Criminal Law & Procedure

Federal Plea Agreements: The Engine That Drives the Prosecution of Increasingly Complex Crimes

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There has been much controversy and criticism, from academia, the bench and the criminal defense bar, over the use of plea agreements to resolve criminal controversies. Indeed, a panel of the federal Tenth Circuit Court of Appeals in *United States v. Singleton*[1] held that plea agreements and subsequent motions filed by federal prosecutors on behalf of cooperating witnesses seeking a more lenient sentence rose to a level of public bribery criminally proscribed by Title 18 Section 201(c)(2) of the United States Code.[2] While the holding in *Singleton* was overturned in less than six months by the Tenth Circuit sitting *en banc,* the entire plea bargain/agreement issue remains a hot topic in the criminal law milieu. This article will attempt to present a practical view on the crucial role plea agreements[3] and Section 5K1.1 motions play in the investigation and prosecution of complex federal cases.

The plea bargain, defined here as a written agreement between the federal government and an uncharged federal criminal target which offers an opportunity for a the target to earn a chance at a lesser sentence based on substantial assistance to the government, is perhaps the single most effective tool available to the government to infiltrate criminal and terrorist organizations. Some courts have insisted that the federal government has at its disposal a vast arsenal of investigative and coercive weapons, including:

> ...the power to call persons before a grand jury; to send out FBI agents with the authority of that office to interview potential witnesses; the power to grant immunity which erases a person's Fifth Amendment privilege and compels the person to testify; the power to decide who to charge with what criminal offense; the power to indict, to dismiss and reduce charges.[4]

Despite the foregoing roster of government powers, all of those tools, many of which evaporate by the mere assertion of the Fifth Amendment by a target of an investigation, pale in comparison to the surgical utilization of an individual working on behalf of federal authorities inside of a criminal enterprise. As current events continue to play out, this writer believes that plea bargaining will take on an even more significant role in terrorism and major corporate corruption scandal cases as well as the traditional white collar, RICO and drug organization prosecutions.

This article will be divided into three sections. The first will briefly summarize two of the key criticisms of the plea bargaining process in both the academic and judicial spheres. The second will explore the policy reasons and practical daily use of the process, including the constitutional protections which are in place to not only protect the cooperator, but also the persons against whom they will ultimately testify. In the third and final section, an attempt to place plea agreements within the logical framework of responsible citizenship will be presented.

I. The Criticism of Plea Bargains

Those who dislike plea bargains constitute a very diverse and vocal congregation. The body of literature dealing with the perceived faults of plea bargaining is overwhelming. Out of the cacophony of complaints, for purposes of this article the two most historically resonant and consistent grievances will be reviewed.

The first criticism, led by the widely respected law professor Albert W. Alschuler, approaches the issue from a humanist perspective and takes the position that plea bargains, "depreciate the value of human liberty and the purposes of the criminal sanction by treating these things as commodities to be traded..."[5] This group asserts the concept was first considered by the Roman slave Publilius Syrus who wrote in the first century B.C., *"beneficium accipere libertatem est vendere,"* which roughly translates: to accept a favor is to sell one's liberty.[6] This group finds it offensive when a defendant is penalized for exercising the basic constitutional right of having his case tried before a jury of his peers. Put another way, if an innocent person receives a more severe sentence after a trial after turning down a more lenient plea offer, critics submit that plea bargains systemically undermine the integrity of the criminal justice system. Judge Fine of the Wisconsin State Court of Appeals eloquently summarizes this group's perceived evil of the existing plea bargaining system in arguing that, "[the defendant] was 'punished' the moment he demanded what the constitution said was his – the right to plead not guilty and have a jury decide his guilt or innocence."[7]

The other major complaint, which is much more cynical, was crystalized in *Singleton ,* which sets out that prosecutors in essence "buy" co-conspirator testimony by offering reduced sentences. As the three judge panel of the Tenth Circuit held, "The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money."[8] One court has held,

"It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."[9]

While the critics of plea bargaining, on the surface, present compelling arguments against the practice, a more in depth analysis discloses that written plea agreements significantly benefit not only the individual accused of the crime, but also society at large.

II. Practical Benefits of Plea Agreements to the Defendant and the Government

A. Plea Agreements Save Resources

The first and most obvious benefit to both the government and the defendant is that the defendant who admits his guilt avoids the time and expense of trial and potentially spends less time in government custody. The defendant can return to his life, family and friends that much sooner. Some commentators have suggested that the entire process of the defendant accepting responsibility for his actions and making intellegent decisions initiated by the plea agreement process may begin the criminal defendant's first step towards rehabilitation, which benefits society at large.

