

# **PLEA NEGOTIATIONS AND COOPERATION AGREEMENTS**

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## **I. Some Case Law on Plea Agreements**

### **A. Contract Analysis Generally Applies**

The government is legally bound to fulfill the promises that it makes in a plea agreement. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971) "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262-63.

"[W]hen the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *US v. Marbry*, 467 U.S. 504, 509, 104 S.Ct. 2543 (1984).

"[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." *Brady v. United States* 397 U.S. 742, 755, 90 S.Ct. 1463 (1970) (citations omitted)

What is "full awareness" becomes somewhat confusing in light of the Court's more recent precedent. . .

"[T]he Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. *U.S. v. Ruiz*, 526 U.S. 622, 630, 122 S.Ct. 2450 (2002).

### **B. Specific Performance**

Defendant is not entitled to specific performance of a government promise. Appropriate remedy, if guilty plea found to be involuntary because of some unfulfilled government inducement, is withdrawal of plea, not specific performance. See *U.S. v. Marbry*, 467 U.S. 504, 510, n.11, 104 S.Ct. 2543 (1984). *Santobello* however, recognized specific performance as a potential remedy to the government breach of a plea agreement, and that in such cases, resentencing should take place before a different sentencing judge. *Santobello*, 404 U.S. at 263, 92 S.Ct. at 499; see also, *United States v. Olesen*, 920

F.2d 538, 540 (8th Cir.1990) (recognizing two available remedies are rescission of a plea agreement and specific performance); *U.S. v. Coleman*, 895 F.2d 501 (8th Cir. 1990) (defendant may seek specific performance, or withdraw guilty plea, if government fails to fulfill the terms of a plea agreement; court looks to terms of plea agreement to determine whether obligations were fulfilled).

## C. Enforcing Government Promises

### 1. Oral Promises at Plea Colloquy

#### ***Brown v. Pool*, 337 F.3d 1155 (9<sup>th</sup> Cir. 2003)**

##### FACTS:

Prosecutor stated to defendant at sentencing: "Now, if you behave yourself at the state prison, as most people do, and I am inclined to believe that you will, you are going to get out in half the time. You get half of that 15 years off, or half of that 17 years off with the imposition of the extra two years, for good time/work-time credits. That's up to you. Do you understand that?"

Defendant served over half the sentence, with no disciplinary problems.

On appeal of writ, government argued prosecutor had no right to, and did not, promise that if defendant had no disciplinary record while in custody, her sentence would be halved.

##### HELD:

[W]e employ *objective* standards--it is the parties' or defendant's *reasonable* beliefs that control.... The construction we adopt, however, incorporates the general rule that ambiguities are construed in favor of the defendant. Focusing on the *defendant's* reasonable understanding also reflects the proper constitutional focus on what induced the *defendant* to plead guilty. . . . The state court could not find, and we do not find, that Brown had an absolute right to be released after seven-and-a-half years. Rather, Brown agreed that she would garner the benefit of early release only if she provided the consideration of a spotless prison record for seven-and-a-half years. Contract terms do not become less enforceable for their being conditional.

*Brown v. Pool*, 337 F.3d at 1159-61 (emphases in original; citations omitted)

### 2. Stipulated Factual Basis in Plea Agreement

#### ***U.S. v. Nelson*, 837 F.2d 1519, 1522 (11<sup>th</sup> Cir. 1988)**

Government is bound to the factual basis stated in plea agreement. Where PSR indicates an inconsistent factual basis, and government does not object, government breaches the plea . . . even if the sentencing judge indicates he will not consider the facts stated in the PSR. *U.S. v. Nelson*, 837 F.2d 1519, 1522 (11<sup>th</sup> Cir. 1988)(11<sup>th</sup> Circuit ordered specific performance of plea agreement because even if district judge did not consider PSR's stated facts, that position did not bind probation or prison authorities)

#### **D. Withdrawing from Plea Agreements**

Rule 11(d) addresses withdrawing a guilty plea generally. It permits a defendant to withdraw a plea for any reason, before the court accepts the plea. Once the court accepts the plea, a defendant may withdraw a) if the court does not accept the plea agreement, or b) if "the defendant can show a fair and just reason for requesting withdrawal."

"[A] voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. at 757.

Therefore, a guilty plea dating before Booker cannot be withdrawn based on argument that it defendant did not know the Guidelines were advisory. See *U.S. v. Roque*, 421 F.3d 118, 123 (2<sup>nd</sup> Cir. 2005) (where defendant voluntarily and intelligently entered guilty plea with agreement to give up right to appeal "for any reason," could not argue change in law wrought by Booker rendered plea invalid).

#### **E. Plea agreement for government to "recommend" may not mean much. . .**

##### **1. *U.S. v. Smith*, 140 F.3d 1325 (10<sup>th</sup> Cir. 1998):**

"Does the government breach a plea agreement if it does not engage in persuasion at the sentencing hearing even though the court is made aware of the government's position by virtue of its inclusion in the Presentence Report?"

FACTS:

Plea K under 11(e)(1)(B).

