16. INDIVIDUAL PLEAS AND SETTLEMENTS

Well over 90 percent of all criminal cases in the federal system, including white collar cases, are disposed of by guilty pleas prior to trial. That means—somewhat amazingly—that for lawyers representing individuals in federal court, understanding the plea negotiation process might be more important than knowing how to try a case.

This chapter looks at the major building blocks of the plea bargaining machine, as they relate to white collar cases. Bear in mind that we already have one such building block from the early chapters: the substantive criminal statutes that (broadly) define offenses and set (relatively high) maximum punishments, supplying prosecutors with much of their leverage in plea bargaining.

A. Applicable Rules

This puts the cart before the horse a bit, but once the defendant has a plea agreement (or no plea agreement—the rules permit a defendant to "plead straight up" to the indictment), the following rule governs the plea proceeding. The most important things here are (1) understanding the difference between "(B) pleas" and "(C) pleas" under Rule 11(c)(1), and (2) seeing the policy concerns that motivate many of the provisions in Rule 11.

Federal Rule of Criminal Procedure 11. Pleas

(a) Entering a Plea.

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising *and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) *Plea Agreement Procedure.*

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these

discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) *To the* extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) *inform* the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

In addition to Rule 11(f), the admissibility of pleas, plea discussions, and related statements is also governed by Federal Rule of Evidence 410. Why do these rules exist? Are they necessary?

FEDERAL RULE OF EVIDENCE 410. PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

B. The Proffer Process

Many plea negotiations begin with the government taking a "proffer" from the defendant. This is an essential step in enlisting any cooperating witness, as it provides prosecutors with the opportunity to assess an individual's credibility and the value of that person's information before committing to granting any benefits in a plea agreement. Such discussions typically take place under a written proffer agreement that affords the individual a limited form of "use immunity" so that the person is not required to, in effect, provide a full confession before knowing whether a plea bargain will be reached.

You will see a lot of proffer agreements in corporate crime practice. The careful lawyer will often insist on such protection before allowing a client to talk to the government, even if the lawyer thinks the client may not be charged and thus may not need to engage in plea bargaining with prosecutors. A proffer agreement is a temporary or limited contract executed on the way to a plea agreement, or as protection for the purpose of talking to the government for a day when the ultimate results of an ongoing investigation remain unclear. (You may hear these agreements referred to by some practitioners, in an unfortunate and hackneyed phrase, as "Queen for a day" agreements.)

Consider the terms of the following sample proffer agreement. What does it give the client? What does it give the government? What does it *not* give both parties? (Hint: recall the materials on immunity from Chapter 12.)

[SAMPLE PROFFER AGREEMENT]

With respect to the meeting of ___________("Client") and his attorney__________, Esq., with Assistant United States Attorney ____________________________ to be held at the Office of the United States Attorney for the Southern District of New York on [Meeting Date] ("the meeting"), the following understandings exist:

(1) THIS IS NOT A COOPERATION AGREEMENT, The Client has agreed to provide the Government with information, and to respond to questions, so that the Government may evaluate Client's information and responses in making prosecutive decisions. By receiving Client's proffer, the Government does not agree to make a motion on the Client's behalf or to enter into a cooperation agreement, plea agreement, immunity or non-prosecution agreement. The Government makes no representation about the likelihood that any such agreement will be reached in connection with this proffer.

(2) In any prosecution brought against Client by this Office, except as provided below the Government

will not offer in evidence on its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting, except in a prosecution for false statements, obstruction of justice or perjury with respect to any acts committed or statements made during or after the meeting or testimony given after the meeting.

Notwithstanding item (2) above: (a) the Government may use information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used in any prosecution of Client by the Government; (b) in any prosecution brought against Client, the Government may use statements made by Client at the meeting and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should Client testify; and (c) the Government may also use statements made by Client at the meeting to rebut any evidence or arguments offered by or on behalf of Client (including arguments made or issues raised sua sponte by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client.

(3) The Client understands and agrees that in the event the Client seeks to qualify for a reduction in sentence under Title 18, United States Code, Section 3553(f) or United States Sentencing Guidelines, Sections 2D 1.1(b) (6) or 5C1.2, the Office may offer in evidence, in connection with the sentencing, statements made by the Client at the meeting and all evidence obtained directly or indirectly therefrom.

(4) To the extent that the Government is entitled under this Agreement to offer in evidence any statements made by Client or leads obtained therefrom, Client shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. It is the intent of this Agreement to waive all rights in the foregoing respects.

(5) If this Office receives a request from another prosecutor's office for access to information obtained pursuant to this Proffer Agreement, this Office may furnish such information but will do so only on the condition that the requesting office honor the provisions of this Agreement.

