

FJC Directions

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ACQUISITIONS

Plea Agreements, Judicial Discretion, and Sentencing Goals

Paul J. Hofer

Whether sentencing reform accomplishes its goals will depend in large measure on decisions judges make about whether to accept or reject plea agreements and how to take agreements into account when sentencing. The Sentencing Reform Act of 1984 was intended to ensure that similar offenders receive uniform sentences proportionate to the seriousness of the crime. Plea bargaining can undermine uniformity and proportionality if offenders guilty of similar conduct do not get the same deal, or get lenient deals that don't reflect the punishment they deserve. Sentencing reform also aims to increase the *honesty* of the system by reducing "confusion and implicit deception." This was accomplished in part by abolishing parole, so that the time imposed is now the time served (less only a small reduction for good behavior in prison). But confusion over plea bargaining also contributes to a perception of dishonesty in the system if defendants misunderstand the effects of their agreements and feel surprised or misled at sentencing.

This article discusses three questions that concern judges when they review plea agreements. First, how will accepting a plea and an accompanying agreement, which may include charge dismissals, sentence recommendations or factual stipulations, affect the amount of discretion that will remain for the judge at the sentencing stage? Second, how should an agreement be taken into account in the sentencing decision in an individual case? For example, what effect should be given to factual stipulations or sentence recommendations? And third, how will the various types of agreements permitted under Fed. R. Crim. P. 11 and the Sentencing Commission's policy statements affect the overall ability of the criminal justice system to achieve its multiple, and sometimes conflicting, goals?

Prosecutorial discretion

Critics of federal sentencing reform have suggested that it has not eliminated discretion, but has only shifted it from the judge to the prosecutor.¹



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The sentence imposed is usually within the guideline range, which is determined largely by the charges of conviction and the government's version of the offense conduct, both of which are in the control of the prosecution. Independent investigation and fact-finding by the probation officer and judge may temper this somewhat, but limitations on judicial resources and authority mean that in most cases the plea agreement, if accepted, will heavily influence the final sentence.

The fairness and success of the new system, then, depend on how prosecutors exercise their discretion. If prosecutors always reach similar plea bargains with similarly situated defendants, then concerns about sentence disparity do not arise. If the allegations in the indictment and the ultimate counts of conviction always reflect the criminal conduct on which a defendant should and will be sentenced, then the honesty of the plea bargaining process is protected.

The 1989 "Thornburgh Memorandum" to federal prosecutors established strict criteria for plea bargaining. It states that "a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct." "The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons." But there are important exceptions. Some charges reflecting conduct that will be taken into account at sentencing *whether or not the defendant pleads guilty to them* may be dropped as part of a plea agreement. As discussed below, this occurs most notably through application of the Sentencing Commission's relevant conduct guidelines. Another exception in the Thornburgh Memorandum permits readily provable charges to be dismissed in some cases, with supervisory approval, if the U.S. Attorney's office is "particularly over-burdened" and trying the case would be time-consuming or would significantly reduce the total number of cases that could be handled by the office. Finally, although the memorandum is silent on the point, charges are routinely dropped in return for cooperation.

Whether or not the policies of the Thornburgh Memorandum are wise and are being faithfully implemented, concern over plea bargaining continues.² A clarification of the procedures required under the memorandum for approval of plea agreements and record keeping has recently been issued.³ Representative data on plea bargaining and its effects on sentencing disparity and honesty are not yet available, but it is clear from the available evidence that problems arose in a substantial proportion of early cases and are likely to be continuing.⁴ Plea agreements that limit defendants' exposure to punishment to levels below the statutory penalties for their actual crimes appear to remain common.⁵ Similarly situated defendants do not al-

ways get equivalent plea bargains. Defendants are sometimes surprised at sentencing when they do not get the sentence they thought they had bargained for.⁶

Judicial review of plea agreements is contemplated by the guidelines as the best mechanism for ensuring that prosecutors exercise their discretion fairly. The Sentencing Commission has reminded judges that "Congress . . . expects judges 'to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines.'"⁷ But hard questions remain about how this review should be conducted, and whether it is practical or even possible for judges to use the plea-taking hearing and presentence report to review plea agreements and ensure that the guidelines' goals are respected.