Prosecutor agreed to perform five acts, namely to: (1) recommend that Defendant receive a three-level reduction for acceptance of responsibility; (2) recommend that Defendant receive a two-level reduction for his minor role in the offense; (3) recommend that Defendant not receive a two-level enhancement for possession of a firearm; (4) recommend that Defendant not receive a two-level sentence enhancement for obstruction of justice; and (5) file a motion for a substantial assistance departure.

All of the agreed-upon recommendations were reported in the PSR. Judge noted government's recommendations, contained in PSR, at the sentencing hearing.

**HELD:**

The government fulfilled its obligation to recommend the sentencing adjustments when those recommendations were considered, although rejected, in the Presentence Report. The sentencing judge may exercise his discretion at sentencing without transforming the prosecutor's silence into a breach of the agreement. *Defendants should be advised that when there is no specific statement in a plea agreement that the government must allocute in favor of its recommendation(s) at a sentencing hearing, the government can satisfy the term "recommendation" by having its recommendations included in the PSR, which is then called to the attention of the sentencing court. Smith, 140 F.3d at 1327 (emphasis added)*

See also *U.S. v. Maling*, 942 F.2d 808, 811 (1<sup>st</sup> Cir. 1991) (where government "agrees not to recommend the imposition of any fines," it can fulfill its promise by remaining silent.")

**2. Ninth Circuit: "Recommend" Means Active Support, *U.S. v. Myers*, 32 F.3d 411, 413 (9th Cir.1994)**

**FACTS:**

Government agreed "to recommend a sentence at the low end of the applicable guideline range." PSR noted that the guideline range was between six and twelve months, and that the "government will recommend a sentence at the low end of the applicable guideline range."

At sentencing, government merely directed court to PSR's statement of facts of the offense. Court then imposed high end of range. *Defense objected.* Government stated it assumed court read PSR, and court said it understood government's recommendation as stated in PSR.

**HELD:**

The government must be held to "the literal terms of the agreement." . . . The bargain that the defendant agreed to was not a promise by the government to recommend, but the actual fact of recommendation. . . It was insufficient that the court, by reading the presentence report and the plea agreement, was aware that the government had agreed to recommend a sentence at the low end of the guideline range. The harmless error rule does not apply to the law of contractual plea agreements. The government agreed to make a recommendation at the low end of the range and was required to fulfill its part of

the contract. . . The public also has a right to know the concessions that the government is making in its plea agreements. "Airing plea agreements in open court enhances public confidence in the administration of justice."  
*Myers*, 32 F.3d at 413 (citations omitted)

**F. Stipulated Sentences After Booker: Rule 11(c)(1)(C) pleas**

**1. U.S. v. Coney, 390 F.Supp.2d 844 (D. Neb. 2005)**

**FACTS:**

Parties stipulate to sentence that is 30 months below applicable guideline sentence. Parties' Guideline calculation turns out to be an error. Government stood by initial recommendation, based on comparison of sentences already imposed on other defendants in case.

**HELD:**

If a Rule 11(c)(1)(C) plea agreement requires a sentence or sentencing range outside the Guidelines, and the plea agreement cannot honestly be justified by reference to a specific provision of the Guidelines, a judge should presume that the plea agreement is improper and therefore the judge should reject it *unless* the parties can demonstrate that (1) use of the bargained-for sentence or range will not undermine the Guidelines and (2) there is a compelling reason for implementing the agreement. . . Thus, if the judge, after a skeptical and probing inquiry of counsel, concludes that the binding plea agreement, while above or below the advisory Guidelines, does not undermine the purposes of the Guidelines and is premised upon very persuasive reasons, the judge will adopt the plea agreement and sentence the defendant accordingly. In that event, the judge will not change the Guidelines calculations or purport to depart from the advisory Guidelines. On the contrary, the judge will express his or her decision as a *variance* from the Guidelines based upon a binding plea agreement that has been implemented for specified reasons.

*Coney*, 390 F.Supp.2d at 851-52.

**G. Government Motion for Substantial Assistance: What Is Required?**

Government motion after substantial assistance is not required to contain specific language. *U.S. v. Melendez*. 518 US 120, 126, 116 S.Ct. 2057, 2061, n.5 (1996).

But, there is a difference between a government motion authorizing a district court to depart from the Guideline range under 5K1.1, from a motion authorizing a sentencing below a mandatory minimum, as permitted by 18 U.S.C. 3553(e). A district court does not have authority to go below statutory minimum if 3553(e) is not mentioned. *Melendez*, 518 U.S. at 126. If the government merely acknowledges substantial assistance, and does not “indicate desire for, or consent to, a sentence below the statutory minimum” the court cannot go below the minimum mandatory sentence. *Melendez*, 518 U.S. at 126; *see also*, *U.S. v. Duncan*, 242 F.3d 940, 945, n.5 (10th Cir. 2001); *U.S. v. Forney*, 9 F.3d 1492 (11th Cir. 1993).

Message: make sure the plea agreement language requires the government to file a motion under 18 U.S.C. 3553(e).

