

MAKING YOUR DEAL WITH THE DEVIL

*PLEA AGREEMENTS UNDER THE FEDERAL RULES,
FEDERAL SENTENCING GUIDELINES,
AND DEPARTMENT OF JUSTICE POLICIES*

David Taylor Shannon¹
Supervisory Assistant Federal Public Defender
Tucson, Arizona
(520) 879-7559

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¹ This article was updated in 1998 and 1999 with substantial research assistance from Brian Rademacher, an attorney in the Federal Public Defender office in Tucson, Arizona. A partial update was done in 2003 to accommodate changes to Rule 11, Fed. R. Crim. P., and some additional case law updates were added in 2007.

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1 Introduction

Most criminal cases in federal court are resolved not by trials, but by plea bargains. In order to negotiate a successful plea agreement, defense counsel must understand what kind of agreements can be made and the effect of each kind on the client's sentencing exposure. Although plea agreements are generally referred to and treated as *contracts*, they are like contracts in a heavily regulated industry. Rights and responsibilities under these contracts are controlled by layers of statutes, rules, guidelines, Department of Justice (DOJ) policies, and case law. Regardless of the type of plea agreement, counsel must understand the impact of all these layers of regulation in order to know what the provisions of the agreement will mean to the client.

The Department of Justice Manual – the blue looseleaf standard reference manual for all U.S. Attorney's offices, cited herein as the DOJ Manual – requires that plea agreements for all felonies and misdemeanors negotiated down from felonies be in writing and filed with the court. (DOJ Manual 9-27.450) Some U.S. Attorney's offices have standard plea agreement forms, others give individual assistants more leeway in what can or must be in plea agreements. Some agreements cover the basics in a couple of pages, others extend to ten or twenty pages. For some time the trend seemed to be toward longer and more complex agreement forms. Any new provision that a prosecutor came up with was simply tacked on to the previously "standard" form. A trend to simplify plea agreements is emerging, particularly where the agreement has to be translated into another language for the defendant.

This article sets out the basic federal rules, sentencing guidelines and DOJ policies controlling plea agreements in federal court, and analyzes typical provisions that show up in many "standard" federal plea agreements. The article is divided into six main sections as follows:

- 1. Introduction** – this section describing the content of the article.
- 2. General Law of Plea Agreements** – rules and guidelines that impact on plea bargaining in general, DOJ policies about the charging decision and plea bargaining, involvement of judges in plea bargains, and enforcement of plea agreements.
- 3. Specific Types of Plea Agreements** – individual analysis of charge bargains, recommendation bargains, stipulated sentences, stipulations to guideline facts, cooperation agreements, etc.
- 4. Waivers: Trial, Appeal, and Collateral** – effectiveness of various kinds of waivers, ethical problems, ways in which the waiver itself can be "waived" or otherwise ineffective.
- 5. Miscellaneous Typical Provisions** – problems with inaccurate penalty statements, typical warnings included in plea text, effect of admissions in the factual basis, effect of the acceptance of the bargain on your ability to withdraw.

6. Collateral Consequences of Plea – a brief mention of various collateral consequences of plea agreements, a subject generally beyond the scope of this article.

Sample language from a hypothetical typical plea agreement is presented in italics in some sections to illustrate certain points.

2 General Law of Plea Agreements

A defendant who is considering a plea is usually primarily concerned about what he or she will plead guilty to and what penalties will be assessed. Although the shape of the plea is controlled by many fact-specific factors related to the crime and the defendant, there are some general principles of law and policy that impact on (1) the prosecutor's initial charging decision, (2) the amount of prosecutorial discretion available for bargaining, (3) the involvement of the court in the bargaining process, and (4) the defendant's ability to enforce the plea bargain once it is entered into. These general matters are the subject of this section. Specific ramifications of the various kinds of plea bargains available in federal court are covered in Section 3.

Plea bargains are controlled or influenced by various sources of law. Federal court practitioners are familiar with Rule 11 of the Federal Rules of Criminal Procedure (FRCrP), which, together with case its law interpretations, sets out much of the basic law on plea bargaining. Certain portions of the Federal Sentencing Guidelines (USSG or Guidelines) – in particular §1B1.2-4 on Relevant Conduct and §6B1 on Plea Agreements – also have a strong effect on plea bargains. Probably the least familiar source of information is the Department of Justice (DOJ) Manual. Most of the DOJ policies discussed in this article are contained in Title 9, Chapter 27 of the DOJ Manual at 9-27.001 et seq.² They will be referred to herein by their section numbers. Most of the provisions of the various DOJ Bluesheets and other memoranda referred to herein have been compiled into that chapter. Copies of the relevant portions of the DOJ Manual should be included as an appendix to this article. If they are not, they should be available in local court libraries and in local federal defender offices.

2.1 Federal Rules of Criminal Procedure

Rule 11, FRCrP, sets out the basic ground rules for all plea bargaining in federal court. Much of the case law regarding how the plea hearing is handled and the effects of various pleas is based on interpretation of Rule 11. It should be the first source consulted on any plea question. The following are some notable provisions of the rules. Citations to the rules in this section are to the FRCrP unless otherwise stated.

2.1.1 Types of pleas allowed under rules

² http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

Rule 11(a) describes the kinds of pleas allowed under the FRCrP as not guilty, guilty, and *nolo contendere*. In addition, a defendant may enter a conditional plea under Rule 11(a)(2) with the consent of the court and the government in order to preserve an issue for appeal. If the defendant prevails, he may withdraw the plea upon remand.

2.1.2 Advice to the defendant

Rule 11 spells out in some detail the proceedings that must occur for a guilty plea to be valid. Below is a checklist that can be used to determine whether all the bases were covered in a particular case. Note, however, that Rule 11(h) specifically provides that variance from the described procedure is harmless error if it does not “affect substantial rights”.

CLIENT:	TRANSCRIPT PAGE
Plea before Magistrate Judge	
D must waive right to proceed in front of district judge	
Rule 7(b) (waiver of indictment)	
Ct must advise D of nature of the charges	
Ct must advise D about GJ (16-23 jurors, 12 must agree)	
RULE 11(b)(1) (advice to defendant)	
(1) D must be placed under oath	
(1) D must be personally addressed in open court	
A - Gov can use statements in perjury or false statement charges	
B - D can plead NG or persist in that plea	
C - Right to jury trial (Boykin #1)	
– burden of proof (not in rule 11)	
– unanimous verdict (not in rule 11)	
D - Right to counsel at trial and every other stage	
D - Court will appoint counsel if needed	
E - Right to confront & cross-examine adverse witnesses (Boykin #2)	
E - Right to remain silent (Boykin #3)	
E - Right to testify	
E - Right to subpoena witnesses	

CLIENT:	TRANSCRIPT PAGE
F - Plea of guilty or nolo waives trial, no trial will occur	
G - Nature of charge	
H - Maximum possible penalty: imprisonment, fine, S/R	
I - Mandatory minimum	
J - Any applicable forfeiture	
K - Court may order restitution	
L - Court must impose special assessment	
M - Court required to apply guidelines	
M - Court may depart from guidelines	
N - Terms of any waiver of appeal or collateral attack	
Rule 11(b)(2) (voluntary plea)	
Ct must address D personally in open court	
Ct must determine if plea is voluntary	
– Not the result of force or threats	
– Not the result of promises other than in agreement	
Rule 11(b)(3) (factual basis)	
Ct must determine there is a factual basis for the plea	
Rule 11(c) (plea agreement)	
(1) Ct may not participate in plea negotiations	
(2) Parties must disclose plea in open court unless court permits otherwise	
(3)(B) If recommendation, must advise that D cannot withdraw	
Rule 11(g) (recording)	
Proceedings must be recorded by suitable method	
Rule 11(a)(3) (nolo contendere plea)	
Ct considered parties views & pub. interest in effective admin of justice	

2.1.3 Types of plea agreements allowed under rules

Rule 11(c)(1) describes the kinds of pleas allowed under the FRCrP and provides that the government can:

- (A) agree not to bring, or to dismiss, other charges in return for a plea,
- (B) make a recommendation to the court, or agree not to oppose a defendant's recommendation, that a particular sentence or range is appropriate or that a particular guideline provision/policy/factor does or does not apply (non-binding),
- (C) agree that a sentence or range is appropriate or that a particular guideline provision/policy/factor does or does not apply (binding once plea accepted).

2.1.4 Ability to withdraw from plea

Rule 11(c)(4) and (5) combine to allow the defendant to withdraw if a plea under 11(c)(1)(A) or 11(c)(1)(C) is rejected. In essence, this is a "back to square one" provision. Unfortunately, if the plea agreement includes a requirement that the defendant perform some action prior to the sentencing, it is difficult to get all the way back to square one. If a recommendation under 11(c)(1)(B) is rejected, the defendant cannot withdraw under this rule.

2.1.5 Involvement of Judges in Plea Negotiations

In general, Rule 11(c)(1) forbids the court to "participate in any [plea bargaining] discussion." For example, a meeting of the judge, prosecutor, defendant, and defense counsel in chambers, off the record, during which the judge said he followed the prosecutor's recommendation 90% of the time, required reversal under Rule 11(c)(1). U.S. v. Daigle, 63 F.3d 346 (5th Cir. 1995). Similarly, where defendant got cold feet at the change of plea hearing and the judge told him (1) that if he was tried on all three counts he would have to get 15 years, (2) that if he pled guilty he would get 10 years, and (3) that he should talk to his lawyer to see if that is what he really wanted to do, the court crossed the line into the realm of forbidden participation in plea bargaining. U.S. v. Casallas, 59 F.3d 1173 (11th Cir. 1995).

2.1.6 Use of statements made in failed plea discussions

Rule 11(f) relies on Rule 410, Federal Rules of Evidence (FRE), to determine the admissibility of pleas, plea discussions, or related statements. Thus, ordinarily, counsel need not worry about the use of such statements against the client except in the two situations specifically excepted by Rule 410: an exception providing a "rule of completeness" that allows the rest of the statement in where part of it is already in, and an exception for use in perjury prosecutions.

Unfortunately, the Supreme Court has held that the protection of these rules is "presumptively waivable". U.S. v. Mezzanatto, 513 U.S. 196 (1995). The 9th Circuit had previously held that, except for the specific exceptions stated in the rules as noted above, the protection of the rules could not be waived. U.S. v. Mezzanatto, 998 F.2d 1452, 1454-1456 (9th Cir. 1993). The Supreme Court rejected the 9th Circuit's analysis and permitted proffer statements made in plea discussions to be used as prior inconsistent statements in cross-examination at trial and to be proved up by an agent

who attended the proffer meeting, noting that such use was consistent with the wording of the waiver executed before the proffer.

Note that, recently, some judges have questioned the viability of a similar protection for statements made as part of a cooperation agreement. Such statements may not be used to increase a defendant's guideline range under U.S.S.G. 1B1.8(a), but some judges are suggesting that in a post-*Booker* world, they can be used to determine a "reasonable" sentence after the guidelines are calculated. U.S. v. Mills, 329 F.3d 24, 27-30 (1st Cir. 2003).

2.2 Federal Sentencing Guidelines

The Guidelines impact on plea bargaining in several ways, and have added a new dimension to the analysis of the benefits of any plea federal bargain. Counsel can now see with some clarity the effect on the sentence that a particular bargain might have. The guidelines have also set up their own standard for when judges should accept or reject plea bargains. Finally, and perhaps most importantly, the guidelines have radically changed the way in which conduct in addition to the conduct involved in the offense of conviction – so-called "relevant conduct", including acquitted conduct – is factored into the calculation of the sentence.

2.2.1 Standards for acceptance or rejection of plea

The Guideline standard for acceptance of plea agreements is set forth in USSG §6B1.2, a Policy Statement which has three sections dealing with the three distinct types of plea agreements authorized under Rule 11(c)(1): (a) dismissals and agreements not to prosecute, (b) non-binding recommendations and (c) specific sentence agreements. The ramifications of these Guideline sections are dealt with more fully below in Section 3 describing the particular kinds of bargains available.

2.2.2 Use of relevant conduct under guidelines

The concept of *relevant conduct* has its genesis in USSG §1B1.3. A detailed analysis of relevant conduct is too broad a topic to be addressed in this article, although more detail about the use of relevant conduct under specific types of plea bargains is given in Section 3. In general, relevant conduct includes all conduct that occurred during the commission of the offense of conviction, or during the preparation for or attempt to avoid detection or responsibility for that offense – provided that the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused the conduct. USSG §1B1.3(a)(1)(A). If the offense was a joint criminal activity, conduct is relevant if it was in furtherance of the activity and was reasonably foreseeable. USSG §1B1.3(a)(1)(B). The rules are different in a *groupable* offense as defined in USSG §3D1.2(d) – the seriousness of which is usually measured in a quantity like weight of drugs or number of dollars. In those cases relevant conduct also includes conduct that was part of a common scheme or plan with the offense of conviction. USSG §1B1.3(a)(2). Regardless of the type of offense, relevant conduct also includes all

harm flowing from any of the above-described conduct, USSG §1B1.3(a)(3), and any special items specifically identified in the applicable guideline. USSG §1B1.3(a)(4). Obviously this is a very broad definition, particularly in conspiracy cases.

The problem facing the defense lawyer is that determination of the guideline range in a particular case is a multi-stage process, with relevant conduct being considered in different ways at different stages. Initially, a specific guideline from Chapter 2 – where there is a guideline for each general type of offense – is selected to be used as a basis for calculation based on the offense of conviction without regard to relevant conduct. USSG §1B1.2(a). Within that chosen guideline, the base offense level and the applicability of various specific offense characteristics and cross references are all based on relevant conduct. USSG §1B1.2(b),3(a). Adjustments under Chapter 3 – for things like role in the offense, obstruction of justice, or acceptance of responsibility – are also based on relevant conduct. USSG §1B1.3(a).

It is usually fair to assume that relevant conduct can and will be considered by the judge in one form or another at sentencing. This can sometimes negate the value of a plea bargain, although the defendant can often derive substantial benefit from the application of a particular guideline based on pleading to a particular charge. The defendant may also benefit from the removal of certain relevant conduct from the sentencing calculus because of the dismissal of some charges, at least in the 9th Circuit.

2.2.3 Use of acquitted conduct under guidelines

The rationale for allowing conduct for which defendant was acquitted to be considered at sentencing is that there is a different burden of proof, preponderance of the evidence, in effect at sentencing. U.S. v. Carreon, 11 F.3d 1225 (5th Cir. 1994) (conviction requires proof beyond a reasonable doubt, sentencing facts need only be proven by a preponderance of the evidence); U.S. v. Lawrence, 934 F.2d 868 (7th Cir.1991); U.S. v. Fonner, 920 F.2d 1330 (7th Cir.1990); U.S. v. Smith, 953 F.2d 1060 (7th Cir.1992); U.S. v. Manor, 936 F.2d 1238 (11th Cir.1991).

Until 1996, the 9th Circuit did not allow the use of acquitted conduct at sentencing, U.S. v. Brady, 928 F.2d 844 (9th Cir. 1991), although counts on which the jury hung *could* be used. U.S. v. Duran, 15 F.3d 131 (9th Cir. 1994). Some judges in other circuits also felt strongly that use of acquitted conduct "must be modified [because a] just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." U.S. v. Conception, 983 F.2d 369, 396 (2d Cir. 1992), cert. denied, 114 S. Ct. 163 (Newman, J., dissenting).

