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Should Judges Take Seriously the Sentencing Commission's Standards for Accepting Plea Agreements?

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COMMENTARY

SHOULD JUDGES TAKE SERIOUSLY THE SENTENCING COMMISSION'S STANDARDS FOR ACCEPTING PLEA AGREEMENTS ?

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The aspects of plea bargaining under the federal sentencing guidelines that have come under the most scrutiny are the provisions dealing with relevant conduct, acceptance of responsibility, and substantial assistance. A potentially important provision, the Sentencing Commission's policy statement concerning standards for accepting plea agreements (§6B1.2), has not received the same attention. Indeed, the absence of case citations suggests that judges routinely disregard this provision.

Why do judges ignore §6B1.2 and the other policy statements in Chapter 6B? Some judges see these policy statements as unworkable and creating undue administrative burdens. Others feel that the policy statements stray too far from past practices, and threaten prosecutors' independence in making charging decisions. Judges who consider the guidelines overly severe or restrictive may reject any attempt to constrain plea bargaining from serving as a release valve to accommodate just sentences.

The Sentencing Commission may have unintentionally invited judges to ignore Chapter 6B by its misleading statement in Chapter 1(A)(4)(c) that the guidelines will not make significant changes in plea bargaining practices. Further, these provisions are nonbinding policy statements, not guidelines. Courts frequently fail to distinguish between the two,[1] but it may be significant that the Sentencing Reform Act does not even authorize the Commission to issue guidelines about plea bargaining.[2]

These concerns notwithstanding, sentencing judges may find it useful to take another look at §6B1.2 as an invitation to communicate their views about plea bargaining and the guidelines in general to the Commission. The courts of appeals may find in §6B1.2 a way to lessen the problems of illusory bargaining by providing meaningful review of sentences that deviate from the expectations embodied in accepted pleas. This process may lead to improvements in the plea bargaining system, or it may point the way toward fundamental changes in the structure of the guidelines.

Under §6B1.2, the same principles should apply to the court's decision to accept or reject a plea agreement, regardless of the type of agreement.

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Charge Bargains

Section 6B1.2(a) states that the court may accept a charge bargain if "the remaining charges *adequately reflect* the seriousness of the actual offense behavior and . . . accepting the agreement *will not undermine* the statutory purposes of sentencing" (emphasis added).

Neither the policy statement nor the accompanying commentary defines "adequately reflect." This provides judges with an opportunity to interpret that phrase by following §6B1.2 and stating on the record the reasons why the remaining charges adequately reflect offense seriousness. A judge might say that he accepts a charge bargain because it: (1) results in a just sentence and avoids the application of a mandatory minimum prison term; (2) reflects a greater reduction for the defendant's minor role in the offense than provided by the guidelines; or (3) allows the sentence to reflect important offender characteristics that have been rejected by the guidelines. In most cases such deviations from Congressional or Commission policies will stand because as long as the sentence is within the range called for by the bargain, there will be no grounds for appeal under 18 U.S.C. §3742.

The Sentencing Commission must have intended that §6B1.2 allow a charge bargain to effect some reduction in the otherwise applicable guideline range: if it did not, it could have easily said so. The question, though, is how much of a reduction will still "adequately reflect" offense seriousness?

One approach would be to allow charge bargains to reduce the original range by a particular percentage or number of offense levels. The acceptable discount could be made consistent across all offenses, or vary depending on the type of offense. The guidepost could be the typical 30-40% discount for pleading guilty found in the Commission's study of pre-guidelines sentencing patterns.[3] This approach would be consistent with the Commission's prison impact analysis, which assumed that a 30-40% discount would continue to be the norm, even though this amount is significantly greater than the acceptance of responsibility reduction.[4] A 1-2 level decrease, in addition to the 2 levels for acceptance of responsibility, would come closer to 30-40%.

Alternatively, judges could address the second part of §6B1.2, the requirement that the charge bargain "not undermine" the statutory purposes of sentencing. The Sentencing Reform Act and the guidelines give no guidance as to how to choose among purposes when they conflict. Under these circumstances, to say that a charge bargain must not undermine the purposes of sentencing says very little. But Congress, by enacting 18 U.S.C. §3553(a), plainly intended that judges address these purposes and §6B1.2 is the Commission's only invitation for judges to do so. This offers a way for judges to send the Commission another message.