Real-offense sentencing

One approach to help reduce the effects of plea bargaining on sentence disparity is "real-offense sentencing." In a real-offense system, sentences are based on a defendant's actual criminal behavior, not the charges of conviction. The guidelines contain several mechanisms for achieving a version of real-offense sentencing in the majority of cases (although not in all).⁸ The relevant-conduct principle and cross-references between guidelines often work to ensure that the offense level is based on the actual offense behavior. For offenses like drug trafficking, theft, fraud, or tax evasion, conduct from uncharged or dismissed counts is often aggregated through application of the relevant conduct guideline section, 1B1.3(a)(2), and its reference to guideline section 3D1.2(d).

Amendments promulgated since the original guidelines, and new proposals being considered in 1992, move the guidelines further toward a real-offense system. For example, guideline section 2D1.6 on the use of a communication facility to commit a drug offense was amended in 1990. Before the amendment the guideline had a flat offense level of 12. But now a cross-reference to the guideline for the "underlying conduct" means that in many cases the offense level is taken from the tables for drugs involved in trafficking, found at guideline section 2D1.1. The amounts of drugs for the underlying offense and all other relevant conduct are added together to arrive at a total offense level. The guideline on renting or managing a drug establishment would be changed in a similar manner if current proposals are adopted.

The guidelines for some other offenses do not follow a real-offense approach, however. Bank robbery, assault, and most immigration offenses, for example, do not increase the offense level based on conduct in dismissed counts. How the Commission decided which crimes should take a real-of-

fense approach is not clear. But the distinction is an important one since it affects how a charge dismissal will limit judicial discretion, as discussed below.

Even where the guidelines themselves do not require a real-offense approach, some courts have practiced real-offense sentencing by departing from the applicable guideline range to take account of behavior in dismissed counts. If drug trafficking counts were dropped, for example, leaving only a simple possession count with an offense level cap of 4 to 6 (depending on the drug), courts have departed from the guideline range to take account of the trafficking in the dismissed counts.

Real-offense sentencing is clearly a way, perhaps the only way, to undo the effects of disparate plea bargains and achieve more uniform and proportionate sentences. But it is not without costs. New problems may be created by the promulgation of new real-offense guidelines, by strict application of the relevant conduct principle, or by departures designed to undo the limiting effects of plea agreements. These problems will be addressed after a more thorough analysis of how various types of charge dismissals affect judicial sentencing discretion.

Types of charge dismissals

Fed. R. Crim. P. 11(e)(1), which was written before the guideline era, divides plea agreements into three basic types: (A) charge dismissals, (B) non-binding sentence recommendations, and (C) binding sentence recommendations. The rule's present categories do not adequately reflect the complex interactions between plea agreements, the sentencing guidelines, and mandatory minimum statutes. The sentencing consequences of accepting an agreement may not be readily apparent to either the defendant or the judge.

For example, different types of charge dismissals can have widely varying impacts on judicial sentencing discretion. Some charge dismissals are *non-limiting*; they leave the judge with all the discretion that he or she would have had without the agreement, or even more. A bargain to dismiss a count that carries a mandatory minimum sentence, such as use of a firearm during a drug offense (18 U.S.C. § 924(c)(1)), leaves the judge with more sentencing discretion at the lower end—and gives the prosecutor great bargaining leverage—by removing the statutory floor created by the mandatory minimum.

Many charge dismissals *limit* the judge's discretion by reducing the statutory maximum under which a sentence must be imposed. Drug trafficking counts under 21 U.S.C. § 841, with statutory maximums of life in prison for some drugs and quantities, may be dismissed leaving only a

count for managing a drug establishment (e.g., running a crackhouse). This would limit the statutory maximum to twenty years.

