

THE UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

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September 17, 1986

MEMORANDUM:

TO: Commissioners
Legal and Research Staff

FROM: Suzanne B. Conlon *shc*

SUBJECT: Public Hearing on Plea Agreements

On Tuesday, September 23, 1986, the Commission will hold a public hearing on issue relating to plea agreements. Testimony from witnesses and additional written responses are being circulated as received. An agenda and brief summary of the issues for the public hearing issues are attached.

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AGENDA

**United States Sentencing Commission
Hearing on Plea Agreements**

September 23, 1986

10 a.m.	Chairman William W. Wilkins, Jr. Opening Remarks
10:05 a.m.	Professor Stephen J. Schulhofer University of Chicago Law School
10:20 a.m.	Mr. Edward F. Marek Federal Public Defender, Northern District of Ohio Ms. Phyllis S. Bamberger Attorney-in-Charge, Legal Aid Society, New York City
10:45 a.m.	Mr. William J. Garber Attorney at Law, Washington, D.C.
Break	
11:15 a.m.	Hon. Frederick B. Lacey Attorney at Law, New York City
11:30 a.m.	Mr. John Volz U.S. Attorney, Eastern District of Louisiana Mr. Anton R. Valukas U.S. Attorney, Northern District of Illinois
11:55 a.m.	Mr. William F. Weld Assistant Attorney General, Criminal Division
12:10 p.m.	Chairman Wilkins Closing Remarks

Issues for Sentencing Commission's September 23 Hearing

GUILTY PLEAS

Approximately 90% of federal criminal cases are presently disposed of by guilty pleas. Empirical studies show that sentencing judges generally imposes lower sentences after a guilty plea for a number of philosophic and practical reasons. Should the sentencing guidelines provide a downward sentencing adjustment for defendants who plead guilty? Or should the guidelines make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty?

PLEA AGREEMENTS

Congress has directed the Sentencing Commission to promulgate guidelines or policy statements that give sentencing judges guidance regarding the acceptance of plea agreements under Rule 11 of the Federal Rules of Criminal Procedure. The legislative history of the Sentencing Reform Act demonstrates Congressional concern that plea agreements not be used to circumvent the sentencing guidelines. What are the appropriate limits of judicial scrutiny of negotiated plea agreements? What standards should a sentencing judge apply in evaluating whether a plea agreement is acceptable according to the letter and spirit of the sentencing guidelines? How does the Sentencing Reform Act impact on "charge bargaining" under Rule 11(e)(1)(B) and "sentence bargaining" under Rule 11(e)(1)(C)? To what extent can prosecutors and defense attorneys stipulate to the underlying facts of an offense and the offenders behavior when such factors mandate a certain sentencing result?

COOPERATION

What recognition, if any, should the sentencing guidelines give offenders who cooperate with authorities? What public policy considerations are involved in encouraging offenders to cooperate in investigations and prosecutions? Should different levels of cooperation be objectively identified and given relative downward adjustments from the otherwise applicable sentence? If so, who should decide the appropriate level or downward adjustment: the sentencing court, the prosecutor in a written certification to the court or the prosecutor and defense attorney in a written agreement? How should disputes regarding the level or quality of cooperation be resolved?

Hearing on Plea Agreement - Sept. 23rd

Lacey, Frederick B.	LeBoeuf, Lamb, Leiby & MacRay
Ginsburg, Douglas H.	U.S. Department of Justice Antitrust Division
Bellotti, Francis X.	Department of the Attorney General, Massachusetts
Young, Joseph H.	United States District Court District of Maryland
Conrad, Stephen F.	United States District Court Middle District of North Carolina
Hale, P. S.	United States District Court Eastern District of Virginia
McNichols, Robert J.	United States District Court Eastern District of Washington
LaPierre, Wayne R.	National Rifle Association of America
Chamlee, Donald L.	Administrative Office of the United States Courts
Clarke, Judy	National Association of Criminal Defense Lawyers
McAnany, Patrick D.	The University of Illinois at Chicago; Department of Criminal Justice
Maxey, Carl	Maxey Law Offices, P.S.
Lacey, Frederick B.	LeBoeuf, Lamb, Leiby & MacRae
* Federal Defender Position Paper on Plea Agreements Guilty Pleas and Cooperation	
Siler, Eugene E.	United States District Court Eastern & Western District of Kentucky
Rogers, Frederick	United States District Court Northern District of Georgia
Carroll, William P.	United States District Court District of New Jersey

Stearns, Charles L.	Federal Probation Officers Association
Allen, G. Frederick	United States District Court Northern District of Illinois
Sullivan, Tobin P.	United States District Court District of Columbia
Edwards, Sherrill E.	The Fisher Institute
Stowers, Dan W.	United States District Court Eastern District of Wisconsin
Curran, Thomas J.	United States District Court Eastern District of Wisconsin
Baca, Anthony P.	United States District Court District of New Mexico
Duke, Gary W.	United States District Court Eastern District of Arkansas
Clark, Charles L.	United States District Court Western District of Missouri
Graves, William D.	United States District Court District of Colorado
Miller, David E.	United States District Court Southern District of Ohio
Varnon, Charlie E.	United States District Court Eastern District of California
Cooper, J. Robert	Cooper & Associates
Doyle, John H.	Anderson Russell Kill & Olick
Daly, T. F. Gilroy	United States District Court District of Connecticut
Sheffield, Linda S.	Law Offices of Linda S. Sheffield
Wiley, Joseph L.	United States District Court Northern District of Indiana
Hughes, Robert C.	United States District Court Middle District of Georgia
Stafford, William	United States District Court Northern District of Florida

Powers, John D.	United States District Court Middle District of Louisiana
Kazen, George P.	United States District Court Southern District of Texas
Bittick, L. Cary	National Sheriffs' Association
Merhige, Robert R.	United States District Court Eastern District of Virginia
Mayhew, Eugene A.	United States District Court District of Delaware
Head, Hayden W.	United States District Court Southern District of Texas
Shein, Marcia G.	National Legal Services, Inc.
Bowen, Dudley H.	United States District Court Southern District of Georgia
Stephenson, Oscar J.	United States District Court Northern District of Alabama
Crooks, Gary R.	United States District Court District of Colorado
Gooch, Richard H.	United States District Court Eastern District of Pennsylvania
Cacheris, James C.	United States District Court Eastern District of Virginia
Van Scoy, C. William	Administrative Office of the United States Courts
Eisele, G. Thomas	United States District Court Eastern District of Arkansas
Arnold, Richard S.	United States District Court Eighth Circuit, Arkansas
Townley, W. Stephen	United States District Court Northern District of Florida
Bownes, Hugh H.	United States District Court First Circuit, New Hampshire
Bonnaffons, Gerald J.	United States District Court Eastern District of Louisiana
Rubin, Alvin B.	United States Court of Appeals Fifth Judicial Circuit

Wilkins, William W.	To: Hon. John P. Vukasin, Jr. United States District Court
Ackerman, John E.	Ackerman-Kinard Associates
Russell, Frederick M.	Russell & Russell
Vela, Filemon B.	United States District Court Southern District of Texas
Freedman, Frank H.	United States District Court Massachusetts
Shevlin, John M.	United States District Court Southern District of Florida
Moccia, John A.	United States District Court District of Hawaii
Goettel, Gerald L.	United States District Court New York, N.Y.
Hardy, Charles L.	United States District Court District of Arizona
Kaufman, Frank A.	United States District Court District of Maryland
Weber, Joel	United States District Court Southern District of New York
Tafoya, Fernando	Unitarian Universalist Service Committee National Moratorium on Prison Construction
Thomas, R. L.	Federal Probation Officers Association
Brown, Joe B.	United States Attorney Middle District of Tennessee
Yolton, L. William	(Testimony) NISBCO
Volz, John	(Testimony) U.S. Attorney Eastern District of Louisiana
Valukas, Anton R.	(Testimony) U.S. Attorney Northern District of Illinois
Weld, William F.	(Testimony) Asst. Attorney General Criminal Division - Dept. of Justice

Garber, William J.	(Testimony)		
Brodsky, William M.	(Testimony)	American	Bar
Freeman, George Clemon	Association		
Robinson, Laurie	(Testimony)	American	Bar
	Association		
	Section of Criminal Justice		
Schulhofer, Stephen J.	(Testimony)	Professor of Law	
	University of Chicago Law School		

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September 22, 1986

Hon. William W. Wilkins, Jr.
United States District Judge
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

The United States Sentencing Commission has scheduled hearings regarding its draft sentencing guidelines pursuant to the Sentencing Reform Act. In connection with these hearings, you have asked for my views on several questions involving the proper role of plea agreements in a sentencing guidelines system. I consider it an honor and a privilege to respond.

INTRODUCTION

At the outset, I unhesitatingly state that I strongly favor disposition of criminal cases by guilty pleas and plea agreements. As a United States Attorney, I quickly discovered that the well-investigated and well prepared prosecution produced guilty pleas in a relatively high percentage of cases. Indeed, the prosecutorial philosophy of a prosecutor's office is discernible from the percentage of his or her cases resulting in guilty pleas. If that percentage is relatively low, the office is indicting on evidence that is too thin; defendants soon learn it pays to go to trial. This same office will reflect a relatively low

September 22, 1986

percentage of convictions after trial. On the other hand, the office that obtains a conviction in every case, by either guilty plea or trial verdict, is probably pursuing too cautious a policy, seeking indictments only in the absolutely air-tight case. The praiseworthy prosecutorial philosophy is somewhere in between these two extremes. In any event, if a relatively large percentage of cases do not result in guilty pleas, even the well organized and administered prosecutor's office will be inundated.

Similarly, as a judge I recognized that guilty pleas were an absolute necessity for the survival of our system. This becomes even more true as we move into the many-month-long narcotics conspiracy trials that more and more are finding their way into our courts. In fact, if the criminal defense bar wished to disrupt or paralyze our system, that portion of the bar that specializes in narcotics trials could do just that - by taking every case to trial and, parenthetically, at that trial exercising their skills to persuade the factfinder that witness after witness against their clients is a perjurer, even while convinced in their hearts that their clients are guilty as charged. This of course denigrates the system even if jurors are not thereby misled.

All of this adds up to a fundamental and inescapable proposition--prosecutors and judges must be free to provide strong incentives to defendants and their counsel to enter guilty pleas.

As to the present Fed.R.Cr.P. 11(e), as a United States Attorney I promulgated an office policy of engaging in "charge bargaining" but not "sentence bargaining." I felt that a prosecutor should not be in a position of recommending probation or any other sentence to a court. I felt then, as I later did as a judge, that if the separation of powers doctrine means anything, it certainly mandates that the charging function be the prosecutor's and that the sentencing role be the court's, and that neither branch of Government should interfere with, or attempt to influence, the action of the other.

Thus, as a judge, I never took a guilty plea where the plea agreement was made under Rule 11(e)(1)(C), embodying a sentence agreement. I felt that the sentence function was exclusively mine - and that not only was it to be so, it was important that it appear to be so. I am still of this mind and believe that sentence bargaining as countenanced by Rule 11(e)(1)(C) should no longer be permitted. Moreover, I would also eliminate so much of Rule 11(e)(1)(B) as permits a

prosecutor to make a sentence recommendation. Even this impermissibly intrudes into the judge's domain in my view.

With this background, let me analyze the questions you have posed.

A. Downward Sentencing Adjustment for Guilty Pleas

Recognizing that sentencing judges often impose lower sentences after a guilty plea than after a verdict of guilty at trial, the Commission is considering having the sentencing guidelines provide in some way for a downward sentencing adjustment for defendants who plead guilty. The apparent goal would be to encourage the entry of guilty pleas and thus facilitate plea bargaining, a process that the Supreme Court has held to be beneficial to the defendant, the Government, and the public. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

It is argued by some that our system rests on two antithetical principles: one, encouraging by sentence benefits the offering of guilty pleas; two, not punishing, by more severe sentences, those who elect to go to trial. Indeed, rewarding those who plead guilty can be viewed conversely as punishing those who choose to exercise their constitutional rights by pleading not guilty. Nonetheless, the Supreme Court has "squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea." Corbitt v. New Jersey, 439 U.S. 212, 219 (1978). Although "[t]he States and the Federal Government are free to abolish guilty pleas and plea bargaining . . . absent such action . . . it is not forbidden to extend a proper degree of leniency in return for guilty pleas." Id. at 223.

While a specific provision for a downward adjustment (say 25%) from the guidelines may be constitutional, its desirability, if it is to be done automatically, is questionable. Automatic leniency in return for a guilty plea would limit the ability of the sentencing judge to fit the sentence to the individual and the peculiar facts of each case. The chief reason for leniency toward those who plead guilty is that the acknowledgment of guilt is the first step on the road towards rehabilitation. However, this is not always true; the decision to plead guilty may be an action born more of expediency to avoid a certain conviction at trial than of contrition. The sentencing judge should be permitted to draw distinctions based upon the peculiar facts of each case. I recommend against an automatic downward

adjustment in return for a guilty plea. Such a device would force the judge to treat the truly remorseful defendant the same as one who has made a calculated decision to obtain a lighter sentence by pleading guilty rather than risk a longer sentence by going to trial. I say this, even though I recognize that a fixed downward adjustment provision might well have the effect of encouraging guilty pleas from defendants who would otherwise take their chances by going to trial.

Thus, it is my view that the decision of how to treat a plea of guilty on sentencing should be left to the sound discretion of the sentencing judge. Moreover, I do not favor limiting this discretion by a statement of principles to guide its exercise. This is an area where rigidity and inflexibility are just not feasible.

B. The Judge's Role in Plea Agreements

Rule 11 of the Federal Rules of Criminal Procedure states categorically that the "court shall not participate" in plea agreement discussions. This is intended to eliminate the perception that, by rejecting a judge's proposal for a plea agreement, a defendant risks a longer sentence. Advisory Committee Notes to Proposed Amendments to Federal Rules of Criminal Procedure, 62 F.R.D. 271, 284 (1974); United States v. Werker, 535 F.2d 198, 203 (2d Cir.), cert. denied, 429 U.S. 926 (1976). Rather than participating in the bargaining process, the judge's responsibility should be limited to examination of the agreement negotiated between the prosecution and the defendant and determine whether to accept it. I obeyed this rule to the letter. It is important that the guidelines retain this provision. Even though the legislative history of the Sentencing Reform Act may indicate Congressional concern that plea agreements not be used to circumvent the sentencing guidelines, the proper way to achieve this is not by making the judge a participant in the negotiating process.

Instead, this can be accomplished by maintaining the court's role, independent of the prosecutor, in determining whether to accept the agreement (which should be limited to a "charge" agreement, as I have noted) and in imposing sentence. In examining a plea agreement, the court must of course be sure that the defendant understands all promises made in connection with the plea and agrees with all of the terms of the agreement.

C. Evaluating Levels of Cooperation

Cooperation with authorities in investigations and prosecutions should be encouraged by the sentencing guidelines because of the obvious social benefit. Thus, for example, society clearly gains by rewarding a low level offender with leniency for information that leads to the dismantling of a large scale criminal enterprise or the conviction of other, more serious offenders.

Like a guilty plea, an offender's cooperation with authorities is viewed as a sign of an intent to be rehabilitated and therefore as something to be encouraged aside from the social benefit. However, as with guilty pleas, all instances of cooperation are not equally voluntary or praiseworthy and, therefore, not equally deserving of recognition in sentencing.

Obviously, then, distinctions must be drawn between levels of cooperation. The issue raised by the Commission's question is whether different levels of cooperation should be objectively identified and given relative and fixed downward adjustments from the otherwise applicable sentence.

It would appear that evaluating and giving appropriate sentencing recognition to an offender's cooperation is once again a determination that depends on the facts of the particular case. It is doubtful that objective levels of cooperation could be identified and applied in a manner that would, across the board, take into account all relevant aspects of each specific situation. Mechanical application of standards of cooperation would deprive judges of the ability to consider the situation as a whole in assessing an offender's cooperation and imposing an appropriate sentence.

I would suggest that the guidelines recognize, by a statement of principles, the right of a sentencing judge to reward a cooperating witness or defendant with a lenient sentence, but that the Commission not provide for a rigid or fixed reduction. Instead, the guidelines could identify factors to be considered in evaluating cooperation, such as:

- Was the cooperation complete or only partial?
- Was the offender fully dedicated to working with the authorities?
- When was the cooperation offered and given?
- Does the timing indicate an ulterior motive of any kind or does it indicate the offender's genuine

Hon. William W. Wilkins, Jr.

-6-

September 22, 1986

remorse and an intent to dissassociate himself or herself from the criminal venture or was it offered strictly for purposes of obtaining leniency? Was the cooperation voluntary or coerced? Was the cooperator willing to serve only as a source of information or also as a witness? Did the cooperation expose the source or his or her family to physical, financial or other risk? If so, was the risk immediate or only potential? What were the results of the cooperation? (While it may not be appropriate to reduce the recognition in sentencing simply because the results were not as good as hoped or expected, it may be appropriate to provide special recognition when the results exceed expectations.) What was the relation between the degree of cooperation and the severity of the charge that led the offender to cooperate? The same degree of cooperation may merit greater recognition when given by someone facing only a minor charge as compared to someone who decides to cooperate only when faced by a serious charge carrying severe penalties.

Again, I express my appreciation for your invitation to appear before you. I have tremendous admiration and respect for the members of the Commission and hope I have made some contribution to your work.

Sincerely yours,


Frederick B. Lacey

FBL:abw



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 23 1986

The Honorable William Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

By letter of August 22, 1986, you requested the views of the Antitrust Division of the United States Department of Justice on the proper role of plea agreements in a sentencing guidelines system. You asked us to address questions on three general subject areas: guilty pleas, plea agreements and cooperation. This letter responds to your request for our views on these issues.

A. GUILTY PLEAS

Approximately 90% of federal criminal cases are presently disposed of by guilty pleas. Empirical studies show that sentencing judges, for a number of philosophic and practical reasons, generally impose lower sentences after a guilty plea. Should the sentencing guidelines provide a downward sentencing adjustment for defendants who plead guilty? Or should the guidelines make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty.

It is appropriate in the Guidelines to continue existing sentencing patterns in which defendants who plead guilty receive lesser penalties than those who stand trial and are convicted. A guilty plea avoids the necessity for a trial and results in earlier, less costly resolution of criminal cases. Creating an incentive to plead guilty, through an offer of lower sentences, thereby conserves limited judicial and prosecutorial resources. The benefits of creating such an incentive have been recognized by the courts, which have found that the creation of this incentive to plead guilty does not interfere with constitutional safeguards. Corbett v. New Jersey, 439 U.S. 212, 219-221 (1978).

Further, a guilty plea both reflects a recognition of responsibility and indicates remorse for the crime on the part of the defendant. Under such circumstances, a lesser sentence may be adequate to rehabilitate the defendant or deter future criminal conduct by him.

Ideally, such lesser sentences should be related to the amount of the anticipated reduction in judicial and prosecutorial costs and reflect the reduced need for rehabilitation and deterrence of the defendant. This generally could be accomplished by imposing sentences toward the lower end of the sentencing range for each crime established by the Commission on individuals who plead guilty. Imposing a lesser sentence to reflect a guilty plea may not be appropriate, however, where the defendant has entered into a plea agreement rather than simply pleading guilty and as a result has already received other benefits for his plea, such as the dismissal of counts or any agreement not to prosecute the defendant further.

B. PLEA AGREEMENTS

Congress has directed the Sentencing Commission to promulgate guidelines or policy statements that give sentencing judges guidance regarding the acceptance of plea agreements under Rule 11 of the Federal Rules of Criminal Procedure. The legislative history of the Sentencing Reform Act demonstrates Congressional concern that plea agreements not be used to circumvent the sentencing guidelines. What are the appropriate limits of judicial scrutiny of negotiated plea agreements? What standards should a sentencing judge apply in evaluating whether a plea agreement is acceptable according to the letter and spirit of the sentencing guidelines? How does the Sentencing Reform Act impact on "charge bargaining" under Rule 11(e)(1)(B) and "sentence bargaining" under Rule 11(e)(1)(C)? To what extent can prosecutors and defense attorneys stipulate to the underlying facts of an offense and the offender's behavior when such factors mandate a certain sentencing result?

We do not anticipate that the nature or scope of judicial scrutiny of negotiated plea agreements will vary significantly under the new sentencing guidelines from current Rule 11(e)(2) practice. In negotiating a plea agreement under Rule 11(e), the prosecutor may in some circumstances be making decisions concerning which offense or offenses to charge or dismiss. These decisions are essentially committed to the discretion of the prosecutor under our criminal justice system. The prosecutor is in the best position to evaluate the strength of the case against a defendant and the cost of prosecuting the case, as well as how the prosecution of a particular defendant will affect the ability of the prosecutor to prosecute successfully other defendants. Such decisions necessarily

entail consideration of the limited resources available to any law enforcement agency, the potential value of the defendant's cooperation and prosecutorial strategy in building cases in an effective overall prosecutorial effort. Furthermore, the prosecutor has the responsibility to decline prosecution of a given defendant when, in his or her judgment, the interests of justice so require. The exercise of this responsibility should not lightly be inhibited by the legislature or the courts, just as it must be carried out with great care by the prosecutor.

The standard that the judge should use in reviewing charging decisions reflected in plea agreements is the standard that regularly applies to the review of decisions of a co-equal branch of the government, when the decision is committed largely to the discretion of that other co-equal branch. A judge should assume, in the absence of clear evidence to the contrary, that a plea agreement reached by the prosecutor was a good faith effort to reconcile the prosecutor's duty to faithfully execute the law with the goals of the sentencing guidelines, and as such that decision should be accorded substantial deference. In essence, we agree with the decision of the Court of Appeals in United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973):

[T]rial judges are not free to withhold approval of guilty pleas . . . merely because their conception of the public interest differs from that of the prosecuting attorney. The question is not what the judge would do if he were the prosecuting attorney, but whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.

To the extent that a plea agreement encompasses not the crime for which the defendant should be convicted, but what sentence the defendant should receive for having committed the crime, i.e., the "sentence bargaining" aspects of an 11(e)(1)(c) agreement, the prosecutor and the judge will be more narrowly constrained by the sentencing guidelines. Where the prosecutor has properly understood and followed the sentencing guidelines, the government's sentencing agreement will provide for a sentence within the appropriate guideline and should be acceptable to the court. Nonetheless, as the final interpreter of the sentencing guidelines, the judge has the right to decide that the guidelines require a different sentence than the one agreed to by the prosecutor for the crime charged. That authority, however, must be exercised with due regard for the need of the prosecutor to resolve criminal charges efficiently and expeditiously.

With respect to the issue of stipulation of underlying facts by prosecutors and defense attorneys to be utilized in the sentencing process, where facts are noncontroverted, or are in some doubt but litigation to resolve those doubts would require the expenditure of resources out of proportion to the importance of those facts, it is appropriate for the parties to stipulate.

Stipulations as to facts between prosecutors and defense attorneys that coincidentally have the effect of mandating a certain sentencing result should not be considered inherently suspect by a judge. Such stipulations are often necessary to resolve disputes without unduly complicating the sentencing process. On the other hand, it would be inappropriate for a prosecutor to stipulate to facts that are clearly untrue for the purpose of having a defendant sentenced within one sentencing range under the guidelines rather than another. Should the judge become convinced that a stipulation has been made to untrue facts for the purpose of drawing a sentence inconsistent with the letter and spirit of the sentencing guidelines, it is the judge's duty to determine the true facts and to sentence the defendant accordingly.

C. COOPERATION

What recognition, if any, should the sentencing guidelines give offenders who cooperate with authorities? What public policy considerations are involved in encouraging offenders to cooperate in investigations and prosecutions? Should different levels of cooperation be objectively identified and given relative downward adjustments from the otherwise applicable sentence? If so, who should decide the appropriate level or downward adjustment: the sentencing court, the prosecutor in a written certification to the court or the prosecutor and defense attorney in a written agreement? How should disputes regarding the level or quality of cooperation be resolved?

It is very important that the sentencing guidelines give recognition to cooperation by antitrust offenders involved in conspiratorial crimes. Such cooperation is often critical to the prosecutor's ability to detect, indict and convict other conspirators.

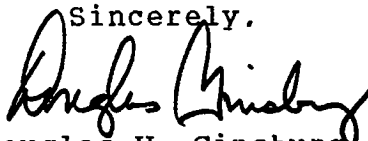
In antitrust conspiracy crimes, there are seldom any non-culpable eyewitnesses. Often the victims themselves are not aware that a crime has been committed. Only through the cooperation of immunized or convicted co-conspirators can the prosecutor develop cases against other co-conspirators. Because these co-conspirator witnesses are themselves culpable, prosecutors strongly prefer to obtain cooperation after conviction rather than through the grant of immunity.

Not only does this serve the interest of justice in seeing that all offenders are punished and the interest of deterrence by making conviction and punishment more likely, but convicted co-conspirators frequently have more credibility as witnesses than those immunized since they have "paid the price" for their crimes. Unless cooperation is recognized in the sentencing process, however, those convicted of antitrust conspiracy crimes will not have the appropriate incentives to cooperate, and enforcement of the antitrust laws will be impeded.

Given the unique circumstances surrounding each defendant, e.g., the nature of that defendant's involvement in a conspiracy, the status of the investigation and prosecution of other members of a conspiracy, the quality of the defendant's recollection of events surrounding a conspiracy, etc., it would be extremely difficult to adopt definitive standards for levels of cooperation. Rather than promulgate such standards, we recommend that the Commission identify sentencing ranges for each category of offender and defendant, lower than the ranges otherwise promulgated by the Commission for that crime, to recognize cooperation. Prior to sentencing, the prosecutor should make an evaluation of the defendant's cooperation and file a report with the sentencing court that sets forth the nature and level of defendant's cooperation along with a specific recommendation for a sentence within the range that reflects cooperation by a defendant in the particular defendant and offense category. If the recommendation is consistent with the guidelines issued by the Commission, this recommendation should then be accepted by the judge unless the judge makes a specific finding that cooperation was not at the level identified by the prosecutor.

I hope that these comments have been of assistance to you.

Sincerely,

A handwritten signature in dark ink, appearing to read "Douglas H. Ginsburg", written in a cursive, flowing style.

Douglas H. Ginsburg
Assistant Attorney General



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE, BOSTON 02108

September 22, 1986

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C.

Dear Chairman Wilkins:

I am pleased to have this opportunity to register my thoughts and comments on the important work being conducted by your Commission. I hope they are helpful.

GUILTY PLEAS

The risk in not codifying within the sentencing guidelines a downward adjustment for those defendants offering guilty pleas, is that when such adjustments are made (which your empirical studies suggest is the usual practice), they may be viewed as violating the spirit of the sentencing guidelines. In particular, one of the factors the sentencing judge must consider under the provision of 3553(a)(6) is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

The obvious risk in creating a downward adjustment for pleas is that in many circumstances that adjustment may not be appropriate. In fact, it could inequitably reward the least deserving of defendants by providing a means of mitigating a sentence where none ought to exist.

The safer course would seem to allow sentencing judges to continue to operate within the present framework which provides ample opportunity to make downward adjustments within the discretionary confines of sentence ranges. This position can be reconciled with the mandate of Sec. 3553 in a number of ways. With regards to section (a)(6), the decision to plea may, in appropriate circumstances, warrant the disparity created by the downward adjustment. Further, (a)(6) may be read to apply only to defendants who are "found guilty" as opposed to those who plead guilty. Additionally, Sec. 3553(a) enumerates a number of factors which are to be considered in imposing sentences, many of which may be read to allow for mitigation in the circumstances of a plea. Also, Sec. 3553(b) specifically provides for further mitigation outside the sentencing guidelines, should such a sentence be appropriate.

One final alternative to be considered is that offered by Sec. 3553 (a)(5) which requires the sentencing court to consider "any pertinent policy statement issued by the sentencing commission..." Rather than amend the guidelines to require a downward adjustment in instances of guilty pleas, the Commission may consider issuing such a policy statement detailing the ways in which a court may elect to mitigate a sentence when pleas are being considered.

PLEA AGREEMENTS

Rule 11 of the Federal Rules of Criminal Procedure governs the tender and acceptance of guilty pleas. The rule specifically exempts the court from the participation in the negotiation process and further provides that nothing negotiated by the parties shall be binding on the court. Under Rule 11(1), any negotiated plea must fall in one of three categories:

- A) The government agrees to dismiss or diminish some of the charges pending;
- B) The government agrees to make a specified nonbinding sentencing recommendation (or agrees not to oppose the defendant's recommendation); or,
- C) The parties jointly agree on a sentence they consider appropriate.

Of course the court may also consider a plea offered without any agreement between the parties.

In any event, the court is bound to provide the defendant with an opportunity to withdraw a plea offered under either A or C, should the court refuse to accept the terms, and the court is further bound to advise a defendant offering a B type plea that he may exceed the recommendation without providing the defendant an opportunity to withdraw. In other words, the parties cannot enter into a binding agreement that would circumvent the sentencing guidelines because any plea (whether by Agreement or not) is subject to the court's review and acceptance. Thus, absent an amendment to the guidelines or a policy statement (as discussed above), the limits of judicial scrutiny to negotiated pleas are precisely those imposed by Sec. 3553 and which are applicable to any sentence imposed by the court.

With regard to pleas being offered under Rule 11(1)(B) and (C), where a particular sentence is being recommended or has been agreed to by the parties, the role of the court prior to accepting such a plea is to insure that the parties can articulate the suggested disposition in terms of the framework

of Sec. 3553 and Sec. 3559 (Sentencing Classification of Offenses). The court's ability to evaluate the appropriateness of a negotiated plea could be enhanced by requiring the parties to submit a memorandum considering: (1) the nature and circumstances of the offense and the defendant's history and character; (2) the need for the sentence (punishment, deterrence, public protection or rehabilitation); (3) the kinds of sentences available; (4) the range of the given sentence category; and (5) the reasons for the recommendations.

Unlike the pleas negotiated under Rule 11(1)(B) and (C), which seek the imprimatur of the court to a specified sentence recommendation, the court is invited to exercise its sentencing discretion when presented with an 11(1)(A) plea. However, the parties are seeking to limit that discretion by reducing through dismissal, the charges to which the defendant stands in jeopardy. Since this may frequently involve an attempt to dismiss the most serious charged offense, the court must pay particular attention to the facts which the government alleges it could prove.

The practice in Massachusetts, although patterned after the Federal Rule, differs in two significant respects. Under our practice (Massachusetts Rules of Criminal Procedure 12(c)(2)), a judge may elect to inform the defendant, prior to accepting his plea, whether he will reserve the right to exceed the sentencing recommendation even if the parties have agreed to it. If the court declares its intention to reserve the opportunity to exceed the recommendation, and the defendant thereafter offers a plea, it may not be withdrawn as a matter of right. Under that scenario, the plea would proceed in the same manner as a Rule 11(c)(1)(B) plea on the federal side.

In practice however, most Massachusetts judges do not exercise that option; they inform the defendant that they will not exceed the recommendation without providing an opportunity to withdraw the plea. If the judge thereafter does refuse to accept the recommendation, he may nevertheless inform the defendant what sentence he would impose (Massachusetts Rules of Criminal Procedure 12(c)(6)). This differs from Federal Rule 11(c)(4) which provides only that the court inform the defendant of its intention to impose a "less favorable disposition than that contemplated by the plea agreement." The Commission might consider issuing a policy statement endorsing such a procedure, as a means of salvaging pleas which may otherwise fall apart.

Although there is nothing in the Act which prohibits or curtails the parties' ability to stipulate to the underlying facts, the court is never bound to accept the proffered guilty plea. In this light, the ultimate impact of the Act may be more on the government (and to some extent, the defense bar). Surely, it will require a greater deal of circumspection in the initial decision to indict, and if so, for what crimes. While the Act retains a significant range for the exercise of

discretion, the framework of that discretion is significantly constrained by factors which seek to categorize defendants, histories, sentences and their objectives with an eye towards uniformity.

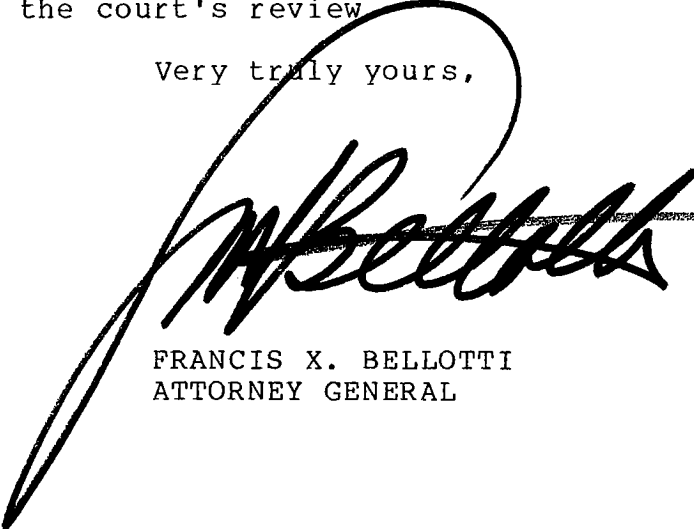
COOPERATION

In the limited context of offenders who are awaiting trial/plea or pending charges, cooperation is seldom an act of contrition or a sign of rehabilitation; it is typically an act of self-interest. The public policy consideration is evident. None of the mitigating circumstance relative to the defendant or to the nature of his offense are present. Without some incentive however, cooperation will surely disappear.

The need for, and use of, such cooperation is uniquely in the province of the prosecutor. Levels of cooperation are ephemeral and impossible to weigh or categorize. The private disclosure of a name, place or item may be worth infinitely more than a week's testimony, depending on the facts of a particular case.

Like the tender of plea, the value of cooperation is something best weighed on a case-by-case basis. The guidelines should perhaps recognize by means of a policy statement, that cooperation has a value in the sentencing process, and then allow the parties to negotiate its worth with the knowledge that it is subject to the court's review

Very truly yours,



FRANCIS X. BELLOTTI
ATTORNEY GENERAL

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
JOSEPH H. YOUNG
JUDGE
BALTIMORE, MARYLAND 21201

September 22, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Your letter dated October 20, 1986, was received while I was on vacation and I have just now had an opportunity to review it.

I apologize for the delay but I thought I would write to you in any event.

I strongly believe that the guidelines should make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty. I readily recognize that a plea may indicate that the rehabilitation process is underway, but I also think this should be left to the discretion of the sentencing judge to evaluate that factor.

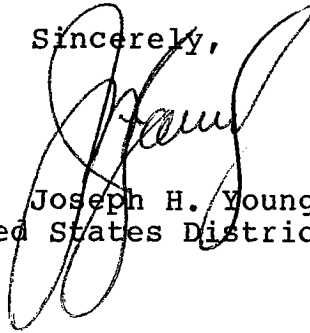
I do not share the concern regarding the acceptance of plea agreements as long as it is clear that the agreement is between the United States Attorney and the defendant and that the sentencing judge is not a part of it. I do believe the sentencing judge has sufficient discretion at the present time to evaluate fairly and thoroughly the propriety of the plea agreement and, in my experience, I have never had an occasion where I thought it was an effort by prosecutors and defense counsel to avoid the sentencing guidelines. As a matter of fact, in my experience, I follow the plea agreements in approximately 75% of the cases and fashion my own sentence in the other cases.

Delving into an attempt to give cooperating offenders consideration for their cooperation can be opening a can of worms. Again, I strongly urge the Commission

to allow this portion of the sentencing process to be resolved by the sentencing judge who will have heard of the extent of the cooperation, the benefit of the cooperation and whether or not it is simply an attempt by a defendant to sell himself for a lesser sentence or that he has truly recognized the wrong of his prior activities and has started on the path of rehabilitation.

Good luck in your most important efforts.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Young', written over the typed name.

Joseph H. Young
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
PROBATION OFFICE

MELVIN C. SMITH
CHIEF PROBATION OFFICER

September 19, 1986

U.S. COURTHOUSE
BOX 3327, GREENSBORO 27402
919-378-5341

Reply to:
P. O. Box 108
Durham, NC 27702-0108
919-541-5494
cc: Greensboro, NC

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

In response to your letter of August 20, 1986, my opinions are as follows:

GUILTY PLEAS:

I agree with the empirical studies that sentencing judges generally impose lower sentences after a plea of guilty and, therefore, agree that sentencing guidelines should provide a downward sentencing adjustment for defendants who plead guilty.

PLEA AGREEMENTS:

I, too, am concerned that plea agreements could seriously jeopardize the directed mission of the Sentencing Commission. Consideration should be given to all charges and sentencing bargaining should not undercut the certainty of a sentence. I strongly oppose the prosecutors and/or the defense attorneys stipulating to the underlying facts of an offense and the offender's behavior. If this is allowed, then we might as well stay with the present system that we have and, therefore, continue to have the tremendous problem of disparity in sentencing.

COOPERATION:

The issue of cooperation is a real "can of worms." I, personally, have problems with people telling on other people and being given the credit for the telling. However, I understand in doing investigations and for further prosecutions it is sometimes necessary for law enforcement agencies and/or prosecutors to "deal." I do believe, however, that before someone should be given any consideration that the cooperation should lead to a prosecution. The person that is prosecuted should be a "bigger" offender and in the case of codefendants or coconspirators, a more culpable individual. In no circumstances should the most culpable person's sentence be minimized below that of a less culpable person that he or she implicates. I feel that the sentencing court should settle disputes regarding the level or quality of cooperation after an investigation has been done by an objective third party such as the Probation Officer.

The Honorable William W. Wilkins, Jr.

Page 2

September 19, 1986

I think the Sentencing Commission must be very careful in all three areas covered in this letter. If not, the judges power and discretion will be taken away and given to the United States Attorneys and all we would do would be to substitute one system of disparity for another.

I appreciate the opportunity to respond on these issues. Again, please be assured of my continuing support of the Sentencing Commission.

Sincerely,

A handwritten signature in cursive script that reads "Stephen F. Conrad". The signature is written in dark ink and is positioned above the typed name and title.

STEPHEN F. CONRAD
U. S. Probation Officer/
Officer In Charge

SFC/pg

cc: CUSPO, Greensboro, NC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
PROBATION OFFICE

GEORGE BECOUVARAKIS
CHIEF PROBATION OFFICER

WALTER E. HOFFMAN U.S. COURTHOUSE
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NORFOLK 23510
(804) 441-6673
FTS: 827-6673

ROBERT B. AULT
DEPUTY CHIEF PROBATION OFFICER

September 23, 1986

The Honorable William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

This letter is sent in response to your inquiry concerning the proper role of plea agreements in a sentencing guidelines system.

It is my feeling a guilty plea in itself should not necessitate a downward sentencing adjustment as every individual has a right to be tried and is presumed innocent until found guilty. On the other hand, if a defendant chooses to cooperate with authorities, there should be provisions for a downward sentencing adjustment. Cooperation can occur before or after sentencing; each should be considered. Cooperation, for whatever purpose, is essential in assisting authorities in ferreting out others involved in criminal activities. Different levels of cooperation could and should be objectively identified and ascribed proportionate downward adjustments. The ultimate decision concerning the appropriate level of downward adjustment should remain under the purview of the sentencing Judge.

Disputes regarding the level of quality of cooperation should be addressed with the Court; the Court should make the ultimate decision following a review of the matters in dispute. One must always be cognizant that cooperation with authorities can create life threatening situations for those individuals. Assistance to individuals in this predicament has been proffered in the past. If the new sentencing guidelines make this cooperation readily identifiable, some form of protection may need to be considered.

The sentencing Judge should have the authority to accept or reject any plea agreements between defense counsel and prosecutors. The Judge should consider the overall offense, the potential depreciation of the seriousness of the offense, the defendant's participation and culpability, and the impact of said agreement on the Justice System, the individual, the community and the public at large. This would include weighing factors such as punishment and deterrence with consideration of the individual as well as mitigating and/or aggravating circumstances.

Certainly the Sentencing Reform Act would have impact on Rule 11(e)(1)(B) and Rule 11(e)(1)(C) in that specific sentences will be ascribed for specific criminal offenses. However, if flexibility is permitted through carefully scrutinized plea bargains which will be evaluated by the Court and consideration for one's cooperation can be included, there should be a balancing of justice available within the sentencing guidelines.

Sincerely,



Mrs. P. S. Hale, Supervising
U. S. Probation Officer

Robert J. McNichols
Chief Judge

United States District Court
Eastern District of Washington
950 United States Courthouse
Post Office Box 2136
Spokane, Washington 99210

September 8, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am responding to your letter of August 20, 1986. First of all, let me say that I appreciate the opportunity to comment on the various subjects which the Commission is considering.

GUILTY PLEAS

I do not believe that the guidelines should make any distinction between a defendant who pleads guilty and one who stands trial and is found guilty. Such provisions would, in my judgment, have a chilling effect upon an accused in asserting his right to trial by jury.

PLEA AGREEMENTS

The authority for counsel for the government and defense counsel to negotiate plea agreements is not only essential but is, in my judgment, critical to our criminal justice system. I believe that Rule 11 in its present form has worked well and has served the interests of justice. I have great difficulty conceiving how workable guidelines could be developed in this area. The variables in each situation, the nature of the offense, the degree of culpability, the resources required for trial and many, many other factors cause me to believe that broad discretion is necessary.

I could cite case after case in which plea bargaining, under the present rule, has been of great value to the Justice Department, the Judiciary, the public and the accused. In a nutshell, it works. I have held court in

Hon. William W. Wilkins, Jr.
September 8, 1986
Page 2

districts in which government trial attorneys had little authority to bargain. The result was substantially more trials and more appeals without significant difference in the eventual outcome. Unfortunately, I do not believe the public understands the real value and function of plea bargain agreements, but I believe that the vast majority of experienced trial judges, United States Attorneys and defense lawyers will agree with my views.

COOPERATION

I have similar views on this subject. Every case is different. If the government can crack a major drug enterprise only with the cooperation of an accused, the ability to bargain with the accused should not be impaired.

Again, I appreciate the opportunity to comment. Please feel free to call upon me at any time for any service that I can render to the Commission

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. McNichols", written over the typed name.

Robert J. McNichols



NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D. C. 20036

September 16, 1986

William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W., Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

Thank you for your letter of August 20. I am pleased to give you our thoughts on the issues you raise, as they relate to the field of firearms violations and sentencing.

The NRA supports the full imposition of consecutive mandatory penalties for the use of a firearm or other deadly weapon in the commission of a violent crime, as mandated by the Federal Gun Control Act of 1968 (P.L. 90-617 as amended by P.L. 99-308; 924 (c)(2)).

When an individual is found carrying a firearm without a license on federal property, however, and absent criminal intent or action, we believe that individual should be allowed to enter a guilty plea in the expectation of a reduced sentence: probation or a fine. In these cases, the individual is guilty of ignorance of the law, rather than malice aforethought.

An earlier communication from the National Rifle Association presented evidence that firearms violations in violent criminal cases are being plea-bargained away under mandatory sentencing laws that are being craftily circumvented in the name of prison overcrowding. Poll after poll confirms that law-abiding Americans would prefer the expense of increased prison construction to the danger of early release of convicted violent felons. If leniency is given to non-dangerous offenders, there is room aplenty for violent armed offenders in federal prisons.

Cooperation is known to be a major factor in the successful prosecution of many large criminal cases. Cooperation should, perhaps, be recognized in the same manner as are guilty pleas, i.e., downward sentencing guidelines may be appropriate. It may, however, be beyond the scope of this Commission to identify different levels of cooperation. That task may be better left to the prosecutor's written certification to the sentencing court.

Thank you for your interest in our views. We look forward to the publication of your guidelines and appreciate the excellent work of this Commission.

Sincerely,

Wayne R. LaPierre, Jr.
Executive Director



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

WASHINGTON, D.C. 20544
September 19, 1986

DONALD L. CHAMLEE
CHIEF OF THE DIVISION
OF PROBATION

Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I write in response to your letter of August 20, 1986, on the role of the plea agreement in a sentencing guideline system. I shall respond to your questions in the order in which you asked them.

Guilty Pleas

Question: "Approximately 90% of Federal criminal cases are presently disposed of by guilty pleas. Empirical studies show that sentencing judges generally impose lower sentences after a guilty plea for a number of philosophic and practical reasons. Should the sentencing guidelines provide a downward sentencing adjustment for defendants who plead guilty? Or should the guidelines make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty?"

Response: Because defendants who plead guilty have generally been allowed to plead to a lesser charge or to fewer counts of the indictment, they have already been given some adjustment of their sentence. Therefore, there is no need to grant an automatic sentence reduction. The guilty plea, however, is fundamental to an efficient management of the judiciary's time and resources; therefore, we recommend that a Sentencing Commission policy statement provide that the court consider imposing the lower end of the guideline range for those offenders who plead guilty. We recommend that individuals not be automatically granted a reduction in their sentence, e.g. reducing a sentence by a set percentage.

Plea Agreements

Question: "Congress has directed the Sentencing Commission to promulgate guidelines or policy statements that give sentencing judges guidance regarding the acceptance of plea agreements under Rule 11 of the Federal Rules of Criminal Procedure. The legislative history of the Sentencing Reform Act demonstrates Congressional concern that plea agreements not be used to circumvent the sentencing guidelines. What are the appropriate limits of judicial scrutiny of negotiated plea agreements? What standards should a sentencing judge apply in evaluating whether a plea agreement is acceptable according to the letter and spirit of the sentencing guidelines? How does the Sentencing Reform Act impact on "charge bargaining" under Rule 11(e)(1)(B) and "sentence bargaining" under Rule 11(e)(1)(C)? To what extent can prosecutors and defense attorneys stipulate to the underlying facts of an offense and the offender's behavior when such factors mandate a certain sentencing result?"

Response: There should be no limits on judicial scrutiny of negotiated plea agreements. U.S. attorneys and defense counsel along with law enforcement agents should also be directed to provide all of the available guideline facts to the probation officer. The officer should act as an independent investigator who compiles the complete facts of the case. Rule 11 provides that the court has the option, in most circumstances, to defer accepting the plea agreement until the judge has read the probation officer's presentence investigation report. There probably is no strong basis for concern that negotiated pleas will be used to circumvent sentencing guidelines. The court has the option described in rule 11(3)(2), under which it may be apprised of all of the guideline factors before accepting a plea. If, after reviewing the presentence report and finding that the negotiated plea does not meet the guidelines, the court will have a sound basis for rejecting the plea if the negotiations include an agreed upon sentence. If the negotiated plea does not include an agreed upon sentence (FRCP rule 11(e)(1)(B)), the court may accept the plea after finding a factual basis for it, and impose sentence at a later date after reviewing the presentence report. Rule 32 currently requires that the defendant consent to the court reading the presentence report prior to its acceptance of the guilty plea. It would be useful to amend Rule 32 in plea agreement cases to allow the court access without restriction to the presentence report.

Finally, prosecutors and defense attorneys could be encouraged to stipulate to the underlying facts of an offense and the offender's behavior, but they should not be permitted to agree to ignore or deny facts which impact on the sentence. The guideline should state that "negotiated pleas shall not be used to circumvent the sentencing guidelines."

Cooperation

Question: "What recognition, if any, should the sentencing guidelines give offenders who cooperate with authorities? What public policy considerations are involved in encouraging offenders to cooperate in investigations and prosecutions? Should different levels of cooperation be objectively identified and given relative downward adjustments from the otherwise applicable sentence? If so, who should decide the appropriate level or downward adjustment: the sentencing court, the prosecutor in a written certification to the court or the prosecutor and the defense attorney in a written agreement? How should disputes regarding the level or quality of cooperation be resolved?"

Response: Since the early 1970's, the United States Government has granted protected witness status to over 300 individuals a year. Most of these individuals were themselves defendants in a case, who agreed to provide prosecutorial information. The majority of these individuals were given some form of reduced sentence.

It is critical to both the prosecution and the defense that the sentencing process allow consideration for those offenders who provide valuable information and cooperate with the government in the prosecution of others involved in illegal activities. The question is how much recognition should be given and are there varying degrees of cooperating defendants? First, there should be different degrees of cooperation and they should be defined. The lowest level of cooperation might be providing identifying information to a law enforcement officer. Higher up on the scale, one would expect to find more active involvement such as introducing law enforcement agents to persons engaged in criminal activities, recording conversations and working undercover. At the top of the scale would be testimony provided in a court of law. The scale should include a determination of the degree of danger the individual was exposed to, for example, did he have to move his residence, did relatives have to move, were verified threats made? The Sentencing Commission should devise a scale for going below the guidelines. The reward for the defendant's cooperation should be determined by the sentencing judge.

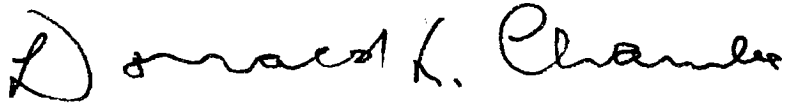
The information that the court uses to assess the worth of the individual's cooperation should come from a variety of sources. In most cases the two most knowledgeable persons, other than the defendant, are the prosecutor and the defense attorney. The prosecutor is best able to provide the court with a description of the cooperation in the matter before the court as well as companion cases. Often prosecutors are not aware, however, of cooperation provided by the individual to other

Honorable William W. Wilkins, Jr.
Page 4

Federal prosecutors and, in particular, state and local authorities. The defense attorney usually will have played a role in these negotiations or will at least be aware of them. The court would be well served to have the probation officer investigate information regarding the individual's cooperation in other jurisdictions. Disputes arising regarding the extent, nature, or value of the cooperation should be decided by the court.

Thank you for inviting our comments.

Sincerely,

A handwritten signature in cursive script that reads "Donald L. Chamlee". The signature is written in dark ink and is positioned above the printed name.

Donald L. Chamlee

cc: Honorable Gerald Bard Tjoflat

National Association of Criminal Defense Lawyers

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Los Angeles, California

September 22, 1986

Judge William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

RE: Plea Bargaining

Dear Judge Wilkins:

NACDL concurs with the position set forth by the Federal Defenders in their position paper on "Plea Agreements, Guilty Pleas and Cooperation" dated September 16, 1986. We believe that the analysis set forth as well as the recommendations contained in the paper submitted on behalf of the Federal Defenders is persuasive and should be adopted by the Sentencing Commission.

NACDL does take a strong position against a "discount" for guilty pleas. We urge the Commission to seriously consider the opposition set forth in the Federal Defender position paper at pages 20 through 23. Our strong position against the "discount" for guilty pleas developed after having had an opportunity to review and consider the discussion which occurred at the August 18, 1986, defense attorney workshop in Washington, D.C. Alan Ellis followed that conference with a letter to you retracting his support for such discounts insofar as they would operate as alternatives to sentence bargains. After further consideration and discussion with other defense counsel, it is now the position of NACDL that such automatic discounts are inappropriate and denigrate the right to a jury trial. There are less onerous means to accomplish the movement of cases including those set forth in the Federal Defender position paper.

Ronald I. Meshbesher
Recent Past President

Albert J. Krieger
ABA House of Delegates

Louis F. Linden
Executive Director

SUITE 550 • 1815 H STREET NORTHWEST • WASHINGTON, DC 20006

(202) 872-8688

Judge William W. Wilkins, Jr.
September 22, 1986
Page 2

We thank you for the opportunity to be heard and for involving NACDL Board Member Alan Ellis in the defense attorney workshop.

Very truly yours,

A handwritten signature in cursive script that reads "Judy Clarke". The signature is written in dark ink and is positioned above the printed name and title.

JUDY CLARKE
NACDL Plea Negotiations Subcommittee
Sentencing Commission Liaison

JCC:teh

cc: Bruce Lyons, Esq.
President, NACDL

Alan Ellis, Esq.
Vice President, NACDL

Edward Marek, Esq.
Federal Public Defender



THE
UNIVERSITY
OF
ILLINOIS
AT
CHICAGO

Department of Criminal Justice (M/C 141)
Box 4348, Chicago, Illinois 60680
(312) 996-5290

October 1, 1986

Mr. William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Mr. Wilkins:

The enclosed response to the Commission's request of August 20, 1986 is submitted for the American Probation and Parole Association. Mr. McDonald, President of APPA, asked me to serve as special liaison to the Commission for the Association. This response is done in that capacity. As I have mentioned in earlier submissions, the positions taken are my own and do not reflect policies of the Association. They do, however, reflect my own reading of the Association and its membership.

If there is any material which the Commission sends out to readership, I would appreciate receiving it. Thank you.

Sincerely,

Patrick D. McAnany
Special Liaison of American Probation and Parole Association

Enclosure

PMcA/jc

I. Introduction

Consistency with principles of desert would point away from allowing sentences to differ based on whether conviction resulted from plea or trial. Admittedly, there are factors which explain disparity in accord with desert, such as personal culpability elements about defendant that come out at trial. But as a general rule, to create disparate sentences based solely on relinquishment of trial rights remains problematic. Further problems arise on constitutional grounds [see Corbett v. New Jersey, 439 U.S. 212 (1978)] which, I take it, the Commission has resolved on its own.

This response will reflect a view of the plea process from the perspective of probation. As such, it will include those features of plea bargaining which impact on the role of probation both at sentencing and in supervision of convicted offenders.

Plea bargaining is a practice that has obvious salience in both federal and state criminal justice systems. If upward of 90% of all cases, even the most serious, are determined by plea and end in conviction, then the practice cannot be written out of existence for sake of consistency with theory, no matter how compelling the theory may be. Of course, no one knows exactly the dynamics of the practice, whether the 90% plea/conviction rates are the result of inducement, bargain and compromise controlled chiefly by the attorneys, or whether in fact the judge and his sentencing habits have a great deal to do with outcomes. "Implicit bargains" are often thought to have as much impact as the activity of the attorneys and defendants. But what the Commission faces is the value---indeed, the need---of making an invisible practice public and prominent without drastically changing the flow of cases through the courts. Even if the Commission can resolve this dilemma, the problem of reconciling pleas practice with desert-based guidelines is considerable. How all of that will affect probation is the final question addressed in this response.

II. Guilty Pleas and Discount Rates

The fear of many experts over the introduction of guidelines or other desert determinants, is that the discretion taken away from judges and parole boards would be transferred to prosecutors. This, they argue, is the worst place to put it because the office of prosecutor is least accountable to the system and least likely to abide by predetermined guidelines and norms on its own. One solution is to legislatively prohibit all pleas bargaining by pro-

secutors. Another is to create various controls on prosecutor discretion, from internal ones, such as self-imposed and administered rules, to external controls placed in the hands of the judiciary or other administrative bodies such as the Parole Commission. Each of these proposals has its pluses and minuses. The alternative suggestion by the Commission of explicitly stated discount rates for pleas falls into the external control variety. Under such a system, it would be up to the court to determine whether the rate offered accorded with the guidelines. This necessarily requires the court to review the pleas agreement under criteria applicable to the facts of the case.

How would such a system affect probation and what might their reaction be to it? Probation is very sensitive to plea bargain practice generally because it represents a source of decision-making about defendants over which they have almost no control. Ideally, conviction turns on legally relevant proof determined by law-trained persons or by juries guided by them. Sentencing is a process in which law-training and legal norms are less relevant. Judges, guided by probation, make sentencing decisions which reflect broader human values of justice, public protection and correction. When the attorneys collapse both of these decisions of guilt determination and sentencing into a single process and determine it outside of the courtroom without the input and scrutiny of judges or probation, probation officers feel uncomfortable. What do the attorneys know about corrections, or even about public safety? Further, can adversarial positions give detached judgement about facts relevant in the case? Even further, what resources do the attorneys have to gather the facts on which to base a judgement?

It is true in the federal system as in some states that judges will not accept a plea agreement without a PSI prepared on the case. But one need not be excessively skeptical to sense the futility of this input after the fact of an agreement. What the attorneys offer the judge is time-saved as well as a reconciliation of adverse interests by the parties. The judge is hardly likely to turn this agreement down even if the probation officer produces information pointing to a different sentence. The pressure to approve the plea agreement results in a lot of defendants being placed on probation caseloads without probation's consent.

Would explicit discount rates remedy this? Perhaps they would. Under a guidelines system, the prosecutor would not be free to deal with a wide range

of penalties. Guidelines would limit sentence according to seriousness and past record and within that range a plea could result in a narrow but significant reduction. Defense attorneys and clients would be aware of these ranges and could decide whether to forego trial or not. What then would probation's role be?

The practice under discount rates would require monitoring by the court, and probation would be a critical source of information. If discount rates depend on offense level, probation officers would have to verify facts of the crime and include all other rate-related information in a PSI report issued for the court. Of course, this raises the issue of what the judge's role should be in the plea process if the probation officer has no authority independent of the court. This new role would not, I think, fit comfortably with probation's present image of staying out of plea bargaining process.

Whether such a discount rate practice could be reconciled with desert sentencing is another question. Certainly, a discount is preferable to a penalty for going to trial---clearly unconstitutional on its face. But is a reduction for a plea not itself also a penalty for going to trial? Further, a discount rate tied to the range and rate determined by desert principles is preferable to no control at all on plea bargaining. But when you get down to it, what desert principle could be invoked to support this practice? Unless there is something about pleading (but only in return for a discount) which per se relates to seriousness, treating the plea vs. trial-determined conviction differently for sentencing makes no desert sense.

Two rationales have been suggested to justify pleas on the basis of seriousness. First, plea bargaining involves the defendant in his own case in a most direct way and thus makes him more accountable for the crime. The give and take between prosecutor and defense attorney forces the defendant to realistically assess the probabilities of guilt and conviction. This "ownership" process, some agree, makes defendants more accountable than does trial, during which the defendant assumes the position of formal denial of liability.

The second rationale presumes that a plea of guilty not only foreswears this position of nonliability but expresses remorse. This explanation has been assailed as unrealistic, and worse, because most defendants act only out of a sense of fear and of foreshortening risk to their interests. This debunking may itself be unrealistic. The psychology of accountability which a defendant

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September 22, 1986

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The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Dear Judge Wilkins:

I had occasion to be in private conversation with The Honorable Robert J. McNichols of the United States District Court here in Spokane and he called to my attention the meeting of the Sentencing Commission and its preparation of the tentative draft of sentencing guidelines. I have practiced some 35 years in the State of Washington and appeared on frequent occasion in federal court. I have also been the chairman of the Criminal Law Section Committee for the Washington State Bar Association in the past and played an active role debating the Uniform Sentencing Guidelines that we presently have in the Superior Court of the State of Washington.

I would like to suggest early up in this letter that the sine qua non of the United States Judicial System is itself an independent judiciary.

We have now experienced the effects of the Uniform Sentencing Guidelines in Superior Court since July, 1985. Since that time we have had an independent study funded by the legislation, a copy of which is enclosed for your advice and guidance. The study was conducted by two eminent scholars at the University of Washington and it already indicates that one of the main concepts of uniformity has been thoroughly breached. The initial argument was advanced that it would provide uniformity and that the rich and poor would be treated the same -- that the divergence that existed between whites and minorities' sentencing would be abolished.

The Honorable William W. Wilkins, Jr.
September 22, 1986
Page Two

Needless to say, the study indicates that throughout the State of Washington there has been the same disparity and discrimination in sentencing habits of our State Judiciary as there was prior to the Uniform Sentencing Guidelines. It might further be called to your attention that we had used the Uniform Sentencing Guidelines in the Juvenile Court System prior to its adoption in the Adult Criminal Justice System. Studies particularly conducted in King County, which is the largest populated county in the State of Washington, clearly evidenced that there were the same injustices in sentencing patterns between the White and rich as there were before with the poor and minorities. So, I would be hopeful that the federal judges would be awfully slow to recommend uniformity of anything.

I suppose the most clariant example of which I speak was the unseemly behavior of both the Senate and House last week in the debate on the new drug legislation. They are willing to provide punishment anywhere from life to death as they felt it would appeal to their political constituents without the slightest concern for administering a sensible resolution as the constitution intended.

I speak briefly to:

Guilty Pleas

I would hope that there never would be a distinction made of a defendant who pleads guilty and stands trial and be subsequently found guilty. While a person should get some special consideration for entering a plea of guilty one should not be penalized by exercising his right to trial. The record is replete with persons who have been sent to the penitentiary who are in fact innocent and there are various degrees and shadings of guilt, all of which can come to the attention of a judge when a trial is fully had and should in no way be a deterrent as to the type of sentence unless in trial the defendant has resorted to deception.

Plea Bargains

A plea bargain is something that almost all of us lawyers who practice in the criminal courts use with great frequency. It provides a large element of freedom and the interests of justice is best served by the allowance of bargaining.

The Honorable William W. Wilkins, Jr.
September 22, 1986
Page Three

We have a tendency to forget there are cases which embrace every conceivable possibility and that evidence can be frequently interpreted one way or the other. In a sea of uncertainty the defense lawyer and the United States Attorney should have the full exploration of the use of a plea bargain and in the end justice has a likelihood of receiving the good fruits of those bargains. It diminishes the likelihood of trial and creates an environment where correctness of sentencing is more assured than a trial itself. Obviously, the courts in our jurisdiction requires and gets usually a full explanation as to why a plea bargain is made and they certainly are in no way bound to accept the same. But, if the plea bargain is compelled to be within the sentencing guidelines it seems to me that it would straight jacket plea bargains to the point that its use would be too restricted. From a practical standpoint nothing has effectively reduced the caseload of the court yet maintained the dignity as well as well administered plea bargaining.

Cooperation

I think cooperation should be a consideration in administering any sentencing guidelines but should not in and of itself be the sole determinate factor. In the State of Washington, we have always had the provision for an exceptional sentence, either up or down, from the standard range depending on circumstances. I am enclosing a copy of that statute for your advice and guidance. Our Supreme Court recently held in State v. Oxborrow, 106 Wn. 2d 525 (August 14, 1986), that once a judge either lowered or raised the penalty under the special circumstances that the sentence could not be reversed unless there was a manifest abuse of judicial discretion.

The fear comes from adding time above the standard range, more so than from granting leniency under the standard range in that public and passion compel situations where judges are more constrained to go up than they are willing to go down. It harkens back to my original observations about the death penalty vote by the United States Senate and Congress. When the public is on a quest we have had witch hunts. One would need to go no further back than the days of the McCarthy hearings and those infamous decisions on cases of alleged communism, the loyalty oath cases, the McCarran Act cases and I think the early days of the War in Vietnam. Most all

The Honorable William W. Wilkins, Jr.
September 22, 1986
Page Four

federal judges were giving the full five years to CO's and I recall specifically one judge in Ohio who openly boasted that no one charged with a draft evasion case has received less than the full five. So, the temper of the times does affect the sentencing patterns.

I hope my observations have been somewhat helpful and I thank you for allowance to communicate.

