any nonbinding recommendation pursuant to Rule 11(c)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(c)(1)(A) and 11(c)(1)(C), until there has been an opportunity to consider the presentence report.

2. Standards for accepting plea agreement (USSG §6B1.2)

a. In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges

(Rule 11(c)(1)(A)), the court may accept the agreement if the remaining charges adequately reflect the seriousness of the actual offense behavior and accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.

1. Conduct underlying such charges may be considered relevant conduct in connection with the count(s) of which the defendant is convicted. *See* USSG §6B1.2(a).

2. Sentencing court may consider conduct underlying charges dismissed pursuant to a plea agreement in determining whether to depart from sentencing guidelines. *See* USSG §5K2.21.

b. In the case of a plea agreement that includes a nonbinding recommendation (Rule 11(c)(1)(B)), the court may accept the recommendation if the court is satisfied either that: (1) the recommended sentence is within the applicable guideline range; or (2) the recommended sentence departs from the applicable guideline range for justifiable reasons.

c. In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that: (1) the agreed sentence is within the applicable guideline range; or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons.

3. Rejection of plea agreements. *See, e.g., United States v. Jeter*, 315 F.3d 445, 446-448 (5th Cir. 2002); *In re Ellis*, 294 F.3d 1094 (9th Cir. 2002), rehearing en banc granted, opinion vacated by 313 F.3d 1094 (9th Cir. 2002) (although a vacated opinion, still interesting read); *United States v. Martin*, 287 F.3d 609, 621-624 (7th Cir. 2002) (court rejected arguments that rejection of the plea agreement usurped the authority of the prosecutor in violation of the separation of powers, and that USSG §6B1.2 is unconstitutional); *United States v. Gamboa*, 166 F.3d 1327 (11th Cir. 1999) (appellate court affirmed district court's rejection of plea agreement that would have permitted a defendant, charged with offenses carrying a minimum sentence of 20 years per count, to plead to a telephone count); *United States v.*

Torres-Echavarria, 129 F.3d 692, 695-698 (2nd Cir. 1997) (district court properly rejected plea agreement where defendant had continued to commit offenses despite several instances of leniency)

4. If a plea agreement is rejected, the parties must be careful not to engage the district court in plea negotiations, *e.g.*, asking the court what sentence would be acceptable. *See, e.g, United States v. Miles*, 10 F.3d 1135, 1139 (5th Cir. 1993).

B. Allegations of governmental breaches

1. failure to make recommendation(s) provided for in the plea agreement. *See, e.g., United States v. Gomez*, 271 F.3d 779, 782 (8th Cir. 2001) (the government breached the plea agreement by failing to recommend an acceptance-of-responsibility adjustment).

2. inefficacy of agreed to recommendation. *See, e.g., United States v. Reeves*, 255 F.3d 208, 209 (5th Cir. 2001) (the government did not breach the plea agreement by failing to recommend a 72-month term of imprisonment at sentencing where the presentence report calculated an imprisonment range of 87-108 months and the government had previously recommended the 72-month term in writing).

3. failure to "stand silent." *See, e.g., United States v. Keresztury*, 293 F.3d 750, 755-757 (5th Cir. 2002) (plea agreement voided where the government had promised not to contest an acceptance-of-responsibility adjustment, but then supported the probation officer's recommendation against granting the reduction at sentencing)

4. USSG §1B1.8: "Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement," and under other circumstances listed in section 1B1.8. *See, e.g., United States v. Jarmen*, 144 F.3d 912, 914 (6th Cir. 1998) (section 1B1.8 "unquestionably forbids the government to influence the sentencing

range by disclosing revelations made by a defendant in the course of cooperation required by a plea agreement").

