CHAPTER 6

PLEA AGREEMENTS AND PROCEDURE

SCOPE NOTE

This chapter addresses the role of plea agreements in the sentencing process. Plea agreement procedure under Federal Rule of Criminal Procedure 11 is discussed, as is the Sentencing Guidelines' policy toward plea agreements. This chapter details the core contractual elements of a plea agreement as well as enforcement, collateral consequences, and plea withdrawal.

Synopsis

§ 6.01 Plea Agreements Used to Mitigate Sentence Severity.

Each year, between 92 percent and 95 percent of all federal criminal defendants pleaded guilty rather than submit to a trial.[1] The extremely high percentage of guilty pleas is explained in part by defendants' desire to mitigate the severity

[1] 2000 Sourcebook of Federal Sentencing Statistics, Figure C, page 20 [hereinafter "2000 Sourcebook"]. *See* App. A. The percentages of cases resolved by guilty plea during the past six fiscal years are: 2000—95.5 percent; 1999—94.6 percent; 1998—93.6 percent; 1997—93.2 percent; 1996—91.7 percent; and 1995—91.9 percent. As in other sentencing areas, the percentage of defendants who plead guilty varies considerably by jurisdiction. For example, 99.0 percent of the 3,336 federal criminal defendants in Arizona pled guilty in fiscal year 2000, while only 86.4 percent of defendants in the Northern District of Florida pled guilty during the same time period. 2000 Sourcebook, Table 10, at 23. *See* App. A.

of the sentence they face. Under the Guidelines, as discussed in Chapter 3, without a guilty plea, it is virtually impossible for a defendant to receive a two or three point reduction to the offense level for acceptance of responsibility. Furthermore, in most cases, an agreement to plead guilty is required before the government will consider the defendant for the most significant possible sentence reduction: a departure from the Guidelines for substantial assistance to the government under USSG § 5K.1.

In addition, defendants seek concessions from prosecutors regarding the charges to which they will plea. Although the time-honored tradition of plea bargaining is severely restricted under the Guidelines and internal U.S. Attorney rules, prosecutors retain some ability to reduce the offense level a defendant would face if convicted of the charged conduct by agreeing that a defendant can plead to a lesser charge or by stipulating to facts that will reduce a defendant's exposure.

The Guidelines inject a level of uncertainty into the plea negotiation process, since prosecutors' agreements and stipulations with the defense about the applicable guideline and the underlying calculation can be ignored by the probation officer who prepares the presentence report and the judge who sentences the defendant. Nevertheless, the process of determining the terms of a defendant's guilty plea requires a mastery of each of the component parts of a Guidelines sentencing calculation and an ability to convince the presentence report writer and the sentencing judge of the reasonableness of the terms of the plea agreement and the resulting sentencing calculation.

Three primary sources of requirements govern the plea process. First, Federal Rule of Criminal Procedure 11 governs plea procedure. Second, the Guidelines address certain aspects of plea procedure and practice. Finally, the Department of Justice's United States Attorneys' Manual imposes requirements upon prosecutors on the manner in which government lawyers engage in plea discussions and enter into plea agreements.

§ 6.02 Plea Procedure Under Rule 11.

[1]—Plea Procedures.

A defendant must admit to all elements of the crime to which he or she pleads guilty. Because a defendant waives the right to trial by pleading guilty, Federal Rule of Criminal Procedure 11 requires that the plea be entered knowingly and voluntarily, with the advice of competent counsel, and it requires that the defendant himself must be competent to enter the plea.[1]

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[1] Competency of defendant.

1st Circuit United States v. Giron-Reyes, 234 F.3d 78, 80 (1st Cir. 2000) (error when a secondary competency hearing was not held when the defendant was previously hospitalized for a mental defect).

To ensure that the plea is entered knowingly, Rule 11 requires that the terms of a plea bargain be disclosed in open court and that the court address the defendant in open court to ensure that the defendant understands: (a) the nature of the charge,[2] (b) the mandatory minimum and maximum sentences for the charge,[3] including supervised release and restitution,[4] and (c) the constitutional

4th Circuit United States v. Damon, 191 F.3d 561 (4th Cir. 1999) (before a court may accept a guilty plea, it must ensure that the defendant is competent to enter the plea).

8th Circuit Wilkins v. Bowersox, 145 F.3d 1006, 1015 (8th Cir. 1998) (defendant was competent to stand trial sufficient to mandate a conclusion that defendant's waiver of counsel was valid).

9th Circuit United States v. Timbana, 222 F.3d 688, 717 (9th Cir. 2000) (colloquy inadequate when judge had reason to suspect that defendant might not be acting with adequate capacity).

[2] Nature of the charge.

1st Circuit United States v. Hoyle, 237 F.3d 1, 7 (1st Cir. 2001) (understanding nature of charge is core concern in acceptance of guilty plea).

5th Circuit United States v. Suarez, 155 F.3d 521, 524–525 (5th Cir. 1998) (vacating plea agreement stating that district court "failed to perform its duty of ascertaining whether [defendant] understood the nature of the charge he was pleading to").

11th Circuit United States v. Camacho, 233 F.3d 1308, 1314 (11th Cir. 2000) (level of inquiry necessary to show a defendant understands the nature of the charges against him varies from case to case).

[3] Mandatory minimum and maximum.

1st Circuit United States v. Santo, 225 F.3d 92, 98 (1st Cir. 2000) (error when court was correct with regards to minimum sentence, but incorrect as to the maximum possible sentence defendant faced).

4th Circuit United States v. General, 278 F.3d 389, 395 (4th Cir. 2002) (failure to inform defendant of the statutory minimum sentence for a firearm offense did not affect defendant's substantial rights).

5th Circuit United States v. Coscarelli, 105 F.3d 984, 990–994 (5th Cir. 1997) (district court's failure to inform defendant of maximum possible sentence violated Rule 11 and was not harmless).

7th Circuit United States v. Fernandez, 205 F.3d 1020, 1028 (7th Cir. 2000) (defendant was not sufficiently advised of mandatory minimum sentence).

9th Circuit United States v. Barrios-Gutierrez, 218 F.3d 1118, 1121–1122 (9th Cir. 2000) (court violated rule by not informing defendant of maximum possible sentence).

[4] Restitution. Failure to advise of possibility of restitution is generally a harmless error.

1st Circuit United States v. Coviello, 225 F.3d 54, 66 (1st Cir. 2000) (failure to warn defendant of possibility of supervised release and restitution during plea colloquy was harmless error).

4th Circuit United States v. Fentress, 792 F.2d 461, 465–466 (4th Cir. 1986) (court's failure to inform defendant about restitution was harmless error).

rights waived by the particular terms of the guilty plea, terms that may include the waiver of the right to appeal the sentence imposed.[5]

To ensure that the plea is entered voluntarily, Rule 11(d) requires that the court ensure that the plea is not the result of force, threats, or promises not contained in the plea agreement.[6]

Federal Rule of Criminal Procedure 11(g) requires that a "verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of the guilty plea."[7]

Finally, once the agreement is submitted to the court, the court must either accept the agreement, reject the agreement or defer acceptance or rejection until after it has considered the presentence report.[8] In deciding whether to accept or reject the agreement, Rule 11(f) requires the court to ensure that there is a factual basis for the guilty plea. A court may find factual basis from anything that appears on the record, including the government's own proffer.[9]

5th Circuit — *See* United States v. Glinsey, 209 F.3d 386, 395 (5th Cir. 2000) (judgment modified to amount defendant had been warned about in order to reconcile the court's failure to advise defendant of restitution with its offsetting warning of exposure to a fine).

[5] **Waiver of rights.** Fed. R. Crim P. 11(c)(1), (6). *See* Jones v. United States, 167 F.3d 1142, 1144 (7th Cir. 1999). *See also* § 6.05[5] *below*.

[6] **Force, threats, or promises.**

1st Circuit — United States v. Teeter, 257 F.3d 14, 24 (1st Cir. 2001) (district court must inquire specifically in to any waiver of rights at change of plea hearing).

2d Circuit — United States v. Tang, 214 F.3d 365, 368 (2d Cir. 2000) (requirement that a waiver must be knowing and voluntary).

7th Circuit — United States v. Gwiazdzinski, 141 F.3d 784, 788 (7th Cir. 1998) (defendant was not entitled to withdraw plea based on claim that wife threatened to not let him see their child if he did not plead guilty).

9th Circuit — United States v. Gaither, 245 F.3d 1064, 1068 (9th Cir. 2001) (inquiry will include totality of the circumstances to determine whether or not defendant had free choice at plea stage).

[7] Fed. R. Crim. P. 11(g). The Department of Justice United States Attorneys' Manual [hereinafter "USAM"] requires that all negotiated plea agreements to felonies, or to misdemeanors negotiated from felonies, be in writing and filed with the court. USAM 9-27.450. *See* App. F. The USAM indicates that a written agreement filed with the court assists the United States Sentencing Commission in monitoring compliance by prosecutors with Department policies and the Guidelines.

[8] Fed. R. Crim. P. (11)(e)(2). *See* Ch. 7, *Sentencing Options and Procedures* (discussing presentence reports).

[9] **Factual basis for plea.** United States v. Martinez, 277 F.3d 517, 531–532 (4th Cir. 2002) (court relied on presentencing report that provided sufficient factual basis for the charges against defendant).

[2]—Plea Agreements Under Rule 11(e).

Rule 11(e)(1) provides that the attorney for the government and the attorney for the defendant may agree that, upon the defendant's entry of a plea of guilty or nolo contendere to a charged offense, or lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on 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 is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.[10]

Thus, Rule 11(e) establishes a procedure for binding and non-binding plea agreements: Rule 11(e)(1)(B) provides that in exchange for the defendant's plea, the government will make a non-binding recommendation to the court, or will not oppose the defendant's request for a particular sentence; whereas, Rule 11(e)(1)(C) provides a binding mechanism for the defendant and the government to agree to a specific sentence as the appropriate disposition of the case. Once the court accepts the agreement under either scenario the defendant is generally not permitted to withdraw the guilty plea.[11]

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[10] **Court may not negotiate.** Fed. R. Crim. P. 11(e)(1)(A)–(C). The court is prohibited from participating in the actual plea negotiations. Fed. R. Crim. P. 11(e)(1) ("[t]he court shall not participate in any discussions between the parties concerning any such plea agreement").

1st Circuit	*See* United States v. Bierd, 217 F.3d 15, 19 (1st Cir. 2000) (stating purposes of Rule 11(e)(1)).
4th Circuit	*See* United States v. Cannady, 283 F.3d 641, (4th Cir. 2002) (judge's comments not participatory when full agreement had already been reached by parties).
5th Circuit	United States v. Rodriguez, 197 F.3d 156, 159 (5th Cir. 1999) (judge improperly participated in plea negotiations).
6th Circuit	*See* United States v. Markin, 263 F.3d 491, 497 (6th Cir. 2001) (no error when defendant changed plea well before his "problematic interchange" with judge).

[11] *See* § 6.10 *below*. Fed. R. Crim. P. 32(e) provides that once the plea of guilty is entered, it may only be withdrawn prior to sentencing being imposed "if the defendant shows any fair and just reason." Once sentence has already been imposed, a plea may only be set aside on direct appeal or by motion under 28 U.S.C. § 2255. *See* Ch. 8, *Post-Sentence Procedure and Practice.*

A non-binding recommendation under a Rule 11(e)(1)(B) plea cannot be withdrawn if the court chooses to reject the recommendation and impose a higher sentence. It is for this reason that Rule 11 requires that the court inform the defendant prior to entertaining an 11(e)(1)(B) plea that the court is not bound by the government's sentencing recommendation and that the defendant has no right to withdraw the plea should the court in fact choose not to follow the recommendation.[12] The failure of the court to advise the defendant of this inability to withdraw the plea may constitute reversible error.[13] The court is not, however, required to inform the defendant of the court's likely sentencing disposition prior to accepting the plea agreement.[14] Some courts have suggested, however, that it is sound practice to do so.[15]

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[12] Fed. R. Crim. P. 11(e)(2).

[13] **Failure to advise of ability to withdraw.**

2d Circuit	United States v. King, 234 F.3d 126, 128 (2d Cir. 2000) ("under the harmless error standard, unless there are exceptional circumstances present, a defendant receiving a lower than recommended sentence cannot demonstrate he or she suffered harm" when he was not warned of ability to withdraw); United States v. Livorsi, 180 F.3d 76, 79 (2d Cir. 1999) (vacating sentence of defendant who was not informed of his ability to withdraw).
4th Circuit	United States v. Martinez, 277 F.3d 517, 531 (4th Cir. 2002) (court must "substantially" inform defendant of ability to withdraw).
6th Circuit	United States v. Fleming, 239 F.3d 761, 764 (6th Cir. 2001) (noting requirement to advise defendant of ability to withdraw).
9th Circuit	United States v. Graibe, 946 F.2d 1428, 1433–1435 (9th Cir. 1991) (holding that failure to inform defendant that guilty plea could not be withdrawn if district court did not accept government's sentencing recommendation was not harmless error).

[14] **Court not required to advise defendant of likely sentence prior to acceptance of plea**.

