

Pleas and Plea Bargains

By Michael G. Santos
August 11, 2008

This article explains the plea process, the differences and costs between court-appointed counsel and retained attorneys, and the differences between plea agreements and proceeding through trial.

At some point, individuals whom the government charges with criminal wrongdoing appear before a judge to enter a plea. Plea proceedings are generally perfunctory, where the presiding judge begins by reading the charges against the defendant. After the judge has read the charges, or the defendant waives his right to have the charges read, the judge will ask the defendant how he pleads.

In most cases, only two choices exist for defendants: they can plead guilty, or they can plead not guilty. Although most all defendants plead not guilty at the first appearance, statistics make clear that the far greater number of defendants eventually agree to plead guilty. They do so for a variety of reasons, one of which being the high costs of proceeding through trial.

The U.S. Constitution holds that all felony defendants are entitled to a jury trial. Logic would dictate that since felony defendants have a *right* to a trial, they should not be penalized for exercising that right. I have served with thousands of prisoners who have chosen to proceed through trial, and my conversations with them persuade me that this is an area of the law where a great contrast exists between the way the law is written and the way it is actually applied. Indeed, the reality—as I have observed it—is that the system penalizes those who proceed through trial and rewards those who agree to forego their rights to a trial by pleading guilty.

I want to make clear that I am not a lawyer, and I am not providing legal advice. If one is charged with a felony, that individual needs to consult with a lawyer on whether to proceed through trial or pursue plea negotiations. Since a felony conviction can have such a significant

impact, the defendant ought to obtain a second opinion as he contemplates which strategy to follow. I wish that I had done so.

My attorney told me there was a world of difference between an indictment and a conviction. For the right amount of money, he said, I could beat this case. That was in 1987, and it proved to be some of the worst advice I could have received. I should have realized the risks to which I was exposing myself by not only proceeding through trial, but also providing false testimony on my own behalf.

It was foolish of me not to have explored my other options. Although my attorney was pushing me into trial, I had reason to question whether his motivations were at one with mine. As other defendants contemplate the potentially life-changing decisions that can accompany felony charges, I urge them to weigh all considerations and to ensure they fully understand the downside exposure to their choice.

Going To Trial

Defendants must realize that proceeding through trial consumes the limited time and resources of the court, of the prosecutor, and of the defense attorney. The court must impanel a jury and schedule a judge's time to preside over all the preliminaries and the trial itself. The prosecutor must use his office and investigative resources to prepare for the trial. Defense attorneys, too, must make time in their crowded schedules to make themselves familiar with all aspects of the case, the appropriate law, and they must prepare trial strategy. When a defendant makes the choice of proceeding through trial, it is incumbent upon that defendant to understand that many costs accompany that decision.

My research suggests that defendants ought to engage in some serious soul searching before they proceed with a decision to take their case to trial. One prisoner I met while I was confined at the prison camp in Florence, Colorado, described how his failure to consider a plea bargain resulted in his being slammed after he was convicted. His name was Doug.

Doug did not think of himself as a criminal, and he could not stomach the thought of pleading guilty when he had not intentionally engaged in any criminal activity. As a younger man, the father of two had earned an undergraduate as well as an MBA from the University of Colorado. He had built his career in the oil business, but after a bitter divorce devastated him financially, Doug no longer had the capital necessary to compete. He dissolved his original business and launched a new career as a consultant, setting up his practice in a corporate office park.

Doug became friendly with Tom, one of the businessmen in an adjacent office. As their acquaintance grew, Tom offered Doug a commission. Tom told Doug that he developed low-income housing that was subsidized by governments in the third world. In an effort to expand his business, Tom said that he was raising capital from investors who would receive a preferred rate of return.

Tom wanted Doug to perform some due diligence research on the projects. For an agreed upon fee, Tom paid Doug to travel to Sri Lanka. Once there, Doug was supposed to evaluate the value of a plot of land, meet with contractors, suppliers and other interested parties. From the data he gathered, Doug was to produce some proforma financial models that would illustrate the viability of Tom's business.