a. defendant must be providing information concerning the criminal activities of "others" in order to qualify under section 1B1.8

b. "use" versus "transactional" immunity

c. *See United States v. Gonzalez*, 309 F.3d 882 (5th Cir. 2002) (prosecutor improperly used information gained under section 1B1.8 to support its argument for a leadership role enhancement); *United States v. Thornton*, 306 F.3d 1355, 1357 (3rd Cir. 2002) (although sentence affirmed on other grounds, the district court violated section 1B1.8 where it relied on the defendant's own admissions confirming the fact that guns were in the house as basis for firearm enhancement).

d. The government bears the burden of establishing that the evidence it wants to use was derived from a legitimate source independent of the defendant. *See, e.g., United States v. Taylor*, 277 F.3d 721 (5th Cir. 2001).

e. The information may be used to determine whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under USSG §5K1.1. *See* USSG §1B1.8(b)(5); *see also United States v. McFarlane*, 309 F.3d 510, 515 (8th Cir. 2002)

C. Enhancements for Crimes of Violence (*E.g.*, USSG §4B1.1 - Career Offender; USSG §4B1.4 - Armed Career Criminal; USSG 2L1.2 - Unlawfully Entering or Remaining in the United States)

1. USSG §4B1.2: Definition of a crime of violence includes "otherwise involves conduct that presents a serious potential risk of physical injury to another."

2. Courts are struggling with the definition of "crime of violence." *See, e.g., United States v. Pereira-Salmeon*, 337 F.3d 1148 (9th Cir. 2003) (appellate court overruled determination that "carnal knowledge of a child" was not a crime of violence); *United States v. Charles*,

301 F.3d 309 (5th Cir. 2002) (*en banc* court overruled panel decision that simple motor vehicle theft was a crime of violence); *United States v. Golding*, 332 F.3d 838 (5th Cir. 2003) (appellate court overruled finding that the unlawful possession of a machine gun is a "crime of violence"); *United States v. Sun Bear*, 307 F.3d 747 (8th Cir. 2002) (district court's decision affirmed but four judges would have granted rehearing *en banc* on the issue of whether attempted theft of an operable motor vehicle constitutes a crime of violence); *United States v. Sandoval-Venegas*, 292 F.3d 1101 (9th Cir. 2002) (enhancement reversed where the record was insufficient to establish that prior conviction was a crime of violence); *United States v. Hoults*, 240 F.3d 647 (7th Cir. 2001) (appellate court overruled district court's conclusion that defendant's prior conviction for burglary of a building qualified him for the enhancement); *United States v. Peterson*, 233 F.3d 101 (1st Cir. 2000) (resentencing required where the district court had found the offense of breaking and entering to be a crime of violence)

3. Issue may arise where district court foregoes an upward departure because of enhancement, which is later overturned.

D. Remand: If sentencing enhancements are held to be improper, ask the court of appeals to give the district court broad authority on remand, including the authority to make an upward departure, especially where it is clear that the district court would have departed if not for the now defunct enhancement. It may turn out, however, that the PROTECT Act's provision prohibiting previously unidentified departures post-appeal will preclude departures even under these circumstances.

Hypotheticals

Hypothetical #1: Defendant Rodney Goodall pled guilty to conspiring to distribute cocaine pursuant to a plea agreement under FRCP 11(c)(1)(C). In the plea agreement, the parties stipulate that Goodall's drug quantity is one kilogram of cocaine, which results in an adjusted offense level of 23 and a range of 57 to 71 months. The government agrees to recommend a sentence toward the bottom of the range. The district court accepts the plea agreement.

In the presentence report which is completed several months later, the probation officer attributes to Goodall an additional three kilograms of cocaine that were found in the trunk of his co-conspirator's car. The resulting adjusted offense level is 27, for a range of 87 to

108 months. The trial judge finds at sentencing that the correct drug quantity is four kilograms rather than the one kilogram recited by the parties. Relying on USSG §6B1.2, he says that he must sentence Goodall in accordance with the correct drug quantity because there is no justifiable reason for a departure. Goodall protests that under Rule 11(c)(1)(C), the plea agreement's sentencing stipulation "binds the court once the court accepts the plea agreement." Must the court sentence Goodall in accordance with the plea agreement? In accordance with the revised drug quantity found at sentencing? What remedy, if any, does Goodall have? How should judges avoid this problem?