Sincerely,



CARL MAXEY

CM:ddd

Enc.

cc: The Hon. Robert J. McNichols

FEDERAL DEFENDER POSITION PAPER ON PLEA AGREEMENTS,
GUILTY PLEAS AND COOPERATION

September 16, 1986

INTRODUCTION

This position paper is submitted in response to questions raised in Judge Wilkins' letter of August 20, 1986, to various Federal Defenders in preparation for the Sentencing Commission's hearing on September 23, 1986, covering plea agreements, guilty pleas, and cooperation under guideline sentencing. The topic headings used below for the most part correspond to the inquiries mentioned in Judge Wilkins' letter.

In this paper the Federal Defenders continue to embrace the position that all forms of plea bargaining under Federal Rule of Criminal Procedure 11(e) are permissible under guideline sentencing and may permissibly produce sentences different from those embodied in the guidelines. We direct the Commission's attention to our previously submitted position paper on plea bargaining under guideline sentencing, which contains arguments that are not repeated herein. The Federal Defenders also believe that "fact bargaining," a form of plea bargaining, should be permitted and that the Sentencing Commission should request that Congress amend Rule 11(e) to include fact bargaining. We think the proper role for the Commission in regard to plea bargaining is to issue general policy statements pursuant to 28 U.S.C. §994(a)(2)(D) to assist judges in

using their power under Rule 11 to accept or reject all forms of plea agreements. If properly used, judicial discretion, as guided by the Sentencing Commission's policy statements, can serve as a means of assuring that the plea bargaining process is not abused and that there is reasonable justification for plea agreements resulting in sentences outside the guidelines.

We take the position that cooperation should be rewarded in appropriate cases, and that the specific downward sentence adjustment for cooperation should be determined through plea bargaining with judicial oversight, or by the sentencing judge. We believe it is neither feasible nor just to institute a system of graduated discounts for fixed, objective levels of cooperation built into the guidelines. Disputes regarding cooperation should be resolved by sentencing judges at the sentencing proceedings. Admissions of guilt should not be considered a form of cooperation.

Finally, almost all Federal Defenders feel that an explicit, automatic guilty plea "discount" should not be provided for in the guidelines because it denigrates the fundamental right to a jury trial.

PLEA AGREEMENTS

1. Legislative History

The Sentencing Reform Act directs the Sentencing Commission to promulgate "general policy statements" concerning, inter alia, "the appropriate use of . . . the authority granted under rule 11(e) (2) of the Federal Rules of Criminal Procedure to

accept or reject a plea agreement entered into pursuant to rule 11(e)(1)." 28 U.S.C. §994(a)(2)(D). The evolution of this particular provision of the Act is explained in the Senate Judiciary Committee Report, which comprises the chief source of legislative history of the Act:

The provision of subsection [994](a)(2)(D), concerning the issuance of policy statements with regard to plea acceptance, is especially important. The guideline sentencing provisions of S.1437 in the 95th Congress were criticized on the ground that, while structuring and rationalizing the exercise of judicial sentencing discretion, they did not also address the exercise of prosecutorial discretion at the charging and plea agreement stages of criminal proceedings. As a result of this omission, it was claimed, prosecutorial decisions -- particularly decisions to reduce charges in exchange for guilty pleas -- could effectively determine the range of sentence to be imposed, and could well reduce the benefits otherwise to be expected from the bill's guideline sentencing system.

One approach that has been suggested for dealing with this situation is to have sentencing judges review charge-reduction plea agreements to ensure that such agreements do not result in undue leniency or unwarranted sentencing disparities. Subsection (a)(2)(D), in combination with the bill's modification of Rule 11(e) of the Federal Rule of Criminal Procedure (to clarify that the Rule covers withholding of charges as well as dismissal of charges) and the addition of subsection (q) of section 994 (to require careful attention by the Sentencing Commission to the effects of plea agreements on sentencing under the new act),[*] is intended to implement this suggestion. It would require the Sentencing Commission to promulgate policy statements for use by a sentencing court in determining whether, pursuant to Rule 11(e)(2), to accept a

* This Senate Report was based on a bill that was amended before it was finally passed by both Houses and enacted as the Sentencing Reform Act. In the final version, Rule 11(e) was not amended as described, and the reference to §994(q) is instead contained in Sentencing Reform Act of 1984, Pub. L. No. 98-473, §236(a)(2), 98 Stat. 1987, 2033.

charge-reduction agreement described in Rule 11(e) (1). This approach is intended to provide an opportunity for meaningful judicial review of proposed charge-reduction plea agreements, as well as other forms of plea agreements, while at the same time to guard against improper judicial intrusion upon the responsibilities of the Executive Branch.

S. Rep. No. 225, 98th Cong., 1st Sess. 167 (1983) (footnote omitted; emphasis added) (hereafter "Senate Report").*

This explanation for §994(a) (2) (D) makes even more sense if one considers it in context, that is, in light of the current practice with regard to Rule 11(e) plea bargaining. Under Rule

* This explanation is contained in the detailed section-by-section analysis of the Senate Report. It is also summarized in an earlier portion of the Report that highlights several important provisions of the Act:

Some critics expressed the concern that a sentencing guidelines system will simply shift discretion from sentencing judges to prosecutors. The concern is that the prosecutor will use the plea bargaining process to circumvent the guidelines recommendation if he doesn't agree with the guidelines recommendation.

The bill contains a provision designed to avoid this possibility. Under proposed 28 U.S.C. 994(a) (2) (D), the Sentencing Commission is directed to issue policy statements for consideration by Federal judges in deciding whether to accept a plea agreement. This guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines. Professor Stephen J. Schulhofer, who initially raised the question of whether sentencing guidelines would shift too much discretion to prosecutors, has stated that judicial review of plea bargaining under such policy statements should alleviate any potential problem in this area.

Id. at 63 (footnotes omitted).

11(e)(1), the prosecutor and the defendant can agree that in exchange for the defendant's plea of guilty the prosecutor will: (1) move for dismissal of other charges (charge-reduction plea agreement); (2) make a non-binding recommendation, or agree not to oppose the defendant's request, for a particular sentence (sentence-recommendation plea agreement); and/or (3) agree that a specific sentence is appropriate (sentence-agreement plea agreement). The court has the power to accept or reject any of these three forms of plea agreements. Fed. R. Crim. P. 11(e)(2), (3), (4). In practice, however, judges often review and many reject the two forms of sentence plea agreements, but it is rare for a judge to reject a charge-reduction plea agreement, perhaps because the decision as to what to charge is considered peculiarly within the prosecutorial province. As a result, some witnesses who appeared before Congress, and ultimately the Senate Judiciary Committee as well, were concerned with the lack of judicial oversight of charge bargaining and the consequent potential for prosecutorial circumvention of the goals of guideline sentencing through manipulation of charge-reduction plea agreements. In the above-quoted portions of the Senate Report, the Judiciary Committee takes note of this potential problem and directs the Sentencing Commission to ensure that there is appropriate oversight of charge-reduction plea agreements "as well as other forms of plea agreements," meaning sentence-recommendation and sentence-agreement plea agreements.

Several conclusions are clear from this legislative history. First, Congress envisioned a sentencing system in which prosecutors and defense counsel would continue to enter into Rule 11(e)(1) charge-reduction, sentence-recommendation and sentence-agreement plea agreements which could result in sentences different from those indicated by the guidelines. Second, if all Rule 11(e)(1) agreements were uncritically accepted by sentencing judges as a matter of course, prosecutors could abuse the plea bargaining practice in order to supplant guidelines sentences with their own personal preferences. Third, Congress decided to prevent potential prosecutorial abuse through exercise of the judicial authority in Rule 11 to accept or reject plea agreements rather than by outlawing Rule 11 plea bargaining altogether. Therefore, the Sentencing Commission is to formulate general policy statements to aid sentencing judges in distinguishing between the appropriate exercise of prosecutorial power under Rule 11 and the inappropriate abuse of that power.

2. Limits of and Standards for Judicial Scrutiny

With this background in mind, the answers to the questions concerning plea bargaining posed by the Commission in Judge Wilkins' letter follow naturally. The "appropriate limits of judicial scrutiny of negotiated plea agreements" (Judge Wilkins' letter) are determined by the purpose of such scrutiny -- to check potential prosecutorial abuse by ensuring that plea agreements do not result

in "undue leniency or unwarranted sentencing disparities." This does not mean that no leniency or disparity is permitted. As Congress has said:

The key word in discussing unwarranted sentence disparities is "unwarranted." The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.

Senate Report at 161.

Thus, the proper role or limit of judicial scrutiny of Rule 11 plea agreements is to distinguish "justifiable differences" between the sentences of similarly situated offenders from unjustifiable differences. General policy statements should direct sentencing judges to ascertain whether there is some reason for the difference between a sentence resulting from a plea agreement and that resulting from application of the guidelines. If there is some legitimate justification, the agreement should be accepted; on the other hand, if the sentence resulting from the agreement is "unduly" lenient and there is no reasonable justification for it differing from the guideline sentence, it should be rejected. This standard can be used by sentencing judges in evaluating whether plea agreements are "acceptable according to the letter and spirit of the sentencing guidelines" (Judge Wilkins' letter).

As for specific justifications which would warrant acceptance of a plea agreement, the first portion of the Senate Report quoted above provides an important clue. It cautions against "improper judicial intrusion upon the responsibilities of the Executive Branch". Senate Report at 167. Thus, acceptance of a plea agreement could be justified by such appropriate Executive Branch considerations as the proper allocation of prosecutorial resources and the desire to conserve such resources for other, more serious offenders. Prosecutors might also justify a plea agreement based on an assessment of the probability of conviction. This assessment would depend upon the strength of the Government's case, including such factors as the potential unavailability of important witnesses, the quality of the Government's witnesses, the potential unavailability of evidence (e.g., due to loss or suppression), or the quality of the Government's evidence (e.g., all circumstantial or requiring numerous inferences to prove guilt), and on the strength of possible defenses, such as duress or coercion, the defendant's limited intelligence, or the defendant's impaired mental condition. Other prosecutorial considerations that might justify a plea bargain include the importance of obtaining a defendant's cooperation, the desire to avoid disclosure of the identity of informants, the need to protect the secrecy of information relating to national security, or a concern for the victims or witnesses who would have to undergo the ordeal of examination at a public trial concerning traumatic events.

These examples are illustrative only. They do not constitute a catalogue of permissible justifications for plea agreements. Any attempt to formulate an exhaustive list would be futile because of the numerous factual variations in each case. Hence, we believe that the policy statements establishing standards for acceptance or rejection of plea agreements should be general, with specific examples provided for purposes of illustration, and that the policy statements make clear that the list of examples is not rigid or exhaustive.*

3. Impact of Act on Charge and Sentence Bargaining

In accord with this analysis, we believe that the Sentencing Reform Act impacts on charge bargaining under Rule 11(e) (1) (A) and on sentence bargaining under Rule 11(e) (1) (B) and (C) by encouraging judges to subject both types of plea bargains to meaningful review before accepting them. There are several factors built into the Act to guide judges in this review and thereby protect against abuse. Judges will now, for the first time, have a standard against which to measure the sentence that would result from the plea bargain. This standard of comparison is contained in the applicable guidelines themselves. In addition, under the policy statements we advocate to be promulgated pursuant to 28 U.S.C. §994(a) (2) (D), judges would have to determine whether there is some legitimate justification for entering into plea agreements for sentences different from those recommended by the guidelines.

* For an example of the format that could be used to set forth the general rule and the list of illustrations, see Fed. R. Evid. 901.

We would suggest that the policy statements also require sentencing judges to include a statement of their reasons for accepting a plea agreement. This statement could include, but need not be limited to, the considerations cited by the prosecutor as leading to his decision to enter into the plea agreement. By having prosecutors and judges justify extra-guideline plea bargains on the record, those responsible for monitoring the system (including the press and the public, as well as those responsible under the statute) can evaluate the propriety of individual plea agreements to ensure that Rule 11 is not being abused at the expense of the goals of guideline sentencing. Indeed, the Act requires that all sentences and relevant sentencing information be reported regularly to the Sentencing Commission, 28 U.S.C. §994(v), and it directs the Sentencing Commission to report to the General Accounting Office, the courts, the Department of Justice, and Congress four years after the guidelines go into effect on several issues, including the impact of the guidelines on prosecutorial discretion and plea bargaining. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §236(a)(2), 98 Stat. 1987, 2033. These newly formalized record-keeping and oversight requirements will permit the Commission and other interested parties to track plea bargaining practices and to take steps to correct any abuses, both individual and systemic, that might occur, including, if necessary, adopting amending legislation.

In addition to these built-in safeguards contained in the Act, there are other factors that will mitigate against potential prosecutorial abuse of the plea bargaining process after the guidelines are adopted. One inherent check is provided by the fact that prosecutors will continue to have a strong interest in maximizing convictions and penalties; they have little or no incentive to make unwarranted sentencing concessions. Also, the Department of Justice will have a vested interest in assuring that plea bargaining does not undermine the guidelines because it was the Department of Justice that essentially sparked the movement for federal guideline sentencing. As a primary advocate of guidelines, it is likely the Department will take steps to see that its prosecutors do not unreasonably circumvent them.

In short, we see the Act impacting on charge and sentence bargaining by subjecting both to standardized review by sentencing judges and to a system of regular, formalized reporting and oversight, all geared toward preventing abuse at the expense of the goals of guideline sentencing.

This analysis assumes, as we believe Congress assumed, that both sentence bargaining under Rule 11(e)(1)(B) and (C) and charge bargaining under Rule 11(e)(1)(A) will continue and may result in sentences below those indicated by the guidelines. We see no reason to distinguish between charge bargaining and sentence bargaining in terms of the effect each will have on a guideline

sentencing system. Both involve prosecutorial discretion that can be used to achieve extra-guideline sentences and, if unchecked, can be abused. However, both can be properly subjected to judicial control through the same mechanism.

4. Fact Bargaining

Despite what we believe to be a position soundly based upon Congressional policy and consistent with reason and logic, we understand that the Sentencing Commission may disagree and may promulgate policy statements pursuant to 28 U.S.C. §994(a)(2)(D) which focus only on fact and charge bargaining and express the Commission's view that sentence bargaining is no longer appropriate.* Particularly if that is done, but even if it is not, we would advocate amendment of Rule 11 to deal with aspects of "fact-bargaining," as described below.

There is nothing in the law generally or in the Sentencing Reform Act in particular that would prohibit prosecutors and defense attorneys from stipulating to the underlying facts surrounding an offense and offender. But there is also no statute or rule of criminal procedure governing judicial acceptance or rejection of such a stipulation. We believe Rule 11(e)(1) should be amended formally to permit prosecutors and defense attorneys to enter into fact stipulations that may be accepted or rejected by sentencing

* We note that policy statements differ from guidelines in that violations of policy statements do not give rise to a right to appeal. 18 U.S.C. §3742; see also Senate Report at 167. Thus, policy statements are more advisory in nature than guidelines. The Commission's mandate with regard to plea bargaining is limited to promulgating policy statements. 28 U.S.C. §994(a)(2)(D).

judges in the same manner, and subject to the same policy statement standards, as other Rule 11 plea bargains. Rule 11 should also be amended to provide that if the sentencing judge rejects a negotiated fact stipulation or seeks to sentence based on facts outside of the stipulation, the defendant would have the right to withdraw his plea, as is the case with Rule 11(e)(1)(A) and (C) plea bargains. This withdrawal provision is vital, as the Probation Department's presentence investigation and report may contradict the negotiated stipulation or may reveal facts that go beyond the stipulation.

While the Sentencing Commission has the authority to promulgate policy statements in this area, we think it preferable to embody these principles governing fact bargaining in the Rules of Criminal Procedure. As noted above, the defendant's right to withdraw his guilty plea when it is based on a fact stipulation that is rejected should have the force of law; policy statements, unlike the Rules of Criminal Procedure, are advisory only and do not have the force of law. Also, because we see fact bargaining as another form of plea bargaining just like charge and sentence bargaining, we think all three should be treated alike; fact bargaining should be included with charge and sentencing bargaining in Rule 11.

In addition, policy statements like those governing charge and sentence bargaining should apply to fact bargaining. Thus, courts should examine fact stipulations that will result in sentences different from guideline sentences to ascertain whether there is some reasonable justification for the fact bargain. Policy statements could also outline the scope of facts to be contained in

negotiated stipulations. These would include: (1) facts made relevant by the guidelines or policy statements to sentencing for the crime(s) and offender under consideration, and (2) facts related to the crime(s) and offender under consideration which are relevant to a request to sentence outside the guidelines (i.e., special aggravating or mitigating circumstances or factors not adequately addressed in the guidelines).

5. Relationship of Charge, Sentence and Fact Bargaining

At the Sentencing Commission's workshop for defense counsel on August 18, 1986, there appeared to be a possibility that the Commission might reject sentence bargaining while accepting charge and fact bargaining. We wish to stress that we view charge bargaining, sentence bargaining and fact bargaining as all standing on an equal footing with regard to guideline sentencing. All three are forms of plea bargaining that can be used to arrive at sentences different from those indicated by the guidelines. If there is potential for improper circumvention of the guidelines through one approach, there exists the same potential for improper circumvention of the guidelines by the other two means. Because all present the same potential for abuse, a position against sentence bargaining but in favor of other forms of plea bargaining is inconsistent. We think it clear that Congress did not intend to prohibit any of them but, rather, to enlist judicial and Sentencing Commission oversight to ensure that they are used in an appropriate manner.

COOPERATION

1. Recognition and Public Policy

The guidelines should permit but not require reduction of the presumptive sentence below the guideline range for offenders who cooperate with law enforcement authorities. Cooperation can be of significant assistance in criminal investigation and prosecution. In appropriate cases it should be rewarded. However, cooperation does not always reflect positive social values. There are individuals who cooperate for loathsome motives, and others who refuse to cooperate due to respectable, principled ideals or well-founded apprehension. For these and other reasons discussed later in this section, the Federal Defenders believe that the complex question of the appropriate level of recognition for cooperation in any individual case should be left to the discretion of sentencing judges to be guided by policy statements on the subject and, perhaps, to be limited to a certain maximum amount.

2. Objective, Fixed Discounts

We believe that it is neither wise nor possible fairly to identify objective levels of cooperation that will reflect the extent and significance of the defendant's cooperation in individual cases. This can be illustrated by using an example suggested by the Commission's staff at an August 18, 1986, workshop for defense counsel. In the example, the guidelines would state that level 3

cooperation consists of providing information to the authorities that leads to the arrest of other alleged offenders, level 4 involves openly testifying against such offenders to obtain their convictions, and level 5 cooperation requires affirmatively placing one's self in a dangerous investigatory situation, such as by working undercover wearing a recording device. The guideline range would be reduced by fixed, automatic percentages which would increase from level 3 to level 5.

The difficulty with this proposal is that it does not necessarily lead to the intended result when applied in individual cases. For instance, it could be more dangerous to supply information against violent offenders who may retaliate than to put one's self in the middle of a securities scam with a hidden camera. In these cases, the level 3 cooperation against the violent offender would represent a more significant effort on the defendant's part than the level 5 cooperation in the securities fraud, yet, under the proposed system, the level 5 cooperating defendant would receive the greater reward. We use this example to demonstrate that we believe there are too many varying fact patterns involved in individual cases to establish an objective description of levels of cooperation that would fairly reflect the significance or extent of the defendant's cooperative effort.

Objective levels of cooperation fixed in the guidelines would also give rise to problems in assessing the value of the defendant's cooperation to law enforcement authorities. Again using the sample levels described above, it would be far more important for the authorities to have an organized crime underling testify

against his bosses than to have the leader of a commodities fraud conspiracy testify at the trial of his secretary, who may have made a phone call in aid of his fraud. Yet, with fixed levels of reward like those described above, both these offenders would fall into level 4 and receive the same sentence discount. This illustrates the difficulty, indeed, the impossibility, of establishing fixed, objective levels of reward for different levels of cooperation which fairly represent the value of the defendant's cooperation in each case.

In addition, the greater the reward for cooperating the greater the incentive to fabricate in order to obtain the higher level sentence reduction. This danger exists because the desire of an individual to avoid incarceration or to reduce the time he must serve is enormous. If automatic, objective levels of cooperation are included in the guidelines with descriptions of behavior or factors that will result in specific sentence reductions, cooperating defendants may be motivated to supply information, whether accurate or not, which meets the standard for the higher discount. For example, if turning in a narcotics distribution ringleader is identified in the guidelines as resulting in a greater sentence discount than turning in a street level narcotics distributor, a cooperating offender can falsely accuse one of the latter of being one of the former.

In short, because such factors as the defendant's motives in cooperating, the significance and extent of the defendant's cooperative effort, and the value of the defendant's cooperation to the authorities cannot be accommodated appropriately in a fixed,

objective discount system, we believe an individualized, case-by-case assessment is necessary and is the only proper method of providing just recognition for cooperation.

3. Who Decides

There should be two avenues available for assessing the appropriate downward adjustment for cooperation. In some cases, it is particularly important to the prosecutor to obtain a defendant's cooperation. In these instances, the prosecutor should be able to bargain with the defendant for that cooperation in exchange for a specific sentence reduction. These bargained-for cooperation agreements should be treated in the same manner as other bargained-for pleas, that is, they should be subject to judicial scrutiny under the Rule 11 principles set forth above. Thus, if the prosecutor presents to the sentencing judge reasonable justification for a specific negotiated sentence reduction based on cooperation, the judge should accept the cooperation agreement and impose the agreed upon sentence; however, if the agreed upon cooperation discount is unduly lenient and there is no legitimate justification for such a departure from the guideline sentence, the sentencing judge should reject it.

Some cases will arise in which the prosecutor has not entered into a cooperation plea agreement or has entered into such an agreement but has not agreed upon a particular sentence recommendation. In these cases, the sentencing judge should evaluate the nature and extent of the defendant's cooperation and should decide what, if any, downward sentence adjustment is appropriate.

In both these instances, whether the judge is deciding on a specific cooperation discount or deciding whether to accept a specific negotiated cooperation discount, he should be guided by policy statements that direct him to assess at least the three factors noted above: the significance and extent of the defendant's cooperative effort, the value of the cooperation to law enforcement and to society, and the defendant's motives in cooperating.

4. Resolving Disputes

Disputes concerning the nature or quality of a defendant's cooperation should be resolved by the sentencing court at the sentencing proceedings. Each side should have the opportunity to present evidence supporting its claim and refuting the other side's position, and to argue for or against a particular cooperation discount, pursuant to procedures which satisfy the requirements of due process appropriate at sentencing (see Federal Defenders' position paper on Fact-Finding in Guideline Sentencing).

5. Admission of Guilt

At the Sentencing Commission's workshop for defense counsel on August 18, 1986, it was suggested that the defendant's admission of guilt, whether through a guilty plea or post-trial, be considered the first level of cooperation and occasion a consequent reduction in sentence. The Federal Defenders oppose this suggestion. An admission of guilt does not in and of itself aid law enforcement. Moreover, sentencing judges are not apt to look kindly

upon a defendant who admits his guilt after having gone to trial. Judges may punish such defendants by, for example, sentencing them at the high end of the guideline range before taking into account the discount for an admission of guilt. In addition, rewarding an admission of guilt will tend to chill the defendant's exercise of his right to appeal his conviction. In many instances, an admission of guilt will make it impossible to raise a substantive appellate issue or will lead to a finding of harmless error. Furthermore, should the conviction be reversed on appeal and a new trial ordered, the admission of guilt would become evidence at the new trial. Also, with a built in discount for admissions of guilt, admissions will sometimes be entered solely in anticipation of receiving a reward rather than for the socially laudable purpose of acknowledging genuine contrition.

GUILTY PLEAS

Almost all Federal Defenders oppose the concept of the guidelines containing an explicit, automatic reduction from the guideline sentence for defendants who plead guilty. Such a mechanism denigrates the right to a jury trial which enjoys a position of particular prominence in our system of justice. Placing the explicit imprimatur of the Sentencing Commission (and of Congress, through its approval of the work of the Commission) on such an inducement to forgo a constitutional protection is offensive

to the reverence with which society purports to treat this cherished right. Even though an explicit guilty plea discount is couched as a reward for those who plead rather than a penalty for those who elect to go to trial, the reality is that those who plead guilty (approximately 90% of federal defendants) will receive lower sentences in comparable circumstances than those who exercise their constitutional right (approximately 10% of federal defendants). We can only conclude that this will result in at least the appearance, if not in fact the reality, that those who exercise their constitutional right are penalized.

If the automatic guilty plea sentence reduction is minimal (e.g., 10% below the guideline range), it will have little practical effect in terms of encouraging guilty pleas in order to prevent excessive numbers of criminal trials. In that case, it will constitute an essentially gratuitous affront to the fundamental right to a jury trial. On the other hand, if the automatic guilty plea sentence reduction is substantial, it will induce defendants to plead guilty even when they have a viable case and/or are not guilty of the offense charged. Consequently, whether the discount is large or small, it does violence to our system of justice and impinges upon an esteemed constitutional right.

A number of judges who currently reward guilty pleas with a reduced sentence reason that a defendant who pleads guilty acknowledges his responsibility and displays remorse, and that he has thereby taken the first step toward rehabilitation. But a guilty

plea is not always an expression of responsibility and remorse; it will be even less likely to indicate genuine remorse and consequent amenability to rehabilitation if it is rendered within a system that guarantees an automatic reward just for pleading. In addition, under the new sentencing philosophy embodied in the Sentencing Reform Act, rehabilitation is only one of four sentencing objectives. 18 U.S.C. §3553(a)(2). The other three would not be served by a guilty plea discount.

We understand that a sentence reduction for a guilty plea is viewed as a means of encouraging defendants to plead in order to prevent the backlog of cases that would result if criminal defendants had nothing to lose and everything to gain by going to trial. But this practical consideration should not override the apparent burden an explicit, automatic guilty plea reduction would place on the right to trial. Moreover, there are other, preferable means of addressing the potential caseload problem that could result under determinate sentencing. These include Rule 11(e) plea bargains and sentencing based on the offense of conviction rather than on the totality of the defendant's alleged conduct, both of which would provide sufficient inducement to plead in appropriate cases.

We recognize that some courts have held that rewarding a defendant who pleads guilty in an individual case does not impose an unconstitutional burden on the right to a jury trial. We do not think that an explicit, system-wide, automatic discount which would apply in 90% of all cases would necessarily be viewed in the same manner by the courts. But even if it is, this does not mean that it

is good public policy. The Sentencing Commission has the authority to set standards greater than a constitutional minimum. In many instances, Congress has granted rights more extensive than those guaranteed in the Constitution. It is sound public policy not to destroy the illusion that we do not penalize criminal defendants for exercising their constitutional right to a trial. Therefore, the notion of an explicit, automatic guilty plea discount built into the guidelines should be rejected.

CONCLUSION

For the foregoing reasons, the Federal Defenders support the continued use of all forms of plea bargaining, including charge, sentence and fact bargaining, following adoption of the guidelines. The Sentencing Commission should direct judges to require justification for extra-guideline sentences arrived at through plea bargaining in order to prevent abuse and circumvention of guideline goals, and it should use its own oversight function to the same end. The Federal Defenders also support recognition in sentencing for a defendant's cooperation in appropriate cases, and feel that the only fair and feasible means of rewarding cooperation must be through plea bargaining or through judicial discretion applied on a case-by-case basis. Finally, almost all Federal Defenders oppose an automatic sentence reduction in the guidelines for defendants who plead guilty because of the negative effect they believe it would have on the constitutional right to a jury trial.

United States District Court
Eastern and Western District
of Kentucky

Eugene E. Siler, Jr.
Chief Judge, Eastern District
Room 207, U.S. Courthouse
London, Kentucky 40741

September 19, 1986

Phone: (606) 878-6822

Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

RE: Sentencing Guidelines

Dear Judge Wilkins:

In response to your letter of August 20, 1986, concerning the proper role of plea agreements in a sentencing guidelines system, I have tried my best to answer the inquiries made:

1. Guilty Pleas

The sentencing guidelines should not provide a downward sentencing adjustment for defendants who plead guilty. No distinction should be made between a defendant who pleads guilty and one who stands trial. There is a right of every defendant to stand trial, and the courts have held that it is improper to give that consideration. Obviously, from the data which you mentioned in your letter, sentencing judges have apparently imposed lower sentences after a guilty plea, but they should not do it as a matter of policy.

2. Plea Agreements

The court should be careful in insuring that negotiated plea agreements, if they are "sentence bargaining" under Rule 11(e)(1)(C), should be within the guidelines set out. If they are not, the court should make certain that any reasons the parties give for going outside the guidelines should be valid. I do not think that there will be any impact on "charge bargaining" under Rule 11(e)(1)(B), as the defendant will then be convicted on only one charge. So long as the court finds that the prosecutors and the defense attorneys are acting in good faith, I believe that the court can allow counsel to stipulate to the underlying facts of an offense and the offender's behavior when those factors mandate a certain sentencing result.

3. Cooperation

Sentencing guidelines should definitely give recognition to offenders who cooperate with authorities. Public policy should also encourage offenders to cooperate, as they sometimes take a genuine risk by doing so.

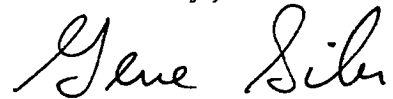
Honorable William W. Wilkins, Jr.

September 19, 1986

Page two

I believe that different levels of cooperation should be objectively identified, if that is possible, but I am not certain that there are objective factors which can be set out. If that is found to be possible, relative downward adjustments should be made from the otherwise applicable sentence. The decision of the appropriate level for downward adjustment because of cooperation should be up to the prosecutor or the prosecutor and defense counsel together. I do not believe that this is a court function. If there is a dispute regarding the level or quality of cooperation, that could only be resolved by the court after each party is allowed to introduce evidence or argue the extent of cooperation.

Sincerely,

A handwritten signature in cursive script, reading "Gene Siler".

Eugene E. Siler, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
PROBATION OFFICE

DANIEL D. RECTOR
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September 18, 1986

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Honorable William W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

Dear Honorable Wilkins:

Forwarded are responses from our district regarding the proper role of plea agreements in a sentencing guideline system.

Guilty Pleas

Should the sentencing guidelines provide a downward sentencing adjustment for defendants who plead guilty? No, however, the Judges should be given the discretion to impose lower sentences if such is warranted.

Plea Agreements

The judiciary's involvement in the scrutiny of negotiated pleas should extend only to the assurance that the agreement is within constitutional bounds and that it adheres to local rules regarding the acceptance of negotiated pleas.

In evaluating a plea agreement, the sentencing judge must first determine that there is a factual basis for the plea. Further, the judge should make sure the plea agreement is not constructed in such a manner so as to circumvent the spirit or intent of sentencing guidelines.

The Sentencing Reform Act will have some impact on the "charge bargaining" under Rule 11(e) (1) (B). It would seem that the government would want to be careful in not bargaining to dismiss charges that might preclude the Court from imposing a sentence within the guidelines. Since the "guidelines" will be predicated on certain known or given factors, the charge bargaining process, if handled improperly, could circumvent the spirit and intent of the determinant sentencing process.

The issue of "sentencing bargaining" under Rule 11(e) (1) (c) will have the same concerns under the Sentencing Reform Act as stated above. Certainly, the Court will look with a jaundiced eye at a plea bargain that would agree to a sentence above or below the guidelines.

Honorable William W Wilkins, Jr.
Chairman

Page - 2 -

Given that certain "underlying facts" of an offense and an offenders behavior may mandate a certain sentencing result, it would appear a stipulation by prosecutor and defense counsel may not be sufficient. It would appear that since such "factors" play such a significant and overwhelming role in the sentencing process under the Sentencing Reform Act, these "facts" should be spelled out and substantiated in such clarity as to unequivocally support any sentence agreement or sentence ultimately imposed by the Court.

Cooperation

The sentencing guidelines should not give recognition to offenders who cooperate. However, if cooperation is to be recognized at any point, it should be included in the plea agreement between the government and defense attorney.

Sincerely,

Fredrick Rogers 

FREDRICK ROGERS

Supervising U. S. Probation Officer

FR:ph

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September 17, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

Attention: Mr. William W. Wilkins, Jr.
Chairman

Dear Mr. Wilkins:

In response to your August 20, 1986, letter I have offered the following comments as they apply to the questions you have raised concerning guilty pleas, plea agreements and cooperation.

GUILTY PLEAS

Given the dramatic increase of criminal intake in the Federal Court System, and the general expectations that this trend will continue, the acceptance of provisioned guilty pleas seems to be most realistic and practical. Hence from the point of view of the Criminal Justice System, (not withstanding the fact that it is assumed that all defendants who plead guilty are guilty), given their entry of a plea, there should be some inducement and some benefit to them. As is the custom now, pleas of guilty are entered to lesser statutory penalty exposure, nevertheless, the Court is and should be apprised of the defendant's role in the total offense behavior. Hence at this point, penalty exposure is usually limited by the entry of a guilty plea. Given these factors and the approval of the Assistant U.S. Attorney, defendants who enter guilty pleas should benefit by having the guidelines adjusted in a downward trend of not more than one-third to one-fourth of the appropriate sentencing guidelines. Although some may argue that this is minimum adjustment to the guidelines, I believe that it is a fair and equitable approach, given the fact that by pleading guilty most defendants have already limited their statutory penalty exposure dramatically.

PLEA AGREEMENTS

My exposure to plea agreements has been solely within the District of New Jersey. The plea agreements usually cite the following areas of comments: 1) the defendant's cooperation if any, 2) the agreement that the government will dismiss outstanding counts of the indictment or information and 3) that the plea agreement is not binding upon other federal and state agencies, and finally that the United States would stand mute at time of sentence other than to correct any factual inaccuracies contained within the presentence report. For most district judges have accepted the plea agreements and it seems rare when such an agreement is not accepted by the Court. Given the upcoming sentencing guidelines requiring mandated sentences, I am not quite sure how effective and critical plea agreements would be. Although I have always felt the United States Attorney should take a stand in Court by expressing or recommending to the Court, a particular sentence, I do not view this as utterly critical, now that the new sentencing guidelines will be mandated. I would have little else comment in this area other than to suggest that the judicial officer still have the authority to scrutinize the plea agreement and to be the final say as to whether it is appropriate and in the best interest of justice.

COOPERATION

It is my belief that this is an essential ingredient in the successful prosecution of many defendants. It should be a realistic concern on the part of the government to offer a practical recompense to those who cooperate. This cooperation should be expressed both publicly and within the plea bargain content. I believe there should be a distinction made between the cooperating citizen within the community and the cooperating co-offender. I embrace the Commission's suggestion for various levels of cooperation and credit for offenders therein. The difficulty, however, may lie in the rewards system. The more serious the crime the more serious the penalty, if a defendant is charged with espionage decides to cooperate against his co-offenders then that particular level of cooperation should not result in a wide span of lesser penalty exposure for the cooperator. The other end of the spectrum would reveal that a "cooperator" in a crime of far less magnitude, say theft of treasury checks (under \$100) should be able to be exposed to a greater lesser penalty limit than one who cooperates in a more serious crime. Although it is acknowledged that this is a confusing area

United States Sentencing Commission
September 17, 1986
Page Three

to evaluate, the worth of one's cooperation I believe it is an essential part of the Criminal Justice System, and those who do should therefore be rewarded.

I hope my comments may be helpful to you. If you require any additional information, please let me know.

Very truly yours,



William P. Carroll
Supervising U.S. Probation Officer

WPC:md

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September 15, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Re: Plea Agreements in a Sentencing Guidelines System

Dear Judge Wilkins:

Reference is made to your letter to Robert Thomas, President, Federal Probation Officers Association, dated August 20, 1986, regarding the proper role of plea agreements in a sentencing guidelines system. Mr. Thomas asked me to submit a response on behalf of the Federal Probation Officers Association.

Regarding guilty pleas, it is believed that the guidelines should make no distinction between a defendant who pleads guilty and one who stands trial and is found guilty. To do otherwise violates not only the "presumption of innocence" premise upon which our criminal justice system is predicated, but imposes a gentle judicial persuasion to plea guilty. An equitable model such as the Sentencing Commission is developing should not discriminate by virtue of the method of conviction.

Regarding plea agreements, it is suggested that the Sentencing Commission promulgate policy statements responsive to the Congressional intent that plea agreements not be used to circumvent the sentencing guidelines. However, by their very nature, negotiated plea agreements and charge bargaining are designed specifically for that purpose. It seems important that discretion be afforded the Court particularly, to allow for unique circumstances calling for an unorthodox disposition. It is paramount that discretion remain with the Court rather

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than the prosecutor. Responsibility for the ultimate sentence must remain with the sentencing Judge who is in the best position to see the "large picture" and to balance conflicting concerns.

In the area of cooperation, it is believed strongly that the sentencing guidelines not give recognition to offenders who cooperate with authorities. It is anticipated that the prosecutor, in filing charges, and the Judge, in plea negotiations, will take into consideration an offender's cooperation. Also, sentencing guideline adjustments favoring cooperating offenders will become common knowledge within the institution and could pose some danger for those identified offenders.

Again, we hope the foregoing observations will be of assistance to the Sentencing Commission in examining their mandate and in preparing a comprehensive and equitable sentencing guidelines document.

Respectfully submitted,



CHARLES L. STEARNS, Supervising
U. S. Probation Officer
Vice President
Federal Probation Officers Association

CLS:de

cc: Mr. Robert L. Thomas
Phoenix, Arizona

Ms. Susan I. Smith
Richmond, Virginia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
PROBATION OFFICE

WILLIAM T. FOSTER
CHIEF PROBATION OFFICER

U. S. COURT HOUSE
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312-435-5700

September 18, 1986

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

We are pleased for the opportunity to respond to your request of August 20, 1986 pertaining to the proper role of plea agreement in a sentencing guideline system. This response was prepared with the assistance of the Chief and Deputy Chief U.S. Probation Officers in this district. A brief introduction will provide the framework in which we have attempted to respond to the Commission's questions.

Of the many issues which we have considered, none in our opinion deserves more careful analysis, consideration and assessment than the issue of the role of plea agreement. This is so because to a great extent the effectiveness of the guideline system to promote a more uniform sentencing practice, which can be executed in a fair and equitable manner, rests with the key policy decision of whether a sentence reflects the degree and seriousness of the offense. A guideline system purports to decrease unwarranted disparities by establishing narrow sentence ranges. If the guideline system simply transfers the discretion from one judicial party to the next, then the task of creating an effective guideline system would, in our view, accomplish very little.

Our position is that plea negotiation is a "necessary evil." It is not a mechanism that promotes justice, but rather, a mechanism that responds to some practical limitations of the criminal justice system. Historically, arguments have been presented attempting to show that abolishing the plea bargaining system would be disastrous. Studies that have demonstrated that this may not be accurate have, so far, not received much support.

We believe the Commission must deal with the greater policy issue with respect to the status of a plea bargaining system. If the Commission, by definition, accepts the view that plea negotiation is a "necessary evil," then the Commission's policy would focus on reducing plea bargaining practice to the extent this is practical or feasible. If, on the other hand, the Commission views plea bargaining as not "a necessary evil" but as a process that is complimentary to the adversary system, then the Commission's policy may, therefore, incorporate a continued plea bargaining system. We believe the Commission should make a clear distinction from a policy point of view with respect to the process of plea bargaining. When this has been accomplished, we believe the issue as to the role it will play in the process will be clearer.

In our analysis, we find a significant relationship between the decision to adopt a guideline system based on the total offense severity versus a system based on the offense to which the defendant has pled guilty. We believe that it is this decision that will determine the role of plea bargaining in a guideline system. In previous submissions to the Commission, we have supported a guideline system which is based on the total offense severity. In the absence of a Parole Commission (which currently considers the overall offense severity), if the guideline system is based on the total offense severity, it is expected that a plea bargaining process will be diminished. There is simply not much to bargain for. It is for this reason that we believe the decision to adopt the guideline system, based on the total offense severity versus a system based on the offense as pled to, will effectively limit plea bargaining. If the guideline system is based on the offense as "pled to," the plea bargaining process will be catapulted into the most powerful variable in the administration of justice. It would effectively transfer discretion from judges to the prosecutor's office.

We believe that the public does not understand the practical needs of the criminal justice system and, consequently, has not supported "making deals with offenders." This contributes to the perception that the criminal justice system suffers from lack of credibility, effectiveness and public support. Eliminating the perception of "dealing with offenders" would promote the perception of the system being effective and just.

In summary, we feel the issue of the balance between the interest of justice (eliminating/reducing plea bargaining as a necessary evil) versus supporting the practical concerns of the deficiency of the system, is essential to this discussion.

Guilty Pleas. In our view, the issue of making a distinction between defendants who plea guilty and those who do not is almost a rhetorical question. We believe that such systematic distinction would violate specific constitutional principles of justice which provides that defendants have the right to a trial. To reward those defendants who pled guilty (although they spared the government the expense of a trial) is, by implication, denying some privileges to defendants who exercise their constitutional right.

Our experience indicates that defendants and their attorneys consider carefully the preponderance of evidence against them, their ability to prove their innocence, and the cost of a trial, and on the basis of this analysis, decide whether to plead guilty or stand trial.

Many defense strategies come to play in this decision. A trial brings out many issues that defendants would prefer to remain in the dark. Sometimes a trial gives the defendant an opportunity to bring out issues in a dramatic fashion which he/she believes will work to his/her advantage. To merely develop a system that gives credit to those who plead guilty would be to deny the serious decision reached on a case-by-case basis "to plea or not to plea."

We recommend, therefore, that the guideline system should make no distinction between defendants who plead guilty and those who elect to stand trial and are subsequently found guilty.

Plea Agreement. As stated in our introduction, the limits of plea agreements will be based on whether a guideline system is founded on the overall offense severity or the counts to which the defendant pled or is found guilty. If the system adopts the overall offense severity mechanism, such as is currently utilized by the Parole Commission, plea negotiations will not be an important factor and its impact on the system will be reduced. In support of our position, it may be helpful to summarize our experience with plea negotiations in the Northern District of Illinois.

For some time, the Northern District of Illinois has had an extensive procedure for handling plea agreements. A consistent format is used which carefully follows the requirement of current law: Summarizing the official charges, stating that the defendant is pleading guilty because the defendant is in fact guilty, including the maximum penalty, what would be involved if a trial was elected including the privilege against self-incrimination, and advising that the defendant waives all rights as is set forth in the documents if the plea of guilty is accepted. Furthermore, the defendant is apprised that the court and the probation officer will be advised of the extent, nature and scope of the defendant's conduct, including all matters of aggravation and mitigation. Finally, the defendant is warned that the sentencing judge is neither a party to nor is bound by the agreement and is free to impose the maximum penalty as set forth in the document. The document provides for the signature of the United States Attorney, the Assistant United States Attorney, the defendant and the defendant's attorney.

It is our experience that the above comprehensive plea agreement procedure, only in rare instances, effectively influences the sentencing outcome. These agreements usually provide for the prosecutor to make no recommendation as to the appropriate finding or sentence, or not to oppose the imposition of a probationary sentence, or reference to restitution or a fine. Instead of influencing the sentencing decision, we believe that the plea bargaining effectively controls the prosecutor's behavior. It is our experience that what is being bargained for in most instances is the position the prosecutor will take at the time of sentencing, and what he will say or not say. This is significant for studies have confirmed that the prosecutor's behavior during sentencing hearings can be a significant determinate of the sentencing outcome. Judicial officers tend to follow prosecutor's recommendations for a number of reasons. These reasons include the prosecutor's credibility in the respective court, the method of presentation and what is emphasized.

With respect to the appropriate limits of judicial scrutiny of the negotiated plea agreements, we believe that based on our experience in this district, there will be little activity requiring judicial involvement. Again, we believe this would depend on the role plea bargaining will play in the process, depending on the policy decision as to whether the guideline system will be based on the overall offense severity or to the counts to which the defendant pled or is found guilty.

This policy decision will also have an impact on the extent to which prosecutors and defense attorneys can stipulate to the underlying facts of an offense in deciding which guideline sentence should apply. Under a system of "charge bargaining" the stipulation between prosecutor and defense attorney will become intense, subject to abuse and manipulation. We are concerned that in this respect defendants with little resources and status will not be able to bargain effectively, while white collar offenders with adequate resources will successfully reduce the charge to fit the mandatory guideline sentence that can

be negotiated between prosecutor and defense counsel. This is due to the fact that many white collar offenders retain private counsel months prior to indictment and bargaining begins at that early stage. Many indigent defendants do not obtain counsel until actual arrest or after the indictment has been returned. We envision that, stepwise, the process will involve determining what sentence is appropriate in the view of the prosecutor and defense counsel. When this decision has been reached, the charge will be accommodated or reduced accordingly to reflect the previously agreed upon sentence. This could result in the system's failure to operate in an effective and just manner which was the justification for developing guidelines in the first place.

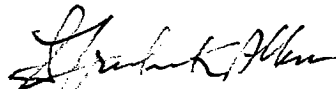
Cooperation. We envision similar problems in dealing with the issue of cooperation as in dealing with plea agreements. From the practical side, without cooperation by some defendants, it would be impossible to effectively prosecute other more culpable defendants in some instances. Yet, we believe it is more important to consider the overall public policy consideration. This is based on our conviction that the perception of the criminal justice system can be an effective tool in the crime control mechanism. It is important for the public to perceive the system as rational, effective and fair. We believe that the present law provides for sufficient flexibility to accommodate a reward system for defendants who cooperate with the government. This can be done through the 25% range between the top and bottom of the sentencing range. Specifically, defendants who cooperate could be given the bottom range. We suspect also that judges will be inclined to give sentences below the guidelines as provided by law for mitigating circumstances. On a practical level, if such a sentence should fall well below the guidelines, only an appeal by the prosecutor could effectively challenge such a judicial decision. Obviously, if a defendant cooperates with the prosecutor, there will be no challenge and the reasons provided by the court as mitigating circumstances would remain valid and unchallenged.

Notwithstanding the practical contribution of giving credit to defendants who cooperate, we find significant problems that would support a rejection of any further identification or adjustment consideration. These problems are:

- 1) The issue of deciding what is "cooperation" and the extent of cooperation.
- 2) The unfairness to defendants who would like to cooperate but have nothing to offer.
- 3) One-defendant indictments involving isolated matters would discriminate against such defendants where cooperation is not applicable.

We hope the above information will assist the Commission.

Respectfully,



G. Frederick Allen, Ph.D.
U.S. Probation Officer
Tel: FTS: 387-5726

GFA:bz

**OFFICE OF THE
PROBATION OFFICER
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
719 13TH ST., N.W.
WASHINGTON, D.C. 20005-3982**

**EUGENE WESLEY, JR.
CHIEF PROBATION OFFICER**

September 16, 1986

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1200-A
Washington, D.C. 20004

MEMORANDUM

**FROM: Tobin P. Sullivan
U.S. Probation Officer**

SUBJECT: Plea Agreements

The following is provided as a response to the issue regarding the proper role of plea agreements in a sentencing guidelines system. Again, I appreciate an opportunity to provide input on this subject matter.

Recognizing that approximately 90% of federal criminal cases are presently disposed of by guilty pleas, the preservation of this procedure for practical reasons is essential to an expeditious handling of the volume of cases confronting the federal criminal system. Accordingly, in this officer's opinion, a plea disposition should carry incentives set forth in the guidelines which would reflect in some way the defendant's election to plead to a particular offense. This would serve to encourage pleas thereby removing the Government from the obligation of prosecuting a particular case which often results in a significant expense for the taxpayer. In addition, a downward sentencing adjustment for defendant's who plead guilty would also serve to recognize the defendant's admission of responsibility for his behavior and level of remorsefulness.

With respect to a plea agreement, recognizing that the legislative history of the Sentencing Reform Act demonstrates congressional concern that plea agreements not be used to circumvent the sentencing guidelines, it

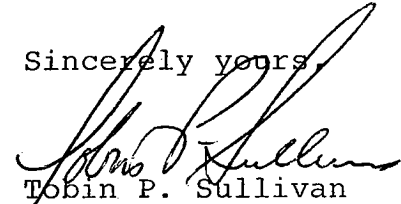
would necessarily follow that some level of judicial scrutiny exist regarding negotiated plea agreements. With regard to specific standards, in this officer's opinion the plea agreement should not serve to minimize the particular offense behavior or prevent the Court from considering all elements of the offense i.e., the various "harms" which are of an aggravating significance. As an example, the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense should not prevent the Court from fashioning an ultimate disposition which would consider the entire offense behavior. However, as previously indicated, the sentencing guidelines should provide a downward sentencing adjustment for individuals who fully acknowledge their culpability and remorsefulness which is demonstrated through a plea disposition.

With respect to "charge bargaining" under Rule 11(e)(1)(B), while the United States Attorney may make a recommendation, or agree not to oppose the defendant's request for a particular sentence, this position should only be in the form of a recommendation to the Court and should once again not prevent the Court from considering the totality of the offense which would include various aggravating circumstances. Relative to "sentence bargaining" under Rule 11(e)(1)(C), the United States Attorney's recommendation with regard to a specific sentence would again serve only as a recommended disposition. Generally, the Court should retain a level of judicial scrutiny promulgated through specific guidelines and policy statements sufficient to the extent that the end result reduces sentencing disparity which is an objective of the Sentencing Reform Act. Finally, the plea agreement should not represent a format for Government or defense attorneys to be used to circumvent the sentencing guidelines.

With regard to an offender's level of cooperation with authorities in investigations and prosecutions, it has long been recognized that this practice is an accepted and fruitful tool to prosecutors. As in the case of plea agreements, various levels of cooperation should be objectively identified and given relative downward adjustments in this officer's estimation. However, strict

guidelines should be applied when assessing an individual's level of cooperation with regard to an investigation. Again, any downward incremental adjustments with regard to a sentence should not depreciate the particular offense behavior. When assessing the appropriate level of downward adjustment, the sentencing Judge should have the ultimate decision making authority. However, this decision should be based upon information provided by the prosecutor and defense attorney.

Sincerely yours,



Tobin P. Sullivan
U.S. Probation Officer
Phone: 633-0440

TPS:dlr

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Partner
Witts & Wilson / Dallas

September 18, 1986

William W. Wilkins, Jr.

Chairman

U. S. Sentencing Commission

1331 Pennsylvania Ave. N.W.

Suite 1400

Washington, DC 20004

Re: Your letter August 20

Mr. Wilkins:

In response to your letter regarding topic of the Commission's September 23 hearing--the proper role of plea agreements in a sentencing guideline system--the Courts & Convictions Committee of the Mayor of Dallas Criminal Justice Task Force met yesterday and took the following positions regarding the questions you posed:

1. GUILTY PLEAS: We would oppose sentencing guidelines providing a downward sentencing adjustment for defendants who plead guilty. We would make no distinctions between a defendant who pleads guilty and one who stands trial and is subsequently found guilty.
2. PLEA AGREEMENTS: To impose restrictive guidelines on the process of plea bargaining is to destroy the ability of the prosecutor and defense attorneys to negotiate the best results. We do not see this process as being the purview of the judge. To make him a viable player would require virtually trying the case for his benefit and background. This is impractical.
3. COOPERATION: Virtually the same answer is used here as in Plea Agreements. In the shortest statement, "It's not now broken so don't mess with it." To impose any new restrictions or "guidelines" is to simply complicate an already unnecessarily complicated process. To attempt to grade "levels or

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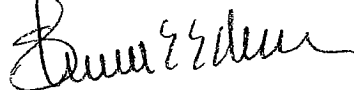
PROFESSORS OF ECONOMICS: DR. FRIEDRICH A. VON HAYEK, University of Freiburg, W. Germany • DR. S. CHARLES MAURICE, Texas A&M University • DR. ROGER LEROY MILLER, Clemson University • DR. THOMAS R. SAVING, Texas A&M University • DR. RICHARD H. TIMBERLAKE, JR., University of Georgia • DR. ROBERT TOLLISON, George Mason University • DR. GORDON TULLOCK, George Mason University

William W. Wilkins, Jr.
September 18, 1986
page 2

quality of cooperation" is to impart more knowledge of human nature than we believe the judges now have and we're quite sure the attorneys and prosecutors do not have.

We have necessarily tried to keep our comments as brief as possible but each reflects protracted discussions with a group of qualified observers.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Sherrill E. Edwards".

Sherrill E. Edwards
President

SEE:sz

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

PROBATION OFFICE

September 19, 1986

DAN W. STOWERS
CHIEF PROBATION OFFICER

517 E. WISCONSIN AVE.
620 FEDERAL BUILDING
MILWAUKEE, WI 53202
PHONE: 414-291-1425
FTS: 362-1425

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

I am pleased to have the opportunity to comment on the issues raised in your letter of August 20. I took the liberty of sharing your letter with each of our District Judges. One of the Judges has responded with a few of his candid thoughts and has authorized me to make them available to you. His letter is enclosed. We are all watching the work of your Commission with great appreciation for the task before you and equal concern over the importance of your work.

As to the questions posed in your letter, please accept the following, which is for the most part the product of my discussions with other probation officers in our district and my own views on the subjects. I cannot, of course, speak for the court.

GUILTY PLEAS

You noted empirical studies which have shown Judges impose more severe sentences after jury or court verdicts. There are, of course, a number of reasons which contribute to this, not the least of which is the attitude of the defendant. It is our experience the level of cooperation and expressions of remorse are usually much more limited with defendants who have received a guilty verdict. This intangible quality is quite often the common thread which links these defendants. As one of our Judges has suggested, we are all impressed with a defendant who admits his wrongdoing and steps forward to accept his punishment and begins the rehabilitation process. To what extent the court or others involved in the sentencing process are influenced by a defendant's decision to exercise his constitutional right to trial is, at best, uncertain. I see insurmountable problems with any guideline for downward sentencing adjustments for defendants who plead guilty. Much like the plea bargaining process, it seems efficient and streamline. However, to do so would give the government a bargaining chip which would, I feel, conflict with the sanctity of the court. I urge you to make no distinction between a defendant who pleads guilty and one who stands trial.

PLEA AGREEMENTS

No limitation should be placed on the discretion of the court as to the kind of plea agreements which can be acceptable or rejected beyond the existing Federal Rules. To cite a practical reference, just this week in court one of our Judges, in accepting a plea of guilty, placed the defendant on the stand and after questioning her at length, the Judge dismissed the plea agreement because essentially the defendant had failed to acknowledge, inspite of the written agreement, her wrongdoing. Were the Judge not to have discretion in confronting the defendant as to what actually happened in the offense behavior in a non-threatening, non-technical manner, the system would lose a very important check and balance. We are also concerned over limitations plea agreements often place on the needs of the victim. This, of course, goes to the much broader question of overall offense severity and the probation officers dilemma with providing a complete picture to the sentencing Judge of exactly what happened in addition to what is charged in the Indictment or even admitted to in the plea agreement. We hope you will not promulgate standards which will limit our ability to incorporate overall offense severity into the sentencing process.

On the other hand, issues are frequently raised at the sentencing stage which unduly complicate the sentencing process and could have been resolved in the plea negotiations. Restitution is a typical area where concrete figures should be agreed to prior to the sentencing hearing or at the very least, at the change of plea hearing. As you suggest in your letter, we see internal contradictions with a system which permits negotiations which could exclude information essential to the uniform and accurate assessment of offense and offender ranking. We cannot envision a system which would place any limitation whatsoever on the nature and quantity of information provided to the court in carrying out the sentencing function.

COOPERATION

To some extent, the matter of cooperation goes to my earlier comments concerning the defendant's attitude. Both human nature and common practice suggest that one's level of cooperation and attitude at all stages of the criminal justice system influence the decisions being made. I urge you to leave the prosecutor with the widest latitude in extending to defendants credit for cooperation through limiting their sentencing exposure. Given the very nature of the sentencing process, I cannot fathom a guideline system which could adequately quantify the extremes in levels of cooperation. Downward and upward adjustment is a fact of life in the present system. Continuity and disparity, to what extent they can and are being controlled, are now the exclusive domain of the prosecutor. I cannot suggest a manner in which the court could or should be placed in a position to grant specific levels of credit or to withhold credit based on the defendant's level of cooperation. Regardless, this human quality cannot be removed from the sentencing process. The defendant's level of cooperation as a factor in sentencing is here to stay regardless of what you may promulgate.

Judge Wilkins
Page 3
September 19, 1986

I hope you will find these suggestions useful. We are looking forward to receiving the earliest possible draft of your guidelines as we are anxious to begin what we perceive as the awesome task of implementing the product of your work.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dan W. Stowers", with a long horizontal flourish extending to the right.

Dan W. Stowers
Chief U. S. Probation Officer

DWS/vlh
Enclosure

United States District Court

Eastern District of Wisconsin

Room 250 Federal Courthouse

517 East Wisconsin Avenue

Milwaukee, Wisconsin 53202

Chambers of
Thomas J. Curran
District Judge

Telephone
(414) 291-4167
(FTS) 362-4167

September 3, 1986

Mr. Dan W. Stowers
Chief Probation Officer
Eastern District of Wisconsin
517 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dear Dan:

With reference to your memo requesting comments on the Sentencing Commission's inquiries, I have the following thoughts to offer on these very complex issues.

Guilty Pleas As stated, there are a number of philosophic and practical reasons why judges impose lower sentences after a plea of guilty. For one, I am much more impressed with a defendant who evidences remorse after his arrest and proceeds to enter a plea of guilty, than the defendant who is struck with remorse after the jury returns a verdict of guilty. Either the sentencing guidelines should provide a downward sentence adjustment for a defendant who pleads guilty or an exception to the guidelines should be recognized where pleas of guilty are received. In other words, this could be one of the factors that would justify a trial judge dropping below the guidelines in cases where pleas were entered. Caution of course has to be exercised to avoid setting up a policy which discourages legitimate defenses to criminal charges.

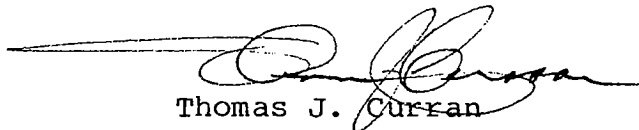
Plea Agreements I don't know of any judge who considers himself bound by the recommended sentence in any plea agreement. In fact as you know, in this district it's a rarity when the plea agreement contains any specific recommendation. I realize that this is customarily done in state court but hopefully that will never come to pass here in the Eastern District. For some time now I have been deeply concerned about the court's role in accepting plea agreements, especially when the summary of the facts presented by the Assistant United States Attorney frequently includes all the elements of the other charges pending against the defendant which the agreement provides are to be dismissed. Up to now, with one exception, I have gone along with

the plea agreement. Other judges argue that counsel for the government and defense are in a much better position to make the evaluations and to determine the strengths and weaknesses of their various positions than the judge is and therefore we should be able to rely upon their agreement. That comes very close to a rubber stamp approach in my judgment. I really don't see where the new sentencing guidelines are going to change that or make it any more difficult. Maybe I've overlooked some of the provisions that the Committee is considering, but on the surface it appears that we're still going to have to apply the same standards as before.

Defendant's Cooperation This has always been a difficult matter to assess. I dislike numerical evaluations but, for lack of a better approach, I wonder if a score could not be assigned to the defendant based upon (a) the value of the information submitted; (b) the voluntariness of the information; (c) corroboration of existing facts; and (d) whether such information would have been obtained with or without defendant's cooperation. There may be some other factors that prosecutors would like to have included in the formula but then attach five for the highest in each of the categories and lesser amounts as you go down the line. Allow the defendant's counsel to object to the evaluation submitted by the United States Attorney and let them refer to it in their in-court statements at time of sentencing. I see no need for an evidentiary hearing but merely an opportunity to alert the court as to any disagreement that might exist between prosecutor and defense counsel and the specific area of dispute.

For what it's worth, these are my off the top of the head comments. Thanks for keeping us informed.

Very truly yours,



Thomas J. Curran

TJC:bf

UNITED STATES DISTRICT COURT
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September 18, 1986

Honorable William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

This is in reply to your letter dated August 20, 1986 requesting our input on guilty pleas, plea bargains, and cooperation.

Guilty Pleas

The sentencing guidelines should provide a downward sentencing adjustment for defendants who plead guilty. Plea bargains are designed to benefit both the defendant and the U. S. Attorney. The defendant is allowed to plead to a lesser charge or to few counts and the U. S. Attorney saves the expense and time necessary to try the individual, or he receives a plea on a case in which his evidence is somewhat dubious. It could be argued that the defendant has received his just reward for his guilty plea by facing a lesser sentence which, on occasion, is substantial. However, practically thinking, plea bargain agreements do help in the processing of some cases more efficiently.

Plea Agreements.

The Court currently has the power to accept or reject plea bargain agreements. However, the Court usually has limited information regarding the crime at the time of the plea. The Sentencing Commission could suggest that the Courts require that at the time of plea, the prosecution provide the Court a prosecution version and a victim impact statement agreed upon by both the defense and the prosecution. The Court, with this information, could more objectively make a decision on the proposed plea bargain. The Sentencing Commission should direct the Court to

closely scrutinize the plea bargain for indications that depreciates the seriousness of the crime or that it is being used to circumvent the sentencing guidelines. If it appears that this is occurring, the Court should be directed to reject the plea and to indicate to the prosecution or the defense the specific concerns.

As indicated in the prior section, plea bargaining is a necessary part of the judicial system. However, with some careful review by the Court, charge bargaining under Rule 11(e)(1)(B) can be adequately controlled. As to sentencing bargaining under Rule 11(e)(1)(C), this has never been a problem in our district since our judges on only a very rare occasion will allow this kind of bargaining. However, the U. S. Sentencing Commission could make a policy statement to the effect that the sentencing Courts should have a complete presentence report prior to accepting any sentence bargaining.

To what extent can prosecutors and defense attorneys stipulate to the underline facts of an offense and the offender's behavior when such factors mandate a certain sentencing result? This is the portion that appears to be the loophole in the U. S. Sentencing Commission's sentencing format. The U. S. Attorney could use plea bargaining to control the sentencing process through a series of stipulations with the defense concerning the aggravated and mitigating factors. Since the Court is not privy to all the information surrounding the offense, this would allow for the U. S. Attorney to be placed in a very secure position in controlling the sentencing process.

Cooperation

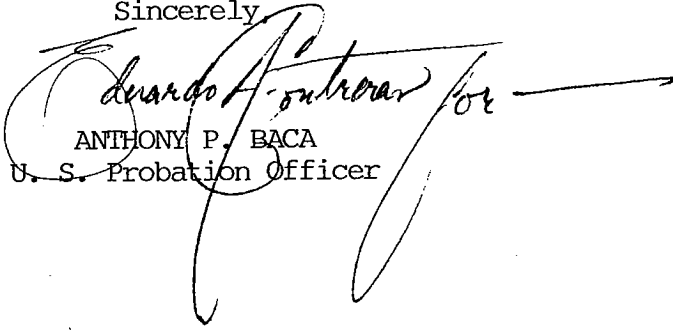
The U. S. Sentencing Commission and their policy statement should basically state that cooperation is a necessary aspect in solving cases. They have placed themselves in a precarious and sometimes dangerous position.