Although until the mid-90s there was some controversy about the use of acquitted conduct to enhance sentences, this came to an end when the Supreme Court held that acquitted conduct *can* be used in sentencing guideline calculations. U.S. v. Watts, 519 U.S. 148 (1997). The court followed the usual reasoning, holding that acquittal does not mean innocence, it merely means there exists a reasonable doubt.

2.3 Department of Justice (DOJ) Policies

Although DOJ policies do not impact directly on the court and do not create a right in the defendant to certain treatment, they do impact on the decisions made by the prosecutor. Knowledge of these policies – knowing what the prosecutor can and cannot consider – can assist the defense lawyer in framing arguments during the plea bargaining stage.

2.3.1 Policies affecting the charging decision

Since pre-guideline days, prosecutors have been directed to bring to the Grand Jury “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.” Principals of Federal Prosecution, July 1980; DOJ Manual at 9-27.001 et seq. A Justice Department Bluesheet dated March 13, 1989 reiterated that requirement, which is now codified at DOJ Manual 9-27.310. The prosecutor can charge other offenses as well, in addition to the most severe, if needed to reflect the nature of the conduct, provide an appropriate sentence, or strengthen the government’s case.

Policies set forth in the **Thornburgh Bluesheet** dated June 16, 1989 emphasized the requirement that prosecutors file gun counts and informations alleging prior convictions under 21 U.S.C. 851 to enhance penalties. The annotation at DOJ Manual 9-27.750A adds more emphasis to the requirement with its description of Project Triggerlock.

The **Reno Bluesheet** dated October 12, 1993 appeared on its face to loosen up the “most serious readily provable charge” requirement. (DOJ Manual 9-27.750B). In particular, it stated that it was appropriate for the prosecutor to consider the sentencing guideline range of a contemplated charge, whether the penalty would be proportional to the seriousness of the defendant’s conduct, and whether the charge achieved the purposes of punishment, protection, deterrence and rehabilitation. Unfortunately, in response to an attack by Senator Hatch, Attorney General Reno “clarified” the Bluesheet by saying that it is still DOJ policy that prosecutors charge the most serious offense that is consistent with the conduct and likely to result in a sustainable conviction. In the wake of that “clarification”, many people felt that the Reno Bluesheet was no longer of any effect.

Ashcroft Memorandum: More recently, DOJ has published the Ashcroft Memorandum of September 22, 2003, which either has been or will be turned into a Bluesheet in due time. The Ashcroft Memorandum sets out new policies for charging and plea bargaining, and is included as an appendix to this article. The new policy says that “federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case,” except as authorized by designated supervisors. “Most serious” means those that generate the most substantial sentence, either under the Sentencing Guidelines or because of a mandatory minimum sentence. Charges are “readily provable” unless the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government’s ability readily to prove a charge at trial. Once filed, the most serious readily provable charges may not be dismissed except to the extent permitted by later sections of the memorandum dealing primarily with charges that have no effect on the sentence, “fast-track”

programs, reassessment of the evidence, or substantial assistance. There is, however, a special section devoted to dropping statutory enhancements – like 21 U.S.C. § 851 or 18 U.S.C. § 924(c) – where they might cause the defendant to have no incentive to plead, and another section that recognizes resource constraints as legitimate reasons to decline or dismiss some charges.

2.3.2 Policies affecting plea bargaining

The 1980 Principles of Federal Prosecution set out a list of things the prosecutor can consider in reaching a plea bargain, including: cooperation, criminal history, seriousness of offense, remorse or acceptance of responsibility, fact that plea is quick and sure for government, probabilities at trial, effect on witnesses, probable sentence at trial, public interest in trial instead of plea, expense of trial and appeal, and effect of this plea on resolving other related or non-related cases. (DOJ Manual 9-27.420). Unfortunately, it is unclear how many of these factors remain viable in light of the later Bluesheets in the guideline era. The Thornburgh Bluesheet notes that after indictment, prosecutors are bargaining about charges that they have *already determined to be readily provable* and reflective of the seriousness of the defendant's conduct, and thus should rarely be in a position to drop charges. However, that same Bluesheet goes on to note that circumstances can arise, such as the need to protect a witness, that might change the bargaining calculus. Nonetheless, the thrust of all the policies was clear: charges are easy to make, hard to drop.

Ashcroft Memorandum: In the Ashcroft Memorandum of September 22, 2003, sets out specific guidance for both charge bargaining and sentence bargaining. Charge bargaining is limited to dropping those charges that could be dropped under the rules set out in the previous section. Sentence bargaining is limited to sentences within the guideline range, or to a limited set of departures. Approved departures include those for substantial assistance and those under “fast-track” programs. Any other departure should be a “rare occurrence,” and prosecutors are required to oppose departures not supported by facts and law and are forbidden to “stand silent.”

2.4 Enforcement of Plea Agreements

In general, the terms of a plea agreement are “contractual in nature” and disputes will be “determined by objective standards”. U.S. v. Goroza, 941 F.2d 905 (9th Cir. 1991). Any government promises that are part of the inducement to plead must be fulfilled. Santobello v. New York, 404 U.S. 257,262 (1971).

However, “plea agreements . . . are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.” U.S. v. Carnine, 974 F.2d 924, 928 (7th Cir. 1992). This is in part because courts are aware that a plea agreement is often “a contract of adhesion. As a practical matter, the government has bargaining power utterly superior to that of the average defendant if only because the precise charge or charges to be brought – and thus the ultimate sentence to be imposed under the guidelines scheme – is up to the prosecution.” U.S. v. Johnson, 992 F. Supp. 437, 439-40 (D.D.C. 1997). Thus, “[c]ourts construe plea agreements strictly against the Government. This is done for a variety of reasons,

including the fact that the Government is usually the party that drafts the agreement, and the fact that the Government ordinarily has certain awesome advantages in bargaining power.” U.S. v. Ready, 82 F.3d 551, 559 (2d Cir. 1996). For these reasons, courts should hold the government to “a greater degree of responsibility that the defendant . . . for imprecisions or ambiguities in . . . plea agreements.” U.S. v. Wells, 211 F.3d 988, 995 (6th Cir. 2000).

For a collection of cases on interpretation of plea agreement terms, see U.S. v Anderson, 970 F.2d 602 (9th Cir. 1992) (meaning is a fact question, government held to literal terms, government responsible for lack of clarity, question is what the parties reasonably understood). There is also a substantial amount of fact specific case law dealing with specific questions of plea agreement interpretation. Some cases involving breaches of specific types of agreements are detailed in the relevant portion of Section 3, below.

The issue of a breached plea agreement is cognizable on direct appeal where defendant has already been sentenced and thus cannot file a motion to withdraw the plea. U.S. v. Van Thournout, 100 F.3d 590 (8th Cir. 1996) (defendant need not move to withdraw under Rule 32, move to reduce under Rule 35, or move to correct under 2255, particularly, where, as here, the defendant does not want to withdraw, but wants to enforce the plea agreement). However, defendant cannot raise the government’s breach of the plea agreement for the first time on appeal. U.S. v. Robertson, 52 F.3d 789 (9th Cir. 1994) (defendant should ordinarily recognize the breach immediately and should be required to raise issue in the district court while the alleged breach can still be repaired).

Many defense claims of government breach involve failure to provide an agreed benefit and are discussed in the relevant parts of Section 3. But what about other types of government misconduct not linked to a benefit in the plea? Where the government solicited grand jury testimony from defendant in the absence of his counsel, in order to avoid the demands of defense counsel for a 5K1.1 substantial assistance motion, the district court was free to depart downward for substantial assistance even in the absence of a government motion. U.S. v. Treleaven, 35 F.3d 458 (9th Cir. 1994).

3 Specific Types of Plea Agreements

This section discusses the three types of plea bargains recognized under the rules of criminal procedure and the sentencing guidelines: charge bargaining, recommendation bargaining, and stipulation bargaining. It also covers some other forms of bargains that are not mentioned in the rules but are prevalent: pre-indictment bargaining, factual stipulations, restitution agreements, cooperation agreements, and agreements related to deportation.

3.1 Pre-indictment Plea Bargaining

Although in the 1989 Thornburgh Bluesheet provided that an AUSA could ignore the "most serious provable offense" policy if a deal is worked out before the charge is filed, it recognizes that the prosecutor often has more freedom of movement

before the indictment is handed up. It noted that “whether bargaining takes place before or after indictment, the Department policy is the same,” but it also recognized that “it will be difficult for anyone other than the prosecutor and the defendant to know whether, prior to the indictment, the prosecutor bargained in conformity with the Department’s policy.” The 2003 Ashcroft Memorandum does not contain this caveat, but in practice, it is still possible to avoid more serious charges by getting with the prosecutor early and arranging a pre-indictment plea. If nothing else, you can try to influence the prosecutor’s view of what is “readily provable.”

3.2 Charge Bargaining

Charge bargaining – the agreement to dismiss or not charge certain counts, or to substitute a less serious charge for a more serious one – is one of the most effective bargaining tools. Absent extremely unusual circumstances, judges cannot prevent the prosecution from dismissing charges and can never force them to file charges. Charge bargaining is limited by the DOJ policies mentioned in Section 2.3.2 above, but is widespread in practice.

Sample Plea Agreement Language

Pursuant to Fed.R.Crim.P. 11(c)(1)(A), the government agrees to dismiss counts 2-7. Insofar as the District of Arizona has venue over such matters, the government agrees not to prosecute the following charges: Robbery of the Valley National Bank at 200 N. Central, Phoenix, Arizona on January 16, 2003.

3.2.1 Rules and Guidelines

Agreements to dismiss or not to pursue charges are authorized under Rule 11(c)(1)(A). In the usual case, an agreement not to prosecute a defendant on other criminal charges is binding only in those judicial districts identified in the plea agreement. U.S. v. Phibbs, 999 F.2d 1053, 1081-82 (6th Cir. 1993). The court is required to advise the defendant that it may reject the agreements, and that defendant can withdraw if that occurs. Rule 11(c)(3)(A). USSG §6B1.2(a) advises the court to accept such agreements if the court determines “for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” Just what it means to “adequately reflect the seriousness” of the offense behavior is unclear. The 1989 Thornburgh Memorandum cites the example of dropping charges that would not have any effect on the guideline range. (DOJ Manual 9-27.410). This extremely narrow construction is not very helpful to the defense.

3.2.2 DOJ policies

In general, as mentioned in Section 3.1 above, DOJ frowns on dismissing readily provable charges that reflect the seriousness of the defendant's conduct. DOJ Manual 9-27.400. Surprisingly, the 1989 Thornburgh Memorandum suggested that prosecutors may drop readily provable charges in order to effectuate aims of the criminal justice system other than observance of the guidelines, such as the conservation of resources. The example given was the dropping of a case because it would be too time consuming or would interfere with the prosecution of other cases. (DOJ Manual 9-27.400). The 2003 Ashcroft Memorandum continues this reasoning with permission to drop statutory enhancements – like 21 U.S.C. § 851 or 18 U.S.C. § 924(c) – where they might cause the defendant to have no incentive to plead, or to drop charges based on resource constraints. Unfortunately, this principle is not reflected in the Sentencing Guidelines Policy Statements in USSG Chapter 6.

The DOJ manual contains a separate treatment of non-prosecution agreements that are made in return for cooperation. Counsel pursuing such agreement should refer to §9-27.600. In particular, §9-27.641 sets forth the process for obtaining such an agreement where the offenses were in multiple districts.

3.2.3 Effect of plea on maximum sentence available

Even under the Guidelines, the court is limited to the statutory maximum sentence for the offense or offenses of conviction. In some cases, the consideration of relevant conduct under the Guidelines, along with the application of various upward departures, may drive the guideline range to an unacceptable height. Although it is difficult to control guideline calculations, pleading to an offense with a maximum of five years as opposed to one with a maximum of ten years at least gives the client some protection.

3.2.4 Use of dismissed and uncharged conduct under guidelines

The guideline sentencing range and the eventual sentence in a particular case are influenced by the selection of the appropriate guideline to serve as the basis for calculation, the decision to apply various adjustments to that guideline based on analysis of the conduct “relevant” to the offense of conviction, the determination of the defendant's criminal history category, and the decision to effect an upward departure. The effect on each of these of a bargain dismissing charges is discussed below. The general rules regarding the use of *relevant conduct* are discussed in Section 2.2.2.

3.2.4.1 Selecting the appropriate guideline section

Although almost all relevant conduct can be considered in some form at sentencing, USSG §1B1.2 & 3, the selection of the actual *guideline section* to be applied is determined by the charge of *conviction*. USSG §1B1.2(a). The defendant can often derive some benefit from having the choice of guideline, and thus the base

offense level, based on conviction for a particular charge. Other relevant conduct is then relegated to consideration only in terms of specific offense characteristics or possible departures. Thus a plea agreement can be effective by preventing the use of dismissed counts in deciding which guideline to apply.

The guideline benefit of pleading to a lesser charge can be nullified if the oral or written plea agreement contains “a stipulation that specifically establishes a more serious offense.” In such cases, the court may apply the guideline appropriate to the more serious conduct. USSG §1B1.2(a) & (c). However, such a stipulation takes effect only if “the defendant and government explicitly agree” that it is to be used for that purpose. USSG §1B1.2, comment. (n.1).

Counsel should also be alert to the possibility of a cross reference to another guideline. For example, the guideline on obstructing or impeding officers, USSG §2A2.4, refers the court to the assault guideline, USSG §2A2.2, if the “conduct constituted aggravated assault”.

3.2.4.2 Determining the guideline range

USSG §1B1.3 provides that, once the appropriate guideline section has been selected based on the offense of conviction, all *relevant conduct* should be used to determine the applicability of specific offense characteristics, cross-references, and adjustments – and thus the actual guideline range – under the chosen guideline. Conduct that constitutes or is related to counts that are dismissed – or not charged – pursuant to a plea bargain can still influence the guideline calculation if that conduct is found to be “relevant” to the offense of conviction. The definition of *relevant conduct* is discussed more fully in Section 2.2.2, but in general it includes: all conduct that the defendant aided, abetted or was otherwise personally responsible for, conduct in a joint criminal activity that was foreseeable and in furtherance of the activity, and conduct in a *groupable* offense that was part of a common scheme or plan with the offense of conviction. This is a very broad definition, particularly in conspiracy cases.

The general rule is that counts dismissed as part of a plea agreement *will* be used to calculate the defendant's sentence if the counts are part of the same course of conduct to which the defendant pled guilty. 79 Cornell L. Rev. 299, n.160 citing U.S. v. Frierson, 945 F.2d 650, 653-55 (3d Cir. 1991), *cert. denied*, 503 U.S. 952 (1992); U.S. v. Smallwood, 920 F.2d 1231, 1239 (5th Cir. 1991), *cert. denied*, 501 U.S. 1238 (1991); U.S. v. Taplette, 872 F.2d 101 (5th Cir. 1989), *cert. denied*, 493 U.S. 841 (1989); U.S. v. Rodriguez- Nuez, 919 F.2d 461, 464-65 (7th Cir. 1990); U.S. v. Williams, 880 F.2d 804, 805-06 (4th Cir. 1989); U.S. v. Scroggins, 880 F.2d 1204, 1213-14 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990); U.S. v. Wright, 873 F.2d 437, 440-41 (1st Cir. 1989); U.S. v. Sailes, 872 F.2d 735, 738-39 (6th Cir. 1989); U.S. v. Baird, 109 F.3d 856, 865 (3rd Cir. 1997). *But see* U.S. v. Griggs, 71 F.3d 276 (8th Cir. 1996) (uncharged conduct can be considered in determining the base offense level for drug cases *unless* the plea agreement limits the court to the stipulated facts in the plea).