The District of Columbia Court of Appeals held that the court must sentence Goodall in accordance with the plea agreement; that is, within the 57- to 71-month range. The parties agreed that a sentencing range of 57 to 71 months was the appropriate sentence and the district court accepted the plea agreement. In this case, the prosecutor had offered proof problems as a "justifiable reason" for the court to accept a plea agreement with a lower sentence, which the district court rejected as not being a "Koon" ground of departure. The DC Court found that section 6B1.2 (policy statement) was promulgated to guide, not to constrain, courts in deciding whether to accept or to reject a plea agreement.

As for remedy, not clear in this case what the court intended to do. If the court meant to accept the plea agreement, it must resentence in the agreed to range. If the court meant to reject the plea agreement, then Goodall must be allowed to withdraw his plea.

Judges should wait until after the PSR is complete before accepting plea agreements.

Agreement with Goodall in *United States v. Mukai*, 26 F.3d 953, 956-957 (9th Cir. 1994); *United States v. Barnes*, 83 F.3d 934, 941 (7th Cir. 1996); *United States v. Cunavelis,* 969 F.2d 1419, 1422 (2d Cir. 1992); *but see United States v. Carroza*, 4 F.3d 70, 87 (1st Cir. 1993); *Fields v. United States, 963 F.2d 105, 108 (6th Cir. 1992)*, which assume without much analysis that a sentencing court's discretion under Rule 11 to accept or reject a plea agreement is limited by section 6B1.2.

Variation #1a: The revised drug quantity is two kilograms rather than four kilograms, for an adjusted offense level of 25 and a sentencing range of 70 to 87 months. The judge declares that he will avoid the discrepancy by sentencing Goodall within the overlapping portion of the two ranges, namely 70 to 71 months. Goodall protests that this move negates the government's agreement to recommend a sentence toward the bottom of the 57-to-71 month range. What recourse does he have?

(*See United States v. Goodall*, 236 F.3d 700 (D.C. Cir. 2001))

Same. Although the 70 to 71 months is within the range that Goodall agreed to, it is clear that he bargained for the judge to be able to consider the full range and had in fact gotten the government to promise to recommend a sentence at the lower end.

Variation #1b: The plea agreement calls for a sentence based on four kilograms (87 to 108 months), but the probation office finds that the three kilos in the co-conspirator's car were not reasonably foreseeable, so the actual quantity should be one kilogram and the range should be 57 to 71 months. The trial judge sentences Goodall in accordance with the plea agreement to 87 months. Goodall appeals, claiming that the guidelines trump the plea agreement to the contrary. The government argues that the plea agreement, which contains an appeal waiver, leaves the court of appeals without jurisdiction.

(*See United States v. Barnes*, 83 F.3d 934 (7th Cir. 1996))

The court is bound by the terms of the plea agreement although the sentence was more onerous than provided for by the guidelines. The court does not have the power to retain the plea and discard the agreed-upon sentence, even if the sentence departs from what the guidelines would prescribe.

Court found that it was without jurisdiction. The defendant in this case wanted to reserve the plea agreement, which included the government's promise to drop a firearms charge, but discard another provision. Can't have it both ways. If she thought that the sentencing consequences of her guilty plea were unjust, she should have attacked the validity of the entire plea.