Upon receipt of the financial projections report that Doug prepared, Tom published a glossy offering brochure. The brochure touted Doug's credentials as an independent consultant with advanced degrees from a prestigious university along with other credentials; Doug was used to authenticate the prospects of Tom's venture. The report walked prospective investors through the project in Sri Lanka, illustrating how Tom's company could build the much needed low-income housing for x amount, and how the Sri Lanka government would guarantee that Tom's company would earn significantly more. The project was so compelling that Tom's company was willing to guarantee investors a 28 percent annual interest rate.

From that brochure, Tom found hundreds of investors. They ponied up more than three million dollars to fund the development. Tom was ostensibly using that investor money to build the project in Sri Lanka. The fund-raising round had exceeded expectations, Tom said. He told Doug that the company was ready to launch a second phase, and commissioned Doug to return to Sri Lanka to perform the same type of due diligence for the second project as he produced for the first.

Tom paid Doug handsomely for his services. Those were welcome funds, as Doug had lost nearly all of his assets previously during his divorce settlement. Yet on the second trip, Doug suspected that all was not right with Tom's company. Doug came to that conclusion when he noticed that despite having raised significant sums of capital from investors, Tom had not advanced the first project in Sri Lanka in any way. The land remained empty, contractors had no news, suppliers had not received any purchase orders, permits had not been issued or inquired about.

When Doug returned from the second trip, he had a heart-to-heart with Tom. As Doug expressed concern about bringing a second development project on line in Sri Lanka when the first one consisted of nothing more than a fancy brochure, Tom suggested that Doug focus on the due diligence reports Tom had paid him to produce. Doug agreed to finish the report, though he stated that he would not continue with additional projects.

In an effort to buy Doug's silence regarding suspicions he expressed, Tom offered Doug a six-figure severance settlement. When Doug said that Tom was not obligated to pay the severance, Tom insisted. Tom said that he wanted to part on amicable terms. To ensure Doug would not raise any adverse publicity or inquiry into Tom's development company, Tom gave Doug the cashier's check.

While Doug went his own way, Tom continued to expand his fundraising. Over the next three years, Tom raised more than \$30 million from investors, though he did not build a single

project. Instead, he was making interest payments to investors with the capital he was raising from others. Tom's was a classic ponzi scheme, and Doug was right to have left.

Doug had long forgotten about his relationship with Tom. After federal authorities came to investigate the scheme, Doug cooperated fully. He knew that Tom had broken the law, though Doug did not suspect he would be implicated. Doug explained that he had been a business consultant and that Tom had retained him to perform due diligence for the projects in Sri Lanka. When Doug suspected that Tom had fraudulent intentions, Doug told the FBI he severed ties.

More than four years after he had severed ties with Tom, Doug received a target letter from the Department of Justice. He was being investigated for his participation in the fraud. Doug hired an attorney, avowing that he would fight the allegations that he had been involved in any type of criminal activity. Doug refused to consider a plea agreement.

The government alleged that since Doug had accepted the six-figure settlement check for silence, Doug was a knowing and willing participant in Tom's fraud. It was not enough that he had severed ties with Tom; the FBI expected Doug to report his suspicions. At the very least, the government stated, Doug should not have taken the hush money. Doug disagreed and was adamant about clearing his name during a trial.

That turned out to have been a bad call. During the trial, the government paraded witness after witness who told of how they had relied upon the fancy brochures touting Doug's lofty credentials when they poured tens of thousands into the faulty investment. The jury did not take long convicting Doug on counts of both wire fraud and mail fraud. Whereas he had once been offered a plea bargain that would have exposed him to no more than 18 months in prison, the judge spared no mercy on Doug. At 59 years old, he began serving a sentence of eleven years.

During the 21 years I've served so far, I've listened to many prisoners describe how they wish they would have taken a plea deal. Even Doug said that upon further reflection, he could understand why the jury would have convicted him.

“Before the trial I couldn’t see it,” Doug told me. “But as I listened to the government’s case, I realized that the investors were angry. They wanted justice, or vengeance. Had I been in their shoes, I likely would have felt the same way. I really underestimated the strength of the government’s case. Still, I never understood that going to trial would expose me to so much more time.”

I could relate to Doug’s experiences. Following my arrest, in 1987, I made about every bad decision a person could make.