#### **H. Government Does Not File Motion for Substantial Assistance**

A court will review a government’s failure to file a motion for substantial assistance where 1) the government’s decision not to file a substantial assistance motion is based on unconstitutional motives (such as race or religion) and 2) where the government refusal to make the motion is “not rationally related to any legitimate government end. *U.S. v. Wade*, 504 U.S. 181, 185-86, 112 S.Ct. 1840 (1992); *see also*, *US v. Duncan*, 242 F.3d 940 (10th Cir. 2001); *U.S. v. Romsey*, 975 F.2d 556 (8th Cir. 1992).

Note: *Wade* did not involve a plea agreement addressing substantial assistance. Accordingly, where there is a plea agreement, the language of the agreement becomes more critical in determining whether the government somehow improperly exercised its discretion.

## **II. Key Statutes, Rules & Sentencing Guidelines Governing Plea Agreements & Substantial Assistance**

### **A. 28 U.S.C. § 994: Authorizing Sentence Below the Applicable Guideline Range**

- Establishes the duties of the Sentencing Commission.
- Section 994(n): Congress’ authorization to create a Guideline which “take[s] into account a defendant’s substantial assistance in the *investigation or prosecution* of another person who has committed an offense.” (emphasis added)

### **B. 18 U.S.C. § 3553: Authorizing Sentence Below Statutory Mandatory Minimum**

- Section 3553(a), of *Booker* fame: factors a court can consider in determining a sentence.
- Section 3553(e): “Limited authority to impose a sentence below a statutory minimum.” Establishes the court’s authority for departing below a minimum mandatory sentence, based on substantial assistance:

*Upon motion of the Government*, the court shall have the authority to impose sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance *in the investigation or prosecution* of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. (emphases added)

**C. 18 U.S.C. 6002: Immunity**

- Prohibits the use of information derived during compelled testimony, or statements otherwise ordered by a court, grand jury, agency of the United States, or the Congress, for any other proceeding.
- Information *directly or indirectly derived* from such compelled statements also may not be used.
- To trigger application of this statute, an individual *must have asserted the privilege against self-incrimination*, and thereafter been ordered to testify or make statements.

**D. Federal Rule of Criminal Procedure 11**

- **Rule 11(c)(1)(A)**: Plea agreement may specify that government will dismiss or not bring certain charges.
- **Rule 11(c)(1)(B)**: Plea agreement may state that government will "recommend, or agree not to oppose" a defendant's specified sentencing request. Such a recommendation does not bind the court.
- **Rule 11(c)(1)(C)**: the plea agreement may state that the government will agree a specific sentence or sentencing range is appropriate for the case, or that a particular Guideline provision or policy statement does or does not apply. Such a request binds the court once the court accepts the plea agreement.
- **Rule 11(c)(5)**: Rejection of a Plea Agreement. Governs procedure where court rejects a plea agreement which contains either a promise to dismiss or not bring charges (11(c)(1)(A) plea), or a stipulated sentence (11(c)(1)(C) plea). Court must, on the record:
  - inform the parties that court is not accepting the plea;
  - advise the defendant personally that the court is not bound by the plea agreement;
  - afford the defendant the opportunity to then withdraw the plea; and
  - advise the defendant that if the defendant persists in a guilty plea the disposition of the case may be less favorable than that contemplated in the plea agreement.
- **Rule 11(f)** : simply states the admissibility or inadmissibility of plea discussions "and any related statements," are governed by Federal Rule of Evidence 410 (below).

**E. Federal Rule of Evidence 410**

- Gives some protection to a defendant who communicates with a prosecutor in the course of plea negotiations, whether or not a cooperation agreement has been reached.
- Bars admission in a civil or criminal proceeding “of any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.”
- Such statements are admissible in a prosecution for perjury, or for impeachment purposes.
- NOTE: Government's *Kastigar* waiver form, signed during proffer sessions, most often includes a waiver of these protections.

**F. Federal Rule of Criminal Procedure 35**

- Authorizes government to move for a substantial assistance departure after plea and sentencing.
- No longer any one-year limitation period after sentencing on the government's ability to make a substantial assistance motion.

**G. U.S.S.G. § 1B1.8**

- Generally bars use of certain information gained during cooperation with the government, if cooperation agreement is in place.
- In order for information derived in proffer sessions not to be used against defendant to determine Guideline range, the cooperation agreement must specify that self-incriminating information may not be used against the defendant.
- Broad exceptions: Use of the above information is allowed under § USSG 1B1.8 where:
  - (1) known to the government prior to entering into the cooperation agreement;
  - (2) concerns the existence of priors, and is used to determine Criminal History and Career Offender status;
  - (3) used to prosecute defendant for perjury or false statement;
  - (4) defendant breaches the cooperation agreement; OR
  - (5) Government moved for a 5K1.1 departure and court uses information from proffer sessions to determine whether, or to what extent, departure is warranted.

**G. U.S.S.G. § 5K1.1**

- “Upon motion of the government stating that the defendant has provided substantial assistance ... the court may depart from the guidelines.”

• Application Note 1: "Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) ... substantial assistance ... may justify a sentence below a statutorily required minimum sentence."