In the past, individuals who have cooperated with investigators (informants, victims, witnesses, etc.) or the prosecution, have faced either repercussions from the defendant, codefendants, or other individuals associated with the case in one form or another. Consequently, to encourage a cooperation which is necessary in a high percentage of the criminal investigations, the cooperating parties should be compensated commensurate to the level or degree of cooperation.

Offenders who have cooperated should be given a relatively downward adjustment from the otherwise applicable sentence. The appropriate downward adjustment should be determined by the prosecutor since he is in the position to know the true and potential value of the cooperation. This information, on many occasions, would not be disclosed because of pending or ongoing investigations using the cooperation from the offender or the information that he provided.

I hope that my respond to your inquiries are helpful. If you need any further information, please do not hesitate to contact me.

Sincerely,


ANTHONY P. BACA
U. S. Probation Officer

/mlm

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PROBATION OFFICE

September 19, 1986

BEAL KIDD
CHIEF PROBATION OFFICER

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Mr. William W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

In response to your letter of August 20, 1986, I would like to provide the following response:

GUILTY PLEAS

We, in the Eastern District of Arkansas, feel the sentencing guidelines should not provide a downward sentencing adjustment for defendants who plead guilty. We feel no distinction should be made at the time of sentencing concerning a plea of guilty or a jury trial. By giving a lesser sentence for a plea of guilty a defendant is being penalized for requesting a trial.

PLEA AGREEMENTS

We feel plea agreements should not be binding on the Court. The entire offense behavior should be taken into account by the sentencing Judge and the defendant should be sentenced accordingly. The sentencing Judge should be able to sentence above the guidelines if the Court feels a plea agreement is being used to circumvent the sentencing guidelines.

COOPERATION

Any cooperation given to the Government by the defendant should be noted in a written statement to the Court and furnished to the Probation Office prior to the preparation of the presentence report. We feel no distinction should

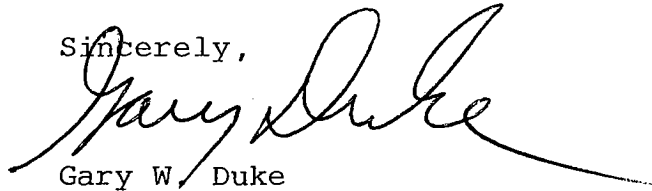
Mr. William W. Wilkins, Jr.
September 19, 1986

-2-

be made in the range guidelines allowing for cooperation by the defendant. If a downward adjustment is made in the guideline range because of a defendant's cooperation, only the sentencing Judge should be able to make this downward adjustment.

Please feel free to contact me at any time if you desire additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary W. Duke". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary W. Duke
U. S. Probation Officer

GWD:gc

UNITED STATES DISTRICT COURT

LEWIS D. FRAZIER
CHIEF PROBATION OFFICER

WESTERN DISTRICT OF MISSOURI
PROBATION OFFICE

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(FTS: 754-2704)

253 U.S. COURT HOUSE
811 GRAND AVENUE
KANSAS CITY 64106
816-374-3921
(FTS: 758-3921)

September 15, 1986

Springfield

REPLY TO: _____

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, Northwest
Suite 1400
Washington, D. C. 20004

Re: Proper Role of Plea Agreements
in a Sentencing Guidelines
System - September 23, 1986, Hearing

Dear Chairman Wilkins:

This is in response to your letter of August 20, 1986, requesting input regarding the consideration of guilty pleas, plea agreements, and defendant's cooperation in the development of sentencing guidelines.

GUILTY PLEAS

In theory, defendants should not be subjected to more severe punishment for exercising their legal rights to go to trial. In practice, the plea bargaining process almost always results in reducing defendant's exposure to sentencing penalties.

In writer's opinion, sentencing guidelines should be developed so they are "practical." Therefore, they should reflect the practice of a downward sentencing adjustment in cases where defendants "admit" their guilt and save the government and taxpayers the expense of trials.

PLEA AGREEMENTS

In writer's opinion, there should be no limits placed upon the Court's scrutiny of negotiated plea agreements except for those noted in Rule 11 and the sentencing guidelines. In addition

Honorable William W. Wilkins, Jr.
Page 2
September 15, 1986

to the standards of Rule 11, the Court should advise the defendant of the sentencing guideline which applies and of the possibility of sentencing above or below the guidelines. The impact of the Sentencing Reform Act on Rule 11(e)(1) appears to be significant. The impact on "charge bargaining" will not be as significant as the impact on "sentence bargaining." However, it is conceivable the government attorney could agree not to appeal if the Court sentences the defendant below the guidelines. The extent to which prosecutors and defense attorneys are able to stipulate to underlying facts of an offense will probably be little different under the Sentencing Reform Act than the extent to which they are able to stipulate under the present statutes. This will probably be a major part of the plea agreement process in the future. Unfortunately, the Sentencing Reform Act provisions may very likely place too much of the judiciary's present authority over the sentencing process in the hands of the executive branch. The sentence will be determined to a large degree by the charge that is filed by the attorney for the government.

COOPERATION

The sentencing guidelines should recognize cooperation with authorities, in addition to recognizing guilty pleas, when the cooperation results in the successful prosecution of other defendants. Different levels of cooperation should be objectively identified and result in variable downward adjustments. The sentencing court should decide the appropriate level of adjustment after reviewing a written agreement between the prosecutor and defense counsel. The Court should also resolve by a preponderance of the evidence any disputes regarding the level or quality of cooperation.

Sincerely,



Charles L. Clark, Ph.D.
Senior U. S. Probation Officer

CLC:skt

(Typed 09/19/86)

cc: Mr. Lewis D. Frazier, Chief U. S. Probation Officer,
Kansas City, Missouri

WILLIAM D. GRAVES
CHIEF PROBATION OFFICER

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
PROBATION DEPARTMENT
September 19, 1986

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BOULDER 80307
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2040C N. ACADEMY BLVD.
COLORADO SPRINGS 80909
303-574-8615
P.O. BOX 3508
GRAND JUNCTION 81501
303-245-5396

The Honorable William W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

Thank you for again allowing me to comment on those important policy issues that the Sentencing Commission must address before it completes its draft on sentencing guidelines. My responses, which have incorporated comments from a number of court officials, will address those specific issues requested in the same order that you have posed them.

GUILTY PLEAS

An argument could possibly be made for a downward sentencing adjustment for those defendants who enter pleas of guilty as they have, ostensible, made the first step toward their rehabilitation by admitting guilt. A more forceful argument, however, must be made for not enhancing penalties simply because that individual elected to exercise his constitutional right to a trial on the issues. My observation is that those individuals who enter guilty pleas generally do so to reduced charges and that in itself is a "downward sentencing adjustment." My strong recommendation here is there not be, must not be, any distinction in guidelines between an individual who pleads guilty and one who stands trial and is subsequently found guilty.

PLEA AGREEMENTS

The U. S. Supreme Court [Santobello v. New York, 404 US 257, 260 92 S.Ct 495, 498, 30 L. Ed.2d 427 (1971)] has indicated that plea bargaining is an essential component in the administration of justice and, if properly administered (emphasis added), it is to be encouraged. Properly administered is the operative phrase in that opinion. Plea bargaining must be consistent with achieving justice, and the appearance of achieving justice, and must not be solely for the sake of expediency. As I indicated in my July 3, 1986 letter on sentencing alternatives, I firmly believe that most disparity occurs long before the Court is involved in sentencing. I am not aware of any empirical studies on this issue but I believe that greater disparity occurs as a result of plea bargaining than because of decisions of sentencing judges.

The Honorable William W. Wilkins, Jr.
September 19, 1986
Page Two

There are many reasons that a prosecution ends with a plea agreement and many of them are not in the public interest. Although the following is not based in fact, the reality is that some prosecutors are lazy and some fear disclosing the government's improprieties during an investigation. Others patronize prominent defense lawyers for possible future employment advantages and some do incompetent investigations. A proper plea agreement should allow the defendant the opportunity to confront his guilt and begin the rehabilitative process but must also serve to protect the public from the unconscionable plea that creates a disrespect for the judicial process. One of the principal objectives of the criminal justice system is to develop respect for the law among those who choose to violate it. To generate that respect, there must be both the appearance, and the reality, of integrity in the process.

The plea negotiation process itself distorts the public's perception of the judicial system. The focus is now removed from what the accused did to defense counsel's role as a "broker", looking for the best deal for his client. That is not in the best interest of the defendant, who is cheated in the rehabilitative process by never having to come to grips with his behavior, and is not in the best interest of the administration of justice. The public's confidence in the judicial system has suffered because of the publicity surrounding "plea bargain" abuses.

Judges in this district have not accepted plea bargains under Rule 11(e)(1)(C). Their view is that the Court must retain full sentencing discretion and they have often requested full explanations before accepting any "charge bargaining" under Rule 11(e)(1)(B). That approach has avoided some of the negative reasons for plea bargaining noted earlier. It is obvious that plea bargains will be used to circumvent the sentencing guidelines. Plea bargains are manipulated now with an eye to the Parole Commission Guidelines. There is a need for more judicial control over the acceptance of plea agreements and to that end we would recommend the following mechanisms:

1. The Court must be able to take into account total offense behavior in determining an appropriate sentence and the Sentencing Commission must take that same information into account in arriving at an appropriate offense severity level. The fact that the Sentencing Commission will consider total offense behavior must be made known to defendant at the time of arraignment;

2. The Court needs to exercise its discretionary authority to accept or reject plea agreements, either at the time of arraignment or after the presentence report is completed. The Court must look at each plea agreement carefully and accept only those that meet the ends of justice (a free and voluntary admission of guilt that is in the public interest) and reject those that do not meet that standard. Appellate courts have held that neither the Government nor the defendant have the right to have a plea agreement accepted and they have allowed the Court a reasonable discretion in rejecting individual agreements.
3. The prosecutor should be required to make a full explanation of the reason for the plea agreement at the time the plea is tendered and should include in that explanation a statement about the prosecutor's view of relative culpability of codefendants and associates.

To permit prosecutors and defense attorneys to stipulate to the underlining facts of an offense, and the offenders behavior, and thereby control the sentencing results would be wholly unwise. That would only serve to magnify the flaws and faults in the existing plea bargaining system. The sentencing judge is the one person in the process who can make an independent and unbiased judgment.

COOPERATION:

It is extremely difficult for a sentencing judge to consider cooperation in arriving at a sentencing decision. The Court must be careful to maintain its role as an objective and unbiased finder of fact. A judge has a solemn obligation to provide a fair trial for all defendants who appear before him. A defendant who cooperates with the government by providing testimony in the sentencing of a codefendant compromises the judge who must sentence the accomplice against whom testimony has been given. The judge could then be seen as part of the prosecution team. That obviously corrupts the Court and that, in turn, corrupts justice. There should not be any consideration of cooperation by the Court. The Department of Justice has means of rewarding cooperation without involving the Court and it should remain that way. Unfortunately, the reality is that cooperation often leads to, or includes, perjury, entrapment and a condoning of new criminal conduct.

The Honorable William W. Wilkins, Jr.
September 19, 1986
Page Four

I trust that this information will be of assistance to the Sentencing Commission. I do appreciate the opportunity and freedom to make this type of response.

Sincerely,

A handwritten signature in black ink, appearing to read "William D. Graves". The signature is fluid and cursive, with a large, stylized "W" and "G".

WILLIAM D. GRAVES
Chief U. S. Probation Officer

WDG:plu

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202

September 17, 1986

Honorable William W. Wilkins, Jr., Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am writing in response to your letter of August 20, 1986, wherein you requested input on the proper role of plea agreements in a sentencing guideline system.

At the onset, I have to say that of all the letters you have sent, and all the questions posed in the past several months, this most recent one has caused me the most difficulty in formulating a response. In attempting to analyze my problem in responding to your questions, I have finally determined that there is no clear cut resolution of the issues raised. The issues you will discuss at your September 23, 1986 hearing on plea agreements are difficult because they spring from a classic confrontation between the functions of the three branches of government. Congress has passed a law, and in so doing, has created the Sentencing Commission to formulate guidelines which will be applied throughout the Judiciary. However, it is the Justice Department, an executive branch agency, which must bring the charges to the Judiciary. How can the Sentencing Commission then have strong impact on the way the Justice Department brings their charges? This is the overall dilemma I faced in trying to answer the specific questions of your letter, and perhaps that dilemma will become more clear as I examine those problems.

Guilty Pleas

I believe that since most guilty pleas result from a plea agreement, where the defendant has already received some reward or benefit by being permitted to plea to a lesser included offense, or to reduced charges, that the Court should not be required to give credit again automatically through the sentencing guidelines. I do think, however, that the Court should have the ability to give credit where a defendant pleads guilty without benefit of a plea agreement, as this shows contrition for his criminal act.

Since our legal system is based partially on a premise that guilt must be proven and everyone is entitled to trial; it is my opinion that the guidelines should not make a distinction between defendants who plead guilty, and those who choose to go to trial. On the other hand, however, there are defendants who obviously go to trial for the purpose of raising frivolous defenses, or attempting to get judicial error; and where those tactics can be demonstrated, I believe the Court should have the ability to enhance the penalty it would otherwise impose.

Plea Agreement

Rule 11 precludes the participation of Judges in the plea bargaining process, but other than that, I do not think the Court should be limited with regard to its power to either accept or reject plea agreements. In other words, I believe the Court should have absolute discretion on whether or not a plea agreement is in the best interests of justice. One objective test that can be applied to the validity of a plea agreement is whether or not it compromises the integrity of the sentencing guidelines. For example, let us assume that a probation officer completes a presentence investigation and determines the overall offense behavior of the defendant. He then applies the sentencing guidelines and the Court approves this application. However, through the plea agreement, the U.S. Attorney has placed a ceiling, or "cap", on the sentence, which is less than what the guidelines call for. In those instances, the Court should reject the plea agreement and require one where it can sentence within the guidelines or force trial.

Now, I fully realize the difficulty in the scenario just presented. It assumes that the U.S. Attorney and/or the case agents have provided full disclosure of the defendant's participation in the offense. While my experience leads me to the conclusion that full disclosure probably occurs in 90% of the cases, I am still concerned about the 10% where, for whatever reason, full disclosure is not made. The crux of the problem lies here. It is also here where we get into the issue of charge bargaining, which again dovetails with how the stipulated fact pleas should be handled. And since the Constitution separates the powers of the Judiciary from the powers of the Executive Branch, I cannot think of how the Court can effectively control what the Government chooses to tell the probation department.

I am of the opinion that the Court should defer approval of plea agreements in every case until after it has received and reviewed the presentence investigation report. This would give the Court some advantage, depending on the ability of the probation officer to find overall offense behavior, to determine whether the plea agreement is in keeping with the applicable sentencing guidelines. Along those same lines, the U.S. Attorney and the defendant should

not be permitted to enter into stipulated facts agreements which are inconsistent with the sentencing guidelines for overall offense behavior. Sentence bargaining, which is authorized by Rule 11(e)(1)(c), should be banned. I do not think that the Government and the defense should possess the authority to negotiate a plea which is based on a specific sentence outcome. Stipulated facts agreements lead to the same end as sentence bargaining.

Cooperation

Cooperation from criminal defendants is crucial to successful enforcement of the law, particularly in the present climate of public concern over the national drug problem, and the prosecution of perpetrators in that area.

I have numerous considerations on how this cooperation should fall into a sentencing guideline scheme: (1) Cooperating defendants are generally rewarded by a generous plea agreement, and so long as that plea agreement does not attack the integrity of the guidelines it should be approved, as stated previously. (2) Outstanding cooperation should be rewarded at sentencing by the Court as an inducement for others in similar situations to cooperate and help the authorities. (3) The cooperating defendant may be cooperating because of remorse, or may be cooperating just to "save his own skin", but in either event, by crossing the bridge to cooperate with the authorities, he is generally burning that bridge behind him that linked him with the criminal sub-culture. (4) The Court should decide upon the significance of the cooperation of the defendant using the U.S. probation officer and his presentence investigation as a guide. The probation officer will need to rely on objective facts supplied to him by the Government and the defendant. (5) Does the openness of rewarding cooperation by the Court within the sentencing guidelines, and through the sentencing process, create more potential harm to the cooperating defendant by drawing more attention to his deeds? (6) We must remember that the more deeply involved criminal has more knowledge and probably greater culpability; yet makes the best informant.

The Sentencing Commission may attempt to develop objective standards to measure the level of cooperation offered by defendants. This can be looked at in at least two ways. How big a crime, or how much loss in terms of money, did the defendant prevent by his cooperation? Secondly, cooperation could be viewed simply as an act by an individual which puts him at certain risks. The risks may be the same whether he is cooperating against another mailbox thief, or he is cooperating against the president of a corporation.

Honorable William W. Wilkins, Jr.
September 17, 1986

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Certain facts about the nature of his cooperation can be delineated. Did the cooperation provide only intelligence information, which may lead to future prosecutions? Did he testify only before the Grand Jury, or in the privacy of a case agent's office, or did he testify in open court? Did his cooperation result directly in aiding prosecution of defendants already known to the Government, or did his cooperation uncover new defendants for the Government to prosecute? Did the defendant participate in overt acts, such as use of a telephone, or the making of purchases of drugs from other defendants, putting him and his family at a greater risk as a result of his cooperation? These questions, and perhaps many others may help the Commission in determining how to quantify the issue of cooperation.

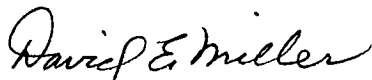
It is clear that the intent of Congress was to create a sentencing system which removes disparity and sentences defendants based on overall offense behavior. Guideline sentencing will go a long way toward standardizing the Judiciary in that regard.

However, it is equally clear that our governmental system of separation of powers will inevitably continue to allow for some disparity to exist. This will occur so long as the Attorney General operates under a selective prosecution system. The Commission recognizes this impurity, I am sure, as well as it acknowledges the political system of which we are all a part. We also must not overlook the effective utilization of limited judicial resources and not impose added time constraints on the system.

I come back to where I began this letter. The sentencing guideline system is going to effectively limit judicial disparity in sentencing. To the extent that prosecutors operate in the daylight regarding overall offense behavior and their plea negotiations, it will approach a perfect system.

Thank you for the chance to have input on these important issues.

Sincerely,



David E. Miller
Supervising U.S. Probation Officer

DEM:nm

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Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N. W., Suite 1400
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Dear Judge Wilkins:

I offer the following comments in response to your letter of August 20, 1986.

GUILTY PLEAS

I believe it is practically and philosophically appropriate to provide for a downward adjustment on the sentence of a defendant who pleads guilty. To varying degrees, this has been a fairly common practice in courts throughout the country for many years. I am not sure the Judiciary or the constitution will approve formalization of this practice, but I sincerely hope so. Naturally, defendants must not be punished for exercising their right to trial, but it should not automatically follow that to protect that right to trial, no notice must be taken of defendants who admit their guilt and accept responsibility for their criminal actions.

I believe formal adjustments provided for in the guidelines will reduce disparity in the amount of credit defendants already get for pleading guilty. Frankly, I believe this formal procedure may provide even greater protection of the rights of certain defendants. Even as I now write, there is a file sitting on my desk involving a defendant who is about to plead guilty to misprison of a felony. Our pre-plea investigation suggests a strong probability that the defendant is not guilty of the crime. With advice of counsel, he is expected to enter a plea of guilty in hopes of getting a lenient sentence rather than risking three years in prison by going to trial. As a practical matter, based on the extremely limited involvement of this defendant and his unblemished prior social and criminal record, it is almost assured that he would get a probation disposition even if he went to trial. Under the guidelines system where a fixed rate of adjustment is established for guilty pleas and there is

much-increased certainty as to sentence based on circumstances of the crime and the characteristics of the defendant, this particular defendant would be in a much-improved position to exercise informed judgment regarding the plea bargain offered by the government. I honestly believe a formal adjustment for admission of guilt would not result in fewer and could possibly result in more jury trials.

PLEA AGREEMENTS:

Before responding to this inquiry, I must share my observation that as the Commission gets closer to finalizing the guidelines, questions get much more difficult.

In response to your inquiry regarding plea agreements, I believe, absent a major change in at least the philosophy if not the legality of the judges' duties, few guidelines and little change in the judge's roll in the plea negotiation process will be necessary.

By several years of observation and careful review of Rule 11 and the Advisory Committee notes to that rule, I am convinced by practice and probably by intent of the rule, the judge's primary function is to insure that the plea is knowledgeable, voluntary, and has a basis in fact. Except for consideration of the views of the parties and the interest of the public in nolo contendere pleas, the judge is only required to see that the rights of the defendant are not abridged when a guilty plea is entered. In our advisory system, it is the government and not the court which is primarily responsible for representing the interest and the rights of the public which has been and may well again be the victim of the criminal defendant. The court determines the threshold issue that there is a factual basis at least for the crime to which the defendant offers to plead guilty. It has not been a common practice nor may it even be practical to expect the court to make sufficient inquiry so as to determine that there is not a factual basis to support the belief that the defendant is guilty of a much more serious crime or of a whole lot more crimes than that to which he is offering to plead guilty. The manner in which your question is posed suggests that judges may be expected to disapprove plea agreements because they are inappropriately favorable to the defendant and do not adequately protect the community thereby circumventing the guidelines sentencing system. I am not sure a guidelines system of sentencing can achieve that goal. I think we must rely on the prosecutor to protect the interest of the public and as I recall his oath of office mentions, at least in passing, that duty.

Under our present system, plea agreements are not exceptionally troublesome. The government may agree to accept a plea to Count One on the condition that the remaining counts be dismissed and upon the further condition that the government will offer a non-binding recommendation as to a specific sentence. Frequently, the single-count conviction carries a penalty of 15-20 years. The judge is free to impose a sentence within the range of zero to fifteen or twenty years. As a result of the operation of our parole laws, a 15-year sentence may result in no more time actually served in prison than a 30 or 45-year sentence, depending on the parole eligibility fixed by the court. Under the system, there is little infringement upon the discretion of the court, the government may not be giving up anything in real prison time, and the defense attorney saves face by informing his client that he cut the possible maximum sentence from 60 to 20 years.

As I understand the Sentencing Reform Act and the present draft of the guidelines system, the plea agreement will have substantially more real impact on sentence under the guidelines. For example, under our present plea-negotiation system if a defendant pleads guilty to one bank robbery and two more bank robberies are dismissed as conditions of that plea agreement, the parole guidelines for a poor risk are 78 to 100 months, assuming the weight of the evidence shows he committed the other two robberies. If the same defendant pleads guilty to all three bank robberies, the parole guidelines are still 78 to 100 months. Under the new system, if the first bank robbery carried a mid-range guidelines sentence of approximately eight years, the defendant would pick up another four to five years for the two additional robberies under the multiple-related harms table. Conversely, if those other two counts are dismissed, the defendant would save four to five years in real time in prison as a result of the plea agreement.

As I indicated above, it may not be practical to expect the court to examine the factual basis for all three bank robberies and thereafter determine that the defendant should be prosecuted for all three and based on that determination disapprove the plea agreement. That would require the court to give consideration to the evidence available, the credibility of witnesses, and a whole variety of other issues which the court should probably not be considering outside the scope of suppression motions or other formal pretrial proceedings. Further, Rule 11 currently prohibits the court's participation in any plea agreement discussions and seems to limit the court's involvement to the acceptance or rejection of the plea agreement as set forth on the record. There is a third option, i. e. delaying the decision as to acceptance or rejection until the court has had an

opportunity to consider the presentence report. The guidelines may provide some mechanism by which the third option could be used by the court in evaluating the appropriateness of offered plea agreement, but I do not think it is appropriate for the court to examine directly the defendant regarding factual basis for charges the government proposes to dismiss.

I believe the most direct approach to the possible circumvention of guidelines sentencing by way of plea agreements would be, through the Department of Justice, to establish guidelines for prosecutors. There is potential in the new sentencing system for placing a great deal of influence and responsibility with the Department of Justice in the sentencing process. That influence and responsibility has always existed to some degree, but it has never been quite as visible as the judge's sentence in open court. I believe it is entirely appropriate that the government be held accountable for its plea negotiation decisions, and those decisions should be very visible to the public which the government represents. So long as the government has the authority to authorize prosecution in the first place and to select charges to be filed, the influence of the Department of Justice on sentencing alternatives will be an inherent part of our system. I believe we should recognize that fact and rely on the competence and professionalism of the Department of Justice to ensure the laws of this country are not circumvented through the plea-bargaining process. To require increased scrutiny from the court at the plea-bargaining stage would seem to impinge upon the neutrality of the court. I believe public scrutiny would be more effective anyway.

Regarding the specific questions as to how the Sentencing Reform Act will impact on "charge bargaining and sentencing bargaining" under subsections (B) and (C), respectfully of Rule 11(e)(1), I offer the following observations. Unlike my comments above relating to plea agreements involving dismissal of counts under subsection (A), I believe the court has the right and responsibility to scrutinize very closely specific sentence recommendations under the present system as well as the new guidelines systems. Charging and indirectly, dismissing charges, tends to be an Executive Branch function whereas sentencing is exclusively the business of the Judiciary. As a general principle, I believe no court should accept a plea agreement under subsection (C) prior reviewing a presentence report. Since subsection (B) is not binding, such a conditional plea could be accepted without reviewing the report.

It seems to me that under the new system specific sentence recommendations must be within the limits fixed by the guidelines

that we formalize this adjustment but in a multiple count situation where counts are dismissed as part of the plea agreement, there will already be a significant reduction in the sentence. It may be appropriate for the Commission to limit downward reductions for guilty pleas to only those cases in which the defendant pleads guilty as charged and receives no other reductions by way of plea negotiation. It does not seem fair that a bank robbery charged in one count should receive a reduction of only a few months when a bank robber charged in three counts pleads guilty to Count One, has two counts dismissed, and gets a reduction of several years.

Regarding the issue of compensating government witnesses, I am pleased to see the Commission take this issue on directly. For many years, at least in this district, plea agreements have included a commitment from the government to make the defendant's cooperation known to the court at the time of sentencing. Probation officers and judges are left to struggle with the decision regarding the degree and the means by which this cooperation will be rewarded. I have always had a fundamental, philosophical problem with the court rewarding assistance to the government because that seems to tarnish the impartiality of the court. Defense witnesses receive no reduction in sentence no matter how valuable or truthful their testimony may be. Unless the cooperating witness has testified before the sentencing judge, the court must rely solely upon the United States Attorney for a statement of the value of the defendant's assistance to the government. Even when that cooperation has been fairly evaluated, the judge has little guidance in the appropriate amount of reduction for the cooperation. I believe the procedure set forth in the current draft of the sentencing guideline manual is reasonable and appropriate. I believe varying levels of reduction are appropriate for different levels of cooperation and the government should certify to the court, in writing, that the degree of cooperation justifies a specific downward adjustment. As a control mechanism, the Commission may wish to require the U. S. Attorney to obtain approval from the Department of Justice before these certifications are submitted to the court.

There are probably two mechanical approaches to these adjustments. First, the guideline range could be established by the court and the fact of cooperation could be offered as justification for imposing a sentence below the guideline range. On the other hand, as is set forth in the present guideline manual draft, the adjustment could be applied as part of the formula thereby lowering the entire guideline range. I would tend to favor the second alternative since statement of reasons for sentencing below the guidelines would be required, and the fact

Honorable William W. Wilkins, Jr.
Page 7.

of the defendant's adjustment would be set forth on the judgment and order of commitment. This may present security problems no matter how careful Bureau of Prisons' personnel are in safeguarding their files.

In summary, I believe any effort to increase judicial scrutiny over plea bargains involving dismissal of counts would meet with little success. The government has the discretion of filing the charges in the first place and even if the court directs that the government prosecute on all counts, the court cannot realistically enforce the quality of the prosecution on counts which the government wishes to dismiss. I believe public scrutiny would be effective in ensuring that the guidelines are not circumvented by plea agreements if the government is required to state on the record its estimate of the reduction in time served as a result of the plea agreement to dismiss some of the counts. Regarding specific recommendations offered by the government as part of plea agreements, I believe those recommendations should be within the guidelines or specific reasons for going below the guidelines should be offered the court at the time the plea is entered. Finally, I strongly urge the Commission to adopt the policy that harms will be excluded from the sentence computation for charges which are dismissed as part of a plea agreement when those charges are unrelated to an offense for which the offender is convicted. To do otherwise, in my opinion, would add intolerable complexity to the sentencing procedures under this system.

Respectfully submitted,



CHARLIE E. VARNON
Chief U. S. Probation Officer

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CRIMINOLOGIST - ADMINISTRATOR

September 17, 1986

Mr. William W. Wilkins
Chairman, United States
Sentencing Commission Suite 1400
1331 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004

Dear Judge Wilkins:

By earlier correspondence you requested that we submit a statement concerning guilty pleas, plea bargain agreements and cooperation. Enclosed please find my statement concerning these three separate matters.

You will note that in preparing my statement I prepared a Preamble. In so doing, it was my desire to convey to the Members of the Commission, some of my basic thoughts about the purpose and duties of the Sentencing Commission. I hope these comments are helpful to you.

I look forward to reviewing the tentative draft of the guidelines which are to be published later this month.

Very truly yours,


J. Robert Cooper

JRC-mg

PREAMBLE

One has heard on many occasions and from any number of sources that, "While the American Criminal Justice System is not one hundred percent (100%) perfect, it is at least the best system ever devised and put into practice." This system is continually undergoing change and more recently through the Comprehensive Crime Control Act of 1984, the Congress of the United States has provided for further change in our system.

Under the changes provided by the Congress, a United States Sentencing Commission has been established and the Commission, in going forward with its designated work, is committed with being a balancing force within the system. They are charged with trying to serve and please the injured public, a specific victim, the court system, prosecutors, defendants and others.

In carrying out its mission of establishing sentencing guidelines for imposing punishment, the Commission is charged with establishing a set of guidelines that is fair to all of these interests, assuming a described set of conduct.

In establishing these guidelines, the interested parties generally ascribe to the principle that accountability for a particular described conduct is what is to be basically considered in determining punishment. These interests feel that there is a minimum penalty and/or punishment that

goes with the conduct irrespective of whether a person has plead guilty to the particular conduct or not.

Thus, in establishing a set of guidelines, the Commission is faced with the unique responsibility of recommending to the Congress limits of punishment for a particular defendant's conduct. Under these guidelines, he should not be held entirely accountable for the conduct of a group with whom he may have been associated.

Under the present guideline system established by the United States Parole Commission, more often than not, every participant in a crime is placed into the same offense category level. This practice came about as a result of their earlier experience with placing defendants into different category levels when considering them for parole. A great deal of litigation resulted from the fact that the United States Parole Commission would place co-defendants in different category levels. Later, when separate co-defendants were called before the Commission for parole hearings, the aggrieved co-defendants would take their complaints of disparity to the District Courts complaining that they should be placed into a lesser category level, along with perceivably less culpable co-defendants. Because of the large number of cases that were filed seeking relief on this basis, the Parole Commission just found that as a practical matter, they could put everyone into the same offense category level and then deal with the culpability issue by assignment within the suggested guideline range, or below and above.

Consequently, all co-defendants in a conspiracy are placed into the same category level by the United States Parole Commission and this results in unfair treatment to those with much less culpability. For example, there are many cases where an individual should have proper guidelines of 14-20 months based upon his particular conduct, but due to the fact that he has been thrown in with the other co-defendants/co-conspirators, he is placed into a 40-52 months guideline range or even higher. The Commission, in considering his parole application, can either place him at the bottom of the guidelines or below. It is almost impossible to get someone a two year below the guideline treatment, thus, a defendant under this practice gets a 36 months parole date when really he should get one at 14 months. The present system neglects individual consideration.

The original premise of the United States Parole Commission, in adopting guidelines, was that the panel of examiners would go to the parole hearing, interview an inmate, consider his case without regard to the parole guidelines and then make a parole recommendation. In practice, however, the panel of examiners now go into the parole hearing room, open the guideline manual, look at the described conduct, state that the inmate is in a particular category level, compute the salient factor (parole prognosis score) and say these are your guidelines and pretty well close the book. The individual treatment contemplated in a parole system and the personal mitigating factors offered as an explanation for the violation or why an early release is warranted or dictated, are more often than not, completely and totally overlooked. The Parole Commission, under their adopted procedures, finds within its guideline range at least 85% of the time.

By doing so, the Parole Commission has abandoned its paroling concept and has become a "term setting" agency, really the function of the Sentencing Commission. If one gets parole in the present parole system, it is only incidental to the guideline process for all individual parole consideration has long since been abandoned.

The Sentencing Commission is charged with the burden of creating a variation to the guideline system of the United States Parole Commission which does not adopt, compound or carry forward these iniquities.

GUILTY PLEAS

The guidelines established by the Sentencing Commission should not make a distinction between a defendant who pleads guilty and one who stands trial. This process would be giving an undue reward to those who plead guilty for whatever reason over those who elect to take advantage of their constitutional right to stand trial. Our present system of jurisprudence states that, "every man is innocent until proven guilty by the government", and I personally feel that you should be able to exercise this right of trial, thereby forcing the government to prove its case, without expectations of being penalized for making this election. United States v. Hutchings, 757 F.2d 11, 14 (2nd Cir.) cert. denied ____ U.S. ____ (1985). United States v. Carter, 795 F.2d 1460 (9th Cir.) decided July 31, 1986.

Generally in a plea situation there has been a plea bargain agreement process. The court, when called upon to accept the plea, is to some extent acting in a vacuum as it relates to many of the basic underlying facts concerning the case and the individual defendant's particular activities. The court relies upon the statements offered by the Probation Department through the Presentence Investigation Report, the prosecutor, the defendant and his attorney to determine these facts. To the contrary, when a defendant elects to go to trial, the prosecution is able to develop a full set of facts concerning the offense and the particular defendant's offense behavior. More often than not, the government is able to introduce into the record other prior acts of the defendant's, whether charged or indicted or not, and also prior similar acts. The court, thus having this additional and extra knowledge, can fully determine in the sentencing process the proper term to impose.

The risk of going to trial and having these aggravating circumstances made known to the court, is more than off-setting when a defendant is considering a plea. A better way to handle the lesser penalties for those not having plead guilty would be the imposition of a harsher penalty because of the aggravating factors learned by the court at trial.

One can certainly look at either side of the coin, that is, you can give credit for the plea, or you can aggravate because of the aggravating circumstances at the trial. The defendant certainly should not be penalized, per se, for electing to go to trial.

PLEA

- A. With Cooperation**
- B. Without Cooperation**

- A. With Recommendation(s)**
- B. Without Recommendation(s) as to Counts, Time, Money**

COOPERATION

- A. Prior to Plea and Sentencing**
- B. After Sentence**
 - 1. Trial**
 - 2. Plea**

COOPERATION

Some reward should be given to those defendants who cooperate with the government. Public policy encourages cooperation and the Criminal Justice System should be the first to take advantage of and encourage persons to cooperate by rewarding them for their cooperation.

A. One of the difficult things for a defendant who is considering cooperating is that he is concerned that some of the information that he gives to the government while cooperating under the plea bargain/debriefing process, will be later used against him. For example, under present policies, if a person is arrested in a particular jurisdiction and cooperates in that jurisdiction, then he finds that he can be later indicted and put to the burden of defending himself in another jurisdiction even though he has given information about matters in that particular jurisdiction.

The prosecutors, in many cases, feel that they cannot restrain the prosecutors in these other jurisdictions from filing cases. The same is true for indictments in State Courts. Thus, while the Sentencing Commission is faced with somehow rewarding cooperation, they should also concern themselves with how to go about protecting those who have cooperated. While it can be successfully argued that this is a subject beyond the scope of the Sentencing Commission, the Commission is certainly not blind to other problems within the Criminal Justice System.

B. Under the present system, there are other areas where a defendant relates to an agent of the government some facts in addition to those for which he has been arrested, tried and/or found guilty. In particular, a defendant will relate additional conduct to a probation officer or a member of the United States Parole Commission even though he has never been indicted, tried or convicted. These agencies will penalize and punish him for this conduct. The defendant's feel that they are being asked to cooperate with the government by making a clean sweep of all of their past conduct and if in the event that they do not tell everything that they know, and admit to other conduct that they have been involved in, and the government later finds out through some source that there has been an omission, then the defendant is faced with a claim or charge that he has failed to cooperate and tell all that he knows and runs the risk of a breach of plea bargain situation.

C. On occasions a defendant, in order to protect himself, will inform the interviewing government agent that he wishes to invoke his Fifth Amendment rights. Even though a defendant may not be guilty of any illegal conduct, the government, under these circumstances, will treat him in a fashion as though he has committed some crime. Accordingly, some system needs to be arranged whereby cooperating defendants can cooperate without any fear whatsoever of being penalized for his cooperation.

D. The recognition and protection of further prosecution is not a reward for cooperation in and of itself. Thus, the Sentencing Commission

can establish a policy of awarding cooperation. It should be the court who should decide how to award those who are cooperating. Unfortunately, left to the devices of the United States Attorney's Office and/or the defense attorneys, the system will soon get tortured and prostituted. The court, the third branch of the government, is the proper agency to determine the awards.

E. Should a particular defendant feel that he has, in any way, been mistreated by the court and not given an adequate reward for his cooperation, then he can be given appeal rights. The appeal rights can be established similar to those that are contemplated under the new Rule 35. In fact, it would seem that the failure to be given adequate recognition and reward for cooperation is a proper complaint under Rule 35 and to be implemented under the Crime Control Act.

As a practical matter in investigating a case and attempting to dispose of a case, the investigating agent, probation officer, United States Marshal, United States Attorney, and any others who are connected with enforcement will promise many, many things to a defendant just to get him to cooperate. Then in final analysis under the present system one often finds that these promises have just been mere promises, and that they are not able to deliver the promised reward. All too often a defendant is back before the court requesting consideration for his effort.

The court system is primarily static but all too often there is a change in the investigating agent, prosecutor, etc. Once the case has been

initiated and/or disposed of, then the person who made the promise to the defendant is no longer available. Then too, the persons making the promises are not properly trained and informed about the law and/or procedures by which the cooperation is to be rewarded. Additionally, these other parties have limited experience in handling cooperation situations while the courts will see these kind of matters every day.

Accordingly, it is my opinion that the court should be the proper agency to handle the question of reward for cooperation.

F. It should be further considered by the Sentencing Commission in establishing rewards for cooperation that many times co-defendants in a case have no information to give. Because of this lack of information, many times these lower and lesser involved individuals receive longer and harsher penalties and punishments than those who are the major participants in the violation. While it is not suggested that the major participants should not get some major reward, this is merely a statement which states that the lesser individuals should, during the sentencing process, be given some consideration both in guideline assessment for culpability, as well as a reward for cooperation. He should get the double benefit of reward for cooperation though his offering is significantly less.

The thing basically to be rewarded is cooperation. Certainly, the value of the intelligence and the value to the government is to be considered. The guidelines should make some efforts to properly reward each and every defendant who cooperates.

PLEAS

The Congress was properly concerned about turning the Criminal Justice System over to the prosecutors.

The subject of plea bargain agreements gets back to the question of who is to control the Criminal Justice System, the prosecutors or the courts? This question has existed and does exist under the present system. At present the prosecutor controls what charges are to be filed, the number of charges to be filed, nature of the charges, etc.

In the plea bargain process it is then up to the prosecutor to bargain with the defendant as to what counts of the information or indictment that he is to plead guilty to. Whether he is to plead guilty to one or more counts, the nature of the counts, etc. It is for this reason that the Sentencing Commission should attempt to establish a balance between the charges that are brought and the plea bargain agreement. The courts in the dispositional phase of the case should have great latitude in learning the underlying facts and circumstances about the particular case and the particular defendant before the court is required to accept or reject a plea bargain agreement.

The court should not be bound by a stipulated set of facts that are proffered to the court by the prosecuting attorney and defense attorney. This practice would tie the hands of the courts and quite often the court

would find itself quite frustrated in dealing with the case where the court feels that the interests of the public are not being adequately protected.

The Sentencing Commission in establishing and recommending its guidelines should not make "guidelines" an idol to be bowed down to by the court, prosecutors and defendants. This is exactly what the Parole Commission has done and guidelines have been found to be a millstone around the neck of the Parole Commission. By using terms like "appropriate limits" one immediately senses that the Sentencing Commission is allowing this idolatry to creep into the efforts of the Sentencing Commission. This is counter productive to the complete and total efforts of the President, the Congress and the courts.

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September 22, 1986

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20530

Dear Judge Wilkins:

I am writing on behalf of the Subcommittee on Sentencing Guidelines of the Association of the Bar of the City of New York in response to your letter of August 20, 1986.

Guilty Pleas

We believe that guidelines should give the sentencing judge some discretion to adjust the sentence downward to reflect the fact of a guilty plea, in the range of a 10% to 25% reduction of the sentence that would otherwise have been imposed.

Our position is based upon a widely reported belief on the part of judges and practitioners in the Southern and Eastern Districts of New York that some inducement to plead guilty is necessary for the practical working of the criminal justice system in the federal courts. Absent a substantial number of guilty pleas, the already overburdened courts, in the New York metropolitan area at least, would be unable to provide the vast numbers of trials that would be required to dispose of the current volume of cases. We can only expect the burdens on the courts to

Hon. William. W. Wilkins, Jr.
• September 22, 1986
Page 2

increase as concern over the drug problem escalates throughout the country.

In addition, a guilty plea often reflects contriteness by a defendant and brings finality and certainty to the criminal process. In these respects guilty pleas help to reinforce public confidence in the criminal justice system and should be encouraged in structuring the guidelines.

A defendant who chooses to go to trial should not, of course, be penalized for doing so, and should receive the appropriate sentence under the guidelines without any consideration of his refusal to plead guilty.

In order to assist the Commission in its continuing monitoring role, we recommend that in guilty plea cases a record be kept of factors such as the percentage of downward adjustment used and the reasons, such as the promptness of the plea with the concomitant savings of the court's time, for the adjustment. The compilation of this information by the Commission would help it to develop a set of uniform standards and to refine the guidelines in the light of experience.

Plea Agreements

We believe that agreements under Rule 11 should continue to be available to the parties and that the Court should continue to have discretion to accept or reject Rule 11 charge and agreements.

Just as in the case of guilty pleas, plea and sentence bargaining serves the useful purpose of avoiding unnecessary trials and is essential to the orderly functioning of the criminal justice system in the federal courts.

Because departure will almost never be available, Rule 11(e)(i)(B) and (C) agreements must, in the vast majority of cases, result in proposed sentences that are within the prescribed range. Hence there is little likelihood that such agreements would be used to circumvent the guidelines.

With respect to charge bargaining under Rule 11(e)(1)(A), the Court would be free to reject a proposed dismissal of charges that would be inappropriate in light of the seriousness of the underlying facts. Thus, through

Hon. William. W. Wilkins, Jr.
September 22, 1986
Page 3

judicial supervision, the use of charge agreements to circumvent the guidelines can be controlled to some extent.

The parties should be permitted to enter into stipulations which the Court should have discretion to accept or reject, on the basis of the presentence report and other facts that may be called to the attention of the Court.

We recognize that in some instances plea agreements have been used by the parties to substitute for the true facts their own incomplete or fictitious versions of the facts, in order to obtain a pre-determined sentence they have agreed upon. We do not believe this will be the general rule under the guidelines, as long as prosecutors are not overwhelmed by a large volumes of cases and thus maintain their ability to go to trial when necessary. The normal process of negotiation between prosecutor and defense counsel involves the exchange of a substantial amount of information, and is itself a fact-finding process. This process can be more reliable as to the underlying facts than the presentence investigation. Given judicial supervision, the plea and charge bargaining process should produce an appropriate disposition in most cases.

There are certain districts, such as the Southern and Eastern Districts of New York, where as a matter of general policy Rule 11 is not used by the U.S. Attorney's office. In such districts plea agreements are worked out between the parties, who agree on the charge or charges to be the subject of a plea of guilty, and who then defer to the Court in the imposition or sentence. Adoption of the guidelines system may result in a wider preference for such informal plea agreements, since under the informal non-Rule 11 procedures the parties have more latitude to structure the plea independently of the Court. Hence under the guidelines the parties may be more inclined to use the informal method to reduce charges to the bare minimum, in view of the limited discretion permitted the Court to tailor a sentence to the particular case, once the offense of conviction has been established.

Because the opportunities for departure from the guidelines are virtually non-existent, mandatory prison sentences may become commonplace even in the case of non-violent first-offenders. Therefore there is reason for concern that in general, plea agreements will be less frequently reached and that a far greater number of defendants

Hon. William. W. Wilkins, Jr.
September 22, 1986
Page 4

will go to trial than at present. This prospect would not be greatly diminished by the availability of downward adjustments for guilty pleas, because there are many defendants who would opt for a trial if a mandatory prison sentence of any length were to be applicable upon a plea of guilty.

Cooperation

We believe that cooperation by defendants is clearly in the public interest and should be encouraged by some degree of leniency in sentences, consistent with the needs for proportionality of sentences among co-defendants and for integrity of the fact-finding process. Thus, we believe that cooperation by a defendant should be a basis for a downward adjustment of sentence, to a degree that is within the discretion of the court. Since the downward adjustment for cooperation will be in addition to the downward adjustment for a plea of guilty, it will probably be necessary for the guidelines to include a special departure mechanism to permit sentencing at below the bottom of the range for cooperating defendants.

The parties should not be encouraged to determine, agree to or certify to the Court the extent of downward adjustment, because such involvements by the parties would impair the credibility of cooperating witnesses. Indeed, a prosecutorial practice of making specific sentencing recommendations to the Court would motivate each cooperating witness to seek some specific benefit in return for cooperation. This would make plea bargaining a unseemly process, with defendants seeking a precise quid pro quo for their testimony. The extent of benefit from cooperation, if any, should be determined solely by the the Court.

Disputes as to the extent of cooperation should be resolved by the Court upon a hearing, if necessary.

We do not believe that different levels of cooperation can be "objectively identified" because there are many variables such as the defendant's demeanor as a witness, the relative importance of his testimony to the government's case, risk to his life because of cooperation, and his relative culpability. Thus no "flat discount" should be prescribed for the element of cooperation.

ANDERSON RUSSELL KILL & OLICK, P. C.

Hon. William. W. Wilkins, Jr.
September 22, 1986
Page 5

Naturally, we will be pleased to respond to any additional questions the Commission may have for us on the above points.

Respectfully yours,

John H. Doyle, III
John H. Doyle, III */c.*

JHD:ct

VIA FEDERAL EXPRESS

CHAMBERS OF
T. F. GILROY DALY
CHIEF JUDGE

United States District Court
District of Connecticut
United States Courthouse
915 Lafayette Boulevard
Bridgeport, Conn. 06604

September 18, 1986

Dear Judge Wilkins:

I hope the following comments will prove useful to you in your September 23, 1986 hearing on sentencing guidelines.

GUILTY PLEAS

A defendant cannot be penalized for going to trial. The sentencing guidelines, however, should provide a possible downward sentencing adjustment for defendants who plead guilty before trial and should further provide that the sentencing judge has discretion as to whether such an adjustment is appropriate in a given case.

PLEA AGREEMENTS

The trial judge should scrutinize negotiated plea agreements only to the extent necessary to determine whether the defendant has entered into the agreement knowingly, voluntarily, and understandingly. I, myself, refuse to be bound by the sentencing aspects of any plea agreement.

In response to your final question in this category, the prosecutor decides what charges are to be brought and whether reduced charges should be brought. The prosecutor can influence the sentencing result, then, to the extent he or she has discretion to make these decisions. A prosecutor, for example, might stipulate with the defendant to the underlying facts of a continuing criminal enterprise, thereby removing any trial court discretion to impose a sentence short of the mandatory ten-year period of incarceration.

COOPERATION

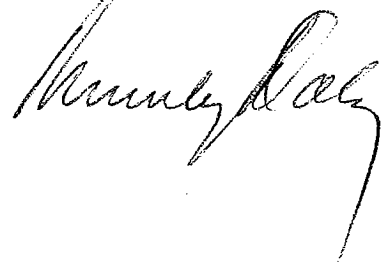
The sentencing guidelines should provide that the sentencing judge may adjust a sentence downward in any appropriate case where a particular defendant has cooperated. The sentencing judge should decide the appropriate level of downward adjustment based upon the extent of cooperation.

Page Two

The major policy consideration involved here, as any prosecutor well knows, is that many major cases are successfully made only when an insider decides to cooperate. I might also add that cooperation is often the first indication of rehabilitation.

If I can be of any further assistance, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Murray Davis", with a long, sweeping underline that extends to the right.

TFGD:jmb

The Honorable William W. Wilkins, Jr.
Chairman, The United States Sentencing
Commission
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September 18, 1986

Mr. William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

Thank you for the opportunity to voice my opinions on the proposed sentencing regulations, pursuant to your letter of August 20, 1986. I wish to address both issues of guilty pleas and plea agreements together, as I feel that the two are inextricably meshed.

Although in a practical sense, the defendant who pleads guilty will usually receive less time than one who goes to trial and is convicted, it is my belief that guidelines with a downward adjustment for a plea would not pass a test for constitutionality.

First, it must be noted that the Sixth Amendment to the Constitution guarantees the absolute and unobstructed right to a full and fair trial by a jury of one's peers, and therefore, set guidelines which automatically granted lower sentences for a plea of guilty in effect penalize one for choosing to go to trial.

If the defendant faces potentially less time for a plea than for a trial, the constitutional problems seem to abound. While I acknowledge the fact that trial judges often justify the higher sentence of a convicted-by-trial defendant for a) conviction on more counts than the plea defendant; or because b) the brutal circumstances of a crime may be vividly portrayed if there is a trial; c) the judge may be convinced the defendant committed perjury in the course of his defense; or d) the judge may feel the defendant has presented a frivolous defense; (see comment, 66 Yale Law Journal 204, 218, 1956), to statutorily mandate the imposition of a lower sentence on those who plead guilty would be violative of the equal protection clause. Before mentioning equal protection however, let me expound a bit on the issue of

disparities and number of counts disparities and number of counts.

The guidelines on a plea defendant may differ from that of the trial defendant by virtue of the statutes of conviction. For example, a defendant indicted in a drug conspiracy case, with substantive counts following the conspiracy count, may plead to a telephone count only. That defendant's guidelines for that statute would differ from a trial defendant's who may be convicted of the conspiracy and substantive drug counts (21 U.S.C. § 841, 846). If the sentencing guidelines are to be set up like the parole guidelines. Then the defendant pleading to the telephone count (facilitating the conspiracy by use of the phone) may have the same guidelines as the trial defendant based upon the underlying offense theory. If the guidelines are NOT like the parole guidelines, then the choice of the counts of the plea could lower the guidelines, depending upon the statute of conviction.

Both federal and state courts have traditionally and uniformly held that a guilty plea is, in effect, a conviction and the equivalent of finding of guilty by jury, [see State v. Battle, 365 A. 2d 1100 (Conn. 1976), U.S. v. L'aquarius, 418 F.Supp. 887 (D.C. Okl. 1976), Osborne v. Thompson, 481 F.Supp. 162, (D.C. Tenn. 1979), People v. Palmer, 595 P. 2d 1060, (Colo. App. 1979), and People v. Hardin, 414 N.Y.S. 2d 320 (N.Y.A.D. 1979)]. Because a plea of guilty is the same as a jury conviction, it seems inherently unjust to have two different standards based upon pleas.

Any plea negotiation system must have some sort of incentives to offer defendants if it is to comport with the criminal justice system; however, these should be determined through existing judicial discretion, and NOT made into a mandatory rule, applicable in all cases.

The Supreme Court of Michigan has squarely addressed the issue of whether the fact that the defendant has pleaded guilty should have any legitimate bearing on the punishment he receives in People v. Snow, 386 Mich. 586, 194 N.W. 2d 314 (1972). In that case, the defendant was tried and convicted of prison escape by a jury, and received a sentence of 2 to 5 years. On appeal, he showed that of 234 prison escape cases in the county over a 26 month period, 207 pled guilty and received minimum sentences of one and a half years or less, while 13 were tried by a jury and received sentences of two years or more. In remanding the case, the court condemned the system in practice and answered in the affirmative to the question of whether the "sentence of a trial court is illegal if it was made harsher as a result of appellant's exercising his constitutional right to trial by jury, and right not to plead guilty." Snow, at 317 (see also People v. Earegood, 173 N.W. 2d 205 (1970), which held that "it is impermissible for a

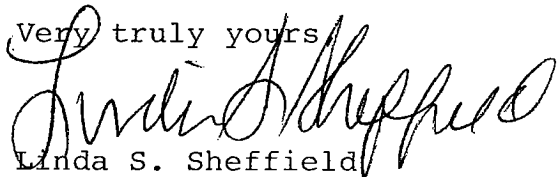
Mr. William W. Wilkins, Jr.
September 18, 1986
Page -3-

judge in imposing sentence to take into consideration as a factor in determining the term of the sentence the fact that defendant pled or waived a jury...", at 207) These cases illustrate the judicial concern that one not be penalized for exercising his constitutional right to a trial by jury.

In Snow the court determined that the defendant was similarly situated with all other prison escapees, that is, in the same class, thereby making disparate disposition of his case illegal.

The Fourteenth Amendment commands that no person shall be denied equal protection of the law. This requires that individuals be treated in a manner similar to others; which certainly extend to the criminal justice context. In his Constitutional Law Treatise, Professor Nowak states: "When the government takes actions that burden the rights of a classification of persons in terms of their treatment in a criminal justice system, it is proper to review these laws under the strict scrutiny standard for equal protection," Nowak, at 818-19. As you know, a regulation may survive strict scrutiny in the face of a compelling state interest. However, it is generally accepted that the utility of plea arrangements is essentially administrative convenience; (" The most commonly asserted justification of plea bargaining is its utility in disposing of large numbers of cases in a quick and simple way", Enker, Perspectives in Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108 (1967) at 112). Certainly, administrative convenience cannot justify penalizing a defendant for choosing to try his case.

Again, thank you for this opportunity to express my views, and please let me know if I can be of any further assistance to you or the commission.

Very truly yours

Linda S. Sheffield

LSS/kmc

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September 17, 1986

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Mr. William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

The following is my response to your letter dated August 20, 1986.

GUILTY PLEAS

There should not be a specific distinction made for a defendant who pleads guilty and one who is found guilty in trial. However the guidelines themselves could have a range that would allow the judge to consider this as a mitigating factor in some cases.

I agree, in part, with the philosophy of less time for those who plead guilty. However, too many factors tip the scales of justice to say this could apply in all cases.

The consideration has merit, but it should not be an absolute reduction in the guidelines and I do not feel the right people will always benefit or suffer across the board.

PLEA AGREEMENTS

This topic is appropriately in the middle of this discussion. It is felt that plea agreements by definition can take into account a plea of guilty versus trial. The United States Attorneys can also make a subjective decision on the amount of cooperation.

I have heard from agents and Assistant U.S. Attorneys that they need some incentive to encourage the pleas and cooperation. If the guidelines were broad enough, then there could be room for recognition of pleas and cooperation, while not taking away significantly from the judge's discretion. A ceiling could be placed within the guidelines for such recognition.

The number of counts charged and pled to is another variable which has been used by the U.S. Attorneys Office. The Commission may wish to consider mandatory consecutive sentences and time for some areas of crime. Thus the defendant would see the dismissal of counts as being more important to his future.

Today, the defense counsel knows the meaning of salient factor and severity ratings. They soon realize that in many cases it does not make any difference how many counts they plead to, except in the area of fines. What defense attorneys and defendants look at the most, is how much time they will spend inside.

Mr. William W. Wilkins

PAGE 2

A prosecutor and defense attorney can speak to the defendant's role in what has been known as total offense severity. This is one of the areas we have had difficulty with minor players in major cases. Presently the Commission allows for one lower level for peripheral involvement. In some cases this has not been enough for the defendant who has had less involvement. The sentencing guidelines could define four (4) different levels of involvement. Example: Peripheral, supporting character but not necessary, involved but not an initiator and prime mover.

I would suggest that the ranking of many drug cases by amount and purity alone has proven inappropriate in many cases. In addition, the clarification of a defendant's role should be defined prior to a plea of guilty.

New information in the presentence investigation, material to sentencing, can be cause for the judge to deny a plea agreement. Otherwise the guidelines should be broad enough for each offense.

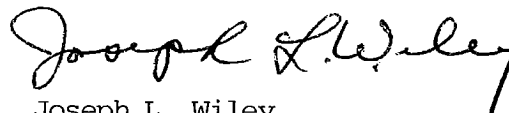
COOPERATION

Cooperation can be credited similar to pleas, but I believe this is even more subjective. The variations will change from agent to agent and AUSA to AUSA. In addition, no one can predict the results of such cooperation. I believe the only factor that can be used is if the defendant is truthfully telling all he knows. I have seen the leader and instigator of conspiracies turn around and cooperate and get less time since he knows the most. One case I have dealt with has made this part of his criminal strategy.

In short, I do not believe we can come up with a scale that would be fair in all cases and with all defendants. The U.S. Attorney can give consideration for this cooperation at the time of the plea agreement as described in my above paragraphs. Primarily, I would prefer to leave this as a mitigating situation for the sentencing judge with a recommendation by the U.S. Attorney.

I would state that the same cooperation should not receive favor at the stage of the plea agreement and then additional consideration at the time of sentencing.

Respectfully submitted,



Joseph L. Wiley
Supervising U.S. Probation Officer

JLW/sh

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
PROBATION OFFICE

September 17, 1986

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REPLY TO Macon

Honorable William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This is in response to your letter of August 20, 1986, regarding the proper role of plea agreements in a sentencing guidelines system. The questions raised in your letter are quite interesting, and I suggest that substantial points of disagreement would exist between various members of the United States District Court family as well as within each office of the Court family member.

For the purpose of our response we have addressed the questions concerning guilty pleas and cooperation jointly as we view this post-offense conduct somewhat interrelated. First, we would argue that the sentencing guidelines should not provide an automatic downward sentencing adjustment for those defendants who plead guilty to an offense for which they have been charged. It is also argued that we should not allow the defendant to be placed in a position that if he or she pleads guilty, the maximum possible penalty under statute may be avoided. Based on experience at the local level, it is suggested that a plea of guilty is not a totally valid measure of the defendant's "sincere or genuine remorse". It is hypothesized that the majority of guilty pleas result as a result of some promised consideration or leniency from the Court as a result of the plea. It is also suggested that one who exercises his constitutional right to a jury trial and is subsequently found guilty would in effect be penalized for going to trial as the defendant would not receive the downward sentencing adjustment. It is our opinion that penalizing one for exercising their constitutional right involves a much greater philosophical/legal issue.

From a practical standpoint, we must admit that guilty pleas do expedite the judicial process, therefore we feel that the Court should take into "consideration" the fact that the defendant has entered a plea of guilty. This plea combined with other indicators, i.e. a contrite spirit, cooperative attitude, etc., should be considered by the sentencing court in the final crafting of the sentence as the Court is determining appropriate forms of sanctions in satisfying an offender's total sanction units for sentence purposes.

September 17, 1986
Page 2

It is suggested that the sentencing guidelines should provide a downward sentencing adjustment for those defendants who "cooperate" with authorities prior to their sentencing date. Cooperation is a rather broad term, and it is suggested that the guidelines must establish a system-wide definition of the concept of cooperation. It is suggested that the Court, United States Attorney's Office and the Probation Office have joint responsibility in defining a particular defendant's cooperation and affixing the appropriate downward adjustment. The prosecutor is the individual who possesses the detailed facts concerning the criminal offense. It is his responsibility therefore to furnish these facts to the Court through the United States probation officer, and it is suggested that the Court and probation officer should work together to determine the appropriate downward adjustment. Candor concerning this process must be the rule, and it is suggested that both the defendant and the defense attorney should be made aware of the details of this process. Disputes concerning the level or quality of cooperation must be dissolved by the sentencing Court based on facts presented by the prosecutor through the United States probation officer. It is suggested that disputes should be resolved in the presentence process in accordance with Rule 32 procedures.

It is suggested that cooperation should be heavily weighted in the defendant's favor as cooperation with authorities tends to expedite the investigative as well as the judicial process. Again, we caution however that the suggestion that cooperation is indicative of a remorseful or a rehabilitative spirit is misleading as it is felt that much cooperation is generated from the fact that the defendant is facing an imprisonment sentence and possibly views cooperation as an avenue to lessen the inevitable "sting".

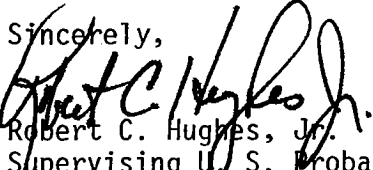
Concerning the area of plea agreements, we share the Congressional concern that plea agreements not be used to circumvent the sentencing guidelines. Unfortunately, it is suggested that much of the public harbors a negative image of plea bargaining, and certainly this image will continue to erode if plea agreements are used to circumvent prison sentences. Judicial scrutiny must be a part of any negotiated plea, however, the Court must avoid any action which would tend to be viewed as an usurpation of the prosecutor's or defense attorney's role. Hopefully the Court would retain an impartial objective role insuring that veracity and candor concerning the offense behavior are standards applied in evaluating whether an agreement was acceptable according to the letter and spirit of the sentencing guidelines. Of grave concern is the issue that plea agreements may be used to present to the Court for application of sentencing guidelines a "sanitized version" of the offense. This in effect would provide the defendant an avenue of manipulation to escape accountability for his actions. It is therefore recommended that the Court should not be bound by any stipulation of fact especially if the Court becomes aware of additional facts. The Court should also have the power to require the United States Attorney's Office through the United States Probation Office to disclose all facts concerning the case. The rule should also require that if there has been any stipulation of fact between the prosecutor and the defense, then the Court, United States probation officer, and significant others should be put on notice. In recent years,

September 17, 1986
Page 3

appellate decisions have defined the fact that Courts may take into account total offense behavior for sentencing purpose, and we feel that the Courts must continue to consider all aspects of the offense as well as the offender in the application of the sentencing guidelines. To do any less in our opinion would undermine the integrity of the sentencing process.

The opportunity to respond to these issues is greatly appreciated. We look forward to a reviewing of the tentative draft of the sentencing guidelines in the near future.

Sincerely,



Robert C. Hughes, Jr.
Supervising U. S. Probation Officer

RCHjr/tla

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA

UNITED STATES COURTHOUSE

110 EAST PARK AVENUE

TALLAHASSEE, FLORIDA 32301

WILLIAM STAFFORD

CHIEF JUDGE

September 16, 1986

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This replies to your August 20, 1986, letter. I will attempt to answer in the same sequence you posed the questions.

