

Attorney-at-Law

Plea Agreement Pitfalls and Mindfields

By Marcia G. Shein, esq.

In federal or state court the plea bargain is a difficult and important decision. Sometimes a plea bargain is necessary in order to resolve a defendant's case with the most potential for mitigating the outcome. It is hard to make the decision to plea bargain but on occasion, good offers are made by the government that are both reasonable and fair in light of the totality of the circumstances and the evidence that may be overwhelming to your attorney's ability to mount a successful defense. Pleading guilty has both direct and collateral consequences. The direct consequences are that you agree to plead guilty to a particular crime with either a sentencing limitation or a broad-based sentencing range depending on if you are a state defendant governed by state sentencing guidelines or a federal defendant governed by the Federal Sentencing guidelines. The collateral consequences of pleading guilty are that you have a conviction and that conviction, should you get in trouble a second time, could be used against you to enhance any additional term of imprisonment.

There are pitfalls to plea bargaining and you must be wary of them. If you agree to cooperate with the government you must

do so one hundred percent in order to get any benefit in the plea bargain or the sentencing disposition. If you withhold anything or mislead the government in any way, that misinformation will come back to haunt you even if you otherwise gave substantial assistance. Frequently we see minor infractions of the cooperation agreement being used to dismantle the entire cooperation benefit even though the government retains the information that was given.

Another pitfall is to not get clarification as to the impact of any prior record on your sentence whether it be for recidivist activity or, under the Federal Sentencing Guidelines, career criminal or armed career criminal enhancement provisions. (See U.S.S.G. § 4B1.3 and § 4B1.4). It is also important to be sure, if you can, to get everyone to agree as to what relevant conduct will be used at sentencing as the total offense behavior. Frequently we see, during the plea bargaining process, an open-ended plea agreement with an understanding of what you believe to be the outcome but without clarification of all relevant conduct on the written or oral record. It is my belief that the oral record, or the written record, should reflect what evidence the government has that would support the findings of fact the court will use to identify what sentencing guidelines should apply to your case. Frequently, this is left open-ended for the probation officer to present to the court in a

presentence report. The presentence report is subject to objections, however, frequently the presentence report comes back much more severe than what a defendant believed was expected based on the plea agreement. In other words, if you plead guilty to one count of a multi-count indictment it does not mean that the dismissed counts will not affect the sentence. In the federal system this is called relevant conduct pursuant to U.S.S.G. § 1B1.3. Relevant conduct is different for every defendant, however, not knowing what that relevant conduct will be can affect how the sentence will be imposed. If you can get clarification as to what the government's evidence would show it might avoid a conflict between the prosecution and the probation office as it relates to the presentence report and eliminate some of the objections to the presentence report that will have to be made if the presentence report is adverse to what the defendant believes should have happened.

Of note in recent Supreme Court action is the case of United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005) and Rita v. United States, 127 S. CT 2456. In Booker, the Supreme Court determined the Federal Sentencing Guidelines were no longer mandatory and are now advisory. Being advisory meant that more cases for mitigation would be presented to the court for decisions outside the guideline range both in aggravation and mitigation of the sentence. However, in Rita, the Fourth Circuit

determined that the guidelines were presumptively reasonable and the Supreme Court upheld the decision of the Fourth Circuit indicating that there is a presumption that the Federal Sentencing Guidelines are reasonable but that they are not mandatory. This has now led to a pending Supreme Court matter dealing with whether or not the pre-Booker standard of applying departures under an "outside the heartland" analysis is still applicable to a sentence below the guideline range or is there a "reasonableness" standard for sentences that depart from the guidelines. It is very important to be sure that any sentencing objections that are filed are in writing, thorough, and supported by fact and law. We encourage defense team work in this arena of activity when a lawyer is not familiar with this type of legal analysis. It is always helpful, if you can afford it, to have more than one attorney represent your interests and direct that defense team approach to both the trial lawyer and a lawyer who specializes in post-conviction matters, especially sentencing mitigation.

Should you run into complications regarding your plea or if you feel it was not knowingly and intelligently entered, it is best to discuss that with the court at the time the plea is taken or the sentence is imposed. Preserving the record for appeal is very important and to do that you have to make the appropriate objections.

A motion to withdraw a plea is based upon a defendant's demonstration that the motion is for a fair and just reasons. See United States v. Schwartz, 785 F.2d 678 (9th Cir.) *cert. denied*, 479 U.S. 890 (1986). The decision to allow the withdrawal of a plea is left to the sound discretion of the court. United States v. McCarty, 99 F.3d 383 (11th Cir. 1996). A defendant may challenge a guilty plea on the grounds of ineffective assistance of counsel preventing defendant from entering a knowing and voluntary plea. See Hill v. Lockhart, 474 U.S. 52 (1985); Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Brady v. United States, 397 U.S. 742, 748 (1970). A plea cannot be voluntary and/or intelligent if the advice given by counsel, upon which the defendant to his detriment relied upon. Hill v. Lockhart, *supra*.

Rule 11 of the Federal Rules of Criminal Procedure governs plea agreements and, among other things, prohibits judicial participation in the plea discussions with the criminal defendants. (Federal Rules of Criminal Procedure 11(c)(1); United States v. Baker, D.C. Circuit, Case No. 05CR00364-01 (June 5, 2007)). Most states have similar rules of criminal procedure. Sentencing and plea bargaining outcomes and practices do vary from district to district and state to state which may result in markedly dissimilar outcomes in similar cases. This alone does not allow you to withdraw your plea.

Frequently, plea bargaining agreements will also require waivers of appeal or post-conviction relief. When this waiver is incorporated into the plea it is usually because there is nothing to appeal in the pretrial capacity. Most plea bargains that do not include this allow for appeals on such matters as suppression if there was a good faith and reasonable belief that the suppression (Fourth Amendment, Illegal Search and Seizure) could prevail after further appellate review. However, watch for this language in your plea as it will keep you from being able to file a direct appeal and a post-conviction habeas corpus petition. Some exceptions have been incorporated into these waivers, particularly as it relates to habeas corpus petitions still being allowed to pursue claims of ineffective assistance of counsel or prosecutorial misconduct.

Some courts have barred any further review on appeal, even under the provisions of Booker when an appeal waiver exists within the plea agreement. See United States v. McGilvery, 403 F.3d 361 (6th Cir. 2005); United States v. Cortez-Arias, 425 F.3d 547 (9th Cir. 2005); United States v. Morgan, 386 F.3d 376 (2nd Cir. 2004). However, see also, United States v. Alford, 436 F.3d 677 (6th Cir. 2006).

Finally, there are additional pitfalls that have started to appear in relationship to federal plea bargaining in particular. The government has been incorporating within the contents of the

plea agreements an agreement to be sentenced within the guidelines and not to seek any departures pursuant to the advisory nature of the guidelines. The government is also putting into their plea agreements waivers of Apprendi v. New Jersey claims and other Supreme Court decisions. At least one circuit court has held that while such waiver may be a valid element of a plea agreement between the defendant and the government, the district court may not impose the waiver as a condition of entry of a plea. United States v. Burling, 420 F.3d 745 (8th Cir. 2005).

Be wary of the special waivers of particular cases and guideline issues as this is an attempt by the government to circumvent Supreme Court precedent and to restrict the court in making more reasonable findings that may not be within a particular guideline range. If you can keep these waivers out of your plea agreement it is in your best interest.