Hypothetical #2: Defendant Karil Mukai's sentencing guidelines range would ordinarily be 121 to 151 months. The government enters into a Rule 11(c)(1)(C) plea agreement with Mukai. The agreement stipulates that the appropriate sentence is a term of imprisonment ranging from five to seven years and that, if Mukai provides substantial assistance to the government, the government will move pursuant to USSG §5K1.1 for a downward departure below the guidelines range to the range contemplated by the plea agreement. The government files the section 5K1.1 motion and the district court departs downward to a five-year term of probation. Arguing that the stipulated sentence binds the court, the government appeals. Mukai replies that section 5K1.1 unlocks the guidelines, authorizing the district court to impose a sentence below what would otherwise be warranted under the guidelines.

(*See United States v. Mukai*, 26 F.3d 953 (9th Cir. 1994))

The district court could not violate the terms of the plea agreement and was limited to a sentence between five and seven years.

Hypothetical #3: Fred Jeter was charged with (1) being a convicted felon in possession of a firearm (Count 1); (2) using and carrying a firearm during and in relation to a drug trafficking crime (Count 2); and (3) possessing cocaine base with the intent to distribute (Count 3). Upon learning that the state was pursuing charges similar to Counts 2 and 3, the government agreed to dismiss those counts in exchange for Jeter agreeing to plead guilty to Count 1. Although accepting Jeter's guilty plea, the district court expressed concern about the disparity between the sentence Jeter would face if convicted of all charges and the sentence he would face under the plea agreement. The court was also concerned that the plea agreement would defeat one of the goals of the sentencing guidelines, *i.e.*, to ensure that repeat drug offenders received harsher sentences for subsequent drug crimes. Initially deferring acceptance of the plea agreement because of its uncertainty as to whether it would be able to make the findings required under USSG 6B1.2(a), the court later rejected the plea agreement based on its earlier concerns. The parties subsequently entered into an agreement in which Jeter agreed to plead guilty to Counts 2 and 3, in exchange for the government's agreement to move for the dismissal of Count 1.

On appeal, Jeter argues that the district court in rejecting the plea agreement usurped the government's exclusive authority to determine when a prosecution should be terminated. He also contends that the court's reasons for rejecting the plea agreement were invalid.

Finally, he complains that the court, by making it clear that it would reject any plea agreement not resulting in a drug conviction, had engaged in plea negotiations.

What result should ensue?

(*See United States v. Jeter*, 315 F.3d 445 (5th Cir. 2002))

Fifth Circuit held the district court did not abuse its discretion in rejecting a plea agreement on the grounds that the agreement would have defeated the goal of the sentencing guidelines of ensuring that repeat drug offenders receive harsher sentences for subsequent drug crimes. Also properly relied on perceived discrepancy.

Further, that the court did not engage in plea negotiations. Under Rule 11, a district court may actively participate in the discussions that occur after a plea agreement is disclosed. The district court merely expressed its concerns with the initial plea agreement and did not express an appropriate accommodation for a subsequent plea.

Hypothetical #4: David Smith and the government enter into a plea agreement under FRAP 11(c)(1)(A) in which the government agrees to move for the dismissal of several counts in exchange for Smith's guilty plea to a drug conspiracy count and his agreement to fully cooperate. The government tells Smith, that pursuant to USSG §1B1.8, nothing he reveals can be used against him. What happens if

(a) Smith tells the government that he committed a murder in furtherance of his drug conspiracy;

Should be able to use if the defendant was properly warned that the protection of section 1B1.8 applies only where the defendant is providing incriminatory information about someone else.

(b) Smith tells the government that he aided a co-defendant in committing a murder in furtherance of their drug conspiracy;

Protected under section 1B1.8.

(c) Smith tells the government that he aided a co-defendant in committing a murder in furtherance of their drug conspiracy and the government later independently finds evidence proving Smith's participation in the murder; and

Should be able to charge the defendant if the government can show an actual independent source of proof. The burden is on the government.

(d) Smith reveals the names of several other coconspirators who were otherwise unknown to the government and one of them tells the government about a murder committed by Smith in furtherance of the conspiracy?

Protected under section 1B1.8 because the government would not have known about the murder if not for the coconspirator that we know of only because of the defendant.