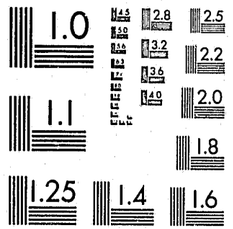

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PLEA BARGAINING

A Report to the Hawaii State Legislature

by the

HAWAII CRIME COMMISSION
State Capitol
Honolulu, Hawaii 96813

THOMAS T. OSHIRO
Chairman

DECEMBER 1982

George R. Ariyoshi
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John Waihee
Lieutenant Governor

This report is respectfully submitted to the Legislature, State of Hawaii, pursuant to Act 16, First Special Session, Ninth Legislature, State of Hawaii, 1977 as amended.

THOMAS T. OSHIRO
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PLEA BARGAINING

INTRODUCTION

Plea bargaining has existed in this country for many years. It has repeatedly been a source of controversy because its very nature--the state giving a form of consideration to a defendant accused of criminal acts in exchange for a guilty plea--has raised some questions as to its propriety, legality, and necessity. Moreover, the practice has been accused of opening the door for abuse and favoritism. This study is an in-depth look at plea bargaining in Hawaii, with a set of specific recommendations designed to improve the system and reinstill public confidence.

Plea bargaining evolved as a standard practice in the criminal justice system in response to a steady increase in the number of cases. Changes in the nature of the criminal trial also complicated cases. These included the use of more specialists and professionals in trials; the proliferation of "technicalities;" the right to representation by an attorney; and new rules concerning evidence, procedures, and defendant's rights. All of these factors delayed the process such that the judicial system could not expeditiously handle the volume of cases only by trial. Plea bargaining became an attractive alternative means of attaining justice in this situation.

In recent years, the practice has come under criticism by both scholars and criminal justice professionals. Some critics believe that only a total ban on plea bargaining can improve the judicial system, ensuring equal justice. Others, both proponents and opponents, feel that plea bargaining is necessary and that reforms can take care of any problems. Some jurisdictions have eliminated plea bargaining, either entirely or for certain

crimes, while others have made reforms in their practices.

Arguments raised against the use of plea bargaining tend to involve constitutional issues and the social costs to either the defendants or to the criminal justice system as a whole. Some of the detriments that have been identified to date are: 1) the possibility of convicting an innocent party; 2) the burden placed on the exercise of certain rights of the defendant, e.g., the right to trial by jury; 3) the possible negative effect plea bargaining has on law enforcement agencies, i.e., they discourage thorough police investigation and/or prosecutor trial preparation; and 4) the possible inconsistent and unjust disposition of cases, e.g., when defendants who plead guilty receive lighter sentences than defendants who choose to go to trial.

Advocates of plea bargaining generally tend to emphasize the factors of cost and administrative efficiency. They argue that plea bargaining reaps considerable savings of judicial resources by allowing more cases to be processed. It is their belief that without plea bargaining, the trial calendar would be congested, necessitating more courts, judges, prosecutors, and support staff. Advocates also contend that plea bargaining provides for flexibility in the criminal process because it mitigates the harshness of the penal code and allows the participants to tailor a disposition to fit the individual facts of the case.

For the past several years, research on plea bargaining has tended to focus on legal issues and analyses to the exclusion of empirical studies of the actual practices of plea bargaining and their impact on the criminal justice system. This study by the Hawaii Crime Commission is an attempt to document the practice of plea bargaining here in Hawaii by analyzing

several hundred felony cases that were disposed of in 1980. It describes the plea bargaining practices in the first judicial circuit (Honolulu County) to determine if there are any problems with the practice as it now exists in Hawaii; whether the public concern over plea bargaining in general, exacerbated by a few well-publicized cases, is justified; and whether the experience of other jurisdictions in dealing with some of the more common theoretical and practical problems can be helpful in Hawaii. Interviews were conducted with criminal justice officials in every county to ensure that their opinions and ideas were included.

The findings indicate that plea bargaining is used properly in Hawaii. Wholesale plea bargaining for the sake of expediency no longer exists. It is frequently used but there is no evidence of its abuse. It seems to be a useful and efficient tool that contributes toward a streamlining of the criminal justice system as a whole.

The Crime Commission offers a set of recommendations designed to improve the present system. It believes that plea bargaining should be retained but that several changes in procedure would improve the process both for those involved in a case and for the general public. The Commission recommends that: A) written guidelines covering all aspects of plea bargaining be established in each prosecutor's office; B) pretrial settlement conferences be held in each case in order to accelerate case disposition; C) a regular procedure by which the police and victim are informed of any plea bargain be set up; and D) all plea agreements be made in writing and signed. These changes would bring the practice of plea bargaining out into the open and allow it to continue under standard terms and conditions.

This report is divided into five chapters. Chapter I defines plea bargaining in the context of the modern trial and discusses the many issues surrounding its practice. Chapter II attempts to describe plea bargaining in Hawaii through the use of data and extensive interviews with current as well as former prosecutors, judges, defense attorneys, and the police. Chapter III discusses various reforms which have been implemented in jurisdictions across the nation. Chapter IV presents the Commission's conclusions, and Chapter V offers recommendations for improving plea bargaining in Hawaii. The Crime Commission sincerely hopes that this study will prove to be valuable both for participants and planners in the criminal justice system as well as informative for the general public.

I. ISSUES IN PLEA BARGAINING

A. Definition.

Plea bargaining is a process in the criminal justice system affecting everyone from the police to the parole board. Nationwide, it has replaced the jury trial as the predominant method of disposing of criminal cases. Yet, it has not been recognized as a legitimate function. Throughout most of its development during the past hundred years, it was expressly prohibited and, therefore, practiced surreptitiously. The result is that plea bargaining varies from one jurisdiction to the next. Four actors--the prosecutor, judge, defense counsel, and defendant--are central to the process, but each participates to different degrees of importance and openness.

Two elements are consistently present in all instances of plea bargaining. The first is that the defendant waives his right to a trial and pleads guilty to an offense(s). The other is that the defendant expects that his cooperation, in pleading guilty, will be rewarded with concessions affecting his sanction.

The decision to plea bargain is rarely initiated by the defendant. Instead, his alternatives are explained by his defense counsel, the prosecutor, or the judge. There are two types of plea bargaining: "explicit" and "implicit."[1] Explicit plea bargaining involves the exchange of a guilty plea for some specific concession. Implicit bargaining occurs when the defendant believes that he will be punished more severely if he is convicted at trial than if he pleads guilty; even if the sentencing disparity may not

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[1]William F. McDonald, "From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept," 13 L. & Soc'y Rev. 385, 386 (1979) (hereinafter cited as "McDonald").

be great. Rather than two distinct styles of bargaining, one author suggests that explicit and implicit plea bargaining are poles of a continuum and that all bargaining contains aspects of both.[2]

Several classes of concessions may be offered in the negotiation for a guilty plea. The two major classes involve reducing the charge against the defendant or making specific sentence recommendations. Charge reduction involves the lowering of the degree of an offense or not prosecuting one or more possible offenses. Sentence recommendation involves the prosecutor recommending leniency for the defendant to the judge at the time of sentencing, not recommending extraordinary punishment, or standing silent. In addition, because plea bargaining may involve more than one defendant, the bargain may involve the prosecutor dropping the charges against one defendant in exchange for the guilty plea of another. Alternatively, a defendant may plead guilty to a minor charge and implicate others in more serious offenses.

The defendant finalizes any negotiation when he pleads guilty before the judge; but whom he negotiates with and at what step in the proceedings will make a difference in what concessions he receives. In most jurisdictions, the defense counsel begins negotiation with the prosecutor. The judge is usually not involved. Whether the defense counsel is privately retained or court appointed may also have an effect. Each of these conditions has its advantages, as well as its potential for abuse. Whether the defendant is in custody or released on bail has a significance. Other variables range from community attitudes toward the type of crime or the defendant himself to the method by which the prosecutor and judge attain

[2] Id. at 386.

office--appointed or elected. In any jurisdiction, the extent and openness of plea bargaining depends on the specificity of statutory and case law on the subject.

The primary reason given for plea bargaining is caseload pressure. The resources of the prosecutor's office, the court, and the public defender's office are often inadequate to provide all defendants with a speedy trial.

B. Plea Bargaining in Historical Perspective.

Presently, plea bargaining is the primary method for disposing of criminal cases in the United States. It accounts for 90 percent of all felony convictions in many jurisdictions.[3] (See the table on page 9.) Conversely, only 10 percent of all felony convictions in these jurisdictions were obtained by trial. Such was not always the case. The court was originally an institution for laymen, whereby the aggrieved pressed charges, the accused offered his defense, and an impartial panel rendered the verdict.[4] Under these conditions, trial was brief, simple, and meaningful. But as trials became tedious, protracted affairs lasting several days, involving complex legal issues, and hinging on the persuasiveness and acumen of professionals who had no personal involvement in the matter, the groundwork was laid for plea bargaining to rise up to its present prominence. It is necessary, then, to fully examine how the court has changed and what accounts for the predominance of plea bargaining.

[3] National Advisory Commission on Criminal Justice Standards and Goals, Courts Report 42 (1973) and Herbert S. Miller, William F. McDonald, and James A. Cramer, Plea Bargaining in the United States 16-24, 311 (1979) (hereinafter cited as "Miller").

[4] Malcolm M. Feeley, "Perspectives on Plea Bargaining," 13 L. & Soc'y Rev. 199, 201 (1979).

Historical research on the growth of plea bargaining is sparse, due largely to a lack of information. Even today, plea bargaining occurs outside the auspices of the court; prosecutors are left to themselves to promulgate standards and hold their subordinates accountable.

The unit of measure used in existing studies is the guilty plea. It is not accurate to assume that all guilty pleas are the result of negotiation, but several authors speculate this is the case more often than not. One indication of bargaining is a change in the plea from not guilty of the original charge to guilty of a lesser charge.[5] Another example of bargaining is evident when defendants who plead guilty receive a more lenient sentence than those convicted at trial.[6] Though not a measure of plea bargaining, the guilty plea rate does provide an upper limit to the extent bargaining occurs.[7]

[5]Raymond Moley, "The Vanishing Jury," 2 S. Cal. L. Rev. 97, 109 (1928) (hereinafter cited as "Moley").

[6]Albert W. Alschuler, "Plea Bargaining and Its History," 13 L. & Soc'y Rev. 212, 231-32 (1979) (hereinafter cited as "Alschuler").

[7]Miller, note 3 supra, at 17.

MEAN GUILTY PLEA RATES BY POPULATION OF JURISDICTIONS

States	Jurisdictions by Population: 1-100,000 a.	1-100,000 b.	100,000-250,000 a.	100,000-250,000 b.	250,000-500,000 a.	250,000-500,000 b.	500,000 & over a.	500,000 & over b.*
Idaho	87.8	(37)	94.5	(1)	-		-	
Illinois	91.4	(83)	86.5	(8)	82.6	(6)	84.0	(2)
Kansas	71.0	(96)	69.3	(2)	69.8	(1)	-	
Louisiana	72.0	(63)	92.8	(5)	86.4	(2)	85.1	(1)
Michigan	86.4	(65)	88.8	(10)	90.4	(3)	93.5	(3)
Minnesota	83.6	(78)	89.3	(3)	85.5	(1)	85.4	(1)
Missouri	73.8	(108)	79.6	(3)	-		87.6	(3)
New Jersey	96.2	(5)	92.3	(5)	88.1	(6)	88.2	(5)
New York	92.1	(34)	89.9	(14)	94.5	(4)	92.7	(9)
North Dakota	89.7	(53)	-		-		-	
Ohio	68.9	(68)	80.4	(11)	88.8	(4)	78.5	(5)
Oklahoma	67.3	(74)	89.0	(1)	90.7	(1)	80.9	(1)
Pennsylvania	82.3	(28)	86.6	(19)	85.5	(8)	65.6	(4)
South Carolina	95.8	(41)	97.3	(4)	-		-	
South Dakota	91.5	(54)	-		-		-	
Texas	90.9	(218)	89.6	(11)	92.7	(2)	91.6	(4)
Utah	71.5	(22)	78.8	(3)	80.4	(1)	-	
Vermont	95.2	(7)	100.0	(1)	-		-	
Wyoming	55.4	(22)	-		-		-	

* a. = $\overline{X}$ Plea Rate.
b. = Number of jurisdictions.
- = No jurisdiction in this population range.

FROM: Herbert S. Miller, William F. McDonald, and James A. Cramer, Plea Bargaining in the United States 19 (1979).

1. Changes in the court process and the emergence of plea bargaining.

The forebear of the criminal justice system in the United States was the English court system of the eighteenth century. The jury trial of the mid-1700's was substantially different from the modern trial, being more like a summary proceeding. Cases were handled rapidly, with as many as 12 to 20 felony trials being concluded per day. The accused was denied representation and the victim (or a private attorney on his behalf) acted as the prosecutor. The defendant was considered the central witness in the case and had no right against self-incrimination; nor were there rules for the exclusion of evidence. There was no voir dire (examination) of prospective jurors; once empaneled, a jury would hear several cases. The judge had unrestricted powers of comment on the merits of a case and, until 1670, could fine a jury for acquitting a defendant against his recommendation. There was virtually no appeal of criminal cases.[8]

The court of colonial America was modeled after its English counterpart but underwent broad structural changes during the nineteenth century. The court was intended not only to arbitrate guilt or innocence but also to bring the offender to justice. It was empowered to issue warrants for arrest and the constables and sheriffs acted as its agents. The rise of the modern police department (1830-1870) brought increasingly more defendants into the system, independent of the court's control.[9]

Dispositional alternatives also changed. Before 1830, prison was one

[8]John H. Langbein, "Understanding the Short History of Plea Bargaining," 13 L. & Soc'y Rev. 261 (1979).

[9]Mark H. Haller, "Plea Bargaining: The Nineteenth Century Context," 13 L. & Soc'y Rev. 273 (1979) (hereinafter cited as "Haller").

of several options available to the court. Being the most restrictive, it was seldom used and then solely for punitive purposes. The penitentiary sought to reform the offender in an environment of isolation, prayer, and honest labor. It became the standard penalty upon conviction of serious offenses. Two problems ensued: the buildings that housed the offenders were quickly filled and the humanitarian spirit degenerated into an attitude of custody. The court became a processing agency between an increasing number of defendants and the undesirable alternative of incarceration.[10]

The victim was replaced by a public official as the prosecutor of criminal cases. As imprisonment replaced payment of restitution and repair of damages, the victim lost a direct interest in the outcome of the case. The prosecutor and judge devised methods of disposition that fit the needs of the system, not those of the victim directly.[11]

During the time that plea bargaining became the standard method of disposition, it developed without sufficient legal orientation. The justices and judges were frequently not lawyers. Defendants who were too poor to afford an attorney appeared in court without representation. To compound the problem, explicit plea bargaining was prohibited in most jurisdictions. The result was that bargaining was conducted informally and secretly, which resulted in vague understandings, unsubstantiated promises, and implied threats of severity.[12]

2. Modern problems, old roots.

Many of the concerns voiced today about plea bargaining are rooted in the past hundred years. These concerns include the sanctity of the

[10]Id.

[11]Id.

[12]Id.

trial and the requirement of a voluntary and knowing decision by the defendant. The impressions that plea bargaining is coercive and corrupt may well have been true during the years of its widespread growth. However, conditions existed that made bargaining an alternative to harsh treatment by the criminal justice system. Traditionally, the courts had been reluctant to accept a plea of guilty. In England, as recent as 1812, the death penalty was prescribed for 220 criminal offenses. Pleading guilty was an act of suicide. The court held that guilty pleas denied it any favorable evidence that might commute the sentence. The court especially feared that an innocent man would suffer conviction due to his own "imbecility and imprudence" or the intractibility of his situation.[13]

The court has long required that a defendant's guilty plea be voluntary and knowing. In 1560, it was recognized that a guilty plea resulting from "fear, menace, or duress" should not be accepted.[14] Although the English felony defendant was not represented by counsel, "it was the basic duty of the trial judges to see that these defendants 'should suffer nothing for [their] want of knowledge in the matter of law'."[15]

In the United States, in the late nineteenth and early twentieth centuries, the concept of the jury trial serving to alleviate the tyranny and oppression was far removed from the realities of life.[16] Incidents of police brutality did not evoke the wrath of the citizenry but fostered an image of

[13] Alschuler, note 6 supra, at 214-217.

[14] Id.

[15] Id.

[16] Lawrence M. Friedman, "Plea Bargaining in Historical Perspective," 13 L. & Soc'y Rev. 247, 258 (1979).

"toughness" in dealing with criminals. As a result, many poor, foreign-born, illiterate, and unrepresented defendants may have been coerced, with threats and promises, into pleading guilty.[17]

Plea bargaining flourished in an environment of corruption. During this era, local political organizations--political "machines"--became powerful. Their power derived from the exchange of favors for votes. Jobs in the criminal justice system were given as rewards for political service and officials, such as the prosecutor, were expected to protect the interests of their sponsor. A defendant, then, could obtain a desirable bargain as a result of influence with or bribery of the political boss.[18]

Plea bargaining grew during this period as a method of circumventing harsh sentencing laws. While the death penalty or extended confinement were the required sanctions for serious offenses, the only chance for leniency was for a defendant to plead guilty to a lesser charge, one that allowed judicial discretion. For example, during the 1920's, a New York state law mandated life imprisonment for offenders with four felony convictions. What resulted was that, "a reluctance upon the part of certain judges and district attorneys to accept the inflexible conditions of this law caused them to use the power of permitting pleas to a lesser offense to mitigate its severity."[19]

3. Current conditions.

While many of the conditions described above have changed, several

[17] Haller, note 9 supra, at 278.

[18] Id.

[19] Moley, note 5 supra, at 114.

factors exist today which tend to perpetuate the practice of plea bargaining. Foremost is the sheer number of persons handled by the system. Compounding this is the length of time it takes to process each case. Not only has the population moving through the system grown faster than the government's ability to provide resources for processing it, but also the plethora of defendant's rights and "technicalities" have slowed the handling of each case considerably. Statutory requirements for a speedy trial have created pressure to plea bargain as the least cumbersome, most expedient method of reducing the backlog of cases. Bargaining bypasses the procedural logjam that exists in our modern court system. Many participants in the criminal justice system feel that plea bargaining is absolutely essential to the continued functioning of that system.

C. Plea Bargaining in the Context of the Modern Trial.

1. Preliminary phases.

a. Charging phase. There is little opportunity for a defendant or his counsel to negotiate during the charging phase. After his initial arrest, a complaint is prepared that alleges the criminal conduct of the defendant. It is rare that an attorney can convince the prosecutor, at this stage, not to file certain charges or withdraw the complaint altogether. Once the complaint has been sworn to under oath and filed with the court, the defendant makes an initial appearance before a judge, to be read the complaint and informed of his constitutional rights.

Depending on the defendant and the nature of the charge, the judge determines the type of pretrial release, if any. What that determination is can greatly affect the possibilities for negotiation. If the defendant

is released on his own recognizance or is able to make bail, it is to his advantage that the case remain pending. The longer it takes the case to reach trial, the greater the possibility that the prosecution's case will weaken, and, therefore, the better the bargain for the defendant. If the defendant is unable to make bail and remains incarcerated, he is under more pressure to plead guilty on the prosecutor's terms.

After arrest, a defendant may have a preliminary hearing to determine whether there is probable cause to believe a crime was committed and that the defendant committed it. The prosecutor must decide if he wants to drop the charges. If not, he is obliged to present only as much evidence as is necessary to show probable cause. Once that has been established, the defendant is bound over for indictment by a grand jury.

b. Screening and discovery. Whether the prosecutor is willing to take a case to trial or to settle for certain concessions of a plea bargain depends primarily on the strength of his case. This is assessed during the screening process. The defense makes its own assessment through a process known as discovery.

Screening effectively starts at the police level. The police are responsible for investigation of a case leading to the arrest of the accused. The kinds of evidence they collect include direct evidence--victim and eyewitness accounts and statements made by the accused--and indirect or circumstantial evidence--physical artifacts from the scene of the crime or from related search and seizure. By the time an arrest is made and the case is turned over for prosecution, presumably sufficient evidence has been gathered to indict the accused.

Screening on the part of the prosecutor determines the reasonable probability of the defendant being indicted and convicted. To be indicted, there must be sufficient evidence to establish probable cause that a crime was committed and that the defendant committed the crime. To be convicted, there must be sufficient evidence to prove beyond a reasonable doubt that the defendant intended to commit the crime and that he did commit the crime. The strength of the prosecutor's case, then, depends on the amount of evidence, the quality of evidence, the persuasiveness of witnesses, and the discretion of the police in protecting the individual's rights. When the defendant agrees to waive his right to trial and pleads guilty, the prosecutor does not have to prove guilt.

The defense is entitled to know the facts of the case and it finds out through the process of discovery. Discovery may be granted by a court order or allowed, informally, by the prosecution. The law states what information the defense may receive. This usually includes the results of scientific and fingerprint tests and the names of witnesses, but excludes the details of testimony or the internal working papers of the prosecutor's office.

Another means by which the defense may glimpse the prosecution's case is through a suppression hearing or by way of preliminary hearing. In this hearing, a particular piece of evidence is presented before the judge who is asked to rule on its admissibility. The hearing affords the defense the opportunity to see how a prosecution witness handles himself under cross-examination. It also serves the defense counsel in the preparation of his defense and in advising the defendant about pleading.

The defense may waive the right to a "speedy trial" in order to enable a more exhaustive discovery or as a ploy to improve the defendant's plea bargaining position. Especially in violent cases, the prosecutor may not want to plea bargain in the face of public pressure; therefore, a longer time between indictment and trial allows the tension to subside and may make a plea bargain possible. The longer the time between indictment and trial, the more likely the prosecutor's case may weaken, such as when a key witness dies or moves to another state, or evidence is lost.

2. Prosecutor's role.

The prosecutor's role is central in plea bargaining. His discretion in charging gives him the choice of whether to bargain or not, which defendants can plead to reduced charges, and what offenses should be treated more leniently. Policy decisions made within the prosecutor's office impact on the whole criminal justice system. The factors involved in the prosecutor's decision to plea bargain are discussed below.

a. Prosecutor's motivation. When the prosecutor enters into plea negotiations, he simultaneously plays four roles, to one degree or another. First, as an administrator, he is responsible for the fast and efficient disposition of cases with his limited resources. Second, as an advocate, he must maximize the convictions of the persons he has charged. Third, his discretion in charging and making sentence recommendations allows him to evaluate a defendant's social circumstances and the particulars of his crime, in a quasi-judicial role. Finally, that discretion also allows him to circumvent legislative decisions where the law requires a mandatory sentence.

Many factors thus influence the prosecutor's decision to plea bargain.

These include both administrative considerations and the unique circumstances of individual cases. Caseload pressure is most frequently cited as a justification for plea bargaining. As an administrator, the prosecutor may feel pressure to bargain simply to "move cases" expeditiously through the system. The prosecutor must assess how much time a case will take at trial--including pretrial motions, written briefs, suppression hearings, and continuances--and then weigh the benefits for society against the expenditure of scarce judicial resources required. Cases can be divided into two groups: "hard" and "easy" cases. Hard cases involve factual controversies or legal issues as to whether the defendant is guilty or not guilty; these cases may involve unusual amounts of time and resources but nevertheless should go to trial. Easy cases, in which there is overwhelming evidence to support the defendant's guilt, comprise the vast number of routine cases. Most of these can be routinely bargained. This is especially true for cases in which the mitigating circumstances justify other than a normal sentence. Other determinants affecting the decision to plea bargain include the seriousness of the offense; the defendant's prior record; community attitudes toward plea bargaining and toward the particular crime; whether the defense counsel is cooperative or uncooperative with the prosecutor; and, in some cases, the defense counsel's reputation as a trial lawyer.

A 1964 Pennsylvania study attempted to enumerate the degree to which these factors influence a prosecutor's decision.[20] Of the prosecutors surveyed, the results indicated that 27 percent considered sympathy for the

[20]Dominick R. Vetri, "Note. Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," 112 U. Pa. L. Rev. 865, 901 (1964).

defendant as a factor; 32 percent said that harshness of the law affected their decision; and 37 percent acknowledged caseload pressure as a significant factor. Overwhelmingly, 85 percent listed "strength of the state's case" as an important consideration in the decision whether to plea bargain or not.

Several factors determine the strength of the state's case. The credibility of the victim and of any eyewitnesses, the definitiveness of test results, and the presence of directly incriminating evidence all relate to the strength of the state's case. Other considerations include aggravating and mitigating circumstances and the availability of witnesses at trial. When problems arise in these areas, prosecutors justify plea bargaining with the attitude that the defendant is guilty of "something."

A serious weakness in the state's case, necessitating plea bargaining, is most likely to arise if all the elements of the crime cannot be established beyond a reasonable doubt or if constitutional safeguards, procedural or substantive, were not observed in bringing the accused to trial. In example, if the state could prove that a defendant caused the death of another but could not prove he did so with the requisite intent (intentionally) or if proof of his intention was obtained through an illegal serach, the case would be sufficiently weakened to warrant plea bargaining. Even slight doubt as to the procedural validity of the state's case may cause the prosecutor to compromise. Even after conviction by trial, a procedural defense allows appellate litigation.

b. Prosecutorial discretion. The policies set by the chief prosecutor for handling plea bargaining in his department have an effect throughout the criminal justice system. Exclusionary rules are designed to

deter police misconduct in the investigation and arrest of a suspect. Plea bargaining subverts this check and balance system by circumventing trial, where the police improprieties would be discovered and remedied. Because the defendant waives his right to trial, he also loses the right to appeal. Therefore, the prosecutor's discretion in screening and charging are important to the proper administration of justice.

c. Prosecutorial bluffing. When a case has deteriorated to the point where one does not exist at all, due to the unavailability of witnesses or the exclusion of evidence, some prosecutors resort to "bluffing" to save the case rather than forthrightly dismissing the charge. Moreover, in cases where the evidence is enough to sustain a finding of probable cause at a preliminary hearing, but not enough to convict at trial because of some legal insufficiency, prosecutors may also bluff in order to buy time in hope that something will develop in the interim.

Bluffing is defined as misleading the defense counsel to believe that the prosecutor's case is ready for trial. Five factors that may weaken the case are 1) lack of evidence linking the defendant to the crime; 2) questions of intent; 3) legal or constitutional flaws; 4) evidence, especially witnesses, being unavailable for trial; and 5) evidence being inadmissible.[21] Bluffing is achieved by manipulation of information regarding these five factors. Whereas there are laws guaranteeing discovery by the defense, the prosecutor may require that a court order be presented to him before he gives the information out. Less restrictive prosecutors have no qualms about admitting administrative problems but do not want to admit to poor quality

[21] Miller, note 3 supra, at xxii.

of evidence. Most prosecutors draw the line at ethical bluffing; they will not volunteer the information that a case is not ready to go to trial, but they will not lie when asked.[22] Prosecutors generally feel that bluffing to achieve the best deal possible for the public is justified. Especially in cases with a strong factual basis, they believe it serves justice.

d. Charge reduction. As defined earlier, two kinds of concessions can generally be offered in exchange for a defendant's guilty plea: charge reduction and sentence recommendation. Because charging is specifically a prosecutorial function, it is natural that charge reduction should be the dominant concession offered by the prosecutor. The type and number of original charges is within his discretion.

Charge reduction may be beneficial to the defendant in several ways. The degree and number of charges will affect his sentence. It may determine the minimum or maximum term or fall within a class of crimes whose sentences are mandated by law. The conviction is entered onto the defendant's record. Certain crimes, sexual offenses for example, stigmatize the defendant both in prison and in the community and, in many jurisdictions, treatment or community service is mandated for the defendant. His record may affect future sentencing decisions should the defendant be convicted again.

Charge reduction is not viewed as detrimental to judicial or correctional goals. Consecutive sentences for multiple charges are rare. The judge is empowered to weigh the circumstances of the crime, including original charges, in reviewing the sentencing options. The parole board is generally more interested in what the defendant actually did than in what label is

[22] William F. McDonald and James A. Cramer, Plea-Bargaining 21 (1980).

attached to him or his crime in determining how long he must be incarcerated.

The prosecutor may use undue pressure on a defendant through "overcharging." Charging a defendant with an offense at a degree higher than the circumstances warrant is an example of "vertical" overcharging. Two types of "horizontal" overcharging are filing a charge for every criminal transaction and fragmenting a single offense into several component charges.

Some prosecutors do not see their charging practices as abusive. Full and decisive evidence of guilt is not necessary, and not always available, during the early steps of the proceedings. The broader scope of charges may allow evidence to be introduced that would otherwise be inadmissible. Furthermore, no one can be convicted of a crime greater than the one charged. However, higher degrees include lesser offenses.

Nevertheless, overcharging is a powerful lever. The greater the number of charges, the less attractive the alternative of going to trial becomes: there will be pretrial motions on each indictment; the admissiblity of evidence on each charge must be sorted out; and the jury may be overwhelmed by the apparent severity of the defendant's behavior. The defendant is aware of the worst possible sentence he can receive and assumes that if all of the charges against him are proven, he is likely to receive it. All these factors help put pressure on the defense to plea bargain.

e. Sentence recommendation. The second method of plea bargaining is sentence recommendation. Because the ability of the prosecutor to affect sentencing directly is generally limited, very rarely does a prosecutor promise an actual sentence. More frequently, however, the prosecutor will offer to make a sentence recommendation. The prosecutor may also threaten to recommend harsh treatment of the defendant, then agree in bargaining to

stand silent at sentencing instead. Nevertheless, sentencing is a judicial function and represents the basis for another type of negotiation--judicial plea bargaining.

3. Judicial participation.

In most jurisdictions, court rules require some judicial supervision of the plea bargaining process. The most common of these practices involves the judge asking a defendant if his submission of the guilty plea is voluntary and is made with the knowledge that he is forfeiting his right to a trial. In the instance when a defendant pleads guilty but asserts his innocence, many jurisdictions require a cursory judicial inquiry into the factual basis for the plea. Some jurisdictions, as in Hawaii, require that the judge explain the consequences of the guilty plea, including that the judge is not bound by any agreements regarding sentencing. In most jurisdictions, the defendant is allowed to withdraw his plea when his due process has been violated or when an agreement he made will not be honored.[23]

Beyond these limited necessities of protecting the defendant's rights, most jurisdictions follow the recommendations of several prestigious national commissions in prohibiting further judicial involvement in plea negotiations.[24] The reasons offered are several. First, it is felt that the judge sits in a position of power to influence the defendant's choice to plead or not. This may occur overtly, in the form of paternalistic advice or simply as pressure, which the defendant may view as the judge's

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[23] Miller, note 3 supra, at xlvi.

[24] ABA Proj. on Stand. for Crim. J., Stand. Re. to the Admin. of Crim. J.--Pleas of Guilty (1974); ALI, A Model Code of Pre-Arraignment Procedure (1975); and National Advisory Commission on Criminal Justice and Goals, Courts Report (1973).

desire to see the case resolved quickly. Second, it is argued that if a judge participates in plea bargaining, then he cannot remain objective in overseeing the case. This may be because the judge has a preview of the evidence outside the impartiality of the courtroom; the defendant's consideration of the guilty plea precludes the presumption of his innocence, thus prejudicing the judge; or the judge may unduly penalize a defendant who rejected an agreement which the judge helped draft.

Arguments in favor of judicial participation advocate the return of the criminal adjudication process to its lofty ideals. Foremost is the argument that prosecutorial plea bargaining circumvents judicial sentencing authority, which would be returned with the participation of a judge. The presence of a judge would invoke a more formal atmosphere in negotiation sessions, restricting discussion to relevant issues and facilitating the flow of information. If the basis for plea bargaining is sentence differential, then judicial bargaining would enable better regulation of the process and contribute to the knowing choice of the defendant. Furthermore, judicial involvement would decrease, though not eliminate, the possibility that the judge would disregard the agreement.

a. Degrees of judicial participation. The degree to which judges participate in plea negotiations can be divided into four categories. The first involves no participation at all; cases in this category rely exclusively on prosecutorial bargaining. The second category is that of implicit plea bargaining. The third category consists of occasional, vague, or inconsistent judicial activity. The last category is outright involvement

by judges in the negotiation process.[25] These four types of judicial involvement are discussed below.

b. No participation by judge. One problem created by prosecutorial plea bargaining, without participation by the judge, is the abdication of judicial power over sentencing. The prosecutor may offer the defendant a reduction in charges or a recommendation for a lenient sentence. Both concessions may tend to subvert the goals of the criminal justice system. Charge reduction may mislabel the real conduct of the defendant. Definitions in the penal code may necessitate that the defendant plead guilty to a charge that is quite unrelated to the facts. Since a judge cannot sentence the defendant for a crime greater than that charged, charge reduction is a matter of finding a crime that fits the punishment.

Sentence recommendation also may subvert judicial authority. In theory, the judge is not obligated to heed the prosecutor's remarks at sentencing. In practice, though, judges usually follow such recommendations closely. The reasons for this are twofold: 1) the prosecutor may have an adequate understanding of the judge's sentencing philosophy and only make the appropriate recommendation; or 2) the judge may feel pressured to go along in order to validate and continue the plea bargaining system. In the latter case, the judge may feel so overwhelmed with caseload pressure that he may do little more than give his stamp of approval, automatically, to the sentence negotiated by the prosecutor. Although a scrupulous judge will take pains to explain to the defendant that he may not adhere to the

[25] Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I," 76 Colum. L. Rev. 1059, 1061 (1976).

prosecutor's recommendation, the defendant probably views this as a hollow but unavoidable ritual.

c. Implicit bargaining. Where implicit plea bargaining occurs, the judge, despite his absence, exerts some influence over negotiations. The judge is primarily responsible for the speed and efficiency with which his caseload demands are resolved. In order to maintain a high rate of guilty pleas, the alternative--a trial--must appear unacceptable. To achieve this, the judge may sentence defendants convicted at trial more severely than defendants who plead guilty. The rationale most commonly offered for this practice is that the defendant who pleads guilty has taken the first step in his rehabilitation by accepting responsibility for his actions.

d. Indecisive participation. Of judges who do participate in plea negotiations, the majority do so in an occasional, vague, or inconsistent fashion. One element characterizes this category of judicial involvement--indirection. The judge is not willing to take a position, be it strict or lenient, cautious or open-minded. Instead the judge speaks in "hints, suggestions, euphemisms and predictions."[26] He communicates the advantage of pleading guilty without making any specific promises. Rather than specific promises, he makes qualified promises--such as stating the range within which he will consider the sentence or a specific term he will not exceed. Another frequently required qualification is that the PSI report confirm the facts as the attorneys for both sides have presented them. Not only does the judge present qualified promises, he may further influence the

[26] Id. at 1092.

kind of concessions offered by the prosecutor. It is to the judge's advantage that the prosecutor request leniency rather than have to grant leniency themselves.

The reason for this noncommittal stance in plea negotiations is the preservation of judicial prerogative. So long as the judge only intimates his position, he is under no obligation to abide by the agreement and the defendant has no legal recourse should the judge change his mind.

e. Outright participation. The alternative to indirect judicial influence on plea agreements is direct participation by the judge in the role of arbiter. In this role, the judge may attend the negotiations and ensure a modicum of formality and regularity; the judge may go so far as to recommend a disposition to the prosecutor and/or defense counsel; or most frequently, he may review and ratify the agreement.[27]

The procedure that the court follows must guarantee the due process of the defendant. The defendant initiates the process by requesting that a conference be held in open court for the purpose of settling the criminal charges against him. The judge may or may not want the defendant present during negotiations. Transcripts of the conference may be made available should the defendant have a basis for appeal.