2d Circuit	United States v. DeJesus-Abad, 263 F.3d 5, 8 (2d Cir. 2001) (court not obligated to inform defendant of the applicable guidelines sentencing range).
3d Circuit	United States v. Powell, 269 F.3d 175, 183 (3d Cir. 2001) (law does not require that defendant be given an "accurate guess" as to what ultimate sentence will be).
4th Circuit	United States v. General, 278 F.3d 389, 395 (4th Cir. 2002) (there is no requirement to inform defendant of mandatory consecutive sentencing).
8th Circuit	United States v. Thomas, 894 F.2d 996, 997 (8th Cir. 1990).
10th Circuit	United States v. Rhodes, 913 F.2d 839, 843 (10th Cir. 1990).
D.C. Circuit	United States v. Watley, 987 F.2d 841, 846 (D.C. Cir. 1993).

[15] **Good practice to advise defendant of sentence prior to acceptance of plea.** United States v. Fernandez, 877 F.2d 1138, 1144 (2d Cir. 1989) (noting that while not required, it may be good practice for the court to assure itself that the defendant has been advised about the applicability of the Guidelines).

In practice, most plea agreements are not binding on the court, and the defendant has no assurance that the sentencing court will follow the terms of the agreement. To avoid the unknown of a non-binding plea agreement, some defendants seek to negotiate a binding agreement under Rule 11(e)(1)(C). A Rule 11(e)(1)(C) plea is straightforward—a court may accept or reject a Rule 11(e)(1)(C) plea agreement, but may in no event modify it.[16]

A plea agreement under Rule 11(e)(1)(C) may contain a specific sentence range[17] from which the court cannot depart.[18] However, in the event that the

[16] Court may not modify Rule 11(e)(1)(C) plea.

1st Circuit United States v. Gutierrez-Rentas, 2001 U.S. App. LEXIS 16759, at *4 (1st Cir. Feb. 12, 2001) (the court may not accept the plea and then "unilaterally" impose a more lenient sentence than that specified in a Rule 11(e)(1)(C) agreement).

2d Circuit United States v. Williams, 260 F.3d 160, 165–166 (2d Cir. 2001) (stating rule against modification, but finding application of § 5G1.3(b) to a plea agreement silent as to whether stipulated sentence should run consecutively or concurrently is not modification).

D.C. Circuit United States v. Goodall, 236 F.3d 700, 706 (D.C. Cir. 2001) (modification by court is prohibited).

Some cases have given definition to what constitutes "modification" under Rule 11(e)(1)(C).

3d Circuit United States v. Gilcrist, 130 F.3d 1131, 1134 (3d Cir. 1997) (a Rule 11(e)(1)(C) plea agreement binds the district court, not withstanding departures from the applicable guidelines).

7th Circuit United States v. Barnes, 83 F.3d 934, 941 (7th Cir. 1996) (the district court does not have the power to retain the plea and discard the agreed-upon sentence, even if the sentence departs from what the Guidelines might prescribe).

9th Circuit United States v. Mukai, 26 F.3d 953, 955 (9th Cir. 1994) (absent a Rule 35(b) motion, the law in this circuit has not previously recognized "exceptional circumstances" as a basis for disregarding the sentence contained in a plea agreement under Rule 11(e)(1)(C)); United States v. Fernandez, 960 F.2d 771, 773 (9th Cir. 1992) (the court erred in rejecting one paragraph of the plea agreement rather than either accepting or rejecting the agreement); United States v. Semler, 883 F.2d 832, 833–835 (9th Cir. 1989) (in an "exceptional case" the district court, after sentencing a defendant, may reduce the sentence in response to a Rule 35(b) motion.).

[17] Specific sentence range.

2d Circuit United States v. Nutter, 61 F.3d 10, 11–12 (2d Cir. 1995) (per curiam) (affirming specific sentence of defendant pursuant to plea agreement).

4th Circuit United States v. Lambey, 974 F.2d 1389, 1396 (4th Cir. 1992) (plea agreement would allow specific sentence or sentence range).

6th Circuit United States v. Kemper, 908 F.2d 33, 36 (6th Cir. 1990) (vacating sentence because court sentenced defendant without giving him an opportunity to withdraw plea after rejecting plea agreement).

agreement fails to address certain sentencing issues, the court may refer to the Guidelines for guidance without being deemed to have modified the plea agreement. For example, in *United States v. Williams*, one of the defendants, Hutchinson, appealed a conviction after a guilty plea arguing that § 5G1.3(b)[19] of the Guidelines required that his sentence run concurrently with his existing undischarged state sentence, with credit for time served on the state sentence.[20] The defendant's 11(e)(1)(C) plea agreement with the government required him to plead guilty to a drug conspiracy charge in exchange for a stipulated sentence of 20 years. The agreement did not mention whether the stipulated federal sentence would be served consecutively to, or concurrently with, the state sentence. The district court ruled that the sentences should run consecutively. On appeal, the Second Circuit focused on the issue of whether the district court was prohibited from applying § 5G1.3(b) to a sentence stipulated in a 11(e)(1)(C) plea bargain. The court acknowledged the rule that a district court must accept or reject a Rule 11(e)(1)(C) sentence bargain, but may in no event modify it. However, the court concluded that where a plea agreement says nothing about whether the stipulated sentence should run consecutively to or concurrently with an existing undischarged sentence, in applying § 5G1.3(b) a district court does not "modify" the stipulated sentence by running the sentences consecutively. In the absence of a concurrent/consecutive sentence provision in the plea agreement, the Guidelines should have controlled the district court's sentencing decision and

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10th Circuit	United States v. Rubio, 231 F.3d 709, 712 (10th Cir. 2000) (an agreement under Rule 11(e)(1)(C) is binding on the court and requires the government to agree that a specific sentence or sentencing range is appropriate).
D.C. Circuit	United States v. Goodall, 236 F.3d 700, 705 (D.C. Cir. 2001) (prosecutor and defendant can agree on a specific sentence or sentencing range that is binding on the court).

[18] Court may not depart.

1st Circuit	United States v. Teeter, 257 F.3d 14, 28 (1st Cir. 2001) (court is bound by sentencing range specified in Rule 11(e)(1)(C) plea agreement).
2d Circuit	United States v. Cunavelis, 969 F.2d 1419, 1422 (2d Cir. 1992) (court has no discretion to depart where agreement indicates a specific sentencing range).
10th Circuit	United States v. Veri, 108 F.3d 1311, at 1315.
9th Circuit	United States v. Mukai, 26 F.3d 953, at 956–97.

[19] ***Williams.*** 260 F.3d 160, 166 (2d Cir. 2001). USSG § 5GB.3(b) states that if there is an undischarged term of imprisonment for an offense that has been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense should be imposed to run concurrently to the undischarged term of imprisonment. Note 2 to § 5GB.3(b) further states that if a sentence is imposed concurrently under § 5G1.3(b), the district court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the offense. 260 F.3d at 163.

[20] 260 F.3d at 162.

the court should have applied § 5G1.3. The court ultimately ruled, however, that the district court's failure to apply § 5G1.3 did not result in a sentencing error.[21]

Once a defendant enters into an 11(e)(1)(C) plea, appeals are severely limited. 18 U.S. C. § 3742(c)(1) restricts appellate review to challenges that a sentence was imposed in violation of law or was imposed as a result of an incorrect application of the Sentencing Guidelines.[22]

[3]—Plea Colloquy.

In order to comply with Rule 11, the Benchbook for United States District Court Judges, published by the Federal Judiciary Center,[23] advises courts to conduct, *inter alia*, the following colloquy before accepting the defendant's plea:

Q: Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?

Q: Are you currently under the influence of any drug, medication, or alcoholic beverage of any kind?

Q: Have you received a copy of the indictment (information) pending against you—that is, the written charges made against you in this case—and have you fully discussed those charges, and the case in general, with Mr./Ms. _____ as your counsel?

Q: Are you fully satisfied with the counsel, representation, and advice given to you in this case by your attorney, Mr./Ms. _____?

Q: Is your willingness to plead guilty (nolo contendere) the result of discussions that you or your attorney have had with the attorney for the government?

Q: Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?

Q: Does the plea agreement represent in its entirety any understanding you have with the government?

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[21] 260 F.3d at 168–169.

[22] **Limited appeal rights.**

2d Circuit	United States v. Djelevic, 161 F.3d 104, 107 (2d Cir. 1998) (refusing to allow an appeal right when right to appeal specifically waived in plea agreement).
7th Circuit	Jones v. United States, 167 F.3d 1142, 1143–1145 (7th Cir. 1999) (waiver will not foreclose review as right to appeal survives an involuntary or constitutionally impermissible plea agreement).
10th Circuit	United States v. Sanchez, 146 F.3d 796, 797 (10th Cir. 1998) (holding that appeals court lacked jurisdiction to review defendant's sentence).

[23] Selected sections of the Benchbook are provided at App. G.

Q: Do you understand the terms of the plea agreement?

Q: Has anyone made any other or different promise or assurance of any kind to you in an effort to induce you to plead guilty (nolo contendere) in this case?

[*If the terms of the plea agreement are nonbinding recommendations pursuant to Rule 11(e)(1)(B)*]

Q: Do you understand that the terms of the plea agreement are merely recommendations to the court—that I can reject the recommendations without permitting you to withdraw your plea of guilty and impose a sentence that is more severe than you may anticipate?

[*If any or all of the terms of the plea agreement are pursuant to Rule 11(e)(1)(A) or (C):*]

Q: Do you understand that if I choose not to follow the terms of the plea agreement [if some, but not all, terms are binding, identify those terms] I will give you the opportunity to withdraw your plea of guilty, and that if you choose not to withdraw your plea I may impose a more severe sentence, without being bound by the plea agreement [or specific terms rejected by the court]?

[*If the plea agreement involves a waiver of the right to appeal the sentence, as defendant*]

Q: Do you understand that by entering into this plea agreement and entering a plea of guilty, you will have waived or given up your right to appeal or collaterally attack all or part of this sentence?

[The court should discuss the specific terms of the waiver with defendant to ensure that the waiver is knowingly and voluntarily entered into and that defendant understands the consequences.]

[*Continue for all pleas*]

Q: Has anyone attempted in any way to force you to plead guilty (nolo contendere) in this case? Are you pleading guilty of your own free will because you are guilty?

Q: Do you understand the possible consequences of your case?

Q: Have you and your attorney talked about how the Sentencing Guidelines might affect your case?

Q: Do you understand that, after your guideline range has been determined, the court has the authority in some circumstances to depart from

the Guidelines and impose a sentence that is more severe or less severe than the sentence called for by the Guidelines?

Q: Do you also understand that parole has been abolished and that if you are sentenced to prison you will not be released on parole?

§ 6.03 Guideline Policy on Pleas.

[1]—Guidelines Impose Restrictions.

The Guidelines address plea agreements in Part B of USSG § 6B1.1 in four Policy Statements.[1] Taken together, the Guidelines impose severe restrictions on plea bargaining. The Commentary provides that the Policy Statements are "intended to ensure that plea negotiation practices: (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a);[2] and (2) do not perpetuate unwarranted sentencing disparity."[3] In addition, these Policy Statements are a "first step" toward implementing 28 U.S.C. § 994(a)(2)(E), which directs judges to "examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines."[4] The commentary to USSG § 6B1.2 provides that a defendant who enters a plea of guilty in a timely manner will enhance the likelihood of receiving a reduction for acceptance of responsibility.[5] That same commentary states that any further

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[1] **Policy statements.** The Commission promulgates Policy Statements under its statutory power to issue "general policy statements regarding application of the guidelines." 28 U.S.C. § 994(a)(2). Policy Statements are binding on courts only if they interpret a guideline or prohibit the court from taking a specified action. *See* §1.01[3][c] *above*. *See also* Williams v. United States, 503 U.S. 193, 199, 112 S. Ct. 1112, 1118–1119 (1992). Courts have held that Policy Statements that do not interpret the Guidelines, as is the case with Policy Statements contained in Chapter Six, are not binding on the courts. *See*—

Supreme Court	Stinson v. United States, 508 U.S. 36, 42, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993) (discussing when policy statements bind the court).
2d Circuit	United States v. Bonnet-Grullon, 212 F.3d 692, 698 (2d Cir. 2000) (policy statements bind the court when they prohibit a specific action).
D.C. Circuit	United States v. Goodall, 236 F.3d 700, 707 (D.C. Cir. 2001) (policy statements may be binding on the court).

[2] The statute provides, *inter alia*, that a court, in determining the particular sentence to be imposed, shall consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; and (2) the need for the sentence imposed to: (a) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) afford adequate deterrence to criminal conduct; (c) protect the public from further crimes of the defendant; and (d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See* 18 U.S.C. 3553(a)(1)–(2).

[3] USSG § 6B1.1, intro. comment.

[4] USSG § 6B1.1, intro. comment. (quoting 28 U.S.C. § 994(a)(2)(E)).

[5] USSG § 6B1.2, comment.

reduction to the offense level or sentence due to the plea agreement would tend to undermine the Sentencing Guidelines.

[2]—Non-Binding Recommendation Agreements.