Section 6B1.2 could also provide appellate courts with an important role in regulating charge bargaining, and making it fairer. Plea bargaining practices

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are not generally subject to review if neither side appeals. But where the judge, after accepting a charge bargain and determining the applicable guideline range, departs from that range,[5] the appellate court should carefully scrutinize the departure. One reason for this scrutiny is that, as noted by Judge Breyer in *Plaza-Garcia*,[6] this practice flies in the face of §6B1.2(a). If the plea adequately reflects the offense seriousness, there should be no basis for a departure. If accepting the bargain would bar a departure, judges should more carefully consider the plea before accepting it.

This strict review standard might help alleviate illusory bargaining, a significant problem under the guidelines that Judge Harold Greene, among others, has highlighted.[7] Although charge bargaining frequently has little or no effect on the guideline range, where it does reduce the range, or where the acceptance of responsibility reduction is part of the agreement, the defendant obviously anticipates a sentence within, or below, that range. If the judge instead departs upwards, the defendant receives little if any benefit from pleading guilty.

If appellate courts make it hard to depart in such circumstances, district judges may respond in one of two ways. If, as recommended by §6B1.1(c), the judge has reviewed the presentence report before accepting the plea, he will know whether the range called for by the charge bargain is appropriate, and accept or reject accordingly. If the judge accepts without the presentence report and later decides on a departure, the defendant should be allowed to withdraw the plea.

Sentence Recommendations

The policy statements concerning sentence recommendations are internally inconsistent. If the parties agree to a nonbinding sentence recommendation, §6B1.2(b) states that the court may accept the agreement if the recommended sentence is within the applicable guideline range, or if the sentence departs from the applicable range for "justifiable reasons."[8] This suggests that the court should accept a recommendation only if it intends to follow it. This reading, however, is at odds with §6B1.1(b), which suggests that the court advise the defendant that the recommendation is *not* binding, and that the defendant may *not* withdraw the plea if the court does not accept the proposed sentence or guideline range.

A typical case involves a recommendation that the judge sentence the defendant at the bottom of a particular guideline range. The practice most consistent with the purposes of the guidelines and fairness to defendants is the same as should apply to charge bargains. The court should either follow the recommendation, reject the plea, or if circumstances change after accepting the plea, permit the defendant to withdraw it.

Uncontrolled Plea Bargaining as a Critique of the Guidelines

The preceding sections examined how §6B's standards and appellate review might affect current plea bargaining practices. Further examination and experimentation, however, may lead to the conclusion that plea bargaining under the guidelines is resistant to all rule-oriented reforms. One reason may be that as long as judges feel the guidelines call for overly harsh sentences, they will be unlikely to reject plea agreements that enable them to impose appropriate sentences.

If further study demonstrates that plea bargaining cannot be effectively regulated, and is significantly undercutting the guidelines, efforts to reduce sentencing disparity by means of guidelines will almost certainly fail. The Commission might then want to consider restructuring the guidelines to reduce the parties' ability to engage in manipulative bargaining. One step might be to amend the guidelines to diminish the importance of facts, such as drug quantity, that are most subject to manipulation.

A different approach would conclude that plea bargaining practices reflect a need for greater flexibility than exists in the current guidelines. If plea bargaining cannot be controlled, the Commission's limitation of sentencing factors in the name of uniformity should be revisited. Perhaps the guidelines will have to be amended to allow greater consideration of offender characteristics and other factors that judges, prosecutors, and defense attorneys continue to see as important to the sentencing process.

FOOTNOTES

[1] *See, e.g.*, T. Hutchison and D. Yellen, Federal Sentencing Law and Practice, §9.11 (West 1989); Miller and Freed, *Offender Characteristics and Vulnerable Victims: The Difference Between Policy Statements and Guidelines*, 3 Fed. Sent. R. 3 (1990).

[2] *See* 28 U.S.C. 994(a).

[3] *See* Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (U.S. Sentencing Commission, June 18, 1987) at 45.

[4] *Id.* at 64-66.

[5] *See, e.g., United States v. Burns*, 893 F.2d 1343 (D.C. Cir 1990), *cert. granted* 110 S.Ct. 3270 (1990); *United States v. Palta*, 880 F.2d 636 (2d Cir. 1989); *United States V. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989).

[6] *Infra* at 196

[7] See, e.g., *United States v. Bethancurt*, 692 F. Supp. 1427, 1 Fed. Sent. R. 178 (D.D.C. 1988).

[8] Although there was initially some confusion about this last phrase, it is now clear that the policy statement does not attempt to broaden the court's departure authority under 18 U.S.C. §3553(b).