One issue that must be resolved before the conference between the attorneys and the judge is convened is whether or not the case can be transferred once negotiations have begun. On the one hand is the concern for judicial impartiality should the case have to go to trial. On the other is the potential for an abuse termed "judge shopping." Judge shopping

[27] John Paul Ryan and James J. Alfini, "Trial Judges' Participation in Plea Bargaining: An Empirical Perspective," 13 L. & Soc'y Rev. 479 (1979).

refers to the practices of defense attorneys employing delays and judicial disqualification to move the defendant's case before a judge known for his leniency. An analogous abuse would be "offer shopping," whereby, once an offer has been presented before the judge, the defendant or his counsel refuses it in hopes that the case will subsequently be transferred.

The advantages of direct and formal judicial participation to the defendant may outweigh the disadvantages. If it is the defendant who initiates negotiations and any statements made to him by the judge are on record, the likelihood that the judge will make coercive statements to the defendant will be minimal. Similarly, if judicial participation in plea bargaining is the norm rather than the exception, the defendant is less likely to view the judge's interest in the case as implied concern that the matter be settled out of court. Some argue that only by involvement in the bargaining sessions can the judge ensure that trade-offs and unseemly deals having little or nothing to do with the individual are prohibited; that the prosecutor has not abused his discretion in overcharging or overrecommending; and that the defendant is adequately represented by counsel who has explored all of the possible defenses and mitigating circumstances on the defendant's behalf. Lastly, the greatest single advantage is that judicial participation substantially increases the certainty of the bargain, thereby alleviating much of the anxiety the defendant feels about the outcome of his case.

f. Factors involving judicial participation. Between the extremes of indirect and direct participation, as described above, many judges choose to participate in plea negotiations on a case-by-case basis. The factors important in a judge's decision include the specificity of statutory law, court rules and case law as to what the judge's role should be, and the

judge's own perceptions regarding his importance to the process. Community size, as an indicator of caseload pressure, has less influence on the single judge than on the local criminal justice system as a whole.[28]

4. Defense counsel's role.

It is the defense counsel's responsibility to act in the best interests of his client. From the standpoint of an advocate for the defendant, it may be difficult to conceive that the defense counsel should agree to anything less than adjudication of the case by trial, where the defendant's innocence is presumed and his guilt requires the highest standard of proof. An alternative view is that the defense counsel's task is to minimize the consequences of the criminal proceedings against the defendant. The defendant must ultimately decide whether to plead guilty or not; however, most defendants are too optimistic about the fairness and accuracy of the trial process or do not fully realize the penalty they may incur by choosing that course. The resultant sentence the defendant would receive, should he be convicted, is influenced by this one tactical decision. One service the defense counsel can perform is a reasonable prediction of the probable outcome of the defendant's case.

It is argued that, in practice, defense counsel does not always provide effective assistance and that plea bargaining diminishes the attorney/client relationship.[29] Defense counsel is sometimes under financial, bureaucratic, or personal pressures that make the guilty plea a convenient expedient.

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[28] Id. at 499-500.

[29] Albert W. Alschuler, "The Defense Attorney's Role in Plea Bargaining," 84 Yale L. J. 1179 (1975).

Counsel may not fully explore the possible defenses available in a case and therefore make an erroneous prediction of the outcome. The Supreme Court concurs:

> It cannot always be assumed that the presence of counsel automatically insures the defendant has not been misled into pleading guilty.[30]

a. Three types of defense counsel. The three types of defense counsel are privately retained, public defender, and court-appointed. Each type of counsel has advantages that are beneficial to the defendant, particularly regarding concessions, but each can also be handicapped by conflicting interests within the criminal justice system and the legal community as a whole.

b. Privately retained counsel. The most capable attorneys are usually attracted to private enterprise. Because the private attorney makes his reputation getting his clients acquitted, hiring a private defense attorney may be a tremendous asset to the defendant. His willingness to go to trial, his ability in the adversarial setting, and his willingness to appeal significantly influence the concessions he may get for a defendant who pleads guilty.

The attorney's reputation, however, does not always serve the defendant's interest. With notoriety comes more clients for the attorney; he may accept more work than he can handle. It may become financially expedient to dispose of cases as quickly as possible, especially those clients who have little money to spend on their defense. The extreme example of this behavior is the "cop-out" lawyer--one who enters into a case with the intention of securing a guilty plea.

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[30] Id. at 1197, citing United States ex. rel. Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967).

c. Public defender. Several factors favor the defendant with a public defender rather than a private attorney. Because the public defender is a salaried position, he is not constrained by monetary pressure to plea bargain all but the spectacular and easily won cases. Also, he regularly works with the prosecutor and over time usually develops mutual respect and an effective working relationship. This is especially important as it relates to the exchange of information. This information may be helpful to a defense counsel not only in pointing out the weaknesses of possible defenses but also evaluating the strength of the prosecutor's case. The prosecutor may not be as open with a private attorney whom he does not know or does not trust. Furthermore, the public defender's day-to-day practice in the criminal justice system gives him the knowledge of an individual judge's sentencing practices as well as attitudes toward particular types of crimes. Finally, the public defender only handles criminal cases and is usually well-versed in the latest developments in the criminal law. These factors all enable the public defender to better evaluate cases for plea bargaining.

The bureaucratic nature of the public defender's office also creates certain problems. Chief among these is caseload pressure. Just as with the prosecutor and judge, the public defender must move a large number of cases through the system. One potential abuse that results from a heavy caseload is "trade-off." The public defender or prosecutor may make concessions in one case in return for a favor in another. Also, when defense counsel represents more than one defendant in a case, the guilty plea of one or more may be traded for leniency for the others. Some have argued that caseload pressure can also be a lever to secure concessions. The public defender may threaten to take all of the cases of a certain charge, gambling

for instance, to trial or demand all of the cases heard by a particular judge be tried. There is little evidence that this in fact happens.

As a class, the clients of the public defender are usually financially disadvantaged. In addition, they are more likely to have a lower level of education, be in a minority, and have prior records of criminal behavior. Furthermore, those defendants are more likely to be incarcerated pending trial. These social concerns will affect what kinds of concessions are offered and how readily they are accepted.

Appointment of a public defender as a defense counsel may have another significant detrimental effect: breakdown of the attorney/client relationship. The defendant assigned a public defender has no choice of counsel. Therefore, he may have no basis for trust or confidence in his attorney's advice. The defendant may view a private attorney as an advocate on his behalf versus a public defender as a member of the "system." In some jurisdictions, an indigent defendant may not even have a public defender that follows his case throughout the proceedings, but a different public defender at each step of arrest, indictment, and trial.

d. Court-appointed attorneys. Court-appointed attorneys are drawn from the ranks of private lawyers and paid a nominal fee to represent indigent defendants. These may comprise two groups: "draftees" and "volunteers." Availability for court appointment may be a condition of belonging to the local bar. Many lawyers who have long since specialized in civil law or who maintain membership though they no longer practice may be unwilling participants in the criminal court's activity. This may result in the defense counsel's eagerness to secure a plea and put his objectionable duty behind him. On the other hand, an attorney may volunteer for court appointment,

possibly out of a sense of social responsibility or probably as a means to gain courtroom experience. In this latter case, the defendant may suffer a penalty for going to trial where a guilty plea would have been more advantageous.

e. Question of innocence. It has been assumed thus far that the defendant who pleads guilty has in fact committed some criminal act. This is not, however, always the case. Some defendants have submitted guilty pleas while still asserting their innocence and stating that their pleas were made voluntarily. The reasons that a defendant would make such a plea lies in the uncertainty of the trial process and, in some cases, the certainty of especially harsh treatment upon conviction. One such defendant, whose case is described in the literature, pled guilty to manslaughter with a 30-year prison term rather than go to trial for murder and risk the death penalty.[31]

The problem that defense counsel faces is whether or not to allow the defendant to plead guilty to a crime he did not commit. Some attorneys take the moral view that allowing such a plea is unethical; others refuse to allow the plea out of fear that the defendant may sue them for malpractice at some later date. Some defense attorneys justify accepting the plea so long as there is a significant chance that the defendant will be convicted at trial and thus be subject to a harsher sentence. An even finer distinction is drawn between committing the crime and admitting to committing the crime. The psychological make-up of the defendant may not allow him to admit his guilt or he may believe that his actions, in self-defense for instance, were

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[31] Id. at 1290.

not criminal as defined by the law.[32]

5. Sentencing structure.

The kinds of plea agreements made may be greatly affected by the overall sentencing structure of the jurisdiction. Conversely, administrative considerations, requiring a high rate of guilty pleas, may impede implementation of the stated sentencing policy. Two sets of considerations that must be taken into account are 1) whether sentencing is legislatively or judicially fixed; and 2) whether maximum or minimum terms are set.[33]

The difference between legislatively-fixed and judicially-fixed terms is one of discretion. The objectives of legislatively-fixed terms are uniformity in sentencing and delegating the responsibility for release from prison to the parole board. The purpose of judicial discretion is to place the decisions of incarceration and rehabilitation in the hands of the judge, the impartial arbiter of the facts. Plea bargaining may subvert both systems of discretion, in different ways. In systems of legislatively mandated punishment for particular crimes, the predominant concession of bargaining is charge reduction. The range of terms the defendant would spend in prison may be determined by the prosecutor, with the parole board retaining only secondary responsibility. Where discretion in sentencing is vested in the judiciary, plea bargaining may have one of two effects: judges may abdicate this authority by regularly following prosecutorial sentence recommendations or judges may impose totally independent sentences and exert a more direct role in the plea bargaining process.

[32] Id. at 1291.

[33] Lloyd E. Ohlin and Frank J. Remington, "Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice," 23 Law & Contemp. Prob. 495 (1958).

Maximum and minimum terms set the ranges of time a defendant must stay in prison if he is incarcerated. Charge reduction is used in systems that have mandatory maximums for particular degrees of an offense as well as provision for consecutive terms. Since the defendant must serve a fixed percentage of the maximum, in both examples, it is to his advantage to manipulate the charges to the lowest possible. Low fixed minimum terms usually pose no problems for either charge reduction or sentence recommendations. The defendant must serve some time incarcerated regardless of the degree of the crime and the minimums are not so substantially different as to make probation a predominant concession. High fixed minimums, however, are greatly resisted by the courts. They allow no mitigating influences after the in/out decision has been made, making probation the major bargaining concession.

D. Issues in Plea Bargaining.

1. Advantages and disadvantages.

Although plea bargaining is used extensively in jurisdictions throughout the United States, that does not mean there is unequivocal support for the practice. There are some advantages to plea bargaining; frequently mentioned is its effect on caseload pressure. On the other hand, some argue that plea bargaining effectively denies an accused due process of the law. Between these extremes are a number of issues, which are viewed as advantages or disadvantages depending on one's position in the criminal justice system. Below are listed some of the arguments that must be examined before the value of plea bargaining can be determined. It must be remembered that the degree to which any one of these arguments is valid will vary from one jurisdiction

to the next. Furthermore, many of these arguments are voiced without the benefit of substantiating data.

a. Coerciveness. Plea bargaining is inherently coercive. Judicial inquiry provides only minimal safeguard against impropriety on the part of the prosecutor and the defense counsel. A defendant may not admit to facts in question yet insist that his plea is both voluntary and knowing. That plea bargaining is the predominant adjudicative process may suggest to the defendant that it is the preferred process. The very basis of plea bargaining is coercive: the defendant must surrender certain constitutional rights in order to secure the benefits of the agreement.

b. Unseemliness. Negotiation of plea agreements is conducted outside of the courtroom, usually excluding the defendant. There is limited accountability for the conduct of public officials and attorneys during the negotiations. The public's confidence may be eroded by the notion that the prosecutor is giving undue concessions to the defense in an effort to bolster his conviction record, possibly for political purposes. Judges influence prosecutors, directly or indirectly, to recommend leniency rather than be forced to grant leniency themselves in the face of contrary public sentiment. The defendant may feel that his attorney, retained or appointed, is betraying confidences and perhaps trading his case for concessions in another. The victim feels that the punishment reflects the relationship between the defendant's attorney and the prosecutor and judge more than retribution for the transgression against him.

c. Expediency. Guilty pleas account for nearly 90 percent of the convictions in many jurisdictions and plea bargaining is the predominant means used to achieve that. The resources of the prosecutor and the court

are under significant pressure to process cases quickly. Without the offer of a concession or threat of a penalty, there is little reason for a defendant not to go to trial. Therefore, without plea bargaining those resources must be greatly expanded to provide all defendants with a "speedy trial."

d. Individualizes treatment/punishment. Plea bargaining shifts the focus of the adjudicative process away from arbitration of the facts, towards treatment of the offender. Because plea bargaining occurs before the defendant goes to trial and because the prosecutor can state with reasonable certainty the probable sentence that the defendant will receive, plea bargaining upholds the idea of swift and sure punishment. Under sentencing laws that allow widely disparate terms for similar offenses or particularly harsh terms for offenses of a higher degree, plea bargaining can be used to individualize treatment/punishment to fit the aggravating or mitigating factors of the defendant's personality and the circumstances of the crime. Some argue that admission of guilt is the first step towards rehabilitation.

e. Ensures certainty. It is not always certain that the trial process convicts those who are guilty and acquits those who are innocent. This uncertainty affects both the prosecution and defense. A defendant who asserts his innocence at trial may nonetheless be convicted and stands a chance of receiving a harsher sentence because of it. A defendant who is factually guilty may be acquitted at trial if the prosecution cannot establish legal guilt. However, if he is factually guilty and pleads guilty, he may get less punishment than he deserves but he nevertheless gets something. The certainty of conviction and punishment is increased.

f. Circumvents the philosophy of the law. In practice, plea bargaining circumvents constitutional safeguards and subverts the separation of power in government. The prosecution enters into plea agreements in some cases that have substantial weakness, or in other words, less than the required "proof beyond a reasonable doubt." Where the issue in question is one of legal technicality, plea bargaining removes the possibility of appellate litigation and therefore new case law. Plea bargaining confounds guilt with sentencing, making the plea conditional to certain concessions. Prosecutorial charging and recommendation practices usurp legislative intent and judicial authority. Furthermore, plea bargaining is predicated on the immediate needs of the prosecutor and the court, with little regards to the goals of the correctional system.

g. Based on irrelevant factors. Similar defendants, having committed similar crimes, receive different sentences depending on the prosecutor, the criminal justice system, and the defense counsel. Prosecutors differ in their levels of experience which affects how they assess the strength of a case and, in turn, the concessions they are willing to give. Court scheduling, publicity surrounding the crime of the defendant, the method by which the prosecutor and judge attain office, and prison conditions are some of the variables that underlie a decision to plea bargain or not. The defense attorney has reasons of his own, including financial and bureaucratic, that often make plea bargaining a favorable alternative.

h. Not a contract. When a defendant pleads guilty, he surrenders his right to a trial. This decision is usually based on an agreement with the prosecutor for concessions that will ultimately affect his sentence.

However, there is no guarantee that the judge will follow the prosecutor's recommendation or, knowing the initial charge and circumstances of the crime, be lenient in sentencing. In this sense, then, the agreement is not a contract. Significant rights are surrendered without firm guarantees of the ultimate benefits.

i. Reduces deterrence. Through plea bargaining, the defendant may manipulate the criminal justice system to his advantage. In exchange for saving the state the time and effort of a trial, he may receive concessions that minimize the consequences he must suffer. Either the charge for which he is convicted does not reflect the seriousness of the crime or the sentence he receives is less than his conduct warrants, or both. Furthermore, defendants with prior convictions may be able to secure better pleas on the basis of their earlier experiences in bargaining. In any case, the deterrent effect of the law is diminished.

j. Increases deterrence. It has been said that plea bargaining achieves "substantive justice" in the sense that the desired ends of the law are achieved despite the impedance of cumbersome procedural safeguards. A defendant who is factually guilty may be acquitted at trial on the basis of a technicality; plea bargaining provides a conviction on some charge that bears a relationship to the actual crime. A greater rate of convictions and, thus, a higher rate of punishment for crimes committed means the deterrent value of the law is increased. Awaiting trial, the anxiety that the defendant feels is focused on the event of the trial rather than on the consequences of his actions. The defendant is likely to consider poor representation or prejudice of the judge and jury as reasons for his conviction and view his sentence as retribution by the system against one of its outcasts. Plea

bargaining begins with the defendant admitting his guilt and his sentence, then, focuses on punishment for the crime. The more direct correlation between the crime and the consequences and the swifter punishment both enhance the deterrence of the law.

Plea bargaining is also a useful tool in the conviction of offenders besides the defendant. A defendant may have engaged in criminal activity with others, though he may have played a relatively minor role. The prosecutor can exchange concessions in his case to obtain information or testimony on one or several of the others involved in the same or a more serious offense. More guilty parties, especially the ones more responsible for the criminal acts, are brought to justice, thereby increasing deterrence.

k. Improves the trial process. Most of the cases that are resolved by plea bargaining are "easy cases," in which there is substantial reason to believe that the defendant is guilty. This reserves the trial process primarily for "hard cases," ones that involve real disputes as to the facts or interpretation of the law. These cases receive the full benefit of the adversarial setting of the trial and the objectivity of the judge and jury. The presumption of innocence and adversarial roles of the prosecution and defense retain their legitimacy.

2. Abolition or reform.

Current methods of plea negotiation evolved in response to changes in the legal system that increased both the number of criminal cases and the time required to adjudicate them. The development occurred by default rather than by design and as a result, plea bargaining, in most jurisdictions, lacks specified intention or direction.

Two groups of critics have tried to influence this development. Those

groups comprise the abolitionists and the reformers. Both see significant problems in the practice of plea bargaining but disagree as to whether plea bargaining is a legitimate function of our system of law or merely an expedient.

The abolitionists contend that the tenets of plea bargaining are irreconcilable with our sense of justice. First, they argue, any process of adjudication that requires the defendant to waive his constitutional rights is coercive. When a defendant pleads guilty pursuant to a plea agreement, he waives his constitutional rights to trial, to confront witnesses, to a jury of his peers, etc. Second, they contend, the practice cannot be justified by any rationale of sentencing. Plea bargaining depends on sentence differential, i.e., on a more lenient sentence for those who plead guilty than for those who are found guilty. As such, those who plead guilty receive less punishment than they should if they in fact committed their crimes and if they didn't, they should not have been punished at all. In either case, injustice results.[34]

The reformers argue that plea bargaining, at its worst, is a necessary evil and, at its best, can be a legitimate process in the criminal justice system. Scholars approach the problem from different points of view and put forth several different arguments. Some state that plea bargaining cannot be eliminated. No matter where you place the restriction, the exercise of discretion, approximating plea bargaining, will occur elsewhere in the system. Furthermore, the system will benefit from guilty pleas so

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[34]Kenneth Kipnis, "Plea Bargaining: A Critic's Rejoinder," 13 L. & Soc'y Rev. 555, 558 (1979).

long as defendants believe they will be rewarded for their cooperation.[35] Others argue against the intrinsic necessity of the trial process itself. The trial is not infallible in its determination of the truth and there is no real need for the adversarial setting to adjudicate "easy cases" of unquestioned guilt.[36] To allay the public's fear that plea bargaining affords admitted criminals excessive and undue leniency, they remind us that more persons are convicted via plea bargaining than would be if all cases went to trial. Moreover, police and prosecutorial screening, pretrial discovery, and judicial inquiry into the factual basis of a plea minimize the hazard that an innocent man will be convicted.[37]

Problems that arise in the practice of plea bargaining fall into several categories. Foremost is the abuse of prosecutorial discretion. The possibilities for abuse include overcharging, bluffing, personal bias toward a defendant or his counsel, corruption, and inconsistency in recommendations. The judge may also abuse his authority. He may use his position to influence a defendant into pleading guilty, influence one or the other of the attorneys to accept unrealistic concessions, or exercise his sentencing prerogative capriciously. Inequities in the system, including lack of staff, overcrowded court calendars, and financial pressures, may cause the prosecutor or defense counsel to engage in negotiations against the interests of justice. Similarly, the defendant may be pressured

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[35] McDonald, note 1 supra, at 388.

[36] Jonathan D. Casper, "Reformers v. Abolitionists: Some Notes for Further Research on Plea Bargaining," 13 L. & Soc'y Rev. 567, 570 (1979).

[37] Thomas W. Church, Jr., "In Defense of 'Bargain Justice'," 13 L. & Soc'y Rev. 509, 517, 519 (1979).

into bargaining just to get out of jail. Yet, he may not fully understand his rights, his options, or the consequences of his decision.

These dangers are generally acknowledged by both the reformers and the abolitionists. The reformers believe that the dangers can be overcome through proper court rules, administrative procedures, and prosecutorial guidelines. Plea bargaining can thus retain its legitimate place in the system. The abolitionists, however, feel that the disadvantages are too extreme and, being part of the nature of plea bargaining itself, can never be corrected through reforms. They argue that nothing can adequately improve the system short of total abolition.

E. National Studies.

There are various views on the practice of plea negotiation and plea agreements. Some see this practice as a necessary tool in the criminal justice system because it accelerates the disposition of cases, alleviates heavy caseloads, and eliminates uncertainties. Others believe that it is a source of injustice in the judicial process.

This section presents the views of the advisory committees of the National Advisory Commission, the American Bar Association, and the American Law Institute. Each of these committees seeks to reform plea bargaining practices by creating specific standards for the disposition of criminal cases in which a plea of guilty is entered, whether as a result of a plea agreement or not.

1. National Advisory Commission.

In 1973 the National Advisory Commission on Criminal Justice Standards and Goals (N.A.C.) considered plea bargaining and adopted a dual

approach. The Advisory Commission believes that efforts towards reform should be encouraged, but that the ultimate goal should be the complete abolition of plea bargaining.

Standard 3.1--Abolition of Plea Bargaining

The N.A.C. recommended the following:

> As soon as possible, but in no event later than 1978, negotiations between prosecutors and defendants--either personally or through their attorneys--concerning concessions to be made in return for guilty pleas should be prohibited. In the event that the prosecution makes a recommendation as to sentence, it should not be affected by the willingness of the defendant to plead guilty to some or all of the offenses with which he is charged. A plea of guilty should not be considered by the court in determining the sentence to be imposed.
>
> Until plea negotiations are eliminated as recommended in this standard, such negotiations and the entry of pleas pursuant to the resulting agreements should be permitted only under a procedure embodying the safeguards contained in the remaining standards in this chapter.[38]

The N.A.C. does not condemn guilty pleas per se, but only the system by which pleas are entered in exchange for concessions. If there are no contestable issues in a case, prosecutors should not litigate.

The Advisory Commission argues that plea negotiation reduces the rationality in processing criminal defendants. It holds that whether or not a defendant is convicted should depend on the evidence available to convict him. Likewise, his disposition should depend on the action that would best serve rehabilitative and deterrent needs. Both of these fundamental principles are compromised by plea bargaining.[39]

The elimination of plea bargaining would remove incentives for prosecutors to overcharge or inappropriately charge. At the same time,

[38]National Advisory Commission on Criminal Justice Standards and Goals, Courts Report 46 (1973).

[39]Id. at 48.

the N.A.C. argues, careful screening, the diversion of cases, and a streamlined trial process could help avoid any increase in caseloads which may result.[40]

The N.A.C. acknowledges that total elimination will take time and therefore have designed the following standards to improve and upgrade the plea negotiation process as an interim measure before prohibition is accomplished:

> Written Agreement (Standard 3.2): A record must be kept of the terms of the plea agreement and the judge's reasons for accepting or rejecting such a plea. There is a need to raise the visibility of the entire plea negotiation process as a way to regularize the administrative process.
>
> Prosecutor's Standards (Standard 3.3): Each prosecutor's office must formulate policies and practices governing all members of the staff when engaged in plea negotiations, to ensure uniform implementation of the practice. The policies should consider the impact of a trial on the offender, the role a plea agreement may play in rehabilitating the offender, the value of trial in fostering the community's confidence in law enforcement agencies, and the assistance rendered by the offender. The policies should specify that weaknesses in the prosecutor's case should not be considered in determining whether to permit a plea agreement.
>
> Time Limit (Standard 3.4): Each jurisdiction should set a time limit in accepting plea agreements. This is to insure the maintenance of a trial docket that lists only cases that will go to trial, thus saving a jurisdiction substantial time and money.
>
> Defense Counsel (Standard 3.5): The defendant must be represented by counsel during the plea negotiation process.
>
> Overcharging (Standard 3.6): Prosecutors are prohibited from giving inducements to enter a guilty plea and from the following: 1) charging or threatening to charge a defendant where there is insufficient evidence to support a guilty verdict; 2) charging or threatening to charge a defendant with a crime not ordinarily charged in the jurisdiction; 3) threatening a defendant with the probability of a more severe sentence if he pleads not guilty; or 4) failing to grant full disclosure of exculpatory evidence. The provisions in this standard seek to eliminate discriminatory practices such as overcharging and oversentencing.

[40]Id. at 47.

Acceptance of Plea (Standard 3.7): The court should not participate in the plea negotiations, but it should inquire as to the existence of any agreement whenever a guilty plea is offered, carefully review the agreement, and make specific determinations as to the acceptability of the plea. The court should require the defendant to make a statement concerning the commission of the offense to which he is pleading. This provision insures that there is factual basis for the plea, removes any doubt of the defendant being innocent, and maximizes the information before the judge at sentencing. The court should not accept a plea in the following cases: 1) counsel was not present during negotiations; 2) the defendant is not competent or does not understand the charges and proceedings against him; 3) the defendant was reasonably mistaken or ignorant as to the law which affected his decision to enter into the agreement; 4) the defendant does not know his constitutional rights and how the guilty plea will affect those rights; 5) the defendant was denied a constitutional right which he did not waive; 6) at the time in which he pled guilty, the defendant did not know that a mandatory sentence or maximum sentence may be imposed; 7) the defendant was offered improper inducements to enter the guilty plea; 8) the evidence is insufficient to support a guilty verdict; 9) the defendant continually asserts the facts of his innocence; and 10) the acceptance of such plea would not serve the public interest.

The standard further recommends that a representative of the police department be present at the time a guilty plea is offered to answer any questions the judge may have. The court must also record a complete statement of the reasons for the acceptance or rejection of the plea. This provision insures that the defendant understands the consequences and voluntarily waives his rights. Should the court discover anything improper it may be able to correct the situation.

Sentencing (Standard 3.8): A guilty plea, either as charged or to a lesser offense, should not be considered in determining the sentence of the defendant.

2. American Law Institute.

The American Law Institute (A.L.I.) formulated guidelines for procedures relating to guilty pleas, which are included in A Model Code of Pre-Arraignment Procedure (1975). The A.L.I. proposes to retain plea negotiation, as it alleviates the time and trouble involved in disposing case overloads and eliminates the risks inherent in litigation. As indicated in the commentary section of the guidelines, the A.L.I. prefers

to make the process of plea negotiation visible and to regulate it, rather than to abolish it.

The standards set forth in Article 350 guide the court in its determination on whether to accept a plea and its inquiries of the circumstances leading up to the plea. These standards, described below, are intended to regulate and legitimize the plea negotiation process.

Section 350.1 makes specific recommendations to the manner in which the defendant enters his plea. The defendant himself must be present in court to enter his plea and may plead to other offenses within the jurisdiction of the court.

A critical provision is the suggestion that a defendant be afforded the opportunity to retain counsel. If there is no attorney, a defendant must be afforded sufficient time before being required to plead. The court should not accept the plea until the defendant has had time to deliberate after being advised by the judge of his right and the consequences of pleading guilty (Section 350.2).

Certain standards are set forth for the procedure of plea negotiation. The guidelines prohibit the court's participation in any plea negotiation and prohibit any inducements of a guilty plea by the prosecution (Section 350.3).

The judge has a crucial role in maintaining the integrity of the guilty plea. The guidelines provide that the court advise the defendant of his rights relating to the plea and the possible consequences of a plea of guilty (Section 350.4). This function includes determining that the defendant understands the charge; informing the defendant that by pleading guilty he forfeits his right to jury trial; and explaining the maximum,

minimum, and additional sentences to which the defendant would subject himself by pleading guilty. The court also has to determine whether the plea was voluntary. If the plea was reached as a result of plea bargaining, the court has to advise the defendant that the court is not bound by the agreement (Section 350.5).

Since the court is not bound by plea agreements, the defendant should have the right to withdraw his plea if the agreement is not accepted. The court, after pronouncing the sentence on a defendant who has pled guilty, must inquire of the defendant whether the sentence violates any agreement. Should there be any inconsistency, the court must entertain a motion to withdraw the plea (Section 350.6). If a guilty plea is withdrawn, the plea negotiations and agreement should not be admissible in any criminal, civil, or administrative proceeding (Section 350.7).

Section 350.8 stresses the necessity of a verbatim record of the proceedings of plea negotiations and agreements. Such record should include the court's advice to the defendant; its inquiries of the defendant, defense counsel, and the prosecutor; and any responses.

Finally, Section 350.9 places a limitation on collateral attacks on conviction. This guideline ensures that allegations of non-compliance with guilty plea procedures shall not be a basis for review of a conviction after the appeal period has expired.

3. American Bar Association.

In 1974, the American Bar Association Project on Standards for Criminal Justice (A.B.A.) concluded that guilty pleas were a necessary and proper part of administration:

> . . . the objective of the following standards is not to bring about a substantial shift away from the practice whereby trial-

> avoiding pleas are obtained and accepted. Rather, the attempt is to formulate procedures which will maximize the benefits of conviction without trial and minimize the risks of unfair or inaccurate results.[41]

The standards set forth by the A.B.A. concern concessions granted under certain defined circumstances. As they duplicate those promulgated by the N.A.C. and the A.L.I., outlined above, they will not be repeated here.

4. Conclusions.

The three national advisory committees are in agreement that reforms are needed to improve plea bargaining practices in the United States. These improvements consist of raising the visibility of the entire plea negotiation process and standardizing many aspects of the practice. They contend that these changes, embodied in their standards, would help curb abuses and restore confidence. The National Advisory Commission holds that such improvements are only temporary aids to justice, that true justice can only be achieved by abolishing plea bargaining. On the other hand, the other two committees believe that, with the reforms outlined above, plea bargaining can be a legitimate part of the criminal justice process.

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[41] ABA Proj. on Stand. for Crim. J., Stand. Re. to the Admin. of Crim. J.--Pleas of Guilty 301 (1974).

II. PLEA BARGAINING IN HAWAII

A. Legal Framework.

In Hawaii, plea bargaining is not governed by state statute or county ordinance. The Hawaii Revised Statutes contain no direct reference to plea bargaining. The legislature has not addressed the subject and, it is beyond the jurisdiction of the councils of the various counties to enact ordinances affecting it.

However, while the statutes are silent with respect to plea bargaining or plea negotiations between the state as represented by the prosecutor and a defendant in a criminal proceeding, the Hawaii Supreme Court has set forth its position in a set of rules promulgated by the court pursuant to Article VI, Section 7 of the State Constitution known as the Hawaii Rules of Penal Procedure. These rules govern all criminal proceedings commenced in the state courts and have the force and effect of law.

Rule 11(e) of the Hawaii Rules of Penal Procedure, entitled "Plea Agreement," is the rule which addresses the issue of plea bargaining. First, Rule 11(e) recognizes the reality of plea bargaining and expressly authorizes the prosecutor and a criminal defendant to enter into an agreement wherein the prosecutor agrees to take certain actions, such as dismissing other charges, in exchange for the defendant's pleading guilty to the charge in question. Further, it mandates that the court accepting the guilty plea not get involved in the discussions leading to the plea agreement, provides that the court not be bound by such an agreement, and allows the defendant to withdraw his guilty plea if the prosecutor fails to comply with his part of the bargain.

Finally, the court is mandated not to accept a plea pursuant to a plea bargain unless the defendant is fully informed that the court is not bound by such an agreement and evidence of a guilty plea later withdrawn, a plea of nolo contendere (no contest), or the discussion relative thereto, is made inadmissible in any civil or penal proceeding against the person who made the plea or offer to plead. Thus, the Hawaii Rules of Penal Procedure provide the basic framework and ground rules within which plea bargaining occurs in Hawaii's state criminal justice system.

In a similar manner, the Federal Rules of Criminal Procedure govern plea bargaining as it occurs in the federal criminal justice system in Hawaii. Rule 11(e) of the Federal Rules of Criminal Procedure, entitled "Plea agreement procedures," is the rule which addresses the issue of plea bargaining.

The federal rule is similar to the state rule. Federal Rule 11(e) recognizes the existence of plea bargaining and authorizes the government to enter into a plea agreement with a criminal defendant. However, unlike the situation under the state rule, the government is restricted as to what it can agree to do for the defendant. It can only agree to do three things: 1) dismiss other charges, 2) recommend a particular sentence, or 3) agree that a specific sentence is the appropriate disposition of the case.

Moreover, under subsection (4) of Rule 11(e), the defendant is afforded the opportunity to withdraw his plea if the court rejects the plea agreement, unless the agreement involves the government making a sentence recommendation. In the latter case, the court advises the defendant prior to accepting or rejecting the plea agreement that it is

not bound by such an agreement and that the defendant has no right to withdraw his plea should the agreement be rejected. In the state system, of course, a defendant is allowed to withdraw his guilty plea only if the prosecutor fails to comply with his part of the plea bargain.

Finally, as under the state rule, a guilty plea later withdrawn, a plea of nolo contendere, and plea discussions are not admissible in evidence against the defendant in any civil or criminal proceeding in the federal courts.

The state and federal rules notwithstanding, it is apparent that the prosecutor has broad latitude in plea bargaining cases inasmuch as these rules are basically procedural in nature. He has, first and foremost, the discretion to prosecute or not prosecute any given criminal offense. In the American system of jurisprudence, this is the role and function assigned to the public prosecutor. He can plea bargain cases or not, as he sees fit; he can plea bargain only property crimes and refuse to plea bargain violent crimes against the person or plea bargain solely for the purpose of reducing his workload. The point is, in the absence of statutes, and given the non-substantive nature of the rules of court which apply, plea bargaining in Hawaii reflects, to a large extent, the philosophical posture of the prosecutor in office.

B. Current Policies and Procedures.

In the City and County of Honolulu, Prosecutor Marsland's position towards plea bargaining reflects his overall "get tough" philosophy against crime and criminals. In general, plea bargaining does not occur unless there is a bargain for "the people." A case would never be bargained if

only the defendant received a bargain. Moreover, the standing policy of the office is that a case should be lost at trial rather than plea bargained to the point where the offense, and the punishment affixed thereto for which the guilty plea were obtained, no longer fit the crime. Only if a critical piece of evidence were lost, or a key witness were now unwilling to testify, or some other serious flaw developed in the case would the prosecutor affirmatively attempt to plea bargain and try to salvage something from the case. And, only under the most unusual circumstances would a violent crime be plea bargained.