Moreover, from an economic standpoint, criminal defendants generally expend much less in legal fees, investigative and litigation expenses on a plea agreement than on a full blown jury trial. As there are inevitably economic challenges facing most defendants after conviction and incarceration, the money better serves him in his own pocket rather than that of his defense attorney's.

The government benefits directly because at the very least, it obtains a conviction, puts a criminal in the penitentiary for a period of time and does not have to expend the additional personnel, material and economic resources to convict the defendant at trial. While it is true that most criminal cases tried in a United States District Court result in a conviction for the government, most laymen and academics do not understand the prodigious amount of resources which must be expended by the prosecution, ultimately financed by the taxpayers, to raise the probability of unanimously convincing twelve persons beyond a reasonable doubt that a fellow citizen should be convicted of a crime and face incarceration.

A federal prosecutor preparing for a complex white collar jury trial, must put aside other casework to allow him to focus in detail on what is required to win the trial. Evidence, which has been gathered sometimes for months or years, is physically transported to the prosecutor's office and formally organized. Proof of fact sheets and trial binders are readied. Witnesses are frequently flown in from out of town, fed, housed and prepped. Other lawyers in the office are lassoed in order to add fresh intellectual wattage to arguments, examinations and cross-examinations. Other resources such as clerical personnel are diverted from routine duties to assist with trial preparation.

In more significant cases to the public, juror questionnaires are designed, distributed and analyzed. Prosecutors sometimes must travel to the Department of Justice in Washington, D.C. to confer with Department officials on policy issues. In short, the level of excellence required both by the individual prosecutors and the Department require intense activity for extended periods. A written plea agreement achieves substantially the same result with the added benefit of the defendant's cooperation.

Moreover, there is a certainty of outcome for both the defendant and the government. The defendant benefits because he is not exposed to a parade of witnesses rendering a long catalogue of his criminal acts to the judge who will ultimately sentence him. The government benefits because it can place its resources on other cases or expand the current case to higher levels using the information or activity provided by the defendant's plea agreement.

In cases involving public figures, the plea guarantees that the plethora of problems which arise in that type of highly publicized tension filled atmosphere will not be present. The public figure benefits by not enduring week after week of negative trial publicity; generally a plea results in a briefer press involvement.

B. Plea Agreements Help Victims Economically and Emotionally

Victims of the crime clearly benefit from plea agreements. As the complexity of crimes has continued to increase, there has been a concomitant evolution of economic items included in plea agreements. Especially in traditional white collar economic fraud cases, the agreement by the defendant and the government on the exact amount of economic loss greatly benefits the individuals from whom the money was purloined. The candid, sworn and written detailed disclosure of financial assets by the defendant avoids a sometimes extended and laborious cat and mouse game. Moreover, the agreement to not seek bankruptcy to discharge court ordered restitution protects those potential funds. Further, the agreement of the defendant not to contest civil or criminal forfeiture actions streamlines the process of attempting to compensate the victim. Too often, the defendant's assets are depleted after a long and ultimately unsuccessful jury trial. These tangible economic benefits for the victims are generally not available in contested jury trials.

One other victim-related benefit plea bargains render is that victims do not have to relive the crimes perpetrated against them by retelling the story on the witness stand. The victim is also relieved of the chore of extensive and frequently intense trial preparation by the prosecution team, which requires the detailed retelling of the events slowly and deliberately. Cross-examination is yet one more opportunity to relive the events. Perhaps those who have personally witnessed the spiteful, vicious, personal and irrelevant cross examinations of elderly or vunerable victims by

defense attorneys preening for their clients or seeking to undermine the witnesses' credibility in front of the jury have the greatest appreciation of the advantage of plea agreements on an humanitarian level. While generally not applicable to federal cases, the same benefit would obviously apply to young victims of child sexual offenses in state cases.

Plea bargains offer the additional benefit of certain and relatively quick closure for victims. Even a casual glance at network or cable new shows will invariably reveal a story of crime victims suffering through yet one more continuance or procedural delay of a trial. This drawing out of the process undermines confidence in the entire criminal justice system. Plea agreements moot all of those issues. A crime victim knows with certainty either at the guilty plea or sentencing who is responsible, why they committed the offense, how long they will be incarcerated and in economic crimes how much restitution will be ordered. In violent crimes, a family can close one part of an unpleasant chapter of their lives with relative swiftness and certainty.