Plea agreements pursuant to 11(e)(1)(B) are non-binding. Such agreements permit the government to recommend, or agree not to oppose, a defendant's specific requests for a particular sentence or for the application of a particular Guideline. Section 6B1.1(b) reinforces the notion that the judge, and not the prosecutor, has the final say about whether a plea agreement will be honored. That Guideline section requires the court to advise the defendant that an agreement or request pursuant to a plea agreement is not binding upon the court.[6] Thus, a defendant does not know until after entering a guilty plea whether the bargained-for guideline calculation will be honored. The court may accept a plea containing a recommended sentence outside of the applicable Guideline range only if it determines that the departure is for "justifiable reasons."[7]

Stipulations of fact that are entered into between the defendant and prosecutor in conjunction with a plea are not binding upon the sentencing court.[8] Such stipulations must "fully and accurately,"[9] "set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics,"[10] and explain "with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate."[11] The parties are

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[6] USSG § 6B1.1(b), p.s.

[7] USSG § 6B1.2(b)(2), p.s.

[8] **Stipulations of fact are non-binding.** USSG § 6B1.4(d), p.s.

1st Circuit	*See* United States v. Saxena, 229 F.3d 1, 4–8 (1st Cir. 2000) (stipulations of fact are not binding on the court unless the plea agreement falls under Fed. R. Crim. P. 11(e)(1)(C)).
5th Circuit	*But see* United States v. Principe, 203 F.3d 849, 853 (5th Cir. 2000) (where stipulated facts establish a more serious offense, defendant may be sentenced to a higher penalty).
6th Circuit	United States v. Velez, 1 F.3d 386, 389 (6th Cir. 1993).
7th Circuit	United States v. Bennett, 990 F.2d 998, 1002–1003 (7th Cir. 1993).
9th Circuit	United States v. Lewis, 979 F.2d 1372, 1374–1375 (9th Cir. 1992).

Similarly, stipulations contained in a plea agreement are not binding on the Probation Department. Indeed, the probation officer may ultimately provide the court with a different sentencing calculation than that contained in the plea agreement. For a discussion of the tension created by recommendations that differ from the government's recommendation, see § 6.08[3] *below*.

[9] USSG § 6B1.4, comment.

[10] USSG § 6B1.4(a)(1), p.s.

[11] USSG § 6B1.4(a)(3), p.s.

admonished not to include "misleading facts" in the stipulation,[12] or to "stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such 'facts' for purposes of the litigation."[13] There is a preference that stipulations of fact be in writing, but exceptions may be made pursuant to local rule.[14]

A court is not precluded from considering dismissed counts in sentencing the defendant.[15] Indeed, the Guidelines provide that a plea agreement shall not include terms that "preclude the conduct underlying such charge from being considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted."[16] For example, in *United States v. Svacina*,[17] the defendant was indicted on two counts of drug offenses—possession with the intent to distribute 138.8 grams of methamphetamine (count one) and attempt to possess with the intent to distribute 80.64 grams of methamphetamine (count two). After the defendant pled guilty to count two, the district court included count one charges for the purpose of calculating the base offense level under the Sentencing Guidelines. The Second Circuit agreed with the district court's determination that the two counts constituted the "same course of conduct," which focuses on whether there is a pattern of criminal conduct. The Second Circuit concluded that the court reasonably inferred that each offense was an episode in an ongoing drug business and thus part of the same course of conduct because count one and count two were similar offenses, involving similar substances and similar conduct on the part of the defendant. Moreover, the offenses had taken place in the same area in Kansas and both involved large quantities of methamphetamine and occurred less than three months apart.[18]

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[12] USSG § 6B1.4(a)(2), p.s.

[13] USSG § 6B1.4, comment.

[14] USSG § 6B1.4, comment.

[15] In addition to considering dismissed counts as relevant conduct, a court may also consider dismissed counts as a basis for departure. *See* USSG § 5K2.21 ("the court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range").

[16] USSG § 6B1.2(a), p.s.

[17] ***Svacina***. 137 F.3d 1179 (10th Cir. 1998).

[18] **Non-conviction conduct may be considered.** *Scavina*, 137 F.3d at 1182–1183.

Supreme Court	United States v. Watts, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 544 (1997) (sentencing court can consider conduct for which a defendant has previously been acquitted).
2d Circuit	United States v. Kim, 896 F.2d 678 (2d Cir. 1990) (departure is permitted for acts meaningfully "related" to the offense of conviction).
3d Circuit	United States v. Baird, 109 F.3d 856, 864 (3d Cir. 1997) (separate individual acts may be taken into account).

Finally, unlike Rule 11, which provides the court with discretion to defer its decision until receipt of the presentence report,[19] the Guidelines require the court to "defer its decision [on requests contained in a plea agreement] until there has been an opportunity to consider the presentence report."[20] Courts differ as to whether a defendant may for any reason, or no reason, withdraw a plea prior to the court's review of the presentence report.[21]

[3]—Binding Agreements.

In the case of an 11(e)(1)(A) agreement that involves the dismissal of any charges, or the agreement not to pursue potential charges, Guideline § 6B1.2(a) requires the court to accept the plea only after carefully considering whether the remaining charges adequately reflect the seriousness of the actual offense behavior and that "accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines."[22]

In cases involving a Rule 11(e)(1)(C) plea, Guideline § 6B1.2(c) provides that the court may accept the plea if the court is satisfied either that: "(1) the agreed sentence is within the guideline range; or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons."[23] Additionally, the court may postpone its decision until after receipt of the presentence report.[24]

If the court rejects a plea entered pursuant to Rule 11(e)(1)(A) or 11(e)(1)(C), Guideline § 6B1.3 requires that the court shall "afford the defendant an opportunity to withdraw the defendant's guilty plea."[25]

10th Circuit United States v. Zamarripa, 905 F.2d 337 (10th Cir. 1990) (conduct not resulting in conviction may be factored into the district court's sentencing decision).

[19] *See* Fed. R. Crim. P. 11(e)(2).

[20] **Court must wait for presentence report.** USSG § 6B1.1(c). *See* United States v. Tyndale, 209 F.3d 1292, 1296 (11th Cir. 2000) (court can accept guilty plea but not the plea agreement without first reviewing presentence report).

[21] **Withdraw plea prior to presentence report.** *Compare* United States v. Hyde, 92 F.3d 779, 781 (9th Cir. 1996) (defendant need not comply with Rule 32(e) in order to withdraw plea prior to court's review of presentence report), *with* United States v. Ewing, 957 F.2d 115, 117–119 (4th Cir. 1992) (defendant must comply with Rule 32 once plea is entered even if acceptance by the court is pending receipt and review of the presentence report).

[22] USSG § 6B1.2(a).

[23] **Acceptance of plea.**

3d Circuit United States v. Gilchrist, 130 F.3d 1131, 1132 (3d Cir. 1997) (stating requirements for acceptance of plea).

D.C. Circuit United States v. Ginyard, 215 F.3d 83, 87 (D.C. Cir. 2000) (stating requirements prior to acceptance of a guilty plea).

[24] USSG § 6B1.1(c).

[25] **Withdrawal allowed if court rejects plea.**

§ 6.04 Department of Justice Policy on Plea Agreements.

The United States Department of Justice's United States Attorneys' Manual ("USAM") contains rules that prosecutors must follow in crafting and entering into plea agreements. The USAM is a looseleaf reference for United States Attorneys, Assistant United States Attorneys, and Department of Justice Attorneys. It contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components of the Department of Justice. USAM does not create any substantive or procedural rights, including discovery rights. In addition, these Guidelines do not create any rights that criminal defendants can invoke.[1]

The USAM requires "honesty in sentencing"[2] and provides that, "the prosecutor should seek a plea to the most serious readily provable offense charged" in the indictment.[3] The charges are to be "consistent with the defendant's criminal conduct, both in nature and in scope," but this requirement "is not inflexible."[4] Furthermore, the USAM provides that "a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into

6th Circuit	United States v. Kemper, 908 F.2d 33, 37 (6th Cir. 1990) (vacating district court sentence to allow defendant opportunity to withdraw from plea agreement).
7th Circuit	United States v. Raimondi, 159 F.3d 1095, 1098 (7th Cir. 1998) (granting a one-day extension for defendant to consider district court's rejection of plea agreement).
8th Circuit	United States v. Payton, 168 F.3d 1103, 1105 (8th Cir. 1999) (under the rules, a defendant has an absolute right to withdraw his plea only if the court rejects the plea agreement; otherwise, defendant must have a "fair and just" reason).
9th Circuit	United States v. Alvarez-Tautimez, 160 F.3d 573, 576 n.5 (9th Cir. 1998) ("fair and just reason" rule only applies after the plea has been accepted).
10th Circuit	*But see* United States v. Siedlik, 231 F.3d 744, 748–749 (10th Cir. 2000) (plea may not be withdrawn because plea agreement rejected).

[1] USAM does not create rights.

2d Circuit	United States v. Piervinanzi, 23 F.3d 670, 682 (2d Cir. 1994).
6th Circuit	United States v. Myers, 123 F.3d 350, 355–356 (6th Cir. 1997) (violation of internal operating procedures of the Department of Justice does not on its own create an enforceable right).
9th Circuit	United States v. Fernandez, 231 F.3d 1240, 1245 (9th Cir. 2000) (USAM does not create any substantive or procedural rights).

[2] USAM § 9-27.400(B). *See* App. F.

[3] USAM §§ 9-27.400(B); 9-27.430(A).

[4] USAM § 9-27.430(B).

plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime."[5] Thus, the USAM appears to leave the prosecutor with some discretion in selecting the charge to which the defendant will plea.

Yet other USAM passages suggest that flexibility is limited. For example, the USAM provides that, "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons."[6] There are two exceptions to this rule. First, prosecutors can drop charges if doing so would not affect the applicable guideline range. Second, charges can be dropped if the United States Attorney or a designee approves, for reasons such as the workload of the particular office involved or the time-consuming nature of the trial of the case.[7]

The USAM provides a non-exhaustive list of considerations for prosecutors to weigh in determining whether it is appropriate to enter into a plea agreement. Section 9-27.420 identifies the following factors to be considered:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;
2. The defendant's history with respect to criminal activity;
3. The nature and seriousness of the offense or offenses charged;
4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;
5. The desirability of prompt and certain disposition of the case;
6. The likelihood of obtaining a conviction at trial;
7. The probable effect on witnesses;
8. The probable sentence or other consequences if the defendant is convicted;
9. The public interest in having the case tried rather than disposed of by a guilty plea;
10. The expense of trial and appeal;
11. The need to avoid delay in the disposition of other pending cases; and
12. The effect upon the victim's right to restitution.

Once the decision is made to enter into a plea agreement with the defendant, the USAM requires each Assistant United States Attorney to consider carefully which particular charges should be included in the plea agreement. The USAM

[5] USAM § 9-27.300(A)

[6] USAM § 9-27.400(B).

[7] USAM § 9-27.400(B).

recommends that the defendant be required to plead to a charge (or charges) that: (1) is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct; (2) has an adequate factual basis; (3) makes likely the imposition of an appropriate sentence and order of restitution, if appropriate, under all circumstances of the case; and (4) does not adversely affect the investigation or prosecution of others.[8]

§ 6.05 Core Concepts of the Plea Agreement.

[1]—Plea Agreements Are Contractual.

Although each plea agreement is unique, and many U.S. Attorney offices have their own rules, customs, and practices regarding the terms of plea agreements, virtually all plea agreements contain certain core concepts. Since plea agreements are viewed as contracts,[1] the precise wording of an agreement is critical to its enforceability. Discussed below are some of the common core concepts contained in federal plea agreements.

[2]—Parties Bound by Agreement.

[a]—Plea Agreement Generally Does Not Bind Other Jurisdictions.

Even though Assistant United States Attorneys act on behalf of the United States, they generally cannot bind other prosecutors in other jurisdictions or other federal agencies. A guilty plea and sentencing resulting from a plea agreement effectively precludes any further prosecution by the prosecutor's office that agreed to the plea. In addition, plea agreements generally do not bind governmental bodies in the same jurisdiction if they are not parties to the agreement.[2] Thus,

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[8] USAM § 9-27.430.

[1] Plea agreements contractual in nature.

1st Circuit	United States v. Clark, 55 F.3d 9, 12 (1st Cir. 1995) (courts are guided in interpreting plea agreements by principles of contract law).
4th Circuit	United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) (interpretation of plea agreement is guided by contract law).
6th Circuit	United States v. Robison, 924 F.2d 612, 613–614 (6th Cir. 1991) (plea agreements are contractual in nature).
9th Circuit	United States v. Johnston, 199 F.3d 1015, 1020 (9th Cir. 1999) (plea agreements are typically construed according to contract law).

[2] Does not bind other governmental bodies.

Supreme Court	*But see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 71 (1964) (dicta—the federal government could, under the supremacy clause, grant immunity from state prosecution even without the consent of the state).
1st Circuit	United States v. Flemmi, 225 F.3d 78, 87 (1st Cir. 2000) (noting that if the rules were otherwise, a minor government functionary would have the power to prevent prosecution of a defendant).

only the prosecutor's office reflected in the plea agreement is bound by the terms of the plea agreement.

The government sometimes seeks to include language similar to the following:

> This offer is binding only upon the United States Attorney for [jurisdiction]. This plea offer does not bind, for instance, other United States Attorney's Offices, the Tax Division of the United States Department of Justice, or the Internal Revenue Service of the Department of Treasury; they remain free to prosecute the defendant as they see fit for any offense, under their respective jurisdictions.