(6) It is further understood that this Agreement is limited to the statements made by Client at the meeting and does not apply to any oral, written or recorded statements made by Client at any other time. No understandings, promises, agreements and/or conditions have been entered into with respect to the meeting other than those set forth in this Agreement and none will be entered into unless in writing and signed by all parties.

(7) The understandings set forth in paragraphs 1 through 7 above extend to the continuation of this meeting on the dates that appear below.

(8) Client and Attorney acknowledge that they have fully discussed and understand every paragraph and clause in this Agreement and the consequences thereof.

The following case is about the kinds of disputes that can arise during the enforcement of a proffer agreement and helps explain what protections a typical proffer agreement provides and does not provide to a defendant. The obvious lesson here is that it will be nearly impossible for an individual to testify in her own defense at a trial after she has made a full proffer to the government.

UNITED STATES v. VELEZ, 354 F.3d 190 (2d Cir. 2004)

JOSÉ A. CABRANES, Circuit Judge.

. . . On November 21, 2001, defendant was indicted for being a convicted felon in possession of a firearm shipped and transported in interstate commerce, in violation of 18 U.S.C. § 922(g)(1). The charge was based on the observations of three New York Police Department officers—namely, that on August 18, 2001 the officers saw defendant pull a gun from his waistband, heard the sound of metal hitting pavement, and then recovered a gun from the ground where defendant had been standing.

Shortly after being charged, defendant participated in two proffer sessions. In a first session on January 14, 2002, defendant, accompanied by counsel, asserted his innocence, claiming that he did not possess the gun found on the ground where he had been standing. The Government did not credit defendant's statements.

On May 9, 2002, defendant, again accompanied by counsel, participated in a second proffer session, which he had requested. (At this session, defendant was represented by his second attorney, because the District Court had granted defendant's request that he be relieved of his prior counsel.) Before participating in the meeting, defendant signed an agreement in which he waived, in certain circumstances, the protection otherwise applicable to his proffer statements that prohibits use of those statements as evidence against him. Relevant to this appeal, the waiver provision to which defendant agreed provides:

> [T]he Government may ... use statements made by [defendant] at the meeting to rebut any evidence or arguments offered by or on behalf of [defendant] (including arguments made or issues raised *sua sponte* by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against [defendant].

Accordingly, by signing the proffer agreement that included this waiver provision, defendant authorized the Government to introduce defendant's proffer statements at trial if defendant introduced evidence or arguments that were inconsistent with his proffer statements.

In the second proffer session, defendant recanted his claims of innocence at the initial session and admitted facts pertaining to one element of the charged offense—namely, that he owned and possessed the firearm that the officers found on the ground near him.

Defendant thereafter requested a third proffer session, which the Government scheduled, but defendant canceled the meeting and elected to proceed to trial.

Before the start of trial, however, defendant presented two issues to the District Court. First, he requested that

the Court again appoint new defense counsel, on the ground that he would not receive a fair trial because his current (second) counsel had stated that he was "limited to attack[ing] certain areas," which, as defendant contended, was due to counsel's presence at the proffer session. The District Court denied defendant's request.

Second, through his attorney at a pretrial conference and in an *in limine* motion, defendant sought a preliminary ruling from the District Court on the scope of the defense's arguments and defense witness testimony that would open the door to the Government's use of defendant's proffer statements. In response to defendant's argument at the pretrial conference, the Government informed the Court that it did not seek to introduce defendant's proffer statements in its case-in-chief, but that it reserved the right "to introduce such statements if they are deemed necessary to rebut testimony or arguments made by or on behalf of the defendant that are inconsistent with statements made by the defendant during the proffer session."

The District Court initially did not rule on defendant's motion, but it noted that certain anticipated defense witness testimony would "come 'close' to opening the door to [the Government's] introduction of [defendant's] proffer statements." (Appellee's Br. at 10 (quoting trial transcript at 36).) When defense counsel informed the Court that it would not elicit that testimony, the District Court provided additional time for the defense to reconsider its decision. However, later in the day, the District Court stated that if the anticipated defense witness testimony were introduced, the Court would indeed permit the Government to introduce defendant's proffer admissions, thereby implicitly finding that the proffer agreement was enforceable. Defendant did not introduce the anticipated testimony.

After a three-day trial, the jury convicted defendant of the sole count of the indictment, which yielded a sentencing range of 100 to 125 months' imprisonment under applicable guidelines. At sentencing, in the context of offering mitigation to warrant a sentence at the low end of the range, defendant stated that he had been "trap[ped]" into making his admissions at the second proffer session. The District Court declined to credit defendant's statement as relevant to mitigation, and on December 16, 2002, sentenced defendant principally to 120 months' imprisonment.