Fed. R. Crim P. 11(c)(1) requires that the judge inform the defendant, before accepting a plea, of any applicable mandatory minimums and the maximum penalty "provided by law," which has been interpreted to mean provided by statute. This ensures that everyone will generally understand the effect of a plea agreement on the statutory range. Confusion may arise, however, when trying to understand the effect of a charge dismissal on the applicable *guideline* range and on the ultimate sentence that will be imposed by the judge. The confusion arises from not understanding how the guidelines' relevant conduct principle and the judge's departure power can undo attempts to limit the sentence.

First, consider the effect of charge dismissals on the guideline range. If a defendant is charged with several counts of drug trafficking, each specifying different amounts of drugs purchased by undercover agents on different occasions, dismissing all but one of the counts will usually have no effect on the guideline range if all the transactions were part of the relevant conduct for the remaining count. When the relevant conduct principle causes conduct in dismissed counts—or even uncharged behavior—to be used to set the guideline range, a charge dismissal will not affect guideline application at all. But since not all the guidelines take the real-offense approach, each agreement must be analyzed carefully to assess its effect on judicial discretion.

Even if a charge dismissal does limit the guideline range, it does not necessarily mean that the ultimate sentence imposed is reduced. In most circuits, an upward departure may be justified on the grounds that the count of conviction does not adequately reflect the real offense. The Second Circuit has suggested that judges, in determining the degree of departure, should begin by calculating the guidelines applicable to the dismissed counts. *U.S. v. Kim*, 896 F.2d 678, 683–85 (2d Cir. 1990). This makes departures work exactly like a cross-reference to the guideline for the underlying behavior.

The Ninth Circuit, on the other hand, has held that judges may *not* base departures on conduct in dismissed counts. *U.S. v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir. 1990). The court cited the Sentencing Commission's Policy Statement 6B1.2(a): "In the case of a plea agreement that includes the dismissal of any charges . . . the court may accept the agreement if the court determines . . . that the remaining charges adequately reflect the seriousness of the actual offense behavior . . ." The court concluded that "to let the defendant plead to certain charges and then be penalized on charges that have, by agreement, been dismissed is not only unfair, it violates the spirit if not the letter of the bargain." A later

decision extends this holding to sentences within the guidelines. Dismissed counts may not be included in the defendant's relevant conduct and used to enhance the sentence. *U.S. v. Fine*, 946 F.2d 650 (9th Cir. 1991). The Sentencing Commission has tentatively approved an amendment to Policy Statement 6B1.2 that would contradict this holding. (Amendment 36(x), tentatively approved March 31, 1992.)

Neither Fed. R. Crim P. 11 nor court interpretations require a judge to inform a defendant before accepting a charge agreement what effect, if any, the agreement will have on the guideline range or ultimate sentence, though some circuits have encouraged the practice.⁹ Unless the judge and attorneys are thoroughly familiar with how relevant conduct and departures work, the consequences of a charge dismissal may not be obvious.

Judicial options when reviewing charge dismissals

What are the judge's options when confronted with a plea agreement that calls for the dismissal of charges? At the plea-taking stage, the judge may wish to defer acceptance of the plea until there has been an opportunity to examine the presentence report. The new format of the report, developed by a special task force created by the Judicial Conference Committee on Criminal Law, is designed to assist judges in understanding what part of the defendant's behavior is captured in guideline computations and what part is not.

The presentence report focuses primarily on the sentencing decision, however, and does not directly address the first question facing the judge: Should the plea agreement be accepted or rejected?

Accepting a non-limiting plea agreement could be an easy choice; the judge retains significant sentencing discretion. But if the agreement understates the conduct that will be used at sentencing, then accepting the agreement but not its implied sentencing consequences casts doubt on the honesty of the plea negotiation process. Defendants have never been guaranteed a particular sentence short of a binding sentence agreement, and they may have always harbored unrealistic expectations about the effects of their bargains. Under the guidelines, however, the apparently direct link between charges, facts, and guideline range—along with confusion over relevant conduct—may mislead defendants into thinking that it is easier to predict and control a sentence with a plea agreement than it actually is. Furthermore, if judges routinely accept agreements but not their implied sentencing consequences, defendants and their attorneys will come to realize that non-limiting agreements bring no sentencing benefits. The incentives to make such agreements will be reduced.