Not all circuits thought that it was fair to use dismissed counts in calculating the sentencing guideline range. The 9th Circuit prohibited such use, based in part on analysis of a since-changed version of the plea bargaining guideline, USSG §6B1.2(a), and in part on the heretical idea that the defendant should get the benefit of his bargain.

U.S. v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990). USSG §6B1.2(a) was amended effective 11/1/92 to specifically provide that both dismissed charges and charges not filed pursuant to a plea agreement *can* be considered as relevant conduct under §1B1.3.

Even in the 9th Circuit, the rationale of Castro-Cervantes was not extended to offenses that are *groupable* under the aggregate harm analysis of USSG §3D1.2. Therefore, if the level of an offense depends on some quantity such as the weight of drugs or the number of dollars involved in a fraud, such that it would be groupable under §3D1.2, then the quantities involved in the dismissed counts *will* be considered in determining the guidelines. U.S. v. Fine, 975 F.2d 596 (9th Cir. 1992) (en banc).

3.2.4.3 Determining the criminal history category

In general, counts dismissed pursuant to a plea agreement are not considered in the calculation of the criminal history category in the instant case. However, as discussed in Section 3.2.4.4, upward departures for inadequacy of criminal history under §4A1.3 are governed by much the same principles as other upward departures, and thus the dismissed counts might well be considered for this purpose depending on circuit law. Some circuits have specifically permitted departures under USSG §4A1.3 based on dismissed conduct. U.S. v. Ashburn, 38 F.3d 803 (5th Cir. 1994) (*en banc*); U.S. v. Collins, 104 F.3d 1436 (8th Cir. 1997). Note also that counts dismissed in one case might also be considered for upward departure in a separate case. U.S. v. Ruffin, 997 F.2d 343 (7th Cir.1993)

3.2.4.4 Deciding on a sentence or a departure

Under the guideline scheme, almost any information may be considered in determining the exact sentence within a guideline range or the propriety or extent of a departure under USSG §1B1.4.

Prior to 2000, there was a split on whether it was appropriate to use conduct underlying dismissed charges to support a departure. For example, in the 9th Circuit dismissed counts could not be used as a basis for upward departure. U.S. v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990). Nor can uncharged counts be used for that purpose. U.S. v. Faulkner, 952 F.2d 1066 (9th Cir. 1991). Other circuits embraced upward departures based on dismissed conduct more readily, particularly since Watts was decided. See U.S. v. Kim, 896 F.2d 678, 684 (2nd Cir.1990) (dismissed counts can be used in some circumstances); U.S. v. Ashburn, 38 F.3d 803, 807 (5th Cir.1994) (same); U.S. v. Zamarripa, 905 F.2d 337, 341 (10th Cir.1990) (same).

In 2000, the guidelines were amended to add §5K2.21, which specifically provides for departures based on dismissed or uncharged conduct. After that, even the 9th Circuit has held that the amendment effectively supercedes the prohibition and that used of dismissed or uncharged conduct is permissible. U.S. v. Barragan-Espinosa, 350 F.3d 978, 983 (9th Cir. 2003).

3.3 Recommendation Bargaining

Recommendation bargaining – the entering of a plea in return for a simple non-binding recommendation from the prosecutor – gives the defendant less than any other bargain. Sometimes, however, it is the best that can be done. When coupled with strong knowledge of the judge and probation officer it can yield great benefit.

Sample Plea Agreement Language

Pursuant to Fed.R.Crim.P. 11(c)(1)(B), the United States and the defendant agree as follows: a) The United States will recommend that defendant receive no adjustment for his role in the offense, and that a sentence of 24 to 36 months imprisonment is appropriate; b) Supervised release and fines shall be determined by the court.

3.3.1 Rules and Guidelines

Non-binding recommendations are authorized under Rule 11(c)(1)(B). USSG §6B1.2(b) authorizes, but does not require, the court to accept the recommendation if it is within the applicable guideline range or departs for “justifiable reasons”. When confronted with a recommendation – or a cap – below the guidelines, some courts simply recite the mantra that “the sentence departs for justifiable reasons” and go ahead and accept the deal. Unfortunately, the commentary to USSG §6B1.2(b) notes that departing for *justifiable reasons* actually means that “such departure is authorized by 18 U.S.C. §3553(b).” That statute requires the court to impose a sentence *within* the guideline range unless there exists an aggravating or mitigating circumstance not adequately considered by the Sentencing Commission. In other words, the words “justifiable reasons” in the Guideline do not create a new reason for departure – the facts of the case must be sufficient to justify a departure under the normal rules.

Where there is no right to withdraw from a plea – such as where the plea agreement is for a recommendation under Rule 11(c)(1)(B) – the court should advise the defendant that he has no right to withdraw if the government’s recommendation is rejected. Rule 11(c)(3)(B). Failure to so advise has been held to be reversible error unless the record shows that the defendant possessed that knowledge. U.S. v. Graibe, 946 F.2d 1428 (9th Cir. 1991). However, there are a number of exceptions. For example, failure to advise the defendant that she would not be allowed to withdraw her guilty plea if the court rejected the government’s sentencing recommendation was error, but when the court did in fact follow the recommendation, there was no prejudice and the sentence was affirmed. U.S. v. Chan, 82 F.3d 921, *opinion amended and superseded by* 97 f.3d 1582 (9th Cir. 1996). A similar failure to advise the defendant during the colloquy was harmless where, at sentencing, the court became aware of the

problem and gave the defendant the opportunity to withdraw and the defendant refused. U.S. v. Diaz-Vargas, 35 F.3d 1221 (7th Cir. 1994).

3.3.2 DOJ policies

The 1989 Thornburgh Bluesheet seems to give carte blanche for recommendations of sentences within the guideline range and recommendations for acceptance of responsibility. Recommendation of departures is discouraged, other than USSG §5K.1 departures for substantial assistance. In the Ashcroft Memorandum of September 22, 2003, recommendation bargaining is limited to sentences within the guideline range, or to a limited set of departures. Approved departures include those for substantial assistance and those under “fast-track” programs. Any other departure should be a “rare occurrence,” and prosecutors are required to oppose departures not supported by facts and law and are forbidden to “stand silent.”

DOJ Manual 9-27.730 states that recommendations should only be made when a plea agreement requires it or the public interest warrants it. The text is fairly even-handed – it even states that a prosecutor should make a recommendation if the prosecutor feels that otherwise it is likely that the sentence will be unfair to the defendant. However, the listing of considerations to be weighed in making a recommendation are heavily weighted toward the government. DOJ Manual 9-27.745. The listing of things to take into account in determining whether to enter into a plea bargain at all is much more extensive and useful to the defense. DOJ Manual 9-27.420. The DOJ manual does not make a big distinction between recommendations and stipulations, but it draws a bright line between recommendations that are in the guideline range and those that are not. DOJ Manual 9-27.410.

3.3.3 Effect of recommendation below the guideline range

The Guidelines require the court to reject a plea outside the guideline range unless there is justification for a departure under 18 U.S.C. 3553(b) and the Guidelines themselves. USSG §6B1.2(c)(2) and Commentary. Nonetheless, if the court does accept a recommendation and sentence below the guideline range, that decision *may* be shielded from appellate scrutiny by the doctrine of waiver. After all, the fact that the prosecution has recommended the sentence should lead the court and the defendant to reasonably expect that the government would not appeal the sentence. This result would be troubling for the appellate courts because the parties would in effect create their own “self-help” departure scheme.

Courts have held in numerous cases that a *defendant* waives any objection that he fails to make in the district court. See, e.g., U.S. v. Belden, 957 F.2d 671 (9th Cir. 1992), *cert. denied*, 506 U.S. 882 (1992); U.S. v. Bafia, 949 F.2d 1465, 1476 (7th Cir.1991) (defendant waived objections to enhancement for obstruction of justice and denial of departure for acceptance of responsibility by failing to object at sentencing). One would expect the same rule to apply to the *government*. The 11th Circuit so held where the prosecutor agreed that the court had discretion and did not object to downward departure. U.S. v. Prickett, 898 F.2d 130 (11th Cir. 1990). However, the

9th Circuit has found an exception to allow the government to appeal where there was plain error and "injustice". U.S. v. Snider, 957 F.2d 703 (9th Cir. 1992). *Accord*, U.S. v. Perkins, 108 F.3d 512 (4th Cir. 1997) (plain error rule allows review of unwarranted downward departure in order to protect integrity of judicial system).

For other exceptions to the rule against raising issues for the first time on appeal see U.S. v. Flores-Payon, 942 F.2d 556, 558 (9th Cir.1991) (exceptions to general rule exist for exceptional circumstances, change in law during appeal, issue is purely one of law and other party not prejudiced, and plain error and injustice). What constitutes "plain error" varies from place to place. See U.S. v. Fant, 974 F.2d 559, 565 (4th Cir.1992) (plain error results when prosecutor breaches plea agreement); U.S. v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir.1992) (same); U.S. v. Phillips, 37 F.3d 1210 (7th Cir.1994) (no plain error where plea agreement breached) Also of relevance are U.S. v. Hand, 913 F.2d 854, 856 n.2 (10th Cir.1990) (breach of plea agreement may be raised for first time on appeal) and U.S. v. Moscahlaidis, 868 F.2d 1357, 1360 (3rd Cir.1989) (same).

3.3.4 Effect of government failure to make recommendation

The government's failure to recommend a sentence at the low end of the guideline range, as called for by the plea agreement, called for a reversal even where, in response to the court's question, the prosecutor admitted that she was recommending the low end. In reversing, the court noted that "the harmless error rule does not apply to the law of contractual plea agreements." U.S. v. Myers, 32 F.3d 411, 413 (9th Cir. 1994) (situation aggravated by the fact that the prosecutor drew the court's attention to facts justifying a higher sentence, and that the defense attorney's objections, the court's question, and the prosecutor's acknowledgment of the agreement all came after the sentence had been passed). *Accord*, U.S. v. Hawley, 99 F.3d 682 (10th Cir. 1996) (defendant entitled to relief "regardless of whether the government's conduct actually affected the sentencing judge"). A contrary result obtained in a case where the written plea agreement contained the substance of the government's recommendation and the appellate court felt that if the government had made the recommendation in court at the time of sentencing it "would not have likely changed defendants' sentence". U.S. v. Flores-Sandoval, 94 F.3d 346 (7th Cir. 1996).

An agreement to recommend a sentence does not imply an obligation to do so enthusiastically or to set forth on the record the reasons for the recommendation. U.S. v. Benchimol, 471 U.S. 453, 455-456 (1985). Nonetheless, the prosecutor may not pay lip service to the agreement with a recommendation but undermine that recommendation by supporting the higher presentence report guideline calculation in a sentencing memo. U.S. v. Taylor, 77 F.3d 368 (11th Cir. 1996). See also U.S. v. Canada, 960 F.2d 263 (1st Cir. 1992) (ordering specific performance via resentencing and noting that while the recommendation need not be made with any particular degree of enthusiasm, nonetheless it is unfair for the prosecutor to inject material reservations about an agreement to which the government has committed itself.)

Where defendant pleaded guilty in federal court in Wyoming with an agreement that the government would recommend *concurrent* time with an upcoming

federal sentencing in Iowa, and where the government attorney in Iowa in fact requested a *consecutive* sentence, the defendant was entitled to specific performance from the government because “absent an express limitation, any promises made by an AUSA in one district will bind an AUSA in another district.” U.S. v. Van Thournout, 100 F.3d 590 (8th Cir. 1996).

Apparently, even an impossible promise must be kept. Where the government agreed to recommend probation but probation was not permissible under the guidelines, and the government informed the court that it “was not bound to impose a sentence that would be illegal under the guidelines”, the plea bargain was based on an unfulfillable promise and the defendant should be allowed to withdraw his plea. U.S. v. Cooper, 70 F.3d 563 (10th Cir. 1995).

3.4 Stipulation Bargaining

Stipulation bargaining – the entering of a plea in return for a “binding” recommendation – is the holy grail of plea bargaining in federal court. Armed with a stipulated sentence a client can be assured of what is going to happen, unless the judge rejects the plea altogether.

Sample Plea Agreement Language

Pursuant to Fed.R.Crim.P. 11(c)(1)(C), the United States and the defendant stipulate and agree that the following is an appropriate sentence: a) The parties stipulate that defendant shall not receive an adjustment for role in the offense and shall receive a maximum of 60 months imprisonment. b) Supervised release and fines shall be determined by the court. c) If the court, after reviewing this plea agreement, and before accepting it, concludes that any provision is inappropriate, it may reject the plea agreement, giving the defendant, in accordance with Fed.R.Crim.P. 11(c)(5), an opportunity to withdraw the guilty plea. d) Pursuant to Sentencing Guidelines §6B1.1(c), the court shall defer acceptance or rejection of this plea agreement until there has been an opportunity to consider the presentence report.

3.4.1 Rules and guidelines

Bargaining for stipulated sentences is authorized under Rule 11 (c)(1)(C) and is analyzed for Sentencing Guidelines purposes under §6B1.2(c). The guideline standard is the same as that for a recommended sentence discussed in Section 3.3.1—the judge may accept the agreement if the sentence is within the guideline range or departs for “justifiable reasons”, meaning that there is a legally sufficient reason for departure.

Rule 11(c)(5), referred to in the sample plea agreement language above, refers to the right to withdraw provided by the rules and the guidelines in the case of Rule 11(c)(1)(A) and 11(c)(1)(C) agreements. As noted previously, this is a “back to square one” provision that attempts to allow both parties to go back to the *status quo ante*. This is the only sense in which a plea agreement including a stipulation is *binding* on the court – the court need not accept it, but the defendant will be allowed to withdraw if the court does not.

3.4.2 DOJ policies

Stipulation bargaining is recognized under DOJ Manual 9-27.410, but little is said about it. The manual makes little distinction between recommendations and stipulations. Neither does the Ashcroft Memorandum of September 22, 2003, which limits stipulations in the same way it limits recommends, namely, to sentences within the guideline range, or to a limited set of departures. Approved departures include those for substantial assistance and those under “fast-track” programs. Any other departure should be a “rare occurrence,” and prosecutors are required to oppose departures not supported by facts and law and are forbidden to “stand silent.”

3.4.3 Sentence agreements under Rule 11(c)(1)(C)

Often the plea agreement will not stipulate an exact sentence, but will instead set forth a maximum – often called a *cap* – or a range of sentence. Prior to the amendments of 1999, the rule only provided for the stipulation of “a specific sentence.” There was some question about whether a cap or a range was “a specific sentence” under the rule. Compare U.S. v. Bolinger, 940 F.2d 478 (9th Cir.1991) with U.S. v. Newsome, 894 F.2d 852 (6th Cir. 1990). The “range” question is now obsolete, as the rule provides for stipulation of a sentencing range. The exact meaning of a cap – for example, does the absence of a lower end imply that probation is possible or departure below the guidelines is agreed to? – is a matter of local practice.

As discussed in Section 3.3.3, *supra*, the court can always reject a plea under Rule 11(c)(5) and the guidelines require it to do so if the plea is outside the guideline range unless a departure is justified. However, if the agreement is under Rule 11(c)(1)(C), the court must either accept the agreement or allow the defendant to withdraw from the plea. Under these circumstances, the court is under some pressure to go ahead and accept the agreement and sentence below the guideline range. The

discussion in section 3.3.3 of a possible waiver of appeal by the government would also apply in this case.