Otherwise, the prosecutor's office may plea bargain depending upon the following factors, but only for cases involving property crimes:

1) the number of similar offenses for which the defendant is charged, e.g. if a defendant is charged with ten burglaries, the office would not object to plea bargaining and dismissing some of the charges in return for guilty pleas to the remaining charges;

2) the type of witness involved--their availability, credibility, and willingness to testify--e.g. if a case involves a witness who is reluctant to testify the office would not be adverse to some form of plea bargaining;

3) the judge before whom the case is pending, e.g. if a case is pending before a certain judge who is distinctly defense-oriented and where the chances of winning any kind of conviction at trial, almost assuredly jury-waived, are practically nil, then the office again would not be adverse to plea bargain; and

4) the possibility of trading one case for another involving a more serious crime, e.g. dismissing a burglary case against a defendant who is willing and able to help secure a conviction in a homicide.

The police officers and the victims involved in a plea bargained case are usually informed about any kind of agreement made with a defendant, but they may or may not be consulted prior to the completion of an

agreement. The prosecutor's position is that a determination of the state of the evidence and the probability for success at trial should be made by attorneys and not those who may not be fully aware of problems in the legal sphere. Thus, the plea bargain decision is strictly a function of the prosecutor's office.

The initial recommendation for a bargain may come from defense counsel or the deputy prosecutor assigned to the case. However it is derived, the proposed bargain is reviewed by a prosecutor who is a division head and ultimately by the First Deputy Prosecuting Attorney for his approval. While there are no formal, written guidelines for the First Deputy to follow, he makes his decisions using the following operational criteria:

1) Justice. If the facts show a defendant is innocent, nolle prosequi the case. If the facts indicate that a lesser charge is more accurate and reflective of the true nature of the criminal conduct, reduce the charge unilaterally.

2) Accurate charging. The original charge(s) must reflect as closely as possible what is accurate and provable. It must be the charge that can be sustained at trial.

3) Strength of case. It is better to gain a criminal conviction on a reduced charge than to lose the case entirely. This may arise when witnesses become unavailable or otherwise the case seriously deteriorates.

4) Ultimate disposition. Lower charges may be dropped if the defendant pleads guilty to the highest charge; multiple charges of the same type and class may be dropped if the defendant pleads guilty to one or more of those charges. This procedure achieves the same end result in sentencing as proceeding with all the charges because of the concurrent sentencing statute, while saving precious, scarce judicial resources. It is "giving away ice in winter."

5) Violent crimes, multiple offenders, career criminals. There is a serious effort to make no concessions to these categories, except in 1), 2), 3), and possibly 4) above.

6) Victims/police. Victims and police are to be notified prior to the conclusion of a plea bargain in all serious cases. If

either party has serious objections, consideration of that point of view is to be made. The ultimate decision must lie with the prosecutor.

7) Accuracy of ultimate charge. A case must be taken to trial if a bargain cannot be made on a charge which accurately reflects the criminal conduct. For instance, rape, kidnapping, and theft cannot be reduced to theft. It is better to lose at trial on rape than to plea bargain down on a weaker charge.

8) Victim's interests. A case, even a violent one, can be plea bargained if it would be harmful for the victim to be subjected to a trial (such as a rape victim where public testimony would be psychologically damaging).

9) Trading up. It is proper to plea bargain a non-violent case leniently (or even dismiss the charge) if the defendant is willing to provide necessary information and evidence in a more serious crime.

These criteria consider the interests of 1) justice, 2) the victim, and 3) society. Plea bargains should be in the interest of justice and not just for the sake of expediency, convenience, and economy. Favoritism is expressly disallowed; the opportunity for corruption is minimized as much as possible by procedures.

Although these criteria have been uniform since the beginning of the plea bargaining reform in the mid-1970's, some differences in approach have been shown by succeeding prosecutors. The primary differences have involved willingness to bluff and to plea bargain in order to avoid certain judges:

1) Bluffing. Some prosecutors contend that it is essentially dishonest to bluff the defense and make it a policy to reveal the strength of a case when negotiating. Others believe that it is entirely ethical to bluff the other side to arrive at the best bargain for society.

2) Judge selection. Some would weigh the judge's tendencies in considering plea bargaining, tending to bargain cases away from certain judges who seem to be "defense oriented" in order to attain a conviction and some punishment, rather

than lose everything. Others would proceed regardless of the judge.

C. Recent History of Plea Bargaining Practices.

The data presented in this study were extracted from cases which were terminated in 1980. As such, they represent cases which were initiated, plea bargained and/or prosecuted sometime prior to Honolulu's present elected prosecutor taking office in January, 1981.[42] Thus, an attempt was made to ascertain the plea bargaining practice in Honolulu during the tenure of the city's last two appointed prosecutors who, between them, held office from 1975 through 1980.

Maurice Sapienza took office in 1975 and remained there until 1978. During the first year of his tenure, he severely limited the rather loose plea bargaining practice he inherited from his predecessor. While plea bargaining was still allowed during this period of time, it occurred only under the most unusual circumstances and then only with the personal approval of the prosecutor. Surprisingly, there was no drastic increase in the number of cases going to trial. Instead, it was discovered that more defendants were entering pleas of guilty as charged, thus keeping the number of trials approximately constant.

After this one year period passed, a more liberal plea bargaining policy was instituted. However, for serious crimes, i.e. crimes of violence or property crimes involving relatively large sums of money, there was no bargaining--win or lose, the case was taken to trial. With

[42]Prior to 1932 prosecutors were elected--1932 to January 1981 Honolulu's prosecutors were appointed.

respect to other crimes, factors such as the availability and credibility of witnesses, the record of the defendant, and the probability of establishing the elements of the crime beyond a reasonable doubt were taken into account in making the decision whether to bargain or not. The status of the defense counsel normally had no bearing on the plea bargaining decision. In fact, if defense counsel was a seasoned trial lawyer the decision may have been not to plea bargain in order to give the deputy prosecutor in charge of the case valuable trial experience. On the other hand, if the public defender's office was involved, consideration was given to it by virtue of the fact that it too was a government agency working "for the people."

An experienced deputy prosecutor was hired to handle the all-important process of screening cases for prosecution. Over time he developed good rapport with the police and assisted in improving the caliber of investigations, from a prosecutorial standpoint. As the strength of cases increased due to the more effective and comprehensive police work, cases were less likely to be plea bargained to cover up inadequacies. In this manner, plea bargaining was minimized and more just dispositions of cases were obtained.

Togo Nakagawa took office in 1979 and remained therein through 1980. The philosophy he brought to the position placed the greatest emphasis with respect to plea bargaining, on achieving justice for all concerned--the community, the victim and the defendant. That is, underlying any plea bargaining decision was the consideration of whether such decision, taking into account all the facts and circumstances surrounding the crime, accused and victim, would result in a just disposition of the case.

Moreover, the integrity of the office was also considered important and dealing honestly and straightfowardly with defense counsel, whether private attorney or public defender was the rule.

Operationally, these underlying factors tended to minimize plea bargaining. If a prima facie case could not be established because a key witness refused to testify, it was nol-prossed rather than plea bargained to a lesser charge or bluffed to the original charge. If a case involved a serious crime or a habitual offender, the defendant was required to plead as charged or he was taken to trial without hesitation.

While there were no formal, written standard operating procedures to follow, the first deputy prosecuting attorney who made most of the plea bargaining decisions did so with the prosecutor's philosophical posture in mind. Thus, it is difficult to categorize what particular kinds of cases were plea bargained inasmuch as the equities of each played such an important role in the making of the ultimate decision and such equities could vary considerably from case to case. Nevertheless, it can safely be inferred that plea bargaining was more the exception than the rule and that it was practiced neither indiscriminately nor arbitrarily.

In sum, the practice of plea bargaining during the six years preceding the term of office of the elected prosecutor was more or less typical of various plea bargaining reforms being introduced across the nation.

The plea bargaining posture of the present prosecutor differs from that of his predecessors. Prosecuting Attorney Marsland has stated that he would prefer to go to trial rather than countenance entering into an agreement which results in a poor bargain for the state.

Marsland's policy and practice permits plea bargaining only where witnesses are unavailable, refuse to testify, or a case otherwise has significant trial or evidentiary difficulties. However, plea bargaining is always open to the defendant who is willing to testify and/or provide evidence in another more serious offense than that with which he is charged. The only other practice the present prosecutor has for dropping charges is where there is a multiplicity of similar charges against the defendant--and dropping a limited number of such charges makes little or no change in the sentence of the defendant.

D. Other Counties.

With respect to plea bargaining in the other counties, the approaches employed by the prosecutors are similar and may be characterized as less inflexible than Honolulu's. These prosecutors do not have hard and fast policies encouraging or discouraging plea bargaining. They recognize it as a useful part of the criminal justice system. While they recognize there is potential for abuse and misuse, they realize that this may be true whenever discretion is exercised on the part of a government official, and accept it as part of our system.

Basically, all prosecutors plea bargain wherever and whenever the ends of justice require it. Thus, a plea bargaining decision normally is based upon the facts and circumstances of individual cases and any type of case is subject to plea bargaining. In serious cases, the police and victim are notified of any agreement reached with the defendant, but they are not necessarily consulted prior to the finalization of such agreement, and under no circumstances is their approval sought or required.

In homicide cases a point is made to explain the situation to the family of the victim. However, a plea bargain in a homicide or a rape case would only occur under unusual circumstances, and must be approved by the prosecutor.

In summary, the practice of plea bargaining in Hawaii was and is not unlike the practice of plea bargaining throughout the nation. It is not regulated to any great extent by state law, just tangentially by procedural rules of court; where, when, and how it occurs is pretty much in the discretion of individual county prosecutors; and these prosecutors look primarily to the facts and circumstances of individual cases to make their plea bargain decisions. While the prosecutor of the City and County of Honolulu now may plea bargain comparatively less often given his general philosophy and policies, the practice in the City and County of Honolulu is not really dissimilar from the other counties because underlying the plea bargaining philosophies of all four prosecutors is a common objective actively sought by each--to see that justice is served. Given this shared goal, and the importance placed upon it by the prosecutors, their actual plea bargaining practices are more similar than dissimilar. Moreover, they all perceive plea bargaining as serving a useful and necessary function in the criminal justice system and view it as an essential part of the system which should not be eliminated either legislatively by statute, or administratively by directive.

E. Data.

When exploring questions concerning the general function and overall efficiency of the criminal justice system, it is important that empirical research be conducted to determine the extent and uses of the practice under review. Interviews with the system's participants are invaluable in determining the perception of reality particular to the participants, but such data is: 1) of a purely subjective character and 2) may be interpreted in various ways. Hopefully, the collection and analysis of empirical data will reveal the actual practices within the system. Such analysis should be of particular interest and help to those in policy and decision making positions, as it will become the basis for their recommendations.

With this in mind, the Crime Commission conducted extensive research at the Honolulu office of the prosecuting attorney focusing on the disposition of felony cases within the First Circuit. Data was collected on the crime, the criminal and the victim. Since case disposition was the basic issue in question, the study focused on plea bargaining to determine the extent of its use, the form most commonly taken in its negotiation and its impact on the sentencing of the convicted offender. The purport of this chapter is not to support pro or con arguments concerning plea bargaining, but rather to present the reader with an overview of the negotiated plea in the First Circuit Court.

1. Methodology.

The data used in this study was collected at Honolulu's prosecuting attorney's office. The "sample" was composed of felony defendants whose cases were disposed of in the First Circuit Court during the 1980 calendar

year. Cases involving violent crimes against the person (as defined in Chapter 707, Hawaii Revised Statutes) were included in toto, and a random sample of 25 percent of the caseload was collected for all other crimes. The selection of and emphasis on all violent crime was in direct response to grave public concern with and interest in the disposition of those cases involving violence. When violent and other crimes are included in the same analysis, the other crimes are weighted to equate the two subpopulations.

A record abstract for collecting data from criminal files was obtained from William F. McDonald, Director of the Georgetown University Law Center. This abstract, specifically created to study plea bargain issues, proved to be invaluable in the course of our study. Since it had been used previously for studies in other jurisdictions, most of the problems had been worked out, thus saving us many weeks usually spent in revisions. (A copy of the abstract used can be found in Appendix A.) The data was converted to computer ready form and the Statistical Package for the Social Sciences was utilized to facilitate analysis.

2. Findings.

Within a total population of 288 cases, 47 (16.3 percent) of the cases were dropped for various reasons (insufficient evidence, inability to locate witnesses, decease of the defendant, etc.) leaving 241 to have verdicts decided. These cases were disposed of as shown in Table 1.

TABLE 1

FINAL DISPOSITION FOR CRIME TYPE*

	Violent crimes	Other crimes	Total crimes (weighted)**
Guilty plea	44 (41.9)	94 (70.7)	420 (65.9)
Nolo	2 (1.9)	1 (.7)	6 (.9)
G-FJT	35 (33.3)	21 (15.8)	119 (18.7)
G-JWT	3 (2.8)	5 (3.8)	23 (3.6)
NG-FJT	12 (11.4)	3 (2.3)	24 (3.8)
DAG/ DANC plea	1 (.9)	6 (4.5)	25 (3.9)
	105	133	637

FJT = full jury trial
JWT = jury waived trial

* data missing in three cases

** 100 percent of violent cases were included but only 25 percent of other crimes. The total column is weighted to adjust the total accordingly, see page 62.

The most notable finding is that violent crimes are 30 percent less likely to be settled with a guilty plea. In discussing this finding, it is important to note that during the target year of this study (1980) the prosecutor's office was dealing with cases from the now famous "sting (hukilau) operation." Many defendants caught in this net were indicted for so many property crimes (sometimes over 40) that plea bargaining was by far the most efficient and practicable way of settling the matter.

This fact will influence our findings in the "other crimes" category, and the reader should be cautious when broadly interpreting the data. (To have excluded such cases would have biased the sample.) Other possible ways of interpreting this outcome might be explored by examining cases that did go to trial.

TABLE 2
FINAL DISPOSITION OF TRIAL BY CRIME TYPE

Outcome	Type	
	Violent	Other
Guilty	38 (65.5)	26 (81.3)
Not guilty	20 (34.5)	6 (18.7)
	58	32

Table 2 indicates that defendants who are actually tried for violent crimes are acquitted almost twice as often as nonviolent offenders. With a one out of three chance of being found "not guilty" it comes as no surprise that a violent offender would chance a trial rather than plead guilty.

Those who do plead guilty do so for any number of reasons, and securing a bargain is not always a major one. Of the sample, a total of 139 defendants pled guilty, after which a number of possibilities became available to them upon negotiation. When the prosecutor possesses evidence strong enough to convince a jury of a defendant's guilt, there is no room for negotiation, and the probable result will be a simple

guilty plea with no bargains in the offing. For those with bargaining power, the offers proffered in exchange for a guilty plea fell into three categories: 1) one or more charges would be reduced in terms of their degree of severity; 2) one or more charges nolle prossed after the defendant pleads guilty to the agreed charges; and 3) a sentence recommendation by the prosecutor (usually in the form where the prosecutor agrees not to request extended terms, mandatory minimums or agrees to remain silent at sentencing--rarely was it a recommendation for a lenient sentence). Combinations of any of the aforementioned were also used.

TABLE 3
FREQUENCY GUILTY PLEA IS A RESULT OF A BARGAIN

	Violent crimes	Other crimes	Total (weighted)
Bargain	42 (84.0)	90 (72.0)	402 (73.0)
No bargain	8 (16.0)	33 (26.4)	140 (25.5)
Unknown	0	2 (1.6)	8 (1.5)
	50	125	550

TABLE 4

FREQUENCY OF TYPE OF BARGAIN GRANTED FOR A PLEA OF GUILTY

	Violent crimes	Other crimes	Total (weighted)
1. Charge reduced	14 (33.0)	13 (14.4)	66 (16.4)
2. Charge dropped	6 (14.3)	33 (36.6)	138 (34.3)
3. Sentence recommendation	7 (16.7)	11 (12.2)	51 (12.7)
1 & 2	1 (2.4)	2 (2.2)	9 (2.2)
2 & 3	7 (16.7)	25 (27.8)	107 (26.6)
1 & 3	6 (14.3)	6 (6.7)	30 (7.5)
1, 2, & 3	1 (2.4)	0	1 (.2)
	42	90	402

The method most frequently employed (34.3 percent) to obtain a guilty plea is for the prosecutor to agree to drop all charges which in turn is enhanced with a sentence recommendation (26.6 percent) or in some cases a reduced charge (2.2 percent) thus bringing the total of dropped charges to 63.1 percent of the negotiated cases. In 16.4 percent of the cases, the most serious charge is reduced in its severity. This is probably the most beneficial for the defendant. A reduction in the charge in almost all cases means that the chances of a lengthy term in prison (20 years or more) has been greatly diminished. Sentence recommendation is used the least often of the three major options (12.7 percent). The reader should also take under advisement the fact that the "hukilau" cases in the sample may have

had a significant impact on evidence gathered on the plea bargaining process. In the "hukilau" cases, charge dropping and sentence recommendation (i.e., no extended terms and/or mandatory minimums) were often exchanged for guilty pleas. Charge dropping was simultaneously theoretically logical and practically efficient in light of the extraordinary number of charges in the various indictments as well as the number that the defendant was willing to plead to, and thus the prosecution declined to request extended terms for the now multiple offender.

Examples from case files were utilized in the hope that they would provide some insights into the motivations of both the defense and the prosecution with regard to plea bargaining. Usually the prosecution had legitimate and substantial reasons to negotiate which revolved around the strength of the available evidence and the credibility and availability of victims and witnesses. The following are six illustrative examples of plea bargaining:

EXAMPLE 1: Agreement--The defendant pled guilty to a firearms charge (class C) under one criminal number in return for having a first degree burglary charge (class B) nolle prossed under another criminal number.

Reason--Although the police investigation was good, the burglary case against the defendant was based on circumstantial evidence. The jury would probably have found that the defendant, a paraplegic unable to walk, was incapable of committing the offense of burglary (the defendant had two co-defendants who were convicted and given prison terms). Also, the judge encouraged the plea agreement because of the awkwardness of sentencing a disabled person to confinement. With this in mind, the prosecution thought it not worthwhile to pursue both cases.

EXAMPLE 2: Agreement--The defendant pled guilty to two counts of first degree robbery (class A) and had one count of first degree robbery and two counts of second degree robbery (class B) nolle prossed.

Reason--The defendant agreed to plead to the highest class felony in exchange for no prosecution in the other cases. These five charges stemmed from four separate incidents. The incident for which he pled guilty had very strong evidence--photos of the defendant committing the crime. The defendant was 32 at the time of the offense and had no criminal history. The prosecution believed that the judge was going to grant the defendant probation based on such factors even if the defendant was convicted of all five counts. Therefore, from the prosecution's point of view, nothing was lost in the bargain.

EXAMPLE 3: Agreement--For pleas of guilty to two firearms charges (both class C), one kidnapping count (class A) was dismissed.

Reason--The kidnapping was dismissed because of evidence and witness problems. The victim initially lied to the police, creating inconsistent statements for the prosecutor to work with. Also, the victim contended that she did not know who was with her at the time of the offense or where that unknown person could be located. A police officer, another of the crucial witnesses for identifying both the defendant and the weapons, was unavailable to testify due to being hospitalized. The prosecution had already requested one lengthy continuance due to problems with the victim and felt another request might raise speedy trial problems.

EXAMPLE 4: Agreement--Defendant allowed to plead guilty to a first degree assault charge (class B) in lieu of another class B offense that would be more detrimental on the defendant's record--manslaughter.

Reason--The defendant was accused of killing her husband. The prosecutor felt the crime was committed when the defendant was under extreme emotional stress--the defendant had been abused by her husband for years and there were numerous police reports and witnesses to attest to this. In light of this history, it was felt that the jury would sympathize with her and enter a finding of not guilty. With the bargain, a guilty plea to the same class of crime would be attained but the victim would be eligible for probation. All sides believed this would be a fair sentence, considering the facts surrounding the crime.

EXAMPLE 5: Agreement--The defendant pled guilty to a lesser charge of third degree assault (a misdemeanor) in place of the original charge of second degree assault (class C felony).

Reason--According to witnesses, the victim appeared to have antagonized the defendant. In addition, the defendant was at the time cooperating with the prosecution in another case involving misuse of public equipment and property. The last reason given is interesting because it was the only case out of the 288 in the population that mentioned court calendars. The entry on the prosecutor's plea bargain justification sheet was, "the court's calendar is clogged and the [prosecutor's] office has more demanding violent cases to handle." Regardless of this last reason, the other two would have probably been sufficient to justify a negotiated plea, whether the court calendar was clogged or not.

EXAMPLE 6: Agreement--None--a simple plea of guilty as charged.

Reason--The defendant sexually abused a 13-year-old friend of his daughter. The defendant confessed to the crime, the medical/legal evidence was strong and the victim was very credible (as children as witnesses usually are). Based on these factors, the defendant was advised by his counsel to plead guilty. Once he did, he was sentenced to a ten-year prison term.

These examples were selected because they typify the motivations for entering into plea negotiations. Bargaining is usually justified because it resolves many of the problems which arise during criminal proceedings. In all of the aforementioned cases, the defendant's guilt was never a question, rather the bone of contention was whether or not there was a case sufficient and substantial enough to convince a jury of guilt beyond a reasonable doubt. Within our present criminal justice system, plea bargaining aids in dealing with those cases which would otherwise either be shunted out of the system or cause it to overload and short circuit.

There are many factors which determine the decision to plea bargain. Circumstances surrounding the crime itself and the criminal history of the offender will certainly affect all parties concerned when discussing the possibility of a negotiated plea.

We shall begin by examining those characteristics of the defendant

which play a significant part in the decision making proce... These characteristics include: the criminal history of the defendant; whether he has charges currently pending in another felony case; whether there was any criminal justice system hold over him at the time of the offense (e.g., parole, probation, or pretrial release in another case); his pretrial release status for the target case; and the type of attorney (private or public defender) who represents the defendant during the criminal proceedings.

In addition to the type of charge and its degree of severity, other characteristics of the crime relevant to the decision making process are: the amount of harm suffered by the victim, the relationship between the offender and the victim, and the weapon involved in the crime. All these factors are necessary to a clear understanding of the nature and seriousness of the crime in question.

Finally the strength of the case must be assessed. The factors which contribute toward a determination of case strength include: 1) whether or not there was a confession; 2) the existence of a positive identification of the defendant; 3) the availability of witnesses; and 4) the existence of physical evidence. The characteristics of the defendant, the specifics of the crime and case strength are all instrumental in determining whether or not a plea bargain will be struck.

a. Characteristics of the defendant. The past felony record of a defendant made a difference in the propensity to plead only in the case of violent offenders. Violent offenders with no prior convictions pled guilty twice as often as those with a prior felony record. The existence of a criminal record did not affect property crimes. If charges were pending in other cases, approximately two-thirds of the defendants pled guilty. The

pretrial release status of the defendant seemed to have little effect on the propensity to plead guilty. The effect of such factors as attorney type (i.e., private or public defender), defendant's status in the criminal justice system at the time of the offense (e.g., probation, parole, or pretrial release) seemed to be of little relevance with regard to the decision to plea bargain. Even with the data and statistical methods of analysis available, it was impossible to characterize or predict the effect the defendant's characteristics would have on the propensity to plea bargain.

b. Characteristics of the crime. Although the numbers within the sample in question are small, there seem to be grounds to establish that injury to the victim has some significance with regard to the decision to plead guilty. Guilty pleas are 20 percent higher when there is no injury involved. Further, crimes in which the victim dies are settled with a guilty plea 10 percent less often than when there is only an injury. The relationship between the victim and defendant had an erratic influence on the entrance of guilty pleas. That is, the defendant was less likely to plead guilty when the victim was either a family member or a complete stranger than if the victim was a friend. The weapon involved also had some bearing on guilty pleas. If there was no weapon involved, about half pled guilty. The same is true for a clubbing weapon. With the involvement of a firearm, guilty pleas decreased one-third, and if it was with a knife it diminished still another fourth. The significance of these figures is impossible to assess individually.

c. Evidence. Considerations of case strength imposed the strictest limits on case selection. In 85 percent to 90 percent of the cases selected, there were witnesses, positive identification of the defendant, and physical

evidence. Moreover, in about one-third of the cases the defendant confessed, in which case he was twice as likely to plead guilty. The presence of other considerations such as witnesses, positive identification, and physical evidence only made the defendant slightly more prone toward a guilty plea. Since the sample included almost exclusively evidentially strong cases, there were not significant differences in degrees of case strength amongst them.

d. Sentencing. A much touted argument in the negotiated plea debate is that a guilty plea will induce a judge to be more lenient when it comes to sentencing because the defendant's having admitted culpability saves the state both time and money. In order to determine if this is indeed the case here in Hawaii, a general overview of crime in terms of class, disposition, and sentence must be carefully scrutinized. Tables 5 through 7 compare the sentences meted out in terms of class and type of crime to the method by which the conviction was obtained. Among the violent crimes, regardless of the method of their disposition, there is little disparity in the sentences. If they chose the trial route, class A offenders had a 9 percent better chance of not going to prison. Where lesser crimes are concerned, there was a slight advantage gained in terms of sentence by pleading guilty when compared with those whose guilt was determined by trial. This difference refers exclusively to probation with jail sentence versus a straight probational sentence with no time behind bars.

For the nonviolent felon, opting to plead guilty appears to be a distinct advantage in terms of severity of sentence. While the great majority of these crimes were settled by guilty pleas, the handful that were convicted by trial end up serving jail or prison time in 70 to 80 percent of the cases, regardless of the class of the crime. All the class A pleaded

cases were required to serve jail or prison sentences, however, for class B crimes on down, there is almost a 50-50 chance that the defendant will not be confined at all. Generally, it appears that pleading guilty will reduce the severity of a sentence.

TABLE 5

	Guilty plea--violent		Guilty verdict--violent	
Class A felony				
Probation			1	(4.5)
Jail				
Prison	8	(100.0)	20	(91.0)
Split sentence			1	(4.5)
Suspended sentence				
Class B felony				
Probation	3	(27.3)		
Jail				
Prison	7	(63.6)	6	(66.7)
Split sentence	1	(9.1)	3	(33.3)
Suspended sentence				
Class C felony				
Probation	8	(44.4)	1	(20.0)
Jail				
Prison	4	(22.2)	1	(20.0)
Split sentence	6	(33.3)	3	(60.0)
Suspended sentence				
Misdemeanor				
Probation	1	(33.3)	1	(33.3)
Jail	2	(66.7)	1	(33.3)
Prison				
Split sentence			1	(33.3)
Suspended sentence				

TABLE 6

	Guilty plea--other		Guilty verdict--other	
Class A felony				
Probation			1	(20.0)
Jail				
Prison	4	(57.1)	4	(80.0)
Split sentence	3	(42.8)		
Suspended sentence				
Class B felony				
Probation	13	(43.3)	2	(28.6)
Jail				
Prison	8	(26.7)	3	(42.9)
Split sentence	9	(30.0)	2	(28.6)
Suspended sentence				
Class C felony				
Probation	25	(47.2)	4	(30.8)
Jail				
Prison	15	(28.3)	3	(23.1)
Split sentence	13	(24.5)	6	(46.2)
Suspended sentence				
Misdemeanor				
Probation	4	(44.4)		
Jail	1	(11.1)	1	(100.0)
Prison	3	(33.3)		
Split sentence				
Suspended sentence	1	(11.1)		

TABLE 7

	Guilty plea--weighted		Guilty verdict--weighted	
Class A felony				
Probation			5	(11.9)
Jail				
Prison	24	(66.7)	36	(85.7)
Split sentence	12	(33.3)	1	(2.4)
Suspended sentence				
Class B felony				
Probation	55	(41.9)	8	(21.6)
Jail				
Prison	39	(29.8)	18	(48.6)
Split sentence	37	(28.2)	11	(29.7)
Suspended sentence				
Class C felony				
Probation	108	(46.9)	17	(29.8)
Jail				
Prison	64	(27.8)	13	(22.8)
Split sentence	58	(25.2)	27	(47.4)
Suspended sentence				
Misdemeanor				
Probation	17	(43.6)	1	(14.3)
Jail	6	(15.4)	5	(71.4)
*Prison	12	(30.8)		
Split sentence			1	(14.3)
Suspended sentence	4	(10.3)		

* Those sentenced to prison under the misdemeanor category were convicted of felonies in non-target cases as part of the plea agreement. Therefore, the target charge was dropped from a felony to a misdemeanor in return for a guilty plea in another felony case. Therefore, a prison sentence will often follow based on highest class crime convicted of.

e. Conclusions. A review of the individual cases as well as the data collected would seem to support the theory that plea bargaining functions as a useful and efficient tool which contributes to a general streamlining effect on the criminal justice system. Despite the frequency of its use, there was no real evidence of its abuse or any inconsistency with the basic goals of the criminal justice system. The highest charge was reduced in about one out of every six cases concurrent with the ideals of rehabilitative justice. The highest charge was maintained approximately 85 percent of the time.

III. PLEA BARGAINING REFORMS

Across the nation, many jurisdictions have made efforts to reform the practice of wholesale plea bargaining. Because prosecution is normally a county function and plea bargaining is discretionary with the prosecutor, changes in the practice have come about through local policy decisions, not through state statutes. Therefore a variety of practices exist. The following section describes some examples of programs and policies which have modified traditional plea bargaining. It does not attempt to be complete, but rather to provide a variety of examples which may prove useful to public policy makers in Hawaii. Section A describes Alaska's statewide ban on plea bargaining. Section B presents examples of plea bargaining reform from jurisdictions across the nation. Section C summarizes a survey of attorneys general conducted by Crime Commission staff.

A. Alaska.

Alaska is the only state which has instituted a statewide prohibition on plea bargaining. The order came on July 3, 1975 when Attorney General Avrum Gross circulated a memorandum informing district attorneys and assistant district attorneys of a new policy to cover all criminal offenses in which the charges were filed on and after August 15, 1975. The Attorney General's policy specified the following:

1) sentence bargaining would no longer be allowed;
2) charge bargaining would still be permissible but the ultimate charge must accurately reflect both the facts and the level of proof. Charges would no longer be reduced simply to attain a guilty plea; and

3) exceptions to the policy were to be approved by the Chief Prosecutor or Attorney General.

Such a statewide policy was possible in Alaska because of that state's unique administration of criminal justice. All powers of criminal prosecution are held by the Attorney General, who appoints the district attorneys for Alaska's four judicial districts. This statewide ban on wholesale plea bargaining was thus accomplished with a simple memorandum.

1. Purpose.

The primary purpose of the plea bargaining ban was to restore the sentencing function to the courts. Before the ban, 90 percent to 95 percent of all cases were disposed of through plea bargaining, most through sentence bargaining. Almost without exception the sentence negotiated through this process was accepted by the court.[43] In the Attorney General's opinion, the judiciary had lost its sentencing function; the plea bargaining ban was intended to correct this situation. It separated the considerations of evidentiary strength and trial predictions from those of sentencing. In restoring sentencing to the court, the Attorney General argued, more appropriate and impartial dispositions could be made which would benefit justice as a whole.

Another purpose of the ban was to improve the performance of criminal justice practitioners. The Attorney General contended that plea bargaining had led to poor work habits throughout the system. If investigations were bad or attorneys lazy or incompetent, plea bargaining could cover it up.

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[43]Speech by Daniel Hickey, Chief Prosecutor, "Plea Bargaining--The Alaska Experience" to the American Judges Association Annual Education Conference, September 30, 1980.

Auxiliary to this motivation was the desire to achieve better control over the district attorneys and their assistants.

The final purpose of the ban was to restore the integrity of the criminal justice system both for the defendant and for the general public. According to the Attorney General, the marketplace atmosphere engendered by plea bargaining led defendants to think of their contact with the system as a game. This attitude detracted from the punitive aspects of that contact as well as efforts at rehabilitation. For the general public, justice was based on "deals," which produced a general dissatisfaction and a lessening of respect for the law.

2. Evaluation of the ban.

Alaska's policy ban on plea bargaining received national attention and many organizations wanted to conduct evaluations. The National Institute for Law Enforcement and Criminal Justice funded an evaluation study by Alaska's Judicial Council.[44] The study consists of two parts: 1) extensive interviews with lawyers, judges, and others involved in the criminal process; and 2) statistical analysis of data collected for felony cases during both the year before and the year after the plea bargaining ban went into effect. The evaluation was conducted to assess the effects of the Attorney General's new policy, with general expectations being that defendants would receive less lenient and more punitive treatment, that the state would win a greater proportion of cases, and that there would be fewer charge reductions and dismissals. The following comments are based on this study.

[44] Michael L. Rubinstein, Stevens H. Clarke, and Teresa J. White, Alaska Bans Plea Bargaining (1980).

a. Impact of the new policy. Plea bargaining was clearly curtailed. Reliance on negotiation diminished in importance and many defendants who expected probation were surprised by jail time. The number of trials increased only slightly and approximately the same number of defendants pled guilty. Screening was toughened, which accounted for dismissals occurring earlier in the process. The court process did not bog down as expected but in fact speeded up. All in all, the ban has achieved some desired results without disrupting the system, as was expected.

The policy was implemented differently in each of Alaska's three major cities. The attitudes of the prosecutors and the working relationships with the defense accounted for these differences. The policy was strictly implemented in Fairbanks but leniently in Juneau, with Anchorage somewhere in between.

Administrative differences also affected the implementation. Pretrial conferences in which lawyers discuss the merits of the case only encouraged negotiations in Juneau. In Fairbanks, different district attorneys are used at different stages: preliminary hearing, grand jury, and trial. The district attorneys are less willing to bargain because they do not know who will see the case after them. Court calendaring also hampered the implementation of the plea bargaining ban. Anchorage used Portland's system of calendaring where the public defender is never required to be in two places at one time. This left the burden on district attorneys who often found themselves scheduled for trial in two different courtrooms. One of the cases would be reassigned to an inexperienced assistant who has a couple of days to prepare before going to trial. In these cases, the assistant would be vulnerable to plea bargain.

Multiple charge cases tended to violate the plea bargaining ban. In multiple charges the element of the offense may be very technical, thus two similar type counts are filed. The prosecutor intends to seek a conviction on one of the charges and dismiss the other. In these cases, the prosecutor's state of mind is very important. If he is worried about the evidence to prove burglary, he may add on a count of larceny to protect the conviction. Whether this is permissible under the Attorney General's new policy remained up to the prosecutor's interpretation of it. Similarly, the decision about whether or not to allow charge reduction depended on the prosecutor.

Infrequent exceptions to the rule on sentence bargaining occurred in cases where the defendant suffered mental or emotional problems and rehabilitation treatment should be recommended. Some lawyers believed that exceptional cases were more of a convenience. The use of this depended upon the prosecutors.

b. Screening. The Attorney General emphasized tighter screening of cases as a part of his policy against plea bargaining. This review of police charges would eliminate cases on insufficient evidence. Prior to this new policy Anchorage had the highest screening rate; accordingly after the ban the rate remained the same, rising only slightly from 13 to 14.7 percent of all felony arrests. In Fairbanks the screening rate almost doubled from 4 percent prior to the ban to 9 percent after the policy change.

The evidentiary considerations of screening decisions may not have played as important a role as some thought they would. Screening was often influenced by the prosecutor's conception of the defendant's personal characteristics. Anchorage screening practices were criticized because they depended on the assistant district attorney who did the intake. This is

probably the reason for the slight change in the screening rate. On the other hand, the Fairbanks district attorney personally reviewed most of the screening decisions. This uniform application probably suggests a greater change in the overall screening rates.