In *United States v. Johnston*,[3] the defendant entered a plea agreement with the United States Attorney for the Eastern District of Michigan for his involvement in a telemarketing scheme involving wire and bank fraud. The agreement explicitly stated that it did not bind or obligate governmental entities other than the United States Attorneys for the Eastern District. The defendant was subsequently indicted in the United States District Court for the District of Nevada on multiple counts of racketeering, fraud, and conspiracy to commit fraud in association with the *same* type of marketing scheme and entered a guilty plea. On appeal, the defendant argued that the Michigan plea agreement barred subsequent indictment in Nevada. However, the court rejected the defendant's argument, pointing to the fact that the Michigan plea agreement stated explicitly that it did not bind any other jurisdiction from prosecuting the defendant.[4]

2d Circuit	United States v. Williamsburg Check Cashing Corp., 905 F.2d 25, 28 (2d Cir. 1990) ("where the government agrees to make no recommendation as to sentence, . . . it may still provide the Probation Department with any factual material relevant to sentencing.").
3d Circuit	United States v. Igbonwa, 120 F.3d 437, 443 (3d Cir. 1997) (AUSA cannot bind INS by making promises regarding deportation without explicit authority of INS).
6th Circuit	*But see* United States v. Randolph, 230 F.3d 243, 250 (6th Cir. 2000) (if Northern District of Texas alone was bound by the agreement, a defendant could reasonably infer that results of prosecutor's investigation would not be handed over to prosecutors from other jurisdictions not bound by the agreement).
9th Circuit	*But see* United States v. Rose, 806 F.2d 931, 932–933 (9th Cir. 1986) (although the Supremacy Clause permits the federal government to extend immunity against state prosecutions, states, of course, do not have a corresponding power to impose their immunity grants on the federal government).
11th Circuit	San Pedro v. United States, 79 F.3d 1065, 1068–1069 (11th Cir. 1996) (without authority from Attorney General, United States Attorney lacked authority to promise nondeportation).

[3] ***Johnston.*** 199 F.3d 1015 (9th Cir. 1999).

[4] 199 F.3d at 1017–1021.

The court's reasoning in *Johnston* is indicates that because the Michigan plea agreement explicitly stated that other jurisdictions were not bound by the agreement, the agreement had no binding power.[5] Plea agreements will be found to bind other jurisdictions when they expressly state that they are to be binding on other jurisdictions, or when they are ambiguous with respect to their binding power. For example, in *United States v. Harvey*,[6] the Fourth Circuit considered whether a plea agreement made by a U.S. Attorney in one district of Virginia barred a subsequent prosecution in a related case in the District of South Carolina. There was a non-prosecution clause in the plea agreement, and the defendant argued that the clause not only prevented prosecution in the Eastern District of Virginia, but also by a U.S. Attorney in any district. The court found that the plea agreement was ambiguous on this point and that the ambiguity must be construed against the government, preventing further prosecutions for such offenses anywhere and by any agency of government.[7]

Federal prosecutors usually cannot bind state prosecutors and vice versa.[8] In

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[5] **Agreement explicitly stated it was non-binding.** 199 F.3d at 1021.

[6] ***Harvey.*** 791 F.2d 294 (4th Cir. 1986).

[7] **Ambiguities construed against the government.** 791 F.2d at 300–303.

6th Circuit	United States v. Fitch, 282 F.3d 364, 368 (6th Cir. 2002) (it is particularly appropriate to construe ambiguities against the government when government could have taken steps to avoid imprecision).
8th Circuit	*See also* United States v. Van Thournout, 100 F.3d 590, 594 (8th Cir. 1996) (absent an express limitation, any promises made by an Assistant United States Attorney in one district will bind an AUSA in another district).
9th Circuit	United States v. Clark, 218 F.3d 1092, 1095 (9th Cir. 2000) (ambiguities will be resolved in favor of the defendant).
10th Circuit	United States v. Peterson, 225 F.3d 1167, 1171 (10th Cir. 2000) (any ambiguities will be construed against the government as drafter of the agreement).

[8] **One sovereign cannot bind the other.**

Supreme Court	*But see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 71 (1964) (dicta—the federal government could, under the Supremacy Clause, grant immunity from state prosecution even without the consent of the state).
4th Circuit	United States v. Christmas, 222 F.3d 141, 145 (4th Cir. 2000), *cert. denied*, 531 U.S. 1098 (2001) (under doctrine of dual sovereignty, federal prosecutions are not barred by previous state prosecutions for same or similar conduct).
5th Circuit	United States v. Sandate, 630 F.2d 326, 328 (5th Cir. 1980) ("[t]he prosecution of [defendants] even after a state conviction is not barred by the Constitution or the Petite policy.").
8th Circuit	United States v. Glauning, 211 F.3d 1085, 1087 (8th Cir. 2000) (state and local government officials have no power to bind the federal government).

New Jersey v. Barone,[9] the defendant argued that the federal court's finding that his plea agreement was breached required dismissal of his state court indictment on similar charges, which was based on defendant's proffer to the federal government. The court ruled that the United States Attorney for the Eastern District of Pennsylvania had no authority to bind any state prosecuting authority in New Jersey because there was neither consent nor participation by the state authorities in the federal plea agreement.[10] A federal plea agreement, however, may be binding on a state, and vice versa where: (1) the state participates in the negotiation of the defendant's plea agreement; (2) there exists an agency relationship between the state and the federal prosecutor; or (3) the state, in bringing its prosecution, was a tool of the federal government.[11]

9th Circuit United States v. Sparks, 87 F.3d 276, 279 (9th Cir. 1996) (federal authorities were not bound by state authorities' agreement with defendant not to prosecute gun crimes); United States v. Perez, 65 F.3d 1552, 1554 (9th Cir. 1995) ("[I]t is well settled that states cannot bind the federal government to the terms of a plea agreement to which the federal government is not a party.").

10th Circuit Hale v. Gibson, 227 F.3d 1298, 1329 (10th Cir. 2000) (trial in federal court would not bar a subsequent prosecution in state court even though underlying facts were the same).

[9] ***Barone.*** 689 A.2d 132, 138–139 (N.J. 1997).

[10] **Neither consent nor participation by state authorities.** 689 A.2d at 138–139.

5th Circuit United States v. Sandate, 630 F.2d 326, 328 (5th Cir. 1980); Pruett v. Mississippi, 512 So.2d 689, 692–693 (*Miss. 1987*).

7th Circuit United States v. 25 Sandra Court, 135 F.3d 462, 464 (7th Cir. 1998) (binding of federal government to state plea agreement requires more than mere participation; it requires consent).

8th Circuit Hendrix v. Norris, 81 F.3d 805 (8th Cir. 1996) (state prosecutors need consent to bind federal prosecutors).

9th Circuit United States v. Sparkes, 87 F.3d 276, 279 (9th Cir. 1996).

11th Circuit Moon v. Head, 285 F.3d 1301 (11th Cir. 2002) (refusing to consider Tennessee part of the Georgia prosecution team where only information was shared).

[11] **When a federal plea can bind a state.** Barone, 689 A.2d at 138.

5th Circuit *See also* Montoya v. Johnson, 226 F.3d 399, 406 (5th Cir. 2000) (if in course of state proceedings defendant was misled into believing that his state plea would bind the federal court, defendant's plea was entered involuntarily).

7th Circuit United States v. Fuzer, 18 F.3d 517, 520 (7th Cir. 1994) (state prosecutor cannot bind the federal prosecutor absent knowledge and consent).

9th Circuit United States v. Cordova-Perez, 65 F.3d 1552, 1554 (9th Cir. 1995) (state prosecutor cannot bind the federal government where the federal government is not a party to a plea agreement); Stephens v. Attorney Gen., 23 F.3d 248, 249 (9th Cir. 1994).

Courts across the nation have also severely limited the binding power of prosecutors' plea agreements on other officers or agencies *within* the prosecutors' jurisdiction. For example, federal and state courts have ruled that probation officers are not bound by a prosecutor's promise not to make a recommendation concerning disposition of a matter,[12] nor are federal or state agencies bound by plea bargains entered into by federal or state prosecutors.[13]

[b]—Plea Agreement May Not Bind Other Federal Agencies.

Federal agencies, such as the IRS and the INS, are not bound by promises made by federal prosecutors in the context of plea agreements. Specifically, with respect to the IRS, an Assistant United States Attorney is not empowered to promise a defendant that the IRS will not pursue tax violations. Such promises are prohibited by USAM 9-27.630, which provides that United States Attorneys may not make agreements that prejudice civil or tax liability without the express

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[12] Probation officers not bound.

Federal Cases.—

1st Circuit	United States v. Saxena, 229 F.3d 1, 7 (1st Cir. 2000) (no error when prosecutor recommended agreed to sentence but then passed information to probation officer).
2d Circuit	United States v. Nutter, 61 F.3d 10, 11–12 (2d Cir. 1995).
4th Circuit	United States v. Lambey, 974 F.2d 1389, 1396 (4th Cir. 1992).
6th Circuit	United States v. Kemper, 908 F.2d 33, 36 (6th Cir. 1990).
7th Circuit	United States v.Turner, 203 F.3d 1010, 1014 (7th Cir. 2000) (probation officer is part of the court, not "surrogate prosecutor").
10th Circuit	United States v. Veri, 108 F.3d 1311, 1313–1315 (10th Cir. 1997).

State cases.—

In re Cunningham, 1996 Ohio App. LEXIS 573 (Ohio Ct. App. Feb. 13, 1996); Wisconsin v. McQuay, 452 N.W.2d 377, 383–385 (Wis. 1990); State v. Merz, 771 P.2d 1178 (Wash. Ct. App. 1989).

[13] Agencies not bound.

2d Circuit	*See also* United States v. Williamsburgh Check Cashing Corp., 905 F.2d 25, 28 (2d Cir. 1990).
3d Circuit	United States v. Igbonwa, 120 F.3d 437, 444 (3d Cir. 1997) (INS not bound unless it consents).
9th Circuit	*See also* State v. Harris, 6 P.3d 1218, 1225 (Wash. Ct. App. 2000) (county corrections officer not bound by plea agreement).
10th Circuit	*See also* State v. Thurston, 781 P.2d 1296, 1300–1301 (Utah Ct. App. 1989).
11th Circuit	San Pedro v. United States, 79 F.3d 1065, 1068–1069 (11th Cir. 1996) (rejecting the suggestion that government attorney has the authority to bind all government agencies to plea agreements).

agreement of all affected divisions and/or agencies. For example, in *In re Minkoff*,[14] the defendant entered into a plea agreement with the United States District Court for the Western District of Missouri wherein the defendant agreed to waive indictment and enter a plea of guilty to filing a false tax return. As part of the plea agreement, the government agreed that it would not further criminally prosecute the defendant in the district of Kansas. The plea agreement also explicitly stated that it bound only the defendant, the United States Attorney for the Western District of Missouri and the Organized Crime and Racketeering Section, but did not bind any other federal, state, or local prosecution authority. The government requested, and the court agreed not to impose restitution on the full amount of the debt owed by the defendant based on IRS calculations. After the defendant was sentenced, the IRS discovered that they significantly underestimated the defendant's tax liability for a particular year and sought to impose the amount of the outstanding debt. The defendant argued that the IRS was estopped from claiming the additional liability because in the plea agreement, the government stipulated that the tax loss for the year in question would not exceed a certain dollar amount. The court concluded that IRS was not bound by the government's stipulation to tax loss for sentencing purposes and that there was nothing in the plea agreement foreclosing the IRS from a subsequent audit, assessment, or claim.[15]

[c]—Enforcement of Certain Promises May Require Additional Signature Authority.

A prosecutor's promises regarding the defendant's deportation status generally are not binding without the express written agreement of the INS.[16] In *San Pedro*

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[14] ***In re Minkoff.*** 1999 Bankr. LEXIS 1721 (Bankr. D. Kan. Dec. 6, 1999).

[15] **Plea agreement did not bind as to stipulated facts.** 1999 Bankr. LEXIS 1721, at *20. *See also* United States v. Spencer, 178 F.3d 1365, 1368 (10th Cir. 1999) (government not under obligation to calculate loss with specificity).

[16] **Deportation status.**

1st Circuit	United States v. Flemmi, 225 F.3d 78, 84 (1st Cir. 2000) (to enforce a promise it must be shown that the promisor had actual authority to make the particular promise and that the defendant relied on that promise detrimentally).
3d Circuit	United States v. Igbonwa, 120 F.3d 437, 443 (3d Cir. 1997) (INS must have consented).
11th Circuit	San Pedro v. United States, 79 F.3d 1065, 1068–1069 (11th Cir. 1996).

While this is generally the case, both the Eighth and Ninth Circuits have ruled that a federal prosecuting attorney who makes a promise of non-deportation during the course of a plea agreement has the authority to bind the INS and that the promise is enforceable against the INS. *See*—

8th Circuit	Margalli-Olvera v. INS, 43 F.3d 345, 354 (8th Cir. 1994).
9th Circuit	Thomas v. INS, 35 F.3d 1332, 1343 (9th Cir. 1994).

v. United States,[17] the defendant, a citizen of Cuba, was indicted by a federal grand jury for bribery of a federal official and conspiracy to commit bribery and pled guilty to the conspiracy charge. The defendant claimed that the United States Attorney and AUSAs who negotiated on behalf of the government, represented, as part of the agreement, that the government would not institute deportation proceedings against him. The INS filed an Order to Show Cause why he should not be deported and the defendant filed a motion seeking a declaration that the instigation of deportation proceedings violated the plea agreement. The Eleventh Circuit determined that it could not enforce any promise of non-deportation made to the defendant because the United States Attorney had no actual authority—either express or implied—to bind the INS.[18]

[3]—Immunity from Further Prosecution for Other Charges or Conduct.