Rejecting a plea agreement may lead to a new agreement that more accurately reflects the real criminal conduct and the ultimate sentence. If this practice were adopted by all judges, disparity would be reduced, more proportionate punishment ensured, and the honesty of plea negotiations increased. Rejection of plea agreements appears to be relatively rare, however, and the reasons for this need careful study.

First, many judges believe that decisions to dismiss counts are solely within the province of the prosecutor. Judges question whether they and the probation officer have the authority or resources to thoroughly investigate the criminal conduct, second-guess the government about the availability of persuasive evidence, and tell the U.S. Attorney's office how to allocate its resources. In addition, post-indictment plea bargaining is only one of the options available to prosecutors. If judges started to aggressively reject charge dismissals, prosecutors might rely more on pre-indictment bargaining, which can have the same negative effects on sentencing goals. Judges are even more reluctant to intrude on prosecutors' decisions about which charges to bring than they are about which charges to dismiss, and many of these decisions are beyond court scrutiny in any event.

Second, by rejecting plea agreements, judges risk upsetting plea negotiations and increasing the trial burden for the government and the court. Statistics collected by the Administrative Office and the Sentencing Commission have not shown any increase in the trial rate for the nation as a whole, though some districts have shown an increase and many judges report that cases that would have settled before the guidelines are now going to trial.¹⁰ But if the trial rate has not increased, this may be because judges are accepting some plea agreements that limit the defendant's exposure to punishment for their real offense conduct. If such agreements were routinely rejected, or if guideline amendments made such agreements impossible, there may not be sufficient incentives to keep the guilty plea rate at present levels.

Third, the opportunity to sentence based only on conduct covered by the counts of conviction may appeal to judges in some cases, for example, where the mandatory minimum statutes or the guidelines applicable to the dismissed counts appear too severe. The bargain may lead to what seems a fairer sentence in an individual case. The mandatory minimums and guidelines have dramatically increased sentence lengths over historic levels, and decreased the availability of probation for many first offenders, white-collar criminals, and minor participants in drug trafficking, such as so-called "mules" who are paid a relatively small amount to smuggle drugs across the border. Charge dismissals become a way to increase sentencing flexibility for these offenders.

Sentence bargains and factual stipulations

Fed. R. Crim. P. 11 clearly defines how much discretion is left for the judge after accepting a plea agreement with a sentence recommendation by dividing those agreements into two types: type (B) non-binding and type (C) binding agreements. The rule also links other procedural requirements to the type of agreement. These are designed to prevent defendant surprise at sentencing and clarify whether the defendant can withdraw his or her plea if the sentence is not as expected. Defendants retain the right to withdraw the plea if the judge rejects the sentence recommendation in a binding (type C) agreement. Where the plea is non-binding (type B), Rule 11(e)(2) directs the court to inform the defendants at the plea-taking hearing that they have no right to withdraw the guilty plea if the sentence recommendation is rejected.

Some plea agreements under the guidelines do not fit neatly into the categories of Rule 11, however, and the procedures surrounding these agreements are not always clear. A recent case from the Fourth Circuit illustrates the potential for confusion. The court affirmed the district judge's denial of the defendant's motion to withdraw his plea. The plea agreement did not precisely follow the language of Rule 11, and it contained both a charge dismissal and a non-binding recommendation for a sentence at the low end of the guideline range. The judge had deferred acceptance of the plea agreement until the presentence report was completed. The defendant argued that since acceptance of the agreement had been deferred, he retained his right to withdraw the plea. But the circuit court drew a distinction between acceptance of the plea and acceptance of the plea agreement, and held that the former had already been accepted even though the agreement had not been. *U.S. v. Ewing*, 1992 U.S. App. LEXIS 2242 (4th Cir., Feb. 20, 1992).