On appeal, defendant argues that the waiver provision in the proffer agreement—which permits the Government to offer a proffer admission by the defendant in rebuttal to contradictory evidence or argument—violates defendant's constitutional rights to mount a defense, to the effective assistance of counsel, and to a fair trial. We disagree. . . .

Ordinarily, statements made by a defendant during plea negotiations, including proffer sessions, are inadmissible at trial. Fed. R. Evid. 410. However, a defendant can waive the protection afforded by Rule 410 as long as there is no "affirmative indication that the agreement [to waive] was entered into unknowingly or involuntarily." *Mezzanatto,* 513 U.S. at 210. In *Mezzanatto,* as defendant correctly points out, the Supreme Court considered and enforced a narrow waiver provision in which the defendant permitted the Government to use his plea-negotiation statements only when responding to contrary testimony by the defendant himself. *Id.* at 198. Here we face a more expansive waiver of Rule 410 because, in the proffer agreement at issue, defendant waived his exclusionary privilege in all circumstances in which the defense presents contradictory

testimony, evidence, or arguments—whether or not defendant himself testifies. We agree with the District Court's implicit decision that the agreement is enforceable.

In contending that the agreement is unenforceable, defendant relies principally on *United States v. Duffy,* 133 F. Supp. 2d 213 (E.D.N.Y. 2001), in which the district court refused to enforce a waiver provision in a proffer agreement similar to the one we consider here. The *Duffy* ruling determined that the waiver provision "prevent[ed defense counsel] from making any sort of *meaningful* defense," *id.* at 216, and that it "exploit[ed]" a disparity of bargaining power between the Government and the defendant, *id.* at 217. The court stated: "After signing the standard proffer agreement, the terms of which are dictated by the government, the only thing that a defendant is guaranteed is the chance to convince the prosecutor to enter a deal. At the same time, the defendant bears all of the risk." *Id.* Concluding that the waiver provision effectively forfeited the defendant's fundamental rights to present a defense and to the effective assistance of counsel and, in doing so, implicated important public interests, the district court held the waiver provision unenforceable. *Id.* at 218.

For the reasons that follow, we respectfully decline to adopt the position advanced in *Duffy*. . . .

As the *Gomez* ruling points out, "fairness dictates that the agreement be enforced." *Id.* at 475. "If the proffer agreement is not enforced, a defendant will have less incentive to be truthful, for he will know that his proffer statements cannot be used against him at trial as long as he does not testify, even if he presents inconsistent evidence or arguments." *Id.*

In addition, invalidating a waiver provision like the one before us would clearly interfere with plea bargaining and cooperation efforts—in direct contravention of the criminal justice system's legitimate goal of encouraging plea bargaining in appropriate circumstances. The Supreme Court has noted that, "[i]f prosecutors were precluded from securing [waiver] agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain." *Id.*

We do not lightly dismiss the observation in *Duffy* that the Government holds significant bargaining power in arranging proffer sessions and securing a waiver provision as a prerequisite for a defendant's participation. 133 F. Supp. 2d at 217–18. However, "[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether." *Mezzanatto,* 513 U.S. at 210. Indeed, to the extent there is a disparity between the parties' bargaining positions, it is likely attributable to the Government's evidence of the defendant's guilt. We thus reject the argument that defendant, relying on *Duffy,* makes in this case—that the asserted disparity of power between the Government and a defendant in proffers renders waiver provisions in proffer agreements unenforceable.

Finally, a defendant remains free to present evidence inconsistent with his proffer statements, with the fair consequence that, if he does, "the Government [is] then . . . permitted to present the defendant's own words in rebuttal." *Gomez,* 210 F. Supp. 2d. at 476. With this avenue open to him, a defendant who has consented to a waiver provision like the one at issue here has not forfeited his constitutional right to present a defense, to the effective assistance of his counsel, or to a fair trial.

Accordingly, we reject defendant's claim that the waiver provision is unconstitutional, and we hold that, where a proffer agreement is entered into knowingly and voluntarily, a provision in which defendant waives his exclusionary privilege under Federal Rule of Evidence 410 by permitting the Government to introduce defendant's proffer statements to rebut contrary evidence or arguments presented by the defense, whether or not defendant testifies, is enforceable. . . .

C. Plea Bargaining and the Constitution

A key element in understanding the power of prosecutors in plea negotiations, and the prevalence of guilty pleas, is the limited constitutional constraints on the practice of plea bargaining. The following two cases are the foundational Supreme Court decisions on the subject. Why do these rulings give so much power to the prosecutor? What is the rationale for doing so? What is potentially wrong with that power? If one wanted the prosecutor to have less power, could the Court have decided these cases differently? Exactly how?

BRADY v. UNITED STATES, 397 U.S. 742 (1970)

Mr. Justice WHITE delivered the opinion of the Court.