GUILTY PLEAS

The sentencing guidelines should provide an option for the sentencing judge to reduce the length of sentence based upon a defendant's guilty plea. I stress that this should be an option with the sentencing judge, inasmuch as some guilty pleas warrant a reduction and others do not, and the sentencing judge is in the best position to make that determination.

PLEA AGREEMENTS

Here we should recognize that the traditional concept of separation of powers still has some vitality. In short, the Executive, operating through the United States Attorney, should make the determination of who and what to prosecute, leaving to the Judiciary the sentencing decision for the crimes to which the defendant has pleaded guilty.

The Attorney General of the United States could issue guidelines to his prosecutors throughout the country, putting limits on their plea bargaining authority. This would do more to eliminate disparity in sentencing than interfering with the independence of the judiciary. In other words, a prosecutor in California could "cut a deal" with a defendant's attorney on the same basis that a U.S. Attorney in Georgia could, resulting in the district judge's sentencing options being the same in both jurisdictions.

The Honorable William W. Wilkins, Jr.
September 16, 1986
Page-2-

During my nearly six years as United States Attorney, and my eleven years as a district judge, this district has never engaged in "sentence bargaining." We do accord to the United States Attorney almost unbridled discretion to negotiate on counts, that is "charge bargaining." It is the position of our judges, however, that to agree on a sentence in advance, without knowing anything about the defendant or his background, is like shooting in the dark, and to have the probation office go to the time and expense of doing a detailed presentence investigation before the court determines whether to accept the plea or not is, in our judgment, a waste of resources. I recognize that "sentence bargaining" is expressly authorized under Rule 11, but mention our practice so that you may understand the frame of reference from which I approach your questions.

You also ask how can the prosecutors and defense attorneys stipulate to the underlying facts of an offense and the offender's behavior to reach a desired result. It has been my practice to refuse guilty pleas if the defendant is unwilling to admit to the truth of the facts that underlie the charge brought by the United States Attorney. It is certainly within the U.S. Attorney's discretion to obtain a superseding indictment or file, with the defendant's consent, an information charging a lesser included or different offense from which the defendant was originally indicted. Any set of facts could conceivably amount to a violation of several sections of the United States Code, but I would absolutely refuse to take a plea if counsel manufactured the factual situation to fit a particular offense.

COOPERATION

A defendant who cooperates is entitled to some consideration by the sentencing court. This serves the prosecutorial function, and can be some evidence of a defendant's first step towards rehabilitation, recognizing, of course, that the defendant is looking for the most favorable deal he can obtain.

I agree that there are different levels of cooperation, and they should be objectively identified, with the primary determiner here being the prosecutor. The defendant should have an opportunity to dissent from the prosecutor's assessment of his cooperation. If the sentencing court is willing to accept a plea agreement calling for cooperation, then it seems to me that the sentencing court must, in case of disagreement, make the ultimate determination as to whether in fact there has been cooperation and the extent of it.

The Honorable William W. Wilkins, Jr.
September 16, 1986
Page -3-

THE FLORIDA EXPERIENCE

I have sent to you several articles concerning the rather disastrous results sentencing guidelines have caused in Florida. There is general dissension among the trial judges, but a new concern has arisen, and it may be of interest to you in your new position on the Fourth Circuit, as well as to your fellow appellate judges nationwide.

The five district courts of appeal in Florida are the intermediate courts of appeal, but except for capital cases and other state-wide issues, are in reality the courts of last resort for most criminal cases. One of those courts of appeal sits in Tallahassee, and the judges on that court remark that they are seeing more and more appeals to the sentencing guidelines. I have no reason to doubt that the other four district courts of appeal in the state are likewise experiencing the challenges to the sentences imposed by our state trial judges. A new body of law is consuming the appellate docket.

Thank you so much for your interest in our district meeting. We look forward to having your representative Mr. Burris join us, and I welcome the opportunity to see you in Clearwater in October. This comes with my best wishes for success in your endeavors.

Respectfully,

A handwritten signature in cursive script that reads "William Stafford". The signature is written in dark ink and is positioned above the printed name.

William Stafford

WS/jj

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PROBATION OFFICER

ROBERT K. SIBILLE
CHIEF PROBATION OFFICER

September 17, 1986

647 MAIN STREET
BATON ROUGE 70801-1996
AREA CODE 504 389-0494
FTS: 687-0494

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

I am responding to your letter of August 20, 1986 requesting my thoughts on the following topics:

GUILTY PLEAS

I believe the sentencing guidelines should make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty. In the early 1970's, in a rural Georgia courthouse, I listened to a District Attorney announce to criminal defendants who were to be arraigned that he would consider probation for any defendant who pled guilty, but any defendant who chose to insist on his right to a trial and who was found guilty would receive only a prison sentence. The announcement occurred prior to court had the desired effect. A defendant should not be punished for insisting on his constitutional rights.

PLEA AGREEMENTS

I stated in a previous letter sentencing guidelines would have the effect of decreasing the discretionary power of the sentencing judge and increasing the power of the United States Attorney. I do not know how the Sentencing Commission can develop guidelines or policy statements to control the United States Attorneys who will use the guidelines in negotiating plea agreements. The U. S. Attorneys are already considering the parole guidelines used by the United States Parole Commission in determining which charges will be prosecuted.

The individual sentencing judge, when presented with a plea agreement, can only judge each agreement on a case by case basis. Standards do not appear to fit in these instances with one exception. Judges should not accept any plea agreement which attempts to narrow the judge's discretionary authority

Honorable William W. Wilkins, Jr.
September 17, 1986
Page 2

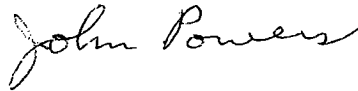
within the sentencing guidelines as a plea under Rule 11(e)(c) might do.

The increased discretionary powers given to the prosecutors under the Sentencing Reform Act will manifest itself under Rule 11(e)(1)(a). The prosecution will hold out the carrot of a charge which carries a shorter sentence within the guidelines. Rule 11(e)(1)(c) which calls for a specific sentence should be rejected by the sentencing judge or at least deferred until the judge has been provided a presentence report. I do not see a big impact by the Sentencing Reform Act on this type of plea agreement. The prosecutors know Rule 11(c)(1)(a) is their big stick.

COOPERATION

Cooperation should be the concern of the government prosecutors in developing their plea agreements relating to dismissal of certain charges. Once the defendant has pled guilty the sentencing judge should be able to consider the level of cooperation in determining a sentence within the guidelines. I see no usefulness in formally identifying levels of cooperation to be used by the judge. The prosecutor and the defense attorney can in whatever manner appropriate inform the judge of the defendant's cooperation. Such information should also be included in the presentence report. If there is a disagreement over the level or quality of the cooperation the judge will simply have to make an evaluation based on the information provided him. The judge can choose to ignore the cooperation altogether believing the defendant's actions were only self-serving. To get involved in a hearing over the level of cooperation would be counter productive.

Sincerely,



John D. Powers
U. S. Probation Officer

JDP:jj

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

LAREDO, TEXAS 78040

CHAMBERS OF
JUDGE GEORGE P. KAZEN

September 15, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

This letter responds to yours of August 20, 1986, inviting comment on guilty pleas and plea agreements. I confess at the outset that my comments are influenced by a very strong feeling that the entire idea of sentencing guidelines is highly questionable. I am not convinced there is a legitimate problem of sentence disparity on a systemic basis nor that guidelines are the solution. Further, it is of questionable value to endeavor to standarize sentences when there is no effort to standarize what charges are filed in a given situation among various jurisdictions. I fear we are about to open a Pandora's box of giantic proportions which will have a severe impact on the work of district courts, appellate courts, court reporters, probation officers, prosecutors, defense lawyers, and everyone else. I also fear that the Congress will make few, if any, provisions to assist. I foresee guilty plea cases becoming mini-trials, with evidentiary hearings on the accuracy of the presentence report followed by appeals on the issues of what guidelines are applicable and whether they have been followed.

If there is a legitimate concern with disproportionate sentencing, why does the Congress pass statutes calling for a range of sentencing from, for example, zero to twenty years? Why is the Congress presently seriously considering legislation in the narcotics area allowing a sentencing range of twenty years to life imprisonment?

It would seem that a far simpler approach would be that now being proposed in the so-called "tax reform" legislation, where the Congress is considering eliminating all but a few tax rates. Similarly, there could be two or three categories of offenses, such as "less serious," "serious" and "very serious," carrying allowable maximum sentences of three years, six years, and ten years, with no parole. The judge would then fix a sentence based on all of the

historically applicable factors, such as age, prior record, extent of cooperation, etc. We would thus eliminate a new bureaucracy, a fertile new field of endless litigation over guidelines, and the mushrooming of appeals from sentences. Most importantly, we would cease the self-delusion that we can quantify, standarize and reduce to formulas situations as infinitely variable as human life itself.

With that preamble, I now attempt to respond to your particular questions.

Guilty Pleas

I do not consciously impose a lower sentence simply because a defendant pleads guilty. Many a defendant has pled guilty before me in the face of overwhelming evidence of guilt while still denying or rationalizing away his culpability. It is clear that he has entered the plea simply to lower his exposure through the plea bargain. The charges may have been reduced or modified by the prosecutor to such an extent that there is no room left for further leniency. I generally look for other signs of genuine repentance, such as efforts to make restitution, cooperation with the Government, changes in lifestyle, or at a bare minimum, candidness concerning the offense.

Without seeing the guidelines, it is difficult to answer your precise question. It has been suggested that the ultimate guidelines will call for a very narrow range between the minimum and maximum sentence. If this is true, I would question a reduction in sentence purely because of a guilty plea, standing alone. I would agree that the guilty plea is one of many factors that could be generally considered in applying the guidelines, but would object to any attempt to quantify a specific "discount" off the sentence for a guilty plea.

Plea Agreements

Plea agreements are essential to obtaining guilty pleas, and guilty pleas are essential to the functioning of the system. I have believed, both before and after taking the bench, that in any jurisdiction, if all criminal defendants would plead not guilty to all charges, and insist upon all their legal rights at every turn of the proceedings, they would bring the criminal justice system to its knees in a matter of months. It would certainly be true for me, where I have just taken a plea in criminal case No. 323 for 1986, with three months still remaining.

The Congressional concern "that plea agreements not be used to circumvent the sentencing guidelines" impresses me as being based on a questionable view of the entire process. It seems to presuppose that the criminal charges either had an origin beyond the prosecutor's office or that they somehow acquired a life of their own after being filed. The fact is that the charges are the creation of the prosecutor and remain his until disposition. The Fifth Circuit, for example, has held that the prosecutor has the power to obtain dismissal of criminal charges against the defendant even after sentencing, where the sentence was more severe than the prosecutor felt warranted because of the Defendant's previous cooperation. United States v. Hamm, 659 F.2d 624 (5th Cir. 1981) (en banc). The Court held that the "leave of court" requirement in Rule 48(a), Fed. R. Crim. P., is primarily intended to protect a defendant against prosecutorial harassment and that the court can deny a motion to dismiss only in "extremely limited circumstances in extraordinary cases." The Court further held that the trial judge would have to find affirmatively that the dismissal was contrary to the public interest in order to deny such a motion. Thus, at least in this circuit, a prosecutor has virtually total control over what charges are prosecuted.

Many is the time that, as a result of a plea bargain, a prosecutor has moved to dismiss the entire indictment against the defendant, filing instead a criminal information charging misprison of a felony, a communications violation in a narcotics case, a smaller quantity of controlled substance, or some other reduced charge. I am unaware of any legal authority allowing me to prevent this.

It is, after all, the prosecutor who drafted the charges in the first place and exercised wide discretion in doing so. It is the prosecutor who first decided whether to file a felony or a misdemeanor or to file at all. It is the prosecutor who decided whether to charge one count or several for basically the same conduct. In short, I do not think that the guidelines can or should attempt to limit the prosecutor on what charge is ultimately offered to the defendant who wishes to plead guilty.

Once that charge is selected, however, I believe the prosecutor's role in the sentencing process should diminish and at most take the form of a recommended sentence under Rule 11(e)(1)(B). I am opposed to Rule 11(e)(1)(C) stipulations even under the present system. I strongly urge that the Court should have the ultimate prerogative to determine the true facts in the case, after obtaining a presentence report. While the prosecutor

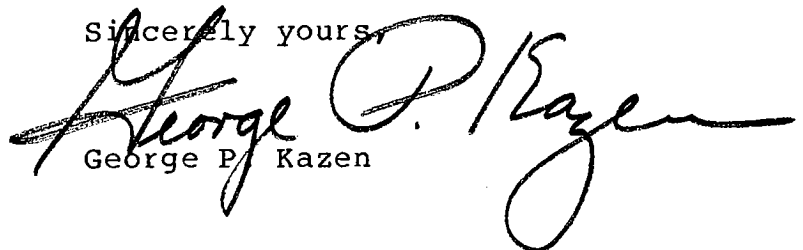
Page 4
September 15, 1986

is free to define the final charges, the Court should not be blindfolded to the facts in determining the sentence. For example, if a defendant is transporting fifty aliens, the prosecutor is free to file one count charging one alien, but the Court should not have to pretend at sentencing that the case is so limited. The same would be true if a defendant is charged with distributing a small sample of narcotics when in reality he also concluded the sale of a much larger quantity. Accordingly, the guidelines must be defined in terms of the facts and not necessarily in terms of the precise charge to which the defendant pleads.

Cooperation

This is an extremely important factor in my judgment, but I cannot imagine how "different levels of cooperation (could) be objectively identified" or how they could be quantified in a guideline. The varieties of cooperation are almost limitless. Is the defendant a simple "mule" who has furnished information on key members of a massive criminal conspiracy? Or is he a substantial criminal offering information about subjects probably less culpable than he? Is he merely furnishing general "intelligence" information or did he actively cooperate, as in the case of a controlled delivery? Did the information actually lead to the arrest and conviction of another individual? What if the defendant were willing and ready to cooperate but the agents had not the time, resources or interest to pursue the matter further? I would urge the Commission to adhere to the historic division of responsibility between the Executive and the Judicial Branch. Whatever benefit the prosecution wishes to confer on a cooperating defendant can and should be done through the shaping of the charges, either in the original indictment or in whatever substitute indictment or information is filed prior to a guilty plea. Thereafter, however, the sentencing should be in the hands of the court. The prosecutor can and should advise the court as to the extent of cooperation and make whatever recommendation he deems appropriate. In the end, however, the court alone should make the evaluation. The cooperation should simply be a general factor that causes the sentence to be reduced in whatever manner the Court feels appropriate. If there are disputes concerning the level or quality of cooperation, they should be resolved by the court after hearing both sides, as is true in the case of any other dispute concerning matters in the PSI.

Sincerely yours,


George P. Kazen

GPK/gsh

Sheriff Don Omodt
President
Minneapolis, Minnesota

L. Cary Bittick
Executive Director
Alexandria, Virginia



NATIONAL SHERIFFS' ASSOCIATION

1450 DUKE STREET • ALEXANDRIA, VIRGINIA 22314

Telephone Number 703-836-7827

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September 17, 1986

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General Counsel
Washington, DC

Honorable William W. Wilkins, Jr.
Chairman

U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Washington, D.C. 2004

Dear Judge Wilkins:

With reference to your letter of August 20, 1986, I offer you the following views which, I believe, reflect the opinions of a substantial majority of our members.

Guilty Pleas

While a large percentage of criminal cases are resolved by guilty pleas and this is important to the Criminal Justice System as a whole; it is of small significance to the average sheriff even though some part of the time of an investigating deputy is saved such as his duties in assisting the prosecutor in case preparation, giving testimony, etc., and less time may be served in jail by defendants who plead guilty, although most defendants are released on bail pending trial. If a defendant's guilty plea is induced by a genuine recognition of the nature of his criminal acts and remorse therefor, and not the overwhelming evidence against him, I feel the sentencing judge should be entitled to consider this fact in sentencing a defendant.

Plea Agreements

Law enforcement officers are generally opposed to plea bargaining with the possible exception of agreements that bring about a substantial commitment by the defendant to cooperate in the solution of other crimes. It is recognized that there are

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instances where the evidence available, or the law, compels a prosecutor to reduce the charge against a defendant but, this should be scrutinized closely by the judge. If the sentencing guidelines are fair, and I am certain they will be, then there should be no modification because of a plea bargain. If, however, plea agreements are to continue, even under more limited circumstances, then we believe judges should review them with particular care to insure that the public interest is fully protected. To this end the judge should not accept just the views and factual presentations of the prosecutor and defense attorney, but broaden his inquiry to include the views of the victim, the investigating officers and other interested public officials.

Cooperation

It is in the area of recognition in an appropriate way of those criminals who cooperate with law enforcement officers that the sentencing guidelines can have the greatest benefit to those whose duty it is to investigate and control crime. It is an old adage that, "You don't catch criminals in church." Organized crime, both national and local, narcotics, white collar and other crimes where multi-offenders are involved are secret and conspiratorial in nature. Those who can provide truly significant and valuable information are usually themselves involved either directly or peripherally in the criminal underworld. To induce cooperation is difficult because those criminals who do so frequently run the risk of serious injury or death be they in or out of the penitentiary. The possibility of some mitigation in punishment is a powerful factor in obtaining cooperation. This is not to say that it cannot be accomplished in other ways but it is exceedingly difficult. Practically all law enforcement officers feel that getting murderers, rapists, burglars, narcotic dealers, etc., "off the streets" particularly the leaders of organized groups (they recognize this must be done constitutionally) is in the public interest. Consideration in the sentencing of a convicted criminal may be a small price to pay for assistance in accomplishing this.

To identify objectively different levels of cooperation and quantity each as to what effect it should have on a sentence is almost impossible to do because of the great difference in criminal activities. One would ordinarily think that a felony charge is more important than a misdemeanor, but this is not always true. I do not know how any sort of standard can distinguish between cooperation which for example enables the authorities to locate and defuse a time bomb on an airplane as contrasted to information that solves a single murder case.

Unless some one can devise acceptable standards, it would seem that some discretion must be given to the court to evaluate differences in value to the public. Similarly disputes as to level or quality of cooperation seem best decided by the court after such hearings as the court may find necessary. Again those involved in obtaining and using the information obtained should participate in such hearings.

I regret that I am unable to be of greater assistance to you. I reiterate that I speak only from the point of view of the law enforcement officer. There are others far better qualified to address this matter on behalf of the prosecutor, the defense attorney and the judiciary.

Very truly yours,


L. Cary Bittick
Executive Director

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA 23219

CHAMBERS OF
ROBERT R. MERHIGE, JR.
DISTRICT JUDGE

September 15, 1986

Mr. William W. Wilkins, Jr
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Billy:

I acknowledge receipt of your letter of August 20 and respond as follows.

Guilty Pleas

As you may recall, I have previously expressed the view that I felt it entirely inappropriate for guidelines to make any distinction between the offender who pleads guilty and one who stands trial and is subsequently found guilty. I realize that some judges adjust their sentence downward on a guilty plea. Under that theory, so it has been expressed to me, a plea of guilty represents the first step towards rehabilitation. While I respect the views of those judges, I feel that such a plea does not represent anything more than that the offender is both in fact and in law guilty, and is satisfied that the prosecution has more than sufficient evidence to make a conviction. My own experience has been that there is little about our sentencing procedures or our penal institutions that rehabilitate a convicted felon.

My primary objection to a downward sentencing adjustment for offenders who plead guilty is premised on my reluctance to put a price on a constitutional right. Every offender, regardless of the enormity of the crime or the evidence available against him or her, starts every case under our constitution with the presumption of innocence. It seems to me to be entirely inappropriate to put a price on one's waiving that right.

While I have not made a detailed study of the matter, I am satisfied that at least 85 percent of the criminal cases that come before me go off on a plea. It is well known that I give no credit for a plea of guilty. On the other hand, hopefully it is just as well known that a sentence is not increased by virtue of the fact that one pled not guilty and was ultimately found guilty. I am a little disturbed at the prospects that in our quest for what is perceived to be efficiency we are willing to make sacrifices resulting in inroads of the constitutional rights of our citizenry. Frankly, it more than disturbs me and borders on frightening. The suggestion that downward adjustment would be appropriate for one who pleads guilty certainly cannot, in my opinion, be justified under any theory of efficiency, and may result in some judges refusing to take a plea of guilty. While I think downward sentencing adjustment is wrong, I will, of course, follow the guidelines.

Plea Agreements

In my view, all plea bargaining is, as a practical matter, sentence bargaining. Rule 11(e)(1) and its subdivisions all deal with either the dismissal of certain charges which reduce the potential sentence, or calls for a recommendation, or at least lack of opposition, for a particular sentence, and finally (C) permits agreement for a specific sentence. I have had little difficulty with Rule 11 in this regard.

Additionally, I have always adopted the attitude that the matter of prosecution is one that rests exclusively in the hands of the executive branch; hence, I have viewed the motion for dismissal of charges to be one which I had no choice but to sustain. While, I have not gone blindly along with the U.S. Attorney's recommendations in reference to a (e)(1)(B)(C) type of plea bargain, I certainly have listened to them carefully, and have been greatly influenced by a prosecutor's views in this regard, bearing in mind that he or she knows--or at least should know--more about the case than any judge will ever know.

More specifically as to your inquiries, I have serious reservations that the Sentencing Reform Act should conflict with Rule 11. The standards a sentencing judge should apply when evaluating a plea agreement will, or should be, in accord with the letter and spirit of the sentencing guidelines. It seems to me that a court must consider the fact that one of the goals of the Sentencing Reform Act is to reserve imprisonment for those who truly are dangerous to society. I contemplate very little change in the way judges will look at plea bargaining under the Act. As to the extent the prosecutors and defense attorneys may stipulate to the underlying facts and offense in the offender's behavior, such factors mandate a certain sentencing result, and it would appear that since it is a stipulation, they should be able to enter into any factual agreement in which both sides acquiesce.

Cooperation

This appears to me to be the most difficult aspect of your inquiries. On the one hand, we all hope that offenders will cooperate with authorities, yet one must be careful not to let this truly become sentence bargaining. I have let the word go out that I certainly give that type of cooperation consideration, but my view is that all citizens should cooperate with the authorities, and failure to do so would be taken into consideration.

I frankly find it difficult to see how your Commission can set objective standards for different levels of cooperation. My own view is that the Commission should simply state that a sentencing court is authorized to take such cooperation or lack thereof into consideration in imposing sentence. It would be appropriate to require a court to state whether or not it has taken such cooperation or lack thereof into consideration in its ultimate sentencing. I doubt seriously if there will be many cases in which the prosecutor and defense will be able to agree as to the level or quality of cooperation. Indeed, the prosecutor is bound to be influenced by law enforcement agencies, who may be more impressed by the level of cooperation given by one of their regular snitches than that given by someone else.

I am afraid little of the foregoing will be helpful to you or to the Commission, and conclude by stating we may all be better off if we keep the guidelines down to a minimum.

With warm personal regards, and looking forward to seeing you in the not-too-distant future, I am

Respectfully,

A handwritten signature in dark ink, appearing to read "Bob.", with a horizontal line extending to the right.

Robert R. Merhige, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
PROBATION OFFICE

BARRY W. POLSKY
CHIEF PROBATION OFFICER

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September 15, 1986

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Chairman Wilkins:

This is in response to your letter of August 20, 1986 concerning the role of plea agreements in the sentencing guideline system. I feel the guidelines should make no distinction between a person who pleads guilty and one who stands trial and is subsequently found guilty. On a philosophical level, I am troubled by the thought that a defendant is punished to a greater degree because they exercised their constitutional right to a trial. In addition, their decision to plead not guilty may be the result of their attorney advising them, for any number of reasons, to go to trial, rather than plead guilty. On a practical level, I anticipate that the guidelines will have sufficient flexibility that, should the sentencing judge desire to punish a defendant more severely for a not guilty plea, they will be able to do so.

In regard to plea agreements, I feel the current right of the Court to accept or reject a plea agreement at arraignment or defer acceptance, until sentencing, is sufficient. Such a determination by the Court will undoubtedly hinge on local and/or regional sentencing practices/philosophy, as well as local practices by U. S. Attorneys, pertaining to plea bargains. I cannot imagine any manual, detailing standards or guidelines which would adequately address this issue in other than the general terms described in 3553(1)(2). In other words, I feel the standards to be considered in acceptance of any plea bargain, (which includes both "charge bargaining" and "sentencing bargaining") are the same as the standards considered by the Court in the imposition of a sentence.

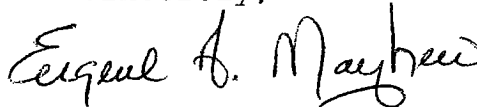
If the underlying facts of an offense and the offender's behavior mandate a certain sentencing result, I feel the prosecutor and defense attorney should agree to a written stipulation prior to arraignment.

I believe the Court should recognize cooperation offenders provide to authorities and that a tentative agreement to provide cooperation should be formalized in the plea bargain. The public policy considerations are the same as those that exist under current sentencing procedures (i.e. - savings of prosecutorial, investigative, judicial resources; apprehension of others; decreased crime; etc.) The Court should be the final arbiter of the downward adjustment but the prosecutor, it seems to me should be the final arbiter of whether or not the offender did in fact cooperate.

In this regard, to avoid conflict at sentencing, the plea bargain should specify that the prosecutor will be the final arbiter of whether or not the offender provided the agreed upon cooperation.

I doubt that objective standards or levels of cooperation which would be sufficiently inclusive, can be identified and/or quantified. Assuming that the guidelines will have a degree of flexibility or range, particularly for the more serious offenders/offenses, I feel the guidelines need only identify cooperation as a factor which justifies a lesser sentence.

Sincerely,



Eugene A. Mayhew
U. S. Probation Officer

EAM:1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HAYDEN W. HEAD, JR.
U. S. DISTRICT JUDGE
521 STARR STREET
CORPUS CHRISTI, TEXAS 78401
512 - 888-3148

September 11, 1986

Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you for your opportunity of August 20, 1986, to discuss the proper treatment of guilty pleas, plea agreements, and cooperation in sentencing. The questions posed by your letter are questions that confront me frequently because of the large number of criminal cases that are handled by this court. Although guilty pleas, plea agreements and cooperation are very frequently integral parts of a single proceeding, I will answer your letter as close as I can to the individual topic.

Guilty pleas constitute a critically large part of the disposition of the cases in this court. Without guilty pleas, I would not be able to hear all of the criminal cases brought to the court for disposition by the United States Attorney, much less civil cases brought by private citizens. Sentencing guidelines should reflect a downward sentencing adjustment for defendants who plead guilty. Most agree, as do I, that a defendant's punishment should not be increased because he has entered a plea of not guilty and exercised his right to have his day in court; however, not to recognize by a reduced sentence a defendant's remorse and apologies expressed through his guilty plea is unfair to him but it is not unreasonable to a defendant who has earned no such consideration. Additionally, it is entirely unrealistic not to give consideration to a defendant who has saved the government and the court considerable time, expense and effort.

Plea agreements are integral parts of most guilty pleas. Plea agreements will no doubt be used by defendants to avoid sentencing guidelines. Whenever the government's case is weak, a defendant will be tempted to obtain a beneficial agreement and the government will likely be tempted to accept it. The opposite is true as well. Typical plea

Honorable William W. Wilkins, Jr.
September 11, 1986
Page 2

agreements in this court are ones under Rule 11(e)(1)(A) and/or (B); e.g., ones in which the defendant pleads guilty to the charge in return for the government's silence at sentencing, or the defendant pleads guilty to one or more counts in return for dismissal of others or promises not to indict for others. Rule 11(e)(1) C agreements are few. Most judges do not like them, but will take them on occasion, depending on the circumstances.

A sentencing judge should review but generally respect a plea agreement. This opinion presumes an able government prosecutor and I think that is the presumption that the guidelines must recognize. The prosecutor is in the best position to evaluate the strength of his case. He is also in a position to determine which of the many cases on his own docket should be the focus of his attention and the limited resources of his office. Those same statements can be made with respect to the defendant's counsel. The prosecution of a case is not the Court's prosecution; the defense of the case is not the Court's defense. Again presumably, the attorneys are in the best position to dispose of the case by plea bargain. By saying the foregoing, I do not mean to state that there is no role for scrutiny by legislative and judicial branches of the government. While Congressional concern may be that plea agreements may circumvent guidelines, and while judges may be concerned that a lenient agreement allows the guilty to escape inadequately punished, oversight has to be realistic.

As a matter of practice, I examine plea agreements and I have occasionally refused plea agreements, but on inquiry the great majority are justified. The refusals were in cases where the defendant had negotiated a very lenient agreement. In one recent instance, the proposed sentence was so low that I told the parties I could not pronounce such a weak sentence for such a serious charge and would rather hold a lengthy trial with the possibility of no conviction than be responsible for promoting a public perception of excessive leniency in the judicial system. In another case, I essentially did the same. In both cases the defendants later re-entered pleas enabling more appropriate punishment. I have accepted other plea agreements which I did not like because the reality of the case was that the defendants were guilty but the government's case was weak. Those circumstances are unavoidable. Most plea agreements

Honorable William W. Wilkins, Jr.
September 11, 1986
Page 3

require no real review because the agreement leaves sufficient room for sentencing discretion. I would add that unless Congress is willing to increase drastically the number of agents, prosecutors, and judges, and provide more courthouses and courtrooms and staff for them, as well as increased expenditure for jury fees, then my recommendation is to leave well enough alone. Having observed Congressional treatment of the Judiciary's needs, I believe I can argue with confidence that those expenditures will not be forthcoming. I am not of the opinion that plea bargaining is a problem in federal courts and I have read no study that shows it to be abused.

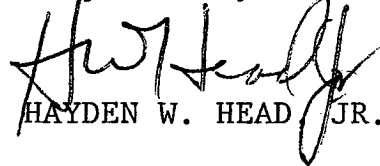
Your questions with respect to cooperation typify the problems of establishing guidelines which, if too detailed, will supplant judgment for a mechanistic approach to justice in the name of consistency. Perhaps some, but I suspect only a few, would debate with me that offenders who cooperate with authorities should be given recognition for their cooperation, and the greater the cooperation, the greater the returned benefits. The sentencing court is the applicable decision-maker upon information furnished by the parties. No certificate need be given, nor written agreement entered. Those may be tools chosen by the parties, but no formalistic paperwork approach should be required when statements of the parties in open court will suffice. Presentence investigations frequently state the level of cooperation and a mechanism is already in Fed. R. Cr. P. Rule 32 to provide the defendant an appropriate method of challenging incorrect information. It is commonplace to allow either party at sentencing to present whatever evidence they would choose to establish cooperation or the lack of cooperation.

In closing, let me simply illustrate that only six to seven indictments per month, if tried to a jury, would consume a judge's entire trial docket for that month. Indictments in my court average about twenty to thirty per month, with a greater number of defendants. No time would be left for hearing the civil cases of our citizens who complain of and defend against alleged violations of property rights, constitutional and civil rights, employment rights, and contract rights, and on and on. I hope that the Sentencing Commission will recognize in its guidelines the need for it to trust the men and women of the executive and judicial branches to dispose of the cases in the courts with integrity and with efficiency. That trust can best be

Honorable William W. Wilkins, Jr.
September 11, 1986
Page 4

exemplified by continuing the flexibility needed to resolve the many, many cases in court, each factually distinct from the other.

Respectfully,


HAYDEN W. HEAD, JR.

HWHjr./jdp

ADDENDUM:

An actual sentencing proceeding yesterday perhaps will illustrate best why I believe guidelines will be very difficult for you to draw in this area of guilty pleas, plea agreements and cooperation. The defendant was convicted in 1981 in Florida of conspiracy to distribute cocaine and possession with intent to distribute cocaine, approximately 50 pounds. Before sentence, he jumped bond to California and assumed a different identity. While there he engaged in a cocaine conspiracy of approximately 80 pounds and was indicted. While awaiting trial in California, he engaged in still another conspiracy with some 6-8 others to import approximately 700 kilograms of cocaine from Colombia. He was one of the major actors. It is this larger cocaine offense for which he was indicted in Corpus Christi.

The defendant was persuaded to plead guilty by virtue of an offer to dismiss several Corpus Christi counts, as well as the California cocaine indictment and the Florida bond jumping indictment, and to make a recommendation for a concurrent sentence on the Corpus Christi case with his Florida 10-year cocaine sentence in return for his testimony against other Florida cocaine dealers. Additionally, there would be a consecutive, but probated, 15-year term on the Corpus Christi cocaine conspiracy indictment, and the Corpus Christi cocaine charge not be enhanced. As a result of his cooperation, the government was able to obtain convictions against six associated Colombians in Miami, Florida, described as among the most sinister and powerful drug groups operating in Miami. This group was responsible for the importation of approximately 500 kilograms of cocaine per month and is suspected of several narcotics-related murders. Without the defendant's cooperation, there would have been no conviction. Additionally, his

Honorable William W. Wilkins, Jr.
September 11, 1986
Page 5

cooperation, I understand, is helping Florida and IRS authorities.

I accepted the recommendation on the theory that while the agreement was generous to the defendant it was not unreasonably generous because the defendant was going to serve a 10-year sentence, had successfully cooperated against ruthless drug dealers, and had risked his life and continues to do so. Two government attorneys at sentencing argued in support of the agreement--the local Assistant United States Attorney and the Assistant United States Attorney from Florida, whose case this defendant made against the Florida drug conspirators. Both strongly urged that without cooperation, such as given by this defendant, top drug dealers will be continue to be immune from prosecution by the layers of insulation that they have placed between themselves and their drugs.

No one likes it, but it is reality.

NATIONAL LEGAL SERVICES, INC.

*Providing Special Assistance on
Sentencing Alternatives and Parole Representation*

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Marcia G. Shein, M.S.

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Debbie A. Turner

Sentencing and Parole Consultant

September 8, 1986

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Re: The Proper Role of Plea Agreements

Dear Chairman Wilkins:

We are pleased to again respond to the Commission's request for our thoughts on a hearing topic. In the past, we have responded extensively, including providing oral testimony. Regarding the particular subject at hand, however, we trust that you will receive plenty of input. The only input we would like to address is something that has disturbed us in the past and may continue to be a problem in the future.

Based upon our extensive practical experience and collective expertise in the long-term effect of Plea Agreements, we would propose the following:

The guidelines applicable to the count(s) pled to should be the guidelines the Court is required to be guided by. Any other counts, regardless of what standing they take, should not be part of the consideration for guideline concerns; otherwise, do not dismiss the counts. The defendant should either plead guilty to a particular count that is a particular crime and that has a particular set of guidelines, and be sentenced accordingly, **or** do not let the defendant plead guilty to those counts. Otherwise you are enhancing aggravation of evidence that was never proven in Court. Additionally, no one ever knew whether it could be proven or not; and that evidence is being dismissed based on the fact that they do not know whether it could or could not be proven.

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
September 8, 1986
Page 2

I am afraid that in the abolishment of the Parole Commission, that the Courts may inherit the propensity for considering all aggravating features above and beyond counts pled. It is not fair. It has never been fair. We encounter the situation repeatedly where the sentence exceeds the guidelines. It is my firm belief that the guidelines should be adhered to unless there is a substantial amount of aggravating information **beyond** what would balance with the mitigating information. In other words, there is a balance to look to: if there is a lot of good **and** a lot of bad, do not do anything. If one outweighs the other the sentence should be reduced or aggravated. But that is the only thing the guidelines should address.

As we have witnessed these problems in the past we have addressed them in some of our previous newsletters which I am providing you. Although they may not apply to the future direction of the Plea Agreement, they might give you some insight. However, the emphasis of our thoughts regarding future Plea Agreement policies is expressed in this letter.

We are looking forward to the publication of the draft guidelines later this month as well as your visit to Atlanta. Thank you for this opportunity to participate in the Commission's hearing on September 23rd.

Sincerely,



Marcia G. Shein, President
Sentencing and Parole Consultant
NATIONAL LEGAL SERVICES

Enclosure

MGS/gn

United States District Court

SOUTHERN DISTRICT OF GEORGIA
AUGUSTA, GEORGIA 30903

DUDLEY H. BOWEN, JR.
JUDGE

POST OFFICE BOX 2106

September 3, 1986

Honorable William W. Wilkins, Jr.
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you very much for your letter of August 20, 1986, seeking my input on the areas of guilty pleas, plea agreements, and cooperation. First, let me comment that these three topics are highly appropriate for your detailed consideration. Every judge has wrestled with these concepts in sentencings. I know of no more vexing, difficult or complex questions than are presented in these three related topics.

GUILTY PLEAS

It is right, proper and economical that approximately ninety percent (90%) of federal criminal cases are disposed of by guilty pleas. I sincerely hope that the same result will obtain after the implementation of the sentencing guidelines. I do not think that the taxpayers or the legislators of this nation have contemplated the financial and logistical results of a change of a few percentage points, say from ninety percent (90%) to eighty percent (80%). This ten percent statistical change would double the criminal caseload in our courts.

While every citizen has the right to enter a not-guilty plea and to put the government to its proof, I know of no logical or constitutional rule against rewarding those who exhibit remorse, contrition, or good citizenship by pleading guilty. Of course, we could always make it obfuscatory. We could deny that rewards are given for pleading guilty and attribute the benefits only to the defendant's demonstrated remorse, etc. This, however, is a charade. Most of the remorse of a criminal defendant is manifest in his sorrow in being caught and prosecuted. There should be real, palpable, advantages to a guilty plea. While a defendant should not be coerced into a guilty plea, neither should a defendant be permitted to "roll the

Honorable William W. Wilkins, Jr.
September 3, 1986
Page 2

dice" on an outside chance of an acquittal at no expense to himself.

PLEA AGREEMENTS

These questions on plea agreements are very reliable indicators of the difficulties which confront the Sentencing Commission in formulating guidelines and sentencing judges in following those guidelines. To be sure, plea agreements should remain under the watchful scrutiny of the court. Federal Rule of Criminal Procedure 11(e)(1)(c) which excludes the trial judge from the actual plea bargaining process, provides sufficient safeguards to prevent abuses. On the whole, the process works well in the federal system. I am sure that abuses have occurred, but I am also confident that those instances predominate in the state systems. Abuses of the plea bargaining process are rare in the federal system. Frankly, most of the concerns which I have heard about the need to regulate or "clamp down on" the process of plea bargaining is political rhetoric insofar as it applies to the federal criminal system. In almost seven years, I have seen one or two instances in which I would flatly reject a plea agreement and a few more under which I would apply some moderate upward adjustment in the sentence.

Plea agreements should not be binding upon the courts. Such binding plea agreements are unseemly and would tend to lessen the dignity of the proceeding. The watchful scrutiny of the court over the dealings between the defendant and prosecution should be maintained. It is very probable that this judicial scrutiny of the plea bargaining process in the federal system is the cause of the successes and respectability which the federal system of plea bargaining enjoys.

I simply cannot come up with an inclusive system of all of the specific factors by which a plea agreement should be dealt with by the Sentencing Commission. The questions that you ask indicate the manifold difficulties. I believe that it would be beneficial to continue to exclude the sentencing judge from the actual bargaining process. Because of the difficulties encountered by the formulation of inclusive specifics, and because of the benefits to be derived by continued

Honorable William W. Wilkins, Jr.
September 3, 1986
Page 3

watchful scrutiny, it may be best simply to allow the broadest possible discretion to the trial judges to govern the dealings between defendant and prosecution in plea agreements.

Judges are not eager to upset plea agreements because to do so exacerbates the problems of busy trial schedules. Nevertheless, neither are they loathe to do so. It seems to me that this element of generous judicial discretion could be beneficially retained.

To answer one of your questions very specifically, it would seem appropriate still to obtain the prosecution version of the offense independent from any stipulation with the defendant. Of course, the court must always determine a sufficient factual basis for the plea. In any event, any stipulation of fact between the prosecution and defense should be made subject to the court's inquiry. Further, any stipulation should be by certificate of truthfulness, after investigation and to the best of the knowledge and belief of the attorneys, and subject to disciplinary sanctions as officers of the court.

COOPERATION

It is my view that the "cooperation factor" in sentencing decisions is one of the most difficult to deal with. On the one hand, I find the prospect of negotiating, dealing, and "cooperating" with criminals, particularly drug dealers, revolting. On the other hand, in some cases it is absolutely necessary and it produces investigations, prosecutions, and convictions which are otherwise impossible. As a practical matter, the factor of cooperation as a mitigating force in sentencing must be retained.

I particularly do not like the practice of making a plea agreement with a defendant, obtaining his cooperation and testimony, and then returning to the court in a Rule 35 proceeding in which the prosecution gives the most glowing report of the defendant's performance in which he is depicted as the next best thing to Dick Tracy. The transition from "scumbag" to cooperating prosecuting witness, ergo hero, is all too rapid and frequent. Somewhere in all of this criminal

Honorable William W. Wilkins, Jr.
September 3, 1986
Page 4

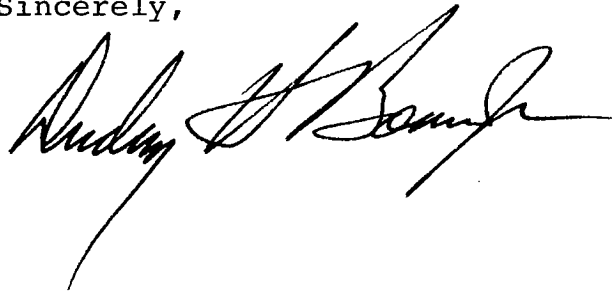
defendants become far too impressed with their own importance, value, and prominence in the system which is organized to punish them.

Sentencing judges now find the aspect of cooperation to be among the most difficult they deal with, and so will the Sentencing Commission. Once again, I cannot suggest a checklist of inclusive specifics. Again, perhaps it would be wisest to leave the court with an element of broad discretion in the consideration of the "cooperation factor." In any event, it would be best to make the assessment of the value of the defendant's cooperation as soon after the guilty plea as is possible, and it should not be deferred until after the defendant has given information or testified. To defer sentencing or the factoring of cooperation until after the defendant's "performance," leaves too much room for imagination to triumph over memory.

I sincerely hope that these ramblings are helpful to you. I do not envy the difficult mission you have undertaken. If I can assist you, I hope that you will call on me without hesitation.

I look forward to seeing you at our Eleventh Circuit Judges Workshop and with kindest regards, I am

Sincerely,

A handwritten signature in dark ink, appearing to read "Rudy H. Benge". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

DHB,jr/cms

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

PROBATION OFFICE

JERONE A. SAVAGE
CHIEF PROBATION OFFICER

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September 3, 1986

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Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

When the Commission considers the proper role of plea agreements in a sentencing guidelines system, I believe that the guidelines should make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty. In my opinion, the guidelines should be based on the offense behavior without consideration as to the manner in which guilt is determined. I don't believe that this would result in more trials, but even if it did, the guidelines need to project a sense of fairness and equity rather than serve as a tool to induce guilty pleas.

In the area of plea agreements, I share Congressional concern that the agreements not be used to circumvent the sentencing guidelines. The Court should insure that any plea agreement first meets the legal requirements of Rule 11. Secondly, I believe that the Judge needs to insist that the proposed sentence in a Rule 11 agreement be within the guidelines for the offense charged. If prosecutor's and defense attorneys can negotiate around the guidelines by use of the plea agreement sanctioned by the Court, then the system will not work as it was intended to do when it was implemented by Congress. In some instances now, prosecutors and defense attorneys attempt to structure a plea agreement so that the offense severity utilized by the Parole Commission will result in lower guideline months to serve. If the sentencing guidelines can be manipulated in a similar manner, then their effect will be diluted. Therefore, I believe that the sentencing Court's primary function in accepting or rejecting plea agreements should be to insure that the mandates of the guidelines will be met, even if the Court accepts the proposed plea agreement and recommended sentence if one is offered to the Court.

Honorable William W. Wilkins, Jr.

Page 2

September 3, 1986

The guidelines should give offenders who cooperate with authorities some limited consideration concerning downward adjustment of their applicable sentences. However, the guidelines should have strict criteria, at least similar to those outlined in the Parole Commission Rules and Procedures Manual at 2.63. The issue of cooperation should not seriously dilute the impact of the mandated guidelines. The revised Rule 35 requires the Government to petition the Court for a reduction based on subsequent substantial assistance in the investigation or prosecution of another person who has committed an offense. The sentencing Court will then need to decide the appropriate level of downward adjustment if it is satisfied that the integrity of the guidelines will not be compromised. As it now stands, the Court defers to the U.S. Attorney to determine the level or quality of cooperation, and I believe this should be the standard in the future also.

This is an area that is subject to a great deal of abuse by prosecutors; therefore, I would recommend that the guidelines be very sparing as to the amount of time that a sentence could be reduced for any such cooperation.

I am looking forward to receiving the draft guidelines, and I appreciate the opportunity to have input at this point in the process.

Sincerely,



Oscar J. Stephenson
Supervising U.S. Probation Officer

OJS/mb

WILLIAM D. GRAVES
CHIEF PROBATION OFFICER

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
PROBATION DEPARTMENT

August 27, 1986

PLEASE REPLY TO:
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GRAND JUNCTION 81501
303-245-5396

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Pursuant to your request of August 20, 1986, the following would represent my position reference the three major areas about which you inquired in your letter:

GUILTY PLEAS

No, I do not believe that sentencing guidelines should provide a downward sentencing adjustment for defendants who plead guilty. I believe it would be impossible to devise a system which rewards people merely for pleading guilty without then punishing the remainder for exercising their constitutional right to trial. Many argue that this would be a more honest system, since empirical studies show that sentencing judges presently tend to impose lower sentences on guilty pleas than those who go to trial. But I believe that this difference is due to something else.

When a defendant pleads guilty, he often does so in a plea agreement that shields him from the sentencing consequences of crimes for which he might otherwise be convicted and sentenced. Those who take their chances by going to trial are frequently convicted of either more charges, more serious charges or both, so it only follows that they receive a more punitive sentence under the present system, as rightfully they should.

With the tentative sentencing guidelines predicated on total offense behavior, I realize failing to make a distinction between the defendant who pleads guilty and the one who does not could result in a significant increase in the number of defendants wanting trials. And I further realize the logistical problems should that materialize, especially given the fact that 90 percent of all federal criminal cases are presently disposed of by guilty pleas.

However, I believe it is fundamentally wrong to devise a scheme that deliberately punishes people simply for going to trial, and I further believe that it is erroneous to believe that judges are already doing so now, but simply being less "up front" about it. But even if judges are, in the present system, covertly punishing defendants who go to trial, that unfairness will still exist even if the system tells defendants "up front" that they will, in effect, be punished via a longer sentence simply for choosing to go to

The Honorable William W. Wilkins, Jr.
August 27, 1986
Page 2

trial, in addition to be punished for their criminal behavior. Surely the Commission can find a better way to safeguard against massive requests for trials.

PLEA AGREEMENTS

"Sentence bargaining" should be prohibited under any circumstances and "charge bargaining" should be allowed only to the extent that it does not circumvent the sentencing guidelines.

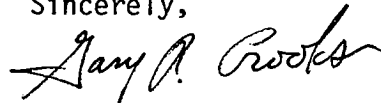
COOPERATION

It seems only reasonable that sentencing guidelines give recognition and reward to those who have cooperated where that cooperation has been significant and documented. Because cooperation can vary, levels of cooperation do need to be objectively identified with the final decision as to the appropriate level or downward adjustment being decided by the sentencing court upon written certification by the prosecutor. Where disputes exist between defense and government counsel, the probation officer could provide a recommendation to the court.

But I am concerned that cooperation not be given an inordinate amount of weight. Doing so tends to undermine the public's confidence in the way the system holds sentenced offenders accountable. It also can result in a reverse form of discrimination: while I have no problem with this working against criminals who could have provided valuable information but chose not to, there are many situations which simply do not lend themselves to an offender being able to cooperate, i.e., simply having no information or ability to assist in any way. Worse, those who have the most information to provide are also the ones who oftentimes are the most entrenched in crime, and it was through their own criminal involvement that they obtained information, which must not be allowed to turn a punitive sentence into a token sentence.

As always, I appreciate this opportunity to provide input.

Sincerely,



Gary R. Crooks
Senior U.S. Probation Officer

GRC/mlp

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
PROBATION OFFICE

PHILADELPHIA

H. RICHARD GOOCH
CHIEF U.S. PROBATION OFFICER
9000 U.S. COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA. 19106-1766
(215) 597-7950

September 3, 1986

SUITE 1106
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READING, PA. 19602

597-2152

Mr. William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

I am responding to your letter of August 20, 1986, addressed to U.S. Probation Officer Thomas R. Maher, inasmuch as Mr. Maher does not have the extra time that would be necessary to prepare a response on this particular occasion.

GUILTY PLEAS

I do not believe the sentencing guidelines should provide a downward sentencing adjustment for defendants who plead guilty, and they should make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty. Personally, I have never believed that defendants found guilty after trial should receive a harsher penalty than those who enter a plea of guilty, because it represents an unfair discrimination against a person who chooses to exercise his/her constitutional rights to a trial by jury. The attached materials are copies of an exchange of correspondence (and photocopies) between a senior district judge, Eastern District of Pennsylvania, and me after the judge informally asked me in January 1985 whether our probation officers considered these factors when recommending a sentence. You will note that there is a Second Circuit opinion [United States v. Wiley, 278F.2d.500 (7th CIR. 1960)], American Bar Association Standard 14-1.8, and an interesting discussion by Saul Rubin (Law of Criminal Correction, Second Edition, Page 64-65) that tend to support my belief.

Page Two

PLEA AGREEMENTS

I do not believe that plea agreements should be used to circumvent sentencing guidelines, because my experience has convinced me that the reason(s) behind the agreements usually have little or nothing to do with the offense or offender characteristics.

COOPERATION

I do believe that there should be some recognition by the sentencing guidelines of offenders who cooperate with authorities, because cooperation tends to facilitate additional prosecutions and thus better serve the public and the broader concerns and purposes of the criminal justice system. I agree that different levels of cooperation be objectively identified and given relative downward adjustments from otherwise applicable sentence; and in my opinion the sentencing court should decide the appropriate level or downward adjustment.

Very truly yours,

A handwritten signature in cursive script, appearing to read "H.R. Gooch".

H. Richard Gooch, Chief
U. S. Probation Officer

HRG/dn
attachments

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

**UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA, PA. 19106**

(215) 597-

January 28, 1985

TO : Mr. Gooch, Chief Probation Officer

Dear Mr. Gooch:

**Thank you for your letter of January 16 and the
enclosures. It has been very helpful.**

**cc: DCUSPO Christy
SUSPO McKemey
USPO Gallagher**

**(Re question as to whether a defendant's
guilty plea and/or being found guilty
after trial is taken into consideration
by probation officers before they make
a sentencing recommendation.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

PROBATION OFFICE

PHILADELPHIA

January 16. 1985

H. RICHARD GOOCH

CHIEF U.S. PROBATION OFFICE

9000 U.S. COURTHOUSE

801 MARKET STREET

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**SUITE 1106
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MEMORANDUM

TO: The Honorable

**FROM: H. Richard Gooch, Chief
U. S. Probation Officer**

I am sure that Your Honor will recall our recent conversation in the lunchroom and your question as to whether a defendant's guilty plea and/or being found guilty after trial is taken into consideration by probation officers before they make a sentencing recommendation to the Court. My reply, in essence, was that they do not; but, I felt that my rationale was most unsatisfactory. For my own benefit and to be of more assistance to Your Honor, I have researched your question and attached copies of the following:

1. Article in C. Newman's textbook, Introduction to Criminal Justice, Second Edition, on "Sentencing Leniency for Guilty Plea Offenders," Pages 286-288, which includes
 - (a) United States V. Wiley, 278 F. 2d. 500 (7th CIR. 1960);
 - (b) American Bar Association's position in Section 1.8; and
 - (c) quotation from the National Advisory Commission on Criminal Justice Standards and Goals.
2. American Bar Association's Standard 14-1.8, Consideration of Plea in Final Disposition.
3. An excerpt from the Law of Criminal Correction, Second Edition, by Sol Rubin, Counsel Emeritus, National Council on Crime and Delinquency, Chapter 2, "The Guilty Plea and Related Sentence Considerations," Page 64.

To: The Honorable

Page Two

4. The Presentence Investigation Report, Publication 105, published and recommended by the Probation Division, Administrative Office of the U.S. Courts with the approval of the U.S. Judicial Conference. Section on the recommendation and rationale, Page 17. (It is to be noted that this publication does not address the issue regarding whether there should be consideration for a guilty plea or finding of guilty following trial by jury.)

HRG/dn

bcc: Christy
McKenney
to Clayton

Deck

Newman, Introduction to Criminal Justice 2nd ed.
The Decision Network

we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."⁴⁸

Dawson found a wide variety of factors beyond the nature of the offense itself which influenced judicial setting of long or short periods of incarceration. Some of these he terms "administrative accommodations," including such things as showing more leniency to an offender who pleads guilty than to one who has had a full trial or showing leniency to an offender who is a police informer or has been a valuable state's witness. Conversely, judges sometimes impose very long sentences, not to bury the offender in prison for many years, but to provide an extended parole supervision period in the belief that intensive surveillance and assistance will be needed on his return to the community.⁴⁹ Furthermore, most conscientious judges wish to "individualize" sentences as much as possible, attempting to fit the actual consequences of sentences to the risk and reputation of the offender and also to consider the effect of the sentence on his family. But it should be noted that individualization is only one sentencing objective. Judges are lawyers, and in sentencing as in other matters, they often have strong allegiances to precedent. Over time it is not unusual for them to strive to impose comparable sentences for similar offenses and similar offenders.

SENTENCING LENIENCY FOR GUILTY PLEA OFFENDERS

As we have pointed out, sentencing determinations are so intertwined with plea negotiation practices that it is sometimes difficult to determine precisely where and by whom the sentence decision is actually made.⁵⁰ In general, overt plea bargaining principally affects selection for probation, avoids mandatory sentences, and, by reducing charges, acts to lower the outer limits of minimum or maximum sentences. Rarely does a bargain include a preconviction promise for a specific term of years in prison.

With minor exceptions, trial judges support the plea negotiation process by honoring bargains made between defense and the prosecutor. But apart from overt bargaining, there is a controversial sentencing issue regarding the common practice of judges showing greater leniency to defendants who have pleaded guilty than to those convicted only after trial. Sometimes called the "implicit bargain,"⁵¹ defendants who plead guilty throw themselves on the mercy of the court and, in most instances, receive this mercy. Opponents of this practice—often other judges—argue that such differential leniency penalizes defendants for exercising their constitutional right to trial. At a federal sentencing conference this issue was debated, and among those favoring more leniency to the guilty plea defendant one judge commented: "In a large metropolitan court it would be impossible to keep abreast of the large number of criminal cases if it were not generally known among the practicing bar that consideration is given to those who are willing to plead guilty."⁵² Others supporting the practice felt that the pleading defendant has shown remorse and should be given a break, while the defendant who pleaded not guilty but was convicted anyway has added perjury to his original crime.

This leniency issue was aired in a federal case involving four codefendants charged

with interstate transportation of stolen furs, where three pleaded guilty, but one demanded trial and was convicted. The judge sentenced the tried defendant to a longer prison term than his partners, although the record showed him to be the least criminal of the four. He had requested probation, but the judge said it was his "standard policy" not to grant probation to defendants who demanded trial and added that his sentence would have been even longer if the defendant had demanded a jury trial instead of accepting a bench trial. The case was reversed on appeal and returned to the lower court for resentencing.⁵³ The court of appeals said:

UNITED STATES V. WILEY
278 F. 2d. 500 (7th CIR. 1960)

The trial judge announced from the bench that it was the standard policy of his court that once a defendant stands trial, probation for such a defendant would not be considered. This policy or rule is self-imposed. It is contrary to the statute and the rule of criminal procedure authorizing probation. Such a rule should not be followed. A defendant in a criminal case should not be punished by a heavy sentence merely because he exercises his constitutional right to be tried before an impartial judge or jury.

In the case at bar, McGhee, the four-time convicted felon, and the ringleader, received a two-year term. The three defendants other than Wiley, all of whom had criminal records, received sentences of one year and a day. Yet Wiley, who had a good previous record except for one juvenile matter when he was thirteen years old, received a three-year term. A realistic appraisal of the situation compels the conclusion that Wiley's comparatively severe sentence was due to the fact that he stood trial. No other possible basis is suggested for the disparity. Consciously or not, the learned trial judge again applied the standard of his rule when he reimposed the three-year sentence. I agree this sentence should not be permitted to stand.

The matter does not rest here, however. The American Bar Association took the following position in constructing its standards for pleading and sentencing:

Section 1.8. Consideration of Plea in Final Disposition.

- a. It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or *nolo contendere* when the interest of the public in the effective administration of criminal justice would thereby be served. Among the considerations which are appropriate in determining this question are:
 - i. that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;
 - ii. that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;
 - iii. that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
 - iv. that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;
 - v. that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;

vi. that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

b. The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty *nolo contendere*.⁵⁴

In contrast to this position, the National Advisory Commission states: "The fact that a defendant has entered a plea of guilty to the charge or to a lesser offense than that initially charged should not be considered in determining sentence."⁵⁵

EXTENDED TERM SENTENCES

Each of the major model sentencing proposals and most newly revised state sentencing provisions provide separate sentencing provisions for youthful offenders and dangerous or professional criminals. In general, sentences for young, first offenders are shorter, more indeterminate, and more clearly directed to treatment and rehabilitative programs in reformatories or other special diversion facilities than sentences for "ordinary" adult violators. Often there are provisions for expunging records if these young offenders show satisfactory correctional progress. It is generally believed that there is much more hope for successful rehabilitation and reintegration of the young with corresponding attempts to reduce the stigma and negative effects of labeling. In many jurisdictions the most modern facilities and a disproportionate number of professional staff are allocated to youth programs. For the most part, this approach is noncontroversial; a majority of all participants in criminal processing give high priority to early leniency and high-quality correctional programs for youthful offenders.

Much more controversial, and exceptionally complex, are provisions for extended sentences for dangerous offenders, gangsters and other persistent, professional criminals. Few would deny the existence of some very dangerous offenders—persons who have committed violent, atrocious crimes—who kill, maim, rape and otherwise seriously jeopardize the safety of us all. The existence of career criminals, professionals who make crime their lifelong occupation, and gangsters and racketeers who traffic in heroin and extort, intimidate and corrupt is an unpleasant reality. The problem of distinguishing these offenders with accuracy and by acceptable means from ordinary, limited-threat offenders is not easily solved.⁵⁶ And the secondary problem, what to do with them once they have been convicted and identified, remains.

These problems generate very difficult legislative questions. Being a "dangerous person" is not itself a crime. Nor is the appellation "gangster" constitutionally sufficient to warrant locking someone up. Instead, model code draftsmen as well as state code revisionists have sought ways to distinguish both dangerous criminal activities

later be sustained. Thus, in *Boykin v. Alabama*,¹ where the record did not reveal that the judge asked any questions of the defendant or addressed the defendant personally, the Supreme Court reversed, stating that the voluntariness of a guilty plea and the waiver of constitutional rights cannot be presumed from a silent record. The Court emphasized that for an accused "facing death or imprisonment" the judge must leave "a record adequate for any review that may be later sought."²

Often courts require a defendant who pleads guilty or nolo contendere to execute a "guilty plea" form or "transcript of plea" form, which recites the advice given to the defendant and disclaims any promises as having been made, except those that are part of a plea agreement. The form may also contain questions relevant to establishing a factual basis for the plea. While such documents are useful as a checklist and serve to emphasize for a defendant his or her constitutional rights, their use should not be regarded as a substitute for a verbatim transcript of the plea proceedings. In *Blackledge v. Allison*,³ the Supreme Court ruled that a defendant's execution of a standard printed guilty plea form did not foreclose collateral attack against a conviction, in which defendant alleged that unkept promises of a lesser sentence had been broken. The Court stressed that the absence of a transcript made it exceedingly difficult to dispose of the defendant's claim, and thus the case was remanded for a full evidentiary hearing.⁴

It is also important that the verbatim record of the proceedings be satisfactorily preserved. This is not always accomplished if the practice is merely to file the reporter's shorthand or stenotype notes, for if the plea is challenged some years later the reporter may be unavailable and another reporter may be unable to prepare a transcript. One means of avoiding this difficulty is to have the court reporter promptly transcribe the plea proceeding. Another alternative is to file the reporter's untranscribed notes with an electronic sound recording of the proceedings.

Standard 14-1.7 is consistent with the Federal Rules of Criminal Procedure⁵ and with the recommendations of other national groups cited in the related standards

section.⁶ Standard 14-1.7 should also be considered in conjunction with standard 14-3.3(f), which recommends that all plea discussions in which a judge participates be recorded verbatim and preserved.

Standard 14-1.8. Consideration of plea in final disposition

(a) The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when consistent with the protection of the public, the gravity of the offense, and the needs of the defendant, and when there is substantial evidence to establish that:

(i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct;

(ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iii) the defendant, by making public trial unnecessary, has demonstrated genuine consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them; or

(iv) the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.

History of Standard

The first sentence in paragraph (a) is new. Its purpose is to emphasize that charge and sentence conces-

1. *Boykin v. Alabama*, 395 U.S. 238 (1969).

1. *Id.* at 243-44.

3. 97 S. Ct. 1621 (1977).

4. *Id.* at 1631-32.

5. FED. R. CRIM. P. 11(g) ("A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea").

6. The terms of state statutes also are often quite similar. See, e.g., N.C. GEN. STAT. § 15A-1026 (1978) ("A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest . . . must be made and preserved. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses"); OHIO R. CRIM. P. 5(B)(7); ILL. SUP. CT. R. 401(c).

sions should not be based solely upon the defendant's decision to plead. Also, the more specific phrase "when consistent with the protection of the public, the gravity of the offense, and the needs of the defendant" has been added to paragraph (a); this language was substituted for "when the interest of the public in the effective administration of criminal justice would thereby be served."

Original subparagraph (a)(i) has been deleted. This provision authorized concessions to the defendant when the plea "aided in ensuring the prompt and certain application of correctional measures. . . ." But unless defendants plead just before or during trial, all defendants who plead contribute to the imposition against them of "prompt and certain . . . correctional measures." This fact alone, however, is not believed sufficient to justify lesser punishment. A defendant who pleads early in a criminal proceeding may do so for a variety of reasons (e.g., to escape pretrial confinement or to take advantage of an attractive plea offer). Such a defendant may be totally unreceptive to the "correctional measures" sought to be "promptly" and "certainly" imposed against the defendant.