Plea agreements under the guidelines are often accompanied by factual stipulations. The parties may stipulate the amount of money or drugs involved in the offense, the role of the defendant, or whether the defendant has accepted responsibility for his or her actions. Factual stipulations are not necessarily part of a formal sentence agreement; the agreement may not state a specific final sentence and may not be categorized as a type (B) or (C) agreement. Stipulations are similar to sentence agreements, however, since if the stipulation is accepted it has a direct effect on the guideline range. If the judge accepts a stipulation that the defendant was a minor participant in the criminal activity, the defendant knows that the guideline range will be approximately 25% lower than if the judge does not give a role adjustment. Unfortunately, the rules surrounding factual stipulations are not as clear as those for sentence agreements.

Confusion can arise when plea agreements with factual stipulations are accepted by the judge. Has the judge also accepted the factual stipulations? Can the defendant withdraw his plea if the stipulations are not incorporated into the guideline determination and final sentence? What warnings are owed the defendant about the effect of the agreement? Sentencing Commission Policy Statement 6B1.4 says that plea agreements may be "accompanied" by factual stipulations, but "[t]he court is not bound by the stipulation." Neither the Commission's policy statements nor Fed. R. Crim. P. 11 explicitly states whether warnings or the right to withdraw are owed to defendants offering plea agreements with factual stipulations.¹¹

Judicial options when reviewing factual stipulations and sentence agreements

If judges treat factual stipulations as non-binding recommendations, they should advise defendants at their plea-taking hearings that they have no right to withdraw their pleas if the stipulations are not accepted—just as judges do now in cases of non-binding sentence recommendations. But given the direct link under the guidelines between facts and sentence range, it might be a better practice to treat factual stipulations as binding sentence recommendations. Judges in some courts have been reluctant to accept factual stipulations or binding sentence agreements because they seem to transfer the judge's sentencing discretion to the prosecution. But these agreements, if done properly, deserve encouragement. They can help prevent unfair surprise and time-consuming disputes at the sentencing hearing. They provide the parties with effective bargaining tools that can keep the plea rate high.

Acceptance of factual stipulations, like all plea agreements, can be deferred pending completion and review of the presentence report.¹³ If the presentence investigation turns up different facts and the stipulations are rejected, the defendant should retain the right to withdraw the plea. Some stipulations, for example that the defendant has accepted responsibility for the crime, might be established and accepted by the judge at the plea-taking hearing. This saves the probation officer—if he or she attends the hearing or is informed of its findings—the effort of establishing factors that the judge has already decided. The judge may want to check the accuracy of other stipulations, such as whether a gun was used in the offense. By explicitly deferring acceptance of a stipulation and relaying that message to the probation officer, the court can direct the investigation to those factors in which it is most interested.

In-depth investigation of criminal conduct is difficult, and in routine cases the probation officer is often dependent on the U.S. Attorney for information about the crime. A concern is that the stipulation process might be used to subvert the guidelines and undermine sentence uniformity. Probation officers in some districts report that parties have filed misleading stipulations, for example, by understating the defendant's role in the offense, even though Policy Statement 6B1.4(a)(2) states that stipulations shall "not contain misleading facts." Judges should be able to enforce the honesty of factual stipulations by sending a clear signal to counsel that plea agreements that distort the defendant's conduct will not be tolerated.

Some disagreements between the probation officer and the government may be inevitable, not because of bad faith on the part of counsel, but because of the different evidentiary standards applicable to their roles. Probation officers need to establish facts for sentencing only by the preponderance of the evidence, while in plea negotiations the government must be concerned with what could be proved beyond a reasonable doubt at trial. By which standard of proof should judges review the factual basis for a plea agreement? In cases with incomplete, complex, or conflicting evidence, judges may wish to accept the parties' resolution of factual disputes. If courts and counsel can agree on what constitutes a reasonable factual stipulation, an open bargaining process that is honest, fair, and efficient can emerge.