The overall low screening rate could be explained by Alaska Criminal Rule 5 which requires all defendants be brought to court within 24 hours after being taken into custody. The prosecutor usually supported the police report because there was insufficient time to make a critical evaluation of the evidence.

c. Guilty pleas or trial. With the new policy, many judges and lawyers predicted that there would be an increase in trials. However, this was not so. Guilty pleas continued even though the state offered defendants nothing. This was because many times all the evidence was against the defendant and going to trial would probably have ended in a conviction. Going to trial would have meant having the judge listen to the evidence for three or four days and probably ending up with a stiffer sentence. The choice between going to trial or pleading guilty depended on the nature of the case and the client rather than on whether plea bargaining was permitted.

d. Sentencing. The Attorney General was quite successful in his effort to reduce sentence bargaining. The clearest and most immediate changes brought about by the ban were the termination of sentence negotiations between attorneys and the elimination of sentence recommendations.

e. Disposition times. Prior to the ban average time required to dispose of a felony case in Anchorage was 192 days. After the ban, disposition time dropped to 89.5 days. Similar but less dramatic reductions occurred in Fairbanks and Juneau. The decline in time could not be directly attributed

to the new policy, since there was some evidence of a decline prior to the announcement. Nevertheless, the courts became more efficient.

Anchorage changed its court calendaring to a master calendar under a presiding judge and his area trial court administrator. With these changes, all motions, including requests for continuances, were referred to the presiding judge who made a special effort to reduce granting continuances. The addition of master calendaring, a new presiding judge, and strict control over motion practice contributed to the acceleration of court dispositions in Anchorage.

Interestingly, Fairbanks enforced the policy against plea bargaining most strictly and the rate of trials rose sharply, yet there were no procedural reforms or increase in personnel, and court dispositions were still more efficient. The elimination of plea bargaining helped to eliminate delay tactics, thus speeding up court dispositions.

f. Statistical analysis. The statistical analysis addressed the impact of the new plea bargaining policy with a before and after design. The study viewed 3,586 felony cases that arose in Anchorage, Juneau, and Fairbanks during Year One (before the ban) and Year Two (after the ban).

The primary goal of ending the prosecutor's role in sentencing was partly accomplished. Records indicated that there was a great decline in sentence recommendations by prosecutors in Year Two. Also, sentencing became more severe in certain kinds of cases. The probability of prison terms increased and the length of terms increased in cases involving drug, fraud, forgery, embezzlement, bad check charges, burglary, larceny, and receiving stolen property. The reason for selective increase in sentence severity could be attributed to the fact that the lesser crimes received

leniency by prosecutorial recommendations prior to the ban. Thus after the ban was instituted, defendants in nonviolent, low-risk cases lost the advantage of leniency and received more severe sentences.

The overall screening rate rose from 10 percent in Year One to 12.9 percent in Year Two. The screening rate varied among the three cities with Fairbanks rising from 3.7 percent in Year One to 8.9 percent in Year Two; Anchorage from 13.1 to 14.7 percent; and 8.9 to 13.9 percent in Juneau. The largest increases in screening rate occurred in morals felony cases in Anchorage (rising from 6.5 to 40.9 percent), and in drug felony cases in all cities.

Trials did not become more frequent after the institution of the ban. Of the cases that went to court, trials increased from 6.7 to 9.6 percent after the ban. The conviction rate for tried defendants increased from 62 to 74 percent, and the rate for tried defendants without charge reductions increased from 50 to 60 percent.

Dismissals tended to occur earlier--in district court rather than superior court--indicating a gain in efficiency. Guilty pleas continued to occur frequently and multiple charging showed a decrease.

The evaluation concluded the clearest change attributed to the new policy was an increase in the severity of sentences in some kinds of cases. There was a reduction of sentence concessions in drug, fraud, and low-risk burglary and larceny cases rather than adding to the punishment of violent crimes. This selective increase was attributed to the reduction of sentence recommendations by prosecutors, thus proving success in shifting sentence responsibilities to the judge. Sentences in violent and high-risk burglary and larceny cases did not change, probably because the sentences received

before the ban were already sufficiently punitive.

The plea bargaining ban was partly successful in increasing convictions and imprisonments. The probability of conviction and imprisonment of at least 30 days increased in cases involving burglary, larceny, and receiving stolen property. However, there was no change in cases involving violent felonies, bad checks, fraud and forgery, drugs, or moral offenses.

There was only a slight drop in guilty pleas to charge reductions. The reason for this may be that Alaskan prosecutors had not favored charge reductions as a way of plea bargaining.

The new policy was not implemented uniformly and the impact of the policy depended on the special characteristics of the cities, the prosecutors, the defense attorneys, and the judges. The overall impact of the new policy indicated dismissals remained at 52 percent, guilty pleas continued about the same, and trials increased only slightly.

The Alaska Judicial Council concluded its evaluation as follows:[45]

> Our findings strongly suggest that current thinking about plea bargaining and the effects of reforming or abolishing it should be reconsidered. We found that the relationships thought to exist between the presence or absence of plea bargaining and any number of "evils" or "benefits" are apparently either absent, or accidental rather than causal associations. For example, although we concluded that the institution of plea bargaining was effectively curtailed in Alaska, and that it had not been replaced by implicit or covert forms of the same practice, we also found the following:
>
> * Court processes did not bog down; they accelerated.
> * Defendants continued to plead guilty at about the same rates.
> * Although the trial rate increased substantially, the number of trials remained small.

[45] Id. at VII - VIII.

> * Sentences became more severe--but only for relatively less serious offenses and relatively "clean" offenders.
> * The conviction and sentencing of persons charged with serious crimes of violence such as murder, rape, robbery, and felonious assault appeared completely unaffected by the change in policy.
> * Conviction rates did not change significantly overall, although prosecutors were winning a larger proportion of those cases that actually went to trial.
> * Local styles of prosecuting and judging were of overriding importance: Anchorage, Fairbanks and Juneau differed so greatly that we concluded the situs of prosecution had stronger associations with differences in the outcomes of court dispositions than whether or not those dispositions were subject to the policy against plea bargaining.

Most of our original hypotheses were disproven, and we were frequently surprised by the discrepancies between our expectations and the actual effects of the Alaska's prohibition. Perhaps some of these unanticipated findings will serve to open minds and lead to a reexamination of old beliefs about plea bargaining.

3. Crime Commission visit.

In July 1982, two Crime Commission staff members visited Anchorage to assess the current status of the plea bargaining ban and to interview participants in the system. The information gathered serves to update and reinforce the findings of the 1980 Judicial Council study which focuses on 1975 and 1976.

a. Interviews. Staff members interviewed the following persons:

* Judge S.J. Buckalew, Superior Court Judge;
* Judge Victor Carlson, Superior Court Judge;
* Larry Weeks, District Attorney;
* Donna Fabe, Public Defender;
* Arthur Snowden, Administrative Director of the Alaska court system;
* Deputy Chief Ron Otte, Deputy Chief, Anchorage Police Department; and

CONTINUED

1 OF 3

* Captain Del Smith, Chief of Detectives, Anchorage Police Department.

The Crime Commission received outstanding cooperation. All those interviewed spoke candidly and were pleased to share their experiences. They provided the Commission with numerous reports, written memoranda, and other data and information helpful to this study.

b. Standards. The plea bargaining ban is implemented at the prosecutor's level through a set of written guidelines, standardized statewide. The latest set, which became effective July 1, 1980 (which they ask we do not publicize) is entitled "Standards Applicable to Case Screening and Plea Negotiations." The standards are promulgated by the Department of Law as a way to guide and standardize the exercise of prosecutorial discretion in screening, charging, and plea bargaining. The three areas are necessarily closely related. A successful policy restricting plea bargaining depends on strict screening and accurate charging.

The standards lay out both the objectives of screening, charging, and plea negotiation and the policies to be pursued to achieve those objectives. For instance, the purpose of screening is defined as: 1) to establish priorities and eliminate cases for which prosecution is inappropriate; 2) to set the tone and level of effectiveness for the office; and 3) insure that those who have been wrongly accused or who cannot be proven guilty are not prosecuted. To achieve these objectives, the following policies are specified: 1) screening should occur as early as possible in a case, preferably before filing of charges; 2) only appropriate and provable charges should be filed; and 3) charges should not be dismissed or altered unless new information comes to light. It is specifically decreed that overcharging is inappropriate and

should never be used as a prosecution tactic.

The written guidelines then specify the details of how to implement stated policies. These include criteria for charge level, multiple charges, multiple counts of related crimes, multiple defendants, charging by grand jury or preliminary hearing, and special consideration such as law enforcement relations and victim/witness relations. They are as specific as possible, yet acknowledge that exceptions will always come up. Prosecutors are expected to abide by the guidelines in most cases. In special circumstances exceptions can be made, but only with the written consent of the chief prosecutor. Such deviations are intended to be made infrequently and subject to review.

The guidelines are also quite specific with regard to plea bargaining. First, plea negotiation is clearly defined. Second, the general prohibition is clearly stated. Third, offenses which are included in the ban are listed. Fourth, the allowable exceptions are stated and required procedures are given. Finally, the specifics regarding charge negotiation and sentencing procedures are discussed. All in all, the section clearly states in writing how the general ban is to be implemented.

The policy is quite simple. In properly charged criminal cases, there is to be no charge reduction and no sentence recommendation in exchange for a guilty plea. The only exception is in cases involving nonviolent offenses with multiple charges or multiple counts. One or more charges or counts may be dismissed if the defendant pleads guilty to the major charge (highest charge), that charge adequately represents the essence of the criminal conduct, and information pertaining to the remaining charges or counts may be fully related to the court at sentencing. Exceptions may be made only

when approved in advance by the Attorney General.

c. Satisfaction with the ban. There is general satisfaction with the plea bargaining ban among all those interviewed by Commission staff. The police, lawyers from both the prosecution and defense, and court officials all agree that the ban has improved the system. They would not want to go back to wholesale bargaining and admit that plea bargaining is not needed to ensure a steady flow of guilty pleas. More than anything, participants feel the ban has made the system more honest. Both the public and professionals seem to be clear about who is responsible for what criminal conduct, to what degree, and what punishment society metes out for that crime. There is more confidence in a system which does not make deals with criminals. Also, comments attest to the fact that cases are now better investigated by the police; original charges are more accurate; prosecutors and defense attorneys are better prepared for trials; and the sentencing function has been returned to the judiciary. All in all, those in the system are happy with the plea bargaining ban and have adjusted well to the new circumstances.

Several professionals made specific comments which are especially helpful. Judge Carlson stated that plea bargaining either must be formally established by court rules or should be completely disallowed. Captain Del Smith noted that before the ban, there were more "probable cause" arrests in Anchorage. The standard has since been raised to "beyond a reasonable doubt." Also, plea bargains are now only made with the concurrence of the police department.

d. Current trends. When the plea bargaining ban went into effect in 1975, there was no rush of cases going to trial as some had predicted. The rate of guilty pleas remained fairly constant. However, the trend seems

to have radically changed this year. The passage of a determinate sentencing law in 1980, as part of a new criminal code, spurred a vast increase in the trial rate. The effects are now being felt, there were twice as many trials in 1982 as in 1981. With a combination of no plea bargaining and determinate sentencing, there is now no flexibility at either end of the system, and virtually no incentive to plead guilty. Apparently more defendants believe they have a better chance at a trial. Alaska's prosecutors cannot use plea bargaining to circumvent the determinate sentencing law as other states' district attorneys have done and the result is a flood of cases going to trial.

B. Jurisdictions That Have Reformed Plea Bargaining Practices.

1. Dade County, Florida.

In Dade County, Florida in 1977, it was proposed that judges should play a more active role in plea negotiations and that victims and defendants should also be invited to participate. A study of this proposal was conducted through the use of a pretrial settlement conference.

To initiate this study, a total of 1,074 cases were randomly selected. Of this total, 378 were assigned to use a pretrial settlement conference, the remaining were used as the control group. At the pretrial settlement conference, the judge, the victim, the defendant, and arresting police officer participated in the plea negotiation process.

The advantages that were seen in having a pretrial settlement conference was that:

1) the judge is not required to take an active role in the actual negotiations, nor is he prohibited from such a role. Traditionally, judges had little more than the authority to accept or reject the

plea negotiation, and this decision was often made by the number of cases that were pending.

2) Victims (and police officers) are given the opportunity to be heard. Traditional plea bargaining has most often excluded the participation of victims. As a result, victims are dissatisfied with both the sentence that was imposed and their inability to have meaningfully participated in the process.

3) The defendant, while retaining all of his or her existing rights, now has the option to participate as a positive observer or an active party.

The predicted disadvantages in having this conference was that the conference would take up unnecessary amounts of judicial time; having victims and defendants together would lead to emotional or even violent confrontations; candid discussions between attorneys that are needed to reach an agreement would be inhibited by the presence of lay participants; victims and defendants would misunderstand the conference discussions and accuse the judge of improper conduct; and that the dignity of the judge would be diminished by his involvement in the negotiations.

The procedure for implementing this project started at arraignment. The judge informed the prosecution and defense that the case had been selected, and scheduled a settlement conference at a time that allowed for the completion of pretrial motions and discovery. The defense attorney was required to contact the prosecutor three days in advance of the scheduled conference if he wanted the conference to be held. Victims and police were invited to attend the conference by the prosecutor, unless their eyewitness identification of the defendant was a crucial element in the case. Victims

were neither subpoenaed nor compensated. The defendant could decide to attend with counsel, not attend but be represented by counsel, or fail to confirm the conference, thereby canceling it.

At the conference the judge would explain the purpose of the meeting and state that, for purposes of the discussion, the defendant's guilt of the charges would be assumed. Stating this assumption was necessary to make it clear that the defendant was not admitting guilt by participating in the discussion. The judge also advised the defendant that he was not required to make any statement in support of that assumption, and could have the conference terminated at any time. The judge advised the defense that no statement made during the conference could be used in a subsequent trial if settlement efforts failed.

The conference discussed whatever issues the parties felt might contribute to a settlement. If a proposed settlement was reached between the prosecutor and defense counsel, the judge had to decide whether it was appropriate, considering the interests of all the parties and of society. The defense counsel was allowed to consult with his client and report back later. If a settlement was not reached, the case was set for trial.

The following is a paraphrase of a pretrial settlement conference (based on observations that were made by a member of the research staff conducting the project). It illustrates the type and quantity of information that was presented.

Parties Present: Judge, Assistant State Attorney, Assistant Public Defender, Defendant, and Victim.

JUDGE: What is this case about?

A.S.A.: This is larceny. The defendant stole television sets from a loading dock.

JUDGE: What about a prior record?
A.S.A.: Drugs and larceny.
JUDGE: Are you the victim?
VICTIM: Yes.
JUDGE: What did you lose?
VICTIM: Two T.V.'s.
JUDGE: How old are you?
DEFENDANT: Twenty-four.
JUDGE: Are you married?
DEFENDANT: No.
JUDGE: Do you have a job?
DEFENDANT: I'm a busboy.
JUDGE: What should happen in this case?
A.S.A.: I'd like to see two years.
JUDGE: What about you?
A.P.D.: He has a drug problem and has been in a treatment program. If he goes to prison it will hurt his recovery and he will lose his job. I'd recommend jail and probation.
JUDGE: Do you have a drug problem?
DEFENDANT: I used to; not any more.
JUDGE: I'll give one year and some probation with treatment and restitution. He has done this before and I have to protect society.
JUDGE: Do you have anything to say?
VICTIM: It's O.K. with me.
JUDGE: Can you come back this afternoon at the sounding?
A.P.D.: I'll have to consult with my client. Thanks for your time.

Time elapsed: 8 minutes
Case status: tentative agreement on some incarceration and probation
Final disposition of the case: a guilty plea was entered the day of the conference. The sentence was 364 days in the county jail and 3 years probation with restitution; recommend drug treatment.[46]

[46]Anne M. Heinz and Wayne A. Kerstetter, "Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining," 13 L. & Soc'y Rev. 357-58 (1979) (hereinafter cited as "Heinz").

Pretrial settlement conferences were held in 287 (76 percent) of the 378 assigned cases.[47] Of these, 75 (26 percent) were settled and 132 (46 percent) were tentatively settled.[48] The remaining 80 (28 percent) did not agree even in principle. According to the participants of these cases, slightly more than half would probably go to trial. The remainder would continue further discussions and in one instance, a second conference was scheduled.

In the 212 cases that did not reach a settlement, about 127 (60 percent) only needed to review a tentative settlement. For example, the defense counsel might say: "Three years probation makes sense to me, but I will have to talk to my client. I'll be back to give you an answer."[49] In one-third of these cases, timing problems were the reasons for failing to settle. Some examples were having additional motions to be filed, an incomplete discovery, or other pending charges.

Although the setting of a conference date reduces flexibility in scheduling, judges and attorneys felt that the conference did not interfere with pretrial preparation. Since most of the conferences were brief, disposition was resolved expeditiously. In addition, the sessions managed to accomplish the task of working out some form of the proposed settlement.

[47]Cancellations were caused by scheduling problems, the timing of the session within the disposition process, and the likelihood of trial. There was some evidence that conferences involving more serious offenses were more likely to be canceled.

[48]Tentative settlement is defined as a disposition to which the parties agreed but which one or more was unwilling to accept as binding at that time.

[49]Heinz, note 46 supra, at 356.

The greatest impact of the conference procedure was that it shortened the length of time it took to close cases. Most conferences lasted an average of ten minutes, and ended in an agreement of at least an outline of the settlement. There were generally four participants in the session; the judge, two attorneys, and one lay member. Hence, the structure of decision making was different from the traditional mode of plea negotiation in criminal cases.

In summary, the pretrial settlement conference in Dade County, Florida, created an open, formal arena for plea negotiations. Joint negotiation by all of the parties in place of traditional sequential series of discussions seemed to facilitate the settlement of cases. The judge played the central role in the process by directing the flow of information and determining the sentence. Further, the conference reduced the costs of communicating information between judge and counsel and between professionals and nonprofessionals. To the extent that processing costs concern all citizens, these reductions were of benefit. Finally, because speedy dispositions are beneficial to innocent defendants, victims, and police, the conference procedure also enhances justice.

2. El Paso County, Texas.

In 1976, an experiment to abolish the practice of plea negotiations was initiated in El Paso County, Texas. The reason for this abolition was due, in part, to a political controversy over prosecutorial policy. By consistently recommending imprisonment in nonviolent felony cases involving defendants with no criminal record, the prosecutor put the courts in a political bind. El Paso juries ended up granting probation in over 90 percent of these cases, which gave the public the impression that judges were mainly

responsible for the increasing crime rate.[50]

The dissatisfaction felt by the public was based on these four objections to plea negotiation:

1) "It inevitably produces the ridiculous result that, as crime grows worse, sentencing becomes more lenient."[51] Plea negotiation exists for the purpose of expediting the disposition of cases. Therefore, as crime grows worse, the number of cases (on the criminal docket) increases. In order to have these cases processed, prosecutors must offer progressively better deals.[52]

2) "Plea negotiation is the focal point of public distrust of the law."[53] People don't like the cynicism expressed in plea negotiation. They believe that criminals cynically count on the fact that plea negotiation will alleviate the consequences of getting caught.

3) "Plea negotiation produces unequal justice."[54] Ethical justifications of plea negotiation are too often offered to excuse exceptionally lenient sentences that are actually based on the identity of the defendant, his family or friends, or his attorney.

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[50]The law in Texas is unique in that it allows an accused to have his sentence, including the question of prison or probation, determined by a jury.

[51]Sam W. Callan, "An Experience in Justice without Plea Negotiation," 13 L. & Soc'y Rev. 327 (1979) (hereinafter cited as "Callan").

[52]The responsible judicial answer to an increased criminal caseload arising out of a growing crime rate is to increase the number of prosecutors and judges to permit stricter rather than more pragmatic sentencing.

[53]Callan, note 51 supra, at 328.

[54]Id.

4) "The law says that judges are to impose sentence, but under plea negotiation, the prosecutors assess sentence."[55] Although judges attend many seminars on sentencing policies that deal with the proper methods of controlling criminals, the prosecutors actually determine these policies. For prosecutors, plea negotiation is solely determined upon political expediency. In other words, what looks good in the press in some cases, and what doesn't look too bad in others.

To implement this project, a set of guidelines called "the point system" was devised. This system enabled the judge to weigh various factors that are important and proper in determining: a) whether to grant probation or imprison, and b) length of sentences (see Attachment A, p. 100).

There were four purposes in having this point system. First, it focused the judge's mind on factors that are proper to sentencing. Second, it committed the judge in advance to the factors he will consider, allowing observers to see and publicize any special treatment of a criminal that violates the principle of equal justice. Third, it enabled the defendant, with the help of his attorney, to predict what the judge's sentence is likely to be. Fourth, it contained the express promise that the defendant can withdraw plea if the judge decides to impose a more severe sentence than the points indicate.

The point system does not control the sentence. All cases are decided individually. The judge is free to tell the defendant to withdraw his plea because he will not be as lenient as the points indicate. On the other hand,

[55] Callan, note 51 supra, at 328.

the judge is free to be more lenient than the points suggest.

Although a large majority of the cases were being disposed of without plea negotiation, the number of cases pending continued to increase at about 200 a year. By late 1977, the two judges in charge of the criminal docket were getting all the help that could be expected from the civil docket judges. In effect, it became necessary to do something else to hasten the rate of disposition.

In late February of 1978, a new system was developed. Under this system, when a defendant is indicted, the Court Services Section of the Probation Department ascertains the official version of the crime and does a thorough investigation of the defendant's prior criminal record. The points are then calculated. (See Attachment B, p. 101.)

If the points are less than 10, the department recommends probation. If they are less than 10 and the defendant had never before been convicted of any crime more serious than a minor traffic violation, a deferred adjudication would also be recommended. If the points are 10 or more, the assessors will determine the category on the time-to-serve chart. Then, working upwards from the bottom of the punishment range indicated by the time-to-serve chart, a determination is made on the number of years that they agree on as a responsible sentence for the case.

The officials who make these recommendations are given strict orders not to discuss any case with either the prosecution or defense. In deciding upon a recommendation, they do not consider the strength or weakness of the prosecution case nor the ability of the prosecutor or defense attorney. Most times, they don't even know which attorneys will be involved in the case. They only consider the crimes committed, the prior record of the defendant,

ATTACHMENT A

PROBATION CHART

Murder	10 points
Aggravated Rape	10 points
Aggravated Arson	10 points
Aggravated Robbery	7 points
Burglary Habitation	6 points
2nd Degree Felony	5 points
3rd Degree Felony	4 points
Use of Firearm	3 points
Use of Other Prohibited Weapon	2 points
Death to Victim in Carrying Out Crime	5 points
Serious Injury to Victim in Carrying Out Crime	4 points
Minor Injury to Victim in Carrying Out Crime	2 points
Little Possibility of Restitution Because of Amount of Loss	4 points
Inability to Supervise Probation	3 points
Bad Rescidivism Prediction of Psychological Test	1 point
Each Previous Felony Conviction in Previous 5 Years	6 points
Each Previous Felony Conviction More Than 5 Years Prior to Act in Question	4 points
Each Previous Class A Type Misdemeanor Conviction	3 points
Each Previous Class B Type Misdemeanor Conviction	2 points
Multiple Charges	3 points
Evidence Indicating Professionalism	4 points
Evidence Indicating Professionalism in Prohibited Substance Cases	5 points

TIME TO SERVE CHART

OFFENSE	*EXPECTED RANGE*
A.	
1. Murder	5-40 years
2. Aggravated Rape	5-40 years
3. Aggravated Arson	5-40 years
4. Aggravated Robbery (no injury to victim)	5-15 years
5. Aggravated Robbery (injury to victim)	8-40 years
B.	
1. Enhanced 3rd Degree Felony	10-15 years
2. Enhanced 2nd Degree Felony	12-25 years
3. Enhanced 1st Degree Felony	20-40 years
4. Habitualized 3rd Degree Felony	12-20 years
5. Habitualized 2nd Degree Felony	20-30 years
6. Habitualized 1st Degree Felony (Defendant pleads true to only one of habitualizing counts)	25-40 years
C. Where defendant, who has no felony record, and does not qualify for probated sentence in Court's opinion in types of cases not covered under A above.	
1. 1st Degree Felony	5-10 years
2. 2nd Degree Felony	4- 8 years
3. 3rd Degree Felony	3- 6 years
D. Where defendant has a previous felony record within the past 5 years, but there is no enhanced or habitualized indictment:	
1. A-1,2,3,4,5	10-50 years
2. Burglary of a Habitation	8-15 years
3. 2nd Degree Felony	6-12 years
4. 3rd Degree Felony	3- 6 years

ATTACHMENT B

IN THE 34TH & 205TH DISTRICT COURTS
OF EL PASO COUNTY, TEXAS

THE STATE OF TEXAS

VS. CAUSE NO. _____

_____

The West Texas Regional Adult Probation Department, based upon our investigation of the defendant's background and prior criminal record (if any), the nature of the offense involved, jury verdicts for similar offenses in El Paso County, the needs for control of the defendant's behavior in the future and the objectives set out in Sec. 1.02 of The Texas Penal Code, recommend the disposition of this case upon the defendant's plea of guilty set out below. This recommendation does not apply to pleas of not guilty because of factors that the trial might reveal or because of the conduct of the defendant between now and the trial. Furthermore, the recommendation is subject to being revised at any time because of the defendant's conduct between now and sentencing.

	No. of Years	Concurrent	Probation	42.12,3(d)	12.44	Fine
COUNT ONE	6	Yes__No__	Yes✓No__	Yes__No__	Yes__No__	$_____
COUNT TWO	_____	Yes__No__	Yes__No__	Yes__No__	Yes__No__	$_____
COUNT THREE	_____	Yes__No__	Yes__No__	Yes__No__	Yes__No__	$_____

FRANK LOZITO, Director
West Texas Regional Adult
Probation Department

BY: xxxxxxxxxxxxxx

THE STATE OF TEXAS
vs.
_____

IN THE DISTRICT COURT
205TH JUDICIAL DISTRICT
EL PASO COUNTY, TEXAS

No. 32410

PROBATION OFFICER'S REPORT

TO THE HONORABLE JUDGE SAM W. CALLAN, JUDGE OF SAID COURT:
205TH JUDICIAL DISTRICT

DATE OF REPORT: September 21, 1978

CRIMINAL RECORD:
___ Felony Conviction(s)
___ Misdemeanor Conviction(s)
___ Juvenile Record
___ Narcotic History
___ Arrest Transcript (Attached)

RECOMMENDATION:
___ Probation Recommended
___ Probation Not Recommended
___ Revocation Recommended
___ Revocation Not Recommended
8 TOTAL POINTS

CONDITIONS:
___ Regular
___ Additional Conditions:

TYPE OF REPORT: Pre-Plea
OFFENSE: Burglary
_____
PLEA OF GUILTY: _____
TERM OF YEARS: _____
ATTORNEY: _____
DEFENSE ATTORNEY: _____
TELEPHONE: _____
ON BOND: No
DATE OF BOND: N/A
AMOUNT OF BOND: $2,000.00
BONDSMAN: N/A
IN JAIL SINCE: July 29, 1978
DATE OF OFFENSE: July 29, 1978
DATE OF ARREST: July 29, 1978

1._____
2._____
3._____

RESTITUTION RECOMMENDED: Yes ( ) No ( )
Restitution in the amount of $_____, payable $_____ per month beginning _____, 19__, payable to:_____

TREATMENT FOR NARCOTIC ( ) ALCOHOL ( ) ABUSE/ADDICTION: Yes ( ) No ( )

COMMENTS:

The defendant is a Mexican National whose known criminal record reflects an arrest for Burglary of Business, the Instant Offense. There are no FBI returns as of this writing.

The official complaint report reveals that on the early evening hours of July 29, 1978, the witness and some of his relatives were walking around the La Villita Shopping Area when they heard what sounded like broken glass. After observing the defendant inside one of the shops, the witness called the police from a phone booth. After making the call, he returned to the shop where the defendant had last been seen. While waiting for the police to arrive, the witness observed the defendant come out of the shop in an effort to make his get away. The witness and his relatives began chasing the defendant. During the pursuit, they observed a patrol car. The officers inside the patrol car were informed of the incident and almost immediately proceeded to place the defendant under arrest charging him with Burglary of a Business.

He scores 8 points on the court's scale as follows:

Instant offense	5 points
Inability to supervise	3 points
Total	8 points

FBI:
DPS: 2498469
PD: 158127
SO: 137441
DOB: July 3, 1953
CASE: 78-36555

and the practicalities of criminal justice in El Paso County.

The new system was created to ensure that a reasonable job of moving the docket while meeting the four objections stated earlier could be done simultaneously. To be specific:

1) This system does not let the size of the docket determine the severity of sentences and will not produce the ridiculous result that, as crime gets worse, sentences get more lenient. Jury verdicts are the only factor that will produce a change in the guidelines and recommendations, and as crime becomes worse, jury verdicts tend to be more harsh.

2) It eliminates public mistrust of justice by eliminating plea negotiation. Since neither the defendant nor his attorney is consulted in determining the recommendation, inequalities that arise from considering the probative strength of the case against the defendant, the skill of the defendant's attorney, and political and economic factors are eliminated. The sentencing guidelines are completely immune to political pressure. Unlike the prosecutor, the probation officer is not responsible for whether or not there is a conviction. He does not have to run for office and is therefore under no pressure to please defense attorneys. Also, the guidelines keep the probation officer from going astray regardless of his innovations.

3) The guidelines themselves prevent the unequal justice that often arises from plea negotiation. Similar crimes and similar criminals produce sentences that are generally equal. The absence of negotiation excludes such factors as the weakness of the prose-

cution's case, the skill or prominence of the defense attorney, and the influence of the defendant, his family, and friends.

4) Since the recommendation must come within the judge's guidelines, his thinking pretty much dominates it, and the sentence for which he is responsible, is more his own than it is under plea negotiation.

Whether the efforts of El Paso County, Texas to abolish plea negotiation is successful will be determined within a few years by comparing the efficiency of negotiated and nonnegotiated dockets. It appears that plea negotiation may be an important flaw in American justice. Sam Callan, a judge in El Paso concludes:

> The existence of plea negotiation in El Paso County is a cynical admission by our legal system that we must come to terms with the crime, and we must recognize the vested rights of crime in American society. We don't have to do that. We can summon the will and the idealism to stop the negotiation of American justice. Judges can impose sentences they consider to be just instead of sentences criminals are willing to accept.[56]

3. Black Hawk County, Iowa.

Since April, 1974, Black Hawk County, Iowa has strictly limited all forms of plea bargaining. The policy has been to allow no bargaining except when a "compelling reason" exists; for example, the serious deterioration of a case after filing. The result has been the drastic reduction of all types of plea bargains, with approximately 80 percent of the cases ending in verdicts of guilty as originally charged.

The purpose of the ban was to restore public confidence in the system. David Correll, County Attorney, wrote that:

> We feel that to engage in wholesale plea bargaining prostitutes the criminal justice system to the point that it cannot enjoy the confidence of the public.

[56] Callan, note 51 supra, at 344.

> If we as a society cannot financially meet the burden of providing a capable and competent criminal justice system, then this should be made obvious to the public. The question will then be left to the public whether they are willing to pay the price for adequate criminal prosecution, and if not, they should accept the consequences of plea bargaining without crying.[57]

To implement the new policy, several changes were made in the operation of the prosecutor's office. The most important was a stricter screening process. Without the benefit of pleading away weak cases, it was important to accept only strong cases. Vertical prosecution was also implemented. Deputy prosecutors could deal strictly with cases because they had more control. Overcharging was also curtailed. Charges became more realistic because they became more than mere bargaining tools.

An auxiliary change which took place was an improvement in police investigations. With a tougher screening policy, police knew that what was originally presented must be as complete as possible if the case was to be accepted. The policy further encouraged hard work by the police because investigators knew that their efforts would be rewarded, that the case would not be plea bargained away. The combination of more complete investigations, less overcharging, and tighter screening meant that the prosecutor's office took only the good cases and it was sure that they were good.

The results of this plea bargaining curtailment have been generally favorable. The new policy was evaluated one year after its implementation.[58] That study concluded that plea bargaining of all types was greatly reduced and that the criminal justice system had reacted by becoming more efficient.

[57] Letter to the Hawaii Crime Commission, March 23, 1981.

[58] Note, "The Elimination of Plea Bargaining in Black Hawk County: A Case Study," 60 Iowa L. Rev. 1053-71 (1975).

Investigations were better, charging was more accurate, screening was tougher, the number of dismissals was greatly reduced, and the number of trials ending in guilty verdicts increased by half (from 50 percent to 75 percent). Interestingly enough, the number of trials remained about the same and the number of guilty pleas remained constant, although the number of pleas to reduced charges was greatly reduced. Convictions went up and the severity of offenses increased without the accompanying chaos which is usually predicted.

Several changes in the criminal justice system were made at approximately the same time that plea bargaining was curtailed and these changes facilitated new policy. The first was a new deferred judgment statute, which individualized sentencing much more and eliminated some of the need for plea bargaining. The second change was a new witness immunity statute which reduced the need to bargain for information and testimony. The last development was adequate funding of Black Hawk County's community-based corrections program which allowed the system to accommodate more deferred judgment verdicts. Together, these changes eased the pressure on the prosecutor's office to plea bargain.

In 1981 the Black Hawk County attorney wrote the Hawaii Crime Commission regarding the consequences of his office's plea bargaining policy. He indicated that the number of trials had increased, the incarceration rate had risen, and the trial ability of both the prosecutors and police had improved:

> The number of criminal trials is ever-increasing and will be approximately 400% higher this year than when the policy was instituted. It is ridiculous to assume that you will not have a substantially larger number of trials. We go to trial on virtually every murder case and accept no pleas. The incarceration rate has substantially increased since the implementation of this policy. The impact of this has been diminished by the fact that the prisons are becoming so full that the distinction between crimes is being eroded by parole decisions.

> We are finding that this has increased the professional trial ability of our attorneys and the police department. It is our experience that the more trials a prosecutor has handled, the better he will be able to handle them in the future. It has also generally increased the quality of the police departments since they have continual learning experiences at trials. It has made our office much more selective and as a consequence, we do not file some cases where we do not feel we will be able to gain a conviction. This can cause some grumbling among the public and the police department.
>
> For your information, we file approximately 500 felony cases a year. This year, I anticipate we will try approximately 125 of those felony cases. Approximately 80% of all defendants are found guilty or plead guilty to the crime with which they are originally charged. We reduce approximately 10% of the charges and approximately 10% are found not guilty.

It appears that Black Hawk County has been successful in sharply reducing plea bargaining. This policy required corresponding changes in procedures in the prosecutor's office and in other agencies, but the accommodation has been achieved and the results are generally favorable.

4. Detroit and Denver.

Detroit and Denver instituted virtually identical plea bargaining reforms but experienced quite different results. A comparison of these two experiences shows that any reform must be considered in the context of the existing system and must be carefully implemented if it is to achieve the desired improvements.[59]

Both cities instituted a plea conference which was held within several weeks of arraignment in all felony cases. The conference was formal in nature and was to include the prosecutor, the defense attorney, and the defendant. Any bargain to be struck had to be concluded at this conference

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[59] Raymond T. Nimmer and Patricia Ann Krauthaus, "Plea Bargaining: Reform in Two Cities," 3 Justice Sys. J. 6-21 (1977) (Detroit's reform came in November 1968, and Denver's in 1971.)

or the prosecutor, as a matter of policy, would later consent to no plea other than guilty on the most serious charge. The purpose of this reform was to increase the administrative efficiency of plea bargaining by having all negotiation concentrated at a single, early stage in the judicial process. This was intended to lead to the earlier disposition of most cases and to limit the purely tactical delays by the defense. After the conference, prosecutors could concentrate on trial preparation.