3.5 Agreements Regarding Guideline Factors

The 1999 amendments to Rule 11(c)(1) now permit the government to recommend or stipulate whether a particular provision of the guidelines, policy statement, or sentencing factor applies in a particular case. Recommendations under Rule 11(c)(1)(B) are never binding, and defendant has no recourse if they are rejected by the court. Rejection of stipulations under Rule 11(c)(1)(C), however, gives rise to a right to withdraw under will Rule 11(c)(5).

Sample Plea Agreement Language

The parties stipulate as follows: the offense did not involve more than minimal planning, and there are no role-in-the-offense, victim-related, obstruction, or Multiple-Count Sentencing Adjustments within the meaning of the Guidelines, Chapter 3.

3.5.1 Court must reject inaccurate stipulations

Generally, USSG §6B1.4(d) states that sentencing courts are not bound by stipulations in plea agreements but instead are free to determine the facts relevant to sentencing. The court may rely on the presentence report to determine the true facts. USSG §6B1.4(d); U.S. v. Lutfiyya, 26 F.3d 1468 (8th Cir. 1994). The fact that the government stipulated to certain facts in the plea agreement does not prevent the district court from considering conduct *outside* the stipulated facts, including uncharged conduct. U.S. v. Griggs, 71 F.3d 276 (8th Cir. 1995).

However, if the government argues a position contrary to its stipulation – as opposed to the judge simply rejecting it – there may be a violation of the plea agreement. U.S. v. Valencia, 985 F.2d 758 (5th Cir. 1993).

3.5.2 Stipulations that hurt the defendant may be relied upon

Stipulations that go against the defendant can be relied by the court – even if they are not supported by the presentence report – apparently as admissions of a party. U.S. v. Cambra, 933 F.2d 752 (9th Cir. 1991) (stipulated to value of fraud loss); U.S. v. Bos, 917 F.2d 1178 (9th Cir. 1990) (stipulation to greater offense). Even stipulations regarding dismissed counts may be considered. U.S. v. Saldana, 12 F.3d 160 (9th Cir. 1993).

In determining *relevant conduct* the district court could properly rely on stipulation in the plea agreement that certain conduct “constitutes relevant conduct

under § 1B1.3 of the guidelines”. U.S. v. Flores-Sandoval, 94 F.3d 346 (7th Cir. 1996) (court ignores defense argument that some conduct not truly “relevant”, relying on stipulation that it was relevant). Similarly, defendant’s stipulation that the “abuse of trust” enhancement should apply, coupled with an agreement not to appeal the accuracy of the stipulated facts, constituted a waiver of her right to appeal a finding based thereon. U.S. v. Allison, 59 F.3d 43 (6th Cir. 1995), *cert. denied*, 516 U.S. 1002 (1995). A stipulation may constitute a waiver, under appropriate circumstances, but does not relieve the court of its obligation to determine its own view of the facts and law. U.S. v. Mankiewicz, 122 F.3d 399, 403 n.1 (7th Cir. 1997).

3.6 Agreements Regarding Restitution

Restitution is not covered exhaustively here. The material in this section has not been updated in recent years. This section only attempts to point counsel toward some of the problems that may be encountered and toward some of the relevant law.

Sample Plea Agreement Language

Defendant specifically agrees to make restitution to the victim in the amount of \$400,000 even though the defendant is not pleading guilty to and has not been convicted of the offense giving rise to the victim’s losses.

3.6.1 Victim Witness Protection Act Prior to 1990

Restitution to the victim of the offense of conviction for amounts involved in the count of conviction has always been allowed. 18 U.S.C. 3651 (the Federal Probation Act or FPA) (repealed), 18 U.S.C. 3663 (the Victim Witness Protection Act or VWPA). Restitution to persons who are not victims of the offense of conviction or for losses not resulting from the offense of conviction is more problematic.

Before the VWPA, restitution was ordered under the FPA which allowed restitution to *all* victims for *all* harms. U.S. v. Hammer, 967 F.2d 339 (9th Cir. 1992). The FPA was repealed November 1, 1987. The VWPA came into effect January 1, 1983 and appears to have overlapped with the FPA until the FPA was repealed. The VWPA applied only to Title 18 and certain sections of the Federal Aviation Act. U.S. v. Snider, 957 F.2d 703 (9th Cir. 1992). The VWPA only authorized restitution to the victim of the offense of conviction for the losses caused by the offense, and it did not allow restitution by agreement. Hughey v. U.S., 495 U.S. 411 (1990).

3.6.2 Victim Witness Protection Act After 1990

As of November 29, 1990 the VWPA was amended to allow restitution in any criminal case "to the extent agreed by the parties in a plea agreement". This has been held not retroactive because of *ex post facto* problems. U.S. v. Snider, 957 F.2d 703 (9th Cir. 1992). Agreements to allow otherwise unenforceable restitution are a useful bargaining tool, but may create a situation where the defendant is certain to violate probation and end up back in custody.

3.6.3 Mandatory Victims Restitution Act of 1996

The Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. §3663A-3664, a part of the Anti-Terrorism Act of 1996, has changed the face of restitution, mostly to the detriment of the defendant. The MVRA modified the VWPA and "makes restitution mandatory, without regard to a defendant's economic situation." U.S. v. Dubose, _____ F.3d _____, 1998 W.L. 338106 (9th Cir. June 26, 1998) (holding restitution under MVRA is punishment but does not violate the 8th Amendment prohibition against excessive fines or cruel and unusual punishment). By its terms, the MVRA applies in all but a few cases. 18 U.S.C. §3663(c)(3).

Courts have split on whether mandatory restitution is punishment and thus subject to the Ex Post Facto Clause. See U.S. v. Newman, 144 F.3d 531 (7th Cir. 1998) (holding it does not violate Ex Post Facto Clause and characterizing cases from the 2nd, 9th and D.C. Circuits holding to the contrary as "without reasoning"); U.S. v. Dubose, _____ F.3d _____, 1998 W.L. 338106 (9th Cir. June 26, 1998) (holding restitution under MVRA is punishment but does not violate the 8th Amendment prohibition against excessive fines or cruel and unusual punishment). Compare U.S. v. Baggett, 125 F.3d 1319 (9th Cir. 1997) (stating that retrospective application of the MVRA violates the Ex Post Facto Clause).

3.6.4 Waiver of appeal regarding restitution

Where a plea agreement acknowledged that the court could order restitution of a certain amount, and the presentence report stated restitution was applicable, defendant's failure to object to the report or the restitution order was a waiver of the right to appeal the restitution. U.S. v. Allison, 59 F.3d 43 (6th Cir. 1995).

3.7 Agreements Involving Cooperation

Cooperation agreements usually require the defendant to perform some act in the future. As a result, they must be analyzed like complex employment contracts in order to determine exactly what the client will be required to do and what benefit or risk is involved. Cooperation agreements are often long and complex. The text of the cooperation portion of a sample plea agreement has been broken up and set forth under the relevant subheadings below.

3.7.1 Subject matter of cooperation

Sample Plea Agreement Language

Defendant will provide information about all criminal activity known to the defendant, including the criminal drug activities of the defendants in CR 98-001-PHX, and including all criminal activity leading to the securing of forfeitable assets and the details of how such assets were obtained and used.

This specifies “all criminal activity known to defendant”. Most agreements are the same, although it is often possible to negotiate a deal that does not require the giving of information or testimony against family members.

3.7.2 Undercover work

Sample Plea Agreement Language

Defendant will not work undercover without the permission and supervision of government agents.

Prosecutors often say that this provision is to prevent “free-lance” work – usually drug activity – by the defendant, which the defendant later claims to have performed on behalf of the government. But, does this provision imply that the defendant has agreed to work undercover? If so, to what extent? Does he have to set up deals? Wear a wire? Be there when the deal goes down? These kinds of details should be worked out ahead of time to avoid unpleasant surprises.

3.7.3 Waiver of Fifth Amendment rights

Sample Plea Agreement Language

Defendant will waive his/her Fifth Amendment privilege against self-incrimination and will provide information and testify at any time requested by the United States, including at any state or federal grand jury proceeding, forfeiture proceeding, bond hearing, pretrial hearing, civil and criminal trial, retrial or post-trial hearing.

Defendant must give information and testify at every conceivable type of hearing, pre- or post-trial. Query whether this is limited to trials that are related to the offense in the indictment, or be against anyone, anywhere at any time?

3.7.4 Use of information against defendant

Sample Plea Agreement Language

Self-incriminating information provided by the defendant during cooperation involving criminal activity for which he is charged, has not been charged, or will not be charged pursuant to this agreement will not be used in determining defendant's applicable guideline range pursuant to Section 1B1.8 of the Sentencing Guidelines. The Guideline range will be calculated with the government's proof independent of defendant's cooperation.

USSG §1B1.8(a) prevents the use of information provided by the defendant pursuant to a cooperation agreement to determine the guideline range *if the government has agreed not to use it*, as the government does in the sample agreement above. In the absence of a USSG §1B1.8(a) agreement not to use information, boilerplate language in a plea agreement saying that the government was free to provide all relevant information to the court at sentencing was held to override the Rule 410 and Rule 11(f) protection of statements made during a proffer in plea negotiations, even though the proffer agreement itself provided that the information would not be used. U.S. v. Fagge, 101 F.3d 232 (2nd Cir. 1996).

Note that the information cannot be used to determine the guideline range, but other uses – such as upward departures – are not specifically prohibited. Nonetheless, some courts have refused to allow the prosecution to use the information for any purpose that would result in a harsher sentence. U.S. v. Malvito, 946 F.2d 1066 (4th Cir. 1991); U.S. v. Ledesma, 979 F.2d 816, 820, n.6 (11th Cir.1992) (information divulged pursuant to plea agreement may not be used for upward departure).

Recently, some courts have decided that although the information cannot be used to determine the guideline range, it can and should be used to determine if a sentence is “reasonable” in a post-*Booker* analysis. The courts are relying on 18 USC § 3661 which says that no limitation shall be placed on the information the court may receive and consider for purposes of sentencing. See U.S. v. Mills, 329 F.3d 24 (1st Cir. 2003).

Also, not all information provided by the defendant is protected. USSG §1B1.8(b) specifically allows use of the information if it was already know to the government, if it is about prior convictions and is used to determine criminal history or career offender status, if it is to be used in a perjury prosecutions, if there has been a breach by defendant, or to determine if a downward departure for substantial assistance is warranted. The information must have been provided as part of the cooperation. Statements made to a probation officer in a routine interview may not protected under USSG §1B1.8(a). United State v. Miller, 910 F.2d 1321, 1325 (6th Cir. 1990); U.S. v. Jarman, 144 F.3d 912, 914-915 (6th Cir. 1998).

There is a distinction between information provided pursuant to a cooperation agreement and statements made during failed plea negotiations. Note that the protection of USSG §1B1.8(a) is contingent on government agreement, unlike the protections of Rule 410, FRE, and Rule 11(f), FRCrP, both of which prohibit the use of statements “made in the course of plea discussions with an attorney for the prosecuting authority” which do not result in a guilty plea.

3.7.5 Types of promises made by the government

Sample Plea Agreement Language

At the conclusion of defendant's cooperation, pursuant to this agreement, the United States will, at the time of sentencing, move pursuant to Title 18, United States Code, Section 3553(e), Title 28, United States Code, Section 994(n) and Sentencing Guidelines §5K1.1 that the court depart from the Guidelines and any applicable minimum sentence established by law to reflect defendant's substantial assistance in the investigation and prosecution. The United States will also bring the nature and extent of defendant's cooperation to the attention of the court, and the Bureau of Prisons, if applicable, at sentencing or any other appropriate time.

The United States retains the right to make a sentencing recommendation, including a recommendation that the defendant receive a maximum possible sentence provided for under this agreement. The United States further retains the right to allocute at the time of sentencing. Defendant understands that the United States will bring to the attention of the court all pertinent facts concerning defendant's participation in any criminal activity, and all facts affecting the sentencing guidelines calculations.

In a cooperation agreement, the government may makes several kinds of promises. Most importantly, the government may promise to make a motion for downward departure under USSG §5K1.1 for *substantial assistance*. Without this motion, there is no benefit to the defendant in most cases. Note that in order to permit departure below a statutory mandatory minimum, the government must also move for departure pursuant to 18 U.S.C. §3553(e). Melendez v. U.S., 518 U.S. 120 (1996) (government motion attesting to the defendant's substantial assistance in a criminal investigation and requesting that the district court depart below the minimum of the applicable *guideline sentencing range* does not also authorize the court to depart below a lower *statutory minimum sentence*). The government should also agree to bring the defendant's cooperation to the court's attention, including at least all of the criteria that

USSG §5K1.1(a) lists as significant, such as truthfulness, completeness, reliability, nature and extent of assistance, injury or danger to defendant or his family, and timeliness.

However, after the departure motions have been made by the government, downward departure by the court is discretionary, not mandatory. The appellate court has no jurisdiction to review the trial court's discretionary decision to refuse downward departure under §5K1.1. U.S. v. Castellanos, 904 F.2d 1490, 1497 (11th Cir.1990); U.S. v. Vizcarra-Angulo, 904 F.2d 22 (9th Cir.1990) (same); U.S. v. Munoz, 946 F.2d 729, 730-31 (10th Cir.1991) citing U.S. v. Richardson, 939 F.2d 135, 139-140 (4th Cir.1991) *cert. denied*, 502 U.S. 1061 (1992) (§5K1.1 substantial assistance departure is discretionary); U.S. v. Miro, 29 F.3d 194 (5th Cir. 1994). See also U.S. v. Hayes, 939 F.2d 509, 511-13 (7th Cir.1991) (interpreting 18 U.S.C. §3553(e)). Thus there appears to be no appellate relief if the defendant gets a §5K1.1 motion from the prosecution but the court refuses to depart. If, on the other hand, the government promises to make such a motion – but fails to do so – there may be relief under certain circumstances. See Section 3.7.9, below.

The government may also reserve the right to make a *recommendation* based on the cooperation. Where possible this should be within a specific negotiated range. Or the government may agree to a *cap* under Rule 11(c)(1)(C) – something not done in the language above. This is always important, and may become more important if there is a breach of the agreement. If the plea is under Rule 11(e)(1)(C) (specific sentence) the judge must honor the agreement or allow the defendant to withdraw. U.S. v. Fernandez, 960 F.2d 771 (9th Cir. 1992).

Note that a provision like the one above saying that the government was free to provide all relevant information to the court at sentencing was held to override the protected nature of statements made during a proffer in plea negotiations, even though the proffer agreement itself provided that the information would not be used. U.S. v. Fagge, 101 F.3d 232 (2nd Cir. 1996) (discussed in Section 3.7.4). Under the same theory, namely that the plea agreement contract modifies any previous agreements, the government could possibly provide the court with information gained during cooperation under a promise of confidentiality.

3.7.6 Timing of sentencing proceedings

Sample Plea Agreement Language

The plea of guilty shall be entered as soon as practicable but the sentencing on the guilty plea will be deferred, with consent of the court, for a period of one year from the entry of the guilty plea, and upon motion of the government and concurrence of the court, for a period beyond that one year. It is the intention of the parties that sentencing on the instant charges be postponed until such time as defendant's cooperation and all related forfeiture actions have been completed.

The agreement provides that sentencing will be delayed for benefit of both parties. The government wants time for defendant to work, and the defendant wants more work to show the court. There should be an upper limit on the court's and the government's ability to delay the sentencing. Under this agreement, the court can refuse a continuance past one year and can force sentencing to go forward.