Finding solutions to the dilemmas of plea bargaining

Why are limiting charge bargains or misleading factual stipulations still occurring? There are surely many reasons and no simple answer. But several possible explanations deserve careful attention because they suggest solutions. First, the guidelines' explicit incentives for pleading guilty, notably the acceptance-of-responsibility reduction, may be inadequate to induce guilty pleas without resort to misleading factual stipulations or charge reductions that limit the sentence.¹² If the incentives are not adequate, this represents a serious shortcoming of the current system. The Sentencing Commission is considering several important options for amending this guideline in the 1992 amendment cycle.

Second, plea agreements that understate criminal conduct to which a severe guideline or mandatory minimum apply are likely to continue as long as there are a significant number of cases in which the government, defense attorney, and the judge all agree that the sentence called for by the statute or guideline is unjust. The "troubled conscience" that ensues from unfairly sentencing a defendant standing before you can overcome qualms about undermining the abstract goals of the Sentencing Reform Act. The

elimination of mandatory minimum statutes and greater flexibility, especially in the use of alternatives to imprisonment, would make it easier for judges to live with both the guidelines and their consciences.

Problems surrounding plea bargaining under the guidelines wait for answers from sentencing judges, appellate courts, and the Sentencing Commission. The time may be right for reconsidering whether plea agreement procedures, especially Fed. R. Crim. P. 11, are adequate for the guideline era. The Judicial Conference Committee on Criminal Law continues its work with the Commission toward the elimination of mandatory minimum statutes and the creation of new explicit bargaining incentives and sentencing flexibility within the guidelines. Judges around the country are experimenting with new plea-taking and sentencing procedures tailored to the guideline era. Continued exploration of these and other options is needed to help sentencing reform achieve its goals.

Notes

1. See, e.g., Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901 (1991); Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161 (1991).

2. See, e.g., Report of the Federal Courts Study Committee 138 (April 2, 1990) (citing promotion of hidden bargaining as a danger with potential to undermine the new system); see also Alschuler, *supra* note 1; Heaney, *supra* note 1.

3. Terwilliger, U.S. Department of Justice "Blue Sheet" (Feb. 7, 1992).

4. See Schulhofer & Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231 (1989) (finding "substantial number" of plea agreements that avoid otherwise applicable guidelines and are not "by-the-book"; Nagel and Schulhofer are completing an update of their research that confirms this finding); Alschuler & Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 Fed. Sentencing Rep. 94 (judges report seeing plea agreements that include fact bargains or call for dismissal of readily provable charges).

5. See Mandatory Minimum Penalties in the Federal Criminal Justice System 56 (U.S. Sentencing Commission, August 1991) (in 35% of cases where available data suggested that a charge carrying a mandatory minimum applied, defendants were permitted to plead guilty to lesser counts).

6. See Garoppolo, *Confusion and Distortion in the Federal Sentencing Process*, 27 Crim. L. Bull. 3 (1991); Heaney, *supra* note 1, Alschuler, *supra* note 1.

7. S. Rep. No. 98-225, 98th Cong., 1st Sess. 63, 167 (1983). Quoted in U.S. Sentencing Commission, Guidelines Manual Ch. 6, Pt. B, intro. comment. (Nov. 1991).

8. The Guidelines Manual originally described the system as a "modified real-offense system," but that terminology was deleted through later amendments.

9. See *U.S. v. Fernandez*, 877 F.2d 1138 (2d Cir. 1989).

10. In a recent informal survey of district judges in two circuits, approximately one-third said they had never rejected a plea agreement in a guidelines case. Another half said they had done so less than 10% of the time. (Results on file in the Research Division of the Federal Judicial Center.)

11. See Report of the Federal Courts Study Committee 137 (April 2, 1990) (half the judges surveyed said that the guidelines had decreased the percentage of guilty pleas in their caseloads).

12. See Adair & Slawsky, *Looking at the Law*, 55 Federal Probation 58 (Dec. 1991), for a discussion of various interpretations of these rules that are found in the case law.

13. Report of the Federal Courts Study Committee 137 (April 2, 1990) (more than 70% of judges surveyed said the guidelines had reduced the incentives to plead guilty).

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