In 1959, petitioner was charged with kidnaping in violation of 18 U.S.C. § 1201(a). Since the indictment charged that the victim of the kidnaping was not liberated unharmed, petitioner faced a maximum penalty of death if the verdict of the jury should so recommend. Petitioner, represented by competent counsel throughout, first elected to plead not guilty. Apparently because the trial judge was unwilling to try the case without a jury, petitioner made no serious attempt to reduce the possibility of a death penalty by waiving a jury trial. Upon learning that his codefendant, who had confessed to the authorities, would plead guilty and be available to testify against him, petitioner changed his plea to guilty. His plea was accepted after the trial judge twice questioned him as to the voluntariness of his plea. Petitioner was sentenced to 50 years' imprisonment, later reduced to 30.

In 1967, petitioner sought relief under 28 U.S.C. § 2255, claiming that his plea of guilty was not voluntarily given because § 1201(a) operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency. It was also alleged that the trial judge had not fully complied with Rule 11 of the Federal Rules of Criminal Procedure. . . .

The trial judge in 1959 found the plea voluntary before accepting it; the District Court in 1968, after an evidentiary hearing, found that the plea was voluntarily made; the Court of Appeals specifically approved the finding of voluntariness. We see no reason on this record to disturb the judgment of those courts. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that the District Court found to have triggered Brady's guilty plea.

The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. One of these circumstances was the possibility of a heavier sentence following a guilty verdict

after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. But even if we assume that Brady would not have pleaded guilty except for the death penalty provision of § 1201(a), this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty. 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.

Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. 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.

The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it

advantageous to preclude the possibility of the maximum penalty authorized by law. 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. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. 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 and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far. . . .

The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

> (A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). 242 F.2d at page 115.

Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.

BORDENKIRCHER v. HAYES, 434 U.S. 367 (1978)

Mr. Justice STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious

charges if he does not plead guilty to the offense with which he was originally charged.

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of 2 to 10 years in prison. Ky. Rev. Stat. § 434.130 (1973) (repealed 1975). After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save[d] the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, then Ky. Rev. Stat. § 431.190 (1973) (repealed 1975), which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. The Kentucky Court of Appeals rejected Hayes' constitutional objections to the enhanced sentence, holding in an unpublished opinion that imprisonment for life with the possibility of parole was constitutionally permissible in light of the previous felonies of which Hayes had been convicted, and that the prosecutor's decision to indict him as a habitual offender was a legitimate use of available leverage in the plea-bargaining process.

On Hayes' petition for a federal writ of habeas corpus, the United States District Court for the Eastern District of Kentucky agreed that there had been no constitutional violation in the sentence or the indictment procedure, and denied the writ. The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. While recognizing "that plea bargaining now plays an important role in our criminal justice system," the appellate court thought that the prosecutor's conduct during the bargaining negotiations had violated the principles of *Blackledge v. Perry*, 417 U.S. 21, which "protect[ed] defendants from the vindictive exercise of a prosecutor's discretion." 547 F.2d, at 44. Accordingly, the court ordered that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument." *Id.*, at 45. We granted certiorari to consider a constitutional question of importance in the administration of criminal justice.

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and

the prosecutor had offered to drop that charge as part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between "concessions relating to prosecution under an existing indictment," and threats to bring more severe charges not contained in the original indictment-a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness. Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment was influenced by his desire to induce a guilty plea. The ultimate conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

We have recently had occasion to observe: "[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, *Brady v. United States*, 397 U.S. 742, 758, the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*, 395 U.S. 238, 242, and the requirement that a prosecutor's plea-bargaining promise must be kept, *Santobello v. New York*, 404 U.S. 257, 262. The decision of the Court of Appeals in the present case, however, did not deal with considerations such as these, but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment. For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

This Court held . . . that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a "realistic likelihood of 'vindictiveness.'" *Blackledge v. Perry*, 417 U.S., at 27, 94 S. Ct., at 2102.

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction-a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Parker v. North Carolina*, 397 U.S. 790, 809, (opinion of Brennan, J.). The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Chaffin v. Stynchcombe, supra*, 412 U.S., at 32–33, n.20. But in the "give-and-take" of plea bargaining, there is no such element of punishment or

retaliation so long as the accused is free to accept or reject the prosecution's offer.

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin v. Stynchcombe, supra*, 412 U.S., at 31. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment. . . .

Problem 16-1
Why has the Supreme Court largely rejected the idea of constitutional regulation of the coerciveness of plea bargaining, even as public and academic concerns about the dominance of plea bargaining mills in the criminal justice system has grown? Can you think of a different approach a future Court might be able to take to constitutional regulation of plea bargains?