3.7.7 Determination of breach of agreement

Sample Plea Agreement Language

If there is a dispute regarding the obligations of the parties under this agreement, the United States District Court shall determine whether the United States or the defendant has failed to comply with this agreement including whether the defendant has been truthful.

Nothing shall limit the United States' methods of verifying the truthfulness of defendant's statements. As part of this process, in the sole discretion of the United States, the defendant agrees to submit to a polygraph examination to verify any information the defendant may provide to the United States, including but not limited to defendant's assets. Such examination will be conducted by a polygrapher chosen and conducted in a manner determined in the sole discretion of the United States. Neither party shall object to the admissibility in evidence of the results of such examination in any proceeding to enforce or set aside this agreement in which compliance with the terms of this agreement are in issue.

The usual breach in cooperation cases is failure to testify truthfully. The agreement provides that the court makes the final determination on failure to comply. Other forms of the agreement require the government to make a "good faith" determination on truthfulness, which may also lead to a hearing.

The burden of proof on whether the agreement was breached is generally on the person alleging the breach. For example, before the government may decline to fulfill its obligations under a plea agreement, it must establish the defendant's breach by a preponderance of the evidence. See, e.g., U.S. v. Crowell, 997 F.2d 146, 148 (6th Cir.1993); U.S. v. Tilley, 964 F.2d 66, 71 (1st Cir.1992); U.S. v. Verrusio, 803 F.2d 885, 894 (7th Cir.1986). However, the burden can, in a sense, be reversed in a substantial assistance case. Where the defendant is claiming that the government breached the agreement by failing to move for assistance, the defendant may have to first demonstrate by a preponderance of the evidence that he provided the degree of assistance contemplated by the agreement. U.S. v. Conner, 930 F.2d 1073, 1076 (4th Cir. 1991).

The sample agreement allows the government to require a polygraph exam. It does not condition the agreement on passing the exam, but it does make the exam admissible at a hearing on compliance. To counter this, the defense should try to insert an agreement that allows the defense to present its own polygraph evidence.

In a case based on a similar agreement, the government introduced at trial a confession made by a cooperating defendant whose deal had fallen through after he failed a polygraph. The 9th Circuit originally showed its dislike of polygraphs by ruling that statements made in a cooperation deal conditioned on a polygraph were involuntary and could not be used after defendant failed the polygraph, describing the results of a polygraph as being out of the defendant's control and unreliable. U.S. v. Escamilla, 966 F.2d 465 (9th Cir. 1992) (withdrawn opinion). Unfortunately, that opinion was withdrawn and replaced with a narrower one that focused on the wording of the agreement, noting that the defendant had not specifically *agreed* that his confession would be admissible if he failed the polygraph. U.S. v. Escamilla, 975 F.2d 568 (9th Cir. 1992). Recently, the 9th Circuit has taken a more liberal, but still hostile, view of polygraphs under Daubert, U.S. v. Cordova, 104 F.3d 225 (9th Cir. 1997). ([W]e do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact ... We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court.) See also U.S. v. Posado, 57 F.3d 428, 431-34 (5th Cir.1995).

3.7.8 Penalties for breach by defendant

Sample Plea Agreement Language

If the defendant fails to comply with any obligation or promise pursuant to this agreement, the United States: 1) may, in its sole discretion, declare any provision of this agreement null and void in

accordance with [the paragraph calling for the court to determine the breach] and the defendant understands that he/she will not be permitted to withdraw his/her plea of guilty made in connection with this agreement; 2) may indict and prosecute the defendant for any offense known to the United States for which he is responsible, including all offenses committed pursuant to his/her failure to cooperate, and defendant waives any statute of limitations, Speedy Trial Act and constitutional restrictions on bringing charges after the execution of this agreement; 3) may argue for a maximum sentence for the offenses to which defendant has plead guilty; 4) may use in any prosecution any information, statements, documents and evidence provided by defendant both before and after the plea agreement including derivative evidence; 5) may advise the Bureau of Prisons that defendant is no longer a cooperating witness, and recommend redesignation of defendant to a higher custodial level.

The agreement indicates that "any provision" may be declared null by the government, subject to review of the alleged breach by the court. The Double Jeopardy Clause does not prevent setting aside a plea and reinstating charges in the event of a breach. Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987). But the government's remedies appear to be limited by several cases. For example, this part says that the defendant cannot withdraw her plea. However, if the plea is under Rule 11(c)(1)(C) (for a specific sentence) the judge must honor the agreement or allow the defendant to withdraw. U.S. v. Fernandez, 960 F.2d 771 (9th Cir. 1992). It also says that the government can use any information provided by the defendant against the defendant. However, the 9th Circuit has prevented such use where the breach was failure to pass a polygraph, in the absence of a specific agreement to allow such use. U.S. v. Escamilla, 975 F.2d 568 (9th Cir. 1992). Nonetheless, the thrust of this part is clearly that all benefit will be lost in the event of a breach by defendant.

3.7.9 Remedies for breach by government

When the prosecution breaches a plea agreement, the breach "may be remedied by either specific performance of the agreement or by allowing the defendant to withdraw the plea." U.S. v. Skidmore, 998 F.2d 372, 375 (6th Cir. 1993).

Where the government agrees to file a §5K1.1 motion *if* the defendant provides substantial assistance, the government's failure to file after determining that the assistance was not "substantial" is not a breach. U.S. v. Price, 95 F.3d 364 (5th Cir. 1996); U.S. v. Knight, 96 F.3d 307 (8th Cir. 1996), Such refusals are reviewed by the district court only on a limited basis, to determine if the refusal was arbitrary or was based on an unconstitutional motive (e.g., racial discrimination). Wade v. U.S., 504 U.S. 181 (1992). See U.S. v. King, 62 F.3d 891, 894, n.2 (7th Cir. 1995) (refusing to review failure to make motion, but noting that a few courts say it may be reviewable if

“irrational or withheld in bad faith”). See *also* U.S. v. De la Fuente, 8 F.3d 1333 (9th Cir. 1993) (motion to depart from statutory minimum could not be withheld where to do so would imply bad faith on the part of the government because defendant would receive no benefit for his cooperation); U.S. v. Moore, 225 F.3d 637, 641 (6th Cir. 2000) (court may only review the government’s decision for unconstitutional motives).

Where the government agrees to recommend a reduction if the defendant is truthful when debriefed by agents, the government’s failure to debrief the defendant prior to his sentencing is a breach of the agreement, particularly where the debriefing could have allowed the defendant to satisfy the one remaining requirement he needed for safety valve protection. U.S. v. Beltran-Ortiz, 91 F.3d 665 (4th Cir. 1996).

The government’s agreement to move for 5K1.1 departure if the defendant provided substantial assistance obligated the government to give the defendant the *opportunity* to furnish such assistance. U.S. v. Laday, 56 F.3d 24 (5th Cir. 1995). Although defendant changed his plea to nolo contendere and was denying knowledge of much of the criminal activity, the government knew that when it amended the plea agreement to allow the nolo plea. The amended agreement still included the substantial assistance provision and thus the government was obligated to carry through and allow defendant to try to cooperate.

Where government agreed to present a Rule 35 motion detailing extent of defendants’ post-sentence cooperation, but details of the cooperation were not in the motion for security reasons and the court refused to grant an evidentiary hearing on the motion, the government was effectively prevented from presenting the Rule 35 motion and the plea agreement was breached. U.S. v. Hernandez, 34 F.3d 998 (11th Cir. 1994) (case came up on appeal from the denial of the Rule 35 motion and the appellate court vacated and remanded for an evidentiary hearing).

3.8 Agreements Regarding Deportation

A “fast track” policy allowing illegal re-entry defendants to stipulate to a two year sentence and waive appeal under 8 U.S.C. § 1326(a) (simple reentry after deportation), in order to avoid 1326(b) (reentry after deportation with felony conviction), showed no discriminatory intent and passed constitutional muster. U.S. v. Estrada-Plata, 57 F.3d 757 (9th Cir. 1995).

4 Waivers: Trial, Brady, Appeal, and Collateral

The waiver section of a plea agreement usually covers two distinct types of waivers. First, there is the set of non-negotiable waivers that must accompany any guilty plea, such as the waiver of the right to trial. Second, there is the somewhat more negotiable set of waivers that the prosecution tries to extract in return for the plea bargain, such as the waiver of the right to appeal.

4.1 Waiver of Trial and Attendant Rights

The general waiver sections of plea agreements vary from minimal to extensive. A few sample paragraphs from a fairly long waiver section are set out below.

Sample Plea Agreement Language

Advice by attorney: *I have read each of the provisions of the plea agreement with assistance of counsel and I understand it. I have discussed the case and my constitutional and other rights with my attorney. I have been advised by my attorney of the nature of the charge[s], of the nature and range of the possible sentence, and that my ultimate sentence will be determined according to the guidelines promulgated pursuant to the Sentencing Reform Act of 1984. I am satisfied that my defense attorney has represented me in a competent manner.*

Waiver of trial rights: *I understand that by entering my plea of guilty I will be giving up my rights to plead not guilty, to trial by jury, to confront, cross-examine, and compel the attendance of witnesses, to present evidence in my defense, to remain silent and refuse to be a witness against myself by asserting my privilege against self-incrimination – all with the assistance of counsel – and to be presumed innocent until proven guilty beyond a reasonable doubt.*

Acting on own volition with clear mind: *My guilty plea is not the result of force, threats, assurances or promises other than the promises contained in this agreement. I agree to the provisions of this agreement as a voluntary act on my part, rather than at the direction of or because of the recommendation of any other person, and I agree to be bound according to its provisions. I am not now on or under the influence of any drug, medication, liquor, or other intoxicant or depressant, which would impair my ability to fully understand the terms and conditions of this plea agreement.*

Merger clause: *I agree that this written plea agreement contains all the terms and conditions of my plea and that promises made by anyone (including my attorney), and specifically any predictions as to the guideline range applicable, that are not*

contained within this written plea agreement are without force and effect and are null and void.

Rule 11(b), FRCrP, lays out a laundry list of things of which the court must advise the defendant, including information about penalties that could be imposed, the right to representation (at no cost if needed), the right to go to trial and attendant rights, the effect of a plea of guilty on those rights, and a warning about testifying under oath. Case law identifies notice of three particular rights as constitutionally essential – the right to confront accusers, the right to a trial by jury, and the privilege against compulsory self-incrimination. Boykin v. Alabama, 395 U.S. 238 (1969). The catch-all provision above covers those Rule 11 and Boykin rights not covered elsewhere in a typical agreement. Some attorneys dislike the reference to their competency, but the defendant will often be asked that question by the judge in one form or another during the colloquy anyway.

This agreement waives many of the rights attendant on trial. Some plea agreements go farther and contain a waiver of sentencing rights, such as the right to seek a downward departure. Although such waivers have become common in immigration cases, it is also beginning to appear in other types of cases.

4.2 Waiver of Brady Material Pre-Plea

The government can require a defendant to waive her Brady right to disclosure of impeachment evidence as a condition of a plea agreement. U.S. v. Ruiz , 536 U.S. 622 (2002). In Ruiz, defendant refused to accept a "fast track" plea bargain, under which government would recommend downward departure under Sentencing Guidelines if she pleaded guilty, because it contained waiver of Brady right to disclosure of impeachment evidence. Defendant ultimately entered a guilty plea without an agreement, then appealed, challenging the government's refusal to recommend, and court's refusal to grant, downward departure. Note the odd procedural posture: Ruiz actually refused to enter into a plea agreement, pled straight up, then complained that her plea was involuntary because she would have entered in to the agreement (and reduced her sentence) if the government had not unconstitutionally refused to proceed without a Brady waiver. Nonetheless, the Supreme Court treated this as an issue of the voluntariness of the plea and held that (1) the Constitution does not require government to disclose impeachment information prior to entering plea agreement with criminal defendant; and (2) plea agreement requiring defendant to waive her right to receive information the government had regarding any "affirmative defense" she would raise at trial did not violate the Constitution. As to both types of information, the court held that the Constitution did not require them to be provided to the defendant prior to plea bargaining primarily because the need for this information is more closely related to the *fairness of a trial* than to the *voluntariness of the plea*. U.S. v. Ruiz , 536 U.S. 622, 632 (2002).

Disclosure of some Brady material may still be required prior to a plea. The Seventh Circuit stated that the Supreme Court "has yet to address, however, whether

the Due Process Clause requires [Brady] disclosures outside the context of a trial” and that Ruiz actually “indicates that such a claim might be viable in certain cases.” McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003). The analysis is interesting:

In holding that the Due Process Clause does not require the government to disclose impeachment information prior to the entry of a criminal defendant's guilty plea, the Court in Ruiz reasoned that it was "particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty" 536 U.S. at 630, 122 S.Ct. 2450 (emphasis added). The Court also noted that "the proposed plea agreement at issue ... specifies the Government will provide 'any information establishing the factual innocence of the defendant,' " *id.* at 631, 122 S.Ct. 2450, and "[t]hat fact, along with other guilty-plea safeguards ... diminishes the force of [defendant's] concern that, in the absence of the impeachment information, innocent individuals accused of crimes will plead guilty." *Id.* Thus, *Ruiz indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence.* Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.

Id. at 787-788 (emphasis added).

Courts have not all treated Ruiz as a blanket approval for all kinds of missing information prior to a plea. For example, the Ninth Circuit held that Ruiz did not prevent relief where the defendant was misled to believe that drug quantity needed to be proved only by a preponderance of the evidence, holding that the true burden of proof “goes directly to the nature of the charge against Villalobos and to the voluntariness of his plea, and is properly characterized as ‘critical information of which the defendant must always be aware prior to pleading guilty.’” U.S. v. Villalobos, 333 F.3d 1070, 1075 n. 6 (9th Cir. 2003).

4.3 Waiver of Appeal

Waiver of appeal is a fairly recent development. More and more it is becoming a non-negotiable part of the agreement. Appellate courts generally favor the waiver. A sample appeal waiver follows:

Sample Plea Agreement Language

Defendant hereby waives any right to raise and/or appeal any and all motions, defenses, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution and to the court's entry of judgment against defendant and imposition of sentence upon defendant consistent with this agreement. Defendant further waives any right to appeal this Court's imposition of sentence upon him under Title 18, United States Code, Section 3742 (sentence appeals).

4.3.1 Statutory limits on right to appeal.

Although defendants who plead not guilty have a right to appeal their conviction – including rulings on such things as pretrial motions – under Rule 32(j)(1)(A), FRCrP, a defendant who pleads guilty has only a limited right to appeal a sentence under Rule 32(j)(1)(B), FRCrP, and 18 U.S.C. 3742(a). Defendants may appeal when the sentence (1) violates law, (2) is based on incorrect guideline application, (3) is greater than the guidelines allow, or (4) is for a crime that has no guideline and is plainly unreasonable. Further restrictions that apply in the case of a plea agreement under Rule 11(c)(1)(C) – stipulated sentence – are set out in 18 U.S.C. 3742(c)(1). Generally, appeals under parts (3) and (4) above – sentence above guidelines or sentence unreasonable and no guideline – are not permitted if the stipulated sentence is not exceeded.