My Own Follies

When I initially retained a South Florida attorney to represent me on charges related to the distribution of cocaine in Seattle, he quoted me a \$200,000 fee. That was in 1987. Before my trial had even begun, the attorney had usurped over \$500,000 of cash and property as his "fee" to represent me through trial. I did not anticipate that my defense would cost that much, but I was willing to forego everything I had accumulated as a drug offender if doing so would restore the life I knew prior to the time I broke the law. I deluded myself into believing that by spending so much, I could somehow purchase my freedom.

There was no one responsible but me for making the decisions I made, and I regret that I did not give more consideration to my options. I knew that I was guilty of every charge against me. Instead of pushing the government through the time and expense of a trial, I should have evaluated all the costs associated with my decision. A plea bargain would have saved me decades of imprisonment.

Bringing an attorney from Miami to handle a case in Seattle was like flashing a neon sign advertising my connection with drugs. In hindsight, I recognize that I should have hired an attorney from Seattle, preferably someone with close ties to the prosecutor so I could get a real feel for the trouble I had created for myself. A competent, local attorney might have been able to structure a deal where I could plead guilty, forfeit my assets to the government, and serve eight

to ten years in prison; since there was no violence in my case, and since I had no history of confinement, it was a reasonable possibility. Such a deal would have given me an opportunity to see daylight and limit my downside exposure. The aggressive strategy I was persuaded to choose, however, exposed me to life imprisonment, and at 23, that was not a very prudent decision. The arrogance of my actions angered the prosecutor and the judge, as my 45-year sentence makes clear.

Whether a defendant proceeds with court-appointed counsel, or retained counsel, he ought to make every effort to understand exactly what he is facing. There may be times when it is prudent to prepare for a legal war. All I am suggesting is that the individual understand that there are costs and casualties to any war, and it is the defendant who must be prepared to bear those costs. It won't be the prosecutor who pays for the war, and it won't be the defense attorney. If one has an opportunity to cut one's losses and resume life as it is supposed to be lived, I urge the defendant to give heavy consideration to that option.

Defendants also ought to give some thought to the composition of the jury. The people who sit on a jury are generally law-abiding people. They have never experienced an indictment with the ominous words that appeared on the top of mine: *United States of America vs. Michael G. Santos*. When one reads such a document, is it really realistic for the juror to maintain a presumption of innocence?

As Americans, we are a patriotic people who support our government; when representatives charge an individual with wrongdoing, society tends to believe those charges. After all, it's unlikely that the government has ever pointed the accusatory finger at one of those individuals sitting on the jury. Again, my experience suggests that guilt or innocence notwithstanding, defendants fight an uphill battle as they try to exonerate their name from criminal wrongdoing.

Plea Bargaining

Prosecutors want convictions. Although the resources of most prosecutors are far more extensive than the resources of most defense attorneys, they, too, are burdened with heavy caseloads. Because too many simultaneous trials would submerge them in work, prosecutors try to clean as many cases off their plate as possible through the use of plea bargains. In a plea bargain, the prosecution may be willing to make some concessions in order to induce the defendant to enter a guilty plea, thereby avoiding the time and expense necessary for a trial.

The federal sentencing guidelines are a kind of matrix that take many factors into account. Judges rely upon the guidelines to determine the appropriate sentencing range. The matrix is made up of a table, with points extending along a vertical and horizontal axis. The horizontal axis is immutable, or fixed, as it measures the defendant's criminal history. The vertical axis however, measures the severity of the crime, with possible adjustments for mitigating or aggravating factors.

The federal guidelines encourage defendants to plea bargain. Indeed, pleading guilty and accepting responsibly for one's actions represent one of the few ways an individual can lessen the severity of the criminal sanction he eventually will receive. The defendant may receive anywhere between one and three points off his criminal-severity score by pleading guilty, depending on how quickly he comes to his decision.

The guidelines are designed to encourage guilty pleas as quickly in the criminal justice proceeding as possible in order to spare the prosecution and the court the burden of trial preparations. The point reduction can lessen one's exposure to prison by several years, and is one of the ways that "the system" induces defendants to plead guilty. Those defendants who are convicted after a trial miss the benefit of this possible point reduction, which is one of the reasons why, in practical terms, they are penalized for exercising their right to a jury trial.