To implement this change, the prosecutor's office in both cities made two changes in plea bargaining practice. First, they issued written guidelines as to what should be offered in which kinds of cases. By setting the range for bargaining, this change aided the expeditious resolution of cases. Second, both offices established procedures for disclosure of information to the defense. This change also facilitated earlier agreement by establishing a common ground for bargaining.

a. Detroit. Results in Detroit were quite positive. About 80 percent of all felony cases were disposed of through the plea conference. This rate of guilty pleas remained the same but elapsed time from indictment to disposition was greatly reduced. Bargaining was successfully concentrated at an early stage in the process and judicial efficiency improved.

Part of the reason for this success lay in the way the policy was planned and implemented. The defense bar was included in the planning stage which, as a result, led to good cooperation from the defense when the policy changes were implemented. The attitude adopted by the prosecutor's office was accommodating to the defense, which further ensured cooperation. The bargaining guidelines and plea conference rules were enforced with flexibility, so as to be equitable and fair. All in all, the new policy was applied

to minimize disruption of the existing system and working relationships and to ensure the cooperation of all parties involved.

b. Denver. Denver's policy changes were not implemented in the same manner as Detroit's, and did not meet with success. By contrast, average elapsed time from indictment to disposition actually increased with the new policy. Contrary to expectation and intentions, the plea conferences did not expedite the judicial process.

The key to this failure lay in the manner of the policy's implementation. The Denver prosecutor's style was entirely different from Detroit's. Little or no attention was paid to the concerns of the defense, the attempted changes were too drastic, and written standards were applied rigidly. The prosecutor assigned to conduct the plea conferences was disliked and mistrusted by the defense attorneys, who refused to go along with the new system. As a result, the rule preventing further negotiation after the conference was only selectively enforced, which caused it to fail.

The comparison of these two cities' efforts shows that reform always comes in the context of an existing system and set of working relationships, which must be accommodated if the reform is to succeed. Any change that is too alien or too radical or that is improperly implemented will not have the desired effects.

5. Seattle, Washington.

a. Interviews. In July 1982, two Crime Commission staff members visited Seattle to assess firsthand the state of plea bargaining in King County. They interviewed the following persons:

* Robert Lasnik, Senior Deputy Prosecuting Attorney;
* Michael Kranda, Administrative Assistant, Office of the Prosecuting Attorney;

* Roxanne Park, Executive Officer, Sentencing Guidelines Commission;

* David Fallen, Research Director;

* Greg Canova, Attorney General's Office;

* Jon R. Zulauf, Eastside Defender Association;

* Paula Clements, Director, Victim Assistance Unit; and

* Dianne Kahaumia, Assistant Director, Victim Assistance Unit, Office of the Prosecuting Attorney.

b. Written guidelines. The King County prosecutor's office has eliminated traditional, wholesale plea bargaining through tough screening, accurate charging, and virtually no charge reductions. The only bargaining allowed is in the sentence recommendation, which the judge is not bound to accept. These reforms have been implemented with a set of detailed, specific standards for charging and plea negotiation entitled "Filing and Disposition Policies." This document, which runs to 100 pages, carefully lays out the general principles involved and standard procedures to be followed and then details all the specifics for charge selection, charge reduction, and sentence recommendation for every important felony. Although detailed, the policies do allow for exceptions, which must be handled in a regular manner.

The introduction sets the tone for what these policies are intended to do:

Section I: Introduction

> The discretionary decisions which the law requires a prosecutor to make are among the most important in our system of criminal justice. Decisions as to who should be prosecuted and for what crimes and what disposition should be made of those cases are vitally important. How they are made affects every citizen. Justice requires that all who are affected by our decisions know the basis on which they are made. In this volume we set forth the policies which guide the decisions we make.

> These policies reflect the philosophy that all who violate the criminal law should be punished, that the degree of punishment should be proportionate to the seriousness of the criminal act and the harm caused to society and that punishment should be imposed only for what the criminal has done and not for what his status or position in the community is. Those decisions should be consistent so that all can be assured that everyone similarly situated is treated equally.
>
> These policies represent the end of traditional plea bargaining in King County. No longer will the disposition of criminal cases be negotiated according to hidden and shifting priorities, subject to the pressures of the moment. These policies require accurate charging decisions based on what the evidence will support and they contemplate that a defendant charged with a serious crime will plead guilty to charges accurately reflecting his criminal conduct or go to trial. While we recognize that a person with a crime free record who commits a minor offense should generally be treated with leniency, we likewise intend that those who commit serious crimes and who repeatedly commit crimes should expect to receive the punishment which their acts deserve.
>
> Any set of policies must recognize that exceptions will always be necessary. The purpose of these policies is not to rigidly bind those who must make individual decisions but to articulate principles that will guide them. When an individual case presents factors which would make application of the general policy unjust, it should be acknowledged as an exception and dealt with accordingly. But the reasons for the exception can and should be set forth in writing. It is this process of stating the general policy and requiring justification for departures which insures responsible and consistent decision making.
>
> Like any set of policies these involve the setting of priorities. These priorities reflect both the fact that some crimes are more serious than others and thus worthy of more official resources and the fact that those resources are always limited. Choices must be made. What these policies insure is that those priorities are stated openly and applied evenly.
>
> This statement of policy is not meant to be a static document. As we gain experience with the effect of these policies in practice and as conditions change so will our policies evolve. Through this process of constant re-examination, we will insure that these policies best serve the public trust which is involved in each decision we make.[60]

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[60] Norm Maleng, King County Prosecuting Attorney, "Filing and Disposition Policies," at 1-3 (Revised, May 1982).

The remaining sections explain how to implement these basic principles.

In these guidelines emphasis is placed on the charging decision. In order not to reduce charges, the original charge must accurately reflect both the nature of the crime committed and the level of charge which the evidence can sustain. If charges are artificially inflated, evidence problems, which are the traditional justification for plea bargaining, are built in from the beginning. To avoid this problem, charging decisions are made conservatively and approved by a senior deputy. After the original decision is made, the defendant is expected to plead guilty as charged or go to trial.

Within the basic guideline that the defendant should plead to a charge and level that reflects the criminal conduct, there is some flexibility. For instance, in a single criminal episode where rape and robbery are committed both charges should be filed; but if the defendant pleads guilty to rape, then the robbery charge may be dismissed. In cases with multiple counts of the same property crime, the defendant only need plead to a sufficient number to indicate he is a multiple offender, provided he agrees to make restitution for all the losses. For personal injury crimes, however, the guilty plea must include charges involving each victim or the defendant must go to trial. Also, if evidence problems occur during the course of the case, then compromises may be made with the written permission of the chief prosecutor or his assistant. In violent crimes the victim is also consulted.

Certain priorities for prosecution are spelled out in these guidelines. Crimes against persons, residential burglary, and armed robbery are targeted as high impact crimes--those having the most serious consequences for victims and causing the most fear in the community--and given priority.

The standard for prosecution is slightly lower, sentence recommendations are higher (always involving incarceration), and more resources are spent pursuing the cases. Priority is also given, in both violent and property crimes, to defendants with prior criminal histories. On the other hand, first-time offenders who have committed relatively minor property and drug crimes are "expedited," being prosecuted quickly and rather leniently at the district court level.

The standards are very specific in itemizing how general policies are to be implemented in specific cases. For instance, standard operating procedure with cases decline for prosecution is as follows:

> II. Declination of Cases
>
> A. Procedure
>
> 1. The specific reasons for declining a case shall be set forth on the decline form. A copy of the reasons shall be given to the detective who presents the case and the detective shall be advised that the decision may be appealed to the senior deputy in charge of the filing unit, the assistant chief in charge of filing and disposition or the chief of the criminal division. The prosecuting attorney will personally review any decline at the request of a chief of police.
>
> B. Reasons Other Than Evidentiary Sufficiency
>
> A case may be declined for prosecution, even though the standard of evidentiary sufficiency has been satisfied, in situations where prosecution would defeat the underlying purpose of the statute in question or would result in decreased respect for the law. This responsibility should be exercised sparingly and only when society would clearly be served by such action.[61]

[61] Id. at 21-22.

The allowable reasons for declining prosecution, other than evidentiary insufficiency, are then listed and each one explained. These reasons include:

* contrary to legislative intent;
* antiquated statute;
* victim requests;
* immunity;
* deminimus violation;
* confinement on other charges;
* pending conviction on another charge;
* highly disproportionate cost of prosecution; and
* improper motives of complainant.

Specific considerations are also listed and discussed for sentence recommendations, exceptions to the standards, habitual criminal allegations, and probation revocation. Considerations of filing, charge negotiation, and sentence recommendations are all itemized in detail for each specific felony.

Finally, these standards are public. Copies have been distributed to the defense bar and are available to any citizen. This provides for accountability and helps remove the taint of plea bargaining as involving secret deals. It is the final, logical step to removing the mask of obscurity, to opening plea negotiations up to public scrutiny, and thus, gaining legitimization and public confidence.

c. Early plea project. In addition to the reforms discussed above, King County has introduced an innovation called the "early plea project." This is an attempt to move both sides into negotiating any plea bargain as soon as possible in the process. The first two weeks after the defendant is

charged is reserved for review of the evidence and consideration of plea bargains. What will be offered is known in advance from the written guidelines. Usually, the offer involves a sentence recommendation. Two recommendations are offered for most crimes specified in the guidelines, a low and a high recommendation. Generally, if the defendant pleads guilty as charged, the low recommendation will be made; but if he proceeds to trial, the higher sentence is recommended.

A senior deputy with full dispositional authority attends the omnibus hearing, scheduled within the two weeks. If there are no issues which need to be resolved at trial, the defendant usually pleads guilty at the omnibus hearing, where the offer is finalized. Such pleas are made even before a trial date is selected, a prosecutor is assigned the case, or subpoenas are issued. Considerable time in pretrial preparation is saved.

The early plea project seems to have been a success. During 1980, the first year of the project, the median time for entry of guilty pleas decreased from 47 days to 27 days. Since approximately 80 percent of the cases are settled by guilty pleas, such a reduction amounts to a considerable savings in resources and an increase in efficiency.[62]

6. Portland, Oregon.

a. Crime Commission visit. In July 1982, two Crime Commission staff members visited Portland, partly to assess Multnomah County's policies and procedures with respect to plea bargaining. Commission staff members interviewed the following persons:

* Judge Robert E. Jones, Multnomah County Courthouse;

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[62] King County Pros. Att'y Annual Rep., at 5-6 (1980).

* Judge John Beatty, Multnomah County Courthouse;

* Michael Schrunk, District Attorney;

* Jim Rhodes, Attorney in Charge, Attorney General's Office;

* Mark Sussman, Public Defender's Office;

* Chief Ron Still, Portland Police Department;

* Charles F. Makinney, Director of Fiscal Services;

* Jim Murchison, Court Administrator;

* Chuck Bernard, Assistant Court Administrator;

* Chuck Wall, Administrator, Central Intake Services (ROR); and

* Steven Houze, Attorney.

The Commission was given excellent cooperation by all those interviewed, who were willing to share their experience and provide any information available to them.

b. Pretrial settlement conference. Portland's primary reform in plea bargaining practices is the mandatory pretrial conference. Established in 1971, the conference has been an important step in Portland's efforts to streamline the judicial process. It requires that any negotiated settlements be made early, be in writing on a standard form, be signed by all parties, and be filed with the court. The offer is tendered in writing at the pretrial conference and left open for a set, specified time period. After the expiration of that period, charge reduction is disallowed.

The pretrial conference is established by court rules. Relevant sections of the rules read as follows:

RULE 3.70 PRETRIAL CONFERENCE

(1) The defendant and his attorney and the Deputy District Attorney will be present at pretrial conference.

. . . .

(5) At or before pretrial conference, the State will disclose to defendant any lesser plea which it will accept in lieu of trial upon a more serious charge or multiple charges, and indicate how long the proposal will remain open. No plea reductions will be allowed by any court after assignment to a trial department unless there is a change of circumstances.

(6) The Chief Criminal Judge will not participate in plea discussion, except in cases where the State and defense jointly present to the Judge a plea agreement or in case of any problem upon which they desire to seek his advice.

RULE 3.80 PLEAS

(1) All pleas of guilty prior to commencement of trial shall be taken in the Chief Criminal Court unless specifically assigned by the Chief Criminal Judge to another judge.

(2) When a plea of guilty is presented in the Chief Criminal Court, the Deputy District Attorney shall present to the Court a fully prepared copy of the indictment or information, the plea petition, and the pleading order concerning sentencing.

(3) The court shall ascertain and make a finding as to the capacity and purpose of the defendant and make a finding as to such upon the record.

RULE 3.95 SENTENCES

. . . .

(2) No plea shall be contingent upon assignment to a particular judge for sentencing, but the Chief Criminal Judge may assign cases for sentencing to a particular judge in the interest of good administration.

The form which is completed at the pretrial conference and submitted to the court lists the specifics of the plea bargain. It includes the charges to which the defendant will plead guilty; the charges which will be dismissed; the details of the sentence recommendation, if any, including restitution

requested; an indication that the defendant accepts, rejects, or is considering the offer; and the length of time the offer remains open. It is signed and dated by the defense counsel and deputy district attorney. Laying out all the details of the negotiation in a public document opens up the process to scrutiny, both by the judge and by the public. It helps remove the cloud of secrecy which seems to taint the process.

There seem to be no other constraints on plea bargaining beyond those imposed by the court. The reforms in this area are the result of judicial initiative. The prosecutor's office has imposed no specific limits through guidelines beyond normal administrative control. Certain injunctions may become policy from time to time, such as the current prohibition on plea bargains in home burglary cases. The police and victims are regularly notified of bargains and the police, at least, have the opportunity for input before the deal is concluded. Although the prosecutor has the final decision, a recommendation from the police department is given strong consideration.

As noted in the court rules, guilty pleas are all heard by the chief criminal judge, who deals with all pretrial matters in the master calendar system. The trial judge cannot take a change of plea; the defense must go back to the chief criminal judge. This procedure precludes judge shopping and thus discourages unnecessary delay, putting more emphasis on concluding the bargain at the pretrial hearing. Sentencing of those who plead guilty are likewise normally all handled by the chief criminal judge.

The judge is not normally otherwise involved in the plea negotiation. As noted in the rules, however, he may be called in at the pretrial conference if requested by both sides. In 1971, when the reforms to speed up the system

were introduced, it became necessary to use judicial plea bargaining in order to clear the backlog of cases. Judge Robert E. Jones convened many conferences to facilitate bargaining of outdated cases, producing twice as many settled cases in the same amount of time. Since that time, however, judges become involved only as necessary to help clear an exceptionally crowded docket.

7. California and Nevada.

a. Interviews. In August, 1982, the Hawaii Crime Commission sent two persons to California and Nevada for the purpose of ascertaining the plea bargaining practice of those two states. Information was obtained by interviewing a number of professionals in the criminal justice system in Los Angeles, Sacramento, and San Francisco in California and Carson City in Nevada.

In California, the following individuals were interviewed:

Los Angeles

* Richard J. Chrystie; Special Assistant Deputy District Attorney;
* Judge Michael Burke, Municipal Court Judge;
* John Iverson, Criminal Courts Coordinator (Superior Court);
* Judge Julius A. Leetham, Superior Court Judge;
* Robert P. Heflin, Head Deputy District Attorney, Career Criminal Unit;
* Jack J. Gold, private attorney;
* James C. Hardin, Deputy Chief of Police;
* Robert E. Savitt, Deputy District Attorney;
* Curt Livesay, Chief Deputy District Attorney;
* Stephen P. Marnell, Criminal Courts Coordinator (Municipal Court); and
* Steve Trott, U.S. Attorney, Sourthern District of California.

Sacramento

* Judge Edward J. Garcia, Municipal Court Judge;

* Felix J. Luna, Captain of Police Department;

* Edward L. Martin, Deputy Chief of Police;

* Michael L. Dillard, Deputy Public Defender; and

* Norman K. Main, Deputy District Attorney.

San Francisco

* Judge Lucy K. McCabe, Municipal Court Judge;

* Ray Canepe, Police Commander;

* Jeff Brown, Public Defender; and

* Paul Principe, Deputy District Attorney.

In Nevada, the following individuals were interviewed:

Carson City

* William A. Maddox, District Attorney;

* J. Gregory Damn, State Public Defender;

* Denis W. Austin, Police Lieutenant; and

* Ernest E. Adler, Deputy Attorney General.

In California, by and large, the interviewees indicated that they perceived no real problem with the practice of plea bargaining and that they in fact saw it as a necessary and integral part of the criminal justice process.

b. Written guidelines. In Los Angeles, deputy district attorneys have explicit, written guidelines with which to settle felony cases. These guidelines are designed to state clearly and publicly, the policy behind and the criteria for felony case settlement. Basically, the guidelines indicate when an accused will be required to plead to all charges or where

a charge can be reduced; when and what kinds of sentence recommendations can be made; and the circumstances under which departures from the standard policies will be allowed.

Specifically, the guidelines are relatively explicit, attempting to anticipate the variety of situations in which questions may arise with respect to the disposing of a felony case. For example, they provide 1) that "an accused charged with multiple murders shall be required to plead to all such counts charged," 2) that "in controlled substances cases, a sale or possession for sale charge shall not be reduced to a lesser offense," and 3) that "in determining whether or not to agree to a felony sentence commitment of no immediate state prison or that an alternative misdemeanor/felony be declared a misdemeanor, an authorized prosecutor shall take into account an accused's prior record, the severity of the crime, the probability of continued criminal conduct, the accused's eligibility for probation and the integrity of the criminal justice system."

All in all, California's plea bargaining practice is not unlike Hawaii's inasmuch as the goals and objectives of the district attorney in California and the prosecutor in Hawaii are very similar. Both desire to protect the community while providing justice to the accused, and to ensure that guilty accused are convicted of those crimes which most accurately reflect the gravamen of their conduct, are sentenced accordingly, and are treated in the process with fairness and consistency.

c. Proposition 8. On June 8, 1982, however, the California electorate voted overwhelmingly for a series of propositions, placed on the ballot through the initiative process, which were to effect sweeping changes to the laws and constitution of that state. One such proposition, Proposition 8, was designed,

among other things, to prohibit plea bargaining in cases involving certain specified felonies and drunk driving offenses.

In relevant part, Proposition 8 read as follows:

> 1192.7. (a) Plea bargaining in any case in which the indictment or information charges any serious felony or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the People's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.
>
> (b) As used in this section, 'plea bargaining' means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.
>
> (c) As used in this section 'serious felony' means any of the following:
>
> '(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a non-inmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with the intent to murder; (18) burglary of a residence; (19) robbery; (20) kidnapping; (21) taking of a hostage by an inmate of a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering or providing heroin, cocaine, or phencyclidine (PCP) to a minor; (25) any attempt to commit a crime listed in this subdivision other than an assault.'

Pursuant to the passage of Proposition 8, the Los Angeles County District Attorney issued the following directive to his deputies to ensure compliance with the mandates of Proposition 8:

> Because of the restrictions on plea bargaining set forth in 1192.7 of the Penal Code, a felony case settlement may be negotiated only in the following circumstances:
>
> 1. A case settlement may be concluded in an unrestricted case, subject to the felony and misdemeanor case settlement policies set forth in the Legal Policies Manual at any time after the filing of the complaint.
>
> a. An unrestricted case is any one of the following:
>
> 1) Any felony charge except a 'serious felony' enumerated in Penal Code Section 1192.7(c) or a felony charge involving driving while under the influence of an intoxicant.
>
> 2) Any misdemeanor charge except those involving driving while under the influence of an intoxicant.
>
> b. While the language of Section 1192.7(a) applies only to enumerated cases charged by an indictment or information, it is the policy of this office to apply a plea bargaining ban to all such cases following the filing of a complaint, subject to the exceptions expressed in Section 1192.7(a).
>
> 2. A case settlement may not be discussed, negotiated or concluded in a restricted case unless it will result (1) in no substantial change in the defendant's sentence, or (2) there is insufficient evidence to prove the People's case against the defendant, or (3) the testimony of a material witness cannot otherwise be obtained.
>
> a. A restricted case is (1) any serious felony, as defined in Section 1192.7 of the Penal Code, or (2) any felony or misdemeanor offense of driving while under the influence of an intoxicant.
>
> 1) We define the word 'sentence' as used in the exception 'no substantial change in sentence' to the middle term on each count plus provable enhancements unless there are sufficient factors in aggravation (as expressed in Judicial Council Rule 421 set forth in the felony case settlement policy) to warrant imposition of the upper term. A prosecutor may agree to strike or stay imposition of sentence on any charge for which a sentence cannot be imposed (Penal Code Section 654) if sentence is imposed on another

charge. However, the charge which is struck or stayed must not be one whose maximum possible sentence is longer than the maximum possible sentence on the conflicting charge.

Penal Code Section 1170 states the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation.

2) A case settlement may be discussed, negotiated, or concluded in a restricted case if there exists a serious factual weakness which creates a substantial likelihood that a conviction will otherwise not be obtained. Any case settlement based on serious factual weakness must be memorialized in a case disposition report and approved by the appropriate Calendar Deputy. This report must contain the deputy's rationale for the case settlement, based on the perceived serious factual weakness. The report shall be placed in the case file with a copy forwarded to the appropriate Head Deputy.

3) A case settlement may be discussed, negotiated and concluded in a restricted case when such settlement is in the interest of justice and if the defendant is a material witness who can provide persuasive evidence against an equally or more culpable defendant in that case or any other case when the evidence is so deficient, against the other defendant, as to present a substantial likelihood that a conviction cannot otherwise be obtained. Any testimony obtained in this manner must be of significant assistance to law enforcement and further the interests of justice.

3. As defined in the statute, a 'plea bargaining' means any bargaining, negotiation, or discussion between a criminal defendant, or his/her counsel and a prosecuting attorney or judge to obtain concessions, assurances or commitments.

Using these criteria, if any plea bargain and/or case settlement is prohibited under the previously described restrictions, subject to the three enumerated exceptions, no discussions between court, defense counsel or deputy district attorney are permitted, with relationship to disposition of charges, unless such discussion is to inform the court that the defendant stands ready to plead to all charges alleged against him.

A close analysis of Proposition 8 and the administrative directive it spawned in response thereto, indicates that the initiative measure really

did not change the status of plea bargaining in Los Angeles County. While the proposition is couched in terms of a prohibition of plea bargaining, the exceptions to the prohibition in effect render it ineffectual. That is, the proposition merely reflects standard plea bargaining practice, prohibiting only those kinds of plea bargains which procure no bargain for the state--the kind of plea bargaining already prohibited by the felony case settlement guidelines. It does, however, prohibit plea bargaining with a defendant in order to convict an equally or more culpable defendant because this kind of plea bargaining is not specifically exempted from the general prohibition. This prohibition notwithstanding, as noted in the district attorney's directive contained in paragraph 2.a.3), deputy district attorneys are still permitted to plea bargain under such circumstances.

Proposition 8 notwithstanding, the plea bargaining practice in California very closely resembles that of Hawaii's. The primary difference is that California has recognized its existence, codified it in state law, and attempted to prevent its abuse by specifying the limited number of circumstances under which it can be conducted.

d. Nevada. In Nevada, the interviewees indicated that the administration of the criminal justice system is very decentralized because home-rule prevails and each of the state's 17 counties is quite autonomous. The state government appears to have much less jurisdiction and authority than our own, notwithstanding the fact that Hawaii's counties are, to a large extent, isolated by miles of water. Each county's district attorney sets his own plea bargaining policy and practice as there are no state laws, rules, regulations, or guidelines covering the matter.

In general, the practice in the major counties, Washoe and Clark, wherein Reno and Las Vegas, respectively, are located, appears to be similar to that of Hawaii's and California's. This is probably true because the district attorneys are elected officials and therefore accountable and responsive to the people in their respective counties. Given the ultimate accountability of having to be elected or re-elected to be or remain the district attorney, there really is not much they would want to do in terms of the kind of plea bargaining they practice, except that which common sense and their feel for what is just and right dictate.

With respect to plea bargaining in the other 15 counties, not much can be said because they are primarily rural in nature with such limited population and so little crime, they are really not comparable at all either to Hawaii or California.

C. Survey of Attorneys General.

To initiate the study on plea bargaining, the Hawaii Crime Commission mailed form letters to the attorney generals of the 49 states. It requested information on each state's policy with regard to plea bargaining; whether that state had considered eliminating or had eliminated plea bargaining practices; and the impact of any such changes. The Commission received replies from 32 states.

1. No modifications of plea bargaining.

Of the 32 states which replied, 29 indicated they had made no modifications in their plea bargaining practices. Twenty-two of these states indicated that there had been no consideration of eliminating plea bargaining (including Delaware, Florida, Georgia, Idaho, Iowa, Kansas,

Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, West Virginia, Wisconsin, and most jurisdictions of Washington and Colorado). These states believe that plea bargaining is a viable and necessary prosecutorial tool and that to limit or eliminate the practice would place a burden on the courts. They feel that without plea bargaining there would be more trials which would hamper the expeditious movement and disposition of cases on the criminal dockets.

Officials in four states--Minnesota, Nebraska, Pennsylvania, and Wyoming--have talked about the possibility of limiting or eliminating plea bargaining, but thus far have done nothing on the matter. Plea bargaining remains an active way of disposing cases.

Three states have considered legislation to set limitations on plea bargaining. These include Illinois, Nevada, and South Dakota. Nevada's bill would limit plea bargaining in cases of murder, kidnapping in the first degree, sexual assault, or robbery where a firearm was used. South Dakota's bill would eliminate plea bargaining in DWI cases (driving while intoxicated). It is also not known whether this legislation has been successful.

Colorado has 22 judicial districts, 12 of which replied to the Commission. Of the 12 replies, 8 judicial districts have no consideration of eliminating or limiting plea bargaining practices. The other four districts have some kind of policy governing plea bargaining.

2. Modifications of plea bargaining.

Two states have modified plea bargaining practices on a statewide basis. Alaska banned plea bargaining in 1975. The Alaska experience is

described above, in section A. Oregon has prohibited plea bargaining in cases of driving under the influence of intoxicants. In all other cases plea bargaining is allowed. In other states, policies have been modified only in certain jurisdictions, usually on a county basis.

Iowa has two counties which have adopted administrative programs which substantially eliminate plea bargaining, Polk County and Black Hawk County. In these counties, there is no negotiation for guilty pleas except where the evidence and witness testimony on a serious charge (homicide, rape, armed robbery) are disintegrating. Only then will officials consider plea negotiation in the interest of public safety.

Since establishing this policy, the number of criminal trials has increased, the incarceration rate has substantially increased, and the prisons are becoming overcrowded.

Colorado has four judicial districts with modified plea bargaining practices. The Second Judicial District is engaged in an ambitious effort to reduce plea bargaining by 1) eliminating charge bargaining after arraignment and trial setting, except upon the Chief Deputy District Attorney's approval in exceptional circumstances; 2) eliminating sentence bargaining; 3) eliminating dismissals, except where the facts of an independent case or cases are provided to the court prior to sentencing on the plea to a principal charge; and 4) opposing continuances, except where a trial judge is unavailable or except where required to prevent statutory dismissals. The Seventh Judicial District of Colorado has modified plea bargaining by permitting a plea of guilty with a deferred judgment only to first offenders involved in nonviolent crimes and by eliminating plea agreements for violent crimes, sale of narcotics, and

repeat offenders.

It has been four years since the Eleventh Judicial District has instituted a stand against plea bargaining. The jurisdiction has sufficient judicial and prosecution resources to permit a reasonably strong line against plea bargaining. It is office policy to refuse deferred prosecution--six-month or one-year continuances of the prosecution of a case. However, on occasion the office does permit deferred judgment and sentence. This device allows the defendant's guilty plea to the charges, with the judge, upon agreement of the District Attorney, withholding the entry of a judgment of conviction for a period of up to two years. During this time the defendant is on probation or sentenced as a condition to up to 90 days in jail. Upon the defendant's satisfactory completion of probation, he is allowed to withdraw his guilty plea, and the charges are dismissed (similar to Hawaii's deferred acceptance of guilty plea).

The Eighteenth Judicial District has restricted plea bargaining in class one, two, and three felonies. These felonies include such crimes as murder, sexual assault, burglary of a home, and aggravated robbery. Plea bargaining is widely used on lower class felonies, misdemeanor and traffic offenses. In cases of first offenders charged with lesser non-violent crimes, deferred judgment and sentencing is used extensively.

Several county prosecutors within the state of Washington have adopted guidelines to regulate plea bargaining practices. One of these is King County, which has set high prosecution priorities on violent crimes against persons such as murder, rape, and armed robbery. Also on the priority list are residential burglary, major dealing in drugs, and large thefts. These crimes are restricted from plea bargaining practices.

However, exceptions to the rule may be necessary and in the public interest. Such situations may include the following:

(1) Evidentiary problems which make conviction on the original charges doubtful;

(2) The defendant's willingness to cooperate in the investigation or prosecution of others;

(3) A request by the victim;

(4) The discovery of facts which mitigate the seriousness of the defendant's conduct;

(5) Where inadequate judicial or prosecutorial resources require the avoidance of the time and expense of a trial.[63]

When prosecution is concluded with a plea agreement, the defendant is required to plead guilty to the charge that bears a reasonable relation to the nature of the defendant's conduct, that makes it possible to impose an appropriate sentence, and that does not affect the investigation or prosecution of others. All plea agreements are written, kept in the case file, and approved at appropriate levels. This is to ensure responsible and consistent decision making and provide for accountability.

3. Summary of responses.

Alabama	:	
Alaska	:	Instituted a statewide no plea bargaining policy since 1975.
Arizona	:	
Arkansas	:	
California	:	Plea bargaining policies are handled differently by various district attorneys of each of the 59 counties.
Colorado	:	Has 22 judicial districts of which we received 12 replies. Of these 12, eight have no consideration of eliminating or limiting plea bargaining practices. The other four have some kind of policy governing plea bargaining.
Connecticut	:	
Delaware	:	No ban on plea bargaining.
Florida	:	Legislature has considered a proposal to eliminate plea bargaining a number of times, but it has not been adopted.
Georgia	:	Utilizes plea bargaining and no effort to eliminate it. However, one judicial circuit, as a matter of policy, does not accept plea bargaining.
Idaho	:	No policy regarding the ban of plea bargaining.
Illinois	:	No formal plans to eliminate plea bargaining. Several bills have been proposed to set limitations on plea bargaining, but none has passed.
Indiana	:	
Iowa	:	Has not eliminated the use of plea bargaining nor has there been any substantial consideration to do so on a statewide level. However, two counties have adopted administrative programs which substantially eliminate the use of plea bargaining.
Kansas	:	Has not seriously considered eliminating plea bargain. However, several counties have major felony bureaus wherein plea bargaining is eliminated for past convicted felons.
Kentucky	:	Doesn't appear that plea bargaining will be eliminated.
Louisiana	:	Never been a movement to eliminate use of plea bargaining.
Maine	:	
Maryland	:	Adopted a policy of formalizing plea bargain by court rule.
Massachusetts	:	Has discussed abandoning the practice of plea bargaining, but it does not seem feasible at this time.
Michigan	:	
Minnesota	:	Elimination of plea bargaining has been studied, but no formal procedure has been adopted.
Mississippi	:	No county has put a ban on plea bargaining.
Missouri	:	Presently unaware of any efforts to ban plea bargaining.

[63] Washington Association of Prosecuting Attorneys, "Charging and Disposition Policies," at 21 (December 5, 1980).

Montana	:	No efforts have been made at state or local level to abolish use of plea bargaining.
Nebraska	:	Minor discussion on eliminating plea bargaining has occurred as part of legislative process, but no action has been taken.
Nevada	:	Recently introduced to legislature a bill that considers a limitation on plea bargaining. Whether it passed is unknown.
New Hampshire	:	Elimination of plea bargaining has not been raised and see no reason to raise it at this time.
New Jersey	:	Twenty-one county prosecutors enter into plea negotiations on a regular basis; however, some county prosecutors do not, as a matter of policy, engage in sentence bargaining.
New Mexico	:	
New York	:	
North Carolina	:	
North Dakota	:	
Ohio	:	Have not considered eliminating plea bargaining. However, one county's prosecuting attorney's office stated that it does not plea bargain sentencing. Plea negotiations regard multiple charges or reduction to lesser included offenses. This practice is not governed by any formal court rule.
Oklahoma	:	
Oregon	:	Prohibits use of plea bargaining in one kind of case--driving under the influence of intoxicants.
Pennsylvania	:	No county has a ban on plea bargaining.
Rhode Island	:	No present plan to eliminate plea bargaining as part of judicial process.
South Carolina	:	Plea bargaining is a viable entity in cases that have lesser included offenses.
South Dakota	:	Have not considered eliminating plea bargaining. A bill was introduced recently which would eliminate plea bargaining in driving while intoxicated (DWI) cases. Whether it passed is unknown.
Tennessee	:	
Texas	:	
Utah	:	

Vermont	:	
Virginia	:	
Washington	:	Several county prosecutors have adopted guidelines to regulate plea bargaining practices. However, we are only aware of King County's regulation on plea bargaining.
West Virginia	:	Has not considered any legislation or rules eliminating the use of plea bargaining.
Wisconsin	:	Nowhere in the state is plea bargaining improper or illegal.
Wyoming	:	Have not considered any restriction on, or the elimination of, plea bargaining.

IV. CONCLUSIONS

A. Traditional Plea Bargaining.

Plea bargaining is used extensively in almost all jurisdictions throughout the United States. The practice evolved as a means to adjudicate an increasing number of criminal cases in the face of limited judicial resources. During the years of its widespread growth, plea bargaining flourished in an environment with little legal or administrative control. As a result, gross abuses became possible, and plea bargaining acquired a poor public reputation. Thus, it seems appropriate to examine both the mechanics and the underlying premises of plea bargaining to determine whether or not the practice serves a legitimate function consistent with the ideals of American jurisprudence. On the basis of this determination, plea bargaining could then be maintained, abolished, or reformed.

Although plea bargaining practices differ from one jurisdiction to the next, there are always two basic elements present: 1) the defendant waives his right to a trial and pleads guilty, and 2) he receives in exchange some concession from the prosecution. The concessions he may be offered vary considerably depending upon the particulars of the case, the structure of the local criminal justice system, and the personalities of those involved. However, the essential nature of the bargain as a "deal" is always present.

It is this characteristic which, above all, has tainted the practice in the minds of the public. This connotation of plea bargaining seems to violate the sanctity of the law and subverts, in particular, the doctrine of uniformity under the law. Unrestricted traditional plea bargaining seems to make a mockery of the American concept of justice. It creates the

potential for abuse of power and results in corruption.

On the other hand, for those in the criminal justice system, plea bargaining serves legitimate ends, chief among which is the alleviation of caseload pressure. Due to the stringency of prosecutorial screening and pretrial court proceedings, most cases possess no basis for real contention as to the guilt or due process rights of the defendant. Plea bargaining enhances the flexibility and efficiency of the criminal justice system in case disposition such that the benefits seem to far outweigh the disadvantages.