4.3.2 Conditional Pleas

With the consent of the court and the government, a defendant may plead guilty and reserve in writing the right to appeal “an adverse determination of a specified pretrial motion.” Rule 11(a)(2), FRCrP. A conditional guilty plea “carries with it the special requirement that it be ‘in writing’ so that a precise record can be made both of the fact of the government’s consent and the ‘specified pretrial motion,’ Rule 11(a)(2), which the defendant reserves the right to challenge.” U.S. v. Herrera, 265 F.3d 349, 351 (6th Cir. 2001) The rule places an ‘affirmative duty’ on the defendant to preserve any issues collateral to the determination of guilt or innocence by specifying them in the plea itself. U.S. v. Ormsby, 252 F.3d 844, 848 (6th Cir. 2001)

4.3.3 Defense waivers of appeal rights are generally effective.

In general, an express waiver of the right to appeal in a negotiated plea agreement is valid. U.S. v. Schmidt, 47 F.3d 188 (7th Cir.1995) citing U.S. v. Bushert, 997 F.2d 1343, 1347-50 (11th Cir..1993), cert. denied, 513 U.S. 1051 (1994); U.S. v. Melancon, 972 F.2d 566, 567-68 (5th Cir.1992); U.S. v. Rivera, 971 F.2d 876, 896 (2d Cir.1992); U.S. v. Rutan, 956 F.2d 827, 829 (8th Cir.1992); U.S. v. Navarro-Botello, 912 F.2d 318, 321-22 (9th Cir.1990), cert. denied, 503 U.S. 942, 112 S.Ct. 1488, 117

L.Ed.2d 629 (1992); U.S. v. Wiggins, 905 F.2d 51, 52-54 (4th Cir.1990); *see also* U.S. v. Hendrickson, 22 F.3d 170, 174 (7th Cir...1994), *cert. denied*, 513 U.S. 898 (1994) (finding no waiver of the right to appeal because such a waiver "must be express and unambiguous"); Griffen v. U.S., 109 F.3d 1217 (7th Cir. 1997) (permitting a habeas action to proceed on issue of whether waiver was the result of ineffective assistance of counsel).

The remedy for an invalid waiver clause is severance of the clause, not invalidation of the plea. Thus the defendant can appeal, but the plea and sentence remain in effect unless the appeal is successful. U.S. v. Bushert, 997 F.2d 1343, 1350-54 (11th Cir...1993), *cert. denied*, 513 U.S. 1051 (1994).

4.3.4 Appeal waivers must be knowing and voluntary

A waiver of appeal must be knowing and voluntary. U.S. v. Bushert, 997 F.2d 1343, 1350-54 (11th Cir.1993), *cert. denied*, 513 U.S. 1051 (1994). A waiver is knowing if the court advises defendant of the waiver or if it is manifestly clear that defendant understood the full significance of waiver. *Id.*; U.S. v. Marin, 961 F.2d 493, 496 (4th Cir..1992). *See also* U.S. v. Benitez-Zapata, 131 F.3d 1444 (11th Cir. 1997) (holding that waiver will be upheld if either: (1) the district court specifically questioned the defendant about the waiver during the colloquy, or (2) the record clearly shows that the defendant understood the full significance of the waiver). The 5th Circuit has upheld a waiver in a written plea agreement even where the court did not advise the defendant of the waiver, in the absence of any indication that the defendant did not understand it. U.S. v. Portillo, 18 F.2d 290, (5th Cir. 1994), *cert. denied*, 513 U.S.893 (1994); *Accord*, U.S. v. Michelsen, 141 f3d 868 (8th Cir. 1998). *See* U.S. v. Agee, 83 F.3d 882 (7th Cir. 1996) (specific dialogue with defendant not needed); U.S. v. Michlin, 34 F.3d 896, 898 (9th Cir.1994) (waiver good even though court did not specifically advise defendant of waiver provision). On the other hand, a waiver was struck down where the colloquy indicated that the defendant did not really understand it even though it was in the written agreement. U.S. v. Baty, 980 F.2d 977 (5th Cir. 1992), *cert. denied*, 508 U.S. 956 (1993).

The 11th Circuit has held that, unless there is a manifestly clear indication in the record that the defendant understood the full significance of his appeal waiver, a lack of sufficient inquiry by the district court during the Rule 11 hearing would be error and would invalidate the appeal waiver. U.S. v. Bushert, 997 F.2d 1343, 1352 (11th Cir. 1993), *cert. denied*, 513 U.S. 1051 (1994). The 9th Circuit rejects this argument, saying that a Rule 11 colloquy on the waiver of appeal is not necessary, and that a finding that the waiver is knowing and voluntary can be based on the text of the plea agreement, the fact that the waiver is mentioned in the presentence report, and the presumption that the lawyer has discussed both of these with the defendant. U.S. v. DeSantiago-Martinez, 38 F.3d 394, 395 (9th Cir. 1992), *cert. denied*, 513 U.S. 1128 (1995).

Note that if the court advises a defendant that he *has* a right to appeal, that may override a waiver in the plea agreement, U.S. v. Buchanan, 59 F.3d 914, 917 (9th Cir. 1996), unless the district court's advice indicated some doubt about the right to

appeal. U.S. v. Martinez, 143 F.3d 1266, 1272 (9th Cir. 1998). *But see* U.S. v. Michelsen, 141 F.3d 867 (8th Cir. 1998) (where advice of right to appeal came at time of sentencing, it was irrelevant to the earlier decision to plead). The result may be different if the prosecutor makes a timely objection to the court's advice, even if the court refuses to change it.

There is also a possibility of implicit waiver of a defendant's appeal rights as to certain issues. Courts have held in numerous cases that a *defendant* waives any objection that he fails to make in the district court. See, e.g., U.S. v. Belden, 957 F.2d 671 (9th Cir. 1992), *cert. denied*, 506 U.S. 882 (1992).

4.3.5 Some appeal waivers may be invalid

A jurisdictional challenge based on a defective indictment is not waived by the waiver of the right to appeal in a plea agreement. U.S. v. Ruelas, 106 F.3d 1416 (9th Cir. 1997), *cert. denied*, _____ U.S. _____, 117 S.Ct. 2470 (1997) (amended opinion).

Nor will a waiver prevent an appeal "where the sentence imposed is not in accordance with the negotiated agreement". Navarro-Botello, *supra* at 321. If the sentence is outside the agreed range, the waiver clause is void and defendant can appeal all aspects of the sentence, even those that did not violate plea agreement. U.S. v. Haggard, 41 F.3d 1320, 1325 (9th Cir. 1994). On the other hand, where the sentence does not exceed an agreed cap, waiver is effective even though the sentence exceeds the guidelines and is not adequately justified as a departure. U.S. v. Bollinger, 940 F.2d 478 (9th Cir. 1991). Thus, at least in the 9th Circuit, any agreement to a cap, in combination with a waiver, gives the court license to disregard the guidelines as long as it honors the cap.

Appeal in spite of a waiver was allowed in U.S. v. Kelly, 974 F.2d 22 (5th Cir. 1992), where the term of supervised release exceeded the statutory maximum. See also U.S. v. Bushert, 997 F.2d 1343, 1350-54 (11th Cir. 1993) (waiver not applicable if sentence is in excess of maximum penalty provided by statute or violates equal protection or violates plea agreement). See also U.S. v. Broughton-Jones, 71 F.3d 1143, 1147 (4th Cir. 1995) (allowing appeal despite waiver where defendant claimed that restitution exceeded the amount allowed by statute, making this similar to a claim of a sentence above the statutory maximum); U.S. v. Zink, 107 F.3d 716 (9th Cir. 1997) (following U.S. v. Catherine, 55 F.3d 1462 (9th Cir. 1995) and U.S. v. Ready, 82 F.3d 551 (2d Cir. 1996)) (defendant who waives his right to appeal a sentence may not have waived his right to appeal restitution, where the plea agreement had specific references to guidelines and maximum sentences but no references to restitution, and restitution was outside the guidelines – but note that the court also *told* Zink he could appeal, which may have had some effect on the decision).

Waiver of appeal may be subject to certain exceptions such as claims of breach of the plea agreement, racial disparity in sentencing among co-defendants, or illegal sentence in excess of the statutory maximum. U.S. v. Baramdyka, 95 F.3d 840 (9th Cir. 1996), *cert. denied*, _____ U.S. _____, 117 S.Ct. 1282 (1997). Baramdyka was cited in U.S. v. Martinez, 143 F.3d 1266, 1270-71 (9th Cir. 1998) for the proposition

that a waiver is generally enforceable if the language of the waiver “encompasses the defendant’s right to appeal on the grounds claimed on appeal”. This is reasonable, but somewhat circular. Appeal may also be allowed where the violation of rights appealed from occurs *after* the waiver, as where a defendant was arguably denied counsel at sentencing after attorney withdrew. U.S. v. Attar, 38 F.3d 727, 732 (4th Cir. 1994).

It appears to be difficult for the government to “waive the defendant’s waiver”.

In one case, the government did not raise the issue of defendant's waiver in its brief to the appellate court. The court noticed the clause *sua sponte*, found it to be valid, and declined to reach the merits of defendant's argument. U.S. v. Schmidt, 47 F.3d 188, 190 (7th Cir.1995). The dissent suggested that if the government chose not to argue that defendant has waived appeal rights, this decision (to waive the waiver clause) should be respected by the court. *Id.*, (Ripple, J. in dissent). See also U.S. v. Doe, 53 F.3d 1081, 1082-83 (9th Cir. 1995) (noting general rule that court will not address waiver if not raised by the opposing party – albeit in a case where the government urged the court to reach the merits).

4.3.6 Government waiver of appeal rights

The 11th Circuit has found an implicit waiver of the right to appeal where the prosecutor agreed that the court had discretion and did not object to downward departure. U.S. v. Prickett, 898 F.2d 130 (11th Cir. 1990). However, the 9th Circuit has found an exception to allow the government to appeal where there was plain error and "injustice". U.S. v. Snider, 957 F.2d 703 (9th Cir. 1992). The government could also be prevented from appealing certain types of errors if the sentence is not less than the agreed "specific sentence". 18 U.S.C. §3742(c)(2).

4.4 Waiver of Collateral Review

Sample Plea Agreement Language

Further, defendant hereby waives any right to raise, appeal, and/or file any post-conviction writs of habeas corpus or coram nobis concerning any and all motions, defenses, hearings, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution or to the court's entry of judgment against defendant and imposition of sentence upon defendant consistent with this agreement.

In addition to waiving direct appeal, the provision above purports to waive any kind of post conviction relief such as writ of habeas corpus. This may create an ethical problem, as the attorney who is advising the client to enter into the guilty plea is probably the same attorney that the client would be calling ineffective counsel in a post-conviction action. Can that attorney ethically advise the client to waive the

potential claim against the attorney? Some bar associations have issued advisory ethics opinions on this issue, but the situation is not clear. In the wake of those opinions, some defenders have sought opinions on the same subject from their state bar committees.

The 5th Circuit has upheld waivers of collateral relief. U.S. v. Wilkes, 20 F.3d 651 (5th Cir. 1994). However, waiver of appeal does not include waiver of ineffective assistance of counsel claim under 21 U.S.C. § 2255. U.S. v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994). Dismissal of an appeal on waiver grounds would be inappropriate where defendant files a motion to withdraw from the plea because the waiver was tainted by ineffective assistance of counsel. U.S. v. Price, 95 F.3d 364, 369 (5th Cir. 1996) (although Price appeal was dismissed because he did *not* file a motion to withdraw).

The 9th Circuit also has faced the problem of counsel advising a defendant to waive claims of ineffective assistance of counsel, although in a slightly different form. In U.S. v. Muro, 87 F.3d 1078 (9th Cir. 1996), the defendant claimed that his counsel was ineffective and asked that a new one be appointed to argue his motion for new trial on that ground. The district court refused and forced the “ineffective” counsel to handle the evidentiary hearing on the motion. The 9th Circuit reversed, stating that forcing a lawyer to try to prove his own ineffectiveness at an evidentiary hearing for new trial created an inherent conflict of interest. The same type of conflict analysis should apply to waiving the right to make ineffective assistance claims.

4.5 Conditional Waivers

A conditional waiver of appeal was enforced in U.S. v. Littlefield, 105 F.3d 527(9th Cir. 1997). Littlefield’s waiver was conditional upon the sentence being within the agreed cap. It was, so he could not appeal.

5 Miscellaneous Typical Provisions

5.1 PENALTIES

The penalties section of a plea agreement sets forth the maximum penalties that the law allows for the charge to which the defendant will plead. Its only real functions are to make sure that the defendant has been properly advised of the penalties and to inform the judge of what to tell the defendant at the change of plea hearing.

Sample Plea Agreement Language

a) A violation of Title 21 U.S.C. §841(a)(1) and §841(b)(1)(A)(vii), is punishable by a mandatory minimum term of imprisonment of ten years, and a maximum term of imprisonment of up to life, or a maximum fine of \$4,000,000 or both.

b) According to the Sentencing Guidelines, the court shall: 1) Order the defendant to make restitution to any victim of the offense, unless, pursuant to Title 18, U.S.C. §3663, the court determines that restitution would not be appropriate; 2) Order the defendant to pay a fine, unless, pursuant to Section 5E1.2(f) of the Guidelines, the defendant establishes the applicability of the exceptions found therein; 3) Order the defendant, pursuant to Title 18 U.S.C. §3583 to serve a term of supervised release when required by law or when a sentence of imprisonment of more than one year is imposed, the court may impose a term of supervised release in all other cases.

c) Pursuant to Title 18 U.S.C. §§3561-3566, §3559, the defendant may not be sentenced to a period of probation.

d) Pursuant to Title 18 §3013, the court is required to impose a special assessment on the defendant of \$100.00 per count.

5.1.1 Common errors in penalty terms

Maximum incarceration terms are usually correct, as they are set out in the statutes. Mandatory minimum terms must be checked carefully, particularly in drug, gun and Continuing Criminal Enterprise (CCE) cases.

Authorized supervised release terms are often wrong. They are controlled in general by 18 U.S.C. §3583, which in turn relies on the classification of the offense under 18 U.S.C. §3559. Specific statutes sometimes have their own supervised release requirements, such as the drug statute 21 U.S.C. §841.

Authorized fines amounts are often wrong. Fines for offenses before the guidelines went into effect are controlled by the specific statute. Guideline case fines are controlled by the greater of the specific statute or the fine in 18 U.S.C. §3571, which was amended in December of 1987 to change the misdemeanor fines. The general fine statute relies on the classification of the offense under 18 U.S.C. §3559.

Special assessments are controlled by 18 U.S.C. §3013, which provides for smaller assessments for class A, B, and C misdemeanors. The section was amended in 1996 to provide for \$100, as opposed to \$50, assessments for felonies.

5.1.2 Effect of errors in penalty terms

Rule 11(c)(1) requires that defendants be advised of the mandatory minimum provided by law, if any, and the maximum possible penalty including the effect of special

parole or supervised release. Many mistakes in advising defendants are harmless errors, generally because the defendant receives a sentence well below the maximum. U.S. v. Sanclemente-Bejarano, 861 F.2d 206, 209-10 (9th Cir. 1988) (harmless error where defendant was advised maximum sentence was life imprisonment and received 15 years sentence and five year term of supervised release). However, there may be harmful error where the combination of sentences received could cause defendant's liberty to be restricted beyond the maximum sentences described. See U.S. v. Roberts, 5 F.3d 365 (9th Cir. 1993) (defendant was not advised of supervised release and receive maximum term and maximum supervised release). Also, advising a defendant that he was subject to a five year mandatory minimum at arraignment, and then finding him responsible for more cocaine at sentencing, triggering a mandatory 10 year sentence, invalidated his guilty plea. U.S. v. Still, 102 F.3d 118 (5th Cir., 1996), *cert. denied*, _____ U.S. _____, 118 S.Ct. 43 (1997).