Most plea agreements contain specific representations by the prosecutor that the United States Attorney's office will not pursue related charges or even unrelated conduct in exchange for the defendant's plea to a specified charge or charges.

For example, a plea agreement may contain the following:

> If the Court accepts the Defendant's plea of guilty, and Defendant complies with the terms and conditions of this plea agreement, the United States agrees that it will not further prosecute Defendant for offense relating to the offense conduct. The Defendant understands that the agreement not to prosecute does not extend to Defendant's civil tax liability, if any.

[4]—Investigative Cooperation with the Government.

Plea agreements may require a defendant's cooperation in return for a promise by the government not to use the information provided against the defendant. For example, a plea agreement may contain the following immunity clause:

> In return for the Defendant's full and truthful cooperation, the U.S. Attorney agrees not to use any information provided by the Defendant pursuant to this Agreement (or any information directly or indirectly derived therefrom) against the Defendant in any criminal case except in a prosecution (1) for perjury or obstruction of justice, or for making a false statement after the date of this Agreement; or (2) for an act of physical violence against the person of another, or conspiracy to commit any such act of violence.

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[17] ***San Pedro.*** 79 F.3d 1065 (11th Cir. 1996).

[18] **No authority to bind INS.** 79 F.3d at 1068–1071.

3d Circuit	United States v. Igbonwa, 120 F.3d 437, 442–444 (3d Cir. 1997).
8th Circuit	United States v. Camacho-Bordes, 94 F.3d 1168, 1174 (8th Cir. 1996).

Failure to assist the government with the proffered testimony may result in prosecution for perjury. For example, in *In re Grand Jury Proceedings*,[19] a witness was given a grant of immunity to testify before a grand jury in an investigation into a Georgia drug conspiracy. Prior to her appearance, the witness informed the prosecutor that she would not testify that she was involved in the conspiracy if brought before the grand jury. The prosecutor informed the witness that several other witnesses had testified to her connection to the conspiracy, and if she denied this connection during her testimony he would seek a perjury indictment. At a hearing, the witness argued that her Fifth Amendment rights would be violated if she was forced to testify because the prosecutor had threatened to indict her if she gave certain testimony that she believed was truthful. The witness was ordered to testify, but refused to do so and was found in contempt. The Eleventh Circuit found that there was no just cause shown for her refusal to testify and that the district court did not err by leaving the witness with the choices of telling the truth, committing perjury, or risking contempt through silence.[20]

[5]—Waiver of Defendant's Rights.

[a]—Constitutional and Appellate Rights.

Most plea agreements specifically provide that the defendant waives certain constitutional rights.[21] These rights include the right to a jury trial, the right to confront accusers, the right against self-incrimination, and the right to appeal the sentencing resulting from the plea. These first three rights are given up at the time a guilty plea is entered. In addition, prosecutors usually insist that a defendant waive appellate rights as part of a plea agreement. For example, a plea agreement may contain the following provision:

> The Defendant is aware that 18 U.S.C. § 3742(a) affords a defendant the right to appeal the sentence imposed. Knowing that, in exchange for the Government's concessions made herein, the Defendant waives to the full extent of the law any right to appeal . . . the conviction and sentence, or the manner in which it was determined. . . .[22]

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[19] ***In re Grand Jury Proceedings.*** 819 F.2d 981 (11th Cir. 1987).

[20] 819 F.2d at 983.

[21] **Defendant may waive rights.** The Supreme Court has repeatedly recognized that a defendant may waive constitutional rights as part of a plea agreement. *See, e.g.,* Town of Newton v. Rumery, 480 U.S. 386, 393, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987); Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (the constitution does not provide criminal defendants an appeal as a matter of right).

[22] **Waiver of appellate rights.** 18 U.S.C. § 3742(c).

2d Circuit	United States v. Teeter, 257 F.3d 14, 26 (2d Cir. 2001) (noting statutory right to waive appeal).
4th Circuit	United States v. Brown, 232 F.3d 399, 402 (4th Cir. 2000) (defendant can waive statutory right to appeal).

[b]—Right to Appeal Sentence.

The USAM recommends the use of language waiving a defendant's right to appeal a sentence in all plea agreements.[23] Such waivers are "helpful in reducing the burden of appellate and collateral litigation involving sentencing issues."[24] The Department of Justice recognizes, however, that sentencing appeal waivers remain vulnerable to appellate attack on several fronts.[25] Indeed, while some courts have recognized the validity of such waivers,[26] others have indicated that such waivers are presumptively invalid,[27] whereas other courts have held only that such waivers require scrutiny.[28] The argument against presentence waivers of appellate rights is that such waivers are anticipatory, that is, "at the time the defendant signs the plea agreement, she does not have a clue as to the nature and magnitude of the sentencing errors that may be visited upon her."[29] If the defendant cannot appreciate the nature of the errors, the waiver cannot be "knowing" as required under Rule 11. Courts that have recognized the waiver have nevertheless recognized exceptions as well. For example, courts have permitted appeals to proceed where the sentencing proceeding was held in violation of the defendant's constitutional right to counsel or the sentence

6th Circuit	United States v. Stubbs, 279 F.3d 402, 410 (6th Cir. 2002) (a defendant can waive a right to appeal only if waiver was knowing and voluntary).
7th Circuit	United States v. Behrman, 235 F.3d 1049, 1051 (7th Cir. 2000) (defendant can waive statutory right to appeal).
9th Circuit	United States v. Ruiz, 241 F.3d 1157, 1164 (9th Cir. 2001) (defendants may waive statutory right to appeal in plea agreement).

[23] USAM 9-16.330.

[24] **Sentencing appeal waivers.** USAM 9-16.330. *See also* United States v. Teeter, 257 F.3d 14, 22 (2d Cir. 2001) ("Reducing the number of baseless appeals promotes both efficiency and finality in the adjudication of criminal cases.").

[25] *See* Criminal Resource Manual No. 1848, at 626, available in U.S. Attorneys' Manual, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm

[26] **Waivers valid.** United States v. Brown, 232 F.3d 399, 403 (4th Cir. 2000) (appeal waivers enforced save two exceptions: (1) sentence was imposed in excess of the maximum penalty provided by law, or (2) based on a constitutionally impermissible factor); *see also* DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000) (right to waive appeal is not absolute).

[27] **Waivers presumed invalid.** United States v. Raynor, 989 F. Supp 43, 44 (D.D.C. 1997) (a presentence appeal waiver is presumptively invalid—defendant can never knowingly and intelligently waive the right to appeal a sentence that has not yet been imposed).

[28] **Waivers require scrutiny.**

1st Circuit	United States v. Teeter, 257 F.3d 14, 21 (1st Cir. 2001) (must scrutinize appeal waivers in plea agreements and grant relief in egregious cases).
2d Circuit	United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 2001) (noting circumstances where right to appeal will be preserved).

[29] **Sentencing waivers are anticipatory.** *Teeter*, 257 F.3d at 21.

imposed was based on a constitutionally impermissible factor, notwithstanding the defendant's waiver of appeal rights.

In *United States v. Attar*,[30] the defendant was charged with defrauding the federal government in connection with research and development contracts and pled guilty to mail fraud pursuant to a plea agreement with the government. The plea agreement contained a waiver-of-appeal-rights provision, in which the defendant agreed to knowingly waive all rights to appeal whatever sentence was imposed, and reserved only the right to appeal an upward departure from the Guideline range that is established at sentencing and the right to appeal based on ineffective assistance of counsel and prosecutorial misconduct not known to the defendant at the time of entering the guilty plea. Five days before the sentencing hearing, Attar's attorneys filed a motion to withdraw as defense counsel citing numerous and significant disagreements with Attar, including regarding what material should be filed in response to the presentence report. Defense counsel also asserted that their continued representation of the defendant would violate applicable ethical rules and deprive the defendant of the Sixth Amendment right to effective counsel. The district court denied the motion, but subsequently granted it at the sentencing hearing where, with defense counsel in attendance, Attar informed the court that he wanted to withdraw his guilty plea because he was not guilty. Attar continued *pro se* but declined to cross examine witnesses and failed to address legal questions concerning the application of the Guidelines. Attar received a sentence at the top of the applicable range after the district court applied several upward adjustments.

On appeal, the defendant challenged his sentence on the ground that the sentencing hearing and the presentation of the motion to withdraw his plea was conducted in violation of his Sixth Amendment right to counsel. As a preliminary matter, the court determined that the defendant's plea was knowing and intelligent. The court, however, declined to dismiss the appeal, observing that the defendant did not waive his right to appeal his sentence on Sixth Amendment grounds because a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations. Although the court ruled against the defendant on the merits of the appeal, it held that the general waiver of appeal rights contained in the plea agreement could not fairly be construed as a waiver of the right to challenge the sentence on constitutional grounds.[31]

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[30] ***Attar.*** 38 F.3d 727 (4th Cir. 1994).

[31] **Waiver exception when counsel ineffective.** 38 F.3d at 732–733.

5th Circuit United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995) (waiver of appeal does not bar claim that the plea agreement generally, and the defendant's waiver of appeal specifically, were tainted by ineffective assistance of counsel).

[c]—Waiver of *Brady* Material.

In *United States v. Ruiz*,[32] the United States Supreme Court upheld the use of *Brady* waivers in plea agreements. In *Ruiz*, the Supreme Court reviewed whether a guilty plea was entered voluntarily where a defendant bargained away her right to receive certain information pursuant to *Brady v. Maryland*. There, the defendant was offered a plea bargain that required her to plead guilty and waive her rights to an indictment, to an appeal, to present motions, and to receive exculpatory information and evidence from the government about her case. The defendant declined to accept the plea bargain because it contained a waiver of *Brady* rights, and she subsequently pled guilty to the charges with no plea agreement. Ruiz's request for downward departures at sentencing was denied, in part, because there was no plea agreement requiring the government to comply with the departures. On appeal, Ruiz argued that the government's refusal to recommend the departure was unconstitutional because her right to receive undisclosed *Brady* evidence cannot be waived through plea agreements. Ruiz further argued that the prosecutors could not withhold the benefits of a plea bargain simply because she refused to waive her unwaivable *Brady* rights.[33]

The Ninth Circuit observed that some rights cannot be waived, including *Brady* rights. The Supreme Court reversed, holding that the constitution simply does not require "preguilty plea disclosure of impeachment information."

[6]—Stipulations of Fact.

Since the application of the Guidelines is dependent upon the facts of the case, the parties to a plea agreement often stipulate to certain facts, as a way to more accurately predict what the ultimate sentence will be. Indeed, the advantage of an 11(e)(1)(C) plea, for example, is the government's stipulation to a specific sentencing range.[34] As discussed above, with the exception of a binding

7th Circuit	Mason v. United States, 211 F.3d 1065, 1069 (7th Cir. 2000) (plea agreement is generally enforceable unless the waiver was involuntary or counsel was ineffective).
9th Circuit	DeRoo v. United States, 223 F.3d 919, 923–924 (9th Cir. 2000) (a decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside the range of competence).
10th Circuit	United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2001) (waiver in plea agreement cannot bar ineffective assistance of counsel claims associated with negotiation of agreement).

[32] ***Ruiz.*** — U.S. —, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002), *reversing* 241 F.3d 1157 (9th Cir. 2001).

[33] *Ruiz*, 241 F.3d at 1161.

[34] **Agreement on sentencing range.**

2d Circuit	United States v. Nutter, 61 F.3d 10, 11–12 (2d Cir. 1995) (specified sentence between 151 to 188 months).

agreement under 11(e)(1)(A) or (C),[35] a sentencing court is not bound by stipulations in plea agreements, but is free to determine the facts relevant to sentencing.[36] Regardless of the type of plea agreement, a recommendation by the U.S. Attorney's office does not bind the Probation Office.[37] Finally, although the government must abide by the specific terms of the plea agreement, courts

3d Circuit United States v. Gilchrist, 130 F.3d 1131, 1132 (3d Cir. 1997) (additional condition of supervised release was breach of the plea agreement).

4th Circuit United States v. Lambey, 974 F.2d 1389, 1396 (4th Cir. 1992) (agreement would allow specified sentencing range).

5th Circuit United States v. Rhodes, 253 F.3d 800, 804 (5th Cir. 2001) (agreements under Rule 11(e)(1)(C), including specific sentencing range, bind the court).

6th Circuit United States v. Kemper, 908 F.2d 33, 36 (6th Cir. 1990) (specified sentence assumed between 27–33 months).

10th Circuit United States v. Rubio, 231 F.3d 709, 712 (10th Cir. 2000) (Rule 11(e)(1)(C) requires agreement on a specific sentence or sentencing range).

[35] Rule 11(e)(1)(A) or (C) agreements.

10th Circuit United States v. Seidlik, 231 F.3d 744, 748 n.1 (10th Cir. 2000) (Rule 11(e)(1)(C) plea agreements are binding on the court).

11th Circuit United States v. Camacho, 233 F.3d 1308, 1320 (11th Cir. 2000) (Rule 11(e)(1)(A) plea is one in which the prosecution agrees to move to dismiss other charges in exchange for defendant's plea).

[36] Sentencing court is free to determine facts.