The motivations vary for each participant in the plea bargaining process. The prosecutor is the key figure basically because it is his discretion that is implemented in the charging process. The prosecutor is usually willing to negotiate for several reasons, including caseload pressure, case strength, and the probable outcome of trial. The defense counsel works under pressures similar to those of the prosecutor, in addition to financial and bureaucratic considerations. His duty to secure the lightest possible sentence for his client is usually influenced by the commonly acknowledged sentencing differential between conviction at trial and a guilty plea. As for the defendant, he is motivated by factors like the severity of sentencing laws or the intractibility of his situation. Judges may also be involved in the plea bargaining process. This involvement may vary from ensuring the defendant's rights and receiving the plea to outright involvement in the actual negotiations. Suffice it to say that significant arguments pro and con exist on the question of judicial participation.

B. Plea Bargaining Reforms.

Many jurisdictions across the country have reformed their plea bargaining

practices. These reforms have ranged anywhere from outright abolition to a ban on bargains in drunk driving cases. All the changes have sought to instill more public confidence in the system and, to some extent, to regularize plea bargaining practices. The reforms have sought to preserve the advantages inherent in traditional plea negotiation--efficiency and flexibility--while minimizing abuse and the potential for abuse. In many areas of the country, traditional wholesale plea bargaining no longer exists.

Scholars have stated and practitioners have admitted that plea bargaining can be regulated but never eliminated completely. Charging is an inalienable part of prosecutorial discretion, and each case is sufficiently unique to require the exercise of judgment at some point in the process. Also, caseloads always seem to exceed existing resources. Given these factors, many argue that if plea bargaining is repressed in one area it will only emerge elsewhere in the process. They feel it is better to officially recognize the practice and allow it to continue with certain regulations than to try to eliminate it completely as that would only serve to make it covert.

Reforms have varied from one jurisdiction to the next, yet they have several traits in common. First, every reform effort started with the presumption that plea bargaining was responsible for a crisis in public confidence. It was felt that a public stance against wholesale bargaining was needed to restore confidence in the criminal justice system. Second, every reform which attempted to limit the amount of plea bargaining involved a trade-off. Less bargaining meant accepting fewer cases through tighter screening. Emphasis on prosecutorial screening was a common element. Finally, the changes in plea bargaining practices reflected certain hierarchies of priorities in prosecution. Bargaining was selectively eliminated

for certain classes of crimes (e.g., violent crimes or all class A felonies), certain classes of defendants such as career criminals, multiple offenders, or both.

Other specific reforms existed in various combinations, while their success depended upon the specific characteristics of the local legal system and its practitioners. For example, some jurisdictions prohibited sentence bargaining, while others banned charge reduction. Some allowed all types of bargaining but insisted that the final charge bear a reasonable relationship to the criminal conduct involved; still others required only that the seriousness of the conduct be represented in the charge. Certain jurisdictions focused on the time factor, disallowing plea bargaining after a certain point in the judicial process. Other programs called for police, victim, and/or judge participation in the actual plea bargain conference; others simply enjoined that the concerned parties be notified on a timely basis. Many jurisdictions implemented plea bargaining reforms through written guidelines.

C. Plea Bargaining in Hawaii.

Wholesale plea bargaining for the sake of expediency alone no longer exists in Hawaii. The effect of this reform has been to eliminate many of the disadvantages of plea bargaining decried nationwide both in the professional literature and by the general public. At the same time, many of the advantages have been retained. Strict screening has placed the prosecutor in a position of strength, and the limit on bargaining has not flooded the prosecutor's office and courts with an unmanageable number of cases. The number of guilty pleas has remained consistently high while the

percentage of trials has remained fairly low.

A review of the individual cases as well as the data collected would seem to support the theory that plea bargaining functions as a useful and efficient tool that contributes toward a streamlining of the criminal justice system as a whole. Despite the frequency of its use, there is no evidence for its abuse. The highest charges are reduced in about one out of every six cases which is appropriate in light of the ideal of rehabilitative justice. The highest charge is maintained approximately 85 percent of the time.

Several deficiencies still remain to be remedied, however. First and foremost, the process lacks visibility. Unlike some jurisdictions which have issued written plea bargaining guidelines as public documents, Hawaii's practices remain shrouded in the cloak of secrecy. Negotiations conducted in private tend to arouse suspicion resulting in a diminution of public confidence in the system. Second, plea bargaining practices lack uniformity, and thus written detailed standard operating procedures should be provided. Third, plea negotiations are not concluded as early as possible in the process. Currently, little time is saved by plea bargaining, and agreements reached late in the judicial process disrupt court calendaring. Fourth, there is no set, formal procedure for regular communication between police, prosecutor, and victim in felony cases. Finally, agreements are not set down in writing and signed by all concerned parties; a fact which has led to many a misunderstanding and mix-up.

These deficiencies are all addressed in the following section by way of a set of practical, workable recommendations. All of the suggestions contained therein have been tried elsewhere and have been proven to be effective.

V. RECOMMENDATIONS

The safeguards recommended by the Crime Commission are designed to standardize, rationalize, and increase the visibility of plea bargaining practices. It is our hope that such safeguards would serve to instill public confidence in the actual use and function of plea negotiation within the criminal justice system. The four recommendations are: A. Establish Written Guidelines; B. Mandate Pretrial Settlement Conferences; C. Maintain Communication with the Police and the Victim; and D. Require Written Agreements.

A. Written Guidelines.

Establishing written guidelines to govern all aspects of plea bargaining will improve the public's confidence in the criminal justice system to deliver "just" results. First, written guidelines will ensure that all plea bargaining decisions will be made in light of public scrutiny. This will provide accountability for the practice since the public will become aware of the philosophy and policy of each prosecutor with respect to plea bargaining. Second, guidelines will ensure consistency so that all persons involved are handled in an open, evenhanded manner in each county and thus prevent arbitrary or capricious actions. This in turn will lend stability and predictability to the system. Finally, this progress will help minimize subjective factors and define the overall goals of the office.

For all of the above-mentioned reasons, the Hawaii Crime Commission recommends that the prosecuting attorney of each county formalize his plea bargaining practice by adopting written guidelines covering all its aspects.

These guidelines should reflect the general policies and priorities of each prosecutor yet be specific enough to be used as standard operating procedures by deputies in his office. If possible, the guidelines should be standardized across the state. Appendix B contains examples of several counties on the mainland which have adopted guidelines to govern plea bargaining practices in their respective jurisdictions.

The Crime Commission recommends that certain specific provisions be included in the written guidelines of each county. Some of these policies are presently in effect but placing them in a public document would create greater confidence in the system. The Commission recommends guidelines which specify:

1) Initial charges be accurate. The charge and degree should accurately reflect what the evidence will fairly support. Overcharging as a mere ploy to encourage plea bargaining should be prohibited.

2) The guilty plea be to charges which accurately describe the criminal conduct. In order to preserve the integrity of the criminal process, the final charge must bear a reasonable resemblance to the conduct involved. Such a policy is easily implemented when the initial charges are realistic

3) Charge reduction be prohibited for high impact crimes. Class A felonies and felonies which involve assault or the use of a firearm should neither be reduced nor dropped except under exceptional circumstances.

4) Charge reduction be prohibited for career criminals. Charges against career criminals should not be reduced or dropped except under exceptional circumstances.

5) Victim's interests be considered. Plea bargaining may be considered in those cases where it would be especially harmful for a victim to be

subjected to participation in a trial.

6) The number of counts may be reduced so long as the remaining counts accurately describe the criminal conduct in question. As long as the defendant pleads guilty to the highest count accompanied by a sufficient number of counts which reflect his conduct as a multiple offender, no useful purpose is served by pursuing prosecution on the remaining counts.

7) That there is opportunity for the police and victim to be informed. Standard operating procedures should provide a means by which the police and victim can be informed of any decision not to prosecute, to dismiss the charge, or to plea bargain, before the completion of final negotiations.

8) The prosecutor clearly states that there are no threats or extra penalties because a defendant goes to trial. This principle is included because it is essential to preserve the constitutional right to trial.

9) There is a standard procedure for exceptions to the guidelines. Allowances must be made for exceptions, but it should be clear that exceptions occur infrequently, and must be fully justified in writing as well as subject to the prosecutor's review. Only in this way will the force of procedural standards retain their power.

B. Pretrial Settlement Conference.

Each prosecutor should mandate that a pretrial settlement conference be conducted within three weeks of arraignment if a case is to be plea bargained at all. Such a procedure would promote judicial efficiency and an accelerated case disposition. Cases which should be resolved with all due speed would be, allowing more time to be spent on cases which do and should go to trial. This would prevent the unnecessary pretrial preparation for cases which are

plea bargained. Of course, if an agreement could not be reached within the allotted period of time, the only option open to the defendant other than trial would be to plead as charged.

Additionally, it is recommended that the pretrial conference be made a regular part of criminal court proceedings and incorporated into the court rules. The system utilized in Multnomah County, Oregon is recommended because it is a successful and appropriate model (see pages 116-119).

C. Communication with the Police and the Victim.

Each prosecutor should require that any plea bargain involving a felony be communicated to the police and the victim (or family of the victim) on a timely basis, i.e., before it becomes public knowledge. This should be done both as a courtesy and to indicate to the victim and the police that they are not merely "evidence" or "evidence fatherers" in the prosecution's eyes, but rather are important parts of the system which concentrates on bringing wrongdoers to justice. Furthermore, in serious cases, the offer should be discussed with both the victim and the police. (We have introduced legislation, approved by the Commission, in the legislature in 1981 and 1982; it did not pass.)

D. Written Agreements.

Each prosecutor should require that all agreements made between the state and a defendant in a criminal proceeding be in writing and signed by the defendant, his counsel, the deputy prosecutor in charge of the case, and the prosecutor or his designee. By so doing, there can be no mistake either as to the existence of the agreement or the terms and conditions thereof, should the deputy prosecutor or the defense counsel change or as the passage

of time dulls memories. The agreement should be entered in the court record on a standard form and be submitted at the end of the pretrial conference. Such a standard practice of issuing written agreements would prevent disagreements, as have arisen in the past, concerning alleged verbal commitments on plea bargains made by a former prosecutor which the courts have ordered subsequent prosecutors to honor, despite changes in philosophy or policy and despite the lack of documentation to support the contentions.

The Commission believes that if these recommendations are adopted, the cause of justice may be furthered. The practice of plea bargaining would be brought out into the open and allowed to continue under standard terms and conditions.

It must be clearly understood that these recommendations do not imply any failure or abuse on the part of any present prosecutor but rather are offered as a means to improve the present system. No system is perfect, especially plea bargaining. Even though some of these recommendations may be standard practice at the current time in various counties, prosecutors change and often their policies change with them.

APPENDIX A

RECORD ABSTRACT FOR COLLECTING DATA FROM CRIMINAL FILES

RESEARCHER _____ CASE NO. _____

1. Defendant's name: _____
2. Criminal number: _____
3. Sex: Male _____ Female _____ Unknown _____
4. Race:

White	_____	Hispanic	_____
Japanese	_____	Black	_____
Chinese	_____	American Indian	_____
Korean	_____	Other	_____
Filipino	_____	Unknown	_____
Hawaiian/Part Hawaiian	_____	Not applicable	_____
Samoan	_____	Multiple	_____

5. Marital status:

Single	_____	Widowed	_____
Married	_____	Common law	_____
Separated	_____	Unknown	_____
Divorced	_____		

6. Years of education completed:

1 - 4	_____	Some college	_____
5 - 8	_____	Trade school	_____
9 - 11	_____	College degree	_____
12	_____	Unknown	_____

7. Years in local residence:

0	_____	5 years	_____
1 year	_____	6 or more years	_____
2 years	_____	Life	_____
3 years	_____	Unknown	_____
4 years	_____		

8. Date of birth: _____ Unknown _____
9. Citizenship:

U.S.	_____	Illegal alien	_____
Legal alien	_____	Unknown	_____

10. Employment:

Full-time	_____	Irregular	_____
Part-time	_____	Unknown	_____
Unemployed	_____		

11. Type of employment:

Government	_____	Military	_____
Blue-collar	_____	Housewife	_____
White-collar	_____	Student	_____
Executive/ professional	_____	Retired	_____
Unknown	_____		

12. Length of continuous employment:

Up to 1 year	_____	6 years	_____
2 years	_____	7 years	_____
3 years	_____	8 or more years	_____
4 years	_____	Unknown	_____
5 years	_____	Not applicable	_____

13. Is there a record of mental illness:

Yes	_____	No	_____

14. Is there a record of drug abuse:

Yes	_____	No	_____

15. Is there a record of alcohol problems:

Yes	_____	No	_____

16. Any prior felony arrests:

0 1 2 3 4 5 6 7 8 or more

Unknown _____

17. Any prior felony convictions:

0 1 2 3 4 5 6 7 8 or more

Unknown _____

18. Felony convictions within five years prior to instant offense:

0 1 2 3 4 5 6 7 8 or more

Unknown _____

19. Any prior misdemeanor arrests:

0 1 2 3 4 5 6 7 8 or more

Unknown _____

20. Any prior misdemeanor convictions:

0 1 2 3 4 5 6 7 8 or more

Unknown _____

21. Misdemeanor convictions within five years prior to instant offense:

0 1 2 3 4 5 6 7 8 or more

Unknown _____

22. Any juvenile record:

Yes _____ No _____

23. Police charges for instant offense: _____

_____

_____

_____

24. Total number of police charges in this case: _____

25. Date of arrest for instant offense: _____

26. Charges pending in other cases:

Yes _____ No _____ Unknown _____

27. On probation/parole/pretrial release at time of instant offense:

Yes _____ No _____

28. Date case received by prosecutor: _____

29. Date of first appearance before judicial officer: _____

30. Pretrial release status:

Cash bond and released _____

Cash bond but not released _____

Released on own recognizance _____

Conditional release _____

Bail denied _____

Unknown _____

31. Date of indictment/information: _____

32. Counts or charges of information/indictment: _____

_____

_____

_____

33. Total number of counts in information/indictment: _____

34. Plea at first opportunity to plead:

Guilty _____ Nolo contendere _____

Not guilty _____ Unknown _____

35. Date of first plea: _____

36. Was there a change of plea:

Yes _____ No _____

37. Type of counsel present at guilty plea or trial:

Public defender _____
Court appointed attorney _____
Privately retained attorney _____
None _____
Unknown _____
Not applicable _____
Yes, but type unknown _____

38. Guilty plea or trial disposition:

Guilty plea _____
Nolo contendere _____
Guilty by jury _____
Guilty by judge _____
Not guilty by jury _____
Not guilty by judge _____
Deferred acceptance of guilty plea _____

39. Date of guilty plea or trial disposition: _____

40. If convicted, sentence imposed:

Probation _____
Jail _____
Prison _____
Split sentence _____
Other _____
Not applicable _____

41. Restitution is condition of sentence:

Yes _____ No _____ Not applicable _____

42. Length of sentence: _____ months _____ years
Unknown _____ Not applicable _____

43. Was there a pre-sentence investigation:

Yes _____
No _____
Unknown _____
Not applicable _____

44. Was the guilty plea a result of a plea agreement:

Yes _____
No _____
Unknown _____
Not applicable _____

45. If yes, what type:

a. Charge reduced _____
b. Charge dismissed _____
c. Sentence recommendation _____
a and b _____
b and c _____
Unknown _____
a and c _____
a, b, and c _____
Not applicable _____

46. Charges convicted on: _____

47. Total number of charges convicted of: _____

48. Sentenced as habitual offender (enhanced):

Yes, # _____ No _____ Not applicable _____

49. Was time of offense night time:

Yes _____ No _____ Unknown _____

50. Harm to victim:

None _____
Minor injury _____
Hospitalization _____
Death _____
Unknown _____
Not applicable _____

51. Age of victim: _____ years

Multiple _____ Not applicable _____ Unknown _____

52. Race of victim:

White	_____	Hispanic	_____
Japanese	_____	Black	_____
Chinese	_____	American Indian	_____
Korean	_____	Other	_____
Filipino	_____	Unknown	_____
Hawaiian/Part Hawaiian	_____	Not applicable	_____
Samoan	_____	Multiple	_____

53. Sex of victim:

Male	_____	Not applicable	_____
Female	_____	Multiple	_____
Unknown	_____		

54. Relationship of offender and victim:

Family	_____	Multiple	_____
Friend/ Acquaintance	_____	Unknown	_____
Stranger	_____	Not applicable	_____

55. Type of burglary victim:

Non residential	_____	Not applicable	_____
Residential	_____	Unknown	_____
Auto	_____		

56. Was there a weapon involved:

Yes, _____ No _____ Unknown _____

57. Was there a confession:

Yes _____ No _____ Unknown _____

58. Was there any physical evidence:

Yes _____ No _____ Unknown _____

59. Number of witnesses: _____ Unknown _____

60. Was there any positive eyewitness identification of the defendant:

Yes _____ No _____ Unknown _____

61. Amount of monetary loss:

Up to $100	_____	5,001 - 10,000	_____
101 - 250	_____	Over 10,000	_____
251 - 500	_____	Unknown	_____
501 - 1,000	_____	None	_____
1,001 - 5,000	_____		

62. Amount of property damage:

Up to $100	_____	5,001 - 10,000	_____
101 - 250	_____	Over 10,000	_____
251 - 500	_____	Unknown	_____
501 - 1,000	_____	None	_____
1,001 - 5,000	_____		

63. Trial judge: _____

64. Prosecutor: _____

65. Defense attorney: _____

66. Judge at sentencing: _____

POLICE BOOKING	COMPLAINT	INDICTMENT	ORIGINAL PLEA	FINAL CHARGE	FINAL PLEA	DISPOSITION	SPECIAL CONDITION

PLEA

1 = not guilty
2 = guilty
3 = nolo contendere

DISPOSITION

1 = discharged by police
2 = no action; report returned
3 = discharged in district court
4 = commitment dismissed
5 = no indictment by Grand Jury
6 = nolle pross
7 = Motion for Judgment of Acquittal
8 = acquitted
9 = acquit and commit to mental institution
10 = suspended
11 = DAGP

SPECIAL CONDITION

1 = sentenced on other counts
2 = state declines
3 = insufficient evidence
4 = witness cannot be located
5 = witness refuse to testify
6 = defendant died
7 = other state hold
8 = Federal hold
9 = deport alien
10 = incompetent
11 = mental treatment
12 = banish
13 = left jurisdiction
14 = consecutive
15 = concurrent

COMMENTS

ITEM NUMBER		ITEM NUMBER	

APPENDIX B

WRITTEN GUIDELINES

1. Office of the District Attorney of Los Angeles County, "Section E. Felony Case Settlement," Legal Policies Manual, Issued, June 1, 1980.

E. FELONY CASE SETTLEMENT

1. GENERAL STATEMENT

a. It is necessary for this office to have a felony case settlement policy. It is important that this policy be express and clear. Only in this way can our decisions be open to public scrutiny. A policy is necessary to insure that felony case settlements protect the community, punish the guilty, provide deterrence, and afford rehabilitation in an evenhanded way throughout the county. A policy is also necessary because cases change from the time they are filed, and it is therefore not always desirable to require felony accused to either plead guilty as charged or be required to go to trial. Such a rigid choice would tend to clog the courts, unnecessarily renew and prolong the suffering of victims, needlessly inconvenience witnesses, erode law enforcement resources, prove unfair to some accused, and impose an unjustifiable burden on taxpayers. In many cases, these costs would be of doubtful benefit to the community.

b. Felony cases shall be evaluated according to the guidelines provided here. They shall not be dealt with - either with respect to sentence or charge - through the market-place process of giving up something of value just because an accused is willing to relinquish something in return.

c. These policies and guidelines are intended to be as clear and helpful as possible. However, inevitably, it will be difficult to apply the policy to some cases. Policy interpretation will be required. Prosecutors shall make that interpretation which effects the underlying purposes of this policy: to insure that guilty accused are convicted of those crimes which most accurately reflect the gravamen of their conduct, sentenced accordingly, and treated in the process with fairness and consistency.

Commentary

The purpose of the criminal justice system is to protect the community and at the same time provide justice to the accused. This purpose is served when a prosecution fosters the following basic goals:

(a) The adequate protection of society from individuals who pose a danger to persons or property;

(b) The appropriate punishment of individuals who violate the law;

(c) The deterrence of the individual accused at bar, and members of the general public from posing a similar danger in the future;

(d) The rehabilitation of individuals so they can become law abiding participants in a free society as a result of which other members of society can thereby be secure in the enjoyment of freedom.

This purpose is not served when the settlement of a case fails to hold an accused precisely responsible for crimes which accurately describe the gravamen of his or her conduct. The term "gravamen" in this regard denotes simply the essence of a criminal transaction. The values embodied in our penal statutes are undermined when an accused is allowed to bargain his or her way through the system. For the system to be effective, it must have integrity and be capable of engendering respect.

2. SELECTION OF THE CHARGE OR CHARGES TO WHICH AN ACCUSED MUST PLEAD

An accused charged with a felony shall be required to plead to the felony charge or charges in the degree which most accurately reflect the gravamen of the accused's conduct for which there is sufficient evidence required by law for conviction, or proceed to trial.

a. An accused charged with multiple offenses separately punishable under Penal Code Section 654 shall be required to plead to the charge or charges in the degree which most accurately reflect the gravamen of the conduct involved plus any additional counts which, in the judgment of the prosecutor, are required in the light of the guidelines of this policy to constitute a just and satisfactory resolution of the case.

b. An accused charged with multiple murders shall be required to plead to all such counts charged.

c. In cases where an accused is charged with separate incidents of voluntary manslaughter, armed robbery, first degree burglary, forcible rape, as defined in subdivisions (2) and (3) of Penal Code Section 261, sodomy by force, violence, duress, menace or threat of great bodily harm, oral copulation by force, violence, duress, menace or threat of great bodily harm, kidnapping, as defined in Penal Code Section 209, lewd acts on a child under 14, as defined in Penal Code Section 288, or any other felony in which the accused, with the intent to inflict such injury inflicted great bodily injury upon any person other than an accomplice or used a firearm in violation of Penal Code Section 12022.5, a plea shall be required to a minimum of at least two such separate counts.

As used in this section, "great bodily injury" means a significant or substantial physical injury.

d. Special enhancement allegations regarding an accused's conduct involving weapons, great bodily injury, amount of contraband, value of destruction, or amount of loss resulting from theft which, if found to be true, may operate to increase an accused's punishment or limit a court's sentencing options, shall either be admitted or vigorously litigated.

e. Allegations of prior felony convictions alleged in a current case charging any of the offenses specified in VII.E.2.c., above, whether singly or in multiple counts, shall either be admitted or vigorously litigated. Allegations of prior felony convictions where crimes other than those listed in VII.E.2.c., above, are charged shall be pursued where in the judgment of the prosecutor the addition of the penalty for the same is required under the guidelines of this policy to constitute a just and satisfactory resolution of the case. See Penal Code Section 667.5. An allegation bringing an accused within Penal Code Section 1203.08 (two or more prior felonies), however, shall not be stricken.

f. In controlled substances cases, a sale or possession for sale charge shall not be reduced to a lesser offense.

g. A plea of nolo contendere pursuant to Penal Code Section 1016(3) frequently provides to an accused more than the civil protection which it was designed to create. Such a plea invariably permits an accused to engage in the undesirable rationalization that he or she is really not guilty of any antisocial conduct, thereby enabling an accused to avoid accepting responsibility for the crime committed. In this sense, whenever a nolo plea is accepted, we run the risk of failing to have any strong emotional impact on an accused which is an integral step in the pursuit of effective punishment, deterrence and possible rehabilitation. It has also been demonstrated that nolo pleas occasionally generate unduly lenient sentences by the judiciary. With this in mind, nolo pleas are to be the rare and reasoned exception in the settlement of cases. Although a prosecutor no longer has the power to veto per se a nolo plea, he or she can still refuse a settlement of a case wherein counts or special allegations are not to be pursued unless such a settlement is on the basis of a guilty plea rather than one of nolo contendere. In any event, whenever a nolo contendere plea is taken, either with or without a prosecutor's acquiescence, he or she shall pursue and demand of the accused on the record - as is the case with every plea of guilty - a full and exhaustive factual admission establishing guilt.

h. With respect to the policy governing the charge or charges to which an accused must plead, the prosecutor actually processing the case shall prepare a District Attorney's Recommendation explaining the charge selection in any of the following situations:

1) Whenever as the result of the analysis of the gravamen of the accused's conduct an accused is allowed to plead to a charge punishable by a lesser sentence than the most severe sentence, including special allegations, for any other offense charged in the case;

2) Whenever a special enhancement or ineligibility for probation allegation is stricken as part of a plea;

3) Whenever an accused charged with multiple offenses separately punishable under Penal Code Section 654 is allowed to plead to less than all such offenses;

4) Whenever an accused is permitted to plead nolo contendere as part of a settlement.

The charge selection action detailed in this subdivision "h" is required to be approved by the appropriate calendar deputy, or Head Deputy in divisions not operating under the calendar deputy system. In such divisions, Grade IV deputies shall be responsible for their own cases. Such recommendation forms shall be signed by the approving prosecutor.

Commentary

The intent of the foregoing is to focus on the gravamen of the accused's conduct as the controlling factor in the process of case settlement. By way of examples, an accused guilty of burglary should plead to burglary - not trespass; an accused guilty of car theft to car theft - not joyriding; and an accused guilty of robbery to robbery - not grand theft person. The term "gravamen" is intended to eliminate individual subjective opinions in the evaluative process. Purse snatches that have been charged as robberies, for example, are not expected to become grand thefts from the person because of someone's belief that purse snatchings are "less serious" than other forms of robbery. Under this approach, the issue of "how serious or aggravated" this

particular robbery was becomes a sentencing consideration, not one of charge selection.

In cases where an accused is charged as the result of one incident with burglary and rape, a plea would normally be proper to rape since that crime most accurately describes the gravamen of the conduct involved. In cases where an accused is charged with Penal Code Section 209, if the movement involved constituted an augmentation of the danger to the victim, then the accused is not just guilty of robbery, but a robbery which created an extraordinary threat to the person of this victim. Focusing on the gravamen of the conduct involved, a plea to Penal Code Section 209 would be in order, not just Penal Code Section 211.

The specification of the degree of an offense must also reflect the facts and circumstances of the case; and it too should not be reduced merely to arrive at a disposition. By the same token, a special enhancement allegation affecting sentencing, including prior convictions in those cases specified in VII.E.2.c., page 2, shall not be used as a negotiating tool. If it accurately reflects the facts, and can result in a greater sentence, it shall be pursued.

In cases where an accused is charged with crimes that can carry separate punishment, a plea to a single count may well be justified, such as in situations where an accused robs two victims during a single incident. If in the same robbery, however, the robber were to inflict great bodily injury on both victims, then a just and satisfactory resolution of the case would normally require a plea to both counts, not just one. This approach is also applicable to the situation where an accused commits theft of money from two victims or commits two separate forgeries. If relatively minor amounts of money are involved, a single count plea would normally constitute a just and satisfactory resolution of the case; if large amounts, a plea to more than one count might be required.

In connection with the question of enhancement and consecutive sentences, prosecutors are expected to be familiar with Penal Code Sections 667.5, 1170 and 1170.1(a) and the effect that any settlement might have on an accused's sentence.

3. SETTLEMENT INVOLVING SENTENCE COMMITMENTS

a. A prosecutor shall not agree to the settlement of a case by way of a plea or an S.O.T. which seeks to include any sentence representations or commitments. However, with the exception of cases involving the matters listed below, and with the prior approval of the appropriate Head Deputy, a prosecutor may agree under the standards herein to a felony sentence commitment of no immediate state prison time, but nothing else. This approval power may be individually delegated to any Grade IV deputy under the Head Deputy's authority with respect to cases for which the Grade IV deputy is otherwise responsible.

The exceptions to this rule are as follows:

1) Murder
2) Voluntary Manslaughter
3) Mayhem
4) Robbery
5) First Degree Burglary
6) Forcible Rape as defined in subdivisions (2) and (3) of Penal Code Section 261
7) Forcible Sodomy
8) Forcible Oral Copulation
9) Kidnapping as defined in Penal Code Section 209
10) Lewd acts on a child as defined in Penal Code Section 288
11) The use of weapons
12) The infliction of great bodily injury
13) Ineligibility for probation
14) Designated career criminals

b. No prosecutor shall agree that an alternative misdemeanor/felony be declared a misdemeanor without the prior approval, under the standards herein, of the appropriate Head Deputy. Such a commitment shall not be approved with respect to any cases involving the exception specified in VII.E.3.a., page 4. This approval power may be individually delegated to any Grade IV deputy under the Head Deputy's authority with respect to cases for which the Grade IV deputy is otherwise responsible.

c. In determining whether or not to agree to a felony sentence commitment of no immediate state prison or that an alternative misdemeanor/felony be declared a misdemeanor, an authorized prosecutor shall take into account an accused's prior record, the severity of the crime, the probability of continued criminal conduct, the accused's eligibility for probation and the integrity of the criminal justice system. It is noted that such decisions can frequently be made with greater precision after a post-conviction probation report has been prepared illuminating many aspects of an accused's criminal involvement, life style, etc. In the event of questions about the propriety of such commitments, it is best to await the probation report and not make a sentence commitment.

Commentary

A sentence commitment of no immediate state prison time or of a misdemeanor should not normally be considered if any of the following circumstances exist.

(a) Prior Record

(1) The accused has been convicted, within the past five years, for the same type of criminal conduct, whether felony or misdemeanor, arising out of a felony charge or a Penal Code Section 17(b)(4) referral.

(2) The accused has been convicted for the same type of crime within the previous ten years, resulting in a state prison commitment.

(3) The accused has a juvenile record, within the previous five years, consisting of a commitment to the California Youth Authority or camp, or the sustaining of more than one felony level petition.

(4) The accused has a record of charges and/or convictions for any type of criminal conduct demonstrating the likelihood of excessive criminality on the part of the accused within the past five years. In the case of crimes committed in a familial setting involving domestic violence or victims under the age of 18 years (See Section I.E.2.h., page 8) a verifiable past history of significant violent criminal behavior shall be considered in this respect whether or not it was ever brought to the attention of the criminal justice system.

(b) *Severity of the Crime*

(1) The accused has attempted to injure another with the use of a deadly weapon or instrument, whether successfully or not.

(2) The accused has, regardless of the means used, caused permanent injuries, temporary injuries requiring hospitalization, or temporary injuries substantially incapacitating another for a significant period of time, in the commission of the crime in question; except that in mutual combat fights or injuries arising out of domestic quarrels or quarrels between acquaintances, other factors should be considered in addition to the mere existence of the injuries.

(3) The accused was in possession of a loaded firearm at the time of the commission of the crime, and the crime in question is such that a loaded firearm could be used to facilitate its commission.

(4) The accused has committed a battery on a police officer inflicting other than minor injuries.

(5) The accused has committed a crime against the property of another involving a substantial loss.

(6) The accused has committed or attempted a residential burglary.

(7) The accused has been charged with Grand Theft Auto or Vehicle Code Section 10851 and the vehicle taken has not been recovered or has been recovered in a stripped or substantially altered condition or was recovered outside of the State of California; or the vehicle's identification was altered by changing license plates, vehicle identification number or ownership document.

(c) *Probability of Continued Criminal Conduct*

(1) The accused has demonstrated he is a professional criminal by his modus operandi, the tools used in the commission of the crime in question, his criminal associations or other similar circumstances.

(2) The accused has committed a crime related to gang activities or organized crime.

(d) *Eligibility for Probation*

The accused is ineligible for probation.

Under the circumstances specified in this commentary, any sentence commitment entered into by a prosecutor is expected to be accompanied by justifiable reasons that are objective and compelling.

d. The decision that a case merits handling on a sentence commitment basis of no immediate state prison time, or as a misdemeanor, is to be based on an objective and fair evaluation of a case. A prosecutor shall not consider what sentence will or might be imposed by the judge to whom the case is assigned.

e. It shall be the policy of this office to obtain, after a plea or conviction, a pre-sentencing probation report in every Superior Court case; however, it shall also be the policy to object to any attempt to secure such a report before a plea, under Code of Civil Procedure Section 131.3.

Commentary

Experience has shown that the pre-plea report is used exclusively as a one-sided bargaining tool. Rarely does it contribute to the proper resolution of a case. A critical factor for the court to consider at the time of sentence is the accused's candid evaluation of his or her own conduct after an admission of guilt. This is not present in such a report.

f. Any plea involving a permissible sentence commitment shall be handled in the manner provided for in Penal Code Section 1192.5. An accused shall be advised that if a probation report or other source reveals unknown facts or circumstances indicating that the settlement commitment was improper, the District Attorney will urge the court to withdraw its approval.

g. Any plea involving a commitment of no immediate state prison time shall be accompanied by a clear explanation on the record to the accused of the possibility of subsequent state prison time on a felony sentence for a violation of probation and the length of such a commitment shall be explained in minimum-maximum terms.

h. In appropriate cases, conditions of probation promoting special prosecution purposes, such as restitution, waiver of rights, marital and family counseling, etc., may be specified as part of the settlement of a case. There shall be no plea commitments, however, that exclude conditions of probation, limit the amount of a fine, or specify the length of jail confinement.

i. There shall be no plea commitments excluding the possibility that an accused will be sentenced to C.Y.A., C.R.C. (except under Section VIII.A.1.f., page 6), Atascadero (see Section VIII.A.1.d., page 5) or other such special institution.

j. At the time of a plea, the position of the District Attorney shall always be stated on the record in open court. Discussions in chambers and discussions off the record regarding case settlement matters are not encouraged. There shall be no off-the-record dispositions, agreements or understandings with the exception of matters that legitimately require confidentiality, e.g., matters involving informants, etc.

k. Whenever a plea is approved specifying no immediate state prison time, or an alternative misdemeanor/felony is by agreement to be declared a misdemeanor, the prosecutor actually processing the case shall prepare an explanatory District Attorney's Recommendation fully setting forth the facts underlying and the justification for the sentence commitment. It shall be signed by the approving prosecutor. Confidential information shall be so designated and shall not be disseminated outside this office.

4. DEPARTURE FROM POLICY

a. In those rare cases where such are required, departures from the policies set forth herein may be made based on (a) the existence in a case of a substantial insurmountable legal weakness, (b) the existence in a case of a substantial insurmountable factual weakness, or (c) unusual or extraordinary circumstances demanding a departure in the interest of justice.

b. Except in cases involving Major Crimes, as defined in Section IV.C., or cases involving a death penalty allegation of special circumstances, Section II.C., a departure based on a substantial insurmountable legal or factual weakness requires the prior approval of the appropriate Head Deputy. This approval power may be delegated to any Grade IV deputy under the Head Deputy's authority, with respect to cases for which the Grade IV deputy is otherwise responsible. In cases involving Major Crimes, Section IV.C., and Career Criminals, such departures require the nondelegable prior approval of the appropriate Head Deputy and the proposed action shall be communicated beforehand through channels to the Chief Deputy District Attorney.

c. In cases involving Major Crimes (Section IV.C.), and Career Criminals, allegations of Penal Code Sections 1203.06, 1203.07 or 1203.08 (two or more prior felonies), or ineligibility for probation under Health and Safety Code Section 11370, a departure from policy based on unusual or extraordinary circumstances in the interest of justice requires the prior written approval of the Chief Deputy District Attorney. In other cases, such a departure requires the nondelegable prior written approval of the appropriate Head Deputy.

d. In Special Circumstances/Death Penalty cases, any disposition other than a plea to all counts and an admission of special circumstances required the prior written approval of the Chief Deputy District Attorney.

e. Whenever any departure from policy is made, either for a substantial insurmountable legal or factual weakness or based on unusual or extraordinary circumstances, the prosecutor actually processing the case shall prepare an explanatory District Attorney's Recommendation fully setting forth the facts underlying and the reasons and justification for the departure. It shall be signed by the appropriate person required by this section to approve such action.