Failure to mention restitution during plea colloquy was harmless error, where defendant was made aware of the restitution obligation through his plea and cooperation agreements. U.S. v. McCarty, 99 F.3d 383 (11th Cir. 1996). It was also harmless error where defendant was advised of a possible fine – but not of possible restitution – and the restitution imposed was less than the fine could have been. U.S. v. Pomazi, 851 F.2d 244 (9th Cir. 1998), *overruled in part on other grounds*, Hughey v. U.S., 495 U.S. 411 (1990). It has been suggested that now that restitution is mandatory under the MVRA failure to advise of restitution runs afoul of the Rule 11(c)(1) requirement that mandatory minimums be mentioned. See Section 3.6.3.

The remedy in some cases for a bad penalty advisement has been a direction by the appellate court that the district court vacate the part of the sentence that exceeds the advisement, rather than allowing the defendant to withdraw his plea. U.S. v. Rogers, 984 F.2d 314 (9th Cir. 1993).

There may also be error where it appears that the decision to plead was impacted by the erroneous advice given by the court. For example, in a situation where a defendant was told at arraignment that he faced 60 years for two drug counts but he actually faced only 30 years, where he pled guilty to one or the counts in return for dismissal of the other, and where the court thought he was subject to 30 years – which he was not – and sentenced him to 15, the defendant's guilty plea and waiver of trial was invalid. U.S. v. Guerra, 94 F.3d 989 (5th Cir. 1996) (significantly, there was nothing in the record suggesting that defendant ever received the correct information about his exposure from his counsel).

Note that it is also possible that failure of the attorney to advise the defendant of certain consequences of the plea, such as failure to warn of possible career offender status, may be ineffective assistance of counsel. Risher v. U.S., 992 F.2d 982 (9th Cir. 1993).

5.2 Warnings

The warnings are usually spread around in the plea agreement, but have been grouped here for discussion.

5.2.1 Perjury and other false statement offenses

Sample Plea Agreement Language

Nothing in this agreement shall be construed to protect the defendant in any way from prosecution for perjury, false declaration or false statement, as defined by the law of any sovereign, or any other offense committed by defendant after the date of this agreement. Any information, statements, documents, and evidence which defendant provides to the United States pursuant to this agreement may be used against him in any such prosecutions.

This paragraph makes explicit the policy set out in USSG §1B1.8(b)(3) regarding the use of information provided in cooperation agreements in a later perjury prosecution.

5.2.2 Reinstitution of prosecution

Sample Plea Agreement Language

If defendant's guilty plea is rejected, withdrawn, vacated, or reversed at any time, the United States will be free to prosecute the defendant for all charges of which it has knowledge, and any charges that have been dismissed because of this plea agreement will be automatically reinstated. In such event, defendant waives any objections, motions, or defenses based upon the Statute of Limitations, the Speedy Trial Act or constitutional restrictions on bringing of charges.

This is the government side of the “back to square one” provision. Because under some circumstance a defendant may be able to withdraw from a plea or have a plea set aside on appeal, the government wants to be able to get back to the *status quo ante* in that event. This kind of provision is not unfair, but is very hard to explain to poorly educated or non-English speaking clients. The second sentence in the above sample language is probably overly broad. It should only waive impediments to prosecution that have resulted from the delay caused by the plea proceedings. No case has surfaced where this language has been used for any more nefarious purpose.

5.2.3 Disclosure of information to Probation Office and Court

Sample Plea Agreement Language

Defendant understands the United States' obligation to provide all information in its file regarding defendant, including charged and uncharged criminal offenses, to the United States Probation Office.

This provision describes, and perhaps causes, a problem. The probation office gets the information on all the conduct known to the prosecutor even if the defendant only pleads to part of it. This is the genesis of the problems regarding consideration of dismissed and uncharged conduct, because it requires the prosecution to give the probation officer information on such conduct – which the officer then uses to increase the defendant’s guidelines.

Note that a similar provision in a plea agreement saying that the government was free to provide all relevant information to the court at sentencing was held to override the protected nature of statements made during a proffer in plea negotiations, even though proffer agreement itself provided that the information would not be used, . U.S. v. Fagge, 101 F.3d 232 (2nd Cir. 1996) (discussed in Section 3.7.4). At sentencing the judge asked the government why the defendant was not entitled to a “minimal role” adjustment and the government used information from the proffers to show that defendant had engaged in several drug deals. The court of appeals held that the language in the plea agreement overrode the proffer agreement.

This provision raises new concerns in the post-*Booker* world, as discussed above in section 3.7.4.

5.2.4 Effect on forfeiture, civil, and administrative proceedings

Sample Plea Agreement Language

Nothing in this agreement shall be construed to protect the defendant from civil forfeiture proceedings or prohibit the United States from proceeding with and/or initiating an action for civil forfeiture. Further, this agreement does not preclude the United States from instituting any civil or administrative proceedings as may be appropriate now or in the future.

This provision reflects the government’s concern that the Double Jeopardy Clause may be implicated when a defendant receives a sentence in one proceeding and suffers a civil forfeiture in another. The Supreme Court found that a tax on marijuana imposed on the defendant after the defendant was prosecuted for possession of the marijuana constituted a violation of double jeopardy. Montana Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994). The tax was authorized by the same statute as the prosecution and was conditioned upon the commission of the crime. Prior to Kurth Ranch, the Supreme Court had also upheld the double jeopardy complaint where what was denominated a “civil penalty” was imposed after a conviction, but the court

found that the penalty was non-remedial and had a punitive character. U.S. v. Halper, 490 U.S. 435 (1989). Taken together these cases had fairly put an end to the practice of following criminal convictions with civil forfeiture actions. In most cases, the government began to seek forfeiture *in* the criminal action, thus avoiding the bar. However, the Supreme Court in U.S. v. Ursery, 518 U.S. 267 (1996), recently held that *in rem* civil forfeitures are neither “punishment” nor “criminal”, and thus do not create a double jeopardy problem. See *also* Hudson v. U.S., _____ U.S. _____, 118 S.Ct. 488 (1997) (no bar to prosecution for misapplication of bank funds where defendant already suffered monetary penalties and occupational debarment at hands of Comptroller of Currency – largely disavowing the Harper analysis and finding the previous penalties to be “civil remedies”).

5.3 Factual Basis

The factual basis section establishes that there are sufficient facts to support a conviction. These facts may also form the basis of some of the probation officer’s guideline calculations and must be examined carefully. Rule 11(b)(3) requires the court to determine that there is a factual basis for the plea.

Sample Plea Agreement Language

I further agree that if this matter were to proceed to trial the United States could prove the following facts beyond a reasonable doubt, and that these facts accurately represent my readily provable offense conduct and specific offense characteristics:

[facts of the offense of conviction]

As mentioned in other sections, the guidelines provide that stipulation to a greater offense may require the use of the guideline for that offense. USSG §1B1.2(a).

Under the revised comment to USSG §1B1.2, however, the defendant must explicitly agree that a factual statement or stipulation will have that effect. If that condition is met, then if the defendant pled guilty to one offense but stipulated to a more serious offense in the factual basis, the court will sentence the defendant based on the guideline for the more serious offense. U.S. v. Martin, 893 F.2d 73, 74-76 (5th Cir. 1990); see also U.S. v. Gardner, 940 F.2d 587, 590-92 (10th Cir. 1991) (defendant pled guilty to bank larceny, stipulated to bank robbery, sentenced for bank robbery).

Inadequacy of factual basis is waived where at sentencing defendant failed to raise the issue and defense counsel agreed that a basis existed. U.S. v. Reyes-Alvarado, 963 F.2d 1184 (9th Cir. 1992).

5.4 Approval and Acceptance

5.4.1 DEFENSE ATTORNEY APPROVAL

The defense attorney approval section, requiring counsel's signature rather than the defendant's, basically tries to lock defense counsel in to vouch for the plea.

Sample Plea Agreement Language

I have discussed this case and the plea agreement with my client in detail and have advised the defendant in all matters within the scope of Fed.R.Crim.P. 11, the constitutional and other rights of an accused, the factual basis for and the nature of the offense to which the guilty plea will be entered, possible defenses, and the consequences of the guilty plea. No assurances, promises, or representations have been given to me or to the defendant by the United States or by any of its representatives which are not contained in this written agreement. I concur in the entry of the plea as indicated above and on the terms and conditions set forth in this agreement as in the best interests of my client. I agree to make a bona fide effort to ensure that the guilty plea is entered in accordance with all the requirements of Fed.R.Crim.P. 11.

Failure to properly advise the defendant of the elements of the offense, defenses, or penalties, resulting in a mistaken decision to plead guilty, has always been possible ineffective assistance of counsel. Now failure to properly advise defendant on sentencing guidelines, resulting in a defendant's decision *not* to take a plea bargain, can also be ineffective assistance. U.S. v. Day, 969 F.2d 39 (3rd Cir. 1992); U.S. v. Sanders, 3 F.Supp. 2d 554 (M.D.Penn 1998). Failure to warn a client of possible career offender status has also been held to be ineffective assistance. Risher v. U.S., 992 F.2d 982 (1993).

The remedy for such a failures is not completely clear. In re Alvernaz, 2 Cal. Rptr. 2nd 713, 830 P.2d 747 (Cal. Sup. Ct. 1992) suggests that where a defendant failed to accept a plea bargain because of ineffective counsel, the remedy would be modification of the judgment consistent with the plea offer or a new trial with resumption of the plea negotiation process. When the same case came before a federal district court on a habeas claim, the court ordered that Alvernaz be allowed to consider the former offer with assistance of competent counsel. Alvernaz v. Ratelle, 831 F.Supp 790 (S.D.Cal. 1993). Where a plea offer was never communicated to the client, the 9th Circuit has said that the remedy would be reinstatement of the plea offer. U.S. v. Blaylock, 20 F.3d 1458 (9th Cir. 1994). To be eligible for relief, the defendant has to demonstrate that he would have accepted the plea had it been communicated. Engelen v. U.S., 68 F.3d 238 (8th Cir. 1995) (citing Blaylock).

5.4.2 Government approval

Sample Plea Agreement Language

I have reviewed this matter and the plea agreement. I agree on behalf of the United States that the terms and conditions set forth are appropriate and are in the best interests of justice.

The government approval section is usually nothing more than a signature block, and has no real significance beyond making the government a party to the “contract”.

5.4.3 Court acceptance

Rule 11(e)(2) allows the court to delay acceptance of the plea agreement until after the presentence report in the case of a Rule 11(e)(1)(A) or (C) agreement, and the guidelines require the court to delay acceptance of the plea agreement until the presentence report has been considered in most cases. USSG §6B1.1(c). Under the Guidelines, the court's acceptance of the plea is contingent on court's consideration of presentence report. U.S. v. Cordova-Perez, 65 F.3d 1552 (9th Cir.1995); U.S. v. Kemper, 908 F.2d 33, 36 (6th Cir.1990); U.S. v. Foy, 28 F.3d 464, 471 (5th Cir.1994); U.S. v. Salva, 902 F.2d 483, 488 (7th Cir..1990).

Acceptance usually takes place on the record at the sentencing hearing, rather than at the change of plea hearing. Prior to U.S. v. Hyde, _____ U.S. _____, 117 S.Ct. 1630 (1997) some courts began to accept the plea agreement at the time of the plea hearing to prevent the defendant from withdrawing from the plea before sentencing. Defendants did so based on U.S. v. Washman, 66 F.3d 210 (9th Cir. 1996), which held that either party should be entitled to modify its position and even withdraw from the bargain until the plea is tendered and the bargain as it then exists is accepted by the court. Washman in turn relied on U.S. v. Ocanas, 628 F.2d 353, 358 (5th Cir.1980), cert. denied, 451 U.S. 984, 101 S.Ct. 2316, 68 L.Ed.2d 840 (1981) which held that unless and until the trial judge approves a plea agreement and accepts a guilty plea, neither party is bound by the agreement. The controversy was laid to rest when the Supreme Court held that once a plea is entered “a defendant may not withdraw his plea unless he shows a ‘fair and just reason’ under Rule 32(e)”. Hyde, *supra* at _____, 117 S.Ct.1631.

The sequence of events is important. Rule 32 prohibits the court from reviewing the presentence report (PSR) before the guilty plea is accepted, and thus the court may not consider it in deciding whether to accept the plea (absent consent of the defendant). In re Ellis, 356 f.3d 1198, 1212 (9th Cir. 2004) (Kozinski, J. concurring). Thus the court must accept the plea, then read the PSR, then reject the plea agreement

if not satisfied. At that point it is up to the defendant to decide whether to withdraw the plea: the court may not vacate the plea on its own motion. *Id.* at 1200.

6 Collateral Consequences of Plea

There are numerous collateral consequences to pleading guilty. The right to vote, the right to bear arms, access to government benefits, and a host of other rights can be effected. Below I mention only three consequences that have been troublesome.

6.1 Loss of Right to Carry Firearms

A plea to a felony under federal law will preclude the defendant from bearing firearms under 18 U.S.C. §922(g) and §921(a)(20). There is no provision for restoration of this right for federal felons except for petitions to the Secretary of the Treasury under 18 U.S.C. §925(c), which are no longer being processed. A state cannot restore a federal felon's right to bear arms. Beecham v. U.S., 511 U.S. 368 (1994).

6.2 Immigration Consequences

The immigration consequences of a plea agreements are very complex and are beyond the scope of this article. Defense counsel should be aware that loss of status, deportation, and other immigration consequences may be even more severe than the criminal sanctions. Whenever the defendant has any kind of immigration status, the consequences of a plea on that status should be evaluated and explained to the defendant prior to the decision to plead. In some cases, pleas can be structured so as to minimize the ill effect on the client.

6.3 Use of Plea Statements in Other Proceedings

Uncoerced statements made by a defendant in a tribal guilty plea may be used for impeachment purposes at his federal trial. U.S. v. Tsinnijinnie, 91 F.3d 1285 (9th Cir. 1996). The court reasoned that if statements taken in violation of Miranda, evidence seized in violation of the Fourth Amendment, and suppression hearing testimony of the defendant may all be used for impeachment at trial, then there is no reason to treat statements made during a tribal plea any differently.

7.1 ASHCROFT MEMORANDUM — SEPTEMBER 22, 2003

**SUBJECT: Department Policy Concerning Charging Criminal Offenses,
Disposition of Charges, and Sentencing**

INTRODUCTION

The passage of the Sentencing Reform Act of 1984 was a watershed event in the pursuit of fairness and consistency in the federal criminal justice system. With the Sentencing Reform Act's creation of the United States Sentencing Commission and the subsequent promulgation of the Sentencing Guidelines, Congress sought to "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). In contrast to the prior sentencing system - which was characterized by largely unfettered discretion, and by seemingly severe sentences that were often sharply reduced by parole - the Sentencing Reform Act and the Sentencing Guidelines sought to accomplish several important objectives: (1) to ensure honesty and transparency in federal sentencing; (2) to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and (3) to provide for the imposition of appropriately different punishments for offenses of differing severity.

With the passage of the PROTECT Act earlier this year, Congress has reaffirmed its commitment to the principles of consistency and effective deterrence that are embodied in the Sentencing Guidelines. The important sentencing reforms made by this legislation will help to ensure greater fairness and to eliminate unwarranted disparities. These vital goals, however, cannot be fully achieved without consistency on the part of federal prosecutors in the Department of Justice. Accordingly, it is essential to set forth clear policies designed to ensure that all federal prosecutors adhere to the principles and objectives of the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines in their charging, case disposition, and sentencing practices.