D. Plea Agreements Without Cooperation

The following is an example of a "straight" plea agreement, without cooperation provisions, in an insider trading prosecution related to the investigation of Raj Rajaratnam and the Galleon hedge fund. What does the defendant get under this type of agreement? What does the defendant give up? Ask the same questions with respect to the prosecutor, and tally the results. Why might a client wish to enter into this kind of "straight" plea agreement?

U.S. Department of Justice
United States Attorney
Southern District of New York

January 18, 2011

Alan Kaufman, Esq.
Kelley Drye & Warren
101 Park Avenue
New York, NY 10178

Re: United States v. Danielle Chiesi, SI 09 Cr. 1184 (RJH)

Dear Mr. Kaufman:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from Danielle Chiesi ("the defendant") to Counts Five, Six and Seven of the above-referenced Indictment.

Counts Five, Six and Seven charge the defendant with conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371, and each count carries a maximum sentence of five years' imprisonment; a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; a mandatory $100 special assessment; and a maximum period of supervised release of three years. The total maximum term of imprisonment for all three counts is fifteen years, in addition to the foregoing, the Court must order restitution in accordance with Sections 3663, 3663A and 3664 of Title 18, United States Code.

In consideration of the defendant's plea to the above offenses, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations as to which this Office cannot, and does not, make any agreement) for her participation in schemes to engage in insider trading from in or about July 2008 through in or about April 2009 in the securities of Sun Microsystems Inc., Advanced Micro Devices, Inc., International Business Machines Corp., Akamai Technologies, Inc., Sybase, Inc., Lenovo Group Ltd., and Marvell Technology Group Ltd., as charged in Counts Five, Six and Seven of the Indictment and disclosed in the Bill of Particulars filed in this matter. In addition, at the time of sentencing, the Government will move to dismiss any open Count(s) against the defendant. The defendant agrees that with respect to any and all dismissed charges she is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant hereby admits the forfeiture allegations with respect to Counts Five, Six and Seven of the Indictment and agrees to forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, the proceeds she obtained as a result of the offenses charged in Counts Five, Six and Seven of the Indictment. The defendant agrees that she will not file a claim or a petition for remission or mitigation in any forfeiture proceeding and will not cause or assist anyone else in doing so. It is further understood that any forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon her in addition to forfeiture.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The Guidelines provisions in effect as of November 1, 2010 apply in this case.

2. The Guidelines provision applicable to the offenses charged in Counts Five, Six and Seven of the Indictment is U.S.S.G. § 2B1.4. Pursuant to U.S.S.G. § 2B1.4(a), the base offense level is 8.

3. The base offense level is increased by 16 levels because the gain is greater than $1,000,000 but not more than $2,500,000. U.S.S.G. §§ 2B 1.4(b)(1), 2Bl.l(b)(l)(I).

4. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through her allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3El.l(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, an additional one-level reduction is warranted, pursuant to U.S.S.G. § 3E1.1 (b), because the defendant gave timely notice of her intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 21.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has no criminal history points. Accordingly, the defendant's Criminal History Category is I.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated sentencing Guidelines range is 37 to 46 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to §5E1.2. At Guidelines level 21, the applicable fine range is $7,500 to $75,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party suggest that the Probation Office consider such a departure or adjustment under the Guidelines, or suggest that the Court *sua sponte* consider any such departure or adjustment.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Office consider a sentence outside of the Stipulated Guidelines Range, and suggest that the Court *sua sponte* consider a sentence outside of the Stipulated Guidelines Range, based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through her allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B 1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the Stipulated Guidelines Range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that her entry of a guilty plea to Counts Five, Six and Seven of the Indictment authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw her plea of guilty should the sentence imposed by the Court be outside the Stipulated Guidelines Range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 37 to 46 months imprisonment and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum.

The defendant hereby acknowledges that she has accepted this Agreement and decided to plead guilty because she is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw her plea or to attack her conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady* v. *Maryland,* 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio* v. *United States,* 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

It is further agreed that should the conviction(s) following the defendant's plea(s) of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all

defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that tins Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

Apart from any written Proffer Agreement(s) that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

E. Plea Agreements with Cooperation

To understand the benefits to defendants of entering into plea agreements that involve cooperation with prosecutors, including testimony, one must begin with the Sentencing Guidelines. Since the 1980s, the following provision has been the engine producing large numbers of cooperation agreements in federal criminal cases. Why is (or was) it so powerful? (The answer to this question will become clearer when the Sentencing Guidelines are taken up in full in Chapter 18.)

United States Sentencing Guidelines § 5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significant and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

The following is an example of a plea agreement with cooperation provisions. (This defendant was the star witness who broke open the FIFA case for the government, although he died before he or anyone else could see the full results of his cooperation.) What does the defendant get in this type of agreement? What does the defendant give up? Same questions as to the prosecutor. How does the resulting tally differ from that in a plea agreement without cooperation provisions like the Chiesi agreement above?