Commentary

This office has an obligation to dispense equal treatment under the law. Departures from policy therefore are a very critical part of the process of case settlement. They require the utmost in care and judgment and are expected to occur only in rare and compelling circumstances where a departure is required in the conscientious pursuit of the purposes of the criminal justice system. It is for this reason that they have been committed to the consideration of the Chief Deputy District Attorney or Head Deputies with, in some instances, the option to delegate to Grade IV's. The following guidelines are intended to be illustrative of the action contemplated by this section:

(a) Substantial Insurmountable Legal Weaknesses

It is anticipated that there will be cases wherein due to insurmountable legal problems the admissibility of critical evidence is questionable. This may be, for example, because of serious problems with the law of search and seizure, Miranda, the disclosure of informants, etc. In such cases, the guilt of the accused is not normally an issue. But, our ability to prove guilt, even where we are convinced of it, will be in question because of such barriers as the exclusionary rule. In such instances, if there is a substantial likelihood that the prosecution's evidence will be held inadmissible by the court, and this evidence is critical to the success of the prosecution's case, a substantial insurmountable legal weakness may exist upon which a departure from policy could be predicated.

(b) Factual Weaknesses

In yet other cases, the quantum of evidence required for a conviction may be seriously wanting. This may arise due to problems which do not cast doubt on the accused's guilt, but do place in question our ability to prove it. The examples of such a weakness are the paucity of corroborative evidence with respect to an accomplice, the death or disappearance of an important witness, the assertion of a privilege not to testify, etc. In such cases, if the factual weakness in question is insurmountable and creates a substantial likelihood that a conviction will not be obtained in a case where the prosecutor remains convinced of the guilt of the accused, a factual weakness may exist on the basis of which a departure from policy could be predicated. Factual weaknesses, however, shall not be arbitrarily used to depart from policy in cases which appear "tough to win". It is expected that only in rare and carefully considered cases will a departure from policy be necessary to insure that a guilty accused does not escape punishment altogether. On the other hand, if a case is such as to leave the prosecutor handling it unconvinced of an accused's guilt, and of our ability to prove the same at trial, the case shall be considered for dismissal pursuant to the appropriate procedures. Prosecutors shall not tender or accept compromise pleas where an accused maintains his or her innocence.

(c) Unusual Circumstances

Finally, unusual or extraordinary circumstances will occur where the interest of justice demands a departure from this policy. Departures in the interest of justice will frequently be suggested in situations where there are no legal or factual defects in the case. The guilt of the accused and our ability to prove it will not be an issue.

Extenuating circumstances in mitigation of conduct might be present when an accused extends significant assistance to law enforcement. (In such cases, leniency shall be requested in appropriate letters from police chiefs.) Other extraordinary, compelling and articulable mitigating reasons may exist sufficient for departures which promote the basic goals of the criminal justice system. (See pages 2 and 3 of this section.)

These departures, however, shall not be based on the view of the prosecutor that the particular statutory sanction is as a general proposition overly harsh. For example, sales or possessions for sale of controlled substances shall not normally be dropped to simple possessions just because the felony consequences are harsh. Those consequences are best left to the Legislature.

5. PROCEDURE

District Attorney's Recommendation forms provided for herein shall be prepared in quadruplicate. The original shall go into the case file with copies to the appropriate Head Deputy, the Bureau Director and the Chief Deputy District Attorney. Confidential information shall be so designated and shall not be disseminated outside this office.

6. SUBMISSION OF A CASE ON THE TRANSCRIPT OF THE PRELIMINARY EXAMINATION

a. The issue of an accused's guilt or innocence shall only be handled by way of a submission on the transcript if in the judgment of the prosecutor handling the case such a procedure is the most effective way to present the People's case.

b. A case shall not be submitted on the transcript by Grade I to III deputies without the prior approval of the appropriate Grade IV calendar deputy or, where no Grade IV deputy is so assigned, the Head Deputy in the division processing the case. In situations where approval is needed from a prosecutor not immediately processing the case, the approving prosecutor shall sign the transcript in question as an indication of such approval.

c. A case shall only be submitted on the transcript if all pending charges are to be thereby determined by the court.

d. A case shall not be submitted on the transcript either to expedite a finding of not guilty or to have an accused found guilty of an offense or offenses less serious than those charged.

e. Grade IV deputies shall make a weekly report of all cases so submitted to the appropriate Head Deputy. If any such submission results in a conviction less serious than a charged offense or a finding of not guilty, an accompanying explanatory report shall be submitted to the appropriate Head Deputy.

Commentary

Experience has shown that the submission of a case on the transcript of the preliminary examination is generally an ineffective way to represent the People. It has been statistically demonstrated that more often than not such a procedure results in unduly lenient sentences and an inordinate number of appellate reversals. A preliminary examination transcript almost by definition rarely presents a case in its best factual or legal light. The S.O.T. procedure has also been abused in numerous ways to attain ends that are either impermissible or which should be arrived at in a more forthright manner. However, there are certain cases where the People's case can be effectively presented by way of an S.O.T., and in so doing, unnecessary witness inconvenience or trauma is eliminated. With this in mind, the procedure is expected to be used only in carefully selected situations.

7. MOTIONS FOR NEW TRIAL AND PROBATION AND SENTENCE PROCEDURES

See Section VII.I.

8. PROBATION AND SENTENCE HEARINGS

See Section VII.J.

9. BAIL ON APPEAL

See Section VII.K.

10. SENTENCING GUIDELINES

The following are sentencing guidelines which are considered to be appropriate for the crimes involved and are set forth for your general guidance:

Crime	Punishment
Murder, Special Circumstances	Death Penalty/Life Imprisonment Without Parole
Murder	State Prison
Rape; kidnapping; armed robbery; sale, offer or possession for sale of 1/2 oz. or more of heroin; sale, offer or possession for sale of large quantities of dangerous drugs, narcotics, or marijuana; sale of drugs to juveniles; heroin cases involving 1203.07 P.C.; controlled substances cases involving 11370 H&S; burglary with explosives; escape with force and violence; felonious assaults on peace officers; burglary, first degree; voluntary manslaughter; arson; all bombing offenses; firearm cases involving 1203.06 P.C., ineligibility for probation under 1203.08 and 1203.09 P.C.	State Prison
Felony child molesting or other felony sexual offenses against children under 14.	State Prison or Atascadero
In voluntary manslaughter; perjury; felonious assaults (other than on a peace officer); unarmed robbery, no injury; escape; theft and other property offenses involving a substantial loss; sale of narcotics in small quantities.	State Prison or other appropriate state institution but, in exceptional cases, felony probation with incarceration or appropriate alternative to incarceration
Vehicular manslaughter; felony drunk driving; sale of marijuana or drugs in small quantities; burglary, second degree; theft and other property offenses; welfare fraud; auto theft and other non-violent felonies.	State Prison, C.Y.A., C.R.C. Atascadero, Department of Health, or felony probation with incarceration or appropriate alternative to incarceration

11. CONCLUSION

A case settlement policy and its results are of vital interest to the public and to law enforcement agencies. The practice of acquiring relevant information from law enforcement, helpful in determining the appropriate settlement of our cases, is encouraged. It is constructive to discuss with officers what we are doing and why. The prosecutor who processed the case is responsible for having the investigating officer, the victim(s) and any other interested People's witnesses advised of the outcome of each case.

2. Richard H. Kuh, "Plea Bargaining: Guidelines for the Manhattan District Attorney's Office," Criminal Law Bulletin, Vol. 11, 1975, pp. 48-61.

Plea Bargaining: Guidelines for the Manhattan District Attorney's Office

By Richard H. Kuh*

Plea bargaining has gone through several distinct stages. Not long ago, it was a practice to be pursued but never mentioned in mixed company. Plea bargaining emerged from its wall of silence when legal scholars and social scientists, most notably Donald J. Newman, began to study and write about the practice. Then came a spate of Supreme Court decisions which, among other things, gave official recognition and a measure of protection to the bargaining.

With the publication of this memorandum, we believe another distinct stage has been reached. Richard H. Kuh, then District Attorney for New York County, spelled out a series of guidelines designed to govern prosecutorial practices in plea bargaining. We believe that the positions actually taken or even the practicalities of implementation are less important than the availability of the document.

No effort has been made to convert the memorandum into an article. That is, the original content and flavor are retained to make certain that you have an authentic document before you.

As you know, I have long been concerned with plea bargaining, its impact upon constitutional guarantees, and the fact that if it is not most prudently conducted, it can result both in inadequate protection of the community and in dashing hopes for the rehabilitation of defendants.

Moreover, unless all of us here follow like principles in plea bargaining, the quality of justice administered by this office will vary from Assistant to Assistant. Such variances are not only inherently unsound within a single office, but they tend to delay justice. Defendants and their counsel, dealing with a hardline Assistant in an arraignment part, may delay disposition in hopes of receiving more lenient treatment from a different and less severe Assistant in a trial part.

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* This memorandum was issued on August 14, 1974, and is reproduced through the courtesy of Mr. Kuh.

This memorandum, therefore, is intended to enunciate clear policies (some but not all of which are currently being followed in this office). They will assure a considerable degree of consistency in prosecution in New York County. It is recognized, of course, that criminal cases involve people and their actions, not fungible mechanical parts. Because conduct, particularly purported criminal conduct (which by definition is conduct that departs from society's norms), as well as the backgrounds of defendants can vary in ten thousand different ways, some flexibility remains. There can be no exact "calculus," definable in advance, to plea bargaining. Some discretion must remain to differentiate people and cases, even though the same crime may be charged, and the defendants superficially may seem similar. The policies set forth in this memorandum are intended to afford as clear a guidance as is possible, without wholly stripping Assistants of necessary discretion in appropriate cases.

Among the factors influencing plea bargaining that are intended to be minimized by this memorandum are the following:

(1) overreaction to the case volume that can, if prosecutors and judges are not wary, turn the criminal justice system into a mindless revolving door;

(2) the shield of anonymity afforded by life in the big city, pursuant to which a case that may be a headline and a central photo-spread on the day of arrest is then ignored by the media on the day of disposition;

(3) the use of plea bargaining to avoid the impact of predicate felony (or multiple offender) legislation;

(4) the pressures occasionally brought by keenly disposition-minded judges whose evaluation of particular cases may differ from our own; and

(5) the desire to avoid the uncertainties inherent in trials when there may be close fact issues. Cases involving close fact issues should be tried in order to avoid the danger that an attractive plea bargain has caused an innocent defendant to enter a guilty plea.

I. General Principles Governing Plea Negotiation

The principles set out in this memorandum govern procedures in the Supreme Court of New York County. Although less formality will be expected in the Criminal Court (for example, pre-

pleading reports will not be required), insofar as is feasible the general principles herein set forth will apply in the lower court. For example, routinely, reductions will not be of more than one Class—from a Class A Misdemeanor to a Class B Misdemeanor—and single pleas will not be accepted to cover multiple crimes.

A. Avoid overindictment. Pursuant to the regular procedure of the Indictment Bureau, and other bureaus that present cases before the grand jury, serious efforts are to be made to assure that indictments reflect only provable crimes. That is, indictments are not to be the result of "puffing" or overcharging.

In the event that an Assistant who is assigned a case finds, after appropriate inquiry, that the crimes charged cannot be proven, but that the proof is legally and factually adequate to support a lesser charge, plea bargaining will start with the lesser, provable charge. There will be no bluffing, no claim that this office can prove a crime when it is clear that we cannot. Specifically, the general principle, hereinbelow stated, that permits a reduction of one Class (e.g., from a Class A to a Class B Felony) will start with the *provable* crime, not necessarily the crime charged.

B. Nonprovable indictments and close issues of fact. If an Assistant, after discussing a matter with a defense counsel who protests his defendant's innocence, entertains valid, serious, reasonable doubts as to a defendant's guilt, and these doubts are not resolved by further fact inquiry, and the Assistant concludes that a trial jury would have to entertain a reasonable doubt, the Assistant should not engage in plea bargaining. A written dismissal should then be prepared, pursuant to normal office procedure.

If, on the other hand, an Assistant is satisfied that there are bona fide, fundamental factual issues, such issues should be resolved in the trial forum. The defendant who protests his innocence, and concerning whom the prosecutor sees some potential that the protestations may be accepted by the trier of fact, should not be permitted to waive his constitutional right to a trial (and all of the constitutional rights appurtenant thereto) by a tempting plea bargain.

C. Reduction to misdemeanors. As stated below (under III, referring to reductions of felonies in the Criminal Court), if a misdemeanor plea is appropriate on a felony charge, and this is above, without regard to the predicate felony law, the fact that the defendant has a prior felony conviction should not prevent the tender of such misdemeanor plea.

There is one further type of situation in which a guilty plea to a misdemeanor in the Criminal Court is to be required if a felony charge is to be reduced. Such a plea is to be required in cases involving the sale of small amounts of marijuana to undercover police officers whose cover will be broken if they have to testify. Other undercover and informer situations may also require the misdemeanor plea as a condition of the reduction.

IV. Plea Bargaining Generally: The Pre-Pleading Report

Given the enormous volume of felony cases handled by this office, and looking realistically at our potential for trying only a small percentage of them, it is necessary that we give something away if we are to dispose of them with the present staffing of courtrooms, the judiciary, court personnel, Assistants, and Legal Aid Lawyers.

Plea bargaining, however, ordinarily makes no sense, either in terms of protecting the community or in terms of assisting in the rehabilitation of the defendant, when the bargained plea bears little resemblance to the underlying crime. Therefore, in the interests of reconciling our responsibility of disposing the large volume of cases with our responsibility both to fully protect the community and, in appropriate cases, to foster rehabilitation, these general principles will govern:

A. General principles. (1) Assistants may, routinely, reduce charges one Class, but only one Class, except as indicated in IV.B, below. (A reduction from a Class E felony to a Class A misdemeanor is a reduction of one Class.) (As already noted, this means a reduction from the top "non-puffed"—in our evaluation—count.)

(2) Assistants in the Supreme Court are not to reduce more than one Class unless the defendant consents to a pre-pleading investigation, and such pre-pleading investigation has been ordered and the report submitted and made available to the court, defense counsel, and the Assistant. If either the court or the defense refuses to consent to a pre-pleading inquiry, the reduction shall not be more than one Class.

(3) If a defendant consents to a pre-pleading investigation, it is to be deemed stipulated by this office that in the event a guilty plea does not result, we will make no use whatsoever of the contents of the pre-pleading report or of any fruit thereof. This, of course, will not bar us from using the same information on trial if we have independently acquired the same information. Whether or not the stipulation is formally made on the court record, it shall be deemed entered into by us.

(4) We will not consent to a pre-pleading investigation, however, unless some likelihood exists of a guilty plea resulting from it. Thus, if the defendant, through counsel, makes unequivocal denials of guilt, and states he is going to trial, there is no purpose to a pre-pleading investigation.

(5) There is to be no pre-pleading investigation in those situations (indicated below, at IV.B) in which we insist upon a plea to the top count of the indictment, with no reduction whatsoever.

(6) Ordinarily, a pre-pleading investigation report is not to be ordered once an Assistant has gotten his trial preparation underway. Such a report would merely serve dilatory purposes at that point.

(7) As indicated in the previously issued sentencing memorandum, Assistants should make all relevant information available to those doing pre-pleading investigations. However, if the identity of a witness must be protected, that information need not be provided.

The use of pre-pleading investigations (which are, in fact, precisely the same as the pre-sentence investigations required by statute in every case, except that they take place before plea rather than after plea) will result in plea negotiations being engaged in by *informed* counsel on both sides. Today, generally, plea negotiations take place between an Assistant, whose knowledge of the particular case is slight (as the negotiations often take place before trial preparation has begun) and the defense lawyer (who has only received such version of the crime as the defendant may have supplied). Neither, ordinarily, has much meaningful information about the defendant's background except the incomplete and sometimes inaccurate information given by the previous criminal record. Ordinarily, the judge who accepts the negotiated plea has even less information than either counsel. The use of the pre-pleading investigation and report will mean that the negotiations take place among well-informed participants. Hence, the outcome of such negotiations should be better suited for the protection of the community and the rehabilitation of the defendant than has heretofore been true.

B. **No reduction below the highest count of the indictment.** There are certain situations in which the defendant will have to go to trial unless he is ready to plead to the top count of the indictment. In these instances, pre-pleading inquiries will serve no purpose and should not be ordered. Such pleas to top counts will be required in the following instances:

(1) If a defendant is charged with a series of separate criminal acts, particularly those involving either physical danger or sizeable larcenies, he will be required to plead to the top count of one set of transactions, but as to additional transactions, the general policies herein articulated will apply.

(2) In cases involving particularly egregious, heinous, or notorious criminal conduct, a plea to the top count will be required.

(3) In VI below, particular situations, dealing with particular crimes, are set forth in which pleas to the top counts will be routinely required.

C. **Reductions of more than one Class.** There will be certain situations, after the pre-pleading reports have been examined, where it will be evident that justice will be fully served and the community fully protected, by permitting the defendants to plead to something less than a one Class reduction. Indeed, some situations may appear in which the interests of justice may be served by permitting dismissal of the indictment.

On the other hand, in some instances, it may appear as a result of the pre-pleading investigation that *no* reduction is in order—even though the sparser information earlier available suggested that at least a one Class reduction was in order—and that the defendant will have to plead to the top count of this indictment. There is no reason why, in consenting to the pre-pleading investigation, society should have to play a "heads you win, tails we lose" game.

After inspection of the pre-pleading report, a reduction of two or more Classes is *not* to be routinely granted. In any case in

which an Assistant, having read the report, believes a reduction of two Classes is in order, he has authority to make such reduction. No Assistant shall consent to a reduction of more than two Classes without discussion and specific approval of his Bureau Chief. This does not mean, however, that in appropriate cases the Assistant, after receiving authority from his Bureau Chief, may not go so far as to recommend dismissal of the charges (on papers) if the facts and circumstances of a particular case warrant such disposition.

As appears more fully immediately below and in V, any reduction of more than one Class is only to be made when the reasons justifying that reduction can be stated unequivocally, and with a high degree of specificity, upon the court record.

As one of our goals is equality of treatment, not varying from Assistant to Assistant, neither should dispositions vary depending upon the persuasive skill of a particular defense advocate. The use of the pre-pleading investigation and report gives the Assistant himself an opportunity to evaluate background so that a defendant who has an ably aggressive attorney does not thereby get a "break" upon disposition that he would not get with less persuasive counsel.

D. Aggravating and mitigating factors. Without purporting to be exhaustive, a list of the aggravating and mitigating factors follow:

1. Aggravating Factors:
   (a) The severity of the crime and its impact upon the victim and the community.
   (b) The previous and contemporaneous criminal involvement of the defendant, particularly for the type of crime charged in the pending case.
   (c) The seriousness of the injury suffered by the victim.
   (d) The fact that the defendant himself inflicted the injuries or carried the weapon rather than a co-defendant.
   (e) The lack of previous relation between the victim and the defendant, particularly in the case of violent crimes.
   (f) The youth or advanced age and apparent fragility of the victim, particularly in assault and rape cases.
   (g) The tardiness of the defendant's willingness to enter

clearly ascertainable while the case is pending in the Criminal Court, the reduction should take place in that forum, rather than held for action in the Supreme Court.

This memorandum is not intended to absolutely ban reductions of felony charges to misdemeanors in the Supreme Court. But such reductions in the Supreme Court should be rare, and they should, of course, conform to the policies herein articulated.

D. Motion practice and bargaining. If a defendant has filed an arguably valid suppression question, or an arguably valid motion for dismissal for lack of prosecution, or a dismissal motion on another arguably valid ground, a uniquely attractive plea bargain should not be tendered conditional upon the defendant's withdrawing his motion. If a defendant acts soundly in the belief that there is no viable case against him, he should not be tempted from that position by a bargain offer.

E. Candor and bargaining with defendants. There should, of course, never be any express or implied misstatements to defense counsel in connection with plea negotiations. (E.g., a statement of readiness if we are not, in fact, ready or virtually ready for trial.) All plea negotiations should be with counsel and never with the defendant himself except in those rare cases in which a defendant, after appropriate court proceedings, is permitted to proceed *pro se*. In such cases, special care must be taken not to utilize plea negotiations as a means of interrogating the defendant.

F. Sentencing. Nothing in this memorandum is intended to vitiate or modify the provisions of my previously issued sentencing memorandum. Particular attention is called to that aspect of the memorandum which stresses that while *plea negotiations* is our appropriate role, *sentencing* is the court's role, and we are not to use plea negotiations in an effort to enforce our own concepts as to appropriate judicial action.

G. Conferences with defense counsel. Clearly, informative plea negotiations cannot take place while calendars are being called in either the Supreme Court or the Criminal Court. And recesses are rarely adequate for the calm and dispassionate discussion that can affect both the future safety of the community and the rehabilitation of the defendant. If plea bargaining is to be constructively carried on, defense lawyers must be given adequate

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opportunities for unhurried presentations of their contentions to Assistants. Therefore, for the present (and subject to expansion or restriction in the future), all Assistants assigned to the Supreme Court and Criminal Court Bureaus are to be available to meet with the defense counsel in their offices at 9:00 A.M. every Tuesday and Thursday. Bureau secretaries will arrange to schedule meetings on telephoned requests.

H. **Deviations from the policies herein.** Assistants who have situations in which they believe deviations from this memorandum should be permitted should, in the first instance, discuss those situations with their Bureau Chiefs. If Bureau Chiefs are also satisfied that such deviations are in order, the proposed deviations should not be effectuated unless approved by the District Attorney, or the Chief Assistant or First Assistant District Attorney.

II. Defendants Charged With Multiple Crimes

In the past, when defendants were charged with multiple criminal acts at different dates and different places (e.g., a series of armed robberies), Assistants often accepted pleas to one count, arising from one criminal act, to cover the series of crimes, whether they had been charged in a single indictment or in multiple indictments

The practice may possibly have served to encourage bailed defendants to continue criminality. Moreover, there are two other considerations. At the time parole is considered, the parole authorities may differently regard a prisoner with a single burglary conviction from one serving time on several such convictions. Similarly, if in the future the defendant is charged with further criminal conduct, and questions then arise as to disposition, it will be significant whether the defendant has now conceded guilt to but a *single* criminal act or to a series of criminal acts. Thus, an inaccurate picture, ultimately likely to be prejudicial to the community's safety, is fostered by a two-for-one or a three-for-one plea bargaining policy.

For these reasons, the policies herein articulated concerning plea negotiations shall be separately applied to *each* indictment of a defendant; and in cases in which a series of crimes taking place at different dates and different places are charged in a single indictment, pleas to *multiple counts* of the indictment shall be required —one count for each separate criminal transaction—rather than a plea to a single count.[1]

There shall, however, be several exceptions to this policy:

(a) Ordinarily, defendants charged with street sales of drugs are not arrested unless there has been more than one street sale. A plea to one transaction on a drug indictment is in order, even though two or three street level sales are alleged.

(b) When defendants are charged with a series of frauds involving no personal injury and involving a common plan or scheme —in an indictment with a handful of counts—it will not be necessary for the defendant to plead to each separate transaction. However, if the scheme includes a very large number of transactions, and the indictment contains a multitude of counts, ordinarily pleas to multiple counts will be required to emphasize to the court (and, ultimately, to the State Division of Parole and to future prosecutors if the defendant is again arrested) that the crime did not merely involve a single larcenous act.

(c) If the crime involves several victims at the same place and time (e.g., the holdup of both a bar and the group of patrons in the bar at the time), a plea to a single count will be adequate. In such cases, however, as stated in IV.B, below, the aggravating factor—the number of victims, each endangered—ordinarily will result in our insistence upon a plea to the top count of the indictment and not to any reduced charge whatsoever.

(d) If the defendant has pleaded to two or more felonies before he is imprisoned on any of them, and he is thereby likely to have his punishment limited by Penal Law § 70.30(1)(c),[2] then pleas can be taken to cover remaining indictments. In such instances, our insistence on further pleas would only result in trials in which defendants had nothing to lose, since no further penalties

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[1] A defendant charged with a substantive crime and then with bail or parole jumping will have to plead to each separately. This approach allows law enforcement to know, in the future, that he may be a questionable bail or parole risk.

[2] This provision of the New York Penal Law provides: "The aggregate maximum term of consecutive sentences imposed for two or more crimes committed prior to the time the person was imprisoned under any of such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences was imposed for a Class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years."

could be imposed. However, if there are strings of felonies (see IV.B, below), the defendant should be compelled to plead to top counts of each transaction to which a guilty plea is taken.

III. Reduction of Felonies in the Criminal Court

Frequently, defendants will be arrested and charged with felonies, particularly Class E felonies, but the gravity of the cases will not require that they be treated as felons. In the past, this type of charge sometimes was reduced to misdemeanor status in the Criminal Court only *if* the defendants expressed their willingness to plead guilty to misdemeanors promptly as a condition of such reductions.

Insofar as this has been the practice, it tends to deprive defendants of their right to trial in cases in which a misdemeanor charge, rather than a felony charge, is appropriate.

If a case is worthy of misdemeanor treatment only, it is ordinarily to be accorded such treatment even though the defendant has not expressed his willingness to plead guilty. But reduction to misdemeanor status must then be considered in assessing the plea ultimately to be offered if the defendant, through counsel, wishes thereafter to engage in plea negotiations. For example, if a case starts as a provable E felony (e.g., a larceny of property valued at about $300), but is reduced to an A Misdemeanor, defense counsel is not entitled routinely to further plea concessions (e.g., ultimately making the case a Class B Misdemeanor).

The situations in which provable felonies should be reduced to A Misdemeanors, without insisting that guilty pleas promptly be entered, will include borderline felonious assaults, borderline grand larcenies, possibly some burglaries in the third degree, and some weapons charges (in which defendants have no prior records and are in New York briefly with a weapon, possession of which is lawful in the state from whence the defendants come, or when unlawfully possessed weapons have come to light in the hands of victims of crime defending themselves.)

The provisions of the previously issued memorandum governing misdemeanor pleas in certain low level methadone sales still apply. Other than in low level methadone sale cases, misdemeanor pleas are not to be afforded to avoid the impact of the predicate felony laws. If, however, a misdemeanor would be tendered, as

CHAPTER 12

THE ROLE OF THE PROSECUTOR IN PLEA NEGOTIATIONS AND SENTENCING

1. EACH PROSECUTOR'S OFFICE SHOULD HAVE DEFINITIVE POLICIES REGARDING PLEA NEGOTIATIONS. THE FOLLOWING CRITERIA SHOULD BE CONSIDERED IN DETERMINING WHAT RECOMMENDATIONS ARE WARRANTED:

   a. THE NATURE AND SERIOUSNESS OF THE OFFENSE OR OFFENSES CHARGED, I.E., CRIMES AGAINST THE PERSON, CRIMES AGAINST PROPERTY;

   b. AN EVALUATION OF THE PROOFS;

   c. AN EVALUATION OF THE WITNESSES, I.E., THEIR AVAILABILITY FOR TRIAL, ANY IDENTIFICATION PROBLEMS, CREDIBILITY, RELATIONSHIP TO THE VICTIM, IMPROPER MOTIVES, ETC.;

   d. THE CIRCUMSTANCES OF THE VICTIM, I.E., EXTENT OF BODILY OR OTHER PERSONAL INJURY, PROPERTY RIGHTS, ECONOMIC LOSS INCURRED, AS WELL AS THE FEELINGS AND ATTITUDE OF THE VICTIM, INCLUDING AN EXPRESSED WISH NOT TO PROSECUTE;

   e. THE BACKGROUND OF THE DEFENDANT, INCLUDING HIS AGE, FAMILY STATUS, WORK STATUS, PRIOR ARREST, JUVENILE AND CRIMINAL RECORD, AND ANY RELATIONSHIP BETWEEN THE DEFENDANT AND THE VICTIM;

   f. THE ATTITUDE AND MENTAL STATE OF THE DEFENDANT AT THE TIME OF THE CRIME, THE TIME OF THE ARREST, AND THE TIME OF THE PLEA NEGOTIATION;

   g. ANY UNDUE HARDSHIP CAUSED TO THE DEFENDANT;

   h. THE CIRCUMSTANCES OF THE ARREST, I.E. WHERE AND AT WHAT TIME IT WAS MADE, WAS IT PURSUANT TO A WARRANT AFTER SEVERAL ATTEMPTS TO LOCATE THE DEFENDANT, OR DID THE DEFENDANT VOLUNTARILY SURRENDER;

   i. ANY PAST OR POTENTIAL COOPERATION WITH LAW ENFORCEMENT;

   j. ANY POLICE RECOMMENDATIONS;

   k. THE MORAL CONSEQUENCES IN THE COMMUNITY;

   l. THE POSSIBLE DETERRENT VALUE OF PROSECUTION;

m. THE AGE OF ,E CASE:

n. A HISTORY OF NON-ENFORCEMENT OF THE STATUTE VIOLATED;

o. ANY OTHER AGGRAVATING OR MITIGATING CIRCUMSTANCES.

2. EACH PROSECUTOR'S OFFICE SHOULD HAVE DEFINITIVE POLICIES REGARDING THE SENTENCING PROCESS. THE PROSECUTOR'S FUNCTION DOES NOT TERMINATE UPON THE RETURN OF A GUILTY VERDICT OR THE DISPOSITION OF CRIMINAL CHARGES BY VIRTUE OF A PLEA AGREEMENT.

a. THE PROSECUTOR SHOULD MAKE A REASONED JUDGMENT AS TO WHETHER A RECOMMENDATION SHOULD BE MADE IN A PARTICULAR CASE. THE CONSIDERATIONS SET FORTH IN STANDARD 1 ARE EQUALLY APPLICABLE TO THE SENTENCING PROCESS AND INCLUDE:

(1) THE NATURE OF THE OFFENSE

(2) THE EFFECT OF THE CRIME ON THE VICTIM

(3) THE BACKGROUND OF THE DEFENDANT

(4) THE RISK TO THE PUBLIC

(5) THE POSSIBILITY OF REHABILITATION

b. THE PROSECUTOR SHOULD NOT MAKE THE SEVERITY OF SENTENCES THE INDEX OF HIS EFFECTIVENESS. NEVERTHELESS, HE MUST ALWAYS BEAR IN MIND THAT HIS PRIMARY OBLIGATION IS TO PROTECT THE PUBLIC. THE PROSECUTOR, WHO OF COURSE IS FULLY FAMILIAR WITH THE FACTS, IS OBLIGED TO ENSURE THAT THE PUBLIC'S RIGHT TO BE PROTECTED AGAINST CRIMINAL ATTACK IS RESPECTED. TO THE EXTENT THAT HE BECOMES INVOLVED IN THE SENTENCING PROCESS, HE SHOULD SEEK TO ASSURE THAT A FAIR AND INFORMED JUDGMENT IS MADE ON THE SENTENCE AND HE MUST ATTEMPT TO AVOID UNFAIR SENTENCE DISPARITIES.

c. THE PROSECUTOR SHOULD ASSIST THE COURT IN BASING ITS SENTENCE ON COMPLETE AND ACCURATE INFORMATION FOR USE IN THE PRESENTENCE REPORT. HE SHOULD DISCLOSE TO THE COURT ANY INFORMATION IN HIS FILES RELEVANT TO THE SENTENCE. IF INCOMPLETENESS OR ERRORS APPEAR IN THE PRESENTENCE REPORT, HE SHOULD TAKE STEPS TO PRESENT THE COMPLETE AND CORRECT INFORMATION TO THE COURT AND DEFENSE COUNSEL.

COMMENTARY

Plea negotiation has now been accepted as a legitimate and respectable adjunct of the administration of the criminal laws.[92]

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92 R. 3:9-3 codifies certain procedures relating to the plea negotiation process. It provides:

> (a) Plea Discussions Generally. The prosecutor and defense counsel may engage in discussions relating to pleas and sentences, but except as hereinafter authorized the judge shall take no part in such discussions.
>
> (b) Entry of Plea Agreement. Where the prosecutor and defense counsel reach an agreement as to the offense or offenses to which a defendant will plead on condition that other charges pending against the defendant will be dismissed or an agreement as to the sentence which the prosecutor will recommend, such agreement shall be placed on the record in open court at the time the plea is entered.
>
> (c) Disclosure of Agreement to Judge. Upon request of the parties, the judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition of the information in the presentence report at the time of sentence is as has been represented to him at the time of his initial concurrence and supports his determination that the interests of justice would be served by his concurrence. If the agreement is reached without such disclosure or if the judge agrees conditionally to accept the plea agreement as set forth above, the entire plea agreement and concurrence shall be placed on the record in open court at the time the plea is entered.
>
> (d) Agreements involving the right to Appeal. Whenever a plea agreement includes a provision that defendant will not appeal, the court shall advise the defendant that, notwithstanding the inclusion of this provision, the defendant has

Our Supreme Court has recognized that "there is nothing unholy in honest plea (negotiations) between the prosecutor and defendant and his attorney in criminal cases. At times, it is decidedly in the public interest, for otherwise, on occasion the guilty would probably go free...." State v. Taylor, 49 N.J. 440, 455 (1967). So too, the Supreme Court of the United States has noted that "the disposition of criminal charges by agreement between the prosecutor and the accused ... is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge was subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." Santabello v. New York, 404 U.S. 257, 260 (1971).

It is not possible to establish absolute standards on a statewide basis that would dictate the only acceptable plea agreement under a given set of circumstances. Indeed, even within the same office, there are very few plea negotiation principles for which there can be no exceptions. The prosecutor must make certain that each case is determined individually according to its own unique facts and circumstances. The ultimate factor must always be the exercise of good judgment by the negotiating prosecutor.

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92 (cont'd)
the right to take a timely appeal if the plea agreement is accepted, but that if he does so, the plea agreement may be annulled at the option of the prosecutor, in which event all charges shall be restored to the same status as immediately before the entry of the plea.

(e) Withdrawal of Plea. If at the time of sentencing the judge determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel, the defendant shall be permitted to withdraw his plea.

his guilty plea, and the fact that a goal of plea negotiation—sparing the time of the trial court and the trial Assistant—has been frustrated by the prior preparation and commencement of the trial of the case.

(h) The mere possession, by the defendant or an accomplice, of a loaded gun in connection with the crime.

2. Mitigating Factors:
   (a) The absence of any prior criminal record of the defendant.
   (b) The extreme youth or advanced age of the defendant or special conditions of health.
   (c) The sound prior social history of the defendant (e.g., military record, work record, etc.).
   (d) The attitude of forgiveness on the part of the victim. (This can be considered, but should not be determinative. After an Assistant has examined the pre-pleading report, he can gauge both the danger and the prospects of rehabilitation better than the victim of this single crime.)
   (e) The defendant's aid to the authorities in the solution of this and other crimes.
   (f) The genuineness of the defendant's contrition, and the substantiality of any indications of reform on his part.
   (g) Weakness in the People's proof. As above, however, if the prosecution lacks a provable case, ordinarily there should be a dismissal rather than a plea bargain. And, if the crime is of an egregious nature—a nasty armed robbery—a greatly reduced plea that can carry only obviously inadequate punishment, should not be forthcoming. We are better off trying the case than giving away so much that adequate protection for the community cannot be forthcoming.