Original subparagraph (a)(vi) has also been deleted. This provision sanctioned the granting of concessions to defendants who, by virtue of their pleas, "aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby . . . increased the probability of prompt and certain application of correctional measures to other offenders." Although congestion in criminal court calendars in many parts of the country remains a significant problem,¹ these standards no longer express the view that it is permissible to grant charge and sentence concessions to defendants solely for the purpose of processing cases through the system. The solution for crowded criminal dockets is the availability of sufficient personnel and other resources, so that prompt trials can be readily given to all defendants who want them.

Subparagraph (a)(i)(which was subparagraph (a)(ii) in the first edition) refers to the defendant who "is genuinely contrite" as one deserving charge or sentence concessions. In the original standard the reference was to a defendant who "has acknowledged his

guilt." The purpose of the change was to emphasize that concessions should be predicated on reasons personal to the defendant rather than on explanations that are necessarily shared by all defendants who plead guilty. For similar reasons, subparagraph (a)(iii)(which was subparagraph (a)(iv) in the first edition) now refers to a defendant who "has demonstrated genuine consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them." Previously this subparagraph referred to the defendant who made public trial unnecessary "where there [were] good reasons for not having the case dealt with in a public trial."

Related Standards

NAC, Courts 3.1

NAC, Corrections 5.7

Commentary

This standard approves the granting of charge and sentence concessions to defendants who plead guilty (and perhaps also to defendants who plead *nolo contendere*), assuming one or more of the criteria listed in subparagraphs (a)(i)-(iv) are met. Concessions to defendants, however, are not deemed justified simply because a plea is entered; subparagraphs (a)(i)-(iv) identify conditions for the granting of concessions that apply, if at all, to defendants on an individual basis. Standard 14-1.8(b) also declares that defendants who elect to stand trial should not be punished for the exercise of their constitutional right to trial.

That the Constitution does not prohibit the granting of leniency to defendants who plead guilty was resolved by the Supreme Court in *Brady v. United States*.² The defendant in *Brady* argued that his plea to kidnapping was involuntary because it was induced by the belief that a death sentence could be imposed only upon recommendation of a jury.³ In an unrelated case decided some years after *Brady*, the Supreme Court held the statute involved in *Brady* unconstitutional, due to the burden that it placed on the exercise of the right to jury trial.⁴ *Brady* then sought collateral relief on the ground that his guilty plea was attributable to his desire to avoid a possible death sentence. The Supreme Court rejected *Brady's* appeal, noting that there was little to differentiate his guilty plea from that of

1. Criminal cases pending in the United States district courts decreased to 17,109 in 1977, the lowest number since 1968 (see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 9, 134-35, A-64-67). But some observers still regard overcrowding of the civil and criminal dockets as the single most urgent problem facing the federal courts. See, e.g., Freeman, *Crisis in the Federal Courts: A District Judge's Analysis*, 13 GA. ST. B.J. 130 (1977). In general, congestion continues to be most marked in state criminal courts. See, e.g., Levinson, *Appellate Caseload in Hawaii*, 13 HAWAII B.J. 3 (Fall 1977).

2. 397 U.S. 742 (1970).

3. According to the Supreme Court's opinion, the defendant failed to request a bench trial due to the trial judge's apparent unwillingness to try the case without a jury. *Id.* at 743.

4. *United States v. Jackson*, 390 U.S. 570 (1968).

other defendants who plead guilty because they are told "the judge is normally more lenient with defendants who plead guilty than with those who go to trial."⁵ The Supreme Court further explained:

Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.

... We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

... For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

... But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State. . . .⁶

Standard 14-1.8 recognizes that it may be appropriate for a court to grant both charge and sentence concessions. While trial courts everywhere retain autonomy to sentence offenders, the authority of courts to approve charge concessions is not universal.⁷ In some states, the prosecutor may be permitted to decide whether to dismiss charges and whether to permit the defendant to plead to one or more lesser offenses.⁸ Thus, the reference in paragraph (a) to charge concessions pertains to those jurisdictions where the courts have authority to approve the reduction and dismissal of charges.

Frequently the defendant who enters a plea will do so following plea discussions. Conceivably, charge concessions, sentence concessions, or both, will be

part of a plea agreement concluded between prosecution and defense. Where this occurs, standard 14-1.8 serves as an aid to the court in deciding whether to grant the concessions contemplated by the parties. This standard, however, applies whenever a plea is entered; it is not dependent on whether the parties have arrived at a plea agreement. (Plea discussions and plea agreements are dealt with in part III of this chapter.)

The National Advisory Commission's standards are similar to standard 14-1.8 in recommending that a defendant's guilty plea "should not be considered by the court in determining the sentence to be imposed."⁹ Sentencing concessions to defendants are deemed appropriate when there is "substantial evidence" of "contrition," "cooperation with authorities," or "consideration for the victims of [their] criminal activity."¹⁰ Except for the National Advisory Commission, no other authorities have developed standards for the granting of charge and sentence concessions.

The criteria listed in standard 14-1.8(a) for the granting of charge and sentence concessions are suitable for use when statutes allow for broad judicial discretion under indeterminate sentencing laws, which is the prevailing pattern in the vast majority of states.¹¹ During the past several years, however, there has been mounting criticism of indeterminate sentencing and a discernible trend toward sentencing guidelines and fixed or presumptive sentences.¹² Basically, this movement can be described as an effort toward greater determinacy in sentencing. While so-called determinate sentencing laws differ considerably, generally they narrow the court's discretion in sentencing for classes of

5. 397 U.S. at 751.

6. *Id.* at 750-53. See also *United States v. Thompson*, 476 F.2d 1196, 1201 (7th Cir. 1973), *cert. denied*, 414 U.S. 918 (1973); *People v. Sivals*, 60 Ill. 2d 102, 324 N.E.2d 422, 424 (1975); *State v. Lacy*, 195 Neb. 299, 237 N.W. 2d 650, 653 (1976); *State v. Black Bear*, 187 Neb. 670, 193 N.W.2d 563, 566 (1972).

7. See notes 3-5, and accompanying text, to standard 14-1.1.

8. *Id.* note 4.

9. NAC, COURTS 3.1.

10. NAC, CORRECTIONS 5.7.

11. *E.g.*, OR. REV. STAT. § 161.605 (1977) ("The maximum term of an indeterminate sentence of imprisonment for a felony is . . . [f]or a Class A felony, 20 years, [f]or a Class B felony, 10 years, [f]or a Class C felony, 5 years"); VA. CODE § 19.2-311 (Cum. Supp. 1978) ("The judge or jury, as the case may be, after a finding of guilt, when fixing punishment in those cases specifically enumerated in . . . this section, may, in their discretion, in lieu of imposing any other penalty provided by law, commit persons convicted in such cases for a period of four years, which commitment shall be indeterminate in character").

12. See M. FRANKEL, CRIMINAL SENTENCES 103-24 (1973); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); A. VON HIRSCH, DOING JUSTICE 98-106 (1976). Several states have recently enacted determinate sentencing laws, *e.g.*, CAL. PENAL CODE § 1170 (West Cum. Supp. 1978); IND. CODE ANN. § 35-50-1-1 (Burns Cum. Supp. 1978); ME. REV. STAT. tit. 17-A, § 1252 (Supp. 1978). Other jurisdictions may opt for sentencing guidelines establishing appropriate ranges of sentences for various types of offenders and offenses. These guidelines are usually derived from a statistical analysis of sentencing decisions rendered by numerous judges and require written justification for deviations from the normal sentence range.

offenses. Judges, however, normally retain discretion to increase or decrease a defendant's sentence depending on mitigating or aggravating circumstances.¹³ These statutes sometimes contain their own lists of factors for determining whether aggravating circumstances are present, and these tend to be relatively objective (e.g., whether the offense committed by the defendant resulted in great bodily injury or pecuniary loss).¹⁴ Philosophically, determinate sentencing laws reject rehabilitation as the primary goal of sentencing¹⁵ and the broad exercise of discretion that is common to indeterminate sentencing statutes. Implicitly, therefore, determinate sentencing laws also seemingly repudiate the use of the kinds of discretionary factors listed in standard 14-1.8(a). Accordingly, these factors are probably not suitable for use in conjunction with the relatively limited exercise of sentencing discretion permitted under determinate sentencing statutes. The criteria in standard 14-1.8(a) could conceivably be used with determinate sentencing statutes when courts are called upon to authorize charge concessions for a defendant—a possibility that can just as easily arise under a determinate sentencing statute as under an indeterminate one. Again, however, since the factors contained in standard 14-1.8(a) are inconsistent with the philosophy of determinate sentencing statutes, presumably a court functioning under such a statute would find the factors inappropriate to consult in deciding whether to approve charge concessions.¹⁶

13. In California, e.g., rape is punishable by a presumptive sentence of four years, which may be increased or decreased by one year upon consideration of aggravating or mitigating circumstances. CAL. PENAL CODE § 264, 1170(b) (West Cum. Supp. 1978). Similar provisions have been enacted in Indiana, where a ten-year presumptive sentence for rape may be doubled or reduced to six years depending on the aggravating or mitigating circumstances present. IND. CODE ANN. § 35-50-2-5 (Burns Cum. Supp. 1978).

14. In California, the following aggravating circumstances are enumerated: prior prison terms, the commission of a felony while armed with a deadly weapon, the use of a firearm in the commission of a felony, the taking or destruction of property valued in excess of \$25,000, the intentional infliction of great bodily injury upon an innocent person during the commission of an offense other than an unlawful killing or one in which the infliction of great bodily injury is an element of the offense, and consecutive sentences. CAL. PENAL CODE § 667.5, 1170.1(c), 12022, -.5, -.6, -.7 (West 1970 & Cum. Supp. 1978). See also ME. REV. STAT. tit. 17-A, § 1252(4), (5) (Supp. 1978).

15. In California, rehabilitation is specifically rejected as an objective of imprisonment: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." CAL. PENAL CODE § 1170(a)(1) (West Cum. Supp. 1978).

16. As one law review article suggests, the practice of granting charge concessions may be incompatible with determinate sentencing, since the former encourages sentence disparity and the latter seeks to eliminate differences in sentences imposed for the same offense. Alshuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563-68 (1978).

Paragraph (a)

Subparagraph (i)

This subparagraph recognizes that a defendant's genuine contrition and willingness to assume responsibility for his or her conduct is a valid consideration in sentencing the guilty plea defendant. (It may sometimes also be relevant when a defendant enters a plea of nolo contendere, although such a plea is less likely to indicate remorse.) Thus, the standard is consistent with prevailing and accepted sentencing criteria, which emphasize the relevance of the attitudes of the defendant and the defendant's willingness to assume responsibility for his or her actions.¹⁷ The standard also is supported by expert opinion on the significance of a confession of guilt. As one court has remarked, "In the present state of our knowledge of human psychology it is at least doubtful that judges should be required, in every case, to disregard . . . [the assumed psychological effect of an acknowledgment of guilt as an important step in the process of reformation] when imposing sentence."¹⁸

Of course, a defendant who enters a plea of guilty may not in fact be repentant:

A reduction in sentence following a guilty plea is consistent with the rehabilitation theory of criminal punishment only if such a plea is indicative of remorse for prior criminal acts. Although a guilty plea may at times be motivated by repentance, more often it would seem to represent exploitation by the accused of the prosecutor's and the court's reaction to such a plea. If a defendant who acknowledged his guilt were aware that the plea could not influence the extent of punishment, then perhaps his action might reflect a renunciation of criminal propensities. But the very fact that a defendant realizes a guilty plea may mitigate punishment impairs the value of the plea as a gauge of character.¹⁹

Accordingly, it is important that the trial court interrogate the defendant carefully in order to determine whether the defendant's guilty plea truly reflects repentance. The court can be aided in this endeavor by the presentence report and by information supplied by the prosecutor and defense counsel.

Subparagraph (ii)

Prosecutors are sometimes receptive to defense offers to plead to a lesser offense when the reduced charge will provide the trial judge with additional sen-

17. See, e.g., ALI, MODEL PENAL CODE § 7.01.

18. *People v. Darrah*, 33 Ill. 2d 175, 210 N.E.2d 478, 481 (1965).

19. Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 210 (1956).

tencing alternatives. Conviction of the offense actually committed may result in severe restrictions on the sentencing judge's discretion. For example, the offense may carry a high mandatory minimum sentence or may not be subject to probation. Trial judges are frequently critical of such restrictions, as they feel that by "accepting lesser pleas . . . [there may result] a finer adjustment to the particular crime and offender than the straight application of the rules of law would permit."²⁰ Subparagraph (a)(ii) sanctions approval by courts of charge reductions and dismissals as a means by which justice for a defendant may be individualized. This subparagraph, of course, applies only to jurisdictions where courts have the responsibility to approve charge concessions.²¹

Even if the judge possesses a sufficiently wide range of discretion to fit the sentence to the circumstances of the individual case, the incidental consequences of conviction for certain offenses may subject the offender to undue hardship. Thus, it is not uncommon for courts to authorize charge reductions for the purpose of avoiding certain conviction labels.

In most cases, it is the label of felon that is sought to be avoided, for conviction of a felony carries with it the loss of certain civil rights and works other hardships. For example, the defendant may be prevented from obtaining certain licenses or some types of employment and will be unable to enlist in the armed services. Also, community reaction to a misdemeanor conviction is likely to be quite different from that to a felony conviction. Misdemeanors too, are often described in vague and encompassing terms, while felony offenses tend to be labeled in terms more descriptive of the criminal conduct involved.

In other cases, an attempt may be made to avoid a particularly repugnant label of the offense that covers the defendant's conduct. Generally these are the sex offenses, which often imply that the defendant is a sexual psychopath or sexual deviant, but they also include those crimes that tend to label the offender as an alcoholic, addict, or dangerous person. In most jurisdictions, the judge is powerless to affect the conviction label. This standard takes the position that a reduction in the charge is proper when necessary to prevent undue harm to a defendant from the form of conviction.

Subparagraph (iii)

Charge or sentence concessions also are appropriate where the defendant pleads guilty and, in so doing, demonstrates genuine concern for the victims of the crime, either by agreeing to make restitution or by sparing the victims the ordeal of a public trial. This standard requires the court to judge whether the defendant's plea is motivated by genuine concern for the victims. (The standard, therefore, is similar to subparagraph (a)(i), which sanctions charge and sentence concessions when the defendant is genuinely contrite and assumes responsibility for his or her conduct.) Where the defendant evidences little or no regard for the victim and pleads guilty solely to take advantage of an attractive plea offer, subparagraph (a)(iii) should not apply. This standard is most likely to apply in cases such as rape or indecent liberties, where the victim would have to appear in court and repeat the details of what transpired. Testifying in public in these kinds of cases is not only humiliating but may be a severely traumatic experience for the victim.

Subparagraph (iv)

Legislation authorizing the granting of immunity from prosecution in exchange for testimony is common.²² However, prosecutors often are unwilling to grant immunity to certain potential witnesses because of the seriousness of their conduct or their criminal record. When such witnesses are themselves defendants, they may receive instead sentence and charge concessions in exchange for their plea and cooperation in securing the conviction of others. This subparagraph adopts the view that such concessions are appropriate. Whatever is lost by the reduced punishment of the offender is gained by the resulting conviction of one or more other offenders. Leniency should be granted to the defendant, however, only when the defendant's cooperation has resulted or may result in the successful prosecution of one or more other offenders engaged in equally serious or more serious criminal conduct.

Paragraph (b)

Frequently at least one of the considerations listed in subparagraphs (a)(i)-(v) will apply to defendants who enter a plea of guilty or nolo contendere, so that such defendants, as a class, will receive more favorable treatment than the class of defendants who stand trial and are convicted. Because each of the foregoing

20. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 432 (1960).

21. For a discussion of judicial supervision over the granting of charge concessions, see notes 3-5, and accompanying text, to standard 14-1.1.

22. E.g., 18 U.S.C. § 6003 (1976); ILL. REV. STAT. ch. 38, § 106-1 (1977).

considerations is related to legitimate objectives of the criminal law, this disparity in treatment is in no sense unfair or inconsistent with the goal of uniformity in sentencing.

Standard 14-1.8(b) states specifically what is implicit in paragraph (a): this disparity in treatment is not to be accomplished by the imposition of excessive penalties on those who stand trial. The defendant who goes to trial should not be punished for putting the state to its proof, and the defendant should receive only that sentence which properly serves the deterrent, protective, and other objectives of the criminal justice system.

It has been contended, of course, that if any disparity exists between the defendant who stands trial and other defendants, the former is receiving excessive punishment.²³ That view is rejected here. There is an essential difference between system A, in which defendants who go to trial receive the greatest punishment justifiable under accepted principles of penology and some defendants who plead guilty or nolo contendere receive something less because of the circumstances surrounding their plea, and system B, in which disparity results from giving defendants who stand trial greater punishment than can be justified. Numerous appellate cases support the position that a policy of leniency following a plea is proper but that its converse, "extra" severity following trial, is not.²⁴

23. See Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1082-87 (1976); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1397-1407 (1970); Comment, *supra* note 19.

24. E.g., *United States v. Araujo*, 539 F.2d 287, 292 (2d Cir. 1976); *United States v. Thompson*, 476 F.2d 1196, 1201 (7th Cir. 1973), *cert. denied*, 414 U.S. 918 (1973); *United States v. Lehman*, 468 F.2d 93, 110 (7th Cir. 1972); *People v. Sivals*, 60 Ill. 2d 102, 324 N.E.2d 422, 424 (1975); *State v. Lacy*, 195 Neb. 299, 237 N.W.2d 650, 653 (1976). See also *United States v. Floyd*, 496 F.2d 982, 989 (2d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974).

§ 6

RELATED SENTENCE CONSIDERATIONS

Ch. 2

who usually controls the criminal calendar.⁴⁶ His recommendation is usually accepted.

§ 7. The Judge

Some of the reasons for the prosecutor's interest in a high rate of guilty pleas apply also to the judge. Theoretically he is an impartial arbiter between prosecution and defense, and his function includes discharge of the innocent as well as conviction of the guilty; but he is still an officer of the state. Although he does not have quite as much interest as the prosecutor in a high conviction rate, the judge would be greatly concerned if the conviction rate in his court was notably low. He shares the prosecutor's desire to avoid the hazards of trial; in addition a large proportion of guilty pleas enables him to administer justice economically. For these reasons many judges give a less severe sentence to a defendant pleading guilty than to a defendant who is tried and found guilty of the same offense.⁴⁷ The reward for guilty pleas is noticeable not only in shorter commitments, but also in more frequent use of probation rather than commitment.⁴⁸

In one survey of the attitudes and practice of the federal judiciary, two-thirds of the responding judges stated that it was accepted practice to sentence more leniently when the defendant pleaded guilty; eight out of nine Connecticut Superior Court judges gave the same answer.⁴⁹ The judges were evidently sensi-

46. *McDonald v. Sobel*, 297 N.Y. 679, 77 N.E.2d 3 (1948); *Friedman v. United States*, 200 F.2d 690 (C.A.Iowa 1953) certiorari denied 345 U.S. 926, 73 S.Ct. 784, 97 L.Ed. 1357, rehearing denied 345 U.S. 961, 73 S.Ct. 937, 97 L.Ed. 1381 (1953). "Although the preparation of trial calendars appears to be a court function, in state criminal cases and apparently federal as well, this function is actually exercised by the prosecuting attorney, with practically no supervision by the court in which the action is pending. The prosecuting attorney is not only allowed to fix the time of arraignment and trial, but in some cities actually distributes the various cases to be tried among the different judges as he desires." Orfield, *op. cit. supra* note 1 at 383.

47. *The Influence of the Defendant's Plea*, *op. cit. supra* note 42, reporting on a survey of judicial practice; also Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, J.Crim.L., C. & P.S. 780, 784 (1956).

48. *Illinois Crime Survey* at 94 (1929): "The chances of getting probation are roughly two and one-half times as great if one pleads guilty to begin with as they are if one pleads not guilty and sticks to it." See ch. 6 § 29 *infra*.

49. *The Influence of the Defendant's Plea*, *op. cit. supra* note 42, at 206. The estimates of the extent to which the fine or prison term was diminished for a defendant pleading guilty varied from 10% to 95% of the punish-

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tive about the implications of a sentencing policy that gave considerable weight to an "efficiency" factor that had nothing to do with the crime or the nature of the defendant. Many of them explained that, in their view, an accused pleading guilty was generally less culpable and thus less in need of punishment than a defendant who had denied his guilt and proceeded to a trial which established it. The authors of the survey considered this belief naive and suggested that generally the reason for the plea of guilty was that it drew a more lenient sentence as "a reward for the defendant's making the judge's often difficult task of sentencing easier, by presenting an image of a repentant defendant." Although a guilty plea may at times be motivated by repentance, more often it would seem to represent exploitation by the accused of the prosecutor's and court's reaction to such a plea."⁵⁰

The survey authors point out that the recidivist, a poor prospect for reformation, has no fear that admitting guilt will damage his reputation. On the other hand, the first offender might well deny guilt in a desperate effort to avoid the stigma and consequences of conviction.⁵¹

Some judges justify heavier sentencing after a plea of not guilty by assuming that the convicted defendant has committed perjury in his testimony at the trial and therefore deserves additional punishment.⁵² Of course, increased punishment on this ground is not justified without another proceeding. The plea of guilty is induced, as noted above, by the expectation that it will mitigate the sentence, not by an aversion to perjury.⁵³ Indeed, the judge himself often endorses something he knows is equally perjurious—a plea of guilty to a charge lesser in grade than the crime committed. For example, judges as well as prosecutors frequently accept a plea to a lesser charge where the original charge would subject the defendant to an unwarrantedly high

ment which would ordinarily be given after trial and conviction; but others would not put a value on the factor, stressing the considerations in the individual case, and other considerations.

50. *Id.* at 209, 210.

51. *Id.* at 211.

52. *Lenvin & Myers, op. cit. supra* note 9, at 221; see *Peterson v. United States*, 246 F. 118 (C.C.A.Va.1918), certiorari denied 246 U.S. 661, 38 S.Ct. 332, 62 L.Ed. 927; *Humes v. United States*, 186 F.2d 875 (C.A.Colo. 1951).

53. *In re Smith*, 162 Ohio St. 58, 120 N.E.2d 736 (1954); *Maxwell v. State*, 292 P.2d 181 (Okla.1956); *Commonwealth v. Cole*, 384 Pa. 40, 119 A.2d 253 (1956); *Hobson v. Youell*, 177 Va. 906, 914, 915, 15 S.E.2d 76, 79 (1941).

sentence under a repeated offender act.⁵⁴ Again, the judge must give his approval when prosecutors and police recommend a plea to a lesser charge in order to avoid excessively high mandatory minimum terms for certain offenses.⁵⁵

Just as the judge must be alert to pressures prejudicing the defendant's guilty plea and negotiated sentence, his sentence may be reversed if his own bias appears.⁵⁶ The judge who is involved in plea bargaining is more vulnerable, less subject to other controls, than the prosecutor.⁵⁷

§ 8. The Police

Like prosecutors and judges, police covet a high percentage of guilty pleas. A plea of not guilty means time spent at the trial to testify; a plea of guilty saves that time. Their reputation, like the prosecutor's, is enhanced by convictions, and conviction by plea of guilty is more certain than conviction by trial. The police use of informers (for example, in apprehending narcotics and gambling offenders) depends on judges' and prosecutors' co-

54. Ohlin & Remington, *op. cit. supra* note 34, at 506.

55. "Statutes prescribing high minimum terms are not ignored. The possibility that they may be used, though remote, is sufficient to cause most sellers of narcotics, for example, willingly to admit guilt in return for the opportunity to plead guilty to a lesser offense of possession of narcotics or addiction. This considerably simplifies the task of the police and the prosecutor and reduces the number of narcotics cases which go to trial. Inadequate sentences do not, however, necessarily result, for the lesser offense of possession of narcotics typically allows for the imposition of a substantial prison term." *Id.* at 507.

56. The judge in imposing a sentence of five to ten years stated that the sentence was increased because if a defendant refused to "take a plea. I would give him the maximum of the crime, and that this may be a sort of a barometer for other lawyers and other defendants. . . . He could have had much less time." Reversed, the appellate court noting that a sharp issue existed as to the intent necessary to establish the crime charged. *People v. Guiden*, 5 A.D.2d 975, 172 N.Y.S.2d 640 (1958). "Taking into consideration the fact that the defendants had no prior record and looking at the case as a whole, we are of the opinion that the agreement the county attorney made with the accused leading them to believe he could control the court's judgment, may have caused the defendant to waive constitutional rights which they, otherwise, might have insisted upon." Sentence reduced; *Maxwell v. State*, 292 P.2d 181 (Okla.1956).

57. Judicial Plea Bargaining, 19 Stanford L.Rev. 1082, at 1088 (1967); Judicial Plea Bargaining Held Violative of Due Process, 41 N.Y.U.L.Rev. 1208 (1966).

white ratio are noted in Virginia, Wisconsin and elsewhere. "In the nine or so states for which we have data, all show disproportionate numbers of blacks to whites in prison. In most instances there has been a substantial increase in the last few years in the numbers of persons imprisoned, and among them, a substantial increase in the ratio of black to white prisoners. In only a couple of states did we find it not so."⁵⁰ The implication that judicial bias is operating is stronger than the possibility that the data reflects a difference in crime by blacks and whites.⁵¹

Aside from the sociological influences on and the biases of individual judges, their views of the processes of justice produce additional biases in sentencing. Some judges impose harsher sentences on defendants found guilty after trial than on those who plead guilty. In spite of the pride the common law takes in the jury as a protection for persons accused of crime, a defendant risks greater punishment in exercising his right to a jury trial if he is found guilty. It is not uncommon for a judge to coerce a defendant into giving up the right to a jury trial,⁵² or to inform him openly that in the event of a guilty verdict after a trial by jury the punishment will be greater than it would have been on a plea of guilty.⁵³ It is common for the judge to say that "in view of the fact that the defendant pleaded guilty" a lenient sentence is being imposed, or that the sentence is more severe because the state was put to the expense of a jury trial. Such a sentence is reversible, although not in all courts.⁵⁴

Another influence on the sentence is the judge's attitude toward parole. "A judge who is unsympathetic toward parole can

50. Rubin, *Law and the Penal System*, 15 *Canadian J. of Crim. and Correc.* 59 (1973).

51. Among federal prisoners, in 1969 blacks were serving sentences averaging 88.5 months, white 75.1 months (Federal Bureau of Prisons Statistical Report 1969 and 1970, table A-3A).

52. See *supra* ch. 2 § 7.

53. *Ibid.*

54. *State v. Mitchell*, 77 Idaho 115, 289 P.2d 315 (1955) (improper to deny probation because of trial by jury); *People v. Guiden*, 5 A.D.2d 975, 172 N.Y.S.2d 640 (1958)—the sentencing judge had been astonishingly frank, saying that because defendant refused to "take a plea, I would give him the maximum of the crime, and that this may be a sort of a barometer for other lawyers and other defendants. . . . He could have had much less time"; reversed. *Contra*, *United States v. Stidham*, 459 F.2d 297 (C.A.Okla.1972).

being sentenced. The national data may be obtained from the most recent annual report of the Director of the Administrative Office of the United States Courts, Table D-5, "Criminal Defendants Sentenced After Conviction, by Nature of Offense." More detailed data on sentencing by offense are available from the *Sentences Imposed Chart*, published by the Statistical Analysis and Reports Division of the Administrative Office. Before using these data, first read the caveat in the *Sentences Imposed Chart* which sets out important cautions on interpreting the tables. *Remember also that the offense reported in each of the tables is the most serious offense of conviction and that the tables do not report the number of counts, or less serious additional offenses of conviction.* The data from the tables are used only to provide a national or district pattern and general guidelines on sentences.

Special Sentencing Provisions.—The probation officer provides a statement of any special sentencing provisions available to the court, exclusive of regular adult sentencing provisions. This section of the presentence report should include any eligibility for sentencing under the Youth Corrections Act, Narcotic Addict Rehabilitation Act, any Special Parole Term required by law, and whether restitution can be ordered (if so, under which statute).

Recommendation

Essential Data:

The recommendation for disposition including supporting rationale and purposes of sentencing.

Include if Pertinent:

Special conditions including fine, restitution, community service, drug or alcohol treatment. Include supporting rationale. Include the level of supervision activity indicating how often the defendant would be seen by the probation officer if placed on probation. Include a recommendation of whether or not the defendant would be a good candidate for voluntary surrender.

Recommendation and Rationale.—All pertinent data have been gathered for the principal purpose of determining the most appropriate sentence. The probation officer is responsible for offering a sound recommendation with a supporting sentencing purpose (i.e., deterrence, punishment, incapacitation, or rehabilitation) which will assist the court in achieving its sentencing goals. The recommendation can be as specific as the court desires, including

number of years of custody or supervision, special conditions of probation, and dollar amounts for a fine and/or restitution.

Comment: If the court does not disclose the recommendation, it should be presented on a separate sheet of paper so that it may be detached when the presentence report is disclosed to the defendant or counsel. Recommendations are to be reviewed by a supervisor and it is good practice for them to be reviewed by a staff committee or the administrative staff. This is especially true in cases involving multiple defendants.

A probation officer may include any recommendation and rationale for a specific institution where a sentence could be served. **NO ADDITIONAL FACTS SHOULD BE REPORTED IN THE RECOMMENDATION SECTION WHICH WERE NOT INCLUDED IN THE BODY OF THE REPORT OR IN THE POTENTIALLY EXCLUDABLE INFORMATION SECTION. THE RECOMMENDATION IS NOT TO BE USED AS A CONDUIT FOR CONFIDENTIAL INFORMATION.**

Voluntary Surrender.—Under voluntary surrender a sentenced offender is ordered by the court to report to the designated institution on his own. The U.S. marshal does not transport him. (See *Guide to Judiciary Policies and Procedures, Probation Manual*, Vol. X-A.) Include a statement of whether or not the defendant would be a good candidate for voluntary surrender. Consider any previous escape history or failure to appear. Generally, persons who have been released on bond and who have complied with the conditions of their bond should be considered for this program. The court order effecting voluntary surrender should include a date and a time that the defendant is to report to the designated institution. The time should be no later than 2:00 p.m. on the date designated.

Information Potentially Exempt From Disclosure (Rule 32(c))

Generally, in a presentence report, under Rule 32, the nature and source of information must be disclosed to the defendant or his counsel. However, when the probation officer considers information to be exempt from disclosure under Rule 32(c) of the Federal Rules of Criminal Procedure, it should be identified for the court on a separate sheet of paper. *Probation officers must use the standards set forth in Rule 32(c) in determining whether or not information can be considered exempt from disclosure.* This information is then submitted with the presentence report under this heading: "INFORMATION EXCLUDED FROM THE PRESENTENCE RE-

United States District Court

EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA, VIRGINIA 22314

CHAMBERS OF
JAMES C. CACHERIS
JUDGE

September 2, 1986

(703) 557-3887

Hon. William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, DC 20004

Dear Billy:

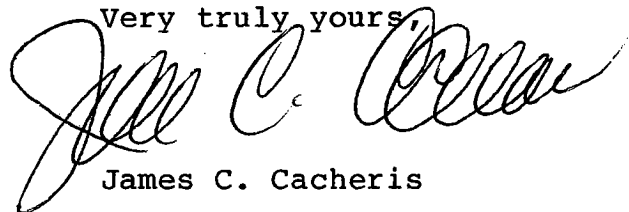
In reply to your letter of August 20, 1986, I think that guilty pleas should not be made as the basis for adjustments for defendants who plead guilty. I don't think that a person's right to trial should be chilled because he elects to try his case rather than plead guilty. As a practical matter, all judges give discounts for guilty pleas.

As to plea agreements, I do not accept plea agreements where I am bound. I think a lawyer should be able to stipulate to the underlying facts of an offense even though it mandates a certain sentencing result under the guidelines. A judge should not involve himself in the plea negotiation process.

As to cooperation, I think sentencing guidelines should recognize that cooperation is a factor to be considered in imposing a sentence. Disputes regarding the level or quality of cooperation should be resolved by fact finding by the trial judge.

I also feel that the guidelines should consider the purpose of the sentencing: deterrence, punishment, isolation, and rehabilitation. I think they should make some provision for a judge to consider these factors in making his sentencing decisions. All judges are taught to use these factors in deciding a particular case. Therefore, I think the guidelines should make provision for these factors.

Very truly yours,

A handwritten signature in black ink, appearing to read "James C. Cacheris", written over the typed name.

James C. Cacheris

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

DONALD L. CHAMLEE
CHIEF OF THE DIVISION
OF PROBATION

September 3, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

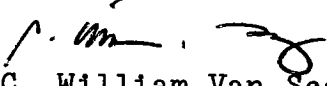
Dear Judge Wilkins:

This correspondence is written in reference to your recent letter dated August 20, 1986, requesting my thoughts on guilty pleas, plea agreements, and cooperation.

Since my earlier submissions to the United States Sentencing Commission, I have resigned my position as a United States Probation Officer in the District of Maryland, and accepted promotion to the Division of Probation as a Probation Programs Specialist. I am, therefore, confident my views will now be reflected in the information which the Probation Division will be submitting to you.

I certainly have appreciated the opportunity in the past to present my thoughts as a field officer on the very important work of the Commission.

Sincerely,


C. William Van Scoy
Probation Programs Specialist

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS
U.S. POST OFFICE & COURT HOUSE
P.O. BOX 3684
LITTLE ROCK, ARKANSAS 72203

G. THOMAS EISELE
CHIEF JUDGE

August 26, 1986

Honorable William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

in response to your letter of August 20, I have the following comments to make:

GUILTY PLEAS

I am opposed to the guidelines' providing a downward sentencing adjustment for defendants who plead guilty. I believe that the guidelines should make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty. This is not to gainsay fact that a judge may become aware of facts during a trial which could have an impact, one way or the other, upon the sentence - which facts he might never become aware of absent the trial. But this is beside the point. Defendants should not be penalized solely because they choose to stand trial.

PLEA AGREEMENTS

I am utterly opposed to, and do not participate in, the standard plea bargain agreements, although I recognize that it is within the discretion of the prosecutor to dismiss counts. My reasons for opposing plea bargaining are set forth in the attached opinion which, by the way, was appealed by both the government and the defendant. I trust the commission will do nothing to change Rule 11 to compel judges to entertain and consider plea bargains.

Finally, I do not believe that prosecutors and district attorneys should be permitted to stipulate to the underlying facts of an offense. In accepting or rejecting a guilty plea, it is the duty of the court not only to determine that the plea is being entered voluntarily, with full knowledge of the defendant's rights and full awareness of the possible consequences, but it must also be convinced that a crime has been committed as charged and that the defendant committed that crime. It therefore should independently and carefully explore the factual basis for the charge.

COOPERATION

I would hope that the guidelines would neither require or forbid the court's taking into consideration the defendant's cooperation with legitimate law enforcement authorities. Please leave some "judging" for the judge to do.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "G. Thomas Eisele".

G. Thomas Eisele

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relevant, under Rule 401 of the Federal Rules of Evidence, to a simple charge of importation or the aiding and abetting of importation, much of it would have to be excluded under Rule 403 in a separate trial of such a charge on the ground that its probative value would be substantially outweighed by the danger of unfair prejudice.

Detailed proof of the activities of the other seven defendants on their trips to Bangkok would at best be remotely relevant in a separate trial of the substantive charges against Clark, Romandi and Jackson. The prejudicial effect of proof of the details of how other defendants on other trips acquired the heroin, secreted it on their bodies, and then returned, would be grossly disproportionate to any conceivable legitimate probative value that proof would have against the three defendants. The court would therefore exclude it under Rule 403 on a separate trial. To expect a jury to perform the intellectual feat in a joint trial of using such proof against seven defendants but not against three is to ask too much of lay (and perhaps of judicial) minds. Accordingly a severance is appropriate. See *United States v. Branker*, 395 F.2d 881, 888-89 (2d Cir. 1968).

[5] Clark and Romandi are both named in count eight and are alleged to have taken part in the September 1977 trip. Clark is also alleged to have participated in the July 1977 trip, but the charges have been dismissed as to all other participants on that trip. Jackson is alleged to have participated only in the April 1977 trip, and has no direct connection with Clark or Romandi. Although some of the same witnesses will testify against all three defendants, the lack of substantial overlap between the case against Jackson and the case against Clark and Romandi warrants a separate trial of her.

Clark and Romandi assert that they will be prejudiced by a joint trial with each other. Although Romandi is charged with participation in only one of the two trips for which Clark is to be tried, the potential prejudice to Romandi resulting from the admission of evidence as to the count in which he is not charged is not such as to

require separate trials. There is no likelihood of his being linked to offenses with which he is not charged by virtue of evidence of an all encompassing conspiracy. Moreover, since only two defendants and two counts are involved, the jury should not have difficulty in keeping separate the evidence as to separate counts.

[6] Clark argues that defendant Romandi's defense, which at the original trial was a proclamation of total innocence and rejection of the alleged conspiracy of his co-defendants when he first learned of it, will serve to implicate defendant Clark. This alone does not warrant granting a severance from Romandi. A defendant is free to defend himself as he chooses, and were a severance required whenever such a defense might potentially implicate a co-defendant, then few if any defendants could be tried jointly. In the absence of a more compelling showing of prejudice Clark and Romandi may be tried together.

The motions for severance are granted to the extent indicated, and the motions to dismiss are denied. So ordered.



UNITED STATES of America

v.

Charles Thomas GRIFFIN, Joe Henry Chambers and Charles Yielding.

No. LR-CR-77-9.

United States District Court,
E. D. Arkansas, W. D.

Dec. 28, 1978.

Defendant and the Government filed motion to set a date to present to court plea agreement struck between parties. The District Court, Eisele, Chief Judge, held that it would decline to consider such agreement, even though cognizant of provisions of federal rules of criminal procedure making such consideration optional.

Motion denied.

1. Criminal Law ⇐273.1(2)

Although cognizant of Federal Rule of Criminal Procedure making consideration of plea agreements optional, District Court would decline to consider plea agreement struck between parties in case. Fed.Rules Crim.Proc. rule 11(e), 18 U.S.C.A.

2. Criminal Law ⇐273.1(2)

Addition of provision to Federal Rules of Criminal Procedure referring to plea bargaining was a recognition, rather than an endorsement, of practice of plea bargaining; under said rule, it is within discretion of court to consider plea bargains or to refuse to hear them. Fed.Rules Crim.Proc. rule 11(e), 18 U.S.C.A.

W. H. Dillahunt, U. S. Atty., Samuel A. Perroni, Asst. U. S. Atty., Little Rock, Ark., for plaintiff.

William R. Wilson, Jr., Little Rock, Ark., for Yielding.

1. As used in this opinion, "Court" refers only to the authoring judge. No effort has been made to adopt a uniform policy for this district with respect to the issue discussed.

2. For the purposes of this opinion, the Court is excluding "count" bargaining, referred to in Rule 11(e)(1)(A), because it has not found an appropriate way to prevent this practice, it being generally held that this is a matter of prosecutorial discretion. This form of bargaining can also be abused, however. It encourages the prosecutor to pyramid charges. It has great potential for deception, intended or unintended. The fact that it is considered in the context of a "bargain" necessarily suggests to the defendant that if he pleads guilty to one or more counts, he gets some real benefit from the dismissal of other counts. But in the great majority of cases this is not true since the sentence that may be imposed upon one count generally exceeds the sentence that would actually be imposed even if the defendant had pled guilty to all counts. And ordinarily the sentence on the one count will not be less than the sentence that would have been imposed on all counts (although it might be structured differently). An example will make this clear.

Suppose an indictment charges a defendant and others with a conspiracy to manufacture and pass counterfeit bills and the overt acts charged indicate that several million dollars worth of such bills were so manufactured and distributed throughout the United States. Fur-

John Forster, Jr., North Little Rock, Ark., for Chambers.

Leon Catlett, Little Rock, Ark., for Griffin.

MEMORANDUM AND ORDER

EISELE, Chief Judge.

[1] Pending before the Court is the motion of the defendant Charles Yielding and the government to set a date certain to present to the Court the plea agreement which has been struck between the parties in this case. It is not now, nor has it been, the practice of this Court¹ to consider such agreements,² even though the Court is cognizant of the provisions of Rule 11(e), Federal Rules of Criminal Procedure, which make such consideration optional.

[2] The addition of section (e) to Rule 11 in the 1975 Amendments to the Federal Rules of Criminal Procedure was a recognition, rather than endorsement, of the practice of plea bargaining. Senator McClellan

ther assume that after the conspiracy count there were 50 substantive counts against the same defendant, the last of which charges the defendant with passing a \$10 counterfeit bill at the local grocery store. The government proposes to dismiss all but the last count. At sentencing the judge will have before him the pre-sentence report setting forth all of the facts relating to all of the charges contained in the indictment. No court, it is submitted, will put on blinders and limit its attention to the passing of the one \$10 counterfeit bill. Rather, the court will put the defendant under oath and question him about his participation in the entire criminal venture. If he admits such participation, the court will take such circumstances into consideration when sentencing him. The result in the hypothetical case might be that the defendant would receive the maximum sentence under the one remaining count, whereas if that count were the only charge against the defendant, he might well have been placed upon probation.

It has been pointed out that only in exceptional cases will a defendant benefit from a count dismissal bargain. The example just given, however, points out the potential vice which occurs when, in the exceptional case, the defendant does receive a concrete benefit from the dismissal of other counts. In those situations, the defendant and the government would be aware that the court would impose a sentence in excess of the statutory maximum for the one count if there were a plea of guilty to

in the Senate debate of July 17, 1975, made this statement:

"Rule 11 of the Federal Criminal Rules deals with entry of pleas in criminal cases. The amendments to this rule proposed by the Supreme Court, particularly those relating to plea bargaining, have provoked much comment and some criticism. Plea negotiation is a fact in the present criminal system and crowded court dockets make it unlikely that the situation will or should change. It is therefore probably a good idea that such a widespread practice should be dealt with by the criminal rules and our proposed amendment accepts the basic structure of rule 11 as proposed by the Supreme Court."

Congressman Hagedorn in the House debate on June 23, 1975, expressed much the same attitude:

"While plea bargaining has recently been viewed in a bad light, it has long served as an integral part of the criminal justice system."

He also added:

"Each judge would have the authority to allow or prohibit plea bargaining in his own court room."

more than one count or a verdict of guilty upon more than one count. In this context, the prosecutor, in effect, becomes the judge. He determines the sentence since he knows the court will impose the maximum for one count and cannot assess a greater penalty.

To further complicate the situation (where counts are dismissed) our courts have been informed that the Parole Commission considers dismissed counts in determining the salient factor scores (which determine release dates) whether or not there is a proper factual record (e. g., the admission of the facts by the defendant) for doing so.

It is the Court's view that this problem is one that addresses itself to very serious consideration by and within the executive branch of our government and particularly the Department of Justice.

House Report (Judiciary Committee) 94-247, in discussing Rule 11(e), says:

"This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it."

During its testimony before the Judiciary Committee, the Advisory Committee of Criminal Rules of the Judicial Conference of the United States stressed that the Rule does not require a court to permit any form of plea agreement to be presented to it.

From the legislative history of the Rule, then, it is abundantly clear that it is within the discretion of the Court to consider plea bargains or to refuse to hear them.³

The Court wishes to make clear some of its reasons for refusing to hear plea bargains. It is the Court's opinion, probably a minority opinion, that the process of negotiating pleas has a tendency to demean all participants: the attorneys, the defendant, and even the Court.⁴ There are "back-

hear their plea agreement, apparently relying on the language of Rule 11(e) that states:

"If a plea agreement has been reached by the parties, the court *shall*, on the record, require the disclosure of the agreement . . ."
(Emphasis added.)

To read this language as mandating consideration of such agreements is to do violence to the procedure the Congress clearly intended to establish in 1975. Rule 11(e) sets forth the procedure a judge *shall* follow if he permits presentation of plea agreements to him; it does not, when viewed in light of the legislative history, require him ever to consider or listen to negotiated pleas. Any other interpretation would result in a charade if it is conceded that a judge has the authority to reject all plea agreements on principle (and out of hand) without even an examination of their content.

3. In this case the attorneys for the government and for the defendant, perhaps in order to test this Court's refusal to consider negotiated pleas, have joined in the motion that the Court

4. Judges should not shut their eyes to the dynamics of the process, or its effects, upon them personally—consciously or unconsciously. Some judges, like many lawyers, fear, or do not

room," sinister implications (albeit unjustified) which simply cannot be removed. The result: public cynicism and lack of faith in the integrity of the judicial process. In emphasizing expediency, allegedly based on dollar costs, plea bargaining derogates from the attempt of the Court to deal justice and substitutes therefor a concern for a cost efficient method of disposing of cases. Even if one accepts the validity of the cost argument, which this Court does not (in the federal system), it surely constitutes a poor justification for the process.

Inasmuch as plea bargaining provides leeway for a strong prosecutor to overwhelm a poorly prepared or timid defense counsel, or a strong defense counsel to take advantage of an inept or overworked prosecutor, there is a tendency to emphasize the disparity of counsel, which has less impact when a case is heard in open court, with all the attendant safeguards of a trial.⁵ Perhaps only trial judges fully understand the pervasiveness of the "fear of trial" experienced by even excellent attorneys. Although good lawyers will not permit this fear to rise to the level of a conscious factor in plea negotiations, it must often remain subconsciously at work in the process, encouraging acceptance of a negotiated plea on some basis other than the merits.

like trials. They would like to avoid them. All judges welcome the settlement of civil cases. Few are unhappy when a defendant, charged with a crime, decides to plead guilty. There certainly is nothing wrong with such feelings or attitudes. Where negotiated pleas are not accepted, these natural attitudes have no effect on the dispensation of justice. But now introduce plea bargaining. Suddenly the decision of the judge to accept or reject a plea bargain may make the difference between a hard six-weeks trial or, possibly, a chance to clean up his motion calendar. This could conceivably influence his decision—even if only on a subconscious level. Additionally, the reputation of the judge becomes a significant factor in the ability of the prosecutor, or the defense counsel, to prevail upon the defendant to agree to a plea bargain. If it can be demonstrated from the record that those who go to trial and lose get the "book thrown" at them, or that it "will cost you to see the hole card" (*i. e.*, if one pleads not guilty and goes to trial), chances are that the defendant will seek an agreement. If, on the other hand, the judge has a reputation for being lenient or even fair, defendants and defense

Another point: when the convicted defendant goes to prison, the opportunity to compare bargains with other inmates and to speculate on what factors may have influenced the various outcomes lends itself to the creation of cynical disdain for a system that proclaims justice as its goal but, arguably, dispenses deals instead. And this Court is of the opinion that it is very important, overall, how the defendants within the system perceive the operation and effect of that system.

And what about the rights of the public? Assume that a United States Attorney chooses to present cases against a person to the grand jury, and the grand jury chooses to indict that person on the basis of the evidence. Now, assuming the integrity of the prosecutorial decision and the evidentiary basis therefor (and why should this not be assumed?), the rights of the public are immediately implicated. Either the man is guilty or he is not. The unimpeded process will produce the proper (just) result. But, one says, the prosecutor may *know* the defendant is guilty but simply cannot get the necessary evidence, so why not prosecute, get a deal and at least put him away for a while? Prosecutorial integrity? Sound public policy? Query.

attorneys would be less likely to feel the compulsion to agree. So, nationwide, the process would tend to disparity rather than uniformity. And many argue cogently that reasonable uniformity should be a goal of the federal criminal justice system. So, consciously or unconsciously, a judge may act in a way which has an effect one way or the other on the entire plea bargaining process, perhaps entirely unknown to him.

5. "Plea bargaining is inherently destructive of the values of the trial process, for it is designed to prevent trials. The practice forfeits the benefits of formal, public adjudication; it eliminates the protections for individuals provided by the adversary system and substitutes administrative for judicial determinations of guilt; it removes the check on law enforcement authorities afforded by exclusionary rules; and it distorts sentencing decisions by introducing noncorrectional criteria."

The Unconstitutionality of Plea Bargaining, 83 Harv.L.Rev. 1387, 1397-98 (1970).

Revealing the existence of plea bargains and their content is, of course, superior to the silent acceptance of *sub rosa* plea agreements. It is obviously preferable to require that the process be spread on the record to maximize protection for the accused and the public. The 1975 Amendments to Rule 11 were therefore better than no change at all, considering then existing actual practices. However, it may be time to make a thorough review of the policies underlying those amendments as well as the practices which have evolved since the addition of section (e) in 1975. In the opinion of this Court, even plea agreements acknowledged in the record do not serve the cause of justice. It would be better to insist that there be none (except possibly in cases involving great national interests, perhaps certified to, as such, by the Attorney General or the President himself.) Rule 11(e) at least allows the Court the option to refuse to hear bargained pleas. This Court exercises its discretion by so refusing, thereby giving no sanction to the practice.

It has been said that without plea bargaining the wheels of justice would grind to a halt and that efficient administration of the courts requires the use of plea agreements. This Court doubts the factual basis for this argument in the federal court context. It has been able to handle its criminal docket expeditiously, and has not found clear-cut evidence that there is any great disparity in the percentage of its criminal cases which proceed to trial, when compared to courts in other districts which do accept plea agreements.⁶ Even if the refus-

al to accept plea bargains clearly results, overall, in a greater number of trials, what difference should this make? That is what the courts are for. They should not be considered agencies created to preside over settlement negotiations. But what about delay? The simple answer is that there can be no significant delay in the disposition of criminal cases in the federal system based on clogged dockets. If the Constitution were not enough, we have the Speedy Trial Act.

Further, there must be more than a lingering concern, when a negotiated plea is heard, that an innocent defendant has been prevailed upon, or has chosen to "play the odds," rather than to staunchly maintain his innocence. In fact, must it not be accepted by the proponents of plea bargaining that, statistically, a certain number of innocent people will suffer judicial penalties *because of that system*? The potential risk of consequences of much greater penalties may drag from the mouth of an innocent man a guilty plea if it is coupled with the guarantee of a significantly lesser penalty. One can say that, in such situations, the defendant is simply exercising rational choices affecting his self-interest. That is true, and it may not be unreasonable for him to make such a choice. But should the federal criminal justice system give an innocent man that choice? This Court says, "No."⁷

We always get back to it: when is a plea voluntarily made? The plea "taken to avoid the risk of being convicted of a more serious crime . . . is truly no more

permitted, many defendants will not plead guilty unless tendered some such bargain. Absent such a possibility, would not many such defendants simply plead guilty?

7. And it is not enough to counter that the Court does not have to accept any bargain and, further, that the Court has an affirmative duty to explore the factual basis of the guilty plea. Once an innocent man has determined, in his self-interest, to lie by pleading guilty, he will know also that it will all go for naught if he does not further lie about the underlying facts. The system should be such as will, as far as possible, remove such compulsions.

6. A study of the impact of acceptance of plea bargains on the number of cases going to trial would not be difficult, using statistics already gathered by the Administrative Office of the United States Courts. According to the statistics available at present, there is a variation between the districts in the percentage of cases going to trial, but it is impossible to ascertain the relationship of those variations to plea bargaining. An empirical study would indicate the nature of that relationship, if any. Such a study could also seek to determine where the percentage of trials, when compared to other dispositions, would level out if no plea bargaining at all were permitted, since it is logical to assume that, because the practice is presently

voluntary than is the choice of the rock to avoid the whirlpool."⁸

It is therefore Ordered that the motion to hear the plea agreement in this case be, and it is hereby, denied.



UNITED STATES of America

v.

Steven MANN, Dennis McLaughlin, Marc Shulman, Bruce Cunningham.

Crim. No. G-78-4.

United States District Court,
S. D. Texas,
Galveston Division.

Dec. 29, 1978.

Defendants, charged with conspiring to import marijuana into United States, conspiring to possess marijuana with intent to distribute in United States and carrying firearms during commission of felony offenses, filed motion to suppress. The District Court, Cowan, J., held that: (1) two and one-half-day suppression hearing was unnecessary and a substantial waste of court time, taxpayer dollars, and dollars of whoever was financing defense, since whether vessel was eight miles from Mexican coast, or 30 miles therefrom, it was still on high seas and Coast Guard still had authority to inspect it, and, upon discovering marijuana, make a search, seizure and arrest, and since it was absurd to contend that defendants had a reasonable expectation of privacy if they were 11.9 miles from Mexican coast, but not if they were 12.1 miles therefrom, and (2) defendants had no reasonable expectation of privacy in Mexican waters, even if they had been in Mexican territorial waters, and they had no

"possessory interest" of any kind in Mexican contiguous waters or Mexican territorial sea, and thus they had no standing to complain of Coast Guard's search, seizure and arrest of vessel.

Defendants' motion to suppress overruled.

1. Shipping ⇐9

Although no "particularized suspicion" is necessary to justify a boarding under applicable statute, grounds existed for a "particularized suspicion," because it was not unreasonable conclusion for coast guard cutter officers to reach that vessel in question was engaged in smuggling of narcotics, where vessel was not rigged for fishing, it was obviously not engaged in fishing, it was obviously not engaged in marine research, it was neither a cargo vessel nor a pleasure boat, course of vessel during period when it was under observation was such as to support an inference that boat was proceeding from Columbia to United States, and not many shipping vessels were seen in such waters. 14 U.S.C.A. § 89(a).

2. Drugs and Narcotics ⇐182

Shipping ⇐9

Boarding of vessel in question was not a pretext but was exercise of Coast Guard's duty and responsibility as outlined in applicable statute; search of vessel was not unduly intrusive, and marijuana was in reality in plain view although stored beneath decks, because it was plainly visible during conduct of normal safety and documentation inspection, and because of odor emitted by 22,000 pounds of marijuana. 14 U.S.C.A. § 89(a).

3. Criminal Law ⇐394.6(5)

In prosecution for conspiring to import marijuana into United States and conspiring to possess marijuana with intent to distribute in the United States, suppression hearing was unnecessary and a substantial waste of court time, taxpayer dollars, and dollars of whoever was financing defense, since whether vessel was eight miles from

8. Kuh, Book Review, 82 Harv.L.Rev. 497, 500 (1968).

503 1221 1145
569 1521 805

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 79-1093

In Re: Charles Yielding, *
* Appeal from Petition
Petitioner. * for Writ of Mandamus

Submitted: April 18, 1979

Filed: May 21, 1979

Before BRIGHT, ROSS, and STEPHENSON, Circuit Judges.

ROSS, Circuit Judge.

This case raises the question of whether a district judge may refuse to entertain all Rule 11(e)(1)(B) and (C) plea agreements as a policy and practice. The petitioner Charles Yielding seeks a writ of mandamus from this court directing Judge Eisele* to hear the plea agreement which Yielding and the government have negotiated and to exercise his discretion in deciding whether to accept it.

We have carefully considered the arguments petitioner Yielding makes, but have concluded that the writ should be denied.

Petitioner Yielding was indicted in July 1977 for alleged violations of 18 U.S.C. §§ 371 and 1006. Petitioner and the government thereafter negotiated a plea agreement, and on September 15, 1978, petitioner filed a motion asking the court to set a date for presentation of the plea agreement

* The Honorable Garnett Thomas Eisele, Chief Judge for the Eastern District of Arkansas.

to the court. The government later joined the petitioner in this motion. The court denied the motion, stating that "[i]t is not now, nor has it been, the practice of this Court to consider such agreements,^[1] even though the Court is cognizant of the provisions of Rule 11(e), Rules of Criminal Procedure, which make such consideration optional."

This question has previously been presented to the Fourth Circuit and was resolved on the basis of the clear legislative history of Rule 11(e). The history reflects Congress' determination that no court should be compelled to permit any plea negotiations at all.

Addressing the issue in *United States v. Jackson*, 563 F.2d 1145 (4th Cir. 1977) the court states:

Subdivision (e) of Rule 11 spells out the guidelines to be observed by the court and counsel in plea agreement procedures, but the Rule leaves to the court the option of whether it will accept or reject the plea agreement. While the Rule is silent with respect to the authority of the court to decline to countenance any plea bargaining whatever, such a prerogative was recognized by the Congress in its consideration of the Federal Rules of Criminal Procedure Act of 1975, P.L. 94-64, 89 Stat. 370. The proposed subdivision (e) had been criticized by some federal judges who read it to mean that consideration of plea agreements was mandatory. However, in their testimony before the Congressional committee, the members of the Advisory Committee on Criminal Rules stressed that the Rule does not require that a court permit any form of plea agreement to be presented to it. On this point the report of the House Judiciary Committee stated:

"Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on

¹In making this statement the court was referring to Rule 11(e)(1)(B) and (C) plea agreements, but not to "count" bargaining under subsection (A).

within its own jurisdiction. *No court is compelled to permit any plea negotiations at all.* Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements."

(Emphasis Supplied). H.Rep. No. 94-247, 1975
U.S. Code Cong. & Admin. News p. 678.

In our opinion each individual judge is free to decide whether, and to what degree, he will entertain plea bargains, and his refusal to consider any plea bargaining whatsoever will not vitiate a guilty plea which has otherwise been knowingly and voluntarily entered.

Id. at 1147-48 (footnote omitted). We agree with this rationale.

Petitioner Yielding relies chiefly on the "explicit" language of Rule 11(e)(2) that "[i]f a plea agreement has been reached by the parties, the Court *shall*, on the record, require the disclosure of the agreement in open court. * * *" (Emphasis added.) This argument was made to the court in *United States v. Stamey*, 569 F.2d 805, 806 (4th Cir. 1978) and the court acknowledged that "from this it is arguable that the language used means that the trial court must at least consider the agreement in each instance in which a plea bargain has been struck." *Id.* at 806. The argument failed in that case, however, because "[t]he legislative history of current Rule 11 * * * refutes [defendant's] interpretation." *Id.*

In a footnote to House Report No. 94-247 the Judiciary Committee writes:

Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee *stressed* during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it. See, *e.g.*, the remarks of United

States Circuit Judge William H. Webster in Hearings II, at 196. See also the exchange of correspondence between Judge Webster and United States District Judge Frank A. Kaufman in Hearings II, at 289-90.

H.R. REP. NO. 94-247, 94th Cong., 1st Sess. 6, *reprinted* in [1975] U.S. CODE CONG. & AD. NEWS 674, 678-79 n.7a (emphasis added).

Petitioner argues that the court should not consult legislative history in deciding this case, points out to the court the salutary goals achieved by plea bargaining, and concludes "that it is patently unreasonable to totally reject plea agreements." Analysis of the pros and cons of plea bargaining is not, however, the dispositive issue in this case; further, we do not agree that the language of the Rule is clear that the court must listen to the agreement. Since Rule 11(e)(2) gives the court the right to accept or reject the plea bargain, it would be a useless act to require a district judge to listen to the agreement when he has already decided to exercise his right of rejection under Rule 11(e)(2).

We conclude that the district court was under no duty to consider petitioner's negotiated agreement, and accordingly deny the writ.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

CHAMBERS OF

EIGHTH CIRCUIT

RICHARD S. ARNOLD

UNITED STATES CIRCUIT JUDGE

P. O. BOX 429

LITTLE ROCK, ARKANSAS 72203

August 25, 1986

The Hon. William W. Wilkins, Jr.
United States Circuit Judge
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Thanks for your letter of August 20 and the opportunity it gives me to comment on various questions relating to the work of the Sentencing Commission.

I do not believe that the guidelines should provide a downward sentencing adjustment for defendants who plead guilty. Such a provision would penalize the right to plead not guilty and go to trial and would raise serious constitutional questions.

I do not believe that judges should entertain plea bargains at all, except for bargains providing for the dismissal of certain counts. When I was a district judge, I did not entertain such plea bargains, and several of the other judges in the Eastern District of Arkansas were similarly inclined.

The guidelines, in my opinion, should give recognition to offenders who cooperate, but it is not practical to identify different levels of cooperation objectively. If it were possible to do so, I would favor decision of the appropriate level of downward adjustment by the sentencing court, and certainly not by the prosecutor or by the prosecutor and defendant's counsel jointly. Disputes regarding the level or quality of cooperation should be resolved just as any other disputed questions of fact are resolved, by an evidentiary hearing before the sentencing court as finder of fact.

Thanks for asking for my views, and, incidentally, thanks also for taking the time and trouble to come to our Judicial Conference in Minneapolis. The work of your Commission is most important, even to those of us who are no longer in the direct line of fire, having been kicked upstairs from the trial court. Your presence at our Conference meant a lot to us.

Sincerely yours,

Richard S. Arnold

Richard S. Arnold

RSA/bh

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

KENNETH B. ANDERSON

CHIEF PROBATION OFFICER
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August 28, 1986

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United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

ATTN: William W. Wilkins, Jr., Chairman

Dear Judge Wilkins:

The following comments relate to your letter of August 20, 1986.

GUILTY PLEAS

Guilty pleas comprise the single greatest avenue through which criminal defendants reach the sentencing stage. Guilty pleas not only spare government the expense of a trial but they also spare the victims further trauma of trial proceedings. Because the guilty plea does in a significant manner serve both the interest of society and the defendant, it is most appropriate that a downward sentencing adjustment be made for defendants who plead guilty. The fact that the downward adjustment would not be made for sentencing decisions on defendants who went to trial should not be seen as punishment to this defendant for his trial decision. By it being stated on the record and made a part of the sentencing formula, all defendants are aware of the fixed benefit that would come to them from a plea of guilty. The availability of this information and certainty of "reward" for any guilty plea would help the defendant make a more informed decision as to his plea.

PLEA AGREEMENTS

As presently set out in Rule 11, judicial scrutiny and inquiry of negotiated plea agreements is required, although it is not for the judge to become involved in such negotiations. The limits that presently exist for judicial review of plea agreements are most adequate. However, because of the nature of the anticipated sentencing guidelines, i.e. the emphasis on total offense behavior, the rule may need to be modified to provide for the Court making inquiry as to stipulations by Government and defense concerning the "official facts" to be recorded in the presentence.

Stipulations or agreements between Government and defense that involve the factual basis and details/circumstances of the overall offense should be reviewed by the Court in much the same manner

Honorable William W. Wilkins, Jr.
August 28, 1986
Page 2

that sentence recommendations and agreements are reviewed on the record. It will certainly be necessary to settle this issue at the plea to avoid as much as possible conflicts in application of the sentencing guidelines.

Any bargaining with regard to charge or sentence will have to be carefully reviewed by the Court in plea bargaining examination in that these are both areas responsible for disparity. Although "charge bargaining" may limit the defendant's sentence exposure, it would not necessarily impact upon the computation of the sentence guidelines. "Sentence bargaining" will necessarily be limited by the more narrow sentence ranges as mandated by the Sentence Reform Act. Any "bargain" will have to fall within the then yet-to-be determined guidelines for that offense and offender. Presently, in many cases, the presentence investigation and therefore the sentencing guidelines would not be completed at the time of plea; therefore, it would be impossible to determine if the "bargain" is within the guidelines for the case.