United States v. Charles Blazer

No. 1:13-cr-00602-RJD (E.D.N.Y. June 15, 2015)

Cooperation Agreement

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States Attorney's Office for the Eastern District of New York (the "Office") and CHARLES BLAZER (the “defendant”) agree to the following:

1. The defendant will waive indictment and, where applicable, venue and plead guilty to a 10-count information to be filed in this District charging violations of 18 U .S.C. § 1962(d) (Count One), 18 U.S.C. § 1349 (Count Two), 18 U.S.C. § 1956(h) (Count Three), 26 U.S.C. § 7201 (counts Four through Nine) and 31 U.S.C. § 5314 (Count Ten). The foregoing counts carry the following statutory penalties:

Count One (Racketeering Conspiracy)

a. Maximum term of imprisonment: 20 years (18 U.S.C. § 1963(a)).

b. Minimum term of imprisonment: 0 years (18 U.S.C. § 1963(a)).

c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583 (b), (e)).

d. Maximum fine: the greater of $250,000 or twice the gross profits of the enterprise (18 U.S.C. §§ 3571 and l963(a)).

e. Restitution: mandatory, in an amount to be determined by the court (18 U.S.C. §§ 3663 and 3663A).

f. $100 special assessment (18 U.S.C. § 3013).

g. Criminal forfeiture: the defendant consents to criminal forfeiture, as set forth below in paragraphs 7 through 14 (18 U.S.C. §§ 1963(a) and 1963(m)).

Count Two (Wire Fraud Conspiracy)

a. Maximum term of imprisonment: 20 years (18 U.S.C. §§ 1343, 1349).

b. Minimum term of imprisonment: 0 years (18 U.S.C. §§ 1343, 1349).

c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583(b), (e)).

d. Maximum fine: the greater of $250,000 or twice the gross gain or gross loss (18 U.S.C. §§ 3571(b)(3), (d)).

e. Restitution: mandatory, in an amount to be determined by the Court (18 U.S.C. §§ 3663 and 3663A).

f. $100 special assessment (18 U.S.C. § 3013).

g. Criminal forfeiture: the defendant consents to criminal forfeiture, as set forth below in paragraphs 7 through 14 (18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c) and 21 U.S.C. § 853(p)).

Count Three (Money Laundering Conspiracy)

a. Maximum term of imprisonment: 20 years (18 U.S.C. §§ 1956 (a), (h)).

b. Minimum term of imprisonment: 0 years (18 U.S.C. §§ 1956 (a), (h)).

c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583 (b), (e))

d. Maximum fine: the greater of $500,000 or twice the value of the monetary instrument or funds involved (18 U.S.C. § 1956(a)).

e. Restitution: mandatory, in an amount to be determined by the Court (18 U.S.C. §§ 3663 and 3663A)

f. $100 special assessment (18 U.S.C. § 3013).

g. Criminal forfeiture: the defendant consents to criminal forfeiture, as set forth below in paragraphs 7 through 14 (18 U.S.C. §§ 982(a)(1) and 982(b), 28 U.S.C. § 2461(c) and 21 U.S.C. § 853(p)).

Counts Four through Nine (Tax Evasion)

a. Maximum term of imprisonment: 5 years (26 U.S.C. § 7201).

b. Minimum term of imprisonment: 0 years (26 U.S.C. § 7201).

c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously serv-d on post-release supervision (18 U.S.C. § 3583(b), (e)).

d. Maximum fine: $100,000 and the costs of prosecution (26 U.S.C. § 7201).

e. Restitution: As further described below in paragraph 3(g), the defendant agrees to pay restitution to the Internal Revenue Service, and further agrees that the tax due and owing for the years 2005 through 2010 will be based on unreported total income in excess of $11 million (18 U.S.C. § 3663).

f. $100 special assessment (18 U.S.C. § 3013).

Count Ten (Failure to File FBAR)

a. Maximum term of imprisonment: 10 years (31 U.S.C. § 5322(b)).

b. Minimum term of imprisonment: 0 years (31 U.S.C. § 5322 (b)).

c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. § 3583(b), (e)).

d. Maximum fine: $500,000 (31 U.S.C. § 5322(b)).

e. Restitution: in an amount to be determined by the court (18 U.S.C. § 3663).

f. $100 special assessment. (18 U.S.C. § 3013).

g. Other penalties: A civil money penalty of $487,875.74, as described further below in paragraph 3(g) (31 U.S.C. § 5321(a)(5)(C), (D)).

The sentence imposed on each count may run consecutively.