Mandatory-Minimum Sentences

Many drug offenses carry mandatory-minimum terms. Other crimes, like being a felon in the possession of a firearm, and other factors, like one's criminal history, may also expose a defendant to a mandatory-minimum sentence. In those situations, prosecutors must agree to reduce the charge if they want to bring a defendant below the threshold of a mandatory-minimum sentence. Doing so requires the judge's approval, and is not automatic. Defendants who face mandatory-minimum 10-year sentences may not be able to move below that threshold without obtaining a substantial-assistance motion from the prosecutor, or demonstrating some mitigating circumstances that the judge agrees are so extraordinary that a lower sentence is warranted.

The threat of a long mandatory-minimum sentence does not mean one should not consider plea-bargaining. On the contrary, the longer the sentence, the *more* reason an individual ought to consider the merits of a plea. Indeed, many criminal justice systems use a guideline table which plays an integral role in the length of one's sentence. By looking at that table, the reader can see that as one moves down the vertical axis of the matrix, which measures the severity of the offense, the sentencing range tends to increase. In the federal system, a level 32, for example, with a criminal history score of one, provides a sentence ranging between 121 and 151 months—a 30-month range; at a level 35, the defendant faces a sentencing range between 168 and 210 months—a 42-month range.

An individual who is convicted at trial for having committed an offense that merits a level 35 faces a possible sentence of as many as 210 months. If that individual pleads guilty at an early stage of the proceeding, and the judge agrees that the defendant has:

- 1) clearly demonstrated responsibility for his offense and either
 - (a) provided complete information to the government concerning his own involvement in offense; or

- (b) timely notified authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently

then the defendant is entitled to a downward departure of three points, reducing his maximum sentence by 59 months. Moreover, if the sentencing judge is persuaded that the defendant has accepted responsibility, the judge is much more likely to sentence the defendant at the low end of the guidelines.

In the example above, the level-35 defendant who accepted responsibility *may* receive a 121-month sentence, whereas had he been convicted at trial, he *could* have received a sentence of 210 months; it's a difference of nearly 72 months in prison. For more detailed information on the federal sentencing guidelines, I recommend readers review the latest edition of *Federal Sentencing Law and Practice*, 2nd ed., 1994, by Thomas W. Hutchison, et al, and published by West Group.

Cooperating with the Government

Many defendants seek to reduce their exposure to prison time by agreeing to cooperate with the government in the prosecution of others. Although this is not a practice that will make serving time in prison easier, it could reduce one's exposure to confinement. The case of Sammy "The Bull" Gravano is one such example. The government rewarded Gravano for his cooperation by sentencing him to a five-year prison term. The reduction seems absurd to me, as I have one close friend in prison who is serving a nine-plus year sentence for bankruptcy fraud.

Cooperating witnesses who serve time in minimum-security camps likely will suffer no retribution from other prisoners. Indeed, most of those prisoners serving time in camps want to avoid problems and focus on their release from prison. Low-security prison populations, on the other hand, are composed of prisoners whose sentence length varies from months to multiple decades. Some of these individuals serve their time on a "snitch hunt," and seek to make life

miserable for those whom they even suspect of having cooperated with the government in the prosecution of others.

In medium-security and high-security prisons, on the other hand, the search for those who have cooperated with the government is at its most intense. A larger segment of prisoners in those facilities is much more recalcitrant, and one's exposure to violent altercations is significantly higher than at a camp or a low-security prison. Those who choose to cooperate with the government in exchange for a lighter sentence should anticipate a level of ostracism, and possible hostilities if their fellow prisoners become aware of their cooperation in the prosecution of others.

Not everyone needs to testify against others to receive credit for cooperation. The plea bargain can bring credit to an individual who simply accepts responsibility. I have spoken with many, many prisoners who explained how their full cooperation resulted in significantly lower sanctions even though they never had to testify against another individual.

Marcus was one such individual. He was arrested in a sting operation involving the distribution of methamphetamines. Marcus had not had a criminal history, and he had distinguished himself as an enterprising young man. Although he was reared in a low-income environment rife with both gang and drug problems, Marcus had avoided that criminal lifestyle. After earning his GED, Marcus enrolled in paralegal course, and with that certification, he was able to obtain respectable employment with a local law firm.