C. Plea Agreements Benefit Defendants

The process of negotiating the terms of plea agreements allows defense attorneys to become involved in the process earlier. In the federal system, there are a growing number of criminal defense attorneys who have become specialists in navigating the nuances of the sentencing guidelines. In sophisticated federal white collar crime organizations, corporate, environmental and RICO prosecutions, the defense attorney is generally present from the moment a target letter is sent or a defendant is arrested on a complaint. Most experienced prosecutors would agree that a good defense attorney's input early in the case benefits the entire process for several reasons.

A skilled defense attorney can disabuse the defendant of many of the popular misunderstandings of the criminal justice system. One would be surprised at how many unrepresented targets believe they will be arrested at the United States Attorney's office during an initial target meeting, or that they will not be eligible for a bond because of a juvenile arrest or missed child support payments. Even a marginally competent defense counsel can put into perspective for his client what he can reasonably expect from the entire process. There are two major hurdles every defendant must overcome before he can make a meaningful plea. The first is that in most cases, their lives will be changed in some way. Whether it is career related, socio-economic or other, there will be changes in a defendant's lifestyle. The second is that the defendant is going to spend time incarcerated in some form or fashion. It could range from home detention to a maximum security facility, but it is inevitable for the most part. The intervention of good lawyers early on in the plea bargain process gives their clients a distinct advantage.

D. Plea Agreements Foster Accelerated Infiltration of Criminal Organizations.

One of the most significant benefits of plea agreements to the government is the early significant intervention into criminal enterprises. Most prosecutors would evaluate this tool to be much more effective than the arsenal of government powers enunciated, *supra.*

Most defendants' cooperation depends ***exclusively*** on the government's ability to offer them the opportunity to reduce their time spent incarcerated. Without this ability, the effectiveness of federal law enforcement would be greatly reduced. In *United States v. White,*[10] the court commented on cooperation based on plea agreements, " ... without such testimony, the government would be unable to enforce drug laws, prosecute organized crime figures under RICO, or otherwise effectively proceed in the thousands of cases each year in which it relies on witnesses who testify in return for leniency." Indeed, the courts have long recognized the tool of plea bargaining as a legitimate law enforcement resource. "The concept of affording cooperating accomplices leniency dates back to the common law of England and has been recognized and approved by the United States Congress, the United States Courts and the United States Sentencing Commission."[11]

Twenty-first century prosecutors and investigators can ill afford to meet more complex challenges using only good will or patriotic feelings of the criminal element ensnared in the criminal justice system.

The following are several concrete examples of tangible and proven benefits of the federal plea bargaining system.

1. Road mapping: No matter how much time and effort has been expended by federal agents attempting to document or surviell criminal groups to determine their activities, an insider can detail the specifics of an organization in a one afternoon debriefing which will serve as a roadmap to law enforcement. Even seemingly minor daily details and logistics of the organization can be invaluable. The basic chain of command— who reports to whom, methods of communication, the method discipline of wayward members— can all be helpful in establishing ways to infiltrate a criminal group. Details concerning how the organization actually operates on a day to day basis are especially beneficial for a variety of reasons. The types of phones, computers, fax and email facilities and internet service providers used as well transportation and financial institutions utilized by the group can be of great value. From a safety perspective, the types of weapons possessed or utilized by violent criminals can help agents prepare for undercover work or eventual arrest of the armed individuals.

Another investigative benefit is the identification of non-players within the organization and the elimination of dead end leads. From the outside looking in, it is frequently difficult to accertain who is a legitimate participant and who is a lower-level participant not worthy of further expenditure of investigative resources. Moreover, an insider

can provide useful information on group members' personal habits and illegal proclivities which can provide future pressure points to help close the enterprise or gain additional informants.

***2. Consensual Electronic Activity*:** One of the most powerful types of evidence is one's own voice admitting involvement in criminal activity or the commission of a crime while being recorded by federal law enforcement. Plea bargains once again prove to be reliable vehicles in obtaining this type of irrefutable evidence. By participating in consensually monitored telephone calls or by wearing concealed portable electronic or digital recording devices, a cooperator can potentially reduce his incarceration time by helping law enforcement. Of course, the cooperator must operate under closely controlled circumstances. If used properly early on in the investigation, this tool can gather a wealth of damaging evidence.