6th Circuit United States v. Rodgers, 278 F.3d 599, 602 (6th Cir. 2002) (resentencing court acted properly in its assessment of defendant's sentence based on all relevant facts, including those before the original sentencing court).

7th Circuit United States v. Williams, 184 F.3d 666, 670 (7th Cir. 1999) (plea agreement stated court would determine final sentence calculation after reviewing the presentence report and allowing both sides to comment); United States v. Wehrbein, 61 F. Supp. 2d 955, 957 (D. Neb. 1999) (USSG § 6B1.4(d) allows court to determine facts relevant to sentencing).

[37] Probation office not bound.

The government may, however, be constrained by the language of the plea agreement from endorsing the recommendation of the probation department.

2d Circuit United States v. Lawlor, 168 F.3d 633, 637 (2d Cir. 1999) (government breached the plea agreement when it affirmatively agreed with the presentence reports application, which was inconsistent with government's stipulation in plea agreement).

11th Circuit United States v. Talor, 77 F.3d 368, 370 (11th Cir. 1996) (government could not argue in support of PSI that differed from recommendation contained in plea agreement).

have not required the government to "enthusiastically" defend its sentencing recommendations.[38]

Sample language may include:

> Pursuant to Section 6B1.4 of the Sentencing Guidelines, the parties enter into the following stipulations under the Sentencing Guidelines Manual effective November 1, 2001. It is understood and agreed that: (1) these stipulations are not binding upon either the Probation Department or the Court; and (2) the Court may make factual and legal determinations that differ from these stipulations and that may result in an increase or decrease in the Sentencing Guidelines Range and the sentence that may be imposed:
>
> (A) The parties agree and stipulate that the base offense level under Guideline Section 2B1.1(a) is _____.
>
> (B) The parties agree and stipulate that, pursuant to Guideline Section 2B1.1(b), the offense level should be increased _____ levels, based upon a fraud loss of approximately $_____ that is specifically attributable to the defendant.
>
> (C) The parties agree and stipulate that, as of the date of this agreement, the defendant has demonstrated acceptance of responsibility for the offense, thus making the defendant eligible for a 2-level downward adjustment under Guideline Section 3E1.1(a).
>
> (D) The parties agree and stipulate that no other offense level adjustments, upward or downward, are applicable.

[7]—Government's Position on Sentencing.

In many situations, the plea agreement may state that the government will simply not take a position on a defense request or reserve the right to make whatever recommendation believed to be appropriate. For example, a plea agreement may state:

> The parties have reached no agreement with respect to the appropriate criminal history category to be applied in the determination of the defendant's sentence. The U.S. Attorney expressly reserves the right to make whatever recommendation he or she deems appropriate with respect to the defendant's criminal history.

Clearly, if the plea agreement does not impose an affirmative obligation on the government, the courts will not impose one.

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[38] Government not required to defend recommendations.

1st Circuit	United States v. Alegria, 192 F.3d 179, 188 (1st Cir. 1999) (defendant's full and truthful cooperation did not obligate government to seek downward departure based on substantial assistance).
8th Circuit	United States v. Has No Horses, 261 F.3d 744, 750 (8th Cir. 2001) (lack of enthusiasm does not breach plea agreement).
9th Circuit	United States v. Johnson, 187 F.3d 1129, 1135 (9th Cir. 1999) (prosecutor did not breach plea agreement where required recommendation was "unenthusiastically" made).

[8]—Fines and Restitution.

Plea agreements may also identify any fines and/or restitution that the defendant will pay.

§ 6.06 Pre-Indictment Pleas.

The USAM recommends that before filing charges pursuant to a precharge or pre-indictment plea agreement, the attorney for the government consult USAM 9-27.430 (Selecting Plea Agreement Charges).[1] USAM 9-27.430 "sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement.[2]

§ 6.07 Approval Required for Consent to Plea of Nolo Contendere.

A criminal defendant has no absolute right to enter a nolo contendere plea.[1] Conditional pleas of guilty, or pleas of nolo contendere are generally discouraged by both the courts and the government. Federal Rule of Criminal Procedure 11(a)(2) provides that a conditional plea requires both the recommendation of the court and the government. The government's recommendation to such a plea is reserved for "unusual circumstances." The USAM provides that "United States Attorneys are instructed not to consent to a plea of nolo contendere except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible or by the Associate Attorney General, Deputy Attorney General, or the Attorney General."[2] According to the USAM, the objections to nolo pleas are based on the view that such pleas fail to serve as a deterrent to crime.[3] Once a court accepts a plea of nolo contendere, Federal Rule of Criminal Procedure 11(f) and the USAM requires that the government "make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged."[4]

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[1] USAM 9-27.330. *See* App. F.

[2] USAM 9-27.430. *See* App. F; *see also* § 6.04 *above*.

[1] **No absolute right to plead nolo contendere.** Fed. R. Crim. P. 11(b).

6th Circuit	United States v. Bearden, 274 F.3d 1031, 1035 (6th Cir. 2001) (rule clearly indicates no absolute right to plead nolo contendere).
7th Circuit	United States v. Fisher, 772 F.2d 371, 374 (7th Cir. 1984) (permissive nature of the rule does not create a right).

[2] USAM 9-16.010. A similar provision regarding the acceptance of an *Alford* plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) is contained at USAM 9-16.015.

[3] USAM 9-27.500. *See* App. F.

[4] USAM 9-27.520. *See* App. F.

§ 6.08 Enforcement of the Plea Agreement.

[1]—Contractual Analysis.

Plea agreements are governed by the law of contracts.[1] The party claiming breach must prove the breach by a preponderance of the evidence.[2] If the defendant breaches a plea agreement, the government may choose to re-prosecute the defendant and bring more serious charges.[3] If a guilty plea to a lesser charge is vacated, withdrawn, or overturned on appeal, the government may reinstate charges dismissed as part of the plea agreement.[4]

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[1] Contract law applies.

1st Circuit	United States v. Ortiz-Santiago, 211 F.3d 146, 151 (1st Cir. 2000) (in general, plea agreements are interpreted like contracts).
2d Circuit	United States v. Colon, 220 F.3d 48, 51 (2d Cir. 2000) (plea agreements interpreted in accordance with principles of contract law).
4th Circuit	United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) (parties to the agreement should receive the benefit of the bargain).
9th Circuit	United States v. Clark, 218 F.3d 1092, 1095 (9th Cir. 2000) (noting underlying "contract" right is constitutionally based).
10th Circuit	United States v. Brye, 146 F.3d 1207, 1210 (10th Cir. 1998) (applying general principles of contract law to define nature of the government's obligations in a plea agreement).

[2] Breach.

3d Circuit	United States v. Swint, 223 F.3d 249, 253 (3d Cir. 2000) (defendant has burden of proving by a preponderance of the evidence that the government breached the plea agreement).
5th Circuit	United States v. Saling, 205 F.3d 764, 766 (5th Cir. 2000), *cert. denied*, — U.S. —, 122 S. Ct. 1374 (2002) (the court must consider whether government's conduct is consistent with the defendant's reasonable understanding of the agreement).
7th Circuit	United States v. Frazier, 213 F.3d 409, 419 (7th Cir. 2000) (government cannot unilaterally determine defendant breached and refuse to uphold its end of the bargain).
10th Circuit	United States v. Peterson, 225 F.3d 1167, 1170 (10th Cir. 2000) (two-step analysis to determine if government breached: (1) the nature of the government's promise, and (2) evaluation in light of defendant's reasonable understanding).

[3] Government may re-prosecute. United States v. Greatwalker, 285 F.3d 727 (8th Cir. 2002) (illegal sentence prevents both parties from being bound by plea agreement so government may re-prosecute).

[4] Reinstate charges.

5th Circuit	*See* United States v. Moulder, 141 F.3d 568, 572 (5th Cir. 1998) (under frustration of purpose doctrine, the government's plea obligations are dischargeable upon breach but they may reinstate charges).

The Circuits are split on the issue of whether the government breached a plea agreement is subject to de novo review[5] or plain error review.[6] Courts also disagree on whether the failure to object to the plea agreement before the sentencing court waives the issue.[7] Conversely, if the defendant shows that the government breached the plea agreement, the court may (1) allow withdrawal of the plea; (2) alter the sentence; or (3) order specific performance of the agreement.[8] The remedy for a government breach of a plea agreement depends

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10th Circuit *See* United States v. Bunner, 134 F.3d 1000, 1004 (10th Cir. 1998) (when plea agreement no longer binds parties, the government may reinstate charges).

[5] De novo review.

1st Circuit United States v. Gonzalez-Perdomo, 980 F.2d 13, 15 (1st Cir. 1992).

2d Circuit United States v. Lawlor, 168 F.3d 633, 636 (2d Cir. 1999).

3d Circuit United States v. Moscahlaidis, 868 F.2d 1357, 1360 (3d Cir. 1989).

10th Circuit United States v. Peterson, 225 F.3d 1167, 1170 (10th Cir. 2000).

[6] Plain error review.

4th Circuit United States v. Fant, 974, F.2d 559, 562 (4th Cir. 1992).

5th Circuit United States v. Palomo, 998 F.2d 253, 256 (5th Cir. 1993).

7th Circuit United States v. Hicks, 129 F.3d 376, 378 (7th Cir. 1997).

8th Circuit United States v. Benson, 836 F.2d 1133, 1135 (8th Cir. 1988).

9th Circuit United States v. Salemo, 81 F.3d 1453, 1460 (9th Cir. 1996). *But see* United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997).

11th Circuit United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000).

[7] Failure to object is not a waiver.

2d Circuit *See* United States v. Lawlor, 168 F.3d 633, 636 (2d Cir. 1999) (defendant is not required to object to a violation of plea agreement at the sentencing hearing).

5th Circuit *See* United States v. Dodson, 288 F.3d 153 (5th Cir. 2002) (defendant forfeited his right when he failed to object).

11th Circuit *See* United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000) (when defendant failed to object at trial she waived the issue on appeal).

10th Circuit *See* United States v. Peterson, 225 F.3d 1167, 1170 (10th Cir. 2000) (failure to object is not a waiver of appeal).

[8] When government breaches.

2d Circuit Spence v. Superintendent, Great Meadows Corr. Facility, 219 F.3d 162, 174–175 (2d Cir. 2000) (choosing to alter sentence by releasing defendant from prison after determining government breached its agreement).

4th Circuit United States v. McQueen, 108 F.3d 64, 65 (4th Cir. 1997).

5th Circuit United States v. Saling, 205 F.3d 764, 768 (5th Cir. 2000), *cert. denied*, — U.S. —, 122 S. Ct. 1374 (2002) (if government breaches, the court has

on the specific case.[9] Whether the court will order "specific performance" of a plea agreement depends entirely upon the nature of the alleged breach or failure to satisfy the terms of the agreement, the specific language of the plea agreement, and the facts surrounding the government's determination that the defendant is not entitled to the benefits of the plea agreement. For example, in *United States v. Velez Carrero,*[10] the government promised to "recommend that no adjustment pursuant to § 3B1.1 of the sentencing guidelines be made." At sentencing, however, the government informed the court that it had agreed that it would make no suggestion to the court regarding the defendant's role in the offense. In finding that the government breached the plea agreement, the court of appeals held that "[w]hat the government bargained to do was *oppose* any § 3B1.1 adjustment. What it delivered was its neutrality. This is no mere terminological distinction."[11]

[2]—Government's Refusal to Recommend Downward Departure for Defendant's Cooperation.

Most plea agreements provide the government with absolute discretion to determine whether defendant's cooperation merits a downward departure. Courts rarely find that the government's failure to recommend a discretionary departure constitutes a breach of the plea agreement. For example, in *In re Sealed Case*,[12] the defendant entered into a standard written plea agreement containing "boiler-plate" cooperation language obligating the defendant to "cooperate truthfully, completely and forthrightly . . . in any matter as to which the Government deems the cooperation relevant."[13] The plea agreement also provided that if the defendant did not "specifically perform or fulfill completely each and every one of defendant's obligations under the plea agreement," the government would be free from all its obligations under the agreement, including its obligation to make a § 5K1.1 motion for a downward departure. After the plea agreement was signed and defendant pleaded guilty, the government asked defendant to cooperate on

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the option of specific performance or withdrawal as a remedy for defendant).

6th Circuit United States v. Carr, 170 F.3d 572, 576 (6th Cir. 1999).

8th Circuit United States v. Gomez, 271 F.3d 779, 782 (8th Cir. 2001) (remanding case for resentencing or to allow defendant to withdraw his plea when government should have withdrawn from the agreement rather than breach at sentencing).

11th Circuit United States v. Taylor, 77 F.3d 368, 372 (11th Cir. 1996).

[9] **Case-specific remedy.** United States v. Velez Carrero, 77 F.3d 11, 11–12 (1st Cir. 1996).

[10] ***Velez Carrero.*** 77 F.3d 11 (1st Cir. 1996).

[11] 77 F.3d at 11.

[12] ***In re Sealed Case,*** 244 F.3d 961 (D.C. Cir. 2001).

[13] 244 F.3d at 963.

two cases; the defendant cooperated fully on one of the two cases and partially on the second.[14] It was not disputed that his cooperation on the one case was instrumental in securing superceding indictments against other individuals that led to guilty pleas. The Assistant United States Attorney told defense counsel that in his opinion the defendant was entitled to a § 5K1.1 motion, but the U.S. Attorney's Office Departure Committee concluded that defendant was not. Defense counsel brought a motion to specifically enforce the § 5K1.1 provision in the plea agreement.