2. The defendant understands that although imposition of a sentence in accordance with the United States Sentencing Guidelines (the "Guidelines" and "U.S.S.G.") is not mandatory, the Guidelines are advisory and the Court is required to consider any applicable Guidelines provisions as well as other factors enumerated in 18 U.S.C. § 3553(a) to arrive at an appropriate sentence in this case. The Office will advise the Court and the Probation Department of information relevant to sentencing, including all criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant's sentence. If the defendant clearly demonstrates acceptance of responsibility, through allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3B1.1(a). Furthermore, if the defendant has accepted responsibility as described above, and if the defendant pleads guilty on or before November 25, 2013, an additional one-level reduction will be warranted, pursuant to

U.S.S.G. § 3E1.1(b).

3. The defendant will provide truthful, complete and accurate information and will cooperate fully with the Office. This cooperation will include, but is not limited to, the following:

a. The defendant agrees to be fully debriefed and to attend all meetings at which his presence is requested, concerning his participation in and knowledge of all criminal activities.

b. The defendant agrees to furnish to the Office all documents and other material that may be relevant to the investigation and that are in the defendant's possession or control and to participate in undercover activities pursuant to the specific instructions of law enforcement agents or this Office.

c. The defendant agrees not to reveal his cooperation, or any information derived therefrom, to any third party without prior consent of the Office.

d. The defendant agrees to testify at any proceeding in the Eastern District of New York or elsewhere; including in foreign jurisdictions, as requested by the Office.

e. The defendant consents to adjournments of his sentence as requested by the Office.

f. The defendant agrees to cooperate fully with the Internal Revenue Service in the ascertainment, computation and payment of his correct federal income tax liability for the years 2005 through 2013, as well as any later tax years that become due and owing prior to the imposition of sentence. To that end, the defendant will file tax returns for the years 2005 through 2013, along with all tax due and owing, exclusive of penalties and interest, within one (1) year of the date of this agreement and consents to the disclosure to the Internal Revenue Service of information relating to his financial affairs that is in the possession of third parties. With respect to the years 2005 through 2010, which are the subject of Counts Four through Nine of the information and the agreement regarding restitution noted above, the defendant stipulates and agrees that the tax due and owing will be based on unreported total income in excess of $11 million. The defendant further agrees to allow the contents of his Internal Revenue Service criminal file to be given to civil attorneys and support staff of the Internal Revenue Service to enable them to investigate any and all civil penalties that may be due and owing by the defendant. With respect to disclosure of the criminal file to the Internal Revenue Service, the defendant waives any rights under Title 26, United States Code, Section 7213 and Fed R. Crim. P. 6(e), and any other right to privacy with respect to the defendant's tax returns and tax information. The defendant agrees that for the purposes of 31 U.S.C. §§ 5321(a)(5)(C) and (D), the value of his unreported account at First Caribbean International Bank (Bahamas) in 2010 was $975,751.48, and he is subject to a civil monetary penalty of 50% of that amount, or $487,875.74.

g. The defendant agrees to comply with the forfeiture provisions set forth in paragraphs 7 through 14, below.

h. The defendant will consent to, and not oppose, any ban that may hereafter be imposed on him by the Federation Internationale de Football Association ("FIFA") or any other soccer governing body.

4. The Office agrees that:

a. Except as provided in paragraphs 1, 16 and 17, no criminal charges will be brought against the defendant for his heretofore disclosed participation in (i) criminal activity involving mail, wire and bank fraud, money laundering, interstate and foreign travel in aid of racketeering, interstate and foreign transportation of money taken by fraud and New York State commercial bribery, all in connection with the following: (A) aiding and abetting the receipt of a bribe and/or kickback payment offered in connection with the voting to host the 1998 FIFA World Cup, which conduct took place in or about 1992; (B) the sale of tickets for FIFA World Cups in or about and between 1994 and 2002; (C) the receipt of bribe and/or kickback payments made in connection with the sale of media and marketing rights associated with the Confederation of North, Central American and Caribbean Association Football ("CONCACAF") Gold Cups played between 1996 and 2003, which conduct took place in or about and between 1993 and 2003; and (D) the receipt of bribe and/or kickback payments made in connection with the voting to host the 2010 FIFA World Cup, which conduct took place in or about and between 2004 and 2011; (ii) violations of Title 26, United States Code, in connection with the willful failure to file personal income tax returns for tax years 1994 through 2010; and (iii) violations of Title 31, United States Code, in connection with the willful failure to file Reports of Foreign Bank and Financial Accounts for tax years 1994 through 2010.

b. No statements made by the defendant. during the course of this cooperation will be used against him except as provided in paragraphs 2, 16 and 17.