Despite the responsible path Marcus was on, he agreed to help a friend who had asked for an introduction to a drug dealer. Marcus said that he had known the drug dealer because they had grown up in the same East Los Angeles neighborhood. Although he was reluctant to get involved, against his better judgment Marcus made the introduction for his friend. That turned out to be a bad decision.

Following the transaction, a drug deal took place. One of the people involved was a government informant, and it did not take long for federal agents to arrest Marcus. On account of the quantity of drugs involved, Marcus was charged with an offense that would have yielded a sentencing range of between 235 and 293 months.

While languishing in the federal holding center, Marcus began interviewing defense attorneys. He learned of the serious problems he was facing. Upon selecting an attorney, Marcus admitted that he had no stomach to withstand a criminal trial. He said that he had recognized that he made a very bad decision, and that he did not want to perpetuate it by contesting his innocence.

With his offer to cooperate and put the matter behind him, the prosecuting attorney acknowledged that the purity of the drugs was very low. Accordingly, the prosecutor agreed to drop the base sentencing level by four points, to level 34 from the original level of 38. Then, on account of Marcus' complete acceptance of responsibility, the prosecutor agreed to decrease the sentencing level by an additional three points. The other individuals in the case were also pleading guilty, so Marcus had no problem in describing everything he knew about the transaction; he was not a central player, but merely providing an introduction against his better judgment. That qualified Marcus for consideration under the guideline's "Safety Valve" clause, which brought another two-point reduction. Finally, the judge agreed to drop Marcus' sentencing guideline range by an additional two points because of his minimal role and expressions of remorse.

In the end, Marcus was sentenced in the guideline range of 27, and received a term of just over six years. He never had to cooperate against anyone else, yet he received credit from the court that amounted to a savings of 14 years or more of confinement.

Final Word

One of the many bad decisions I made following my arrest was not making enough of an effort to understand the world into which I was moving. I did not understand my exposure to such a potentially long sentence, and despite the possibility of receiving a lengthy sentence, I never really expected that my government would sentence a nonviolent offender with no history of confinement to a term that exceeded ten years. I blame no one but myself for not doing more to understand the vengeance of our nation's criminal justice system. Although national politicians of the highest level may describe a "kinder and gentler" America, and Rush Limbaugh-like talk-show hosts describe "the forgiving and compassionate" nature of our national psyche, no criminal defendant ought to delude himself into believing that those sentiments apply to our nation's criminal justice system.

Defendants ought to take every factor into consideration when making the decision of whether to plead guilty or engage in a plea bargain. Think not only of one's exposure to time, but also about how the sentence will influence one's family relations, one's career, and one's psychological well being. If one comes to prison, every aspect of life as he has known it will change, and the best time to prepare for that is before one enters prison gates.

Those who pursue plea bargains with the government should keep in mind that, as in any negotiating session, everything is on the table. Never forget that prosecutors want to resolve the matter with a conviction at the soonest possible time so they can free their schedules to pursue other matters. In most cases, that means one's hand is strongest at the earliest phase of the proceeding. Do not limit requests to time, because defendants also may request the prosecutor's assistance in being designated to a particular facility that is close to the defendant's source of support. I know one defendant who was successful in negotiating his private transportation to and from court by the government in exchange for his guilty plea; he did not want to subject himself to the degrading prisoner transport system. Defendants must use their attorney to act as a

buffer in the negotiating process, seeking to slice off as much of the sanction as possible in exchange for that all-important guilty plea.

It may be worthwhile for defendants to hire an attorney who specializes in post-conviction guidance. These specialists focus on issues pertaining to confinement and what happens after conviction; they may contribute to such issues as:

- 1) Accuracy of Presentence Investigation Report, and making sure the prison system has a correct copy;
- 2) Lobbying prison designators for a specific institution;
- 3) Providing advice on the best possible prison;
- 4) Advocating for individuals in various disputes with prison personnel, some of which may include sentence reduction for completion of the drug treatment program; medical issues; custody classification; and halfway house placement.