Any stipulation to the facts of the offense by the defense and government should be subject to review by the Court so as to determine that the stipulations do not radically alter the facts to the point that the sentencing guidelines compiled on those facts are not based on the "real" offense.

COOPERATION

Cooperation, rendered through the providing of information concerning a defendant's participation in the offense, as well as the involvement of others, has long been taken into consideration in sentencing. To some extent, cooperation is akin to the guilty plea, in that it indicates acknowledgement of guilt. Although it can be seen as somewhat self-serving in that the defendant is hoping to receive some benefit from his cooperation, this factor should not negate positive things that accrue to the defendant and law enforcement from his cooperation.

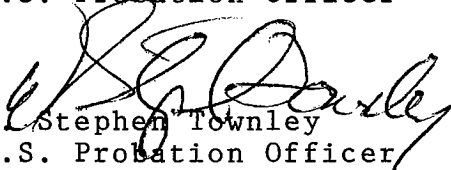
It would seem to be difficult to distinguish between different levels of cooperation. The extent of assistance possibly could be defined in terms of "cooperative attitude" whereby the defendant fully identifies his role and others roles, but his information does not result in a significant furtherance of the investigation or arrest of others. There could then be actual "cooperation" whereby, through the defendant, investigations are significantly advanced and/or others indicted. In the end, it will be necessary for the Court to determine the actual extent of cooperation and whether it meets the criteria for some level of downward adjustment. The Court's findings would need to be made on the basis of written or in-court certification of cooperation by the prosecutor.

Honorable William W. Wilkins, Jr.
August 28, 1986
Page 3

In conclusion, plea agreements are a desirable and needed portion of the criminal judicial process. However, they have long been a source of disparity that originates outside of the actual sentencing role of the Court. For this reason, if the intent of the Sentencing Reform Act is to be accomplished, the role of plea agreements in sentencing has to be addressed. In no way should a plea agreement be used by the parties to manipulate or alter the sentencing process to the point that the sentence does reflect the appropriate sanctions for what truly happened.

Sincerely,

Kenneth B. Anderson, Chief
U.S. Probation Officer


W. Stephen Townley
U.S. Probation Officer

WST:cs

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
HUGH H. BOWNES
JUDGE

FEDERAL BUILDING
55 PLEASANT STREET
CONCORD, N. H. 03301

August 28, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This is in reply to your letter of August 20.

GUILTY PLEAS

I do not think that sentencing guidelines should provide a downward sentencing adjustment for defendants who plead guilty. The guidelines should make no distinction between the defendant who pleads guilty and one who stands trial and is subsequently found guilty. I think that making a downward adjustment in the guidelines would raise serious constitutional questions. A defendant has a right to plead not guilty and it is assumed that if he does so, he is innocent until proven guilty. As a practical matter, I would assume that if a defendant pleads guilty he would probably receive a sentence at the lower end of the guidelines and if he pleads not guilty and is found guilty, he would receive a sentence at the higher end of the guidelines, particularly if the government had a strong case.

PLEA AGREEMENTS

It is a little difficult for me to understand what Congress meant by directing the Sentencing Commission to promulgate guidelines or policy statements that give sentencing judges guidance regarding the acceptance of plea agreements under Rule 11 of the Federal Rules of Criminal Procedure. It must be assumed that Rule 11 will be followed by the sentencing judge. I do not think that plea agreements should be used or, in most cases, will be

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BEVERLY HILLS, CA.

August 25, 1986

Hon. William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

Thank you for requesting my thoughts on the agenda established for the September 23 hearing by the Commission. My views follow.

GUILTY PLEAS

Actual disparities in sentencing guidelines for dispositions by trial and by plea would, of course, be unconstitutional.

And, while an offender takes a rehabilitative step forward by accepting accountability for his wrongdoing, it is a small one, the extent to which it is taken for strategic advantage in sentencing.

Therefore, an announced policy of lenity by the Commission for frank admission of wrongdoing, evidenced not only by guilty plea, but by "substantial, effective (truthful) post-prosecution cooperation," could better turn an offender's attitudes, as manifest by actual conduct, toward systemically acceptable ones. (See discussion under COOPERATION, post.)

No policy direction should be given by the Commission regarding "philosophical and practical reasons" to reduce a sentence on consideration of plea alone.

PLEA AGREEMENTS

The Sentencing Reform Act's abolition in spirit of "sentence bargaining" and Congressional concern for manipulation of guidelines by litigants aside,

the alternatives appear limited. It is doubtful that a continuation of the 90% guilty plea figure will persist for at least those offenses where the exceptional ("below the guideline") sentence would be probationary treatment. Thus, absent either life with an expanded judicial backlog or a significantly expanded federal judiciary itself, permitting the prosecution and defense to participate in the sentencing process by bargained-for stipulations of "total offense/offender characteristics" seems unavoidable.

Judicial scrutiny of the entire plea process should be preserved, however, to allow for assessments by the court not only whether the agreement itself, but, in the proper case, whether the underlying stipulations of counsel, would either unduly depreciate the seriousness of the offense or promote disrespect for the law in the eyes of the public.

From a defense-perspective, acrimonious controversy over extraneous government allegations under Federal Rule 32(c)(3)(D) might be avoided by requiring a specification of the "core" of objectionable conduct sought by the government to be punished.

COOPERATION

The extent to which criminal sentencing exists to reorient attitudes of offenders to the mainstream morality of an ideal general populace, the proof of its effectiveness can be measured by the attitudinal identification by the offender with the interests of that populace. A positive incentive pattern toward that behavioral end can at least be set in place by a policy preference which favors downwardly adjusting sentences in proximate relation to an offender's post-prosecution conduct--his or her actual, substantial and effective (truthful) cooperation with law enforcement authorities.

If an offender has sufficient social conscience to bear the breast of his own wrongdoing and that of others with whom he has previously identified or collaborated (or whom he has harbored by silence,) then the gain to society by detection of crime should merit a proximate gain to the offender, a balance uniquely suited to the temperament of the judiciary and founded in time on experience.

If, in the ordinary course of law enforcement, crime is solved largely by citizen participation, this pattern of sentencing rewards might aid the effort to motivate an offender's conduct toward a new, socially-responsible pattern.

(No actual witness need ever be made of such an offender. But the information he provided could be lawfully verified and acted upon.)

My sincere thanks for this opportunity to speak,

A handwritten signature in dark ink, appearing to be 'FMR', with a long horizontal flourish extending to the right.

Frederick M. Russell

FMR/srs

United States District Court

Southern District of Texas

Filemon B. Dela

Judge

P. O. Box 1072

Brownsville, Texas 78520

August 26, 1986

Hon. Judge William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Judge Wilkins:

Judge, in reviewing the many inquiries that the Commission has submitted to those of us who serve on the Advisory Committee, I am evermore convinced that your work is indeed challenging and deserving of extraordinary acknowledgment. I submit my thoughts relating to the matters of September 23rd.

Guilty Pleas. In the background we face legal pronouncements that convictions under not guilty pleas should not be treated differently than guilty pleas. In reality, we face countless distinctions as would touch upon the respective gestures. Ranging from a plea of guilty which in effect has a Defendant saying to society, "Look I made a mistake, I admit it, I am truly sorry" to a guilty plea in which advantage is sought by an individual who has a history that does not merit favor. The process further implicates a variance among prosecutorial approaches and sometimes a costly exercise dealing with the fundamental right. Humanly speaking, a Judge's exposure to evidence by way of a plea of guilty proceeding as opposed to extensive details in the trial of a cause, requires more than ordinary temperament to assess punishment on an equal basis. It would seem to me that the guidelines should make no distinction in general terms but should most certainly include consideration for what ensues or results from the Defendant's choice. Remorsefulness is a circumstance that guidelines should include, but likewise factual particulars which are emphasized or are enlarged because of the pursuit of the right to a trial become guideline elements. It is not the pursuit of the fundamental right that aggravates or non-aggravates but it is simply the natural attendant consequences that are revealed which distinguishes between the choices. Again, there must be left to the sentencing judge that discretion which cannot and should not be denied for matters that most certainly should be considered in the final decision and which cannot and should not be committed to hard-fast written rules. Otherwise, we repeat, we simply punish the crime.

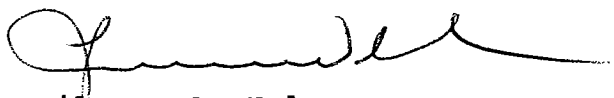
Plea Agreements. It would appear that for the objectives of the Enactment to be accomplished that all plea bargaining must conform to the guidelines to be established. We should remember that much of what is entailed in plea agreements relates to Executive functions (with regard to Counts) and hence does not affect the role of the judge. This judge does not perceive that the guidelines will hinder plea bargaining as this is one of the busiest criminal docket centers in the country and despite the fact that we rarely accept binding plea agreements, there has been no decrease in the number of guilty pleas. Further, in a real sense, the guidelines will lend far more certainty than is now available to the bargaining parties. Consequently, it is this writer's opinion that plea agreements should not interfere with the letter and spirit of sentencing guidelines. If the legislation is effectively applied, as is apparently contemplated, the Executive (Prosecution) should have no less of a duty than the Judiciary. It follows that the Prosecution will still preserve control over indictments and to what extent offenses are pursued thereunder but under no circumstances should distinctions be drawn other than those included in this report under the item of Guilty Pleas. Accordingly, false stipulations as to underlying or withheld facts and behavior should be rejected.

Cooperation: Nothing in this Judge's experience has been more perplexing and inconsistent than plea agreements and how cooperative individuals are treated. Constantly, we are faced with the most culpable individual receiving more favor than less culpable persons purportedly because of their cooperation. Worse, there are times when sentencing of lesser offenders must be structured around that assessed against the main party in an effort to preserve a semblance of consistency.

Most certainly, offenders who cooperate with authorities deserve some consideration. If a case is made as a result of an offender's testimony and cooperation, such conduct must be weighed as a factor in passing upon that person's case. Drug cases come to mind where, but for the work of the offender, countless cases would never be prosecuted and the effect of removing the practice as a tool from law enforcement might well produce adverse results.

Levels of cooperation should be objectively identified by proof, in writing, of what the accused performed, and the conduct can be categorized by such considerations as 1) the exposure of the Defendant, 2) the magnitude of the case, 3) the willingness to testify, 4) the extent of the cooperation. The guidelines should then establish an adjustment that would conform to the circumstances. Disputes can be resolved by the sentencing judge by giving the accused the opportunity to present his proof in writing.

Respectfully yours,



Filemon B. Vela

United States District Court
Federal Building - U. S. Courthouse
Springfield, Massachusetts 01103

CHAMBERS OF
FRANK H. FREEDMAN
DISTRICT JUDGE

August 29, 1986

William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am pleased to be able to respond to your August 20, 1986 letter regarding the subject matter of guilty pleas, plea agreements, and cooperation by offenders.

Speaking for myself only, I am not known to grant lower sentences to a defendant simply because he pleads guilty than if he had been found guilty in a jury trial. I believe the judge should maintain his discretionary power to sentence the offender based on the defendant's culpability, his previous record, and extenuating circumstances, should there be any, as well as his entire background in imposing the appropriate sentence. I do not feel guidelines should make any distinction between a defendant who pleads guilty and one who is tried and subsequently found guilty.

I also feel the sentencing judge should be the final decisionmaker in giving credibility to any plea agreements between the prosecution and the defense attorney in criminal matters. If it should be that sort of plea bargain under Rule 11(e) in which a defendant has the right to withdraw a guilty plea and go to trial, he should be told in advance that the plea agreement is not binding upon the Court, and in fact, should be given the opportunity to withdraw the plea and go to trial.

All cooperation by offenders should be brought to the attention of the trial judge at trial and it is he who should be given the opportunity to give credit to the defendant for

William W. Wilkins, Jr.
August 29, 1986
Page 2

such cooperation and lessen the potential sentence as a result. The value of such cooperation should be determined by the prosecution and it should make the Court aware of it at the time of sentencing.

Good luck to you in your September 23 hearing and future work in this important project.

Sincerely,

A handwritten signature in cursive script, reading "Frank H. Freedman".

Frank H. Freedman
United States District Judge

P.S.: The Court also considers the prosecution's recommendation at the time of sentencing and the prosecution can consider the defendant's cooperation in making its recommendation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

CARLOS JUENKE
CHIEF PROBATION OFFICER

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405 FEDERAL OFFICE BUILDING
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WEST PALM BEACH, FLORIDA 33401 - 5199

P. O. BOX 3269, STATION A
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August 29, 1986

REPLY TO: MIAMI, FL

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Pursuant to your correspondence of August 20, 1986 the following is submitted relative to the issues that are recently under consideration by the Sentencing Commission as pertains to the imposition of sentencing guidelines.

GUILTY PLEAS: It would seem only appropriate and practical that individuals who choose to enter a plea of guilty be rewarded in some fashion for acknowledging the guilt for the offense to which they have been charged. As a result, I would recommend that the Sentencing Commission offer some type of downward adjustment to defendants who plead guilty as opposed to those who exercise their right to go to trial. Those opposed to such consideration may suggest that individuals exercising their constitutional right to a trial are being punished. This is simply not the case.

Those individuals who choose to exercise virtually any constitutional rights do so only after expending some personal sacrifice. For example, the Constitution addresses the fact that individuals may not be discriminated against on the basis of gender or race in exercising their right to vote. This is not to say however that there are not certain costs in exercising one's right to vote. The individual must generally go through the expenditure of time and resources to fulfill some type of registration process. The individual must also expend certain amounts of time, energy and suffer some degree of inconvenience as a result of going to a polling place to cast ones vote. Those citizens who choose not to exercise the right to vote conversely do not endure these personal costs.

Likewise, there are certain rewards for individuals who choose not to go to trial. These have been and are a part of the criminal justice process. For example,

-Individuals who choose not to exercise their right to trial oftentimes are rewarded economically via a lessened cost for legal representation.

-The offender who chooses to enter a plea of guilty shortens the amount of emotional turmoil associated with the pendency of a criminal charge.

-Those individuals choosing to enter a plea of guilty often indicate that an element in their choice was one of bringing closure to their case in terms of sentencing. In this fashion their families do not suffer needlessly in either an economical or emotional frame of reference.

-In almost all instances of plea, there is a promise by the government as to a dismissal of other counts in the indictments or limitation as to the government's role in sentencing (eg. the government may not allocute as to the quality or quantity of punishment at sentencing).

-The defendant who elects to enter a plea of guilty dramatically limits the courts potential for imposing punishment (imprisonment on consecutive counts) as well as other types of sanction (restitution on multiple counts in an indictment as opposed to a single count disposed of by plea.)

-By publicly acknowledging one's guilt in an offense, many offenders are given consideration in sentencing as they have taken the initial step towards rehabilitation.

-As is often pointed out at sentencing by defense attorneys, there should be some type of reward for those defendants who appreciate that the resources of the criminal justice system are finite and would prefer not to utilize those limited resources. Instead, they acknowledge their guilt, accept their sentence and attempt to rehabilitate themselves under whatever constraints the sentence imposed by the court offers.

In summary, it would appear that such a consideration by the Sentencing Commission would be appropriate, not in the framework of punishing those who elect to exercise a constitutional right, but in an effort to provide an additional reward other than those indicated previously for individuals who elect to enter a plea of guilty.

PLEA AGREEMENTS: This is an area that provides an incredible amount of potential to totally circumvent whatever guidelines the Sentencing Commission formulates. At present,

August 29, 1986

Page Three

many defendants are sentenced under negotiated pleas to a charge which has little or no relationship to the offense behavior in question. For example, in drug offenses many defendants are given the opportunity to enter a plea of guilty to the charge of Title 21, United States Code, Section 843(b)(Use of a communication facility in reference to a drug transaction). The reality of the situation is that the offense behavior had very little to do with a telephone call but in fact had much to do with a defendant who was in possession of a large quantity of a controlled substance. The court, of course, is limited as to the potential sentence (four years) that may be imposed. Another common plea of convenience is when the defendant enters a plea of guilty to simple misdemeanor possession (Title 21, United States Code, Section 844). This plea of convenience restricts the court to a one year sentence. The obvious question is should the offender in Boise, Idaho be forced to enter a plea of guilty to a five year felony for possession of 10 pounds of marijuana while his counterpart in Miami, Florida is permitted a plea of guilty to a one year misdemeanor for the same offense behavior.

In this respect it would seem totally appropos that the Sentencing Commission offer standards to the sentencing judge in terms of plea agreements. Those standards should revolve around a stipulation **that no plea agreement may be accepted by the Court that deviates from the factual reality of the offense behavior.** Without this consideration, the door would be fully open for plea agreements to be entered into in which defendants are sentenced, as is unfortunately the case at present, under circumstances and conditions that have little or no connection to the behavior that precipitated their prosecution in federal court.

COOPERATION: Cooperation is an issue that should also be taken into consideration by the Sentencing Commission in promulgation of the guidelines. However, it should be done so within a very limited context. Consideration should be given to those defendants who actually enter into a cooperative posture with law enforcement in such a capacity that real results are produced. Specifically, real results would include heretofore information unknown to law enforcement agencies prior to the arrest, cooperation that leads to the arrest of other individuals (confidential informant-type drug buys leading to an arrest) and actual testimony against codefendants in either a grand jury or trial proceeding.

No consideration should be given to those defendants who do not provide cooperation as stipulated previously. In many instances the sentencing proceedings are clouded

August 29, 1986
Page Four

by a remark from the defendant or his attorney suggesting that there was willingness to cooperate, however the government did not respond. As the Assistant U.S. Attorney who actually prosecuted the case or the case agent who actually investigated the offense may not be present, a reasonable rebuttle is simply not available. A desire or verbalization of willingness to cooperate is an empty promise. The quality and quantity of cooperation is an issue that should be solely determined by the government, and in almost all instances, an issue that should be resolved by the case agent as opposed to simply the U.S. Attorney.

In summary there should be a recognition as to cooperation offered by a defendant. There should be different levels of cooperation identified. If a dispute occurs relative to the degree of cooperation, it should be settled by the Court.

As always, the opportunity to provide any input to the U.S. Sentencing Commission relative to the development of sentencing guidelines is greatly appreciated. I look forward to the time that the Sentencing Commission's guidelines are finally implemented within the federal court system.

Sincerely,



John M. Shevlin, Supervising
U. S. Probation Officer

JMS/mds

cc: Mr. L. Russell Burrese
U. S. Probation Officer
United States Sentencing Commission
Washington, D.C.

Mr. Carlos Juenke, Chief
U. S. Probation Officer
Miami, Florida

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
PROBATION OFFICE

ELIZABETH L. TAYLOR
CHIEF PROBATION OFFICER

August 28, 1986

ROOM C - 126
300 ALA MOANA BLVD.
BOX 50111
HONOLULU, HAWAII 96850-9987
TEL. (808) 546-3100

The Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

I am responding to your most recent request for input to the Sentencing Commission.

GUILTY PLEAS

I do not believe that sentencing guidelines should provide a downward sentencing adjustment simply because a defendant has pled guilty rather than been convicted by trial. Aside from the fact that this issue would seem to pose a question of constitutionality regarding a defendant's right to trial, it has been my experience that there are a number of motives which prompt an individual to plead guilty, not all of which are positive. It is true that a guilty plea can indicate remorse and a step toward rehabilitation. As often as not however, a guilty plea is more a tribute to the quality of the comprehensive investigation than it is a mark of positive change. Therefore, I don't believe that the sentencing guidelines should make a distinction between a defendant who pleads guilty versus one who stands trial.

PLEA AGREEMENTS

My only opinion regarding plea agreements is that they should never contain a sentencing limit which is binding to the Court. Instead, they should state, in effect, that the U.S. Attorney at the time of sentencing will only recommend a sentence but that the Judge may use his full discretion.

Chairman William W. Wilkins, Jr.
Page 2
August 28, 1986

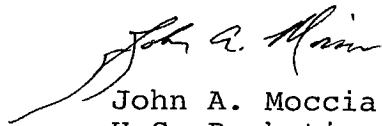
COOPERATION

Cooperation with authorities by defendants deserves significant consideration at time of sentencing only, in my opinion. I believe it is very practical that it publicly be made known that cooperation with law enforcement will lighten a sentence.

Different levels of cooperation should be objectively identified and given relative downward adjustment. A defendant who only agrees to identify co-conspirators but refuses to testify in court against them, for example, deserves far less consideration than the defendant who acts in an undercover capacity on behalf of a law enforcement agency, develops new cases and is willing to testify in court against them. I feel the sentencing Court, after reviewing information provided by the prosecution and defense, would be best able to resolve disputes over the level of cooperation. These disputes would probably best be resolved in camera.

Should you wish further input, please contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "John A. Moccia".

John A. Moccia, Supervising
U.S. Probation Officer

JAM/ah

United States District Court

United States Courthouse

Foley Square

New York, N. Y. 10007

Chambers of
Judge Gerard L. Goettel

August 28, 1986

Hon. William W. Wilkins, Jr.
Chairman, United States
Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This is in response to your letter of August 20, 1986.

Guilty Pleas

While there are a few rationalizations for the common practice of giving a lesser sentence to those who plead guilty, in the final analysis it is merely done as an incentive. As an incentive, it is critical to the functioning of the criminal justice system. If the sentencing guidelines were to require, or even make it likely, that no consideration would be given to the fact that there has been a plea rather than a trial, the number of trials will escalate substantially. The problem, however, is that if you institutionalize the practice you will face an immediate constitutional challenge claiming that persons who exercise their right to trial are being punished. This is one of the dilemmas of the guideline approach. You will have to find some acceptable way to allow judges to give credit for the offering of a guilty plea without provoking a constitutional attack.

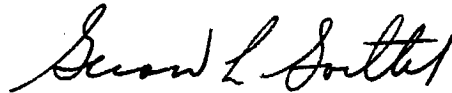
Plea Agreements

Plea agreements have always been something of a problem and the problem will be more acute with sentencing guidelines. I think that the practice of charge bargaining can continue since realistically the prosecution has control over the charges in the first instance and the Court has the limited option of accepting or rejecting pleas to less than all of the charges. Sentence bargaining, however, would seem to be contrary to the spirit and purpose of the guidelines.

Cooperation

Of all of the factors to be considered with respect to sentencing, cooperation is the most variable. In some instances, it can be of little or no consequence. At the other extreme, if the defendant has assisted the Government in making a case against other important defendants, and has done so at personal risk to himself or his family, very great consideration must be afforded. The prosecutorial function would be severely impaired were cooperation not acknowledged as being a pertinent consideration in sentencing. It would be extremely difficult, however, to attempt to factor different levels of cooperation objectively. It is quite proper for the prosecution and the defense to give the Court their views as to the value of the cooperation. Where there are disputes in this regard, the Court must resolve them. Again, as with guilty pleas, I do not think the factor of cooperation can be quantified into the guidelines and should be covered simply by a broad statement to the effect that a lesser sentence would be appropriate in the presence of cooperation and the amount of the diminution must depend upon the circumstances.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Gerard L. Goettel".

Gerard L. Goettel

GLG:ekd

United States District Court

DISTRICT OF ARIZONA
UNITED STATES COURTHOUSE
PHOENIX, ARIZONA 85025

CHARLES L. HARDY
Judge

September 10, 1986

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Here are my thoughts on your questions relating to the proper role of plea agreements in a sentencing guidelines system:

GUILTY PLEAS

While it may be true that sentencing judges generally impose lower sentences after guilty pleas, I do not believe that sentencing guidelines should provide a downward sentencing adjustment for a defendant who pleads guilty. The guidelines should not penalize a defendant who exercises his right to go to trial.

PLEA AGREEMENTS

I seriously doubt that any guidelines or policy statements can be written that will prevent plea agreements from being used to circumvent the sentencing guidelines. Even now, with the broad discretion vested in sentencing judges to determine an appropriate sentence, the people in the criminal justice system who have the most influence on what sentences will be are the prosecutors. They have complete discretion in deciding what charges are to be filed against any given defendant. Of course, the nature of the charge fixes the limits of the possible punishment. A prosecutor's agreement as to what is appropriate punishment fairly effectively establishes the upper limits. I do not believe that I have ever refused to accept a plea agreement because the sentence was too light. My reasoning has always been that the prosecutor knows his case, knows the defendant and his record, and knows the injuries sustained by victims and others. Given his knowledge, deference should be given to his feelings as to what is an appropriate sentence.

The Honorable William W. Wilkins, Jr., Chairman
Page 2
September 10, 1986

I think that the factors set forth in 18 U.S.C. § 3553(a) are the standards a sentencing judge must apply in evaluating whether a plea agreement is acceptable.

Given the discretion vested in a prosecutor to determine what charges to bring against a defendant, I do not see how the Sentencing Reform Act can have any impact on "charge bargaining." The Act will obviously have considerable impact on "sentencing bargaining," but I have no doubt that imaginative prosecutors and defenders can contrive ways of avoiding the guidelines.

I do believe that prosecutors and defense attorneys should not be permitted to stipulate to underlying facts that mandate a specific sentencing result. A defendant should be convicted for acts that he did that constitute a crime. He should never be convicted for something that he did not actually do simply for the purpose of giving him a sentence different than what he would have received for what he actually did.

Perhaps one way to resolve the whole plea bargaining problem would be simply to outlaw plea negotiations. It is my understanding that prosecutors in Alaska are forbidden to enter into plea bargains and that the policy has worked out very well. Of course, I suppose that congressional action would be required.

COOPERATION

In many cases the prosecution and punishment of all persons who have participated in an offense is possible only through the cooperation of some of the offenders. The cooperation of an offender should be rewarded by a downward adjustment of an otherwise applicable sentence. I can think of at least three levels of cooperation: the offender who gives some information regarding other participants, the offender who gives full information regarding other participants, and the offender who gives full information regarding other participants and is willing to testify against them.

Without being able to articulate a reason, I have a feeling that the appropriate level or downward adjustment should be decided by the sentencing court. Disputes regarding the level or quality of cooperation should be resolved by the sentencing court.

Yours very truly,



CLH/js

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

September 5, 1986

FRANK A. KAUFMAN
United States District Judge
Baltimore, Maryland 21201

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Billy:

I have your letter of August 20, 1986.

I would think that the answers to the questions which you pose under the heading "Guilty Pleas" would depend, in the first instance, on constitutional considerations and, secondly, on policy considerations. Insofar as the former are concerned, the question arises in my mind (without the benefit of research on my part) as to whether the adoption of specific sentencing guidelines providing a downward sentencing adjustment for defendants who plead guilty would put an unconstitutional burden upon the exercise by a defendant of his rights to stand trial and to require the Government to prove him guilty beyond a reasonable doubt. If the answer to that question is in the negative, then I must admit that the question of whether the guidelines should distinguish between a defendant who pleads guilty, on the one hand, and one who stands trial and is subsequently found guilty, on the other hand, raises very difficult philosophical considerations. While I, for one, would prefer that there not be such a distinction, I would think that the practical fact of life is that usually such a distinction is in fact made by trial judges.

Perhaps, the way to approach the matter is to equate a guilty plea with at least a minimal type of cooperation by a defendant. In many instances, of course, guilty pleas do go hand in hand with some type of cooperation, albeit, in some cases, very minimal cooperation. If your guilty plea questions are approached in the context of cooperation, that would lead one, it seems to me, to consideration of the questions which you have posed under the heading of "Plea Agreements." In that latter regard, I would think that a sentencing court will need to determine specifically whether plea recommendations are within the sentencing guidelines. If, either within the four corners of a written plea agreement or at the time of arraignment, the court could be informed of all relevant facts relating to the application of the sentencing guidelines, then the court would be in a

position, before accepting the guilty plea, to have such facts stipulated to by the Government and the defendant, or if there is a disagreement with regard to the same, to take evidence and make findings with regard to the same at the time of rearraignment or in a further scheduled proceeding prior to sentencing.

Insofar as Federal Civil Rules 11(e)(1)(B) and (C) are concerned, the practice, I believe, of every judge of our Court--and I know my own practice--has been not to accept a (C) type of plea except in the most extraordinary type of circumstances. I can only remember two occasions upon which I have accepted (C) type pleas--and in those instances I really have not accepted what is usually thought of as a (C) type plea. What I have done is to agree, at the time of rearraignment, that I will inform the defendant at the commencement of the sentencing proceeding whether or not I will sentence no more severely than called for by the plea agreement and that if I then inform the defendant that I will not commit myself so to do, then the defendant will have a right to withdraw from the plea agreement. I could imagine an instance in which the Government might also request an opportunity to opt out of a plea agreement if the court states that it will not commit itself to sentence as severely as provided by the plea agreement, but in the two instances in which I have proceeded under what might be considered (C) type plea agreements, the Government has not asked for a chance so to opt out. I would think that the statutory provisions which your Commission is seeking to implement would seem to suggest that (C) type agreements, other than on the type of opt-out basis indicated above, would not be permitted; otherwise, the Government and the defendant could bypass the sentencing guidelines by their own agreement.

I would think that all underlying relevant and material facts of an offense and the offender's behavior should be stipulated to by the parties to the fullest extent possible and that the judge should accept such stipulations, provided that he gets an assurance from counsel on both sides, as officers of the court as well as advocates, that, insofar as they know, the stipulated facts are truthful and may be relied upon by the court.

With regard to level or quality of cooperation of a defendant, I would suggest that findings of facts concerning the same be made by the Court at the time of rearraignment, hopefully, on the basis of stipulations by the parties and, if not, on the basis of presentation of evidence.

I want to add one caveat to the "thinking out loud" which I have indulged in in this letter and that is that, rather obviously, our criminal justice system will break down

if we have too many disputed factual evidentiary hearings in connection with the application of the new sentencing guidelines. Further, in any event, if we have a large number of such evidentiary hearings, we will surely need to establish procedures pursuant to which the judge can determine disputed questions of fact on the basis of proffers and the like without taking lengthy question-and-answer testimony.

I know I need not point out to you and to your fellow Commission members the complexities of the issues which the questions posed in your August 20, 1986 letter present. I have just returned from ten days at the beach and have not had too much time to ponder about the matters discussed in your letter and in this response, though I have thought a great deal about these issues over the years. If I get any additional thoughts before your September 23, 1986 deadline rolls around, I will pass them on to you for what they are worth.

Best regards.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Frank'.

Frank A. Kaufman

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PROBATION OFFICE

September 3, 1986

MICHAEL J. LUCIANO
CHIEF PROBATION OFFICER

207 U.S. COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007
(212) 791-0088

Honorable William W. Wilkins Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue NW, Suite 1400
Washington, DC 20004

Dear Mr. Chairman:

Reference is made to your letter of August 20, 1986. In regard to guilty pleas, I would be in favor for flexible downward sentencing adjustment for defendants who plead guilty. It seems to me that the sentencing judge should be able to give more credit to a defendant who enters a plea of guilty early on in a matter which would have resulted in a long, complex trial had he or she not entered the plea, and less credit to a defendant who enters a plea of guilty in a simple matter which would have resulted in a one day trial. Similarly, in a complex matter, the defendant who enters his plea on the morning the trial was to have begun or during the course of the trial should be given less credit than if he or she had entered that plea before trial preparations had begun. One judge in this district uses an informal "20 percent off" standard in regard to pleas. However, the nature of the plea bargain may affect the amount of consideration a plea should be given inasmuch as if the defendant has been allowed to plead guilty to an offense which carries a penalty far less than normally would be associated with the crime committed, less consideration should be given to the simple fact that the defendant is before the Court for sentencing as the result of a plea rather than after trial.

In regard to plea agreements, it is not uncommon in this district for an individual who has cooperated in a drug investigation to be allowed to enter a plea of guilty to a "telephone" count (21 USC 844) or a conspiracy count (18 USC 371), thereby reducing the maximum exposure at sentencing from 15 or 20 years to four or five years. In check case, the prosecutor can treat each of nine or ten checks as separate counts to achieve a maximum theoretical penalty of 45 or 50 years or lump them altogether in one five year count. Sometimes indictments are rewritten to create informations which artificially reduce the penalty to a misdemeanor level. While I do not oppose any of these maneuvers, it seems that such factors as cooperation, the nature of certain specific offenses and some element of overall fairness need to be included if specific limits on plea bargains are to be imposed. It would be a

nightmare if, for example, an 85 year old widower is prosecuted for cashing six of his wife's social security checks following her death and due to the limits placed on "charge bargaining" he must enter a plea to six counts, each carrying five years Even if the guidelines are geared more toward the amount of money stolen or defrauded, such as the present parole guidelines, an overly rigid system could present the possibility of serious inequities. For example, a judge in this district is soon to sentence an 82 year old individual who evaded millions of dollars in taxes. As far as can be determined, this individual was not otherwise criminally oriented, has no prior record, and his co-conspirators have died of old age. The defendant is not in good health. He has agreed to make full restitution including interest and penalties. Current parole guidelines would have him serve 40 - 52 months, but I suspect few judges would wish to sentence this individual to more than three years in prison.

Inasmuch as this district does not engage in "sentence bargaining," I have no comments on that matter. While I do not feel qualified to suggest the appropriateness of judicial scrutiny of negotiated plea agreements or the standards which should be applied, as a practical matter it may be useful in certain difficult situations to withhold the final acceptance of a plea agreement until after the presentence report has been received by the Court.

I have had extensive contact with cooperating individuals and judges who have had to sentence these defendants. Since this district does not engage in sentence bargaining and, as a rule, the U.S. Attorney's Office makes no recommendations as to sentence for cooperating individuals, the burden of determining a fair sentence falls fully on the sentencing judge. Some examples of recent cases in this district may be of use.

A) A defendant who was serving a parole term for a huge narcotics conspiracy was caught dealing ounce amounts of highly pure heroin. He cooperated and his unique abilities and contacts resulted in the seizure of many kilograms of heroin and the successful prosecution of eight or ten very high level, intensely conspiratorial and very hard to prosecute individuals. The Court's view was that the only way high level traffickers can be successfully prosecuted is through the cooperation of individuals such as the defendant and the only way to encourage such cooperation is to suitably reward these individuals. The defendant was sentenced to probation.

B) "Mitigation but not exoneration" applied in another case where the Court attempted find a balance between the extreme seriousness of the offense to which the defendant had admitted (which were previously unknown to the authorities) against the great public service he rendered by testifying against his former associates, a public service done at considerable risk to himself and his young children. In this instance the defendant was sentenced to ten years imprisonment; the maximum exposure had been 20 years. This officer knows of a number of instances where individuals who engaged in the importation of multi-kilogram amounts of heroin were eventually sentenced to probation

terms due to their cooperation.

In terms of getting the cooperation of individuals involved with high level narcotics trafficking, it would be a disaster in my opinion if the Commission's guidelines made it such that, for example, any individual involved in the distribution of more than three kilograms of heroin must spend 80 or 90 months in prison whether or not he or she cooperated with authorities. It is my strong opinion that the more stringent the restrictions placed on "charge bargaining" or stipulation as to the underlying facts, the more generous the maximum reward for cooperation should be. There must be substantial rewards available for those who make it possible to convict high level, conspiratorial defendants against whom successful prosecutions could not be mounted without the assistance of cooperators.

Your letter refers to levels of cooperation and perhaps distinctions should be made between an individual who provides only information and documents as opposed to someone who goes "wired" against armed and dangerous individuals who would surely do him (or her) bodily harm if they discovered that their conversations were being recorded. Of course, depending upon the target of the prosecution, simply testifying against certain individuals can place the cooperator and/or the cooperator's family at great risk. The more difficult issue is the "quality" of the cooperation. In contested matters, it is unlikely that either the prosecutor or the prosecution to defense in tandem are likely to be able to produce a useful document for the Court and it is thus only the sentencing Court which can resolve such disputes. From my own experience, all other the factors being equal, an individual who has cooperated and reformed is far more deserving of reward than someone whose sole motivation is to reduce the severity of the punishment to be meted out. I am highly skeptical as to the likelihood that all the significant factors in the plea bargain and sentencing of an individual who has cooperated with authorities (especially in a major investigation) can be quantified and statistically plugged into a numerical system. However, based upon personal experience, perhaps the chart below will be of some use.

See Next Page

<u>Circumstances of Decision to Cooperate</u>	<u>Level of Cooperation</u>	<u>Usefulness</u>	<u>Attitude of Cooperation</u>
Immediate, upon confrontation, without substantial persuasion 2	Very high, including personal risk 4	Results in successful prosecution of high level individuals 4	Remorseful, attempting reform 3
After consulting lawyer & negotiating 1	Very high, without risk 2	Result successful 2	Remorseful 1
Other 0 (such as limited etc.)	High 1	Not successful 1 (no fault of cooperation)	Other 0
	Lukewarm or less 0	Other 0 (Conviction not obtained or made difficult by)	

Score of 3 or below: reduce by up to 10 %

Score of 4 to 7 : reduce by up to 25%

Score of over 8: reduce by up to 50%, probation available.

Yours truly,

MICHAEL J. LUCIANO
Chief U.S. Probation Officer

Joel Weber
JOEL WEBER
U.S. Probation Officer

JW/dh



**Unitarian Universalist Service Committee
National Moratorium on Prison Construction**

2519 Mission Street Suite 3 San Francisco, CA 94110 (415) 647-1890

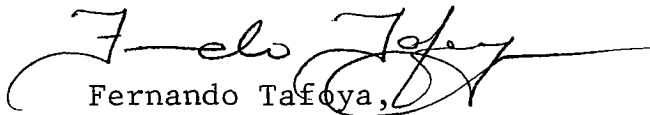
September 8, 1986

Mr. William W. Wilkins, Jr. Chairman
United States Sentencing Commission
1331 Pennsylvania Ave. NW Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

Thank you for your letter of August 20, 1986 seeking my input on sentencing guidelines. Since we have an office based in D.C. I have forwarded your letter the D.C. office for a response.

Sincerely,


Fernando Tafuya,
Coordinator

FT/mec

Jobs Not Jails

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National Officers 1986

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September 10, 1986

Hon. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W. #1400
Washington, D. C. 20004

Dear Judge Wilkins:

**RE: PLEA AGREEMENTS, ROLE OF
Your ltr 8-20-86**

Before addressing the three (3) questions posed in the referred correspondence, please be advised you will be receiving comments from FPOA Executive Vice-President Charles Stearns, and Legislative Coordinator Greg Hunt. Susan Smith is on annual leave and may not be back in time to provide a written statement, but has indicated a willingness to appear in person at the 9-23-86 hearing. Please contact her directly if that is your desire.

GUILTY PLEAS:

I do not dispute the figures or explanatory statement made in your letter. I strenuously object to a further downward adjustment of the sentencing guidelines for those defendants who have pled guilty.

I do not have documentation to support this next statement, but if obtained, such figures probably would support the contention that 99.9% of the 90% mentioned resulted from a plea agreement, thereby effectively downgrading the seriousness of the offense, and the Court imposed penalty.

Because an individual "believes" he/she is innocent and goes to trial only to be found guilty, should not dictate a harsher or lighter sentence, although the former may result because the offense of conviction is not bargained down and thus possessing a heavier penalty. The reverse is true for a voluntary guilty plea.

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In other words, the "adjustment" is built in to the offense of conviction, whether by plea or trial; nothing should be added or subtracted - let the offense penalty determine the time, not how it was achieved.

PLEA AGREEMENTS:

My response to this concern is: Judges should not be party to underwriting plea agreements when they do not have all the facts, and the facts they do have are biased on prosecution and/or defense interests. One purpose of the presentence report is to provide the Court with information necessary to make an informed sentencing decision; the same philosophy holds regarding accepting or rejecting plea agreements.

The Federal Judge is a qualified trier of fact, a process not complete until all the facts are in - premature decision making serves only to deny justice - society's and/or the defendant's. To do otherwise limits the judge to the role of overseer, rubber stamping prosecution deals. Plea bargaining is an administrative process involving prosecution and defense interests. In my view, the Court is there to decide the merits of the agreement after all the facts are known - not before.

COOPERATION:

Response to concerns about rewarding defendant cooperation is akin to that offered on a reduced plea reward, i.e., the gratuity is built in the terminal offense and penalty.

Prosecution and defense have given suspect legitimacy to a cult of informers, bolstered by dire predictions of a crumbling judicial system and threats of clogged court calendars, if these people do not receive certain "rights" in the form of special treatment. Defendant cooperation should be acknowledged, not rewarded, via the mutually agreed upon offense, and penalty imposed within guidelines for that offense.

We cite deterrent effect as one purpose of criminal sanctions, but what about criminal and crime incentives resulting from plea bargaining, downgraded sentencing guidelines, special privileges for cooperation, early parole release, government moot at sentencing, etc., etc.

From the public view, there is much wrong with our criminal justice non-system. Do we reinforce that disillusionment and distrust by making it easier for criminals in the name of bargained justice?

Finally, the attached article may be of some benefit in your deliberations.

Hon. William W. Wilkins, Jr., Chairman
Page 3
September 10, 1986

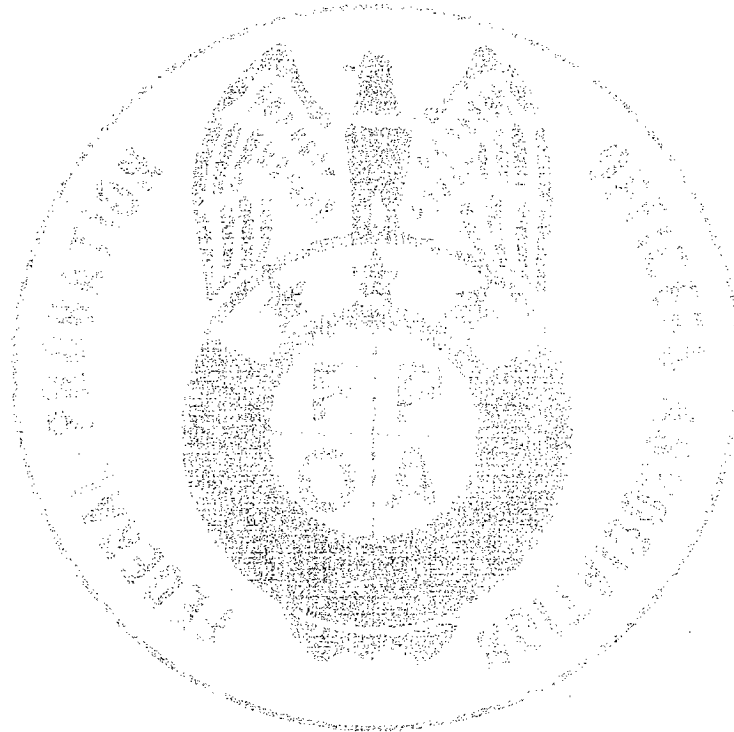
Again, thank you for asking FPOA to participate in this important work. I only ask you and your Commission recognize that, if there is discretion and perceived disparity, it is better in the hands of a trier of fact than a prosecutor.



R. L. THOMAS, PRESIDENT

vi

Attachment



(e) Schedule of Permissible Reductions for Superior Program Achievement.

Total months required by original presumptive date:	Permissible reduction
14 months or less	Not applicable.
15 to 22 months	Up to 1 month.
23 to 30 months	Up to 2 months.
31 to 36 months	Up to 3 months.
37 to 42 months	Up to 4 months.
43 to 48 months	Up to 5 months.
49 to 54 months	Up to 6 months.
55 to 60 months	Up to 7 months.
61 to 66 months	Up to 8 months.
67 to 72 months	Up to 9 months.
73 to 78 months	Up to 10 months.
79 to 84 months	Up to 11 months.
85 to 90 months	Up to 12 months.
91 plus months	Up to 13 months.

Plus up to 1 additional month for each 6 months or fraction thereof, by which the original date exceeds 96 months.

Court—Prosecutor—Probation Officer: When Is Discretion Disparity in the Criminal Justice System?

BY ROBERT L. THOMAS

Supervising Probation Officer, U.S. District Court, Phoenix, Arizona

THE INTENT of this article is to examine those less obvious factors which affect the probation officer's decisionmaking process leading to a recommendation to assist the court in sentencing a criminal defendant. Current research does not directly speak to the issue. There is abundant literature on the discretion—disparity question, but as it relates to prosecutors, judges, parole commissions, legislators, and, to a lesser degree, an ambivalent public, overcrowded correctional system, confused media and a disorganized criminal justice system (Harris, 1975).

All the above affect the probation officer in the performance of statutory responsibilities. The officer is part of the system and subject to the same pressures, myths and misconceptions surrounding the sentencing disparity controversy.

Absence of Unified Correctional Philosophy

There is not yet in America any clear, consistent, rational policy regarding whether to pursue a correctional philosophy of rehabilitation or one of retribution. Criminologists, legislators and correction officials operate at cross purposes; some perceive criminals to be accountable for their misdeeds and emphasize retribution; others see offenders in need of rehabilitation or therapy since their behavior is the product of external forces and not the result of free and responsible choice. Some scholars hold a "nothing works" doctrine, arguing neither rehabilitation nor retribution lowers recidivism rates. Proponents of this third view have pushed for a correctional philosophy of humane incapacitation. Incapacitation without

therapy comes down to a variant of punishment; hence, the "nothing works" doctrine results pragmatically in a punitive approach. This means one is left with a choice between some form of retributive correctional philosophy and some form of rehabilitative theory.

Not only is there wide disagreement regarding what should be done in corrections, there is no consensus as to what is currently being practiced.

Schrader-Frechette (1978) argues that rather than attempt the impossible and try to develop a correctional policy which admits the importance of both retribution and therapy—because the offender is both responsible and, in some sense, not responsible—there is another course of action open. This is to recognize that after-the-fact solutions to crime do not work but, prevention might. Prevention is much more difficult because it challenges a societal system of values and not just the adequacy of human skills or financial resources. As Friday (1976) noted, crime prevention is successful only to the extent every individual is essentially a community-oriented person. It is simplistic but, nevertheless, correct to point out that correctional institutions cannot be expected to compensate for the many ways in which we all fail to be, and expect others to be, socially responsible.

One reason we have failed to become (and to teach our children to become) socially responsible is that we in America have valued our constitutional freedoms highly. American liberal traditions have created, to an extreme degree, a "cult of personal liberation." Consequently, neither the offender nor the nonoffender has developed a true social conscience. Realistically, the persistence and the acceleration of the crime rate is testimony to more than the absence of social responsibility; rather, in a positive but often extreme sense, our current correctional problems, of which disparity is but one, bear testimony to the success of a far-reaching system of civil liberties. Without such liberties, crime prevention would be easy. Correctional officials have the difficult task of maintaining one while achieving the other.

Disparity: A Traditional Definition

The former emphasis on treatment or rehabilitation is being replaced by an emphasis on certain punishment; the indeterminate sentence is being replaced by determinate sentences designed to achieve equal treatment and certainty of punishment. Dickey (1979) points out that regardless of which sentencing option is used, an effective decision requires knowledge of facts, whether those

facts relate to characteristics of the defendant, which might indicate responsiveness to treatment, or to the facts of the offense, upon which a judgment as to suitable punishment should be based.

At the very center of the concept of rehabilitation has been individualized sentencing—the belief that a sentence should fit the offender and the circumstances of the case rather than being determined solely by the nature of the offense. This practice has been implemented by providing discretion at various points in the criminal justice system. Discretion is given to judges in choosing the type and length of sentence, and to parole agencies who can reduce the length of time served based on assessment of inmate institutional progress.

To individualize sentences means that different people who commit the same crime may receive different sentences. To reformers this is traditionally referred to as "sentencing disparity." This so-called disparity may be completely appropriate since crimes can and do vary widely in their circumstances. No crime can be viewed realistically without a consideration of its circumstances and consequences.

There are currently a number of legislative and administrative proposals designed to limit or eliminate discretion previously given judges and others. Unfortunately, many of these proposals do not provide any alternative method of tailoring sentences to circumstances. To the extent they limit discretion, they limit the possibility of individualizing sentences. It can be dramatically unfair to give the same or similar sentences to two persons convicted of identical crimes when the circumstances of those crimes were extremely different.

The Court: Scapegoat or Villain?

The protection of society is the ultimate objective of all criminal laws and it should be so of criminal sentence. According to Boldt (1963), this objective may be sought through punishment of the offender, incapacitation by confinement, rehabilitation through treatment, or by deterring others from committing similar offenses.

Evans and Gilbert (1975) describe the criminal court's two basic functions as establishing innocence or guilt and imposing judgment. In the latter area a void of guiding law and expertise exists. Sentencing options available to judges are too often neither fully understood nor do they address the specific needs of individual offenders. Criminal courts have not been imaginative in the area of sentencing alternatives, and new judges are well trained in the social sciences. Most courts

labor under the burden of inadequate time and staff necessary to satisfy the important task of sentencing. As expected, critics attack sentencing variations and statistical studies reflect a wide range of dispositions for "identical offenses."

Morris & Hawkins (1970) note that inherent within the goal of achieving a higher level of quality in judicial sentencing is not only the desire to reduce unwarranted "disparity" but, the need to work toward a more rational approach to the entire correctional process. This involves a diligent search for more realistic alternatives to the traditional dispositions of criminal cases and a clearer understanding of who should not go to prison.

Evans and Gilbert (1977) believe judicial discretion is essential. The court is the institution to which society brings its ills for treatment and resolution. To the extent the court is limited in its discretion, it is prevented from achieving the goal of justice. It is simply not possible to legislate specific solutions for all peculiarities and outcroppings of mankind's social problems.

The potential for abused discretion is nurtured by legislators, law enforcement, prosecutors, releasing authorities, the public, scholars, and courts. Should the court's discretion be singled out for substantial contraction?

Constraint upon the courts will merely transfer the responsibility to other nonjudicial components of government. Plea bargaining has already placed substantial limitations upon judicial discretion; as a result, present imperfections of our justice process frequently dictate a disposition beyond the court's control.

Prosecutors: Plea Bargaining Justice

Plea bargaining pervades the administration of criminal justice. Plea bargaining is supported by those directly involved in the middle of the justice process: judges, prosecutors, and defense counsel. Agencies at the beginning and end of the justice continuum, police and probation, are the most critical. Job tasks explain the difference in attitude. According to Parnas (1980), judicial, prosecutorial, and defense support for plea bargaining can arguably be construed as partially colored by personal considerations. The police and probation view might be looked upon as more objective although, less knowledgeable because of their limited involvement.

Prosecutors have, in practice, a greater influence on sentencing than the other agencies; the knee-jerk reaction for sentencing reform has largely ignored this extensive prosecutorial power. Alschuler (1977) holds that fixed and presumptive

sentencing schemes are unlikely to achieve their objectives if they leave the prosecutor's power to formulate charges and bargain for guilty pleas unchecked. Indeed, this method of reform is likely to produce its antithesis—to yield a system every bit as flawed as the current sentencing regime and one in which discretion is concentrated in an inappropriate agency and in which the benefits of this discretion are made available only to defendants who sacrifice their constitutional rights.

As judicial discretion, the discretion of the prosecutor lends itself to inequalities and disparities based on disagreements concerning issues of sentencing policy; it permits the occasional dominance of illegitimate considerations such as race and personal or political influence; it may lead to a general perception of arbitrariness and uncertainty, contribute to a sense of unfairness, and even undercut the deterrent force of criminal law. The exercise of prosecutorial discretion is more frequently made contingent upon a waiver of constitutional rights; it is generally exercised less openly, it is more likely to be influenced by considerations of friendship and by reciprocal favors of a dubious character; it is commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial; it is usually exercised by people of less experience and less objectivity than judges; it is commonly exercised on the basis of less information than judges possess; and, its exercise may depend less upon consideration of desert, deterrence, and reformation than upon a desire to avoid the hard work of preparing and trying cases. The discretion of American prosecutors, in short, has the same faults as the discretion of American judges and more.

Probation Officer: A Leveling Influence?

The probation system did not, according to Im-lay and Reid (1975), autogenously emerge like mushrooms after a rain. It originated as part of antithetical reaction to older theories of retributive punishment, and in response to the newer premise that a person's actions are socially determined rather than the result of "free will." A corollary of this assumption is that the logical social response to crime and punishment should be to attempt to reinstate the errant individual as a functioning unit of society.

The notion of rehabilitation finds countervailing influences in the law which, in its primary emphasis on maximum prison terms in defining each enumerated crime, assumes that punishment should serve as a social dissuader rather than as a

method of individual rehabilitation. The law is founded on morality; its remedies have been traditionally looked upon by its high priests not as tools of social engineering but, as retribution for moral derelictions. The law abhors social relativism. It deals with the clear cut: guilty-not guilty, sane-insane. The notion that, in the process of sentencing, two criminals committing the same crime should be dealt with differently because of existing circumstances, runs afoul of the grain of traditional legal thinking.

Based on the retributive or exemplary theories of punishment, all sentences should be equal; based on the theory of rehabilitation all sentences should be individually tailored to insure that those who are most likely to reassimilate receive lighter sentences or probation. The hue and cry today is for uniformity in sentencing sanctions. Uniformity in sentencing is antithetical to the humanistic notion of individualized rehabilitation.

The Supreme Court in 1949 (*Williams v. People of New York*) announced: "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become the important goals of criminal jurisprudence."

Notwithstanding this pronouncement, a critical public cannot readily comprehend a system of justice which treats one offender differently than another. The public demand is for equal punishment for any given offense; retributive punishment is still a dominant public objective.

Our present law-making procedure insures that sentencing provisions will emphasize the expeditious rather than the rehabilitative goals of sentencing. For this reason, probation officers must have assuasive roles in the sentencing process to offset the vocal demands that punishment should fit the crime rather than the individual.

Czajkoski (1973) argues that as judges shed more and more of their judicial functions, the role of the probation officer undergoes sympathetic change. Under circumstances where judicial and administrative powers become increasingly blurred, the probation officer seems more and more in a quasi-judicial role. Questions are raised to the propriety of the probation officer achieving judicial effect without judicial process.

Abdication of judicial sentencing responsibility to the plea bargaining system leaves the probation officer in an even more peculiar position than it leaves the judge.

Theoretically, the probation officer is supposed to make sentencing recommendations based on a professional estimate of the defendant's rehabilitation potential. Whether or not a defen-

dant is sentenced to probation probably depends more now on success in plea bargaining than on any promise of reformation. How does the probation officer fit into a scheme of extensive plea bargaining?

Blumberg (1967) says the probation officer serves to "cool the mark" in the production-oriented and confidence game-like system of expeditiously moving defendants through the court by means of plea bargaining. Like the judge's role, Blumberg sees the probation officer's role in sentencing diminishing. It has become the judicial role to simply certify the plea bargaining process, thus the probation officer's role is quasi-judicial in that he/she does the same. It is admittedly a peculiar argument, as Imlay (1975) notes, but where the probation officer does a perfunctory presentence report and aims the recommendation toward the predetermined plea bargained sentence, the officer is indeed playing out a de facto judicial role.

It has long been argued the probation officer's role in sentencing is a quasi-judicial one, especially where the judge more or less automatically imposes the officer-recommended sentence. Empirical studies have shown a very high correlation between officer recommendation and court disposition. Carter and Wilkins (1967) pointed out that judges follow probation officer recommendations in better than 95 percent of the cases. Among the factors which might explain the high level of agreement it was postulated that officers make recommendations in anticipation of judicial preference. Today it is more likely the prosecutor has communicated the plea bargaining agreement to the officer and the officer responds with an appropriate offering. Insofar as it firmly determines sentence, the plea bargaining process clearly undermines the probation officer's professional role. It is now more appropriate for the officer to counsel the prosecutor on rehabilitation potential than the judge. The prosecutor occasionally uses the officer's professional estimate in the plea bargaining. Probation officers now conduct "prepleading" investigations which are used by both judge and prosecutor to decide plea matters.

The probation officer's role is multi-faceted. Many of the facets are not easily recognized, particularly in the areas of setting the conditions of probation, initiating violations procedures or enforcing the conditions of community release. It is difficult to say whether the officer's quasi-judicial role is increasing. It is still very closely tied to the judge but, the judge seems to be giving up more of the judicial role. If the probation officer ties in more with the prosecutor, the quasi-judicial func-

tion may paradoxically increase because of judicial aggrandizement of the prosecutor's office through plea bargaining and pretrial diversion.

Regardless of role perception, probation officers make decisions affecting defendants, communities, and the total justice system. The majority of these decisions become apparent in the presentence investigation report. Reports are also used as a guide for supervision and a basis for classification and treatment by institutions. Parole authorities use the report when considering individual release eligibility. Obviously, the importance of the data collected relates to the use it is put. While some of the data collected and recorded may not have significant or immediate use in the sentencing, the probation officer is in the best position to develop information which may be of significance in the total correctional process.

Within the probation officer's role the potential for misuse or abuse of statutory discretion is apparent. But, is the reported disparity critical or simply judgmental use of discretion similar to that afforded police in the decision to arrest; the prosecutor to under or over charge; the court with its sentencing options; or, the parole authorities in exercising release guidelines?

The majority of articles discussing disparity are in reality an attack on lack of uniformity in sentencing. Researchers examine more the mechanical outcome rather than what caused the discovered difference in specific cases. Proper use of discretion is a legitimate correctional tool. The misuse or abuse by agency or individual is more the fault of that agency or individual than in the concept. Is lack of uniformity evidence of disparity or only that which must be expected in a system offering such a wide range of alternatives and outcomes while attempting to resolve, prevent, or contain human weakness as manifest in behavior termed "criminal" or "illegal"?

For the probation officer, it is at the investigation level and formulation of a sentencing recommendation that the problem of "disparity" is greatest. Bernard (1976) noted that sentencing disparity is based on entirely inappropriate criteria such as race of the defendant or personality of the sentencing judge. "Disparity is unjustified if the rationale for these differences cannot be traced to relevant distinctions of character or behavior which bear a certain known relationship to the aims of punishment." It is this unfair and inappropriate disparity which has compromised the effectiveness of the entire criminal justice system and not discretion.

The real problem goes beyond Bernard's description of disparity to include individual affective

learning and resultant behavior. The literature is inconclusive, or at best, confused in defining statements of affective objectives. Bloom (1956) uses the term "primitive." Learning experiences generally determine the direction of growth in the affective domain and components form a continuum ranging from simple awareness of a phenomenon to complete internalization, becoming a part of the individual (bias or prejudice) and forming value judgments which determine ultimate conduct toward others whether conscious or unconscious.

Thus, "disparity" is deciding to arrest, prosecute, sentence, release or revoke an individual because of race, color, creed, political beliefs or a multitude of other internalized factors and not because of a crime's seriousness or potential for individual rehabilitation. All else is a matter of discretionary judgment, the resolve of which requires an entirely different approach, be it legislative or administrative in scope.

Probation officers as a work group universally pride themselves on objective case investigation and recommendation. However, certain offenders, offender attitudes and offenses lend themselves to unacceptable and unprofessional breaks in decisionmaking objectivity. It is against these tendencies a probation officer must guard. Examples can be advanced to support the contention that probation officers, like all other actors in the justice system contribute to disparity.

Carter (1966), in his article "It Is Respectfully Recommended," started out examining the relationship between the probation officer's recommendation and the court's disposition. He offered that one of the more important areas upon which attention should be focused was the internal factors—the officer's experience, age, ethnic background, culture, academic training, prejudices, and personality—all which contribute to a court recommendation.

What specific biases or prejudices are displayed by probation officers and directed toward the alcoholic, addict, homosexual, or certain racial or ethnic group? Are reports "slanted" to a specific judge? Why is there such a high relationship between recommendations and dispositions? Is it because there is a large number of individual cases who are obviously probation or prison cases; a matter of complete trust and faith by the court in its probation staff; the product of "knowing" the court and its views on certain matters? How much of the information collected during the course of the presentence investigation is genuinely important in helping the officer formulate a recommendation? At what point in the fact-gathering process

does the officer decide on the recommendation? If a decision is made early in the collection process, does the officer then seek out other factors which will support the conclusion? Does this, then, lead to the preparation of a disparate biography?

The current literature does not delve into these questions with any degree of authority or resolve. There is realization of good and evil within any group of practitioners, be they doctors, lawyers, merchants, or probation officers. The path to objectivity is paved with good intentions, but more than one well meaning probation officer has taken an occasional detour to disparity. The question remains: How does one empirically examine disparity as defined here? What methodological approach is best? How valid or reliable will the findings be beyond a specific sample at a given time and place? No one has the answer. Maybe there is not one—only generalizations, inferences, supposition, conjecture, and suspicion.

The best source of information to answer the questions may be the probation officer. Bartoo (1963), informally investigated nine identified factors that directly or indirectly affect the officer's recommendation. He examined areas involving the officer's tendency to avoid problems for personal convenience; to what extent community interest or public opinion influenced the recommendation; how do the officer's moral standards, code of ethics, and attitudes affect decisionmaking; and, what influence is exerted by the nature and magnitude of the offense or attitude of the offender. The outcome of this limited investigation found that disparity resulting from internalized attitudes and behavior did, in fact, color judgments; however, it was also discovered that generally the probation officer is aware of the problem and conscientiously works to evaluate each offender objectively.

To this writer's knowledge, little has been done to prove or disprove Bartoo's conclusions. There has been much said about the universal problem of abused discretion; but, for probation officers it is a wide open avenue of investigation affecting a very large and important segment of the justice system.

Conclusion

There is in all of this a substantial need for research to expose the problem and training to correct deficiencies. As the trend continues for the probation officer's earlier involvement in the

criminal prosecution process through pretrial diversion and bail release investigation, it becomes important to insure that officer objectivity is paramount and that decisionmaking, while acknowledging statutory discretion, is not perverted or faulty due to disparity. Disparity is real. Attempts to identify, correct and eliminate it are, at this point, within this role, not on the horizon.

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U.S. Department of Justice

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615/736-5151
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September 5, 1986

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W. - Suite 1400
Washington, D.C. 20004

Dear Billy:

This is in response to your August 20, 1986 letter requesting comments on sentencing guidelines involving guilty pleas and plea agreements.

With respect to guilty pleas, the guidelines should make a provision for a downward sentencing adjustment for a defendant who agrees to plead guilty substantially in advance of the trial date. I believe that a defendant who enters an early guilty plea should be given some credit for his willingness to admit guilt, accept responsibility for his violation, and save the government the time and expense of a trial. In order for the benefits to be gained by the government, it is necessary that the defendant plead guilty well before the government has gone to full trial preparation. A plea entered after the jury has been assembled should receive perhaps some slight credit, but certainly should not receive the credit of a defendant who enters an earlier plea. The guidelines might well require that the government state to the Court the amount of time and effort the guilty plea has saved the government in order to have an objective basis for such credit.

Plea agreements are one of the most difficult issues facing prosecutors and judges under the sentencing guidelines. It is my perception that in many cases, in order to avoid trials and to show the defendant that he gains something by pleading guilty, prosecutors and defense attorneys will attempt to arrive at a plea bargain that will ensure a sentence less than that proscribed by the guidelines.