5. The defendant agrees that the Office may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel's presence at such debriefings and meetings. Upon request of the defendant, the Office will endeavor to provide advance notice to counsel of the place and time of meetings and debriefings, it being understood that the Office's ability to provide such notice will vary according to time constraints and other circumstances. The Office may accommodate requests to alter the time and place of such debriefings. It is understood, however, that any cancellations or reschedulings of debriefings or meetings requested by the defendant that hinder the Office's ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant's ability to provide substantial assistance. Matters occurring at any meeting or debriefing may be considered by the Office in determining whether the defendant has provided substantial assistance or otherwise complied with this agreement and may be considered by the Court in imposing sentence regardless of whether counsel was present at the meeting or debriefing.

6. If the Office determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion pursuant to U.S.S.G. § 5K1.1with the sentencing court setting forth the nature and extent of his cooperation. Such a motion will allow the Court, in applying the advisory Guidelines, to consider a range below the Guidelines range that would otherwise apply. In this connection, it is understood that a good faith determination by the Office as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, including the demonstration of

acceptance of responsibility described in paragraph 2, and the Office's good faith assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon him. The defendant agrees that, in making this determination, the Office may consider facts known to it at this time. The Office will not recommend to the Court a specific sentence to be imposed. Further, the Office cannot and does not make a promise or representation as to what sentenced will be imposed by the Court.

7. The defendant acknowledges that money and property is subject to forfeiture as a result of his violations of 18 U.S.C. §§ 1962(d), 1349 and 1956(h), as alleged in the information. Pursuant to 18 U.S.C. §§ 1963(a), 981(a)(1)(C) and 982(a)(1), and 28 U.S.C. § 2461(c), the defendant consents to the forfeiture of one million nine hundred fifty-eight thousand ninety-two dollars and seventy two cents ($1,958,092.72), which represents a portion of the monies that defendant received from bribes, kickbacks and unauthorized World Cup ticket sales . . . and to the forfeiture of a second unspecified amount of United States currency to the determined by the Court. . . . [ed: *extensive procedural provisions for facilitating the forfeiture process have been omitted*].

16. The defendant must at all times give complete, truthful and accurate information and testimony, and must not commit, or attempt to commit, any further crimes. Should it be judged by the Office that the defendant has failed to cooperate fully, has intentionally given false, misleading or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this agreement, the defendant will not be released from his plea of guilty but this Office will be released from its obligations under this agreement, including (a) not to oppose a downward adjustment of two levels for acceptance of responsibility described in paragraph 2 above and to make the motion for an additional one-level reduction described in paragraph 2 above, and (b) to file the motion described in paragraph 6 above. Moreover, this Office may withdraw the motion described in paragraph 6 above, if such motion has been filed prior to sentencing. The defendant will also be subject to prosecution for any federal criminal violation of which the Office has knowledge, including, but not limited to, the criminal activity described in paragraph 4 above, perjury and obstruction of justice.

17. Any prosecution resulting from the defendant's failure to comply with the terms of this agreement may be premised upon, among other things: (a) any statements made by the defendant to the Office or to other law enforcement agents on or after December 29, 2011; (b) any testimony given by him before any grand jury or other tribunal, whether before or after the date this agreement is signed by the defendant; and (c) any leads derived from such statements or testimony. Prosecutions that are not time-barred by the applicable statutes of limitation on the date this agreement is signed may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statutes of limitation between the signing of this agreement and the commencement of any such prosecutions. Furthermore, the defendant waives all claims under the United states constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal statute or rule, that statements made by him on or after December 29, 2011, or any leads derived therefrom, should be suppressed.

18. This agreement does not bind any federal, state or local prosecuting authority other than the Office, and does not prohibit the Office from initiating or prosecuting any civil or administrative proceedings directly or indirectly involving the defendant. Apart from the written proffer agreements dated December 29, 2011, January 17, 2012, January 18, 2012, January 31, 2012, February 1, 2012, March 13, 2012, March 15, 2012, March 21, 2012, April 25, 2012, April 27, 2012, May 14, 2012, June 26, 2012, July 19, 2012, October 3, 2012, October 5, 2012, January 14, 2013, January 16, 2013, June 10, 2013 and November 13, 2013, no promises, agreements or conditions have been entered into other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties. This agreement supersedes any prior promises, agreements or conditions between the parties. To become effective, this agreement must be signed by all signatories listed below and must be approved by the Tax Division of the United States Department of Justice.

Problem 16-2

Shirley, the trader from Edgar's hedge fund, is back in your office. Now she has been charged in a federal indictment with four counts of securities fraud, based on insider trading, each of which carries a statutory maximum term of imprisonment of 10 years. It is decision time. Explain to Shirley what her options are and what the pluses, minuses, and consequences are of each of her options.