***3. Establishing Probable Cause*:** Prosecutors and federal agents can make good use of information provided from a cooperating individual regarding the participants and activities of illegal operations. The information can help provide the legal basis required to help establish probable cause for a wide ranging compliment of investigative tools, including arrest complaints and warrants, search warrants, pen registers and Title III wire intercepts.

E. Procedural Protections

Some of the more dated criticisms of plea bargains stemmed from the practice of oral plea bargains, which by their very nature tended to be imprecise and led to misinterpretation on the part of prosecutors and defendants alike. Most federal plea agreements are in writing. The typical written agreement recites the charges, maximum statutory penalties for incarceration, fines and supervised release terms. In addition, the agreement provides for the defendant's disclosure of financial information, as well as the defendant's agreement not to seek discharge in bankruptcy and his waiver of both Title 28, Section 2255 *habeus corpus* and direct appeal rights.

The most important two paragraphs in the document are those which address two of the main criticisms of plea bargains. The first paragraph sets out that any untruthful statement by the defendant renders the entire agreement void. The second paragraph informs all who read the document that the four corners of the letter constitutes the entire agreement. There are no side deals or secret agreements which exist. These two features should give comfort to even the most strident critics of the plea bargaining system. Most plea bargains are included in the court record for all to see. The element of transparency is certainly present in modern plea agreements.

Two more protective devices in the plea bargaining process inserted by judicial decree are the *Giglio* [12] and *Brady* [13] decisions. Simply stated, these cases require that the existence of a plea agreement must be disclosed to the defendants against whom the cooperator could testify. This tender is required because the government has a duty to disclose any favorable deals to witnesses under *Giglio* and any potentially exculpatory material under *Brady*. Federal prosecutors are compulsive about following the letter and spirit of these two holdings not only because it is their legal and moral duty to do so, but also because not doing so is an easy way to sabotage an otherwise outstanding case. There is no more painful a legal wound than one that is self-inflicted.

At the end of a jury trial, the court will generally read to the jury a long listing of rules to be followed during their deliberation concerning evidence. These rules, known as jury charges, deal with all aspects of how evidence should properly be considered by the jury. Some of this evidence is physical: papers, guns and blood. Other evidence is testimonial. There are at least two jury charges dealing with the testimony of co-conspirators and those who have reached plea agreements with the government. The charges are best summarized in Section 1.15 of the *5th Circuit Pattern Jury Instructions* [14]:" You should keep in mind that such testimony is always to be received with caution and weighed with great care. You **should never convict a defendant upon the unsupported testimony of an alleged accomplice** *[emphasis added]* unless you believe that testimony beyond a reasonable doubt." These instructions, read to every federal criminal jury, at a minimum, represent a judicial admonition that cooperators have gained a material benefit from their testimony. These jury charges are yet one more protection afforded defendants implicated by cooperating persons who have plead guilty pursuant to plea bargains.

This section has pointed out some the distinct advantages plea bargains render for government, victims and defendants. Moreover, there are a surfeit of protections built into the system to protect those against whom the cooperators testify. In the final section, this article will attempt to place in context where plea agreements fit within our constitutional framework.

III. Why Plea Bargains Make Sense in our System of Government

Thankfully, we live in a country which, from the days of our founding fathers, has given its citizens many protections from the excesses of government. These protections have been embodied in the Constitution. Some protections which were placed in the document because of bad behavior of the occupying British soldiers, such as the prohibition against quartering of soldiers in homes, have become dated. Other prohibitions are as modern and living as the evening news. Those rights which protected those whom the government sought to incarcerate were given exalted positions. The rights to be free from unreasonable search, self incrimination and the right to demand a jury trial are the cornerstones of our constitutional criminal system.

However, our system also contemplates a citizenry able to make informed decisions concerning these rights, and the power to waive them. Those who seek to eliminate a citizen's right to better his position by legally waiving these rights creates a less powerful citizen and a more powerful government, which is a notion that the framers of the constitution clearly rejected.

We, as citizens and adults choose to waive rights and privileges in order to take advantage of other more desirable rights and privileges. The examples are numerous and varied. For example, in order to enjoy the constitutional right of a bond pending trial, most defendants surrender their passport and agree to restrict travel pending the outcome of their case. In theory, a constitutional purist could argue that this common practice is outrageous and should be resisted. The practical result of the failure to waive this right would be bank tellers who purloin $5,000 from Mainstreet National Bank would spend more time in jail awaiting trial than they would serving their sentence.