This is quite simply a fact of life, that a defense attorney will have great difficulty in convincing his client that he should plead guilty unless he can show the client that the client is in fact getting something out of the plea. If the sentence would be the same, whether the defendant pleads guilty or goes to trial, then the defendant may not have much incentive to plead and will be willing to roll the dice and hope the jury might acquit on one or more charges.

The adjustment down for a guilty plea under the previous paragraph would, of course, be one answer to this problem and may be the strongest reason as to why adjustment down for a guilty plea should be considered. As a practical matter, I believe that under the sentencing guidelines, prosecutors will engage much more in charge bargaining where the maximum sentence provided by law will be less than that required by the guidelines. For instance, instead of charging mail fraud which carries a 5-year violation, there might be a plea to a false statement to a bank which carries only a 2-year sentence. Pleas to lesser included violations, I believe, will become much more popular.

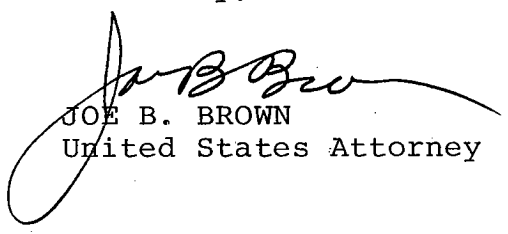
At the present time in my district, in many cases we deal with the Rule 11(1)(c) sentence bargain in which we agree that a sentence not to exceed "X" number of years is appropriate. I would hope that such plea bargains would not be totally eliminated under the new procedures, although I understand that a desire for some degree of uniformity may in fact mandate that such sentence bargaining be eliminated, or at least sharply curtailed. One practical effect may be that the defense attorney will be under a great deal more pressure to negotiate a plea with the prosecutor before a formal indictment is returned. If the indictment itself addresses only a narrow issue, that will in effect reduce the overall exposure of the defendant. It may well be that prosecutors will call up defense attorneys and say, we are offering you an opportunity to plead guilty to a one-count information or indictment at the present time, and, if you go to trial, there will be a multiple count, and your sentencing guidelines will be substantially more. This will certainly put a considerable amount of pressure on a defense attorney to plead guilty at an early stage.

In other cases, I think there will often be an attempt by the defense attorney to negotiate a statement of facts which will result in reasonably favorable sentencing guidelines for his client. To the extent that such statements of fact are not inaccurate, I would certainly enter into such agreements. To the extent these agreements would be binding on the judge in applying the guidelines would have to be left to later case law. It would appear that the judge would always have the right to find the facts as he believes they exist, regardless of stipulation. Of course, such findings might result in the defendant attempting to withdraw his plea based on changed circumstances.

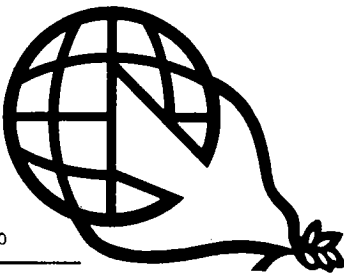
I very strongly believe that cooperation should be given substantial weight in the sentencing guidelines. In many complicated investigations, the only way that a case can be made against a major defendant, is to secure the cooperation of lesser involved defendants. If that individual cannot be appropriately sentenced to a lesser sentence, the prosecutor will be faced either with a choice of not prosecuting at all, which of course is always an option, or prosecuting and seeing the cooperating individual receive a much stiffer sentence than the prosecutor feels appropriate given his cooperation. The degree of cooperation should be certified by the U.S. Attorney. Based on that degree of cooperation, reductions of up to 50% should be applicable. Should there be disputes regarding the level or quality of cooperation, it would appear to me that this would have to be resolved by the judge after hearing both sides. Of course, a reduction for cooperation and a guilty plea would have to be worked out so that there is not a double credit for the same act.

If I may be of further assistance, please do not hesitate to call.

Sincerely,



JOE B. BROWN
United States Attorney



Formed: 1940

NISBCO

National Interreligious Service Board for Conscientious Objectors

September 30, 1986

The Honorable William W. Wilkens, Jr.
U.S. Sentencing Commission
1331 Pennsylvania Ave.
Washington, DC 20004

Dear Judge Wilkens:

I send along my testimony about plea agreements, regrettably tardily. I was off in California and staff did not understand that the text needed to be forwarded to be on hand before the hearing last week.

I hope that the observations I offer will still be of help to the Commission in this matter where I think the concerns of NISBCO are specially relevant and exceptional to the run-of-the-mill comments. I note from the notice in the Washington Post that the matter of plea agreements is not included in the preliminary guidelines and will still have to be determined.

I shall look for the text of the guidelines in today's Federal Register. Please forward to me several copies of the full set of sentencing guidelines. I hope that our constituent religious bodies, where they are competent through their criminal justice programs will take note and participate in the regional hearings.

I have welcomed the opportunity to comment in the course of the hearings. I was impressed with the respectful manner in which you conducted the public hearings, and I hope that constructive input will continue in the next set of regional meetings. I look forward to seeing the guidelines in their final version.

I intend to consult with our legal committee and to provide a written analysis in due time. I see a significant need to interpret these guidelines, not only to the religious leadership, but also to the many chaplains and volunteers who work with prisoners in the Federal prison system. Through the program of Prisoner Visitation and Support we have a group of about one hundred accredited visitors in the major Federal correctional institutions.

Respectfully,



L. William Yolton

cc.: John K. Stoner, Raymond Nathan, Barry Lynn

Suite 600, 800 Eighteenth St., NW, Washington, DC 20006-3599 (202) 293-5962

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Executive Director

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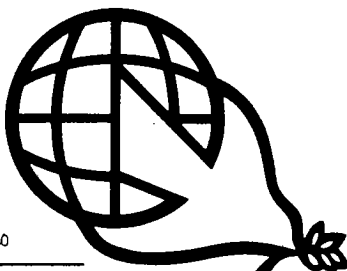
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Northwest Representative

GERALD SHENK
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Formed: 1940

NISBCO

National Interreligious Service Board for Conscientious Objectors

TESTIMONY ON PLEA AGREEMENTS IN SENTENCING

before the

U. S. SENTENCING COMMISSION

on behalf of the

National Interreligious Service Board
For Conscientious Objectors

by Rev. L. William Yolton
Executive Director

September 15, 1986

Suite 600, 800 Eighteenth St., NW, Washington, DC 20006-3599 (202) 293-5962

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GERALD SHENK
Southwest Representative

This testimony is presented on behalf of National Interreligious Service Board for Conscientious Objectors [NISBCO] which represents thirty-four Catholic, Protestant, and Jewish religious organizations, as well as religious organizations based on primarily ethical concerns. In addition, NISBCO interprets the concerns of several conservative religious bodies who on principle do not participate in coalitions.

Since 1940 has supported those who for reasons of conscience oppose conscription for military service. More recently it has taken an interest in the problems of those who for reasons of conscience oppose payment of taxes for war or preparation for war. On behalf of all persons affected by conscription laws, NISBCO has sought to improve the fairness of those laws, their administration, and the treatment of those persons involved.

* * * * *

The U.S. Sentencing Commission is to consider whether a plea agreement should be taken into consideration when determining a sentence, and in what way. NISBCO believes that the special category of war objectors¹ is harmed rather than helped by a guideline reflecting conventional wisdom which makes allowances for those who "plea bargain" to seek reduction in sentence severity.

If a guideline for reduction of sentences for those who plea bargain in cooperation with the prosecution were adopted, many

¹ NISBCO's prior testimony has detailed the situation of war objectors who may comprise as much as ten percent of the Federal prison population, if the experience of the height of the Vietnam era is repeated.

conscientious war objectors who appear before the court would be unfairly disadvantaged and several purposes of the justice system would not be served. Whatever guideline is adopted it must meet the situation of conscientious war objectors, who are the exceptions that literally "prove the rule."

1. Most war objectors who appear in court have persisted in their convictions despite ample opportunity to register or to accept service in the armed forces or pay their withheld taxes or make other concessions that would have removed them from the jurisdiction of the courts. Their very presence in court is to protect their consciences from violation. Their consciences will not allow plea bargaining. Though they may be guilty of violation of the law, they do not believe themselves morally guilty.

2. Some war objectors would use the courts as a forum to make their witness. They would take the risk of whatever sentence to bring to the public awareness those wrongs they refuse to condone by accepting a plea bargain. The function of the courts to bring to public attention great disagreements in the society about public policy is an important secondary function of the judicial system.

3. Some litigants are seeking to test the meaning of the statute or the regulations. This process of testing is important especially in the instance of conscription where personal liberty is at issue. In many instances, it was through the persistence of individuals who sought redress through the

courts that significant advances were achieved. Seeger persisted in his case though he could not assert that he believed in a Supreme Being as the statute then required. Ultimately, the Supreme Court ruled that he qualified, and that the statute was unconstitutional. Welsh persisted and the Supreme Court ruled that persons with moral and ethical beliefs qualified under the court's interpretation of "religion." Mulloy persisted and the Supreme Court ruled that the Selective Service System could not fail to consider claims if they presented a prima facie case. Gardiner persisted and the Federal District Court in the District of Columbia ruled that the unpublished regulation under which he and other conscientious objectors had been ordered to alternative service was contrary to the published regulations and to the statute.

Since the Selective Service System operates with few safeguards of due process,² the courts may be the only place where a person whose liberty is in jeopardy can have a fair hearing. In some instances, particularly among traditional pacifist groups, individuals will have nothing to do with the

² Since 1945 the standard for the review is that the local board decision may not be reviewed if there is any basis in fact for the classification action. Litigants must rely on showing that the local board had no basis in fact for the classification action, or that the Selective Service System failed to follow its own regulations. Since 1982 Selective Service has amassed a volume of regulatory materials under the guise of administrative instructions which have never been pre-published for comment nor promulgated as regulations, yet according to an amendment to the statute in 1971 and the decision in Gardiner v. Tarr these procedural rules are subject to the requirements of the Administrative Procedures Act. It can be anticipated that there will be many court cases when conscription is reinstituted which will test this anomaly.

para-military system of Selective Service, and converts in the armed forces will have nothing to do with military jurisdiction. Plea agreements in these situations rarely serve justice.

* * * * *

Allowing the plea agreement to influence the final sentences would pressure war objectors to lessen their sentences through abandoning their arguments. The function of the courts to test and redefine both statute and regulations would be diminished. Conscience and justice would not be served.

Respectfully submitted,

L. William Yolton

STATEMENT OF JOHN VOLZ, UNITED STATES ATTORNEY,
EASTERN DISTRICT OF LOUISIANA,
BEFORE THE UNITED STATES SENTENCING COMMISSION

The following comments are provided pursuant to the request of the U.S. Sentencing Commission that I appear before that body at a public hearing on September 23, 1986 in Washington, D.C. The statement contains my comments relative to the appropriate disposition of certain issues before the commission, namely, whether or not consideration should be given in the sentencing guidelines for guilty pleas, and for cooperation by defendants with law enforcement authorities. Also at the request of the commission I have expressed comments concerning plea agreements.

It is obvious that if every criminal defendant exercised his right to trial by jury, with all subsequent review procedures upon conviction, our criminal justice system would crumble under the sheer volume of cases. There should not be much doubt that structuring consideration into the sentencing guidelines for pleading guilty would invite attacks on those guidelines with the charge that such consideration is coercive in nature because it forces a defendant to waive his right of trial by jury with the threat of a greater sentence should he go to trial. However, I think that the benefit of a defendant's knowing as a certainty what consideration will be given to a guilty plea far outweighs the expenditure of judicial resources in disposing of such an attack which I feel would fail. It is true that in practice today many judges do give consideration to those persons who plead guilty and give them a lesser sentence because of that plea,

however, many Judges say that they do not. That inconsistency lends itself to disparity in sentencing and encourages a defendant to "take his shot" because the sentence will be the same for both a guilty plea or a conviction at trial. In response to the argument that such structured consideration is coercive, I would point out that by admitting his guilt the defendant has demonstrated that he has taken the first step toward rehabilitation on his own by admitting his guilt and standing ready to receive the appropriate punishment which society has dictated he must suffer -- that in itself is deserving of a downward adjustment in sentence.

PLEA AGREEMENTS:

Most guilty pleas have an attendant plea agreement in one form or another as part of the process. In trying to determine the appropriate role of the judiciary in the scrutiny of negotiated plea agreements, one should first examine the basic role, responsibility and authority of the judicial officer in the criminal justice process. The role of the judge is to insure that the criminal justice process is administered and operated fairly. He is an arbiter in our adversarial system of justice. The judge should not deviate from his role as an impartial umpire, with his principle responsibility being to satisfy himself that the guilty plea being entered by the defendant is one of which he is truly guilty and should not take on the role of the prosecutor or the defense lawyer in second guessing, either the prosecutor in

agreeing to accept such a plea, or the advisability of a defendant's accepting such an arrangement. Furthermore, there is no reason to believe that a judge is better able to be the final authority on plea negotiations. To the contrary, he may not possess all of the facts or the intelligence data that is available to the prosecutor, nor should he be burdened with the responsibility of eliciting all of those facts. To burden the judge with an additional responsibility of approving of negotiated pleas would be to force him to deviate from his role as an arbiter in an adversarial system and to becoming one of its proponents.

If the Sentencing Reform Act mandates that all offenses be classified into categories, and that more definite sentences be required for any offense, the impact on Rule 11E(1)(b) i.e., charge bargaining, would be significant, because under the present system charge bargaining benefits the defendant only in reducing the possible maximum fine or imprisonment range of discretion available to the sentencing judge. In view of the fact that there is a wide variable range in the present sentence possibilities, one can only speculate as to the actual sentence that would be imposed. However, as I understand the Sentencing Reform Act, the discretion of the sentencing judge will be considerably more restricted in terms of the minimum and maximum sentences which he might impose. Therefore, charge bargaining becomes a more meaningful disposition of a criminal prosecution in that both the adversaries, i.e., the Government and the accused, are more knowledgeable about the consequences of such an agreement. Likewise, under the new sentencing guidelines sentence bargaining will

take on much less significance in that there will be much less incentive to try to negotiate a term of imprisonment within a 25% discretionary range available to the judge under the sentencing guidelines mandated by 28 U.S.C. § 994(b).

While it is true defense attorneys and prosecutors may stipulate the essential elements of the defense as the factual basis for a guilty plea there should be no stipulation of facts which would conceal anything from the Court. Under the current system as practiced in my district, the Probation Department which conducts the pre-sentence investigation is fully advised by my office of all of the facts surrounding the violation -- not only the essential elements of the offense to which the person pleads guilty. We should never conceal any relevant fact from a judge by stipulation or otherwise. Stated another way, under the present system the judge should be fully aware of all of the surrounding facts of any particular case. I see no reason that it should change under a system of sentencing guidelines.

COOPERATION

In dealing with those who violate our laws as a prosecutor, one learns early in his career that criminals do not cooperate with law enforcement officials for any lofty ideals or a repentance and resolve to sin no more and to assist law enforcement officers in the public interest. If there is not recognition for cooperation in the sentencing process, then cooperation will be impossible to secure. Like it or not, we must, in the public interest, reward those who have committed crimes but who have agreed to assist in giving testimony or in other ways to help the

Government to pursue and apprehend other law violators who are more culpable and hold a higher level in the criminal hierarchy. Perhaps the best example that can be given is in prosecutions for drug offenses. We know the illicit drug trade is highly organized. In order to penetrate the drug hierarchy those persons of lesser stature in an organization must be enticed in some form to cooperate with the authorities in order to apprehend and convict those persons above them in the drug hierarchy. We also know that when a defendant does cooperate with law enforcement authorities against other drug dealers, he takes a serious risk of his life or at least of being branded as a "rat" with all the attendant ostracism and threatened mayhem he faces in serving any sentence within the confines of a penitentiary. If the cooperating defendant risks a great deal when he assists law enforcement agencies, the realities of the situation are such that he does not do this for any reason other than to benefit himself in terms of a sentence. Under current procedure when a defendant agrees to cooperate with prosecutors, his cooperation is usually acknowledged by the prosecutor in correspondence to the Court in a rather general type statement which may or may not list specific actions of the defendant. Thus, a defendant and the prosecutor are really in the dark as to the real meaning of a defendant's cooperation in the individual judge's mind, since it will obviously vary from judge to judge under the present system. While it is probably true that a defendant is given some consideration in all cases where he has cooperated, there is too much room for disparity under the present system. It would be preferable to

have different levels of cooperation objectively identified and given relative downward adjustments from the otherwise applicable sentence. This would be a much stronger incentive for the defendant to cooperate more fully in that he could, in fairly certain terms, measure the benefit of what he would derive from assisting the Government to whatever degree he was capable. In other words, the more he assists the greater his benefit. A more definite sentence based on levels of cooperation is certainly much better than the vague sentence possibilities that result in different levels of recognition depending upon the philosophy and mind set of the jurist who is asked to consider and recognize a defendant's cooperation.

The only person who is fully able to evaluate the level of cooperation is the prosecutor. To burden the judge with that responsibility would, in another instance, be asking him to deviate from his role as arbiter and to decide how much and at what risk a defendant has benefited society by his cooperation. Likewise, a defense attorney cannot be made privy to all of the facts or intelligence data necessary to enable him to effectively evaluate the level of his client's cooperation, nor should it be a joint undertaking of the prosecution and the defense because the interest of the public in effective law enforcement would not be served in many instances by a joint free discussion between prosecution and defense of all of the facets of a defendant's cooperation. Doing so could compromise other investigations. In order to insure that there be no informal bargaining between Assistant United States Attorneys and defense lawyers concerning the level

of a defendant's cooperation, all such correspondence to the Court and designations of levels of cooperation should require the signature of the United States Attorney of that district. As to the question of the resolution of disputes concerning the level of cooperation, under a system where the U.S. Attorney alone designates the level of cooperation, disputes should not arise based on facts to which only he is privy.

The formulation of sentencing guidelines under the Sentencing Reform Act could undoubtedly have the effect of narrowing discretion by the sentencing judge in some instances, of widening the discretion of the U.S. Attorney in some instances, but only in those in which he is better able to evaluate the appropriate charge and the level of a defendant's cooperation by weighing his guilt relative to co-defendants, and/or the exact significance of his cooperation. We cannot expect our criminal justice system which has such a tremendous impact on the order of our society, a society which recognizes in the first instance the individuality of a criminal defendant and the recognition of the fact that there are many variables in every case, to totally remove discretion from persons who hold key positions in the administration of our system of justice. To do that would be to replace one system with serious flaws in the sentencing structure to one that is so highly structured that it does not lend itself to application in those instances where the public interest requires the use of some limited discretion and some deviation from rigid standards.

STATEMENT OF ANTON R. VALUKAS

UNITED STATES ATTORNEY

FOR THE NORTHERN DISTRICT OF ILLINOIS

BEFORE THE

UNITED STATES SENTENCING COMMISSION

September 23, 1986

—

SENTENCING COMMISSION

September 23, 1986

I APPRECIATE THE OPPORTUNITY OF SPEAKING TO YOU ABOUT SENTENCING, AND PARTICULARLY THE QUESTION INVOLVING THE FUNCTION OF COOPERATION IN THE SENTENCING PROCESS.

THE VIEWS I EXPRESS ARE MY OWN AND I AM NOT HERE ON BEHALF OF THE DEPARTMENT OF JUSTICE.

IT HAS BEEN MY EXPERIENCE THROUGH THE LAST 17 YEARS AS BOTH A PROSECUTOR AND A DEFENSE ATTORNEY, THAT THE SINGLE MOST IMPORTANT FACTOR, ASIDE FROM THE CRIME ITSELF, WHICH SHOULD BE CONSIDERED IN DETERMINING A SENTENCE IS THE QUESTION OF COOPERATION.

THE FACTORS THAT I BELIEVE ARE CRITICAL IN DETERMINING
HOW COOPERATION IS TO IMPACT ON THE SENTENCE ARE AS FOLLOWS:

1. WHAT IS THE NATURE OF THE COOPERATION?

IS IT TOTAL? IS IT COMPLETE? IS IT COOPERATION WHICH
INCLUDES THE WILLINGNESS OF AN INDIVIDUAL TO PLACE
HIMSELF, FOR INSTANCE, IN DANGER? IS IT COOPERATION WHICH
INCLUDES THE WILLINGNESS OF THE INDIVIDUAL, TO RECORD
CONVERSATIONS WITH OTHER POTENTIAL DEFENDANTS SO AS
TO HELP GATHER EVIDENCE CONCERNING WRONGDOING, OR
IS IT MERELY COOPERATION WHICH RECOUNTS TO THE
PROSECUTOR THAT WHICH THE PROSECUTOR ALREADY KNOWS.

2. WHAT IS THE VALUE OF THE COOPERATION?

INFORMATION WHICH IS PROVIDED TO THE GOVERNMENT BY

AN INDIVIDUAL WHICH MAY DISCLOSE THE EXISTENCE OF SUBSTANTIAL CRIMINAL ACTIVITY ON THE PART OF OTHERS PROMOTES THE PROSECUTION OF CRIME. OBVIOUSLY, THE GOVERNMENT'S RESOURCES IN FIGHTING CRIME AND DISCOVERING CRIME ARE SUBSTANTIALLY ENHANCED BY THAT TYPE OF COOPERATION. IN PLACING A VALUE ON COOPERATION IT IS IMPORTANT TO REALIZE THAT SOCIETY DERIVES A SIGNIFICANT BENEFIT FROM THAT TYPE OF COOPERATION.

3. **TIMING OF THE COOPERATION**

THE WILLINGNESS OF AN INDIVIDUAL EARLY ON TO ACKNOWLEDGE HIS OWN INVOLVEMENT IN CRIMINAL ACTIVITY AND TO MAKE FULL DISCLOSURE OFTEN SUBSTANTIALLY REDUCES THE EXPENDITURE OF LIMITED RESOURCES AVAILABLE TO THE GOVERNMENT TO FIGHT CRIME. THIS TYPE OF COOPERATION

IS MEANINGFUL BECAUSE IT SAVES THE GOVERNMENT'S RESOURCES AND THIS PERMITS IT TO FIGHT OTHER CRIMINAL ACTIVITY. IT ALSO SUBSTANTIALLY REDUCES THE AMOUNT OF TIME SPENT BY THE JUDICIARY IN LITIGATING THESE MATTERS.

THE WILLINGNESS OF AN INDIVIDUAL TO COOPERATE ON THE EVE OF TRIAL, AFTER HAVING GONE THROUGH SUBSTANTIAL LITIGATION IN THE FACE OF OVERWHELMING ODDS, IS OF FAR LESS VALUE TO SOCIETY THEN IF THAT COOPERATION BEGAN AT AN EARLIER TIME.

I THINK, BOTH AS A PROSECUTOR AND A DEFENSE ATTORNEY, CERTAINTY IN THIS PROCESS IS OF SUBSTANTIAL VALUE. IF A DEFENDANT KNOWS THAT BY MAKING A FULL DISCLOSURE OF THE MATTER AND PROVIDING THE GOVERNMENT WITH FULL INFORMATION AS TO HIS CRIMINAL ACTIVITY AT THE EARLIEST

POSSIBLE MOMENT HE WILL REDUCE HIS SENTENCE BY A SUBSTANTIALLY GREATER AMOUNT THAN IF HE WAITS TO THE EVE OF TRIAL, THIS MAY BE AN INDUCEMENT FOR HIM TO COOPERATE AT THE EARLIEST POSSIBLE DATE. BY DOING SO, HE SUBSTANTIALLY REDUCES EXPENDITURE OF GOVERNMENT RESOURCES.

HOW SHOULD THESE FACTORS BE VALUED? I WOULD PROMOTE A CONCEPT WHICH SAYS THAT A PERSON WILLING TO COOPERATE AT THE EARLIEST STAGE IN THE PROCEEDINGS, THAT IS WHILE UNDER INVESTIGATION, SHOULD BE CREDITED WITH THE MAXIMUM OF CREDIT AGAINST THE SENTENCE.

I WOULD REDUCE THE AMOUNT OF CREDIT AGAINST THE SENTENCE WHICH WOULD COME AS A RESULT OF COOPERATING ON THE EVE OF TRIAL OR AFTER SUBSTANTIAL LITIGATION.

I WOULD ALSO INSTITUTE A PROCESS WHEREBY THE UNITED STATES ATTORNEY COULD CERTIFY TO THE COURT THAT THE COOPERATION WAS OF SUCH AN EXTRAORDINARY NATURE THAT THE COURT WOULD BE FREE TO IMPOSE A SENTENCE THAT IS LESS THAN THE RANGE REQUIRED BY STATUTE.

LET ME PROVIDE A PRACTICAL EXAMPLE OF THIS:

WE HAVE UNDERWAY IN CHICAGO, THE SO-CALLED "GREYLORD" INVESTIGATION OF THE JUDICIARY. WE HAVE BEEN SUCCESSFUL IN OBTAINING SOME LIMITED COOPERATION PRIOR TO INDICTMENT. IT HAS BEEN A MORE COMMON EXPERIENCE THAT COOPERATION COMES ONLY AFTER INDICTMENT AND AFTER SUBSTANTIAL PENALTIES HAVE BEEN IMPOSED.

THE RESULT IS THAT COOPERATION OCCURS ONLY AFTER

LENGTHY DELAY AND THE EXPENDITURES OF SUBSTANTIAL GOVERNMENT RESOURCES. BY THAT TIME THE STATUTE OF LIMITATIONS MAY HAVE RUN ON ANY NUMBER OF OFFENSES INVOLVING OTHER INDIVIDUALS WITH WHOM THIS COOPERATOR WAS INVOLVED.

THE PREVAILING ATTITUDE ON THE PART OF MANY DEFENDANTS HAS BEEN TO PUT THE GOVERNMENT TO TRIAL AND THEN HOPE THAT THEY HELP THEMSELVES LATER BY COOPERATION. SINCE THAT COOPERATION IS NEEDED THE GOVERNMENT HAS NOW GONE THROUGH AN INVESTIGATION WHICH HAS EXTENDED ALMOST 6½ YEARS AND IS STILL ONGOING.

I BELIEVE THAT IF IT WAS UNDERSTOOD FROM THE BEGINNING THAT THE SENTENCES WHICH WOULD BE IMPOSED WOULD BE SEVERE AND THAT ONLY BY EARLY COOPERATION WOULD THESE SENTENCES BE AVOIDED, THAT WE WOULD HAVE BEEN

SUBSTANTIALLY AIDED IN OUR EFFORTS.

I BELIEVE THAT BY PLACING A NUMERICAL VALUE ON THE TIMING OF THE COOPERATION AND THE VALUE OF THE COOPERATION, WE ESTABLISH A CERTAINTY IN THE PROCESS. THE COURT WILL BE BETTER ABLE TO IDENTIFY THE VALUE OF THE COOPERATION. DEFENSE ATTORNEYS WILL BE BETTER ABLE TO ARTICULATE IN ACTUAL NUMBERS THE VALUE TO THE DEFENDANT OF THE COOPERATION AND IN TURN, DEFENDANTS ARE BETTER ABLE TO EVALUATE AND MAKE A DECISION AS TO WHETHER OR NOT THEY WISH TO ASSIST THEMSELVES IN THESE MATTERS.



Department of Justice

DRAFT

STATEMENT

OF

WILLIAM F. WELD
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

THE ROLE OF GUILTY PLEAS, COOPERATION,
AND PLEA AGREEMENTS IN THE SENTENCING PROCESS

ON

SEPTEMBER 23, 1986

DRAFT

Mr. Chairman and Members of the Commission:

I appreciate this opportunity to appear before you to present the views of the Criminal Division of the Department of Justice concerning the relationship of plea agreements to the guidelines and the related topics of how a defendant's guilty plea and/or cooperation with the government should be treated under the guidelines.

CONSIDERATION OF GUILTY PLEAS

It is common experience that defendants who plead guilty often receive sentences which are lower than the sentences imposed upon defendants who are convicted of similar offenses after trial. No doubt this contributes to some extent to the high rate of federal criminal cases which are disposed of by guilty pleas. Defendants plead guilty for a complex of reasons. In some cases, the principal motivation is genuine contrition. Also, the plea is often an acknowledgement of guilt inspired by recognition of the government's ability to win a conviction at trial. And frequently, guilty defendants (and their lawyers) often act on the accurate assumption that a plea, either because of concessions wrung from the government, or because of the philosophy (and calendar) of the sentencing judge, will produce a more lenient result than would sentencing after trial. (In many cases, however, a change in judicial attitude after trial may

reflect less a philosophy of favoring pleas than a heightened awareness of the severity of the crime or the personality of the defendant gained through the intense exposure of a trial.)

From the government's point of view, guilty pleas serve two fundamental purposes. First, they make more prosecutions possible. A plea proceeding consumes on the average an hour or so of court and attorney time. Rarely in federal court does a jury trial last less than three or four days, while trials of three or four weeks' duration are not uncommon.

Second, the plea confers certainty on a prosecution which for its complexity, evidentiary problems, or even simple lack of jury appeal, might be of doubtful success. Finally, while prosecutors as a rule do not enter plea negotiations with litigation costs in mind, the substantial savings occasioned by the large percentage of prosecutions resolved by pleas is a factor of the prosecution, the substantial significance to the administration of the criminal justice system.

Because guilty pleas serve the interests of both defendants, on one hand, and the criminal justice system, on the other, it would be advisable and proper for sentencing guidelines to encourage pleas by offering the prospect of some reward to a defendant who foregoes his constitutional right to a trial by jury.

We believe the guidelines should at least provide the court with discretion to mitigate, within a specific range, the sentence of a defendant who indicates a willingness to admit and accept responsibility for his or her wrongdoing. The fact that a defendant entered a plea of guilty would be a factor which the court could consider in deciding if the defendant is entitled to such mitigation.

Investing the Court with discretion to mitigate the sentence by a specified amount or amounts, rather than directing specified "guilty plea credit" in all cases, would very much undercut any Constitutional objection to the plan. As the Commission is aware, the Constitution has been held to forbid imposition of a penalty for a "defendant's unsuccessful choice to stand trial." Smith v. Wainwright, 664 F.2d 1194, 1196 (5th Cir. 1981). Of course, the Supreme Court has held that this does not forbid extending a "proper degree of leniency in return for guilty pleas." Corbitt v. New Jersey, 439 U.S. 212, 223 (1978). The line that distinguishes a sentencing scheme which simply provides leniency to those who plead from that which impermissibly punishes those who go to trial, however, may not always be a clear one. One key factor appears to be whether the sentencing scheme at least allows the same punishment to be imposed upon those who plead and those who go to trial. Compare United States v. Jackson, 390 U.S. 570 (1968) (invalidating a statute that allowed death penalty only if defendant elected to go to trial) with Corbitt, supra (upholding

a statute that required life imprisonment upon conviction by a jury but allowed the court to impose either life imprisonment or a lesser sentence if there was a plea). As Justice Stewart questioned in his concurring opinion in Corbitt: "Could a ... legislature provide that the penalty for every criminal offense to which a defendant pleads guilty is to be one-half the penalty to be imposed upon a defendant convicted of the same offense after a not-guilty plea? I would suppose that such legislation would be clearly unconstitutional under United States v. Jackson." Id. at 227. An automatic reduction might be argued to be similar to a scheme which reserves the maximum of punishment only for defendants who go to trial.

Even if the Commission is satisfied as to the constitutionality of an automatic downward sentence adjustment for all defendants who plead guilty, the question remains whether the "automatic" approach is the better one. It may be argued, in support of an "automatic" rule, that the absence of a guaranteed reduction will significantly increase the number of defendants who elect to go to trial. A relevant experience in this regard is what happens when case disposition guidelines are changed by prosecutors. When prosecutors decide no longer to reduce charges in a class of cases that previously were reduced, there is usually a response from the defense bar that this will result in fewer dispositions and more trials which will consume more court time. I am informed the general experience has been that while

there may be a lower number of pleas initially, after a period of time the number of cases which do go to trial returns to the prior or "normal" level.

Also, in some cases it will not be in the best interest of society to reduce the sentences of defendants who commit serious felonies simply to save court resources when the defendants' backgrounds and the circumstances of their offenses mandate that a substantial term of incarceration be served.

One other factor arguing against a wholly automatic rule is that in terms of conserving prosecutorial resources, the time at which a decision is made to plead is as important as the fact of the plea. If decision to plead is not made until at or near the day of trial, or until after numerous pre-trial motions, very few prosecutorial resources are saved. Thus, if the degree of leniency cannot be tied to the timing of the plea, a reduction in sentence because of a plea will not necessarily conserve prosecutorial resources.

In order to insure that any discretion is properly and uniformly exercised, the Commission should promulgate a policy statement concerning the criteria the courts may wish to apply in deciding whether and to what degree a defendant is entitled to mitigation based upon a willingness to admit and accept responsibility.

One area such a policy statement might address would be to define what is meant by "willingness to admit and accept responsibility for wrongdoing." One relevant factor, as I have already mentioned, is whether the defendant pled guilty. Whether a plea represents a sincere acknowledgement of wrongdoing will be determined by the court

Other factors may also be relevant to the degree of sentence mitigation. For one thing, defendants who take affirmative steps to terminate the criminal conduct -- not those who merely withdraw -- may be viewed as recognizing and admitting the wrongfulness and harm of their conduct even if their efforts are unsuccessful. (However, the timing of the attempt to end the criminal conduct may contradict this inference; for example, when the attempts are made because it is known that detection of the crime is imminent.)

A second factor may be whether a defendant has made a complete and truthful disclosure of his or her criminal activity. A defendant who discloses not only his involvement but that of others and agrees to aid the government in its investigation and prosecution clearly evidences the requisite character trait needed to obtain mitigation.

A third factor may be whether the defendant has voluntarily taken any steps to redress the harm caused by the offense or to

relinquish any profits of the crime. For example, a defendant's voluntary effort to return the conviction to the status quo ante, by making restitution for losses suffered by the victims, can be substantial evidence that the defendant accepts responsibility for his or her wrongdoing. Similarly, a voluntary forfeiture of the proceeds or instrumentalities of the crime may indicate that the defendant recognizes that his or her conduct was wrong.

Also, the sooner a defendant indicates that he or she acknowledges responsibility and the more affirmative steps are taken by the defendant that evidence this admission, the more credit should be given. For example, a defendant who makes full disclosure of his or her criminal activity, assists the government in convicting others and voluntarily makes restitution to the victims of his or her offense very likely would be entitled to the full measure of mitigation allowed by the guidelines. On the other hand, a defendant who makes minimal disclosures and admissions in connection with a plea of guilty may deserve only a very small degree of mitigation.

Finally, in certain circumstances a defendant's admission and acceptance of responsibility may be outweighed by other relevant sentencing considerations. A defendant who habitually engages in criminal conduct, for example, should not necessarily receive any reduction in sentence because he or she exhibits a willingness to admit responsibility for the current crime at time

of sentencing. Such an admission might be too self-serving to be indicative of any real step towards rehabilitation. Also, for particularly serious offenses, mitigation based on an admission of responsibility may not always be appropriate. Arguably the court should retain discretion to impose the maximum sentence on, for example, a defendant who for purely monetary reasons engaged in espionage resulting in substantial damage to the national security.

CONSIDERATION OF A DEFENDANT'S COOPERATION

In my view, a defendant who cooperates with law enforcement authorities should be entitled to some reduction in sentencing for his or her efforts. As noted previously, a defendant's cooperation is one factor that may tend to demonstrate that a defendant is "willing to admit and accept responsibility" for his or her wrongdoing. It is certainly true that a defendant's cooperation, just like a plea of guilty, may be motivated by considerations other than a recognition of wrongdoing and a desire to begin anew. Nonetheless, since cooperation requires a defendant to do more than simply not contest the charges and actually may place the defendant in jeopardy, it is far more likely to indicate a change in attitude. Thus, granting leniency to defendants who cooperate with law enforcement generally will not result in sentences which are contrary to the basic purposes of sentencing.

Public policy may justify sentence reduction for a defendant who cooperates even if that cooperation is not based upon any desire to reform. Particularly in complex fraud or large scale drug cases, charges may not be successfully pursued against the managers and organizers who have insulated themselves unless some of the individuals involved at a lower level agree to cooperate. We believe that providing sentence reduction to a defendant who cooperates is especially appropriate when it leads to the dismantling of an organized criminal operation or aids in the apprehension, charging and conviction of those who are more culpable than the defendant -- not simply those who may have acted at the direction and management of the defendant.

The difficult question is not whether to mitigate a sentence because of a defendant's cooperation, but the mechanisms of how it should be done. I favor a system which would set forth criteria to define various levels of cooperation and which would require the prosecutor to file a certificate indicating the level of the defendant's cooperation and the facts supporting that determination. A policy statement should indicate an appropriate amount of sentence reduction for each level of cooperation. If a defendant disputes the prosecutor's assessment, the court should conduct such inquiry as is necessary to satisfy the court that there is a valid basis for the prosecutor's certificate as to the level of cooperation.

JUDICIAL SCRUTINY OF PLEA AGREEMENTS

We do not believe that the Sentence Reform Act eliminates "sentence bargaining" under Rule 11(e)(1)(C). The prosecution and the defendant should still be able to agree that a particular sentence is appropriate. However, the Act impacts sentence bargaining in two ways. First, the agreed upon sentence must be one which, based upon the facts and circumstances of the offense and the defendant's background, is within the permissible range of sentences under the guidelines or the plea agreement must set forth some justification for going outside the guidelines. Otherwise, the court could not implement the sentence if it chose to accept the plea agreement. Second, the guidelines adopted pursuant to the Sentencing Reform Act may provide standards for the court to utilize in exercising its discretion under Rule 11 to reject or accept a plea agreement which contains an agreed upon sentence.

Whether an agreed-upon sentence is within the range allowed by the guidelines naturally depends upon the circumstances of the offense and the defendant's background. Rule 11 provides that where a plea agreement contains an agreed upon sentence, the court may defer its decision until a pre-sentence report has been obtained.

The court may not need to await a pre-sentence report, however, if the plea agreement contains a stipulation of facts. In such cases if the court is satisfied that the stipulation has a basis in fact and accurately reflects the circumstances of the crime and the defendant's background, it should accept the plea agreement. This may require only that the court inquire of the prosecution and defense at the time of sentencing. (If the inquiry leads the court to believe that the stipulated facts are erroneous or not supported in fact, the court could then exercise its discretion to reject the plea agreement.)

* * *

I have appreciated this opportunity to address the Commission and would be pleased to try to answer any question you may have.

Statement of William J. Garber, Esq.
BEFORE THE UNITED STATES SENTENCING COMMISSION
September 23, 1986

My name is William J. Garber and I am a practicing attorney in the District of Columbia with offices located at 301 Eye Street N.W., Washington, D.C. 20001. I was admitted to practice before the Courts of the District of Columbia in 1952 and have been in active practice since 1956. My practice is largely confined to the defense of criminal cases in the Courts of the District of Columbia (United States District Court and the Superior Court of the District of Columbia). Although I have had some experience in other jurisdictions, for the most part my experience has been in the Courts in Washington, D.C.

1. Guilty Pleas. I am aware of the fact that approximately 90% of the dispositions in criminal cases are the result of plea agreements. [H.R. No. 1017, 98th Cong. 2d Sess 49 (1984)]. This figure comports with my own personal experience. There is no doubt that plea bargaining is a practice of long standing in criminal law and is necessary for several reasons. It promotes the expeditious flow of criminal cases through the Court system. It takes little imagination to predict what would happen to Court calendars if

every criminal case proceeded to trial. Neither the interests of the defendant nor the prosecution, much less the judicial system would be served by such a process. In cases where there is little or no defense to a criminal charge, a trial would impose an enormous burden on both the resources of the defendant and the government. It would subject a defendant charged with multiple offenses to the prospect of substantial penalties which could be avoided or lessened by a fair plea agreement.

In any bargaining process, each side seeks to gain something. This entails concessions from each side. Such is a fact of life. It is no less a fact in the disposition of criminal cases by plea bargaining.

The Supreme Court of the United States has recognized that a defendant's election to plead guilty may be based upon several motivations: (1) Breach of law alone may be sufficient to trigger the acceptance of a plea, (2) Apprehension and charge alone may be sufficient to trigger a plea disposition, (3) The post indictment accumulation of evidence may convince a defendant that a trial is not worth the agony and expense of trial, and (4) the prospect of a favorable plea agreement with the expectation or hope of a lesser sentence. Haring v. Prosise, 462 U.S. 306, 318-19 (1983), quoting from Brady v. United States, 397 U.S. 742, 750 (1970); Toillett v. Henderson, 411 U.S. 258, 263 (1973)

If guilty pleas account for 90% of the dispositions in criminal cases under the present system, sentencing guidelines must

take account of that fact and project that the 90% figure will not vary substantially unless incentives to plead guilty are removed by the implementation of guidelines which make no distinction between the defendant who pleads guilty and the one who goes to trial and is later found guilty. The provision of a downward adjustment for the entry of a guilty plea is, in my view, an absolute essential element to the efficient and orderly administration of justice. Without the official sanctioning of an adjustment via the guidelines--or even worse--a prohibition on adjustment, the typical defendant would likely have nothing to lose by going to trial and the criminal justice system as we know it would develop into a crisis in calendaring and the movement of cases.

It should be clear that if judges are denied the opportunity to adjust a sentence in return for the entry of a plea, that few, if any, defendants would be inclined to pursue that avenue. In a system which puts nearly the entire burden upon the prosecuting authority to prove a person guilty and protect his rights in the process, it is unreasonable to expect any but the most petty offenders to plead guilty if their only present incentive (the prospect of sentencing consideration) is eliminated.

The entry of a guilty plea is one of the most serious steps in a person's life. While there are several good reasons to enter the plea (such a person's time saved, quick elimination of embarrassment or publicity) the two most significant are the prom-

ise by the government to dismiss a particular count or charge and the prospect that the judge will take a plea into sentencing consideration. In many cases, however, the offer by the government to drop or dismiss counts is an offer with no real substance and the prospect for sentencing consideration often becomes the predominate motive for the entry of a plea. Moreover, the more serious a crime becomes (and thus involving more of a potential penalty) the more singular this factor becomes in the decision to enter a plea or proceed to trial.

It should be no secret that the decision not to plead guilty and require the government to the proof of its case at a trial is not one that is always based on a claim of innocence. Those even vaguely familiar with the trial by jury system know that a trial is often a "crapshoot" whose conclusion cannot be predicted with any assurance. One need only ask a prosecutor how many "locked" cases his office has lost to realize that if a defendant is given no consideration to plead, common sense and the eternal hope that something might go wrong with the government's case at trial will force every defendant facing serious charges to require a trial.

In the event that sentencing adjustments are not permitted for guilty pleas, I believe that the system will experience the following consequences:

A. Significantly More Appellate Litigation. While it is axiomatic that with more trials there will be more appeals, there

are additional burdens which are not immediately obvious. For example, a defendant who elects to take advantage of a plea offer because of sentencing considerations most likely will not engage in significant pre-trial motions. Normally an appeals court would never hear from this defendant. On the other hand, a defendant who has no incentive to plead would naturally feel compelled to raise as many legitimate pre and post trial issues as possible.

Moreover, the larger the number of trials, the greater probability that at least some will be reversed for the type of human error which is part and parcel of a human system.

B. Diminution of the of the Presumption of Innocence. The present system encourages trials only for those matters that are contested. Trials that are the result of a system with no other alternative turn quickly into "slow pleas" which could inevitably encourage shortcuts and diminish standards of procedure.

2. Plea Agreements I believe that flexibility should remain that hallmark of our criminal justice system. While I acknowledge that sentencing flexibility can create the possibility of iniquities (same crime, different defendants/judges/prosecutors) these potential iniquities are vastly preferable to the guaranteed iniquities inherent in the elimination of judicial flexibility.

We should initially make the distinction between the "administration of the law" and "doing justice." In the former,

the mechanical viewpoint of justice predominates. Judges, prosecutors, and defendants are thought of as the neat and orderly meshing gears of the slow grind of the justice "machine." In such a view, all criminal cases are made up of interchangeable parts and the inflexible application of tables and schedules is unavoidable. My experience, however leads me (and I believe a majority of all those who participate in the system) to the conclusion that "doing justice" is an individual process that should involve the defendant, the crime, the victim and other factors unique to the particular situation. The law can be "administered" by a rule book and talking computer. "Doing justice" requires the application of the human understanding.

While recognizing that the Congress has expressed a concern that plea agreements not be allowed to circumvent sentencing guidelines, the judiciary should not be straightjacketed into absolutely prohibiting the very real benefits of plea agreements. As I believe I made clear above, the results of such a policy would be disaster to the criminal justice system. Unless such guidelines are extraordinarily broad in their limits (which would obviously be counterproductive to their role as guidelines) concerning such matters as extenuating circumstances or cooperation with law enforcement, then such critical factors that today play a role in the decision to plead guilty could evaporate. The net result will be a strong disinclination to enter a plea.

3. Cooperation I strongly advocate the inclusion of cooperation as a factor in the sentencing guidelines. There are few major criminal cases presented today which do not rely partially, if not totally, on cooperating individuals facing pending charges. While a perfect world would have these individuals coming forward on the basis of their duty as citizens, the real world experiences their cooperation only after they can be assured that their assistance will play a role in their sentencing. To downplay (or prohibit from consideration) the role of that cooperation would have serious effects on the ability of the government to proceed in some prosecutions.

While different levels of cooperation can be objectively identified--informal information, actual physical assistance in police operations, grand jury testimony, trial testimony--these objective levels will often have different values to a prosecuting authority on a case by case basis. Moreover cooperation should be viewed from both perspectives. For example, a conclusion by the government that a defendant has provided no assistance of real value should be balanced against the real or perceived risks undertaken by the defendant in pursuit of the cooperation. To recognize the different levels would provide some assistance, but the benefit to society, and thus the consideration given to a

defendant, must in the final analysis, be the recommendation of the government and a finding by the trial court.

The evolution of our criminal justice system has recently seen the recognition of the plea bargain and the subsequent entry of that plea as a legitimate avenue in the administration of justice. A critical element in that recognition is to keep the bargaining process open and to eliminate secret or closed negotiations. The incorporation of the plea bargain process into the sentencing guidelines would insure its continued presence in a system within which it has proved to play so vital a role.

4. Rule 11, Federal Rules of Procedure. The provisions of Rule 11(e)(1)(B) provide for charge bargaining and sentence recommendations and agreements for specific sentences. My experience in the District of Columbia is that specific recommendations and agreements as to sentence are exceedingly rare. The government frequently allocutes for unspecified periods of incarceration and sometimes for the imposition of the maximum penalty in certain cases. The issue of the impact of sentencing guidelines as they relate to Rule 11 dispositions should be addressed by those who have more experience in jurisdictions where specific recommendations are a practice. I can envision, however, that these issues

can cultivate a fertile field for appellate litigation, especially in view of 18 USC 3742 (a)(3)(B) and 3742(b)(3)(B).

Respectfully submitted,

William J. Garber



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September 23, 1986

Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Chairman Wilkins:

I am pleased to transmit on behalf of the American Bar Association the comments of the Criminal Justice Section Ad Hoc Committee concerning the effects on federal sentences of guilty pleas and of cooperation in criminal investigation and prosecution.

Best regards.

Sincerely,

Laurie Robinson
Director

LR:dc

Enclosures

cc: John M. Greacen, Chairperson
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STATEMENT SUBMITTED
TO THE UNITED STATES SENTENCING COMMISSION
ON BEHALF OF
THE AMERICAN BAR ASSOCIATION
ABA CRIMINAL JUSTICE SECTION AD HOC COMMITTEE
ON THE U.S. SENTENCING COMMISSION
CONCERNING
THE EFFECTS ON FEDERAL SENTENCES
OF GUILTY PLEAS AND OF
COOPERATION IN
CRIMINAL INVESTIGATION
AND PROSECUTION

SEPTEMBER 23, 1986

This statement is submitted to the U.S. Sentencing Commission in response to a letter of August 20, 1986, from its chairman to Ms. Laurie Robinson, Director of the ABA Section of Criminal Justice. It was prepared by members of the ABA's Ad Hoc Committee on the U.S. Sentencing Commission.

The statement is a summary of official positions of the American Bar Association, as set forth primarily in volumes I and III of the second edition of the ABA Standards for Criminal Justice (1980). The statement includes references not only to the standards themselves, but also to the commentary accompanying them. The commentary is not itself a statement of the ABA's official positions. However, it is often helpful in understanding the standards.

The chairman's letter asked a series of questions about the significance of guilty pleas, of negotiated pleas in particular, and of offenders' cooperation with authorities. The first two questions were these. Should the sentencing guidelines provide a downward sentencing adjustment for defendants who plead guilty? Or should the guidelines make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty?

According to ABA standard 14-1.8:

(a) The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when consistent with the protection of the public, the gravity of the offense, and the needs of the defendant, and when there is substantial evidence to establish that:

(i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct;

(ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iii) the defendant, by making public trial unnecessary, has demonstrated genuine consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them; or

(iv) the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.

The history of the development of this standard underscores the limited scope of the four exceptions it contains. An earlier version had authorized concessions to the offender when the guilty plea had "aided in assuring the prompt and certain application of correctional measures. . . ." Pages 14.40-.41. The current version omits that exception, on the ground that it was too broadly applicable and did not, standing alone, justify lesser punishment. Id.

Another former exception, which likewise has been deleted, sanctioned concessions for offenders whose guilty pleas "aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby . . . increased the probability of prompt and certain application of correctional measures to other offenders." Page 14.41. The theory on which the ABA deleted this exception was that "the solution for crowded criminal dockets is the availability of sufficient personnel and other resources . . ." Id.

Even the four exceptions that do exist in the current version of the standard are relatively narrow. The earlier version had identified a defendant who "has acknowledged his guilt" as one deserving charge or sentence concessions. Id. This exception is tightened in the current version, so that it reaches only

one who "is genuinely contrite." Id. A similar narrowing of a previous exception has given us the present provision for concessions for offenders who are genuinely considerate of their victims. Page 14.41-.42. A third exception in the current version approves concessions for offenders who cooperate in prosecution of others engaged in "equally serious or more serious criminal conduct." Standard 14-1.8(a)(iv). The fourth one approves concessions that make possible more appropriate correctional measures than would otherwise be legal, and concessions that prevent "undue harm to the defendant from the form of conviction." The commentary makes it clear that this exception is designed for charge reductions and dismissals to avoid stigma and legislatively-required, severe sentences. Pages 14.47-.48, 14.70.

If the history of this standard underscores the narrowness of its exceptions, then the commentary to the standard supplies an exclamation point. "[I]t is important," says the commentary, "that the trial court interrogate the defendant carefully in order to determine whether the defendant's guilty plea truly reflects repentance. . . ." Page 14.46. Likewise, "this standard requires the court to judge whether the defendant's plea is motivated by genuine concern for the victims." Page 14.48. If, instead, the offender is pleading guilty solely to take advantage of an attractive plea offer, no concessions should be made, according to the commentary.

The ABA approved this standard, forbidding charge and sentence concessions for guilty pleas subject only to narrow exceptions, in the face of much broader arguments for plea bargaining. Several portions of the commentary discuss the benefits of guilty pleas, or quote with approval from other discussions of them. These benefits are said to include quite a catalog of practical advantages to the offender, the prosecutor, and society as a whole: "enabling an

oversupply of cases to be processed through an underfunded criminal justice system," page 14.68, promptness and finality of dispositions of cases, page 14.69, limitation of confinement pending trial, id., protection of the public from crimes committed by defendants released on bail, id., sparing defendants the ordeal of trial, page 4.71, certainty of conviction, id., avoidance of "the tensions of conflict," id., and confidence that those convicted are actually guilty, id.

Obviously, many of these benefits exist in a much broader category of cases than the exceptions to our standard cover. Nevertheless, the Association decided that charge and sentence concessions for pleas should be limited to cases involving one or more of the four exceptions. The commentary to this standard includes a statement that these exceptions will apply "frequently." Page 14.49. Whatever that frequency may prove to be, the standard clearly does not provide a source of support for federal sentencing guidelines generally offering lower sentences to those who plead guilty than to other offenders.

The chairman's letter next referred to congressional concern that plea agreements not be used to circumvent federal sentencing guidelines. It asked a series of questions about judicial acceptance or rejection of such agreements, and about the interrelationships of plea agreements and sentencing guidelines.

The ABA standards are replete with expressions of approval of plea bargaining, and with instructions for the conduct of bargaining by prosecutors and defense attorneys.

Standard 3-3.9 sets the stage by approving prosecutorial discretion not to present at the outset of a prosecution all charges for which there is evidence sufficient for conviction. The commentary to that standard indicates that "a prosecutor ordinarily should prosecute if, after full investigation, it is found

that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty."

Page 3.55. Even under those circumstances, however, the standard and commentary approve the withholding of charges, and they list illustrative factors that can influence the exercise of prosecutorial discretion. Among the exemplary factors are some that would also be relevant to charge or sentence negotiations or to sentencing itself, such as "the extent of the harm caused by the offense." Standard 3-3.9(b)(ii).

The standards then repeatedly approve of negotiations aimed at further reducing the charges or influencing the punishment to be imposed. Standard 4-6.1 states that a defense lawyer may engage in plea discussions with the prosecutor. Indeed, the commentary to that standard advises defense counsel that "plea discussions should be considered the norm" Page 4.72. Standard 14-3.1 permits the prosecutor to attempt to reach a plea agreement with defense counsel. It approves his agreeing, as dictated by the circumstances of the individual case, "to make or not to oppose favorable recommendations as to the sentence . . . [, and] to dismiss, to seek to dismiss, or not to oppose dismissal" of particular charges, in exchange for a plea of guilty or nolo contendere. See also page 3.94.

However, this encouragement of negotiations is clearly not intended to undercut standard 14-1.8, which disapproves of judicial charge or sentence concessions for guilty pleas in the absence of the four exceptions quoted above. The commentary to the standard that endorses prosecutors' participation in plea negotiations explains that prosecutors must themselves consider "such factors as those contained in standard 14-1.8." Page 14.70. More importantly, one of the standards provides that "the prosecutor should assist the court in basing its

sentence on complete and accurate information for use in the presentence report," standard 3-6.2(a), and should disclose to the court "all information in the prosecutor's files which is relevant to the sentencing issue," standard 3-6.2(b). The judge should "order the preparation of a preplea or presentence report, when needed for determining the appropriate disposition . . ."

Standard 14-3.3(b)(i). The commentary is even stronger on this point. "There is much to be said for a court deferring acceptance of the plea and its response to a plea agreement until preparation of a preplea report. Postponing acceptance until all relevant information is available assures the most intelligent exercise of the court's sentencing discretion" and of its power to accept or reject a plea to a lesser charge. Page 14.81. Of course, the defendant's written consent is needed for judicial examination of a preplea report, under Federal Rule 32(c)(1).

The language summarized above is found in the standards for the prosecution and defense functions and for guilty pleas. The commentary to the standards for sentencing is even more emphatic that judges should possess full information before passing on a negotiated disposition.

[R]ational and consistent sentencing decisions cannot be achieved without a reliable informational base that provides the sentencing court with both an accurate and a relatively uniform volume of information about all offenders. . . .

. . .

These standards are unwilling to accept the proposal . . . that the presentence report be dispensed with in cases where the sentence is negotiated, since such a "reform" would once again transfer discretion from the court to the prosecutor. . . .

Pages 18.335-.341. "Frequently, plea bargaining results in the offense of conviction being less severe than the 'real' offense, and it provides a desirable

check on plea bargaining practices for the court to be given an independent evaluation of the facts of the case." Page 18.350. See also standard 18-6.3(d); pages 18.430, .436-.437.

The standards thus contemplate that the judge should be equipped with complete and accurate information before deciding whether to accept or reject negotiated charge concessions and, certainly, sentence concessions. ABA policy is clear as to the role that the court, being so informed, should play in reviewing the agreement. According to standard 14.3.3(b)(ii), the court should "give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions" The commentary to that standard states that the judge "will want to consider the criteria in standard 14-1.8 for granting charge and sentence concessions." Page 14.82. The commentary to standard 14-1.8 itself is still stronger. It states that the ban on charge and sentence concessions for guilty pleas, with its four exceptions, "applies whenever a plea is entered; it is not dependent on whether the parties have arrived at a plea agreement." Page 14.44. Thus the standards and commentary treat negotiated and non-negotiated guilty pleas alike, and disapprove charge and sentence concessions except for cases within the four exceptions.

The commentary appears to contemplate even fewer such concessions for guilty pleas under a guideline system than under a more traditional sentencing scheme. There are two indications of this.

First, the commentary to standard 14-1.8 draws a contrast between "broad judicial discretion under indeterminate sentencing laws," on the one hand, and "sentencing guidelines and fixed or presumptive sentences," on the other. Page 14.44. It states that the four exceptions to the ban on concessions for

guilty pleas are suitable in the former type of sentencing, but "probably not suitable" in the latter. Pages 14.44-.45. The commentary suggests that application of the exceptions would inject considerations of rehabilitation that are inconsistent with the philosophy of determinate sentencing statutes, and would create more discretion than such statutes typically permit.

The other indication that guilty pleas should earn even fewer concessions under a guideline system is found in the commentary accompanying one of the four exceptions. Paragraph (a)(ii) of standard 14-1.8 approves of charge and sentence concessions for guilty pleas when "the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction" The commentary discussing this paragraph justifies it entirely as a device to avoid application of "a high mandatory minimum sentence," a prohibition on probation, or the label of felon, sex offender, "alcoholic, addict, or dangerous person." Pages 14.47-.48. Charge reductions are justified, the commentary argues, "where the judge's power is severely limited by high legislative minimum sentences, fixed maximum sentences, or frequent absence of probation as an alternative" Id. It appears likely that the United States Sentencing Commission will adopt guidelines that will generally prevent imposition of excessively severe sentences, or at least not require their imposition. If so, then the Commission will ameliorate one of the grounds on which the ABA based even its quite limited approval of concessions in return for guilty pleas.

When a court does accept a guilty plea to a less serious offense than the defendant really committed, perhaps because of a plea bargain, should the offender be sentenced under a guideline for the offense of conviction, or under one for the "real" offense? If the former, does the commission of the "real" offense tend to justify a sentence harsher than the guideline provides? These are key issues covered by the questions in the chairman's letter about the interrelationship between charge and sentence bargaining, on the one hand, and the federal sentencing act and guidelines, on the other.

The commentary notes that the issue of "real offense" sentencing is "not specifically addressed by these standards," but is "at least tangential" to the statement in standard 18-3.1(c)(iii) that "guidelines should focus on more than the offense of conviction alone" Page 18.214. According to the commentary,

policy arguments can be advanced to support such a system of upgrading the offense to its "real" level in order to minimize sentencing disparities that otherwise are caused by prosecutorial practices in charging and plea bargaining. . . . Nonetheless, as a matter of policy, these standards should not be read as an endorsement of "real offense" sentencing as presently conducted. There is encroachment on the concept, if not yet the case law, of due process when an offender convicted for one offense is sentenced under the guidelines for another, more serious offense. Thus, in cases where the offense of conviction is significantly below the actual offense behavior as indicated in the sentencing record, it may well be preferable for the court to consider this disparity as an aggravating factor Thus, the court would be more able to impose a sentence in excess of the guideline level. As hazy as the distinction may seem between the recommended use of the "real offense" as an aggravating factor and its disfavored use as the operative guideline indicator, the defendant will be marginally more protected in the former case by the higher burden that exists to justify a sentence outside the guidelines More important, a practice is not institutionalized that risks infringing the appearance of justice and downgrading the operative significance of the trial stage by pushing back the resolution of material factual issues to the sentencing stage. . . .

. . . Given the lack of experience with "real offense" sentencing, these standards express no formal opposition. It is recognized that the need to control prosecutorially caused disparities may justify experimentation with this and other options. . . .

Pages 18.215-.217.

This portion of the commentary is addressed to potential disparities that are caused either by plea agreements or by prosecutorial decisions in charging. It thus treats the relationship between plea agreements and sentencing guidelines as part of this more general question: to what extent should the identity of the crime of conviction control sentencing, under a system of guidelines? In standard 18-4.8, the ABA has dealt with that general question in another context. Given the commentary's unified approach to disparities, regardless of whether they result from charging discretion or plea bargains, this standard is worthy of review by the Commission. It provides:

If the defendant has been convicted of a felony, and if the court, considering the nature and circumstances of the offense and the history and character of the defendant, concludes that exceptional circumstances are present which would make it unduly harsh to sentence the defendant to the term normally applicable to the offense, the sentencing court should be authorized to reduce the offense . . . and to impose sentence accordingly. In jurisdictions where a guideline drafting agency has been established, it should address the problem of defining the circumstances in which such a reduction is appropriate. . . .

The commentary to this standard states that "particularly in jurisdictions employing a guideline system, it [offense reduction] should not be used as a means of circumventing decisions made by the legislature or the guideline drafting agency." Page 18.323. It also states, as a partial justification for giving a judge this exceptional power, that the prosecution would be "authorized to appeal the reduction of the conviction to the same extent as if the court had simply sentenced the offender to a sentence below the applicable guideline range

for the original felony." Id. After that standard and commentary were written, however, the ABA changed its policy from approval to disapproval of government appeals of lenient sentences. See page 18.324 n.*. By so doing, the Association eliminated part of the stated justification for standard 18-4.8. It is therefore difficult to say what significance, if any, standard 18-4.8 now has for the relationship between sentences and offenses of conviction in a guideline sentencing system. Considering this standard and its commentary, alongside the explicit refusal elsewhere in the commentary to take a position on "real offense" sentencing, one probably should conclude only that the Association views these issues as worthy of thoughtful experimentation.

Whatever position the Commission may adopt on these substantive issues, there is a procedural issue on which the ABA's views are crystal-clear. The chairman's letter asked to what extent prosecutors and defense attorneys should be able to stipulate to the facts about an offense or offender that under the guidelines may influence or even largely determine the sentence imposed. The Association disapproves determination of sentencing facts by mere stipulation of the parties to a criminal case.

This statement identified above most of the general principles that underlie the ABA's position on this point. Under standard 14-3.3(b)(ii), the court should make an "independent decision on whether to grant charge or sentence concessions" on which the parties have agreed. Before doing so, the court should receive a complete and accurate preplea or presentence report. Standard 14-3.3(b)(i) and pages 14.81, 18.335-.341, and 18.350. If that report is somehow incomplete or inaccurate, the prosecutor should disclose to the court any information in his or her file that is relevant to sentencing. Standards 3-6.2, 18-6.3(d).

The commentary explains the most basic reason for these requirements.

[S]entencing is a judicial responsibility, one in which the court fundamentally supervises an independent inquiry through its probation staff, rather than simply monitoring the clash of competing adversaries.