The court distinguished between cases with no plea agreement versus cases with a plea agreement:

> In the absence of a plea agreement, the Government has broad discretion to file a substantial assistance motion. If the Government declines to file such a motion, the District Court can grant relief only upon a showing of unconstitutional motive or a failure to meet the fundamental requirement that the Government's actions bear a rational relationship to some legitimate government objective. [Citations omitted.] The Government's discretion may be constrained, however, by a plea agreement. When the prosecutor reneges on an agreement to afford a defendant the benefit of a section 5K1.1 motion, the District Court may, upon request, compel the filing of the motion if the Government's refusal amounted to bad faith or otherwise violated the express terms of the plea agreement. [Citations omitted.][15]

The court concluded that since the plea agreement gave sole and complete discretion to the government to decide the threshold of "substantialness," and since there is no objective way to determine whether defendant's cooperation was "substantial," then the court could not infer that the Departure Committee violated the plea agreement.[16] Accordingly, the court could not force the government to make a § 5K1.1 motion and/or depart downward without such a motion being made by the government.[17] The court did leave open the possibility that under a limited set of circumstances,[18] the government could be

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[14] **Partial cooperation.** 244 F.3d at 963. Defendant cooperated in the investigative stage of the second case, but decided at the last minute that he did not want to testify in the second case due to fears for his safety and the safety of his family. Notwithstanding his failure to testify, the government secured convictions in the second case.

[15] 244 F.3d at 964.

[16] 244 F.3d at 964–966.

[17] The court also refused to allow defense counsel discovery—even *in camera*—on the issue of whether the Departure Committee's actions amounted to "bad faith" such that it would be a basis for the court to enforce the plea agreement. 244 F.3d at 965–966.

[18] **Finding of "bad faith" a limited possibility.** For example, if the government did not provide the district court with a summary of what information it provided to the Departure Committee, including an explanation for the finding that defendant's assistance was insubstantial. 244 F.3d at 966.

1st Circuit — *See also* United States v. Doe, 233 F.3d 642, 644 (1st Cir. 2000) (showing bad faith is an "uphill battle" for defendant challenging government's discretionary decision not to file a downward departure).

forced to defend its decision against an allegation of "bad faith."[19]

[3]—Government's Failure to Make Recommendation.

Where a plea agreement stipulates that the government will recommend a specific departure basis, such as a two or three point reduction for acceptance of responsibility, the government will be held to its bargain.[20]

In the face of a specific obligation to make a recommendation, the government is not permitted to take a neutral position.[21] However, a sentence is unlikely to be disturbed merely because the government failed to object to a contrary recommendation contained in the presentence report,[22] or because of otherwise failing to "enthusiastically" defend its sentencing recommendations.[23] Indeed,

6th Circuit *See also* United States v. Moore, 225 F.3d 637, 641 (6th Cir. 2000) (reviewing decisions for bad faith not allowed except when unconstitutional motives can be shown).

[19] Tailor agreements. The court suggested that in the interests of justice and fair play, the government should tailor USSG § 5K1.1 paragraphs to each specific defendant's plea agreement, rather than using "boilerplate" language. 244 F.3d at 967.

[20] Government will be held to stipulated recommendation.

1st Circuit United States v. Riggs, 287 F.3d 221 (1st Cir. 2002) (prosecutors will be held to high standards of promise and performance).

2d Circuit United States v. Enriquez, 42 F.3d 769, 771–773 (2d Cir. 1994).

5th Circuit United States v. Valencia, 985 F.2d 758, 760–761 (5th Cir. 1993) (government must strictly adhere to terms and conditions of its promises).

7th Circuit *But see* United States v. Ashurst, 96 F.3d 1055, 1057 (7th Cir. 1996) (permitting government to argue against agreed upon acceptance adjustment as a result of offense conduct committed by defendant post-plea agreement).

9th Circuit United States v. Camarillo-Tello, 236 F.3d 1024, 1027 (9th Cir. 2001) (government's "alteration" of recommendation varied from agreement and therefore was impermissible).

[21] Specific obligation.

1st Circuit United States v. Velez-Carrero, 77 F.3d 11, 11–12 (1st Cir. 1996).

6th Circuit United States v. Bemes, 278 F.3d 644, 649 (6th Cir. 2002) (defendant's substantial rights were affected where government failed to expressly recommend sentencing of the defendant at the low end of the guideline range).

9th Circuit United States v. Myers, 32 F.3d 411, 413 (9th Cir. 1994) (court remands when government gave no reason why it failed to recommend stipulated sentence).

[22] Presentence report. United States v. Has No Horses, 261 F.3d 744 (8th Cir. 2001) (finding no error in government's failure to object to PSR's recommendation against an acceptance adjustment).

[23] Enthusiastic defense of recommendation not required.

even when the government agrees to make a sentencing recommendation, the government may in fact provide information that is adverse to the defendant without violating its obligations under the plea agreement.[24]

For example in *United States v. Stemm*,[25] the defendant entered into an 11(e)(1)(C) plea agreement with the U.S. Attorney that provided that he would plead guilty to one count of mail fraud in return for which the government would dismiss all other counts. The U.S. attorney promised it would not recommend a prison sentence longer than the one given to a co-defendant and would make no other recommendations regarding the sentence to be imposed. On appeal, the defendant argued that the prosecution breached the plea agreement through its submission of a detailed version of the facts with culpability ratings included in the presentence report for all the defendants and strong statements about the defendants' conduct. The Tenth Circuit, however, ruled that the disclosure of information as to the nature of the offense and each defendant's role was proper and within the government's duty to provide, despite the government's promise that it would make no recommendation or sentence.[26]

§ 6.09 Collateral Consequences of Plea.

[1]—Court Does Not Have Duty to Inform.

Although a court is required to inform a defendant of direct consequences of a guilty plea, a court is not required to inform the defendant of the collateral consequences of a guilty plea.[1] In light of the wide-ranging effects of a criminal

1st Circuit	United States v. Alegria, 192 F.3d 179, 188 (1st Cir. 1999).
2d Circuit	United States v. Miller, 993 F.2d 16, 19 (2d Cir. 1993).
3d Circuit	Dunn v. Colleran, 247 F.3d 450, 458 n.4 (3d Cir. 2001) (Rule 11 does not require a prosecutor to make his recommendation "enthusiastically").
8th Circuit	United States v. Has No Horses, 261 F.3d 744, 750 (8th Cir. 2001) (prosecutor's lack of enthusiasm did not breach the agreement).
9th Circuit	United States v. Camarillo-Tello, 236 F.3d 1024, 1027 (9th Cir. 2001) (citing United States v. Fisch, 863 F.2d 690 (9th Cir. 1988) in noting that the issue is not whether the prosecutor enthusiastically disclosed defendant's cooperation, but whether prosecutor disclosed all cooperation).

[24] **Providing adverse information.** United States v. Prince, 204 F.3d 1021, 1023 (10th Cir. 2000) (government's handing over adverse information regarding defendant to probation department did not breach, or otherwise interfere with, government's promise to recommend adjustment for acceptance of responsibility).

[25] ***Stemm.*** 847 F.2d 636 (10th Cir. 1988).

[26] **Government's disclosure was proper.** 847 F.2d at 638.

[1] **No duty to inform.**

6th Circuit	United States v. El-Nobani, 287 F.3d 417, 421 (6th Cir. 2002) (deportation is a collateral consequence of defendant's guilty plea not required to be disclosed at time of plea).

felony conviction on collateral issues relating to the defendant, it is important to be familiar with the collateral consequences of a criminal felony conviction.[2]

[2]—Federal Restrictions.

The bulk of collateral consequences are imposed by various state laws and not by federal law. Federal law imposes the following restrictions: inability to participate in certain capacities relating to a labor organization;[3] denial of federal benefits;[4] inability to serve in certain banking;[5] investment and securities related occupations;[6] inability to holding a supervisory position under a federal contract;[7] exclusion from the United States (depending on alien status);[8] loss of federal firearm privileges;[9] and registration (for sexual offenders).[10]

[3]—State Survey of Collateral Restrictions.

[a]—Constitutional Rights.

[i]—Right to Vote.

The United States Constitution provides that qualifications for voting in federal elections are determined by state law.[11] The power of the states to deny the right

9th Circuit United States v. Amador-Leal, 276 F.3d 511 (9th Cir. 2001), *cert. denied,* — U.S. —, 122 S. Ct. 1946 (2002) (immigration consequences are collateral consequence of guilty plea); Bargas v. Burns, 179 F.3d 1207, 1216 (9th Cir. 1999), *cert. denied*, 529 U.S. 1073 (2000) (trial court is only required to inform defendants of direct consequences of pleas; trial court not required to inform defendant of prosecution's burden to prove intent at trial).

[2] This section is based on the state-by-state survey compiled by the Office of the Pardon Attorney. *See* Civil Disabilities of Convicted Felons: A State-By-State Survey, U.S. Department of Justice, Office of the Pardon Attorney (October 1996). *See* App. P.

[3] **Limit role in labor organization.** *See, e.g.,* 29 U.S.C. § 504 (1998) (restricting service as officer or organizer in labor organization); 29 U.S.C. § 1111 (restricting ability of certain felons to serve as administrator, officer, fiduciary, etc., to any employee benefit plan).

[4] **Denial of benefits.** 21 U.S.C. § 862 (1999) (restricting right to certain grants, contracts, licenses and other federal benefits, excluding social security, disability, public housing). *See* United States v. Littlejohn, 224 F.3d 960, 969 (9th Cir. 2000) (inability to remain eligible for federal benefits must be disclosed by the court).

[5] *See* 12 U.S.C. § 1829 (2001).

[6] *See* 15 U.S.C. §§ 80b-3(e)(2), 78o(b)(4)(B).

[7] *See, e.g.,* 10 U.S.C. § 2408.

[8] *See, e.g.,* 8 U.S.C. § 1182(a)(2)(A), (B), (C); 8 U.S.C. § 1251(a)(1)(A).

[9] 18 U.S.C. § 921 *et seq*. This prohibition generally does not apply to certain federal and state "white collar" offenses. However, most states impose restrictions such as five- and ten-year waiting periods before granting a convicted felon the right to a firearm.

[10] 42 U.S.C. § 14071(a).

[11] U.S. Const. art. I, § 2, cl. 1; art. I. § 4; art. II, § 1, cl. 2; amend. XVII.

to vote is granted to the states under the Fourteenth Amendment.[12] Most states disqualify from voting any person convicted of a felony. Restoration of voting privileges in some states is automatic after release from prison, or in 10 years, while in other states it requires court or administrative approval.

[ii]—Jury Duty.

The right of a convicted felon to serve as a juror is restricted in the majority of states. Some states restore the right to serve following release from imprisonment.

[b]—Family Law Issues.

[i]—Parental Rights.

Currently, 19 states may terminate the parental rights of convicted felons. Some states impose termination only if in addition to the felony conviction the defendant served a term of imprisonment for a specified length of time. To terminate such rights, most state codes require a court to find that the conviction renders the defendant "unfit" to supervise or care for the child.

[ii]—Basis for Divorce.

In many jurisdictions a felony conviction alone is sufficient grounds for divorce, a minority of jurisdictions require a felony conviction and a term of imprisonment.

[c]—Professional Licenses.

In many states, a felony conviction may result in the loss of a professional or occupational license, such as a certified public accountant, physician, attorney, or dentist.

[d]—Right to Public Employment/Public Office.

A felony conviction alone does not preclude federal or state employment. However, both federal and state hiring agencies generally maintain discretion to weigh the relevance of the conviction on the defendant's ability to handle the job in question. A minority of states prohibit persons convicted of a felony offense from holding public office.

[4]—Impact on Civil and Administrative Liability.

Once entered, a guilty plea to a criminal charge will be admitted as evidence in a related civil action.[13] Note, because a plea of nolo contendere is not an

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[12] U.S. Const. amend. XIV, § 2.

[13] **Guilty plea as evidence in civil action.** *See* McCormick on Evidence (5th Ed), § 257 at 145 *citing* Jacobs v. Goodspeed, 429 A.2d 915, 917 (Conn. 1980); Brohawn v. Transamerica, Ins. Co., 347 A.2d 842, 847–848 (Md. 1975); Teitelbaum Furs Inc. v. Dominion Ins. Co., 375 P.2d 439 (Cal. 1962).

admission of guilt, such a plea is generally considered inadmissible in a related civil action.[14]

§ 6.10 Motion to Withdraw Guilty Plea.

[1]—Rule 32 Requires "Fair and Just Reason."

Federal Rule for Criminal Procedure 32(e) provides that once a guilty plea is accepted by the district court, a defendant may only withdraw the plea upon a showing of any "fair and just reason."[1] At any other time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

[2]—Presentence Motion to Withdraw.

[a]—Basic Requirements.

In order to determine whether a plea should be withdrawn *presentence*, a court is required to weigh: (1) evidence that the plea was not knowing or voluntary; (2) evidence of legal innocence; (3) assistance of competent counsel; and (4) judicial economy.[2] Although the rule is generally construed liberally in favor of the accused, the motion is committed to the discretion of the court and its discretion will not be disturbed absent an abuse of discretion.[3]

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[14] **Nolo contendere is inadmissible.** Fed. R. Evid. 609; *See* McCormick on Evidence (5th Ed.), § 257 at 146, *citing* Federal Deposit Ins. Corp. v. Cloonan, 193 P.2d 656, 670 (Kan. 1948).