On a daily basis, we give up certain privacy rights at airports so that we may travel from one coast to the other in four hours rather than four days. Some of us choose to live an hour from the cities in which we work in order to enjoy larger homes, better schools and safer neighborhoods. On a larger scale, most of us choose one partner to the legal and moral exclusion of all others to enjoy the joys of marriage and family.

The vast majority of people who become involved in the criminal system do so because of voluntary behavioral decisions. There are a minuscule number of criminal defendants who get into the system because of duress, insanity or other non-voluntary reasons. Most are there because they were caught after they decided to break the law. That is not to say there are not many compelling societal ills which drive the behavior which gets most ensnared, but that is a discussion for another forum.

Plea agreements give defendants an ability to make knowing and voluntary decisions to better their legal position. Information and cooperation become the currency by which they better their position. They must waive certain rights, but in doing so they gain or regain other rights sooner. The decisions seem logical and fit well within the framework of the rights and responsibilities of Americans. A. Neier, a former director of the ACLU was quoted as saying:

> "Stuff & Nonsense" was Alice in Wonderland's response to the idea that the sentence should come first and the verdict and trial later. Plea bargaining carries the logic of the Queen of Hearts one step further. It is sentence first and never mind about the trial and verdict. They are eliminated from the system.[15]

A defendant knows better than anyone else in the system whether he is guilty. He already knows what the verdict *should* be in the event he were to proceed to trial. His defense attorney, when informed by the defendant of his guilt, can further advise the defendant concerning the technical variables of trials, possibilities of evidence suppression under of the rules of evidence, as well as jury and sentencing issues. Unlike the *Alice in Wonderland* scenario alluded to by Mr. Neier, a federal defendant and his attorney are nearly certain of the probable outcome of the trial.

By entering a plea agreement, the defendant voluntarily waives his right to a jury trial, self incrimination, confrontation of witnesses, *inter alia*, and betters his position in the process based upon thoughtful and reasoned analysis. As a citizen, he chooses to make the best of a bad situation. This choice is a perfect merger of the dual ideals of personal freedoms and personal responsibility envisioned in our constitution. His choice also helps the victim, the system and hopefully society at large.

Conclusion

Some critics of the system have advocated for the hosing down of the "fish market"[16] that they say plea bargaining has become. However, reformers of the system, both judicial and executive, have proven by their holdings and actions their belief that sunshine is the best disinfectant. The modern federal plea bargaining system is virtually transparent to all who wish to view it and allows not only illumination, but also the heat of truthful assistance of cooperators to be felt by increasingly complex and dangerous criminal enterprises in the twenty-first century.

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Footnotes

[1] *United States v. Singleton*, 144 F.3d 1343 (10th Cir.1998); vacated by *United States v. Singleton,* 165 F.3d 1297 (10th Cir. 1999).

[2] The *United States Sentencing Guidelines* (USSG) provide at Section 5K1.1 that prosecutors may file a motion with the court seeking a downward departure for a defendant who has provided substantial assistance to the government.

[3] As a rule, state, municipal, misdemeanor and traffic plea bargain issues will not be addressed in this article as the issues presented are different.

[4] *United States v. Fruguela*, 1998 WL 560352*2 (E.D. La.)

[5] *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System,* Albert W. Alschuler, 50 U.Chi.L.Rev. 931, at 932(1983).

[6] Sentential B.5.

[7] *Echoes of a Muted Trumpet,* Ralph Adam Fine, 2003.

[8] *United States v. Singleton* 144 F.3d 1343 at 1347 (10th Cir. 1998).

[9] *U.S. v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir 1987).

[10] 27 F.Supp.2d 646, 649 (E.D.N.C. 1998).

[11] *United States v. Barbaro* 1998 WL 556152 (S.D. N.Y.) at *3.

[12] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

[13] *Brady v. Maryland*, 373 U.S. 83, 835 S.Ct. 1194 (1963).

[14] 2001 Edition, West Publishing Company, St. Paul, Minn., at page 26.

[15] *Plea Bargaining and Guilty Pleas,* Bond, James E, Second Edition, Clark Boardman and Company, Ltd. New York, 1983, Section 2-10 quoting A.Neier, *Criminal Punishment, A Radical Solution* (1976), at page159.

[16] *Supra.,* Endnote 7.