The above list of aggravating and mitigating factors is not exhaustive, and cannot be. The Assistant who has examined the pre-pleading investigation should consider family status, employment record, psychiatric history, if any, and other factors revealed in that report. The scope of the punishment available to the Court is also to be considered.

V. Procedure in Court

As in the past, plea negotiations ordinarily are to be carried on off-the-record between Assistants and defense counsel, or off-the-record at bench conferences in which the Judge participates.

In every instance in which a lesser plea recommended by the Assistant is more than one Class less than the highest count charged in the indictment, *a fully detailed, highly specific statement* is to be made by the Assistant on the court record as to the reason for recommending the acceptance of that plea.

A single statement that the plea "is in the interests of justice," or that the "plea affords adequate scope in sentencing," provides no information and does not comply with this policy.

If the highest count in the indictment was a "puffed" count, this should be stated as a reason for reduction. If the lesser plea is, in part, justified because the defendant had no prior criminal history, and was previously stable and law abiding, specifics demonstrative of such stability should be placed on the court record (e.g., references to his employment, etc.). If the defendant aided the prosecutor or the police, and this is a basis for the lesser plea, this, too, must be placed on the court record, but when advisable can be done at the bench, or in chambers in the presence of the defendant and his counsel. *All* reasons justifying the lesser plea are to be fully stated, as well as all terms and conditions upon which the plea is given.

This statement, on the court record, of reasons should take place at the same session of court at which the plea is entered. It may be made before the plea is accepted or immediately thereafter.

VI. Reduced Pleas Concerning Certain Specific Crimes

Certain specific crimes and particular dispositional policies concerning them are considered in this section. This list is illustrative, not exhaustive:

A. Homicides. In the following types of homicide cases, no lesser plea will be offered to the actual killer, or his accomplice, absent the most unusual circumstances. Before any lesser plea is recommended in the following types of homicide, it must be approved by the Homicide Bureau Chief.

1. The killing of an on-duty police officer or prison guard. (This, indeed, is non-reducible pursuant to statute.)
2. Multiple killings.
3. Kidnapping for ransom, or the taking of hostages in which the victim is killed.
4. Murder for hire.
5. Murder when the defendant has previously been convicted of a homicide.
6. Murder of a public official while engaged in the performance of his duties, or murder of a "political" nature (e.g., assassination).
7. Murder of a witness.

B. Larceny. No effort will be made herein to set a monetary dividing line in larceny cases which will prevent the acceptance of a lesser plea. Suffice it to say that an unwillingness to make restitution when the defendant appears to have some means to do so, the value of the property stolen, and callousness toward victims unable to protect themselves, are key elements affecting plea determination in larcenies.

C. Narcotics Cases. In narcotics cases, plea negotiations are in great measure governed by the provisions of the law relating to Dangerous Drugs which became effective on September 1, 1973. When the defendant is engaged in the sale of heroin, cocaine, or opium for profit, and is a non-user, no lesser plea will be accepted without the consent of the Special Assistant District Attorney in charge of Narcotics Prosecutions.

D. Predicate Felony Cases. Situations where the defendant has a prior felony conviction as defined in Section 70.06 are likewise governed by the "predicate felony" provisions which became effective September 1, 1973.

E. Rackets Cases. Indictments involving organized crime or racketeering and official corruption have always been the subject of special attention of the New York County District Attorney's Office. When government employees or officials have been charged with felonies committed in the course of their official duties, misdemeanor pleas are not, ordinarily, to be permitted, even though the same crime, if committed by one other than a government employee, might be disposed of by a misdemeanor plea. "A public duty is a public trust," and this office has a special responsibility in seeing that it is so regarded.

3. New Jersey, "Chapter 12, The Role of the Prosecutor in Plea Negotiations and Sentencing," Prosecutor Manual, 1978.

When plea negotiation has been initiated, all files pertaining to the subject defendant should be gathered and considered for possible disposition. If the defendant advises the negotiating prosecutor of new charges which have not yet reached the prosecutor's office or if the criminal history record information indicates any pending charges the prosecutor should contact the local police department or municipal court and request that said charges be forwarded immediately so that they may be included in the plea agreement.[93] This will enable the prosecutor to make a plea offer based on a more accurate assessment of the defendant's criminal proclivity, provide an opportunity to clear the docket of several indictments or potential indictments, and give the sentencing judge a clear picture of the defendant's background. It will also obviate the necessity of repeating the procedure when other charges ripen.

Before plea negotiation has resulted in final agreement, consideration must be given to its effect on codefendants. It should be the goal of the prosecutor conducting negotiations to strengthen, or at least not weaken, his case against co-defendants. Where appropriate, he may wish to exact some form of cooperation from the defendant as a condition of the plea agreement. In some cases the prosecutor may wish to elicit certain information from the defendant, on the record, thereby protecting the State's position against codefendants in subsequent trials. Conversely, a defendant who has decided to plead

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93 If the record information indicates the pendency of a charge in another county, the prosecutor should contact the foreign prosecutor to see if a negotiated plead can be arranged pursuant to R. 2:25A-1.

guilty may wish to take complete responsibility for the criminal act, and thereby exculpate codefendants. The prosecutor would then be in a position to dismiss charges against codefendants.

No plea agreement should be consummated unless the negotiating prosecutor has had an opportunity to review the defendant's complete record of prior criminal involvement. In many cases, since criminal records are often incomplete, a detective should be assigned to determine the final disposition of charges.[94] It should be obvious that a defendant's prior criminal activity is a very significant factor to be considered before entering a plea bargain on current charges.

It is often advisable to contact the police officers who investigated the crime which is the subject of negotiations in order to obtain further information concerning the defendant. A prosecutor's decision to enter a plea agreement is a discretionary act which cannot be forced on him by court or counsel. He is not limited to considering only prior convictions in determining whether or not to exercise his discretionary authority. Information obtained from local authorities that a defendant has engaged in criminal activity which has not resulted in a conviction may be a significant factor to consider.

Where there is a specialized unit within an office with jurisdiction over crimes of the type being considered for a plea negotiation, e.g., homicide, narcotics, gambling, etc., the appropriate member of such unit should be consulted. In this manner, the negotiating prosecutor may be able to obtain relevant information concerning the defendant, which may not appear in the file. He may also wish to consider the effect of the plea on the overall operation of the specialized unit.

Before consummating a plea agreement in sensitive cases such as rape, assaults on police officers and "police brutality" situations, the victim should be contacted. The victim should be advised by the prosecutor of the latter's reasons for making concessions. The prosecutor should solicit the victim's views and answer all questions concerning disposition of the charges, but should never be in the position of requesting the victim's permission to complete the agreement. So too, although an arresting police officer should in certain cases be consulted, the prosecutor should not yield his authority to enter a plea agreement.

Generally accepted types of agreements may be divided into three categories:

1. Recommendations that separate indictments or counts of the same indictment or of other complaints or indictments be dismissed in return for specified guilty pleas. See R. 3:9-3; R. 3:25-1.

2. Recommendations for specified maximum exposure less than the statutory maximum (or a concurrent sentence). See R. 3:9-3.

3. Recommendations that the crimes charged be downgraded to lesser included offenses, either indictable or disorderly. Prior to indictment the prosecutor can administratively

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[94] See also the discussion concerning simultaneous disposition of open charges, supra.

dismiss or downgrade offenses and remand to the municipal court. After indictment a court order is required, and the indictable offense can be dismissed upon plea to the downgraded offense. See R. 3:25-1.

It is "essential that the terms of the agreement be clear and unequivocal and fully understood by defendant." State v. Brown, 71 N.J. 578, 582 (1976). An agreement may contain concessions by the defendant waiving his right to appeal. See State v. Gibson, 68 N.J. 499 (1975), as to the effect thereof. See also R. 3:9-3(d). If the court rejects the prosecutorial recommendations made as part of a negotiated plea the defendant is entitled to withdraw his plea. R. 3:9-3(e).

The Prosecutor in each county should develop, reduce to writing, and distribute to every member of his staff, his plea negotiation policies which should be broad enough to apply to all cases. This will tend to encourage a consistency of approach in similar situations and to minimize the effects of forceful judges, persuasive counsel and negotiating prosecutors with widely divergent plea negotiation philosophies.

Either the Prosecutor, his First Assistant, or a designated assistant must always be available to discuss and interpret office policy as it applies to a specific set of facts. In order to encourage uniformity and to discourage disparity, the Prosecutor or his designee (such as the First Assistant or the Chief of the Trial Section) should approve all negotiated plea agreements. This assistant must have a thorough knowledge and understanding of office policy and the requisite authority to accept or initiate offers which constitute exceptions to established policy.

Internal office plea negotiation procedures should concentrate on three essential elements:

1. Preparation of agreements at the earliest possible stage of the proceedings;
2. Documentation of each plea negotiation sought to be entered by means of a written memorandum which would become a permanent part of the file;
3. A multiple review of each plea negotiation prior to consummation. It is imperative to clearly define who in the office has the requisite authority for approving, rejecting or modifying a plea agreement.

Turning now to the subject of sentencing, it is axiomatic that the role of the prosecutor does not terminate upon the return of a guilty verdict or the disposition of criminal charges by virtue of a plea agreement. The prosecutor must recognize that he has an affirmative function with respect to the sentencing process.[95] He may take any appropriate

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95 Of course if part of a plea negotiation is that the prosecutor will make no recommendation as to sentence, this must be strictly adhered to. State v. Brown, supra. The prosecutor must adhere to the terms of a plea negotiation, however. If a specific recommendation as to sentencing was promised to the defendant, the prosecutor must "meticulously" carry it out. See State v.

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position at sentenci with respect to each case involving either a plea or trial, provided that if a negotiated plea was involved, the terms of that plea must be strictly adhered to. That is not to say that a prosecutor is duty bound to take a position with respect to sentencing in each case. However, his decision to make a recommendation with regard to a sentence should be based upon reasoned judgment.[96] Plainly, the guidelines set forth above with respect to plea bargaining are equally applicable to sentencing recommendations. Stated somewhat differently, the nature of the offense, the effect of the crime on the victim, the background of the defendant, the risk to the public, and the possibility of rehabilitation must be considered.

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95 (cont'd)

Jones, 66 N.J. 524 (1975) for a situation where the prosecutor failed to recommend concurrent sentences pursuant to the terms of a plea negotiation. However, where the plea is not entered pursuant to negotiations, the prosecutor may make any appropriate recommendation upon the entry of a guilty plea. Moreover, the prosecutor may also be heard at sentencing following convictions after trial.

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As part of a negotiated plea, the prosecutor may recommend incarceration or a maximum exposure or a specific term of years. However, if a judge does not impose the specific term of years, as recommended by the prosecutor, it is not clear the plea can be withdrawn. Cf. State v. Spinks, supra. In connection with sentence recommendations independent of a negotiated plea, the prosecutor can -- and in appropriate circumstances should -- recommend imposition of a custodial term, the place of incarceration, a specific term, a consecutive sentence or any other appropriate action.

4. Norm Maleng, King County Prosecuting Attorney, "Filing and Disposition Policies," Revised, May 1982, pp. 1-20, 39-45.

Note: Portions of this document have been deleted in order to save space. The complete manual is available for examination at the Crime Commission office.

FILING AND DISPOSITION POLICIES

NORM MALENG
KING COUNTY PROSECUTING ATTORNEY
Revised May, 1982

FILING AND DISPOSITION POLICIES

CRIMINAL DIVISION
NORM MALENG
PROSECUTING ATTORNEY

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SECTION 1: INTRODUCTION

The discretionary decisions which the law requires a prosecutor to make are among the most important in our system of criminal justice. Decisions as to who should be prosecuted and for what crimes and what disposition should be made of those cases are vitally important. How they are made affects every citizen. Justice requires that all who are affected by our decisions know the basis on which they are made. In this volume we set forth the policies which guide the decisions we make.

These policies reflect the philosophy that all who violate the criminal law should be punished, that the degree of punishment should be proportionate to the seriousness of the criminal act and the harm caused to society and that punishment should be imposed only for what the criminal has done and not for what his status or position in the community is. Those decisions should be consistent so that all can be assured that everyone similarly situated is treated equally.

These policies represent the end of traditional plea bargaining in King County. No longer will the disposition of criminal cases be negotiated according to hidden and shifting priorities, subject to the pressures of the moment. These policies require accurate charging decisions based on what the evidence will support and they contemplate that a defendant charged with a serious crime will plead guilty to charges accurately reflecting

his criminal conduct or go to trial. While we recognize that a person with a crime free record who commits a minor offense should generally be treated with leniency, we likewise intend that those who commit serious crimes and who repeatedly commit crimes should expect to receive the punishment which their acts deserve.

Any set of policies must recognize that exceptions will always be necessary. The purpose of these policies is not to rigidly bind those who must make individual decisions but to articulate principles that will guide them. When an individual case presents factors which would make application of the general policy unjust, it should be acknowledged as an exception and dealt with accordingly. But the reasons for the exception can and should be set forth in writing. It is this process of stating the general policy and requiring justification for departures which insures responsible and consistent decision making.

Like any set of policies these involve the setting of priorities. These priorities reflect both the fact that some crimes are more serious than others and thus worthy of more official resources and the fact that those resources are always limited. Choices must be made. What these policies insure is that those priorities are stated openly and applied evenly.

This statement of policy is not meant to be a static document. As we gain experience with the effect of these policies in

practice and as conditions change so will our policies evolve. Through this process of constant re-examination, we will insure that these policies best serve the public trust which is involved in each decision we make.

SECTION 2: GENERAL PRINCIPLES

I. CHARGING DECISION

The initial charging decision is the most important single decision a prosecutor makes. Placing an accurate initial label on the criminal conduct involved is essential to the elimination of traditional plea bargaining since charges will not routinely be reduced to induce pleas of guilty. Defendants will be expected to plead guilty to charges accurately reflecting their crimes or go to trial.

To guarantee that the initial charge is as accurate as possible only deputies with felony trial experience will file charges. Every decision to file charges will be approved by a senior deputy prosecuting attorney. Any decision to decline to file will be supported by written reasons approved by a senior deputy. Police agencies or victims who disagree with a decision not to file may appeal through the chain of command of the criminal division and ultimately to the prosecuting attorney personally.

To insure that the initial charges are not inflated beyond what the evidence will fairly support, these policies require that issues as to what charge or degree should be filed be resolved conservatively. If the evidence will clearly support a charge of a lower degree but might also questionably support a higher

degree, the initial charge should be of the lower degree. This insures that weaknesses in proof are not built into cases from the beginning. Since proof weaknesses are the major justification for traditional plea bargaining, this policy is designed to minimize this justification in the beginning.

II. DISPOSITION RECOMMENDATION

These policies set forth the position of the prosecuting attorney as to both aspects of the disposition of a criminal case: (1) the charges and degree of crime the defendant will be expected to plead guilty to, and (2) the sentence which will be recommended to the sentencing judge.

These policies require that if a defendant wishes to enter a plea of guilty the plea should be to charges which accurately describe his criminal conduct. If that conduct is a single crime then these policies require that the plea of guilty be to the highest degree which the evidence will support.

If the criminal conduct consists of a single incident which may legally support several different charges, these policies call for a plea of guilty to the crime which most accurately describes the conduct involved. For example, if a defendant rapes a person while armed with a knife and then steals her purse, charges of both rape and robbery may be filed. Since the gravamen of the act

is the rape, the plea of guilty should be to the rape charge rather than the robbery charge. If a plea of guilty to the rape charge is entered, then there is little reason to continue to trial on the robbery charge and thus these policies permit its dismissal.

At times a defendant will have committed a series of identical crimes in a short period of time. For example, a defendant with a stolen credit card commits the crime of credit card forgery every time the card is used. It is not uncommon to have cases where the card has been used five to ten times in one day. The defendant should be convicted of sufficient charges to clearly reflect his conduct as involving multiple offenses but there is little utility in requiring resolution of every incident. Accordingly, these policies provide that upon a plea of guilty to five charges and an agreement to assume responsibility for restitution for all losses that the charges in excess of five need not be filed. This principle is applied generally throughout these policies. A plea of guilty must be to a sufficient number of charges to accurately characterize the defendant as a multiple offender. Once that has been accomplished, there is little utility in filing excess counts. This policy, however, does not apply to crimes involving personal injuries to victims. In those cases, a defendant must plead guilty to charges involving each

victim, without limit, or go to trial. If those crimes have been committed as part of a common course of action, they may be combined in one count which names each individual victim. These policies always require an admission of guilt as to each individual victim where the evidence is sufficient to result in a conviction at trial.

The discussion above has assumed that there exists sufficient admissible evidence to support a conviction of the crimes charged. There will be cases, however, which appeared to be strong at the time of filing but which later develop proof problems. Witnesses may become unavailable to testify; evidence may be ruled inadmissible because of the manner in which it was acquired; evidence supporting a legal defense may come to light; or any of a myriad of other difficulties may surface. These situations are impossibile to predict in advance and must be dealt with on a case by case basis. Frequently, these situations make compromise a more desirable alternative than proceeding to trial with a case that may be lost. These policies permit such compromises when they are necessary but require that they be supported by written reasons therefore and approved by the chief or an assistant chief. In all serious crimes against persons, the compromise must also be discussed with the victim. In this way we insure the flexibility which is necessary to deal with developing problems but also

guarantee that the proof difficulties are real and truly warrant the compromise which is proposed.

Whenever the appropriate level of punishment is one year or less, the judge must place the defendant on probation and then make the jail sentence a condition of probation. This is because the law does not allow a direct jail sentence in felony cases. This then raises the issue of what other conditions of probation should be imposed. These policies reject the treatment philosophy which holds that we can somehow "diagnose" the cause of the crime and "prescribe" a treatment program which will "cure" the offender. Such a philosophy leads inexorably to injustices since it deals with defendants on the basis of who they are rather than on what they have done. We believe that all who commit similar acts should be treated equally, regardless of their background or status or potential in the world. Rehabilitation can and does occur but it happens when an individual defendant makes a decision to change. Before that moment, no treatment program is likely to be successful. Thus, while our sentence recommendations in cases where probation is appropriate are designed to facilitate rehabilitation once a defendant has decided to reform they recognize that our ability to force treatment on those who are unwilling is limited. For example, if a particular crime deserves a punishment of four months loss of liberty, that sentence would

normally be served in the county jail. But if a defendant desired to receive alcohol or drug treatment, the sentence could be served in a residential treatment program. Similarly work or education release allows defendants to maintain or learn occupations while receiving the just deserts of their crimes. While the period of punishment through loss of libery is fixed by the seriousness of the crime and the defendant's criminal career, the location of the punishment may vary to increase the likelihood of rehabilitation of the defendant.

III. PRIORITIES

Like all governmental agencies, we do not have unlimited resources. Choices must be made. Priorities must be set.

These policies reflect our judgment that crimes against persons are more serious than crimes against property and thus deserving of higher priority in the allocation of prosecutorial resources. Because of both their impact on the individual victim and their contribution to the climate of fear which is so debilitating to a society, crimes against persons must receive top priority. This priority is reflected throughout these policies. Crimes against persons will be prosecuted if the available evidence is sufficient to take the case to the jury for a decision. Crimes against property are prosecuted when there is

sufficient evidence to make conviction probable. Crimes against persons always receive a sentence recommendation which includes jail or prison time. First offense property offenders may receive straight probation recommendations. We recognize that these policies will result in more trials in cases involving crimes against persons and thus require more of our deputies' time. We believe this is where their time should be devoted because of the tremendous impact these crimes have on the public.

Within the crimes against property category, priorities are assigned primarily on the value of the property stolen. Since the gravamen of a crime against property is the economic loss involved, we believe this distinction is more appropriate than one based upon the particular criminal method involved. Special mention should be made of the crimes of robbery and residential burglary. While the motive for both crimes is normally economic, we classify both as crimes against persons and thus deserving of high priority: robbery because of the threat of violence and injury which always exists; residential burglary because of the feeling of fear and loss of personal security which victims suffer when their home has been invaded.

Within all classifications, priority is given to defendants who have a prior criminal history. Those who have proven their propensity to commit repeated serious crimes receive the highest

priority in prosecution. Defendants in this category can expect prosecution to the maximum extent possible under the law. Cost and resource questions are not considered in these cases. At the other end of the spectrum are minor property offenses committed by first time offenders. In these cases the shock of the arrest and prosecution are usually a sufficient deterrent to further criminal conduct and thus they can be resolved as misdemeanors in District Court rather than with the time and expense of a felony prosecution in Superior Court. This expedited handling, however, is limited to first offenders. If a person commits a second crime, even a relatively minor property offense, that person can expect full felony prosecution.

The expedited crime category is limited to first felony offenders who have committed minor theft crimes involving property of less than $600 in total value, joyriding in motor vehicles and drug offenses where it is clear the drugs were possessed for personal use only. These relatively minor crimes can be dealt with adequately by District Court sentences, thus saving scarce Superior Court judicial and prosecutorial resources for crimes against persons and those committed by repeat offenders.

We believe this set of priorities maximizes the effectiveness of the limited resources we have by focusing them on the most serious crimes and criminals.

IV. SPECIAL ALLEGATIONS

The legislature has enacted a number of special statutes which impose mandatory sentences in certain cases.

The first of these statutes deals with habitual criminals. Passed in 1909, it provides for a life maximum and fifteen year minimum sentence for any person convicted of three felony offenses. The statute makes no distinction between the most minor and the most serious crimes. While we believe a sentence of this severity is deserved by a defendant who repeatedly commits crimes against persons or major property offenses, we also believe it would be unjust as well as wasteful of scarce prison capacity to impose such a sentence on a third time minor property offender whose total criminal career may have involved no violence to persons and the loss of only a few hundred dollars. Accordingly, these policies limit the habitual criminal charge to those offenders who truly deserve it by restricting its application to those who commit high impact crimes and whose past criminal history indicates a series of serious crimes. At the same time, by prohibiting in habitual criminal cases any form of plea bargaining or negotiations, they insure that those who truly deserve such a sentence will actually receive it.

The "firearm" statute (9.41.025) was enacted in 1969 and

amended in 1981 and operates to require a mandatory prison sentence by prohibiting the sentencing judge from granting any form of probation. It applies to any crime which was committed by a person armed with a firearm.

The "deadly weapon" statute (9.95.040) was enacted in 1935 and operates to affect the power of the Board of Prison Terms and Paroles to grant paroles. It has no effect on the sentencing judge and does not prevent the granting of probation. If a deadly weapon was used in the commission of a crime and the judge sentences the defendant to prison, the Parole Board is required to set a minimum term of at least five years. The Board, however, may reduce this mandatory minimum term if five of its seven members agree.

These policies call for "deadly weapon" and "firearm" allegations to be filed in every case where the weapon was actually used in the commission of the crime except in assault cases where these policies limit the use of these statutes to situations where the weapon was actually used to inflict injury or in an attempt to inflict injury as opposed to merely being present. We believe this is consistent with a legislative policy of increasing the punishment when weapons are actually used.

V. SEXUAL ASSAULT AND CHILD ABUSE CASES

Sexual assault cases and crimes against children, because of their sensitive nature, require special treatment. More so than in most other crimes, these cases present situations where prosecution can actually increase the harm already done if not conducted in a sensitive and supportive manner. Because of this we have a special unit which handles all sexual assault and child abuse cases. The unit is composed of specially selected and trained deputies. Each case is assigned to a single deputy who meets the victim at the earliest opportunity and is responsible for that case -- and for keeping the victim informed of its progress -- from beginning to end.

It is the position of the office that sexual assaults against adults or children are amongst the worst of crimes and that persons who commit such crimes should be severely punished. However, these policies also recoginize that a large percentage of sexual assaults against children are perpetrated by family members or other persons known to the child. In these cases, the victim often feels ambivalent about prosecution because while the child wants the abuse to stop, he or she does not want the offender to go to prison. These policies also recognize that there exist treatment programs for treating incest offenders and other child molesters. For these reasons, these policies permit in these

cases a sentencing recommendation which allow probation and jail time rather than prison as long as the offender participates in a qualified sexual deviancy treatment program. Inpatient treatment may also be an appropriate alternative to prison.

SECTION 3: DEFINITIONS

The following definitions shall apply to all filing and disposition policies:

I. "High Impact Crimes" are:

A. murder in the first or second degree.

B. manslaughter in the first degree and second degree.

C. Assault in the first degree or in the second degree where actual serious injury has been inflicted.

D. rape in the first or second degree.

E. statutory rape in the first or second degree.

F. indecent liberties

G. robbery in the first or second degree.

H. kidnapping in the first degree and second degree.

I. burglary in the first degree, or second degree involving a residence or the loss of more than $5,000.

J. arson in the first degree and second degree involving actual danger to human life.

K. theft in the first degree or possession of stolen property in the first degree or any related crime involving property of a value of more than $10,000.

L. possession or sale of narcotics or dangerous drugs of a value of more than $10,000.

M. bribery.

N. intimidating a witness or juror.

O. extortion in the first degree.

P. violations of the Uniform Firearms Act where the defendant is on active probation or parole.

Q. attempts, solicitation or conspiracy to commit any of the above offenses.

II. "Expedited Crimes" are the following crimes when committed by a person who has not been convicted of a felony or an expedited crime within the past five (5) years and who does not have a pending felony case for which there is probable cause:

A. theft or possession of stolen property of any type where the total value of all property taken or possessed pursuant to a common scheme is less than $600, except

1. from the person, or

2. as part of a business enterprise, or

3. where the property possessed was stolen in a robbery or residential burglary and circumstances exist which give probable cause to believe that the defendant comitted the robbery or burglary, or

4. where the property possessed was stolen in more than one criminal incident.

B. forgery or credit card forgery when the total face value of all instruments forged is less than $600, unless two or more different identities are involved.

C. credit card theft where the possession involves the cards or identification of one person only.

D. unlawful issuance of a bank check in an amount less than $600.

E. malicious destruction of property where the diminution in value is less than $600.

F. joyriding where the vehicle was abandoned within 24 hours of the theft, where no stripping occurred, where there is no evidence of intent to permanently deprive, and where no substantial damage to the vehicle has occurred.

G. possession of marijuana in the folowing quantities: (1) less than 250 grams of marijuana, (2) less than 12 immature marijuana plants, (3) less than 100 grams of hashish. Such cases are not expedited if the circumstances indicate possession for sale rather than personal use.

H. possession of other narcotics or dangerous drugs in small quantities indicating possession for personal use only. Absent other factors, possession of drugs with a street value of more than $250 shall be considered as for other than personal use.

I. forged prescriptions where the purpose was personal use rather than re-sale.

J. escapes from custody by misdemeanants where no force was used and the escape posed no risk to public safety.

III. "Prior Conviction" means conviction for non-traffic offenses.

A. Arrests that do not result in convictions are not prior convictions.

B. Two misdemeanor convictions involving crimes against persons, property or involving drugs or weapons count as one felony conviction. Traffic offenses shall not be considered except where the present crime is traffic related.

C. Deferred prosecutions resulting from a formal deferred prosecution program shall be considered as convictions.

D. Juvenile record for crimes occurring before July 1, 1978 will be calculated as follows:

1. Adjudications of delinquency shall be considered as convictions of the most serious crime upon which the adjudication was based.

2. Cases which have been screened sufficient for filing and which have been adjusted shall be considered as convictions of the most serious crime upon which the adjustment was based.

3. Cases which result in modification petitions which are sustained shall be considered as convictions of the most serious crime alleged.

4. Crimes committed before age 14 and status offenses shall not be considered.

5. Dependency and incorrigibility adjudications shall not be considered.

E. Juvenile convictions or diversions occurring after July 1, 1978 shall be considered in the same manner as adult convictions except that status offenses shall not be considered.

IV. "Multiple Incidents" means independent crimes i.e., two robberies of different victims at different locations are separate criminal incidents; the robbery of two victims at the same time and location is one criminal incident.

V. "Defendant on Active Parole, Probation, or Pending Disposition" means that the defendant was subject to the jurisdiction of the Parole Board or a Superior Court judge pursuant to a felony conviction and the parole or probation had not been placed on inactive status by the Department of Social and Health Services or that the defendant was pending trial or sentencing on another felony charge at the time of the commission of the instant crime.

SECTION 5: HOMICIDE

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Homicide cases will be filed if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be rasied under the evidence, would support conviction by a reasonable and objective fact-finder.

2. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, it would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.

B. CHARGE SELECTION

1. Degree

a. Aggravated Murder, Death Penalty.

(1) Any filing deputy who becomes aware of a potential death penalty case by virtue of the fact subsection (a) and (b) below are present, shall immediately notify the Chief Criminal Deputy and the Prosecuting Attorney. No deputy prosecuting attorney is authorized to file a notice of Special Death Penalty Sentencing Proceedings without the prior personal approval of the Prosecuting Attorney If the Prosecuting Attorney is unavailable, the prior personal approval of the Chief Criminal Deputy shall be obtained.

(2) Notice of Special Death Penalty Sentencing Proceeding shall be filed when the Prosecuting Attorney is satisfied that:

(a) substantial evidence exists to establish that the homicide was in fact premeditated for a period of time beyond that involved in its actual commission; and

(b) one or more of the aggravating factors listed in RCW 10.95.020 are present; and

(c) the defendant's guilt can be proven with clear cetainty; and

(d) there exists no substantial evidence of any mitigating factor listed in RCW 10.95.070 sufficient to merit leniency.

b. Murder in the First Degree - 9A.32.030

(1) Premeditated Murder in the First Degree - 9A.32.030

(a) Premeditated homicide cases shall be filed as murder in the first degree only if sufficient admissible evidence of "premeditation" (See 9A.32.020) exists to take that issue to the jury.

(2) Felony Murder in the First Degree 9A.32.030(c)

(a) Felony murder in the first or second degree shall be charged if sufficient admissible evidence exists to take to the jury the question of whether the death was caused in the course of or in furtherance of the requisite felony or in immediate flight therefrom.

(b) Felony murder shall not be charged if sufficient admissible evidence exists to raise a reasonable question as to whether the defense set forth in 9A.32.030(c)(i) through (iv) exists.

(c) Doubts as to whether the requisite felony is one of those listed in 9A.32.030(c) shall be resolved by charging felony murder in the second degree.

c. Murder in the Second Degree - 9A.34.050

(1) All intentional homicides other than those covered in (a) or (b) above shall be charged as murder in the second degree.

(2) Felony Murder in the Second Degree

(a) Felony murder in the second degree shall be charged if sufficient admissible evidence exists to take to the jury the question of whether the death was caused in the course of or in furtherance of the requisite felony or in immediate flight therefrom.

(b) Felony murder shall not be charged if sufficient admissible evidence exists to raise a reasonable question as to whether the defense set forth in 9A.32.050(b)(i) through (iv) exists.

d. Manslaughter - 9A.32.060 and 9A.32.070

Non-intentional homicide not resulting from the operation of a motor vehicle shall be charged as manslaugther in the second degree (9A.32.070) unless sufficient specific admissible evidence exists to take the issue of the defendant's actual knowledge of the risk to the jury, in which case manslaughter in the first degree (9A.32.060) shall be charged.

e. Negligent Homicide - 46.61.520

(1) Negligent homicide cases based on DWI or recklessness theory shall be filed if sufficient admissible evidence exists to take the DWI or recklessness issue to the jury.

(2) Negligent homicide cases based on a disregard for safety or other theory shall not be filed unless the disregard is a gross deviation from the care a reasonable person would exercise in the same situation.

f. Where Doubt Exists as to Degree

Cases where a question exists as to the proper degree to be charged should be resolved by filing the lower degree and including a notification to the trial deputy to consider an amendment upward is such is justified by the facts as developed during trial preparation. It should not be assumed that cases will be reduced in degree upon a plea of guilty.

2. Multiple Counts

If more than one person has died as a result of the defendant's conduct, each homicide shall be charged separately in the original complaint or information.

3. Special Allegations

a. Refer to "General Provisions", pp. 33-34.

b. Deadly weapon (9.95.040) and firearm (9.41.025) allegations shall be included in each count of murder and manslaughter if sufficient admissible evidence exists to take the issue to the jury.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

a. A defendant will normally be expected to plead guilty to the degree charged or to go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a reduction to a lesser degree

will be offered. Caseload pressure or the expense of prosecution may not be considered. The exception policy shall be followed before any reduction is offered. All reductions shall be discussed with the victim's next of kin before being concluded.

b. A charge of aggravated murder in the first degree shall not be reduced without the prior personal approval of the prosecuting attorney.

c. The prosecuting attorney or the chief criminal deputy shall be notified of all proposed reductions prior to the time the reduction is offered.

2. Dismissal of Counts

a. Normally counts representing separate homicides will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not be considered. The exception policy shall be followed before a dismissal of counts is offered. All dismissals shall be discussed with the victim's next of kin before being concluded.

b. A count alleging aggravated murder in the first degree shall not be dismissed without the prior personal approval of the prosecuting attorney.

c. The prosecuting attorney or the chief criminal deputy shall be notified of any offer to dismiss a count representing a separate homicide prior to the time the dismissal is offered.

d. Counts of manslaughter or negligent homicide representing separate deaths arising from a single act or omission may be combined into one count alleging the death of each victim if the defendant indicates a willingness to plead guilty to such a count.

3. Dismissal of Special Allegations

Normally firearm and deadly weapon allegations will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a special allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a special allegation is offered.

B. SENTENCE RECOMMENDATION

1. Attempts, Solicitation or Conspiracy

Attempts, solicitation or conspiracy to commit murder shall receive a recommendation one step below that which would have been applicable if the crime were completed.

2. Maximum Term

a. A maximum term of 20 years shall normally be recommended for murder in the second degree. In all other cases the statutory maximum shall apply.

b. Consecutive maximum terms shall be recommended in all multiple murder cases. In manslaughter and negligent homicide cases where multiple deaths have resulted from a single act or ommission concurrent maximum terms shall be recommended.

3. Minimum Term

A minimum term within the range shall be recommended. Recommendations outside the specific range shall be made only pursuant to the exception policy and all exceptions in homicide cases must be discussed with the victim's next of kin before being concluded. The requests of the next of kin of the victim shall always be considered and may justify an exception from the stated minimum recommendation.

4. Restitution

See "Payment of Restitution", page 29.

	= A	Negligent Homicide	
1 misdemeanor	= B		
1 felony	= C	Where a partici-	6 mos.-
1 felony + 1 misd.	= D	pant with the	1 yr.
2 felonies	= E	defendant in the	
3+ felonies	= F	conduct which cause the death (e.g. racing, drinking)	
Murder 1° 20 years		No prior record	1-1 1/2 yr.
		One major or five minor driving violations within the past 5 years or driver's probation	1 1/2- 3 yrs.
Murder 2°		Two major or eight minor driving violations within past 5 years	3-5 yrs.

A. 10-15 years
C. 15-20 years

Manslaughter 1°

A. 1 1/2-3
C. 3-5
E. 5-10

Manslaughter 2°

A. 1-2
C. 1 1/2-3
E. 3-5

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