[1] **Withdrawal of plea.** After the submission of the signed plea agreement to the court, but prior to the defendant's plea, either party may withdraw its consent to the plea bargain.

5th Circuit	United States v. Adam, 296 F.3d 327 (5th Cir. 2002) (applying stricter standard on defendant to withdraw); United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980) (applying liberal standard for authorizing withdrawal); United States v. Smith, 648 F. Supp. 495, 497 (S.D. Tex. 1986) (denying government opportunity to withdraw).
9th Circuit	United States v. Dohm, 62 F.3d 1426 (9th Cir. 1995) (table), *reported in full at* 1995 U.S. App. LEXIS 29378; United States v. Savage, 978 F.2d 1136, 1138 (9th Cir. 1992).

[2] **Determining withdrawal.**

4th Circuit	United States v. Wilson, 81 F.3d 1300 (4th Cir. 1996) (giving six-prong test for evaluating motions to withdraw plea).
5th Circuit	United States v. Thomas, 13 F.3d 151 (5th Cir. 1994) (applying factors to be considered in deciding whether the defendant has carried his burden of justifying withdrawal).

[3] **Court's discretion.** United States v. Still, 102 F.3d 118, 123 (5th Cir. 1996) (absent abuse of discretion, court's discretion will not be disturbed).

[b]—Knowing and Voluntary.

In *DeRoo v. United States*,[4] the defendant pleaded guilty to a one count indictment for possession of ammunition by a convicted felon and was sentenced to 210 months in prison and other penalties. The defendant had waived his right to appeal the judgment and the sentence and to contest the conviction or sentence in post-conviction proceedings. Arguing that his plea was not knowing and voluntary as a result of ineffective assistance of counsel, the defendant filed a motion to vacate, set aside, or correct his sentence. Among other things, the defendant cited counsel's failure to file a motion to dismiss the indictment, which he claimed induced him to plead guilty. The Eleventh Circuit held that a decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement is the result of advice outside the range of competence demanded of attorneys in criminal cases.[5] The Court further observed that justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. The Court vacated the defendant's sentence and remanded the case for resentencing.

[c]—Evidence of Legal Innocence.

In *United States v. Sims*,[6] the defendant filed a *pro se* motion to withdraw his plea to narcotics conspiracy, alleging ineffective assistance of counsel and an irreconcilable conflict of interest with his former counsel. In filing his motion to withdraw, the defendant alleged that he had little contact with his attorney prior to entering the agreement, he did not have an opportunity to read the agreement and that he pled guilty because he thought he would lose at trial with an unprepared attorney representing him. The defendant further alleged that he was innocent of all charges. With respect to the claim of innocence, the court observed that it is a fundamental tenant of law that a defendant who pleads guilty foregoes his opportunity to prove his innocence. The court determined that the defendant's assertion of innocence, without more, did not justify withdrawal of his guilty plea.[7]

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[4] ***DeRoo.*** 223 F.3d 919 (11th Cir. 2000).

[5] **Knowing and voluntary.** 223 F.3d at 923–924; *See also* Hill v. Lockhart, 474 U.S. 52, 56 (1985); Tollett v. Henderson, 411 U.S. 258, 266–267 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970).

[6] ***Sims.*** 882 F. Supp. 1308, 1310–1311 (N.D. Ill. 1993).

[7] **Innocence.** 882 F. Supp. at 1315; *See also*—

2d Circuit	United States v. Hirsch, 239 F.3d 221, 225 (2d Cir. 2001) (claims of innocence sufficient to justify withdrawal from plea if backed up by evidence); United States v. O'Hara, 960 F.2d 11, 12 (2d Cir. 1992) (directed verdict of acquittal for defendant's co-conspirators did not constitute fair and just reason for defendant to withdraw guilty plea).

[d]—Ineffective Assistance of Counsel.

A defense counsel's inability to advise a defendant properly under the Guidelines may constitute a "fair and just" reason permitting a withdrawal of a defendant's plea. Although most cases that discuss ineffective assistance of counsel do not do so in the context of a Rule 32 motion, such cases are generally helpful in identifying the relevant issues. Courts have upheld allegations of ineffective assistance of counsel where:

- Defense counsel failed to consider the benefits of a § 5K1.1 departure;[8]
- Defense counsel maintained philosophical opposition to cooperating with the government, or failed to consider cooperation early in the process;[9]
- Defense counsel failed to be diligent in explaining the parameters of "substantial assistance";[10] and
- Defense counsel failed to consider, request or bargain for appropriate departures.[11]

3d Circuit	United States v. Brown, 250 F.3d 811, 818 (3d Cir. 2001) ("bald" assertions of innocence not sufficient to justify withdrawal of guilty plea).
7th Circuit	United States v. Groll, 992 F.2d 755, 758 (7th Cir. 1993); United States v. Ray, 828 F.2d 399, 422 (7th Cir. 1987).
D.C. Circuit	United States v. Barker, 514 F.2d 208, 226 n.17 (D.C. Cir. 1975).

[8] Failure to consider § 5K1.1 departure. In *United States v. Fernandez*, 2000 U.S. Dist. LEXIS 5721 (S.D.N.Y. May 3, 2000), the defendant alleged that his counsel's failure to advise him of the importance of cooperation with the government, as a means of reducing his sentence under the Guidelines, was evidence of ineffective assistance of counsel. The court agreed, holding that "in the age of the Sentencing Guidelines, it is malpractice for a lawyer to fail to give his client timely advice concerning the importance of cooperation with the government as a means of reducing the defendant's sentence." The court stated that with the advent of the Guidelines, the conventional wisdom among defense counsel of not cooperating with the government under any circumstances is ineffective counsel *per se*.

[9] Failure to cooperate.

8th Circuit	United States v. Robertson, 29 F. Supp. 2d 567 (D. Minn. 1999) (defense counsel's "philosophical" opposition to "working with the Government" supported other evidence of ineffective assistance of counsel).
9th Circuit	United States v. Basalo, 109 F. Supp. 2d 1219, 1224–1225 (N.D. Cal. 2000) (counsel's advice to defendant to refuse to cooperate and proceed to trial despite insurmountable odds was ineffective assistance of counsel).

[10] Failure to explain. *See* Sullivan v. United States, 11 F.3d 573, 574 (6th Cir. 1993) (defendant alleged ineffective assistance of counsel when his counsel failed to inform him that the government maintained the discretion under the terms of the plea agreement to determine whether cooperation was sufficient to merit departure).

[11] Failure to seek departures.

Courts have held that a defense attorney's underestimation of the probable guideline range is generally not a "fair and just" reason justifying the withdrawal of a guilty plea.[12] However, where defense counsel, government counsel, and the court misinform the defendant of the likely sentence, courts have recognized exceptions to this general rule.

2d Circuit United States v. Carmichael, 216 F.3d 224, 227 (2d Cir. 2000) (remedy for ineffectiveness of counsel is to re-sentence defendant at level he would have been sentenced had he received effective advice from counsel).

3d Circuit United States v. Headley, 923 F.2d 1079, 1083–1084 (3rd Cir. 1991) (counsel's failure to seek a "potentially fruitful" downward adjustment under Guidelines fell outside prevailing professional norms and therefore was ineffective).

4th Circuit United States v. Hall, 40 F. Supp. 2d 340 (D. Md. 1999) (ineffective assistance of counsel where counsel failed to request downward departure under § 4A.1.3 (over-representation of criminal history) for defendant whose prior offenses occurred at a young age and in close proximity).

5th Circuit United States v. Phillips, 210 F.3d 345 (5th Cir. 2000) (appellate counsel ineffective for failing to challenge sentence enhancement on appeal).

6th Circuit United States v. Khalife, 954 F. Supp. 1168, 1171 (E.D. Mich. 1997) (defendant alleged that counsel was ineffective as he was inexperienced in matters relating to the Sentencing Guidelines and case law arising thereunder); Stinson v. United States, 102 F. Supp. 2d 912, 917–919 (M.D. Tenn. 2000).

7th Circuit United States v. Cruz-Velasco, 224 F.3d 654, 664 (7th Cir. 2000) (ineffective assistance of counsel to fail, without any justification, to ask for an obviously applicable departure).

9th Circuit United States v. Zavala-Angulo, 78 F.3d 596 (9th Cir. 1996) (defendant alleged counsel ineffective because counsel allegedly failed to conduct an investigation that could have revealed mitigating information that the court could have considered in determining his sentence).

10th Circuit United States v. Pelfrey, 1997 U.S. Dist. LEXIS 11453 (D. Kan. July 29, 1997) (evidentiary hearing required to determine whether counsel's failure to appeal several issues including whether defendant's conduct constituted an abuse of trust, constituted ineffective assistance of counsel).

D.C. Circuit United States v. Soto, 132 F.3d 56, 59 (D.C. Cir. 1997) (ineffective assistance of counsel where counsel failed to move for a downward departure for qualified client).

[12] Underestimating sentence not grounds for withdrawal of plea.

4th Circuit United States v. Martinez, 136 F.3d 972, 980 (4th Cir. 1998) (defendant claimed difference between his exposure as predicted by counsel and his actual exposure demonstrate prejudicial error).

5th Circuit United States v. Jones, 905 F.2d 867, 868 (5th Cir. 1990).

8th Circuit United States v. Baxter, 128 F.3d 670–671 (8th Cir. 1997) (defendant agreed to plead guilty after being admonished by the court that he could not withdraw his guilty plea because of asserted misunderstanding).

For example, in *United States v. Toothman*,[13] the defendant, an employee at the Immigration and Naturalization Service, had been indicted on several counts for obtaining sexual favors from Mexican immigrants in exchange for helping them regain their immigration documents. The defendant entered into a plea agreement with the United States that he understood enabled him to plead guilty to a misdemeanor civil rights violation, count one in the indictment.

During a plea hearing held prior to sentencing, the government advised the court that the defendant would be pleading guilty to a superseding information containing eight counts.[14] When asked by the court whether count one was a felony or a misdemeanor, the defendant stated to the court that his attorney had informed him that it was a misdemeanor, with a maximum possible punishment of one year. The defendant also acknowledged that the remaining counts were felonies with maximum fifteen year terms.[15] The defendant's attorney informed the court that, with respect to count one, the applicable Sentencing Guideline provision, indicated an offense level of 6. With respect to counts two through eight, the defense attorney indicated that 2C1.1 applied, and yielded a base offense level of 10, plus 2 for more than one event.[16] However, the government informed the court that there was no agreement among counsel regarding the appropriate application of the Guidelines. The government then pointed out that although 2C1.1 was appropriate, 2H1.4 was also appropriate for the conduct for which the defendant plead guilty.[17] At the conclusion of the hearing, the court instructed the defendant that it would not be able to determine the applicable guideline sentence for the case until after reviewing the presentence report.[18]

In light of the presentence report, the court concluded that the underlying offense of count one was felony criminal sexual abuse and sentenced the defendant to 109 months—a sentence he would have received had he gone to trial and been convicted.[19] On appeal, the defendant challenged the district court's application of the Sentencing Guidelines and sought to withdraw his plea to count one. He argued that his plea was not voluntary because he and his counsel reasonably understood he was pleading to a misdemeanor which would invoke

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[13] ***Toothman.*** 137 F.3d 1393 (9th Cir. 1998).

[14] 137 F.3d at 1395.

[15] 137 F.3d at 1396.

[16] 137 F.3d at 1396.

[17] 137 F.3d at 1396.

[18] The presentence report applied § 2H1.1 to calculate the base level offense for count one, resulting in a base offense level of 27. The presentence report also grouped counts two through eight and applied § 2C1.1(b)(2)(B). In total, the presentence report recommended 199 months. 137 F.3d at 1397.

[19] 137 F.3d at 1398.

a guideline range of ten to sixteen months.[20] The Ninth Circuit agreed that the defendant had been misinformed by the court, the government counsel and his own counsel when each represented that the basic guideline range for all counts would be ten to sixteen months.[21] Because of this misinformation, the Ninth Circuit did not believe the defendant was equipped to intelligently accept the plea offer made to him and therefore his plea was involuntary. The Ninth Circuit vacated the conviction and sentence, setting aside the guilty plea.[22]

[3]—Post-Sentence Motion to Withdraw.

A motion to withdraw a guilty plea post-sentence is generally granted only in order to prevent manifest injustice.[23]

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[20] 137 F.3d at 1398.

[21] 137 F.3d at 1400.

[22] 137 F.3d at 1400–1401.

[23] **Post-sentence withdrawal.**

5th Circuit	United States v. Glinsey, 209 F.3d 386, 397 (5th Cir. 2000) (noting more stringent test for overcoming a guilty plea after sentencing).
9th Circuit	United States v. Ruiz, 257 F.3d 1030, 1032 (9th Cir. 2001) ("Rule 32(e) divides motions to withdraw guilty pleas into two groups, those made prior to sentencing, which should be granted for 'any fair and just reason,' and those made after sentencing, which should be dismissed as untimely.").
10th Circuit	United States v. Barker, 579 F.2d 1219 (10th Cir. 1978).
D.C. Circuit	United States v. Pollard, 747 F. Supp. 797 (D.D.C. 1990).