The Department has previously issued various memoranda addressing Department policies with respect to charging, case disposition, and sentencing. Shortly after the constitutionality of the Sentencing Reform Act was sustained by the Supreme Court in 1989, Attorney General Thornburgh issued a directive to federal prosecutors to ensure that their practices were consistent with the principles of equity, fairness, and uniformity. Several years later, Attorney General Reno issued additional guidance to address the extent to which a prosecutor's individualized assessment of the proportionality of particular sentences could be considered.

The recent passage of the PROTECT Act emphatically reaffirms Congress' intention that the Sentencing Reform Act and the Sentencing Guidelines be faithfully and consistently enforced. It is therefore appropriate at this time to re-examine the subject thoroughly and to state

with greater clarity Department policy with respect to charging, disposition of charges, and sentencing. One part of this comprehensive review of Department policy has already been completed: on July 28, 2003, in accordance with section 401(1)(1) of the PROTECT Act, I issued a Memorandum that specifically and clearly sets forth the Department's policies with respect to sentencing recommendations and sentencing appeals. The determination of an appropriate sentence for a convicted defendant is, however, only half of the equation. The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department's decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.

Accordingly, the purpose of this Memorandum is to set forth basic policies that all federal prosecutors must follow in order to ensure that the Department fulfills its legal obligation to enforce faithfully and honestly the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines. This memorandum supersedes all previous guidance on this subject.

I. Department Policy Concerning Charging and Prosecution of Criminal Offenses

A. General Duty to Charge and to Pursue the Most Serious, Readily Provable Offense in All Federal Prosecutions

It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in the limited circumstances described below. The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence. A charge is not "readily provable" if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government's ability readily to prove a charge at trial. Thus, charges should not be filed simply to exert leverage to induce a plea. Once filed, the most serious readily provable charges may not be dismissed except to the extent permitted in Section B.

B. Limited Exceptions

The basic policy set forth above requires federal prosecutors to charge and to pursue all charges that are determined to be readily provable and that, under the applicable statutes and Sentencing Guidelines, would yield the most substantial sentence. There are, however, certain limited exceptions to this requirement:

- 1. *Sentence would not be affected.*** First, if the applicable guideline range from which a sentence may be imposed would be unaffected, prosecutors may decline to charge or to

pursue readily provable charges. However, if the most serious readily provable charge involves a mandatory minimum sentence that exceeds the applicable guideline range, counts essential to establish a mandatory minimum sentence must be charged and may not be dismissed, except to the extent provided elsewhere below.

2. “Fast-track” programs. With the passage of the PROTECT Act, Congress recognized the importance of early disposition or “fast-track” programs. Section 401(m)(2)(B) of the Act instructs the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels “pursuant to an early disposition program *authorized by the Attorney General* and the United States Attorney.” Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (emphasis added). Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to fast-track programs that rely on downward departures, the same requirement will also apply, as a matter of Department policy, to any fast-track program that relies on “charge bargaining” - *i.e.*, an expedited disposition program whereby the Government agrees to charge less than the most serious, readily provable offense. Such programs are intended to be exceptional and will be authorized only when clearly warranted by local conditions within a district. The specific requirements for establishing and implementing a fast-track program are set forth at length in the Department’s “Principles for Implementing An Expedited or Fast-Track Prosecution Program.” In those districts where an approved “fast-track” program has been established, charging decisions and disposition of charges must comply with those Principles and with the other requirements of the approved fast-track program.

3. *Post-indictment reassessment.* In cases where post-indictment circumstances cause a prosecutor to determine in good faith that the most serious offense is not readily provable, because of a change in the evidence or some other justifiable reason (*e.g.*, the unavailability of a witness or the need to protect the identity of a witness until he testifies against a more significant defendant), the prosecutor may dismiss the charge(s) with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney.

4. *Substantial assistance.* The preferred means to recognize a defendant’s substantial assistance in the investigation or prosecution of another person is to charge the most serious readily provable offense and then to file an appropriate motion or motions under U.S.S.G. § 5K1.1, 18 U.S.C. § 3553(e), or Federal Rule of Criminal Rule of Procedure 35(b). -3- However, in rare circumstances, where necessary to obtain substantial assistance in an important investigation or prosecution, and with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, a federal prosecutor may decline to charge or to pursue a readily provable charge as part of plea agreement that properly reflects the substantial assistance provided by the defendant in the investigation or prosecution of another person.

5. Statutory enhancements. The use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases. As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district. Accordingly, an Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to forego the filing of a statutory enhancement, but *only* in the context of a negotiated plea agreement, and subject to the following additional requirements:

- a. Such authorization must be written or otherwise documented and may be granted only after careful consideration of the factors set forth in Section 9-27.420 of the United States Attorneys' Manual. In the context of a statutory enhancement that is based on prior criminal convictions, such as an enhancement under 21 U.S.C. § 851, such authorization may be granted only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.
- b. A prosecutor may forego or dismiss a charge of a violation of 18 U.S.C. § 924(c) only with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, and subject to the following limitations:
 - (i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.
 - (ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations.

6. Other Exceptional Circumstances. Prosecutors may decline to pursue or may dismiss readily provable charges in other exceptional circumstances with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring the practical limitations of the federal criminal justice system. For example, a case-specific approval to dismiss charges

in a particular case might be given because the United States Attorney's Office is particularly over-burdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. However, such case-by-case exceptions should be rare; otherwise the goals of fairness and equity will be jeopardized.

II. Department Policy Concerning Plea Agreements

A. Written Plea Agreements

In felony cases, plea agreements should be in writing. If the plea agreement is not in writing, the agreement should be formally stated on the record. Written plea agreements will facilitate efforts by the Department of Justice and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the Sentencing Guidelines. The PROTECT Act specifically requires the court, after sentencing, to provide a copy of the plea agreement to the Sentencing Commission. 28 U.S.C. § 994(w). Written plea agreements also avoid misunderstandings with regard to the terms that the parties have accepted.

B. Honesty in Sentencing

As set forth in my July 28, 2003 Memorandum on "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals," Department of Justice policy requires honesty in sentencing, both with respect to the facts and the law:

Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.

This policy applies fully to sentencing recommendations that are contained in plea agreements. The July 28 Memorandum further explains that this basic policy has several important implications. In particular, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Likewise, federal prosecutors may not "fact bargain," or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing.

The current provision of the United States Attorneys' Manual that addresses charging policy and that describes the circumstances in which a less serious charge may be appropriate includes the admonition that "[a] negotiated plea which uses any of the options described in this section must be made known to the sentencing court." See U.S.A.M. 9-27.300(B); see *also* U.S.A.M. 8 9-27.400(B) ("it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure"). Although this

Memorandum by its terms supersedes prior Department guidance on this subject, it remains Department policy that the sentencing court should be informed if a plea agreement involves a “charge bargain.” Accordingly, a negotiated plea that uses any of the options described in Section I(B)(2), (4), (5), or (6) must be made known to the court at the time of the plea hearing and at the time of sentencing, *i.e.*, the court must be informed that a more serious, readily provable offense was not charged or that an applicable statutory enhancement was not filed.

C. Charge Bargaining

Charges may be declined or dismissed pursuant to a plea agreement only to the extent consistent with the principles set forth in Section I of this Memorandum.

D. Sentence Bargaining

There are only two types of permissible sentence bargains.

1. Sentences within the Sentencing Guidelines range. Federal prosecutors may enter into a plea agreement for a sentence that is within the specified guideline range. For example, when the Sentencing Guidelines range is 18-24 months, a prosecutor may agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, a prosecutor may agree to recommend a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 if the prosecutor concludes in good faith that the defendant is entitled to the adjustment.

2. Departures. In passing the PROTECT Act, Congress has made clear its view that there have been too many downward departures from the Sentencing Guidelines, and it has instructed the Commission to take measures “to ensure that the incidence of downward departures [is] substantially reduced.” Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003). The Department has a duty to ensure that the circumstances in which it will request or accede to downward departures in the future are properly circumscribed.

Accordingly, federal prosecutors must not request or accede to a downward departure except in the limited circumstances specified in this memorandum and with authorization from an Assistant Attorney General, United States Attorney, or designated supervisory attorney. Likewise, except in such circumstances and with such authorization, prosecutors may not simply stand silent when a downward departure motion is made by the defendant.

An Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to request or accede to a downward departure at sentencing only in the following circumstances:

a. Substantial assistance. Section 5K1.1 of the Sentencing Guidelines provides that, upon motion by the Government, a court may depart from the guideline range. A substantial assistance motion must be based on assistance that is *substantial* to the

Government's case. It is not appropriate to utilize substantial assistance motions as a case management tool to secure plea agreements and avoid trials.

b. "Fast-track" programs. Federal prosecutors may support a downward departure to the extent consistent with the Sentencing Guidelines and the Attorney General's "Principles for Implementing An Expedited or Fast-Track Prosecution Program." The PROTECT Act specifically recognizes the importance of such programs by requiring the Sentencing Commission to promulgate a policy statement specifically authorizing such departures.

c. Other downward departures. As set forth in my July 28 Memorandum, "[o]ther than these two situations, however, Government acquiescence in a downward departure should be, as the Sentencing Guidelines Manual itself suggests, a "rare occurenc[e]." *See* U.S.S.G., Ch. 1, Pt. A, 1 (4)(b). Prosecutors must affirmatively oppose downward departures that are not supported by the facts and the law, and must not agree to "stand silent" with respect to such departures. In particular, downward departures that would violate the specific restrictions of the PROTECT Act should be vigorously opposed.

Moreover, as stated above, Department of Justice policy requires honesty in sentencing. In those cases where federal prosecutors agree to support departures, they are expected to identify departures for the courts. For example, it would be improper for a prosecutor to agree that a departure is warranted, without disclosing such agreement, so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining must honestly reflect the totality and seriousness of the defendant's conduct, and any departure must be accomplished through the application of appropriate Sentencing Guideline provisions.

CONCLUSION

Federal criminal law and procedure apply equally throughout the United States. As the sole federal prosecuting entity, the Department of Justice has a unique obligation to ensure that all federal criminal cases are prosecuted according to the same standards. Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner.

7.2 ASHCROFT MEMORANDUM — September 22, 2003

SUBJECT: Department Principles for Implementing an Expedited Disposition or “Fast-Track” Prosecution Program in a District

Section 401(m)(2)(B) of the 2003 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“PROTECT Act”) instructs the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels “pursuant to an early disposition program *authorized by the Attorney General* and the United States Attorney.” Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650,675 (2003). Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to fast-track programs that rely on downward departures, the Memorandum I have issued on “Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing” likewise requires Attorney General approval for any “fast-track” program that relies upon “charge bargaining” - *i.e.*, a program whereby the Government agrees to charge less than the most serious, readily provable offense. This memorandum sets forth the general criteria that must be satisfied in order to obtain Attorney General authorization for “fast-track” programs and the procedures by which U.S. Attorneys may seek such authorization.³

I. REQUIRED CRITERIA FOR ATTORNEY GENERAL AUTHORIZATION OF A “FAST-TRACK” PROGRAM.

Early disposition or “fast-track” programs are based on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in **U.S.S.G.** circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases. Such programs are not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases. 3E1.1. These programs are properly reserved for exceptional

In order to obtain Attorney General authorization to implement a “fast track” program, the United States Attorney must submit a proposal that demonstrates that -

³ The requirement that a fast-track program be approved by the “Attorney General” under the PROTECT Act or under these Principles may also be satisfied by obtaining the approval of the Deputy Attorney General. **See** 28 U.S.C. 5 510; 28 C.F.R. 50.15(a).

- (A) (1) the district confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited or “fast-track” basis would significantly strain prosecutorial and judicial resources available in the district; or
(2) the district confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;
- (B) declination of such cases in favor of state prosecution is either unavailable or clearly unwarranted;
- (C) the specific class of cases consists of ones that are highly repetitive and present substantially similar fact scenarios; and
- (D) the cases do not involve an offense that has been designated by the Attorney General as a “crime of violence.” See 28 C.F.R. 0 28.2 (listing offenses designated by the Attorney General as “crimes of violence” for purposes of the DNA collection provisions of the USA PATRIOT Act).

These criteria will ensure that “fast-track” programs are implemented only when warranted. Thus, these criteria specify more clearly the circumstances under which a fast-track program could properly be implemented based on the high incidence of a particular type of offense within a district - one of the most commonly cited reasons for justifying fast-track programs. Paragraph (A)(2), however, does not foreclose the possibility that there may be some other exceptional local circumstance, other than the high incidence of a particular type of offense, that could conceivably warrant “fast-track” treatment.

II. REQUIREMENTS GOVERNING UNITED STATES ATTORNEY IMPLEMENTATION OF FAST-TRACK PROGRAMS.

Once a United States Attorney has obtained authorization from the Attorney General to implement a fast-track program with respect to a particular specified class of offenses, the United States Attorney may implement such program in the manner he or she deems appropriate for that district, provided that the program is otherwise consistent with the law, the Sentencing Guidelines, and Department regulations and policy. Any such program must include the following elements:

A. *Expedited disposition.* Within a reasonably prompt period after the filing of federal charges, to be determined based on the practice in the district, the Defendant must agree to plead guilty to an offense covered by the fast-track program.

B. *Minimum requirements for “fast-track” plea agreement.* The Defendant must enter into a written plea agreement that includes at least the following terms:

- i. The defendant agrees to a factual basis that accurately reflects his or her offense conduct;
- ii. The defendant agrees not to file any of the motions described in Rule 12(b)(3), Fed. R. Crim. P.
- iii. The defendant agrees to waive appeal; and
- iv. The defendant agrees to waive the opportunity to challenge his or her conviction under 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel.

C. *Additional provisions of plea agreement.* In exchange for the above, the attorney for the Government may agree to move at sentencing for a downward departure from the adjusted base offense level found by the District Court (after application of the adjustment for acceptance of responsibility) of a specific number of levels, not to exceed 4 levels. The plea agreement may commit the departure to the discretion of the district court, or the parties may agree to bind the district court to a specific number of levels, up to four levels, pursuant to Rule 1 I(c)(I)(C), Fed. R. Crim. P. A “charge bargaining” fast- track program should provide for sentencing reductions that are commensurate with the foregoing. The parties may otherwise agree to the application of the Sentencing Guidelines consistently with the provisions of the Sentencing Guidelines and Rule 1 1.

III. PROCEDURES WITH RESPECT TO IMPLEMENTATION OF FAST-TRACK PROGRAMS.

Procedures for Attorney General approval. Before implementing a fast-track program, a district must submit to the Director of the Executive Office for United States Attorneys (EOUSA), for Attorney General approval, its proposal to implement a fast-track program. Likewise, any such program in existence on the date of this Memorandum may not be continued after October 27, 2003, unless a fast-track proposal has been submitted and approved. Any fast- track proposal must contain the following elements:

- A. An identification of the specific category of violations to be covered by the fast-track program.
- B. A detailed explanation of why the criteria described in Section I are satisfied with respect to such offenses. If the district has previously implemented a fast-track program for such offenses (*i.e.*, prior to the date of this memorandum),

the explanation should include a detailed discussion of the experience under such program in the district.

Notice to EOUSA of compliance with additional requirements for fast-track programs. The district must notify EOUSA of any fast-track programs it adopts. The district must also identify in the Case Management System any case disposed of pursuant to an approved fast-track program, so that the number of cases and their dispositions may be determined for reporting or other statistical purposes.