Page 18.430. In addition, the commentary addresses the specific subject of judicial fact-finding in the face of a negotiated plea.

A degree of tension could develop between the requirement that the prosecutor honor sentencing agreements . . . and the obligation imposed here on the prosecutor to disclose to the court all relevant sentencing information in the prosecutor's possession. Obviously, a plea agreement would be illusory and perhaps fraudulent if the prosecutor, while recommending a specific lenient sentence, were also to inform the court that special facts were present justifying an extended term on the grounds of the defendant's dangerousness. There seems little doubt that appellate courts would not tolerate such deceptive conduct on the part of the prosecutor. . . . But equally dubious is the opposite extreme of the prosecutor agreeing as part of a plea agreement to withhold facts showing that relevant guidelines would normally require a longer term than that recommended because of some special characteristic (e.g., possession of a weapon during the commission of the crime). To withhold such information is to preempt the court's role in sentencing. . . .

The dangers thus stated involve two extremes: while the duty here imposed on the prosecutor to present an objective factual picture of the defendant could be used to present a disguised form of sentencing recommendation undermining the plea agreement reached earlier, the prosecutor may be tempted to protect a plea agreement by withholding pertinent information that, if disclosed, could cause the court to reject the agreement or deny sentencing concessions that the prosecutor believes are desirable to offer. As with other questions of proper conduct, the lines here may be hazy in their application to some cases. Nonetheless, the controlling principles stated in paragraphs (b) to (d) [of standard 18-6.3] are sufficiently clear: the prosecutor should present all relevant information even if it may dissuade the court from granting the recommended sentence, and correspondingly, the prosecutor's presentation of such information should be specific and factual, avoiding pejorative or nonessential characterizations. Where evidence suggesting the need for an extended term [because of special characteristics of the defendant] is known to the prosecutor, it should be specially conveyed to defense counsel [by a formal notice] In all cases . . . it is the prose-

utor's responsibility not only to apprise the court of the existence of such information but to develop a factual case for presentation at the [sentencing] hearing

Pages 18.436-.437.

A principal intent of the ABA standard governing presentence reports used in jurisdictions with sentencing guidelines is, according to the commentary,

to minimize the danger that a new and highly questionable form of plea bargaining may develop under a guideline system: agreements between the parties to hide information given express weight by guidelines from the sentencing court's attention. Although the institution of plea bargaining is recognized by these standards as legitimate, it must be subject to judicial oversight. That oversight is lacking, and indeed the operation of a guideline system become potentially unaccountable when the court is denied access to pertinent sentencing data. . . . For example, if guidelines gave weight to such factors as whether the offender was in possession of a weapon at the time of the crime or used narcotics, it would be inappropriate for the prosecutor to agree to withhold this information . . . in order to obtain a plea of guilty. . . . Situations will, of course, arise in which the prosecutor will be forced to concede that aggravating factors cited in the presentence report and challenged by the defendant cannot be sustained at the sentencing hearing Considerable discretion will no doubt remain in the prosecutor's hands, but the critical distinction is that the court will be on notice. In general, courts have adequate resources at their disposal where issues are in the open to prevent the parties from manipulating their discretion.

Pages 18.356-.357. "If discretion is to remain with the court rather than with the prosecutor, it is essential to minimize 'fact bargaining' -- that is, tacit agreements between the parties to withhold relevant factual information."

Page 18.467.

Finally, the chairman's letter asked a series of questions about sentencing concessions for offenders who cooperate with law enforcement authorities. The ABA clearly supports the granting of such concessions. Standard 3-3.9 approves consideration of such cooperation in a prosecutor's initial decision not to

file the most serious charges that can be proven. See also pages 3.57-.58. In addition, standard 14-1.8(a), in one of its four exceptions discussed above, approves a court's granting charge and sentence concessions in appropriate cases for offenders who plead guilty or nolo and who have "given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct." Information about such cooperation thus comes within the provisions instructing both prosecutors and defense attorneys to inform the court of information relevant to sentencing and favorable to the offender. Standards 4-8.1(b), 18-6.3(d)(i)-(ii), (f)(ii).

The rationale for these concessions, as expressed in the commentary, is that ". . . prosecutors often are unwilling to grant immunity to certain potential witnesses because of the seriousness of their conduct or their criminal record," page 14.48, and that the lesser reward of charge and sentence concessions is justified by the direct and indirect benefits to society. "Whatever is lost by the reduced punishment of the offender is gained by the resulting conviction of one or more other offenders." Id. "[I]t is in society's interest to reward the offender in order to induce others to behave similarly" Page 18.506.

Standard 18-6.9 adds the caveat that ". . . it is inappropriate for the court to take the initiative in seeking to obtain . . . [a confession of guilt] or to induce cooperation with the prosecution." However, both the commentary to that standard, and a passage in the 1986 supplement amending that commentary, make it clear that this standard disapproves only judicial initiatives to induce the defendant's cooperation. Pages 18.496-.498; 1986 Supp. to pages 18.496-.498 and n.5. The standard does not detract from the ABA's approval of

judicial concessions to reward cooperation that the defendant has offered or given.

The chairman's inquiry about rewards for cooperation ended with these questions. Should different levels of cooperation be objectively identified and given relative downward adjustments from the otherwise applicable sentence? If so, who should decide the appropriate level or downward adjustment: the sentencing court, the prosecutor in a written certification to the court, or the prosecutor and defense attorney in a written agreement? How should disputes regarding the level or quality of cooperation be resolved?

The standards and commentary do not discuss the feasibility, much less the wisdom, of reducing the wide variety of kinds, degrees, and consequences of cooperation to objective levels with matching adjustments in sentences. Neither do they address the questions, as specifically as the chairman has framed them, of who should evaluate a particular offender's cooperation and choose the reward for it.

However, the generally applicable provisions that are quoted and summarized above, in which the ABA specifies the respective functions of prosecutor, defense attorney, and judge, do apply in this context. After all, the principal provision in which the Association approves charge and sentence concessions for cooperating offenders is one of the four exceptions to the general ban on rewards for guilty pleas. Standard 14-1.8(a)(iv). Other standards and commentary specify, as was mentioned above, the roles of the respective participants in the sentencing process as a whole, and in the application of the four exceptions in particular. The court obtains a complete and accurate preplea or presentence report. Standard 14-3.3(b)(i); pages 14.81, 18.335-.341, .350. The prosecutor and defense counsel supply information to correct any

omissions or errors in that report. Standards 3-6.2, 4-8.1(b), 18-6.3(d). The court then makes an independent decision within the confines of the applicable exception, even when there is a plea agreement. Standards 14-1.8, 14-3.3(b)(ii), pages 14.44-.48, 14.70, 14.82.

Under these general rules, the preplea or presentence report should describe the cooperation and its results. The parties should contest or endorse its accuracy as their view or views of the facts require them to do. When the court has been thus fully informed, the court should determine the kinds, extent, and consequences of the offender's cooperation, and choose the kinds and extent of concessions to be approved.

On behalf of the ABA, the committee is grateful for the opportunity to furnish this information to the Commission. We hope it will be helpful, and would welcome the opportunity to be of further service.

United States Sentencing Commission

September 23, 1986

Testimony of Professor Stephen J. Schulhofer

My name is Stephen J. Schulhofer. I am the Frank & Bernice J. Greenberg Professor of Law and the Director of the Center for Studies in Criminal Justice at the University of Chicago Law School.

The treatment of guilty pleas and plea agreements is probably the single most important issue that the Sentencing Commission must address. Presently 80-90% of federal convictions are obtained by guilty plea. The Commission's decisions with respect to plea agreements will determine whether guilty pleas will continue to be tendered in those proportions. Those decisions will also determine whether the sentencing guidelines will or will not have any influence on sentencing in guilty-plea cases. The starting point for examination of the problem is the question whether the mode of adjudication should ever be a relevant consideration in sentencing. I will discuss this fundamental question of principle first, though much more briefly than its importance calls for. I will then examine in more detail the relatively technical questions of form and implementation that present major immediate concerns for the Commission.

The propriety of guilty-plea concessions

Why should a defendant who pleads guilty be treated more leniently than one who, all other things being equal, has been convicted after trial? The leading penological rationale has been that the guilty plea demonstrates remorse and thus indicates that the defendant is either less culpable, less likely to return to crime or more amenable to rehabilitation. The connection between remorse and rehabilitation, recidivism or culpability is of course debatable, but the decisive problem is that in a plea bargaining system there is simply no connection between the guilty plea and remorse. A guilty plea probably would be indicative of remorse in a court that systematically suppressed all sentencing inducements to plead guilty. But so long as guilty pleas are systematically rewarded, as they presently are in the federal courts, such a plea is much more likely to demonstrate the calculated pursuit of self-interest (or perhaps even a cynical effort to manipulate the system) than it is to demonstrate "remorse."

The other important rationale for guilty-plea concessions is administrative rather than penological: guilty pleas, it is said, save court time and thus permit the processing of larger numbers of cases. The defendant who extends this advantage to the government should be rewarded for doing so, and must be rewarded if the flow of pleas is to continue. The guilty plea system thus involves a "mutuality of advantage" that benefits

both prosecution and defense.¹

This argument for guilty plea concessions unfortunately rests on a number of very problematic assumptions. First and foremost, it assumes that the case-processing costs avoided by the guilty-plea system are greater than the costs (especially in terms of lost deterrence) generated by the very existence of the guilty-plea system. Few factors detract from the certainty and severity of criminal sanctions more than the many opportunities we afford for criminal defendants to negotiate their way out of the penalty that should apply to their conduct. And the widespread expectation that one can always "cop a plea" detracts from the perceived certainty and severity of criminal sanctions even when those expectations are unfounded in fact. As crime rates rise, courts and legislatures naturally look to increased prison sentences as a way to enhance deterrence, but this expensive approach is likely to prove futile so long as the guilty-plea system undermines the certainty that higher sentences will be imposed and perpetuates the perception (even if it is a myth) that the defendant can always work out a deal. The guilty-plea system thus weakens deterrence, encourages crime and condemns us to the pursuit of expensive but ultimately ineffectual countermeasures.

A second difficulty grows out of the assumed mutuality of advantage, i.e. the notion that the guilty plea system is advantageous to defendants. It is probably true that defendants,

1. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

in the aggregate, do benefit from the system.² If so, why is the system unfair? The problem is that often the wrong defendants benefit from plea bargaining. Sophisticated defendants with experienced counsel can benefit greatly from the system and avoid appropriate punishment for serious crimes of which they are unquestionably guilty. Other defendants, even if potentially innocent, may sacrifice prospects for acquittal and plead guilty without reaping a significant advantage at all. The fairness problems posed by the guilty-plea system remain acute, regardless of whether that system benefits defendants as a class.

The alleged benefit to defendants in the aggregate is a claim that should in any event put us on our guard. The criminal justice system should not operate to the advantage of defendants who are, by hypothesis, guilty of crimes. The purpose of the criminal justice system is not to make these defendants happy or to provide them opportunities to work out a "good deal." In short, there is -- at least in this context -- no such thing as a free lunch. The "mutuality of advantage" is something we all pay for in terms of reduced deterrence and increased risk of crime.

The third problematic assumption is that abolition of the guilty-plea system is simply unthinkable because prohibitive administrative costs would be entailed. Guilty pleas undoubtedly require much less court time than jury trials, but most of the same time savings could be realized by holding bench trials

2. Concessions are often illusory, however, since the guilty plea system can cause the "normal" penalty imposed after trial to be increased -- so that other defendants will choose to plead guilty.

instead of jury trials. Defendants who until now have been asked to waive all their trial rights need be asked to waive only their right to a jury.³ Based on examination of a state-court system (where the mix of cases would differ somewhat from that of the federal courts), one study found that by providing bench trials in lieu of guilty pleas, the number of trials could be doubled with only a 3% increase in the court resources devoted to the adjudication stage of criminal cases.⁴ Given the rather substantial variations in the criminal trial output of the federal courts from year to year,⁵ it seems clear that a resource requirement of this modest magnitude could rather easily be met by adjusting the allocation of existing judicial resources or by a very small percentage increase in court resources as a whole.

Because the guilty-plea system imposes such extensive costs on society and because it apparently could be eliminated at rather modest cost, I urge the Commission to give careful and serious attention to the possibility of ultimately eliminating

3. Such jury-waiver concessions are common in Pennsylvania, and their constitutionality seems clear. See Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037, 1089-93 (1984) [hereinafter cited as Plea Bargaining]; Note, *Constitutional Alternatives to Plea Bargaining: A New Waive*, 132 U. Pa. L. Rev. 327 (1984).

4. Plea Bargaining, supra n.3, at 1086.

5. The guilty-plea rate has tended to remain relatively constant, but there are substantial variations in the absolute numbers of cases tried. For example in fiscal 1983, when the guilty-plea rate was 83%, 484 federal district judges tried 6240 cases, for an average of 13 each, while in fiscal 1977, when the guilty-plea rate was 82%, 372 federal district judges tried 8113 cases, for an average of 22 each. Sources: 1984 Sourcebook of Criminal Justice Statistics 572 (1985); Posner, *The Federal Courts* 357 (1985).

guilty-plea concessions from all stages of the sentencing system. This problem should be kept prominently on your agenda, but in terms of priorities I do not think it essential that guilty-plea concessions be phased out right away. First, sentencing guidelines will give practitioners plenty to digest at one gulp, even if those guidelines do not disturb the proportions of cases that go to trial. Second, provided that sentencing guidelines are structured to insure uniformity and predictability in the administration of guilty-plea concessions (and that is a crucial proviso), many of the evils of the guilty-plea system and much of its negative impact on crime control would be eliminated without affecting the proportion of cases that go to trial.

In the remainder of my remarks, I will assume that the Commission intends to preserve the present mix of pleas and trials for the immediate future and accordingly that the Commission will be willing to preserve some sentencing concession for guilty-plea cases. I will turn my attention to the technical questions of where and when such concessions should be granted, how their extent should be determined and in what ways they should be guided and controlled.

Possible sources of guilty-plea concessions

If guilty-plea concessions are appropriate, in what form should they be made available? There will be numerous possibilities, even under a guidelines system that narrowly restricts judicial sentencing discretion. The principal

possibilities are as follows:

1. Guideline selection. The sentencing judge will determine the appropriate sentencing range on the basis of offense and offender characteristics and any other factors made relevant by the Commission's guidelines. Prosecution and defense could influence this determination -- and insure the application of a lower sentencing range than the one that would have applied in the event of conviction at trial -- by stipulating to particular facts or by submitting a Rule 11(e)(1)(C) plea agreement requiring imposition of a sentence in the range of a particular guideline.

2. Guideline departures. Prosecution and defense could stipulate to mitigating facts calling for a lower-than-guideline sentence, even though such facts might not be found by the judge in the event of a contested trial. Similarly, a plea agreement could recommend [Rule 11(e)(1)(B)] or require [Rule 11(e)(1)(C)] a lower-than-guideline sentence. When cases involve serious aggravating facts that might warrant a departure from the guideline in the direction of a higher-than-guideline sentence, the prosecution could agree to stipulate to the absence of such facts, or agree not to oppose defense denials of such facts; similarly, the plea agreement could recommend or require the judge to stay within the guideline and thus in effect require him or her to ignore such facts.

3. Guideline ranges. To the extent that the guideline sentence consists of a range rather than a single number, sentencing judges could afford guilty plea concessions by

generally sentencing at the lower end of the range for guilty plea defendants and/or by sentencing at the higher end of the range for defendants convicted after trial. Similarly, plea agreements could recommend or require imposition of a sentence at the lower end of the authorized range.

4. Explicit guilty plea discounts. The sentencing guidelines could authorize or require a specified sentence reduction in the case of convictions by guilty plea.

5. Charge reduction. Because the seriousness of the offense will be one of the most important determinants of the guideline sentence, a plea agreement requiring dismissal of certain charges [Rule 11(e)(1)(A)] would afford a substantial sentence reduction to the guilty plea defendant.

Should the Commission regulate or structure the guilty plea concessions?

One simple solution to the guilty-plea problem would be for the Commission to leave guilty-plea concessions entirely unregulated. This approach would save the Commission a good deal of work, would guarantee the system's ability to elicit the desired proportion of pleas and would assure that criminal justice professionals suffer the least possible disruption of established means of doing business. Despite these undeniable attractions, the Commission should not and cannot adopt this approach. The legislative history of the Sentencing Reform Act is replete with statements of Congressional concern that plea agreements not be used to circumvent the sentencing guidelines,

and the language of 28 U.S.C. § 994(a) requires the Commission to promulgate policy statements with respect to the acceptance of plea agreements. Indeed, the legislative history makes clear that this requirement was regarded as especially important.⁶

It is worth recalling the reasons why Congress took such a firm position on this issue. In a guidelines system, sentence will be determined, within rather narrow ranges, by the offense and by various background circumstances to be identified by the Commission. Under this approach parole-release discretion is abolished, and the sentencing discretion of the trial judge is tightly confined; the sentence to be served becomes predictable, with few qualifications, for defendants convicted after trial. But 80-90% of all federal convictions are not obtained by trial. The sentence for these defendants would be determined by the plea-agreement practices of judges, prosecutors and defense counsel, and those discretionary practices would remain entirely unstructured. As a result, the entire costly and elaborate sentencing reform effort would be at best an irrelevancy for the overwhelming majority of all federal defendants. Unwarranted disparities would not be significantly reduced, predictability would not be achieved, and neither the equity nor the deterrent effectiveness of federal sentencing law would be significantly

6. See, e.g., Criminal Code Reform Act of 1979, S. Rep. 96-553, 96th Cong., 2d. Sess., p. 1236 [hereinafter cited as 1979 Senate Report]; Criminal Code Revision Act of 1980, H. Rep. 96-1396, 96th Cong., 2d Sess. 501 [hereinafter cited as 1980 House Report]; Comprehensive Crime Control Act of 1984, S. Rep. 98-225, 98th Cong., 2d Sess., p. 63 [hereinafter cited as 1984 Senate Report].

enhanced.

What is even more serious is that sentencing reform would prove worse than irrelevant for the cases resolved by plea. Prior to reform, the U.S. Parole Commission used its parole-release powers to alleviate unwarranted disparities resulting from the plea-bargaining practices of individual prosecutors, and judges used their wide sentencing discretion for the same purpose.⁷ These overlapping discretionary powers served to check one another and to assure some degree of overall uniformity. By eliminating parole-release discretion and narrowly confining judicial sentencing discretion, the new law raised the prospect that unwarranted disparities in guilty-plea cases would actually increase. On balance, it seemed likely that any reduction in disparity or uncertainty for cases resolved by trial would be more than offset by increased disparity and uncertainty for cases settled by plea. In effect, sentencing reform would actually aggravate the problems of inequity and inadequate deterrence that had prompted so much public concern in the first place. Under these circumstances Congress rightly considered it imperative to provide for guiding and structuring the determination of sentence in guilty-plea cases.⁸

7. For discussion see Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733, 743-48 (1980) [hereinafter cited as Due Process].

8. Subsequent experience has confirmed the wisdom of this Congressional judgment. The absence of a power to control guilty-plea sentencing has severely limited the value of the otherwise successful Minnesota sentencing reform effort. See Rathke, Plea Negotiating Under the [Minnesota] Sentencing Guidelines, 5 Hamline L. Rev. 271 (1982).

This Congressional mandate will be no easier for the Commission to carry out than any of the other tasks Congress has assigned it. But this particular effort must be pursued vigorously if all the rest of the Commission's work is not to prove seriously counterproductive.

How should guilty-plea concessions be structured?

Against the background of the Congressional concerns just mentioned, the Commission's goals in structuring guilty-plea concessions must be to insure, insofar as possible, that those offense and offender characteristics deemed relevant to punishment will control sentencing in both guilty-plea and trial cases, that like cases will be treated alike, that guilty-plea sentences will be predictable, that any guilty-plea discounts will be available on a uniform basis to all similarly situated defendants, and finally, of course, that the available guilty-plea discounts will be adequate to preserve the customary proportions of pleas and trials.

How should the pursuit of these goals be given concrete form? An infinite variety of approaches can be imagined, but for practical purposes there are only three important areas for decision. These are:

- (1) the treatment of stipulations and plea agreements affecting guideline selection, guideline departure and guideline ranges;

(2) the use of an explicit guideline discount for a guilty plea; and

(3) the treatment of prosecutorial decisions to reduce (or withhold) charges.

Although the proper approach in each of these areas is dependent upon decisions taken with respect to the others, the complexity of the problem is greatly reduced by the fact that in each area, there is little doubt about the approach that should ultimately commend itself to the Commission. Stipulations and plea agreements should be allowed no effect whatever with respect to guideline selection, guideline departure and guideline ranges; an explicit guilty plea discount should be provided; and charge-reduction plea agreements should be permitted but regulated by either real-offense sentencing or charge-reduction guidelines. I discuss each of these conclusions in turn.

1. Stipulations and plea agreements affecting guideline selection, guideline departure and guideline ranges. The Commission will want to preserve within the sentencing system some source of guilty-plea concessions, but stipulations and plea agreements affecting application of the guidelines would be the worst possible source of those concessions. Once such stipulations and plea agreements are authorized at all, there can be no practical way to structure their availability -- in the myriad factual circumstances relevant to guideline application --

on an evenhanded, predictable basis. They therefore have to be either permitted without restriction or prohibited and (where they occur) ignored. The former alternative would not only destroy prospects for uniformity and predictability in guilty-plea sentencing, but it would render the Commission's substantive judgments about various offense and offender characteristics irrelevant, by leaving prosecution and defense free rein to arrive at weakly supported or wholly counterfactual stipulations. This approach would only encourage, in flagrant fashion, the kind of guideline - circumventing tactics that Congress intended to prevent. Since there are ways to afford guilty-plea concessions with much greater consistency, there is no need to permit this sort of wholesale disregard of the guideline system.

The Commission's policy statements with respect to guideline applications should therefore instruct sentencing judges to put aside any stipulations affecting guideline selection, guideline departure or choice within the guideline ranges and to make all necessary factual findings on the merits. Similarly, the policy statements issued pursuant to 28 U.S.C. § 994(a)(2)(D) should instruct sentencing judges to give no weight to plea agreements recommending [Rule 11(e)(1)(B)] a particular application of the guidelines and should instruct them to reject plea agreements that require [Rule 11(e)(1)(C)] a particular application of the guidelines. The judge should make the necessary guideline application decisions on the merits, in light of the probation officer's presentence report and all other information available

at the time of the sentencing hearing. Finally, the Commission's policy statements should make clear that with respect to the judge's own guideline application decisions, a guilty plea does not in itself warrant sentencing toward the lower end of the guideline range; rather the guidelines themselves will specify the appropriate sentencing adjustment (as discussed below).

The approach I have recommended would not be wholly immune from evasion by determined prosecutors and defense counsel. Prosecutors could tacitly agree not to oppose defense claims about mitigating facts, and the probation officer might not be in a position to alert the judge to the potential weakness of defense arguments. But so long as the guidelines do afford reasonable opportunities for legitimate guilty-plea concessions, while at the same time making clear the impropriety of covert manipulation of the court's factual findings, evasive tactics by counsel should be unusual and the integrity of the guidelines system should be preserved overall.

2. Explicit discounts for guilty pleas and for related defense behavior.

The question whether to build into the guidelines an explicit guilty-plea discount appears difficult and sensitive, but the advantages of this approach are decisive. Guilty-plea concessions will exist somewhere in the sentencing process. If the guidelines do not explicitly provide for them (and particularly if a "real offense" approach simultaneously blocks negotiated concessions), those concessions necessarily will be either forced into less easily structured aspects of the

sentencing decision, or driven underground and left entirely beyond the reach of judicial control.

It is arguable that instead of including a guilty-plea discount in the guideline computation itself, the Commission should authorize concessions only through the vehicle of the charge-reduction plea agreement. This approach is not wholly unworkable, but it entails several disadvantages. First, it will force counsel to rely on charge reduction in virtually every negotiated plea case. This in turn will make guilty-plea concessions harder for the Commission to control, will produce excessive guilty-plea discounts when adjacent offense severity levels produce large differences in sentence, and will invariably distort the connection between the conviction offense and a proper description of the criminal behavior. Second, if the Commission chooses to focus on the severity of the "real offense," that choice will nullify most charge-reduction agreements and again insure that guilty-plea concessions are driven underground, where they will escape control altogether. Finally, reliance solely on charge-reduction agreements would mean the denial of any guilty-plea concession to the defendant who is willing to concede guilt without insisting on a negotiated "deal." Ironically, the one type of defendant most likely to deserve some sentencing consideration for genuine remorse would receive no concession at all. These problems suggest that the guilty-plea discount should be made an explicit part of the guideline computation and that it should be extended automatically to all those who plead guilty.

The bluntness of this approach disturbs some observers, who are troubled by making so clear the cost of exercising the right to trial. But there is no constitutional barrier to an explicit guilty-plea discount,⁹ and there is no longer any policy advantage in attempting to disguise a practice which is undoubtedly engrained in our criminal justice system and which is hardly a secret to anyone.

Assuming that some explicit guilty-plea discount should be an automatic feature of the guideline sentencing computation, I consider next four related questions: the amount of the discount, and the possibility of discounts for remorse, for cooperation and for jury waivers.

Amount of the discount. The discount should be small -- 10% or perhaps 15% at most. This is a crucial point because we are considering here the automatic discount that will be built into the guidelines and extended to all offenders on a uniform basis. Larger discounts would pressure a plea from the innocent defendant who has significant prospects for acquittal at trial; at the same time larger discounts would extend unwarranted leniency to the clearly guilty offender whose defense (if any) could be easily overcome at trial. The occasional need for larger discounts is best met on a case-by-case basis through charge-reduction agreements negotiated with prosecutorial approval and reviewed by the judge under Rule 11(e)(2).

9. See Schulhofer, Prosecutorial Discretion and Federal Sentencing Reform, vol. 1, pp. 93-106 (1979) [hereinafter cited as Prosecutorial Discretion].

Remorse. The guidelines should not authorize a separate sentencing discount, independent of or in addition to the plea itself, based on the judge's perception of "remorse." This is not because remorse is irrelevant to sentencing. On the contrary, remorse is quite relevant, but as soon as the guidelines provide a discount for remorse, the courts will be flooded with it. It is essential to limit any "remorse" discount to concrete, objectively demonstrable behavior that is not undertaken solely for purposes of influencing the sentence.

If a remorse discount of this limited kind can be successfully developed, the Commission should consider whether it would be possible to confer guilty-plea incentives solely in this fashion and thus avoid the need for an explicit guilty-plea discount. But several problems would need to be explored in this connection. First, many cases might inherently lack possibilities for exhibiting the limited, objectively identifiable sorts of remorse permitted to affect sentence. Some other guilty-plea inducement probably would be needed for such cases. Second, the defendant who does objectively exhibit remorse might still wish to go to trial. For example, defendants who cause physical injury or financial loss (by misleading an investment client, for example) might feel genuinely sorry for the harm done and might make full restitution, but they may still wish to contest any allegations of criminal intent. Since such defendants presumably would have earned the remorse discount whether or not they plead guilty, some additional incentive might be required, if the Commission wants the guilty plea to remain an

attractive option in such cases. For these reasons, the remorse problem probably warrants continued exploration, but it is not yet possible to conclude that a discount of this kind would displace the need for an explicit guilty-plea discount.

Cooperation. Demonstrated cooperation with the prosecution in the investigation and prosecution of other offenders is a legitimate sentencing consideration, but it should not be the subject of an explicit guideline discount. The importance of cooperation is too variable to permit the appropriate adjustment or range of adjustments be identified usefully in advance. This subject is best dealt with in the context of charge-reduction plea agreements and (for the most extensive cooperation) immunity agreements that fall outside the scope of the Commission's concern.

Jury waivers. Roughly 20-25% of federal criminal trials are bench trials, and there is evidence that decisions to waive a jury, like guilty-plea decisions, are sometimes prompted by significant sentencing inducements.¹⁰ If the sentencing system does not provide some mechanism for perpetuating these inducements, some portion of the bench trial cases (which numbered 1300 in fiscal 1985) could become jury trial cases after the guidelines go into effect. Alternatively, administrative pressures might require efforts to induce such defendants to plead guilty, but this result would be equally unfortunate, to

10. Tiffany, Avichai & Peters, A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-68, 4 J. Legal Stud. 369 (1975).

the extent that it forced defendants to forego their day in court and forced society to extend additional, arguably unwarranted sentencing concessions.

One possible source of the inducement to waive a jury will be the judge's general discretion in fact-finding and in setting sentence within the authorized sentencing range. But to rely on concessions in those areas would be awkward: if a sentence toward the bottom of the range is likely to be warranted regardless of the mode of trial, the defendant would not have this incentive to waive the jury. Moreover, to rely on the possibility of favorable judicial fact-finding means in effect to rely on judicial nullification and mislabeling in order to create an inducement that the sentencing system could just as easily make explicit.

The straightforward solution to these problems is for the Commission to build into the guidelines a small automatic discount for waiving a jury.¹¹ The unfamiliarity of this approach suggests the need for further study of its benefits and possible impact, but the Commission should devote serious attention to this often-ignored problem, because bench trials

11. There is no constitutional barrier to the use of this approach. See note 3, *supra*. Because it is the jury-waiver decision rather than the guilty-plea decision that generates most of the time savings for the courts (the average federal criminal jury trial takes 3-4 days, but 80% of federal criminal nonjury trials are completed in one day or less), it might be appropriate to allocate most of the automatic discount to the jury-waiver decision. Thus the guidelines could provide a 10% discount for the jury waiver and an additional 5% discount for the guilty plea. The flexibility needed to negotiate larger guilty-plea concessions in certain cases would be afforded through the vehicle of the charge-reduction plea agreement.

offer so many of the advantages of plea bargaining while avoiding the bulk of its problematic effects.

3. Charge-reduction decisions. How should the judge respond to a charge-reduction plea agreement? The principal options involve either discretion, deference, real-offense analysis or formal charge-reduction guidelines.

Discretion. The Commission could simply leave judges free to exercise their own best judgment in determining under Rule 11(e)(2) whether to accept or reject a plea agreement. This approach, however, is flatly foreclosed by the statute, which provides in § 994(a)(2)(D) that the Commission "shall" develop and promulgate policy statements to guide judges in the exercise of their discretion. The mandatory language of this section was undoubtedly chosen with care; the legislative history emphasizes the imperative nature of this duty and makes plain that the Commission may not choose simply to preserve unguided discretion in this area.¹²

Deference. In issuing its policy statements under § 994(a)(2)(D), the Commission conceivably could instruct sentencing judges to defer to prosecutors and defense counsel and to accept all plea agreements tendered under Rule 11(e)(1)(A), except under extraordinary (and unspecified) circumstances. Many prosecutors and defense attorneys would undoubtedly find this an

12. The 1984 Senate Report, supra n.6, at 63, states that the Sentencing Commission "is directed" to issue policy statements on this subject. Similarly, the 1979 Senate Report, supra n.6, at 1237, states that the language of the statute "would require" the Commission to promulgate such policy statements. See also 1980 House Report, supra n.6, at 501.

appropriate solution. But this approach would give counsel free rein to circumvent the guidelines by determining in their own unlimited discretion the seriousness of the offense upon which the guideline sentencing calculation would be based. Neither uniformity, predictability nor adequate deterrence would be assured. Indeed, this alternative is again clearly foreclosed by the Sentencing Reform Act. Congress contemplated that the guidance issued under § 994(a)(2)(D) would be substantive; the policy statements are intended to promote "judicial review of plea bargaining"¹³ rather than mere deference to the conclusions of prosecutors and defense counsel.

Real-offense analysis. A third alternative would be to base offense seriousness, for purposes of the guideline computation, on the actual offense behavior rather than the formal offense of conviction. This approach is attractive because it does appear to restrict the sentencing impact of prosecutorial charging and bargaining practices. Nevertheless, the statute and its legislative history probably prohibit the use of this technique, and in any event it suffers from numerous problems of fairness and feasibility.

The statute is not so emphatic with respect to real-offense sentencing as it is with respect to the matters of deference and discretion just discussed. Nonetheless, § 994(a)(2)(D) makes

13. 1984 Senate Report, supra n.6, at 63. Similarly, the report that accompanied the bill in which the § 994(a)(2)(D) requirement first appeared described that section as intended to provide an opportunity for "meaningful judicial review." 1979 Senate Report, supra n.6, at 1237.

clear that Congress intended for inappropriate charge reductions to be formally rejected, in the exercise of the judge's power under Rule 11(e)(2). To the extent that such rejections occur, the real-offense approach is of course unnecessary to correct the improper bargain; conversely, if a charge reduction is appropriate and is properly accepted under Rule 11(e)(2), it would then be absurd for a real-offense approach to nullify the very action that the policy statements contemplated by § 994(a)(2)(D) had authorized. In short, § 994(a)(2)(D) leaves no room for the proper operation of a real-offense policy, and the structure of that statutory provision would make no sense if a real-offense policy is to be pursued.

The legislative history reinforces this interpretation. The principal House Report dealing with the bill (and its predecessors) contains a long, unequivocal denunciation of real-offense sentencing.¹⁴ The Senate Reports are less clear because they do not criticize real-offense analysis in so many words. But the Senate Reports do state that the problem of prosecutorial charging discretion should be dealt with by formal charge-reduction guidelines and formal rejection of inappropriate charge-reduction agreements.¹⁵ Thus, like the statute itself, the Senate Reports opt for a solution to the problem that is different from and incompatible with real-offense sentencing.

The Congressional rejection of real-offense sentencing can

14. 1980 House Report, supra n.6, at 492-94.

15. 1984 Senate Report, supra n.6, at 63; 1979 Senate Report, supra n.6, at 1236-37.

be understood in terms of the numerous problems of fairness and feasibility that this approach would raise in the context of a guidelines sentencing system.¹⁶ First of all, the real-offense approach is costly and procedurally cumbersome. Real-offense characterizations are certain to be challenged by the defense. Cases involving charge reduction (i.e. potentially the great majority of the guilty-plea cases) would involve extended, contentious hearings rather than the expedited process that guilty pleas are supposed to permit. Moreover, the judge will be unable to count on vigorous prosecutorial opposition to these defense challenges. The prosecuting attorney who agreed to the charge reduction probably will not oppose it at sentencing, and his plea agreement may even bar him from doing so.¹⁷ The probation officer will have to defend the real-offense characterization on his own. Such proceedings are bound to be awkward and unsatisfactory methods for determining the true nature of the defendant's acts.

Second, the appearance of fairness is deeply threatened by the real-offense approach. The logic of basing sentence on actual behavior encompasses not only charge reduction in plea bargaining but also charges on which a defendant is acquitted (perhaps because of a reasonable doubt) at a contested trial. But consider the situation in which a defendant is charged with

16. For a more extended discussion, see Prosecutorial Discretion, supra n.9, at 62-72.

17. See, e.g., United States v. Crusco, 536 F.2d 21 (3d Cir. 1976). Compare United States v. Miller, 565 F.2d 1273 (3d Cir. 1977).

robbery (or murder) and the jury convicts only of theft (or manslaughter). Can the sentencing judge then apply the guideline applicable for robbery (or murder) on the ground that she finds such an offense by a preponderance of the evidence? To do so seems manifestly unfair, and probably would violate double jeopardy principles.¹⁸ Alternatively, the Commission could specify that the real-offense analysis does not apply after a contested trial. But this exception would undermine the logic of the real-offense approach while raising new problems of fairness. Why is the guilty-plea defendant singled out for the real-offense correction? If the charge-reduction bargain was inappropriate, why did the judge accept it in the first place? Even if most defendants understand the workings of real-offense analysis (an optimistic assumption), many certainly will think that acceptance of the charge-reduction agreement gives them a sentencing concession. The real-offense approach, where it actually works, will deprive such defendants of the value of their expected bargain.

Third, the real-offense approach is too inflexible. As already indicated, the sentencing system should allow for guilty-plea concessions somewhere. Even if an automatic discount is built into the guidelines, that discount -- being pegged at the level of the lowest concession appropriate for all defendants -- necessarily will be insufficient for some kinds of cases. What mechanism will be available for extending an additional guilty-

18. See Due Process, *supra* n.7, at 767 & n.144. Cf. Green v. United States, 355 U.S. 184 (1957).

plea discount? The Commission would have to instruct judges to rely on the real offense some of the time only. A policy stated in that form would hardly bring to the sentencing process the integrity that is supposed to flow from focusing on actual offense behavior. The Commission could (and presumably would have to) impose some limits on real-offense analysis by insisting on a kind of nexus between the offense of conviction and other charges that would count for real-offense purposes. Offenses unrelated to the offense of conviction probably could not be integrated smoothly into the real-offense analysis. But the drawing of this line would be difficult, and in any event it would fail to provide the needed flexibility at the right places. Guilty-plea discounts need to vary with the prosecutorial circumstances of the case, not with the formal charging categories that happen to be available.

Finally, the real-offense approach simply will not work. Its goal is to prevent charging and bargaining practices from circumventing the guidelines. But it cannot succeed in doing this because prosecutors can easily circumvent the real-offense analysis too. They can decline to defend the probation officer's characterization of the real offense and thus insure that this characterization will not survive a contested sentencing hearing. They can reduce charges three or four steps rather than just one, so that the outer bounds of the statutory range for the remaining charge (a mere misdemeanor, for example) prevent the judge from imposing the sentence that the real offense warrants. Even worse, they can seek conviction on a tangentially

implicated charge unrelated to the defendant's principal criminal behavior; the judge would have to overlook the real offense because it would not bear a sufficient nexus to the formal offense of conviction. In all these ways, real-offense analysis would fail to offset the disparities and distortions associated with plea bargaining; in fact real-offense policies would actually aggravate those distortions by rendering the nominal offense of conviction even less realistic than it is now.

Some of the foregoing problems were present, or lurking, in the real-offense policies pursued by the U.S. Parole Commission, but most of them were not. In the context of a sentencing guidelines system, a real-offense approach will prove wholly unsatisfactory in every relevant respect.

Charge-reduction guidelines. Nearly all of the difficulties of real-offense sentencing could be avoided by authorizing judges to do formally and unambiguously what real-offense analysis attempts to do by the back door -- namely, to restrict charge-bargaining and to reject inappropriate charge-reduction plea agreements. This is the approach for which Congress expressed a clear preference in § 994(a)(2)(D) and its legislative history.¹⁹

What should charge-reduction guidelines look like? A draft set of charge-reduction guidelines is attached as an Appendix to my testimony. The draft is, of course, simply illustrative. The formulation is one that emerged from an exploratory study

19. See 1984 Senate Report, supra n.6, at 63; 1980 House Report, supra n.6, at 501; 1979 Senate Report, supra n.6, at 1236-37.

conducted under the auspices of the Federal Judicial Center in 1978.²⁰ Its particulars still strike me as appropriate, but the important point, for present purposes, is that this approach provides a framework that can easily accommodate substantive judgments different from or even diametrically opposed to those reflected in the draft itself. I will therefore limit myself here to a discussion of the two organizing principles that, I believe, were decisive in persuading Congress that this was the path to take. These are first, the safety-valve feature and second, the distinction between conditional and unconditional charge reductions.

The safety valve is built into section D of the draft, which expressly authorizes the court to disregard the charge-reduction guidelines when appropriate in the interests of justice. This loophole will not render the charge-reduction guidelines meaningless, however. The section requires the judge to make explicit his reasons for disregarding the guidelines and to submit those reasons to the Commission in writing. This approach should be sufficient in practice to encourage good-faith compliance with the guidelines, while guaranteeing that the guidelines will never pose a barrier to the proper play of any legitimate consideration. In addition, the Commission, by monitoring compliance with the guidelines and studying the reasons offered for guideline departures, will be in a position

20. Prosecutorial Discretion, supra n.9, at 115-19. This formulation is cited with approval in all of the Congressional committee reports explaining § 994(a)(2)(D) and its predecessors. See, e.g., sources cited in note 19 supra.

to identify sources of regularity or disparity and to refine the guideline principles progressively over time.

Of course, the Commission can and probably should initiate the process of testing and refining charge-reduction guidelines now. Much could be accomplished before April 1987. But the Commission simply cannot and need not attempt to anticipate every plea bargaining problem that could arise. The safety-valve notion reflects a judgment that the essential problem at this juncture is for the Commission to bring existing sources of sentencing discretion into the open, to provide a framework for the exercise of that discretion, and to create a mechanism that will enable it to develop more specific substantive rules as better knowledge emerges. Real-offense sentencing will actually impede these goals because it will render so much of the relevant fact-finding discretionary and invisible; charge reduction with an explicit safety valve will preserve appropriate flexibility while insuring that we know just what prosecutors and sentencing judges are doing.

The distinction between conditional and unconditional charge reductions provides the second essential key to both the workability and the legitimacy of charge-reduction guidelines. There should be no judicial review or control over unconditional charge reductions, such as decisions to withhold charges or to dismiss charges under Rule 48(a), provided that those decisions are not in any way linked to a defendant's commitment to plead guilty. Such unconditional charge reductions involve the traditional charging discretion of the prosecutor, a discretion

that on separation of powers grounds probably should not be -- and on pragmatic grounds probably cannot be -- subject to effective judicial control. But charge reductions that are conditional upon the defendant's plea raise different issues. Here the charge reduction is used as the basis for an adjudication of guilt and a determination of sentence. Both are quintessentially judicial functions. Indeed, present law already grants the judge discretion to accept or reject a charge-reduction plea agreement. Charge-reduction guidelines applicable only to conditional charge reductions serve to structure this existing judicial discretion without in any way intruding upon the appropriate charging discretion of the prosecutor.

The focus upon conditional charge reductions is also essential to the workability of charge-reduction guidelines. This focus cuts the guidelines free from subjective and infinitely variable assessments concerning the strength of the evidence, the de minimus nature of the violation, or similar matters that cannot possibly be reviewed with any regularity by the courts. This is not to say that such assessments have no place in prosecutorial decision-making. On the contrary, they are perfectly appropriate considerations, and no American criminal justice system will ever function without them. The point is that where such considerations exist, they call for unconditional dismissal, and no question of sentencing policy is raised at all. In contrast, the legitimate justifications for a Rule 11(e)(1)(A) dismissal, which is contingent upon the defendant's plea, are generally narrower, and the court can

assess them without attempting to second-guess complex, pragmatic judgments.

An example may help illustrate the way that guidelines limited to conditional dismissals could work in practice. Suppose the prosecutor argues that a charge reduction is warranted because the evidence of factual guilt on the top count is not sufficiently strong. The judge need not weigh this evidentiary claim on the merits (with no one to present the other side of the argument), because the argument is in principle insufficient to justify conditional dismissal. In such a case the dubious charge should be dismissed unconditionally under Rule 48(a), and the defendant can then decide whether to go to trial, plead guilty immediately, or negotiate a plea agreement on the charges for which the government can prove guilt. Alternatively, the prosecutor may conclude that the top count is in fact legitimately triable and should not be dismissed outright. In that event, again, the defendant can decide whether to plead guilty or to seek a resolution of the doubtful issues of factual guilt at trial.²¹ The important point is that the prosecutor's assessment of the strength of the evidence is independent and unreviewable, but it does not in any way impinge on the court's

21. Note that the room for doubt about factual guilt presumably would be substantial in the latter case because the defendant was unwilling to waive his chances for acquittal in exchange for the automatic discount. If the case is an unusual one in which doubts about factual guilt warrant a negotiated "compromise" conviction, the attorneys could seek to persuade the judge to depart from the guidelines in the exercise of his safety-valve authority under section D of the model guidelines.

responsibilities for adjudication and sentencing.²²

An obvious problem with this approach is that it does nothing about the potential for unwarranted disparities in the unconditional dismissals or in the initial charging decisions. Those disparities can raise significant fairness problems and they can indirectly affect uniformity in sentencing. But I do not think it wise for a Sentencing Commission to try to do anything about them. So long as the initial charging decision is truly independent of the plea, substantial uniformity is likely to be present in practice. The forces generating uneven, unpredictable charging decisions increase many times over in the context of plea negotiation. So the problem of disparity in unconditional charging decisions exists, but it is insignificant compared to the enormous problems of disparity in charging decisions linked to plea negotiation. At the same time, courts simply cannot address unconditional charging discretion without relying on standards so vague and open-ended as to render their review meaningless. The experience in the State of Washington has made clear that an ambitious effort to control both conditional and unconditional charging practice will lead inevitably to amorphous standards that can defeat the prospects

22. Problems of proof not related to factual guilt pose different issues and arguably should be treated differently in charge-reduction guidelines. For discussion, see Due Process, supra n.7, at 793-94. In addition, a defendant's cooperation in the prosecution of other offenders would justify some reduction of charges. Although the judge would necessarily have to be satisfied that prosecution certifications about cooperation were tendered in good faith, U.S. Attorneys are in practice unlikely to mislead the court in this respect and the dangers of abuse seem limited.

for any effective control at all.²³

There is a catch in all of this, and that is the need to assure that ostensibly unconditional dismissals are not tacitly linked to a defendant's commitment to plead guilty on the remaining charges. Similarly, prosecutorial decisions to withhold charges from the outset must not be linked to preindictment commitments concerning the plea. There is no airtight method of preventing such covert agreements, but under charge-reduction guidelines they would likely be very unusual in practice. Tacitly conditional decisions to withhold or dismiss charges would be very dangerous for the prosecution because there would be no reliable way to induce defendants to uphold their part of the bargain.²⁴ Once the more serious charges were out of the picture, defense counsel would have to advise that the remaining benefits of a guilty plea were limited, and defendants could then choose to go to trial. Any attempt to reinstate the dismissed or withheld charges would place the prosecutor in the awkward position of revealing his illicit tactics to the court, and in any case reinstatement would pose severe difficulties under both the Speedy Trial Act and such due process decisions as

23. The Washington legislature, recognizing the difficulties that had arisen in Minnesota (see note 8 supra), required its Sentencing Commission to promulgate "prosecuting standards," but the standards adopted are so open-ended that judicial review can be only sporadically effective. See Rev. Code of Wash., § 9.94 A.430 et seq. (West Supp. 1986). See also Boerner, Sentencing in Washington 12-1 through 12-56 (1985).

24. The dynamics are discussed in more detail in Prosecutorial Discretion, supra n.9, at 106-113.

Blackledge v. Perry.²⁵ Moreover, there would rarely be any need for a prosecutor to take these risks because the charge-reduction guidelines themselves afford adequate scope for overt charge bargaining and give the prosecutor every incentive to disclose the real charge-reduction agreement to the court, even in unusual cases.

Evasive tactics to circumvent the guidelines cannot be ruled out altogether of course, but real-offense analysis can also be evaded, and much more readily. Moreover, even in the absence of bad faith, the real-offense approach remains awkward, because the judge's ability to control plea-agreement practices is dependent on factual assessments requiring resources that as a practical matter the probation officer will not realistically be able to provide. In contrast, the formal charge-reduction approach cuts judicial review free of elusive evidentiary determinations and requires prosecutorial cooperation only in ways that are most likely to be forthcoming in practice.

Charge-reduction guidelines thus offer the best prospects for preventing circumvention of the guidelines, while at the same time preserving needed flexibility and maintaining the existing proportions of pleas and trials. I urge the Commission to

25. 417 U.S. 21 (1974). United States v. Goodwin, 457 U.S. 368 (1982), is distinguishable: there the charges presumably had been increased because of a normal reevaluation of the case in the course of pretrial preparation, and there was therefore no reason to believe that the prosecutor was engaged in self-vindication; the court made clear that Blackledge would apply where (as in the situation we are considering) the prosecutor attempted "to punish [the defendant] for doing something that the law plainly allowed him to do." 457 U.S., at 384.

reconsider the apparent advantages of real-offense sentencing, and in lieu of that approach to begin a vigorous effort to develop the kind of explicit, openly enforceable charge-reduction guidelines upon which Congress itself clearly and wisely intended to rely.

Appendix

MODEL CHARGE-REDUCTION GUIDELINES

A. When any plea agreement described in rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure is submitted for the court's approval pursuant to rule 11(e)(2), the court shall require the attorney for the government to disclose the considerations thought to warrant dismissal of any charges pursuant to the plea agreement. Such disclosure shall be made in open court on the record, except as provided in paragraph B(4).

B. In determining whether to accept or reject such plea agreement, the court shall be guided by the following principles:

(1) The savings of time and expense for witnesses, the parties, and the court resulting from disposition by guilty plea shall not justify the dismissal of any pending charges. The sentencing guidelines provide for a sentencing adjustment that gives appropriate weight to this consideration.

(2) Ambiguities of fact or difficulties of proof that raise a question concerning factual guilt shall not justify dismissal of any pending charges.

(a) If the government concludes that there is no reasonable doubt concerning factual guilt and the defense disputes this position, the charge-reduction agreement shall be rejected and the dispute shall be resolved by trial.

(b) If the government concludes that there is a reasonable doubt with respect to factual guilt on any charge, it may move for dismissal of that charge under rule 48(a). Such motion shall not be contingent upon the defendant's plea with respect to any remaining charges, and if any such motion is granted, the court shall enter an order continuing for at least seven days any proceeding involving the defendant's decision whether to tender a guilty plea to any remaining charges.

(3) If the availability or admissibility of significant evidence is substantially in doubt, for reasons not related to factual guilt, the court shall accept the plea agreement to the extent that it provides for reduction of the charges by one level of seriousness.*

(4) If the defendant has agreed, upon acceptance of the plea agreement, to cooperate in the investigation and/or prosecution of other persons, and if the attorney for the government certifies that such cooperation is expected to be of significant value and cannot be obtained by other means, the court shall accept the plea agreement to the extent that it provides for reduction of the charges by one level of seriousness.* The justification set forth in this paragraph may, in unusual cases, be presented to the court in camera under seal, but such justification shall remain part of the record. The charge reduction authorized by this paragraph shall be in addition to any charge reduction authorized pursuant to paragraph (3).

* When multiple charges are pending, the court may dismiss any charge or charges to the extent that such dismissal has the effect of decreasing the potential punishment by an amount not to exceed 25% of the penalty prescribed for the most serious offense committed. If the court approves a dismissal or reduction in grade that reduces by one seriousness level the most serious offense charged, the court may not in addition approve the dismissal of any other charges pursuant to this paragraph.

C. In determining the sentence to be imposed following conviction pursuant to any plea agreement described in paragraph B(3) or (4), the court shall also give to the guilty plea the weight specified in the sentencing guidelines.

D. The court may, in the interests of justice, accept a plea agreement in circumstances not authorized by paragraph B, or reject a plea agreement required to be accepted by paragraph B, but in any such case the court shall state in open court, for the record, its reasons for departure from the principles set forth in paragraph B and shall submit a copy of that statement to the sentencing commission on the form prescribed for this purpose.

E. Except pursuant to a plea agreement formally disclosed to the court as required by rule 11(e)(2), the attorney for the government shall not agree either to refrain from presenting any charge or to seek dismissal of any pending charge on the condition that the defendant plead guilty to any other federal charge. The court shall ensure compliance with rule 11(e)(2) and with this paragraph by appropriate scrutiny of the circumstances surrounding any indictment or information on related charges filed subsequent to the defendant's arraignment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
PROBATION OFFICE

GERALD J. BONNAFFONS
CHIEF PROBATION OFFICER

August 28, 1986

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Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

This is in response to your letter of August 20, 1986.

GUILTY PLEAS

As I appreciate case law in this subject, a lesser sentence for a guilty plea can be supported and justified as a guilty plea and the defendant's expressions of contrition and remorse can be considered as a step towards rehabilitation. However, for the Sentencing Commission to build in a "downward sentencing adjustment for defendants who plead guilty" will certainly leave the guidelines vulnerable to attack, probably on constitutional grounds. I believe the guidelines should be broad enough to allow for the court to consider a sincere expression of remorse by the defendant, as opposed to an obviously fabricated defense during trial.

PLEA AGREEMENTS

Before discussing this question, I would first like to acknowledge that I am not a strong proponent of the plea agreement process. I recognize, of course, the purpose that the plea agreement serves to law enforcement officials and prosecutors, its importance in moving cases, and one would have to be naive not to understand why defense attorneys strongly support such a system. However, everyone involved in the criminal justice system is no doubt aware of the pitfalls of the liberal use of plea agreements, and I need not elaborate on them.

That said, I will now state the obvious - the Commission must establish policies that assure that sentencing remains in the hands of the judge. I believe there are two areas where the Commission must direct attention in order to ensure that this occurs. First, it seems absolutely necessary that the sentencing judge be provided a description of the total offense behavior, and that the guidelines allow for sentencing as to the overall criminal activity, not just the convicted offense (limited, of course, by the statutory penalty). To do otherwise, would give the prosecutor an inordinate amount of authority over the sentencing process, a situation which exists in some state systems. As to the suggestion that the prosecutor and defense attorney stipulate to the underlying facts of the offense, I must raise the question "Will this inhibit the probation officers' investigatory responsibilities?" For example, the probation officer will interview the investigating agents and might possibly get a version somewhat different than that stipulated to.

Honorable William W. Wilkins, Jr.
August 28, 1986
Page Two

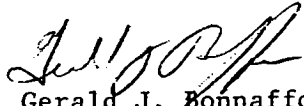
The second area where the judge's control must be maintained is with regards to the plea agreement itself. The court must have the authority to reject a plea agreement, particularly when the offense charged does not truly reflect the alleged criminal behavior, but also when the plea agreement inhibits the court's ability to impose justifiable penalties (e.g., complete restitution). As to Rule 11(e)(1)(C), in this district we do not engage in such plea agreements and I personally believe that such plea agreements should be utilized in only the most exceptional circumstances.

COOPERATION

The impact of a defendant's cooperation on the sentence imposed is an area of considerable dispute, as you well know. Moreover, I believe the "rating" of cooperation will always be a subjective matter. Also, to try to quantify cooperation and adjust the sentencing guidelines accordingly, will place before law enforcement officers, prosecutors, the defendant and his attorney, the temptation of trying to predict a specific sentence because of a particular level of cooperation. Therefore, while I believe cooperation should be recognized in sentencing, and that the prosecution should be permitted (or required) to describe this cooperation in a letter to the court, I don't feel that we should specify the "downward adjustment" for cooperation in the guidelines.

I hope this information is useful to the Sentencing Commission.

Sincerely,


Gerald J. Bonnaffons

GJB:db

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL DISTRICT

ALVIN B. RUBIN
CIRCUIT JUDGE
SUITE 2440 ONE AMERICAN PLACE
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August 25, 1986

William J. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

Dear Mr. Wilkins:

In response to your letter of August 20:

GUILTY PLEAS

Guidelines should make no distinction between a defendant who pleads guilty and one who stands trial and is subsequently found guilty. The circumstances surrounding the guilty plea, the remorse of the defendant, and other matters might justify a difference in sentencing, just as they would in the case of a defendant who has been found guilty after trial, but the fact of pleading guilty per se should not warrant a difference in sentencing. To include a provision in the guidelines to the effect that sentence should be mitigated in some way based on the guilty plea would, in effect, penalize a defendant who elects to stand trial.

PLEA AGREEMENTS

Rule 11, as interpreted traditionally, appears to me to be adequate. I have seen no efforts to circumvent the purposes of the criminal law by stipulations as to the underlying facts of the offense and the offender's behavior. Charge bargaining has not been the problem in federal courts that it is in state courts. To the extent that multiple charges are used (e.g. charging conspiracy and the substantive offense or offenses)--actions that I think represent an abuse of prosecutorial discretion in some instances--I do not think these can be alleviated by provisions concerning plea agreements.

Cooperation: the sentencing guidelines should provide that sentence should be mitigated to the extent of genuine cooperation with authorities because such cooperation does assist law enforcement and because it shows, at least to some extent, that a return to a "proper" course of conduct.

Different levels of cooperation should, I think, be objectively identified and given different relative downward adjustments. Thus, a defendant who imperils his own safety or the safety of his family by cooperating should be given greater consideration than one who does not run those risks. The sentencing court should decide the appropriate level of downward adjustment. If there is a dispute regarding the level or quality of cooperation, it should be resolved by a hearing before the sentencing judge.

Very truly yours,

A handwritten signature in black ink, appearing to be 'ABR' followed by a stylized flourish.

ABR/mr

standards should a sentencing judge apply in evaluating whether a plea agreement is acceptable according to the letter and spirit of the sentencing guidelines? How does the Sentencing Reform Act impact on "charge bargaining" under Rule 11(e)(1)(B) and "sentence bargaining" under Rule 11(e)(1)(C)? To what extent can prosecutors and defense attorneys stipulate to the underlying facts of an offense and the offender's behavior when such factors mandate a certain sentencing result?

COOPERATION

What recognition, if any, should the sentencing guidelines give offenders who cooperate with authorities? What public policy considerations are involved in encouraging offenders to cooperate in investigations and prosecutions? Should different levels of cooperation be objectively identified and given relative downward adjustments from the otherwise applicable sentence? If so, who should decide the appropriate level or downward adjustment: the sentencing court, the prosecutor in a written certification to the court or the prosecutor and defense attorney in a written agreement? How should disputes regarding the level or quality of cooperation be resolved?

with the assistance of

Your response would be most helpful if received prior to the September 23, 1986 hearing. The Commission appreciates your interest in our work and looks forward to your comments.

Sincerely,

William W. Wilkins, Jr.

William W. Wilkins, Jr.
Chairman

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August 25, 1986

United States Sentencing Commission
1331 Pennsylvania Ave, NW
Suite 1400
Washington, DC 20004

Dear Folks:

This is in response to the specific inquiries contained in your letter of August 20, 1986.

GUILTY PLEAS

This question raises what I believe to be one of the most serious problems of current federal sentencing. Our systems stands solidly for the proposition that everyone is entitled to their day in court. There are no lead pipe cinch cases in which it is clear going in that the Defendant is going to be acquitted. Most judges before whom I appear charge what we call "courtroom rent." In other words, if a defendant decides to stand on his rights and force the government to its proof and is convicted, he or she will ordinarily pay a heavy price for having used the courtroom to no avail.

I therefore feel very strongly that no distinction should be made. We should not penalize defendants who choose to do what the system guarantees to them.

Others will argue that such an approach will dramatically increase the number of cases tried in the federal courts. This argument has merit. Defendants who have nothing to lose by going to trial will insist upon trials more often. The problem becomes one of determining whether they really have nothing to lose. Even if the number of trials goes up as a result, isn't this our commitment to our citizens? Shouldn't every accused in this country be entitled to exercise his or her rights to a trial by jury without fear of being penalized as a result?

The resolution of this problem really goes to the very foundation of our system of criminal justice in this country.

Although we currently have a system which in many cases penalizes defendants for going to trial, it is not written that such is an appropriate or desirable outcome. We will really work a fundamental change in the relationship between government and

Sentencing Commission, Page 2 - - -

the governed if we write, for the first time, that it is appropriate to penalize for going to trial or reward for not going to trial.

If the theory of penal sanctions has any meaning, then like offense should be treated alike without regard to the manner of disposition of the offense. Why is a person who chooses to go to trial entitled to enhanced punishment? How does that make him or her a more heinous offender?

It is important to keep firmly in mind that the criminal justice system does not deal with issues of moral guilt or innocence. Whether or not, in fact, the defendant committed the acts charged, is not an issue in criminal trials. The issue is the ability or non-ability of the government to prove guilt beyond a reasonable doubt. A guilty plea, is, therefore, not a confession of moral guilt, but an agreement that the government could prove legal guilt beyond a reasonable doubt.

PLEA AGREEMENTS

The questions here raise another interesting and very troublesome area, somewhat akin to that raised above.

Presumably, the entire purpose of the Sentencing Commission is an effort to provide some kind of uniformity in sentencing in Federal Courts. In some degree the Commission was designed to reduce the very large disparities currently occurring in the United States.

Since 90% of dispositions today are based upon some sort of plea agreement, and since some large percentage following the institution of guidelines will no doubt continue to result from plea agreements, this is no small issue. If we are going to leave the disposition of 80% to 90% of the dispositions up to prosecutors and defense lawyers, the guideline will surely fail to accomplish their objective. On the other hand, no matter how carefully crafted, the guidelines will fail to adequately account for the uniqueness of individual cases.

It would seem that in the area of "charge bargaining" it really should be up to the prosecutor what charges he or she finally want the case to be disposed on. If the prosecutor decides to dismiss the majority of the counts against a defendant, this should simply not be a concern of the court. Charge bargaining, I suspect, has little impact on final outcomes, since concurrent sentencing is the rule, rather than the exception.

Sentence bargaining, however, is a more serious matter. If sentencing guidelines are going to work, then they must apply with full force to "sentence bargaining."

Regarding stipulations of evidence, the defense attorney should never be permitted to stipulate facts on behalf of his or her client. Only the defendant should be permitted to stipulate facts, the stipulation should be clear, and the defendant must be fully and completely advised by the court as to the consequences of the stipulation.

COOPERATION

A great deal of the "cooperation" which goes on in the courts of this country results from law enforcement laziness. It is simply much easier to turn a co-defendant than it is to do a proper and thorough investigative job in the first place. It is also much easier to change the facts of a case to suit the government's theory when the government is permitted to purchase testimony. What is the cash value of 10 years in prison? \$100,000? \$200,000? How likely is it that "turned" defendants, who are admitted violators always tell the unvarnished real truth?

A defendant who purchased favorable testimony, and his lawyers would likely be indicted for obstruction of justice for having the audacity to engage in such reprehensible behavior. Prosecutors, however, do it daily and judges are regular aiders and abettors of the practice. Some kind of restriction and control needs to be imposed on this process.

What though of the truly repentant individual who wishes to bare his soul and testify against his compatriots if need be? Shouldn't this person receive some kind of consideration? On the other hand, what about the truly repentant individual who wishes to bare his soul who has no compatriots to testify against, but would be willing to do so if they existed? Is there any rational basis to distinguish between these two persons? I think not, and yet, the current system distinguishes between them dramatically.

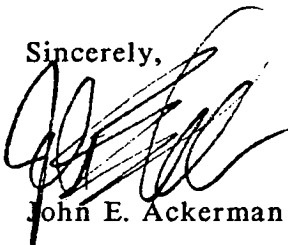
There should simply be no possible downward adjustment below the guideline floor. The prosecutor's role should be limited to informing the judge of the nature and extent of the cooperation. The judge who presided over the trial in which the cooperating individual testifies, should, as often as possible, be the judge who imposes sentence on the cooperator.

CONCLUSION

I hope my random and rambling thoughts regarding the issues raised by your letter will be of some help. These issues are very complex and in many ways highlight the crux of the sentencing problems in this country. There are no easy answers to the questions. If there were it would have been unnecessary for you to ask them.

If I can be of any further service to the Commission please do not hesitate to call upon me.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Ackerman", written over a horizontal line.

John E. Ackerman